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INQUEST



GONIWE & OTHERS



HEADS OF ARGUMENT
PRESENTED BY THE SADF

COUNSEL'S NOTES

1. In these Heads of Argument we have disregarded the formal title and rank of witnesses after their initial mention.
2. We have referred to the various bodies by their Afrikaans acronyms rather than their English counterparts. This course has been dictated by considerations of convenience: all the witnesses who referred to the bodies concerned did so in Afrikaans.
3. These heads are concerned almost exclusively with matters of fact. A further set of heads will be filed at the hearing of this matter, by which time the legal issues will have been identified.
4. The question of the complicity of the South African Police in the Goniwe murders is not dealt with in these heads. We have made the assumption that other parties will ensure a comprehensive debate of the topic.

IN THE SUPREME COURT OF SOUTH AFRICA

(SOUTH EAST CAPE LOCAL DIVISION)

INQUEST NO. CC7/93

Deceased:

MATTHEW GONIWE

SPARROW MKONTO

FORT CALATA

SICELO MHLAULI

HEADS OF ARGUMENT ON BEHALF OF
THE SOUTH AFRICAN DEFENCE FORCE

INTRODUCTION

THE SIGNAL:

This document was published in the New Nation of 8/14 May 1992. Its interpretation as a death warrant in the accompanying article unleashed a flood of polemical speculation as to the meaning and purpose of the signal.

This enquiry is a direct result of those events.

The determination of the signal's meaning and purpose is central to the present enquiry insofar as it relates to the South African Defence Force ("SADF").

CHAPTER I

" ... permanent uit die samelewing verwyder ..."

1. The interpretation of these words, as they appear in the signal and in their wider context, is the principal topic dealt with in these heads: it is the most important issue in this inquest insofar as the present enquiry is concerned with the conduct of members of the SADF.
2. The words, singly or as a phrase, bear an innocuous meaning. That fact, however, is of little or no assistance. The real question is whether the words, giving full weight to the factors which bear upon their interpretation, constitute a "death signal" or whether the words retain their primary innocuous meaning.
3. Any reasoning employed in the search for an answer to the question characterised in the previous paragraph, must take its rise from the

association in time between the signal (7 June 1985) and the murders of Matthew Goniwe and the others (27 June 1985).

4. The search for that answer would involve:

4.1 an examination and determination of those principles which would provide the legal matrix against which the facts, circumstances and the probabilities would be evaluated;

4.2 a consideration of the evidence and exhibits, employing the principles so garnered.

5. As always, the point of departure is the Presumption of Innocence.

5.1 The practical effect of that presumption on this inquest, is to cast the onus squarely on whomsoever suggests that the signal was a "death signal".

- 5.2 Words or phrases which are capable of more than one meaning, should be interpreted *in favorem innocentiae*, until a contrary meaning has been established.
- 5.3 The onus is the one appropriate to criminal cases in general, with full consideration of the *prima facie* nature of the search in inquest proceedings.

FACTS, CIRCUMSTANCES AND PROBABILITIES:

6. This triad of considerations will be used to evaluate each of the following topics:

- 6.1 The *ipse dixit* of Colonel Du Plessis.
- 6.2 The *ipse dixit* of General Van Der Westhuizen.

THE FACTS:

7. The Objective Facts:

The signal and its immediate historical matrix are of cardinal importance to its interpretation. A number of facts provide the most reliable objective "tools" for the task in hand.

Objective Fact No. 1:

The signal, in its terms, was drafted by Colonel Lourens Du Plessis ("Du Plessis") and despatched on the same day.

Objective Fact No. 2:

The signal of 23 May 1985 was despatched on that day.

Objective Fact No. 3:

The GVS-Aksiekomitee ("GVS") resolved to appoint a working committee. That committee functioned under the chairmanship of Brigadier Geldenhuys. The object of that working committee was expressed in the words " ... oor GONIWE se lot sal beslis ...".

That resolution was taken on 6 June 1985.

Objective Fact No. 4:

The Geldenhuys committee commenced its sittings on the 7 June 1985. Its report is dated 12 June 1985.

Objective Fact No. 5:

The Geldenhuys committee reported in the terms appearing in the document at Bundle 2, p. 70.

8. Uncontroverted Facts Established by the Evidence:

A number of facts, established by the testimony of witnesses, are uncontroverted.

Uncontroverted Fact No. 1:

Major General Van Rensburg ("Van Rensburg") telephoned then Brigadier (now Lieutenant-General) Van Der Westhuizen ("Van Der Westhuizen") on 7 June 1985 on the issues before the Geldenhuys committee.

"Nou het u vir Gen. Van der Westhuizen gebel voor die subkomitee vergadering of tydens die subkomitee vergadering?
--- Ek het hom beslis gebel voor die saamtrek van daai vergadering wat om 10-uur die oggend begin het."

Van Rensburg 27 : 23-26

Uncontroverted Fact No. 2:

During the course of the aforesaid telephone conversation, Van Der Westhuizen undertook to confirm his point of view in writing.

"Wat het Van der Westhuizen vir u gesê oor die telefoon? Het hy hulle standpunt gegee? --- Hy het baie pertinent die standpunt genoem en hy het ook vir my gesê dat daar, dit word skriftelik bevestig.

Was dit nodig dat dit skriftelik bevestig moes word? --- U Edele ek het dit nie as nodig beskou nie maar ek kan nie vir hom sê hy moet dit nie doen nie. Ek het in elk geval op die mondelinge inset wat hy gelewer het het ek die Geldenhuyskomitee voorgelig oor presies wat hulle uiterste standput was omtrent die aanhouding van Mnr. Goniwe."

Van Rensburg 31 : 22-31

Uncontroverted Fact No. 3:

Van Der Westhuizen instructed Du Plessis to draft and despatch a signal.

Uncontroverted Fact No. 4:

To the knowledge of Du Plessis, the signal and its copies would be filed in various official files and entered in various official registers.

The signal or its copies were filed with the signals office in the Port

Elizabeth office of Eastern Province Command, in a file under the control of Du Plessis in the offices of Eastern Province Command, in the files kept at the office of the Secretariat of the State Security Council (SSVR), and the Communication Centre at Army Headquarters.

Uncontroverted Fact No. 5:

When the murder of Goniwe and the others became public knowledge, Du Plessis did not discuss or broach the matter with Van Der Westhuizen, despite the former's curiosity as to the persons responsible.

Uncontroverted Fact No. 6:

Van Der Westhuizen did not discuss the topic with Du Plessis.

Uncontroverted Fact No. 7:

Du Plessis did not mention the matter to Van Der Westhuizen during the ensuing years.

A REVIEW OF THE OBJECTIVE AND UNCONTROVERTED FACTS:

9. The difference in the two categories of facts lies in their origin.

9.1 The existence of the first category of facts is established by evidential material which is not dependent on the testimony of any witness.

9.2 The second category of facts has its origin in the testimony of witnesses. The guarantee of trustworthiness of the facts listed in the second category is found in the quality of their being uncontradicted and, for the most part, either confirmed by other facts or adequately supported by probabilities.

In consequence, the distinction lies in their origin and not in their probative quality: both sets of facts are reliable and worthy of acceptance.

THE CIRCUMSTANTIAL EVIDENCE AND PROBABILITIES PROVIDED BY THE OBJECTIVE FACTS AND THE UNCONTROVERTED FACTS:

10. The hard core of fact distilled from the objective and uncontroverted facts listed above provides the substratum from which probabilities and inferences arise. Those probabilities and inferences provide the key to the meaning of the signal.

11. The events which provide the hard core facts occurred on 6 and 7 June 1985 or are linked to the occurrences of those dates.

11.1 On 6 June 1985 the GVS-Aksiekomitee resolved, after discussion, that a committee under the direction of the SSVR would decide on the fate ("lot") of Goniwe. That committee was to make a submission on 12 June 1985.

(Bundle 2, p. 54, par. 5)

In the result, the submission was compiled and submitted on 12 June 1985.

(Bundle 2, p. 70)

11.2 Geldenhuys was appointed as chairman of the committee on 6 June 1985.

11.3 That committee ("the Geldenhuys committee") commenced its sittings on 7 June 1985.

- 11.4 On the same day, Van Rensburg telephoned Van Der Westhuizen. The latter undertook to furnish a written "inset" for use by the Geldenhuys committee.
- 11.5 Van Der Westhuizen instructed Du Plessis to draft and dispatch the signal.
- 11.6 The signal was drawn and dispatched. Copies were filed in various official files and entered in a number of registers.
- 11.7 In paragraph 3 of the committee's submission the following sentence appears: "Oostelike Provinsie GBS het ook 'n kort skriftelike inset gelewer".
- 11.8 Paragraph 26 of the same document reads:

"MOONTLIKE OPSIES

26. Om Goniwe te neutraliseer kan basies twee opsies onderskei word nl, optrede in terme van veiligheidswetgewing, of om hom terug te bring in die stelsel deur hom weer in 'n ondervyspos aan te stel".

11.9 Paragraph 27 of the same document reads:

"OPTREDE IN TERME VAN VEILIGHEIDSWETGEWING

27. Daar kan teen Goniwe opgetree word deur hom onder Artikel 28 van die Wet op Binnelandse Veiligheid sonder verhoor aan te hou. Hierdie soort aanhouding lok groot kritiek uit en stel die probleem net uit en word onder die gegewe omstandighede nie as prakties beskou nie".

11.10 Paragraph 35(a) reads:

- "a. Hy word uit die gemeenskap waar hy 'n leidende rol speel verwyder - dit sal Cradora en ander egter nie tot stilstand bring nie".

11.11 Paragraph 40 reads:

"OPTREDE TEEN GONIWE MEELOPERS

40. Dit kan oorweeg word om meelopers van Goniwe, soos sy neef Mbolelo Goniwe en Fort Calata na die Direkteur vir Staatsveiligheid te verwys vir moontlike aanhouding of inperking. Dit moet egter nie onmiddellik saamval met Goniwe se aanstelling nie aangesien dit weereens 'n moontlike uitkomst vir Goniwe kan bied. 'n Geskikte tyd en omstandigheid moet hiervoor afgewag word".

11.12 Goniwe and three others were murdered on 27 June 1985. From the time the murders became public

knowledge to the present day, Du Plessis neither mentioned nor discussed the murders with Van Der Westhuizen. Van Der Westhuizen, similarly, did not mention the matter to Du Plessis.

12. 12.1 The immediate task in hand is to determine what inferences are to be drawn from the hard core facts, employing the established principles for sound judicial reasoning by inference.

12.2 Thereafter, the impact of the testimony of various witnesses on the result of the inferences so drawn, falls to be examined.

13. No better yardstick for reasoning by inference can be employed than the dictum of Watermeyer, J.A. in R v. Blom, 1939 AD 188 at pp. 202 and 203:

"In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

- (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn".

Over the past 50 years that passage has distinguished itself and its learned author by becoming the most quoted, referred to and followed citation in the annals of our case law.

The inference sought to be drawn in relation to the signal by those who dispute that it was an innocuous administrative communication, is that the signal in the use of the words "... permanent uit die gemeenskap verwyder ..." was a "death" signal.

14. The hard core facts are in the language of Blom's case, "consistent" with an innocuous meaning. Moreover, the hard core facts, on proper analysis, gainsay the notion of a death signal.

15. Whatever the outcome of reasoning based on consistency may be, the suggestion of a death signal fails when regard is had to the

second tenet of Watermeyer, J.A.'s reasoning: "The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn". Again, an examination of all the facts leaves ample room for drawing a reasonable inference that the signal was an innocuous one.

16. If one examines the hard core facts and particularly the fact of the GVS decision of 6 June 1985 and the content of the Geldenhuys report, the undeniable evidence is that two alternatives for Goniwe were being considered: reappointment or Section 28 incarceration.
17. No document or witness who was concerned at SSVR level even remotely suggests that the killing of Goniwe was an option. The immutable contents of the resolution of 6 June and the report of 12 June, more cogent than the "say so" of any witness, speak of a version which is "consistent" only with a version in which Goniwe's death was not considered.

18. This result is achieved even if one accepts that the signal was not before the Geldenhuys committee. A close analysis of the facts, however, leads one to the conclusion that the 7 June 1985 signal was before that committee:

18.1 The signal of 7 June 1985 had its very origin and existence in the decision to appoint a committee to decide on the fate of Goniwe taken the previous day.

18.2 The signal was called for and dispatched on 7 June 1985 so that it could be placed before the Geldenhuys committee.

18.3 There is no suggestion that it was not delivered to the offices of Van Rensburg. In the ordinary course of events, therefore, the assumption is strong that it was timeously delivered.

18.4 Van Rensburg in his first affidavit states: " ... ek kort na gemelde telefoniese gesprek 'n skriftelike sein ontvang het vanaf die Oostelike Provinsie GBS ... ".

- 18.5 The report of the Geldenhuys committee contains a passage that is consistent with the signal of 7 June 1985 having been placed before it: "Oostelike Provinsie GBS het ook 'n kort skriftelike inset gelewer".

Bundle 2, p. 70, par. 3.

- 18.6 The earlier suggestion that the last quotation may refer to the earlier signal of 23 May 1985 is displaced by the evidence of Geldenhuys himself who says that he has never seen that signal.

"MNR HENNING: Wel ek wil u net verwys na 'n sein gedateer 23 Mei 1985, U Edele dit is die dokument by bladsy 47 in die tweede bundel, kan u net, die tweede bundel. Het u die betrokke seinberig al ooit vantevore gesien? --- Dit is die seinberig van 23 Mei?

Dit is inderdaad korrek. --- Dit is gister aan my getoon.

Ja, ek meen nou rondom die datum wat nou ter sprake is, Junie-maand 1985? --- Ek kan nie in herinnering roep dat ek hierdie dokument gesien het nie."

Geldenhuys 510 : 14-23

- 18.7 Furthermore, the content of paragraph 40 of the report is consistent only with knowledge of the content of the signal of 7 June 1985.

"OPTREDE TEEN GONIWE EN MEELOPERS:

40. Dit kan oorveeg word om meelopers van Goniwe, soos sy neef Mholelo Goniwe en Fort Calata na die Direkteur vir Staatsveiligheid te verwys vir moontlike aanhouding of inperking. Dit moet egter nie onmiddellik saamval met Goniwe se aanstelling nie aangesien dit weereens 'n moontlike uitkomst vir Goniwe kan bied. 'n Geskikte tyd en omstandigheid moet hiervoor afgewag word".

The reference to Mholelo Goniwe as Goniwe's "neef" and the names of the same persons who appear on the signal of 7 June 1985, put the matter almost beyond question. The signal refers to those three people, it does so by using their full names and by referring to Mholelo as the "broer" or "neef" of Goniwe.

By contrast, the signal of 23 May 1985 does not refer to Mholelo Goniwe and refers to Goniwe and Calata by their surnames only.

- 18.8 The language of paragraph 35(a) of the document bears a striking resemblance to the language of the signal of 7 June 1985:

"a. Hy word uit die gemeenskap waar hy 'n leidende rol speel verwyder - dit sal Cradora en andere egter nie tot stilstand bring nie".

18.9 Van Rensburg in his evidence (p. 30) deposes to a very different version to that which appears in paragraph 5 of his first affidavit. We give a detailed *critique* of Van Rensburg's evidence in Chapter IV below. At this stage it is sufficient to say that his first version is to be preferred:

18.9.1 Despite two opportunities in his two subsequent affidavits, Van Rensburg does not take the opportunity of "correcting" paragraph 5 of his first affidavit. Moreover, after the lapse of some 10 months from the time of his first affidavit, he takes no opportunity to correct paragraph 5 of his first affidavit. He knew that avenue was available to him since he had twice had the occasion to abridge his first affidavit by means of subsequent affidavits;

18.9.2 His second version is in total conflict with the probabilities. The signal was dispatched for purposes of placing it before the Geldenhuys committee. It is unthinkable that the signal, having been drawn and dispatched with the required expedition, would arrive at the offices of the SSVR and then not reach the very body for whom it was intended.

18.10 Van Der Westhuizen was in Pretoria from 9 or 10 June 1985 for a number of days in order to present the Strelitzia Plan. Van Rensburg was present during the presentation of that plan.

"Generaal, u het vir ons gesê dat kort na die 7de Junie u is Pretoria toe. --- Ja U Edele.
En ek kan nie onthou presies wat u getuienis was - het u Generaal van Rensburg daar gesien of nie? --- Ja U Edele. Op die 12de toe ons Plan Strelitzia aangebied het hy die Staatsveiligheidsraad was hy teenwoordig gewees. Die 12de Junie."

Van Der Westhuizen 2829 : 4-10

If Van Rensburg and Van Der Westhuizen had been conspiring on 7 June 1985 to kill Goniwe, the

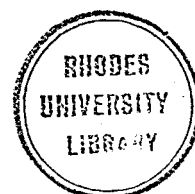
probabilities are that Van Der Westhuizen would have taken the opportunity of his sojourn in Pretoria to persuade the Geldenhuys committee that Goniwe should be murdered. Alternatively, the matter would have been of sufficient importance to warrant a special trip to Pretoria rather than commit a matter of such sensitivity to paper which a large number of people had access to and could read.

- 18.11 The names of the remaining two persons, other than Goniwe, which were to be included in the signal was left to Du Plessis for selection. If the signal was a death warrant, it could hardly be left to the discretion of an underling to make the selection as to whom to kill and whom not to kill.

"U Edele die opdrag aan my was drievoudig. Ek moes die gesprek bevestig in die eerste plek en in die tweede plek moes ek die name noem van die persone wat betrokke is ...".

Du Plessis 2417 : 5-8

- 18.12 Du Plessis had to indicate the implications of the proposal in the signal:



"... Tweedens die name van die persone wat betrokke is en die implikasies. En ek het dit onmiddellik gaan doen."

Du Plessis 2503 : 14-16

18.13 If the request was one for Goniwe's murder, the most important implication would have been the fact that the SAP would be investigating the murders. One would have expected that fact to be spelt out in the clearest terms and additional suggestions to have been made as to how that eventuality was to be handled. Nothing of the sort appears in the signal. The implications that Du Plessis does spell out are the ones that one would expect to have followed upon the arrest and a lengthy term of detention.

18.14 What none of those seeking to put the connotation of a death warrant on that signal have sought to explain is the arrant stupidity of placing such a request in writing.

"Maar sou Van der Westhuizen of Du Plessis hulle skuldig gemaak het aan so iets? --- Ek sou graag wou reken dat hulle verantwoordelik was en dit nie sou wou doen nie, maar ek wil ook vir u sê in dieselfde asem dat dit volgens my bykans 35 jaar van Staande Mag diens seer sekerlik die eerste keer

sou wees wat ek hoor dat iemand so iets soos 'n versoek om iemand dood te maak op skrif sou stel. Ek dink dit sou die domste persoon wees onder die son om sy hand op papier te sit en te sê "hiermee versoek ek dat X, Y en Z moet doodgemaak word".

Van Rensburg 197 : 19-28

"Wat beteken dit vir u? --- Ek sou nie in my verste gedagte kon dink dat iemand 'n sein sou skryf, sy hand op skrif sou sit en sê maak asseblief vir my die volgende persone dood nie. Nie in my verste gedagte sou ek so iets kon dink nie. En as dit nie reeds onmoontlik is nie om dan nog so 'n sein aan die SSVR te rig sou vir my totaal, in my verste gedagte sou ek nie aan so iets kon dink nie."

Geldenhuis : 523 : 23-29

"Kom ons gaan nou na ander dinge. Kom ons gaan nou na die veronderstelling dat Van Rensburg het u gebel en dat u mening was dat hy vermoor moes word. Sou u daardie inset in 'n sein van die aard vervoord? --- Nee, ek sou nie eers op die telefoon daarvoor gepraat het nie."

Van Der Westhuizen 3008 : 6-10

- 18.15 The words "verwyder", "samelewing" and "permanent" in the sense in which they are used in the signal, form part of the usage of the "Veiligheidsgemeenskap" at the time. No better evidence of this is to be found anywhere

than that which came spontaneously from Snyman under cross-examination by Mr. Bizos:

"Nou as dit nou beweer word dat die woorde in paragraaf 3: "Dit word voorgestel dat bogenoemde persone permanent uit die samelewing as saak van dringendheid verwyder word." As dit 'n voorstel is dat die persone moet aangehou word, wat sou u sê? --- Ek weet nie wat hierdie mense bedoel het by die sein nie U Edele.

Hoe verstaan u dit? --- Dat hy uit die samelewing verwyder moet word.

Permanent? --- So dit kan óf beteken "aanhouding" of "inperking".

Permanent? --- "Aanhouding" of "inperking" - dis al wat dit kan beteken.

Permanent? --- Nee ek wil - ek weet nie van hierdie ding nie, ek het hom nie opgestel nie, so ek wil nie verslag lewer oor die "permanent" nie.

O en u wil nie 'n mening uit... (tussenbeide) --- Maar in ons taal kan dit net beteken óf aanhouding óf inperking." (our underlining).

Snyman 1029 : 24 - 1030 : 10

The questions could not have been expected nor the answers canvassed in prior consultation.

18.16 Moreover, the number of instances in documents of the "veiligheidsgemeenskap" in which the word "verwyder" was used, indicates that the word was very much part of "ons taal". Similarly, the word "gemeenskap" and

"samelewing" were seen then as being synonymous, as indeed they are semantically.

"Hier praat hulle "uit die gemeenskap verwyder".
U woord keuse was "uit die samelewing verwyder".
Is dit reg Kolonel? --- Dit is so U Edele.
Is daar 'n noemenswaardige verskil tussen
"gemeenskap" en "samelewing"? --- Nee Edele, nie
sover my betref nie.
Natuurlik nie. Hierdie ding van "uit die
gemeenskap verwyder" en "uit die samelewing
verwyder" was in hierdie tyd geëkte GBS taal, reg?
--- Ek sal saamstem met dit U Edele."

Du Plessis 2326 : 10-18

"Verwyder" - die woord wat u gebruik het,
"gemeenskap", u het dieselfde woord gebruik in sy
sinoniem "samelewing". Kon daardie woorde van
u sien afgekom het? --- Watter paragraaf is dit U
Edele?

Par.A ho aan blads.75. Hy word uit die
gemeenskap(tussenkoms) --- verwyder, ja,
dit is so U Edele.

U stem daarmee saam? --- Ja U Edele."

Du Plessis 2327 : 25 - 2328 : 3

"Miskien moet ek voor dit begin. Onthou u dat u
vir ons gesê het Vrydag dat gemeenskap en
samelewing beteken dieselfde? Onthou u dit? --- Ja
U Edele."

Du Plessis 2398 : 21-23

18.17 No instructions were given for the signal to be destroyed as one would have expected in the event of that signal containing a request to kill Goniwe and the others.

18.18 If the signal was a suggestion to kill Goniwe and the others, it was sent to the wrong address.

"Nooit in der ewigheid sou dit deur my kantoor gegaan het nie om twee besondere redes. Die Sekretariaat van die Staatsveiligheidsraad was verhewe bo enige koverte (?) moord ondermaanse vuil "cloak and dagger" spele van hierdie aard, en punt nommer 2 die uitvoering van enige sodanige taak sou gelê het op die lynfunksie van Brigadier van der Westhuizen, met ander woorde dit sou dan in sy lynkanaal na die weermag toe moes gaan vir 'n normale koverte (?) operasie, en beslis nie na die Sekretariaat van die Staatsveiligheidsraad nie. Ons het daar hoegenaamd geen uitvoerende gesag gehad nie. Uitvoerende optredes was deur die lynfunksie instansies getref en daarom sou so 'n versoek vir koverte (?) operasies direk na die hoof van die weermag of direk na die hoof van die leër toe in daardie geval gegaan het langs weermagskanale as 'n weermagsversoek en nie in die Sekretariaat verband nie."

Van Rensburg 192 : 5-21

"Hy sê duidelik die SSVR is verhewe bo koverte-operasie en u stem daarmee saam? --- Ek stem daarmee saam. Dus weet hy dat wat ookal - watter dokumente ookal daar mag opdaag wat betrekking het op koverte-operasies nie daar hoort nie. Kan 'n mens dit aanvaar? --- Dis korrek U Edele.

U sou dit weet as kommunikasiedeskundige dat, hoor hier dis die standpunt van die SSVR, dis die standpunt van die Departement of die Tak Strategie - koverte-operasie en hierdie onderduimse goed wat Generaal Van Rensburg beskryf het hoort nie hier tuis nie dit hoort by die Suid-Afrikaanse Weermag of wat ookal - u sou dit geweet het, kan ons dit aanvaar? --- U Edele ek sou geweet het dit hoort nie in die stelsel tuis nie. Nie in die Sekretariaat van die Staatsveiligheidsraad tuis nie maar dit hoort

by die Weermag tuis. --- Ek weet nie waar dit tuis hoort nie maar dit hoor definitief nie in die veiligheidsbestuurstelsel tuis nie en as dit daar geopper is dan was dit verkeerd gewees."

Stemmet 302 : 3-22

"U Edele enige uitvoering het in die lynfunksie van 'n departement gelê, of dit nou koevert is of nie koevert nie, maar sekerlik nie by die Sekretariaat van die Staatsveiligheidsraad nie."

Stemmet 306 : 22-25

"Nee, ek stem nie daarmee saam nie. Die OPGBS was in geen posisie om na hoër hierargieë opdragte uit te reik nie, wat nog te sê doodsoopdragte. Die omgekeerde is ook waar. Die SSVR as 'n hoër liggaam in hierdie geval was ook nie in 'n posisie om doodsoopdragte of enige opdragte behalwe oor stelselaangeleenthede aan die GBS te rig nie. Die veiligheidsbestuurstelsel het geen gesag gehad nie, gesag by jou departemente."

Stemmet 342 : 23-30

"Wat beteken dit vir u? --- Ek sou nie in my verste gedagte kon dink dat iemand 'n sein sou skryf, sy hand op skrif sou sit en sê maak assehlief vir my die volgende persone dood nie. Nie in my verste gedagte sou ek so iets kon dink nie. En as dit nie reeds onmoontlik is nie om dan nog so 'n sein aan die SSVR te rig sou vir my totaal, in my verste gedagte sou ek nie aan so iets kon dink nie."

Geldenhuis 523 : 23-29

"Die tweede vraag is, nou weereens op dieselfde hipotetiese veronderstelling, as u een oggend wakker geword het en besluit het dis nou in landshelang dat Goniwe vermoor moes word, wie sou u in daardie verband gekontak het? --- Ek dink ek sou seker na hoof van die leer toe gegaan het.

In albei gevalle sou u die SSVR gekontak het? --- Nee, ek sou nie.

Waarom nie? --- Die aanhouding van 'n individu eerstens het nie by die SSVR gelê nie, dit was 'n lynfunksie verantwoordelikheid, en op die veronderstelling soos u dit nou aan my stel sou ek nie, dis moeilik om dit te sê, maar ek sou nie 'n moord beplan en dan met die SSVR daaroor praat nie."

Van Der Westhuizen 3007 : 23 - 3008 : 5.

18.18.1 The SSVR was only able to advise and co-ordinate.

"Die GBS was 'n koördinerende liggaam tussen verskillende departemente. Departemente moes direk met hulle hoofkantore skakel. In gevalle waar meer as een departement betrokke was of waar daar verskille was tussen departemente wat nie op GBS-vlak uitgeklaar kon word nie, sou die SSVR ook ingelig word en kon die hulp van die SSVR ook ingeroep word om probleme te help oplos en advies te verskaf. In sulke gevalle het die SSVR 'n fasiliteringsrol tussen departemente vervul."

Stemmet 246 : 30 - 247 : 10.

"U Edele die departemente op streekvlak het uiters selde met die SSVR geskakel. Die GBS wel het met die SSVR geskakel. Die gedagte is dat die stelsel is 'n ko-ordinerende stelsel soos ek gesê het van kabinetsvlak af tot onder wat ko-ordinerend, nie uitvoerend. Jou uitvoering het gelê in jou departementele lyne met die opdragte afkomstig van die hoogste gesag. Met ander woorde as die Staatsveiligheidsraad 'n besluit geneem het, dan sal dit, die betrokke ministers of die betrokke Direkteur Generaal as hy teenwoordig is, sal hy dit aan die hoof van sy departement die opdrag deurgee, wat dit dan in sy lyn sal afgee tot onder by

die uitvoeringsvlak. Probleme hier ondervind op die uitvoeringsvlak sal deur daardie persone weer op dieselfde lyn opgevoer word. Met ander woorde soos 'n gewone Staatsdepartement werk. Maar waar die GBS hymekeer is, en die mense opper hulle probleme daar, kon hulle dikwels op streeksvlak die probleme oplos sonder om weer na hoofkantoorvlak te gaan. As hulle dit nie kon doen nie, was daar twee kanale Pretoria toe. Die een is op sy lynfunksie departement op, die ander een is om na die Sekretariaat toe, wat dit dan weer op ons beurt sal opneem met die verteenwoordigers van die verskillende departemente en dikwels kon ons die probleem oplos selfs voordat hy heeltemal hoegaan. So daar was verskillende vlakke, skakelvlakke en ook ko-ordineringsvlakke. Kan ek net vir u so vra; veronderstel daar was 'n probleem op streeksvlak by 'n GBS geïdentifiseer, hulle nader nou die SSVR in 'n fasiliteringsrol om die probleem te help oplos, opgelos te kry en die SSVR identifiseer nou 'n moontlike opsie, 'n moontlike oplossing, maar wat nou blyk vir uitvoering net in een departement te wees, sou daardie moontlike oplossing dan reguit in die lynfunksie na daardie departement toe aangaan of sou dit terug na die GBS op streeksvlak om dan na die streekverteenwoordiger van die departement (tussenbei). --- Nee, dit sou na daardie departement toe. Daardie departement se departementele verteenwoordiger wat deel sou wees van hierdie groep of komitee wat daarmee gewerk het, sal dit terugvat na hulle departement toe en sê "ons het konsensus bereik, ons gaan hierdie saak so hanteer." Dit is natuurlik as sy departement saamstem dat dit so gedoen word. Ons sal dalk volledigheidshalwe die GBS laat weet, veral as hulle inligting gegee het, sou ons hulle laat weet dat dit is die besluit wat geneem word, Departement X gaan hierdie saak verder departementeel hanteer."

Stemmet 251 : 28 - 253 : 12.

18.18.2 A proposal to kill Goniwe and the others
would have gone along Van Der

Westhuizen's line function to the Chief of the
Army.

"Nooit in der ewigheid sou dit deur my kantoor gegaan het nie om twee besondere redes. Die Sekretariaat van die Staatsveiligheidsraad was verheue ho enige koverte (?) moord ondermaanse vuil "cloak and dagger" spele van hierdie aard, en punt nommer 2 die uitvoering van enige sodanige taak sou gelê het op die lynfunksie van Brigadier van der Westhuizen, met ander woorde dit sou dan in sy lynkanaal na die weermag toe moes gaan vir 'n normale koverte (?) operasie, en beslis nie na die Sekretariaat van die Staatsveiligheidsraad nie. Ons het daar hoegenaamd geen uitvoerende gesag gehad nie. Uitvoerende optredes was deur die lynfunksie instansies getref en daarom sou so 'n versoek vir koverte (?) operasies direk na die hoof van die weermag of direk na die hoof van die leër toe in daardie geval gegaan het langs weermagskanale as 'n weermagsversoek en nie in die Sekretariaat verband nie."

Van Rensburg 192 : 5-21

- 18.19 Van Rensburg would not have brought a proposal to kill
Goniwe and the others to the attention of a civilian such
as Stemmet.

"Daai besondere sein was, het ek met Brig. Verster bespreek en die enigste ander persoon met wie ek daardie sein bespreek het was Mnr. A P Stemmet.

HOF: Maar het hulle altwee die sein gesien? --- O ja, baie bepaald so U Edele. Ons het onder andere ook met Brig. Verster die tekortkominge, taktiese tekortkominge in daai besondere sein bespreek en met Mnr. Stemmet het ek die hele kwessie van die taalkundigheid van hierdie sein bespreek."

Van Rensburg 33 : 16-25

"Die inligting in die sein was suiwer daar om vir hom tē sē dat toe ek hierdie saak hespreek het - ek het daardie inligting aan hom oorgedra om vir hom in die prentjie te hou met wat aan die gang was op die ander front - die Goniwe-front en ek het hom toe meegedeel van my waarneming dat daar waarskynlik so 'n verstopping in daardie kanaal kan wees en dat hy dit vir my moet gaan oopmaak en ek het dit ook nie vir hom gegee nie, ek het dit met hom saam deurgewerk en daarna het ek hierdie sein na Mnr Stemmet toe geneem en dit by Mnr Stemmet waarskynlik gelaat."

Van Rensburg 37 : 6-16

"Ek is redelik seker dat hy dit gedoen het. Daarom het ek die sein, die inligting, die woorde herken toe ek dit in die koerant gelees het. En ek is hynā 100% seker dat hy hierdie woorde onder my aandag gebring. Of hy dit vir my gewys het soos ek netnou gesē het, of hy dit aan my oorhandig het, dit sal ek nie meer kan onthou nie."

Stemmet 257 : 26 - 258 : 1.

18.20 Du Plessis wrote the original signal and also made a carbon copy thereof, whereafter he took both the original and the copy to the cryptographer. Once the cryptographer had written the necessary reference numbers on the signal, Du Plessis caused it to be filed. The original signal was left at the signal office.

"HOF Wie het die nommer 5 op daardie afdruk geskryf? U kan kyk na bladsy 73. --- Ja U Edele, het het, dit lyk na my handskrif.

As dit u handskrif was dan het u dit gemerk as die vyfde dokument van daardie lêer? --- Vir seker.

As u weer daarna kyk kan u sê of dit u handskrif is of nie? --- As ek daardie 5 moet vergelyk met die res van my handskrif dan lyk dit nie vir my na my handskrif nie."

Du Plessis 2173 : 27 - 2174 : 4

"Het hy nie 'n afskrif daarvan gesien nie? --- Nee U edele. Die normale prosedure is jy skryf 'n oorspronklike en koolpapier afskrif. Die oorspronklike word by die seinkantoor ingegee vir versending. Hulle hou dit. Die afskrif, die koolpapier afskrif gaan op die lêer.

En wie hou die lêer of wie het die lêer gehou destyds? --- Ek was in beheer van die lêers in daardie afdeling U Edele.

MNR. GOOSEN: Nadat u dit nou opgestel het, u het gesê u het dit laat versend. Wat presies het gebeur? Het u dit persoonlik laat versend of gegee vir die klerk om te laat versend of what het gebeur daarmee? --- Nee U Edele, ek het persoonlik die twee afskrifte geneem na die kommunikasiesentrum en dit vir die kriptograaf gegee want dit is 'n uiters geheime sein. Ek die kriptograaf het die nommers aangebring, die verwysing met die opstellersnommer en so meer en ek het die afskrif, die koolpapier afskrif ni my besit gehad. En later laat liasseer.

Du Plessis 2022 : 29 - 2023 : 16.

The original signal was entered in a register in the signal office and kept for three months.

"Kom ons kyk na party van die waarskynlikhede waarom dit nie in 'n sein sou voorkom nie. Wat het aanvanklik met hierdie sein gebeur in terme van liassering? --- Hy word geskryf, die afskrif word op die lêer geplaas, dit word dan ingehandig by die seinkantoor waar hy in 'n register ingeskryf word, dit word dan gedekodeer, versend.

Kom ons gaan net na die verskeie plekke toe waar die sein of afskrifte daarvan geliasseer sou word. --- Wel dit sou eerstens by die GBS se registrasie gewees het. Dan word hy by die seinkantoor gehou as ek reg onthou vir drie maande lank."

Van Der Westhuizen 3008 : 11-21.

Furthermore, Du Plessis would have expected the signal to be placed on file at the SSVR.

"U Edele met Kolonel Du Plessis, toe nog Kommandant Du Plessis se ondervinding in die Weermag en ek glo met sy ondervinding in die stelsel wil ek die stelling maak het hy geweet dat hierdie sein in Pretoria op 'n lêer geplaas sou word. En daar vir almal om te sien? --- Vir die wat dit behoort te sien. Vir die? --- Vir die wat dit behoort te sien. Já. --- In hierdie geval Tak Strategie.

Of jammer ek het dit swak gestel, daar vir almal wat by die stelsel betrokke was om te sien? --- Dis korrek U Edele.

HOF: Maar dit het blykbaar nie gebeur nie? Of sover u weet, of weet u nie? --- U Edele ek dink die vraag gaan of Kolonel Du Plessis moes geweet het.

Ja. --- Dat dit sal gebeur en ek sê met sy ondervinding moes hy geweet het en het hy geweet dat dit sou gebeur. Dat dit nie gebeur het nie dink ek is 'n ander saak.

MNR MOSTERT: Nou dit gaan eintlik - u is heeltemal reg Mnr Stemmet, dit gaan oor Kolonel Du Plessis se verwagting. --- Dis korrek U Edele. Sy verwagting was dat dit daar op lêer sou geplaas gewees het vir almal in die stelsel om te sien, is dit korrek? --- Dis korrek U Edele.

En hy sou nie verwag het dat die sein sou verdwyn het nie? --- Dis korrek U Edele."

Stemmet 415 : 4-29.

In Pretoria, the signal would have been dealt with as follows: At the Army's signal office it would have been deciphered; recorded in a register; typed in ordinary

script; recorded at the registration office of the SSVR; placed on file at the SSVR; and handed to the addressee. The proposal to murder Goniwe and the others would therefore have been filed in at least three files and entered in various registers.

"Dan word hy ontvang, daar was nie 'n seinkantoor by Staatsveiligheidsraad nie, die seine het gegaan na die hoof van die lêr se seinkantoor toe, dan word hy ontvang in kodevorm by hoof van die lêr se seinkantoor waar hy dan weer in 'n register geskryf word, gedekodeer word. Hy word dan oorgetik en dan word hy per rapportryer, dit is maar iemand wat met 'n motorfiets aflewering doen, aan die Staatsveiligheidsraad se registrasie gelewer, waar hy weer in 'n inkomende register vir geheime of uiters geheime dokumentasie aangeteken word, dan op 'n lêr geplaas, en dan word hy nou na die persoon toe geneem.

In spoedeisende gevalle kan die rapportryer, as hy spesiale instruksies het, dit direk ook aflewer aan die geadresseerde persoon.

Het ek dit reg dat as hierdie nou 'n moorddokument was dan sou daar nommer een by, op minstens drie lêers sou mens nou die moorddokument vind, is dit reg? --- Ja."

Van Der Westhuizen 3008 : 22 - 3009 : 8.

See also Wybenga, par. 5, F8.

- 18.21 According to Du Plessis it was left to him to decide who, apart from Goniwe, had to be mentioned in the signal, and he realised that he was in fact ordering those persons to be killed.

"Ja. --- En die ander persone moes ek se name self hyvoeg omdat ek die inligting stafoffisier, senior stafoffisier, inligting was op daardie stadium en presies geweet het watter pesone betrokke is in die onrussituasie. Dit is hoekom ek daardie name hygevoeg het".

Du Plessis 2021 : 15-19

"Nou u sien die treffende ding wat hieruit voorkom is dat net Goniwe se naam is genoem. Is dit reg? --- Tot die beste van wat ek kan onthou was my opdrag gewees ten opsigte van Goniwe in die eerste plek, en sy meelopers, ander instansies, of anderste sou ek nie hulle name genoem het nie.

Kan u my asseblief, kan u asseblief vir my, voordat u vir Sy Edele vra om te gaan, kan u net asseblief my vraag antwoord. Dit is wat hier staan, net Goniwe se naam is genoem? --- Net Goniwe se naam is genoem as ek nou reg onthou, maar die opdrag het behels dat ander persone se name ook genoem moet word. Die besluit was aan my oorgelaat gewees wie die ander persone is.

Dis wat ek wil hê. Met ander woorde toe u toe teruggegaan het na u kantoor toe, daardie moordopdrag opgestel het en hom afgestuur het, was u toe die regter en jurie wat die doodsvonnis gefel het op die ander twee? U het die besluit gemaak? --- Ja, ooreenkomstig die opdrag wat ek ontvang het. Mnr. Goniwe en andere."

Du Plessis 2311 : 16 - 2312 : 4.

On Du Plessis's version, Van Der Westhuizen's instructions to him as well as his own participation therein, were clearly illegal. On Du Plessis's version, it is improbable that he:

18.21.1 would have complied with such an illegal order;

18.21.2 would have dealt with the signal in the manner in which he did, without proposing an alternative method of conveying the information to Van Rensburg so as to prevent any risk of his involvement in the murder becoming known.

Under those circumstances, one would have expected him to distance himself as far as possible from the murder by, inter alia:

18.21.3 writing Van Der Westhuizen's particulars in the columns "Drafter's Name", "Appointment", and "Phone No." on the signal;

18.21.4 presenting the signal to Van Der Westhuizen for his approval and signature.

18.22 If the signal was a proposal to kill Goniwe and the others, one would expect Van Rensburg and Van Der

Westhuizen to have discussed the proposal and the subsequent death with each other, but they never did so.

"En Generaal as daar dan die komplot was tussen u byvoorbeeld nou en Generaal van Rensburg om Goniwe te vermoor, dit is weer op hierdie hipotetiese veronderstelling, sou u en Generaal van Rensburg na Goniwe se dood dit bespreek het? Weereens op die hipotese dat julle die moord beplan het. --- Ja ek sal so aanvaar U Edele dat ons dit sou gedoen het. En die werklikheid is volgens u herinnering, dat na Goniwe se moord was daar enige gesprek tussen u en Generaal van Rensburg wat u kan onthou? --- Nee U Edele.

Van Der Westhuizen 3011 : 5-15

"So sou u dan ook vir die sein gevra het? --- Ek sou vir die sein gevra het ja U Edele.

HOF: Het Van Rensburg ooit teenoor u gekla oor die taal wat gebruik is in seine wat gestuur is of oor die taal wat oor die algemeen gebruik is deur weermagoffisiere? --- Nee U Edele.

MNR. HODGEN: Nou as ek u getuienis reg verstaan, Van Rensburg het nooit teenoor u gekla oor die bewoording van die sein van 7 Junie 1985 nie? --- Nee U Edele.

U het sy getuienis seker gelees dat die sein hom gebelg het en dat hy uiters bekommerd was oor die sein. Is dit nie snaaks dat hy dit nooit by u geopper het nie? --- Ja ek moet sê dit is U Edele. Ek weet nie of hy dit dalk - dalk het hy dit aan Du Plessis genoem, ek weet nie. Maar hy het dit nie aan my genoem nie, sover ek kan onthou nie U Edele.

En dit was glad nie bespreek toe u by die SSVR in Pretoria was op 12 Junie 1985 nie? --- Nee U Edele, nee.

Hy het glad nie gekla dat hy dit nie gekry het nie en hy het glad nie gekla oor die bewoording van die sein nie. --- Nee U Edele. Dit is lank terug maar ek kan nie onthou dat so iets bespreek was nie. Miskien, ek sou dit seker dalk onthou het as dit bespreek was U Edele."

Van Der Westhuizen 3033 : 19 - 3034 : 10.

Van Rensburg did not make any contact with Du Plessis.

"Kolonel nadat u die sein gestuur het, is u genader deur enigiemand in verband daarmee, daarna? --- Onder geen omstandighede nie U Edele."

Du Plessis 2062 : 27-29

"Ja. Nou, u is alreeds gevra deur Sy Edele of iemand daarna u gebel het of u genader het om - of enige vrae aan u gestel het in verband met die inhoud van die sein en u antwoord was "nee". - -- Nee, hoegenaamd nie U Edele."

Du Plessis 2130 :31 - 2131 : 4.

One would also have expected Van Der Westhuizen and Du Plessis to have discussed the proposal and the subsequent killing of Goniwe and the others with each other if the signal was a proposal to have them killed. They never did so.

"En as hierdie 'n moordversoek was of 'n moordopdrag en dit is so bespreek tussen u en Du Plessis sou u verwag dat toe Goniwe vermoor is dat Du Plessis na u toe sou gekom het en dit met u bespreek het? --- Op die veronderstelling nou (tussenheide) Op die veronderstelling dit is nou 'n moord wat die twee van julle beplan het en julle het nou die moordopdrag die wêreld ingestuur, sou mens verwag het dat Du Plessis dit met jou sou bespreek het? --- Ja.

Het hy? --- Nee.

En julle het vir 'n hele aantal maande daarna nog, ek dink amper meer as 'n jaar nog daarna, saamgewerk? --- Vir 'n jaar en 'n half nog, ja.

Is die onderwerp ooit weer ter berde gebring? --- Nee, nie wat ek van weet nie.

HOF: Is die kwessie van Goniwe se dood ooit tussen u bespreek?

--- Soos ek gesê het ek was weg, ek het teruggekom / nou 20

Julie, ek is nie seker nie, en toe is aan my genoem dat Mnr Goniwe vermoor is.

Ja, maar wat ek wil weet is het dit ooit opgekom in 'n gesprek tussen u en Van Rensburg? Het u ooit (tussenbeide)

--- Van Rensburg?

Ooit gepraat oor Goniwe se moord? --- Met Mnr du Plessis?

Ja. --- Nee.

Ek bedoel Du Plessis. --- Ja-nee, ek verstaan U Edele.

U sê u en Du Plessis het nooit gesels oor Goniwe se dood nie of (tussenbeide) --- Nee, nie sover ek kan onthou nie. As ek reg onthou het Kolonel Hall vir my toe ek teruggekom het gesê het, my sekretaresse as ek weg is hou gewoonlik vir my die hoofberigte van die tydperk wat ek weg is wat in die koerante verskyn het."

Van Der Westhuizen 3009 : 15 - 3010 : 16

"Het u enige besprekings gehad daarna met Brig Van der Westhuizen ten opsigte van die sein?--- U Edele dit het nooit weer ter sprake gekom nie behalwe dat ek probeer uitvind het wat die situasie werklik was omtrent die doodmaak van mnr Goniwe hulle, het ek geen gesprek weer met Brig Van der Westhuizen of enigiemand gehad in verband met die Goniwe geval nie, tot onlangs natuurlik. En na die moord op mnr Goniwe en die ander, kan u onthou het u enige gesprek gevoer met-óf Brig. Van der Westhuizen of enige ander persoon? --- Nee behalwe dat ek probeer uitvind het wie verantwoordelik was."

Du Plessis 2062 : 30 - 2063 : 10

"Die verhouding tussen myself en Genl. Van der Westhuizen was van so 'n aard gewees dat ek presies geweet het wat hy bedoel. Nadat ek die opdrag van hom ontvang het, het ek die sein gestuur en dit nie weer verder met hom bespreek nie."

Du Plessis 2064 : 11-16.

18.23 All the above factors militate against any submission that
Van Der Westhuizen's proved conduct is consistent only

with the signal being a request or order by him to kill Matthew Goniwe (the first tenet in Blom's case). Nor can it be said that the proved facts are such that they exclude every reasonable inference from them save the one sought to be drawn, namely that the signal is a request by Van Der Westhuizen to have Matthew Goniwe murdered (the second tenet).

CHAPTER II

19. We now turn to examine the extent to which the other evidence may serve to displace the above inferences, probabilities and conclusions.
20. In this chapter we will deal with the evidence of Du Plessis and, in particular, its impact on the culpability of Van Der Westhuizen in respect of the Goniwe murders.
21. Du Plessis is the only witness whose testimony seeks to implicate Van Der Westhuizen in any way. Even then, the link is tenuous, as an examination of Du Plessis' evidence will show.
22. The highwater mark of Du Plessis' evidence as testimony indicting Van Der Westhuizen, are his various statements that the words " ... permanent uit die samelewing verwyder ..." meant and were intended to mean that Goniwe and the others mentioned were to be killed:

"Alhoewel ek nie spesifiek kan onthou of Brig. Van der Westhuizen woorde "permanent uit die samelewing verwyder" gebruik het nie, is dit moontlik dat hy dit wel gedoen het. In elk geval was dit vir ons albei duidelik wat voorgestel word, die doodmaak van Goniwe behels".

Du Plessis 1946 : 18-23

"Maar wat het u daarby verstaan? --- Dit is vir my moeilik om dit te sê maar ek het verstaan dat dit beteken het dat daardie mense moet doodgemaak word."

Du Plessis 2063 : 31 - 2064 : 3

"Was daar enige twyfel, is daar enige twyfel oor wat die opdrag wat Brig. Van der Westhuizen aan u gegee het destyds, behels het? --- Geen twyfel by my nie U Edele. Ek wil nou net aangaan deur die handel met Operasie Katzen.

HOF Kan ek net dit vra op hierdie stadium? U het gesê dat een manier om 'n persoon uit die samelewing te neem is hyvoorbeeld dat hy aangehou word. Die ander manier is natuurlik dat hy doodgemaak word. Nou u sê die bewoording van die sein "permanent uit die samelewing verwyder word" kan u sê of dit die woorde is en of dit nie die woorde is wat deur Van der Westhuizen gebruik is? --- U Edele ek kan werklik nie vir u eerlik sê of dit die woorde was nie maar ek het ook gister genoem dat ek sou dit nie uit my duim uitgesuig het nie. Wat ek wel weet en wat ek al in verkla- rings gesê het en vir ander mense ook gesê het, is dat die woord "doodmaak" was nie tussen ons twee genoem nie en ek wil daarby bly."

Du Plessis 2065 : 11-28

23. The evidence referred to in the previous paragraph:

- 23.1 does not survive the withering effect of a number of other passages in his evidence;
- 23.2 does not bear the scrutiny of a critical evaluation.

24. We commence with the citation of that passage which so blights Du Plessis's testimony as to the meaning of the signal that Van Der Westhuizen's culpability remains unproved.

"VRAE DEUR HOF:

Ek wil hê u moet nou baie noukeurig en versigtig dink oor hierdie vraag kolonel, die vraag wat ek nou vir u gaan vra. Ek wil hê u moet goed daaroor dink voor u die antwoord gee. U het vir ons gesê u kan nie presies onthou wat Brigadier van der Westhuizen vir u gesê het nie in verband met die gesprek wat hy met Van Rensburg gehad het en in verband met die sein wat u moes stuur, is dit korrek? --- Dis korrek.

Nou daar is aan u uitgewys dat u het in u getuienis gepraat van ontslae raak van Goniwe, u het in u getuienis verwys na oplossing van die Goniwe probleem en so aan. U sê die presiese woorde wat gebruik is kan u nie vir ons sê nie, is dit korrek? --- Dis korrek.

U sê dat u en Van der Westhuizen het 'n goeie verstandhouding gehad? --- Dis korrek.

En u sê dat die Goniwe probleem was 'n probleem wat u alreeds bespreek het, is dit korrek? --- Dit was deurlopend bespreek.

Nou u het vir ons gesê dat die sein wat u gestuur het was u eie woorde keuse, is dit korrek? --- Dit is korrek, na aanleiding van die opdrag wat ek ontvang het.

Maar die spesifieke bewoording van daardie opdrag kan u nie vir ons sê nie, is dit korrek? --- Ek kan werklik nie op hierdie stadium sê of ek notas geneem het nie. Ek dink ek mag notas geneem het tydens my gesprek, maar ek beaam dat dit was soos wat ek die opdrag verstaan het.

Nou u het vir ons gesê dat met hierdie sein wat u gestuur het en die woorde wat u gebruik het het u bedoel om te sê dat die

mense doodgemaak moet word? --- Dit is my indruk op daardie stadium gewees.

Nou my vraag aan u, en ek wil hê u moet haie noukeurig dink voordat u die antwoord gee, en ek wil hê u moet haie eerlik wees met u antwoord, maar u moet goed dink voordat u die antwoord gee. Wat ek van u wil weet is dit. Is daar 'n moontlikheid dat Van der Westhuizen toe hy die opdrag aan u gegee het bedoel het dat Goniwe-hulle aangehou moet word en dat u hom verkeerd verstaan het, en dat u gedink het hy bedoel hulle moet doodgemaak word? Net om iets hy te voeg tot die vraag. Is dit byvoorbeeld moontlik dat Van der Westhuizen die woorde "permanent uit die samelewing verwyder", of soortgelyke woorde, gebruik het, en dat hy met daardie woorde bedoel het vir 'n lang tyd aangehou word, en dat u sy woorde verkeerd geïnterpreteer het en gedink het hy bedoel doodmaak, en dat u dan 'n sein gestuur het dat die mense doodgemaak moet word? U sê daar was 'n goeie verstandhouding tussen u en Van der Westhuizen. Ek wil hê u moet nou eerlik vir my sê of u dink daar kon moontlik in hierdie verband 'n misverstand gewees het, dat u kon verkeerdelik sy opdrag vertolk het? --- Kan ek u tweeledig antwoord?

Ja. --- Ek hly by wat ek deurlopend gesê het, is dat ek die opdrag so verstaan het in die eerste plek. Ek sê dit al van Maandag af dat die mense doodgemaak moet word. In die tweede instansie moet ek toegee dat ek uit die aard van die saak, ons is almal mense, miskien opdrag verkeerd kon interpreteer het. As ek u vraag nou antwoord U Edele. Ek kan dit nie betwis, enige mens kan 'n opdrag verkeerd verstaan.

Nou as dit so is en u nou so 'n belangrike sein aan Generaal van Rensburg moes gestuur het, as daar ruimte was vir 'n misverstand, hoekom het u nie vroeë gestel aan Van der Westhuizen nie om seker te maak dat u weet presies wat hy bedoel en wat hy wil hê u moet oordra aan Generaal van Rensburg? --- Nadat ek met die generaal gepraat het, of Brigadier van der Westhuizen destyds, toe het ek onmiddellik die opdrag gaan uitvoer. Daar was nie 'n tydsverloop gewees nie. Ek het nie eers, as ek nou moet vir u eerlik sê, daaraan gedink om dit weer te gaan bespreek met hom nie. Ek het net die opdrag uitgevoer.

Ja, wel my vraag is hoekom het u nie absoluut seker gemaak dat u die opdrag behoorlik verstaan? --- Ek het gedag ek verstaan die opdrag. Ek is jammer, ek kan nie vir u meer as dit sê nie. Was daar by u enige twyfel of nie? --- Nee.

Oor wat bedoel word? --- Ek het die opdrag onmiddellik gaan uitvoer.

Ja Mnr (tussenbeide)

MR MOSTERT: M'lord before My Learned Friend does that, I don't want to ask anymore questions, Your Lordship may be interested in the light of the questions Your Lordship has just asked him, Your Lordship may be interested in what is

contained at page 2348, an answering reply to a question put by Your Lordship, commencing on about line 10.

HOF: Het u dit miskien daar? --- Nee U Edele.

Dis volume 27, bladsy 2348. Sal u kyk na reël 13. U kan begin by reël 11. Sien dit staan daar:

"Ek het nie verstaan dat dit verwys na die dokument nie, maar wat daarin staan as sulks wou ek gesê het daar is altyd die moontlikheid dat daar 'n fout kon gewees het, en dat ek die generaal verkeerd kon verstaan het. Niemand kan dit wegedeneer nie. Maar wat ek gesê het is dat ek het verstaan dit beteken hy moet doorgemaak word."

U verwys daar na 'n moontlikheid van 'n misverstand. --- U Edele met respek gesê, ek dink ek het nou so pas vir u gesê dat ek erken dat daar 'n moontlikheid van 'n misverstand kon gewees het.

Nou hoe sterk is daardie moontlikheid, kan u vir ons sê? --- Wel U Edele moet ek dit in 'n persentasie uitdruk?

Wel net soos, op enige manier, net soos dit u pas. ---

Seker 'n 50/50 kans U Edele.

So u dink daar was 'n 50% kans dat u Generaal of Brigadier van der Westhuizen verkeerd verstaan het? 50% kans? --- Ek sal so sê, ja.

Nou as dit die geval is hoekom het u nie seker maak voordat u so 'n ernstige sein aan iemand stuur nie? As daar 'n 50% kans is dat u hom verkeerd verstaan het, en u stuur 'n sein aan iemand wat feitlik 'n opdrag is dat drie persone doorgemaak moet word, en u maak nie eers seker of u die korrekte boodskap oordra nie? --- Ek kan nie verduidelik hoekom ek so reageer het soos wat ek toe reageer het nie, werklik nie."

Du Plessis 2425 : 23 - 2429 : 14

25. The significance, and particularly the cogency, of the above passage is to be found in the fact that it emerged spontaneously in response to a question from the Presiding Judge. This passage is consistent with and supported by other passages in the evidence.

26. Paragraph 6 of Du Plessis's affidavit of 11 May 1992 reads:

"Ek is egter baie seker daarvan dat Brigadier van der Westhuizen nooit teenoor my te kenne gegee het dat sy voorstel behels dat enige persone doodgemaak moes word nie. Indien hy dit wel gedoen het, sou ek dit baie beslis onthou het".

27. He attempted to alter that evidence in his later affidavit.

"Ek wil dit graag op rekord plaas dat paragraaf 6 van my eerste eedsverklaring nie die feite van die saak korrek daarstel nie. Dit is wel so dat ek my nie kan herinner dat Brig. Van der Westhuizen aan my oorgedra het in soveel woorde dat die betrokke persone gedood moes word nie, maar daardie bedoeling was wel wat Brig. Van der Westhuizen se opdrag aan my behels het."

Exhibit F4, par. 8.

That attempt, however, was short-lived when it came to giving evidence before this Court.

28. In his evidence he says after paragraph 6 was again read to him:

"Stem u saam daarmee? Is dit die waarheid of is dit nie die waarheid nie ... U Edele in terme van wat tussen myself en Generaal van der Westhuizen gebeur het, is dit die waarheid".

Du Plessis 2195 : 9-13

29. The above passage in his cross-examination becomes the subject of a dispute later on and that passage is then played back to him. Thereafter, the following occurs:

"Veral hierdie laaste gedeelte het u gehoor? --- Ja U Edele. Bevestig u dit? Dit is 'n baie eenvoudige vraag; bevestig u u getuienis soos dit nou aan u teruggespeel is, ja of nee? --- Ek bevestig dit U Edele maar ek wil dit kwalifiseer. Goed, kwalifiseer dit dan. --- En dit is dat wat eintlik die bedoeling is, en ek het hierdie verklaring ontken - wat eintlik bedoel was, was dat daar nie tussen myself en Brig. Van der Westhuizen gemeld was dat mense doodgemaak moet word nie. Goed. Dan is paragraaf 6 mos korrek. Want die gesprek het plaasgevind net tussen twee mense, is dit reg? --- Dit is heeltemal korrek U Edele. Tussen wie? --- Tussen myself en Brig. Van der Westhuizen. Reg. En kom ons kyk nou wat sê u: "Ek is egter baie seker daarvan dat Brig. Van der Westhuizen nooit teenoor my te kenne gegee het dat sy voorstel behels dat enige persone gedood moes word nie." Dit is wat u daar onder eed gesê het en u het dit so pas onder eed bevestig. U het dit herhaal en bevestig, korrek? --- Dit is korrek U Edele maar (tussenbei). Nou maar goed. Kan u kyk (tussenbei). --- Ek wil net weer sê (tussenbei).
HOF: Ja, gee die getuie die geleentheid.
MNR. MOSTERT: Jammer U Edele.
HOF: Ja? --- Ek wil net weer sê dat die gesprek tussen myself en Generaal Van der Westhuizen het nie uitgeloop op 'n opdrag wat gesê het die mense moet doodgemaak word nie. Ek erken dit, ek het dit deurlopend gesê, maar dit was my, soos wat ek die opdrag verstaan het.
MNR. MOSTERT: Nou maar goed. --- Ek sê dit net weer.
HOF: Hoe het u dit opdrag verstaan? --- U Edele soos wat ek dit formuleer het en dit is dat daardie mense moes doodgemaak word.
MNR. MOSTERT: Kom ons gaan nou weg van wat u verstaan het. Is die eerste sin hier korrek soos dit hier gestel is, dat "Brig. Van der Westhuizen nooit teenoor my te kenne gegee het dat sy voorstel behels dat enige persone doodgemaak moes word nie."

Dit is korrek? --- Dit is so U Edele. Nie in daardie terminologie nie. Nou maar goed. En gaan aan na die volgende paragraaf toe: "Indien hy dit wel gedoen het ..." Jammer, die volgende sin: "Indien hy dit wel gedoen het sou ek dit baie beslis onthou het." Is dit reg? --- Ek erken dit. Nou maar goed. --- Ek bly sê U Edele dat daar was nie gesê gewees dat mense moes doodgemaak word nie, nie tussen myself en Brig. Van der Westhuizen op daardie stadium nie.

HOF: Verstaan u daardie eerste sin? Die eerste sin sê nie dat die woord "doodmaak" is nie gebruik nie. Die eerste sin van paragraaf 6 sê dat Van der Westhuizen nooit teenoor u te kenne gegee het dat sy voorstel behels die doodmaak van persone. --- Ek verstaan U Edele wat dit beteken, maar as ek mag, kan ek net teruggaan na die omstandighede waaronder hierdie eedsverklaring afgelê was? Ja, ek dink die omstandighede het u al klaar gegee. ---

Ek het U Edele. Maar is daar enige verskil tussen 'n bewering dat die woord "dood" is nie gebruik nie en 'n bewering dat die voorstel het behels die dood van iemand? --- U Edele daar is baie beslis 'n verskil. Die woord behels, gee 'n ander nuanse aan daardie sin. Wat ek eintlik vir u sê is dat daar was nie tussen ons bespreek dat iemand doodgemaak moes word nie. Dit was uitsluitlik gewees soos wat ek die opdrag verstaan het. En ons kan maar 6 dae hier in die hof sit. "

Du Plessis 2197 : 1 - 2199 : 12

30. The gravamen of that evidence is repeated:

30.1 "Maar kom ons bevestig; hy is in sy wese korrek om u eie taal te gebruik? --- U Edele behalwe vir die feit dat ek herhaal dat die gesprek tussen myself en Generaal Van der Westhuizen of tydens daardie gesprek was daar nie melding gemaak van mense dood maak nie."

Du Plessis 2199 : 25-28

30.2 "Daar was nie tussen myself en Brig. Van der Westhuizen 'n gesprek wat spesifiek gepraat het van mense doodmaak nie."

Du Plessis 2200 : 8-15

31. Du Plessis confirms that during his discussion with Van Der Westhuizen there was no mention made of killing people. The notion of misconception is introduced:

"Wat - ek herhaal die vraag (tussenbei). --- Ek dink tog daar is 'n verskil U Edele, in die sin dat die gesprek tussen ons, tydens die gesprek was daar nie melding gemaak van mense doodmaak nie. Hierdie laaste paragraaf, 6, het 'n ander nuanse, in die sin dat dit sê dat daar nie te kenne gegee was nie. Nou "te kenne gegee was" in my opinie U Edele, is dat daar dan gesê word dat ek die opdrag verkeerd verstaan het. In ander woorde U Edele, dat ek die berig hewoord het in teenstelling met wat die gesprek tussen myself en Generaal Van der Westhuizen te kenne gegee het."

Du Plessis 2201 : 1-11

32. Du Plessis states that there was no specific instruction from Van Der Westhuizen that the people were to be killed. He claims to have said this to the ANC, to the New Nation and Mr. Wagener.

- 32.1 "Sal u asseblief die oorkonde voor u hê, bladsy 2209. Sal u teruggaan na 2208 asseblief, na reël 13. Ek stel net belang in een sin, dis eintlik 'n bietjie verder af, maar kom ons neem die hele dag om die verband te kry. Ek vra vir u:
"Vertel vir my wat is die verskil? --- Die verskil is in die nuanse. Ek het gesê daar was nie melding gemaak tussen myself en

Generaal van der Westhuizen ten opsigte van mense doodmaak nie, terwyl hierdie paragraaf", dit wil sê paragraaf 6 in die eerste verklaring, "terwyl hierdie paragraaf effens anders lees." Nou kom ons volstaan eers by daardie eerste gedeelte. "Ek het gesê daar was nie melding gemaak tussen myself en Generaal van der Westhuizen ten opsigte van mense doodmaak nie. "Het u dit vir die mense van die ANC en die New Nation gesê? --- Ek het dit vir die ANC, vir die New Nation, vir Mnr Wagenaar, vir almal gesê, en ek volstaan daarby, dat daar nie spesifiek tussen my en Generaal van der Westhuizen gesê was dat mense doodgemaak moes word nie."

Du Plessis 2281 : 11-31

- 32.2 "Wat ek wel weet en wat ek al in verklarings gesê het en vir ander mense ook gesê het, is dat die woord "doodmaak" was nie tussen ons twee genoem nie ek wil daarby bly".

Du Plessis 2065 : 26-29

- 32.3 "Alhoewel ek nie spesifiek kan onthou of Brig. Van Der Westhuizen woorde 'permanent uit die samelewing verwyder' gebruik het nie, is dit moontlik dat hy dit wel gedoen het. In elk geval was dit vir ons albei duidelik wat voorgestel word, die doodmaak van Goniwe behels".

Du Plessis 1946 : 18-23

- 32.4 "Ek wil net weer sê dat die gesprek tussen myself en Generaal Van der Westhuizen het nie uitloop op 'n opdrag wat gesê het die mense moet doodgemaak word nie. Ek erken dit, ek het dit deurlopend gesê, maar dit was my, soos wat ek die opdrag verstaan het".

Du Plessis 2197 : 30 - 2198 : 4

THE EVIDENCE OF DU PLESSIS AND THE PROBABILITIES:

33. The probabilities which emerge as objective guidelines from irrefutable facts displace Du Plessis's version of an intended death signal.
34. At the risk of repetition, the hard core facts establish probabilities which are inconsistent with the "death signal" version.
35. Linguistic treatment of the words ("samelewing, verwyder, permanent") yield much the same result.
36. Each one of the following topics falls to be examined under this head:
 - 36.1 the semantic meaning of the words;
 - 36.2 the context;



36.3 Du Plessis's own interpretation.

THE SEMANTICS OF "PERMANENT, SAMELEWING, VERWYDER":

37. The semantic content of these three words, giving full weight to contextual influence, determines the tenor of the signal.
38. Although the definitive word is "verwyder", the latter's semantic content will be largely determined by the meaning to be assigned to "permanent".
39. In both cases, the meaning of the words will be determined by their ordinary (dictionary) meaning and their context. Needless to say, context will be the ultimate determinant.
40. The ordinary meaning of the two words present little problem:

40.1 We refer to the work of Prof. Van Jaarsveld and Prof. P.H. Swanepoel (F21).

40.2 The following dictionary extracts are of use:

40.2.1 "Verklarende Handwoordeboek van die Afrikaanse Taal", Schoonees, *et al*, Eerste Uitgawe, 1976:

p. 642:

"permanent, b.n.w. en bw. Blywend, duursaam; voortdurend: 'n Permanente uitstalling."

p. 989:

"vervyder. I ww. (-). 1. Verplig om 'n plek te verlaat, ontruim; weg laat gaan: Iemand uit die geselskap vervyder. 2. (refleks.) Weggaan; vertrek: Hy het hom vervyder. 3. Vervreemd; afsonder; skei: Die geskil het hulle van mekaar vervyder. 4. Wegneem: Die borde van die tafel vervyder. Vullis vervyder. II b.n.w. Ook vervyderd. Afgeleë, ver: Op 'n vervyderde plek. vervyder: ..haar, ..ing."

40.2.2 "Verklarende Afrikaanse Woordeboek", Kritzinger, *et al*, Sesde Uitgawe, 1972:

p. 744:

"permanent, -e blywend, aanhoudend, voortdurend; ..."

p. 1175:

"verwyder, ~, verplaas, afsonder; weggaan, vertrek; wegneem, uitsny; van mekaar vervreem.."

40.2.3 Van Dale's "Nieuw Groot Woordenboek der Nederlandse Taal", Zevende Druk, 1950:

p. 1361:

"PERMANENT (<Fr.), hn. bw., 1. duurzaam, niet tijdelijk: permanente wegen; - 2. voortdurend, steeds doorgaande, aanhoudend: die permanente droogte deed veel schade aan de landbouw; - zich permanent verklaren, niet uiteengaan (inz. van lands-, gewestelijke of gemeentevergaderingen); - permanente commissie, die niet telkens veranderd of vernieuwd wordt; - permanente tentoonstelling van schooluitgaven; - permanent Hof van Arbitrage; - permanente belasting, belasting welke voortdurend op een constructiedeel aanwezig is, b.v. eigen gewicht; - wij hebben permanent last van onze bureu; - 3. blijvend, niet veranderend: permanente gassen, die niet tot een vloeistof verdicht kunnen worden: zuurstof gold vroeger als een permanent gas; - permanente kleuren, die in zon en lucht niet verkleuren."

p. 2000:

"VERWIJDEREN, (verwijderde, heeftverwijderd), 1. op een afstand, verder plaats, afzonderen: (fig.) dit heeft hen zeer van elkander verwijderd, dit heeft hun vriendschap bekoeld; - 2. wegnemen: het deksel, de stop verwijderen; - wegdoen; - iem. uit de klasse verwijderen, wegsturen; iem. uit zijn huis verwijderen, hem de toegang ontzeggen; - 3. zich verwijderen, zich van een plaats weg begeven, heengaan: toen de agent zich weer verwijderde; langzaam verwijderde de boot zich; - zich even verwijderen, even weggaan om aan een natuurlijke behoefte te voldoen. VERWIJDERING, v. (-en), 1. het verwijderen; - 2. het uiteenliggen, het verwijderd-zijn, afstand; (sterrenk.) schijnbare afstand van een planeet tot de zon; - 3. (fig.) het uiteengaan, verkoeling, bekoeling (van vriendschap). VERWIJDERINGSHOEK, m. (-en), (sterrenk.) afstandshoek van een planeet."

41. The ordinary meaning of the two words, whether used jointly or singly, do not suggest murder. At best for those contending for an adverse connotation, the words are ambiguous.
42. *Context* and *extraneous evidence* must be looked at to provide reliable guidelines.
43. Throughout the excursion from ordinary meaning to a meaning where full weight is given to contextual influence, one cardinal legal principle can never be overlooked: in the event of ambiguity the innocent rather than the culpable meaning will prevail. That

principle is complimented by the equally obvious tenet that the *onus* lies upon him who contends for acceptance of the culpable version.

44. The hardcore facts and their probabilities, in the absence of any other material, provide a simple and final answer: death was not intended by the signal and the two occurrences - the deaths and the signal - are not linked.

45. Other equally cogent probabilities exist.

45.1 If Du Plessis is correct in his version that he intended the signal to have a connotation calling for Goniwe's murder, one would expect:

45.1.1 Van Der Westhuizen to have approached him and to have discussed and, perhaps, to have exulted in their success once the news of the Goniwe murders became known;

45.1.2 Du Plessis to have approached Van Der Westhuizen for much the same purpose.

45.2 Yet, according to their evidence, no discussion of either sort takes place - not then, nor in the ensuing 8 years.

45.3 The improbability of it all grows.

45.4 Du Plessis, according to his evidence, endeavours to find out the identity of those who carried out Goniwe's murder from the uniform branch of the police, the security police, the Reccies and National Intelligence.

"U Edele ek het nadat ek verneem het dat mnr Goniwe en sy vriende vermoor is, probeer uitvind wie verantwoordelik was en ek het geen reaksie van niemand gekry nie. Ek het met die Veiligheidspolisie gepraat, ek het met die polisie gepraat, ek kon geen antwoord kry nie."

Du Plessis 2062 : 4-9.

He speaks to Colonel Snyman and a General Rust at a GBS meeting.

"Met wie het u by die Veiligheidspolisie gepraat?
Met Kolonel Snyman.

Wie nog? -- Nee, net met Kolonel Snyman.
Met wie het u hy die polisie gepraat? --- Met
Generaal Rust."

Du Plessis 2293 : 28 - 2294 : 2

45.5 The probability is, according to Du Plessis, that Van Der
Westhuizen would have been present at that meeting.

45.6 Neither Snyman nor Rust can satisfy Du Plessis's
curiosity. Yet' he does not approach Van Der
Westhuizen; not then at that meeting, nor at Van Der
Westhuizen's office which is only metres away from his
own.

"En na die moord op mnr Goniwe en die ander,
kan u onthou het u enige gesprek gevoer met òf
Brig. Van der Westhuizen of enige ander persoon?
--- Nee behalwe dat ek probeer uitvind het wie
verantwoordelik was.

Du Plessis 2063 : 7-10

46. Du Plessis's conduct from the time of the Goniwe murders until May
1992 is crucial to the interpretation of the signal.

47. For nearly 7 years Du Plessis's conduct is consistent with that of a man who had drafted an innocuous signal on 7 June 1985.

47.1 He does not discuss the murders with Van Der Westhuizen and enquire after the identity of the murderers (see *supra*).

47.2 He did not "tell a soul on this earth" that the signal was an order to kill.

"U sien Kolonel, van Junie 1985 tot April 1992, 'n maand of wat na 7 jaar hoor, volgens u getuienis, nie 'n persoon op hierdie aarde van u dat daardie sein 'n moordopdrag is nie. En dan skielik vanaf April 1992 verander alles. Is dit reg? Is dit feitelik korrek? --- Dit is so U Edele".

Du Plessis 300 : 24-28

47.3 He did not inform the police that he drafted Goniwe's death signal.

"U weet dat die Goniwe moord was geondersoek deur die polisie hier plaaslik? --- Ek weet daar was 'n ondersoek.
Het u na die polisie toe gegaan en gesê kyk hierdie Goniwe, ek weet nie wie het hom doodgemaak nie, maar ek het die doodsein, die moordsein het ek uitgeskryf, hier is hy? Het u dit gedoen? --- Nee, ek het nie.

Waarom nie? --- Die beste antwoord wat ek vir u kan gee is dat Mnr Goniwe was beskou gewees as 'n vyand".

Du Plessis 2298 : 24-31

47.4 He did not inform the Magistrate presiding over the first inquest of that fact.

"En met die na-doodse ondersoek het u nie net eenvoudig gegaan na die landdros toe nie en gesê 'landdros ek het 'n moordsein geskryf, hier is dit.' U het dit nie gedoen nie? --- Nee U Edele ek het nie".

Du Plessis 2300 : 3-6

48. The argument that Du Plessis kept silent because loyalty and a sense of duty demanded that he do so, has an initial allure. That argument, however, does not survive a recall of the events of May 1992 and his dealings with the New Nation and the ANC. Both a sense of duty and loyalty to the SADF were singularly absent from his dealings with Holomisa, the New Nation and the ANC.

49. The watershed in Du Plessis's conduct vis-a-vis the signal is the period immediately before May 1992 when he feels the pressures of his discontent with an inadequate pension, his parlous financial position and the temptation of turning the sensitive documents belonging to the SADF in his possession, to account.

50. His drinking habits did not assist in resisting those pressures.

51. Du Plessis all but confirms being "turned" by Holomisa.

"Dit is aan my gesê deur 'n kundige in die inligtings-beroep, dat die klassieke manier om 'n agent te werf, kry iemand met 'n drinkprobleem of 'n finansiële probleem of 'n ander probleem en werf hom met beloftes en hoofsaaklik of in meerdere gevalle waar die belofte nooit gehou is nie en net vervang is met ander beloftes. Is joune - pas daardie beskrywing van werwing van 'n klassieke geval nie presies op die feite wat op u van toepassing is nie? --- U Edele wat genoem was het ek reeds vanoggend in die hof erken, so as dit 'n kwessie was dat ek gewerf wou word en dat beloftes nie nagekom is nie, dan is dit so."

Du Plessis 2302 : 21-31

52. Circumstanced as he was, the rewards promised by his new masters were irresistible:

52.1 Salaried employment by the ANC as an advisor:

"Ek het met Mnr Sithole gepraat oor 'n aangeleentheid ten opsigte van dat ek sou deur die ANC in diens gewees het as 'n adviseur sedert die begin van Januarie hierdie jaar, en dat ek 'n salaris sou ontvang het daarvoor, maar ek het nooit 'n salaris nog ontvang nie, en ek het hom verskeie kere daarvoor geskakel want hy is my skakelpersoon, ek kan nie vir Mnr Mandela geredelik maklik in die hande kry nie, telefonies of andersins nie. So as die vraag is het ek met Mnr Sithole geskakel oor ander sake dan is die antwoord ja.

Wanneer is die voorstel of aanbod aan u gemaak om teen 'n salaris vir die ANC te werk? --- Dit moes gewees het tydens een van my besoeke aan Johannesburg, heel waarskynlik Desember verlede jaar. ".

Du Plessis 2288 : 31 - 2289 : 13

52.2 The prospect of an appointment in Mr. Mandela's new government or in his new defence force must have been very attractive.

"Sê nou vir my waarom was u vir Mnr. Mandela so belangrik dat die man, wat so min tyd het soos ons almal weet, tyd ingeruim het om u te ontmoet? --- My persoonlike indruk U Edele - ek kan nou nie sê hoekom Mnr. Mandela my so beskou nie (tussenbei).

Ja, ek vra dit. Hoekom Mnr. Mandela u so beskou.

--- Maar my persoonlike indruk is dat daar gekyk word na mense wat behulpsaam kan wees in 'n nuwe regering of in 'n nuwe weermag.

Ek sien. --- Dit is my besondere indruk van dit.

Ek wil dit aan u stel dat Generaal Holomisa het u beskou as 'n bruikbare persoon. --- Ek weet nie wat u bedoel nie U Edele. Ek en hy is ou kennisse. Hy beskou my seker as 'n persoon wat gebruik kan word."

Du Plessis 2246 : 29 - 2247 : 14

53. Du Plessis admits to taking money from Holomisa but says the amount was limited to R600, which he required for expenses. Insofar as the amount is concerned, the statement has a false ring about it. Why should Du Plessis part with sensitive military, and therefore valuable, documents to Holomisa for the paltry sum of R600?

53.1 "As u enige ander aansienlike bedrag in die orde van 10 000 or meer geleen het, of van enige ander oord ontvang het, sou u daarvan onthou? --- Ek het ontvang van Generaal Holomisa R600,00.
Hoeveel nog? -- Nee, dit is al wat ek van hom ontvang het tydens die onderhoud wat ons met Mnr. Mandela gehad het. Hulle het my onkoste betaal. Ek het ontvang van - nee, ek kan nie aan ander bedrae dink nie U Edele."

Du Plessis 2264 : 16-23

54. His new masters would not be interested in a signal with an innocuous meaning. A signal with a murderous connotation, however, would have considerable value when rewards were being bargained for.

55. The next episode in the pitiful tale of the tragic figure that is Lourens Du Plessis almost writes itself: Du Plessis for the first time in the seven years since his authorship of the signal tells somebody that " ... permanent uit die samelewing verwyder ..." means that Goniwe and the others were to be killed.
56. The dramatic coincidence in time of the pressures, the ending of a seven year treatment of the signal as innocuous, his "turning" and the assigning of a murderous connotation to the signal, strains the acceptance of his version well beyond breaking point.
57. Du Plessis was the author of the signal of 7 June 1985 and the person who employed the words " ... permanent uit die samelewing verwyder ..." in that document.
58. If he had been asked to write a signal on that day asking for Goniwe's removal from society, in the form of a lengthy incarceration, he would, by his own admission, conceivably have used the very words that appear in the document in question.

59. 59.1 "Onthou u dat u vir ons gesê het Vrydag dat gemeenskap en samelewing beteken dieselfde? Onthou u dit? --- Ja U Edele. En onthou u dat u gesê het as u ontslae wou raak van Goniwe, op 'n manier wat nie dood behels het nie, u die woord "verwyder" sou gehruik het? Onthou u dit? --- Dit is korrek U Edele."

Du Plessis 2398 : 21-27

- 59.2 "Dit kom daarop neer dat as u wou gevra het in daardie sein van 7 Junie dat Goniwe verwyder moet word vir 'n blywende tydperk op 'n manier wat nie dood behels nie, u sou gesê het dat hy permanent uit die samelewing verwyder moet word. Is dit reg? --- Dit is korrek U Edele, maar dit was hipoteties gestel gewees."

Du Plessis 2399 : 6-12

- 59.3 " ... dat elkeen van daardie woorde as 'n mens hulle saamvat, kan beteken dat die man vir 'n lang tyd uit die samelewing verwyder moet word sonder dat dit dood beteken. Dit is wat u gesê het. Stem u saam? --- Ja maar dit was U Edele fiktiewe scenarios wat geskep was. Wel dit is juis die vraag, of dit nou fiktief was of nie sal ons later met Sy Edele argumenteer. Maar die feit is daardie woorde dra daardie, kan daardie betekenis dra, is dit reg? --- Ek het so gesê U Edele."

Du Plessis 2400 : 29 - 2401 : 8

- 59.4 "U sien nou is ons in 'n situasie dat volgens u, mens 'n sein het wat kan 'n onskuldige betekenis hê en 'n sinistêre betekenis, is dit reg? --- U Edele ja. Al wat ek tot dusver gesê het is hoe ek die interpretasie gesien het. Nee, u het baie meer gesê as dit. Ek stel die vraag weer aan u: Volgens u getuienis Vrydag en hierdie hof, het u 'n sein gestuur met hewoording wat 'n sinistêre betekenis kon hê of 'n

onskuldige betekenis. Is dit reg? --- U Edele ja, sekere mense kon dit seker so geïnterpreteer het.

Usel'f is een van hulle wat dit so kon interpreteer het. Kyk na 2338. --- Ek kyk na dit U Edele.

Ja, usel'f is 'n persoon wat dit so kon interpreteer het, want u sê "dit is hoe die sein geskryf sou word as dit is wat ek bedoel het."

As u 'n onskuldige bedoeling gehad het. --- U Edele ek vervys weer na Vrydag se getuienis. Dit was hipotetiese gevalle wat aan my voorgehou was.

Dit is nog steeds hipoteties. --- Wat ek mee saamgestem het."

Du Plessis 2402 : 30 - 2403 : 17

59.5

"Verwyder. --- Ek het dit erken, dat blywend nie noodwendig beteken dat - ag, ekskuus tog, nie blywend nie, permanent - nee, vervyder, dit was die woord gewees. Ek het erken dit is algemene terminologie in die veiligheidsmagte gewees op daardie stadium.

En mens sou amper vervag het dat u die woord "vervyder" sou gebruik het. Is dit reg? --- Ek het die woord "vervyder" gebruik U Edele.

Nee, as u wou gehad het hy moes aangehou word vir 'n lang tydperk, sou u amper vervag het dat u die woord "vervyder" sou gebruik het. --- Ek sou sê ja U Edele.

Reg, en mens sou amper vervag het dat u die woord of "gemeenskap" of "samelewing" sou gebruik soos die polisie hyvoorbeeld gedoen het in van die dokumente wat u gesien het, is dit reg? --- Ek kan nie onthou dat die - ja, "vervyder" en "uit die samelewing", ek stem saam met dit.

Ja. Mens sou dit amper vervag het, is dit korrek? --- Dit is korrek U Edele.

Ja. En as mens, as u dit nou wou gehad het dit moes vir 'n besondere lang tyd, 'n blywende tydperk gebruik het, wat se woord sou u gebruik het? --- Ek sou blywend gebruik het U Edele.

Permanent? --- Ek het permanent gebruik U Edele. Ek gaan werklik nie - U Edele as ek mag iets sê - ek gaan nie verander van wat ek gesê het nie. Ek gaan nie sê wat Mnr. Mostert wil hê ek moet sê nie."

Du Plessis 2409 : 26 - 2410 : 21

60. Equally pertinent is the semantic value of "verwyder" within the "veiligheidsgemeenskap". See supra, par. 18.6.

Du Plessis confirmed the use of "verwyder" within GBS circles on many occasions.

On each one of those occasions the word had an innocent meaning. No single instance could be demonstrated where the word was capable of denoting murder or killing. There is no single instance on record where the word "permanent" invested "verwyder", or any other word for that matter, with a culpable or sinister meaning.

THE CREDIBILITY OF DU PLESSIS:

61. At p. 2425 of the record, Du Plessis says:

"Ek is nie 'n perfekte getuie nie. Ek aanvaar dat my getuienis kan varieer".

62. No greater truth was spoken by Du Plessis in his entire sojourn in the witness box. If there is criticism of that testimony, it exists in the extent of its understatement.

63. During the course of argument before this Court, a fully detailed document will be provided of the various contradictions by Du Plessis of his own testimony. For the present moment, we present no more than the following telling instances of contradictions:

63.1 The content of paragraph 6 of Du Plessis's first statement (Bundle 1, p. 104) is in direct conflict with the last sentence of paragraph 9 of his second statement, being "F4".

63.2 In paragraph 9 of Exhibit F4 Du Plessis states:

"Hy het my meegedeel dat hy kort voor my aankoms 'n telefoniese gesprek gevoer het met Generaal Van Rensburg en dat laasgenoemde aan hom gesê het dat hy ons sal kan uithelp om ontslae te raak van Goniwe."

(our underlining).

In Court Du Plessis, however, repeatedly said that Van Der Westhuizen referred to " ... help met die Goniwe probleem".

"Hy het my ingeroep en gesê "ek het nou net met Generaal Van Rensburg gepraat en hy het aangedui dat hy ons kan help met die Goniwe probleem"."

