JUSTICE – TRANSKEI STYLE

by Tiresias

'Twill be recorded for a precedent
And many an error, by the same example
Will rush into the state. It cannot be.

- The Merchant of Venice, Act IV, Sc. i

A number of commentators have remarked upon the eagerness with which Transkei, under the guidance of the Matanzima brothers, has seized upon all the worst aspects of South Africa's legal system and then honed and tempered them into a uniquely malevolent political tool. The best example of this tendency which comes to mind is the Transkei Public Security Act, 30 of 1977.

This legislation is likely to be remembered as an extraordinary compendium of almost every objectionable principle culled from the legal systems of the world. It has borrowed heavily from the security laws of big brother South Africa, in particular. It incorporates some of the most objectionable elements of the Internal Security Act, the Terrorism Act, the Riotous Assemblies Act and the Affected Organisations Act. These South African laws have been the subject of considerable comment and criticism elsewhere.[1] But not content with this, it has created some new offences as well.

Section 2 of the Public Security Act reads as follows:

> "Any person who makes any statement, verbally or in writing, or performs any act which is intended or is likely to have the effect of subverting or interfering with the authority of the State or any officer in the employ of the State, shall be guilty of an offence and liable on conviction to imprisonment for a period of not less than one year and not exceeding three years."

What exactly is required before a statement "is likely to have the effect of interfering with the authority of any officer in the employment of the State"? Clearly the section is aimed at stifling criticism of not only the Transkeian government, since in that land the distinction between State and government is hardly well-defined, but also of individual employees of the State. The section does not state that their functional efficiency must be impaired as a result of the statement or act, but only that their authority must be "interfered with". Criticism of a tribal chief would clearly fall within the ambit of the section. Even if statements do not fall within its scope, the mere existence of such a provision will provide a powerful brake on freedom of expression in Transkei. No doubt it is intended to do so. The imposition of a minimum sentence of one year's imprisonment is also highly objectionable since it takes away the sentencing discretion of the trial court. One would hope that the Transkei courts would follow the example of their South African counterparts when Dr. Connie Mulder's minimum sentences for drug offences were introduced, by suspending them partially or in their entirety in deserving cases.

But section 3 of the Act takes the principle a bit further. It provides that:

> "Any person who verbally or in writing or in any other manner propagates any view or doctrine, or disseminates or promotes the dissemination of any view or doctrine, which defies, or is repugnant to, or aims at the subversion of the sovereignty of Parliament or the constitutional independence of Transkei, shall be guilty on conviction to the penalties provided by law for the offence of treason."

At first sight, the section does not seem particularly bad. Why shouldn't those who attempt to subvert the sovereignty of Parliament be punished as if they had committed treason? The sting lies in the words **"or the constitutional independence of Transkei"** and in the history of Transkeian Opposition politics. It was the policy of the Opposition to attack Transkei's "independence" and to urge that it should be abandoned in favour of a re-unification with South Africa. Only in that way, it was reasoned, would Transkeians eventually inherit their birthright. The enactment of this section was intended to silence those who promoted that line of argument.

It has been used against Paramount Chief Sabata Dalindyebo, who, as the hereditary Paramount Chief of the Tembus has long been an enemy of President Kaiser Matanzima, whose Paramount Chieftainship of the Emigrant Tembus he owes to the South African government. Paramount Chief Dalindyebo was charged with a contravention of this section, and of section 71 of the Republic of Transkei Constitution Act, 15 of 1977, which creates the offence of violating the dignity or injuring the reputation of the Transkei President.[2] On the charge of contravening section 3 of Act 30 of 1977 it was alleged that he had, at Qumbu and Umtata, claimed that:

" (a) the President visited Pretoria at the instance of the White Boers and accepted independence on terms dictated by them;

(b) only the President and his Ministers are free and independent but not the people in the land of their birth;

(c) the authorities repossessed the residence 'of the King' (i.e. the accused) and allocated it to a concubine;

(d) the Republic of Transkei is a 'pigsty';

(e) as a result of the foregoing the adolescents of Transkei are idle, ruin their parents' homes, have no means of livelihood, pounce upon and throttle innocent victims - 'they should not be blamed:they are correct';

(f) the people of Transkei are not free: they do not have either freedom or independence;

(g) Transkei passports are valueless documents;

(h) the citizens of Transkei are maltreated;

