daar stel wat 'n mens in gedagte moet hou.

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

en dan op bladsy 337A - B:

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

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

My respekvolle submissie is dan dat die hof ook

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

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

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

Dit is/..

Dit is so dat UDF aan sy ander kant uit die dokumente, "tapes", videos, dit is bande en die videos, deur alles, die toesprake daarop gelewer, het UDF regdeur die ANC gepopulariseer in die toesprake en liedere en in slagspreuke. By UDF-vergaderings soos ons gesien het weer op bande, videobande, en op ander bande en ook menig by UDF se geaffilieerdes se ver-. gaderings en ook selfs by begrafnisse, is liedere gesing om die ANC se geweld te populariseer. Dit is ook so bevind deur die hof op bladsy 480 en dit word bevestig nie net deur die dokumente nie, maar hier was verskillende eks-ANC-lede wat getuig het daaroor en wat vir die hof vertel het die waarde van hierdie liedere en die sing daarvan sonder enige getuienis tot die teendeel daaroor. (10)

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

Die volgende punt is dat beskuldigde 20 en UDF het aan Mandela 'n platform gegee vir sy nie-afswering van geweld as ANC-leier. Daardie stuk spreek vanself waar hy hom nog self ook noem as die leier van die ANC en ons weet dat daardie stuk was deur UDF versprei gewees. Ek verwys hier na die uitspraak, bladsy 483, 484, 495 tot 497, 499 tot 503. Edele, daar is 'n magdom van getuienis om al hierdie aspekte te bewys. Dit is so dat UDF het kampanjes identies aan dié van die ANC gevoer terwyl dit in hulle deklarasie gesê word dat hulle na bewering slegs opposisie wil bied teen die konstitusie of die wetgewing rakende die konstitusie en swart plaaslike besture en Koornhof-wette, (20) (30)

het/..

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

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

Beskuldigdes 19, 20 en 21 was die uitvoerende beamptes (10) van UDF en wat die strategie, beplanning van UDF moes uitvoer en daaraan deelgeneem het en hulle het sitting gehad op die NGC, REC, NEC, die sekretariaat en ook op die streke en hulle was 'n kerndeel van die dominante leierskap van UDF. Edele, dit kan sekerlik nooit weggeredeneer word nie. 'n Mens het die getuienis hoedat beskuldigdes 19 en 20 die Vrystaat ingevaar het om te gaan organiseer vir UDF, hoedat hulle gegaan het na die Oos-Kaap, na Vryburg toe, hoedat hulle gegaan het na Kimberley toe, hoedat beskuldigde 21 die Noord-Transvaal georganiseer het. So, hulle was van die dominante, kerndeel van UDF se (20) leierskap wat die beleid moes uitgevoer het. Die toesprake en die dokumente bewys dat geweld 'n integrale deel van UDF-beleid is om die RSA onregeerbaar te maak en dan uiteindelik 'n regering van massas daar te stel. Dit is so deur die hof bevind ook en dit word bewys weer deur 'n magdom van bewysstukke en dokumente wat bewysmateriaal gebied het aan hierdie hof.

Die toesprake - ons het daarso Amanda Kwadi, ons het Sisulu se toesprake. Ons het hulle toesprake waar ons gesien het en hulle hoor, hoedat hulle 'n rewolusionêre klimaat aanwakker en aanstig. Dit is so, volgens die dokumente wat (30)

hier/..

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

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

wat/..

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

So, my respekvolle submissie is dat op die oorweldigende getuienis voor hierdie hof en gebrek aan enige getuienis (10) aangevoer deur die verdediging tot die teendeel, kan geen ander hof ooit noop om te kom sê of moontlik redelik te bevind dat hierdie hof se bevindings was verkeerd gewees nie en op hierdie basis wil ek dan ook vra dat u hierdie aansoek van die verdediging op hierdie aspek van die verdediging nie sal toestaan dat hulle daarop na die appèlhof gaan nie.

Daar is 'n ander aspek wat ek dink waarop ek moet antwoord en dit is dat die bewerings wat gemaak word van mistastings oor die feite wat hierdie agbare hof sou gemaak het, dat dit 'n grond is waarop 'n ander hof tot 'n ander slotsom kan kom. (20)

My respekvolle submissie is, mnr. Bizos het gister en vandag hieroor geargumenteer en my respekvolle submissie is dat die hele argument wat die basis is waarop hierdie grond staan is dat die taalgebruik van die hof om 'n getuie se geloofwaardigheid mee uit te druk as die basis daarvoor is, want in die eerste instansie het die hof vir bladsye lank in die Z-deel van die uitspraak uiteengesit presies waaroor elke getuie se getuienis verwerp word. Die verskillende redes het gewissel vandat hulle uit en uit hulleself weerspreek, dat hulle weerspreek word deur ander, dat hulle weerspreek medebeskuldigdes. Dit help nie (30)

vir/..

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

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

Ek kan/..

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

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

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

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

My respekvolle/..

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

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

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

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

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

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

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

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

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

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

MR CHASKALSON/..

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

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

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

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

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

MR CHASKALSON: As your lordship pleases.

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

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

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

issue,/....

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

only/....

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

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

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

MR CHASKALSON: They are matters of great legal controversy.

COURT: You need not address me on that.

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

because/....

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

COURT: Observations? In public? (10)

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

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

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

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

MR CHASKALSON:/....

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

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

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

down/....

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

COURT: Mister who?

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

COURT: Oh no. 9.

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

otherwise,/....

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

prosecutors/....

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

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

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

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

And at page 729 he says:

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

effect/....