IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA Ass. 2

(TRANSVAALSE PROVINSIALE AFDELING)

SAAKNOMMER: CC 482/85

DELMAS

BETHAL

1985-10-16

DIE STAAT teen: PATRICK MABUYA BALEKA EN 21 ANDER

VOOR: SY EDELE REGTER VAN DIJKHORST EN

ASSESSORE: MNR. W.F. KRÜGEL

PROF. W.A. JOUBERT

NAMENS DIE STAAT: ADV. P.B. JACOBS
ADV. P. FICK
ADV. W. HANEKOM

NAMENS DIE VERDEDIGING: ADV. A. CHASKALSON
ADV. G. BIZOS
ADV. K. TIP
ADV. Z.M. YACOOB
ADV. G.J. MARCUS

TOLK: MNR. B.S.N. SKOSANA

KLAGTE: (SIEN AKTE VAN BESKULDIGING)

PLEIT: AL DIE BESKULDIGDES: ONSKULDIG

KONTRAKTEURS: LUBBE OPNAMES

VOLUME A

(Bladsye 1 - 46)

MNR JACOBS: Soos dit die Hof behaag ek verskyn namens die Staat saam met my Geleerde Vriende mnr Fick en mnr Hanekom.

MR CHASKALSON: May it please Your Lordship I appear for all the accused in the case with My Learned Friend Mr Bizos, Mr Yacoob and Mr Tip. There are two matters which I need to raise with Your Lordship this morning. One does concern the State and I would like to raise that immediately. It arises out of a publication in a newspaper and I would like to place before Your Lordship an affidavit which, and a newspaper report. The affidavit is made by the attorneys acting for (10) the accused in this case, the main affidavit ....

COURT: For all the accused?

MR CHASKALSON: They have authority in relation to this as appears from Mr Lane to bring this to Your Lordship's attention on behalf of all the accused and Mr Lane points out that his firm is acting for two of the accused only but he makes it clear in his affidavit that there has been a discussion between him and the other attorneys acting in this matter and between all the accused in the case and that he is the person with authority to bring this matter to Your Lordship's attention. (20) It arises out of a publication in the newspaper Rapport on 22 September 1985 and Mr Lane indicates, after referring to the publication which is annexed to his affidavit, he indicates in paragraph 3 of his affidavit that he and his partner concerned with this case considered that the article amounted to contempt of court and that instructions were then, discussions were then held with the attorneys acting on behalf of the remaining accused persons and that the matter was discussed with all the accused persons and that his firm was then authorsed by all the attorneys concerned and all the accused (30) persons to write a letter to the Editor of Rapport and also

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to the reporter under whose name the article is published. Now that letter appears as Annexure "B" and if I might first just draw Your Lordship's attention to the article itself. The heading of the article, it is a full page of the paper and there is a series of articles published under the heading "Revolusie Oorlog" and if Your Lordship will look on the right-hand side the main lead article at the right, "Suid-Afrika en sy mense is in die greep van revolusionêre oorlog-voering met die publiek as teiken. Die hoof spelers in hierdie aanslag is die S.A. Kommunistiese Party, die African National (10) Congress en The South African Congress of Trade Unions met die hulp van die United Democratic Front en filiale word hard gewerk aan 'n klimaat wat die land en sy mense so sal verswak dat 'n uiteindelike geweldadige sosialistiese revolusie of aanheinbaar is." Now of course that is the very issue in this case and I will show Your Lordship later how the article has been put together to in fact anticipate what the outcome, without referring to this case but to make very clear and direct statements which are highly relevant to the issue which is going to be tried I believe for a year or more (20) here. Now in the letter which is Annexure "B" Mr Lane draws attention to the letter and to the basis upon which, draws attention to the publication and to the basis upon which he acts and the in the second paragraph he says "The indictment served on our clients was made freely available to members of the press. Its contents have been given wide publicity and are well known. They contain an allegation that the aim of the United Democratic Front was and is the unlawful overthrow of the Government by force or by means which include or contem-plate the use of force. It seeks to link the aims of the (30) United Democratic Front with the aims of the South African

Communist/.....

Communist Party and the African National Congress and to hold our clients, the accused, liable for treason through actions inter alia allegedly taken by them on behalf of the United Democratic Front allegedly in furtherance of these aims. These allegations are denied by our clients who will plead not guilty to the charges brought against them." Attention is then brought to, attention is then drawn to the terms of the publication and on page 2 Mr Lane continues by saying "Our clients are aggrieved by this publication and have been instructed to advise you that this publication is regarded (10) as contempt of court. At the commencement of the trial at 10 a.m. on Wednesday 16 October the attention of the presiding Judge will be drawn to the articles to which we have referred and the Learned Judge will be asked to take such steps as he thinks fit against you. We are giving you notice of our intention to bring the publication to the attention of the presiding Judge in case you wish to be represented in court on 16 October 1985. The case has been set down for hearing in the court at Delmas." But for a fortuitous incident yesterday all of us on this side, and the representatives of (20) the newspaper would have been in Delmas this morning because that was where we were led to believe that this case was to be heard. When we discovered yesterday that the agreement between counsel that the case would be heard in Delmas was construed by the State as applying not to the remand but only to the proceedings of the trial notwithstanding the discussions which had taken place I believe in the presence of Your Lordship we were able to communicate with counsel who had communicated with Mr Bizos in regard to this matter to tell him that in fact it was not Delmas, it was to be Bethal. So (30) despite the statement in this letter we are all here today.

COURT:/.....

COURT: Yes while we are on this topic Mr Chaskalson this matter was remanded by the magistrate for hearing today at Bethal. The Judge President determined that the further hearing of this case would be at Delmas and I will adjourn further proceedings of this case after today to Delmas. I was under the impression that the State and the Defence counsel would agree to the hearing today at Delmas and it seems that no agreement was reached and it seems further that, Mr Chaskalson, that this has led to a misunderstanding and to inconvenience possibly on the part of counsel and possibly on the part (10) of the relatives of the accused and as far as I am concerned this state of affairs has to be regretted.

MR CHASKALSON: Yes. Well I am grateful to Your Lordship for those observations. I will say no more about the Delmas situation. We were under the impression there had been an agreement, the State was under the impression that it did not apply to today. But nothing is gained by dwelling on that issue. But we are all here today.

COURT: Now the next point is you invited the newspaper to be present today, are they represented? (20)

MR CHASKALSON: It is Mr Eloff, I am sorry I should have informed Your Lordship.

MR ELOFF: May it please Your Lordship I appear on behalf of Rapport Uitgewers, the newspaper invited to be here today.

COURT: Instructed by?

MR ELOFF: Attorney Couzyn, Hertzog & Horak of Johannesburg.

MR CHASKALSON: I think I should just indicate to Your Lordship the basis upon which we bring this matter to Your Lordship's attention and if I might then just for that purpose refer to two or three cases which will indicate why we have (30) taken, why this view has been adopted and why this particular

method/.....

method of bringing it to Your Lordship's attention has been followed. Now the, it appears that there are a variety of ways of bringing this type of a contempt of court to the attention of a court. One way is by making a substantive application in a civil trial, seeking the commital of a person alleged to have been guilty of contempt of court for contempt. Another way is for such matters, if they do arise, either to be taken up by the court on its own initiative, if it comes to its attention and I believe it is not infrequent that in the court's where newspapers do not report accurately or transgress the con- (10) temptive code requirements Judges take it up on their own initiative. But also as Judge's cannot be expected to read everything that is published it has been accepted that people with an interest may bring such a matter to the attention of the court for the court to decide of its own initiative what response it wishes to make, and in that situation the person acts as it were as an informer. It is described by MILNE, J. in the case of CAPE TIMES v UNION TRADES DIRECTORIES & OTHERS 1956 (1) SA 105 and at page 124 MILNE, J. says this, actually if I could take up reading the last line on page 123, he (20) says:

> "I think it is clear enough from this that the contempt for which the appellant in that case might have been punished was regarded as being criminal and punishable as such in the interests of the public or the administration of justice. In BURGER v FRASER there was no question of the applicant's locus standi to bring proceedings for contempt for he brought no such proceedings. In the CORIN BATORE case - actually the name of the ship appears to have been the COYAN BATORE - the question (30) of locus standi was not raised. It appears from an

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examination of the original record in that case that although Mr Greening, who presented the facts to the court, is stated on the record to have appeared as counsel for the seamen in the contempt proceedings that was not really the case. He had, in his capacity as an attorney, no doubt he was a dual practitioner, previously represented the seamen in connection with interdict proceedings but the affidavit upon which the court relied in punishing Mr McCarthy for contempt of court nowhere stated that Mr Greening was instructed by the seamen to represent (10) it on their behalf. The last paragraph of that affidavit is as follows:

> 'I submit the matter to this Honourable Court and I hold myself in submission to pursue such course as to this Honourable Court it may seem well to direct.'

