THE STATE
versus
MORGAN TSVANGIRAI

HIGH COURT OF ZIMBABWE
GARWE JP
HARARE, 3 February 2003 – 26 February 2004 and 15 October 2004

Assessors: Mr M. Nyandoro and Mr J. Dangarembizi

Mr *B Patel* with Mr *Musakwa* and Mr *Nemadire*, for the State
Adv. *G. Bizos* with Adv. *C. Andersen SC* and Adv. *E. Matinenga*, for the Accused

GARWE JP: The accused in this case is charged with the crime of high treason it being alleged by the State that he approached a company called Dickens and Madson carrying on business in Canada and requested the company to arrange the assassination of President Mugabe and the staging of a military coup. At the commencement of trial the particulars of the charge against the accused were that:-

1. On 22 October 2001 at Heathrow Airport in the United Kingdom the accused requested Ari Ben Menashe of Dickens and Madson to organize the assassination of President Robert Gabriel Mugabe and to arrange for a military coup against the Government of Zimbabwe.

2. On 23 October 2001 and at Heathrow Airport, London, accused 2 faxed to Dickens and Madson a memorandum of understanding which in actual fact was cover for the unlawful plot to overthrow the Government of Zimbabwe.

3. On 3 November 2001 and at Royal Automobile Club, London, in the United Kingdom accused one requested Ari Ben Menashe of Dickens and Madson to organize the assassination of President Robert Gabriel Mugabe and to arrange for a military coup against the Government of Zimbabwe. On the same date Dickens and Madson received from BSMG a company

representing accused persons US$97,400 as initial deposit previously promised, constituting fees for the plot to carry out the assassination of President Robert Gabriel Mugabe and the overthrow of the Government of Zimbabwe.

4. On 4 December 2001 and at Dickens and Madson offices, in Montreal, Canada, accused one requested members of Dickens and Madson to arrange for the assassination of President Robert Gabriel Mugabe and the carrying out of a military coup against the Government of Zimbabwe.

Following the acquittal of the 2nd and 3rd accuseds at the close of the State case, the particulars of the charge against the present accused were amended by the State to read as follows:

1. On 22 October 2001 and at Heathrow Airport in the United Kingdom the accused person requested Ari Ben Menashe of Dickens and Madson to organize the assassination of President Robert Gabriel Mugabe and to arrange for a military coup against the Government of Zimbabwe.

2. On 3 November 2001 and at Royal Automobile Club, London, in the United Kingdom accused requested Ari Ben Menashe of Dickens and Madson to organize the assassination of President Robert Gabriel Mugabe and to arrange for a military coup against the Government of Zimbabwe. At a later stage Dickens and Madson received from BSMG a company representing accused persons, US$97,400 as initial deposit previously promised, constituting part of the fees for the plot to carry out the assassination of President Robert Gabriel Mugabe and the overthrow of the Government of Zimbabwe.

3. On 4 December 2001 and at Dickens and Madson offices in Montreal, Canada, accused person held a meeting with members of Dickens and Madson as well as a Mr Simms also known as Schuur and Mr Rupert Johnson at which the elimination of Present Robert Mugabe and the setting up of a transitional Government in furtherance of the aforesaid plot were discussed.

The accused pleaded not guilty to the charge. He also denied the particulars of the charge as itemized.

THE EVIDENCE

The following is common cause or at least not seriously in dispute. Dickens and Madson is a company incorporated in Canada and carrying on business in Montreal, Canada. The Movement for Democratic Change popularly referred to as the MDC is an opposition political party in Zimbabwe. The discussions between the MDC and Dickens and Madson that have given rise to the present allegations against the accused were facilitated by one Rupert Johnson. Rupert Johnson was fairly well known to Renson Gasela, the MDC Member of Parliament and Shadow Minister of Agriculture. Mr Gasela first came to know Mr Johnson in 1992 when Mr Johnson won a tender to supply grain to Zimbabwe following a drought in the country. At the time Mr Gasela was the general manager of the Grain Marketing Board. Sometime in 2001 Mr Johnson also made contact with Dickens and Madson. Thereafter Rupert Johnson arranged a meeting between the MDC and Mr Ben Menashe at the Heathrow Hilton Hotel, London, on 23 October 2001. Following that meeting a decision was taken by Dickens and Madson to arrange another meeting with the accused. That meeting took place at the Royal Automobile Club in London on 3 November 2001. The discussions that took place during that meeting were audio-taped by Tara Thomas, an assistant to Mr Menashe. The audio tape produced was of poor quality but a transcript was produced by Tara Thomas and Elizabeth Boutin, also employed by Dickens and Madson. Mr Menashe

eventually took the audio tape, transcript and disk and handed these over to Air Vice-Marshal Mhlanga in Harare on 23 November 2001. It was on that date that Mr Menashe advised the authorities in Zimbabwe of a request allegedly made by the accused and his colleagues for Dickens and Madson to arrange the assassination of the President and the carrying out of a military coup. A decision was made that further evidence of the request be collected. A sum of US$30,000 was provided by the Government of Zimbabwe for this purpose. A third meeting was then convened at the offices of Dickens and Madson in Montreal on 4 December 2001. That meeting was video taped. Following this a sum of US$200,000 was transmitted to Dickens and Madson on 14 December 2001. A formal agreement was then entered into between Dickens and Madson and the government of Zimbabwe on 10 January 2002 in terms of which the former was to provide public relations consultancy services and attract investment. That contract was subsequently renewed in March 2003.

What is in dispute in this case is the nature of the discussions that took place at each of the three meetings as well as the role played by Rupert Johnson. Rupert Johnson has not availed himself to give evidence and indications are that he is somewhere in the United Kingdom. The State on the one hand is saying the accused requested Dickens and Madson to arrange the assassination of the President and the staging of a military coup and that it was the MDC that sent Rupert Johnson to arrange the first meeting in London during which the request was allegedly made. The accused denies this and says Rupert Johnson approached the MDC indicating that he was a director of Dickens and Madson and that his company was able to do lobbying work on behalf of the MDC in North America and to raise funds for the party.

The State called a number of witnesses. These were Mr Ben Menashe, Tara Thomas, Air Vice-Marshal Robert Mhlanga, Bernard Schober, Chief Superintendent Moses Magandi, Senior Assistant Commissioner Mutamba, Retired

Brigadier Happyton Bonyongwe, Air Marshal Perence Shiri, Constantine Musango, Tineyi Nyawasha and Edward Tamukaneyi Chinhoyi.

The defence called the accused, Mr Welshman Ncube, Mr Renson Gasela and Mr Giles Mutseyekwa. The evidence led during the trial was very lengthy. The trial spanned a period of over a year. A detailed summary of the evidence given by the various witness has been prepared and is attached to this judgment as Annexure 'A'.

CREDIBILITY OF WITNESSES

Mr Ari Ben Menashe

He is the main witness for the prosecution as it was him who played the leading role in the meetings that took place with the accused and also arranged the recording of the meeting of 4 December 2001 in Montreal, Canada.

The defence attacked his reputation during cross-examination. Various allegations made in various press articles and publications attacking his general reputation were put to him. He denied these allegations. No witnesses were called to give evidence on his reputation. All that is before the court therefore are unsubstantiated allegations made in some cases by persons who are unknown. Having carefully considered the evidence this court is of the view that the allegations suggesting a bad reputation on the part of Mr Menashe have not been proved.

Turning to Mr Menashe's demeanour in the witness box, there is no doubt that Mr Menashe was very rude during the proceedings despite being warned by the court on several occasions. On occasions he made gratuitous remarks about the accused. He would desist when warned but would thereafter engage in similar conduct. He derided defence counsel. In reference to the accused and his erstwhile co-accused, he used language such as murderers, a criminal, a terrorist. He remarked, at one stage, that the accused has no intellectual capacity to undertake

an analysis of the results of the referendum. In reference to the accused he further remarked that a person who negates himself in evidence is mentally unstable. During cross-examination by Advocate *Bizos* he remarked at one stage "You are talking nonsense" and "Stop your nonsense".

