

APPLICATION FOR REMAND

IN THE HIGH COURT OF NAMIBIA
HELD AT WINDHOEK

CASE NO. 41/90

DATE: 18/4/90

THE STATE versus

DONALD ACHESON

BEFORE:

THE HONOURABLE MR JUSTICE
MOHAMMED (ACTING)

ON BEHALF OF THE STATE:

ADV. H. HEYMAN

ON BEHALF OF THE ACCUSED:

ADV. T. GROBBELAAR, SA

ADV. G.H. OOSTHUIZEN

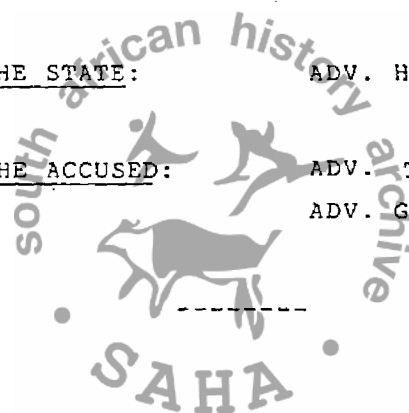
CHARGE:

MURDER

CONTRACTORS:

SNELLER RECORDINGS (SWA)

(PTY) LTD., WINDHOEK



S.A.: My Lord, I want to bring an application for the trial to be postponed and the accused to be remanded in custody. With the permission of the Court I want to call the investigating-officer, Col. Smit, in support of my application.

COURT: To what date do you wish the trial to be postponed?

S.A.: My Lord, I've discussed this with my Learned Friends and they will oppose the application. So I think we must first see if a remand is granted, then we can decide on a date. I will ask for a remand as long as possible.

COURT: In custody?

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S.A.: In custody.

COURT: It may be very relevant whether you're asking for a short remand or for a long remand.

S.A.: My Lord, I think it will become clear to the Court, with respect, once I've called Col. Smit.

COURT: Very well, you may call him.

S.A.: Thank you, My Lord.

S.A. Calls:

JAN DE BRUYN SMIT, S.S.

COURT: Thank you for your co-operation, the accused is English speaking and it would facilitate matters very much.

--- It is a pleasure, My Lord.

EXAMINATION BY S.A.: You are a colonel in the Namibian Police and investigating-officer in this case. --- That is correct.

Now the accused before court, when was he arrested?

--- The accused was arrested on 13 September 1989 at 13h00.

So he is in custody now for more or less seven months, if I'm correct? --- Yes, 7 months and 5 days to be correct.

The charge against the accused, can you explain to the Court, give to the Court more details about the charge?

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--- It was for the assassination of a political figure, one Anton Lubowski who was a member of a political party in Namibia, SWAPO, and the murder occurred on 12 September 1989.

S.A.: Say for instance the Court grants a remand and the accused is not in custody, where can he go? --- The accused is a citizen of Ireland, he has got no citizenship anywhere in Africa or for that matter anywhere else, so he could only be in Ireland or to be more specific, Belfast in Ireland.

Colonel, are you aware of any other suspects in this case? --- There are two more suspects in this case and 10 warrants for their arrests were issued on 2 February of this year, and their names are Mr L.A. Maree with an alias of Chap Maree and one D.F. Du Toit Burger with an alias of Staal Burger. These are the two other suspects in this case.

Since the warrants were issued, have you been looking for them? --- I was looking for them since 2 February, but both the accused have disappeared, and could not be arrested.

And is this still the position? --- It is still the position as far as Chap Maree is concerned but as far as Burger is concerned the information I've got is that during 20 the week of 2 to 6 April, he made his appearance in Johannesburg, and according to what I know, he is still in Johannesburg but I am not (interrupted).

Is there a chance of arresting him? --- Yes, at the moment I think there is a chance, to arrest him.

As far as the witnesses are concerned, the witnesses in this case? --- My Lord, I went down to Johannesburg and interviewed four witnesses, and also served subpoenas on them. The first witness is Abram Van Zyl, the second witness is Carl C. Botha, better known as Calla Botha. The subpoenas 30

for these two witnesses I served on their advocate, Adv. Etienne Du Toit in his chambers in the Scheiner Chambers in Johannesburg and he consulted with them the same evening, and I was later informed that they are unwilling to attend this court case today. That was served on 9 April at 17h00.

S.A.: Sorry, but let us take it step by step. The first witness was? --- Abram Van Zyl.

What is his nickname? --- His nickname is Slang Van Zyl.

And you served the subpoena on him when? --- On 9 April at 17h00. (1)

Have you got a statement from this witness? --- I've got a statement from Mr Van Zyl.

When was this statement taken? --- This statement was taken during January of this year, I am sorry, during February, I am not certain.

COURT: In Johannesburg? --- In Pretoria.

S.A.: My Lord, I ask permission to hand in this subpoena as EXHIBIT A. What is the position at the moment with this witness Van Zyl, is he here today? --- He is not here today, he did not arrive. 20

What is your information? --- My information is that he is definitely not coming, and do not wish to give evidence in this case.

Did he give any reason to you? --- He gave no reason to me except that he does not want to get involved, that is according to his advocate.

The second witness? --- The second witness is Carl C. Botha, better known as Calla Botha. The subpoena was served on him on the same date, on 9 April, 17h00 in the chambers 30

of his advocate, Adv. Etienne Du Toit.

S.A.: Have you got a statement from this Botha? --- I don't have a statement of Mr Calla Botha.

Why not? --- I've made arrangements with Mr Botha on various occasions, but on each occasion there was some or other excuse that I could not get hold of him. Eventually I got through to his advocate, Mr Du Toit, who promised that he will draw up a statement and hand that over to me, and that did not happen yet.

Now is he here today? --- He is not here today, My Lord.

What is your information? --- My information is also the same, that he does not wish to get involved in this case by giving evidence.

I hand this subpoena in as EXHIBIT B, My Lord. --- The third witness is Mr Ferdinand Barnard, I served this subpoena on 8 April at 18h00 at his house in Roodepoort. I spoke to him personally. I have a statement of this witness. He informed me the next day (interrupted).

What is the date of the statement? --- The statement was taken during December and also in November, there are two statements.

And what is the position with that witness, is he here today? --- The witness also did not arrive. According to information or what he told me, he had received legal advice not to attend the court case because according to him it was a political matter and he does not wish to get involved.

I hand that subpoena in as EXHIBIT C, My Lord. --- The fourth witness is an ex-policeman, ex detective sergeant W. Knox. I have a statement of this witness. I served this

subpoena on 9 April at Brixton, Johannesburg. He is not here today and he informed me that due to business appointments he is unable to attend this matter today.

S.A.: I hand that subpoena in as EXHIBIT D, My Lord. If the Court grants a remand, what do you think, colonel, would be the chances of getting these witnesses? --- It is a difficult question but to my own knowledge I can testify here that at least Mr Barnard will definitely not attend, he told me so. Mr Botha won't attend and Mr Van Zyl might attend but I can't be certain about that. As far as Mr Knox is concerned, he is 10 unwilling and I also doubt that his excuse is substantiated with business appointments.

What is the last resort now? --- The last resort is that I doubt that these witnesses will attend court here in Namibia to testify in this case.

So is it correct that the only way now to get these witnesses is through diplomatic channels? --- If possible, yes, that would be the only way out of this.

Do you know of any existing agreements between the two governments? --- There are no agreements, according 20 to what I've, to my knowledge.

NO FURTHER QUESTIONS BY S.A.

CROSS-EXAMINATION BY DEFENCE: Col. Smit, for what period of time have you been a police officer? Approximately, I am not trying to confuse you. --- 27 years approximately.

27 years. You are the chief investigating-officer in this case, is that correct? --- That's correct.

I accept unreservedly that you carried out very extensive investigations into the background of this particular case and all the facts relating to this particular case? --- 30

That is correct.

DEFENCE: Your investigations, as you've indicated, indicated that this was what is regarded as an apparent political assassination, is that correct? -- I would say so.

You are absolutely satisfied that without the four witnesses you've mentioned being present, the chances of securing a conviction in this particular case seems to be very remote, is that correct? --- That is also correct.

You're also convinced that for the purposes of the proper adjudication of this case, it is absolutely essential that Messrs Burger, Staal Burger and Mr Chappie Maree, be extradited and joined in this particular indictment, is that correct? --- That is also correct.

I would like to have a little more about the background of these gentlemen, without going too deeply into the case. All six the gentlemen you've referred to, i.e. Messrs Burger, Maree, Botha, Barnard, Knox and Van Zyl, are all experienced policemen, is that correct? --- That is correct, ex-policemen.

Ex-policemen. At some stage or another at least five of them were associated with the Brixton murder and robbery squad, is that correct? --- That is correct.

And if I were to describe them as very experienced policemen, I'm not trying to flatter them, that is indeed a fact, is that correct? --- That is a fact.

As a matter of fact, at one stage or another Col. Burger was the head of the Brixton murder and robbery squad, is that correct? --- That is also correct.

I accept that his appointment was subject to ability, and for no other reason, is that correct? --- That must be so. 30

DEEENCE: I accept that these gentlemen, because of the positions they occupied, are also fully aware of the pros and cons of giving evidence, is that correct? --- That is also correct.

It is also correct that the four gentlemen, i.e. to say Messrs Botha, Van Zyl, Barnard and Knox, were in fact given indemnity by the Attorney-General of the Republic of Namibia from possible prosecution, is that correct?

COURT: Which four, Mr Grobbelaar?

DEFENCE: Messrs Botha, Barnard, Van Zyl and Knox. --- Well, 10 more specifically Mr Botha but that could also count for the other three.

Look, I'm not trying to trap you, Mr Smit. Unfortunately I am in the invidious position that I have to read the newspapers in order to gauge what is apparently going on in this case, but I don't blame my Learned Friend. I mean he could only, obviously, provide me with that amount of information, but if I understood - My Lord, I can't speak from personal knowledge but I was driving to chambers in Pretoria when I heard on the radio that the present Attorney- 20 General, please, I am not a witness, had apparently granted indemnity to these gentlemen. --- That was specifically done, I must correct myself, to Mr Abram Van Zyl and Mr Calla Botha and one say that the same counts for Mr Barnard and Mr Knox.

I mean these gentlemen, obviously because of their past experience, are also fully aware of what an indemnity means, isn't that so? --- That is correct.

I mean irrespective of the fact that an indemnity had been given and promises had been made, I am not suggesting 30

ulterior promises, these gentlemen, as you've correctly indicated, you still doubt whether these witnesses will ever attend court in order to testify, is that correct? I mean that is the gist of your testimony, is that correct? --- That is correct.

DEFENCE: I just want to resort to two other gentlemen. I don't want to go into the facts of this case, but it is also alleged that the CCB, what is called the Civil Co-operation Bureau, is apparently involved in this entire matter, is that correct? --- That is alleged.

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COURT: For the purpose of the record, that is a department of the Department of Defence of the Republic of South Africa.

DEFENCE: I thank Your Lordship so much, thank you very much, My Lord. And the CCB and their activities are presently the subject of an inquiry which is held in the Republic, is that correct? --- That is correct, it is called the Harms Commission.

And evidence had, inter alia, been given, I'm not going to go into the full evidence, by Mr Van Zyl that the CCB was apparently interested in the movements of the late deceased, is that correct? --- That is so.

And that they apparently, I don't know who and I'm not interested in that, but members of the CCB carried out surveillance on the movements of the late deceased on the evening of 12 September 1989, is that correct? Look, I'm speaking subject to correction. Please, I'm not trying to mislead you. --- No, I don't think that was the evidence given by Mr Van Zyl. I think he mentioned a surveillance on two occasions during August of 1989.

But Mr Burger, the one gentleman you wish to add

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as an accused, join as an accused, apparently travelled to Windhoek under the fictitious surname of Gagiano or something, isn't that so? Look, you must please correct me, as I say I wasn't there, I merely read it. --- No, I am not aware of such, evidence to that effect.

DEFENCE: But in any case, to cut it short, you are aware of the fact that the allegation is that the CCB is apparently also involved in this particular assassination. Just to cut it short, is that correct? --- That is correct.

And that the involvement and the killing of Mr Lubowski, although it hasn't been finally tried yet, is of a political nature, is that correct? -- That is correct. 10

There is another aspect which is very important. You say that the warrants for the arrest of Messrs Burger and Maree were issued on 2 February 1989. --- No, 1990.

Sorry, I am still behind times, My Lord, my apologies. From the moment that warrants were issued for the arrests of these two gentlemen, they went so to speak underground, is that correct? --- That is correct.

As a matter of fact not a word has since been heard from Mr Chappie Maree, is that correct? --- That is also correct. 20

But I mean you will readily concede that with the expertise these gentlemen have, because of their former position and because of their obvious influence in the Republic, I mean for them to appear and disappear are the easiest of things, is that correct? --- That is so.

Now on the assumption that the authorities in the Republic have all that amount of clout, the full clout of the South African Police Force was given to you in order to 30

try and arrest Mr Burger, is that correct, after he had gone underground, is that correct? --- That is also correct.

DEFENCE: This was with the assistance of the full might of the South African Police Force, is that correct? --- That is correct.

And that was irrespective of the fact that Mr Burger was extremely well known in the Republic of South Africa, is that correct? --- Also correct.

Photos of him had been freely circulated, is that correct? --- That is correct. 10

Irrespective of that he remained underground, according to your information, in the Republic of South Africa, is that correct? --- That is correct.

And at all times apparently avoided detection and arrest with the greatest of ease, is that correct? --- Correct.

And it was only after the independence of the Republic of Namibia which was on 21 March, is that correct? --- That's correct.

That Mr Burger surfaced during April 1990, is that correct? --- That's correct. 20

You've given the date (interrupted) --- As the week of 2 to 6 April, I could be wrong with that, it could be earlier but that is the information I have, 2 to 6 April.

And this was after it was freely broadcast in the Republic that there is no extradition treaty presently existing between the Republic of Namibia and the Republic of South Africa, is that correct? --- That is also correct.

As a matter of fact, I understand there was also another gentleman, his name is obviously not essential for the purpose of this case, and was apparently also sought by 30

your police in connection with another matter, is that correct, which also has political overtones, is that correct? --- That is correct.

DEFENCE: That gentleman also apparently surfaced after the independence of the Republic of Namibia and after it had become known that there was no extradition treaty in existence, is that correct? --- That is correct.

And I accept that, My Lord, I am saying this with all due respect to Mr Burger, I am not suggesting that he is guilty or anything, I get the impression that he is moving around in the Republic with the greatest of impunity, is that correct? If one can use that description, is that correct? --- I think one can say that. 10

And you've got no guarantee that on the assumption that an extradition treaty is arranged for at some stage in the indefinite future, that Mr Burger might not disappear from the scene again, is that correct? --- I cannot say, I mean it is correct what is put to me.

Yes, I mean with all his expertise and his know-how, that would be the easiest of things under the sun, isn't that so? --- That is so. 20

Now on the assumption that His Lordship were to grant a postponement, obviously it would require an extremely lengthy postponement in order to resolve all the present problems, for instance with regard to the question of an extradition treaty, isn't that so? --- That is so.

The second problem, as you're aware of, this is an offence which apparently has political overtones, isn't that so? --- That is so.

So at the end of the day, I think you will readily 30

concede, that any possibility of seeing Messrs Burger and Maree here within the next few months, is extremely remote. Do you agree with that? --- I agree, I can't guarantee their arrests at all. I am sorry.

DEFENCE: As a matter of fact, if one were to take it a step further, at the end of the day, according to your investigations, any endeavour to secure their presence as accused people in the Republic of Namibia, seems not only to be remote, but also seems to be an exercise in futility, is that correct? --- I think one can put it that way, unfortunately. 10

I'm trying to put it as softly as possible, colonel, as you can appreciate. I just want to secure a few facts insofar as the accused is concerned, Mr Smit. It is purely to give His Lordship background to the matter. The normal experience, I say the normal experience, I don't say that assassinations follow a particular pattern, these things are normally extremely carefully planned beforehand, isn't that so? --- Most definitely.

Normally any assassins or people who has been involved in assassinations, try and leave the particular scene of the assassination as soon as possible, isn't that so? 20 --- That is so.

Obviously it also includes extremely careful planning and premeditation, is that correct? --- I would presume so.

And as you've said at some stage or another, during the course of some proceedings, I mean for instance for a person to go to the airport, Eros, and flee from the Republic of Namibia is apparently the easiest of things, isn't that so? --- That is so. 30

DEFENCE: Now the deceased was shot presumably, according to the further particulars, between 20h30 and 20h40 on the evening of 12 September 1989, is that correct? --- That is correct.

Irrespective of this background, you only arrested the accused on 13 September 1989 at approximately what time? --- 13h00 approximately.

After a time lapse of approximately? Colonel, sorry for taxing your brain, could you just indicate this to His Lordship please? --- About 17 hours I would say. 10

I thank you. He was still in Windhoek? --- He was still in Windhoek.

Not a case of his suitcase being packed or anything of that nature, things which you observed, isn't that so? He was still here. --- Yes.

He was arrested then. On 15 September 1989, please colonel, I'm not mentioning this evidence in order to show you up in a poor light, I just want the background for His Lordship. On 15 September 1989 he was no longer kept as a suspect on a charge of murder, if one could describe it in such a way, but he was then detained under the provisions (interrupted) --- Of the Immigration Act. 20

Of the Immigration Act, as a matter of fact, I'll you the particular section very shortly, it is under the provisions of - My Lord, sorry, may I just get the particular - (interrupted).

