ARTIKEL 174 VAN WET 51 VAN 1977

1.

Artikel 174 bepaal dat ontslag van 'n beskuldigde aan die einde van die Staatsaak kan volg indien die hof by sluiting van die Staatsaak, van oordeel is dat daar geen getuienis is dat die beskuldigdes die misdryf soos in die aanklag vervat, of enige ander misdryf waarop die hof 'n bevoegde uitspraak kon lewer op die aanklag, gepleeg het nie.

2.

Hieruit volg eerstens of die hof 'n diskresie het; tweedens of die diskresie, indien die hof wel een het, slegs uitgeoefen kan word indien daar geen getuienis is dat die beskuldigdes die misdryf gepleeg het nie; derdens of die hof, indien hy 'n diskresie het, verplig is om die diskresie uit te oefen indien daar geen getuienis teen die beskuldigdes is nie.

3.

Eerstens moet bepaal word wat die Wetgewer met die uitdrukking "geen getuienis" bedoel.

3.1 Dit word betoog dat die toets neergelê in Gascoyne vs Paul and Hunter, 1917 TPD 170 deur Sy Edele De Villiers (R.P.) en bevestig deur die appèlhof in R vs Shein, 1925 AD 6 op p. 9, nogsteeds geldende reg is. Daarvolgens moet daar minder getuienis wees as waarop "a reasonable man might convict - not should convict, but might convict" wanneer die ontslag van 'n beskuldigde gegee word.

Vide: ook R vs Kritzinger and Others, 1952(2) SA 401 (WLD) op 402 D, en die meer resente beslissing van S vs Khanyapa, 1979(1) SA 824 (A) op 838 F - "geen getuienis" beteken natuurlik geen getuienis waarop

'n/...

'n redelike mens die beskuldigde skuldig sou kon bevind nie" - per H.R. Rumpff.

3.2 In die praktyk, word betoog, beteken "geen getuienis" onvoldoende getuienis waarop 'n redelike man sou kon skuldig bevind.

3.3 Wat hiermee saamhang, is die vraag of die hof op hierdie stadium, by beoordeling van die vraag of daar "geen getuienis" is nie, mag of moet let op die geloofwaardigheid van die getuies en daaroor op hierdie stadium 'n oordeel behoort te fel. Hieroor was die howe ook nie eensgesind nie.

3.3.1 In R vs Dladla and Others, 1961(3) SA 919D op 923 F beslis Sy Edele James, R., "I am accordingly of the opinion that the true position is that the credibility of witnesses is not a matter to which a Judge may pay regard when considering an application for discharge at the close of the Crown case. His sole duty at that state is to consider whether the evidence advanced by the Crown, if believed, might be sufficient..." (My onderstreping)

3.3.2 In die saak VAN S vs National Board of Executors Ltd. and Others, 1971(3) SA 817 (D) op 819 F, kom Sy Edele, Harcourt, R., tot dieselfde gevolgtrekking.

3.3.3 Sy Edele Regter Vieyna het in die W.P.A. in die saak van S v Naidoo, 1966(1) PH H104 'n ander benaderingsgevolg:

But in considering the application of section 157(3) of the present statute the Court is not hampered by considerations as to what is or

what/...

what is not a point of law.

The sole concern is the assesment of the evidence, and in this regard there can be no warrant for excluding the question of dredibility. Of course, as the test is not what a reasonable man should find, but could or might find, a court is not entitled to approach the question of credibility on the same basis as when considering the verdict at the close of the whole case, for reasonable men may well differ in their assesment as to the acceptability of witnesses..."

3.3.4 Wyde Regter Eksteen het in R vs Nortje, 1961(2) PH H166 reeds in 1961 van die Natalse uitspraak van R vs Dladla en Others (supra) verskil in soverre hy bevind het t.a.v. geloofwaardigheids-oorwegings:

> "In sekere gevalle egter vind mens wel 'n mate van getuienis wat die beskuldigde kan impliseer en die misdaad teen hom uitmaak, maar as daardie getuienis na die oordeel van die voorsittende Regter van so 'n swak gehalte is dat geen redelike mens daarop kan handel om enige persoon skuldig te bevind nie, dan sal die voorsittende Regter wel geregtig wees om ook so 'n aansoek om ontslag toe te staan."

3.3.5 Sy/...

3.3.5 Sy Edele Regter Potgieter kom in die Vrystaat in die saak van S vs Bouwer, 1964(3) SA 800 (O) op 802 H tot die volgende gevolgtrekking:

> "By wyse van hoogste uitsondering mag geloofwaardigheid ter sprake kom, maar, meen ek, slegs in 'n geval waar die geloofwaardigheid van 'n getuie so aanvegbaar is dat dit feitlik daarop neerkom dat dit geen getuienis is nie."

3.3.6 In S vs Supetha and Others, 1983(4) SA 262 (C.P.D.) meen Sy Edele Regter Williamson op 265 D-E:

> "In my view the cases of Nortje, Bouwer and Naidoo correctly hold that credibility is a factor that can be considered at this stage. However, it must be remembered that it is only a very limited role that can be played by credibility at this stage of the proceedings. Before credibility can play a role at all it is a very high degree of untrustworthiness that has to be shown."

3.3.7 Daar ontstaan 'n anomalie sover dit die aspek aan geloofwaardigheid aangaan - is die vraag of daar "geen getuienis" is, 'n regs- of feitevraag? Indien dit 'n regsvraag is, is dit alleenlik die voorsittende Regter wat hieroor mag beslis; indien dit 'n feitevraag is, het ook die assesore 'n beslissingsreg t.a.v. hierdie aspek.

3.3.7.1 In die onlangse saak van S vs R.S. Mashela en 9 andere, CC 105/86, (ongerapporteerd) en beslis in die Transvaalse Provinsiale Afdeling op 18 Maart 1986 deur Sy Edele Regter Van der Walt, word bevind (op p. 1124).

"The/...

"The question of whether there is any evidence upon which a reasonable man could properly convict the accused is in itself a matter of law to be decided by the Judge alone..."

3.3.7.2 Die saak van Dladla bevestig dat die kwessie van ontslag 'n regsvraag is - p. 922 H.
Hier word egter verwys na die appèlhof uitspraak van R vs Slabbert and Prinsloo, 1945 AD 137 waar A.R. Greenberg beslis het dat "questions of credibility are not for the judge" - aldus Sy Edele James, R.

3.3.7.3 As dit so is dat die hele kwessie van ontslag 'n regsvraag is waar die regter alleen oor mag beslis, op welke basis kan die beoordeling van geloofwaardigheid van getuienis (waaroor die Assesore inderdaad saam 'n $^{2}/_{3}$de meerderheidstem in die hof het), hul ontneem word by die aansoek om ontslag?

3.3.7.4 Na my oordeel moet, soos die howe in die Bouwer- en Mpetha-sake beslis het, geloofwaardigheid slegs 'n rol speel waar die getuies so ooglopend ongeloofwaardig was dat hul getuienis bykans neerkom op geen getuienis nie - om 'n ander reël te wil toepas, sal enersyds beteken dat Assesore hul reg op beslissing oor die geloofwaardigheid van getuienis ontneem word, en andersyds dat, as

die/...

die hof nie geloofwaardigheid in aanmerking kan neem nie, 'n saak vir dae en maande kan voortsloer sonder enige hoop op sukses vir die Staat - wat bepaald nie die doel van strafverhore is nie.

3.4 Waar die Staat steun op omstandigheidsgetuienis, is dit die Staat se betoog dat die volgende oorwegings geld:

3.4.1 Die hof het, met respek, fouteer waar in S vs Bouwer 1964(3) SA 800 (O) op p. 802, beslis is dat die reëls soos in R vs Blom, 1939 188 op 202 neergelê is, geld hy 'n aansoek om ontslag en die Staat op omstandigheidsgetuienis steun.

3.4.2 Die hof het in S vs Cooper and Others, 1976(2) SA 875 (TPD) op 890 D-E die korrekte toets, na my respekvolle oordeel, toegepas:

> "... if there is more than one inference possible from the facts ... then that is just the sort of evidence that should be referred to the triers of fact for decision." - Vide: ook S vs Ostilly and Others, 1977(2) SA 104 (D) op 107 B-D

4.

Dit word betoog dat die hof, as 'n kwessie van selfsprekendheid, slegs die ontslag van 'n beskuldigde kan oorweeg aan die einde van die Staatsaak as daar "geen getuienis" is - om dit op ander gronde toe te laat, is om die Staat sy rol van dominus litis te ontneem en aan die hof toe te ken.

5.

Oor die vraag of die hof verplig is om sy diskresie uit te oefen as daar "geen getuienis" is, is daar eweneens tweespalt tussen die howe gewees:

5.1 R vs Kritzinger, 1952(2) SA 401 (W) staan aan die een uiterste van die spektrum, terwyl R vs Mall, 1960(2) SA 340 (N) aan die anderste uitsterste grens.

5.2 In R vs Mall (supra) word beslis dat dit "wrong" is om ontslag te weier waar daar 'n moontlikheid is dat 'n beskuldigde o.a. "out of his own mouth or out of the mouth of a co-accused" ge-inkrimineer kan word.

5.3 In R vs Kritzinger (supra) kom die hof tot die gevolgtrekking dat dit heeltemal geoorloof is vir die hof om ontslag te weier indien die moontlikheid bestaan dat die beskuldigde se skuld tydens die verdedigingsaak bewys kan word. Die hof steun hier o.a. op die uitspraak van Wynde H.R. Solomon in R vs Lakatula and Others, 1919 AD 362 waar die hof beslis "It may very well be that, even if the Judge is wrong in his view, the deficiency in the evidence for the prosecution may be supplied by the witnesses for the defence, and so the case may be established against the accused."

5.4 Respekvol word betoog dat die vorige sake gestaan het in die skadu van jurieverhore, maar dat met die regsontwikkeling wat plaasgevind het en waar slegs regsgekwalifiseerdes as assesore optree, die wetgewer se woorde hul gewone betekenis gegee moet word - nl. waar die wetgewer van "kan" praat, bedoel hy presies dit - die hof is nie verplig nie, en het 'n diskresie om ontslag te weier as daar "geen getuienis" is nie.

Die/...

Die wetgewer het tog sekerlik nie bedoel om vir 'n beskuldigde met artikel 174 'n skuiwergat te skep om sy verantwoordelikhede te ontduik nie - indien daar uit die aard van die aanklag en die aard van die gelewerde getuienis duidelik blyk (soos in casu met o.a. 'n sameswering) dat die skuld van meerdere beskuldigdes bewys kan word deur die getuienis van ander beskuldigdes (wat bv. met die beskuldigdes saam op komitees se besture gedien het), dan kan tog nie, met respek, aan die einde van die dag, as daardie ander beskuldigdes wel ge-inkrimineer en ook skuldig bevind word gesê word dat daar 'n onreg gepleeg is nie - die hof het tog sekerlik ook 'n plig teenoor die gemeenskap om te sien dat skuldiges nie vry uitgaan halfpad deur 'n verhoor waar daar 'n moontlikheid is dat hul skuld wel uiteindelik bewys kan word nie.

6.

Die feit dat beskuldigdes lank verhoorafwagtend is en in 'n lang verhoor betrokke is, is ook 'n faktor wat die hof, behoort te oorweeg by 'n aansoek om ontslag -

Vide: S vs Ostilly, 1977(2) SA 104 (D)

Dit beteken egter nogsteeds dat die hof ook na die ander faktore moet kyk om te bepaal hoe geregtigheid op die beste wyse gedien sal word.

2. DIE REGSAANSPREEKLIKHEID VAN DIE BESKULDIGDES

1.1 Dit is die Staat se saak dat die beskuldigdes te alle tersaaklike tye gehandel het met n gemeenskaplike doel en ter uitvoering van (n) sameswering(s).

1.2 Die gemeenskaplike doel was die wederregtelike omverwerping of ingevaarstelling van die wettige regering van die Republiek van Suid-Afrika.

1.3 Die sameswering(s) het bestaan tussen die UDF se bestuurslede en UDF se geaffilieerde organisasies en aktiewe ondersteuners se bestuurslede en amptenary onderling en bekend as UDF en/of tussen UDF en die ANC/SAKP en laasgenoemde se lede en/of aktiewe ondersteuners welke sameswering(s) gerig was op die uitvoering en bevordering van die gemeenskaplike doel.

1.4 Dit is die Staat se saak dat elke beskuldigde regtens aanspreeklik is, benewens elke daad wat hom persoonlik te laste gelê word, ook vir elke daad wat aan sy medebeskuldigdes en mede-samesweerder toegeskryf word en wat in die akte van beskuldiging vermeld word. Die regsaanspreeklikheid blyk uit die toepassing van die regsbeginsels wat betrekking het op sameswering en gemeenskaplike opset met dolus eventualis as opsetsvorm.

2.1 Sameswering

> "A conspiracy is an agreement between two or more persons to commit a crime. The parties to the agreement must be ad idem as to their object - Harris v R 1927 N.P.D. 330 - and in terms of decisions in English Courts the agreement must be such that, if lawful, it would be capable of being enforced" - S v Alexander and Others (2) 1965 (2) 818 op p. 821-822."

2.2.1 Behalwe/...

2.2.1 Behalwe in die geval van hoogverraad is 'n blote sameswering of ooreenkoms om 'n misdaad te pleeg nie 'n misdaad eo nomine volgens die gemenereg nie. S v Solomon and Others 1898 15 S.C. 107 op p. 108.

