

“A BLOW TO THE HEAD”

THE MURDER OF STEVE BIKO AND THE COMPLICITY OF THE LEGAL SYSTEM

by Tembeka Ngcukaitobi SC, Johannesburg Bar

I am honoured that the Azanian Peoples Organisation has invited me to deliver this lecture. You as AZAPO should feel proud that you are one of the few organisations that has kept the memory and legacy of Steve Biko alive. I also feel doubly privileged that my host tonight is this great university, named after our founding president, Nelson Mandela. I have entitled this lecture “A Blow to the Head”. It is obviously a play on the words, because in the first instance this was the cause of Biko’s death. But I also use it as a double entendre. There is a secondary meaning to the title. Steve Biko’s death was itself was a blow to the head of black society. And maybe society at large.

The sub-title of the lecture is “The Murder of Steve Biko and the Complicity of the Legal System”. I believe that the story of the murder, and of the complicity for the cover up that

came afterwards, is yet to be fully explored. I have therefore pieced together a narrative, based on public sources, archives and published materials, to create not just a picture, but an imagination of the last days of Biko’s life. Because Biko was not an isolated man, there is another pressing story, which provides context and elucidation to the final days of Biko. I shall start with that story.

On 15 April 1996, Ms Nonhle Mohapi appeared before the Truth and Reconciliation Commission. She wanted to tell the story of the death in detention (more accurately, murder in detention) of her husband Mapetla Mohapi. This was the first day of the commission. And Ms Mohapi was the commission’s very first witness. In a court of law, the choice of a first witness is a singular decision, as it can shape or sink the trajectory

of a case. Yet right at the outset, Bishop Desmond Tutu, who chaired the commission, announced, just before Ms Mohapi was sworn in to “tell the truth, the whole truth and nothing else but the truth”, that the commission’s proceedings would not be conducted like a court of law. The reason, he stressed, was that he wanted the proceedings to be dignified and respectful to the people whose stories would be told in that forum.

In welcoming Ms Mohapi, Bishop Tutu continued: “Many of us remember as though it was yesterday when Mapetla died in police custody. We remember the anguish and the horror of those days. We know also, apart from the personal grief that you’ve experienced, that you yourself have been a victim of human rights violations”. Mohapi was a graduate of the then University of the North (today’s University of Limpopo), where he became a member of the South African Students Organisation, SASO. He was also an activist in the nascent black consciousness movement, where he had met and forged a comradely relationship with Biko. For his activism in the black people’s convention, Mohapi was detained in 1974 for about eight months. A year earlier, Biko had himself been banned and restricted to King William’s Town.

After his arrest Mohapi was transferred to the Central Prison in Pretoria, without notice to his family, who were under the impression that he was still detained in King William’s Town. It was Father Aelred Stubbs who suggested that he could be detained in Pretoria, which is where Ms Mohapi travelled to see if she could find her missing husband. Despite attempts to visit her husband in Pretoria, Ms Mohapi could still not get access to her detained spouse. One day, she was told that she could see him. But only for two minutes. Those two minutes must have felt like a lifetime.

There was no charge put to Mohapi. No trial. Then out of the blue, in April 1975, he was released. His capturers and interrogators must have concluded there was nothing more to gain from his further detention. The police could do this in terms of the laws of the time. Arrest a person. Detain them. Interrogate. Torture. Then release. And then do it again. The police were not yet done with Mohapi. In September 1975, they banned him in terms of the Suppression of Communism Act 44 of 1950, also known as the Internal Security Act. In terms of the banning orders, Mohapi’s movements were restricted to King William’s Town. Now we know this place as eQonce. He used the time to finish his degree at Turfloop, and became a qualified social worker. Very few Africans had university qualifications, even fewer in a discipline as important as social work. In that sense, Mohapi was a torchbearer for his community. He also regarded himself as such. For, he took up a job at the Zimele Trust Fund, a fund which cared for the reintegration into society of political prisoners upon their release from prison.

On 16 June 1976 South Africa’s future changed forever. Under the auspices of the Soweto Students Representative Council, and the radical leadership of Tsietshi Mashinini, the education bloodline of apartheid was challenged, openly and defiantly. Emerging evidence now proves the centrality of the black consciousness philosophy in shaping and channelling the uprising of students against the enforcement of Afrikaans as a medium of instruction in black schools. The immediate challenge, of course, was that the shift from English to Afrikaans, in subjects like maths and science, resulted in exponential

levels of failure rates among black students. And Steve Biko, the foremost intellectual of this generation, could capture and articulate the phenomenon in enlightening and radicalising ways. The problem, Biko said, was that the imposition of Afrikaans produced “an inferiority complex” because it “inculcates in many black students a sense of inadequacy. You tend to think that it is not just a matter of language. You tend to tie it up with intelligence”. Afrikaans therefore didn’t just become another subject to be mastered at school, but a political lightning rod.

The uprising of June 1976 sent shockwaves across the white political establishment. Since the Rivonia Trial had ended in 1964, with the life imprisonment of the leaders of Africans, there had been no direct confrontation with the system, which exercised some sort of a vice grip over the lives of black people. Now June 16, 1976 marked the loosening up of this control, which posed a unique challenge because it showed that white power could be vulnerable. You see, since the days of Jan van Riebeeck, white power has always thrived on of the sense of control over black bodies. From that control, whiteness could guarantee its hegemony, stability and in fact security. Many children were shot in cold blood to suppress the uprising of the 16th of June 1976. Those who couldn’t be killed that day were hunted down and upon capture had their lives snuffed out of their small bodies.