There was no order prayed, he did not ask for costs and although he mentioned others besides Mr McCarthy as being involved in the disobedience of the interdict, including the consul of the country to which the (20) shippers had belonged he did not cite anyone as respondent. The court on this information presented to it by Mr Greening inter alia issued a rule nisi calling upon Mr McCarthy to show cause why he should not be punished for contempt. It appears to me, therefore, that Mr Greening acted merely as an informant and I respectfully agree with WESSELS, J. in INCORPORATED LAW SOCIETY v SAND KOVASKY & COMPANY 1910 TPD 1295 where he is reported to have said:

> 'I take it that any person has a right to point (30) out to the court that its process is being abused

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and then the Court will, upon being made acquainted with the circumstances, issue a rule if it thinks fit. A fortiori there is no reason why a party himself should not bring to the notice of the court any circumstance amounting to criminal content connected with a breach of an order he has obtained in civil proceedings.'

So it proceeds. Now there are other instances in which that has been done and if I might very briefly indicate to Your Lordship why we bring this matter to the attention of the Court and what the species of the contempt of court appears to us to be an issue here. First there appear to be two species of contempt of court relating to court proceedings. One comment which affects pending court proceedings, and it is really that type of contempt which we are concerned with. Secondly there is what is known as scandalising of a court, where somebody writes in relation to a case matters which are derogatory of the Judge or in some way bring the presiding judicial officer into contempt in relation to the proceedings. Now in relation to the former it appears that the test to be applied is if the matter published were to be accepted by the Court as correct would that have a bearing on the issue which the Court is to decide. It is discussed in the case of S v VAN NIEKERK by OGILVIE-THOMPSON, C.J. and there were two charges in the VAN NIEKERK case, one which was concerned with the scandalising of the Court, one which was concerned with two different types of contempt of court in relation to a speech. But His Lordship the Chief Justice said this, he said:

"From as far back as R v HARDY .....

COURT: Just give me the reference please?

MR CHASKALSON: I am sorry My Lord, I should have done that,

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it is 1972 (3) SA 711 and the passage I am reading from is at page 724. Perhaps I should go back to the last couple of lines at 723:

> "It would, however, also appear from the English decisions that in relation to non-jury proceedings the English courts adopt a less strict attitude towards contempt than that which has been adopted in cur own courts. As far back as R v HARDY it was stated by FINNEMORE, J. that the proper test as to whether an article constitutes contempt of court is not the actual effect which it might produce upon the Judges who would have to hear the appeal but the tendency of the article to prejudice the proper hearing of the prospective appeal. WILSON, J. expounded the test as the effect which it, the statement in issue, may reasonably be said that it is capable of having while BRUME, J. used the expression 'calculated to obstruct and interfere with the course of justice' and went on to say that it was not only real or actual prejudice but potential mischief which had to be guarded against."

And then there are references to a Cape case which I do not need to bother Your Lordship with but it was a statement by the Judge President of the Cape, WATERMEYER, J., and the Chief Justice continues:

> "That distinguished Judge was also a member of the Court in In re NORRY v KONSANE where, in delivering the judgment of the Full Bench GARDINER, J.P., after re-affirming the criterion of tending to interfere with the administration of justice and adding that one cannot enquire in each case whether the document would or would not be likely to influence the Judge's mind went on to

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formulate the test as follows:

> 'If the facts as set forth in the document were accepted by the Tribunal would this influence the case.'

Applying this test the Learned Judge President held that the statement there under consideration, if accepted by the Tribunal, might introduce something outside the evidence which might influence the Court and they therefore constituted contempt of court."

And His Lordship goes on to say that the test propounded in NORRY v KONSANE was followed in MAEDER v PERMAS and in MAKEWANE v DIE AFRIKAANSE PERS BEPERK EN ANDER. In MAEDER's case, ST LIVES, J., after citing the test as formulated by GARDINER, J.P. in NORRY v KONSANE posed the matter for his decision in the following terms:

> "Applying the above test I must ask myself whether, if I were persuaded that the statements in the advertisement complained of in this case were true this would influence the action now pending between the applicant and the respondent. Even postulating a statement clearly capable of influencing the administration of justice in a pending proceeding it is manifestly impossible to determine whether the statement would in fact influence a particular tribunal. To mention merely one aspect would obviously depend upon the individual or individuals constituting the particular tribunal concerned. Accordingly, and bearing in mind the rationale of the type of contempt of court presently under consideration, I am of opinion that the principle adopted over a considerable period of time by the above cited cases is a salutory one which should be maintained. I

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

Now it also appears from one of the cases cited with approval, though on a different issue, by His Lordship the Chief Justice in VAN NIEKERK's case that the element of mens rea is not an element in this particular type of contempt. That was stated crisply in MAKEWANE's case. It is reported in 1957 (2) SA 560 at page 562D where HIEMSTRA, J. said: (10)

"Die respondente het beëdigde verklarings van drie persone in gedien. Die bewerings daarin word nie betwis nie en dit openbaar dat daar geen onreëlmatigheid was in die neem van die foto nie. Die toestemming van die magistraat is selfs vooraf verkry. Die omstandighede waarin die beskrifte gemaak is toon bo twyfel dat daar geen opset was om die strafverhoor te beinvloed nie. Die Redakteur gee toe dat die byskrifte ongeoorloofde kommentaar bevat en bied sy verskoning aan. Dit is egter duidelik dat die afwesigheid van opset of (20) mens rea geen verbeur is nie."

Now it appears from these cases that what is the concern of the Court is that when matters are the subject matter of judicial proceedings, particularly matters of importance, the press must be careful not as it were either to create an atmosphere which could influence the trial by influencing either potential witnesses who may come before the Court or creating a general atmosphere that particular persons are either guilty or may be guilty so that at the end of the day when the Court, after hearing all the evidence, possibly comes to a different (30) conclusion the public confidence in the Court should not be

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impaired by what has taken place in the press. And it is for that reason apparently that the Courts in this country have been meticulous in seeking to control and prevent the publication of matter which, if accepted by the reader, would in effect be expressing opinions or creating atmospheres in regard to pending trials. Now in this particular case, I do not know whether Your Lordship has had an opportunity of reading the indictment in the case ...

COURT: I have read the indictment, yes.

MR CHASKALSON: Well Your Lordship will know that if one looks merely at this little slim volume, the first part, that on page 5 of that slim volume there is an averment of a conspiracy between the ANC and the South African Communist Party and at pages 7 to 8 of that little slim volume there is an averment as to what the goal of the UDF is and it is stated that, "dat die doelstelling van die UDF was en is die wederegtelike omverwerping in of in gevaar stelling van die wettige regering deur geweld en/of dreigemente van geweld en/of op ander wyses wat die gebruik van geweld insluit of beoog", and at page 8 there is a specific averment "dat om hierdie taak suksesvol uit te voer moet die UDF soos hierbo omskryf 'n aktiewe ondersteune vir al die Swart massas in die RSA vereenig, organiseer, mobiliseer, polities opsweef en indoktrineer, kondisioneer en/of aktiveer tot deelname aan aktiwiteite, dade, projekte, handelinge en/of geweldpleging waardeur die RSA onregeerbaar gemaak moet word in welke situasie ontwikkel in 'n geweldadige revolusie deur veral die Swart massas in die RSA". And the final averments at pages 9 and 10 make it clear that the accused are charged pursuant to that alleged conspiracy involving the UDF implementing the ANC, SACP conspiracy. So if one comes back to lock at this publication,

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looking at the whole page Your Lordship will see that it deals with the revolutionary war, links the ANC and the South African Communist Party together, it talks of the United Democratic Front in that context, it makes the very firm statement which I have drawn Your Lordship attention to that "met die hulp van die United Democratic Front en filliale word hard gewerk aan 'n klimaat wat die land en sy mense so sal verswak dat 'n uiteindelike geweldadige sosialiste revolusie onafwendbaar is", which clearly links the United Democratic Front as helping the South African Communist Party and the (10) African National Congress to achieve its goals and is probably the central issue in this case. Now the accused were aggrieved at this publication, they are aggrieved at the fact that such articles should appear before their trial commences and I should indicate that by that time the accused had already appeared in court, this case had been remanded to the Supreme Court, the indictment had been made public and it had been published elsewhere in the press. The effect of that article is to induce the public to believe that the United Democratic Front have a part in an unlawful conspiracy and the implica- (20) tions of that are, as I have put them earlier to Your Lordship in regard not only to the atmosphere of this case and the effect that it may have on witnesses and potential witnesses but the feeling of people standing trial, that they are being, that their fate may be determined elsewhere. Now of course everybody knows that Your Lordship and the Courts do not pay attention to what may or may not appear in the press and that cases are decided by the evidence and not by what outside commentators may write or talk about but it is precisely to keep that, precisely to prevent the trial by press which (30) occurs elsewhere in the world and parts of the world that our

courts/.....

courts have been so strict on this issue, and the test applied is not whether the Judge will be influenced or may be influenced but if the Judge were to accept what appears in the press would that have an effect on the case. Now we bring these matters to Your Lordship's attention and I think that I have now done that, I have indicated to Your Lordship why it is seen in this way and I think that I have no other role to play having done that. So I think I must now leave it to Your Lordship to decide what would be appropriate to be done in the circumstances. If I can be of assistance to Your Lordship in any (10) way or to respond to any problems Your Lordship may have I am obviously will be glad to do whatever I can but I think I have done what my role is.