2.2.2 Die beskuldigdes in die onderhawige geval word nie alleen van 'n sameswering aangekla nie, maar ook van spesifieke dade ter uitvoering daarvan. Die bewering van sameswerings word gemaak om aan te toon dat die beskuldigdes gesamentlik of afsonderlik, maar met 'n gemeenskaplike doel as oogmerk gehandel het. In so 'n geval is die beginsels en prosedures wat van toepassing is waar die beskuldigdes van sameswering (soos in die Engelse gemenereg of deur oortreding van artikel 18(2)(a) van Wet No. 17 van 1956) aangekla sou word.

"But there is another side, namely, that

> 'on charges of conspiracy, the acts and declarations of each conspirator in furtherance of the common object are admissible against the rest; and it is immaterial whether the existence of the conspiracy, or the participation of the defendants be proved first, though either element is nugatory without the other'

(Phipson 9th ed. p. 98) Although this principle may have originated in the English law of criminal conspiracy it applies also where parties are charged with a crime and the case against them is that they acted in concert to commit it; it makes no difference whether the particular trial is of one or some or all of the conspirators" R v Mayet 1957 (1) SA 492 (AD) op 494 E-F.

2.3 Die/...

2.3 Die beginsels en prosedures van toepassing op 'n sameswering het oor die afgelope jare duidelik uitgekristaliseer en kan soos volg saamgevat word:

2.3.1 Daar moet 'n ooreenkoms tussen verskillende partye wees om 'n gemeenskaplike einddoel "(the so-called grand object)" te bereik.

2.3.2 Dit is nie vir die bewys van 'n sameswering nodig om aan te toon dat die partye daartoe in direkte kontak met mekaar was om die ooreenkoms aan te gegaan het nie. Dit is selfs nie nodig om te bewys dat hulle mekaar geken of van mekaar geweet het nie. Indien die partye deur hulle dade dieselfde doelstelling nastreef, hetsy deur dieselfde dade al dan nie, kan die afleiding gemaak word dat hulle betrokke was in 'n sameswering om daardie doelstelling te bereik.

2.3.3 Die bestaan van 'n sameswering kan soos enige ander feit bewys word deur omstnadigheidsgetuienis.

2.3.4 Waar twee of meer persone 'n organisasie vorm wat 'n sekere misdadige oogmerk as einddoel het, beteken dit dat hulle saamgesweer het om die betrokke misdaad te pleeg. Dit volg dat enige persoon wat aansluit by so 'n organisasie terwyl hy bewus is van die doelstelling van die organisasie, of lid bly nadat hy bewus geword het van die doelstelling, homself skuldig maak aan sameswering om die misdaad te pleeg.

2.3.5 Terwyl die sameswering bestaan kan persone daarby aansluit of ander persone kan hulle daaraan onttrek.

2.3.6 Sodra/...

2.3.6 Sodra daar ooreenstemming oor die einddoel van die sameswering bereik is maak die manier of wyse waarop beoog word om die einddoel te bereik nie saak nie.

2.3.7 Alles wat deur een samesweerder gedoen word in die uitvoering van die sameswering is getuienis teen al die ander betrokke partye, hetsy hulle teenwoordig was al dan nie en hetsy hulle bewus was van die betrokke dade al dan nie.

2.3.8 Dade van samesweerders wat begaan is voordat 'n betrokke samesweerder aangesluit het is toelaatbaar om die oorsprong, aard en doelstelling van die sameswering te bewys.

2.3.9 Dade en verklarings,"(acts and declarations)" uitvoerend in teenstelling met verhalend, deur een van die samesweerders is toelaatbaar as getuieis teen die ander, selfs al was laasgenoemdes nie teenwoordig tydens die pleeg van die daad of die maak van die verklaring nie, <u>om die terme van die sameswering te bewys en om aan te toon dat die betrokke daad gepleeg is in die uitvoering van die samswering</u> Dit maak ook nie saak of die samesweerders teen wie die dade of verklarings as getuienis gebruik word bewus was van die feit dat die dade gepleeg of die verklarings gemaak word nie.

2.3.10 Die sameswering duur voort totdat dit beëindig word by bereiking van die einddoel of totdat dit om een of ander rede 'n natuurlike dood sterf, bv. uit frustrasie. Solank daar egter handelinge ter uitvoering van die sameswering verrig word, bestaan dit voort.

Sien/...

Sien: R v Mayet 1957(1) SA 492 (AD)
R v Adams and Others 1959(1) 646 Sp. Court
S v Alexander and Others (2) 1965 (2) 818 (K)
S v Moumbaris and Others 1974(1) 681 (T)
S v Cooper and Others 1976(2) 875 (T)
S v Twala and Others 1979(3) 864 (T)

2.4 Solank die sameswering bestaan is die een samesweerder regtens verantwoordelik vir elke daad gepleeg deur 'n mede-samesweerder wat gepleeg word ter bereiking van die einddoel.

> "... as long as the conspiracy remains constant in regard to its aims, and as long as the aims are unlawful, the particular or varying ~~means~~MEANS. adopted by any one of the conspirators are attributable to the others, provided that they were employed for the purposes of achieving the so-called "grand object"."
> R v Adams and Others (supra) op p. 660-661

3.1 Gemeenskaplike opset

> "The words 'common purpose' are well known in the criminal law and connote that there is a purpose shared by two or more persons who act in concert to do something. There may be an express agreement between such persons to achieve some object or there may be an implied agreement to the same end" - r v Kahn 1955(3) SA 177 (AD) op p. 184.

3.2 Waar/...

3.2 Waar twee of meer persone ooreenkom om gesamentlik op te tree ter uitvoering van 'n gemeenskaplike doel dan is die een verantworodelik vir die dade deur die ander gepleeg, solank die dade gepleeg is in die uitvoering van die gemeenskaplike doel.

> "As far as the expression :acting in concert and with common purpose' is concerned, and however mush one may criticise the use of the word 'mandate' in connection therewith, the law is clear that perosns may be held liable for the acts of each other if they act in pursuance of the same purpose, and have agreed, or are deemed to have agreed, to share that purpose" R v Adams and Others (supra) op p. 654 C.

3.3 Die feit dat die socius criminis aanspreeklik gehou word vir die daad van 'n ander, hang nie af van die vraag of hy fisies bygedra het tot die pleging van die daad nie.

> "In order to fix criminal responsibility upon any of the present appellants for this invasion of the rights of others, it was not necessary for the Crown to establish that each accused person committed any particular act of violence, and to justify a conviction it was sufficient to show that the accused persons were associated with the others in the execution of some common purpose the result of which, either as deliberately intended by the associated persons or as being the natural and probable consequence of their acts, was a riotous public invasion of the rights of others" R v Wilkens and Ohters 1941 TPD 276 op p. 289.

3.4 Die feit dat die socius criminis selfs nie eens fisies teenwoordig was by die pleging van die daad nie doen nie afbreuk aan sy aanspreeklikheid nie.

R v Bergstedt 1955(4) SA 186 (AD)
S v Nkombani and Another 1963(4) SA 877 (AD)
S v Dambalaza and Others 1964(2) SA 783 (AD)

3.5 Waar/...

3.5 Waar 'n bende met 'n gemeenskaplike misdadige doel optree sal 'n lid van die bende verantwoordelik gehou word vir elke daad gepleeg deur die ander lede van die bende, selfs al was hy nie by die daad teenwoordig nie, selfs al het hy geen aandeel gehad in die beplanning of uitvoering van die daad nie en selfs al het hy nie geweet dat die daad uitgevoer gaan word nie, indien die betrokke bendelid voorsien het dat die daad gepleeg sou word in 'n poging om die gemeenskaplike doel te bereik.

3.5.1 "...If it is established that all the members of a gang have agreed that murders are to be committed in the furtherance of the group objects, the mandate given by each to the others may be so wide as to make each liable for all gang murders, even if the individual charged with such a murder took no part in its planning or commission and even if he did not know that it was going to be committed. But the evidence would have to be strong and clear that the mandate was indeed so wide and that it subsisted in that wide form when the crime was committed. So, if a gang, initially formed for purposes that were either innocent or only mildly criminal, subsequently developed murderous proclivities, a person who became a member at the earlier stage could not be held liable for major crimes of violence committed by other members after the objects have been changed, unless his adherence to the changed policy, with full knowledge of the change, was clearly proved" - R v Motaung and Another 1961(2) SA 209 (AD) op p. 210 H - 211 B.

3.5.2 "The evidence against the appellant is that for monetary reward he joined a terrorist gang ... he knew they were terrorists and he knew their avowed purpose was to murder Europeans indiscriminately. ...

"... the appellant assisted this terrorist gang no furhter than acting as a general servant for them, and he seems to indicate that he was little more than their cook; he cooked and prepared their food for them. The mere fact, however, that the part he played in assisting the terrorists was a menial one does not obscure the fact that he made common purpose with the terrorists in their object of murdering Europeans,/...

peans, and he joined them with the intention of making that common purpose. His mens rea, therefore, ... has been abundantly proved and his appeal against conviction must be dismissed" - S v Bvuure 1974(2) SA 24 (R.A.D.) op p. 25 B-F.

Die beskuldigde is van moord aangekla. Die hof het bevind dat die beskuldigde gedurende die nag wat die moord gepleeg is deur lede van die terroristebende nie teenwoordig was nie en nie eens bewus was dat die aanval uitgevoer sou word nie. Die hof het in die beskuldigde se guns aanvaar dat hy tydens die aanval in die terroristekamp gelê en slaap het.

3.5.3 "In common with all terrorist gangs, the purpose of this gang was, by murder and subversion, to overthrow the existing Government. In pursuit of this general purpose, it must have been contemplated by the members of the gang that members of the Security Forces would be killed ... But, generally speaking, it could not be known to the members of this gang where and when attacks on the Security Forces would take place. This would depend on the opportunities which arose once the gang had entered Rhodesia and upon the needs of any situation which might arise ... There can be no doubt that each member of the gang, in joining it and entering Rhodesia with arms of war, must have contempleted that in the course of engagements with the Security Forces, individual members might become separated from the main body and, while separated, might murder members of the Security Forces. Each member of the gang must in such circumstances be taken to have conferred a mandate on other members to attack the Security forces although separated from the main body, and it is no answer that it would not be possible for them to know in advance the circumstnaces in which such murders might be committed by a separeated member of the gang.

"... the/...

"... the common purpose between the appellant and the terrorists actually responsible for firing the shots which killed these two members of the Security Forces, commenced not on that day, but at a much earlier stage, when the members of the gang first agreed amongst themselves to enter Rhodesia on their mission to murder" - S v Nhiri 1976(2) SA 789 (R.A.D.) op p. 790 E- 791 F.

3.5.4 "... these appellants and a number of others were implicated in the instigation and planning of an armed revolution, involving violence, murder and arson, which had as its purpose the overthrow of the authority of the Republic in the territory, with assistance from Russia and communist China ... In that Swapo, a political organisation of which the accused were members, had played its part, as also in regard to certain other facets of the conspiracy. Persons had been trained in the ways of armed terroristic violence and had been indoctrinated with communistic political views. ... The Court found that all the accused had been instructed as to the purposes and methods of the compaign, and that they were overthrow the Government of the territory, that they were in law, if not by actual participation, implicated in all these incidents, and that ... they had made themselves guilty of hight treason ..." s v Tuhadeleni and Others 1969(1) SA 153 (AD) op p. 177 G- 178 C.

3.6 Die wyse waarop te werk gegaan word om die einddoel te bereik doen nie afbreuk aan die aanspreeklikheid van die socius criminis nie.

"In my view, the true doctrine is ... that the liability of the parties to a common purpose depends on whether the result produced by the perpertrator falls within the mandate, and is not concerned with the means by which the result is produced" R v Shezi and Others 1948(2) SA 119 (AD) op p. 128.

4.1 Dolus/...

4.1 Dolus eventualis as opsetvorm

Behalwe waar die socius criminis as 'n mede-dader optree waar direkte opset ter sprake is, word dit aan die hand gedoen dat opset by moontlikheidsbewussyn, dolus eventualis, die oordeerwerp van die opsetvorm uitmaak in die onderhawige geval. Die posisie word volledig uitengesit deur Sy Edele Holmes, A.R., in S v Malinga and Ohters 1963(1) SA 692 (AD) op p. 694 F tot p. 695 C:

> "Now the liability of a socius criminis is not vicarious but is based upon his own mens rea. The test is whether he foresaw (not merely ought to have foreseen) the possibility that his socius would commit the act in question in the prosecution of the common purpose ...
>
> "In considering the issue of intention to kill, the test is whether the socius foresaw the possibility that the act in question in the prosecution of the common purpose would have fatal consequences, and was reckless whether death resulted or not ...
>
> "In both of the foregoing tests the foresight may of course be proved by inference..."

4.2 Waar die geleerde Regter in die aangehaalde passasie verwys na die "act in question" beteken dit nie dat vereis word dat die socius die pleging van die spesifieke daad moes voorsien het nie, bv. dat oorledene X op 'n spesifieke tyd en plek op 'n bepaalde wyse deur 'n besondere medepligtige gedood sou word nie. Dit is genoegsaam indien bewys word dat die socius die moontlikheid voorsien het dat in die uitvoering van die gemeenskaplike opset 'n persoon, waarvan die identiteit nie relevant is nie, gedood kan word, en roekeloos daarteen gestaan het. Stawing vir die stelling word gevind in Malinga se saak op p. 695 A-C:

"And/...