The witness was unpleasant and continued to exhibit contemptuous behaviour even after being warned by the court. There were occasions he appeared not to appreciate he was in a court of law.

There is however need for fairness and on a careful reading of the record it is apparent that the cross-examination by lead counsel was unnecessarily long and in some instances repetitive. This was brought to the attention of lead counsel on occasions. The cross-examination was at times confusing. The language used in some instances was not always the most polite. This may, to some extent, explain the sudden and somewhat puerile outbursts on the part of Mr Menashe. Nevertheless this cannot be an excuse for some of the utterances he made during the course of the proceedings.

There are aspects of Mr Menashe's evidence that call for closer analysis.

The first relates to the role played by Rupert Johnson and in particular whether Rupert Johnson represented the MDC in the meetings that took place. It will be recalled that it was Mr Menashe's evidence that Mr Johnson represented the MDC in all the dealings they had with him. Mr Menashe was asked to explain a number of documents which reflect Mr Johnson as a director of Dickens and Madson. These are Mr Johnson's business card, the contract dated 24 September 2001 (Exhibit 3), the contract dated 23 October 2001 (Exhibit 4) which is addressed to Mr Johnson and the money transfer request dated 2 November 2001 (Exhibit 24) addressed by Mr Johnson as director of Dickens and Madson to Natwest Bank London. A careful perusal of these documents shows that Johnson must have represented himself, with the knowledge and approval of Mr Menashe, as a director of Dickens and Madson. The court says so for the following reasons. Mr

Menashe admits he saw a copy of the contract signed by Mr Johnson dated 24 September 2001. Mr Johnson signed that contract in his capacity as a director of Dickens and Madson. All Mr Menashe did was admonish him telephonically. He also observed Mr Johnson carrying a Dickens and Madson card which reflected him as a director of the company. Again all he did was reprimand him. He did nothing else. Further the contract between Dickens and Madson and the MDC (Exhibit 4) is on MDC letterheads. It is addressed to Rupert Johnson in his capacity as a director of Dickens and Madson. The face of the document reads: "Re: Memorandum of Understanding". This is followed by the words "Dear Rupert Johnson" which are handwritten. Mr Menashe initialled page 1 of the document and effected two amendments on page 2 of the same document. He then signed on behalf of Dickens and Madson. Mr Menashe would no doubt have noticed that the contract was addressed to Mr Johnson as a director of Dickens and Madson. He would have noticed that the contract was on MDC letterheads and that it was signed by Welshman Ncube. He did not correct the misrepresentation made in the document. Instead he signed the document. Further Mr Johnson, again writing as a director of Dickens and Madson, remarks in the request for transfer of the money (Exhibit 24):–

> "To assist with the verification of this transfer and for the benefit of <u>our</u> Bankers in Canada, Messrs HSBC, please would you be good enough to advise a routing reference code or number by return."

Mr Menashe also admitted accompanying Mr Johnson to the Congo on two occasions during this period. He says he paid his own fare and was largely a spectator. He wanted to find out what the MDC was up to. This trip was never brought to the attention of the Zimbabwean authorities and was only disclosed during cross-examination when the witness was questioned on the contents of the transcript of the audio tape (Exh 13). On balance the totality of the evidence

suggests that Mr Johnson represented himself as part of Dickens and Madson with the knowledge and tacit approval of Mr Menashe.

The second is the role played by Mr Simms. Mr Simms chaired the Montreal meeting posing as a representative of the American Government. In the latter part of the video, he is heard to talk about funding and mentions a figure of US$6 million. Mr Menashe is heard in the video saying to the accused that work had been done for his party in the United States right up to congress. Mr Menashe admitted no such work was done and that the meeting was a pretence. Promises of money being raised were part of the pretence. Mr Menashe denied having met Mr Simms before the Montreal meeting or knowing where he can be contacted. He says his presence at the meeting was never discussed but was arranged by Mr Legault. Mr Legault did not give evidence before this court the reason, according to Mr Menashe, being that someone had to remain in the office. Mr Menashe and Tara Thomas agreed that the purpose of the Montreal meeting was to record what was being said during the meeting. The inference is therefore irresistible that Mr Simms was brought in to give an air of authority to the meeting and to show that the Americans were involved in whatever was being discussed. Mr Simms came into the meeting with a file. The accused told the court the file had a map of Zimbabwe on it and this was not disputed. Mr Simms, if that be his real name, was obviously pretending. It is difficult to imagine Mr Menashe not knowing where Mr Simms can be contacted or what his true names are. Mr Menashe must know or is able to find out who Mr Simms is and where he can be found. His denial seems highly improbable. The State has no idea who Mr Simms is or where he can be found. He is unlikely to be a member of "Team America". Brigadier Bonyongwe in his evidence was of the view that Mr Menashe knows Mr Simms and that he has a definite link with him.

The third relates to the second London meeting and the attempt to record that meeting. No proper explanation has been given why a decision was not taken

to employ someone with more expertise to do the recording. Mr Menashe told the court he did not know if Tara Thomas was competent to do the recording. She had joined Dickens and Madson in May 2001. Indeed she admitted she had never done this before and was unable to record part of the meeting because, unbeknown to her, the batteries were flat. Mr Menashe also told the court he does not know how and why Tara Thomas was asked to go to London to record the meeting. He personally did not make the arrangements. He did not discuss with her why she was going there or what had happened at the first meeting. He did not discuss with her what she was expected to do there. He did not discuss with her the murder plot. Tara Thomas in her evidence however says Mr Menashe said the accused was going to say something which could be quite amazing, namely, the assassination of President Mugabe. She says Mr Menashe had told her to record the meeting. It appears to this court that Mr Menashe may have tried to distance himself from the unsuccessful attempt to record the second meeting.

The fourth relates to the circumstances surrounding the transcription of the audio tape. Mr Menashe's evidence was that Tara Thomas and Elizabeth Boutin occasionally put words together without actually hearing the words. This was contradicted by Tara Thomas who told the court that what they transcribed is what they heard on the diskette. Of significance however is the fact that the transcript makes reference to persons and situations Mr Menashe accepts are real. There is reference to Edith and former Zambian President Chiluba's corrupt tendencies. The transcript refers to Kenzo who was shot dead. It is not in dispute that the person shot dead was one Penza. There is then talk of Mwenzi Kongolo who was at the time the Minister of Security in the Democratic Republic of Congo. Mr Menashe accepts that Kongolo was the Minister of Security and that when he and Mr Johnson went to the Congo Mr Johnson wanted to request assistance from Kongolo in recruiting Zimbabwean soldiers. Menashe also admitted that his company acted as consultants to the President of Gambia. There is reference to the

Gambia in the transcript. Mr Menashe also admits that during the meeting there was talk of seeing the Director of the CIA or a senior American official and to keep the meeting discreet. This is in the transcript. It is clear that Tara Thomas and Elizabeth Boutin were able to hear and transcribe some portions of the tape. Mr Menashe says he did not listen to the audio tape or see the transcript. Tara Thomas says he did.

Of some concern is the fact that the audio tape given to Air Vice-Marshal Mhlanga and subsequently produced before this court was found to be inaudible. Unfortunately the equipment used by Tara Thomas and Elizabeth Boutin was not made available so that the Court could ascertain whether in fact the tape was audible in places.