COURT: Thank you Mr Chaskalson. Mnr. Jacobs, voordat ek mnr. Eloff vra, het u iets te sê oor die aspek?

MNR. JACOBS : Edele, ek het nie eers geweet daarvan nie. Ek kan absoluut niks sê op hierdie stadium nie.

HOF : Het u die berig al gesien?

MNR. JACOBS : Ek het daardie berig self nie gelees nie. Ek moet eerlik wees, ek het hom nie gelees nie. (20)

HOF : Ja, mnr. Eloff.

MNR. ELOFF : Edele, as ek kortliks kan begin deur te handel met die prosedure wat gevolg is. Ek stem met respek heeltemal saam met My Geleerde Vriend, dat 'n persoon wat 'n belang het bloot as informant kan hof toe kom en vir die hof kan sê "Ek wil graag hierdie feite onder die Hof se aandag bring" en die Hof moet dan besluit wat om daaromtrent te doen. My submissie gaan miskien net 'n stap verder as dit. 'n Mens vind dat in die gerapporteerde gewysdes daar minstens, en ek praat nie nou van die gevalle waar daar strafverhoor of waar, soos in hierdie (30) geval, die pers vervolg is nie, vind 'n mens dat daar by wyse

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van eedsverklaring gewoonlik die feite voor die Hof geplaas is en die doel daarvan is, met respek, dit blyk duidelik uit die CAPE TIMES saak wat My Geleerde Vriend vir u uit aangehaal het op bladsy 125 waar MILNE, R. sê ... (Hof kom tussenbei)

HOF : Gee net weer vir my die volle verwysing?

MNR. ELOFF : Dit is CAPE TIMES v UNION TRADES DIRECTORIES AND OTHERS 1956 (1) SA 105 (N) en die passasie wat ek graag aan U Edele wil voordra is op bladsy 125. In hierdie geval praat Sy Edele van die soort van geval waar optrede wat as minagting beskou kan word, nie in die hof in facie curiae (10) plaasvind nie, maar ex facie curiae. Dit verwys na Engelse gesag en dit gaan soos volg aan :

> "Where the contempt complained of is committed ex facie curiae and is dealt with without a criminal trial the proceedings are in practice commenced by an order served upon the offender containing particulars of the conduct alleged to constitute the contempt of court complained of and calling upon the offender to appear before the Court to show cause why he should not be punished summarily for the alleged contempt of court. Sometimes the order(20) has been issued on application by the Attorney General sometimes it has been issued by the court meru moto, but in every case, it has informed the offender the case he has to meet and in every case it has allowed him sufficient time to consult counsel, to prepare his defence and to decide whether he will give evidence on oath or not."

U Edele, in hierdie saak is dit wel so dat daar 'n brief geskryf is, maar daar is vanoggend op my beteken hierdie eedsverklaring waarin die sentimente van die prokureurs duidelik uitgespreek is. Die pers, in hierdie geval Rapport Uitgewers, het nie (30) geleentheid gehad om voor U Edele 'n eedsverklaring in antwoord

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hierop te liasseer nie, maar ek gaan nie vir u daardie geleentheid vra nie, want ek dink nie dit is in enigeen se belang om hierdie verrigtinge uit te rek, ten einde nou hierdie feite voor u te plaas nie. Ek gaan slegs twee feite voor U Edele uitstip en tensy dit gedisputeer word, sal ek vir U Edele vra om dit te aanvaar. Die eerste een is, en ek gee toe met My Geleerde Vriend se betoog, dat opset nie 'n vereiste is waar die pers betrokke is nie. Ek gee nie toe dat dit nie 'n vereiste is waar die indiwidu betrokke is nie, maar beslis waar die pers by betrokke is, is dit nie 'n vereiste nie, maar (10) ek wil graag net die feit onder U Edele se aandag bring dat die persoon wie hierdie artikel geskryf het, is in Kaapstad. Dit is hoegenaamd nie geskryf met enige verwysing na hierdie verhoor of bedoel om dit te skryf met enige verwysing na hierdie verhoor nie.

HCF : Hoe weet ons dit?

MNR. ELOFF : Dit is ongelukkig 'n feit wat ek voor U Edele moet plaas self, want ek het nie 'n eedsverklaring wat ek voor U Edele kan plaas nie, want die eedsverklaring is vanoggend eers op my geliasseer. (20)

HCF : Maar dit is tog so dat hierdie koerant gepubliseer word landswyd.

MNR. ELOFF : Korrek.

HOF : En dat hy ook hier in Transvaal gelees word?

MNR. ELOFF : Dit is so, maar die persoon wat die artikel geskryf het, sit in Kaapstad en dit is beslis nie geskryf met verwysing na hierdie verhoor, maar ek sal terugkom na daardie aspek, want ek gaan by U Edele aan die hand doen, met respek, dat hierdie artikel in elk geval niks met hierdie verhoor te make het nie. So, die enigste punt wat ek wil probeer (30) maak is dat is die gebruik blykbaar om by wyse van eedsverklaring

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minstens betyds aan die betrokke persoon kennis te gee, nie in 'n brief nie, maar by wyse van eedsverklaring waar feite deeglik uiteengesit word.

HOF : Sou die korrekte manier nie wees dat die Hof nou dat dit onder die Hof se aandag is, sy griffier die koerant laat kennis gee dat hierdie aspek oorweeg word en hom geleentheid gee om die Hof toe te spreek nie, maar nou is u hier. So, die prosedure is kortgeknip. Daar is net twee uitweë oop. Of u spreek my toe of u sê u het nie voldoende geleentheid om voor te berei nie of u het nie voldoende feite nie, u wil nog materiaal voor my plaas en ek moet die saak laat oorstaan. Ons kan nie op twee stoele sit gelyktydig nie. (10)

MNR. ELOFF : Ek stem met respek saam. Dit is om daardie rede wat ek vir U Edele gaan vra of ek dalk die feite sonder eedsverklaring voor U Edele kan plaas.

HOF : Ek voorsien 'n probleem en dit is dat mnr. Chaskalson eenvoudig die gegewens voor my geplaas het. Al sou hy sê dat hy aanvaar dat die persoon in Kaapstad is en dat die persoon sekere dinge bedoel het of nie bedoel het nie, hoe bind dit my? (20)

MNR. ELOFF : Alleen met respek in die sin dat daar is 'n feitlik gemeensaak voor u geplaas. Alleen in daardie sin.

HOF : En afgesien daarvan, hoe affekteer dit die publikasie? Moet ek die publikasie nie neem soos hy staan nie en kyk of die publikasie inmeng met die verloop van die verrigtinge nie?

MNR. ELOFF : Dit is korrek.

HOF : So, wat die persoon ook al bedoel het, is eintlik irrelevant.

MNR. ELOFF : Dit is korrek. Ek gaan niks verder van daardie punt maak nie. Dit was net ter inleiding. As ek dan mag handel met die aantyging wat gemaak word teen Rapport Uitgewers. (30)

... / Die

Die definisie van hierdie soort van minagting van die hof word baie duidelik gedefinieer of word baie duidelik weergegee in Law of South Africa, volume 6. Dit is die band wat handel oor strafreg. Die outeur doen dit met verwysing na vele gesag wat ek binne oomblikke aan U Edele sal voordra en wel op paragraaf 199 bladsy 182. Hy sê :

> "It is contempt of court to publish either by the written or the spoken word information of comment regarding a case which is pending and which may tend to prejudice the outcome of the case." (10)

Die woorde waarop ek graag sou wou klem lê is "regarding a case." "It must be regarding a case which is pending." Kan ek sommer op hierdie stadium vir u sê ek aanvaar ten volle My Geleerde Vriend se argument oor die toets wat geld met betrekking tot die tweede been, naamlik 'n mens moet vir jouself vra, as 'n mens daardie feite aanvaar, is daar nadeel? Met ander woorde, dit is bloot 'n geval van potensiële nadeel, maar wat die eerste been betref, my submissie is ... (Hof kom tussenbei)

HCF : Is u betoog dus dit dat as iemand aangekla word van diefstal, dat hy 'n hoender gesteel het, die koerant nie (20) mag publiseer dat hy skuldig is in daardie saak nie, voordat die saak aangekom het nie, maar die koerant wel mag sê hy is 'n dief van 'n hoender?

MNR. ELOFF : Miskien nie eers so ver nie. Miskien nie eers so ver om te gaan om te sê hy is 'n dief van 'n hoender nie, maar kan ek dit vir u illustreer aan die hand van gesag. Daar is vele gesag op hierdie punt. Die eerste saak is AFRIKAANSE PERS BEPERK v MBEKI 1964 (4) SA 618 (A) op 627 D tot F. STEYN, H.R. haal aan uit vele gesag NORRY v KONSANE en MAKUWANE, die saak wat My Geleerde Vriend aangehaal het : (30)

> "Uit al hierdie sake en ook uit ander blyk dit voorts

... / tot

tot stremming of belemmering van die regspleging as minagting van die hof beskou en summier bereg en bestraf is, slegs waar die ten laste gelegde gedrag plaasgevind het met betrekking tot 'n aanhangige geding."

