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KHULUMANI
Support Group

Johannesburg
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Khulumani et al v *Barclays et al*: An Update and Overview of its Present Status

An Amended Claim is Filed on October 24, 2008

On October 24, 2008, **an amended claim** in the Khulumani apartheid litigation was filed with the court in New York. The amended claim is officially cited as *First Amended Complaint for Docket MDL No.02-md-1499 (JES); Jury Trial Demanded, Class Action.*

The amended civil claim identifies as the plaintiffs in the litigation **Khulumani**, the plaintiff organisation that provides assistance to victims of apartheid atrocities, on behalf of itself, **and thirteen individual plaintiffs or "class plaintiffs"** on behalf of themselves and all other individuals similarly situated. The class plaintiffs identified in the amended claim are Sakwe Balintulo, Dennis Brutus, Mark Fransch, Elsie Gishi, Lesiba Kekana, Archington Madondo, Mpho Masemola, Michael Mbele, Catherine Mlangeni, Reuben Mphela, Thulani Nunu, Thandiwe Shezi and Thobile Sikani. These persons are either personal representatives of victims of extrajudicial killing or are direct victims of the crimes of torture, prolonged unlawful detention and cruel, inhuman and degrading treatment in violation of international law, that were perpetrated by the security forces of the apartheid regime between 1960 and 1994.

The **eight defending corporations** in this class action are Barclays National Bank Ltd, Daimler AG, Ford Motor Company, Fujitsu Ltd, General Motors Corporation, International Business Machines Corporation, Rheinmetall Group AG and Union Bank of Switzerland AG. They are charged with knowingly aiding and abetting the South African security forces or of participating in a joint criminal enterprise in furtherance of the crimes of apartheid, listed above.

Why an Amended Claim?

The original claim was **a damages claim** brought in the name of Khulumani Support Group as an organisation together with 87 named plaintiffs. This claim was brought against 23 corporations with a presence in the United States, who were charged with aiding and abetting the perpetration of gross human rights violations in South Africa. As with the amended claim, the suit invoked the provisions of the Alien Tort Claims Act.

The amended claim is a class action which provides for the inclusion of all individuals who fit the categories of extrajudicial killing, torture, prolonged unlawful detention and cruel, inhuman and degrading treatment in violation of international law. This means that every individual similarly situated as a victim of one of these categories of gross human rights violation, will be included in the claim, even although they are not personally named in the claim, hence the value and significance of the Khulumani Apartheid Reparations Database.

Feedback on the Hearing of Oral Arguments on February 26, 2009

1. The hearing that took place in New York on Thursday, February 26, 2009, considered oral arguments from attorneys for the plaintiffs and the defendants in the Khulumani and the Ntsebeza claims. The hearing considered the defendants' motion for the claims to be dismissed. It lasted two and a half hours with the attorneys being questioned for around a half hour each.

2. The presiding judge, Judge Scheindlin, was reportedly extremely well-prepared and well-versed in all the issues relevant to the arguments. It was clear that she had thoroughly evaluated the comprehensive record – a fact appreciated by all the attorneys acting for the plaintiffs.

3. Judge Scheindlin seemed to make clear in the hearing that she was sceptical of the defendants' arguments. She seemed receptive to the arguments put forward by the plaintiff's attorneys about the connection between the companies and the perpetration of the crime of apartheid. She seemed to accept the argument that the defendant companies were not merely doing business in South Africa or doing business in general with the apartheid government and its military and security agencies, but that the goods, materials and commodities that they had supplied to the apartheid security agencies, had been used specifically to enforce apartheid.

4. Apparently, Judge Scheindlin asked tough questions of all the attorneys, and in particular of the defendants' attorney, Frank Barron. She focused in particular on the defendants' reasons for claiming that the standard to be met by the case for aiding and abetting liability should be specific 'intent', under international law, rather than 'knowledge'.

5. Michael Hausfeld explained the difference between these two bases for aiding and abetting liability. He said that 'intent' to aid and abet the perpetration of a crime is difficult to prove. Liability on the basis of having 'actual or constructive knowledge' can be more readily proven, especially in these claims. The defendant companies, Michael explained, had continued to provide equipment to the apartheid security agencies despite knowing that it was being used to harm vast numbers of the South African population.

