that would be difficulties. In relation to Dr Hartshorn, the first reference at 85, an attempt by your lordship and the assessor to put the blame, to extract evidence from the witness that would put the blame for the boycotts on the SRC's and COSAS. The 315 reference, the matter is taken up again in relation to SRC's and COSAS. Dr Motlana was questioned at length about the affiliation when he in fact admitted that there was a de facto situation, and also he was questioned at length about songs. And Mabaso, he was questioned about AZAPO and the VCA in the Vaal. It was suggested to him (10) that co-operation in the Vaal would not be compromising the principles of AZAPO. Your lordship's assessor puts to him that AZAPO does not really believe in peaceful change and both your lordship and your lordship's assessor make it quite clear to him that his answers in relation to what he says about the aims of AZAPO and what sort of socialism, if any, it wants are not acceptable. Could we turn to Nkopane, accused no. 8.

COURT: Page?

MR BIZOS: It appears to start on, yes we are going to limit (20) the number of references that we will give your lordship, indications of. Would your lordship turn to page 12 please, the fourth line from the bottom. There is three pages of examination by your lordship about the representativeness of the meeting at which the stayaway was decided, a matter that we submit should have been left to the prosecutor. Then the first entry on top of page 13, that is the 9 083, the court trying to direct the witness into an admission that COSAS was involved in the planning because of the use of the word "children" in the pamphlet. The next item, 9 084, (30)

further/....

further examination about COSAS. The next item, 9 085, examination about the illegality of the march and about Esau Raditsela. The third last item on page 13, that is 9 111, the court introduce to Tumahole and foreseeability even though we contend it was not part of the charge. And your lordship's attempt, well not attempt, your lordship's putting the prohibition in relation to meetings as an exhibit during the defence case, which was not in our respectful submission a matter which ought to have been a matter for your lordship but rather for the state. (10)

COURT: Page?

MR BIZOS: I am sorry my lord, it is the fourth last, it is 9 194, 13, 9 197 line 6. Have I got that down? I want to place on record that this is not an exhaustive list of the interventions of the court and the assessor but these are the ones which we managed to put together during the time available to us in a more or less presentable form. Let me repeat that the purpose of this is to show that your lordship's findings on credibility may not be accepted by the appeal court as a result of your lordship's participation in the (20) manner which we have set out. We are not unmindful of the difficulty for anyone to even accept that there is a reasonable possibility that another court will take the view that one has gone beyond the proper limits. But we would ask your lordship to be guided by the remarks of Didcott, J. to allow the appellate division to do this, especially as the case is going to go on appeal anyway, judging by your lordship's *prima facie* views thusfar expressed, either by way of general leave or special leave, special entries or questions of law reserved. I also now have to address your lordship on certain (30) misdirections of fact. I do not know for how long your

lordship intends continuing.

COURT: We will hear you out Mr Bizos.

MR BIZOS: Well perhaps I should then have a sip of water.

MNR JACOBS: Net voor mnr Bizos aangaan kan ons die hof vra vir 'n paar minute se verdaging edele, ons sit darem nou van 14h00 af. Ons moet net ons karre uitkry want waar dit is word dit toegesluit dan kry ons dit nie vanaand uit nie.

DISCUSSION BETWEEN COURT AND COUNSEL.

FURTHER ADDRESS BY MR BIZOS: That on your lordship's findings as far as we are able to study the judgment not (10) a single accused was found to be a credible witness. On hardly any point. And even though accused no. 2 has been acquitted that is not the end of the matter in relation to credibility and your lordship's approach to it. He is described as a wholly unreliable witness. His explanations of AZAPO are to say the least incomprehensible and wholly unclear. Now IC.8 is described as unreliable. Your lordship says, yet your lordship cannot make a finding about the tape. We submit that a proper finding in relation to that on the evidence is that the tape evidence of IC.8 is false and a proper (20) finding would have been that why was it, how did he find it, why did he find it necessary to lie about his friend. The fact that he lied in the witness box in relation to his assault, how, the appellate division may well ask as we do, with respect, why is IC.8 merely an unreliable witness and the accused no. 2 is wholly an unreliable witness. Now accused no. 3 is described as a totally unreliable witness. His evidence was often contradictory and often untruthful. He is also described as being verbose and the most evasive witness we had in the whole case. Yet Mahlatsi, Masenya, Rina (30)

Mokoena/....

