IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO. CC 482/85

PRETORIA

1988-12-14

THE STATE

versus (10)

PATRICK MABUYA BALEKA AND 21 OTHERS

O R D E R

VAN DIJKHORST, J.: It is my duty to make an order in respect of those state witnesses who were warned in terms of section 204(1) of the Criminal Procedure Act 51 of 1977. The court has to hold the opinion that a witness has answered frankly and honestly all questions put to him before making such order. This seems to be a stringent test and not all the witnesses which we will discharge from prosecution pass (20) it. The prosecutor has, however, informed the court that he waives the right to prosecute these witnesses. We are therefore at liberty to make the following order:

The witnesses IC.7, IC.8, McCamel, Peter Mohapi, Jacob Mahlatsi and IC.24 are, in terms of section 204(2)(a) discharged from prosecution for the offences of which the accused were charged and any offence in respect of which a verdict of guilty would be competent upon a charge relating to these offences. In terms of section 204(2)(b) this discharge is entered on the record. (30)

MR CHASKALSON ADDRESSES COURT: My lord can I first indicate to your lordship how we would like to proceed today, and our approach to the question of leave to appeal, special entries and reservations of questions of law. We have given thought to what your lordship put to us on Monday in regard to the choices and we agree that it is not really practical to wait for your lordships to return from long leave nor would it be practical to put a record of these dimensions before another judge. The time and cost involved in that make it an unrealistic choice. Also no one is really better placed than your lordship to deal with the matters we have to deal with today. So what we intend to do is not to attempt to address detailed argument to your lordship on issues relevant to leave to appeal. We will have of necessity to deal with issues in a generalised and an unspecific way and we trust that your lordship will appreciate and make due allowance for that in dealing with our application. Now we also, in the course of the last day and a half, formulated a series of special entries and reservations of questions of law. They were only really finally typed some last night and some this morning. So it has not been possible to get them to your lordship but we do have the schedules and I think I should, these if I could hand up to your lordship the schedule of special entries which we would like to address and we think it may be convenient to deal with them after your lordship has had an opportunity of considering them, after our learned friends have had an opportunity of going through them and so we would begin then, with your lordship's permission - I think I should also hand up to your lordship the reservations of questions of law. They are really confined to the Vaal case because your

lordship/....

lordship indicated as far as the UDF case it would not be necessary to identify matters there. Then as far as the special entries are concerned if your lordship could look at the graph of the special entries matters, all matters I think appear from the record other than the item which is numbered 2 and partly no. 1. We have an affidavit, and again I think your lordship should have an opportunity of seeing that affidavit and we should hand it up to your lordship now. Now your lordship will, I should draw your lordship's attention to the fact that the last page of the affi-(10) davit has a draft special entry attached to it, I think. Well your lordship does not need to look at it. The draft special entry is not the special entries which we have put before your lordship now. It has been reformulated in a, the document attached to this affidavit has been, one paragraph of it has been changed. It is not material, it is a formulation of a law point but I should draw your lordship's attention to the fact that at the time the affidavit was deposed to the final formulation had not been settled. Now we would ...

COURT: Now may I just ask about this application - I made (20) a ruling during the course of the trial that evidence about conversations between judge and assessors about the case was inadmissible. Does that ruling stand or is the evidence placed before me contrary to that ruling? Because if it is it cannot be allowed.

MR CHASKALSON: Well the special entry will raise the question as to whether that ruling was correct.

COURT: That is quite right. And until the appellate division decides otherwise that ruling stands.

MR CHASKALSON: Yes. Now the difficulty that we have is (30)

that/....

that if the appellate division is to consider that ruling it needs to have the document to consider the relevance of it.

COURT: Well the appellate division cannot, can first decide on the legal point, whether it is admissible or not, and then it can call for this document if it wants to and you can hand it up there but you cannot hand it up to me because I have ruled it to be inadmissible.

MR CHASKALSON: No I understand what your lordship is now saying to me. We felt that it was necessary to have the evidence to put before the court for the purposes of the special entry because the cases say that where the evidence, where the outcome or the facts relevant to the special entry depend upon evidence which does not appear from the record it is necessary for that evidence to be put before the court at the time of the asking for the special entry.

COURT: That is quite correct Mr Chaskalson, provided that evidence is admissible evidence. If it is inadmissible evidence it cannot be placed before the court.

MR CHASKALSON: Now I want to make my position clear to your lordship and that is that it is important from our point of view that the formulation of this issue is done properly and in accordance with what we understand the cases to be. In other words that your lordship may wish yourself to see the document which is referred to.

COURT: But now if I see it and it is inadmissible how does it take the matter further?

MR CHASKALSON: Because it may affect your lordship, well let me put it differently to your lordship. It seems to us necessary that the document should be before your lordship so that your lordship could understand the substance of the

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special entry and the reason for it. Your lordship has never seen that document.

COURT: No, and actually I am not very interested. If the appellate division rules that it is incorrect, my ruling was incorrect then no doubt the appellate division will call on me to comment upon any matter which is placed before it and I will do so in good time and in my own way. But I cannot, having ruled that evidence by Professor Joubert is inadmissible, now allow the evidence.

MR CHASKALSON: No my lord I only want to put to your lordship this, and I am not trying to push a document onto a record. What I want to say to your lordship is this that where the point in issue is inadmissibility of evidence in every instance, as I understand it, the appellate division has the opportunity of seeing the evidence to decide whether or not that evidence is or is not admissible. So the fact that evidence is inadmissible may affect the trial record, it may affect the evidence upon which the court gives its judgment.

COURT: No but there are two matters one has to be concerned with. The one is whether evidence per se is inadmissible because it falls in a category which makes it inadmissible, then you do not look at the evidence at all, it is inadmissible. Or otherwise the contents of the evidence may be such that it is inadmissible for other reasons. Well then of course you can look at the evidence itself to see whether it is for that reason inadmissible. But this evidence falls within a category which makes it inadmissible and for that reason it cannot be placed before the court.

MR CHASKALSON: Well it makes, for the purposes of our application ...

COURT:/....

COURT: I can appreciate your difficulty Mr Chaskalson and I have no objection if you hand this evidence to the appellate division and they can do what they like with it. But as far as I am concerned my ruling stands and as long as it stands and until the appellate division decides that it was incorrect I will not deal with it, this evidence, or look at it.

MR CHASKALSON: As long as I have tendered to your lordship what I thought we were obliged to tender to make the application for the special entry and as long as the document is ready and available to your lordship we cannot be prejudiced in any way from now onwards by your lordship's ruling.

COURT: No, we have both set out position very clearly on record and you can do what you like in the appellate division about it.

MR CHASKALSON: I understand ...

COURT: But as far as I am concerned it is not part of my record and I hand it back to you.

MR CHASKALSON: Well ....

COURT: And I am not interested in it.

MR CHASKALSON: Can we just ...

COURT: This may affect the formulation of your special entries but we will have to look at that then when we get to it.

MR CHASKALSON: There is, apart from the document or the evidence which your lordship considers inadmissible there is also an affidavit from the accused.

COURT: Yes well it may well be that the affidavit is irrelevant when we formulate the special entries because the point, first of all, which you have to argue is whether this type of evidence is admissible or not and on that basis of course,

pertaining/....

pertaining of course to what happened in judge's chambers, on that basis of course if I am correct then whatever the accused have to say does not count. If we are dealing with other matters like the accused think they have been prejudiced because of what they heard from Professor Joubert that is their affair and that is before the court in any event in the documents which were handed in at the time. That cannot be taken any further.

MR CHASKALSON: No there is one other thing, it can be taken, well the degree to which it goes further is only this that (10) the accused specifically draw attention to this document in relation to their own subjective feelings.

COURT: Yes I have no doubt Mr Chaskalson that they may feel strongly about the matter but first it has to be decided whether it is admissible as such. If it is inadmissible what they feel about the matter is irrelevant.

MR CHASKALSON: We are slightly at cross purposes with each other. Your lordship says it will appear from the record what their feelings are.

COURT: Yes, you will remember that there was an application (20) at the time and that application was placed before court, it is before court and only the annexure which pertained to Professor Joubert was I think removed.

MR CHASKALSON: No your lordship did not receive the affidavit. Your lordship looked at a copy, the original affidavit we still have. It was never handed in and never became part of the record. Your lordship asked, I invited your lordship to look at, your lordship asked me to detach the report.

COURT: Yes that is right.

MR CHASKALSON: And you told me to leave the original as it (30)

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was and I then handed the original to the attorney and asked him to keep it in safe custody from then onwards.

COURT: You may well be right Mr Chaskalson but that copy I still have and I regard that as part of the record.

MR CHASKALSON: As part of the record.

COURT: Yes. It has to be part of the record.

MR CHASKALSON: I did not understand it ever having been received. I thought that it was rejected along with everything else and as far as I am aware it has never been part of the record. But we do not, your lordship and I do not have (10) any ....

COURT: I do not think it will make much difference because in the end in the appellate division you will place the lot before the court.

MR CHASKALSON: Yes, what I am saying to your lordship is...

COURT: So it will not prejudice you.

MR CHASKALSON: There can be no prejudice as far as the accused are concerned and if your lordship chooses not to look at the document and feels it would be better not to do so it cannot prejudice us in any way as long as our special entry is (20) made. We can then, if the appellate division, offer the document to the appellate division. If they choose to see it they will see it and if they choose not to see it well...

COURT: If they want to hear one side of the case they are welcome to do so. If they want to hear my side they can call upon me to hear my side as well.

MR CHASKALSON: Why I am tendering it to your lordship now and why I felt obliged to tender it to your lordship now was that if your lordship makes a report on these matters ...

COURT: I am not going to make a report on these matters (30)

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at this stage.

MR CHASKALSON: Well your lordship understands my position, I understand your lordship's position. I do not think there is any prejudice as far as the accused are concerned.

COURT: I do not think so Mr Chaskalson. The matter is and remains wide open as far as you are concerned.

MR CHASKALSON: Yes, as long as we can get the special entry and argue it in time and as I understand your lordship to say you do not need the affidavit, no.

COURT: I do not need an affidavit for the special entry. (10) As far as I am concerned the special entry should be made on the question whether in law the court was correct to rule that that evidence may not be placed before it.

MR CHASKALSON: Yes, it may have a, yes but the second issue may then arise from it what the consequences would have been had that been placed before the court.

COURT: Well that is a matter that the appellate division can decide what to do about it when they first decided the first ruling.

MR CHASKALSON: I think, as I understand the cases, the (20) appellate division can itself can reformulate special entries if it is necessary to do so, if they are not satisfied...

COURT: That they can do, they can call for a report from the judge, they can sort if out themselves.

MR CHASKALSON: Well I have no problems with that. As long as I have done what I am obliged to do and is necessary to do from the point of view of the accused. Now what we propose to do to begin with is to deal first but not at great length with the question of leave to appeal concerning the areas and then my learned friend Mr Bizos will deal with the Vaal side of (30)

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the case and we are, the question of special entries we put up the document to your lordship and when your lordship has had an opportunity of considering it your lordship will indicate your ...

COURT: Yes if I have any difficulties I will mention them and then you can think about them and we can sort it out.

MR CHASKALSON: Yes. Now as far as the areas are concerned we consider it to be of the greatest importance that leave to appeal should include a right on the part of the accused to challenge the findings that you made in relation to the areas (10) and there are a number of reasons for that. First if the accused are denied that right the appeal against the findings made in relation to the UDF will not be a full appeal. It will be a partial appeal in which the accused would labour under the disability of an adverse finding in relation to an important aspect of the case, a finding which could influence materially inferences to be drawn from the other evidence. Now this I think is implicit in the judgment itself where at page 508 it is said that the actions, public statements and documents of the United Democratic Front, its office bearers (20) and its officials have to be evaluated against the background of the existing situation in our country. Now that background, the genesis of the events, how they manifested themselves, all those matters then become relevant to the interpretation of the documents and the finding made in respect of any one of the areas that the, either the UDF or its affiliates were responsible or contributed to violence in a particular area then becomes a crucial finding upon which the guilt or innocence of the accused could depend. And therefore to deny the accused the right of appealing against that part of the judgment (30)

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in effect means that they would be denied the right to appeal against an essential part of the judgment. Now this is no ordinary case in any sense of the word. It is an extraordinarily complex case where particular findings influence other findings and if one reads the findings in relation to the 31 areas they are in a sense influenced by findings which your lordship has made in respect of other parts of the case. They do hang together. It is also an extraordinary case because of its immense public importance. Now I do appreciate and accept that because a case is of public importance that that in (10) itself is not necessarily a reason to give leave to appeal where in a less important case, or where it is clear that there is no prospect of success. But when one is concerned with a matter of such enormous importance and where the findings impact upon other findings and where there is going to be an appeal, where the matter is going to be thrashed out before the appellate division it is our submission to your lordship that this is pre-eminently a case in which a full appeal and not a partial appeal should take place. And there are also in our submission issues of some difficulty and im-(20) portance relative to the areas which can only properly be resolved if those areas become included in the appeal. For instance the linkages between the UDF and its affiliates, the linkages between the affiliates and the individuals which are of fundamental importance or could be of fundamental importance cannot properly be evaluated unless the evidence as to the violence which occurred is seen in its context. Once that takes place, we submit to your lordship, within a case of this nature the accused should be free to undertake that task without being hampered by a particular adverse finding which(30)

they/....

they may wish to challenge. There is also another factor which your lordship may bear in mind in this regard and that is in relation to the areas there was very little oral argument indeed. I think my learned friend Mr Bizos addressed your lordship briefly and Mr Yacoob addressed your lordship in relation to one area. But for the rest the case had to be dealt with almost entirely in writing.

COURT: That I think was to the advantage of all concerned because I took my time leisurely and could study each and every sentence in that heads of argument and set it against(10) something else. Had it been an oral argument it would have just created a total, total incomprehensible mess.

MR CHASKALSON: Save there was one thing, we never had the opportunity of debating issues with your lordship.

COURT: Well yes, but can one debate each and every small fact in a case of this magnitude?

MR CHASKALSON: It is not a question ...

COURT: I must tell you Mr Chaskalson that it was a very very great advantage to have your argument on the one side of the desk, the state's argument on the other side of the desk (20) and compare and then get to a conclusion and it would not have been possible had we had oral argument.