Die feite in hierdie saak, as ek dit net baie kortliks vir u mag voorhou op 626 E tot F :

"Wat die skuldigverklaring betref, is dit nodig om daarop te let dat dit gaan om 'n besondere vorm van minagting, naamlik publikasie van berigte wat die respondent byvoorbaat voorhou as 'n persoon wat saam met ander aan sekere(10) misdade skuldig is en wat uit hoofde van vooringenomendheid teen hom, waartoe dit aanleiding kan gee, die uitwerking sou kon gehad het om hom te benadeel."

Maar die eerste been is my respekvolle submissie, dit gaan daaroor dat daardie persoon voorgehou word in daardie saak. Met ander woorde, dit moet betrekking hê op 'n spesifieke saak.

HOF : Moet dit by name genoem word, die saak?

MNR. ELOFF : Dit sal genoeg wees om te sê die terroriste verhoor in Pietermaritzburg op die oomblik, wat op die oomblik aan die gang is as 'n voorbeeld. Die tweede gesag wat ek (20) graag aan U Edele wil voorhou is MAKUWANE v AFRIKAANSE PERS BEPERK 1957 (2) SA 560. My Geleerde Vriend het u reeds verwys na hierdie saak. Net by wyse van illustrasie, die feite in hierdie saak op bladsy 561 D tot F. HIEMSTRA, R., soos hy toe was, sê :

"Die feite hier is die volgende: In die loop van die hoogverraadondersoek het 'n getuie 'n groot wêreldkaart as bewysstuk ingedien wat hy gevind het in die kantoor van 'n organisasie wat homself 'The South African Peace Council' noem. Die applikant sê dat hy lid is van (30) The South African Peace Council wat in 1953 ontstaan het

... / uit

uit 'n beweging vir vrede in Suid-Afrika en wat sy hoofkwartier in Johannesburg het. Die organisasie het volgens die petisie dieselfde oogmerk as The World Peace Council ..."

Daar was 'n berig gewees in die Vaderland koerant, wat soos volg lees :

"Dit is 'n kaart (daar is 'n foto van die kaart) wat die getuie gevind het in die kantore van The South African Peace Council en toon die hoofkantore van die Peace Movement in Moskou met die vlaggies van elke land wat ver-(10) takkinge van die beweging verteenwoordig."

Spesifieke verwysing na 'n getuie in 'n saak. Die derde een is :

"'n Illustrasie van 'n saak waar daar nie 'n direkte verwysing was na 'n verhoor nie. Om bewyse van duidelike eksterne faktore het die Hof bevind dat hierdie toespraak duidelik verwys het na die betrokke verhoor."

Dit is die saak wat My Geleerde Vriend u alreeds na verwys het S v VAN NIEKERK. Ek weet nie of U Edele die feite onthou nie. Dit was prof. Van Niekerk van die Natalse Universiteit wat 'n toespraak gehou het waar 'n groot aantal mense teenwoordig(20) was oor aanhouding. Die saak is gerapporteer in 1972 (3) SA 711 (A). Die feite is kortliks op bladsy 715 E tot F : Die man het 'n vergadering waar baie persone teenwoordig was, toegespreek terselfdertyd as wat daar 'n groot verhoor plaasgevind het in Pietermaritz, S v HASSIM EN ANDERE en in Durban Stadsaal het hy 'n toespraak gehou. Hy het verwys na elkeen van die geskilpunte wat ook 'n geskilpunt was in die saak. Om die verbintenis te bevind tussen sy toespraak en die verhoor - en ek meld weer eens, hy het nie direk verwys na hierdie verhoor, hy het na 'n Pieter maritzburg saak wel verwys, maar nie na(30) hierdie een nie, het hy die advokate wat opgetree het in

... / daardie

daardie saak, uitgenooi om teenwoordig te wees, om te kom luister na sy toespraak en OGILVIE-THOMPSOM, H.R. sê op bladsy 723 A tot F :

"In view of the publicity which had attended the HASSIM trial, appellant must inevitably have been aware not only that the trial was currently in progress, but also that it was directly concerned with the terrorism act upon some aspects of which he intended to speak at the meeting. Moreover, appellant personally extended invitation that the defence counsel engaged in that trial(10) should attend the City Hall meeting and join those seated upon the stage, irresistably points towards some correlation in appellant's mind between the HASSIM and what appellant had by virtue of his prepared typescript, already decided he would say at the meeting."

Daar was 'n direkte eksterne feit wat onteenseglik aangetoon het dat hy bedoel het om sy toespraak te maak met spesifieke verwysing na die verhoor wat daar plaasgevind het. Laastens, as ek U Edele kan verwys na net nog 'n voorbeeld, S v VAN STADEN 1973 (1) SA 70 (SWA) per TRENGOVE, R. en wel na bladsy 74 E(20) tot G :

"Dit bring my dan by die werklike geskilpunt in die saak. Die advokaat vir die appellant het betoog dat die gewraakte artikel volgens die strekking daarvan geensins as minagting van die Hof beskou kan word nie."

Daar was 'n baie duidelike verwysing in hierdie saak oor die kwessie van straf van hierdie betrokke persone. Ek kan nie nou die presiese verwysing vind nie, maar dit was baie duidelik na 'n betrokke verhoor gewees. As 'n mens van daar af gaan na hierdie saak, ek kan nie ontken dat hierdie artikel in (30) hierdie publikasie handel, hoewel in baie breë trekke, in die

... / sin

sin dat 'n mening uitgespreek word oor aspekte wat gedek word in die geskilpunte in hierdie saak, as 'n mens na die klagstaat kyk nie, naamlik onder andere die doelstellings van die ANC en die United Democratic Front. As 'n mens hierdie artikel lees, dan vra 'n mens vir jouself waar in hierdie artikel blyk dit dat die hoegenaamd verwysing het na enigiets anders as die algemene punt wat feitlik daagliks op televisie verskyn, feitlik daagliks in die koerante verskyn, feitlik daagliks op die tong van elke persoon in die straat is, naamlik geweld wat gekoppel word met die ANC. My submissie gaan wees dat (10) daar iets meer moet wees as blote toeval. Die blote feit dat 'n kontensieuse punt wat behandel word deur die pers in 'n koerant toevallig ook die geskilpunt vorm van 'n verhoor, is nie genoeg in my respekvolle submissie nie. U Edele is wel bewus daarvan dat daar dikwels verhore in hierdie land plaasvind waar hierdie geskilpunte opkom. 'n Mens hoef dit alleen in die pers te lees. Dit gebeur dikwels. Om daardie rede moet daar iets meer wees as dekking van daardie geskilpunt. 'n Mens vind dit interessant dat die skrywers in Law of South Africa handel hiermee in paragraaf 19 - ek dink dit is 199. As (20) ek net die verwysing kan vind. Hulle sê op paragraaf 191 :

> "It would seem that in a case of contempt committed by the publication of particulars relating to a matter which is sub judicae, the publication of matter which would otherwise be defamatory may be justified by the fact that it deals with an event which holds extraordinary public interest. For example, the assassination of a prime minister."

Met respek, 'n mens kan kwalik vandag ontken dat die betrokkenheid van die ANC in hierdie land 'n kontensieuse punt is (30) wat daagliks op almal se tonge is en daagliks in die media

... / behandel

behandel word, ook wat betref die United Democratic Front. Hulle gee dan 'n paar voorbeelde. In voetnoot 9 verwys hulle na Strauss se boek. Hulle sê :

"See Strauss, Strydom and Van der Walt path reg 172 - 173 Strauss 1971 S.A. Law Journal 129 : The authors point out that no prosecution of contempt was instituted when newspapers throughout the country published details of the attempt assassination by Tsafendas and of the siege of the Israeli Consulate in Fox Street, Johannesburg in 1975 by the Protter brothers. All these particulars (10) related to figures were evidence in trials. Tsafendas was even openly described as a murderer by the news media before his trial."

