

cc M'Keen
M'Keen
to T. Ireland
Mr Ferguson
Mr Johnson.

CONFIDENTIAL



10 DOWNING STREET

From the Private Secretary

30 September 1984

Dear Len,

DETAINEES IN DURBAN CONSULATE

I enclose a copy of Mr. Botha's reply to the Prime Minister's message, delivered by the South African Charge d'Affaires to 10 Downing Street tonight.

Yours sincerely,

(C.D. POWELL)

Len Appleyard, Esq.,
Foreign and Commonwealth Office.



The Rt Honourable Margaret Thatcher, MP
Prime Minister
10 Downing Street
LONDON

30 September 1984

Dear Prime Minister

I have been requested by the State President of South Africa to present his compliments to you and to convey the enclosed Personal and Confidential letter to you.

Might I take this opportunity of assuring you of my highest consideration and personal good wishes.

Yours sincerely

A handwritten signature in cursive script, reading "Denis Worrall".

AMBASSADOR



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PRETORIA

30 September 1984

Dear Prime Minister

Thank you for your message of 30 September 1984 in reply to my suggestion yesterday through Minister R F Botha and Baroness Young for you to receive my Foreign Minister in London.

My suggestion for you to meet Mr Botha was prompted by a desire to minimise the harmful effects to our relations inherent in the situation which has developed and to find a way out of the growing dilemma in which we find ourselves.

I share your sentiments that we will have to show great delicacy in the manner in which we handle this matter. I also appreciate the frankness of your message and feel sure that you would want me to be equally candid in my reply.

I have taken note of the fact that you reiterate your government's point of view that it is for the six South African nationals presently in your Consulate in Durban to negotiate with my government and for us to create conditions under which they will feel able to leave the Consulate voluntarily.

In this regard I am constrained to point out that the South African Minister of Law and Order issued detention orders in respect of the six men more than three weeks ago but that the South African Police have been unable

to serve these orders because of the fact that the men have found sanctuary in the Consulate.

For this reason the Foreign and Commonwealth Office was informed that your government's failure to either surrender the men or to allow the appropriate authorities to enter the Consular premises and take them into custody, amounts to an obstruction of the South African process of law-enforcement. Furthermore, the Foreign and Commonwealth Office was informed that customary international law prohibits governments from providing sanctuary or asylum in Consulates to persons fleeing from the judicial or law-enforcement agencies of the receiving state.

Consequently it is my government's viewpoint that the refusal of the British government to accede to the request put forward in the South African government's Aide Memoire of 20 September 1984, and its failure to either expel or surrender the six South Africans in the British Consulate in Durban of its own accord, was unlawful in terms of customary public international law. (In this respect it should be noted that you indicated to Mr Neil Kinnock on 19 September 1984, that "... it would not be right for us to intervene in the legal processes of another country, whether or not we agree with them." Yet the British action has had the effect of making the execution of such legal processes impossible.)

My government's subsequent decision not to allow the four South Africans to return to the United Kingdom to stand trial was an act of reprisal. The doctrine of reprisal is well established in customary public international law and it is common cause and tripe law that it entails that an act which would normally be unlawful is rendered lawful by a prior unlawful act of the other government. An act of reprisal need not take the same form as the original unlawful act but should be proportionate to it. The South

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African government's act of reprisal meets these requirements.

It follows that the South African government's decision not to allow the four South Africans to return to the United Kingdom was clearly lawful, and I am sure that reputable British authorities on international law share this view.

The case of the four South Africans has been a subject of a number of discussions between your Foreign and Commonwealth Office officers and officers of the South African Department of Foreign Affairs.

During these discussions it was intimated to the Foreign and Commonwealth Office that the South African government would prevail upon the four men to accept offers to compound proceedings against them and that such offers presented a mutually acceptable legal solution to what my government perceived as a dilemma involving both governments.

Although Foreign and Commonwealth Office spokesmen have repeatedly indicated that it is not the kind of case which would lend itself to compounding procedures, I am nevertheless taking the liberty of attaching a memorandum setting out what we believe to be cogent arguments in support of a compounded settlement.

It may be, Prime Minister, that such a compounded settlement still represents, albeit only in part, a solution to the dilemma in which we find ourselves.

I therefore propose that a legal team representing the four South African nationals and my government should meet as a matter of urgency with representatives of the Foreign and Commonwealth Office, the prosecuting authorities as

well as the Director of Public Prosecutions in order to explore this avenue. I believe that such a course of action would not constitute any interference in the due process of law and may provide the key to the resolution of the current impasse.

I wish also to refer to your letter delivered to me on 28 September 1984. The position regarding the Kwa Ngema community remains as set out in the memorandum attached to a letter from the South African Chargé d'Affairs in London to you dated 20 June 1984 and to which Mr Charles Powell replied on 4 July 1984.

I can, however, assure you that the South African government is at all times handling this matter with concern and respect for the feelings and interests of the Kwa Ngema community.

Your remarks on the Nkomati Accord and the British Government's intended significant increase in its level of economic assistance to Mozambique, are most encouraging and welcome. It is pleasing to note that Mozambique has now obtained IMF/IBRD membership. The security situation within Mozambique continues to give rise for concern. I can inform you in confidence that Foreign Minister Botha and Defence Minister Malan spent two days and nights at the end of last week in parallel talks with delegations from the Mozambique government and the Mozambique resistance movement, RENAMO. I am pleased to say that some progress has been made and we think that an agreement on a cessation of the armed activity and conflict in Mozambique might be possible.

I thank you for your sentiments regarding the constitutional changes which have taken place in South Africa and the new responsibilities which will rest with me and the Cabinet which I appointed on 15 September 1984.