(i) the citizens of Transkei are told untruths and caused to assimilate same as the truth ; and

(j) the educational system of Transkei is corrupt and inferior."[3]

In acquitting the Paramount Chief of this charge, the Chief Justice of Transkei, the Honourable Mr Justice Munnik, held that there were deficiencies in the State case and that "there is a fundamental difference between undermining the

Government's popularity and undermining the authority of the State or its officers." Paramount Chief Dalindyebo was convicted on the charge under the Constitution Act. His allegations that the President of Transkei:

"(a) visited Pretoria at the instance of the White Boers and accepted independence on terms dictated by them;

(b) has an abundance of the necessities of life whilst his people have to live on excreta [4]; and

(c) maltreats his people"

were held by the Chief Justice to lower the President in the esteem of all right-thinking men. During the course of the Chief Justice's judgment a new figure appeared on the Southern African legal stage, the "man on the Ngqeleni XRT bus",[5] who is evidently the Transkei's indigenous equivalent of the well-known man on the Clapham omnibus. The latter has recently had short shrift at the hands of the South African Appellate Division.[6] The Paramount Chief was sentenced to a fine of R700 or 18 months' imprisonment, of which R200 or six months were conditionally suspended.

In the course of sentencing Dalindyebo, the Chief Justice observed that:

> "The moment a man becomes the President of Transkei in terms of the Constitution he is no longer in the field of politics. He is not an Executive President as there is in America. He is the titular head of the State and it is clear that the whole intention of the Constitution Act is that he should represent and symbolise the nation as such, especially in Transkei with its nine different main tribes, act as a unifying force" **(syntax is original)**.

Technically the Chief Justice was quite correct, but this merely illustrates the perils of allowing constitutional statutes and constitutional reality to diverge. In the view of several commentators, the Transkei President has never allowed the reins of power to fall completely into the hands of his brother, the Prime Minister.[7] While the President continues to exercise executive powers it is highly undesirable that his actions should be protected from scrutiny by a law which is based upon an entirely different constitutional premise. The Muldergate affair made this point very clearly in regard to former State President Vorster.

A few months earlier, in another trial under the Act, the Chief Justice had sentenced one Ncokazi, the leader of the Democratic Party, to a fine of R500 or 18 months' imprisonment, plus a further three years' imprisonment wholly suspended for the following utterance made at a Democratic Party Congress at Engcobo:

> "I saw the dreams turn into nightmares when on 26th October 1976 the Transkei people braved the inclement weather and attended the celebration that marked the final sacrifice of their future and the future of their children on the altar of Pretoria's independence. The Transkei people were the victims of that political swindle at the hands of that racist White minority Government of South Africa. During the last half of 1976 these people (the Transkei leaders) were trying to convince the World that Transkei independence was a progressive political venture in terms of Black liberation politics - there are a few words omitted - their political statements were simply glosses or deceits lulling the people into acquiescence and civility. Their Koyana is trotting all over the world through the back door trying to sell this unsaleable commodity. To think that the outside World can recognise any of the independent Bantustans is an advertisement of political buffoonery. With the backing of the OAU and the UNO we shall fight the independent Bantustans. Now the South African government in connivance with the TNIP has limited our scope of political operation by legally forcing us to operate within an area bounded by the Umzimkulu and Kei Rivers. We don't want to swim with the Whites on beaches, we want to swim with him in the legislative chambers of South Africa." [8]

The Chief Justice added a further 18 months' imprisonment, wholly suspended, on a second count which arose out of the following statement:

> "These Transkei leaders are living in luxury getting thousands of rands per month when the masses are floundering in poverty. They roam about under cover of darkness with women using Government cars without the public consent. They are rich because they have unduly enriched themselves and when we ask them why they do these things they react by locking us up in their prisons. The Transkei people are cursed with the worst Government in the history of mankind, a Government that is scandalously corrupt and is prone to suppress the DP which it always castigates - and I think the word 'them' was left out here - for their corrupt deeds. They waste money on propaganda and other trivial undertakings when people are smothering in poverty." [9]

Detentions under the provisions of the Act were challenged in the Transkei Supreme Court in **Sigaba v Minister of Defence and Police and Another**[10] (challenge successful), **Honey and Another v Minister of Police and Others** [11] (challenge successful) and **Mnyani and Others v Minister of Justice and Others** [12] (challenge unsuccessful).