Mokoena, IC.8, Phosisi, are described as merely unreliable witnesses. They gave evidence which was contradictive, improbable, unacceptable. Why are they not described in the terms in which your lordship describes the evidence of accused no. 3? Your lordship describes his evidence in relation to DA.8 as evasive, illogical and sheer nonsense. Was Phosisi's evidence not sheer nonsense? Was Mahlatsi's evidence not sheer nonsense when the learned assessor found it necessary to say of him that he was speaking with, "Would the real Mr Mahlatsi please stand up". I do not want to say anything about Rina(10) Mokoena. Your lordship describes accused no. 3's evidence in relation to the speech of accused no. 19 as absolute nonsense.

COURT: Now what is the point? You are dealing with misdirections of fact.

MR BIZOS: Yes my lord.

COURT: Is your point that I should have more strongly described Masenya, Mahlatsi and Mokoena and Phosisi or is your point that I should have more weakly described accused no. 3, and if so where does it take us in the appeal?

MR BIZOS: I will tell you my lord. It is neither the one (20) nor the other and I will tell you the point that I am trying to make. What I am saying to your lordship is that on a proper analysis of the evidence the witnesses for the state that I have mentioned were much worse witnesses than the two defence witnesses that we have dealt with up to now. The fact that your lordship described them in this manner may persuade the appellate division that your lordship's description of other witnesses is in similar terms to accused no. 2 and 3, is not valid.

COURT: Is that a misdirection of fact or a misdirection (30)

of/....

of approach?

MR BIZOS: Well it is the same thing, in my respectful submission. Approach in order to determine the facts is a misdirection in relation to the facts. And this is carried forward in relation to accused no. 5 in respect of whom your lordship says a very intelligent witness with impecable demeanour in the witness box and very calm. He tells material untruths without batting an eyelid. We will submit that there are no demonstrable untruths told by accused no. 5 and we will deal in due course that the basis upon which some of his answers were rejected were, on speculative inferences, not consistent with all the facts. Your lordship refers to him as the greater fighter for the youth organisation in the Vaal. The denial that the police intended to stop the march is ridiculous. Your lordship also finds that it is totally unacceptable that Esau Raditsela would leave this important meeting of the VCA without instructing accused no. 5 to propose the same resolutions, it is inconceivable that Edith and Esau would have left this important meeting without making sure their resolutions would be put and passed. Now this is, with the greatest respect, speculative and is not in accordance with the facts. The preponderance of probabilities and the weight of evidence is that accused no. 5 did not propose the march but only the stayaway, in the circumstances. There was no credible evidence to contradict him. Your lordship finds that accused no. 5 misled the audience about the illegality of the march. We submit that the evidence that there is, there is no warrant for finding that he misled anyone. Your lordship finds it totally unacceptable that there were no children younger than 18. Your lordship finds that his

evidence/....

evidence that he spent the night in Zone 3 is probably an attempt by him to evade embarrassing questions of his knowledge of the violence in zone 13 before the march. He was not challenged on this, and on what basis is a finding of fact made against him? Accused no. 6 is again found untruthful, an unreliable witness. His statement about councillors is curious. A portion of his evidence is said to be stretching credulity too far. Now again all these adjectives are reserved for accused persons and not for witnesses for the state. Accused no. 7 is evasive and at times blatently untruthful. (10) No. 8 is described as untruthful, not a good witness, unreliable, contradictory, evasive, has a tendency to turn his sails to the wind when confronted with other statements in conflict with his. Now I submit that we may reasonably be able to persuade the appellate division that once this sort of adjective was used in relation to him and not to witnesses which we on the record may be able to show were deliberately untruthful your lordship's findings may be disturbed. Accused no. 9, excitable, fast spoken, argumentative, evasive, untruthful. His evidence is wholly unreliable. On what my lord? (20) He is a person who actually admitted, without any evidence for the state, that he took part in the march.

COURT: Yes he did not know what was coming Mr Bizos. You have made that point a number of times. But that was put in cross-examination to an early witness.

MR BIZOS: Yes my lord.