6. Paul Hoffman, attorney for the Ntsebeza claim, being heard together with the Khulumani claim, strongly argued that the standard by which aiding and abetting liability should be established, should be 'knowledge' under either federal common law or international law. It seemed that Judge Scheindlin was convinced on that point.

7. In respect of the statements that had previously been tabled with the court by the US and South African governments, including the Maduna declaration and the Mabandla amicus brief, the judge seemed to appear sceptical. She seemed to suggest that the South African government's position had probably been a response to the 'ill-conceived' Fagan claim and that it had been based on the erroneous belief that the defendants were being charged for merely doing business in South Africa during apartheid. She seemed to indicate that in her view, the two governments had misunderstood the central arguments of the claims. It seemed that she did not think it necessary to once again canvas the respective governments of the United States or of South Africa for their current views of the litigation.

8. Michael Hausfeld was questioned on some of the more difficult issues such as whether banks could be held liable for lending money to the security forces under the more restrictive 'specific intent' standard, given that 'banks simply do what banks do – lend money'. He was also questioned on whether parent companies could be held liable for the conduct of their South African subsidiaries. Michael Hausfeld argued that there was a clear distinction between general consumer lending by a bank and lending by a bank to a “terrorist organisation.” He said that no civilised country would allow a bank to fund a “terrorist organisation” such as the apartheid government could be considered to have been. In respect of the role of banks as lenders to illegitimate governments, he said that the United Bank of Switzerland (UBS) had a reputation for lacking any 'conscience' regarding its lending practices and that he foresaw that they would continue to try to steamroller the legal proceedings.

9. On the issue of whether some of the complaints had been lodged too late to allege a class, Michael Hausfeld replied that this was not so as the suit had been lodged after the final closure of the TRC in 2002. It could not have been lodged before that time.

10. The impression left by the hearing was that our lawyers had received a fair hearing and that Judge Scheindlin had made a clear distinction between companies that simply did business in South Africa in general (which are not being sued in the Khulumani case) and companies that did business that enabled the South African security agencies to perpetuate apartheid repression. The general sense was that Judge Scheindlin is independent-minded. (It should be noted that she has previoulsy presided over mass tort claims as well as a significant case against UBS.) In summary, the impression of observers of last Thursday's hearing was that it seems unlikely that Judge Scheindlin will dismiss the cases and also unlikely that she will request new opinions from the two governments involved.

11. At this point, it is anticipated that Judge Scheindlin will probably rule that the case should go forward with significant portions of the claims upheld. It seems likely also that she will refuse the defendants the right to appeal her judgment. Her ruling is expected within 30 to 60 days. If she refuses an appeal by the defendants, she will convene a status conference which will then provide for the legal teams to have access to the historical records of the corporations and also enable them to take depositions from key corporate officials. Access to the records of the corporations could hopefully reveal the extent of 'knowledge' of the corporate executives involved and might also reveal their connections with other companies who might then also be included in a claim.

12. At this point, it is thought that the jury trial could commence in 2010 and that this would finally provide for consideration of the injuries and abuses that were committed against the 'real people in the case', the actual victims and survivors. The value of having a jury trial was emphasised as being that a jury trial removes the academic bias associated with the consideration of written abstract intellectual arguments, as opposed to making a decision based on what was done to “real people”.

13. On the point of whether the legal teams would consider an out-of-court settlement if they were offered such an exit strategy, Michael Hausfeld advised that it is always necessary to have an exit strategy that could provide a fair-minded solution, but he indicated that none of the companies had to date exhibited any receptivity to the option of a negotiated settlement. It seems that the defendants are still focused on a 'legal war' to get the cases dismissed. It was clear to the defendants, however, that it will not be easy to achieve this goal given the appointment of a new judge.

14. In respect of the automotive corporations, Michael Hausfeld asserted that the fact that these corporations had been severely affected by the global financial crisis would mean that no-one could predict who would be in control of these companies or what shape they would be in at the time of a judgment possibly being made against them. This would have to be faced when the time came.