Die enigste punt wat ek wil probeer maak is, waar 'n mens so 'n kontensieuse punt het, moet 'n mens iets baie, baie sterker hê as blote toeval, blote toeval dat daardie punte gedek word in die publikasie. Nou soek 'n mens, met respek, tevergeefs in hierdie publikasie na enigiets wat daarop dui dat hierdie artikel gemik is op hierdie verhoor of soos die definisie lui in Law of South Africa "regarding the pending trial." (20) 'n Mens kan eerder sê dit is "regarding" miskien baie "pending trials" wat in die land plaasvind, nie noodwendig hierdie een nie. U Edele sal vind in die artikel as 'n mens kyk onder die opskrif "Groep ANC wil praat", daar word gepraat van die beleid van die ANC en so meer en soos ek aangetoon het, ek sê ek gee toe, met respek, dat daardie punte, wat baie oppervlakkig behandel word, is relevant tot die geskilpunt in hierdie saak en word uitdruklik so uiteengesit in die klagstaat.
As 'n mens kyk na die artikel aan die regterkant, vind 'n mens in die heel regterkantste kolom wat daar begin met "Minstens(30) twee van sy ampsdraers is gelyste kommuniste, Zoli Malindi

... / en

en Helen Joseph." Toevallig sien ek daar is twee Malindi's hierdie saak. Ek sien nie een van hulle se naam is Zoli nie. Hulle ander name. In elk geval is die klagte in hierdie saak, sover ek verstaan, nie lidmaatskap van die SAKP nie. Hoe dit ook al sy, daar is minstens twee Malindi's hier. Miskien is daar nog tien ander. Dan gaan dit aan "16 UDF Leiers staan tans op verhoor in Pietermaritzburg." So, miskien sal die beskuldigdes in die Pietermaritzburg-saak meer rede hê om te kla, as hierdie beskuldigdes, want daar word spesifiek na hulle verwys. Ek merk in die brief wat die geleerde proku-(10) reur van die beskuldigdes geskryf het en wat My Geleerde Vriend na verwys het, maak hy punt van - omtrent in die middel heel onder is daar 'n klein opskriffie met die naam van Koploos. in die artikel. "Die United Democratic Front is koploos. Feitlik al sy leiers is in hegtenis of skuil iewers." Ek sien hy maak 'n punt daarvan. Is hulle in hegtenis weens die huidi usmaatreëls? Is hulle in hegtenis vir ondervraging of om welke rede? Ek sal met respek aan U Edele aantoon dat die blote feit dat 'n man in aanhouding is, beteken nie dit verwys na 'n verhoor wat hangende is nie en mag ek in hierdie(20) verband verwys na weer eens Law of South Africa paragraaf 199. In voetnoot 3 word dit duidelik gestel :

> "A case is not pending where a person is arrested for questioning by virtue of special statutory authority which does not necessarily lead the criminal prosecution as in the case of the former Section 70 of the General Amendment Act. It is submitted that this principle also applies to detention in terms of Section 6 of the Terrorism Act."

Met ander woorde, in hegtenis om een van tien redes. Dit (30) toon met respek geensins dat hierdie persone is in hegtenis

... / in

in hierdie verhoor - daar is geen verwysing na hierdie verhoor in die artikel nie. Die enigste verwysing na enige verhoor is 'n verhoor in Pietermaritzburg. Daardie punt word ook gemaak in MBEKI se saak.

> "Indien ons bestaande reg nie uit die oog verloor word nie, dan hang die aanneemlikheid van hierdie betoog in die eerste instansie af van die juistheid van die bewering dat inhegtenisname kragtens artikel 17 in die geval waar die gearresteerde self onder verdenking van 'n misdaad beskou moet word, as 'n stap waarmee strafproses begin (10) of aanhangig gemaak word."

Met respek, die blote feit dat leiers van UDF in hegtenis is, beteken met respek niks. Dit beteken geensins dat hierdie artikel deur die redelike leser daarvan in die straat of enige persoon gelees moet word as synde betrekking te hê op hierdie saak nie. My submissie is dat die artikel is absoluut neutraal wat betref hierdie verhoor. My submissie aan U Edele is dat voordat daar bevind kan word dat hierdie artikel op hierdie verhoor betrekking het, daar 'n baie sterk aanduiding moet wees veral omdat hier gehandel word met 'n baie kontensieuse (20) alledaagse punt. Dit sal baie jammer wees as die pers nie mag menings lug oor wat hulle beskou as die aktiwiteite van een of ander organisasie nie, bloot omdat daardie punt mag ontstaan in 'n verhoor. Daar moet verder gegaan word voor daar hoegenaamd sprake kan wees van minagting van 'n hof, veral omdat daar baie terroriste verhore orals gevoer word. So, my submissie is dus dat daar geen sprake kan wees van minagting van die Hof nie, maar vir die belang van die beskuldigdes stel ek dit duidelik om hulle miskien tevrede te stel vir sover hulle gevoelens seergemaak mag wees. Hierdie artikel is (30) geensins bestem om op hulle betrekking te hê spesifiek nie,

... / hoegenaamd

hoegenaamd nie. Dit is bestem om bloot 'n mening te lug oor die aktiwiteitevvan 'n organisasie en dit was geensins bestem gewees om hulle regte aan te tas nie. Dankie.

MR CHASKALSON : Would you like to add something to what you have said already?

... /MR CHASKALSON

MR CHASKALSON: Again perhaps if I might just, perhaps to be of assistance to Your Lordship, I must say I was somewhat surprised, I had expected that My Learned Friend might say that the newspaper regretted the publication and would not again enter upon issues which were the subject matter of this case. I listened for that and did not hear it. Apparently it is claiming the right to do so as long as it does not mention the case by name. May I perhaps just draw Your Lordship's attention to two aspects. One in the VAN NIEKERK case. What was said by His Lordship the Chief Justice, My Learned Friend read Your Lordship the passage about the publicity attendant upon the HASSIM trial and the invitation to people to sit on the stage but if Your Lordship goes a little bit further in that passage Your Lordship will find the following:

> "Furthermore with the proceedings of the HASSIM trial, including the allegations therein made, having been so prominently featured in the press I am of opinion that appellant must inevitably have appreciated that at least some, if not indeed the great majority of his audience, would associate his remarks with the proceedings in the Pietermaritzburg trial."

Now in the correspondence the letter from Mr Lane and Mr Dyson, there is this statement in the beginning of the second paragraph. It says "The indictment served on our clients was made freely available to members of the press. Its contents have been given wide publicity and are well known and they contain an allegation that the aim of the United Democratic Front was", and in the reply, there is a reply to that letter from the attorneys and when they reply they say: "Ons opdrag is om op rekord te plaas dat die betrokke berigte nie geskryf is met die verhoor wat op 16 Oktober begin in gedagte nie. Dit

blyk /....

blyk ook nie ex facie ons klient se berigte dat die berigte betrekking het op die saak waarna u verwys nie." They say nothing to suggest that they did not know of the case, that it had not received wide publicity and that the nature of the allegations are well known. Now the complaint, the simple complaint made here is not that there has been a statement that the African National Congress has a policy of violence, that is well known, everybody knows that, it has been determined in many cases in this country before. The complaint is to link the United Democratic Front with that and that is something (10) which is totally different, that is something which is the subject matter of this case and that is something which the public, by this type of article and this type of publicity are being led to believe is the truth and it is that to which the accused object. It is for Your Lordship to decide that issue, it is not for the press and it does not help the press, as My Learned Friend says, if they know of the case and if they write about the case to do so in a way without mentioning the name. That is all that I think I should say other than to mention that the point in the MBEKI case was whether the (20) accused had yet been arrested on a charge. It was held that before a person is arrested on a charge there was no case pending and that the summary jurisdiction of a Court to interfere in relation to cases pending does not exist where the publication takes place prior to the arrest. If, and the point is made in the judgment that there are other procedures, other than the summary procedure. You can take proceedings for attempting to defeat the ends of justice or some other form of interference with court proceedings but the summary jurisdiction does not exist, and that was really the point, as I understand the (30) judgment in the MBEKI case. I do not have it in court with

me/ ....

me but I recollect the case, my recollection of the case is that that is the point. I may be wrong but I think I, I think the point was that the person had been held in detention but had not been arrested and no charge had been brought and therefore the publication in regard to matters which subsequently became the subject matter of a trial could not be dealt with summarily but should be dealt with, if at all, in another basis. But I am saying so without the case in front of me. I think I am right.

MNR ELOFF: Ekskuus tog U Edele mag ek net 'n punt weer stel. Edele My Geleerde Vriend voel dat ek nie sterk genoeg gestel het oor die houding van Rapport. Namens die koerant stel ek dit baie duidelik die koerant voel jammer as die persone gegrief voel en sekerlik sal die koerant nie enige berigte publiseer wat wyer is as wat hulle mag gaan nie. Ek sê dit slegs, die grondslag dat die koerant erken nie dat dit dit hier gedoen het nie, ek sê dit baie duidelik ek voel jammer as iemand gegrief voel en het geen bedoeling om dit ooit te doen nie en sal dit ook nie doen nie. Dankie.

HOF: Ek sal op hierdie aspek in gaan en 'n reëling daaroor, 'n uitspraak daaroor gee wanneer hierdie saak weer hervat. U sal in kennis gestel word van die datum. Are there any other points you want to mention Mr Chaskalson?

MR CHASKALSON: Yes My Lord. If I might now turn to deal with something which will be, this time it is of relevance to the State. I am going to be referring to some correspondence, if I might hand it to Your Lordship.

COURT: Before we proceed Mr Chaskalson we should start to sort out the exhibits in this case. Is there some sort of a system upon which the parties have agreed? How should I number my documents?

MR CHASKALSON:/.....

MR CHASKALSON: My Lord I think that this will not have relevance to the main trial.

COURT: Will it not be relevant to the trial itself?