MR CHASKALSON: No my lord, I can see from your lordship's point of view that it may have facilitated the task. From our point of view though we have never been able to engage in debate upon matters, we have never had questions put to us and I make that submission to your lordship bearing in mind that within those areas there could be particular findings which in a sense start affecting something else in the case. It is not, as your lordship put to me yesterday, that, or it was (30)

on/...

on Monday, that, it was put that the court cannot be wrong in every respect, it must be right somewhere. But the question really is a different one. Could the court be wrong in any respect in regard to any of the material findings which it has made in those areas? Or to put it differently would another court take, reasonably take a different view in regard to any of the matters in relation to those areas where the finding is one which could impact upon something else. And your lordship will also bear in mind that your lordship must have disbelieved over 100 witnesses called by the defence. The whole question (10) of the approach to witnesses of that category, how the evidence of such witnesses should be evaluated, what is necessary in regard to onus, where the state carries onus and leads no direct evidence and a witness that is less than perfect or is open to criticisms in some respects as called by the defence. That of course does not prove the state case. And the whole approach to witnesses then becomes quite fundamental and we submit that we should be given the right to deal with that approach, look at some of the witnesses that have been rejected to try to satisfy the appellate division that too (20) stringent a test has been adopted in dealing with such witnesses, to try to satisfy the appellate division that it was for the state really to negative those matters and once they are put in issue and the state does not produce direct evidence to negative it that a positive finding contrary to that advanced by the defence witnesses cannot be made. Now all of these are arguments of importance. They are of importance because in some respects the case is going to give rise to issues of causation. Always a difficult issue but a particularly difficult issue in a case of this nature and inferential (30)

reasoning,/....

reasoning, and all of these get mixed up together and we suggest to your lordship it would just be wrong to undertake that task once it has got to be undertaken in a manner which hampers the accused in the material respect. They have got to do it all and yet they are going to be denied the opportunity of going into a section of the record and we submit to your lordship that that ought not to happen. And we do suggest to your lordship that there is room for debate. Now it is not my intention to go through each one of the areas and attempt that debate, again I do not quite frankly believe I am (10) qualified to do that in the time available though I could draw attention to particular areas. But can I just ask your lordship to have regard to the findings made in relation to Somerset East which included a finding that the UDF can be directly linked to the violence in Somerset East. Now in the last resort that finding was based on the evidence of Sergeant Mgube. He was found by your lordship or by the court should I say, to be a witness whose evidence was open to criticism and in regard to meetings other than the crucial meeting which was pivotal to that finding, or the crucial occasion(20) which was pivotal to that finding, the court actually found itself unable to make any definite findings concerning parts of his evidence. In other words there were meetings about which he attested to and which the court said well we cannot make a finding but that was said. So his evidence was considered as not sufficiently reliable for that purpose. Yet in regard to the disputed issue of the incitement by Elizabeth Sibanda, Mamma General(?), a firm finding was made on the basis of his evidence alone notwithstanding the fact that it was disputed by the defence witnesses. Now apart from the (30)

contradictory/....

contradictory evidence which was rejected by the court and upon which we would want the appellate division to hear us, one of the witnesses was a school teacher and even if there were contradictions or a lack of reliability one has got to go to the stage of are these lying witnesses because even if they are not necessarily reliable witnesses there could be no mistake as to whether there was an incitement to burn down buildings. So these witnesses, the finding, for a finding to be, for a finding contrary to the accused to be made one would have to proceed on the basis that these witnesses came to court deliberately to lie. And we would like to have the opportunity of suggesting to the appellate division that that cannot be so, bearing in mind the lack of reliability of Nguba. Because apart from their evidence there are certain improbabilities which are not really addressed in the judgment. For instance there is an inherent improbability that on a public occasion such as that, to a packed church, somebody would stand up and say "I am a member of the ANC" and then incite to violence. Now that is a very unusual and improbable bit of conduct. Yet it is not dealt with, it is not put into the, the judgment does not deal with that. And then the judgment also does not deal with the fact that Nguba does nothing to head off the incident, does not, having heard what amounts to an incitement to violence nothing is done to head off the incident or make sure that violence does not take place by trying to protect the beerhalls and no explanations have been advanced at all as to why there has been no prosecution of the alleged incitor. Nguba says that he has never been called to give evidence and he is the only person who could do so. So all of those factors are material on that part of the finding as far/...

far as Nguba is concerned. But if one goes to the other side of the finding there was a finding or implicit in the finding is that Mr Gonevay(?) was present at the house at the time of the incitement on which the state's case is founded. I appreciate that it was also suggested that he was, there was also evidence that he was in the church. That at the very least Nguba's evidence about the church must be doubted. But as far as the house is concerned there is in fact no evidence that Mr Gonevay was there at the time. On the contrary the only person who was asked about that was DuPisanie whose (10) evidence makes it clear that he was not there. He says "hy het verdwyn voor die gebeurtenis". That is at page 5 403. Nguba does not suggest that he was there. So there is indeed no evidence that he was there at the time. Now assuming something happened at the house, leave aside for the moment the reliability of Nguba, leaving aside the dispute in regard to sneeze machine it seems something happened at the house which led to the incident and there the police evidence in regard to the sneeze machine becomes a factor. If Nguba is unreliable we do not know what that something was but whatever it may (20) or may not have been there is nothing to show that Gonevay was there at the time. Now in the absence of Gonevay's presence on that occasion, and according to Nguba the funeral party was at the house for approximately 15 to 20 minutes before this incident occurred. That your lordship will find at page 5 552 lines 9 to 24. Well if Gonevay had come back with the funeral party, there were 15 to 20 minutes he had gone, or nobody says he was there and DuPisanie said "Hy het verdwyn". Gonevay as we know is dead. If it is not shown that he was there then the suggestion that the incitement was authorised by the (30)

UDF/....

UDF because it was made in the presence of Gonevay becomes open to dispute and there is at least sufficient to suggest that an argument of substance on this issue, and that another court could take a different view. And there are also difficulties with regard to the actual reasoning, or the process of reasoning which we would like to raise. To begin with Elizabeth Sibanda is not alleged to be a co-conspirator. Now an alleged incitement by a person not alleged to be a co-conspirator, even if done in the presence of an officer of the UDF is in our submission far too tenuous a link to justify the (10) conclusion that the UDF was responsible for the violence in Somerset East. And if one adds to that the doubt which must exist in regard to the presence of Gonevay at the house at the crucial time that chain becomes even weaker. Now I have chosen Somerset East because it is an important area because that is I think, I may be wrong but my recollection is that that is the one area in which there is a suggestion that the UDF was directly in some way responsible for violence. But if we get into the other areas there are a number of difficulties. A lot of the reasoning of the judgment proceeds on the basis (20) of propositions that really come down to this that the UDF, through its affiliates created a revolutionary climate and having created a revolutionary climate as a consequence certain incidents occurred and therefore that linkage is made. Now we have difficulty with that. First of all what is a revolutionary climate? No evidence, it is in a sense a vague term but no evidence was given that such a climate existed in South Africa. The state called a witness whose field of expertise this was, Mr Prais (?). If such a climate existed in South Africa Mr Prais could have said so, could (30)

have/.....

have explained it, could have told us why, could have been questioned, the defence could have investigated it, the defence could have called contrary evidence had it chosen to do so. But if the state calls an expert whose field of expertise is concerned with this very matter and chooses not to ask the expert to express any opinions on it and does not call a single witness, not a single policeman or other witness was called to say that there was a revolutionary climate in South Africa. Our submission to your lordship is that without such evidence that finding cannot be made. Or (10) at least that is what we would argue to the appellate division and we suggest to your lordship that there is a reasonable prospect that the appellate division might accept that submission. We have also got to look at the events in perhaps a little more perspective because apart from the one big stayaway, which was not an allegation, a direct allegation in the indictment, it was never part of the state case that the November stayaway was organised by the UDF as part of some greater conspiracy. It entered the indictment very obliquely and early as a report of discussions which had taken place (20) concerning the stayaway. That is as far as it got into the indictment. It was never investigated in any detail at all. In one or two of the, I think in one or two areas there was some reference to it. But apart from that incident we are really concerned in this case with crowds of small numbers. We, if we go to the areas there is not a great deal of evidence about the numbers of people who came to meetings or the number of schoolchildren involved in incidents but we are talking about, in each of the little areas or towns, 100 or 200 scholars, a few hundred adults. Now the question we (30)

would/....

would ask is how can a revolutionary climate be created or how can the inference be drawn that there was a revolutionary climate from meetings which were comparatively small. We do not know what frequency they were held. By a few hundred school children. What sort of a revolution is that? No evidence of breakdown of essential services anywhere in the country, school dissent, yes there was a lot of evidence about school dissent but that was not really the focus of the indictment. But how can that result in ungovernability? It may be that the scholars, in a narrow sense, were ungovernable by (10) the school authorities but that is not treason. So, and this was also I think an aspect of the case which we were not asked to deal with in argument. I certainly, from my side, have no recollection of ever having been asked to deal with this in argument. And I do not think my learned friend Mr Bizos was but if he was he will tell your lordship. So on a very central part of the case - and we would like to examine all that evidence in relation to that. Now that is a core, it is a very important part of many of the findings in the areas and in each area we have got to look at difficult questions of (20) causation and responsibility because once again there was no direct evidence of planned violence. So we are into inferential reasoning in regard to the planning of violence. There was often no evidence at all as to the identify of persons who committed the violence. Now there was a lot of evidence that was not before the court and of necessity that had to be so because if we were to have looked at all 31 areas in the same detail as we looked for instance at the Vaal this case would still be going on and it would be never ending. And it is an impossible task for the accused to undertake, for anyone (30)

to undertake. But that, if it is an impossible task that means that that is just simply a difficulty that the state faces, if it chooses to charge in this fashion. But it cannot, by putting up patchwork evidence and insufficient evidence, ask - well let me put it differently. If there is insufficient evidence that is a consequence which will be carried by the state whose responsibility it is to prove its case beyond reasonable doubt and we would like the opportunity of arguing to the appellate division that the bits and pieces of evidence may give rise to suspicion and speculation but they are not (10) sufficient to lead to the conclusions which were found in relation to the 31 areas and there is a substantial case to be argued there. In some areas the Daleside conference loomed large. The finding which the court made was that the Soweto Civic Association had 18 representatives from different branches at the Daleside conference yet it went with the finding that the Soweto Civic Association did not organise or direct violence. There was the same finding in regard to at least one of the accused. If that is so, in the light of that finding is the characterisation of the Daleside conference (20) not open to a different interpretation and how does that affect the areas where the Daleside conference figures in the reasoning? Also some of the findings proceed upon inferences which we would like to argue to the appellate division are based on assumptions that COSAS and the UDF had full knowledge in the sense that they received full and accurate reports of events consistent with the evidence given by the state in this case, which was accepted by the court. But there has been no such evidence placed before the court. Nor is there any reason to believe that that is what in fact happened. It is much more (30)

likely/....

likely that the sort of reports that they were getting were the sort of reports which you heard from the 100 witnesses who were called. It is much more likely that they, if anybody went to as small a place as Somerset East to find out why the event took place that somebody would have said that the police put the sneeze machine on us and the crowd went wild, or that if somebody went to Tumahole and said what happened here that they would say the police used violence and the crowd rioted. Now if you are getting, that is the sort of information that is coming out - whether it is right or wrong it does not matter - one has got to find out for the purpose of the inferential reasoning from which one is going to justify a lot of these findings and the linkages with the UDF what the flow of information into the head office of COSAS or the regional concerns of COSAS, the head office of the UDF, what all that was. And we suggest that there is not any evidence to suggest that the information that they were getting is the same as the information upon which your lordship based the findings, whether that information is right or wrong. So again we would want to look at the sort of information which was coming out there and, so some of the conclusions there are open to debate on those points. Now these, and there are many other issues which are going to have to be argued in relation to the areas and we submit to your lordship that it would be wrong to deny us that opportunity and so we ask that the leave as far as the UDF is concerned should include that.

COURT: Mr Chaskalson you mentioned at the outset something about general leave on points of law. Apart from the documentation and the videos is there anything else that has to be argued?

MR CHASKALSON:/....

MR CHASKALSON: I do not think so in the ...

COURT: That is all I can think of.

MR CHASKALSON: I do not think so because I think the leave that your lordship has given us would entitle us to argue on the indictment insofar as there are any uncertainties in regard to the structural meaning of the indictment. Your lordship has given, I think we have covered the main sweep but for the areas and once that is there if that main sweep is not within what the indictment, there were arguments addressed to your lordship on the indictment and there may be arguments again in the areas in relation to the way the charge was formulated. But I think that that would be covered and in any event it is the sort of matter I would think which we cannot at this stage necessarily be expected to formulate details and it is the sort of matter that the appellate division always let you argue if there is any substance. But I would think, apart from the indictment, and how the facts and the findings and the case, the state is curtailed in any way by the indictment, there is something to do with dates and with things like that but that is a trivial matter in the broader context. I think the document, I think there may be instances about events outside of the indictment period but it seems to me those must all be really covered and it a hopeless task to try and sort out each one like that. I do not think your lordship intends to curtail us in that way at all and I am sure the appellate division would not construe it that way.

COURT: My idea is that as far as that sort of thing is concerned - I was merely concerned about factual issues, not to make the task of the appellate division impossible by absolutely flooding it with such a mass of fact that no

human can deal with it.

MR CHASKALSON: I understand the difficulty but I think your lordship does, or I hope your lordship will see the difficulty from our side and at the end of the day we, it is no good putting up an argument which has got nothing to it. I do not think that that is what we would do when we kick off there. It does not help your case, if you put up an argument which has got 50% bad points in it you lose the 50% good points and I think we would obviously approach our task from that viewpoint. For the rest I do not think I have any- (10) thing more that I would like to say. I could attempt to go through each of the areas but I really do not see any purpose in that. Your lordship knows the areas, I think I have covered some of the broader aspects in relation to them and I am content to leave it on that basis. My learned friend Mr Bizos is going to address your lordship in relation to the Vaal side of the case. I may address your lordship on some of the reservations of questions of law so I may come back again. But I do not, I think it will be better if your lordship has an opportunity of considering those documents. (20)

COURT: Yes I will read these in the tea adjournment and during the luncheon adjournment and then we will know where we stand.

MR CHASKALSON: As your lordship pleases. Well then I would like to let Mr Bizos continue. If your lordship feels you want me to address specifically other areas to be able to deal with my request in relation to the areas I am willing to attempt to undertake it but I do not think it is necessary unless your lordship feels that you cannot make an order without hearing me. Well that is not possibly a fair question.

COURT: It is very very difficult for me to put up (30)

arguments/....

arguments on your behalf and then ask you to deal with them.

MR CHASKALSON: Well I, no I am not, that was not what I was inviting your lordship, I would not like your lordship to say that I ought to think but I cannot address you on anything else other than this and ...

COURT: No I am certain that you will be able to keep me a month if you want to.

MR CHASKALSON: Well I do not want to my lord and I think I should let my learned friend Mr Bizos deal with the Vaal side.

MR BIZOS ADDRESSES COURT: Your lordship may have noticeed (10) that there are questions of law to be reserved in relation to the Vaal case. I merely draw attention to them now. My learned friend Mr Chaskalson will argue that matter after your lordship has had an opportunity of looking at them. There is also one draft special entry in relation to the Vaal case. It is the seventh in the schedule that has been handed in to your lordship. Relating to the attitude of the state in relation to making statements available. And that too will be argued by my learned friend Mr Chaskalson. We are asking for leave to appeal for all the Vaal accused that were convicted(20) and it is necessary, in our respectful submission, to be a little longer in view of your lordship's remarks on Monday in relation to this part of the case. We had tried in the time available to us, since your lordship's judgment was given, to try and categorise the pillars upon which the conviction against these accused rest and it would appear that your lordship's conviction is dependent upon the following: Firstly that strident language was used against councillors and calls were made on them to decrease the rent or resign and that they were defamed by being accused dishonestly and other (30)

matters./....

matters. Now I do not know that anyone was in any doubt that this was a common cause fact during the course of the trial, many admissions were made by state witnesses. The question though that arises is in relation to this finding of fact to what extent this can be taken into consideration in basing other findings of fact. We may be able to persuade the appellate division that a citizen has the right to speak loudly against corruption and dishonesty. We are not unmindful of the fact that your lordship indicated during the course of the examination of accused no. 10, and in your lordship's(10) judgment that only four persons were known by him to be dishonest, therefore the generalisation was not justified. Well in our respectful submission, having regard to the minutes, having regard to the evidence of Mr Louw and Mr Matthysen, having regard to the manner in which the meetings were conducted, that the allegations of corruption were not unjustified. They were found to exist by Professor Van der Walt and it raises a fundamental question as to whether one has to use polite language in crying out against persons of that calibre. Your lordship noted in your lordship's judgment that they (20) were called oppressors, the apostles of evil, all that is part and parcel, in our respectful submission, of the thrust and counter-thrust of political language. Your lordship may remember that whilst we were still in Delmas we had an admission by a political party which had or was seeking representation in Parliament which had used substantially similar words in relation to the government. And it may affect the right of the citizens of the country to express themselves vociferously without a danger that that, taken together with other facts, may make them guilty of some offence. The second finding (30)

is/....

is that there was a call for a stayaway. That too is common cause. The fact that is not common cause is your lordship's finding that those who participated in this call and in the asking of other people to take part in it foresaw or ought to have foreseen that it could not possibly be successful without coercion and that the illegality of their action was really based on that. I do not argue at great length at this stage that that was not the case which the accused were called upon to meet. The case which the accused were called upon to meet was one of direct violence and insofar as there were questions about foreseeability they merely went to the credit of the witnesses in order to prove or disprove whether there was that conspiracy to commit violence. The calling for and arranging of a march was also common cause. What is not common cause is the finding by your lordship that they foresaw that the march would lead to confrontation with the police, and violence. It is also common cause that those persons whom your lordship convicted took part in the march. But on your lordship's own finding in order to be convicted they had to have the foreknowledge that it would lead to confrontation with the police and knowledge that violence was actually taking place in the environs of the assembling of the march, on their way to the march and shortly after the march set off. Your lordship also took into consideration the subsequent conduct - and may I say with respect not so much of the individual accused but the VCA after the events of the 3rd. The other finding of fact which your lordship made was that their denials of material facts were not accepted and their denials in relation to any intent that may have been required was not accepted. We would submit, with respect, that that is

very/....

very briefly a fair summation of the basis upon which your lordship convicted these accused. And it would appear that the credibility of the accused, the state witnesses and the defence witnesses is an issue. We are not unmindful of the fact that the appellate division will not interfere with findings of fact unless we are able to show that there are misdirections in arriving at that conclusion and it is with some regret that I have to say this but it is unfortunately necessary for the purposes of this case that if we are able to show that your lordship descended into the arena and that your lordship's (10) findings of fact may be challenged on that basis then the appellate division may have to make other findings. Now there is one general submission that I want to make in relation to that and that is this, we have looked very carefully through annexure Z and of the 126 witnesses called by the defence approximately 120 have been disbelieved. Sometimes, we will try and show your lordship for the purposes of leave to appeal in the appellate division, in harsh and sometimes, with respect, emotional terms. By way of contrast we hope to be able to persuade your lordship and the appellate division where state (20 witnesses were actually shown to be untruthful beyond reasonable doubt that such language is not used but they are merely described as unreliable, for whose evidence corroboration may have to be sought elsewhere. This overwhelming improbability, in our respectful submission, that like Diogenes we were unable to find an honest man or woman in the country and that the state had the prerogative of capturing them all before we got to them may strike, with respect, the appellate division as an improbability and examine the evidence afresh in order to determine whether or not your lordship's finding is well (30)

founded on the record.

