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(TRANSVAALSE PROVINSIALE AFDELING)

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PRETORIA

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DIE STAAT teen :

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ANDER

VOOR:

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ASSESSOR : MNR. W.F. KRUGEL

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(SIEN AKTE VAN BESKULDIGING)

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AL DIE BESKULDIGDES: ONSKULDIG

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COURT RESUMES ON 9 AUGUST 1988.

MR CHASKALSON : My Lord, I want now to turn to deal with the provisions of section 69(4) of the Internal Security Act and the first general submission I make to your lordship in regard to the construction of this section, that it is a drastic provision which renders admissible evidence in criminal proceedings which would otherwise be inadmissible and in accordance with the ordinary principles of interpretation, the section should therefore be interpreted as far as possible with as little deviation from the common law as (10) is consistent with the language of the statute. I think that is a well recognition proposition. It is dealt with by Steyn in Uitleg van Wette at pages 97 to 100.

COURT : Which edition?

MR CHASKALSON : I have the fifth edition. I am not sure whether it is the latest. I am informed that it is. There is a subsidiary proposition which goes with it, which Steyn refers to at page 100 which - that there should be a strict construction of provisions, statutory provisions which confer extraordinary rights. Our submission to your lordship is (20) that section 69 indeed does confer extraordinary rights upon the state.

Can I perhaps look first at the generale framework of the section before I turn to deal with each one of the separate provisions. It provides, as your lordship knows, that in any prosecution for an offence in terms of the internal security act - it is also an application to civil proceedings as well, arising from the application of the act, any document, record, book, pamphlet or other publication or written instrument, first of all which has been found in or removed from the (30) possession/...

possession, custody or control of the accused or any party to the proceedings and then secondly from any person who was an officer or a member or an active supporter of an organisation of which the accused or the said party is alleged to have been an office bearer or officer or member or supporter. So, immediately, we are taken into documents with which the accused personally may have no knowledge and may have had no contact with at all and then in subsection (b) it deals with documents which have been found in or removed from any office or other premises occupied or used at any time before (10) or after the commencement of this act by any organisation of which the accused or the said party is alleged to be or to have been an office bearer or member or active supporter and I pause to point out that the document does not need to have anything to do with the organisation or the organisation's affairs and as I should show your lordship later it would apply for instance to a newspaper found in an office or a letter written to somebody which is left lying in the office or indeed a letter addressed to somebody in their official capacity as an office bearer. The point I make there is, (20) it does not need - it is not a document of the organisation. It is a document found at a place where the organisation has had an office, irrespective of whether the organisation itself is responsible for that document or not and then the third one which is more akin to the criminal procedure act provisions which on the face has been compiled, kept, maintained, used, by or on behalf of the organisation.

I am going to come back to look at some of the particular problems associated with the application of the section, but can I first of all turn to the reference in section 69(4). (30)

It/...

It refers to any document book, record, pamphlet or other publication or written instrument. Your lordship will see that in section 1 of the act there are definitions of both document and publication and as usual, the definition provides that unless the context of the act otherwise indicates, these definitions shall apply and if we turn to the definitions themselves, we see immediately that they cannot apply because the - for instance the word document is defined as including any book, pamphlet, record, list, placard and a number of other things. If it were intended that the word document(10) should carry its ordinary - the defined meaning, then the section would not have said document, record, book, pamphlet or other publication, because they are already embraced within the definition of the word document and under publication we find the same thing. Publication means any newspaper, magazine, pamphlet, handbill or poster and other things. So, it seems from the context that this is one of those instances in which the legislature was using the words in their ordinary meaning and not in their defined meaning. I do not think for the purposes of this part of the argument that anything turns on(20) that, because I think that the material with which we are concerned now, the publications and the minutes and the pamphlets and so on, would within the ordinary meaning of those words fall within the ordinary language of section 69(4) which refers to any document, book, record, pamphlet or other publication.

But there are a number of problems which arise with regard to the application of that section to the facts of the case. First, can the section be construed as referring to part of a publication or part of a document, because amongst the (30) multitude/...

multitude of paper put before your lordship are a number of instances in which the documents or the pamphlets or whatever they might be, on the face of them do not appear to be complete and it is our submission to your lordship that the section should not be construed as applying to parts of a publication or parts of a document and there would be good reason for adopting such a construction. First it could be extremely prejudicial to the accused if a portion of a document only is admitted, because if that were to happen, statements made in the document would be wrenched out of their context(10) and one would need to know the entire book or publication or pamphlet, whatever it may be, to be able to evaluate that evidence. For instance there could be on pages 1 and 2 disclaimers which have set what appears on pages 3, 4 and 5 and if only pages 3, 4 and 5 are found, one would not know of that. There may be contradictory statements in other parts of the document which, if they were read together, would affect the use that might be made of the document and if the section were intended to render admissible, only part of a book or part of a document, the legislature (20) could easily have said so and indeed there is an example in which the legislature has done that. It is in a different section, it is not of this statute, but in section 47(2) of the publications act, number 42 of 1974 under the definition of undesirable, we find that the legislature defines the meaning of that word for the purposes of that act as any publication or object, film, publication or intended publication, shall be deemed desirable as if it or any part of it. There was no reason why the legislature should not have said any document or part of a document or any book or part of (30)

a/...

a book if that had been its intention and we submit to your lordship that insofar as fragmented documents have been placed before your lordship, they do not fall within the provisions of section 69(4) and for that reason alone they should not be received. I think it is in the definition of document if I could take back that point. Your lordship will see that in defining documents in the internal security act the legislature specifically refers to section 47 of the publications act which is the section I read. I read section 47(2), the legislature refers to section 47(1). So, it was (10) mindful, one would assume, of that distinction, but let me now turn to section 69 to subparagraph (a) of section 69(4). It deals with documents found in the possession of the accused and it deals with the documents found in the possession of other persons and I want to deal with the section which deals with that part of the provision that deals with other persons. It is any person who was at any time before or after the commencement of this act an office bearer or officer or member. The submission that we make to your lordship is that that section means that the person must (20) have been an office bearer or officer or a member or an active supporter of the organisation at the time of the finding. Otherwise there would be no nexus whatever between the finding of the document and the accused. There would be no nexus between the person in whose possession the document was found and the accused at the time of the finding. Let me give your lordship an example. Assume that a document is found in the possession of A. Ten years later A joins an organisation of which the accused is a member. The act of joining the organisation cannot render admissible the (30) document/...

document which was inadmissible when it was found.

COURT : What do you say to the words have been? The said party is or have been? Is alleged to be or to have been an office bearer, officer or a member or an active supporter. It is alleged he has been an active supporter.

MR CHASKALSON : No, the accused has been.

COURT : Or the party.

MR CHASKALSON : No, the party refers back not to the person in whose possession it was found. The party refers back to the civil proceedings. (10)

COURT : Oh yes, that is the second portion of it.

MR CHASKALSON : Yes. One can understand that, because I am going to deal with what is meant in regard to alleged in that context a little bit later in my argument, because the document has got to be relevant to that allegation and one can use the document for the purposes of establishing that allegation. That provides the nexus itself, but it will be a remarkable situation if a person has a document and that the way it becomes admissible is that many years later that person joins the organisation. The very least one would (20) expect, it is a very far reaching provision as I am going to show your lordship, as we start looking at the different aspects of it and the very least one would expect is a construction which narrows it to the reason which would exist. The only reason why it would be admissible is that the legislature has said well, if you are a member or active supporter and you have certain documents, those can be used against the accused in certain circumstances. It does not contemplate persons who are not members or active supporters who have possession of particular documents which were (30)

found/...

found in their possession, that those documents can be used. So, one then asks oneself well, what was the state of affairs at the time of the finding because that is what is crucial and of course if that be the correct construction, it becomes necessary for the state to show at the time of the finding ... (Court intervenes)

COURT : Why would the section say at any stage, at any time before or after the commencement of this act? Why would the section not say at the time of the finding? It is much easier?

MR CHASKALSON : I have got to look at that provision. (10)
Are your lordship looking ... (Court intervenes)

COURT : At any time, before or after the commencement of this act.

MR CHASKALSON : Yes, that simply means that if the document was found. It is to indicate that the section is intended to apply in a sense retrospectively.

COURT : Why does it not merely say which was at such time?

MR CHASKALSON : Because in accordance with - well, it is to make clear that a document found before the commencement of that act would fall within the purview of the section (20) if it is otherwise within the terms of the section, but it does not assist your lordship in deciding the second question. The nexus would exist, the nexus which I suggest to your lordship is the fundamental nexus exists whether the act had been passed or not and the admissibility of the document has got nothing to do with - it is an evidential provision. It is not as it were a criminal liability provision. So, that nexus, if the nexus has to be there, exists whether the act has commenced or not and all that the statute is saying is that you will construe this as applying to any proceedings (30)
which/...

which have been brought, whether the finding took place before or after the commencement of the act, as long as the factual state of affairs exists and our submission to your lordship is that that factual state of affairs must exist and it is for the state to prove that it does exist.

I have already addressed argument to your lordship on the meaning of the word organisation. I cannot usefully add anything to what I have said on that. Your lordship has given a ruling on that already and I do not - I cannot really add anything. I have said all that I can possibly say on that. (10)

COURT : Where do you find that ruling? Have you got a quick reference to it? I can look it up if needs be.

MR CHASKALSON : I will find it. I think it was in your judgment on the application for the discharges.

COURT : I will find it myself.

MR CHASKALSON : We will find it. Mr Marcus is looking for it and we will give it to you. I do not intend to say anything more about that. But the next submission I want to make to your lordship is in regard to the meaning of the word alleged. Alleged to be or to have been an office bearer or officer (20) or member or an active supporter. I want to come back to this. I have argued this point to your lordship previously, but I would like to develop it again and the submission that we make is that the allegation referred to in that provision is one which has to be an essential element of the offence with which the accused is charged and the reason for that submission is this, that on that construction no prejudice can come to the accused if an incorrect allegation is made. If the allegation is faulty no prejudice can come to the accused, because one of the elements, one of the essentials (30)

which/...

which has to be decided in the trial is whether the allegation is or is not correct and if the allegation is not proved, the accused will be acquitted because an essential element of the offence has not been proved. So, it is sufficient therefore for the legislature to refer to allegation because the state cannot be expected to prove the surrounding circumstances or cannot be expected to prove the guilt or innocence of the accused before the document is tendered because one of the reasons for tendering the document is to be - enable that decision to be made. So, if it is construed as being an (10) essential allegation, then no harm can be done. The other matters which are required can be proved and the state obviously has to prove it. It has to prove what one might call the essential pre-requisites for admission and those are questions of fact and at the end of the case one can look at that and say well, those factors have or have not been proved and we leave this document out of account if it has not been proved, but it could never say, it could never require the state to prove the essential allegation as a condition of the admissibility, because you would then into (20) a situation in which the document could not be admitted because unless you had proved the guilt, it could not have been admitted and therefore could not have been used for the purpose of proving guilt. So, that is why the statute uses the word allegation and if it is construed in any other way, then by making an irrelevant allegation the state can secure the admission of evidence ... (Court intervenes)

COURT : There is a difference between an allegation, an irrelevant allegation and an element of the offence, because something may be an element of the offence which might be (30)

more/...

more constricted than an allegation which may lead to a conviction. One may make a hundred allegations to prove all those allegations, but not each and every one need be an element of the offence. Say for example intent is an element of the offence, culpability is an element of the offence, that is sort of a legal concept, but you may make a hundred allegations and prove a hundred facts to prove that.

MR CHASKALSON : It is only if what you have alleged to have to prove to get a conviction that it can be admissible.

COURT : But then what you are saying is not an element of (10) the offence, but an essential fact, or a fact which can be used to prove - to get to conviction.

MR CHASKALSON : An essential fact. An essential allegation in the charge. Otherwise what happens is that the allegation can be made. It never has to be decided upon whether it is true or not. You make the allegation. You may lead no evidence on it at all and you make the allegation for the purpose of getting evidence in.

COURT : Let us get to an example. It is alleged that five people conspired under the name of the Rietondale Tennis (20) Club as far as high treason is concerned. Is it an essential allegation that they conspired under the name of the Rietondale Tennis Club or is it merely an essential allegation that they conspired? Because if it is not an essential allegation, the documents of the Rietondale Tennis Club are not admissible.

MR CHASKALSON : The way your lordship has put it to me it is an essential allegation because the charge had said, we are charging you with being treason because you belong to the Rietondale Tennis Club and that is the policy of the (30)

Rietondale/...

Rietondale Tennis Club. You could not get a conviction on that indictment without proving that proposition. It is an essential ... (Court intervenes)

COURT : But if I put it slightly different and say the five of you conspired and as a cover you used the Rietondale Tennis Club, would the documents of the Rietondale Tennis Club be admissible?

MR CHASKALSON : Not if you do not have to prove that proposition.

COURT : Well, it is an allegation that is made. (10)

MR CHASKALSON : But that is precisely the point. You cannot render admissible a document by making an allegation which you do not have to prove, otherwise it presents irreparable prejudice to the accused person, because the document is going in on the basis of a factual inaccuracy. You say you are a member of the Rietondale Tennis Club, you put in all the Rietondale Tennis Club documents and at the end of the case you say it has been established that the accused is not a member of the Rietondale Tennis Club, but the allegation was made, so I looked to all those documents as prima facie (20) proof of the contents thereof. That would make what is already a harsh evidential provision, exceptionally onerous as far as accused persons are concerned. Why would that accused be different from any other person who is not a member of the Rietondale Tennis Club. Why should that accused be put in a different position to any other accused whose guilt or innocence cannot be established by the production of a document which is not otherwise admissible? And it is only if you actually have to prove it that you avoid that prejudice because if you have got to prove that (30)
allegation/...

allegation to get your conviction, then the making of the allegation is sufficient, because if you make an allegation which you cannot establish, you fail. Otherwise the floodgates just get opened. You can make any allegation and in comes documents and we submit to your lordship that the section should not be construed as giving to the state the power itself to render other inadmissible evidence admissible by simply an allegation which is not necessary for the purposes of the charge and which it has no obligation to prove. If your lordship were to place such a construction on the (10) act, it would mean that no limits are placed on the ability of the state to produce evidence under this section and the very fact that the legislature requires proof of the status of the person from whom the document is removed, because that has to be established, that that person was a member or active supporter.

COURT : Before we get too involved in a judgment on this point, which documents are you thinking of?

MR CHASKALSON : Let me finish this and then I am going to show your lordship at this stage how this can apply to (20) certain documents in the case. Part of my problem is, my problem really in trying to reply to the argument is that a massive documents had been put before your lordship. Any document which contains any reference to any term really which we have in this case is produced, it is put in. Any evidence of any acts of unrest anywhere in the country at any time is put in and it is all put into a pot and stirred and put into the oven and out pops a conviction with no attempt to disaggregate what has gone in.

COURT : Do you think it is so easy? (30)

MR CHASKALSON/...

MR CHASKALSON : I do not think it is so easy at all. What I am trying to do is to do a bit of disaggregation and take these component parts out again. I want to show your lordship how - let me finish all the problems I have with section 69(4) and I really will, what I want to do is - I am not going to do it immediately. I thought your lordship would like to hear argument as to the meaning of the section. Now your lordship seems to indicate to me ... (Court intervenes)

COURT : No, no, I am interested in the section, but I am not going to write a judgment which is merely hypothetical. (10)

MR CHASKALSON : I understand that. I think there are other submissions on the section which I should put to your lordship before I start dealing with the particular documents. If I could refer your lordship again, I think I have mentioned it previously, the case of S v Tinte 1979 3 SA 407 it is a judgment of the full bench of the Cape Provincial Division. It dealt with the admission of a Sechaba in a prosecution under the internal security act 1950. The court held that the Sechaba did not prove itself, relying on S v Lindsay and Watson which I referred your lordship to yesterday. (20) That was at page 409 G to H and at 411 E to H the court places a construction on the provisions of the 1950 section which though not in identical terms to the section which we are now dealing with in 1982 act for the purposes of the argument, there is no material difference in the wording of the section or at least we do not see any. We do not think that there is any material difference. So, we rely on that.

