

TRUTH AND RECONCILIATION COMMISSIONSECTION 29 HEARINGS"IN CAMERA"

HELD AT: CAPE TOWN

ON: 20 MAY 1997

NAME: JACQUES HECHTER

ADV NTSEBEZA: This is a Section 29 inquiry, the subject matter of which will obviously be introduced by those who will be leading the proceedings on behalf of the Commission. It is going to be held in camera. I believe that a number of people have been subpoenaed. I believe that the person who we are going to hear first, if we get to that stage, is Mr Hechter.

I understand that there has been an indication that some other people who are in this room may want to be present during the examination. But before we do that, since these proceedings are in camera, I will allow the media to do such photo opportunities as they were entitled to do and then for them to leave, which I think is now.

MEDIA LEAVE THE ROOM

ADV NTSEBEZA: Welcome to this Section 29 inquiry. As I indicated it does appear that there are preliminary points that need to be placed before us by the representatives of Mr Hechter and the others with whom Mr Hechter is an applicant in the amnesty committee that has given rise to these proceedings. Subject to what Mr Vally and/or Mr Goosen and/or Mr Chaskalson are going to be saying by way of introduction, I do not know whether this is not an

SECTION 29 HEARING

TRC/CAPE TOWN

appropriate time to hear those preliminary issues.

Perhaps what we need to do is to introduce the persons who will be doing the panel. It is going to be myself, Dumisa Ntsebeza, Commissioner and Head of the Investigative Unit and Advocate Denzil Potgieter, Commissioner and who is a member of the Human Rights Violations Committee. We will be the panel on behalf of the Commission.

The people who will be conducting the investigative inquiry on behalf of the Commission are, Messrs Hanif Vally, the National Legal Advisor and officer. Advocate Glen Goosen who is the National Director of Investigations.

And they are assisted in that task by Mr Jerome Chaskalson, who is a member of the Investigative Unit in the national office, and Mr Magadhla who is the Deputy National Director of Investigations, also based in Cape Town.

I assume that the legal team representing the amnesty applicants in this matter are going to place themselves on record.

ADV DU PLESSIS: Yes thank you Mr Chairman. I am Advocate du Plessis. I am acting on instructions of my attorney Mr Britz of the firm Strydom Britz Attorneys, and we act on behalf of Captain Hechter. I believe the proceedings today will only be in respect of Captain Hechter.

ADV GOOSEN: Mr Chairperson that is correct. There is in fact - subpoenas were issued in respect of four other persons, also represented by Advocate du Plessis. It was agreed that we would, as it were, deal with the subpoena of Captain Hechter by way of, if you like, a test case, regarding certain information that we would seek in this

inquiry.

It is also part of the agreement that given the nature of the information that we would be seeking, namely the identity of possible informers which would have provided information in relation to the matters set out in the subpoena, and given that there would be, as it were, argument about whether that should be disclosed or not, I would have no objection to the other persons being present and observing the proceedings. It is not intended, at this point, until that argument is completed, that we would in fact receive evidence during the course of this inquiry, and for that reason it, in the circumstances not ... (indistinct) under Section 29(5) of the Act. Probably just proceed with argument in relation to those matters.

ADV POTGIETER: What do we have, do we have five Section 29 inquiries relating to five specific individuals who have been served with individual notices to appear?

ADV GOOSEN: That is correct, we do have.

ADV POTGIETER: So what we have before us at this stage is an inquiry in respect of Captain Hechter?

ADV GOOSEN: Correct.

ADV POTGIETER: I'm not sure whether it's in fact an irregular proceeding to have anybody else but those people who are directly related to the inquiry in respect of Captain Hechter in the proceedings, given the provisions of our Act, making the proceedings in camera.

ADV GOOSEN: Yes. Mr Commissioner, I would rest in your hands. If you would rule that we should in fact deal with each of the persons subpoenaed in order, then we can do so.

It is understood though, the agreement that we have
SECTION 29 HEARING

TRC/CAPE TOWN

reached with the representatives of the persons that we've subpoenaed, it's been indicated to us that they would object to providing the information that we seek in terms of the subpoena. There would be argument. You would be called upon to rule on that and depending on what your ruling is there may well be further judicial proceedings that would follow from that ruling. So it's not anticipated that we would get to the evidence, assuming that you rule that that evidence, that we are entitled to that evidence today.

ADV POTGIETER: I do understand that, I do understand the reasoning and I can very well follow what you are saying but I am just concerned about our powers as a panel here. Section 29(5) says that,

"No person other than a member of the staff of the Commission..."

In fact it's now amended of course, it also includes Commissioner, right.

ADV GOOSEN: Yes.

ADV POTGIETER: "...or any person required to produce any article or to give evidence shall be entitled or be permitted to attend an investigation".

So it seems to me as if that limits our discretion to permit people to be present.

ADV GOOSEN: Yes.

ADV POTGIETER: We will hear what the legal representatives of Captain Hechter says and who precisely are present, but that's the difficulty that I would want to put to you just

SECTION 29 HEARING TRC/CAPE TOWN

to hear whether you've got any response or any views on that.

ADV GOOSEN: Commissioner no, I don't have any response to that. I think the wording of the section is quite clear and perhaps, in the circumstances, it would be inappropriate for even the argument to be addressed in apparent defiance of the prescriptions of Section 29(5).

ADV NTSEBEZA: What is your view Adv du Plessis?

ADV DU PLESSIS: Well, Mr Chairman, one should consider perhaps - of miskien moet ek Afrikaans praat.

Mnr die Voorsitter, 'n mens moet miskien oorweeg wat die gevolge kan wees, van die toelaat van hierdie persone by die verrigtinge. Die enigste moontlike probleem wat daaruit kan voortspruit, wat ek kan sien, is die feit dat daar moontlik later aangevoer kan word dat daar onreëlmstig opgetree is in terme van artikel 29. Die enigste persone wat moontlik so 'n argument in die toekoms kan aanvoer, is ons, en ons, as ons vir u die versekering nou hier op rekord gee dat ons dit hoegenaamd nie enigsins in die toekoms gaan aanvoer as synde een of ander rede hoekom daar onreëlmstig opgetree is nie, kan ek nie sien dat beide partye nie kan afstand doen van enige regte wat hulle mag hê uit hoofde van artikel 29(5) nie. Dit is so dat die artikel, as 'n mens die artikel lees dan lyk dit asof 'n ander persoon nie toegelaat kan word hier nie, maar my submissie is dat as daar nie enige nadeel is vir enige van die partye betrokke nie. Dit wil sê die Kommissie, die ondersoekspan, sowel as die persone of kapt Hechter en sy regsvertegenwoordigers nie, dan kan daar geen gevolge, nadelige gevolge daaruit voortspruit nie. Dit is punt

nommer een.

Punt nommer twee, kan 'n mens argumenteer dat die ander persone wat hier betrokke is, behalwe mnr Strydom, ook subpoenas ontvang het om hier teenwoordig te wees om getuienis af te lê, en dat streng gesproke, hulle vandag hier moes wees uit hoofde van die subpoenas. Daar is 'n ooreenkoms tussen ons en die ondersoekspan bereik hieromtrent, maar as 'n mens artikel 29(5) streng uitlê dan is hulle ook persone wat, as ek die Engels - verwysing na die Engelse Wet - then they are persons who are required or were required to give evidence. Op daardie basis kan u die teenwoordigheid van die persone toelaat. Ek kan werklik nie sien dat daar enige nadeel vir enige party is nie, as ons u die versekering gee dat ons nie hierdie aspek ooit as 'n onreëlmatigheid gaan opper nie.

ADV POTGIETER: Ek is nie seker daarvan nie, adv Du Plessis. U sê dat as u afstand doen van u reg om 'n punt te neem ten opsigte van onreëlmatighede, wat verband hou met die teenwoordigheid van persone wat nie streng gesproke by die ondersoek van kapt Hechter ter sprake is nie, dan kan daar geen moontlike nadelige gevolge voortspruit uit die verrigtinge nie. Maar die verrigtinge gaan juis oor ander mense. Dit gaan juis om inligting te bekom omtrent beweerde informante. Hulle kan later kom en hulle kan sê maar julle het ons, die enligting bekom op 'n onreëlmatige wyse. So ek meen, daar is 'n hele klomp moontlikhede. Dit is die een punt.

Die ander punt is, hier is dwingende bepalings in artikel 29(5). Dit sê "shall be entitled or shall be permitted". So dit lyk vir my asof dit nie 'n kwessie is

van of 'n mens afstand doen van regte of nie. Dit is 'n kwessie of dit 'n dwingende bepaling van die Wet is, en indien wel, of die paneel enige diskresie het in die verband. Dit lyk vir my nie adv Goosen het klaarblyklik daardie punt toegegee, dat dit blyk dit is dwingende bepalings en dat ons in elk geval te doen het met vyf ondersoeke. So met ander woorde, op hierdie stadium is die ondersoek van kapt Hechter voor ons en kan 'n mens nie, soos ek die situasie verstaan, na enigiemand anders verwys as "persons required to give evidence" nie "or to produce any article".

ADV DU PLESSIS: Goed.

ADV POTGIETER: So ek moet sê dat dit is die probleem wat ek het. Dit is of ons 'n diskresie het of nie.

ADV DU PLESSIS: Ja. Mnr die Voorsitter, ons sal berus by u besluit. Ek is meegedeel deur die ander persone hier dat hulle uit die aard van die saak nie beswaar het om uit te gaan, as u so gelas nie, en as u sou wou bevind dat dit die korrekte prosedure is, dan sal ons ons daarby neerlê.

ADV NTSEBEZA: Thank you gentlemen for the views that have been expressed. It seems to me, without really wasting our time, the provisions of Section 29(5) are peremptory and that they leave us with no room for discretion. And it seems to me also, that whilst we take into account the agreement that was reached between the representatives of the Commission and the applicant's lawyers and the ... (indistinct) (microphone is not on).

ADV GOOSEN: (Microphone is not on - the voice is barely audible) - It's not necessary, Mr Chairman. Mr Chairperson, given that there was an indication that an

objection will be raised on behalf of Capt Hechter to answering any questions relating to the identity of informers relevant to the investigation set out in the subpoena, I wonder if perhaps Capt Hechter's representatives would not want to place that record and indicate the nature of their objection. Strictly speaking, we should perhaps proceed with the swearing-in of the witness as it were and the raising of the issues so that that objection could be raised by the witness, and I would think that that may be the correct procedure to follow in the circumstances.

ADV NTSEBEZA: We agree. Do you have any objections to that procedure being followed, Adv du Plessis?

ADV DU PLESSIS: No, Mr Chairman. There are certain points which I want to raise first. I really don't see the need that we have to swear in the witness. We can deal with the points first and if we ever come to the situation where he has to be sworn in, then we can deal with that. I don't think there is a necessity to swear him in.

ADV NTSEBEZA: Can we then proceed to swear the witness in? Adv Potgieter will you do that please.

JACQUES HECHTER: (Verklaar onder eed).

ADV POTGIETER: Baie dankie. Sit gerus.

CAPT HECHTER: Dankie.

ADV DU PLESSIS: Mnr die Voorsitter, mag ek voortgaan om die besware wat ek het, dat daar enigsins voortgegaan word met ondervraging, voor die Komitee te plaas en ons houding daaromtrent voor die Komitee te plaas.

ADV NTSEBEZA: Perhaps from a procedural point again you see we have to - now if you are raising any objections, are

you raising any objections to a question that has been put to the witness which you wouldn't like the witness to reply to, or are you just raising the objections to the subpoena itself?

ADV DU PLESSIS: Nee, mnr die Voorsitter, ek beoog om dit op die volgende wyse te doen. Daar is twee of drie aspekte wat ek eers uitgeklaar wil hê met betrekking tot die regsbasis van hierdie proses. Punt nommer een. Wat daardie aspekte betref sal ek graag eers antwoorde wil hê.

Dan is daar, dan sal ek die antwoorde graag wil oorweeg, as ek seker is wat presies die regsbasis waarop ons voortgaan, en dan gaan ek sekere aspekte op rekord plaas, nadat ek daardie antwoorde oorweeg het wat betref die bepaalde prosedure wat gevolg word onder die omstandighede.

Dit sluit nie net die omvang van die subpoena in nie, dit sluit ook die prosedure wat voor die Komitee is vandag, in.

ADV POTGIETER: Ek volg nie die ...

ADV DU PLESSIS: Kom ek maak dit net vir u duidelik ...

ADV POTGIETER: Nee, nee, wag eers.

ADV DU PLESSIS: Soos u behaag.

ADV POTGIETER: Wag eers. Wat is die punt wat u maak? Is die punt wat u maak dat kapt Hechter is onreëlmstig hier voor ons vandag? Is dit wat u wil argumenteer, want anderster as u dit nie argumenteer nie, dan is die prosedure baie duidelik. Dan moet die ondervraging begin en dit is vir u om besware aan te - te opper teen vrae wat gestel word.

ADV DU PLESSIS: Mnr die Voorsitter, die subpoena sê baie duidelik dat ons net handel met kapt Hechter -

"... that you should give evidence and ought to answer questions relating to the identity of alleged informers, relevant to the investigations being conducted by the Commission in respect of ..."

En dan word daar 'n lys gegee.

Nou die eerste punt wat ek duidelik wil kry op rekord, voordat ons voortgaan met die ondervraging, is presies waaroor die ondervraging gaan, of dit slegs gaan oor die

"... identity of alleged informers relevant to the investigations being conducted by the Commission, in respect of ..."

En dan die lysie van ...

ADV POTGIETER: Ek is jammer, ek kan nie - hoe kan u dit vra? U sal moet u posisie oorweeg in die lig van wat gebeur het, die verrigtinge wat hierso vandag geskied. U kan nie voor die tyd vra waaroor gaan hy gevra word nie, wat is die vrae wat hy gevra word nie. U moet luister na die vrae. Tensy u vir ons sê dat die subpoena voor u is onreëlmstig, dat ingevolge daardie subpoena kapt Hechter nie verplig is om vandag hier te verskyn nie, dan kan u daardie argument opper, maar as u wil argumente opper oor die meriete van dit wat hy gevra word, dan sal u moet wag om te kyk wat gevra word.

ADV DU PLESSIS: Nee, mnr die Voorsitter, ek sê nie ek gaan op hierdie besware opper teenoor wat hy gevra word nie. Wat ek sê is, voordat kapt Hechter gaan getuig, vra ek dat die omvang van die ondersoek duidelik op rekord geplaas

word. Ek lees die subpoena as synde te verwys -
" ... to the identity of alleged
informers relevant to the
investigations being conducted by the
Commission."

Nou ek probeer bepaal presies in terme van welke bepalings in die Wet hierdie ondervraging gaan plaasvind, eerstens. En tweedens probeer ek bepaal of die omvang van die ondervraging beperk gaan wees tot daardie aspek. Dit is die eerste punt.

Laat ek sommer kom by die tweede punt. Die tweede punt is dat ons van mening is dat korrekte administratiewe prosedure onder die omstandighede sal wees dat ons insae kry in alle dokumentasie in besit van die persone, die ondersoekspan, wat die ondervraging gaan doen, voordat kapt Hechter enige antwoorde gee daaromtrent. Ons wil nou in besit geplaas word van enige dokumentasie in u besit waarop die ondervraging gaan voortgaan, en ons wil ook weet vooraf presies welke vrae aan kapt Hechter gevra gaan word, sodat ons kan oorweeg presies welke antwoorde gegee moet word onder die omstandighede.

My submitisie is, mnr die Voorsitter, dat dit billike administratiewe optrede in terme van die bepalings van die nuwe Konstitusie is. Ek kan u verwys na die gesag, as u wil.

ADV POTGIETER: Nee, ek is jammer, ek is jammer. Dit is nie 'n kwessie van die argument nie. Ek probeer vasstel wat u eintlik sê, op watter basis probeer u om die ondervraging van kapt Hechter te probeer stuit op hierdie stadium.

ADV DU PLESSIS: Mnr die Voorsitter, ek wil weet, ek wil weet presies wat die omvang van die ondervraging is. Ek wil weet op welke bepalings in terme van die Wet, die ondervraging berus. Daar is een of twee aspekte wat ek graag uitgeklaar wil hê.

ADV POTGIETER: Is die subpoena nie duidelik nie?

ADV DU PLESSIS: Mnr die Voorsitter is, wat my betref, nie duidelik nie. Daar is 'n paar aspekte en 'n paar vrae wat ek het daaromtrent. En ek wil graag vir rekorddoeleindes presies weet waaroor my kliënt ondervra gaan word, eerstens, regkens gesproke. In ander woorde, op welke artikels in die Wet baseer die Kommissie, het die Kommissie eerstens, die subpoena gebaseer en tweedens, is die Kommissie geregtig om die ondervraging te hou met betrekking tot die identiteit van informante. Dit wil ek graag op rekord hê en ek wil duidelikheid hê daaroor, voordat ek bloot kapt Hechter in die boks sit om te getuig oor aspekte waaroor ons nie duidelikheid het nie. As ons dit nie doen nie, mnr die Voorsitter, dan gaan ons waarskynlik met elke vraag 'n verdaging hê en 'n geveg hê oor presies daardie punte. Ek wil dit graag duidelik hê voor die tyd. Dan tweedens, en ek gooi nou die tweede punt somer in aan die begin. Tweedens wil ek graag presies insae hê in die dokumentasie in besit van die ondersoekspan, waarop enige ondervraging in hierdie proses gebaseer gaan wees. Ek wil insae daarin hê, ek wil 'n tyd hê, 'n tydjie hê om dit bestudeer. Ek aanvaar dat ek seker nie te lank sal neem daaroor nie. En ek wil ook weet presies welke vrae kapt Hechter gevra gaan word, en ek voer aan dat ek geregtig is of dat ons geregtig is op daardie

prosedure uit hoofde van die bepalings van die Konstitusie.

ADV NTSEBEZA: Can I just ask a few questions, adv Du Plessis. Since one of the issues that you seem to be raising is that the subpoena is not very clear, I think my first question is: when did it become clear to you that there would be further particulars required on the strength of the information in the subpoenas? And, what steps did you take to make sure that such information that you required, was obtained from the investigative unit?

ADV DU PLESSIS: Mnr die Voorsitter, die punt - ek wil myself net duidelik uitdruk. Die punt gaan nie bloot net om die subpoena nie.

