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(TRANSVAALSE PROVINSIALE AFDELING)

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SAAKNOMMER: CC 482/85

PRETORIA

1988-08-09

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. YACOOS
ADV. G.J. MARCUS

TOLK:

MNR. B.S.N. SKOSANA

KLAGTE:

(SIEN AKTE VAN BESKULDIGING)

PLEIT:

AL DIE BESKULDIGDES: ONSKULDIG

KONTRAKTEURS :

LUBBE OPNAMES

THE COURT RESUMES AFTER LUNCH

MR CHASKALSON: If I could spend just a little more time on the article DA.202, that is the Cape Times article under the heading "Boesak Calls For United Front". Within the content of the article there are important ideas put forward which are later taken up inside of the UDF declaration. Your lordship will see in the first column, I think it is the third paragraph. It begins with : "What is surprising..". The report is quoting Dr Allan Boesak, it says:

"What is surprising and disgusting is the eagerness (10 with which they have accepted the government's proposals. They have done so unconditionally, knowing that it is based on the acceptance of the fact that the homelands policy would be irreversible and that all the basic tenets of apartheid such as race classification and the Group Areas Act remain intact and cannot be changed.

Now those are themes which get taken up in the declaration later, and your lordship will see also in the second column Dr Boesak said:

"All community organisations, sport organisations and (20 the churches have so far clearly and unequivocally rejected both the PC and its proposals on political and moral grounds, and these organisations do in fact represent the vast majority of the people in rural and urban areas." He said a united front against the proposals was likely because people realise it is no longer the child's play of the CRC coloured politics, this is historic stuff. "People realise in this area the strength of our proposition in what I call the politics of refusal, for the lack of real political (30

power / ..

power saying "no" to any scheme which is politically immoral."

Now that theme "say "no" to" is a theme which is again picked up in the UDF declaration: We say "no" to the Koornhoff bills in the new scheme. And there is reference here which is confirmed by Kemp's own evidence to the fact that the sports organisations and the churches and other community organisations have rejected both the PC and its proposals on political and moral grounds and we know from Kemp's evidence that there was discussion at this time of a united front as an answer to it. Now we also know that the anti-SAIC meeting took place, I think it was 22/23 January and that Dr Boesak gave a keynote address at that meeting where he made a formal call for a united front. And what is important is this, that there is no evidence at all to suggest that there was any ANC publication, any Seshaba or any other ANC publication, even those pamphlets we are told in the evidence come to the camp later; nothing to show that there was any document in existence, in circulation in South Africa or even in print at that time from the ANC (20 at the time of the formal call being made on 22/23 January yet we do know that on 7 January against the background of people talking about a united front that there are headlines in a newspaper with a circulation of 72 712 saying: "Boesak Calls.."

COURT: Where does one come in with the 12, is that on the Saturday or on the Friday?

MR CHASKALSON: I think those are average circulation figures and like averages they are never accurate but they give your lordship an idea of the extent. Perhaps we should just (30

make / ..

make do with 72 000. And we know also from Kemp's evidence that it was picked up in other newspapers. We know also from the evidence of other witnesses that there was widespread opposition at that time to the new constitution and organising within the, if I may call it the anti-apartheid community in regard to that. Now let me give your lordship some references to that. The evidence of Mabaso who your lordship will remember was the AZAPO president and that he came down to Cape Town. He mentioned the Disorderly Bills Action Committee which in itself was (10 a mini-front of groups which were organising against the Koornhoff bills. Mabaso's evidence, volume 421, page 24 643 line 20 to page 24 644, line 25; page 24 646, line 25 - I seem to have another reference to page 24 646, line 25. That is where he refers to the Disorderly Bills Action Committee and that was, if I remember correctly, at the end of 1982. M'lord, the passage in 24 646. He is reading really from a publication, he is reading from DA.216 which he referred to and which contained the statement that when the Disorderly Bills Action Committee was organised in (20 1982 civic bodies, sporting organisations, women's organisations, trade unions and students' and youth organisations participated. Organisations that united to fight against the enforcement of an inhuman law. There is nation-wide opposition to the Koornhoff bills and to the President's Council proposals etc. Dangor who was formally a member - Mr Dangor who was formerly a member of the Labour Party and he resigned over the decision to go into the new constitution. He was at the Eshowe meeting and he gives the dates I think of it, and his evidence in volume 372, page 21 510, line 22 to (30

page 21 512, line 15.

ASSESSOR: Volume again, please?

MR CHASKALSON: It is volume 372. And at the same volume, page 21 513, line 16 to 21 514, line 24. There is Mrs Duncan's evidence, volume 392, page 22 683, line 24.

COURT: You will have to go a bit slower than that - 392?

MR CHASKALSON: I am sorry, m'lord, volume 392, page 22 683 line 24 to page 22 684, line 4. There was Dr Motlana's evidence - I will give your lordship the volume number shortly, I do not have it immediately, but it is page 24 428, (10 line 17 to 24 429, line 26. We will get the volume number and I will give it to you. And I think we can give you passages later from other witnesses to the same thing, but it is quite clear that these proposals evoked widespread opposition within the black community, that there were discussions, that they came at a time within the anti-apartheid community, within South Africa. There were talks of united fronts to oppose government policy, that small fronts were already being formed and then we get the statement published on the front page of the Cape Times on 8 January. (20

Now I want to step back a little bit and - published on 7 January, sorry m'lord. I want to step back a little bit and look at what some of the evidence - I am told that the evidence of Dr Motlana to which I have referred your lordship is in volume 417. Now I want to step back a minute and look at how the ANC functions, and the evidence which came from the state's own case was that the ANC keeps in close touch with and that it monitors developments in South Africa closely so that it is able to react to and to capitalise on events which are taking place within the country. The evidence (30

to which I would like to refer your lordship is that of the witness IC.23 who was in the political department of the ANC in Lesotho. His evidence is at volume 131, page 6 517 to 6 517, line 6.

COURT: No, you have stayed on the same page.

MR CHASKALSON: I am sorry, 6 515, line 7, to 6 517, line 6. Have I unconfused your lordship - 6 515, line 7 to..

COURT: No, I am quite clear.

MR CHASKALSON: ..6 517, line 6. I am sorry, numbers are very similar to me and I inverted them. What he says is (10 this, this is his cross-examination:

"I think in your evidence-in-chief you described to us how the political department studied events in South Africa. -- That is correct.

And that indeed was part of your work.."

(pauses)

COURT: Yes, go ahead.

MR CHASKALSON: (Continues reading) -

"-- Yes, that is correct.

You would study the newspapers to see what was (20 happening in South Africa? -- That is correct.

You would want to know how these particular events that were happening in South Africa could possibly be used for the benefit of the ANC? -- That is correct.

You would try and take advantage of and capitalise on developments inside of South Africa? -- That is correct.

Now let me just talk about something, you talked about bus boycotts I think? -- That is correct.

Now bus boycotts I believe have been happening in South Africa for many years, over the years there were (30 frequently/..

" frequently bus boycotts? -- That is quite true.

Commuters get angry about the raised fares and they decide to boycott the buses? -- That is true.

And the police try to break the boycott by arresting people and getting people to go back onto the buses. -- That is correct.

Friction between bus boycotters and the police? -- That is true.

So if you were studying what was happening in South Africa whilst you were Lesotho and you read the reports and you read that a bus boycott had started and that there was friction between the police and the boycotters that would be news of importance to you? -- That is correct. (10

Because that is just the sort of information on which the ANC can capitalise? -- Quite so.

And..(reads indistinctly and very fast)..to paint slogans in the area where the bus boycott is taking place? -- I would not say that the guerillas would go there and write slogans because I do not even have an idea or knowledge as to who the people are who wrote the slogans there. (20

Alright, anyway, you would do whatever you could to capitalise on the situation? -- Quite true.