15. Michael Hausfeld asserted that he anticipated that if the judge ruled in favour of the claims and if she provided for the defendants to appeal her decision, he felt that even with the present composition of the Second Circuit and the Supreme Court of Appeal (SCA) , the decision of the judge was likely to be upheld. He added that by the time that the case would reach the SCA (not before 2010 if it does), the composition of that court would in all likelihood have changed and the judge's decision would be upheld.

16. It was agreed that the concerned parties would wait until the transcript of the court hearing was available so that journalists could be referred to it.

17. After this, a meeting would be organised with all strategic partners to plan an awareness campaign in anticipation that the judge is likely to deny the defendants' motion to dismiss the claims. The campaign would seek to include the Ntsebeza claim. In respect of the Ntrsebeza claim, the judge seemed less willing to accept certain aspects of the Ntsebeza claim such as the inclusion of discriminatory practices and the 'denationalisation' aspects of the case (the removal of South African citizenship.

18. Michael Hausfeld notified participants that the new Hausfeld LLP website (www.hausfeldllp.com) would be launched in mid-March and would be interactive. He confirmed that the change in the process of the lawsuit, from a damages claim to a class action, would not change the outcome of the suits. A positive outcome would provide some relief for anyone who falls into the four categories named in the class action. At this point, it was noted that the significant progress in the capturing and validating of the information of the individuals registered with Khulumani Support Group on the Khulumani Apartheid Reparations Database – KARD, (now standing at over 45,000) would facilitate the process of 'certification of the classes' in the claim when that stage of the legal proceedings was reached.

Some Background on Judge Scheindlin

Judge Shira A. Scheindlin, 62 years old, is a United States District Court judge for the Southern District of New York. She was nominated by President Bill Clinton on July 28, 1994 to a seat vacated by Louis J. Freeh, had her appointment confirmed by the United States Senate on September 28, 1994 and was commissioned on September 29, 1994. She is an alumnus of Cornell Law School, the University of Michigan and Columbia University.

Judge Scheindlin has developed a reputation for her intellectual acumen, demanding courtroom demeanour, aggressive interpretations of the law, and expertise in mass torts, electronic discovery and complex litigation.

Her publications include Electronic Discovery Sanctions in the Twenty-First Century, 11 Michigan Telecommunications and Technology Law Review 71 (Fall 2004) (with Kanchana Wangkeo, Esq.); Revisions in Federal Rule 53 Provide New Options for Using Special Masters in Litigation, 76 Journal of the N.Y. State Bar Association 18 (Jan. 2004) (with Jonathan M. Redgrave, Esq.) and Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?, 41 B.C.L. Rev. 327 (2000) (with Jeffrey Rabkin, Esq.).

Judge Scheindlin was a panellist in 2003 on a panel entitled Judge Jack V. Weinstein, Tort Litigation, and the Public Good: A Roundtable Discussion to Honor One of America's Great Trial Judges on the Occasion of his 80th Birthday, 12 J.L. & Pol'y 149.

Before taking her current seat on the Southern District, Scheindlin worked as a prosecutor, commercial lawyer and judge. Between 1982 and 1984, she served as special master in the Agent Orange mass tort litigation and between 1992 and 1994 as special master for the mass torts case involving property damaged by asbestos.

Significantly, in April 2004, in the case *Zubulake v. UBS Warburg*, Scheindlin sanctioned UBS for not being able to complete their E-Discovery of potentially informative documents and not complying with their litigation hold on the destruction of documents. This case was seen as revolutionary in the legal realms of human resources and computer forensics, as the burden of proof was effectively shifted to the defendant for their inability to produce documents in a timely manner, and the presentation to the jury of an adverse inference.

Judge Scheindlin has been awarded the Distinguished Jurist Award from the National Association of Criminal Defense Lawyers (2008); the William Nelson Cromwell Award for unselfish service to the profession and the community from the New York County Lawyers Association (2007); the Edward Weinfeld Award for Distinguished Contributions to the Administration of Justice, New York County Lawyers (2005); the William J. Brennan Award, Criminal Law Section, New York State Bar Association (2003); the Robert L. Haig Award for distinguished public service, Commercial & Federal Litigation Section, New York State Bar Association (2001); and the Special Achievement Award in appreciation and recognition of Sustained Superior Performance of Duty, U.S. Department of Justice (1980).