ADV NTSEBEZA: I am just asking a direct question. When did you realise that the subpoena was containing insufficient information for purposes of your being able to appear today and represent your client fully and properly.

ADV DU PLESSIS: Mnr die Voorsitter ...

ADV NTSEBEZA: And when it became so clear to you, what steps did you take to obtain the information which you now want on the morning of the inquiry?

ADV DU PLESSIS: Mnr die Voorsitter, uit die aard van die saak is die subpoenas beteken, ek is nie seker presies wanneer die subpoenas beteken is nie. Dit is 'n wyle ruk terug. Die subpoena is gedateer 22 April 1997 en daar is bepaalde, verwysings na bepaalde artikels in die Wet, met betrekking tot die subpoena. Die subpoena verwys, onder andere, dat ons versoek word in terme van artikel 29 om te getuig, en dat ons getuienis moet aflê en ek gaan vir u die bewoording lees op bladsy 3:

"The investigative unit of the Commission is in terms of the provisions of section 28 of the Act, conducting investigations into the aforementioned matters. The Commission is of the opinion that you possess information in relation to the abovementioned matters, which it requires in order to fulfil its obligations."

ADV NTSEBEZA: Mr Du Plessis, when did you get that? When did that come to your knowledge that there was this subpoena in relation to which you are going to have to appear today? When did that come to your attention?

ADV DU PLESSIS: Wel, mnr die Voorsitter, kom ons neem die datum kort na 22 April, die datum 23 April.

ADV NTSEBEZA: So you had a month almost, within which you would have made this sort of fuller particulars that you now seek and on the basis of which you want to say we are not entitled to proceed until you have had those enquiries.

ADV DU PLESSIS: Mnr die Voorsitter, daar is geen procedure in die Wet wat voorsiening maak vir die vraag ...

ADV NTSEBEZA: I am not asking that Adv Du Plessis. I am just asking like a lay person factual questions. Are you telling me that within a space of nearly a month you didn't do anything and all that you are now doing is to ask today what you could have done yesterday. That is all I am asking.

ADV DU PLESSIS: Mnr die Voorsitter, ek vra vandag hierdie Komitee of die Kommissie vandag, presies op welke regsbasis

die Kommissie voortgaan vandag met hierdie ondervraging. Nou daardie regsbasis is nie noodwendig iets wat in die subpoena uiteengesit hoef te wees nie. Ek wil bepaal presies op welke regsbasis die Kommissie geregtig is om voort te gaan met die ondervraging met betrekking tot informante vandag. Dit is die punt. Dit is punt nommer een, mnr die Voorsitter. Punt nommer twee ... (intervention).

ADV NTSEBEZA: Adv Du Plessis, with respect, I have to interrupt you here. One of the bases that you indicated you want - are you listening to me, Adv Du Plessis? One of the bases that you indicated as a reason why you would like to be able to get documentation from the investigative unit, is because the subpoena does not give sufficient information. That's why you would like to have everything that the investigative unit have at its disposal, on the basis of which it is going to be answering questions. Am I correct in saying that?

ADV DU PLESSIS: Mnr die Voorsitter, die inligting in die subpoena vervat is nie die enigste basis waarop ek die vrae vra nie.

ADV NTSEBEZA: I am not asking about other bases. I am pursuing just one line. Is it one of the bases on which you would like clarification, that you don't have sufficient information, because the subpoena does not have sufficient information. Is that one of the bases?

ADV DU PLESSIS: Dit is een van die basisse.

ADV NTSEBEZA: Yes. Now pursuing just that one basis, why have you not made requests for that information within the space of the last month? That is my question.

ADV DU PLESSIS: Mnr die Voorsitter, omdat ek bewus is van so 'n prosedure, hetsy uiteengesit in die Wet, hetsy uiteengesit in enige regulasies afgekondig in terme van die Wet, hetsy in terme van die gemene reg, hetsy in terme van die administratiefreg, ingevolge waarvan jy nadere besonderhede tot 'n subpoena vra nie.

ADV NTSEBEZA: But you want it now, in terms of what procedure?

ADV DU PLESSIS: Mnr die Voorsitter, ja. Hierdie is die korrekte forum om te vra op welke basis die Kommissie van voorneme is om hierdie ondersoek te hou. Dit is die forum om te vra op welke basis en met verwysing na die subpoena, maar ek wil dit benadruk, dit gaan nie net oor die subpoena nie. Op welke basis die Kommissie, op welke regsbasis die Kommissie van voornemens is om ...(tussenbeide).

ADV NTSEBEZA: I hear you on all of that, Adv Du Plessis, with respect, I hear you on all of that.

ADV DU PLESSIS: En hierdie is die forum om dit te doen, mnr die Voorsitter.

ADV NTSEBEZA: Are you saying this is the only forum you could have requested further particulars in respect of information that you considered insufficient about a month ago? Is that your submission, Mr Du Plessis?

ADV DU PLESSIS: Mnr die Voorsitter, met respek, my submissie is dat die korrekte prosedure van die regsverteenwoordigers van kapt Hechter, in ander woorde ek en mnr Britz, is om vandag, indien ons bepaalde vrae gehad het oor die basis waarop die ondersoek sou voortgaan, om vandag die vrae aan die Kommissie te vra. Daar is geen basis, geen regsproses, geen prosedure sover my kennis

strek, ingevolge waarvan ons 'n verpligting gehad het, verplig was of van ons verwag was om enige vrae te vra met betrekking tot die inhoud van die subpoena nie. Met die gevolg is, ek vra die Kommissie vandag om voordat hierdie ondervraging aangaan, dat ons bepaal presies op welke regsbasis die Kommissie geregtig is om ondervraging te hou met betrekking tot die bepaalde onderwerp uiteengesit in die subpoena. Dis wat ek vra aan die Kommissie.

ADV NTSEBEZA: Adv Goosen?

ADV GOOSEN: Thank you very much, Mr Chairperson. Just to deal with the first aspect raised, which I understood to be a request in essence for further detail regarding each of items 1 through to 14, set out in the subpoena, as well as a request for certain documentation. I wish to place on record that approximately two weeks ago I was not present, but on a Friday, I think it was the 9th of May, the legal representatives who are present here, both Adv Du Plessis and Mr Britz, met with Mr Jerome Chaskalson and Mr Hanif Vally. They were visiting Cape Town in relation to other matters, had a meeting to discuss today's inquiry, where discussions were held about the fact that it would not be necessary ... Yes, no, the discussions were without prejudice. I am not going to go into the detail of that, but from that discussion there was an agreement that only Capt Hechter would be required to attend today, given the fact that certain objections, legal objections may be raised to the asking of the questions. It is my understanding that at no point in that discussion, and certainly the opportunity was there, was there any question addressed as to the basis upon which the subpoena is

issued. Whether we determined that today is the correct forum or not for the first time to have raised the issue, that may not be a matter of great consequence. It is clear from the subpoena and a proper reading of the Act - in fact, the subpoena refers to the various provisions in terms of which these proceedings are held. Chapter VI grants the Commission certain investigative powers. It is made clear in the subpoena that the Commission, through its investigative unit is conducting certain investigations, relating to the matters set out in paragraphs 1 to 14. Those investigations are in the instant case concerned with the establishment of whether in the first place, information may have been obtained by Capt Hechter from informers in regard to the matters set out in paragraphs 1 to 14 on page 1 and 2. That is the first issue.

Secondly, to establish whether - to establish the identity of those victims. I can draw your attention, if you want, to a general provision in the Act, which sets out the functions of the Commission, in paragraph - I beg your pardon, Section 4 of the Act, which reads that:

"The functions of the Commission shall be to achieve its objectives and to that end the Commission shall ..."

And if you look at paragraph sub (a)(iii) -

"The identity of all persons, authorities, institutions and organisations involved in such violations."

Section 4(a)(iii). To that end the Commission, there are other provisions. I am sure that Adv Du Plessis is well

SECTION 29 HEARING TRC/CAPE TOWN

aware of the provisions of the Act, which establish an investigate unit to conduct certain investigations. It is quite clear from the Act that we conduct investigations in relation and on behalf of the Human Rights Violations Committee which was duly constituted a committee of the Commission, as well as the Amnesty Committee.

This inquiry is an inquiry conducted on the - for investigative purposes, so that the investigative unit can provide its investigative services to both the HRV Committee and the Amnesty Committee.

This is not for amnesty - we are not conducting this investigation for specific purposes of the Amnesty Committee, to report to the Amnesty Committee. There are other purposes. I have indicated Section 4(a)(iii).

Now Adv Du Plessis requests certain documentation and so on. I can indicate to him that apart from the content of the amnesty applications which he is in possession of, which was filed on behalf Capt Hechter, as well as the record of the proceedings conducted before the Amnesty Committee, we are not in possession of any documentation relating to these matters. Had he requested that an earlier stage we would have indicated that to him.

I can indicate also that it is apparent from the record of the amnesty hearing, where Capt Hechter testified, that in relation to at least one of the matters, that appears on this list, in fact the matter of the murder of Dr Fabian Ribeiro, that Capt Hechter is in fact in possession of information relating to the identity of the informer, and I wish to quote to you a section of his testimony which is at page 484 of the record, as an

illustration of the point. There he states at line 17, beginning at line 17, this is where the issue of informers was being debated, as it were:

"I assume that those people's lives will definitely be placed in jeopardy if their names should be made known now. Their information led to the death of the people. So I cannot think that those persons would be able to move around in their areas freely."

Then he asks the Commission to give serious consideration to not disclosing the names. I wish again to quote to you the section of the Act, Section 4(a)(iii), which reads, that one of the functions of the Commission and it does this by way of its investigative unit, and by way of the processes of the Human Rights Violations Committee, that:

"It shall facilitate and where necessary, initiate or co-ordinate enquiries into the identity of all persons, authorities, institutions and organisations involved in such violations."

Now by Capt Hechter's own evidence on oath, he has information in which he says that a particular person gave information, which led to the death, in this instance, of Dr Ribeiro and his wife.

The Commission is entitled to that information, and it is for that purpose that we are conducting these enquiries.

If I would be permitted ultimately to put questions in relation to the other matters, he may indicate to us that

no informers are involved, he may indicate informers were in fact involved, he can indicate their role in relation to that. But that the Commission is entitled to establish and is in fact enjoined to establish the identity of all persons involved in certain violations. It is clear from the Act. And that is the basis, the legal basis, if you want, for why we are conducting this inquiry today.

ADV POTGIETER: Adv Goosen, I have noted your arguments on -and you have dealt with the points that Adv Du Plessis raised about the bases for this subpoena, and you have responded to his request to have insight into any relevant documentation that we might have in our possession. You have raised that. It would be quite peculiar if the amnesty application of Capt Hechter and the record of the proceedings before the Amnesty Committee, in respect of Capt Hechter's application is not at the disposal of Adv Du Plessis. But if not, then I am quite sure there is no difficulty in making that available.

He has raised one other point, it seems, and that it is that he wants to know exactly what questions are going to be put to Capt Hechter today. What is your response to that?

ADV GOOSEN: Thank you, Commissioner, I omitted to deal with that.

There is nothing in the Act, there is no provision in the Act which would require in the conduct of an inquiry of this nature, that we provide to a witness a complete list of all the questions that we want that witness to answer. I can think of no provision in any other statute that would require that we would prior to asking a question, provide

that question to the witness. The terms in which the subpoena is framed, those are set out in the Act. There are certain requirements that the subpoena must comply with. We must give sufficient detail, we must set out reasons why we want it, and we have done so in the subpoena. In fact, paragraph - we set out what the matters are that we want to question the witness about. It is quite clear from the opening paragraph that the ambit of the questioning is confined to the identity of alleged informers, relevant to those investigations being conducted and we set out what that is.

We make it quite clear that there are - the Commission is of the opinion that Capt Hechter is in possession of information which is relevant to these investigations and we are required to do that. Apart from that it is not a requirement of this Act that we should set out each and every question, formulate the question in advance. If we would do that, we have done by way of written interrogatories and that's not the procedure that is envisaged by the Act.

I can think of no legal basis on which Adv Du Plessis can insist on knowing beforehand and in advance what question I am going to ask. He can know the subject matter and he can ask for certain additional information in relation to that subject matter. He is entitled to documentation where that is available, certainly, but to ask what questions I am going to formulate, what point is not only not provided for in the Act, but it is also totally unreasonable. His function as a legal representative here would be to hear the question and if

there is an objection that can validly be raised to that particular question, then to raise that. That is his function here.

ADV POTGIETER: But I mean, is it at all applicable, I mean, in a proceeding like this, that you come here with a list of questions prepared, 1 to 15 and that you put them?

Is the practice not that the questioning also depends largely on the response of the subject of the inquiry?

ADV GOOSEN: It is an inquiry, it is an inquiry that is conducted on oath. The subject matter would set out the framework within the questioning would take place and if I had to overstep the mark by asking questions which do not relate to any of these matters, he would obviously be entitled to raise an objection and say we don't have notice of that and consider that question need not be answered in the circumstances.

ADV POTGIETER: Thank you very much.

ADV NTSEBEZA: Let me just ask; if reliance were to be placed on the recent Appellate Division judgment by Adv Du Plessis, as a basis for requiring the information by way of the questions that he would like you to give to him and indicate to him, what would your response be? Would you say the sort of information that he requires in terms of your questions, as requested, falls within the expectations of the reasoning of the judgment which says sufficient information must be made available to him?

ADV GOOSEN: Yes. No, the position I would adopt is that it clearly doesn't. What the Appellate Division judgment requires is that we provide sufficient information on the strength of the Appellate Division judgment, and just maybe

to indicate, that this may well have been the basis. Adv Du Plessis argued that he knows of no basis, either in common law or in statute, which would entitle him to ask for further particulars. We needn't ask for further particulars. He could point out that in terms of the Appellate Division judgment, it requires that we give sufficient information and the insufficient information is disclosed in the subpoena, and on the strength of that judgment he could ask for further information regarding each of the matters. But I would certainly submit that it would be stretching the terms of the judgment to argue and contend that he would be entitled to know exactly what questions his client was going to be asked to answer in relation to any one of these matters.

ADV NTSEBEZA: The question is, is it clear from the judgment, as you recall it, that that process also covers an investigative inquiry or is it only covering other than an investigative inquiry?

ADV GOOSEN: I don't have the judgment before me and I would need to look at it in detail. So I wouldn't want to commit myself on that, but the subject matter with which the Appellate Division was seized, was not an investigative inquiry. They were there dealing with procedures relating to Section 30, where there would be information which would be to the detriment or potential detriment of an individual, and what that person's rights and entitlements would be prior to the Commission making a determination of that issue. That is not what this particular inquiry is about. Where we are seeking to establish information, receive evidence by way of an inquiry at a stage some time

before the Commission was called upon to make a determination of facts which may emerge or information which may emerge. So the Section 30 procedure with which the Appellate Division judgment was concerned, is something that does not arise in the circumstances.

ADV NTSEBEZA: Adv Du Plessis?

ADV DU PLESSIS: Ja, dankie, mnr die Voorsitter. Miskien kan ek met die laaste aspek eerste handel. Dit is die versoek om die vrae vooraf te hê. Voordat ek daarby kom kan ek net kom by die rekord van ons amnestie-verhore. Ons het daardie rekord, ek het die rekord in elk geval verlede week Donderdagmiddag, dink ek, Woensdagmiddag, Donderdagmiddag gekry. Ek het nie daar deurgegaan voor gistermiddag nie. Ek en mnr Britz het agtergekom - ek was in die Kaap, ek is in die Kaap vir 'n ander saak. Dit is hoekom ek hier was. Ons het agtergekom dat gedeeltes van die rekord wat vir ons gegee is, weg is, bepaalde volumes is weg. Ons het die begin van volume, van dag 6, waar die uitspraak van Regter Mall is, die argument egter het ek nooit gehad. Nou ek het nie werklik gedink dit is so relevant nie, ek sal dalk net vir 'n paar oomblikke as ons verdaag, op 'n stadium seker vir tee verdaag, net vir 'n paar oomblikke vinnig daarna kyk. Ek dink adv Goosen sal dit vir my beskikbaar stel. Ek het die argument self gevoer, so ek onthou redelik goed wat dit sê. Ek aanvaar dat daar nie ander dokumente is nie, en daardie punt val dan weg.

Wat die vrae betref, mnr die Voorsitter, is dit so, die Appêlhof-uitspraak waarna ons almal verwys, sal u onthou is 'n uitspraak wat gegaan het oor die kennisgewing

aan "implicated persons", as ek die Engelse woorde kan gebruik, van persone wat genoem is in amnestie-aansoeke. Daardie persone moes vroegtydig kennis gekry het dat hulle geïmpliseer word en presies wat gesê gaan word, alhoewel die uitspraak nie so duidelik is daaroor nie. Dit is so dat dit oor artikel 30 gegaan het, dit gaan hier oor artikel 29.

Sover ek kan onthou, en ek het gedog ek het die uitspraak hier, maar ek het hom nie hier nie, sover ek kan onthou het daardie uitspraak nie iets gesê oor artikel 29 procedure en kennisgewing voor die tyd van vroeë ensovoorts nie. Die punt wat ek argumenteer daaromtrent, berus op die beslissing van **Geva v Commissioner of Inland Revenue**, (PE) - Miskien kan ek net vir u die verwysing gee - 1995(2) (433), dit is 'n Suid-Oos Kaap se beslissing. Sy Edele Regter Jones het die beslissing gegee, en dit het daar gegaan oor 'n ondersoek voor die Meester.

ADV NTSEBEZA: (Indistinct - microphone not switched on).

ADV DU PLESSIS: That is 1995(2) SA (433), South Eastern Cape local division.

Nou daardie beslissing gaan nie so ver as om te sê dat 'n persoon in 'n ondervraging voor die Meester geregtig is op die vroeë voor die tyd nie. Die beslissing gaan egter so ver om te sê dat 'n persoon by ondervraging voor die Meester, geregtig is op alle inligting en dokumentasie wat in beskikking is van die ander kant van die Staat, en die likwidateur wat die ondervraging doen, ten einde hom behoorlik voor te berei om sy vroeë behoorlik te antwoord.

