LuM/023/0001/04

Ex Parte WALTER SISULU AND OTHERS

MEMORANDUM

1. On 12 June 1964 Mr Walter Sisulu was found guilty and sentenced to life imprisonment on a charge of sabotage by Mr Justice de Wet, sitting in the Transvaal Provincial Division of the Supreme Court. Mr Sisulu was one of several accused, including Mr Nelson Mandela, who were so found guilty and sentenced.

2. Since that date, Mr Sisulu and his colleagues have been in uninterrupted custody. Mr Sisulu himself is at present incarcerated at Pollsmoor Prison and some of his other colleagues are similarly incarcerated at Robben Island Prison.

3. Instructed by their families and through the firm of Priscilla Jana & Associates, we had a consultation with Mr Sisulu on 15 October 1986.

On the next day, we had a similar consultation with three other prisoners who were also accused in the Rivonia trial with Mr Sisulu. These other persons were at Robben Island and their names are Mr Govan Mbeki, Mr Elias Motsoaledi and Mr Wilton Mkwayi.

4. All the prisoners whom we consulted have now been in custody for nearly 24 years. We have been asked to express some preliminary views as a matter of urgency as to whether an application for the release of the prisoners concerned could be motivated on any legal grounds.

5. A sentence of life imprisonment can ordinarily have the effect of incarcerating the prisoner for his natural life, unless the provisions of the Prisons Act, No 8 of 1959, are invoked in the discretion of the authorities to permit an earlier release. There appears to be no automatic right vesting in a prisoner's sentence to life imprisonment to demand his release at any particular moment.

This much is clear from the judgment of Rumpff, JA in S v Tuhadeleni & Others 1969 (1) SA 153 (AD) at 189H. The discretion of the authorities to authorise an earlier release in terms of sections 61 and 64 of the Prisons Act is equally beyond question:

S v Masala 1968 (3) SA 212 (A) at 217-218.

6. Notwithstanding the discretionary machinery for release contained in chapter 6 of the Prisons Act (which includes sections 61, 64 and 67 which are all relevant in this regard), neither Mr Sisulu nor any of his colleagues sentenced by Mr Justice de Wet as aforesaid has in fact been released. The possibility of their release arose, however:

(a) from a speech made by the State President to parliament on 25 January 1985 and subsequently repeated on other occasions, both by the State President and other members of the government to the effect that Mr Nelson Mandela, who was the first accused in the said trial before Mr Justice

de Wet, would be freed, subject to the condition that he renounced or forswore violence. (In a subsequent debate, the State President confirmed that exactly the same offer applied to all other prisoners in the position of Mr Mandela and, consistent with this undertaking, one of the other accused in the trial before Mr Justice de Wet, Mr Dennis Goldberg, was in fact released after he had apparently furnished such an undertaking);

(b) from a statement distributed to all the accused in the Rivonia trial inside prison, concerning the terms of the State President's offer and apparently inviting a reaction. Mr Sisulu, Mr Mbeki, Mr Motscaledi amd Mr Mkwayi also received these statements from the prison authorities.

7. We are instructed that none of the persons consulted by us in fact furnished the State

President or the prison authorities with the undertaking specified by the State President. Apparently they all adopted the attitude that it was not competent for the State President to impose such a condition.

8. Although we will require the exact terms of every utterance made by the State President in this context, as well as the exact terms of the statements made available to our clients in prison in order to satisfy ourselves of the precise evidence, we are instructed and we assume for the purposes of this advice that:

(a) the statements of the State President constituted a clear and unequivocal undertaking to release Mr Mandela and the other accused in the aforesaid trial before Mr Justice de Wet subject to the condition that they undertook to renounce or forswear violence;

(b) this was an offer which was open at any time and is still so open;

(c) the prisoners whom we have consulted are still not prepared to give the undertaking required.

9. There is no doubt whatever that the State President does have the power to release the prisoners sentenced to life imprisonment. That power:

(a) firstly, vests in him in terms of section 64(3) which provides that, following upon a report from a prison board regarding a prisoner upon whom a life sentence has been imposed, the Commissioner of Prisons is required to submit such a report to the Minister of Justice, who can either release the prisoner or submit his recommendation for the consideration of the State President who may, in terms of section 64(3):

"authorise the release of such prisoner on the date recommended by the prison board or on any other date, either unconditionally or on probation or on parole as he may direct.";

(b) secondly, section 69 of the Prisons Act provides that:

"Notwithstanding anything to the contrary in any law contained, if at any time it appears to him to be expedient, the State President may authorise the release of any prisoner either unconditionally or on probation or on parole as he may direct, and may grant remission of a portion of the sentence of any prisoner."

This section is not specifically confined to sentences of life imprisonment and it might successfully be contended that such sentences are also not excluded from the special powers conferred on the State President in terms of section 69.

10. The first source of the State President's power appears to arise only following upon a favourable report of the prisons board, whilst the second is simply a special power in respect of all sentences. We have no instructions as to whether the offer made by him was made pursuant to the first source of authority contained in section 64(3) or the second source contained in section 69 but, whatever the source, it is clear that the State President is entitled not only to authorise the release of a prisoner sentenced to life imprisonment, but also to make that release unconditional or on probation or on parole, as he may direct.