COURT: Yes. So it is not so much an admission. You could not have put to the witness he was not in the march when there could have come five witnesses who said he was in the march and his own story is he was in the march. So it is not a (30)

very/....

very great concession. But I take note of it.

MR BIZOS: But it was not necessary to put anything.

COURT: Yes.

MR BIZOS: Your lordship finds the fact that he did not enquire about Edith's whereabouts at the meeting of the 26th is held to be incomprehensible. Why should he be concerned about the comings and goings of Edith Lethlake? Accused no. 10 is verbose, frequently evasive and often untruthful, cannot be regarded as a satisfactory witness, he is totally unreliable. His interpretation of the people's (10) population liberation movement is absurd. No. 11 unreliable and untruthful in many respects, far fetched, exaggeration, totally unconvincing. Either naive or he is being untruthful. His evidence on the stayaway is at various times described as nonsense. On the legality of the march his evidence is described as absurd. Accused no. 13 is described as untruthful because, apparently he feigned ignorance of the struggle. Accused no. 16 is untruthful. His evidence was false in a number of respects. Dlamini, who gave evidence on the march and the meeting of 3 December 1988, is described as a wholly(20) untrustworthy witness. Now the witness' evidence is characterised by your lordship as a clear attempt to adjust to the defence's case. His explanation of her misunderstanding in relation to some small matter is unacceptable, making wild statements about seeing the post office damaged, if it was there. Now we submit, with respect, that the grounds advanced by your lordship in Annexure Z are not sufficient to reject these witnesses' evidence. Lepele(?) who gave evidence on the march was unsatisfactory, he cannot be relied on. Having given evidence on the march and on the meeting of the 3rd (30)

the/....

ground upon which he is apparently disbelieved relates to a contradiction as to the payment of a bribe, some time in 1983 or January 1984 with the contradiction as to which of the two it was. Letsole, on the march in Bophelong, very poor lying witness. This sort of description is not for state witnesses. Mgulwa is described as contradictory and had a bad memory, he is wholly unreliable. The non-payment of rent is one of the grounds upon which, which is listed presumably for him to be disbelieved. The other ground that is given is his prejudice against the councillors is evidenced because, says his (10) lordship, when asked why he did not complain to the councillors in 1984 he said that these complaints would not be attended to. There were lots of evidence to this effect, to support the belief that the councillors would not attend to complaints. Professor Van der Walt reports many of them and there is direct evidence from a number of accused and witnesses, and concessions from state witnesses. Mahini is described as wholly untrustworthy. This is perhaps a matter which illustrates the different approach. William Mahini is an untrustworthy witness. We would agree. He is the person (20) who contradicted himself about the meeting of the 26th. He said something about, as your lordship points out, that Kabe spoke and he said Kabe did not speak. But having dismissed him as a wholly untrustworthy witness he made a statement in cross-examination that he had heard of the existence of VYO, the Vaal Youth Organisation. I would say that at least forty to fifty witnesses were cross-examined on the same point, defence witnesses, because my learned friend for the state, not having had any evidence in relation to VYO and COSAS lost no opportunity to ask witnesses what did they know about (30)

VYO/....

VYO and COSAS, and everyone of them said that they did not know very much about COSAS and practically every one of them that was asked said that they had never heard of VYO. The one completely unreliable witness who contradicted his evidence-in-chief who happens to have said that he has heard of VYO is used in the judgment of your lordship as a fact to convict accused no. 5. Now that in our respectful submission is a serious misdirection and is evident of your lordship's approach, and we may be able to persuade the appellate division that it is symptomatic of your lordship's approach that that which is (10) against the accused's case is more readily accepted than that which is in its favour. Mphala, he is described as an impressive and wholly unreliable witness. The reasons that we can see is the non-payment of rent and what your lordship considered a silly remark about his classification between youth, middle aged and old. It may be silly but we submit with the greatest respect it is not a sufficient ground for disbelieving a witness. Mazibuko is described as untrustworthy because your lordship says he is a political activist who down plays his role. His political activism, in your lordship's judgment,(20) is apparently from the fact that in Evaton where he lived there was going to be no increase yet he joined a march which did not concern him and for which he lost a day's wages. He did not try to hide the fact that he wanted to identify himself with the cause of the people of the Vaal. The mere fact that he decided to go to the march does not make him an untrustworthy witness. Angelina Magotsi is apparently from Bophelong, is apparently rejected for her nonsensical explanation of how they arrived at the R30. Mokate is described as a very poor witness and totally unreliable. We submit (30)

that/....

