

SAAKNOMMER: CC 482/85

DELMAS

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DIE STAAT teen:

PATRICK MABUYA BALEKA EN 21

ANDER

VOOR:

SY EDELE REGTER VAN DIJKHORST EN

ASSESSORE: MNR. W.F. KRUGEL

PROF. W.A. JOUBERT

NAMENS DIE STAAT:

ADV. P.B. JACOBS

ADV. P. FICK

ADV. W. HANEKOM

NAMENS DIE VERDEDIGING:

ADV. A. CHASKALSON

ADV. G. BIZOS

ADV. K. TIP

ADV. Z.M. YACOOB

ADV. G.J. MARCUS

TOLK:

MNR. B.S.N. SKOSANA

KLAGTE:

(SIEN AKTE VAN BESKULDIGING)

PLEIT:

AL DIE BESKULDIGDES: ONSKULDIG

KONTRAKTEURS:

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COURT RESUMES ON 6 MAY 1986.

COURT: Yesterday I issued a rule nisi calling upon the Editor of the Weekly Mail and the reporter Joanne Bekker to show cause in this court today why they should not be convicted of contempt of court. Is there any appearance.

MR KUNY: May I please Your Lordship I appear on behalf of Mr Harber, the Editor of the Weekly Mail and Miss Bekker the reporter.

COURT: What are their full names?

MR KUNY: Anton Harber is the name (10)

COURT: H-a-r-b-e-r?

MR KUNY: H-a-r-b-e-r. Anton Paul Harber.

COURT: And the reporter?

MR KUNY: Jo-ann, a-n-n, Bekker, B-e-k-k-e-r. They are both present at court and I appear on their behalf.

COURT: Yes thank you, they may sit down. Yes Mr Kuny?

MR KUNY: We understood that Your Lordship had issued this order in court yesterday morning and that the order embraced certain portions of a report contained in the Weekly Mail of May 2 to May 8 on pages 8 and 9. In particular on page 9 the (20) portion appearing in the block headed "A Judge's Own Notes on Police Activities" and we understand that in addition Your Lordship referred to certain other portions of the reports, namely a portion of the first paragraph on page 8 in the section headed "Commission Shuns Agitator Thesis" and at the bottom of that paragraph, the bottom of that column running into the top of the second column starting with the words "The reason for the delay is a mystery" and continuing down to the words "been made available earlier", and then we understood the order to relate also to a portion on page 9 in the (30) last column on the right-hand side starting with the words

"new/....."

"new evidence which could shake the State's case includes the following" down to the bottom of that column. Your Lordship has also indicated to me this morning that the order covers a portion of the caption to the photograph.

COURT: I do not think that that would be covered as such by the order. I would like to be addressed on that as well. I did not mention it yesterday when I issued the order, the caption, and neither did I mention the portion at the bottom of page 9 which reads "At the same time there appears to be little clarity as to what the hearing is about" but I would(10) like to be addressed on that as well.

MR KUNY: As Your Lordship pleases. As I understand the procedure then the Editor and the reporter must show cause to Your Lordship why they should not be convicted of contempt. In dealing with this we propose to lead evidence and in the first instance I propose to call Mr David Dyson as a witness. He is the attorney who is in fact one of the attorneys in the present proceedings before Your Lordship. I call Mr Dyson.

DAVID STANLEY DYSON: d.s.s.

EXAMINATION BY MR KUNY: Mr Dyson you are an attorney of (20) this court and you practice as such as a partner of the firm Bell, Dewar & Hall in Johannesburg? -- That is correct.

And do you also represent certain of the accused persons in this trial? -- That is correct.

Now on 2 May an edition of the Weekly Mail was published which contained on page 9 a column under the heading "A Judge's Own Notes on Police Activities". You are aware of that? -- I am aware of it.

And did you have anything to do with the publication of these notes? -- Yes I did. (30)

Would you explain to His Lordship how it came about that

you/.....

you were concerned with this? -- Yes. At the outset let me say that the erroneous publication of these notes emanates from me and I regard it as my fault. The error came about as follows: The day that the video was shown in court my partner James Sutherland was in court here.

Were you at court that day? -- I was not in court on that day.

Had you seen this video prior to its being shown in court? -- I had.

Yes. -- He came into my office after court, as he (10) normally does, and we chatted about the case and he handed me a set of notes which I understood to be the notes of Your Lordship's observations.

Did he say that to you or did you make an assumption? -- I made that assumption.

Was there any reason why you should have made that assumption? -- Well he gave me the notes on a separate piece of paper. I read through the notes quickly and it seemed to me as if they had been the observations of the Court, very much as if a Court makes observations after it goes on an (20) inspection in loco and certain notes are recorded.

Did you question him about these notes? -- Not really no.

What did you do with them once he handed them to you? -- I filed them away.

And did you give any further thought to them at that stage? -- No.

At a later stage, a later date, were you approached in connection with the publication of a certain article, or articles, in the Weekly Mail? -- Yes I was.

By whom and in what circumstances? -- Well I was (30) approached by Miss Bekker who wanted some documents from the

trial/.....

trial because she was doing a feature on the trial and one of the documents I gave her were Mr Sutherland's notes, which I purported to her as being the Judge's notes.

Well did she ask you anything in particular about the video? -- Well she said she was particularly interested in the video and I told her that I had the notes that were made by the Court at the time.

How would she have known that a video had been shown in court? -- I had received press publicity.

And so you volunteered these notes to her? -- That is (10) correct.

With the comment that they were the Judge's notes? -- Yes.