So as I understand it was really your job in the political department to study events and decide what events you should react to? -- That is correct.

And of course protests or action which seem to have grass root support would be of particular interest to the ANC? -- Yes, quite true. (30

Because / ..

" Because those are particularly the sort of protests which the ANC could use as a vehicle to promote its image and its ideas? -- That is true.

For instance the rent boycott which looked like being successful might be something which the ANC would want to involve itself in? -- Yes.

It might when it reads about that send in pamphlets in support of the boycott? -- That is correct.

It might even claim credit if the boycott proves successful? -- That is correct. (10

It is right then that wherever possible the ANCE attempts to capitalise and claim credit for community protests? -- Not to claim the responsibility but since it represents the people it has to be on the side of the people.

So it will claim, it will give its support even though it had not initiated the protest itself? -- Obviously yes."

So what we see from that are a number of things which are relevant to the state's thesis, first that the ANC through its political department keeps a very close study on news-(20 papers and what is happening within South Africa. We see that it looks particularly at issues which seem to have grass roots community support, upon which it can capitalise. And we see that if it believes that it can capitalise on such matters it would do so and really that it goes so far as to being willing to claim credit for demonstrations and possibly even unrest in the country even if it may not have initiated the initial protest or initial objections. Now we know that Mr Kemp's article with this headline story was published on the front page of the Cape Times on January 7 and that (30

similar / ..

similar reports were carried in other newspapers. By the evening of January 8 this would have been known to the ANC through its monitoring structures. It may m'lord, possibly also have known of the discussions within South Africa in regard to the formation of a united front to oppose the new constitution and the Koornhcf bills. Whether it did or did not is pure speculation at this time.

COURT: Was the Cape Times an afternoon or a morning paper?

MR CHASKALSON: A morning paper.

COURT: A morning paper?

(10)

MR CHASKALSON: A morning paper. It would have been a very simple matter for it to pick up the developments and incorporate them into Mr Tambo's speech because we know that the printed document only comes out some time afterwards - it just needs a little note to refer to it and we know also that Kemp's article was taken up by SAPA. His evidence tells us that it was taken up by Lusaka so it may even get circulation outside of South Africa. But where there is something to tell us that the ANC was watching these development is in AAH.2 itself. In AAH.2 at page 9 there is a paragraph (20 which says:

"The recent decision of the South African Labour Party to support and participate in the implementation of the President's Council scheme must therefore be condemned without reservation."

That decision was taken, M'lord, we know during the period 3 to 5 January and I will try and see if I can find in the record the evidence to show when it was taken but it seems likely to have been taken on the 5th - I will have to look carefully at Mr Dangor's evidence to see if we can find a (30

date/..

date. But it does not really matter, it could have been taken on the 5th, whether it is the 4th or the 5th does not matter, this clearly to get that in Mr Tambo's speech on the 8th - they were in close, they were watching closely the developments in the Labour Party. It is at the very least possible that as far as the ANC was concerned that the headline call by Dr Boesak for the formation of a united front was taken up and incorporated into Mr Tambo's speech in the same way as the reference to the Labour Party's decision was incorporated into his speech. It would be a golden opportunity (10 for the ANC if such a front were to be developed to do precisely what IC.23 says they do do, which is to look for grass roots movements with which they can identify themselves and on which they can capitalise. So it is at least possible that that is what happened, but it does not really matter from that point of view because if one goes back now to the anti-SAIC conference towards the end of the month we do know certainly by that stage that great publicity had been given - perhaps I should not exaggerate, m'lord, widespread publicity had been given to Dr Boesak's interview because (20 it appeared in a number of newspapers. We know Dr Boesak was invited to give the keynote address there and that he repeats the call that he had earlier made. No evidence to suggest, even in print yet, any document from Mr Tambo because the evidence is that it comes into a Seshaba. I think looking at other Seshabas and I can check, I do not know - we think that it is the March Seshaba that it made its first appearance in. The evidence of IC.24 is that these pamphlets are only distributed after the speech. There was no evidence that that pamphlet was even out by the end of February, so (30 there/..

there is absolutely no evidence to show that anybody in South Africa was aware of the call made by Mr Tambo on 8 January. There is just no evidence, at the best there is speculation that somebody who might have been a member of the ANC might have heard it over Radio Freedom if that message was broadcast and if it was broadcast in a way in which it was received in South Africa and not blocked in some other form. That is the furthest that it goes. Against this we have got the background, the discussions, the formation of mini-fronts, then the publication of the call(10 for the front in the meeting at which Dr Boesak is invited to speak and speaks, and the submission we make to your lordship is that there is an overwhelming probability that the UDF was established as a result of the call made formerly by Dr Boesak at the anti-SAIC conference in which he took up the theme which appeared in his earlier press interview on 6 January. Certainly the state has not produced one jot of evidence to support the proposition that anybody associated with the founding of the UDF did so at the instance of the ANC or as a result of a speech made by Mr Tambo. (20 On the contrary, every bit of evidence that had been put before the court in this case shows that the UDF can be traced to the call by Dr Boesak. Let me show your lordship some of the evidence which supports that proposition. First of all Mr Molefe stated that he was not aware of any call for the establishment of the United Democratic Front made by Mr Tambo during 1983, nor had he at the time read anything in any newspaper to suggest that such a call had been made and that he had never heard of such a call, I think he said before this case started. But certainly he was absolutely(30

clear that he had not heard of it at the time. His evidence volume 248, page 13 173, line 27 to page 13 174, line 11. The state has advanced no reason why your lordship should reject that evidence. Now Mr Molefe identified EXHIBIT A.1 as an official UDF document and it deals with the proceedings at the launch of the UDF. That is identified at volume 148, page 13 194, lines 1 to 3. That which was the official document issued by the UDF, contains a statement at page 2 of EXHIBIT A.1, a call for unity and joint action against the government's new divide and rule plans was (10 first made by Dr Alan Boesak on January 23, 1983 at a conference of the anti-SAIC. Mr Molefe says that it was generally understood within South Africa that the call for the United Democratic Front was made by Dr Allan Boesak. He said that it was never suggested at any of the discussions attended by him which took place in the Transvaal prior to the launch or at the conference at the launch of the UDF at which 2 000 delegates came together that the origin of the UDF was not Dr Boesak's call. That is his evidence at volume 248, page 13 195, lines 9 to 23. The state has advanced no reason (20 why you should reject that portion of Mr Molefe's evidence. He also said the fact that Dr Boesak had made the call was known and welcomed by a lot of people. He says it was a matter of discussion and debate, and that is in volume 248 page 13 173, lines 14 to 26. He says that when he heard of Dr Boesak's call to form a united front he personally found that to be a very attractive idea. He said he understood it to be similar to the one that he himself had made in 1981, similar to the one that he had read about in a pamphlet sent to him by Dr Neville Alexander and he found it to be quite (30

in keeping with his own views. That is his evidence in volume 248, parage 13 172, lines 19 to 26. Now the uncontradicted evidence is that in its official documentation the UDF has always traced its origins to the call made by Dr Boesak at the anti-SAIC conference for a united front against the government's plans. That was at the anti-SAIC conference in Transvaal at the end of January. Mr Molefe said that in volume 250, page 13 337, line 27, to page 13 338, line 10. Now there are a number of exhibits which repeat that and I give your lordship a series of examples. I am not going to read them but your lordships will find it in the passage in EXHIBIT A.1 to which I have already referred; in EXHIBIT W.52, at page 4; in EXHIBIT W.53 at page 3; in EXHIBIT W.54 at page 1. Now those are important documents because they were widely distributed to people working within the United Democratic Front in connection with the Million Signature campaign. There is EXHIBIT Al.30, page 9, and then there is EXHIBIT Al.32. I am sure there are other as well but that is enough to show that the UDF always, at every stage, attributed its origins to Dr Boesak's call.

