

DELMAS

1985-11-08

THE STATE

versus

P.M. BALEKA AND 21 OTHERS

(10)

J U D G M E N T

VAN DIJKHORST, J.: The defence raised an objection in terms of Section 85(1) of the Criminal Procedure Act No.51 of 1977 to the charge, as amplified by further particulars, on the following grounds:

- (a) The charge does not comply with the provisions of the Act relating to the essentials of the charge, and
- (b) that the charge does not contain sufficient particulars (20) of matters alleged in the charge.

Before me, the second aspect, that is (b), was argued, also referring to the fact that certain essentials are not set out.

The State has served an indictment with annexure of some 364 pages. This was followed by a request for particulars of 75 pages, to which the State replied in a document consisting of some 114 pages, which incorporates some 82 volumes of documents said to be more than 5 000 pages.

The complaints by the Defence can be arranged under the following headings:

(30)

(a)/...

- (a) Certain questions are not answered directly, but by reference to documents from which the Defence is to extract the information sought. Some of these documents are stated to be not exhaustive - this is objection 1.1. In view of the number of documents involved it is a major task to extract the information without certainty that the result is exactly what the State has in mind. These objections are contained in paragraphs 1.2 and 1.3 of the objections. The State refers to documents in general terms, for example, transcriptions of speeches and (10) minutes, without specifying to which documents it refers for a particular allegation. These objections are contained in paragraphs 1.4, 5, 9 and 13 of the objections. Where particular documents are referred to, they are sometimes lengthy and there is no reference to the paragraphs which the State has in mind in the document. This objection is set out in paragraph 1.4.
- (b) Certain questions have not been answered at all. This complaint is found in paragraphs 2 and 11.
- (c) Certain answers are confusing. This is stated in paragraphs 3 and 10. (20)
- (d) Certain answers have been generalised by the use of the words "onder andere" and such like words. This is contained in paragraph 6, and
- (e) certain answers do not give sufficient detail and some answers raise new matter which has to be clarified by further particulars. This is contained in paragraphs 4, 7, 12, 6 and 8 of the objections.

The test to be applied can be found in R v ADAMS 1959 (1) SA 646, a decision by the Special Criminal Court. The test is (30) fairness/...

fairness to the accused and the question whether an accused has been sufficiently advised of the extent of his alleged participation in a criminal course of conduct is one of degree, depending on the circumstances of each case. In ADAMS's case, a wide reference to hundreds of speeches and thousands of documents was held to be inadequate. The State was ordered to state on which document it relied in respect of each accused. To the principles I have mentioned can be added those referred to S v NATIONAL HIGH COMMAND 1964 (3) SA 462 (T) where it is set out that documents are part of evidence and there is no duty on (10) the State to furnish them beforehand and where it is also stated that the fact that a number of acts complained of are innocuous does not invalidate the indictment, unless the Court can find that the inference sought to be drawn from them, can be drawn. In view of the lastmentioned principle, as this is not an application to quash the indictment, I do not at this stage find it advisable to interpret the declaration and working principles of the UDF, as I was invited to do, and then to say that as they are innocuous there must be something more that the State intends relying on and ordering the State to supply that in- (20) formation. At this stage, I have to deal with adequacy and clarity of the information given, not the interpretation thereof to see whether the State has made out a case.

There was no duty on the State to furnish the documents supplied, but having done so, and having incorporated them by reference in the further particulars the State has to see to it that the documents and further particulars form a coherent intelligible whole. It follows that documents have to be referred to by code numbering, if made part of the further particulars. During argument, however, it transpired that the (30) State/...

State had not intended that all these documents should form part of the further particulars supplied but that many were just handed over to the Defence to obviate the preparation of their case. If this is correct, it is improper that these documents are before Court and in possession of judge and assessors as it may be that some of them are never put in as evidence. I also got the impression from the argument of counsel for the State that some of the documents have been referred to as samples of a type of document used in campaigns, for example, a pamphlet, and that the State intends to say there are many (10) others of the same sort. That may be intended by the use of the words "vele andere". It is however not clear.