My argument gaan dit 'n trappie verder, en die argument wat ek aan u voorhou steun op die bepalings van

die Konstitusie, meer spesifiek artikel 33 - dit was ook in die interim Konstitusie artikel 24, artikel 33, wat verwys na die reg op billike administratiewe optrede wat prosedureel billik en regverdig is. In ander woorde, die argument wat ek aan u voorhou is billike administratiewe optrede behels - en ek sê nie in alle gevalle nie. Ek sê nie voor die Meester en ondersoek voor die Meester moet dit in alle gevalle so wees nie, maar in 'n geval soos hierdie, die omvang van hierdie aangeleentheid, die erns van hierdie aangeleentheid, die gevaar van getuienis wat kapt Hechter moet aflê hier, nadat hy reeds getuig het in 'n amnestie-verhoor, veroorsaak dat ons baie versigtig moet wees presies welke getuienis hier op rekord geplaas word. Ons moet kan beoordeel en oorweeg presies welke antwoord op welke vraag gegee moet word, sodat ons kan bepaal en seker maak dat kapt Hechter se amnestie-aansoek en die getuienis daarin, nie benadeel word nie, sodat hy nie getuienis aanbied wat dalk een of ander privilegie mag skend nie. Ek doen met eerbied aan die hand dat hierdie prosedure, veral voor u vandag, met die belang wat dit het vir die werksaamhede van die Waarheidskommissie in geheel en die land in geheel, dit noodsaak dat ons die geleentheid kry om dit vooraf te hanteer. As ons nie daardie geleentheid kry nie, gaan dit beteken prakties, dat ek telkens na elke vraag 'n verdagting gaan vra, ten einde met my klient te konsulteer en ten einde te oorweeg presies welke antwoord gegee gaan word, ten einde dit billik en regverdig te maak.

Goed. Dit wat daardie aspek betref.

As ek kan terugkom na die regbasis van hierdie ondersoek. Ek wil u graag neem ... (tussenbeide).

ADV POTGIETER: Ek is jammer, ek is jammer, adv Du Plessis, miskien moet ons dit stapsgewyse neem. Laat ek net verstaan, seker maak of ek u reg verstaan. Sê u dat dit is onontbeerlik, dit is noodsaaklik dat u 'n lys van al die vrae het van al die individuele vrae wat vandag gevra gaan word, om te kan handel met die belange waarna u verwys het, die gevaar van die getuienis, die benadeling, moontlike benadeling betreffende u kliënt se hangende amnestie-aansoek, waar ek aanvaar hy al klaar getuig het? Ek is nie so seker hoe ver daardie prosedure is nie, maar sê u dat u het 'n lys' van een en elke vraag wat gevra gaan word vandag, voor die tyd nodig, en dat dit nie kan billike administratiewe handeling wees, tensy u daardie lys kry nie?

ADV DU PLESSIS: Ja, mnr die Voorsitter, kapt Hechter het reeds sy getuienis afgehandel met betrekking tot al die aspekte wat verwys word in die subpoena. My submitisie aan u is dat ons geregtig is op 'n lys van vrae van daardie aspekte wat gedek gaan word by die Kommissie wat die ondervraging betref, en dat ons in 'n posisie gestel moet word om te kan oorweeg presies welke antwoorde ons moet gee. Indien 'n mens nou uit die aard van die saak, soos ondersoek gaan, kan 'n mens verwag dat sekere antwoorde sekere verdere vrae uit die aard van die saak kan ontlok. Ek handel nie nou daarmee nie. Ek sou waarskynlik vir praktiese doeleindes sou 'n mens dit op 'n vraag/verdaging/vraag/verdaging antwoord kon hanteer, sodanige vrae. Ek sou nie te veel van 'n probleem gehad het daarmee nie. Wat wel die situasie is, is dat ons sê dat ons voor die tyd soveel moontlik vrae wat enigsins gevra

SECTION 29 HEARING

kan word, wat nie gaan voortspruit uit antwoorde wat gegee word nie, aan ons vooraf gegee word, sodat ons die vrae kan oorweeg en dit kan antwoord. Dit gaan uit die aard van die saak hierdie ondervraging natuurlik baie makliker maak, instede net op 'n prakties noot, instede van die versoek van die verdagting elke keer nadat 'n vraag gevra word.

ADV POTGIETER: U sê dat in die **Geva**-saak was die bevinding van die Hof nie dat die persoon wat vir ondervraging ter sake was daar nie, geregtig was op een en elke vraag wat vooraf gevra gaan word nie.

ADV DU PLESSIS: Nee. Nee, mnr die Voorsitter, dit was nie beslis daar nie. Ek verwys na die **Geva**-saak, want dit is die beslissing wat spesifiek handel oor welke inligting, inligting en dokumentasie aan die persoon beskikbaar gestel moet word met betrekking tot administratiewe optredes teen so 'n persoon, ten einde dit billik en regverdig te maak. Nou die saak gaan in werklikheid eintlik oor die verskaffing van dokumentasie en dit is gebaseer op die reg van toegang tot inligting wat tot beskikking is van die persone wie die bepaalde persoon sal ondervra. Ek het net na die **Geva**-saak verwys omdat dit die saak is wat die naaste kom aan die vraag waarop is 'n persoon geregtig wanneer hy onderworpe gaan wees aan 'n administratiewe ondervraging soos hierdie. My argument gaan verder as dit.

My argument sê in 'n bepaalde ondervraging soos die huidige, met inagneming van die probleme, met inagneming van die feit dat kapt Hechter reeds getuienis afgelê het voor die Amnestie Komitee, met inagneming van die belang van hierdie saak en met inagneming van wat hierom draai, dit in hierdie gegewe geval billik en regverdig sou wees om

benewens dokumentasie wat in besit is van die ondersoekspan, ook die vrae vooraf te hê om dit te kan oorweeg.

ADV POTGIETER: Kan u ons na enige gesag verwys wat ...

ADV DU PLESSIS: Nee.

ADV POTGIETER: ... wat u ondersteun? Kan u aan enige praktiese voorbeeld dink van waar dit van toepassing is?

ADV DU PLESSIS: Ja.

ADV POTGIETER: Ek het probleme, ekself kan nie dink aan enige praktiese geval waar 'n party vooraf geregtig is op ieder en elke vraag wat gevra gaan word nie. Kan u dink aan 'n praktiese geval waarna u ons kan verwys?

ADV DU PLESSIS: Ja, mnr Potgieter, ek kan vir u sê dat sedert die Konstitusie nou begin het, of in werking getree het, het veral voor die Meester, hierdie tipe van aspekte redelik gereeld opgeduik. Nie redelik gereeld nie, baie gereeld opgeduik. Die jurisdiksie waar ek praktiseer in Pretoria, het dit verskeie kere opgeduik. Dit het baie maal gedraai om die dokumentasie en dit is tans die gebruik van die Meester, soos ek dit verstaan, om te gelas dat dokumentasie hier beskikbaar gestel word in meeste gevalle.

Ek is ook bewus van sekere gevalle, ek was nie self betrokke daarby nie, maar ek is bewus van sekere gevalle waar die Meester wel gelas het dat vrae wat aan 'n persoon gevra gaan word tydens 'n insolvensie-ondervraging, wel vooraf beskikbaar gestel gaan word. Dit beperk natuurlik nie die omvang van die verdere ondervraging wat uit die antwoorde mag voortspruit nie. Daar is wel gelas in bepaalde omstandighede dat die vrae vooraf beskikbaar gestel word, ten einde die persoon wat getuig, 'n

geleentheid te gee om die vrae voor te berei en behoorlike antwoorde voor te berei. Daar is egter nie 'n beslissing op hierdie punt nog of billike administratiewe optrede in terme van die Konstitusie in gegewe omstandighede of in 'n bepaalde geval, dat dit so 'n prosedure regverdig nie. Ek voer hierdie punt aan voor u vandag, as synde dat hierdie forum vandag, gegewe die situasie vandag, juis 'n forum is waar daardie optrede billike optrede en regverdige optrede sou wees in die omstandighede. En dit is die rede hoekom ek dit voor u aanvoer.

ADV NTSEBEZA: I don't know if I follow you well, Adv Du Plessis. Was it your contention that depending on the nature of the question and the answer that might have to be given, certain of the answers that your client might have to give, might prejudice his amnesty application? Did I understand you well?

ADV DU PLESSIS: Yes, Mr Chairman, that is one of the reasons. Some of the other reasons, another reason is that it might involve some privilege, some privileged information or a privilege that my client might have, which is something which I need to consider in respect of the answer to every question.

We are saying, however, that because of the fact that we have already testified before the Amnesty Committee, that random questioning might at the end of the day, prejudice my client's amnesty application.

ADV GOOSEN: Mr Goosen?

ADV GOOSEN: Mr Chairperson, just on that point. I don't know that I fully follow the argument that was raised by Adv Du Plessis. I indicated quite clearly, the subpoena

○ makes it quite clear, that what we are dealing with is questions in relation to the identity of informers. If I were to begin to ask questions in relation to any one of these matters mentioned here, which goes beyond questions relating to the identity of informers, well, then I could understand that there may be a concern that by conducting a broader ranging inquiry on matters concerning which Capt Hechter has already testified before the Amnesty Committee, that in those circumstances there may be some prejudice which may arise, because reformulation of an answer which may apparently contradict what has already been said before the Amnesty Committee. That doesn't arise in the circumstances. So that is a reason for why additional or why we should provide a list of every single question that we are going to ask, doesn't in my view pass muster.

I think the second point to make there is that the Section 417 inquiry, the company inquiry, the **Giva** matter, is a very different animal to that which we are dealing with here. I don't think it can be contended that a consequence of this very specific inquiry, with the very limited ambit of questions, and they are quite clearly stated, identity of informers, that that can in any way be construed as an inquiry which would have a consequence for the person who is the subject of the inquiry. It may have a consequence in relation to the informer, and for that reason, certainly there may be consequences about whether a privilege of some description or another may be involved, but in regard to that, we are dealing here with an **in camera** inquiry for which provision is made in the Act, at a stage prior to any decision being taken by the Commission

SECTION 29 HEARING TRC/CAPE TOWN

as to how to deal with. In fact, Section 29(5) makes it quite clear that information that we obtain during the course of this will not be made public and the ultimate decision still has to be made. So yes, I can understand that we would want, that Adv Du Plessis would want to know generally what the questions are, so that he can consider whether in the circumstances a claim of privilege should be raised or not.

The general practice though, in virtually all criminal and civil courts that I am aware of, is that a claim of privilege is raised in relation to a specific question that is put, and so from that point of view, I can understand that he would want to know what the question is, so that he can consider whether a claim of privilege should be raised.

But that that should be a basis upon which he should then know each and every question that is going to be asked, in advance, I believe that that takes it far too far.

It is quite apparent why the **Giva** judgment doesn't go as far as to suggest that every single question should be known. It would render not only Section 417 inquiries, but any form of inquiry before a Court, virtually impossible to conduct. There would be no reason why there should then be a difference between the Section 417 inquiry and a criminal trial. In fact, all the more reason why every single question that is going to be put to a witness, certainly the accused in a criminal trial, should be known by the accused beforehand.

There is in my knowledge no jurisdiction in the world that would make provision for the conduct of trials on that basis. On that basis I would submit that there is no

SECTION 29 HEARING TRC/CAPE TOWN

authority, no matter how much you try to stretch the **Giva** judgment, you are not going to stretch it to cover the sort of request that Adv Du Plessis is now raising.

The very simple matter is that if the question is perceived by him on instructions and on the basis of his experience of these matters, to be outside of the ambit of the subject matter of this inquiry, he can raise an objection. Beyond that, I don't believe he needs to know more than what the subject matter of the inquiry is.

ADV NTSEBEZA: Adv Du Plessis, do I understand that your main concern at the end of the day, about the procedure, that we would otherwise be following in putting your client on the witness stand, and asking the legal representatives of the Commission to ask him questions, would be that from a practical point of view it would be tedious if you did not have the questions ahead of time, and therefore, it speaks particularly to convenience of the proceedings, because you might be finding yourself constrained to raise objections on virtually or to virtually each and every question? Is your objection, quite apart from you contending on the **Giva** judgment to be premised on legal consideration, would I be correct to say that it seems to me it is one premised on a balance of convenience? It would be more convenient if we proceeded in the form in which you request than if we proceeded otherwise?

ADV DU PLESSIS: Ja, mnr die Voorsitter - Mr Chairman, obviously we must just take into account that this is one point I am raising. I have got a few other points that we have to deal with as well. In respect of this specific point, it is actually twofold. I say firstly, from a

SECTION 29 HEARING

TRC/CAPE TOWN

practical point of view that's the way it should be done, on a balance of convenience, as you have said, from a practical point of view.

But, furthermore, I say apart from that, given the situation here and the subject of the questioning, it would be fair towards my client, in terms of the Constitution, fair administrative action to be divided with the questions beforehand.

And the important point in respect of privilege there, to remember, Mr Chairman, is the fact that there exists something like privilege in the common law, in South Africa and overseas, pertaining to informers, which means that privilege will most probably be an aspect which will be raised in respect of each and every question that is going to be asked here. That is another point I am coming to. So on that basis we say that we want the questions beforehand, so that we can determine exactly in respect of which questions we would want to raise that specific privilege. We intend to raise the whole question of the applicability of the privilege, as you surely are aware of, pertaining to informers, which is a common law privilege which exists. We intend to do that.

Now if we have to do that in respect of each and every question, we are going to come back, raise the privilege, have the next or have a decision on that perhaps or have a next question and then have a decision, at the end of the day.

ADV POTGIETER: Why not? Why not?

ADV DU PLESSIS: Well, Mr Chairman, if the Commission feels, if you feel that practically that would be the way

to do it then from a practical point of view one can do that.

ADV POTGIETER: That's what happens, that's what happens out there in reality. You object, you take a point in regard to a specific question. So what's the difference?

ADV DU PLESSIS: I am trying to ...

ADV POTGIETER: Why can't you consider the points that you want to take in respect of every question as it is put? What's the difficulty?

ADV DU PLESSIS: Mnr die Voorsitter, ek probeer dit net vir u makliker maak. Maar wat die balans van geriefsituasie betref, en aan die einde van die dag gaan ons dieselfde punt oor en oor en oor argumenteer op elke vraag. Dit is die, as u dit so wil doen van die praktiese kant af, dan kan u so gelas. Dit doen egter nie afbreuk aan die feit dat ons konstateer dat dit billike administratiewe optrede sal wees teenoor my kliënt om hom die vraag vooraf te gee om dit te oorweeg. Ons sê dat ons geregtig is in terme van die Konstitusie in hierdie bepaalde geval, met inagneming van die privilegie aspek, en inagneming verder, van die feit dat dit wil vir my voorkom asof hierdie ondersoek nie net met betrekking tot een Komitee gedoen word nie. Dit word ook gedoen met betrekking tot die werksaamhede van die Amnestie Komitee. In ander woorde, die getuienis wat voor u geplaas gaan word, hou verband met die werksaamhede van die Amnestie Komitee. Dit kan my kliënt se amnestie-aansoek ongelooflik benadeel. Dit gaan ook, as hierdie prosedure kan gebeur, dat 'n persoon getuig in 'n amnestie-aansoek, en daarna deur die "investigative unit" onderwerp kan word aan verskeie vrae oor verskillende onderwerpe

voortspruitend uit sy amnestie-aansoek, dan beteken dit 'n mens gaan, wat die amnestie-prosedure wat hierdie Wet betref, in vyf, ses verskillende verhore inloop, gehou deur verskillende persone. Dit is juis die rede waarom ons die vrae wil oorweeg voor die tyd ten einde te kan bepaal of ons beswaar maak daarteen op daardie basis.

ADV POTGIETER: Nee, ons verstaan u argument oor die vrae.

Die ander punt was die insae in enige dokumente. Is u gelukkig - dit lyk vir my asof u aanvaar dat daar slegs die rekord is van die amnestie-aansoek en die amnestie-aansoek dokument self. Dit lyk asof adv Goosen ook aangedui het dat u kan gerus insae daarin hê. Is dit genoegsaam ten opsigte van daardie punt?

ADV DU PLESSIS: Ja. Mnr die Voorsitter, ek is heeltemal tevrede. Ek wil net graag insae hê in die argument-gedeelte, maar dit sal my nie lank vat nie.

ADV POTGIETER: Goed. Het u enigiets om by te voeg oor die ander grond, die basis van die subpoena?

ADV DU PLESSIS: Ja.

ADV POTGIETER: Ons verstaan u argument daaromtrent ook.

ADV DU PLESSIS: Asseblief. As ek u kan, kan ek u neem na die Wet, asseblief. Ek wil u neem na artikel 3(3), artikel 3(3) van die Wet.

ADV NTSEBEZA: Can I just have a two, three minute adjournment.

COMMITTEE ADJOURNS

ON RESUMPTION:

ADV NTSEBEZA: Thank you for that indulgence. You may proceed.

ADV DU PLESSIS: Thank you, Mr Chairman. Mr Chairman, if I can refer you to Section 3(3) of the Act. It sets out what the Commission can do, the powers of the Commission in order to achieve their objectives. That is apart from the function in Section 4. But we perceive that Section 3(3) sets out the powers of the Commission. Section 3(3)(a) says that -

"The Committee on Human Rights Violations shall deal, among other things, with matters pertaining to investigations of gross violations of human rights, victims and motives and perspectives of persons responsible for the commission of the violations, by conducting investigations and holding hearings."

(b), (c) and (d) I do not perceive as being applicable for current purposes for this investigation. I accept, although my learned friend, Mr Goosen did not specifically refer to Section 3(3)(a), that (3)(3)(a) and he also mentioned the Amnesty Committee, so it would also be (b), would be the powers upon which they rely to have this investigation.

Then the last subsection of the Act. Mr Chairman, if you will just give me a moment, please.

ADV GOOSEN: Mr Chairman, perhaps, maybe just to correct one indication thing that my colleague may have misunderstood. I indicated that the investigative unit is empowered in terms of Chapter VI to conduct investigations. Broadly, that it services both the Amnesty Committee and the Human Rights Violations Committee.

ADV DU PLESSIS: (Indistinct - microphone not switched on).