COURT: Take your time, Mr Grobbelaar.

DEFENCE: It is in terms of Section 13(1)(f) of Act No. 59 of 1972, and this act refers to the admission of persons to the territory of Namibia Regulation Act, is that correct? --- I 30

take it to be correct, I can't remember the (interrupted).

DEFENCE: Well, you can take my word for that. I just want to give you or show you a copy of this notification and ask you whether it is correct. Unfortunately I haven't got the original. Will you just identify it please, if you don't mind? I don't know what the number of the last exhibit is, My Lord.

COURT: I think it is "D", Mr Grobbelaar.

DEFENCE: Could we make this EXHIBIT E, if you don't mind.
--- This is a true copy, My Lord, I can testify to that.

COURT: This is a detention preparatory to a deportation, 10
Mr Grobbelaar.

DEFENCE: That is correct, My Lord. He was detained under the, as a prohibited immigrant, he was then detained under the provisions of this particular section and act up and until 6 November 1989, is that correct, when an application was lodged in the then Supreme Court of South West Africa.

COURT: What is the date again?

DEFENCE: 6 November 1989. An application was lodged in the then Supreme Court of South West Africa for an order setting aside the declaration of the accused as a prohibited 20
person in terms of the particular section. --- That is correct.

His Lordship, the Honourable Mr Justice HENDLER, allowed this application on 6 November 1989, is that correct?
--- That is correct.

I wish to hand in, with the Court's permission, will you just look at this? Is this a copy of the order issued by His Lordship, Mr Justice HENDLER on 6 November 1989? ---
This is a copy.

This would be EXHIBIT F, My Lord.

COURT: On the basis that you can't hold a man under the 30

Immigration Act in order to keep him warm for a criminal trial.

DEFENCE: I think it sort of speaks for itself, My Lord. I say we're just giving the background and the facts to Your Lordship, that is all. This order had been given on 6 November by His Lordship, Mr Justice HENDLER arrested on a charge of murder, is that correct? --- That is correct.

That was on 6 November 1989.

COURT: Immediately after the order. --- After the order.

DEFENCE: And it is correct, colonel, I am not trying to show you up in a bad light, you already had a premonition on 3 November that there was a very strong probability that this application for the setting aside of the immigration order was going to take place, isn't that so? --- Oh yes, My Lord, that is true. 10

But nevertheless you waited for the Supreme court to intervene and only after that was the accused then arrested formally in respect of this particular allegation, is that correct? --- I think that was the only day available after the 3rd. The 3rd, I think, was on a Friday (interrupted)

COURT: But what happened between 13 September and 15 September? --- Oh, well, it was carried on with the investigation. (20)

He was arrested on the 13th, was he not? --- He was arrested on the 13th of September.

For what? --- On suspicion of this murder.

Not the immigration? --- Not the immigration.

DEFENCE: Thank you, My Lord. On 13 November 1989 a formal application was made for the release of the accused on bail in the local magistrate's court, is that correct? --- I can't remember the dates, but that could be correct. 30

DEFENCE: The State objected to the accused being released on bail, isn't that correct? --- That is correct.

And you also testified in that matter in opposition to the accused being released on bail, is that correct? --- I testified.

And the application was then refused. --- That is so.

Subsequent to that an appeal was noted against the decision of the magistrate, is that correct? --- That is also correct.

This appeal was heard on 12 February 1990 in this Honourable Court, is that correct? --- Again I can't remember the date, but the appeal was heard in this Court. 10

And you're aware of the fact that the appeal was refused, is that correct? --- I am also aware of that.

COURT: Is there a judgment on the matter?

DEFENCE: My Lord, I doubt whether a judgment was handed down. Well, a judgment was obviously given but I doubt whether it has been transcribed, My Lord, and for reasons which I understand, I mean with all due respect, it is not for me to debate the approach of the Judge or question or query it. With all due respect, I think he was perfectly entitled to refuse the application. We didn't take it any further, My Lord, but on the facts which appeared on paper, obviously with all due respect, His Lordship had no other option. As I say it is not for me to give a ruling on the correctness or incorrectness. 20

COURT: Did you appear in the (interrupted)

DEFENCE: I appeared in that matter, My Lord, but I'm not the best of witnesses, as Your Lordship will appreciate.

COURT: Which Judge heard that (interrupted). 30

DEFENCE: Mr Justice HENDLER, My Lord. You're aware that on 25 January 1990, the then Attorney General, Mr E. Pretorius, wrote a letter to the Chief Magistrate, Windhoek and it referred to the matter of the accused, and I'll just read it to you and you can just look at it, and say whether it is correct. Firstly, My Lord, this will be handed in as EXHIBIT G.

"1. In accordance with the provisions of Section 122(2)(1) of the Criminal Procedure Act, No. 51 of 1977, I have decided to arraign Donald Acheson before the Supreme Court at Windhoek from 18 to 30 April 1990 at a summary trial on a charge of murder.

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2. The indictment and summary of substantial facts will be duly served on the accused in accordance with the provisions of Section 144(4)(a)(i) of the Criminal Procedure and Evidence Act.

3. The provisions of Section 122(3) of the act must be complied with.

4. Please provide this office with two, and the Registrar, Supreme Court, Windhoek with the original and three certified copies of the record of the proceedings in the magistrate's court."

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Would you just have a look at this please, if you don't mind?

--- I know of this letter.

COURT ADJOURNS

COURT RESUMES

JAN DE B. SMIT, still under oath

NO FURTHER QUESTIONS BY DEFENCE

NO RE-EXAMINATION BY S.A.

S.A.: My Lord, that is the evidence that I wish to present 31

to the Court.

COURT: I just want to get clarity on a few issues, Col. Smit. The two suspects that you have are Maree and Burger, is it?

--- That is correct.

You would wish to charge them with the same offence.

--- That is correct.

Have you got statements from either of them? --- No, I've got no statement, I've never seen them.

Why is it that the warrants for these two suspects were only issued on 2 February? --- My Lord, it was only 10 then that a case against them was made out.

Based on statements which you had previously? --- Which I then obtained during January and also some during December, but mostly during January.

From whom? --- Well, from witnesses, a local witness here and also one from (incomplete).

One from South Africa? --- One from South Africa.

I see. Have you previously not proposed calling either Maree or Burger in the trial against Mr Acheson? --- No, that was not tried. 20

Are they not included in the list of witnesses who were supposed to give evidence against Mr Acheson? --- That is now, sorry My Lord, are you referring to Burger and Maree?

Maree and Burger, yes. --- No, they are not included.

Now if you've got a case against Maree and Burger, or either of them, why can't that case proceed independently? Why must Mr Acheson have to wait? --- My Lord, I think that's for the Prosecutor General to answer that but I think that there could be a common purpose, I think that would be the 30

answer.

COURT: Yes, but whatever evidence you have against Mr Maree and Mr Burger, could be the subject matter of an independent trial. Why should Mr Acheson have to wait until you're ready to proceed against them? --- Again that would be the decision of the Prosecutor General but I don't foresee that there will be a problem, that could be independently.

I suppose your major difficulty has arisen in consequence of the fact that your legal process has now been interrupted by the independence of Namibia. --- That is correct. 10

Now the independence of Namibia was on the 21st of April. --- 21st of March.

March. But the date had been nominated long before, had it not? --- That is so.

Had you not anticipated the possibility that your process might become legally unenforceable? --- Well, I have anticipated the problem.

Well, if you had anticipated the problem, were any steps taken diplomatically to ensure timeously that some other method is found to bring these people here? --- I'm afraid I can't answer that, My Lord. What I know is that I prepared the case as far as possible, and then presented it to the then Attorney General and the dates and arrangements were done by him. 20

But it was known months in advance that independence will come and the legal process would become unenforceable, not so? --- That is so.

What steps were taken to meet this problem? --- Again I must say I can't answer that, My Lord. The then Attorney General was handling that and this case was set down 30

for today. I suppose there were some reasons for that, but which I am not able to answer.

COURT: Colonel, you have mentioned the possibility of diplomatic assistance between the two countries in order to procure these people into Namibia, is that not so? --- Yes, that is as far as Burger and Maree are concerned.

And what about the others whom you need as witnesses?
--- To my knowledge there is no arrangement that could be made through diplomatic channels. I am not certain about that.

Do you know if any such arrangements have been initiated, whether they have been discussed between the two governments? --- I cannot say whether it was discussed, but all I can say is that on the 11th of this month I had an interview with our present Attorney General in co-operation with the Prosecutor General where this was mentioned and also requested. So how far it has gone, I can't answer.

So you have requested the present Attorney General to (interrupted) --- Negotiate, yes.

Negotiate (a) (interrupted) --- For extradition agreements.

(a) the two suspects to be brought here, and
(b) the witnesses to be brought here. --- Yes, you can say that in so many words, yes, although I don't think it is possible. I don't know, I'm not a legal man, I'm a policeman.

You know I have considerable discomfort about a remand for virtually an indefinite period of time of a man in custody. Why have you been so opposed to bail for Mr Acheson?
--- Well, first of all My Lord, it was mainly on the fact that he was actually a prohibited immigrant here and also in South Africa. So he had nowhere to go but back to Ireland

where he, according to my information, last visited somewhere perhaps at the beginning of this decade.

COURT: But if there is a court order requiring him to make himself available to be in court, he would have to be here, wouldn't he? --- Yes, if he remains in this country.

Well, why are you so sure that he will not stand trial? --- As I've said mainly because he has got no reason to be here, he can leave whenever he likes and we have argued that point in all the applications.

This is a matter of considerable public interest, not so, Mr Lubowski's death? --- Oh yes. 10

He was a prominent politician. --- That is so.

Apparently being a member of the party which is now the governing party in this country. --- That is so.

Is it beyond the capacity of the police to monitor his movements effectively, if he were to be granted bail? --- I would not say it is beyond the capacity, My Lord, but there is always the possibility that he could leave the country and it has happened before.

You see what is worrying me, colonel, is that it is not his fault anymore. He is here willing and able to stand trial, he is represented by senior counsel and for no fault of his the State now requires that there be a long postponement in custody. I have difficulty with that, I'm trying to get some assistance if I can. --- I must agree, My Lord, it is something that, I suppose, must have been foreseen but we relied on the good faith of the witnesses to be available, and it turned out to be that they are not available. 20

Do you have any further questions, Mr Heyman, arising (interrupted)

U. G. B. SMIT

S.A.: Thank you, My Lord. Colonel, who was in charge of the investigations of this case now in the Attorney General's office? --- I consulted with Adv. Mullineux and Adv. Pretorius, that is the Attorney General.

When did I have the first consultation with you?
When did I take over this case? -- I'll be wrong with the dates but I would say on the 29th of March, 30th.

NO FURTHER QUESTIONS BY S.A.

NO QUESTIONS ARISING FROM QUESTIONS BY COURT BY DEFENCE

COURT: Thank you, colonel, for your assistance.

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S.A.: My Lord, the State's application rests on three points, three legs. Firstly I want to join these other suspects as accused. My Lord, it is a very complicated case. For instance if that, I don't want to put all my evidence on the table but I can (interrupted)

COURT: Well, you may have to put in if (interrupted)

S.A.: I can assure the Court, for instance you've got certain evidence, say for instance Burger is not joined as an accused, then you can't use that evidence and that evidence is applicable against the present accused and Burger. 10

COURT: But Mr Heyman, the State was quite willing to proceed on a murder charge against Mr Acheson before it discovered that there were two other suspects. You already had what you said was a prima facie case in the Magistrate's Court.

S.A.: Yes, that might be so, My Lord, but since the further investigation it has become clear that we must join the other accused, or at least one of them.

COURT: Why?

S.A.: The evidence, there is an indication, My Lord, as I've put it, that certain evidence of certain witnesses, I can't use it all against this accused but if one of the other accused is charged, that evidence will be admissible. 20

COURT: Admissible against this accused

S.A.: Against this accused.

COURT: You'll have to be more particular than that, these are abstract provisions, Mr Heyman. Ordinarily I wouldn't expect the State to disclose the details of its evidence but if an accused person is going to be remanded in custody for a lengthy period, I think you'll have to tell me a little more 30

about what is your evidence.

S.A.: My Lord, with respect, I'm fully in agreement with the Court, this man is in custody, but he is not charged with an ordinary murder and he has only been in custody now for seven months.

COURT: It is not only, seven months is a long time, Mr Heyman.

S.A.: Seven months, and the State at least must get a chance to prove the case, and I can assure the Court that without joining the other accused, we will not have a case, well, I cannot say not a case but the problem is we'll have a much stronger case with the other accused. 10

COURT: Mr Heyman, I am not entirely unsympathetic to your position. I realise that the independence of Namibia has created certain legal difficulties with regard to the inforcibility of your process. I am not unalive to that problem but I have to be satisfied that I am not going to be unfair to Mr Acheson. At the moment the law presumes his innocence, he is innocent until proved guilty. He has served seven months without any guilt being established. I want to be clear in my mind what is this other evidence that you say exists which would then be led, which would then be admissible not only against the new accused, but also against Mr Acheson. I think I would like to know that, and I think that Mr Grobbelaar is entitled to know that in order to be able to deal with your submission. I have no doubt, Mr Heyman, that whatever submission you make you bona fide believe, there is no issue about that at all. But I'd like to know why you say what you say about this new evidence, you better tell us some detail, what is the nature of this new evidence and how is it going to be admissible against Mr Acheson? 20 30

S.A.: My Lord, I can appreciate what the Court says but my problem is I don't want to disclose that evidence at this stage, this case being (interrupted)

COURT: You might have to, Mr Heyman, because you run the risk of having your postponement refused.

S.A.: Yes, My Lord. May I just address the Court on this issue first? As far as the accused (that is the other accused) are concerned, as I can see the act applicable for extradition, is the South African Act 67 of 1962 and in paragraph 3(ii), according to that paragraph it is not necessary that there be agreement, there can be only a diplomatic relationship between the two countries. So it is not necessary for an agreement, so it won't take so long. I can assure the Court at this stage that the Attorney General has assured me that he is endeavouring everything possible to come to some sort of an arrangement with the South African government.

10

COURT: Mustn't you lead that evidence? Mustn't I know exactly what negotiations have taken place? How far they have gone? What are the prospects of their successful maturity? You see I don't want to have a man remanded in custody on a speculative possibility.

20

S.A.: I agree with the Court, My Lord. For that proposition I'll have to ask for an adjournment to consider the matter, but before that, there is also the point, that is now as far as the accused are concerned.

COURT: Sorry, I just want to index your argument. I take it we're still on the first of your three legs, namely your wish to join the other accused?

S.A.: The accused.

COURT: We're still on that leg.

30

S.A.: Yes, but I've got the other problem that without these witnesses I can see no need for joining the accused, the other accused because without these witnesses (interrupted)

COURT: You wouldn't have a case against (interrupted)

S.A.: I wouldn't have a case. It might be, if I join one of the accused, that I have a little bit of a stronger case against this accused but if I take into consideration everything, then I think that without these witnesses from the Republic, we can have these accused, the other two accused, but I don't think the State will succeed. 10

COURT: So then can I ignore the first ground? Your first ground was you want to join the other accused.

S.A.: Yes.

COURT: Can I ignore that ground?

S.A.: My Lord, that is why I want to (interrupted)

COURT: Right, so one down. Let's come to the second one.

S.A.: Then as far as the witnesses are concerned, My Lord I can refer the Court to (interrupted)

COURT: Page?

S.A.: That is now 179 of this commentary on the Criminal Procedure Act. 20

COURT: Section 179 or page 179?

S.A.: Section 179, it is page 234, there it states "attendance in foreign courts". There is Section 7 of the foreign courts, Evidence Act 80 of 1962 applies.

COURT: Where are you reading from now?

S.A.: I'm reading from p.234, there under paragraph 179, attendance of witness in certain territories and according to that there are agreements between South Africa and a number of other countries and that is what we are trying to do, to make 30

that arrangement with the South African government.

COURT: Incidentally when must it be a foreign state? At the time of service or at the time when the man has got to appear?

S.A.: I think it is at the time of service.

COURT: Well, then you've got a valid subpoena.

S.A.: No, the subpoenas were served after independence.

COURT: After independence?

S.A.: Yes.

COURT: In all cases? 10

S.A.: Yes, as far as I recollect. It was after the (interrupted)

COURT: So what you're trying to procure is the applicability of Section 7?

S.A.: That is exactly so, My Lord. If we can't, or I mean if the governments can't come to an agreement, there is still open to the State Section 171 and Section 171 is evidence on a commission, My Lord, but for that I also need a remand.

COURT: No, but evidence on a commission would simply mean that somebody can hear the witness in a foreign country but 20 how is the witness compellable before the commission?

S.A.: That is my problem, My Lord, but I mean I've got - (interrupted)

COURT: All you're showing to me is that I can sit in Pretoria, that's not the problem, I'm willing to sit anywhere. The problem is how do you get the witness before me?

S.A.: My Lord, we've got statements from these witnesses, or at least from three of them.

COURT: I know but Col. Smit told us that they are not willing to give evidence. 30

S.A.: According to Col. Smit's evidence they are not - well, they've got a very lame excuse now. That is also, I just want to mention that to the Court, if I can get a remand, I can also try and use Section 171 because the time here, I today for the first time (interrupted)

COURT: But my difficulty is this, according to Col. Smit's evidence the witnesses are now not wanting to give evidence, they don't want to get involved. The problem is not that they don't want to come to Namibia, they just don't want to tell us anything. Now what difference would it make if you have 10 evidence on commission? How will it change their attitude that it is being heard in Pretoria or Johannesburg or Cape Town? "Maak nie saak nie". The problem is how do you get the witness before the commission.