The aftermath of the uprising was a dangerous time in an even more dangerous place. Black consciousness was identified by the state as a poison to the mind of otherwise innocent black children. Biko had emerged as the intelligent, astute and forcefully articulate spokesperson of this new political philosophy already in May 1976 when he was subpoenaed as a defence witness in the so-called SASO Trial, whose official designation was *S v Cooper & Eight Others*. It is in this context that Mohapi was arrested again on the 16th of July 1976. Again without charge. Again without trial. This was the second time. This was unlike the first detention of eight months. He didn’t survive. When his body was seen again on the 5th of August 1976, it was a corpse. An official inquest found no one responsible for his death. In fact, the police manufactured the falsehood that he hanged himself, with his own pants while in detention. To buttress the lie, they also fabricated a suicide note. Ms Mohapi could easily dismiss this as a clumsy forgery because the signature on the piece of paper was not that of her husband. Later judicial outcomes of the Supreme Court in a civil case launched by Ms Mohapi also sided with the police in finding the police innocent of the death of a man who was in their custody when he died.

On the 27th of August 1976 Biko was also arrested, remaining in detention for more than 100 days. No trial. No visitors. Interrogation after interrogation. But, Biko being Biko, he couldn’t just sit and let his fate be decided by his capturers. He fought back. If it was a physical fight, then he would engage in it. Even in isolation, surrounded by armed policemen, he would fight back, using his fists. Hence he developed the reputation that he would not be a sitting duck for his tormentors. Harold Snyman was one of Biko’s interrogators. He explained at the TRC when he applied for amnesty that “we knew of a previous occasion in which Biko had assaulted a member of the police and knocked his teeth out. He was a big and strong man.”

“BIKO HAD EMERGED AS THE INTELLIGENT, ASTUTE AND FORCEFULLY ARTICULATE SPOKESPERSON OF THIS NEW POLITICAL PHILOSOPHY ALREADY IN MAY 1976 WHEN HE WAS SUBPOENAED AS A DEFENCE WITNESS IN THE SO-CALLED SASO TRIAL.”



Let me conclude Nonhle Mohapi’s story, because in the next episode it ties up directly with Biko. She faced hardships. As someone who was regarded as a “wife of a terrorist”, she was unemployable. When Biko began what they referred to as “self-help” projects, she found this a useful way of using her skills and uplifting her community, and she worked as Biko’s secretary.

Enter the apartheid intelligence unit – the secret and secretive Bureau for State Security, BOSS. In 1976 BOSS agents actively tried to infiltrate the black consciousness movement. Their eyes were set on Biko. At her TRC testimony, Nonhle recalled promises of bursaries to study overseas, attempts to plant tape recorders with her so that she could pass on whatever information she could gather on Biko. They wanted to know everything about Biko, she said. In the end, they got nothing. She gave them no information. For this, she would pay. She, herself was detained. Another six months. No bathing water. No lawyers. No family. Her only company seems to have been a filthy toilet bucket, which was sometimes collected, but mostly not. The place of her detention was the Mount Road Police Station, a couple of kilometres from here. But in the evenings, the members of the special branch – the detention squad – would fetch her and take her to the Sanlam building. This, she recalled, was where “the atrocities” took place. A person beaten until they pass urine. Beaten until they soil themselves. The target again, was Biko. They wanted her to admit that “Steve is a terrorist, and also that he was busy distributing pamphlets”. As they pressed on with the interrogation, their methods became desperate. From begging her, they changed to threats, and then violence. Ms Mohapi would conclude her testimony: “At times they would bring blank papers so that I could sign, and they promised to release me, if I should sign them. But they asked me if I wanted the same thing to happen as happened to my husband? At times I would be fastened to a grill and then would be assaulted brutally and would be unable to defend myself. There was not even a chance to run away because the grill holds you so fast that you cannot do anything about it.” In the end she refused to sign the blank piece of paper. I guess if they wanted to kill her like they did her husband, she was resigned to that.

Once they had captured their target, Biko, the police seemed

to have lost interest in Ms Mohapi, and just discarded her. Injured. Scarred and scared. Traumatized. It was up to her to pick up her pieces and rebuild a life with toddlers, and without a husband.

The system drew no distinction. Man. Woman. Daughter. Son. Husband. Wife. Once within their sights, they had to be found. And once in their clutches, anything was possible. It seemed that the means were justified by the ends.

Steve Biko was murdered. After the murder there was a cover up. Eight policemen were involved in the murder and in covering it up. Doctors were also implicated in the cover up. And the involvement of state lawyers, and the magistracy, in the cover up transformed the event into a grand scheme, which could only be carried out by people with money, power and evil intent.

I want to examine the events leading to the murder. Not so much the motive behind it, but to try and answer the question of what happened. Many who are here today do not know the story. And even those who know it might find it as shocking as the first time they heard it.