ADV GOOSEN: Indeed, but it was not my submission that this inquiry relates to the Amnesty Committee's process. In fact, the Section 4(a) I referred to 4(a)(iii) -

"... the identity of all persons,
authorities, institutions,
organisations involved in such
violations."

You may wish to have a look at Chapter III, specifically Section 14(1)(a), which empowers the Human Rights Violations Committee to institute enquiries referred to in Section 4(a), which is what we are talking about.

ADV DU PLESSIS: Yes, thank you, Mr Chairman. I am indebted to my learned friend. This is actually what I want to determine. I want to determine exactly in terms of which provisions we act here.

In Section 3(iii) it states:

"In order to achieve the objectives of the Commission, the Committee on Human Rights Violations deals with matters pertaining to investigation of gross violations of human rights ..."

And there is a reference to the Committee on Amnesty and a reference to the Committee on Reparation and

Rehabilitation. Then it says:

"The investigating unit referred to in Section 5(d) shall perform the investigations contemplated in Section 28(4)(a)."

Now as I perceive this, there are three committees and then the investigating unit should perform investigations contemplated in Section 28(4)(a). If I can take you to Section 28(4)(a), please. 28(4)(a) reads:

"That the investigating unit shall investigate any matters falling within the scope of the Commission's powers, functions and duties, subject to the directions of the Commission, and shall at the request of a committee investigate any matter falling within the scope of the powers, functions and duties of that committee, subject to the directions of the committee."

Now as I understand my learned friend correctly, and maybe this isn't a problem at all, is that we are dealing here with the Human Rights Violations Committee, and I accept for that purposes also that there was a request made by the Human Rights Violations Committee, to the investigating unit, to investigate this specific matter. That is something that I would like to have cleared up before we go on.

That is the one point that I would like to be clear on. Because it is important, as you would realise, that we need to know in respect of which committee we are dealing

SECTION 29 HEARING

TRC/CAPE TOWN

with here. Is it the Human Rights Violations Committee, is it the Committee on Amnesty. Specifically ... (intervention).

ADV POTGIETER: What if it is the Commission?

ADV DU PLESSIS: Well, Mr Chairman, that is the point of 28(4)(a). If you read - and that is my interpretation of Section 28(4)(a). My interpretation is that the investigating unit can act on the request of a committee which investigates any matter. The committees existing in terms of the Act, are the committees set out in Sections 3(iii), which are the Committee on Human Rights Violations, the Amnesty Committee, the Reparation & Rehabilitation Committee or any other committees referred to in 3(e). That is why I am raising this point right at the start so that we know exactly in respect of the workings or the - die werksaamhede van watter komitee is ter sprake met betrekking tot hierdie ondersoek.

Dit is die aspek wat ek wil bepaal. Ek sal vir u die rede sê hoekom ek dit sê, mnr die Voorsitter. Dit is, as daardie inligting voor ons is, en ons weet presies in terme van welke bepalings in die Wet hierdie verrigtinge vandag plaasvind, dan kan ek gaan bepaal presies wat die posisie is met betrekking tot die magte van die komitee om 'n ondervraging te hou met betrekking tot hierdie bepaalde onderwerp. Ek kan nie daardie bepaling doen en in daardie posisie geplaas word voor ek dit nie weet nie. Dit is ook die spesifieke rede hoekom ek sê die subpoena is vir my onduidelik, bloot vanweë die feit dat die subpoena nie verwys na welke komitee hier ter sprake is nie.

Ek wil nie later kom dat ons in allerhande gevegte inloop oor wat die regsbasis is vir die ondervraging nie, watter komitee is ter sprake, wie is gemagtig om wat te doen waar nie. Ek wil graag hê ons moet dit voor die tyd uitklaar en bepaal.

ADV NTSEBEZA: Advocate, do I - maybe you have not said it in so many words. Let's assume that it was the Commission that had authorised this investigation. Would you say that it was a misdirection on the part of the Commission to have ordered this investigation, and that only the committees, specifically the Human Rights Violations Committee is legally authorised to hold this investigation?

ADV DU PLESSIS: Yes, Mr Chairman, if I read Section 3(iii) correctly, it sets out the Commission achieves its directives and it works through certain committees. We say that it has to be one of the committees. If you read Section 28(4)(a) referring to the investigative unit's powers, it also refer to the fact that they should act on request of a committee. So that is what we say. We say that the Act is quite clear on that, Mr Chairman, and we say that the Commission itself cannot outside the auspices of the committees created to achieve the objectives of the Commission, act unilaterally, arbitrarily without that power having been created in the Act. We say that that power has not been created in the Act.

ADV POTGIETER: I don't understand that submission. Chapter VI refers to investigations and hearings by the Commission - "The Commission may establish investigating unit - that is

the heading to Section 28. Section 29:

"The powers of the Commission with regard to investigations and hearings."

And then of course:

"In terms of the definition, commission here includes a committee and commissioner in terms of the definition includes committee member."

So Chapter VI relates to the entire structure; commission, committees, commissioners, committee members.

ADV DU PLESSIS: Mr Chairman, if we can look specifically at the definitions of the Act. It says:

"A commission means the Truth and Reconciliation Commission, established by Section 2 and Committee means the three committees as the case may be."

If we read Chapter VI ... (intervention).

ADV POTGIETER: No, I'm sorry, I am sorry to interrupt you.

ADV DU PLESSIS: Yes.

ADV POTGIETER: Also read subsection (ii), (1)(ii).

ADV DU PLESSIS: Well, Mr Chairman, that says for purposes of Sections 10, (i), (ii) and (iii) and 11 in Chapters VI and VII -

"Commission shall be construed as including a reference to committee or subcommittee, as the case may be."

ADV POTGIETER: Yes.

ADV DU PLESSIS: Now that means committee or subcommittee, and if you look at what the definition of committee is, it can only be one of three committees. So our contention is

that the Commission can only act through one, through committees and on the basis of that.

ADV POTGIETER: I don't understand that argument, I must say, but I have referred you to Section 28 and 29, the headings and Section 1(ii).

ADV DU PLESSIS: Well, Mr Chairman ...

ADV POTGIETER: But carry on.

ADV DU PLESSIS: Yes.

ADV POTGIETER: I have heard what you have said.

ADV DU PLESSIS: Yes, that is the argument, Mr Chairman, and obviously if the view is that the Commission, that a power is created apart from the three committees for the Commission to act unilaterally, on a different basis and not under the auspices of one of the committees or not in respect of the workings of one of the committees, we say that today's hearing will then be **ultra vires**. That is the one point that we would like to make pertaining to that.

Perhaps - I don't know if you, Mr Chairman, would want to deal with that or if you want to hear my whole argument pertaining to the question of **ultra vires**?

ADV POTGIETER: I thought that you had these three points and that you dealt with the other two. You are now simply just responding to the argument of Adv Goosen in respect to your point relating to the basis of the subpoena.

ADV DU PLESSIS: Yes.

ADV POTGIETER: So I thought we are hearing your response on it.

ADV DU PLESSIS: Yes, I am with you, I am with you.

ADV POTGIETER: In fact, perhaps to assist you. I mean, we have heard your original argument, we have heard the basis

on which you raised these points **in limini**. We have listened to it very carefully. We have heard the response of Adv Goosen and we are simply listening to your reaction to that. So that we can deal with this.

ADV DU PLESSIS: I understand.

ADV POTGIETER: I mean, we want to proceed.

ADV DU PLESSIS: Yes, I know, Mr Chairman, and that is why I am saying there are - I have come to the point that if what I say, if what we say is correct, that it is the Commission and not one of the Committees who are conducting this investigation, obviously then there are further points which I want to raise pertaining to the question of is it **ultra vires** or not. But perhaps we should deal with that question first, and determine exactly which committee we are dealing with here; is it the Commission itself which is conducting this investigation and get the legal basis hundred per cent correct before I deal with any other points.

ADV POTGIETER: No, I am sorry, there must be some misunderstanding. You have raised the point in regard to the basis for the subpoena. You have argued it. There was a response to that, as well as a response to the remaining two points that you have raised **in limini**, and we have heard the argument. I assume that you finished your argument, you completed your argument. If so, then it is time for us to make a ruling on these points that you have raised and that we are not engaging in an exercise of exchanging factual information. We are listening to your legal arguments and we will make a ruling on that, and that's it.

ADV DU PLESSIS: Yes, but Mr Chairman, let me just, if you can just understand where I come from.

Wat ek presies sê, mnr die Voorsitter, is ek kan nie vir u sê dat ons van mening is dat hierdie prosedure wat ons nou mee besig is **ultra vires** is, as ek nie weet op welke regsbasis in terme van die bepalings van die Wet, hierdie bepaalde prosedure gevoer word nie. En wat ek mee besig was tot dusver, is ek het gesê die subpoena is onduidelik wat dit betref. Ek wil graag inligting hê met betrekking tot welke regsbasis hierdie prosedure gevoer word, sodat ek 'n bepaling kan maak of daar **ultra vires** opgetree word. Ek sê dat ons geregtig is om te weet op welke regsbasis hierdie prosedure gevoer word.

ADV POTGIETER: Ek is jammer, ek is jammer. Soos ek u verstaan, soos ek die prosedure hier verstaan, u het sekere punte **in limini** geopper.

ADV DU PLESSIS: Ek is nog nie klaar nie, mnr die Voorsitter.

ADV POTGIETER: Goed, goed, dan begin ons mekaar te verstaan. Adv Goosen het daarop gereageer, u is besig - ons gee vir u die reg om in repliek daarmee te handel. Ons luister daarna en as u daarmee klaar is, moet ons 'n bevinding maak, 'n "ruling" maak, en dan gaan die prosedure voort.

ADV DU PLESSIS: Ja, maar mnr die Voorsitter ...

ADV POTGIETER: Verstaan ons mekaar daaromtrent?

ADV DU PLESSIS: Mnr die Voorsitter, daar is punte **in limini** wat ek wil neem. Die punte **in limini**, die basiese punt wat ek wil neem voordat die verrigtinge 'n aanvang kan

neem, gaan oor die vraag of hierdie prosedure **ultra vires** is of nie. Ek kan nie bepaal of die prosedure **ultra vires** is as ek nie weet wat die regsbasis is nie.

Met ander woorde, ek het geargumenteer oor die vraag met betrekking tot die subpoena, die regsbasis van die ondervraging en die vraag of daar bepaalde dokumentasie is, sodat ek ook daaruit kan bepaal wat die regsbasis is van die ondervraging, onder andere, en die vrae wat ek voor die tyd wil hê. Dit is die punte wat ek aan die begin geopper het. Indien ek sekerheid het oor wat die regsbasis is, waarop hierdie ondersoek gedoen word vandag, dan voordat die aansoek 'n aanvang kan neem, gaan ek, as ek bepaal dat daar **ultra vires** opgetree moet word, gaan ek daardie punt dan moet neem, en dan vir die Komitee sê op grond van die feit dat dit die regsbasis is waarop die prosedure gedoen word, sê ons nou dit is **ultra vires** om hierdie en hierdie en hierdie redes.

ADV POTGIETER: Ja.

ADV DU PLESSIS: Ek het daardie redes nog nie geadresseer nie.

ADV POTGIETER: Nee, ek verstaan dit, ek verstaan dit heeltemal. U het die punt geopper omtrent die basis. Adv Goosen het daarop geantwoord. U het die stukke voor u. U moet besluit of u 'n saak het of nie. U moet - u het of 'n saak op die punt of die dagvaarding **ultra vires** is of u het nie 'n punt nie. En u kan nie verwag, u kan nie verwag dat u die basis vir 'n moontlike argument wat u het, gaan verskaf word deur 'n derdeparty nie. U moet besluit, het u 'n argument. En soos ek u verstaan, het u probeer tot op

hede in argument te opper dat die subpoena **ultra vires** is, dit is onduidelik en dit sê nie vir u waarom dit gaan nie.

U wil weet wat die regsbasis is. U is verwys na artikel 29 en na die subpoena self. Ons is besig om te luister na u repliek. So as u klaar is met u repliek dan kan ons handel op dit wat voor ons is en ons kan 'n bevinding maak.

ADV DU PLESSIS: Goed, mnr die Voorsitter, maar dit beperk my reg, as daar 'n bevinding gemaak te word met betrekking tot die punte wat nou geopper is, onder andere, die vraag op welke regsbasis hierdie proses vandag voortgaan. Dit gaan nie net oor die subpoena nie, dit gaan oor die proses van vandag ook. Dan gaan ek - en ek wil net by u verneem, of ek die geleentheid gegun gaan word dan, indien ek bevind of indien ek van mening is dat die prosedure dan **ultra vires** is, om aan u voor te hou presies om welke redes ons aanvoer dat die prosedure **ultra vires** is en nie kan voortgaan nie.

ADV POTGIETER: Ja, ek dink ons moet - soos ek vir u gesê het, die drie argumente het u geopper. Ons moet dit afhandel en dan met die proses aangaan daarvandaan.

ADV DU PLESSIS: Ja, ek wil net nie my - ek wil net dit baie duidelik maak; ek beperk my nie op hierdie stadium wat die punte **in limini** betref tot daardie drie punte nie.

ADV POTGIETER: Ja, ons verstaan dit, maar ons wil graag hierdie punte afhandel.

ADV DU PLESSIS: Soos u behaag.

ADV POTGIETER: Goed. Is daar enigiets verder wat u wil byvoeg by die drie punte wat u geargumenteer het? Is dit u argument?

ADV DU PLESSIS: Nie wat hierdie punte betref nie.

ADV POTGIETER: Goed.

ADV DU PLESSIS: Die **ultra vires** punt sal ek graag nog iets wil byvoeg na die uitspraak, en argumenteer daaroor.

ADV POTGIETER: Goed. Adv Du Plessis, u sê dat u miskien, u het nog dalk iets op die hart ten opsigte van die **ultra vires** argument.

ADV DU PLESSIS: Ja.

ADV POTGIETER: Moet u nie u argument volledig aan ons voorlê nie?

ADV DU PLESSIS: Ja, mnr die Voorsitter, ek en my prokureur het nou daaroor gepraat. Die aspek soos wat ek dit verstaan, waarop u moet uitspraak gee nou, is die vraag of ons geregtig is op vrae voor die tyd. Die ander aspekte wat ek geopper het, is bloot - ek het probeer bepaal op welke regsbasis die proses voortgaan. In ander woorde, ek wil graag duidelikheid hê op grond van welke artikel in die Wet en met betrekking tot welke komitee, hierdie proses voortgaan. So dit is twee aspekte soos ek dit sien, mnr die Voorsitter, waarop daar - op die een moet 'n uitspraak gegee word en op die ander een moet ons in besit gestel word van genoeg inligting om te weet presies op welke regsbasis hierdie proses voortgaan, wat betref welke komitee optree en op welke artikels in die Wet gesteun word vir hierdie prosedure. Eers as ek daardie inligting het, mnr die Voorsitter, kan ek vir u sê dat of kan ek argumente aan u voorhou met betrekking tot die vraag of daar **ultra vires** opgetree word. Ek moet eers bepaal op watter artikels in die Wet hierdie prosedure voor ons vandag gebaseer word, voordat ek kan bepaal en 'n besluit kan maak

SECTION 29 HEARING

of hier **ultra vires** opgetree word of nie. Ek hoop u volg my, mnr die Voorsitter.

So die een punt is 'n punt wat u besluit, soos wat ek dit sien met betrekking tot die vrae. Die ander punt is 'n duidelikmaking aan die regsverteenvoerders van kapt Hechter aan ons, presies op welke basis, regsbasis en welke bepalinge in die Wet daar opgetree word met betrekking tot hierdie prosedure. Inaggenome artikel 3 spesifiek.

Dan wil ek u adresseer as ek dan tot die gevolgtrekking kom dat die optrede **ultra vires** is, uit hoofde van die basis waarop dit gedoen word, dan wil ek u graag toespreek oor hoekom ons sê die optrede **ultra vires** is.

ADV POTGIETER: Ek dink u kollega wil inkom, maar u het geluister na adv Goosen se reaksie, en miskien moet ons by adv Goosen verneem of hy enigiets wil byvoeg - whether he wants to add anything to his exposition in regard to the basis for the subpoena. Because to my mind he has dealt with that point, I am not sure if he wants to add anything specifically around that basis. But otherwise, he seemed to have dealt with the point and it is for you to decide how you are going to handle the matter in the light of that reaction.

ADV GOOSEN: Mr Chairperson, I don't wish at this point to add anything in relation to that. I think I have dealt with the issue. I would agree with your assessment that it falls to Adv Du Plessis to determine whether what has been indicated to him would be sufficient for him to sustain an argument that it is **ultra vires** or not.

Could I just add one another point, perhaps before you deal with the matter. I just want to confer with my colleague, but I want to address one issue.

Mr Chairperson, I have conferred. The issue that I would need to address, in fact, is not necessary to address in the circumstances.

ADV NTSEBEZA: I just wanted to canvass from you, Adv Du Plessis. I have just been looking at the particular notice, the subpoena to Mr Jacques Hechter, and it seems to me that it sets out the legal basis on which this whole inquiry is being conducted. It cites - it may not be saying in terms that this is this committee or that committee, but it refers to sections, firstly that the notice is issued in terms of Section 29, that the requirement for the giving of evidence and the answering of questions is framed within the provisions of Section 28 of the Act, that it refers to a section, Section 31(i). And that in terms it puts all of this as being the investigative inquiry authorised by the Commission.

As I understand your position, you would argue that this inquiry is **ultra vires** the Act, if it is conducted by the commission rather than by the Human Rights Violations Committee.

Now what I would like to find out from you. Let us assume that in terms of the information that you requested, and it was able to be provided, and the answer was that it is in terms or at the instance of the Human Rights Violations Committee, would you make the argument or put the same question differently? Let us assume, as my learned friend here indicated, that we are not at this

point in the business of making information available; we stand and we fall by what is contained within the four walls of the notice, and from the notice it appears that it is the Commission. Would you still make the point or would you need to be able to make the point that to the extent that it is not clear from the subpoena, the argument is made that these proceedings are conducted in circumstances where the **ultra vires** argument can be made?