To summarise the above, I hold that where it is intended that a document should be part of the further particulars, namely, that that document, further particulars and indictment form the case alleged against the accused, that document should be referred to by its code number. If specific facts are to be set out by the State in answer to a request for further particulars, those should preferably be set out in the further particulars themselves. If it is deemed necessary to incorporate (20) facts or statements contained in a document by reference to that document and that document contains many other facts or statements, the particular portion of such document to which it is intended to refer is to be stated either by reference to page number or paragraph number, or otherwise. It follows from the fact that documents referred to become part of the indictment by their incorporation by reference in the further particulars, that a prolixity thereof may obscure, rather than clarify the real issues between the State and the accused. The State should consider limiting their reference to documents (30) to a/...

'to a reference to the essential ones only. All the others it can attempt to put in as evidence during the trial. Documents handed over to the Defence team to assist them in their preparation and which do not form part of the further particulars are not to be referred to therein at all. They can be sent over with a covering letter. They should not be handed to judge and assessors at this stage unless it is done by agreement between the parties.

I deal with the different objections separately.

Objection 1. This reads as follows: "On a number of (10) occasions the State does not answer directly the questions asked in the request for particulars but refers to documents sometimes making the reservation that there may be other documents on which it will rely as containing the information sought in the request for particulars and invites the accused to extract the information themselves from the documents." This, I have dealt with. The State will have to do some rethinking and redrafting in the light of what has been said by me. The State conceded that it was obliged to supply directly the information requested in paragraphs 1.1.1, 1.1.2 and 1.2 in so far as it was in (20) possession thereof. During the argument, Mr Jacobs indicated what the references are of the documents referred to in paragraphs 18.1, 18.2, 18.3, 19.1 and 19.2 and this was accepted by Mr Chaskalson. No order is therefore required in this respect. The State also conceded that it is obliged to identify by reference to their coding, the documents referred to in paragraphs 16.5 and 16.7. AD paragraph 26: This is to amplify paragraphs 50 to 65 of the annexure to the indictment which set out that various propaganda campaigns were waged over the period 20 August 1983 to April 1985 by means of publications, (30) pamphlets/...

pamphlets, posters and stickers. The request was as follows:
"Copies are required of each publication, pamphlet, poster and sticker referred to in these paragraphs, indicating in respect of each such document, the particular passages therein that are relied on in support of the specific averments made in each of the numbered sub-paragraphs of the said paragraphs, failing which, particulars are required of each publication, pamphlet, poster and sticker referred to in these paragraphs, indicating in respect of each such document - 26.1 the text thereof; 26.2 the particular passages that the State intends to rely upon (10) in support of the specific averments made in each of the numbered sub-paragraphs of the said paragraphs; 26.3 the name of the organisation which produced the document, together with a precise description of the exact relationship between the organisation concerned on the one hand, and the UDF and/or any of the accused on the other; 26.4 the precise area in which each of the documents is alleged to have been distributed." The State replies to these requests in paragraph 26 of its further particulars as follows: "Afskrifte van die publikasies, pamflette, plakkate en plakkers ten aansien van elke kam- (20) panje word hiermee verskaf. Die Staat steun nie net op sekere passasies nie maar in elke geval op die geheel van die dokument en dit is selfverduidelikend waar hulle verwys na die verskillende kampanjes soos aangepak en uitgegee. Die naam van die organisasie wat verantwoordelik is vir die betrokke dokument blyk uit die dokument en hul verbondenheid aan UDF word hierbo uiteengesit in paragraaf 1."

Now it is clear that the Defence is not entitled to copies of the documents referred to but the answer indicates that there was an intention to incorporate them by reference. I (30)

say this/...