that no sufficient reason has been given as to why this witness should be disbelieve. Nomane is wholly untrustworthy and biased in many respects against councillors and the system. Does that mean that witnesses cannot be truthful? He did not vote in councillor's elections in 1983, being prejudiced against the councillors. Is that ground for disbelieving a witness? I am not unmindful of the preamble to Annexure Z but the fact that these were matters which your lordship thought worthy to note as an aid memoir to assist your lordship in your lordship's judgment shows your lordship's approach. His hatred for councillors is evident from his total lack of commiseration or help for his friend, neighbourg, Councillor Mtwane. He stated he was angry about the rent increase, that councillors were traitors and corrupt and enemies of the blacks. Now when one lives in a divided society it may be that one does not behave with the charity that one ought to behave. But that does not make a person an untruthful witness. His reasons for not paying rent are described as a lame excuse. Mtseya(?) from Bophelong, an untrustworthy witness whose evidence at best are full of things who does not contribute much. Criticism against her is that she cannot be a political baby in the woods, her sister Cynthia was detained after the riots and her brother Toto has not been seen since. What does this prove, with the greatest respect? That she has had the misfortune of having two of her relatives affected. It has not been unknown for members of families to have fundamentally different views in relation to current matters. The non-payment of rent is noted. Donald Monyana was not frank and his evidence was subject to various criticism.

COURT:/....

COURT: Who was that now?

MR BIZOS: Donald Monyana, Nonyana I beg your pardon. No sufficient grounds have been given for the rejecting of that witness' evidence. This witness gave evidence on the march and the meeting of the 26th. Her memory about events are obviously not clear. No reliance can be placed on details. We do not regard her as trustworthy. Your lordship indicated, I think this time when Mr Jacobs was cross-examining at great length, blow by blow, as to what happened at the launch of the VCA, as to whether anyone was expected and what happened at (10) the meeting. The payment of rent is again noted. Is that a reason for her being disbelieved or unreliable? Martha Olifant, your lordship's remark in our respectful submission is, with respect, a strange one. "It is amazing after all these years she can remember all the dates of relatively unimportant house meetings. She has been coached." It was not put to her. Her attempt to give the dates was no different to IC.8 or the Reverend Mathlatsi even though the Reverend Mahlatsi managed to get them all mixed up. But in his evidence-in-chief he gave all those dates. Then your lordship says (20) "Because she denied that accused no. 5 called councillors puppets and sellouts it was clear that she was attempting to shield the accused." Presumably, if she was coached, she must have been told that accused no. 5 admitted that he called the councillors puppets and sellouts. Is that an aspect where she was not properly coached? How can a witness be disbelieved on grounds which have not been put to her, which have not been argued by the state, which have not been, in respect of which we have not been given an opportunity to answer? As to where Esau was when the march started is described by your lordship (30)

as/....

as hedging and we submit that for a person who was moving about from place to place why should a witness be in a position to say precisely where this person was. Then the witness Poenyang(?) was wholly unimpressive and that he was not candid and was untrustworthy. There is no evidence to contradict him. His evidence stands uncontradicted that this banner was made a day or two before the funeral by Mamzi and him because they felt that they had been left out. We do not find any discussion in your lordship's judgment as to why this evidence should be rejected but it is used as a fact to find that VYCO existed and to use that fact for the conviction of accused no. 5. Joshua Raboroko. We submit that again your lordship says that he was an unsatisfactory witness, was not a satisfactor witness. Your lordship says that he would have suppressed an incitement to murder because he is part of the friendly press. It might be said, with the greatest respect, that IC.9 was employed by the unfriendly electronic media. But it was not put to him that he was part of the unfriendly press, I beg your pardon the friendly press who would suppress this fact. Your lordship in our respectful submission misdirects yourself when you say that he, they do not, he did not publish it, the stayaway and the march and other matter because they do not publish incitement. His evidence was clear as to why he did not publish anything about the stayaway, that there were conflicting reports and that he did not want to involve his newspaper ...

COURT: That is one part of his evidence Mr Bizos. If you look at a different page you find a different part of his evidence. That is one of my problems with this witness.