Overall Objectives of the Litigation

The goal of the apartheid litigation is to provide remedies to individuals for the harm they suffered and support for Khulumani in pursuing the rehabilitation of persons who suffered lifelong consequences arising from their violations, while simultaneously seeking to advance universal adherence by corporations to clear global standards of ethical corporate behaviour.

A Brief History of the Khulumani Apartheid Litigation

1. The Khulumani lawsuit was **filed in November 2002** in the Eastern District Court of New York against 23 corporations and banks on the basis that they had aided and abetted the apartheid government in committing gross human rights violations. The original defendant corporations were spread across 5 industries and were from six countries. The industries operated in the fields of providing arms and ammunition to the apartheid government; fuel to the police and military forces; transportation to the police and military forces; military technology to the apartheid government; and financing to the apartheid government to obtain the above goods. The corporations and banks were from Switzerland, Germany, The Netherlands, the United Kingdom, France, and United States of America.

2. The corporations and banks **opposed** the lawsuit on the grounds that their respective countries had permitted trade with the apartheid government and in some instances, had actually encouraged constructive engagement and investment in apartheid South Africa.

3. At this stage there were three apartheid litigations in New York courts. **A Multi-District Litigation Panel** decided to transfer all the cases to the Southern District Court. **In July 2003,** the

South African government (through the ***ex parte declaration of Mr Penuell Maduna,*** in his capacity as Minister of Justice) urged the Southern District Court to dismiss all the suits on the basis that they interfered with the sovereign right of the South African government to settle the domestic matter of reparations itself and asserted that the suits posed a threat to foreign direct investment in South Africa.

4. In **November 2004 all the apartheid-related civil suits were dismissed by Judge John Sprizzo** on grounds that aiding and abetting an international law violation was not actionable under the ATCA. Khulumani's lawyer, Michael Hausfeld, then took the matter on appeal to the 2nd Circuit Court where the appeal was considered by a panel of three judges.

5. **On October 12, 2007, the 2nd Circuit overturned the decision of the District Court to dismiss the suits.** It held that the Alien Tort Statute (ATS) under which the cases had been brought, did indeed provide jurisdiction for the cases to be heard and that an inquiry should first be held to thoroughly consider the views of all the parties - government, plaintiffs, banks and corporations, before making a decision on whether or not to dismiss the cases, despite the request from the South African government for the cases to be dismissed. The 2nd Circuit ordered that the cases go back to the District Court for such an inquiry. It also created the opportunity for the claims to be amended by the plaintiffs.

6. Following the decision of the 2nd Circuit, **the corporations filed on November 1, 2007, a "Motion to Stay" the decision of the 2nd Circuit** pending their petition to the United States Supreme Court. They then took the extraordinary action of making an 'a certiorari' petition to the U S Supreme Court of Appeal requesting the dismissal of the cases.

7. **In May 2008, the US Supreme Court was unable to make a determination in the case** because it failed to realise the quorum of five (out of nine justices) needed for it to be able to issue an opinion on the application by the defendants. Four justices had had to recuse themselves because of their investments in defendant companies while a fifth justice recused himself on the basis of close family ties to a particular corporation. This opened the way for the apartheid litigation to proceed.

8. The basis of the claim was then reviewed and the decision made to adjust the claim from a damages claim to a class action.

The Legal Theory informing the Construction of the Amended Khulumani Complaint

The amended complaint is based on an aiding and abetting theory of liability for violations of international law actionable under the Alien Tort Claims Act. The Second Circuit unequivocally held that "in this Circuit, a plaintiff may plead a theory of aiding and abetting liability under the ATCA". While the availability of the theory of aiding and abetting is clear, there are, however, no clear standards for establishing liability in terms of this legislation.