In terms of section 44 of the Public Security Act, the Transkei President may declare the existence of a state of emergency when a breakdown of public order is feared. After the school unrest in 1980 the President, Paramount Chief K D Matanzima, declared a state of emergency.[13] His brother, Prime Minister G M M Matanzima, acting in his capacity as Minister of Police, then issued certain regulations under powers conferred upon him by section 45 of the Act. [14] In terms of these Regulations, certain persons were declared to be "affected persons" for the purposes of the Regulations. An affected person is:

(a) any person enrolled as a scholar or student at any institution (this latter being defined as the University of Transkei, any Transkei school and any other institution declared to be affected by the Minister); and

(b) any person in the employ of any institution whom any member of the Police has served with a notice declaring him to be such.

The plight of an affected person is not a happy one. Amongst other restrictions he/she may not:

(a) if resident in a municipal area depart from that municipal area without the permission of a magistrate or police station commander;

(b) on any day, other than a Sunday, be in any street or public place except for the purpose of proceeding to an institution to attend any class which he is required to attend or for the performance of his official duties there;

(c) on any day be outside the boundaries of any premises, kraal, hostel or other place at which he is residing **outside a municipal area**: (i) at any time between the hours of 18h00 on that day and 06h00 on the following day; or (ii) at any time between the hours of 06h00 and

18h00 except for the purposes of attending a **bona fide** funeral ceremony or if otherwise exempted from this requirement; or

(d) if required to attend any class absent him/herself from such class without the permission of the designated authority of the institution concerned.

The penalties prescribed for breaches of these Regulations are those set out in section 23(b) of the principal Act, which include a fine of R1 000, imprisonment for a period not exceeding five years and a whipping not exceeding ten strokes. The onus of proving his/her innocence rests upon the accused person at the trial.

It is not always easy for the visitor to Transkei to acquaint himself with his rights and obligations during his visit. A friend of the writer who had the misfortune to be both British and a student dutifully reported to the border post at Umzimkulu. He was issued with two documents. One, a temporary permit, issued on form TI 417, authorised him to enter Transkei for the purpose of a holiday visit and to remain there for six days. The other, a notice of prohibition on form TI 433, declared him to be a prohibited person and refused him permission to enter the country. The border official could not throw any light on the matter, but the friend entered the country and had a most enjoyable holiday on the Wild Coast.

Life in a Transkeian goal is not to be recommended, according to Nimrod Mkele, who spent a month there after criticising the banning of the Black Community Programmes in a report in the Daily Dispatch. [15] He was another in a long line of people who have learned the hard way of the Matanzimas' thin skins. Others include Humphrey Berkeley and Jimmy Skinner.

Unfortunately it would appear that this hypersensitivity to criticism is not confined to the executive arm of government in Transkei. It has manifested itself in the judicial branch as well. In a trial for murder in Transkei before Chief Justice Munnik and two assessors, the Chief Justice made certain findings relating to the demeanour and credibility of the accused, one Mpopo. [16] He made the following comments:

> " His evidence in the witness-box and his demeanour have been completely unsatisfactory. *One of my assessors is a fluent Xhosa linguist, I myself understand the language sufficiently to follow the evidence and to form some impression of his demeanour and we are both satisfied that his demeanour was that of a lying witness.*" [17]

In the corrected transcript of the judgment which was used to complete the record of the case on appeal the italicised words did not appear. How they came to be omitted was explained by the Chief Justice in his judgment granting leave to appeal as follows:

> "After the trial the Attorney-General drew my attention in Chambers to the fact that the references to being a Xhosa linguist, the assessor being a fluent Xhosa linguist and my understanding the language were inappropriate as the accused had given his evidence in Sotho. I confirmed this with the interpreter as I was somewhat puzzled because during the trial when the accused gave evidence, I had found myself able to follow the gist of his evidence. It may well be that this is due to the fact that the accused comes from the district which borders on an area occupied by the Hlubi tribe who are Xhosa-speaking and to some extent the Hlubi influence may have crept in. Be that as it may, I was under the impression that he had spoken Xhosa and I was apparently wrong in that impression, in so far as demeanour was judged by his use of language. When the transcript came back to me from Lubbe Recordings, I felt that it would be unfair to the accused to include in the judgment this reference to the ability to understand Xhosa and the fact that my assessor was a Xhosa linguist, in that it might add to the judgment a valid point of criticism of his evidence which in fact, in view of the information conveyed to me by the Attorney-General, was not a valid point of criticism and I then deleted this passage from the judgment, i.e. the passage to which I have just referred."[18]

