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COMMENTS ON THE THAMI ZULU ENQUIRY REPORT

19 OCTOBER 1994

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Notes on Thami Zulu which featured in my Boncourt JSC interview

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Now several years later I hear that TZ is dead, that he had been in detention and had come out in a terrible condition. I think I have a deep natural caution about security structures. They are necessary, I know, but I don't trust them. No matter whether they are "their" security or "our" security. When I was asked to be a member of a Commission of Enquiry into TZ's death I accepted with alacrity. On the face of it, a terrible injustice had taken place and I was anxious to ensure that the full truth came out.

The Chairperson of the Commission whom I knew as "Jobs" had worked for some years in the Legal Department of the ANC and I had full confidence in his carrying out his functions fairly and effectively. He had been an attorney in exile in Lesotho for some years before joining the Legal Department and the Constitutional Committee. Tim Maseko I had known fleetingly but people spoke well of his probity. The fourth member I came to meet through the proceedings of the Commission. He was a good representative of the generation of long-standing ANC members who had worked for many years in the frontline states.

We had some difficulty arranging a time when we could all meet. Tim was in Tanzania, I in London and the other two in

Lusaka. If I recall correctly we began our work in January. It was a year and a half after the bomb blast which nearly killed me, and I was still relatively weak.

The first witness we called was Dr Ralph Ngijima. Ralph was head of the Health Department of the ANC. He had been a personal friend of Thami's and in fact when Thami came out of detention he had gone straight to Ralph's place. Ralph gave us a vivid description of Thami's lamentable state at that time. He was clearly indignant and of the view that a grave injustice had been done and that by no stretch of the imagination could Thami ever have been an agent of Pretoria. At the same time he made it clear that Thami did not complain of having been subject to torture, third degree or any kind of physical violence.

It became clear to us that we would have to examine very closely the cause of death. A major section of our enquiry therefore related to medical evidence. I think we called five doctors to testify. What they said appears in the report. At first I was reluctant to accept that Aids had caused the catastrophic collapse of Thami's condition. Yet the medical evidence was striking. The clinical symptoms were consistent with and indicative of Aids and the blood tests were HIV-positive. This created a special dilemma for us in that ANC policy was to treat Aids victims with consideration and humanity and not to reveal to the world the fact that they suffered from the disease.

It would have been easy to simply get the word around in the ANC that TZ had died of Aids. This could have let security off the hook and diverted attention from the essence of the enquiry. At the same time it would have been misleading to allow the conjecture about his death to continue on the assumption that it was ill-treatment that had led to the deterioration of his condition. To add to the complexities there was strong evidence in the post-mortem report that the actual precipitating cause of death was poison. This not only complicated the medical position but also gave rise to speculation as to who could have administered the poison, bearing in mind that the last days of Thami's life were spent under the protection of military security. As we said in the report, there were too many causes of death.

Looking back I am fairly sure that he was poisoned and the poison was put into beer which he drank in the period of a day or two before his death. We didn't know then about the allegations against Neethling of the forensic laboratories in Pretoria. I know that one reason why I was removed from Maputo Central Hospital only ten days after the bomb blast,

was that the ANC people feared I might be poisoned in the same way that an ANC person working on Mozambique had been poisoned while in that hospital some years earlier.

The blood analysis done at the time of the post-mortem report on TZ and the clinical symptoms strongly suggested poison. I think it was this more than anything else that led military headquarters to challenge the Thami Zulu report and resist its publication. If only it had been published immediately!

For three years on the NEC I tried to get the report published. South African newspapers carried several leaked and inaccurate versions. I felt the correct thing to do was to publish the report in full. We had also made a proposal for inviting Thami's family as well as the families of the nine MK members whose cold-blooded killing had given rise to the enquiry, to be present on the occasion of publication. The idea was to encourage reconciliation through honouring all those who had died in the cause of freedom. Unfortunately tension between the security department and the military prevented the report from being published in that way. In the end it only came out when the Motsuenyane Report was published and then as a sort of addendum to that report rather than an enquiry in its own right.