COURT: Apart from numbers Mr Bizos I think it would then be proper to convince me that in respect of each and every witness there has been, the court has erred. One cannot take a general view, then you must take a particular witness and say well these six reasons were given by the court and these six reasons are all wrong.

MR BIZOS: I have notes to that effect and I intend addressing your lordship on that and I may say also that we will be able to draw to your lordship's attention that where witnesses (10) have been rejected outright by your lordship they have been relied upon in some detail in order to support the state case. But those details it is our duty to draw to your lordship's attention in order to persuade your lordship that we are entitled to leave to appeal.

COURT ADJOURNS FOR TEA. COURT RESUMES.

COURT: Before your continue Mr Bizos Mr Chaskalson I have had a look at the schedule of special entries - subject to what Mr Jacobs has to say and subject to what I have to say I have not much to quibble about except that the formulation is (20) in such a way that the judge agrees with what you say here, which is clearly not the position.

MR CHASKALSON: No I understand that my lord ...

COURT: So you will have to look at your formulation, to put it clearly that this is what you say but not necessarily what I say.

MR CHASKALSON: I understand that my lord.

COURT: That is the first part. You can look at that part. The, that can be done by way of a sort of an introduction. Just a few words as part of the introductory paragraph I (30)

think./....

think. As far as three is concerned of course I do not agree and of course it must be made clear that if you want to argue this I have no problem with you arguing paragraph 3 at all - that is up to you - but as long as it is not stated on the record in a way as if it appears that I agree with the contents of paragraph 3.

MR CHASKALSON: I understand that my lord. My lord ...

COURT: Let me just take you through it and then you can address me on it later when your turn comes again. I will hear Mr Bizos first. On paragraph 4 I would like to hear your authority, that is on the right to curtail the oral argument. On 5 and 6 I would like to hear your authority. Yes that is all I have to say on the special entries.

MR CHASKALSON: There is one suggestion I might put to your lordship which may meet the first point that your lordship, after the words "in that" one could say "it is intended by the accused". That might meet the difficulty your lordship raised.

COURT: Yes.

MR CHASKALSON: Would that be sufficient or would your lordship want me to give thought to it?

COURT: No I do not think it need be much wider than that.

MR CHASKALSON: As your lordship pleases.

COURT: Yes Mr Bizos?

MR BIZOS: I intend referring your lordship to a number of cases. I have photostats here which may expedite matters if your lordship would receive them. I am sorry that I have not got another copy, only two copies were made late last night and there was actually no disrespect intended but it is the only copy that we do have available. The first case that

I want to refer your lordship is to is Solomon & Another v The Vaal. I want to refer particularly to page 580B to 581B

MNR JACOBS: Net voor my geleerde vriend aangaan, daar is nie vir ons 'n afskrif gegee nie en nou word daar nie eers selfs vir ons die verwysing gegee dat ons maar op ons eie later kan ingaan nie.

MR BIZOS: I am sorry, I should have given the reference. 1972 1 SA 575 (A).

COURT: Could you give Mr Jacobs the whole list you are going to refer to then he can get the books out. (10)

MR BIZOS: As your lordship pleases. Before analysing the evidence in this case and dealing with the different issues raised on the pleadings I have to mention a matter of general complaint raised by counsel for the defendants concerning the conduct of the judge a quo at the trial. He submitted that the frequent interventions during the course of the trial showed that he had associated himself too closely with the conduct thereof.

COURT: The judge was Beyers, J.P. You will probably refer me to a number of other cases in which he figures. (20)

MR BIZOS: No my lord, have I got the wrong case? I have Solomon & Another v The Vaal.

COURT: Yes, and the judge to whom reference is made was Beyers, J.P.

MR BIZOS: Your lordship means at the court a quo.

COURT: Yes.

MR BIZOS: Yes my lord. I will also refer your lordship to the next case ...

COURT: In which he also figures.

MR BIZOS: No my lord, in which Didcott, J. figures. (30)

COURT:/....

COURT: Yes. We all get our turn it seems.

MR BIZOS: Thereby denying himself the full advantage usually enjoyed by the trial judge who is the person holding the scale between contending parties is able to determine objectively and dispassionately from his position of relative detachment the way the balance tilts. And then Wessels, J.A. in Hamman v Moolman at page 344 E-F counsel submitted that a trial judge's impressions of the defendant's witnesses and his findings as to credibility should therefore not be afforded the weight normally given to the findings of a trial judge. (10) It is regrettable that if we have to consider a complaint of this nature but it is necessary to do so in the interests of justice. A perusal of the record reveals that the learned trial judge often and unfortunately quite unwarranted, intervened in the proceedings while defendant's counsel was cross-examining plaintiff's witnesses and during the hearing of the defendant's case. It is unnecessary to quote the numerous passages in question. Suffice it to say that during the hearing of plaintiff's case the learned judge asked certain questions and made certain observations which reflected (20) favourably upon the plaintiff's case and adversely upon the evidence that defendant's counsel asserted would be adduced for the defendants. Furthermore during the hearing of defendant's case the learned judge examined their witnesses in such a manner and made observations in the course thereof of such a nature as to evince his hostile disbelief or at any rate his doubts about their credibility. Those and other interventions by the learned judge must have been most harrassing to defendant's counsel but fortunately he did not allow the actual presentation of defendant's case to suffer thereby. (30)

However/....

However by descending into the arena of the conflict between the parties in the manner the learned judge might well have disabled himself from assessing with due impartiality the credibility of the witnesses, the probabilities relating to the issues and the amount of the general damages sustained by the plaintiff. Even if that were not so such interventions might well have created the impression - at least in the mind of the defendants - that he had so disabled himself and that he was favouring or promoting the plaintiff's cause and prejudicing the case against the defendants. In that regard it must be borne in mind that justice should not only be done but should manifestly and undoubtedly be seen to be done. Consequently in my view it is necessary that this court itself determine the issues between the parties on the recorded evidence without relying on the findings made by the learned judge and so dispel any possible impression that justice has not been done. Fortunately that can be done without much difficulty for, as will presently appear, the assessment on the demeanour of the witnesses is not essential for the proper determination of their credibility. Otherwise it may have been necessary to remit the case with the proper directions for complete rehearing. Insofar as demeanour is concerned I do not think that it is really necessary for me to remind your lordship that you actually relied very rarely, if ever, on demeanour of the witnesses. So that there ...

COURT: Specifically set out.

MR BIZOS: Yes my lord, this is what I am saying, no this is what I am saying. But that of course has the advantage, we submit, as far as the application for leave to appeal are concerned and what we would hope to be appellants in the

appellate/....

appellate division will be in as good a position to assess the situation without the benefit of having seen the witnesses. The other case that I want to refer your lordship to is Hamman v Moolman. The references have been given to my learned friend, 1968 4 340 at 343F to 345A.

COURT: Your reference is three? Where are you quoting from?

MR BIZOS: From 343 F

COURT: To 344?

MR BIZOS: To 344 C. And there counsel for the defendant again contended an appeal before this court: (10)

> "Firstly that the defendant had not been afforded the full advantage or the elementary right to which every litigant is entitled under our system of administering justice, both civil and criminal, namely the right to have matters of dispute determined by a court on a fair and proper trial between the parties concerned. The gravamen of the complaint is the extent and nature of the learned judge president's intervention in the conduct of the case, particularly when defendant and his wife were testifying, hampered the defendant in the (20) proper presentation of his case. It was submitted, furthermore, that by the manner of his intervention the learned judge president so closely associated himself with the disputations between the parties that he virtually disabled himself from properly assessing the worth of the witnesses and fairly determining the matters in issue between them. In developing his argument in support of the abovementioned counsel for the defendant furnished the court with certain statistical information extracted from the record which was then set out. Counsel for (30)

the/....

"the defendant fairly considered that a purely quantitative analysis of the intervention by a judge in the conduct of the case would not by itself necessarily indicate the frustration of a party's rights to the proper presentation of his case. Counsel might not be sufficiently skilled or experienced in the important art of eliciting relevant information by means of the examination or cross-examination of witnesses, particularly where complicated issues of fact, including issues arising from evidence of a technical nature require determination by the court. The need for a judge to intervene in order to understand the purport of evidence or to clear up points that have been overlooked or left obscure may no doubt arise more frequently in such circumstances than in cases where counsel are reasonably skilled and experienced in the art of presenting evidential material or the issues to be determined are relatively uncomplicated. I might remark that in the present case both parties were represented by senior counsel and a perusal of the record shows that the issues of fact which required determination were not of an unduly uncomplicated nature. It is, therefore, a matter which occasions some surprise that in this case the learned judge president should have found it necessary to intervene to the extent apparent from the record."

Now your lordship, in the preface of your lordship's judgment, if we understand it correctly, described the difficulties that a court finds itself in and your lordship complained particularly about the length of cross-examination. And also your lordship expressed views as to how matters should be put

right/....

right and what the court's function should be. Whatever the position may be in regard to that we would submit, with the greatest respect, that on the appellate division authorities your lordship, with the greatest respect, misconstrued your lordship's function as did Didcott, J. in the Raal case. May I refer your lordship to the Raal case, 1982 1 SA 828 at, in the first instance at 830F to 831A where there is a quotation from the judgment of Didcott, J.

> "In applying for leave to appeal his counsel - he did not appear before us on the appeal - relied inter alia on an irregularity allegedly committed by the learned judge during the proceedings."

Your lordship has it? It is ...

COURT: No I am still looking for it.

MR BIZOS: 830.

COURT: 830F. Yes thank you.

MR BIZOS: "The allegation was that while the appellant was testifying in his defence the learned judge questioned him in a manner that was, having regard to his judicial functions, impermissible or excessive. Apropos hereof the ..."

COURT: Could we now pause here. Which Vaal accused was, according to you, excessively questioned?

MR BIZOS: Well we will show your lordship. I think that, I do not know whether your lordship noticed it but that in the argument on the 31 areas ...

COURT: But I am talking about the Vaal accused. You are addressing me on the Vaal accused.

MR BIZOS: Yes my lord.

COURT: Yes, now how do you get to the 31 areas then?

MR BIZOS: In that document my lord, in the argument that was handed in in writing.

COURT: Yes, the written argument?

MR BIZOS: The written argument. There is a schedule in relation to accused no. 10.

COURT: Yes, who was discharged.

MR BIZOS: Yes but my lord, this is correct but ...

COURT: So no. 10 is not complaining?

MR BIZOS: No my lord, what we are trying to do is this that the manner in which your lordship questioned accused (10) no. 10 ...

COURT: And thereafter discharged him.

MR BIZOS: And thereafter discharged him.

COURT: Yes. So on that basis that I questioned him excessively and then discharged him you are alleging I was prejudiced.

MR BIZOS: No but, my lord what we are relying on this that your lordship's questioning of accused no. 10 indicates an approach to the facts of the case, not alone accused no. 10 but others. But your lordship's conduct in relation to (20) accused no. 10 is not irrelevant to the issue that I am addressing your lordship and we are not going to rely only on accused no. 10 but on the record as a whole and I have a schedule which I am going to ask your lordship's leave to hand in where your lordship's interventions are set out, which taken together with no. 10's interventions, on a selective basis amount to over 500 interventions in the trial. Which has been ...

COURT: In a trial of three years. That is very little Mr Bizos. (30)

MR BIZOS:/....

MR BIZOS: Quantitatively, as indicated in the case, quanti-
C.1576 tatively it may or may not be but the question on the matters upon which your lordship questioned accused persons expressed disbelief, and other issues. We want to refer your lordship to them in order to try and establish that your lordship ...
COURT: I set out, you can argue that Mr Bizos, I set out right at the outset of my judgment that my approach was, and it still is and it will always be, that if I have anything which crosses my mind I put it squarely in front of everybody so that it can be dealt with. That I have stated in the (10) preface to the judgment and that I reiterate now because that I will always do and I think that is fair to everybody concerned, so that it can be met by everyone. And if that is prejudice then I do not know what is prejudice.
MR BIZOS: May I make the submission that your lordship's view of what your lordship's function in relation to the examination and cross-examination of witnesses is substantially similar to that which I was about to read to your lordship, was Mr Justice Didcott's.
COURT: Only a much diluted version I believe. (20)
MR BIZOS: Well that is a question which I would like to address your lordship on but may I, before we proceed to the details, make this submission and ask for your lordship's forbearance and that is this, this is not a pleasant task that I am performing but it is a task which in our respectful submission has to be done and what I would appeal to your lordship to, what your lordship's approach should be is this that once there is this submission made it is very difficult for your lordship and indeed for any human being to sit upon judgment upon one's own conduct and that is an additional ground for (30)

granting/....

granting the application now before your lordship for leave to appeal because here we have a situation where your lordship actually goes as far as to set out as to how cross-examination should proceed in the future and what the court's functions should be. Without wishing to be disrespectful it is not in accordance with what the appellate division has said in these cases.

COURT: That is also what I set out in the preface Mr Bizos.

MR BIZOS: Yes, I know my lord.

COURT: And that is not what I said I did in this case. Had I done it we would have shortened the case by half, a year and a half.

MR BIZOS: Yes, that is so. What I am busy doing is submitting to your lordship that your lordship's view of your lordship's function is no different to the words used by His Lordship Mr Justice Didcott. I want to read to your lordship what His Lordship Mr Didcott said. What His Lordship Mr Justice Trollip and their lordships Muller and Van Heerden J. said in relation to that and then try and demonstrate to your lordship with the schedules and the facts and references to the record that the submission may well be considered to be well founded by the appellate division. I am sure, and it would be almost a superhuman task to persuad anybody involved in the administration of justice who tries to do his best according to law to be persuaded that he actually did these things. But we sometimes do. This is what Didcott J. said:

> "It is not for me to say anything on the aspect of the matter beyond this. In this case as in others I consider that I am not a referee in a game who is here merely to blow a whistle. I am here to discover, insofar as I

can,/....

"can, the truth of the matter. That not infrequently involves questioning one or another and sometimes a number of the witnesses. They may be accused or defence witnesses. It depends on whether the evidence is evidence that in the court's view calls for much more detailed probing than it has received or which calls for particular aspects to be investigated that occur to the court as important and may not necessarily occur to counsel as being important. They may sometimes turn out, in the court's view, not to be important in the long run but in the meantime they must be investigated in case they are. The appellate division must decide whether the reasonable limits of judicial questioning, whatever such may be, have been exceeded in this case."