"And they must have foreseen, and therefore by inference did foresee, the possibility that the loaded fire-arm would be used against the contingency of resistance, pursuit or attempted capture. Hence, as far as individual mens rea is concerned, the shot fired by accused No. 4 was, in effect, also the shot of each of the appellants. On the question of intention to kill, they must have foreseen, and therefor by inference did foresee, the possibility that the use of the loaded fire-arm would have fatal consequences. ... And the appellants were clearly reckless whether death would in fact ensue or not."

Sien ook: S v Dambalaza and others (supra) op p. 787 C tot p. 788 B

"Next it was urged that some of the accused may have been in the group which was pursuing Zayedwa and therefore not present at the moment when the deceased was struck. This brings me to the question of common purpose. Now the primary common purpose of this armed excursion was to kill Zayedwa. In considering whether each member foresaw the possibility of injury and death to others besides Zayedwa, and was reckless as to such occurence, one must consider the nature of the excursion, the manner in which the plan was to be carried out, and the actual execution thereof."

Die geleerde Regter bespreek die feite van die saak en vervolg dan:

> "In my view, whether or not any of the eight accused were in the group which pursued Zayedwa, and whether or not any of them actually struck the deceased, each is criminally liable for the attack on the deceased, The reason is that at any stage of the operation at Zayedwa's, particularly after the teacher had been attached, each member of this murderous excursion of vengeance must have foreseen the possibility of death to any inmates, whether burned inside or attacked on emergence; and each was clearly reackless of any such occurrence."

IS DIE MISDAAD VAN HOOGVERRAAD TEEN DIE BESKULDIGDES BEWYS?

1.1 Gardiner and Lansdown: South African Criminal Law and Prosedure, 6th Edition, p. 987 omskryf die misdaad soos volg:

> "High Treason (Perduellio, Hoogverraad) is committed by those who with a hostile intention disturb, impair or endanger the independence or safety of the State, or attempt or actively prepare to do so."

1.2 De Wet en Swanepoel: Die Suid-Afrikaanse Strafreg, 2de uitgawe, p. 518 die volgende omskrywing:

> "Hoogverraad is die wederregtelike, opsetlike verstoring, aantasting of in gevaarstelling van die staatsbestaan."

1.3 Hunt: South African Criminal Law and Procedure, Vol. II p. 14 defineer hoogverraad soos volg:

> "High treason consists in any overt act unlawfully commited by a person owing allegiance to a State possessing majestas who intends to impair that majestas by overthrowing or coercing the Government of that State."

1.4 Waar die eersgenoemde twee definisies gebrekkig is in die sin dat belangrike elemente van die misdaad van hoogverraad nie daarin vervat is nie, kom die definisie van Hunt volledig voor met vermelding van al die elemente van die misdaad, alhoewel die opsetselement beter omskryf kan word. Dit word aan die hand gedoen dat die volgende definisie van hoogverraad aan al die vereistes voldoen.

"Hoogverraad/...

"Hoogverraad bestaan uit die pleging van 'n wederregtelike daad deur 'n persoon wat trou aan 'n soewereine Staat verskuldig is met 'n vyandige opset om die regering van die Staat omver te werp of in gevaar te stel."

1.5 Die belangrikste elemente van die misdaad wat bespreking verdien en wat van toepassing is op die beskuldigdes in hierdie saak is die volgende:

(a) wederregtelikheid;

(b) die daad;

(c) die persoon wat trou aan 'n Staat verskuldig is;

(d) soewereiniteit; en

(e) opset.

2.1 Wederregtelikheid

Dit spreek vanself dat die beskuldigde wederregtelikheidsbewussyn moet hê. 'n Daad wat daarop gemik is om op konstitusionele wyse die regering van die staat omver te werp kan nie as hoogverraad bestempel word nie. Om aan te sluit by 'n organisasie soos die A.N.C. ten einde inligting te bekom en as 'n spioen van die owerheid op te tree sluit wederregtelikheid uit. Dit word aan die hand gedoen dat die dade wat die BESKULDIGDES gepleeg het met die nodige wederregtelikheidsbewussyn begaan is sonder enige regverdigingsgrond.

2.2.1 Die daad ("An overt act")

Voordat daar sprake kan wees van hoogverraad moet daar 'n handeling deur 'n persoon wees. Die manifestering van die vyandige opset moet op een of ander wyse tot uiting gekom het, hetsy deur 'n fisiese handeling of deur die uitspreek van woorde:

> "That the commission of the overt act - the so-called 'manifestation' of the hostile intent - constitutes and completes the offence of hight treason, is common cause; so too is it accepted that there are, or can be, as many acts of high treason as there are overt acts; ....."
>
> R v Adams and Others 1959(1) SA 646 (Special Criminal Court, Pretoria) op p. 666 B.

2.2.2 Dit maak nie saak of die daad binne of buite die grense van die Republiek begaan word nie.

> "... so far as high treason committed by a subject is concerned, there exists no international custom or comity which debars a state from trying and punishing the offender no matter where the offence has been committed. The reason for this is clear, it is because hight treason, committed outside of the territory of the state concerned, is an offence only against such state. No other state is interested in punishing the offender and the punishment of the offender by the state concerned does not encroach upon the rights of other states."
>
> R v Pienaar: R v Holm 1948(1) SA 925 (AD) op 930

2.2.3 Die/...

2.2.3 Die blote toetrede to of aansluiting by 'n organisasie wat die wederregtelike omverwerping of ingevaarstelling van die regering beoog, stel 'n daad van hoogverraad daar.

> "In our opinion the oath, taken by itself, means that the signatories joined an organisation under the leadership of No. 1 accused, whose orders they bound themselves to obey even at the risk of their lives, that the organisation was to function against the Goverment and was to seek to change South Africa into a national socialist state; that its goal was not to be achieved by the formation of a political party but by secret and unconstitutional methods in which loss of life might be suffered. In its natural sense the oath, in our view discloses a treasonable conspiracy. Whether any particular signatory entertained a hostile intent when he signed it will depend on the circumstances known to him and on his evidence in explanation of how he came to sign."
>
> R v Leibbrardt and Others 1944 AD 253 op 283

"In R v Mulcahy (3 E. & I. App. 306 at p. 328) Lord Chelmsford, refers to this confusion as follows:

> 'It is too late to argue that a conspiracy may not be an overt act of treason. There are many authorities which establish that it is a sufficient allegation in an indictment for this offence ... It is a mistake to say that conspiracy rests in intention only. It cannot exist without the consent of two or more persons, and their agreement is an act in advancement of the intention which each of them has conceived in his mind.....'

"...the/...

"... the terms of the blood oath itself indicate what the signatories agreed to, viz: that they would strive, among other things, for the building up in South Africa, of a National Socialist State and that they would serve their people and country as directed by No. 1 accused, the leader ... and that they would guard their secrets with their lives. In other words, by signing the blood oath they, with No. 1 accused, formed, for the purpose of building up a National Socialist State in South Africa, an organisation, the members of which were sworn to obey No. 1 accused and no one else. The oath, therefore, was in terms an agreement or conspiracy, inconsistent with the allegiance owed by a citizen to the State ..." - p. 290

"Where two or more persons have associated themselves in an organisation with the agreed purpose or object of committing an offence, they have in law formed a conspiracy to commit the contemplated offence. it follows that any person who joins such an organisation as a member, well knowing the object or purpose thereof or who remains a member after becoming aware of the purpose thereof, has signified by his conduct his agreement with the aims of the said organisation and has made himself guilty of a conspiracy to commit such offence" -
S v Alexander and Others (2) 1965 (2) SA 818 (CPD) op p. 822 F.

"It thus appears that what the State alleges, is ..... THIRDLY: That the accused themselves committed certain unlawful overt acts, with the intention of overthrowing or coercing the State and in the furtherance of the conspiracy. I find it difficult to understand why the indictment as framed in this way, because once it is alleged that each of the accused committed certain unlawful acts with hostile intent it is superfluous to allege further that they did so in conspiracy with others and in furtherance of the conspiracy. If they committed such acts with that intent they are guilty of treason and it makes no difference whether they did so in furtherance of a conspiracy .... On the other hand, the mere act of joining the sort of conspiracy which is alleged here may be tantamount to an overt act which, if done with hostile intent/...

intent, may be treasonable by itself."
per Refer, R. in S v Sekete and Others
N.P.D., 'n uitspraak gegee op 12 November 1979

2.2.4 Die ontvangs van militêre opleiding onder beskerming van 'n organisasie wat die wederregtelike omverwerping of ingevaarstelling van die Regering beoog stel 'n daad van hoogverraad daar.

"Our view, based on all the evidence, is that all the accused actively supported the A.N.C., at the very least by their preparedness to undergo military training and by actually undergoing it and by thus strengthening the military wing of the A.N.C. In doing so, they were all aware of the fact that the purpose of the training was to establish and develop a force of men who sould be able to harass the State, inter alia by engaging its Security Forces in armed combat, by sabotaging Government and strategic installations and by instigating and fermenting civil unrest and public civil disobedience, all the the view to its eventual overthrow or to coerce it to do the bidding of the A.N.C." - par Hefer, R. in S v Sekete (supra).

2.2.5 Die blote besit van wapens, ammunisie en plofstof (met die nodige opset) stel 'n daad van hoogverraad daar. Sien S v Sekete (supra).

2.2.6 Die/...

2.2.6 Die wederregtelike ontneming van 'n ander se eiendom (met die nodige opset) is 'n daad van hoogverraad. R v De Wet 1915 O.P.D. 157 (aanklag 8).

2.2.7 Dit word aan die hand gedoen dat enige daad of handeling wat met die nodige opset begaan of gepleeg word die misdaad van hoogverraad uitmaak:

> "Whether any acts, laid to the charge of an accused person, amount to treason will depend upon the circumstances of each case. The ordinary rule, that a man's intention or state of mind is to be judged of by reference to his acts and conduct, applies." R v erasmus 1923 AD 73 op p. 89

> "The typical act of treason, historically, may be the adherence to or the furnishing of aid to a foreign foe, so that in war time it may be stated that any act which is designed to assist the enemy ... is an act of high treasons." (My onderstreping). R v Leibbrandt and Others (supra) op p. 281

> "An act, apparently innocent in itself, may clearly be an overt act of treason if proved to have been done "with hostile intent to the injury of hte State or the supreme government" - per Ramsbotton, R. (soos hy toe was) in R v Wenzel 1940 WLD 269 op p. 275.

2.2.8 'n/...

2.2.8 'n Daad hoef nie voltooi te wees om hoogverraad daar te stel nie. 'n Voorbereidingshandeling of 'n poging om die daad te pleeg is reeds voldoende, bv. die verkenning of spioenering van 'n terrein waarop 'n aanval geloods sou word of die beplanning van 'n aanval op 'n sekere teiken.

"Let ons op die omskrywings van ons gemeenregtelike skrywers, dan blyk dit dat woorde soos "verstoring", "weerstandbieding", "tekortdoening", "voorbereiding of onderneming van enige bedrywigheid", "aantasting", "benadeling" en "in gevaarstelling" en so meer gebruik word. Dit is duidelik dat dadighede so aangedui, baie ver verwyderd kan wees van die voltooide daadwerklike omverwerping van die Staat." De Wet en Swanepoel op cit p. 526.

"Die gevolgtrekking wat uit hierdie voorbeelde van ons skrywers gemaak kan word, is .... (dat) die geringste openbaring van die wil om die staatsbestaan aan te tas as voltooide daad gesien (is)."
De Wet en Swanepoel p. 528

"In my opinion, the argument that before an act can amount to an overt act of treason it must have reached the stage at which it would have been an attempt had some other crime been contemplated is quite untenable. There is no warrant for it in the Roman Dutch authors whose definitions I have quoted, and the English and Scottish cases show that an act of preparation may be an overt act of treason. I think the English cases may be used since what whould be an "open deed", such as is required by the Statute of Treasons, would be covered by the words "iets doen of ondernemen" in Moorman's definition" -
R v Wenzel (supra) p. 273

2.2.9 'n/...

2.2.9 'n Persoon wat 'n ander hulp verleen om 'n daad van hoogverraad te pleeg, hetsy voor, tydens of na die daad, verrig self 'n daad van hoogverraad wat hom skuldig maak aan die daad self.

"In Hardy's case, New State Trials, Vol. 1, p. 626, the jury was instructed as follows:

'It is now proper for me to add what, however, is probably known to you all, that in treason there are no accessories. All who became partakers of the traitorous project, whether at an early or late stage of it, whether as leaders or followers, whether they engage for the whole plot or only to execute a particular part of it, are quilty of treason, provided that the part which they do undertake, relates strictly and properly to the forwarding and accomplishing of the grand object in view by the rest of the conspirators' ...

These passages support the contention that as long as the conspiracy remains constant in regard to its aims, and as long as the aims are unlawful, the particular or varying means adopted by any one of the conspirators are attributable to the others, provided that they were employed for the purposes of achieving the so-called "grand object..." R v Adams and Others (supra) op p. 660-661

2.2.10 Dit word betoog dat die dade wat teen die Beskuldigdes bewys is wel dade van Hoogverraad is.

2,3,1 'n Persoon wat trou aan 'n staat verskuldig is

Enige persoon wat in die Republiek van Suid-Afrika gebore is en hier woonagtig is, burgers en onderdane, is trou aan die Staat verskuldig "(is owing allegiance to he State)".

Hunt/...

Hunt op cit p. 21
Ex Parte Schwietering 1948(3) SA 378 (OPD) op p. 383

2.3.2 Die feit dat 'n persoon tydelik die Republiek verlaat het doen nie afbreek aan die verskuldigde trou nie.

> "Without doubt, then, allegiance is required of a resident alien while he himself is physically present in this country. Such allegiance does not, in my view immediately terminate as soon as he departs from the country ..... It seems to mee that where it is clear that his departure is of a purely temporary character, accompanied by a definite intention to return for permanent residence, the protection previously acquired does not cease on departure."
> R v Neumann 1949 (3) SA 1238 (Special Criminal Court, Transvaal) op p. 1265-1266.

