COURT RESUMES ON 15 DECEMBER 1988

FURTHER ADDRESS BY MR BIZOS: The submissions thusfar made to your lordship in support of the application for leave to appeal refer to all the accused from the Vaal that have been convicted. In the time available we have decided to address detailed reasons to your lordship in relation to the case of no. 5. Your lordship will see from the submissions that we have to make that in order to do it for all the accused would be a task which we would not have been able to complete, either to prepare or to present. Since we have had your lordship's judgment we have had to prepare evidence in mitigation and do other things. But I am going to deal with accused no. 5 and ask your lordship by parity of reasoning to, by parity of reasoning to apply what we have to say in relation to him to the other accused and to accept that in the time that we have had available we can make substantially similar submissions in relation to the case of the others as we are able to make in relation to accused no. 5. After all it is our task to persuade your lordship that there is a reasonable prospect that your lordship's judgment may not stand in relation to findings of fact and that is what we are busy with now. Now with those matters in mind I will turn to accused no. 5. Your lordship deals with him in Annexure Z at Z30. And your lordship finds him to be of impeccable demeanour and calm but who tells material untruths without batting an eyelid. Your lordship then sets out reasons for that conclusion, some 23 of them in number, and we want to submit that a number of those reasons are not well founded on the record and none of them justify the finding that he tells material untruths. We submit that on the weight of evidence, and more particularly the

probabilities/....

probabilities, his version could on the very least be reasonably true and I may say at the outset that although this test is well known in relation to this particular accused we do not, with respect, find it used or the evidence and facts analysed in order to determine whether that is so or not. I will take the reasons seriatim. The first is that it is hard to believe that accused no. 5, the great fighter for the youth, for the youth organisation in the Vaal who chaired all the youth bodies did not know VYCO or its zone 14 branch of which a big banner was displayed at the funeral of Joseph (10) Sithole. I would ask your lordship to read that together with reason no. 8 where your lordship finds that he spoke on behalf of the youth and promised the support of the youth at the ERPA meeting on 26 August 1984. It is hard to believe that there is no organisationof the youth as he said. I think with respect that those two can be taken together for the purposes of argument. Now the submissions that we want to make is that he had no reason to be untruthful. His case is not advanced nor is it damaged by the existence or non-existence of VYCO. There is no allegation, nor any evidence, that VYCO committed(20) any wrongful act in the Vaal, unless he was telling the truth why should he want to distance himself from an organisation if it in fact existed? We would submit that if in fact there was VYCO and it did anything it is passing strange on the probabilities that not a single document, not a single minute, not a single T-shirt, not a single letter or any other insignia relating to VYCO was found either in his possession or in the possession of any of his co-accused or in the possession of any person in the Vaal or elsewhere. That probability has not been examined by your lordship and it (30)

is/....

is possible, we submit, that another court may find that once this was given as a reason for the finding that he is capable of telling untruths that that finding may be disturbed. It is again with regret that I have to submit to your lordship that your lordship's expression "the great fighter" is an expression which may be interpreted as used in an ironical sense which is not warranted in the circumstances. Who was he fighting and how was he fighting? The finding that "who chaired all the youth bodies" is not warranted on the evidence. His evidence was, and there is (10) no evidence to the contrary, that there were small groups working towards the formation of the organisation, they rotated the chairmanship and that accused no. 5 had possibly more than his fair share of that rotation on his own evidence. But that does not amount to chairing all the youth bodies in the Vaal. Your lordship will recall the evidence of accused no. 11 that he himself took an intiative in Boiphatong. The evidence of accused no. 11 that there was an independent initiative in Bophelong. Then if we were to read the 8th reason together with this his evidence was that he took this (20) opportunity of speaking there hoping that there would be young people at this meeting in which he was to propagate the idea of a youth organisation to the youth of Evaton. His evidence was that as there were only elderly people there he did not make that appeal. There is no evidence of the existence of an organisation and the inference that your lordship seeks to draw that there must have been an organisation if in fact he was there as a young person to speak on behalf of the youth, there is no reason why his evidence that he spoke in his personal capacity to support the people's struggle in (30)

Evaton/....

Evaton because he himself was born there, there is no reason, we may be able to persuade the court appeal that there was no reason why he should be ... Of course I am reminded that in relation to the first one, that he was chairman of COSAS that was at a time outside the period of the indictment but there is no reason, the fact that he chaired COSAS, that the organisation had been formed. But to return to the 8th reason the evidence of accused no. 5 is to be found in 10 791 to 10 793. The other witness who gave evidence about this meeting was Mrs Mokoena. She is, has been described by your lordship (10) as a pathetic witness. Therefore anything that she might have said cannot reasonably be held to validly contradict the evidence of accused no. 5 and your lordship recalls that there was no other state witness but Mayini(?) gave evidence, who was a defence witness and who was conceded to be a bad witness. Your lordship found him to be wholly untrustworthy and he is the only one of, who admitted to having heard of VYCO but he obviously was at sixes and sevens about everything. Then the second ground that the account of his breaking up of the march is unreliable. On perusing the evi- (20) dence we would concede that there is some criticism to be levelled in relation to the reliability of the witness in relation to that but what we ask your lordship to take into account, that it depends on one's vantage point, that it was a traumatic experience for all concerned, that there was teargas used which affected him and this unreliable account is not a factor which indicates that he tells material untruths. What I would ask your lordship to note that this witness was in the witness box for eight days, subjected to five and a half days of cross-examination, in fact longer (30)

than/....

than any state witness was cross-examined by the defence and his evidence runs over 480 pages. That there should be some unreliability in relation to a matter which is really common cause, that the police did in fact disperse the march. The manner in which it was done or if there was some exaggeration from a person who was the victim of teargas and shooting that does not, with respect, that does not support a finding of material untruths. We turn to the third ground. His denial in cross-examination that the police blockade of the road indicated that the police intended to stop the march is (10) ridiculous. With the greatest respect that is not the evidence. We would refer your lordship to 10 857 in answer to his cross-examiner what he said was that the police would not necessarily stop the march, that they might have asked the leaders of the march where they were going and what did they want and might have allowed them to go on. It is correct that in that passage your lordship will find the usual insistence to a yes or no answer but the accused insisted that that was his belief and that it is not an unreasonable belief. We have evidence that that is what happened in Tumahole after the (20) original trouble and it is not an unreasonable belief for any person to hold. The next reason for your lordship holding that he was an untruthful witness, no. 4, is to be read with points no. 10 and 19 which in our respectful submission is really the same point expressed from a slightly different point of view. The word "gathering" I would submit with respect is somewhat strange in layman's ears. People speak of meetings and marches. His evidence is that he thought that meetings were prohibited but that marches were not and that even if "gathering" was used that it is not synonymous with march (30)

in/....

in common parlance. The evidence that he assured the people at the meeting of the 26th that it was legal is equally consistent with his bona fide belief that it was legal, with the belief found by your lordship that he intended to mislead. The next one is no. 5. We submit with respect that your lordship has correctly summarised the position there but what I am asking your lordship to find is that this is not a reason for holding that the witness was untruthful. He was giving evidence about an event which took place three years before in respect of which he could not have been reasonably (10) expected to have perfect recollection. And it does not really advance his case one way or the other to have been untruthful about any of the matters described in that paragraph. Six, on the assumption that after the march he fled from the police, Edith Lethlake as well, this is because the VCA was the leader of the march and of the meetings, it is not clear to us whether your lordship means immediately afterwards or whether the "fled" was went into hiding. I do not know what your lordship had in mind but it would appear that what your lordship had in mind, on the evidence, that he fled (20) after the march. Well everybody fled after the march, everybody went away from there. We do not know why that is a ground. The seventh ground, that his denial that accused no. 7 at the ERPA meeting of 26 August referred to the councillors or the council is in conflict with accused no. 6 who said he did, as did some state witnesses. Now the only state witness there that gave evidence about this meeting was Rina Mokoena. There were no state witnesses. There was only one state witness in relation to this meeting. We have already referred your lordship to your lordship's finding that she was a (30)

pathetic/....

pathetic witness. If we understood yesterday's proceedings correctly your lordship actually did not even grant her an indemnity. No. 6 was rejected as a witness and we pose the question why should his recollection be rejected in preference to that of no. 6 and/or Rina Mokoena? In any event let us assume that his recollection in relation to this is faulty. It is no reason for finding him to be untruthful. Then your lordship sets out his antagonistic attitude towards the councillors and your lordship gives a number of examples. Now that is what he believed, that is what there is an abundance of evidence many people in the Vaal believed. That is the belief that was commonly held according to Professor Van der Walt. Why does the expression of that belief be a ground for rejecting the evidence he gave in court? There would have been valid criticism if he told your lordship that he did not believe these things and your lordship in your lordship's judgment indicated that the people here were not on trial for their beliefs. Honestly and strongly held beliefs expressed in strong or even strident language cannot be a ground for disbelieving an accused. Insofar as your lordship refers to the Evaton situation we submit, with respect, that the evidence puts a different hue on what your lordship has found in relation to the duty of the Community Council vis a vis the freehold rights of the people of Evaton. I want to merely refer your lordship to that evidence on page, I am sorry, volume 208 page 10 925 to 7. Then in relation to the eleventh criticism we would ask your lordship to bear in mind that he gave evidence more than three and a half years later and the only criticism that can be levelled is that his memory was not particularly good on matters which were not so highly

placed/....

placed in the order of importance in this trial. Now the twelfth criticism we submit that your lordship had found, has found that IC.8 is not to be believed unless he is corroborated. Mr Malindi, accused no. 5, denied the evidence. His denial was corroborated by accused no. 13. The evidence of IC.8 is highly improbable and we submit that the probability relied on by your lordship that they would want a poet/writer into this organisation was not, is not really a probability. Why would they want a person who was on his own evidence a member of AZAPO and other matters - we do not want to overdevelop (10) the point. Then in relation to the thirteenth criticism we submit that the criticism is not well founded on the evidence. It is to be found in his evidence-in-chief in 10 780 and under cross-examination in 10 990 to 10 991. In relation to the fourteenth criticism the criticism is not a valid one and we will rely on your lordship's criticism of Mr Jacobs for pursuing the point. May we remind your lordship that exhibit C.103 is an undated document produced from the internal content after his arrest which was 23 September 1983. Your lordship will see that C.103 relies for its information on clippings (20) from The Star, The Sowetan and other newspapers. Oh I beg your pardon, no I beg your pardon I confused it with the subsequent one. C.103 is the COSAS document. I beg your pardon. The one page, I beg your pardon I confused it with the ... And, yes I am sorry, this is where his evidence is that this was not the policy of COSAS at his time. He had not seen it before. Your lordship will find that at 11 041. Your lordship at 11 043 upholds an objection that clarity must be put to the witness that this was a subsequent document and your lordship suggested to my learned friend that you should (30)

perhaps/....

perhaps allow the witness to read the document overnight. The matter was not taken any further but there is no reason, in our submission, to have any suspicions in regard to it and certainly it does not add to the reasons that the witness was unsuccessful - I am sorry that the witness was untruthful. Then if we take the 15th reason and the use of the word "child". His evidence that the word "child" is used in different contexts is not unreasonable. Many other witnesses dealt with it on different bases. Your lordship says when pressed stated that he did not regard himself as a child. Your lordship will (10) find at page 11 061 line 12 to 24 that questions were asked by your lordship and we submit that if one has regard to that evidence it does not support the fact that he was an untruthful witness. Now 16 has partly been dealt with by me and I do not want to repeat it. I merely want to mention, I do not want to argue it I merely want to mention the points. Why no. 5? If in fact he was in conspiracy with Raditsela why did he not suggest this during the morning ERPA meeting. The improbability that Raditsela would have left it to chance although in general terms is correct on the facts it is (20) likely that Marupeng, who suggested the march as an addition to the stayaway, may have been the person with whom Raditsela had made this arrangement but that once the proposal for the stayaway was made by accused no. 5 he confined himself to the second leg of the march and we submit that that is not an adequate reason for disbelieving the accused. Seventeen we submit either way is not a vital point. When a witness three and a half years later is asked whether he would necessarily have heard something or not not much can turn on it. Then the 18th point. He is in conflict with accused no. 10 who said (30)

that/....

that accused no. 5 referred to the resolution of 25 August, that councillors resign and if not that their businesses be boycotted on the 26th. He denies that the latter part, and that is given as a reason for disbelieving him. But why disbelieve him? Your lordship has found accused no. 10 unreliable and on the general probabilities who is more likely to remember what he himself said. It is not a ground for disbelieving him, more particularly when Mr Malindi, accused no. 5, actually must have given your lordship the impression that he is not one to try and run away from responsibility. Your lordship (10) will recall that in relation to the moving of the resolution to stay away that there was evidence both from no. 10 and no. 8 that he merely referred to the resolution and he did not specifically propose that they should be adopted. Accused no. 5 went into the witness box and said in-chief "I brought it to their attention and I formally moved that it should be adopted". He made his position clear that he was in favour of boycotts so that if it was suggested that his version is, was an attempt to evade responsibility one could understand it but there is no basis in our submission. The 19th reason(20) depends on the rejection ...

COURT: I think you took that together with another point.

MR BIZOS: Yes my lord, the four, no. 4.

COURT: Point 4 and 10.

MR BIZOS: No. 4, yes my lord, I do not want to repeat it, yes. And now in relation to no. 20 your lordship by parity of reasoning in the judgment relating to accused no. 2 said that people coming from zone 3 could not have seen what was going on equally applies to him. I think that the point is made. Then point no. 21, having regard to the disputes as to who (30)

are/....

are children and who are not children and depending from the vantage point of a particular person this is not a sufficient ground for disbelieving the accused in our submission. No. 22, that his brother did not participate was not investigated and there may be all sorts of reasons why his brother did not participate. We do not know what his job commitments were. Once it is not investigated it is not a ground for disbelieving. Then the 23rd reason, as to whether he slept in zone 3. His evidence was that he did. He was not challenged nor was it investigated. But his home - if it were challenged we could have called persons, possibly called persons to corroborate him but it was not challenged. There may have been all sorts of reasons that he was with his friends there the night before, that he got transport in the evening and thought that there may not be transport the next day. There are all sorts of ... Now we submit that that is not a ground. So that to sum up the position it seems that the most numerous and most cogent reasons advanced by your lordship for disbelieving this person relate to his evidence in relation to VYCO and pertinently your lordship finds that he is untruthful because it must have existed. Now I want to refer your lordship to page 767 of your lordship's judgment in which your lordship says:

> "On the basis of the above we find that there existed in the Vaal a number of youth organisations for non-schooling youths. This includes Sebokeng. Whether it was formally constituted as VYCO is immaterial. Accused no. 5 was the leader of this group in Sebokeng and accused no. 11 was the leader in Boiphatong. The youth groups, who worked in close association with the VCA

in/....

"in Bophatong and Bophelong associations."

We read this as a finding that it is reasonably possibly that VYCo was not launched. That is all accused no. 5 was telling your lordship and therefore he cannot be disbelieved. In any event what he told your lordship may have reasonably been true. Your lordship will recall the evidence of the calling of the Saturday meeting and the letter, if my memory serves me correctly it is AN.4 on which this meeting was called. So it is clear that it was not formed in June/July, until June/July 1984. If it was not in existence in June the probabi- (10) lities are it did not come into existence by 23 September when the accused was arrested. But in any event, but in any event once it is conceded as a possibility that it did not there is no basis for the disbelief in our submission. Then he did not try to diminish his role in relation to the formation of a youth organisation and we would submit, contrary to your lordship's general finding, that a young person of his age, giving evidence some three, three and a half years after the events and being subjected to eight days of examination and cross-examination he did not do too badly. Then your lord- (20) ship deals with this matter in another part of your lordship's judgment on page 760. I will try and do it as quickly as possible by merely referring to the page number and the paragraph and what we submit. On page 761 your lordship finds that your lordship has grave difficulty that COSAS played no role at the meetings of the VCA in 1984 and your lordship says that relying on the evidence of McCamel that there were banners of COSAS at meetings which were attended by McCamel in 1984. The only evidence before your lordship of the VCA meetings attended by accused no. 5 is that he attended the (30)

meeting/....

meeting of 25 August and 26 August, in 1984. McCamel was not at these two meetings. The VCA meetings that McCamel attended, on his own evidence read together with his reports, were for the formation of area committes in Bophelong and other zones and we submit therefore that the evidence of McCamel cannot be used to disbelieve accused no. 5 when he said that he did not see any COSAS banners at the meetings which he attended. No one suggested that there were COSAS banners at the two VCA meetings he did attend. Therefore the finding on 761 that he cannot be believed is not well founded, and there (10) is no evidence that there were COSAS speakers despite the entry in a programme to that effect. And your lordship has had enough evidence of people not turning up at meetings. There is also, in relation to this, a probability in favour of accused no. 5 that if VYCO existed in 1984 surely the presence of such an organisation would have been made known by banners and pamphlets and presence at meetings at which McCamel and IC.8 attended. The absence of such banners or pamphlets makes highly probable the young man who accompanied Mamsi(?) to make the banner for the reasons stated shortly before 23 September. (20) Then your lordship's finding in relation to accused no. 5, and it also applies to accused no. 11 on the same page, on the reliance of the VCA on the co-operation of COSAS we would ask your lordship to take into consideration that accused no. 5 was not on the committee of the VCA nor was he privy to any discussions between Raditsela and McCamel. Then on page 762 where your lordship says accused no. 5 had to wait from May 1982 to April 1983 to get the green light for the formation of a youth group in the Vaal from one Mandla, a member of the said committee. This is odd. If it is true it indicates (30)

that/....

that the youth movement in the Vaal was neither spontaneous nor autonomous. In fact the witness IC.8 was told in February 1983 at a COSAS meeting by accused no. 5 and no. 13 that VYCO is a branch of COSAS which is active in politics for non-schooling youths. Now may we pause there for a moment that your lordship cannot rely on IC.8. This was denied by accused no. 5 and no. 13 and, having heard the evidence as to how COSAS did not want people who had left school to be in its ranks the evidence of IC.8 that VYCO was a branch of COSAS is nonsense and it should have been rejected. The evidence (10) relied on by your lordship as to what was contained in SASPU National, that some, that the Port Elizabeth Youth Congress was established earlier in the year as part of COSAS policy of creating regional youth organisations does not show that it was formed or that accused no. 5 was ... Then on page 763 your lordship's reliance on Joshua Raboroko that word got around in 1983 that VYCO was going to be launched in 1983. We merely want to say that talk of going to be launched does not equal launch, and in any event that is consistent with the evidence that it was intended to have an organisation. (20) May I have a couple of minutes to finish this section?

COURT: Yes certainly.

MR BIZOS: Then your lordship mentions at page 763 that William Myini(?) of Evaton had heard, I have already dealt with him, that he is a completely unreliable witness and only one of about three dozen who specifically denied that, who said the opposite. Your lordship mentions on the same page AN.4. We submit that that is destructive of the notion that it was formed and that accused no. 5 was being untruthful. On page 764 the statement in SASPU National reporting that over 20 (30)

youth/....

youth congresses sprung up does not take the matter any further. It is certainly not evidence that anything happened, of that nature, at the Vaal. And in 1983, and we know that in 1984 the Vaal people were still talking about it. Your lordship again mentions the banner of the 14th. We have already dealt with that on page 764. Then the document that I was confused about earlier is AN.8, page 7, which your lordship deals with on page 764. That is the document which the sources are from The Star and The Sowetan and other newspapers. That he had been a member of the, that the deceased (10) had been a member of the youth congress. First of all it is clear that whatever the admissibility position of SASPU National as proving facts may be very little weight, if any, can be attached to it. In any event he was variously described elsewhere as a member of the VCA and as a member of COSAS. Of course he was, on the evidence, part of the working group of VYCO and it may be in the journalistic style a member of a working group towards the formation may have been too long a matter to report and rather make him a member. Then the, your lordship's statement on page 765: (20)

> "To this we can add the press statement of the Transvaal Area Committee of the UDF names VYCO as one of the organisers of the stayaway of the 5th and 6th of November 1984."

This cannot have any effect on the, a document published after, may I continue my lord? A document produced after 5 and 6 November, some months after the detention of accused no. 5 cannot be used in order to show what the state of facts were before he was arrested. The probability mentioned by your lordship at page 765 that at the ERPA meeting of 26 August (30)

accused/....

accused no. 5 promised the support of the youth. This could hardly do if there was no existing organisation. If he was busy trying to form an organisation and if he was seeking support and consistent with his evidence that he was busy forming it there is no reason, we submit, there is no improbability and no reason for disbelieving. Then an acceptance of page 767 of the possibility that it did not exist makes his evidence reasonably true. There was no evidence, nor was the matter put by the state that there was any co-operation between no. 11's doings in Boiphatong with the (10) people in Sebokeng and there was only minimum co-operation between the civic associations of Boiphatong and Bophelong which were in an embryonic form and in any event at the time with the Boiphatong youth organisation. Then the final matter that the birth of these youth organisations, when regard is had to the time thereof, fits in with the call of the UDF for the formation of such organisations and with the same call of the ANC. There is no evidence that the accused no. 5 knew anything about that and in any event if the call was made and there was such a flurry of activity elsewhere (20) in the country, and more particularly in the Eastern Cape, the facts in relation to Sebokeng where accused no. 5 is concerned can only show that either they did not know about the call or if they did know about the call they were very tardy about such youth organisations. I want to briefly refer to the portion of the judgment on which your lordship's reasons are put together for the finding of guilty of accused no. 5 commencing on page 912 of your lordship's judgment. If your lordship looks at the second paragraph:

"That on the 16th of June COSAS memorial service he (30)

spoke/....