11. Since the offer made by the State President in the present case is not intended to be unconditional, the crucial question which arises is whether the condition which he purports to attach to the release of the prisoners concerned are conditions which may validly and lawfully be imposed in terms of the Prisons Act. Prima facie, there is no limitation on the content of the condition or conditions which the State President

is entitled to impose (subject only to the need to behave reasonably and to apply his mind properly to the matter which might be implied by the common law pertaining to the manner in which discretions may be exercised by administrative and executive officials:

cf. North West Townships Ltd v Administrator of the Transvaal 1975 (4) SA 1 (T) at 8C-G).

It might therefore be contended with justification that the condition imposed by the State President is legitimate because it cannot be said that there is anything unreasonable in law in requiring a prisoner to renounce or forswear violence as a means of political change. However, the narrower question to be determined is whether the "condition" contemplated by the Prisons Act can be a condition which is capable of being broken or honoured before the prisoner is released at all. Inherent in the position taken by the State President in refusing to release any of the prisoners concerned is the proposition that they have not fulfilled the "condition" of their release, namely that they have not fulfilled the condition or undertaking to renounce or forswear

violence. It seems to us to be arguable that, on a proper reading of the Act, to qualify as a condition for these purposes, the stipulation concerned must only be capable of being honoured or broken <u>after</u> the release of the prisoner concerned. Our reason for this contention appears from the provisions of section 68(2), read with section 67(2) and section 67(1). These sections, read with the general scheme of the chapter, show that in terms of the Act:

> (a) the prisoner is released either unconditionally; or
>
> (b) the prisoner is released on probation or on parole for such period and on such conditions as may be specified;
>
> (c) if the prisoner is released on probation or on parole and he fails to observe any condition of his release, either on probation or on parole, a warrant may be issued for the arrest of that prisoner who may thereafter be detained in prison.

(Although both sections 67 and 68, on which we rely to infer this scheme, apply to the release of a prisoner on probation or on parole by the Commissioner and not by the State President, they are nevertheless the material sections because the release of a prisoner on probation or on parole is always by the Commissioner and where the State President acts in terms of section 64 or section 69 he merely authorises such release <u>by the Commissioner</u>).

12. Section 68(2) provides that if a prisoner fails to observe any condition of his release, a warrant may be issued for his arrest. There would be no need to issue a warrant for the arrest of a prisoner who has never been released. The prisoner's failure "to observe any condition of his release" must be a failure which takes place after this release. Similarly, section 67(2) only purports to exempt a prisoner released on probation or parole from being liable to any further punishment if he has completed the period of his probation or parole without breaking any condition of his release. It therefore postulates

that the condition can be broken or honoured only after the prisoner is released on probation or on parole.

On this argument, therefore, a condition which can be broken or observed before the prisoner is released is not a proper condition which may be imposed on probation or parole within the meaning of the Prisons Act:

cf. S v H Friedman Motors 1972 (3) SA 421 (A) at 425.

This argument is, of course, not free from difficulty and a court might very well hold that this is too narrow a construction of a statute and that valid conditions may be imposed by the State President in terms of the Act which may be capable of being honoured or broken, both before and after the release of the prisoner on probation or on parole. It might also be contended that, on a true analysis of the facts, the State President was not exercising any powers of release on probation or on parole when he made his offer, but was merely exercising his power to pardon or reprieve offenders in terms of section 72.

(The latter argument might in turn be open to the counter attack that nothing in section 72 authorises the State President to make the power of pardon or reprieve conditional; forgivance might be a total quality not admitting of return).

13. The argument that the State President imposed an unlawful condition in requiring the prisoners concerned to give him an undertaking renouncing or forswearing violence does not in any way mean that the State President was precluded from ensuring that the prisoners concerned were returned to gaol if they advocated violence. It would have been perfectly lawful, even on this argument, for the State President to have authorised the release of the prisoners concerned on probation or on parole on the condition that they should not, upon their release, advocate, encourage or aid violence as a means of effecting political change. This would have been a unilateral condition imposed by the State President involving no act of renunciation by any of the prisoners before they were released. If any of

the prisoners, upon their release, had thereafter acted in breach of this condition, they could properly have been returned to the prison. Indeed, it might even be that the State President could validly have imposed a condition in terms of the Prisons Act to the effect that, upon their release, each of the prisoners concerned had to make a public declaration renouncing or forswearing violence as a means of political change and again, if that condition was breached, the prisoners concerned could have been returned to gaol. The argument is not that the objective sought to be achieved by the State President was unlawful; the argument is simply that the legal means chosen by him to achieve the lawful objective were technically defective and unauthorised by the Act.

14. If the argument that the State President has imposed an unlawful condition (by requiring the prisoners concerned to give him an undertaking to renounce or forswear violence

before they had left prison) were to find favour with the court, the next question which arises is whether the condition purportedly imposed by the State President must be regarded as being pro non scripto and the prisoners as having been released unconditionally, or whether the whole of the decision of the State President must be regarded as being unauthorised by the Prisons Act with the result that there is in fact no order for the release of the prisoners. On the first postulation, the prisoners would be entitled to an order declaring that they have been released unconditionally; on the second postulation there would be no such order.

