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# Mock Trial: Nontsikelelo (Ntsiki) Margaret Biko nee Mashalaba

***Nontsikelelo ("Ntsiki") Biko née Mashalaba***

In 1970, Ntsiki Mashalaba married Steven Biko, the anti-Apartheid activist who was killed in a Port Elizabeth prison in 1977. Together, Mashalaba and Biko developed the anti-apartheid Black Consciousness Movement in the 1960s. Given her involvement with the BCM and her knowledge of the way Steve Biko died, Mashalaba would be a clear critic of the TRC's ability to grant amnesty to police officers admitting to actions similar to those which resulted in the death of her husband. Clear evidence of this is to be found in the 1996 constitutional court case that she and three other applicants brought against the government of the Republic of South Africa. Their lengthy and carefully argued statement essentially claims the formation and functioning of the TRC was unconstitutional in that it directly violated other tenets of the constitution. A close reading of this statement should yield a variety of solid arguments for the plaintiffs; a copy of the statement can be found here: http://www.saflii.org/za/cases/ZACC/1996/16.html

## ARTICLES:

Milloy, Courtland. "To Understand the Death of Steve Biko." *The Washington Post (pre-1997 Fulltext)*: c03. Sep 06 1987. *ProQuest.* Web. 21 Jan. 2016 . http://search.proquest.com/docview/306936544/7BDF80C81890408DPQ/3?accountid=415.

"Reconciliation and Steve Biko." *The Economist* Feb 01 1997: 42-3. *ProQuest.* Web. 21 Jan. 2016 . http://search.proquest.com/docview/224084374/7BDF80C81890408DPQ/9?accountid=415.

Simmonds, Yussuf J. "Steve Biko." *Sentinel*: 1. Nov 2007. *ProQuest.* Web. 21 Jan. 2016 .

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## BOOKS:

Bizos, George. [Ntsiki Biko] In: *No One to Blame: In pursuit of justice in South Africa.* Cape Town : David Philip Publishers ; Bellville : Mayibuye Books, 1998. Print. Pp. 84+. Web. https://books.google.com/books?id=nAgAzUwnyN4C&pg=PA84&dq=ntsiki+biko&hl=en&sa=X&ved=0ahUKEwjJ8NCY5bvKAhVJ22MKHTBRCu0Q6AEIIzAB#v=onepage&q=ntsiki%20biko&f=false.

Mangcu, Xolela. *Biko : A Life.*I.B. Taurus, 2014. Web. 23 Jan. 2015.

https://books.google.com/books?hl=en&lr=&id=tZAAAwAAQBAJ&oi=fnd&pg=PA5&dq=Ntsiki+Mashalaba&ots=Un2QPQXr7t&sig=VDID2t6jXN-LS0A-4zr8D99zAS8#v=onepage&q=Ntsiki%20&f=false

Note: search Ntsiki in the internal search of the link above.

## VIDEO:

"South Africa : widow of Steve Biko visits cell where he died ." *AP Archive*. YouTube, Jul 21, 2015. Web. 22 Jan 2016. https://www.youtube.com/watch?v=C6FfqhEAU64.

"TRC: Episode 01, Part 10." *SABC*. YouTube, Apr 6, 2011. Web. 22 Jan 2016. https://www.youtube.com/watch?v=gFxEHHo5EYI.

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## Brief on Relevancy to Hale Tribunal Hearings (Uhlman):

In the 1996 constitutional court case that Ntsiki Biko and three other applicants brought against the government of the Republic of South Africa, she argued that the formation and functioning of the TRC is unconstitutional in that it directly violates other tenets of the Constitution. Specifically, Biko argued that section 20(7) of the Promotion of National Unity Act of 1995 - which states that "no person who has been granted amnesty [by the Committee on Amnesty] in respect of an act, omission or offence shall be criminally or civilly liable in respect of such an act, omission or offence" – violates Section 22 of the Constitution of the RSA (Act 200 of 1993) which states that "[e]very person shall have the right to have justiciable disputes settled by a court of law or, where appropriate another independent or impartial forum." She argued that Amnesty Committee was neither a court of law nor an independent or impartial forum.

