

P5.1

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between :-

GCINUMUZI PETRUS MALINDI
TSIETSI DAVID MPHUTHI
NAPHTALI MBUTI NKOPANE
TEBELLO EPHRAIM RAMAKGULA
SEKWATI JOHN MOKOENA
SERAME JACOB HLANYANE
THOMAS MADIKWE MANTHATA
HLABENG SAM MATLOLE
POPO SIMON MOLEFE
MOSIUOA GERARD PATRICK LEKOTA
MOSES MABOKELA CHIKANE

First Petitioner
Second Petitioner
Third Petitioner
Fourth Petitioner
Fifth Petitioner
Sixth Petitioner
Seventh Petitioner
Eighth Petitioner
Ninth Petitioner
Tenth Petitioner
Eleventh Petitioner

and

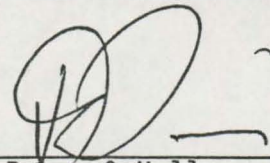
THE STATE

Respondent

In re : THE STATE v PATRICK MABUYA BALEKA & OTHERS
(TPD CASE NO. 482/85)

PETITIONERS' REPLYING AFFIDAVIT TO RESPONDENT'S ANSWERING AFFIDAVIT

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TO:
THE REGISTRAR OF THE
ABOVE HONOURABLE COURT
BLOEMFONTEIN

AND TO:

Attorney General of the Transvaal
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RECEIVED a copy hereof on this
the day of MAY 1989

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO. 54/89

In the matter between:

| | |
|-------------------------------|---------------------|
| GCINUMUZI PETRUS MALINDI | First Petitioner |
| TSIETSI DAVID MPHUTHI | Second Petitioner |
| NAPHTALI MBUTI NKOPANE | Third Petitioner |
| TEBELLO EPHRAIM RAMAKGULA | Fourth Petitioner |
| SEKWATI JOHN MOKOENA | Fifth Petitioner |
| SERAME JACOB HLANYANE | Sixth Petitioner |
| THOMAS MADIKWE MANTHATA | Seventh Petitioner |
| HLABENG SAM MATLOLE | Eighth Petitioner |
| POPO SIMON MOLEFE | Ninth Petitioner |
| MOSIUOA GERARD PATRICK LEKOTA | Tenth Petitioner |
| MOSES MABOKELA CHIKANE | Eleventh Petitioner |

and

THE STATE

Respondent

In re: The State v Patrick Mabuya Baleka and Others
 (TPD CASE NO. CC 482/85)

REPLYING AFFIDAVIT

We, the undersigned,

GCINUMUZI PETRUS MALINDI
 TSIETSI DAVID MPHUTHI
 NAPHTALI MBUTI NKOPANE
 TEBELLO EPHRAIM RAMAKGULA
 SEKWATI JOHN MOKOENA
 SERAME JACOB HLANYANE
 THOMAS MADIKWE MANTHATA
 HLABENG SAM MATLOLE
 POPO SIMON MOLEFE
 MOSIUOA GERARD PATRICK LEKOTA
 MOSES MABOKELA CHIKANE

hereby make oath and say:

1. We are the petitioners in the above matter.
2. We have read the answering affidavit of the Attorney General for the Transvaal and wish to reply thereto as follows.
3. Ad Paragraph 3

3.1. Annexure "A" was prepared to provide the above Honourable Court with sufficient information to enable it to come to a decision on the relief claimed in prayer 1 of the petition.

3.2. We respectfully submit that the petition read with Annexure "A" contains all the information that is necessary for this purpose.

T. E. R.

H.S.M.

S.B.H.

N.M.N.

S.J.M.

J.D.M.

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4. Ad Paragraph 3.3 to 3.7

4.1. Your petitioners' contentions in regard to the special entries referred to in prayer 1 of the petition are set out in paragraph 16 of the petition. In particular, it will be contended on behalf of your petitioners that if the special entries are upheld, there will have been so gross a departure from the established rules of procedure, as to constitute, per se, a failure of justice.

4.2. If this contention should be upheld, your petitioners submit that the question of prejudice becomes irrelevant, and that the factual issues raised by the Respondent in paragraph 3.3 and 3.4 of his answering affidavit will not arise. Your petitioners respectfully submit that it cannot reasonably be contended, and indeed the Respondent does not so contend, that Annexure "A" contains insufficient information for the purpose of enabling the above Honourable Court to decide whether or not the trial judge was empowered by Section 147 of the Criminal Procedure Act to make the order that he did, or whether he erred in making the rulings that he did in regard to the admissibility of Professor Joubert's affidavits, and the binding effect of the statement he placed on record on 30 March 1987.