And this is what we are really asking for here and I am going to refer your lordship to the other cases and categorise for your lordship what the appellate division sets out is impermissble. There is grave difficulty as to what is permissible but what is impermissible in our respectful submission is fairly clear. And then Trollip, J. says, at 831 B, setting out Hepworth's case and that is so well known as the springboard that I do not really wish to refer your lordship to it. And then Trollip, J. says at 831G:

"Much depends of course on the particular circumstances of the trial itself as to whether or to what extent and in what form or the manner such questioning should be indulged in by the judge. Thus if the accused is not represented by counsel the judge should and ordinarily would assist him to put his defence adequately, if necessary by the judge himself questioning the

"prosecution witnesses as well as the accused and his witnesses. The need to do that is naturally far less where the prosecution and defence are both represented by counsel. While it is difficult and undesirable to attempt to define precisely the limits within which such additional questioning should be confined it is possible, I think, to indicate some broad well known limitations relevant here that should generally be observed."

And his lordship refers to Singwala's case. The first is:

"According to the abovementioned dictum the judge must(10) ensure that justice is done. It is equally important, I think, that he should also ensure that justice is seen to be done. After all that is a fundamental principle of our law and public policy. He should therefore so conduct the trial that his open mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused."

And then certain cases are referred to.

"The judge should consequently refrain from questioning(20) any witnesses or the accused in any way that, because of its frequency, length, timing, form, tone, contents or otherwise conveys or is likely to convey the opposite impression. Secondly a judge should also refrain from indulging in questioning witnesses or the accused in such a way or to such an extent that it may preclude him from detachedly or objectively appreciating and adjudicating upon the issues being fought out before him by the litigants."

And then your lordship sees the reference to Yule v Yule (30)

which/....

which your lordship quotes in the preface to your lordship's judgment:

"If he does indulge in questioning:

'He so to speaks descends into the arena and is liable to have his visions clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation.'"

And then a quotation from the Hamman and Moolman case:

"The full advantage usually enjoyed by the trial judge, who is the person holding the scale between the contending parties is able to determine objectively and dispassionately from his position of relative detachment the way the balance tilts. The quality of his views on the issues in the case, including those relating to the demeanour or credibility of witnesses or the accused or the relevant probabilities may in consequence be seriously impaired and if he is sitting with assessors that may well adversely influence their deliberations and opinions on those issues.

3. A judge shall also refrain from questioning a witness or the accused in a way that may intimidate or disconcert him, or unduly influence the quality or nature of his replies and thus affect his demeanour or impair his credibility."

And then again a quotation from Yule's case:

"It is further to be remarked, as everyone who has had experience of these matters knows, that the demeanour of a witness is apt to be very different when he is being questioned by the judge to what it is when he

is/....

"is being questioned by counsel, particularly when the judge's examination is, as it is in the present case, prolonged and covers practically the whole of the crucial matters which are in issue. It therefore follows that a right or duty of a judge to examine the witnesses or accused in a criminal case is not nearly as extensive as the learned judge seems to predicate in the above quoted extract from his judgment in granting leave to appeal."

Now your lordship is familiar with the Salem case in 1987 (10) 4 SA 772 and particularly the passage at 791J. May I read it in the translation in the headnote. My pronunciation in English may just be a little better than the Afrikaans:

"Impatience is something which a judicial officer must, where possible, avoid and in any event always strictly control. It can impede his perception, blunt his judgment and create an impression of enmity or prejudice in the person against whom it is directed. When such person is an accused such an impression will, to a greater or lesser extent undermine the proper course of justice. (20) It can also lead to a complete miscarriage of justice. A judicial officer can only perform his demanding and socially important duty properly if he also stands guard over himself, mindful of his own weaknesses such as impatience and personal views and whims, and controls them."

Your lordship refers to Jones v National Board in your lordship's preface to the judgment. Your lordship will see that this is the Queen's Bench report, your lordship refers to the other but the All England Law Reports reference has also (30)

been/....

been put up for controlling purposes. And I want to read the passage because in our respectful submission the opening words, as well as the contents, are important:

"No one can doubt that the judge in intervening as he did was actuated by the best motives. He was anxious to understand the details of this complicated case and asked questions to get them clear in his mind. He was anxious that the witnesses should not be harrassed unduly in cross-examination and intervened to protect them when he thought necessary." (10)

It is at 63 my lord.

COURT: Yes go on. I have read it before.

MR BIZOS: As your lordship pleases:

"He was anxious to investigate all the various criticisms that had been made against the board and to see whether they were founded or not, hence he took them up himself with the witnesses from time to time. He was anxious that the case should not be dragged on too long and intimated clearly when he thought that a point had been sufficiently explored. All those are worthy motives (20) on which the judges daily intervene in the conduct of cases and have done so for centuries. Nevertheless we are quite clear that the interventions, taken together, were far more than they should have been. In the system of trial which we have evolved in this country the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question (30)

'How's/....

"'How's that?'. His object above all is to find out the truth and to do justice according to law in the daily pursuit of it. The advocate plays an honourable and necessary role. Was it not Lord Elgin, L.C. who said in a notable passage that the truth is best discovered by powerful statements on both sides of the question. And Lord Green who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations. If a judge, said Lord Green, should himself conduct the examination of witnesses he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict. Yes he must keep his vision unclouded. It is all very well to pay justice blind but she does better without a bandage round her eyes. She should be blind indeed to favour or to prejudice but clear to see which way lies the truth and the less that dust there is about the better. Let the advocates, one after the other, put the weights into the scales, the nicely calculated less or more. but the judge at the end decides which way the balance tilts, be it ever so slightly. So firmly is all this established in our law that a judge is not allowed in a civil dispute to call witnesses whom he thinks might throw some light on the facts. He must rest content with the witnesses called by the parties. So also it is for the advocates each in his turn to examine the witnesses and not for the judge to take it upon himself, lest by so doing he appeared to favour one side or the other."

Then:

"It/....

"It is for the advocate to state his case as fairly and strongly as he can without undue interruption, lest the sequence of his argument be lost. The judge's part in all this is to harken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure, to see that the advocates behave themselves seemly and keep to the rules laid down by law. By wise intervention that he follows the points that the advocates are making and can assess their worth and at (10) the end to make up his mind where the truth lies. If he goes beyond this he drops the mantle of judge and assumes the robe of an advocate and the change does not become him well. Lord Chancellor Bacon spoke right when he said

> 'Patience and gravity of hearing is an essential part of justice and an overspeaking judge is no well tuned symbal.'

Such are our standards. They are set so high that we cannot hope to attain them all the time. In the very (20) pursuit of justice our keenness may overturn our sureness and we may trip and fall. That is what happened here."

Now it is our submission, on the facts that we are going to refer your lordship to, that that too has happened here. The other case that I want to refer your lordship to is the Seleke(?) case. And it is our unpleasant duty to submit that there were irregularities that were deposed to by witnesses, particularly state witnesses, in cross-examination. We submit that your lordship made it difficult for counsel to investigate those irregularities by interrupting the cross- (30)

examination,/....

examination, calling upon counsel to justify relevance on very simple questions and in some instances actually blocking the enquiry. Now we submit that that is not permissible and I rely on this case, we rely on the case of S v Sele 1965 1 82 and more particularly at 99E to 100D. This was a case where the question of a confession and the conduct of a police officer was in issue. There was an aspect of this case which was disclosed during the trial and to which I think reference should be made, on page 99E.

"I refer to the fact that while the appellant was in police custody he was apparently so seriously injured that a district surgeon considered it advisable that he should be removed to hospital for examination and treatment. In dealing with the matter the presiding judge said that the police called as witnesses and denied that they had all assaulted him, but the facts remain, continued the learned judge, that the accused was in fact assaulted. We do not know who did it and it will require much more investigation to decide who did it. I am not going to comment on it or reprimand anybody because, as I have said, we do not know who did it and we do not consider that any assault on the accused can affect the merits of the case. We did not get to the bottom of what happened and we are not going to say that any of the policemen are, on this particular point, not truthful. In any event the assault must have taken place on the 24th or on Saturday the 25th. That is long after the pointing out had already been done. If an assault, which led to the appellant being sent to hospital on 26 May 1963, took place whilst he was in the custody of

the/....

"the police, other than those at Marshall Square who were connected with the investigation, for isntance whilst he was in the custody of the police at the Langlaagte Police Station from whence he was removed to hospital, then of course the fact that such an assault may well have been entirely relevant to the enquiry before the court. It was then both unnecessary and undesirable that it should embark upon the investigation in regard thereto. Nevertheless in my view it is to be regretted that the presiding judge did not then and there take some steps (10) to try to see that the question of such assault was not investigated, either by the Attorney-General or the Commissioner of Police. A judicial officer can never close his eyes to the gravity of the fact that a prisoner or accused person has been assaulted whilst in the custody of the police. This was not a case of mere allegation by an accused person that he had been assaulted, an allegation so often quite unjustifiably and regrettably made against the police or prison officials. There was strong independent corroborative evidence of the fact (20) that such an assault in such a case it seems to me a judicial officer, if he is not called upon himself to investigate the matter, or cannot do so should cause some investigation to be officially initiated even if the alleged events took place many months earlier, as was the position in this case. The possible assault by the police in that case took place on or about the 24th of May 1963. At the hearing of the appeal this court was told by counsel that they knew of no enquiry being held of the circumstances which led to the appellant being (30)

removed/....

"removed to the Baragwanath Hospital from the Langlaagte Police Station. Despite the considerable lapse of time it may still be possible for it to be ascertained by the relevant authorities, if they did not already know, what circumstances gave rise to such removal to the hospital."

And then his lordship on appeal orders an investigation to take place. The reason why we refer your your lordship to this case is because the record shows that not only was your lordship not concerned about it, as Williamson, J. says (10) that your lordship ought to have been when IC.8 complained of an assault but your lordship actually ruled, after numerous interruptions of the cross-examiner to justify what relevance the date was or where the place of the assault took place or where this was getting us all to. On a matter which obviously became particularly relevant, was to our knowledge relevant at the time and it became particularly relevant thereafter. The gravity of the situation is not to be overlooked, with the greatest respect and I will start on the facts with this last matter before I go on to the other. IC.8 gave evidence (20) which, if true, would have made some twelve or thirteen accused persons guilty of murder - and I say this because of his false evidence that Raditsela gave the purpose of the march to go and kill the councillors. If this evidence was believed, that the march was responsible, one would have expected, it would have had absolutely devastating results, certainly on the liberty of thirteen or fourteen accused and may even have endangered their lives.

COURT: Was he disbelieved or was it not proved?

MR BIZOS: I would say that we will, we may be able to (30)

persuade/....

persuade the appellate division that he was a deliberate liar in this respect.

COURT: Well that you may or may not be, Mr Bizos, but on the findings of this court was the finding that he was deliberately lying or was the finding that as he is an accomplice and as one has to be very cautious it was not proved?

MR BIZOS: Your lordship has correctly represented your lordship's finding.

COURT: Yes. Now on what basis do you then say that it was found that he was a liar and that so many people would have innocently been taken to the gallows by his evidence?

MR BIZOS: What I said my lord ...

COURT: His evidence was not accepted by this court. Full stop.

MR BIZOS: No my lord, what I am saying is this, had his evidence been accepted it would have had dire consequences for thirteen accused. We must take ourself to the point where he was being cross-examined, where serious charges were faced by the accused and where he gave damning evidence against them.

COURT: Yes.

MR BIZOS: It comes out, it comes out that this witness was assaulted. I submit that it was your lordship's duty in terms of the judgment of Williamson, J., not only to try and cut short the cross-examination on that ...

COURT: But to hold an enquiry?

MR BIZOS: Not to hold an enquiry but to hold, certainly to allow cross-examination to proceed.

COURT: As to what?

MR BIZOS: As to who the persons were who assaulted him.

COURT: And then when we have found that? How does it help the finding in this case?

MR BIZOS: To enquire who was responsible and what was his connection, may I finish my sentence my lord?

COURT: Yes finish your sentence Mr Bizos. This matter we argued at the time. There was a ruling given on it at the time, reasons were given at the time. You need not reargue the case.

MR BIZOS: No I am arguing my lord that your lordship's view of the matter, and your lordship's ruling may have been wrong and in relying that your lordship's view may have been wrong in curtailing cross-examination in the manner in which your (10) lordship tried to curtail and did succeed ...

COURT: I think Mr Bizos in this case you got more scope in cross-examination than was your due. You are very lucky actually.

MR BIZOS: Well my lord....

COURT: And it applies to the state too. And that is where this case went wrong, as I said in the preface to this judgment and the last thing you and Mr Jacobs can complain about in this case is that your cross-examination was curtailed.

MR BIZOS: In relation to the cross-examination as to who (20) assaulted IC.8, the cross-examination was curtailed.

COURT: Yes. Go ahead.

MR BIZOS: And to what end your lordship asks, and the submission that I make in relation to that is this, we could have identified who it was that had assaulted him in order to, in order to implicate people into an allegation of murder and how that person was connected and how that person was connected with the investigation team that brought this case to your lordship. And if we determined that, if we determined that then it would have affected not only the evidence of IC.8 but the evidence(30)

of/....

of other witnesses because it is a particularly relevant fact as to how an investigating officer has behaved who is in charge of witnesses. Now the other matter that IC.8 referred to is the manner in which his statement was taken and I pose this simple question, what would your lordship's view have been if four or five members of an attorney's firm spent four months taking the statement of a witness and on his own evidence suggesting to him which answer would have been favourable and which would have been unfavourable? Would your lordship have left that matter unattended to? With the greatest respect my lord, or would your lordship have wanted to know who did it, why and have called them into the witness box to explain their conduct? Because again this was the evidence of the witness, it is uncontradicted. The manner in which they behaved in relation to IC.8 is particularly relevant to how other witnesses' statements may have been obtained who were in detention. And if, we would have asked these persons whose statement had they been responsible for taking. Now, and whilst I am dealing with IC.8 he is the person who found it necessary to tell your lordship, brazenly, that he had not been assaulted and thereafter he admitted that he had been assaulted and that he thought that the same treatment would be meted out. That again raises questions which should have been of interest to your lordship at that time. Where are these witnesses kept and are they completely free of the influence of the persons who have taken their statements? The moment I started cross-examining IC.8, with the greatest respect, as to the circumstances under which his statement was taken, with the very first question my learned friend Mr Fick was on his feet to object on the ground of irrelevancy.

The/....

The record will show that I had to justify practically all the questions that I had to ask, thereafter, on the grounds of relevancy. And the record will show, in our respectful submission, that your lordship actually believed at that time that the questions that I was asking were irrelevant. As it turned out when the matter, after grave difficulty, being on one's feet, the matter did come out that he had been assaulted, that he had been programmed and when we referred your lordship to the authorities as to what effect that sort of conduct has on the credibility of a witness then in retrospect the relevance of all the questions that I had to ask IC.8 became clearer. IC.10 complained of improper conduct and it is with regret that I have to make the following submission that as soon as she said that her evidence had been contrived by those involved in preparing it for the state your lordship lost all interest in what she had to say. That is not a discredited witness. The section, if my memory serves me correctly, is 190, provides specifically as to how a witness is to be discredited. A young person saying that she was compelled to give evidence against Mr Lekota, accused no. 20, and that she gave her evidence under duress but that it was false is not a discredited witness because the issue is was there duress or was there not duress and that was not determined. The mere, if a witness changes her evidence - and this is really the fundamental issue which your lordship overlooked at the time, with the greatest of respect, and it has importance on other witnesses. It is not enough to merely disregard the evidence. If a witness gives two completely inconsistent versions then that is a discredited witness. If a witness gives different versions but says that the one

version/....

version was given under duress that is not a discredited witness. The duress has to be investigated before she can be discredited.

COURT: Why?