The two big questions that we really had to consider were—was Thami an enemy agent and was he ill-treated. The report as published does not go into the detail of the evidence against him. That should be contained in supplementary documents that were sent to the NEC with the report. I cannot at the moment recall the precise allegations. I remember that there were about five main facts or sets of circumstances that he was called upon to explain. One of them was an apparent lack of concern on his part on learning of the deaths in two incidents near the Swaziland border of 9 young comrades under his command. The parents of some of the deceased had gone to Lusaka to speak to Oliver Tambo about the loss of their children and to demand an enquiry. TZ was one of very few people who would have known about the moments when these two batches were crossing the border. The security forces of Pretoria were waiting for them. As we learnt later, the CCB killed four in cold-blood while they lay on the ground. There were also incidents of security raids in Swaziland where TZ had somehow miraculously not been captured.

There was considerable evidence of a circumstantial kind that, taken together, raised at least a very strong suspicion that TZ had worked in collusion with Pretoria.

Giving my own subjective opinion now several years later, I would say that I was not convinced that he was an agent. I would not however be amazed if documents in Pretoria should one day show that in fact he had been an agent. Someone very close to him, however, must have passed on vital information to Pretoria. Apparently, the first batch that was intercepted could have been known by a number of people, but not the second batch. My sense at the time was that someone very close to him was working for either British or American intelligence and that the latter would pass on anti-MK information to Pretoria in terms of "combatting terrorism". The person indicated for this role was his wife who worked for Oxfam and who had access to documents which Thami acknowledges he left lying around. We did not interview her - she was understandably angry, and we had no powers of subpoena. It would be unfair on the basis of scanty evidence to point a direct finger at her, especially since she has not had a chance to give her version of the events. It also became clear that at the very least Thami's morale had declined over the years and that he had been negligent, even grossly negligent. At the same time I felt very strongly that investigations were designed to come to definitive conclusions on the basis of proper procedures, that the onus of proof should rest clearly on those who alleged betrayal of the movement, and that in the absence of such proof members of the movement should be freed without their honour being undermined.

I was asked by the Commission to draft the report. We discussed all the issues and agreed on everything except the question of whether the length of detention was too long. In the context of our discussions, this was not regarded as one of the hot issues. I thought it was clearly too long even granted that all except 8 weeks had been in relatively comfortable house-arrest rather than detention. For me, the essential thing was to put security to terms to either charge or release. I was very disappointed when the others failed to agree with me. If I remember correctly Jobs also felt it was too long and the other two were quite emphatic that it was not in all the circumstances. They pointed out that the issues were very grave, that enquiries had to be made in South Africa itself, which was difficult, and in Swaziland, which was even more difficult; and that we were not a state with all the investigative agencies and legal capacity of a government. I got the sense that they were more inclined than me to accept on the evidence that Thami had in fact been an agent. If one of them had written the report, it might have come out in a way which could have

given a green light to security in future and been rather more damaging to Thami's name.

In any event, we all agreed that in future very clear guidelines would have to be established laying down periods of detention. It was a strange time to be writing our report. One day when we were hearing evidence, Jobs brought in his radio so that we could get news of a speech de Klerk was due to make in Parliament. We worked right through the lunch hour- I remember how hungry we were, all we could get was black tea and a dry roll - until well into the afternoon. Then Jobs tuned into the BBC and we heard a voice in one of those confident BBC commentator's tones saying: "...and because of the unbanning of the ANC" It was the 2nd of February, and that was the first we knew that we were legal again.

Clearly the whole perspective of the movement had to shift. The importance of the TZ enquiry was to clarify what had happened rather than to establish a precedent for the future. At the same time, we didn't know how long the process of getting back into the country would take. I can remember suggesting to everybody I could get hold of that now was the time to release everybody who might still be in detention. The sooner the better, I said. One day they would all have to be allowed to return to South Africa so there was no point in hanging on to them. I understand that this approach was more or less followed and that most if not all of the detainees got back to South Africa well before their captors did.