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Yours sincerely,

P.W. BOTHA

STATE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

MEMORANDUM CONCERNING THE HISTORY OF THE CASE OF THE FOUR SOUTH AFRICANS WHO HAVE BEEN CHARGED WITH CONTRAVENTIONS OF UNITED KINGDOM CUSTOMS AND EXCISE LEGISLATION AND CONCERNING UNITED KINGDOM COMPOUNDING PROCEDURE

During March 1984 four South African and three British nationals were charged by H.M. Customs and Excise officials with alleged offences in terms of section 170(2) of the United Kingdom Customs and Excise Management Act of 1979 by being knowingly concerned in the exportation of goods with the intent to evade the prohibition imposed by the Export of Goods (Control) Order of 1981. A fourth British national was subsequently charged with a similar offence.

No objection to bail was raised in respect of any of the four British defendants, although substantial sureties were sought. In the case of the four South Africans, however, bail was opposed, inter alia on the basis that they have ties with a South African company with semi-Government links and were therefore likely to abscond.

On 9 April 1984 a bail application, backed by certain assurances of the South African Government designed to enable the Court to treat the South African nationals on an equal footing with the British nationals, was made in the Coventry Magistrate's Court. The application was contested but successful.

On 22 May 1984, a Judge in Chambers reversed a decision by the Coventry Magistrate's Court and granted an application, which was also contested, for the variation of the conditions of bail so as to allow the four South Africans to return to South Africa for a specified period of time. The South African Government again gave certain assurances to the Court including the assurance that the four would comply with their conditions of bail. This they have done with

meticulous care and have subsequently returned to the United Kingdom for a Court appearance.

Without prejudice to the question of the guilt or innocence of the four gentlemen concerned and in order to afford them the opportunity to decide whether it may not be in their interest to accept an offer to compound the proceedings against them rather than to go through the costly, time consuming and, given the fact that they reside and work in South Africa, extremely inconvenient exercise of establishing their innocence, an official of the Department of Foreign Affairs approached the Foreign and Commonwealth Office on a number of occasions in an effort to persuade them to prevail upon H.M. Customs and Excise to make such an offer. Up to now such an offer has not been forthcoming.

Section 152(a) of the Customs and Excise Management Act of 1979 provides that:

"(T)he Commissioners (of Customs and Excise - see section 1(1)) may, as they see fit -

(a) stay, sist or compound any proceedings for an offence or for the condemnation of anything as being forfeited under the customs and excise Acts;"

The application of this provision was explained by the Honourable Mr Hayhoe on 25 April 1984 in response to a Parliamentary question as to the criteria applied by the Commissioners in deciding whether to compound proceedings under Section 152 of the said Act. Mr Hayhoe replied as follows:

"The commissioners do not prosecute, nor apply other

main sanctions such as compounding, unless there is a clear prima facie case. The decision whether to prosecute or to offer to compound proceedings is taken on the merits of each case. The general factors taken into consideration are the gravity of the offence and the best interests of law enforcement and of the revenue. In view of the pressure on the courts and on departmental resources, it is the commissioners' policy to offer compounding whenever appropriate. If that offer is refused, they then proceed with the prosecution of the alleged offender."

In response to a follow-up question of the same date as to the total amount claimed by Customs and Excise (for each year since 1979) in cases which were subsequently compounded and as to the total amount actually received by the Exchequer in such cases after compounding, Mr Hayhoe, after giving the total sum of offers accepted in settlement of value added tax offences, responded as follows:

"A more detailed breakdown is not available and comparable information about other Customs and Excise cases is not held centrally. However, the aggregate sum of court fines and costs and Section 152 settlements can be found in appendix B of successive annual reports of the Commissioners of Her Majesty's Customs and Excise, copies of which are available in the House of Commons Library."

The said successive annual reports of H.M. Customs and Excise reveal that offers to compound proceedings approach the rule and only by way of exception have such offers not been made.

The question arises whether South Africans should be treated

on a different footing from other alleged offenders. The answer to this is to be found in Mr Hayhoe's response on 26 April 1984 (pursuant to his reply on 25 April 1984), when he replied as follows to a question whether the Chancellor of the Exchequer will stop the Board of the Customs and Excise compounding penalties in situations of omission of export licences of sales of arms to South Africa:

"No. The criteria which the Commissioners apply in deciding whether to compound were explained in the answer that I gave to my hon Friend the Member of Leicester, East (Mr Bruinvels) on 25 April 1984."

During his discussions with officials of the Foreign and Commonwealth Office it was intimated to the official of the South African Department of Foreign Affairs that there were political considerations which complicated matters.

In view of the stated policy that South Africans will be treated on the same footing as all other alleged offenders as well as the Honourable Prime Minister's response to a question in the House of Commons on 13 April 1984 when she stated inter alia, that it is not the Commissioner's practice to reveal details of compounded settlements, there ought to be no substance in this consideration. The Prime Minister subsequently reiterated this standpoint in response to another question.

It may be that the "serious nature of the alleged offence", in the words of Mr Ridout, who is the prosecuting officer in the case of the four South Africans, stand in the way of an offer to compound.

In this respect it should be noted that the value of the

goods allegedly involved in the alleged offence is less than £300,000. When compared to the amounts involved in cases with which the Commissioners are no doubt familiar, this amount is not at all significant. The four have also not been charged with the exportation of arms, but with the exportation of components allegedly capable of application in a weapon system.

The Foreign and Commonwealth Office has also indicated that it could not interfere with the judicial process.

The South African Department of Foreign Affairs approached the Foreign and Commonwealth Office on the basis that it was not expected of that Office to interfere in the administration of justice or the due process of law, but simply to persuade an executive organ of the state to exercise an executive discretion to the possible advantage of the four South Africans by affording them the opportunity to decide whether it would be in their interest to accept an offer to compound the proceedings against them.