"spoke for the formation of the youth group and Masiya, accused no. 22 and Esau Raditsela spoke on the formation of the civic. Two days later he attended meetings in furtherance of these objects and he became a member and co-chairman of the Vaal Action Committee, prepared the ground for the founding of the Vaal Civic Association. He worked closely with Raditsela in respect and it is probable that like McCamel there listened to tape recordings of ANC Radio Freedom programmes and the revolutionary freedom songs." (10)

And then your lordship gives the exhibit numbers. Now what we want to say about that is that it is a speculative finding. There is no evidence that any of these things happened.

COURT: What page are you on now?

MR BIZOS: 916 my lord.

COURT: Yes, thank you.

MR BIZOS: The second paragraph. There is no evidence of this. The evidence is to be found at 10 897 line 11 to 14. He was asked, he denied it. There is no evidence to the contrary. Now how can such a finding, in our respectful (20) submission, be made on the probabilities in a criminal case without any basis of the evidence. It is possible, and your lordship may be entitled to be suspicious. Your lordship may even be in a position to elevate it to a probability that your lordship has found but in the absence of evidence it is not a fact which can be put into the scale in order to convict the accused. Then your lordship says:

"Accused no. 5 testified that in 1983 he became religious. We have only his word for it."

Well we will leave that there. It did not affect his (30)

attendance/....

attendance at political meetings it seems. Well in it, in our respectful submission, there is a judgment that has something wrong with it. Why should he not have and why does that make him, is that a fact which is dealt with on the summation of the reasons for his conviction? He participated in the VCA's, VAC survey to test public opinion and to do the groundwork for the formation of the civic association. Yes. But what adverse inference can this have. In fact it is destructive of the state's submission that they were merely to arouse people's feelings where no grievances existed. This is what he him- (10) self has said. He took responsibility for his actions. We do not know, with the greatest respect, why your lordship finds that as a ground which leads to a particular conclusion. Then the final paragraph on 916, the finding of fact is correct but it is common cause that the urging of accused no. 19, at the bottom of page 916 my lord, the urging of accused no. 19 was for the formation of a UDF area committee was rejected and he was told that, 19 was told that the civic association would decide whether or not they would affiliate. Then on page 917 your lordship will find the evidence that he only came there (20) at the very end of the meeting, having attended a wedding. Your lordship will find that at 10 775. And he was corroborated by this, in this by Mazibuko. The next paragraph is a correct statement of fact but the question arises, if a person believes that the candidates are oppressors why should he not say so, and why does that show any adverse fact supporting a conviction? The next paragraph we submit, with respect, does not correctly set out the facts and your lordship will find the evidence, this is the one in November 1983, your lordship will find the evidence at 10 779 line 16 to 10 780 (30)

line/....

line 7. But let us assume that he asked embarrassing questions and let us assume, well we know that he did not vote in the elections. It is his right to do so and that furnishes no reason why he should be convicted.

COURT: Well what do you say is wrong with the statement?

MR BIZOS: No, the embarrassing questions were not by him.

COURT: Is that the complaint?

MR BIZOS: That is the complaint. That he did not vote, that he, I am sorry I should have made it clear. That he did not ask the questions. But even if he did we submit (10) that there is nothing wrong with it. Then the next paragraph about participation, at the Raborapi(?) Festival where some of the councillors were referred to as disciples of evil. It may be exaggerated language, it may even be in bad taste, it was done in the presence of the security police, no action was taken, no trouble arose out of it. Why should it be used in a judgment on convicting an accused of terrorism. He spoke at the COSAS meeting on June 16, commemorative meetings in 1983 and 1984. Well again it only shows that he is a person who was interested. But why should that - he acknowledges (20) it, it does not affect his credibility. Then on page 918 he wholeheartedly supported the UDF. We would have no quarrel with that, but worked for affiliations of organisations to the UDF, there is no evidence on. The evidence in relation to affiliation, if your lordship wants them I have them, were not as your lordship has set it out. Your lordship will find that at 10 767 line 30 to 10 768 line 14 and 10 972 line 28 to 10 903 line 10. He is an adherent of the freedom charter. Why is that a fact to be set out in a judgment finding him guilty of the type of terrorism that he has been found (30)

guilty/....

guilty of?

COURT: Why is it set out he attended the meeting of 25 August 1984 in zone 13 where he took the minutes? That could have been left out as well. One can leave out everything.

MR BIZOS: No but my lord one assumes ...

COURT: One sets out all facts to give a full picture of this man and his activities so that in the end you can draw a conclusion. If you take each fact on its own you can tackle each fact on its own and you get a totally distorted picture. That has been set out in the judgment. That is the correct approach and if that approach is wrong well then everything is wrong. Good luck to you Mr Bizos.

MR BIZOS: Well thank you my lord. What we really want is leave to test whether our submissions are correctly founded or not. Luck may play a part in it but we would really like an opportunity of advancing reasoned argument. All these matters that your lordship has set out, with respect, relate to ordinary political activity and political beliefs. Then we submit that the statement at page 919 at the top, that had Raditsela been there he could not have done it better himself, for the reasons that we have set out as to the person who called for the march, that that axiom, with the greatest respect, is not well founded on the facts. The second paragraph on page 919, the fact that accused no. 10 asked accused no. 5 to explain what happened at the meeting, we submit that no sinister inference can be drawn from that. It is not unusual for the chairman or co-chairman or a helper of the chairman to ask the proposer of a motion to explain questions that are asked in relation to it. We submit that the middle paragraph of page 919 shows a contrast in your lordship's

approach./....

approach. Where a young man is charged with having been, is actually charged with having participated in a gruesome murder and the only evidence of his being in the vicinity, albeit as an innocent spectator by one most unsatisfactory witness and where that evidence cannot be relied upon because the witness is unreliable we may persuade the appellate division that he was actually deliberately untruthful. We submit that the way your lordship fails to make a finding on it, despite the fact that the accused made a, gave evidence, or even to find that his denial could reasonably be true in order to exculpate (10) him from this terrible allegation shows with the greatest respect lack of generosity on the facts of the case. Then at page 919 your lordship relies on the documents that were found in the possession of accused no. 5 in order to attribute knowledge and motive to him. Now what we want to say, this is taken up at page 919 and goes on to page 921. Mr Malindi, accused no. 5, admitted that he had these documents in his possession. He was not cross-examined on them. It was not put to him whether he had read them. He was not asked when he had received them, whether he had just put them aside (20) or whether he read the particular article which was published more than a year before, whether he remembered it or what effect that he had to it, whether he agreed with it or did not agree with it and it forms a very important part of your lordship's judgment on the final question, and the question is whether mere possession of a document is to be used in the absence of cross-examination on it. Your lordship does not know what his answers would have been, whether they would have been satisfactory or not and in our respectful submission this would be a misdirection, if we are correct in our submission. (30)

It also was not investigated whether these were the only documents that were in his house. One does not know how many others there were, what magazines there were, what newspapers there were.

COURT: Why did you not lead evidence on it? The state put this document in by way of an admission. So it was before the court in the same way as if a witness had proved the document and handed it in. It was handed in for a purpose, not for nothing. It was up to the accused then to explain the document. If it was innocious(?) it is innocious. But if it is not innocious he had to explain it. Why did he not? And why should there be cross-examination if there is no explanation? (10)

MR BIZOS: Yes but my lord, with the greatest respect your lordship is putting an onus on the accused ...

COURT: There is no onus on the accused. It is common sense. Something is put before court which is against him prima facie.

MR BIZOS: Why is it against him my lord? Why on this indictment was it against him? Why on this indictment what SASPU wrote is against him?

COURT: Well Mr Bizos that is another point. You are now dealing with the indictment. We are not dealing with the indictment, we are on the supposition that it is covered, that the finding is covered by the indictment this is against him. (20)

MR BIZOS: Yes but ...

COURT: So do not evade the point. The point is if the indictment covers the eventual finding why did you not deal with this fact?

MR BIZOS: Because in my ...

COURT: Why blame the court if the court makes deductions from facts which you do not deal with? (30)

MR BIZOS:/ ...

MR BIZOS: A document is put in and if I remember correctly your lordship, finishing my sentence in relation to a submission that I had to make about documents his lordship told me that I do not require to refer your lordship to any authority because your lordship had the Khoran. Now presumably there can be, in anybody's house, newspapers over the years found and produced. Attention is not drawn in the particulars or at the application for a discharge or at any other stage that any use is going to be made in relation to these documents.

COURT: At the application for the discharge attention was drawn to these documents in the sense that I wanted clarity whose documents were these, the brother's or his.

MR BIZOS: Yes.

COURT: So it is not a question that the documents were forgotten.

MR BIZOS: No the contents of the documents we are talking about my lord. An inference to be drawn against an accused person on a document found in his possession, it is for the party in our respectful submission that is seeking to draw that adverse inference to put that adverse inference to that witness and it is not for the counsel of that witness to sift through every document that was found in his possession and put in by the state to try and explain what effect that particular thing had on his mind. We submit that our submission is correct. If your lordship's view of the law is different then we would submit that this is yet another reason why we should be given an opportunity to test the correctness of your lordship's view by arguing the matter in the

C.1582 appellate division. There is no cross-examination in relation to Soweto which your lordship relies on, put to him,

and/....

and your lordship relies on it on page 922. Then your lordship's finding on the basis that coercion was a necessary element of the stayaway was not put to him and in the absence of these matters being put to him and heavily relied on by your lordship on page 323 and 324, 924 I am sorry, 923 and 924, we submit with respect that the finding is not warranted. As I indicated to your lordship we could do the same in relation to the other accused that have been convicted. The time required for this is not available but I want to make this submission ... (10)

COURT: Just a moment. Let us now get clarity. What does that mean, does that mean that you want time to do it in respect of each and every accused. Then I will hear the matter in August. It is your choice Mr Bizos, but do not take the point in the appellate division. If you want to take the point take it now and I will hear the matter in August. It is your choice.

MR BIZOS: That sort of Hobson's choice ...

COURT: No it is not Hobson's choice Mr Bizos. It is now 10h35. We sat until 18h45 last night to accommodate you. (20) We started at 09h00 this morning to accommodate you and if you need more time I will accommodate you but there are other interests also that have to be accommodated, not only Mr Bizos.

MR BIZOS: I would like my lord to ...

COURT: So I would just like to know exactly where I stand. You have now alluded to this question. We do not have time, we are not ready etcetera. Let us know where we stand.

MR BIZOS: I would like to believe that I am asking your for accommodation for the benefit of presentation of the accused's case and not for my personal benefit. But be that as it may (30)

what/....

what I was about to tell your lordship was this that if accused no. 5 is entitled to leave to appeal by parity of reasoning so are the others. As the case, or I can put it the other way, if your lordship finds for one or other reason that the case has to go to the appellate division in any event then that would be a factor to be taken into consideration in granting leave, even though your lordship may be of the view that not adequate grounds may exist and that this may be a borderline case as to whether leave should be granted or not to these particular accused. The choice that your (10) lordship gives me is that it would be unfair on everybody concerned, and more particularly the persons whom we hope to get some relief for from the ...

COURT: I asked you yesterday how much time you needed. You said three quarters of an hour. The time, double that time has now been spent.

MR BIZOS: Well does your lordship really believe that I wasted your lordship's time this morning my lord?

COURT: I believe that you were repetitive in some instances and I believe that you mentioned a lot of trivial matters (20) which you could have left out. That is what I believe.

MR BIZOS: Well that is your lordship's view but as counsel for the accused I must be credited in knowing what I submit are proper submissions to make on their behalf. But be that as it may on the choice that your lordship has given me I would rest the application for the Vaal accused on what I have said up to now.

COURT: Now there is one aspect I want to ask you. This document handed in, "Questions of Law to be Reserved in relation to the Vaal Case", where does that come in? (30)

MR BIZOS:/.....

MR BIZOS: It was handed in yesterday and I told your lordship that insofar as it had to be argued it would be argued by my learned friend Mr Chaskalson.

COURT: Yes but this is not part of the alleged irregularities or special entries?

MR BIZOS: No my lord, yesterday I alluded to it and my learned friend handed it in and told your lordship that there were questions of law. Not special ...

COURT: Now who is to argue it?

MR BIZOS: It was made clear yesterday that if it was to be (10) argued that it would be Mr Chaskalson.

COURT: Yes well then we will leave it to him.

MR BIZOS: As your lordship pleases. There is just one other aspect of the question of sentence that your lordship mentioned. The, we have looked at the cases in relation to the conditions. I do not want to argue it at length before your lordship or refer your lordship to the cases but it would appear that there is a distinction between imposing a condition , preventing a person from committing a crime, which are clearly conditions provided they are clearly expressed (20) there is no objection to. There are other conditions compelling persons to do some good. Either to themselves or others in relation to the events but conditions to forebear from doing lawful acts we have not been able to find and I must argue it from general principles. Let us assume that a father assaulted his child. It would be a proper condition to say well that you are not ...

COURT: May I just pose a problem that I have. In case you succeed on this point would the state not be entitled to say well then the initial sentence should be imposed and that (30)

is/....

is that they should go to jail?

MR BIZOS: No my lord. Not, with respect. Your lordship made a judgment and your lordship ...

COURT: I made it clear that in my view they should actually go to jail. I was lenient because I wanted them back with their families and I laid down certain conditions to keep them out of mischief in those fields where normally they might be tempted to mischief. That is all. Now you attack the conditions. But in fact I tried to help the accused.

MR BIZOS: This is really the fundamental difference of approach, that your lordship considers political activity mischief. (10)

COURT: No Mr Bizos, definitely not. If you read the judgment you will see otherwise.

MR BIZOS: No this is what the judgment says. But what your lordship has just said ...

COURT: That is not what I intend to say Mr Bizos. Not political activity is mischief. In the political activity they come to mischief.

MR BIZOS: Yes. What we are saying is that because of the novelty of the conditions we would like an opportunity of arguing it and the other point that I want to make is that what the appellate division's view may be, even if everything else fails in relation to accused no. 5, that I can understand, with respect, that your lordship would want to give effect to the fact that accused no. 5 had a previous conviction. And let us assume that I was incorrect in the submission that it is of a different character. To serve, to be distinguished and to have to serve a period of five years imprisonment because of a conviction some eight years, (20) (30)

seven/....

seven years earlier may be considered a sentence which is in disparity with the sentences imposed on the others. And the appellate division may come to no. 5's assistance in that regard. Finally I am not unaware of your lordship's desire to send to the appellate division 40 000 pages of record and documents. But if the case is going to go there anyway, and because on what I may call the main thesis of the indictment your lordship has made a finding against the state that actual violence not advocated it is possible to trim the record substantially and it must bear upon the, the responsibility must be taken for those who prepare the record to see to it that that is done. Thank you my lord, I have nothing more to say.

COURT: Yes Mr Chaskalson?

MR CHASKALSON: May it please your lordship, I shall put the points as tersely as I can. If your lordship would, the first point really relates to the form of the indictment. It is a matter I think which we have argued before in relation to whether the state ties itself to conspiracy 1, it can seek to achieve a conviction on conspiracy 2 even if the facts may reveal a different conspiracy. I think I gave your lordship authorities at the time. I do not want to repeat that.

COURT: Yes, is that the point that is made?

MR CHASKALSON: It is really the point. If your lordship would have regard to page 979 of the document your lordship will see there the finding in relation to one of the accused. I think it is accused no. 15. We have found that the leadership of the VCA was bent on the demise of the Black Local Authority. Its methods included mass action, accepted that violence was an inevitable and necessary component. No. 15's action and

his/....

his position of VCA leads to the inevitable conclusion that he made common cause with the others, endorsed their action. Well knowing the possible violent component of what they were doing. The fact that this was a minor role may be taken into account when a suitable sentence is determined. So in effect what the accused were charged with was a nationwise conspiracy to overthrow the state. I might call it the UDF conspiracy. Your lordship acquits them on that but finds a different conspiracy, a VCA conspiracy. Now that is an entirely different self standing conspiracy with different goals, different membership and different purposes. Our submission, very tersely, is that that is not covered by the indictment. The second point is really again on the indictment ...

COURT: This is now point 1 with all its sub-paragraphs?

MR CHASKALSON: All its sub-points. It was an attempt to formulate it as a question of law that way. The second point is the question again where the state gives particulars, basically the particulars given by the state were that apart from the broader particularity if one assumes that they could have been charged on the, what I might call the narrower conspiracy because if the first point is good that is the end of the matter. But if one assumes they could be charged on the narrower conspiracy, they were actually charged with going out and committing specific acts of violence. It was not really the charge that they foresaw that the stayaway would be enforced by coercion and that the march would lead to violent confrontation with the police. In other words the particulars of violence for the purposes of the terrorism charge were entirely different particulars and what they

have/....

have been convicted is of particulars which were not the subject of the charge. That too is putting it very tersely. The third point I need to refer your lordship to the act. Again it arises from the form of the judgment because the judgment is based on this question of, that they foresaw the confrontation with the police and so on. The key section is 54(ii) because I think 54(iv) refers back to this:

"Performs any act which is aimed at causing ...
or contributing to such act or ..."

Well let me read it: (10)

"Performs any act which is aimed at causing, bringing about, promoting or contributing towards such act or threat of violence or attempts, consents or takes any step to perform such act."

And (iv) is the incitement. Now the submission we would want to make here, that as far as terrorism is concerned within the context of the crime of terrorism that, if I might put it the "change", just in inverted commas, that violence is the medium. In other words people should be terrorised by the violence to change, not that violence, in other words that (20) you should aim at violence to cause the change. Not that you should aim to cause the change by means which violence is not the primary part of but violence might be foreseen as a consequence of. In other words your goal is not violence, your goal is something else. It may be some other offence ...

COURT: Just a moment now. I have not got the section here. Is not the first part of the section, the introductory portion of section 54(1), does that not say if you have certain aims?

MR CHASKALSON: Certain intent.

COURT: Certain intent. Yes an intent. (30)

MR CHASKALSON:/....

MR CHASKALSON: And then the other is method.

COURT: That is the intent to change something and you then do something violently then you are guilty of terrorism. Is that not so?

MR CHASKALSON: Well I am not sure that that is necessarily so because sub-(2) talks of performs any act which is aimed at. In other words the, as I understand terrorism if you use violence as your method that is terrorism. In other words you put, your methodology is violence.

COURT: Yes now ... (10)

MR CHASKALSON: In other words your aim is violence, you are aiming specifically at violence.

COURT: But let me stop, stop there. Let us say you want to disrupt the municipal elections. That is now the example that we had and that was the stories we were told, the ANC wanted to disrupt the municipal elections, whether that is true or not is irrelevant. A terrorist is sent in with hand grenades to disrupt the elections. So the aim is to disrupt the elections so that they do not take place, they should not take place. The method is violent. That would clearly fall under (20) the act.

MR CHASKALSON: That is what I would say the act is aimed at.

COURT: Now how would that differ except in grade from the current matter where we have the aim to coerce the local authority to do something and the method one that entails violence?

MR CHASKALSON: Well the method is, well where I would base the argument, if I were to argue it, is on the use of the language within the context of the offence of terrorism. In other words where your methodology is violence. In other (30)

words/....

words you use the violence and that is the methodology. I will bring about change by letting off bombs so people will be afraid and there will be change. That is terrorism. If you say I will, the method which I will use is to go out on a march, your methodology is not violence, but you can foresee that as far as these accused ...

COURT: Well let us take it a bit more extreme than the case and on that march - it is now not to the left, it is a march to the right and they have a lot of pistols and all things, packing all that, and you clearly foresee violence and there (10) is shooting in the end. They all shoot the pistols. Now would that not fall under the section?

MR CHASKALSON: I do not say it is not another offence. I would understand that within the framework of the statute there may be other offences within the framework of the common law there may be other offences. Whether it is the offence of terrorism is a different question because it is of course a question of degree. But if in fact you are, if your primary purpose is violence, in other words you are setting out to commit an act of violence then it is terrorism. If you are (20) setting out to commit a different act but should foresee violence it is not terrorism. Because your act is not aimed at violence. It is simply a linguistic, and also within the context of the statute. Because if one is talking about terrorism, terrorism properly so-called one understands as people saying I will put a bomb unless you do this. In other words your primary goal is violence. If your primary goal is not the violence but your primary goal is something different but incidental to that you should foresee violence you may be guilty of some other offence. It may be subversion, it (30)

may/....

may be something else. Depending upon the statute, the statute is quite a difficult one. But the argument which we would advance would be that where you do not, that you would have to make the finding that these particular accused intended to commit violence because, that their act was aimed at violence. As I understand your lordship's finding you did not make such a finding. You did not say that what they set out to do was aimed at violence. You said they should have foreseen it, and therefore they are liable. And that would be the argument. So those would be the law points which we would want to raise.