If I could then turn to the second subparagraph. That is sub (b). Here too the argument which we have advanced (30) based/...

based on S v Tinte is equally applicable to this section. The state is under an obligation to prove the facts which are prescribed and are necessary to make the document admissible. So, it has to prove all the necessary elements, if I could call them that, connected with the finding. It has to be an office of the type described. It has to be found with the person who has the documents or it had to be found with the person who had the documents in his or her capacity as an office bearer and so on.

In relation to the application of this section to (10) the present case, it has to be borne in mind that certain documents were found in offices of affiliates of the UDF. There is no allegation that the accused were members, office bearers or active supporters of all the affiliates. The VCA for instance is one of the affiliates of which some of the accused are alleged to have been members. So, as far as documents - as far as VCA documents which would fall within this section are concerned, and I think that applies equally to sub (a), that allegation is made, that would trigger the admissibility if other documents - if the other requisites (20) are established, but it would not be enough simply to prove that a document was found at the offices of the Transvaal Indian Congress, because the accused are not alleged to be members, office bearers or active supporters of the Transvaal Indian Congress and indeed that is not part of the charge against them. Once again it is for the state to show your lordship or to establish the necessary elements there and if we turn to section 69(4)(c) we see the same - the same issue arises again. The documents - the state has proved the essential elements and there has to be an essential (30) allegation/...

allegation that the accused or the said party is alleged to have been an office bearer, officer or member or active supporter of that particular organisation.

Those are the submissions which we make in regard to the meaning of each one of the subsections and I want now to turn ... (Court intervenes)

COURT : Could we just pause there. What is your submission as far as the document is concerned which is admissible against one accused in terms of the section? How does that affect the admissibility against the other accused? (10)

MR CHASKALSON : The submission we would make to your lordship is that it could be used only against the accused who falls within the parameters of the section.

COURT : So, one has to dissect the documents vertically and horizontally?

MR CHASKALSON : Yes.

COURT : And as you put it page by page to see whether it is a part?

MR CHASKALSON : Yes. Your lordship has obviously got to go further because you have then got to distinguish those docu-(20) ments and that evidence which is admissible in relation to statutory offence and put it out of the way when you think about the common law offences. These mental gymnastics which have to be undertaken which makes a trial like this of two and a half years of inadmissible evidence on the main count. Really, in effect - not in intention but in effect it becomes suppressive, because your lordship sits here and hear things you should never have heard and your lordship's assessor hear thinks he should never have heard and atmospheres get built up by inadmissible documents and then you come (30)

to/...

to view the evidence on the treason and say no, I have been listening for two and a half years and I have been reading documents for two and a half years and everything which I read I should not have been shown and everything that I heard I should not have listened to and I have now got to determine your guilt on that, but let me go a stage further in regard to this section. What actually does it mean when it says that the document shall be admissible under the section as prima facie proof of the contents thereof? The state has said "Ah, in effect there is proof." If somebody makes a (10) statement - a factual statement in a document, that fact is proof. Our submission to your lordship is that that is not what the section means. To begin with, the wording of the section is significantly different to provisions of section - let me take a comparison - 246 of the criminal procedure act of 1977. That is a section which your lordship knows which provides that any document et cetera, it is a long list of other matters which are not included presumably in the word document there, which was at any time on premises occupied by an association of persons incorporated or unincorporated (20) or in the possession or under the control of any office bearer, officer or member or such association and then there are four subsections. Each one of the subsections says what it is proof of. Prima facie proof that the accused is a member or office bearer of the association in sub (a). (b) Prima facie proof that the accused is the author under sub (b). (c) Prima facie proof of the holding of such meeting and of the proceedings there at under (c) and under (d) is prima facie proof of the object of the association. So, in other words, there the legislature identifies facts which (30) are/...

are taken to be proved by the production of the document.

Section 69(4) does not say that the document shall be admissible as prima facie proof of any facts stated therein or as prima facie proof of the truth of the facts stated therein. It is that construction that the state has put on it. Prima facie proof of the truth of the facts and we suggest to your lordship that proper construction is that it really enables the state to prove that the document is what it purports to be and what it claims to be it should be taken to be. In other words, if a Sechaba is produced and (10) tendered under that section and all the other requirements for that section are established, then the Sechaba proves itself and what you can say is, this is a Sechaba, it is what it purports to be and this is what the Sechaba says.

COURT : Does it then prove prima facie that the Sechaba is the journal of the ANC as is stated on Sechaba?

MR CHASKALSON : I think it would prove that Sechaba - I think it would prove that it is what it purports to be. It purports to be the journal of the African National Congress and therefore it is prima facie proof that it is what it (20) purports to be, but it would not be prima facie proof of any fact recorded or any statement, because in a sense on the construction of Sechaba really what you are doing when you are looking at it is, it means Sechaba says this is what happened or Sechaba says X. Sechaba says Y. All that it will be is prima facie proof that Sechaba says X or Sechaba says Y. Let me give your lordship some examples as to why I say that is the proper construction of the statute, before I turn to look at the cases which may be relevant to this issue. (30)

COURT/...

COURT : But now why add the words as prima facie proof of the contents thereof? Why could it not have ended shall be admissible in evidence against the accused?

MR CHASKALSON : Well, it could have said that. Admissible as what?

COURT : Well, it can only be what you say. If you stop at admissible against the accused, it can only be what you say now it should be.

MR CHASKALSON : Prima facie proof of the contents does not mean prima facie proof that the facts stated therein are (10) correct. It is prima facie proof that Sechaba says that. It is not prima facie proof that what Sechaba says is correct.

COURT : But the moment it is admissible in evidence, it is prima facie proof that it is what it is when it is a document saying something.

MR CHASKALSON : Well, it is a document, it would be admissible in evidence, you could then presumably - you would not have to call somebody from Sechaba to identify it or somebody from the printer. You will get over the problem of Lindsay and Watson but it would not get you any further. Let us (20) look at that section, because if your lordship is going to construe that section, broadly and not narrowly as we suggest it should be construed, we suggest that because of the very far reaching implications that it would have, take a number of examples. Take a newspaper. A newspaper publication or any written instrument falls within the scope of that section. Assume that Beeld runs a story in which it says the UDF is planning a violent revolution. Assume that newspaper were to be found at the UDF office. On the state's argument you put in Beeld and it is now prima facie proof that the UDF (30)

is/...

is planning a revolution. On our argument it is only prima facie proof that Beeld says that the UDF is planning a revolution. Now, what Beeld says may or may not be admissible. If Beeld is in some way - if a statement by Beeld is relevant to the case, it would be admissible, but if a statement by Beeld that the UDF is planning a revolution is not admissible, the evidence does not become relevant. It may be admissible for the document but it has got to be linked up and its relevance has to be established by other propositions. Unless that construction is put on it, it has the most extraordinary(10) implications. Any piece of paper found in the office, irrespective of who it came from, irrespective of who wrote it, can be picked up and put in as prima facie proof of a fact and really it becomes a question of construction, because if one looks at a document, a document - any document, I would suggest to your lordship - is on a proper construction of that document, is that the writer of the document says this is what happened and that is all that you can say the prima facie proof of the contents means. That the writer of the document says X or the writer of the document (20) says Y. That is all that the contents of the document means. It does not mean that what the person who wrote it said is correct and you have got to take the next stage and see whether the fact that X or Y or it says that has any relevance to the case and what inferences can you usefully draw from the fact that X or Y or Z said that and that has to be determined by other propositions.

COURT : I still do not understand why one would call that prima facie proof of the contents. It is prima facie proof - well, if you admit a document, you admit a document and (30)

then/...

then the document speaks for itself and not necessarily that it is true or that it is good evidence or that it means anything, but if a document is before court it speaks for itself. Whatever conclusions you draw from it, is something else, but why speak of the prima facie proof of the contents?

MR CHASKALSON : I could ask your lordship why do they not say prima facie proof of the facts contained therein?

COURT : That is the contents.

MR CHASKALSON : I suggest to your lordship that that is not what it is. The contents of a document, when you construe (10) what does this document say, what is the contents of this document, part of the contents is who says it. Part of the contents of a document is that X has said it.

COURT : That is not the contents.

MR CHASKALSON : It is part of it. So, it is prima facie proof of the fact that X says that Y happened. That is all that is being proved.

COURT : But now, let us take a concrete example. Say for example a minute is found in an office which was occupied by an organisation and the minute says that on such and (20) such a day we blasted the post office into oblivion. What does it mean? Merely that the minute says so or does the section mean to say that prima facie one can take it that it was - that in fact this organisation compiling the minute blasted the post office.

MR CHASKALSON : I think what it would say is that prima facie at a meeting of the organisation this was said. From that your lordship could draw certain inferences.

COURT : Does one have other statutory provisions using the phrase prima facie proof of the contents? (30)

MR CHASKALSON/...

MR CHASKALSON : I am going to draw your lordship's attention very shortly to all the cases that we have been able to find which seemed to us to be relevant. We have not found - I have found other different evidential sections ... (Court intervenes)

COURT : So, as far as you are concerned this phrase prima facie proof of the contents or "prima facie bewys van die inhoud daarvan" is unique?

MR CHASKALSON : No, I am not saying that. I am saying that I have not found it yet. Everything that we have found (10) to be relevant - I am going to give your lordship the cases which we have got.

ASSESSOR (MR KRUGEL) : Could we perhaps compare section 214.

MR CHASKALSON : 246.

ASSESSOR (MR KRUGEL) : 246, thank you. MR CHASKALSON : That is the criminal procedure act. It says "Any document including any book, pamphlet, circular letter, list, et cetera which has been found under the control of certain people" I will give your lordship subsection (a) "on the face whereof a person of a name corresponding to that of the accused person appears (20) to be a member or office bearer of such association, shall upon the mere production thereof by the prosecution in criminal proceedings be prima facie proof that the accused is a member of an office bearer of such association as the case may be.

ASSESSOR (MR KRUGEL) : In other words the facts?

COURT : Which is the content thereof? Is it not?

MR CHASKALSON : We have just disagreed about that. What I say the content thereof is that it is, I gave your lordship the Beeld example. The content of that is not as a fact that that happened. The contents is Beeld says that (30) happened/...

happened and if your lordship construes it any differently you are turning this section into a monster.

COURT : No doubt, it can have far reaching implications, but at the moment we are debating the language.

MR CHASKALSON : Well, what I am suggesting to your lordship is that in accordance with the ordinary rules of interpretation that is the interpretation I have given to your lordship and I have got authority for that, I am going to come to it, if the interpretation which I have given to your lordship is reasonably capable of according with the language, that(10) interpretation should be adopted because otherwise this section simply becomes a trap for putting people into jail.

Let me give your lordship another example. The commissioner of police serves a notice on the UDF saying that under the emergency regulations - he writes to him. He says under the emergency regulations - I write to you under the emergency regulations. You are a front for the African National Congress and you must stop your activities immediately. The next day the policemen come, they raid the office and they take the letter. The letter gets produced(20) in court as prima facie proof of the contents thereof.

COURT : But remember, there are the words prima facie. So, he goes into the box, he says it is not true and nobody believes the letter.

MR CHASKALSON : No, but it is not that easy, because very often, very often and in conspiracy trials in particular the facts are dealing with events upon which the accused can say nothing.

COURT : Yes, but this section is intended as I see it merely to be a method to get the accused to give evidence on the (30) point/...

point.

MR CHASKALSON : Yes.

COURT : To get past the initial darkness into the light. The moment the accused comes along and says of course it is not true, then that is the end of the matter. Because you cannot rely on Beeld where the accused says well, it is not true or on the letter from the commissioner of police which is merely an accusation. It is not so monstrous as it seems at first blush.

MR CHASKALSON : What would happen if the letter or the (10) document or the article deals with an event about which the accused knows nothing at all? What has the accused to do? All the accused can do is, is to go into the box and say "I know nothing about that."

COURT : But if it is prima facie proof, does the court necessarily have to accept it as conclusive proof if there is no other evidence? It can be judged in the light of the circumstances. It can be said well, it is just a Beeld, it is before the court as prima facie proof but I disregard it.

MR CHASKALSON : It may be and it depends upon how one (20) uses it and what meaning one gives to the section and I am arguing to your lordship all the things that your lordship says and something extra. I am arguing to your lordship that where there are denials of documents, the accused's denials take preference over the documents. Where there are no denials you have got to look at it and say well, the accused could not tell me that and therefore I cannot really hold that against them. I am going further. I am saying to your lordship that your lordship should construe that as meaning that it is prima facie proof that the writer of (30)

the/...

the document said that and what it purports to be. It purports to be minutes of the meeting. It is prima facie proof that the records of that organisation record a meeting which took place. If that is otherwise admissible, you can draw inferences from it and proceed on that basis, but the argument which we put to your lordship is this, that since the section applies to documents which may have nothing whatever to do with the accused or to the organisation to which they are alleged to belong and may have been compiled by total strangers, even persons hostile to the accused or the organisation, the (10) rendering of such documents admissible on a serious criminal charge as prima facie proof of the facts set out therein, could result in a serious miscarriage of justice, particularly in conspiracy trials in which the accused many have no knowledge of such facts and no way of rebutting it. Bearing in mind that this clearly in the context of the internal security act will have application to conspiracy trials, that construction we suggest in accordance with ordinary principles should be adopted.

If we take it to the facts of this case. If you pro-(20) duce - if the state produces the working principles of the UDF as it did when it produced EXHIBIT A that becomes prima facie proof that the document is what it purports to be which is the working principles of the UDF. From that your lordship says well, there are the working principles of the UDF and you can draw some inference from it. It is open to an accused person to go into the box and say it is true that that is the working principles of the UDF, that was actually a draft document, the one which we really adopted is this and tell your lordship that, but if the state produces (30)

for/...

for instance a SASPU National, then we submit that all that it is, is it is prima facie proof that that is what SASPU National says and not prima facie proof that what SASPU National says is true. What SASPU National says may or may not be relevant depending upon other circumstances.

Let me give your lordship those authorities which we have which deal with the evidential provisions similar to section 69(4).

The first one is the case of S v Nkosi. It is a judgment of the full bench of the Transvaal Provincial Division (10) per Cooper, J. and Boshoff, J. It was decided - I am so sorry. It is 1961 4 SA 320. It was concerned with a prosecution under the suppression of communism act of 1950 and it was concerned with membership of an unlawful organisation. Section 12(4) of that act is referred to at page 322 and it provides that for the production of a document and subsection (c) says which on the face of it has been compiled, kept, used et cetera on behalf of the organisation of which the accused is alleged to be or to have been an office bearer, officer, member et cetera or any photographic copy. It is very (20) similar language, shall be admissible in evidence against the accused as prima facie proof of the contents. So, it is the same point.

