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

COURT: Yes, the written argument?

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

COURT: Yes, who was discharged.

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

COURT: So no. 10 is not complaining?

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

COURT: And thereafter discharged him.

MR BIZOS: And thereafter discharged him.

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

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

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

MR BIZOS: Quantitatively, as indicated in the case, quanti-

C.1576 tatively it may or may not be but the question on the matters upon which your lordship questioned accused persons expressed disbelief, and other issues. We want to refer your lordship to them in order to try and establish that your lordship ...

COURT: I set out, you can argue that Mr Bizos, I set out right at the outset of my judgment that my approach was, and it still is and it will always be, that if I have anything which crosses my mind I put it squarely in front of everybody so that it can be dealt with. That I have stated in the (10) preface to the judgment and that I reiterate now because that I will always do and I think that is fair to everybody concerned, so that it can be met by everyone. And if that is prejudice then I do not know what is prejudice.

MR BIZOS: May I make the submission that your lordship's view of what your lordship's function in relation to the examination and cross-examination of witnesses is substantially similar to that which I was about to read to your lordship, was Mr Justice Didcott's.

COURT: Only a much diluted version I believe. (20)

MR BIZOS: Well that is a question which I would like to address your lordship on but may I, before we proceed to the details, make this submission and ask for your lordship's forbearance and that is this, this is not a pleasant task that I am performing but it is a task which in our respectful submission has to be done and what I would appeal to your lordship to, what your lordship's approach should be is this that once there is this submission made it is very difficult for your lordship and indeed for any human being to sit upon judgment upon one's own conduct and that is an additional ground for (30)

granting/....

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

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

MR BIZOS: Yes, I know my lord.

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

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

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

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

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

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

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

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

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

And then certain cases are referred to.

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

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

which/....

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

"If he does indulge in questioning:

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

And then a quotation from the Hamman and Moolman case:

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

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

And then again a quotation from Yule's case:

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

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

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

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

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

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

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

It is at 63 my lord.

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

MR BIZOS: As your lordship pleases:

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

'How's/....

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

Then:

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

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

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

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

examination,/....

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

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

G. MARCUS

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO. CC.482/85

PRETORIA

1988-12-12

Application for Leave to Appeal

THE STATE

versus

P.M. BALEKA AND 21 OTHERS

O R D E R

VAN DIJKHORST, J.: I will hear argument on Wednesday morning at 10h00 by Mr Jacobs on the UDF and all the points raised thereunder by Mr Chaskalson, except that I would like to hear Mr Chaskalson first on the seventh point - that is the point whether I should grant leave on the point whether the UDF is responsible, directly or indirectly for violence in any of the areas. So in other words on the areas.

I would like to hear Mr Jacobs first on the question of law re documents and tapes. I would like to hear Mr Chaskalson on the question of credibility of any other person, apart from the accused, and as far as the special entries are concerned I would like to see them first before I decide whom I hear first on the special entries. But on the fact that special entries have to be made I would like to hear Mr Jacobs if he doubts the correctness of that submission. As far as the credibility of the accused are concerned, that is now the UDF accused and no. 16, I would like to hear Mr Jacobs

first/....

first and I would also like to hear Mr Jacobs first on whether there should not be granted general leave in respect of accused no. 16. On the Vaal, the points raised by Mr Bizos, I would like to hear Mr Bizos first.

On sentence I would like to hear Mr Bizos and Mr Chaskalson first. That is how we will deal with the matters on Wednesday morning and Mr Chaskalson and Mr Bizos will start and Mr Jacobs will then reply.

IN DIE HOOGGEREGSHOF VAN SUID-AFRIA

(TRANSVAALSE PROVINSIALE AFDELING)

SAAKNOMMER: CC 482/85 PRETORIA

1988-12-14

DIE STAAT teen : PATRICK MABUYA BALEKA EN 21 ANDER

VOOR: SY EDELE REGTER VAN DIJKHORST en
ASSESSOR : MNR. W.F. KRUGEL

NAMENS DIE STAAT: ADV. P.B. JACOBS
ADV. P. FICK
ADV. H. SMITH

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

TOLK: MNR. B.S.N. SKOSANA

KLAGTE: (SIEN AKTE VAN BESKULDIGING)

PLEIT: AL DIE BESKULDIGDES: ONSKULDI

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KONTRAKTEURS : LUBBE OPNAMES

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(Bladsye 28 992 - 29 055)

PAGE 28 992 - AWAITING RETURN OF REVISED ORDER.

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

lordship/....

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

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

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

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

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

that/....

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR CHASKALSON: I understand ...

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

MR CHASKALSON: Well ....

COURT: And I am not interested in it.

MR CHASKALSON: Can we just ...

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

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

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

pertaining/....