COURT: Yes thank you.

(10)

(20)

(30)

MNR FICK/....

MNR. FICK SPREEK HOF TOE TEN AANSIEN VAN AANSOEK OM VERLOF OM TE APPELLEER: Ek sal begin antwoord waar my geleerde vriend nou geëindig het. Dit is die staat se submissie dat hierdie voorbehoud van die regsvraag afgewys moet word. Eerstens, dit hou nie verband met die bevindings van die hof nie. Tweedens, dit hou nie verband met die akte van beskuldiging nie en dit is gebaseer op 'n wanuitleg van die akte van beskuldiging. In paragraaf 1 byvoorbeeld word gesê:

"1.1 The charge against them was based on an allegation that they were party to a nation-wide conspiracy to overthrow the state by violence."

Dit is een deel van die akte van beskuldiging. Van bladsy 13 tot bladsy 18 is die res van die akte van beskuldiging waar gesê word nie net om die staat omver te werp nie, maar ook het hulle gepoog om die regering te beweeg om iets te doen of nie te doen nie of 'n bepaalde standpunt te aanvaar of nie te aanvaar nie, het hulle die dade verrig in die akte van beskuldiging. So, daardie aspek is heel buite rekening gelaat. Verder is die kampanje van die UDF een teen die swart plaaslike besture wat die VCA opgeneem het en in hierdie kampanje van die UDF wat die VCA uitgevoer het, het die hof bevind het geweld plaasgevind en dit is ons submissie dat die verdediging die uitspraak verkeerd gelees het. Die hof het nie bevind dat hulle het voorsien of hulle moes voorsien nie. Die hof het bevind dat hulle het geweld bedoel. In die verband wil ek u baie kortliks net na 'n paar bladsye verwys van die uitspraak, bladsy 804 heel bo-aan:

"The VCA was the main, if not the sole, political active organisation in the Vaal. It organised the stay away and march. It follows therefore that they organised/..

organised or had a hand in the organisation of the violence."

Nou, 'n mens organiseer nie "violence" as jy dit nie bedoel nie. Dan verder die passasie wat my geleerde vriend self na verwys het op bladsy 979 van die uitspraak daar het die hof weer eens bevind dat die VCA was daarop ingestel op die vernieting van die swart plaaslike besture en geweld. Verder kan die hof - op bladsy 868 vind ons die volgende in die hof se bevinding:

"Whichever way the matter is viewed the march was a recipe for disaster. We can come to only one conclusion and that is that it was intended to be that." (10)

Op bladsy 897 van die uitspraak -

"The VCA was the main, if not the sole, politically active organisation in the Vaal. It organised the stay away and march. In the light of all the above considerations we draw the only reasonable inference and that is that the VCA organised or had a hand in the organisation of the violence."

Dit is dus ons submissie, soos hierdie voorbehoud van die regsvraag geformuleer is, is dit foutief. Dit hou nie verband met die uitspraak of die akte van beskuldiging nie. Ek wil net laastens op hierdie argument van my geleerde vriend die volgende sê, dat hy lê klaarblyklik artikel 54 verkeerd uit. Artikel 55 sê iemand wat met die opset om, met ander woorde die opset is onder andere die regering beweeg om iets te doen. Dit is die opset, dan sekere dade pleeg, onder andere geweld of geweld goed praat of geweld aanstig, veroorsaak, bewerkstellig of bevorder. My geleerde vriend het die artikel omgeswaai om hom te pas. Dit is verkeerd. (20) (30)

U sal/..

U sal verder merk, edele, in artikel 54(1)(a)(ii) word uitdruklik gesê dat persone wat -

"performs any act which is aimed at causing violence". Met ander woorde selfs as geweld nie direk beoog is nie, maar noodwendig 'n voortvloeisel is. Ek vra die hof dus om hierdie voorbehoud van die regsvraag van die hand te wys heeltemal.

Ek wil vervolgens handel met mnr. Chaskalson se betoog oor verlof om te appelleer ten opsigte van die areas behalwe die Vaal. Net ten aanvang, as ek mnr. Bizos se argument reg verstaan kom dit daarop neer dat as die hof in elk geval (10) gaan verlof gee en vir die appèlhof werk gee, gee hom so veel as moontlik, gee hom alles en met respek dit wat hierdie hof gesê het aan die begin van sy uitspraak toe die hof na die voer van hierdie saak verwys het, dit gaan klink na, om die tolk se woorde te gebruik, 'n pryslied as die appèlhof uitvind dat dit die hof se houding moet wees, want ons gee hom in elk geval alles terwyl die saak op appèl is. Dit is nie die toets nie. Dit kan nie geregverdig word nie.

Wat die areas betref sit die verdediging met 'n geweldige probleem, soos met die UDF ook. Die hele verhoor het hulle (20) die werklike getuies weggehou van die hof af, doelbewus. Waar is die Amanda Kwadi's, waar is Albertina Sisulu, waar is Oscar Mpheta, waar is Frank Chikane, waar is professor Mohamed? Die mense wat die geweld gepleeg het. Laat hulle kom verduidelik, maar wat doen die verdediging? Hulle roep mense wat op die kantlyn staan, wat nie eintlik weet wat aangaan nie, beskuldigdes wat sê hulle was nie daar nie, hulle was òf in aanhouding òf in 'n ander kantoor. Hulle moet kom verduidelik en nou draai die verdediging om en nou sê hulle ons het dit nie gedoen nie, maar nou wil ons 'n algemene verlof hê om te (30)

appelleer/..

appelleer op alles. Dan noem my geleerde vriend Somerset-Oos as 'n voorbeeld, maar hy het baie probleme daar. Somerset-Oos - was UDF betrokke, hulle baniere was op die begrafnisse. Hulle mense was daar gewees. Mathews Gonaway was daar. Dit is nie verduidelik nie hoekom die mense - hulle roep 'n getuie wat vir hierdie hof kom sê ek het onder andere die begrafnis georganiseer, ek weet waaragtig nie waar kom hierdie mense van UDF hieraan nie. Nou sê hulle hul wil verlof hê om te appelleer, want die hof het foutiewelik bevind UDF is betrokke, maar die hof kan nie algemene verlof gee nie. Wat van Mankweng? Daar is (10) direkte getuienis dat die leiers van UDF daar sit met ANC-dokumente, hulle het stukke opgestel. Daar is getuienis dat AZASO en al die organisasies, MACA, MAYCO, die hele lot het geweld georganiseer en oorgegaan na geweld op vergaderings. Nie een van daardie mense word geroep nie, maar 'n skoolkind wat toevallig in die pad geloop het. Hy moet kom verduidelik. Wat van Alexandra, waar die getuienis is dat die mense het na die ANC toe gegaan in Botswana, leiers van die organisasies, hulle het teruggekom, hulle het opdragte gekry julle moet geweld gebruik teen die raadslede? Daardie mense is nooit (20) geroep nie. Nou wil hulle verlof hê.

Ons sit hier met 'n ander voorbeeld. HUCA. My geleerde vriend, mnr. Bizos, is op rekord dat hy vir 'n raadslid wat hier getuig het, hy het hom aangeval en gesê ek stuur vir jou 'n uitnodigingskaartjie as Hoffman Galeng kom getuig om te kom sê jy lieg. Hoffman Galeng het nooit gekom nie. Wat moet 'n mens aflei? Het Hoffman Galeng vir my geleerde vriend gesê die getuie het die waarheid gepraat, ek kan dit nie betwis nie, moet my nie roep nie, maar hy wil verlof hê om te appelleer. (30)

Mnr. Chaskalson/..

Mnr. Chaskalson sê vir die hof ja, hier is getuienis van 200 skoliere wat geloop het in die straat en moeilikheid gemaak het, watse polisie is dit nou? Watse rewolusionêre klimaat is dit? Dit is, om die Engels te gebruik, "an understatement of the year". Dit is nie die getuienis voor die hof nie. Hier het duisende mense geloop en geweld gepleeg. Thabong. Dit is nooit verduidelik nie. Skole is vir meer as 'n jaar toegesluit, is geboikot, daar is geweld gepleeg, daar is mense dood oor die hele land, in die Vaal alleen 230 geboue vernietig. Staatsgeboue, die staat se amptenare, se uitvoerende persone is aangeval fisies, maar dan sê hulle daar is nie getuienis van 'n rewolusionêre klimaat nie. Edele, ons sit met die probleem oor Daleside. Hulle sê vir die hof die hof het foutiewelik BEWYSSTUK 710 na gaan kyk, afleidings gemaak, maar hier het ons weer dieselfde moeilikheid. UDF se Training Committee het hierdie ding aangebied en waar was hulle gewees in die getuiebank? Hulle het nooit opgedaag nie. Hulle is nie geroep nie. Hulle is weggehou van die hof af. Dit is nou maklik miskien vir die verdediging om te sê die onus is op die staat, hy moet die getuienis roep, maar ons is mos nie almal kinders nie, ons weet mos nou hierso dat hierdie mense getuig nie vir die staat nie. Die hof is bewus van die intimidasie wat hier aan die gang was en hier is 'n dokument voor die hof waar daar ex facie die dokument blyk die opdrag is "destroy the black local authorities", maar die mense wat van UDF betrokke is, wie se name genoem word by hierdie komitee wat die ding gereël het, hulle word nie geroep nie. Om 'n duidelike dokument te weerlê word daar nie mense geroep nie. Dan kom my geleerde vriend, mnr. Chaskalsen, dan sê hy daar is geen getuienis dat die inligting wat die hof bevind het, het by UDF en COSAS

se/..

se hoofkantoor uitgekom nie. Die verdediging het net hulleself te blameer, hulle het nie daardie getuienis gelei nie. Dit is hulle mense. As die dokumente voor die hof is, deur die staat daar gegee, hoekom roep hulle nie die mense om dit te weerlê nie? Hulle sien hulle staan met die dokumente en hulle kan die mense roep en sê dit is verkeerd of lê die dokument so uit.

Edele, ten aansien van die Vaal, my geleerde vriend, mnr. Bizos, het gesê dat die hof het in ag geneem die taalgebruik by die aanval op die raadslede èn die hof gebruik dit om 'n bevinding te maak teen die beskuldigdes ten aansien van die swart plaaslike bestuur-kampanje, maar my geleerde vriend vergeet die hof het gesê hierdie is nie 'n saak oor bloot eenvoudig die vryheid van spraak nie. Dit gaan meer. Hulle het nie net dit gedoen nie. Hulle het dit gebruik om die mense op te sweep. My geleerde vriend ignoreer daardie deel van die akte van beskuldiging en die getuienis daaroor. Hulle ignoreer dit.

Edele, die ander aspek wat ek groot probleme mee het, is die dokument wat my geleerde vriend hier ingehandig het in die hof, die skedule "The schedule of intervenings by the court". Hulle vra vir 'n spesiale inskrywing hierso. Artikel 317 van die Strafproseswet sê hulle is net daarop geregtig as die aansoek bona fide is of as dit nie "an abusive process of court" is nie. Die hof sal homself herinner dat hierdie was 'n punt voor hierdie hof by 'n aansoek om onttrekking van u edele, maar die verdediging het dit laat vaar op daardie stadium. Hulle het nie aangegaan daarmee nie. Op watter basis kan hulle nou weer kom en sê dit is bona fide, ons wil dit weer doen? Dit is 'n misbruik van die regsproses wat hier aan die gang is. Daar is verwys na sekere sake en dan is daar gesê dat hierdie hof is bevooroordeeld ten gunste van sekere - kom ons noem dit

maar/..

maar reguit, ten gunste van die staat, maar met alle respek enige mens wat in hierdie hof vir enige beduidende tyd gesit het kon sien dat hierdie hof is objektief. Die hof het nie net die verdediging aangespreek nie. Die hof het die staat aangespreek, my persoonlik menige kere. Ek kla nie, maar ek sê net neem dit in ag as die hof moet besluit of ...

HOF: "Cowboys do not cry".

MNR. FICK: Ja, ek kla nie daaroor nie, ek konstateer net 'n feit. Die verdediging vertel net die een deel van die storie. Ons het probleme gehad oor uitstelle, die staat. Ons het gevra vir verdagings om voor te berei vir besonderhede aan die begin, toe het ons probleme gehad. Dit is nie 'n geheim nie, ons het ons bes gedoen. Ons het probleme met die klagstaat gehad, ons moes gee. Die vele borgaansoeke is in werking gestel, ons moet dit doen, dit is gedoen, uitstelle vir getuies. Ek persoonlik het groot probleme opgetel daaroor een dag, maar dit is 'n aanduiding dat die hof objektief is, maar dit word oor geswyg. Die blote feit dat beskuldigde nr. 10 ontslaan is nadat hy, soos my geleerde vriende gesê het, "excessively" ge"question" is wys onteenseglik op hierdie hof se onpartydigheid en dan is daar ongeveer vyfhonderd "interventions" wat my geleerde vriend van praat in 'n verhoor van drie jaar en as ons kyk dan is daar ongeveer tweehonderd - daar is meer as 250, maar sê maar 250 getuies want dit is maklik om 'n sommetjie te maak, dit kom neer op 'n gemiddeld van twee vrae per getuie wat die hof gevra het. Dit oor drie jaar hoor ons is onredelik en onbillik. Die staat se argument is dit is snert. As die hof nou so partydig wou gewees het, kon die hof getuies geroep het waar die staat goed uitgelaat het, die hof kon getuies herroep het. Die hof het dit nooit gedoen nie. Ons hoor hierso dat die/..

die hof het 'n plig gehad toe 'n getuie gesê het hy is aangerand, dat die hof moes dit ondersoek het. Dit is nie die gesag nie. Die hof moet dit nie ondersoek nie. Hulle mense moet dit ondersoek, maar my geleerde vriende vergeet dat hierdie selfde getuie gesê het ek weet nie wie my aangerand het nie, dit is nie die ondersoekspan nie. Hy het gesê dit is mense in uniform, hy weet nie wie is dit nie, maar nou word die hof verkwalik daarvoor, omdat hierdie man sê hy weet nie wie het hom aangerand het nie en die hof het dit nie ondersoek nie en wat belangrik hier ook is, word vertel hier is een of ander sistematiese verkryging van getuies om vals getuienis voor hierdie hof te kom aflê. Edele, hier was 22 beskuldigdes in 'n veiligheidsaak en nie een maar een het vir hierdie hof kom vertel ek is sleg behandel deur 'n polisieman, deur die ondersoekbeampte of enige ander ondersoeker nie. Nie een nie. Nie een getuie het kom sê ek is aangerand deur die ondersoekspan nie. Niks, maar dan word daar gevra die hof moet 'n afleiding maak dat iemand "connected with the prosecution" verkry hier getuienis, probeer vals getuienis te verkry. Edele, in hierdie saak wil ek u verwys na die saak van Sefatsa & Others v The Attorney-General Transvaal 1988 4 297 op 305 daar het die hof bevind - daar was net so 'n poging aangewend om te kom vertel dat hier was "a systematic procuring of false evidence" toe sê die hof in die lig van die feit dat die ander staatsgetuies - daar is niemand anders wat probeer beweer het dat hulle geïntimideer is deur die polisie om getuienis valslik af te lê, om die beskuldigdes uit te wys, te inkrimineer nie sê die hof "I am of the view" - dit is teenoor paragraaf D bladsy 305:

> "I am of the view that the application for the hearing of further evidence to determine whether a special

entry/..

entry should be made or not, is frivolous and absurd. The exercise would be an abusive process of court."

Hier het die hof nog minder. Selfs nie eers die mense wat kom leuens vertel het vir die hof het kom sê dat een van die ondersoekbeamptes het vir my gesê ek moet hier kom lieg teen hierdie beskuldigdes nie.

Edele, ten aansien van beskuldigde nr. 3 het my geleerde vriend 'n punt gemaak en gesê die hof ..

OP HIERDIE STADIUM VERDAAG HOF VIR TEE HOF HERVAT (10)

MNR. FICK: Edele, die verdediging het die punt geneem dat die hof het vrae gevra aan beskuldigde nr. 3 ten aansien van die rapport - ekskuus, aan Steyn ten aansien van die rapport wat aan hom gemaak was of wat hy gemaak het met die samesprekings met beskuldigde 3 wat hy ontvang het van Kau. My submissie is dit was 'n heeltemal geregverdigde vraag eerstens omdat ons weet dat dit die verdediging se saak is dat dit 'n opgemaakte storie is hierdie pleging van geweld op die vergadering van 19 Augustus en in elk geval as die verdediging enigsins beswaard daaroor gevoel het kon hulle gevra het vir die terugroep van majoor (20) Steyn om hom daaroor te kruisverhoor, maar dit is nie gedoen nie. Slegs as hulle gevra het vir majoor Steyn, om hom terug te roep en die hof sou dit afgewys het dan het hulle 'n beter kans gehad, maar hulle het dit nie eers gedoen nie, hulle regte gebruik nie.

Oor Masenya het hulle ook beweer dat die hof ingemeng het, maar met respek die hof kan vrae vra ter opheldering. Die feit van die saak is die hof weet nooit wat 'n getuie gaan sê nie, want die hof het nooit met hom gekonsulteer soos enige van die partye nie en as die hof 'n vraag vra dan kan dit enige kant toe gaan. Dit is geen aanduiding van dat die hof spesifiek 'n (30)

sekere/. .

sekere antwoord wil hê nie.

Ons vind verder - ek sal nou na die skriftelike stuk verder verwys wat mnr. Bizos behandel het, bladsy 5. Ek gaan nie die hele ding met die hof behandel nie.

HOF: Net 'n oomblik, laat ek net kyk waar u besig is.

MNR. FICK: Bladsy 5. Ek wil vooraf sê ons kon onmoontlik alles deurgaan, ek het steekproewe gedoen en dit is my submissie in die algemeen eerstens dat hierdie is geen werklike gronde nie. Die goed is, met respek, baie keer uit verband uitgeruk. Die goed is verkeerd geïnterpreteer. Dit is vrae wat gevra is ter opheldering. Die hof het mense gevra soos I.C.15 byvoorbeeld oor liedere vanweë die man se agtergrond en die hof sit met dokumente en daar is geen ander getuienis oor die aard van die liedere en die oorsprong van die goed nie en hierdie man kon daaroor getuig. Dan wil ek u nou eerstens verwys na bladsy 5, na die getuie Molanka, dit is bladsy 3 830. Daar is beweer dat die getuie is gevra om iemand uit te wys met wie hy sekere onderhandelinge gehad het. Hy het gesê hy weet nie en toe het die hof gesê hy moet weer kyk. Edele, met respek dit is net 'n geval van hierdie - van 'n man is senuweeagtig, hy kom hier in die getuiebank dan sê die hof of iemand sê vir hom kyk, dan kyk hy so vinnig en dan sê hy ek sien niemand nie. Al wat die hof hier gedoen het, die hof het vir hom gesê neem jou tyd en kyk ordentlik en dan het die man gekyk. Dit is al wat daar gebeur. Dit is geen aanduiding van enige partydigheid of inmenging nie. Dan bladsy 8. Daar het mnr. Bizos beweer ten aansien van die getuie Preiss dat die hof - hy het gevra vir meer as 'n dag om te kruisverhoor en die hof het hom nie die tyd gegee nie en later het hy geargumenteer en hy het wel die tyd gekry. Nou, dit is met alle respek nie 'n aanduiding van die hof se

bevooroordeling/..

bevooroordeling nie, dit is juis 'n aanduiding van die hof se oop gemoed vir oortuiging. Die hof het hom gelyk gegee en hom toegelaat en hy het sy kruisondervraging gedoen. Dit is geen rede vir 'n klagte nie. Dan op bladsy 8 nog steeds, dit is ten aansien van beskuldigde nr. 8, volume 169 bladsy 8 725, daar is 'n bewering gemaak, het die hof verwys na 'n "progressive lady". Edele, hierdie is met alle respek ...

HOF: Gee my net die bladsy.

MNR. FICK: Ek het dit as 8 725. Met alle respek hierdie is 'n opmerking wat die hof gemaak het. Dit is geensins bedoel om (10) enigeen af te sit nie. Dit is 'n beskrywing van hoe die hof 'n sekere getuie, 'n dame beskou na wie die beskuldigde verwys het en ek doen aan die hand dit is absoluut beuselagtig om so iets oor te kla.