Cooper, J. who gave judgment for the court said this at page 322 B :

"The documents to which I have referred were on the face of them compiled, kept or maintained by or on behalf of the PAC of which the appellant was alleged to be or to have continued to be a member. Mr Schwartzman on behalf of the appellant suggested that in order (30)

to/...

to comply with the subsection it was necessary to show that the document was held by or on behalf of the unlawful PAC and that the subsection did not apply to documents created before the organisation was declared to be unlawful. I do not agree with that contention, for the phrase 'and which has been declared an unlawful organisation' merely defines the organisation in respect of which the subsection does not apply until the declaration has been made."

Then his lordship continues as follows against the letter (10)

D :

"The fact, however, that these documents were admissible did not in itself assist the state to establish its case and reliance then had to be placed on the provisions of section 263bis(1) of the criminal code, the relevant portions whereof are as follows."

His lordship then cites section 263bis(1) :

"Any document, including any book, pamphlet, letter, circular letter, list, et cetera, which was at any time on premises occupied by an association of persons (20) incorporated or unincorporated or in the possession of or under the control of any office bearer, officer or member of such association and (a) on the face whereof such a person - whereof a person of a name corresponding to that of an accused person, appears to be a member or office bearer of such association, shall on its mere production by the public prosecutor in the criminal proceedings be prima facie proof that the accused is a member or such an office bearer of such association as the case may be. (30)

The/...

The extract from EXHIBIT A to which I have already referred makes mention of the name corresponding to that of the appellant and he appears to be a member or office bearer of the PAC by virtue of his election as chairman of the regional committee. This extract would therefore constitute prima facie proof of the fact that the appellant was a member of the PAC."

So, the approach of the Transvaal Court in this case is in fact the approach that I have urged your lordship to adopt. That you can produce the letter - you can produce the (10) document, but you then have to, on some other ground, see how you can use the document and as I have said, there are many different bases upon which it could be used. You could go elsewhere or it may be enough in certain circumstances. If in fact the document is a document of a co-conspirator and an executive statement of the co-conspirator, then the fact that the co-conspirator has said or done something, would be admissible, if it is shown to be executive and then one could produce the document under section 69(4). It is prima facie proof of its contents in the sense which I (20) have urged on your lordship. One could then say well, if X says, that has some relevance to the case and I will take that into account, not as proof that what X says is true, but as proof that X said that and I would suggest to your lordship in any event that ... (Court intervenes)

COURT : If it is a document that is signed, for example by Mr X, do you take the signature as proof prima facie that it is Mr X's document?

MR CHASKALSON : Yes, because it is prima facie proof of the contents and it is prima facie - part of the contents is (30)

X's/...

X's signature and it purports to be X's signature, so it is prima facie proof of that. I would accept that. I would accept that if the document said issued by the African National Congress, prima facie the contents say it is issued by the African National Congress. So, it purports to be issued by the African National Congress. It will be prima facie admissible. But if it says on such and such a day it happened, it is only and indeed that will be the way of construing the document, it is only a statement that X says that that happened. Anything in the document on a construction of (10) the document really comes down to say that is what the author of the document says.

COURT : But the author of the document says we compiled the document.

MR CHASKALSON : Yes.

COURT : That is also a statement of fact.

MR CHASKALSON : It goes more than that. It is what it purports to be. Let me put it to you differently. I would suggest that if you were going to construe any piece of paper which says that on 1 January A shot B, that does not (20) mean as a matter of fact A shot B, but it is a matter of construction that X says A shot B. So, whenever one looks at it, that is not a fact which is stated there. It is a statement of - if he says X shot B and I was present, then it will be prima facie proof that the person who says he was present is saying that X shot B - that A shot B. Whether or not you could use that at a trial, would depend upon whether the statement that A shot B made by X is admissible against the accused.

I want to take your lordship further through other (30)
cases/...

cases. I think the next case which I need to refer your lordship to is the case of Twala 1979 3 SA 864. This dealt with the provisions of section 2(3) of - I think it was the general law amendment act. 83 of 1967. It was the act which introduced terrorism. I cannot remember whether it was the terrorism act or whether it came in through a general law amendment act.

ASSESSOR (MR KRUGEL) : What court was this?

MR CHASKALSON : It is a single judge in the Transvaal per Van Dyk, J. Again for practical purposes and certainly (10) for the purpose of this case section 2(3) is similar to section 69. There at - there is only one reference to it. At 876 D what Van Dyk, J. says is this :

"Section 2(3) of act 83 of 1967 provides that provided certain pre-conditions are being met, certain documents will become admissible at the same and at the same instance will create a presumption to the effect that the contents of such document are prima facie true, a presumption which the accused can rebut on a balance of probabilities." (20)

There was no argument at all apparently on this. The judgment in the case to which I have referred - the full bench judgment of Nkosi is not referred to and indeed one cannot tell from the judgment at all how the learned judge used the document. In other words, whether that was merely a loose use of the word or what he meant by "true". I do not know what he meant by that and how he used it. If it is what it purports to be, it is in that sense true.

COURT : You mean if the judgment is what it purports to be it suits you? (30)

MR CHASKALSON/...

MR CHASKALSON : No, there is nothing in this judgment which I can find in the application of the law to the facts which are in any case against me. It is a dictum in a judgment which does not refer to a previous full bench decision and which merely is uttered in passing. It may be - I do not know how the judge used it, I cannot tell from the report how the judge used the section, but that is what he said and there is nothing else in that whole case ... (Court intervenes)

COURT : It is just a repetition of the section it seems? (10)

MR CHASKALSON : Not quite, because he uses the word "true" and I do not know what he means by the word "true". "The contents of such documents are prima facie true." It is only the use of the word true there - I do not think it takes it any further, because I think - my construction is that the contents are prima facie what they purport to be, which would be true in that sense, but he does not talk about - he does enter into the enquiry with regard to the issue which we have been debating at all.

Would your lordship like me to complete this section (20) of the argument before ... (Court intervenes)

COURT : Let me just think whether I can get clarity. Let us forget about the section. Had there not been a section would it have been inadmissible to prove if the facts are relevant - to prove that a document was found in the possession of an office bearer of an organisation to which an accused belongs, not necessarily proving the contents as correct and true, but proving that this document was found in his possession?

MR CHASKALSON : It would depend upon a lot of other (30)
circumstances/...

circumstances. The mere fact that a particular document is found with a particular person may be a fact relevant to facts in issue. Would not always be ... (Court intervenes)

COURT : Well, if it is relevant - if it is not relevant it is inadmissible on that score, but if it is a relevant fact?

MR CHASKALSON : It would only be relevant because - the only inference you could draw against that is that X, the person in whose possession it was found, had it. So, it would have to be - there would have to be some relevance to the case that X had it. (10)

COURT : But in that case one has to call a witness to prove that the document was found in that person's possession?

MR CHASKALSON : Yes.

COURT : Otherwise you do not get it before court?

MR CHASKALSON : Not at all.

COURT : Now in this case as well, under the section, you have to prove a witness to prove that the document was found in the possession of that person?

MR CHASKALSON : Yes.

COURT : So, on your construction, why introduce the section?(20)

MR CHASKALSON : I can tell your lordship why. Let us assume that the document - let me give you this example. Let us assume that there is a Sechaba found in the possession of an office bearer of an organisation. To prove that a document which purports to be Sechaba is found in the possession of the office bearer of the organisation, does not prove that is Sechaba. That is Lindsay and Watson and that is the Tinte and others. So, if that office bearer were on trial, the fact that the office bearer had possession of a document such as that, may be relevant, but you could not prove that(30)

the/...

the document was Sechaba by saying it was found in the possession of an office bearer. Under this section you can prove that it is Sechaba and then becomes admissible as a Sechaba provided the other pre-requisites are satisfied and that was precisely the point in Tinte. So, it has a very relevant purpose. It serves a very important purpose and a purpose - it serves a purpose not covered by any of the other provisions. It is way of proving Sechabas. It is a way of proving material such as that.

COURT ADJOURNS.

COURT RESUMES.

(10)

MR CHASKALSON : I have two more judgment to refer to. The one is the case of S v Matsiepe 1962 4 SA 708 (A). It does not really take the matter further one way or another. The case was concerned with a prosecution under the suppression of communism act, the admissibility of documents under section 12(4)(c) of that act, which is similar to the section for practical purposes that we are dealing with. The point in issue was whether the African National Congress had continued its operations after it had been banned. A document produced under that section was a document called "Congress(20) Voice" which purported to be the official organ of the African National Congress which contained statements inside of it. The court held that that was admissible under the section and that as it purported to have been - that was not the words of the court. That is what I am saying. On the face of it it appeared to have been issued at a date after the banning of the African National Congress, it appeared to have been issued by the African National Congress and it was saying certain things in the document which showed that the African National Congress was carrying on its activities. (30)

The/...

The court held that that was sufficient proof of the fact that the African National Congress was carrying on activities and on either argument that would be so, because on my argument to your lordship, that it is what it purports to be - I put it to you differently. If the court shows that in February - if it is shown that in February 1961 the African National Congress said X, Y and Z that will be sufficient proof of the fact that the African National Congress was carrying on its activities. So, it does not - there is no discussion of the issue that I have put to your lordship and it does (10) not really take the matter further one way or another and I think that is probably true. That seems to me to be true of all the cases we have brought to your lordship apart from Nkosi. Nkosi's case seems to be the only case in which the use which could be made of a particular document was considered. All the others - well, that is probably not quite accurate, but the only case which seems to consider or to address the issue which I have put to your lordship as Nkosi's, because in all the others the admissibility was accepted and the way it was used in the cases where (20) we can tell how it was used, because Twala's case I cannot tell how it was used ... (Mr Krugel intervenes)

ASSESSOR (MR KRUGEL) : Would section 261 be the present 246?

MR CHASKALSON : I am told that 263bis is the present 246.

The last of the series of cases is a case of S v Mabitsela 1985 4 SA 61 (T). It is a full bench judgment, Kirk-Cohen, J. and Human, J. The issue there was whether a document really - it was really the question again of the proof of a document and the provisions of section 69(4) of the act were referred to and Kirk-Cohen, J. gave judgment and he starts by (30)

referring/...

referring to section 69(4)(a) and he goes on to say :

"In my view the following of the relevant words in any prosecution for an offence in terms of the act, any document which has been found in or removed from the possession, custody or control of the accused, shall be admissible in evidence against the accused as prima facie proof of the contents thereof."

His lordship goes on to say :

"Similar legislation was considered in S v Alexander (that is a 1965 Cape case) which dealt with section (10) 263bis of act 56 of 1955 now section 246 of the criminal procedure act. Those provisions deal with an association of person, the office bearers, officers and members of such organisations bears a similarity to section 69(4). I refer to Alexander's case where the intention of the legislature in enacting section 263bis is considered and which reasoning in my view applies equally to the present subsection. By enacting the aforesaid section. 263bis the legislature has provided that certain specific evidence which ordinarily would not be (20) adequate to convey proof of the facts sought to be proved shall afford prima facie proof thereof. The effect of section 69(4)(a) is therefore twofold. It renders admissible upon mere production of certain documents and also accords to the contents of such documents a probative effect amounting to prima facie proof. By prima facie proof is intended evidence which is such as to call for an answer which in the absence of an answer becomes conclusive proof. In my view, therefore, the provisions of section 69(4)(a) provide(30) the/...

the document in question is thus prima facie proof of the contents thereof. Including if such appears from : (1) evidence of who published or disseminated the document; and (2) whether it was published or disseminated by (i) an unlawful organisation; (ii) under the directions of an unlawful organisation; (iii) under the guidance of an unlawful organisation: (iv) on behalf of an unlawful organisation."

Nothing else in the judgment seems to be relevant.

There are two matters arising out of ... (Court inter-venes)

COURT : At what page is this?

MR CHASKALSON : This is 66 to 67. First of all, his lordship refers to Alexander's case, but of course Alexander's case was dealing with section 263bis which quite clearly is concerned with the proof of facts in the sense that we are dealing, distinguishing between facts and statements. So, his lordship is quite wrong, with respect in saying that Alexander's case helps - I do not think his lordship had to address his mind again to the issue which we are talking about but if he were to be addressing his mind to that issue, Alexander's case would not help him deciding it, because Alexander's case is perfectly clear what that - the only purpose for which he uses or the purpose for which the documents were being used, was for the purpose of proving the facts within the purview of that section, but again the issue did not really arise, because on the face of the document it purported to have been published and issued by the unlawful organisation and I accept that if it is what it purports to be, that that would be correct. (30)

Apparently/...

Apparently what happened in Mabitsela's case is that the matter did go to the Appellate Division - well, alright, apparently two people were charged in Mabitsela's case. Whether they were charged together or whether their cases - there were cases where they were charged separately. There were two cases. Mabitsela and a case called Melck. Mabitsela's case in fact the appeal succeeded. So, irrespective of the admissibility or not, the matter did not go further. In Melck there was a conviction. The matter then went to the appellate division, but I am told by Mr Marcus who appeared(10) in that case that the Appellate Division upheld the appeal without dealing with the interpretation or without saying anything relevant to this issue. It was upheld apparently on mens rea.

We have not been able to find anything - this is what we have been able to find in regard to the sections which stem through - which have their origin through security legislation. The old terrorism act, the old suppression of communism act, the old internal security act. Nothing in those cases has led us in any other direction. I personally(20) have not looked elsewhere, but I have not found any annotation or anything that leads me anywhere else, but as your lordship has asked me whether there is anything else, I will try to find out whether there is and if there is, I will let your lordship know, but these - nothing in any of these cases has led us off in any direction and we have looked - and everything that has been brought to my attention, I have brought to your lordship's attention. I will see if there is anything else and if there is, I will let your lordship know. (30)

I/...

I would like to take the matter one stage further, because your lordship will remember that at the time of the application for discharge we pointed to a document. It was actually some minute of the UDF which the state had put in and there was that statement "We are not guilty of treason." And I said if the state is right, here is prima facie proof that this person is not guilty of treason and the state was then driven to say "Ah, anything in the document which is favourable to the accused is not prima facie proof, not- (10) withstanding the fact that we produced it. Anything that is against the accused, is prima facie proof. So, we can produce a document which contains five statements. Four of the paragraphs are favourable to the accused, one is against the accused. Since we produced it, we can rely only on the one and it is not prima facie proof of any of the other propositions." That is, I would suggest, an extraordinary proposition, but that conundrum is solved, it is absolutely solved if your lordship adopts the construction which I have argued for, because the fact that X on the regional committee of (20) the UDF says we are not guilty of treason, is irrelevant, because it will be a self-serving statement and a document is merely prima facie proof of the contents thereof. So, that it is is that X who is on the regional committee of the UDF says he is not guilty of treason. That would not be relevant evidence unless somehow or other somebody said you you did admit you were guilty of treason. He said no, I did not. Look, here I said this on that occasion. Otherwise it would not be and there is no way of resolving that problem, of reaching the extraordinary conclusion that is (30)

prima/...

prima - produced becomes prima facie evidence of the facts contained therein, but you can only look at facts adverse to the accused and not facts in their favour, which is the state's argument. That would be a most astonishing conclusion to reach, but the argument which I have put to your lordship absolutely solves that conundrum, because its value and its admissibility depends upon whom it is attributed to and you never get that problem. So, our suggestion to your lordship is that that is the construction.

If your lordship - I have put to your lordship that (10) in the last case to which I have referred, the case of Mabitsela I put to your lordship that the issue did not really arise in that case, because on either argument the document - the result would be reached. If Mabitsela means anything other than I have suggested it means, I would suggest - my submissions to your lordship are that first, the passage which refers back to Alexander is obiter, that it is ill-considered, because it does not distinguish between the statute and Alexander and the statute and this case, that it is inconsistent with S v Nkosi which - and that it (20) is clearly wrong and that if in fact your lordship construes it and I do not suggest that it should be construed that way, if your lordship construes it, your lordship is then faced - would be faced with a dictum in one full bench decision and a ratio in another full bench decision, because in - the approach in Nkosi is necessary for the decision in a case proceeded that way and if that is so, your lordship should follow Nkosi, because otherwise all the problems which I have put to your lordship will arise.