4.3. Your petitioners respectfully submit that the Respondent's contention advanced in paragraphs 3.3 and 3.4 of his answering affidavit, that the entire record needs to be placed before the above Honourable Court to enable it to decide the issues raised in special entries 1 and 2 is incorrect, and based on two mistaken assumptions.

4.3.1. First, that the issue of prejudice will arise, whereas in fact your petitioners contend that

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the trial judge did not have the power to make the order that he did, that there was accordingly an irregularity in the proceedings which resulted in a failure of justice per se, and in the circumstances the special entry can and should be decided without regard to the issue of prejudice.

4.3.2. Secondly, and if it is assumed that the trial judge had the power to make the order that he did, but committed an irregularity in the procedure that he followed, that it would then be necessary to consider the nature and importance of the Million Signature Campaign which, so the Respondent contends, can only be done in the light of the evidence contained in the entire record. Your petitioners dispute this contention. They contend that even if the trial judge had the power to make the order that he did, he acted irregularly in making the order, and in so doing committed an irregularity which per se resulted in a failure of justice. In support of this, your petitioners will contend that the question is not what the Million Signature Campaign form means, nor how important the Million Signature Campaign was, but whether there was reason to believe that as a result of having signed a form protesting against the new constitution Professor Joubert would not give a true verdict on the issues to be tried. In this context, it will be contended that what was important was Professor Joubert's attitude to his duty as assessor, his recollection and understanding of the document that he signed, and his purpose in signing it. It will also be contended that the trial judge's decision to make an order in the circumstances that he did and without hearing argument, the

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reasons given by him as to why he made the order, the information contained in Professor Joubert's affidavits (including the third affidavit) and the rulings referred to in Annexure "A" contain the material information upon which this question falls to be decided.

4.4. Your petitioners accordingly deny the allegations contained in paragraphs 3.3 to 3.7 of the Respondent's answering affidavit.

5. Ad Paragraphs 3.1, 3.2 and 3.8

5.1. Your petitioners repeat paragraphs 3 and 4 above.

5.2. It is correct that your petitioners have not approached the Respondent for agreement in regard to the contents of the record to be placed before the above Honourable Court in regard to the hearing of special entries 1 and 2.

5.3. The purpose of prayer 2 of the petition was not to secure an advantage over the Respondent, but to obtain authority to use the documents already filed with the above Honourable Court at the hearing of the special entry. The reasons for seeking this relief are set out in paragraph 17 of the petition.

5.4. Your petitioners bona fide believed, and still believe, that Annexure "A" contains all the information that could reasonably be said to be relevant to a determination of their main contentions in regard to special entries 1 and 2, namely, that as a result of the matters raised in such special entries there have been material irregularities which per se constitute a failure of justice.

5.5. Your petitioners bona fide believe that it cannot reasonably be contended, and Respondent has not so

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contended, that in regard to the determination of that question any documents other than those contained in Annexure "A" need to be placed before the Court.

6. Ad Paragraph 10

6.1. Your petitioners admit sub-paragraphs (a), (b) and (c).

6.2. Your petitioners have been advised and verily believe that :-

6.2.1. the letter referred to in sub-paragraph (a) has no relevance to these proceedings;

6.2.2. the application to strike out was made during the course of the application, and the notice was misplaced and overlooked when Annexure "A" was prepared. It is, however, apparent from Annexure "A" that such an application was made;

6.2.3. the two pages from the Commission of Enquiry were omitted from the original documents, as appears from Annexure "A".

6.3. Save as aforesaid your petitioners deny paragraph 10 of the answering affidavit.

7. Ad Paragraph 11

7.1. Your petitioners submit that the extracts from the record referred to in paragraph 11.2 of the petition are relevant. This is a question for argument and will be dealt with at the hearing of this matter.

7.2. Annexure "5" is contained in pages 282 and 283 of Annexure "A".

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8. Ad Paragraph 13

- 8.1. Your petitioners submit that Professor Joubert's third affidavit is relevant to the issues raised by special entries 1 and 2 and that it ought properly to be before the Court at the time that those issues are determined, and also, at the time when it is decided whether or not the issues can and should be determined in limine.
- 8.2. Your petitioners submit that it is necessary for the above Honourable Court to see the third affidavit to enable it to form a view in regard to its relevance to the issues, and to form a view as to whether or not reasonable grounds exist for holding that the whole, or part of the affidavit, is admissible.
- 8.3. The third affidavit has been included in the papers for the reasons set out above, and the reason set out in paragraph 13.3 of the petition. No prejudice can be caused to the Respondent by having the third affidavit included in the record. If it is inadmissible it will be ignored. If there is reason to believe that it may be held to be admissible, then any reply that the trial judge may wish to make to the averments made by Professor Joubert in the third affidavit, can be secured in advance of the hearing.