ADV DU PLESSIS: Yes, Mr Chairman, I understand what you say. I would like to be in a position to consider my position pertaining to the **ultra vires** argument. I don't want to raise the point of **ultra vires**, without being able to consider it properly. I read the subpoena and I saw that there was a reference to commission. My first question was: what committee. I then went to read the Act and I interpreted the Act as I have set out in my argument. I do not interpret the Act as saying that the Commission can act in this way, apart from the committees created. So I need to know exactly who are we dealing with. Are we dealing e with a committee, is it at the instance, at the request of the committee that the investigative unit is doing this; is it at the request of the Commission itself; is it the Commission itself who is conducting this inquiry.

Now if you should say to me that the basis of the inquiry is contained within the four walls of the subpoena, then I am going to ask for an adjournment, discuss it with my attorney and make a decision, if this indicates that the Commission is acting **ultra vires**. I have given you my **prima facie** view on that, and at this point of time I am of the view that that will be the case. But I first want to know

exactly what the basis is upon which this inquiry is conducted, before I can make a final decision. Otherwise, I am going to argue about **ultra vires** in the air without really having the benefit of knowing exactly what to say, who is acting **ultra vires** of what. I have to be able to say who is acting **ultra vires** about what, Mr Chairman. You can say to me that it is within the auspices of the subpoena, and then I will consider my position.

ADV POTGIETER: Sorry, does that conclude your replication?

Is dit u repliek?

ADV DU PLESSIS: Mnr die Voorsitter, dit is die repliek, met betrekking tot die punte wat ons gehanteer het tot dusver.

ADV POTGIETER: Nee, ek het u gehoor.

ADV DU PLESSIS: Ja.

ADV POTGIETER: Is dit u repliek?

ADV DU PLESSIS: Ja. Ek behou nog die reg voor om die **ultra vires** punt te argumenteer.

ADV POTGIETER: Nee, dit is u goeie reg, u kan doel wat u wil, maar dit is die repliek op die punte wat u vanoggend gelig het?

ADV DU PLESSIS: Op die punte, en daardie punte, as ek net kan saamvat; is die eerste punt is die vrae wat ons wil hê, vooraf, wat die prosedure betref, en tweedens, die vraag presies wat die regsbasis is vir hierdie ondersoek.

ADV POTGIETER: So u gaan nie voort met die punt oor insae in dokumente nie?

ADV DU PLESSIS: Nee, daardie punt is bevredigend.

ADV POTGIETER: Goed.

ADV DU PLESSIS: Dankie, mnr die Voorsitter.

ADV POTGIETER: Dankie.

ADV NTSEBEZA: Mr Potgieter, do you have anything to say before a ruling is made?

ADV POTGIETER: Goosen.

ADV NTSEBEZA: Oh, Goosen.

ADV GOOSEN: I have nothing further to add in argument, thank you, Mr Chairman.

ADV NTSEBEZA: Adv Potgieter is going to make the ruling in this tribunal.

ADV POTGIETER: Thank you, Chairperson.

R U L I N G

At the commencement of the proceedings this morning, Mr Du Plessis, who appears on behalf of Capt Hechter, on instructions from attorney Britz, has raised three points which he has required us to make a ruling on. We will simply make a ruling at this stage in regard to those three points raised without furnishing complete reasons for the ruling at this stage. As I have indicated, this happened at the commencement of the proceedings, so that we have not yet moved into the proceedings itself, and it is necessary for the matter to progress.

The first point that - or let me put it this way; one of the three points which was raised by Adv Du Plessis, relates to having access to relevant documentation. After argument he has indicated that he is not proceeding with that particular point, so it is not necessary to rule in regard to that.

Of the two remaining points, one relates to a request that the officials of the Commission conducting the inquiry

should furnish Mr Hechter and his legal defence with a complete list of questions to be asked at these proceedings today.

We have listened to the arguments in regard to this particular question. We are not persuaded that there is any legal basis or any merit in this point raised on behalf of Capt Hechter, and we rule that the information as contained in the subpoena, is sufficient to enable Capt Hechter and his defence to deal with the questions today.

The remaining point related to the legal basis for the subpoena, and in this regard there has been a lot of argument as well, which we have listened to carefully. It appears as if at the end of the argument Adv Du Plessis has taken the position that he can't fully argue his point on whether or not these proceedings today are **ultra vires**, because there are some outstanding information that he requires.

Adv Goosen, who presented the argument on behalf of the Commission, has responded to the question relating to the legal basis or the basis for the subpoena. He has indicated that he has no further information and no further submissions to add to what he has already said.

Under those circumstances it appears as if it is for the defence of Capt Hechter to decide whether or not they do indeed want to proceed with a question relating to whether or not these proceedings are **ultra vires** or not. We understood that they might very well want to raise this point at some stage. We have indicated to them that it is obviously open to them to do so when they are so minded.

So in respect of the remaining point relating to the

SECTION 29 HEARING

TRC/CAPE TOWN

basis of the subpoena, there is no ruling that we can make at this stage in view of the fact that the defence of Capt Hechter has indicated, that they might want to raise this point and argue the **ultra vires** issue at a later stage in these proceedings.

Those are the rulings that we are minded to make at this stage.

ADV DU PLESSIS: Thank you, Mr Chairman. Mr Chairman, may I then for good order perhaps proceed - I will be short - to deal with the exact reasons why we say that - why we wish to say that the proceedings are **ultra vires**. Could I perhaps, before we deal with that, just ask for a very short adjournment, just to make a final decision regarding that. Thank you.

ADV NTSEBEZA: Very well, there will be an adjournment - how long?

ADV DU PLESSIS: Five minutes, Mr Chairman. I have to go as well.

ADV NTSEBEZA: There will be an adjournment of five minutes.

COMMITTEE ADJOURNS

ON RESUMPTION:

ADV DU PLESSIS: Thank you, Mr Chairman. I think my concentration will be of a bit higher standard now.

ADV NTSEBEZA: Very well.

ADV DU PLESSIS: Mnr die Voorsitter, mag ek u in Afrikaans adresseer?

ADV NTSEBEZA: Adv Goosen, can you put off ...

ADV DU PLESSIS: Goed. Ek het gedeeltelik die eerste punt eintlik hanteer. Ek het u verwys na artikel 3(iii) wat voorsiening maak vir die bereiking - for the achievement of the objectives of the Commission. Ons standpunt is, en ons submitisie is dat daar drie komitees is; dat adv Goosen, my geleerde vriend, het wel gesê eers dat dit te doene het met die Amnestie Komitee en die Menseregteskendings-komitee. Hy het later gesê dit is net die Menseregteskendings-komitee, en die subpoena verwys na die Kommissie self.

Nou ons is nou nog steeds nie honderd persent seker met betrekking tot welke komitee ons hier mee te doen het nie, en of ons te doen het met die Kommissie self nie. Om daardie rede doen ons, met eerbied, aan die hand dat indien die prosedure en die verrigtinge gaan voortgaan, op daardie basis, is dit **ultra vires**. As ons aanvaar dat die subpoena die basis is waarop die verrigtinge gevoer word, dan verwys

dit net na die Kommissie.

Ons submissie is dat die Kommissie nie die magte het om 'n ondersoek soos hierdie te hou, waar dit nie duidelik is dat dit val binne die werksaamhede van een of ander van die arms van die Kommissie, naamlik een van die komitees nie. Ons doen ... (tussenbeide).

ADV POTGIETER: Ek is jammer. So is u punt dat die Kommissie kan dit hou, maar dit moet blyk dat dit val binne die raamwerk van die werksaamhede van een van die komitees?

ADV DU PLESSIS: Ja, die punt is dat die ondersoekkomitee of die ondersoekteenheid in terme van artikel 28, Hoofstuk VI, 28(iv) moet en ons interpreteer 28(iv)(a) as synde dat hulle op die versoek van 'n komitee 'n bepaalde aspek moet ondersoek. Nou ons sê dat die ... (tussenbeide).

ADV POTGIETER: Ja, maar dit - ek is jammer - is een van artikel 28(iv)(a).

ADV DU PLESSIS: Ek verstaan.

ADV POTGIETER: Die eerste been sê ... (tussenbeide).

ADV DU PLESSIS: Ek weet.

ADV POTGIETER: "The investigating unit sal investigate any matter falling within the scope of the Commission's powers, functions and duties, subject to the directions of the Commission."

ADV DU PLESSIS: Ja.

ADV POTGIETER: Dit is die een been. En dan is die tweede been -

"And, shall at the request and shall at the request of a committee investigate any matter falling within the scope and powers ..."

Et cetera.

ADV DU PLESSIS: Ja.

ADV POTGIETER: "Of that committee, subject to the directions of the committee."

ADV DU PLESSIS: Ja.

ADV POTGIETER: So daar is twee bene.

ADV DU PLESSIS: Ons sê daardie, hierdie bepaling is nie baie duidelik nie, die woord "and" - as daar gestaan het "or", dan kon jy baie duidelik gesê het daar is twee bene.

Daar staan egter nie "or" nie, daar staan "and", en om daardie rede sê ons dat die ondersoekspan kan net op versoek van die komitee dit ondersoek. Ons sê die woordjie "en" koppel die eerste gedeelte aan die tweede gedeelte, mnr die Voorsitter.

ADV POTGIETER: Ja?

ADV DU PLESSIS: En om daardie rede, as u my argument sal volg, om daardie rede sê ons dat die uitleg van daardie artikel moet wees dat die komitee kan optree net op versoek van 'n komitee.

Ek verstaan u argument, en in my submissie is daardie bepaling effens dubbelsinnig. As die woordjie "of" of in die Engels "or" daar gestaan het, dan was u honderd persent korrek in die opmerking wat u nou gemaak het. En om daardie rede sê ons, ons sê die interpretasie met verwysing na die woord "and", en die woordjie "en" in Afrikaans, moet

lees dat die Kommissie optree uit hoofde van een van die drie bene, en een van die drie bene, naamlik een van die drie komitees die ondersoekspan moet versoek om 'n aangeleentheid te ondersoek.

Ons sê dit met verwysing na die ander bepalings in die Wet, as 'n mens artikel 28(iv)(a) wil uitlê, en meer spesifiek, die bepalings van artikel 3(iii). Die bepalings van artikel 3(iii) maak nie voorsiening daarvoor dat die Kommissie as 'n kommissie as sulks buite die werksaamhede van die drie komitees en die subkomitees in artikel 3(iii)(e) kan optree nie. En dit is die eerste punt wat ons wil maak.

ADV POTGIETER: Ja, ek verstaan dit, maar ek verstaan nie u argument rondom die gebruik van die woord "or" nie. Sê u as daar 'n "or instead of and" was dan sou dit duidelik gewees het dat die Kommissie het ook die bevoegdheid om ondersoek te gelas?

ADV DU PLESSIS: Ek sê as daar staan "or".

ADV POTGIETER: Ja?

ADV DU PLESSIS: Dan sou, as ons dit net lees -

"... the investigating unit shall investigate any matter falling within the scope of the Commission's powers, functions and duties, subject to the directions of the Commission, or shall at the request of a committee ..."

As daar gestaan het "or" dan beteken dit die Kommissie self buite die komitees ook, kan die "investigating unit" vra om enigiets binne die Kommissie se magte te ondersoek.

ADV POTGIETER: En waarom het die woord "and" die teenoorgestelde uitwerking?

ADV DU PLESSIS: Mnr die Voorsitter, die woord "and" is juis - en daar is spesifieke gesag daaroor. Ek het nou nie die betrokke beslissing hier by my nie, mnr die Voorsitter, maar ek het hom twee weke gelede gebruik en ek het heel dag probeer onthou wat die beslissing is. Daar is 'n spesifieke beslissing van sy Edele Regter Daniels in 1987, dink ek, is hy gerapporteer. Ek kan nie die beslissing onthou nie, maar dit - in die notra onder "words and phrases" het ek hom opgespoor, kan ek onthou, wat spesifiek bespreek wat die normale uitleg is met betrekking tot die gebruik van die woord "or" en die gebruik van die woord "and" in 'n geval soos hierdie, waar twee goed saamgevoeg word. Die uitspraak was dat wanneer jy die woord "of" gebruik of "or" in Engels, dan is dit teenstellend, en wanneer die woord "en" en "and" gebruik is dit samevattend.

Ons submitisie is dat in hierdie geval, saamgelees met artikel 3(iii) en ander bepalings in hierdie Wet, maak voorsiening daarvoor slegs dat die ondersoekspan 'n ondersoek kan doen "at the request of a committee".

ADV POTGIETER: Maar is dit nie, is hierdie bewoording nie ondubbelsinnig nie? Is dit nie duidelik dat wat hier gesê word is dat op beide die versoek van die Kommissie en ook op die versoek van 'n komitee word die ondersoekteenheid gemagtig om ondersoeke te doen, op beide.

ADV DU PLESSIS: Ja, mnr die Voorsitter, dan sou 'n mens verwag dat die woord "or" sou of "ook" daarin sou voorkom, wat nie daarin voorkom nie. Dit is 'n kwessie van uitleg, mnr die Voorsitter. Ek sê nie dat die interpretasie wat

ons hieraan heg die heel duidelikste interpretasie is nie, ek sê ook nie dat die interpretasie wat u aan my genoem het, die duidelikste interpretasie is nie. Ek sê dat dit in 'n mate dubbelsinnig is, artikel 28(iv)(a).

ADV NTSEBEZA: How do you read Section 8(iv)(b) in furtherance of your interpretation? Isn't it very clear there that the Commission is capable of ordering the investigation, in those cases where the Commission orders it, to function, it will function in that way, or where it is ordered by a Commission.

ADV DU PLESSIS: Ja, ek het gekyk daarna, mnr die Voorsitter. Dit maak dit vir my nog meer onduidelik, want daar word - hoekom word daar 'n onderskeid getref en nie, in ander gevalle onderskeid getref nie? Hoekom word daar in artikel 3(iii) nie 'n onderskeid getref tussen die werksaamhede van die Kommissie aan die een kant en die drie komitees aan die ander kant nie? Maar hier byvoorbeeld word daar 'n onderskeid getref. In elk geval, artikel 28(4)(b) handel met prosedure soos dit vir my lyk, en dit handel nie met die spesifieke magte van die ondersoekende nie.

Die punt wat ek probeer maak, is aan die einde van die dag is hierdie artikel dubbelsinnig en om dit te probeer oplos moet 'n mens ag slaan op artikel 3(iii), want artikel 3(iii) bepaal wat moet gedoen word, wie het watter magte "in order to achieve the objectives of the Commission", en daar word bepaalde liggame geskep wat die "objectives of the Commission" kan bereik.

Nou daar word nie gesê, mnr die Voorsitter, dat die Kommissie op sy eie kan optree nie. Trouens, daar word

voorsiening gemaak daarvoor dat die Kommissie in 'n bepaalde gevalen in bepaalde omstandighede 'n subkomitee kan aanstel. Artikel 3(iii)(e) sê -

"The subcommittees referred to in Section 5(c) shall exercise, perform and carry out the powers, functions and duties conferred upon them, assigned to or imposed upon them by the Commission."

En as ons kyk na wat artikel 5(c) sê, sê dit dat die Kommissie -

"The Commission has the power to establish subcommittees, to exercise, carry out or perform any of the powers, duties and functions assigned to them by the Commission."

So hoe ek dit lees, mnr die Voorsitter, om artikel 28(iv)(a) uit te lê, is my submissie dat die Kommissie, indien die Kommissie iets wil doen of ondersoek of optree buite een van die drie komitees wat geskep word in artikel 3(iii) moet 'n subkomitee aangestel word deur die Kommissie, in terme van artikel 5, saamgelees met artikel 3(iii).

As 'n mens dit in ag neem dan kan jy artikel 28(4)(a) nie anders interpreteer as wat ons dit interpreteer nie, met respek.

ADV POTGIETER: Nee, nee, ek volg nie u argument nie. Dit volg nie uit artikel 5(c) dat die Kommissie verplig is om subkomitees aan te stel nie; dit is 'n diskresie wat die Kommissie het.

ADV DU PLESSIS: Ja.

ADV GOOSEN: Mr Chairman, I wonder if I could possibly assist. I mean, given that I have now actually heard the way in which Adv Du Plessis formulated the argument for ... (intervention).

ADV DU PLESSIS: Part of the argument.

ADV GOOSEN: ... for the proposition that it is **ultra vires**, I could perhaps assist. Without necessarily conceding the particular interpretation that he places on it, but would wish to point out that in fact a subcommittee ~~is~~ established, in that the Commission by resolution established an investigative subcommittee for the very specific purpose of conducting Section 29 inquiries.

Let's look at Section 29. Section 29 says:

"The Commission may for purposes of or in connection with the conduct of the investigation ..."

It nowhere there refers to a committee. In my submission, I don't think we need to necessarily determine it, but in my submission, Section 29 - I beg your pardon. The interpretation of Section 28, specifically 228(iv)(a) should be read in the context of Chapter VI as a whole, because Section 28 actually deals with the establishment and sets out the broad purpose of the establishment of an investigate unit. When you read that in conjunction with Section 29 where it refers not to any committee which shall issue subpoenas, but to the Commission, then the mechanism whereby the Commission in fact empowers the holding of a Section 29 inquiry, that question is raised.

The procedure adopted by the Commission in resolution adopted in September, last year, when in any event at a point prior to the issuing of any Section 29 subpoenas, the Commission established a subcommittee, an investigative subcommittee, which in terms of subsection - in terms of Section 5 the - I am not sure if it is Section 5 - I beg your pardon, Section 6, if you look at 6:

"Subject to the provisions of 45 any power referred to in 5(a), (b) and (c) and if it is to be exercised, should be exercised in consultation with the Minister. After consultation with the Minister a subcommittee, other than one of the three standing committees ..."

Because if you look at the reading of Section 5, subcommittee clearly refers to something other than the existing statutory standing committees. A subcommittee, was in fact, established by resolution, and power delegated to that subcommittee to conduct Section 29 inquiries. So it is in terms of the powers delegated to that subcommittee that the investigative unit is empowered to prepare and issue Section 29 notices, in terms of that subcommittee.

Subcommittees, in fact, has delegated authority to issue the Section 29 - I don't know if whether that may clear it. You refer - Adv Du Plessis refers to the fact that if the Commission is going to exercise certain powers, which in terms of Section 29 it is exercising, then it would need to do so by way of a subcommittee. Well, the factual position is, there is such a subcommittee. The investigation subcommittee duly authorised, duly

established by resolution of the Commission and approved of by the Minister of Justice as is required in terms of Section 6 of the Act. We can provide that resolution.