Du Plessis 2020 : 30 - 2021 : 2

"Generaal van Rensburg het gesê hy kan ons help met die Goniwe probleem."

Du Plessis 2025 : 11-13

"Kan u glad nie onthou wat hy vir u gesê het in verband met sy telefoniese gesprek met Generaal van Rensburg nie? U sê hy het gesê dat y, dis Generaal van Rensburg, kan u help met die probleem. --- Ja."

Du Plessis 2026 : 28-31

"HOF: Kan ek net dit vir u vra; die telegram of the sein is gestuur van Generaal van Rensburg en u sê dat u het van Van der Westhuizen verneem dat Generaal van Rensburg sal u help om die Goniwe probleem op te los."

Du Plessis 2108 : 16-19

"Wat ek weet is wat Generaal van der Westhuizen vir my gesê het, en dit was dat hy 'n gesprek gehad het met Generaal van

Rensburg en dat hy kan uithelp om van die Goniwe probleem ontslae te raak soos wat dit hier staan."

Du Plessis 2209 : 22-26

"Sover my rekolleksie strek, en ke bly daarby, is toe Generaal van der Westhuizen my ingeroep het, toe het hy vir my gesê hy het met Generaal van Rensburg gepraat, en Generaal van Rensburg het gesê hy sal ons kan help met die Goniwe probleem. Ek bly daarby".

Du Plessis 2309 : 5-10

63.3 When he was asked whether he knew who was responsible for the murder of Goniwe and the others, Du Plessis stated that he had tried to find out. He added:

"Ek het met die Veiligheidspolisie gepraat, ek het met die polisie gepraat, ek het met N.I. gepraat ek het met die Reccies gepraat, ek kon geen antwoord kry nie"

Du Plessis 2062 : 2-9

However, in cross-examination it became clear that he had never discussed Goniwe's death with any member of the Reccies.

"MNR MOSTERT: Het u die Reccies gevra of nie? --- Ek het die Veiligheidspolisie gevra, ek het die uniformtak van die polisie gevra, ek het vriende van my gevra. Ek kan nou nie onthou, dis

agt jaar gelede, op watter geleentheid nie, wie betrokke was, en niemand kon vir my 'n antwoord gee nie, of niemand was bereid om vir my 'n antwoord te gee nie.

Het u die Reccies gevra? --- Ek kan nou nie spesifiek onthou nie. Ek het hulle in elk geval nie gebel nie.

Bladsy 2062 U Edele.

"Ek het met die Veiligheidspolisie gepraat, ek het met die polisie gepraat, ek het met MI gepraat, en ek het met die Reccies gepraat."

Wat sê u nou? --- Ek volstaan daarby.

Maar u kon so pas nie onthou nie? --- Maar ek kan nie onthou spesifiek wanneer ek met hulle gepraat het nie.

Nee, nee, dit was nie die vraag nie. --- Maar ek het ook nie telefonies met hulle gepraat nie.

U is gevra of u met die Reccies gepraat het, nou net. U het gesê (tussenheide) --- Ek het so gesê.

Na die beswaar van u advokaat toe het u gesê u kan nie onthou of u met die Reccies gepraat het nie. U sien kolonel, as u gister 'n ding sê en u kan vandag dit nie onthou of u dit gesê het of nie, dan is die hele stelling begin naderhand verdag raak. Het u hoegenaamd met enigeen gepraat as u dit nie van dag tot dag kan onthou nie? Wat is u kommentaar? --- Ek volstaan by wat ek gister gesê het. Ek het met al daardie instansies gepraat. Plaaslik is dit maklik om te onthou. As dit by die Reccies kom kon ek miskien verneem het tydens 'n vergadering of 'n besoek aan Pretoria ensameer. Ek kan nie onthou nie, maar ek bly volstaan dat ek gevra het of die Reccies betrokke was.

Met wie het u by die Veiligheidspolisie gepraat? --- Met Kolonel Snyman.

Wie nog? --- Nee, net met Kolonel Snyman.

Met wie het u by die polisie gepraat? --- Met Generaal Rust.

Generaal? --- Rust.

Rust? --- Ja.

Met wie het u by MI gepraat? --- Ek kan nie nou sy naam onthou nie. Hy was die streeksdirekteur van MI op daardie stadium.

En met wie het u by die Reccies gepraat? --- Nee, ek kan glad nie onthou van die Reccie aangeleentheid nie, want dit kon enige plek gewees het. Dit kon hier in Port Elizabeth gewees het, dit kon in Pretoria gewees het.

Kon dit gewees het dat dit glad nie gebeur het nie? --- Ekskuus?

Kon dit gewees het dat dit glad nie gebeur het nie, dat u glad nie met die Reccies gepraat het nie? --- Nee, ek het verneem, ek volstaan daarby, dat ek verneem het. Ek kan nou net nie vir u besonderhede gee hoe ek verneem het of die Reccies betrokke was nie."

63.4 Du Plessis initially refused to admit that he had been dissatisfied with the financial aspects of his retirement from the SADF and stated that he was treated fairly.

"En toe u uittree het die weermag vir u 'n billike pakket laat toekom? --- Onder die omstandighede, ek wil teruggaan, kan ek 'n agtergrondskets vir u gee?

Antwoord net die vraag.

HOF: As dit nodig is vir u antwoord op die vraag dan kan u dit doen. --- Ek dink dit was 'n billike pakket gewees, ja. MNR

MOSTERT: U sien dis die heel teenoorgestelde wat u vir my daardie dag gesê het. U het 'n groot gedeelte van daardie oggend deurgebring om aan my te vertel hoe onbillik is u deur die weermag behandel. --- Dit is wat ek nou aan U Edele wou verduidelik het. Nie onbillik behandel nie. Ek glo nie dit was my woorde gewees nie, en (tussenheide) Veel erger. Veel erger. Ek sê onbillik. Kom ons gaan op die besonderhede in. Watse pensioen kry u? --- Tesame met my annuïteite oor die R2 000,00 'n maand. Watse annuïteite is dit? Dis versekeringspolisse? --- Ja. Nee, maar wat betaal die weermag u per maand? --- R1 300,00/R1 400,00 'n maand. R1 400,00 'n maand? --- Ja. U sien dis juis wat u vir my gesê het. --- Ek sien nie die relevansie (tussenheide)

Dat u u hele loopbaan in die weermag deurgebring het en hulle laat u, nadat u kolonel rang bereik het, laat hulle u in die aand van u lewe met R1 400,00 'n maand. U was bitter ontevrede. --- Ek het dit nie so te kenne gegee nie, werklik nie. Is u doodtevrede? --- Ek wou netnou aan U Edele verduidelik het, maar ek was nie die geleentheid gegee gewees nie. Goed, verduidelik nou. --- Ek het in 1990 op pensioen gegaan, maar dis nou op pensioen in hakies, en van daardie tyd af, dit was die einde van Mei, ondergrondse aktiwiteite betref, koverte aktiwiteite, nou ek weet nie of ek daarop moet uithrei nie, totdat die befondsing skandaal in Natal ten opsigte van Inkatha plaasgevind het. Toe het die Staatspresident gesê dat die front organisasies moet toegemaak word, wat wel gebeur het teen die einde van Augustus 1991. Ek was toe terugverplaas gewees na die kommandement hoofkwartier toe as 'n burgerlike, 'n siviele werker. Ek het daar gebly tot die einde van Januarie 1992 en toe het ek uit my eie vrye wil besluit om te bedank. As die implikasie of die insinuasie liever is dat ek finansiële probleme het dan is dit so, ek ontken dit nie, maar dit is nie as gevolg van die feit dat die weermag my sleg behandel het nie. Ek het my gratifikasies gekry, ek het R35 000,00 gekry net vir opgehoopte verlof, maar ek het daardie geld tydens 'n besigheidspoging in Alice in die Ciskei verloor toe die ANC my

daar uitgeskop het. So ek is finansieël in 'n onbenydenswaardige posisie, ek myself persoonlik, omdat ek my geld verloor het. As dit nou is wat die hof wil hoor. Kom ek vra dit vir u. As u nie na koverte operasies oorgeplaas is en u het u volle dienstermyn uitgedien, en toe uitgetree, sou u baie beter daaraan toe gewees het of slegter daaraan toe gewees het? --- Dit sou 'n verskil gemaak het van 'n addisionele 7/8 jaar diens. Wat beteken dit in geld? Eerste wat gratifikasie betref? --- Dit sou nie so vreeslik beteken het in my geval nie want ek het nie soveel jare diens gehad dat dit 'n aanmerklike verskil sou gemaak het nie. En in pensioen? --- Wel ek kan werklik nie sê nie. Mens moet iemand vra om die formules te gebruik om uit te werk watse verskil dit sou gemaak het. Kan ek u dit vra. U weet wat 'n pakket is né? --- Ja. En u het in werklikheid 'n pakket vervag? --- Ek het 'n pakket gekry. Ek het gratifikasie gekry, my verlof was uithetaal, en ek kry 'n pensioen, en ek het op die ou end self bedank. Wat u vir my destyds gesê het is dat hulle, u het gevra vir 'n pakket en hulle het vir u gesê u gaan nie 'n pakket kry nie, maar 'n pensioen. 'n Pakket is iets anders. Ek weet wat 'n pakket is kolonel, en u weet wat 'n pakket is. U het nie 'n pakket gekry nie, is dit reg? --- Sover my betref het ek 'n pakket gekry, want ek het 'n gratifikasie bedrag gekry, my verlof was aan my uithetaal gewees, en ek kry 'n pensioen. Wel kom ek stel dit aan u dat u het uitdruklik gesê, onthou u daardie dag in Februarie in my kamer in Johannesburg, onthou u dit? --- Ja. Mag ek vra wat u daar lees? --- Ek het net gekyk. Dit is (tussenbeide) Wat is dit? Dis u verklaring. Goed. Kom ons gaan terug daar na, onthou u daardie dag in my kamer? --- Ek onthou dit. En onthou u dat u vir my gesê het dat u het gevra vir 'n pakket, u het gemeen u was geregtig op 'n pakket, en hulle het geweier om u 'n pakket te gee, maar bloot 'n pensioen, en u was bitter gegrief daaroor? --- Ek kan dit nie onthou nie."

Du Plessis 2212 : 9 - 2215 : 7.

In cross-examination Du Plessis was, however, compelled to admit that he had been dissatisfied with his gratuity and monthly payments.

"Ja, u het dit nou al by herhaling gesê, maar die feite is anders. Aan die hand van die antwoorde wat u so in die laaste vyf minute vir Sy Edele gegee het sê u nog u was ontevrede met u

R1 000,00 'n maand en die helfte van die gratifikasie? Sê u dit nog? Sê u nog dat u was tevrede met u R1 000,00 'n maand en helfte van die gratifikasie? --- Wel dis R1 300,00 'n maand, en die gratifikasie het omtrent die helfte beloop, wat nie aan my verwagtinge voldoen is nie, so ek kan nie vir u sê dat ek tevrede was daarmee nie, maar ek het nie 'n grief teen die weermag nie. Ek sal daarby volstaan, u was ontevrede, is dit reg? --- Ek is nou nog ontevrede."

Du Plessis 2232 : 15-26

CHAPTER III

VAN DER WESTHUIZEN AS A WITNESS:

64. We preface our submissions on this topic with one or two observations.

Van Der Westhuizen testified on matters of fact, opinion and on hypothetical issues. An analysis of his evidence shows that he was a good witness on the first of these two subjects, and was more than a match for the cross-examiners.

On a few occasions he experienced some difficulty when questioned on hypotheses, the latter usually of the questioner's making and tailored to achieve his objects.

The fact that Van Der Westhuizen may have fared poorly in picking his way through a minefield of hypotheses and concepts, may reflect on his ability as a conceptual thinker, but hardly contributes to the assessment of his veracity on matters of fact and expertise.

Nor does it contribute to the main task in hand: The search for the perpetrator of the Goniwe murder.

His ability to reason conceptually and deal with hypotheses *ad lib*, could never serve as proof positive of his innocence in the face of damning evidence. Equally, his poor showing in dealing with concepts and hypotheses can hardly be proof of his complicity in the Goniwe murders in the present absence of other evidence.

Much, if not all, of the questioning of Van Der Westhuizen on the topic of the signal of 7 June 1985 was in the form of hypotheses and hypothetical questions.

65. 65.1 Van Der Westhuizen cannot recall the conversation with Van Rensburg on 7 June 1985, nor can he recall that he ordered Du Plessis to send a signal to Van Rensburg.

65.1.1 "Wat die sein self betref dien vermeld te word dat dit nie in my skrif is nie, en dat ek dit ook nie geteken het nie. Ek kan die sein, as dit wel ooit bestaan het, glad nie onthou nie".

Bundle 1, p. 108, par. 15

- 65.1.2 "Wat die inhoud van die sein betref, kan ek ook nie die genoemde telefoongesprek met Generaal Van Rensburg onthou nie. Ek kan daarom ook nie onthou hoekom enige name aan General Van Rensburg voorsien moes word nie".

Bundle 1, p. 109, par. 16

- 65.1.3 "As 'n vergadering gereël was om die heraanstelling van Matthew Goniwe te bespreek, sou u verwag het dat u in kennis gestel sou word as so 'n vergadering by die SSVR gehou sou word of nie? --- Ja heel waarskynlik U Edele, ek sien ook die sein verwys na telefoongesprek. Ek kan nie die telefoongesprek onthou nie maar ek aanvaar dat Genl. Van Rensburg dan vir my gesê het op 7 Junie daar is 'n groep aangestel - Geldenhuys Kommissie aangestel oor hierdie aangeleentheid. Ek kan dit egter nie onthou nie."

Van Der Westhuizen 2489 : 3-11

- 65.1.4 "U Edele ek weet nie. Ek kan nie die gesprek onthou soos wat Generaal van Rensburg dit skynbaar onthou nie. Ek het vir u gesê soos wat ek dit interpreteer op die hipotese dat ons 'n gesprek gehad het."

Van Der Westhuizen 2617 : 29 - 2618 : 3

- 65.1.5 "Ek sal my vraag herhaal omdat dit is mos die kruk van die saak, ek wil u 'n kans gee om te verduidelik. Hoe 'n gesprek tussen 'n generaal en 'n brigadier, en 'n gesprek deur 'n brigadier en 'n kolonel, tot die woorde dat die drie mense moet van die samelewing permanent verwyder word, as die een sê dat die gesprek het oor aanhouding gegaan en die ander sê dit was net in verband met die heraanstelling en oor die alternatiewe, hoe kon daar misverstand gewees het deur 'n generaal, 'n brigadier en 'n kolonel? Verduidelik dit asseblief. -

-- Ek weet nie, ek probeer ook soos u 'n sin gee daaraan. Al wat ek vir u kan sê is wat ek kan onthou, en ek het sekere aanvaardings gemaak daar rondom. Daar kon 'n misverstand gewees het dan, selfs tussen my en Generaal van Rensburg of tussen my en Kommandant du Plessis wat die sein gaan opstel het. Ek kan nie onthou wie wat vir wie gesê het nie."

Van Der Westhuizen 2696 : 22 - 2697 : 7

65.1.6

"So toe hy die woorde gestuur het sê hy dat dit is hoe hy dit verstaan het, en dit is waarom hy die woorde gebruik het, en die woorde wat hy hier in sy verklaring en sy getuienis dat u het die woorde van Goniwe ontslae te raak, of woorde tot die effek, as u kan nie onthou wat die gesprek tussen u en Du Plessis was nie hoe kan u nou sê dat hy nie reg is toe hy die getuienis gegee het nie? --- Maar as ek dit nie kan onthou nie dan beteken dit nie dat dit wat hy sê korrek is noodwendig nie.

Nee, u is nie in staat om dit te ontken nie? --- Nee, ek is nie in staat nie want ek kan dit nie onthou nie, maar ek kan nie dink dat ek sulke woorde teenoor hom gesê het nie.

HOF: Kan ek net dit vir u vra op hierdie stadium. Het Generaal van Rensburg, u sê u kan nou nie hierdie telefoon gesprek of telefoniese gesprek waarna verwys word in die sein, sê u kan u nie onthou nie (tussenbeide) --- Ja.

Het Generaal van Rensburg ooit op enige stadium vir u gesê dat hy kan u help met die Goniwe probleem? --- Nie wat ek van weet nie, nee.

Ontken u dit as daar sulke getuienis is, of sê u dit is moontlik, u kan nie onthou nie, of wat is u antwoord? --- Nee, wat ek sê dit is moontlik tydens hierdie telefoon-gesprek wat ek aanvaar op 7 Junie plaasgevind het, dat hy sou gesê het ek kan julle help met die Goniwe probleem, kan julle vir my 'n inset lewer. So in daardie konteks ja, kan ek dit aanvaar. Ek kan dit egter nie onthou nie."

Van Der Westhuizen 2556 : 14 - 2557 : 10

65.1.7 "Nou goed. Met ander woorde, Du Plessis verwys na 'n beweerde telefoongesprek tussen u en Van Rensburg op daardie 7de Junie. --- Beweerde is korrek U Edele want ek kan nie die telefoongesprek onthou nie."

Van Der Westhuizen 2541 : 13-16

65.1.8 "Wel, het u aan hom gesê dit is wat die generaal wil hê? --- U Edele ek weet nie ek kan nie die gesprek tussen my en Lourens vir u herhaal nie, ek kan dit nie onthou nie."

Van Der Westhuizen 2710 : 3-5

66. During cross-examination, Van Der Westhuizen was criticised for his inability to recall his conversation with Van Rensburg.

66.1 "HOF: Sien ek vind dit baie snaaks. Hierdie was 'n baie ernstige, 'n baie belangrike probleem waarmee almal gesit het. Hulle moes nou besluit wat moet met Goniwe gebeur, en ek vind dit baie snaaks dat u kort-kort vir ons sê u kan glad nie onthou nie, u kan niks van die sein onthou nie, u kan niks van die telefoniese gesprek onthou nie, u kan nie onthou wat u vir Du Plessis sou gesê het nie, u kan nie onthou watter opdrag u vir Du Plessis sou gegee het nie."

Van Rensburg 2585 : 9-16

66.2 Mr. Bizos asked Van Der Westhuizen why he was unable to recall the signal and yet was able to recall the signal of 23 May 1985.

"Waarom onthou u die een en nie die ander nie? --- Dit kan net wees dat die notule en die sein van Meimaand my meer voor die gees gestaan het as die ander ene. Dit is vir my moeilik om nou terug te dink waarom ek die een beter onthou as die ander een U Edele."

Van Der Westhuizen 2619 : 24-31.

66.3 The importance of Van Der Westhuizen's conversation with Van Rensburg should be seen in context. The fact that Goniwe was an important activist did not necessarily render the conversation one of exceptional importance. The conversation between Van Der Westhuizen and Van Rensburg was one where the latter required an official input from the GBS of the Eastern Cape. This input was required as part of the material which was to be laid before the Geldenhuys committee which had been established on the previous day and was to commence sitting on 7 June 1985.

Moreover, the view expressed by Van Der Westhuizen was one which was already widely held and required but a moment's reflection to express. Equally, the instruction to send a signal confirming what had already

been a *fait accompli* in the conversation required neither time nor effort.

66.4 Goniwe was a particular problem and therefore of greater importance to Mr. Merboldt of the Department of Education and Training and his department, Colonel Snyman and the South African Security Police, and especially Major Winter and his staff.

66.5 It must be stressed that the importance of the conversation must be seen in context. Throughout the questioning of Van Der Westhuizen, attempts were made to escalate the importance of the Van Rensburg conversation in an attempt to discredit Van Der Westhuizen's inability to recall. Full allowance must be made for both the passage of time and the fact that the conversation may have had a lesser importance than that which was attributed to it in the questioning.

"En ek wil aan u stel dat paragraaf 16, toe die verklaring gemaak was, was gedoen om aan u die opsies in die toekoms oop te laat. U was nie bereid om te sê wat tussen u en Generaal van Rensburg gesê is en dat u moes wel onthou het wat die gesprek was in so 'n belangrike saak. --- Nee U Edele dit is nie so nie. Ek

dink ook die saak word in sy belangrikheid uit konteks uitgeruk vir my persoonlik."

Van Der Westhuizen 2620 : 21-27).

67. Van Der Westhuizen explained his inability to recall his conversations with Van Rensburg and Du Plessis as follows:

67.1 "So met ander woorde u kan nie vir my sê of u dit moontlik vir Van Rensburg gesê het of nie, dat u aanbeveling of u voorstel is dat Goniwe aangehou moet word. --- U Edele nee ons fokus nou hier op 'n besondere gesprek, ek was baie, baie besig gewees, ek kan nie detail onthou van wat gesê is en vir wie en wanneer wat gesê is nie."

Van Der Westhuizen 2584 : 18-23

In paragraphs 5 and 6 of his statement of 10 May 1992, Van Der Westhuizen gives an indication of the enormous task that rested on his shoulders during the relevant period:

"5. My taak as voorsitter van die OPGBS is verder bemoeilik deur geskille tussen die Transkei en die Ciskei, welke state beide in my verantwoordelikeheidsgebied geval het. Daar was destyds reeds 'n Gesamentlike Bestuursraad vir elk van die Transkei en die Ciskei, en ek was ook die voorsitter van daardie rade. Daarbenewens het die onstabiele situasie in die suidelike gedeelte van Lesotho en die Herschel-gebied ook baie van my aandag geverg.

6. In my hoedanigheid as die bevelvoerder van die Kommandement Oostelike Provinsie het ek ongeveer 30,000 lede onder my bevel gehad, en my verantwoordelikeheidsgebied het bestaan uit die Transkei, Ciskei, die Herschel gebied, Noord-Oos Kaap sowel as die Grens en 'n groot gedeelte van die Karoo. Hierdie pos alleen is normaalweg op sigself 'n voltydse taak."

67.2 "HOF: Ja. --- Dit het niks met die Departement van Verdediging te make gehad oor wat moet met Goniwe gebeur nie. My hydrae of my aandeel aan die OP GBS was uit 'n GBS hoedanigheid gewees. So ek kan onthou van probleme maar dit het nie vir my as Brigadier van die OP persoonlik geraak nie. Dit is 9 jaar gelede. Ek was in daardie tyd net enkele dae in Juniemaand in Port Elizabeth gewees - ek was die meeste van die tyd in Pretoria. Ons was besig met 'n plan wat ons moes gaan aanbied, Plan Strelitzia. Ek was baie besig U Edele. Of ek hierdie besondere gesprek moet onthou wat ek dan sou gehad het, ek dink net dit is te veel gevra. Ek kan dit net nie onthou nie. Dit staan my nie uit nie, dit val my nie by nie. Die heel eerste dag toe ek my verklaring gemaak het toe het ek gesê ek kan nie onthou dat ek so 'n gesprek of iets meer weet van daardie sein nie."

Van Der Westhuizen 2586 : 3-17

67.3 "So as die antwoord, as ons die antwoord of die verduideliking wat u gegee het totaal en al aanvaar, dit lyk of die Goniwe probleem as ek dit so kan stel, was nie te hoog in u agenda nie. - -- As Bevelvoerder, Kommandement Oostelike Provinsie, met ander woorde met my weernaghoed op sal ek sê ja U Edele. Ja maar die rede - as u nie kan onthou nie, as u die ander hoed sou opgesit het as die voorsitter van die OP GBS, dit sou nie meer belangrik gewees het nie. In daardie hoedanigheid ook die probleem van Goniwe self was nie hoog op u agenda nie. --- U Edele nee, met daardie hoed op het ek kennis geneem van die OP GBS se standpunt rondom Goniwe. Ek sal nie sê dit was vir my uitermate belangrik gewees nie. Ja. En behalwe die sein van die 23ste en die besluit wat daar genceem is, verder u het geen persoonlike ... --- Belangstelling? Ja, u het nie persoonlike belangstelling in enige, of op die een hoedanigheid of die ander, u het nie soveel belang gestel nie. Dit

6. In my hoedanigheid as die bevelvoerder van die Kommandement Oostelike Provinsie het ek ongeveer 30,000 lede onder my bevel gehad, en my verantwoordelikhedsgebied het bestaan uit die Transkei, Ciskei, die Herschel gebied, Noord-Oos Kaap sowel as die Grens en 'n groot gedeelte van die Karoo. Hierdie pos alleen is normaalweg op sigself 'n voltydse taak."

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was 'n probleem wat moet deur die ander departemente moet opgelos word. --- Dit is korrek, dit was 'n lynunksieprobleem van Onderwys en Opleiding en SAPV U Edele.

Ja. En nie 'n probleem van u in u hoedanigheid as die bevelvoerder van die Kommandement en ook nie as die voorsitter van die OP GBS nie. --- Wel hoogstens in die mate waartoe Mnr. Goniwe se aktiwiteite die onluspotensiaal in die O P kon verhoog. In daardie sin kon dit vir my belangrik gewees het U Edele."

Van Der Westhuizen 2681 : 12 - 2682 : 9

67.4 "Ja U Edele, ek dink die probleem hier is die lang tydsverloop. Dit is nie asof mens praat oor 'n gesprek wat jy gisteroggend gehad het nie. So dit is baie moeilik om pertinent te sê by woorde wat is bespreek en nie bespreek nie. Ek kan dit net nie onthou nie."

Van Der Westhuizen 2688 : 13-18

68. It is apparent, therefore, that Van Der Westhuizen had an enormous workload. He was under extreme pressure at the time. He was under pressure from the Minister of Defence to resolve the problems of the Eastern Cape, and in addition, he put a lot of work into Plan Strelitzia.

"Ons het baie hard gewerk daarvoor en ek dink my hele wese was op Strelitzia ingestel gewees"

Van Der Westhuizen 2831 : 5-7

- 68.1 Much of Van Der Westhuizen's evidence in this regard is confirmed by Du Plessis.

"U Edele in ongeveer Augustus 1984 het die onrusituasie begin ontwikkel hier in die Oos-Kaap. Aanvanklik was die weermag nie betrokke daarby nie. Die polisie het dit hanteer. Van die begin van 1985 af was die weermag betrokke gewees en deurlopend - 1985/86 was daar veral aan die begin van 85 geweldige druk van politici se kant af op Generaal Van der Westhuizen om die situasie plaaslik op te los en soos ek gister ook genoem het, was die opdrag deurgaans gewees "julle moet die probleem op grondvlak oplos. Ons kan nie vir julle sê hoe om dit op te los nie." En dit het ontwikkel - nou as ek mag U Edele wil ek net my respek vir Generaal Van der Westhuizen te kenne gee. Hy is 'n innoverende mens, hy is seker die beste bevelvoerder wat ek nog mee saamgewerk het. Ek wil dit graag noem. As gevolg van die druk het Generaal Van der Westhuizen allerhande innoverende idees tevore gebring, naamlik talle planne, onder andere Strelitzia."

Du Plessis 2055 : 8-24.

- 68.2 According to Du Plessis, the background of that which led to the signal was not mentioned by Van Der Westhuizen.

"5. Ons het nie die agtergrond wat aanleiding gegee het tot die betrokke sein enigsins bespreek nie en is dit my herinnering dat Brigadier van der Westhuizen my bloot 'n opdrag gegee hete om bepaalde inligting per sein oor te dra aan die Sekretariaat van die Staatsveiligheidsraad."

Bundle 1, p. 103, par. 5

Although Du Plessis declined to confirm his statement of 11 May 1992, he did confirm the correctness of paragraph 5. Du Plessis 2194 : 11 - 2199 : 22

He further said that:

" ... ek was net gesê 'verwys na die gesprek, noem die name van die persone wat betrokke is en spel uit die implikasies'"

Du Plessis 2108 : 13-15.

69. There are many mysteries attached to the whole question about mental recall, about which much has been written by psychologists and others. To the extent to which an answer can be given to Van Der Westhuizen's recall of the signal of 23 May 1985 and not the later one, a recall of some of the facts may assist.

The earlier signal related to the problem of the school boycotts. The role which Goniwe played in that regard was well-known amongst members of the GBS.

- "3. Ek wil kommentaar lewer oor waarom hy veerplaas is. Tydens 'n OP GBS vergadering is ek gevra om mnr Goniwe te verplaas. Dit het herhaaldelik gebeur omdat hy gesien is as die oorsaak van die onrus in Cradock. Ek kon nie daarop reageer nie omdat hy nie buite die dissiplinêre raamwerk van die Departement Onderwys en Opleiding opgetree het nie. Ek kan ook nie onthou wie spesifiek druk binne die OP GBS druk op my uitgeoefen het om Goniwe te verplaas nie. Dit was egter oorweldigende druk deur die hele vergadering. Omdat ek nie kon optree nie het hulle toe Onderwys en Opleiding, hoofkantoor, genader. Mnr Jaap Strydom het toe toegetree, hy het toe afgekom na die Oos-Kaap toe en 'n onderhoud met mnr Goniwe gevoer waarby ek nie betrokke was nie."

Merbold, Bundle 1, p. 5, par. 3

- "5. Wat betref die OP GBS vergadering is die notule van 23 Mei 1985 aan my getoon. Ek was teenwoordig op die vergadering as verteenwoordiger van die Departement Onderwys en Opleiding. Ek het gereeld my Departement daar verteenwoordig. Op 23 Mei 1985 het die OP GBS die besluit geneem dat mnr Goniwe nooit weer heraanstel moes word nie. Die besluit is geneem omdat hy homself ontslaan het en ek het die besluit ondersteun (par 26(a) van die Notule van 23 Mei 1985)."

Merbold, Bundle 1, p. 6, par. 5

- "4. Die laaste vergadering van die O.P.-G.B.S volgens die notule van 23 Mei 1985 wat gehou is voor 7 Junie 1985 (dit wil sê die datum waarop die sein uitgegaan het) is aan my getoon. Volgens die genoemde notule het ek nie sitting op die vergadering gehad nie. Volgens genoemde notule het daardie vergadering aanbeveel dat Matthews Goniwe en Fort Calata nooit weer aangestel moes word nie. Ek onthou dat altwee hierdie persone ondervysers was wat polities baie aktief was in

1985 en lei af dat die aanbeveling verwys na hulle heraanstelling. Dit is vir my verstaanbaar dat so 'n aanbeveling deur 'n G.B.S gedoen sou kon word."

Swart, Bundle 1, p. 88, par. 4

- "4. In die loop van my werksaamhede het dit tot my aandag gekom dat die betrokke mnr. GONIWE wat as onderwyser te Cradock, by die Departement van Onderwys en Opleiding diens gedoen het, afgedank is omdat hy versuim het om 'n verplasing na Graaff-Reinet te aanvaar. Die voortnelde afdanking en moontlike heraanstelling, was 'n aangeleentheid tussen mnr. GONIWE en sy Departement en nòg en nòg die S.A.P. se Veiligheidstak het daaroor beheer gehad."

Snyman, Bundle 1, p. 97, par. 4

- "12. Nog verder onthou ek dat Goniwe vir die Departement Onderwys en Opleiding ("O en O") besondere probleme verskaf het. 'n Mnr Merboldt van daardie Departement, wat die direkteur van "O en O" in Oos-Kaap was, het by geleentheid hierdie probleme met my bespreek. Na die beste van my herinnering was "O en O" vanweë een of ander rede onwillig om Goniwe af te dank, en is daar later besluit om hom te verplaas."

Van Der Westhuizen, Bundle 1, p. 108, par. 12

The school boycotts and Goniwe's role therein were often discussed at GBS meetings.

- "c. Die verplasing van die onderwysers van Cradock vind plaas. Aanvanklik was die onderwysers tevrede, maar hulle weier nou om die nuwe poste te

aanvaar. Dit is blykbaar agv die invloed van Matthew Goniwe."

GBS on 28 March 1985, Bundle 2, p. 24, par. 7(c)

"26. OP GBS aanbeveling. 'n Seinberig sal aan die SSVR gestuur word om ook deurgevoer te word na die betrokke ministers.

- a. Matthew Goniwe en Fort Calata moet nie ooit weer aangestel word nie.
- b. Die 248 vorige studente van die Kaaplandse Onderwyskolleë moet nie weer oorweeg word vir hertoelating gedurende 1985 nie."

GBS on 23 May 1985, Bundle 2, p. 20, par. 2

These discussions, and in particular Mr. Merboldt's strong views on the subject must have made an impression on Van Der Westhuizen.

"HOF: Ja, ek weet nie of u die vraag mooi verstaan nie. Ek dink die vraag is sou u, as u gevra was vir 'n inset, sou u gesê het wat sou u houding gewees het, die OPGBS se houding gewees het, met ander woorde sou u gekies het tussen die drie of sou u net eenvoudig die drie alternatiewes in die sein ingesluit het? --- Ek dink ons sou op 23 Mei se sein wat ons gesê het hy moet nie aangestel word nie, heelwat gewig daaraan verleen het en gesê het Mnr Goniwe moet nie heraangestel word nie, moontlik tot alternatief daarvoor moet hy verplaas word. Ek weet en ek kan onthou dat daar in die GBS, ek dink dit was deur Mnr Merboldt, aanhangig gemaak dat hulle hom Cradock toe wou verplaas.

Van Der Westhuizen 2560 : 10-21

"Ja, maar wat van die Departement van O en O? --- Mnr Merboldt van Department Onderwys en Opleiding was baie sterk daarop dat Mnr Goniwe nie weer aangestel moet word nie."

Van Der Westhuizen 2564 : 18-20

"Waarom onthou u soveel detail in verband met die sein van die 23ste Mei en so min van die sein van die 7de Junie? --- Ek het die sein van die 23ste het ek gesien in die stukke wat tot my beskikking was U Edele. Ek het ook die notule van die vergadering van die 23ste gesien en dit is eintlik die notule wat ek onthou van die bespreking wat daar was rondom Mnr. Goniwe. Ek dink ek het voorheen gesê dat Mnr. Merboldt in die besonder 'n probleem gehad het met hom en die kan ek baie goed onthou. Ek dink dit staan ook in my verklaring so"

Van Der Westhuizen 2587 : 28 - 2588 : 7

"MNR. BIZOS: Waarom onthou u die een en nie die ander nie? --- Dit kan net wees dat die notule en die sein van Meimaand my meer voor die gees gestaan het as die ander ene. Dit is vir my moeilik om nou terug te dink waarom ek die een beter onthou as die ander een U Edele. Maar die notule in verband met die heraanstelling wat u moes daarna geweet het van belang was aan die Geldenhuys-komitee was ook ter sprake. Waarom onthou u iets in verband met die een geleentheid en nie die ander nie? --- U sien wat ek kan onthou is dat Mnr. Merboldt baie omgekras was en hy het ook so te kenne gegee by die OP GBS dat sy departement nie met hom saamstem oor sy standpunt dat Mnr. Goniwe nie aangestel moet word nie en dat die GBS Mnr. Merboldt ondersteun het".

Van Der Westhuizen 2619 : 27 - 2620 : 10

70. Van Der Westhuizen was unable to recall his attitude at the time regarding the question whether Goniwe should be detained or not.

"Het u enige mening gehad ten opsigte van aanhouding as sulks?

--- Dit is wat ek sê ek nie kan onthou nie en wat ek nou heredenerend op probeer antwoord op wat ek sou gedoen het. Maar kan u nie vir ons sê wat het u gedink destyds ten opsigte van die aanhouding van Goniwe nie? --- Dit is soos ek reeds vir Adv Bizo geantwoord het, ek dink dit sou 'n tydelike oplossing gebring het.

Ja maar was u ten gunste daarvan dat hy aangehou moet word?

--- Nie wat ek van kan onthou nie, ek was saam met die OP GBS ten gunste van nie her-aanstelling gewees.

Bedoel u nou dat u glad nie weet wat u houding was destyds nie.

-- Behalwe om te sê dat dit was ten gunste van her-aanstelling, of nie her-aanstelling gewees nie.

Dit verstaan ek maar ek praat van die kwessie van aanhouding.

Sê u nou dat u weet glad nie wat u houding was ten opsigte van die moontlike aanhouding van Goniwe nie? --- Ja U Edele.

U het geen idee wat u houding was destyds nie. --- Ek kan glad nie onthou wat my houding daaromtrent was nie.

Van Der Westhuizen 2583 : 3-22.

This is hardly a ground for the criticism of Van Der Westhuizen's evidence. This evidence is a reliable indicator of Van Der Westhuizen's honesty. He could, with consummate ease, have said that he was in favour of Goniwe's detention. Had he said so, he would have strengthened the argument that the signal relates to detention and not to murder. He chose not to do so. Full weight must be given to the implications of honesty inherent in his evidence.

71. Van Der Westhuizen was cross-examined at length as to whether he would have made a recommendation to Van Rensburg on 7 June

1985 without consultation with any of the bodies of which he was the chairman, the security police or the Department of Education and Training.

"Ek vra u of daar enige besluit was om te aanbeveel dat die mense moet permanent aangehou word, ja of nee? --- Nee.

En u as 'n destydse brigadier en nou 'n generaal, wat in "clear and unmistakable language" praat, sou nie enige aanbeveling gemaak het sonder 'n besluit van die OPGBS of die dagbestuur van die OPGBS of GOS of GIS nie? --- Die aanhouding van mense in die algemeen was bespreek gewees, veral by die Gesamentlike Inligtingsentrum. Die identifikasie en die aanhouding van daardie mense was die SAPV se departementele taak gewees. Maar dit was bespreek gewees. So ek het kennis gehad dat een van die metodes wat met politieke aktiviste kon gebeur het was aanhouding gewees.

Generaal, ek dink dat alhoewel my Afrikaans nie te goed is nie, ek dink dat u die vraag wel verstaan het. Sou u 'n aanbeveling gemaak het wat nie aanbeveel was deur een van die strukture waarvan u óf die voorsitter óf 'n lid was of nie? --- Nee, ek sou nie, maar dit sluit nie in dat daar nie 'n bespreking kon oor gewees het en dat ek kennis gedra het nie.

Ja, ek praat nie van besprekings nie. Ek praat van besluite om aanbeveel te word aan die mense wat die bevoegdheid gehad het om dinge te doen. Daar was geen besluit om 'n aanbeveling te doen nie. Dit is wat ek vir u vra. --- Ek verstaan.

En wat is die antwoord? --- Ek dink nie ek sou dit gedoen het as ek nie ten minste 'n bespreking daarvoor gehad het en kennis gehad het nie, ek sou dit nie self uitgedink het nie. Die ander aspek is Generaal van Rensburg kon my in daardie oggend se gesprek gevra het wat van aanhouding.

Nee, ek wil u vra sou u sonder konsultasie met een of ander van die strukture waarvan u óf die voorsitter óf 'n lid was 'n aanbeveling gemaak het sonder 'n besluit dat so 'n aanbeveling moes gemaak word? --- Nee, ek sou nie. Ek wil weer by sê, ek sou heel waarskynlik darem bewus gewees het wat die Suid-Afrikaanse Veiligheidspolisie se houding was.

Ja, maar wat van die Departement van O en O? --- Mnr Merholdt van Departement Onderwys en Opleiding was baie sterk daarop dat Mnr Goniwe nie weer aangestel moet word nie.

En wat van die minister se houding daarna? --- Ek is nie seker van die minister se houding daarna nie.

Nee jammer, ek trek daardie vraag terug. Die vraag is in die OPGBS daar was 'n verteenwoordiger van die O en O? --- Dis reg.

Hy was van mening dat hy moet nie heraan gestel word nie? --- Korrek.

Daar was nooit enige besluit by die OPGBS om aan te beveel dat Goniwe-hulle moet permanent aangehou word nie? --- Nee, u is heeltemal korrek.

As ek nou korrek is het ons 'n generaal in daardie getuiebank wat sou nie 'n aanbeveling gemaak het aan die SSVR sonder 'n besluit dat daardie aanbeveling moes gemaak word? --- Ek wil weer sê ek was heel waarskynlik bewus van Kolonel Snyman of van ander Veiligheidspolisie lede se alternatief, naamlik aanhouding sover dit Mnr Goniwe aanbetref. Tweedens het ek aanvaar dat Generaal van Rensburg my geskakel het daardie oggend, en wil ek aanvaar dat daardie moontlikheid ook daar bespreek sou gewees het. Dan derdens wil ek aanvaar dat ek dit in daardie sin aan Kommandant du Plessis sou oorgedra het.

HOE: Kan ek dit net vra. Die sein praat van 'n voorstel? --- Ja. En ek dink die vraag is u sê dit word voorgestel dat so-en-so, nou ek dink die vraag is sou u dit op u eie geneem het om te sê dit is die OPGBS se voorstel, of sou u eers seker gemaak het dat dit wel die OPGBS se voorstel was en nie net u eie voorstel nie? -- Al twee is moontlik. Eerstens ek kon seer sekerlik bewus gewees het wat die houding was ten opsigte van Mnr Goniwe deur die individuele lede van die OPGBS. Ten tweede het ek 'n mandaat volgens my pligstaat gehad om aanbevelings te maak aan die Staatsveiligheidsraad uit hoofde van my aanstelling uit. Ja, maar kyk na die sein, is dit 'n persoonlike voorstel of is dit 'n OPGBS voorstel? Kyk net bo aan op die sein. --- Nee, dit is (tussenheide)

Dit sê "Van OPGBS aan SSVR". --- Ja, dit is 'n OPGBS voorstel.

Nou as die OPGBS nie besluit het dat dit die voorstel moet wees nie sou u dit op u eie geneem het om te sê dit is die OPGBS se voorstel? --- Dit is moontlik omdat ek bewus was van wat die lede se houding was omtrent die aangeleentheid.

So u sou dit moontlik op u eie geneem het om te sê dit is wat die OPGBS wil hê? --- Ja, behalwe dat op my eie, sonder enige bespreking daarvoor, sou ek dit seker nie, ek sou dit nie self uitgedink het nie. So ek wil aanvaar daar was 'n bespreking gewees, dat ek bewus was van die Veiligheidspolisie se houding, en dat ek dit ingesluit het in die moontlikheid, of in die gesprek wat ek met Generaal van Rensburg gehad het, en dit daarna herhaal het aan Kommandant du Plessis.

Wat bedoel u by 'n bespreking? 'n Bespreking daardie dag of 'n bespreking op 'n vorige dag? --- Nee, nee, ek verwys na die telefoongesprek op 7 Junie.

Ja, maar kyk die telefoongesprek lyk dit vir my was miskien 'n vraag deur Generaal van Rensburg aan u. --- Ja.

In ander woorde Generaal van Rensburg praat met u en tydens die gesprek tussen u en Van Rensburg vra hy vir u wat is die OPGBS se houding, of wat is hulle voorstel? --- Korrek.

Nou sou u dit dan daardie dag met die ander lede van die OPGBS bespreek het, of sou u sommer dadelik vir hom gesê het wat is die OPGBS se voorstel? --- Wel uit die aard van die saak sou ek vir hom gesê het terwyl hy met my gepraat het, vir hom gesê het wat is die OPGBS se houding daaromtrent. Ek weet nou nie wanneer die telefoongesprek plaasgevind het nie, of 'dit nou voor die vergadering was of na die vergadering.

En wat sê u was die OPGBS se voorstel op daardie stadium? --- Dat Mnr Goniwe nie weer heraan gestel moet word nie.

Is dit al? --- Nee, en dan soos ek gesê het met die alternatiewe van aanhouding of verplasing. Verplasing kan ek baie pertinent onthou. Ek weet nie of dit genotuleer is nie, maar daar was definitief sprake gewees dat Mnr Goniwe as ek reg onthou Graaff-Reinet verplaas kon word, en as ek reg onthou sou dit met bevordering gewees het.

Nou as u dan vir Kolonel du Plessis ingeroep het en vir hom gesê het ek het nou 'n gesprek gehad met Van Rensburg en ek wil hê u moet my gesprek bevestig, u moet 'n sein stuur waarin dit bevestig word, sou u dan vir hom gesê het stuur maar 'n sein en in die sein noem maar die verskillende alternatiewe, die moontlikheid van verplasing, die moontlikheid van aanhouding, die moontlikheid van, wel al die verskillende moontlikhede? --- Dit is moontlik. Destydse Kommandant du Plessis het uit die aard van sy aanstelling as inligtingsoffisier en GBS sekretaris meer agtergrond gehad as wat ek gehad het oor hierdie aangeleentheid, so ek sou heel waarskynlik net vir hom in breë trekke gesê het of herhaal het wat die gesprek tussen my en Generaal van Rensburg was (einde van kasset 215) - hom oorgelaat het dan om dit verder uit te spel.

Ja, maar my vraag is watter sein sou u hom gevra het om te stuur? 'n Sein wat al die moontlike alternatiewe uiteengesit het, of sou daar een definitiewe voorstel gewees het? --- Gesien in die lig dat ons op 23 Mei reeds aanbeveel dat heraanstelling nie moet plaasvind nie sou seker, ek wil amper sê logiesgewys, alternatiewe vir heraanstelling moes gewees het, want daar is reeds so 'n sein gestuur. So dit lyk vir my ek sou vir hom gesê het spel ook ander alternatiewe uit as net heraanstelling wat ons reeds ingedien het.

Nou dit het hy blykbaar nie gedoen nie, want u sien hoe lees die sein. --- Ja, die sein lees vaag.

Kan u dit verklaar hoekom hy dit nie gedoen het nie as dit waarskynlik u instruksies aan hom was? --- Nee, ek kan dit nie verklaar nie.

Ek dink dit is feitlik tyd, wil u nog iets (tussenbeide)

MR BIZOS: May I just put one question to round this off M'lord?

COURT: Yes.

MNR BIZOS: Generaal, as daar aan u 'n versoek was om 'n mening van die OPGBS dringend na Generaal van Rensburg oordra, hoe lank sou dit geneem het om die dagbestuur van die

OPGBS 'n vergadering te probeer saamkry? --- Ek kan nie dink dat hierdie aangeleentheid 'n dringende ad hoc vergadering sou regverdig nie. Dit sou heel waarskynlik op die volgende geroetineerde vergadering onder die hoof korrespondensie hanteer gewees het deur die Sekretariaat.

Was al die lede van die dagbestuur nie hier in Port Elizabeth nie? --- Ja, daar was ook lede in Oos-Londen gewees.

In elk geval die wat beskikbaar is en miskien aan die buite staat se mense oor die telefoon vra? --- Ja, ek wil weer sê ek sou nie die dagbestuur net hiervoor bymekaar geroep het nie. Met ander woorde om 'n telefoongesprek wat ek gehad het aan die dagbestuur voor te lê nie. Dit sou op die volgende vergadering onder die hoof korrespondensie hanteer gewees het.

U sien ons het die verklarings van twee offisiere wat lede van die OPGBS was, en ek wil aan u lees, mag ek net die twee paragrawe lees?

HOF: Ja seker.

MNR BIZOS: Bladsy 97 in volume 1 wat die eedsverklaring, vanaf paragraaf 3 op bladsy 97, paragraaf 3:

"Wat betref die prosedure met die aanhouding of inperking van persone ingevolge die Wet op Binnelandse Veiligheid was dit nie 'n aangeleentheid wat in die normale loop van sake op die OPGBS bespreek sou word nie, dit was 'n funksie wat suiwer onder die SAP se Veiligheidstak geresorteer het."

Sal u saamstem dat Kolonel Snyman, wie 'n lid van die OPGBS was, reg is? --- Ja, dit is heeltemal korrek. By die OPGBS sou dit nie bespreek gewees het nie. Dit kon wel by die Gesamentlike Inligtingsentrum van die OPGBS bespreek gewees het.

En ook die onder-voorsitter van die OPGBS, dit wil sê Christoffel Antonie Swart, bladsy 88, paragraaf (ii):

"Aanhoudings en inperkings was suiwer en uitsluitlik deur die Veiligheidspolisie gehanteer en beslis nie deur GBS nie."

Sal u dit aanvaar as die korrekte stelling? --- Dit is heeltemal korrek.

Nou as dit nie die funksie van die OPGBS was nie en dit uitsluitlik van die, dit suiwer en uitsluitlik deur die Veiligheidspolisie gehanteer was, hoe kon u enige sein na Pretoria stuur sonder om die Veiligheidspolisie te nader voor u namens die OPGBS 'n sein sou gestuur het? --- Die aangeleentheid van aanhouding in die algemeen in die beginsel was wel bespreek gewees. Ek kan my onthou dat die hoof van die gevangenisdepartement op 'n stadium die kwessie van aanhouding bespreek het by die OPGBS waar hy gesê het dit skep vir hom 'n probleem. So alhoewel die individuele gevalle seer sekerlik nie by die OPGBS bespreek gewees het nie sou die maatreël in die algemeen definitief bespreek gewees het.

Maar ons het hier met die individuele te doen gehad, of die mense moes aangehou word of nie. As daar wel so 'n aanvraag aan u gedoen was deur Generaal van Rensburg sou nie die antwoord gewees het vra my nie as die voorsitter van die OPGBS, ek ken heel seker die telefoonnommer van Kolonel Snyman, bel hom. Dit sou die natuurlike reaksie van 'n brigadier wat die reëls sou gevolg het. --- Ek sou heel waarskynlik geweet het wat Kolonel Snyman se houding is. Ek het voorheen gesê dat ek wil aanvaar daar was bespreking ook gewees, en dis nie noodwendig dat al die besprekings genotuleer is nie.

Wel ek wil aan u stel aanvaar u dat u het nie met die Veiligheidspolisie, u het nie die Veiligheidspolisie gebel nie? --- Nee, nie wat - nee, nie sover ek onthou het ek hulle gebel nie. Wel ek wil aan u stel dat die rede waarom u nie die Veiligheidspolisie gebel het nie, die rede waarom u het nie 'n dagbestuurvergadering belê nie, was dat alhoewel u namens die OPGBS gepraat het in die sein, dit was iets besonders geheim tussen u, Generaal van Rensburg en die goeie Kolonel du Plessis. --- Nee, ek weet nie wat u bedoel met iets besonders geheim nie, maar ek kan nie wat u nou sê aanvaar nie."

Van Der Westhuizen 2563 : 12 - 2570 : 31

"MNR BIZOS Van die 34ste ja. As enige persoon in u posisie as die voorsitter of enige persoon soos Genl. Van Rensburg in sy posisie in die SSVR, as hulle sou voorstel nie net dat hy moet nie her-aangestel word nie maar dat hy moet ook vir 'n permanente of 'n lang tyd aangehou word. Waar het u die opdrag gekry of hoe het u besluit dat hy moet aangehou word? --- U Edele, ek sou uit hoofde van my aanstelling as voorsitter van die OP GBS bewus gewees het van die lede van die GBS se houding wat seer sekerlik dan, soos dit weerspieël is in die 23ste Mei, aanhouding ingesluit het - ekskuustog her-aanstelling ingesluit het - aanhouding kon 'm moontlikheid gewees het en dan soos ek vir u gister genoem het, verplasing was ook te berde gewees. Laat ons by aanhouding bly asseblief. U sien wat was u persoonlike mening op die 7de as u een gehad het. Was dit wenslik dat mnr Goniwe aangehou word of nie? --- Ek wil net hyvoeg by my vorige antwoord. Genl. Van Rensburg skakel my en ek het dit aanvaar en hy vra 'n voorstel, so 'n voorstel word eers op die telefoon bespreek en daarna per sein bevestig. Nou ek dink nie hy sou vir my gevra het vir 'n voorstel as dit net oor die her-aanstelling gegaan het nie. Hy sou seker ander alternatiewe ook gehad het en daardie aanvaarding kan ek maak."

Van Der Westhuizen 2577 : 2-24

"HOF Was u op daardie stadium op 7 Junie ten gunste daarvan dat Goniwe en die ander manne aangehou moet word? --- U Edele weereens as ek op my herinnering moet staatmaak, soos ek sê ek was ten gunste daarvan gewees dat hy nie heraaangestel moet word nie.

Ja, maar was u ten gunste daarvan dat hulle aangehou moet word? --- Nie wat ek van onthou nie.

MNR BIZOS So as u wel vir 'n aanbeveling deur Genl. Van Rensburg gevra was, u sou nie aanbeveel het dat hy, Goniwe, en sy luitenant moet aangehou word nie.--- Ek moet weer op die veronderstelling gaan Van Rensburg hel my, hy is bewus van ons vorige inset, hy vra heel waarskynlik vir alternatiewe wat kan daar nou nog gebeur en ek aanvaar ek sê vir hom die man kan aangehou word of hy kan verplaas word as 'n alternatief op heraanstelling.

HOF Maar ek dink die punt is nie of u moontlike alternatiewes aan hom kon genoem het nie maar sou u so ver gegaan het as om 'n voorstel te maak of 'n aanbeveling te maak, naamlik dat hy aangehou word. --- U sien U Edele wanneer jy so deur jou senior gebel word en vir 'n voorstel gevra word, dan gee jy die moontlike gebeurtenisse wat kan gebeur vir hom. Die besluit lê nie by my nie, die besluit lê dan by daardie instansie wat daarvoor vra.

As u dan in 'n sein daardie gesprek wou bevestig, sou u dan vir die kolonel gesê het stuur 'n sein en in die sein sê maar net een moontlikheid is aanhouding. --- Dit is so U Edele, ek sou vir hom gesê het ons het reeds 'n standpunt oor heraanstelling maar ander moontlikhede is verplasing of dan aanhouding. Dit kan ook wees dat ek inperking genoem het as ek bewus daarvan was. Net as 'n moontlikheid. --- As 'n moontlikheid.

Maar nie 'n aanbeveling as sulks nie of 'n voorstel. --- U Edele die hele sein van 7 Junie is 'n voorstel, dit is nie 'n besluit nie."

Van Der Westhuizen 2579 : 8 - 2587 : 11.

Van Der Westhuizen was unable to recall whether any such consultation took place and answered all questions in this regard hypothetically.

All Van Der Westhuizen's answers were given on the acceptance that he did have the conversation with Van Rensburg and that he did give Du Plessis certain instructions.

"So u sou dit moontlik op u eie geneem het om te sê dit is wat die OPGBS wil hê? --- Ja, behalwe dat op my eie, sonder enige bespreking daaroor, sou ek dit seker nie, ek sou dit nie self uitgedink het nie. So ek wil aanvaar daar was 'n bespreking gewees, dat ek bewus was van die Veiligheidspolisie se houding, en dat ek dit ingesluit het in die moontlikheid, of in die gesprek wat ek met Generaal van Rensburg gehad het, en dit daarna herhaal het aan Kommandant du Plessis."

Van Der Westhuizen 2566 : 3-11.

The crux of Van Der Westhuizen's evidence in this regard is the following response to a question by the Court:

"En ek dink die vraag is u sê dit word voorgestel dat so-en-so, nou ek dink die vraag is sou u dit op u eie geneem het om te sê dit is die OPGBS se voorstel, of sou u eers seker gemaak het dat dit wel die OPGBS se voorstel was en nie net u eie voorstel nie? --- Altwee is moontlik. Eerstens ek kon seer sekerlik bewus gewees het wat die houding was ten opsigte van Mnr Goniwe deur die individuele lede van die OPGBS. Ten tweede het ek 'n mandaat volgens my pligstaat gehad om aanbevelings te maak aan die Staatsveiligheidsraad uit hoofde van my aanstelling uit."

(Our underlining)

Van Der Westhuizen 2565 : 14-23.

72. The point of departure in dealing with his evidence on the signal and his discussion with Van Rensburg remains and must always be his inability to recollect those events, but his preparedness to accept that they took place.

"Ek moet weer op die veronderstelling gaan Van Rensburg bel my, hy is bewus van ons vorige inset, hy vra heel waarskynlik vir alternatiewe wat kan daar nou nog gebeur en ek aanvaar ek sê vir hom die man kan aangehou word of hy kan verplaas word as 'n alternatief op her-aanstelling."

Van Der Westhuizen 2579 : 17-22

"U Edele weereens, ek moet hipoteties antwoord want ek kan dit nie onthou nie. Ek wil weer sê wat vir my logies klink hoe ek sou opgetree het, ek sou verwys het na 23 Mei, na die standpunt wat die OP GBS sou gehad het. Hy sou vir my kon sê ons het julle standpunt, watter ander alternatiewe bestaan daar. Ek sou vir hom kon gesê het, daar is 'n alternatief van aanhouding of verplasing of inperking."

Van Der Westhuizen 2580 : 22-29

- 72.1 The hypothetical nature of the questions and answers must always be kept in mind. It is when sight is lost of that fact and hypotheses in the mind of the questioner becomes fact that problems arise:

"HOF U sien generaal ek het nou probleme met u getuienis. Ek wil dit net mooi verstaan. Verstaan ek u korrek as ek dit vir u sê dat u getuienis is dat u

het nie 'n voorstel van aanhouding gemaak nie. U het ook nie 'n aanbeveling ten opsigte van aanhouding gemaak nie. U het aanhouding net as een moontlikheid aan Van Rensburg genoem in die telefoongesprek. Is dit korrek?"

Van Der Westhuizen 2582 : 7-13.

73. An examination of Van Der Westhuizen's evidence can never gainsay the fact that in dealing with his discussion with Van Rensburg, his instructions to Du Plessis and what his attitude might have been if he had seen the signal at the time, was hypothetical.

73.1 "COURT: But the question was put, if he had seen this - if he had seen the signal (intervention) ...
MNR. BIZOS: Watter van die twee sal u aan hom gesê het? --- In retrospeksie, teruggdinkende nou, dink ek ek sou vir hom gesê het "jy het my verkeerd verstaan Louwrens."

Van Der Westhuizen 2538 : 6-16

73.2 " ... ek aanvaar ek roep daarna vir Kommandant Du Plessis, ek sê vir hom ..."

Van Der Westhuizen 2554 : 28-29

73.3 "Nee, wat ek sê dit is moontlik tydens hierdie telefoongesprek wat ek aanvaar ... Ek kan dit egter nie onthou nie"

Van Der Westhuizen 2557 : 6-10

- 73.4 "Ek dink ons sou op 23 Mei se sein wat ons gesê het hy moet nie aangestel word nie, heelwat gewig daaraan verleen het en gesê het Mnr Goniwe moet nie heraan gestel word nie, moontlik tot alternatief daarvoor moet hy verplaas word."

Van Der Westhuizen 2560 : 15-19

- 73.5 "Ek gaan nou van die veronderstelling uit Generaal van Rensburg bel my, hy sê vir my daar is 'n komitee, gee vir my julle aanbevelings, ons sê vir hom 23 Mei sein Mnr Goniwe moenie heraan gestel word nie, alternatief daarvoor die ander twee moontlikhede soos ek genoem het, en dit is dan die inset van die OPGBS aan die Staatsveiligheidsraad se komitee."

Van Der Westhuizen 2560 : 31 - 2561 : 7

- 73.6 "Ek moet miskien dan van die verdere veronderstelling uitgaan dat hy nou vir my gesê het maar is daar nie ander alternatiewe nie.
Wel het u aan Kolonel du Plessis gesê sê vir hulle dat Goniwe hulle moet permanent aangehou word? Het u dit gesê?
--- Nie wat ek van weet nie, nee."

Van Der Westhuizen 2561 : 25-30

- 73.7 "So ek wil aanvaar daar was 'n bespreking gewees, dat ek bewus was van die Veiligheidspolisie se houding, en dat ek dit ingesluit het in die moontlikheid, of in die gesprek wat ek met Generaal van Rensburg gehad het, en dit daarna herhaal het aan Kommandant du Plessis.
Wat bedoel u by 'n bespreking? 'n Bespreking daardie dag of 'n bespreking op 'n vorige dag? --- Nee, nee, ek vervrys na die telefoongesprek op 7 Junie."

Van Der Westhuizen 2566 : 6-14

- 73.8 "Gesien in die lig dat ons op 23 Mei reeds aanbeveel dat heraanstelling nie moet plaasvind nie sou seker, ek wil amper sê

logiesgewys, alternatiewe vir heraanstelling moes gewees het, want daar is reeds so 'n sein gestuur. So dit lyk vir my ek sou vir hom gesê het spel ook ander alternatiewe uit as net heraanstelling wat ons reeds ingedien het."

Van Der Westhuizen 2567 : 26 - 2568 : 1

- 73.9 "Ek wil net byvoeg by my vorige antwoord. Genl. Van Rensburg skakel my en ek het dit aanvaar en hy vra 'n voorstel, so 'n voorstel word eers op die telefoon bespreek en daarna per sein bevestig. Nou ek dink nie hy sou vir my gevra het vir 'n voorstel as dit net oor die her-aanstelling gegaan het nie. Hy sou seker ander alternatiewe ook gehad het en daardie aanvaarding kan ek maak."

Van Der Westhuizen 2577 : 17-24

- 73.10 "Ek moet weer op die veronderstelling gaan Van Rensburg bel my, hy is bewus van ons vorige inset, hy vra heel waarskynlik vir alternatiewe wat kan daar nou nog gebeur en ek aanvaar ek sê vir hom die man kan aangehou word of hy kan verplaas word as 'n alternatief op her-aanstelling."

Van Der Westhuizen 2579 : 17-22

- 73.11 "U Edele weereens, ek moet hipoteties antwoord want ek kan dit nie onthou nie. Ek wil weer sê wat vir my logies klink hoe ek sou opgetree het, ek sou verwys het na 23 Mei, na die standpunt wat die OP GBS sou gehad het. Hy sou vir my kon sê ons het julle standpunt, watter ander alternatiewe bestaan daar. Ek sou vir hom kon gesê het, daar is 'n alternatief van aanhouding of verplasing of inperking."

Van Der Westhuizen 2580 : 22-29

- 73.12 "Veronderstel dat u die sein op die 7de Junie gesien het ... Sou u enigiets anders as dit aan Kol. du Plessis gesê het as Van Rensburg vir u vir die alternatiewe gevra het? --- U Edele ek

weet nie ek sou logies-gewys weer by 23 Mei begin het, dit is my vertrekpunt."

Van Der Westhuizen 2581 : 4-15

- 73.13 "Ja U Edele. Dit is wat ek gister ook gesê het, die sein kom baie vaag voor en ek sou vir hom gevra het op die veronderstelling ek het nou daardie gesprek gehad met Generaal van Rensburg, "hoekom herhaal jy nie wat ek en Generaal van Rensburg oor gesels het nie?""

Van Der Westhuizen 2588 : 29 - 2589 : 3

- 73.14 "Ek wil aanvaar dat hy vir my seker sou gesê het daar is nou 'n kommissie aangestel, ek dink daardie dag of die vorige dag, en dat hy dringend 'n aansoek of 'n inset van ons kant af vervag. En Kolonel du Plessis het amper onmiddellik gedoen gewoonweg wat u hom gevra het om te doen? --- Ja, ek veronderstel as ek die telefoongesprek gehad het sou ek daarna direk vir Kommandant du Plessis geroep het en vir hom gesê het ek het nou net 'n telefoongesprek gehad, herhaal dit op 'n sein asseblief."

Van Der Westhuizen 2604 : 15-24

- 73.15 "Daar kon 'n misverstand gewees het dan, selfs tussen my en Generaal van Rensburg of tussen my en Kommandant du Plessis wat die sein gaan opstel het. Ek kan nie onthou wie wat vir wie gesê het nie."

Van Der Westhuizen 2697 : 3-7

- 73.16 "HOF: Nou kan u dan verduidelik hoekom Calata se naam in daardie sein genoem is dan? --- Al verduideliking wat ek kan gee is dat Du Plessis moes dit hygevoeg het. Om watter rede? Hy voer u opdrag uit. --- Ek weet regtig nie, ek probeer nou namens hom dink om watse rede, in ander

woorde dan moes Calata ook sê aangehou gewees het of verplaas gewees het, of nie heraangestel gewees het nie.
Nee, maar het u dit met Van Rensburg ooit bespreek? --- Nee, nie wat ek van weet nie, en ek kan dit ook nie (tussenbeide)"

Van Der Westhuizen 2701 : 9-18

- 73.17 "En daar was geen gesprek van òf Calata òf Goniwe se broer of enige ander persoon tussen u en Van Rensburg. Net Goniwe. --- Ek sal glo dit was net Goniwe gewees.
Ek wil nie hoor wat u glo nie. U beweer dat Du Plessis u twee name bygevoeg het en u het hom nie die name gegee nie. Is dit u getuienis? --- Wel sover ek kan onthou, dit is wat ek sê.
En is u getuienis dat Genl. Van Rensburg nie met u gepraat het van persone ander as Matthew Goniwe. --- Dit is soos ek dit sal aanvaar U Edele, dat ons net oor Goniwe gepraat het.
En u sê dit is wat u glo. Is dit moontlik dat u aan Du Plessis gesê het stuur 'n sein oor Goniwe en Calata en Goniwe se broer of Goniwe en sy meelopers of Goniwe en sy luitenant. Is dit moontlik dat u dit aan Du Plessis gesê het. Enige een van daardie drie alternatiewe wat ek aan u gestel het. Is dit moontlik dat u dit aan Du Plessis gesê het? --- Ek sal dit in volgorde van moontlikhede plaas. Dit is miskien moontlik dat ek gepraat het van Goniwe en sê sy meelopers.
En sy meelopers. --- Miskien, dit klink uiters onmoontlik dat ek sou gepraat het van Goniwe, Calata en Goniwe se broer."

Van Der Westhuizen 2703 : 8-30

- 73.18 "Wel, het u aan hom gesê dit is wat die generaal wil hê? --- U Edele ek weet nie ek kan nie die gesprek tussen my en Lourens vir u herhaal nie, ek kan dit nie onthou nie."

Van Der Westhuizen 2710 : 3-5

- 73.19 "Die strekking van u getuienis is u kan nie onthou pertinent waarom daardie sein gestuur moes word nie want u kan nie die telefoongesprek onthou nie, u kan nie onthou wat tussen u en Generaal van Rensburg sou gebeur het nie? --- Dit is korrek.
U het ook getuig dat op die basis van 'n aanvaarding dat daar wel so 'n telefoongesprek was (tussenbeide) --- Dit is korrek."

Ja, het u dan getuig oor wat die moontlikhede of die waarskynlikhede was oor waarom daardie telefoongesprek gegaan het? --- Dit is korrek."

Van Der Westhuizen 2970 : 7-17

74. When Van Der Westhuizen is asked questions of fact and his views on matters falling within his expertise, the quality of the witness emerges. Moreover, it is then that one obtains an immutable view that Van Der Westhuizen did not have the intention to kill Goniwe and the others.

- 74.1 "U sê u het hom nie as 'n terroris beskou nie? --- Definitief nie. Hy was 'n politieke aktivis. Mens kan ook praat van 'n politieke organiseerder of die ander woord wat gebruik is, 'n radikalis."

Van Der Westhuizen 2535 : 17-21

"Dit politieke aktiviste soos Mnr. Goniwe was nie as 'n terroris beskou nie U Edele".

Van Der Westhuizen 2621 : 23-24

- 74.2 Because Goniwe was a political activist and not a terrorist or an insurgent with a weapon, Van Der Westhuizen would not have killed him.

"Maar beteken dit dat as 'n soldaat by die grens van Lesotho 'n terroris gesien het, hy moet hom nie doodskiet nie voor dit op die hoogste vlak besluit was. Is dit wat u sê dit beteken? --- Nee U Edele, nee 'n terroris met 'n wapen, was opdrag gewees, moes geskiet gewees het."

Van Der Westhuizen 2667 : 19-23

"Dit is moontlik 'n bietjie 'n verwarring. U sien, ons sien die insurgensie in dieselfde lig as 'n terroris. Dit is 'n gewapende vyand as ek dit so kan uitdruk vir u. Tervyl aan die anderkant staan daar die aktivis, die organiseerder, die radikalise. Goed. --- So dit is - ja militêre optrede teen eersgenoemde ja. Maar my standpunt is en bly dat militêre optrede teen laasgenoemde is kontra-produktief."

Van Der Westhuizen 2938 : 28 - 2939 : 5

"Ja. Dit is die punt wat ek probeer uit u uitkry. So ons kan aanvaar dat die veiligheidsmagte wel verstaan het dat aktiviste of terroriste, gewapen, moontlik in sekere omstandighede uitgewis kon word, elimineer kon word gedurende 84, 86 en later. Sal u dit aanvaar? --- Ja U Edele. Ek sal dit aanvaar in die lig wat ons hier gepraat het. Dit is nie vir my, en dit was my standpunt nog altyd gewees, dat aktiviste moet (nie - our insertion) uitgehaal word nie.

Ek sien u gebruik die woord "uithaal." --- Ja wel dit is (tussenbeide).

Beteken dit doodmaak? --- Ja ek het dit so bedoel U Edele."

Van Der Westhuizen 2942 : 16-27

74.3 Van Der Westhuizen gave convincing reasons why it would have been counter-productive to kill a high profile political activist such as Goniwe.

"U Edele om in 'n rewolusionêre oorlog die politieke aktiviste of die politieke organiseerders te gaan vermoor, beredder nie die situasie nie, dit vererger die situasie. Ek kan nie die sin daarin verstaan nie. In 'n konvensionele oorlog ja, waar jy in 'n staat van oorlog verkeer ja, dan maak jy 'n vyand dood en dan is die vyand 'n man in uniform met 'n militêre wapen. Mnr. Goniwe was 'n politieke aktivis of organiseerder. Jy maak nie volgens alle beginsels van teen-rewolusionêre oorlog daardie mense dood nie. Dit skep helde, dit skep martelare, dit skep geleenthede soos vakansiedae wat uitgehuit kan word en later teen jou gebruik word. Dit maak net geen sin nie."

Van Der Westhuizen 2592 : 6-17

"U Edele ek dink ek het gesê dit is kontra-produktief wanneer so 'n hoë profiel persoon vermoor word want dan kry jy die effek van dit skep of 'n martelaar, hy word tot 'n held verhef, dit blaas die onlusklimaat aan, daar kom as gevolg daarvan ekstra aktivering in die vorm van boikotte, nog weghlyksies, dit lei tot die daarstelling van vakansiedae. By die begrafnis van so 'n persoon word daar ekstra politiek uitgehaal en in die geheel sal ek sê die totale effek daarvan is 'n eskalasie in die onlusklimaat, 'n verhoging daarvan. En wat haat mens daarby aan die anderkant? Is daar iets? --- Nee, dit los nie die probleem op nie U Edele."

Van Der Westhuizen 3014 : 30 - 3015 : 11

"Was daar wye reaskie plaaslik sowel as nasionaal, wye reaskie? --- Ek wees nou nie van sy vorige aanhouding nie, maar Mnr Goniwe se profiel het van sy vorige aanhouding tot in hierdie tydperk geweldig verhoog, hy het baie aktiewer begin raak, en ek kan nie onthou nie, dit was die eerste gedeelte van 1985 wat hy aangestel was as streeksorganiseerder van die Oos-Kaap. So ja, het dit meer nuuswaardig geraak".

Van Der Westhuizen 2603 : 16-23.

74.4 For example, one obtains his views on normalisation and stabilisation.

"Normalisering het gedui op die welvaartsterrein, welvaartsterrein is die staatkundig ekonomies maatskaplike terreine van die samelewing, orde te skep, 'n normale lewe te skep, terwyl stabilisering gedui het dat op die veiligheidsterrein 'n stabiele veilige omgewing geskep moet word."

Van Der Westhuizen 2635 : 26-30

"Ons is ook gesê dat miskien 'n bietjie later Generaal Malan gedreig het dat as u nie die probleem oplos nie u sal u kommandement verloor. --- Ja, ek dink dis darem 'n bietjie kras gestel. Daar was 'n meningsverskil tussen my en Generaal Malan oor hoe die probleem aangespreek moet word."

Van Der Westhuizen 2461 : 22-26

"... u het in antwoord op een van die vrae het u gepraat oor u siening van normalisering. En die siening van die - kom ons sê die geseteldheid van die tyd, die militêre en politieke geseteldheid van die tyd, in verband daarmee en ook hulle siening in verband met stabilisering. En ek verstaan u het nie met hulle saamgestem nie, ek dink dit was u getuienis. --- Dit is korrek U Edele."

Van Der Westhuizen 3015 : 12-19

"U was 'n voorstander van normalisering. --- Dit is korrek. En weereens aan die hand van hierdie skets, wat sou dit beteken het? --- U Edele dit beteken dat daar moet 'n ordelike gemeenskap geskep word waarin die individu vry is om te beweeg, vry is om te werk, vry is om te speel, vry om deel te neem aan al die strukture."

Van Der Westhuizen 3016 : 23-29

"In 'n woord of 'n sin, hoe het u die normalisering gesien as 'n oplossing van die algehele probleem? --- Ja U Edele, dit was baie belangrik en dit is waar 'n groot verskil gekom het. Ons het gesê dat jy kan net veiligheid en stabiliteit hê in 'n normale samelewing, so as jy wil veiligheid en stabiliteit hê dan moet jou omgewing genormaliseer wees. Dus moet jy begin by normalisering en uit normalisering sal jy stabiliteit kry. Ek weet nie of ek moet verder verduidelik nie.

Asseblief. --- U sien die ingesteldheid was op 'n baie korttermyn moet stabiliteit of veiligheid verkry word. En die primêre fokus van die staat was gerig op "los die probleem nou op." Probleem verwysende na daardie probleem of rondom onlus en onrus. Met ander woorde die veiligheidsituasie. Ons benadering was gewees "nee, konsentreer om 'n normale samelewing te skep. Uit 'n normale samelewing kan daar veiligheid vir die individu kom, veiligheid vir die omgewing kom." Dit was 'n benaderings-verskil gewees wat ons gehad het. Die probleem met ons benadering, dit is langtermyn, terwyl die druk van die politici se kant af "los die probleem nou op." En dit kon net nie gebeur nie U Edele. Dit het vandag, tot vandag toe nog nie gebeur nie. "

Van Der Westhuizen 2018 : 30 - 2019 : 22

75. Van Der Westhuizen did not only support normalisation in theory, he was also active in promoting projects aimed at normalisation.

75.1 Food from hotels and military messes were distributed in black townships.

"En Kolonel Louwrens Du Plessis ek dink se getuienis was dat op 'n tydperk was kos verskaf aan Maquina sover ek onthou. Ek staan onder korreksie daar. Maar ek dink dat die Kommandement Oostelike Provinsie óf kos of hystand verskaf het aan Eervaarde Maquina. Was dit voor Junie 1985 of na Junie 1985 wat u kan onthou, of is u ook nie seker nie? --- Ek kan nie

presies onthou U Edele. Ek kan onthou ons het 'n projek gehad wat ons by hotelle en uit ons eie menasies uit kos geneem het, kos wat oorgebly het en voorsien het aan die swart woongbuurtes. Ek kan nie presies onthou wanneer dit was nie maar ons het so 'n projek gehad".

Van Der Westhuizen 2499 : 31 - 2500 : 11

75.2

"Nou sal u vir ons praktiese voorbeelde gee van wat gedoen moet word om te normaliseer? --- U Edele daar is natuurlik op elkeen van daardie drie onder-afdelings van welvaart aspekte wat gedoen moet word. Eerstens moet die individu aan die staatkundige bestel kan deelneem op al die vlakke van regering. En daar was Strelitzia dan ook daarop ingestel gewees. Dit was primêr staatkundige bestuursprogram gewees.

Nou as ek sê prakties, dan bedoel ek fisies, wat het u voorgestaan, wat het u bewerkstellig op enige van daardie drie vlakke? --- U Edele eerstens dan op die staatkundige gedeelte het ons gereël vir opleidingskursusse, vir swart raadslede bygestaan deur die Oos-Kaapse Ontwikkelingsraad. Daarna het ons probeer om die Blanke munisipale rade verenig te kry by die swart rade. Daar was pogings ook gewees tot affiliasie gewees van die swart rade met die blanke rade. Daar is van die burgemeesters wat daarin geslaag het om van die swart raadslede te betrek by die blanke rade. Hulle het in gesit in die vergaderings. En dit was eintlik 'n hele skoling of opleidingsprogram gewees op plaaslike vlak, op plaaslike regering - ook bekend gestaan as derde vlak regeringsvlak U Edele.

Reg. Kom ons kyk na ekonomies. --- Die ekonomies, dit was maar moeilike ekonomiese tye gewees en die meeste van daardie projekte was ingestel op die generering van werks-geleentheid en geld. En baie van die reëls en regulasies van daardie tyd het juis dit teëgewerk. So daar was 'n projek gewees om te kyk na bestaande reëls en regulasies. Daar was veral knellende gesondheidsprobleme gewees, gesondheidsregulasies gewees. Om dit te probeer wegkry en dan werk geskep te kry deur middel van die uithouding van die informele sektor - ek verwys na straatstalletjies. Ons het 'n gebou bekom waar die sogenaamde byekorfs werksgeleenthede geskep is. Dit is 'n gebou met toerusting en iemand kan daar gaan werk - hy kan iets maak wat hy kan verkoop. Daar was pogings gewees om deur Universiteit van Port Elizabeth die ekonomiese potensiaal van die Oos-Kaap uit te bou. Met ander woorde om beleggers te lok. Ag U Edele, daar was baie programme gewees maar dit was alles ingestel om werk en geleentheid te skep vir die inwoners.

En nou kom ons by maatskaplik. --- Maatskaplik beweeg op die mense se leefterrein, sy godsdiens, sy kultuur, sy skool, sy ontspanning, sy sport. En veral op die terrein van sport, ons het sport gesien as 'n soort van 'n sleutel om die deur mee oop te sluit, was daar baie projekte gewees. Sporttoerusting beskikbaar gemaak. Ek het, die weermag het 'n geniekorps, ons het hulle gekry om sokkervelde te maak waar daar sokker kon gespeel gewees het. Borge gekry, trofeë gekry, wedstryde gereël. U Edele dan was daar godsdiens-programme gewees. Daar was 'n godsdiensprojek gewees om deur middel van die Woord ook, ek wil amper sê 'n vredesomgewing te kry. Daar was verskillende kombinasies, kerkgebootskappe betrokke daarby gewees. Dit het onder leiding gestaan van Eerwaarde Badenhorst, Poen Badenhorst op daardie terrein. Ag, en daar was maart voortdurend probeer gewees om die mense op te voed deur middel van pamflette om deel te neem aan 'n ordelike samelewing."

Van Der Westhuizen 3017 : 3 - 3018 : 29

75.3

"Dit was 'n verskil oor die benadering hoe om die probleem aan te spreek. Ons was van mening gewees dat as jy stabiliteit wil hê dan moet jy eers normaliteit verkry, met ander woorde die omgewing waarin die mens beweeg moet 'n ordelike normale omgewing wees met sy normale strukture en in so 'n normale omgewing kan jy dan stabiliteit verkry. Die Regering was egter sterk daarop gewees om stabiliteit eers te verkry en daarna in normalisasie programme in te beweeg. So ons was voorstanders van normaliseer en deur normalisasie sal stabiliteite kom, terwyl die Regering gesê het nee, stabiliseer eers dan kan ons normaliteit verkry. Dit is 'n verskil in benadering en as u kyk na plan Strelitzia dan sal u sien die hele wese kom daaruit om 'n normale struktuur te skep in die Oos-Kaap."

Van Der Westhuizen 2675 : 25 - 2676 : 8

76.

There was no room in the ethos of normalisation for the murder of political leaders.

"Nou kom ek terug na in daardie filosofie, in daardie etos van normalisering, is daar ruimte vir die moord van politieke leiers?

--- Nee beslis nie U Edele.

En is dit waarom u sê dit sou kontra-produktief gewees het? ---

Dit is korrek U Edele.

Was dit teen al die dinge waar u voor gestaan het? --- Ja U Edele.

Normalisering aanvaar ek, beteken die daargestelling van 'n streeksbestel, om dit so te stel, 'n streeksbestel op - ek soek na 'n woord - 'n streeksbestel op 'n beskaafde manier. --- Dit is korrek U Edele.

En so 'n beskaafde bestel, of dit nou streeks is of landwyd, is daar ruimte vir politieke moord? --- Nee U Edele."

Van Der Westhuizen 3020 : 24 - 3021 : 7

"So 'n mens moes eintlik eers aandag gegee het aan stabilisering. Nie om welvaart uit te sluit nie maar dit was die eerste opsie om die vlamme te blus, was dit nie? --- Dit was soos wat die politici ook geredeneer het U Edele met alle respek. Dit is baie korttermyn. Jy kan 'n vuur nou blus en hy spring net langsaan weer op en dan uiteindelik hardloop jy uit middele uit om al die vure te blus. Dit is baie korttermyn benadering om die probleem aan te spreek."

Van Der Westhuizen 3038 : 18-25

77. Van Der Westhuizen denied any conspiracy with Van Rensburg to kill Goniwe and denied giving Du Plessis orders to that effect.

"Ek wil aan u stel wat ek aan Generaal van Rensburg gestel het, dat dit was nie vir die komitee bedoel nie, maar dit was getuienis van 'n sameswering tussen u en hom in verband met die dood van Goniwe. Dit is die rede waarom niemand in die Geldenhuys Komitee dit gesien het nie. --- Dit sal ek ontken. Dit is nie so nie."

Van Der Westhuizen 255 : 8-13

"Ek wil verder aan u stel dat die opdrag aan Kolonel du Plessis, wat hy wel verstaan het en wat hy korrek in daardie sein weergee, was om 'n voorstel te maak dat Mnr Goniwe en die ander persone daarin doodgemaak moes word. --- Nee, dit is nie waar nie."

Van Der Westhuizen 3001 : 19-23

"Daar is nie vir my 'n verband tussen die veronderstelde gesprek wat ek met Van Rensburg en Du Plessis gehad het en die sein en die moord nie."

Van Der Westhuizen 2602 : 3-5

78. Van Der Westhuizen testified that a decision in principle to kill political activists would have been a strategic decision, and that such a decision would have been taken at national level by the SVR or the Cabinet.

"Ja goed. Maar daardie houding dat dit kontra-produktief is, kom dit nie daarop neer dat dit 'n taktiese besluit is nie? Selfs 'n strategiese besluit in daardie opset? Dit is u beginsel wat u het dat dit kontra-produktief is, is dit korrek? --- Ek dink nie dit is 'n beginsel nie. 'n Beginsel moet algemeen van toepassing wees, so daar kan uitsonderings wees. Ek sou sê dit is 'n strategiese besluit U Edele."

Van Der Westhuizen 2941 : 17-23

"So dit is 'n taktiese besluit of u die eliminerings van 'n aktiviste goeie staan, nie waar nie? Daar mag omstandighede wees waar dit nie kontra-produktief sal wees nie. Sal u dit aanvaar? -- U Edele nee, om in die breë te sê dit is 'n taktiese besluit sover dit aktiviste aangaan dink ek is nie korrek nie. Dit sal meer 'n strategiese besluit wees."

Van Der Westhuizen 2944 : 13-19

"U sien mens moet 'n beleid hê, gaan ons optree teenoor aktiviste en hoe gaan daar opgetree word. Gaan ons optree teenoor die, wat ons noem die insurgente, die terroriste, en hoe gaan daar opgetree word. So daardie beleidmaking geskied nie op 'n taktiese vlak nie, die uitvoering van daardie beleid geskied op 'n taktiese vlak, op 'n eenheidsvlak wil ek amper sê.

Ja, ons kan later terugkom na die verskil tussen strategie en taktiek, maar kom ons los dit daar vir die oomblik. Die besluit, dit is óf 'n taktiese óf 'n strategiese besluit, dit is nie 'n besluit in beginsel nie. Met ander woorde die moontlikheid bestaan tog dat daar in sekere omstandighede besluit kan word om 'n aktiviste te elimineer. Verstaan u dit? --- Dit is korrek.

En u aanvaar dit? --- Ja, dit aanvaar ek.

En dit gaan net afhang van wat daardie omstandighede is? ---

Ja. Behalwe dat ek wil byvoeg ek sien so 'n besluit op 'n strategiese vlak geneem.

Ek sal dit aanvaar, ja."

Van Der Westhuizen 2945 : 2 - 2947 : 21

Once such a strategic decision had been taken, the tactical decision to kill a particular political activist would have been taken by the particular line department.

"Ja, dit mag moontlik wees dat in omstandighede waar daar 'n breë strategiese besluit alreeds geneem is dan is dit nie nodig om die besluit weer te neem op dieselfde vlak met elke individu nie, is dit reg? --- Dit sal dan heel waarskynlik in 'n sub-orgaan of in 'n lyndepartement verband hanteer word."

Van Der Westhuizen 2948 : 9-14

- 78.1 Such a decision would have been highly sensitive and would not have been taken up with an institution such as the SSVR, which fell outside Van Der Westhuizen's line function.

"Ja, dit mag moontlik wees dat in omstandighede waar daar 'n breë strategiese besluit alreeds geneem is dan is dit nie nodig om die besluit weer te neem op dieselfde vlak met elke individu nie, is dit reg? --- Dit sal dan heel waarskynlik in 'n sub-orgaan of in 'n lyndepartement verband hanteer word."

Van Der Westhuizen 2948 : 9-14

"Ons praat nou oor die eliminerings van 'n radikalis in hierdie konteks, wat vir my dan in hierdie konteks 'n baie sensitiewe saak sou gewees het. Ek kan verstaan dat dit op 'n lynfunksie gehanteer word senior tot senior. Ek weet nie of so 'n aangeleentheid wat so sensitief is gehanteer sou gewees het met 'n instansie buitekant die lynfunksie van daardie persoon wat die versoek rig nie."