Let me move away from that for a moment. Those are my (30)

arguments/...

arguments as to the construction of the section. I want to make some submissions to your lordship in regard to the application of the section generally to the facts of the case. First the section has no application to the charges of treason and murder. Secondly, where the requirements of the section had been met, we submit that the documents can be relied upon to prove prima facie that they are what they purport to be. What use can be made of those documents or what use can be made of that evidence depends upon other factors. Take for example documents such as working (10) progress. Now, working progress is not alleged to have been an affiliate of the UDF. There is no evidence before your lordship as to who the publishers of working progress are, but that does not matter. Your lordship might be able to find that from the document, but it is not alleged to be an affiliate.

C1471 Proof that an article appeared in working progress is not in itself relevant. It is of no assistance to your lordship in deciding any matter in this case. If it appeared that an article in working progress upon which the state (20) relies was written by a co-conspirator and that working progress was indeed admissible under one of the provisions of section 69(4) because the state had proved the essential pre-requisites necessary for the admission of such a document, then it would be evidence of the fact that an article written by the co-conspirator that that article was written by the co-conspirator and appeared in working progress. What relevance that would have to the charge would then depend upon whether or not what the co-conspirator wrote in working progress was an executive statement or a narrative statement. (30)

And/...

And the state of course has the onus of proving everything necessary to satisfy your lordship on all aspects relating to the use of that evidence. In other words, it would have to satisfy your lordship that the person who appears to have written the article was a co-conspirator and if it does not, it would be the end of that article. It would also have to satisfy your lordship that what was said was executive and not narrative and if it has left that in doubt, that would not be admissible. So, each time reliance is placed on anything in an article, one has to go through precisely the (10) same enquiry. Who was the author? When was it written? Is it admissible under one of the provisions of section 69? What can you infer from the fact that it was written? Is it relevant? Only relevant depending upon a whole lot of other circumstances. That needs to be done with each one of the documents. Some are easier than others. Minutes, they are easy, because if minutes record decisions taken, they are what they purport to be. Prima facie that is a decision taken by the body concerned. If it is relevant to the case, one can tell immediately whether a decision (20) taken for instance by the UDF national executive committee, prima facie relevant to the case and prima facie proof of the contents, one would look at it and it does not matter whether it is for or against the accused. It is prima facie proof of the contents and one would then look at it and deal with it. It is more difficult if one gets into affiliates. Even more difficult if one gets into individuals who may or may not have any connection with the accused and quite complicated if one gets into publications like SASPU and others which I will say a little bit about (30)

later/...

later.

Now, the state of course has just left us in the dark about all that, but let me illustrate to your lordship some of the problems - CA46 is a document to which the state devoted a great deal of attention in its argument. On the face of the document it was the keynote address at the second national consultative conference delivered on 29 March 1986. It bears on the first page thereof the legends "National education crisis committee." Below that it says "Second national consultative conference. Keynote address.(10) Saturday, 29 March 1986. People's education for people's power." a great deal of attention was devoted to this in the oral argument, because counsel for the state spent a great deal of time relying on propositions contained in that document. If we have to determine the admissibility of that document, we have now got to go back to its history. It was not - let me put it to your lordship somewhat differently. There is no evidence as to where it was found. So, the finding provisions, as I might put it, in section 69, do not trigger its admissibility. (20)

The national education crisis committee is not alleged to be an affiliate of the UDF. The name of the author does not appear from that, but there was evidence as to who delivered the speech. The document itself will show you nothing about who the author was. There was evidence given by Dr Motlana that a Mr Swelati Sisulu delivered the speech. Mr Sisulu is not alleged to be a co-conspirator. The speech on the face of the document and indeed I think Dr Motlana's evidence concerns it, was delivered about one year outside the period covered by the indictment. Dr Motlana's evidence(30) at/...

at volume 418 page 24 486 line one to 24 489 line 25 says that no resolution was taken, adopting Mr Sisulu's speech as policy at this conference and it was merely the keynote address given by Mr Sisulu.

Assuming that Dr Motlana's evidence were sufficient to prove - and I am not sure that it goes that far because he said I was given a copy of the speech, but he was not present when the speech was delivered. So, he does not know what Mr Sisulu said. Whether he spoke in that form or said anything else. He was not there when that happened. All that he (10) did is, he got a copy from somebody, but let me assume for the sake of my argument against myself that the contents - that is identified - let me step back a bit. First of all section - it cannot be proved under section 69(4) because the requirements of section 69(4) are not there. Dr Motlana was not there when the speech was given. So, he cannot say what was said or what was not said, but even if it were said, it has no relevance to the case for the reasons that I have given to your lordship.

Certainly, whatever construction, even if the con- (20) struction of section 69(4) - well, I do not want to argue that again. All I am saying to your lordship is this document has nothing to do with this case.

Let me take another document. EXHIBIT W23 volume 4 of the W series. That is a SASPU National. The document was found with a Mr S. Bolton. The evidence of Mr Molefe is that he did not know who Mr Bolton was. Volume 270 page 14 597 line 13 to 16. We have not see Mr Bolton's name amongst the co-conspirators alleged. We have not seen any admissions made in regard to Mr Bolton from which your lordship may (30)

or/...

or may not be able to infer his standing in any of the UDF affiliates, if any. The state has not drawn our attention to any such allegations or admissions. If indeed - there is nothing from which your lordship could establish that provisions of section 69(4) have been triggered, then this would not be admissible at all, because it does not prove itself on mere production and it is not alleged that any of the accused are office bearers or members et cetera of SASPU National, but assuming it were produced, let me just make an assumption for the purposes of this section for the argument. (10) Assume that the state showed you something from which you could say that section 69(4) renders this document admissible. Our argument to your lordship merely becomes admissible of the fact that this is what has been written in SASPU National. This is what SASPU National have said about these events.

According to the indictment there was a time when SASPU National was affiliated to the UDF and subsequently it ceased to be an affiliate. This is at a time within which SASPU National was alleged to be an affiliate. If it had been (20) after June or July - I am not sure of the date, I do not want to mislead your lordship, but I think it was June or July of 1984. If it had been at a time afterwards, it would cease to have been an affiliate.

Now, the indictment alleges at page 19 of the further and better particulars that the co-conspirators associated with SASPU National are two persons. K. Coleman and A. Griesel. What, if anything, did Mr Coleman - what, if anything, did K. Coleman or A. Griesel have to do with this? Did they write any of the articles? Did they know about its (30) publication/...

publication? What is the editorial policy of SASPU National? Who determines what goes in? What does not go in? We do not know anything about that, I think, because I am not prepared to say for your lordship that somewhere in the 25 000 pages there is not something which may be relevant, but we were told nothing about it and if not, what use can be made of the publication? Even if Mr Bolton had been of the category of persons out of whose possession a document taken could be produced in court, what use could be made of it? We say nothing, because unless you can take the next stage and (10) prove the relevance that a co-conspirator said something and it was an executive statement and the co-conspirator is responsible for it, then it is of no assistance, because a statement made by someone who was not a co-conspirator is not admissible merely because it appears in SASPU National. So, perhaps your lordship has to go not only horizontally and vertically, but also diagonally as well.

Now, I wandered away from where I was yesterday. I did so deliberately, because I thought your lordship wanted me to address you on section 69 earlier in my argument and I (20) thought perhaps it would be appropriate to do so. But can I take you back to where we left off yesterday?

I think a point that I have reached yesterday was that these ANC publications had not been proved for the purpose of the treason charge certainly and I had referred to Lindsay and Watson and of course the Tinto is actually a Sechaba. That does not make it better or worse, but it is dealing with precisely the same sort of situation with which we are concerned and so all my arguments there about the necessary allegations which have to be made before it can become (30) admissible/...

admissible would apply thereto. If your lordship accepts my argument on that and follows Tinto then your lordship - then the admissibility of the Sechaba's on any charge becomes questionable, but let me accept for the purpose of this part of my argument that the state has established that the ANC gave its support to the UDF, that it praised it in its publications, that it extolled its virtues to its recruits, none of that would necessarily have been known to people and to organisations within South Africa, since the ANC is a banned organisation. Its publications are not freely (10) available. We do not know anything at all about how many of its publications get into the country. We do not know whether its circulation within South Africa is five or five million. So, we do not really know - or let me put it to your lordship differently. There is nothing, no facts have been put before your lordship from which your lordship can infer with the proof necessary or with the degree of certainty necessary for a conviction in a criminal case, that what appears in Sechaba was known to anybody associated or alleged to have been associated with a conspiracy and more specifi-(20) cally would be accused in this case, because there has been direct evidence from the accused who are office bearers of the UDF that they did not see these documents. They did not know about them, that they were not members of the African National Congress and that all the things - perhaps I should not be so general as to say all the things, but basically what has been read out here in court as coming from the African National Congress, they did not know.

The state has not shown, even if we put their case at its best and start giving some admissibility to these (30) documents/...

documents, the state has not shown the contrary.

Let us assume that there are certain ANC operatism and obviously there are. We know that the ANC is active in South Africa. We heard that evidence from the IC witnesses. So, we know that it has members in South Africa. We do not know how many members. In a sense the more members it has, the more difficult the state case here becomes, because any of the incidents of unrest which have been started anywhere around the country, could have been provoked by ANC cadres within the country and we know from the evidence, the evi-(10) dence which I put to your lordship yesterday of IC.23 - I do not want to repeat those passages, but precisely what the ANC does is to look for issues upon which it can capatalise. If it sees public anger over a particular issue, it can go to it and its cadres who are around could lead the people to start the violence or could provoke a violence and an ANC cadre hypothetically, because I think - my learned friend Mr Bizos is going to address you on the evidence in the Vaal. We know the violence did not start as the state alleged it started. We know that it did not take place as the state (20) alleged it took place in the indictment. We know the violence moved from precisely the opposite direction to which the state says that it moved. Mr Bizos will deal with all that when he argues to your lordship, but let us assume that it starts at a point ... (Court intervenes)

COURT : Was it Bophelong or Boipatong?

MR CHASKALSON : I cannot remember whether it was Bophelong or Boipatong. I am sorry, I do not remember, but the evidence shows that it started at one of those two places the night before. Let - we do not know how it started. There has (30)

been/...

been no evidence, but certainly there is absolutely no reason why you should infer that was somebody in the VCA. Why not the ANC cadre who was there, who sensed the feeling and if it was not reactive violence and it may indeed have been reactive violence to police action, there are two possibilities. It was either provoked violence or it was reactive violence and the state evidence does not show which and there is no evidence upon which your lordship can show - can make a finding to say which it was, because they did not tell us enough about that incident. That is where it started. (10)

We do not know how it started. Assume it were provoked violence. We do not know who provoked it. We do not know whether the person who provoked it had any connection at all with the VCA or whether the person who provoked it was a total stranger to the VCA. So, we cannot make any inferences there and you cannot say simply because the VCA was active in the Vaal, I must infer that they started it, that they provoked the violence, if it indeed be provoked violence and not reactive violence. Why not an ANC person who senses the feelings of the crowds or the feelings of the people there (20) and says "Look here, let us do this" and then the thing blows up. It is all speculation and nobody would necessarily know even if we found the person who started the whole thing that this was on the go because the evidence tells us that the ANC cadres operate secretly and not openly.

The evidence of IC.23 volume 131 page 6 513 line 22 to page 6 515 line 6. This was a witness, we started off, I had asked him a question about the word "cadre" or guerrilla and there was a bit of a discussion as to what was and was not a cadre and then the cross-examination continues as (30)

follows/...

follows at page 6 513 line 22 :

"Let me use the other word guerrilla. I think it has probably got less complications. You told us that it is dangerous work for the guerrillas to come back but that there is no other way. I think that was the way that you put it.
-- That is quite correct.

And of course, if the guerrillas get caught in South Africa by the South African Police they may face very serious penalty? -- That is so.

Even possibly the death sentence? -- That is so. (10)

That of course is wellknown to everybody? -- Quite true.

And of course, it is also very bad for the organisation for its' guerrillas to be caught because they might disclose information about how the organisation works? -- That is true.

And they might disclose where arms are hidden and what the plans of the ANC are and what is happening in the camps?
-- That is true.

So, the ANC must be as anxious as the guerrillas are that the guerrillas should not be caught while they come back to South Africa? -- That is correct. (20)

So, would the instructions then to the guerrillas be who are returning to South Africa to be as careful as possible?
-- That is correct.

Because it is important in their interest? -- That is so.

And it is important in the interest of the organisation? -- That is correct.

So, when they come back as guerrillas into South Africa they must conceal from everybody the fact that they are guerrillas? -- That is quite true.

They must go about their work discreetly as possible? (30)

That/...

-- That is correct.

They must do their work quietly and surreptitiously? --
That is correct.

Do I understand you to use the words guerrillas and cadres in the same sense? -- I say there is a trained cadre and the untrained cadre and then a guerrilla."

Then your lordship asks some questions and then the final question at page 6 515 :

"But what you told us about coming back to act quietly and surreptitiously would apply to everybody who comes (10) back for the ANC? -- Yes, every one."

That is almost self-evident if one thinks about it, but self-evident or not, that is the evidence. We have then this position that the documents are secret. We know nothing about how many people saw them. The people who come back keep secret. They go about their works surreptitiously and it is part of their work to stir up trouble wherever they see it appropriate and if they are doing their work properly, if there is tension at the time of a particular incident or anything, they will stir up the trouble. Where does your (20) lordship infer from the inadequate evidence put before us that the trouble which was stirred up was initiated by the UDF and its affiliates? I am told that this issue was raised with all the IC witnesses and everybody agreed on the element of secrecy, all the former ANC people.

So, that is another problem that the state faces, a problem which it has not really addressed. I do not know how it seeks to overcome it, but let me go even further. Let me assume that Sechabas are freely available, which according - there is no evidence that they are not. Let us assume (30)

that/...

that they are freely available. Let us assume everybody knew what was being said in Sechaba. How does that make the UDF or its affiliates party to a conspiracy with the ANC? How does that make their office bearers guilty of treason? Because the fact that the ANC called for opposition to the tri-cameral parliament or to black local authorities or to removals, does not mean that no one else in South Africa may take up such issue, even if they were to hear it for the first time from the ANC, which is not the evidence in this case, but it cannot be treason because the ANC says it is (10) a good thing to do X, that you do X for your own reason. That is not treason and if the ANC calls upon democratic forces in South Africa to unite, that does not make it treason, if democratic forces in South Africa do unite. Even if they heard of it from the ANC, which is not the evidence in this case, because the ANC cannot proscribe political action within South Africa by making declarations and statements and urgings from Lusaka and elsewhere in the world and people and organisations in South Africa cannot be prevented from engaging in lawful political activities simply because the (20) ANC expresses approval of such activities or even if it goes so far as to encourage its members and followers to support it. There is another step which has to be shown and that is that you did it for them in accordance with an agreement with them and it is that which is totally lacking in this case.