At that time did you still believe them to be the Judge's notes? -- I did.

And did you furnish her with any other documentation relating to the proceedings? -- I did.

What sort of documentation? -- She perused some court record and I gave her some transcripts of court record and one or two other documents that had been used in the matter.

Thereafter did you see the article as published in (20) the Weekly Mail? -- I did.

When did you see it? -- I saw it on the Friday morning.

That is Friday the 2nd of May? -- That is correct, last Friday.

Where was that? -- Well I saw it at my office and I saw it here at court again and it was pointed out to me by other legal representatives that these were not the notes that had been made and I immediately realised the error and immediately approached His Lordship.

Did you speak to Mr Sutherland about these notes at (30) that stage, on Friday 2 May? -- Yes I spoke to Mr Sutherland

and/.....

and he pointed out to me that a ghastly mistake had been made.

What did you then do? -- I tried to contact His Lordship and just managed to stop him before going away on Friday and I showed him the offending article.

Did you furnish His Lordship with a copy of the publication? -- That is correct.

And did you say anything to His Lordship in regard to your responsibility in the matter? -- Yes I explained that this had been a ghastly error and it was a very rushed discussion, His Lordship had not actually read the article (10) yet and he took the article away to read in his own time and I explained that this had emanated from me.

And was there any request by His Lordship that you should attend court yesterday in connection with this matter? -- Well His Lordship indicated to me that I should try and get the reporter here yesterday morning. I did attempt to get hold of the Editor and the reporter. The Editor was away for the weekend and the reporter had been given a prior assignment. So I spoke to His Lordship's registrar yesterday morning at 08h45.

Yes, you spoke to him on the telephone? -- On the (20) telephone to explain that there was a problem in getting the reporter here.

Yes. And when did you hear then that an order had been issued? -- My partner telephoned.

Now you said at the outset of your evidence that it was your fault and that you accepted responsibility for what has happened? -- Correct.

Was there any reason for you to have believed other than that these notes were His Lordship's notes of the observations made of the video until Friday when it was pointed out to (30) you? -- I had no reason to believe anything else. I saw the

comments and I thought that they were accurate comments. I had seen the video myself. I noticed there were one or two wry comments but I thought that this must have been what His Lordship had said.

And are you prepared to offer an apology for the error that has taken place? -- I do sincerely apologise and I have advised the Editor and the journalist that correction would have to be placed in order to correct this. Immediately I noticed the mistake and Mr Bizos and Mr Sutherland pointed this out to me my instant reaction was that it would have to be corrected. (10)

Yes, have you in fact seen the intended correction? -- I have.

May I place this before Your Lordship. -- Yes this is it.

Would you read that out? -- "In last week's Weekly Mail a report appeared on page 9 which purported to contain notes by Mr Justice J. van Dijkhorst regarding a video shown at the Delmas treason trial. At the time that we published this report we believed the notes were made by the Judge. This was incorrect. A legal representative for the accused had provided us with these notes on the mistaken belief that (20) they were made by the Judge. They were in fact notes made by one of the other legal representatives. Our belief that these notes were made by the Judge was held in good faith. The Weekly Mail sincerely regrets this error. There was no intention on our part to bring the Judge into contempt or disrespect or question the propriety of his conduct. We apologise for any embarrassment and inconvenient that may have resulted."

Thank you My Lord that is all the evidence from Mr Dyson. (30)

COURT: Mr Dyson is this caption correct, "The first and only/....

only picture of all the Delmas treason trialists taken this week after a lengthy battle for permission from the Judge, the local Chief Magistrate and the District Commissioner of Police"? Was there a lengthy battle to get permission from me for this photograph? -- Well sir the way I read that was that there was a lengthy battle to get permission from all of those three sources.

Is it not correct that you saw me for about a minute and that my attitude was that the photograph was not to be taken in court but that I had no objection to it being taken out- (10) side court in the passage and that that was outside my jurisdiction, that you should arrange that with the Magistrate or the police or whatever? -- Yes sir. I think that is a bit of journalese, I think the lengthy battle refers to the fact that the photographer attempted all day to get this photograph and was here early in the morning and eventually only got permission at 15h30. Lengthy is possibly a bit of an exaggeration.

And "battle" is also an exaggeration, as far as the Judge is concerned. Yes. Did you inform the reporter (20) that there appears to be little clarity as to what the hearing is about? -- No sir.

You handed this reporter portions of the record of the evidence? -- Yes sir.

As an attorney you know that when a Judge comments on a video that becomes part of the record? -- That is correct.

Why did you not hand the reporter that portion of the record? -- Sir since this issue has come about I feel that I should have taken more care in establishing that this was the actual court record. (30)

Well if you ... -- I, at the time that the reporter
approached/.....

approached me I am not sure whether that transcript had been printed yet but where, I sincerely believed that Mr Sutherland had handed me a full transcript.

Well did you take any steps to ascertain whether that transcript had been printed yet and was available? -- No sir.

Is that not negligent, is it not better to hand the record transcript to the reporter than your own assistant's notes? -- With hindsight sir I regret it sincerely that I did not do that.

Yes. Thank you. Any further questions Mr Kuny? (10)

MR KUNY: No further questions.

COURT: You may stand down.

NO FURTHER QUESTIONS.

ANTON PAUL HARBER: d.s.s.

EXAMINATION BY MR KUNY: Mr Harber you are the Editor of the Weekly Mail, the publication which published the offending passage? -- Correct.