The fifth is that up until 23 November 2001 everything that Mr Menashe did in connection with this matter was without the knowledge or sanction of the government of Zimbabwe. The first meeting between Mr Menashe, the accused and his colleagues was held at the Heathrow Hilton on 22 October 2001. It was at this meeting that the accused allegedly made the request for the assassination of the President and the staging of a military coup. This was followed by another meeting at the Royal Automobile Club on 3 November 2001. It was that meeting that Tara Thomas audio taped. Mr Menashe tried to contact Air Vice-Marshal Mhlanga on or about 14 November 2001 but the latter was out of the country. Mr Menashe eventually came to Harare and saw Air Vice-Marshal Mhlanga on 23 November 2001 and brought with him the audio tape and transcript. It was then that he indicated he had been requested by the accused and other MDC officials to arrange the assassination of the President and the staging of a military coup. For a period of one month Mr Menashe made no contact with the government of Zimbabwe to warn the latter about the request. The convening of the second meeting and the recording of that meeting were done without reference to the Zimbabwe Government.

The sixth is that having delivered the audio tape and the transcript to Air Vice-Marshal Mhlanga and after it was agreed that further evidence of the plot be gathered, Mr Menashe then arranged for Mr Schober to install the necessary devices to record the meeting that was to take place on 4 December 2001. A sum of US$20,000 was then forwarded to Dickens and Madson by the Government of Zimbabwe on 30 November 2001 i.e. a week after the meeting in Harare. This was followed by a further US$10,000 on 4 December 2001. It is not in dispute the money was intended to meet the cost of procuring additional evidence. It is apparent that out of the total sum of US$30,000 sent to Dickens and Madson to pay for the procurement of the evidence, a sum of US$5,000 was given to Mr Schober and the balance of US$25,000 was retained by Dickens and Madson. The meeting of 4 December 2001 was then secretly video-taped and the original video given to Messrs Magande and Bonyongwe who arrived in Harare on or about 10 December 2001. On 14 December 2001 a further sum of US$200,000 was transmitted to Dickens and Madson. A consultancy agreement was then signed between Dickens and Madson and the Government of Zimbabwe on 10 January 2002. That contract was effective for a year. By August 2002 Dickens and Madson had received a total sum of US$615,000 from the government of Zimbabwe. At the commencement of the trial in February 2003, discussions for the renewal of the contract were taking place and on 11 March 2003 the contract was renewed for a further period of 12 months on the same terms and conditions. Negotiations for the renewal had commenced 2-3 weeks before the signing. It is clear therefore that at the time Mr Menashe gave evidence he was providing services to the Zimbabwe government, a fact accepted by Mr Bonyongwe the Director General of the Department of State Security. Mr Menashe believed he is still owed US$365,000 although it appears the figure is in dispute.

It also seems highly unlikely that having spent considerable sums of money before he met Air Vice-Marshal Mhlanga Mr Menashe did not expect

reimbursement. Indeed Brigadier General Bonyongwe remarked that Mr Menashe could not have done all he did for nothing. He flew to London in first class whilst Tara Thomas flew business. They obviously incurred expenses. Thereafter he flew to Zimbabwe to meet Air Vice-Marshal Mhlanga and then flew back to Canada.

Two other matters need to be mentioned. The first is that the second and third meetings were convened in part for the purpose of recording utterances by the accused. The attempt at the second meeting was not successful. When Mr Menashe flew to Harare to meet Air Vice-Marshal Mhlanga, it was found that there was hardly any evidence on the audio tape and transcript and a decision was taken that more evidence be collected. The third meeting was then convened. A video was then produced of that meeting.

The second is that on Mr Menashe's evidence he never intended acting on the request he says was made by the accused. He attended the meetings in order to collect evidence of the request.

Regard being had to the role he played in this matter and the fact that he stood to gain financially his evidence must be treated with circumspection.

Tara Thomas

She is an employee of Dickens and Madson. It is clear from her evidence that she was completely inexperienced in the taping exercise for which she flew with Mr Menashe to London. Her story however about why the tape did not capture all the discussions did not sound credible. In her evidence in chief, she told the court she did not check the batteries. Under cross-examination she told the court she bought new batteries in London because Mr Legault had suggested that she does so in London. Having bought new batteries she did not immediately put them in the tape but instead decided to use the old. It was when she went out about 30 minutes after the commencement of the meeting that she realized the recorder was not working. She then put in the new batteries. This explanation

sounded far-fetched and improbable. It appeared to be an attempt to explain why the audio tape did not capture the whole meeting.

She also appeared hard pressed to explain paragraphs 14 and 15 of her statement to the police. In paragraph 14 she says the accused sought to discuss the transitional period but Mr Menashe asked him to be clear about what was to transpire to bring about this transition and whether this was after the elimination of President Mugabe. In paragraph 15 she says the accused responded by saying he was not prepared to discuss that issue and appeared upset. She says at that stage the accused got up from the table and asked Rupert Johnson to join him outside. Under cross examination she said her statement was incomplete because her memory failed. She also remarked, as did Mr Menashe in similar terminology, that the statement was accurate but incomplete. In the statement she says the accused indicated he was not prepared to discuss that issue and appeared upset. The issue referred to was what was to transpire to bring about this transition and whether this was after the elimination of President Mugabe.

The witness also admitted that there was nothing to suggest that the injury she sustained had anything to do with the Zimbabwe Government. That notwithstanding she received US$8,000 from the Zimbabwe Government "as compensation for injuries sustained … while executing duties assigned … by Dickens and Madson in fulfillment of its consultancy services to the Government of the Republic of Zimbabwe".

There is need to treat her evidence with caution in view of the role she played and her relationship with Mr Menashe.

Chief Superintendent Magande

His evidence was largely common cause. He told the court Mr Menashe was evasive on the identity of Mr Simms. He also admitted there was no evidence of a plot on the transcript of the audio tape. He further admitted they were aware that

what Mr Menashe was being quoted as saying publicly differed from that which was on the tape.

Bernard Schober

His evidence does not call for much comment. He was paid by Dickens and Madson to set up the recording equipment. His travelling expenses to and from Zimbabwe to give evidence were met through Dickens and Madson. On his evidence he was being paid US$1,000 per day for the duration of his stay in Zimbabwe. He seemed a good witness but it is clear the picture and audio quality of the video he produced was generally poor. His explanation that surveillance cameras are very small and that the picture he produced was the best in the circumstances was not shown to be incorrect, especially regard being to the fact that the recording was on VHS and the recording in turn was done on long play. Indeed Mr Chinhoyi confirmed this claim. A significant remark he made was that the technology does exist, perhaps not in Zimbabwe, to remove the background buzzing noise and to get clearer audio. This suggestion was not followed up by the State.

Director-General Bonyongwe

He was subjected to lengthy cross-examination on the work that was performed by Mr Menashe which justified the various payments made by the Government. When advised that Mr Schober who installed the recording equipment had only been paid US$5,000, he told the Court the balance of US$25,000 may have been used in meeting other expenses. When further advised that Mr Menashe had told the court that the company had not benefited at all he stated that he did not believe Mr Menashe did all that he did for nothing. Mr Menashe's evidence was that all the money was passed along to Mr Schober who installed the listening and recording devices. The witness appeared reluctant to give details of the work done by Mr Menashe before the contract was formally

signed in January 2002. He explained that some of the activities fell within the covert area of the department's operations and some of the vouchers related to these activities were destroyed after three months in accordance with the department's internal regulations. He confirmed that the reason why his department entered into a contract with Mr Menashe was because he had produced the video.

He believed Mr Menashe had definite links with Mr Simms also known as Schur. Mr Menashe had even promised to get Mr Simms to come to Zimbabwe. It was his evidence that they paid compensation to Tara Thomas because they had been made to believe that her injuries were connected to the work she was doing for Zimbabwe. His belief that Tara Thomas was entitled to compensation appeared genuine. However considering the evidence given by Tara Thomas it is apparent that his department was misled in this regard.

Air Marshal Perence Shiri

He appeared a good witness and was credible. He admitted meeting members of the MDC on two occasions in January 2002. The discussion centred around the possibility of the witness supporting the accused in the event he won the elections. He denied meeting Giles Mutseyekwa at a meeting held in the office of the Minister of Defence.