say this because though the answers to questions 26.2 and 26.3 are given, there is no answer to question 26.4 and the text of the pamphlets is not set out in answer to question 26.1. The State relies on the documents as a whole and apart from identification by code, no further specification of portions of documents is therefore necessary. Mr Jacobs argued that the State has extracted in each of paragraphs 50 to 65 of the indictment the essentials of each propaganda campaign and that this is adequate particularity. He argued that it could not be required of the State to herd together the documents under the various(10) campaigns as some are part of several. Mr Chaskalson argued that not only was the State obliged to do that but that the State had to go even further and bracket together all documents relating to each important allegation of each campaign as set out separately in the individual paragraphs 50 to 65 of the annexure to the indictment. In my view, that is taking the matter too far. The indictment is comprehensive and what is asked here, is evidence. Normally, that would not be furnished. Once the documents have been identified by code reference and once they have been allocated to the different campaigns, (20) the Defence team will, in my view, not be prejudiced if they read each document with the State's interpretation in mind to determine whether it fits one or more of the averments of the State. I hold that fairness to the accused demands that the code reference of documents referred to in paragraph 26 be given with reference to each particular campaign separately, but that the State need go no further. Where there is overlapping in the sense that more than one campaign is dealt with in the same document, the necessary cross-references can be made. Of course, if the State still maintains that the documents (30)

were/..

were supplied merely to assist the Defence and not as an incorporated portion of the further particulars it is at liberty to redraft its further particulars deleting therefrom the reference to copies of the documents. Then however it will have to give particulars of the documents to enable the accused to identify them.

AD paragraph 27.1: This is to amplify paragraph 66 (1) of the annexure to the indictment which alleges a propaganda campaign in furtherance of a campaign against the Government's policy and legislation on its various structures of authority. (10) The request is mutatis mutandis request 26 and so is the answer. It follows that the same ruling will apply here.

AD paragraph 27.2: These questions relate to the alleged adoption of the principle that all organisations affiliated to, or supporting UDF actively have to support all campaigns of UDF. The State furnished particulars which, in my view, are adequate, except that there appears the following at page 72. "Ander organisasies waaronder VCA het later met hulle affiliasie die beginsels aanvaar, onder andere word verwys ook na die volgende bewysstukke." A number of references are (20) given and at the end thereof, the words "en vele ander" appear. The use of the words "onder andere" and "vele ander" cloak the answer in uncertainty. Mr Jacobs stated that it was not intended that the documents should form part of the further particulars. In that case there should be no reference to them. The State is to clarify and/or amend this answer.

AD paragraph 27.3: The questions in paragraph 27.2 are repeated mutatis mutandis and the reply thereto is incorporated in the answer which refers to certain additional documents "en vele meer". The same reasoning applies as in the case of (30) paragraph /...

paragraph 27.2. The State is to clarify and/or amend its answer.

AD paragraphs 27.4.1 and 27.5.1: The answers to these questions are comprehensive by reference to numerous documents but contain the punch lines "en vele andere wat ook verskaf word" and "en ook van die ander dokumente". The aforesaid reasoning applies. The State is to clarify and/or amend its answers.

I therefore make the following order on Objection 1: I direct (10)

- (a) that the State furnish directly the information requested in paragraphs 1.1.1, 1.1.2 and 1.2 of the request in so far it is in possession thereof;
- (b) that the State identify by reference to their coding the documents referred to in paragraphs 16.5 and 16.7;
- (c) that the State identify by reference to their coding the documents referred to in paragraphs 26 and 27.1 separately with reference to each particular campaign;
- (d) that the State is to clarify and/or amend its answers to questions 27.2, 27.3, 27.4.1 and 27.5.1, (20)

in the light of what is stated in this judgment.

Objection 2: This relates to an omission by the State to answer question 1.3.3 which asks where, when and in what manner each official and member of organisations or bodies being affiliates or active supporters of UDF joined the conspiracy. In my view, this is evidence. The State case is that during the periods 20 August 1983 to April 1985 they were participants in the conspiracy. The names of the persons concerned and the organisations to which they belong are given. The concession by Mr Jacobs during argument that the State is obliged to (30) furnish/.

furnish these particulars seems to me to have been ill-advised. Should it not be the State case that all the persons mentioned were participants in the conspiracy for the said period, it should reconsider its answer.

I make no order on Objection 2.