Finally to round up that section of the argument, the evidence of discussions amongst recruits, casual gossip in the ANC camps is not admissible. There are two judgments for that. S v Bondi 1962 4 SA 671 (A) at 675 A to C and at 677 G to H and R v Levy 1929 (A) 312 at 325. There are (30)

not/...

not line references there, but the passage at that page is a passage which comes from the judgment of Curlewis, J. who cites a passage from a judgment of Lord Denmin in the case of R v Blake. He says midway down the page after saying :

"I have no doubt as to the first point. The evidence clearly was receivable. The day book or something done in the course of a transaction was properly laid before the jury as a step in the proof of the conspiracy."

Then the second point :

"And on the point of whether a counterfoil of a certain(10) cheque drawn by B after the goods were passed, the proceeds of which cheque had been traced to B was admissible as evidence against B, Lord Denmin said, the evidence must be rejected on the principle that a mere statement made by one conspirator to a third party or any act of such conspirator not done in pursuance of the conspiracy is not evidence for or against any other conspirator."

I think it is fairly the same proposition.

Let me step away from that and refer your lordship to the defence evidence which has been given denying the con- (20) spiracy. Mr Molefe in volume 247 page 13 112 lines 11 to 21 said this - he said

"There is no truth in the allegation. I have never been a member of the ANC. (This is his evidence-in-chief) I have never been a member of the South African Communist Party. I have got no dealings with those organisations or any other organisations that is involved in a violent program to overthrow the state."

At page 13 112 lines 22 to 30 he said that he had had no access to ANC or SACP publications. As far as we are (30) aware/...

aware it was never suggested to Mr Molefe that he did have access to such publications. We have not found any where where it was suggested that he did have dealings with the ANC in the sense that he had any contact with them at all.

In his evidence-in-chief - those are the sort of things I thought we might have heard from the state and would be able to respond to, but we did not. In his evidence-in-chief Mr Molefe denied that there was any link between the UDF and the ANC. He said that at volume 250 page 13 362 (e). I think that is one of those records which we got into sub pages of. (10) 13 362 is the reference I have (e). He says at line 14 and he is asked :

"Has there ever been any link between the United Democratic Front and the African National Congress? -- There has never been a link between the African National Congress and the UDF. That allegation was made several times by the government and was mentioned by supporters of the government and repeatedly from time to time that allegation was made. The UDF (that is clearly a typing error) never had occasion to place on record its position vis-a-vis the ANC. We always denied (20) that we were a front for the ANC."

I do not know what that word is, because Mr Molefe's evidence is full of occasions upon which they placed on record that they were not associated with the ANC.

Let me give your lordship the references where it is placed on record that the UDF had no association with the ANC. At a speech made at New-Brighton on 24 October 1983 on the occasion of the launch - it was a meeting to establish a UDF interim committee in the Eastern Cape. Mr Molefe's evidence was that on that occasion he mentioned that the (30)

UDF/...

UDF was not an extension of the African National Congress. His evidence is in volume 249 page 13 269 line 27 to 13 272 line 9. There he confirmed that he had said that and we produced for his confirmation a press report of the meeting, which is EXHIBIT DA18. EXHIBIT DA18 includes the statement that the UDF is not an extension of the African National Congress. It is simply a broad front opposed to apartheid and the evils of the P.W. Botha reforms. That was said at a public meeting on the occasion of the formation of the interim committee. It would have been told to everybody (10) who came in or were considering to come in and it was published in a newspaper with a circulation of over 13 000 in that area. No, I have given your lordship the wrong figures. It is 24 000. The actual figure on AAS. It was reported in the Evening Post. The actual figure, circulation figures are 24 956. So, there we have this public statement that at a very important meeting with wide publicity, all the affiliates would join on the basis of that statement or all people considering would come in on the basis of that statement. No evidence to produce, to suggest that the (20) people who then affiliated in the Eastern Cape had any different perception of the ANC and what they were about.

Mr Molefe referred to an article written in the Financial Mail on 25 November 1983, EXHIBIT DA15 at volume 249 page 13 223 line 26 to 13 224 line 2. That article says this :

"It is true that both UDF and the ANC are groups opposed to apartheid in South Africa, but we must say categorically that we have no relationship with the ANC and do not envisage one because we are operating legally and it is banned. The methods we are using to oppose (30) the/...

the state also differ fundamentally. The ANC uses violence. We are dedicated to non-violence."

His own evidence was that he personally has never made a call upon anyone to commit violence and he says this :

"It has simply not been my policy as an individual and neither was it the policy of the organisation that I belonged to, the United Democratic Front and it was not even the policy of the Soweto Civic Association."

That evidence is in volume 249 page 13 325 lines 7 to 13.

He dealt very specifically with evidence which had (10) been led by the state in regard to the contact between certain of the ANC - between certain of the members of the affiliates and ANC members or ANC houses. That was the evidence which was given through various of the IC witnesses. He dealt specifically with each incident which was adduced in evidence by the state and the totality of that evidence your lordship will find at volume 252 page 13 502 line 25 to 13 505 line 13. Let me give your lordship the gist of that evidence. With regard to the evidence led by the state, it was suggested that certain individuals associated with the UDF had made (20) contact or received training from the ANC. Mr Molefe specifically denied knowledge of such occasions and he stated that if they had occurred, that would not have been pursuant to any mandate from the UDF. That very specific statement is in that section at 13 502 line 20 - it is the whole general section. I am sorry.

With regard to the evidence of IC.6 who said that certain persons who were officials of the UDF had visited Lesotho and received crash courses from the ANC, Mr Molefe stated that he had no knowledge of such incidents, that (30) they/...

they would not have been acting on behalf of the UDF in receiving such training, nor would they have obtained a mandate from the UDF and the UDF never issued such a mandate.

With regard to the evidence of the witness IC.6 to the effect that Mr Botha of the South African Allied Workers Union - South African Allied Workers Union was an affiliate - was seen at ANC houses in Lesotho. Mr Molefe stated that the ANC had given him, Botha, no such instructions and could not have asked him to do that kind of thing. Mr Molefe himself said he himself did not know whether or not Mr (10) Botha was ever there.

With regard to the evidence in which it was alleged that members of the East London Youth Congress received instructions from the ANC, Mr Molefe said he knew nothing about this. He said that during the period alleged by the witness IC.6 that the East London Youth Congress was not an affiliate of the UDF and he said that if any such persons in fact did receive instructions, they would not have had a mandate to do so from the UDF.

With regard to the evidence concerning Mr Dennis Neer (20) who was said to have attended a conference of the International Labour Organisation in Zambia, Mr Molefe said he did not know whether or not Mr Neer had gone to Zambia, but if that he had gone there, it would not have been for the UDF and he would not have had any mandate from the UDF.

With regard to the meeting between Bishop Tutu and the ANC or the allegation that Bishop Tutu met representatives of the ANC in Lusaka, Mr Molefe stated that he was not informed of any specific meeting that Bishop Tutu attended in Lusaka and that if he had had a meeting with the ANC on any (30)

occasion/...

occasion, the UDF would not have asked him to do so. It would not have been at the instance of the UDF. Mr Molefe said that he knew of no reports ever having been made by Bishop Tutu to the UDF concerning this alleged meeting with the ANC and he said that as a patron of the UDF Bishop Tutu was not party to the policy making structures of the UDF and that certainly that he had no mandate from the UDF to undertake any visits on its behalf. As far as we can establish from the record, none of this evidence was ever challenged - Mr Molefe's evidence. On what basis can the state ask you(10) to reject that evidence if heard none, but I suggest none can possibly exist and it cannot ask your lordship to reject that evidence, where is its case.

Mr Molefe specifically denied that UDF campaigns alleged in the indictment were undertaken in implementation and furtherance of the aims of the ANC and SACP. That is volume 215 pages 13 362 lines 2 to 8. I will deal more fully with that evidence and how the state approached that evidence when we deal with that section of the case on the campaigns.

As far as Mr Molefe is concerned, he also drew - (20) attention was also drawn in the course of his evidence to EXHIBIT C9 which was the report of the secretariate to the December 1983 general council meeting which described as harassment attempts which had been made to isolate the UDF - I am sorry, by attempting to project it as a front for the banned ANC. So, when the UDF has discussions amongst itself, it sees the accusation, that it is a front for the banned ANC as harassment. That is prima facie proof of the contents and it was confirmed by Mr Molefe.

Let me go to the evidence of accused no. 20. Mr Molefe(30) said/...

said - I mean Mr Lekota specifically denied that he participated in the UDF on behalf of the ANC or SACP or that he was party to any secret conspiracy with any organisation or person. He said that at volume 282 page 15 472 lines 15 to 25. He was the publicity secretary and he said when accusations linking the UDF to the ANC started appearing in newspapers, he took steps, as he put it, to put across the correct position as it was and then he referred to a number of occasions upon which this was done. I have lumped together here statements which deal with a number of issues. They (10) are all relevant really to the UDF's attitude to violence and bloodshed. It was a document which was a press statement. The evidence is that - Mr Lekota said that he tried to get as wide a publicity as possible for this statement. That is volume 282 page 15 492 lines 4 to 5. He confirms the statement at volume 282 page 15 488 line 24 to 15 492 line 3. It is a statement which deals with the basis of the UDF opposition ... (Mr Krugel intervenes)

ASSESSOR (MR KRUGEL) : Is it 282? It cannot be.

MR CHASKALSON : It is volume 282. (20)

ASSESSOR (MR KRUGEL) : Volume 282 starts at 15 478.

MR CHASKALSON : I have got 15 488 and somebody who claims to have checked my notes ticked my reference.

ASSESSOR (MR KRUGEL) : Volume 283.

MR CHASKALSON : Volume 283, I am sorry.

COURT : What is your reference to the press statement?

MR CHASKALSON : It is a press statement where he says in the course of ... (Court intervenes)

COURT : Has it got an exhibit number?

MR CHASKALSON : AL8 and in the course of that statement (30)

he/...

he says :

"We have confidence that given the opportunity, South Africans will not choose revolution. We are opposed to the new deal because we are opposed to bloodshed." He specifically denied that the UDF took any instructions from the ANC and he said that the UDF has got a constituency. This is at volume 283 page 15 508 lines 12 to 15. He pointed out that the UDF has got a constituency.

"If it is going to take instructions from the ANC or from anybody else, it is going to fall foul of this (10) constituency and it will find itself completely discredited."

He said that throughout the time that he served in the UDF they never had any contact with the ANC and he said :

"And we had no need to discuss these issues with the ANC because we had an independent body."

References to that are volume 288 page 15 927 lines 11 to 15, page 15 969 lines 10 to 11. He said that he had no access to ANC or SACP publications. That is in volume 289 page 16 073 line 24 to page 16 074 line 7. The other referen-(20) ce is volume 283 page 15 500 lines 14 to 20.

It was put to him in cross-examination that the UDF and the ANC conducted the same campaigns and his answer to that was this - that appears at volume 286 page 15 815 lines 13 to 22 :

"There is no connection between the African National Congress and the United Democratic Front. We have never had any organisational contact at the time, throughout the time that I was serving and until our arrest. I do not know how we could have had joined (30) operations/...

operations with them."

Then there are some words left out which I should just check on and it continues after that :

"Each time the UDF has been accused of being a front for the African National Congress I have made the point quite clear that we had neither formal nor informal links with them."

Volume 286 page 15 815 lines 13 to 22. I do not know on what basis your lordship is asked to reject that evidence of Mr Lekota. It was put to him that the UDF was the (10) internal structure of the ANC and that the UDF calls on the masses to support the UDF inside the country for that reason and the passage is at volume 289 page 16 072 lines 3 to 22 where he says :

"I deny it that the UDF is an internal wing of the African National Congress. The UDF has never mandated the ANC to campaign on its behalf, nor indeed are we aware that the ANC has undertaken such a task on our behalf. We have no knowledge of what calls it has made on the masses of the people of South Africa. As far as I (20) know the ANC is banned and it may not be quoted in this country. I have not read a statement in the newspapers where it was said that barring the (and I think that there are some words left out, but the context is) one statement that was allowed by Mr Le Grange late in 1983 after Johnny Makhatini had addressed the commonwealth in Nieu-Dehli India. Barring that statement which was specifically permitted by the minister and on which we issued a statement and made clear our position that we had no linkage with the African National Congress." (30)

There/...

There was a public statement issued by Mr Lekota dealing with this in the Evening Post of 5 December 1983. The references are volume 283 page 15 509 line 7 to 15 510 line 10 and volume 289 page 16 073 lines 13 to 14. The exhibit number is DA65 and according to Mr Lekota's evidence at volume 283 page 15 511 lines 1 to 4 there were other newspaper reports of the same statement in the Western Cape, in Natal and in the Transvaal. He did not identify specifically the newspapers, but we do know that as far as the Evening Post is concerned, that its circulation is approximately 25 000.(10) The effect of this statement is :

"There could be no links between the African National Congress and the United Democratic Front under present circumstances, the UDF has announced. The publicity secretary, Mr Terror Lekota, was reacting to a statement of support for the UDF issued by the ANC at the recent common wealth conference. While we welcome the support of the ANC, just as we would welcome the support of any organisation or group of South Africa and opposed to the constitution and the Koornhof Bills, there are(20) no links between the UDF and the ANC. Nor can there be any links under the present circumstances, Mr Lekota said. This was because the ANC was banned and because the methods of the UDF were different from those from the ANC. Mr Lekota said that the UDF was concerned about allegations by some government officials that the UDF was a front for the ANC. There is not a grain of truth in these allegations."

Shortly before his arrest he issued another statement. That appeared in the Star of 20 April 1985. It is EXHIBIT DA42.(30)

There/...

There too he denies - he says he continually repeated that there are no formal or informal links with the ANC.

He was cross-examined to suggest that he did not condemn the ANC and it was suggested to him that because he did not condemn the ANC, he must be taken to support it and he deals with that in the record at volume 285 page 15 688 lines 8 to 30 and he said :

"I wish to state quite categorically that I think it is very tragic that the African National Congress has had to resort to these methods. It is tragic because (10) so many innocent people suffer in the process. It is also tragic because I think a lot of young people from within our own communities who would have made very meaningful and extensive contributions to the political field within our society, are themselves lost to our society, because if they get arrested and some of them get hung and so on, potential politicians with capabilities are lost to our society. I understand, however, very firmly the depth of frustration of young people, young and old really, who look around themselves and (20) see the life without opportunities of a tomorrow for themselves. Young men, young fellows and young mothers who look around and see that they have nothing to bequeath unto their children, except the state of political recklessness, as menial servants denied the opportunities of education, training and so on. I understand those frustrations and for that reason I am not in a position and I reserve my condemnation for what is taking place in our society for the policies of the government of our country. It is those policies really which produce (30) people/...

people with such a depth of frustration as would then resort to methods of this nature."

Our submission to your lordship is that that is a reasonable position to take up. It does not matter whether one agrees or disagrees with that position. It is a reasonable position to take up and one cannot certainly characterise the failure to condemn for those reasons as leading as it were to the conclusion, therefore you are in conspiracy with them.

Attention was also drawn to other publications dealing(10) with a bogus pamphlet which sought to link the UDF with the ANC, purported to have been issued in the name of the UDF and a number of press statements were made about that in various newspapers with wide circulation in South Africa. Mr Lekota himself made a statement which appeared in the Rand Daily Mail on 19 May 1984 :

"UDF publicity secretary, Mr Patrick Terror Lekota said yesterday that state propaganda had made a series of unsubstantiated efforts to equate the UDF with the ANC. Parents should not allow themselves to be taken(20) by such propaganda. There is nothing in the operation of the UDF or its affiliates which can be used to imply that the UDF recruits people for ANC activities, he said."

COURT : Exhibit number?