MR BIZOS: Because, in our respectful submission ...

COURT: A witness Mr Bizos is called to prove fact (a), the witness is discredited, fact (a) falls away. One cannot run into all sorts of side issues and investigate all sorts of side issues. That is the function of you, your attorney, civil matters and the police and complaints there but a court has to decide the issues before it on the evidence before it. It cannot enlarge the scope of its enquiry and thereby sit six years instead of three years.

MR BIZOS: May I pose a question, with the greatest respect, rhetorically. Why did your lordship Mr Bam to come and explain his conduct?

COURT: Because Mr Bam was an officer of the court Mr Bizos and that is the difference.

MR BIZOS: With the greatest of respect they both ...

COURT: And there were grave allegations made against Mr Bam.

MR BIZOS: To say, for a young person to say that she was programmed by the investigating officers and others into giving false evidence against no. 20 is also a very grave allegation.

COURT: That is an, but the investigating officer is not an officer of this court Mr Bizos.

MR BIZOS: He is very closely connected. He is very closely connected with the investigation of this ...

COURT: Well you have made your point, go ahead.

MR BIZOS: There were other witnesses of a similar nature, but what we see in your lordship's judgment is this, to return to IC.8, although he admits that he committed perjury before his lordship, before your lordship, he is characterised as an unreliable witness. Defence witnesses who contradicted themselves as to time and place and position in the march are untruthful witnesses. And it may well be that we will be able to persuade the appellate division to disregard your lordship's credibility findings and that on the record another finding may be made. I have already referred your lordship to the portion of the written heads of argument relating to accused no. 10. I do not know whether your lordship's copy of the argument handed in was actually numbered. Mine is not and I think they were on various topics ...

COURT: I think it was a loose section, that portion on accused no. 10.

MR BIZOS: Yes. Your lordship will have it. It is a six and a half page, if my memory...

COURT: Yes I have it. I went through it Mr Bizos because you had stated that I cross-examined the witnesses for five pages and I could nowhere find five pages but it is very irrelevant actually whether it is four or five or three.

MR BIZOS: The document is five pages my lord.

COURT: I know that, but where it all arose is from a statement by you that I cross-examined this accused for five pages and then I asked you for a reference. You did not give a reference and in the end you handed me this document and then I looked at the document to see whether there are any five pages and I could not find five pages. But maybe I did not look properly Mr Bizos.

MR BIZOS: Perhaps we can clarify that.

COURT: But it does not matter at all whether it is three or four or five pages.

MR BIZOS: Yes, as your lordship pleases. What we have done is to have, to draw another schedule of the other witnesses which I would ask for leave to hand in, of instances where your lordship ...

COURT: Yes. Do you perhaps know which witnesses were referred to because to merely give the volume makes it a bit awkward. (10)

MR BIZOS: Yes, I am sorry, it was drawn up hurriedly. I will go through it with your lordship and will refer to the witnesses. Or if your lordship wants to, I have it on mine in my handwriting and we can very easily and quickly transfer it if your lordship will have it in handwriting during the adjournment by putting on the left-hand the name of the witness. If that will be of assistance.

COURT: Yes, I see it is volume 4, so that must be one witness, volume 8 I think that must be another.

MR BIZOS: I actually have those names and I am sorry that, (20) it was something that I, that was done, the typing was done mechanically but I found it necessary to put the names down so that I can remind myself in relation to the matter. So if your lordship would allow us to put in the names.

COURT: Well you can do that during the adjournment.

MR BIZOS: During the adjournment the attorneys can do that. Now the categories of complaint are the following. We submit that reading the schedules as a whole that there is a discernible difference of approach to state witnesses and defence witnesses. Secondly that there is extended questioning (30)

of/....

of witnesses, both during the evidence-in-chief and cross-examination. Thirdly interruption of cross-examination, blocking of avenues and extending protection to witnesses when such protection was patently not needed. Impatience, particularly with defence counsel.

COURT: Which defence counsel?

MR BIZOS: I would rather not personalise the matter but I think ...

COURT: Yes, let us leave it in the air Mr Bizos, we both know. (10)

MR BIZOS: I think I may be able to refer your lordship to passages which, during Mr Tip's attempts to cross-examine some witnesses but I will not complain in relation to myself unduly. Because there is a difference ...

COURT: Yes, what is your next point? I have written it down.

MR BIZOS: As your lordship pleases. Then the introduction of themes and evidence...

COURT: Themes?

MR BIZOS: Themes and evidence into the case. I will give your lordship the following examples. Matters such as that (20) opposition to the council system would lead to chaos, the importance or otherwise of the role played by children, what happened in other areas, long questioning in relation to ...

COURT: Is that a new point or is it under themes?

MR BIZOS: Still under themes my lord. In relation to songs, the non-payment of rental, and we will try and show to your lordship that it was on those very issues that were introduced by your lordship for the first time that some of the credibility findings are based and some of the facts found to convict the accused are based. The next matter is that (30)

there/....

there are a number of instances where defence witnesses, and sometimes not known to your lordship, in stressful circumstances were addressed by your lordship in a manner which was completely disconcerting and it was difficult actually to lead them in-chief. We will collect them all but so that it may become apparent, the sort of matter that we have in mind, telling a young girl "What did it take you three years to pass one standard" when it turns out that the unfortunate woman, the unfortunate young woman had been in detention on and off during the period, but we will give your lordship the (10) references. Telling a school teacher "If you cannot explain a simple transaction like this how do you manage to teach your class anything". Those are the sort of things which make an impression on witnesses and an impression on the accused which ought not to be allowed to happen. The other heading is that your lordship, with the greatest respect, assumes - and I am sorry to use the expression but your lordship knows better - how we should consult with our accused, what investigations we should make, how long we need in order to prepare the cross-examination, how we should conduct the cross-examina- (20) tion and this was, with the greatest respect, evidenced to us right at the beginning when we asked for Mr Branders' cross-examination to stand down. It appears in volume 4. Your lordship will recall what Mr Branders' evidence was, if nothing else it made an important accused in this case, all the accused in this case are important, but an important official of an organisation which your lordship found to have had considerable support, also found that it had gone over to violence, that he behaved - to use his own words in jest, I had better not repeat them - that he behaved in a completely (30)

irresponsible/...

irresponsible manner of picking up stones at a funeral and throwing them at the police. And your lordship's view was that what was there to investigate, just ask accused no. 20 whether he was there or not and just cross-examine him and then the matter will be over. I will not allow the witness to stand down. And we actually had to, it was while my learned friend Mr Chaskalson was on his feet that we had to persuade your lordship, with much argument, that we actually required a little time to investigate. The investigation showed how important it was that we should have that time in order to (10) have extraneous evidence to put to the witness.

COURT: And you got the time Mr Bizos.

MR BIZOS: Eventually, yes.

COURT: And Branders came back after three months.

MR BIZOS: No fault of ours my lord.

COURT: Never mind whose fault it is. What are you complaining about?

MR BIZOS: What I am complaining is I am using Branders as an example of your lordship's ...

COURT: Yes you have made your point, make your next point. (20) Do not take up my time with trivialities.

MR BIZOS: Well ...

COURT: Make your next point. This point is written down.

MR BIZOS: As your lordship pleases. The reference is the first one on the schedule that your lordship has and subsequent pages. Now these are the categories and I intend, with respect, going through the schedule. Unless your lordship wants to deal with it in some other way to possibly look at the passages. We submit that each one of these passages supports one or other of the general submissions that we (30)

have/....

have made and as we say in the preamble that these are merely examples and not the only interventions that your lordship... Now the first two we refer to Branders, the next one refers to Steyn.

ASSESSOR (MR KRUGEL): Volume 4 still?

MR BIZOS: Volume 4, yes that is to Major Steyn. But now this one I want to make the submission, at that time your lordship knew what the allegation against accused no. 20 was, I beg your pardon accused no. 16, from the indictment. My learned friend Mr Jacobs was leading the witness. He did not find it necessary to ask whether Major Steyn had told accused no. 3 who advocated violence at the meeting of the 19th. Your lordship did. (10)

COURT: Yes.

MR BIZOS: Now that my lord is ...

COURT: What is wrong with that?

MR BIZOS: It is initiating something because taken by itself, and this is the danger ...

COURT: But it has, what is wrong with investigating the case Mr Bizos? Let us get the facts before court. (20)

MR BIZOS: Yes my lord, but how? And on what basis because let me just explain what my point in relation to this is. When I start, when I, because obviously this is a particularly relevant fact in relation to accused no. 16. When I start cross-examining your lordship tells me not to open a can of worms.

COURT: But I did not stop you Mr Bizos.

MR BIZOS: No you did my lord, on this occasion. On this occasion you did and I actually thanked your lordship for the advice. But what happens is that your lordship allows a question in re-examination which identifies accused no. 16. (30)

Had/....

Had the matter been left in the ordinary way Mr Jacobs may never have asked as to whether Mr Steyn asked that question or not.

COURT: But now where is the prejudice Mr Bizos?

MR BIZOS: I will show your lordship the ...

COURT: We got the facts before court, accused no. 3 agreed with them. Do you not want the truth before court?

MR BIZOS: My lord ...

COURT: Are you attempting to shield the truth?

MR BIZOS: No my lord, with the greatest respect, your lord-(10) ship has invited me to show the prejudice.

COURT: Yes?

MR BIZOS: Mr Manthata's name is mentioned for the first time in re-examination. The, who made the report, what the report was is left up in the air. But this fact is used by your lordship on subsequent facts to show that there was consistency in Koago's evidence.

COURT: But it was common cause.

MR BIZOS: What was common cause my lord?

COURT: It was common cause after accused no. 3 gave evidence(20) that this had been mentioned.

MR BIZOS: With the greatest respect I do not think that your lordship's memory in relation to no. 3's evidence is correct. No. 3 denied that any name was mentioned.

COURT: Very well.

MR BIZOS: And that was one of the issues. And had the matter been allowed to either be investigated - because the futher prejudice is this ...

COURT: But now Mr Bizos when it was mentioned in re-examination why did you sit down? Why did you not get up and say well (30)

now/....

now I want to re-cross-examine? YOu have done that often.

MR BIZOS: Yes I did but I was, as a result of an issue raised by your lordship for the first time I did not know, this was before Koago gave evidence, before I knew what evidence was coming and on what basis do I stand up and cross-examine?

COURT: Yes. Do not blame me for your mistakes Mr Bizos.

MR BIZOS: The point that I have made my lord, tried to make is that if it was a mistake it was on a matter which was initiated by your lordship and this is what I am now addressing your lordship on at the moment. The next reference in (10) volume 8 - I am sorry I just have to look for the name because I did not transfer the name from the previous schecule and it will take me a moment to have a look to find it. This was IC.6 my lord. Your lordship will recall the evidence of IC.8 that came afterwards, which tried to link AZAPO with the PAC and part of the issue in the case was about ideological affiliations. I tried to cross-examine the witness who was knowledgeable on these matters, having been in both the PAC and the ANC, on the differences and your lordship ruled it as inadmissible. It may well be that those facts could (20) have been used to support the submission that we had made. It was not irrelevant, or at any rate your lordship at that time could not have known what the relevance or irrelevance of it may have been. The next reference, this is in - I am sorry that the volume is not mentioned but it is page 500, is also IC.6. Now this witness had given very damaging evidence, among others against Dr Naude. The suggestion was that he was a police informer and we wanted to investigate the possibility that he may actually have been in the part time employ of the police when he said that he went to Dr Naude. Your lordship(30)

blocked/....

blocked and stopped the cross-examination about the date on which certain events took place in Cape Town which may, there are of course as your lordship said many things that lead to dead ends but it may have shown that he was actually associated with the police when he said that he went to ask for money from the UDF. The next one on page 609 is Masenya. Now this is specifically what Trollip, J. says ought not to happen, with respect. Let me remind your lordship what this was about. Your lordship will recall that there was contradictory evidence given by Masenya as to who had advocated violence at the meeting of the 26th. There was no lack of clarity in his evidence. With the greates respect there was no need for your lordship to take over the examination of the witness in his evidence-in-chief. On one occasion he said that there was express violence and on another occasion he said there was no express violence.

COURT: Yes and in the end the questions I asked were to your advantage because Masenya was discredited and I did not rely on him. What is your complaint?

MR BIZOS: What my complaint ...

COURT: I have an idea that the questions which I put led to the fact that it was shown that he was not truthful. Now where is your complaint?

MR BIZOS: I agree.

COURT: A question put by the court can go either way Mr Bizos.

MR BIZOS: Yes I know my lord.

COURT: Sometimes it is against you and sometimes it is in your favour. In this case it was in your favour.

MR BIZOS: I agree, that as it turned out Masenya made an even bigger mess on the third occasion and I agree that my

task/....

task as a cross-examiner was made very much easier as a result of your lordship's ...

COURT: Yes. I am surprised that you complain about this instance.

MR BIZOS: Your lordship misunderstands the nature of my submissions. Your lordship misunderstands, with the greatest respect, the nature of my overall submission. What I am saying to your lordship is this that your lordship has disbelieved some 120 witnesses and we say that as a result of your lordship's approach to the witnesses as a whole, including Masenya and others, is that your lordship's questioning and your lordship's conduct of the trial may lead the appellate division to the view that they will not consider themselves bound by your lordship's findings of fact. Now the mere fact, I think with the greatest respect it would have been unwise of me not to refer to this but it shows what your lordship's attitude in relation to the eliciting of evidence is and that is that your lordship wants to take over, with respect. Which your lordship did in the case of Masenya and I am very grateful, and I want to repeat it, with the eventual result. But it does not diminish the point that I am making. Your lordship's, the next one also relates to Masenya in relation to the fold of the photograph. What your lordship said and the manner in which your lordship said it made it clear to us at any rate that your lordship was clearly supporting the witness on a highly contentious point and your lordship put on record that there is a fold right across there, which turned out on the subsequent photograph, or rather on the newspaper photograph, to be incorrect, with respect. I do not know whether your lordship deliberately made the

finding/....

finding that the words that Masenya actually deposed to were on that photograph but that is how I read your lordship's judgment, which in our respectful submission is incorrect. But I do not know whether much turns on it at this stage. But again here one is cross-examining a witness who has given devastating evidence against the accused and your lordship says this. My attention is drawn to the time and it may go quicker if we fill in the name of the witnesses.

COURT: Yes, the schedule will be handed over to you.

COURT ADJOURNS UNTIL 14h00.

COURT RESUMES AT 14h00.

COURT: We, both my assessor and I have problems next week and we for that reason intend to sit late this afternoon.

MR BIZOS: As your lordship pleases.