S.A.: My Lord, for that we will also have to reach, the two governments will have to reach some sort of an agreement and (interrupted)

COURT: What agreement would compel (interrupted)

S.A.: There must be some sort of a diplomatic relationship because if I ask this Court for evidence on a commission, this 20 Court must appoint somebody in the Republic to take down the evidence.

COURT: That's fair enough but how do you get the witness to come to that commission?

S.A.: Well, I think you can, My Lord, in a (interrupted)

COURT: How? Tell me which law would compel a witness in a foreign country to come before a commission.

S.A.: My Lord, I've had some authority there that if a witness is unwilling to testify before a commission, I've only got Afrikaans authority here.

COURT: That's all right.

S.A.: That is now in the Criminal Procedure Act, HIEMSTRA, 4th Edition on p.379, it is under Section 171 and what he says here is: "Onwillige getuies. Indien die getuies in 'n vreemde land nie wil saam werk nie, hang die proses af van die mate van vriendskaplikheid en kontak wat daar tussen die Republiek en die vreemde land bestaan. Die Hof wat die bevel gee dat getuienis by 'n kommissie geneem moet word, kan daarin ook 'n bevel opnoem dat getuies gedagvaar kan word." 10

HOF: Watter Hof kan daardie bevel maak? Ek of die Hof in Suid-Afrika?

S.A.: "Die Hof wat die bevel gee dat getuienis by 'n kommissie geneem" (tussenkoms)

HOF: Ek kan nou 'n bevel maak wat 'n Suid-Afrikaanse burger verbind, dat hy moet daar gaan getuig voor 'n kommissaris?

S.A.: But My Lord, that is precisely the point, there must be some diplomatic relationship between that country and this country. All I ask from the Court is if the Court takes into consideration now that - in fact it is only today 20 that we were sure that these witnesses don't want to testify.

I received information from Col. Smit that they are a bit reluctant to come and give evidence but it is only today that I'm sure that they are not here. So I must at least get some time to approach the South African authorities.

COURT: So all your eggs are in the diplomatic basket? You've got nothing outside the basket?

S.A.: Exactly so, My Lord.

COURT: Now what does the diplomatic basket look like? Who has spoken to whom? What progress has been made? 30

S.A.: My Lord, that is a very important question, that is why I consulted with the Attorney General about that and I must ask the Court, with respect, to give me an adjournment until tomorrow for that point, to clear that point up.

COURT: That I have no difficulty with. I just want to also tell you, Mr Heyman, that you also have to satisfy me, I think, that the evidence of these witnesses is material. Now I don't think that in the circumstances of this case it is enough for you to say you assure me it is material. I've no doubt that your assurance is given bona fide, I have no doubt and I'm sure Mr Grobbelaar wouldn't contest that, but we have to assess what these witnesses would be in a position to say if your diplomatic basket yields sufficient fruit. What will they say?

S.A.: At least we have their statements, My Lord.

COURT: Yes, but what do they say? I do not know what they say. Mr Grobbelaar tried to get some idea of your case, he asked you for further particulars and all we know is that you say that Mr Acheson shot the deceased, but now what are these witnesses able to say? Are they able to say that they were in the car, in which they were passengers, in which Mr Acheson shot the deceased, or are they saying that Mr Lubowski's murder was planned at a certain date with Mr Acheson? Or are they saying that Mr Acheson at a subsequent time admitted killing Mr Lubowski? I don't know what they are in a position to say. You see I have to be satisfied that the evidence exists, that the evidence is material and that it is likely to be forthcoming. What is making my task very difficult is that you want him to be in custody, that's my problem.

S.A.: I can see that I must divulge this information,

but these witnesses will say that Mr Acheson worked for the CCB and that the CCB were interested in Lubowski.

COURT: And did they authorise, according to these witnesses, did the CCB authorise Mr Acheson to kill Mr Lubowski?

S.A.: My Lord, that I cannot say at this point.

COURT: I understand, I understand your problems.

S.A.: But My Lord, I feel that at least (interrupted)

COURT: In other words, let me understand the materiality of the evidence because if I am not satisfied on the materiality of the evidence, then the fact that you might have the witnesses¹⁰ available won't help me. So as I understand, if these witnesses can be procured, they would be in a position to say that (a) Mr Acheson was either a member of, or was working for the CCB; (b) that the CCB had an interest in the elimination of Mr Lubowski and maybe (c) that they actually authorised Mr Acheson to kill Mr Lubowski.

S.A.: Exactly, My Lord, that is the point. These witnesses will provide the motive for the killing of the deceased. That's why they are so important.

COURT: I see.

S.A.: They will provide the motive, otherwise the State is without a motive.

COURT: Now I understand the materiality of your evidence. But they're not claiming that they were at the scene of the murder?

S.A.: Yes, My Lord.

COURT: Yes means no, or yes?

S.A.: No, we are not claiming, or let me put it this way, we can't prove it.

COURT: Okay, now I understand the importance of your

evidence, at least I'm beginning to focus but Mr Heyman, I must have some (interrupted)

S.A.: Indication of what was done on diplomatic level.

My Lord, I understand this and I appreciate it and I (interrupted)

COURT: And you'd like to have the opportunity.

S.A.: That is the point.

COURT: Of course you are entitled to that, Mr Heyman, subject to what Mr Grobbelaar says. I just, while you're preparing on that aspect and subject to what Mr Grobbelaar has to say, I want you also to take the opportunity of trying to convince 10 me why Mr Acheson shouldn't get bail. The matter is one of very considerable importance. I realise that the public has an interest in the prosecution of whoever the murderer is of Mr Lubowski. If it is a matter of such importance, why can't satisfactory arrangements be made? If need be, in terms of which Mr Acheson is confined to his place of work and residence and you can put a policeman outside watching him. But why should it be beyond the capacity of the Namibian State to monitor him effectively? Without prejudging the matter in any way, Mr Heyman, I want to tell you that unless you 20 satisfy me in all these respects, I would prima facie be very reluctant to just give you a postponement of long duration with the accused in custody. It seems to offend my own sense of equity and fairness. It seems to offend expressed provisions of the Constitution which say that a person on trial must be brought reasonably to trial, and it seems to me to be unfair in all the circumstances to the Defence. So although prima facie and subject to what Mr Grobbelaar says, I think I would be inclined to give you the opportunity of clearing up the aspect of the diplomatic progress. I think 30

you should nevertheless take the opportunity on the other question as well.

S.A.: I am indebted to the Court, My Lord, for putting this proposition to me.

COURT: You know I think it is better that I put to you all my problems, so that you know how my mind is working and you can meet it. It is quite unfair for me to have reservations in my mind which I don't communicate to you and which you are not in a position to meet.

S.A.: No My Lord, I am indebted to the Court. If the Court will grant me this (interrupted)

COURT: I would also, while you're at it, Mr Heyman, also ask you to deal with this case of GERITIS which is 1966(1) of the South African Law Reports at p.753. I'd like you to deal with what His Lordship Mr Justice VIEYRA had to say in that case and I don't know whether these reports are available in the library here but in the GERITIS case there is reference to two very old English cases, one in 1764 and the other in 1848 which deal with the situation where the State is asking for a postponement. So I'd like you to look at those cases perhaps and then help me and perhaps also help me on the question of, if I am persuaded to give you a postponement at all, why no bail should be granted.

S.A.: Yes My Lord, I will (interrupted)

COURT: And although you said earlier on that you just want to discuss the postponement and then debate, that is not how I see the problem. It is one thing for you to ask for a postponement of one week or two weeks. It is quite another thing to ask the kind of postponement Col. Smit had in mind.

It would require a lot of persuasion to allow that kind of

postponement without bail. Please don't misunderstand me, I don't want you to assume that as long as bail is granted, you are going to get a postponement. It may well be that I decide, on the basis of GERITIS' case, that even with bail, there should be no postponement because you haven't shown me a reasonable prospect of getting the missing witnesses. But if I do grant a postponement, the next question will be why can't the man get bail? It may be that you may even have to get some kind of interim postponement to satisfy me on further evidence that there is a reasonable prospect but even for an interim postponement I am most loathe to keep this man in custody. 10

S.A.: I understand the Court's difficulty, My Lord.

COURT: You see the GERITIS case says that there are two principles which are relevant in a matter like this. The one is that the public interest requires that a person who has committed a murder doesn't get free because of technicalities. That's the one interest. The other is that a man is not unnecessarily punished by being waiting too long for his trial to come on and in custody. It is a question of balancing the one against the other. 20

S.A.: No, I am fully in agreement with the Court, My Lord, but with respect, it is my submission that the State must at least get a chance to try and get these witnesses here.

COURT: What is in your favour is this complication caused by the independence and the fact that this is the first Supreme Court appearance, isn't it?

S.A.: Yes My Lord, and the State can't be blamed for that. That's how I see it.

COURT: Can the accused be blamed? He has got his counsel 30

here, if you want to go on he is ready.

S.A.: With the greatest respect, this is not an ordinary case, this is a vicious murder and it is my submission that the State must get every chance to try and prove the guilt of the accused.

COURT: Or as His Lordship Mr Justice HOLMES put it: "The Criminal Law must not be denied its legitimate prey".

S.A.: Yes My Lord, justice must be seen to be done, that's how I see it.

COURT: Seen to be done for both. 10

S.A.: For both sides, not only for the accused.

COURT: You want until tomorrow?

S.A.: Yes, until tomorrow.

COURT: Will that be sufficient for you?

S.A.: My Lord, the Attorney General is a very busy person and he is usually in one or other cabinet meeting, so I must try and contact him first because it is essential that I get, but the Court is well aware that I'm in a very difficult position, I must first consult with him because he is the political head of the office. 20

COURT: Yes, I understand.

S.A.: Thank you, My Lord.

COURT: Mr Grobbelaar?

DEFENCE: My Lord, I obviously have no objection whatsoever. I can appreciate the dilemma of my Learned Friend.

COURT: Have you got any submissions to make arising from the debate I've had with Mr Heyman?

DEFENCE: My Lord, no, except that so far, with all due respect, I agree with what Your Lordship has intimated. There are certain additions, with all due respect, which I would like 30

to make at some stage or another. I feel that it would possibly be jumping the gun if I were to debate the issue or issues with Your Lordship at this particular stage. I think it is imperative, as Your Lordship has indicated, that my Learned Friend must first of all persuade Your Lordship - and this he can obviously do only by means of consultation with the Attorney General - that there is a reasonable prospect of finding these witnesses.

COURT: And that they are material.

DEFENCE: Well, the materiality we are not disputing. What obviously goes with Your Lordship's questioning is what steps were taken in order to ensure through diplomatic means or otherwise, that these witnesses attend court. As I say it is a fairly lengthy debate, as Your Lordship can appreciate but I think until that particular issue has been clarified one way or another, it would be jumping the gun if I were to address Your Lordship at this particular stage.

COURT: I just want you to jump the gun in one respect. Assume that Mr Heyman succeeds in giving a reasonable prognosis that the witnesses will become available and that they are material, is there any reason why bail shouldn't be granted?

DEFENCE: My Lord, firstly dealing with Your Lordship's first question, miracles, with all due respect, may still happen and at the end of the day my Learned Friend may still persuade Your Lordship that this is a matter in which a postponement ought to be allowed. I say miracles do happen. But on the assumption that a miracle does happen and that he has a solution or an answer, whatever the case may be, then obviously we're going to apply for bail. I mean that was the second leg of our appearance.

COURT: His application seems like a package deal, he says, when he stood up this morning he said 'I apply for a postponement with the accused in custody'.

DEFENCE: That's right, My Lord.

COURT: To me the two are related. If the man is going to be in custody, then I would be far less inclined to give the postponement than if he was freed.

DEFENCE: Quite so, My Lord. But My Lord, even on the assumption, as Your Lordship has correctly indicated, if the accused were to be released on bail, the type of postponement 10 which is envisaged in this particular case is a very lengthy one and I am not blaming my Learned Friend for that. I mean he is not responsible for the present situation, nor is he responsible for any lack of possible diplomatic contact. I don't know whether that is the case or not, I am not appreciative of what the situation is, I am no diplomat, nor any politician but I appreciate that my Learned Friend is not responsible for the present situation. It seems to me that the present situation is creating a stalemate, that is the problem and the only prospect of solution is a long time postponement. 20 There I rely on what Your Lordship said that a lengthy postponement, even with the accused out on bail, would most decisively not be in the interest of justice.

COURT: Apparently he is able to find employment here in Windhoek.

DEFENCE: That may be so, My Lord but (interrupted)

COURT: According to the evidence given in the bail (interrupted)

DEFENCE: But his resources are not unlimited, as Your Lordship is fully aware of. He has got senior counsel and junior counsel. We had to make ourselves available until the 30th 30

of April. We all believe in indulgence up to a certain extent but this is a fairly expensive exercise as Your Lordship can appreciate, and I am not so certain that the accused will be able to afford the same exercise on the next occasion because assume that the matter is now going to be postponed, what certainty is there that witnesses who are reluctant to come and testify will be otherwise persuaded on another occasion. After all My Lord, you are not dealing with inexperienced people. These gentlemen, if I understand the evidence correctly, belonged to the Brixton murder and robbery squad, I'm making no claims about their fame or absence of fame, that is not my particular function. They were also given indemnity. I'm just visualizing myself in their position. If I were to be given indemnity in a case of this nature, I would have jumped at it. Irrespective of that lure, they are still not prepared to testify. There is no procedure whatsoever, not even by way of commission, whereby they can be compelled to give evidence before a commission. So we're back at square one and as the colonel, with all due respect, I'm not submitting that he has got to take the decision, but as he very fairly conceded, whatever one does is an exercise in futility. I can carry on like this, I wouldn't like to say indefinitely My Lord, but I'm just giving a few of my thoughts.

COURT: On the other hand if these witnesses did become available in the meantime, the accused has been found not guilty, it will be a miscarriage of justice.

DEFENCE: But that is the point, My Lord. I can argue against the materiality of (interrupted)

COURT: You know you've pleaded already in the Magistrate's

Court.

DEFENCE: My Lord, that is not binding. There is Appellate Division authority on that particular score, unfortunately I haven't got the case with me but I recently had to give an opinion. There is Appellate Division authority on that particular score. The plea, I think it is a different section, I'm speaking subject to correction. It refers to Section 122 or 119 procedures. That isn't binding on the Supreme Court proceedings and that is not regarded as a plea as we understand it, for the purposes of this Court. 10

COURT: You mean that he can still be charged again?

DEFENCE: Oh yes, My Lord. The case was given during the course of last year or this year, unfortunately I haven't got it with me. But the plea he gave there he is not binding, binding from the point of view that a judgment must be given today, well assuming that the State closes its case, that he is entitled to a verdict.

COURT: Not?

DEFENCE: No. My Lord can accept my word for that, it is an Appellate Division authority. 20

COURT: Of course. Is that binding on me?

DEFENCE: Well, the Criminal Procedure and Evidence Act is still applicable in this country, Act 51 of 1977.

COURT: Yes, but the interpretation of it (interrupted)

DEFENCE: Well, then I accept that (interrupted)

COURT: I don't know, I'll have to look at the authority. What do you say about that Mr Heyman? That's rather an important point.

S.A.: My Lord, I think the case is S v SWANEPOEL, I am speaking under correction but it was decided in that case 30

that a plea in the Magistrate's Court is only an administrative plea. It is not a plea in the true sense of the word and that an Attorney General can withdraw the case after that plea and charge the accused again.

COURT: So you both agree that that is the law?

S.A.: Yes, I am aware of that authority.

COURT: So if I refused a postponement, you can still charge him.

S.A.: I can withdraw the case and I can charge him again.

COURT: That is SWANEPOEL, do you think?

10

S.A.: I think it is SWANEPOEL, My Lord, but it is not last year, it is 4 - 5 years back.

COURT: I'll have a look at that; that may be quite useful. Would 10 o'clock tomorrow be convenient for counsel?

S.A.: My Lord, may I please ask the Court with respect, I want to consult with the Attorney General first. I don't know when I will be able to be in contact with him.

COURT: I know the National Assembly is in session today.

S.A.: Yes, that is my problem, I was unable to see him at all yesterday because he was in a cabinet meeting the whole time. Now if the Court will grant me this adjournment and say that as soon as I'm ready, I'll contact my Learned Friend and I'll contact the court. Otherwise we ask for an adjournment until tomorrow and tomorrow I'm not ready. The accused is in custody now and I hope in the next two days I will be able to sort this thing out.

20

COURT: If it is longer than Friday, you'll have to make a substantive application.

S.A.: Yes. No, I am in agreement with the Court there. I can see (interrupted)

30

COURT: You'll have to come back to me and say I need more time and this is the reason why I need it.

S.A.: Yes, I agree.

COURT: Because the man is still in custody, every minute he is in custody.

S.A.: Yes, My Lord. I am in agreement with the Court there.

COURT: Well, then as soon as you are ready and perhaps you can discuss the matter with Mr Grobbelaar, whatever information you have and exchange notes and (interrupted)

S.A.: Yes, we will certainly do that, My Lord. 10

COURT: Then you can just let the Registrar or my clerk know when you require me to sit again.