Messrs Musango and Nyawasha

The evidence of these two was not really in dispute. They both told the court the video was of poor quality and they experienced difficulty in understanding what was being said. Mr Musango told the court he had to play the tape several times and there were times he could not say who was speaking. Mr Nyawasha had a difficulty with Mr Legault's accent.

Mr Chinhoyi

He appeared a good witness. He had no reason to lie. On synchronization he told the court he could not see the lips of the speakers because the picture was too far out and hazy. In other aspects the movements and gestures by the speakers were consistent with the words spoken.

He described the picture as poor and hazy. It was difficult to see details and the speakers were not always audible. He confirmed surveillance cameras are not meant to provide a good picture.

The Accused

In general he did not appear confident when questions were put to him in cross-examination and in particular when asked to explain the remarks he made in the video. He reluctantly admitted that there was indeed a discussion between him and the other participants during the Montreal meeting about the elimination of the President and that the word elimination was used in a sinister way. His stance initially had been that the word elimination had been used in an innocuous sense. He told the court that as the meeting progressed it dawned on him that Mr Menashe was using the word elimination in a sinister sense. The accused was also unable to explain why a sum of US$50,000 was paid from the personal account of Mr Weeks. He called Mr Welshman Ncube who explained that Mr Weeks did so pending clearance of a cheque that had been deposited into the MDC account. If this was a normal business transaction and considering that BSMG operated an account for the MDC, it made little sense for Mr Weeks to take such a large sum of money out of his own personal account and transmit it to Dickens and Madson. If a cheque was awaiting clearance in the MDC account it is not clear why BSMG could not have waited for a few days to allow for the clearance of the cheque and then pay out in the normal way. Alternatively BSMG could have issued its own cheque in anticipation of the cheque deposited being cleared. The explanation

given in this regard is unsatisfactory and leaves one with the impression that the whole truth has not been told.

The MDC was represented in Europe by BSMG a big consultancy and lobbying company. The company also had offices in North America. The accused and his colleagues opted instead to use Dickens and Madson which was relatively unknown. The only reason given was that Renson Gasela vouched for the integrity of Mr Rupert Johnson and that they believed Dickens and Madson would do a better job in North America. The decision to use BSMG raises some suspicion. However one can go further than that.

The accused accepts as largely correct the intelligible portions of the transcript of the video – Exhibit 18. Perusal of the transcript shows that the accused made remarks or statements which are exculpatory on one hand and incriminatory on the other. The court will now proceed to look at these in greater detail. In interpreting the remarks made during the meeting sight must not be lost of the fact that Mr Menashe was out to collect evidence of a request from the accused. It is not in dispute that the accused was the only person in the conference room who did not know that the discussions were being recorded.

(a) <u>Incriminatory Remarks</u>

– At 8:53:34 Mr Menashe remarks that Mugabe's Government is not going to go away by itself. He then says the MDC represented by the accused, "commits to let us call it whatever you want to call it, the coup d`etat or the elimination of the President … wants Shiri to agree with the way to pursue this … what chances do we have that Shiri will cooperate?" In response, the accused does not deny that this is the purpose of the meeting. Instead he says "to win an election is another thing in Zimbabwe". He talks of the military being divided on what to do with Mugabe.

– 09:08:01 Mr Menashe says until now you weren't seeing the meaning of the word elimination. There are different interpretations as to the words used exactly. Tara Thomas said the words were "the weight of the word elimination". In response the accused says, amongst other things, the arrangements of elimination of the President are in a different scenario. He says "we have to work at another strategy to communicate with them, But how do you communicate with them in the event of what is going to happen? …. It is now a new scenario, then we have to relook at that." Under cross-examination the accused admitted the scenario referred to was the illegal removal of the President.
– 09:22:03 Mr Legault says his understanding of the London meeting was that definitive action against President Mugabe was necessary because of the uncertainty of the electoral process. The accused agrees that when he came to the meeting his understanding was that "the second meeting would brief me about the transitional arrangement, what's going to happen if we move towards this …. how then do you move to the next step, and the next step. The next step being a three-phase program, the transitional program, the election process and the post transitional program … and this meeting was supposed to be talking about, ok, we have moved so far; we can definitely say that Mugabe is going to be eliminated. What is the transitional arrangement that is in place."
– 09:26:39 There is talk of power sharing. The accused asks what the formula would entail. He says on their side power sharing is not a problem but he asks whether that will mean that the head of the military will head the government. There is talk of an interim president. The accused then says "in the event of that happening" the army must guarantee that "that they will remain an outside guarantee for enforcing a bi-partisan Government, a transitional Government between ZANU(PF) and the MDC for a certain duration. That duration should … lay down the basis for a clean election. …."

- 09:28:27 When asked who is to call for the emergency the accused says "all they need to do is tell the Vice President that, look, we have got a crisis, we cannot proceed immediately after the President's elimination but we want to form a transitional relationship with the MDC to ensure that conditions are put in place for a free and fair election. We cannot move into free and fair elections under circumstances where the country is not stable because the head of State is gone…."
- 09:30:42 The accused says in his view that would be the most stable way to proceed and it will not raise suspicions.
- 09:31:28 The accused says Perence Shiri must be brought on board not on the question of the elimination of Mugabe, but on the fact that they have to guarantee a peaceful transition.
- 09:37:32 The accused says the most serious concern in Zimbabwe is that if Mugabe goes into the election, then there will be mayhem. He says "that emphasises that moving Mugabe aside creates more opportunities …"
- 09:43:56 Mr Legault says if Mugabe is taken out before the election you are going to run into some kind of chaotic mess. The accused says "To me that's the fundamental issue …".
- 09:46:03 In response to an earlier question by Mr Legault that if Mugabe is harmed, there will be chaos and mayhem, the accused says "And that's where I think, the problem is. But all we can pray for is for the military to understand that these are the scenarios that have emerged."

(b) <u>Exculpatory Remarks</u>

- 09:00:58 Mr Menashe asks whether in the event of a breakdown of power, Perence Shiri would support the MDC. The accused says it depends what kind of power breakdown to which Mr Menashe says "The President is

eliminated." To this the accused responds "If the President goes, then there is a vice-president: who is supposed to take over in terms of the constitution.

- 09:01:35 When asked by Mr Menashe what they are talking about the accused says "We are talking about an arrangement where if Mugabe goes the Vice-President takes over and within three months there will be elections, that's the constitutional arrangement ."
- 09:01:50 Mr Menashe then says he thought they were talking about "the elimination arrangement, having a transitional government to which the accused responds by saying "How is it going to come about?" When Menashe says "That's exactly the point!" the accused says "Because in terms of the Constitution …" after which he is interrupted by Mr Menashe who says it looks like they are guilty but they can all talk openly.
- 09:05:08 After further talk of the elimination of the President and a transitional government and Mr Simms refers to $6 million in government funding and the process involved the accused remarks "Yes, don't mistake me, I am not opposed to a transitional arrangement, I am saying, practically, how is it going to emerge. I am not opposed to a transitional arrangement, how is it going to emerge, in the event that the president is gone."
- 09:07:39 At this stage there is a dispute as to what was said before the accused responded. Mr Menashe says there was a question by Mr Legault whether a meeting had been held with people in the current power structure. Indeed there are words to that effect on the tape but they are not very audible. The defence suggested that these words may have been inserted. Whatever the correct position, the accused remarked "The discussion was never about the elimination of Mugabe. It was about the election and the post election outcome." Mr Menashe immediately steps in and says "But now there is a different story". Mr Menashe further says "Because until now you weren't seeing the meaning of the word

elimination". The remark by Mr Menashe "But now there is a different story" followed by the further remark "Because until now you were not seeing the weight of elimination" are not entirely consistent with the question raised by Mr Legault whether there had been a meeting with people in the current power structure.