FURTHER ADDRESS BY MR BIZOS: Your lordship's and your learned assessor's schedules, the names have been added which may quicken the pace a little. If your lordship looks at IC.8 on page 2 the first two references to IC.8. This comes under the category of your lordship taking an active part in the questioning in the evidence-in-chief and introducing a theme with IC.8. I will recall it to your lordship's memory that my learned friend Mr Fick was leading the witness and he said that there was a decision by AZAPO not to take part in the elections. One of the issues in this case was whether people had the right not to take part in the elections or not. In the two references that we give we submit that a fair reading of them, judging by your lordship's questions, is that if you do not participate in elections then you are in favour of chaos. And that in my submission was a theme introduced by your lordship and it must be particularly disconcerting to defence witnesses and the accused who have to come and persuade your lordship that they considered it their right, not only not to take part in the elections themselves but to actively campaign that their fellow citizens should not take part in the elections. Then the next paragraph at page 768, again your lordship examines IC.8 in-chief and the effect of your lordshiop's questions was, the witness had used the expression "to disturb all the things that we have got to do with the local authorities" and your lordship had asked him what he meant by that and he said that they were going to take part in

boycott/....

boycott action and then your lordship asked him questions which the witness had difficulty with, but on page 769 your lordship suggests to him that if chaos was again the intention and that if it was only a temporary goal in the beginning, to merely disturb eventually was to ensure the destruction of the BLA system. That comes from your lordship's questions in-chief. Now the next one is also in, on page 784. I am sorry on top of page 3, that is your lordship asking questions about the Kill Mahlatsi poster. The next one is one that I want to specifically refer your lordship to, is that the witness IC.8 had not tried, had tried to connect accused nos. 2, 8, 13 and 17 with the destruction of what was described as a bus shelter and your lordship asked "Was beskuldigdes nrs 2, 8, 13, en 17 bewus van die voorval". Now it may be an attempt to ascertain the truth but it has got to be taken in context. The prosecutor has a statement, he chooses not to ask any questions about it, we have an accomplice before the court who is in detention and what must be going through his mind is how best can he get out of his difficult situation. Questions of that nature put by the court, in our respectful submission, may give him an idea that he, wrongly, that he has to answer that sort of question in the affirmative. The fact that he did not accept the invitation does not make it any more objectionable in, or any less objectionable in our respectful submission. And also these four accused were sitting in the dock, what will be going through their minds? Why is the person who is to decided on our guilt or innocence at the invitation of the state who has called a witness should be asking whether we were personally involved about this. Then the next one, on page 789 if your lordship will bear with me I want to look/.....

look at the schedule. Yes an objection was noted and your lordship did not respond to the objection at all. The next one in volume 19 page 883, 7 to 14, in answer again to a question by your lordship, if my memory serves me correctly, in order to try and equate AZAPO with the PAC. Then the next one is on page 949, your lordship made it quite clear that your lordship would not allow the investigation into the treatment of the witness whilst he was in detention. The next one at 1 070 was in the circumstances, we submit, an unfortunate remark by your lordship to the witness which the witness (10) adopted. Your lordship heard the evidence that someone said "There is the dog". Your lordship found it necessary to suggest to the witness that a dog is to be destroyed. The next one is also a PAC/AZAPO equation. The next one is not your lordship's question by your lordship's assessor's question. The witness was asked for an expression of opinion whether people there were ready to fight and a number of questions were asked in relation to the readiness of the people to fight. We submit that these are matters which should have been left to counsel in the case to ask about. The next one on page 1 379 in (20) relation to the role played by Mohage in the investigation which was made clear at that early stage that we had reason to believe that Mr Mohage was responsible, rightly or wrongly. We had that, but we were not allowed to ask questions about it. The next one, at 1 386 your lordship answers the question for the witness. If your lordship bears with me I just want to make sure that what is on page 1 420. Oh yes I now remember. The cross-examiner, it was made in very uncertain terms in relation to IC.9 this is, that questions in relation to the nature of his employment should not be directed to him. We (30)

considered/....

considered it relevant and we submit that it eventually did become relevant having regard to what he did and what he did not do with the notes that he said that he took at the meeting of the 19th. The, in relation to Lord McCamel your lordship, at the first reference takes over the examination-in-chief of the witness for almost two pages. The next reference reads with, is in direct, your lordship takes up the theme as to whether there were previous riots. And that was a theme that was introduced by your lordship for the first time in the trial. 1 644, again with McCamel, your lordship interrupts (10) my learned friend Mr Chaskalson and introduces almost two pages of examination of McCamel in relation to the turning of funerals into political occasions. This again is a new theme that is introduced by your lordship for the first time and may I remind your lordship that your lordship later said that this was not part of the indictment, that they were not pleaded but it was a theme which was thereafter taken up by the state and Brigadier Viljoen and others were led, and then your lordship again said eventually that your lordship did not know why so much time had been spent on them. Then on 1 649 the leading (20) questions put by your lordship to McCamel and using expressions such as the belief that the council had received their just desserts. 1 653, again leading questions put to McCamel that the events at the march were seen as a victory. The 1 655 reference, your lordship's assessor puts AN.15 to the witness suggesting that selective violence was still envisaged. To the witness to whom this document was not connected with, if my memory serves me correctly. Then the Reverend Mahlatsi. No one had suggested that anything would happen to anybody if they did not stayaway until your lordship asked Mr Mahlatsi (30)

the/....

the question for the first time. The next passage, 1 986, the witness had been particularly responsive to the cross-examiner about the peaceful nature of the march but then obviously he is diverted away from those favourable responses to the accused when your lordship asked him whether there were any stones on the road. Now IC.8 had said nothing about that. It is more than likely, or there is at least a possibility, that a person in detention and an accomplice in a weak position might be tempted, especially the questioning coming from the court, to answer in the affirmative. Then in relation to Mr Piet(10) Mokoena the cross-examination is taken over in relation to the bottlestores and an answer is invited that there were open tenders. This, taken with other questions asked by your lordship and learned assessor must have given the accused an impression that not only were they not entitled to use strident language against the councillors but that members of the court were anxious that they should not be seen as corrupt persons. Your lordship's assessor, at 2 275, 26 to 2 280, 24, that is quite a number of pages, an attempt is made to elicit information which would justify increasing the rental. We would (20) submit that that was not an issue which should have been investigated by a member of, by the initiative, or by a member of the court. In relation to Mr Tsina, without any suggestion up to that stage the question is asked "Were there assaults at councillors' meetings". And at the next reference the, a fair interpretation of the passage is that assistance was given to an obviously unsatisfactory witness who we would submit ought to have been chided for his answers rather than assisted. Then we give two lengthy references in relation to Phosisi. I want to spend just a short while in relation to (30)

that,/....

that, to recall to your lordship's memory that if this witness' evidence was allowed to stand many of the accused, or practically all of the accused who had taken part in the march would have been convicted of a very serious offence, if not the murder of Caesar Motjeane. Her evidence, in our respectful submission despite your lordship's benevolent finding that she was merely unreliable, was clearly false. She siad that she was on the corner of the intersection when in truth and in fact she was at a place where she could not possibly see. It must have struck the accused as strange for your lordship, during the (10) application for a discharge, to say that she was probably referring to another march and this is a clear example where a witness ought to have been disbelieved in strong terms, rather than the terms in which your lordship dismissed her evidence. The witness Matthysen, our learned friend Mr Jacobs asked him 57 questions and your lordship asked him 109. That is in his evidence-in-chief. We submit that that is a clear example of your lordship taking over. If the state had a case represented by senior counsel it should have been allowed to try and put the evidence before the court without your lord-(20) ship's assistance. The mayor Esau Mathlatsi, at 3 158, your lordship will see there of an accusation to the cross-examiner that he had the whole picture wrong, again. The cross-examiner was busy cross-examining Mr Mahlatsi on Mr Mahlatsi's evidence. The reason why your lordship thought that counsel had it wrong again was because your lordship was working upon the correctness of Mr Louw's evidence that had been given previously. Your lordship's assessor at 3 355 found it necessary to discredit a report in the Sunday Mirror. We are not unmindful that newspaper reports may be incorrect or wrong but we (30)

submit/....

submit with respect that your lordship, and particularly your lordship's assessor, by this and other questions showed a sensitivity to criticism of the council. We then deal with - if your lordship bears with me, if your lordship bears with me I have notes on Brigadier Viljoen next on my original notes. Could I ask, once we have taken it on the record, on a running basis to inter-lineate after Mahlatsi Brigadier Viljoen and to make notes of a couple of points. I am sorry it was, the schedules were prepared for your lordship's convenience in order to save time, hurriedly, and this, and the references are at (10) 3 565 and in relation to that your lordship participates in the examination of Brigadier Viljoen to show that the funerals of the 15th and the 23rd, 1984, are used to sweep up the masses. Then your lordship grants a short, this evidence was given in the absence of senior counsel. Mr Tip asks for a postponement because these two funerals have to be investigated and your lordship grants that at page 3 398. And then there is cross-examination on the funerals at 3 467. We would submit that that cross-examination showed that Brigadier Viljoen was a most unsatisfactory witness and during the course of that (20) cross-examination your lordship then for the first time indicated that this, these funerals and this evidence had nothing to do with the case, or very little to do with the case. In fact at one stage, at 3 565, your lordship says the funeral is entirely irrelevant. We submit that the impression may have been created that your lordship showed considerable interest during the evidence of Brigadier Viljoen and asked specific questions which could, the answers of which were prejudicial to the accused but once the evidence of Brigadier Viljoen was shown to be, to say the least, unreliable and in certain (30)

respects/....

respects very embarrassing to him, having regard to his behaviour on the tape, we were told that the evidence was irrelevant and it may well be that some of your lordship's findings at the end are based to a very large extent on certain aspects on the evidence of Brigadier Viljoen who is said in some respects to be an expert. Then if I may turn to the schedule, in Molanto(?), the witness is asked to point out the person with whom he had dealings. The person says, after looking at the accused in the dock says that he does not see the persons whose names he has heard and your lordship then directs the witness to look again. Then as far as IC.10 is concerned your lordship makes a credibility finding by discrediting her instead of investigating. Then the witness, Decorlen(?), again your lordship's assessor shows a keen interest to show that the rentals in Huhudi were disproportionately lower than the increases in salaries. This can only be justified on the basis that councils are not bad after all, not one of the main issues in this case. Then the witness Matloko, your lordship tells the witness "Don't just agree because counsel says so". We submit that there was no evidence that the witness was merely agreeing to what counsel was putting.

COURT: You must remember that when a witness gives an answer and it elicits that response from a judge he gives that response because he sees the witness' reaction in the witness box, and that goes for this particular instance. I put that on record. Go ahead.

MR BIZOS: I just want to take the next one my lord. Then IC.12, just bear with me one moment please my lord. Your lordship for over three pages took over the examination of

this/....

this witness on the video. Your lordship takes over the examination, focussing on COSAS for approximately four pages. And may we say in relation to COSAS that the less evidence there appeared to be and the less attention the state paid to that particular issue the, we submit the record will show the greater the intervention by your lordship. And then the 4 340, the questions asked are directed to undermine the evidence that the affiliates were independent of the UDF. Then IC.15, it was made clear to the witness that a state of mind of not believing in violence and regarding certain ANC leaders as (10) their leaders is a completely non-acceptable state of facts. In relation to IC.15, again, your lordship examines the witness for over three pages in relation to songs. Then the 4 876 reference of IC.18 relates to your lordship's view of a witness who is in any way associated with TSO(?) and whether or not TSO is to be considered an affiliate of the UDF or not. Then IC.19, again in our respectful submission that what everyone referred to as a removal, taking the two passages together, what everyone referred to as a removal of the persons concerned as one of the grievances is described as a (20) temporary relocation in order to provide housing. Your lordship's impatience on 5 203 by the remark to counsel "Ask the questions that you feel fit but just stick to the correct facts", in circumstances we submit where the stricture was not warranted. Then the 5 035 reference, in the context your lordship's definition of a vigilante as one of a group of citizens coming together to defend themselves or their property in the context in which the witness was giving evidence we will submit is hardly appropriate. IC.19 still, 5 070 your lordship's assessor is again concerned to justify the executive (30)

action/....

action by justifying the removal on the basis that there was illegal squatting. The next is Letsunyo(?), at 5 185. Your lordship leads the witness to say that certain threats that she had deposed to were seriously intended. Then the witness Ndou, if your lordship bears with me - I am sorry that I cannot locate that at the moment. I may come back to it. There is obviously some mistake in the transposition of the clearer copy. Then IC.21 at 5 262. The cross-examination is interrupted, when trying to establish that Mr Mazibuko was going to resign anyway. Could I ask your lordship to add the reference 5 264(10) line 29 to 5 266 line 2. I beg your pardon they are taken together, it is written down. Then the witness Mquba(?), your lordship tries to introduce Sukize Bananza to an organisation in order to determine as to how he was introduced. Sergeant Mquba, having said that he cannot remember what Goniwa said your lordship persisted in questioning him and eventually some little detail came out. Warrant Officer Waters, this your lordship will find at the references given, that my learned friend Mr Tip had elicited a major contradiction but your lordship exhibits what in my respectful (20) submission may be described as considerable impatience and no further questions are asked. Then the Muller reference is, they concern questions by your lordship's assessor in order to justify the local authorities actions and to justify the rent increase. The one of Smith when my learned friend Mr Tip objects to evidence being led outside the period of the indictment he is summarily dismissed, evidencing impatience. The reference to Kunene is an example of the breaking off of further cross-examination. And in relation to IC.23, I am sorry my lord but without actually going to the record I (30)

cannot/....

cannot give your lordship that but again under IC.23 if your lordship takes the one 6 500 to 6 508 is your lordship's examination of the witness in-chief for eight pages on songs, and the previous references, the 6 477 line 26 deals with various phrases which your lordship asked and not the state as to the meaning of mobilisation and your lordship equates it with incitement and leads him into saying that the following phrases are guerilla warfare and that revolution means bloody revolution etcetera. Again we submit that once we have an accomplice questions such as these coming from the court (10) may give him the impression that he should answer in a particular way. Then we do not know on what basis your lordship put the leading question that a cadre is one who has Marxist sympathies.

ASSESSOR (MR KRUGEL): Which point is that Mr Bizos?

MR BIZOS: It is the sixth, volume 131, 6 513, on top of the page, 6 513 at the top of page 8. Now I mentioned the question of Branders and your lordship told me that Branders came back a long time afterwards. The next one is the question of, if I could ask your lordship, the question of Prace, to fit that (20) in. But here was an expert. Your lordship thought that we should not have more than a day and a bit in order to cross-examine him. Without knowing what we wanted to investigate and how easy or difficult the investigation would be. We had to reargue the matter after your lordship made an order and from the nature of the cross-examination we would submit that your lordship would come to the conclusion that the time that we took, that we were eventually given, was in fact required. The reference is to go between, it is volume 133 if your lordship would put it under volume 131, 133, 6 578, 21 to 6 592, (30)

21. I want to submit that the reading of those passages support fully the submission that I made earlier to your lordship that your lordship's view, without actually knowing, because of the very nature of your lordship's function being completely different to ours, what time is required in order to do a particular job. There are, in relation to Atkinson Mr Jacobs says that he has no questions, then your lordship proceeds to ask him questions for five pages. Then, I do not want to deal with all the, accused no. 10. We have taken just a few in order to indicate the, your lordship's questioning. (10) The first one in volume 161, I do not know if your lordship has that schedule here. Then I will just give your lordship the references. Volume 161, page 7 904 line 28 to 7 905 line 24. Now your lordship spoke of counsel trying to close gaps before asking a direct question. At the top of page 7 905 your lordship asks Mr Vilakazi this:

"I understood your evidence previously to be that you did not in zone 3 organise a mass rally because you could not get a venue, you could not get a hall? -- That is so.

Could you not have held that mass rally on the (20) soccer field across the road from your house or anywhere else in the open? -- There were a number of problems there. Firstly that would be an open air gathering which was not permissible then.

Now on that point I thought that that would have been the position, that is why you bothered to get halls. Would a march not have been an open air gathering which was in contravention of the law? -- My understanding of an open air gathering, I understood it to be people coming together at one point in the open air, not (30)

moving/....

"moving from one point. That is my understanding." The point that I want to make here, that that is how an astute cross-examiner would have put it, with the greatest respect to your lordship. Then in the same volume, 7 962 line 21 to 7 963 line 7 your lordship in the witness' evidence-in-chief examines the witness in order to get an admission that there would have been some sort of coercion of people not to go to work on the day of the stayaway. And a suggestion that the leading question that schoolchildren were intended to take part in the march. Then in volume 162, page 7 962 to 7 963 (10) the court's view that there is something unacceptable in people not taking part in government created apartheid structures as the witness described them. And in the same volume, 7 985 to 7 988 the same theme is taken up and what is in fact happening, I submit with respect, is a debate between your lordship and the witness to try and persuade the witness of the error of his ways in having this view of Black Local Authorities. And in volume 164 8 214 lines 4 to 25 your lordship's questions about genuine people's organisations and AZAPO fitting into it or not, then at 8 275 line 26 to 8 277 line 27 the wit- (20) ness is examined by your lordship on the speech of Professor Mohammed and asked to express views on that speech. I may remind your lordship that in your lordship's own subsequent directives to counsel for the state it is quite wrong to put documents to a witness who has nothing to do with the particular document and does not know it. Then at 8 295 line 25 to 8 297 line 29, now in my respectful submission this is a passage which if counsel cross-examining a witness put it in this way your lordship would with the greatest respect have stopped it. This is the passage in which the witness was (30)

cross-/....

cross-examined on the meaning of accredited liberation movements. The witness had difficulty in answering on a yes or no basis as to whether certain organisations were accredited liberation movements or not. He appealed to your lordship to allow him to explain and your lordship would not give him that opportunity. He was forced to give a qualified answer and your lordship insisted on an absolute answer. And your lordship took the adjournment and gave him an opportunity the next day to explain himself. We had the situation that when he gave the explanation the next day the state felt aggrieved (10) by the explanation and had to ask him whether he had discussed the explanation with his fellow accused the previous night, something of course which could have been avoided if he had been given an opportunity to explain. Finally on page 8 479 line 14 to 8 480 line 14 your lordship's examination of him starts with the question:

> "So according to you the UDF is just a talk shop, just a place where people have a cup of coffee and have a nice chat?"