Now that presents an obviously fundamental obstacle to this part of the state's case because even if one or two people or a sprinkling of people, one does not know, there is no evidence, it is pure speculation, but if one goes beyond this pure speculation and assume that somebody might have known of Mr Tambo's call, if you take the 600 affiliates or 400 to 600 affiliates to the UDF and all the people in their management committee, there is just no way in which one could say that they came together as result of Mr Tambo's call when as I have said there is for practical purposes (30

no evidence that it was ever received here; certainly no evidence that it was received before the anti-SAIC conference and against that you have this continual statement: Dr Boesak made the call. So that prop in the state's case that the people came together as a result of Mr Tambo's call must be knocked down. Now I am going to show your lordship that there is direct evidence in this case from other sources which deal with this proposition. Perhaps before I go on to the next point your lordship will also pay attention to what has been drawn to my attention and (10 that is that at the rally at which over 50 000 people were present and at which the United Democratic Front was in fact constituted it was announced, Dr Boesak was identified as the person who made that call. So all the people who came together on that day, the day on which the state relies upon, 20 August, as the day on which this conspiracy took shape finally at least, where the agreement was entered into, where people adhered to the declaration; those people who adhere to the declaration adhere on the basis of the statement that Dr Boesak made the call and there is no evidence (20 to show anyone of those persons who signed up that day thought anything different. Now this was dealt with by Mr Lekota, he was cross-examined on it, at volume 290, page 16 080, line 21 to 16 081, line 3, he had this to say; He said:

"I think we have heard here even on the question of the formation of the United Democratic Front, we have heard a lot of evidence here of how many people made calls for the formation of a front long before the UDF was formed. The documents of the UDF which had been brought here by the state indicates clearly that the UDF was (30

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formed following the call that was made by Dr Boesak. That is what we have always know, that is what I have always known; that is what I have gone around the country telling the people and that is the only truth I know. It is the first time that I hear in this trial that it was the African National Congress that made such a call, so I deny this allegation entirely. There is no basis for it."

In cross-examining Mr Lekota on this issue the state relied on EXHIBIT AAG.1. That was the publication entitled: (10 "Dawn". It was volume 7 of Dawn no.8 of 1983 and the cross-examination is at pages 16 073 to 16 087. It seems to be at volume 289 that it begins - yes, it is and it crosses into the next volume. Now as far as Dawn is concerned the first thing is that Mr Lekota did not know it and certainly on the count of treason it has not been proved. But even on the assumption..

COURT: On what count has it been proved?

MR CHASKALSON: Well, I want to deal with the evidence differently. I am not sure that it has been proved on (20 any count, but I would like to address your lordship separately. I am still trying to finalise that section of our argument and I intend later dealing with it. I want to keep the..

COURT: Yes, well, I will just make a note of your argument here.

MR CHASKALSON: As your lordship - I will certainly come back to that. I do intend to deal with what is proved.

COURT: Thank you.

MR CHASKALSON: Upon what is proved. Even if one made the assumption that the document is admissible in evidence it (30

does / ..

does not on a close analysis really helps the state case because really of what is contained within it. First of all the article in question is entitled: "Some Thoughts on the United Democratic Front", the author is said to be one Zakes Kulu. Now we do not know, nobody has identified Zakes Kulu at all. The state did not tell us who Zakes Kulu was, Mr Lekota said that he did not know who he was. From the article itself it is apparent it consists merely of the thoughts of an individual on the UDF and it does not purport to be an authoritative statement by the ANC on the subject (10 There is no evidence as to who the author is, what position he hold in any organisation, what the source of his knowledge was; whether he was in South Africa at the time or not; whether he has any knowledge of what happened in South Africa at that time or not; whether he had any mandate to speak on behalf of any organisation. Mr Lekota stated that (hesitates)

COURT: Yes?

MR CHASKALSON: Mr Lekota stated that it was a name that he had never heard of before; that he did not know whether the author ever was or ever had been associated with the UDF, (20 or what his position might be in the ANC, or indeed whether he was a member of the ANC or not; and the state chose to take that no further with Mr Lekota, they did not cross-examine him on it. That passage your lordship will find in volume 290, page 16 081, lines 4 to 10. Now the opening sentence of the article itself is instructive - it is at page 3 of the publication. It says that:

"A United Democratic Front is not a new phenomenon." and then it refers to initiatives to form a united front going back as far as 1926. If one goes to page 3 of that, (30

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the third paragraph on page 3, where it says:

"The Labour Party's decision to participate in the bogus Presidential Council sparked off an intense battle in our country which gave an immediate impetus to the formation of a United Democratic Front. It chrystallise the fact that only through united action shall we stop the designs of racist Pretoria. A call made by the Rev Allan Boesak at the Transvaal anti-SAIC meeting to form a united democratic front to oppose the racist fraudulent constitutional proposals (10 was welcomed with overwhelming enthusiasm."

So this article itself links the formation to Dr Boesak's call. On page 4 of the article there was a passage upon which the state relied, where there is reference to Mr Tambo's speech saying:

"On January 8 our President, comrade Oliver Tambo called on the people to form a united democratic front for national liberation to engage the enemy at all times in united action."

Bu the article itself does not suggest that the UDF was a (20 result of this speech. On the contrary, if we turn to page 5 we see within this article evidence that the writer at any rate rightly or wrongly does not see the UDF as having been established at the instance of the ANC, because what it says is that the National Liberation Alliance headed by the ANC shall be able to guide the UDF only "if we have our own underground structures within the UDF. These structures must be skillful, give the correct guide to the UDF and above all raise the tasks of the Front." If indeed this were at admissible. It would give evidence to show that the UDF (30

was not as it were an extension of the ANC, it was not set up and controlled by people who were part of the ANC otherwise what the writer is saying "infiltrate the UDF". Only by "our own underground structures within the UDF, skillful structures giving the correct guide to the UDF can we have an influence upon them". Now that document which is relied upon so strongly by the state case is really destructive of the state case because if it were admissible it might be support of a secret conspiracy within the UDF structures but that is not the case which has been pleaded. Nor (10 indeed was it suggested to anybody, any one of the accused that they were members of such a secret little group within the UDF. So the submission that we make to your lordship is that a call to ANC members to infiltrate the UDF is a call which would have been totally unnecessary if, as the state alleges, the UDF was set up by the ANC and was subject to its instructions.

In this regard it should also be noted that the allegation that the ANC was responsible for the formation of the UDF is in fact contradicted by a different article (20 written by Mr Maharaj in Seshaba, that is EXHIBIT AAE.3 page 17 - AAE.31, I am sorry. If I could give your lordship some more references to Mr Lekota's evidence because this was raised during the cross-examination of Mr Lekota. I do not want to take your lordship through them all, they are clear denials by Mr Lekota of the propositions put to him. Again the state does not tell your lordship why you should reject those denials. The passages on Mr Lekota, volume 299 page 16 881, lines 15 to 24 to volume 299, page 16 883, line 13; volume 299, page 16 883, lines 14 to 30. (30

M'lord / ..