Passages. Is it correct that at a certain stage, I do not know precisely when but a few weeks ago, you requested (20) Miss Bekker, a freelance journalist, to do a feature article on the Delmas trial? -- That is correct.

And did you give her any advice as to where she should obtain information concerning the article? -- I spoke to her about the article and about the way I saw it and suggested that she speak to Mr Dyson who was one of the attorneys.

Yes, and did you then leave it to her to research the matter? -- That is correct.

Did you have anything further to do with the articles themselves? -- Not until they were delivered. (30)

Before publication? -- That is right.

Did/.....

Did you have a look at them? -- Yes.

Did you satisfy yourself in any way as to the content or the comment that was contained in those articles? -- Yes.

How did you do that? -- I read it and discussed it with my colleagues and was satisfied with it.

Yes. Did you notice in particular the portion dealing with the Judge's notes on police activities? -- I did, yes.

Did you have any reason to believe that those were not the Judge's notes? -- Not at all.

Did you ask Miss Bekker about that? -- We did not (10) discuss it in any detail that I remember. I accepted that they were the Judge's notes.

Do you know Miss Bekker as a journalist? -- Yes.

Are you able to comment on her experience, her competence as a journalist? -- She is an experienced competent and very reliable reporter.

Yes. Have you used her services previously? -- Yes for some time.

And in publishing what was published in this issue of the Weekly Mail was there intention whatsoever to bring (20) His Lordship into any disrepute or contempt? -- Absolutely not. I, at the time I was, I was of the firm belief that it was the Judge's notes.

And insofar as the other portions are concerned, the portions to which His Lordship referred this morning relating to the comment, you have heard which portions they were, did you form any view on those portions at the time that you authorised the publication of these articles? -- Yes I was satisfied that it was a reasonable summary of the proceedings here. (30)

Your newspaper has undertaken, I understand, to publish

a/.....

a retraction and an apology in the form in which Mr Dyson read it into the record this morning? -- Correct.

And with what prominence would you display this retraction and apology? -- I would say that we are obliged to give it the same prominence as the original error.

Yes. I have no further questions.

COURT: Mr Harber what is your experience, how long have you been a newspaper man? -- I have been a journalist for approximately six years.

And before that? -- I was a student. (10)

Of journalism? -- No a Bachelor of Arts student at Wits University.

Did you do any court reporting in your time? -- Yes, I have done a fair amount of court reporting.

How many years experience do you have there? -- It is difficult to put an exact time on it because I have done specific cases rather than periods as a court reporter, but I have spent some time covering lengthy cases.

Have you ever come across a case where a Judge's notes have been published? -- Well as I understand it the Judge, (20) I have had experience of an in loco inspection where the Judge makes certain notes which are then entered into the record.

Where the Judge's observations as made in court and as recorded by the machine are then public property and may be published. But have you ever come across an instance where the Judge's notes have been published? -- Only when those notes have been made part of the record.

Then one does not publish them as the Judge's notes, then one publishes them as the Judge's observations, or remarks in court? -- I think in journalism one often chooses a shorter (30) word and that quite fine legal distinction sometimes, the

sub-editor/....

sub-editor or the person who writes the headline or the piece is not aware of that fine legal distinction.

Well it is not only the sub-editor, it is the reporter as well. But you said you read this portion? -- Yes.

And the Judge's notes as such when the Judge sits with assessors are not relevant unless they become part of the record and then they are the observations of the Court, not of the Judge. -- Well the notes refers to how it originates, it is originally the Judge making the notes which are then written, which are then read into the record. (10)

Well have you any experience of any reporter having access to the Judge's notes in the sense that a Judge's notes were handed to him? -- No, the Judge's notes are only made available to the reporter once they are read into the record.

Yes. What do you say about the comments in this, in your weekly Mail, the following ones: "New Evidence which could shake the State's case includes the following", and the following: "One wonders if the protracted Delmas trial might have taken a different route had the findings been made available earlier", with reference to the Van der Walt report? (20) -- I think that as the reporter has summarised the proceedings here and summarised the new or recent evidence.

Is your opinion that a journalist is entitled to speculate about the influence a piece of evidence may have on the Court? -- I think it is the reporter's job to indicate the importance of this evidence and that is what Miss Bekker has done, she has said it is important evidence because it will affect the State's case.

Yes. What do you say about the following: "At the same time there appears to be little clarity as to what the hearing (30) is about". To whom did it appear that there was little clarity?

-- To/.....

-- To the reporter.

To the reporter? -- Um hum.

Is that stated? How many days was this reporter in court?

-- The reporter has been to court

Once if I have it correctly? -- I do not know the exact time.

Well my impression is that she was here on one day only and this case has run for more than three months. Is it proper then to comment and say that there appears to be little clarity as to what the hearing is about? -- Well (10) should, is the point not the truth of the statement, should we not then be looking at whether her assessment was a valid one or not?

Well is the assessment a valid one? -- I accept her assessment, yes. I accept it as a reporter with whom I have given the responsibility to make the assessment.

Is the impression not conveyed that there is little clarity as to what the hearing is about amongst counsel and on the side of the Court? -- I think it is quite clear that this is the assessment of the reporter. (20)

Yes very well, any further questions Mr Kuny?

MR KUNY: No further questions My Lord.

COURT: Yes, thank you, you may stand down Mr Harber.

NO FURTHER QUESTIONS.

JO-ANN BEKKER: d.s.s.

EXAMINATION BY MR KUNY: Miss Bekker you are a freelance journalist? -- That is correct.