MR CHASKALSON : There are a series of exhibits. EXHIBIT DA82, 83, 84 and 85. The one I have just read from is EXHIBIT DA85. The record is volume 286 page 15 733 line 15, 15 775 line 26. I have not checked the circulation figures of the other newspapers, but the one in which Mr Lekota's was published,(30) had a circulation of 118 000.

COURT ADJOURNS UNTIL 14h00.

THE COURT RESUMES AFTER LUNCH

MR CHASKALSON: To complete the references to Mr Lekota's evidence, in his evidence-in-chief at volume 286, page 15 776, lines 5 to 12, you specifically asked whether the public of South Africa was informed of the UDF's aims and objects and of the fact that it had nothing to do with the ANC and his answer was:

"In my view the position of the UDF was so constantly repeated that it had become almost monotonous. We said it over and over again. We tried to say it in different ways and we were satisfied in our own minds that the public was sufficiently informed about the position of the United Democratic Front and we have never had any doubt about that fact."

Again I make the submission to your lordship that no basis has been put forward for rejecting that evidence. Now if I could turn to another aspect relevant in this context which emerges from the state case itself, the state alleged that all the members of the management committee were party to this conspiracy with the ANC or in some way involved (20 with the ANC to promote the ANC's objectives, and one of the persons specifically mentioned in the indictment as being party to that conspiracy was the witness Father McCamel and he was identified in the further particulars and in the further and better particulars. The further particulars at page 3 he is referred to as indeed he was, the chairman of the VCA. And in the further and better particulars his name is mentioned again at page 10, yet when he came to give evidence for the state he denied that any linkage - that there was any linkage at all between (30 the / ..

the VCA and its activities and the ANC and the South African Communist Party and indeed when these allegations were put to him he said that there was no truth in them whatever and he agreed that they were quite ridiculous allegations. That is in McCamel's evidence at volume 35, page 1 608, line 3 to page 1 609, line 14. As the state case progressed the state itself seemed to give up this allegation. It did not seem to have been taken up with the members of the affiliates who have been called to give evidence in any depth or any detail that we can find and as far as we have been able (10 to establish so far it does not seem even to have been put to Dr Motlana who of course was the chairman of the most prominent, one of the most prominent members of the class of members of management committees.

Now let me move away from that and turn to the allegation made by the state that the UDF even if was not in conspiracy with the ANC, that its goals were the violent overthrow of the government and in essence as I dealt with it - as we dealt with it yesterday in our argument, the state's contention here is that the UDF was planned and constituted (20 with the object of organising and politicising the masses with the ultimate goal of leading them into a violent revolution to overthrow the state. Now not only was there no direct evidence rendered in support of this allegation but the allegation was denied by the main state witness whose evidence the state says was satisfactory. He was put forward as a satisfactory witness, that is McCamel. In volume 7, I am sorry, it is volume 35; after having dealt with the question of the ANC the cross-examination gets taken up with him at page 1 603 line 12: (30

"If / ..

"If it were to be said that you as chairman of the Vaal Civic Association conspired with the UDF to overthrow the South African government by violence, would you regard that equally as a ridiculous allegation?

-- That person would not be telling any truth.

What is your own personal attitude to achieving political objectives by violent means? -- I do not go accord with any violence.

Can we accept then when you joined the Vaal Civic Association that you did not do so in order to promote violence? -- That is true. (10

And that remained your attitude throughout the whole period that you were associated with the Vaal Civic Association? -- That is so.

You made no mention in your evidence of it ever having been suggested to you at any meeting that you attended that the Vaal Civic Association should promote or encourage violence? -- In no meeting which I ever attended was a mention made of any violence.

Nobody ever suggested in your presence that the Vaal Civic Association members should endeavour to promote revolution? -- That is so. (20

None of these speakers at the mass meetings which you attended ever made such a statement in your presence? -- No.

I can understand that you cannot remember everything that was said at all the meetings but if such a thing had been said in your presence is that something which you would have remembered? -- I believe that I would."

And then the cross-examination proceeds further. So out (30

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of the state's own witnesses comes a denial of the central proposition to the state case and what the state has tended to do is to ignore the denials of a witness like McCamel to deal quite inadequately with the evidence of the defence witnesses all of whom denied this proposition and to attempt to construct a case by inferences which it seeks to draw from the unrest during the period September 1984 to June 1985 and from passages in certain documents and speeches, and it does as I have suggested earlier to your lordship today it treats every act of violence which have been (10 referred to in this case as having been committed by the UDF in furtherance of its goals and it sees every document and every speech as if it were an official statement of UDF policy without regard to the evidence in that respect. It has also not seemingly paid any attention to the fact that the UDF was a political front and not a political organisation. And it seemingly has paid no attention to the evidence given by the witnesses as to the structure of the UDF and its policy. Now what we want to do is to begin by looking at the structure and policy of the UDF, to (20 begin by looking at the evidence in regard to the structure and policy of the UDF. And we will deal with certain related matters arising out of the indictment and we will then proceed to look at the evidence relating to acts of violence; there will be an argument on the Vaal evidence; there will be an argument addressed to your lordship on the 31 areas and there will be an argument looking at the speeches and publications, the central documents on which reliance is placed.

But beginning with the structure. Now a front in (30

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our submission unlike a political party does not have a unitary cohesive structure. It has a loose and flexible structure deliberately adopted to enable affiliates to retain their own independence with the object of bringing together people and organisations rather of different, possibly different attitudes but who have a common identity on the issue or issues to which the front is directing its attention. And so there will inevitably be divergences - or not inevitably but there is no reason why there should not be, and in all likelihood there will be divergences (10 of attitudes, divergences of ideologies, divergences of actions between the different people, within the different organisations within the front when those organisations are engaged in pursuing their own purposes. Mr Molefe dealt with this in his evidence at volume 249, page 13 268, line 17, to 13 269, line 7. I am going to leave out a few words in what I am reading to your lordship to let the matter flow more logically. It is in the middle of an answer, line 17 where he says:

"..but within a front you have a situation where (20 especially a front of the nature of the UDF, where organisations that existed before they have got different ways at which they look - different ways of looking at problems. They have got their own policies and programmes that had been operative before the UDF was formed as a front. If a front sought to keep these organisations together under its banner it would not have been able to do so without accepting the fact that they have to be independent, they have to carry on the programmes that they have been carrying out. (30

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It would simply not be in a position to decide for all those organisations. I think another factor that is crucial is that the very size of the United Democratic Front, the hundreds of organisations that were coming together under this banner simply meant that it was not going to be feasible to control every component of that front in terms of determining what they should do at what time. Besides that it would simply run counter to the whole concept of democracy because it is the members of those organisations who must decide (10 at local level as to the direction that they thought their organisation should take."

And Mr Lekota took up the same theme. He did so at volume 283 page 15 520, lines 21 to 27. And he explained there that the autonomy of the affiliates was an accepted and important principle of the UDF and he said first of all because the UDF was a front the question of autonomy of the affiliates was an important one, in fact because the affiliates of the UDF were organisations that had existed in their own right before the UDF was formed. It was (20 important for them to define the parameters as to what extent they were ceding their independence in affiliating and to what extent they remained independent. And the central issue around which the UDF was formed was around the question of opposing the new constitution and the Koornhof bills and as Mr Lekota put it at volume 291, page 16 195 lines 1 to 5, it was not for us to shape their policy, shape their perceptions and their visions and so on; they had been there longer than us.

Now the structure of the UDF appears from its working (30 principles/..

principles. The highest decision making body is the national general council which comprises representatives of all affiliated organisations and it is required or it is expected under the working principles to meet at least once a year and the working principles begin at page 8 of EXHIBIT A.1 and it is paragraph 8 which determines, which identifies the role of the national general council and how voting takes place. Decision making between national general council meetings is undertaken by the national executive committee which consists of office bearers and representatives and constituent regions of the UDF and its decisions are to be carried out (10 by the secretariat which consists of two secretaries from each region and there has been a good deal of evidence given to your lordship about decisions which the national executive committee did take and about things which they did not decide and we will have to look at that later as well. But the national executive committee is dealt with in paragraph 9 of the working principles. There are only two offices of the UDF, that is the general secretary who is accused no.19, Mr Molefe; and the publicity secretary who is accused (20 no.20, Mr Lekota and they are ex officio members of the NEC. That appears in paragraph 11 of the working principles.

Now the working principles in paragraph 6 provide that all regional formations and member organisations shall have complete independence within the umbrella of the United Democratic Front provided that actions and policies of members are not inconsistent with the policies of the UDF. Now of course the member is the affiliate, not an individual person and to determine what the policy of an affiliate is one would have to look at the affiliate's constitution, one (30

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would have to look at the affiliate's activities in a broad sense and one would have to contextualise a particular action or statement of an individual who belonged to that affiliate within the broader picture of the affiliate to determine what the policy of that affiliate was. We really had no evidence directed to that in any meaningful sense. There are 600 affiliates of the UDF, it did not really look at what the policies of each one of the affiliates were. We were not asked to investigate a speech made by X at a meeting of affiliate Y to see whether that speech could (10 be relied upon to prove the policy of affiliate Y and one could not do that without looking at what affiliate Y's broad policy was, what it claimed its policy was, what its constitution said it was doing, what it told its members it was doing and whether that particular person was speaking on behalf of that organisation and if he was speaking on behalf of that organisation, what was said was consonant with the policy. And if one or two speakers make militant speeches you cannot even infer from that that the policy of the affiliate is a militant policy. And no attempt was (20 really made to establish policy of the affiliates, but this independence - I draw attention also that the independence attaches not only to the member organisations but also to regional formations. Now regional formations of course consists, the policy of a regional will be determined by the affiliates to that region but a policy of a region is not necessarily a policy of the UDF unless all regions accept it at the national general council. And again I do not think any attempt had been made to investigate what was meant by policy of the UDF. When it is said the policy (30

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of the UDF is to overthrow the state by violence how do you determine that policy? Certainly not enough to show that a speaker uttered words which could be construed as militant can possibly be supportive of violence. One would have to go very much further than that and when we come to look at that particular aspect of this case, I will look at the main documents relied upon by the state and deal with them. But to go back again to the question of independence, Mr Molefe in volume 249 page 13 267 line 15 to 13 268 line 4 said this: (10

"At a practical level this means that although organisations are coming together under the banner of the United Democratic Front despite the fact that they were members of the United Democratic Front their independence would be guaranteed. This means the United Democratic Front was not going to take decisions for those organisations; the UDF was not going to determine their day to day activities. They would continue to decide on their own programmes, it would be their members who actually decided the policies of those (20 organisations and their day to day activities. It would mean that the philosophy that they were subscribing to or the political tendencies that they adhered to would be respected within the umbrella of the United Democratic Front."

Now I have not yet counted the number of affiliates about whom we have had evidence in this case. We do know that there were 600 affiliates, and what we do know is that we have heard only about a few and indeed not even about the affiliates so much as about people within, who are members (30 identified / ..

identified as members of those affiliates, as to what they have done, what they may have said. There are documents of some affiliates but clearly they had just been produced - as I will show your lordship later there is evidence that there are a lot of other meetings which were held by the UDF which had not been referred to; a lot of other documents which had not been referred to. We do not know how representative the documents of the affiliates are that are produced for the purpose of determining their policies and no witnesses were called about those affiliates to say what(10 their policies were. All of these present problems when you come to examine what inferences you can draw from the evidence that is before you in regard to the policy of a particular affiliate and the policy of the United Democratic Front itself.

Now the evidence was according to Mr Molefe at volume 251, page 13 403 page 22 to 13 404 line 3, that when the UDF itself took a decision for instance whether to support the referendum or not it tried as far as possible to achieve consensus and that the NEC did not perceive its role as (20 a dictatorial role, laying down policy and quite frequently we see both from the evidence and from the minutes themselves that NEC decisions were treated not as policy decisions but as recommendations to go back to the affiliates for further discussion and Mr Molefe put it this way at volume 251, page 13 403 line 22 to 13 404 line 3. He says:

"It operates in this manner. At all material times it takes into account the fact that the regions are autonomous bodies within the broad UDF and that the decisions that the NEC takes are recommendations which have (30

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got to be discussed at regional level. When the affiliates in the region of the UDF feel that as far as they were concerned what the NECC is saying is incorrect, they had every right to take a decision that is against that. They are free to do so. In other words the NEC did not impose its decision on its regions, it could not enforce those decisions unless there was a consensus within the UDF."

Now the attitude towards the independence and the autonomy of the affiliates was respected in practice according to (10 the evidence, that this was made manifest on a number of occasions and it is in fact from witnesses other than the - there are witnesses other than the accused^{...} who had referred to this. For example Mr London of the Huhudi Civic Association. In volume 400, page 23 277 line 13 to page 23 280 line 17, mentions that he brought back the message in regard to independence. I think it may have been from the launch. I think I put it slightly wrongly, m'lord. It was not Mr London himself -

"Did any member of your association raise the ques- (20 tion of the UDF? -- Joe Khasu was the person who had some information about it."

ASSESSOR: Where is that now?

MR CHASKALSON: 23 277, line 13. It is in Mr London's evidence. And he tells there at the beginning of that passage of how they found out, how the UDF was brought to their attention and how people went to the launch and that - and this is what he says at the bottom of 23 278:

"Was there any discussion as to whether or not your civic association was to become a member of the UDF (30

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or not? -- Yes, what happened is that after a report was made to the community by the delegation which attended the launch of the UDF in the Cape, they were then asked what their feelings were, what could be done after the information had been given to them, on which the community decided that our associate can affiliate to this organisation.

You say they came back with some resolutions. Was there any resolution or resolutions that were of particular interest to you in Huhudi? -- Yes, the very one in which we were involved, the removal. They have taken a resolution about that, they were going to help. (10

The question of affiliation, how did you understand that? Would you become part of another organisation or do you remain independent from the other organisation? -- We were joining them but were still going to remain independent on our own decisions."

And so that was the message that was brought back that they were going to join but that they were to remain independent and dr Nkomo in volume 382 page 22 143 line 4 read with (20 page 22 147 line 2 and following, indicated that the question of independence was of importance to the Saulsville/Atteridgeville - it is really the Atteridgeville/Saulsville residents' association. And the fact that there would be differences between the affiliates and that those differences could be accommodated within the front was specifically mentioned at the launch. In the speech the Rev Frank Chikane which is recorded in EXHIBIT A.1, that is the document which was distributed by the UDF, it is at pages 36 to 37, there is a record of these observations attributed to the Rev (30

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Frank Chikane:

"This broad front therefore agreed on a declaration of principles on which they had to work. We are going to look into the final draft of those principles today but those are minimum demands around which we can rally in opposing these reform proposals. The idea of the front therefore is a new concept in the struggle of the people for the last twenty years and is understood to be standing for unity in action, accepting the fact that all the organisations coming together have got (10 differences. There are also differences of class, differences of ideology, differences of intent, but all of them agree that they reject the reform proposals that are proposed by the Botha regime and as a result they need a broad front to do this. That necessitates therefore the formation of this group not necessarily as a national political organisation but as a united front for the sole purpose of opposing the reform proposals in the Koornhof bills."

