

DECLARATION BY JUSTICE MINISTER PENUELL MADUNA ON APARTHEID LITIGATION IN THE UNITED STATES

MINISTRY OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT
REPUBLIC OF SOUTH AFRICA
2003-07-11

The Honourable Mr Justice John E Sprizzo
United States District Judge
United States Court House
500 Pearl Street
New York, New York 10007
UNITED STATES OF AMERICA

Dear Judge

(a) SOUTH AFRICAN APARTHEID LITIGATION (MDL NO.1499)
(b) KHULUMANI & OTHERS (CV 02 5952)

I write to convey to the Honourable Court through my enclosed declaration the views of the Government of the Republic of South Africa regarding the South African apartheid litigation pending before the Court.

Respectfully yours
Dr P M MADUNA, MP
MINISTER

DECLARATION BY PENUELL MPAPA MADUNA

1. I am the Minister of Justice and Constitutional Development of the Republic of South Africa and a member of the cabinet of President Thabo Mbeki. I am an admitted attorney of the High Court of South Africa and hold the degrees of B.Juris, LL.B, LL.M as well as an LL.D in constitutional law.

2. I make this declaration to set forth the South African government's ("the government") view of various cases pending in the United States courts against corporations that did business with and in South Africa during the apartheid period, including those cases consolidated under the caption, In Re South African Apartheid Litigation, MDL No. 1499 (S.D.N.Y.) and In Re Khulumani & others, CV 02 5952 (E.D.N.Y.) It is the government's submission that as these proceedings interfere with a sovereign's efforts to address matters in which it has the predominant interest, such proceedings should be dismissed.

3.

3.1 By way of background, the Republic of South Africa is one sovereign democratic state founded on the values of human dignity, equality, non-racialism, non-sexism, supremacy of the Constitution, and the rule of law, universal adult suffrage and a multi-party system of democratic government to ensure accountability, responsiveness and openness. Under South Africa's 1996 Constitution, the Constitution is the supreme law of the republic. Under the Constitution, the judicial authority of the republic is vested in the courts, which are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. No person or organ of state may interfere with the functioning of the courts, while all other organs of the state, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. An order or decision of a court binds all persons to whom and organs of state to which it applies. South Africa has a well-developed judicial system, with the Constitutional Court at its apex and the Supreme Court of Appeal as the final court of appeal in non-constitutional matters. Judgments of the Constitutional Court and, indeed, the Supreme Court of Appeal, are widely admired for their independence and incisiveness and are frequently referred to in judgments of other final courts of appeal internationally.

3.2

3.2.1 The 1993 Interim Constitution, which paved the way for South Africa's first democratic government in 1994, made provision for the establishment of a Truth and Reconciliation Commission ("the TRC") in order to establish the truth in relation to "past events", the circumstances under which gross violations of human rights occurred and to make such findings known. The purpose of the TRC was not simply to provide an account of the apartheid system, but to document gross violations of all human rights abuses, irrespective of their perpetrators, and to make provision for amnesty for those who made full disclosure of such politically motivated human rights violations and to provide reparations for the victims of such abuses. In 1995, Parliament enacted legislation to establish the TRC formally. In taking these constitutionally-mandated steps, government deliberately avoided a "victors' justice" approach to the crimes of apartheid and chose instead one based on confession and absolution, informed by the principles of reconciliation, reconstruction, reparation and goodwill.

3.2.2 The 1993 Constitution and the Promotion of National Unity and Reconciliation Act, 1995, which established the TRC, was based on a conscious agreement by all political parties in South Africa to avoid Nuremberg-style apartheid trials and any ensuing litigation.

3.2.3 The TRC completed its work in March 2003. It granted amnesty to many perpetrators of gross violations of human rights on a cross-party basis. It also recommended financial reparations for some 20,000 victims of such abuses. In his address to Parliament on 15 April 2003, on the tabling of the TRC Report, President Thabo Mbeki on behalf of the government, observed that:

"In the recent past, the issue of litigation and civil suits against corporations that benefited from the apartheid system has sharply arisen. In this regard, we wish to reiterate that the South African Government is not and will not be a party to such litigation.

In addition, we consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our constitution of the promotion of national reconciliation."

3.2.4 It is my respectful submission that the government's views on matters which fall within its sovereign domain should be respected in all forums.

3.3 I believe that it is important for the court to understand the context in which these cases are brought. The litigation appears to suggest that the government of which I am a member, has done little or nothing about redressing the ravages of the apartheid system, which, while formally and institutionally terminated by the election of the Mandela government on 27 April 1994, continue to live with us and will, unfortunately, continue to endure for many years to come. It likewise fails to appreciate the mandate under which South Africa's first democratic government was elected and how it has gone about executing this mandate since 1994. In order to assist the court, I set out briefly the details of this below.