And from time to time you have contributed pieces to the Weekly Mail? -- That is correct. (30)

Do you write for any other publication? -- Yes I do.

What/.....

What publication? -- Well I am employed by Alistair Sparks, who is himself a freelance journalist and I do research for him. I sometimes work for his newspapers and I also write for a paper in Florida in the United States.

What is your experience as a journalist? -- I have three years experience.

Have you ever done court reporting? -- Yes I have.

And were you requested a while ago to do a piece or pieces on the Delmas trial for the Weekly Mail? -- Yes I was.

Had you ever yourself attended the proceedings in this(10) court? -- I had earlier this year, I was here for two days.

You were requested by Mr Harber to write something for the Weekly Mail? -- Yes.

And is it correct that he suggested that you speak to Mr Dyson in order to gather material? -- Yes.

Did you in fact see Mr Dyson? -- I did.

You have heard his evidence this morning. Is it correct that you requested that he furnish you with certain documentation and in particular concerning a video that had been shown in court? -- Yes. I did not particularly ask him to (20) do it but in, with regard to the whole context it was an aspect I was interested in.

You made reference to the video? -- Yes.

And in response to this did he furnish you with certain notes? -- Yes he did.

With any explanation or comment? -- He said "These are the Court's notes" and I took that to be a transcript of the Court's records of the notes.

Did you in fact, were you given a transcript? -- No I was given, I understood that they were notes that somebody (30) had taken of what the Judge had read into the record.

Did/.....

Did you question him any further about them? -- No.

Was there any reason, as far as you were concerned, why you should have questioned him any further about those notes? -- I had no reason to doubt.

Were you also furnished with certain portions of the court record? -- Yes.

Any other documentation? -- I was given a number of transcripts of the records and also a copy of the Van der Walt Commission.

Yes. And you then wrote the pieces that have appeared (10) under your name in the Weekly Mail of 2 May on pages 8 and 9? -- Yes.

Incidentally the heading to the piece on page 9 "A Judge's Own Notes on Police Activities", was that yours? -- I had nothing to do with the headline.

Who would have put that headline? -- The sub-editors would have.

Yes. And for the rest was it your comment preceding the notes themselves? -- That was also slightly rewritten.

By? -- By the sub-editor. (20)

Yes. The portion on page 8 dealing with the ...

COURT: Just a moment, what was rewritten by the sub-editor?

-- I am afraid I do not have a copy of my original because I typed it into a computer which was transmitted via the telephone into the Weekly Mail. I do not have any hard copy but I remember that my introduction was only one paragraph. It was shorter, it was saying "These are the Judge's..." I do not know if I used the word "notes" or "record" but the impression I meant to convey was that it was your formal observations.

MR KUNY: Can I just place before you a copy of the Weekly (30) Mail. Could you refer His Lordship to the particular paragraphs

that/.....

that you say were rewritten or are not yours? -- Myself I cannot remember using the phrase "a remarkable light". I indicated that these were the notes that the Judge, the record of the Judge's notes after watching a funeral in Evaton, a mass funeral.

Yes.

COURT: Well did you convey to the Weekly Mail that these were the Judge's notes? -- I thought I had.

So in whatever way it is phrased, the first paragraph, "Notes made by a Judge while watching video footage", that(10) emanated from you? -- Not those words. My words were "what follows is Presiding Judge Justice J. van Dijkhorst's record of the video footage".

So are you saying that the first paragraph was inserted not by you but by the sub-editor? -- It is often that a sub-editor will rewrite a story to make it stronger, to make it capture the reader's interest.

But now where would he, how would he ascertain that these were the Judge's own notes? --I would submit that, although that may be an implication, it may be what people would read(20) into it that there was no intention to show that it was a Judge's own notes, insomuch as it was his private record, it was his own notes but which were nevertheless part of the Court record.

MR KUNY: Well what was your impression when you wrote the article? -- That was what my, that is what I understood to be the case.

COURT: Yes but I have no clarity now. If you only wrote the article as from the third paragraph "What follows is the Presiding Judge's record of the video footage" how (30) could one then conclude from that that these were the Judge's notes/.....

notes one could only conclude that these were the Judge's observations recorded in court. -- I can only back up what Mr Harber said and that is that journalists themselves are not as attuned to the legal distinctions.

Well are not the probabilities that you informed, whether it was in the article or not, that you informed the sub-editor or the editor or whoever that you had extracted this from the Judge's notes? -- Only in so much as they were part of the record.

Well can you not give us a bit more clarity, what (10) exactly did you tell the Weekly Mail? -- I remember writing two paragraphs. The first paragraph saying that you know this is a, this is a record, the Judge's record of his comments on funerals in Evaton in September 1984. But I certainly never intended to imply that they were your private record.

Now have you ever come across a report where the Judge's notes are discussed? -- In my court reporting, which I must have done at least a year's court reporting at various times, I have not ever watched a video in court so I am not aware of the procedure, whether you actually make comments as the (20) video is being shown. But it seemed to me that that was possible, that you might do it that way or that it was your observations after the video.

You see what strikes me as remarkable Miss Bekker is that the editor has no experience of a Judge's notes being used in court except when they are recorded, you have no experience of that, you do not tell the editor or the sub-editor that you got this information from the Judge's notes and yet it appears in the article. Is the conclusion one has to draw not that in some way or other you told the Weekly Mail that you got (30) it from the Judge's notes? -- I would not, I do not know, I

mean/.....

mean I would not know how it would be possible to get the Judge's own notes, if they were not observations made in court.

Yes. Yes Mr Kuny?