Van Der Westhuizen 2949 : 25 - 2950 : 2

"Nie heeltemal nie, maar ek sal probeer antwoord daarop. Soos wat ons die ding beredeneer het kan ek aanvaar dat daar kon op 'n strategiese gekoördineerde vlak 'n beginsel besluit geneem word, sê nou maar soos wat ons gepraat het oor die doodmaak van aktiviste. Dit kan ek as 'n strategiese, maar die werklike beplanning, die werklike operasie, die

werklike goedkeuring, sou ek aan 'n lynfunksie departement koppel en nie aan 'n sentrale orgaan soos die Staatsveiligheidsraad nie."

Van Der Westhuizen 2950 : 14-22 .

78.2 On the assumption that a strategic decision to kill political activists had already been taken at national level, the tactical decision to kill a particular political activist would have been taken at a very high level within the particular line department.

"Nou kom ons hierby. Indien die weermag byvoorbeeld so 'n voorstel wou maak dat 'n spesifieke persoon doodgemaak moet word, as ek nou sê die weermag praat ek nou van 'n bevelvoerder in 'n spesifieke gebied, dan sou 'n mens verwag op daardie beginsel wat ons nou net oor gepraat het dat daardie voorstel deurgevoer sal word na 'n hoë gesag binne die weermag byvoorbeeld? --- Dit is korrek."

Van Der Westhuizen 2949 : 8-14

Any covert operation would require the consent of the Chief of the Army.

"En die enigste voorbehoud wat hy daar het is dat u moet dit nie aan hom gestuur het nie maar aan die hoof van die weermag. Ek wil vra as daar enige, koverte operasies moes gedoen word, het u die toestemming van die hoof van die Weermag of

die Leër moes kry? --- Ek moes toestemming kry van die hoof van die Leër, soos byvoorbeeld, ek dink ons het dit netnou herhaal waar ek gepraat het van koverte optrede waar ons gelees het van die Reccies"

Van Der Westhuizen 2673 : 8-15

"Uitvoerende optredes was deur die lynfunksie instansie getref en daarom sou so 'n versoek vir koverte (?) operasies direk na die hoof van die weermag of direk na die hoof van die leër toe in daardie geval gegaan het langs weermagskanale as 'n weermagsversoek en nie in die Sekretariaat verhand nie"

Van Rensburg 192 : 16-21.

78.3 In the light thereof, the signal cannot be construed as a suggestion that a strategic decision be taken on national level to kill political activists.

Neither can it be construed as a suggestion to a person in Van Der Westhuizen's line function that a tactical decision be taken to kill Goniwe and the others.

In consequence, there is no room for an argument that the signal was a proposal to kill Goniwe and the others.

79. The only witness who comes close to testifying that Van Der Westhuizen might have proposed the death of Goniwe and the others is Du Plessis. For reasons that we have dealt with in considering Du Plessis's evidence, there is simply no contest between the veracity of Du Plessis and Van Der Westhuizen. The following examples serve to underscore not only Van Der Westhuizen's honesty as a witness, but his courage in not flinching from his duty to make admissions truthfully.

79.1 He testified that elements within the security forces were the only instances who did have the ability to have murdered Goniwe and the others in the particular manner.

"Nou kan ek die vraag só vra; Generaal kan u aan enige instansie dink wat al daardie vermoëns en eienskappe gehad het?

--- U Edele die Suid-Afrikaanse Polisie en die Suid-Afrikaanse Weermag.

So u aanvaar dat die weermag moontlik al daardie vermoëns en eienskappe gehad het? --- Ja U Edele.

Goed. So u stem saam met die antwoord wat daar gegee is ook?

--- Ja U Edele. Ek kan miskien net byvoeg, daar was destyds ook die Suid-Afrikaanse Spoorwegpolisie wat ook baie goed opgelei was vir operasies, veral vir ontsettings-operasies.

Goed. En dit is die enigste instansies wat u kan noem wat al daardie eienskappe sou gehad het korrek? Is dit korrek? --- Ja behalwe, ek dink nie die Suid-Afrikaanse Spoorwegpolisie se monitering was dalk so goed nie. Hulle was meer op die operasionele kant gerig.

Ja. Kan ek aflei uit u antwoord dat die instansies wat u kan noem is instansies wat deel vorm van die veiligheids-magte dan? -

-- Ja U Edele.

Korrek. Daar is nie 'n ander instansie wat u kan noem nie. ---
Wat oor al die vermoëns beskik het?

Ja. --- Vir die beplanning en die verkenning, nee U Edele."

Van Der Westhuizen 2916 : 3-25

"So gegee die feit dat die veiligheidsmagte - en dan praat ek van die veiligheidspolisie en ook die weermag, dat hulle oor die vermoë beskik het om op 'n koverte manier op te tree en Mnr. Goniwe en sy meelopers te dood op die manier wat dit gebeur het - sou daardie veiligheidsmagte ook sodanig kon optree dat die moorde blyk deur een of ander van die twee instansies in konflik, uitgevoer te word, korrek? --- Ja U Edele. Ek sal saamstem daarmee.

En ons weet dat die veiligheidsmagte, binne die veiligheidsmagte, dat dit die enigste instansie was wat oor die vermoë beskik het om die moorde te kon pleeg, korrek? --- Ek verstaan net nie "die enigste instansie was" U Edele?

Wat oor die vermoë, al die vermoëns beskik het. --- Die veiligheidsmagte?

Ja. --- Ja U Edele.

As ek nou praat van veiligheidsmagte dit kan of die polisie wees of die weermag of elemente van hulle of dies meer. --- Ek verstaan. Dit is korrek U Edele."

Van Der Westhuizen 2922 : 23 - 2923 : 10

"Ek sal u sê hoe. U kan dit beplan as 'n koverte optrede deur die veiligheidsmagte. --- Dit is moontlik, ja.

En ek wil aan u stel dat dit inderdaad gedoen is. --- Ek het dit reeds gesê, dit is moontlik dat dit deur 'n koverte optrede (tussenheide)

Luister mooi na die vraag. Ek wil aan u stel dat dit inderdaad gedoen is. Daar is beplan deur die veiligheidsmagte om Mnr Goniwe dood te maak. --- Dit kan ek nie bevestig nie."

Van Der Westhuizen 3001 : 10-18

79.2 Van Der Westhuizen took the question as to who killed Goniwe and the others even further by testifying that

Azapo may have had the intention, but that it did not have the ability to kill Goniwe and the others in the manner in which the murders were committed.

"Maar was dit nie so nie dat die ANC gesien is deur die veiligheidsmagte as die oorkoepelende organisasie wat die UDF hetrek het? --- Ja U Edele.

So u kon ook net gesê het daar was 'n magstryd tussen die PAC en die ANC sonder om die UDF by name te noem? --- Ek kon dit so gesê het ja U Edele."

Van Der Westhuizen 2920 : 19-23

79.3 We refer to what has been said in paragraph 70 above, and his attitude to Goniwe's detention.

79.4 "Nou oor die sprake van AZAPO se betrokkenheid het u enige gewig daaraan geskenk, of enige - het u gewig daaraan geheg? -- Ek dink daardie tyd ja, want die konflik was sterk op die voorgrond gewees U Edele. Ek dink nadat die feite aan my bekend geraak het soos uit die stukke uit, het ek nie meer baie gewig daaraan geheg nie.
So u sê nou dat - goed, nee ek aanvaar dit. U sê u sal nie nou sê dat dit moontlik AZAPO kon gewees het nie wat betrokke is nie. Die feite, die waarskynlikhede dui nie daarop nie. --- Daar is seker 'n moontlikheid maar ek sal dit nie baie groot maak nie."

Van Der Westhuizen 2919 : 14-24

"Maar as dit in Port Elizabeth gebeur het, as hy in Port Elizabeth doodgemaak word, en daar word gebruik gemaak van messe om hom aan te val, sy liggaam word verbrand, endiesmeer, sou dit meer in verband wees met wat tussen die UDF en AZAPO gebeur het destyds in Port Elizabeth, nie waar nie? --- Ja.

So gesien in die lig daarvan sou die feit dat daar sodanige konflik was 'n ideale dekking bied vir daardie optrede in Port Elizabeth?

--- Ja, u is heeltemal korrek. Daar was dan ook dan sprake gewees dat AZAPO betrokke was by Mnr Goniwe se dood.

En daardie sprake het geheers vanaf daardie tyd tot die eerste nadoodse ondersoek. Kan u dit onthou? --- Ja, ek het geruime tyd dit gelees dat dit is so.

En moontlik ook nog vir 'n rukkie daarna? --- Ja, dit is korrek. Maar soos u nou daar staan aanvaar u dat onder die omstandighede dit 'n vae moontlikheid is dat AZAPO wel verantwoordelik was? --- Korrek."

Van Der Westhuizen 2955 : 9-27.

It should be kept in mind that from the documents before the Court, as well as from certain evidence presented at the first Inquest, it would have been quite possible for Van Der Westhuizen to justify an attitude that Azapo should still be regarded as a suspect in this enquiry. See for instance the following:

"9. Onrus-klimaat.

- a. Die afgelope twee weke het die fokus grootliks verskuif vanaf owerheids-gerigte optrede na 'n faksie-stryd tussen AZAPO en UDF geaffilieerde organisasie. Hierdie twee groepe het aanvalle geloods op die persoon en eiendom van teenstanders van die onderskeie organisasies. UDF-organisasies het 'n wagstelsel by prominente ampsdraers se huise ingestel en is gevolg deur AZAPO. Organisasies soos PEBCO, PEYCO en COSAS het van huis tot huis gegaan om persone op te kommandeer vir hierdie wagdienste."

Bundle 1, p. 22, par. 9(a)

"b. Konflik UDF en AZAPO

i. Beriggewers berig dat ongeveer 200 vrouens by Eerv Maqina, beskermheer van AZAPO, was en dat hy hulle meegedeel het dat vete en geweld tussen UDF en AZAPO sal voortduur totdat die koppe van 5 UDF persone gewaai het nie, naamlik :

- (1) Edgar Ngoyi - President van UDF; Oos-Kaap streek.
- (2) Henry Fazzie Vise President van UDF; Oos-Kaap streek.
- (3) Mono Badela - Ondersteuner van UDF en sekretaris van ZWIRU.
- (4) Africa Maqolo - PEBCO en PEYCO (sing van vryheidsliedere by vergaderings).
- (5) Mkuseli Jack - President van PEYCO."

Bundle 1, p. 41, par. 4(b)(i)

"Die afgelope twee weke het die fokus grootliks verskuif vanaf owerheids-gerigte optrede na 'n faksie-stryd tussen AZAPO en UDF geaffilieerde organisasie. Hierdie twee groepe het aanvalle geloods op die persoon en die eiendom van teenstanders van die onderskeie organisasies"

Bundle 1, p. 200(c), par. 9(a)

- "b. In een geval is 65 jeudiges gearresteer aan huis van Sopho Hashe, bestuurslid van PEBCO. Die arrestasie het gevolg na 'n aanval op 'n polisievoertuig vanuit die perseel. Petrolbomme is ook op die perseel gevind. 'n Saak van Openbare geweld word ondersoek. Die verdagtes voer aan dat hulle wagdiens verrig het uit vrees teen aanvalle deur AZAPO.
- c. In 'n ander geval is 'n kombi vol jeugdige aangetref waar hulle na bewering op pad was om die huis van 'n AZAPO ondersteuner aan te val. Petrolbomme is in hulle besit gevind. Dit wil voorkom asof ene Dlali in bevel van die groep was. Hy dien op die uitvoerende bestuur van PEYCO en het in die verlede talle besoeke aan Lesotho gebring."

Bundle 1, p. 200(d), paras. 9(b) and (c)

- "k. Behalwe vir die sporadiese voorvalle wat voorgekom het tussen AZAPO en UDF aanhangers, wil dit voorkom asof daar 'n afplatting in die onrussituasie is."

Bundle 1, p. 200(e), par. (k)

- 79.5 79.5.1 Van Der Westhuizen's account of things has its own inherent truthfulness which is revealed if one gives full consideration to its content and circumstances.
- 79.5.2 If the signal was one requesting the murder of Goniwe and the others, it would

necessarily have followed upon a conspiracy between Van Der Westhuizen and Van Rensburg to that end.

79.5.3 If that had been the case, Van Der Westhuizen would undoubtedly have remembered the conspiracy, the signal and its murderous intent.

79.5.4 In that case, one would have expected Van Der Westhuizen and Van Rensburg to have conspired further in the concoction of some exculpating story which would explain the signal, should it ever be connected to Goniwe's death.

79.5.5 One would also have expected Van Der Westhuizen to have taken steps to ensure that all copies of the signal were destroyed, should a signal have been resorted to at all, which is in itself unlikely.

79.5.6 Van Der Westhuizen, with his intelligence, must have realised the extent of the criticism that his evidence as to his inability to recall the incident would elicit.

79.5.7 If his choice was to resort to dishonesty, the easier and, possibly, the more efficacious course would have been to discuss the matter with Van Rensburg before making his initial statement and to ensure that their versions coincided; in that case the dishonest version would have avoided any suggestion of an inability to recall and would have been built on fabricated facts.

79.5.8 He did not do so. The statements of Van Rensburg and that of Van Der Westhuizen were minuted and drafted at different times without any prior discussion between them.

"Nou waarom is dit so gestel, "indien die sein wel deur die OP GBS aan Generaal van Rensburg gestuur is?" Het u of u prokureur of enigiemand anders aan u gesê dat Generaal van Rensburg wat

volgens u getuienis voor u hulle geraadpleeg het, Generaal van Rensburg het hulle gesien, is u nie gesê dat Generaal van Rensburg aan hulle gesê het dat daar wel 'n sein deur hom van die OP GBS gevra is en dat so 'n sein is ontvang? --- Nee. ek glo nie dit is aan my gestel nie U Edele.

Wel, u sou nie gesê het "indien die sein wel deur die OP GBS aan Generaal van Rensburg gestuur is" as Generaal van Rensburg voor u die verklaring gemaak het nie. --- U Edele ek verstaan (tussenbei). Ja, 'n verklaring sou gemaak het "ek het 'n sein ontvang." Ja, wat is u antwoord? --- Ja U Edele. Al wat ek kan dink dat dit in daardie konteks staan is ek was nie hewus van die sein, ek kon nie die sein onthou nie en daaroor sê ek "indien die sein gestuur is". Ek is nie die outeur nie en ek het hom nie gestuur nie.

U sien, was u verklaring en die verklaring van Generaal van Rensburg terselfdertyd geteken? --- U Edele my verklaring was geteken die Sondagoggend seker hier hy 1-uur, 2-uur se kant. Ek kan nie onthou nie. Dit was vroeg die Sondagoggend.

Ja. If Your Lordship hears with me M'Lord. U sien, ek kan nie verstaan hoe op dieselfde dag twee Generaals van die Weermag kan die een getuig in 'n verklaring en sê "indien die sein wel deur die OP GBS aan Generaal van Rensburg gestuur is" as dieselfde regsverteenvoordigers 'n verklaring van Generaal van Rensburg het wat aandui - I just want M'Lord to find out whether ...

COURT: I think on page 114, paragraph 5.

MR BIZOS: I am looking at that M'Lord. 114 Your Lordship said M'Lord?

COURT: 114, top of the page, paragraph 5.

MR BIZOS: Oh yes. I was looking at the second affidavit - I am sorry. Ja. En die ander sê "Ek kan onthou dat ek kort na gemelde telefoniese gesprek 'n skriftelike sein ontvang het vanaf die Oostelike Provinsie GBS en sover my herinnering strek, stem die inhoud van die dokument soos gepubliseer in gemelde New Nation inwese daarmee ooreen."

U kan seker nie verklaar waarom u nie verwittig was dat Generaal van Rensburg het erken dat hy wel 'n sein wat in wese dan daarmee ooreen voorkom. Kan u dit verduidelik? --- Nee U Edele. Dit was onafhanklike verklarings wat gemaak was. Aan dieselfde ondersoekbeampste? --- Ek is nie seker nie. Adv. Knoetze was by my betrokke gewees. Ek is nie seker wie by Generaal van

Rensburg betrokke was met die opstel van sy verklaring nie."

Van Der Westhuizen 2623 : 20 - 2625 : 11

"Voor u u verklaring geteken het, het u u goeie bronne gebruik om vas te stel waar die dokument is, wat het van die wat geblyk het na Generaal van Rensburg gestuur was, wat se afskrif was daar by die OP GBS lêers te Port Elizabeth? Het u enige bronne geaktiveer om vas te stel wat het van die sein gebeur? --- Nee U Edele. Ek het toe nou nie geweet van die sein nie. Ek het die sein daardie Saterdag gesien.

Maar u het dit op die Saterdag gesien. --- Ja. Wel u het geen bronne geaktiveer nie nê? --- Daarna het Generaal Liebenberg - nou praat ek van na die Saterdag - het Generaal Liebenberg 'n Generaal Verbeek aangestel om die sein te ondersoek."

Van Der Westhuizen 2865 : 9-19

79.5.9 Finally, and perhaps conclusively, if Van Der Westhuizen had anything to hide, he would have been alerted by General Liebenberg's telephone call which he received at least a week before making his statement, and his conduct would then have been different: conceivably, he would then not have gone to Sun City, he would have contacted Van Rensburg and ensured that a

suitably tailored and rehearsed version was available when the signal was published.

79.5.10 His conduct in fact is very different and consistent with the honesty of his version. He does not discuss the signal with anybody prior to making the statement.

"Sal u asseblief vir ons sê wanneer, vir die eerste keer voor 10 Mei toe u 'n verklaring geteken het, wanneer het u vir die eerste keer gehoor dat die New Nation in sy besit gehad het wat die publiek sou inlig in verband met die omstandighede van Goniwe-hulle se dood. Wanneer vir die eerste keer het u gehoor? --- U Edele as ek reg onthou was dit die vorige Vrydag, maar dit kon ook die Saterdag gewees het, met ander woorde die 1ste, 2de of 3de Mei, het Genl. Liebenberg my gebel by die huis, ek weet dit was by die huis en ek dink hy het vir my gesê hy was in kontak gewees oor 'n berig oor Goniwe en toe vra hy vir my of ek weet van enige betrokkenheid daarby. (Onhoorbaar) van hom nie. En toe hy dit daar gelaat, ek is daarna weg en ek het op Saterdag 9 Mei die middag, hierdie berig gesien.

Het iemand voor die 10de Mei, voor die 10de Mei het enige persoon u gevra of u miskien enige kennis dra van 'n sein wat gestuur is van Port Elizabeth, Pretoria toe? Het enige persoon u gevra? --- Ek kan nie onthou of Generaal Liebenberg van 'n sein gepraat het nie.

Of 'n dokument. --- Nee, ek kan nie onthou of hy daarvan gepraat het nie U Edele.

Behalwe Generaal Liebenberg, het enige ander persoon u gevra of u enige kennis dra in verband met enige dokument wat "The New Nation" - van New Nation toe hulle eers, die eerste keer melding gemaak het van die saak, het niemand u gevra nie? --- Nee ek dink dit was net op daardie Saterdag gewees.

Net op die Saterdag die 9de? --- Die 9de.
En niemand voor dit nie? --- Nee, nie wat ek kan onthou nie, behalwe dan nou Generaal Liebenberg, wat geskakel het."

Van Der Westhuizen 2863 · 18 - 2864: 17

"Ja, ek dink dis na aanleiding hiervan wat Generaal Liebenberg my ook geskakel het.
By Sun City? --- Nee, ek het gesê hy het my geskakel by die huis.

Na dié berig? --- Ek aanvaar dit is na hierdie berig verskyn het, want hy het vir my gesê van die berig. Wanneer het hy dit gedoen, kan u onthou? --- Dit was die naweek voor ek weggegaan het. Dit kon die Saterdag, ek weet dit was die aand gewees, dit kon die Saterdagmiddag gewees het, ek is nie seker nie.

En het hy vir u uitgelees wat hier voorkom? --- Nee, sover ek onthou hy het net gepraat van 'n berig wat hy gekry het oor, dat Goniwe doodgemaak is, en toe het hy my gevra of ons daarby betrokke was, toe sê ek vir hom nee.

Maar was u nie nuuskierig, heel seker die New Nation word ook by Sun City verkoop, het u nie gegaan om vas te stel waarom die generaal vir u gebel het om u te vra of u betrokke was as gevolg van 'n berig in 'n nuusblad? --- Nee, hy was tevrede toe ek vir hom gesê nee ons was nie betrokke nie.

Het hy vir u verduidelik waarom hy u gebel het? --- Wel hy weet ek was die bevelvoerder in die OP gewees en hy weet ek was die OPGBS voorsitter gewees.

Ja, en alhoewel u naam hierin nie genoem is nie, dit is heeltemal duidelik dat dit na u verwys. --- Ja, ek het nou nie die hele berig geles nie, maar ek sal so aanvaar.

Lees dit asseblief en sê vir ons dat as - wel lees dit en sê vir ons of u nou van mening is dat dit na u verwys?

--- Ja, ek sal glo dit verwys na my in die tweede paragraaf:

"We can reveal that the letter from Eastern Province Joint Management Centre",
dit was die GBS waarvan ek die voorsitter was.
En dit is hoe die generaal dit verstaan het en dit is die rede waarom hy u gebel het. --- Ja.

Nou wou u nie weet waarom die bewerings teen u gemaak is alhoewel u sê dat u nie betrokke was nie? Of u betrokke was of nie sulke baie ernstige bewerings kan nie daar gelaat word en Sun City toe gaan nie. --- Nee, hy het dit vir my gevra, ek het vir hom gesê nee, ek is nie betrokke nie. Hy het ook vir my gesê daar gaan blykbaar 'n sein, of die sein gaan verskyn wat gestuur is waarna hier na verwys word.

Ja, maar waarom het u self nie onmiddellik 'n koerant gekoop en ondersoek instel hoe kan so 'n ernstige bewering teen my gemaak word? --- Ek het my nie daaraan verbind nie.

Maar hoe groter die leuen hoe groter dit nodig was vir u ondersoek te stel om die leuen of valse bewering te weerspreek. Hoe kan u nou sommer Sun City toe gaan sonder om die koerant te koop om te sien presies wat die bewerings is en sonder om enige ondersoek in te stel of die bewering eerstens na u verwys, of dit nou korrek is, wie die persoon wat daar was, wie die persoon gestuur het, die sein gestuur het, en ander detail kry om onmiddellik die bewering te weerspreek? --- Nee, Generaal Liebenberg was tevrede met my antwoord. Ek het nie verder daaraan aandag gegee nie.

Dit is nie 'n kwessie of die generaal tevrede was of nie. Was u alreeds 'n generaal? --- Ja.

Daar is 'n baie ernstige bewering gemaak teen u, 'n generaal, alhoewel u naam nie genoem is nie. Heel seker u wou weet presies wat die bewering is en as u nie onthou het nie watse stappe moet u neem om vas te stel of dit nou net 'n lasterig (?) berig is of daar is miskien na iemand anders verwys, hoe kon u nie die koerant gekoop het nie en geen stappe neem om vas te stel wat die waarheid is nie? Kan u verduidelik? --- Nee, ek het dit seker toe nie belangrik geag nie.

HOF: Wat het u nie belangrik geag nie, die bewerings wat teen u gemaak is? --- Ja, Generaal Liebenberg het my geskakel, hy het vir my gesê of ek iets weet van Goniwe-hulle se dood, toe het ek vir hom gesê nee. Hy het gevra was julle betrokke gewees, ek het vir hom gesê nee. En daar het dit toe gebly."

"Ja. Nee, ek het van destyds Kolonel Britz vervvys. Hy was dieselfde ondersoekbeampte wie altwee verklarings geneem het op dieselfde dag, was dit nie? Was dit Jonker? Jammer.

MNR. MOSTERT: Nee, Jonker het die een geneem en Britz die ander een.

MNR. BIZOS: O, baie jammer. Ek trek die vraag terug.

MR HODGEN: M'Lord perhaps I can be of even more help. The statements were not taken by the investigators, they merely were called across to do the oath M'Lord. I think that perhaps helps all the parties M'Lord. There is some confusion in that regard.

MNR. BIZOS: Ja, die verklarings is nie aan die ondersoek-beamptes gemaak nie, die verklarings is deur u regsverteenwoordigers gemaak. Hulle het dit net, die ondersoekbeamptes het net die eed geneem. --- Dit is korrek U Edele."

79.5.11 Equally, he could, after making his first statement, on the pretext that his memory was refreshed by reading the statements of Van Rensburg and Du Plessis, then have presented a new fabricated version.

"Hy sê in sy eedsverklaring en in sy getuienis dat hy kan nie die woorde onthou nie, maar u het woorde soos byvoorbeeld ontslae te raak van Goniwe en sy militante luitenant, of woorde tot die effek. Is u in staat om die getuienis van Kolonel du Plessis in die opsig te erken of ontken? --- Nee, dit lyk my sy geheue is beter as myne. Ek onthou nie dat ek sulke woorde gebesig het teenoor hom nie"

Van Der Westhuizen 2555 : 23-29

"Waarom het u nie gesê die eerste keer dit is verkeerd, waarom het u probeer om 'n dubbelsinnige antwoord te gee sodat u getuienis kon miskien versoen word met die van Generaal Van Rensburg? --- Nee, ek probeer 'n volledige antwoord gee en die ander alternatiewe ook daar stel.

Die getuienis is heeltemal duidelik en daar is, dit is beklemtoon daar dat net een enkele bedoeling daar was. Hoe kan hierdie getuienis versoen word met die getuienis wat u voortdurend gegee het dat volgens u geheue die gespek was om die drie alternatiewe aan hom te gee? Het u enige antwoord? --- Ja, al wat ek kan dink is dis soos Generaal van Rensburg dit onthou. My herinnering gaan terug na die OPGBS se houding toe, en daarvoor het ek my onthouding van die saak aan u gegee"

Van Der Westhuizen 2696 : 17-30

"O. U sien ek sal aan u stel dat u die getuienis probeer bring, of u gee getuienis op 'n manier was ons sal sê dui dat as u vervittig word van Genl. Van Rensburg se getuienis u probeer om getuienis te gee om dit versoenbaar te maak met die getuienis van Genl. Van Rensburg. --- U Edele nee ek probeer my bes om te herhaal hier wat ek kan onthou. Dit wat ek nie kan onthou nie maak ek 'n aanvaarding op"

Van Der Westhuizen 2712 : 11-17

79.6 The genuineness of his testimony is further demonstrated by his admission, readily made, that "permanent(e) verwydering" in the form of "aanhouding" would only present a temporary solution at best.

"Ja U Edele, ek dink 'n man gaan in aanhouding in en as hy daar uitkom dan kan hy sy aksies waarvoor hy in aanhouding gegaan het net weer voortsit so ek dink nie dit sou 'n oplossing gewees het nie. Dit kon moontlik net 'n alternatief gewees het tydens 'n bespreking en dit kon iemand se mening gewees het. So dit was nie u mening op die 7de dat u probleme hier in die Oos-Kaap kon opgelos gewees het as mnr Goniwe en sy militante luitenant permanent aangehou gewees het nie. --- Nee ek dink dit sou net tydelik die probleem aangespreek het."

Van Der Westhuizen 2578 : 27 - 2679 : 7

"Maar kan u nie vir ons sê wat u gedink het destyds ten opsigte van die aanhouding van Goniwe nie? --- Dit is soos ek reeds vir Adv Bizo geantwoord het, ek dink dit sou 'n tydelike oplossing gebring het"

Van Der Westhuizen 2583 : 7-10

79.7

It is significant that once he heard the signal was to be published, he did not attempt to make contact with Du Plessis in order to "tailor" their respective versions. This undoubtedly would have been the actions of a man who was responsible for a signal with a murderous connotation. Yet he does not do that. Instead he goes to Sun City and does nothing further about the whole matter, as one would expect an innocent person to do. His actions are consistent only with that of a person who is oblivious of the traitorous dishonesty of which he is about to fall victim.

"Ja, ek dink dis na aanleiding hiervan wat Generaal Liebenberg my ook geskakel het.

By Sun City? --- Nee, ek het gesê hy het my geskakel by die huis.

Na dié berig? --- Ek aanvaar dit is na hierdie berig verskyn het, want hy het vir my gesê van die berig.

Wanneer het hy dit gedoen, kan u onthou? --- Dit was dienaarweek voor ek weggegaan het. Dit kon die Saterdag, ek weet dit was die aand gewees, dit kon die Saterdagmiddag gewees het, ek is nie seker nie.

En het hy vir u uitgelees wat hier voorkom? --- Nee, sover ek onthou hy het net gepraat van 'n berig wat hy gekry het oor, dat Goniwe doodgemaak is, en toe het hy my gevra of ons daarby betrokke was, toe sê ek vir hom nee.

Maar was u nie nuuskierig, heel seker die New Nation word ook by Sun City verkoop, het u nie gegaan om vas te stel waarom die generaal vir u gebel het om u te vra of u betrokke was as gevolg van 'n berig in 'n nuusblad? --- Nee, hy was tevrede toe ek vir hom gesê nee ons was nie betrokke nie.

Het hy vir u verduidelik waarom hy u gebel het? --- Wel hy weet ek was die bevelvoerder in die OP gewees en hy weet ek was die OPGBS voorsitter gewees.

Ja, en alhoewel u naam hierin nie genoem is nie, dit is heeltemal duidelik dat dit na u verwys. --- Ja, ek het nou nie die hele berig gelees nie, maar ek sal so aanvaar.

Lees dit asseblief en sê vir ons dat as - wel lees dit en sê vir ons of u nou van mening is dat dit na u verwys?

--- Ja, ek sal glo dit verwys na my in die tweede paragraaf:

"We can reveal that the letter from Eastern Province Joint Management Centre",

dit was die GBS waarvan ek die voorsitter was.

En dit is hoe die generaal dit verstaan het en dit is die rede waarom hy u gebel het. --- Ja.

Nou wou u nie weet waarom die bewerings teen u gemaak is alhoewel u sê dat u nie betrokke was nie? Of u betrokke was of nie sulke baie ernstige bewerings kan nie daar gelaat word en Sun City toe gaan nie. --- Nee, hy het dit vir my gevra, ek het vir hom gesê nee, ek is nie betrokke nie. Hy het ook vir my gesê daar gaan blykbaar 'n sein, of die sein gaan verskyn wat gestuur is waarna hier na verwys word.

Ja, maar waarom het u self nie onmiddellik 'n koerant gekoop en ondersoek instel hoe kan so 'n ernstige bewering teen my gemaak word? --- Ek het my nie daaraan verbind nie.

Maar hoe groter die leuen hoe groter dit nodig was vir u ondersoek te stel om die leuen of valse bewering te weerspreek.

Hoe kan u nou sommer Sun City toe gaan sonder om die koerant te koop om te sien presies wat die bewerings is en sonder om enige ondersoek in te stel of die bewering eerstens na u verwys, of dit nou korrek is, wie die persoon wat daar was, wie die persoon gestuur het, die sein gestuur het, en ander detail kry om

onmiddellik die bewering te weerspreek? --- Nee, Generaal Liebenberg was tevrede met my antwoord. Ek het nie verder daaraan aandag gegee nie.

Dit is nie 'n kwessie of die generaal tevrede was of nie. Was u alreeds 'n generaal? --- Ja.

Daar is 'n baie ernstige bewering gemaak teen u, 'n generaal, alhoewel u naam nie genoem is nie. Heel seker u wou weet presies wat die bewering is en as u nie onthou het nie watse stappe moet u neem om vas te stel of dit nou net 'n lasterig (?) berig is of daar is miskien na iemand anders verwys, hoe kon u nie die koerant gekoop het nie en geen stappe neem om vas te stel wat die waarheid is nie? Kan u verduidelik? --- Nee, ek het dit seker toe nie belangrik geag nie.

HOF: Wat het u nie belangrik geag nie, die bewerings wat teen u gemaak is? --- Ja, Generaal Liebenberg het my geskakel, hy het vir my gesê of ek iets weet van Goniwe-hulle se dood, toe het ek vir hom gesê nee. Hy het gevra was julle betrokke gewees, ek het vir hom gesê nee. En daar het dit toe gebly.

MNR BIZOS: Wel ek sou verwag dat u as hoof van inligting sou onmiddellik gesê het, of 'n opdrag gegee het, dat die relevant lêers nagegaan, onmiddellik moes nagegaan word in Port Elizabeth en by SSVR. --- Nee, dit het ek nie gedoen nie, dit het agterna eers gebeur."

HVR 2887 : 8 - 2889 : 23

CHAPTER IV

THE EVIDENCE OF VAN RENSBURG:

80. Van Rensburg undoubtedly made a poor showing in the witness box. Having observed him in the witness box and again after reading his evidence, one is left with the impression of a person with an overweening vanity who endeavoured to remedy a justifiably inadequate memory by resorting to reconstruction.
81. This does not entail a rejection of the totality of his evidence. In much of his evidence he is the sole source of information on topics. In many instances, his evidence is supported by the probabilities or corroborated from other quarters.
82. The task in hand, therefore, is a careful selection of passages in his evidence for acceptance and rejection. In this respect, the objective facts and their probabilities again serve as a useful guide. His evidence that he saw the signal for the first time on 17 June 1985 is suspect. The probabilities are that this is a product of reconstruction

and not of recollection. For the reasons indicated in paragraph 18 above, the probabilities indicate that the signal was placed before the Geldenhuys committee.

83. That would also be consistent with the probability expressed in the following question: Why should a signal which is dispatched as a matter of urgency for purposes of placing it before the Geldenhuys committee only come to Van Rensburg's attention five days after that committee had completed its work?

The answer to that question cannot favour Van Rensburg's version.

84. Van Rensburg's evidence is also open to criticism when he attempts to explain what happened to his copy of the signal. The more he tried to explain, the deeper he found himself in a quagmire of contradiction and improbability. The most likely answer is also the simplest: that signal probably disappeared into the maw of an inadequate bureaucratic filing system.

85. On the other hand, much of his evidence is not contradicted nor susceptible of criticism.
86. Van Rensburg testified that his task at the SSVR was to facilitate strategic advices, to co-ordinate the execution of security strategies, and to draft security regulations.

"Ja? --- My pligte daar het in die eerste plek gedek die fasilitering van strategiese adviese aan die Staatsveiligheidsraad oor die hele spektrum van veiligheid, ekonomie, maatskaplike en selfs staatkundige aangeleenthede U Edele. In die tweede plek het my taak behels die ko-ordinering van die uitvoering van veiligheids strategieë en in daai verband het die gesamentlike bestuursentra oor die hele land ontplooi - daar was elf van hulle - het dan ook aan my gerapporteer en is deur my kantoor geko-ordineer. En in die derde plek was my verantwoordelikheid ook die betrokkenheid by die opstelling van konsep noodregulasies vir noodsituasies in die land, pertinent afgestem op oorlog en indirek ook betrokke by konsep noodregulasies afgestem by die binnelandse veiligheidsituasie waar ons adviserend was tot die polisie wat daai (onduidelik) gehad het. In die derde plek in hierdie verband, ook die terrein bestryk van, konsep noodregulasies ingeval van 'n krygswegafkondiging in die land."

Van Rensburg 19 : 1-19.

See also Exhibit "G1".

In co-ordinating the security aspects, the SSVR had to respect the autonomy of the various line function departments,

"Het u saamgestem dat dit die korrekte praktyk was en dit moet so bly? --- U Edele, dit was nie op die weg gewees van die Sekretariaat van die Staatsveiligheidsraad om in enige departement se besondere lynfunksie in te meng nie so vir my om 'n departement se lynfunksie-prosedure vanuit die Sekretariaat te moes gaan staan en beoordeel en kritiseer, sou beteken het 'n direkte teenkanting teen die opdrag en die doel van die Sekretariaat van die Staatsveiligheidsraad, naamlik om die koördinerende van die veiligheid te hanteer met honderd persent respek vir die outonomie van lynfunksie instansies."

Van Rensburg 155 : 22 - 156 : 2

and had no executive powers of its own.

"Ons het daar hoegenaamd geen uitvoerende gesag gehad nie."

Van Rensburg 192 : 15-16

87. Stemmet corroborates Van Rensburg by confirming that the SSVR did not have executive powers. He put it as follows:

"U Edele die departemente op streekvlak het uiters selde met die SSVR geskakel. Die GBS wel het met die SSVR geskakel. Die gedagte is dat die stelsel is 'n ko-ordinerende stelsel soos ek gesê het van kabinetsvlak af tot onder wat ko-ordinerend, nie uitvoerend. Jou uitvoering het gelê in jou departementele lyne met die opdragte afkomstig van die hoogste gesag. Met ander woorde as die Staatsveiligheidsraad 'n besluit geneem het, dan sal dit, die betrokke ministers of die betrokke Direkteur Generaal as hy teenwoordig is, sal hy dit aan die hoof van sy departement die opdrag deurgee, wat dit dan in sy lyn sal afgee tot onder by die uitvoeringsvlak. Probleme hier ondervind op die uitvoeringsvlak sal deur daardie persone weer op dieselfde lyn opgevoer word."

Stemmet 251 : 28 - 252 : 11

"Met ander woorde soos 'n gewone Staatsdepartement werk. Maar waar die GBS bymekaar is, en die mense opper hulle probleme daar, kon hulle dikwels op streeksvlak die probleme oplos sonder om weer na hoofkantoorvlak te gaan. As hulle dit nie kon doen nie, was daar twee kanale Pretoria toe. Die een is op sy lynfunksie departement op, die ander een is om na die Sekretariaat toe, wat dit dan weer op ons beurt sal opneem met die verteenwoordigers van die verskillende departemente en dikwels kon ons die probleem oplos selfs voordat hy heeltemal ho uitgaan. So daar was verskillende vlakke, skakelvlakke en ook ko-ordineringsvlakke.

Kan ek net vir u so vra; veronderstel daar was 'n probleem op streeksvlak by 'n GBS geïdentifiseer, hulle nader nou die SSVR in 'n fasiliteringsrol om die probleem te help oplos, opgelos te kry en die SSVR identifiseer nou 'n moontlike opsie; 'n moontlike oplossing, maar wat nou blyk vir uitvoering net in een departement te wees, sou daardie moontlike oplossing dan reguit in die lynfunksie na daardie departement toe afgaan of sou dit terug na die GBS op streeksvlak om dan na die streekvertenwoordiger van die departement (tussenbei). --- Nee, dit sou na daardie departement toe. Daardie departement se departementele vertenwoordiger wat deel sou wees van hierdie groep of komitee wat daarmee gewerk het, sal dit terugvat na hulle departement toe en sê "ons het konsensus bereik, ons gaan hierdie saak so hanteer." Dit is natuurlik as sy departement saamstem dat dit so gedoen word. Ons sal dalk volledigheidshalwe die GBS laat weet, veral as hulle inligting gegee het, sou ons hulle laat weet dat dit is die besluit wat geneem word, Departement X gaan hierdie saak verder departementeel hanteer."

Stemmet 252 : 11 - 253 : 12

"U Edele dit gaan weer oor die Weermag en die Leër en daardie soort van goed, ek dra nie kennis van hulle binnewerking nie maar ek sal probeer help deur derhalwe wat ek vanoggend vroeg gesê het, lynfunksie-optredes of optrede op die grond moes in die lyn afkom het nie deur die stelsel nie"

Stemmet 300 : 4-11

"Ek aanvaar dat u wel die sein vir mnr Stemmet gewys het, maar sou mnr Stemmet nie daardie sein vir u teruggegee het nadat hy klaar was vir opleidings of dit op die korrekte lêers geliasseer het nie. --- Ek wil graag aanvaar dat mnr Stemmet synde 'n baie administratief georiënteerde man, indien hy dit geneem het, dit wel sou liasseer het in die Sekretariaat"

Van Rensburg 206 : 18-25

88. According to Van Rensburg, the SSVR was never part of any covert operation or any plan to murder anybody. This was confirmed by Stemmet.

"Nooit in der ewigheid sou dit deur my kantoor gegaan het nie om twee besondere redes. Die Sekretariaat van die Staatsveiligheidsraad was verhewe bo enige koverte (?) moord ondermaanse vuil "cloak and dagger" spele van hierdie aard, en punt nommer 2 die uitvoering van enige sodanige taak sou gelê het op die lynfunksie van Brigadier van der Westhuizen, met ander woorde dit sou dan in sy lynkanaal na die weermag toe moes gaan vir 'n normale koverte (?) operasie, en beslis nie na die Sekretariaat van die Staatsveiligheidsraad nie. Ons het daar hoegenaamd geen uitvoerende gesag gehad nie. Uitvoerende optredes was deur die lynfunksie instansies getref en daarom sou so 'n versoek vir koverte (?) operasies direk na die hoof van die weermag of direk na die hoof van die leër toe in daardie geval gegaan het langs weermagskanale as 'n weermagsversoek en nie in die Sekretariaat verband nie"

Van Rensburg 192 : 5-21

"Op daardie betrokke stadium was ek alreeds bykans drie jaar weg uit die suiwer militêre stelsel. Ek was gesekondeer na die Staatsveiligheidsraad toe en wat binne die militêr, die eng militêre kanale en lyne plaasgevind het, kan ek nie hiervoor kommentaar lewer nie. Wanneer dit gaan oor praktyk, oor die

breë nasionale veiligheidsbestel, daaroor kan ek kommentaar lewer, maar wat binne-in die eng militêre lyne plaasgevind het, ek was drie jaar lank weg, ek het my totaal afgeskakel gehad, ek was nie geag gewees op daardie stadium 'n militaris te wees nie, maar kom ons noem dit nou maar soos wat die pers dit graag wil noem 'n "securocrat" (?) op daardie stadium by die Sekretariaat."

Van Rensburg 194 : 13-24

"Ek het reeds gesê wat my primêre en eerste subjektiewe vertolking van hierdie dokument was na aanleiding van my gesprek met Brigadier van der Westhuizen, en ek het ook daarna vir u gesê dat hierdie woorde het my gekwel omdat as hierdie woorde presies moet beteken wat die betrokke advokaat nou daar voordra dan het dit sekere implikasies vir ons by die Sekretariaat gehad, dan sou dit ons absoluut onregverdiglik en valslik betrek het by verwerkings of 'n deurgee stasie van daardie soort versoeke, en ons het by die Sekretariaat nooit, maar nooit, maar nooit met enige vertoë of versoeke om die doodmaak van mense gewerk nie, baie beslis nie, en dit is waarom ek gewraak gevoel het hieroor, ek was gewraak oor die dubbelsinnigheid hiervan want dit wat ek met die brigadier bespreek het kon net sowel in daardie duidelike klinkklaar taal hier gestaan het "aanhouding" en dan kom hulle met woorde wat verkeerd vertolkbaar was."

Van Rensburg 195 : 14 - 196 : 4

"Ek verwys jou ook na paragraaf 1 (a) (iv), "Aanstellings sal op meriete geskied". Dit bots heeltemal met wat die advokaat nou aan my stel.

Jammer Mnr Stemmet, ek verstaan nie. Kan u dit herhaal?

--- U haal selektief aan uit hierdie dokument en dan wil u vir my probeer vasvra, maar nou sê ek vir u dat paragraaf 1 (a) (iv) sê "Aanstellings sal op meriete geskied". Die stelsel het aanbeveel dat Mnr Goniwe aangestel word vir hierdie besondere skool, maar die prerogatief om hom aan te stel of nie aan te stel nie berus nog altyd by die Departement van Onderwys en Opleiding. As daar beter kandidate is dan het hulle hom dalk nie aangestel nie, of op 'n ander plek aangestel, maar weereens vra vir die Departement.

Mnr Stemmet waarom is dit dan nodig om die hele aangeleentheid vooraf te gaan deur te handel met die hantering

van die media en hoe die aankondiging oor die aanstelling gemaak sou word? --- Dit is heel op die einde. Sou hy aangestel word dan sou die hantering van die media soos volg gewees het. Die stelsel kan nie vir Onderwys en Opleiding verplig om die man in 'n besondere pos aan te stel nie.

Stemmet 320 : 3-22

"Nou wil ek net terugkom na die standpunt van die SSVR as ek die so mag noem, die Sekretariaat. Sou die Sekretariaat hom ooit verbind het of ooit betrokke geraak het by enige koverte operasie van watter aard ookal? --- Die Sekretariaat moes nooit betrokke geraak het by enige operasie van enige aard nie behalwe sover as wat gekoördineerde beplanning aanbetref. Jammer, ek het nie die laaste deel gehoor nie Mnr Stemmet. --- Ek sê sover as wat gekoördineerde beplanning aanbetref omdat dit nie 'n uitvoeringsorganisasie was maar 'n beplanningsorganisasie. Sou die Sekretariaat ooit van sy kant af koverte optrede voorstel aan departemente of aan departementshoofde of aan ministers of aan GBSe? --- Die Sekretariaat behoort dit nie te doen nie. Sou u hyvoorbeeld ontken dat die Sekretariaat ooit voor sou stel dat weermagde 'n gemeenskap binne moet gaan en revolusionêre leiers uit moet wis? --- Ek sal dit ontken."

Stemmet 309 : 5-22

"Nou as die sein sou gelees het hierdie mense moet doodgemaak word sou u dan ook gesê het dit is maar net verkeerde gebruik van die woorde? --- Nee, werklikwaar nie. In die stelsel is daar nooit sprake gewees van doodmaak nie. Mense kon die verkeerde afleiding gemaak het, die leek in die straat kon dit gemaak het, maar die stelsel self het met doodmaak nooit iets te doen gehad nie. As ek praat van die stelsel bedoel ek die nasionale veiligheidsbestuurstelsel.

MNR NAVSA: Het u destyds kennis gedra van die telefoongesprek wat hierdie sein voorafgegaan het tussen Brigadier van der Westhuizen en Generaal van Rensburg? --- Ek het nie kennis gedra nie, maar ek het aanvaar dat dit is 'n kwessie van praktyk, toe ons van die GVS af by die kantoor gekom het die GBS voorsitter sou gebel het. Maar u het geweet wat die gesprek was nie? --- Nee, ek het dit nie geweet nie.

Nou wil ek aan u 'n stelling maak en ek wil dit binne konteks plaas en billik aan u stel, nie buite verband ruknie. As 'n mens praat oor Generaal van Rensburg wat in sy getuienis weereens verskeie kere het hy gesê dat die oningeligde, vir iemand wat nie sou weet van die telefoongesprek wat hierdie sein voorafgegaan het en wat gedurende die gesprek plaasgevind het sou hierdie objektief gesproke, met die nodige druk, objektief gesproke kon vertolk as 'n doodsvonniss, as 'n doodsopdrag. Stem u daarmee saam? --- Nee, ek stem nie daarmee saam nie. Die OPGBS was in geen posisie om na hoër hierargieë opdragte uit te reik nie, wat nog te sê doodsopdragte. Die omgekeerde is ook waar. Die SSVR as 'n hoër liggaam in hierdie geval was ook nie in 'n posisie om doodsopdragte of enige opdragte behalwe oor stelselaangeleenthede aan die GBS te rig nie. Die veiligheidsbestuurstelsel het geen gesag gehad nie, gesag by jou departemente."

Stemmet 341 : 28 - 342 : 30

"Die vraag is, as u nou daarna kyk, en u neem in ag die feit dat daar verwys is in die sein na mense wat verdwyn het, en u sê dit kan die betekenis van die woorde "uit die samelewing verwyder word" affekteer, wat dink u nou moet 'n mens verstaan by die woord "uit die samelewing verwyder word?" --- U Edele laat ek dit vir u sê stel; as die opsteller enigiets bedoel het anders as wat ek verstaan wat "permanet uit die samelewing verwyder word", dan verstaan ek werklik nie hoekom hierdie sein na die SSVR toe gestuur is waar daar gewerk is aan 'n strategiese advies nie"

Stemmet 391 : 6-16

"Kom ek wil aan u 'n persepsie stel wat in die hof oor die laaste aantal dae wat die Hof sitting gehad het bemark is of daar gepoog is om dit te bemark. Die poging in die persepsie gaan daaroor dat die SSVR is 'n organisasie aan wie se adres ander dele van daardie struktuur versoeke kan rig om persone te dood en dan sal die SSVR daartoe toesien. Wat sê u van so 'n persepsie? --- Dit sal totaal verkeerd wees U Edele. Daar is in my tyd en dis 10 jaar - meer as 10 jaar gewees by die SSVR nooit sulke versoeke ontvang nie en in elk geval al sou sulke versoeke gerig gewees het aan die SSVR kon hulle dit nie uitvoering gee aan enige versoeke ten opsigte van doodmaak of enigiets anders nie, omdat die stelsel in die SSVR veral nie uitvoerend was nie en nie uitvoerend mag opgetree het nie."

Stemmet 410 : 8-21

Stemmet went even further, and indicated that if a suggestion to kill anybody was received at the SSVR, it would have caused consternation and would have been reported to higher authority. He added that if the SSVR had been involved with requests to murder people he would not ("sou ek waaragtig nie") have remained there.

"Goed ons het gekom op die posisie waar ek vir u gesê het daar is hierdie poging tot bemerking en u het dit heftig ontken dat so 'n versoek aan die adres van die SSVR gerig kon word of sou word. Of dat die SSVR of enige van sy amptenare dan so 'n dood sou bewerkstellig. --- Dis korrek U Edele.

Nou kom ons kyk nou na die sein - het u 'n afskrif van die sein daar voor u? --- Ek het hom U Edele.

Kom ons sê dat in plaas van daardie omslagtige Weermagtaal wat hier gebruik is in paragraaf 3 en op aanname dat dit 'n dood is wat versoek is, as in paragraaf 3 dit gestel sou gewees het deur die opsteller van hierdie sein, "Dit word voorgestel dat die hogenoemde persone vernioor word", wat sou die reaksie gewees het by SSVR? --- U Edele ek glo dat Generaal Van Rensburg hierdie dokument onmiddellik na die Hoof van die Leër ten minste sou verwys het as dit nie was na die Hoof van die Weermag toe nie.

Vir uitvoering of met konsternasie? --- Met konsternasie U Edele.

En as dit by u gekom het wat sou u reaksie gewees het? --- Ek sou onmiddellik aan my hoof, Generaal Van Deventer gerapporteer het wat ook 'n militêr was sodat hy dit kon opneem met die militêre.

Met of sonder konsternasie? --- Met konsternasie U Edele.

Ja en (tussenkoms) --- En ek kan u verseker dat Generaal Van Deventer sou hoogs ontsteld gewees het.

Nou as toe - kom ons kom nou na die werklikheid. Toe hierdie sein in hierdie vorm daardie dag by u uitgekom het en dit óf gedeeltelik vir u gewys is, óf in geheel maak nie saak nie, maar toe die bewoording in paragraaf 3 onder u aandag gebring is deur Generaal Van Rensburg, as u dit op enige wyse sou kon vertolk as 'n versoek tot moord wat sou u gedoen het? --- Ek sou dit aan my hoof gerapporteer het U Edele.

Met of sonder konsternasie? --- Met konsternasie. Met konsternasie.

HOF: Wie was u hoof? --- Generaal Van Deventer was daardie jare die Sekretaris van die Staatveiligheidsraad.

MNR MOSTERT: Het dit enigsins by u posgevat dat hierdie 'n moontlike versoek is om te vermoor? --- Glad nie U Edele, soos ek gesê het my reaksie was dit is maar net weer 'n tipiese Weermag-oordrewe-dramatiese taalgebruik.

En u het daardie siening toe gehad en het u daardie siening nou nog? --- Ek het dit vandag nog U Edele.

En het u daardie siening gehad toe u gehoor het van Mnr Goniwe se dood? --- Ek het daardie siening gehad toe ek gehoor het van Mnr Goniwe se dood.

En is dit die rede waarom u nie die sein en sy dood met mekaar in verband kon bring nie? --- Ek het dit glad nie in verband gebring met mekaar nie.

U sê vir ons dat in al die tyd wat u daar was het u nooit gehoor daarvan dat die SSVR gebruik is as 'n adres om moordversoeke te ontvang nie. Dit het u alreeds vir ons gesê. Het u dit gehoor van iemand anders ooit? --- Nee U Edele ek het by die SSVR aangekom nie baie lank nadat hy gestig is nie. Trouens hy was nog in sy wordingstadium toe ek gekom het daar in 1980 en toe ek daar weg is in 1990 was ek die langsdienende lig gewees van die SSVR en in daardie tyd was so iets nóóit ter sprake gewees nie.

Goed. --- En sekerlik as dit ter sprake sou gekom het sou ek waaragtig nie daar aangebly het nie."

Stemmet 412 : 22 - 414 : 23

Geldenuys was equally adamant that if the signal was a proposal to kill Goniwe and the others, it would not have been sent to the SSVR.

"Ek sou nie in my verste gedagte kon dink dat iemand 'n sein sou skryf, sy hand op skrif sou sit en sê maak asseblief vir my die volgende persone dood nie. Nie in my verste gedagte sou ek so iets kon dink nie. En as dit nie reeds onmoontlik is nie om dan nog so 'n sein aan die SSVR te rig sou vir my totaal, in my verste gedagte sou ek nie aan so iets kon dink nie"

Geldenhuis 523 : 23-29

89. Van Rensburg further testified that the SSVR was not to be used as a postal service for the various departments.

"... en dit was vir my absoluut sinneloos vir die GBS om te kom en my te versoek by die Sekretariaat om na hierdie seinberig na ministers toe te stuur wat alreeds die hele aangeleentheid deeglik oorveeg het voordat hulle alreeds 'n besluit aangekondig het, en ek het dit weer ervaar as nie praktyk van die Sekretariaat om poskantoor diens vir departemente te speel nie. Indien daar 'n instansie was wat hierdie betrokke sein dan wel onder die aandag wou gebring het van die betrokke ministers dan was dit die Departement van Onderwys en Opleiding self, om dit onder hulle minister se aandag te bring, en om daardie rede dan ook is die opdrag gewees om Departement O en O van hierdie sein en hierdie standpunt telefonies te verwittig"

Van Rensburg 176 : 25 - 177 : 7

Stemmet corroborates Van Rensburg in this regard by stating that it was not the function of the SSVR to forward the signal of 23 May 1985 to the Ministers.

"U Edele dit is nie vir my duidelik wat met die sein gebeur nie. Soos ek vroeër gesê het ken ek nie hierdie sein nie. Dit is vir my net vreemd dat die sein aan die SSVR gerig word vir deursending aan 'n minister. As dit was vir deursending aan die GVS, vir deursending aan 'n taakgroep, dan kan ek dit verstaan maar hierdie gedeelte van deurvoering aan die betrokke minister, dit is sekerlik nie die SSVR se taak nie"

Stemmet 255 : 23-31

It can therefore not be argued that Van Rensburg would have forwarded the signal to some or other hit-squad who would then have carried out the so-called proposal to kill Goniwe and the others.

90. Van Rensburg on his telephonic conversation with Van Der Westhuizen:

There is no reason to doubt Van Rensburg's evidence that he phoned Van Der Westhuizen on 7 June 1985.

90.1 Van Rensburg indicated that the reappointment of Goniwe could have security implications and that, for that reason he decided to telephone Van Der Westhuizen.

"Uit hoofde van my gemelde amp, het ek voorsien dat die herindiensneming van Mnr Goniwe streeksveiligheidsimplikasies kan inhou. Daarom het ek besluit om die voorsitter van die Oostelike Provinsie GBS, Brigadier C P van der Westhuizen (tans Luitenant-Generaal) telefonies te skakel, met die versoek dat hy vanuit sy posisie 'n inset moes lewer oor die wenslikheid en implikasies van 'n herindiensneming soos voormeld. Tydens hierdie gesprek was 'n moontlike alternatief genoem, naamlik dat Mnr Goniwe asook van sy ander militante luitenant, eerder ingevolge Veiligheidswetgewing, en meer spesifiek Artikel 28 van die Wet op Binnelandse Veiligheid (Wet 74 van 1982) vir 'n onbepaalde tyd aangehou moes word ten einde die plofbare situasie te ontloot. As verdere alternatief was ook die

moontlikheid genoem dat Mnr Goniwe eerder verplaas kon word na 'n ander sentrum in die RSA, ten einde moontlik dieselfde gevolge te bereik. Brigadier van der Westhuizen het aangedui dat sy inset spoedig sou volg."

Bundle 1, p. 113, par. 4

"Nou wie het vir wie geskakel die oggend? Het u vir Gen. Van der Westhuizen geskakel? --- Ek het vir Gen. Van der Westhuizen daai môre geskakel"

Van Rensburg 30 : 26-28

In view of Goniwe's role as political activist, the aforesaid statement cannot be doubted. As to why he, instead of somebody else on behalf of the Geldenhuys task group made the enquiry, Van Rensburg testified as follows:

"U Edele dit was my praktyk om my komitee behoorlik voor te lig en dan hulle taak vir hulle te formuleer en hulle dan aan die gang te kry. Dan was daar ook die geval met die staatsveiligheid se - ag, met die Sekretariaat dat ons onder opdrag was om voordat ons oor enige aangeleentheid rakende GBS besluite neem of besin, seer sekerlik eers die GBS te ken. En in hierdie besondere geval het ek dit my taak geag om dan persoonlik Brig. Van der Westhuizen te skakel en vir hom eerstens mee te deel wat my taak was, tweedens om vir hom te vra wat hulle standpunt was rondom die Goniwe aangeleentheid en wetende dat hulle al ook vantevore 'n standpunt ingeneem het botsend met enige aanstelling, die sogenaamde nooit ooit weer aanstelling van Mnr. Goniwe en daarteenoor dan ook die standpunt wat hy kortliks aan my mondelings gestel het, hulle versoek dat Mnr. Goniwe en sy luitenant dringend in aanhouding geplaas moet word huite die GBS gebied".

Van Rensburg 31 : 4-21

90.2 As to why he telephoned Van Der Westhuizen and not another member of the GBS, Van Rensburg gave the following answers:

"Ek wil aan u stel dat die rede waarom u Brig. Van der Westhuizen met hom dit bespreek het en nie met Kol. Snyman of iemand anders omdat u 'n baie makliker verhouding gehad het met die brigadier. Julle was op dieselfde private terrein. --- Dit is beslis nie die rede nie U Edele. Ek het dit pertinent gestel dat my skakelpunte binne in 'n GBS in was na die voorsitter toe en nie na ondergeskiktes van ander departemente toe nie. Dit sou 'n absolute oortreding van die stelsel gewees het vir my om van die Sekretariaat af die hoof-offisier verantwoordelik vir Veiligheidstakaangeleenthede in dié O.P. te bel, hy sou nie eens geweet het wie is ek en wie is dit wat praat nie. Daar was absoluut uitgelegde kanale waarvolgens ons geskakel het en dit sou taboe gewees het vir my om met Kol. Snyman Snyman te skakel".

Van Rensburg 161 : 10-23

"Ek herhaal U Edele, dit was hoegenaamd taboe vir ons om met ondergeskiktes van ander departemente te skakel op 'n direkte lyn oor so 'n aangeleentheid. Daar was waarskynlik ander maniere waarop ek dit sou kon doen, ek het polisie op my eie staf gehad as ek dit langs daardie weg wil doen om die GBS te systap, maar my praktyk was om met die GBS voorsitter direk te praat en nie met ander instansies onder hom nie".

Van Rensburg 162 : 3-10

90.3 The telephone call to Van Der Westhuizen in order to determine the view of the OP GBS appears to have been the correct action.

Van Rensburg briefed the Geldenhuys task group at
10:00 on 7 June 1985.

"Nou het u vir Gen. Van der Westhuizen gebel voor die subkomitee vergadering of tydens die subkomitee vergadering? - -- Ek het hom beslis gebel voor die saamtrek van daai vergadering wat om 10-uur die oggend begin het."

Van Rensburg 27 : 23-26

"En hy het my versoek om dan net die bal af te skop en die enigste tyd wat ek daarvoor kon vind was 10-uur die oggend van die 7de waar ek dan nou ook hierdie taakgroep van hom voorgelig het oor spesifiek die twee pole van hierdie probleem - die Onderwysdepartement (onduidelik) se belang wat hulle het, die heraanstelling teenoor die veiligheidsgemeenskap se belang van geen aanstelling en aanhouding van Mnr. Goniwe en sy luitenant."

Van Rensburg 28 : 7-14

"Was dit nodig dat dit skriftelik bevestig moes word? --- U Edele ek het dit nie as nodig beskou nie maar ek kan nie vir hom sê hy moet dit nie doen nie. Ek het in elk geval op die mondelinge inset wat hy gelewer het het ek die Geldenhuyskomitee voorgelig oor presies wat hulle uiterste standpunt was omtrent die aanhouding van Mnr. Goniwe."

Van Rensburg 31 : 26-31

"Die sterk mening uitgespreek deur Van der Westhuizen was nie voor Geldenhuys geplaas nie? Die sterk mening van Brigadier van der Westhuizen was nie voor die Geldenhuys taakgroep geplaas nie? --- Dit is nie korrek nie. Die standpunt van die OPGBS met betrekking tot aanhouding het ek persoonlik mondelings in die voorligting aan daardie taakgroep aan hulle oorgedra."

Van Rensburg 151 : 14-20

"Hoe laat het u vir Brigader van der Westhuizen geskakel die oggend? --- Ek het reeds gesê ek het Brigadier van der Westhuizen geskakel tussen agtuur, na agt en voor tienuur daardie oggend."

Van Rensburg 184 : 15-18

"Generaal ek wil dit verder aan u stel die telefoongesprek tussen u en Brigadier van der Westhuizen plaasgevind het om en by tweeuur die middag, en nie soos wat u getuig het voor tienuur die oggend nie. Wat sê u daaromtrent? --- Dit sou uiteraarskynlik gewees het dat dit kon gebeur het. Ek kan dit definitief nie herinner nie. My herinnering staan op tussen agt en tienuur. Ek het die standpunt nodig gehad voor voorligting van daardie besondere komitee.

HOF: Wanneer het die komitee, die Geldenhuys Komitee, begin met hulle werk, hoe laat? --- Om 10h00 daardie besondere oggend van die 7de.

En sê u dat u gesprek met Van der Westhuizen voor dit plaasgevind het? --- Het daardie dag voor 10h00 plaasgevind. Is u seker daarvan? Is u seker daarvan dat die telefoongesprek plaasgevind het voor die komitee begin het met hulle werk? --- Ja, andersins sou ek nie die Geldenhuys taakgroep behoorlik kon voorlig oor die twee pole van die probleem nie."

Van Rensburg 188 : 27 - 189 :16.

Although Geldenhuys cannot specifically remember being told what the attitude of the OP GBS was at the time, he confirms that Van Rensburg addressed his task group.

"Is u ooit deur enigiemand mondelings in kennis gestel wat die houding van die OPGBS was? --- Nie wat ek van kan onthou nie

Geldenhuis 509 : 12-14

"Kan u onthou of die dag toe u begin het, in ander woorde 7 Junie, of u Generaal van Rensburg gesien het die dag? --- Ek is feitlik seker ja. Kan u onthou of hy enigiets vir u gesê het? --- Ja, as ek reg onthou het hy, hy het aan my genoem wat my taak was, ek dink hy het dit die vorige dag reeds genoem, en hy het ook 'n kort voorligting gegee aan my en die komitee om die probleem min of meer breedweg te skets.

Kan u onthou wat het hy gesê in verband met die voorligting, watse voorligting, wat sy woorde was, min of meer wat hy gesê het? --- Breedweg was die voorligting dat daar soos in my verklaring, dat daar 'n ietwat van 'n meningsverskil was oor, tussen die veiligheidsgemeenskap en die Ondervys en Opleiding oor Mnr Goniwe se toekoms, die terme van aanstelling of nie aanstelling nie.

Kan u enigiets verder onthou wat hy gesê het? --- Nee.

Kan u onthou wanneer hy dit vir u gesê het? --- Nee. Hy sou dit waarskynlik vir my gesê het die dag van 6 Junie toe hy my opgedra het om die taak te doen, en hy sou dit waarskynlik vir die komitee ook genoem het. Wanneer? --- Die 7de."

Geldenhuis 509 : 23 - 510 : 13

Van Rensburg sketched the attitude of the Department of Education and Training as opposed to that of the security community.

"HOF: Wanneer het u oorgedra aan die komitee wat Van der Westhuizen vir u gesê het? --- Tien-uur daardie selfde oggend van die 7de U Edele, het ek die Geldenhuis-komitee voorgelig oor hulle besondere taak en ek het hulle taak vir hulle geformuleer en vir hulle gesê wat van hulle verwag word.

Ja-nee dit is so, maar wanneer het u vir hulle gesê wat is die GBS se houding? --- U Edele ek het na die beste van my wete nie die GBS as sodanig genoem nie, maar gepraat van die veiligheidsgemeenskap se standpunt.

Nou wanneer het u vir hulle gesê wat is die Veiligheidsgemeenskap se standpunt? --- Ek het tydens my voorligting daardie môre aan die taak genoem sodat hulle kan aangaan met hulle werk, dit pertint vir hulle gestel, hier is die twee pole,

Onderwys en Opleiding wou mnr Goniwe aangestel hê en die veiligheidsgemeenskap is absoluut gekant teen 'n her-aanstelling en verkies sy aanhouding ingevolge Veiligheidswetgewing buite die OPGBS gebied."

Van Rensburg 76 : 6-23

90.4 The fact that Van Rensburg is adamant that he spoke to Van Der Westhuizen before 10:00 on the particular day, whereas the time indicated on the signal is 14:30, is of no significance. It should be remembered that Van Der Westhuizen has no recollection of the incident and that he merely assumed that he would have instructed Du Plessis to send the signal immediately after his conversation with Van Rensburg.

"En Kolonel du Plessis het amper onmiddellik gedoen gewoonweg wat u hom gevra het om te doen? --- Ja, ek veronderstel as ek die telefoongesprek gehad het sou ek daarna direk vir Kommandant du Plessis geroep het en vir hom gesê het ek het nou net 'n telefoongesprek gehad, herhaal dit op 'n sein asseblief."

Van Der Westhuizen 2604 : 19-26

It is useful to keep in mind that both Van Der Westhuizen and Du Plessis attended a special GOS meeting that morning. Van Der Westhuizen could have

given Du Plessis his instructions immediately after his conversation with Van Rensburg, but Du Plessis may only have been able to comply with those instructions after the GOS meeting. Also relevant is the fact that Du Plessis had to indicate the implications of the proposal, which must have taken him some time. Van Rensburg states that he was already busy with his own task group that afternoon.

"Ek sou dit graag wou ontken omdat op daardie stadium op die 7de was ek die voorsitter gewees van 'n ander taakgroep by die Sekretariaat wat om en by elfuur daardie oggend begin het, net na die Geldenhuys taakgroep begin het, en waarom daar alreeds getuienis voor die Hof is dat dit eintlik 'n baie dringende en 'n baie groot taakgroep was waarby baie persone by betrokke was. So dit is absoluut hoogs onwaarskynlik dat ek uit 'n taakgroep van omtrent 20 na 25 lede toe myself sou onttrek het om nou vir Brigadier van der Westhuizen 14h00 daardie middag te gaan skakel het nie."

Van Rensburg 189 : 9 - 190 : 19

91. Van Rensburg on what Van Der Westhuizen told him:

According to Van Rensburg, Van Der Westhuizen was strongly opposed to the reappointment of Goniwe and suggested that he and his camp-followers should be permanently detained outside the area of the OP GBS. Van Rensburg put it as follows:

- 91.1 "HOF: Sal u net weer vir my sê wat het Van der Westhuizen vir u gesê toe u hom gebel het? Het hy toe sy standpunt gegee oor die telefoon? --- U Edele hy het met my bevestig dat dit eerstens, dit nog steeds die OPGBS se standpunt is dat Mnr Goniwe nooit-ooit-weer in die onderwys aangestel moet word nie. Punt no. 2 het hy vir my gesê hulle (tussenkoms). Net 'n oomblik - ja net 'n oomblikkie. Ja? --- Punt no. 2, dat in teenstelling tot heraanstelling die GBS veel eerder die aanhouding - die spoedige aanhouding van Mnr Goniwe en sy luitenant ingevolge Veiligheidswetgewing buite daardie gebied sou wou sien."

Van Der Westhuizen 45 : 5-16

- 91.2 "Probeer asseblief, neem u tyd, om vir ons sover soos u kan, woord vir woord te sê wat tussen u en die brigadier gesê is. U het hom gebel. Wat het u aan hom gesê? --- U Edele, ek sal sê sover my geheue my bedien, eerstens dat ek is getaak deur die GBS om 'n oplossing te fasiliteer rondom moontlike optredes teen mnr Goniwe. Ek het ook vir hom gesê ek is bewus van die OP GBS se standpunt oor nie-aanstel en ek het vir hom gevra wat is die veiligheidsimplikasies van die aanstelling en watter ander alternatief of standpunt hulle in die verband het. Ja, en het hy 'n antwoord aan u gegee? --- Die antwoord wat hy aan my verstrek het is, ja, hulle standpunt bly nog steeds nooit ooit weer her-aanstelling nie, hulle sou eerder wou sien dat mnr Goniwe en sy luitenant in permanente aanhouding geplaas moet word buite die OP GBS gebied."

Van Rensburg 74 : 11-25

- 91.3 "Vir dieselfde redes. Nou die brigadier het aan u gesê dat hulle moes aangehou word. Het u hom gevra wat sal dit help, hulle is vantevore aangehou en die situasie het net vererger. Het u hom gevra of gesê? --- Nee U Edele wat ek wel gesê het is dit, dat indien mnr Goniwe aangehou word, wat dan van sy luitenant. As hy aangehou word dan impliseer dit dat sy luitenant sal net by hom oorneem en die situasie sou voortgegaan het."

Van Rensburg 78 : 22-29

- 91.4 "U Edele ek wil ten sterkste ontken dat daar ooit tussen ons die woorde van "permanente verwydering uit die samelewing" gebruik is. Ons het die woorde "aanhouding" gebruik en nie "permanente verwydering uit die samelewing" nie."

Van Rensburg 107 : 24-28

- 91.5 "Hy het 'n voorstel gemaak wat gewoonweg buite sy jurisdiksie was. --- U Edele as voorsitter van die GBS kon hy 'n standpunt inneem en dit was die GBS se standpunt of sy standpunt dan wel wat hy oorgedra het en wat ek as sodanig ingevoer het by die taakgroep en ek is tevrede daarmee dat as 'n voorsitter daarvan hy wel so 'n behoefte kon stel of dit uigeklaar was by sy dagbestuur of die res van sy GBS lede, dit kan ek nie sê nie, maar dat hy wel so 'n voorstel van aanhouding kon maak as 'n inset tot die teen-pool van aanstelling, dink ek is baie beslis binne sy jurisdiksie gewees om dit op daardie stadium te kom sê aan my."

Van Rensburg 158 : 4-14

- 91.6 "Goed. Soos u daar staan kan ons aanvaar dat u, of wat die brigadier die uitdrukking "permanente aanhouding" gebruik het. --- Nee, ek wil dit nogtans vir u sê die brigadier het gepraat van ons is die voorstanders van aanhouding buite die gebied vir 'n lang termyn.
Permanent? Was die woord "permanent" gebruik, ja of nee, of dit 'n glips was of nie? --- Nee die woord "permanent" was nie in die telefoongesprek met Brig. Van der Westhuizen gebruik nie, die woord nie, ek kan dit glad nie herinner nie. Die woord "vir 'n lang termyn" ja wel."

Van Rensburg 159 : 20-30

- 91.7 The aforesaid two options were indeed considered by the Geldenhuys task group as appears from their report.

"MOONTLIKE OPSIES

26. Om Goniwe te neutraliseer kan basies twee opsies onderskei word nl, optrede in terme van veiligheidswetgewing, of om hom terug te bring in die stelsel deur hom weer in 'n ondervyspos aan te stel.

OPTREDE IN TERME VAN VEILIGHEIDSWETGEWING

27. Daar kan teen Goniwe opgetree word deur hom onder Artikel 28 van die Wet op Binnelandse Veiligheid sonder verhoor aan te hou. Hierdie soort aanhouding lok groot kritiek uit en stel die probleem net uit en word onder die gegewe omstandighede nie as prakties beskou nie.
28. Artikel 18 van die Wet op Binnelandse Veiligheid maak voorsiening vir die beperking van lidmaatskap van sekere organisasies en openbare liggame. Hierdie wet is nog baie selde toegepas.
29. Artikel 19 en 20 maak voorsiening vir die inperking van persone en beperking tot bywoning van byeenkomste. Tipies sou dit die inperking tot 'n bepaalde landdrosgebied wees, gepaardgaande met die vereiste dat die ingeperkte tussen 18h00 en 07h00 tuis moet wees. Die verwagting is dat 'n inperkingsbevel in die meerderheid van gevalle tans aanleiding tot 'n dringende aansoek by die Hooggeregshof sal gee waarkragtens die Minister van Wet en Orde binne 'n bepaalde tyd aanvaarbare redes vir die inperkings moet verstrek anders moet die bevel opgehef word.

IMPLIKASIES VAN VEILIGHEIDSOPTREDE

30. Voorgenoemde veiligheidsopptrede kan op streeks- en nasionale vlak die volgende voor- en nadele tot gevolg hê.
- a. Ferme optrede van die regering kan hydra om veral die Blankes gerus te stel.
 - b. Die huidige onrusituasie kan weer oorgaan tot 'n grootskaalse onlusituasie.

- c. Cradora sal nie geneutraliseer word nie.
 - d. Linkse politieke inmenging en verhoogde status vir Goniwe.
31. Op die internasionale terrein sal wetsoptrede teen Goniwe in die huidige situasie allermens tot ons saak se voordeel strek. Dit sal bykomende skietgoed aan die RSA se vyande bied en tot groter status vir Goniwe lei.

HERAANSTELLING AS ONDERWYSER

32. Departement Onderwys en Opleiding was nie bereid om met Goniwe te onderhandel solank die skolehoikot voortduur, dws terwyl hy besig was om die departement te probeer afdreig nie. Sedertdien is die skolehoikot deur Cradora afgelas en het mnr J. Strydom van Onderwys en Opleiding 'n nie-amptelike gesprek met Goniwe op 24 Mei 1985 gehad. Volgens Goniwe lê sy eerste belangstelling nog steeds in die onderwys.
33. Deur Goniwe in 'n onderwyspos terug te bring kan sy energie in 'n rigting gekanaliseer word wat sy huidige negatiewe invloed kan beperk en uiteindelik selfs kan neutraliseer.
34. Die eerste vraag is of Goniwe so 'n aanstelling sal aanvaar. Dit is die oorvoë mening dat hy moeilik kan weier. Hy is naamlik diep in die skuld by die ouers en kinders van Cradock wat terwille van sy saak 15 maande nie skole bygewoon het nie. As hy weier sal hy 'n groot mate van sy kredietwaardigheid verloor en kan verwag word dat die plaaslike gemeenskap baie omgekrap sal wees.
35. Die tweede vraag is of Goniwe 'n pos by Cradock of elders aangebied moet word. Die voor- en nadele van 'n aanstelling elders kon kortliks as volg opgesom word:
- a. Hy word uit die gemeenskap waar hy 'n leidende rol speel verwyder - dit sal Cradora en andere egter nie tot stilstand bring nie.
 - b. 'n Pos elders sal beteken dat hy die geleentheid gebied sal word om te

weier (waarskynlik onder druk van die UDF) sonder om sy kredietwaardigheid in te boet. Hy kan naamlik aanvoer dat dit presies die rede vir sy oorspronklike weiering was.

- c. Die agitasie dat hy 'n pos in Cradock moet kry sal voortduur, want die gemeenskap sal glo dat die onreg nie reggemaak is nie. Dit sal steeds as 'n strafmaatreël gesien word.
- d. Sy vrou se werk by Samewerking en Ontwikkeling in Cradock kom in gedrang. As dit enigsins lyk of die gesin skade ly, materieel of andersins, sal dit onaanvaarbaar wees en skietgoed aan die vyand voorsien.
- e. Van linkse politieke kant en ook internasionaal sal daar steeds verhoë en kritiek wees.

36.

Voordele van heraanstelling in Cradock

- a. Hy word teruggebring in die stelsel en kan beheer en gedissiplineer word volgens die professionele kode van die onderwysprofessie. Hy moet naamlik binne die onderwyswet en regulasies optree. In hierdie geval sou hy onder die Wet op Onderwys en Opleiding no 90 van 1979 val, wat dan vir die Departement van Onderwys en Opleiding die geleentheid sou gee om sy bedrywighede te monitor en indien nodig, dissiplinêre stappe teen hom neem. Die betrokke wetsbepalings lui soos volg:

"22. 'n Onderwyser in diens by 'n staatskool of 'n gemeenskapskool is skuldig aan wangedrag en kan daar dienoreenkomstig die bepalinge van Artikel 23 met hom gehandel word as hy

- (b) 'n daad wat nadelig is vir die administrasie dissipline of doeltreffendheid van 'n skool, departement, kantoor of inrigting van die Regering doen of laat doen of toelaat, of oogluikend toelaat dat dit gedoen word ; ...
- (f) in die openbaar, behalwe op 'n vergadering belê deur 'n vereniging van onderwysers wat kragtens Artikel 30 erken is, neerhalende kritiek uitoefen op die administrasie van die Departement ...
- (o) 'n misdryf pleeg (dws enige kriminele oortreding begaan".

Aritkel 23 maak voorsiening vir 'n departementele verhoor wat tot die ontslag van 'n onderwyseer kan lei.

- b. Sy groot grief dat heranstelling hom geweier word, verval en hy kan dit nie meer gebruik om die skoolsituasie te destabiliseer nie.
- c. Die gemeenskap en die kinders het nie meer rede om negatief met betrekking tot skoolsituasie op te tree nie, want reg het aan hom geskied. Die Minister kan nie meer afgedreig word oor hierdie aangeleentheid nie.
- d. Hy het baie minder tyd om aan politieke (UDF) bedrywighede te wy. Hy kan nie meer heeltydse Plattelandse Organiseerder van die UDF wees nie - hy sal in 'n groot mate met hul moet breek. Sy invloed in omliggende gebiede sal in 'n groot mate geneutraliseer word.
- e. Hy kan gedwing word om spesiale motiveringskursusse (departementeel)

te deurloop wat hom kan beïnvloed en
van sienswyse kan laat verander.

- f. Dis binne sy gemeenskap waar hulle hom wil hê; hulle sal sielkundig beter tot toekomstige samewerking ingestel wees.
- g. Behuising en skeiding van gesin lewer nie probleem nie - hy voel sterk hieroor.
- h. Sy vrou behou haar werk by Samewerking en Ontwikkeling - materieel verloor hy nie.
- j. Professioneel kan hy goed gebruik word as hof by Sam Xhallie-skool. Dis waar hy sou gewees het as hy nie verplaas was nie. Dis ook waar die gemeenskap hom wil hê.
- k. Op internasionale vlak sal kennis geneem word maar dit sal nie noodwendig groot impak maak nie. Dit kan egter die RSA se vriende van skietgoed voorsien.

37. Nadele van aanstelling op Cradock

- a. Hy kan kinders binne die skoolsituasie beïnvloed - dog dit sal moeilik gaan om dit openlik soos nou te doen.
- b. Die gemeenskap en hyself sal dit as 'n oorwinning oor die Regering sien - so ook linkse elemente en die opposisiepers. Dit sal egter net 'n tydelike wins wees.
- c. Hy bly in sy magsbasis en kan die gemeenskap makliker beïnvloed.

38. Gevolgtrekking.

Indien sy heraanstelling oorweeg word is dit duidelik dat dit beter sou wees om hom in Cradock aan te stel.

VOORWAARDES VIR HERAANSTELLING

39. Die SAP Veiligheidstak het ernstige bedenkinge of Goniwe op hierdie stadium tot ander insigte gebring kan word. Hulle sal slegs 'n aanstelling as ondervyser ondersteun as Goniwe skriftelike voorwaardes buite die gewone ondervysvoorwaardes onderteken. Dit sal ondernemings soos geen verdere deelname aan UDF en CRADORA-aktiwiteite insluit. Die res van die komitee was egter van mening dat dit weereens 'n skuiwergat aan Goniwe kan bied om die aanstelling te weier sonder om geloofwaardigheid in te boet.

OPTREDE TEEN GONIWE MEELOPERS

40. Dit kan oorveeg word om meelopers van Goniwe, soos sy neef Mholelo Goniwe en Fort Calata na die Direkteur vir Staatsveiligheid te vervys vir moontlike aanhouding of inperking. Dit moet egter nie onmiddellik saamval met Goniwe se aanstelling nie aangesien dit weereens 'n moontlike uitkomst vir Goniwe kan bied. 'n Geskikte tyd en omstandigheid moet hiervoor afgewag word.

BEREDENERING VAN DIE OPSIES

41. Die heraanstelling van Goniwe in 'n ondervyspos sluit nie uiteindelik veiligheidsoptrede teen hom uit nie. Hierdie opsie kan steeds uitgeoefen word (as dit blyk dat Goniwe nie in sy spoor trap nie). Sodanige veiligheidsoptrede kan dan op 'n weloorwoë manier gedoen word en moet van so 'n aard wees dat die staat se saak in 'n hof suksesvol gehandhaaf kan word.
42. Dit is die mening dat veiligheidsoptrede nou teen Goniwe nie die probleem oplos nie, en teweens die situasie kan vererger. Die heraanstelling van Goniwe as ondervyser plaas hom in 'n moeilike posisie. Sou hy weier sal hy met die gramskap van die plaaslike gemeenskap te doen kry en dit kan tot die aftakeling van sy invloed lei. Aanvaar hy die aanstelling bied dit die geleentheid om hom te neutraliseer. Indien daarin geslaag kan word om Goniwe tot beter insigte te bring kan hy as kanaal gebruik word om uiteindelik ook vir CRADORA te neutraliseer.

AANBEVELINGS

43. Dit word aanbeveel dat:

- a. Goniwe in 'n onderwyspos op Cradock aangestel word;
- b. geen voorwaardes buite gewone onderwysaanstellingsvoorwaardes van hom vereis word nie;
- c. streng monitering van sy optredes as onderwyser toegepas word."

Bundle 2, p. 73, par. 26 to p. 77(a), par. 43

91.8 Geldenhuys also confirmed that both options had to be considered.

"HOF: Kan ek net duidelikheid kry, die vraag voor u taakgroep, ek wil net weer vir u vra, waarom moes u besluit, of Goniwe heraanstellingsmoet word, of moes u besluit tussen twee moontlikhede, die een moontlikheid is dat hy heraanstellingsmoet word, die ander moontlikheid is dat hy onder wetgewing aangehou word? Wat eintlik was u taak? --- Ek dink ons taak was basies heraanstelling of nie heraanstelling nie.

Net die? --- Maar die gebruik by die Sekretariaat was om volledig te wees, en ek het, of dit uit die voorligting was, soos ek sê ek het self nie die GVS vergadering bygewoon waar hierdie saak, hierdie versoek gerig is nie, en op een of ander manier het ons dit geïnterpreteer dat aanstelling of nie aanstelling nie, maar ook die opsie van aanhouding was beslis, ek het die persepsie gehad dat ons ook daarna moes kyk, maar die basiese opdrag was heraanstelling of nie heraanstelling nie."

Geldenhuys 533 : 8-24

91.9 Stemmet gave evidence to the same effect.

"Maar het u geweet watter bedoeling, wat is eintlik bedoel deur hierdie sein? Wat die persoon wat die sein gestuur het eintlik daarby bedoel het? Het u dit geweet? --- U Edele daar was gedurende die werkgroep se werk was daar verskeie moontlikhede genoem. Daar was die kwessie, daar was moontlikhede genoem en ek dink dit kom ook by party van die opsies uit wat in hulle dokument is, dat die mense moet onder die Veiligheidswetgewing aangehou word. Mnr. Goniwe. Ek weet nie van die ander mense af nie. Dit was een moontlikheid wat genoem is. Daar was 'n moontlikheid genoem dat iemand het daar gesê dat as Mnr. Goniwe weer aangestel word moet hy permanent aangestel word sodat Onderwys en Opleiding beheer oor hom kan hê. Daar is 'n moontlikheid genoem dat hy 'n permanent aanstelling moet kry weg van Cradock af. Daar is 'n moontlikheid genoem dat dit in 'n klein dorpie moet wees iewers in die Karoo waar die gemeenskap eintlik die tronkmure is. Dit is moontlikhede wat daar genoem is maar nou wil ek dit vir u dadelik sê dat ek het nie deel gevorm van hierdie komitee nie. Dit is maar soos die mense verdaag het en ons het gesels daar oor tee en so aan."

Stemmet 262 : 8-28

91.10 The Geldenhuys task group did not restrict itself to the question of Goniwe's reappointment as a teacher. It follows that a suggestion by Van Der Westhuizen that Goniwe and the others should be detained, dovetails as a relevant response to the question posed to him by Van Rensburg.