– 09:09:34 The accused then remarks "I think lets not get confused. The circumstances under which the MDC and all the power institutions communicated were based on moving towards an election. So don't try to arrange, or to set up, these arrangements of elimination of the President are in a different scenario. In a different scenario, then, we have to work at another strategy to communicate with them. But how do you communicate with them in the event of what is going to happen? As far as I am concerned the arrangements and discussions so far were based on the election process. Its now a new scenario, then we have to relook at that."
– 09:10:22 Mr Menashe says they had discussed this new scenario but he was now very surprised as this was a completely new scenario. The accused asks "which one" and Mr Menashe comments: "Well Morgan is talking about elections, now he thinks we didn't talk about elections … He agreed to us on the transitional Government but suddenly we hear he is talking of elections … we are hearing the backtrack of the situation." In response to this the accused says "I do not think so. I think you got the point wrong."
– 09:11:58 Mr Menashe says they are not hired guns neither are they going to murder Mugabe and then assassinate or eliminate or whatever. He further remarks that this is not what they do for a living. To this the accused remarked "I am certainly agreeing with you there. The arrangement really is, when we last met at the RAC Club we agreed that the route we were going to take was that if Mugabe goes there will be a transitional arrangement but the method of implementation was not discussed."

– 09:13:33 After Mr Menashe remarks that work has been done up to Congress and to get people "on site for the elimination" the accused then left the room together with Rupert Johnson. It is at this stage Tara Thomas says the accused looked upset. However there are also words to the effect "Lets stop the process" before the accused walks out.

THE AUDIO TAPE

This was brought to Harare by Mr Menashe when he came to see Air Vice-Marshal Mhlanga on 23 November 2001. Air Vice-Marshal Mhlanga described the tape as inaudible. Mr Menashe also brought with him a transcript of the tape. It is not in dispute that using normal transcribing equipment available in this country one cannot produce the same kind of transcript as did Tara Thomas and Elizabeth Boutin from the same tape. Tara Thomas told the Court that the transcript was made possible after the audio tape had been recorded on to a diskette and the diskette in turn played on equipment with equalizer. Unfortunately the equipment that was used in transcribing the tape was not brought and it is therefore not possible to confirm the truthfulness of Tara Thomas' evidence in this respect. In fact the transcript was only made available to the defence after the commencement of the trial largely because the State considered it of no consequence. Indeed the police officers who gave evidence told the Court it was not included in the docket because there was nothing on the audio and there were many gaps in the transcript.

That the transcript is a relevant piece of evidence there can be no doubt. Indeed it should have formed part of the investigations. According to Mr Menashe and Tara Thomas, there was a request at the second meeting for the assassination of the President and the staging of a military coup. Tara Thomas accompanied Mr Menashe to London to record the discussion on the tape recorder. The transcript produced by Tara Thomas and Elizabeth Boutin has complete sentences in certain

sections and one can follow the discussions that took place in those sections. The court has already noted that the transcript refers to former Zambian President Frederick Chiluba and his alleged corrupt practices as well as other players on the Zambian political scene including Edith and one Penza who was killed. There is reference to the Congo and the Minister of Security Mr Kongolo. The transcript is therefore relevant containing, as it does, portions which reflect clearly the discussions that took place. What is in the inaudible portions will of cause never be known. But to the extent to which the transcript contains meaningful discussions during that meeting, it is relevant.

It is relevant because the State says there were various requests by the accused during that meeting for the assassination of the President and the staging of a military coup. It is not in dispute that the transcript does not in fact contain evidence of such a request. Although the transcript is not complete, the fact that it does not confirm that such a request was made is relevant. A document is not only relevant because it supports the case for the prosecution. It is also relevant if it does not do so or if it contradicts the prosecution witnesses.

In the light of this it was improper for the State to have ignored the transcript or at the very least not to have brought the contents of the transcript to the attention of the defence. The duty of the prosecution to do so in these circumstances in now settled law - see *Smyth v Ushewokunze & Anor* SC 1997 (2) ZLR 544, 549, *Mutevera v S* HH 112/01. However in fairness to the investigation team, there appears to have been a genuine but misguided belief that it was not relevant.

THE VIDEO TAPE AND TRANSCRIPT

Besides the oral evidence given by Mr Menashe and Tara Thomas to the effect that the accused requested for the assassination of the President and the staging of a military coup, the video tape and accompanying transcript are no doubt

important pieces of evidence in this case. Mr Menashe told the court that the meeting in Montreal was recorded in order to provide proof of the criminal intention of the accused.

The video was played several times during the course of the trial. The video is accompanied by a humming sound almost similar to the sound that one hears on an aircraft in motion. The state witnesses attributed the interference to a central air conditioning system for the entire office block. What was said by the witnesses is audible in some places but not in others. This much is apparent from the transcript of the proceedings which reflects gaps in various places.

There is no doubt that both the picture and audio quality of the video tape are poor. The picture does not provide clear focus generally although one can identify the different people who took part in the meeting. The audio quality is certainly poor as there are various inaudible portions in the video. In short the video does not provide a complete record of what was discussed.

The State led evidence from Mr Chinhoyi. Mr Chinhoyi showed the court the various techniques used in tampering with a tape. He told the court in general poor focus cannot result by mistake especially if there is a monitor. He examined the video tape in this case and did not see any evidence of tampering. He told the court however that one cannot say so with certainty as there are modern techniques that can be used in such a way as to make alterations undetectable. It was also his evidence that it is easier to tamper with a poor picture than a picture of good quality. In his opinion the real difficulty with the video is that whilst the picture remains unbroken the sound is interrupted in several places.

Mr Schober in his evidence told the court that technology exists to remove the buzzing sound and thereby enhance the audio sound. This was not followed up. The result is that there is before this court a video tape in which some of the discussions during the meeting are audible and others are not. Because of the gaps

one cannot say what words followed or how those words might have qualified the words that are audible.

The question that arises is whether the video is admissible.

In his evidence the accused told the court that he used the transcript to "jog" his memory. His assessment was that generally the audible portions of the tape correctly reflect the discussions that took place in Montreal. There were a few amendments to the transcript by Mr Menashe, Tara Thomas and the accused. Most of the amendments were not in contention. There is some dispute however on what was said before the accused uttered the words –

"The discussion was never about the elimination …."

In short therefore the correctness of the portions that are audible is not really in dispute although the admissibility of the video has been challenged.

The law on the admissibility of video and audio tape recordings was considered in *S v Ramgobin & Others* 1986 (4) SA 117. In my view that decision correctly reflects the law on this topic. In the present case the authenticity and accuracy of the video have been established although suggestions have been made that it may have been interfered with. The fact that a tape is inaudible in parts is no reason to require its exclusion, particularly in a case, such as the present, where the accused accepts the accuracy of the portions that are audible. In all the circumstances therefore this court reaches the conclusion that the video tape is admissible.

Of significance however is the fact that it is common cause that nowhere in the video tape is there a direct request to Mr Menashe or his company Dickens and Madson to arrange the assassination of the President and to carry out a coup d`etat. Indeed it was for this reason that the State, at the close of the State case, amended the charge and removed all reference to such a request during the third meeting.

FINDINGS ON THE FACTS

The following are the findings of the court on what happened.

First, on the evidence before the court, Rupert Johnson could not possibly have been representing the MDC. The documentary evidence available suggests that Rupert Johnson represented himself as a director of Dickens and Madson, with the knowledge of Mr Ari Ben Menashe. The suggestion that Rupert Johnson approached Dickens and Madson in his capacity as a representative of the MDC is not therefore tenable.

Second, the transcript of the meeting held at the Royal Automobile Club, though incomplete, does not reflect the request that Mr Menashe says was made for Dickens and Madson to arrange the assassination of the President and the staging of a military coup. The intelligible portions of the transcript reflect discussions on other topics.