MR KUNY: Miss Bekker when did you first hear the fact that these were not in fact His Lordship's notes or part of the record of the proceedings? -- My Dyson telephoned me at my home on Saturday night.

Saturday 3 May? -- 3 May.

Until then had your belief been as you have indicated to His Lordship in your evidence? -- Yes they had. (10)

Would you just look at page 8, the portion to which we referred at the bottom of the first column onto the, well first of all the top of the first column, "The Van der Walt Commission" into "the September 1984 uprising in the Vaal townships could have major implications for the 22 men facing charges of high treason in Delmas." Was that your own comment? -- Yes it was.

And what was, what did you imply or intend by that comment? -- Just to indicate that the Van der Walt Commission was addressing or was investigating the causes of the September unrest in the Vaal and that is, as I understand it, (20) a primary aspect of the case.

Did you understand, or did you know whether the Van der Walt Commission report had already been referred to in the present proceedings at the stage you wrote your article? -- I understood it had been placed on record.

And then if you look at the bottom of the first column to the top of the second column you comment "Again one wonders if the protracted Delmas trial might have taken a different route had the findings been made available earlier." What did you intend to suggest by that comment? -- Only that it (30) might have altered the State's prosecution if this evidence

had/.....

had been, it may have, it would have, I understand it would have been pertinent and it may have changed the direction of the State's prosecution.

COURT: How? -- I would just say inasmuch as the article says, the whole aspect of agitators.

Well what do you mean by saying "That it could have major implications for the 22 men facing charges of high treason"? What do you mean by that, what implications? -- If the Court did accept the findings of the Van der Walt Commission as relevant it might find that individual agitators or what- (10) ever did not play a major role in the unrest.

So in fact you are prejudging the findings of this Court?
-- I

You are telling everybody what the effect of this evidence will be, either for or against the State? It is irrelevant at the moment in which direction you write the article. -- I cannot prejudge what the Court will find.

Well is that not exactly what you are doing there and what you are doing down at the bottom of that paragraph, "One wonders if the protracted Delmas trial might have taken a (20) different route had the findings been made available earlier"? -- It could just be one aspect before the Court, one record before the Court.

The question is not what effect your speculation will have on this Court, none whatsoever. The question is whether it is proper to speculate about the effect of evidence on a finding of a Court which has not been given yet. That is the issue at the moment. Yes Mr Kuny?

MR KUNY: In regard to the portion of your article on page 9, the last column starting with the words "New evidence which (30) could shake the State's case includes the following", now were
you/.....

you there referring to evidence which had already been placed before the Court or evidence which was going to be given? -- I remember writing "recent evidence". It is not new evidence.

Well what evidence was in fact being referred to then as recent evidence? -- The three paragraphs which are marked with a blob.

And when you say "which could shake the State's case" what did you intend by that statement? -- It just seemed that it was dramatic evidence which might have implications for the State's case. (10)

COURT: It may well be. All the evidence, most of the evidence which favours the defence would have implications for the State's case. The question is whether it is proper to speculate about the implications in a newspaper while the Court has to find that. -- I understood that my articles would be submitted to a legal expert to look at them to make sure that they were okay, that they were not in contempt.

Well were they submitted to a legal expert? -- Yes they were.

Who was the legal expert? -- The legal expert was My Dyson. (20)

I see. Yes Mr Kuny?

MR KUNY: There is also the portion at the bottom of the second last column, "At the same time there appears to be little clarity as to what the hearing is about". Is that your own comment? -- Yes it was. It was based on the following paragraphs, the paragraphs which follow that.

COURT: Yes. On the admissibility of the evidence and on a remark by myself? -- Yes.

As to the relevance of certain evidence? -- Yes. (30)

But does it follow from remarks about the relevance of

evidence/.....

evidence that there is little clarity as to what the hearing is about? -- I also understood.

Were you intending to convey that you had little clarity or that the Court and counsel had little clarity as to what the hearing is about? -- I meant for an observer, somebody who would read all the newspaper reports which have a lot of this trial it does not seem very clear where the case is going, it does not seem to be....

But now was it clear to you where the case is going?

-- No.

(10)

If it was not clear to you where the case is going why did you not ask? Why did you not ask Mr Dyson where the case was going? Is the impression not conveyed by this observation here that the Judge does not know where the case is going? -- Well that comment that is quoted would appear to bear that out.

Yes, on a specific point. But as to what the hearing is about, the trial is about? I have to put it to you that the impression prima facie created by this paragraph is that after three months of trial the Judge does not know what the case (20) is about. Yes Mr Kuny?

MR KUNY: Miss Bekker was it your intention to convey that, what His Lordship has just put to you? That the Judge does not know what the case is about after three months of hearing? -- No it was not.

Miss Bekker did you have anything to do with the caption to the photograph? -- No no part whatever.

And finally I want to ask you

COURT: Did you inform the editor or sub-editor of the Weekly Mail that there had been a lengthy battle for permission (30) from the Judge? -- No I did not.

MR KUNY:/.....

MR KUNY: Finally I just want to ask you whether

COURT: Where does this come from? -- I do not know.

MR KUNY: Did you have anything to do with the photograph?

-- Nothing to do with the photograph.

I wanted to ask you finally whether had you known that these notes were not the Judge's notes or for that matter had they been the Judge's notes but were not part of the record would you ever have published them or allowed them to be published? -- I would certainly, I would not have, certainly not. (10)

And are you prepared to apologise to His Lordship for the impression created by your article, or your articles? -- I am.