4. In addition to institutionalising enforced racial segregation, and denying the majority the franchise, the apartheid system sought systematically to exclude most South Africans from access to adequate education, health care, housing, water, electricity, land and communications, while likewise excluding it from proper participation in the economy. The African National Congress-led government, under the leadership of former President Mandela, was elected in 1994 by the previously apartheid-excluded majority on a programme specifically to redress the legacy of apartheid. The government's programme, based on the reconstruction and development of the South African economy, accordingly had and continues to have as its central plank the fundamental transformation of South African society. It does so by attempting to rehabilitate the lives of the previously disadvantaged through the promotion of non-racialism, equality and social justice. The implementation of this policy, as will be seen below, has been and continues to be achieved through wide-ranging legislative reforms to transform South African society. In other words, what the government is attempting to do is to repair the damage caused by the apartheid system through a broad programme of socio-economic reparations which has at its heart, the betterment of the lives of the previously disadvantaged.

5.

5.1 South Africa's 1996 Constitution, which the African National Congress was instrumental in drafting, gives effect to government policy to redress the wrongs of the apartheid system, by not only prohibiting all forms of discrimination, but also by guaranteeing the right of all South Africans to access to housing, education, health care and related social services. Under the Constitution, the government is obliged to meet these socio-economic rights within the limits of its resources. The central importance of these provisions of the Constitution is, however, transformative and redistributive, in order to enable all South Africans to overcome the legacy of apartheid, through the creation of a more just and egalitarian society. Although, the government has obviously not met all of its 1994 goals, its record, faced with the realities of a globalised economy is, I submit, impressive.

5.2 In education, the spending disparity on white and black learners (18:1 in 1970 was reduced to 3:1 by 1993) was eliminated by racially integrating schools while at the same time, directing the bulk of state expenditure to the neediest schools. In addition, free primary and secondary level education will be available to the poorest 40 percent of the population from 2004. Government remains committed to reducing adult illiteracy.

5.3 Skewed land ownership is being addressed through legislation which provides for the restitution of land taken from black South Africans under race-based legislation first introduced in 1913. Further laws provide for the redistribution, with state assistance, of some 30 percent of commercial farming land to emerging black farmers.

5.4 Social pensions (equalised prior to 1994) have now been extended to many more beneficiaries and supplemented by school feeding schemes, free medical treatment at state hospitals for pregnant women and children under the age of six, and a child support grant. Substantial increases have been made in providing state financial support, especially to children, with more than eight million people expected to receive social assistance grants by 2005 compared with 2,7 million in 1997. Government is currently rolling out state financial support for children between the ages of seven and fourteen years, over a seven-year period.

5.5 At the same time, government has adopted a range of legislative measures aimed at overcoming racial inequality, including the Employment Equity Act of 1998, and the Preferential Procurement Policy Framework Act of 2000. The vast bulk of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000, came into effect on 16 June, 2003.

5.6 A good example of achieving majority participation in the economy is the Minerals and Petroleum Resources Development Act of 2002, which is due to come into force in late 2003. This vests all mineral rights in the state and grants new mining licences to applicants in return, among other things, for comprehensive endeavours to promote black economic empowerment. The objectives here include the transfer of ownership to black South Africans of at least 26 percent of equity or operating assets within ten years under a broad-based mining charter agreed with the South African mining industry. Likewise a Black Economic Empowerment Bill, intended to promote black economic empowerment in other sectors through measures such as affirmative action, preferential procurement and equity transfers in favour of black South Africans, is currently before the South African Parliament.

6. While the government's job is to govern in a way which is best for the people as a whole, it cannot ignore the fact that it is the successor government and, as such, bears primary responsibility for the rehabilitation and improvement of the lives of the people whom the claimants claim to represent.

7. The decision taken by Cabinet not to support the litigation was not taken lightly. The Cabinet only took this decision after an extensive discussion both at Cabinet committee level and in the full Cabinet in which I participated fully. The principal reason for the Cabinet's decision was that as the Mandela government in 1994 and the Mbeki government in 1999 were both elected by an overwhelming majority of the population, on a programme of thorough socio-economic transformation aimed at redressing the legacy of apartheid, it would make little sense for the government to support litigation, which not only sought to impose liability and damages on corporate South Africa but which, in effect, sought to set up the claimants as a surrogate government. Accordingly, on 16 April 2003, the Cabinet after extensive discussion of the matter at Cabinet committee level, resolved that: "It remains the right of the government to define and finalise issues of reparations, both nationally and internationally. In this regard, it is imperative for the government to clearly express its views on attempts to undermine South African sovereignty through actions such as the reparations lawsuit filed in the United States of America by a US lawyer, Mr Ed Fagan, against two South African mining firms and the participation of South African lawyers in such procedures."

8.

8.1 The government's policy is to promote reconciliation with and business investment by all firms, South African and foreign, and we regard these lawsuits as inconsistent with that goal. Government's policies of reconstruction and development have largely depended on forging constructive business partnerships. Its 1996 Growth, Employment and Redistribution ("Gear") strategy further acknowledged the importance of the private sector that faster economic growth offers the only way out of poverty, inequality, and unemployment, that such growth is driven by both foreign and local private sector investment, and that government's principal role is to create an enabling environment for such investment. This market-friendly strategy regards business as the engine of economic growth.