Steve Biko was arrested on the 18th of August 1977 in Grahamstown. Until his death on the 12th of September 1977, he was in solitary confinement, with his only visitors being his

barbaric torturers. Psychologists have long argued that isolation from human contact for long periods is a form of psychological trauma. Only recently has the United Nations adopted the Nelson Mandela rules which say that the confinement of a person for longer than 15 days without proper human interaction is a form of torture, and is by law prohibited.

The warrant for the arrest and detention of Biko had been issued in terms of the Terrorism Act 83 of 1967. That Act was the Act of all Acts. A law to end all laws. Since the 1950s the white government had tried to pass different laws to control black political activity. But the pinnacle of all of these laws in intensity, scope, breadth, and sheer cruelty and barbarism was the Terrorism Act. If a person was detained under that Act, their fate was sealed. Basically an act of terrorism came down to one factor: intent. The intent to endanger law and order in the republic. If one committed or incited, encouraged, instigated, commended, aided, advised, encouraged or procured others to do anything with that intent, one was guilty of the crime of terrorism.

Yet it was not the processes of proving the crime before a judge that was of interest to the securocrats that wielded political power at the time. Indeed, it was the process by which one came to be a detainee that was the true intention behind this law as exemplified by its central provision, Section 6. An arrest could be effected without a warrant, although in Biko's case there was a warrant. The police commissioner was under a duty to inform the minister at least once a month whether a detainee was still in detention and why they had to remain as such. A detainee could, at least in theory, make representations to the minister relating to his detention or release, who in turn had the power to order the release of a detainee. Section 6(5) was a most cynical provision, ousting the powers of the court: "No court shall pronounce upon the validity of any action taken under this section, or order the release of any detainee." And only government officials could visit a detainee. A magistrate was not allowed as a matter of course to visit, but only "if circumstances permitted". And there was no duration set for the detention, meaning that a detained person could be kept by the police indefinitely.

It was under this law that Biko was detained. Yet, as Sydney Kentridge SC, who represented Ntsiki Biko at the Biko inquest, noted on the final day of the inquest into the death of Biko, a detainee, even under this law, was an awaiting trialist. Not a prisoner yet, because no judgment had been passed by a judge concerning their guilt. But as I see it, in reality, a detainee had fewer rights than a convict. Generally, a detainee should be entitled to food, to exercise, to go outside for fresh air, to clean clothes, and to human contact. In violation of the conditions in the warrant, Biko was not allowed out into open air, he was not allowed to receive food, he was not allowed to bath. He was not allowed fresh clothes from his family. In fact, a perverse and despicable thing happened: the clothes that he was wearing were taken by the police and he was left naked in the cell. For days. Recall that the theory of the law was that a detainee could complain to a magistrate about the conditions of their detention. Biko did just that on the 2nd of September. But he was ignored.

The policemen who were responsible for Biko's entire movements while he was in detention included Daniel Siebert, Jacobus Beneke, Rubin Marx, Gideon Nieuwoudt and Harold

Snyman, taking shifts day and night.

The warrant also dictated the place of his detention: Walmer Police Station. That is where he was detained on the 19th of August. Pieter Goosen was a colonel in the South African Police. He had given the instruction that Biko should not be allowed any clothes, and that he should be kept naked. His explanation for this order was to prevent suicide. It was left to Kentridge to ask whether, for decency's sake, it was not appropriate at least to give a man some underwear.

In the morning of the 6th of September 1977, Biko was taken to the Sanlam Building for interrogation. Ms Mohapi has described the Sanlam Building as a place of atrocities. Biko would remain at this place until the night of the 8th. During that entire period – for two days – he was in wrist shackles and leg iron chains. Plainly he was also deprived of sleep, as the shackles were fastened to a grill in an "office", which was designated for the interrogation. The question of why a man would be kept in chains and tied to a grill was raised at the inquest. It too happened on the instruction of Goosen, who seemingly had limitless powers over any detainee. Of interest was whether there was any law that authorised the use of the leg irons in the manner they had been used. None, said Goosen. But that was because Biko was a detainee of the security police or the special branch. For Goosen, the special branch did not operate in terms of any statutes, but in accordance with its own powers. And there were also no convincing reasons for chaining a man to a grill for two days. He could have been kept in a locked cell. Guards could have been placed outside. But none of these options were considered suitable. What they wanted, it seems, was to break him down.

When Biko was removed from Walmer, to the Sanlam Building, he was "fit and well". Upon his arrival at the Sanlam Building, the interrogation lasted for hours, from 10am until 6pm. He was well enough to answer questions put to him, even if he was uncooperative or even aggressive. However, during the morning of the 7th of September, at 7.30 am to be exact, he was found by Col Goosen to be incoherent. Col Goosen said that he suspected that he had had a stroke in the evening of the 6th of September. A stroke. Goosen would later say why he thought of a stroke: Biko could not speak. He couldn't engage with him in any conversation. The interrogators had also conjured up their racist theories about Biko. One was that he was into Eastern yoga, and the other was that as a person who had studied medicine up to fourth year level, he had the ability to manipulate and exaggerate. So, although his physical situation was grave already by the 7th, there was no change in the course of action by the police.

Perhaps unwittingly, Goosen's observation found some support in the medical evidence. At 9.30am, on the 7th of September, Biko was examined by a state doctor, Dr Lang, who – with all his biases – found signs of neurological abnormality: slurred speech, "atactic type gait" and differences in reflexes in Biko's arms which were weaker on the right side.