ADV POTGIETER: Can I just ...

ADV GOOSEN: That may clarify where we are and also it may assist in the formulation of the further elements of his argument.

ADV POTGIETER: Yes, and then perhaps just whilst you are on your feet, just to deal with the question raised by Mr Du Plessis that the Commission has got no power, authority to investigate.

In the full Bench decision in **Van Rensburg** in the Cape High Court, that Court, if I recollect that judgment correctly, that Court deals with the power to investigate and amongst other things, when it deals with - when it refers to Section 29, in fact 28 and 29, they refer to in the course of the judgment, if I remember correctly and I am just trying to hear whether your recollection coincides, they deal with the power of the Commission in fact to investigate, to conduct investigations. So I mean that has been established by that judgment of the full Bench in the Cape High Court.

ADV GOOSEN: Yes.

ADV POTGIETER: Okay.

ADV GOOSEN: That is my recollection. I can get a copy of the judgment and perhaps refer to that in due course. But that is my understanding. But I thought perhaps it may assist to indicate, since the question of the subcommittee established in terms of Section 5 is raised, to indicate that in fact such a subcommittee has been established by

resolution and we will provide the resolution.

ADV POTGIETER: Thank you very much. I think it should assist, but ...

ADV DU PLESSIS: Yes, thank you, Mr Chairman. I tried a long time this morning to find that out, because that is exactly the basis upon which the hearing is then conducted today. I will have a look at that resolution and consider my position pertaining to that point.

The further point which I want to make, is that if you have regard to Section 4 of the Act, my learned friend relied specifically on Section 4(a)(iii), with reference to the functions of the Commission. One should now remember that we are dealing with the identity of alleged informers.

Now -

"The function of the Commission shall be to achieve its objectives and to that end the Commission shall facilitate and where necessary, initiate or co-ordinate enquiries into the identity of all persons, authorities, institutions and organisations, involved in such violations."

Now it seems to us that one has to take into account the fact that it deals with the identity of persons involved in the violations themselves, firstly,

I also, in developing this argument, want to take you to the objectives of the Commission. The objectives of the Commission refers to -

"The establishing as complete a picture as possible, of the causes, nature and extent of gross violations of human rights which were committed, during the period 1 March to the cut-off date."

Now as I read it, in respect of the objectives in Section 3, that is the only one that can be applicable under the circumstances, as we have already decided that or heard that this proceeding does not relate to amnesty. I accept that it does not relate to the amnesty procedure.

Now if that is the case, Mr Chairman, our submission is that in no way whatsoever can the identity of an informer who gave information to the security forces, not knowing why the information was sought, not knowing what the information led to, not knowing why the information was needed, not knowing where the information was going to lead to, in no way can that be interpreted as falling under the identity of a person involved in a gross human rights violation, or add to the completion of a picture of possible causes of the nature and extent of gross human rights violations. And to add to that, if we look at the definition of a gross violation of human rights, in the definition of the Act, it says:

"It means the violation of human rights through the killing, abduction, torture or severe ill treatment of any person, or any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a)."

Nowhere, Mr Chairman, we read that to mean that the simple transfer of information falls under the definition of gross violation of human rights. It does not fall under the objectives of the Commission, it does not fall furthermore under the functions of the Commission, and specifically Section 4(a)(iii).

That is why we say that an investigation into the identity of informers is simply something that falls outside the auspices, the powers and the duties of the Truth Commission, if you read all the sections together.

ADV POTGIETER: But you see, Adv Du Plessis, this is not just an inquiry in general into the situation around informers. This morning, when Adv Goosen responded to your arguments, he referred to an extract from the amnesty application, the testimony of your client in the course of his amnesty application, relating specifically to the killing of Dr Ribeiro and his wife. That is one of the - it is in fact, item 5 in the subpoena of your client.

Now his testimony in the amnesty application, listening to the extract that Adv Goosen has raised this morning, makes it quite clear that there was a causal connection between the activities of the informer that he referred to - and we are specifically dealing with Capt Hechter's testimony. The activities of the informer or the informers - I am not sure how it is reflected in that record - that he refers to, is linked to the incident relating to Dr Ribeiro and his wife, which clearly is a gross human rights violation. I mean your client has applied for amnesty for that. He says - the basis for your client's amnesty application, is that it is a politically

motivated issue. So clearly that is the killing that must be on the version that we have got in front of us at this stage, or on the information that your client has or the version that your client has placed before the Amnesty Committee, which has to be a gross violation of human rights. So I can't understand your submission that that would be beyond the mandate of the Commission, because it does not relate to somebody who is involved in a gross violation of human rights, when on the testimony of your own client, there is a causal link between the informers and the killing.

ADV DU PLESSIS: Yes. Mr Chairman, somewhere there has to be a cut-off point. If you refer to the fact that there is a causal link, somewhere there has to be a cut-off point. If there is no cut-off point, Mr Chairman, it means that Section 4(a)(iii) means that any church minister of the NG Kerk who said that the operations of the South African Defence Force in South West Africa was correct and he preached that, should also be investigated, because he was then also involved in such violation. Because that led to people believing that what they were doing was right.

Furthermore, Mr Chairman, if we have to look at the causal connection. It says:

"The identity of all persons involved
in such violations."

If there has to be a causal connection between the violation and the person's action, one could say that the whole, the whole political agenda of the ANC and the liberation movements, speeches made by representatives of the ANC at that time, led to gross human rights violations,

at the end of the day. Because of the fact that it caused the South African Police to act in a certain way.

ADV POTGIETER: But that's why I am telling you. I don't want to cut through your argument, but you know, we need to progress. That is why I am telling you we are not debating this in general terms. We are relating it specifically to the evidence of your client. And in fact, I am going to ask Adv Goosen just to give me access to that reference to his testimony, and let us look at that specifically. We are talking about that here. We are not talking in general.

ADV GOOSEN: Mr Chairman, this is a copy of the extract from that. It appears at page 484 opposite line 20.

ADV POTGIETER: Thank you. You appeared for Capt Hechter in that application. Unless Capt Hechter is now going to come and tell us that you know, this is not his testimony, but this is what he says, opposite line 20. He says:

"Their information led to the death of these people.

... led to the death of these people.

So I cannot think that those persons would be able to move around in their areas freely."

So I repeat -

"Their information led to the death of these people."

So that's the context in which this inquiry is being conducted, not in general terms.

ADV DU PLESSIS: Mr Chairman, the point I am trying to make is, at the end of the day the question is: what is the function of the Commission. Is it the function of the

Commission to go further than simply the involvement of people in the gross human rights violations. That means, Mr Chairman, if it goes further than the physical involvement in a human rights violation, it has to go much wider, and that's the point I tried to make. It has to go much wider. In the evidence, and that is so, I remember the evidence well, and it was not just in that application that such evidence was given. Clearly the information of informers was relied upon by the security forces to act and to commit lots of gross human rights violations.

The question is: does the powers of the Commission go as far as to investigate in terms of Section 24, people who were not involved in the violations to such an extent, that they can be charged criminally, that they can be liable civilly, or on any other basis have any consequences reckoned to them.

So aan die einde van die dag is die vraag hoe ver hierdie kousale verband - as u verwys na kousale verband - moet strek. Hoe ver kan die Komitee gaan en de Kommissie gaan om die betrokkenheid van persone by "gross human rights violations" te ondersoek. Dit maak eintlik die "scope", as ek die Engelse woord mag noem, van die Kommissie amper onbeperk. 'n Mens kan teruggaan tot die dae van Jan van Riebeeck, tot die ontstaan van apartheid. Het dit ontstaan met Lord Milner se paswette na die Boere Oorlog or waar het dit ontstaan?

Daar is geweldig baie argumente wat 'n mens kan opper daaroor, en daarom sê ons daar is 'n beperking; daar is 'n beperking in die funksie van die Kommissie. Die funksie van die Kommissie moet gaan oor die vraag wie was betrokke

by die "violations". Who were the perpetrators. Dit is wat die mense wil weet, dit is wat die Kommissie wil weet, mnr die Voorsitter, en dit is ons punt.

Ons punt is; die identiteit van die informante gaan wyer as wat die grense van hierdie Wet vir die Kommissie bepaal. Dit is die eerste punt wat ek wil maak.

ADV NTSEBEZA: Isn't the very reason therefore that questions should be put to your client in an endeavour to find out in what way he is making that sort of statement? Isn't that the sort of thing that would be clarified by evidence? Isn't that the very reason therefore that questions should be put and be put in a way that would contextualise the manner in which the conclusion was made, because your client made the conclusion there, that the murder of the persons involved, was as a consequence of information made available by his informers? Wouldn't an investigating inquiry such as this one, establish the background to that person becoming an informer? What if an informer, for instance, referred to in the circumstances, is himself an Askari, what if a person referred to in the circumstances, is, as he was largely indicated, somebody who now is in Government, but who has himself a whole history of gross violation of human rights? Isn't that the reason that we then must proceed to getting the questions and the surrounding circumstances in terms of which this information was given to the person who is - I mean, to your client?

ADV DU PLESSIS: Mr Chairman, then one has to conduct an investigation into those - with the Commission of Gross Human Rights Violations.

Ons sê dat as die Kommissie se werksaamhede so wyd is dat dit hierdie tipe van aspekte insluit, gaan hierdie Kommissie nooit tot 'n einde kom nie. Ons sê dat daar moet 'n beperking wees op die funksies en magte van die Kommissie. Ons sê dat die Kommissie kan nie bloot alle aspekte en alle persone se ver afgeleë betrokkenheid op 'n kousale verband ondersoek, waar dit op een of ander wyse 'n verband kan hou met so 'n oortreding nie. En dan verder, mnr die Voorsitter, 'n mens moet in gedagte hou dat die betrokke inligting was nie inligting wat gesê het luister, maak daardie persoon dood nie. Die inligting was bloot inligting wat oor 'n breë front verskaf is, waarop sekere besluite onder andere, geneem is. Die besluite is nie net op sulke inligting geneem nie. Die besluite is as gevolg van verskeie ander redes geneem. Op grond van verskeie ander inligting. Dit blyk nou uit die aard van die saak nie duidelik uit hierdie spesifieke getuienis in die Ribeiro-saak nie. Maar u moet onthou ons het vir vier daelank het brig Cronje getuienis aangebied oor hoe die informantstelsel werk; hoe het dit plaasgevind; hoe is besluite gemaak op grond van inligting.

Ons sê eenvoudig - en ek gaan afsluit met die punt - ons sê dat die bepalings van die Wet, en ek wil dit terugbring om dit te lees, saam met die doel van die Wet, die aanhef van die Wet; dat die inligting met betrekking tot die verskaffing van die name van informante, nie die doel van die Kommissie is nie. Dit was nooit die bedoeling dat die Kommissie dit moet ondersoek nie, en dit is definitief nie 'n aspek, en ek het dit reeds geargumenteer voor die Amnestie Komitee, en ek is gelyk gegee daarvoor.

Dit is nie 'n aspek wat gaan die rekonsiliasie tussen mense in hierdie land - the well-being of all the South African citizens, peace required, the reconciliation between the people of South Africa. Dit gaan dit nie voortbring nie, mnr die Voorsitter.

Ons sê dat dit is nie die doel van die Kommissie om hierdie aspekte te ondersoek nie. As die Kommissie wil ondersoek wat se "human rights violations, gross human rights violations" die betrokke beweerde informante by betrokke was self fisies, dan is dit 'n ander ding. Maar bloot oordrag van inligting gaan nie, word nie gedek deur die bepalings van die Wet nie. En ek wil graag afsluit met die punt om dit op daardie basis te argumenteer.

Ek het ander punte oor die **ultra vires** punt, so ek sal graag na die ander punte toe wil oorgaan, as u my die geleentheid gee.

ADV NTSEBEZA: Can I just ask you. If you say it is not the aim or the objective of the Commission to identify informers, would you say it is not the function of the investigative unit to follow any leads that might impact on them being able to establish a broader picture? Are you saying that?

ADV DU PLESSIS: Yes, we are saying that, Mr Chairman.

ADV POTGIETER: Let me add to the difficulty that the Chairperson put to you. Are you suggesting seriously that as a Commission when this kind of information, this kind of allegation is made, at our proceedings - not outside the Commission, in our proceedings, that their information led to the death of these people, that we should then sit back and just allow this sort of allegation to stand there? Are

you suggesting that, that the death - the death - taking people's lives, the death is not sufficient for us, is not sufficient for us to trigger our attempt to comply with our mandate? Is that really seriously what you are suggesting this Commission should be all about?

ADV DU PLESSIS: Mr Chairman - mnr die Voorsitter, aan die einde van die dag moet 'n mens die getuienis wat in hierdie aansoeke gegee is, in die geheel lees. Daarom het ek verwys na die eerste drie dae se getuienis van brig Cronje, wat gaan oor die informante en baie gedetailleerde inligting oor die wyse waarop informante hanteer is, en hoe dit gewerk het, wat se inligting gegee is, hoe die inligting gegee is, moet in ag geneem word.

Kapt Hechter sê op bladsy 484:

"Could I ask the Committee, my colleagues and I are asked to publish the names of these informers. Is it necessary for us to make known the names of these informants and consequently unnecessarily endanger their lives once again. I assume that those people's lives would definitely be placed in jeopardy if their names should be made known now. That information led to the death of these people so I cannot think that those persons would be able to move around in their areas freely. I am asking the Commission to give serious consideration to this."

Nou mnr die Voorsitter, ek kan dieselfde vraag terugvra. Is dit die funksie van die Kommissie om aan die einde van die dag persone wat ons weet in gevaar gestel gaan word; persone wat nie - wie se belange nie bevorder gaan word deur die openbaarmaking van hierdie inligting nie, vir geen doel hoegenaamd nie. Waar ons weet dat dit nie gaan bydra tot waarheid en versoening nie, is dit die funksie van die Kommissie om sulke inligting openbaar te maak? Is dit die funksie van die Kommissie om mense se lewens in gevaar te stel? Is dit die funksie van die Kommissie om inligting te openbaar met betrekking tot persone wat hulle in geweldige moeilike posisies gaan plaas; waar kapt Hechter nie in besit is van dokumentasie om dit te bewys nie; waar daardie persone nie in besit is van dokumentasie om dit te weerlê nie, en waar dit strydig is met die hele basis en onderbou van hierdie Wet. Hierdie Wet gaan oor "promotion of national unity and reconciliation". As u die aanhef van die Wet lees, dan kan u sien dit gaan oor -

"The fate or whereabouts of the victims of violations, the granting of amnesty to persons who make full disclosure, the taking of measures aimed at the granting of reparation, reporting to the nation about violations and victims ..."

Violations and victims -

"... the making of recommendations aimed at the prevention of the commission of gross human rights violations. To provide the

establishment of the Truth and Reconciliation Commission."

Dit sê nie daar "to disclose, discover and disclose the names of informants" nie, mnr die Voorsitter.

En ons submitisie is werklik dat dit negeer die doel van die Kommissie. Dit is nie waarvoor die Kommissie hier is, nie, en dit sou die ondersoekspan in my submitisie, en ek sê dit in alle piëteit, meer betaam om ondersoek te doen byvoorbeeld, na 'n situasie soos die moord van dr Webster en Anton Lubowski as om tyd te mors op hierdie aspek.

ADV POTGIETER: En ook, suggereer u dat 'n ondersoek na die moord - luister na my - ondersoek na die moord van dr Ribeiro en sy vrou is nie die moeite werd nie?

ADV DU PLESSIS: Nee, nee, ek suggereer dit hoegenaamd nie, mnr die Voorsitter, en ek het gesê ek sê dit in alle piëteit, en ek wil nie hê wat ek gesê het moet verkeerd geïnterpreteer word nie.

Wat ek sê, mnr die Voorsitter, en ek wil hê ons moet mekaar mooi verstaan, asseblief. Ek sê dat die ondersoekbaarheid behoort aspekte wat val binne die kader en die omvang van die Wet, te ondersoek.

Ek verstaan wat die situasie is met betrekking tot die moord op dr en mev Ribeiro. Ek wil vir u sê ek het 'n gesprek gehad met hulle seun, Chris Ribeiro, ek en my prokureur, 'n informele gesprek. Ons het lank met hulle gepraat. Ek het my simpatie aan hulle meegedeel, my prokureur het sy simpatie aan hulle meegedeel. Ons het almal simpatie met hulle.

Ons verstaan, ek het veral simpatie met die feit dat hy vir ons gesê het as sy ouers nie dood is nie, sou hy 'n

prokureur of 'n advokaat gewees het soos ek en mnr Britz. Daarmee het ons absolute simpatie. Ek wil nie hê u moet my verkeerd verstaan nie, ek het miskien my nie heeltemal reg uitgedruk nie. My prokureur stem met my saam, mnr die Voorsitter.

Ek wil dit net duidelik stel dat die ondersoek na die name van informante vir niemand tot voordeel kan wees nie.

Dit kan nie vir die land tot voordeel wees nie. Dit kan nie vir rekonsiliasie tot voordeel wees nie. Dit kan nie vir die betrokke informante tot voordeel wees nie. Dit kan vir niemand tot voordeel wees as 'n mens kyk na waarheid en versoening nie. As 'n mens kyk na die werklike suiwer doelwitte en magte van die Kommissie, dan is ons submissie dat dit nie daarbinne val nie. Ek wil nie oor dit submissies maak nie, Voorsitter, dit is my argument daaromtrent.

ADV NTSEBEZA: Mr Goosen is going to be asked to respond, but I would like to look at one of the functions that you have indicated for age. And that speaks to recommendations that would have to be made to the President for the establishment of measures. Those measures should be such as to be conducive to a stable and fair society, institutional administrative and legislative measures. The aim there would be to prevent the commission of the violation of human rights.

