

D THE SO-CALLED LUBOWSKI CASE

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Darius & Leale

D1 Following a statement during a joint session of Parliament on 1 March 1990, this Commission's terms of reference was extended to include an inquiry into and a report on the allegation that Anton Lubowski was a paid agent of the South African

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~~Defence Force's Military Intelligence~~

D2 Advocate Anton Lubowski was a leading member of Swapo and was murdered in Windhoek on 12 September 1989. The allegation is made that the SA Defence Force, and more particularly the so-called Civil Co-operation Bureau, was instrumental in his elimination. Such an allegation was, for instance, made under oath by Brigadier F.J. Mostert, Commanding Officer of the Brixton Murder and Robbery Squad.

Prompted by this, it is believed, the Minister of Defence, General Magnus Malan, said, inter alia, the following in the House of Assembly on 26 February 1990:

"Allegations were made in respect of the involvement of the SA Defence Force in the murder of Mr Anton Lubowski. I want to disclose here today that Mr Lubowski was a paid agent of Military Intelligence. I have been assured that he did good work for the SA Defence Force. The Chief of Staff: Intelligence, Gen 'Witkop' Badenhorst, would consequently not have approved any action against Lubowski.

D3 During the joint session of Parliament on 1 March 1990 the State President said the following:

"In view of the controversy surrounding the alleged involvement of the late Anton Lubowski as a paid military informant of the SA Defence Force, and in view of the request made by the Minister of Defence in this connection, I announce that I have furthermore decided to expand the terms of reference of the commission as follows:

~~to inquire into and report on the allegation that~~
Anton Lubowski was a paid agent of the SA Defence Force's Military Intelligence.'

I have also taken cognisance of a statement made by Mr Theo-Ben Gurirab, Swapo's Shadow Minister of Foreign Affairs, in which an appeal is made to me to have an investigation instituted into the circumstances leading to the death of Anton Lubowski. At this stage I have decided against that. In my opinion it would be inappropriate to assign this matter as well to the commission, firstly because crime in Namibia does not fall under the jurisdiction of South African courts. Furthermore, according to my information, it is also apparent that the normal legal process of an investigation by the police in Namibia has reached such an advanced stage that warrants for the arrest of certain persons have been issued, and that a person is to stand trial on 18 April 1990. However, if facts were to emerge in the course of that case which are indicative of improper involvement by South African authorities, I would consider expanding the terms of reference of Mr Justice Harms. In the meantime my instructions are that there should be the closest co-operation with the authorities in Namibia to ensure that the law takes its course there and that justice is done."

D4 In the light of this statement and also in the light of the wording of the Commission's terms of reference as a whole,

the Commission did not investigate who was responsible for the deceased's death.

The Commission's officers did, however, co-operate very closely with Advocate Miller, the Senior Public Prosecutor responsible for the murder investigation in Namibia. This co-operation was, however, subject to the provisions of the regulations that applied to the Commission.

D5 Owing to the limited scope of the new terms of reference, and as there were delays with other work, it was decided to give it priority. Limiting factors were, however, the fact that the next of kin of the deceased as well as representatives of his estate indicated that they wished to take part in the proceedings and repeatedly asked for an opportunity to collect such evidence as they might be able to offer or might wish to offer. This matter also lost its importance, and it was subsequently decided to deal with it in the main report of this Commission.

D6 The SA Defence Force lodged an application with the Commission to maintain the utmost degree of secrecy in the course of the inquiry. This application was substantiated partly in public in a sworn statement by Lieutenant-General Badenhorst. Further facts were submitted to the Commission in camera. I came to the conclusion that the utmost secrecy was essential because -

- * existing information systems would be jeopardised;

* existing agents' freedom or lives could be exposed to danger.

The result is that the proceedings were conducted only by the Chairman and one officer, Advocate McNally SC. Even the SA ~~Defence Force's legal representatives did not have access to~~ the proceedings or documentation procured by the Commission itself.

D7 The dilemma in which the Commission found itself is described by Lord Denning¹ in similar circumstance:

"Now there is this inquiry which I have been entrusted with alone. It has the advantage that there can be no dissent but it has two great disadvantages; first, being in secret, it has not the appearance of justice; second, in carrying out the inquiry I have had to be detective, inquisitor, advocate and a judge, and it has been difficult to combine them."

When I accepted this part of the brief I was unaware of the fact that it would involve an in camera hearing and, more particularly, an in camera hearing of so special a nature. According to the Salmon Commission² a commission ought not to be appointed in such circumstances.

¹ In his so-called Profumo Report, paragraph 5.

² Paragraph 42.