M'lord, Mr Chikane's evidence was again to the same effect. He said that he first heard of the proposal to form a united democratic front towards the end of January 1983 when he read about the call made by Dr Boesak at the anti-SAIC meeting. He said that he received a report of that meeting at which the call had been made, that the report was given to him by a Mr Ismail Momoniat who had been present when the call was made. That evidence is at volume 300, page 16 962, lines 8 to 20. He said that he was in favour of the idea of a proposed front. He said (10 that at volume 300, page 16 963, lines 3 to 5. He said that when he was approached by Mr Momoniat about the proposed front, Mr Momoniat did not say that the idea had emanated from Mr Tambo or from the ANC, nor was any suggestion of that sort made at any time at any discussion with any person or at any UDF meeting. That is his evidence, volume 300, page 16 963, lines 17 to 22. He said that when he approached people about the proposed front he told them that the call was made by Dr Boesak at the anti-SAIC meeting in Johannesburg on 23 January 1983. That is his evidence at volume (20 300, page 16 965, lines 23 to 26. He said that he never suggested to any of the people whom he spoke to that the front was being formed at the instance of the ANC. That is volume 300, page 16 966, lines 1 to 3. And he said that he actually spoke at a conference in the Northern Transvaal on 3 February 1985 where he specifically spoke about the history of the UDF and told the audience that it was formed after the call made by Dr Boesak. The relevant passages here are Mr Chikane's evidence at volume 300, page 17 040, line 24, to 17 041, line 5; volume 306, page 17 544, (30

line 28, to 17 545, line 20; and EXHIBITS ABA.17 and 18.

COURT: ABA?

MR CHASKALSON: ABA.

ASSESSOR: Like the people who sing?

HOF: Ja, jy het nou een "B" uitgelaat.

ASSESSOR: ABA?

MR CHASKALSON: ABA. I am sorry, m'lord, Mr Marcus thinks I have given your lordship a wrong exhibit number. I think I have given your lordship the right exhibit number, in fact there may be just an additional exhibit number; but I (10 will do is I will check it and if I have made a mistake, as I could well have done, I will correct it tomorrow.

Dr Motlana testified that in the beginning of 1983 he had got to hear about the call by the Rev Boesak, or he got to hear about the call from the Rev Boesak for the formation of a front to the new constitution and the Koornhof bills. That is in his evidence at volume 417, page 24 427, lines 11 to 24. What was important is that he said he could not remember exactly when he heard about the call but that it became the talk of the townships that there (20 was this call for a united front. That was at volume 418 page 24 494, lines 23 to 28. We are not aware of that having been challenged in cross-examination or indeed that it was ever put to Dr Motlana that the call for the formation of the United Democratic Front emanated from any other source other than Dr Boesak. Now I think in this context it would also be relevant to refer your lordship to Mr Dangor's evidence at volume 372, page 21 515, line 22 to 21 516, line 5. With the submission that we make to your lordship on this aspect of the case, is that the state's (30

contentions/..

contentions are no more than speculation based on the hypothetical possibility that some news of Mr Tambo's speech had got into South Africa before these events took place. Certainly it gets no further than mere speculation and it is wholly inadequate to prove that those people who came together on 20 August 1983 to form the United Democratic Front did so because Mr Tambo had asked them to do so, and that they were really coming together to create a front for the ANC under the guise of calling it the UDF. There is just no evidence in our submission to justify such a (10 conclusion.

Now if I may move - and of course the same applies to those who joined after 20 August 1983, like the people at the VCA when it was established in September. Or October, I am sorry I do not know these dates; at that stage everybody was saying Dr Boesak, Dr Boesak, Dr Boesak.

Now if I could go to look at the other leg of this case, that the directives were issued through the UDF by the ANC. Now what the state has to establish here in our submission is that the UDF as a matter of policy (20 sought to implement directives given by the ANC and we would say that that case is not established by showing that individuals who were, or possibly later became members of the UDF, made speeches or prepared documents which could be construed as supporting the ANC or activities of the ANC; nor would it be established by showing that individuals who were or later became affiliates of the UDF or who were or later became members of affiliates of the UDF I should say, had contact with the ANC. They would have to show that the UDF as a matter of policy took its directives (30

from / ..

from the ANC and not that one or two individuals might have had links with it. We do not concede that it has shown any of that. What it set out to prove was the matter of policy. Now the state in its argument spent time dealing with EXHIBIT C.130 and we heard a lot about Mr Nkhondo, Curtus Nkhondo. And EXHIBIT C.130 is the letter found at the home of Mr Curtis Nkhondo and it was the letter which the state described as a letter to the ANC. It is addressed to "Dear Brother and Sister" - I am going to deal with that a little bit later. The state also dealt with alleged (10 visits made by certain affiliates, members of affiliates of the UDF to the ANC in Lesotho and to contact between ANC recruits and certain individuals who were or became members of affiliates of the UDF. Two things, even if one were to accept all that, the numbers of persons involved is minute in relation to the total membership of the UDF or the body of UDF affiliates, and secondly it is really of no assistance to the state, unless the state can go one stage further and show that all this was done as a matter of UDF policy with the authority of the UDF, and as I will show (20 your lordship later that proposition was very firmly denied by everybody who gave evidence.

The letter C.130. Now that letter was apparently written in 1981 so it could hardly be described as an executive statement by a co-conspirator and certainly as far as the main count is concerned and I am going to deal with my argument on the other counts later as to admissibility, it has not been proved at all in evidence. There is no evidence that that was Mr Nkhondo's writing. No reason why the state could not have proved who the author was, it did not. So (30

on the main count the letter is not proved, but in any event we would submit even if it were proved, it would not be permissible because a 1981 letter could not be said to be an executive statement of a conspirator.

COURT: Could we just pause there? Forget about the fact that it was 1981. Can one not from that type of letter, if one accepts for the moment that Mr Nkhondo wrote it, draw certain conclusions as to his political leanings?

MR CHASKALSON: I think that that is right. I think that one could, in any particular document which you - which is (10 put before your lordship and which is proved as having been authored by a particular person, one could say that that particular person at that particular time had certain attitudes, yes. What the correct inferences are will be a question of each document.

COURT: No, we only get to the question of the executive statements when you want to draw factual conclusions from the document.

MR CHASKALSON: Yes

COURT: In the sense that you want to take the facts set (20 out in the documents and use them as proof of those facts in the case. Only then do you come to the question of executive statements.

MR CHASKALSON: It will enter in two different ways because I think the cases do say that the executive statements are not necessarily admitted for the proof of the truth of what was said within them. That they are admitted for a different purpose, not necessarily the truth, but that that sort of letter was written, and the inferences you can draw from it and I have to address your lordship as to the meaning of (30

section 69, which is not an easy section and which - I think we are ready to deal with that, I just want to put my notes in working order so that I can deal with it sensibly and not chaotically.

What the state has to show on this side of its case is that the little bits and pieces of evidence upon which it relies - let me take the letter of Mr Nkhondo for what it is worth. That bits of evidence like that put together in a context of an organisation with 600 affiliates and all the members of those affiliates which makes policy as (10 a group of affiliates; that those little bits and pieces from that you can draw as the only reasonable inference the conclusion that the UDF as a matter of policy was engaged in a planned scheme to overthrow the state by violence. As I have said if you can infer that 1 or 2 or even several people had particular attitudes or particular leanings it does not take you far enough to meet what the state has to meet and that I think we will see when I go back to the 1956 treason trial and how the court there dealt with the evidence of violent statements made by certain indivi- (20 duals. Even by decisions taken at certain regional meetings which were national decisions. I will come to that when I look at the documentation. It will be a little while before I get there.

Now I do need to deal with the evidence of former ANC witnesses on whom the state relied for proof of this part of the case. There are three preliminary observations I want to make in regard to those witnesses. First they were accomplices, secondly they were particularly vulnerable in the sense that they were former ANC recruits, stood to (30 stand/..

stand charge on the most serious of offences and to face very severe penalties, and they were therefore - they would therefore have a very strong motive to ingratiate themselves with the security police and to offer evidence, or to guild their - to cut up their evidence, to put in a sentence or two here or there which they think will satisfy the police and enable them to escape responsibility for what they have done. Thirdly, you have to evaluate their evidence knowing that for practical purposes it is impossible for the accused to produce evidence to contradict them. If somebody says (10 I had a discussion in a particular camp with Mr Alfred Nsau or somebody else, how can the accused be expected to produce evidence to say no, that did not happen?