Mr. Justice Corbett of the South African Appellate Division, which at that time, was still Transkei's appeal court in terms of section 54(1)(e) of the Transkei Constitution, gave the judgment on appeal. With Judges Trollip and Klopper concurring he held that:

> "It seems to me that what happened in the Court **a quo** amounted to an irregularity. Generally speaking, where a witness gives evidence through an interpreter, what occurs is that:
> 'A species of expert witness is telling the Court in a language understood by the Court (and by any recorder) what it is the witness is actually saying. What the expert or interpreter tells the Court becomes the actual evidence in the case put before the Court and recorded.' . . . .
>
> What the Court must, thus, have regard to is what the interpreter tells the Court, not what the witness himself says in the language which is being interpreted. For the Court or certain members of the Court to give their attention to what the witness himself is saying and to rely upon their own individual knowledge of the language used to form views or impressions as to the veracity or otherwise of the witness' testimony amounts, in my view, to an undesirable and potentially dangerous procedure. In the first place, as already emphasized, it is what the interpreter tells the Court that constitutes the evidence and it is this that the Court is required to evaluate. It is true that the interpretation procedure is not altogether satisfactory in that it often puts the cross-examiner at a disadvantage and does not enable the Court to obtain such direct and clear-cut impressions of the demeanour of the witness as it may gain when no interpreter is employed. These disadvantages, however, do not justify recourse to the kind of practice followed in the present case. Secondly, the interpreter is the chosen expert whose function is to translate the words used by the witness into the language of the Court. For members of the Court, having perhaps an imperfect knowledge of the language (as appears to have been the position in the present case), to endeavour to go behind the translated evidence and, thereby, to reach certain conclusions seems to me to be fraught with danger. I have no personal knowledge of the Xhosa and Sotho languages or of the differences between them but, judging from the reaction of all parties concerned to what happened in this case, I must infer that the differences are substantial and that a Xhosa linguist would not necessarily understand fully evidence given in Sotho or be able to judge the demeanour of a witness testifying in the latter language. Thirdly, the competence of the different members of the Court to understand the language used by the witness may vary considerably or in the case of one or more members may be non-existent. In the latter event a wholly anomalous situation would arise because the member (or members) who did not understand the language would have to rely upon the impressions of the member (or members) who did. That would not be a proper basis for a member of the Court who did not understand the language to come to a decision (albeit perhaps a joint decision) in the matter.

And that, it would seem, is precisely what occurred in the present case. There is no mention of the third member of the Court being conversant to any degree with the Xhosa language and one must, therefore, assume that he was not. Consequently, even if appellant had been speaking Xhosa, this third member of the Court could not have formed his own direct impressions of the demeanour of the appellant from the way he gave evidence in his own language. To a lesser degree similar problems could arise where there are varying degrees of competence on the part of the members of the Court to understand the language used by the witness.

It is clear from the judgment of the Court *a quo* (in its original form) that the Court formulated its view as to the demeanour of the appellant in the witness-box to a substantial degree on the strength of the impressions gained by two members of the Court from listening to the evidence given by him in his own language. The Court's finding as to demeanour was one of the grounds for its rejection of the appellant's evidence. For the reasons stated above, I hold that in so relying upon those impressions the Court committed an irregularity." [19]

With regard to the alteration of the record of the original trial by the Chief Justice, the Appellate Division held that:

"I have no doubt that, whatever may have led the trial Judge to alter the record in this way, he should not have done so – for two main reasons. In the first place, the record of the judgment in its original form correctly reflected what had actually occurred in Court and there was consequently no valid ground for the alteration thereof. Secondly, it seems to me that in this instance and at the stage when he acted the learned CHIEF JUSTICE was *functus officio* and had no power, *mero motu*, to amend the record in the way he did. As far as counsel's submission is concerned, however, I do not see how that which was done by the trial Judge some time after the conclusion of the trial can affect the trial itself. As I understand the submission, this fact, i.e. the deletion from the record, is cited as further proof *(ex post facto)* of partiality on the part of the trial Judge during the trial. This is a matter of inference. It is not an inference that I am prepared to draw."[20]

This judgment was delivered on 27th February 1977. In 1978 the Transkei Constitution was amended by the Republic of Transkei Constitution Amendment Act, 11 of 1978. One of the consequences of the amendment was the severance of the link with the South African Appellate Division and the establishment of an Appellate Division of the Transkei Supreme Court, which would have a quorum of three judges. No judge might be a member of the Appellate Division when it was considering an appeal where he had been the judge of first instance.