Dan wil ek u verwys na bladsy 13 heel bo-aan, volume 177, bladsy 9 083. Edele, ek het die moeite gedoen en gesoek vir hierdie passasie waar beweer word dat die hof het probeer om 'n getuie te laat erken dat COSAS betrokke was by die beplanning in die Vaal. Ek het hierdie passasies gelees en met alle respek die ding is totaal uit verband uitgeruk. My geleerde (20) vriend, mnr. Hanekom, was besig om die beskuldigde te kruisverhoor oor 'n sekere dokument, BEWYSSTUK AM15, en die hof het die dokument voor hom gehad en toe het die hof gevra nou maar watse "children" is hierdie, waarom word hier gepraat van "children" op die ding en die man het verduidelik, toe sê die hof om watter rede sou 'n mens dan byvoeg op die pamflet toe sê hy hy weet nie. Toe vra die hof -

"Het u nie gevra vir die een wat dit opgestel het nie?" toe sê hy "Nee, ek het nie" en daar het die hof dit gelaat. Dit is doodeenvoudig om op te klaar wat word bedoel met 'n sekere (30)

dokument/..

dokument waarvan hierdie man veronderstel was om kennis te dra en wat die staat op daardie stadium voor die hof geplaas gehad het en besig was om met die getuie te argumenteer. Dan wil ek u verwys na bladsy 15 heel onderaan, dit gaan oor beskuldigde 11. Daar word die hof beskuldig dat die hof sou vrae gevra het oor die politieke aard van die jeugorganisasies wat hierdie beskuldigde by betrokke was. Edele, 'n heeltemal natuurlike vraag. Hierdie man het aanvanklik getuig hierdie is organisasies wat hulle beplan het om sport mee te bedryf en kultuur, maar die dokumente wat die hof voor hom gehad het, is dokumente wat geskryf is eerstens aan 'n skoolhoof wat gesê het hulle eis, hulle wil inspraak hê in hoe die skool bestuur moet word en 'n dokument waar hulle aan die stadsraad skryf en kla oor waar kom die stadsraad aan die reg om die kerke toe te maak vir politieke vergaderings. Toe het die hof vrae gevra maar wat is die aard van hierdie ding van julle. Is julle 'n politieke organisasie of wat is julle en dit is die klagte. Daar is geen meriete in hierdie klagte nie met alle respek.

Ek wil u verwys na bladsy 16. Dit is volume 222 bladsy 11 759, dit is die derde een van onder af. Daar word gekla dat die hof het 'n dokument gestel aan die getuie wat nie gebruik is deur die staat nie. Dit is foutief. My geleerde vriend het die verkeerde inligting hier voor die hof geplaas. Ek het spesifiek gaan kyk. Die hof is besig om - laat ek so sê op bladsy 11 757 was ekself persoonlik besig. "Ek wil met u gaan na die volgende bladsy van die bewysstuk, BEWYSSTUK B2" en ek behandel die ding dan vir twee en 'n halwe bladsy en vra die hof die volgende:

"Daar was gister 'n lang debat tussen uself en die

aanklaer oor die vraag van samewerking met bestaande strukture. Ek vind op hierdie bladsy .."

dit is die een wat die staat na verwys

"'n paragraaf wat miskien hiermee in verband staan. Ek wil vir u lees en vra of dit u standpunt weergee."

Dit is wat die hof gedoen het. Dit is eerstens nie 'n ding wat die staat nie na verwys het nie, soos my geleerde vriend probeer vertel het, 'n ding wat die staat nie voor die hof geplaas het nie, en verder is dit 'n totaal onskuldige vraag.

Dan wil ek gaan na bladsy 17 toe, die tweede een van bo af, volume 224. Die verwysing is 11 876 tot 7. Hier word gekla dat die hof "reminded the witness" sekere Bantoestans wat hulle noem Bantoestans "as independent states". Ek het weer die passasie nagegaan. Die hof het hier vir die man gesê - die staat was besig om AZAPO se beleid met hom te behandel en 'n sekere dokument, vra die hof:

"Wat verstaan u onder Bantoestan 'dumping grounds'? U hoef nie te verduidelik waarom u dit so sê nie. Ek wil net weet wat verstaan u onder Bantoestan. Die tuislande wat nie onafhanklik is nie of ook onafhanklike gebiede wat voorheen deel was?"

Dan sê die getuie "Nee, beide voorbeelde van u pas nie, want ek verstaan nie" dan gaan die hof verder en sê hy:

"Met ander woorde bedoel u nie die Transkei nie?"

Toe sê hy "Nee - O, ek verstaan nie mooi nie". "Met ander woorde" sê die hof toe, toe hy geantwoord het "dit geld ook vir gebiede soos die Transkei, Bophuthatswana, Lebowa en Gazankulu, dit is so. Is dit wat u verstaan onder Bantoestans? -- Dit is so" en dit is die klagte. Dit is onsinnig, beuselagtig.

Edele/..

Edele, dan word daar gekla oor beskuldigde 3, dat die hof met hom sekere "at length" vrae gevra het, maar die getuie, nr. 3, is dié getuie wat geen vrae ooit reguit geantwoord het nie. Hy het net niks reguit geantwoord nie, òf my geleerde vriend hom gevra het vir die verdediging en of my geleerde leier hom gevra het, of u hom gevra het, die geleerde assessor hom gevra het, hy het net nie 'n vraag reguit geantwoord nie. Dit is sy eie skuld dat daar "at length" naderhand begin vrae gevra word omdat die man antwoord nie.

Op bladsy 18 vind ons - volume 264 bladsy 1 476 - word (10) die hof daarvan beskuldig dat die hof sonder "expert evidence" gesê het watse goed is "Marxist language" en wat nie. Die hof moet krediet kry darem ook vir sekere goed, dat die hof kan sekere afleidings maak. Die hof het voor hom 'n hele aantal dokumente van die SA Kommuniste Party gehad. Dit is voor die hof, die hof het dit gelees, daarna is verwys in betoë, skriftelike betoë meer as een keer. Die hof het dit gesien. Op watter basis kan die hof dan nie sê wat is Marxistiese taal nie?

Dan bladsy 19, die tweede een van bo af, volume 271, bladsy 14 729, daar word gekla dat "the court made the statement that the black local authorities were democratic". (20) Ek het dit gaan naslaan. Dit is met beskuldigde 19. Mnr. Jacobs was vir drie bladsye besig om met hom te handel oor hierdie aspek en dan bo-aan bladsy 14 729 blyk dit duidelik, sê die hof "That is of course also applicable to the black local authorities", dit gaan oor die woord "democracy" - "in the sense that those bodies are voted on - are elected". Dit is nou die klag dat die hof gesê het omdat daar gekies kan word vir die mense, dit is demokraties is totaal onsinnig. Daar is geen meriete in hierdie hele ding nie. (30)

Op dieselfde/..

Op dieselfde bladsy, die heel laaste verwysing, 287, daar word gekla dat BEWYSSTUK C1O2, sou die hof gesê het "the government must hand over the government to Tambo and others" en dit wys die hof ...

HOF: Is dit die laaste verwysing op bladsy 19?

MNR. FICK: Bladsy 19, dit is volume 287 bladsy 15 920. As ek praat hier van die hof dan bedoel ek die geleerde assessor ook. Dit is na die getuie nou gepraat het, gekruisverhoor is hierso weer eens vir twee bladsye, dan word gevra deur die geleerde assessor:

(10)

"Does not this also mean, Mr Lekota, that the government is not the authetic leaders of the people?"

dan gee die beskuldigde 'n lang antwoord, toe sê die geleerde assessor "It is difficult" en voor die vraag verder gevra word sê die beskuldigde "No, it is not difficult. It is quite easy" en dan gee hy weer 'n baie lang antwoord, dan sê die geleerde assessor "No, I merely made the observation that as it stands here the leaders of the people were in this context - it cannot include the government as leaders of people, the government itself", dan vra die hof hom maar meen dit ook dat - "How am (20) I to interpret authentic leaders of the people" en dan verwys die beskuldigde na die mense op Robben Island en die Rivonia "trialists" en gaan ek maar verder aan, en dit is die klagte, dat die hof sou hier onregverdig opgetree het en 'n sekere standpunt ingeneem het teen die beskuldigde.

Edele, die hof is geregtig om sy prima facie-siening van 'n dokument te stel aan 'n getuie, vir hom te sê wat is jou kommentaar daarop. Dit is net billik.

Edele, dan bladsy 21, die vierde een van onder af, dit is volume 328, dit is die getuie Nyembe, bladsy 18 739. Daar (30)

word/..

word gekla dat "the disbelief put to the witness how did he expect to find the councillor at home on the Monday". Al wat die hof weer hier gedoen het, is die man het gekom met 'n weergawe wat normaalweg - natuurlikerwys verwag 'n mens nie iemand Maandae by sy huis as hy werk nie, het die hof vir hom gesê maar het julle verwag hulle gaan daar wees, dit is al. Nou word daar gesê die hof het ingemeng. Dieselfde op bladsy 22, die getuie Mokgotsi, volume 350 bladsy 20 017. Daar word gekla dat die hof sou gesê het van hierdie R30 wat julle wil hê vir huur, hoe het julle dit bepaal, maar weer eens die hof moet (10) sy prima facie-standpunt stel. Dit is 'n objektief belaglike bedrag om vir huur te vra nadat die huur hoër was voor dit en dan te sê wat is die hof se prima facie-standpunt daaroor en dan die getuie te vra maar hoe kom julle daarby uit, hoekom wou julle dit so gehad het, daar is niks verkeerd mee nie.

Bladsy 23, die getuie Tobela, volume 336 bladsy 21 064. Daar word gekla dat "the court asks questions as to why there is to be a parents' committee as there is already a school committee". 'n Heeltemal natuurlike vraag, want altwee is veronderstel om dieselfde werk te doen. Dit is geen aan- (20) duiding van partydigheid nie. Dit is 'n onduidelikheid wat opgeklaar moet word.

Edele, dan op bladsy 24, die getuie Ngwangwala, dit is volume 395 bladsy 22 946, die vyfde een van onder af. Daar word gekla dat die hof sou gevra het vir hierdie getuie en die hof het duidelik laat blyk dat hy twyfel hoekom sy nie teruggegaan het na 'n sekere huis toe nie. Nou, dit is die getuie - net om die hof kortliks, u geheue te verfris, wat 'n begrafnis gereël het, toe op 'n stadium is sy skielik daar weg van hierdie begrafnis. Dit is haar familie se huis en vir drie (30)

jaar/..

jaar het sy nie teruggegaan na daardie plek toe om uit te vind wat het hier gebeur nie. Dit is 'n baie onnatuurlike reaksie, 'n mens verwag dit nie. Nou, die hof het vir haar gevra hoekom het jy nie teruggegaan nie, het jy nie skottels daar gehad wat jy moes gaan haal nie. Ek weet nie watse aanduiding is dit van partydigheid nie.

Edele, bladsy 26, die vyfde een van bo af, dit is die getuie Ndembisa, Billy Ndembisa, volume 407 bladsy 23 729. Daar word hy gevra deur die hof wat beteken "a luta kontinwa". Edele, die agtergrond van die ding het my geleerde vriend buite (10) rekening gelaat. Dit is hierdie getuie se eie organisasie se dokument. Hulleself het hierdie ding daar geskryf "a luta kontinwa" op hulle dokument wat hulle uitgegee het. Nou vra die hof 'n heel onskuldige vraag hoekom skryf julle dit daar, waar kom dit vandaan, weet jy waar kom dit vandaan. Nou is die hof partydig.

Edele, bladsy 27 die laaste bladsy, heel bo-aan, getuie Motsana. "Questioned at length about the affiliation of Soweto Civic Association". Edele, die "at length" wat ons sien wat daar aangehaal word, is van reëls 12 tot 21. Dit is nie 'n (20) verskriklike lengte nie. Dit is die eerste probleem. Die ander een is dat die hof het hier gesit met beskuldigde nr. 16 wat aan dieselfde organisasie behoort en in dieselfde bestuur sit wat 'n ander weergawe gee oor die affiliasie en die hof het dit probeer opklaar. Dieselfde met die derde verwysing, met Mabasa. Die man is van AZAPO. Die klagte is hy was gevra oor die VCA en AZAPO se samewerking in die Vaal, dieselfde. Daar was 'n dokument voor die hof gewees, ek het dit ook gestel aan ander getuies ook voor Mabasa waar gesê word dat hulle saamwerk, hulle kom gereeld saam vir vergaderings van die VCA en die hof het (30)

hom/..

hom daaroor gevra. Daar is verder die dokument van UDF wat sê hulle is bereid om saam te werk oor sekere aspekte. Die hof het hom daaroor ook gevra, maar die staat het hom ook daaroor gevra. Die hof het ter opheldering gevra. Die derde laaste een, die verwysing 422 bladsy 24 705 sou die hof te kenne gegee het dat die hof sê dat AZAPO glo nie aan "peaceful change" nie. Eweneens daar was 'n dokument voor die hof wat behandel is wat deel was van die kongres van AZAPO waar gesê is - die uitdrukking was nog gewees, vry vertaal, die wat glo in vreedsame oplossings is baie min en hulle tyd hardloop uit om dit ook te (10) bewys, dat daar nog enige sprake van vreedsame oplossing is. Dit is een van die B-bewysstukke en die hof daaroor gevra wat sê jy daarvan, dit is al.

Ek wil aan die hand doen dat, soos uit die steekproewe blyk, dat hierdie is totaal sonder meriete, dit is uit verband geruk, dit is verkeerd aangehaal, verkeerde uitgangspunte waarvan daar gewerk is en dit kan nie 'n grond wees vir 'n spesiale inskrywing nie, want die hof kan bevind met alle respek dat dit is "frivolous" selfs absurd en as die hof moet kyk na wat beteken absurd dan wil ek net in hierdie verband na een (20) saak verwys, die S v Cooper and Others 1977 3 SA 475 (T) op 476C - H. Daar het die hof 'n uitleg gegee van wat bedoel word met beuselagtig en onsinnig. Dan het die hof onder andere gesê, ek gaan nie alles lees nie, maar ek gaan net dié lees:

> "These words have been used according to the decided cases in respect of pleadings and actions which were obviously unsustainable, manifestly groundless, utterly hopeless without foundation."

Dit is die staat se submissie dit is wat hier aan die gang is.

Ek sal verder sekere aspekte kortliks, baie (30)

kortliks/..

kortliks behandel wat aanvanklik Maandag na verwys is, maar wat ek nie weer gevind het weer na verwys word nie. Ek weet nie of dit laat vaar is of wat is die posisie nie, maar baie kortliks is eerstens gesê dat as die hof meen dat daar substansie in beskuldigde 16 se saak is dat hy verlof moet kry, dan outomaties beïnvloed dit die ander beskuldigdes ook en om daardie rede moet hulle ook verlof kry om te appelleer teen die skuldigbevinding, algemene verlof. Die staat se submissie is dit kan nie so werk nie. Beskuldigde 16 word verbind eerstens weens een vergadering in die Vaal en, tweedens, weens sy betrokkenheid (10) by die Soweto Civic Association waar nie een van die ander beskuldigdes op hierdie basisse verbind word aan die misdade nie.

Edele, dan ten aansien van beskuldigde 5 is Maandag gesê dat die hof kan nie hierdie man skuldig vind nie, want die staat het sy aanspreeklikheid gebaseer in die akte van beskuldiging op sy deel van die bestuurstruktuur van VCA. Nou, deels is dit die waarheid, maar dit is weer net die halwe waarheid. Bladsy 82 van die verdere en beter besonderhede wat die staat verskaf het, het die staat gesê beskuldigde 5 word onder andere aanspreeklik gehou in sub-paragraaf 8 op bladsy 82 omdat (20) beweer word hy is deel van die bestuurstruktuur, dit is die een basis. Die ander een lees en die laaste sin: "Verder het die beskuldigdes" - hy word saam met die ander genoem - "ook deelgeneem aan die aktiwiteite soos uiteengesit" en daar is 67 tot 77 van die bylae tot die akte van beskuldiging. Dit is die ander basis waarop die staat sê dat hy aanspreeklik is. Nie net omdat hy deel van die bestuurstruktuur was nie, maar omdat hy die ander dade gepleeg het en hy het tot op die einde saamgeloop met die VCA. Of hy nou 'n lid was of nie, hy het saamgeloop, hy was saam met die mars, hy was by die vergaderings, het heel (30)

pad/..

pad saamgeloop. Dan word verder vir die hof gesê Maandag as daar 'n vergelyking getref word tussen beskuldigde nr. 5 en nr. 10 se posisie, dan is dit duidelik dat hulle is nie te onderskei nie en daarom beskuldigde 5 moes eintlik ook onskuldig bevind gewees het. Edele, dit kan nie wees nie. Nr. 10 was lid van die VCA gewees. Nr. 10 is onskuldig bevind tereg omdat die hof bevind het dat hy is 'n ou wat begin het, maar halfpad het hy weggehardloop. Hy het nie aangegaan met die geweld nie, hy het êrens gestop voor die geweld, het hy hom onttrek, by alles wat hy by betrokke was en dit is presies die teenoor- (10) gestelde as wat die hof bevind het by nr. 5 en nr. 5 se eie getuienis. Hy was tot op die einde, was hy nog steeds betrokke. In elk geval wat die ander beskuldigdes betref ook wat die hof skuldig bevind het, hulle was lede van die VCA, dit is nou afgesien van nr. 16 en nr. 19, 20 en 21, maar die res was lede van die bestuurstruktuur van die VCA so hulle kan daar ook onderskei word.

Edele, dan word beweer dat die hof het 'n afleiding gemaak ten aansien van beskuldigde nr. 5 wat eenvoudig net nie uit die getuienis uit blyk nie en dit word gesê die hof sou 'n af- (20) leiding gemaak het dat nr. 5 het geluister na die ANC se uitsendings en hy het ANC-dokumente gehad. Dit is nie wat die hof bevind het nie. Bladsy 916 het die hof net so ver gegaan en gesê "it is probable" dat hy saam kon geluister het met die ander. Daar is nie 'n bevinding gemaak hy het dit gedoen nie.

Dan word daar Maandag gekla dat die hof het nie sy <u>prima facie</u> "views" oor die geloofwaardigheid van die beskuldigdes vooraf bekend gemaak nie. Edele, dit is ons kontensie, ek wil niks meer sê daaroor nie, maar dit is so ongegrond. Daar is nie so iets dat die hof voor die tyd moet sê luister, kyk, ek (30)

gaan/..

gaan jou man glo, wil jy vir my nog iets vertel nie. Daar is nie so iets nie. Dit word net nie gedoen nie. Daar is nie so 'n plig op die hof nie.

Edele, daar word beweer die hof het op nietige teenstrydighede die getuienis ten aansien van die verdediging verwerp oor die mars en die gebeure by die interseksie. Ek wil net - ek gaan nie daarna verder verwys nie - sê van bladsy 855 tot 864 gee die hof baie duidelike, goeie redes waar die teenstrydighede duidelik uit blyk, wat ernstige teenstrydighede is en hoekom hulle verwerp moes word. (10)

Hier is 'n punt gemaak Maandag dat die getuie I.C.10 is nie gediskrediteer nie en sy moes gediskrediteer gewees het. Edele, met respek die hele doel agter die kwessie van diskreditering van 'n getuie wat afwyk van sy verklaring of nie die waarheid praat nie, is om te verseker dat 'n beskuldigde nie skuldig bevind word op vals getuienis of van 'n getuie wat uit twee monde praat nie, dan is daar die plig op die staat om die ding op te handig en vir die hof te sê kyk, dit is wat gebeur het, ek diskrediteer my getuie, maar hier het die getuie dit self kom loop sê. Die getuie het gesê alles wat ek gesê het, (20) het ek gelieg. Watter redelike en onredelike hof gaan op sulke getuienis mense skuldig vind? Daar rus geen plig verder op die staat om hierdie dokument in te handig nie, watse doel gaan dit dien?

Edele, dan net een aspek, Maandag is daar ook gesê verder oor die Daleside-dokument, dit is C11O, dat die hof het foutiewelik hierdie dokument in ag geneem, maar ek vra die hof om in ag te neem, afgesien van wat my geleerde vriende gesê het, is dat hierdie is 'n seminaar wat gehou is spesifiek op versoek van die VCA. Dit is dokument - die U4-reeks, is by 'n klomp van die (30)

bestuurslede/..

bestuurslede van die UDF gekry, in hulle besit, en in UDF se kantore self, spesifiek die een waar gesê is dat "make the black local authorities ungovernable" - ekskuus "destroy the black local authorities". Daardie dokument is spesifiek by die UDF in sy kantore gekry en op daardie basis is daardie dokument toelaatbaar en weer eens is hier niemand van UDF geroep om te kom sê luister hoe kom hierdie dokument hier nie, is dit ons dokument nie, maar daar is volstaan met nr. 19 en 20 wat sê ons ken nie die dokument nie, want ons is nie altyd in die kantore nie en van die begin af was dit baie duidelik vir die ver- (10) dediging dat die staat sterk steun op hierdie dokument. Hulle kon nooit onder 'n wanindruk verkeer het nie, maar hulle het nogtans volstaan om nie die mense te roep wat geweet het of wat moet weet nie, maar om die hof in die duister te los en nou te sê ons wil die voordeel hê van hierdie ding wat ons aangevang het. Dit werk nie so nie.