COURT: So you do not believe in the approach by some other counsel that they want to take that sort of evidence on commission?

MR CHASKALSON: Well, Mr Bizos who knows these things better than me says that those sort of applications have been refused over and over again but m'lord - let me stay with my submission that one cannot reasonably expect the (20 accused to go in search of unknown commanders, unnamed commanders at particular camps, to look for evidence to contradict this. So I make those three preliminary observations in regard to the evaluation of their evidence. Now the first of the witnesses as IC.24. I think it was in answer to a question from your lordship that he said that the ANC claimed leadership over the UDF. That was at page 7 380, line 29.

COURT: 7 380?

MR CHASKALSON: Yes, line 29. Your lordship asks the (30 question / ..

question..

COURT: And the volume number is..?

MR CHASKALSON: I am sorry, it is volume 147:

"Over which organisations did the ANC claim leadership?
-- There are a lot of organisations which the ANC claim
leadership over especially one of the birth organisa-
tions, the United Democratic Front."

I think "birth" might have been - it has a question mark next to it in the record and I cannot think what the witness might have said - it sounds...I do not know, m'lord. (10

COURT: We will have to look it up then if it becomes important.

MR CHASKALSON: I do not think anything turns on it because he says that it claims leadership over one of the - something - organisations, the United Democratic Front and also other trade unions inside the country. Now he subsequently equivocated saying that the ANC was not the leader of the UDF, but that the formation of the UDF was the inspiration of the ANC. He said that at volume 147, page 7 381, line 21 to 26. When he was pressed for the source of his (20 information he responded by placing reliance on the speech made by Mr Tambo on 8 January 1983 - 8 January 1983. I suppose I should identify it because apparently he makes a speech every 8 January. That is in IC.24's evidence, volume 147, page 7 381, line 26 to page 7 382, line 20. When he was questioned about that he conceded that Mr Tambo did not use the words, the UDF is a creation of the ANC, but that he referred to a mass democratic organisation without mentioning the UDF. And that is in his evidence at volume 147, page 7 382, lines 24 to 28 and indeed we know that that could (30

not / ..

not possibly be construed as a claim for leadership over the UDF because the UDF had not even been formed yet at the time of that publication. It happens to be the publication that the state relied upon that I have already dealt with in some detail, but he chose to rely on that as well. He was cross-examined and he was shown EXHIBIT AAE.31 in which Mr Maharaj writing on the UDF had said at page 17 of that article that the UDF is not a creation of the ANC. He then said well of course the ANC would never admit its relationship with the UDF: That is IC.24 at volume 147 (10 page 7 385, lines 12 to 16; and page 7 386, lines 14 to 24. Then after being pressed to state who in the ANC had claimed the UDF was a creation of the ANC he then said Alfred Nsau. Now he came out with that answer after the question had been put to him several times. The first time he said there was never a situation where it came out openly the question that the UDF was a creation of the ANC. The second time when it was put to him he said that claim had been made by the leadership of the ANC and when asked who had made the claim, he stated: I cannot specify who said (20 that because there is a lot of leadership in the ANC. And finally when asked which leader again he stated: One I remember although I am not quite certain is Alfred Nsau. That is a progression of the evidence and your lordship should look at the record, volume 148, page 7 387, lines 7 to 30, and 7 388, lines 27 to 29. With regard to this alleged statement by Nsau and apart from the fact that the witness said he was not quite certain whether it was Nsau or not and the vacillations which I have mentioned before he stated that he could not remember the month, the day or (30

the occasion on which it was made, nor could he remember the precise words used. Nor was he able to describe the circumstances in which the statement was made. That is in his evidence at volume 147, page 7 399, lines 21 to 24, page 7 400, lines 2 to 7. When he was taxed with the contradiction between what he claimed he had been told by Mr Alfred Nsau on the one hand and what had allegedly been stated by Mr Maharaj in Seshaba on the other hand, he really sort of vacillated in different ways. Perhaps that is not a fair way of putting it, vacillation, but certainly there are (10 a number of different tacks which he embarks upon during this part of his cross-examination. He characterises a statement of Mr Maharaj as a lie and one which Mr Maharaj - when it was put to him that this document said that Mr Maharaj said that it was not a creation, he said that was a lie. He said that at volume 147, page 7 391, lines 19 to 25. Then he was asked well, who would you believe when you are confronted with a different story or contradiction between Mr Nsau and Mr Maharaj and his answer is: I would believe Mr Tambo. He said that at volume 147, page 7 391 (20 line 26 to page 7 392, line 4. Ultimately when he was pressed he says well, he would believe Mr Nsau. That is page 7 392, lines 8 to 10. He says well, he believed the ANC propaganda when he was part of the ANC but he no longer believes it. That is at volume 147, page 7 403, lines 9 to 30 but nonetheless he believes what Mr Nsau said, that this was the creation of the ANC and the very loose description that he gives of that conversation is at volume 147, page 7 404, lines 16 to 18. He says he is not really prepared to believe Mr Nsau on other issues although when he was in (30

the ANC he did believe him. He says that in volume 147, page 7 405, line 18 to page 7 406, line 19. He said that he had absolute confidence in Tambo and he believes what he says and that Tambo would not hide the true intentions of the ANC. At volume 147, page 7 408, line 27 to page 7 409, line 6. And then he has put to him a passage from a speech allegedly made by Mr Tambo and he immediately says well, I do not believe that anymore; and he said that at volume 147, page 7409 lines 15 to 17.

There are a number of submissions to make about that (10 witness' evidence apart from the general submissions which I made to your lordship. His evidence is not satisfactory but more than that his evidence has not been shown really to be admissible. The terms of what was said are not clear, he cannot remember them. The onus is on the state to prove that it is an executive statement. He did not discharge that onus and it becomes really very flimsy evidence against all the other evidence to which we are going to refer your lordship from which to make a finding that the ANC created the UDF. (20

Then there was the evidence of the witness IC.6. Now his evidence went on for a long time. I do not really need to take your lordship right through it because he subsequently, the state subsequently abandoned reliance on the witness' evidence, this part of the witness' evidence because it was hearsay and said as much. Well, perhaps I should take your lordship through the evidence because I think that the part that is abandoned, I will have to look carefully at that part of the record.

COURT: Well, shouldn't we first look at the abandonment (30
before/..

before we take time to go through all the evidence.

MR CHASKALSON: Alright, I may have misunderstood a note which I have and I should look at it, this abandonment at volume 9, page 452, lines 11 to 19. Yes, I think there are two parts of the witness' evidence m'lord.

COURT: Well, it does not cover the point that you are making. This deals with people arriving in the country.

MR CHASKALSON: Yes, there were two separate points which he made, that is right m'lord, there were two sections of his evidence. Let me go back to the beginning and deal with (10 the first part. He sought to link - his evidence was relied upon for two propositions, one of which was abandoned. I think he testified that in the camps, that he heard that the UDF was the internal mission of the ANC. He said any person who had received military training from the ANC would tell you this, page 273, lines 12 to 14.

COURT: What volume are you referring to?

MR CHASKALSON: I am looking at volume 5, page 273. The passage is this. It is volume 5.

ASSESSOR: In the middle of the page. (20

COURT: Yes, we have got it. It is in the middle of the page.

MR CHASKALSON: Yes, it is page 273:

"Wat bedoel jy nou met mense wat plaaslik is en nie mense wat buitekant die land is? -- Dat hulle moet praat van die mense van die UDF en nie van mense van die ANC wat buite die land is nie.