COURT ADJOURNS

ON RESUMPTION - 19/4/90

S.A.: With respect My Lord, I request a formal postponement of the trial to tomorrow. By tomorrow at 10 o'clock I will be ready to present my argument on the question of further (voice fades).

COURT: What further evidence do you propose leading?

S.A.: I don't propose leading any further evidence. 20

COURT: But are you proposing to give me no further facts on the issue as to the state of the diplomatic negotiations?

S.A.: No, I will, I hope I will be able to give Your Lordship some further facts on the issue of the witnesses.

COURT: What is the reason that you are not ready now to present your argument? Is it that you are awaiting certain facts, or are you awaiting further information?

S.A.: Yes, there are just a few things that I want to tie up before I present my argument to the Court.

COURT: Is it just a question of preparing legal argument? 30

S.A.: Well, mostly My Lord.

COURT: But didn't you expect to be prepared yesterday?

S.A.: My Lord with respect, I was sort of under the impression that in principle I was granted a remand until tomorrow and that this will just be, because it wasn't expressly stated in court yesterday and the accused must be remanded to a specific date.

COURT: Yes, that is perfectly true. I may have misunderstood the situation yesterday. My impression was that the postponement you required was in order to enable you to give me 10 further information or evidence pertaining to the state of the diplomatic negotiations.

S.A.: That is exactly so, My Lord.

COURT: That is not what you now require a postponement for. What you now require a postponement for is not in order to ascertain the state of the diplomatic negotiations, but rather to prepare argument.

S.A.: Yes, My Lord, and as well as to give Your Lordship further information as far as diplomatic relations.

COURT: Further information? 20

S.A.: Yes.

COURT: Not evidence?

S.A.: No further evidence, My Lord.

COURT: But how will Mr Grobbelaar test your information?

S.A.: Well My Lord, I will abide by the ruling of the Court after I've presented my argument.

COURT: Yes, I see. Is the information that you are going to give to me, is that information not available now?

S.A.: It is available, My Lord.

COURT: But you just want to prepare argument? 30

S.A.: That is so, My Lord.

COURT: What is your attitude, Mr Grobbelaar?

DEFENCE: My Learned Friend presented his problem to me this morning. Apparently he only had a consultation with the particular individual involved in the course of the morning, this is what I understood, and he explained his difficulties to me. I appreciate his difficulties and we obviously have no objection, My Lord. I mean we're still bound by your ruling but I appreciate his difficulties.

COURT: Yes, I understand.

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DEFENCE: Thank you, My Lord.

COURT: I don't know what information is going to be forthcoming. I have not made any firm view in my own mind as to what I will eventually do, it would depend on the information, it would depend on what argument you present, it would depend on submissions but I would like counsel tomorrow to be prepared on four issues, if possible.

S.A.: My Lord, with the greatest respect, if the Court will just give me a short adjournment, I can proceed with my arguments.

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COURT: No, no, I don't want you to please do anything that you feel pressured to do, it is an important matter from the point of view of the State, I realise that. You can present argument whenever you are ready, don't feel under any pressure at all. If you're ready this afternoon it is fine, if you're ready tomorrow morning, it is also fine, you just let me know. But what I'm trying to say to both counsel is that I would like, if possible, to have argument on all relevant issues so that I don't give piecemeal judgments. Not so much that it is convenient for me, but it may be unfair to the

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accused if I have to give piecemeal judgments. Theoretically there are various options open. The first option is simply to exceed to your application for postponement of this matter for a substantial period of time with the accused in custody, that's one option. The second option is to postpone this matter for a substantial period of time and give bail to the accused. The third option is to postpone it only for a short period of two or three weeks in order to enable you to bring fuller evidence as to the real prospects of diplomatic success, and the accused in custody in the meanwhile, and if at the end of that short period you are unable to present better evidence, you might have to bite the bullet. The fourth option is to postpone the matter for a short period, for the same purpose, but give the accused bail in the meantime, and the fifth option is simply to refuse the postponement and force you then to elect whether you want to go on with the trial now, or whether you want to abandon the case against the accused. Those are the five options, and I would like argument as to these options, which is the most expedient course that I should adopt. If I were to take the first option and give you a long postponement with the accused in custody, then bail conditions become irrelevant. If I follow the last option and I simply refuse the postponement and you elect to withdraw, then also bail conditions become irrelevant. But if I postpone the matter for a long time with bail, or I postpone the matter for a short time with bail, I would like to hear you on the issue of why you think the accused shouldn't get bail. I would like to hear you about the conditions of bail, I would like to hear you about the quantum of bail, I would like to hear you on the issue as to how often

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he should report and that sort of thing. But I don't want to put the accused possibly in the disadvantageous position of first hearing you on the postponement and then having an adjournment, and then hearing you on the bail. I am concerned, as I've tried to make very clear yesterday, that this man is in custody and his guilt has not been proved or established. The purpose of keeping a man in custody is not punishment, and I think Mr Heyman, I owe it to you to make it clear to you that I would be very unhappy to grant any long postponement with this man in custody. You'll have to persuade me that 10 that is a course which the interest of justice absolutely requires. On the other hand I appreciate that you had independence recently, that you haven't established the formal channels of diplomatic negotiations, that you haven't finalised agreements, that we are dealing with an extraordinary state of a nation in transition. I appreciate those problems, but I cannot be blind to the fact that the overwhelming constitutional value is the liberty of the subject. A man cannot be incarcerated for a long period of time without bail until his guilt is proved. I therefore have to weigh on the one 20 hand that the public interest requires that if a man may be guilty that he doesn't escape, but on the other hand the liberty of the individual is fundamental. He is entitled to an expeditious trial. Now I'm putting my problems to you so that you can understand the kind of argument and the matters which I would require tomorrow to be satisfied on. I hope that my problems have been made clear to you, if they are not, I would welcome you debating it with me, so that we know what to expect, tomorrow or whenever you are ready. I regard this as a matter of great importance. Both counsel 30

are quite free to debate with me now any uncertainties as to what is the kind of argument about which I'm anxious to hear counsel tomorrow. I would appreciate anything that is not clear, but I want full argument on all these matters.

S.A.: With respect My Lord, I must again say I am indebted to the Court for putting these problems to us, and I think the Court has made itself quite clear on what is expected from us.

COURT: Thank you. Thank you, Mr Heyman, I am indebted to you for being of such assistance to me. Mr Grobbelaar? 10

DEFENCE: I have no problems, thank you My Lord.

COURT: Thank you. I think that seeing it is a criminal trial, Mr Heyman, it would be desirable to postpone it to a fixed time.

S.A.: 10 o'clock tomorrow.

COURT: Unless you're ready earlier. Do you think there is any point in me postponing it to 2 o'clock this afternoon? If not, please don't feel under any pressure. I know it is a matter of great importance for the State, I'm just enquiring.

S.A.: I will suggest a postponement until tomorrow at 10 o'clock. 20

COURT: Very well. Is that (interrupted)

DEFENCE: I have no problems, thank you My Lord.

COURT: I was just wondering about the convenience to you, Mr Oosthuizen. Are you planning to go back to Pretoria over the weekend?

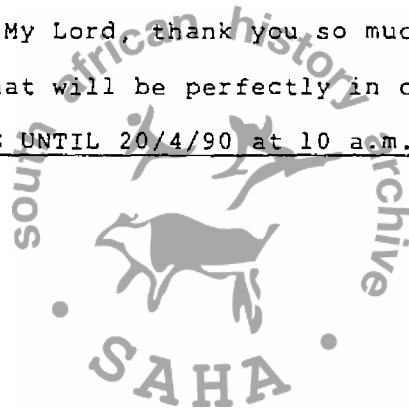
DEFENCE: My Lord, firstly I'm used to hardship, not that I'm suggesting that Your Lordship is responsible for it but as Your Lordship is fully appreciative, this matter has been enrolled until the 30th. With all due respect, that doesn't mean 30

that I'd like to stay here until the 30th, but we've made arrangements that if possible we can stay over until next week. If possible we would obviously like to avoid it but we're in the hands of Your Lordship. I say I can appreciate the dilemma of my Learned Friend and if Your Lordship were to feel that 10 o'clock tomorrow morning would be in order, it would be perfectly suitable to us.

COURT: I am just concerned with your convenience, Mr Oosthuizen, Mr Grobbelaar. You know it may be that if I hear argument at 10 o'clock that I may not be in a position to give judgment until Monday morning, and I was just wondering whether that would inconvenience you terribly?

DEFENCE: No, My Lord, thank you so much. I appreciate your concern but that will be perfectly in order.

COURT ADJOURNS UNTIL 20/4/90 at 10 a.m.



ON RESUMPTION - 20/4/90:

S.A.: May it please the Court, My Lord, as far as the diplomatic relations between this government and the South African government are concerned, I wish to state to the Court that there is already a draft agreement under consideration, and that we hope that finality can be reached in about 6 weeks' time. For that reason I will apply for a postponement of this trial for 6 weeks.

My Lord, further to this issue I want to hand to the Court a statement by the State President of South Africa, Mr F.W. De Klerk, and I want to refer the Court to page 10 of this, it is in Afrikaans but I will hand it in as an exhibit. The point that I want to stress is that the State President of South Africa in this statement says:

"Intussen gee ek opdrag dat daar ten nouste met die owerhede in Namibië saamgewerk moet word om te verseker dat die reg aldaar sy gang gaan en geregtigheid geskied."

I'll hand this in as EXHIBIT H, My Lord.

COURT: Is this during the independence celebrations?

S.A.: Yes, My Lord. As the Court is aware, diplomatic arrangements between two countries are always a very delicate issue and I will take the matter no further as far as this issue is concerned and I will abide by whatever the Court's decision will be on this issue.

As far as the authorities are concerned, I've made a study of this case of GERITIS to which the Court has referred me. I've also have a copy of the English judgment, the one English judgment that it refers to I can't find anything in that judgment of importance. The other judgment is more

or less on the same principles as the GERITIS case. My Lord the important point here is that the Court stressed in this case of R v D'EON (interrupted)

COURT: R versus?

S.A.: D'EON, the English case, My Lord.

COURT: Oh yes.

S.A.: The witnesses must be essential, their evidence must be essential, that is the first point. The other one is that the Court must look at the possibility that these witnesses will come and give evidence at a later stage, and the Court must also look at the crime. Now in GERITIS case it seems to me, it is not clear but it seems to me that it was a case of fraud or something like that.

COURT: Yes, it is fraud.

S.A.: Fraud. There in GERITIS case it is especially stated that the nature of the charge must be taken into account, there must, i.e. now GERITIS case but that is more or less the same as the English case, it is based on that, there must be a reasonable expectation that a witness would attend at a later date, the evidence must be material. But My Lord, in both these cases there is a very important issue, and that is that there was neglect on the part of the State, and in this present application, if I might say so My Lord, there is no neglect on the part of the State. What happened here is that only on Wednesday, when this trial started, there was confirmation that these witnesses did not want to come to court, these witnesses from the Republic, South Africa. With respect My Lord, I can't think of anything that the Namibian government could have done before Wednesday, or that the State could have done. The State sent Col. Jumbo Smit to

the Republic with these subpoenas, he personally handed them to the witnesses, and what more could the State have done? All I require from the Court is to give the State a chance to try and get these witnesses to come and testify through diplomatic channels or perhaps by some other means. I haven't consulted with these witnesses, and I am inclined to, if the Court grants me a remand, to personally go and consult with these witnesses. But the State has never had the chance to try anything, and that is the most important issue for me in this case, that there was no neglect on the part of the State, and that the State must, and I say it with respect, we can't prejudge the issue and say no, these witnesses, there will never be an agreement, that is speculation. I ask you with respect that the Court must give the State a chance to try and get these witnesses here. It is like a golden thread through all these decided cases, the neglect on the part of the State, and I think that is a very important aspect of all these cases.

With respect My Lord, to speculate now, will the State be able to compel these witnesses to come to this court, is not quite right. The State did not have the opportunity to try and compel these witnesses to come to court, and there is machinery to do that. This is a murder charge, it is not fraud or something like that and it is a very serious murder charge, and I'm of the opinion that the State must at least try everything possible to proceed with this trial. For that reason I ask for a postponement of this case for 6 weeks. It is not a very short adjournment, it is also not a very long adjournment. I also ask that the accused be kept in custody but (interrupted)

COURT: You're going to have a lot of difficulty with that, Mr Heyman.

S.A.: As far as the bail application is concerned, that rests on the Defence to bring that application and then I'll answer to that. I think the Court must decide these two -
(interrupted)

COURT: You know there was an application made for bail.

S.A.: But I think the Court must decide these two issues together, the Court can't just decide first I will give a remand and then later on the bail. So this must be decided together. 10

COURT: Exactly. What is your attitude on the bail question?

S.A. My Lord, I've got a technical problem here. Bail was refused in the Magistrate's Court, there was an appeal against the bail here in this court. It is not clear from the act if the Court can now (interrupted).

COURT: Why not? Just because the Court at one stage said that bail is not indicated, does it mean for ever it is protruded from considering the position again?

S.A.: No My Lord, there must be some new evidence. 20

COURT: Well, the new evidence is that you want to wait for 6 weeks, that's the new evidence, and we don't know at the end of the 6 weeks whether your witnesses are going to come at all. That's the new evidence. What more is Mr Grobbelaar supposed to put up?

S.A.: My Lord, throughout the Magistrate's Court proceedings and the Supreme Court proceedings the main reason for not granting bail was the accused will not stand his trial.

COURT: I understand (interrupted)

S.A.: And I can't see any new evidence around that issue. 30

COURT: It was inherent in that that the trial would be completed expeditiously. Now for no fault of the accused at all, he is willing to go on now with the trial, for no fault of the accused you want another 6 weeks. Why is that not new evidence as to the prejudice to him? You're not asking for a week or so, you're asking for 6 weeks, the man has been in custody for 7 months and 7 days, or something of that sort. Now you want another 6 weeks.

S.A.: My Lord, I can see that the Court feels strongly about this issue, I myself feel strongly about it. I think, 10 keeping that in mind, I will concede to bail.

COURT: Subject to very stringent conditions, I mean it is for you to put a policeman outside his house, if you feel strongly enough but I am most (interrupted)

S.A.: No My Lord, I will concede to bail, I think in the amount offered in the Magistrate's Court, R10 000 and certain conditions.

COURT: Well, I'll hear you again on that aspect. Have you finished on the other aspect of a postponement?

S.A.: Yes, My Lord, my application is this (interrupted)

COURT: I don't want to interrupt you.

S.A.: 6 weeks, I will concede to bail of R10 000, I think that (interrupted)

COURT: We can talk about that, but you know I still want to get some clarity on why you need 6 weeks.

S.A.: My Lord, the State must, my point is this, the government of this country couldn't have done anything before last Wednesday and at least we must give the State and the government a chance to arrange for some extradition treaties.

COURT: But why, Mr Heyman? Let me take up your own 30

argument. When you argued this originally, you referred me to certain provisions in terms of which an extradition agreement was not necessary in order to procure the attendance of a witness. You referred me to Section 3(2) of the Extradition Act first of all, you referred me to that and you said that this permitted a State to take action notwithstanding the fact that an extradition agreement hadn't been completed. You also referred me to the possibility of a commission being issued and so forth. What I want to know is why have you not taken any of those steps, even since you heard on Wednesday, why have you not told me, or produced evidence that you've contacted the South African State, that in terms of some ad hoc agreement pertaining to this matter, not a general extradition agreement, they are prepared to co-operate, why haven't you done any of that?

S.A.: My Lord with the greatest of respect, the Court's main problem, as I saw it, was that the man is in custody. Now I've conceded to bail now. I don't ask for a long adjournment, I ask for 6 weeks.

COURT: It is one thing, if you give bail, you remove part of my problem but you haven't relieved the whole of my problem. I still have to be satisfied that there is a reasonable prospect that these witnesses are going to be available. Now in order for me to be satisfied in that regard, I would like to know what steps you are taking, other than the conclusion of a general extradition agreement, to find out whether you can't bring him to trial earlier?

S.A.: My Lord, I was waiting for this remand. It was only Wednesday, this must be done through diplomatic channels. It is not so easy (interrupted)

COURT: Why can't there be an urgent telephone call between the two foreign ministers or the presidents? You know I've got to start with a basic constitutional guarantee in the constitution which says that, I think it is an article which says that every person has a fundamental right to be expeditiously tried. A trial must take place within a reasonable time in which the accused shall be released, i.e. 12(1)(b) of the constitution. Now the constitution is the fundamental document which represents the spirit and the aspirations of the new Namibian nation. I have got to let it preside over me as a kind of overhanging spirit, not so? Let me put to you the problems that I have. I'm not saying that you may not be right, I just want to put to you my difficulties. Section 33 of the Supreme Act which still applies, the South African Supreme Court Act says that if you apply for a commission, the Court can give you an order, this Court and then that can be sent to the South African State and if the minister recommends it, the South African Court can call service of the summons to be affected in terms of Rule 33(2). Why can't that kind of procedure be considered? Why must I wait for 6 weeks? The extradition agreement would deal with the matter generally. What I want to know is why can't specific arrangements be made in regard to this matter, why must it wait for 6 weeks?

S.A.: Well My Lord, if that's how the Court sees this section, then I will immediately make an application.

COURT: I am not asking you to make any application, it is not for me to ask you.

S.A.: Or a request but I was under the impression that must also be done through diplomatic channels.