Third, it is clear that the third meeting, like the second, was recorded on tape by Dickens and Madson in order to secure evidence of a request by the accused for assistance in arranging the assassination and military coup. Mr Menashe had been told that what he had brought to Harare on 23 November 2001 contained no evidence of such a request.

Fourth, the video recording is generally of poor quality. The picture appears hazy and somewhat lacking in focus. Though audible in places, the audio quality is generally poor. The transcript of the video confirms that a lot of what was said is not inaudible. In short there are gaps and it is not possible to say what was said on those occasions.

Fifth, it is clear that by the time the video recording took place Dickens and Madson had been paid US$30,000 out of which sum Mr Schober was paid US$5,000. About two weeks later on 18 December 2001 a sum of US$200,000 was sent to Dickens and Madson by the Government of Zimbabwe.

Sixth, the audible portions of the video tape do not reflect a request on the part of the accused for Dickens and Madson to arrange the assassination of the President and the staging of a *coup d`etat*. It was for this reason that the State applied to amend the charge following the discharge of Welshman Ncube and Renson Gasela at the close of the State case. In the application the State says "The evidence of the State witnesses at the trial shows that the accused requested members of Dickens and Madson to arrange for the assassination and coup *d'etat* at the first and second meetings. There is no evidence to show that the accused specifically repeated this request at the third meeting in Montreal."

Seventh, the audible portions reflect various statements being made by all the people in attendance. In the majority of cases questions were put to the accused and he would answer. It is apparent from the video that the accused initially appeared confused and gave the impression he did not know what was being referred to. In later portions of the video he appears less hesitant and makes a number of remarks, some of them not innocuous.

Eight, the discussions at the Montreal meeting touched on the transitional period following the elimination of the President, the post election period as well as the funding needed for this purpose. The meeting discussed what would happen in the event the President was eliminated, the possibility of chaos, the role of the army in this situation and the need to engage the army so that they provide stability during the transitional period. There is talk of the need to meet Perence Shiri. There is no doubt that the accused took part in this discussion and that the discussions at this stage were anything but innocuous.

WHY MR MENASHE AND TARA THOMAS MUST BE TREATED AS SUSPECT WITNESSES

Allusion has already been made to the need for the evidence of Mr Menashe and Tara Thomas to be treated with caution. On the evidence there can be no

doubt that Mr Menashe had a financial interest in this case. Tara Thomas was his assistant. She did as instructed. Neither he nor Tara Thomas can be described as impartial. They were out to trap the accused. In *S v Ohlenschlager* 1992 (1) SACLR 695 it was suggested that in such situations the ordinary principles of co-perpetrator or accomplice should prevail. In short both must be treated as suspect witnesses. The remarks by HOLMES JA in *S v Machinga* 1963 (1) SA 692 A 693-694 that –

> "Whatever the juristic niche into which he may be classified as a witness, his evidence had two things in common with that of an accomplice. First he had a possible motive to benefit himself by false implication of others, …. ….. Secondly by reason of his participation in this crime he was in a position to deceive the unwary by a realistic account of it."

are pertinent.

The need for caution in these circumstances was also stressed in *S v Mupfudza* 1982 (1) ZLR 271, 273C where BARON JA remarked as follows:

> "There are several types of witnesses who, for one reason or another must be regarded as suspect and whose evidence must be regarded as suspect and whose evidence must be approached with particular caution …. In all such cases there is potentially a danger of false incrimination, and before a trial court can safely convict on the testimony of such a witness it must satisfy itself that that danger has been excluded …."

Considering the role played by Mr Menashe before the Government of Zimbabwe became involved in this matter, the fact that he was engaged by the Government after procuring the video tape and the extent to which his company has benefited as a result of the contract it signed with the Government there is need for the evidence of both Mr Menashe and Tara Thomas to be treated with caution.

WHAT THE STATE IS REQUIRED TO PROVE

Reference has already been made to the particulars of the amended charge that the accused is facing. The particulars of the charge may be summarised as follows:-

(a) in respect of the meeting of 22 October 2001 that the accused requested Mr Menashe to organize the assassination of President Mugabe and to arrange a military coup.

(b) in respect of the meeting of 3 November 2001 that the accused again made the same request and thereafter transmitted a sum of $97,400 being part payment of the fee charged to carry out the plot.

(c) in respect of the meeting of 4 December 2001 that the accused held a meeting with members of Dickens and Madson as well as Mr Simms and Mr Johnson, at which the elimination of the President and setting up of a transitional government in furtherance of the plot were discussed.

Section 146 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides that each count of an indictment, summons or charge should set forth the offence with which the accused is charged in such manner and with such particulars as to the alleged time and place of committing the offence and the person, if any, against whom … the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge. In other words the charge should be framed in such a way that the accused fully understands the nature of the charge he is facing. Although this is elementary it is necessary to stress once again that a charge must correctly state the basis of the allegation made against an accused person. Unless another offence is a competent verdict, or unless the essential elements of the other offence are included in the essential elements of the offence actually charged, an accused person cannot be convicted of an offence with which he is not charged. Thus for example a person charged with theft cannot be convicted of assault even if that offence is proved in evidence. The court will revert to this aspect in due course.

In respect of the crime of treason the position is now established that –

> "there are … as many acts of high treason as there are overt acts; and … each may constitute a separate offence, in itself, susceptible of forming the

subject matter of a separate count " - see *South African Criminal Law and Procedure,* vol. II, *Common Law Crimes,* 3 ed. by JRL Milton at page 38.

In practice however the State often sets out the various alleged overt acts, not as separate counts but by way of particulars of a single count – see *South African Law and Procedure (supra)* at page 38.

Indeed it has been suggested that where there are several acts chargeable, it is desirable to group them together in one count, with separate paragraphs in date sequence, all those which are of the same character – see *Gardiner and Landsdown,* 6 ed. (1957) 1002.

The above remarks are pertinent regard being had to the fact that although the accused is facing a single count of high treason, three particulars of the offence have been set out by the State in the present case.

The evidence given by Mr Menashe and Tara Thomas may be summarised as follows. At the first meeting held at the Hilton Hotel, Heathrow on 22 October 2001 the accused in the company of Mr Welshman Ncube and Mr Renson Gasela requested Dickens and Madson to arrange for the assassination of the President and the staging of a military coup. Mr Menashe says they went to the second meeting "to make sure I and everyone else heard correctly". He says on this occasion the request was repeated and in addition practical matters to be dealt with in order to carry out the plan were also discussed. During the third meeting they discussed what would happen after the assassination of the President as well as the transitional process.

On the basis of this evidence and in the light of the particulars of the charge supplied by the State the court found, at the close of the prosecution case, that only one overt act had been alleged in the indictment – namely the request made to Dickens and Madson to arrange the assassination and staging of a military coup. The court held that all three meetings were important and composite elements of the overt act. The second and third meetings were a continuation of the first. On that basis this court held that only one overt act had been alleged although three

meetings had been held between the parties to discuss the request. On reflection however it does appear that each request as alleged in the original charge may have constituted a separate overt act. Nothing however turns on whether there was more than one overt act charged in this case. I will revert to this shortly.

The State submitted in argument that if only part of the overt act is proved and that which is proved amounts to treason then a conviction for treason would be proper in the circumstances. This submission must be accepted as correct. In other words if a request had been shown to have been made at any one of the three meetings then the crime of treason would have been committed.

The gravamen of the allegation in the first and second particulars of the amended charge is requesting Mr Menashe to assassinate the President and to organize the coup. Put another way the charge against the accused is that he incited Mr Menashe. A request to another to engage in criminal conduct amounts to incitement – see the remarks of HOLMES JA in *S v Nkosiyana* 1966 (1) SA 655. An inciter is one who unlawfully makes a communication to another with the intention of influencing him to commit a crime – *South African Criminal Law and Procedure*, vol 1, 3 ed. by JM Burchell, page 39. Although there is reference to a plot in paragraphs 2 and 3 of the particulars to the charge, this appears to refer to nothing more than the request. Indeed the Acting Attorney-General stated during his closing address that the discussion was "in furtherance of the plot constituted by the request".