92. Van Rensburg on the meaning of the signal:

Because of what was said during his telephone conversation with Van Der Westhuizen on 7 June 1985, Van Rensburg is adamant that the signal proposes nothing else but that Goniwe and the others should as a matter of urgency be detained for a lengthy period outside the area of the OP GBS. Apart from the portions of Van Rensburg's evidence already quoted in paragraph 88 above, the following portions of his evidence are also relevant:

92.1 "Nou wat was die bedoeling, wat moes u dan met die sein doen? Hoekom is die sein gestuur en wat moes u daarmee gedoen het? U het alreeds sy standpunt gehoor, u het dit alreeds aan die komitee gestel wat hulle standpunt is. Wat was dan die doel van die sein? --- U Edele die doel van daai sein het ek ook gesien as die motivering waarom hulle hierdie mense in aanhouding wou laat plaas."

Van Rensburg 32 : 8-14

92.2 "Die woord permanent in hierdie sin, U Edele, sou ek ook kon verduidelik vir u, maar om die woord permanent hier staan. en dit staan hier omdat die heer Goniwe was by geleentheid, in 'n poging om hom uit die Cradock gemeenskap te verwyder, verplaas gewees na Graaff-Reinet. Daardie verplasing wat dan 'n gebiedsverwydering sou beteken het, was nie eers van tydelike aard gewees nie omdat dit nie voltrek was nie. Punt nommer 2, vanuit 'n GBS oogpunt gesien is dit so dat die betrokke heer, mnr Goniwe, na die beste van my wete ook gedurende 1984 in aanhouding was, as ek reg onthou in my geheue, dit dien my korrek, dan was dit van ongeveer Maart 1984 tot Oktober van daardie selfde jaar wat hy in aanhouding was ingevolge 'n veiligheidswetgewer. Met ander woorde selfs daardie termyn van sy weg wees uit daardie gebied, het net 'n tydelike effek gehad.

En van daar dan, teen daardie agtergrond gesien, beteken die woord permanent hier vir my dat dit vir 'n veel langer periode moet geskied as net vir die periode in die okkasies en geleenthede wat in die verlede sy verwydering uit daardie gebied bewerkstellig het."

Van Rensburg 59 : 20 - 60 : 10

- 92.3 "U Edele, indien ek daardie sein ter insae gehad het onderwyl die Geldenhuys-komitee nog in sitting was, sou ek baie pertinent die sein aan hulle oorgedra het. Daar is ook aspekte hierin wat ek vir hulle sou uitgelig het in hierdie sein wat eintlik meebring dat die OPGBS se standpunt van aanhouding soos wat dit in hierdie dokument was, hulle dit eindelijk self uitgemotiveer het vir 'n moontlike oplossing."

Van Rensburg 77 : 4-11

- 92.4 "U Edele paragraaf 4 in sy totaliteit motiveer eintlik die hele opsie van aanhouding uit enige oorweging uit, want die norm waarvolgens sou bepaal moes word watter optrede teen Mnr Goniwe geneem moes word sou die norm wees van wat in die beste helang van die ontlooting van die veiligheidsituasie was en as u hierdie paragraaf lees dan sou aanhouding per se eintlik die totale onlusituasie opgeblaas het en verder laat opvlam het. So dit is waarom ek gesê het dis een van die redes van my ongelukkigheid ook gewees met die besondere sein. Maar (tussenkoms)

HOF: Ja-nee ek verstaan dit nie mooi nie. Die sein sê dat soos u sê u dit verstaan het het die sein beteken hierdie mense - die aanheveling is dat hierdie mense moet aangehou word. --- Dis reg U Edele."

Van Rensburg 93 : 17-31

- 92.5 "U Edele na my beskeie mening sou hierdie sein hulle absoluut oorreed het om die aspek van aanhouding glad nie eers te oorweeg as 'n opsie nie en op die stadium toe ek hierdie sein ontvang het was ek bewus daarvan dat die Geldenhuys-taakgroep ook reeds die hele aspek van die aanhouding van Mnr Matthew

Goniwe totaal uitgegooi het uit hulle beredenering uit as onaanvaarbaar ..."

Van Rensburg 103 : 19-26

- 92.6 "U was ongelukkig met die bewoording van hierdie sein. Het u nie miskien - het die gedagte nie by u opgekom dat miskien beteken hierdie sein iets anders as net eenvoudige aanhouding nie? --- U Edele ek het reeds gesê dat vir my na aanleiding van my gesprek met Brigadier Van der Westhuizen het hierdie sein een en net een enkele bedoeling gehad en dit was dat die drie lede wie se name hier genoem is as 'n dringende saak in langtermyn aanhouding geplaas moes word buite die OPGBS-gebied."

Van Rensburg 104 : 14-22

- 92.7 "U Edele wat in hierdie dokument staan kan ek net dit sê wat teenstrydigheid aanbetref, die naam aanvanklik van Matthew Goniwe was genoem wat bykomend is tot daardie gesprek - nie teenstrydig nie maar bykomend was die name van Mbulelo Goniwe en Mnr Fort Calata as die spesifisering van die luitenant van Mnr Matthew Goniwe en paragraaf 3, nie teenstrydig nie omdat ek paragraaf 3 vertolk het - subjektief vertolk het in die lig van ons bespreking van aanhouding, maar paragraaf 3 vir die persoon wat nie aan daardie gesprek deelgeneem het nie sou beslis gewonder het wat dra hierdie sein oor. So in daardie opsig is paragraaf 3 teenstrydig met die duidelike aanbeveling van aanhouding."

Van Rensburg 106 : 26 - 107 : 8

- 92.8 "Ek het verwag om in hierdie sein ook 'n motivering te kry van die eerste standpunt van die GBS naamlik van hulle standpunt van "nooit-ooit-weer heraanstelling" vir Mnr Goniwe nie. So daar was nie enigsins 'n motivering vir daardie standpunt hierin gestel en die implikasies wat dit sou meebring nie, maar soos wat ek alreeds gister gesê het het ek ook geglo dat die groter begrip van aanhouding in werklikheid die hele kwessie van die "nooit-ooit-weer aanstelling" oorkoepel het."

Van Rensburg 107 : 11-19

- 92.9 "U Edele die gebruik van die woord "permanent" het ek baie duidelik vir u gesê gister, volgens my interpretasie het dit beteken 'n lang termyn en langer as die periodes wat in die verlede alreeds gegeld het. Nou daarby dan is dit net duidelik die effek ook self's al van hierdie swak taalgebruik wat dit op myself gehad het in hierdie verband."

Van Rensburg 159 : 13-19

- 92.10 "My (onduidelik), my subjektiewe standpunt oor die vertolking van hierdie sein na aanleiding van my gesprek met Brigadier van der Westhuizen was een en net een besondere vertolking, naamlik dat die drie here wie se name daar verskyn word aanbeveel om vir 'n lang termyn aangehou te word in terme van veiligheidswetgewing buite die OPGBS gebied."

Van Rensburg 175 : 3-9

CHAPTER V

VARIOUS MATTERS

93. Geldenhuys and Stemmet:

We do not propose to discuss the evidence of these witnesses beyond those topics mentioned in previous paragraphs. The topics dealt with contain the important material in their testimony. As at present advised, the balance of their evidence take matters no further.

94. Vermaak and Others:

Again, the remainder of the witnesses take the matter no further.

95. The South African Police:

We indicated in our notes to these heads that we do not propose dealing with the arguments relating to the complicity of the SAP in the Goniwe murders. One aspect deserves brief mention: whatever

involvement the SAP, or the Security Police for that matter, may have had, there is no evidence that the SADF were in any way involved. The evidence shows a complete lack of combined sinister operations.

CONCLUSION

96. The objective and uncontroverted facts, the probabilities and circumstances all serve to spin a web whose intricate but consistent design serves as the infallible touchstone that reveals:
 - 96.1 The incongruity of any suggestion that the signal was a death warrant.
 - 96.2 The inherent truthfulness of Van Der Westhuizen.
 - 96.3 The evidence of Du Plessis is in character with the man: perjury, theft, discontent and treachery, all compounded in one tragic alcoholic being.

97. In the final result, Du Plessis becomes so enmeshed in that web and his own lies and contradictions that nothing of worth in his testimony remains.
98. The evidence in this Inquest goes further than providing no proof of criminal behaviour connecting Van Der Westhuizen with the Goniwe murders: the evidence establishes his innocence.

A.W. MOSTERT SC.

BARNARD KNOETZE

Advocates' Chambers
JOHANNESBURG

15 November 1993

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IN THE SUPREME COURT OF SOUTH AFRICA

(SOUTH EASTERN CAPE LOCAL DIVISION)

INQUEST NO: 626/87

Deceased: MATTHEW GONIWE

FORT CALATA

SICELO MHLAULI

SPARROW MKONTO

SUPPLEMENTARY HEADS OF ARGUMENT

AD OPERATION KATZEN

1. Evidence in regard to the planning and execution of Operation Katzen, as deposed to by Du Plessis and corroborated by the documentary evidence tendered, is admissible in this inquiry

- 1.1 as establishing the fact that the Security Forces, and more particularly the South African Defence Force, regarded the murder of identified opponents as legitimate means to achieve the objects of Counter Revolutionary strategy;

FAX TO: Attorney General (Guth)
FAX NO: 0461-24693 PAGE: 1 OF: 14
ATTENTION OF: Mr Mike Hodges SC
FROM: Adu Glenn Goosen DATE: 16-3-94
COMPANY: _____

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1.2 in rebuttal of the denial by Van der Westhuisen that neither he nor the EPJMC ever planned or approved the murder of any person;

1.3 in support of Du Plessis' assertion that:-

1.3.1 the Security Forces during 1985 and subsequently were prepared to murder political opponents of the State;

1.3.2 the principles of Counter Revolutionary warfare included the recognition and acceptance of the necessity to embark on extra-legal activities, and that such principles were in fact applied.

2. In dealing with the admissibility of "similar fact" evidence our Courts have held that such evidence is admissible where there is a sufficient nexus between the fact in issue and the fact sought to be proved.

S v Letsoko and Others 1964 (4) SA 768 (A) at 775 C - E

Gosschalk v Rossouw 1966 (2) SA 476 (C) at 482 G

S v Maduna and Others 1978 (1) SA 143 (D&CLD)

Omega and Others v African Textile 1982 (1) SA 951 (T) at 955 H

c:\docs\ggsupp p.3

3. It is our submission that in regard to the meaning to be attached to the Signal, the essential facts in issue are:-

- 3.1 whether the SADF, SAP Security Police and / or individual members of the said Forces accepted the necessity for extra-legal covert actions inter alia involving the commission of murder, to achieve the object of countering the revolutionary onslaught;
- 3.2 the perception of Matthew Goniwe and his associates and the analysis of their activities by the Security Forces;
- 3.3 the approach of the Security Forces and /or individual members thereof to the challenges presented by the escalating unrest and revolutionary climate in the Easter Cape;
- 3.4 the broader context presented by the strategic planning of the Security Forces in particular and the State in general during the mid 1980's;
- 3.5 the intention of Du Plessis (the drafter of the Signal), Van der Westhuisen and Van Rensburg, and
- 3.6 the veracity of Van der Westhuisen's denial of his or the EPJMC's involvement in the planning or approval of the murder of any person.

4. In order for the evidence relating to Operation Katzen to be admissible a nexus in proximity of time, of method and of circumstance between the fact or facts in issue and the facts sought to be proved must be established.

S v Green 1962 (3) SA 886 (A) at 894 E - F

5. It is not necessary to establish a link between the Signal per se and Operation Katzen.

Proximity of Time

6. Operation Katzen came into existence approximately one year after the despatch of the Signal. The fact that the evidence sought to be proved deals with facts subsequent to those in issue is no bar to its admissibility.

S v Green (supra) at 894 G

7. Nor in our submission is the mere fact that the particular facts are separated in time by one year a bar to their admissibility. The proximity in time will be one of the factors which will be weighed in determining whether there is indeed a nexus.

Gosschalk v Rossouw (supra) at 484 F

8. Du Plessis testified that Plan Strelitzia, a brain child of Van der Westhuisen, involved

".. 'n plan om die strukture in die Oos Kaap te herstruktureer sodat daar vinniger besluitneming kon wees. Ek het reeds gister ook genoem dat al die streeksdirekteure moes altyd hulle beslissings na hulle hoofkwartier toe deurvoer want hulle kon nie plaaslik beslissings he nie. Strelitzia was 'n plan gewees om daardie strukture saam te vat met 'n, kom ons noem dit 'n goewerneur vir die Oos Kaap."

Du Plessis p. 2055 lines 24 - 31

Van der Westhuisen confirms this.

"Ek kan vir u skets. Die idee was amper dat die Oos Kaap provinsiale status moet kry, daar is selfs gepraat, nou klink dit miskien 'n bietjie snaaks, van 'n goewerneur stelsel vir die Oos Kaap. 'n Fiesiese ontwikkelingstreek was 'n ander term wat gebruik was."

Van der Westhuisen p. 2964 lines 4 - 9

See also p. 3017 line 9 and p. 3020 lines 9 - 23

9. Whilst the central idea in the Strelitzia Plan was to achieve a co-ordination of state departments and "de-centralisation" of power, the driving rationale of the plan was the combatting of the revolutionary onslaught.

Van der Westhuisen p. 2962 line 30 - p. 2693 line 3

10. Plan Strelitzia was prepared during the same period that the Signal was drafted and despatched, and it was presented in Pretoria on 12 June 1985.
11. We do not know the full content of the Strelitzia Plan, but it is significant that the central idea also finds subsequent expression in the Operation Katzen documents.

Annexure A to F4 par 11 (b)(i) and (ii)(3)

Annexure B to F4 par 14 (b)(i) and (ii)(3)

12. The above references must, we submit, be read in the context of the statement that:-

"Die idees in hierdie skrif is nie losstaande nie en moet dus as deel van die totale teen-rewolusionere poging beskou word."

Annexure B to F4, par 3

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13. We submit that there is on the evidence of Van der Westhuisen and Du Plessis, a conceptual continuity between the key elements of Plan Strelitzia and those of Operation Katzen. The formulation of those ideas - as a basis for strategic planning - are closely linked in time to the events and circumstances surrounding the drafting and despatch of the Signal.

Method and Circumstance

14. It is apparent from the Katzen documents that the initial proposals were prepared by officers of EP Command and despatched to higher authority for approval. The Signal too was despatched to higher authority for approval of a proposal emanating from officers of the EP Command.
15. Reference to higher authority for approval of operations involving extra-legal activity is a recognised practice in counter revolutionary warfare. This was conceded by Van der Westhuisen and Van Rensburg.

Main Heads par 31.2

16. The documents read as whole are drafted in conspiratorial terms, employ "veiled language" and evidence the need for stealth and subterfuge to avoid any actions being traced back to the South African Security Forces.

17. In particular, the language used in the Katzen documents bears a striking similarity to that used in the Signal.
18. Operation Katzen was conceived as an overall strategic plan to stabilize the Eastern Cape and to create an effective counter revolutionary bulwark against the ANC / SACP alliance.
19. These essential counter revolutionary objectives were being pursued by the Security Forces, and in particular the SADF, from early in 1985 prior to the despatch of the Signal.
20. It is apparent from the Katzen documents that particular individuals who are characterised as obstacles to the achievement of the strategic objective of the Operation are targeted for covert action by the Security Forces. These covert actions, per the documents included:-

20.1 Disinformation and discrediting;

Annexure C to F4 par 1 (c)(f)

Annexure D to F4 par 2 (d)(ii)

20.2 Attacks on property;

Annexure D to F4 par 2 (g)

20.3 Murder;

Main Heads par 47.2

21. Matthew Goniwe was identified as a thorn in the flesh of the Security Forces and as a major obstacle to the achievement of the strategic objectives of the Security Forces during 1985.

Main Heads par 32 - 40

22. It is also significant that the key persons and institutions involved in Operation Katzen are the same as those involved in the events giving rise to the Signal.
23. In the premises, it is our submission, there is a sufficient nexus between the facts in issue and the facts sought to be proved in regard to Operation Katzen to warrant the admissibility of such evidence.
24. In regard to the proposition advanced by Counsel for the SADF that the Katzen documents are capable of innocuous interpretation, we submit that there is no basis in fact or in logic for such an interpretation. We associate ourselves with the submissions made by Counsel for the Families as to the proper evaluation of the Katzen evidence and accordingly do not deal therewith herein.

AD VAN RENSBURG'S FURTHER EVIDENCE

25. We repeat our submission that Van Rensburg's evidence is a labyrinth of lies made all the more absurd by his so called "nuwe herinnering".

26. The high water mark of the absurdity of his evidence is achieved when, despite a clear indication of the consequence of a particular answer, he states that on 17 June 1985 he could not remember that he had incorporated the proposal contained in the Signal on 12 June 1985.

Van Rensburg (Further Evidence) p. 976 lines 16 - 18

See also p. 981 lines 25 - 28

27. He then takes the matter further by stating that on 17 June 1985 he assumed that Le Clus was in fact present at the SSVR, when on the basis of his further evidence Le Clus, Van Rensburg's personal assistant, could not have been there since March 1985.

Van Rensburg (Further Evidence) p. 982 lines 11 - 21

28. It is our submission that at the time when Van Rensburg first gave evidence in this Inquiry, he had a clear recollection of what had transpired in regard to the Geldenhuys Committee Report.

c:\docs\lggsupp p.11

28.1 He recalled that he had received the Report on 12 June 1985;

Van Rensburg p. 85 lines 6 - 10

28.2 He recalled that he (not another person) had worked through the document and satisfied himself that it dealt adequately with the question of detention of Goniwe and his "meelopers".

Van Rensburg p. 85 line 20 - p. 86 line 1

28.3 He also recalled that he had handed the Report to Strydom.

Van Rensburg p.86 lines 1 - 5

29. The above is entirely inconsistent and irreconcilable with the allegation that his first evidence was based on the assumption that Le Clus was present, in that had Le Clus been present, as he assumed, Le Clus would have dealt with both the Signal and the Report.

Van Rensburg (Further Evidence) p. 957 line 7 - p. 958 line 27

30. It is also irreconcilable with the allegation that on 17 June 1985 he had assumed that Le Clus was present and that in effect he operated under that assumption until August 1993 when he realised that Le Clus could in fact not have been present at the SSVR at the relevant time.
31. We submit that Van Rensburg's alleged discovery that Le Clus was not present at the SSVR in June 1985 is an attempt by him to mask the real reason for his change in evidence. That real reason, we submit, is to be found in the fact that in the event that this Honourable Court were to find that the Signal was treated as an input to the Geldenhuys Report it would follow that the Court could not find that the Signal bears a culpable meaning and that it was so intended.
32. It is our submission that the Court will reject his evidence as lying evidence.

AD VORSTER'S EVIDENCE

33. Vorster's evidence offers no positive support to Van Rensburg's further evidence. On the contrary Vorster's evidence lends the lie to Van Rensburg's assertion that he received the Signal and Geldenhuys Report together as open documents on the 12 June 1985.

c:\docs\ggssupp p.13

34. Vorster was not challenged on her statement that in the event that she received correspondence per courier she would have handed such correspondence to Van Rensburg in an unopened envelop. We know that the Signal would have been delivered to the SSVR offices per courier in an envelope, given that it was marked "Uiters Geheim". Vorster therefore could not have, per her affidavit, delivered the Signal to Van Rensburg as an open document (particularly also in the light of the fact that Le Clus, who was the only other person who could have dealt with the Signal was not there in June 1985).
35. Nor was it put to her by Van Rensburg's Counsel that she had delivered the Signal together with the Report to Van Rensburg on 12 June 1985.
36. Vorster also testified that she did not type the Geldenhuys Report and that she did not edit the document, as was suggested by Van Rensburg in his evidence.

Vorster p.1059 lines 10 - 18

37. We submit that the Court will accept Vorster's evidence as reliable.

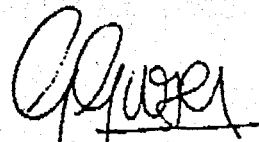
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GELDENHUYS' FURTHER EVIDENCE

38. It is our respectful submission that, in the light of our submissions in regard to Van Rensburg's further evidence, Geldenhuys does not take the matter any further than in his original evidence, and we accordingly make no further submission herein.

CONCLUSION

39. We reiterate our conclusions as stated in our Main Heads of Argument.


G. G. GOOSEN

Counsel's Chambers

PORT ELIZABETH

16 March 1994

GONIWE AND OTHERS
HEADS OF ARGUMENT

PRESENTED BY
COLONEL LOURENS DU PLESSIS

IN THE SUPREME COURT OF SOUTH AFRICA
(SOUTH EASTERN CAPE LOCAL DIVISION)

INQUEST NO: 626/87

Deceased: MATTHEW GONIWE

FORT CALATA

SICELO MHLAWULI

SPARROW MKONTO

HEADS OF ARGUMENT

A: INTRODUCTION

- 1 This Inquest in to the deaths of Matthew Goniwè, Fort Calata, Sparrow Mkonto and Sicelo Mhlawuli was re-opened following the publication by the New Nation of a signal message ("the signal") despatched from the EPJMC to the SSSC on 7 June 1985.
- 2 Central to the determination of the issues raised during the course of the Inquest is the meaning to be attached to the Signal.

3 It is our submission that determination of the meaning of the Signal will require an evaluation of the following factors:-

3.1 An understanding of the role and function of the NSMS during the mid 1980's and in particular during 1985;

3.2 An assessment of the attitudes and approaches of the Security Forces to the political challenges raised by the state of political unrest during this period;

3.3 An evaluation of the veracity of the witnesses directly concerned with the Signal, namely VAN RENSBURG, DU PLESSIS and VAN DER WESTHUISEN.

4 It is our submission that upon a proper evaluation of the above factors this Court will find that the Signal,

4.1 Was intended to convey the suggestion that Matthew Goniwe, Fort Calata and Mbulelo Goniwe be murdered;

4.2 Was sent for the purpose of initiating steps to murder the aforementioned persons; and

4.3 Was on the probabilities causally connected with the eventual murder of the aforementioned deceased persons some 20 days thereafter.

5 We therefore submit that this Court will find that there was as between VAN RENSBURG, DU PLESSIS and VAN DER WESTHUISEN a conspiracy to commit murder alternatively to incite the commission of murder.

6 We have had the benefit of reading the Heads of Argument submitted by Counsel for the Families of the Deceased. We associate ourselves with the submissions therein contained. We accordingly do not propose to repeat such submissions and will confine ourselves to additional submissions only. Where it is necessary for the purposes of the argument to repeat submissions raised by Counsel for the Families we will do so.

7 It should be noted also that these Heads deal essentially with matters of fact. We will in due course file Supplementary Heads of Argument which deal with legal issues to be debated in Argument. We do not propose to deal with the allegations concerning the alleged involvement of members of the South African Police in the commission of the murders. These matters are dealt with by Counsel for the Families and in any event largely fall outside of the ambit of our particular interest in

these proceedings.

B: THE NATIONAL SECURITY MANAGEMENT SYSTEM

- 8 The NSMS was established during the course of 1979 and after a period of dormancy was revitalised during the course of 1984. The system essentially comprised an interlocking system of committee structures at different levels. At its apex was the State Security Council comprising senior Cabinet officials and representatives of the South African Defence Force and South African Police. Also represented were the various Intelligence agencies of the state.

Du Plessis p 2027 line 16

- 9 The SSC was serviced by a Secretariat (SSSC) based in Pretoria. The SSSC comprised seconded members of the Police, SADF, Intelligence agencies as well as representatives of government departments.
- 10 Within each SADF Command Area a Joint Management Centre (JMC) was established comprising representatives of the Security Forces (SAP, SADF, NIS, Railway Police) and the government departments operative in the area.

- 11 Each JMC had established within its area of jurisdiction Mini- JMC's constituted on a similar basis.

Families Heads of Argument par 21

- 12 It is our submission that the NSMS itself is a creation of counter revolutionary warfare theory and not merely the vehicle by which that counter revolutionary war was fought.

Exhibit G4 par 30

Van der Westhuisen p 2931 line 10

Counter Revolutionary Warfare

- 13 Numerous witnesses conceded that the Security Forces were, during 1985, engaged in waging a counter revolutionary war against revolutionary forces represented by the ANC/SACP alliance and the PAC.
- 14 Du Plessis testified that this counter revolutionary war was conducted according to broad principles set out in the works of various experts, including Fraser (G4) and McCuen (G32).

- 15 Central to the counter revolutionary doctrine is the recognition that the conflict is primarily political rather than military. It flows from this that the key to success of both the revolutionary forces and the counter revolutionary forces is the population itself.

Exhibit G4

Exhibit G32

- 16 Du Plessis testified that in the development of counter revolutionary strategy regard must be had to the fact that between the revolutionary and counter revolutionary forces there lies a neutral majority of the population. He also testified that it was accepted by the Security Forces that the pro-revolutionary segment of the population should be neutralised and the revolutionaries eliminated.

Du Plessis p 2042 line 30 - p 2043 line 14

see also : Van der Westhuisen p 2929 lines 17 - 20

- 17 Du Plessis further testified that the McCuen and Fraser documents were circulated amongst members of the Security Forces and that the principles set out therein were in fact applied.

Du Plessis p 2043 line 27

Du Plessis p 2046 lines 6 - 8

see also: Van der Westhuisen p 2927 lines 3 - 17

18 Although Van der Westhuisen was not prepared to concede that the McCuen Summary (G32) was regarded as a bible amongst Security Force members he nevertheless conceded that in virtually all respects McCuen correctly reflects the approach adopted by the Security Forces.

19 He attempted however to downplay the significance of the doctrine of Counter Revolutionary warfare in favour of his own conception of Normalisation / Stabilisation.

Van der Westhuisen p 2675 line 25 - p 2676 line 8

20 When he is taken step by step through the principles of counter revolutionary warfare theory, he concedes the significance of each and every principle. In addition he accepts that the Security Forces in fact acted in accordance with those principles.

Van der Westhuisen p 2929 line 12,

p 2930 line 20,

p 2930 line 29 - p 2931 line 9

21 He goes further than this. When he is confronted with Exhibit G57 he embraces those aspects which present no apparent danger to him. So for instance he agrees that in the organisation and counter-organisation phase of the war attention must be paid to improving administration and services where necessary.

22 Van der Westhuisen p 2934 line 2 - 20

22 He also readily concedes that a key component of the strategy is the use of psychological operations

p 2935 line 8

and is prepared to acknowledge certain "dirty tricks" operations.

p 2935 line 31, p 2936 lines 27 and 28

Heitman

23 However, when he is confronted with a passage in Exhibit G 57 which reads,

" Further, some extra legal-operations may prove beneficial both in eliminating key members of the insurgency and in sowing suspicion. Needless to say, such operations would need to be suitably disguised and the necessity for them carefully weighed."

he immediately equivocates by attempting to draw the distinction between "insurgents" and "activists".

p 2938 line 23

- 23 Later, when he is forced to concede that such "extra-legal operations" were indeed regarded as part of the arsenal of the counter revolutionary forces in the country in 1984 / 1985, he takes refuge in the assertion that he personally always regarded such actions as "kontra-produktief".

p 2939 line 4

- 24 Van der Westhuisen later develops this attitude into the basis of his own version of counter revolutionary warfare based on his preference for "normalisation " rather than "stabilisation".

- 25 Counsel for the SADF argues that in the ethos of normalisation there is no room for political murder. Consequently Van der Westhuisen could not (and did not have) the will to murder Goniwe.

SADF Heads of Argument p 111 par 76

- 26 This argument unfortunately loses sight of a rather more reliable touchstone of Van der Westhuisen's attitude to "normalisation / stabilisation" than his mere ipse dixit, namely the Operation Katzen documents.

Annexure A to Du Plessis second affidavit (F 4) is drafted in Van der Westhuisen's handwriting and is signed by him. Paragraph 2 and 3 thereof reads:-

"2. Beklemtooning. Hierdie geskrif spreek die probleem van blywende normalisiering van die Oos Kaap situasie aan..... Die idees in hierdie geskrif is nie losstaande nie en moet dus as deel van die totale teen-rewolusionere poging beskou word. In Nov 1985 het hierdie Kmdmt en GBS hul ten doel gestel om "in 1986 te wen". Dit is dan ook nog steeds ons doel om die Oos-Kaap voor 31 Des 1986 sodanig te stabiliseer en te normaliseer dat die huidige noodstoestandregulasies opgehef kan word. Dit word egter voorsien dat die teen-rewolusionere taak nie daarmee as afgehandel beskou sal kan word nie.

DOEL

3. Die doel van hierdie voorlegging is om beginsel goedkeuring te verkry vir 'n plan om die Oos-Kaap teen Des 87 blywend te normaliseer."

- 27 It is our submission that this passage lends the lie to Van der Westhuisen's assertion that within the ethos of normalisation there is no room for political murder. It further lends the lie to his claim that whilst other Security Force leadership were concerned with short term stabilisation actions he was a proponent of longer term normalisation actions. It is also clear in our submission that "normalisation" and "stabilisation" are merely terms which describe the necessity in counter revolutionary strategy to address not only military but also socio-economic problems.

Van der Westhuisen p 3015 lines 12 - 19

- 28 The direct evidence of Du Plessis, which was not disputed nor challenged, is to the effect that Operation Katzen as approved and executed clearly envisaged the murder of certain persons. The plan was drafted by Du Plessis and Hall on the specific instructions of Van der Westhuisen who was directly involved in the operational execution of the plan.

See paragraph 47 below

- 29 Perhaps the most telling indication of Van der Westhuisen's attitude to the ethos of normalisation is his unfortunate and unguarded use of the word "uithaal" interchangeably with eliminate to mean kill. Telling,

because the word "uithaal" finds favour with Van der Westhuisen in the Katzen documents where it has precisely the same meaning.

- 30 It is our submission that Van der Westhuisen rather cynically has attempted to present himself as a champion of a more civilised approach to the security problems which confronted the Security Forces during 1984/85.

We respectfully submit that this is merely an attempt to avoid the logical consequence of the proper application of the doctrines of counter revolutionary warfare, namely acceptance of the fact that the unconventional nature of such warfare justifies the use of unconventional methods, which methods include the murder of key individuals involved in the revolution.

- 31 It is further our submission that the evidence establishes that the Security Forces:-

- 31.1 Accepted in principle the necessity from time to time to employ extra-legal operations to eliminate key revolutionary figures;

Exhibit G57

Du Plessis p 2048 line 30

31.2 Recognised that the decision to employ such extra-legal operations was one requiring approval at the highest level, and accepted that such operations by their very nature would be covert and therefore so conducted to permit a plausible denial of any complicity by the Security Forces; and

Exhibit G4 paragraph 33 (d)

Exhibit G33

31.3 In fact conducted such extra-legal operations, which included the murder or attempted murder of key figures in opposition to their stated objectives.

See paragraph 47 below

C: THE "GONIWE PROBLEM"

32 It is common cause that the civil unrest which engulfed the country from September 1984 reached alarming proportions in the Eastern Cape during 1985. It is also common cause that the African National Congress (ANC) together with the South African Communist Party

(SACP) were regarded as primarily responsible for the onslaught. The United Democratic Front (UDF) and its affiliates were seen by the Security Forces as front organisations for the ANC/SACP alliance.

Heads of Argument for the Families par 22

- 33 It is also common cause that Matthew Goniwe, together with his close associates, created substantial difficulties for the Security Forces in the Eastern Cape. He was described as a thorn in the flesh of the Security Forces.

Du Plessis p 2027 line 6

- 34 In our submission the full import of the challenge presented by Goniwe becomes apparent when his role is assessed against the backdrop of the prevailing analysis of the revolutionary onslaught then being waged against the State.

This onslaught comprised a range of activities aimed at destroying the organs of state control in black townships, particular the Black Local Authorities, attacks on Security Force personnel, Councillors and business interests. The Eastern Cape was regarded as the fulcrum of the revolution.

Du Plessis p 2034

Van der Westhuisen p 2994 line 20 - p 2992 line 3

Bundle 1, Affidavit of Van der Westhuisen p 105 par 4

- 35 Van der Westhuisen conceded that the African National Congress had adapted its strategic conception of the manner in which the armed struggle was to be prosecuted to take account of changing circumstances.

Van der Westhuisen p 2986 line 22

The effect of this adaptation was that the ANC prior to 1985 had begun to promote the concept of an "insurrectionary climate" and "people's war".

Van der Westhuisen p 2987 lines 3 - 7

In effect this adaption necessitated the development of training bases inside the country , recruitment and mobilisation of groups of militant youths armed with home made weaponry.

Van der Westhuisen p 2988 - 2991

36 In this context, the creation of so called "alternative structures" represented not only a challenge to existing state structures but also an immediate military threat, in that these structures were ideal recruiting basis for the ANC, enabled ANC operatives to mobilise the population, gather intelligence and camouflage there activities amongst the population.

Van der Westhuisen p 2992 - 2994

Du Plessis p 2053 line 19, p 2054 line 20

37 It is our submission that Matthew Goniwe's activities fitted the pattern of an unfolding revolutionary assault upon the State. He played the role of a revolutionary, an agitator and the disseminator of the revolutionary idea.

Du Plessis p 2052 line 28

But perhaps of even greater significance was the fact that Goniwe was able to a greater or lesser extent to disguise his activities as merely political agitation on the social and welfare terrain.

Van der Westhuisen p 2997 at line 12 where he says:-

"Hy het vryheid van beweging gehad, hy kon toesprake maak, hy kon mense beïnvloed, hy kon die alternatiewe strukture stig wat hy wel gedoen het, so dit het hom die bewegingsvryheid gegee om daardie strategie te ontplooi."

and at line 23,

"Ja, hy was 'n politieke aktivis, en die rol wat in op daardie terrien gegee het, ja dit was bydraend gewees tot die gewapende stryd ook gewees. Dit staan aanvullend of wisselwerkend tot mekaar."

38 It is our submission that the evidence establishes beyond doubt that Matthew Goniwe was in fact regarded as a dangerous enemy of the state.

Winter p 793

Snyman p 1142 line 8 - 14

Van Rensburg p 90 line 3 - 5

Vermaak p 452 lines 7 - 11

Du Plessis p 2046 line 30

Van der Westhuisen p 2524 line 3

Herein, we submit lies the true dilemma that Goniwe created for the Security Forces, namely a recognition by the Security Forces of his true revolutionary role coupled with an inability to act against him without exacerbating an already desperate situation.

39 That the situation was indeed desperate is demonstrated by the pressure which was brought to bear on Van der Westhuisen to take steps to remedy the situation.

40 Du Plessis's evidence was to the effect that Van der Westhuisen's job was put in jeopardy as a result of the situation.

"Die politici het vir Generaal Van der Westhuisen onder geweldige druk geplaas want die standaard antwoord was "soorteer julle dinge uit hier op die grond, ons kan nie vir julle se wat om te doen nie", wat aanleiding gegee het tot 'n klomp planne wat toe beraam is om die situasie te probeer ontloot. Daar was op 'n stadium die indruk geskep gewees dat Generaal van der Westhuisen dalk sy pos sou verloor as hy nie die situasie onder beheer kon kry nie."

Van der Westhuisen confirmed that he was under tremendous pressure.

Van der Westhuisen p 2640 lines 22 - 24

D: THE FAILURE OF ACTIONS AGAINST GONIWE

41 Prior to June 1985, the actions taken by the Security Forces against Goniwe and his associates had failed to render any long term solution to the problems which he created. It is common cause that Matthew Goniwe's transfer out of Cradock had only created widespread social unrest and boycotts.

His detention under Section 28 of the Internal Security Act had served little other than to increase his influence both in and outside of the Eastern Cape.

Re-instatement in his post as teacher would represent a defeat and would not contribute to any limitation of his effectiveness as a revolutionary organiser within the region. Hence the unequivocal opposition of the Security Forces within the EPJMC to his re-instatement.

Heads for the Families par 25

E: THE SIGNAL

Du Plessis' Evidence

42 It is our submission that Du Plessis was a credible and reliable witness in all material respects and accordingly his evidence should be accepted by this Honourable Court.

43 Du Plessis gave direct evidence in regard to the meaning of the Signal, which evidence is supported by documentary evidence before the Court and the probabilities of the matter.

He stated unequivocally and repeatedly that paragraph 3 of the signal meant that the persons named therein should be killed. Despite a protracted and at times harrowing cross-examination he remained unshaken on the critical issue, namely the meaning to be attached to the signal on the date on which it was drafted and despatched.

Du Plessis p 2108 lines 9 - 13

see too: p 2026 lines 24 - 26

p 2063 line 31 - p 2064 line 2

p 2065 lines 11 - 13

p 2066 lines 3 - 6

Du Plessis p 2107 lines 6 - 13

Van der Westhuisen p 2198 lines 6 - 8

p 2199 lines 9 - 12

Van der Westhuisen p 2305 line 9

Van der Westhuisen p 2305 line 9

- 44 In response to questions put by the Court Du Plessis conceded that there was a possibility that he could have misinterpreted the order given to him by Van der Westhuisen. He went so far as to concede a 50 % chance of error on his part.

Van der Westhuisen p 2305 line 9

Du Plessis p 2427 lines 13 - 19

p 2428 line 27 - p 2429 line 6

Van der Westhuisen p 2305 line 9

- 45 It is our submission that this concession was in fact not warranted by the evidence tendered by Du Plessis earlier in his testimony. It is further our submission that this concession is far more indicative of his desire to be fair to Van der Westhuisen, a man whom he admires deeply, rather than a reflection of the probabilities of the matter.

Conclusion

Indeed if regard is had to the very good relationship of trust and understanding which existed between Du Plessis and Van der Westhuisen at the time, and

Van der Westhuisen p 2305 line 9

Du Plessis p 2064 lines 12 - 16

Van der Westhuisen p 2312 lines 12 - 14

the fact that there had never been any other occasions when Du Plessis was guilty of bad draftmanship or error in the preparation of signals,

Van Rensburg p 181 lines 20 - 28

then, in our submission, the "50%" concession is not a significant concession on the probabilities.

46 In any event Du Plessis testimony as to the meaning of the Signal is corroborated by documentary evidence. In this regard we refer to the Operation Katzen documents.

47 Du Plessis' evidence in regard to Operation Katzen was not contested nor challenged in cross examination. On the contrary, despite his claim of privilege, Van der Westhuisen confirmed his involvement in the Operation.

Van der Westhuisen p 2899 lines 10 - 19

Exhibit G37

Van der Westhuisen p 2900 lines 20 - 26

47.1 Van der Westhuisen also confirmed that the phases of the Operation, namely those that were carried out, were indeed approved.

Van der Westhuisen p 2895 lines 18 - 24

47.2 It is clear from the evidence of Du Plessis that the achievement of the objects of Operation Katzen involved the murder of Chief Minister Lennox Sebe and other persons. This was understood and accepted by all of the parties involved in the planning and execution of the operation, including Van der Westhuisen.

Du Plessis p 2075 line 28 -p 2076 line 28

p 2078 lines 10 - 17

p 2079 lines 10 - 15

p 2079 lines 26 - 28

p 2080 lines 16 - 22

p 2081 lines 9 - 11

p 2082 lines 10 - 12

48 The language used in the Operation Katzen documents, in particular the use of phrases such as "permanent verdwyn", "uithaal" and "permanent uithaal" bear a striking resemblance to the language used in paragraph 3 of the Signal.

49 It is also significant that the persons responsible for that usage of words were all involved with the EPJMC and / or Eastern Province Command of the SADF during June 1985.

50 It is our respectful submission that the evidence clearly establishes that the phrases used in the Katzen documents were intended to convey the meaning that the persons to whom they refer be killed. In addition hereto the evidence also establishes that steps were in fact taken with the consent and / or active connivance of Van der Westhuisen and Du Plessis to give effect to the stated intention to kill certain persons during the execution of the early phases of Operation Katzen.

51 It is our submission that the Katzen documents provide a far more coherent context within which the language usage in the Signal is to be understood than the so-called "verwyder bundel" (G47) on which Counsel for the SADF seeks to rely.

52 It is further our submission that the Katzen documents establish the true extent to which the Security Forces applied the principles of counter revolutionary warfare. It is instructive to note that the Operation was referred to very high authority for approval, and was conducted with the active involvement of all components of the Security Forces.

- 53 Du Plessis failed to confirm his first affidavit deposed to by him on 11 May 1992. In that affidavit he states that he is certain that Van der Westhuisen never suggested / indicated that his proposal implied that persons should be killed.

Bundle 1: Affidavit of Du Plessis p 104

- 54 Du Plessis testified as to the circumstances under which he deposed to his first affidavit. At no stage was he cross-examined about those circumstances nor was any evidence tendered to rebut his allegations. We submit that in the absence of evidence to gainsay Du Plessis' explanation that such explanation can be accepted by this Court.
- 55 It is further our submission that the language used in the First Affidavit, which was drafted by Wagenaar, erstwhile attorney for the SADF, was calculated to afford scope for plausible explanations by Van der Westhuisen.
- 56 Paragraph 1 of Du Plessis' first affidavit refers to the signal " wat klaarblyklik in my handskrif voltooi is" (our emphasis). Paragraph 3 refers to the date of the Signal - " volgens die gemelde sein was dit waarskynlik op 7 Junie 1985" (our emphasis). Paragraph 4 again refers

to the Signal as published in New Nation as "klaarblyklik outentiek" (our emphasis).

57 The aforementioned language usage suggests that at the time that Du Plessis deposed to the affidavit he did not have an independent recollection of the signal, nor could he attest to its authenticity. Du Plessis' evidence in contrast was to the effect that from the outset he acknowledged the authenticity of the signal and his evidence read as a whole indicates that he has an excellent recall of the events of June 1985.

58 It is instructive to note that Van der Westhuisen's affidavit contains similar language usage. Paragraph 7 thereof refers to the published "afdruk van wat voorgee 'n seinberig...", and in paragraph 15 states in regard to the Signal, "as dit wel ooit bestaan het" that Van der Westhuisen has no recollection.

Bundle 1: Affidavit of Van der Westhuisen p 106

59 We submit that affidavits, drafted by the same person and during the same period, were so drafted to keep open the options of SADF witnesses who may have been called to testify. We also submit that this corroborates Du Plessis' explanation of the circumstances under which he deposed to his first affidavit, and may indeed explain why

Wagenaar and Nipe were not called to give evidence.

60 Counsel for the SADF has suggested that Du Plessis tailored his evidence as part of a disinformation campaign against the SADF. We submit that this suggestion is ludicrous. If Du Plessis was involved in a conspiracy to discredit the SADF, and the conspiracy commenced prior to the leaking of the Signal (as is contended for by Counsel for the SADF) then why would Du Plessis commit himself under oath to a version in conflict with his conspiratorial version, and thereby risk his credibility.

61 It is our submission that the conspiracy argument is a desperate but rather weak attempt to rescue Van der Westhuisen.

Furthermore, if Du Plessis had intended to falsely implicate Van der Westhuisen in murder for purposes of discrediting the SADF then one would have expected that he should in clear and unambiguous terms state that Van der Westhuisen had told him in so many words to send a signal proposing that Goniwe and the others be killed. One would also have expected him to falsely testify that Van der Westhuisen had selected the persons to be killed and so to further implicate Van der Westhuisen. Yet Du Plessis does nothing of the sort. Indeed he repeatedly states that he and Van der Westhuisen did not discuss the killing of any person in such terms. He says instead that the term

"doodmaak" was not used between them. He understood what Van der Westhuisen's order meant.

Du Plessis p 2198 lines 6 - 8

p 2199 lines 9 - 12

p 2305 line 9

- 62 Counsel for the SADF's attack on Du Plessis' character established only that Du Plessis has a drinking problem. The attack in no way served to undermine Du Plessis' reliability as a witness.

Van der Westhuisen's Evidence

- 63 Counsel for the Families has dealt in detail with the evidence of Van der Westhuisen on the Signal. We concur with the submissions made and do not propose to make any additional submissions. In any event we deal elsewhere in these Heads with submissions regarding his reliability as a witness in general.

Van Rensburg's Evidence

- 64 In similar vein, Counsel for the Families has argued at length, and in our submission quite correctly, that Van Rensburg's evidence is a labyrinth of absurdities and lies. We do not propose to deal further with his

evidence, save to highlight one crucial aspect which further underlines his untruthfulness.

- 65 Van Rensburg testified that the SSSC was not involved in any covert operations. He stated (at p 192 line 6):-

" Nooit in der ewigheid sou dit deur my kantoor gegaan het nie om twee besondere redes. Die Sekretariaat van die Staatsveiligheidsraad was verhewe bo enige koverte (?) moord ondermaanse vuil "cloak and dagger" spele (our emphasis) van hierdie aard, en punt nommer 2 die uitvoering van enige sodanige taak sou gele het op die lynfunksie van Brigadier Van der Westhuisen,..."

- 66 The underlined portion in the above passage is simply not the truth. Documentary evidence before the Court indicates that a meeting occurred at the offices of the SSSC in Pretoria and at which the SSSC was represented regarding Operation Katzen. Operation Katzen as we have submitted elsewhere envisaged the murder of Lennox Sebe and other persons and by its very nature was a covert operation. It is our submission that the SSSC was involved at a very high level in the planning of Operation Katzen, and on the probabilities, we submit, would have been involved in such planning as a matter of course.

F: CONCLUSIONS

- 67 We submit that this Honourable Court will find that Du Plessis was a truthful and reliable witness whose evidence in regard to the Signal and the surrounding circumstances can be accepted. We submit further that the Court will find that Van der Westhuisen was not candid in his testimony and deliberately adopted the course of alleging a failure of memory.
- 68 We submit that the Signal was intended to convey the proposal that Matthew Goniwe, Fort Calata and Mbulelo Goniwe be killed.
- 69 We therefore submit that the evidence before the Court establishes that Van Rensburg, Van der Westhuisen and Du Plessis are guilty of conspiracy to commit murder alternatively incitement to murder.

G. G. GOOSEN

Counsel's Chambers

PORT ELIZABTH

15 DECEMBER 1993

INQUEST

GONIWE & OTHERS

HEADS OF ARGUMENT

ON BEHALF OF THE SOUTH AFRICAN POLICE

INQUEST
GONIWE & OTHERS

HEADS OF ARGUMENT
ON BEHALF OF THE SOUTH AFRICAN POLICE

1.

It is submitted on behalf of the South African Police that whatever the test to be applied in this matter, there is no case against the South African Police and there is no evidence linking the South African Police with the four deceased.

It is further submitted that the case against the South African Police sought to be made out by the representatives of the families, is purely speculative and based on vague inferences sought to be drawn from facts that have not been proved nor shown to exist.

2.

THE SIGNAL :

There is no evidence linking the South African Police with the signal, and there is no evidence whatsoever to show that the South African Police were aware of the signal, the existence of the signal nor of the contents thereof.

See: Du Plessis : Record, pp. 2031, 2171;

Snyman : Record, p. 2297;

Van der Westhuizen : Record, pp. 2489, 2570.

We will accordingly refrain from making any submissions regarding the interpretation of the contents thereof, as well as with all other aspects dealing with the signal.

3.

Central to any finding against the South African Police is the evidence of Sgt. KONI. The representatives of the families of the deceased rely heavily on KONI's evidence and it is therefore necessary to deal with his evidence in some detail. At the outset, however, it is submitted that KONI's evidence should be rejected and that the finding be made that he was an evasive, unreliable and untruthful witness. It should furthermore be borne in mind that Sgt. KONI was a single witness on the aspects on which he testified, and that his evidence should be adjudicated in that light.

3.1 KONI'S AFFIDAVIT (F34) :

3.1.1 Ad paragraph 1 thereof :

This paragraph is correct.

3.1.2 Ad paragraph 2 :

From what follows hereafter it is clear that this paragraph is not true and correct.

3.1.3 Ad paragraph 3 :

This paragraph is factually incorrect. Mr. KONI was transferred from the security branch to the Uniform Branch in Cradock on the 19th October 1987 and not in 1989 as he alleges.

See Record, pp. 3257 - 3260;

See also G63 and G64.

Furthermore, Mr. KONI did not leave the police force finally in 1991 but on the 31st July 1990.

See Record, p. 3260.

His explanation for his mistakes is quite ludicrous :

"..... Ja, dit kan korrek wees. Miskien het ek net 'n fout gemaak van die jaar.

Meneer, wat ek by u wil probeer uitvind is hoe maak u 'n fout oor iets wat u persoonlik raak soos u ontslag uit die Suid-Afrikaanse Polisie? Hoe gebeur dit dat u 'n fout maak soos hierdie? -

Dit is moontlik, U Edele, dat ek vergeet het weens die manier hoe ons gebly het daar in Cradock

Nee my getuienis is betroubaar, U Edele, en my geheue is goed. Die manier hoe ons daar gebly het wat ek na verwys het is die feit dat ons daar in die perdeskuer gebly het, dit is nou in daardie jaar

Nee, dit affekteer nie die datum nie maar mense se gedagte, die feit dat jy nou bly in 'n stal, perdestal.

*Het dit u geheue geaffekteer sê u? Is dit u antwoord -
Nie my geheue nie, maar die hele, die moreel van 'n
persoon".*

Record, pp. 3260 and 3261.

3.1.4 Ad paragraph 4 :

This paragraph is also factually incorrect.

Only Major Winter and Mr. Hough arrived at Cradock prior to the murders. Winter arrived towards the end of April, beginning of May 1985, and Hough arrived in October 1984. The evidence regarding Sgt. Lourentz and Sgt. Roux set out in this paragraph is incorrect. We submit, with respect, that this was not a mere mistake but a deliberate untruth in an attempt to mislead the presiding Judge in seeing something sinister about the arrival of four "Koevoet" members shortly prior to the death of the deceased.

Lourentz and Roux will be dealt with more specifically further on.

3.1.5 Ad paragraph 5 :

Even this paragraph contains a factual mistake. Maj. Winter remained at Cradock until the 7th January 1991 and was only thereafter transferred to Port Elizabeth. He was not transferred to Port Elizabeth in 1989 as alleged by Mr. KONI.

It is respectfully submitted that the explanation given by Mr. KONI on p. 3278, namely that Winter phoned him and told him that he had been in Port Elizabeth since 1989, is a lie.

3.1.6 Ad paragraph 6 :

In this paragraph there is also a factual mistake, namely that Mr. Labuschagne was not transferred from Cradock in 1988 but on the 11th July 1990. Mr. KONI conceded that he was not quite sure but that he was not far out with his "skatting".

Record, p. 3279.

His affidavit, however, does not indicate an estimate but states as a fact that Labuschagne was transferred in 1988.

Once again this is a manifestation of a person who is prepared to put on oath as a fact things that he is not sure of, and when he is making a mere "skatting".

3.1.7 Ad paragraph 8 :

As stated above, this paragraph is factually completely incorrect.

The ^{third}~~first~~ sentence, namely that Lourentz was at the time of the making of KONI's affidavit based in Port Elizabeth, is factually incorrect.

Record, p. 3269 & 3270.

Once again Mr. KONI concedes that he couldn't say for sure whether Mr. Lourentz was still in Port Elizabeth at the time of the making of the affidavit, yet he presents this as a fact in his affidavit. He goes further and states that even Mr. Lourentz' girlfriend was at the time of the making of the affidavit based in Port Elizabeth. This is also factually incorrect.

Record, pp. 3269, 3270 and 3271.

Affidavit of Lourentz, F-38.

It is also factually incorrect to state that Lourentz and his girlfriend arrived early in 1985.

See in this regard Record, pp. 3262, 3263 (the top of this page is a further example of the flippant and evasive manner in which Mr. KONI sometimes responded to questions)

See also in this regard pp. 3264, 3265, 3266, Exhibits G68 A, B and C as well as Lourentz' affidavit. Not even the last sentence in that paragraph is correct, namely that Lourentz was transferred to Port Elizabeth in 1987 or 1988. Lourentz was transferred to Port Elizabeth on the 1st May 1989.

See Record, p. 3272.

3.1.8 Ad paragraph 9 :

This paragraph is also factually incorrect. Sgt. Roux did not arrive in Cradock in 1985. He only arrived at Cradock on the 26th June 1990! This is more than five years later!

See Record, p. 3273, 3275 and 3276.

See also Exhibit G70, as well as the affidavit of Sgt. Willie Roux, F 37.

3.1.8 Ad paragraph 10 :

We do not intend dealing in detail with this paragraph except to point out that even here there is a contradiction by Mr. KONI. He states in paragraph 10 of his affidavit, F34, that

"during 1985 these responsibilities were as follows

10.2 Adelaide and Bedford: Wentzel, Maqina and Gcani".

In his evidence, Record p. 3223, he states that Mr. Maqina retired with pension prior to 1985 and was not in Cradock in 1985.

There are various other inconsistencies and contradictions in his affidavit which we will not deal with in detail, but we will now deal with the questions surrounding the entries in the WH11 on the 27th June 1985 and the dates immediately prior and subsequent thereto.

3.1.9 Ad paragraph 17:

(There is another example of Mr. KONI stating facts of which he is not sure. In the last sentence in paragraph 17 of his affidavit he states that the security policeman would disguise himself as a Post Office worker and go to place taps in the telephones.

It is clear from his evidence given in the Record p. 3226 that all he knew was that the security policeman would leave the offices and then come back and say that the "tap" was working. He did not know what exactly had been done.)

3.1.10 WH11:

In paragraph 15 of his affidavit Mr. KONI states that the book in which the transcriptions are made from the taped telephone recordings is known as a WH11.

Exhibit G10 before the court is an extract from the book and most of it was in his handwriting.

Compare with this his evidence in chief, Record, p. 3206 where he stated that he referred in his affidavit to notes he had made of the transcriptions of some of the telephone calls and that he had an opportunity of looking through the documents. This must obviously have been prior to the making of his affidavit.

His evidence set out in paragraphs 33, 34 and 35 can only be described as a pack of lies.

He repeated his evidence in chief that he listened to the telephone call and that he then took the summary to Major Winter.

Record, p. 3207.

He confirms that there was a book called WH11.

Record, p. 3208.

He confirms in his evidence that he transcribed the conversation with Swartz in WH11 : Record, p. 3208 .

He confirms this again.

See Record p. 3294.

On p. 3291 he repeatedly reiterated that the entry was in WH11, and that he took the book, WH11 to Major Winter. This fact namely of taking the book through to Major Winter is contradicted by him in his further evidence.

Record, p. 3319.

A reading of his evidence from the Record p. 3297 to 3319 shows beyond any doubt that Mr. KONI is an untruthful and totally unreliable witness. His evidence in this regard commenced with him listening to the tape, making the transcription in WH11 and taking it through to Major Winter. See affidavit para. 35 Record p. 3207.

Regarding the transcription in WH11 see Record p. 3290 and 3291.

After it was shown to him that his evidence was false, he then adjusted his evidence to say that he transcribed the conversation on a piece of paper and not in WH11.

See Record p. 3297 and 3298.

In this regard he refers to other entries that were made on paper, see p. 3300

On p. 3301 he states that he could have made a mistake and that he could have forgotten what had happened. He then deviated further when confronted with the fact that he would not have transcribed the full conversation on a piece of paper, stating that he only made an entry that could be referred to as a "nota".

See Record, p. 3302.

On this page he stated that he did not listen to the tape again but further on, on p. 3307 he states that he could have listened to the tape and then lower down on the page on 3307 he once again was sure that he did listen to the tape. When he was confronted with the fact that he did not say that he wrote a note but that he made a transcription, he stated that he wasn't aware of the difference between a transcription and a note.

See p. 3302, 3303.

His evidence regarding the making of a note is quite fascinating:

"So u sou net 'n nota geskryf het vir Majoor Winter, is dit korrek? - Dit is reg".

Record, p. 3302.

"Nou meneer u sê nou op die getuienis nou dat u het 'n nota vir Majoor Winter geskryf tot die effek dat Mnr. Goniwe Port Elizabeth toe sou kom, is dit reg? - Dit is reg".

"....Meneer, u sê nie 'Ek het 'n nota aan Mnr. Winter geskryf' nie, u sê 'Ek het die gesprek met mnr. Swarts getranskribeer'. - Ek het nie besef, U Edele, dat daar 'n verskil is tussen die een kant die maak van 'n nota en aan die ander kant die transkripsie nie.

"Ja. Wat u mee saamstem is u het nie die gesprek getranskribeer nie. Dit is verkeerd nê? - Ek het die gesprek op 'n stukkie papier getranskribeer.

"Nee, meneer, u het 'n nota geskryf op 'n stukkie papier. U het nie die gesprek getranskribeer nie - Ek het nou-nou gesê dat na my mening is daar nie 'n verskil tussen die maak van 'n nota en die maak van 'n transkripsie".

"Goed, ek sien. Is dit u antwoord? U was net 'n bietjie verkeerd met u woordgebruik, u het gedink transkripsie van 'n gesprek bedoel ook die maak van 'n nota, is dit so? - Dit is reg".

Record, pp. 3302 and 3303.

"As ons kyk na die inskrywing van die 24ste van die sesde, op die tiende lyn, 'I won't be there on Wednesday, maybe a day thereafter', so staan daar geskryf en daardie 'the day thereafter' verwys na die 27ste 'Majoor sien inskrywing gedateer dit en dat,'. Miskien ek het op daardie stuk papier geskryf 'Majoor sien my inskrywing op so en so 'n datum'."

Record, p. 3306.

"Goed. U verduideliking bly u het 'n nota geskryf en u het reeds ook netnou gesê as ek reg onthou, u het nie weer na die band self, u het nie self na die band geluister nie. - Dit kan wees dat ek 'n nota geskryf het. Wat ek gesê het ek gewoonlik doen.

Ja, maar ek sê mos, is u getuienis dat u het nie u gesprek getranskribeer nie, u het net 'n nota aan Maj. Winter geskryf? Dit sê u mos nou. - Ek het gesê dat dit moontlik is.

O! Is u nie seker nie? - Ek is glad nie seker daarvan nie maar dit kan wees dat ek dit gedoen het.

Ek wil net, om net om regverdig teenoor u te wees, sê u nou u is nie seker of u 'n nota vir Maj. Winter geskryf het nie? - U Edele, die vraag was nie dit nie, die vraag was gewees of ek seker is of nie, dat ek geluister het na band. "

(In fact, this was not the question at all).

Record, pp. 3306, 3307.

".... Ek het gesê Msoki het die inskrywing gemaak, ek persoonlik het op 'n stuk papier geskryf en daardie nota oorhandig. Ek vra u Edele dat ons die woord 'nota' nie gebruik nie want ek weet nie wat dit beteken nie. Die transkripsie wat ek gemaak het op die 27ste het verwysing na wat ek gedoen het of my 'comment' van die 24ste".

"..... Die Engelse taal wanneer dit verwys na 'note' beteken baie dinge en in die Wet, die woord 'note' kan beteken iets anders as wat ek aan dink. Daardie transkripsie het ek op 'n stuk papier gemaak en ek praat die waarheid as ek so sê. Dit is nou my antwoord op die stelling dat ek nie die waarheid praat nie".

Record, p. 3315.

"....Sien u daardie nota wat u daar gemaak het aan Maj. Winter? - Ek sien dit.

"So u weet dit is 'n nota? - Die kommentaar wat daaronder lyk.

".....Dit is 'n nota wat u gemaak het aan Maj. Winter - Ons het verwys na die as 'n kommentaar nie as 'n nota nie.

"Maar u het so pas gesê dit is 'n nota wat u aan Maj. Winter gemaak het. - In die sin wat nou aan my gestel is moet dit wees dat dit 'n nota genoem kan word. Ek het gesê dat dit die kommentaar is.

Mnr. Koni, dit is in elk geval nie 'n transkripsie nie.-

Wat hier staan, verwys u na die woord Majoor, na die einde toe, is kommentaar. 'n Transkripsie is een wat net bokant dit is.

".....Al is die boek daar het ek 'n nota gemaak of 'n inskrywing gemaak op 'n stuk papier en dit gevat na Maj. Winter".

Record, pp. 3316 and 3317.

On p. 3315 he states that he did not know what "nota" meant. This is clearly false. See p. 3316 from which it is clear that he knew exactly what a transcription was and what a note was. Further on p. 3303 lines 8 - 10 he states that there is no difference between the making of a note and a transcription. In this regard reference is once again made to p. 3316.

On being cornered with all this false evidence, he at one stage reverted to saying that the short entry referred to in paragraph 35 of his affidavit was actually the one made in Exhibit G10 p. 232. This entry, however, refers to the 24th June 1985 and not the 27th June 1985 and this explanation is patently false.

See Record, p. 3304.

His evidence on this page 3304, lines 25, 26 and 27 is clearly false, namely that he made the entry, or made the statement in his affidavit prior to him having seen the transcription.

See in this regard Record, p. 3206.

Furthermore, after he had seen the entries, he confirmed his affidavit on oath when giving evidence and he was once again asked at the commencement of cross-examination whether he confirmed his evidence.

Record, p. 3221.

On p. 3306 he states that it is possible that he wrote a note on a piece of paper but he was not sure.

See p. 3306 lines 22, 23, 26 & 27.

He has now reached the point where he is not even sure if he did make a note or not. He immediately contradict it, however, saying the question related to the listening of the tape.

Record, p. 3307.

On p. 3314 he once again reverts to the feeble explanation that he was not aware of the difference between a transcription and a note on a piece of paper. This is in direct contradiction to his evidence that he was not aware of the meaning of a note and his evidence referred to above where it was clear that he was exactly aware of the difference between a note and a transcription. On p. 3315 he once again states that he wasn't aware as to what the meaning of a note was, but in this regard reference has already been made to the contents of page 3316.

On page 3310 he once again repeated "*Wat belangrik is, is dat wat hulle oor gepraat het is net soos ek dit neergeskryf het*".

This is clearly not the making of a "note" or a "comment", but constitutes a transcription - something he said he did not do!

Record, pp. 3303, 3304, lines 18-27.

It is clear from the above that Sgt. KONI's evidence is totally unreliable and at times completely untruthful. No weight can therefore be given to his evidence as to what occurred on the 27th as well as to the subsequent happenings on the 28th. This will, however, be dealt with in detail later on.

On p. 3319 he states that he only took the piece of paper through to Major Winter. This is contrary to his earlier evidence given on page 3290 and 3291, namely that he took WH11 through to Major Winter.

His evidence in paragraph 36, namely that Winter, Hough and Labuschagne left Cradock immediately after Winter's phone call, is also unreliable. He conceded in his cross-examination, Record p. 3319, that he was not aware as to whether they left Cradock or not. He merely assumed that that was the position because they did not return to the office. This is just a further pointer to the unreliability of statements made by him under oath.

3.1.11 Paragraph 40 :

The statement in this paragraph is further indicative of the untruthful attempts by Mr. KONI to mislead this Honourable Court. He states in this paragraph that Winter was "unusually anxious". The reasons given for him saying that Winter was "unusually anxious" were because Winter wanted Msoki and him to stay on duty and he ordered that at any particular time at least one of them should be listening to the telephone. He further states *"Usually we would both leave the machines for teatimes and mealtimes"*.

Affidavit F34 para. 40;

See also: Record, p. 3289.

This is in direct contradiction to his evidence given in chief regarding the changes that were ordered by Winter namely that the morning time was changed and that the instructions were that there should always be someone at the office to watch the telephone and the electronic device.

See in this regard Record, p. 3203 and 3204.

These changes were effected according to Mr. KONI at the end of May or beginning of June 1985.

Record p. 3202.

If his evidence in chief is to be accepted, then on the 28th June 1985 the instructions that both should not leave the machines for teatimes and mealtimes but that there should always be somebody present were not new instructions and therefore not out of the ordinary. The statement in the last sentence of paragraph 40 of his affidavit can therefore not be true.

See also his evidence in cross-examination, Record, p. 3288 and 3289.

His evidence on top of p. 3289 is once again in direct contradiction to his earlier evidence given under oath as appears on pp. 3202 and 3203.

3.1.12 Ad paragraph 41 :

The contents of this paragraph are also contrary to what was put to Major Winter by Counsel for the families.

See Record, p. 682 line 20.

3.1.13 Ad paragraph 42 :

In this paragraph he states that he made a transcript of the telephonic conversation between Makaula and Mrs. Goniwe. In cross-examination he stated that this transcript was made in WH11.

Record, p. 3296.

Later on he stated that he could no longer say whether it was made in WH11.

See Record p. 3334.

This was after it was pointed out to him that his evidence in paras. 33, 34 and 35 was false. There is in fact no such entry in WH11.

Furthermore, he testifies in this paragraph to a call received by him from W/O Els who told him that the vehicle had been found. (Record p 3210 where KONI stated that he thought that he received this call from Els before lunchtime). In paragraph 43 he states that he reported this conversation to Major Winter. Major Winter left his office and came back an hour later and told him that "AZAPO het hulle gekry". This evidence of Mr. KONI is patently untrue.

KONI's evidence was that he left on Friday, 28 June 1985 at 4 o'clock to go home and came back at 7 o'clock to listen to the disco meeting.

Record, p. 3331 lines 21 - 23.

The burnt out vehicle was only found on the 28th June 1985 at approximately 16h00. (A13). W/O Els was only taken to the site at 16h20. (A16). The motor vehicle was therefore found by Els only after KONI, on his own evidence, had gone home. It was therefore impossible for W/O Els to have phoned KONI before 4 p.m. and he would not have found KONI at the office after 4 p.m. and before 7 p.m. This whole picture of KONI created whilst testifying about the call and Winter's alleged reaction, is therefore also untruthful.

3.1.14 Ad paragraph 59 :

It is also highly unlikely that Winter would have voiced security branch's opposition to the reinstatement of Mr. Goniwe. In this regard the evidence of Mr. Vermaak is important, namely to the effect that the security police in Cradock supported the reappointment of Mr. Goniwe. See Record p. 427, 432, 452, 453, 463 as well as Vol 2, para. 2, pp. 80 and 83.

3.1.15 It is respectfully submitted that on the probabilities the phone call from Mr. Swarts to Mr. Goniwe was not made at 5.30 in the morning but probably at about 9.30. In this regard WH11 (A29) reflects that it was half past five when Mr. Goniwe phoned Swarts. It must be borne in mind that this was in the middle of winter and probably during school holidays. Cf. J.A. Vermaak, p. 496 to the effect that black schools normally closed the second week of June and reopened after the first week in July. There was no reason for Mr. Goniwe to get up at 5.30 in the morning and phone Swarts so early. (Sunrise at Port Elizabeth on the 27th June 1985 was at 7h23. This is according to the tables issued by the *SA Astronomical Observatory*: See *Section 229 Criminal Procedure Act*).

Furthermore, KONI has testified that Mr. Msoki made many mistakes and that Mr. Goniwe normally spoke very quickly over the phone.

See Record, p. 3280, lines 21 - 28 and Record, p. 3292, lines 27 - 29.

According to Mr. Swarts (A10) Mr. Goniwe phoned him at approximately 10 o'clock that morning. The half past five could have been mistaken for half past nine. Mrs. Goniwe (A1) stated that Mr. Goniwe phoned the UDF offices at approximately 8 o'clock that morning to inform them that he was on his way to PE and that he left Cradock at approximately 10 o'clock that morning. Mrs. Mkonto (A79) confirms this.

It should further be noted that Mr. Goniwe's vehicle was seen at Somerset East and Cookhouse between 12 o'clock and 13h00. (A1, A3 and A7). The distance between these two towns and Cradock fits in with a time of ten o'clock when Mr. Goniwe probably left Cradock. According to a note on G9, p. 9, there was also a newspaper report on the 29th June 1985 to the effect that Mrs. Goniwe alleged that Mr. Goniwe left Cradock at 10h00 on the 27th June 1985. The suggestion on p. 3208 of the Record namely that Major Winter spoke about "10 o'clock" and left Cradock at 7.15 for Port Elizabeth and that Winter would have been in Port Elizabeth round about 10 o'clock, can therefore not stand in the light of what is set out above. The distance from Cradock to Port Elizabeth is given by Mr. KONI as about 200 and some odd kilometers. P. 3208.

It is therefore respectfully submitted that the telephone call from Mr. Goniwe to Mr. Swarts was probably made round about 9.30 on the morning of the 27th and not at 5.30 as WH11 reflects.

4.

THE QUESTION OF THE CONTINUOUS OBSERVATION OR
MONITORING OF THE DECEASED:

4.1 It is firstly submitted that Mr. KONI's evidence must be rejected in toto including also on the question of his allegations regarding the continuous observation or monitoring of Mr. Goniwe and the others.

4.2 In paragraphs 22 and 23 of his affidavit, Mr. KONI states that "*if Goniwe went somewhere an informer or handler who saw this would try to follow him at a distance*". This indicates or suggests that there could be occasions where the handlers or informers did not see Mr. Goniwe going somewhere and that they would not always be able to follow him at a distance. However, if the intention is to say that he was continuously under observation, we submit with respect that this is highly improbable and this suggestion should be rejected.

4.3 KONI's statement in his evidence in chief on page 3191 is significant, namely *"firstly the handlers or fieldworker would report whether the fieldworker or the handlers followed him or had seen him or what the informer had told this fieldworker or handlers what he has told him about Mr. Goniwe"*. This does not indicate a continuous supervision. Furthermore, on p. 3192 he was asked: *".... How was Goniwe monitored, in what ways was he monitored?"* Answer: "He was monitored by way of informers. The handlers or the fieldworkers and this was done by means of telephone taps and the buggings in the house."

It is common cause that Mr. Goniwe was monitored by way of telephone taps in the house and at one stage prior to Major Winter, there was also a "tamatie" (bugging device) in working order in the house.

- 4.4 His explanation on page 3213 as to how this following would have been done is ludicrous. He even went so far as to say in reply to a question from His Lordship at the foot of page 3214 over to 3215: *"Would it go from police station to police station or would you have cars changing over in the middle of nowhere where there is no police station or town? Answer: "That will take place, My Lord, any where along the road and not necessarily at police stations."* This is clearly nonsense. The untruthfulness of this evidence is also shown by his reply to a question by His Lordship, the presiding Judge, whether he didn't try to find out which vehicle had the vehicle of the deceased under the constant observation at a time when the vehicle was stopped or attacked. The question was put at the foot of page 3215: *"Were you not curious to find out which policeman was following him at the time and to try and find out from that policeman what happened? Answer: "I was not interested in that My Lord because I was doing administrative work".*

It is submitted that the truth of the matter is that he could not find out because no policeman was following Mr. Goniwe at the time that the car was stopped or attacked. His evidence on page 3220 is also clearly unconvincing, to say the least, namely that all vehicles which had to follow this car must put in reports whether anything happened or not. Once again it became clear that he had no knowledge as to what he testified to and that he had never taken part in any such observations.

Record, p. 3220.

His evidence is once again based on what inferences he drew from entries such as "observasiedienste" or "eie waarneming". This is also clear from G9, p. 24 and Mr. KONI's evidence in that regard on page 3247 and 3248 of the Record. See also page 49 of G9. He becomes very evasive when questioned about details. Page 3249 lines 1-10.

4.5 His evidence is further explained by his reply given at the foot of page 3252, namely: "*As die agtervolging nie gedoen was nie, u Edele, sou daar nie, sou mens nie geweet het wat sy doen en late was nie*".

4.6 There is no evidence except his that the police ever knew exactly what Mr. Goniwe did virtually every minute of the day, i.e. that there was constant surveillance. It is submitted that the police knew of Mr. Goniwe's movements through informers that attended meetings, telephone tapping and intercepting of post.

4.7 On p. 3255 he states that his evidence regarding the constant surveillance of Mr. Goniwe was as reliable as his other evidence given. If that is so, then caedit questio.

4.8 An important point under this heading is the fact that Mr. Goniwe's vehicle was seen on the 27th June 1985 at Cookhouse. According to Constable Oosthuizen (A7) he noticed the motor vehicle whilst he was driving in his patrol van. It is clear that this was not a constant or clandestine surveillance but it was a chance meeting or a chance observation by Constable Oosthuizen.

4.9 Regarding the phone call of the 24th June 1985 in G10 p. 232, it is possible that this entry was only made on the morning of the 25th June.

See Record p. 3324 and 3325.

From this book it appears as if Major Winter was not there on the 25th as he did not sign the entries on that day. It is important to remember that Mr. KONI stated that when an entry was acted upon, there was normally a note made in the margin.

Record p. 3283.

See also the evidence of Mr. KONI on p. 3327 of the Record where he states that *"Dit beteken dat die wat hy voor geteken het was die oggend van die 27ste neergeskryf"*. This relates to calls made on the 26th.

See also Record p. 3328.

It is a strong possibility, furthermore, that the entry of the 27th, namely the telephone call from Mathew Goniwe to Derek Swarts was only placed before Winter later on on the 27th and only after the entry of the call to Barry du Toit was made in WH11.

See Record p. 3328.

In this instance it is also important to note that Mr. KONI states that he followed the normal routine on the 27th, namely to sit down and write a note on a loose piece of paper and not to take the book to Major Winter because it was so urgent. If the normal routine was followed, then it is not improbable that the book was only placed before Winter after the entry of the Barry du Toit call was made. This once again puts a lie to the evidence of Mr. KONI.

- 4.10 It should be noted that Mr. KONI said that he could not deny that there were no informers in Cradock who had motor vehicles. The whole Security branch in Cradock only had five motor vehicles.

Record, p. 3244.

In regard to the continuous surveillance he also sidestepped questions. See Record, p. 3245 over to 3246.

- 4.11 It is furthermore clear that he formed the impression, (if he in fact did form such an impression) regarding the continuous surveillance from entries in the nature of those contained in SAP67 and G9 page 24 (Record p. 3247) and G9 p. 49 (Record p. 3248). See also his evasiveness on page 3249. See also his meaningless replies in this regard on p. 3253 of the Record.

It is therefore submitted that also in this regard no weight can be attached to the evidence of Mr. KONI.

- 4.12 Major Winter was adamant that there was no continuous following of Mr. Goniwe.

Winter : Record, p. 612/3, 614, 642, 855.

- 4.13 In regard to Col. Snyman's evidence, the following is submitted:

- 4.14 Col. Roelofse : The police did not have the capability to monitor a person for days on end.

Record, pp. 1837, 1854/5; 1859 - 1864; 1865 - 1868.

P. 1913.

Roelofse was an impressive witness. He was not even recalled for further cross-examination.

- 4.15 F30 Col. J.C. Scheepers: Goniwe was not specifically monitored in Port Elizabeth.

5.

ALLEGED ROADBLOCK ON THE 27TH JUNE 1985 :

5.1 It is noted from the various Heads of Argument filed to date that no one is submitting that there was indeed an organised roadblock on the 27th June 1985 as testified to by Mrs. Butters and Mr. Vusani. We will therefore not deal with their evidence in detail, but merely submit that both these witnesses are at best making a *bona fide* mistake when they say that there was a roadblock on the 27th June 1985. It should also be noted that the first affidavit was made to the police only on the 15th May 1992, almost seven years after the incident.

Vol. 3, p. 93; p. 313.

Record, p. 3146.

5.2 There is also a contradiction between Mrs. Butters' evidence and that of Vusani as to what happened at the roadblock that morning.

Compare Record, p. 3131 with Vusani's evidence, p. 3185 to the effect that she spoke to the police at the roadblock, whereas she testified that she was busy with correspondence and she could not remember whether there was a roadblock in the morning.

5.3 She was also not a satisfactory witness in regard to the fact that she testified that she heard for the first time in court that the police denied that there had been a roadblock on the 27th June 1985.

Record, p. 3137, 3138.

This prompted the Deputy Attorney-General to inform the court that he did cover W/O Els's statement (F23) with her during consultation.

Record, p. 3138.

Only thereafter was she prepared to concede that she may be mistaken.

Pp. 3139, 3140.

5.4 See also the affidavits of Col. De Beer and Col. Grobler, as well as Exhibit F23 and the affidavit of W/O Els.

6.

CB 10627 :

- 6.1 See Vol. 3, p. 122 and the affidavit of Col. Jonker to the effect that the Security Police were based in Sanlam Building, Strand Street, Port Elizabeth until March 1985.
- 6.2 It appears that a Mr. Mzima purchased a Chev motor vehicle with registration number CB 10627 during 1980/1 in Port Elizabeth.
(See A63).
- 6.3 This vehicle was scrapped on the 19th January 1984 after an accident on the 29th October 1983.
See A26; A63; A66 and A73.
- 6.4 The tickets and other documents relating to this are also contained in A68.
- 6.5 According to Col. Jonker there was no police vehicle issued with registration number CB 10627.

- 6.6 According to Col. Snyman the Security Police had their own parking area where they could park and it was therefore not necessary for them to park in the street.

See Record, p. 1068.

See aksi Scheepers, F30, para. 6.

- 6.7 It should be noted that not only the Security Police make use of false number plates, but also the Army, National Intelligence, as well as Mr. Goniwe used false number plates.

See the affidavit of Brig. Roeland F31 as well as Van der Sandt F19.

- 6.8 Not only the security police was stationed in Strand Street at the relevant time.

- 6.9 In regard to the false number used by Mr. Goniwe, see F31 as well as the affidavit of Mr. Gideon de Klerk Botha, F33.

6.10 It is clear from the above that the tickets were issued for a Datsun motor vehicle on the 4th, 5th and 7th July 1984. The vehicle was parked at two identified parking meters in Strand Street and once in Victoria Quay, the exact place being unknown. According to the documentation (A68) Mr. Mzima made representations in respect of one of the tickets on the basis that his car had been scrapped on the 19th January 1984. The ticket was accordingly withdrawn on the 11th June 1985 by the Senior Public Prosecutor. Two other tickets were also withdrawn on the same day and this was presumably done in the light of Mr. Mzima's representations.

6.11 A further seven tickets were issued for a Ford sedan Cortina motor vehicle during the period 8 August 1983 to 26 August 1983. These tickets were for expired parking meters in Strand Street. The tickets have since been destroyed with the result that the exactly location of each parking meter involved cannot be established. Mr. Mzima's car would at that time still have been in use. One ticket was withdrawn by the Senior Public Prosecutor on the 16th August 1983; five were withdrawn on the 1st September 1983 and one was withdrawn on the 7th October 1983. It is unknown whether these withdrawals occurred as a result of representations by Mr. Mzima or anybody else - all documents have since been destroyed.

6.12 It is therefore respectfully submitted that to allege that the police had anything to do with the use of the relevant number plate, is based solely on speculation and conjecture and there is no evidence to this effect whatsoever.

Cf.: S v Mtsweni 1985(1) SA 590 A at 593 E-I.

7.

AD THE ARGUMENT PRESENTED BY THE FAMILIES OF THE
DECEASED IN SO FAR AS IT RELATES TO THE SOUTH AFRICAN
POLICE :

7.1 Ad paragraph 3.2 :

There is no evidence, alternatively no reliable evidence whatsoever linking Col. Winter and Col. Snyman to any conspiracy or incitement to kill the deceased.

7.2 Ad paragraph 23.8 :

As was submitted earlier, no weight can be attached to the evidence of Mr. KONI.

7.3 Ad paragraph 25.4 :

Winter's evidence is supported by the evidence of Mr. Vermaak to the effect that the security forces in Cradock supported the policy of reappointment of Mr. Goniwe.

See Vol. 2, pp. 80 - 83, para. 2;
Record, p. 427, 432, 452, 453 and 463.

7.4 Ad paragraph 25.5 :

Once again KONI's evidence should not be accepted.

7.5 Ad paragraph 26 :

As was submitted, Sgt. KONI was a totally unreliable and untruthful witness and no evidence of his should be accepted. On the specific question of the intensification of the monitoring he has given contradictory evidence.

See Record, Vol. 17, pp. 3203/4 compared with e.g. p. 3289.

7.6 Col. Winter's evidence was to the effect that it was impossible to monitor Mr. Goniwe twenty-four hours per day. His evidence is credible on this point.

See Record, p. 612 as well as p. 855.

See also Record, p. 614 to the effect that nobody ever followed Mr. Goniwe from Cradock to Port Elizabeth.

See also Record, p. 642.

Cf. also Scheepers, F30.

In regard to the fact that Col. Winter cannot specifically remember his actions on the specific day, this is to his credit. If the execution was a carefully planned one by the South African Police, or in which the South African Police and Winter more specifically played a role, one would have expected him to have created an alibi for himself.

7.7 Ad paragraph 32 :

The affidavit of Brig. Roeland shows exactly how Mr. Goniwe was monitored. This was by way of informers who reported *ex post facto* to the fact that Mr. Goniwe had attended a meeting, etc.

See also F31, the affidavit of Brig. Roeland.

In that sense the police were aware of some of his movements.

7.8 Ad paragraph 33 :

It is clear that Col. Du Plessis testified in general and could give no specific evidence as to what had occurred during the period relevant to this inquest.

See also Du Plessis in cross examination, Record, p. 2430/1.

7.9 Ad paragraph 35 :

Reference has already been made to KONI's contradictory evidence in this regard.

7.10 Ad paragraph 39 :

Goniwe was monitored in Port Elizabeth in the general sense, namely of informers who, if he attended a meeting and if an informer was present at the meeting would have reported thereon afterwards. There is no evidence to the contrary and it was not the gist of Snyman's evidence that Mr. Goniwe would have been followed twenty four hours a day and also in Port Elizabeth.

See also Du Plessis, pp. 2430/1.

7.11 Ad paragraph 39.2 :

Van der Westhuizen's evidence is in general and not specifically related to the period of time. Both Van der Westhuizen and Du Plessis clearly had no specific knowledge as to the manner in which Goniwe was monitored.

7.12 Ad paragraph 39.4 :

This concession by Winter cannot assist the families. It is obvious that there must have been other people who knew that Mr. Goniwe came to Port Elizabeth on this specific day.

Cf. Van der Westhuizen : Record, p. 3004.

7.13 Ad paragraph 40 :

Mr. KONI's evidence regarding the day of the 28th is totally unreliable as has been shown above. No weight should therefore be attached to his evidence. In fact, the evidence that Major Winter came back every five to ten minutes to enquire about what they had heard, is contrary to what was put to Major Winter on behalf of the families.

See Record, p. 692.

Furthermore, the fact that Winter could not deny it shows his truthfulness. This, however, does not mean that KONI's evidence must be accepted merely because of the fact that that evidence is uncontradicted.

See Minister of Justice vs Seametso 1963(3) p. 530 SALR A at 534 G-H.

7.14 Ad paragraph 45.8:

There is no evidential basis for the statement that the investigation into the PETCO three's disappearance was pursued with a lack of enthusiasm and professionalism.

It is contested that the police monitored Mr. Goniwe so closely that his disappearance could only have taken place with their knowledge and/or connivance. This is in dispute and there is no acceptable evidence before this Honourable Court to show that this is the position.

7.15 Ad paragraph 45.9 :

The fact that Winter had access to the investigating diary does not mean that there was anything sinister regarding it. In fact, Winter preserved this document and kept it in the Goniwe files at Cradock who are all intact and are in the possession of the Deputy Attorney-General. This clearly points to an innocent possession of the facts by Winter and is directly contrary to the inference sought to be drawn by the legal representatives of the families.

To state that W/O Els was a very junior policeman is also not correct and there is no factual basis for it. There is no factual basis for the statement that W/O Els was subject to the orders of Major Winter. In his investigations W/O Els was not subject to the orders of Major Winter.

The Motherwell investigation is by agreement not dealt with in this inquest and we therefore refrain from commenting on the reference thereto.

7.16 Ad paragraph 46.12 :

Col. Du Plessis could not confirm that security policemen were present when the death of people were discussed.

See Col. Du Plessis, Record, p. 2438/9.

There is therefore no evidence to the fact that Brig. Van der Merwe was present when these aspects were discussed.

7.17 Ad paragraph 57 :

Winter's evidence as to the reason for him obtaining the evidence makes sense. If he had any ulterior motive Winter would not have placed this on file and kept the file to date.

7.18 Ad paragraphs 58 and 59 :

As stated repeatedly, no value should be attached to the evidence of Mr. KONI. As pointed out above, the fact that Mr. Winter could not remember specifically where he was on that day, points to his innocence. If he was a party to a carefully and well planned murder, he would have made certain that he had an alibi.

7.19 Ad paragraphs 60 - 64 :

We submit with respect that Winter was a good witness. He testified to matters which occurred some eight years ago and his evidence was not that of a person who was guilty to a crime of this nature.

Cf. e.g. his evidence on Record p. 670.

7.20 Ad paragraph 65 :

It is denied that Winter was not a credible witness. He was not evasive. His evidence does not reflect on his truthfulness or not, but shows that he was testifying to events which occurred many years ago. The reference to Annexure "B", the Memorandum of the Commissioner of the SAP, Bundle 2, p. 105, is ill-founded. It is clear from a reading of pp. 628 and 629 that Major Winter referred to the contents or the facts contained in the document, and not document B himself. The memorandum that he testified about later on was not Annexure "B" but was another memorandum that he testified about.

See Record, pp. 629/30.