> "All these accused, if they are in fact aliens, which we doubt, were residing in South Africa and owed the South African State their allegiance. And the fact that they left the country and received training abroad, makes no difference because their intention to return is manifest. Indeed, they did return". per Hefer, R. in S v Seketo (supra).

2.4.1 Soewereiniteit

Hoogverraad kan slegs gepleeg word teen 'n staat wat majestas besit en nie staatkundig ondergeskik is aan enige ander staat of regering nie.

> "The crimen laesae majestatis, which includes treason, is an offence committed by a subject or inhabitant of a State against that State. Treason is an offence against the highest political power in the State ... Every State .. which is a sovereign power is entitled to exact from those who reside in its territory a respect for its sovereignty

and/...

and to punish any person guilty of taking up arms to subvert the Government ... Prima facie a State which has the full and exclusive right to make laws for its subjects and inhabitants and to enforce these laws, possesses internal majestas in relation to its subjects and inhabitants. It is by virtue of this majestas, that it compels obedience to its laws and respect for its political authority.

"A free State, i.e., a State which is not the vassal of some superior State, has the power in our law to demand from all the inhabitants of its territory a respect for its internal sovereign power or majestas in order to protect its territory and to enforce its laws. It is this political right of a State to demand respect for its laws which is offended by lavying war upon it" - per Sy Edele Appèlregter Wessels in R v Christian 1924 AD 101 op p. 135-136.

2.4.2. Die Republiek van Suid-Afrika is 'n onafhanklike soewereine staat wat majestas besit. Sien die Grondwet van die Republiek van Suid-Afrika, Wet No. 110 van 1983.

2.5.1 Opset

Uit die gedagtes van ons skrywers en uit die verskillende uitsprake van ons howe staan dit vas dat vir hoogverraad 'n daad vereis word wat begaan is met 'n vyandige opset teen die regering van die Staat. De Wet en Swanepoel op cit p. 539 Hunt op cit p. 25

2.5.2 Dit/...

2.5.2 Dit word aan die hand gedoen dat daar geen twyfel bestaan nie dat enige daad wat deel uitmaak van 'n gewapende aanval op die staat, of dade van revolusionêre oorlogvoering, ondermyning of sabotasie waardeur daar gepoog word om die regering of die staatsbestel omver te werp of te ondermyn of in gevaar te stel, die vereiste opset daarstel.

> "And where a number of citizens, endeavouring by force of arms to impose their will upon the government, embark upon warlike operations, such as those in which the ACCUSED is found to have participated, a trial Court is justified in drawing the conclusion that they were actuated by a hostile mind. The intent to coerce the governing authority of their country by force may be properly described as hostile even though there is no direct proof that they "aimed at wholly subverting the government"". Innes N.R. in R v Erasmus 1923 AD 73 op. p. 82.

> "The facts show that the prisoner Viljoen had deliberately taken up arms against the forces of the State, and together with others fired on those forces and engaged in acts of war against the Government, with the aim and object of coercing it and of enforcing his will and that of the Strikers upon the Government. Acts of this description indicate a hostile mind against the State or against the Government representing and acting on behalf of the State" - per Kotze AR in R v Viljoen 1923 Ad 90 op p. 96.

2.5.3 Die Staat teen wie die opset gemik is, is in werklikheid die regering wat deur die volk aan bewind geplaas is en die volk self.

"The/...

"The State against which the hostile intent must exist is, of course, the people of the Union of South Africa, of which the King, under the South African Act, is the head. The various powers of the people so organised (e.g. legislation, executive, judicial) are exercised on behalf of the State by the persons entrusted by the State under its constitutional laws with these functions.
R v Leibbrandt and Others supra op p. 279.

2.5.3 Dit is nie relevant wat die dryfveer agter die opset is nie.

"Treason may be committed and the hostile intent he entertained with a view to achieving some further purpose. The ultimate goal may be the achievement of some social or economic advantage for a portion or even for the whole of the community.

"It may be the advancement of some political or ideological theory, or it may be the fulfilment of personal ambition or the wreaking of personal hatred. None of these ultimate motives is relevant to the enquiry whether treason has been committed or not. Whatever the factors are that induce a citizen to entertain an intention to help the enemy or to weaken the effort against the enemy, if he acts to carry out that intention he commits an act of treason" - per Schreiner R. (soos hy toe was) met goedkeuring aangehaal in R v Leibbrandt (supra) op p. 281

2.5.4 Die begrip "vyandige opset" beteken nie dat 'n geval van haat teenoor die Staat vereis word nie.

"The requirement in the definition of treason that the actions complained of must have been done with hostile intention against the State does not mean that the accused must have been animated by feelings of hatred or ill-will towards the State, but merely/...

merely that he was intentionally antagonistic towards it."
R v Strauss 1948(1) SA 934 (AD) op p. 940

3. Dit word met respek aan die hand gedoen dat die Staat bo redelike twyfel bewys het dat al die Beskuldigdes verskillende wederregtelike dade gepleeg het met 'n vyandige opset teenoor die Staat terwyl hulle trou verskuldig was teenoor die Staat.

Dit is die verdediging se betoog dat in die akte van beskuldiging 'n bewering moet verskyn van dat 'n beskuldigde 'n ampsdraer, beampte, lid of aktiewe ondersteuner was van die toepaslike organisasie voordat dokumentêre bewysmateriaal toelaatbaar word.

1.1 Die eerste vraag wat ontstaan is presies hoe moet hierdie woorde in die akte van beskuldiging ingesluit word. Moet dit elke keer volledig uitgeskryf word dat beweer word dat beskuldigde is 'n beampte, of 'n ampsdraer of 'n lid of 'n aktiewe ondersteuner sowel as 'n bewering in 'n aanklag teen 'n beskuldigde dat 'n ander party dokumente besit het as ampsdraer, beampte, lid of aktiewe ondersteuner is van 'n organisasie waarvan beweer word dat 'n beskuldigde 'n amps= draer, beampte, lid of aktiewe ondersteuner was.

As gelet word op artikel 69(4), Wet 74 van 1982, en waarop die Staat steun, is dit opmerklik dat die Staat 'n hele rits sodanige lomp bewerings in die akte sou moes beliggaam. Sekerlik sou teen van die stellings beswaar kon aangeteken word met moontlike sukses.

1.2 Dit kan sekerlik nie die wetgewer se bedoeling wees om met die neerlê van bewysregtelike reëls inbreuk te maak op prosesregtelike beginsels nie. Die vraag waaroor die Hof moet beslis is of aan die einde van die dag daar so 'n feit uitkristalliseer of nie. Hoekom moet daar nou spesifiek sulke omslagtige omskrywings in die akte van beskuldiging verskyn.

1.3 Dit is my betoog dat dit nie nodig is nie, want dit is nie artikel 69(4) wat die misdryf skep nie. Die goue reël by die opstel van 'n akte van beskuldiging is dat die artikel wat die misdaad skep, behoorlik in die akte van beskuldiging opgeneem word. Dit waarop die beskuldigde moet voorberei is die misdaad wat hom ten laste gelê word en nie die bewys=

materiaal wat die Staat teen hom gaan aanbied nie. Die bewysmateriaal wat aangebied word is 'n kwessie wat tydens die verhoor ter sprake kom en is nie 'n kwessie vir pleit nie. Dit was ook seersekerlik nie die bedoeling van die wetgewer om dit aan die vervolging oor te laat om by impli= kasie en deur 'n bewering in die akte van beskuldiging te bepaal watter getuienis toelaatbaar is of nie.

1.4 Ek stem egter saam dat die verdediging nie totaal in die duister gelaat moet word oor op watter wetsbepalings die Staat gaan steun nie. Die erkende en algemeen aanvaarde beginsel is om dit wel in die akte van beskuldiging te meld waar beskryf word watter artikels van die wet oortree word en byvoorbeeld op welke vermoedens die Staat gaan steun. SIEN: S v Shangase and Others, 1972(2) SA 410(A) op p. 432 F-H.

Dit is dan ook in hierdie saak by elk van die statutêre oortredings gemeld dat die misdaadskeppende artikel saam= gelees moet word met die bepalings van onder andere arti= kel 69 van die Wet. Dit word ook herhaaldelik herhaal waar die verskillende aanklagte formeel opgestel is. Dit is my betoog dat beskuldigdes en die Hof ingelig word dat die Staat steun op die bepalings van artikel 69(4), en daarna word dit 'n kwessie of die Staat voldoen het aan die bewysregtelike vereistes wat gestel word, en hieraan is voldoen.

(1) Die verdediging het formeel erken waar die dokumente gevind was, op persele deur UDF en sy takke of ge= affilieerdes geokkupeer of gebruik.

(2) Die verdediging het formeel erken waar dokumente gevind is by beskuldigdes en ander persone.

(3) Die verdediging het formeel erken watter persone lede is van die bestuurstrukture van UDF, UDF-streke en UDF-geaffilieerdes.

(4) Die verdediging het formeel erken dat waar dokumente gevind was by persone wie se name ooreenstem, die van die persone hierbo gemeld wel dieselfde persone is.

1.5 Die Staat gaan ook verder as 'n blote betrekking van artikel 69 in die akte van beskuldiging en maak positiewe bewerings van sameswerings te wete dat te alle tersaaklike tye het -

> "die lede van die bestuurstrukture en amptenary van UDF en die van die bestuurstrukture van die organisasies en/of liggame wat met UDF geaffilieer is of UDF aktief ondersteun en waaronder die beskuldigdes, met mekaar saamgesweer het onder die naam van UDF om, en/of onder die naam van UDF met die ANC en sy lede en aktiewe ondersteuners saamgesweer het om bovermelde doelstellings van die ANC en SAKP of van UDF of van beide genoemde doelstellings uit te voer ------ ".

In hierdie bepaling word die partye van die sameswerings saamgevat -

(a) Dit sluit in al die lede van bestuurstrukture van UDF wat insluit streke, takke, komitees van UDF vir doeleindes van hierdie artikel.

SIEN: Omskrywings van ampsdraer en beampte in artikel 1 van Wet 74 van 1982.

(b) Dit sluit in al die lede van die bestuurstrukture van geaffilieerdes en aktiewe ondersteuners van UDF wat weer eens die persone soos betrek in die omskrywings van ampsdraer en beampte in artikel 1 van Wet 74 van 1982.

(c) Dit sluit in die lede en aktiewe-ondersteuners van die ANC.

1.6 Lyste van name van persone verbonde aan die bestuurstruktuur van UDF en geaffilieerdes word sover in die vermoë van die Staat verskaf in die "Besonderhede" bladsy 1 tot 27 en "Beter Besonderhede" vanaf bladsy 1 tot 28. Dit is partye wat deel vorm van die UDF-sameswering.

Die ANC-leiers en -bestuur sowel as dié van die SAKP en Umkhonto we Sizwe word betrek in die sameswering.

1.7 Die bewering word deurgaans gemaak dat die beskuldigdes in die saak sowel as ander samesweerders soos hierbo uiteenge= sit, voortdurend aktief gewerk en deelgeneem het aan aktiwi= teite om die sameswering of samesweerings te bevorder of uit te voer en gewerk en aktiwiteite uitgevoer het om hul ge= meenskaplike doelstellings in UDF te verwesenlik; om die ge= meenskaplike doelstellings met die ANC se bestuur en lede te verwesenlik of beide doelstellings te verwesenlik.

Die feit is dat die Staat regdeur beweer dat die beskuldigdes almal deel is van sameswerings wat hulle en ander lede van die sameswerings wat genoem word voortdurend, hetsy as lede van die bestuurstrukture, amptenary, ens. van UDF en van UDF-geaffilieerdes aktiewe en ondersteunende werk verrig het om die sameswerings en gemeenskaplike doelstellings te be= vorder en uit te voer.

1.8 Dit is op hierdie aspek waar die huidige saak pertinent onderskei kan word van die omstandighede in S v Tinto, 1979(3) SA 407(C). Die omstandighede soos supra geskets, vind direk= te aansluiting by 'n gewysde wat wel pertinent van toepassing is, te wete, die saak van S v Naidoo 1966(4) SA 519(N) waar Sy Edele Regter Harcourt tot die volgende slotsom gekom het - p. 521 H -

> "In my judgment the allegations made are sufficient to carry the point that the accused, although not alleged to be a member of the A.N.C. (as I shall call the Afri= can National Congress), was a person who conspired with it. This, in my view, clearly means that he was more than a mere contemplative or speculative thinker in re= gard to that association; he was more than a theoretical supporter; that he was more than a passive supporter and more than a quiescent supporter. Mr. Mahomed at one stage appeared to contend for the omission of the word "active", before the description of various capacities in which the accused is said to have acted, as being a fatal bar to an application of sec. 12(4)(c). In my judgment this places too great an importance upon tech= nicality. There is no esoteric decisiveness about the use of the word "active" and I cannot think that the Legislature was introducing by this description a highly technical requirement that the very word "active" should be used. ----------

Bearing in mind the manifest purpose of the section, which is to enlarge the area of admissibility of documents traced to the custody and control of unlawful organisations or, on the face of them bearing to be issued or published by such unlawful organisations, I have no doubt but that the document in question is admissible in the present case because of the allegations which are made in the indictment, read with the provisions of sec. 12(4)(c)."