8.2 The re-entry of South Africa to global capital and export markets post-1994, together with the government's exemplary fiscal and monetary policy record, have resulted in an increase in economic growth to 2.5 percent per annum from 1994-2002, compared with the paltry below 1 per cent per annum growth of the previous decade. Importantly, private sector fixed investment has responded to the improved environment, rising some 4.3 percent per annum since 1993.

8.3 The improved performance is still less than what it is required to address successfully all the socio-economic legacies of apartheid --especially unemployment. But, together with the government's redirection of existing expenditure, it has enabled important progress to be made in addressing historical inequalities and poverty.

8.4 In addition to the government performance set out in 5, the recently released 2001 census, together with figures from the South African Reserve Bank, provide evidence of further important progress:

* real disposable income per capita of households (at constant 1995 prices) rose from R8 640 in 1994 to R9 271 in 2002, reflecting an increase of 7.3 percent;

* from April 1994 to February 2003, close on 1.5 million houses had either been built or were under construction with the help of the government's subsidy for low-income first-time buyers. The number of formal dwellings increased from 4.3 million in 1996 to 6.2 million in 2001, an increase of 44 percent. Further, formal houses constituted 48 percent of the total number of dwellings in 1996 and this proportion rose to 56 percent in 2001;

* the number of households using electricity for lighting increased from 5.2 million in 1995 to 7.8 million in 2001, an increase of 50 percent. While 57 percent of all households used electricity for lighting in 1996, this proportion had risen to 70 percent by 2001.

* the number of households with access to clean water increased from 7.2 million in 1996 to 9.5 million in 2001, an increase of 31 percent.

As a result, by 2001 85 percent of all South African households had access to piped water within 200 metres of their homes;

* in 1996, the number of people aged between 5 and 24 who were studying at an educational institution was 11.8 million while in 2001 the number had risen to 13.7 million: an increase of 16 percent. The number of people aged 20 or over who have Grade 12 or have completed high school rose from 3.5 million in 1996 to 5.2 million in 2001, an increase of 50 percent.

9. The government accepts that corporate South Africa is already making a meaningful contribution to the broad national goal of rehabilitating the lives of those affected by apartheid. Over and above its existing corporate social investment programmes, business has been in partnership with the government in the R1-billion (approximately US 133-million) Business Trust. Over five years, this business led initiative has improved the lives of 2.5-million disadvantaged South Africans through focused programmes of human capacity building and employment creation. Further initiatives in partnership between business and government, as well as other social actors, are being prepared with concrete commitments having been made in a number of fields at the government's June 7, 2003 Growth and Development Summit attended by leading representatives of government, business and labour. At the summit, business agreed with government and labour to invest R145-billion (US\$19-billion) in the automotive, chemical, mining and oil sectors over the next five years.

10. The remedies demanded in the current litigation in the United States -- both the specific requests (such as for the creation of a historical commission and the institution of affirmative action programmes) and the demand for billions of dollars in damages to be distributed by the US courts -- are inconsistent with South Africa's approach to achieving its long term goals. In this regard, I refer further to the earlier discussion on the TRC and its establishment in 3.2. As indicated above, the government has its own views on appropriate reparations policies and the appropriate allocation of resources to develop our economy. I would also make the point that matters of domestic policy which are pre-eminently South African should not be pre-empted by litigation in a foreign court.

11. It is also the view of the government that the issues raised in these proceedings are essentially political in nature. These should be and are being resolved through South Africa's own democratic processes. Another country's courts should not determine how ongoing political processes in South Africa should be resolved, not least when these issues must be dealt with in South Africa. In addition, the continuation of these proceedings, which inevitably will include massive demands for documents and testimony from South Africans involved in various sides of the negotiated peace that ended apartheid, will intrude up and disrupt our own effort to achieve reconciliation and reconstruction.

12. Permitting this litigation to go forward will, in the government's view, discourage much-needed direct foreign investment in South Africa and thus delay the achievement of our central goals. Indeed, this litigation could have a destabilising effect on the South African economy as investment is not only a driver of growth, but also employment. One of the structural features of the South Africa economy, and one of the terrible legacies of apartheid, is its high level of unemployment and its by-product, crime. Foreign direct investment is essential to address both these issues. If this litigation proceeds, far from promoting economic growth and employment and thus advantaging the previously disadvantaged, the litigation, by deterring foreign direct investment and undermining economic stability will do exactly the opposite of what it ostensibly sets out to do.

13. I understand that under United States law, courts may abstain from adjudication cases in deference to the sovereign rights of foreign countries to legislate, adjudicate and otherwise resolve domestic issues without outside interference, particularly where the relevant government has expressed opposition to the actions proceeding in the United States, and where adjudication in the United States would interfere with the foreign sovereign's effort to address matters in which it has the predominant interest. The government submits that its interest in addressing its apartheid past presents just such a situation.

I declare, under penalty of perjury, under the laws of the United States, that the foregoing is a true and correct statement.

Signed on 11 July 2003
Penuell Mpapa Maduna