Objection 3: Question 1.4 asked whether the State relies on an express agreement constituting the conspiracy. The answer was "Die Staat steun nie op 'n uitdruklik bewoorde sameswering nie. Nogtans is die sameswering uitdruklik vergestalt gedurende die stigting van UDF op 20 Augustus 1983 te Kaap- (10) stad waar vandie beskuldigdes deel geword het van die bestuurstruktuur van UDF. Wanneer, waar en hoe die lede van die sameswering voor die stigting van UDF deel van die sameswering geword het, is aan die Staat onbekend. Na die stigting van UDF het samesweerdere deel van die sameswering geword deur aan te sluit by UDF, hulle met die doelstellings van UDF te vereenselwig en/of aktief deel te neem aan die aktiwiteite van UDF ter verwesenliking van die doelstellings van UDF. Die presiese datums, tye en plekke is aan die Staat onbekend." This should be read with the answer to question 1.6.1 where it is stated "die (20) Staat steun nie op 'n uitdruklik bewoorde sameswering nie." The complaint is that the answer to paragraph 1.4.1 is confusing. I do not think that the answer is confusing, although it is certainly inelegantly worded. I refer to the use of the words "nagtans" and "uitdruklik vergestalt". The rest of the paragraph, however, adequately indicates what is intended.

I make no order on Objection 3.

Objection 4: Question 1.5 reads: "If the State relies on an implied agreement or intends to establish the existence of the alleged conspiracy, not by direct evidence, but by (30) inference/...

inference from facts, then it is required to indicate the facts and circumstances from which the agreement will be inferred. The answer is "die bestaan van die sameswering word afgelei van onder andere die feit dat vir die ontstaan van UDF georganiseer was, dat dit tot stand gekom het met spesifieke doelstellings en projekte, dat h bestuurstruktuur en amptenary ontstaan het wat verantwoordelik is vir die beleidsbepaling en koördinerings en uitvoering van kampanjes en besluite, deur aan te sluit by UDF as geaffilieerde, deur UDF aktief te ondersteun en mee te doen aan die uitvoering van kampanjes en (10) besluite deur UDF geneem en aanvaar, deur aktief te organiseer en mee te doen aan die mobilisering, organisering, politisering en aktivering van veral die Swart massas." The objection is that it is not clear from the answer what the "spesifieke doelstellings" of the UDF are alleged to be. Mr Jacobs contended that these are set out in the indictment. That may be but then the further particulars should have referred to them as such. As the answers stand, it could have a much wider import. It should be clarified.

The State is directed to furnish the accused with (20) particulars of the "spesifieke doelstellings" referred to indicating

- (a) what "spesifieke doelstellings" of the UDF are referred to in paragraph 1.5 of the further particulars,
- (b) if the "doelstellings" were adopted in the constitution or any resolution of the UDF, the State is required to identify the passages in the constitution or the particular resolutions relied upon. If not, the State is directed to inform the accused of the manner in which and by whom on behalf of the UDF these "doelstellings" (30)

were/...

were adopted, indicating when, where and in what manner this was done.

Objection 5: In the indictment, it is alleged that the ANC realises, accepts and advocates that its alleged aim can be realised only if the masses and above all, the Black masses in the Republic of South Africa, are persuaded to participate in a violent revolution. On this allegation, the accused require the following further particulars: " 3.1 Does the State intend to rely on any decision of the ANC to this effect? 3.2 If the answer to 3.1 hereof is in the affirmative, precisely (10) when, where and by whom on behalf of the ANC is the said decision alleged to have been taken? The exact terms of the alleged decision are also required and if written, a copy thereof is required." The answers given by the State in its further particulars are as follows: "3.1 Ten aansien van die bewering wat die Staat in paragraaf 4 bladsy 5 van die akte van beskuldiging maak is die Staat van voorneme om te steun op die amptelike beleidsverklaring soos uiteengesit in amptelike ANC en SAKP publikasies. 3.2 Presies wanneer, deur wie en hoe die beginsel in genoemde stelling aanvaar is, is aan die Staat (20) onbekend. Amptelike ANC en SAKP publikasies kan nie op hierdie stadium aan die beskuldigdes beskikbaar gestel word nie maar sal by die verhoor beskikbaar gestel word aan die beskuldigdes." The objection of the Defence is that this is not a proper answer. Mr Jacobs contends that the State is not obliged to furnish these documents. This is correct. He set out his reasons. That disposes of the request for copies of the decisions, but it does not dispose of question 3.1 and the first part of question 3.2. The State alleges that it will prove the decisions of the ANC by reference to official ANC policy statements and (30)

therefore/...

therefore alleges by implication that it does not have the information sought in paragraph 3.2. The policy statements in official ANC and SACP documents are evidence to which the accused would normally not be entitled. I am not convinced that fairness towards the accused dictates that this evidence be furnished in advance.