2.

'n Volgende regsaspek wat ter sprake kom ten aansien van dokumentêre bewys is die begrip "vereniging van persone" soos in artikel 246 van Wet 51 van 1977, sowel as in artikel 1 van Wet 74 van 1982, bedoel.

2.1 Die eerste belanghebbende faktor wat op die voorgrond tree, is dat die wetgewer in beide dié Wette, en waar dit telkens oor bewysregtelike maatreëls gaan, ooreenstemmende terminologie, naamlik "vereniging van persone", gebruik.

2.2 In geeneen van die Wette word 'n omskrywing gevind van wat met "vereniging van persone" bedoel word nie. Wat wel duidelik is, is dat hierdie woorde 'n betekenis het wat wel wyer gaan as 'n blote organisasie.

2.3 Die Interpretasiewet, Wet 33 van 1957, gee ook nie 'n omskrywing van organisasie nie, maar slegs van "persoon", wat soos volg omskryf word -

"omvat ook -

a) 'n afdelingsraad, munisipale raad, dorpsbestuur of dergelike gesag;

b) 'n maatskappy as sodanig met regspersoonlikheid beklee of geregistreer kragtens enige wet;

c) enige liggaam van persone, hetsy met regspersoonlikheid beklee al dan nie;"

2.4 In die "Dictionary of Legal Words and Phrases" van Claassen, word "association", die ekwivalent van "vereniging" omskryf as -

> "an organised body of persons who have joined together under some contract, statute, regu= lations or rules, for the purpose of carrying out some common object."

2.5 Uit al bogenoemde is dit opmerklik en duidelik dat die betekenis van 'n "vereniging van persone" 'n baie wyer betekenis het as net die blote lede van die beherende liggaam. In die onderhawige saak het ons getuienis dat UDF 'n besondere ingewikkelde en goeddeurdagte samestelling het:

(a) Die hoogste gesagsliggaam is die Nasionale Algemene Raad (NGC) wat bestaan uit al die geaffilieerde organisasies en streke van UDF plus die Uitvoerende Komitee van UDF en die Sekretariaat.
SIEN: BEWYSSTUKKE: 1(1) - (7), V.1, V26 en A.1.

(b) Die Nasionale Uitvoerende Komitee (NEC), bestaan uit -

3 Presidente;

'n Uitvoerende Voorsitter wat deur die NEC aangewys word;

2 Vise-Presidente deur elk van die Streke van UDF aangewys;

elke streek van UDF wys elk 2 sekretarisse aan vir die NEC;

elke streek van UDF wys nog 2 lede elk aan om as addisionele lede te dien op die NEC;

die twee Nasionale Tesouriers vorm deel van die NEC, sowel as die Nasionale Algemene Sekretaris; en

die Publisiteitsekretaris.

(c) Die Nasionale Sekretariaat bestaan uit -

die Nasionale Algemene Sekretaris;

die Publisiteitsekretaris;

die twee Nasionale Tesouriers; en

die twee Sekretarisse uit elk van die Streke van UDF -

SIEN: Erkenning - BEWYSSTUK: AAS(4) pp. 12 en 13.

(d) Die Opleidingskomitee van UDF -
SIEN: BEWYSSTUK: AAS(4) pp. 13 en 14.

(e) Die MSC-komitee;

(f) Koördineerders van die IYY;

(g) Organiserende Komitee van die "Votes for All" Konvensie.

(h) Die Geloofsbriewe-komitee;

(i) Die Evaluasie-komitee;

(j) Die Finansiële-komitee;

(k) Die Interim Freedom Charter-komitee;

(l) Die Koördineerders van die "Treason Trial Support Committee";

(m) Organiseerder van UDF (Transvaal) -
SIEN: BEWYSSTUK: AAS(4) pp. 14 tot 16.

(n) Die Streeks-Algemene Raad van UDF (RGC) bestaan uit twee afgevaardigdes van elke geaffilieerde sowel as die lede van die Streek-Uitvoerende Komitee van UDF (REC); die Sekretarisse en die Tesouriers;

(o) Die Streeks-Uitvoerende Komitees van UDF (REC) bestaan uit lede aangewys deur die RGC (Streeks-Algemene Raad van UDF).

2.6 Uit wat hierbo genoem is, is dit duidelik dat UDF in sy totaliteit wel bestaan uit 'n vereniging van persone.

Om 'n absurde argument te gebruik; is dit nie slegs name van organisasies wat UDF uitmaak en besluite neem nie, maar die persone wat die organisasies vorm en uit hul geledere verkies word op die bestuur en amptenary van UDF.

2.7 Die argument dat UDF slegs 'n vereniging van organisasies is, word duidelik nie gesteun deur bogenoemde uiteenset= ting van hoe die verskillende dele inmekaar skakel.

2.8 Verdere steun vir die Staat se standpunt dat UDF wel 'n vereniging van persone is, word gevind in die omskrywings van "ampsdraer" en "beampte" in Wet 74 van 1982 wat aandui dat 'n organisasie (wat 'n vereniging van persone insluit) 'n uitgebreide betekenis het :

"1(i) 'ampsdraer', met betrekking tot organisasie, 'n lid van die beherende of uitvoerende lig= gaam van -

a) die organisasie;

b) 'n tak, afdeling of komitee van die organisasie; of

c) 'n plaaslike, streek- of hulpliggaam wat deel van die organisasie uitmaak.

1(ii) 'beampte', met betrekking tot 'n organisasie, iemand wat werk vir die organisasie of vir 'n tak, afdeling of komitee van die organi= sasie of vir 'n plaaslike, streek- of hulp= liggaam wat deel van die organisasie uit= maak".

2.9 Tydens argument het die verdediging toegegee dat UDF wel 'n vereniging van persone is volgens die betekenis van beide die Strafproseswet en die Wet op Binnelandse Veiligheid. In hierdie verband word met die verdediging saamgestem dat dit die korrekte benadering is.

In die saak van C.I.R. v Witwatersrand Association of Racing Clubs, 1960(3) SA 291(A) moes die hof bepaal of 'n assosiasie van persone geklassifiseer kon word as "person". Die feite van die saak is dat verskillende klubs 'n losse vereniging gevorm het met behoud van elkeen se eie outono= mie, en het die hof soos volg bevind op p. 304 G - 305 A -

> "Nevertheless, I am unable to agree with them. Respondent appears to me to be an organised body different from the clubs acting in concert ad hoc. Respondent has a secretary: it has funds which are kept in a separate banking account. Respondent has continuously existed since 1933, notwithstanding that some clubs have since then come and gone. ----------
>
> Indeed in relation to the race of 2nd June 1953 - the fons et origo of the present enquiry - it is plain, from what is set out earlier in this judg= ment, that respondent acted as a separate entity. In my judgment, it is clear that respondent is an association of persons".

3.

'n Konsep wat van belang sal wees in hierdie hof, is die kwessie van oogmerke van 'n organisasie. Dit sal ter sprake wees by sowel artikel 13 en artikel 246 van Wet 74 van 1982 en Wet 51 van 1977 onderskeidelik, en word dit hier behandel.

3.1 Dit is noodsaaklik dat duidelikheid verkry word en dit word ook aanvaar, vir die doeleindes van artikel 13 van Wet 74 van 1982, dat die oogmerke daar ter sprake gekwali= fiseer moet word aan die hand van een of ander onderskei= dende kenmerk om dit 'n misdryf te maak.

3.2 Dit is 'n basiese beginsel dat die wet so uitgelê moet word dat dit effektief, eerder as oneffektief, sal wees, en met hierdie regsbeginsel in gedagte word vervolgens gekyk na die gesag waarop die verdediging steun.

3.3 Die argument van die Verdediging is hoofsaaklik gebaseer op "distinctiveness" van die oogmerke van 'n organisasie, en hierdie hele argument is blykbaar gebaseer op een enkele oogmerk, te wete -

"to bring an end to Apartheid by violent revolution" -

p. 148 van die Verdediging se hoofde.

3.4 Hierdie argument is verkeerd vir die volgende ooglopende redes :

3.4.1 die artikel in die Wet, artikel 13(1)(v) meld spesifiek "enige van die oogmerke van die onwettige organisasie of oogmerke wat soortgelyk is";

3.4.2 in enige organisasie, en in die besonder ANC/UDF ook, is daar korttermyn- en langtermynoogmerke wat hulle nastreef;

3.4.3 kan dit met reg gesê word dat dit die uiteindelike doelstelling van die ANC/UDF is om Apartheid omver te werp in 'n gewelddadige rewolusie? Is dit nie moontlik dat daar 'n verdere oogmerk is om 'n regering van die massas ooreenkomstig die Freedom Charter te bring ná die val van die Regering nie, of dat die regering van die massas ooreenkomstig die Freedom Charter ingestel, net 'n tussentydse fase is voor die vestiging van 'n sosialistiese/kommunistiese regeringstelsel?

Dit is dan betekenisvol waarom die wetgewer spesifiek verwys na oogmerke van 'n organisasie, en dit sluit beslis alle oogmerke in, en nie net die finale oogmerk(e) van 'n organisasie nie.

3.5

3.5.1 Soos reeds gesê, moet 'n wet só uitgelê word dat aan sy bepalings gevolg gegee kan word, eerder as om die bepalings doelloos te maak.

Dit is my respekvolle betoog dat, deur te werk met die toets van "distinctiveness", word hierdie wets= voorskrif se toepassing verydel en onmoontlik gemaak, want op die argument van die Verdediging sal hy slegs toepassing kan vind indien bewys kan word dat die finale oogmerk, wat dan "distinctive" moet wees, om 'n sosialistiese regering te vestig, die deurslaggewende faktor is. Die feit dat dit bewerkstellig moet word deur 'n gewelddadige rewolusie, dat die massas opge= sweep moet word tot deelname aan so 'n rewolusie, sal dan van geen waarde wees en nie toepassing vind nie.

3.5.2 In hierdie argument ten aansien van "distinctiveness" word daar in al die gesag waarna later verwys word, en waarop die Verdediging steun, hoegenaamd geen voor= siening gemaak of oorweging geskenk aan die bepaling met betrekking tot "oogmerke wat soortgelyk aan dié van die organisasie is".

3.5.3 Die beperking van die artikel deur die toets van "distinctiveness", verleen hoegenaam geen erkenning vir die ondergeskikte of aanvullende korttermynoog= merke waarvoor in die Wet wel voorsiening gemaak word.

3.5.4 Die grootste kritiek teen die toets van "distinctive= ness" is dat daardeur die mag aan enige organisasie of liggaam verleen word om die toepassing van hierdie artikel na eie keuse onwerkbaar te maak. Veronderstel die ANC het 'n spesifieke korttermynoogmerk en 'n ander organisasie kom tot stand en aanvaar 'n identiese oog= merk, dan sal dié oogmerk nie meer toepassing vind nie, en word dit waardeloos. As voorbeeld, dit is 'n kort= termyndoelstelling van die ANC dat die massas in die RSA gemobiliseer, politiseer en georganiseer moet word. Dit is deur UDF en honderde organisasies ná UDF se totstandkoming oorgeneem, en gevolglik is dit nie meer "distinctive" van die ANC nie, hoewel die ANC

steeds met die oogmerk voortgaan en dit as 'n metode van rewolusionêre oorlogvoering bedryf.

3.6 Die locus classicus aangaande die uitleg van die betekenis van oogmerke van 'n onwettige organisasie of oogmerke soortgelyk aan die oogmerke van 'n onwettige organisasie, is en bly S v Arenstein, 1967(3) SA 366(A).

Voordat hierdie saak bespreek word, moet twee belangrike aspekte beklemtoon word -

(a) Die Suid-Afrikaanse Kommuniste Party (SAKP) is en bly steeds 'n verbode organisasie en word steeds getref deur artikel 13 se bepalings; en

(b) Beginsels wat neergelê word deur die hof, moet sodanig neergelê word dat dit in alle gevalle vir alle onwettige organisasies sal geld, en dit is ons betoog dat die Arenstein-saak 'n interpretasie verleen wat in alle gevalle geld.

3.7 Bespreking van S v Arenstein (supra) -

3.7.1 Die argument dat hierdie artikel so uitgelê moet word dat die dade beperk word tot die uiteindelike oogmerk, is nie iets wat nou op die voorgrond getree het nie, maar word lank reeds geargumenteer, en het die Appèlhof hieroor uitspraak gegee waarin hierdie gedagte totaal verwerp word.

> "It was in the light of the above evidence that Mr. Hanson submitted to this Court on behalf of appellant, that the State had failed to prove that any of appellant's proved or admitted acts were calculated to further the achievement of any of the fundamental principles of the doctrine of Marxian Socialism. It could not, so he contended, avail the State merely to prove that appellant's acts were calculated to achieve an intermediate stage or an ancillary objective of that doctrine, an objective which that doctrine might very well share with other political ideologies of a merely liberal or progressive nature.

The implication of this argument is that the Legislature merely wished to control and pro= hibit any act calculated to further the achievement of the ultimate object of the doctrine of Marxian Socialism, viz., the es= tablishment, in final form, of the communist state. In order to test the validity of this somewhat startling proposition it becomes necessary to examine the true nature of the offence created by sec. 11(a) of Act 44 of 1950".

- p. 379 D - F.

3.7.2 Eerste aspek wat die hof ondersoek, is wat word bedoel met die woord "enige" in die artikel, en as die artikel behoorlik uitgelê word, beteken dit nie alleen die uiteindelike oogmerk nie, maar ook tussentydse en bykomstige oogmerke -

"Appellant was convicted of contravening sec. 11(a) of the Act which prohibits the performance of acts which are

'calculated to further the achievement of any of the objects of communism'.