Nou hoekom moet hulle praat van die UDF se mense, wat moet hulle praat? Wat is vir hulle gesê? -- Hulle was nie gesê nie want dit word bespreek daar in die kampe. Ons word gesê dat die UDF is die "internal mission". (30

"Internal" /..

"Internal mission"? Wat bedoel jy daarmee? -- "Internal mission of the ANC". In die kampe word dit bespreek deur enige persoon as ons daar sit in die kamp.

Is dit die algemene opvatting in die kamp dat die UDF die "internal mission" is? -- Ja, dit is so. 'n Mens kan enige ander persoon gaan kry wat van buitekant af kom en praat met die persoon en vra vir hom wat word gesê van die UDF buite die land. Die persoon sal vir jou dieselfde sê wat militêre opleiding ontvang het by die ANC." (10

And that is then left at that point and they go on to something else. At the moment it looks like just discussion in the camp between people who were there. Certainly that - Did I give your lordship the right IC number? It is IC.6 I have been told I have given the wrong one. Apparently Mr Fick had heard me differently, I thought perhaps I had misquoted it. Then the matter is taken up again at page 360. It is volume 9 - no, it is volume 8, I have given your lordship the wrong volume number. It is volume 7, page 360, line 6 to 8. He was asked why he had gone to Mr Ndau's office and he said: (20

"I went to the office of the UDF there. I did not say I want to speak to Mr Ndau, I only asked for a person to whom I could speak there. Secondly, I knew that the UDF was helping us or working with us hand in hand, that is what I was told outside this country and that is what I was told in fact."

And it is taken further with him at volume 9, page 446, lines 6 to 19. It is the wrong number I am afraid, m'lord - page 446? Ja, it is just that mine had been bound (30

chaotically / ..

chaotically, it is not only upside down but the pages are not in order. I found it:

"Have you ever heard any ANC leader call the UDF as the internal mission of the ANC? -- Not a political statement, it was mentioned in the camp."

Then he goes on to say that that is what the people who are in the leadership of the ANC used to talk to us about in the camp.

"Who are these, the platoon commanders? -- I am talking about the national executive. A platoon commander does not form part of the national executive. (10

Well, I am going to put it to you on the information available to you any member of the ANC that was claiming that in the camps was really blowing the ANC's trumpet.

-- I am glad to know that."

And then there is a long cross-examination about a person who may go about saying that as a matter of policy of his party, then the person would be putting his party in jeopardy because the things you say in public, such statements you must be sure of what you are saying. You must know (20 what you are saying and you must be prepared or able to stand for what you have said. Then there is a long cross-examination at volume 9, page 448 where he is pressed to state who came into the country to work for the UDF and he says: "Well, I do not say that they are working with the UDF, I said they were working hand in hand with the UDF". And he was pressed to reveal the names and he said: "I am not going to reveal the names of those people because at the present moment they are witnesses for the state in other cases". He was pressed further and he still refused, (30

saying / ..

saying: "I am going to ask for the assistance of the court here. The people I am talking about are still waiting to give evidence in other cases. And I cannot reveal their names because another reason is I do not know whether they are going to give evidence in this particular case in which I am involved or not". That is at page 448, lines 8 to 25. It was then put that the state should indicate whether it intends relying on this evidence or not, because in the event of it so relying that the defence should be entitled to investigate and the witness ought to be ordered to provide a name. That should be at page 450, lines 6 to 28. (10

Then it seemed after further cross-examination that the witness was not speaking of his own knowledge. That is volume 9, page 451, line 21 to page 452, line 8, and it was at that stage that the state indicated that in the light of the witness' lack of personal knowledge it would not rely on that part of his evidence. That is at page 452, lines 11 to 19. Now there is a number of things arising out of this that I want to make at this stage. First, that the progression of this cross-examination shows how a statement put forward as fact develops into a statement of hearsay (20 but secondly, none of these witnesses whom he says can speak on this and are here in the country get produced. It shows how very easy it is for a person in that position to make a statement, how it sounds on the face of it to be satisfactory; how when pressed he gets into difficulty, how he cannot sustain it and how it is shown to be unreliable. Now I am going to ask my learned friend, Mr Bizos, when he is dealing with the credibility of some of the other witness to deal very specifically with this witness' as (30

well / ..

well because he tells me that there are other aspects of his evidence when he was recalled..

COURT: That is IC.6?

MR CHASKALSON: Yes, m'lord.

COURT: Well, let us not run through the same ground twice.

MR CHASKALSON: No, we will not run through it twice, m'lord.

Mr Bizos might add some things..

COURT: Well, if Mr Bizos is going to deal with the thing then let us drop it here and wait till he comes to it.

MR CHASKALSON: Alright, then. He was the witness who was (10 recalled and had apparently contradicted himself, so Mr Bizos says, reminds me.

Then there was the evidence of IC.7. This witness testified - well, his evidence on this issue is re-introduced by a leading question. It is in volume 10, page 518. This is the way his questioning is introduced. He was asked first of all if he was a member of the ANC and has he undergone military and political training, and had he been trained in Angola, Cachita (?) and Pankop, and his lordship asked him whether those are all in Angola and he says yes. Now he (20 is asked:

"Terwyl jy in Cachita opleiding ondergaan het en ek wil in die besonder gaan na die opleiding toe, het julle daar spesifiek opleiding en instruksies ontvang omtrent organisasies in die Republiek van Suid-Afrika en veral die UDF? -- Ja, die meeste van die tyd was ons opgelei aangaan die UDF."

Well, he was pointed off in the right direction at the beginning of his evidence, but he then goes on to say that they received a copy of UDF News and The Eye at the time when (30

the / ..

the UDF was launched and he said that that was to make them realise that the UDF works together with them:

"Dit was 'n manier om ons te laat beseef dat die UDF met ons werk."

He says that at page 518, line 27 to - right the way through to page 519, line 8. Then he says at page - at line 22 on page 519:

"Ons sal daarnatoe terugkom maar die instruksies, was daar enige instruksies aan julle gegee as julle nou hier in die Republiek is omtrent julle, het julle hulp(10 nodig of iets van dié aard? -- Ja, die instruksies was indien ons enige hulp nodig het binne in hierdie land moet ons die UDF toe gaan maar ons moet nie na die hoër gesag in die UDF gaan nie, dit is persone met hoë posisies; ons moet na die mense toe gaan wat nie hoë posisies hou nie want die hoë posisies word onder observasie gehou deur die polisie."

K1469 Well, that is almost unbelievable, the proposition that if you come into this country you can go to anybody associated with the UDF. That implies that every single member of (20 every affiliate of the UDF is part and parcel of the ANC conspiracy. It is not even a state proposition. It is also a highly improbable proposition. It is inconceivable that it would be given in such broad terms, if indeed any such instructions were given. So that again puts a very big question mark against his evidence.

Then he also talked about instructors giving them - mentioning the fact that the UDF was working with them and there was quite a lot of cross-examination about that. At volume 10 at page 555, lines 4 to 19, he agreed that an (30

event like the formation of the UDF is interpreted by the ANC as proof of its assertion that the revolution is around the corner and he went on to state that it was our daily bread having events interpreted in order to believe that the revolution is around the corner. The more this was done the more fulfilled they were "until at some stage we discovered that these people were lying to us to the extent that there was fighting within ourselves in the camp. We shot and killed each other, using the AK for that very reason."

It is volume 10, lines 8 to 18. And he drew a distinction there between people who had been there a long time who were now the disbelievers and the more recent arrivals who were the believers. That is at page 566, lines 21 to 30. (10

Then he gave evidence himself about his own visit and he said he was going to meet somebody called Bushy Moabe of the UDF and he first says at page 537 lines 9 to 15:

"Do you know whether there was a UDF office in Kimberley at all? -- No, but what happened was this. I was supposed to have met somebody by the name of Bushy Maobe at Vryburg. On my arrival there it was (20 only to find that this person had been arrested. On my own initiative I then decided to proceed to Kimberley. That is how I happened to be in Kimberley.