If by the morning of the 7th, Biko already exhibited signs of physical and mental wreckage, these were confirmed on the 8th. On that day, two doctors examined Biko. Dr Tucker found that he moved his left upper limb with difficulty, the reflexes of the left upper limb were reduced and difficult to elicit. There was a doubtful raising toe on the right side, and he had difficulty

in using his left leg and enuresis had occurred. These were elements consistent with neurological disorder. Another doctor, Dr Hersch, also came pretty much to the same conclusions. But he took it further. There was evidence of brain damage: the extensor plantar reflex, the decline in speech and the left side weakness.

Klaus von Lieres und Wilkau was the Deputy Attorney General for the Transvaal. This is a post equivalent to today's provincial director of public prosecutions. He was a favourite among the security police in such inquests, because of the enthusiasm that he showed in defending them. Here, he was also retained. He would protest at the language used by Kentridge during the inquest. Biko had been "smashed up" by the police, said Kentridge. Any cursory reading of the medical reports proves that Kentridge was correct in his description of what the evidence revealed.

Biko could have survived if the story had ended on the 8th, and upon the realisation that he had been badly injured. But regrettably the story goes beyond that, into an even darker and sinister place. Biko should have been seen by a specialist physician. But on the 9th of September, he was still in shackles, in a confused state, because of the brain damage that he had sustained. This was so much so that there was a report that he exhibited unusual and odd behaviour. The attempt by the prison warders of Port Elizabeth to place him in a prison hospital was short lived. By the 11th of September, he had been placed back into in a cell. Sitting on a mat. Without any clothes. Obviously in excruciating pain. Dr Tucker was again called in. But it seems that on this occasion, his medical ethics had temporarily escaped him, as he saw nothing, heard nothing and could speak of nothing. His report was that there was nothing wrong with Biko. But there was something very wrong. This was why on that day, a decision was taken that he should be taken to a hospital. But this hospital, a prison hospital, was more than 1,300km away from Port Elizabeth – in Pretoria. They put him in the back of a Land Rover, with no food, no clothes, no medically trained personnel along the way, and only a bottle of water for his provisions. The police drove from Port Elizabeth to Pretoria, overnight only stopping once, to refuel. It is difficult to comprehend what went through the minds of the policemen when they drove those many kilometres knowing that there was a human being in the back who could die at any minute. "The horror! The horror!" These lines come from Joseph Conrad's *Heart of Darkness*. They are suitable here.

On arrival in Pretoria, Biko's capturers distorted his actual condition. They did not want to tell the story of his injuries. Nor did they want to impress upon the medical personnel in Pretoria that he needed urgent medical attention. Instead they passed on the story that he was shamming his illness, malingering. It was also said that he had been on a hunger strike. No one from his family had access to him. In fact they didn't know where he was. Biko didn't receive any medical help in the morning of the 12th of September.

In the evening of the 12th of September 1977, Biko died. He died in a prison cell. On a stone floor. George Bizos has described this as a sad, lonely, miserable, death. I would add the word cruel to the vocabulary.

As soon as the reality of the death of Biko hit the policemen, they panicked. This was not just a police operation gone wrong,



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which could be explained. Or the kind of death that happens because the police tend to be purposelessly heavy-handed. This was a scheme. A narrative had to be found. A story had to be constructed. Eight policemen were involved in Biko's last days. Five during the day. Three at night. Doctors, Lang and Tucker, were also involved. What would they say happened? They were the last ones to be seen with Biko the man. The first ones to be seen with Biko the corpse. How did this happen then? The evidence was clear. Biko's death was caused by brain injury. "A blow to the head." He must have suffered the blow between the 6th of September and the morning of the 7th of September 1977. One version was that he hit his head on a wall during a scuffle with the police. Yet another was that he hit his head on the floor. And an even more fanciful one was that he lunged at the police and tried to assault them. Yet this is a man they kept in chains the entire time because they accused him of a violent temper.

Jimmy Kruger was the minister of justice at the time. On 13 September 1977, he issued a press statement, which was dripping with mendacity. He claimed that since 5 September

Biko had “refused his meals and threatened a hunger strike” and that he had been regularly supplied with meals and water, but refused to either eat or drink. As if this was not enough, a day later, on the 14th of September, at the Transvaal Congress of the National Party, Kruger would utter these words, which have since gained global notoriety: “I am not glad and I am not sorry about Mr Biko. His death leaves me cold. I can say nothing to you. Any person who dies. I shall also be sorry if I die.”

There was an inquest into the death of Biko. An inquest is mandatory when a person dies in these circumstances. It

was held at the Old Synagogue, in Pretoria. The choice of this venue was also political. That is where the treason trial was held in the 1950s. In 13 days between November to December 1977, Sydney Kentridge, George Bizos and Ernie Wentzel instructed by Shun Chetty would try to restore the credibility of the legal profession under apartheid, which had been sullied by acts of cowardice and collaboration. It was clear that Biko’s death was no accident. It was not a “death in detention”. Biko had been murdered. When Goosen was questioned on this, he answered that they had no reason to kill Biko, because he was “worth more to them alive than dead”. This is a callous thing to say, today. But they could say it then because of the policy of the state towards people like Biko.