DS On 22 March 1990 I issued the following statement:

"After the affidavit by General R. Badenhorst, i.e. exhibit D1, the Commission received, inter alia, an affidavit from a senior staff officer stationed at MID in which the question is fully dealt with whether or not the proceedings relating to the question submitted should be held in camera. I, as chairman, and Advocate McNally, ~~as senior officer of the Commission, having~~ examined documents, have satisfied ourselves that not only may a disclosure of the facts submitted be prejudicial to the intelligence system of MID, but also that certain individuals' freedom and/or lives may be endangered. I am well aware of the fact that full disclosure is desirable, not only to ensure that justice is seen to be done but also to afford any interested persons the opportunity of submitting evidence in rebuttal or testing the evidence proffered. Upon weighing the two conflicting interests I feel obliged particularly to set the possible danger to life above the other interests. I do not intend, therefore, unless anything unforeseen is going to happen, to disclose more than is being disclosed hereby. If an interested person wishes to adduce evidence in rebuttal, that evidence may at the request of such a person be led in public. Consideration has been given, for instance, to making a full disclosure to counsel only, but because this would place an unreasonable onus on counsel as to how to deal with the information, it has been decided against.

The terms of reference of the Commission falls into two parts:

- (a) Did the late Advocate Lubowski receive money from the MID, and
- (b) if so, did he receive it as an agent?

With regard to the first question the Commission was afforded access to or took possession of the following documents:

- (a) Original cheques issued by the South African Defence Force, duly crossed and made out to an intermediary party.
- (b) The original requisition forms which led to the cheques being issued, showing that the amounts were ~~advanced as an advance to a collaborator and~~ bearing an indication of the final bank account into which the funds had to find their way. The dates and amounts of the requisition forms correspond to those of the cheques under (a).
- (c) Proof of payment of the cheques into the account of an intermediary.
- (d) Cheques drawn on the account of the intermediary. The dates and amounts of these cheques correspond to those on the cheques referred to in (a).
- (e) Original deposit slip duplicates which correspond to the original deposit slips found in one or both of the following bank files:
 - (i) Paradiso Trust, a bank account held at Nedbank, St George's Street, Cape Town, account number 01009428144, on which the late Advocate Lubowski had sole signing powers.
 - (ii) The personal bank account of Mr A.T.E.A. Lubowski under number 1038018420 held at Nedbank, Windhoek.
- (f) Microfiches on which the deposits and the original cheques are shown.

Original deposit slips from the Paradiso Trust accounts dated 8 June 1989 - R40 000 and 28 June 1989 - R20 000 were handed in as exhibits. Likewise the microfiches. No other documents from either of the two bank accounts were handed in as originals.

As regards the intermediary, it is not disclosed whether there was one or more intermediaries. As regards (c) and (d), the plural is possibly appropriate but the complete chain was traced. The Commission also obtained evidence that the person or persons in control of the intermediary or intermediaries was or were unaware of the transactions through the account(s). Members of the

~~the Commission and used the power of inquiry, power of~~
second question is to some extent, but not necessarily, dependent upon the answer to the first. In the mean time the evidence before the Commission is that the payments to Lubowski were made to him as an agent, in consideration of which he did certain things. Until facts to the contrary have been presented, the Commission does not intend to conduct a detailed investigation."

D9 On 5 April the following statement was released:

"On 22 March I gave an account of the information obtained in camera. I stated that unless anything unforeseen was going to happen I did not intend to disclose more than was disclosed in the statement. It was also said that if an interested person wished to adduce evidence in rebuttal that evidence could at the request of such an interested person be presented in public. On 23 March I caused the following press statement to be issued:

'Certain media reports that have dealt with the disclosure of the in camera evidence in the Lubowski affair create the impression that the exposition of the evidence amounts to a finding of fact. This is incorrect. The purpose of the exposition was, in the first place, to elicit evidence in rebuttal, and in the second place, to make known what exhibits exist and where they are.

As is customary, the Commission's findings of fact will be contained in a report to the State President, and it is the prerogative of the State President to make those findings of fact known. At the request of the legal representatives of the Lubowski family and estate, they are being given time to collect evidence and the matter will only be returned to at the beginning of May.

'Judging by certain press reports, it may be inferred that the press has become an alternative forum for the inquiry. Also, the identity of Global Capital Investments has been disclosed. Because of this I have decided that the exhibits relating to the flow of money may be disclosed in due course. Meanwhile the legal representatives are being invited to inspect the original documents, which are with the secretary, on condition that they do not divulge the identity of any signatory. If any of the interested parties wish to have evidence presented, they are requested to have the necessary affidavits as well as the witnesses available by 7 May.'

Then, just to conclude, the microfiches handed in will be returned to Nedbank."

D10 It was my expressed intention to disclose the exhibits concerned at that stage, but I was requested by the Lubowski family's legal representatives not to do so because it might interfere with their own investigation to obtain evidence in rebuttal. The continual postponements were also due to their request. Evidence in rebuttal was supposed to have been

available overseas. One of the consequences of these postponements was that the summons served on the executor's attorney lapsed because Namibia had become independent. Although the executor had legal representation before the Commission, the last that was heard of him was when his legal representative told the Commission that he would indicate on ~~6 May 1990~~ what his standpoint would be regarding further participation in the Commission.