COURT: Have you got Section 33?

S.A.: I have it before me.

COURT: Well, let's have a look at it. It says:

"Whenever a commission rogatoire or letter of request received from any State or territory or court outside the Republic, is transmitted to the registrar of a provincial or local division by the Secretary of Justice, together with a translation in English or Afrikaans,... and an intimation that the Minister considers it desirable 10 that effect should be given thereto without requiring an application to be made to such division by the agents, if any, of the parties to the action or matter, the registrar shall submit the same to a judge in chambers in order to give effect to such commission rogatoire or letter of request."

Then subsection 33(2) says:

"Whenever a request for the service on a person in the Republic of any civil process or citation received from a State territory or court outside 20 the Republic, is transmitted to the registrar of a provincial or local division by the Secretary for Justice, together with a translation in English or Afrikaans if the original is in any other language, and an intimation that the Minister considers it desirable that effect should be given thereto, the registrar shall cause service of the said process or citation to be effected in accordance with the rules of court..."

Now I don't know, I mean it is not for me to say whether this 30

section applies or not, but what consideration has been to any of these problems? You can't just say we need a general extradition agreement.

S.A.: Well, that is one of the points we are considering, My Lord, this specific section.

COURT: That is not what you said to me you are considering. All you said to me is you want 6 weeks because you are going to take 6 weeks to conclude an extradition agreement. Why can't some evidence be produced to me earlier that the two governments are in contact on this very issue, that agreements ad hoc pertaining to this issue are likely to be concluded, that witnesses are therefore, there is a reasonable possibility that these witnesses will be here? Mustn't I have something more than just a statement to the effect that an extradition agreement will take 6 weeks? You say you are considering it, but it is only when I asked you that, otherwise all you want is a straight 6 weeks.

S.A.: Well My Lord, if the Court will give me a shorter adjournment I abide by it. I ask for 6 weeks.

COURT: Mr Heyman, I want counsel to help me with propositions which can enable me to exercise a judicial discretion. You haven't referred me to any of these sections, you haven't referred me to any authorities and I've been looking up, hoping that I would get, would be able to debate with you various cases. There is the case of SEGAL v SEGAL, 1949(4) of the South African Law Reports at p.86 which suggests that this Court can make some kind of order and then leave it to the South African authorities to make enforceable in terms of their own law. I don't know whether this is confined to civil process, or whether it would

include criminal process. You also know that according to HIEMSTRA in his book on p.379 he suggests that where there is a friendly state, this can be done but I need assistance in all this regard. I can't just act on the basis that you are going to conclude an extradition agreement, that will take 6 weeks and I must just postpone the matter for 6 weeks. I want more assistance in this regard. You see I was hoping that you people will be able to help me as to why a long postponement is necessary. You know what HIEMSTRA said, you yourself referred to it at some point, dealing with Section 171 of the Criminal Procedure Act where he said that:

"Indien die getuies in die vreemde land nie wil saamwerk nie, hang die proses af van die mate van vriendskaplikheid en kontak wat daar tussen die Republiek en die vreemde lande bestaan en tussen lande wat voorheen mede-lede van die Britse Statebond was, sodanig bygestaan."

Then he refers to Section 33 of the Supreme Court Act and he says:

"Dit is 'n proses waarmee langs diplomatieke weg die regering van die vreemde land deur middel van sy Departement van Buitelandse Sake genader word. Die proses is primêr van privaat regtelike gedinge bedoel, maar sal waarskynlik ook vir strafsake beskikbaar wees onderworpe aan kwalifikasies in verband met politieke aanklagte."

There are various suggestions about this. What I would have thought, when we had the adjournment on Wednesday, is that

you would take the opportunity to bring some information to me as to which of these alternatives have been considered, as to who on behalf of the Namibian State has approached somebody on behalf of the South African State, as to what the response of the South African State prima facie has been, I was hoping for something like that.

S.A.: Well My Lord, what I can do is to approach the Attorney General and ask him to act on this.

COURT: Well, didn't you do that since Wednesday?

S.A.: That is exactly what I did. 10

COURT: Well, what has he done?

S.A.: I asked him to do that and he is busy with it, that's all I can state.

COURT: He is what?

S.A.: He is busy with it, that's all I can say. I've approached him yesterday.

COURT: What does "busy with it" mean? Has he been in touch (interrupted).

S.A.: He is trying to work according to this section, My Lord, to make a request. 20

COURT: Which section?

S.A.: I haven't asked him today what has he done.

COURT: You see my difficulty, Mr Heyman, is to be satisfied that there is a reasonable prospect that these witnesses will be forthcoming. How do I get satisfied with a statement to the effect that you are busy? I'm having real problems.

S.A.: That is as far as I can take the matter. I approached the authorities and the Attorney General is aware of this section and the Attorney General is busy with it but that was only yesterday that I approached him. 30

COURT: You mean there hasn't been much time for the Attorney General to do anything about it?

S.A.: He is busy all the time, in cabinet meetings and sessions of parliament.

COURT: There are various factors in your favour as well. As you say until Wednesday you had no clarity that the men definitely won't pitch up. There is the complication that your process has been aborted by the independence of Namibia, and there is, as you've pointed out, a clear statement by the South African State President that his wish is to continue the kind of relationship which is appropriate to friendly states and which is conducive to the committee of nations, and I suppose that one must accept that a friendly state wishing to keep fruitful relations with its neighbour, will not likely avoid its duty to assist the judicial process. I suppose all that is in your favour.

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S.A.: Yes My Lord, but the most important point is now that I have conceded to bail, the man is no longer in custody.

COURT: Mr Heyman, if you hadn't conceded bail, I wouldn't have (interrupted)

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S.A.: My Lord, I was under the impression that it is very important to the Court.

COURT: Oh yes, it is precisely because bail is being granted that I'm having the kind of debate that I am now having.

S.A.: My Lord, I can't take the matter any further. All I can request is as there was no neglect on the part of the State, that the State be at least given a chance to try and get these witnesses here and that we don't speculate about the outcome, because the important point is this that only on Wednesday, the 18th, when this trial started,

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the State in this court was finally aware that these witnesses did not want to come, then there was confirmation.

COURT: To give an encore to your argument is not to augment your argument, Mr Heyman.

S.A.: Thank you, My Lord.

COURT: Just wait a minute, Mr Heyman, I want to ask you something else. Accepting that you haven't really had much of an opportunity of pursuing this matter since Wednesday, and accepting that the Attorney General has only been approached for the first time yesterday to initiate the diplomatic processes, wouldn't the correct approach be for you to be given an opportunity only to explain within a reasonable time what he has done, and whether or not, having regard to what he has done, there is a reasonable prospect of these witnesses coming forth? In other words, the opportunity that you need and the opportunity which you are entitled to perhaps, is not the opportunity for an extradition agreement to be concluded, but for an opportunity to persuade the Court that steps have been taken which yield the reasonable possibility that these witnesses will be forthcoming. Do you see the difference between the two opportunities? Isn't that all you would be entitled to? Something like 2 or 3 weeks?

S.A.: Well My Lord, I will abide by that but I can't the matter (interrupted).

COURT: You obviously have to, abide by any judgment of the Court, I don't need your concern to confer jurisdiction on the Court. What I need is your assistance to enable me to understand how I should exercise my discretion.

S.A.: Well, My Lord, if the Court is of the opinion, say at least 4 weeks.

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COURT: No, why? I mean how long does it take for Mr Ruppel in these days of technology and fax machines? To use telephone calls, to use fax machines, to fly over, if necessary, in order to put me in the position where I can fairly and honestly conclude that there is a reasonable prospect of these witnesses becoming available? How long does that take?

S.A.: I think then 3 weeks might be enough. If the Court would give me a postponement for 3 weeks, I'll be happy.

COURT: With bail?

S.A.: With bail.

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COURT: Thank you, Mr Heyman.

DEFENCE: My Lord, I would like to preface my remarks by pointing out the salient issue, i.e. the onus is on the State who is applying for a postponement in this matter to convince Your Lordship that there is a reasonable prospect of these witnesses attending court. The mere fact that the question of bail has been left dangling in front of us, with all due respect, isn't going to affect my approach at all, My Lord. I have endeavoured to compile some heads of argument, it doesn't obviously compose my entire argument, as Your Lordship can appreciate. May I ask for permission to hand it up, My Lord?

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COURT: I am indebted to you.

DEFENCE: As I say it doesn't cover every aspect as Your Lordship can obviously appreciate. I am going to try and conduct as full an argument as possible, and during the course of my argument I will also incorporate in my argument the new facts which have been brought to Your Lordship. I say facts with a question mark behind the word "facts?" but I'll revert to that issue at a later stage.

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DEFENCE: Having regard then, My Lord, first of all to the aspect, as I say that the onus is on the State to convince Your Lordship that there is reasonable cause for postponing this matter. My heads of argument read as follows: In the application for the adjournment of criminal proceedings are governed by the provisions of Section 168 of Act No. 51 of 1977, namely a Court before which criminal proceedings are pending, may from time to time during such proceedings, if the Court deems it necessary or expedient, adjourn the proceedings to any date on the terms which the Court may seem proper and which are not inconsistent with any provision of this act. The decision as to whether to adjourn the proceedings is in the discretion of the Court. Two basic principles should guide a Court in considering an application for adjournment, namely:

(a) it is in the interest of society that a guilty person should not evade conviction by reason of an oversight, or because of a mistake that can be remedied;

(b) that an accused person, deemed to be innocent, is entitled, once indicted, to be tried with expedition.

My Lord, I then refer to HIEMSTRA. Your Lordship has seen HIEMSTRA, I've also referred Your Lordship to DU TOIT, to the relevant section, and then the important case, the case of S v GERITIS. As Your Lordship will observe I quoted from this particular case fairly freely. These principles have been further propounded in two English cases in which certain desiderata in matters of this sort were prescribed, namely R v LE CHEVALIER D'EON, 3 Burr 1513; 97 E.R. 955, the King's Bench Division in the year 1764 and THE QUEEN v MITCHELL, reported in Vol. 111 of Cox's Criminal Law Cases (1848).

DEFENCE: Now My Lord, I must really ask your forgiveness here. Unfortunately I was only apprised on last Thursday that this application was going to be lodged, as Your Lordship will see from my heads of argument as I carry on. My Learned Friend 'phoned me last Thursday and he told me that these witnesses were not coming to testify. Well, obviously he had to wait for confirmation until Wednesday. Unfortunately here I didn't have access to these authorities but I accept for the purposes of my argument that they are correctly reported and I think that the salient aspects, in any case My Lord, don't take the matter very much further. In the former case the Court referred to certain requirements as being essential before such an application could be granted in the following language. It is necessary therefore in such a case as this first to satisfy the Court the persons are material witnesses, secondly to show that the party applying has been guilty of no laches or neglect in omitting to apply to them the endeavour to procure their attendance, and thirdly to satisfy the Court there is a reasonable expectation of his being able to procure their attendance at a future time to which he prays the trial to be put. Your Lordship has canvassed this point, with all due respect, time and again. I am reverting to this particular issue at some stage or another during the course of my argument.

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In applying the desiderata laid down in the above cases, VIEYRA, J. propounded the following principles on p.755 B to D. It would seem according to these cases that in order to obtain a postponement, all three points mentioned should be satisfactorily answered. Although I accept them as being of great importance, I do not think that this must

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necessarily be so. No doubt it is a sine qua non that the evidence be material, but assuming there has been neglect in procuring the attendance of a witness - I am also reverting to this issue - the Court, it seems to me, might nevertheless grant a postponement if satisfied that there was a reasonable expectation that the witness would attend at a later date. I think that the Court would also take into consideration whether the accused is on bail, how long the prosecution has been pending and the period of the postponement that has been requested. There are instances where there has
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been no neglect and yet the witness does not attend on the date of trial. A short postponement might then well be granted to enable to investigations to be made as to the cause for the absence. Then again I venture to suggest that the nature of the charge must be taken into account. Thus there is a difference between a murder charge and one of theft or of fraud, that is readily conceded, I mean it speaks for itself. It is accepted for the purposes of our address that the four witnesses, namely W.B. Knox (witness no. 9), Ferdinand Barnard (witness no. 11), Abram Van Zyl, alias
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Slang (witness no. 16) and Carl Botha (witness no. 17) are vital to the State's case and are therefore material witnesses. I cannot dispute that particular issue at all. It would be foolish for me to endeavour to persuade Your Lordship to the contrary. With regard to the question whether the State has been guilty of neglect in endeavouring to procure their attendance as witnesses, the matter is open for debate. My Lord, after the announcements made by my Learned Friend, it is open for even more debate and greater debate than I possibly anticipated but I'll revert to that
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issue at a subsequent stage. I'm referring here again to the case of R v CHEVALIER D'EON. It must be assumed that the State case was fully investigated and ready for trial not later than 25 January 1990. My Lord that, with all due respect, is common cause. That, with all due respect, is not in dispute. Your Lordship is in possession of a letter written by the then Attorney General, Mr E. Pretorius, to the Chief Magistrate of Windhoek, dated 25 February 1990, indicating inter alia, the date of trial, the procedural steps which had to be taken and all the rest of it. I, for one, with all due respect, cannot accept that any responsible Attorney General (and I accept that any Attorney General of this particular State is a responsible person) would lightly have taken a decision to prosecute an accused person unless the case had been fully canvassed and fully investigated on that particular date. That I accept unreservedly, with all due respect, and subject to your ruling, I am not debating that particular issue any further. 10

The State must firstly convince the Court that timeous and adequate steps were taken by the relevant authorities in order to ensure that the above witnesses are in attendance at court, and this is one of the kernel issues in this particular matter. Serious doubts exist as to whether such steps were taken by the State. My Lord, I'm reverting to this issue again. Very serious doubts exist as to whether the State can prove that there is any expectation whatsoever, reasonable or tenuous, that the witnesses will attend on the future date. The above witnesses are all experienced, former South African police officers of the Brixton murder and robbery squad. As I've indicated 20 30

on a previous occasion, I am not here to debate the Brixton murder and robbery squad. These gentlemen, because of their duties, have a fair knowledge of murder trials, the implications of murder trials and all the pros and cons associated with such trials. They are not ordinary laymen. As opposed to ordinary laymen, they are fully au fait with the pros and cons and the implications of giving evidence, the relevance of evidence, the knowledge of what implications are hidden in being subpoenaed to attend a court, being subpoenaed to attend a court possibly in a foreign country. I am not using the term "foreign country" in a derogatory sense but it is a matter of fact. It is common cause that the above witnesses were given an indemnity against any possible prosecution by the Attorney General of Namibia. Here the first problem starts with the State case. When was that indemnity given? Why was that indemnity given? Because the Attorney General at that stage already anticipated that there were going to be problems securing the attendance of these witnesses.

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COURT: Not necessarily. He might have thought that they will come here and then refuse to give evidence.

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DEFENCE: No, I appreciate it. This factor, standing alone, I concede isn't necessarily indicative of that, but Your Lordship must also (and I'm coming to that particular factor) have regard to the evidence of Col. Smit, the chief investigating-officer in this case, a very experienced police officer. And what was his evidence after questioning by Your Lordship? That already prior to the independence of Namibia, problems had been visualised in securing the attendance of these witnesses. If Your Lordship joins that up

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with this particular factor, then it is not only a question of one fact emerging, it becomes like circumstantial evidence, and I'm not stopping at this particular issue. I'll canvass further points as my argument progresses. But this, with all due respect, is a very, very important point. I carry on to say (interrupted).

COURT: Mr Heyman occupies a very senior position in this country, and he assures me that the first time that he was definitely informed that these witnesses were not going to be available was Wednesday. I've got to accept his (inter= 10 rupted).

DEFENCE: My Lord, that I accept.

COURT: I've got to accept his assurance.

DEFENCE: My Lord, I hope that I'm not giving any wrong impression. As far as the integrity of my Learned Friend is concerned, I've known him for a fairly lengthy period of time. It has never been in doubt, as far as I am concerned, and I accept his word unreservedly, but if Your Lordship were to look at the statement made by my Learned Friend, he said the following: it was only on Wednesday that we 20 definitely knew that the people were not going to be here, and we only definitely knew on Wednesday that they were not going to be here because that was the day which they had to attend court. Their absence is concrete proof that they are not coming, but my Learned Friend already 'phoned me last Thursday, saying to me that there is a strong probability that these - as a matter of fact I was given to understand they were not coming.

COURT: Is that common cause, Mr Heyman?

S.A.: That is common cause, My Lord.

DEFENCE: My Lord please, I'm not mentioning this in order to cast any doubts on my Learned Friend's integrity. I repeat he made it very clear that it was purely because of the confirmation which he received on Wednesday when these people didn't turn up in the flesh, that (interrupted).

COURT: What do you suggest he could have done between Thursday of last week and Wednesday of this week?

DEFENCE: No, no, my Lord, the question is what could have been done since the date, we don't know what date is in issue here, when indemnity was given to the witnesses. We would also like to know what steps were taken from 25 January 1990 until today in order to ensure the presence of these witnesses. Not accused people, My Lord, witnesses and there is a vast difference between accused people and witnesses. Your Lordship is fully aware, I'll come to the relevant sections at some stage or another, but that information is shining in its absence, and that is the knitty gritty in this particular case.

COURT: In an ordinary situation, Mr Grobbelaar, this sort of fact would be pretty decisive but we are dealing with an extraordinary situation of a nation in transition with all kinds of loose ends which still have to be tied up.