I submit again that that sort of questioning in relation to (20) the UDF's perception of this is not calculated to put the witness at his ease. Now I want, having referred to these passages I want to come back to your lordship's statement to me that what is the complaint, accused no. 10 was acquitted. That is not the issue. The issue is that other accused who gave evidence subsequently heard your lordship examining accused no. 10. I have not got a ready reference but I remember that in a case where a similar complaint was made in relation to a judicial officer and then it was said that his co-accused did not go into the witness box to give evidence (30)

that/....

that the court took the manner in which the, his co-accused was examined into consideration in excusing his not going into the ...

COURT: You will probably have noticed that accused no. 10 was the first accused to give evidence and that many, if not most, of the problems the court had were put to accused no. 10. Which was done intentionally so that they could be cleared up later.

MR BIZOS: Yes my lord.

COURT: Yes. Now you complain about it. (10)

MR BIZOS: No what I am saying is...

COURT: I have your point.

MR BIZOS: That the manner in which it was done was not calculated to either put him at his ease, and after all he is an important witness in relation to the other accused and the mere fact that he has been acquitted does not mean that the matter is at an end for the purposes for which we are addressing your lordship at this stage. Then we turn to accused no. 8. Irony, with respect, puts a witness at a disadvantage and in volume 169, page 8 727 when Mr Nkopane said that one of (20) his relatives voted your lordship's remark "A progressive lady it seems" would not have put him on his ease. At the next reference your lordship would not allow a press report to be read which was seen by the witness at the time and which, in our submission, is entitled to do. At 8 725 your lordship's interruptions in relation to it must have put the witness off in our submission. A value judgment at 8 729 is made by your lordship to the witness when he says that when people have not got money they would rather have no increases and poorer facilities than increases which they cannot afford and (30)

better/....

better facilities. Again this is an attempt, with respect, to justify the policy of the council. I am sorry that I cannot give your lordship the 8 744 reference. No it is, I am sorry I cannot deal with that. I will just take the next one. Yes I am sorry it has been explained to me as to why I have this difficulty. Certain others have been put in there. I am going to ask your lordship to have regard to, to bear with me until I trace the ones that are the more, but I ask your lordship to bear with me in relation to Mr Nkopane's because they are not on my other schedule and I will just (10) have to go back to the record briefly. I will come back to accused no. 8 once the volume is before your lordship. Could I ask your lordship to turn to accused no. 9 on page 14. There is just a mix up of the schedules in relation to no. 8. The first one in relation to accused no. 9 at 185, volume 185, 9 594 line 10 to 9 597 line 5, the witness is examined by your lordship at length in order to make this a VCA march which the witness had a different perception of and we submit having regard to his lack of formal education not an unreasonable approach. Then accused no. 7, I am sorry accused no. 6, (20) the very reason of ERPA in view of the existence of a previous organisation is questioned by your lordship. Then accused no. 7, your lordship is, gives a very clear indication that the witness could not honestly have believed that he could be removed from Evaton against his will when so much evidence, when there was so much evidence of that sort of thing happening. Then in relation to accused no. 5, in volume 208 10 912, your lordship tries to elicit from the witness that he was still connected with COSAS when, not for the purposes of clarification we submit, his evidence was very clear that (30)

he/....

he was at work for some time and that he was not connected with COSAS. And the 10 984, the 10 983 reference to line 984 in relation to youth organisations, questions by the court as to whether supporters of the council would be allowed to participate. Then the 10 970, yes your lordship questioned him at length as to whether the rejecting of the councils was a local or a national grievance and implied in the question is what business were national matters to him or to anyone else that he was associated with, and the use by your lordship of the word "opstand" which was done, in our submission, more than (10) once where your lordship characterises shouting demands by youths or schoolchildren as "opstand". The primary meaning of which we debated with your lordship at the time and we submit that there is a clear indication that noisy protest is equated with "opstand". Then the 71, page 71 to 73 your lordship examines him at length on the question on which your lordship's finding is eventually based in relation to the call for the stayaway and the march. And the 80 to 82 reference questions putting extended meanings, in our submission, to the word sellout and similar words. The 02 to (20) 03 reference, your lordship questions him at length about co-operation amongst civics and what the purpose of it was. The 09 reference is a reminder to the witness by your lordship that the council did not get credit for the good that it did. The 11 116 reference your lordship examined the witness for over three pages in relation to the buses and gave a clear indication that the witness' answer that those who wanted to board buses would be free to do so. The 11 170 is again three pages of questioning in relation to the ages of the marchers and I submit that if your lordship looks at the questions (30)

it/....

it is not for the purposes of clarification but a debate as
C.1578 to whether what he is saying can be correct or not. The 212 reference, to 218, this is approximately six pages of questioning by your lordship's assessor, in relation to the Tumahole situation and the foreseeability and your lordship may also note your lordship's view of my right to further re-examine the witness on this issue. The 301 reference, to 302, that, under accused no. 11, there are questions about the political nature of the youth organisations that the accused was concerned with. The 304 reference on top of page 16, a (10) debate over six pages on youth organisations and the meaning of democracy. The 404 reference about the joint committees in relation to the school and your lordship expressed the view in the judgment that it was a cheek for young people to suggest to their elders what should happen. We submit that that is a view which can be properly held, with respect. But your lordship heard witnesses as to how younger people feel about their right to express their ideas about their education and other matters. I am sorry my lord I was interrupted. Could your lordship give me an indication which I dealt with last (20) because I was interrupted.

COURT: 404.

MR BIZOS: In the 421 that the letter was really nothing more than a press statement is judgmental during the examination. The 510 disbelief expressed in relation to the genuineness of a document because it was in English and not in Sotho. The 25 dispute over illegal evictions and what that means. The 19 reference, judgmental questioning of accused no. 2 to the effect that the preconditions for a national convention are deliberately set to make it impossible. The 31 reference (30)

a/....

a concern about the criticism of the education system. The 58, again the question is not for the purposes of getting information but rather judgmental and calculated to put the witness off his guard, that language, figurative language must be qualified with repeatedly saying that we are for non-violence. Your lordship puts a document, under 59 puts a document to the witness not used by the state in relation to the effects of non-collaboration.

COURT: How do you mean not used by the state?

MR BIZOS: Well ... (10)

COURT: Was it before the court at the time?

MR BIZOS: It was before the court.

COURT: Then I am entitled to put it. What is your complaint?

MR BIZOS: Taken by itself my lord, taken by itself ...

COURT: In fact there is a duty on me to put it. If I see something in the document which is at variance with what the witness says.

MR BIZOS: No but my lord, very often with respect your lordship will notice that it is not germane to what the cross-examiner is about and your lordship will, taking it, may (20) I say that I rely on the cases which say that any one of these matters taken by itself may not be enough but it is the cumulative effect of it all that really is to be considered. The 65 reference that both your lordship and the assessor examined the witness about talking to the government and characterise the call for a national convention as a sham. The 81 reference that the use of the word, again a judgment expressed that the use of the word "comrades" really means, is used because AZAPO wants a socialist republic. The 62 reference is again extensive questioning by your lordship in relation to (30)

commemorative/....

commemorative services, commemoration services and their use. 76 your lordship's reminder to the witness that the Bantustans are real and independent states. What we are saying is that once there is a dispute as to the perception of these matters it is wrong, with respect, for the court to examine a witness on the premise that he has to accept that which is against his beliefs or against his stand. The 950, the questioning in relation to the meeting at Sharpeville is not for the purposes of clarification or explanation. The 98, your lordship's assessor raised many questions in relation to (10) the COSAS-AZAPO conflict in 1984. Then in relation, and I submit with respect that the acquittal of no. 2 accused is not a factor which vitiates the submission that we are making to your lordship. The issue is whether the questioning was, in the circumstances, excessive, which would have the effect of allowing another court to examine the facts afresh. And of course no. 2 was an important witness for accused no. 16 and for others, on the case as a whole. Then in relation to accused no. 3, the 98 references, he is questioned not for the purposes of clarification about Nkosi Sikelele i Africa and (20) the raised fist. The 30 reference is again question not for the purposes of clarification but rather an attempt to justify to the witness that the government is actually providing as best as it can that which it has to provide. The 35 reference is a very protracted examination on ideological and theological matters, not for the purposes of clarification. The 27 reference is again questioning, at some length, about the beerhalls and the underlying assumptions of the questioner is that there was, nothing wrong took place. The 54 reference, an incorrect assumption put to the witness that all the leaders (30)

of/....

of the Sharpeville protest came from outside and that they had no real interest in the issue. The 23 in relation to accused no. 19 expressed scepticism in relation to the letter written to the Prime Minister, taken up by your lordship's assessor, suggesting that there could not have been a genuine expectation for a reply. The 99 your lordship's expectation to the witness that there should have been an entry in the programme of action that we are going to attain this by peaceful means. A matter which, in respect of which your lordship had to express a different view that one does not expect to see this sort (10) of thing in an organisation's constitution. The 13 758 reference "Have you at any stage given the government credit where credit is due?". The, volume 261, no I beg your pardon, the 37 if you warn the government you must take your stand unequivocally for non-violence. Your lordship's view that the Ciskei is an independent state and your lordship's response to Mr Molefe's answer that the mere fact that one gives money does not make an affiliate dependent by giving the example that South Africa finances the Ciskei although a valid answer was patently rejected. Your lordship's remark on the 46 (20) reference - "I did not notice that there was apartheid in America and they have got a very very large army". The 22 reference, your lordship's assumption put to the witness that revolutionaries are Marxists. The 57 reference, questions on over two pages with the underlying assumption that the UDF is not allowed to criticise the use of the SADF in the townships. The 76 reference, your lordship's assumption of what your lordship believes to be Marxist language, in the absence of any expert evidence. Your lordship's assumptions in relation to the late Braam Fisher are put to the witness. (30)

COURT:/....

COURT: Were they incorrect?

MR BIZOS: Well we actually checked the record. He was not found guilty of treason.

COURT: What was he found guilty of?

MR BIZOS: Sabotage. But let me say at the outset that I do not recall precisely in what context this assumption was made. It may have been in relation to something else but that is the one that comes to mind. The 80 reference your lordship expresses the view that if you were to take the witness' evidence seriously in relation to non-violence Sisulu and Saloojee should (10) clearly have said at the meeting that the UDF has nothing to do with the ANC. Your lordship elsewhere says that when they do say so they are only doing it for the press or for the purposes of avoiding restriction. Now the 56 reference is to the statement by your lordship "What would you say if it is argued at the end of the case that you at no stage decry the actions of the ANC but throughout decry the actions of the government, thereby placing yourself squarely on the side of the ANC." Where the state is represented by senior counsel and where its case is that anyway we submit, with respect, (20) that it is not necessary for the presiding judge to put that sort of question.

COURT: How are you prejudiced? Is it not to your advantage that that sort of thing is put straight out so that the witness gets an opportunity to answer it and explain it?

MR BIZOS: Yes, but he already ...

COURT: Rather than that it be held in the end of the case against him and he had no opportunity to answer it?

MR BIZOS: No, he had already been led in-chief that that was not so. And put that way by your lordship may be a clear (30)

indication/....

indication to the witness and the other accused sitting in court that your lordship has collected this syndrome of evidence or inferences and where the person has denied it in-chief and the state is represented this is the sort of question which we submit, with respect, should be put where the two sides are possibly not equally as well or as badly represented and it may be left unsaid. But where the state is represented by senior counsel and where the accused himself has been led by one of the leaders of the profession it is not, in our respectful submission, correct for your lordship to put that question which may give that impression. Then the - I am sorry that I have not the other references readily available in order to give your lordship an indication but just bear with me for one moment. The 603 reference on top of page 19, the court asking the witness on the facts of the case whether they had been correct or not, reminding the witness that Mr Mandela is a violent man. When the issue, the issue raised by the witnesses makes it quite clear as to what their perception of him is, we submit is not correct in the circumstances. Your lordship's statement on the 29 reference, "The Black Local Authorities are democratic and everyone could have participated in the elections" again is a judgment on one of the issues which is not calculated to put the witness as his ease in our submission.

COURT: And factually incorrect, is your submission?

MR BIZOS: It depends to a very large extent what one means by a democratic institution and if its functions ...

COURT: Exactly Mr Bizos.

MR BIZOS: If its decisions can be overridden by an official or by a minister then it has very limited powers. People

either/....

either rightly or wrongly may perceive it as an undemocratic institution. What I am saying, with respect, is that whilst a witness is deposing to facts it is incorrect for the presiding judge to express himself in this way, with respect. The 73 reference is one in which when produced to show that Chief Buthelezi refuses to condemn the ANC your lordship said, disallowed it and said "Every time Chief Buthelezi says do not resort to violence but by clear implication the UDF does not do so". This of course, your lordship's view of what Chief Buthelezi says every time is in conflict with the evidence (10) contained in EXHIBIT DA.36. We now turn to accused no. 16. The 83 reference, your lordship makes it quite clear to accused no. 16 by the nature of your lordship's question that he has no absolute line on socialism. The 87 reference some four pages of questioning by your lordship on imperialism. The 71 reference your lordship asks a number of questions with the underlying assumption that the SCA supported violence in the Vaal, that the SCA did so. The 98 reference, questions in order to show that the SCA's contention in relation to rentals is completely unreasonable and could not be seriously (20) supported by an honest person. The 300 reference is to similar effect. We then turn to accused no. 20. It is put to him that the people convicted in the Rivonia trial represent violence. The 22 reference your lordship characterises the language used as socialism and when the witness talks about destabilisation in Mocambique your lordship's assessor comments on South Africa' humanitarian aid to refugees. The 72/73 reference your lordship characterises the language used in relation to the Ciskei as strong and impermissible when in fact it is nothing more than the expression of ideas in (30)

strong political language. The 920 statement your lordship characterises EXHIBIT C.02, when examining the witness, "So what you are in fact saying is that with certain variations and other leaders that may come into it is that the government must hand over control of the state to the Rivonia trialists and to Oliver Tambo and others?" Now an examination of the record will clearly indicate that the accused who was a witness did not say that. The, over the page the 012 reference it is put to the witness "I read somewhere that the definition of an activist, and I am not saying that it is my definition necessarily, is a person who goes around to people who think they are happy and tells them they are unhappy and they should be unhappy". The impression that may be created in a witness and the co-accused's mind is that the mere reference to this definition which is the very contrary to the essence of their evidence is judgmental and an early indication of what an activist really is or is expected to be. The 37 reference in relation to C.106 your lordship puts to the witness that this seems to have been the keynote speech and it is taken up in various forms in the other references. And we submit that it is in various handwritings, that there is no evidence that it was ever delivered. All those references refer, up to 55, your lordship again expresses the view that an activist is one who creates grievances. Then the 58 reference in relation to the co-operation between the education department and the police your lordship goes on record "If the school authorities were not threatened I cannot see why the police would have been brought in or was it merely a question of harrassment without provocation?" and your lordship says that this sounds odd. But now there was no evidence that they were, for the

general probability that they were threatened. It may well be that vociferous demands for an SRC were thought as good reason to bring in the police. The 83 reference right up to 89 is a debate between your lordship and the witness as to whether Mr Mandela is a violent man or not. We then deal with accused no. 21. The 012 reference, when he was explaining to your lordship his attempts to have the suspension of school students lifted as part of his efforts to restore peace your lordship went on record "Well the moment they were back there would again be trouble." There was no evidence of that and (10) it shows, with the greatest respect, a predisposition, with the greatest respect, to project your lordship's views into the situation in respect of which there is no evidence and which does not necessarily follow on the probabilities. On the 29 your lordship's assessor makes it quite clear to 21 that he does not accept what the witness is saying in relation to his interpretation of the events in the Vaal. The 37 reference when there was a complaint that the BLA's were not viable structures it was said "It had nothing to do with the structure, it had to do with the Group Areas Act". Well (20) there are two comments I want to make in relation to that. Firstly I would submit that it is wrong in law because the Group Areas Act actually excludes the urban local authorities occupied by africans and secondly Mr Chikane could be excused if he did not know precisely which act was responsible for the shortage of land for himself and his people. The 218, the 217 reference shows, with respect, how dangerous it is to rely on one's beliefs or thought what knowledge is, how correct one's knowledge is when we are living for all practical purposes in somewhat different worlds with your lordship believing that (30)

blacks and whites wrote the same matriculation examination and examining accused no. 21 on that assumption. Until there was an intervention. The 29, before hearing Dr Hartshorn your lordship expressed the view that this novel proposal that scholars should have a say in their own education and examining the witness on that basis, on the basis of that belief. Then could I ask you to just put a short note in relation to Mr Ratibisi, after, just before Namane. Now for the first time your lordship and your lordship's assessor introduced the question of rent. It is at 18 234 line 14 to 18 238 line 1.(10) I have a note that it is Ratibisi. I beg your pardon, that is why I asked it to be checked, I was corrected by, it is Namane and not Ratibisi. No it is Namane, the name was put, on mine was put below. This is the, volume 318 the 34 reference. Yes it is Namane, yes it is correct. Your lordship does not have to add any name. This is the introduction of the question of rent and examining him at length, and your lordship explaining later as to why rent was not being paid and your lordship explaining it that you wanted to assess the witness' morality. We have also noted that your lordship (20) noted it in Annexure Z as one of the reasons why the credibility of a witness may be aversely affected. Because he or she was not paying rent. We submit that that is a misdirection. It should not have been introduced by your lordship, it is generally known that hundreds of thousands of people do not pay their rent for various reasons. It may be that a very recent appellate division decision may have absolved them from the moral turpitude that your lordship thought may be present.