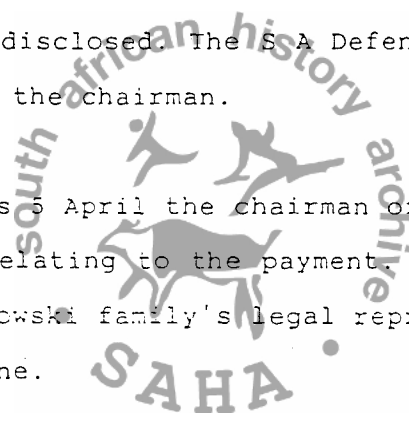
D11 On 27 April 1990 Advocate Bertelsmann SC on behalf of the Lubowski family terminated their participation in the Commission in the following words:

"Before Adv. Maritz proceeds with the further examination of the witness, may I just make a formal announcement and to place on record that our clients, the Lubowski family, yesterday decided to withdraw from the Commission for the present. Their decision to do so is motivated firstly, by the fact that the Commission's present terms of reference do not include an inquiry into the murder of Mr Anton Lubowski. You held earlier that the terms of reference could not be given such an interpretation. Our clients then requested the State President to widen the ambit of your commission but unfortunately so far without success. Our clients still hope to be able to do so and to persuade the government otherwise, in which event they would participate in such an inquiry again. Regarding the allegation that Mr Lubowski was a paid agent of the South African Defence Force, the evidence presented to the Commission must remain untested, because of the Defence Force's unwillingness to allow this evidence to be subjected to public scrutiny and cross-examination. As this impedes our clients' ability to clear Anton Lubowski's name, they have decided to withdraw from further participation

in the Commission. Nothing is intended as a slight upon you or the Commission."

D12 Although it must be presumed that the Lubowski family has an genuine and earnest desire to establish who is responsible for the murder of Advocate Lubowski, it is striking that the withdrawal took place only after the original documents had been studied by the legal representatives and almost three months had passed within which two bank accounts had to be checked. What is wrong in the quoted statement is:

- * It is the chairman who decided that the full information cannot be disclosed. The SA Defence Force merely put a request to the chairman.
- * As early as 5 April the chairman offered to disclose the exhibits relating to the payment. It was at the request of the Lubowski family's legal representatives that this was not done.
- * The documentation proves the payments beyond all doubt. The documents could not be subjected to cross-examination.
- * Advocate Bertelsmann was afforded the opportunity by the SA Defence Force of questioning Mr Penzhorn in private, who, according to the Companies Office, had an interest in the intermediary, but this opportunity was declined.



D13 The sum of R100 000 was paid to the late Advocate Lubowski in three instalments during June 1989. The relevant facts concerning the second payment are the following:

(a) On 15 June 1989 a requisition for funds was completed and approved for R40 000 to be paid by MID to a collaborator. This document was available for inspection.

(b) On 16 June 1989 cheque 3570518 in the amount of R40 000 was drawn on Treasury by the SA Defence Force payable to Global Capital Investments (Pty) Ltd. On the same day the cheque was deposited in Global's account with the Standard Bank. The original was found in the possession of the SA Defence Force and was made available for inspection.

(c) On the same day a cheque from Global (number 187) in the amount of R40 000 to A.T.E.A. Lubowski was drawn on the said Standard Bank account. The original cheque is in the possession of the SA Defence Force and was made available for inspection.

(d) On 17 June 1989 the cheque in question was deposited at the Verwoerdburg Branch of Nedbank for the credit of A.T.E.A. Lubowski's Nedbank, Windhoek, account 1038018420. The deposit slip duplicate was found in the possession of the SA Defence Force and was made available for inspection.

(e) Nedbank, Windhoek, is in possession of a microfiche containing a photograph of the cheque 187 in question, as well as the original of the deposit slip referred to above. In other words, this cheque was received in

Advocate Lubowski's personal account. The original deposit slip is probably in the possession of the deceased's executor.

It is certain that:

* The account in question was in fact Advocate Lubowski's ~~personal account.~~

* The money was paid into his account.

* All the documents aforementioned had been signed by members of the MID.

* Global was used as a front by MID in several transactions.

* The registered member of Global (which is in fact a close corporation), attorney E. Penzhorn, had long since made over his interest in Global to a third party and had no knowledge of the fact that MID was using Global as a business front.

D14 The other two payments were channelled through Paradiso Trust's bank account. The relevant facts relating to the first payment are the following:

(a) On 8 June 1989 a similar requisition was made out for payment of R40 000 to a collaborator codenamed Anto.