DEFENCE: That I fully appreciate, but Your Lordship has the evidence of Col. Smit. I accept that Your Lordship is going to accept that evidence unreservedly, that even before the independence of this country, problems had been visualised. Secondly we are not dealing, with all due respect, as Your Lordship correctly pointed out, with a lot of laymen. We have responsible officials here, they are trained lawyers, they knew that this problem was going to arise. It is a different

matter had they been caught by surprise, but there is not a suggestion of their being caught by surprise. I mean why would Col. Smit have given this evidence otherwise? That is the damning factor. But it goes much further than that.

COURT: The wheels of the bureaucracy move with suffocating speed.

DEFENCE: I appreciate that, My Lord but who suffers because of the wheels of bureaucracy? And what about the constitution of this country? I can carry on like this indefinitely if I were to start canvassing those issues, but I repeat, if 10 I may use an un-Supreme Court expression, it would have been a different story if this State had been caught with their pants down about the independence issue. That would have been an entirely different issue, My Lord.

COURT: They were not caught with pants down but perhaps slightly unbuttoned.

DEFENCE: That may be so, but then again as Your Lordship quite correctly pointed out, My Lord, one is dealing with astute lawyers, people who had already been aware of the problems at that stage. And what does Your Lordship find now? Not a gist 20 of evidence to say that in anticipation of these problems, we did this and we did that. As I say I'm coming to those points. No My Lord, please, Your Lordship is not interrupting my train of thought, I am very pleased that Your Lordship posed these problems to me. After all My Lord, I would like to try and assist Your Lordship as far as I possibly can without adding to the confusion, with all due respect, which is already present and I would like to know Your Lordship's problems, if there are problems (interrupted).

COURT Mr Grobbelaar, I have doubt about one proposition 30

that you've advanced initially. I think it was said that the question as to whether bail is going to be granted or not is irrelevant to the consideration of a postponement and that the fact that bail might be granted does not affect your argument. If that is what you did intend to say, I may have some difficulties with that.

DEFENCE: My Lord, I'm saying this with the utmost of respect. If consolation prizes were to be, please, I am not suggesting for one moment that Your Lordship has a wrong approach, but if one were to have regard to all the facts applicable in this case, if one were to have regard to the fact that there is no reasonable prospect that any of these witnesses, then that would be a purely consolation, My Lord please, I'm not suggesting that Your Lordship thinks like that, but that can then be described as a consolation prize.

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COURT: It is not a question of a consolation prize, Mr Grobbelaar. As you've pointed out correctly, I've got to determine in terms of Section 168 whether the adjournment sought is necessary or expedient. Now expedient would seem to suggest whether or not in all the circumstances the adjournment would be advantageous, judicious, just, suitable.

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DEFENCE: That's right.

COURT: Now as an element of the issue as to whether or not it is just, advantageous or suitable, surely the question of whether the accused will be in custody in the interim or not is a relevant factor.

DEFENCE: It may be, depending on the circumstances of the particular case.

COURT: I'm only having difficulty with the approach

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which might have suggested that I'm to consider the question of a postponement as a separate issue from the question of bail. That was also Mr Heyman's initial approach and I've always doubted the correctness of that approach but I may be wrong.

DEFENCE: When I made that statement, I possibly erred from a point of view that I sounded dogmatic.

COURT: Now I understand.

DEFENCE: The other word is pragmatic as Your Lordship can appreciate. That was not my intention at all, but I feel so strongly about the merits of this matter, with all due respect that hasn't even entered my mind yet, except for that particular dogmatic expression. I can appreciate that there may be circumstances where that approach obviously wouldn't apply at all. I then carry on, and I'm also coming to the aspect of the expeditious appearance. I carry on to say, this is p.7 My Lord, that the above witnesses - My Lord, I wonder, isn't this perhaps an appropriate time?

COURT: Yes, whenever it is convenient for you. Is it convenient?

DEFENCE: Thank you.

COURT ADJOURNS

COURT RESUMES

DEFENCE: Before I carry on with what I said on p.7, there is one other aspect which must always be borne in mind when regard is being had to the question that it was only through the physical absence of these people on Wednesday, that there was final confirmation.

(a) These people had been approached long beforehand, not to attend court as witnesses but Your Lordship is aware of

the evidence which Col. Smit had given of the statements which had been taken from them, with one thing and one thing only in mind, this particular case. That's where the history commences. Your Lordship can never, with all due respect, disregard the expertise and experience of these people when it comes to attending court cases. Their knowledge with regard to court procedures, the pros and cons, I am not suggesting that they are experts please, but they're not very far below that. They're not laymen. The real situation, subpoenas have been served on them, they were aware before 10 the time that they had to come and attend court. Last Thursday it was finally indicated by them that they were not going to attend court, and it was only through their physical absence on Wednesday that there was final confirmation. Now since then not a word has been forthcoming from these gentlemen that they intend attending court in future, or intend giving evidence in future.

COURT: I think that that's clear enough. My difficulty is that if some kind of legal process compels them to do so, they might well change their mind. 20

DEFENCE: I appreciate that My Lord, but again without being facetious, in the year 2,000, with all due respect, such a situation might have materialised.

COURT: No why? Why can't (interrupted)

DEFENCE: Possibly I'm a little too pessimistic.

COURT: You see what I've got to take into account is that their obvious reluctance to come here, might in the future be mitigated by the situation where they are harassed by legal process in South Africa which leaves them very little option but to take the more comfortable alternative of coming to give 30

evidence, picking up their indemnity and having this off their head.

DEFENCE: But the issue is not so simple, My Lord. First of all when a treaty is negotiated, My Lord has gone into the authorities. It normally applies to accused people only. When it comes to witnesses, the issue, with all due respect, is entirely different. My Lord was also referred to the particular section, Section 8, this was referred to in the work of Commentary on Criminal Procedure Act, DU TOIT, DE JAGER, PEIZES, SKEEN and VAN DER MERWE, p.179 where reference 10 was made to Section 7 of the Foreign Courts Evidence Act 80 of 1962.

COURT: Section 7?

DEFENCE: 80 of 1962, it is page, sorry My Lord, it is 23/4, it is under the heading Section 179 and p.23/4, I'm terribly sorry My Lord, I've never been able to understand the page numbers of this particular book, attendance in foreign courts, Section 7 of the Foreign Courts Evidence Act 80 of 1962.

COURT: I am not sure whether this section applies to Namibia at all. What happened was that apparently before 20 independence, there were various statutory provisions and proclamations and ordinances, I don't know, I've not been referred to what they are, in terms of which process issued from this court would be operative in South Africa. It is not clear to me now that with the independence of Namibia those provisions have become automatically repealed. I don't know, I would like to hear argument on that.

DEFENCE: My Lord, with all due respect, that is not my field. The fact that it is not my field doesn't mean that I shouldn't make a study of it. 30

COURT: I unfortunately I haven't got that option.

DEFENCE: I spoke to the only person who could possibly assist me, a colleague of mine, a colleague Your Lordship knows extremely well, Adv. Van der Byl. I don't say that he is a constitutional expert but obviously I had to go and talk to him, now first of all he gave me the constitution of the Republic which I have in my possession for which I am very grateful and I obviously, please My Lord, this is not authoritative, I debated with him the question about the sudden surfacing of gentlemen like Mr Burger and a number of other people and I understood, after I've discussed the issue with him, that presently there is no treaty in existence, none - (interrupted)

COURT: But do we need a treaty? What I would like perhaps at some stage to get some argument on is (a) what were the provisions which enabled process issued in Namibia or South West Africa as it was then called, to be served in the Republic of South Africa, and (b) whether or not the independence of Namibia has led to the automatic repeal of that section. It is pretty vital because if that is not so, then Mr Heyman doesn't need extradition agreements, all he needs is the issue of the process.

DEFENCE: My Lord, if I understand the position correctly, please, I repeat I haven't gone into it properly. What I've done was this, I had regard to extradition treaties, the different acts, the provisions dealing with evidence taken on commission, those which are available to me and, with all due respect, those which I possibly understand. I debated the issue with my colleague, please, this is not authoritative but I debated the issue with him because that worried me too

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except that I didn't anticipate at that stage that this was going to happen, there was going to be an application for postponement. What worried me was the implications of the fact that these people had surfaced and disappeared at will when warrants are still, as far as I am given to understand, operative and all the rest of it, and I was given to understand in any previous act or acts which covered any treaties with regard to accused people, witnesses and all the rest of it, if any were ever in existence, had been severed because of the independence of this country. 10

COURT: You see that would depend on the following question. Your first question will be before 21 March 1990, were there provisions in terms of which any legal process issued from Namibia would be executable and operative in South Africa, that would be no.1. No.2: did that process automatically lapse upon the independence of Namibia on 21 March 1990? No.3: if it did lapse, did it lapse (a) by virtue of some doctrine of international law, or (b) did it lapse by a statute of the South African Parliament recognising the independence of Namibia? 20

DEFENCE: My Lord, if I can possibly assist Your Lordship and I've got no authority for this, but I've appeared in these courts very often and in the old days, as I understood the situation, with the provisions of Act 51 of 1970, being operative in the Republic and still being operative here, there were never any problems experienced. In other words, process was issued, it was conformed with and it was complied with. Then the second problem arose (interrupted).

COURT: The lapsing.

DEFENCE: The lapse - well, obviously, once this country 30

became independent, then whatever existed before the time, elapsed completely.

COURT: Why? Why do you say 'obviously'?

DEFENCE: With all due respect, it makes sense because this country is now (interrupted).

COURT: The fact that it makes sense, is often a reason why the legislator doesn't do it.

DEFENCE: This country has now become independent and it doesn't stop there.

COURT: It may be a very sensible proposition but is it a legally correct proposition? 10

DEFENCE: It is obviously a legal proposition. If there was any machinery to secure the presence of these people, the Attorney General of Namibia would have opted there and would have applied it.

COURT: Maybe he doesn't know that that is so.

DEFENCE: My Lord, with all due respect, Col. Smit testified that already on 25 January or before the independence of this country, problems were anticipated.

COURT: Yes, but Mr Grobbelaar, it is a question of law. It doesn't matter what view Col. Smit took. If as a matter of law the process issued from Namibia is executable in South Africa, then it doesn't matter whether Col. Smit thinks so or doesn't think so.

DEFENCE: The fact remains that it is not excludable.

COURT: Why do you say that?

DEFENCE: That I can't say.

COURT: Well, that's the problem, it is a question of law. I don't say you are wrong, I'd just like to know why.

DEFENCE: No, no, I appreciate it. I would like to see 30

the two acts in question. My Learned Friend apprises me of the fact that there are apparently two acts which do seemingly cover this particular issue.

COURT: The Namibian acts of South African acts?

DEFENCE: South African acts.

COURT: Obviously this is a matter which you have no notice of, I simply asked you the question without (interrupted).

DEFENCE: I appreciate the fact that Your Lordship posed those problems because (interrupted).

COURT: But I understand fully, Mr Grobbelaar, that it is not something which you can just answer on your feet like that 10

DEFENCE: Thank you, My Lord.

COURT: You must please take the opportunity to please help me in this regard. The one assumption you can safely make is that I am very worried about these matters, so you can educate me on these matters, I would appreciate it.

DEFENCE: The last impression I get is that Your Lordship is endeavouring to harass me, please My Lord, I would like to assist as far (interrupted).

COURT: Mr Heyman, you as well, if you could give me assistance in this regard, I'd like you to please tell me what was the provision in terms of which process issued from here was executable in South Africa and why it is no longer operative. I'd like you please to go into this question and assist me perhaps by this afternoon. 20

S.A.: Thank you.

DEFENCE: My one instructing attorney has left court in order to get these two particular acts. Might I during the interim, with Your Lordship's permission, continue with my argument? When he comes I'll (interrupted). 30

COURT: Of course, entirely at your convenience and when it suits you.

DEFENCE: Thank you, My Lord. I was then busy on p.7 which reads as follows: It is common cause that the above witnesses were given an indemnity against, I've dealt with that. Irrespective thereof the witnesses have not only refused to attend to court, but stated categorically that they do not wish to give evidence. A greater lure to testify cannot be imagined and it reflects adversely on the possibility of securing their future attendance. I've also debated it further with Your Lordship. It is common cause that since the independence of this country, this is where the two acts will show whether it is common cause or not; no extradition treaty is in existence between the Republic of Namibia and the Republic of South Africa.

COURT: That, I think, is common cause, that there is no extradition agreement. Whatever the statutes might say, I don't think that Mr Heyman has ever contended that there is an extradition agreement. On the contrary, he says he needs time to complete an extradition agreement.

DEFENCE: Except that these two acts might cast further light (interrupted).

COURT: Whatever they say, they are not an extradition agreement. So what you say here is clearly accurate.

DEFENCE: Even on the assumption that a treaty can be negotiated for on some unknown future date, such an agreement can only make provision for the possible extradition of accused persons and has no bearing on the attendance of witnesses in foreign countries. There I referred Your Lordship to the different authorities, Your Lordship also referred

to those authorities. Due to the refusal of the witnesses to testify, any possibility of taking their evidence on commission will also be a wastage of time. Your Lordship also referred to the provisions contained in HIEMSTRA and I'm also referring to those provisions in this particular heading.

COURT: Why would it be a waste of time if the commission is issued under section, is it 33, of the Supreme Act?

DEFENCE: First of all Section 33, the way I read it and the way I interpret it, only refers to civil processes. I know that HIEMSTRA seemingly indicates a probability that the Criminal Law may also be used under Section 33, but with all due respect My Lord, I don't think that that is the position at all. The provisions of Section 33 are clear, unambiguous and peremptory and with all due respect, I don't agree with that approach at all but at the end of (interrupted)

COURT: He quotes no authority for his observation.

DEFENCE: I appreciate that, My Lord.

COURT: I say that is in favour of what you say.

DEFENCE: No, I know My Lord, but this, with all due respect, is my interpretation, if one reads the particular section and the wording of the section. But at the end of the day it again revolves around one question: (a) how long has the accused got to sit in gaol? For how long has the case got to be postponed in order to negotiate that and at the end of the day the witnesses have already indicated they're not willing to testify.

COURT: Well, that is something (interrupted).

DEFENCE: But that is another issue, as Your Lordship can appreciate.

COURT: But that is something that could change. Their

willingness might be improved by the arrival of a process which puts them in gaol.

DEFENCE: But how and when is that going to change? I mean with all due respect, and I'm not trying to be facetious, My Lord is fully aware of what is happening presently in the Republic. I can't visualise the Minister of Foreign Affairs calling up the Minister of Foreign Affairs from this country within a week, next week or so in order to resolve this problem, the problem which has arisen in this particular case. Those things are being dealt with diplomatically as Your Lordship appreciates and it takes time and time is of the essence in this particular case as Your Lordship appreciates. That sort of treaty or (interrupted).

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COURT: Must the State not be given an opportunity to canvass this issue?

DEFENCE: How long does the State require? Ad infinitum, with all due respect?

COURT: They say maybe 3 weeks. They say indefinitely - (interrupted).

DEFENCE: My Learned Friend knows as well as I that if by this stage, since 25 January when it was anticipated that this problem was going to be resolved, it had not yet been resolved now, it is not going to be resolved within the next week or so.

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COURT: Why not?

DEFENCE: There is no substantial evidence to that effect. I am not saying that any person is misrepresenting the situation but we are in the following invidious position: if an approach was made, when was it made? By whom was it made?

I can carry on like this indefinitely, and with all due

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respect, certainty is required on that particular score, and if there is a proposed draft, I mean as Your Lordship said with all the modern amenities and all the rest of it, this can be photocopied and telexed, I believe they have tele-fax facilities in Namibia, we can have a proposed copy of this draft within the next 5 minutes or 10 minutes ready for Your Lordship. As I say I can carry on like this for the rest of the day, My Lord, and all that evidence is shining in its absence. I repeat again, I am not suggesting that any person is deliberately misleading this Court. If that impression is created, then the Court completely misunderstands me. 10

COURT: No, I didn't understand you to suggest that. No, I think that is clear, the bona fides have never been an issue.

DEFENCE: I want to make that clear all along. I'm not doubting the bona fides of any person in this country or any person in the Republic of South Africa, but there is one further problem with this whole case, and that is looming like a large octopus behind this whole case. The State's case is going to be based on the following approach, the CCB is involved in this case. We all know, Col. Smit testified to that effect, the CCB is part and parcel of the Military Intelligence Section of the Defence Force of the Republic of South Africa. That means that the authorities on that side of the border have a vested interest in these witnesses. 20

COURT: No, but it doesn't mean that the State President knew anything about it, or that he is prepared to protect anything which was done without his authority.

DEFENCE But what did the State President say, with all respect? The State President, inter alia, touched on the 30

one golden rule to which I'm going to refer later during the course of my heads of argument, and I'm coming to the issue that the matter had to be tried expeditiously. I don't know whether Your Lordship read through the entire heads of argument which I've presented, that is a very major portion of my argument. For instance on the bottom of p.3:

"Dit is essensieel dat hierdie aangeleentheid", that is the thrashing out of the activities of the CCB, be resolved as soon as possible.

"Dit is essensieel dat hierdie aangeleentheid so gou moontlik op die mees indringende en regverdigde wyse afgehandel moet word sodat die land, die regering en die Suid-Afrikaanse Polisie met die belangrike take wat voorlê, onbelemmerd sal kan voortgaan. Die bekende uitdrukking" -

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and as Your Lordship will read my heads of argument, this is very strongly incorporated in my heads of argument and I'm coming to it.