Edele, ten aansien van vonnis - artikel 297(1)(a)(i)(hh) sê dat die hof kan enige ander aangeleentheid gebruik vir 'n opskortingsvoorwaarde. Die wet is spesifiek wyer gemaak as wat hy was en die voorwaardes wat die hof hier opgelê het, is (20) nie net sommer gekies vir die lekkerte nie met respek. Dit is alles voorwaardes wat verband hou met wat hierdie beskuldigdes by betrokke was die afgelope paar jaar. Dit is massavergaderings, huisvergaderings, toesprake maak, opswepery van mense, pamflette versprei, vergaderings bywoon, opmarse reël. Al daardie goed is absoluut tersaaklik by hierdie saak en dit is nie soos my geleerde vriend sê dat dit is nie 'n misdaad nie, hulle kan dit doen en daarom behoort die hof dit nie op te lê nie, maar die feit van die saak is in hierdie saak het die beskuldigdes daardie goed wat nie misdade is nie, omskep in misdade. Hulle (30)

het/..

het dit misbruik om 'n misdaad te skep, te pleeg. Hulle het hulle vryheid van spraak misbruik. Hulle het hulle reg van vergader in die openbaar het hulle misbruik. Dit is hoekom hulle skuldig bevind is en dit is hoekom dit nodig is dat sulke voorwaardes opgelê word tot hulle voordeel.

Daar is ook gesê Maandag maar wat van die ander mense van UDF? Edele, die hof is bekend met die saak van S v Ramgobin. Daardie mense was aangekla en nie vir die dade waarvoor hierdie beskuldigdes voor die hof gestaan het nie, vir ander dade. My geleerde vriende kan dit bevestig as hulle dit betwis. (10) Hulle is vry, maar toe hierdie beskuldigdes aangekla was, was daardie beskuldigdes die Sisulu's, die Tsekane's, daardie mense was voor 'n hof, 'n ander hof. Ons kon hulle nie in hierdie saak voeg nie al wou ons. Hulle was besig met 'n ander saak.

Dan word daar verder gesê dat hierdie beskuldigde was maar 'n jong man, nr. 5, toe hy sy vorige veroordeling vir openbare geweld gehad het, toe hy daaraan skuldig bevind is. Dit mag so wees, maar hierdie man was glad nie meer so jonk toe hy hierdie misdaad gepleeg het nie, wetende dat hy het so 'n vorige veroordeling wat net drie jaar vroeër hom opgelê is. Dit is (20) duidelik hy hoor nie, soos nr. 20. Hulle hoor nie. Hy gaan net aan.

Ek vra die hof om die verlof om te appelleer teen die vonnis af te wys.

Edele, ek is klaar. My geleerde leier sal aangaan met die spesiale aantekening en 'n paar ander aspekte. Dankie.

MNR. JACOBS: Edele, u het, toe ons in aanvang geneem het met die aansoek, het u 'n paar punte uitgenoem wat ek sou moes argumenteer. Ek wil eers ter aanvang weer bevestig dat die staat is in opposisie teen enige algemene of 'n oop, 'n sogenaamde (30)

oop/..

oop appèl in hierdie saak. Ons respekvolle submissie is dat die verdediging moet in hierdie geval vir die hof oortuigende redes gee of vir die hof oortuig, laat ek dit dan so stel, die hof oortuig dat 'n ander hof of dat daar 'n redelike moontlikheid of redelike vooruitsigte is dat 'n ander hof tot 'n ander insig kan kom. Dit bly en is die toets regdeur vir die regs sowel as die feitevrae.

Met 'n saak van hierdie omvang is dit net noodsaaklik en nodig dat die gronde vir appèl behoorlik omskryf en behoorlik afgebaken word. Die gesag daarvoor dat die gronde vir (10) appèl waarop appèl gevra word afgebaken word, is artikel 316(2) van Wet 51 van 1977 en dit is ook so gesê in S v Rossouw 1964 3 SA 671 (OVS).

HOF: Kan ek u net dit vra, mnr. Jacobs, moet die gronde finaal afgebaken word voordat ek hierdie aansoek aanhoor of kan dit later afgebaken word as ek algemene riglyne neerlê?

MNR. JACOBS: Edele, ek sou gesê het dit moes eintlik - edele, laat ek dit vir u so stel, ons het 'n geweldige probleem om te voorsien waarop om alles te kom antwoord vir u. U het vir my gesê ek moet oor die wet oor dokumente, tyd en sulke dinge (20) moet ek kom praat waaroor ek sal kom praat, maar ek weet nie wat is die benadering van hierdie mense, van die beskuldigdes of die verdediging in hierdie geval nie. Ek moet argumenteer uit die bloute uit. Nou, edele, as die hof algemene riglyne sou aandui dan gaan dit - ek sal met respek dan sê dan gaan dit nog beter wees as om net een algemene oop reg van appèl te verleen, want daar moet, volgens die omvang van hierdie saak, moet daar tog ook aan die staat 'n geleentheid gegee word om betyds behoorlike hoofde van argument op te trek as die saak op appèl gaan en as dit 'n oop appèl is dan gaan dit gebeur dat op die (30)

uiteinde/..

uiteinde wanneer die appèlhof eers vir hoofde van argument gevra het en die verdediging dit moet ingehandig het, sal die staat weer, soos ons ongelukkig tot nou toe is, altyd onder tyd gedruk is, dan gaan ons weer binne 'n baie kort tyd oppervlakkige hoofde vir die hof moet opstel. So, as die hof in hierdie geval dan riglyne neerstel waarbinne en binne 'n sekere tyd spesifieke gronde van appèl uiteengesit moet word, dan kan dit die staat ook help dat ons kan begin werk aan behoorlike argumente om behoorlik voor die hof te plaas, maar daarom sê ek die eintlike doel is dat dit moes al gewees het voor hierdie hof vir (10) argument voordat daar begin is met die argument sodat dit behoorlik kon nagevors gewees het. Ons moes - met respek, ons was verplig gewees om gisteraand steektoetse te maak van baie belangrike en ernstige aantygings wat op hierdie stadium teen die hof gemaak word. As 'n mens behoorlik dit kan gaan ontleed dan is ek baie oortuig en ek is heilig oortuig daarvan dan kan ons 'n geheel ander prentjie voor die hof lê as wat hier gister voor die hof gelê is. So, afgesien daarvan dat 'n mens sal verwag dat daar ook aan die staat dan 'n geleentheid gegee word, is dit die houding van die appèlhof ook dat artikels 316(2) en (20) (5) nie verontagsaam moet word nie, maar dat, soos die hof dit gestel het in S v Hlatswayo 1982 2 SA 744 (A) op 745H:

"These sections should always be observed."

Dit is die opmerking wat die appèlhof gemaak het hieroor en my respekvolle submissie is dat daar is - agterliggend van hierdie opmerking is daar 'n baie, baie goeie rede, want die appèlhof sal sekerlik geregtig daarop wees dat ons van die staat se kant af kom en vir hulle behoorlik ons saak kan stel en as dit 'n oop appèl is dan kry ons nie daardie geleentheid nie. Ek is met respek baie jammer ons kon dit nie kry nie en my (30)

geleerde/..

geleerde vriend se argument dat - net voor ek daarby kom, en ek wil dit verder byvoeg ons is dit ook verskuldig aan die appèlhof om te weet presies waarmee kom ons van hierdie hof af na die appèlhof toe, presies wat is dit waarvoor hulle moet voorberei. Om te gaan duisende bladsye getuienis lees en op 'n stadium nog nie te weet waaroor dit gaan nie en eers op 'n latere stadium wanneer hoofde gevra word nou skielik te sien wat is die gronde waarop hulle gaan, moet hulle weer teruggaan en miskien dubbele werk doen, dit is ook onbillik teen die regters wat daar gaan sit, met alle respek, as daarso 'n oop, algemene reg van (10) appèl verleen word. Wat ek hier nou ..

HOF: Ek wil net nog duidelikheid kry, volgens u met ander woorde het ons nou in hierdie proses die kar voor die perde gespan? Ons moes gewag het vir 'n behoorlike kennisgewing van appèl en dan aan die hand van daardie kennisgewing van appèl die vooruitsigte op appèl beredeneer het? Is dit u submissie? Dit is die normale manier.

MNR. JACOBS: Eintlik is dit so dat die verdediging moes vir ons 'n uiteensetting gegee het presies ...

HOF: Maar nou mag natuurlik 'n mens jou gronde vir appèl (20) mondelings gee net na die uitspraak en dan aan die hand daarvan verlof vra. Is dit nie so nie?

MNR. JACOBS: Edele, dit mag gedoen word, die hof mag dit doen, daar is voorsiening daarvoor, dat die howe het in die verlede dit toegelaat, dat dit mondelings gedoen word, maar nou is die vraag presies wat is gegee aan ons as die gronde waarop ons kon voorberei het?

HOF: U submissie is dat die gronde wat gegee is algemeenhede is en nie spesifieke gronde nie?

MNR. JACOBS: Nie spesifieke gronde nie. Hulle was vaag ..(30)

HOF/..

HOF: Nou goed, kom ons aanvaar as u nou reg is daar dan sou dit beteken dat daar 'n kennisgewing van appèl ingedien moet word. Wat bepaal artikel 316 oor die indiening van 'n kennisgewing van appèl wat tyd betref?

MNR. JACOBS: As ek reg daar is dan is dit 14 dae of soveel tyd verleng as wat 'n hof mag verleen.

HOF: Hierdie hof mag dit verleng?

MNR. JACOBS: Verleng. Ek kan net seker maak. Ek het die .. (mnr. Jacobs slaan die artikel na). Die verlof om te appelleer, as ek reg onthou, moet toegestaan word kragtens artikel 316.(10) Ek sien -

> "Aansoek om kondonasie om verlof om te appelleer en om verlof om verdere getuienis te lei."

Edele, volgens 316(1) lees dit -

> "'n Beskuldigde wat voor 'n hoërhof aan 'n misdryf skuldig bevind word kan binne 'n tydperk van 14 dae vanaf die oplegging van vonnis ten gevolge van so 'n skuldigbevinding of binne 'n langer tydperk wat op aansoek in hierdie artikel 'n aansoek om kondonasie genoem' om gegronde redes toegelaat word. In die (20) geval van .."

So, die hof kan kondoneer, edele.

HOF: Met ander woorde ek kan 'n langer tyd daar stel as 14 dae.

MNR. JACOBS: Dit is reg.

HOF: Veertien dae vanaf datum van vonnis raak 'n bietjie kort.

MNR. JACOBS: Vir so 'n saak stem ek saam. My submissie aan u dan is dat ek verwelkom dit en ek wil dit dan vra as die hof sou verlof om te appelleer toeken, dat die hof 'n raamwerk daar vir die verdediging sal stel soos die hof nou voorgestel het en dat dit gebonde word aan 'n sekere tyd en dat daardie gronde (30)

wat/..

wat dan daarvolgens opgestel word dan volledig uiteengesit word sodat alle belanghebbende partye, die appèlhof self sowel as die advokate wat hierdie saak namens die staat sal doen, genoegsame tyd sal hê om behoorlik hulle hoofde en argumente voor te berei vir die appèlhof. Eens weer, die appèlhof sal hoofde vra lateraan as daar so 'n reg verleen word, maar dan gaan die tyd te kort wees met alle respek.

K1583 Edele, die hof het ook aangedui Maandag dat daar sekere aspekte is waarop ek dan die hof sal moet toespreek. Ek wil dan oorgaan na hierdie aspekte toe op die basis dat dit moontlik is dat die hof sal beveel dat daar op sekere aspekte appèl sal verleen word.

Die eerste aspek wat ek dan wil behandel wat ek dink wat belangrik is, is dan die kwessie van die videos. Ek sal lateraan terugkom na die regsvrae wat my geleerde vriend gesê het. Ek wil eers hierdie aspekte afhandel wat die hof vir my gegee het.

Die hof het reeds al vir my 'n aanduiding gegee en duidelik gemaak in die lig van die teenstrydige bevindinge in ander afdelings van die hooggeregshof oor videos, dat ons nie met respek kan argumenteer dat daar nie 'n redelike moontlikheid bestaan dat die appèlhof tot 'n ander gevolgtrekking kan kom nie. Ek gaan dan hierdie aspek van die toelaatbaarheid op daardie van die videos hoewel ek persoonlik in die lig van die getuienis dat daar nie van die staat se kant af met enige - getuienis en erkennings van die staat se kant af nie deur enige beampte van die staat of in wie se besit hierdie videos was tot hulle by die hof gelewer is ooit mee gepeuter was nie, saamgeneem met die ander getuienis - die uitspraak van die hof, in aanmerking daarvan gaan ek dan nie die aspek verder neem oor die

toelaatbaarheid/..

toelaatbaarheid daarvan nie.

Die tweede aspek wat ek dan moet behandel is die klankbane. Die klankbane, die toelating daarvan, en ek dink ek moet daarby saamvat die dokumente hoewel ek later meer in besonder sal terugkom na die dokumente, het geskied in die algemeen wil ek dit stel, het die toelating daarvan ooreenkomstig die bestaande reg en regsbeginsels en voorskrifte en wat opmerklik is, daar is getuienis aangebied deur die staat en erkennings gemaak oor hierdie klankbane weer eens dat niemand, terwyl daardie klankbane geneem was deur die staat of die ander wat beslag op gelê is by UDF vandag hulle in besit gekom het van die staat totdat hulle voor die hof gespeel was, dat daar nie met hulle gepeuter was nie. Dit was die getuienis en dit was die erkennings en daar was geen getuienis om die teendeel daarvan te bewys nie.

Edele sal weet ons het destyds selfs by die toelating van die videos het ons verwys na die gesag wat daar bestaan oor die toelating van klankbane. Dit is 'n ou geykte stelsel wat daar bestaan waaraan voldoen moet word en my submissie is dat die staat het in alle opsigte aan die vereistes voldoen om te verseker dat daar geen valse klankbane voor hierdie hof gekom het nie en daar was geen getuienis tot die teendeel of geen suggestie dat dit so is nie en my submissie aan u is dat die hof oor hierdie aspek van die klankbane dit nie as 'n grond vir appèl vir die verdediging sal gee binne die raamwerk nie, want daar is geen redelike moontlikheid hoegenaamd nie dat 'n ander hof tot 'n ander gevolgtrekking kan kom as om hierdie klankbane toe te laat nie. So, op daardie basis is hulle heeltemal enig in hulle soort wat hierdie saak betref.

Dan aansluitend weer by videos en interpretasies van

die/..

die videos en die klankbane. Ons respekvolle submissie is dat daar hoegenaamd geen aanduiding aan hierdie hof gegee is nie of daar bestaan geen aanduiding dat die interpretasie daarvan op appèl geneem moet word nie en dat dit uitgesluit sal word. In die eerste instansie wil ek die hof daarop wys dat sowel die videos as die klankbane het hierdie hof in die gunstige posisie verkeer en kon die inhoud van die videos self waarneem en daarna luister en kon self luister na die inhoud van die klankbane en dit vergelyk met die transkripsies wat daarvan gemaak is. Die hof was in 'n posisie om die atmosfeer waarin die toesprake gelewer was ..

HOF: Kan ek net duidelikheid kry, hoe sal dit nou werk op 'n appèl, as dit op appèl sou gaan? Sal die appèlhof nie na die bande luister en na die videos kyk nie?

MNR. JACOBS: Die appèlhof kan daarna kyk, maar wat ek eintlik bedoel is dit is nie 'n grond om dit nou te gaan appelleer nie. Dit is wat my punt is, dat die hof nie daarop 'n grond van appèl sal toelaat, oor die interpretasie daarvan nie en dat die appèlhof sal aanvaar dat hierdie hof korrek dit gedoen het. Hierdie hof was met respek in 'n posisie om die atmosfeer waarin die toesprake gelewer word en die reaksie van die aanhoorders direk te ervaar en te evalueer. Die gedrag op die vergaderings is vanselfsprekend en selfverduidelikend. Wat waargeneem kan word is daar en kan nie weggeredeneer word nie en kan ook nie weggedink word nie. Die verdediging het self ook videos ingehandig en daarop gesteun as bewysmateriaal. Onder andere is daar die Sharpeville-vergadering as 'n voorbeeld waar op verskeie plekke beeld ontbreek het terwyl klank aangegaan het en ook anders om en die verdediging vereis dat die hof daardie video moet interpreteer en aanvaar op sig soos

dit/..

dit is. Daar is getuienis voor hierdie hof wanneer die hof interpretasie doen dat daar bestaan geen suggestie of bewys dat enigiemand van die staat se kant met enigeen van die opnames gepeuter het nie. So, wat dus geld vir die verdediging omtrent klankbane geld ook vir die staat - so moet ook vir die staat geld. As hulle daarop kan steun en 'n interpretasie daarop wil hê dan moet die staat ook daarop kan steun.

Ons respekvolle submissie is by gebrek aan enige bewering of argument dat hierdie agbare hof met alle respek gesê 'n foutiewe interpretasie of waarneming sou gemaak het van wat gesê is op die videos of die klankbane en gevolglik omdat daar geen so 'n bewering is nie, is dit nie nodig vir die staat om enige interpretasie van die hof te probeer regverdig nie en die tweede is dat die appellant het geen sodanige grond gebring nie en met alle respek is daar ook geen redelike moontlikheid wat bestaan dat 'n ander hof oor die interpretasie van hierdie dokumente tot 'n ander insig kan kom nie.

Dan die interpretasie en die - eers die toelating en interpretasie van die dokumente. Oor die toelating van die dokumente en die interpretasie daarvan wil ons die eerste belangrike punt maak dat oor die toelating van die besondere dokumente waarop die hof spesifiek gesteun het in die uitspraak kan daar hoegenaamd geen twyfel bestaan nie. Die eerste punt wat ons maak daar onder, onder hierdie hoof is die verdediging het erkennings gemaak van waar die dokumente gevind was. 'n Aantal was gevind in die kantore van UDF en UDF-affiliale. 'n Aantal was gevind in besit van en selfs opgestel deur beskuldigdes. 'n Aantal was gevind in besit van leiers en lede en aktiewe ondersteuners van UDF en affiliale. Die dokumente toon ex facie die dokumente self dat UDF se doelstellings daarin bevorder

word/..

word. Die ANC-dokumente en die SAKP-dokumente is geïdentifiseer en bevestig as sulks deur 'n getuie en een Sechaba is selfs deur die verdediging ingehandig waarop hulleself gesteun het.

So, hierdie dokumente wat voor die hof is, is almal toelaatbaar en toegelaat kragtens erkende en aanvaarde bestaande gesag. Ek gaan net kortliks vir die hof hierso - ek kan net sê artikel 69(4) wat ek behandel van die Veiligheidswet daar word gesteun en dit is aanvaarde reg dat dit toegelaat word as daar aan die vereistes voldoen word, so is dit ook aanvaar in die appèlhof selfs in S v Matsipe 1962 4 SA 708 (A) op 712C (10) tot F. Daar is S v Mabitsela 1985 4 SA 61 (T) op 67A - C en dan die bekende saak ook nog S v Twala en Andere 1979 3 SA. Die punt wat ek hier maak is dat daardie artikel 69(4) voorsien vir die toelating daarvan en dit is ook aanvaar deur die howe as sulks. Nou, kragtens artikel 246 van Wet 61 van 1967 die dokumente op persele van assosiasie van persone of in besit van ampsdraers, beamptes of lede van so 'n vereniging van persone, ook dit is, as dit in hierdie omstandighede gevind word, toelaatbaar as getuienis om as bewysmateriaal te dien. Ek noem dan net ook 'n lys - ek het hier ses sake neergeskryf waar dit (20) alreeds in die howe gedien het en dit is dan aanvaarde reg. Ek sal dit net vinnig noem, al die gesag het die hof ook al gehad. Daar is S v Nkosi 1961 4 SA 320 (T), S v Alexandra, die tweede saak, 1965 2 SA 818 (K) op 823, S v Naidoo 1966 4 519 (N), S v Twala 1979 3 864 (T), S v Setlodi 1962 1 Prentice Hall H35, S v Motopeng 1965 4 SA.

Die derde punt waaronder die dokumente toegelaat was as bewysmateriaal is kragtens die Gemenereg as omstandigheidsgetuienis uit hoofde van verklarings ter bevordering van 'n gemeenskaplike doel in 'n sameswering. Dit is substantiewe (30)

getuienis/..

getuienis en dit is ook al erken en toegepas dat onder hierdie omstandighede die dokumente toegelaat word. Ek het hier eintlik 'n lang ry gewydes. Ek begin by R v Muller 1939 (A) waar dit as omstandighedsgetuienis toegelaat is, dit is AD 106; dan International Tobacco Co. Ltd. ...

HOF: Is dit nie al die sake wat u vantevore genoem het nie?

MNR. JACOBS: Ja, edele, dit is daarom wat ek sê dit is al die sake. Die feit bly daar is onder andere van hulle drie appèlhofsake waar hierdie beginsel erken is, in R v Bosch 1949 1 SA 548 (A) - ek sal net hulle gee. S v Levy, dit het ek ook al voorheen gegee, maar ek gee dit net vir volledigheid - 1929 (A) 312, dan is daar R v Mayet 1957 1 SA.

My submissie is dat al hierdie dokumente wat voor hierdie hof is, is toegelaat deur erkende en aanvaarde regsbeginsels, hetsy deur 'n wet geskep of hetsy deur die gemenereg geskep en in al die gevalle het dit sanksie gekry deur die howe in gewysdes wat ek na verwys het.

My submissie is dus dat daar hoegenaamd geen rede of 'n moontlikheid bestaan dat enige ander hof tot 'n ander gevolgtrekking sal kom as hierdie agbare hof om te bevind dat die dokumente waarop die hof gesteun het nie toelaatbaar is as getuienis nie.