Looking back now, I find the TZ report interesting for itself but even more interesting for its context. This was not a report designed to go into Law Reports. Nor was it written as part of ongoing development of legal doctrine. It was an enquiry established by the National Executive Committee to resolve what was in effect a dispute between military and security. It had pronounced human rights aspects but was not a trial. The report would have found its place on the extremely busy agenda of the NEC preparing to return to South Africa. I was asked when being interviewed by the Judicial Service Commission why I had not written a minority report denouncing from the rooftops my opposition to detention without trial. I was tired at the time of the question since the hour allotted had been well exceeded and the whole experience of accounting for my two decades in exile had been quite emotional. Suddenly three of the commissioners pounced on me in rapid fire. I had assumed that all the commissioners had copies of the TZ report and that they could all see that it was honestly

argued and imbued with a spirit of respect for human rights (at any rate, that was my evaluation of it). What I failed to do was to bring out the most obvious point, namely that we had succeeded in conditions of exile in establishing a degree of legality and due process in terms of which it was even possible to question the length of detention of a suspect. I know of no other liberation movement in the world that has come even close to achieving this. Principal credit must go to Oliver Tambo and the majority in the NEC who were so appalled by the Stuart Report on ill-treatment of suspects in the camps in Angola, that they set about establishing as much legality and due process within the movement as possible. If I look back on all the work that I have done as a lawyer in different conditions and various continents, I think that the most valuable by far was in helping to draft the ANC Code of Conduct which was presented to the Kabwe Conference in 1985. We had to design what was in effect a criminal code and a criminal procedure act for a movement in exile without courts, without a police force, without a legal profession, without prosecutors. The one approach was that in a revolutionary struggle you had to hit the enemy hard and not be held back by formal notions of bourgeois legality. The other approach was that we were fighting for justice in our country so justice had to exist in our own ranks. I felt proud at the Kabwe Conference to see the overwhelming support that came for the second approach particularly from young delegates from MK. The Code of Conduct as a whole, taken together with replacing certain officials, made a great difference, even if it was not always applied as rigorously as it should have been. As far as I know no executions took place after 1985. Systematic ill-treatment came to an end. A number of people were put on trial and some were acquitted. I can recall Penuell Meduna telling me how angry security had been when someone he had defended was found not guilty. "How can you let that agent go," security said to him "the guy who prosecuted was useless and you were too strong."

This then is the main point about the TZ enquiry. We were able to evaluate the conduct of ANC security using the same criteria that we would use in a developed state. The one gap in the Code of Conduct was that no precise dates were laid down governing permissible periods of detention. This was left to regulations which were to be drafted, I think by the Justice Officer. The Justice Officer was Zola Skweyiya. I had supported his nomination for that position because I knew him to be someone who was not afraid. He in fact had conflicts with security who made it difficult to visit places of detention. We were scattered all over Africa and Europe, extremely overworked and it was difficult to follow

up on projects. As it turned out, no regulations governing detention were ever drafted because the ANC released the detainees and we all returned to South Africa.

I feel great sadness when I think of the case of Thami Zulu. To me he represents the hundreds of young patriots who gave their all and who died in those difficult years. Swaziland was an inferno. It was so penetrated by spies and counter-spies, assassins and informers of every kind and so vulnerable to raids by hit squads from South Africa that many ANC people felt safer when they crossed the border into South Africa on a mission than they did in Swaziland itself. The evidence we heard was far more complex and tragic than any Ludlum novel. Whereas authors can construct their own endings, we can only rely on memory and the healing impact of time. I personally would like some day to find a way to honour the pain that Thami Zulu endured and through him to pay respect to all those who didn't survive as well as to all those who survived but never found the peace and fulfilment for which they had fought.