"Die bekende uitdrukking 'justice delayed is justice denied' bly steeds geldig."

Then I want to come to the very crucial part and I want to read the entire portion, p.8 (interrupted).

COURT: This is from the State President?

DEFENCE: That's right My Lord, and I'm reading from the second paragraph: "In die lig van die polemieë rondom

die beweerde betrokkenheid van wyle Anton Lubowski as 'n betaalde militêre informant van die Suid-Afrikaanse Weermag en die Minister van Verdediging se versoek in dié verband, het

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ek voorts besluit om die Kommissie se opdrag soos volg uit te brei: om ondersoek in te stel na en verslag te doen oor die bewering dat Anton Lubowski 'n betaalde agent van die Suid-Afrikaanse Weermag se Militêre Inligting was. Ek het ook kennis geneem van 'n verklaring van mnr. Theo-Ben Gurirab, Swapo se Skadu Minister van Buitelandse Sake, waarin daar 'n beroep op my gedoen word om ondersoek te laat instel na die omstandighede wat tot Anton Lubowski se dood gelei het. Ek het 10 in hierdie stadium daarteen besluit. Om nou hierdie taak ook aan die Kommissie op te dra, sal myns insiens onvannas wees, eerstens omdat misdaad in Namibië nie onder die jurisdiksie van Suid-Afrikaanse howe ressorteer nie. Na wat ek verneem, blyk dit verder ook dat die normale regsproses van 'n ondersoek deur polisie in Namibië so 'n gevorderde stadium bereik het dat lasbriewe vir sekere persone reeds uitgereik is en dat 'n persoon reeds op 18 April 1990 tereg 20 sal staan. Indien in die loop van daardie saak" -

and it is in this light that he had passed the remarks to which my Learned Friend referred -

"feite na vore kom wat dui op onbehoorlike Suid-Afrikaanse owerheidsbetrokkenheid, sal ek oorweeg om die opdrag van Regter Harms uit te brei. Intussen gee ek opdrag dat daar ten nouste met die owerhede in Namibië saamgewerk moet word om te verseker dat die reg aldaar sy gang gaan en geregtigheid geskied."

Not 'I'll see to it that Mr Burger or any possible accused be extradited, I will see to it that special provision is being made for the appearance of witnesses, witnesses required in the Republic of South Africa, in the Republic of Namibia.' Those undertakings were not given at all, and one, with all due respect, must read this article in its entirety in order to try and appreciate, with all due respect, what the State President intended saying.

COURT: Mr Grobbelaar, I must accept that, Namibia and South Africa are friendly neighbours who are going to assist each other in their judicial process. I must also accept that the probabilities are that if there is the need to ensure justice in Namibia which requires the co-operation of the South African State, that it would be ordinarily forthcoming and vice versa. Isn't that a probability that I must accept? Because we are surely not at war with each other.

DEFENCE: No, My Lord, and please, if I gave that impression, then I'm also misunderstood. The problem is (interrupted).

COURT: When.

DEFENCE: When, and this is the problem, with all due respect, which the Court has. When. These things are not done overnight, and this is when one has recourse to the existing legislation, or the existing legal position, what is the existing legal position. The existing legal position is first of all that a treaty has got to be negotiated for.

COURT: But Mr Heyman says he doesn't need a treaty, there could be co-operation in regard to a particular matter ad hoc.

DEFENCE: But if there were going to be co-operation, why wasn't the South African authorities already approached on

25 January or before 21 March in order to secure such arrangements? That is the simple issue, My Lord, and if the position is so simply, surely since Wednesday the authorities on that side of the border, in full appreciation of what is going on, could have said 'tell the authorities on that side that there are no problems whatsoever, through means of diplomatic recourse or whatever the position may be, this little problem can be resolved immediately', or as I've said to Your Lordship my Learned Friend can come, please again, I'm not attacking him or the Attorney General, but with all the modern amenities, 10 show us a photo-copy of the treaty or the arrangements or whatever the case may be which are presently being drafted. It is the easiest thing under the sun. Why is this information not forthcoming? I mean the answer is as clear as anything. I must say, with all due respect, I didn't think as strongly about this point. Your Lordship is aware that where it deals with political offences, this, with all due respect, has all the elements of a possible political offence in such relation, I mean Col. Smit testified to this effect. If one has got all the problems, or all the 20 difficulties before one country agrees to extradite its people to another country, wouldn't such a country be even more reluctant to see that its own witnesses or witness, or possible witnesses, be handed over for questioning and for possible evidence? As I carry on to say, I say: the independence of the Republic of Namibia on 21 March 1990 did not cause a dilemma for the State. The State's case was fully investigated on 25 January 1990 and on that date the State must have been fully aware of the possible consequences of the independence of the Republic of Namibia. Then I 30

raise the following questions and this was not incorporated, unfortunately, in my type-written argument because at that stage I didn't know what my Learned Friend's reply was going to be, but I have since raised the following questions and I did it as follows. My Lord, I'm terribly sorry about this, I hate presenting my argument in this particular way. I say any approach at diplomatic level must show the following:

1. That an approach must indeed have been made;
2. between who was it made; and
3. on what date was it made in order to exclude any possible argument of negligence in the light of the fact that problems about securing the presence of the witnesses were already foreseen before the independence of Namibia. 10
4. How far the negotiations have proceeded.
5. On what date the negotiations will be concluded and be followed by a treaty or an agreement or an arrangement.
6. The probability of the treaty being successfully concluded in view of the fact that if the State's allegations are well-founded, then the CCB and therefore the Military Intelligence of the Republic of South Africa are involved in this case. That means that the Republic of South Africa has a vested interest in these witnesses, and would therefore be extremely reluctant to surrender these witnesses. 20
It is a matter of common logic.
7. How the conclusion of the treaty is going to overcome the refusal of the witnesses to testify and what is most important, a guarantee of their availability in view of the fact that they apparently have the know-how how to disappear or re-appear at will. Assuming that such a negotiation is concluded, these gentlemen are not without expertise. We 30

saw how Col. Burger appeared at will, at what stage he appeared, etc. I can carry on like this, with all due respect, indefinitely. Then I say any possible undertaking, no matter how well intended, that the above witnesses will attend court at a future date and will testify, is without substance, and therefore any postponement to secure their future attendance will be an exercise in futility.

Then I carry on before I conclude. I say the next and probably one of the most important requirements is that the accused, who is deemed to be innocent, is entitled, 10 once indicted, to be tried with expedition. This requirement has to be judged against the background of the following facts: the accused was apprehended on 13 September 1989. It is uncertain whether he was initially arrested on a charge of alleged murder on the deceased.

COURT: According to the evidence he was.

DEFENCE: In any case, My Lord, these are the facts.

COURT: According to what Col. Smit (interrupted).

DEFENCE: Yes I know, My Lord, possibly apprehended on suspicion, but I must say that there was a very rapid change of mind. 20

But in any case, these are the facts, especially if the State has such a strong case, it appears that on 15 September 1989 he was served with a notice purporting to be issued in terms of Section 13(i)(f) of Act No. 59 of 1972. On 6 November 1989 an application was lodged in the then Supreme Court of South West Africa for an order setting aside the declaration of the accused as a prohibited person in terms of Section 13(i)(f) of the above act. What is also important is the evidence which Col. Smit gave, without being presumptuous, it was already felt on 3 November 1989 that this application 30

was going to succeed, that irrespective of that the process of Court was first of all applied and His Lordship, Mr Justice HENDLER, first of all had to allow the application before the accused was then formally arrested on 6 November 1989 for the murder of the deceased in this case. Why? Immediately after the above order, the accused was arrested on 6 November 1989 on a charge of murder of the deceased; on 13 November 1989 a formal application was lodged for the release of the accused on bail. After objection by the State and evidence which had been given by the chief investigating-officer, Col. Smit, the application was refused and an appeal against the above ruling was noted. On 12 February 1990 the appeal was heard by the Honourable Mr Justice HENDLER of this Honourable Court and refused. On 3 April 1990 an indictment and summary of substantial facts were served on the accused in accordance with the provisions of Section 114(4)(a)(i) of the Criminal Procedure Act 51 of 1977. On 10 April 1990 a request for further particulars was served on the Prosecutor General of Namibia. On 12 April 1990 a letter was handed to the Prosecutor General, urgently requesting a reply to the above request. A reply to the above request was received on the afternoon of 17 April 1990. The accused is still in custody. The accused was informed on 25 January 1990 that his case is set down for summary trial from 18 to 30 April 1990. Then I raise the following query or queries. In view of the above and in view of the serious allegations made against the accused, the accused had to make provision for his defence at great expense. The accused was compelled to make provision for the commencement and continuation of his trial on 18 April

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1990 and was apprised for the first time by the Prosecutor General, I again reiterate, I'm not blaming the Prosecutor General, on 12 April 1990 that an application would be lodged for the postponement of his case. It is submitted that the present application constitutes an abuse of the process of court because of the delay in bringing this matter to trial. The crucial question is how long the accused is supposed to be incarcerated in the absence of even a remote possibility that the above witnesses may turn up at court in future and be willing to testify against the accused. At the National Conference of State Trial Judges, 1983 to 1984 under the heading 'Standards Relating to Court Delay Reduction, American Bar Association, April 1985, p.5,' the following approach was adopted, namely 'justice delayed is justice denied. Delay devalues judgments creates an anxiety in litigants, and results in loss or deterioration of the evidence upon which rights are determined ... Delay signals a failure of justice and subjects the court system to public criticism and the loss of confidence in its fairness and utility as a public institution.'. Article 14(3)(c) of the International Covenant on Civil and Political Rights, 1966, provides for the following:

'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees in full equality.

(c) To be tried without undue delay.'

The Constitution of the Republic of Namibia as promulgated in the Government Notice, No. 1 of 1990, proclaims, inter alia, the following:

1. Article 7, protection of liberty. No person shall be deprived of personal liberty except according to procedures established by law.

2. Article, respect of human dignity.

(i) The dignity of all persons shall be inviolable.

2(b) No person shall be subject to torture or to cruel inhuman or degrading treatment or punishment.

3. Article 10, equality and freedom from discrimination.

(i) All persons shall be equal before the law.

4. Article 11, arrest and detention.

(i) No person shall be subject to arbitrary, arrest or detention.

5. Article 12, fair trial.'

My Lord, I am not going to read the first part of it, My Lord is aware of the contents thereof. My Lord also referred to paragraph (b):

'A trial referred to in sub-article (a) thereof shall take place within a reasonable time, failing which the accused shall be released.

(d) All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them. It is in keeping with the policy of Act No. 51 of 1977' (which is still adhered to in this country) 'that an accused person shall be brought to trial without delay and shall not be held indefinitely in custody.'

My Lord, I refer to this case of KABE & OTHERS v THE ATTORNEY 30

GENERAL AND ANOTHER, I don't know whether Your Lordship read the case or not, please, I am not being presumptuous but - (interrupted).

COURT: Please, if you wish to - (interrupted).

DEFENCE: Then I carry on, refer to the case:

'Albeit that the sections of Act No. 56 of 1955', those were the sections applicable at the time of this judgment, 'to which reference were made in the above case, were amended, by the provisions of Act No. 51 of 1977, the principle that an accused person shall be brought to trial without delay and shall not be held indefinitely in custody, remain unchanged.'

My Lord, I cannot underline these words sufficiently.

'See DU TOIT, DE JAGER, PAIZES, SKEEN and VAN DER MERWE, Commentary on the Criminal Procedure Act' -

and they deal with the provisions of the present Section 50 which again underlines the importance that a person shall be brought to trial without delay and shall not be held indefinitely in custody. Then I say in view of the fact that it is recognised that the right to a speedy trial is fundamental to the process of justice in the courts of the Republic of Namibia, it remains to define this right, set its limits and quantify its contents'. Factors which must be taken into account in order to arrive at an equitable position, includes, inter alia, the following:

1. the entire length of the delay from the time the event arose through to the date of the trial.
2. Reasons given by the prosecution to justify the delay.

3. Whether the delay is due in part to the accused or is consented to by the accused.
4. Actual and presumptive prejudice to the accused.
5. The effect of the delay on the accused person and private life
6. The seriousness of the allegation against the accused and the complexity of the case.
7. Any institutional resources.

And My Lord, this I cannot underline sufficiently:

7. Any institutional resources that gave rise for the delay. My Lord, I carry on and this I didn't incorporate in my argument, I say that the facts of this case bear a strong resemblance to the facts in the GERITIS case, except that in that case the accused was free, he was out on bail which operated in favour of the accused in that case. It is not a case of an accused person who had been incarcerated for seven months and a number of days against the background of the facts which had been given to Your Lordship, and that he was a South African citizen. This is not a Namibian citizen, he is a foreigner, with all due respect, in this country, subject to all the consequences, with all due respect, which flow from the fact that he is a foreigner. If the impression is created that I say that this country ill-treats or mistreats foreigners, please, the problem is I'm misunderstood so often that I've often got to clarify myself. I'm not trying to say that and I'm not trying to overdo this particular point but can My Lord visualise being incarcerated in a foreign country - the fact remains it is a serious allegation - for a period in excess of 7 months? Where you were already told on 25 January that your case is going to be disposed of on 18 April, then you come to court on 18 (3)

April, you've got your counsel, you've got everything ready, you've spent the last of your resources in order to see to it that you have counsel, and then you come to court and what reasons are offered?

The final question is: is there any reasonable possibility, Your Lordship kept on asking this question time and again, I appreciate why, of the witnesses being able and willing to testify? The facts overwhelmingly indicate a 'no'. If no suitable arrangements could have been concluded between 25 January 1990 and 21 April 1990, when are they ever going to be concluded? If ever. I am not trying to be unduly pessimistic. Your Lordship referred to the aspect of bureaucracy. I am not going to endeavour to give Your Lordship a lecture on that particular issue, that would be presumptuous. Your Lordship is fully aware of bureaucracy and what it entails and what it includes. In the background lurks the vested interest which the South African Government has in these witnesses.

COURT: That assumes that whatever these witnesses might have done, has the authority and blessing of the State of South Africa. It may not be so.

DEFENCE: I have no authority for what I'm saying, and I'm purely applying the rules of logic.

COURT: But is it logical to assume (interrupted).

DEFENCE: But it is, with all due respect My Lord.

COURT: Is it logical to assume that the South African State sanctioned acts of unlawfulness on the part of its own officials?

DEFENCE: With all due respect, I've been dealing in the underworld for a very lengthy period of time, not in a

personal capacity, and I've heard many things. But My Lord, what I've heard lately, with all due respect, doesn't shock one anymore and I say this with all due respect and the problem is if the sort of things we've heard until now do not shock one anymore, a further question arises. If these things, even albeit that they had not been sanctioned, had been done, can one readily expect a state to say 'I make provision or I'm prepared to arrange that my inhabitants, my citizens go to another country and there testify (a) that it was sanctioned' because this is what these people say, that the State sanctioned these actions. This is what they say. I know that it hasn't been tested.

COURT: It doesn't mean I have to believe it.

DEFENCE: My Lord, that is a different issue but this is what these people say. I know that it has not been tested, I know that one listens to it with absolute disbelief but the other thing is this: those witnesses will know when such an agreement had been concluded. They are already unwilling to come and testify. Can Your Lordship appreciate that they are going to be available at the end of the day to come and testify?

COURT: But what option would they have if the South African State releases the leashes of the law?

DEFENCE: Col. Smit was in possession of warrants for the arrest, inter alia, of one Staal Burger.

COURT: But he went underground.

DEFENCE: Chappie Maree is still underground but fact remains that Burger was in the Republic of South Africa, he was not an unknown figure, his photos figured prominently in all the newspapers, on television, everything. If there was

one person in the Republic who was well-known and whose face was well-known, it was Burger's and irrespective of all the might of the South African authorities and everything, was he apprehended? When did he appear with impunity? I can carry on like this indefinitely, My Lord.

Then I carry on, and this I say with the greatest of respect, please: under these circumstances any postponement, with all due respect, subject to this background and these facts, would be tantamount to a travesty of justice, and I say... this with the greatest of respect and please, I don't want 10 the Court to think for one moment that I'm presumptuous. But I feel very strongly about making this particular statement in view of all the facts and everything which had been placed before Your Lordship.

The fact, and this was also canvassed, that this is only the first appearance doesn't alter the position at all. On 25 January 1990, approximately 3 months before the first appearance, the State said that it was going to proceed, not on one day, from 18 to 30 April. When was the first indication that there was going to be an application for a 20 postponement? Last Thursday.

COURT: Well, Mr Heyman says that is the first time he thought it became necessary to tell you that; before that he had assumed that they would come.

DEFENCE: There is no evidence on record that those people had at any stage indicated that they were going to be willing to come and testify. It is one thing to assume, it depends on on what you base your assumption, and again I am not attacking the integrity of my Learned Friend, but there is no evidence indicative of the fact that these people indicated all along 30

that they were willing and that they were to come and testify.

COURT: Some of them had made statements.

DEFENCE: My Lord, the fact that you make a statement, doesn't mean that you're willing to come and testify.

COURT: What would be the purpose of making a statement except as preparatory to being a witness?

DEFENCE: Preparatory to an investigation but not preparatory to being called as a witness. There is a big difference between the two, and My Lord (interrupted).