Die volgende aspek gaan oor die interpretasie van die dokumente. Ook hierdie aspek, is dit my respekvolle submissie, dat geen reg van appèl toegestaan sal word nie omdat daar geen redelike moontlikheid bestaan dat 'n ander hof tot enige ander gevolgtrekking kan kom nie.

Ek wil ter aanvang - ek sal dit nog weer op 'n latere stadium by 'n ander aspek noem, ter aanvang wil ek my aansluit by wat my geleerde kollega gesê het omtrent dokumente wat

voor/..

voor hierdie hof geplaas is as bewysmateriaal van die begin af. Dokumente was op gesteun en die inhoud was gestel aan getuies, veral beskuldigdes 19, 20, 21. Hulle het gekom en van vele van hierdie dokumente wat hulle nie kon identifiseer nie, met respek onder omstandighede waar hulle dit moes gedoen het en kon gedoen het en nogtans het 'n mens gevind hoewel die inhoud van hierdie dokumente selfs ernstig op gesteun was deur die staat aan die einde van die staat se saak toe die ontslag gewees het, het niemand gekom om daardie dokumente prima facie uit te skryf uit die UDF-geledere nie en as UDF-dokumente en wat UDF of (10) dokumente ten gunste van UDF of dokumente wat UDF-beleid of beplanning of strategie uiteensit nie.

Die eerste interpretasie wat die hof moet toepas wat ek dink wat ek moet noem is dié kragtens artikel 69(4). My submissie aan die hof met respek is dat die wetgewer het artikel 69(4) ooglopend op die wetboek geplaas om 'n uitsondering te bring op die hoorsêreëls ten einde getuienis voor die howe te kry, veral in ondermynende bedrywighede en organisasies waar hulle betrokke is. Die artikel spel ooglopend en duidelik uit wat bewys kan word. Die taal is duidelik, die taal is spesi-(20) fiek en kan geen ander interpretasie regverdig nie en ek dink spesifiek hieraan as bewys van die waarheid van die inhoud daarvan op 'n prima facie-basis. As 'n mens kyk die interpretasie wat die verdediging vra dat die hof daarop moet plaas. Ons het dit voorheen geargumenteer, ons argumenteer dit weer, dat die hof en 'n ander hof as hierdie hof sal moet betekenis gee aan daardie artikel en nie die artikel so uitlê dat dit 'n nulliteit word of dat dit 'n absurde betekenis bring nie. Daar moet betekenis aan gegee word, aan die duidelike bewoording van die wetgewer en om dit te gaan interpreteer, dat wat in (30)

artikel/..

artikel 69(4) bedoel word, is bloot dat dit bewys is dat daar so 'n dokument deur so 'n organisasie uitgegee is, is dan eintlik doelloos. Wat is die doel om nou te bewys 'n organisasie se dokument is deur die organisasie uitgegee of namens hom uitgegee? In 49(4)(c) is daar 'n hele reeks verskillende soorte. Dit is opgestel, wat aangehou is, in stand gehou is, gebruik is, uitgereik is of gepubliseer is ten behoewe van 'n organisasie. Kom ons gebruik net een van daardie verskillende terminologie. Daar word gesê 'n dokument wat uitgereik is deur of namens of ten behoewe van so 'n organisasie. Nou, hoekom sal die wetgewer sê 'n dokument wat uitgereik is ten behoewe van 'n organisasie om te bewys dit is uitgereik ten behoewe van 'n organisasie. Dit is mos onbenulligheid, dit is onsinnig, heeltemal onsinnig. So, ons respekvolle submissie is dat daar hoegenaamd geen aanduiding is waarom hierdie hof se interpretasie nie die deurslaggewende interpretasie is nie en dat 'n ander hof op 'n redelike moontlikheid tot 'n ander gevolgtrekking sal kom nie en onthou, edele, hierdie interpretasie was nie iets wat nuut nou voor hierdie hof gekom het nie. Dit het al verskeie kere voor die howe gedien. Edele, daar is alreeds na verskeie van hierdie sake, Twala se saak, ander sake verwys waar dit toegepas is. So, dit is ons respekvolle submissie dat in daardie opsig kan daar nie suksesvol gevra word dat hierdie deel van die interpretasie aan appèl blootgestel word nie.

Dieselfde geld ook vir die bewyskrag van dokumente uitgereik kragtens artikel 246 van die Strafproseswet. Edele, ook in daardie geval bepaal die wetgewer duidelik onder watter omstandighede die dokument bewysmateriaal is en watse bewyskrag dit het en ons respekvolle submissie is ook dat daardie interpretasie was al verskeie kere deur die howe toegepas gewees

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en was aanvaar gewees, dat dit gaan verder as net bloot 'n betekenis ook in daardie geval dat so 'n dokument uitgegee is deur een of ander organisasie. Dit bewys wat die artikel sê, onder andere wie die mense is in beheer van so 'n organisasie. Ek wil hulle nie almal herhaal nie, dit staan duidelik.

Die derde groep wat daar is, is dan die dokumente volgens die gemenereg. Ek het daar 'n lang rits van sake reeds vir die hof gegee waar daardie dokumente hetsy as omstandighedsgetuienis, as reële getuienis aangebied word of deel van getuienis waar dit gaan oor 'n sameswering en ten uitvoering van die gemeenskaplike doel van die samesweerders.

Ons submissie is - ek weet nie of ek dit moet herhaal nie, die hof het dit reeds. Om tyd te bespaar het ek dit nie gedoen nie. Ons het 'n addisionele betoogshoofde op versoek van die hof ingehandig omtrent die artikel in die nuwe wet oor hoorsêgetuienis en ons het daarso vir die hof 'n hele reeks voorbeelde gekry uit besliste sake uit van watse afleidings die howe kan maak, die verskillende afleidings wat daaruit gemaak kan word, uit hierdie dokumente uit en ons vra dat die hof dit net hier in oorweging sal neem wanneer dit kom by die interpretasie van daardie dokumente, dat verskeie afleidings kan deur 'n hof gemaak word uit die dokumente wat ingaan kragtens die gemenereg en as ek met respek kan sê waar die hof gesteun het op dokumente ten aansien van die eerste aanklag, die hoogverraad, is dit ons indruk dat die hof het juis ook daardie beginsels toegepas en afleidings gemaak van daardie ding en dit is ons respekvolle submissie dat ook ten opsigte van hetsy artikel 69(4), 246 of die gemenereg dat daar hoegenaamd enige grond staan waarop 'n ander hof tot 'n ander gevolgtrekking kan kom nie.

Volgens die uitspraak is dit 'n belangrike aspek om

hierop/..

hierop te let en in gedagte te hou hierso as daar miskien - ek weet nie of daar nog argumente hierteen kan kom nie, maar ek wil net die volgende ook graag noem. Volgens die uitspraak het dit duidelik geblyk dat die hof het hoofsaaklik gesteun op dokumente wat deur leiersfigure van UDF en sy affiliate wat die saak van UDF bevorder het, soos beskuldigdes 19, 20 en 21, daardie Meyer-vroumens, Steve Tshwete, Stofile, Albertina Sisulu, Frank Chikane, prof. Mohamed, Amanda Kwadi en nog andere gesteun het op dokumente waar hulle 'n aandeel in gehad het of in hulle besit gewees het. Die tweede aspek, dokumente wat (10) hul oorsprong het uit die bestuursliggame van UDF en affiliate, uitvoerende liggame van die UDF. In die geval het die hof baie gesteun en gebruik gemaak van NGC se dokumente, die NEC se dokumente, die RGC's se dokumente, REC se dokumente, sekretariate se verslae, die verskillende kommissies soos die Education-kommissie, die media-kommissie en die Million Signature Campaign-kommissie, ensovoorts se dokumente. Onder andere wat nou belangrik is in so 'n geval om net in gedagte te hou en aan te sluit by vorige argumente van my geleerde vriend, mnr. Fick, is byvoorbeeld die Daleside se dokumente, daardie U4, (20) en wat lateraan versprei is onder verskeie van juis hierdie leiers van UDF. Verder is daar, die derde punt, dokumente van affiliate en aktiewe ondersteuners ter bevordering van die UDF se saak en sameswerings byvoorbeeld SASPO National, The Eye, Grass-Roots, Peak, COSAS-dokumente, AYCO-dokumente, AZASO-dokumente, ensovoorts. Dit is hoofsaaklik dokumente uit die hoë hiërargie van hierdie afdelings ook.

Ons respekvolle submissie is die taal van hierdie dokumente en toesprake waarna die hof verwys het, is duidelik en baar geen interpretasieprobleme nie. Die boodskappe daarin (30)

soos die/..

soos die leser en aanhoorder dit ervaar is vanselfsprekend en verg geen ingewikkelde interpretasies nie. As daar van rewolusie en bloedvergieting gepraat word of mobilisasie en vyande van die swartmense wat vernietig moet word, swart plaaslike besture wat vernietig moet word, ensovoorts, ensovoorts, dan weet almal waaroor dit gaan. Dit is nie 'n kwessie van ingewikkelde interpretasies nie. Van die beskuldigdes het probeer om te gaan sê maar dit is nie wat bedoel word nie. Dit is nie die toets nie. Dit is wat hier gesê word wat oorgedra was aan die mense. Die beplanning, doelstellings of korttermyn- (10) of langtermyndoelstellings, propaganda, kan sekerlik nie anders geïnterpreteer word as in die duidelike taal waarin dit verskyn in die dokumente nie. Niemand wat byvoorbeeld na Cedric Kekana sou luister op 'n UDF georganiseerde vergadering kan enigsins twyfel oor wat hy bedoel het met om hulleself onregeerbaar te maak en swart plaaslike besture te vernietig nie. As beskuldigde in 'n rondskrywe wat hy rig aan streke van die UDF dat soos reeds bekend 'n bloedige stryd in die skole verder uitgebrei moet word kan daar seker nie twyfel daaroor bestaan of enige interpretasieprobleme daaruit blyk nie. (20)

Sy, my respekvolle submissie aan u edele is dat as die hof die totaliteit van al hierdie omstandighede wat ek aan die hof geskets het in ag neem, dan bestaan daar hoegenaamd geen rede om verlof te verleen vir appèl op hierdie aspek nie, want geen ander hof kan tot 'n redelike moontlike gevolgtrekking kom dat die hof verkeerd was nie.

So, op daardie aspek vra ek u dan om nie 'n verlof van appèl toe te staan nie.

Ek wil nou oorgaan na die spesiale inskrywings. Eerste wil ek 'n paar algemene opmerkings maak. Ek wil net 'n paar (30)

aspekte/..

aspekte 'n bietjie ophelder. Ek dink die belangrikste saak wat die hof in hierdie omstandighede - oor hierdie aspek is Xaba se saak. Ek weet nie of die hof die verwysing het nie. S v Xaba 1983 3 SA 717 (A) waar daar spesifiek gekyk word na die bepalings van artikel 317(1) en op bladsy 731C word die volgende gesê:

> "It is clear from the wording of section 317(1) that the power of a trial judge to refuse to make a special entry of an alleged irregularity on the record is confined within very narrow limits."

In die geval waar dit gegaan het oor die onttrekking, die eerste van die verdediging se punte, vanaf 1.1 af, waar dit gegaan het oor die onttrekking van prof. Joubert as 'n assessor, dit is 'n nuwe faset in ons regstelsel en hoewel ons - ek reken toe die aansoek gedoen was dat ons, die staat, die argumente wat daar aangevoer is regverdiging daarvoor is dat dit die regte beslissing is wat die hof geneem het in daardie omstandighede, voel ons dat omdat hierdie 'n nuwe aspek in die appèlhof is en wat ek nou net vir die hof aangedui het dat ek nie op hierdie stadium dan kan vra dat die hof sal bevind dat 'n ander hof nie moontlik tot 'n ander gevolgtrekking kan kom nie. Dit is ten aansien van die eerste een, maar ek is nie met almal met die verdediging saam nie. Edele, ek sien dit is al 13h00.

HOF: Wat is u eie tydskatting?

MNR. JACOBS: Edele, ek gaan nie meer baie lank wees nie. Ek het omtrent - sê op die uiterste 'n uur.

HOF VERDAAG TOT 13h45 VIR MIDDAGETE

HOF/..

HOF HERVAT

MNR. JACOBS: Ek wil vra dat wat paragraaf 1.4 betref van die verdediging se gestelde saak hier, die spesiale inskrywing, dat dit deurgehaal word. Dit is met respek - as ons teruggaan na die stukke wat destyds ingehandig is deur die verdediging wat voor die hof was en waarop geargumenteer is, en ek dink daarmee kan 'n mens saamvat die volgende punt 2 saam. Hierdie twee opponeer ons ook.

Ons respekvolle submissie is dat hierdie twee punte is gebaseer op beëdigde verklarings van professor Joubert wat gemaak was nadat die stukke alreeds aanhangig gemaak was en ons submissie is dit het duidelik geblyk by die aansoek wat destyds behartig was dat die verdediging eintlik male fide was in daardie opsig. Ek sê dit reguit want in een van die briewe blyk dit dat hulle het uit hulle pad uitgegaan, die verdedigingsprokureur, om briewe te kry geskryf aan professor Joubert om verklarings te kry en ons submissie is dan dat die verkryging van die latere verklarings van professor Joubert van mededelings in 'n regter se kamers is nie die korrekte optrede nie en dit is nie wat 'n mens verwag van senior advokate nie. U sal onthou ook dat daardie verklarings was gekry en dan deur die verdediging versprei aan die beskuldigdes. So hulle het die situasie geskep waar beskuldigdes insae gehad het sonder dat hulle dit eers teruggehou het tot hulle gehoor het by die hof wat die werklik - of die hof dit sal aanvaar en toelaat en ontvang. Ons submissie daar is dat dit 'n skepping van die verdeding was, hierdie spesifieke twee punte, en dat ..

HOF: Dit is nou 1.4 en punt nr. 2?

MNR. JACOBS: En punt nr. 2. Dat hulle nie nou daarop kan kom en steun en sê dat hierdie hof het 'n mistasting -

hierdie/..

hierdie hof het 'n onreëlmatigheid begaan in hierdie opsigte nie.

Wat punt 3 aanbetref, my geleerde vriend het dit reeds in 'n groot mate behandel. Ons opponeer ook weer hierdie aansoek wat punt 3 betref en ons wys - my geleerde vriend het vir die hof daarop gewys dat hierdie was eintlik - eintlik moet ek met respek sê dat dit was geabandoneer met die aansoek. Dit was nie mee voortgegaan nie en nou word daarmee weer op hierdie stadium voortgegaan. Ten tweede, dit is 'n kleinsielige aansoek, is dit my respekvolle submissie, want baie van die dinge wat gesê word, die oorgrote meerderheid word nie gesubstansieer nie. (10)

Wat punt 4 aanbetref, dat hulle nie 'n volle reg gehad het van kruisondervraging nie. Edele, in die eerste instansie, die artikel ...

HOF: Dit is van toespreek?

MNR. JACOBS: Dit is van toespreek. Artikel 175 se bepalings is gister aan u ingelees, maar wat belangrik is daarvan, dit is nie 'n gebiedende bepaling nie, dit is 'n gemagtigende bepaling. Dit sê die partye mag die hof toespreek. Dit is 'n belangrike faset, veral waar dit gaan kom by die volgende punte ook, om dit net in gedagte te hou. Edele, in die saak moet ons ook (20) kyk na die feite wat gebeur het in hierdie geval. Die verdediging het vir ses weke die hof toegespreek en dan moet 'n mens kyk na werklik wat gebeur het, dat dikwels het dit gebeur dat dieselfde punte oor en oor geargumenteer was, tot drie keer is dieselfde punte geargumenteer, en die hof moes verskeie kere daarop wys dat daardie punte is alreeds geargumenteer en word oor geargumenteer. So, wanneer moet 'n mens nou begin ophou om te keer? Kan 'n mens net van vroeg tot laat aanhou met argumenteer sonder dat daar enige perke geplaas word, veral gesien as dit 'n magtigende bepaling is? Want die feit is hulle was (30)

nooit/..

nooit ontsê om te argumenteer nie. Geleentheid was gebied aan almal van ons om lank voor die tyd geskrewe hoofde in te handig nog. Op sigself beteken dit nie iets nie, maar gesien in die lig van al die omstandighede van die saak het dit tog betekenis. So, ons vra dat die hof sal ook punt 4 nie toelaat as 'n inskrywing nie.

Wat punt 5 betref, dit is vir my een van die wonderlikste punte hier. Toe die argumente aangekom het vroeër was daar al in 'n mate na hierdie aspekte, dat die staat nie op alle aspekte gewys het nie, gewys. Dit is vir my iets besonders nuut hierdie. Ek het reeds gewys dat dit is 'n reg wat mag uitgeoefen word om toe te spreek. Beteken dit nou dat as die staat nie elke besondere faset van 'n saak bespreek nie dat dit nou 'n onreëlmatigheid is en die verdediging nie daarop 'n kans kry om te antwoord nie? My submissie is dit was nog altyd, en dit was die staande beginsels, dit is so vanselfsprekend en dit is so algemeen toegepas oor al die jare dat dit nie nodig is vir enige persoon om elke faset, of hy nou reken dit is nodig of nie nodig nie, dat hy dit moet noem sodat 'n verdediging kan antwoord nie? Die feite is tog dat die staat kom en hy stel sy saak en wat hy dink is nodig of wat hy wil voorlê aan die hof dit lê hy voor. Dit is nie so dat hy alles moet voorlê nie. Dieselfde geld vir die verdediging. Wat hulle wil voorlê lê hulle voor. Die feit bly nog altyd dat dit is die taak van die verdediging om die getuienis te evalueer en sy adres aan die hof doen ooreenkomstig die getuienis voor hom, nie op wat die staat sê daaromtrent nie. Dit is nie die toets nie. Hy moet sy saak stel soos wat die getuienis daar is, nie wat die staat sê nie en my respekvolle submissie is dat hierdie stelling wat hier gemaak word dat die staat eers moes gesê het watter punte hy nou

gaan/..

gaan argumenteer en dat die verdediging daarna sou kom en antwoorde daarop gee, dit gaan nie op nie en dit is heeltemal 'n skepping van heeltemal iets nuuts wat nie bestaan in die reg nie en in my respekvolle submissie dit kan nie 'n grond wees vir 'n regsargument vir die appèlhof nie.

Dieselfde geld vir punt 6. Dit sluit honderd persent daarby aan. Is dit - ek het dit nog nooit gesien as die plig van 'n regter in 'n hof waar ek verskyn het, as ek die kant nou so mag vat, as hy besluit hy wil iemand gaan onskuldig vind, om nou vir my as advokaat te kom sê kyk, op hierdie punt en hierdie punt en hierdie punt gaan ek hom skuldig vind nie. Dit is weer my taak as die advokaat wat hier staan om op grond van die getuienis wat daar voor die hof is my argument te bou en die hof te probeer oortuig, maar ek het nog nooit gesien dat dit 'n plig en 'n onreëlmatigheid van 'n hof is as hy nie aan hom punte uitspel en sê antwoord my hierop nie. Die howe doen dit baiekeer uit eie beweging uit waar die howe onseker is oor 'n punt, maar ek het nog nooit gesien waar 'n hof seker is oor 'n punt dat hy sê as ek hierdie bevinding gaan maak nou moet jy my eers daaroor toespreek nie. My repsekvolle submissie is dat hierdie kan nie staan nie en ons opponeer ook punt 6.

Wat punt 7 aanbetref, daar is net, wat die eerste deel betref in die tweede sin "material variances between the witnesses' written statements". Dit is nie so nie. Eintlik is dit nie heeltemal korrek gestel nie. Dit is dat die getuienis aangevul was deur latere verklarings.

HOF: Laat ek net 'n bietjie kyk wat hier gesê word. Wat hier staan is die feite was dat daar 'n wesenlike verskil was tussen die skriftelike verklarings van die getuies en wat in konsultasie aan die aanklaer vertel is, mondeling, en dat op

daardie/..

daardie basis is die getuie geroep en die aanklaer het dit nie as sy plig beskou om daardie verskil aan die hof te openbaar nie. Dit is blykbaar die onreëlmatigheid wat hier bedoel word.

MNR. JACOBS: Edele, reg of verkeerd die beginsels wat toegepas word wil ek die hof verwys na R v Steyn (A). Ek wil een kort passasie daaruit lees. Dit is R v Steyn 1954 1 SA 337A - B. Ek lees daar:

> "One other matter remains to be mentioned. In his reasons the learned chief justice said disclosure must be left to the discretion of the attorney-general or his deputy. The prosecutor stands in a special relation to the court and where there is a serious discrepancy between the proof of the crown witness .."

ek verstaan dit as die verklarings en goed voor die tyd

> "and what he says on oath at the time the court has a right to expect that."