As for Biko, we know that he embraced a deeply philosophical approach to death, saying that the fear of death is an irrational thing. “You are either alive and proud or you are dead, and when you are dead, you can’t care anyway.” The conjunctive “and” in the above statement shows that Biko was not just talking about death in abstraction, but making a larger existential point, trying to answer the question of how to be in the world, as a black person. There is only one way of being the world: being alive and proud. Biko would also add that freedom comes with losing the fear of death. And that the manner of one’s death can also be a politicising thing. His death clearly was.

The magistrate who presided over the inquest was Marthinus Prins and he had two assessors, Professors Issie Gordon and J.A. Olivier, both pathologists of some repute. But all of them were clearly men of the system. While illuminating in the evidence presented and the disclosures made, the inquest failed to produce an outcome that would allow the bones of Biko to rest. This is what the magistrate ruled:

“The following is my finding according to Section 16(2) of the Inquest Act 58 of 1959

- a) The identity of the deceased is Stephen Bantu Biko, a black man, approximately 30 years old;
- b) Date of death incident: 12 September 1977;
- c) Cause or probable cause of death:

Head injury with accompanying extensive brain injury followed by centralisation of the blood circulation, disseminated intravascular (in the vessels) blood clotting as well as acute kidney failure with uremia (urine in the blood). The head injury was probably acquired during the morning of Wednesday, 7 September 1977, when the deceased was involved in an altercation with members of the Security Branch of the South African Police of Port Elizabeth.

- d) The available evidence does not prove that the death was brought about by any act or omission involving or amounting to an offence on the part of any person.”



This ruling was given on the last day of the inquest, being the 2nd of December 1977. When it was announced, Ntsiki Biko, who was sitting next to George Bizos, could not contain her utter astonishment and disgust at the ruling. “What,” she said, “is he saying there is no one to blame?” Those words have now been immortalised in a book, by George Bizos called *No One to Blame: In Pursuit of Justice in South Africa*, published in 1998. In the chapter entitled “The Passion of Steve Biko”, there is a quote from Hilda Bernstein who describes the Biko inquest as “the revelation of racism, of the way it has distorted ordinary people, and the way it has destroyed all morality and decency in a rich and beautiful country”.

This is a potent quote. Ordinary people distorted. All morality destroyed. What was going on? At his interrogation, the Security Branch theory was that Biko was wanted for authoring a subversive pamphlet which advocated black power and the killing of whites. The pamphlet was read at length at the inquest. When I read the inquest record in preparing for this lecture, I was also keen on the contents of this pamphlet, which seemingly was used by the police as a pretext to lock Biko up, under the terrorism laws. For the most part the pamphlet is about black unity. Some of the statements there are compatible with what Biko could have said. Of course, his views were public, and it was not difficult to repeat them. But it was when the pamphlet transitioned from the virtues of black unity into the murder of other black people who were perceived as opponents of black power that I knew it was a fabrication. Not even a clever fabrication. The pamphlet simply did not make any sense. It was plainly a product of Security Branch amateurish work.

But I also think that there was something deeper at play. Not designed by the bloodthirsty enforcers, like Niewoudt, Goosen, Snyman and those guys who were at the Sanlam Building, but by people higher up at the top. The people who

came up with the idea of apartheid, of how to sustain and protect white interests and privileges. The decade of the 1970s was a dangerous time for black intellectuals, who questioned the system and revived the spirit of the struggle for freedom. The decade of the 1960s did not produce an unhinged Security Branch, operating outside the rules of law, rules of decency and rules of morality. The leaders of the revolution in the 1960s were sent to prison for long periods of incarceration.

But in the 1970s and the early 1980s, African leaders were assassinated, executed, in the creation of a climate of fear. This was the legacy of BOSS, which had come into existence in 1969. Ongopotse Tiro was a talented man. He was murdered. Mapetla Mohapi was a gifted man. They murdered him. Steve Biko, who had moved from medicine to law, by the time of his death, stood at the pinnacle of the talented sons of this country. He too was murdered. Thenjiwe Mtintso fled for exile. Nkosazana Zuma left the country. Barney Pityana went to exile. Griffiths Mxenge was slaughtered with an okapi knife and beaten with a wheel spanner. Forty five stab wounds. His ears cut and his throat slit. Victoria Mxenge was chopped with an axe.

There are many others. They had different stories. What was unique is that they were the brightest and the most talented sons and daughters. But apartheid as a geography had no place for them.

The men of the law were complicit in all of this. Take the Terrorism Act as a prime template of an apartheid law. It contained an ouster clause: no one could go to court to challenge detention and no court could order the release of a person detained under the Terrorism Act. For the most part the judges enforced this law, meaning that the politicians could exercise unrestrained, despotic power over black people's lives. The ruling by the magistrate in Biko's case finding that the death was caused by unknown persons simply confirmed the selectiveness and bias of the law. It was the legal system which sided with the policemen when they murdered black activists. And it is the legal system which has enabled them to avoid accountability even after the end of apartheid.

Snyman, Siebert, Beneke, Marx and Niewoudt applied for amnesty from the TRC on the 5th of September 1996. In its ruling the TRC found that Biko's death resulted from "a collision between an object and his head in room 619, Sanlam Centre, Port Elizabeth." In his cross-examination, George Bizos had relentlessly questioned Harold Snyman, one of Biko's interrogators, now appearing as an applicant for amnesty, about how the "head injury" had in fact occurred. Bizos put it to Snyman that there was no "bump" of the head against a wall, no collision of the skull against concrete. What had happened is that the five of them, Biko's interrogators, had deliberately rammed Biko's head against the concrete wall. In fact, Snyman effectively conceded this: "Subsequently the three of us grabbed Biko and moved with him in the direction of the corner of the room and ran against the wall into the wall with him."