No further questions.

COURT: Yes, thank you, you may stand down.

NO FURTHER QUESTIONS.

MR KUNY: My Lord that is all the evidence which we propose to lead.

COURT: Yes, yes Mr Kuny, would you like to address me?

MR KUNY: As Your Lordship pleases. (20)

MR BIZOS: My LOrd I just want to interrupt My Learned Friend. Apparently one of the accused is expected by the District Surgeon and a Specialist Physician. Has he Your Lordship's leave to leave the court.

COURT: Yes, no. 14?

MR BIZOS: No. 14.

MR KUNY: My Lord Your Lordship has summoned the Editor and the reporter of the Weekly Mail to appear before you on, to show cause why they should not be convicted on a charge of contempt. The content of the order really covers several differing (30) aspects of the reports that appeared on page 8 and 9 and I

propose /.....

propose to deal with these separately but broadly speaking my submission to Your Lordships will be that whilst the publication of the notes as Your Lordship's notes when they were clearly not Your Lordship's notes is most unfortunate and regrettable. The circumstances under which this publication took place do not constitute contempt with intention and Your Lordship would have to find, in order to find the editor and the reporter guilty of contempt, that they intended to....

COURT: Are you correct on that point? Is there not strict liability of the Press? (10)

MR KUNY: Well My Lord there is no authority that I have been able to find which places a strict liability on the Press in these circumstances. The furthest perhaps that it goes is in GIBSON's case.

COURT: What about MAKWANE's case?

MR KUNY: My Lord my submission is that intention is clearly an element of the offence and that Your Lordship must find either actual intention or intention in the form in which His Lordship Mr Justice MILNE dealt with it in GIBSON's case, which is reported in 1979 (4) SA at page 131 where His Lord-(20) ship made the following comment, dealing with the question of contempt at the letter C:

"It is trite law that the State must prove beyond reasonable doubt that the accused had such an intention. I think it is clear that none of the accused subjectively desired to violate the dignity, repute or authority of the Court or to interfere in the administration of justice."

COURT: Was that a matter of a press report? What were the facts there? (30)

MR KUNY: Yes it was a matter, the Editor and the journalist

were/.....

were there being charged with criminal contempt and defamation.

And His Lordship said:

"There was therefore no dolus directus. It would be sufficient, however, if it were shown that the accused made a statement falling within the definition of a contempt of court and that he subjectively foresaw a real possibility that his words or conduct would be insulting to the Court and nevertheless acted recklessly without caring that such a result might ensue. As was put by VAN DYK, A.J. in S v KAKUNGA: (10)

'Hierdie opset kan bestaan in sy twee verskyningsvorme, naamlik opset as oogmerk en opset met moontlikheid bewussyn.'

We would submit that that is really the test. There has been speculation as to whether liability is strict and Your Lordship is referred to Hunt, South African Criminal Law and Procedure, Volume 2, in this regard at page 183 to 184 where the author deals specifically with what he terms "the newspaper cases" and at page 184 the author submits the following:

"It is respectfully submitted that when the Appellate (20) Division is called upon to pronounce upon the question of mens rea in the newspaper cases it should overrule the decisions already mentioned and place mens rea in those cases on the same footing as in other common law crimes of intention, namely the publisher or editor is guilty of contempt only if he actually foresees the possibility that proceedings are pending and that they may be influenced by what he publishes, or if he actually foresees that his publication may in some other way constitute a violation of the Court's dignity, repute (30) and authority. In these circumstances if he publishes

he/.....

he acts recklessly, whatever his motive may be."

Now we have the situation here that we are dealing with two different types of allegations against the Editor and the journalist. The one is, insofar as Your Lordship's supposed notes are concerned. That falls into a somewhat different category to the other portions of the reports because there the evidence before Your Lordship is that the journalist, in putting out these notes as Your Lordship's notes was acting in the bona fide but obviously mistaken belief that they were Your Lordship's notes. Clearly there was an error on her (10) part. This error may have been negligent but it could never, in our submission, amount to the intention which would be required for the commission of this type of offence. It could never have amounted to the recklessness which is referred to in the GIBSON judgment or in Hunt. She received these notes from an attorney who was involved in the matter and who had told her that they were the Judge's notes. She had no reason to believe otherwise. It is true that she was not furnished with a formal copy of the record in this regard but with the assurance from the attorney that they were the Judge's notes, (20) and this was of course his erroneous impression as well, she then bona fide published them in that form believing that they were the notes which would have been placed on record and therefore would be publishable in that form. She was wrong in this regard and she has explained how her error arose. But with respect that would not amount to contempt on her part because she had no intention as required by law. Similarly as far as the Editor is concerned he had merely commissioned her to write this piece and thereafter he played no role in the preparation of the pieces that were written (30) or in their publication other than to see them in their

completed/.....

completed form before publication and to approve of them, believing in what she had indicated in her report these notes to be the Judge's notes. He had no reason to believe otherwise. And in this regard he has explained that he knows that in proceedings in courts of law where a Judge or a Presiding Officer has an inspection in loco he will normally make notes of his observations and those notes would then be read into the record and as far as he was concerned this is in fact what these notes comprised. In those circumstances we would submit that there was no intention on his part either to commit (10) contempt. The responsibility clearly was that of the attorney who was under the mistaken, but we would submit bona fide mistaken impression that they were Your Lordship's notes. That error should never have occurred and the attorney, the moment he realised what error had been made drew this to Your Lordship's attention outside court on Friday and has explained how and why and in what circumstances he made this mistake. It may not be excusable but it certainly was not done intentionally and he has apologised to Your Lordship for the error and Your Lordship has before you a form of retrac- (20) tion and apology which the Weekly Mail would publish, either in this form or in such other form as Your Lordship may direct, which would correct the mistaken impression created by the report. We would submit that it is a most unfortunate report, it is a most unfortunate error and it is one which clearly Your Lordship was entitled to and in fact obliged to investigate in this forum. But one which in the circumstances would not amount to criminal contempt.