MR CHASKALSON: No My Lord, it is merely to ask for Your Lordship, a direction from Your Lordship. It will not be an exhibit in the case and I think with respect there is no need for Your Lordship to give them any numbers at this stage. It really relates to the request for particulars which was served on the State towards the middle of August. On 19 August a letter was written in these terms: (10)

"We refer to the above matter and have been requested by the other attorneys acting on behalf of all 22 accused persons in this trial to approach you with the urgent and serious request that the State reply to the defence's request for further particulars to the indictment be furnished in English and not in Afrikaans. As we previously advised your offices the accused can neither speak nor are they conversant with Afrikaans and the fact that the indictment has been drawn in that language made it impossible for the accused to personally par- (20) ticipate fully and constructively in the preparation of their defence. For that reason the defence attorney requested of Advocate Jacobs that an English translation of the indictment be furnished by the State but this he was not prepared to do. Accordingly the defence has gone to the considerable expense of obtaining a translation of the indictment in order to enable the accused to prepare their defence. For the above reasons we will be most obliged if you would ensure that the further particulars are furnished in English since this will avoid further (30) and unnecessary delays in the preparation of the accused's

defence/.....

defence and it will also be an appropriate courtesy which would be much appreciated."

There was no reply to that letter but on direct enquiry in regard to the particulars apparently information was given that they could be expected some time in September. Then the second letter dated 29 August was written, well that is a request, I do not need to detain Your Lordship, it is a request for some of the documentation and inventories, asking for urgent attention. There was no reply to that letter either. Then there was a letter of 29 August, the same date: (10)

"Further to our letter of 19 August when we requested that your reply to the defence request for further particulars to the indictment be furnished in English we would be pleased if you would bear in mind the number of copies."

And that is mentioned. And then at page 2:

"We note your advice that it is going to take some two to three weeks from the end of August to prepare the further particulars and are therefore hopeful that you will be able to accede to our request and that we (20) obtain approximately ten copies of those further particulars since we would hope to avoid further delays when working on this defence which could be occasioned by having to set up special arrangements for the making of additional copies. Your assistance will be much appreciated."

There was no reply to that letter. On 10 September another letter is written:

"We refer to the above matter and advise you that we have been requested by the other attorneys acting on (30) behalf of all 22 persons in this trial to furnish you

with/.....

with a copy of the English translation."

That has been done. But the last paragraph:

"May we take this opportunity to remind you of our request that the further particulars to the indictment be provided in English in order to obviate the necessity for commissioning yet another translation of these pleadings and we trust that you will meet us in this regard."

And there was no reply to that letter. Then there was a letter on 20 September: (10)

"We refer you to the following letters dated

1) the 19th August 1985.

2) the 29th August 1985.

3) the 29th August 1985.

4) the 10th September 1985

and will be pleased to receive the courtesy of a response thereto. You can appreciate that it is of considerable importance to the preparation of the accused's defence that the information and documentation requested above be supplied as soon as possible and (20) we would appreciate your urgent advice in this regard."

There was no reply to that letter. Then there was another letter written:

"We refer to the above matter and we advise that we have been requested by the other attorneys acting on behalf of all 22 persons in this trial to confirm that in discussion with counsel Advocate Jacobs said he would provide the defence with transcriptions of the various meetings mentioned in the indictment once he had had the opportunity to make a few amendments. We would be (30) pleased if you would advise as soon as possible when

these/.....

these transcriptions will be made available. Your assistance will be much appreciated."

And there was no reply to that letter. Then on 3 October this letter was written:

"We address you at the instance of all the attorneys of record in the above matter and on behalf of all the accused therein. We refer to previous correspondence and advices in regard to the furnishing by you of further particulars to the indictment as requested by us. In particular we refer to your advice that these particulars will be available two or three weeks from the end of August. The indicated time has now passed and we regret to have to place on record that we have as yet not received the further particulars requested by us. We must record further that the lack of such further particulars is serious prejudicing the capacity of the accused to prepare their defence and may also make it impossible for us to comply with the request made by Mr Justice Van Dijkhorst that all legal issues arising on the indictment be dealt with on 16 October. This in turn may lead to regrettable delays in the commencement of the trial proceedings. We should like to stress that this is a matter of particular concern and weight in view of the fact that all the accused are still in custody. We would request you to give your urgent attention to this matter and to advise us, also as a matter of urgency, precisely when the further particulars will be delivered by you."

There was no reply to that letter. Now Your Lordship will see that the inability to establish communication with the State apply not only to the, whether this case was taking place in

Delmas/.....

Delmas or Bethal but in regard to all sorts of matters related to the trial. Now we find ourselves today in this position, the accused have been in custody for a very long time, some have been in custody already for over a year, others for periods between six months and a year. Now the State took a long time to prepare its indictment and no doubt it is a complex case, there is a lot of paper in that indictment, but unfortunately it does not tell you some of the essential facts, some of the essential averments, which the State must have resolved in its own mind before it chose to charge the (10) accused with treason because they are absolutely vital to the formulation of the charge and so, but they have not put it in the indictment, they must have known and sorted that out in their own mind in order to formulate an indictment. Now although our request for particulars was a lengthy document it is directed to information which the State must have sifted and identified and there seems to be no reason why the particulars should not have been furnished, but above all no reason why we could not get some definite statement as to when to expect these particulars and it seems that the State does (20) not have an appreciatin of the position of the accused persons and is conducting the case as if time were not an issue and as if the position of the accused were not an issue. We have a very long indictment served on the accused in a language which is not their language, which is contrary to the ordinary custom. We have a choice of venue by the State originally to be in Bethal, miles away from the accused, their friends and their families, without any prior consultation though subsequently there were discussions to shift the venue. We have opposition to bail while the accused are being kept in custody, (30) we do not deal with that today because that is a matter pending

before/.....

before another Court, before the Full Bench and will be argued on Friday. We have no reply to our correspondence, we have no particulars. This morning when it was raised with the State as to when the particulars might be given they say that they have their draft ready but it will need some checking, it will need some preparation and apparently there is no commitment to a time to put up the document. Now we find ourselves in this position today. We had hoped that if there were any issues arising on the indictment that we would be able to deal with them today, certainly the indictment as it stands without (10) particulars seems to us to be excipiable, perhaps the particulars will put that right, perhaps the particulars will tell us the sort of information we need to know, perhaps we are wrong in thinking it is excipiable but that is a matter which would have to be argued. But we find ourselves in this position that we cannot proceed as had been contemplated and we really have no way of being able to tell Your Lordship whether the case, when the case can continue, we do not know what is going to emerge when the particulars ultimately come, we do not know how long we are going to need to study those particulars, (20) we do not know whether or not we are going to take points on the indictment and have to argue them. Now none of that can of course be resolved today and I am not going to, I do not expect Your Lordship to do anything in that regard. But what I would ask of Your Lordship is a direction to the State to indicate the need for some haste as far as this case is concerned. Perhaps to take seriously requests which are put to them, to deal with them, and to let this case proceed as litigation should proceed not as it were as a barrier where you speak into the void and get no response. I would like Your (30) Lordship to get an undertaking from the State as to when these

particulars/....

particulars can be read and in the light of that to plan the future progress of this case so that we can know when we are, whether we are going to start the case this year or whether we are going to address argument to Your Lordship this year. And I would ask Your Lordship to get some indication from counsel for the State as to a date by which he will commit himself firmly to giving us these particulars and to make it clear to him that they should be given by then and that their work should be done to see that it is done by then and that I am afraid that the provisional date fixed for 4 November may yet (10) remain a provisional date. It is our anxiety, we are in this dilemma, the dilemma facing us is that the accused are in custody and have been for a very long time and are very anxious therefore for the case to proceed, so there is a desire on our part to get going as soon as possible. On the other hand we cannot start the case without adequate preparation and without considering the particulars and taking instructions. We do not know until we see those documents whether we are going to address argument to Your Lordship on the indictment, whether we are going to be able in the time which we will have to (20) take instructions to say we are ready to commence on 4 November, which I understood to be the agreed date, the understood date for the commencement of the trial, and I need to tell Your Lordship that because this is the position in which we find ourselves today and we are really asking now Your Lordship's assistance to ask to put the State on terms as to when it will put those particulars up and we will give Your Lordship this assurance that as soon as those documents come to us we will apply ourselves to them with the greatest diligence that we can muster and will try to formulate our position as soon (30) as we possibly can and we will inform both the State and

Your/.....

Your Lordship as soon as that is served whether we will be in a position on 4 November to commence the evidence or whether we contemplate argument or whether we will be addressing Your Lordship to seek a remand. But I would very much regret if we had to come back to court on 4 November and find ourselves in much the same position as we find ourselves today. So I would ask Your Lordship to try to help us and resolve the position by putting the State on terms to deal with this matter.

COURT: I will hear Mr Jacobs after the tea adjournment.