MR BIZOS: Well then my lord, but why use the portion which

is/....

is unfavourable to the accused?

COURT: Why does he tell us two or three stories?

MR BIZOS: But my lord he is not an accused. Let us, with the greatest...

COURT: He says to us Mr Bizos, he says to us - and I referred you to it when you argued previously. You just ignored my referral, you never came back to it. I had to look it up myself and there is a portion in the record where he says clearly "I did not publish it because I did not want to publish inciting matter". Now you come again and you refer (10) again to the other part of the evidence as if the other part does not exist.

MR BIZOS: But my lord, let me take, I am sorry I do not remember this being, being asked to do it ...

COURT: I remember it clearly Mr Bizos.

MR BIZOS: Well I will accept that my lord. In a case such as this I think I must be forgiven if I have overlooked a piece of evidence. But let us assume, let us assume that this is what he said in relation to the march and the stay-away. Your lordship will recall what his evidence was in (20) relation to the incitement to murder and that is that if Mr Manthata said anything like that he would have made arrange-ments with his editor.

COURT: To do what? To publish it?

MR BIZOS: In order to keep the front page empty the next day because he had a big story. This was his evidence in rela-tion ...

COURT: But that would conflict directly with what he told me at another page, that they would not publish that sort of thing. You see this is the problem with this witness. (30)

MR BIZOS:/....

MR BIZOS: No my lord, let me ...

COURT: And then you complain that I reject him.

MR BIZOS: No my lord, but your lordship uses him, your lordship uses him in order to find that there were ...

COURT: But Mr Bizos let us be practical. This man has a report of a stayaway, he is told that by Esau Raditsela. He has a report of a march. He is told that by Esau Raditsela. What does he publish on the particular day? He does not publish either, having been told that by the organiser of both he does not publish it but he publishes a month old report on corruption by councillors. Why? (10)

MR BIZOS: He gives an explanation my lord.

COURT: And it was not accepted by this court.

MR BIZOS: Well we may be able to persuade the appellate division, with the greatest respect, that the explanation was a reasonable one because let me remind your lordship what the explanation was, because he had conflicting reports...

COURT: One explanation Mr Bizos.

MR BIZOS: Well my lord but it was an ...

COURT: I have taken note of what you say. (20)

MR BIZOS: As your lordship pleases. But Joshua Raboroko is another example of your lordship using his evidence in order to prove that there were, I am thinking of the padversperrings. Obstructions on the road, and with the greatest respect, ignores the evidence of the neighbour who says that by the time the march arrived there and shortly after the police left the buses and the obstructions were removed. And your lordship does not discuss the fact with respect, but IC.8 and Mahlatsi did not see any damaged buses there, nor was it put to any defence witnesses that there were damaged buses there. So (30)

again,/....

again, like we have with the previous witness who is unsatisfactory but we use his evidence against the accused we again have an example in Raboroko that we cannot rely on his evidence which favours the accused but we rely on his evidence which is against the accused. Radebe is described as stupid, evasive and wholly untruthful and we submit that we may be able to persuade the appellate division that some... My lord it has been suggested that my learned friend Mr Chaskalson should possibly take over for approximately half an hour.

COURT: Any time you like Mr Bizos. (10)

MR CHASKALSON: My lord my learned friend has been on his feet for many hours and I think I should ask for him to take a break.

COURT: Well should he not finish with the witnesses at least. We are now at Radebe so there will not be many left.

MR BIZOS: I will finish with this my lord. Mrs M Radebe is described as an unsatisfactory witness and we submit that that is not justified. Ratibisi we respectfully submit was a very good witness. No reasons were suggested to him in cross-examination as to why he should be untruthful. Your lord- (20) ship's basis of disbelieving him is that he is sympathetic to the accused because he joined the march although he does not pay rent. He told your lordship that he wanted to identify himself with what he considered to be an unjustified increase. Your lordship says that his version why he left the march is inexplicable but then your lordship in your lordship's judgment says that one of the accused, if my memory serves me, I do not remember who it is, that he should really have done what Ratibisi did, he should have turned back. Robert Sello, Robert Sello's evidence is rejected as false. We submit for (30)

insufficient/....