Die toets soos ons dit gesien het en nou nog sien en soos al die gesag daarop wys is is daar 'n botsing in die getuienis wat, of soos dit hier gestel is "the proof of a crown witness" en dan wanneer hy dit aan 'n hof kom sê. Dit is die toets. Wyk hy hier in die hof af van wat hy gesê het in sy verklaring dan is daar 'n plig op hom, maar wanneer hy die "proof" wat hy aan die staat beskikbaar gestel het van die "witness", kom en hy geen daardie "proof" soos hy dit gegee het en hy wyk nie in die hof af nie, dan is daar nie 'n plig nie. Dit is soos ek die toets sien wat daar gestel was en dit is ook al baiekeer ook gewaarsku dat 'n mens moet nie hierdie ding net los en vas gaan toepas nie. Ek kan 'n praktiese voorbeeld vir die hof noem. Vat nou op enige moordsaak. 'n Ooggetuie se verklaring word daar

geneem/..

geneem deur iemand wat nou daar die polisiebeampte is en die staat kry lateraan daardie dossier, maar hy wil sekere aanvullings hê. Streng gesproke, op die toets soos die verdediging dit verwag, is daar 'n afwyking. Daar is 'n verskil tussen twee verklarings as daar 'n aanvullende verklaring gemaak word. Beteken dit die staat besluit om daardie getuies te roep. Hy weet dit, hy weet wat is die feite, beteken dit nou dat hy moet nou altwee daardie verklarings kom openbaar en sê maar kyk, hierdie is 'n leuenagtige getuie, hy het twee verskillende verklarings gemaak. In die een het hy dit gesê (10) en nie dit wat hy in die tweede verklaring kom sê nie. Dit is 'n verskil wat daar is. So, die beginsel word self toegepas deur die appèlhof en ek wil verder verwys - edele, net om eerstens te bewys wanneer die toets gestel word, sy edele Botha R. in S v Xaba 1983 3 SA 717 (A) op 728H en volgende stel dit weer:

> "It is clear therefore that when a state witness gives evidence from which a serious discrepancy emerges between the evidence and a prior statement made by the witness to the police."

Ek het dit nog altyd verstaan en ek verstaan dit nou nog (20) so dat die persoon moet in die hof kom en afwyk, dan is daar 'n plig op die aanklaer. Die verklarings was gemaak en die - ek wil dit noem ter onderskeiding, aanhoudend noem "the proof of the witness" omdat ek praat altyd nou oor voor hy in die hof gekom het. Dit was gemaak op 'n stadium toe die ondersoek nog nie 'n rigting gehad het nie, alles was deurmekaar en verskillende polisiebeamptes om verskillende redes het verklarings geneem, die bevinding van sy edele Greenberg A.R. in R v Steyn reeds aangehaal wil ek nog verder aanhaal op bladsy 335 waar hy juis dit wat ek nou argumenteer, die waarskuwing duidelik (30)

daar/..

daar stel wat 'n mens in gedagte moet hou.

> "But there is a serious possibility that statements made to the police which are made in entirely different circumstances may be far from constituting this accurate representation and through inaccuracies may be a target for cross-examination which instead of revealing the truth may obscure it"

en dan op bladsy 337A - B:

> "In the result I have come to the conclusion that the appellant was not entitled to the disclosure of the statements which was claimed on his behalf and that the case in R v H 1952 4 SA 344 (T) was wrongly decided."

Nou, ons submissie is ook dat niemand in hierdie agbare hof het dit ooit probeer verbloem dat die getuies aanvullende verklarings en regstellings gemaak het voordat hulle hul getuienis afgelê het nie. As iemand oneerlik wou gewees het, as ons getuienis wou fabriseer soos die bedekte aantyging gemaak word, was dit baie maklik om vir die getuie te gesê het kyk man, jy sê net jy het een verklaring gemaak en dit is al, maar die getuies was gesê hulle moet net die waarheid vir die hof kom vertel en dit is wat hulle vertel het. Hy het gekom en hy het in sy getuienis kom sê, toe hy gevra was daaroor, dat hy het die een verklaring - ek vat Mhlatso - hy het die verklaring gemaak, hy het sekere dinge verswyg daarin. Sy gewete het hom gepla, hy het gevra om die polisiebeampte te sien en het dit later weer aangevul. Verdere aanvullings het hy gemaak in konsultasie. Daar was niks sinistêrs daarin gewees nie. Niks was verbloem gewees nie.

My respekvolle submissie is dan dat die hof ook

hierdie/..

hierdie aansoek van die verdediging sal van die hand wys en punt 7 ook sal skrap van hierdie stuk wat ingehandig is by die hof.

'n Volgende aspek wat die hof ook gesê het wat ek sal moet behandel is dan UDF en die ANC. Ek het dit as my hoof gemaak, UDF en die ANC. Ek dink die hof se stelling was gewees - u het nog gesê ek sal al hierdie punte - mnr. Chaskalson het geopper UDF en die ANC, toe het die hof gesê ek moet dit roep, uitgesluit UDF se verantwoordelikheid vir geweld wat mnr. Chaskalson sou geargumenteer het. Ek het volledig geargumenteer hierso(10) oor die dokumente se toelaatbaarheid en die toepassing daarvan. Dit is alreeds een agtergrond. Nou, die ANC-dokumente is deur 'n getuie geïdentifiseer as dokumente van die ANC en dit is as sulks aangebied en aanvaar as bewysmateriaal in hierdie hof.

My respekvolle submissie is dat hierdie dokumente en die interpretasie van hulle en my respekvolle submissie is dat die hof tereg dit ook so aanvaar het, is dat die ANC bewys lewer dat die ANC die oorsaak is vir die ontstaan van die UDF. Volgens die dokumente word bewys gelewer dat twaalf van die kampanjes wat deur UDF by sy stigting aanvaar was kom voor (20) in die ANC se beleidsverklaring van 1983-01-08 waar die stigting van 'n verenigde front bepleit is. Vergelykenderwys die UDF en die ANC gebruik dieselfde taal. Dit is 'n bevinding van die hof op bladsy 475 tot 77 en die dokumente, soos ek alreeds gesê het, spreek vanself. Die taal is daar, jy kan dit sien, jy kan dit waarneem en dit is so. Aan die ander kant ook bekende en oud ANC-lede en -leiers is in die leierskap van UDF opgeneem en leiers van die ANC word deur die UDF gepopulariseer. Dit is so op bladsy 461 tot 63 bevind en dit word gestaaf deur hierdie bewys wat voor die hof geplaas was. (30)

Dit is/..

Dit is so dat UDF aan sy ander kant uit die dokumente, "tapes", videos, dit is bande en die videos, deur alles, die toesprake daarop gelewer, het UDF regdeur die ANC gepopulariseer in die toesprake en liedere en in slagspreuke. By UDF-vergaderings soos ons gesien het weer op bande, videobande, en op ander bande en ook menig by UDF se geaffilieerdes se ver-. gaderings en ook selfs by begrafnisse, is liedere gesing om die ANC se geweld te populariseer. Dit is ook so bevind deur die hof op bladsy 480 en dit word bevestig nie net deur die dokumente nie, maar hier was verskillende eks-ANC-lede wat getuig het daaroor en wat vir die hof vertel het die waarde van hierdie liedere en die sing daarvan sonder enige getuienis tot die teendeel daaroor.

Dit is so van UDF se kant af by begrafnisse en herdenkingsdienste en selfs op vergaderings gewees van geaffilieerdes van UDF was ANC-klere, die geskiedenis van die ANC, AK47 gepopulariseer. So was dit ook gevind deur die hof op bladsy 482 en dit kom voor uit die getuienis wat aangebied is wat ons het uit die videos waar ons dit self waargeneem het.

Die volgende punt is dat beskuldigde 20 en UDF het aan Mandela 'n platform gegee vir sy nie-afswering van geweld as ANC-leier. Daardie stuk spreek vanself waar hy hom nog self ook noem as die leier van die ANC en ons weet dat daardie stuk was deur UDF versprei gewees. Ek verwys hier na die uitspraak, bladsy 483, 484, 495 tot 497, 499 tot 503. Edele, daar is 'n magdom van getuienis om al hierdie aspekte te bewys. Dit is so dat UDF het kampanjes identies aan dié van die ANC gevoer terwyl dit in hulle deklarasie gesê word dat hulle na bewering slegs opposisie wil bied teen die konstitusie of die wetgewing rakende die konstitusie en swart plaaslike besture en Koornhof-wette,

het/..

het hulle tog verder gegaan en dit blyk uit die dokumente wat daar ingehandig is, bewysmateriaal voor hierdie hof.

Ten opsigte van die swart plaaslike besture het dit nie bloot gegaan oor opposisie teen wetgewing rakende swart plaaslike besture nie, maar oor die vernietiging daarvan volgens die ANC se leiding. Dit is wat die ANC sê en dit is wat UDF se mense sê en daardie getuienis kom voor. Ek kan net teruggaan weer na Sedrick Kekana toe, wat hy op 'n vergadering van UDF gesê het.

Beskuldigdes 19, 20 en 21 was die uitvoerende beamptes van UDF en wat die strategie, beplanning van UDF moes uitvoer en daaraan deelgeneem het en hulle het sitting gehad op die NGC, REC, NEC, die sekretariaat en ook op die streke en hulle was 'n kerndeel van die dominante leierskap van UDF. Edele, dit kan sekerlik nooit weggeredeneer word nie. 'n Mens het die getuienis hoedat beskuldigdes 19 en 20 die Vrystaat ingevaar het om te gaan organiseer vir UDF, hoedat hulle gegaan het na die Oos-Kaap, na Vryburg toe, hoedat hulle gegaan het na Kimberley toe, hoedat beskuldigde 21 die Noord-Transvaal georganiseer het. So, hulle was van die dominante, kerndeel van UDF se leierskap wat die beleid moes uitgevoer het. Die toesprake en die dokumente bewys dat geweld 'n integrale deel van UDF-beleid is om die RSA onregeerbaar te maak en dan uiteindelik 'n regering van massas daar te stel. Dit is so deur die hof bevind ook en dit word bewys weer deur 'n magdom van bewysstukke en dokumente wat bewysmateriaal gebied het aan hierdie hof.

Die toesprake - ons het daarso Amanda Kwadi, ons het Sisulu se toesprake. Ons het hulle toesprake waar ons gesien het en hulle hoor, hoedat hulle 'n rewolusionêre klimaat aanwakker en aanstig. Dit is so, volgens die dokumente wat

hier/..

hier ingehandig is en dit is ook deur die hof behandel, dat die swart plaaslike besture-kampanje deur UDF gebruik was om die massas se woede aan te blaas. UDF-leiers het die houding ingeneem dat die doel heilig die middele, geweld is aangeprys as "glorious victories", dit is wat die getuienis is wat blyk uit die dokumente van UDF wat voor die hof is. Die eise deur die UDF en die NDC gestel vir 'n nasionale konvensie is so hoog dat geen regering dit kan aanvaar nie en dit word so uitgestuur vir al hulle lede. Dit word nie, soos beskuldigdes 19 en 20 probeer het om dit te versag nie. Dit word nie gedoen in (10) daardie dokumente nie. Dit word so pertinent gestel, dit is hulle vereistes en dit wil hulle hê en dan is dit tog eienaardig dat beskuldigdes 19 en 20 het hier te kenne gegee dat hulle het eintlik gebrekkige kennis oor hierdie dokumente gehad en dan word daar geen getuienis om hierdie stelling wat hulle maak dat dit nie van die nasionale konvensie is nie deur die verdediging aangebied nie. Die staat se getuienis staan daar. Dit is wat ons sê wat dit is, dit is wat daar uit daardie dokumente blyk, dit is wat julle sê is julle minimumvereistes. As hulle wil kom sê dit is nie dit nie, dan moes hulle (20) getuienis gebring het, maar hulle het verkies om nie een getuie te bring om dan van UDF se kant te kom en te sê nee, maar die getuienis vir die staat is verkeerd nie. Die feit is hulle kon dit nie doen nie en hulle kan nie hulle eie dokument weerspreek nie en hulle eie dokument praat daarso.

Nou, in hierdie aspekte was ook genoem die gebruik van COSAS as 'n mag deur UDF en ook in die ANC. Beskuldigde 19 en 20, ek gaan net hier steun op daardie een aspek, beskuldigde 19 en 20 se gesamentlike vergadering met COSAS en die daaropvolgende skrywe vir uitbreiding van die stryd in die skole (30)

wat/..

wat op daardie stadium alreeds gewelddadig was, is vanself-sprekend. COSAS en UDF beide verklaar dat die jeug 'n belangrike mag in die stryd is vir die vryheid van swartmense. UDF verleen voortdurend steun aan die jeugsake. Dink aan die internasionale jeugjaar, die onderwys "charter" kampanje en die onderwys "charter" en A1, die deklarasie sê watter mense almal gemobiliseer moet word en daar word spesifiek ingesluit die jeug as 'n belangrike komponent.

So, my respekvolle submissie is dat op die oorweldigende getuienis voor hierdie hof en gebrek aan enige getuienis aangevoer deur die verdediging tot die teendeel, kan geen ander hof ooit noop om te kom sê of moontlik redelik te bevind dat hierdie hof se bevindings was verkeerd gewees nie en op hierdie basis wil ek dan ook vra dat u hierdie aansoek van die verdediging op hierdie aspek van die verdediging nie sal toestaan dat hulle daarop na die appèlhof gaan nie.

Daar is 'n ander aspek wat ek dink waarop ek moet antwoord en dit is dat die bewerings wat gemaak word van mistastings oor die feite wat hierdie agbare hof sou gemaak het, dat dit 'n grond is waarop 'n ander hof tot 'n ander slotsom kan kom.

My respekvolle submissie is, mnr. Bizos het gister en vandag hieroor geargumenteer en my respekvolle submissie is dat die hele argument wat die basis is waarop hierdie grond staan is dat die taalgebruik van die hof om 'n getuie se geloofwaardigheid mee uit te druk as die basis daarvoor is, want in die eerste instansie het die hof vir bladsye lank in die Z-deel van die uitspraak uiteengesit presies waaroor elke getuie se getuienis verwerp word. Die verskillende redes het gewissel vandat hulle uit en uit hulleself weerspreek, dat hulle weerspreek word deur ander, dat hulle weerspreek medebeskuldigdes. Dit help nie

vir/..

vir mnr. Bizos om te kom sê maar die hof het beskuldigde 10 se getuienis verwerp daarom moet beskuldigde nr. 5 nou geglo word nie. Die feit is hulle het een verweer gestel, dan was daar 'n botsing van belange, dan moes hulle nie saam aangekla gewees het en deur een persoon verdedig gewees het nie, want, edele, onthou een ding wat baie belangrik is hier, daar was vele stellings gemaak teen staatsgetuies van getuienis van die verdediging wat gebots het met wat later gekom het en die hof wys dit ook uit wanneer die hof hierdie aspekte behandel van hoekom die hof die getuienis verwerp. So, die feit is daardie (10) twee is mense wat mekaar weerspreek wat eintlik dieselfde verweer gehad het. So, my respekvolle betoog oor hierdie aspek is dat die verdediging negeer deur bloot te verwys na die taalgebruik van die hof, die belangrike beginsel wat die appèlhof in De Villiers se saak neergelê het en wat hierdie agbare hof duidelik gestel het as die basis van u beslissing wanneer dit gaan oor die geloofwaardigheid en oor die saak, dat 'n mens kan nie elke stukke iets wat daar is net vir daardie klein deeltjie - vir jou eie aanwend nie. 'n Mens moet die hele ding insien in die konteks van die getuie se (20) getuienis. 'n Mens moet dit sien in die hele konteks van sy getuienis as 'n geheel, nie as 'n stukkie vir stukkie en 'n stukkie vir stukkie om dit dan so te vergelyk nie en dit is nie net in die Z-deel waar die hof die geloofwaardigheid van die getuies behandel nie. Dit is ook in die ander dele van die uitspraak word dit ingebring.

So, my respekvolle submissie is dat daardie argument kan nooit aangaan solank die verdediging voortgaan om die appèlhof se beslissing te negeer en dit brokkie vir brokkie hier by die hof te kom aanvoer nie. (30)

Ek kan/..

Ek kan vir die hof wys - ek het die moeite gaan doen om 'n aantekening te maak en dit - die hof gee party - as 'n mens die indruk gister gekry het dat - wat ek gekry het, is dat die hof het eintlik 'n oppervlakkige uitspraak gegee, maar die hof het talle, talle, talle punte gewys ten opsigte van elke getuie waarom die hof die getuienis verwerp. Vat net beskuldigde 3, het die hof 52 punte as motivering gebruik hoekom die hof sy getuienis verwerp. Dit is net in die Z-deel.

In hierdie opsig wil ek aansluit weer by my geleerde kollega, mnr. Smit. Die hof moet kyk ook in die hele totaliteit na watter getuies het die verdediging geroep.

HOF: Het mnr. Fick 'n naamsverandering ondergaan intussen?

MNR. JACOBS: Ekskuus, mnr. Fick. Ek is jammer, maar die punt wat ek wil probeer maak is kyk na die getuies wat gebring was. Dit is die kantlynstaners. As daardie mense, terwyl hulle getuig het onder kruisverhoor nie behoorlik staan nie - ek dink nou maar aan 'n geval, ek wil nou een spesifieke voorbeeld noem. Vat Seisoville(?) in Kroonstad. Die een na die ander getuie is hier gebring en dan is hy gebreek in kruisondervraging dan word daar weer 'n ander sypaadjiestaner gebring, maar nooit word die mense wat tel en wat die werklike feite moes kom gee hier gebring gewees nie. Kan die hof nou geblameer word as die hof hierdie mense ongeloofwaardig bevind? My respekvolle submissie is dit kan nie. Die hof het 'n uiters goedgemotiveerde uitspraak hier gelewer waarom hierdie getuienis verwerp moet word, nie die taal wat die hof gebruik het nie, maar redes, werklike redes is gegee en as die hof sy misnoeë dan in sterk taal wil gee, dit is seker die hof se reg en ek wil met respek sê en ek verstout my om dit te sê dat oor die algemeen was die staat se getuies nie van daardie swak kaliber gewees nie.

My respekvolle/..

My respekvolle betoog dan is dat geen redelike hof, ander hof sal dit as 'n redelike moontlikheid vind om in te meng met wat hierdie hof bevind het oor getuies nie.

Ek wil net noem die hof het ander punte ook uitgesonder wat ek nou nie op sou moes antwoord nie, maar mnr. Chaskalson onder andere die vonnisse van die UDF drie. Daar is niks daaroor gesê deur die verdediging nie hoewel die hof gevra het dat dit moes gedoen word. Ek kan net daarop sê dat in die lig van geen teenkanting het hulle dit blykbaar geabandoneer, want my respekvolle betoog is dat geen hof sal kan bevind dat (10) hierdie hof onredelike, swaar vonnisse opgelê het vir ernstige misdrywe nie.

Samegaande hierso, dit was ook Maandag genoem dat dit sal geargumenteer word dat UDF openlik geopereer het, maar eintlik is dit nie so nie. Die feite en al die getuienis hier by die hof is hy het ondergronds geopereer om geweld aan te blaas soos die hof dit bevind het en daarom is die vonnisse van die UDF drie is eintlik lig onder die omstandighede.

Hier was genoem dat daar sou argument wees oor beskuldigde nr. 16. Hier was nie. My respekvolle submissie is dat (20) daar is geen rede om daar 'n appèl toe te laat nie ...

HOF: Ek het begryp dat u argument sal gee oor beskuldigde 16.

MNR. JACOBS: O nee, edele, ek het dit net weer anderste gehad.

HOF: Miskien moet albei dan praat oor nr. 16.

MNR. JACOBS: My respekvolle submissie is nog dat beskuldigde nr. 16 het spesifiek, volgens die getuienis wat die hof as eerlik en aanvaarbaar gevind het, geweld aangemoedig in die Vaal. Volgens sy eie skrywes is hy 'n rewolusionêre persoon. Daardie stuk wat hy en Mabasa-hulle saam opgetrek het en die dokumente in sy besit gevind wys ook sy rewolusionêre (30)

inslag/..

inslag wat hy het en in die algemeen wil ek een stelling maak, dat oor die aktiwiteite van die Soweto Civic Association en hulle deel aan die aktiwiteite van UDF en die kampanjes was hy 'n oneerlike getuie. In daardie opsig word hy weerspreek deur vele van hulle dokumente uitgegee deur SCA en UDF en my submissie aan u is dat ook hy is tereg skuldig bevind. Geen getuienis is daar om hom te onthef van wat hy gedoen het vanaf die verdediging se kant nie. Mense wat hom ken vir lank het hier kom getuienis gee, maar nie mense wat saam met hom gewerk het nie. Dit is weer een van daardie gevalle waar die werklike (10) mense wat saam met hom gestaan het in die stryd daar in Soweto nie getuig het nie. Die naaste wat daaraan gekom het, was dr. Motlana gewees. Sy getuienis en nr. 16 se getuienis is direk botsend.

Ek dink ek het nou almal gedek. Ek het nou gekyk op die lys, ek het almal gedek wat nou die dag uitgestippel was, daarom vra ons dan weer dat geen algemene reg van appèl toegestaan word nie, want daar is volgens ons respekvolle betoog op feitlik al die punte geen hoop dat 'n ander hof redelik moontlik tot 'n ander insig kan kom nie en dan wat die regsvrae betref (20) dan vra ons die wysigings daarvan en die skrapping daarvan soos ek dit hier aangegaan het. Dankie.