COURT ADJOURNS FOR TEA. COURT RESUMES. (10)

MNR JACOBS: In die eerste instansie wil ek net vir u vra dat hierdie saak uitgestel word vir verhoor te Delmas op 4 November. Die kwessie van die besonderhede wat gevra is, laat ek ter aanvang sê, ek wil nie graag kom met 'n klomp verskonings nie, maar ek sal vir die Hof op 'n paar wys, dat ek is jammer ook self, want ons self wil ook graag hierdie goed van ons af kry. Ek mag vir die Hof noem dat sedert die klagstaat uitgegaan het en ons die versoek om besonderhede gekry het, moet ons op twee vlakke, as een stel advokate, by twee verskillende howe moet ons akkommodeer. Daar is 'n aansoek oor die borg en (20) waar ons voorbereiding moes doen. Soos ek sê, ek wil nie graag dit as 'n verskoning aanbied nie. In die tussentyd moes ons ook hier aangaan. Daar is My Geleerde Vriende in die gelukkige posisie. Hulle het net die een saak. Ek het ander advokate wat die regsargument daar geargumenteer het. So, ons was verdeeld op daardie afdeling. Dan wil ek ten tweede sê dat dit is nie 'n kwessie dat die Staat onverskillig staan nie. Ek self persoonlik het baie nagte tot twaalfuur wat ons werk. Ons werk naweke om die goed reg te kry. Die derde aspek wat ek aan u wil meld is in die besonderhede word gevra vir (30) dokumente. Ons moes letterlik honderde dokumente uitsoek wat

... / ons

ons graag aan die verdediging wil verskaf, nie om op 'n later stadium hulle te kom verras met verdediging nie, om dit vir hulle te gee. Daar gaan honderde dokumente aan die verdedi ging oorhandig word. Daar is twintig toesprake wat gemeld word in die klagstaat, waar ons transkripsies wat op die ver- gaderings gemaak is moes kry en wat, nadat ons dit gekry het en ongelukkig was daar foute in wat ons toe moes regmaak. Ons moes 'n korrekte weergawe aan die verdediging verskaf. Die vierde punt wat ek dan vir die Hof wil meld is, dat die besonderhede wat gevra word, is baie lywig. Dit is 73 (10) bladsye soos hy so staan. As 'n mens daarna kyk, sal 'n mens sien dat party eer ten opsigte van tien bewerings in die klag- staat word daar gesê dat die vorige vrae word herhaal. Dit word in een paragraaf gestel om te sê hulle herhaal al daardie sekere vorige vrae ten opsigte van hierdie. Dit maak daardie dokument nog meer lywig. Soos ek sê, ons het nagte gewerk. Ons het so ver gekom dat ons - dit is 'n ander punt wat ek wil maak - by verskeie geleenthede van die verteenwoordigers van die verdediging ontmoet het, waar ons met die ander saak ook besig was en dan het hulle ons gevra vir hierdie besonder- (20) hede en ons het vir hulle gesê ons doen ons bes, ons werk hard daaraan, ons sal dit so gou as moontlik vir hulle laat kry. So, dit is nie 'n kwessie dan dat hulle heeltemal geïgno- reer word nie, maar ons het aanvaar dit is voldoende as ons vir hulle sê. Ek het selfs vir mnr. Bizos gesê dat daardie transkripsies van die toesprake wat hy gevra het - omdat hy gevra het of ons dit al voor die tyd vir hom kan gee, sodat hulle dit kan lees, kon ons nie vir hom as 'n foutiewe stuk gee nie. Ons moes hom eers regmaak en sodra dit reg is, sal ek dit vir hom gee. So, ons het op hierdie stadium gekom,(30) ek mag die Hof inlig, dat ons die laaste deel daarvan opgetrek

... / het

het. Al wat nou gebeur is, hulle moet getik word en die dokumente is uitgesoek en as dit klaar getik is, is dit 'n kwessie van oorlees om net seker te maak, maar op 'n geskrewe stuk is hierdie besonderhede oor die 200 bladsye lank.

HCF : Maar kan ek nou asseblief 'n datum kry waarop u dit gaan lewer? U weet, ek moet regtig sê, ek weet wat u probleem is, ek kan dit begryp nou dat u dit verduidelik het, maar ek is baie teleurgesteld dat ons nie vandag in 'n posisie is om ten minste, as daar regsargumente was of is, dit af te handel nie. Ek wil baie graag op 4 November met die saak self (10) begin het. Ek is nie gelukkig daarmee dat u vir my sê dit is by die tikster en dit sal kom nie. Wat is die datum wat u sê, wanneer gaan dit gelewer word?

MNR. JACOBS : Ons plan was dan gewees as ons dit kan klaarkry en vinnig deurkry om dit volgende week in die begin van die week te lewer.

HOF : Wat is Dinsdag, volgende week? Wat sal die datum wees?

MNR. JACOBS : Die 23ste. Ek mag net noem, die nasienwerk sal ons seker, as hulle dit kan klaar tik, oor die naweek moet doen, want vandag word daar verdere beëdigde verklarings (20) blykbaar bestel vir die ander aansoek wat nou weer moet nagegaan word, wat ons ook weer aandag aan sal moet gee. Dit kom Vrydag aan die gang. As ons daarop moet voorberei, dan moet ons dit seker ook behoorlik vir die Hof voorberei, miskien môre. So, ons sal dit nog oor die naweek en Maandag kan nasien.

HOF : Kan ek net duidelikheid kry dan. Die transkripsies is nou nagesien. Dit hoef nie weer gedoen te word nie? So, dit is afgehandel.

MNR. JACOBS : Hulle is nou gereed.

HOF : En die dokumente wat u van praat is ook afgehandel? (30)

MNR. JACOBS : Ja.

... / HOF

HOF : Dit kan in elk geval gegee word. Is dit al by wyse van kruisverwysing genommer A, B, C ensovoorts?

MNR. JACOBS : Ons het hulle genommer ... (Hof kom tussenbei)

HOF : Met verwysing na u besonderhede?

MNR. JACOBS : Nee, met verwysing na al die dokumente soos wat ons dit in die hof gaan inhandig.

HOF : En daardie nommering gaan u gebruik in die pleitstukke ook?

MNR. JACOBS : Ja, dit is reg. Ons oorhandig die dokumente so in die volgorde van die nommering. (10)

HOF : Dus die dokumente hoef nie meer nagegaan te word nie?

MNR. JACOBS : Nee.

HOF : Deur u nie. Kan die dokumente dan nie maar onmiddellik oorhandig word nie, met die gedagte dat die geskrewe stuk wat getik moet word, dan agterna kom nie? Dan het die mense darem in elk geval die dokument?

MNR. JACOBS : Die dokumente kan ons nou oorhandig.

HOF : Hulle kan hulle dokumente lees intussen.

MNR. JACOBS : Ja.

HOF : Wat die geskrewe stuk betref dan, dit moet u dan (20) nagaan om te kyk of daar tikfoute is ensovoorts?

MNR. JACOBS : Dit is reg.

HOF : Kan ons afspreek dat u dit dan op sy laatste op Dinsdag aan die verdediging beskikbaar stel?

MNR. JACOBS : Ja.

HOF : En die dokumente môre of so spoedig as moontlik?

MNR. JACOBS : Selfs ook as ons vandag hierso wegkom.

HOF : As u vandag los kan kom, vandag. Dan is dit darem iets waarop hulle kan werk.

MNR. JACOBS : Miskien môre-oggend dat ek hulle dan net (30) reg kry.

... / HOF

HOF : Mnr. Jacobs, dit word dan so genotuleer dat die onderneming is môre op sy laaste kry die mense die dokumente en die transkripsies waarna verwys word in die nadere besonderhede.

MNR. JACOBS : Kan ek net hoor oor die transkripsies, of hulle afdrukke al klaar is?

HOF: Ja, maak net seker.

MNR. JACOBS : Ek verstaan dit wat ons gekorrigeer het en dit wat in die klagstaat is, is klaar.

HOF : Dit waarna kruisverwys word in die nadere besonder- (10) hede, dit gee u dan?

MNR. JACOBS : Ja.

HOF : En die nadere besonderhede self wat u moet nagaan, ek aanvaar dat u dit oor die naweek sal moet doen, sal dan Dinsdag gelewer word, op die laaste?

MNR. JACOBS : Ja.

HOF : Dan is daar nog een aspek wat my gehinder het en dit is al die onbeantwoorde briewe. U weet, as 'n prokureur nie 'n brief beantwoord nie, tot daardie mate, kan hy van die rol gehaal word. Nou kan dit wees dat u elke brief mondeling beantwoord(20) het. Ek wil nie 'n ondersoek daarna hou nie, maar dit skep nie 'n baie goeie indruk as daar so baie briewe is wat totaal onbeantwoord bly.

MNR. JACOBS : Ons het van die briewe skriftelik geantwoord. Ek weet nou nie watter dit is nie, waarin ons gesê het die besonderhede sal sodra dit klaar is beskikbaar gestel word. Die belofte van die drie weke wat ons gemaak het, dit is so. Ek het gesê dit sal ongeveer drie weke duur. Ek het dit geskat voordat ek daardie dokumente gelees het. My skatting was heeltemal uit. Ek het nie gedink dit gaan so lywig word (30) met soveel terug- en kruisverwysings nie. Daarna het ons 'n

... / brief

brief geskryf en gesê sodra dit beskikbaar is, sal ons dit beskikbaar stel. Die ander gevalle, ek het gesê ek het ook mondeling aan die mense - en ek het aanvaar dit is genoeg - gesê sodra ons klaarkry daarmee, sal ons dit verskaf.