The Plaintiffs in our mock trial could try to take up this line of argument objecting to the TRC and its Amnesty sub-committee on the grounds that it violates procedural justice. However, the ruling by the Constitutional Court of SA written by Chief Justice DP Mahomed dismisses this argument on the grounds that other portions of the 1993 Constitution, specifically the epilogue, not only allow for but mandate that a body like the TRC be formed and amnesty granted to qualifying applicants thus voiding the claim that the TRC violated the Constitution: the court ruled against Biko in this case. If the Defendants are able to bring these facts out in cross examination, the procedural argument will fail; however, there is a lot of legal jargon to sift through and raising the potential unconstitutionality of the TRC still seems a strong initial strategy for the Plaintiffs. For one, they could - through Biko - contend that the Superior Court ruling was an invalid interpretation of the Constitution, that the epilogue does not have sway over one of the main sections (specifically section 22) of the Constitution, that nothing – not even the perceived need for amnesty in the healing process of SA in the post-Apartheid era – can supersede the rights of the victims of a crime to seek legal trial. Perhaps more effectively, the Plaintiffs could switch from a procedural argument to a theoretical one: how can the rights of individuals be deemed less important than those of a country? The TRC was not an effective remedy for SA precisely because it did/does not balance the rights and needs of individuals with that of the country as a whole to move forward as a functioning democracy (kind of the inverse of the Kaiser Nyatsumba critique of the TRC on the grounds that it focuses too much on specific cases and fails in reconciling either the country as a whole or the majority of the populous).

An even more promising line of argument for the Plaintiffs on procedural grounds has to do with another objection to the TRC brought forth by Biko in her 1996 lawsuit. Specifically, she contended that the RSA is "obliged by law to prosecute those responsible for gross human rights violations and that the provisions of s 20(7) which authorized amnesty for such offenders constituted a breach of international law. Specifically, Biko references articles (49, 50, 129 and 146) from the first (1864), second (1906), third (1929) and fourth (1949) Geneva Conventions respectively. In all four of these documents the language is identical: "'The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches . . .' defined in the

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instruments so as to include, *inter alia*, willful killing, torture, or inhuman treatment and willfully causing great suffering or serious injury to body or health." Again, DP Mahomed in his opinion dismisses the argument on technical grounds. First, he contends that the Superior Court was being asked to rule solely on the constitutionality of s 20(7) of the Act making the issue of its violation of international law therefore irrelevant. Second, international treaties and conventions are not part of the municipal law of SA "until and unless they are incorporated into the municipal law by legislative enactment" – this was not done in SA. Third, section 231 of the Constitution states that such treaties and conventions can only become part of the law if parliament "expressly so provides and the agreement is not inconsistent with the constitution." Also, an act of parliament can override international agreements entered into before the commencement of the constitution; the epilogue to the Constitution represents such an overriding. Lastly, and of most interest, is Mahomed's rejection of the black majority of South Africa during Apartheid (as represented by the ANC, for example) as a "High Contracting Party" (HCP) – a state, country or nation capable of signing and ratifying an international convention or treaty. Similarly, Mahomed points out that the Geneva Conventions (particularly the one in 1949) are only applicable in cases where a hostile power invades a foreign state; it can have no bearing then on the situation in SA which was a conflict between formations within the same state. Footnote 29 of Mahomed's opinion is also of interest for two reasons: (1) While Mahomed notes that the Conventions of 1949 were extended by Protocol 1 (1977) to include "armed conflicts in which peoples are fighting against colonial domination and alien occupation, and against regimes in the exercise of their rights of self-determination," he chooses to remain neutral on whether the Black majority population of SA during apartheid would qualify; (2) instead, he resorts to a technicality that because the Protocol was never ratified by SA during the conflict it has no binding on the conflict in SA even if it could be argued to fall within the Protocol 1 extension.

There is much play here for the Plaintiffs. First, Mahomed resorts to a lot of technicalities about the proper filing of documents and formal acknowledgements of international law; the Plaintiffs can argue on theoretical grounds that the TRC is not an effective remedy because international law was not adhered to in the granting of amnesty in certain cases even if, and perhaps especially because, on procedural grounds the TRC is insulated from such charges. Second, and more significantly, the failures to identify the black majority population of SA (for example, the ANC) as a HCP and/or identifying the conflict in SA as one engaged in by those resisting colonial domination, alien occupation and/or against totalitarian regimes are not only gross misconceptions of the history of the colonization of SA by first the Dutch and later the English but also of the stark realities of the genocide perpetrated by the white Apartheid government on the black people of SA. These are the kinds of misconceptions that authors like Magona in *Mother to Mother* or Biko in his black Conscious movement are/were trying to correct. Ironically, how can a group of oppressed people get justice from entities like the UN and laws like those put forth in the Geneva Conventions if they are not recognized as a group of people who have access to such justice? How is it okay for the white apartheid government to openly dehumanize black South Africans as "illegal aliens" and not for them to be rightly identified for what they are: beneficiaries of the first "illegal aliens" of SA, the Europeans who came and dispossessed the native people of their land and ways of life?

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Regardless of which side of the trial one is on, a close reading of the ruling on Biko's lawsuit as well as the Constitution of 1993, the Promotion of National Unity of 1995 and the relevant United Nations documents mentioned above is essential not just for preparing direct and cross-examination of Ntsiki Biko but for nearly every witness in the trial.