(b) On the same day a similar Defence Force cheque in the amount of R40 000 in the favour of Global was paid in at the Standard Bank on Global's account. Here again, the original was found in the possession of the SA Defence Force and was produced for inspection.

~~(c) On the same day a similar Global cheque (number 179) in~~
the amount of R40 000 was made out to Paradiso Trust. The original cheque was also in the possession of the SA Defence Force and was likewise produced for inspection.

(d) On the same day the Global cheque was paid in at Nedbank, Kempton Park, on Paradiso Trust's Nedbank account in Cape Town number 1009428144. The duplicate deposit slip was found in the possession of the SA Defence Force and the original deposit slip in the possession of Nedbank, Cape Town, in Paradiso Trust's file. Again, these documents were available for inspection.

It is certain that :

- * Advocate Lubowski had sole signing powers on Paradiso Trust's said account.

- * All the said documents had been signed by MID personnel.

D15 On 28 June 1989 a final amount of R20 000 likewise found its way into Paradiso Trust's bank account and the remarks made there apply equally.

D16 It is therefore certain beyond any doubt that money that had its source in MID was paid to Advocate Lubowski or in favour of him. These facts are indisputable and, as has been said, cross-examination could make no difference to the facts.

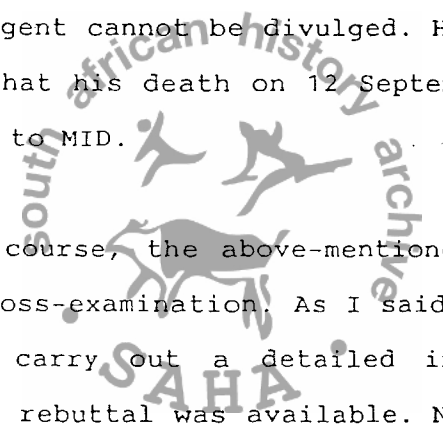
D17 The next question is whether Advocate Lubowski received the ~~money as an agent or in some other capacity. According to~~ the evidence before the Commission, Advocate Lubowski was recruited because he had the necessary access to Swapo and because he was particularly vulnerable through having lived far above his income. At the stage when he was recruited (during the first half of 1989) he was desperately seeking funds to keep his overdrawn bank account below the limit allowed by the bank. The mortgage loans on his properties amounted to approximately R160 000. His bank account was overdrawn to an amount of approximately R75 000. A measure of corroboration of this evidence may be found in a report in Beeld on 1 March 1990. According to this report his executrix had said that the money in the deceased's bank account was not his own. Apparently the deceased did receive money for projects, but paid the money into his personal bank account to ease his "usually overdrawn account". She also said that there was a fairly large mortgage on his house and that the mortgage was not insured.

D18 The deceased indicated that he was willing to act as an agent for MID for a consideration of R100 000. Contrary to normal procedure, the money was paid in advance to get him out of

his predicament and, obviously, to compromise him. The arrangement was that the money would be laundered through Paradiso Trust so as to make tracing difficult, particularly since Paradiso Trust's bank account was in Cape Town. The second instalment, however, was paid directly because Advocate Lubowski was experiencing difficulties in getting money out of Paradiso Trust quickly and he needed the funds urgently.

D19 The particulars regarding the work done by Advocate Lubowski as a paid MID agent cannot be divulged. However, the fact of the matter is that his death on 12 September 1989 came as a serious setback to MID.

D20 Admittedly, of course, the above-mentioned evidence was not tested under cross-examination. As I said on 22 March, I did not intend to carry out a detailed investigation unless evidence in the rebuttal was available. No such evidence was presented and, clearly, no such evidence could be found before the withdrawal of the legal team took place. On 27 April 1990 counsel sought permission to present argument to the Commission in their personal capacity to show that Advocate Lubowski was not a paid agent of the MID. That permission was granted, but no argument was forthcoming. On 31 July counsel reported that the Lubowski family had just forbidden them to present such argument.



D21 In the absence of any plausible alternative, my inevitable conclusion is that Advocate Lubowski received the money as an agent of the MID.

D22 In conclusion, and to revert to the statement by the Minister of Defence which led to this inquiry:

~~In my opinion the Minister erred in making the dis-~~

closure because the mere disclosure compromised certain existing information channels. Even before 22 March the Lubowski legal team already knew that Global was the probable intermediary between the MID and the deceased. Global's deposit slip in the deceased's bank account probably gave the clue.

* In so far as the statement was meant to convey that the fact that the deceased was an MID agent is proof of the fact that the SA Defence Force was not involved in his death, the premises are wrong. The CCB was suspected of the murder. The CCB acted independently of the MID. The MID probably did not even know of the CCB's existence. The CCB, in its turn, had no direct access to the MID. Without suggesting that the CCB was responsible for the act, the aforementioned facts do not show that the CCB was not responsible for the act.