But it could also have been a blunt instrument, like an iron

hosepipe. Siebert blamed Gideon Niewoudt for hitting Biko with a hosepipe: "From there we moved more towards the middle of the office floor and then when Mr Niewoudt joined in with the piece of hosepipe and started hitting him with the hosepipe, we were some distance from the wall."

"Biko was smashed up", Kentridge had suggested some 20 years earlier.

The TRC rejected the amnesty application, noting that Biko's head was, on the policemen's versions "accidentally knocked in an attempt to restrain him after he attacked Siebert." On this version there was "no political objective". The scuffle was not a political thing. Restraining Biko was not a political act. The police themselves had said that when they questioned Biko,

they already had the information which apparently linked him to acts of subversion and terrorism. If that was the case, said the TRC, there could be no political objective to pursue in the further interrogation.

It was a requirement to get amnesty that an applicant should prove that they committed an offence with a political objective. And this is where the policemen came unstuck. If their version were true, said the TRC, then they committed no offence because they argued that they acted lawfully in "self-defence" against an attack by Biko, whom they accused of violent temper swings.

Eventually, however, the TRC had had enough of the cooking of the truth. The policemen were lying. Their version was so improbable that it had to be rejected as false. They were not credible witnesses. They had conspired to conceal the truth of what had led to the death of Biko. Mr Kentridge was no longer around to cross-examine the police before the TRC. But in George Bizos, there was an able replacement. He had exposed the policemen's version to be a pack of lies, just like it was 20 years earlier when Marthinus Prins, the magistrate of the apartheid order, said it was the truth. The TRC concluded that it was "more probable that Biko was attacked after [the policemen] did not take kindly to his arrogant, recalcitrant and non co-operative attitude particularly exemplified by his occupying a chair without their permission to do so. This attack appears to be actuated by ill-will or spite towards Biko. This view is reinforced by the cruel and inhumane manner in which Biko was treated after he sustained the fatal injury, in particular the manner in which he was shackled to the metal grille and his transportation to Pretoria. There appears to have been no justification at all for Beneke to simply blindly attack Biko. This in all likelihood sparked off a general attack on Biko with most of the policemen present joining in. The attack was possibly also not unrelated to the fact that the Applicants were informed that Biko had beaten up one of their colleagues on an earlier occasion."

The TRC had no way of knowing what Biko said to his interrogators. But we know what he must have said. Speaking of one of the episodes of his interrogation, Biko made plain what his general attitude was towards interrogation. He had told one policeman, he recalled, that any rough stuff wouldn't work, and

"THERE IS ONLY ONE WAY OF BEING THE WORLD: BEING ALIVE AND PROUD. BIKO WOULD ALSO ADD THAT FREEDOM COMES WITH LOSING THE FEAR OF DEATH. AND THAT THE MANNER OF ONE'S DEATH CAN ALSO BE A POLITICISING THING. HIS DEATH CLEARLY WAS."



“WHEN I SAY THAT THE LEGAL SYSTEM WAS COMPLICIT IN THE MURDER OF STEVE BIKO, I DO NOT MEAN IT IN AN ABSTRACT, COLOURLESS, VALUELESS WAY. I MEAN IT IN THE TANGIBLE, CONCRETE SENSE.”

apartheid was rule *by* law, but it is false to equate that with the rule *of* law. The former is rule by force through legislation, while the latter – which is Steve Biko’s true legacy – is the supremacy of the law, over people. This is what we must defend in South Africa. You see, the case of Biko powerfully illustrates the point. Because we had no supreme constitution, and in fact had parliamentary supremacy, it was easy simply to pass any law, and to tell any court that it had no power to intervene, including in cases of human liberty. This is all possible in a supreme parliament, but impossible in a supreme constitution.

There is a further dimension to accountability. If we are to build for the future, let it be on firm and truthful foundations, not evasions and lies. When the TRC denied amnesty to the five men who applied, that imposed a duty on the state to prosecute them. Are these men now dead? Can they be prosecuted? If they are dead, obviously they cannot be prosecuted. But that is not where it ends. Why were they not prosecuted when they were still alive? This is also another layer of complicity by the legal system – the current

legal system – to avoid doing the right thing, which is to bring perpetrators of murder to justice. I agree that our country faces many urgent and important challenges, including state capture, grand corruption, which all require the attention and the resources of the severely under-resourced National Prosecuting Authority. But the prosecution of failed amnesty applicants is also one of the things that must be done. Because the failure to prosecute apartheid killers breeds contempt for the rule of law.