See Record, p. 834 lines 4-5.

p 936 - 937

This reference is therefore misleading and ill-founded. The most important fact is that the Cradock files of Goniwe are all intact and in possession of the Deputy Attorney-General. The most important document, namely WH11, was also preserved. If Winter was a party to a well-planned execution of the deceased, it is highly improbable that he would have kept this potentially damaging evidence.

7.21 Ad paragraph 66 :

We deny that Winter's evidence is contradicted by the monitoring referred to in paragraphs 26 to 40 of the Heads of Argument.

7.22 Ad paragraph 68 :

Winter testified that his "Koevoet agtergrond" existed of dialogue with civilians.

Record, p. 876, lines 28 - 29.

This is further confirmed by his appointment to the Peace Committee.

Record, p. 842, lines 15 - 18.

It is respectfully submitted that the so-called "Koevoet element" which the representatives of the family tried to introduce into the inquest, was an remain a red herring.

7.23 Ad paragraph 69 :

There is nothing sinister about Winter's response that AZAPO was responsible for the murders. Winter's concession that he would not repeat the theory after what he heard was not correctly made. It is submitted that AZAPO still remains a possibility. The making of the concession, however, shows Winter's innocence.

See in this regard further para. 7.38 hereafter.

7.24 Ad paragraph 70 :

It is denied that Major Winter was not a credible witness. The evidence of the 28th June 1985 in so far as it relates to the evidence testified to by Mr. KONI must be disregarded. Winter's acquisition of the investigation diary makes sense, and there is nothing sinister in it. There is no evidence that he downplayed his obvious knowledge of Goniwe's movements. He was furthermore not evasive, and the fact that he could not reply directly to questions merely had to do with the fact that so many years have elapsed. The concessions made by him to Counsel for the families point to him being a truthful witness.

7.25 Ad paragraph 71 :

It is conceded that Snyman was not a good witness. His evidence, however, does not point to him being involved in anything sinister but is merely because of the lapse of time and the fact that he could not remember. He also made concessions that point to his innocence.

7.26 Ad paragraph 76 :

Snyman did not say how Goniwe would have been monitored. It is common cause that Mr. Goniwe was monitored on the day of his death, namely by way of the tapping of his telephone.

7.27 Ad paragraph 77 :

It is disputed that the murders of Goniwe and the deceased could not have been executed without the co-operation and participation of the security branch. There is no factual basis for this and in fact it is nonsense. The fact that Snyman was not a good witness does not mean that he was a party to a gruesome murder. It is also not proper to say that the security branch had the motive to kill Goniwe. There is no such evidence.

7.28 Ad paragraph 79 :

See in this regard the cross-examination of Du Plessis, Record, p. 2430 and 2431 in regard to the fact as to whether the police's knowledge of Goniwe's movements. It is totally in dispute that the police were aware of Goniwe's movements and plan up to his death. There is no evidence in this regard.

7.29 Ad paragraph 84 :

All the minutes of the EP JMC are not before the court. It can therefore not be accepted that the death of Mr. Goniwe was never discussed at a later meeting after the 27th June 1985.

7.30 Ad paragraph 88:

As regards the destruction of documents, see the affidavits of Wilkins F10, Meyer F11 and Hattingh F12.

The important point to note is that the Cradock files were kept intact as was WH11. It is inconceivable that if the police destroyed documents in order to wipe out any reference linking them with the death of Goniwe and the others, that the Cradock files would have been kept intact and that WH11 would have been kept. This, we respectfully submit, is an important pointer to the fact that the police are innocent and are not involved. This fact is therefore inconsistent with an inference that police were involved.

7.31 Ad paragraph 90 :

It is denied that the murders were well planned and professionally executed. The evidence of Winter is opinion evidence and it is still for the court to decide whether that is so. It should be borne in mind that within a few days the bodies were not only identified but the vehicle was also found and identified.

See also the evidence of Van der Westhuizen : Record, p. 3005.

7.32 Ad paragraph 92.2 :

There is no evidence that the number plates were removed from Goniwe's car and a false number plate was attached after Goniwe and the others were attacked. According to W/O Els it appeared as if both the CAT and the CB number plates came from the deceased's vehicle.

Regarding the parking tickets, see above. As pointed out above, not only the security branch was located in Strand Street, but also other Government offices. As furthermore pointed out above, even Mr. Goniwe travelled with false number plates from time to time.

See the affidavits of Brig. Roeland F31 and Botha F33.

7.33 Ad paragraph 94 :

The attempt to prevent the identification of the four deceased failed dismally. We are not quite sure what weight should be attached to the statement that the killers would have had to be equipped with petrol. Anybody can buy petrol.

7.34 Ad paragraph 95 :

It is not beyond doubt that the gun used was a Gevarm. See the further affidavit of Wolmarans dated 14th December 1989 and annexed to F1.

7.35 Ad paragraph 96 :

As the bodies were burned, it can never be said that there was no resistance from the victims. Any signs of resistance would have been destroyed by the fire.

7.36 Ad paragraph 98 :

It is once again denied that Goniwe was so closely monitored by the security branch as is submitted on behalf of the families. There is no evidence whatsoever to show that Goniwe and the others could not have been killed without the co-operation or participation of the security branch, and this is a far-fetched statement.

7.37 Ad paragraph 99 :

The fact that witnesses concede that the only institution with the capability to execute the murders were the security forces, does not mean that this is in fact the position. AZAPO was as capable.

See Van der Westhuizen's evidence, Record, p. 3003, 3004, 5.

7.38 Ad paragraph 100 :

As pointed out above, the concession by Winter was not correctly made.

Regarding Van der Westhuizen's evidence as to the capability of AZAPO, see his evidence, Record, p. 3004, 3005.

It is not apparent why it was improbable for AZAPO to have effected the killings. The fact that there was no significant AZAPO presence in Cradock does not mean anything. In this regard the following is important:

Mr. Goniwe was the regional organiser of the UDF. See A1 and A10.

The three other deceased were also members of the UDF.

The president of the UDF, Mr. Fazzie, (A8) confirmed that there was a battle between AZAPO and the UDF during 1985. AZAPO attacked many houses of UDF members with petrol bombs and burned them down. UDF members were also killed or injured.

(A84). Mr. Maqina described this as a war between the two factions.

P148.

Mr. Coetzee (A9) a member of the Gelvandale Youth Movement and a body affiliated to the UDF mentioned that during June 1985 the conflict was at its worst between AZAPO and the UDF. Members necklaced each other and burned houses down.

According to Mr. Coetzee the meeting of the 27th June was at his house because Mr. Maqina threatened the UDF after a hand grenade exploded outside Maqina's house. They were afraid to meet at the UDF offices. Fazzie (A8) confirmed the incident with Maqina. According to him Maqina and about 15 AZAPO members stormed into the UDF offices during a meeting and said that they were going to take revenge. Maqina confirms the incident although he only mentioned that he had four members with him and that there was no threat. (P142).

It is therefore important that the UDF members were afraid of AZAPO at the time of the incident. AZAPO did kill UDF members and AZAPO therefore clearly had both the capability and the motive for the killings.

7.39 Ad paragraph 103 :

In so far as this statement relates to the South African Police, it is disputed.

7.40 Ad paragraph 104 :

The statement by Du Plessis is not evidence against the South African Police and does not relate to them. Even if AZAPO were involved in the killing, it is clear that the killings would have been politically motivated. To say that because of the fact that the killings were politically motivated it therefore has to be the security forces, is a *non-sequitur*.

7.41 Ad paragraph 105 :

These works have nothing to do with the South African Police.

7.42 Ad paragraph 112 :

This is disputed and we submit with respect that there is no factual basis for this far-fetched statement.

7.43 Ad paragraph 113 :

It is disputed that the security branch had the motive to kill Goniwe and Calata and Mkhonto. In fact, this supposed motive is directly contradictory to Winter's attitude, namely the reappointment of Goniwe. Winter is supported that this was his attitude in the evidence of Vermaak referred to above. The documents of McCuen, Fraser and the BSB document has nothing to do with the South African Police.

7.44 Ad paragraph 114 :

The evidence of Van der Westhuizen given in the Record, p. 3003, 3004, 3005 is ignored. It is conceded by Van der Westhuizen that AZAPO probably had the capability to plan and execute the murders. They also had the motive. Factually this is clearly the position and no argument can just wish these facts away.

7.45 Ad paragraph 115 :

It is disputed that there is any compelling conclusion that the South African Police were involved in the execution of Goniwe and the others. There is no acceptable evidence in this regard.

7.46 Ad paragraph 116 :

It is respectfully submitted that no finding can be made against any individual member of the South African Police, nor against the South African or any of its branches.

8.

It is therefore respectfully submitted that there is no evidence linking the South African Police or any individual members thereof to the deaths of the deceased.

P J DE BRUYN, S.C.

J. WESSELS

**CHAMBERS
PORT ELIZABETH
26 JANUARY 1994**

IN THE SUPREME COURT OF SOUTH AFRICA
(South Eastern Cape Local Division)

In the inquest in respect of the deaths of:

MATTHEW GONIWE
FORT CALATA
SICELO MHLAULI
SPARROW MKONTO

FAX TO: LRC, JHB.
FAX NO: 011 836 8680 PAGE: 1 OF: 20
ATTENTION OF: MOHAMED or NICOLLETTE
FROM: CLIVE DATE: 19/3/94
COMPANY: LRC, GTN
FAX NO: 0461 23933 **Post-It** Notes from 3M

SUPPLEMENTARY SUBMISSIONS BY HODGEN & HENNING

INDEX:

A	INTRODUCTION	1 - 1
B	VAN RENSBURG'S NEW EVIDENCE	2 - 6
C	MRS VORSTER'S EVIDENCE	7 - 8
D	GELDENHUYS' NEW EVIDENCE	9 - 10
E	THE SIGNAL OF 7 JUNE 1985	11 - 13
F	GENERAL POINTS AND RESPONSES	14 - 16
G	THE LEGAL QUESTIONS	17 - 19

A. INTRODUCTION

- A1. In the light of the fact that new evidence has been adduced, the new points that have been raised together with additional argument and heads by various counsel, additional submissions are now filed.
- A2. We have kept our additional submissions to a minimum and have not reiterated points already adequately addressed in the additional heads that have already been received (i.e. for du Plessis and the families).

B. VAN RENSBURG'S EVIDENCE

B1. As a result of a communication between Van Rensburg and his former counsel, his former counsel (SADF counsel) no longer represent him and he is represented by Adv. Van Rooyen, has filed a new affidavit (Bundle 4, F39) and has again given evidence (Record, new pages 792 - 1049). The affidavit of A.E. Vorster (Van Rensburg's former secretary) has now also been admitted (F40), furthermore she and Geldenhuys (who formerly gave evidence) were called after Van Rensburg completed his new evidence.

B2. Van Rensburg's evidence differs substantially from his former evidence. The key difference is that he now submits that he received the Signal on 12 June 1985 and personally introduced elements thereof into the Geldenhuys report on 12 June 1985 and he sent the report to Cape Town on 12 June 1985. His own additions included paragraphs 40, 41 and in paragraph 3 the words "Oostelike Provinsie GBS het ook 'n kort skriftelike inset gelewer" (Bundle 2 p. 70). He edited, made alterations and the said additions and then sent off the report to Cape Town, after the Committee had sat and without informing the Committee or its chairman of these changes or of the arrival of the Signal. Geldenhuys and other members of the Committee were never shown the Signal.

B2.1. This former evidence was to the effect that:

(a) He only received the Signal on 17 June 1985.

Rp 30 (6 - 19).

- (b) He was fully satisfied with the Geldenhuys report. It was full and complete and even dealt with the possible detention of Goniwe's "luitenant" (Mbulelo Goniwe & Calata).

Rp 85 (20) - 86 (5)

Rp 146 (7 - 10), 146 (29) - 147 (3)

Rp 32 (20)

Also see Rp 148(31) - 149(21).

- (c) Geldenhuys sent his report to Cape Town on 12 June 1985.

Rp 25 (15 - 27)

Rp 26 (17 - 22)

- (d) The reference to a "skriftelike inset" from the "Oostelike Provinsie GBS" was probably a reference to the signal of 23 May 1985.

Rp 138 (8 - 11).

Rp 148(31) - 149(21).

- (e) The Signal added nothing and he was "gebelg" by its language.

Rp 47 (1 - 10), p 48 (1 - 7).

Bundle 1 p 121 & 122 (paras 3 - 5).

- (f) He could have destroyed, filed or given the Signal to Stemmet.

Bundle 1 p 122 & 123 (paras 4 - 7).

- B3. The SADF's original heads of argument criticised the former evidence of Van Rensburg and argue, inter alia, that the Signal was received before 17 June 1985 and that elements thereof were incorporated in the Geldenhuys report. Van Rensburg's new evidence and affidavit resemble the submissions in the SADF's original heads and if accepted would be compatible with those submissions.

SADF original heads, 16 - 18, paragraphs 18 to 18.7. (See also p 19 & 20 paras. 18.8 - 18.9.2).

- B4. The new direction of Van Rensburg and his "nuwe herinneringe" are according to him as a result of his realisation that le Clus was a full-time student in June 1985 and therefore could not have been the drafter ("opsteller") or sender ("afsender") of the Geldenhuys report.

Bundle 4, F 39 para. 10.

- B4.1. This trigger of Gelderhuys' new recollections ("nuwe herinneringe") does not stand-up to close scrutiny. The new heads for both Du Plessis & the families have dealt with this in detail.

- (a) Van Rensburg never in his affidavits or his former evidence ascribes any role in respect of the Geldenhuys report (or Committee) or the Signal to le Clus. In fact Geldenhuys and he were the key role players.

- (b) Van Rensburg knew from the beginning that he was the key figure in respect of the Geldenhuys "werkkomitee". He had attended the "GVS - aksiekomitee" meeting (not le Clus), he had given the "voorligting" (with reference to the 23 May 1985 signal and the attitude, as he put it, of the "Veiligheidsgemeenskap"), the reportbacks were to him each day (not le Clus), he received the Signal (not le Clus). His name is also given for inquiries at the top of the first page of the Geldenhuys report.

See Bundle 2, p 70 (again no mention of le Clus).

Rp new p. 998 (7 - 29)

Rp 281, p. 151 (see also R new p 1001 (9 -31))

Rp 29 (25 - 30) & Rp

R new p 999(7) - 1000 (4).

- (c) If Van Rensburg thus always believed and knew he was a key role player in respect of the Geldenhuys report and signal, then he cannot rely on the argument that he had up till August 1993 believed it was le Clus who was the drafter, editor, amenber and sender of the report.

B5. The former evidence of Van Rensburg was clear - there was absolutely no need to change the Geldenhuys report. There was no need to edit or add to the report. Now in his new evidence the report required amendment and editing, while the Signal which formerly offended him and added nothing, became a vital element which had to be incorporated into the report, despite the fact that neither Geldenhuys nor his Committee had seen it. It is submitted that this volte-face cannot be accepted.

Old evidence: Rp 85(20) - 86(5), p 146 (7 - 10), p 146(29) - 147(3), p 148(31) - 149(12).

B6. Van Rensburg has now given several versions of when he received the Signal and who saw it, who he gave it to and what might have happened to it. His evidence and these changes are most unsatisfactory.

See also SADF original Heads, Du Plessis & Families Heads (both original and new).

C. MRS VORSTER'S EVIDENCE

C1. We submit that Mrs Vorster was a credible witness and that her evidence can be relied upon, including those aspects which contradict Van Rensburg. To a large extent she is neutral vis-a-vis the occurrences which form the basis of this enquiry. There is no obvious reason why she should give false evidence to favour any particular version which is being argued before this Court. Neither was any motive to give false evidence alleged against her in cross-examination by any of the Counsel.

C2. Although Mrs. Vorster did concede the possibility that she might have given both the signal and the report to Van Rensburg as 2 open and loose documents,

R new p. 1063 (5 - 8).

C2.1. we submit that the probability of this having in fact occurred, is highly doubtful, especially in view of the evidence regarding the handling and dispatch of top secret documents.

Bundle 4 F8 (Wybenga)

C3. Throughout her evidence Mrs. Vorster was adamant the she did not type the Geldenhuys report.

Rp 1059 (13 - 14)

1063 (22 - 23).

C3.1. In view of Van Rensburg's evidence that he himself cannot type on a word processor, and no reason having been advanced before this Court why, on 12 June 1985, Van Rensburg would have taken his typing to anybody

other than his personal typist, we submit that it is highly improbable that the final draft of the Geldenhuys report was edited and typed at Van Rensburg's request (given Mrs. Vorster's denial that she typed it).

- C4. The above submission fits in with Geldenhuys' initial evidence (and even at first during his latest testimony) that he had sent the report.

R: new. p. 1066 (28) - p. 1067 (1).

D. GELDENHUYS' NEW EVIDENCE

D1. We submit that Geldenhuys was unwilling to make a complete about face and change his previous evidence: at the same time however, he was reluctant to differ from Van Rensburg's new version. This forced him to give evidence which in some instances, simply cannot survive scrutiny.

D2. The following examples illustrate the point:

D2.1. Geldenhuys agreed readily that Van Rensburg would not have the authority to change the essence of their report, without referring back to the Committee.

R n p 1069 (14 - 27)

D2.2. He also agreed that the Committee itself should judge what the essence of its report was.

R n p 1125 (4 - 6)
1125 (10 - 23).

D2.3. Despite this Geldenhuys flatly maintains that Van Rensburg could add to the report, from documents which were not before the Committee.

R n p 1135 (3 - 13).

D2.3.1. He clearly fails to appreciate that in so doing, without referring back to the Committee, Van Rensburg added to the essence of the report (and changed it) and Van Rensburg denied the Committee the opportunity to judge whether the essence of their report had been changed and whether they agreed with and supported those changes (which in respect of paras. 40 & 41 impacted on certain of

the delegates' departments "line functions").

D3. Geldenhuys readily agreed that there was no possibility that a person could simply by virtue of his rank, change or overrule the Committee's recommendation.

R n p 1127 (10 - 13), (27 - 31).

D3.1. However, when it was put to him that Van Rensburg, not being a member of the Committee, by adding to their recommendations without referring back to them, did just that, he gives a long and it is submitted, irrelevant answer, in an attempt to evade the consequence of his support for Van Rensburg.

R n p 1128 (11) - 1129 (9).

D4. We submit that Geldenhuys, for whatever reason, tried to align his evidence with Van Rensburg's new version, while attempting not to renege on his own previous version. It is submitted that his new evidence where it tends to support Van Rensburg's new version, yet contradicts his previous evidence or is against the probabilities, should not be accepted.

E. THE SIGNAL OF 7 JUNE 1985

E1. The points we made in section G of our original heads are it is submitted all still valid.

Our original Heads: section G.

E2. We still have a situation where the Signal was not seen or considered by Geldenhuys or his Committee.

E3. On Van Rensburg's original version (Bundle 1 p 114 para. 5 and also p 121 - 123) he received the Signal shortly after his telecom with Van der Westhuizen but apparently chose (because of its "dubbelsinnige" wording it seems) merely to show it to Stemmet and file or destroy it. On his evidence in March 1993 he said he received the Signal after the Geldenhuys report had been sent, namely on 17 June 1985. On both of these versions the Signal was deemed by him to either be "dubbelsinnig" and to have no value for the Geldenhuys Committee or report (either because it added nothing and was unclear OR because the report included all the relevant factors and the Signal therefore was irrelevant). If Van Rensburg's new version is rejected then we still do not have the Signal of 7 June 1985 having a role for the Geldenhuys Committee or report.

E3.1. If one accepts the version that the Signal was received by Van Rensburg on the 12th, then one still has the fact that the Signal was an ambiguous document, which cannot easily be reconciled with a document for consideration by a Committee to consider the re-appointment of Matthew Goniwe as a teacher.

E3.1.1. Van Rensburg merely latches onto the 2 names which

appear in both the Signal and the report as one of the key points to link the Signal and the report.

E3.1.2. Paragraph 40 of the Geldenhuy's report however reads as follows:

"Dit kan oorweeg word om meelopers van Goniwe, soos sy neef Mbolelo Goniwe en Fort Calata na die Direkteur vir Staatsveiligheid te verwys vir moontlike aanhouding of inperking. Dit moet egter nie onmiddellik saamval met Goniwe se aanstelling nie aangesien die weereens 'n moontlike uitkoms vir Goniwe kan bied. 'n Geskikte tyd en omstandighede moet hiervoor afgewag word."

E3.1.3. It can be seen that paragraph 40 deals with:

- (a) "Sy neef Mbolelo Goniwe" (not "broer of neef" as used in the Signal).
- (b) It gives the option of "aanhouding of inperking" (no mention of "permanente verwydering uit die samelewing").
- (c) Van Rensburg has now obviously carefully studied the Geldenhuys report (see Bundle 4, F39 and his new evidence), yet especially paragraph 41 is a paragraph that should obviously have carried the blessing of at least the Police, "Veiligheidswetgewing" and Education and Training representatives on the Committee. The "flow" of the report and especially paragraphs 39 to 42 show a delicate balancing of the interests of the various departments on the Committee, it is inconceivable that van Rensburg who set-up the Committee to allow the various departments to reach a compromise, given their conflict of interests, could possibly interfere with and alter the delicate and negotiated points made by the Committee.

Bundle 2, p 70 - 77(a) esp. at p 77.

Bundle 1, p 114 & 115 paras. 7 - 8.

- E4. It is submitted that van Rensburg's new version of what happened on 12 June 1985 should be rejected. However it is still clear that he did receive the Signal, it is however even more questionable as to what he did with it.

See also our comments i.r.o. Geldenhuys and Vorster.

F. GENERAL POINTS AND RESPONSES

F1. In respect of the annexures to Bundle 4, F4 (du Plessis' affidavit) the SADF argument is that the Katzen documents are "innocuous" and are "capable only of an innocent meaning on the probabilities".

See R new p. 691 (9 & 10), 684 (14 - 19), generally p 676 et seq.

F1.1. The annexures to F4 alone, it is our submission clearly contemplate or envisage actions which can result in deaths.

See Bundle 4, F4:

Annexure A: (by van der Westhuizen) p 11 para. 5, p 15 para 4, p 16 para 14, p 17 para 18 (a) & (c).

Annexure B: (written by another, signed by Van der Westhuizen) para. 14.: p 7, (4) & (5); p 9 para. 14 (c)(5) (a) (7) "coup de etat"; p 8, para 14(6).

Annexure C: p 1, para. 1 (c)(i)(c) & (d); p 3 (1st paragraph on page); p 4, f(i) & (ii).

Annexure D: p 2, E.

F1.2. The copies written or signed by Van der Westhuizen contemplate getting rid of ex President Sebe. Special Forces are contemplated, a coup de etat is contemplated to name just a few of the sections quoted above.

F2. A point that still is not clarified is that Matthew Goniwe was a key cause of the unrest, Cradock was the centre of the unrest and the Eastern Cape was the main centre of unrest in the entire country, yet on Van Rensburg's and Van der Westhuizen's versions, Goniwe and the Signal and the Geldenhuys Committee's results were of so little importance that they never even discussed them (both of them were in Pretoria on the 12th at the SSVR: i.r.o. Plan Strelitzia). However both the "Noodtoestand" and "Plan Strelitzia" largely flowed out of the results of the unrest in the Eastern Cape (with Goniwe at its centre). How could they have deemed the result of Goniwe's actions (and those of his associates and organisations) of such high priority, yet treated the question of the Signal and the possible implication of the Geldenhuys Committee and its report so cavalierly? Their lack of interest or knowledge of what happened to the Signal and if they ever discussed what to do in respect of Goniwe, it is submitted was feigned ignorance.

F3. The argument on behalf of the S.A.P. criticised various points individually in respect of our original heads of argument.

F3.1. In respect of the withdrawal of the parking tickets (our original heads D9.1. - 9.5.2.), our argument is that whoever parked the vehicles with the false CB10627 number plates, appears not to have worried about being caught (our para. D9.3.1.), irrespective of who had the tickets withdrawn.

F3.2. The Bluewater Bay inquest (Bundle 5, G73) merely indicates that as regards information/intelligence, the Security Police should have known (given the fact

their member found the bodies) that bodies of apparent unrest victims would not necessarily attract excessive interest, if found in that area.

See our original D6.4.

F3.3. We pointed at possible motives, opportunity and the like in our original heads (Sections F, F(A) and F(B) as factors to weigh when considering the probabilities.

R v de Villiers 1944 AD p 493 at 508

R v Blom 1939 AD p 188 (on how its facts were evaluated).

G. THE LEGAL QUESTIONS

G1. Prima facie

- G1.1. We submit that a presiding officer at an inquest is in much the same position as the presiding officer at a preparatory examination under the previous Criminal Procedure Act (Act 56 of 1955).

See Section 74(1) of Act 56 of 1955.

It is submitted that at the conclusion of an inquest, the presiding officer must decide whether there is sufficient evidence which may establish the guilt of a suspect, were he to be prosecuted, and the evidence were accepted.

- G1.2. As to the test which the presiding officer must apply we submit that the expression prima facie in section 16(2)(d) of the Inquest Act must be interpreted against the above background. The existence of a prima facie case, must be determined on all the "evidence" before the presiding officer, which may include hearsay evidence, or evidential material in the form of unsworn statements. It stands to reason that in this sense, a prima facie case may be different from that finding at a criminal trial, where ordinarily, hearsay evidence would be inadmissible, as well as unsworn statements not made viva voce and the fact that the accused does not have to give his version.

See Swift Law of Criminal Procedure Second Edition
p 121 - 122, p 129 - 130.

G2. Standard of proof

As to the standard of proof required, we maintain that it cannot be higher than on a balance of probabilities. Because of the nature of inquest proceedings it is quite possible and often happens, that a presiding officer must make his finding on affidavits placed before him. In the absence of any cross-examination of the deponents of such affidavits, it stands to reason that the finding cannot be beyond reasonable doubt, where reasonable doubt can very easily be created merely by cross-examining the deponent of an affidavit.

G3. Applicability of the presumption of innocence in an inquest

We submit that the presumption of innocence only finds application in adversarial proceedings, where an allegation of misconduct or crime, is made.

May "South African Cases and Statutes on Evidence Fourth Edition par. 240.

Hoffmann and Zeffertt "The South African Law of Evidence" Fourth Edition p. 513 - 515.

Hoffmann describes the "presumption of innocence" as "not" a presumption in the usual sense but a general rule of policy which requires that the prosecution should ordinarily bear the onus on all issues" (p 513).

We submit therefore that this presumption finds no application in inquisitorial proceedings, where a fortiori there is no onus on any party to prove anything.

G4. The Admissibility of Similar Fact Evidence regarding the Katzen Documents

The Court is respectfully referred to May (Op Cit) par. 385, 386 and 387.

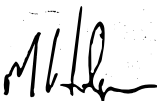
G5. The offence of Incitement in contravention of section 18(2) of the Riotous Assemblies Act 17 of 1956

We submit that absence of a causal connection between an incitement to kill, and the eventual death of a victim, is no bar to a conviction for incitement. In fact, if such a causal connection exists and can be proved, the inciter becomes a party to the crime of murder, and should be charged as such; but if only the incitement can be proved against the accused, and not the commission of the murder, he obviously cannot be either charged with or convicted of murder.

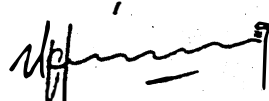
Snyman "Strafreg" Derde Uitgawe (2nd Ed) p 319.

Burchill & Hunt "SA Criminal Law & Procedure", Vol 1 (2nd Ed) p 473.

G6. We further submit that in the absence of such a causal connection, even if an inquest Court cannot find in terms of Section 16(2)(d) that the death of a deceased was brought about by an act or omission prima facie amounting to an offence on the part of any person, that the Court is not precluded in its analysis of the evidence, from commenting on an obvious offence by any person, which appears from the evidence.



M.J.C. HODGEN SC



N. HENNING

IN THE SUPREME COURT OF SOUTH AFRICA

In the inquest in respect of the deaths of:

MATTHEW GONIWE
FORT CALATA
SICELO MHLAULI
SPARROW MKONTO

THE MAIN SUBMISSIONS BY HODGEN AND HENNING

CONTENTS:

A	INTRODUCTION	2 - 5
B	THE INQUIRY IN THESE PROCEEDINGS	6 - 11
C	WHO WERE MATTHEW GONIWE AND HIS COMPANIONS IN THE CONTEXT OF CRADOCK, THE EASTERN CAPE AND SOUTH AFRICA IN 1985?	12 - 20
D	HOW WERE THEY MURDERED AND WHAT WAS THE MODUS OPERANDI?	21 - 32
E	WHEN WERE THEY MURDERED VIS A VIS OTHER DEVELOPMENTS IN 1984/5	33 - 35
F	WHO MURDERED THE DECEASED OR COULD HAVE DONE SO, CONSIDERING	36 - 49
F(A)	MOTIVE	36 - 45
F(B)	WHO HAD THE ABILITY, MEANS AND OPPORTUNITY TO MURDER THE DECEASED	45 - 49
G.	THE SIGNAL OF 7 JUNE 1985	50 - 59
H.	EVALUATION	60 - 67

A INTRODUCTION

A.1. The inquest into the deaths of Matthew Goniwe, Fort Calata, Sicelo Mhlauli and Sparrow Mkonto was re-opened in terms of section 17A(1) of Act 58 of 1959 before the Honourable Mr Justice Zietsman, Judge President of the Eastern Cape Division of the Supreme Court.

Volume A p 3 (24 - 28)

A2. The inquest papers now consist of:

(a) The record of the inquest proceedings in the Supreme Court (Volume A p 1 - 78 containing the introductory addresses and the remainder of the record pages 1 - 3353).

(b) The "Bundles" of exhibits and the original inquest record:

Bundle 1: First Volume of documents ("the Signal documents").

Bundle 2: Second Volume of documents (State documents of officials and committees).

Bundle 3: Third Volume of documents (Diverse aspects such as the Hammer allegations, the roadblock allegations, the CB 10627 number plate and parking tickets, etc.).

Bundle 4: The "F" series of exhibits (these are further affidavits).

Bundle 5: The "G" series of exhibits (these are documentary exhibits).

Bundle 6: The original inquest record.

A3. There are also physical exhibits:

Exhibit K1 : Detonator;

Exhibit K2 : Limpet Mine;

Exhibit K3 : Map (this was handed in with F.24).

A4. The heads of argument for the families present a thorough and useful overview of the facts and organisations mentioned during this inquest. We will only repeat factual statements and references to the evidence, where they are necessary in the development of our argument.

Families Heads

A4.1. The heads of Argument for the SADF deal primarily with the Signal of 7/6/85 (and its interpretation) and the credibility of du Plessis.

SADF Heads

A4.2. The heads of Argument on behalf of the Police deal primarily with the credibility of Koni and those points in the Families Heads which allege or imply police involvement in the murders of Matthew Goniwe and his companions.

Police Heads

A4.3. The heads of Argument on behalf of du Plessis largely confirm and add to the points raised for the families (Families Heads), they also, inter alia, defend du Plessis' credibility, deal with the 'Counter Revolutionary Warfare' and operation Katzen.

Du Plessis' Heads

- A4.4. The main issues raised and in dispute, at this stage, are whether van der Westhuizen and other specified persons, the SADF and/or the Police and particularly the Security Police murdered Matthew Goniwe and his companions and furthermore whether the Signal, du Plessis, Koni and the evidence and documents as a whole cast any reliable new light on these questions.

Families' Heads paras. 3.2, 115.

- A5. The re-opened inquest has had access to a number of top secret and secret documents and information which was never before of public knowledge. The new information has placed this Court in a unique situation to consider how persons such as Matthew Goniwe were considered and viewed in structures and documents of government (and the National Security Management System) which till now were largely secret and taboo.

Bundles 1 & 2 & 5 generally.

- A6. In these submissions we propose, while keeping in mind that this is an inquest, to consider the factors surrounding and leading up to the murders on 27 June 1985. We will consider the deceased and how they were murdered; the possible suspects their circumstances, pressures and possible motives. Thereafter we will examine how the Signal impacts on the facts and the general scenario. Finally we propose to evaluate the circumstances and submit what our conclusions are.

A7. In these submissions commonly used abbreviations for the various bodies will be used (see Families' Heads). Given the changing ranks of the role players and titles of the deponents, witnesses and persons referred to, we will as far as possible merely use surnames or initials and surnames.

Families' Heads esp. para. 21 - 21.7.

A7.1. Abbreviations or shortened forms (English and Afrikaans, in that order) used hereunder are, inter alia:

the Signal	=	the Signal message of 7 June 1985
EPJMC or OPGBS	=	Eastern Province Joint Management Centre
JMC or GBS	=	Joint Management Centre
E.P.	=	Eastern Province or Eastern Cape
NSMS or NVBS	=	National Security Management System
SSSC or SSVR	=	Secretariat of the State Security Council
SSC or SVR	=	State Security Council
UDF	=	United Democratic Front
CRADORA	=	Cradock Residents Association
CRADOYA	=	Cradock Youth Association
AZAPO	=	Azanian Peoples Organisation
SWAPO	=	South West African Peoples Organisation (their armed guerrillas known as PLAN members)
DET or "O & O"	=	The Department of Education & Training
Askari	=	Turned terrorist (former guerrilla of a liberation movement who now works with State forces esp. the Police).

B THE INQUIRY IN THESE PROCEEDINGS

B1 The matters to be dealt with in terms of the Inquest Act are pertinently and succinctly set-out in the Introductory section of the record (Volume A) at page 2 (see p. 1 - 3 also) namely:

1. The identity of the deceased persons.
2. The causes or likely causes of their deaths.
3. The date of their deaths.
4. Whether their deaths were brought about by any act or omission prima facie involving or amounting to an offence on the part of any person.

B1.1. The Magistrate correctly on the information before him made findings in respect of all the points. The Magistrate's findings on questions 1 to 3 are common cause and may be accepted. The finding on question 4 is the subject of dispute at this stage.

Section 16(2) of Act 58 of 1959

Bundle 1 Forms J56 and findings.

B2 Any inquiry could move directly to the 4th question and consider the motives, opportunity and evidence pointing to either individuals or groups as suspects, in respect of the murders.

B3 The very nature of this inquiry however calls for a more detailed analysis than would usually be expected or required in an inquest.

B4 The questions posed by the Inquest Act can however serve as a useful framework to build on:

1. Who were the persons murdered?
2. How were they murdered?
3. When were they murdered?
4. Who murdered them?

B4.1. These questions can be considered not narrowly but as ones to prompt an in depth consideration of the relevant facts; they can be expressed as follows:

1. Who were Matthew Goniwe, Fort Calata, and Sparrow Mkonto Sicelo Mhlauli in the context of Cradock, the Eastern Cape and South Africa circa 1985?
"C" hereunder.
2. How were they murdered and more particularly what was the likely modus operandi?
"D" hereunder.
3. When were they murdered vis a vis other developments and events circa 1985?
"E" hereunder.
4. Who murdered them or could have done so considering motive, ability, means, opportunity and the evidence.
"F" hereunder.

B5. The requisite degree of proof in an Inquest is a matter raised in the Families' Head (paras. 4 - 20). Section 16(2)(d) of the Act requires the Court to make a finding whether the death of a deceased was brought about by an act or omission prima facie involving or amounting to an offence on the part of any person. Since the Act itself, is silent as to what is meant by the term prima facie in this context, regard must be had to case law on this point.

B5.1. The only (unreported) judgment dealing specifically with the meaning of prima facie in section 16(2)(d) that we are aware of, is that of Stegmann J in the inquest into the death of Dr David Joseph Webster, in the Supreme Court of South Africa (Witwatersrand Local Division), dated 22 January 1993.

See also Families' Heads para. 9.

B5.2. In the abovementioned judgment the Court finds that in section 16(2)(d) the legislature, requires proof beyond reasonable doubt of the commission of an offence on the part of any person.

B5.3. We find ourselves in respectful disagreement with his conclusion, although the following paragraphs are, it is submitted, correct:

P18 (3 - 19) of the judgment reads:-

"However, as Mr Wessels pointed out, in my view correctly, an inquest is not such an adversarial proceeding. The authorities are quite clear on the proposition that the judicial officer holding an inquest is not to deal with the matter as if it were a criminal trial. (Cf Timol's case at 219 H - 292 B). It is not a criminal trial. There is no accused person; there is no indictment or charge alleging

the commission of a specified crime by a specified person at a specified time and place; there is no prosecutor burdened with the duty of proving any such allegations; there is no stage at which any proponent's case is closed, and therefore no occasion to apply either of the tests for a prima facie case. An inquest is in these and other respects entirely different from a trial. It is simply an inquiry by a judicial officer for the purpose of determining the answers to the question posed by the legislature in section 16 of the Inquest Act."

Pages 18 (26) - 20 (10) of the judgment reads:

"In my view it is clear as a matter of historical record that the concepts of prima facie evidence and prima facie proof, both broader and narrower, in fact developed in the context of adversarial proceedings and depend upon the context for their meaning. I therefore consider Mr Wessels's submission to be correct.

This conclusion leads to the further inference that the legislature in introducing the term prima facie into the context of a proceeding which does not have the adversarial features which ordinarily invest the term with each of its two technical meanings, has used the term with a meaning different from either of them. What then is its meaning in this context?

In my view the term prima facie, as used in the context of section 16(2)(d) of the Inquests Act has been introduced for the purpose of recognising and emphasising that as a matter of law the judicial officer holding the inquest, although directed to record a finding in terms of section 16(2)(d) and accordingly to make a decision on both the facts and the law as to whether or not any person has been proved to have committed an offence which brought about the death being enquired into, can nevertheless not make a final and binding determination which affects the

legal rights and obligations of interested parties. It is in that sense that the finding is to be prima facie for it is to remain subject to the outcome of any other proceedings which may follow and in which precisely the same question may be enquired into and decided upon by another court in criminal proceedings, or by another court in civil proceedings, between all or any of the parties having an interest in the outcome of the inquest. A finding under section 16(2)(d) cannot give rise to a situation of res judicata, even as between interested persons who may have been present at the inquest and may have taken part in determining its outcome. It seems to me that the term prima facie was introduced to remove uncertainty as to the nature of the decision to be made. That the decision is merely prima facie establishes that it is not intended to be, and as a matter of law cannot be, final or binding and that it is liable to be superseded by binding decisions made in subsequent criminal or civil proceedings.

As to the standard of proof, for the reasons already given I consider that the words "prima facie" are equally applicable to the civil standard and the criminal standard. The phrase "prima facie" is therefore no help in resolving that question."

B5.4. Since an inquest is not an adversarial proceeding, there cannot be a question of an "onus of proof" in the traditional sense, on any party. The Court must make a finding based on the evidence (much of which the Court itself calls for in any event). What is required is that the Court, to be able to come to a finding, must be satisfied to a certain degree, of the existence of certain facts.

B5.4.1. To what degree then must the Court be satisfied? Section 16(1) requires (in express terms) that the Court must be satisfied beyond reasonable doubt that

a "missing person" is in fact dead, before recording a finding that a death has occurred.

B5.4.2. It is submitted, in the absence of any similar express indication as to degree of proof required in section 16(2)(d), that based on the recognised rule of inclusive interpretation ex contrariis, it must be argued that section 16(2)(d) of the Act requires only proof on a balance of probabilities. The rule above referred to, is formulated as follows:

"Where an enactment expressly provides for certain circumstances, it is inferred that for opposite circumstances the contrary obtains"

See The Law of South Africa, Volume 25
para. 311 (b) and the authority quoted.

B5.5. We therefore submit that the term prima facie in section 16(2)(d) is not indicative of proof beyond reasonable doubt being required, but merely means (in its ordinary sense) "at first sight" or "on the face of it", Families' Heads (p 9 par 18), and that, in these proceedings, all that is required is that the Court must make a finding on a balance of probabilities.

C WHO WERE MATTHEW GONIWE AND HIS COMPANIONS IN THE CONTEXT OF CRADOCK, THE EASTERN CAPE AND SOUTH AFRICA IN 1985?

C1 In both State and more particularly the National Security Management System (NSMS or "NVBS") organs, Matthew Goniwe was the subject of attention, discussion and debate.

C1.1. The National Security Management System is described and set out by A.P. Stemmet and Van Rensburg. -

Bundle 5, G1 & G2

R p 20(8) - 21(20) (Van Rensburg)

R p 221(28) - 223(23) (Stemmet)

C2 A perusal of the documentary exhibits in Bundles 1 & 2 indicates the profile Matthew Goniwe had:

C2.1. The OPGBS (the E.P. Joint Management Centre) chaired by Brigadier C.P. van der Westhuizen, on 23 May 1985, recommended to the SSVR (secretariat of the State Security Council) that Matthew Goniwe and Fort Calata should never ever be re-appointed (to any post in the DET).

Bundle 2 p 20 (para. 26) and p 45 and 46

See also Bundle 1 p 5 - 7 (Merbold).

C2.2. The "GVS/GOS Aksiekomitee" (Joint Security or Operational Centre Action Committee) chaired by Deputy Minister A. Vlok on 6 June 1985, referred the decision on Matthew Goniwe's re-appointment as teacher to a committee under the direction of the SSVR.

Bundle 2 p 54 para 5

- C2.3. The special committee under the direction of the SSVR was chaired by Brigadier Geldenhuys of the SSVR (hereafter called the Geldenhuys Committee). It sat on 7 June 1985 and considered in detail the position of Matthew Goniwe.

Bundle 1 p 137 - 167

R p 1015 (3 -20)

R p 501(4) - 513(14)

- C2.3.1. The results of this Committee's deliberations are contained in a detailed minute sent by diskette to Cape Town on 12 June 1985 by Brigadier Geldenhuys. This minute also made passing reference to possible action against "meelopers" or associates of Matthew Goniwe such as Fort Calata and Mbulelo Goniwe.

Bundle 2 p 70 - 77 (a), Bundle 1 p 159 - 167

- C2.4. The top management of the Department of Education and Training (DET) considered Matthew Goniwe's possible re-appointment as teacher.

Bundle 2 p 80 - 83

- C2.5. The Commissioner of Police sent a minute dated 25 June 1985 to the Minister of Law & Order setting out his recommendations in respect of Matthew Goniwe.

Bundle 2 p 84 - 115

- C2.5.1. The Security Police Head Office, on 23 May 1985, urgently required information on Matthew Goniwe's recent movements and activities (and also those of his "geesgenote"), including his visits to other areas which resulted in unrest. This information would, it is submitted, have been available to the Security Police Headquarter's staff on both 7 June 1985 (when the Geldenhuys committee sat) and when the Commissioner of Police drafted his minute dated 25 June 1985:

Bundle 4, F6 para. 7 & F6 annexure A, section C.1.
 R p 966 (30) - 967 (5),
 R p 1021 (5 - 18)

- C2.6. The documents above indicate that persons at a high level in the NSMS and the State considered Matthew Goniwe as an important figure and that the problems he posed to the State required urgent attention.

See also R p 1008 (10) - 1009 (18).

- C3. The evidence also confirms Matthew Goniwe's profile not only locally but nationally.

- C3.1. Commandant G.B. Marais identified Matthew Goniwe, Fort Calata and "Molile" Goniwe (or more correctly "Mbulelo" R p 3054 (3 - 4)) as prominent figures in the unrest, in his minute dated 3 February 1985.

R p 3041 (27 - 29) & Bundles 5, G54 especially paragraphs 3 & 6 and its "aanhangel A" paras 5 & 11.
 See also R p 3078(30) - 3079(2).

C3.1.1. The Cradock Mini GBS was strongly against the re-appointment of Matthew Goniwe & Fort Calata as teachers.

R p 3046 (4 - 12) & Bundle 5, G53 para. 6.

C3.1.2. Annexures "A" to "B" of the minute by Commandant G.B. Marais (Bundle 5, G53) sketch the perceived origins of unrest in Cradock and the people and organisations associated with it and set out a "diary" of events (annexure "B"). Key role players are given as, inter alia:

- (i) Cradoya (Cradock Youth Association)
- (ii) Cradora (Cradock Rate Payers (sic) Association, or more correctly Cradock Residents' association).
- (iii) Matthew Goniwe ("Vir al hierdie vergaderings word ... as voorsitter verkies...")
- (iv) Fort Calata ("Vir al die vergaderings word ... as sekretaris verkies..."). Fort Calata was also grandson of Rev. Calata, one of the founding members of the ANC).

C3.1.2.1. The following factors were also mentioned:

- (i) Cradora was affiliated to the UDF.

- (ii) Cradora (and Matthew Goniwe) had links or contact with the UDF, the Black Sash, the S.A. Council of Churches ("SARK") and PEPCO ("PEPKO").

See also Bundle 2 p 84 - 115 esp. p 94 para. 8 - 10.

C3.2. Snyman in mid 1985 was strongly opposed to Matthew Goniwe's re-appointment as a teacher, due to his activities in Cradock, Graaff-Reinet and in the surrounding areas as organiser of the UDF, and due to his previous conviction for furthering the aims of communism.

Record p 1007 (7 - 11)

Bundle 4, F6, annexure B esp. para. 7 & R p 965 (31) - 966 (19).

Also R p 999 (6 - 13) & R p 986 (27) - 987 (6)

C3.3. Nieuwoudt identified Matthew Goniwe as the key figure in implementing the "G" plan (for Goniwe Plan), which contributed substantially to the unrest and "ungovernability" in the Eastern Cape.

R p 1583 (13) - 1584 (21)

C3.3.1. Matthew Goniwe as UDF Regional Organiser extended his influence to various areas in the Eastern Cape.

R p 1584 (1 - 5)

C3.3.2. Nieuwoudt regarded the UDF and their sub-bodies such as Cradora as the internal section of the ANC and as representatives of the ANC.

R p 1584 (7 - 23)

C3.3.3. Nieuwoudt regarded such organisations as responsible not only for the "G" Plan but also the establishment of the 'amabuthos' that carried out intimidation and the necklace (murders).

R p 1584 (15 - 21)

C3.4. Van der Westhuizen considered the Eastern Cape to be the flashpoint ("brandpunt") of the revolution against the State in 1984/5, with the unrest deteriorating to anarchy in sections thereof. Goniwe in his view:

- (i) Played a very prominent roll in the revolutionary "attack" (aanval),
- (ii) Was a leading figure in the U.D.F.,
- (iii) Implemented "alternative structures" namely the "G" or "M" plan, beginning in Cradock,
- (iv) Was a leader of the militant youth movements in the Eastern Cape,
- (v) Enjoyed prominence in the media (and with the Security Police and the Department of Education and Training).

Bundle 1 p 105 - 107 esp.; para. 4, 8, 9, 10.
R p 2451 (4) - 2454 (10) & 2458 (30 - 2459(3) & 2463 (1).

Bundle 5, G53 & R p 2495 & 2496 (19) - 2497 (31) give further background.

C3.4.1. Fort Calata was an associate ("meeloper") of Goniwe.

Bundle 1 p 108 para. 13.

C4. The documentary exhibits give additional insight into the people who were in contact with Matthew Goniwe. It is not necessary to quote in detail, but a few examples are useful.

C4.1. Mr White (first Secretary) of the British Embassy telephoned on 25 June 1985 and arranged to see Matthew Goniwe on Sunday (30 June 1985).

Bundle 5, G 10 p 233 (& last para. p 232)
also G9 page 11 (29 & 30/6/85 report).

C4.2. Molly Blackburn (M.P.C.) was in regular contact with Matthew Goniwe.

Bundle 5, G10 p 233 (b) entry 26/6/85 - p 235
Bundle 2 p 85, p 102 (para 34.1) & 103.

C4.3. In Bundle 2, the memorandum of the Commissioner of Police indicates various people who had contact with Matthew Goniwe e.g.:

C4.3.1. EX MEMORANDUM

- (i) Helen Suzman
- (ii) Oscar Mpetha

EX ANNEXURE B

- (iii) Senator Edward Kennedy
Bundle 2, p 105
- (iv) Sheena Duncan (Black Sash)
Bundle 2, p 107

- (v) Overseas journalists
Bundle 2, p 111.
- (vi) Michael Robinson (attached to the BBC)
Bundle 2, p 111
- (vii) Molly Blackburn
Bundle 2, p 112, 114
- (viii) Dr Allan Boesak
Bundle 2, p 114

C4.3.2. Although Fort Calata and Sparrow Mkonto have a much lower profile in the papers they, together with Mbulelo Goniwe, are also mentioned.

e.g. Bundle 2 p.s. 77 (para. 40), 97, 104 and 107.

C4.4. The signal message of 7 June 1985 confirms the profile of Matthew Goniwe and to a lesser extent Fort Calata and Mbulelo Goniwe, both locally and nationally.

Bundle (Volume) 1 p 73 para. 4.

C5. Fort Calata, Sparrow Mkonto and Mbulelo Goniwe were all regarded as "meelopers" or "geesgenote" or "militante luitenant" of Matthew Goniwe. Fort Calata, Sparrow Mkonto and Sicelo Mhlauli were also UDF members.

See above, also Bundle 6, A10.

C6. Fort Calata was also a grandson of Rev. Calata (a founder member of the ANC), secretary in organisations such as Cradora and a fellow teacher with Matthew Goniwe.

See above.

C7. Matthew Goniwe however was the key figure and was seen at the centre of the web of unrest that began in Cradock and spread its strands into virtually every corner of the Eastern Cape and beyond.

See above.

C8. Sicelo Mhlauli although also a teacher (Bundle 6, A42) and a member of the UDF was not it appears a key political figure, in Cradock or the Eastern Cape.

C9. The probabilities are that anyone with Matthew Goniwe, on the night of 27 June 1985, would have been killed to prevent identification of the murderers. Matthew Goniwe was, it is submitted, the main target.

D HOW WERE THEY MURDERED AND WHAT WAS THE MODUS OPERANDI?

D1. The final finding of Mr E. De Beer in the original inquest proceedings was that Matthew Goniwe, Fort Calata and Sparrow Mkonto died as a result of multiple stab wounds and that Sparrow Mkonto died as a result of a bullet wound to the head ('deur die kop') and a stabwound to the heart ('tot in die hart').

Bundle 6: finding p 2 (20) - p 3(2) and J.56 forms, also A 46, A 48, A 50 and A 52.

D1.1. Key points from post-mortem findings and photographs are, inter alia:

(a) In respect of Sparrow Mkonto:

(i) Extreme burning of the body, making identification very difficult.

(ii) A bullet wound through the skull and brain and a second shot in the chest.

(iii) Stabwounds to both the front and back of the chest (3 front, 3 back) with one of the stabwounds from the front penetrating into the chest cavity and right through the heart. A more superficial stabwound at the back of the neck.

(iv) Death was caused by the bulletwound to the head and the stabwound to the heart.

Bundle 6, A46 and A31 (photos).

(b) In respect of Sicelo Mhlauli:

- (i) Extensive burning of the body, making identification very difficult.
- (ii) Multiple stabwounds to the body, 25 to the front of the body, 7 to the back and a large stabwound to the right and centre of the neck.
- (iii) Death was as a result of the multiple stabwounds.
- (iv) The right hand was missing from the wrist and there was also a stabwound just above the wrist. There was a stabwound to the left wrist and a stabwound through the skin of the palm of the left hand.
- (v) Sicelo Mhlauli was big and strong ("groot en fris"), while the other deceased were either small (Mkonto) or average (Calata & Goniwe) in size (per A46, A50, A52).

Bundle 6, A48 and A32 (photos).

(c) In respect of Fort Calata:

- (i) Extensive burning of the body, making identification extremely difficult.
- (ii) Stabwounds into the front of the chest (4), (front) stomach (2) and back of chest (4) and back of neck (1) and probably two to the back of the neck and one in the vicinity of the 10th and 11th ribs.

(iii) The stabwounds to the front of the chest area all penetrated the heart cavity and the right ventricular of the heart.

(iv) Death was caused by the stabwounds into the heart.

Bundle 6, A50 (esp. annexure 1 & Sketch) and A33 (photos)

(d) In respect of Matthew Goniwe:

(i) Extensive burning of the body, making identification very difficult.

(ii) Stabwounds, 9 to the front of the body (from the neck to the abdomen) and probably two to the back of the body, one in the neck and one in the vicinity of the 10th and 11th ribs (the entry wound in respect of the latter could not be found due to the burning of the body).

(iii) One of the stabwounds penetrated right through the heart.

(iv) Death was caused by the multiple stabwounds.

Bundle 6, A 52 (esp. annexure 1) and A34 (photos).

D2. The bodies were found spread out over some distance in the Redhouse / Bluewater Bay area on the outskirts of Port Elizabeth and the deceased had probably been killed at the places where their bodies were set alight (i.e. the site where the bodies were found).

Bundle 6: finding esp. p 2 (20), also p 2 (20) - 3(7).

D3. The deceased were last seen alive by Derrick Swarts at approximately 9 pm (21h10) on 27 June 1985, when the deceased left 76 Kemdrick St, Gelvandale, in Matthew Goniwe's Honda Ballade car with registration CAT 8479.

Bundle 6: finding p 2 (12 - 21) & A 10 (affidavit of D. Swarts).

D4. While Sparrow Mkonto's body was at Stone Hill Veeplaas (near Redhouse), the bodies of the other deceased were found on the seaward side of the N2 National Highway and on the Eastern side of the Swartkops river. Matthew Goniwe's car was found burnt-out near the Aldo Scribante race-course on the Eastern side of the Swartkops river but on the landward side of the N2 National Highway.

Bundle 6: A16 (W/O Els) and A39 (W/O Lottering)

Bundle 4: F24 & annexure (plan of relevant area which is also exhibit K3).

D5. The bodies of Matthew Goniwe and Fort Calata were found approximately 1,7 km from the body of Sicelo Mhlauli, all 3 bodies having been found in the bush area between Bluewater Bay and St Georges Strand. The bodies of Goniwe and Calata were only about 5 yards from each other.

Bundle 6: A16 (W/O Els) and A39 (W/O Lottering).

Bundle 4: F24 & annexure.

- D5.1. The body of Sicelo Mhlauli was found on 29 June 1985, only after a fairly long search resulting from a report by an unknown person. The bodies of Matthew Goniwe and Fort Calata were found on 2 July 1985 after an extensive search involving, inter alia, Lt-Col. Strydom and Defence Force members.

Bundle 6: A15 (Lt Col Ferriera), A14 (Molendorff) & A16 p 2 (W/O Els).

- D6. The deceased bodies all were burnt and stabbed. In appearance, it is submitted, they could easily have been mistaken for unrest victims (many of whom were stabbed and burnt with petrol).

(Nieuwoudt) R p 1588 (26) - 1589 (9)

Bundle 6: A46, A48, A50 & A52 (P.M. reports) A31, A32, A33, A34 (Photographs).

- D6.1. The numerous stab wounds could in isolation have suggested low tech., unsophisticated murders (with the exception of Mkonto's shooting).
- D6.2. The deceaseds' murderers inflicted sufficient stab wounds to ensure that their victims died. The burning of the deceased was clearly not designed or necessary to cause their deaths.
- D6.3. The burning of the deceased and more particularly of their faces, the fact that the bodies were scattered over a wide area and a distance from where Matthew Goniwe's burnt out car was found all point to a desire to hide the identity of the bodies and to make them appear to be random (unidentifiable) unrest victims. There were numerous bodies (many unidentified) of unrest victims in the Port Elizabeth / Eastern Cape area during 1985.

D6.4. There were other unidentified bodies in the Bluewater Bay / St George's Strand area, which were found earlier on in 1985. They have never been identified.

R p. 1177(8) - 1178(7)

R p. 935(24) - 936(6).

D7. The Bluewater Bay / St George's Strand murders of Goniwe, Calata and Mhlauli had the appearance of unrest murders and if the bodies had not been found fairly soon after the murders, may never have been linked to the deaths of the deceased. The body of Mkonto was found where an unrest victim's body could be expected, while the other bodies were all found at fairly isolated spots in the area of the Bluewater Bay / St George's Strand and were difficult to find.

D7.1. The fact that Sparrow Mkonto was shot, is not in keeping with the modus operandi in respect of the other 3 deceased and would suggest that the dynamics surrounding his death (a distance from the other deceased) differed from the others.

D8. The deceaseds' murderers it is submitted must have taken both the deceased and their vehicle into the murderers' control on the night of 27 June 1985, probably before the car and its occupants left Port Elizabeth and its environs.

D8.1. The Honda Ballade and its passengers probably stopped without a struggle and were taken into the control of the murderers.

Bundle 6, A57 (Klatzow)

- D8.1.1. The lack of physical damage to the Honda Ballade and lack of reports of a high speed chase or any other unusual circumstances involving the deceased and their car would suggest that the deceased surrendered to either someone they knew and/or to someone who they accepted could take them from their car.

Bundle 6, A57 (Klatzow)

- D8.1.2. Given the tensions between the U.D.F. and AZAPO in Port Elizabeth it is highly unlikely that the deceased would have merely stopped and surrendered themselves to AZAPO members.

- D9. The murderers obviously must have had vehicles to convey themselves and the deceased to the various places where the bodies were later found and where the burnt out Honda Ballade was found.

- D9.1. The burnt number plate CB 10627 found on the scene where the deceased's Honda Ballade was burnt out is a vital clue. The fact that various parking tickets were issued to both a Datsun and a Ford Cortina during 1984 and 1983 in Strand Street, Port Elizabeth, is also highly relevant.

Families' Heads para. 92 - 92.8

Police Heads para. 6.1 - 6.12.

- D9.2. It is common cause that the Security Police Offices were in Strand Street during 1983, 1984 and part of 1985. It is also accepted that the SADF, other Police units and government departments had offices in or near Strand Street. At this stage it is clear that the Security Police, SADF and others at times used false number plates.

Police Heads paras. 6.7, 6.8 & 6.9.

- D9.3. The Security Police parking at Strand Street would not necessarily have been used by the person using the false CB10627 number plates, even if he was a member of the Security Police, as it would have drawn attention to himself and the false number which was not on record (the use of such numbers did not carry official sanction). If the car with the false registration numbers was used for covert operations, one would obviously not park in the official Security Police parking area as the car's registration and cover would be "blown".
- D9.3.1. The person who parked the vehicle was not overly concerned about parking tickets and being prosecuted (for both the parking tickets and using false number plates). The person(s) parking the vehicles using the false CB 10627 number plates does not seem to have worried about inquiries and seems to have expected that the tickets would be withdrawn without difficulty and that he would not be arrested or prosecuted for using vehicles with false number plates.
- D9.4. The area where the false CB 10627 number plates were used, the identity of the person(s) using them, the groups that used such false plates all point strongly to members of the Security Establishment (veiligheids-gemeenskap) and persons in the organisations represented on the OPGBS such as the Security Police or SADF.
- D9.5. The number plates CB 10627 appeared to have come off Matthew Goniwe's Honda Ballade and the strong inference is that the murderers used this registration when moving the deceased's car to the spot where it was burnt.

- D9.5.1. The murderers would, it is submitted, have ran the risk of being linked with the deceased's death if they drove his (well known) vehicle with its usual (also known) CAT registration. They would obviously wish to remove any links to the false registration when the vehicle was to be burnt. It is submitted they would with proper planning and execution have envisaged removing the CB 10627 number plates. However as with any complex action undertaken at night, even the best planning may result in someone mistakenly leaving the one CB numberplate on the scene.
- D9.5.2. The presence of the CB 10627 number plate is a further indication that the murders were a planned operation by persons in State agencies (such as the Security Police, SADF, etc.).
- D10. There must have been sufficient persons in the murderers' group to control the deceased, especially as each one realised that he (or his companion(s)) was to be murdered.
- D11. Although the deceased could theoretically have been murdered one after the other in the presence of the other surviving members, the surviving members would undoubtedly then have resisted as much as possible and tried to raise the alarm. The murderers would then, at some stage, have had to transport the survivors or survivor across the National Highway and on public roads to the other main execution area.
- D.11.1. Given the abovementioned circumstances the most likely scenario is that Sparrow Mkonto was held separately and killed separately from the other deceased. The modus operandi of his murder also differed from the others, which, it is submitted suggests the actions of different members in the group that stopped the deceased.

D.11.2. It is also easier to restrain and murder one preferably unsuspecting victim at a time or at the most two. It is submitted that Sicelo Mhlauli was probably murdered separately from Messrs Goniwe and Calata. Sicelo Mhlauli was in professor Knobel's words "groot en fris" (Bundle 6, A48, p 2 of G7/15) and would not have been an easy victim to overpower and murder. The wound through his one hand, the fact that his other hand was cut off and the extent of his injuries suggest major resistance on his part and the presence of, it is submitted, probably 3 to 4 people to effect his murder.

D12. The probabilities strongly suggest that a group of persons working together and numbering at least 8 (2 per deceased) but probably more (10 to 12), were involved. They undoubtedly had vehicles, petrol and weapons (they definitely had one firearm).

D12.1. The group must have been and probably still is extremely tight-knit and disciplined, to have maintained its silence and secrecy since 1985. The chance of a large diverse group maintaining its discipline and silence (in the face of the pressures and large reward) since 1985 are extremely low. While some of the group may have died, the probabilities are very strong that most of them are alive and probably following developments in the inquest with keen interest.

D13. The murder of the deceased, at night, by a group acting out their deeds over a wide area, removing all leads and clues to their identities, keeping solidarity and preventing any of their members from giving away or admitting their actions suggests a highly cohesive, motivated group with experience in killing others and high organisational ability.

D14. The murderers obviously must have planned the operation, assembled their group and its equipment for action on the night of 27 June 1985; in the knowledge of where their proposed victims would be on that night. Given Matthew Goniwe's unpredictable movements (especially on the 27th), they almost certainly had to come together at speed on the 27th to do this final planning and organisation.

D15. A detailed knowledge of the roads in the area would have been essential, for the murderers to work at night, with about 4 different widespread points. Lack of knowledge of police movements and especially the existence of roadblocks could also be fatal to such a mission. If the planning was not to be flawed, the murderers would have needed to know if any roadblocks were to be set-up on the night of the 27th. The police keep records and primary control over roadblocks.

Bundle 4, F23.

D15.1. An ability to communicate by radio would have been a distinct advantage and the ability to monitor police radio reports would also be extremely useful (e.g. it would help with checking movements of the police, pinpointing accidents (which could lead to blocked roads or extra controls on traffic, etc.)).

D15.2. Given the transporting of the deceased, the movement between the different sites, the moving of the deceaseds' vehicle, the transporting of the murderers after the murders with their blood stained clothing and weapons, only the most foolhardy would have followed the modus operandi of the murders in this case, without knowledge of police and traffic police movements and/or the authority to overrule or deflect any unforeseen problems with routine patrols of the traffic or S.A. police and the like.

D15.3. The deceased were murdered:

- (a) In respect of Mkonto near Veeplaas/Redhouse, a spot near where concentrations of Black people lived and given the unrest circumstances, where necklace and similar murders could be expected to occur.
- (b) In respect of Mhlauli, Calata & Goniwe: between Bluewater Bay and St Georges Strand. As close as 500 metres from the (then White) beach at Bluewater Bay (Bundle 6, A39 (Lottering)) and far from and separated by major roads and/or the Swartkops river and/or the (White) residential area of Bluewater Bay, from the Black townships of Port Elizabeth.

Bundle 4 F24 & Annexure
Bundle 6, A35.

D15.3.1. The Veeplaas / Redhouse area was a better choice to disguise the murders as unrest related but it had the disadvantage of being nearer concentrations of people (and circumcision groups, see Bundle 6, A11) and an area where discovery was far more likely. With well known figures such as Matthew Goniwe and Calata, the more isolated and deserted area of the bush between Bluewater Bay and St George's Strand was a better choice (the fact that other bodies had at the time recently been found there also indicated that even there, people might expect the bodies of apparent unrest victims).

E WHEN WERE THEY MURDERED VIS A VIS OTHER DEVELOPMENTS IN 1984/5

E1. They were murdered at a time when there was revolution and anarchy in the Eastern Cape.

See above esp. C3.4.

Bundle 1 p 105 (van der Westhuizen)

R p 2034 (12 - 17).

E2. At a time when the Security establishment of the State was extremely hard pressed to maintain order in the Eastern Cape and when great pressure was exerted for the problems in the Eastern Cape to be solved.

See above

R p 2035 (6 - 21), 2164 (30) - 2165 (11)

R p 2640 (22 - 24).

E3. During 1985 there had also been problems between the UDF and AZAPO in the Port Elizabeth area, including attacks and murders. This however did not apply to Cradock and Matthew Goniwe had not personally had problems with AZAPO.

Bundle 6, A9 (Coetzee), A10 (Swarts), A1 (N. Goniwe)

Rp 3211 (27 & 28)

Rp 702 (10 - 13)

G Botha Marais R p 3074 (30) - 3075 (3).

E3.1. Given this background, an AZAPO attack on Matthew Goniwe and his companions in Cradock, was extremely unlikely, but could be possible in Port Elizabeth, especially where AZAPO members would know they could find UDF members (e.g. at the UDF offices).

Bundle 6, A9 & A10.

Bundle 2, p. 36 (par. 4.6 i & ii)

R p 3211 (27 & 28)

E3.1.1. Azapo members were therefore potential suspects or convenient potential scapegoats.

E4. The persons mentioned in the June 7 Signal Message, namely Godolozzi, Hashe and Galela, the PEPCO office bearers ("PEPCO AMPSDRAERS"), went missing in May 1985. They have never been seen since 1985.

Bundle 1, p. 73 (Signal) p. 72 (comment on disappearance of Godolozzi, Hashe & Galela & Signal)

R p 2113 (27) - 2115 (25).

E4.1. PEPCO in Port Elizabeth and CRADORA in Cradock were regarded in a similar light by Major Nieuwoudt, as the groups responsible for alternate (government) structures, intimidation and murder. Tremendous pressure was placed on those favourably disposed to the Government and working with Government institutions (3rd level government).

R p 1584 (1 - 27)

R p 1580 (1 - 21).

E4.1.1. The unrest created a breeding ground for terrorists (and terrorist infiltration), with the Black residential areas made so ungovernable that they became safe harbours for terrorists.

Rp. 1582 (23) - 1583 (3).

E5. The Signal Message of 7 June 1985 was sent 20 days before the murders of Matthew Goniwe, Fort Calata and their companions on the night of 27 June 1985.

Bundle 1, p 73.

E5.1. The Signal was sent at a time when it seemed that the higher Government authorities outside the Eastern Cape were going to dismiss or ignore the strong views and recommendations from the Eastern Cape and compromise with Goniwe.

R p 966 (12 - 14)

Background R p 959 - 966

R p 966 (24) - 967 (1) Col. MacDonald would have had Snyman's signal available on 7/6/95

R p 991 (20 - 27) & also R p 1000 (4) - 1001 (29).

F. WHO MURDERED THE DECEASED OR COULD HAVE DONE SO,
CONSIDERING

(A) MOTIVE

(B) ABILITY, MEANS & OPPORTUNITY

F(A) MOTIVE

F(A)1. Various organisations or groups have been mentioned as possibly having a motive to kill the deceased, the organisations mentioned are:

(a) The ANC or UDF
(see F(A)2. hereunder).

(b) AZAPO
(see F(A)3 hereunder).

(c) The NSMS and the State Structures
(see F(A)4 hereunder).

(d) The E.P. Security Police (The Eastern Province Security Branch of the S.A. Police)
(see F(A)5 hereunder).

(e) C.F. van der Westhuizen and the SADF
(see F(A)6 hereunder).

F(A)2. The ANC or UDF was mentioned as a possibility by Nieuwoudt.

"... dit moontlik sy eie kamerade kan wees wat hom vermoor het,...".

R p 1588 (15 & 16).

F(A)2.1. The motive for such murders that he gives is:

"... want weens die feit dat hy onderhandel het, en dit is nie die UDF se beleid volgens my mening op daardie stadium nie om met die regering te onderhandel, hulle wil juis dan die derde vlak regering nie daar hê nie, en dit is al afleiding wat ek kan maak."

R p 1588 (16 - 20) - My underlining

See also R p 1594 (12) - 1595 (3),

R p 1595 (21) - 1597 (14),

F(A)2.1. He later also gives the possibility of a power struggle in the leadership of the ANC/UDF as a motive for the murders.

R p 1592 (14 - 19).

F(A)3. AZAPO has been mentioned as a group which could have been responsible for the murders.

F(A)3.1. Nieuwoudt gives AZAPO (and the ANC/UDF) as his prime suspects and he mentions AZAPO being involved in conflict with the UDF (ie. his opinion, giving a motive or a basis for AZAPO members to murder the deceased).

F(A)3.2. There was undoubtedly conflict between AZAPO and the UDF in Port Elizabeth during 1985.

Bundle 6, A8 (Fazzie), A9 (Coetzee) & A10 (Swarts)

Bundle 2, p 36, para, 4.6. i & ii.

F(A)3.2.1. The persons in the UDF alliance (according to the 'Spesiale GOS' meeting of 7 June 1985) on the AZAPO list, whose "heads should go" ("koppe waai"), were:

Edgar Ngoyi (UDF), Henry Fazzie (UDF), Mono Badela (UDF & ZWIRU), Africa Magolo (PEPCO & PEYCO) and Mkuzeli Jack (President of PEYCO).

Bundle 2 p 36, para. 4. b.i.

F(A)3.2.2. The AZAPO members under the protection of Rev. Maqina were apparently well monitored by informers.

Bundle 2 p. 36, para. 4.b.i.

F(A)3.3. On 28 June 1985 Major Winter, regarding the disappearance of the deceased, allegedly stated "Azapo het hulle gekry".

Bundle 4, F34 par. 43.

R p 3211 (12 - 26), Koni.

R p 685 (19 & 20), Winter.

F(A)4. The National Security Management System and State organs considered Matthew Goniwe's position in some detail. It is obvious that he was a major concern for the NSMS (especially the security establishment) and the State.

See above, "C".

F(A)4.1. While the persons and structures in the Eastern Cape took a hard-line approach to Matthew Goniwe (and his "geesgenote") and were obviously not enamoured with him, the NSMS and State organs in Pretoria (higher up

in the chain of command) took a more pragmatic and conciliatory stance, favouring some form of re-appointment of Matthew Goniwe as a teacher.

See above, "C".

F(A)4.2. What strikes one is that, despite the differences in approach, the NSMS and State Structures appear to have been involved in a legitimate process, with legitimate (legal) recommendations and actions by the Commissioner for Police, the Geldenhuys Committee, the Department of Education and Training and the Directorate of Security Legislation.

See above "C" and Bundle 1, p 181 - 183 (du Bruyn).

F(A)4.3. The concern of these structures, especially at ground level (ie. in the Eastern Cape) provides a basis for certain of these structures or members of these structures to wish they could permanently rid themselves of Matthew Goniwe (and to a lesser extent his "geesgenote"). This is especially so considering the fact that he had previously been imprisoned (in Transkei - for furthering the aims of communism), he and his 'geesgenote' had been detained, he had been a teacher and was no longer teaching, yet he was more persistent and effective and seemed to grow in strength and stature each time steps were taken against him.

See above and esp. Bundle 4, F 6, Annexures A & B.

F(A)4.3.1. To persons in these State Structures Matthew Goniwe was the kingpin figure and the vortex of the hurricane that was devastating the government structures and peace in the Eastern Cape. Yet unlike the ANC terrorists and Swapo guerrillas, who were fair game (and possibly less effective), Matthew Goniwe was entitled to the full protection of the law.

F(A)4.3.2. This must have been particularly galling to those individuals in the structures who had fought and killed on the borders, yet had to play kid gloves with persons they regarded as equally or more dangerous than "the enemies" they had been allowed to kill.

Generally

Also R p 686 (17 & 18) Winter
du Plessis' Heads p 17 para. 38.

F(A)4.3.3. The ultimate frustration must have been that persons in the Eastern Cape, dealing with the problems posed by Matthew Goniwe, had in effect run out of legal options to effectively and quickly curb Matthew Goniwe and his activities. On top of this retreat was envisaged in Pretoria by persons who did not on a daily basis have to deal with the terrible pressures in the Eastern Cape and could be perceived to be out of touch with the Eastern Cape realities and view Matthew Goniwe through rose coloured spectacles.

F(A)4.4. The frustrations Matthew Goniwe caused in 1985, would thus have provided fertile ground for any conspiracy or plot to kill him, by any disaffected person in the NSMS and State, especially those who had reason to disagree with the direction the official NSMS and State hierarchy were taking.

F(A)4.5. There was also tremendous pressure for the persons on the ground to solve the problems in the Eastern Cape. Particular pressure was brought to bear on Brig. C.F. van der Westhuizen who was then (1984/5) chairman of the OPGBS (Eastern Province Joint Management Centre).

R p 2640 (22 - 31) (vd Westhuizen),

R p 2034 (3) - 2035(21), R p 2055 (1 - 24), 2164(11) - 2165(15) (du Plessis).

F(A)4.6. The NSMS bodies and members therefore tended to include both doves and hawks. In addition the "veiligheidsgemeenskap" in the Eastern Cape and particularly van der Westhuizen (who wore both OPGBS & SADF caps) and the Security Branch of the S.A.P. (who were particularly involved with security in the Eastern Cape) were, it is submitted, under great pressure to solve the "Goniwe problem".

F(A)4.6.1. Given the circumstances of Snyman and the Security Police in the Eastern Cape, and van der Westhuizen and the SADF, it is appropriate to specifically consider them in respect of motive.

F(A)5. The Security Police headquarters in the Eastern Cape were in Port Elizabeth. The Cradock Security Police fell under and reported to Port Elizabeth. Lt. Col. Snyman (as he then was) was Divisional Commander of the Security Police in the Eastern Cape from the

beginning of 1984 till June 1986 (ie. for all of the relevant period). He had also been a member of the Port Elizabeth Security Police since 1967.

R p 967 (15 - 29)

R p 954 (18 - 21)

R p 968 (27 - 31).

F(A)5.1. The relevant lines of authority and official channels of communication for the Security Police, were Cradock to Port Elizabeth, Port Elizabeth (on behalf of the Eastern Cape Division) to Pretoria.

R p 969 (16 - 21)

R p 1021 (12 - 18).

F(A)5.2. Snyman was both the Divisional Commander of the Security Police and their top representative in the OPGBS and also its sub-committees. To a degree his position was similar to that of van der Westhuizen (ie. he wore both Security Police and OPGBS caps). His Security Police line of command covered both the Cradock branch (Winter et al) the B section of the Port Elizabeth Branch (Major Herman B. du Plessis, Lt. G.J. Nieuwoudt (as he then was), Capt. J.M. van Zyl, etc.). These two sections were responsible for monitoring Matthew Goniwe in Cradock and Port Elizabeth.

Bundle 3 p 124 - 126) esp. B section members,

R p 967 (15 - 22), 969 (15 - 20), 970 (7 - 21)

Bundle 4 F 5

F(A)5.2.1. While the Security Police used their own channels between Cradock and Port Elizabeth and Pretoria (i.e. they worked within their "line-function" and chain of command), Commandant G.B. Marais (Botha Marais) of the Cradock Commando as chairman of the Mini GBS reported to Brig. van der Westhuizen (chairman of the OPGBS) along NSMS channels.

See above
Bundle 5 G2, G53.

F(A)5.3. The frustration felt by Lt. Col. Snyman (echoed to a degree by Nieuwoudt, see above) clearly comes through in the annexure to Snyman's affidavit (annexure B).

Bundle 4, F6 Annexure B (esp. para. 7)
Rp 2479 (9 - 28).

F(A)6. C.F. ("Joffel") van der Westhuizen was in 1985 both Commander in the Eastern Cape of the South African Defence Force (stationed at E.P. Command in Port Elizabeth) and chairman of the OPGBS (which operated from E.P. Command in Port Elizabeth) and held the rank of Brigadier at that time. He had approximately 30,000 Defence Force members under his command in the Eastern Cape.

R p 2451 (16 - 28), R p 2452 (15 - 21), (ex Bundle 1 p 105 - 106)
also Bundle 3 p 1 - 4(a).

F(A)6.1. Van der Westhuizen mentions his responsibilities both in his affidavits and evidence (see above F(A)6):

They also included stopping threats of military insurgency in South Africa and as part of his military duty sheet his role in the NSMS could in certain circumstances include pro-active action to prevent a revolutionary climate in his area of responsibility.

R p 2470 (1 - 10)

R p 2471 (19 - 29)

Bundle 5, G50.

F(A)6.2. Van der Westhuizen would have been and was well aware of Matthew Goniwe's actions and the unrest situation in the Cradock and Eastern Cape in 1984/85.

Bundle 1, p 105 (para. 4), p 106 (para. 8) - p 107 (para. 10)

R p 24 (4 - 27): (Bundle 2 p. 7, p. 12 para j & p. 19 (para. 16))

R p 2491 (1 - 18)

R p 2495(1) - 2499

Bundle 5, G53.

F(A)6.3. There was tremendous pressure on van der Westhuizen (and others) to solve the unrest/political problem locally and he had the impression that his job was on the line, if he did not.

R p 2461(22) - 2461(8)

See also F(A)4.5 above, especially du Plessis' evidence that van der Westhuizen could be fired or transferred if he did not solve the problem, at

R p 2164(11) - 2165(15) but also R p 2034(3) - 2035(21 & R p 2055(1 - 24).

F(A)6.3.1. Van der Westhuizen obviously would have had ample reason to wish to get rid of Matthew Goniwe (and to lesser extent his 'geesgenote') in 1985. Obviously sufficient basis for motive exists in his case.

F(B) WHO HAD THE ABILITY, MEANS AND OPPORTUNITY TO MURDER THE DECEASED

F(B)1. The ability to murder the deceased (when it was done) required accurate intelligence (information). It is necessary to consider who had the means, ability and opportunity to obtain this information.

F(B)1.1. Given the facts of the deceaseds' deaths, it is clear that the killers would have to have known where Matthew Goniwe and his companions would be on the night of 27 June 1985.

See above, especially "D"

Bundle 6, p 149 - 159 (of transcribed record).

F(B)2. Derrick Swarts (of the UDF) knew of the deceaseds' time of departure and plans to return to Cradock, we also know that the Security Police had tapped the Goniwe telephone and also had access to this information. In addition we know that the Security Police monitored Matthew Goniwe's movements and activities on a regular basis (this included following him) in Cradock, Port Elizabeth and elsewhere in the country.

F(B)3. While the SADF and van der Westhuizen had the technical ability to tap telephones, much of their information on Matthew Goniwe was obtained via NSMS channels (especially briefings etc. by the Security Police). One also would not have expected the SADF and Security Police to fall over each other in respect of such activities as monitoring activists as this would be totally counter productive and cause stress between van der Westhuizen and Snyman.

R p 2154(24) - 2155(9) but see also R p 2156(18) - 2157(23)

p 2178 (8 - 11).

F(B)3.1. AZAPO could theoretically have had people who saw Matthew Goniwe in Port Elizabeth. They obviously (in 1985) would not have had nearly the same intelligence gathering capabilities as the Security Police or the SADF.

F(B)3.2. If persons (or groups) in the higher echelons of the NSMS were conspiring to kill Matthew Goniwe, they would obviously have had to obtain details of Matthew Goniwe's movements on 27 June 1985 to murder him themselves. To work without the knowledge of the Security Police would have invited apprehension by and conflict with the Security Police. Given Matthew Goniwe's movements it is unlikely they could have launched an operation such as these assassinations on 27 June 1985 without extensive local Eastern Cape assistance.

- F(B)4. The Security Police also had established informers to monitor activities of persons such as Matthew Goniwe (and AZAPO, etc.). The other members of the "veiligheidsgemeenskap" in the NSMS would have obviously known this. Any person in the NSMS, planning the murders in this case, would logically check with the Security Police, before assassinating persons such as Matthew Goniwe and his companions, as one or more of them, could in theory, have been key informers for the Security Police.
- F(B)5. The Security Police (and SADF to lesser extent) would in 1985 have had access to information regarding potential road blocks, police patrols and other possible impediments to murdering the deceased, and disposing of their car in the area used by the murderers. Any other groups planning the murders would have been extremely reckless to operate as the murderers did, without this intelligence (information).
- F(B)5.1. The Security Police (and to a lesser extent the SADF) would have had the added advantage of being able to finesse through unforeseen roadblocks or unforeseen queries such as spot checks by off duty policemen and others (e.g. the traffic police).
- F(B)6. All the potential suspects/organisations had manpower or potential manpower with the ability to kill persons.

See above.

F(B)6.1. The unrest murders and the fued between AZAPO and UDF (and their member organisations) show that parties other than the Security forces had the ability and means to kill persons.

See above.

F(B)6.2. In respect of the Security Forces, both the SADF and the Security Police had manpower with the ability to kill persons.

F(B)6.3. The SADF had been involved in war on the borders of SWA/Namibia and Angola and had given back-up support to the Police in respect of the unrest. The SADF forces are obviously trained to kill and this ability could be used both for conventional and unconventional actions. There were approximately 30,000 personnel under van der Westhuizen. They would have included persons capable of killing others in the manner the deceased were killed in this case.

Above (generally) + Bundle 1 p 105 - 106, Bundle 3 p 1 - 3 (van der Westhuizen)

Bundle 5, G 33, 634, 635 & 636

Bundle 4, F 24 & annexures.

F(B)6.4. The Security Police also had experience of the war situation on the borders and particularly on the SWA/Namibia border. Their ranks in the Eastern Cape included persons who has served with Koevoet in SWA/Namibia: Koevoet was regarded as one of the most effective units fighting against SWAPO guerrillas/insurgents, with a high "kill" rate. The Security Police also had access to and the services of Askaris

(or former terrorists, who had changed alliance) many of whom would have training for and had experience of killing.

Winter: R p 620(22) - 621
 R p 703(6) - 704(2), p 705(25 - 31)
 R p 706(12 - 24) (- each commander could use his own unorthodox methods and this often caught the enemy offside).

R p 707 (6 - 9)
 R p 716 (10 - 15)
 R p 722 (10 - 29), p. 723 (4 - 16).
 R p 1407 (10)

F(B)6.4.1. The Askari, Charles Jack also known as Xolile Sakati, blown-up by the Motherwell bomb (in 1989) was attached to the Port Elizabeth Police in 1985 (as were w/o Mgoduka, Sgt Faku and Const. Mapipa). Jack/Sakati was not on the official staff list.

Bundle 5 617 & Bundle 3 p 124 - 126.

R p 1368 (21 - 26).

F(B)7. The points above indicate that van der Westhuizen and the SADF and Snyman and members of his Security Police had the best ability and means to carry out the murders in this case. While UDF and Security Police would have known that the opportunity existed to have Matthew Goniwe in Port Elizabeth.

G. THE SIGNAL OF 7 JUNE 1985

- G1. How the Signal impacts on the points above is of key importance, because although the documents produced and evidence led since this inquest was re-opened are highly relevant (as indicated above), the Signal is the one document which can be interpreted as a recommendation that Matthew Goniwe, Mbolelo (Mbulelo) Goniwe and Fort Calata be murdered.

du Plessis R p 2018 (10 - 12) 2063 (30) to 2064 (2)

Bundle 4, F4 para. 5 & para. 9.

van Rensburg R p 54 (12), p 60 (14 - 22).

Vermaak R p 445 (13, 14), (23)

Stemmet R p 341 (20, 21) 342 (1-2)

Families' Heads p 38 - 108 but especially p 118 para. 82.

- G1.1. The question of the Signal, its formulation, its import, and security classification are dealt with in detail in the families' Heads. Many of their points are not in dispute and I will not repeat them.

Families' Heads p 38 - 108 and p118 para. 82.

- G2. Taking an overview of the Signal one has an extremely unusual set of circumstances which I will set out hereunder.
- G3. The Signal was drafted and signed by du Plessis, nobody other than him and the Signaller ever admit seeing it in the Eastern Cape.

- G3.1. Du Plessis was also party to meetings with Sisulu (of the "New Nation" newspaper which first published the Signal) and others in unusual circumstances and had a close friendship with Holomisa, who supplied a copy of the Signal to the "New Nation".

R p 2273 - 2274

Bundle 1 p 69

SADF Heads p 61 para. 51, p 63 para. 53.

- G3.2. No other copies of the Signal have been found, in either the Eastern Cape or Pretoria.

Bundle 1 p 80 and p 39

Bundle 1 p 60 and p 63

Bundle 1 p 206 par. 7 and p 212.

- G3.3. Du Plessis confirmed the authenticity of the Signal to both Sisulu and to the legal representatives of the SADF.

Du Plessis R p 2019 (18 - 25), p 2274 (10 e.v.)

Bundle 1 p 102 - 104, Bundle 4, F4.

- G3.4. Du Plessis has made two affidavits, the first giving a innocent interpretation of the Signal, the second explaining why he gave the first affidavit and explaining that the Signal was in fact a recommendation that Matthew Goniwe and Mbulelo Goniwe and Calata be killed.

Bundle 1 p 102 - 104 & Bundle 4, F4.

- G3.4.1. The SADF Heads mention various weaknesses in du Plessis' evidence.

See esp. SADF Heads and response in du Plessis' (and Families') Heads.