insufficient reasons. This is the witness who said that the buses and the padversperrings were removed. Why should he be disbelieved? There is no evidence to the contrary and the two main state witnesses did not see any buses. IC.8 was not led on obstructions on the road. Mahlatsi came with obstructions late in the day. Tao(?) is described as a poor witness and wholly unreliable. The ground given by your lordship is that he is a friend of accused no. 8. It is a factor to be taken into consideration but hardly sufficient to disbelieve a witness. Mary Zulu, so vague and contradictory (10) that no reliance can be placed on her whatsoever. Who could be worse than Rina Mokoena, on whose evidence your lordship refers to in the judgment from time to time. Your lordship disbelieving accused nos. 19, 20 and 21 has been prepared by my learned friends Mr Chaskalson and Mr Marcus. I do not intend dealing with them because it would appear that your lordship is of the view that they should get leave, but we would submit that there are also misdirections in regard to that evidence. Your lordship's finding in relation to defence witnesses, there is a passage on page 836 of your lordship's(20) judgment, after indicating that Koaho and IC.9 had much to lose by giving false evidence your lordship says this about the defence witnesses, about ten of them in number:

> "The same reasoning cannot apply to defence witnesses. Their defence of accused no. 3 and accused no. 16 will enhance their stature in large sections of their community and false evidence will practically speaking not place them on risk."

C.1580 This, in our respectful submission, together with another passage which I cannot immediately identify the place but (30)

I remember it well, that where witnesses give evidence for the defence - and it certainly is suggested in Annexure Z in relation to Mrs Smith - your lordship wonders as to whether they have not been coerced, your lordship does not use the word "coerced", intimidated into giving evidence for the defence. Now it is true that your lordship does not say this in respect of all witnesses but your lordship obviously says it in respect of nine who gave evidence on the Sharpeville case. You say it in relation to Mrs Smith, and what we want to say to your lordship is this that the only evidence of coercion on witnesses to give evidence comes from the other side, to the other side's witnesses and not to the defence witnesses. And the coercion of detention and making a statement and keeping to it, this is the coercion I am referring to, or intimidation that I am referring to. I suppose it is not intimidation because it is authorised by a statute. But it is coercion. Now it was never put to any defence witness that they were giving false evidence because they were intimidated or because they wanted to favour the accused. Or because they wanted to enhance their stature in the community. If your lordships findings elsewhere are correct that never so few misled so many the vast majority of the community would of necessity be against such a man and we submit that this is an underlying serious misdirection in the approach of the defence evidence. There are specific things which I wish to say in relation to individual accused and other general matters and also to make submissions to your lordship about findings of fact which are not supported by the evidence and which are, have been arrived at as a result of speculative reasoning but with your lordship's permission I will ask

my/....

my learned friend Mr Chaskalson to address your lordship.

MR CHASKALSON: Your lordship asked me to address you on the special entries nos. 4, 5 and 6. Now the special entry no. 4 concerns the right to oral argument and I think the beginning point must be the statute. Section 175 of the Criminal Procedure Act says that the prosecution and defence may address the court at the conclusion of evidence - that is the chapter heading - and it says:

> "After all the evidence has been adduced the prosecutor may address the court and thereafter the accused may address the court."

And then there is the provision that the prosecutor may reply on any matter of law raised by the accused in his address and may with the leave of the court reply on any matter of fact raised by the accused in his address. Now of course the word "address" is equivocal in the sense that it can be used, I think, in the sense of one of its recognised meaning is to speak to somebody or to communicate by words. I think you can use "address" in English also in the sense of writing. But if we look at the Afrikaans version that ambiguity seems to be put out of the way because the word used in the Afrikaans version is "Nadat al die getuienis aangevoer is kan die aanklaer die hof toespreek en daarna die beskuldigde die hof toespreek". Now I have consulted a dictionary ....

COURT: I do not think one needs a dictionary for that. The question is each has got a right to address the court orally, the question is whether that right can be curtailed in any way by the court by placing a limitation on the time. That is all.

MR CHASKALSON: Well on the method, is what we are concerned with here. What your lordship's direction ...

COURT:/....

COURT: Not necessarily on the method. On a time limit laid down in advance. If the time limit in itself is unreasonable obviously then that would be a matter for a special entry. But the fact that a time limit is laid down, would that in itself be an irregularity? Provided the time limit is reasonable.