Let me draw to a close on this theme of accountability. In *Country of My Skull*, Antjie Krog vividly describes the first day of the hearings into the role of business during apartheid before the Truth and Reconciliation Commission on 11 November 1997. Biko’s spirit hung in the air, haunting those who were in the room to confess about the economic benefits of apartheid. There was a “touch of surrealism”, Krog observes. The “breathtakingly wealthy” captains of industry, Nicky Oppenheimer, Bobby Godsell, Julian Ogilvie-Thomson, dressed in designer suits, sat opposite the commissioners to be questioned “just as hundreds of others have sat before them”. An illusion of equality. “Not even the rich” were above the law. Those hearings, however, began on a note of denial. Then came ignorance. And finally prevarication. Johann Rupert, Krog recalls, was there to defend Afrikaner business: “Rembrandt was started by Afrikaners and sustained by Afrikaners long before the Afrikaner had financial

that if they wanted to get information from him, the best way is to talk. And he knew of one method of dealing with them: “I only understand one form of dealing with the police, and that’s to be as unhelpful as possible. So I button up.”

This takes me to the final point. The story of Biko is also about the law. The law is a fundamentally moral thing. In Biko’s case, it was perverted to serve immoral ends. This is why Steve Biko stood against the apartheid legal order. In the end, standing on immorality, the apartheid legal order could not sustain itself, and was bound to collapse.

The story is also about injustice. If the law is selective in its application, it loses credibility. The apartheid legal system was premised on a racial injustice, on the supremacy of whites and the subservience of blacks. No legal system can survive where it is fundamentally animated by racialised inequality.

The story is also about accountability. When I say that the legal system was complicit in the murder of Steve Biko, I do not mean it in an abstract, colourless, valueless way. I mean it in the tangible, concrete sense. It was lawyers who designed a law that was so obviously discriminatory and designed to breathe life into apartheid. The Terrorism Act was a law without the rule of law. This distinction is necessary to make, because often criticism is directed – perhaps misdirected – at the law as such for producing unjust outcomes, like apartheid. It is so that

clout." By the third day it had dawned upon the captains of industry that the denials were "bad for business". But no confessions came. No truth was told.

The "blow to the head" that struck Biko was delivered at the Sanlam Building. Sanlam was an important business under apartheid, catering for the insurance needs of white people. In fact, it became synonymous with apartheid. The then managing director of the company, Desmond Smith, spoke on behalf of the company at the TRC hearings, on 13 November 1997. Sanlam couldn't support the struggle against apartheid, he told a startled TRC. That was because the struggle against apartheid was "violent". He seemingly hadn't noticed that apartheid was itself a violent policy. A further bizarre submission made by Desmond Smith was that it was "logical" that Sanlam came about from people who supported separate development, and the apartheid policy. This, in turn, allowed management of Sanlam to succumb to the "influence [and] submission" of apartheid politicians in order "to establish institutionalised apartheid". And finally, Smith pointed out, in the post-apartheid South Africa they were now friends of the new government: "In fact we are also in very good books with the ANC-led government." It was left to commissioner Fazel Randera to point to the duplicity of the company, ensuring that it pleases any government, regardless of the morality of the policies it pursues, enjoying "the best of both worlds".

Yet even in death, Biko wouldn't let go. He wanted some reckoning with his own murder. Johann Rupert asked for forgiveness about Biko. This is what he said:

"I was fortunate enough to have met the late Steve Biko in the early 1970s when he was the head of SASO. As an Afrikaner, the immorality, of his and other murders, will forever live with me as a permanent reminder, of the cruelty of man to man, as perpetrated during the evil years of apartheid. And I hope and pray that our fellow citizens will forgive us."

It was this type of forgiveness, forgiveness without accountability, that your organisation, AZAPO, together with Ntsiki Biko, took to the Constitutional Court in 1996. This means that Mrs Biko in fact had foreseen the design flaw in the amnesty process, which is why she rejected it. What she argued was that Biko's murderers should be prosecuted and punished, and that they should pay civil compensation to the victims or dependants of the victims of their deeds. True justice. We know that the case failed, because the court said that without



an amnesty process, there would be no incentive to tell the truth. Well, we also know that in Biko's case no truth was told, yet there was immunity from prosecution. Effective political immunity, not immunity through a proper legal mechanism. Meaning that Mrs Biko was right. Perhaps AZAPO's scepticism about the process of amnesty was justified. But I have to plead that we should not let that scepticism turn into cynicism at the project of democratisation under the Constitution itself. We have no other democracy. Of course we can make it better, but breaking it first will not make it better.

When the business community spoke at the TRC hearings, it made many promises to set things right. But as Krog says these promises were designed for business to "look good on the eight o'clock news". When the hearings were concluded, it was business as usual. The oil companies who were responsible for putting petrol into the apartheid military vehicles did not show up. Those who bothered to attend simply shelved their

submissions and carried on with their lives. The landowners who got the land unfairly and immorally through laws that didn't have the rule of law, like the Natives Land Act of 1913, did not attend the amnesty process. The lawyers who made the apartheid laws, those who enforced them, and those who gave effect to them, under the cloak of judicial authority, also didn't account. In fact, they carried on seamlessly. From being apartheid judges they just became judges of democracy overnight. Luckily, by now most of them are gone largely due to natural attrition. And we can try to bring dignity to the law, by a vigorous pursuit of the goals of our Constitution, to end racism, to build equality and to entrench the rule of law.