It was not long before the question of assessment of demeanour arising out of a judicial officer's own linguistic proficiency arose again. [21] In a judgment delivered on 4 June 1980 Chief Justice Munnik set the record straight with the following statement:

"Now, the Appellate Division of the Supreme Court has held in a case emanating from this Court that the Court is not allowed, where there is an interpreter, to use its own interpretation from the language in which the witness is giving evidence. With due respect to CORBETT J.A., who delivered judgment in that case, he completely misunderstood the point in issue. What I said in that case was that, because the Court understood the language concerned, it was in a position to gauge demeanour because it knew what was being said and obviously would hear the tone of voice and see the reaction of witnesses when the questions were put and answered. It is not a question of putting an interpretation on the words different from that given by the interpreter and then relying upon this different interpretation for drawing conclusions which do not appear from the record. Decisions of the Appellate Division of South Africa are not binding upon me. In the context in which this Court uses its knowledge of the language, and particularly when my assessor here is a Transkeian and I understand the language, we are entitled, as we are doing in this case, to have regard to the demeanour of this witness as evinced by his reaction in his own language."[22]

It would seem that the Transkei executive perceives itself to be beleaguered, both internally and externally, by hostile and destructive forces, only some of which are of its own making. Like the South African government, its reaction has followed the "total strategy" model, and repression has replaced resolution. With the South African example so close to hand, it should not surprise one.

Advocate Sydney Kentridge warned in a recent paper that:

"One day there will be change in South Africa. Those who then come to rule may have seen the process of law in their country not as protection against power but as no more than its convenient instrument, to be manipulated at will. It would then not be surprising if they failed to appreciate the value of an independent judiciary and of due process of law." [23]

In the case of Transkei it would seem that his prophecy has already been fulfilled.

1. See, for example, A. S. Mathews *Law, Order and Liberty in South Africa* Juta 19/1; J. Dugard *Human Rights and the South African Legal Order* Princeton UP 1978.
2. This section is, of course, a duplicate of section 13 of the Republic of South Africa Constitution Act, 32 of 196l, which protects the South African State President.
3. *S v Dalindyebo* 1980 (3) SA 1049 (TkSC) at 1061.
4. The original language was a bit more robust. "Here again I pause to indicate that during the course of the translation the interpreter used the original word which was the rather crude word 'shit' which was used in the Xhosa . . ." Per Munnik CJ at 1058.
5. At 1057G
6. " . . . it is somewhat strange to see that the need is felt in Durban, in order to measure the standard of driving ability of the South African bus driver, to refer to the driver of the Clapham bus, whose passengers a long time ago were supposed to be models of reasonable Englishmen." Per Rumpff, CJ, in *Marine and Trade Insurance Co Ltd v Singh* 1980 (1) SA 5(A) at 12A.
7. See for example B Streek, "Transkei - The Weird Wonderland of the Matanzimas" in Vol 1 no 6 *Frontline* at page 22.
8. *S v Ncokazi* 1980 (3) SA 789 (TkSC) at 793C
9. Ibid, at 793H-794
10. 1980 (3) SA 535 (TkSC)
11. 1980 (3) SA 800 (TkSC)
12. 1980 (4) SA 528 (TkSC)
13. By Proclamation No 9/1980 of 4 June 1980
14. By Government Notice No 81/1980 of 4 June 1980
15. N Mkele, "Guest of the President" in Vol 1 no 5 *Frontline* at Page 18
16. *S v Mpopo* 1978 (2) SA 424(A) is the appeal case.
17. At 425G-H
18. At 425H-426
19. At 426F-427
20. At 428H-429
21. *S v Gandu* 1981 (1) SA 997(TkSC)
22. S Kentridge, "The Pathology of a Legal System: Criminal Justice in South Africa" in Vol 128 *University of Pennsylvania Law Review* 603 at 621