MR CHASKALSON: Well perhaps I, your lordship asked me to look for authority and I had not realised that this had ever happened before.

COURT: Did it happen before? (10)

MR CHASKALSON: Yes my lord. Not quite, the facts were a little bit different but the facts are not comparable in the outcome because here both sides got in written addresses whereas in the other case that did not happen. But I was somewhat surprised to find that this issue had been debated, in fact by the appellate division. The judgment is Transvaal Industrial Foods Limited v B & M Process (Pty) Limited. It is reported in 1973 1 SA 627 and the judgment of Trollip, J. deals with the matter. Apparently what happened is that after the conclusion of all the evidence the judge directed (20) counsel to submit their arguments to him in writing and to exchange the written arguments ...

COURT: Was this not Hiemstra, J.?

MR CHASKALSON: It does not say. Oh yes it is, its Hiemstra, J, yes.

COURT: Yes Hiemstra, J. did it once and I do not think the appellate division agreed with that.

MR CHASKALSON: They did not agree with it but there is something else which was obviously even more disagreeable and that is is that he gave judgment before he got the other side's, (30)

before/....

before he got both sets of written argument.

COURT: Before he got the argument, yes.

MR CHASKALSON: But the point is that Trollip, J. at page 268 said:

> "I pause here to say that generally arguments for the litigants in a trial should be delivered orally in open court and not in writing to the trial judge in his chambers for section 16 of the Supreme Court Act requires that all proceedings in a court must be carried out in open court except insofar as any such court may, in special cases otherwise direct."

And that is to do with closing the court and special reasons there I think. And then his lordship says:

> "The same is implicit in rule 39(10) of the rules of court which says that upon the cases of both sides in a trial being closed the parties or their advocates may address the court in order therein laid down. Moreover for reasons that are too trite to be listed here oral argument is far more effective than the written substitute. Consequently neither the court nor the litigants should normally be deprived of the benefit of oral argument in which counsel can fully indulge their forensic ability and persuasive skill in the interests of justice and their clients. The trial court should therefore not direct that the arguments be delivered in writing except in special circumstances and then only after discussion with counsel."

Now that of course is a civil case dealing with a rule of court where the rule of court could be departed from. Here we are concerned with a statutory provision. Now in the

special/....

special entry we refer also to section 158 which is the provision of the code which requires the proceedings to be conducted in the presence of the accused. And the only other case I could find was actually an observation by your lordship in the case of The Cerebros Food Corporation in 1984 4 SA 149 where your lordship merely refers to the Transvaal Industrial Foods Limited's case as authority for the proposition that the appellate division, well you are dealing with something, with open doors or closed doors and I think your lordship said: (10)

> "The appellate division has not ruled in this matter except for deciding that argument should be oral and in open court."

Now ...

COURT: I do not think you need take this point any further. I will hear Mr Jacobs on it if he disagrees. Point 5?

MR CHASKALSON: Now your lordship also wished to hear me on 5 and 6. Now there again I think your lordship knows it is unnecessary really for me to cite the passage from the Qaba case on special entries which cites from Nafti. The Qaba (20) case is 1983 3 SA 717. It is the appellate division judgment and at page - I seem to have the wrong page which I shall find in a moment. There is a citation there from Nafti's case at page 732-733 where the passage which is said to be applicable to the present act is a passage cited with reference to the previous act but the appellate division in Qaba's case held it nonetheless to be applicable to the present act. But we must therefore be careful not to whittle away the safeguard provided to an accused person which places a duty on the presiding judge to direct a special entry to be made under (30)

circumstances/....

circumstances set out in such section.

COURT: Are you now dealing with the duty to inscribe a special entry?

MR CHASKALSON: Yes my lord, that is what we are asking for, is this as a special entry.

COURT: Yes, no I was merely interested on whether there is any authority for the proposition in 5 and 6.

MR CHASKALSON: I have not found any ...

COURT: If you have no authority you hope to make it in the appellate division. (10)

MR CHASKALSON: I have not any direct authority for it but the proposition seems to us to be supported indirectly by cases which are really different.

COURT: Well if there is not anything directly on this point...