Today's generation confronts many formidable challenges. We do not have Biko's moral clarity, his courage and intelligence to confront them. Yet Biko is still here. Still irreverent. Still asking the difficult questions of the day. Granted, South Africa is crisis ridden on multiple fronts: racial inequality, crime which disproportionately affects black people, capitalism and accumulation which favour whites at the expense of black people, their progenies of racism and starvation, apartheid

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tentacles which stubbornly refuse to disentangle, and deep seated levels of poverty. Biko is still with us. Still asking: what are we going to do about the unfinished struggle for the emancipation of black people?

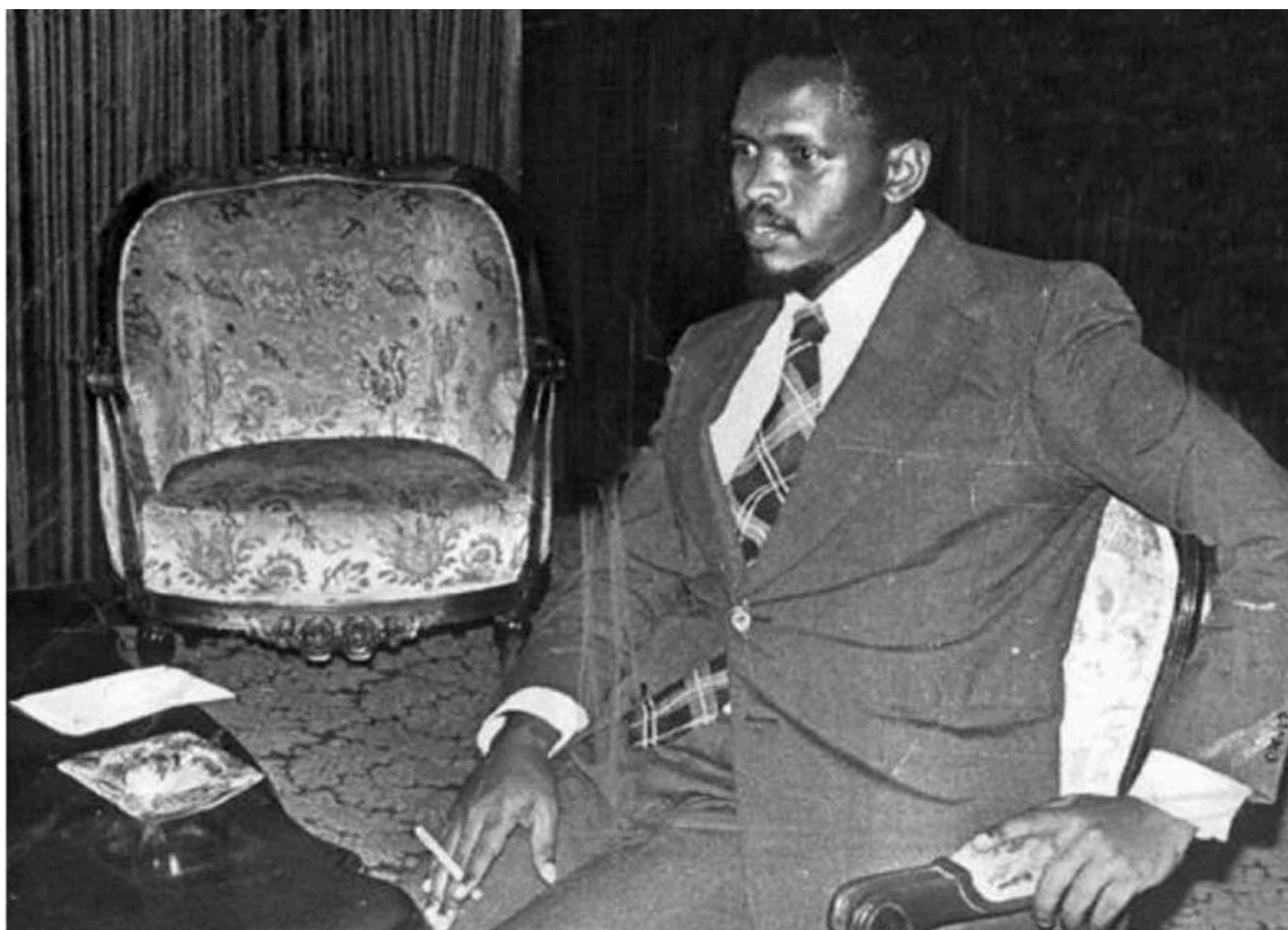
It is difficult to answer these questions. There is, however, something devastatingly disarming in Biko's intelligence: most of his ideas just flew out of him without effort. By far, he is one of the most quoted, and quotable, figures of his generation. Yet, the root of the philosophy that he espoused was not a grand and all-encompassing theory of state. It was a simpler idea of self-pride. Not a philosophy that we should think like him, but that we should think for ourselves; that the people as a whole are their own liberators. This is a theory of all theories; a theory to transcend all others; a theory to end all theories. And this isn't just a Bikoist idea, it is *Biko's* idea. The apartheid state could not match Biko, word for word, pound for pound, brain for brain. He was above and beyond their grasp.

Biko's message is not that we should be heroes. He wasn't one. Neither did he project himself as a big man of the struggle. But he does demand that we should be better than we are. That we should fight for ideas that transcend us. That we should be impatient with human suffering. Not that we should succeed, but that we should at least try.

One Azania. One Nation. 

Notes

- 1 The Steve Biko Memorial Lecture was delivered at Nelson Mandela University on 12 September 2024.



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