COURT: Do you think that a witness who has made a statement to an investigating-officer, would be shocked if he said 'now you must come and give this in court'? What does he expect? 10

DEFENCE: But there is another problem, and fortunately Your Lordship asked this question: Were problems already anticipated before the independence? And for that I cannot thank Your Lordship sufficiently because, with all due respect, that is the answer time and again. Why would problems already had been visualised before the independence in this country if these people were willing and able to come and testify? We get back, with alle due respect, to square one. I hope to give Your Lordship a reply, we're trying to get hold of my colleague, Van der Byl, in Pretoria. Apparently he works for a living and he is apparently not in chambers presently. I spoke to another colleague of ours who apparently worked with him, my colleague Maritz from the local Bar. He would apparently also have the answer to this, unfortunately we couldn't get in touch with him either. In any case, there's no point in my telling Your Lordship what I believe but we'll try and get these acts for Your Lordship before the 30

afternoon is out.

One other thing, please My Lord, this is no reflection on any person, p.20 of the evidence of Col. Smit. This referred to the question of the witnesses turning up, and this fits in with the evidence of Col. Smit, third paragraph:

"And what about the others whom you need as witnesses? --- To my knowledge there is no arrangement that could be made through diplomatic channels. I am not certain about that."

Then this:

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"Do you know if any such arrangements have been initiated, whether they have been discussed between the two governments? --- I cannot say whether it was discussed, but all I can say is that on the 11th of this month I had an interview with our present Attorney General in co-operation with the Prosecutor General where this was mentioned and also requested."

That adds more emphasis to the argument I have already presented.

My Lord, I then come to the next aspect. Your Lordship canvassed the issue about the accused having pleaded in the Magistrate's Court. I have the authority, unfortunately I (interrupted).

COURT: Is it AD?

DEFENCE: Yes, it is an Appellate Division case, S v SINGH.

COURT: Oh yes.

DEFENCE: GH, I thought it was 1990, when I looked it up I found it, 1990(1) SA 123 and with all due respect, Your Lordship can just read the headnote.

COURT: That follows HENDRIX and LUBBE and those cases. 30

DEFENCE: That's perfectly correct, My Lord, sorry that I didn't bring this to your attention before the time.

COURT: And HENDRIX was in any event a judgment of His Lordship Mr Justice MILNE who is now in the Appellate Division.

DEFENCE: That is correct.

COURT: It seems clear that a plea in the Magistrate's Court would not entitle the accused to plea autrefois acquit if he was charged (interrupted).

DEFENCE: That is perfectly correct, My Lord. Unless there is any question on this particular aspect, I'm now coming, with all due respect, and I say it again with the utmost of respect, the possible consolation prize. Before I deal with that, if there is any other aspect in respect of which I can possibly assist you, I do promise you, My Lord, that I will make available those statutes. I believe that they were promulgated in the Republic of South Africa and the impression I get is that all (interrupted).

COURT: Yes, what I might want to do is not merely have the statutes available, but perhaps to debate the meaning or the implications with you, so perhaps we should have it in court.

DEFENCE: I hope that Your Lordship wouldn't ask me to do that, My Lord. I know a little bit about Criminal Law, but in any case, we will see to it that those statutes are made available to Your Lordship as soon as possible.

Then I come, and I say this again with the utmost of respect, the possibility of a consolation prize. I say any postponement, if one were to be granted, would have to be a very lengthy one in order to be feasible.

COURT: Why?

DEFENCE: If until now no reply is forthcoming about when the different initiatives commenced, the possibility of a draft, the fact that the witnesses have suddenly decided that instead of being unwilling, they're now suddenly going to become willing, so I can carry on indefinitely.

COURT: No, I think you must distinguish between two kinds of postponements. The one postponement is where the State has succeeded in persuading me that there is a reasonable prospect that the witnesses will be forthcoming, and that its failure to procedure these witnesses today is not due to any culpable remissness on its part, and therefore the matter should be postponed in the future to enable those witnesses to be called. That is one postponement.

DEFENCE: May I reply to that?

COURT: Just one second, I just want to distinguish between that postponement and then you can reply to me. The second kind of postponement is where it has failed to persuade me that there is a reasonable prospect that the witnesses will be giving evidence, and their failure to be present today is not due to culpable remissness on its part, but where nevertheless, having regard to the special circumstances of this case, it is entitled to have a further opportunity of seeking to persuade me that (a) will in fact be fulfilled, (a) is where they have succeeded in persuading me that there is a reasonable prospect that the witnesses will give evidence; (b) is where they have not succeeded in persuading me but they have succeeded in persuading me that in the special circumstances, they should have an opportunity, a further opportunity to persuade me.

DEFENCE: I appreciate the distinction.

COURT: Now (b) doesn't have to be a long postponement at all, unless for any particular reason, that is what the accused desires. If the accused desires a long postponement, that is another matter but (b) is a different story altogether.

DEFENCE: May I, with all due respect, give the following reply? If on the facts of this case the State endeavoured in persuading Your Lordship that there is a reasonable possibility of these witnesses attending court and that Your Lordship should therefore grant a postponement, then, with all due respect, I repeat, having regard to the circumstances of this case, then the State, with all due respect, must have been terribly persuasive.

COURT: On (a)?

DEFENCE: On (a). As a matter of fact if ever before, having regard to these facts, a person will have to be persuasive, then it applies to this case.

COURT: What about (b)?

DEFENCE: (b), My Lord, negligence, overwhelming, the fact remains that this issue had already been debated on the 11th (interrupted)

COURT: No, but that is relevant to (a). Let's say, maybe I haven't made myself clear. (a) is where the State has persuaded me, (i) that there is a reasonable possibility that the witnesses will give evidence, and (ii) that there was no culpable remissness on its part. (a) involves two legs: they must persuade me (i) that there is a reasonable prospect of the witnesses being able to give evidence; (ii) that there was no culpable remissness on the part of the State.

DEFENCE: May I reply to those, first of all (interrupted)

COURT: Let me finish, so that you understand the problem. 30

(b) is where (a) has not been fulfilled, and they want an opportunity to persuade me that indeed (a) will be satisfied if they have a further opportunity.

DEFENCE: My Lord, how many opportunities (interrupted)

COURT: No, that is another question but I think (interrupted)

DEFENCE: Do the State require?

COURT: You can only answer me if you understand what I'm saying, and you can only understand what I'm saying if I make myself clear. Now I want you to get clear in your mind the distinction between a postponement contemplated by category 10 (a) and a postponement contemplated by category (b). In (a) they have persuaded me already that there is a reasonable prospect that the witnesses will be able to give evidence and that there has been no culpable remissness on its part. In (b) they have not persuaded me about that at all, but they want an opportunity to be able to persuade me with further evidence. Now I'm talking about (b). The postponement in (a) obviously has to be lengthy as you've correctly submitted; in (b) not necessarily.

DEFENCE: Even until now no positive evidence had been 20 adduced that even if these people were approached again, that even if in future approaches were to be made, that there was any possibility of these people consenting at the end of the day to come and testify.

COURT: No, but (b) would mean that the State would have an opportunity to come here and say the Attorney General of the Republic of Namibia or the Foreign Minister of the Republic of Namibia has been in contact with the South African State, that the South African State has now shown a willingness or an anxiety to use its legal processes in order to compel the 30

attendance of these witnesses, and therefore the reluctance of the witnesses to come and give evidence might reasonably be overcome by the compulsory mechanisms of the South African legal processes. That is (b).

DEFENCE: But My Lord, that invitation was already extended by Your Lordship on Tuesday to the State. It was repeated again yesterday, My Lord and such invitation, or rather first of all, I'm not saying that the invitation was deliberately ignored, I am not entitled to say that, but if there was any substance in such negotiations, then such substance is shining in its absence. Why?

COURT: Well, the suggestion is that this nation in transition hasn't been able to get its act together, it is not particularly in relation to your client. It is just part of the process of growing up after independence.

DEFENCE: This problem was already foreseen on the 11th of April, p. 20.

COURT: But 11 April is just a week ago, isn't that?

DEFENCE: As Your Lordship has already pointed out, with all the modern amenities and all the rest of it, it surely doesn't take an age, with all due respect, to resolve these little problems.

COURT: No, I understand your submission that (a) should fail and (b) should fail, but all I want of you is to appreciate that when you say it has to be a lengthy postponement, it only applies to (a) and not to (b).

DEFENCE: My Lord, sorry, I appreciate why you're drawing the distinction and I appreciate the fact that Your Lordship has given me the opportunity (a) of replying, and also giving the distinction according to my particular approach.

COURT: Mr Grobbelaar, the argument you've put up against the postponement looked at from the point of view of the accused, is undoubtedly a formidable argument and ordinarily it would seem to me to be an argument which might well be very near being unanswerable.

DEFENCE: I just hope Your Lordship is not going to add a 'but'.

COURT: Yes, what is worrying me is whether the extraordinary situation which has arisen in consequence of the independence of Namibia and what that has done to the legal process, 10 combined with the great public interest in ensuring that a man of great visibility, who has been murdered, does not have his murderer go free if indeed he is the person before the court. Those two considerations, the great public interest in the matter and the extraordinary situation caused by the transition, are making me just feel that this is a very, very carefully balanced exercise that I've got to perform.

DEFENCE: I appreciate that but My Lord, if Your Lordship's approach, with all due respect, is correct, the argument 20 which I canvassed is virtually unanswerable.

COURT: Unanswerable on (a) or unanswerable on (b)?

DEFENCE: On both. Let me then revert to the two problems which Your Lordship has canvassed, the extraordinary situation. Not this is not, with all due respect, an extraordinary situation.

COURT: It is. How many nations go through independence in the middle of a major political trial of this kind?

DEFENCE: I'll come to the second point just now. May I just answer the first point? The extraordinary situation was 30

already appreciated, so we're back at square one.

COURT: It may be, but if Namibia wasn't going through independence in the middle of this trial, the situation would have answered itself. These people would have not answered and I would have issued warrants of arrest immediately.

DEFENCE: I appreciate that, but My Lord, this was all appreciated before the time, long before the time.

COURT: I understand that, but it distinguishes this kind of case from the kind of GERITIS case?

DEFENCE: I'll come to the case, I'll come to that very shortly. If there was no anticipation that this was going to happen, if the authorities in this country were absolutely powerless, then it would have been a different story. If evidence is adduced to indicate that steps were timeously taken in order to overcome this problem, then the issue is immediately different but let's get to the facts of this case. I'm not trying to belittle this case, obviously murder under any circumstances is important and not only that, but to be eradicated at all costs. But why should the accused be made a scapegoat?

COURT: Well, is he being made a scapegoat? I mean if the State gets an opportunity, a short opportunity to persuade me that these are the contacts which have been initiated with the South African Government, and these are the possibilities which arise and that there is a real prospect that witnesses would be forthcoming, is he being a scapegoat if in the meanwhile he is free and on bail?

DEFENCE: No, but My Lord, that is not the issue. You must remember, My Lord, that even if he is set free, and I don't want Your Lordship, if you were to decide against this, to

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leave the Court in prison, but can My Lord appreciate under what circumstances he is going to be let free? A foreigner in a foreign country with a terrific sword of Damocles hanging over his head.

COURT: But look at it the other way, Mr Grobbelaar. Assume President De Klerk takes a strong view of the situation and says under no circumstances am I prepared to harbour or condone unlawful acts by members of my Defence Force, I want to maintain the most correct and friendly relations with Namibia, I am going to yield these people and they must take the consequences. He takes that decision and in the meanwhile your client is enjoying a vacation in Dublin or Ireland. Will the ends of justice not have been defeated? Because Mr Lubowski's, the person who is accused of Mr Lubowski's death is then no longer amenable to my jurisdiction.

DEFENCE: No My Lord, but your Constitution, when I say your, the Constitution of this country (interrupted)

COURT: Ours.

DEFENCE: Ours, create a presumption of innocence. Let's start there.

COURT: Of course.

DEFENCE: Now let's go a step further. Can Your Lordship visualise the State President of the Republic of South Africa with all the powers and everything, congregating the Parliament within the next week or so, passing special legislation just to (interrupted)

COURT: No, he doesn't have to pass special legislation. There can be diplomatic arrangements.

DEFENCE: But My Lord, on what basis? They got to be subject to the provisions of the law and there are no provisions of

the law, My Lord.

COURT: But is that so?

DEFENCE: But that is so, My Lord.

COURT: But you haven't given me the chapter and verse on that.

DEFENCE: No but My Lord, I said to you and what I say is this and this is fact. First of all there is no diplomatic treaty. There has got to be a diplomatic treaty.

COURT: Why?

DEFENCE: But My Lord, how can these people be handed over otherwise? 10

COURT: Well, Mr Heyman has quoted provisions which allow that it can be done without an extradition agreement as such. It can be an agreement ad hoc for a particular case.

DEFENCE: But My Lord, where are the indications of such an agreement being negotiated presently?

COURT: That's another matter, but you were submitting that you would need Parliament to be specially summoned for that. I think it is part of the executive powers of the South African Government. 20

DEFENCE: My Lord, with all due respect, the President on that side of the border can't simply issue a direct that these people have got to be apprehended and that they be delivered over, post haste or whatever the case may be, to the authorities in Namibia in order to come and testify. Your Lordship, with all due respect, is as fully aware of that as I. There has got to be special legislation.

COURT: But I thought, Mr Grobbelaar, that you were saying to me earlier this morning that you were still going to get the relevant statutes and you're going to check. 30

DEFENCE: That I'm going to get, My Lord.

COURT: But you seem to be able to make the submissions without the benefit of that reading.

DEFENCE: That I concede, My Lord, but (interrupted)

COURT: It is not an advantage which I have.

DEFENCE: No, I appreciate that, My Lord, and I will see to it that those acts are made available to Your Lordship this afternoon, as soon as we can get hold of my colleague, Mr Van der Byl but I'm having (interrupted)

COURT: Assuming you are right about this, I still have 10
this problem that it would not be in the public interest if
eventually the witnesses were forthcoming and in the meanwhile
your client was no longer amenable to the Court's jurisdic-
tion, nobody would be satisfied with that. I've got to
weigh both sides, not so?

DEFENCE: How long has this got to last, My Lord?

COURT: That's what I say, that is another question.

DEFENCE: But that is the point, it is a different matter
if it could be done within a week or 2 or 3 or 5, 6 but it
can't be done within that (interrupted) 10

COURT: Might they not be entitled, I put it no higher
than that, to be given an opportunity for 2 or 3 weeks simply
to be able to persuade me that this possibility exists?

DEFENCE: But they haven't persuaded Your Lordship yet, with
all due respect, because no evidence has been placed before
Your Lordship.

COURT: Yes, but that's the point. Aren't they entitled
to an opportunity to procure such evidence and place it (inter-
rupted)

DEFENCE: They were given that invitation by Your Lordship 30

on Wednesday.

COURT: Yes, that is so.

DEFENCE: That invitation hasn't been followed up. Why not?
The answer is unassailable.

COURT: Yes. No, I understand your submission. You want
to get onto the second leg or what you call the consolation prize.

DEFENCE: My Lord, I'm sorry for using that expression, please,
no disrespect.

COURT: No, except that your client's perception of the
consolation may be a good deal more practical than the 10
interesting legal argument here.

DEFENCE: I hope that I've persuaded Your Lordship by this time.
What we would like to try and endeavour is to try and get
into touch with my colleague, Mr Van der Byl, or Mr Maritz
and that would obviously simplify my further approach.
Could I possibly suggest a postponement?

COURT: That is perfectly in order. Mr Grobbelaar, when
we meet this afternoon, apart from these treaties or statutory
provisions, I would like to hear you on what you've called
the consolation prize. I'd like to hear you on the details 20
of any bail, and I'd like to hear you on the quantum. I'd
like to know what is going to be your place of residence,
what is going to be your place of employment, that sort of thing.

DEFENCE: I'll do that, My Lord.

COURT: Until when do you suggest we adjourn? I'm not
putting any pressure on you, I just want to fix a time.

DEFENCE: I'm just trying to get into touch with these
colleagues of mine. I feel, with all due respect, that I owe
Your Lordship a reply in respect of the question which you've
posed and which, I submit, that I can possibly have anti= 30

icipated but (interrupted)

COURT: No, no, these problems come up in argument.

DEFENCE: I appreciate that, My Lord. Could we make it half past 2?

COURT: I can do it even better, you take your time. I'll sit in my chambers and whenever it is convenient for you, you can let me know. Don't feel under pressure to be here by 2:30.

DEFENCE: May I just make one further point? If there is anything else in respect of which I can possibly assist Your Lordship, please ask me. Not that I may have the answer ready, but I would appreciate that. 10

COURT: Thank you, Mr Grobbelaar. Mr Heyman, you've heard this debate, you've heard me distinguishing between the two kinds of postponement.

S.A.: Yes, My Lord.

COURT: I take it you understand the difference between the two kinds of postponement.

S.A.: Yes.

COURT: You also heard me say that Mr Grobbelaar's submission is on the first kind of postponement, namely whether you have persuaded me that there is a reasonable prospect of getting these witnesses on the existing evidence. You've heard me say to Mr Grobbelaar that I thought that his argument in that respect was a formidable argument, but I said that nevertheless, although you might not have succeeded in persuading me that there was this reasonable prospect, and that you had not been remiss, that notwithstanding that you might be entitled to a short postponement in order to get more tangible evidence as to what the Attorney General was doing and what the prospects were. Now Mr Grobbelaar's answer 20