The two judges of the Second Circuit who in fact, voted to uphold aiding and abetting liability, articulated somewhat different standards on aiding and abetting liability. Judge Hall adopted the firmly-established domestic civil standard under which a person may be liable for aiding and abetting a crime if he/she knowingly provides substantial assistance to the principal perpetrator who commits the crime, while Judge Katzmann referred to international law rather than domestic law

and adopted the standard, codified in the Rome Statute of the International Criminal Court, according to which interpretation a person may be liable for aiding and abetting a crime only if he/she provides substantial assistance to the principal perpetrator with the purpose of facilitating the crime. Katzmann admitted that the Rome Statute "has yet to be construed by the International Criminal Court" and that "its precise contours and the extent to which it may differ from customary international law thus remain somewhat uncertain." Very few international cases have, in fact, adopted Judge Katzmann's standard for aiding and abetting liability. Most have adopted the standard of "knowing" and "providing substantial assistance".

The Plaintiffs' First Amended Complaint has thus been constructed to meet both the Katzmann and Hall standards for aiding and abetting liability under the ATCA. The amended claim thus alleges that the technology companies worked intensively with the apartheid regime over a prolonged period of time to develop computer systems that would run the passbook system and that they purposefully designed the system so that it would maximize the efficiency and efficacy of the regime's enforcement of the pass laws. These companies knew that these activities violated international law, making their assistance to the apartheid government, not only substantial, but also with the knowledge that they were assisting the perpetration of international law violations including the perpetuation of apartheid, an international crime in itself, and also the violence necessary to the maintenance of apartheid.

In addition to the aiding and abetting theory of liability, the Plaintiffs' First Amended Complaint also raises a joint criminal enterprise ("JCE") theory, under which a person may be liable for a crime committed by some aspect of a criminal enterprise if the person acted in furtherance of the criminal enterprise, with knowledge of the nature of that enterprise and the intent to further the criminal purposes of that enterprise. This theory has been relied on in several cases before the International Criminal Tribunal for the former Yugoslavia and the factual allegations of the plaintiffs in this claim, also satisfy this theory.

One example is the allegation that Barclays National Bank actively participated in the South African Defence Advisory Board through its director, Basil Hersov and that through this collaboration, along with the continued financing of the apartheid regime by Barclays National Bank, the bank intentionally furthered the criminal purposes of the South African security forces in maintaining and enforcing apartheid. The injuries sustained by the plaintiffs were thus utterly foreseeable at the hands of the South African security forces, whose violent acts were condemned around the world. Barclays National Bank should then be found liable under the ATCA under the JCE theory as well as the aiding and abetting theory.

In respect to both theories of liability, the First Amended Complaint focuses on the corporate defendants' substantial assistance to the South African security forces. The plaintiffs are not suing the defendants for their general business activities in South Africa during apartheid, or even for their business dealings with the South African government in general. They are suing specifically those key companies that supplied armaments, military vehicles, computer systems required for the passbook system, and financing to the security forces with full knowledge that these strategic military assets would facilitate the maintenance and enforcement of apartheid through specific security applications such as the patrolling of black townships, the tracking of political dissidents, and the control of the black population. The defendants collaborated with the apartheid security forces over many years to develop these products, to improve them, and to supply them to the security forces with contracts for maintenance and servicing, while thwarting international efforts to cut off South Africa's supply of strategic security equipment. The eight defendants are thus the

companies most involved in assisting the security forces to commit the international law violations that caused injuries to the plaintiffs.

Conclusion

At this point, Khulumani Support Group calls on all concerned South Africans and others to:

- support the Khulumani lawsuit
- remember and honour the Khulumani plaintiffs and members who are all victims and survivors of apartheid gross human rights abuses and violations
- assist with reparations and rehabilitation programmes for victims and survivors of apartheid gross human rights violations, given the significant role they played in creating democracy and freedom in South Africa
- acknowledge the high levels of unresolved trauma in the country and the consequences of failing to systematically address this trauma through psychosocial interventions that support the re-empowerment of victims and survivors
- call for the funds remaining in the President's Fund to be placed in an Endowment Fund with representation on its Board from organised victims, the private sector and government, to provide for funding of the ongoing work of healing, transformation and reconciliation, and
- support the building of bridges between those left facing the lifelong consequences and the wider population of South Africa as well as with those affected by gross rights violations in the SADC region with whom Khulumani stands in solidarity.

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