HOF : Die volgende aspek is nou die kwessie van Engels. Is die nadere besonderhede in Engels of is hulle in Afrikaans?

MNR. JACOBS : Hulle is in Afrikaans. Ons kon hulle ongelukkig nie in Engels verskaf het nie.

HOF : Ek kan u nie dwing om of die een of die ander amptelike taal te gebruik nie, dit is so, maar dit kan op sigself (10) weer 'n vertraging teweeg bring.

MNR. JACOBS : As hy moet vertaal word nou nog deur ons, gaan dit dan nog meer vertraging bring. Daar is redes hoekom - ek wil dit nie nou ophaal nie - ons nie kan nie, maar uit die dokumente, as 'n mens dit vertaal, verloor 'n mens iets daaruit en toe het ons dit nie goed gevind, na die subtiele veranderinge wat daar inkom - het ons besluit om te hou by die Afrikaans.

HOF : Ek kan u nie verplig om of in die een of die ander taal 'n akte van beskuldiging of nadere besonderhede te gee nie. (20) Dit is jammer dat in hierdie saak die saak bemoeilik gaan word deur die kwessie van die taal. Ons moet nou daarmee maar genoë neem, maar u moet die nadere besonderhede dan nou maar gee in die taal wat dit is om verdere vertragings te voorkom. Is die dokumente almal in Engels?

MNR. JACOBS : Ja.

HOF : Is daar nog iets wat u wil sê?

MNR. JACOBS : Nee, dit is al, dankie.

... / MR CHASKALSON

MR CHASKALSON: My Lord My Learned Friend is right when he says that his answer given orally, and I believe that a letter, I am now told a letter was written to one attorney that you will get the particulars when they are ready. It was unfortunately not a very helpful answer from our point of view.

COURT: Yes well as it is now there is a firm commitment on the documents and on the particulars so at least I think we will get some headway.

MR CHASKALSON: Yes, of course we will manage the documents in Afrikaans but it is regrettable that, we will be put to very considerable expense to have those translated so that the accused should ....

COURT: But in the meantime you can proceed on the Afrikaans documents so we will not be waiting for that.

MR CHASKALSON: We will proceed. We will endeavour at the earliest possible moment tc indicate whether we have, intend to raise any more issues and we will also as soon as we are in a position to do so inform Your Lordship whether we will be doing that or whether we will be applying for a remand or whether we will be ready to start the evidence. But I can- not tell Your Lordship at this stage what our position will be, other than to let Your Lordship know as soon as we can. We will formulate the position.

COURT: How long do you think you need before you can decide what your conduct is going to be?

MR CHASKALSON: My Lord it is very difficult because I do not know what is coming, that is part of the problem, and I really would not like to say anything because anything I were to say to Your Lordship today would, I might ....

COURT: Well the application by Mr Jacobs is for a remand to Delmas on 4 November.

MR CHASKALSON:/...

MR CHASKALSON: Yes. No My Lord we would, with respect, accept that date because I think it is good to have a date and if it looks as if we have any difficulties in regard to our position we will let Your Lordship know as soon as possible. But there is one matter I would like to raise, but I really again am asking for Your Lordship's assistance and I do not think it is necessarily that My Learned Friend can assist us with. The accused at the moment are being held in custody in Pretoria and they were informed this morning that they were to be moved to another jail. I believe though that, I have made enquiries (10) from Your Lordship's Registrar and apparently the warrant for commital is going to be a warrant for commital back to Pretoria, but the jail that they are to be moved to is the jail at Modder B, or they were told they were to be moved to the jail at Modder B. Now one appreciates that when the case ultimately starts and evidence gets going that will be a convenient jail, or may be a convenient jail in relation to transportation to Delmas but there are a number of practical problems about the accused being accommodated in Modder B at this stage. First of all the facilities for consultations (20) I am instructed are not satisfactory for a case such as this at Modder B, particularly if we are to be getting particulars in Afrikaans where we will have to sit down, or members of the attorney's staff and counsel will have to sit down with the accused to explain to them what is there, there is going to be a lot of space needed for consultation. The facilities at Pretoria are very much better. Secondly the working conditions are better at Pretoria for the sort of problems which we are likely to encounter. In Pretoria the accused are accommodated in single cells, they are people who are asked (30) to read documents and can read them, others who want to go to

sleep/.....

sleep can go to sleep without disturbing each other. Apparently at Modder B there are only very big cells so that you would have all 22 accused in one cell. It may be difficult if some people want to work, to meet the requests of counsel and attorneys for information or instructions and others feel tired and need to sleep. The working, actual conditions, will be very complicated. Their family visits have all been organised for Pretoria and it will be easier there. Finally, there are apparently, this is known to the accused, they have seen in the paper, was recently some conflict between certain detainees (10) under the emergency and warders and Modder B and the accused would very much like not to be part of that now. They have got a very difficult case on their hands, they would not like to be put into a jail where that difficulty exists.

COURT: Modder B is obviously a big prison, I do not think that would affect them.

MR CHASKALSON: Yes. No My Lord I mention these things but from a purely practical point of view if a request from Your Lordship would be made that the accused be kept in Pretoria pending the commencement of the evidence in this case that would help (20) us with our preparation and would be greatly appreciated by us, associated with the defence and by the accused themselves would have a better opportunity to get ready there.

HOF: Mnr Jacobs wat is die standpunt van die polisie?

MNR JACOBS: Met respek, ons het eintlik nie 'n sê op die plek waar hulle aangehou word nie. Ek mag die Hof net inlig dat aanvanklik sou die verhoor hier gewees het omdat hier 'n voldoende groot gevangenis is en wat gerieflik genoeg is om die mense te akkommodeer. Dit is die oorspronklike oorweging waarom Bethal gekies was 'n gerieflike forum, ook vir die verdedi- (30) ging. Toe die aansoek gekom het dat dit moet op Delmas

... / gewees

gewees het, daar is nie 'n gevangenis nie en hoewel ons niks met hierdie reëlings te doene het nie, het ons probeer om dit te akkommodeer op Delmas en het ons probeer reël met die gevangenisowerhede dat hulle dan die mense aanhou op Modderbee Gevangenis . Die prokureur-generaal het self daardie onderhandelinge gedoen en met groot moeite tot ongeveer nog 'n week gelede het ons nog moeilikheid met die ding gehad en het hulle
K2 toe wel daar plek gekry op Modderbee juis met die probleem wat My Geleerde Vriend van praat van ander mense wat aangehou word. So, al die reëlings het die gevangenisowerheid (10) getref om daardie gevangenis te gebruik en ek verstaan daar is in Pretoria self - soos ek sê dit is nie ons probleem nie, ongelukkig - met die aanhouding van die mense ook moeilikheid met akkommodasie wat hulle nie eintlik daar het nie. Hulle akkommodeer hulle daar op die oomblik om almal te help. So, al wat ek vir die Hof kan sê is, hoewel ons nie daarmee kan inmeng nie, is daar in hierdie saak spesifiek met groot moeite probeer om 'n plek te kry waar hulle gerieflik naby aan Delmas aangehou kan word en dit is Modderbee. Die reëlings is getref en nou word dit alles net omver gegooi. (20)

HOF : Maar is die reëlings getref dat dit vandag sou begin, want hulle is vandag nog nie in Modderbee opgeneem nie?

MNR. JACOBS : Nee, maar die aanhouding sal van vandag af begin het, wanneer ons hier begin en dan oorplaas na Delmas toe, dan sou hulle daar aangehou word. Soos ek sê, dit is die reëlings wat die gevangenis getref het destyds.

HOF : Sou daar in beginsel enige beswaar wees dat ek 'n versoek rig dat hulle aangehou word te Pretoria tot 3 November? As dit nie kan nie, dan kan dit nie anders nie, want ek het ook nie beheer daaroor nie. (30)

MNR. JACOBS : Nee, ons het geen beginselbeswaar nie. Al

... / hoekom

hoekom ek dit genoem het, is omdat ek gesê het ons het nie beheer oor hierdie aspekte nie en daarom wel probeer het om almal te akkommodeer juis met die oog op hierdie verhoor om op Modderbee plek te kry en dat die moeite gedoen was. Verder het ons hoegenaamd geen beheer oor hierdie aspekte nie. Ons het ook nie 'n beginselbeswaar nie. Dit maak nie aan ons saak waar hy aangehou word nie.

HOF : Is daar enigiets wat u nog wil sê, mnr. Jacobs, voordat ek die saak verdaag?

MNR. JACOBS : Nee. Tensy daar iets is wat u miskien wou gehad het. (10)

HCF : Wat ek wou gehad het is vinnige besonderhede. Anything that you would like to add?

MR CHASKALSON : No. I would be greatful if such a request could be made by Your Lordship.

COURT : This matter is remanded to 4 November 1985 and the case will be heard at Delmas. A request is directed to the prison authorities to hold the accused in Pretoria instead of at Modderbee until 3 November 1985.

COURT ADJOURNS.