G3.5. Normally with a background of this nature and with the concessions extracted by the representatives of the S.A.D.F. one would, despite the refreshing honesty that du Plessis often displayed when giving evidence (especially on the circumstances during 1984/5/6), have to consider his evidence with caution and only accept it if it was corroborated or not disputed or supported by the probabilities and logic. Much of his evidence is thus supported and weight can, it is submitted, be attached to such evidence.

G3.5.1. It may be mentioned in passing that the majority of witnesses in this inquest did not impress as being absolutely frank, truthful and open with the Court.

G4. The evidence of the very persons who could theoretically explain the innocent meaning of the Signal, tends if anything to negate the innocent interpretation of the Signal.

G5. The events surrounding the date of the Signal were:

- (i) 23/5/85: OPGBS Meeting and recommendation that Matthew Goniwe and Calata must never ever be re-appointed (as teachers). Van der Westhuizen, du Plessis, Snyman and Vermeulen present.

Bundle 2 p 7 et seq.

- (ii) 23/5/85: A signal message to the SSVR (only 'Vertroulik') "persoonlik" from van der Westhuizen, which is sent by Vermeulen with du Plessis' name given for inquiries. Van Rensburg receives it and "O & O" are informed of its contents. This signal pertinently states the OPGBS unanimously decided to recommend that

Goniwe and Calata under no circumstances ever be appointed to a post in the DET again.

Bundle 1 p 65 (Signal typed and notes written thereon, p 68 (Fourie), p 53 & 54 (handwritten signal).

(iii) 6/6/85: A 'GOS Aksiekomitee' meeting chaired by Vlok in Pretoria refering a decision on Goniwe's re-appointment to a committee under the direction of the SSVR.

(iv) 7/6/85: The Geldenhuys committee sits to discuss and draw-up a report for Vlok on the possible re-appointment of Matthew Goniwe to a post in the D.E.T.

R p 503 (16 - 17).

(v) 7/6/85: The Signal is sent, marked "uiters geheim" and for the personal attention of van Rensburg. It has no reference to the appointment of Goniwe to a D.E.T. post whatsoever. It has no mention of an OPGBS meeting, it is not a confirmation of the 23/5/85 signal and makes no reference thereto.

Bundle 1 p 73 Geldenhuys R p 519 (18 - 21)

(vi) 27/6/85: Matthew Goniwe, Fort Calata and their two companions are murdered.

G6. The fact that the Signal was sent and received is confirmed by the Signaller and van Rensburg. It and its contents then could always have been drawn to van der Westhuizen's attention or he could have demanded to see the Signal's exact wording. Du Plessis could not therefore have afforded to have a signal which conflicted with what he was

told to confirm (even if he kept control of the OPGBS file copy). Van Rensburg would also have seen if a nonsensical signal was received which had no relationship to the telephone conversation. It is clear that the wording of the signal is correct (Signaller's confirmation) and that it was close enough to the telephone conversation for van Rensburg not to query van der Westhuizen, even if he did not like the word choice. One can therefore accept that paragraphs 1,2 and 3 conveyed to van Rensburg the essence of the telephone conversation which it is meant to confirm.

Bundle 1 p 74 - 75

R p 30 (10 - 12)

- G7. Mbulelo Goniwe (also referred to as Mbolelo) was never mentioned for consideration for appointment to the DET, the Geldenhuys Committee were not entrusted with the task of making recommendations in respect of him. Why his name should be included in a top secret signal to evaluate the re-appointment of Matthew Goniwe, is extremely strange and cannot be adequately explained by the Geldenhuys Committee's passing reference to 'optrede teen Goniwe Meelopers'.

Bundle 2, p. 77 para. 40.

Contra: SADF Heads

Families' Heads

- G8. There was a Security Police representative on the Geldenhuys Committee who would have been aware of the detention option. Van Rensburg would undoubtedly have known this and that such a member would know of his E.P. Divisional Commander's views (i.e. Snyman's attitude). Why would van Rensburg need a superfluous recommendation for detention, by signal, if the party that primarily dealt with such matters was present?

- G8.1. He had no expectation that the Signal would arrive on the 7th, yet tries to say he needed the Signal in case the line function canal (Security Police) overlooked it.

R p 208 (4 - 11)

also see Families' Heads and SADF Heads.

- G8.2. The clear 'line function' for detentions lay with the Security Police. There is no good reason why van der Westhuizen would trespass so blatantly into their area of jurisdiction (and be allowed to do so by van Rensburg who would have known of McDonald's presence). Furthermore there is no evidence that van der Westhuizen contacted anyone about his proposal, not even Snyman who was with him on the 7th. There was also no indication that the Signal's proposal was ever that of a committee of the OPGBS. The Signal therefore appears to contain the personal recommendation of van der Westhuizen.

Swart, Bundle 1 p 87 - 89

Snyman, Bundle 1 p 96 - 98, p 205 (12 - 20)

van der Westhuizen R p 2481 (2 - 3)

du Plessis R p 2147 (13 - 18).

- G8.2.1. The Signal stands in solitary isolation yet the signal of 23/5/85 has its origin in the OPGBS minutes, it was on file in OPGBS files and it was on file in the SSVR (Pretoria) with its relevant ^{notes} ~~data~~ thereon.

Bundle 1 p 32, p 50 - 54, p 63 - 68.

- G9. Van der Westhuizen had a reputation for exactness. The idea of him sending a poorly worded obscure communication, when the signal needed to clearly convey its message, to not only van Rensburg, but others, was extremely strange (unless the Signal had to use veiled language to convey something other than mere detention).

Van Rensburg R p 205 (26 - 31).

G9.1. Du Plessis was a trusted and reliable officer holding key posts, who even after the death of Goniwe and his companions, was entrusted with key, sensitive operations and information. He was not a person one would expect to use insensitive, obscure language in his communications, unless veiled terms were needed.

van der Westhuizen R p 2979 (9 - 19); 2980 (11 - 17)
 du Plessis R p 1940(1) - 1941(3)
 du Plessis' and Families' Heads

G9.2. When du Plessis sent the Signal on 7 June 1985 and if he and van der Westhuizen (and van Rensburg) only intended it to be a recommendation that Calata, Matthew and Mbulelo Goniwe he detained, none of them could have known that Matthew Goniwe and Fort Calata would be murdered on 27 June 1985 or even that such a possibility existed. Neither Du Plessis nor van der Westhuizen could, it is submitted, at that time have had any hidden motive in using obscure emotive language to convey and support their proposal for detention. On the innocent explanation of the Signal (SADF Heads) one would have expected clear easily understood language that could be conveyed to a diverse group and be understood by them.

G9.2.1. The signal of 23 May 1985, drafted by du Plessis' junior, shows how one would have expected the Signal to be drafted (i.e. in clear unequivocal terms).

Bundle 1 p. 53 & 54.

G9.2.3. Paragraph 4 of the Signal was supposed to relate to a proposal for detention. Instead we have in 4.A. a warning that interdicts such as in the Godolozzi, Hashe & Galela disappearances could be expected.

Van Rensburg R p 37 (21 - 24).

G9.2.3.1. The interdicts in that matter were habeas corpus interdicts and the three PEPCO officials mentioned, have disappeared permanently from society.

G9.2.3.2. It is strange that a Commandant, Du Plessis, would mention the interdicts, which related to a case involving the complete disappearance of individuals, in a signal recommending legal detention, all the time knowing General van Rensburg and Brigadier van der Westhuizen, would and could (respectively) see the Signal and could severely criticise him for implying that the "permanent removal from society" meant that Goniwe Calata, Matthew and Mbulelo Goniwe would disappear completely like the PEPCO 3. In doing so du Plessis was either highly negligent or paragraph 4.A. of the Signal in fact was warning of the possible results of causing the Goniwes and Calata (the UDF 3) to disappear permanently (i.e. not into detention) and that this was what the Signal was intended to convey.

Bundle 1 p 73 (Signal)

G10. The Signal was sent on 7 June 1985 and van der Westhuizen was in Pretoria, at the SSSC (SSVR) for some days after 9 & 10 June 1985 (at least on 12 June 1985). It is surprising that van Rensburg did not raise the Signal at all with him and that they did not on their evidence,

discuss the proposal (even if van Rensburg did not have the Signal yet, which is unlikely).

van der Westhuizen R p 2829 (4 - 10)

Bundle 2, p. 39 para. 14

van Rensburg R p 205 (26 - 31)

G10.1. There was presumably time for both van der Westhuizen, van Rensburg and others to discuss the Signal's recommendation, while van der Westhuizen was in Pretoria and to plan how best to put it into operation.

G11. The Signal was sent to General van Rensburg, the head of the Strategy division of the SSSC (SSVR) who was in a key position, and liaised or saw on a regular basis persons in various government departments, but especially the security establishment. He met Brig. Willem Schoon on occasion.

Van Rensburg R p 22 (4 - 10) p 22 (26 - 29) & p 49 (10 - 17).

Stemment R p 379 (22 - 30)

G12. While various meanings can be ascribed to the words in the signal, these do not really assist this inquiry, because the circumstances make an innocent interpretation extremely unlikely. The logical interpretation, on all the facts, is that the signal cannot fit in with the current suggested innocent interpretation.

See also SADF Heads vs Families' & du Plessis' Heads

On probabilities see S v Singh, 1975(1) SA 227 N 228 G

S v Guess, 1976(4) SA 715 A 718 H

S v Texeira, 1980(3) SA 755 A 761 A

G13. If, on all the evidence, it cannot be found that a nexus exists between the signal and the eventual deaths of the deceased, it is submitted that this Court is not called upon to make a finding on the question whether any individual person may prima facie, have committed an incitement or conspiracy to commit murder.

See Section 16(2)(d) of Act 58 of 1959.

H. EVALUATION

H1. In final analysis we have a situation where various persons and organisations had the basis for a motive to murder Matthew Goniwe and his companions.

H2. The suggestion by Nieuwoudt that the ANC/UDF or their leaders/members committed the murders does not have merit and the reasons he suggested, namely that Matthew Goniwe negotiated or a leadership struggle, ignore the fact that Goniwe was a highly effective member of the UDF and had spread its influence especially in the rural platteland. He was obviously liked and well considered by the "linkse politici" (to use the language of the Signal). This suggestion is not one of the options considered by either van der Westhuizen (now Head of Military Intelligence) or Winter (former Cradock Security Police commander).

R p 92 (14 - 27); 93 (1 - 7); 99 (18 - 30).

H3. The suggestion that AZAPO had reason to kill Matthew Goniwe and his companions, is based on the feud between AZAPO and the UDF in Port Elizabeth. AZAPO in addition had the ability to kill UDF members in Port Elizabeth at the time (although its human and material resources were fairly limited compared with the SADF and Security Police).

H3.1. The AZAPO list of persons whose heads should roll ("koppe waai") as reported at the "Spesiale GOS (Port Elizabeth)" meeting of 7/6/85 (attended by both van der Westhuizen & Snyman) did not include Matthew Goniwe or his companions. He therefore does not seem to have been one of the specific targets of AZAPO in Port Elizabeth and it seems unlikely, even if they could, that AZAPO would have staged the

elaborate murders of Matthew Goniwe and his companions.

Bundle 2, p. 35 - 37 (esp. para. 4.6.)

- H3.2. AZAPO and Rev. Magina were obviously well monitored by the "Veiligheidsgemeenskap". Snyman confirms that Magina was the "protector" ("beskermheer") of AZAPO in Port Elizabeth (in 1985) and the AZAPO members stayed with him at that time.

Snyman R p 1173 (22- 29).

- H3.2.1. The monitoring of Magina and the AZAPO members would therefore not have been difficult.

- H3.3. Whether Magina and the AZAPO members needed monitoring by the Security Police (or the SADF) was another matter as Magina worked both for the Security Police, with Major Herman du Plessis as his handler, and thereafter became more involved with Eduguide CC. Magina later founded 'Ama Africa', which the State funded (this was after he was thrown-out of AZAPO).

Du Plessis R p 2146 (4 - 31).

- H3.4. While Nieuwoudt suggested that not every action of AZAPO could be monitored and that they had vehicles, etc, the mounting of a co-ordinated operation such as the Goniwe murders, on their own, without being foiled or apprehended or ever found-out, would, it is submitted, have been beyond their capabilities.

- H4. Both van der Westhuizen and Snyman and the persons working under them had the capability to mount an operation such as the Goniwe murders in extreme secrecy and silence.

H5. The Signal, together with Snyman's telegram (or signal) and the evidence and copies of documents show a high degree of polarisation and a war mentality in the country during the 80's, with persons such as Goniwe regarded as the enemy. The unrest and anarchy justified and provide a very clear basis for a motive to kill Goniwe and his 'militant lieutenants, especially by those in the front ranks in the Eastern Cape. As stated above, the "dovish" moves by "O & O" to accommodate Matthew Goniwe must have been well nigh the last straw for those who had to deal with the unrest and spreading chaos that Matthew Goniwe was perceived to cause in the Eastern Cape.

H6. Koni gave valuable insights into the workings of the Cradock Security Police. The transcript of the call between Matthew Goniwe and Derrick Swarts supports Koni that the call was early in the morning (see Goniwe's reference to the time as 5:30 - Bundle 5, 99 p 239, first entry dated 27/6/85). Koni was however not an insider in respect of much of what happened. There may be a doubt as to when Winter made the remark "AZAPO het dit gedoen", since it appears from the affidavit of Basson (A13) that Goniwe's vehicle was only discovered at about 16h00, and that Koni could only have known about it after then, by which time, on his own evidence, he was not at the office any more.

H6.1. What can however not be denied, is Koni's statement in evidence that Winter left the office on the morning of the 27th and did not return on that day. It is significant that this part of his evidence is not specifically denied in their heads by the representatives of the SAP. Although they submit that Koni's evidence relating to leaving Cradock is unreliable, Koni while confirming they left the

office, conceded that he could not say whether Winter and the others had in fact left Cradock. It is however never specifically denied that Winter had in fact left the office for a whole day, without indicating where he had gone or for what reason (and that this occurred on the day of Goniwe's death).

Contra: SAP Heads p 16.

H6.2. While Koni did make some mistakes in his evidence it is submitted that the criticisms are not of such a nature that his evidence can be rejected. His demeanour was generally good.

H7. The Signal and du Plessis' evidence give tantalizing details of how the system worked and how people felt in the system. Du Plessis was open about "the system in the 80's" and about secret operations (Katzen et al). His knowledge of the circumstances surrounding the Signal and especially Goniwe's murder is however frustratingly limited; it is strange that he was entrusted with sending the Signal and even choosing the names of Goniwe's militant lieutenants to be mentioned in the Signal, yet has no further knowledge of the matter.

H7.1. The Signal could and can be interpreted as a recommendation that Matthew Goniwe, Fort Calata and Mbulelo Goniwe be murdered.

See Above

also Families' Heads p 118 para. 82.

H7.2. The Signal was sent at the time when the unrest was assuming the proportions of a revolutionary onslaught (and warfare) and when war was being fought on the borders, when the distinction between enemies (on the

borders) and members of organisations such as the UDF, were fast blurring and both were perceived as the enemy.

H7.3. Given the existence of over zealous securocrats and people under tremendous pressure to deal with the problems of the unrest; coupled with people who were used to exercising their own discretion at ground level (e.g. the Koevoet units were allowed a wide discretion in SWA/Namibia, as mentioned by Winter) or persons told to solve the unrest problem themselves (such happened to van der Westhuizen); one had the potential for persons to easily misinterpret the Signal's message or to interpret any 'nod and wink' after its dispatch, as approval for action.

H7.3.1. One can but think of the much rued words of Henry II of England (in respect of Becket):

"Who will free me of this turbulent priest?".

H7.4. The Signal as far as its progress in Pretoria is concerned dies with van Rensburg (although Stemmet and Verster may have seen it) and only van Rensburg knows whether it had any further role in this matter. His evidence about what happened with the Signal is far from satisfactory, his evidence and affidavits as to when it was received are also contradictory (see SADF Heads). Unfortunately there is no evidence at this stage that the Signal is directly linked to the murders.

H7.5. The Signal nevertheless gives a clear idea how strongly van der Westhuizen felt about Matthew Goniwe.

H8. The Families' Heads give specific names of individuals and submit the persons are guilty of murder:

Families' Heads p 132 para. 116.

H8.1. The names given are as follows:

van Rensburg
van der Westhuizen
du Plessis
Winter
Snyman

H8.1.1. The families also submit that other members of the SAP and SADF whose identities are unknown are also guilty of murder.

Families' Heads p. 132 para. 116.

H8.2. A thumb-nail sketch of each person suggested in the Families Heads, is as follows:

van Rensburg - Key position in SSSC, contact with various departments, head of Strategy, insight into direction government taking with Goniwe (esp. "O & O"), knowledge of composition and direction of Geldenhuys Committee. Signal confirms his discussion with van der Westhuizen. He and van der Westhuizen in Pretoria the next week.

van der Westhuizen - (see above also) chairman of OPGBS and commander of the SADF in the Eastern Cape (pressure on him to solve unrest), innovative person who is prepared to try new solutions (du Plessis & his own evidence), close co-operation with others in OPGBS

including Snyman. Sufficient capabilities and basis for motive. And veiled language on occasion (e.g. Katzen), originator of Signal.

du Plessis - he held key posts in the OPGBS (and E.P. Command) he was trusted with highly secret operations (e.g. Katzen), he was entrusted on his own evidence to add Fort Calata and Mbulelo Goniwe in the Signal. He also had close contact with other members of the OPGBS. He drafted and sent the Signal.

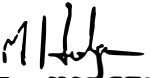
Winter - Commander of the Security Police at Cradock (& esp. in May and June '85), member of Koevoet for a number of years (as P.E. men Sakkie van Zyl and Sakkie du Plessis), had little time for Mini GBS, was his own man (kept his opinions to himself), he and his branch monitored Goniwe, had direct access to information of Goniwe's proposed movements on 27/6/85. Left office on 27th not returning. On 28th and thereafter his reactions highly suspicious.

Snyman - (also see above) As with van der Westhuizen, a key member of OPGBS and Head of the Security Police in the Eastern Cape. His division monitored Goniwe and other activists. He has men such as van Zyl, Winter and Askaris under his command: Herman du Plessis his B-section commander would have known this, especially as his brother Sakkie du Plessis had been with Koevoet. As with van der Westhuizen sufficient capabilities and intelligence (info.) plus a basis for motive.

H8.3. The facts, it is submitted, point overwhelmingly to the participation of elements in the Security forces in the murder of Matthew Goniwe, Calata, Mkonto and Mhlauli.

H8.3.1. In respect of the persons mentioned in 8.1. and 8.2. above, there is a high degree of probability on the evidence that either van der Westhuizen or Snyman or both of them and/or the others mentioned with them (van Rensburg, Winter, etc.) were responsible for the deaths of Goniwe and his companions. Furthermore there is a high degree of probability that other as yet unidentified members of the Security Forces (especially the SADF and Security Police) were involved in the murders. Our frustrating conclusion unfortunately is that we cannot submit with authority exactly which combination of the named individuals are guilty of murder.

r



M.J.C. HODGEN SC

IN THE SUPREME COURT OF SOUTH AFRICA
(SOUTH EAST CAPE LOCAL DIVISION)

CASE NO: CC7/93

Deceased:

MATTHEW GONIWE

SPARROW MKONTO

FORT CALATA

SICELO MHLAULI

HEADS OF ARGUMENT IN REPLY BY
THE SOUTH AFRICAN DEFENCE FORCE

INTRODUCTION

In these Heads, we have adopted the following scheme:

1. In Section A we deal with the arguments raised by Counsel for the Families on the topics of the Katzen documents, the evidence of Van Der Westhuizen and the evidence of Du Plessis.
2. In Section B we deal with the various other topics raised by Counsel for the Families.
3. In Section C we deal with topics raised by Counsel for Du Plessis.

SECTION A

KATZEN:

4. The frequent and heavy reliance on the Katzen documents, and particularly on words like "uithaai", demonstrates the extent to which Counsel for the families and for Du Plessis are driven to finding material to connect Van Der Westhuizen with the Goniwe murders.
5. The fact and the contents of the Katzen documents concern transactions (in the *res gestae* sense) which have nothing to do with the Goniwe murders. The test of relevancy is and remains unsatisfied.
6. Not even the "similar fact" rule can be called in aid to assist in the admissibility of the Katzen documents:
 - 6.1 Upon a proper approach to the problem, the Katzen documents are neither receivable in evidence nor capable of being accorded any weight.

"SIMILAR FACTS"

1. Introduction

The topic of similar-fact evidence involves a consideration of three of the matters that have already been discussed: (a) the requirement that evidence, if it is to be received, must be logically relevant and of sufficient probative force to warrant its reception despite any practical disadvantages that might be caused by admitting it; and (b) the rules of the English law, applicable to character evidence, that have been (c) applied to South Africa by statute. Similar-fact evidence, it will be seen *is only exceptionally* admissible. It will be received *exceptionally*, only if it is, *first*, sufficiently relevant to warrant its reception and, *secondly*, if it has a relevance other than one based solely upon character."

Hoffmann and Zeffertt: The South African Law of Evidence (4th Ed.), p. 52

6.2 Three considerations demonstrate not only the lack of any exceptional circumstance, but reasons why the Katzen documents cannot contribute to a finding in this case. These are:

6.2.1 The fact that there is no relationship between the one set of events and the other:

6.2.2 This part of the enquiry is concerned with the interpretation of the signal. How can the interpretation of the signal written on the 7th June

1985 be affected by the use of the words a year later in a different place and in a different context?

6.2.3 How can the use of the words "permanent ... verwyder" used by Du Plessis in the circumstances of the signal be affected by the use of the words "uithaal ..." and others by different authors in a different context?

7. Not only are there no factors present which would warrant "exceptionality", but those factors that can be found militate against the use of the Katzen documents and negate any probative value of those documents.
8. Similarly, the BSB document was written two years later by a person who had nothing to do with the Goniwe affairs. Similarly, Van Der Westhuizen, neither in 1985 or 1987, had anything to do with the BSB. Moreover, the BSB was a very different organisation with very different aims to the OP GBS, the SVVR or the Eastern Province Command of Van Der Westhuizen.

9. Whether one proceeds by way of pure legal principle or plain common sense, the result is very much the same: the events which were acted out by entirely different actors in entirely unrelated matters a year later do not assist in revealing the identity of the Goniwe killers.

CRITICISM OF VAN DER WESTHUIZEN'S EVIDENCE:

10. In their Heads. counsel for the families introduce their argument on this topic with the use of words like "untenable", "ludicrous" and "absurd" in describing aspects of Van Der Westhuizen's evidence. Epithets and brickbats can never improve the quality of what purports to be a reasoned argument, nor supplement the lack of sound reasoning in it.
11. In paragraph 47.1 Van Der Westhuizen's lack of detailed memory on the topic is seen, without reasoning, as evasiveness and a ploy of convenience. No attempt is made to get this result by reference to the facts or reasoning.
12. What counsel overlook, and what cannot be overlooked, are the following: At the time when Van Der Westhuizen made his affidavit, seven years had elapsed since the signal had been sent, and by the time he testified, eight years had elapsed. Secondly, at the time of Van Der

Westhuizen's testimony, the signal and all the facts surrounding it had become of cardinal importance. There is every indication that at the time he gave the instructions for it to be sent, he regarded the matter as being of lesser importance:

12.1 On the available evidence, his contribution to the matter was the discussion with Van Rensburg on the telephone and then instructions to Du Plessis.

12.2 His attitude that the matter was one of minor importance is reflected in at least two incidents:

12.2.1 when Goniwe is killed and that fact made public, the matter is not discussed with Du Plessis. This is indicative of the fact that the signal was not related to the killings. If the signal was not related to the killings, it is a matter of minor importance:

12.2.2 later, when he is told of the first publication in the New Nation, the matter is treated by him with considerable indifference; and he goes off

to Sun City. If the matter was to be associated with Goniwe's death and his complicity in that death, his actions would have been very different indeed. Again, it is indicative of an attitude of minor importance and consistent with his inability to recall the event of seven years previously.

Van Der Westhuizen's inability to deal with concepts on the spur of the moment can hardly be held against him. We illustrate this statement by the use of an example with which we are all familiar: the Law Reports abound with instances where Judges have erred in the handling of concepts. These are people with a lifetime in dealing with concepts: moreover, they have had the benefit of addresses by counsel and the opportunity of days and months to consider the question in hand. In this case the witness was asked to deal with a concept on the spur of the moment. To suggest that because he is a general he should also be an expert in conceptual thinking, is a basic error indicative of a confusion between conceptual thinking and his ability to deal with matters which are a function of his experience and training as a military man.

14.

"Van Der Westhuizen, at the time that he made his affidavit, did not know where Du Plessis stood or whether he would testify, and deliberately decided that partial amnesia would best serve his purpose and would leave his options open. It is not evidence of his honesty

as Counsel for the SADF would have it. Much of his conduct is consistent with the hope that the conspiracy of silence would continue".

Counsel for the Families' Heads, par. 47.4

There is not a shred of evidence to support the facts alleged in this sentence. Or are they facts? Are they not submissions which are being presented as facts? Either way, there is no factual substratum to support the statements.

This method of dealing with the case is not limited to that instance, but one finds it appearing again and again in the Heads of Counsel for the families.

15. The whole import of the criticism of Van Der Westhuizen as a witness is that he is a bad witness and therefore he was implicated in the murder of Goniwe.

16. The fallacy in this is fundamental as the case law shows.

R v. Ndhlovu, 1945 AD 369 at 386 and 387

S v. Mtsweni, 1985 (1) SA 590 (A) at 593I to 594G

S v. Yelani, 1989 (2) SA 43 (A) at 50D to E

DU PLESSIS'S EVIDENCE:

17. "You can never make a silk purse out of sow's ear".
- 17.1 Counsel for families have at their election chosen to make use of Du Plessis's evidence as if it were credible on occasions, and then on the other occasions rejected it with a strong indication that it is untruthful.
- 17.2 This "curate's egg" or selective approach to Du Plessis' evidence cannot work. We again refer to the "hardcore facts and their probabilities", which are discussed at some length in our Heads from paragraph 44 to paragraph 60, and our demonstration that Du Plessis's version cannot be accepted. Furthermore, we refer to the criticism of Du Plessis' credibility (at paragraph 61 *et seq*). These arguments demonstrate how totally unreliable Du Plessis's evidence is.
18. Inherent in the argument appearing at paragraph 46.1 of the Heads of Counsel for the families, is the notion that the "direct evidence" of Du Plessis must be accepted as is with complete disregard of the criticism and other reasons for its rejection referred to above. Furthermore, the

argument is put forward that this is not a proper case for reasoning by inference and in the very next sentence reference is had to "overwhelming probabilities", one of the key instruments in reasoning by inference. And this conceptual confusion is then followed by a quantum leap: " ... particularly as the Katzen document showed that Du Plessis and Van Der Westhuizen were both involved in plans to murder".

19. The attempts by Counsel for the families in paragraph 46.3 and the paragraphs following to excuse Du Plessis's perjury, fail. However one looks at the situation. Du Plessis committed perjury and his proffered reasons for making the second affidavit in no way detracts from the fact that one way or the other he had consciously told a lie under oath.
20. Thereafter, in the sub-paragraphs that follow, the Heads selectively pick out the answers given by Du Plessis at various times which favour his case and that of the families. The exercise is a very interesting one. Du Plessis's evidence, however, must be seen in its context, and as a whole.
21. In paragraph 46.19 Du Plessis's 50% answer is dealt with. It is said that it is not in line with the rest of Du Plessis's evidence and the evidence of other persons (not named) "lend a lie" to the 50% chance of a mis-

understanding. All this leaves out of account that Du Plessis's answer was a considered one after the detailed warning by the Court to consider his answer and Du Plessis having taken full advantage of that opportunity. Whatever Counsel may now have to say about the answer, it certainly was never retracted or attenuated in any way by Du Plessis himself.

22. All in all, and for many reasons mentioned in our Heads and to be found in the record, Du Plessis's evidence is so bad that it cannot form the basis of any adverse finding.

SECTION B

23. AD PARAGRAPH 6:

23.1 The statement made in the abovementioned paragraph is incorrect. It is not supported by the decisions referred to in paragraphs 4 and 5 of the heads of argument by the families, nor by the wording of the Inquest Act, 1959 (Act 58 of 1959) ("The Act").

23.2 The said statement would have been correct had it been phrased as follows:

"It is clear from what is set out above that the overall purpose of the Inquest Act No 58 of 1959 ('the Act') is that there should be an inquiry into each unnatural death in respect of which there is a decision not to prosecute".

24. AD PARAGRAPHS 7 TO 20:

24.1 As we will indicate hereunder, neither the fact that an Attorney-General prosecutes whenever, in his opinion, there is *prima facie* evidence that a person has committed an

offence, nor the fact that the Attorney-General's decision whether to prosecute or not was left unaltered when the term *prima facie* was inserted in Section 16(2)(d) of the Act, is incompatible with the view that the finding by a presiding officer in an inquest should be beyond reasonable doubt.

24.2 If the primary reason why an inquest has to be held was merely to notify those near and dear to the deceased and the public at large that the Attorney-General's decision not to institute a prosecution was justified because there was no *prima facie* case, then the same result would have been achieved:

24.2.1 If all the statements and other evidence which the South African Police ("SAP") were able to obtain were simply made available for inspection to all interested parties and their legal representatives at their request. Should an interested party after perusing such evidence, disagree with the Attorney-General's decision, he would be free to request the Attorney-General to issue a *nolle prosequi* certificate. (See Section 7(2)(b) of the

Criminal Procedure Act, 1977 (Act No. 51 of 1977). Such a request would compel the Attorney-General to carefully reconsider his decision not to prosecute. The interested party will therefore then already have the assurance that the matter is being considered at the highest possible level. If a *nolle prosequi* certificate is indeed issued by the Attorney-General, and if such an interested party is still dissatisfied with the decision, he would in terms of Section 7 of the Criminal Procedure Act, 1977, be entitled to institute a private prosecution:

24.2.2 by granting persons with a real interest in the matter the right to take the Attorney-General's decision on review by means of an inexpensive or *gratis* procedure:

24.2.3 if all inquests were of the informal kind where no *viva voce* evidence is produced.

24.3 The purposes of holding an inquest are those referred to in the extracts from the cases of Marais and De'Ath quoted in paragraphs 4 and 5 of the heads by the families, as well as the following:

24.3.1 "For the administration of justice to be complete and to instil confidence, it is necessary that, amongst other things, there should be an official investigation in every case where a person has died of unnatural causes, and the result of such investigation should be made known."

Timol & Ano. v. Magistrate, Johannesburg, 1972
(2) SA 281 (T) at 287 H - 288A

24.3.2 "The prosecutor, we think, is also present so that he can assist in bringing out the truth. Otherwise it is possible that the magistrate may hold an inquest without anybody present to examine or cross-examine the witnesses."

(Our underlining)

Timol (*supra*) p. 291D

24.3.3 "This is the purpose of the Act, to provide an alternative inquiry where that official investigation does not flow from prosecution".

De'ath (substituted by Tilev) v. Additional Magistrate, Cape Town, 1988 (4) SA 769 (CPD) at 776H.

24.3.4 In South Africa many deaths occur yearly in our mines, and of course also in our industries. Furthermore, major transport disasters, such as SAA's Helderberg accident near Mauritius during 1987 do occur from time to time. In regard to such incidents, the finding which has to be made in terms of Section 16(2)(b) of the Act will also serve to assist the particular industry as well as the Government to take the necessary steps to prevent similar occurrences. We submit that this obvious benefit is also a reason why an inquest has to be held. In Scotland a sheriff holding an inquest must, *inter alia*:

"... in his determination set out any reasonable precautions whereby the death or the causative accident might have been avoided. He must also specify any defects in a system of working which contributed to the death or associated accident."

(The Laws of Scotland) (Stair Memorial Encyclopedia), Vol. 17, p. 411 par. 971)

This is the purpose of an inquest which Smallberger JA had in mind in Marais NO vs. Tilev 1990 (2) SA 899 (A) at 901 E-H where he stated ".... so that, where necessary, appropriate

measures can be taken to prevent similar occurrences, ...".

24.4 The statement in paragraph 15 of the heads by the families regarding the primary reason why an inquest has to be held is also incorrect. That statement loses sight of the fact that in a great number of instances of unnatural deaths, all concerned, including those near and dear to the deceased, are satisfied that the Attorney-General's decision not to institute a prosecution was correctly taken. That means that if the view expressed in paragraph 15 was correct, many inquests are being held unnecessarily. Under the present system, a large number of inquests have to be held, and many man-hours are spent thereon, clearly at great expense for the State. If the primary reason for holding inquests was as is maintained by the families, one would have expected the Legislature to avoid the cost and energy spent on those instances of unnatural deaths where all concerned agree with the Attorney-General's decision not to prosecute.

24.5 The view expressed in paragraph 15 furthermore implies that, except for the fact that the public has access to a formal inquest enquiry, an inquest is merely a costly repetition of work already done by the Attorney-General. If an inquest were meant to be a kind of "re-do" of the Attorney-General's work, one would have expected an Inquest Court's decision

that there is *prima facie* evidence that a particular person has committed an offence, to be binding on the Attorney-General, and that he would in such a case be obliged to prosecute the said person. Such a situation would not be unique since it existed in England and Wales until 1977.

The law there used to be as follows:

"Where a coroner's inquisition charges a person with murder, manslaughter or infanticide the coroner must issue his warrant for arresting or detaining that person, if such a warrant has not previously been issued. Where a person is charged with murder, manslaughter or infanticide the coroner must specify in his warrant of commitment the Crown Court before which he is to be tried."

Halsbury's Laws of England, (4th Ed.), Vol. 9.
par. 1153

See also: The Laws of Scotland, Stair Memorial
Encyclopedia. (Vol. 17), p. 414, par. 975

Prior to being repealed by Section 24 of the Act.

similar legislation was force in South Africa.

The Inquests Act, 1919 (Act No. 12 of 1919),

inter alia, provided as follows:

- "5. If the magistrate upon an inquest held under this Act has reason to believe that the deceased's death was caused by an act or omission which amounts to a criminal offence and that the person guilty of such act or omission can be brought to justice, the magistrate shall cause him to be arrested or summoned in order that

criminal proceedings may be instituted against him."

Both the Fire Inquests Act, 1883 (Act No. 33 of 1883) of the Cape of Good Hope, and the Fire Inquests Law, 1884 (Law No. 5 of 1884), of Natal, contained the following provision:

"10. If the Magistrate upon any such inquest shall see reason to believe that any crime or offence has been committed in connection with such fire by any person who can be made amenable to justice, the Magistrate shall cause such person to be apprehended in order that a preparatory examination may be instituted against him."

24.6 It must be kept in mind that an Attorney-General is as a rule, an experienced officer of high standing in the legal fraternity. The trust placed in the Attorneys-General by the Legislature is evident from the very substantial powers granted to them. They can, in certain instances, even override a Court's power to grant an accused person bail. (See Section 61 of the Criminal Procedure Act, 1977. See also Section 3 of the said Act.)

24.7 In view of the aforesaid, and especially in view of the fact that an Attorney-General is not bound by any decision of an

Inquest Court, it is clear that an inquest is intended to be much more than a notice to those near and dear to the deceased that the Attorney-General's decision not to institute a prosecution was correctly taken. In this regard, the fact that a witness can be subpoenaed to give *viva voce* evidence, and that such a witness may be cross-examined by, *inter alia*, the representative of the Attorney-General, is of significant importance. Although an inquest is neither a trial nor a preparatory examination (Timol & Ano. v. Magistrate, Johannesburg & Ano., 1972 (2) SA 281 (T) at 291H - 292A; and Wessels & Others v. Additional Magistrate & Others, Johannesburg, 1983 (1) SA 530 (T) at 533B-D), the benefit of being able to test the evidence of a witness in cross-examination, instead of having to accept the correctness of his statement as it appears in the police docket, places the decision of the presiding officer, as well as any new decision which the Attorney-General may take after a formal inquest has been held, on a much higher level than the decision which the Attorney-General had to make on the statements only. Support for this view is to be found in the following extract from the Timol case, where the function of a prosecutor at an inquest is discussed:

"The prosecutor, we think, is also present so that he can assist in bringing out the truth. Otherwise it is possible that the magistrate may hold an inquest without

anybody present to examine or cross-examine the witnesses. It may be convenient for the magistrate to ask the prosecutor to lead the evidence. Such a request would be regular, provided that he, the prosecutor, does not decide whom to call, and that he is not hampered by the rule against cross-examining one's own witness. It must be remembered that the witness is the witness of the inquest court and not of a party."

(Our underlining)

Timol, *supra*, p. 291 D-E

24.8 When the Attorney-General is compelled to base his decision on the contents of the police docket only, he is by the nature of things obliged to accept the correctness of a statement by a person who implicates another in the commission of an offence, unless such a statement is patently false or clearly incorrect. Such a decision would then be based on *prima facie* evidence in the narrow sense. *Prima facie* evidence in the narrow sense is what is defined in paragraphs 17 and 18 of the heads by the families. If the *prima facie* evidence in the narrow sense indicates towards the commission of an offence, the Attorney-General will decide to prosecute, and it would then be the task of the Trial Court to test and weigh such evidence in accordance with the normal rules of evidence.

24.9 Conversely, the presiding officer in a formal inquest can never base his decision on *prima facie* evidence in the

narrow sense because he cannot ignore the impression gained from hearing (and observing) the testimony of all the important witnesses being tested in cross-examination, nor can he ignore the benefit of having heard argument on legal and factual matters by all parties concerned. Such a test is far removed from the meaning of " ... at first sight; on the face of it; at first blush" referred to in paragraph 18 of the heads by the families.

24.10 Because the Inquest Court (and the Attorney-General subsequent to the holding of a formal inquest) is able, and in our view compelled by the aforesaid factors to apply a test which is stricter than that of *prima facie* evidence in the narrow sense, any decision then taken can no longer be based on " the ordinary meaning of the words used", as is suggested in paragraph 17 of the heads by the families. The test referred to in paragraph 17 is unavoidable in the case of legislation because the Legislature cannot be called upon to give *viva voce* evidence and to submit itself to cross-examination as to its intention and the meaning of the words it used in a statute.

24.11 The argument put forward in paragraph 19 of the heads by the families takes their case no further. Paragraph 24.2 above, is *mutatis mutandis* applicable to paragraph 19.

Furthermore, if the argument in paragraph 19 had been correct, it would have been completely unnecessary ever to hold a formal inquest.

24.12 In The Oxford English Dictionary (2nd Ed.), Vol. XII, on p. 470. "*prima facie*" is described as:

"At first sight; on the face of it; as appears at first without investigation."

This definition corresponds with that of Hiemstra & Gonin quoted in paragraph 18 of the heads by the families. However, in a strictly legal sense, Scoble in The Law of Evidence in South Africa (on pp. 16 and 17) had the following to say on the meaning of "*prima facie* evidence":

"Prima facie evidence means, generally, that sufficient evidence has, in the eyes of the law, been produced to induce a reasonable man to act upon it, or, in other words, that the evidence adduced is, in the absence of any rebutting evidence, sufficient to prove a given fact. The one fact being proved or ascertained, the other, its uniform concomitant, is universally and safely presumed. It is in general evidence which 'calls for a reply' from the other party. (Rex v. Potgieter, [1936] O.P.D. (P.H.. H.12); Rex v. Smith, [1932] O.P.D. 150; Rex v. du Plessis, [1942] E.D.L. 9; Rex v. Afrika, [1938] A.D. 556).

Prima facie evidence is closely allied to what is termed 'presumptive evidence' and, in some cases, is almost indistinguishable from it, vide the remarks of Wessels, J., in Ex parte Minister of

Justice, In re Jacobson and Levy, [1931] A.D. 473:

'In this connection the words 'prima facie evidence' are perhaps misleading. The phrase 'prima facie evidence' is sometimes used when in a jury trial the judge determines that certain facts can be produced in evidence, we then say that there is prima facie evidence to go to a jury. The term prima facie evidence is used as equivalent to a presumption in law in favour either of the plaintiff or the defendant or of the Crown or the accused.'

Thus Best on Evidence, section 273, says:

'The burden of proof is shifted by these presumptions of law which are rebuttable; by presumptions of fact of the stronger kind and by every species of evidence strong enough to establish a prima facie case against the party.'

Here, a prima facie case means a case where there is a presumption of law in favour of one party which, until rebutted, establishes his case and judgment must be given in his favour unless his opponent can rebut that presumption. In the case of *Goosen v. Stevenson*, [1932] T.P.D. 223. Tindall, J., is reported to have said:

'Prima facie evidence ... is a phrase that is sometimes used ambiguously. It is sometimes used to mean 'evidence sufficient to go to the jury' or 'evidence sufficient to raise a doubt', but that is not a correct use of the expression ... prima facie evidence in its more usual sense is used to mean prima facie proof of an issue the burden of proving which is upon the party giving evidence. In the absence of further evidence from the other side the prima facie proof becomes conclusive proof and the party giving it discharges his onus. It is not, however, in every case that the burden of proof can be discharged by giving less than complete proof on the issue: it depends on the nature of the case and the relative ability of the parties to contribute evidence on that issue. If the party, on whom lies the burden of proof, goes as far as he reasonably can in producing evidence and that evidence 'calls for an answer' then in such a case he has produced prima facie proof, and in the absence of an answer from the other side,

it becomes conclusive proof and he completely discharges his onus of proof.'

The rule is the same in criminal cases (Rex v. Koen, [1937] A.D. 211; Rex v. Persotam, [1938] A.D. 92; Rex v. Ingram, [1937] T.P.D. (J/c 498/37); Rex v. Afrika, [1938] A.D. 556; Rex v. du Plessis, [1942] E.D.L. 9). In other words, where there is sufficient prima facie proof to 'call for an answer' from the other side, and a doubtful or unsatisfactory answer is given, it is equivalent to no answer at all and the prima facie proof, undestroyed, becomes sufficient proof (Salmons v. Jacoby, [1939] A.D. 588). Unanswered prima facie proof does not necessarily and inevitably result in a decision for the party producing it, for the court or jury is still entitled to ask itself whether, on the case as a whole, it is satisfied and persuaded by the evidence (Tregear v. Godart, [1939] A.D. 33).".

Hoffmann & Zeffert in The South African Law of Evidence

(4th Ed.) on pp. 596 and 597 say the following on the subject:

"2. Prima facie evidence

Like so many terms in the law of evidence, prima facie evidence is used in two different senses. It sometimes means evidence upon which a reasonable man could find in favour of the party adducing it: that is to say, the amount of evidence which a plaintiff must produce in order to avoid having absolution decreed at the end of his case, or which would be sufficient to prevent an accused from being discharged at the end of the prosecution's evidence. It is often said that in the absence of such evidence there is 'no case to answer', but the refusal of absolution or discharge does not necessarily mean that an answer is required. The defendant or accused may close his case at once and still succeed. In this sense, therefore, a ruling that a party has 'made out a prima facie case' means only that his opponent runs the risk of losing if he offers no evidence.

Although this meaning of prima facie evidence is in constant use, there is another which is even more common. In the other sense one is dealing with what may better be called 'prima facie proof' and the different meanings attached to the words prima facie evidence have been remarked on by Jansen JA in *Marine & Trade Insurance Co Ltd v Van der Schyff*. In *Ex parte Minister of Justice: re R v Jacobson* and Levy Stratford JA said:

'Prima facie evidence in its usual sense is used to mean prima facie proof of an issue, the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges his onus.'

In this sense, prima facie evidence means evidence capable of being supplemented by inferences drawn from the opposing party's failure to reply. Whether such inferences may legitimately be drawn depends upon the nature of the case and the evidence which has been adduced ...

The principles of prima facie evidence apply to civil and criminal cases alike. But they do not mean that in some cases a party may obtain a verdict without producing the ordinary degree of proof. The requisite standard must always be satisfied, but in considering whether the onus has been discharged, the court is entitled in appropriate cases to take a party's failure to adduce evidence into account. It is therefore impossible to say what will constitute prima facie evidence."

24.13 In the case of Rex v. Kasa & Ano., 1936 OPD 200 at 202-203, the court remarked as follows regarding the measure of conviction required in a preliminary examination or inquiry where the court is not called upon to decide any issue:

"In my view a clear distinction must be drawn, as has always been drawn, between the burden of proof in civil and criminal cases. There is no such 'doctrine of prima facie proof' in a criminal trial, whatever meaning one may attach to the words 'prima facie proof' as such, or in connection with a civil trial. (Cf. Rex v. Stoddart, 2 Cr.App.R. at p. 233). It is true that, where a magistrate hold a preliminary examination or inquiry, it is said that he is justified in committing the accused for trial where the Crown has made out a prima facie case, but, as the magistrate is not called upon to decide any issue, but merely to record the evidence for the benefit of the Attorney-General, who eventually has to decide whether the accused should be put on his trial, the above words have been interpreted to mean that the Crown has so far adduced sufficient evidence to justify the Court in coming to the conclusion that the charge against the accused may have been established unless some explanation is forthcoming.".

(Our underlining)

24.14 It is clear from the following remarks by our courts that a finding based on *prima facie* evidence means more than " ... one which shows that an unnatural death was at least on the face of it, brought about by an act or omission involving or amounting to an offence on the part of any person" as is stated in paragraph 19 of the heads by the families.

"'Prima facie' proof, in the absence of rebuttal, therefore, means clear proof leaving no doubt."

Ex parte The Minister of Justice : In re Re

Jacobson & Levy, 1931 AD 466 at 474

"If the party, on whom lies the burden of proof, goes as far as he reasonably can in producing evidence, and that evidence 'calls for an answer', then, in such case, he has produced *prima facie* proof, and, in the absence of an answer from the other side, it becomes conclusive proof and he completely discharges his onus of proof. If a doubtful or unsatisfactory answer is given, it is equivalent to no answer and the *prima facie* proof, being undestroyed, again amounts to full proof."

Salmons v. Jacoby, 1939 AD 588 at 593.

"Secondly, where the Crown has produced evidence amounting to *prima facie* proof of the accused's guilt - calling for an answer from him - then on failure to make an answer, the *prima facie* proof becomes conclusive proof - *Rex v. Koen* (1937, A.D. 211), *In re Rex v. Jacobson* (1931, A.D. at pp. 474 and 479). What this *prima facie* proof is, which in the absence of any refutation by the accused becomes proof beyond reasonable doubt, will vary in different cases and will be affected by rules relating to proof or provisos and exceptions, negatives, facts peculiarly within the knowledge of the accused and the like - *Rex v. Khumalo* (1930, A.D. 193); *Rex v. Sandos* (1932, A.D. 315)."

R v. Cigler, 1946 OPD 179 at 185

"'Prima facie evidence' in its customary sense is not merely 'some evidence'. It must be of such a character that if unanswered it would justify men of ordinary reason and fairness in affirming the question which the party upon whom the *onus* lies is bound to maintain (See the judgment of Brett, J., in *Bridges v. Directors of N.L. Railway Co.*, L.R. 7 H.L.

213, and *Wigmore*, 3rd ed., vol. IX, p. 299)." .

R v. Mantell, 1959 (1) SA 771 (CPD) at 775 H

24.15 The fact that an inquest is an inquisitorial procedure, and that no party thereto bears any onus, makes no difference to the validity of the definitions quoted in paragraph 24.14 above. The only difference is that, by the nature of the things, the *prima facie* evidence may be produced by any party to an inquest.

24.16 Although an inquest is, as has already been stated, neither a criminal trial nor a preparatory examination, it leans more towards a criminal than a civil process. We regard this fact as important because the usual standard of proof required by our criminal courts is that of proof beyond a reasonable doubt. The interwovenness of an inquest with criminal law and procedure appears from the following:

24.16.1 in terms of Section 16(2)(d) of the Act, a finding must be made whether or not an offence has been committed:

24.16.2 in terms of Section 2 of the Act, a death by unnatural causes must be reported to a policeman:

24.16.3 in terms of Section 3 of the Act, the police have to investigate unnatural deaths;

24.16.4 in terms of Section 4 of the Act, a policeman who investigated an unnatural death has to submit a report thereon to the public prosecutor;

24.16.5 in terms of Section 8(2) of the Act, the laws governing criminal trials shall *mutatis mutandis* apply to securing the attendance of witnesses at an inquest, their examination, the recording of evidence given by them, the payment of allowances to them and the production of documents and things;

24.16.6 in terms of Section 11 of the Act, the public prosecutor may examine any witness giving evidence at an inquest;

24.16.7 in terms of Section 17 of the Act, the record of the proceedings of an inquest must be submitted to the Attorney-General concerned.

24.17 It would therefore be strange indeed if the Legislature intended the burden of proof required for a finding in terms

of Section 16(2)(d) to be anything less than proof beyond a reasonable doubt. If the term "*prima facie*" in Section 16(2)(d) means nothing more than *prima facie* evidence in the narrow sense, none of the purposes of holding an inquest referred to in paragraph 24.3 will be properly served. Thus, for instance, a decision based on *prima facie* evidence in the narrow sense could hardly be sufficient to assist the relevant instances to take the appropriate measures referred to in par 24.3.4 above. Furthermore, those near and dear to a deceased person will not be reassured, but instead be more troubled if an inquest court using the criterion of *prima facie* evidence in the narrow sense makes a finding that a certain death was brought about by an act amounting to an offence, whilst the Attorney-General, anticipating the decision of a trial court based on the stricter requirement of proof beyond reasonable doubt, decides not to prosecute.

24.18 It is similarly for the purpose of obtaining certainty in an instance where the body of the person concerned is alleged to have been destroyed or has not been found, that Section 16(1) requires a finding of proof beyond a reasonable doubt. We submit that because the aforesaid reasons (barring that of certainty) why a finding in terms of Section 16(2)(d) should be on the standard of proof beyond a reasonable doubt are not applicable to a finding in terms of Section 16(1), the

Legislature found it necessary to specify the standard of proof required in that instance. Had the Legislature required a different standard of proof in respect of a finding in terms of Section 16(2), it would have been stated in clear terms.

24.19 We support the view held by Stegmann, J. in the inquest into the death of Dr. D.J. Webster, namely that the phrase "*prima facie*" in Section 16(2)(d) of the Act should be interpreted as meaning that a finding in terms of section 16(2)(d) is itself a *prima facie* finding. Thus interpreted, the term *prima facie* serves to clarify the status of a finding in terms of section 16(2)(d). As has been indicated in par 24.5 above, a finding in terms of the now repealed Inquest Act, 1919 that a person was guilty of an offence, had a higher status than a decision in terms of sec 16(2)(d), in that a decision in terms of the repealed Act resulted in the "guilty" person being arrested or summoned in order that criminal proceedings may be instituted against him.

24.20 We also support the view held by Stegmann J in the Webster inquest that a decision in terms of section 16(2)(d) should be made on the standard of proof beyond a reasonable doubt.

Du Plessis's evidence that the executive of the OP GBS met daily or whenever necessary during 1984 and 1985, is incorrect, as appears from the following extracts:

"MNR BIZOS: Generaal, as daar aan u 'n versoek was om 'n mening van die OPGBS dringend na Generaal van Rensburg oordra, hoe lank sou dit geneem het om die dagbestuur van die OPGBS 'n vergadering te probeer saamkry? --- Ek kan nie dink dat hierdie aangeleentheid 'n dringende ad hoc vergadering sou regverdig nie. Dit sou heel waarskynlik op die volgende geroetineerde vergadering onder die hoof korrespondensie hanteer gewees het deur die Sekretariaat.

Was al die lede van die dagbestuur nie hier in Port Elizabeth nie? --- Ja, daar was ook lede in Oos-Londen gewees.

In elk geval die wat beskikbaar is en miskien aan die huite staat se mense oor die telefoon vra? --- Ja, ek wil weer sê ek sou nie die dagbestuur net hiervoor bymekaar geroep het nie. Met ander woorde om 'n telefoongesprek wat ek gehad het aan die dagbestuur voor te lê nie. Dit sou op die volgende vergadering onder die hoof korrespondensie hanteer gewees het."

Van Der Westhuizen 2568 : 13-30

"By u. hy OP GBS? --- Ja, dit was die gebruik gewees, dit was ook die gebruik gewees U Edele om hy die weeklikse vergaderings van die Dagbestuur die vorige week se korrespondensie te hanteer."

Van Der Westhuizen 2594 : 5-8

"Dan gaan Sy Edele voort om te verwys na die syfer 5 bo-op ens. Wat ek wil u vra is dit: dat daar moes Dagbestuur vergaderings van OP GBS gewees het en ook vergaderings van die OP GBS na die 7de Junie 1985. --- Ja U Edele. Die Dagbestuur was gewoonlik weekliks uitmekaar en die OP GBS maandeliks uitmekaar."

Van Der Westhuizen 2879 : 20-25

When necessary, special executive meetings were held.

"Nou in die notule van 'n vergadering op 18 Junie, dit is die spesiale dagbestuur vergadering, ek sal u nou verwys daarna - dis volume 2, bladsy 32, het u dit daar voor u? --- Ja."

Van Der Westhuizen 2962 : 8-11

See also: Bundle 2, p. 30 : "Notule van Spesiale OP GBS dagbestuurvergadering gehou op 18 Jun 85".

26. AD PARAGRAPHS 21.13 AND 105:

26.1 Van Der Westhuizen disagreed with Du Plessis on the importance of the writings by McCuen and Fraser. He, *inter alia*, said the following regarding Fraser's work (G4):

26.1.1 "Sover my kennis strek, is die term "this indicates that the use of terrorism by the government" nie van toepassing op Suid-Afrika nie en ek is nie seker of hierdie konteks in die algemeen gaan oor die revolusionêre oorlogvoering en of dit spesifiek op Suid-Afrika van toepassing nie."

Van Der Westhuizen 2665 : 13-18

26.1.2 "Ja ek moet weer stel in die breë konteks van revolusionêre oorlogvoering is dit seker 'n opmerking wat gemaak kan word. Maar as dit bedoelend is dat dit per se op Suid-Afrika van toepassing is, dan kan ek nou nie daarvoor instaan nie U Edele. Ek dink dit is 'n algemene handboek, as ek reg onthou oor die aard en die wese van revolusionêre oorlogvoering wat nie per se voorskriftelik is vir 'n Oostelike Provinsie of 'n Suid-Afrikaanse omstandigheid nie. Ek stel aan u dat u wel weet dat dit beteken en u is nie bereid om die "simple"

waarheid te aanvaar dat dit beteken dat die regering deur die weermag en/of die polisie van tyd tot tyd dade van terrorisme pleeg, het dit aanbeveel "this indicates that the use of terrorism by government forces must be decided upon at the highest level and it must be so applied as to avoid it boomeranging." Daar is nie enige moeilikheid in verband met die mening van die woorde, is daar? -- Behalwe soos ek sê, ek verbind dit moeilik met die situasie waarin ek daardie tyd in die O.P. verkeer het. Die term wat ek egter kan verbind en wat ons gebruik het is "teen-insurgensie".

Van Der Westhuizen 2666 : 25 - 2667 : 15

26.1.3 "U Edele nee Genl. Fraser het 'n boek geskryf oor revolusionêre oorlogvoering. Ek kan dit nie sien as 'n aanbeveling nie, dit is een van die verskeie boeke wat oor daardie onderwerp verskyn.

'n Suggestie dat as u moet teen-terrorisme gebruik u moet nie seif die besluit nie en dit moet op 'n manier gedoen word dat dit nie boomerang nie. Is dit nie wat dit beteken nie? --- U Edele hy het 'n boek daarvoor geskryf, dit is nie 'n instruksie aan my nie.

Ek weet, maar hy het 'n boek geskryf wat u ook aan u offisiere gegee het en dit maak sin dat u moet nie seif besluit nie maar u moet op die, soos hy dit stel "the highest level" toestemming kry voor u dit doen. --- U Edele nee daarvoor het ons instruksies en voorskrifte gehad wat ons van die hoof van die Leër ontvang het.

Laat ons die omstandighede van Goniwe se dood weer aan u stel. Sonder 'n sy aan die hoogste vlak, niemand kon hier in Port Elizabeth besluit om Goniwe dood te maak nie, as hulle dit wou doen. Nie waar nie? Hulle sou die suggestie van Fraser in aandag geneem het. --- U Edele nee ek kan nie 'n boek wat in die algemeen oor 'n onderwerp direk koppel aan wat u nou vir my sê nie en u skets dit asof dit 'n voorskrif, 'n handleiding, 'n prosedure is wat gevolg moet word, terwyl dit 'n boek oor revolusionêre oorlogvoering is.

Ons het nie sulke voorskrifte of instruksies gehad nie.

Maar as u 'n boek gebruik, is die aanbevelings wat in die boek gemaak is as

dit nou as 'n boek beskou word wat van hulp sal wees vir die offisiere en die offisiere lees "This indicates that the use of terrorism by government must be decided upon the highest level". Is dit nie 'n suggestie ten minste u soldaat, korporaal, lieutenant, kaptein, majoor, kolonel, miskien ook brigadier, u moet nie besluit om iemand dood te maak nie. U moet na die hoogste vlak gaan om toestemming te kry. Is dit nie wat dit beteken nie? — Nee U Edele dit beteken nie dit vir my nie, ek het nie sulke instruksies gegee nie, ek het nie sulke instruksies ontvang nie. Die konteks wat hierin geskryf is moet ek weer sê kom uit 'n algemene werk oor die onderwerp by."

Van Der Westhuizen 2668 : 2 - 2669 : 9

26.2 Regarding McCuen's work (G32), Van Der Westhuizen.

inter alia, said the following:

26.2.1 "Wel, Kolonel du Plessis het vir ons gesê dat vir hom en sy mede-offisiere dit was as 'n Bybel beskou. --- Wel ek sal dit nou nie so sterk uitdruk nie U Edele dat dit as 'n Bybel beskou moes gewees het nie. Daardie boek handel oor 'n ander tydperk, oor 'n ander land. Suid-Afrika in 'n ander tydperk in sy eie unieke omstandighede het ook eie unieke antwoorde vir daardie probleme gegee.

Het u ooit by enige parade aan die offisiere gesê wat u nou gesê het? --- Ja. Ons het verder gegaan U Edele. U sal sien ons het ook boeke van ander skrywers oor rewolusionêre oorlog versprei en dan het ons verder gegaan en ons eie plan in die formaat van Plan Strelitzia geskryf."

Van Der Westhuizen 2652 : 27 - 2653 : 8

26.2.2 "Ja, ek kan net nie akkoord gaan dat dit die Bybel was nie. Dit was een, en ek kan my baie goed onthou dat ons nie daarmee saamgestem het met alles wat daarin gesê word nie U Edele.

Nou laat ons die kwessie of dit nou as 'n Bybel beskou was of nie uitlaat. Was dit 'n belangrike boek wat die riglyne uiteengesit het in verband met die "art of counter revolutionary warfare?" — Dit was een van die riglyne. Ek kan dit baie moeilik omskryf as 'n belangrike riglyn U Edele. En ek moet vir u sê ek het baie sterk daarvoor gevoel."

Van Der Westhuizen 2653 : 25 - 2654 : 4

27. AD PARAGRAPH 22.6:

The driving force behind the unrest was not the UDF, but the ANC, of which the UDF was a front. In this regard, Van Der Westhuizen said the following:

27.1 "Wie was die vyande van die weermag gedurende 85-87? --- Goed, die militêre vyande van die weermag was die verbanne SAKP, ANC Alliansie gewees U Edele.

Ja, wie nog? --- Die PAC.

Wie nog? --- Dit is al wat ek van weet.

Dit is nie wat die notule bewys nie. Wat van die UDF? --- Die UDF was 'n frontorganisasie of 'n veriengstuk van die ANC gewees so daar was baie ander organisasies ook gewees.

Nee, maar laat ons net van UDF praat asseblief Generaal. Sal u saamstem dat by u vergaderings die UDF beskou was as 'n deel van die vyand? — Ja U Edele.

Ja. En sal u saamstem dat u in u eie vergaderings Mnr. Goniwe, Mnr. Calata, Mnr. Goniwe en sy militante luitenant, Mnr. Goniwe en die ander leidende figure wat die UDF beheer het, as die vyande genoem was? --- Dit is heeltemal korrek. Miskien as u my sou toelaat kan ek dit in konteks ook plaas vir u. Die kategorieë van vyande wat bestaan het in daardie rewolusionêre oorlog was gesien gewees amptelik as synde daar drie kategorieë te wees. Die eerste was diegene wat op 'n gewelddadige wyse die bestel van die land wou oorneem. Na hulle is verwys as die terroriste en die insurgente en die organisasies wat daaraan gekoppel was was die ANC, PAC, en die SAKP. So die gewelddadige omverwerpers van die staatsbestel. Die tweede groepering was diegene wat op 'n nie-samewerkingswyse of deur die daarstelling van

alternatiewe strukture op die politieke front beweeg het om die bestaande bestel in die land omver te werp. Na hulle is verwys as radikales, aktiviste, politiek-andersdenkendes."

Van Der Westhuizen 2523 : 20 - 2524 : 17

27.2 "MR BIZOS: Well we will leave it at that M'Lord. U sê u het hom nie as 'n terroris beskou nie? -- Definitief nie. Hy was 'n politieke aktivis. Mens kan ook praat van 'n politieke organiseerder of die ander woord wat gebruik is, 'n radikalis.

En het u, was u van mening dat hy met die ANC saamgewerk het? -- Ja U Edele.

En het u die UDF beskou as 'n frontorganisasie wat saam met die ANC gewerk het? -- Ja U Edele."

Van Der Westhuizen 2535 : 17-25

27.3 "En wie was die vyand in Port Elizabeth? --- Die ANC, SAKP, Alliansie (tussenheide)".

Van Der Westhuizen : 21-22

27.4 "Nou wat sou u sê van Mnr. du Plessis se getuienis in die verhand en veral hierdie laaste sin, dat hy die oorsaak was van brandstigting, "necklacing" en geweld? Kan u dit beantwoord? --- Nee U Edele. Nee. Daar was wei as gevolg van sy besoeke aan piekke in die Oos-Kaap wegbly-aksies, stakings, boikotte, wat deel was van die organisering en daarstelling van die alternatiewe strukture, maar ek kan nie "necklaces" en ander geweldaksies daaraan verbind nie U Edele.

Brandstigting? --- Nee ook nie brandstigting nie U Edele."

Van Der Westhuizen : 3014 : 12-22

28. AD PARAGRAPH 24.6:

The quotations in the abovementioned paragraph do not give a full picture of the evidence in regard to the question whether or not the unrest situation improved during the detention of Goniwe and Calata.

The following evidence is also relevant:

28.1 "Volgens my herinnering het die eintlike probleme eers in Augustus begin en toe was mnr Goniwe alreeds vrygelaat gewees want hy was op die toneel gewees op daardie stadium.

Kan ons dit sê sy vrylating het saamgeval met 'n verergering in die onluste. -- Ek sou sê ja U Edele. volgens my beste rekolleksie."

Du Plessis : 2319 : 11-17

28.2 "Ek wil u vra of u saamstem met die getuienis van Kol. Du Plessis dat toe Goniwe en Calata aangehou was, die situasie het verbeter en kort na hulle vrygelaat was het die situasie vererger. Stem u saam met Kol du Plessis? - -- Ja dit is waar. Ek weet nie of dit direk gekoppel kan word aan nadat hulle nou weer vrygelaat is nie. Die situasie in die hele land het vererger. Dit het sodanig vererger dat 'n noodtoestand in helfte 1985 ingestel is."

Van Der Westhuizen 2856 : 28 - 2857 : 5

29. AD PARAGRAPH 39.2:

It is necessary to keep in mind that the evidence referred to in the abovementioned paragraph is not all that Van Der Westhuizen had to say on that subject. He also said:

"Maar as 'n feit het, as 'n feit en tot u kennis het die Weermag oor daardie inligting beskik? --- Nee."

Van Der Westhuizen 3007 : 3-4

30. AD PARAGRAPH 43.5:

It should be noted that detention in terms of Section 28 was at the time generally referred to as "permanente aanhouding".

"Daar was nie in daardie tydperk van ons Wetgewing, daar was moeilikheid met aanhouding, ek kan wel onthou. Het u of enige kolonel of luitenant-kolonel of ander persoon onder sekere omstandighede 'n persoon aangehou hy moet net vir 14 dae of vir 'n sekere tydperk - daarna moet aansoek gedoen word om 'n persoon verder aan te hou en die komitee wat deur 'n Regter gelei was voor die 6 maande dat die aanhouding kon langer as 6 maande plaasvind. Is dit hoe u dit onthou? --- Ek sal dit so aanvaar.

Is dit hoe u dit onthou? --- Ek is regtig nie seker nie, maar soos wat u gesê het sal ek dit aanvaar.

Ek stel dit so aan u omdat ek is nie heeternaal seker van die periodes nie, maar ek weet dat dit kon nie permanent wees nie. Sal u aanvaar dat daar kon nie permanente aanhouding wees nie. --- Ek is nie heeternaal seker nie U Edele, daar was twee tipes aanhouding gewees as ek dit korrek onthou - twee artikels. Een was vir 'n baie kort tyd.

Agt-en-twintig. --- En dan een was vir 'n baie lang tyd en ek dink laasgenoemde is verwys as permanente aanhouding."

Van Der Westhuizen 2578 : 2-20

31. AD PARAGRAPH 44.1:

It is incorrect to state that the Defence Force's case centres on semantics. A reading of our main heads of argument will indicate that it deals with facts, circumstances as well as probabilities, and that the

semantics of the signal is but one of the aspects which we submit has to be considered in this Inquest.

32. AD PARAGRAPH 44.4:

32.1 The crux of Prof. Swanepoel's views, with which we have no quarrel, is contained in paragraphs 4.1 and 4.2 of his memorandum, and reads as follows:

"In die voorafgaande word daar aangetoon

- 4.1 dat die betrokke uitdrukking in konteks meerduidig interpreteerbaar is:
- 4.2 dat die betrokke uitdrukking in een moontlike interpretasie daarvan as 'n opdrag beskou kan word om die betrokke persone te (laat) vermoor:".

However, the view enunciated in paragraph 4.3 of the memorandum is of no scientific value since it is based on Prof. Swanepoel's subjective view of the context in which the signal was sent, and the professor is clearly not qualified nor sufficiently informed on the subject, to be a judge thereof.

33. AD PARAGRAPH 44.6:

It is incorrect to allege that "samelewing" is a wider term than "gemeenskap".

33.1 Du Plessis, the author of the signal, said the following in this regard:

"Is daar 'n noemenswaardige verskil tussen "gemeenskap" en "samelewing"? --- Nee Edele, nie sover my betref nie. Natuurlik nie. Hierdie ding van "uit die gemeenskap verwyder" en "uit die samelewing verwyder" was in hierdie tyd geykte GBS taal, reg? --- Ek sal saamstem met dit U Edele."

Du Plessis 2326 : 13-18

33.2 Snyman also testified that the two words have more or less the same meaning.

"Hoe verstaan u die woord 'samelewing' daar, wat daar in paragraaf 3 voorkom? --
- Dit is die omgewing waarin hy woon.
Is dit wat samelewing beteken? --- Ek sou dit so beskrywe ja.
En daar is baie samelewings in die samelewings? --- Ja, die gebied waarin hy woon, dit is jou samelewing.
Is daar 'n verskil tussen die woord samelewing en gemeenskap volgens u? --- Dit is min of meer dieselfde."

Snyman 1164 : 15-22

34. AD PARAGRAPHS 44.7 TO 44.10 AS WELL AS PARAGRAPHS 46.12. 47.40 AND PARAGRAPHS 50.2.4 TO 50.2.9:

34.1 The statement in paragraph 60 of our Heads that "There is no single instance on record where the word 'permanent' invested 'verwyder', or any other word for that matter, with a culpable or sinister meaning.", is correct. The last sentence of paragraph 60 does not imply that we have

demonstrated an instance (apart from the signal) where the term "permanent verwyder" as such was used in an innocent sense. It means that no other party proved the converse.

34.2 Apart from Du Plessis's bias and lack of credibility, the fact that he is neither the author of annexure "C", nor attended the said meeting, means that his evidence regarding the meaning of "permanent uitgehaal word" is not only hearsay, but is also void of any substance. There is no need to challenge such a testimony.

35. AD PARAGRAPH 45.2:

35.1 There is also no evidence which shows that similar concerns were not expressed.

35.2 One should also keep in mind that after his previous detention. Goniwe became a very prominent figure and the situation in the country as a whole also changed dramatically.

'9. Goniwe het 'n baie prominente rol in die voormelde rewolusionere aanslag in die Oostelike Provinsie gespeel. Hy was een van die leiers van die United Democratic Front ("UDF"), en na die beste van my wete was Cradock die eerste plek in die RSA waar

die voormelde alternatiewe strukture geïmplementeer is.

11. Verder meer was daar 'n magstryd tussen die Pan Africanist Congress ("PAC") aan die een kant en die African National Congress ("ANC")/UDF-alliansie aan die ander kant. Goniwe was 'n baie prominente lid van die ANC/UDF-alliansie. Hierdie magstryd het tot wedersydse bloedvergieting gelei."

Statement by Van Der Westhuizen: Bundle 1, p.

107. paras. 9 and 11

"In die konteks van die Oos-Kaap van daardie tyd sou 'n prominente figuur soos Mnr Goniwe reaksie uitgelok het by die media."

Van Der Westhuizen 2603 : 29-31

"Goniwe was die streeksorganiseerder, die prominente persoon. Die gesprek wat die OP GBS gehad het het rondom Goniwe gegaan."

Van Der Westhuizen 2614 : 19-22

"Ek wil u vra of u saamstem met die getuienis van Kol. Du Plessis dat toe Goniwe en Calata aangehou was, die situasie het verbeter en kort na hulle vrygelaat was het die situasie vererger. Stem u saam met Kol du Plessis? — Ja dit is waar. Ek weet nie of dit direk gekoppel kan word aan nadat hulle nou weer vrygelaat is nie. Die situasie in die hele land het vererger. Dit het sodanig vererger dat 'n noodtoestand in helfte 1985 ingestel is."

Van Der Westhuizen 2856 : 28 - 2857 : 5

"Mnr Goniwe was die streeks-organiseerder vir die Oos-Kaap van die UDF, is dit korrek? --- Van die UDF, ja."

Van Der Westhuizen 3004 : 19-22

"Volgens my herinnering het die eintlike probleme eers in Augustus begin en toe was mnr Goniwe alreeds vrygelaat gewees want hy was op die toneel gewees op daardie stadium.

Kan ons dit sê sy vrylating het saamgeval met 'n verergering in die onluste. --- Ek sou sê ja U Edele, volgens my beste rekolleksie."

Du Plessis 2319 : 11-17

"During March 1985 Matthew Goniwe was appointed rural organizer of the UDF in the Eastern Cape. His area of responsibility encompassed the towns of Cradock, Graaff-Reinet, Somerset East, Bedford, Adelaide, Middelburg, Hanover, Hofmeyr, Pearston, Steynsburg, Cookhouse, Noupoot, Port Alfred and Fort Beaufort."

Heads by the families, par. 22.7

36. AD PARAGRAPH 46.2

The statements made in the second paragraph of paragraph 46.2 are incorrect. The meaning of paragraph 5 of Du Plessis's first affidavit becomes quite clear when it is read in context, namely with paragraph 4 of the statement. The term "bepaalde inligting" clearly refers to the implications which Du Plessis had to spell out himself. The term "bepaalde inligting" can therefore be read as meaning "die voormelde

inligting", being the information referred to in paragraph 4 of his statement.

37. AD PARAGRAPH 46.7:

The allegation that Du Plessis acknowledged that the signal was drafted " ... as explained in his second affidavit", is incorrect. If the said portion of Du Plessis's evidence is read in context, it is obvious that he only identified the signal as the signal drafted by him. He was not there commenting on the meaning of the signal. The record reads as follows:

"O.K. goed. nee ek het u misverstaan. Goed. Kan ons net aangaan na 'n ander aspek? Ek wil net hê u moet kyk na die sein. Dit is - verskoon my U Edele. dit is Volume 1.

HOF: Bladsy 73?

MNR. GOOSEN: Bladsy 73. Dit is ek verstaan, gemenesaak dat hierdie afskrif is van die sein wat gepubliseer is in die New Nation koerant. --- Dit is korrek U Edele. Herken u die sein? --- Ja U Edele.

In wie se handskrif is dit opgestel? --- In my eie handskrif U Edele.

Is dit ook u handtekening wat regs onder verskyn? --- Dit is my handtekening U Edele.

Is dit die sein wat u op die 7de Junie 1985 opgestel het soos wat u in u eedsverklaring sê? --- Baie beslis U Edele. Geen twyfel omtrent dit nie."

Du Plessis 2019 : 11-25

38. AD PARAGRAPH 47.26:

The last sentence of the abovementioned paragraph is not a correct translation of Van Der Westhuizen's evidence.

38.1 The particular portion of the record reads as follows:

"HOF: Kan u onthou of u ooit aan Generaal van Rensburg voorgestel het dat dit die oplossing is, dat Mnr Goniwe-hulle onder daardie artikel onmiddellik aangehou moet word? --- Nee, ek kan nie onthou dat ek per se so 'n voorstel aan hom gemaak het nie.
Dink u dit is moontlik dat u so 'n voorstel kon gemaak het of nie? -- Dit is dalk moontlik in daardie gesprek waarna hy verwys, die gesprek van 7 Junie.".

Van Der Westhuizen 2694 : 2-99

38.2 The correct translation of the words "dalk moontlik" is "perhaps possible". There is no contradiction in the aforesaid portion of Van Der Westhuizen's evidence.

39. AD PARAGRAPH 48.35:

The statement contained in the abovementioned paragraph is incorrect.

Van Rensburg's evidence in this regard was as follows:

"HOF: Was dit nie meer belangrik at daardie sein u vinniger bereik as die een van die 23ste Mei? --- Ek wil se ja dit was belangriker U Edele.".

(Our underlining)

Van Rensburg 37 : 13-15

The context in which the aforesaid question was asked, makes it clear that the question related to the promptness of the delivery of the signal. The aforesaid portion of Van Rensburg's evidence must be read with the following:

"En interessantheidshalwe, die sein van die 23ste Mei is ontvang binne 'n paar ure nadat dit gestuur was volgens die inskrywing op daardie dokument. Was daar enige rede waarom die sein so lank geneem het, wat meer vertroulik was, meer belangriker was, en meer dringend was. Het u enige verduideliking? --- Ek sal poog om dit te verduidelik ja.

As u sou kyk na die sein-berig van die 23ste Mei, dan sou u ook daar opmerk dat daardie sein "vertroulik" gemerk is en na die beste van my wete volgens die administratiewe stelsel by die Sekretariaat op daardie stadium was daar 'n Telekommunikasie fasiliteit wat vertroulik kon akkommodeer tot by die Sekretariaat direk van die GBS af en vandaar af die uitskakeling van die tussen stasies en die direkte ontvangs van die sein by ons."

Van Rensburg 86 : 25 - 87 : 3

40. AD PARAGRAPH 48.53:

The statement contained in the last sentence of the abovementioned paragraph is incorrect in as far as it relates to the SSVR. At the time the classification of a document addressed to the SSVR had everything to do with the speed with which it would reach Van Rensburg, as appears from the following:

"Die uitsers geheime sein sou in kodevorm by die H-Leër se kriptokantoor ontvang word."

(Our underlining)

Wybenga F8: p. 4, par. 5.2

"Kan u ook net kortliks vir die Hof inlig, is u bewus hoe die sisteem op daardie stadium gewerk het, synde soos hierdie wat geklassifiseer is as uiters geheim? Hoe is dit fisies ontvang by die kantore van die SSVR? --- U Edele ons seinapparaat in daardie stadium was net geskik gewees om tot vertroulik te hanteer. Ons warapparraat was nie voldoende om geheime of uiters geheime seine te hanteer nie. Seine van die GBS'e af is deur die leerkommandement gestuur na leerhoofkwartier waarvandaan dit dan na ons toe gekom het. So in hierdie geval, hierdie sein, sou na leerhoofkwartier in Potgieterstraat gegaan het. Vandaar sou hulle dit na ons toe gestuur het."

Stemmet 242 : 5-16

41. AD PARAGRAPH 48.61:

The statement contained in the last sentence of the abovementioned paragraph is begging the question. If the signal had an innocent meaning, as we submit it does, there would have been no reason to make it available to the investigating team.

42. AD PARAGRAPH 49.13:

Stemmet's reply quoted in the abovementioned paragraph is not an answer to the question "... whether he had had sight of the signal", but is a reply to the question whether he had had sight of the signal in its handwritten form. The said reply should be read in its context, which is as follows:

"Die vraag wat ek vra is toe u dit in die "New Nation" gesien het, was daar 'n afskrif van hierdie dokument wat in die "New Nation" verskyn het, is dit korrek?

— Daar was 'n afskrif van hierdie sein gewees.

En u het gekyk daarna en dit gelees, korrek? — Ek het dit gelees.

En dit het vir u bekend gelyk. — Dit is korrek U Edele.

Wat daar staan, is dit korrek? — Dit is korrek.

Nou wil ek u net só vra; u sê paragraaf 3 soos wat dit daar staan, dit het vir u bekend gelyk. — Ja, veral die woorde "permanent uit die samelewing verwyder."

So dit het vir u voorgekom dat u dit moontlik gesien het soos dit daar in die "New Nation" verskyn het, is dit korrek?

— Dit is moontlik U Edele, ek het dit gister reeds gesê.

U sien Mnr. Stemmet hier het ek 'n probleem want die getuienis hier voor die Hof is dat daar op geen stadium te Pretoria ooit 'n seinberig wat soos daardie seinberig lyk, sou ontvang word nie. Die seinberig wat in Pretoria ontvang sou wees, sou 'n getikte weergawe wees. — Dit is moontlik U Edele, dat die sein getik was. Ek verwys na die afdruk wat ek in die koerant gesien het en wat daar staan in paragraaf 3 en veral hierdie (onduidelik). Of hy getik anderkant aangekom het of handgeskrewe, dit sal ek nie weet nie.

Nee maar u sê dit het bekend gelyk. — U Edele dit het bekend gelyk.

Soos dit daar in die "New Nation" gestaan het. — Daardie paragraaf, maar veral die woorde "permanent uit die samelewing uit verwyder."

Ek het nie die vraag gehoor nie, verskoon. Die antwoord. — U Edele ek sê daardie (tussenhei).

HOF: U sê daardie woorde het bekend gelyk.

MR. GOOSEN: So dit is nie korrek dat hierdie dokument soos wat dit in die "New Nation" verskyn het bekend gelyk het nie.

— U Edele wel ek het darem hierdie vraag nou al oor en oor en oor geantwoord gister vir 'n ander advokaat, nou weer vir u.

HOF: Ja, ek dink die - ek sien u punt. Kan ek dit miskien só stel: het die dokument as suiks bekend gelyk? Met ander woorde was u onder die indruk dat "hierdie dokument het ek al gesien" net soos die dokument in die "New Nation" gestaan het? — Nee U Edele ek het nooit

gedink ek het hierdie dokument al gesien nie maar toe ek hom deurlees in die foto-afdruk wat ek van die "New Nation" gehad het en ek kom by hierdie gedeelte het dit vir my, soos ek gister gesê het, verbasend bekend gelyk.

Ja. Met ander woorde wat het vir u bekend gelyk; die dokument self of die bewoording daarvan? --- Die bewoording daarvan het vir my bekend gelyk."

(Our underlining)

Stemmet 382 : 25 - 384 : 15

43. AD PARAGRAPH 87:

43.1 It is not common cause that Mbulelo Goniwe and Fort Calata had nothing to do with the Geldenhuys committee.

43.2 As things developed, the Geldenhuys committee eventually did deal with Mbulelo Goniwe and Fort Calata. This fact appears from paragraph 40 of the committee's report (Vol. 2, p. 77), which, *inter alia*, reads as follows:

"Dit kan oorweeg word om meelopers van Goniwe, soos sy neef Mbulelo Goniwe en Fort Calata na die Direkteur vir Staatsveiligheid te verwys vir moontlike aanhouding of inperking ...".

44. AD PARAGRAPH 107:

44.1 We have already dealt with the question as to whether or not Van Rensburg and the SSVR were the logical addressees of a suggestion to kill Goniwe in paragraph 18.18 of our main heads of argument.

44.2 The fact that counsel for the families is obliged to argue that "The mechanisms used by the Security Forces to plan and execute the deaths of the deceased are however peculiarly within their knowledge" is significant. That statement is tantamount to an acknowledgement that the evidence produced in this Inquest does not prove a causal connection between the signal and the killing of the four deceased.

44.3 To argue that "Clearly, Van Rensburg, Van Der Westhuizen and Du Plessis, in conspiring to kill, did not use the conventional structures of the NSMS" is merely another way of saying that: "We do not know how Van Rensburg, Van Der Westhuizen and Du Plessis went about to arrange the killing of Goniwe and the others".

44.4 The aforesaid concessions are not surprising because even Du Plessis, who is a so-called conspirator, does not know who

committed the murders, nor how and by whom it was arranged.

44.5 The aforesaid concessions support our contention that the evidence in this Inquest provides no proof of criminal behaviour connecting Van Der Westhuizen with the Goniwe murders.

45. AD PARAGRAPH 116:

As we have demonstrated, the finding requested on behalf of the families is not justified on the evidence. The finding by this Court in respect of Section 16(2)(d) of the Act is bound to be the same as that of Regional Magistrate De Beer in the first inquest, which reads as follows:

"(d) Whether the death was brought about by any act or omission involving or amounting to an offence on the part of any person

Yes: By a person or persons or group of persons unknown."

SECTION C

46. AD PARAGRAPHS 4 AND 5:

For the reasons already set out in our main Heads of Argument, as well as for the reasons set out herein, we submit that the findings proposed on behalf of Du Plessis in the abovementioned paragraphs are not justified.

47. AD PARAGRAPH 16:

The term "revolutionaries" as used in the abovementioned paragraph is ambiguous. Van Der Westhuizen distinguished between political activists and terrorists, both of which could qualify as revolutionaries.

47.1 Van Der Westhuizen described the difference between the two groups as follows:

"Dit is heeltemal korrek. Miskien as u my sou toelaat kan ek dit in konteks ook plaas vir u. Die kategorieë van vyande wat bestaan het in daardie rewolusionêre orlog was gesien gewees amptelik as synde daar drie kategorieë te wees. Die eerste was diegene wat op 'n gewelddadige wyse die bestel van die land wou oorneem. Na hulle is verwys as die terroriste en die insurgente en die organisasies wat daaraan gekoppel was was die ANC, PAC, en die SAKP. So die gewelddadige omverwerpers van die staatsbestel. Die tweede groepering was diegene wat op 'n nie-samewerkingswyse of deur die daargestelling

van alternatiewe strukture op die politieke front beweeg het om die bestaande bestel in die land omver te werp. Na hulle is verwys as radikales, aktiviste, politiek-andersdenkendes."

Van Der Westhuizen 2524 : 4-17

47.2 His attitude was clear that activists should not be killed.

"Ja. Dit is die punt wat ek probeer uit u uitkry. So ons kan aanvaar dat die veiligheidsmagte wel verstaan het dat aktiviste of terroriste, gewapen, moontlik in sekere omstandighede uitgewis kon word, elimineer kon word gedurende 84, 86 en later. Sal u dit aanvaar? -- Ja U Edele. Ek sal dit aanvaar in die lig wat ons hier gepraat het. Dit is nie vir my, en dit was my standpunt nog altyd gewees, dat aktiviste moet (nie) uitgehaal word nie."

Van Der Westhuizen 2942 : 16-23

48. AD PARAGRAPH 39:

The statement in the abovementioned paragraph is misleading.

48.1 It should be made clear that the pressure which was brought to bear on Van Der Westhuizen was to stabilise his area. It was not expected of him to do something about Goniwe as such.

"MNR. BIZOS: Wel Goniwe was die doring - was dit die woorde wat gebruik was? Die doring in die vleis van die veiligheidsmagte hier. U was die voorsitter

van die OP GBS. Politieke druk is op u geplaas om die distrik onder beheer te bring. Is al daardie stellings korrek of nie? -- Ja, behalwe dat ek het op die strategiese of op die bestuursvlak beweeg en oorhoofs gekyk na die problematiek. As (tussenbei). --- Ek het nie - ekskuus - ek het nie op die vlak van die individu beweeg soseer nie U Edele."

Van Der Westhuizen 2586 : 17-27

48.2 Although Van Der Westhuizen was the chairman of the OP GBS, the responsibility to stabilise the area was not his alone.

"Is daar in die begin van 1985 geweldige druk van politici se kant op u geplaas om die situasie plaaslik op te los? -- Ja, daar was baie druk. En was die politici se houding dat u moet die probleem op die grondvlak hier moet oplos? -- Ja, darem nou nie net ek persoonlik nie, maar so (tussenbeide) U is heeltemal reg, huile het "julle" gesê. -- - Ja."