I make no order on Objection 5.

Objection 6: In the indictment it is alleged that the ANC called upon its members to organise, etcetera, the masses. Question 4 seeks to obtain information, not of the call, but (10) of the organisational steps following thereupon. The State supplied particulars of the call and organisational steps in connection therewith. They run into fifteen paragraphs; they are introduced by the words "onder andere". This gives rise to the first part of the objection. It is alleged that this is too generalised. Mr Jacobs contended that the State at this stage has no further information. Then it should say so and not use "onder andere" which means that the State has knowledge of other facts, apart from those before Court. The State should clarify its use of the words "onder andere" in paragraph 4.1 (20) to 4.4 of the further particulars. It is further alleged by the Defence that new matter is introduced. That is not surprising as the request for particulars is intended to bring more facts to light. The question remains, whether the State should be required to furnish further and better particulars in respect of certain of this alleged new matter. Mr Jacobs contends that the State has supplied adequate particulars of its case on the organisational steps of the ANC and that what is sought, is evidence. Paragraph 4(f) of the further particulars reads: "Sedert 1983 en op 'n voordurende grondslag word deur middel (30)

van/...

van koeriers deur die ANC geskakel met UDF se affilieerde organisasies en in besonder in die Vaaldriehoek waar geldelike hulp, advies, opdragte, pamflette, publikasies en plakate verskaf is." The objection contains a request of four paragraphs on this paragraph. What is asked, is clearly evidence, yet the paragraph is so widely worded that the possibility is not excluded that the accused have personally liaised with the ANC. Though it be evidence, I hold that fairness dictates that if that is the State case, the accused be apprised thereof. The same applies to paragraphs 4(g), (h), (j), (l), (m) and (10) (o). To a limited extent therefore, the questions will have to be answered.

On Objection 6, I direct that the State clarify the words "onder andere" in paragraphs 4.1 to 4 of the further particulars and that in so far as it is alleged any of the accused was personally involved in the matters set out in paragraphs 4(f), (g), (h), (j), (l), (m) and (o), the request for further and better particulars be answered.

Objection 7: The indictment alleges that all affiliates of UDF bind themselves to promote, etcetera, the policy, deci- (20) sions, projects and activities of UDF. It is the State case that all such affiliates were aware of, and accept the aim of UDF to overthrow or endanger the Government by violence. The Defence requested in paragraph 8 particulars as to where, when and in what manner each such body and each accused became aware of, and accepted such aim. The State replied "Presies wanneer en waar is aan die Staat onbekend maar die Staat beweer deur (1) elke organisasie wat met UDF affilieer onderneem om UDF beleid, projekte en besluite uit te voer; (2) elke organisasie wat met UDF affilieer vorm deur verteenwoordiging deel van die (30)

verskillende/...