The matter is not free from difficulty, but it is our view that there is some prospect that a court will hold that the statement made by the State President in fact constitutes a perfectly lawful order of release but that the condition imposed by him is unlawful and must simply be struck out. In support of such an approach, the court would have regard to the fact that:

(a) notionally, the two matters are quite severable: the release of the prisoners and the conditions upon which they are to be released are two separate ideas. The first can survive without the second. Depending on the exact terms, the two matters may even be grammatically severable:

cf. S v Ockers 1974 (2) SA 523 (C) at 528-9;

(b) the main object sought by the State President would in no way be defeated by unconditional release of the prisoners concerned. If they were indeed to advocate or perform violence as a means of effecting political change, both the armoury of the common law and the statute law of the Republic of South Africa would be able to ensure a result substantially the same as the result which would be achieved by causing the prisoners to be returned to prison upon the breach of a condition requiring them not to advocate,

encourage or aid violence:

cf. Johannesburg City Council v Chesterfield House (Pty) Ltd 1952 (3) SA 809 (AD) at 822;

(c) the present matter concerns the liberty of the individual. The prisoners in the present case have had their liberty curtailed for nearly a quarter of a century, albeit it on lawful grounds. Documents or statements which have the effect of perpetuating such lengthy periods of incarceration must be restrictively construed:

S v Ramgobin & Others 1985 (3) SA 587 (N) at 590A-B;

R v Milne & Erleigh (7) 1951 (1) SA 791 (A) at 822-3.

15. Notwithstanding the considerations referred to in the preceding paragraph, a court might well hold that, although the condition referred to might be both notionally and grammatically

severable, it would be much too contrived and that the proper approach is to strike down the whole of the purported direction releasing the prisoners. Such an approach certainly has some support in some of the authorities, but these authorities do not deal with the present context and might be distinguishable on that ground:

Attorney General for Manitoba v Attorney General for Canada 1925 AC 561;

Arderne, Scott, Thesen Ltd v Cape Provincial Administration 1937 AD 429 at 459;

Reloomal v Receiver of Revenue 1927 AD 401 at 410;

Johannesburg City Council v Chesterfield House (Pty) Ltd, supra, at 821.

16. In this memorandum we have concentrated attention on what "conditions" are contemplated by the Prisons Act. Depending on the exact wording of the statements made by the State Presidents and, more particularly, on the exact wording of the statements made available to the prisoners concerned, it might be possible to attack the purported orders on another ground: namely that

the conditions stated are much too vague and not capable of a readily ascertainable meaning. It might be possible to contend, for example, that:

(a) it is uncertain when the undertaking to renounce or forswear violence must be given. Assuming that it must be given before the release of the prisoners from prison and not after, can it be at any time or within a reasonable time of the offer being brought to the attention of the prisoners?

(b) the meaning of the stipulation that they must renounce or forswear violence is unclear. Does this mean that they must renounce or forswear violence under any circumstances? If so, does it also include the need to renounce or forswear violence which might be perfectly lawful, such as violence used in legitimate self-defence? Does it mean that violence must not be used as a means of effecting

political change or as a means of effecting any other kind of change? Does it mean that violence must not be used as long as the present economic and political dispensation of the Republic of South Africa remains substantially the same or does it mean that it must not be used even if there were a substantial deterioration in that situation, excluding for instance the right to have any access to any judicial process under ordinary circumstances, such as might be the position in times of military rule?

Where the meaning of a stipulation intended to have legal effect is a matter of speculation, the courts will ordinarily strike down the stipulation. In Brierley v Philips (1947) All ER 269 at 270B-C, Lord Goddard, CJ said:

"It is a very serious thing to produce Orders as regulations, whether under Defence Regulations or anything else, creating offences which can be dealt with as very serious matters, if they are

couched in language which does not make clear whether a person is committing an offence or not. I am certainly not prepared ever to support Orders and to find people guilty of criminal offences when the Orders which they are charged with violating are couched in language which is open to all sorts of meanings and causes all sorts of difficulties, so that the unfortunate people cannot know whether they are acting legally or not, unless possibly they get counsel's opinion, or at any rate a solicitor's advice."

cf. Metal and Allied Workers Union & Another v State President & Others 1986 (4) SA 358 (D) at 372D-F;

R v Kadjee 1960 (1) SA 830 (T) at 832G-H;

R v Jopp & Another 1949 (4) SA 11 (N) at 13-14;

S v Mahlangu 1986 (1) SA 135 (T) at 138D.

17. It should be clear from the aforegoing that there are many questions of fact which might need further investigation. It is also clear that the propositions of law which we have advanced in favour of our clients are not free from difficulty

and might not find an empathetic judicial response. We are nevertheless of the view that the prospects of success are not hopeless and that there might be merit on legal grounds in launching an application for the release of the prisoners concerned or for an order declaring that they are entitled to such release.

I MAHOMED S.C.

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25 November 1986

(For Priscilla Jana and Associates
Ref: Mrs D P Jana)