Van Der Westhuizen 2640 : 22-28

49. AD PARAGRAPHS 54, 55 AND 59:

49.1 Du Plessis was indeed cross-examined on the circumstances under which he deposed to his first affidavit. See Du Plessis 2205 : 10 - 2208 : 8; of which the very last portion reads as follows:

"En aanvaar u dat dit is wat u gesê het?
--- Ek het dit sekerlik gesê want ek het dan
die verklaring onderteken, en ek was voor
'n Kommissaris van Ede gewees. As u
enige probleem gehad het met Wagenaar
en (onduidelik) was u nou voor 'n
amptenaar van die hof, voor 'n
Kommissaris, as u enige probleem gehad
het kon u dit aan hom openbaar het, is dit
korrek? --- Ek sou dit kon gedoen het.
En u het nie? --- Ek het nie 'n probleem
op daardie stadium gehad nie. En u
het aan hom bevestig voor God dat wat
hier staan die waarheid is, is dit reg? ---
Soos wat, ek het dit bevestig soos wat ek
die inhoud van die verklaring verstaan
het."

Du Plessis 2207 : 25 - 2208 : 8

49.2 Du Plessis was also cross-examined on the meaning of the
content of his first affidavit. Regarding paragraph 6 of his
first affidavit, which is the paragraph which he was not
prepared to confirm, he, *inter alia*, said the following:

"Ek gaan nog net eenkeer die vraag vra en
dan gaan ek my wend tot Sy Edele toe en
vir hom vra om 'n bevel op u uit te reik
om nie die vrae te ontwyk nie. Ek gaan u
help, ek gaan dit vat sin vir sin, frase vir
frase.

"Ek is eger baie seker dat Brig. Van der
Westhuizen nooit teenoor my te kenne
gegee het dat sy voorstel behels dat enige
persone doodgemaak moes word nie."

Stem u saam daarmee? Is dit die waarheid
of is dit nie die waarheid nie? --- U Edele
in terme van wat tussen myself en
Generaal Van der Westhuizen gebeur het
is dit die waarheid."

Du Plessis 2194 : 31 - 2195 : 12

49.3 In the light of the answers given by him, there was no need to produce evidence to gainsay any evidence given by him regarding either the circumstances under which his first affidavit was made, nor regarding the meaning of the content thereof.

49.4 In view of Du Plessis's evidence quoted in paragraph 49.2 above, as well as the fact that he had no problem with the rest of his first affidavit, the statement in paragraph 55 of the heads of argument by Du Plessis is both incorrect and defamatory. In making the said statement, counsel for Du Plessis had lost sight of the fact that when Du Plessis made his statement, both Van Der Westhuizen and Van Rensburg had already made their statements.

50. AD PARAGRAPHS 56 AND 57:

50.1 The use of the word "klaarblyklik" in the portions of his first affidavit quoted in paragraph 56 does not support the statement that Du Plessis did not have an independent recollection of the signal when he deposed to that affidavit. The word "klaarblyklik" is defined as follows on p. 3 of Die Afrikaanse Woordeboek:

"b.n. en bw. [Op 'n wyse] wat duidelik blyk; ongetwyfeld, onteenseglik, onweerlegbaar; klaarblykend ...".

50.2 It is once again necessary to emphasise that Du Plessis only had problems with paragraph 6 of his first affidavit. There is therefore no basis for any suggestion that paragraph 3, including the word "waarskynlik", is not precisely what Du Plessis said to Wagener.

50.3 It should also be remembered that Du Plessis was at that stage still playing innocent, and the fact that he was in cahoots with the New Nation and the ANC was still a secret. In fear of raising suspicion regarding his involvement in the leak of the signal, he could therefore not afford to make his intimate knowledge of the signal known to Wagener and Major General Knipe.

51. AD PARAGRAPH 58:

51.1 There is nothing sinister in the use of the word "voorgee" by Van Der Westhuizen. He explained it as follows:

"Waarom het u die vaag, of ten minste vaag, wat ons kan sê misleidende taal gebruik in verband van die feit dat u wel geweet het dat dit in Du Plessis se

handskrif was en dat dit sy handtekening was? --- Omdat ek onbewus was van die dokument."

Van Der Westhuizen 2611 : 22-26

"Al rede wat ek vir u kan sê is ek was nie bewus van die bestaan van die oorspronklike dokument nie. So daarvoor gee ek, dit gee vir my voor dit is 'n berig wat hy geskryf het.

Dit voorgee 'n sein wat deur Kommandant L du Plessis is gesien, 'n afdruk wat voorgegee het 'n seinberig wat deur Kommandant, waarom - stem u saam dat 'n eerlike persoon wat wou die hele waarheid praat sou gesê het vir die inligting van sy regsverteenvoordigers, vir die inligting van die polisie, vir die inligting van die publiek, vir die inligting van die howe, as die ondersoek geopen was, om op rekord te plaas ek ken daardie handskrif, dit is Du Plessis se handskrif, dit is Du Plessis se handtekening? Voorgee, wat beteken voorgee? Beteken dit dit is? -- - Dit skyn te wees 'n berig wat hy geskryf het. Ek het nie die berig geskryf en nie gesien nie.

Wat beteken "voorgee"? Is "voorgee" dieselfde as "is"?

--- Ek sou sê mens kan sê "voorgee" is skyn te wees, wat weergee."

Van Der Westhuizen 2612 : 11-29

"Kom ons gaan na die benadering van inligtingsmense, ons verkeer nou op die inligtingsterrein, met die verskeie grade en fase waardeur inligting gaan voor en na bevestiging en so meer. Sal u dit asseblief weer 'n slag verduidelik of verduidelik? U het dit nog nie hier verduidelik nie. --- U Edele informasie word ingesamel, kan op verskeie wyses ingesamel word. In die breë kan 'n mens sê dit kan kovert of overt ingesamel word en dan is daar verskeie wyses hoe dit bekom kan word. So dan kom die ingesameide informasie hyeen by 'n punt, waar dit dan vergelyk word, getoets word, in verband of in konteks geplaas word. Ons noem daardie proses die verwerking van daardie informasie.

Dan word dit gekyk of dit bevestig is. Met ander woorde staan dit in konteks, is dit waar? Dit is die bevestigingsproses daarvan. En dan daarna geskied 'n vertolkingsproses. Met ander woorde dit word nou verduidelik aan die hand of 'n deel daarvan kan ook 'n voorspelling wees of 'n aanbeveling wees as dit uit die vertolkingsproses uitkom. En dan vind die verspreiding daarna plaas. Nou die verspreiding is van bevestigde, vertolkte informasie. Die noem ons inligting.

Reg, so het ek dit korrek; wanneer u informasie ontvang, gaan dit deur 'n proses van bevestiging en wanneer dit bevestig is word dit beskou as inligting. --- Ja U Edele.

Is dit in kort? --- Dit is in kort ja.

Nou die middag toe u die sein sien, en die eedsverklaring gemaak het die Saterdag, het u die informasie gehad in verband met dit wat voorgee was 'n sein te wees? --- Ja. soos u dit stel dit was die eerste keer dat ek dit gesien het ja U Edele.

Reg. Het u oombliklik die korrektheid daarvan aanvaar as bevestig? --- Nee U Edele.

Sou u dit gedoen het? --- Nee.

En die eedsverklaring is gemaak weereens op hierdie aannamebasis en die aanname is gemaak dat dit wel bestaan het. --- Ja U Edele.

Sal u nou kyk na die woorde in paragraaf 5 en dan weer in 17? Daardie woorde wat ek gebruik het "as dit wel ooit bestaan het." Paragraaf 15 - jammer - en 7. --- Ja U Edele.

En "voorgee". --- Ja U Edele.

Dit wat u nou vir Sy Edele gesê het verduidelik dit daardie woorde of verduidelik dit dit nie?".

Van Der Westhuizen 3021 : 25 - 3023 : 7

52. AD PARAGRAPH 61:

- 52.1 The argument that if Du Plessis was falsely implicating Van Der Westhuizen, one would have expected him to say in clear and unambiguous terms that Van Der Westhuizen had

told him in so many words to send a signal proposing that Goniwe and the others be killed, is wrong and incompatible with the wording of the signal.

52.2 For his version of how the signal ought to be interpreted to have any credibility, it was necessary for Du Plessis to testify that paragraph 3 of the signal contains more or less the words used by Van Der Westhuizen. The following portions of Du Plessis's evidence are in point:

"MR GOOSEN: Certainly M'lord. Kan ek u dit vra kolonel, het Brigadier van der Westhuizen enigsins aangedui wat hy bedoel hy wat hy gesê het ten opsigte van die gesprek wat hy gehad het met Generaal van Rensburg? Het hy gesê wat hy daarhy bedoel? --- Die woorde wat hier staan, dat die mense permanent uit die samelewing verwyder moet word as 'n saak van dringendheid het ek nie uit my duim uitgesuig nie.

HOF: Waar het u daardie woorde gekry? - -- Ek neem aan, maar ek kan nou nie vir u presies sê nie, maar ek neem aan dit was tydens 'n gesprek tussen myself en Generaal van der Westhuizen.

Kan u nie onthou presies wat hy vir u gesê het nie? --- Ek kan nie daardie woorde presies onthou nie, maar ek sou dit nie so bewoord het as dit nie die indruk was wat hy my geskep was nie."

Du Plessis 2062 : 13-27

"U Edele ek kan werklik nie vir u eerlik sê of dit die woorde was nie maar ek het ook gister genoem dat ek sou dit nie uit my duim uitgesuig het nie. Wat ek wei weet en wat ek al in verkla- rings gesê het en vir ander mense ook gesê het, is dat die woord

"doodmaak" was nie tussen ons twee
genoem nie en ek wil daarby bly."

Du Plessis 2065 : 22-28

52.3 If Du Plessis had said that Van Der Westhuizen told him in so many words to send a signal proposing that Goniwe and the others be killed, he would have been forced to admit that he had sucked the wording of the signal out of his thumb. Had Du Plessis implicated Van Der Westhuizen any further, the signal itself would have been proof that his version is false.

53. AD PARAGRAPH 62:

53.1 The questioning regarding his drinking problem did indeed serve to undermine Du Plessis's reliability as a witness.

53.2 Firstly, because he was initially evasive about the fact that he has a drinking problem. Later he was, however, obliged to admit his drinking problem.

"Maar u het ander probleme ook het u nie, sekerlik in hierdie tyd gehad? Dit lyk vir my dit gaan nou baie beter met u. U het ook 'n drankprobleem gehad. --- Ek dink U Edele 'n mens moet dit kwantifiseer. Wat is 'n drankprobleem? "

Du Plessis 2236 : 29-31

"Ja. En is daardie feite nie presies op u van toepassing nie? --- Ek het 'n finansiële probleem ja, ek het van tyd tot tyd 'n drankprobleem, maar ek wil vir u sê U Edele dat, soos ek veraggend ook gesê het, drank is, ek skakel dit aan en af soos wat dit nodig is. ".

Du Plessis 2303 : 28 - 2304 : 4

53.3 Secondly, because it was possible to demonstrate Du Plessis's willingness to lie if he thinks that the lie will not be detected. Initially he denied that he ever had to stay away from work as a result of his drinking habits. However, when he was confronted with Exhibit G39, he was obliged to admit that it did happen.

"Was dit só dat u van diens af al moes bly as gevolg van drankmisbruik? --- Ek ontken dit U Edele, nie sover my kennis strek nie. ".

Du Plessis 2238 : 21-23

"So nou het ons dit dat alkoholmisbruik u afwesigheid van diens af veroorsaak het. Geheel of gedeeltelik, maak nie saak nie. --- In hierdie geval ja U Edele. ".

Du Plessis 2241 : 7-9

54. AD PARAGRAPHS 67, 68 AND 69:

As has been indicated in these as well as our main Heads of Argument, the submissions contained in the abovementioned paragraphs are not supported by the evidence, and should therefore be rejected.

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3 February 1994

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NUMBER 10

PHIPSON ON EVIDENCE

FOURTEENTH EDITION

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FACTS EXCLUDED BY PRIVILEGE

Circumstances where the claim arises

- 1-01 A witness who is asked a question about a conversation which is privileged may refuse to answer. One who is subpoenaed to produce a privileged document may object to doing so. The rules of court¹ which require the parties to a civil action to disclose all documents which are or have at any time been in their "possession, custody or power" do not compel the production of privileged documents, although their existence must be revealed.² These are the only circumstances in which a true claim for privilege arises,³ and the rules relating to privilege discussed in this chapter are common to all three.⁴

Subject-matter of the claim for privilege

- 0-02 The matters protected from disclosure or production on the grounds of privilege are the following: (1) professional confidences; (2) title-deeds, lien; (3) matrimonial communications; and (4) criminal questions. The old privilege relating to the question of adultery in divorce cases has been abolished by the Civil Evidence Act 1968, s.16(5), and this section governs testimony, discovery and interrogatories.⁵

Nature of the claim

- 20-03 The privilege may be that either of the witness himself, or of another whom he represents; in the former case he will not be compelled, and in the latter he will not be allowed (without the principal's consent), to disclose the protected matter.⁶ Such claims arise more frequently on applications for discovery or inspection before trial than with reference to testimony in the witness-box, but the principles are substantially the same.⁷

¹ R.S.C., Ord. 24, r. 1.

² R.S.C., Ord. 24, r. 5(2).

³ The failure to appreciate this sometimes leads to curious results: see *Truman (Frank) Exports Ltd. v. M.P.C.* [1977] Q.B. 952, considered *post*, § 20-25.

⁴ There are some minor exceptions to this general statement. It is also subject to the qualification that not all the rules are applicable to all three types of cases equally. For example, the rules about copies of documents have no relevance to privilege claimed in the course of oral examination.

⁵ *Nast v. Nast and Walker* [1972] Fam. 142 (C.A.).

⁶ *Post*, -11.

⁷ *Greenough v. Gaskell*, 1 M. & K. 98, 115, *per* Lord Brougham; *Hennesy, v. Wright*, 21 Q.B.D. 509, *per* Wills J.

By whom and when made

- 20-04 They should, in strictness, be made by the witness himself, and not be made or argued by counsel whether in the cause,⁸ or specially instructed,⁹ but in the case of professional confidence they are now usually both taken and argued by counsel on his client's behalf¹⁰ as otherwise the privilege might be lost through ignorance, since, though the judge ought, yet he is not obliged,¹¹ to advise the witness of his rights. The claim may be made at any stage of the examination and is determinable by the judge, who may, if he thinks fit, hear other witnesses on the point.¹² He may also read a document to determine its privilege.¹³

Effect, when allowed

- 20-05 When allowed, the privilege protects the witness not only from further answers, but from partial ones already given¹⁴; and where a document is privileged he cannot be compelled to state its contents,¹⁵ or his knowledge, information or belief founded thereon,¹⁶ since otherwise the privilege would be illusory. For the same reason, no adverse inference may be drawn from the fact that a party has invoked privilege.¹⁷ This is so in relation both to legal professional privilege^{17a} and to the privilege against self-crimination.^{17b} In the latter case, the reason is or includes the fact that the privilege is intended to protect the innocent and the guilty alike.^{17c}

- 20-06 The fact that a document is privileged does not affect its *admissibility*. Privilege may be waived.¹⁸ Even where there is no waiver, but the other party has somehow obtained possession of privileged material, it may

⁸ *Thomas v. Newton*, Moo. & M. 48n.; *R. v. Adey*, 1 Moo. & Rob. 94; *Doe v. Doe*, 3 Q.B. 609.

⁹ *Doe v. Egremont*, 2 M. & R. 386.

¹⁰ *Rochevoucauld v. Boustead*, 65 L.J.Ch. 794; *Cowley v. Cowley*, *The Times*, January 20, 1897; *Evans v. Evans* [1904] P. 378; *post*, § 20-48.

¹¹ *Att.-Gen. v. Radloff*, 10 Ex. 88.

¹² *Cleave v. Jones*, 7 Ex. 421; *ante*, § 19-02.

¹³ *Re Daintrey, ex p. Holt* [1893] 2 Q.B. 116; *Birmingham, etc., Co. v. L. & N.W. Ry.* [1913] 3 K.B. 850 (C.A.).

¹⁴ *R. v. Garbett*, 1 Den.C.C. 236.

¹⁵ *Davies v. Waters*, 9 M. & W. 608.

¹⁶ *Lyell v. Kennedy*, 9 App.Cas. 81.

¹⁷ *Wentworth v. Lloyd* (1864) 10 11 L.C. 589 (11 L.). It was suggested in previous editions of this book (by reference to Taylor on Evidence § 1467, see 7th edition of this work) that there might be an exception to this principle in the case of the privilege against self-crimination, but this does not seem to be correct. An accused who at his trial for a criminal offence exercises his right not to give evidence exposes himself to a limited extent to comment by the court (though not by the prosecution): but this is an exception to a different rule, and is considered *ante*, §§ 11-46 to 11-47.

^{17a} *Wentworth v. Lloyd* (*ante*).

^{17b} *Ex p. Symes* (1805) 11 Ves. Jr. 523; *Bray, Discovery* (1884) p. 315. *cf.* note 17, *ante* and see also n.17c *post*.

^{17c} *Adams v. L.* (1858) 3 H.&N. 351 at 363; *Lamb v. Munster* (1883) 10 Q.B.D. 110 at 114.

¹⁸ See §§ 20-36 *et seq.*, *post*.

(subject to what is said below) be tendered in evidence. It was held in *Calcraft v. Guest*¹⁹ that if a privileged document comes into the hands of the opposite party independently, it is admissible; and that this is so even if it has been obtained by improper means. This is consistent with the general rule that evidence is admissible notwithstanding that it has been obtained as a result of illegal acts.²⁰ In *Calcraft v. Guest*²¹ itself the defendant's solicitors had taken copies of the proofs of witnesses and the notes on the evidence in a previous action brought by the plaintiff.²² The originals of the documents were handed back to the plaintiff's solicitor, and it was the copies which the defendant successfully tendered in evidence. Theoretically the rule goes so far that it renders admissible material which comes into the hands of the opposite party through the default of the first party's legal advisers. In practice this is not so; and modern authorities have greatly reduced the scope of the rule in *Calcraft v. Guest*.²³ They have done so indirectly, by the application of three doctrines whose operation prevents the use of the evidence.²⁴ First, the public interest in ensuring that documents are brought into court may act to prevent a party from taking advantage of the documents he has acquired.²⁵ Secondly, limits have been set to the extent to which a party can unintentionally waive privilege: this topic is considered further below.²⁶

20-07

The third exception lies in the equitable principles which entitle parties to restrain the abuse of confidential information. These principals may be invoked so as to prevent the use of material obtained in breach of confidence, and their application has become much more commonplace in the last 30 years. In the present context, the almost forgotten decision in *Lord Ashburton v. Pape*,²⁷ which exemplified the doctrine in the context of privileged documents obtained in the course of litigation, was

¹⁹ [1898] 1 Q.B. 759 (C.A.). See also *Lloyd v. Mastyn* (1842) 10 M. & W. 478, at 481-482, per Parke B. in the course of argument; *R. v. Leatham* (1861) 8 Cox C.C. 498, 501; cf. *Joyce v. Joyce*, *The Times*, April 30, 1909; *Auten v. Rayner* (No. 4), *The Times*, March 6, 1962.

²⁰ *Kuruma v. R.* [1955] A.C. 197 (P.C.); *R. v. Sang* [1980] A.C. 402 (11.L.); see generally Chap. 28 post, for the modern position in criminal cases.

²¹ *Ante*.

²² Actually his predecessor in title; but for these purposes that makes no difference: see post, § 20-35.

²³ *Ante*.

²⁴ There used to be one clear distinction between privilege properly so-called and public policy immunity. In the latter class of case, there was an absolute prohibition of disclosure even of information which had been voluntarily surrendered to the opposite party, and *a fortiori* where it had accidentally come into that party's hands, which has in recent years been somewhat relaxed: see § 19-31, *supra*. It is instructive to compare this with the opposite process which can be seen in the attenuation of the strictness of the common law principle of admissibility in the privilege cases and the reduction of the scope of the rule in *Calcraft v. Guest* (*ante*).

²⁵ *C. Film Distributors v. Video Exchange* [1982] Ch. 431, *ante*, p. 19; *Goddard v. Nationwide Building Society* [1987] Q.B. 670, per Nourse L.J. at 685C-686A.

²⁶ Post, § 20-36.

²⁷ *Ante*.

revivified in *Butler v. Board of Trade*.²⁸ As a result, the equitable doctrine was given considerably more attention in this class of case than had previously been accorded it.²⁹ In *Goddard v. Nationwide Building Society*³⁰ a solicitor acted both for the building society which was financing the purchase of a house and for the purchaser. In an action by the purchaser against the building society, the latter proposed to rely on an attendance note made by the solicitor of information received by him from their local manager, and the solicitor's subsequent discussions with the plaintiff about it. It was found that the attendance note was entirely the plaintiff's document, and thus subject to his legal professional privilege. It was held that in those circumstances the court would enjoin the use of the document by the defendants, because that use would involve a breach of confidence. The principles of *Lord Ashburton v. Pape*³¹ and *Calcraft v. Guest*³² were combined.

"If a litigant has in his possession copies of documents to which legal professional privilege attaches, he may nevertheless use such copies as secondary evidence in his litigation: however, if he has not used the documents in that way, the mere fact that he intends to do so is no answer to a claim against him by the person in whom the privilege is vested for delivery up of the copies or to restrain him from disclosing or making any use of the information contained in them."³³

It is to be noted that this principle applies only in cases where there is both privilege *and* confidence. There is no general right to prevent documents being used in legal proceedings merely on the ground that their use involves a breach of confidence.³⁴ It was said in *Goddard's* case³⁵ that this solution is not satisfactory because the question of whether or not equitable relief is or is not granted would depend on the order in which the applications are made.³⁶ It is submitted, however, that an injunction may be sought at any stage of the proceedings,³⁷ even in the course of a trial in which a party seeks to tender evidence obtained in breach of an obligation of confidence. It has been said that in such cases the entitlement to an

²⁸ [1971] Ch. 680.

²⁹ See Tapper, "Privilege and Confidence" (1972) 35 M.L.R. 83; J. D. Heydon, "Legal Professional Privilege and Third Parties" (1974) 37 M.L.R. 601; Matthews, "Breach of Confidence and Legal Privilege" (1981) 1 *Legal Studies* 77.

³⁰ [1987] Q.B. 670 (C.A.).

³¹ [1913] 2 Ch. 469 (C.A.).

³² *Ante*.

³³ *Goddard v. Nationwide Building Society* (*supra*) at 683D E, per May L.J.; and see per Nourse L.J. *ibid.* at 684D.

³⁴ See p. § 20-54.

³⁵ *Ante*, see per May L.J. at 683D, per Nourse L.J. at 684D.

³⁶ cf. *I.T.C. Film Distributors v. Video Exchange* [1982] Ch. 431.

³⁷ cf. *Universal City Studios Inc. v. Hubbard* [1984] Ch. 225.

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1901

which alleges that the goods were carried subject to a just and reasonable condition made by the Defendants, and assented to by the Plaintiff. I think it is competent to a company, under the 17 and 18 Vict. c. 31, to impose conditions upon the carriage of goods without having a signed contract, provided the conditions do not extend to exonerate them from liability for wilful neglect or misfeasance, and are such as ought to be adjudged to be just and reasonable. For the reasons which I have given, I consider that the condition exonerating the Defendants from responsibility for the loss of, or injury to, certain articles (including marbles), unless declared and insured according to their value, does not extend to losses or injuries arising from neglect, or default of the company or its servants, and, therefore, that the condition ought to have been adjudged to be just and reasonable. For these reasons, I think that the judgment of the Exchequer Chamber ought to be affirmed.

Judgment of the Court of Exchequer Chamber reversed; and judgment of the Court of Queen's Bench affirmed.—Lords' Journals, 28 July 1863.

[589] W. C. WENTWORTH.—*Appellant*; J. C. LLOYD and Others.—*Respondents*
[April 23, 29, May 2, 6, 27, 1864].

[Mews' Dig. v. 911: vi. 394, 399: vii. 263; xiv. 1247. S.C. 10 Jur. N.S. 961:
10 L.T. 767; and below, 32 Beav. 467.]

Evidence—Professional Secrecy.

There is no presumption of fact to be made against a party who enforces the rule against the disclosure, by his solicitor, of knowledge professionally acquired. Per Lord Chelmsford.

Armory v. Delamirie (Strange, 505) does not apply to such a case.

In this case a suit had been instituted by the Appellant to set aside a sale of certain estates and other property formerly belonging to him in New South Wales, which sale was made on his behalf by one of the Respondents to the others of them, and the Appellant impeached the fairness of the transaction. The case was heard before the Master of the Rolls, who in September 1863 directed the bill to be dismissed. Evidence had been taken in Sydney, and one of the witnesses was a Mr. Wright, who had acted for some years as the Appellant's solicitor in the colony. Mr. Wright was asked a question, the answer to which was prevented from being given by an objection founded on the fact that he had acquired his knowledge through his professional employment. In commenting upon the case the Master of the Rolls said, "Mr. Wright is asked this question, 'Did Mr. Wentworth ever say anything to you on the subject of any of his dealings with Mr. Mort?' Before the answer was given the Plaintiff interposed with this question, 'Were those communications between me and you professional?' To which Mr. Wright said, 'They were.' And the counsel for Mr. Lloyd of course did not press his question or obtain any answer. The Plaintiff no doubt had a right to prevent Mr. Wright from stating what the Plaintiff had told him about Mr. Mort. It is the client's privilege to prevent the solicitor [590] from divulging confidential communications. But if the client chooses to adopt this conduct, he must be subject to the rule laid down in *Armory v. Delamirie* (Str. 505), where the keeping back of evidence must be taken most strongly against the person who does so. When I say this I wish to distinguish between the case of the suppression of evidence by a witness, and the case where he declines to answer the question on the ground that he is not bound to criminate himself; in which case no presumption of guilt can be fairly drawn from his refusal to answer, or the privilege would be at once destroyed. This is no case of crimination. By the terms of the obligation he is under in this suit he is bound to supply every species of evidence, written or parol, that he can, and I must treat his refusal to allow a witness to answer a question in the same light as if he had kept a material witness out of the way, or refused or prevented the production of a document in his possession."

The Lord Chancellor affirmed the judgment of the Attorney-General, Mr. Sir H. Cairns, Mr. Ba

Lord Chelmsford on the ground that the knowledge obtained, said. The Plaintiff's right to prevent so entirely at variance with well-known and invariable cannot pass it by in [I think it would be instances to which his them to be. I confess closing the mouth of tions, and the conduct jewel which had been the empty socket to the brought to recover it of the finest water, w: *contra spoliatorem*.

confidence of the professional law has so great a reliance even the party himself. his solicitor with reference

As Lord Brougham, pool (1 Myl. and K. communications. "It exists. No man will defence, or to the end the general interest of to permit professional strongly against him. purposes, the law aff only be asserted to the facts of this case the Rolls might be hereafter serious departure from confidence.

[593] WILLIAM MALCOLM.—*Plaintiff*; J. C. LLOYD and Others.—*Defendants* [July

[Mews' Dig. vi. 635, 636; W.R. 178. On appeal, *English Fishery v. Mayor of London* (1882, 3 A.C. 138) documents in evidence (1899), 2 Ch. 121.

Several Fishery—Naval

The soil of navigation is in the public. But the fishery, existed

a just and reasonable condition for the Plaintiff. I think it is s. 31, to impose conditions on a contract, provided the condition is not a condition exonerating the party to certain articles (in- g to their value, does not default of the company or to have been adjudged to be judgment of the Exchequer rsed; and judgment of the July 1863.

and Others.—Respondents

[1].
S.C. 10 Jur. N.S. 961;
467.]

a party who enforces the knowledge professionally such a case.

want to set aside a sale of him in New South Wales. ents to the others of them. tion. The case was heard directed the bill to be dis- of the witnesses was a Mr. solicitor in the colony. Mr. evented from being given his knowledge through his the Master of the Rolls worth ever say anything " Before the answer was those communications said, "They were." And on or claim any answer. it from stating what the privilege to prevent the ions. But if the client e laid down in *Armory v.* ust be taken most strongly distinguish between the case where he declines to to criminate himself; in om his refusal to answer. ase of crimination. By bound to supply every ust treat his refusal to he had kept a material ction of a document in

The Lord Chancellor (Lord Westbury), on the merits of the case, moved to affirm the judgment of the Court below. (The Counsel for the Appellant were the Attorney-General, Mr. Southgate, and Mr. Surrage; for the Respondents, Mr. Rolt, Sir H. Cairns, Mr. Baggallay, Mr. Dickinson, and Mr. Erskine.)

Lord Chelmsford concurred; and with reference to excluding evidence, on the ground that the knowledge of the facts inquired into had been professionally obtained, said. The use which the Master of the Rolls made of the exercise of the Plaintiff's right to prevent the disclosure of confidential communications seems to me so entirely at variance with principle, and so utterly in contradiction to the well-known and invariably recognised privilege of professional confidence, that I cannot pass it by in [591] silence; and, without dwelling upon the contrasted case, I think it would be found upon examination that the presumptions in the two instances to which his Honor referred, are exactly the reverse of what he assumed them to be. I confess that I am unable to conceive the analogy between a client closing the mouth of his solicitor upon a question as to professional communications, and the conduct of the jeweller in *Armory v. Delamirie*, who, upon a mounted jewel which had been found being brought to him, took out the stones and returned the empty socket to the finder, and not producing the jewel at the trial of the action brought to recover its value, was made to pay in damages the value of a jewel of the finest water, which would fit the socket, upon the rule *omnia præsumentur contra spoliatorem*. But a person who refuses to allow his solicitor to violate the confidence of the professional relation cannot be regarded in that odious light. The law has so great a regard to the preservation of the secrecy of this relation, that even the party himself cannot be compelled to disclose his own statements made to his solicitor with reference to professional business.

As Lord Brougham says, when speaking, in *Bolton v. The Corporation of Liverpool* (1 Myl. and K. 94, 95), of the supposed right to compel the disclosure of such communications, "It is plain that the course of justice must stop if such a right exists. No man will dare to consult a professional adviser with a view to his defence, or to the enforcement of his rights." The exclusion of such evidence is for the general interest of the community, and therefore to say that when a party refuses to permit professional confidence to be broken, everything must be taken most [592] strongly against him, what is it but to deny him the protection which, for public purposes, the law affords him, and utterly to take away a privilege which can thus only be asserted to his prejudice. I have been drawn aside from considering the facts of this case through an apprehension that the authority of the Master of the Rolls might be hereafter asserted as establishing what appears to me to be a most serious departure from the principles of the law of evidence applicable to professional confidence.

[593] WILLIAM MALCOMSON.—Appellant; JOHN O'DEA and Others.—Respondents [July 3, 4, 10, 11, 1862; February 24, July 28, 1863].

[Mews Dig. vi. 635, 643, 660; vii. 36, 95. S.C. 9 Jur. N.S. 1135; 9 LT. 93; 12 W.R. 178. On point (i.) as to fishing in navigable rivers, followed in *Edgar v. English Fisheries Commissioners*, 1870, 23 LT. 736; and *Neill v. Devonshire*, 1882, 8 A.C. 138; (ii.) as to presumption of Crown grant, followed in *Goodman v. Mayor of Saltash*, 1882, 7 A.C. 651; (iii.) admissibility of ancient documents in evidence, applied in *Blandy-Jenkins v. Dunraven (Earl of)* (1899), 2 Ch. 121.]

Several Fishery—Navigable River—Crown Grant—Entries of Payment of Rent—Bill and Answer in Chancery—Evidence.

The soil of navigable tidal rivers, so far as the tide flows and reflows, is *prima facie* in the Crown, and the right of fishery therein is *prima facie* in the public. But the right to exclude the public therefrom, and to create a several fishery, existed in the Crown, and might, lawfully, have been exercised by

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state, without an obligation it is suggested, that Agnew's 500 coming out of his separate at Elderton, indebted to the en, having made away his satisfaction to be had from him? to set off a separate against in which each is interested, partners, not liable to the ad upon any account; as it considerable than that, which in the bankruptcy of Castell

(1) Ves. 518: see the notes to understand it. But, it is said, that all the affairs of the partnership are cleared in order to the 2d should have been cleared, and that where the partners are not bound to set off against each other as charged, and the accounts are what the separate will pay, and is this the Commission Partnership debts. Then, if cleared in their names, and a surplus to Agnew, that over as such to his assignees, as left in the pocket of one of the partners, as part of the separate debt, that there was a great deal attached to it, that case, partners were 1000, so, there to be an equity, that from Agnew's separate, But, to take that, then it would be separate creditors, whose debts, that shall be divided, but according to the rights surplus may be constituted the joint estate. Had not one of the partnership credits

fourth, which was his

The claim of Agnew is in 11 Ves. 519, 520. Ves. 521, 522, up to law in not setting jurisdiction; and here the requiring naturalty; now, The assignee of this which she [521] would stand here is no privacy, speaking of 11 Ves. 518, says after not appear to have received

deny, that there is a need this petition stands; but, to bail the habitual arrange-

SYMES. *Ex parte*. April 18th. Aug. 27th. 1803.

Proof under a Commission of Bankruptcy refused: the party claiming the debt being charged by the examination of the bankrupt with the receipt of money; and refusing a disclosure as to the receipt and application on the ground, that it might tend to criminate him.

The petition stated, that the petitioner offered to prove as a debt under a Commission of Bankruptcy against Agnew, the sum of £519, 9s. 2d. due to him for his bill of costs: which debt he had established by evidence to the satisfaction of the Commissioners; and that in that bill he had given credit for all sums he received on account of his bill of costs; and, in case he ever received any other sums from the bankrupt (but which he did not admit, and ought not to be examined to) the same were not received on account of his bill of costs; and the same were paid over long before for [522] the use, and according to the direction of the bankrupt; and at the time of the bankruptcy no part remained in the possession or power of the petitioner; and he insisted, he was not bound to answer more fully.

At another meeting the petitioner stated, that he had not received any sum of money on account of the said bill of costs, except the sums placed in that bill to the credit of the bankrupt; and, if he ever did receive any other sum, which he did not admit of the bankrupt's, he did not receive it on account of the bill of costs, but if received, it was paid over according to the direction of the bankrupt; and no part was then or at the time of the act of bankruptcy in the petitioner's possession. The petitioner, being then asked, if in fact he ever had received any sums from the bankrupt, except what were specified in the bill of costs, he refused to answer; giving as the reason of that refusal, that the answer might tend to criminate him. He stated, that he had spoken the whole truth, with the exception of the matters relating to the preceding answer, and offered to swear, that he had not refused to answer for the purpose of concealing any fact, which would show fraud by the bankrupt on the petitioners; or would affect the estate, or right of the creditors; but that the Commissioners refused to receive that disposition, or to admit him to prove the debt. The petition further stated, that the Commissioners refused to permit him to prove, upon the ground, that he had received sums of money from the bankrupt, the application of which he had not accounted for; which was also stated in the certificate of the Commissioners, as the ground, appearing by the examination of the bankrupt.

The *affidavit* made for the Petition. Mr. *Attorney* for the Assignees. [523] The *Lord Chancellor*: Eldon. This is a new and very important question. The certificate imports what is contrary to the statement of the petition; which does not amount to an admission, that the petitioner did receive any money. The statement is singular, that, if he ever did receive any, it was applied for the use, and according to the direction of the bankrupt; protesting against declaring, whether he did receive any. It comes to this. The bankrupt upon his examination asserts, that the petitioner did receive different sums, which were not accounted for. It does not appear, whether the bankrupt was examined to the application according to his direction and for his use. His examination might have raised the next question, whether, if the money had been so applied, in a question between the creditors and the person making the application, he could have discharged himself from the receipt. If the question comes to be decided by the examination of the petitioner, it stands thus. *Prima facie*, upon proving a bill of costs, the creditors have the same right to inquire, what the party received on account of his principal, with a view to set off, as if both parties solvent were contending. If the ground of the Commissioners' objection, that the petitioner's refusal to answer amounted to an admission, that having received sums of money, he had illegally applied them, that is an incorrect mode of reasoning; the principle enabling him in a Court of Justice to say, that, if they gave no more information than they can have from him, they have no information, upon which they can act. It would be a singular application of the principle to hold, that the law protecting him from answering, they shall use that protest as distinct evidence of guilt; as if it was confessed.

[524] But, take this in another point of view, whether, the parties have not a right to know from the individual, as to the debt alleged and sworn by the bankrupt,

that he has received different sums of money; first, whether he has received the money; 2dly, how it was been applied. The first question if connected with the other, has a tendency to bring him into that situation, in which he may avail himself of the principle, protecting him from a criminal prosecution. The consequence of his refusal to tell whether he received money, and how it was applied, is not, that any Court can say, he has illegally applied it; but every Court may say, if the party will not give that information, which is necessary to decide upon a civil right, they must proceed upon that, which is evidence; viz. the bankrupt's oath, that the petitioner did receive money; and, if he will not say, whether he did, or did not receive it, so that opportunity may be given by investigating and pursuing it to the persons, to whom it was paid, to get at the truth, the result is, not, that I shall tell him, he shall answer, or, that, as he has not answered, he is guilty; but, that, if he will not furnish the means of satisfying the Commissioners, whether the money was properly applied, or improperly, or was not applied, the effect of his protest against answering amounts to this, that it must be concluded, there is a purpose, which makes it preferable to him not to place himself in that situation, in which it is possible to decide the true state of the account. But, I think, this has not been examined yet upon its true principles; and, considering the difference of the certificate and the representation in the petition, the Commissioners should again give him an opportunity of applying; and should call upon the bankrupt to be examined as to the payment, and the application of the money, and, if they shall refuse to receive the [525] proof, they may specially certify the effect of the examination in both.

An Order was pronounced accordingly; but with this qualification: if the petitioner and the bankrupt think proper to be examined. Another meeting was called, at which the bankrupt repeated his statement as to the fact of the receipt of money, and that he had no doubt, the whole was applied to election purposes, according to the trust reposed in the petitioner; but knew nothing of the fact. The petitioner still declined to make any further admission or disclosure than upon his former examination.

Lord, 27th. The Lord Chancellor (Eldon). This debt cannot be proved. The proposition is, that no man can be compelled to answer what has any tendency to criminate him. *Durand v. Green*, 5 Ves. 405, and the note, 410. But the consequence is inevitable; that, if it can be established, that he has received money, that, if alleged to the bankrupt, and he chooses to protect himself against answering as to the application, he comes under the difficulty, that he cannot discharge himself of the receipt of the money. Individually, I have no doubt the petitioner applied this money according to the directions of his employers. But the petitioner still declining to answer, the question is, whether a bankrupt, having sworn to a person, coming to prove a debt, money, for which he is *prima facie* accountable, the creditors, as well as the bankrupt, have not a right to insist, that he shall discharge himself; and, if he chooses to say, he cannot without proving, he has done something illegal, the consequence is, money is traced to him, and he cannot [526] prove, it has come from him; and therefore necessarily it must be considered as still in his hands.

The Petition was dismissed.

Lord St. John v. Lady St. John. Mar. 27, 1806; Aug. 27th, 1806.

[See *St. v. Thurst*, 1824, 2 Barn. & Cress. 551, 554; *Jones v. Waite*, 1839, 7 Scott. 331; *Frammer v. Frammer*, 1841, 4 Beav. 294; *Wilson v. Wilson*, 1845, 14 Sim. 417; *Eyre v. Hope*, 1857, 3 De G. M. & G. 744; *Vansittart v. Vansittart*, 1858, 4 Kay & J. 71; 2 De G. & J. 256.]

Matter in an Answer, relevant according to the case made by the Bill, not scandalous; whatever may be the nature of it. As to the validity in Law or Equity of Articles between husband and wife for future separation, even with trustees, in this instance proving, that the wife may at any time with the assent of the trustees or the survivor, his executors or administrators, separate, and take away the children, *ante*.

Lord and Lady *St. John* having lived apart under articles of separation, a reconciliation took place; upon which occasion another instrument was executed by

them and two trustees; pr with the assent of the trustees separate from her husband, reviving the provisions of the non. to have these instruments and the cause of the separation previous to the first separation they were referred for impet in favour of the answers, an.

Mr. Romilly and Mr. G. any facts, not material to any of the parties, scandalous whether the subject of the between the parties. They Commissioners *Eyre, Ashtons*

[527] The Attorney General person for the Report. The of the wife. The trustees are

to support her interest. In so are extremely material; and, *Fenwick v. Passavant* (2 I

deed is void at law, the Plaintiff may have been such, that to

the protection, to which she answer, therefore, though Lord, may be material. The

did not arise. The answers in Court will see, that it is attain they will examine it. But, with

that the Bill gives occasion for between a bill and an answer, the grounds of her consent to

it unreasonable, might General *B. Bro. v. C.* 614) the Master

full consideration of them dec at the suit of the wife. A nee

an injunction against the husband in *Booth v. Booth* and [528] Lord Alton; but the

appear. The express stipulation *Fletcher v. Bro. v. C.* 619, and a

Chancellor held, that the subject the Court will decide, that this in

to the exercise of all his rights in acted towards his wife; whether

Mr. Romilly, in Reply. The case, cannot be maintained. Not

2 East, 283. See *Durant v. F. of Wymouth*, 1 Jac. 123) such

together they cannot stipulate, as husband and wife. Even, *adm*

sole, that provision cannot be va settlement, previous to marriage,

he will be separated from his wi be the state of his family at that

he has attempted, that he shall at that time four daughters. The

unless these trustees interpose, or instituted in the place of the Ecclesi in both these trustees, and the s

of the survivor; so that it might C. XII.—35*

EVIDENCE
IN
TRIALS AT COMMON LAW

by
JOHN HENRY WIGMORE

In Ten Volumes

VOLUME 8

Revised by

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paradox, for he must prove the criminatory character of what it is his privilege to suppress just because it is criminatory. The only practicable solution is to be content with the door's being set a little ajar, and while at times it permits the suppression of competent evidence, nothing better is available.

CLARK, J., in *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951): "The witness is not exonerated from answering merely because he declines that in so doing he would incriminate himself - his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified . . . and to require him to answer if 'it clearly appears to the court that he is mistaken.' . . . However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evidence to a the implications of the question, in the setting in which it is asked, [1937] that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure would result. The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.'"

HASTIE, J., in *United States v. Coffey*, 198 F.2d 136, 140-41 (3d Cir. 1955) (the latter part of this quotation was cited with approval by the Supreme Court in *Emepak v. United States*, 319 U.S. 190, 198 n.18 (1953)): "[W]e think the problem is what to do about apparently innocuous questions, the answers to which are admittedly not incriminating in themselves, when there are no additional facts before the Court which suggest particular connecting links through which the answer might lead to and might result in incrimination of the witness. We think the Supreme Court is saying that such facts are not necessary to the sustaining of the privilege. The decision in the Mason case would not be followed today. It is enough (1) that the trial court be shown by argument how conceivably a prosecutor, building on the seemingly harmless answer might proceed step by step to link the witness with some crime against the United States, and (2) that this suggested course and scheme of linkage not seem incredible in the circumstances of the particular case. It is in this latter connection, the credibility of the suggested connecting chain, that the reputation and known history of the witness may be significant.

Finally, in determining whether the witness really apprehends danger in answering a question, the judge cannot permit himself to be skeptical; rather must he be acutely aware that in the deviousness of crime and its detection incrimination may be approached and achieved by obscure and unlikely lines of inquiry.

BRENNAN, J., in *In re Pillo*, 14 N.J. 8, 16-20, 22, 93 A.2d 176, 181-183 (1955): "Basically the problem for the trial court is how properly to afford full protection to the witness and at the same time prevent simulated excuses. The trial judge is not to accept the witness' mere statement that the answer will tend to incriminate him. It is for the court to say whether his silence is justified. *Aaron Durr's Case*, *supra*. The test for the judge, 'governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence,' *Hoffman v. United States*, 341 U.S. 479, 487 . . . (1951), is whether from all the circumstances appearing, that is, the setting in which the question is asked, 'there is reasonable ground to apprehend danger to the witness from his being compelled to answer . . . [quoting further from *R. v. Boyes*, *supra*].' . . .

[20] The solution here was not aided by any evidence by Pillo or on his behalf to explain the basis for his fear of self-incrimination. . . . [22] Pillo

chose to keep the door tightly closed and to deny the court the smallest glimpse of the danger he apprehended. He cannot then complain that we see none.

WHEELER, J., in *Hendon v. John Hancock Mutual Life Ins. Co.*, 155 Me. 319, 374-75, 155 A.2d 721 (1959): "We know of no such presumption [that a witness claims the privilege in good faith]. So many persons have claimed the privilege in recent years, for reasons based upon political convictions or upon their personal philosophy as to the proper scope of inquiry and examination rather than upon any honest fear of self-incrimination, that the probabilities that might otherwise have tended to support such a presumption have been greatly diminished. In fact, resort to this great constitutional heritage has been so abused and misused that the claim of privilege is now too often popularly and vulgarly referred [375] to as 'taking the fifth.' If we are to preserve this safeguard for posterity, courts will do well to make no assumptions but rather to make proper inquiry to ascertain as nearly as may be in each case whether or not the privilege is sought in good faith.

The approach described in *R. v. Boyes*, *supra*, applies in most jurisdictions. As well as may be, that rule on the one hand protects the principle of compulsory testimony (§2202 *supra*) against the simulated excuses of witnesses reluctant for reasons other than fear of self-incrimination, while on the other not seriously harming the deserving witness who (for some reason unable to make a showing of appreciable risk) has his claim denied.³ First, the instances in which the disclosure in such marginal cases will in fact contribute to a prosecution are rare and, second, partial protection is in any event probably offered by the rule (§2270 *supra* at note 7) that evidence enormously compelled will be suppressed. The contemporary federal view, however, is otherwise. It reflects a sympathy for the privilege so great that no chance of a ruling requiring self-incriminatory disclosure will be brooked. The federal rule is fairly construed in the quotation *supra* from *Coffey v. United States*.

§2272 (including former §2272a). Effect of making claim: (1) Inference and comment; (2) Sanctions (public and private) permissible against the claimant. The question whether an inference may be drawn from a person's exercise of his privilege, and whether he may properly be penalized because of it, is one which may well puzzle by its anomalies.

1. *Inference and comment.*⁴ An accused is on trial. What should one

³ The possibility of such injustices is acknowledged by Mr. Justice Brandeis in his able dissent to *Emepak v. United States*, 319 U.S. 190, 207 (1953).

§2272 (including former §2272a). 1 Wigmore, 8 Evidence §2272a (3d ed. 1960): "The reasoning [of persons supporting the view that an inference should be permitted] is not to be summarily disposed of. Perhaps it is impregnable. Certainly the possibilities of *pro* and *con* are prolific and interesting. But the substance of it all, and the answers to it, seem to be as follows:

"Argument *pro*: An inference from the refusal is inevitable; therefore why try furiously to avoid it? Answer: The bare inference is indeed inevitable; but it is at

have a practical question whether counsel's comment shall be permitted.

"Argument *secundo*: There is no actual compulsion, as prohibited by the rule; for the accused has an option, and the exercise of this option, by choosing silence, is therefore a voluntary act of his own. Answer: By hypothesis, his answer will be incriminating (and it is the ignoring of this hypothesis which seems to form the fallacy of the learned Chief Justice Appleton); thus, the supposed option lies between answering in confession of the incriminating fact or keeping silence and letting the same fact be inferred; which is no option at all.

"Argument *tertio*: The inference is drawn by virtue of the nonproduction of the

infer from his election not to testify in his own defense? Or a witness—whether party or not, whether the cause is criminal, civil or investigatory—is on the stand. He is asked, "Were you in the barroom at the time of the affray?" This may be answered "yes" or "no." What is the significance of a claim of privilege? Or he may be asked, "Are you now or have you ever been a member of the Communist Party?" The answer, again, may be "yes" or "no." What inference does a plea of privilege support? The layman's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime.

The lawyer's answer would be more complex.

In the case of an *accused*, as a matter of logic, failure to testify may indeed imply confession of guilt of at least one of the crimes or degrees of crime charged. In most instances (a characterization of disturbingly little use in a *particular* instance) this is probably the true significance of silence. But silence by the accused also, as a matter of logic, may imply fear of exposure of matters related only remotely to the charges, fear of impeachment by proof of bad character evidence (especially prior convictions), or fear that his demeanor on the witness stand will do his innocence a fatal disservice. In the case of a *witness*, the lawyer's answer would be that, in logic, the claim if improperly made justifies no relevant inference at all and if properly made justifies only an inference of the incriminating fact, not of crime. In all instances, the lawyer would certainly add that it is not a question of mere logic—of the recognition that an inference of guilt is open or even likely. The question is whether the inference, though not denied, should not be ignored—whether principle and expediency require us to prevent, so far as feasible, any further use of the inference than is inevitable in the mere disclosure of the claim. If the issue arises during a trial, perhaps the jury can effectively be instructed on the subject; at any rate the comment by counsel can be prohibited. Thus the question ceases to be merely one of mental gymnastics and is after all worth attempting to solve.

testimony of a competent witness (*ante*, §285), and not by virtue of the claim of privilege, and hence the two may be kept distinct,—precisely as the character of the party as witness and as accused are allowed to be kept distinct (*ante*, §61). Answer: It is true that the inference is disavowed by virtue of that principle, but it is also a necessary implication in the claim of privilege; so that the analogy is not exact. Where a constitutional rule is involved, and not merely an ordinary rule of evidence, it would seem better to allow the former and not the latter aspect to control the situation. Nevertheless, if a logical mode of escape from the privilege is devised—that is, if we are determined to limit its harmful operation by any interpretation which an honest logic will permit—this argument seems a tenable one.

"Argument fourth: There is no actual extraction of any reply, and hence the

privilege not to reply is literally maintained. Answer: It is true that no reply is required, and that this is the strongest argument for maintaining that the privilege is not violated. But if we consider the ultimate ground of policy upon which the privilege rests (*ante*, §224 [note 1]), we observe that a general practice of permitting the use of such inferences might (as against accused persons, at least) tend to bring about the very evils which the privilege is intended to prevent, namely, the reliance by the prosecution for the means of proof, upon the confessions in court of the accused himself or upon the inferences of guilt which could be drawn from his silence, and the consequent slack and imperfect investigation of other sources of proof. If there is such a policy involved in the privilege, it applies equally to the prohibition of inferences, differing only in the degree of danger involved."

For a century this question remained in controversy in England and Canada. Until the middle of the last century, it could not arise for an accused's testimony, because the accused could not testify even if he would. But the case of an ordinary witness—use of the inference to impeach his credit—presented very much the same issue, and each generation exhibited from time to time the same difference of opinion. Finally, in 1898 the statute making accused persons competent scuttled the law, viz., that in England comment by the jury only is allowable, and in Canada comment by neither judge nor counsel is allowable. In the *United States* almost universal legislation decreed, in varying phraseology, that the inference shall not be availed of. Only by a few courts and constitutions was the inference permitted to be drawn against one who claims the privilege of silence, but the number is gradually being enlarged.¹

¹ Both the American and British citations are contained in this footnote.

UNITED STATES: The *U.S.* states which allow comment in one form or another do so either by constitutional provision (California and Ohio), by judicial decision (Connecticut, Iowa and New Jersey—the latter two states having no specific constitutional privilege), or by rules of court procedure (New Mexico). It should be noted that the courts of two states (Massachusetts and South Dakota) have held statutes allowing comment unconstitutional, and that the legislatures of two states (Maine and Vermont) have overruled the courts' determinations that comment and inference were permissible. The Virgin Islands, by adopting Uniform Rule of Evidence 21(d), permits comment on and inference from the accused's failure to testify.

While the constitutional and statutory provisions cited *infra* refer specifically only to the *accused*, they (as in the case of the similarly worded constitutional enunciations of the privilege itself, discussed *supra* §222) have usually been construed to establish a principle of general application—to protect a person, whether or not he be an accused, from inference from his resort to privilege.

In addition to the citations *infra* from all American jurisdictions, see §252 *supra* for constitutional provisions and §188 *supra* for statutes relating to testimonial qualifications. See also Bruce, *The Right to Comment on the Failure of the Defendant to Testify*, 31 Mich. L. Rev. 226 (1932); Clapp, *Privilege Against Self-Incrimination*, 10 Rutgers L. Rev. 511, 561-59 (1936); Reeder, *Comment Upon Failure of Accused to Testify*, 31 Mich. L. Rev. 40 (1932); Way, *The Rule Permitting Comment on Failure to Testify*, 65 N.J.L.J. 97 (1932) (study of New Jersey decisions); Note, *Limitations on Right to Comment upon Failure of Accused to Testify*, 34 Calif. L. Rev. 761 (1946); Note, *Proposed Right of Comment on Failure of Defendant to Testify in a Criminal*

Trials, 25 Fordham L. Rev. 381 (1956); Comment, 46 Mich. L. Rev. 342 (1939); Annot., 68 A.L.R. 1108 (1930); Annot., 171 id. 1267 (1947).

Texas: 18 U.S.C. §3181 (1932) ("His failure to make such request shall not create any presumption against him"); Exec. Order No. 9903, 13 Fed. Reg. 6993, 5108 (1948) (Public Health Service, §21.307; disciplinary proceedings similar to above). See *Wilson v. United States*, 149 U.S. 60 (1893); *Wingo v. United States*, 308 U.S. 287 (1939) (defendant held to have right to instruction that failure to testify creates no presumption); *Johnson v. United States*, 318 U.S. 389 (1943) (no comment or inference permitted from accused's failure to testify where, having taken stand, he was erroneously permitted to claim privilege); *United States v. Feinberg*, 110 F.2d 592 (2d Cir. 1941) (comment by prosecution allowed where accused's counsel attempted to explain accused's failure to testify); *Holland v. United States*, 318 U.S. 121, 136 (1943) ("once the Government has established its case, the defendant remains quiet at his peril"); *Beard v. United States*, 222 F.2d 81 (4th Cir. 1957) (income tax evasion by bookmaker; charge to jury that it might consider defendant's failure to explain discrepancy between defendant's tax return and government's proof upheld); *Holland v. United States*, *supra*, quoted with approval; *Smith v. United States*, 269 F.2d 436 (5th Cir. 1959) (held error for court not to instruct jury that no inference could be drawn from failure of defendant to testify; request for such an instruction had been made, and prosecutor had commented on failure of defendant to offer any evidence); *Travis v. United States*, 279 F.2d 127 (4th Cir. 1960) (comment by prosecutor that there was no evidence to contradict government's evidence held not to be comment on accused's failure to testify).

Uniform Rule of Evidence 23(d): "If an accused in a criminal action does not testify, counsel may comment upon accused's fail-

not to testify, and the trier of fact may draw all reasonable inferences therefrom." Id. Rule 39: "Reference to Exercise of Privileges. Subject to Paragraph (4), Rule 23, if a privilege is exercised not to testify, or to prevent another from testifying, either in the action or with respect to particular matters, or to refuse to disclose or to prevent another from disclosing any matter, the judge and counsel may not comment thereon, no presumption shall arise with respect to the exercise of the privilege, and the trier of fact may not draw any adverse inference therefrom. In those jury cases wherein the right to exercise a privilege, as herein provided, may be misunderstood and unfavorable inferences drawn by the trier of fact, or be unpaired in the particular case, the court, at the request of the party exercising the privilege, may instruct the jury in support of such privilege." Note, however, that under Uniform Rule of Evidence 71 a criminal defendant may not be impeached by proof of prior convictions unless he first puts his character in issue.

Model Code of Evidence Rule 201(8) (1942): "If an accused in a criminal action does not testify, the judge and counsel may comment upon accused's failure to testify, and the trier of fact may draw all reasonable inferences therefrom." Id. Rule 233: "If a privilege to refuse to disclose . . . in a matter is claimed and allowed, the judge and counsel may comment thereon, and the trier of fact may draw all reasonable inferences therefrom."

Alabama: Ala. Code tit. 15, §307 (Supp. 1955) ("his failure to make such a request shall not create any presumption against him, nor be the subject of comment by counsel. If the solicitor or other prosecuting attorney makes any comment concerning the defendant's failure to testify, a new trial must be granted on motion filed within thirty days from entry of the judgment"). See *Stephens v. State*, 250 Ala. 123, 33 So.2d 235 (1948) (homicide; remarks of solicitor in argument to jury, held to amount to comment on failure of defendant to testify); *Broadway v. State*, 257 Ala. 414, 60 So.2d 701 (1952) (the last sentence of the statute, added in 1919, held beyond the constitutional power of the legislature); *Welch v. State*, 263 Ala. 57, 81 So.2d 901 (1955) (liquor offense; statement of prosecutor in argument to jury, "he had a good case and the defense had not offered any evidence," not a comment); *Vinet v. State*, 38 Ala. App. 299, 83 So.2d 357 (1955) (larceny of cow; prosecutor's argument with reference to lack of explanation of defendant's possession of cow upheld).

Alaska: Alaska Comp. Laws Ann. §66-13-53 (1919) (similar to Fed. *supra*).

Arizona: Ariz. Rev. Stat. Ann. §13-163 (1956) ("The defendant's neglect or refusal

to be a witness in his own behalf shall not in any manner prejudice him, or be used against him on the trial or proceedings").

Arkansas: Ark. Stat. Ann. §13-2016 (1917) (similar to Fed. *supra*); id. §6-815 (Supp. 1957) (State Sovereignty Commission; refusal to testify or produce evidence on ground of self-incrimination, notwithstanding grant of immunity, considered as part of evidence). See *Collins v. State*, 113 Ark. 601, 221 S.W. 455 (1926) (comment by prosecutor allowed where defendant's counsel first so commented); *Cox v. State*, 143 Ark. 1145, 225 S.W. 29 (1927) (defendant held entitled to instruction concerning his failure to testify).

California: Cal. Court. Art. 4, §13 (but in any criminal case, whether the defendant testifies or not, his failure to explain or deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury); Cal. Pen. Code §§1097, 1127, 1323 (give effect to the Constitution). The constitutionality of these provisions was upheld in *Adams v. California*, 352 U.S. 46 (1957). See *People v. Sanchez*, 35 Cal. 2d 522, 531, 219 P.2d 5, 14 (1959) (prosecutor's comment upon defendant's failure to testify and failure of judge to give instruction thereon, held error where accused's defense of invocation "would have presented a rational explanation for his failure to deny the evidence against him"); *In re Plummer*, 79 Cal. App. 2d 651, 180 P.2d 771 (1947) (murder; accused's failure to testify before committing magistrate does not of itself constitute probable cause); *People v. Talle*, 111 Cal. App. 2d 650, 661, 215 P.2d 633, 641 (1952) (comment and cross-examination of defendant concerning his refusal to take stand as prosecution's first witness held error; by express constitutional and statutory limitation comment is allowed only when the prosecution has first made out "deny"); *People v. Scott*, 176 Cal. App. 2d 458, 1 Cal. Rpt. 600 (1960) (comment by prosecutor on defendant's failure to testify approved).

Canal Zone: C.Z. Code tit. 6, §623 (1934) (like Ariz. *supra*).

Colorado: Colo. Rev. Stat. Ann. §9-715 (1953) ("but in no case shall a neglect or refusal of the accused to testify be taken or considered any evidence of his guilt or innocence").

Connecticut: Conn. Gen. Stat. Rev. §54-81 (1958) ("The neglect or refusal of an accused party to testify shall not be commented upon to the court or jury"). This statute has been interpreted not to forbid comment by the judge; *State v. Heno*, 119 Conn. 29, 171 A.2d 181 (1954); *State v. Hayes*, 127 Conn. 543, 38 A.2d 895 (1941). It does not forbid the drawing of an inference if the prosecutor has first made out a prima

facie case; *State v. Ford*, 100 Conn. 490, 116 A.2d 828 (1955); *State v. Ted Vrechio*, 145 Conn. 549, 115 A.2d 160 (1958).

Delaware: Del. Code Ann. tit. 11, §3501 (1957) ("A refusal or failure to testify shall not be construed or commented upon as an indication of guilt").

Florida: Fla. Stat. Ann. §918-09 (1941) ("not shall any prosecuting attorney be permitted before the jury or court to comment on the failure of the accused to testify in his own behalf"). See *Simmons v. State*, 139 Fla. 645, 19d So. 756 (1939) (statute also forbids comment on failure to testify at preliminary hearing, on application for bail, at habeas corpus hearing, or former trials. In re the Integration Rule of the Florida Bar, 101 So.2d 767, 867 (Fla. 1956) ("This court is committed to the doctrine that claiming the privilege against self-incrimination is not a disgrace; it is not to be construed as an inference of guilt or that the one who claims it is addicted to criminal tendencies; it may be claimed by the innocent as well as the guilty and its exercise may not be considered a breach of duty to the court"); *Aid v. State*, 108 So.2d 38 (Fla. 1959) (receiving stolen property; prosecutor's comment to jury on defendant's failure to testify and explain his possession of goods held reversible error; court distinguished between failure of defendant soon after arrest to explain possession (which will support an inference) and his failure on the trial to explain possession (which will not)).

Georgia: Ga. Code Ann. §§38-415, 38-416 (1954) (accused is neither competent nor compellable witness for or against himself, but he may give such sworn statement as he desires). See *Parks v. State*, 208 Ga. 508, 67 S.E.2d 716 (1951) (failure of accused to give such sworn statement not subject to comment or inference); *Williams v. State*, 98 Ga. App. 316, 105 S.E.2d 771 (1958) (comment by prosecutor to effect that defendant's statement was not under oath held not to be prejudicial error).

Hawaii: Hawaii Rev. Laws §22-15 (1955) ("but in case any such person neglects or declines to offer himself as a witness no inference shall be drawn prejudicial to such accused by reason of such neglect or refusal, nor shall any argument be permitted tending to injure the defense of such accused person on account of such failure to offer himself as a witness").

Idaho: Idaho Code Ann. §19-3003 (1948) (similar to Ariz. *supra*).

Illinois: Ill. Ann. Stat. c. 38, §731 (Smith-Hurd, 1935) ("his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect"); id. §82 (theft); similar). See *People v. Gochen*, 352 Ill. 582, 186 N.E. 162 (1933) (defendant who fails to testify is entitled to an instruction that such failure

creates no presumption against him). See also Deck, Proposed Reforms to Illinois Criminal Law and Procedure, 12 J. Crim. L. & C. 385 (1921) ("there is no sound reason why his failure to deny the charge should not be the subject of comment by the prosecutor").

Indiana: Ind. Ann. Stat. §9-1603 (1956) ("But if the defendant do not testify, his failure to do so shall not be commented upon or referred to in the argument of the cause, nor commented upon, referred to, or in any manner considered by the jury trying the same; and it shall be the duty of the court, in such case, in its charge, to instruct the jury as to their duty under the provision of this section").

Iowa: Iowa Laws 1928, c. 108, §1 had explicitly forbidden comment, and even declared that the accused's election not to testify "shall not leave any weight against him on trial." This provision was struck out by Iowa Laws 1929, c. 290. Before this time, the Supreme Court had held that the privilege was beyond legislative control even though not mentioned in the State Constitution (see §252 *supra*, note 1). Iowa Code Ann. §781.12 (1950) now reads simply: "Defendants in all criminal proceedings shall be competent witnesses in their own behalf, but cannot be called as witnesses by the state." This statute has been construed to allow both comment by the prosecuting attorney and inference; *State v. Ferguson*, 226 Iowa 361, 283 N.W. 917 (1939) (constitutionality upheld); *State v. Graft*, 228 Iowa 159, 290 N.W. 97 (1940).

Kansas: Kan. Gen. Stat. Ann. §62-1320 (1949) ("The neglect or refusal of the person on trial to testify . . . shall not raise any presumption of guilt, nor shall the circumstances that [such person] . . . failed or refused to testify be either commented upon or referred to by any attorney prosecuting the case, nor shall the same be considered by the court or jury before whom the trial takes place"). Distinguish comment on failure of codefendant to testify; *State v. Addington*, 158 Kan. 276, 147 P.2d 367 (1941).

Kentucky: Ky. Rev. Stat. §155-090 (1959) (similar to Ill. *supra*). See *Hicks v. Commonwealth*, 311 Ky. 492, 224 S.W.2d 936 (1949) (remark of Commonwealth's attorney that the defendant did not take the stand held prejudicial); *Bradley v. Commonwealth*, 261 S.W.2d 612 (Ky. 1953) (indirect comment of Commonwealth's attorney on failure of defendant to testify held prejudicial); *Adams v. Commonwealth*, 261 S.W.2d 283 (Ky. 1954) (prosecutor's argument to jury, susceptible of the inference that the defendant failed to testify, held prejudicial).

Louisiana: La. Rev. Stat. Ann. §15:461 (1951) ("In the trial of all indictments, complaints and other proceedings against persons charged with . . . commission of crimes

daval, 59 N.M. 85, 279 P.2d 850 (1959) (rule does not violate constitutional privilege).

New York: N.Y. Code Crim. Proc. §393 (similar to Fed., *infra*). See *People v. Leavitt*, 301 N.Y. 113, 92 N.E.2d 915 (1950) (comment in summation to the jury as to defendant's failure to testify held error); *People v. Hetseni*, 301 N.Y. 80, 106 N.E.2d 30 (1952) (murder; district attorney's reference to the failure of the defendant to testify held error); *People v. Brown*, 285 App. Div. 1165, 110 N.Y. 1 382 (1955) (murder; reference to fact that certain testimony was uncontradicted held error where only defendant could have contradicted it); *People v. Manning*, 9 App. Div. 2d 789, 193 N.Y.S.2d 50 (1959) (comment on failure of defense to contradict evidence of state's witness held error when such contradiction would have had to come from defendant; contradiction affirmed, however, because error was cured by judge's charge).

Proposals to amend §393, made in 1956 and in 1956, were unavailing. See Report of the Joint Legislative Committee on the Coordination of Civil and Criminal Practice Acts, p. 11 (1956); New York Commission on the Administration of Justice, Second Supplemental Report (Leg. Inc. 1956, No. 80), p. 15.

North Carolina: N.C. Gen. Stat. §5-24 (1953) (similar to Fed., *infra*). See *State v. Buchanan*, 216 N.C. 505, 61 S.E.2d 521 (1950) (excerpt from former opinion of supreme court by solicitor held to amount to such comment); *State v. Bowdler*, 233 N.C. 683, 65 S.E.2d 323 (1951) (same for bids comment on accused's failure to testify, even by his own counsel); *State v. Waller*, 251 N.C. 465, 112 S.E.2d 61 (1950) (comment by prosecutor that no one had contradicted testimony of state's chief witness held not to be improper comment on defendant's failure to take stand).

North Dakota: N.D. Rev. Code §29-211 (1913) (similar to Kan., *supra*).

Ohio: Ohio Const. art. I, §10 ("No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel"). See *Patterson v. State*, 122 Ohio St. 96, 171 N.E. 26 (1930) (defendant's voluntary testimony before the grand jury was introduced by the prosecution at the trial; comment by the prosecution concerning defendant's failure to testify at the trial held error since, by introduction of his own evidence, he had in effect testified before the petit jury); *State v. Parks*, 152 N.E.2d 154 (Ohio Ct. App. 1957) (comment by counsel on defendant's failure to testify and inference by jury therefrom held proper).

Oklahoma: Okla. Stat. Ann. tit. 22, §701 (1937) (similar to Ill., *supra*, but with additional clause: "If commented upon by counsel it shall be ground for a new trial").

See Yeager v. State, 13 Okla. Crim. 317, 278 Pac. 665 (1929) (prosecutor's comment excused because subject opened by accused's counsel); *League v. State*, 58 Okla. Crim. 239, 52 P.2d 14 (1935) (same); *Shepherd v. State*, 77 Okla. Crim. 131, 135 P.2d 605 (1943) (robbery); comment of county attorney in argument to jury on failure of defendant to testify held to warrant a new trial; *Boyd v. State*, 30 Okla. Crim. 281, 136 P.2d 431 (1943) (Why did the defendant deny the evidence here? held reversible error); *Clark v. State*, 91 Okla. Crim. 210, 218 P.2d 110 (1950) (statement that the evidence for the state was uncontradicted held not to violate statute); *Taylor v. State*, 95 Okla. Crim. 188, 211 P.2d 223 (1952) ("The evidence of the state is not contradicted" upheld; however, practice of invoking bar defense assertions disapproved); *Harks v. State*, 273 P.2d 880 (Okla. Crim. App. 1954) (statement "defendant brings no defense" does not amount to comment upon defendant's failure to testify); *Demery v. State*, 349 P.2d 379 (Okla. Crim. 1959) (comment on absence of evidence "on the other side" held not to violate rule against comment on defendant's failure to testify).

Oregon: Ore. Rev. Stat. §19-310 (1950) (similar to Fed., *supra*).

Pennsylvania: Pa. Stat. Ann. tit. 18, §631 (1939) (One may neglect or refusal of any defendant, actually upon trial in a criminal court, to offer himself as a witness be treated as creating any presumption against him, or be adversely affected by court or counsel during the trial). See *Commonwealth v. Yellin*, 115 Pa. Super. 215, 175 Atl. 429 (1941) (trial judge's comment that defendants were not called upon to testify, held not "adverse"); *Commonwealth v. Kaufman*, 179 Pa. Super. 215, 116 A.2d 316 (1955) (where defendant's counsel undertook to explain why defendant did not testify, he waived the benefit of the statute and was not entitled to an instruction thereon); *Commonwealth v. Fowler*, 150 Pa. Super. 93, 132 A.2d 507 (1957) (judge's charge that jury could draw inference from defendant's claim of privilege during questioning by police held to be violation of constitutional privilege).

Puerto Rico: P.R. Const. art. II, §11 ("the failure of the accused to testify may be neither taken into consideration nor commented upon against him"). See *People v. Dife*, 69 P.R. 577 (murder; error held cured by instructions).

Rhode Island: R.I. Gen. Laws Ann. §12-17-9 (1956) (similar to Ala., *supra*).

South Carolina: S.C. Code §26-105 (1952) (merely allows accused to testify "if he desires"). Judicial decisions have, however, prohibited comment and inference; *State v. Boward*, 26 S.C. 197, 11 S.E. 481 (1892); *State v. Fox*, 227 S.C. 138, 87 S.E.2d 287

(1955); *State v. Allen*, 231 S.C. 101, 90 S.E. 2d 826 (1957).

State v. Brinn, 237 S.C. 305, 111 S.E.2d 669 (1959) (murder; remarks made by trial judge, in ruling on admissibility of certain evidence, to the effect that defendant could take the stand and testify held reversible error).

South Dakota: S.D. Code §31-2613 (1955) (similar to Fed., *infra*). An earlier statute had allowed comment; S.D. Laws 1927, c. 53. But about eight years it was held invalid; *State v. Wolfe*, 61 S.D. 474, 206 N.W. 116 (1936).

Tennessee: Tenn. Code Ann. §10-2103 (1955) (similar to Fed., *supra*).

Texas: Tex. Code Ann. Proc. Ann. art. 710 (1941) ("but the failure of any defendant to so testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause"). See *Chambers v. State*, 147 Tex. Crim. 343, 180 S.W.2d 927 (1944) (comment by prosecution that the evidence was uncontradicted held error where only defendant could have denied it); *Compton v. State*, 118 Tex. Crim. 53, 181 S.W.2d 630 (1945) (statute does not forbid the court to mention defendant's failure to testify, but prohibits its being construed against him); *Landford v. State*, 146 Tex. Crim. 113, 239 S.W.2d 361 (1944) (improper comment cannot be cured by instruction); *Barrera v. State*, 165 Tex. Crim. 572, 307 S.W.2d 518 (1957) (argument of state's counsel, held to amount to an allusion as to the failure of defendant to testify); *Deason v. State*, — Tex. Crim. —, 320 S.W.2d 670 (1959) (forever; statement in argument of prosecutor, held equivalent of comment upon failure of defendant to testify); *Johnson v. State*, — Tex. Crim. —, 322 S.W.2d 540 (1959) (prosecutor's comment on absence of evidence proving that defendant's possession of liquor was for other than sale held not to violate rule against comment on defendant's silence at trial).

Utah: Utah Code Ann. §7-11-5 (1953) (similar to Ark., *supra*).

Vermont: Vt. Stat. tit. 13, §601 (1959) ("the failure of such person to testify shall not be a matter of comment to the jury by either the court or the prosecution and shall not be considered by the jury as evidence against him"). This statute, enacted in 1955, changed the law in Vermont, which had, by judicial interpretation, allowed such comment and inference. See *State v. Baker*, 115 Vt. 91, 53 A.2d 53 (1947); *State v. Levine*, 117 Vt. 320, 91 A.2d 658 (1952).

Virginia: Va. Code Ann. §19-238 (1950) (similar to Ala., *supra*). See *Elliot v. Commonwealth*, 172 Va. 555, 1 S.E.2d 273 (1939) (improper comment requires reversal; harmless error doctrine inapplicable because comment deprived accused of fair trial); *Jefferson v. Commonwealth*, 192 Va. 471, 65

S.E.2d 866 (1954) (comment, comment on Commonwealth's attorney held error, and prejudicial error, because there was substantial conflict in evidence as to defendant's guilt).

Virgin Islands: V.I. Code Ann. tit. 5, §5-51 (1957) (adopting Uniform Rule of Evidence 23(4), quoted *infra*; the revisers indicate that their failure to adopt also Rule 39 would permit both comment by the judge and inference).

Washington: Wash. Rev. Code §10-52-010 (1956) ("it shall be the duty of the court to instruct the jury that no inference of guilt shall arise against the accused if the accused shall fail or refuse to testify as a witness in his or her own behalf"); Rule of Practice 12 (1944) abrogated the mandatory aspect of this provision so that the trial court is no longer required to give the instruction, but comment by counsel is still improper).

West Virginia: W. Va. Code Ann. §5731 (1953) (similar to Ill., *supra*).

Wisconsin: Wis. Stat. Ann. §325.13 (1956) (similar to Fed., *supra*).

Wyoming: Wyo. Comp. Stat. Ann. §7-21 (1957) (similar to Ill., *supra*).

ESCRABO: *Millman v. Tucker*, Peake Add. Cas. 222 (1803) (Ellenborough, L.C.J., told the jury "that if the witness chose to avail himself of that protection which the law gave him, he was not thereby at all disadvantaged"); *Ilford v. Pasingham*, 16 Ves. Jr. 50, 64 (1809) (Eldon, L.C.: "I protest strongly against the doctrine that Robert Pasingham, having demurred to so much of the bill as seeks discovery of facts which have a tendency to affect him criminally, is on that account to be considered as admitting the allegations of the bill"); R. v. Watson, 2 Stark. 453 (1817) (Hayley, J.: "He may demur to the question, for he is not bound to criminate himself; and if he refuse, this is not without its effect on the jury . . . It would perhaps be going too far to say that you may discredit him if he refuse to answer it is for the jury to draw what inferences they may"); Holroyd, J.: "If you propose a question to a witness and he declines to answer it, his not answering can have no effect with the jury"; *Ruse v. Blakemore*, Ry. & Mo. 383 (1826) (Aldon, C.J.: "There was an end of the protection of a witness if a demur to the question were to be taken as an admission of the fact inquired into"); *Boyle v. Wiseman*, 10 Ex. 647, 651 (1855) (Parker, B.: "The protection given by the statute would be of no avail, if the refusal to answer was construed into evidence of guilt; it is impossible, however, to prevent the jury drawing their own conclusions"; Alderson, B.: "It seems to me that a party not denying a fact which it is in his power to deny gives a color to the other evidence against him"); *Bartlett v. Lewis*, 2 C.B. (n.s.) 219, 263

(1862) (Fife, C.): "I must confess I do not see why a guilty man should not be prejudicial in the eyes of a jury").

Then in 1898 came the statute (quoted *infra* §188) qualifying the accused as a witness, which provided that the accused's failure to give evidence "shall not be made the subject of any comment by the prosecution." This, however, left open the question of the judge's right to comment on the exercise of his common law power to comment generally on the evidence. It was immediately decided, and has since been adhered to, that the judge may so comment: *Kops v. R.*, [1940] A.C. 650 (under N.S. Wales Stat. 1892, 55 Vict. No. 5, §6), the judge may comment on the accused's failure to explain by his own testimony the evidence against him; and the provision against being "compellable" to testify does not forbid the drawing of inferences: *R. v. Rhodes*, [1909] 1 Q.B. 77, 83 (the court's right to comment to the jury on the evidence is not taken away by the statute qualifying the accused; and comment on a failure to testify is allowable); *Mudge's Case*, 1 Crim. App. R. 62 (1908) (inference made from accused's failure to take the stand, under Stat. 1898); *Kirkham's Case*, 2 Crim. App. R. 253 (1909) ("People who set up an alibi, and do not go into the box, are not entitled to come here and rely upon that defence"); *Hampson's Case*, 2 Crim. App. R. 271 (1909); *Theodorus' Case*, 3 Crim. App. R. 269 (1909); *George J. Smith's Trial*, *Reale British Trials* 398 (1912) (trial in 1911; wife murdered; the accused's failure to testify commented on by the judge); *R. v. Naylor*, [1933] 1 K.B. 685 (1932) (the accused, before the magistrate, on being summoned to the usual manner and asked whether he wished to make any answer to the charge, answered that he did not "except that I am innocent"; held that a comment by the judge on the accused's failure to say more was improper); *R. v. Parker*, [1933] 1 K.B. 850 (1932) (*R. v. Naylor*, *supra*, distinguished; here the accused was tried with two others, who had not reserved their defense in the police court, and the judge's comment that the prosecution had in his case had no opportunity to inquire into the defense was held not improper); *R. v. Littleboy*, [1936] 2 K.B. 408 (causal knowledge at the preliminary hearing the accused "received his defence", but at the trial his defense was an alibi and the trial court said in comment that his failure to make that defense at the trial was "unfortunate", because the police could not test the statement in the interim; held not a misdirection, in the circumstances); *R. v. Naylor*, *supra*, distinguished; *Trial of Rattenbury and Stener*, *Notable British Trials Series* 269 (1935) (murder; defense that Stener may have been under influence of cocaine; Humphreys, J., in charge: "there is one human being who

knows . . . and that person is Stener himself. . . . Stener perhaps has not to give the evidence"; said the inference "perhaps is conclusive"); *R. v. Leakey*, [1911] 1 K.B. 80 (Crim. App.) (comment by judge on failure of defendant to deny guilt after caution by police officer held improper); *R. v. Naylor*, *supra*, *forthwith*.

There is *Attorney General v. Hamlyn*, [1911] 1 R. 104 (1911) (particulars what ever may be the limitations of comment for the prosecutor, the trial judge has a discretion "whether and how far he will comment upon the statement, or silence of one, from the prisoner"; here, a comment on failure to give details of an alibi were held not improper); *People v. Traynor*, [1956] 1 R. 110 (Crim. App. 1954) (causal knowledge of guilt held; trial judge exceeded bounds of discretion in commenting upon failure of defendant to testify).

CANADA: By Dom. Stat. 1901, c. 51, §1, R.S. 1906, c. 114, Evidence Act, §1, Rev. Stat. 1927, c. 59, §1 (quoted *infra* §188), the accused's failure to testify "shall not be made the subject of comment by the judge or by counsel," etc. This differed from the English statute by including the judge in the prohibition of comment, and this provision has since been frequently applied.

Dominion: *R. v. Kelly*, 21 D.L.R. 311, 323 (1916) (where the accused elects to make a statement not under oath, the judge may state to the jury that this is not the equivalent of sworn testimony, without violating the Evidence Act); *Arcillier v. R.*, 18 D.L.R. 158 (1919) (murder; judge's comments on the accused's failure in his testimony to draw the act, held not improper on the principle of §2273, *infra*).

Alberta: *R. v. Gallagher*, 63 D.L.R. 629 (Alta. 1921) (judge's comment held improper); *R. v. Joseph*, [1934] 3 D.L.R. 22 (on appeal, the accused's failure to take the stand may be considered in determining whether a new trial would be just).

British Columbia: *R. v. Mah Hong Hing*, 53 D.L.R. 356 (B.C. 1920) (judge's comment on accused's failure to disclose his defense at the preliminary hearing held improper under Evidence Act); *R. v. Schweitzerbauer*, [1934] 2 D.L.R. 739, 746 (on appeal, the accused's failure to testify may be considered in determining whether a substantial wrong or miscarriage of justice has occurred).

Manitoba: *R. v. Houss*, [1936] 2 D.L.R. 781 (the appellate court here held not entitled to consider the accused's silence for the purpose of confirming the justice of a conviction).

New Brunswick: *R. v. Maguire*, 35 N.B. 609 (1901) (the judge's comment on the accused's failure to show an alibi held on the facts a comment violating the statute).

Northwest Territories: *R. v. King*, 6 N.W. Terr. 1 (1907) (murder; applying the Evidence Act).

Assuming that the rule forbids the drawing of inferences from a claim of privilege, it remains to notice the forms in which the rule is applicable.³

(a) It clearly forbids comment by counsel,⁴ as well as comment by the judge,⁵ upon the accused's failure to testify.

New Scotland: *R. v. Sanford*, 9 New Brw. 276 (1914) (instructing the accused, counsel's statement that "my evidence has not been contradicted," the accused being the only other person at the transaction and he not testifying, held not improper under Evidence Act).

Ontario: *R. v. Zicari*, [1976] 2 D.L.R. 542 (statement by counsel's counsel, giving his reason for not calling the accused, held not to allow the judge to comment).

Quebec: *R. v. Rimaudo*, 21 D.L.R. 165 (1945) (comment by the judge held improper under Evidence Act; the judge's withdrawal of the comment, held here not to cure the error); *Bignouette v. R.*, [1927] 1 D.L.R. 1117 (murder; judge's comment on failure to explain away evidence, held to violate the privilege).

See a learned comment on Canadian precedents by E. L. B. Johnston, K.C., Esq., and L. A. Schneider, Evidence of Accused Persons, [1951] 1 D.L.R. 1.

The distinctions in the text *infra* do not necessarily apply in England nor the six states, mentioned at the beginning of note 2 *infra*, which adhere to the minority view. Nor do they exhaust the special problems growing out of inference from the claim of privilege against self-incrimination.

For example, a tricky problem is presented by questions asked in a series. A witness before a grand jury or congressional committee is asked whether he ever belonged to subversive organizations (1) A, (2) B and (3) C. His answers are (1) no, (2) privilege and (3) no. Logically, the inference here as to Organization B is no different than if only one question had been put (as to Organization B) and only one answer given (privilege). The presence in a series of that question and answer adds to the incriminating inference only because the answers to the *apparent* questions demonstrate that the witness is behaving logically — that is, that he is reserving the privilege for bona fide self-incriminating matters. In either event, series or not, it is easy to infer that a truthful answer as to Organization B would be "yes."

The point just made — relating to a simple open-ended series of questions — does not apply, however, where the questions come in a pinpointing or closed-ended series. There a "no" answer to one question may imply a "yes" answer to a complementary question. For example, an inquisitor could easily discover whether a person was at the scene of the crime by asking him enough questions as to whether

he was at other places at the crucial moment. In this pinpointing situation, therefore, the "no" answers as to the other places would be self-incriminating by negative implication, and a claim of privilege justifies no inference that the answers would be "yes."

The distinction between the "open-ended" and "closed-ended" series is so evasive, however — and so beyond the ken of a harassed witness even if the witness could know what the interrogator had in his mind which would "close the end" — that it contributes little to the reliability of the factual inference to be drawn from a plea of privilege when questions are asked in a series. See §2260 *supra* at note 11 for a discussion of the suggestion that to avoid the clue-giving inference from the claim of privilege, especially when questions are asked in a series, the privilege should apply to certain nonincriminating matters.

⁴ See note 2 *supra*; most of the statutes enact this expressly and most of the decisions make this application.

Of course, where the defendant's counsel has himself first discussed the defendant's failure to testify, the prosecution may discuss it. See, e.g., *United States v. Feinberg*, 110 F.2d 392 (2d Cir. 1941); *Collins v. State*, 113 Ark. 604, 221 S.W. 435 (1920); *Commonwealth v. Scott*, 125 Mass. 239 (1877) (*contra*); *People v. Schuler*, 210 Mich. 297, 178 N.W. 89 (1920); *State v. Leitch*, 360 Mo. 594, 229 S.W.2d 562 (1950); *Trague v. State*, 58 Okla. Crim. 239, 52 P.2d 91 (1935).

⁵ Except in England, under the statute of 1898, cited *infra* note 2, and the jurisdictions named *supra* in the introductory paragraph to note 2.

Occasionally a judge's charge presents the question. See, e.g., *York v. United States*, 211 Fed. 656 (9th Cir. 1916) (here the defendant waived the error); *Shea v. United States*, 251 Fed. 410 (6th Cir. 1918) (the judge's reference to "uncontradicted testimony" held not improper on the facts); *Davis v. State*, 90 So.2d 629 (Fla. 1956) (comment even after verdict by judge who must pass on new trial motion held in the circumstances to be error); *People v. Carmen*, 367 Ill. 326, 11 N.E.2d 397 (1937); *Brown v. Commonwealth*, 335 Mass. 476, 140 N.E.2d 461 (1957) (charge held error); *Rader v. State*, 12 Okla. Crim. 394, 157 Pac. 270 (1916); *Commonwealth v. Chickering*, 251 Pa. 160, 96 Atl. 129 (1915) (murder; a charge that "the defense has not made any denial of the . . . in any as offered by the Commonwealth" held not improper);

But there is no call for the stringent rule that a *new trial* shall be granted *ipso facto* where comment has been improperly made.⁶ The trial judge must be trusted not only to control counsel but also to remedy the effect of his impropriety.