In so far as the other portions of the reports are concerned to which Your Lordship has taken objection I would (30) submit that the report dealing with the Van der Walt Commission

does/.....

does not, with respect, anticipate in any way the findings of this Court or interfere in any way with the administration of justice. The definition of "contempt" as set out in Hunt is as follows:

"Contempt of Court consists in unlawfully and intentionally violating the dignity, repute or authority of a judicial body or interfering in the administration of justice in a matter pending before it."

Now that portion of the report could only, with respect, be brought under the section of the definition which reads (10) "interfering in the administration of justice". It does not, with respect, in any way violate the dignity, repute or authority of this Court. And insofar as it is to be examined in terms of that part of the definition my submission is that if one reads this carefully it does not deal with the administration of justice in this fashion, it merely speculates that the case may have been handled differently by the State had that report been available at an earlier stage. It does not amount to criticism of the State, it does not amount to any criticism of the Court in the manner in which the (20) Court has dealt with this report, but it does regret the fact that the report, which was submitted to the Government in March 1985 had not been available earlier because had it been available earlier the course of this trial, not the result, not the outcome but the course of the trial, might have been different. It might for example have affected the way in which the State decided to run its case or the number of witnesses which the State decided to call or the areas which the State may have decided to cover. But it does not, otherwise, in any way comment upon these proceedings or interfere in (30) respect with the administration of justice in these proceedings, and/.....

and, with respect, it is a comment which is really speculation and perhaps fair comment based upon the fact that a report which apparently deals with some of the very issues which are being canvassed in the course of this trial had not been made available much earlier prior to the commencement of the trial when in fact it had been furnished to the Government as early as March 1985, and the comment then relates only to that facet and no other. So that whilst at first glance it may have appeared to Your Lordship to have been in some way or another commenting on Your Lordship's conduct of these proceedings (10) or the prosecution's conduct of these proceedings it does not, with respect, do that. It merely wonders whether the proceedings may not have taken a different course, and in fact the words used are "the trial might have taken a different route". The emphasis we would place here is on the word "route". Had these findings been made available earlier. And with respect that is fair comment and certainly not comment which would bring it within the ambit of being contempt of court.

Insofar as the portion on page 9 is concerned I deal first of all with the portion under the words "New Evidence which (20) Could Shake the State's case includes the following:" First of all the reporter is there dealing not with new evidence of the nature that was still going to be presented but in fact with, she was dealing with evidence that had already been placed before Your Lordship. So that it really would be more what she says she wrote, "recent evidence", rather than new evidence in the sense of evidence that was going to be presented. And then she says the following:

"The tabling of the official Van der Walt Commission's findings on the causes of the September 1984 rising, (30) the report found grievances against rent increases and

corrupt/.....

corrupt councillors and not 'agitators' were responsible for the revolt. See separate report."

There she is commenting factually on the content of the Van der Walt Commission report and it would appear that she has actually taken, using words of the report in this very brief statement about it. Secondly she speaks about Brigadier Viljoen, the policeman in charge of the riot units in the Vaal during the uprising, "conceded under cross-examination that he had received no briefing on the situation in the Vaal before taking control." She is dealing there, presumably, with (10) something that emerged from the record itself and it would be the sort of report that one might find in any court report of court proceedings where a witness has made a concession under cross-examination. Thirdly "Esau Mahlatsi, Mayor of Lekoa Town Council seemed to give substance to allegations of corruption in the Councils when he admitted that councillors had divided liquor outlets among themselves." Now I am not...

COURT: You are not in the case?

MR KUNY: No.

COURT: How do you read this last portion of that sentence?(20)

MR KUNY: Well My Lord I not being in the case read it as saying that there are allegations of corruptions in the councils and this particular man, who was the Mayor of a Council, having admitted that councillors had divided liquor outlets among themselves was giving some sort of credibility to that allegation.

COURT: But what do you, not being in the case, understand by the words "had divided liquor outlets amongst themselves"?

MR KUNY: It would to my mind, as a layman as far as the case is concerned, indicate that there had been some corrup-(30) tion on the part of those persons. That would be my ...

COURT:/.....

COURT: Yes. It would appear to be so.

MR KUNY: My impression yes. Now I do not know whether that is a fair comment on the evidence or whether that is what emerged from the evidence itself.

COURT: It is not correct, but I did not take it up with the reporter because I am not going to comment on the evidence here.

MR KUNY: Yes I understand.

COURT: There was no division of the liquor outlets amongst themselves. They tendered for the liquor outlets. (10)

MR KUNY: Well I do not know to what extent it accorded with what is on the record.

COURT: But this is not going to be an issue in this situation we are here with, it does not matter and I will not comment on it further. What I want you to address me on is this aspect, "New evidence which could shake the State's case includes the following". The question whether a journalist is entitled to comment upon the effect, or speculate upon the effect evidence will have upon the Court.

MR KUNY: Well the test in this regard has been dealt with (20) in a number of cases and I would refer Your Lordship to a dictum in the case of NORRIE v CONSANI 1932 CPD 313 where the following was stated: I have not got the actual report here but what I have is A Newspaperman's Guide to the Law, 4th Edition at page 88.