Having regard for the moment solely to the language of the section on which the charge is based, it would seem to lend but scant support to the argu= ment advanced on appellant's behalf that the Legis= lature intended to penalise only such activities as were calculated to further the achievement of the fundamental principles of Marxian Socialism. The section refers to 'any' of the objects of com= munism. The word 'any', unless the context in which it is used indicates a contrary intention, is one of 'wide and unqualified generality' (R v Hugo, 1926 AD 268 at p. 271) and would appear to include both an intermediate or ancillary, as well as an ultimate aim, of communism. The endea= vour to introduce a limitation on the wide genera= lity of the meaning of the word 'any' is, however, founded upon the statutory definition of communism appearing in sec. 1(1)(ii) of Act 44 of 1950, as amended, and set forth at the outset of this judg= ment. If one has regard to this definition it is clear that it comprehends three different catego= ries which, for the purposes of that Act, are equated to each other as forms of communism."

- p 379 - 380 A.

en ook -

"Upon a proper construction of the definition of communism the 'objects' then being inquired into are not contextually restricted to a reference to the fundamental principles of Marxian Socia= lism. It could well be that an object, the furtherance of the achievement of which forms the basis of a charge under sec. 11(a) of the Act, is in fact one of the fundamental princi= ples of Marxian Socialism but it could equally well be that such object might merely be an intermediate or ancillary aim of that doctrine. This circumstance would not, however, exclude it from being numbered amongst the objects contemplated by the Legislature in sec. 11(a) of the Act."

- p. 380 E - F.

3.7.3 Die volgende aspek wat ondersoek word, is die vraag of die teweegbring van politieke, industriële, sosiale of ekonomiese veranderinge deur die bevordering van oproer 'n fundamentele oogmerk kan wees, en word bevind dat sodanige oproer self nie die fundamentele oogmerk kan wees nie, maar slegs 'n tussentydse oogmerk:-

"For example, under sub-para. (b), there is included as a doctrine equated to Marxian Socialism one which aims at bringing about political, industrial, social or economic changes within the Republic by the pro= motion of disturbances. Now while the promotion of disturbance may very well be one of the methods by which Marxian Socialism seeks to achieve its aims, it could quite clearly not in itself be regarded as a fundamental principle of Marxian Socialism, al= though it could correctly be characterised as one of its intermediate objects. Nevertheless the Legislature has chosen to equate a doctrine having such an aim to Marxian Socialism. Sub-para. (d) affords similar evidence of the intention of the Legislature in regard to the meaning of "objects of communism", and goes to show that matters of method and short-term objectives could also be numbered thereunder."

- p. 380 H - 381 A.

3.7.4 Die hof ondersoek vervolgens wat bedoel word met die bewoording "bereken om te bevorder" en kom tot die

gevolgtrekking dat die gewraakte aktiwiteite objektief benader moet word en vasstel of sodanige aktiwiteite inherent die gevolge teweeg kan bring en besluit na deeglike ondersoek, dat daar wel ondersoek ingestel moet word na die opset van die oortreder -

"One further matter involving the construction to be placed on the charging section requires clari= fication. It was argued by Mr. Hanson that, as sec. 11(a) uses the words 'calculated to further', the Court must view the activities of the appel= lant objectively and ask itself whether these activities were inherently likely to further the object set out in count 3. No regard should accordingly be paid to appellant's Marxist-Leninist thinking as a motivation for his actions nor to the fact that, on his evidence, his activities were limited to the achievement of an intermediate stage on the road to the ultimate introduction of a com= munist state. On this argument, for which support was sought in the case of S v Nokwe and Others, 1962(3) SA 71(T), mens rea is not an element of the offence created by sec. 11(a).

In view of such general maxims as nulla poena sine culpa and actus non facit reum nisi mens sit rea, the Legislature, in the absence of clear and con= vincing indications to the contrary in the enact= ment in question, is presumed to have intended that violations of statutory prohibitions would not be punishable in the absence of mens rea in some degree or other. See R v H, 1944 AD 121 at pp. 125, 126; S v Arenstein, 1964(1) SA 361(AD) at p. 365. Botha, J.A. in S v Arenstein, supra, loc. cit., stated that

'indications to the contrary may be found in the language or the context of the prohibition of injunction, the scope and object of the statute, the nature and extent of the penalty and the ease with which the prohibition or injunction could be evaded if reliance could be placed on the absence of mens rea'.

I can find no indication in the language or context of the charging section which would serve to displace such a presumption. It is true, as was held in S v Nokwe and Others, supra, at p. 71 - and correctly so in my view - that the word 'calculated' must not be interpreted as 'intended'. It is equally true that the Legislature describes the act prohibited with reference to the objective results likely to be

achieved by its performance and it can be conceded that if the achievement of such results may, as a reasonable possibility, flow from the performance of that act then such act was intended to be prohibited. (See such cases as American Chewing Products Corpo= ration v American Chicle Company, 1948(2) SA 736 (AD) at pp. 741-2; Rex v Heyne and Others, 1956(3) SA 604 (AD) at p. 622; S v Nokwe and Others, supra, at p. 74). All this, however, does not indicate that the Legislature intended that no regard should be had to the mental state of the perpetrator when performing the act prohibited. Nothing in the lan= guage of sec. 11(a) or in the context of that sec= tion in the Act as a whole leads to the conclusion that the afore-mentioned presumption has been dis= placed."

- p. 381 B - H.

Die hof gaan dan voort om in die besonder ondersoek in te stel na die vraag of 'n organisasie wat nie die vei= ligheid van die Staat in gevaar wil stel nie, maar enersluidende oogmerke het, deur die artikel getref word, en word 'n verduideliking verskaf van die beslissing van S v Nokwe and Others, 1962(3) SA 71(T), en kom dan tot die ferme beslissing dat mens rea wel vereis word deur hierdie artikel.

3.7.5 Dit is die bewese feite van 'n saak wat oorweeg moet word om vas te stel of die gewraakte dade waarskynlik die oogmerke van 'n onwettige organisasie sal bevorder.

Om dit te kan doen, is dit nodig om te kyk na die or= ganisasie se doelstellings; en vir die doeleindes van hierdie argument, en om 'n voorbeeld te verskaf, word die volgende aangehaal wat baie ooreenstem met die feite in hierdie saak :-

"These are set out in the Communist Party programme, the relevant extracts from which are quoted earlier in the course of this judgment. They include, in the short run, the organisation of communists and non-communists in a united front of national libe= ration for the purpose of bringing about a national democratic revolution to put an end to race discri= mination, to restore the land and wealth of the country to the people and to guarantee to them all an equality of democratic rights. To this end the

South African Communist Party lends its unqualified support to the implementation of the Freedom Charter. The object in so doing is to lay the foundation for the achievement, in the long run, of the ultimate communist aim of creating a classless society.

The method envisaged in the programme to achieve these objects is to organise the working classes in trade unions and to build mass political organisations of the peasants and working classes, who together will destroy the dictatorship of the capitalists and replace it with the dictatorship of the working class and a system of socialism.

A comparison of the aims set forth in the Freedom Charter and in the document entitled 'The Immediate Task of the National Liberation Movement' with those of the South African Communist Party demonstrates the basic similarity between the aims contained in the former two documents and the short term objects contained in the programme of the latter Party. The Freedom Charter enshrines the ideal of a multi-racial democratic South Africa, with the mineral wealth, the banks and monopoly industry of the country in the hands of the people. The National Liberation Movement supports the objects of the Freedom Charter and aims at the building up of mass organisations, such as African trade unions, residents associations in Bantu townships and political parties and political groups to work towards the achievement of such objects.

Apart from a comparison of the documents above-mentioned, appellant stated in evidence that at least the short term objects of the South African Communist Party coincided with those of the Freecom Charter and with those of the National Liberation Movement."

- p. 384 D . 385 A.

3.7.6 Wat in die besonder insiggewend is, is die dade wat gepleeg is ter bevordering en wat baie duidelik nie die uiteindelike oogmerk van die organisasies is nie, en wat die hof hier bevind het wel handelinge is wat die oogmerke van die organisasie bevorder het.

"The question thus arises as to what acts he performed while working for the Movement; more particularly what acts did he perform in so doing which were calculated to further the organisation of the non-white masses to take part in mass action for the purpose stated in the indictment and with what intention did he perform them. Acts would, I appre=

hend, be calculated to further the achievement of a particular object if such acts, as a reasonable possibility, contributed, in a not inappreciable degree, towards the attainment of such object.

Many of the acts performed by appellant undoubtedly contributed, to the extent aforesaid, towards the organisation of the non-white masses to take part in mass action for the purpose alleged in count 3 of the indictment. Thus the endorsement and the issue by appellant to Rudin of the two documents, viz. 'The Immediate Task of the National Liberation Movement' and the memorandum of the Congress Move= ment, in both of which the organisation of the non-white masses is advocated, is one such act. The documents were supplied by appellant to Rudin for use and the act of supply contributed towards the bringing into operation of the forms of mass orga= nisation therein contemplated.

The memorandum, RA. 3, supplied by appellant to Nkosiana to assist the Opposition Party in the Transkeian Assembly in pursuance of a campaign to build up mass opposition to the ruling party amongst the electors of that Assembly is another such act. So, too, was appellant's use of Dunne as a contact with opposition leaders in pursuance of the same policy.

The various acts performed by appellant in relation to the attempt to make money in London available in South Africa for the purpose, inter alia, of paying the wages of full-time organisers to assist in building up mass political organisations to take part in Bantu Council elections and in elections in a future Zulustan similarly fall into that category. He also advised Ernst and Rudin as to what should be done by them in connection with the National Liberation Movement, for which Movement he regarded Rudin as working in Johannesburg, and he advised Mxenge and Dhlomo of the Natal University in regard to the setting up and financing of a political or= ganisation to operate in a prospective Zulustan as well as in connection with urban Bantu Council elections.

The evidence thus leaves no doubt but that the State has proved numerous acts by the appellant calculated to further the achievement of the building up of the non-white masses to take part in mass action. Since the purpose of this activity was in furtherance of the aims not only of the National Liberation Move= ment and the Freedom Charter but also of the South African Communist party, the State has thus proved that the acts performed by appellant were calculated to further the achievement of the object set out in count 3 of the indictment."

- p. 385 B - 386 A.

3.7.7 Die onderskeid tussen staatsgevaarlike en nie-staatsgevaarlike organisasies se nie-aanspreeklikheid aan oortreding van hierdie artikel, word getoets aan die opset en hierdie opset word gekwalifiseer as die oorheersende opset wat daarop gemik is om die Staats= bestel in gevaar te stel -

> "His own evidence, therefore, leaves me in no doubt that his overt intention in performing the acts he admittedly did perform was to further the ultimate achievement, stage by stage, of the aims of Marxian Socialism. The fact that he performed them in pursuing the ob= jectives of the National Liberation Movement and the Freedom Charter was dictated solely by the social, political and economic situation for the time being existing in the country and not by virtue of any intention on his part to confine his actions to achieving only the li= mited objectives of the National Liberation Movement.
>
> That being so, not only has appellant not discharged the onus resting on him but it has been established beyond doubt that appellant's acts were performed with the mens rea required to establish guilt on the charge on which he was arraigned and I conclude, therefore, that he was rightly convicted on count 3."

- p. 386 F - H.

3.7.8 Dit is my betoog dat as hierdie saak van die Appèlhof, met respek behoorlik geïnterpreteer word, dit duidelik is dat die Appèlhof baie beslis nie ondersteuning ver= leen aan 'n toets van "distinctiveness" wat noodwendig moet slaan op die uiteindelike doelstelling.

Onskuldige organisasies wat moontlik 'n korttermynoog= merk soortgelyk aan dié van 'n onwettige organisasie mag hê, word uitgesluit van die trefkrag van hierdie artikel deur die interpretasie daarvan dat die uitein= delike (oorheersende) opset van die oortreder, die deurslaggewende faktor is.

3.8 NDABENI v MINISTER OF LAW AND ORDER AND ANOTHER, 1984(3) SA 500 (D & CLD) -

Die Verdediging steun sterk op hierdie saak vir hul argument aangaande "distinctiveness".

My respekvolle betoog is dat in hierdie saak is die be= ginsels en gesag van die Appèlhof, soos beliggaam in S v Arenstein, supra, hoegenaamd nie oorweeg en toegepas nie.

3.9 S v THEVAR AND OTHERS; ongerapporteerd, (NPD) op 7 November 1985 : AR 701/85 -

Hierdie saak het geen toepassing in die onderhawige saak nie, aangesien die Staat versuim het om enige van die doelstellings van die ANC te bewys, en waar daar wel moontlike oogmerke van die ANC bewys is, het die hof hoe= genaamd nie daarop ingegaan en na enige gesag verwys vir sy beslissing nie.

3.10 S v NTSHIWA, 1985(3) SA 495 (TPD) -

3.10.1 Dit is my respekvolle betoog dat die hof in hierdie saak met verwysing na R v Adams, 1959(1) SA 646 (SPC) en met verwysing na die woordeboekbetekenis van sekere woorde in die artikel, nie die hele artikel in gedagte gehou het nie, en 'n interpretasie gegee het wat nie die hele artikel se betekenis weergee nie.

Die hof het net die betekenis van die woorde "bepleit, aanraai, verdedig of aanmoedig" uitgelê en bevind dat daar een of ander kommunikasie moes plaasgevind het, en het nie aandag geskenk aan die volgende deel van die artikel nie:-

> "of enige ander handeling van watter aard ookal verrig wat bereken is om die verwesenliking van so 'n oogmerk te bevorder nie."