Nor is it proper, when no comment has been made, to go so far as to instruct the jury to disregard the inference. It is well enough to connive artificial fictions for use by lawyers, but to attempt to enlist the layman in the process of nullifying his own reasoning powers is merely futile, and tends toward confusion and a disrespect for the law's reasonableness. However, by express statute in Indiana and Washington such an instruction is required. By express language or by implication in a number of states, no "mention" of the accused's silence is to be made, and this may be construed to forbid even the judge's reference to it by instructions; thus, the words of the local statute may affect the result.⁷

Canales v. State, 152 Tex. Crim. 194, 241 S.W.2d 950 (1951) (judge may in his charge discuss defendant's failure to testify, but jury may not consider it as a circumstance of guilt); *People v. Trayer*, [1906] 11 R. 110 (Crim. App. 1954) (judge in charge may comment, but error in this case because jury might have inferred that burden was on accused to prove his innocence).

See *Annott.*, 94 A.L.R. 701 (1935).

⁶This unnecessary measure is expressly provided by the statute of Oklahoma, and such a provision in the statute of Alabama was declared unconstitutional (see note 2 *supra*). For judicial views upon the question whether an instruction may cure the fault, see *Wilson v. United States*, 119 F.5. 68 (1892), and *Pendleton v. United States*, 216 U.S. 305 (1906); and compare *State v. Shannon*, 135 Me. 325, 196 Atl. 635 (1918) (an especially perverse opinion), with *Commonwealth v. Richmond*, 207 Mass. 210, 93 N.E. 816 (1911) (the best opinion on the subject). Also compare the general doctrine of new trials (§21 *supra*).

⁷The following cases deal with the subject:

Federal: *Becker v. United States*, 5 F.2d 45 (2d Cir. 1924) (d. Hand, J.): "It is no doubt better, if a defendant requests no charge upon the subject, for the trial judge to say nothing about it; but to say that when he does it is error, carries the doctrine of self-incrimination to an absurdity"; *Sweazel v. United States*, 22 F.2d 280 (2d Cir. 1926) (it is error for the judge without request to charge that no inference should be drawn); *United States v. Reibum*, 127 F.2d 525, 526 27 (2d Cir. 1942); *United States v. Heenor*, 162 F.2d 935 (7th Cir. 1947) (instruction that failure of defendant to testify should not be considered by jury in determining guilt or innocence, upheld; see Comment, 46 Mich. L. Rev. 684 (1918)); *United States v. Maloney*, 262 F.2d 555 (2d Cir. 1959) (athine to admonish, although

not asked for, in the circumstances held error).

Halamas: *Thomas v. State*, 139 Mo. 80, 36 So. 741 (1900); *Salvadori v. State*, 33 Mo. App. 372, 33 So.2d 752 (1918) (language: state introduced evidence that, "when defendant was arrested, a piece of paper was found on his person"; refusal of trial judge to instruct jury that the fact defendant did not testify was not to be considered, held error).

District of Columbia: In re Davis, 85 A.2d 590, 553 (D.C. Mun. App. 1951) ("An instruction from the judge that the jury should draw no unfavorable inference from the failure of the accused to testify in his own behalf is one which the court is required to give when requested by the accused").

Florida: *Roth v. State*, 72 Fla. 112, 72 So. 619 (1916) (not decided); *Fogler v. State*, 96 Fla. 68, 117 So. 681 (1928) (the judge may charge the jury to draw no inference).

Idaho: *State v. Levy*, 9 Idaho 483, 75 Pac. 227 (1901); *State v. Gruben*, 19 Idaho 692, 115 Pac. 1 (1911).

Illinois: *Canell v. People*, 133 Ill. 214, 21 N.E. 423 (1890); *Miller v. People*, 216 Ill. 369, 74 N.E. 715 (1905) (court's comment forbidden); *People v. Spira*, 263 Ill. 215, 106 N.E. 131 (1911) (proper instruction where one defendant testifies and another does not); *People v. Michael*, 280 Ill. 11, 117 N.E. 193 (1917).

Iowa: *State v. Stevens*, 67 Iowa 567, 569, 25 N.W. 777 (1885); *State v. Canney*, 106 Iowa 483, 76 N.W. 805 (1898); *State v. Scery*, 129 Iowa 250, 105 N.W. 541 (1903); *State v. Bosser*, 191 Iowa 719, 163 N.W. 322 (1921) (under the 1897 statute prohibiting comment by the state's attorney, it is not illegal for the judge to instruct the jury as to not drawing an inference).

Louisiana: *State v. Johnson*, 50 La. Ann. 138, 23 So. 199 (1898); *State v. Johnson*, 156 La. 875, 250 (1921) (the trial court

In two states the jurors are forbidden even to discuss the subject among themselves.⁸

(b) The rule applies equally to the *ordinary witness* — i.e., an inference against the party is not to be made because of the witness' claim of privilege.⁹

may warn the jury to draw no inference); *State v. Bierbaum*, 189 La. 511, 180 So. 135 (1938) (under the statute, the judge may but need not so instruct the jury).

Maine: *State v. Landry*, 35 Me. 95, 26 Atl. 948 (1892).

Massachusetts: *Commonwealth v. Peoples Express Co.*, 201 Mass. 501, 88 N.E. 420 (1909) (in some cases, it may be proper not to stop the counsel's argument, but merely to give an instruction later).

Michigan: *People v. Prosser*, 114 Mich. 17, 107 N.W. 710 (1906) (careful opinion reviewing the various rules); *People v. Murphy*, 115 Mich. 521, 108 N.W. 1040 (1906); *People v. Terrie*, 219 Mich. 471, 119 N.W. 56 (1922) (statute does not prevent the judge from instructing the jury to make no inference).

Minnesota: *State v. Pearce*, 56 Minn. 226, 234, 57 N.W. 652, 1062 (1894).

Missouri: *State v. Robinson*, 117 Mo. 319, 663, 23 S.W. 1066 (1895); *State v. DeWitt*, 186 Mo. 61, 81 S.W. 956 (1903) (reversing *State v. Robinson*, *infra*).

Nebraska: *Metz v. State*, 16 Neb. 517, 65 N.W. 190 (1895); *Lamb v. State*, 89 Neb. 212, 95 N.W. 1066 (1903); *Neal v. State*, 101 Neb. 56, 175 N.W. 669 (1909); *Murray v. State*, 119 Neb. 16, 226 N.W. 790 (1929) (the judge may instruct).

New Hampshire: *State v. Fogg*, 80 N.H. 533, 119 Atl. 799 (1922) (judge's remark held not improper on the facts).

New Mexico: *State v. Graves*, 21 N.M. 556, 157 Pac. 160 (1916) ("the argument of the appellant is extraordinary and novel; it is that the jury was actually prejudiced because the court gave the contrary instruction").

New York: *Ruboff v. People*, 35 N.Y. 213 (1871).

North Dakota: *State v. Gates*, 52 N.D. 669, 204 N.W. 350 (1923) (the judge may instruct on his own motion).

Oklahoma: *Russell v. State*, 17 Okla. Crim. 164, 191 Pac. 212 (1920) (whether the recital of the statutory rule by the judge is error requiring a new trial; *Alaughlin v. State*, 11 Okla. Crim. 152, 169 Pac. 657, modified; *Williams v. State*, 35 Okla. Crim. 171, 219 Pac. 433 (1926) (though statute provides that improper comment shall be a ground for new trial, yet "since the enactment of our harmless error statute the mere fact of comment would not require a reversal"); *Shelton v. State*, 49 Okla. Crim. 430, 295 Pac. 210 (1931).

Pennsylvania: *Commonwealth v. Thomas*, 275 Pa. 137, 118 Atl. 667 (1922) (under statute judges warning not to make infer-

ence from the defendant's silence is not improper).

South Dakota: *State v. Carlisle*, 28 S.D. 169, 132 N.W. 686 (1911); *State v. Wimpson*, 46 S.D. 6, 189 S.W. 989 (1922).

Texas: *Fulcher v. State*, 24 Tex. App. 465, 473, 13 S.W. 750 (1899); *Wilson v. State*, 39 Tex. Crim. 365, 46 S.W. 251 (1898).

Washington: *State v. Deatherage*, 35 Wash. 320, 77 Pac. 501 (1901); *State v. Pavelich*, 150 Wash. 411, 273 Pac. 182 (1928) (statute held to be antogated by Rules of Court (now Rule 12); the trial court must instruct the jury if requested; *State v. Pavelich*, 150 Wash. 359, 273 Pac. 1102 (1929) (the instruction need not be given unless requested).

West Virginia: *State v. Walker*, 94 W. Va. 691, 120 S.E. 171 (1923) (the judge may and on request must instruct the jury not to draw an inference).

Wyoming: *Anderson v. State*, 27 Wyo. 315, 196 Pac. 1047 (1921) (an instruction pointing out the difference between the defendant's election to testify and his election to make a statement, held improper).

⁸Kansas and Texas. See Kan. Gen. Stat. Ann. §62-142d (1915) (quoted *supra* note 2), construed in *State v. Rambo*, 69 Kan. 777, 77 Pac. 543 (1903) (here the court set aside the verdict because the jurors in their deliberations were unable to forget their native reasoning powers to suit the statute). See *Caughy v. State*, 152 Tex. Crim. 158, 211 S.W.2d 970 (1918) (jury admittedly discussed defendant's failure to testify; new trial granted); but it has been held in Texas that mere reference to the fact, without showing that it was "taken as a circumstance against him," is not error. *Mullins v. State*, 121 Tex. Crim. 368, 61 S.W.2d 829 (1933).

⁹A better ground for the indicated result, since no right of the privileged witness is impaired when an inference is drawn against the party, might be that the party in such a case is denied his right of cross-examination. If the witness' testimony, rather than silence, were offered against the party, deprivation of an opportunity to cross-examine would entitle the party to have the testimony stricken; a similar result should follow when it is the witness' silence which is offered probatively against the party. But the cases generally test their holdings on the policy of the privilege. See, e.g., *Beach v. United States*, 46 Fed. 754 (C.C.N.D. Cal. 1890) (leading case; opinion by Field, J., on error for prosecutor to refer to argument to claim of privilege

2. *Sanctions (public and private) permissible against the claimant.*¹⁶ It is accepted that no aspect of the constitutional privilege prohibits *private parties* from imposing *private sanctions*, including discharge from employment, against a person who refuses to answer questions on the ground that disclosure may tend to incriminate him.¹⁶ Because the constitutional provisions and statutes expressly limit governmental power, however, the question as to what action the *government* may take is more difficult. It should go without saying that no *affirmative penalty* may be imposed upon a person, as a witness or criminal defendant, because of his claim of privilege. It is assumed similarly that the person may not for this reason be deprived of any of his *natural rights*.¹⁷

the court may dismiss his action or strike his testimony; here, however, since it was not the witness's action, testimony struck children nevertheless awarded to her).

Harris v. Wagner Iron Works v. Wag-
ner, 4 W. 2d 228, 90 N.W.2d 110 (1948)
(action to recover misappropriated funds;
defendant not denied inspection of corpo-
rate books because he earlier had refused
to answer questions on grounds of pri-
vilege).

16 The principle of this paragraph is of course closely related to, and sometimes indistinguishable from, that of §2275 *infra* (waiver of privilege by contract). It is often difficult to distinguish between a case on the one hand in which the sanction is imposed because of failure to abide by what is construed as a waiver of privilege, and a case on the other hand in which the sanction is imposed because of an inference drawn from refusal to disclose.

For discussions of the general point of inference and sanctions, see *Herman, Inference from the Invocation of the Privilege Against Self-Incrimination*, 41 Va. L. Rev. (1955); *Raumer, Consequences of Exercising the Privilege Against Self-Incrimination*, 21 U. Chi. L. Rev. 472 (1957).

17 See §2252 *supra* for the proposition that the federal Fifth Amendment does not apply to *state action*; a fortiori it does not apply to *private action*. See §2252 *supra* also for the proposition that the federal Fourteenth Amendment does not require the states to imitate the federal privilege against self-incrimination. Furthermore, the express terms of the federal Fourteenth Amendment and of the state privilege against self-incrimination provisions limit their applications to *state action*. Just what amounts to "state" action may sometimes be a troublesome question. E.g., what if a private employer seeks the aid of the courts in a contract action where the breach alleged is damage to good will caused by the employee's claiming the privilege against self-incrimination? See *RKO Radio Pictures v. Janicek*, 128 Cal. App. 2d 172, 271 P.2d 928 (1954) (cited fully *infra* note 18); cf. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

(enforcement by state court of restrictive covenant provision held to be "state action" within the meaning of the Fourteenth Amendment and enforcement held unconstitutional because the covenant was racially discriminatory). But action which is clearly private is not within the constitutional provisions. This is accepted even by those members of the Supreme Court who dissent on related matters. See *Leiter v. Casey*, 357 U.S. 309, 414 (1958) (alleged violation by state government of First Amendment rights; dissenting opinion by Douglas, J., concurred in by Black, J.; "Private citizens, private clubs, private groups may make such deductions and reach such conclusions as they choose from the failure of a citizen to disclose his beliefs, his philosophy, his associates"). Whether private action, based on such deductions, is "right" or whether it constitutes, e.g., a breach of contract are questions of another dimension. On the latter point see the report of the special committee of the American Association of University Professors, adopted at the annual meeting in 1956; 42 A.A.U.P. Bull. 339 (1956) ("It follows that the invocation of the Fifth Amendment by a faculty member under official investigation cannot be in itself a sufficient ground for removing him from his position, or for passing a judgment on other actions in passing a judgment on him"); on the latter point see *Regan v. New York*, 319 U.S. 58, 68 (1953) (dissenting opinion); "Surely private employers are not now free to compel their employees to waive this and other constitutional privileges").

Distinguish the principle of §2275 *supra* that the privilege does not protect against disclosure of facts involving disgrace or infamy.

17 See, e.g., *Opinion of the Justices*, 332 Mass. 763, 766, 126 N.E.2d 100, 102 (1955) ("The right of the individual to engage in a lawful occupation is itself a right secured to him under both Constitutions. This right is so great that reasonable regulation in the public interest, but it cannot be destroyed. . . . It would seem that the

But as to *benefits and privileges* controlled by the government to which the person has no natural right, it is held that at least some of these may be denied the person who declines to answer questions on grounds of possible self-incrimination.¹⁸ An explanation of the position—at least as

proposed statute [summarized *infra* note 18] would practically destroy the constitutional right of certain persons to engage in the occupation of teaching for no other reason than that they had exercised another constitutional right—the right not to incriminate themselves).

18 In addition to the illustrative cases and statutes below, see the cases *supra* note 11, which dismiss a party's action or strike his testimony as a penalty for non-disclosure—albeit the reason given is the privilege. Also, while the taking of blood for blood-alcohol tests does not properly involve the privilege against self-incrimination, compare the citations *supra* §2252(5), note 6, on this point; some statutes provide that refusal to submit to the test may lead to revocation of the driver's license.

As can be seen from the citations *infra*, the law is not unsettled in the area of sanctions for claiming privilege. It should be noted that in many instances where the benefit is denied the person, it is not the *inference* from the plea of privilege, but rather the *refusal to provide information* (for whatever reason), which is the basis for the action (see §2273 *infra*). Indeed, the privilege may not even have been claimed. But in all of the following cases, a self-incriminating matter was assumed to have been involved:

Federal: 68 Stat. 1112 (1953), 5 U.S.C.A. §2283 (1954) (government officers or employees, refusing to testify on grounds of self-incrimination as to relationship with foreign government, or as to membership in or association with Communist Party, or organization advocating the overthrow of the government, are deemed annuitants or retirement benefits; this provision was held unconstitutional in *Stromberg v. United States*, *infra*); Maryland v. *Supra*, 220 U.S. 9 (1926) (removal of criminal prosecution of federal official from state to federal court; no exception to rules of pleading made for self-incriminating matters); *Kaulman v. Hurwitz*, 176 F.2d 210, 211 (4th Cir. 1949) (discharge in bankruptcy denied to person refusing on grounds of privilege to disclose matters material to his financial condition); *Carter v. Board of Public Works of the City of Los Angeles*, 341 U.S. 716 (1951) (city ordinance required every employee to take non-Communist oath; plaintiffs refused and were discharged; relief denied in 5 to 4 decision); *Orloff v. Willoughby*, 315 U.S. 83 (1953) (doctor, induced to army under statute relating to "military specialists," was denied commission because he refused to state on appli-

cation for commission whether he was member of Communist Party; habeas corpus denied; "No one believes he can be punished for doing so [relying on the privilege]. But the question is whether he can at the same time take the position that to tell the truth about himself might incriminate him and that even so the President must appoint him to a post of honor and trust. We have no hesitation in answering that question. No"; *Basky v. Board of Regents*, 317 U.S. 412 (1951) (*confer*, physician's license suspended pursuant to statute because he had been convicted of a crime; the crime was refusal to produce records of an organization of which he was president and which was on the attorney general's list as subversive; no reference to privilege against self-incrimination; held, no violation of due process); *Regan v. New York*, 319 U.S. 58 (1953) (pursuant to New York law providing for dismissal of city employees who refuse to sign waiver of immunity, Regan signed such waiver but nevertheless refused on grounds of self-incrimination to answer questions concerning his salary; held, contempt conviction upheld; if waiver valid, Regan must answer because he voluntarily gave up immunity; and if waiver invalid, he has immunity; in either event he must answer); *Davis v. University of Kansas City*, 129 F. Supp. 716 (1955) (teacher with tenure dismissed for failure to answer questions put by college officials as to whether he had ever been a member of the Communist Party; held, motion to dismiss claim sustained; teacher's conduct was "adequate cause" under the tenure provision); *Sholower v. Board of Higher Education*, 340 U.S. 551 (1956) (professor in city college summarily dismissed solely because he claimed privilege when asked questions regarding his Communist affiliations by federal investigating committee; held that dismissal violated due process); *United States v. *Not**, 76 Sup. Ct. 255, 100 L. Ed. 1518 (1956), *aff'd*, 351 U.S. 902 (application for bail pending determination of petition for certiorari; bail fixed below at \$30,000; lower court, being "strongly influenced" by defendant's refusal on grounds of privilege against self-incrimination to disclose his whereabouts during certain previous years, refused to reduce bail; bail set by Harlan, J., at \$10,000; reduction of bail cannot be made a quid pro quo for waiving privilege); *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957) (*remble*); state committee, after calling, rejected K's application for admission to the bar on

it applies to government employment, where the problem is most pressing — is contained in the following quotation:

ground that he refused to answer questions regarding membership in the Communist Party; privilege against self-incrimination not cited; held, K's silence not being involuntary nor in bad faith, reversed; *Reilan v. Board of Education*, 357 U.S. 309 (1958) (teacher was dismissed as "incompetent" because of refusal to answer questions put by school superintendent regarding Communist connections on grounds the questions were about "political and religious beliefs"; no plea of privilege against self-incrimination; dismissal upheld on ground that teacher did not fulfill his obligation of "loyalty and cooperation"); *Steinberg v. United States*, 113 Cl. Cl. L. 163 F. Supp. 500 (1958) (pursuant to statute, plaintiff was denied annuity because he refused, on grounds of self-incrimination, to testify regarding his government service; held, statute unconstitutional); *Bulfinch v. Hollands*, Civil No. 25384, 1 D. Pa., April 8, 1959 (deposition based in part on Bulfinch's pleading privilege; thus displayed lack of cooperation inconsistent with his being a desirable resident); *Nelson v. County of Los Angeles*, 362 U.S. 1 (1960) (county employee discharged for refusal on grounds of privilege against self-incrimination, to answer questions regarding subversive activities asked by federal committee; dismissal of one of the witnesses, a permanent social worker who had been given a hearing, affirmed by equally divided court with out opinion; dismissal of the other, a temporary worker given no hearing, affirmed 5 to 3; *Stochower*, *supra*, distinguished since here no inference was drawn from claim of privilege, but rather discharge was based on insubordination of employee in failing to cooperate with federal committee); *Kimm v. Rosenberg*, 363 U.S. 103 (1960) (deposition; petitioner pleaded privilege as to membership in Communist Party; held that as a consequence attorney general need not exercise discretion in petitioner's favor in permitting voluntary deposition; petitioner failed to carry his burden of proving attorney general's authority to exercising discretion).

California: Cal. Gov. Code §11281 (appearance and testimony of public employees concerning association with organizations advocating the overthrow of the government, and membership of the Communist Party: "Any employee who fails or refuses to appear or to answer under oath on any ground whatsoever any such questions so propounded shall be guilty of insubordination and guilty of violating this section and shall be suspended and dismissed from his employment in the manner provided by law"); *Christal v. Police Commission*, 83 Cal. App. 2d 561, 92 P.2d 416 (1939) (dis-

charge of policeman for refusing on grounds of privilege to answer questions before grand jury as to alleged official misconduct upheld); *RKO Radio Pictures v. Jarrow*, 128 Cal. App. 2d 172, 271 P.2d 926 (1954) (action for declaratory judgment that defendant breached contract to write screen play by becoming "an object of public disgrace and ill will"; defendant had pleaded the privilege before federal investigating committee; held, that defendant had breached contract and the plaintiff need not give him "even credit"); *Steinmiller v. California State Board of Education*, 44 Cal. 2d 816, 224 P.2d 285, 285 P.2d 617, 621-22 (1955) (mandamus to compel reinstatement of professor at state college; he had refused to answer questions as to membership in Communist Party and had, pursuant to statute, been discharged; writ denied; "A public employee, of course, cannot be forced to give an answer which may tend to incriminate him, but he may be required to prevent disclosure of information and losing his employment"); *Board of Education v. Mass*, 17 Cal. 2d 194, 3rd P.2d 1015 (1956) (proceeding to dismiss teacher; hearing limited to the question whether teacher, questioned by federal congressional committee, refused to answer questions regarding Communist affiliations; held not in compliance with statute; to hold otherwise would render statute unconstitutional); *Orange Coast Junior College v. St. John*, 116 Cal. App. 2d 456, 303 P.2d 160 (1957) (held, board of trustees of school district can, as condition of continued employment, require teacher to take oath that he is not a member of the Communist Party).

District of Columbia: D.C. Code §1-219 (Supp. 1959) ("Any officer or employee of the District who refuses to testify upon matters relating to his office or employment in any proceeding . . . [on ground of self-incrimination] shall forfeit his office or employment and any emolument . . . and be disqualified from holding any public office or employment under the District").

Florida: *Sheiner v. State*, 82 So.2d 657 (Fla. 1955) (disbarment; held that disbarment solely because attorney pleaded privilege before federal committee was denial of due process); *Position for Revision of, or Amendment to, the Integration Rule of the Florida Bar*, 193 So.2d 373 (Fla. 1956) (the proposed revision would make claim of privilege with respect to matters relating to Communist activities grounds for disbarment or prima facie evidence of unfitness; held, that position rejected, citing *Sheiner v. State*, *supra*).

Illinois: *Re Holland*, 377 Ill. 316, 36 N.E.2d 513 (1941) (proceeding to suspend license of attorney; invocation of privilege

Commission on Government Security (pursuant to P.L. 501, 81st Cong.: as amended) 619 S.O. (June 21, 1947): Although the proponents of this position have argued that it would be improper for an employer to draw any inferences as to guilt from an invocation of the fifth amendment in view of the fact that the purpose of the privilege is the protection of an innocent person who might

not necessarily being inconsistent with innocence, rule recommending suspension of license discharged); *Duffy v. Holtby*, 359 Ill. App. 33, 88 N.E.2d 738, 402 Ill. 213, 83 N.E.2d 657 (1949) (discharge of two Chicago police officers for refusing on grounds of privilege to testify before grand jury as to alleged misconduct in office upheld; prior cases reviewed; "It is significant that there appears to be no reported cases in any jurisdiction upholding the right of a policeman to refuse to sign an immunity waiver or to refuse to testify when called to do so in a criminal case. All the decisions heretofore cited are consonant with the principle that a police officer, by reason of his special status, duties and responsibility, may not invoke his constitutional privilege against self-incrimination in matters touching upon his occupation without being guilty of a breach of duty on his part by reason of such refusal").

Kentucky: *Schell v. Bell*, 125 Ky. 750, 795 97, 162 S.W. 213 (1907) (drawing adverse inference drawn from plea of privilege by police officers when questioned as to alleged official misconduct approved).

Louisiana: La. Rev. Stat. Ann. §78-2182 (1956) (persons or corporations refusing to testify or tender information requested by investigating authority in connection with state contracts declared ineligible to hold contracts with state); *State Board of Medical Examiners v. McInerney*, 69 So.2d 592 (La. App. 1954) (suit to enjoin defendant from practicing medicine; defendant's plea of self-incrimination, while under cross-examination, held not to constitute affirmative proof of plaintiff's case); *Lalou v. New Orleans Police Department*, 238 La. 531, 115 So.2d 841 (1959) (proceeding to review dismissal of police officer; held that Louisiana constitutional provision to effect that any civil service employee who refuses to testify before hearing officer on grounds of self-incrimination shall be dismissed upheld).

Massachusetts: *McAniff v. City of New Bedford*, 115 Mass. 216, 20 N.E. 517 (1892) (leading case dealing with analogous matter; discharge of police officer for engaging in political activity; *Holmes, J.*: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman"; discharge upheld); *Faxon v. School Committee of Boston*, 331 Mass. 31, 120 N.E.2d 772 (1955) (facts similar to *Stochower*, *Id.*, *supra*, but here there was a hearing; dismissal upheld);

Opinion of the Justices, 332 Mass. 763, 126 N.E.2d 160 (1955) (proposed statute requiring the dismissal of any teacher in any school, public or private, who refused for any reason at a duly constituted hearing to answer questions regarding membership in the Communist Party; opinion given that it would be unconstitutional); *Opinion of the Justices*, 332 Mass. 785, 127 N.E.2d 663 (1955) (same except limited to teachers in public schools; opinion given that it would be constitutional).

New Jersey: N.J. Stat. Ann. §2A:81-171 (Supp. 1960) ("Any person holding or who has held any elective or appointive public office, position or employment (whether State, county or municipal) who refuses to testify upon matters relating to the office, position or employment in any criminal proceeding . . . shall, if holding elective or public office, position or employment, be removed therefrom . . . provided the iniquity relates to a matter which occurred or arose within the preceding five years" and he shall not thereafter be eligible for any public office in the state); *Elsa v. Board of Education of Newark*, 23 N.J. 361, 129 A.2d 273 (1957) (dismissal of teacher who refused, on Fifth Amendment grounds, to answer questions put by federal committee; held, case should be remanded to local board for hearing; a finding of membership or of failure to respond to the board's inquiries would constitute grounds for dismissal).

New York: N.Y. Const. art. 1, §6 ("any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years, and shall be removed from office by the appropriate authority or shall forfeit his office at the suit of the attorney general"); *Haywood v. Craig Colony*, 7 App. Div. 2d 69, 180 N.Y.S. 2d 701 (1958) (employee dismissed by state-regulated business for supplying someone a drug illegally; petitioner did not testify in his own behalf at hearing; petitioner reinstated); *In re C'cen*, 9 App. Div. 2d 436, 195 N.Y.S.2d (1956) (disciplinary proceedings against attorney; held that attorney may plead privilege against self

to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the incriminating circumstances can be accounted for consistently with innocence, and be able to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting would tend to sustain the charge. But this is to be arbitrarily applied, and only in cases where it is manifest that proofs are in the power of the accused not accessible to the prosecution.

There is, of course, difficulty in ruling upon borderline cases, especially zealous prosecutors tend to overstep the line; certain situations must here be discriminated.

(1) *The failure to produce evidence in general, other than has been to the only, is open to inference against a party accused with the same limitations* 2285 2291 *applicable to civil matters*! The application of the dis-

§2273. 1 In addition to the following cases, see those cited *infra* §2274, note 2.

UNITED STATES: *Felton*; *Tellowitz v. United States*, 273 Fed. 664 (2d Cir. 1924). There is a word of denial in *United States v. Tellowitz*, that L. was a "partner," held not improper comment; *Redden v. United States*, 201 Fed. 975 (6th Cir. 1923) (opinion otherwise). T. says she had these conversations with A.W., and no one comes before this trial to deny them; allowed, on the facts; *Warden v. United States*, 206 Fed. 101 (5d Cir. 1924) ("There is no contradiction of the evidence at all," held improper comment where "the only persons who could possibly contradict their testimony were the defendants themselves"; *Montroy v. United States*, 6 F.2d 869 (6th Cir. 1927) (similar comment held not improper where it did not appear that the presenters themselves and the accused were the only persons present); *Janak v. United States*, F.2d 216 (3d Cir. 1925) (comment that evidence is uncontested allowable); *Garrett v. United States*, 77 F.2d 972 (8th Cir. 1935) (receiving stolen goods; "why did you not offer an explanation?" allowed on facts).

Alabama: *Bector v. State*, 269 Ala. 603, So. 899 (1953) (comment on defendant's pregnancy is improper where he does not testify and identity is not in issue); *Abant v. State*, 242 Ala. 275, 167 So. 540 (1936) (comment: "Nobody knows how they were murdered; but, and whether he will ever state it or not, I don't know" allowed).

Arizona: *Culter v. State*, 15 Ariz. 243, 8 Pac. 1018 (1914) (same under act).

Alabama: Markham v. State, 149 Ark. 77, 233 S.W. 676 (1921) (liquor offense; "We find the five leaving the mill and moving in the direction of the still; none of them denied that they went to the still and that P-1 held not improper comment).
California: People v. Cline, 83 Cal. 374, 8, 23 Pac. 391 (1890) (barrel of booze; defendant's failure to call the alleged vo-

Conover v. State v. Gilwood, 73 Conn. 675, 46 A.2d 449 (Conn. Sup. Ct. 1946), 89 Conn. 209, 131 A.2d 107 (1957) (discovery of defendant's confession after defendant's failure to call a useful witness, constituted error).

Alldredge v. People, 227 Ill. 363, 81 N.E. 318 (1906); *People v. Mann*, 244 Ill. 91, 91 N.E. 101 (1909) (the defendant not having taken the stand, the prosecution's form of argument as to uncorroborated evidence "is there a man or woman on earth that ever came in here and conducted her in the back? No, sir," was "bad logic or clever logic"; *People v.*

Donaldson, 275 Ill. 19, 95 S.W.2d 692 (1932) (absence of corroboration may be noted in argument). People v. Parks, 200 Ill. 516, 132 N.E. 872 (1921) (necessity of a predicate fact; prosecution's comment on lack of testimony denying certain assertions of K, a witness for the prosecution, held allowable, even though some but the essential could have supplied the death

Indiana: Traver v. State, 175 Ind. 30, 39, 34 N.E. 817 (1893) (failure to produce any evidence); *Guffrich v. State*, 163 Ind. 555, 72 N.E. 563 (1904) (arrest); *Keifer v. State*, 201 Ind. 431, 181 N.E. 567 (1933) (comment held to violate the privilege).

Iowa: State v. Hinkle, 6 Iowa 207, 15 (1846) (failure to explain where arsenic was brought); State v. Hays, 121 Iowa 507, 95 N.W. 1115 (1903) (the absence of contradiction for certain facts may be noticed, even though "the accused is the only one who could contradict them"); State v. Kuntz, 152 Iowa 240, 172 N.W. 150 (1911).
Kansas: State v. Labaree, 80 Kan. 661,

103 Pac. 106 (1906) (absence of contradictory evidence in general); *State v. Owen*, 124 Kan. 233, 261 Pac. 600 (1927).

Kentucky. Dineen v. Commonwealth, 270 Ky. 579, 573 S.W.2d 627 (1970); Rother v. Commonwealth, 272 Ky. 577, 46 S.W.2d 1102 (1932) (malicious shooting); Winder v. Commonwealth, 275 Ky. 361, 71 S.W.2d 201 (1934) (murder by a party of three); "no one has taken the witness stand and elicited anything said by the Commonwealth," allowed.

Footnote: State v. Cannon, 127 La. 694, 587 So. 582 (1955) (stating: "Is there one of those people who possess? held no violation of the rule? State v. Cannon, 165 La. 220, 111 So. 484 (1922) where the court has held that a word from any person of the defendant's household, State v. Rayon, 172 La. 22, 113 So. 23 (1925) (bank robbery).

Mazda Int'l. v. Hino, 687 F.2d 912, 915 (CA-9, 1982), cert. denied, 459 U.S. 1078, 73 L.Ed.2d 1361, 57 S.Ct. 1397 (1982); *Commonwealth v. Wachter*, 59 Mass. (5 Cush.) 207, 216 (1840) (quoting in last sentence); *Commonwealth v. Heener*, 110 Mass. 41 (1872); *Commonwealth v. Brownell*, 115 Mass. 319, 11 N.E. 403 (1887); *Commonwealth v. Johnson*, 199 Mass. 55, 87 N.E. 188 (1906) (failure to call Commonwealth to occupation, etc.); *Commonwealth v. People's Express Co.*, 261 Mass. 664, 88 N.E. 420 (1910) (defendant corporation's failure to call its own employees to court to inform).

Michigan: People Mills, 91 Mich. 630; 278; 4 N.W. 484 (1903); People v. Jacey, 217 Mich. 321, 186 S.W. 96 (1922) (arrest). The facts that the complaining witness has related in this case stand absolutely uncontradicted and undisputed; held not *People v. Hunter*, 219 Mich. 273, 188 S.W. 516 (1922) (*failure to call*); *People v. Kisco*, 230 Mich. 278,

2003 N.W. 135 (1925) (manslaughter).
Minnesota v. Zemple, 196 Minn.
 559, 261 N.W. 587 (1936) ("There is just
 one man who can tell you how that fire
 started").

Mossop v. Baird, 116 Miss. 547, 112 So. 705 (1922) ("A cold-blooded murder has been done, and it is undisputed" held not a violation); *Winnchester v. State*, 163 Miss. 462, 142 So. 451 (1932) (murder; the only eyewitness D testified for the state; "Not a single soul has said she was not with her at this D woman has told you," held not a violation); *J. Hanna v. State*, 168 Miss. 552, 151 So. 570 (1933) (larceny of cotton; "the testimony for the State stands out here

function will depend upon the language used (by counsel or by judge) in a particular case in pointing out the inference:

MORROW, P. J. in *Hoone v. State*, 90 Tex. Crim. 374, 377-78, 379, 235 S.W. 580, 581-82, 283 (1921) (robbery; the defense was an alibi, but the defendant himself did not testify): A bill is presented complaining of the remark of counsel, who stated that if he were accused of an offense of robbery and had

uncontradicted and unimpeached, allowed.
(Hoad v. State, 177 Miss. 664, 171 So. 713
(1937) (defendant the country by false
records of delivery of goods); Church v.
State, 182 Miss. 862, 183 So. 525 (1938)
(homicide); this is undisputed in the case,
held not improper); Latsch v. State, 197
Miss. 381, 20 So.2d 810 (1941) (and later);
The defendant has not furnished you a
single witness who said that the defendant
did not do it"; held no error; however,
such expression disapproved by Griffith, 11
Missouri: State v. Steele, 280 Mo. 63,
217 S.W. 80 (1919) (allegation); State v. De-
Pue, 288 Mo. 439, 232 S.W. 83 (1921)
("You may say that it was there;
there has not been a witness here who
says he was not there," held not improper
comment); State v. Watkins, 357 Mo. 904
(1907 S.W.2d 141, 190 (1907) (comment).
State v. Mosier, 102 S.W.2d 620 (Mo., 1937)
(Id.).

New York: People v. Watson, 216 N.Y.565, 111 N.E. 243 (1916) (wife murder, the son being the only witness of the alleged killing; but repeated allusions to the lack of contradiction of the son's testimony, held improper); *People v. Avalone*, 255 App.Div. 253, 7 N.Y.S.2d 410 (1943) (parent poisoning of stolen goods; whether "unexplained" refers to defendant's failure to

North Carolina v. Lester, 127 N.C. 566, 37 S.E. 326 (1900) (failure to call witnesses to explain accused's whereabouts); *Alabama v. Fox*, 1 Tex. 177, 6 Ala. 82 (1843); *Alabama v. Fox*, 1 Tex. 177, 6 Ala. 82, 87, 88, 297 (1906) (accused, but here the prosecution, constructs the principle as practically to shut the mouth of the prosecution in discussing the accused's failure to produce evidence in general); *Kaler v. State*, 19 Ala. 354, 157 Pac. 270 (1906).

affirming here said or proved that it was for his own use," held improper); *Riley v. State*, 57 Okla. Crim. 313, 49 P.2d 813 (1935).

(murder). "Riley knows what he was doing" (including those two hours," etc., held not inadmissible. *State v. Riley*, 61 Okla. Crim. 318, 58 P.2d 345 (1936); *State v. Caldwell*, 63 Okla. Crim. 252, 67 P.2d 457 (1937) (murder). Two other persons were present at the homicide; one was deceased and the other testified; comment that there was no common tradition, held not inadmissible. *State v. Riley*, 61 Okla. Crim. 318, 58 P.2d 345 (1936); *State v. Caldwell*, 63 Okla. Crim. 252, 67 P.2d 457 (1937) (murder of cattle; "why didn't the defendant

been tried once and was on trial again for the offense that he would feel that he should give the jury the benefit of all his movements on the day of the robbery and that "they" (meaning the defendant and his counsel) hadn't done it." This is claimed to have violated the statute prohibiting reference in argument to the failure of the accused on trial to testify.

The statute, Article 790, Code of Criminal Procedure, does not prohibit the comment in argument upon the failure of the accused or his counsel to produce

and offer some testimony about that?" held not an improper comment).

Oregon: *State v. Black*, 160 Ore. 269, 42 P.2d 171, 177 (1935) (assault; comment on defendant's failure to amend the trial, thus making identification difficult, held not a violation of the privilege).

South Dakota: *State v. Knapp*, 35 S.D. 177, 111 N.W. 921 (1901); *State v. Lindie*, 51 S.D. 516, 215 N.W. 495 (1927) ("All the evidence that has been introduced here has been introduced on the part of the State; the defendant has not introduced any evidence"; held to violate the privilege).

Tennessee: *Hays v. State*, 159 Tenn. 359, 19 S.W.2d 313 (1929); *Hutchins v. State*, 172 Tenn. 108, 110 S.W.2d 319 (1947) (surgency); *Lind v. State*, 184 Tenn. 413, 201 S.W.2d 539 (1947) (homicide; failure of defendant to produce evidence in explanation of circumstances raised presumption that such evidence would have been unfavorable).

Texas: *Jackson v. State*, 31 Tex. Crim. 342, 344, 26 S.W. 921 (1892) (failure to account for possession of stolen goods); *Boone v. State*, 190 Tex. Crim. 374, 235 S.W. 580 (1921) (robbery; quoted in text *infra*); *Newton v. State*, 91 Tex. Crim. 362, 251 S.W. 240 (1923); *Bales v. State*, 105 Tex. Crim. 221, 268 S.W. 198 (1926); *Durham v. State*, 106 Tex. Crim. 85, 290 S.W. 1052 (1927); *Pirtle v. State*, 110 Tex. Crim. 395, 10 S.W.2d 364 (1928); *Jones v. State*, 111 Tex. Crim. 172, 113 S.W.2d 798 (1928); *Wood v. State*, 116 Tex. Crim. 336, 28 S.W. 2d 139 (1930) (liquor offense); *Hester v. State*, 128 Tex. Crim. 52, 78 S.W.2d 981 (1935) (theft); *Bridges v. State*, 128 Tex. Crim. 544, 83 S.W.2d 671 (1935) (murder); *Boone v. State*, *supra*, distinguished; *Weathered v. State*, 129 Tex. Crim. 513, 89 S.W.2d 212 (1935); *Parrish v. State*, 139 Tex. Crim. 626, 91 S.W.2d 366 (1935) (murder); *Helms v. State*, 131 Tex. Crim. 358, 99 S.W.2d 303 (1936) (assault with intent to rape); *Goldman v. State*, 130 Tex. Crim. 471, 95 S.W.2d 423 (1936) (conspiracy to bribe); *Johnson v. State*, 132 Tex. Crim. 390, 101 S.W.2d 853 (1937) (robbery); *Coleman v. State*, 135 Tex. Crim. 229, 118 S.W. 2d 600 (1938) (murder); *York v. State*, 149 Tex. Crim. 651, 198 S.W.2d 106 (1946) (murder; argument susceptible of unfavorable inference from failure of accused to testify, held error).

Vermont: *State v. Bolton*, 92 Vt. 157, 102 Atl. 469 (1917) (judge's reference to

"unexplained evidence," held not improper on the facts).

Virginia: *Miller v. Commonwealth*, 153 Va. 850, 139 S.E. 459 (1929) ("The rule does not prevent proper comment and emphasis upon the testimony of other witnesses simply because it could only be contradicted by the accused and he stands mute").

Washington: *State v. Sandalene*, 77 Wash. 91, 70 Pac. 603 (1905); *State v. Babo*, 112 Wash. 614, 204 Pac. 415 (1925) (defendant's extrajudicial silence when arrested is not affected by the present principle); *State v. Paschall*, 132 Wash. 3rd, 47 P.2d 15 (1935) ("Where is the man's lips that said it is not so?" pointing to the accused; held improper).

West Virginia: *State v. Carter*, 101 W. Va. 466, 152 S.E. 869 (1926) (comment held improper); *State v. Kinard*, 101 W. Va. 396, 140 S.E. 338 (1927).

Wisconsin: *Lam Yee v. State*, 132 Wis. 527, 112 N.W. 425 (1907) (rape; defendant's failure to call witnesses to deny his gonorrhea); *Hallner v. State*, 176 Wis. 371, 187 N.W. 173 (1922) (keeping a house of ill fame; comment on nonproduction of evidence held improper on the facts).

CANADA: *R. v. Abey*, 11 B.C. 111 (1961) (statement in the charge that the onus is on the accused to account for his presence at the place, etc., the accused not taking the stand, is proper); *R. v. Bayden*, [1926] 1 D.L.R. 765 (N.B.) (judge's comment held not improper on the facts); *R. v. Bundell*, 11 Ont. L.R. 410 (1966) (failure to account for possession of stolen goods); *R. v. Guerin*, 18 Ont. L.R. 426 (1969) (Riddell, J., who had commented on some uncontradicted testimony to a conversation with the accused: "I have heard the same kind of statement by trial judges over and over again before 1892, and it never was thought an impropriety or an unfair thing to do at that time when the mouth of the accused was closed"); *R. v. Kaplinsky*, 69 D.L.R. 626 (1922) (Riddell, J.; comments on the lack of evidence contradicting an identification held proper).

PRINCIPAL ISSUES: *United States v. Navarro*, 3 P.1 113 (1901) (the original Spanish Penal Code §183, on the sense of imprisonment of an "innocent" person, providing that the failure of the accused to give information of the person's whereabouts or to prove that he was set at liberty shall increase the

evidence. It does prohibit counsel in argument to allude to or comment upon his failure to testify. The plain import of the statute is that counsel for the State, in argument, must refrain from making use of the silence of the accused during his trial against him by direct or indirect means. . . . An indirect comment upon the failure of the accused to testify is quite as harmful as a direct one, and this court has often held that the consequences of the violation of the statute were not to be avoided by the adroitness of counsel in selecting indirect rather than direct means of disregarding it.

The statute is not shown to have been infringed, however, by disclosing that counsel, in argument, used language which might be construed as an implied or indirect allusion to the failure of the accused to testify. To come within the prohibition the implication must be a necessary one; that is, one that cannot reasonably be applied to the failure of the accused to produce other testimony than his own. Where there is other evidence, or the absence of other evidence, to which remarks may reasonably have been applied by the jury, the statute is not transgressed. . . . The case of *Pickens v. State*, 69 Tex. Cr. 628, is useful. The case was one of incest with Ollie Walston, and the following language was used: [378] "They tell you the prosecuting witness has not been corroborated—they will tell you no one saw the act of intercourse except the two (prosecutrix and defendant). It is true that no one was present at the act of intercourse but these two; it is true that Ollie Walston testifies that no one was present when the defendant told her to take uppinine except herself and the defendant; but, gentlemen, she has testified to both of these transactions, and they have not dared to put a witness on the stand to contradict her testimony in any particular." It is obvious from the quotation that contradiction demanded could come from no source save the accused. The court held, and wisely held, that the statute was impinged. The case of *Jackson v. State*, 31 Tex. Cr. 312, was one for theft of money. In argument counsel said: "I say they have not proved that the money was Drew's money. Why have they not had Drew's family here, and the other witnesses, to prove that the money was Drew's money? Don't you know that counsel appreciates the importance of the evidence, and if the money was Drew's money they ought to have had their witnesses here to prove it? And nobody has testified to this jury that the money belonged to defendant, and he has never claimed it since the sheriff took it from him." The argument was held legitimate. Many like illustrations are available. . . .

[379] In the case before us, . . . the State's evidence goes to show that he was absent from the city of Amarillo during a large part of the day upon which the robbery took place; that he was seen on the road traveled by the offenders in various places in an Overland automobile. It may be conceded that on some of these occasions there were no others with him, but it is his theory that it was not he that the State's witnesses saw, and that he was elsewhere. To meet the requirements of the law which the appellant invokes, it would be necessary that the state of the evidence be such as to exclude the knowledge of his presence elsewhere by others.

penalty, is a violation of the privilege and is void; three judges dissenting; *United States v. Lizon*, 4 P.1 343 (1905) (similar); *United States v. Tria*, 17 P.1 303 (1911) (ill-considered); *United States v. Srikala*, 37 486 (1918) (murder; citing the above text with approval).

So also where other persons were present

and one was possibly the doer, their denials of their guilt allow an inference that the defendant was the only possible doer, and this is distinct from the inference from his failure to deny; *Commonwealth v. Richmond*, 207 Mass. 1 98 N.E. 816 (1911).

See *Annot.*, 70 A.L.R. 1326 (1931); *Annot.*, 135 id. 1375 (1941).

CHAMBERS, J., in *Ford v. State*, 184 Tenn. 433, 201 S.W.2d 539, 541 (1948): Just here, it should be noted, in passing, that since it was obviously within the power of the defendant to produce such evidence, his failure to do so gives rise to a presumption, under well-known rules, that it introduced it would have been unfavorable to him. . . . It is, of course, now well settled that our statute (Code 1908) providing that no presumption of the guilt of the defendant shall arise from his failure to testify in his own behalf, has application only to the personal testimony of the defendant himself and does not extend to apparently available testimony by others.

Here, however, the effect of the burden of proof has sometimes tended to confuse. It is true that the burden is on the prosecution (§§2485 and 2511 *infra*); and that the accused is not required by any rule of law to produce evidence. But nevertheless he runs the risk of an inference from nonproduction. This seeming paradox, which has been already sufficiently noticed in treating of the general principle (§200 *supra*), has impelled a few courts to deny that any inference may be drawn.²

(2) The inference is equally applicable to the *nonproduction of documents or other chattels*. But since the privilege applies to the compulsory production by the party, as a witness, of all documents and chattels (§200 *supra*), does the prohibition of an inference extend to all things which he might, but for the privilege, have been compelled to produce? For example, does it apply to all documents within his possession or control? Presumably not. The production of a document at here appears to play a second part. It is, with regard to inference, for a witness — i.e., it is something distinct from his own testimony and personality and is merely an object which he has the power to produce. The inference, then, is proper, at least as to documents which may be authenticated without reliance upon the party's testimony. In any event, the prohibition of the inference should be restricted to such documents as are of *his own personal authorship*, thus permitting the inference for all others which happen to be within his control and not produced. Such would seem to have been the practice hitherto.³

² *Federal*: *Boones v. United States*, 8 F.2d 832 (8th Cir. 1925) (opium offense); the witness P and defendant being alone in a room, the argument "Not a human being has testified that in so testifying P lied," was held improper.

California: *People v. Sarguler*, 121 Cal. 431, 53 Pac. 918 (1908) (No presumption against him is raised by the law if he does not make him attempt to explain evidence against him).

Georgia: *Carruth v. Carruth*, 158 Ga. 714, 124 S.E. 346 (1924) (divorce for adultery; option disavowed).

Louisiana: *State v. Carr*, 25 La. Ann. 407, 408 (1873) (inference not allowable from a failure to offer any evidence for the defense).

Minnesota: *State v. Richman*, 143 Minn. 514, 173 N.W. 718 (1919) (failure to explain possession of stolen money; the opinion ignores the consideration that the whole common law doctrine about unexplained

(3) Where the witness not produced is *privileged* and therefore might refuse to testify if called, there arises an interesting and complicated problem already elsewhere considered (§286 *supra*, in general, and §§213 *supra*, marital privilege). It here involves also the question whether the accused's failure to call a *co-defendant*, who would be privileged but competent and whose nonproduction would otherwise be open to inference, can thus be noticed. It would seem that it ought to be — at least unless it appears that the co-defendant claims his privilege.⁴

(4) Where the accused now *takes the stand voluntarily*, he waives his privilege, to a certain extent at least (§207-6 *infra*). The prohibition against inferences from his failure to testify comes to an end with the ending of the privilege. Hence, his *failure in his testimony to deny or explain* the evidence against him which he might naturally have explained is therefore open to inference.⁵ This is so however narrowly the extent of the waiver be

United States: *Tealwood v. Abbott*, 5 United States 37 How. 242, 247 (1846); *United States v. Fleming*, 48 Fed. 907, 916 (1891); *Grinnell v. United States*, 115 Fed. 81, 89 (C.A. 1906) (failure to produce invoices, etc.).

Illinois: *Central Stock & C. Exchange v. Board of Trade*, 196 Ill. 596, 64 S.E. 740 (1902) (plaintiff, in a bill to secure quotation service, refused to produce its sales sheets, claiming the privilege; held, that the inference could be drawn as against a party to a civil cause, even though production was not compulsory because of the privilege).

Missouri: *State v. Chamberlain*, 89 Mo. 139, 154, 1 S.W. 115 (1886).

Excelsior: *R. v. Smith*, 3 Burr. 1475 (1764).

For the question whether the prosecution is at least entitled to give the usual notice to produce a document possessed by defendant, see §2268 *supra*.

Utah: *State v. Mathews*, 123 Ala. 58, 26 So. 333 (1899) (same).

Kentucky: *McLean v. Commonwealth*, 146 Ky. 101, 112 S.W. 231 (1912) (inference allowed).

Michigan: *People v. Schultz*, 210 Mich. 297, 178 N.W. 89 (1920) (prosecutor may comment on failure to call co-defendants).

Missouri: *State v. Mathews*, 98 Mo. 125, 130, 10 S.W. 144, 11 S.W. 1135 (1888) (inference allowed, the co-defendant not being on trial at the same time, and being therefore qualified, and not privileged; Sheriff, J. dissenting on the ground that a co-defendant not on trial is privileged).

State v. Weaver, 165 Mo. 1, 65 S.W. 308 (1901) (no inference allowed for a failure to call a competent co-indictor not on trial).

State v. Mathews, *supra*, republished, with the remark that "the ruling in that case simply dodged the issue, and that is what every lawyer will say who reads the opinion in the case".

Oklahoma: *Cole v. State*, 16 Olla. Crim. 420, 183 Pac. 731 (1919) (convicted co-defendant; inference allowed from failure to call him).

Oregon: *State v. White*, 48 Ore. 416, 87 Pac. 137 (1906) (conspiracy to kidnap; failure to call an incompetent co-defendant not on trial; the court need not instruct the jury not to draw inference).

Texas: *McClure v. State*, 95 Tex. Crim. 53, 251 S.W. 1069 (1923) (here the co-defendant and claimed privilege).

Casady: *R. v. Hare*, 11 Ott. 1 R. 315 (1906) (the judge's comment on the accused's failure to call F., jointly indicted but separately tried, and competent for either party, held not a violation of statute).

Federal: *United States v. Lee Huen*, 118 Fed. 412, 476 (D.C.N.Y. 1902); *Ball v. United States*, 129 Fed. 689, 695 (8th Cir. 1904) (the principle is conceded, but here the trial judge's language in the instruction was held too broad); *Caminetti v. United States*, 212 U.S. 470 (1917) (the accused's failure to explain incriminating circumstances and events already in evidence, in which he has participated and concerning which he is informed, is open to inference; repudiating the language in *Balliet v. United States*, *supra*); *Le More v. United States*, 253 Fed. 867, 897 (5th Cir. 1918); *Krodkiewicz v. United States*, 19 F.2d 421 (6th Cir. 1927) (*Caminetti v. United States*, *supra*, followed); *Carrier v. United States*, 19 F.2d 431 (6th Cir. 1927) (similar).

Alabama: *Clarke v. State*, 87 Ala. 71, 74, 6 So. 368 (1888); *Cotton v. State*, 87 Ala. 103, 6 So. 396 (1887).

Arkansas: *Davis v. State*, 174 Ark. 891, 208 S.W. 359 (1927) (liquor offense).

Colorado: *Solander v. People*, 2 Colo. 48,

interpreted (§2276 *infra*). Furthermore, where the party refuses answer and claims privilege as to the matter which is in truth included in the waiver, but this answer is *not* made *upon* the inference is of course available,⁶ and this is conceded even under the anomalous doctrine of Mr. Justice Goble as to waiver.⁷ Finally, this waiver has been held to go so far as to permit inferences to be drawn from *poor omissions or failures or refusals to testify* at a time when the privilege existed and the inference would have been prohibited.⁸

⁶ 1873; *Blanda v. People*, 67 Colo. 541, 189 Pac. 219 (1926).
⁷ *Laurie v. State v. Goble*, 51 Kan. 370, 375, 10 P. 8 (1898).
⁸ *Massachusetts v. Larkin*, 250 Mo. 218, 127 S.W. 600 (1904) (overruling *State v. Graves*, 95 Mo. 510, 6 S.W. 739 (1888)) and adopting rule stated in *State v. Morton*, 193, 194 S.W. 430 (1896).
⁹ *State v. Priddy*, 276 Mo. 359, 208 S.W. 91 (1918); *State v. Cooper*, 229 S.W. 431 (Mo. 1923).
¹⁰ *State v. Larkin*, *supra* followed; *State v. Milbap*, 310 Mo. 500, 276 S.W. 626 (1925); *State v. Ayres*, 311 Mo. 571, 285 S.W. 107 (1926) (*State v. Larkin*, *infra* followed); *State v. Murray*, 316 Mo. 31, 292 S.W. 431 (1925) (affirming the rule in *State v. Larkin*, *supra*).

Nebraska v. Powers v. State, 75 Neb. 296, 106 N.W. 312 (1905); *Russell v. State*, 77 Neb. 519, 110 N.W. 380 (1907) (but the inference does not necessarily apply to every fact not explicitly denied by a party taking the stand).
¹¹ *New York v. Stover v. People*, 56 N.Y. 315, 250 (1874) (lacking defendant's failure when on the stand, to account for the money, admissible for conspiracy).

¹² *Utah v. Mattivi*, 39 Utah 331, 117 Pac. 31 (1911).

¹³ *Hoss v. Wotton*, 3 Cal. 24 384, 41 P.2d 750 (1925) (conveyance in fraud of creditors; the parties' claim of privilege for part of the questions asked, held open to inference; following *Andrews v. Frye*, Mass., *infra*); *Fines v. Commonwealth*, 25 Ky. 1, Rep. 1233, 77 S.W. 363 (1903); *Andrews v. Frye*, 104 Mass. 234, 206 (1870); *State v. Olier*, 22 N.H. 459, 465 (1873); *State v. Dodson*, 52 N.D. 305, 156 N.W. 789 (1912).
¹⁴ Distinguish the case in which, despite waiver, the plea of privilege is erroneously upheld by the trial judge. In such a case, no inference is proper. *Johnson v. United States*, 318 U.S. 159 (1943).

¹⁵ *Cooley*, Constitutional Limitations 317 (5d ed. 1973), quoted *infra* §2276, note 2. Compare the following cases of earlier date: *Caine v. Litchfield*, 2 Mich. 346, 341 (1852); *Knowles v. People*, 15 Mich. 408, 413 (1867).
¹⁶ In addition to the following authorities, §2272 *supra* at notes 10 and 11, and §2276 *infra* at note 7:

UNITED STATES: *Federal*; *Raffel v. United*

5. CESSATION OF THE PRIVILEGE

§2275 (including former §2275a). Waiver: (a) By contract

been doubted that the privilege against self-incrimination, in

nature of confession; state permitted to cross-examine regarding defendant's failure to testify in that matter in prior trial).
California: *People v. Jones*, 61 Cal. App. 2d 608, 143 P.2d 726 (1943) (grand jury's cross-examination of defendant as to whether he had not refused to make a statement to the district attorney on the ground that it might incriminate him adversely; *People v. Weaver*, 41 Cal. 2d 814, 264 P.2d 517 (1953) (state, solely for impeachment of defendant, allowed to bring out that he had claimed the privilege before grand jury).

Colorado: *Miller v. People*, 73 Colo. 55, 209 Pac. 632 (1922) ("this is the first time you have testified in [the three trials of] this case, isn't it?" allowed).
Indiana: *Chalmers v. State*, 213 Ind. 516, 12 S.E.2d 266 (1948) (claim of privilege at a prior trial of co-defendant).

Kentucky: *Taylor v. Commonwealth*, 17 Ky. 1, Rep. 121, 31 S.W. 227 (1896) (failure to testify at a preliminary examination); *Newton v. Commonwealth*, 28 Ky. 1, Rep. 81, 88 S.W. 1099 (1905) (failure to testify on application for bail; no authority cited); *Posner v. Commonwealth*, 271 Ky. 813, 120 S.W.2d 649 (1938) (defendant had failed to testify before coroner; adverse cross-examination permitted).

Maryland: *Allen v. State*, 173 Md. 619, 197 Atl. 111 (1938) (defendant had refused to testify at inquest; cross-examination regarding this matter allowed).
Mass.: *Meyserson*, 190 Md. 671, 59 A.2d 489 (1948) (attorney had failed to testify in his criminal prosecution; in proceedings to obtain reinstatement to the bar, inference permitted).

Massachusetts: *Commonwealth v. Smith*, 103 Mass. 411, 40 N.E. 189 (1895) (refusal to testify before the grand jury); *Phillips v. Chase*, 201 Mass. 411, 87 N.E. 755 (1909) (*Commonwealth v. Smith*, *supra*, approved).
But see *Mass. Gen. Laws Ann. c. 27A, §23 (1959)* (annulling *Commonwealth v. Smith*, *supra*).

Michigan: *People v. Prevost*, 219 Mich. 233, 189 N.W. 92 (1922) (two judges dissenting); *People v. McGee*, 303 Mich. 213, 279, 6 N.W.2d 489, 515 (1942) (that defendant exercised the privilege against self-incrimination when called before the grand jury admitted at the trial when defendant voluntarily took the stand and claimed that he committed no wrong, giving answers that could not have incriminated him had he given the same before the grand jury).
Minnesota: *Berg v. Ventulis*, 173 Minn.

INQUEST : GONIWE & OTHERS

FURTHER SUBMISSIONS

ON BEHALF OF THE SOUTH AFRICAN POLICE

1.

It was Mr. Koni's evidence that after Col. Winter saw the transcription of the phone call of the 27th June 1985 between the deceased, Mr. Goniwe and Mr. Schwarz, Winter immediately made a phone call and immediately left after the phone call. According to Koni, he also did not return to the office that day at all.

Koni, Bundle 4, F34, para. 36, pp. 11 and 12;

Koni, Record. p. 3207, line 11 - 3209 line 7.

3319 line 20

2.

When Col. Winter is not at the office, some other officer, for instance, Mr. Wentzel, used to sign the WH11.

See G10 dated 25 June 1985.

14 March 1986 26th

25 June 1985

3.

The call on the 27th June 1985 to Barry du Toit must have been before 10 a.m. (That is the time that Mr. Goniwe and the others allegedly left Cradock for Port Elizabeth - see Mrs. Goniwe, A1 and Mrs. Mkonto, A29.)

4.

There were therefore only two calls transcribed on that day, the last one (i.e. the one to Barry du Toit) before 10 a.m. on the 27th June 1985. The probabilities are overwhelming that the WH11 would have been placed before an officer during the course of that day.

5.

The officer before whom the WH11 would have been placed, would have signed in the margin as happened for instance on the 25th when Mr. Wentzel signed. In this case Col. Winter signed next to the second call. See G10, 27.6.85. *para 23A 4/10*

6.

The transcript of the Barry du Toit call was a long transcript. It would have taken some time and Col. Winter could not have signed next to it if he left immediately after the phone call he alleged made.

7.

The fact that Col. Winter therefore signed next to the Barry du Toit call, is further proof of the fact that Mr. Koni is lying as to what happened that day. On the probabilities from the objective facts as disclosed in WH11, Col. Winter must have been at the office during the day of the 27th June 1985 and did not leave the office for the whole day, as testified to by Koni.

Bundle 5: The "G" series of exhibits (these are documentary exhibits).

Bundle 6: The original inquest record.

A3. There are also physical exhibits:

Exhibit K1 : Detonator;

Exhibit K2 : Limpet Mine;

Exhibit K3 : Map (this was handed in with F.24).

A4. The heads of argument for the families present a thorough and useful overview of the facts and organisations mentioned during this inquest. We will only repeat factual statements and references to the evidence, where they are necessary in the development of our argument.

Families' Heads

A4.1. The heads of Argument for the SADF deal primarily with the Signal of 7/6/85 (and its interpretation) and the credibility of du Plessis.

SADF Heads

A4.2. The heads of Argument on behalf of the Police deal primarily with the credibility of Koni and those points in the Families' Heads which allege or imply police involvement in the murders of Matthew Goniwe and his companions.

Police Heads

A4.3. The heads of Argument on behalf of du Plessis largely confirm and add to the points raised for the families (Families' Heads), they also, inter alia, defend du Plessis' credibility, deal with the 'Counter Revolutionary Warfare' and operation Katzen.

Du Plessis' Heads

A4.4. The main issues raised and in dispute, at this stage, are whether van der Westhuizen and other specified persons, the SADF and/or the Police and particularly the Security Police murdered Matthew Goniwe and his companions and furthermore whether the Signal, du Plessis, Koni and the evidence and documents as a whole cast any reliable new light on these questions.

Families' Heads paras. 3.2, 115.

A5. The re-opened inquest has had access to a number of top secret and secret documents and information which was never before of public knowledge. The new information has placed this Court in a unique situation to consider how persons such as Matthew Goniwe were considered and viewed in structures and documents of government (and the National Security Management System) which till now were largely secret and taboo.

Bundles 1 & 2 & 5 generally.

A6. In these submissions we propose, while keeping in mind that this is an inquest, to consider the factors surrounding and leading up to the murders on 27 June 1985. We will consider the deceased and how they were murdered; the possible suspects, their circumstances, pressures and possible motives. Thereafter we will examine how the Signal impacts on the facts and the general scenario. Finally we propose to evaluate the circumstances and submit what our conclusions are.

Goniwe and Calata under no circumstances ever be appointed to a post in the DET again.

Bundle 1 p 65 (Signal typed and notes written thereon, p 68 (Fcurie), p 53 & 54 (handwritten signal)).

(iii) 6/6/85: A 'GOS Aksiekomitee' meeting chaired by Vlok in Pretoria referring a decision on Goniwe's re-appointment to a committee under the direction of the SSVR.

(iv) 7/6/85: The Geldenhuys committee sits to discuss and draw-up a report for Vlok on the possible re-appointment of Matthew Goniwe to a post in the DET.

R p 503 (16 - 17).

(v) 7/6/85: The Signal is sent, marked "uiters geheim" and for the personal attention of van Rensburg. It has no reference to the appointment of Goniwe to a DET post whatsoever. It has no mention of an OPGBS meeting, it is not a confirmation of the 23/5/85 signal and makes no reference thereto.

Bundle 1 p 73, Geldenhuys R p 519 (18 - 21)

(vi) 27/6/85: Matthew Goniwe, Fort Calata and their two companions are murdered.

G6. The fact that the Signal was sent and received is confirmed by the Signaller and van Rensburg. It and its contents then could always have been drawn to van der Westhuizen's attention or he could have demanded to see the Signal's exact wording. Du Plessis could not therefore have afforded to have a signal which conflicted with what he was

- G8.1. He had no expectation that the Signal would arrive on the 7th, yet tries to say he needed the Signal in case the line function canal (Security Police) overlooked it.

R p 208 (4 - 11)

also see Families' Heads and SADF Heads.

- G8.2. The clear 'line function' for detentions lay with the Security Police. There is no good reason why van der Westhuizen would trespass so blatantly into their area of jurisdiction (and be allowed to do so by van Rensburg who would have known of McDonald's presence). Furthermore there is no evidence that van der Westhuizen contacted anyone about his proposal, not even Snyman who was with him on the 7th. There was also no indication that the Signal's proposal was ever that of a committee of the OPGBS. The Signal therefore appears to contain the personal recommendation of van der Westhuizen.

Swart, Bundle 1 p 87 - 89

Snyman, Bundle 1 p 96 - 98, p 205 (12 - 20)

van der Westhuizen R p 2481 (2 - 3)

du Plessis R p 2147 (13 - 18).

- G8.2.1. The Signal stands in solitary isolation yet the signal of 23/5/85 has its origin in the OPGBS minutes, it was on file in OPGBS files and it was on file in the SSVR (Pretoria) with its relevant notes thereon.

Bundle 1 p 32, p 50 - 54, p 63 - 68.

- G9. Van der Westhuizen had a reputation for exactness. The idea of him sending a poorly worded obscure communication, when the signal needed to clearly convey its message, to not only van Rensburg, but others, was extremely strange (unless the Signal had to use veiled language to convey something other than mere detention).

Van Rensburg R p 205 (26 - 31).

discuss the proposal (even if van Rensburg did not have the Signal yet, which is unlikely).

van der Westhuizen R p 2829 (4 - 10)

Bundle 2, p. 39 para. 14

van Rensburg R p 205 (26 - 31)

G10.1. There was presumably time for both van der Westhuizen, van Rensburg and others to discuss the Signal's recommendation, while van der Westhuizen was in Pretoria and to plan how best to put it into operation.

G11. The Signal was sent to General van Rensburg, the head of the Strategy division of the SSSC (SSVR) who was in a key position, and liaised or saw on a regular basis persons in various government departments, but especially the security establishment. He met Brig. Willem Schoon on occasion.

Van Rensburg R p 22 (4 - 10) p 22 (26 - 29) & p 49 (10 - 17).

Stermet R p 379 (22 - 30)

G12. While various meanings can be ascribed to the words in the signal, these do not really assist this inquiry, because the circumstances make an innocent interpretation extremely unlikely. The logical interpretation, on all the facts, is that the signal cannot fit in with the current suggested innocent interpretation.

See also SADF Heads vs Families' & du Plessis' Heads
On probabilities see S v Singh, 1975(1) SA 227 N 228 G
S v Gress, 1976(4) SA 715 A 718 H
S v Texeira, 1980(3) SA 755 A 761 A

elaborate murders of Matthew Goniwe and his companions.

Bundle 2, p. 35 - 37 (esp. para. 4.6.)

H3.2. AZAPO and Rev. Maqina were obviously well monitored by the "Veiligheidsgemeenskap". Snyman confirms that Maqina was the "protector" ("beskermheer") of AZAPO in Port Elizabeth (in 1985) and the AZAPO members stayed with him at that time.

Snyman R p 1173 (22- 29).

H3.2.1. The monitoring of Maqina and the AZAPO members would therefore not have been difficult.

H3.3. Whether Maqina and the AZAPO members needed monitoring by the Security Police (or the SADF) was another matter as Maqina worked for the Security Police, with Major Herman du Plessis as his handler, and thereafter became more involved with Eduguide CC. Maqina later founded 'Ama Africa', which the State funded (this was after he was thrown-out of AZAPO).

Du Plessis R p 2146 (4 - 31).

H3.4. While Kneuwoudt suggested that not every action of AZAPO could be monitored and that they had vehicles, etc, the mounting of a co-ordinated operation such as the Goniwe murders, on their own, without being foiled or apprehended or ever found-out, would, it is submitted, have been beyond their capabilities.

H4. Both van der Westhuizen and Snyman and the persons working under them had the capability to mount an operation such as the Goniwe murders in extreme secrecy and with silence thereafter.

- H5. The Signal, together with Snyman's telegram (or signal) and the evidence and copies of documents show a high degree of polarisation and a war mentality in the country during the 80 s, with persons such as Goniwe regarded as the enemy. The unrest and anarchy justified and provide a very clear basis for a motive to kill Goniwe and his 'militant lieutenants' especially by those in the front ranks in the Eastern Cape. As stated above, the "dovish" moves by "O & O" to accommodate Matthew Goniwe must have been well nigh the last straw for those who had to deal with the unrest and spreading chaos that Matthew Goniwe was perceived to cause in the Eastern Cape.
- H6. Koni gave valuable insights into the workings of the Cradock Security Police. The transcript of the call between Matthew Goniwe and Derrick Swarts supports Koni that the call was early in the morning (see Goniwe's reference to the time as 5:30 - Bundle 5, 69 p 239, first entry dated 27/6/85). Koni was however not an insider in respect of much of what happened. There may be a doubt as to when Winter made the remark "AZAPO het dit gedoen", since it appears from the affidavit of Basson (A13) that Goniwe's vehicle was only discovered at about 16h00, and that Koni could only have known about it after then, by which time, on his own evidence, he was not at the office any more.
- H6.1. What can however not be denied, is Koni's statement in evidence that Winter left the office on the morning of the 27th and did not return on that day. It is significant that this part of his evidence is not specifically denied in their heads by the representatives of the SAP. Although they submit that Koni's evidence relating to leaving Cradock is unreliable, Koni while confirming they left the

- 4.12 Major Winter was adamant that there was no continuous following of Mr. Goniwe.

Winter : Record, p. 612/3, 614, 642, 855.

- 4.13 In regard to Col. Snyman's evidence
see paragraph 7.25 hereafter.

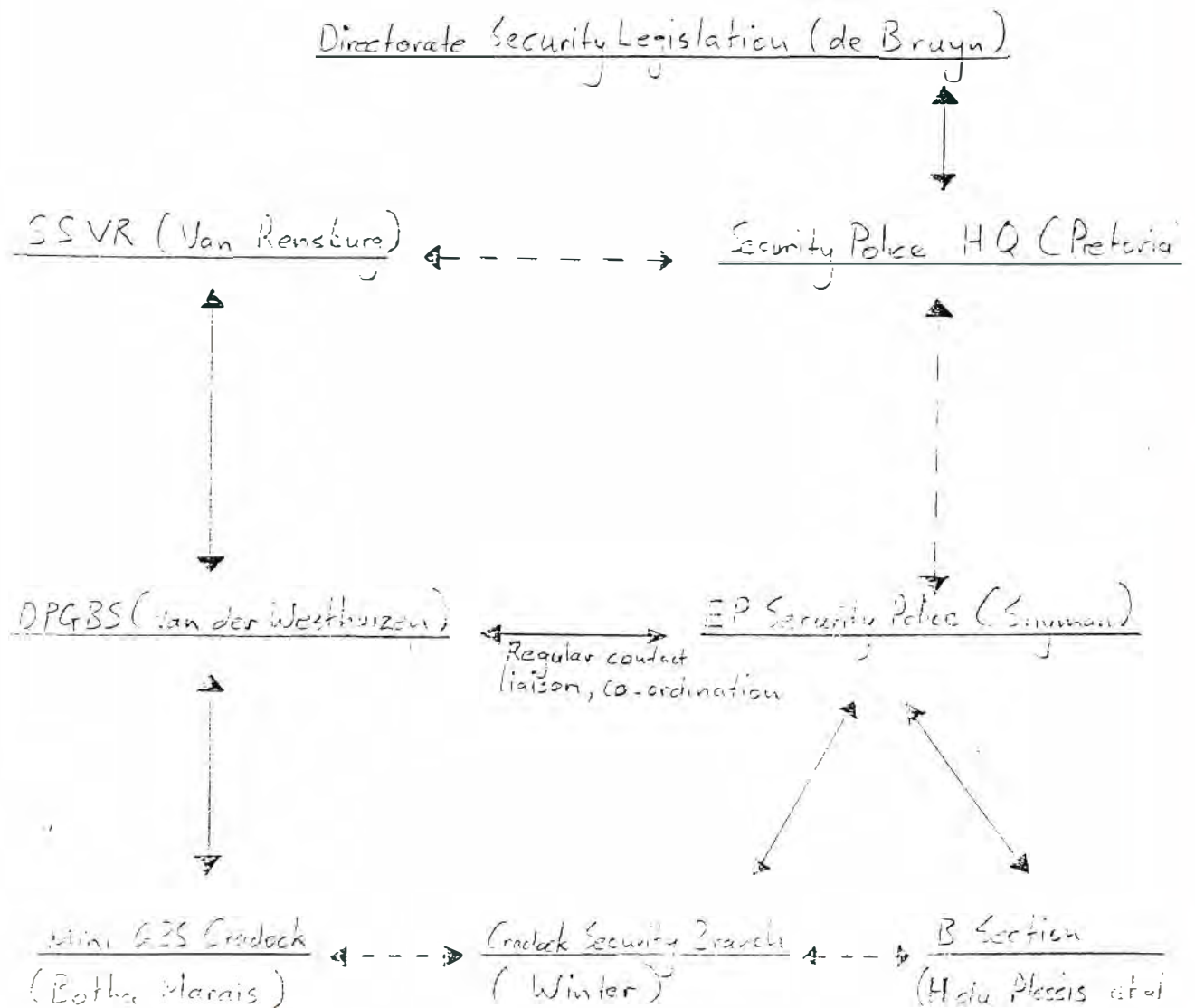
- 4.14 Col. Roelofse : The police did not have the capability to monitor a person for days on end.

Record, pp. 1837, 1854/5; 1859 - 1864; 1865 - 1868.

P. 1913.

Roelofse was an impressive witness. He was not even recalled for further cross-examination.

- 4.15 F30 Col. J.C. Scheepers: Goniwe was not specifically monitored in Port Elizabeth.



IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA
(SUIDOOS-KAAPSE PLAASLIKE AFDELING)

GDO nommer 626/87

Oorledenes

MATTHEW GONIWE
FORT CALATA
SICELA MHLAULI
SPARROW MKONTO

BONDIGE HOOFDE VAN BETOOG AANGEBIED NAMENS GENERAAL
JANSE VAN RENSBURG

1. Die regterlike beampte moet 'n bevinding aanteken ten opsigte van die aspekte genoem in artikel 16(2) van die Wet op Geregtelike Doodsondersoeke Nr 58 van 1959, soos gewysig (die Wet) en vir doeleindes van hierdie verrigtinge is artikel 16(2)(d) van belang, naamlik *"of die dood veroorsaak is deur 'n handeling of versuim wat 'n misdryf aan die kant van iemand insluit of uitmaak."*
2. Die Regsverteenwoordigers namens die families van die oorledenes het geargumenteer dat die persone genoem in paragraaf 3 van hul betoogshoofde, wat Generaal Janse van Rensburg insluit, hul skuldig gemaak het aan moord op die oorledenes. Dit is geargumenteer dat gemelde persone die motief en middele gehad het om die moord te kon uitvoer.
3. Dit word namens Generaal Janse van Rensburg aangevoer dat die getuienis, waarna kortliks hierin verwys sal word, nie die gevraagde bevinding onderskryf nie.
4. Gedurende 1985 was Generaal Janse van Rensburg aan die Hoof van Tak Strategie by die SSVR (Van Rensburg bl 18 r1 25-30) met pligte wat kortliks as volg saamgevat kan word, naamlik:
 - 4.1 Die gee van strategiese adviese aan SVR;
 - 4.2 Die ko-ordinering van die uitvoering van veiligheids strategieë; en

4.3 Die opstel van konsep noodregulasies vir noodsituasies. (Van Rensburg bl 19 r1 1-19).

Volgens Van Rensburg (bl 908 van die oorkonde) moet daar ook onderskei word tussen die posisie wat hy by die SSVR beklee het en die Strategiese Afdeling by HSAW. Die afdelings het onafhanklik gestaan van mekaar.

5. Verder, het die Sekretariaat nie oor uitvoerende bevoegdheid beskik nie (Van Rensburg bl 899 r1 14-19, bl 192 r1 16-21).
6. Op 6 Junie 1985 vind daar 'n vergadering plaas onder voorsitterskap van A Vlok en in paragraaf 5 van die notule is die volgende aangeteken: *"Na bespreking van die Goniwe geval word besluit dat 'n komitee onder leiding van die SSVR oor Goniwe se lot sal beslis en 'n voorlegging maak aan die voorsitter op 12 Junie 1985."* (Geldenhuis bl 1152 r1 22 tot bl 1153 r1 3).
7. 'n Komitee onder voorsitterskap van Brigadier Geldenhuis is saamgeroep deur Generaal Janse van Rensburg en het die toeligtingsvergadering op 10h00 op 7 Junie 1985 plaasgevind (Van Rensburg bl 70 r1 31 tot bl 29 r1 16 en bl 795 r1 11-29).
8. 'n Telefoongesprek het verder op 7 Junie 1985 tussen Van Rensburg en Generaal van der Westhuizen plaasgevind ten einde die inset van die OP GBS te kry (Van Rensburg bl 27 r1 23-28). Volgens Van Rensburg het gemelde gesprek voor 10h00 die oggend plaasgevind.
9. 'n Verslag algemeen bekend as die Geldenhuisverslag is opgestel ooreenkomstig die opdrag wat in die notule van die GVS vergadering van 6 Junie 1985 vervat is.
10. Die gewraakte sein is die middag van 7 Junie 1985 vanaf OP GBS aan die SSVR vir aandag Generaal Janse van Rensburg gestuur. Van belang is die vraag of die gemelde sein as inset van die OP GBS beskou moet word en of dit neerkom op 'n sameswering om die oorledenes te dood.

11. Van Rensburg het tydens die aflê van sy getuienis in Maart 1993 getuig dat hy die sein eers op 17 Junie 1985 sou ontvang het aangesien hy besig was met 'n ander projek (Van Rensburg bl 30 rl 11-21).
12. Van Rensburg het in Maart 1993 getuig dat die sein verband hou met die werksaamhede van die Geldenhuyskomitee en dat Van der Westhuizen hom meegedeel het dat die OP GBS standpunt skriftelik bevestig sou word (Van Rensburg bl 31 rl 10-25). Dit word ontken dat die sein van 7 Junie 1985 op 'n sameswering neerkom.
13. Op 26 Februarie 1994 het Van Rensburg die eedsverklaring afgelê, bewysstuk F39. In gemelde verklaring verander Van Rensburg sy getuienis ten opsigte van wanneer hy die sein onder oë sou gehad het en verder getuig hy dat hy sekere bywerkings aan die Geldenhuysverslag gemaak het voor afsending daarvan. (Van Rensburg bl 793-800).
14. In bewysstuk F39 en tydens kruisondervraging verskaf Van Rensburg 'n verduideliking vir die verandering van sy getuienis, asook waarom dit nie vroeër onder die aandag van die verrigtinge gebring is nie (Van Rensburg bl 801 rl 25 tot 802 rl 23, bl 809 rl 20 tot bl 810 rl 22, bl 822 rl 26 tot bl 824 rl 13).
15. Volgens C W H Schmidt, BEWYSREG 3de uitgawe bl 426-7 onder die opskrif Vorige teenstrydige verklarings huldig die geleerde skrywer die standpunt dat getuienis wat in stryd is met 'n vorige verklaring wel as getuienis aanvaar kan word indien daar goeie rede is om te aanvaar dat die getuienis reg is. Die blote aanwesigheid van strydige getuienis bring nie noodwendig verwerping van al die getuienis mee nie.
16. Tydens Van Rensburg se getuienis in 1994 het hy getuig dat hy persoonlik die redigering was en sekere bywerkings aan die Geldenhuysverslag behartig het. Bewysstuk F39 (Van Rensburg bl 798 rl 1-21).

17. In paragraaf 40 van die Geldenhuysverslag word daar na Mbolelo Goniwe en Fort Calata verwys as synde twee van die meelopers van Matthew Goniwe. In besonder moet daar gelet word op die spelling van die voornaam Mbolelo, asook die voorname wat gebruik word. Indien die verwysing na Matthew Goniwe se meelopers hul oorsprong sou gehad het in dokumentasie van die veiligheidstak dan sou die spelling verskil van die huidige spelling en verder, uitgesluit Matthew Goniwe, word daar in gemelde dokumentasie na drie persone verwys met hul volledige voorname en nie soos wat na in die betrokke sein van 7 Junie 1985 slegs na 3 persone verwys word nie.

Memorandum gedateer 25 Junie 1985 met bylae daartoe: Bundel 1 bladsy 84 tot 104 in besonder paragraaf 28 te bladsy 99, paragraaf 36.5 te bladsy 104.

Bundel 1: De Bruin bladsy 181 paragraaf 2.

18. Verder, is die sein van 7 Junie 1985, asook die Geldenhuysverslag albei as uiters geheim geklassifiseer. Gevolglik kan aanvaar word dat die aangeleentheid rondom Matthew Goniwe as sensitief beskou is.
19. Daar moet ook gelet word op die getuienis soos afgelê deur Vorster en die verdere getuienis wat deur Generaal Geldenhuys gedurende 1994 afgelê is. Die volgende is daar van belang:

Al getuienis van Vorster wat uiteindelik strydig is met die van Van Rensburg gaan oor die vraag of sy enige tikwerk aan die verslag gedoen het. Aanvanklik het sy getuig dat sy nie kan onthou dat Van Rensburg die twee dokumente op 12 Junie 1985 van haar sou ontvang het en dat sy sekere veranderinge aan die verslag sou aangebring het nie. (Vorster bl 1056 r1 12-21). Later getuig sy dat sy glad nie die Geldenhuysverslag getik het nie, asook bywerkings daaraan gedoen het nie. (Vorster bl 1059 r1 13-17).

20. Verder gee sy toe dat dit moontlik was dat sy die twee dokumente, (die sein en die Geldenhuysverslag) as los dokumente aan Van Rensburg kon gegee het (Vorster bl 1062 r1 28 tot 1063 r1 11).

21. Geldenhuys verleen ook steun aan Van Rensburg se weergawe soos getuig in 1994 deurdat:

21.1 Hy toegee dat Van Rensburg sekere bywerkings tot die verslag kon gedoen het solank dit nie die eindaanbeveling sou verander nie (Geldenhuys bl 1069 rl 12-27). Gemelde optrede, verwysend na bywerkings wat Van Rensburg aan die verslag sou gedoen het sou nie onreëlmatig wees nie (Geldenhuys bl 1070 rl 30 tot 1071 rl 9, bl 1082 rl 6-26).

21.2 Dat Van Rensburg as hoof verantwoordelik was vir terugvoering oor die verslag (Geldenhuys bl 543 rl 1 tot 544 rl 3).

21.3 Dat leiding deur Van Rensburg verskaf sou word aan die komitee met hul werksaamhede (Geldenhuys bl 1153 rl 18 tot 1154 rl 30).

21.3 Dat Van Rensburg wel die verslag onder dekking van 'n memorandum op 13 Junie 1985 aan hom sou kon gestuur het met sekere opdragte (Geldenhuys bl 1148 rl 10 tot 1149 rl 22, bl 1150 rl 20 tot 1151 rl 2).

22. Die voorafgaande is enkele aspekte wat daarop dui dat Van Rensburg se getuienis, soos afgelê in 1984, nie blatant verwerp kan word nie en dat daar ondersteuning te vind is in sy weergawe.

23. Dit is ook verder die getuienis van Van Rensburg gewees dat die SSVR nie oor uitvoerende magte beskik het nie. Van kardinale belang is ook die feit dat Van Rensburg getuig het dat hy 'n voorstander was vir die heraanstelling van Goniwe (Van Rensburg bl 1048 rl 13 tot bl 1049 rl 14).

24. In aggenome Van Rensburg se getuienis oor sy eie standpunt rondom Goniwe word dit namens Van Rensburg betoog dat daar nie sprake daarvan kan wees dat Van Rensburg 'n motief kon gehad vir die doodmaak van Matthew Goniwe nie.

25. Daar word ook geargumenteer dat die inset van die OP GBS, na verwys in die Geldenhuysverslag, die sein van 7 Junie 1985 was en dat gemelde sein geensins aanduidend is van enige sameswering vir die moord van onder andere die oorledenes nie.
26. Gevolglik word dit namens Van Rensburg aangevoer dat daar geen getuienis is op sterkte waarvan 'n bevinding soos na verwys in artikel 16(2) van die Wet, teen hom gemaak kan word nie.

F C VAN ROOYEN
KAMERS

19 MAART 1984



