"I WON'T LET HIM WEAR ME DOWN"

Gilbert Marcus SC

The Delmas Treason Trial[1] was one of the longest in South Africa's history. It took up 437 days in court over a period of 37 months.[2] It was heard in the politically charged atmosphere of emergency rule. The charges of treason and murder flowed from the mobilisation of the United Democratic Front and other internal political movements against the bogus reforms ushered in by the Tri-Cameral Parliament. The accused were alleged to have been responsible for the nationwide protests and violence that erupted in opposition to these measures.

The legal team was led by Arthur Chaskalson and included George Bizos, Zac Yacoob, Karel Tip and me. Arthur and I were part-timers, only attending court for specified purposes. George, Zac and Karel endured the grind of daily attendance with fortitude. George's endurance was

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[1] The trial was known as the "Delmas Treason Trial" because it began its life in Delmas. After 18 months, however, it was moved to Pretoria.

[2] E Cameron, G Marcus and D Van Zyl Smit "The Administration of Justice" in 1988 Annual Survey of South African Law at 521.

legendry. This case tested it to the limits but George was up to the challenge. He had earned the nickname "Matla a Ntlou" – the strength of an elephant.

The presence of George Bizos and the trial Judge, Kees van Dijkhorst in the same courtroom over a lengthy period, was an accident waiting to happen. They were polar opposites. Van Dijkhorst was precise, cold, authoritarian and clever. George was effusive, warm, generous and also clever. The trial soon became a battle of wills and clashes between counsel and Judge were frequent.

The legal team met every Sunday afternoon at Arthur's house to discuss the week's evidence and to receive strategic direction from Arthur. Reports from George, Zac and Karel indicated a perception of a hostile attitude from the Judge. Arthur, never one to accept anything at face value, would interrogate these claims and usually dismiss them, at least at the level of justifying a recusal application. But the weekly reports persisted, ranging from concerns about interjections by the Judge to accusations of impatience and a lack of fairness. Eventually Arthur

instructed that all these interventions be compiled for later assessment. The list grew and grew. Matthew Chaskalson, then a law student, and assisting in the case, eventually compiled a list of some 500 “incidents” that had occurred in the trial.

At the end of the trial several of the accused were found guilty and received lengthy terms of imprisonment. An appeal was essential. The question arose as to what should be done about the 500 incidents. It was decided that these should be the subject of a special entry on the record. It was formulated on the basis that the trial Judge’s interventions by way of questions or observations were “*of a frequency, length and nature such as to create an impression of subjectivity and partiality*.”

Arthur refused to argue this part of the leave to appeal, not because he thought it had no merit, but because he was not sufficiently steeped in the atmosphere of the trial to be able to do the argument justice. And so it was left to George. On the morning that the point was to be argued, Arthur and I had briefly gone to the court library to research a point

that was due to be argued later in the day. We left the court when George began to address the first "incident". We were anxious to return to court to be ready to argue when George was done. We were confident that the 500 incidents would be despatched quickly, one way or the other. How wrong we were!

When we returned to court after an absence of about 20 minutes, George was still addressing the first incident. The Judge was furious. He regarded this as a personal affront which he was not going to tolerate. He insisted on George addressing each and every one of the 500 incidents and George proceeded to do so. When 4pm came, George enquired whether it was a convenient time to adjourn. "No, it was not", was the terse response. George carried on. By 5pm, the court stenographer was in tears and Van Dijkhorst refused to release her. Shortly before 6pm the prosecutor enquired whether the court could adjourn to get motor cars out of the parking garage which was about to close. Nothing doing. At 7pm, Arthur said to George, "*it's enough George, sit down*". An argument ensued, audible for all to hear. George said "*I will not let him wear me*

down. I will continue till midnight if necessary." As George later observed, *"by now it was a matter of stamina"*.[3] Eventually Arthur stood up and simply told the Judge that *"It's enough"*. The Judge relented.

This incident epitomises George's tenacity and endurance. He would never give up, no matter how steep the odds. Importantly, the Judge ultimately agreed to make the special entry. He did so *"in self defence"* insisting that he was *"even handed in his treatment of both counsel"* as all *"came in for criticisms that was due to them"*. He explained that *"where tediousness or repetitiveness of some led to exasperation my remarks were sometimes caustic. I offer no apology therefor"*. He added that he would normally have dismissed this special entry "*as frivolous or vexatious"* but chose not to do so. This was because *"Mr Bizos for the defence harped upon these alleged irregularities in exaggerated terms to a captive audience of reporters who lost no time in publishing his views, to the determinant of myself and the bench"*. In the

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3 George Bizos *Odyssey to Freedom* (2007) Random House at p 469.

circumstances, Van Dijkhorst regarded it as *"imperative that this matter be decided by our highest court"*.[4]

The Appellate Division never got to express a view on this special entry for which George had so tenaciously fought. The appeal succeeded on the basis of a different fatal blunder committed by the Judge in precipitately dismissing one of his assessors.[5]

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4 *S v PM Baleka and Others*, judgment on leave to appeal, 20 January 1989, unreported.

5 *S v Malindi and others* 1990 (1) SA 962 (A) in which it was held that Van Dijkhorst had acted incorrectly in failing to hear any of the parties before coming to a decision that an assessor had been unable to act.