3.11 S v RAMGOBIN AND OTHERS, 1986(1) SA 68 (N) -

3.11.1 Ook hierdie saak waarop die Verdediging sterk steun, aanvaar sonder meer die leiding in die Ndabeni-saak neergelê.

3.11.2 In hierdie saak het Sy Edele R. Milne wel oorweging aan die saak van S v Arenstein, supra, geskenk, maar nie die leiding van die Appèlhof aanvaar nie, maar verkies om af te wyk. Dit is my respekvolle betoog dat hierdie hof gebonde was aan die uitspraak in S v Arenstein, en dit moes toegepas het.

3.12 MOKOENA v MINISTER OF LAW AND ORDER, 1986(4) SA 42 (WLD) -

Dit is my respekvolle betoog dat hierdie hof nie oorweging geskenk het aan die uitspraak in S v Arenstein, supra, en die beginsels neergelê deur die Appèlhof toegepas het nie, maar bloot die Ntshiwa-, Ramgobin- en Ndabeni-sake gevolg het.

3.13 Dit word finaal ter oorweging gegee dat die term "dis= tinctiveness", vir my met respek, hoegenaamd geen duide= likheid bring van wat daarmee bedoel word nie.

Sy Edele Regter Didcott het dit gestel in die Ndabeni-saak supra, dat die oogmerke moet "distinctive" van die ANC wees, maar nie "exclusive" nie. In hierdie woorde is daar vir my 'n mate van contradictio in terminis in die konteks waarin dit toegepas word.

In die Tweetalige Woordeboek van Bosman, Van der Merwe en Hiemstra, sewende uitgawe, p. 1154, word "distinctive" aangegee as synde "onderskeidend, kenmerkend, eiesoortig, apart, besonder en vernaam", en "exclusive" word op p. 1191 aangegee as synde "uitsluitend, apart, afsydig, eensydig, kieskeurig, deftig, eksklusief, met uitsluiting van, ongerekend, sonder, buiten en onverenigbaar."

4.

Die volgende belangrike stap is om vas te stel onder watter ge= sag die dokumente aangebied kan word as getuienis en die getuie= niswaarde daarvan.

A. ARTIKEL 246 VAN WET 51 VAN 1977.

1. Die eerste tersaaklike bepaling is die plek waar die dokument gekry is; wat belangrik is voordat dit toe= laatbaar is as bewysmateriaal.

   (i) 'n Dokument te enigertyd op 'n perseel was ge= okkupeer deur 'n vereniging van persone met of sonder regspersoonlikheid.

   (ii) 'n Dokument te enigertyd in besit of onder beheer was van 'n ampsdraer, beampte of lid van so 'n vereniging.

2. As daar aan bogemelde vereistes voldoen is vloei daar verskillende gevolge daaruit voort.

   (i) So 'n dokument kan deur blote inhandiging by die hof bewysmateriaal word.

   (ii) So 'n dokument verkry bloot op gesigswaarde - ex facie die dokument self - prima facie bewyskrag van sekere feitlike aspekte daarin vermeld.

3. Die feite wat bewys kan word ex facie so 'n dokument is -

   (i) Dat 'n beskuldigde die lid of ampsdraer van so 'n vereniging is as 'n naam soortgelyk aan 'n beskul= digde sin in die stuk voorkom as lid of ampsdraer van daardie vereniging.

   (ii) Dat 'n beskuldigde 'n outeur is van so 'n dokument as dit ex facie die stuk dit blyk dat iemand met 'n naam wat ooreenstem met beskuldigde sin wat 'n lid van daardie vereniging is of wat die outeur daarvan was.

(iii) As dit blyk ex facie die stuk dat dit die notule of 'n afskrif van of 'n uittreksel uit die notule van 'n vergadering van daardie vereniging of van 'n komitee daarvan is, bewys dit prima facie :

(a) die hou van so 'n vergadering, en
(b) van die verrigtinge by so 'n vergadering.

(iv) As so 'n dokument 'n oogmerk van daardie vereniging openbaar, dan is dit prima facie bewys dat bedoelde oogmerk 'n oogmerk van daardie vereniging is.

B. Die voorlegging van 'n dokument kragtens hierdie artikel is nie per se bewys dat die gebeurtenisse daarin vermeld die waarheid is nie, maar bewys wel die soort van leesstof en inligting wat die vereniging van persone onder sy lede ver= sprei.
SIEN: S v Alexander (2) 1965(2) SA 818 (K).

C. In die onderhawige saak is daar formele erkennings tot die volgende effek -

(i) Verskillende dokumente is gevind op die persele van die vereniging van persone, dit is UDF, UDF-streke en UDF-geaffilieerdes se kantore.

(ii) Verskillende dokumente was gevind in besit of beheer van ampsdraers, beamptes en lede van die vereniging van persone - van UDF, UDF-streke en UDF-geaffilieer= de organisasies.

(iii) Die name van 'n groot aantal van die beamptes, amps= draers of lede (uit die aard van die saak is amps= draers ook lede) van die vereniging van persone - UDF-Nasionaal, UDF-streke, UDF-komitees en geaffili= eerdes van UDF.

(iv) Dat waar name van persone waar die dokumente gevind is ooreenstem met die name van die ampsdraers van die vereniging van persone soos erken (UDF, Streke en geaffilieerdes) dit dieselfde persone is.

Dus deur hierdie artikel alleen word al die dokumente wat oor die volgende aspekte handel toelaatbaar as bewysmate= riaal.

(i) Al die dokumente waarin die name van beskuldigdes voorkom, hetsy as ampsdraer of as outeur van die dokumente.

(ii) Al die notules, uittreksels uit notules of af= skrifte van notules van 'n vergadering van die vereniging van persone, te wete UDF-Nasionaal, UDF-streke en geaffilieerdes van UDF, asook van komitees van hierdie vereniging van persone.

(iii) Alle dokumente gevind op die persele van UDF-Nasionaal, UDF-streke en geaffilieerdes van UDF sowel as alle dokumente gevind by ampsdraers van UDF geheel soos hierbo omskryf en waarin enige van die oogmerke van UDF, dit wil sê uiteindelike doelstelling(s) sowel as korttermyn en sydelingse oogmerke van die vereniging van persone voorkom.

D. Wat tot hier gesê is, is egter nie die einde van die saak sover dit die gemeneregtelike misdade aanbetref nie. Dit bring my by die sameswering en indien die Staat 'n sameswe= ring bewys, tree verdere regsbeginsels aanvullend tot bogemelde beginsels in werking. Die verdere beginsels word in die volgende gewysdes uiteengesit -

S v ALEXANDER AND OTHERS(2), 1965(2) SA 818(T), p. 821 - p. 823:

(i) Die argument was ook daar geopper deur die Verdedi= ging dat die blote voorlegging van die dokument nie die inhoud daarvan bewys nie -

> "On behalf of the accused it was argued that the mere production of a document does not prove the contents thereof and that, no matter what the contents of the documents were,

the Court would still have to find that the accused conspired together as alleged in the indictment. Before dealing more fully with the objects or aims of the Y.C.C.C. and/or N.L.F. as revealed by all the evidence be= fore the Court this may be an apposite stage for considering the legal concepts of a conspiracy."

(ii) Om hierdie stelling van die Verdediging as foutief te bestempel, behandel die Hof kortliks die gevolge wat voortvloei uit 'n sameswering -
SIEN: p. 821 H - 822 F.

Die Hof kom daarna tot die volgende beslissing op pp. 822 en 823 -

"The defence contention regarding the proof of the contents of a document is not entirely correct. Sub-sec. 263 bis (1)(d) of the Cri= minal Procedure Act, 56 of 1955, provides that where any document which was at any time in the possession of a member of an association of persons discloses on the face thereof any ob= ject of such association it shall on its mere production in criminal proceedings be prima facie proof that the said object is an object of such association.

Where the objects of the Y.C.C.C. and/or N.L.F. therefore appear on any document either found in possession of any member of this organisa= tion or which had been in possession of any member at any time it constitutes prima facie proof of the objects of such organisation. Similarly, in terms of sec. 263 bis (1)(a) of the said Act, where on the face of any such aforesaid document a person of a name corre= sponding to that of an accused person appears to be a member or office bearer of such asso= ciation, it constitutes prima facie proof that the accused is a member, or such an office bearer, of such association as the case may be.

By enacting the aforesaid sec. 263 bis of Act 56 of 1955 the Ligislature has provided that certain specified evidence which ordinarily would not be adequate to convey proof of the fact sought to be proved shall afford prima facie proof thereof. The effect of the section is therefore two-fold - it renders admissable, upon mere production, certain documents and it accords to their contents a probative effect amounting to prima facie proof. By prima facie

proof is intended, as far as those facts are concerned, evidence which is such as to call for an answer and which in the absence of an answer may become conclusive proof.

Subject to the aforesaid I agree with the defence contention that the production of a document is not per se evidence of the happening of events specified therein, but the document by its contents nevertheless discloses the type of reading matter and information produced and distributed by an organisation to its members whether or not the events related therein actually took place or the the informa= tion supplied is authentic."

S v MOUMBARIS AND OTHERS, 1974(1) SA 681(A); pp. 685 - 687 -

Die Appèlhof bevestig dat bewerings van so 'n sameswering en gemeenskaplike opset die omvang van toelaatbaarheid van getuienis vergroot.

"The allegations of conspiracy and common purpose widened the ambit of initially admissible evidence.

When two or more persons are engaged in a common enter= prise, the acts and declarations of any one of them in pursuance of that common purpose are admissible against the other. It is immaterial whether the existence of the common purpose or the participation of the person therein be proved first although either element is nuga= tory without the other; R v Miller and Another, 1939 AD 106 at pp. 115 to 188. At the end of the case the Court has to consider whether there was a common enterprise for the alleged purpose and whether the accused were parties to it. If evidence was allowed to be first given of the general matter, that was only provisionally rele= vant against the respective accused until evidence was given that they were parties to the common enterprise. If evidence was first given of the acts of a particular accused that was only provisionally relevant as against the other accused until it was shown, either from the manner in which those acts were done or otherwise, that the acts were done in pursuance of a design common to him and the others. Once there is evidence aliunde of a common enterprise and the parties thereto, the acts and statements, executive as opposed to narrative, of one of the socii criminis or co-conspirators are ad= missible to confirm the scope of the common enterprise or the conspiracy and the nature of the steps taken to carry it out, and there seems to be no reason why such evidence should not be used to confirm the other evi= dence as to the parties who took part therein; see judg= ment of SCHREINER, J.A., as quoted in R v Leibbrand and Others, 1944 AD 253 at p. 276; R v Mayet, 1957(1) SA 492 (AD) at p. 494.

At common law a bare conspiracy or an agreement to commit an offence without the offence being committed or attempted in consequence of the agreement is not, save in the case of treason, a substantive and indictable offence; R v Kaplan, (1983) 10 S.C. 259 at pp. 262 to 265; R v Solomon and Others, (1898) 15 S.C. 107 at p. 108. If a person assists in or facilitates the commission of a crime, if he stand by ready to assist although he does not physically act, as where a man stands outside a house while his fellow-burglar breaks into the house, if he gives counsel or encouragement, or if he affords the means for facilitating the commission; if in short there is co-operation between him and the criminal then he aids the latter to commit the crime (R v Jackelson, 1920 AD 486 at p. 491) and he is a socius criminis and can be indicted and punished in the same manner as the actual perpetrator. It is not necessary to charge him specifically as a socius criminis; R v Longone, 1938 AD 532 at pp. 536 to 537. By acting in this way the socius is acting in furtherance of a common purpose with the actual perpetrator of the offence. The words common purpose connote that there is a purpose shared by two or more persons who act in concert in doing something. There may be an express agreement between such person to achieve some object or there may be an implied agreement to the same end; R v Kahn, 1955(3) SA 177(AD) at p. 184. This situation can only arise at common law in relation to a crime actually committed or attempted and the liability of the socius flows from his own part in the deed coupled with the existence of mens rea in relation to the crime itself; R v Parry, 1924 AD 401 at p. 406. Though there is at common law no crime of criminal conspiracy as exists in England, we recognise the notion of association in crime and when accused are charged as socii criminis having a common purpose we apply the English rule of evidence, making executive statements and acts of one in furtherance of the common purpose admissible against the other or others; R v Cilliers, 1937 AD 278 at p. 285."

en -

"As far as proof goes, conspiracy is generally a matter of inference deducted from certain acts of the parties accused, done in pursuance of a criminal purpose in common between them; R v Brisac and Scott, (1803) 4 East 164 at p. 171 (102 E.R. 792 at p. 795). A conspiracy is thus not merely a concurrence of wills but a concurrence resulting from agreement. On the face of it one might suppose that the agreement is the same as the agreement necessary for a contract. No doubt such an agreement would be sufficient, but, judging from the manner in which a conspiracy may be proved, it would appear that something less would be sufficient. As an agreement it has three stages, namely

(1) making or formation,
(2) performance or implementation, and
(3) discharge or termination.