verskillende bestuurstrukture van UDF wat beleid bepaal en besluite neem en die uitvoering daarvan koördineer, (3) aktief deel te neem aan UDF kampanjes, opleidingskursusse en massa-vergaderings, (4) kennis van UDF verslae en UDF dokumentasie, (5) die organisasie het in werklikheid geweld ontketen in ten minste die Vaal, D. duza, Oos-kaap en Wes-kaap. 8.2.2 Presies wanneer en waar ten opsigte van elke organisasie wat met UDF geaffilieer het is aan die Staat onbekend. Maar elke organisasie wat met UDF geaffilieer het en daarna deelgeneem het aan UDF se beleidsbepaling, besluite, kampanjes en projekte en (10) dit in die praktyk uitgevoer het, het hulle vereenselwig met hierdie doel van UDF." And then in respect of the individual accused, the State replies in paragraph 8.5.1 "Beskuldigdes 1, 2 en 3 het minstens in die Vaaldriehoek hulle aktief vereenselwig met hierdie doel deur aktief deel te neem aan die uitvoering van UDF kampanjes teen die regering en Swart plaaslike besture om die Swart plaaslike besture in ten minste die Vaaldriehoek te vernietig en die gebied onregeerbaar te maak en aktief daar te organiseer en deel te neem soos infra in die akte van beskuldiging uiteengesit is. Dit was in ooreenstemming met 'n oor-(20) eenkoms tussen AZAPO en UDF om saam te werk in die Vaaldriehoek teen die regering en Swart plaaslike besture. Beskuldigdes 4 tot 18 en 22 was minstens bewus van, en het hulle vereenselwig met die doel deur hulle samewerking met UDF en as lede van liggame van met UDF geaffilieer is, en aktief saamgewerk het in die Vaaldriehoek teen die regering en Swart plaaslike besture en om die Swart plaaslike besture in die Vaaldriehoek ten minste te vernietig soos meer in besonderhede in die akte van beskuldiging infra uiteengesit word. Beskuldigdes 19, 20 en 21 was as deel van die bestuurstrukture van UDF bewus van, en gemoeid (30)

met/...

met en het hulle vereenselwig met die doel en het aktief meegewerk in die besluitneming, koördinerings en uitvoering van aktiwiteite om die doel te verwesenlik." The objection is that the State has failed to provide sufficient particularity as to the facts upon which it intends to rely to prove the state of knowledge of the persons and organisations, referred in paragraph 8 of the request for further particulars. The Defence then seeks an order that the State be directed to inform the accused when, where and in what manner it is alleged that each of the accused became aware of the alleged aim of the UDF (10) to overthrow or endanger the Government by violence, threats of violence or means which include or contemplate violence. It is clear that the State does not have the information sought. It says so. It does however set out the facts which it intends to prove from which the Court is to infer the knowledge of and acceptance by the accused of the violent aims I set out. This is an acceptable manner of pleading. Whether this inference is to be drawn from these facts, is to be decided later but it cannot be said the accused are unaware of the case they have to meet. (20)

The objection cannot be sustained. I make no order on Objection 7.

Objection 8: The State alleges that it was the aim of the UDF to overthrow or endanger the lawful government by violence. In answer to a request, the State set out in paragraph 9.3 of its further particulars that the existence of this aim is inferred from the totality of the evidence which comprises inter alia, in particular some thirteen aspects which are set out in thirteen sub-paragraphs. Further and better particulars are sought to sub-paragraphs (x) and (xiii). Paragraph 9.3 (x) (30) reads/...

reads: "UDF verklaar uitdruklik in UDF publikasies en propageer en organiseer UDF om die RSA onregeerbaar te maak deur die organiseerde en gemobiliseerde Swart massas." The allegation that it is expressly stated in UDF publications that the country should become ungovernable is a material allegation which goes to the heart of the case. Mr Jacobs says it is evidence. So it is but accused no.20 is alleged to be the national publicity secretary of UDF and accused no.19 the national general secretary with no.21 his co-secretary. The alleged publications could be vital evidence against these accused and possibly others. (10)

I hold that fairness dictates that they be apprised thereof and not be kept in the dark and have to search through thousands of documents. I direct that the State identify by reference to their alphabetical and numerical coding the publications referred to in paragraph 9.3.(x) of the further particulars and the passages therein on which reliance is placed or otherwise identify the publications referred to and the terms of the alleged statements. Paragraph 9.3.(xiii) reads: "UDF verleen hulp aan die ANC veral deur sy geaffilieerde organisasies wat onder andere insluit die hulpverlening aan ANC opgeleide(20) terroriste deur skulling te bied en inligting te verskaf." The Defence interprets this to say "that the UDF and its affiliates decided" to render the assistance mentioned and seeks particulars of the assistance given but not of the decisions themselves. I do not think this interpretation is necessarily correct. The paragraph is vaguely worded. This is brought about by the use of the words "veral" and "onder andere". In view of Mr Jacobs's explanation of these words, where they occur elsewhere, it may well be that the State's knowledge is limited to what is set out. Mr Jacobs contends that what is sought is evidence. (30)

That/..

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