Did you know whether or not there was a UDF office in Kimberley at all?"

and then there is a discussion between your lordship and Mr Jacobs and the effect of that is that the answer was: I did not. So he set off as it were according to him having come to meet somebody, finding the person arrested and he set off to Kimberley in search of a UDF person without knowing (30

whether / ..

whether or not there was a UDF office there. Later in his evidence at page 577, that is in the next volume, volume 11, line 16 to 25 - at line 11:

" I want to give you an opportunity to deal with what appears to be a contradiction in your evidence. Yesterday you said on arrival at Vryburg you found that Bushy Moabe had been arrested and you therefore proceeded to Kimberley. -- Yes.

This morning you said that you did not know that Bush Moabe had been arrested at the time of your arrest in Kimberley. Can you explain that contradiction if the records shows that that is what you said? -- I only came to know about Bushy's arrest or detention after I was arrested. If ever I said that yesterday that I knew about him having been arrested before I left Vryburg then I must have made a mistake, or it is just a mistake which I cannot explain because at Vryburg I did not even make enquiries about him. I did not ask anybody there." (10

Now that in fact is a very serious contradiction in his evidence because the proposition was that he was going to meet Bushy Moabe at Vryburg, his UDF contact in Vryburg. At one stage he says he could not make the contact because the man had been arrested. Later he says no, no, I did not even any enquiries about Moabe at Vryburg. I did not even know he had been arrested and then he sets off for Kimberley without knowing whether there are UDF offices there. Now there is not much more you can do with witnesses like that. They can come and say anything. You cannot put up another version, you can only look at the probabilities, you can (30

look / ..

look at the probabilities, you can look at their reliability and you look at the sort of contradictions which emerge, possibly fortuitous then as a result of cross-examination. So that is, as far as we are aware, the sum total of the people who talked directly about this talk of contact between UDF and ANC. But there are passages with which I am going to deal with later, dealing with the allegations of visits to Lesotho and other evidence and I will bring that to your lordship's attention.

But there was another witness, IC.11, who testified (10 that her job was to broadcast in Xhosa and English over Radio Freedom. She said that she broadcast during August of 1983 and from 20 to 22 August broadcasts were made on the launching of the UDF. According to her evidence the only broadcast, she herself broadcast on only one of those days. And she said the procedure was that they made live recordings for Radio Angola which were then taped and when the time comes for the broadcast Radio Angola plays the tape and that Radio Freedom was given broadcasting time on Radio Angola. That is IC.11, volume 78, page 491, line 4 to 492 line 9. And she said she really acted on instructions from the person in charge of Radio Freedom. That is at volume 78 page 492, lines 11 to 18. She herself was unable to remember the day between 20 and 22nd August during which she made a broadcast, but she said that she had in fact during the broadcast made a call to all people in South Africa together with their democratic organisations to attend the launch of the UDF which was to be held at Mitchell's Plein in Cape Town. That is in volume 78, page 492, lines 19 to 28, page 4 138, lines 8 to 13. And from the context of what she (30 stated/..

stated the broadcast refers to the launch of the UDF - it seems as if it was already taking place. She said that she was assisted in writing the programme by one Anderson. That is volume 78, page 4 137, lines 26 to 30 and when she was asked where she got her information from she said: "As I have already stated we were monitoring news from different radio stations and we then compile from those the news, then the people working for Radio Freedom will come and sit together and after monitoring the news and discuss from the news that we had been monitoring and decide whether we can(10 make an article from what we have heard from the news and make a comment on that. That was at volume 78, page 4 138 lines 20 to 27. And she said she could not remember who had monitored the news on that particular day, however, the person monitoring the news for the day, after finishing then the people, the unit, they will come and sit together and discuss the news monitored by the particular individual. That is still at page 4 138, it is now line 30, to 4 139, line 5. And then it continues. She was subsequently asked whether there was another broadcast over Radio Freedom concerning (20 the advent of the UDF and that is at volume 78 at page 4 096 line 6. She is now in evidence-in-chief, to 4 097, line 22. Perhaps I should read this one to you, m'lord:

"Het u ooit weer enige iets te doen gehad terwyl u daar by Radio Freedom was met enige aspek in verband met UDF? -- Ek weet weer uitgesaai. We saw it as an achievement in the struggle in South Africa that the people now were getting more organised. Dit is die besluit wat ons geneem het, ons besprekings as uitsenders van Radio Freedom na ons toe bespreek het and we even saw the (30 launching/..

actually happened is we made some reference from the statement.

You quoted it? -- Yes.

Now the first statement was about the 1982 statement? -- When the ANC president was calling on the people that they must get united, I mean in the sense that they must try to organise even among the white race.

And the 1983 statement? -- We quoted the president whereby he was saying that the people together with the democratic organisations, they must unite and form (10 a united front.

Kan ek net duidelik kry, wat u nou gesê het die aanhalings van die president van die ANC, Tambo, was dit aangehaal op dieselfde tyd of dieselfde toespraak toe u die uitsending gemaak het in verband met die UDF of is dit nou verskillende tye? -- In die uitsending waarin ons die UDF populariseer het ons hierdie uittreksels van die toespraak van die president ook daar in daardie uitsendings genoem."

and then they go back to the 1982 statement and then she (20 leaves that part of it. Now when she is cross-examined about that recording at 4 139 or about that incident..

COURT: 4 159?

MR CHASKALSON: 4 139, m'lord, line 6:

"Will you please tell us what you recorded the second time the UDF was mentioned? -- What I recorded on the second occasion was how we felt about the UDF.

Who is "we"? -- We, the people working for Radio Freedom.

So you put on tape how you felt about the UDF? --

Yes.

(30

What / ..

What did you say? How did you feel about the UDF? Did you do it in English or in Xhosa? -- Both English and Xhosa.

Yes, but can you tell us what you said, how you felt about the UDF? -- Well, we felt it was an achievement by the forming or launching of the UDF and again we came to realise that people in South Africa are getting organised.

Did you find yourself expressing favourable - sometimes favourable and sometimes unfavourable commentary (10 about organisations working in South Africa? -- Yes, that used to happen.

And if a new and strong trade union was formed would that please you? -- I beg your pardon?"

And then they would go on to the trade unions. But what seems important here as far as all this is concerned is that it is left to the decision of the people who are giving the broadcast to decide what they should include and what they should not include, what they should mention and what they should not mention. There is no suggestion there of any (20 directive from the ANC to make particular statements or to do anything specific as far as the UDF is concerned. Now from her evidence it was in a sense almost fortuitous that the broadcasters there decided on two occasions to do what they did do after gathering news from other sources; not from ANC directives. They did get a tape of the UDF launch which apparently had been sent to them from their department of information and propaganda but she herself did not know where the department of information and propaganda had received that tape from. And that really was the (30

gist of her evidence.

Now I would like to deal at this stage with some of the publications and the question of admissibility, and I think I can start my argument now. I have a note of other evidence given by ANC witnesses which is just simply not in my file at the moment. I am going to have to find it, I know where it is but I will have to come back to it, but I think I would like to start with the question of evidence and I would like to take that forward and deal with section - I will bring my notes together on that tonight on section 69(4) and I (10 will be able to address your lordship fully at one stretch on admissibility of evidence but I may have to come back a little later at some stage and bring to your lordship's attention some other evidence I have not mentioned.