When the conspiratorial agreement has been made, the offence of conspiracy is complete, and it has been com= mitted and the conspirators can be prosecuted even though no performace has taken place. But the fact that the offence of conspiracy is complete at that stage does not mean that the conspiratorial agreement is finished with. It is not dead. If it is being performed, it is very much alive. So long as the performance continues, it is operating, it is being carried out by the conspirators, and it is governing or at any rate influencing their conduct. The con= spiratorial agreement continues in operation and therefore in existence until it is discharged (termi= nated) by completion of performance or by abandonment or frustration or however it may be; per LORD PEARSON in Director of Public Prosecutions v Doot and Others, (1973) 1 All E.R. 940 (H.L.) at p. 951. While the con= spiratorial agreement is in existence it may be joined by others and some may leave it. The person who joins it is equally guilty; R v Murphy (1837) 8 C & P 297 at p. 311 (173 E.R. 502). When considering the liability of the respective conspirators, it should be borne in mind that everything done by any one of the conspira= tors in furtherance of the common purpose is evidence against each and all of the parties concerned, whether they are present or absent and whether or not they were individually aware of what was taking place (Taylor, Evidence, 12th ed., para. 592, p. 377) and that such acts and declarations of other conspirators before any parti= cular conspirator joined the association, are only re= ceivable against the latter to prove the origin, charac= ter and object of the conspiracy, and not his own par= ticipation therein or liability therefor; and if they were not in furtherance of the common purpose (e.g. were mere narratives, descriptions, or admissions of past events) they will not be admissible against him; Phipson, Evidence, 11th ed., para. 264, p. 120. The pro= secution has on some of the counts indicated in the in= dictment who the socii criminis are."

S v COOPER AND OTHERS, 1976(2) SA 875(T); p. 879 -

"A conspiracy normally involves an agreement, express or implied, to commit an unlawful act. It has three stages, namely

(1) making or formation,
(2) performance or implementation, and
(3) discharge or termination.

When the conspiratorial agreement has been made, the offence of conspiracy is complete, it has been committed and the conspirators can be prosecuted even though no performance has taken place. But the fact that the of= fence of conspiracy is complete at that stage does not mean that the conspiratorial agreement is finished with. It is not dead. If it is being performed, it is very much alive. So long as performance continues, it is

operating, it is being carried out by the conspirators, and it is governing or at any rate influencing their conduct."

en ook -

"While the conspiratorial agreement is in existence it may be joined by others and some may leave it. The person who joins it is equally guilty; R v Murphy, (1837) 8 C & P 297 at p. 311 (173 E.R. 502 at p. 508). Although the common design is the root of a conspiracy, it is not necessary to prove that the conspirators came together and actually agreed in terms to have the common design and to pursue it by common means and so carry it into execution. The agreement may be shown like any other fact by circumstantial evidence. The detached acts of the different persons accused, including their written correspondence, entries made by them, and other documents in their possession, relative to the main design, will sometimes of necessity be admitted as steps to establish the conspiracy itself. It is generally a matter of inference deduced from certain acts of the parties concerned, done in pursuance of a criminal pur= pose in common between them. R v Briscoe and Scott, (1803) 4 East 164 at p. 171 (102 E.R. 792 at p. 795). If the conspirators pursued, by their acts, the same object, often by the same means, some performing one part of the act and others another part of the same act, so as to complete it with a view to the attainment of the object which they were pursuing, the conclusion may be justified that they have been engaged in a conspi= racy to effect that object."

S v TWALA AND OTHERS, 1979(3) SA 864(T): op p. 875 -

"The documents handed in by the State are indeed the do= cuments found by the police under the circumstances de= scribed by them and it is trite law that where an accu= sed is found in possession of a document, or has that document in his possession or under his control, the Court is entitled to infer knowledge of the contents thereof by such an accused. The same inference natu= rally can be drawn where the accused has written or compiled the document. The Court would also be entitled to infer that the document was written or compiled, or that production thereof was done in furtherance of the conspiracy and/or common design. Where the writing or production of the document constitutes an act in fur= therance of the conspiracy or is calculated to promote the conspiracy or common design, such document will be admissible against a co-conspirator on the principles

set out above. Similarly, where the document contains detail of the objects, aims and scope of the conspiracy, the document will be admissible against a co-conspirator or show the scope and nature of the conspiracy he became a party to. Ex post facto declarations will not be admissible against co-conspirators, unless, of course, the document and its production constitutes an executive act in promoting the common design. See Hoffmann (supra)."

E. As bogemelde gesag ontleed word, blyk dit gesaghebbend dat die omvang van die bewyswaarde van dokumente soos volg uitgebrei en toegepas word -

(1) Die dokument bewys deur sy inhoud die aard van die leesstof en informasie wat die samesweerders versprei. Dus die propagandawaarde van die dokumente.

(2) Die dade en verklarings van enige samesweerder of hy nou 'n beskuldigde is of nie, wat gedoen is in die uitvoering van die sameswering indien sodanige dade en verklarings uitvoerend van aard is, bewys die omvang van die sameswering en die aard van die stappe gedoen om die sameswering uit te voer (bv. ook publikasies om die massas op te sweep).

(3) Dit kan as stawende getuienis aanvaar word om ander getuienis ten aansien van die identiteit van die samesweerders te bewys.

(4) Solank die sameswering voortduur en handelinge verrig word in die uitvoering daarvan, is enigiets wat gedoen word in die uitvoering van die sameswering as getuienis toelaatbaar teen elk en 'n ieder van die samesweerders, of so 'n samesweerder teenwoordig was of individueel daarvan bewus was of nie (as voorbeeld die uitgee van 'n publikasie ter bevordering van 'n gemeenskaplike doel).

(5) Dat sulke uitvoerende handelinge of verklarings van ander samesweerders, voordat 'n latere samesweerder tot die

sameswering toegetree het, slegs teen die latere samesweerder toelaatbaar is om die oorsprong, aard en doelstellings van die sameswering te bewys, maar nie deelname van die latere samesweerder te bewys voordat hy aangesluit het nie.

(6) Volgens die gesag het 'n sameswering drie fases te wete -

(i) sluit van die ooreenkoms;

(ii) uitvoering en implementering; en

(iii) beëindiging daarvan.

Solank as die sameswering bestaan en uitgevoer word is dit lewendig en kan enige party daarby aansluit en deel van die sameswering word of dit verlaat. Die party wat daarby aansluit is ewenseens skuldig.

(7) Die bestaan van die sameswering kan bewys word soos enige ander feit deur omstandigheidsgetuienis deur die dade van die verskillende beskuldigdes, hul kor= respondensie, inskrywings deur hulle gemaak en ander dokumente in hul besit en wat relevant tot die aanklag is. Dokumente kan as bewysmateriaal aangebied en ont= vang word om die bestaan van die sameswering self te bewys en ook die aard en omvang daarvan. (Dit is be= vestig en aanvaarding van die beginsels oor bewyskrag van toegelate bewysmateriaal in R v Tropedo, 1920 AD58).

(8) As 'n beskuldigde in besit of beheer van 'n dokument gevind is, of dit geskryf, of saamgestel het, kan die hof aflei dat die beskuldigde kennis van die inhoud daarvan het.

(9) Die hof is geregtig om afleidings te maak en te bevind dat sodanige dokumente geskryf, saamgestel of geprodu= seer was in uitvoering van die sameswering.

(10) 'n Dokument geskryf of geproduseer in die uitvoering van die sameswering is toelaatbaar teen mede-samesweerders om te bewys die omvang en aard waartoe die samesweerders behoort.

(11) Ex post facto verklarings wat 'n uitvoerende handeling is ter bevordering of uitvoering van die gemeenskaplike doel is toelaatbaar en getuienis.

5.

ARTIKEL 69(4) VAN WET 74 VAN 1982 :

Dié artikel stel 'n kwalifikasie dat daar 'n vervolging ingestel moes wees ingevolge hierdie Wet. Aan hierdie kwalifikasie is voldoen en word dokumente of enige reproduksies daarvan toe= laatbaar en bewysmateriaal.

5.1 'n Dokument gevind of verwyder uit die besit, bewaring of beheer van -

(a) 'n beskuldigde; of

(b) enige persoon wat 'n ampsdraer, beampte, lid of aktiewe ondersteuner was van 'n organisasie waar= van die beskuldigde beweer word 'n ampsdraer, beampte, lid of aktiewe ondersteuner was, is toe= laatbaar as getuienis van die inhoud van so 'n dokument of reproduksie, teen 'n beskuldigde.

5.2 'n Dokument of reproduksie daarvan gevind of verwyder -

(a) uit 'n kantoor of ander perseel geokkupeer of ge= bruik deur 'n organisasie waarvan die beskuldigde beweer word 'n ampsdraer, beampte, lid of aktiewe ondersteuner was; of

(b) uit 'n kantoor of perseel geokkupeer of gebruik deur 'n persoon in sy hoedanigheid as ampsdraer of beampte van bedoelde organisasie, is prima facie getuienis van die inhoud daarvan teen die beskuldigde.

5.3 'n Dokument of reproduksie daarvan wat -

(a) oënskynlik deur of namens 'n organisasie waarvan die beskuldigde beweer word 'n ampsdraer, beampte, lid of aktiewe ondersteuner te wees; of

(b) deur of namens 'n persoon met 'n naam wat wesenlik met dié van 'n beskuldigde ooreenstem, opgestel, aangehou, instand gehou, gebruik, uitgereik of gepubliseer is, is teen die beskuldigdes prima facie bewys van die inhoud daarvan.

5.4 "Organisasie", volgens die omskrywing van hierdie Wet, is belangrik en lees soos volg -

"Artikel 1(xviii): 'organisasie', enige vereniging van persone, met of sonder regspersoon=likheid, en ongeag hy ooreenkomstig 'n wet ingestel of geregistreer is al dan nie."

Hierdie omskrywing moet toegepas word in die lig van die regsbeginsels soos hierbo volledig bespreek. Daarvolgens beteken dit dat UDF as 'n vereniging van persone bestaan uit UDF (Nasionaal), die Streke van UDF, alle komitees van UDF, en alle geaffilieerde organisasies se bestuurslede. Daarom word dokumente wat selfs gevind is by lede en kan=tore van geaffilieerdes, sowel as dokumente deur hulle op=gestel en uitgegee, betrek.

5.5 Volledigheidshalwe en in aansluiting by para. 5.4(supra), is dit ook belangrik om die volgende omskrywings van amps=draers en beamptes hier te vermeld -

"Artikel 1(i): 'Ampsdraer', met betrekking tot 'n orga= nisasie, 'n lid van die beherende of uitvoerende liggaam van -

(a) die organisasie;

(b) 'n tak, afdeling of komitee van die organisasie; of

(c) 'n plaaslike-, streek- of hulpliggaam wat deel van die organisasie uitmaak."

"Artikel 1(ii): 'Beampte', met betrekking tot 'n organi= sasie, iemand wat werk vir die organi= sasie, of in 'n tak, afdeling of komitee van die organisasie of vir 'n plaaslike-, streek- of hulpliggaam wat deel van die organisasie uitmaak."

Dit, saam met wat supra bespreek is aangaande 'n vereniging van persone, bevestig die wye omvang van UDF as synde UDF (Nasionaal), sy Streke, Komitees en hulpliggame van UDF, en ook geaffilieerde organisasies van UDF.

5.6 As die beginsels hierneergelê, toegepas word, word al die dokumente wat by hierdie Hof ingehandig is en erken is deur die Verdediging, bewysmateriaal teen die beskuldigdes; en wat meer is, sover dit die aanklagte onder die Wet op Binnelandse Veiligheid betref, word dit ook prima facie bewys van die inhoud daarvan teen die beskuldigdes.

5.7 In hierdie saak het die Verdediging gewag daarvan gemaak dat die Staat die oorkonde onnodig oorlaai het met 'n massa dokumente waarvoor hulle nie die nodigheid insien nie.

Die Staat het wél 'n doel gehad -

(i) Indien slegs enkele dokumente ingehandig was, kon interpretasieprobleme ontstaan het - dit word groot= liks uitgeskakel deurdat dieselfde feite herhaaldelik verkondig word en die betekenis van die dokumente, en die doel daarvan, duidelik na vore kom.

(ii) Verder was die groot hoeveelheid dokumente aangebied om te bewys dat die sameswering nie slegs 'n gepraat was nie, maar dat dit landwyd energiek uitgevoer was, en dat dit wel lewendig was.

(iii) Die groot hoeveelheid dokumente bied opsigself getuienis hoedat die verskillende knelpunte deurlopend en aktief aangewend was om die massas te mobiliseer, politiseer en te organiseer teen die Staat vir uiteindelike omverwerping van die Staatsgesag in die uitvoering van die sameswering.

5.8 Tydens die betoog van die Verdediging was die argument geopper dat as die dokumente toegelaat word kragtens artikel 69(4), en bewys bied van die waarheid van die inhoud daarvan, dit ook bewyse bied in die guns van die Verdediging.

Hiermee stem die Staat nie saam nie, vir die volgende redes -

(i) Die wetgewer was bewus van die probleme van die Staat om getuienis voor te lê ten aansien van die aspekte in die artikel vermeld, en het daarom hierdie hulpmiddel op die wetboek geplaas.

(ii) Die wetgewer was eweneens bewus van die feit dat beskuldigdes, vanweë hul verbintenis met 'n sekere organisasie, maklik die aspekte in die artikel gemeld, kan weerlê.

(iii) Om hierdie redes het die wetgewer uitdruklik bepaal dat dié dokumente <u>prima facie</u> bewys sal wees van die inhoud daarvan <u>teen</u> 'n beskuldigde, en dit vir vir die beskuldigde ooplaat of hy die feite <u>teen</u> hom wil weerlê, of <u>getuienis in sy guns onder eed</u> wil voorlê.

DELMAS TREASON TRIAL 1985-1989

DOCUMENT DETAILS:

Document ID:- **AK2117-K1-3**
Document Title:- **Argument in terms of article 174 of Act 51 of 1977**