COURT: By Mr Dyson?

MR KUNY: He is one of the co-authors of the latest edition.

COURT: Yes. I hope there are no mistakes in the book.

MR KUNY: Well I hope not. The portion of the judgment quoted is the following: (30)

"Now it seems to me that there is a tendency to interfere

if/.....

if the document is of such a nature that if it came to the notice of the Tribunal and if it influenced the mind of the Tribunal it might affect the case, or a portion of the case. It is contended, and rightly so, that the Judge would not be influenced by this letter even if it came to his notice but it seems to me that one cannot enquire in each case whether the document would or would not be likely to influence the Judge's mind. The question to my mind is this, if the facts set forth in the document were accepted by the Tribunal would this influence (10) the case."

COURT: Is this exactly what we are dealing with at the moment? Let me put to you a very crude example. Say a journalist writes "Yesterday Mr X testified. We are sure that this evidence will mean that the accused is found not guilty." Just on that basis. Would that be proper?

MR KUNY: No I submit that that would not.

COURT: Now if he does not go that far but the journalist says "I wonder whether the accused will not be found not guilty because of Mr X's evidence yesterday" would that be (20) proper?

MR KUNY: It may be a matter of degree and it may be very difficult to draw a line as to where fair comment ends and contempt begins. We would submit that there comes a stage at which clearly it is not proper for a journalist to comment on the evidence because that would be dealing with something which is sub judice and which should not be commented on. It is for the Court at the end of the proceedings weighing all the evidence to deal with it. All that the journalist is doing here is again speculating, very very tentatively, in (30) respect of evidence that has already been placed before Your

Lordship/.....

Lordship as to whether this could possibly shake the State's case and what she says is "New evidence which could shake the State's case includes the following" and the test then is whether that would in some manner interfere with the administration of justice by affecting, or which could affect, the mind of the Court hearing the matter.

COURT: No the test is not that because it is clear that this will never affect this Court or any other Court. The test is whether the opinion the public has of the Court and of the dignity of the Court will be lowered by newspaper speculation (10) on evidence on the outcome of a case. There is no difficulty with reporting that Mr X said this and Mr Y said that. But when you go further and say this is very important evidence, we are sure that the Judge will take it into account and it will have an effect on the case how far can you go?

MR KUNY: Well in the case of VAN NIEKERK, in which OGILVIE-THOMPSON, J. gave the judgment, I cannot, VAN NIEKERK's case is 1972 (3) SA 711 (A) at 720, His Lordship said the following:

"The line between scandalous comment and fair and legitimate criticism is not always easy to draw." (20)

But at page 724 His Lordship said:

"The test to be applied is whether the statement or document in issue tends to prejudice or interfere with the administration of justice in pending proceedings."

And we would submit that that in respect of this comment is the test that Your Lordship should apply and the question is whether it would tend to prejudice or interfere with the administration of justice. If for example the reporter was referring to evidence which was not yet before Your Lordship, or something outside of the proceedings clearly that could, without (30) question affect Your Lordship's mind and prejudice the

proceedings./.....

proceedings. But where she is dealing with evidence which has actually been placed before Your Lordship and what she has done is merely to pinpoint certain aspects of the evidence with the thought expressed in the form that new evidence which could shake the State's case includes the following we would submit that whilst it is not desirable that a reporter write in those terms it would not in itself constitute contempt. It is certainly not to be encouraged but, it is certainly not to be encouraged that journalists should speculate freely about the effect that evidence which had been placed before a (10) Court might have. But with respect that is not contemptuous as one understands the tests for contempt.

Similarly in regard to the passage at the bottom of the second last paragraph "At the same time there appears to be little clarity as to what

COURT: I think as far as that passage is concerned it is unwisely put but it may be open to an interpretation that the clarity or lack of clarity is not on the part of the Judge. I do not think you need address me on that. I think it is unfortunate to put it in that way. (20)

MR KUNY: I may say it may have been triggered by Your Lordship's words "Where is this going". In other words Your Lordship was enquiring about something and the reporter took that up and carried the speculation a little further.

COURT: Which is not unusual. Yes. As far as the caption is concerned that as far as I am concerned is not contempt of Court. Either it is factually correct or it is not factually correct. It happens to be not factually correct.

MR KUNY: Beyond that I have no further submissions to make. My ultimate submission to Your Lordship is that Your Lordship (30) should find that unfortunate as this reporting may be, and

clearly/.....

clearly it is, that it did not constitute contempt in the circumstances, that there was no intention on the part of the journalist or on the part of the Editor to commit contempt and that Your Lordship would so hold. At the same time the apology and the explanation as tendered to Your Lordship will of course be published and Your Lordship may want to give directions as to anything further to be added to it or any caption to be placed on it, or the form in which it should be presented.

COURT: Yes. Mr Kuny there is actually only one redeeming (10) feature on page 9 and that is that the photograph was a great success.

MR KUNY: As Your Lordship pleases.

COURT: I reserve my judgment until tomorrow morning at 09h00.

MR KUNY: May I be excused from attending tomorrow morning?

COURT: Yes, will there be somebody to speak on behalf of the accused then, will somebody else attend?

MR KUNY: There certainly will be, if it is not myself then somebody else. (20)

COURT: It will be somebody else, yes thank you Mr Kuny. The Court will now resume its normal hearing. The evidence is in camera and those not directly involved are requested to leave the court.