9. Ad Paragraphs 14.1 and 14.2

- 9.1. Your petitioners admit that the Million Signature Campaign is referred to in various documents. This is acknowledged in paragraph 14.2 of the petition.
- 9.2. Your petitioners repeat the averments made by them in paragraph 4 of this affidavit.

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9.3. Save as aforesaid your petitioners deny paragraphs 14.1 and 14.2 of the answering affidavit.

10. Ad Paragraphs 14.3 to 14.6

10.1. Accused No. 6 was not the first defence witness. Prior to his giving evidence, evidence had been given by Accused No's 8, 9 and 10. Their evidence covers 1876 pages of the record.

10.2. Your petitioners deny that the Million Signature Campaign constituted a material or important part of the State case and repeat the averments made by them in paragraph 14 of the petition and in paragraph 4 of this affidavit.

11. Ad Paragraph 14.7

11.1. It is clear from Professor Joubert's first and third affidavits that he has no clear recollection of the contents of the document that he signed. He thought that it was a Million Signature Campaign form, but if it was signed during the course of the referendum, it may have been a different form, possibly relating to the Nusas petition as appears from page 461 of Annexure "A".

11.2. Your petitioners dispute the contentions contained in sub-paragraphs (b) to (e) of the Respondent's answer to paragraph 14.7 of the petition. These contentions constitute argument and will be dealt with at the hearing of the matter.

12. Ad Paragraph 16

12.1. Your petitioners repeat the averments made in paragraph 4 of this affidavit.

12.2. Your petitioners submit that there can be no doubt concerning their averment that there will be a very

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substantial saving of time and costs if a finding is made by the above Honourable Court that special entries 1 and 2 should be upheld, and that they constitute material irregularities which per se resulted in a failure of justice.

12.3. Your petitioners admit that the Respondent has a material interest in the hearing of the appeal, but contend that it is in the interest of the Court and all the parties (including the Respondent) that special entries 1 and 2 be determined in limine.

12.4. Save as aforesaid your petitioners deny paragraph 16.

13. Ad Paragraph 19

13.1. It is made clear in paragraph 14 of the petition that there are references to the Million Signature Campaign in the documents.

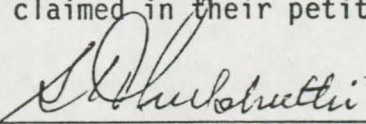
13.2. The great majority of the documents relied upon by the State were made available to the Court in the form of bundles which were simply handed up to the Court and were not read into the record or referred to by any of the witnesses. Indeed, some of them were not referred to at any stage of the proceedings, and were not dealt with in the evidence of witnesses, or in argument or in the judgment.

13.3. No formal admissions were made specifically with regard to the Million Signature Campaign. Admissions were, however, made in regard to the finding of documents at certain premises or in the possession of certain persons. On the basis of such admissions a large number of documents were subsequently found by the trial judge to be admissible. Some of these documents included references to the Million Signature Campaign.

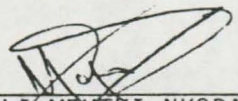
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13.4. The first occasion on which the Million Signature Campaign was investigated in any depth was when Accused No. 6 gave evidence. We deny that the averments made in paragraphs 14.2 and 14.3 of the petition, or that the averments made by the said Dison in support thereof, present an untrue or incorrect picture to the above Honourable Court.

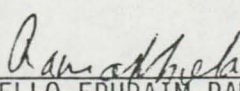
Wherefore your petitioners pray that it may please the above Honourable Court to grant them the relief claimed in their petition.



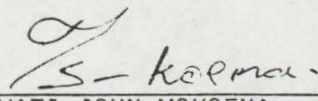
 TSIETSI DAVID MPHUTHI
 Second Petitioner



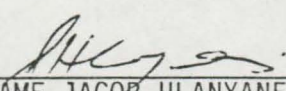
 NAPHTALI MBUTHI NKOPANE
 Third Petitioner



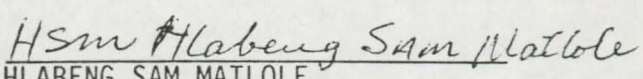
 TEBELLO EPHRAIM RAMAKGULA
 Fourth Petitioner



 SEKWATI JOHN MOKOENA
 Fifth Petitioner

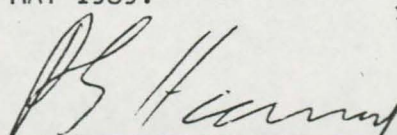


 SERAME JACOB HLANYANE
 Sixth Petitioner



 HLABENG SAM MATLOLE
 Eighth Petitioner

I CERTIFY that the deponents have acknowledged that they know and understand the contents of this affidavit signed and sworn to before me at JOHANNESBURG on the 7TH day of MAY 1989.



 COMMISSIONER OF OATHS

FULL NAMES _____

 BUSINESS ADDRESS _____

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