In respect of the third meeting, the gravamen of the allegation is that there was a discussion "in furtherance of the aforesaid plot".

At this stage it is necessary to comment on what appears to be a misunderstanding on the part of the prosecution as to the overt act or acts the accused is alleged in the charge to have committed in this case. Although the particulars allege a request, reference has been made during the trial to a conspiracy and a plot. In paragraph 31 of its closing address the State says the

charge is plotting to assassinate the Head of State and to overthrow the Government. However in paragraph 35 of its closing submissions, the State says the accused incited and sought to arrange the assassination of the President, the carrying out of a military coup and the setting up of a transitional government. The Acting Attorney-General stated that the discussion was in furtherance of the plot constituted by the request. There is a big difference between a request (i.e. incitement) and an agreement (i.e. conspiracy). A plot has been defined in the Concise Oxford Dictionary as a secret plan or scheme. It may also mean a conspiracy. Certainly on a charge as serious as treason the particulars of an overt act of conspiracy must be clearly stated. The particulars must identify the co-conspirators and the agreement they are alleged to have concluded.

Paragraph 2 of the original charge alleged that a memorandum of understanding was faxed to Dickens and Madson and that it was a cover for the unlawful "plot" to over throw the government. No further detail of the "plot" was given. No indication was given as to who was involved in the plot. Were the plotters the three accused or was it the three accused and Mr Menashe? The evidence of Mr Menashe was never that there was a conspiracy between him and the accused at any of the meetings. His evidence was that he pretended to go along in order to obtain evidence and did not intend to act on the request. In these circumstances there cannot therefore be any question of a conspiracy – see *R v Harris* (1927) 48 NLR 330.

In the light of all these facts this court found at the close of the State case that only one overt act had been charged i.e. incitement. The court has already accepted that on reflection each request could have been treated as a separate overt act. The accused's erstwhile co-accuseds were acquitted firstly because the evidence against them was flimsy and secondly because they could not have been convicted, whether or not there was more than one overt act, on the evidence of only one witness, namely Mr Menashe. The allegation that there were discussions

in furtherance of the plot was only substituted following the acquittal of the erstwhile co-accuseds at the close of the State case. Consequently it would not have made any difference, so far as the erstwhile co-accuseds were concerned, whether more than one overt act had been alleged.

What the State is required to prove may be summarised as follows. In respect of the first meeting, that there was a request. In respect of the second the same but further that a sum of $97,400 was forwarded "as part of the fee for the plot". In respect of the third meeting that there were discussions in furtherance of the plot. There is no allegation that there was a conspiracy at the third meeting. The allegation is that there was a discussion in furtherance of "the aforesaid plot" i.e. the plot allegedly hatched during the first two meetings.

The remark made that there is no allegation of a conspiracy at the third meeting requires amplification. At the commencement of the trial the allegation in respect of the third meeting was that the accused requested members of Dickens and Madson to arrange for the assassination of the President and staging of a military coup. Following the acquittal of the accused's erstwhile co-accused at the close of the State case, the prosecution conceded there was no evidence of such a request. Instead the prosecution sought to amend the charge to allege that there was a discussion between the accused and various other persons at which the elimination of the President and setting up of a transitional government in furtherance of the plot were discussed and agreed. The court ruled that since the accused had come to court to answer the allegation that he had requested Dickens and Madson to arrange the assassination of the President and staging of a military coup, the State was not entitled, half way through the trial, to amend the charge to allege that there was an agreement between the accused and the other persons who attended the Montreal meeting. The court found that such an amendment would have been highly prejudicial. Accordingly the court granted the amendment but the words "and agreed" were struck out. In short therefore the court ruled that so

far as the Montreal meeting was concerned the State was not entitled at such a late hour to allege a conspiracy when all along the allegation had been one of incitement.

The Court is aware that an overt act may take the form of speaking or writing words. Indeed in *R v Wenzel* 1940 WLD 269 the court held that a person who writes or speaks in the furtherance of an intent to overthrow or coerce the government would be guilty of treason.

HAS ANY OVERT ACT AND HOSTILE INTENT BEEN PROVED?

It has been noted that the State is relying on three particulars of the charge, each of which in turn relates to each of the three meetings. It is necessary to look at the evidence led in respect of each meeting and thereafter determine the extent to which that evidence proves the act alleged.

Turning to the first meeting that took place on 22 October 2001, the only available evidence is that of Mr Menashe. He says there was a request. There is no other evidence which confirms that this request was made. The court has already found that Mr Menashe is a suspect witness. In all the circumstances it cannot be said there is reliable evidence of a request having been made during the first meeting. Put another way the evidence before this court does not clearly establish that such a request was made.

Coming to the second meeting, in addition to Mr Menashe's evidence, there are other pieces of evidence. There is the evidence of his assistant Tara Thomas. For reasons already given the evidence given by both Mr Menashe and Tara Thomas must be treated with caution. Further the contract signed at the second meeting does not in any way substantiate the claim that there was such a request. The contract itself does not say so. To the contrary it talks of Dickens and Madson

representing the MDC in the USA and Canada and lobbying for support of the MDC's programmes and ojectives. There is also nothing to suggest that the sum of US$97,400 transmitted by BSMG was anything other than part of the fee of US$500,000 charged by Dickens and Madson for lobbying services in terms of the memorandum of understanding. Then there is the transcript of the audio. The transcript however does not in any way confirm that a request was made. Indeed when Mr Menashe met with Air Vice-Marshal Mhlanga and Retired Brigadier Bonyongwe, it was agreed that there was no reliable evidence of a crime having been committed at that stage and that there was need for further evidence to be obtained. In short there is also no reliable evidence of a request having been made at that meeting. Nor is there any evidence of a "plot" having taken place at that meeting.

Turning to the third meeting different considerations however apply. This meeting was video-recorded. It is common cause however that nowhere in the video tape is there a request by the accused to Mr Menashe to arrange the assassination of the President and to stage a military coup. The court has already noted that the video tape is not audible in places. The transcript has gaps. In other words one cannot say what else was said in the portions that are not audible. During the meeting however there is clear evidence of a discussion touching on several issues such as what would happen following the elimination of the President, the post-election period, the role of the army and Air Marshal Perence Shiri in particular, etc. The discussions in this regard have previously been commented upon. In addition to the video tape the State is also relying on the evidence of Mr Menashe and Tara Thomas both of whom say the accused made the request and that the third meeting discussed the aftermath of the illegal removal of the President. The court has already found that the two are suspect witnesses and that whatever they have told the court must be viewed with caution. Mr Menashe in particular must have been under considerable pressure to get an admission on

tape from the accused to confirm his story that there had been a request. It goes without saying that Mr Menashe and the others who knew that the proceedings were being recorded would have steered the discussions in such a way as to induce an admission. Some of the utterances made by the accused particularly at the beginning suggest that there were statements being made that he did not agree with. There were occasions he appeared confused. In the latter part of the discussion however he seemed more at ease and responded to questions and also put questions to the other persons in attendance.

Sight must not be lost of the fact that the allegation in respect of the third meeting held in Montreal is that there were discussions in furtherance of a previous plot. It has already been noted that there were indeed discussions touching on several issues following the removal of the President. The evidence, as has been noted, does not disclose either a request or a plot at either the first and second meeting. In the result, in so far as the third meeting is concerned, the evidence discloses a discussion but there is nothing to suggest that the discussion was "in furtherance of a previous plot". Nor can one say, in the light of the contradictory remarks made by the accused in the video, that the video conclusively proves that a plot had previously been agreed upon and that the discussions during the meeting were in furtherance of that plot.

Is a discussion in these circumstances treasonous? The State submitted that "even a preparatory act done with hostile intent" or "mere signification can be sufficient". Whilst this statement in general terms is correct, the State faces some difficulties.