COURT: Maybe they were absolved from the legal turpitude Mr Bizos. (30)

MR BIZOS: Well be that as it may not to believe witnesses because they did not pay rent where there is a whole ...

COURT: Please read the introduction to Exhibit Z.

MR BIZOS: Well they were noted on that basis and I actually asked your lordship what the relevance was and your lordship told me because you wanted to know what sort of person this was and they are there as one of the reasons that are noted against these people.

COURT: Yes.

MR BIZOS: The question may well arise why was it introduced if it is there merely to be read subject to the introduction. Then the 72 reference under Mr Namane your lordship takes up a line of cross-examination by the state and expected the witness to have gone to express his condolences to the persons who had been the victims of violence. We submit that that may have been a matter proper for the prosecutor and not for your lordship. Your lordship, in relation to Zulu, who cannot remember much about the meeting and as an obvious criticism your lordship asks the witness how can the date be remembered. Well obviously in order to test the credibility. This question of not remembering used against the defence witnesses is in marked contrast to the court's not taking up with Brigadier Viljoen that he did not remember whethe or not he kicked accused no. 1 in the chest. I am sorry about Mphala(?) - through some typing error I do not seem to have a specific reference of what the passage is about. I will just ask your lordship to put it in square brackets. The 84 Mgudlwa is when your lordship indicated that the non-payment of rent is a question of morality. And the examination in relation to the non-payment of rent. The witness Tau(?),

no I am sorry, if you could, it is not really related to this. It is another matter in relation to your lordship saying that come what may your lordship will not be here in December. So obviously it does not really ... Then Nyembe at 36, again the question of rent is taken up by your lordship and we would submit that on a proper reading of the record your lordship's great disapproval, if not anger, is expressed in the questioning. The 39, again your lordship's disbelief of the witness is expressed by putting to the witness that how did he expect any councillors to be found on a Monday (10) at home or elsewhere. Mbajwa, at 30 reference, yes I am sorry I should really start it at the 25 reference, the 25 reference. This is a witness who spoke about having personal knowledge of bribery and when he has difficulty in, with the date it is said "Hoekom kom u hier om stories te vertel om omkoopery as die man by wie u kontak het nie 'n woord praat van omkoop geld nie?" and other questions being asked which clearly indicate to him that his evidence is not being believed. He is told, on the 26 reference, that surely the authorities had good reason for not giving him a house. Again we submit (20) that this is an attitude that the local authority is unfairly criticised. We are not saying that these are irrelevant matters. They may well be but they are matters which a prosecutor should take up so that if a witness has some explanation your lordship should be able to adjudge it rather than your lordship asking questions which have judgmental undertones in it. The 30 reference, again is questioning which cannot put him at his ease in relation to the bribe that he had to pay. And let us pause for a moment. This was not an outrageous suggestion that came forward for the first time. (30)

Other witnesses have spoken about it. Professor Van der Walt said that this was a corrupt body about whom nobody had a good word to say. Why a witness who came to say what happened at the meeting should have to undergo such questioning from your lordship may be a matter which the court of appeal to which we are seeking leave may consider relevant in relation to findings. Then the witness Thewa(?). May I ask your lordship to put that in square brackets. Again I seem to, that is again extended examination by both your lordship and the learned assessor on the question of rent. (10)

ASSESSOR (MR KRUGEL): Where is that now?

MR BIZOS: This is Lephele, 23 to 27. And then Mazibuko. When a person in his position is asked that the cause of detention was the arrest of the pupils your lordship's learned assessor corrects him and says that the real cause was that whatever the people did, the pupils did to warrant arrest. So that without any evidence an assumption is made. We do not know if it was arrest or even detention in respect of which nobody has to justify publicly anything. The unfavourable interpretation is placed. Then again Mazibuko on the 49 (20) reference. The extended, he is examined at length as to why he took part in the march when he lived in Evaton. It is one of the reasons why the witness is disbelieved and he had to submit an explanation as to why he took part but in any event political parties are known to hire lots of buses to take supporters from all over the place to the place where they have a meeting or a protest. Then the Msimanga, this witness was examined at length as to the meaning of the word Amandla and how it is used. And then Hlolota(?) your lordship will see over two pages of examination about rent. Of course (30)

we all know that we think that that which is our own questioning or our own point is better than that elicited by others and one of the reasons why, with respect, the rule is that presiding judicial officers should not ask too many questions or take up topics is in order to avoid that happening. Then Mgotsi at 017 and again this would have better come from counsel than your lordship - "Sê nou 'n advokaat sê vir my aan die einde van hierdie saak dat die R30 was 'n belaglike bedrag, wat julle geweet het die owerheid sou nooit aanvaar nie wat sou u antwoord op so 'n argument wees?" We submit (10) that this is not something that should have come from your lordship. And then your lordship's assessor takes it up and wants particulars as to how the R30 was made up. From a person who was caught up in the troubled times in 1984 when this suggestion was made by persons over whom Mgotsi had no control. Then Letsai(?) at 082. It is your lordship who asks what business Mr Lekota, accused no. 20, had in Kroonstad. Again we submit it could have been left to counsel for the state. At this stage accused no. 20 had already given evidence about it being his home town. It would be difficult, with respect, (2 to speculate as to what the purpose of the question was. Then Segetuani(?) at 84, questions asked as to who the leaders were in Kroonstad, again a matter that could quite easily have been left to the state, and 85 there is long questioning about the SRC constitution and questioning about the SRC's. Now then we come to Raboroko and your lordship will see that even whilst he was busy explaining his report in-chief your lordship directed may questions to him in relation to his report. That is equally applicable to the 96 reference and again he had to answer questions about his article on the bottlestores(30

which appeared on the morning of the 3rd. Highly critical questions were asked of him over two and a half pages. We submit that his article is in substantial agreement with the evidence given in this case and based primarily on the minutes of the council itself but we submit that the questioning tends to show that the court's view was that he had no business to write an article which would show the councillors in a bad light. Then Didiso(?). Your lordship's remark to him "Watter standaard het u op skool behaal? -- Ses. Nee dan moet u nie so dom wees nie." was not a remark in our respectful sub- (10) mission which was calculated to put the witness at ease. The Moloi at 44. Your lordship's assessor takes up a discrepancy which we submit is of a very minor nature and he is examined on it on over a page, with an underlying assumption that his evidence cannot be correct. Tobela at the 64 reference again your lordship asks questions over a page as to why there is to be a parent's committee if there was already a school committee with an underlying suggestion that the witness and those involved in the parents committee did something wrong. Dr Hartshorn and others that spoke of education (20) gave your lordship sufficient cogent evidence as to how ineffective the existing structures were. Could I, if your lordship bears with me. Then if I ask your lordship to look at Tobela at 64.

COURT: We have had Tobela at 64.

MR BIZOS: Oh I am sorry my lord, yes. Could I ask your lordship to put Moloneng Nqoba in square brackets please.

COURT: Who is that?

MR BIZOS: Mololeng.

COURT: Monchuacheng(?). (30)

MR BIZOS: Monchuacheng and Ngubu. Your lordship's question about the Labour Party's preconditions for a national convention. This is one of the few witnesses whose evidence your lordship accepted but we merely say that this sort of questioning should really be left to the prosecutor. Then Moqedo(?), that is at the 822 reference, there is extended questioning by your lordship as to whether the TCA is a political organisation and whether it would have been one if it had affiliated to the UDF. The 49, again a page of ques-
C.1579 tioning about the reasons for the stayaway. Mabena, over (10) two pages of questioning about school boycotts in Daveyton and expression of disbelief about a witness' reasons, the reasons given by the witnesses for the boycotts, for the origins of the boycotts. And the witness Badi, the questions about his ability to speak Afrikaans when this is a matter which could quite easily have been left to the prosecutor. Mololeke, extensive questioning on pamphlets for over three pages about Badi and Tsobo's taxis. Sam, on to of page 24, this is the young woman to whom I alluded earlier where your lordships in disbelief asked her whether she had only passed (20) one standard in three years. May I draw your lordship's attention that Mr Tip, who led her for about two pages after that, could not get a coherent answer from her on matters, "I don't know, I don't remember". Your lordship may assume that she was not called to give evidence-in-chief about I don't know and I don't remember. Sello, the reference to 479, Sello, the witness was examined for just under a page as to why the source of the teargas was not investigated. And Moloi, at the 41 reference, an attempt is made to get the witness to make admissions about the existence of COSAS (30)

despite denials of, denial of any such knowledge. Modisi, at the 603 the questions about the, with an underlying tone of non-acceptance such as "What was the point if you were on boycott, so that, to reopen the schools so that you can sit outside the classes. Is that what you wanted?" That, in our submission presupposes matter which was not in accordance with the evidence of subsequent expert and knowledgeable witnesses in relation to education. Ngobane is the schoolteacher that I alluded to earlier. "Please you are a qualified teacher, we should not have this difficulty. If you have this diffi-(10) culty in explaining this to me how can you easily explain things to the children?" Because he got the months of September and December wrong, when the internal content of his evidence clearly indicated that it was September. One of the demands was you must extend the date of the examinations, it was December or the other evidence would not have made sense. Your lordship will also see that it took that witness some time to compose himself and to answer questions in an intelligible manner. Then at 94, at 97, unsympathetic questioning about his inability to estimate distances. At 15 despite (20) the absence of any evidence the court tries to introduce into the record the possibility of restrictions imposed at the funeral. It was for the state to lead evidence or for the state to try and extract information it considered a necessary part of its case. Your lordship's assessor again asks "Why were there a crowd of people at the funeral?" as if some sinister inference was to be drawn about people going to a funeral from one town to the other. Then Ngawalangwale(?).

COURT: Normally known as Ngwalawala.

MR BIZOS: Thank you my lord. Tries to, your lordship (30)

clearly doubts the evidence that she did not go back to the house after the funeral by asking the questions "Who would give the plates back". Again we submit that that is a matter for cross-examining counsel and not for the court. And at the 46 reference the matter is taken up again. Then Mapele at 952. Again a remark is made which, in our respectful submission coming from a presiding judge is likely to be very disconcerting to a witness. "It may help you to think more if you will just leave your jaw and put your hands down".

COURT: Yes and that remark was very very justified. Looking at the way this chap was standing in this witness box.

MR BIZOS: It may have been.

COURT: Yes. And if the court has not the right to remark that I do not know what a court is for.

MR BIZOS: My lord ....

COURT: I take your point, go on to your next point.

MR BIZOS: No but my lord your lordship says that your lordship takes my point without giving me an ...

COURT: Yes. And I made a remark about this witness as well. in Annexure Z if I remember well. Exactly on this point.

MR BIZOS: Your lordship says that you take my point without giving me an opportunity to say what I have to say in response to your lordship.

COURT: Yes. Your point is I put the witness off. Well I did not put that witness off.

MR BIZOS: As your lordship pleases. I was going to submit that merely to ask him to remove his hand may have had the same effect as far as putting him at his ease. Then the 71 reference shows that the witness was questioned both by your lordship and your lordship's assessor clearly

indicating that his answer that he was scared to return to school because of an anonymous notice. Then the witness Plaatjie, again attempts being made, an attempt being made by your lordship to extract information about COSAS and asking why the COSAS executive and not the SRC executive, clearly indicating that his proferred evidence was not being accepted. And then Dihali(?). At the 56 reference. Your lordship will recall that at none of these funerals was there evidence of restrictions at the funerals, and the court attempts to obtain evidence prejudicial to the accused about restrictions. (10) There would be nothing wrong, we submit, for a prosecutor who had failed to raise something to try and get admissions from defence witnesses but we submit that it was not correct for the court. The, another remark of your lordship's to Dihale: "Why did it take you so long and first say Tsakane committee and then Silverton committee? Was it not your real name?" Now we submit that in the circumstances that remark was not justified. And then on - if your lordship bears with me. I may have made a mistake. The last one that I gave to your lordship may have been under Nthlapo rather than the other. (20) Would your lordship just put a query there so that we may just see. May I now deal with Maseko. The 97 reference, the 02 reference, I am sorry, the 02 reference. Your lordship will recall that this witness did not write the May examinations. His explanation was that the examination hall was next to the hostels and when there was fighting between the two. Irrespective of any evidence this sort of happening is not foreign and your lordship's response was "So what". Makonso at the 97 reference is admonished to understand the questions well. He is told that he is an intelligent man in a manner which (30)

is an indication to him that his answers for lack of understanding are not being accepted. On the 204 reference he is cross-examined for just under three pages about his speech. London(?) who on the internal evidence showed, on things that he had done that did not have personal hostility towards councillors is examined by the court on a HUKA pamphlet to contradict his word that he was not inspired by any hatred towards the councils. Bishop Buthulezi, the first reference given, examination about funerals by your lordship. Again examination by your lordship about flags and colours. The (10) 43 reference, extensive questioning about songs. The 73 reference, questioning about schools and SRC's. Extensive questioning about SACC funds. The 516, the 519 reference, the 516 reference again questioning about the SACC grants. Then Thebe(?), no Thebe was not included in the schedule and it actually deals with criticism of counsel on both sides rather than on witnesses, sorry. Ndabiswa(?) in the 729 reference questions on the meaning of Aluta continwa(?). Sekweya who we submit was a serious minded person, has his evidence characterised, the first reference, "Rather childish was (20) it not". The 26 reference, questioning to link the bombing of councillor's houses to the anti-council campaign when there was no basis, we submit. The 38 reference, extensive questioning of almost two pages on the street committees when on his evidence it was clear that they were there and they did not form any part of the allegations in this case. If anything they were either there before something that arose afterwards. Then Mosipwa, that your lordship put to him that being, expressed surprise that he should refer to it as difficulties a state of events where sjamboks were used, (30)