Now wouldn't it be so that especially if we were to enquire, as we would, once we have established the names of the persons that your client refers to, that would not be the end of the story, as I understand the process. We would have to test the validity of the information that is

supplied against an investigation that would establish whether there was any basis for that information. It may well be that on the basis of false information supplied by your informers, a decision was taken by your clients to kill Dr Ribeiro and his wife. It may well be that as a consequence of an investigation that followed after we have been able to deal in an investigation with the informers disclosed by your clients, we may discover that a lot more people were killed on the basis of false information that was given by people who had to give information on bases that do not stand the test of close scrutiny. And that, on that basis, we would be able to recommend that informers should not be used to intervene in political situations. I am just sketching a hypothetical - to say it is not far-fetched in my view, and I would like your views thereon, to say that it would in fact be in keeping with the functions, especially at the recommendation level, where we want a society where for political reasons people should not be subjected to this sort of thing that the Ribeiros were subjected to, in the sense of being informed upon and the basis being established only on that information for them to be killed. How far-fetched is that?

ADV DU PLESSIS: Ja, mnr die Voorsitter, dit kan ook gedoen word sonder dat die name van die informante bekend gemaak word. Ons weet presies hoe die informantstelsel gewerk het. Ons weet presies wat die situasie was. Ons kan, ons het volledige getuienis voor die Komitee geplaas met betrekking tot die hele werking van die informantstelsel en die aanbevelings wat gemaak kan word deur die Kommissie kan gemaak word.

Ek sou dink dat dit aan die einde van die dag 'n uiters "recommendable", as ek die Engelse woord kan gebruik, aanbeveling wees van die Kommissie, om te sê ons het hierdie aangeleentheid oorweeg en ons wil nie verdere mense se lewens beïnvloed en in gevaar stel en probleme veroorsaak vir mense wat kon gebly het in die nuwe Suid-Afrika nie. Ons wil voortgaan, ons wil nie mekaar haat nie, ons wil nie mense se lewens in gevaar stel deur die name van informante te hê nie. Ons kan die hele kwessie van die informantstelsel ondersoek. Ons kan selfs vir u die nommers van informante gee, wat gebruik is deur die Veiligheidspolisie, sonder om die name te gee. Maar ons wil nie die name bekend maak nie, want dit gaan nie lei tot versoening in hierdie land nie.

Mnr die Voorsitter, ek wil vir u ook verder sê, ek wil nou nie verder gaan as dit nie, maar indien ons getuienis voor die Hof moet plaas hieromtrent, kan ek getuienis voor 'n Hof plaas van die probleme wat een van die persone ondervind het in ons verhore, wat erken het dat hy 'n informant was, sedert die dag wat hy daardie erkenning gedoen het. Die feit dat hy drie of vier keer van sy huis moes skei, moes trek, moet weghardloop, juis vanweë die openbaring van daardie feite. Hoe lei dit tot versoening en rekonsiliasie?

Mnr die Voorsitter, ek wil graag afstap van hierdie punt. Ek het my submissies gemaak daaroor. Ek het een of twee ander punte wat nog 'n tydjie gaan vat.

ADV NTSEBEZA: Yes, I think we will. Adv Goosen?

ADV GOOSEN: Thank you, Mr Chairperson. I think really just two points in reply. I don't want to belabour the point. I

think the first point is that disclosure of the names of the informer or informers in the course of an investigation conducted in terms of Section 29, does not mean that the names of those informants will be released by the Commission. That is a decision that the Commission still has to consider. The argument therefore that disclosure of names now would be, as it were, contrary to public policy, whilst conducting an investigation and prior to the Commission making a determination as to whether to release it, that argument is prematurely raised.

It falls to the Commission to deal with the very difficult issue of reconciliation, ultimately. And in exercising its powers and in exercising its discretion as to what information should be made public, the arguments raised by Adv Du Plessis are certainly arguments that the Commission will have to take into account. It may well be that the Commission comes to a decision not to disclose the names of informers, having already received that information.

In fact, it is a fairly well-known fact now that the Commission received during the course of the ANC second submission, a detailed list of informers, disclosed by the ANC. The Chairperson is on record as stating, very clearly, that that does not mean that those names will be released.

So the argument that it is, as it were, contrary to public policy, and I am anticipating perhaps some further submissions that may be made by Adv Du Plessis in relation to the question of privilege, that to not to disclose those now in the course of this inquiry, which is an *in camera* inquiry, robs the Commission of the factual basis upon

which it may wish to exercise a discretion; a discretion granted to it both constitutionally and in terms of the Act. The way in which the Commission comes to make that decision is not really the subject matter, can't be the subject matter of debate here in this forum.

So I would submit that that is not an argument for not disclosing the names in the course of an inquiry such as this.

The second point would be to deal with the interpretation attached to 4(a)(iii), which refers to the identity of all persons involved in such violations.

As I understand my learned colleague's submission, it is that there needs to be a cut-off point that the notion of causality can't be stretched to the point where involved in violations did not mean physical involvement in violations.

Well, I think there that that submission is not well-founded. For the very simple reason that you can't speak, with respect, you can't speak about physical involvement as being the cut-off point where the section actually deals with authorities, institutions and organisations, legal personae which are not capable of physical involvement in violations at that level.

So the section actually contemplates something more than actual physical involvement in the violation. And elsewhere in the Act the Commission is enjoined to deal with issues of responsibility, issues of accountability at a broader level and not within a strictly legal context as well.

For that reason I would submit that it, quite apart from all the practical considerations that are raised, and those are points well taken, it is within the mandate - it does fall within the functions of the Commission to consider the identity of persons involved in violations, where that involvement may merely be the supplying of information which may have been acted upon and on the basis of acting upon that information, gross human rights violations may have occurred.

In the specific instance, and I think that's as it were, as an example of what we are talking about, there is an indication in the amnesty record that I have referred to, in the Ribeiro matter, where it is the evidence of Capt Hechter, that there is a direct causal relation between the type of information supplied and the decision to kill the De Ribeiros.

Now that does not necessarily mean that it flows from that that the informant is legally liable or can be charged. In fact, if I am not mistaken, in the record elsewhere - it may be in argument. I can check it, but there is certainly reference - there is also reference there that if these names had to be disclosed, then it may well be that those people would have to apply for amnesty.

That just strengthens the point that it is the evidence of Capt Hechter that there is a direct causal relation between the information obtained and the violations which subsequently occurred.

In fact, Adv Du Plessis makes the point in response to Judge Ngoepe where he says at page 489:

"Even if Mr. Du Plessis, even if he were to come here and say I was an informer, how likely is it that he would come and say I told them that Dr. Ribeiro was politically active, thereby, in innocence, submitting that Dr. Ribeiro was killed as a result of his information."

Adv Du Plessis says:

"Yes, and such an admission would .."

I think it must be "would" -

"... be an incriminating act and he would have to apply for amnesty as well."

Now I am not saying that on the basis of that statement, that it is the evidence of Capt Hechter that this person who was an informant, would have to apply for amnesty.

No, but therein lies the recognition of the causal links that may well be established, once one establishes who the person is and what information was provided.

It is very relevant to the exercise of the mandate to establish the identity of persons involved in violations, and I would submit that that can't be interpreted simply to mean physical involvement. The Act contemplates something more than that.

In the circumstances it is within the mandate that we should obtain this information.

ADV NTSEBEZA: I need your guidance here. I see that it is already ten past one, and I don't know whether there are any further points you wanted to make. How do we stand

for this afternoon? Adv Goosen, I hear that you seem to be mumbling something about a problem.

ADV GOOSEN: Mr Chairperson, I have a flight at five to three from Cape Town.

ADV DU PLESSIS: Mr Chairman, maybe I can make the points very shortly, and we can deal with the decision later or something in that line. I haven't discussed it with my attorney.

ADV NTSEBEZA: Do I understand that the further points you would be making are still in pursuit of the **ultra vires** argument?

ADV DU PLESSIS: Yes, Mr Chairman. Mr Chairman, I also have to point out that my attorney and I have to for five minutes see the Amnesty Committee at 10 to two. We thought that would be during the luncheon adjournment and we made an arrangement to see them about the heads of argument in our other matters. So we would want to be excused just for 10 minutes or so at that time.

ADV NTSEBEZA: It appears that from the time constraints that we have that maybe let's hear all your arguments on the **ultra vires** point and then we will have to consider our ruling as far as that goes, and depending on how we rule, we would then be in a position to determine whether we go on or we do not go on, and maybe you will want to take your points quickly on the **ultra vires** argument.

ADV DU PLESSIS: Yes, Mr Chairman. May I proceed?

ADV NTSEBEZA: yes.

ADV DU PLESSIS: Mr Chairman, may I please refer you to Section 5, and specifically paragraph (e) thereof, where the Act deals with the powers of the Commission.

"In order to achieve its objectives and to perform its functions, the Commission shall have the power to refer specific or general matters to, give guidance and instructions to, or review the decisions of any committee, subcommittee or the investigating unit, with regard to the exercise of its powers, the performance of its functions, and the carrying out of its duties. The working procedures which should be followed and the divisions which should be set up by any committee in order to deal effectively with the work of the Committee."

And then the important part, Mr Chairman -

"Provided that no decision or the process of arriving at such a decision of the Committee on amnesty, regarding any application for amnesty, shall be reviewed by the Commission."

We say, Mr Chairman, that the whole issue pertaining to the informers, was a decision made by the Committee on Amnesty, it cannot be reviewed by the Commission. It cannot be amended or changed by the Commission, and in addition to that, we say that the Amnesty Committee is simply a leg of the Commission, a decision that has been made by the Amnesty Committee pertaining to this issue and the Commission is **functus officio** in that regard.

On that basis we say that this inquiry cannot go on, because it will be contrary to Section 5(e) of the Act.

Then, Mr Chairman, I don't know if my learned friend wants to respond to that point first, or should I deal with all my points?

ADV NTSEBEZA: I think, deal with all your arguments and then he can respond to all of them.

ADV DU PLESSIS: All right. The next point I wish to make, is that the normal common law privilege pertaining to the disclosure of the names of informants, is also applicable to the proceedings before this Commission. I want to refer you to Section 202 of the Criminal Procedure Act, and also the common law pertaining to the disclosure of the names of informants.

I wish to refer you specifically to page 23-44A to 46 of the book of Skeen, Paiseys and Others - Du Toit. I think it is Du Toit, Skeen, Paiseys and Others, **Commentary on the Criminal Procedure Act**, where it sets out this whole privilege.

ADV POTGIETER: I am sorry. I am sorry to interrupt you, but how does that fit in with the **ultra vires** argument?

ADV DU PLESSIS: Mr Chairman, yes, perhaps I should deal with this point last. Perhaps I should deal with this point last.

In respect - ja, sorry, in respect of the **ultra vires** points, if you will just give me one moment.

ADV NTSEBEZA: In fact, I don't think you can deal with the privilege question here.

ADV DU PLESSIS: I beg your pardon.

ADV NTSEBEZA: It is raised at the point that ...

ADV DU PLESSIS: Yes, sorry, Mr Chairman, I want to raise these arguments and I thought we could go ahead with that, but that doesn't deal with the **ultra vires** points.

ADV NTSEBEZA: My view of things is that were we to rule that your arguments on the **ultra vires** question is not tenable, and for that account we were to therefore request you to call your client to the witness stand, it is only when questions are put which attach to privilege, that you would obviously raise an objection and then raise the whole argument on it.

ADV DU PLESSIS: Yes, I am with you, Mr Chairman. I beg your pardon, you know, I didn't realise.

ADV NTSEBEZA: Very well.

ADV DU PLESSIS: That concludes my arguments pertaining to the **ultra vires** question. We say that - with specific reference to Section 5(e) - this inquiry cannot be held.

Thank you.

ADV NTSEBEZA: Thank you, Mr Du Plessis. Mr Goosen?

ADV GOOSEN: Thank you very much, Mr Chairperson. Mr Chairperson, I think again, very briefly, to deal with the argument.

I wish to refer to the ruling itself, the ruling of the Amnesty Committee, which, I think, it appears at 521, 519 of the record. I will make a copy of this available to you. I am not sure if it is contained in that bundle that I gave to you earlier. If not, I will make a copy available. It is a ruling handed down following argument, concerning whether or not the names of the informers should be disclosed to the Amnesty Committee and you will recall and

SECTION 29 HEARING

TRC/CAPE TOWN

see from the exchanges that occurred, that one of the issues that was raised in argument by Adv Du Plessis at that stage was that for purposes of determining whether full disclosure was made, it would not be necessary to disclose the names of informers.

Now the ruling is as follows, and I am referring here to line 28:

"Having regard to the common law expounded by the Appellate Division, in, for example **Rex v Van Schalkwyk**, 1937(AD) and subsequent decisions, the Committee has come to the conclusion that for present purposes, it is not appropriate to exceed the request and the Committee accordingly rules that we will not call upon witnesses to disclose the identity of their informers."

Now, Mr Chairperson, the decision by the Commission authorising by the subcommittee, as we have referred to in previous debate and I have given copies of that resolution or those resolutions to Mr Du Plessis and his team, that decision does not constitute a decision to review the decision of the Amnesty Committee. The Amnesty Committee is **functus officio** in relation to the ruling regarding the disclosure of the names of informers for purposes of its determination of the amnesty applications. It cannot be that the Amnesty Committee by ruling that for present purposes, quite clearly circumscribed being the purposes in which the ruling applies, that it thereby ties the hands of

SECTION 29 HEARING

TRC/CAPE TOWN

the Commission more broadly, or any of its committees or subcommittees to enquire into any of the circumstances regarding matters which have featured before the Amnesty Committee.

Let me give you an example. Let's assume for the moment, that Dr Ribeiro and his wife were killed by seven people; three of those people apply for amnesty. We have victims, family members who have come forward for example, and made statements to the HRV Committee. It cannot be that a ruling in regard to matters which may arise in the amnesty hearing of three of the perpetrators of that killing, should preclude the Committee of the Human Rights Violations Committee or the Commission from instituting investigations into the activities and the involvement of other perpetrators of that violation.

It is quite obvious from the ruling that the Amnesty Committee considered that its ruling was confined to the very limited purposes for which the Amnesty Committee - or the very limited purposes that the Amnesty Committee was considering before it at that point, and cannot possibly be a decision that the Commission can be bound to.

In the circumstances I would submit that firstly, the decision to conduct this inquiry does not constitute a review of that decision and in fact, that the purposes that we have outlined here, are completely different or totally different purposes to those that were before the Amnesty Committee. I would therefore say that the Commission was certainly not **functus officio** and that therefore these proceedings are not **ultra vires** in the circumstances.

ADV POTGIETER: I am not even sure whether the hands of the Amnesty Committee itself are bound by this decision. It says that for present purposes. It seems to only be in the form of an interlocutory ruling.

ADV GOOSEN: Indeed, yes.

ADV POTGIETER: So that they can untie their own hands to deal with it.

ADV GOOSEN: Potentially. The Amnesty Committee has not, as I understand it, Mr Chairman, has not determined the amnesty applications of the applicants. There may still be argument, whether in the form of written argument or not, but argument that may be addressed to the Amnesty Committee. The Amnesty Committee may on consideration of the matter, may come to a decision at a later point, that further evidence may need to be led or further evidence may need to be received on a different matter than that which they have already received evidence on.

So the amnesty process isn't finished from that point of view. But this doesn't relate to that. For purposes at that point, the Committee just ruled that it was not necessary to disclose the names of informers.

The Commission has authorised this investigation for different purposes, and on that basis it can't possibly be that the Commission's hands are tied and that this inquiry is therefore **ultra vires**.

ADV DU PLESSIS: Mr Chairman, may I respond to that, please?

ADV NTSEBEZA: Yes, go ahead, Adv Du Plessis.

ADV DU PLESSIS: Thank you. Mr Chairman, I was involved in the argument in this matter. The pages that I have got are

not all the pages relating to the specific argument. I can remember distinctly exactly what was argued, and it doesn't contain the argument of neither myself nor Mr Currin. There is a specific part in the argument which I know well, because it was on television later on, and that is also not contained in here.

I can specifically remember that my argument was addressed to the Committee, not just pertaining to the De Ribeiro matter, but it pertained to the whole principle.

Now I don't know if that was recorded. I am not hundred per cent sure. What I do know is that I do have an excerpt on television where part of the argument was on, which I have, which I don't find here in these pages. I do, however, remember that my argument specifically, related to the principle and not specifically, wasn't specifically related to only the De Ribeiro matter. If you read the judgment, the judgment was understood by us to mean that, and if you read the judgment specifically and closely, you will see that on page 520 the Committee says that they rule that we will not call upon witnesses to disclose the identity of their informers.

You will also note that in the ruling reference was made to the common law privilege pertaining to the disclosure of the names of informants.

Now we say that the decision of the Amnesty Committee binds the Commission. The Amnesty Committee is part of the Commission. It binds the Commission in respect of this issue. The Commission decided also on the basis of the privilege, which is not now for purposes of the **ultra vires** argument before you, but the Amnesty Committee decided that

the disclosure of the names of the informants should not be made. We say that Section 5(e) makes provision for the fact that no decision taken by the Amnesty Committee shall be reviewed.

Now my argument, and maybe Mr Goosen didn't understand my argument properly, is that this process is negating the decision of the Amnesty Committee. It is negating the decision of the Amnesty Committee. It means that this inquiry is going to or will lead to the disclosure of the names of the informants, where a decision on that point has already been made for purposes of the workings of the Commission.

We humbly submit that that goes outside the auspices of the Act, and specifically Section 5(e). For that purposes we say that this procedure will be **ultra vires** and I want to make the point again, it is not just the subpoena, it is the proposed procedure, it is the proposed inquiry that we say will be **ultra vires**. Thank you, Mr Chairman.

ADV POTGIETER: What is, before you conclude, what is the significance of the words "present purposes, for present purposes"?

ADV DU PLESSIS: Yes, Mr Chairman, that is why I refer to the fact that one would have to look at the arguments, which we do not have before us because it is not in these pages. One will have to look at the basis upon which the argument was addressed to the Committee and then read the ruling. The reference to present purposes pertains, as far as I understand it, to the fact that the decision was given in respect of the De Ribeiro matter, but the decision did

not specifically only entail the question of the disclosure of informants in the De Ribeiro matter only.

So this decision did not say only in the De Ribeiro matter, this decision went further than that. And the use of the words "present purposes" is difficult to interpret, but if you read the argument and the decision at the end of the day, it was not simply just in respect of the De Ribeiro matter, it went further than that, Mr Chairman.

ADV NTSEBEZA: You have nothing in reply?