MR CHASKALSON/..

MR CHASKALSON: Mr Jacobs has accused me of acting in bad faith and unprofessionally in seeking to have a point reserved for argument by the appellate division. Since I have no particular respect for his views in regard to my professional responsibility I do not really care what he says about them. Your lordship knows there are to Bar Councils have ruled that it is the duty of counsel to do what we want to do in this case and I choose to take my advice there rather than from Mr Jacobs. Having said that I choose to say no more about that. As far as procedure is concerned I agree that (10) it would be fair to the state to have details of what they should prepare for and it seems reasonable that the leave to appeal should require us to furnish such details, and require us to do that in good time so that the state should have ample time to prepare itself. The preparation of the record in this case will obviously be a mammoth task and take very considerable time.

COURT: Yes could I just make an observation here. I intend reserving judgment in this application today. I do not think that you must wait until you get my judgement before you (20) start working on your grounds of appeal. It should be clear that at least in some, on some points you should get leave to appeal and do not leave it again until the last moment and then start working on the notice of appeal.

MR CHASKALSON: Yes. No my lord we will, what I would like to ask your lordship to consider is this, that we would file a notice. It will not, as I said that the preparation of the record is going to be a mammoth task and we are not looking in regard to matters which are going to be ready with a short time. I myself, and most of us, are really quite exhausted (30)

at/....

at this stage. I think we need a short break before we start on this task. So whatever the time is I would ask your lordship to think not in terms of a week or two but in terms of a month ...

COURT: I did not think of a week or two because I will set it down, I will give you time after the delivery of this judgment but the judgment will not be delivered in a week or two.

MR CHASKALSON: As your lordship pleases.

COURT: But I was just thinking that you must not leave it(10) for a couple of months and then think that you can start.

MR CHASKALSON: In our own interests it is no good because we will lose familiarity with the case and have to come back to it but we do need a holiday and that we would like to take now. But we will give thought to this and while it is fresh in our minds it is something we could do. Let me deal first, if I may, with the special entries and perhaps I should deal first with the argument addressed by my learned friend Mr Fick in regard to the special entry no. 3. I think that that in chronology was the first of the special entries to (20) be dealt with. We agree that the test is the test in Xaba's case, the passage it is in 1983 3 SA, the passage is at page 732H to 733A. Now your lordship, if I may say so, is one of those judges who believes that judges should take an active role in the proceedings. Some judges do, some judges are more passive. I do not think your lordship would for a moment put yourself in the camp of those who believe that a judge should do nothing but sit back during a trial. Your lordship alluded to this in your own judgment at the beginning about the difficulty of the role of a judge in a case such as this, about (30)

the/....

the intervention of judges into proceedings and that I do not think is a matter your lordship would quibble with. Nor would your lordship think that the only questions that your lordship asked were the questions which were referred to during the course of argument yesterday. There are indeed, as one will expect in a long trial, literally thousands of questions which are asked. And a reading of the record, and your lordship's own knowledge of these proceedings confirm that. Now the question really, as far as this special entry is concerned, is whether in playing the active role that your lordship (10) chose to play in this case, your lordship crossed the line which the appeal court has spoken about on many occasions before. It is a line which is not always easy to define but it is a line which if crossed means you have entered the arena, as the appeal court calls it, and it then becomes a factor relevant to the assessment of credibility findings and the like. Now though Mr Fick picked out a few of the passages cited by my learned friend Mr Bizos yesterday he did not deal with the central thrust of the argument or the passages cited in support of it was that your lordship in your (20) questioning introduced and pursued certain issues which subsequently became central issues in the case and I cannot remember all of them but I do remember some that were referred to. The question of whether a boycott of Black Local Authorities would result in chaos, whether the events in Tumahole should have served as a warning, whether smoke and damage should have been seen by the marchers and whether or not that was relevant to forseeability, the detailed investigation of the songs, the role of children, the precise role of COSAS, identifying the keynote address, the payment of rent as a credibility (30)

issue,/....

issue, the illegality of a march, and I think there were others too. Now what that argument was, the thrust of that argument was that these are matters which ought properly to be introduced by the state and argued by the state and that a judicial officer ought not to intervene in the middle of cross-examination or in the middle of examination with such matters but should ordinarily wait until the end of the questioning, when the cross-examination has been completed and then seek clarification on matters. Now somewhere between doing nothing, being very active, somewhere there is a line and (10) the question really is whether or not that line has been crossed. Some judges have crossed it on occasions in the past, some judges have been accused of crossing it in the past and the appellate division says in fact they have not. But that is the issue, and it is in our respectful submission an issue which meets the test in Xaba's case and an issue which can legitimately and ought properly to be argued before the appellate division and therefore form the basis of a special entry. I want to say one thing more about what Mr Fick said at that time. He said that, he suggested that once pre- (20) viously this question had been raised and then withdrawn and he is of course alluding to the proceedings at the time of the application for the quashing of the proceedings and the recusal. Now your lordship knows that in those papers it was stated by counsel, well not by counsel, it was stated in those papers that counsel, or at any rate the legal advisers, had advised the accused that the interventions by the judge did not form the subject in themselves of an application for recusal and could not be relied on for that purpose in isolation. The papers also made perfectly clear that it was (30)

only/....

only the events consisting of the order that Professor Joubert should recuse himself, followed by the reports which were received which, in conjunction with the others, matters were relied upon by the accused to say why they felt the way they did. The way that matter proceeded was that your lordship made a statement dealing with material issues. Your lordship subsequently ruled in effect that that statement must be accepted. Your lordship ruled that material provisions of Professor Joubert's affidavit to which you had not responded could not be relied upon and so the effect of those rulings was that (10) nothing was left for the application other than the interventions. And since it had always been the advise to the accused that those interventions in themselves could not be relied on, there was at that stage no basis upon which the application could legitimately be argued. Because to do so will be to place reliance on something which in the opinion of the legal advisers of the accused could not properly be relied upon for the application. For that reason nothing more could be said. But that there are issues which can be raised I suggest to your lordship is clear. Whether they are good or bad is (20) another matter but that the appellate division can decide.

Now as far as the other issues are concerned the state objects to that part of a special entry which depends upon Professor Joubert's reports, that is paragraph 1.4 and 2. Those two issues are matters of great legal controversy.

COURT: Yes, they go hand in hand, 1.4 and 2 and 1.3 and ...

MR CHASKALSON: They are matters of great legal controversy.

COURT: You need not address me on that.

MR CHASKALSON: As your lordship pleases. As far as 4, 5 and 6 are concerned can I put very briefly to your lordship, (30)

because/....

because in a sense they hang, I think it is, in a sense they hang together. It is, no 4 is different, 4 I have, well yes in a sense they do hang together. I have addressed your lordship on 4 and I do not think I can usefully add to what I have already said to your lordship on that. As far as 5 and 6 are concerned can I ask your lordship to consider the structure of an argument along these lines, that usually courts refrain from making preliminary observations in regard to the credibility of witnesses ...

COURT: Observations? In public? (10)

MR CHASKALSON: Observations in regard to demeanour certainly would always be made.

COURT: It has to be made otherwise you cannot remember it.

MR CHASKALSON: You cannot do it, no I accept that and I also wanted to say something else. Ordinarily one would refrain from making credibility reasons, or observations relevant to credibility other than demeanour and conduct and such matters. They obviously have to be made at the time. For the very reason that these are matters which should be left until argument is heard lest a court should shape its attitude (20) to the case by observations prior to argument. That is a well known proposition and there are cases for that. I think your lordship told me that you knew of some which I did not know of yesterday. Now I appreciate immediately that in a very long case such as this that a court may feel that because of the case it would be appropriate to do something which may not be done in a short case.

COURT: I think it must be clearly understood that if a court does not keep entirely up to date there will never be a judgment in a case like this. It is absolutely impossible. (30)

MR CHASKALSON:/....

MR CHASKALSON: I understand why that should be done. What I did want to argue and would like an opportunity of arguing is really this that where a court in fact makes, as your lordship told us you did, observations which really constitute a prima facie reaction to the credibility of a witness by reference to the witness' own evidence, evidence of other people and does that whilst the case is going along, and it is the exigencies of the case which your lordship says made that necessary. Now if that choice is taken, and I do not want at the moment to debate whether it should or should not be taken but for the purposes of this argument let me accept that it is the correct course to follow. Inevitably when that happens there will be a shaping of thinking and attitudes, that is an inevitable consequence of it because once one has formed a particular view it does impact upon you.

COURT: It is really a question of whether you have a long case or a short case. In a short case you have it in your mind and in a long case you have it on paper. In reality there is no difference. When you have seen a witness you have formed certain impressions of him.

MR CHASKALSON: No I understand all that and what I wanted to, the argument which I would like an opportunity of addressing is this that where that has happened, and precisely in a very long and a very complex case such as this one where, if one were to, there is no such thing as necessarily, in a short case where there is one issue you know what you have to address. In a complex and complicated case such as this if one chooses to address every possible issue argument would be endless. Also one would be in a position, if the state chooses not to argue something of possibly putting up a hurdle and knocking it down/....

down and unnecessarily so and doing something which is not really in anybody's interest, least of all those of your own client. And the argument which we want to advance, and it becomes relevant really to your, ultimately to your lordship's credbility findings, is that where a court has chosen to follow the course that your lordship did and to make the very detailed notes that your lordship did and where the state does not address those issues in its argument and where you are called upon, as we were called upon, to address a 2 000 page argument which did not raise those issues. It may not (10) be 2 000, it may be 1 000. I cannot remember but I think it is probably 1 000 and not 2 000. But it does not matter, it was a very long argument and we had our time cut out, as your lordship will remember because when we asked for more time to be able to address the argument which we thought, saw as our responsibility in the first instance to do we were kept on a tight leash. Where that happens then we would suggest that we should be given an opportunity by the court of dealing with issues, if that is to be the basis of its judgment. Now if I could give your lordship an example. Your lordship relied (20) on 29 points as your reasons for rejecting the evidence of Mr Molefe. Not one of those points was relied upon by the state.

COURT: Mister who?

MR CHASKALSON: Mr Molefe, that is the ...

COURT: Oh no. 9.

MR CHASKALSON: Accused no. 9, yes. Not one of those points was relied upon by the state. In the result on, and you can multiply that right throughout the case. So what has happened is that in the result your lordship's findings on many important aspects of the case concerned with credibility and (30)

otherwise,/....

otherwise, have been made without hearing argument. Now this is of course a case of, it is an exceptionally unusual case and a case of exceptional difficulty and complexity. But we would like to be able to argue to the appellate division that where credibility findings have been made in that way that certainly as far as the major grounds are concerned we should have been told to address argument on certain aspects, if they had not been covered by the state and you intended to rely on them. So that you have the benefit of hearing arguments relevant to the prima facie view. But what happens is at (10) the end of the day the state does not rely upon it, we do not know why the state is saying that our witnesses should be unreliable, we do not address argument to you so your lordship is in the position of making a credibility finding without having heard argument on the central issues. Now that may be legitimate but the appellate division may feel that it is an irregularity and if it is then it does have a profound effect, or could have a profound effect on the appeal and we suggest to your lordship that in the line of Xaba's case that the points 4, 5 and 6, they come together but you will see they are (20) lined and/or. If you look at that composite grouping of them, either singly or in totality, they present a point of sufficient substance to meet the requirements of Xaba. And that is all that your lordship has to decide. Your lordship does not have to decide it is a good point or a bad point as I understand Xaba, simply that it is made in good faith and that it is not so devoid of any substance that no court could possibly be influenced by it. So we suggest that there are grounds for the special entries there. As far as no. 7 is concerned the point really is this, the practice followed by the (30)

prosecutors/....

prosecutors is set out at the bottom of page 27 185. It is volume 459 where it is said:

> "Oor die algemeen was dit die ondervinding dat die getuies, omdat hulle so bevrees was, hulle huiwering was om met die feite uit te kom. So ons respekvolle submissie is dat voordat die getuies in die hof getuig het was hulle opdrag aan ons gewees, dit was ons gelei het en dat hulle nie in daardie sin afgewyd van hulle opdrag nie, en dit is ons respekvolle submissie dat dit is nie nodig om die verklarings onder daardie omstandighede in te handig nie." (10)

And he continues to say that witnesses openly acknowledged that they had departed from their statements. Let me say they only made that open acknowledgement under cross-examination, and it was only those witnesses with whom the matter was raised and in cross-examination acknowledged it, who confessed to it. But if one comes back to the Xaba case the bottom of page 728 there is, Botha, J. says this:

> "It is clear therefore that when a state witness gives evidence from which a serious discrepancy emerges between that evidence and a prior statement made by the witness to the police the prosecutor has no choice, he is obliged to disclose that fact and apart from special circumstances not relevant here to make the statement available to the defence for the purposes of cross-examination of the witness." (20)

And at page 729 he says:

> "In my opinion the discrepancy is serious whenever there is a reasonable possibility that the probing of it by means of cross-examination could have an adverse effect/.... (30)

"effect on the assessment by the trial court of the witness' credibility and reliability. Such a real possibility is not created by a discrepancy of a minor or trivial nature."

Now if there is a written statement to the police which is subsequently, in a material respect, departed from or added to, when I say added to I mean added to in relation to matters which one would expect to be in that statement or to see in that statement, during consultation with counsel, that is no different to whether it is added to or departed from during the course of evidence. It cannot make any difference whether the last consultation before the witness gives evidence is a consultation with the police or a consultation with counsel. The important thing is that if the police have recorded a written statement and they have in their possession that written statement and a witness subsequently gives evidence which if one had that written statement one could say why did you not say that, you have said something different in your evidence, this is something which should have been in your statement. You could have made use of that in cross-examination. And that is as we understand Xaba's case, is, and I need to put it no more than that at the very least arguable. And that is the argument that we want to advance there, because it is quite clear that the prosecution had an understanding of its responsibilities in a particular way and I do not dispute that that was its understanding. The question is not whether when it put the witnesses into the box it had that understanding. The question is whether that understanding, which is recorded at page 27 185 in the passage that I have cited to your lordship, was correct. Now I shall be very

brief/....

brief as far as the rest is concerned. There was a statement made in argument that the defence kept witnesses away from the court. Now much depends upon counsel's perception of the onus of proof and what is required to rebut any case that may have been led and whether or not that onus has been discharged. Something which counsel has to decide from time to time - sometimes they make the right decisions and sometimes they make the wrong decisions but your lordship would appreciate that where witnesses have been called and where evidence, if accepted, is sufficient to answer the state case that one (10) would not lightly call people to give evidence, people who are said themselves to be guilty of treason. One would not lightly call people to expose themselves to cross-examination when there is an uncertainty as to the parameters of what is and is not treason, what the limits of dissent may or may not be, where as your lordship put it in your judgment, where the line gets crossed, what is legitimate dissent and when does it become treason. Those persons themselves may not wish to be subjected to that ordeal. There are many reasons, many good reasons for not calling witnesses and the question is not whether other (20) witnesses might or might not have been called. The question is whether there was or was not sufficient evidence before the court and it was said to your lordship in argument that we did not call anybody to talk about the material policy of the UDF, about the conditions and their policies on the national convention and so on. But that is not correct. We called accused nos. 19, no. 20 and no. 21 who were able to give evidence on that. Now of course there is no other evidence from the state and if their evidence were to be accepted that should be more than enough to answer the (30)

case./....

case. And the same with the areas. We called people who were in different positions, different backgrounds, to speak about what had happened in meetings and on different occasions. They too, some of them may have been thought to, some, not all I agree but some of them may have been thought to have come to the case with less of a direct involvement in some of the disputed facts or in relation to some of the disputed facts. Their evidence has not been accepted. If their evidence were accepted the findings would be very different and the question is not whether X or Y could have come here to give evidence. (10) The question is whether A and B and C who gave evidence in all the circumstances whether their evidence was sufficient to create a doubt which, if it exists, should lead to an acquittal. So in the end one has to decide this matter not on the basis of who could have given evidence, bearing in mind that accused 19, 20 and 21 all did, but whether there is a reasonable prospect that the evidence was sufficient, that the 136 witnesses - perhaps I have got the figure wrong - whether their evidence is sufficient or whether it is just so bad that it might never have been called at all. Now I do appre- (20) ciate that the record is massive and it is a case which happens once in a lifetime. Courts unfortunately are sometimes called upon to deal with these once in a lifetime cases and it means that the appellate division will unfortunately be called upon to spend much more time on one case than it would ordinarily have to do. And of course counsel will have a responsibility to the appellate division to prepare full heads of argument and to try to make the case as manageable as it possibly can. I would assume that the appellate division will be guided to the passages and to the important issues, not only by the (30)

heads/....

heads of argument but by your lordship's judgment and by your lordship's report. But it does not mean that the appellate division is going to ahve to read every piece of paper that is put in front of it. And if it is going to be a big task for the appellate division - and we acknowledge that it will be - it is also equally a case of great national importance. So those two do go together and I do not want to go back to what I have said about that already.

As far as the admissibility of documents and videos is concerned there are in our submission points of considerable substance and importance to be raised there. There are many important issues which the appellate division will have to resolve for us which have not yet been resolved. The way section 69(4) should be used, the way it should be interpreted is a point of fundamental importance upon which the appellate division has never really addressed itself. It has dealt with matters which are clear and in cases where there is no dispute but it has never been called upon to address this particular issue and I may say that the same is true, in a different way, of many difficult questions of evidence which arise here. As far as the interpretation of such material is concerned that too is a task which cannot be avoided. The appellate division will have to make the interpretation. It cannot have an appeal. As counsel for the state will have that you can appeal as long as you cannot challenge the conclusions of the judge. That is what it comes down to. The interpretations of that documentation and that material is really fundamental to the case.

As far as the other matters are concerned we have argued them fully really at the time of the trial and I

do/....

do not want to go back to that and to trot out the arguments which I have already, or we have already addressed to your lordship. Your lordship is well aware of them. The submission we make to your lordship is that they are arguments of substance, they are arguments of importance and they are arguments which deserve consideration by another court.

I think that is really all I should say to your lordship. One observation I think I may have to make and that is that the fact that there was no, there was a suggestion in argument that there was no question from the accused that they (10) had themselves been assaulted. No statements were tendered by the, from the accused. The accused were held in detention, no statements made by the accused were ever tendered. So the issue, the question of their own treatment is not really an issue in this case and I would not like my silence in that regard to be construed as agreeing that that was the position.

COURT: How should I construe your silence on the question of sentence of the UDF three?

MR CHASKALSON: I have a note about that.

COURT: And no. 16. (20)

MR CHASKALSON: I have a note about that in front of me. As far as the UDF three are concerned I think the central issue there is whether it was wrong to treat accused nos. 19, or no. 21 on the same basis as accused no. 19.

COURT: So in fact the appeal is by no. 21, not by no. 19 and not by no. 20?

MR CHASKALSON: Yes, I do not have any instructions not to proceed with a request for an appeal. I think my learned friend Mr Bizos has said all that can be said on that issue and I cannot add anything to it but as far as accused no. (30)

21 is concerned he has been treated on the same basis as accused no. 19 and I think that from the point of view of a reply that was not really dealt with and I think that that is a material point which should be taken into account by your lordship. For the rest I cannot add anything.

COURT: Yes, but now I was not clear. I understand Mr Bizos to address me on the Vaal accused and sentence. I cannot recollect that anybody addressed me on sentence on no. 16 or on no. 19 and no. 20. I understand the argument as far as no. 21 is concerned. (10)

MR CHASKALSON: I was under the impression, and may I check. I really was under the impression that my learned friend Mr Bizos did deal with sentence.

COURT: It may have slipped my mind.

MR CHASKALSON: My learned friend says he had made certain broad submissions to your lordship in that regard and he is content with what he has said there. I understood him to make submissions to your lordship in regard to sentence. I certainly did not because he had done so. I understood him to address submissions to your lordship on the Monday. (20)

COURT: On the?

MR CHASKALSON: On the Monday of this week. I may be wrong but that is his recollection, that is my recollection and ...

COURT: Well it seems to be that these submissions are not so outstanding to all of us that we can all recall them.

MR CHASKALSON: Well I do not, my recollection was that my learned friend Mr Bizos did address argument to your lordship on that. My recollection is that he did address you on accused no. 16 along the lines, if I remember it correctly and I may now be quite wrong because it may be someting he has (30)

told/....

told me and it was not articulated in that way. But I understood that argument to be that if one takes the act for which he had been found guilty, which amounted to an incitement which led on the evidence to nothing, that the substance of that did not warrant the sentence which was imposed. I think that was all that he said.

COURT: Well it may have been so broad that it got lost in the offing. Now as far as nos. 19 and 20 are concerned, what is your argument?

MR CHASKALSON: Well I would content myself with the ... (10)

COURT: By saying nothing?

MR CHASKALSON: Yes. I think, I do think that some broad submissions have been made to your lordship.

COURT: Yes.

MR CHASKALSON: I do not think I have anything more to say to your lordship.

COURT: Judgment is reserved.

COURT ADJOURNS.