And the same point was made by Archie Gumede in his speech (20 at the launch. This at EXHIBIT A.1, page 39. And he says after having pointed to the fact that everybody knew what the front - he says:

"You all know what the United Democratic Front is about." He says it is a front, it is not an organisation. "It is a front and it is composed of different organisations which do not necessarily agree ideologically in all respects with each other's point of view but you have all agreed that apartheid must be banished from the face of South Africa. It is a front at this stage which is established for the purpose (30

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of struggling against the constitutional bills and the Koornhof bills which are intended to entrench apartheid in our society. The individual organisations of this front have their own identity but they are determined to co-operate with one another in this specific issue". And that point is taken up in the Financial Mail article by Mr Molefe who confirmed the correctness of what was said there. In volume 249 page 13 272 line 6 to 10, the article is DA.15. And again he stressed the fact there that the front consists of numerous affiliate organisations which are to retain (10 their autonomous identities although they subscribe to the UDF's overall aim. That same point is made in his speech in Port Elizabeth which he identified in evidence and I previously referred to that and it is EXHIBIT DA.13.

Mr Lekota reaffirms that in the South African Labour Bulletin which is EXHIBIT C.54. He confirms that at volume 294, page 16 437, line 5 to 7. He says:

"When an organisation is affiliated to the UDF it retains its independence. It cedes its independence only in regard to opposition to the constitutional (20 proposals and the Koornhof bills."

and in a speech to the Transvaal Indian Congress which is recorded in EXHIBIT V.9 - it is a long speech, it is a long extract from the record, which is recorded in volume 285 page 15 697 line 28 to page 15 698 line 26. It is when speaking, and he is speaking to an affiliate, he says:

"I want to make the crucial point that the United Democratic Front is united because it unites our people across racial boundaries and across provincial boundaries. The United Democratic Front pulls together (30

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our people not only on the basis of their particular class or social structure interests but is pulling these people together on the basis of primarily a commitment to opposition to apartheid. I will submit that the amount of differences which exist between the different affiliates like you could say that there is 90% difference between the constituents of the United Democratic Front. Our interest is in the 10% agreement that the new constitution and legislation is unacceptable to the people of South Africa. That is what constitutes this front."

and in his evidence he reaffirms that passage. Now these are not things which were being said as it were during the trial for the first time, this is what the people associated in leadership positions in the front were going the country saying to people: you are independent, you are determining your own policies. They reported that, it was all said. It is not something contrived. There are a series of independent organisations and even the regions have their own autonomy and flexibility and Mr Molefe drew attention to that at volume 249 page 13 275, lines 3 to 8 where he confirmed that in practice the working principles which give regional autonomy was adhered to. He said that the regions enjoyed at autonomy. They would deal with problems as they saw them, they saw best in the areas in which they were operating. The NEC from time to time would suggest guidelines but as to how that would be implemented depended on how the affiliates at regional level felt about the guidelines provided. And your lordship will recollect that where an issue such as the referendum, whether to vote in the referendum or not (30

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cropped up the NEC did not determine what should be done. In fact what happened was that it became clear that there was - because there was no concensus that there should be a national general council held to try and resolve the issue, whether to call for a referendum or not on the question within the Indian and Coloured communities because your lordship will remember that there was to be a referendum within the white community but not in the Indian and Coloured communities and there was a question that should there be a call for a referendum - in the end a national general (10 council was called to discuss that. The national general council itself could not resolve it because there were differences of opinion. I think we were told the figures of something like 55 to 45 and in the end it was really - compromises had to be arranged and Mr Molefe deals with it in volume 249 at page 13 272 line 25 to 13 274 line 28. Now of course that shows not only the loose structure within the UDF but it also shows that the UDF was not as it were a front of the ANC. It is very clear evidence of the fact that the UDF was taking its own decisions because if the ANC was (20 telling it what to do the ANC would have issued a directive : do this, do that and it would have been implemented. Yet we see that when there is something which has to be decided the process which gets followed before that decision. And Mr Molefe in the passage which I have given your lordship shows how careful they were to try to reach a concensus that would be acceptable. I think your lordship asked Mr Molefe whether the Transvaal region would have to toe the line as far as the national executive council was concerned and his reply at volume 254, page 13 695, line 15 to 13 696 (30 line 10/..

line 10 was this as far as the region was concerned:

"It might decide that it does not support that line, it may have to be debated and if consensus is not reached very often it is difficult to go ahead. Let us take the example of the Kennedy visit. The general view of the NEC of the UDF was that Kennedy was welcome, he should be met. The UDF could assist him in whatever he wanted to be assisted in. Then a number of regional affiliates said no, they did not think the UDF should do that and the NEC could not impose its views on (10 that, some kind of flexible approach had to be adopted. It was really a difficult situation. If the NEC could just tell them: look, you toe this line, we would have taken that decision and every region would have toed the line but it could not happen that way. It was the view of the majority of the people in the NEC that for instance there must be a call for a referendum and that UDF must participate in that referendum and vote "no", but regions could not accept that and we could not go ahead calling for a referendum." (20

And I understand, I haven't the reference at the moment but that the witness Kachalia supported the evidence given by Mr Molefe in regard to the Kennedy visit and we will find that reference. So the state's argument was incorrectly premised on the existence of an organisation with a command structure which controls and directs the activities of its affiliates. And apart from the fact that that misconception misconceived the nature of front formation the evidence showed that the actual decision making mechanisms of the UDF were often slow and cumbersome and that there were a (30

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large number of problems of co-ordination and communication. Mr Molefe describes how policy of the UDF is set in volume 257 page 13 808, lines 1 to 10. He says that the national general council is the highest policy making body and in the intervening period when the NGC is not meeting the NEC is entrusted with the task of dealing with policy matters. It makes policy subject to a process of consultations with the regions of the UDF and the affiliates of the UDF which would be participating as part of the regions of the UDF and then it gets feedback from the regions of the UDF and then it (10 arrives at a synthesis of the view of all the regions and only then does the issue become a policy of the UDF, so it is a slow laborious process, nothing to show that a planned scheme of violence was ever the subject of discussion and the violent overthrow of the state was ever the subject of discussion within the UDF itself, within any of its affiliates.

He also explained that the national office of the UDF did not deal with affiliates save in exception circumstances. The national office would liaise with regions. Its job (20 was to implement the national work of the UDF and where it would have contact with others it would deal with the regions and that even then it would not give instructions to the regions as to what is to be done, it would also send out recommendations or proposals to the regions for discussions in those regions and would wait for the feedback. That comes at volume 251, page 13 452, lines 1 to 15. And it was for that reason that the affiliates would take, who enjoyed their own autonomy, would take their own decisions on local campaigns. He said sometimes they might involve (30
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the UDF in it, sometimes they might ask the UDF to send speakers to the meeting, but essentially the decisions were taken locally and that evidence is at volume 256, page 13 718 line 29 to 13 719, line 5.

COURT: What local campaigns did the affiliates do?

MR CHASKALSON: Well, I do not know that that was ever investigated.

COURT: I have never heard of one.

MR CHASKALSON: But Mr Molefe mentioned that. I am not sure that anyone questioned them on that to ask them were (10 there any local campaigns. I will look through some of the evidence, we think that there may be some evidence of local campaigns. It is suggested to me that the removal in Huhudi was a local campaign that has been going on and which was pursued by the Huhudi people on their own. That there was evidence about squatters on the East Rand who had been running - in certain places who have been running their own campaign and which continue. There was evidence about people being active in Lenasia in certain areas which was continued. (20

COURT: What do you mean by campaign then?

MR CHASKALSON: Well I would assume that a campaign in that context would be a decision by the local affiliates to pursue a particular objective and to pursue it systematically, going to - you see, I am sure what the evidence in Huhudi says and I am reluctant to say what may be embraced within that campaign, but that is what I would understand as a campaign, to pursue a particular campaign systematically for the purposes of that particular affiliate by whatever means that affiliate deems to be appropriate. It may amount to (30 meetings /..

meetings, it may amount to protests, it may amount to seeking interviews with people to put their cases but it would be an organised undertaking towards the achievement of a particular purpose.

To complete the references here there is a passage in volume 256, page 13 801 lines 5 to 22 and there are two passages from Mr Chikane's evidence, volume 305, page 17 447, lines 16 to 18 and volume 305, page 17 442 line 20 to 17 443, line 1. All stressing the independence of the affiliates. It is also clear from the evidence that there (10 were problems where the UDF national offices attempted to perform its role of co-ordinator in regard to issues that were to be taken up on national scale. In the office's report to the national executive meeting of 1/2 June which your lordship will find in EXHIBIT G.2 paragraph 3 records this:

"3.1. Minimal co-ordination between affiliates and REC and among affiliates themselves. All this is reflected by performance in the MSC.

3.2 Administration of this region is very distur- (20 bing.

3.4 Lapse of contact between areas are observable and at times racial overtones are detectable."

ASSESSOR: Is that in T.2?

MR CHASKALSON: G, m'lord, G.2.

ASSESSOR: Oh, G.2, I am sorry.

MR CHASKALSON: EXHIBIT G. Mr Lekota gave evidence about that and their understanding of that at volume 285, page 15 732 lines 3 to 25. He said that the Transvaal office did not seem to be having a lively interaction with the (30

various / ..

various affiliates under it and tended to be a disjointed activity in the region. There was not sufficient co-ordination as a result their performance became fairly well poor. And Mr Chikane also confirmed that communication between the Transvaal office and its affiliates was not good, that they did not work together on the - adequately on the Million Signature campaign and that the working relationships between organisations in the Transvaal and the Transvaal office could not function properly. The office was just not working. That is in his evidence, I will give your (10 lordship two passages, volume 300 page 17 030, line 29 to 17 034 line 24. Volume 306, page 17 537 line 1, to 17 540 line 3. On 14 April 1984 the minutes of the Transvaal general council meeting which is EXHIBIT P.1 reflect that only three reports had been received from affiliates and it was noted there that the failure to make reports made it difficult for the Transvaal office to keep in contact with the affiliates. Mr Chikane was questioned about this, about this directive role as it were. In volume 306 page 17 543 line 22 to page 17 544 line 2, and it was put to him that (20 the UDF in effect directed and controlled the mobilisation and the politicisation of the affiliates in the 22 - apparently that is the figure used. Whoever put the question said there were 22 places mentioned in the indictment. I assume it was meant to be the 23 remaining areas. I do not know, but anyhow the questioner refers to the 22 places mentioned in the indictment. And Mr Chikane's response was: "I reject that. It was not controlling the organisations. UDF have a declaration of working principles of which organisations have wanted to support and subscribe to and they, (30

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in these papers it is very clearly stated that organisations retain their autonomy, so I reject the suggestion that they were controlled by the UDF. And then at page 17 554, the cross-examination continues as follows:

"And I put it to you further, Mr Chikane, that these affiliated organisations of the UDF in the different places mobilised, politicised and organised the people in accordance with the issues and campaigns of the UDF that is as depicted in the resolutions adopted at the launch of the UDF in August 1983. -- I have stated (10 yesterday that when I went to Northern Transvaal for instance I did not have the resolutions. I spoke about the declaration, I spoke about the working principles. Those were the key documents of the United Democratic front, so I reject the suggestion that those organisations were organised on the basis of those resolutions."

In the absence of any evidence to the contrary the state is bound by the answer. We have not had any contrary evidence drawn to our attention, indeed we do not think there is any. Even on the suggestion that the minutes should be (20 exchanged so that the regions should know what was taking place in different parts of the country, even there it appears that this did not happen, that it was sufficient for the regions to report at the NEC when the NEC had its meetings and that evidence was given by Mr Molefe in volume 252 page 13 512 line 26 to 13 513 line 12. It appears also that the regions did not send minutes of their meetings to the national office and that the regional executive meetings were not sent to the affiliates. Only minutes of the general council was sent to affiliates. Mr Molefe's evidence (30
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volume 272 page 14 785 line 2 to 16. Now we make the submission to your lordship that a proper understanding of the formation of a front, a front formation is necessary to answer the question what was the policy of the front, which is the key question in this case. And so one has to have an understanding of the relationship between affiliates and the front and the way in which the affiliates can or are allowed to function independently of the front. And Mr Molefe put it this way in volume 267, page 14 401 line 22 to 14 402, line 4. He said: (10

"The UDF is a front of diverse organisations. Each one of them pursue its own policy, its own ideology. All they agree on is that the new constitution and the Koornhof bills were unacceptable. It may well be that they agree on a non-racial democratic South Africa, some of them may agree on a black majority government, something like that, but I cannot attempt to speak for every affiliate of the UDF in respect of their individual policy positions in respects of the kind of South Africa that each of them wants. Some of them are committed (20 to the Freedom Charter, others are not. Others are black consciousness orientated organisations."

Now m'lord, we found in the cross-examination that the cross-examiner would simply put to the witness that what an affiliate did was really what the UDF did and it was continually rejected by the witnesses to whom it was put. And there is an exchange between Mr Molefe, Mr Jacobs, at volume 253, page 13 585 line 19 to 13 586 line 15 where this proposition is firmly rejected by Mr Molefe. Again the same thing taken up with Mr Molefe at volume 268, page 14 522 (30

line / ..

line 23 to 30 and 14 523 line 15. And again volume 269 page 14 537 line 2 to 17. And it was repeatedly emphasized in the evidence that the UDF cannot be held responsible for what is contained in publications of its affiliates or for what is contained in documents such as SASPU National and other such documents which were put before the court. And when asked, Mr Lekota, whether the UDF had control over the contents of documents emanating from affiliates his answer at volume 299, page 16 951 lines 13 to 25 was this: "No, certainly not. A lot of the documents which would have (10 been written by affiliates we would not have control over unless they came into our hands and they came to the councils of the front and they were discussed there, but otherwise you know people write documents and one does not even see those documents, and when the police go into action and they go to a house and they go into a building and they find those documents for the first time when we come here we also meet some of those documents. They have got nothing to do with the policy of the front, they are not sanctioned by the front; they are not even known to officials of the front.(30

And again in regard to particular documents, EXHIBIT C.96, Mr Lekota dealt with that in volume 290 page 16 136 lines 5 to 19 and EXHIBIT AG.12 which is the document from the Transvaal Indian Congress, he dealt with that in volume 290, page 16 154 lines 7 to 13 and he indicated that the UDF logo merely indicated in effect that the particular organisation was affiliated to the UDF but it did not signify that the UDF approved of the contents of any document or it meant nothing more than that that organisation was an affiliate of the UDF, and that is in volume 305. I think (30

that / ..

that is Mr Chikane's evidence, not Mr Lekota, I am sorry.
Volume 305 page 17 518 line 19 to page 17 519, line 12.

Now there was a great deal of evidence directed by the defence to the question as to whether the goal of the UDF was the violent overthrow of the state. Mr Molefe made it clear on a number of occasions that violence did not form any part of the programme of the UDF and that violence was never contemplated by the UDF. He made it clear that it aimed at all times to achieve its objects by non-violent methods and he said that there was no truth in the allegation that the UDF was preparing the masses for a violent revolution. And there are a number of public statements to which he referred during the course of his evidence. At volume 249, page 13 223 line 26 to 13 224 line 2 he identified EXHIBIT DA.15. It is a November 1983 statement in which it was said: "It is true that both the UDF and ANC are groups opposed to apartheid, but we must say categorically that we have no relationship with the ANC and do not envisage one because we are operating legally and it is banned."

That is the one, yes - but it is again in this context and it is not only in the context of the ANC now, it is the context of his stressing the fact that "we are dedicated to non-violence". In the Evening Post of August 1984 there is a statement reported by Mr Molefe in which he said that it was not the UDF policy to organise disruptive action and in which he stated further that the UDF was a legal and non-violent body and they accused the government of making false allegations concerning the UDF

COURT: What is your reference?