MR CHASKALSON: I must tell your lordship what we started looking when your lordship saw us leaving court. We were not aware of any authority against it. We could not find it. We went to look and what we found were statements that a judge should not make an observation in open court after a witness has given evidence before he has heard argument on it. (20)

COURT: And there is also cases that say a judge should not record what he has seen or observed without hearing argument on it. Is that, but that is something different. The proposition you set out in 5 and 6 means that every consideration which a court may think of during the case or during his preparation of the judgment should be put to counsel and argument invited thereon.

MR CHASKALSON: I would not want to go ...

COURT: And that I think is absolutely far fetched.

MR CHASKALSON: Well let me put it to your lordship ... (30)

COURT:/....

COURT: I have no problem with you arguing that in the appellate division.

MR CHASKALSON: Can I, thank you my lord, I do not want to sort of lose that right but can I just put it to your lordship that it is a somewhat different situation. But if, excuse me if your lordship is happy I should argue it in the appellate division it is better I should say no more.

COURT: Yes I think so. You may trip yourself up.

MR CHASKALSON: Well I would not like to do that.

COURT: Is that all you wanted to say? (10)

MR CHASKALSON: Well I think that is all your lordship asked of me. Your lordship indicated that all you wanted of me was paragraphs 4, 5 and 6 of the special entries and you said for the rest you did not wish to hear me any more. But is now 18h40. We have had a long day and we have had very little time, as your lordship will appreciate. I think that it may be necessary for my learned friend Mr Bizos to continue a little bit tomorrow.

COURT: How long is a little bit?

MR CHASKALSON: Well my lord I cannot answer that. (20)

COURT: You have this difficulty Mr Chaskalson, I heard grumblings from your side about the way this case is to be conducted or not to be conducted. Counsel have so far in this case taken no cognisance of the convenience of the bench, especially of the assessor but also of the judge. Arrangements have been made, there is a long leave due. Apart from that being due my assessor has other commitments, I have other commitments next week. Everything has to be moved around because counsel take their time. You have had this judgment for nearly a month. (30)

MR CHASKALSON:/....

MR CHASKALSON: We have had the judgment for a time ...

COURT: I do not want any recriminations but I am, we are in a position tonight to hear you out and give Mr Jacobs a full day tomorrow to hear him out, then I will reserve judgment.

MR CHASKALSON: Let me say this to your lordship that we have had time but we have also had lots of things on our hands. The time that we took, we spent a lot of time considering the issue of mitigation which was a very important issue, consulting with witnesses and all our time was taken up at that period. We directed ourselves to that issue. Since then (10) we have had very little time indeed and part of the difficulty is that the schedules are so dense that to settle down by reference to the record and to deal with them is a big job and we too, it is not that we are, it is not that we are trying to be difficult in the sense of leaving out of account your lordship's position. I understand fully what your lordship's situation is. The great difficult that we have is that if we are to do our duty to our clients we should endeavour to address certain issues on which your lordship may wish to be persuaded and it is difficult for us to do that in a few(20) days when we have to jump from one thing to another. So actually one wastes times when you try to do things within a few days.

COURT: Well let us get down to brass tacks Mr Chaskalson. Is Mr Bizos in a position to continue?

MR CHASKALSON: Now?

COURT: Now.

MR CHASKALSON: I would prefer him not to my lord. He has been on his feet for five hours.

COURT: I am asking Mr Bizos whether he is. (30)

MR CHASKALSON:/....

MR CHASKALSON: Well Mr Bizos should answer.

COURT: How much time do you need Mr Bizos?

MR BIZOS: I need to polish up an argument in relation to the portion of your lordship's judgment starting on page 760 to 767 on youth organisations. I also have ...

COURT: Yes, I want to know how much time you need?

MR BIZOS: I would need approximately three quarters of an hour and what I am appealing to your lordship to do is not to make this a race of physical strength because if your lordship orders me I will obviously have ... (10)

COURT: I asked you whether you are in a position to continue and if you say no we do not continue. If you say yes we continue. But if you undertake to finish within an hour we will start at 09h00 tomorrow morning and I will give you an hour and that would give Mr Jacobs a full day to conclude his argument. I think that would be fair.

MR BIZOS: As your lordship pleases. I think that my argument may even be briefer if I am able to organise the material for tomorrow morning at 09h00 rather than now.

COURT ADJOURNS UNTIL 15 DECEMBER 1988. (20)