The state relied on a number of publications which were allegedly issued by the ANC and SACP and Mkhonto we Sizwe, and the submission that we make to your lordship that as far as the main charge of treason is concerned, that most of these publications have not been proved properly. They were for the most part produced by the state under the provi- (20 sions of section 69 of the Internal Security Act and that section has no application to the main count of treason. As far as the main count is concerned the ordinary rules of evidence would apply. Now the ordinary rule is that a document is only admissible if it is shown that it was prepared or adopted in some way by the person to whom it is attributed and the document itself cannot be used to prove such propositions. There must be proof aliunde and in the absence of that proof the document will be inadmissible. There are a number of judgments which deal with that. I (30 think / ..

think I will refer to only one now and I will give your lordship the references to several, to three at any rate. The case is R v Promesius Printers and Publishers 1960 4 SA 888; S v Lindsay & Watson 1965 1 SA 572 - I should tell your lordship that the Promesius Printers case is a judgment by the CPD. And Lindsay & Watson was also a judgment of the Cape Provincial Division and the pages there are at 573 D-G and 574A-D. There is a judgment of the Transvaal, S v Conceicao 1978 4 SA 186.

COURT: C-o-n-c-e-i-c..?

(10)

MR CHASKALSON: C-a-o. Conceicao - I do not know, anyhow I have given your lordship the spelling. The judgment I am reading from is a judgment by GOLDSTONE J. It is in a different context, it is a case concerned with written statements as to weight of volume appearing on the containers of certain products and his lordship said at 189H:

"Such written statements not made by the appellants are clearly hearsay evidence as to the truth thereof. In R v Promesius Printers and Publishers the state was required to prove that the accused were the printers (20 and publishers of a certain newspaper. The state relied upon a statement to that effect from the newspaper itself. In this regard the judgment of the full bench was delivered by O'HAGAN J and he said the following: 'There can I think be no doubt that this statement adduced through the complainant was hearsay in character. The complainant did not say that he was aware of his own knowledge that the statement was correct, nor did he suggest that he acquired the paper through channels which pointed to the appellant as being connected

(30

with / ..

with the publication. An assertion of fact in the document handed into court as evidence is not in itself evidence of its truth unless the assertion falls into one or other of various categories in which the law recognises a document as being at least prima facie evidence of the truth of its contents. Apart from the special instances provided by statute, common examples of cases where documents may evidence the truth of its contents are to be found in admissions, certain declarations by deceased persons and the like. Into none (10 of these categories does the statement relied upon by the Crown fall."

and at the bottom of page 890 the learned judge continues:

"In my opinion there is no warrant for accepting the statement in the newspaper that the appellant was the printer of Indaba sa Simonte (?) as evidence of the truth of that assertion. SCHREINER JA in the case of Vulcan Rubber Works v S A R & H said: 'There is no doubt that the exceptions to the rule against hearsay have come into existence mainly because there was (20 felt to be a strong need for such exceptions if justice was to be done. But that is a different thing from recognising a principle that the rule against hearsay may be relaxed or is subject to a general qualification if the Court thinks that the case is one of necessity. I do not find in the English textbooks any recognition of the principle of necessity as a basis for relaxing the rule against hearsay beyond the well recognised established exceptions.."

It is really "beyond the well-established exceptions". (30

A similar conclusion was reached by the full bench in the case of S v Lindsay & Watson, the judgments in both the Promosius case and the Lindsay & Watson case found approval in the case of S v O'Malley, that was a Natal case. And his lordship then goes on to say that in the case of Meyer v Director of Public Prosecutions the House of Lords specifically set its face against the relaxation of the hearsay rule and the course of his speech Lord Reid said the following:

"The whole development of the exceptions to the (10
hearsay rule is based on the determination of certain
classes of evidence as admissible or inadmissible and
not upon the apparent credibility of particular evidence
tendered. No matter (inaudible) particular evidence
may seem to be, a letter comes within a class which is
admissible it is excluded."

and then his lordship goes on to say:

"In my view is in full accord with our own authorities
in relation to the relaxation of the hearsay rule."
that is a judgment of the Transvaal court. And I think (20
your lordship will find in the Vulcan Rubber Works case at -
it is AD, it is 1958 3 SA 285 and the passage is at 296.
That is the passage in which is really cited in one of the
judgments quoted by his lordship GOLDSTONE J where SCHREINER
J says that necessity is no grounds for relaxing the rule
against hearsay and that the only exceptions are the recog-
nised exceptions which have been recognised by the court.
So as far as the main count is concerned the ANC publications
that have been proved and I have in mind a document like
AAH.2 to which I have already referred, would be (30
admissible / .

admissible in evidence for the purpose of establishing the alleged conspiracy within the ordinary rule but the documents which have not been proved cannot be used by the state for that purpose on the main count and that the state has to satisfy yourself in regard to all of these publications and any statement upon which it relies, that the circumstances are such as to justify its admission for that purpose. In other words they would have to satisfy your lordship that the statement is executive and not narrative. And if I conclude this part of it just to give your lordship the reference to a proposition your lordship raised with me earlier, it is a judgment in the Appellate Division in the French Peter case, it is 1972 3 SA 430. It was a charge under the Terrorism Act and at 450 OGILVY-THOMPSON CJ deals with the well-known rule where he says this:

"This court has adopted the principle stated in Phipp-son's, 9th edition page 98, that it is immaterial whether the existence of the conspiracy or the participation of the defendants be proved first although either element is nugatory without the other."

and he refers to R v Meyer and the earlier decision there is cited.

"In accordance with this decision the executive statements of co-conspirators are rendered admissible.

There must however also be some evidence aliunde to lay the foundation of a common purpose before such executive statements can at the end of a case be taken into account. As Phipps concisely states "either element is nugatory without the other."

and I am leaving out the other cases he refers to in (30

support / ..

support of all this. As appears from what has been said earlier in this judgment -

"..the aluinde evidence of appellant's alleged participation in the conspiracy charge is tenuous indeed. As indicated above the only direct evidence relating to funds controlled in the Republic by the appellant is that of Miss Norman and appellant himself and the evidence negative participation by the appellant in the conspiracy charge. So far as the issue of admissibility is concerned the state's contention as above outlined in relation to paragraph 9E of the indictment would thus appear to be something in the nature of a petitio principii. Furthermore, while executive statements that is to say statements made in furtherance of a common purpose are admissible in conformity with the above rule in aid of establishing the existence of the conspiracy. They are not necessarily evidence of the truth of the assertions they contain."

and his lordship refers to R v Muller 1939 AD 106 at 119: (20

"These principles do not always appear to have been borne in mind by the trial court in arriving at its conclusion expressed in relation to 9E of the indictment that the conspiracy alleged has been proved."

I see I have moved beyond the time..

COURT: While we are on this point, the difference between narrative and executive statements, can a narrative statement relating the history if part of propaganda not be called an executory statement?

MR CHASKALSON: Well, if I may respond by assuming for (30

the / ..

the moment that it is, I do not think it takes the state case any further because it would be admissible not as proof of the truth of such a statement but of the fact that such a statement has been made and it would have to be weighed up against the evidence which is given as to the truth of a certain situation. In other words it is something from which - the fact that X makes a statement may enable you to draw certain inferences but it does not enable you to say that the statement that X made is true.

COURT: No, no, the first step, number one is can the (10 statement be before court? It can only be before court if it is an executory statement otherwise it cannot be before court. It can be an executory statement if it is narrative in form but used for the purpose of propaganda. The moment it is before court one can say well, you must bear in mind the man says this; he may be right or he may be wrong that depends on the weight one can attach to that statement.

Is that not the correct approach?

MR CHASKALSON: I think that if your lordship could get it before the court it would be evidence only that X said it (20 not evidence that what X said was true.

COURT: Yes, thank you, we will take the adjournment now.

THE COURT ADJOURNS UNTIL 9 AUGUST 1988

DELMAS TREASON TRIAL 1985-1989

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