MR CHASKALSON: That is EXHIBIT DA.16 and the reference is (30
volume /..

volume 249 page 13 228 line 27 to 13 230 line 8. Now I am not going to keep looking up these circulation figures but you know that these publications had wide circulation and certainly as far as people who were in the front, members of affiliates and others who were going to be part of the front and who wanted to go along with the front, this will be continually in front of them. There would be no reason for them when they continually see these papers, this wide circulation, this wide publicity given to it, to believe that the policy of the UDF was anything other than it purported (10 to be. Your lordship will remember that in regard to the Black Christmas campaign, that there was a press statement issued which was published - the one produced to your lordship was in the City Press. It is EXHIBIT DA.17, it is Mr Molefe's evidence, volume 249 page 13 230, line 21, to 13 232 line 19 and in that statement Mr Molefe specifically called upon people to act with dignity and not to use force to persuade others to observe the Black Christmas campaign. Its circulation is 98 000 and it is a newspaper directed very specifically to the black community. Apparently I (20 have given your lordship the wrong figure, it is more than that but I do not think anything turns on that. It is about 115 000.

In April of 1985 Mr Lekota issued a statement saying it is a lie that the UDF is intent on precipitating revolution. "We are determined to see real change rather than such massacres at Uitenhage". That is in EXHIBIT DA.42, Mr Lekota's evidence volume 274 page 14 901 line 29 to 14 903 line 26, the distribution of that document is 197 000. Mr Molefe testified that if any individual who was a member (30

of / ..

of the UDF affiliates, of an UDF affiliate engaged in violence, if any affiliate of the UDF engaged in or committed violence, if any individual promoted violence, if any affiliate promoted violence, that that would be contrary to UDF policy.

That is volume 250 page 13 314 line 3 to 16 and he said that he knew of no affiliate of the UDF which was indeed involved in violent activities. That is volume 251, page 13 466 line 19 to 22. It was put to him that the UDF affiliates sought to intimate people and particularly to intimidate councillors in resigning and he rejected it. In volume (10 256 page 13 792 line 9 to 13 793 line 13 he said: "Well, as far as I am concerned that is not true. It has never been part of the policy of the UDF to intimidate people to resign. In fact we have made statements time and again and we said we would not intimidate anybody, in fact we were prepared to attend the meetings of those who supported the government and raise questions which we would expect them to answer. And your lordship will recollect and it will be referred to later than indeed we have a press report of a statement issued by Mr Lekota after incidents in Parys. (20 He urged, he issued a public call not to burn people's houses but rather to boycott. I am informed that that statement is at EXHIBIT DA.43, and the circulation of that was 177 000. And also I could refer your lordship in the most general context to Mr Lekota's evidence at volume 286 page 15 808, line 27 to 15 809, line 28 and Mr Chikane's evidence at volume 303, page 17 238 lines 3 to 19.

Mr Molefe also gave evidence to the effect that he knew of no single violent incident at any meetings of the UDF, and that an application to oppose a ban on the UDF (30 meeting / ..

meeting during 1984 the police who motivated for the banning of the meeting did not suggest that there was ever any violence at any meeting of the UDF. That was his evidence at volume 250 page 13 343 lines 2 to 12. He said he himself gave statements through interviews with different newspapers, at big public meetings which were recorded widely in newspapers; at big press conferences including both local and international media, press, TV and radio dealing with these matters. That is at volume 249, page 13 280 lines 21 to 30. And then it was put to him well, if the UDF affiliates - perhaps it was not put to him, it may have been.. he was dealing at any rate with the suggestion, I am not sure whether it was in chief or in cross-examination, but he was dealing with the suggestion that affiliates by adhering to the UDF declaration committed themselves to a policy of violence. That is the central allegation in the state case and he said this at volume 249 page 13 218, lines 14 to 20. He said:

"Since its inception the foundation of the policy of the UDF has always been a commitment to non-violence. It has at all material times made its position very clear that it would not seek to achieve its objectives by violent means and in this connection there have been a number of statements made a number of officials of the UDF."

Mr Lekota's evidence was generally to the same effect. I would refer here to Mr Lekota where he said he was not aware of any incident of violence associated with any meeting and he had no reports of such incidence. Mr Lekota, volume 299 page 16 946, lines 7 to 13. And he said that violence

had / ..

had never formed part of the programme of the UDF at any stage that he was associated with it and he said that that had been made publicly clear at press conferences at the eve of the national launch, that it had been repeated over and over some passage - it is Mr Lekota, volume 283, page 15 499, lines 6 to 30, where after referring to the press conference on the eve of the national launch, he said the point had been repeated over and over, sometimes through my mouth, on many other occasions through the mouth of other leaders of the United Democratic Front, that the UDF wants (10 a peaceful solution and that it calls on the government to call a national convention of the leaders of the respective people of our country, to work out an acceptable constitution. That is the approach of the United Democratic Front; from its foundation the question of violence was out. That is why newspapers, editorials and reports of various kinds could be written to say that the UDF was a non-violent organisation and he went on to point out that nothing had ever been done contrary to that and he said that they had written about it, other people had written about it, the (20 UDF, knowing that they are a non-violent front. He also referred on a number of occasions to speeches made in which it was made clear that the UDF was not a violent organisation. Some of it I have read and I do not want to repeat it but your lordship will find this in Mr Lekota's evidence, volume 285, page 15 713, line 22 to 15 714 line 14; volume 285, page 15 720, line 27, to 15 721, line 29; Volume 285 page 15 725, lines 20 to 30.

There is also corroboration of this statement through newspaper reports and meetings. It is not as if this is (30 something / ..

something which had been manufactured for this case. Mr Lekota, volume 286, page 15 772, line 14, to 14 773, line 15, dealt with a meeting which he addressed in Port Elizabeth on 16 April 1984 and which was reported in the Eastern Province Herald where he said after drawing attention to the forced removal of townships and to the hazards of such a policy, he says this:

"We must insist on creating avenues of a non-violent nature and desperately need people with a high level of social conscience and on an item listed on the (10 agenda as clarification of questions which had arisen about the organisation, Mr Lekota said the UDF is not a political organisation, but a national front or alliance to which 570 organisations including civic, student, community, trade union and sport and cultural groups currently subscribe. These groups are united by a common belief in working through non-violent methods towards a non-racial democratic South Africa where people are not judged by colour but on their merit alone." (20

Now this was at a public meeting and he went on to say at volume 285, page 15 636 line 21 to page 15 637, line 2, that he recalls that at a number of meetings "I made the point either that the UDF sought a peaceful settlement of the South African problem or that the UDF saw the national convention as the path of an acceptable settlement. I would also have made the point that the UDF was a non-violent organisation."

He very specifically denied that the meetings of the national executive council were in pursuance of a (30 conspiracy / ..

conspiracy to overthrow the state by violence in which the ANC and the SACP were involved and he said that there was nothing said at any of those meetings he attended which either concerned itself with the overthrowing of the state by promoting revolution or by making the country ungovernable. That is volume 283, page 15 532, line 25; to page 15 533, line 10. We have the minutes of the meetings which are prima facie proof of their contents and under the Criminal Procedure Act are evidence of the proceedings conducted at them. They confirm Mr Lekota's statement. (10

There has been no evidence to show that any such discussions ever took place. And then there is the fact that the meetings were public, they were advertised, they were open. All the speeches that we have been referred to were speeches made at these public meetings, meetings at which according to the evidence, and I will show your lordship that later, it was known the police were likely to be present. There was nothing secret or conspiratorial or behind-the-scenes going on. People were speaking openly about their feelings and about their attitudes. Nowhere do we find a policy (20 of overthrowing the state by violence.

Now Mr Lekota put it this way at volume 283, page 15 528, lines 2 to 13. He says:

"Any conspiracy or secret agreement where there are so many thousands of people would be too public to be a secret anyway. It would have no future as a secret because the whole country almost was there. We had no secret agreements, no secret agenda; in fact the purpose of making the meeting so big and inviting people and so on was precisely so that the decisions (3

and / ..

and the agreements that were made there must be known as widely as possible."

He referred to occasions upon which the Rev Allan..or Dr Boesak had distanced himself from violence because there has been a suggestion made that some of Dr Boesak's speeches should be construed as being violent speeches. There is Mr Lekota's evidence, volume 299, page 16 929, line 28 to 16 931, line 8; and volume 299, page 16 931 lines 9 to 12.

Mr Chikane's evidence was to the same effect. He (10 denied that the formation of the UDF, that is decision-making and implementation of its decisions was to further a conspiracy to promote violence or that there was a planned scheme for a violent revolution in the Republic. He said that he knew the UDF to be a non-violent organisation and that the UDF's position on non-violence was publicly known. Mr Chikane's evidence, volume 300, page 16 970, line 16 to 16 971, line 8. Now the state has called not a single witness to suggest that there was amongst the people associated with it or amongst the communities with which it (20 was working, that there was a perception that the UDF was a violent organisation. Nobody has come to this court to say that although the UDF was saying it was not violent, although the UDF was preaching non-violence, we did not believe that, we knew it to be a violent organisation. Nobody has said that. That is the argument for the state but where is the evidence for that? If that indeed was the perception of the policy of the UDF, if that was what people thought about the UDF, why couldn't we have had evidence to say that its policy was understood in this way; people (30 who / ..

who had adhered to it, affiliates knew that when they adhered
K1476 to it and the affiliates who took part in the organisation
knew that that was the policy. None of that has been pro-
duced.

And there was evidence from Mr Chikane at volume 300
at page 16 995, lines 11 to 13, of having addressed the
meeting at Atteridgeville on 15 February 1984, at which
he had said that even genuine grievances do not justify
violence and he gave evidence about his own work in connec-
tion with the school crisis and he said that from time to (10
time through the press that statements had been made indica-
ting that the committee with which he was associated wanted
to resolve this problem as peacefully as they could to try
to bring reconciliation between teachers and students in
the community. That was in his evidence at volume 300,
page 17 005 line 4 to 9. There is also his evidence which
confirms a report in the press in volume 300, page 17 006
line 20 to 17 007 line 3, that the United Democratic Front
had invited principles, teachers and students to a meeting
intended to create a spirit of co-operation and under- (20
standing. And then there was a press report on 7 April 1984
in which it was said - issued again by Mr Chikane on behalf
of the UDF in which it was said that:

"If any group involved in this Atteridgeville situation
is going to adopt violent methods UDF will have no
option but to pull out from the negotiations."

That is part of DA.27. Now Mr Molefe gave evidence about
that and Mr Chikane also gave evidence about it. Mr Chikane's
evidence is at volume 300, page 17 007 line 4 to 17 008 line
29; and Mr Molefe's evidence is at volume 252, page 13 476

(30
Line 23 / ..

line 23 to 13 477, line 27. Then there was the statement which was issued in the Sunday Express on 8 April 1984, in which the evidence is at volume 300, page 17 009 line 19 to 17 010 line 8, in which it was said that the DET has threatened to close the schools unless the pupils return. The students say they will not go back to school - that they will go back to school when their suspended class mates are reinstated and will then continue negotiations for SRCs. The stalemate is trying the patience of the United Democratic Front which has tried to act as the peacemaker, (10 and it says that if we do not do something it is the children who lose out. We are afraid it could lead to another Soweto.

Now in the state case, he should not be trying to get the children back to school, he should not be trying to remove the obstacles which stand in the way; he should not be trying on the state case to urge the Department of Education to take the children back and to negotiate with them, he should be encouraging them to stay out so that another uprising could take place. It is the antithesis of the proposition put (20 forward by the state.

COURT: What is the exhibit number?

MR CHASKALSON: I have the passage, m'lord, I would have to find the exhibit number. We are going to check it and I will give it to your lordship. Now Mr Chikane also identified EXHIBIT AAB.1 as notes..

COURT: AAB - for Ben?

MR CHASKALSON: Yes. AAb - for Ben. There are certain notes which he used to make a speech which is referred to in The Eye newspaper or newsletter and his notes record (30

this / ..

this:

"Our future is in our hands. Corruption, terrorism can never be tolerated. Police are not our enemy but people who have to execute the law. There are people who have to maintain order and ours is to see that there is only one order."

He gave evidence about that m'lord, volume 300, page 17 026 line 24 to page 17 029 line 21.

Can I go back to the Sunday Express. I am informed by Mr Marcus who has consulted the record that the arti- (10 cle from the Sunday Express was read into the record, it was not handed in.

Now there is the evidence of the speech in which he says terrorism can never be tolerated, the policy are not our enemy, people who have to maintain the law. How is that consistent with the state case. Now there were other witnesses who gave evidence about this. There was Dr Motlana who testified that he attended the conference and the rally at which the UDF was launched and he was asked whether he believed that violence was going to be used in order to (20 achieve any of the objects set out in the declaration and his answer was: "Violence was not even discussed. I did not believe that it was the purpose of that rally and launch to bring about change through violence. It was a peaceful meeting which would adopt peaceful means to adopt these purposes. That was his evidence at volume 417 page 24 432 line 1 to 10. Mnlord, I would check that but Mr Bizos tells me that his recollection is that that was never challenged. I was not in court at the time but we will cull the record again to see if we can find any challenge of that. Dr (30

Motlana / ..

Motlana was asked whether at any of the meetings attended by him he heard of any secret agenda in which it was suggested that the objects of the UDF might be achieved by violent means and he said, his answer was: Most certainly not. He said that there had never been any suggestion at any of the meetings that he attended that there was a secret agenda for the UDF to achieve its objects by violent means. His evidence is at volume 417, page 24 435 line 7 to 19. He said that he never heard it being advocated on any occasion by people within the UDF that violence was the means by (10 which the UDF would achieve its objects. That was at volume 417 page 24 451, lines 25 to 29. He was asked about the attitude of the Soweto Civic Association to violence that was taking place intermittently in Soweto since 1976 and his answer at volume 417, page 24 425 line 23 to 24 426 and I have lost the line number but it is just over the page - I can read your lordship the extract. He says:

"We were unhappy with this sometimes what we thought was mindless violence. We could understand the anger of many of these young people but we certainly could (20 not condone it. We shared the views of our chaplain the Arch Bishop Tutu for instance when he publicly and roundly condemned the necklacing of one young woman in Delmas. I myself participated in the saving of two or three lives. I remember coming to the rescue of one young man who was being almost murdered at Regina Mundi because someone had identified him as a police informer. I remember being at the Diepkloof hall when one teacher whose name I still remember was almost stabbed to death. I had to come between these (30 young / ..

young people and the teacher and I can say without fear of contradiction that I saved his life, so we have been exposed to these kinds of violence and many of us in the civic association among the priesthood have been involved in our attempts to stop this kind of violence."

That is volume 417 page 24 425 line 23 to - I gave your lordship the reference, to 24 426, unchallenged I am told. Then it was put to Dr Motlana in cross-examination that there was nothing in the declaration and working principles to (10 indicate that the UDF was purely a non-violent organisation and his answer was, and the passage is - I will get your lordship the passage. It is omitted but I will have it by tomorrow morning. He said this:

"I do not know where counsel gets that from. My own interpretation as a member of the UDF at the head of an organisation that supports the UDF, my interpretation of its principles, of its programme of action, is that they are of an entirely peaceful organisation."

and when he was pressed on this point that there was (20 nothing which said as much in the declaration or the working principles, he said he never was a call upon the UDF to state in those words, so many words that it was a non-violent organisation. The assumption in this country would be that no organisation or trade union or civic association could be formed in this country that could even by a stretch of imagination embark upon any policy that will be interpreted as violence. I think none of that was challenged either.

Now I am about to embark upon another section.

COURT: Yes, we have a slight credit from yesterday so we (30 will / ..

will use some of that up today.

MR CHASKALSON: As your lordship pleases.

THE COURT ADJOURNS UNTIL 10 AUGUST 1988