The first and most serious difficulty is that contrary to remarks that have been thrown about during the course of this trial the accused did not come to court to face a charge of conspiracy in respect of the third meeting. The allegation initially was that he made the request at all three meetings. Only after the discharge of his erstwhile co-accused did the State amend the charge to allege that

he and others took part in discussions which were in furtherance of the previous plot.

The second is that even if it were to be assumed for a moment that the charge is one of conspiracy it is clear that on the authority of *R v Harris (supra)* there can be no question of a conspiracy as there was no intention on the part of Mr Menashe and the others to act on any understanding as this was a trapping exercise.

The third difficulty is that the evidence does not in any event show that there was a conspiracy or a plot at either the first or second meetings. Put another way, there is no evidence of "the aforesaid plot" having taken place at either the first or second meeting.

The fourth is that a mere discussion "in furtherance of the aforesaid plot" is not, in the absence of evidence of an incitement or a conspiracy, treason.

In *R v Labuschagne* 1941 TPD 271 there were three meetings during which there was a discussion as to whether the parties should participate in acts of treason. The discussions were certainly not innocuous. GREENBERG JP who presided over the trial remarked on pages 273-5 of the judgment:-

> "We now come to the third meeting in which the first and third accused are implicated. This meeting, of course, must be taken in its setting in so far as the happenings of the first and second meetings are relevant to a full understanding of the third meeting. The meeting, as I have said before, was a meeting on a farm outside Potchefstroom. The first and third accused and six or seven soldiers – I think seven is the number – Kennedy and the two brothers Prinsloo, the owners of the farm, were present at that meeting and the first question to be considered is whether there is evidence of a conspiracy on that occasion, taking the facts there in conjunction with what happened before.
>
> The evidence shows that a plan was produced by one van Jaarsveld, one of the soldiers. It had been suggested at an earlier meeting that he should get this plan and that it was necessary for their further activities. I omitted to mention that in regard to the acquisition of this plan, it is not proved that the accused who was present when the plan was mentioned

knew that this was arranged and therefore he cannot be convicted of complicity in this matter.

But to return to the third meeting, the evidence shows that the plan was produced and that it was studied by all the persons present, including the first and third accused. They all looked at it and the plan was explained to them by van Jaarsceld. There was then a discussion and Kennedy mentioned the proposal that 150 of the people whom he claimed to control and whom he described as "stormjaers" would attach the camp. It was pointed out by one of the soldiers present that it was out of the question to attempt to attach the camp with 150 men and, I think, the evidence is that this soldier said that 500 or 600 men would be necessary. I am not perfectly clear whether this figure was mentioned by the first accused, but it is clear that the first accused associated himself with the view that 150 men were wholly insufficient for such an attack and that 500 or 600 men would be required.

As far as we can see, nothing further was done; it certainly was not agreed at that meeting that there would be an attack on the camp. Kennedy at an earlier meeting said that the attack had to take place within six weeks. There is however nothing to connect accused No. 1 and No. 3, or accused No. 2 for that matter, with knowledge of that statement.

The first accused was then called upon to deliver what was described as a "slotwoord" – a sort of benediction – on the meeting, but that does not mean that there was any final decision at that meeting because the evidence negatives this. The evidence does not go so far as to show that the project was dead, but it certainly does not establish that anything was decided or that it was decided to prorogue the meeting and consider the matter at a future date.

I think, therefore, that the evidence does not disclose a conspiracy at that stage and if the evidence does not disclose a conspiracy the accused cannot be convicted either on the ground that they took part in the conspiracy or on the ground that they did not report it. I shall assume that the failure to report may be high treason itself, but in the view I take of the matter it is unnecessary to decide whether the failure to report must be failure to report an intention to commit high treason on the part of other persons or to report treasonable acts which have already been committed. It can be assumed that failure to report past conduct which is treasonable is also treason. The last point would be relevant it there were evidence that Kennedy or any other person incited the other to commit high treason, but there is no evidence of that. It does not appear to me, as I indicated before, that the mere discussion as to whether the parties will take part in conduct which is high treason amounts to high treason. It may be that part of that discussion in itself would amount to incitement and that this would be

> criminal, but there is no evidence in the present case that the discussions which took place involved incitement by any person and, therefore, there was no duty on any person present to report."

In the absence of both incitement and conspiracy, the accused in the above case were acquitted. JRL Milton in the *South African Criminal Law and Procedure* (*supra*) at page 22 expresses the view that it was unlikely, in any event, that there was sufficient evidence of "hostile intent".

In *S v Banda & Others* 1990 (3) SA 466, 474, FRIEDMAN J remarked:-

> "Equally important is to note that a mere discussion of the possibility of acts of treason, not resulting in any agreement, nor including any mutual incitement, does not amount to high treason."

In the present matter there is evidence of a discussion during which the accused and others talked about what could happen following the elimination of the President. The State conceded there was no evidence of a request at the third meeting. The State alleges that there were discussions "in furtherance of the aforesaid plot". There is no suggestion that there was a conspiracy or an incitement during the discussions. The plot which is alleged to have taken place previously has not been proved. A mere discussion in this context is different from speaking or writing in furtherance of an intent to overthrow the government as was observed in *R v Wenzel (supra)*. As further noted in the *South Africa Criminal Law and Procedure* Vol. II, *Common Law Crimes (supra)* at page 32 for a man to express without incitement or conspiracy hostile sentiments will not constitute treason, not because there is no overt act but because there is no hostile intent.

The fifth difficulty is that because of the gravity with which the crime of treason is viewed special provisions have been put in place to provide some measure of protection to persons facing such a charge. One of these is the two witnesses rule. The other is that evidence shall not be admitted of any overt act not alleged in the indictment unless to prove some other overt act alleged therein. In other words if conspiracy has not been alleged in respect of the third meeting, can

the State now turn around and say there is evidence of a conspiracy in respect of that meeting and therefore the accused should be found guilty of treason on that basis? The Criminal Procedure and Evidence Act forbids this except if the evidence is relevant to prove the request alleged to have been made at the first and second meetings.

Putting aside the above problems for a moment the totality of the evidence in this case is such that one cannot say with certainty that the overt act charged in respect of the first and second meetings i.e. incitement has been proved beyond a reasonable doubt or that it has been proved beyond a reasonable doubt that the discussion at the third meeting was in furtherance of a previous plot. The law is settled that where such doubt exists it must be resolved in favour of the accused. No onus rests on an accused person to convince the court of any explanation he gives. It is sufficient if a court thinks there is a reasonable possibility that it may be true. Even if the explanation given is improbable the court must acquit unless proof beyond a reasonable doubt is adduced – see *Edward Chininga v S* SC 21/02; *Mupfunde v S* SC 37/95. In this case the possibility that the version given by the accused could be true has not been discounted. Put another way it cannot be said the State has proved beyond a reasonable doubt that high treason was committed in this case.

In my view this case aptly illustrates the difficulties that can be associated with a charge of high treason and how vague the crime can be. It may be a moot point whether on a charge that the accused requested another to organize the assassination of a head of State and to arrange a military coup the State would be entitled to amend the charge to allege that there was a discussion in furtherance of a plot. It is also difficult to conceptualize what "discussions in furtherance of the aforesaid plot" refers to. If by the word plot the State was referring to the request, the accused should simply have been charged with making that request i.e. with incitement rather than with having discussions "in furtherance of the aforesaid

plot". In my view the allegation against the accused in respect of the third meeting is vague. For this reason the State has during this trial interchangeably referred to the charge against the accused as incitement or conspiracy. In view of the conclusion that this court has reached it will not however be necessary to make a definite finding on these matters.

In the circumstances the court must return a verdict of not guilty and the accused is accordingly discharged.

Attorney-General's *Office*, legal practitioners for the State.
Atherstone & Cook, legal practitioners for the accused.