ADV GOOSEN: Well, it is not really by way of reply. I mean, Mr Chairman, I think that the only way in which you can interpret "for present purposes" and that is the force of my submission, is that it is the Amnesty Committee that is making the ruling and for purposes of the proceedings of the Amnesty Committee. Those are the present purposes that are before the Amnesty Committee. No other purpose.

In fact, Mr Chairman, if you look at the provision which says that no decision of the Amnesty Committee may be reviewed, if you read that in its proper context, it is quite obvious why that is there. The Amnesty Committee is the Committee enjoined to grant or refuse amnesty. So it makes a decision that X should receive amnesty. It therefore is - it is **ultra vires** for the Commission to over-rule that and say X should not receive amnesty.

That's the thrust of that provision, not to say that every single decision - let's take for example the Amnesty Committee makes a decision about certain proceedings that it is going to conduct or certain administrative arrangements that it is going to make. Does it mean, because it is a decision of the Committee, that the

Commission can't review that decision? No, that can't possibly be the extent of the Amnesty Committee's independence of decision-making within the Commission. If that was the case, then the Amnesty Committee would exist completely separate from the Commission as a whole and there would be no need for the Amnesty Committee to fall under the general authority of the Commission as a whole.

So you can't interpret, because it says you can't review a decision of the Amnesty Committee, that it means that if the Amnesty Committee decides not to employ certain staff members or not to conduct hearings in a particular way or not to abide by general Commission policy, in relation to administrative matters, that the Commission can't review that. You can't say this Committee is out of line in terms of the overall powers granted to the Commission to do that. It can't possibly be that. It is a limited number of decisions that are open to review. In any event, this is clearly a limited purpose decision which is quite possibly interlocutory in nature.

ADV NTSEBEZA: Thank you, Mr Goosen. The Committee will have to take time to consider their ruling in this matter.

I am taking into account, Mr Goosen, your concerns about your flight and I don't know whether you are going to make any arrangements with Mr Hanif Vally.

ADV GOOSEN: I am contemplating, that I will make, quite possibly make an arrangement that for ...

ADV NTSEBEZA: For the remainder of ...

ADV GOOSEN: ... the conduct of the proceedings, if you will excuse me, Mr Chairperson, that he would conduct those in my absence.

ADV NTSEBEZA: Would you have any objections to that, Adv Du Plessis?

ADV DU PLESSIS: No, Mr Chairman.

ADV NTSEBEZA: Well, we shall adjourn until quarter past two or so soon thereafter as we can convene. Thank you.

COMMITTEE ADJOURNS

ON RESUMPTION:

ADV NTSEBEZA: Let us resume.

R U L I N G

This is a ruling in relation to an argument that was raised by counsel for Mr Hechter, Adv Du Plessis, with regard to preliminary legal points which he took, with regard to whether or not the proceedings here are **ultra vires** provisions of the Act.

The argument seems to have been premised on three main points. The first point that was taken seems to me was that the Commission, **qua** Commission was not competent to conduct these proceedings. It was his desire to be placing the knowledge of whether it was one of the statutory committees in terms of which this inquiry was being held or whether it was Commission, **qua** Commission that it authorised these proceedings.

During the course of argument it became clear from information that was made available by Mr Goosen, and from documentation that was circulated, that an investigatory subcommittee was established, pursuant to a full resolution of the Commission. It appears therefore that unless there

is anything that Adv Du Plessis wishes to raise about the propriety of the documentation that has been made available to him, which constitutes a resolution of the Commission and indicates the names of the persons who sit as part of the subcommittee so construed, it would appear that that leg of the argument falls away.

It would therefore be our view that the **ultra vires** argument on that basis should fall away.

The second leg, as I understand it, was premised on a reading of Section 483, which in terms seems to indicate one of the functions of the Committee as being the facilitation and where necessary, the initiation or co-ordination of enquiries into the identity of all persons, authorities, institutions and organisations involved in such violations.

The argument seemed to be that on a proper reading of the word "involved" in such violations, one should understand that it would be people who should have been themselves involved in the violation of human rights. The argument therefore is that the identity of an informer, who not himself or herself, having been involved in the way in which it is understood, would not assist the achievement of that particular objective of the Commission.

It seems to me, when one takes into account the evidence of Mr Hechter himself, in so far as he in so many words indicated that the people - who we understand to have been his informants - led to the killing of Dr Ribeiro, seems to me without getting to the dictionary meaning of the word "involved". This alone is a pointer of the fact that it is a matter in which one can properly draw the

conclusion that it is not only people who were physically involved, but also people who might throw a light on the commission of the gross violation that is being referred to.

In any event, it appears to me it would be very remiss of a Commission such as this one, which has been seized with information, that specifically indicates the involvement of informers in the commission of a murder, certainly two murders, for it to say simply because we cannot stretch the connection between an informer and the commission of an offence, however heinous the offence, that nexus should not be of such a nature as to justify us making enquiries in the form in which this investigation seeks to do.

I therefore find that also on that account it would not be properly said that by reason only of the provisions of Section 4(a)(iii) this body is acting **ultra vires** the functions of the Commission, by seeking to make enquiry that it does.

The last thing remaining leg of the argument seems to have been premised on the reading and construction of Section 5(e) of the Act. Section 5(e) of the Act deals **inter alia** with the powers of the Commission, and in it there is a rider which is a proviso, which points to the fact that no decision or process of arriving at such a decision of the Committee on Amnesty, regarding any application for amnesty, shall be reviewed by the Commission.

The argument, as I understand it, was that this body in seeking to establish the identity of informers, would in

fact be seeking to review a decision or a process of the Amnesty Committee, regarding an application for amnesty, by an application before the Amnesty Commission.

It does not seem to me that the decision referred to, or the process of arriving at such a decision referred to in Section 5(e) of the Act, is a decision or a process to arrive at a decision that is contemplated in these proceedings.

It appears to me that these proceedings are only intended to establish the identity of informers, not with a view of reviewing the decision of the Amnesty Committee. It appears that the decision that cannot be reviewed or should never be reviewed by the Commission, is a decision that regards the application for the granting of amnesty. The decision such as it can be called, is not even going to the question of whether it is interlocutory or not, and I am not expressing any views about that at the moment. It appears that the decision or the ruling of the Amnesty Committee was not on the substance of whether or not the applicant should or should not be granted amnesty. It was a ruling on a matter and to that extent it is not the sort of decision or a process of arriving at such a decision, that is contemplated in Section 5(e) of the Act.

It seems to me therefore, that also on that account the basis for arguing that the proceedings seeking to establish the identity of informants in this particular matter, are **ultra vires** the provisions of the Act. It cannot be sustained.

I therefore rule that all arguments that have been proffered so far can not be sustained and that the matter

should proceed as was originally contemplated.

ADV NTSEBEZA: Mr Vally?

ADV VALLY: Thank you, Mr Chairperson. I am indebted, Mr Chairperson. I think we can start putting certain questions to Capt Hechter.

ADV DU PLESSIS: Mr Chairman, may I please interrupt. Our view of the decision is that the decision is not correct, with respect to you, and we intend applying to the Supreme Court for a review of - or to the High Court for a review of the decision.

I want to raise another point with you, and perhaps one could deal with that, depending on your views on that.

The question of privilege will come into play when we deal with the evidence of Capt Hechter. It will be an issue that

will be raised as part of an argument pertaining to the Act, as well as with reference to the common law privilege.

It is something that I foresee that if we go - launch a review application, pertaining to your decision now, to the Supreme Court, pertaining to the **ultra vires** question, we will not be able to deal in the High Court with the question of privilege. I foresee a possibility that depending on what happens in the High Court, if we have to come back, if we do not succeed with our argument in the High Court and we have to come back, and we have to start giving evidence, the question of privilege will come up and we will have to deal with that again. There is a possibility that we will have to go to the High Court again on that point. I thought, first thought of not raising that and dealing with it as it happens. But I do think in all fairness to yourselves and so that I cannot be blamed later on for doing things piecemeal, I want to raise this point, and that it might be appropriate to deal with the point of privilege today as well. So that if a decision is made in that regard which goes against us on that basis, that we are also able to include that in a review application.

I am, however, in your hands, because I realise that we are actually going a little bit one step further than where we are now. If you feel that we shouldn't deal with that issue now, I have raised that point, we need not deal with it. But in respect of the **ultra vires** point we wish to take the decision on review.

ADV NTSEBEZA: Thank you, Mr Du Plessis. I only wanted to say I note the fact that you will be taking the decision on

review, and I would like to think that we should proceed and if and when the matter for privilege becomes a subject matter of debate in view of whatever objections will have been raised, then we will deal with the question of what happens thereafter, as and when a decision around the issues of your objections have been determined.

ADV DU PLESSIS: Thank you, Mr Chairman. But obviously we will not be able, because of the fact that we wish to take your decision on review, go ahead with the inquiry today. I have had a discussion with Mr Vally beforehand about this possibility which might come up, in respect of a review application. We have made between us some sort of arrangement in that regard. Obviously if we are correct that the proceedings are **ultra vires**, the proceedings cannot go ahead, and we have to be given the opportunity to apply to the Supreme Court or the High Court to have the decision reviewed and have a finality on that.

ADV NTSEBEZA: Mr Vally?

ADV VALLY: Mr Chairperson, the position I understood to be, yes, we have got an agreement, we had an agreement regarding the privilege issue, and the issue about **ultra vires** had not been raised. What I would suggest is that we proceed in this matter and if and when the issue of privilege is raised and argument is canvassed on the issue by both parties, and if a ruling is sought, and if the presiding panel is able to give a ruling, at that point the issue of the matter be taken on review is brought into play.

ADV DU PLESSIS: Well, Mr Chairman, that is why I raised the question of privilege, because as I see it, the matter

SECTION 29 HEARING TRC/CAPE TOWN

can not proceed if we tend to take the matter on review. Obviously we say that the decision pertaining to the question of **ultra vires** is not the correct decision and we wish to take that on review and we should be given that opportunity.

ADV NTSEBEZA: Why would it not proceed, why should it be dealt with ... (intervention).

ADV DU PLESSIS: Because it would be a nullity if we are correct, if the procedure is **ultra vires**, Mr Chairman. That is my experience of how these decisions usually work.

ADV NTSEBEZA: Is that again an argument on the balance of convenience or is it an argument on law?

ADV DU PLESSIS: No, it is an argument on law and normal practice, Mr Chairman, with respect. If a decision is made which affects a person's rights, by an administrative tribunal, such a decision may be taken on review and the proceedings can not go ahead until such time as the proceedings have been - or the application for review has been dealt with by a higher court. That is my experience and that is also the law, with respect.

ADV VALLY: Yes, well, that is a point, what is the authority? You suggest that is the law and your experience, on what authority do you base that submission?

ADV DU PLESSIS: Well, Mr Chairman, I don't have the authority with me now. I thought it was such trite law that I don't need to have the authority with me. It is obviously, it is clear that that is the normal situation.

That is the usual situation, that is how it is usually dealt with in administrative tribunals. For instance, I can say to you that in respect of proceedings in front of

the Master, for instance, insolvency proceedings, that is the normal procedure. If a decision is made which one party wants to take on review, the proceedings are postponed for purposes of the review application to take place. Otherwise Capt Hechter is clearly going to be prejudiced by being forced into an investigation and a questioning, where the allegations are made that the proceedings are **ultra vires**.

What I however, would like to do, and that is what I raised with you, is the fact that the question of privilege will come up probably within the first question, and I requested that we deal with that as well, because I foresee that there is also going to be a problem with that in that regard.

ADV POTGIETER: You can't deal with matters academically, Mr Du Plessis. If the question of privilege is not before this panel, then you can't deal with it. How can you deal with an issue that hasn't arisen and in any case, that is the one point. The other point is, are you suggesting that by merely indicating to us that you have instructions and your client is desirous of taking these proceedings on review, by simply just communicating that to us, that is the sole basis that lays the groundwork for stopping the proceedings, and sitting back and waiting for you to decide when you are going to take the matter to court one day? I mean, it can't be, how can it be?

ADV DU PLESSIS: Mr Chairman, that was the agreement that we had with Mr Vally. He says now it is about privilege. I cannot remember that we discussed it specifically with privilege, but I accept his word. We discussed it pertaining to the issues that will come up in this matter.

As I understood him we were all **ad idem** that whatever disputes would come up and would be taken on review, that would be handled on that basis. Within a specific time period, and there was an agreement pertaining to that with Mr Vally, what period that would be.

My experience is, Mr Chairman, and that is the law, is that clearly Capt Hechter will be prejudiced if he is subjected to a questioning which ultimately is found to be **ultra vires**.

ADV NTSEBEZA: But I can't understand, in what way, I just cannot understand that he is going to be - when you were arguing the issue from the very word go, you were saying and I think and we all understood you to be saying that, the purpose of you wanting a piecemeal - not on a piecemeal, but questions ahead of time, because you wanted to be enabled to know what questions would be prejudicial rather than go the tedious way of having to object virtually to each and every question as when it might arise, because you could foresee the possibility of you objecting on each and every question. Now what is stopping you from doing that, as and when the matter comes up? I cannot see because you are going to do exactly the same thing as you said you would do in the event of the procedure of supplying with questions ahead of time not being complied with. I can't see that - you are persuasive in saying there is going to be prejudice which you as the legal representative of Mr Hechter cannot take care of, objections.

ADV DU PLESSIS: No, Mr Chairman, I am not saying that. What I am saying is that I cannot allow my client to

participate in proceedings which are **ultra vires**. Clearly, my client is going to be prejudiced if he does that. Now what I am trying to say is we all foresee that the question of privilege is going to come up, probably in the first question, because the questioning is about informants. And we say there exists privilege upon which Capt Hechter need not answer that.

Now that argument rests on two legs, and I will address you on that when I get the opportunity. But we say that apart from that we intend to take the decision pertaining to the fact that you found that the proceedings are not **ultra vires** on review. What we would like to do is we would like to deal with that, together with the question of privilege in one application to court, if you should find against us on the privilege question.

Now what we say, is we are asking that we deal with the question of privilege and the arguments pertaining to privilege now, so that a decision can be made pertaining to that, and ... (intervention).

ADV NTSEBEZA: That is exactly what Adv Potgieter has been asking.

ADV DU PLESSIS: Yes.

ADV NTSEBEZA: How do we deal with the question of privilege when it has not arisen?

ADV DU PLESSIS: But Mr Chairman ...

ADV NTSEBEZA: And you know the procedure in terms of which it can arise. I canvassed this with you before lunch and you agreed that would be the procedure.

ADV DU PLESSIS: Mr Chairman, I cannot let my client answer questions in proceedings which are **ultra vires**, with

respect.

ADV NTSEBEZA: I don't know what you can let happen, but I mean, there is a ruling and I do not know whether this is an application for a postponement, pending the submission of a review process. I do not know. If it is an application for a postponement say so in so many terms and lay the basis for it.

ADV DU PLESSIS: Mr Chairman, could you give me an opportunity to have a discussion with my attorney, please.

ADV NTSEBEZA: Very well, Adv Du Plessis.

ADV DU PLESSIS: Thank you, Mr Chairman. Can we excused, can we go outside?

ADV NTSEBEZA: Yes.

ADV DU PLESSIS: Thank you.

ADV NTSEBEZA: We will adjourn for a few minutes.

COMMITTEE ADJOURNS

ON RESUMPTION:

ADV DU PLESSIS: We have had a discussion. If we can do it

SECTION 29 HEARING

TRC/CAPE TOWN

on the basis, if the questioning can go ahead on the basis that we do not waive any rights whatsoever to take the decision that you have already made on the **ultra vires** point as well as the point on the questions, sir, we say we had to be provided with beforehand, we - if it can go ahead on that basis that we do not waive any rights whatsoever and without any prejudice of any rights whatsoever we have pertaining to the review application, we can go ahead with the questioning, and when any problems come up - which I perceive might come up - pertaining to Section 31, as well as pertaining to the right of privilege, then we will deal with that.

ADV NTSEBEZA: Thank you, Mr Du Plessis. I understood that to be the basis when I said I noted your decision to take the matter on review. Mr Vally, are you ready?

ADV VALLY: Yes, we are. Has Capt Hechter been sworn in?

ADV DU PLESSIS: Yes.

JACQUES HECHTER: (Still under oath).

ADV VALLY: Capt Hechter, you are a member of the South African Police?

CAPT HECHTER: Dis reg.

ADV VALLY: From which period were you a member of the South African Police?

CAPT HECHTER: Herhaal net weer, asseblief, van?

ADV VALLY: From which period were you a member of the South African Police?

CAPT HECHTER: Ek het aangesluit in 1971 tot 1991.

ADV VALLY: Are you still a member of the South African Police?

CAPT HECHTER: Ek is in 1991 medies ongeskik uit die Mag uit.

ADV VALLY: Thank you, Capt Hechter. You have applied for amnesty for a number of incidents.

CAPT HECHTER: Dis korrek.

ADV VALLY: I will read you these incidents and after each one will you confirm that you have applied for amnesty for it or not?

CAPT HECHTER: Ek verstaan so, Voorsitter.

ADV VALLY: The murder of 10 allegedly ANC supporters in Bophuthatswana?

CAPT HECHTER: Dis korrek.

ADV VALLY: The murder of nine allegedly ANC supporters in KwaNdebele?

CAPT HECHTER: Dis korrek.

ADV VALLY: The murder of Jeffrey Sibiya and another?

CAPT HECHTER: Dit is korrek.

ADV VALLY: The murders of Andrew Mokape, Jackson Make and Hal Sopala?

CAPT HECHTER: Dis korrek.

ADV VALLY: The murder of Dr Fabian Ribeiro and his wife?

CAPT HECHTER: Dis korrek.

ADV VALLY: The murder of Piet Ntuli?

CAPT HECHTER: Dis korrek.

ADV VALLY: The murder of Joe Masele?

CAPT HECHTER: Dit is korrek.

ADV VALLY: The murder of Sgt Motasi and his wife?

CAPT HECHTER: Dit is korrek.

ADV VALLY: The murder of an unidentified member of Harold Sofolo Cell?

CAPT HECHTER: Dit is korrek.

ADV VALLY: The attack on a garage in KwaNdebele?

CAPT HECHTER: Dis korrek.

ADV VALLY: The attempted murder of Jerry Tibedi?

CAPT HECHTER: Dit is korrek.

ADV VALLY: The murder of various unidentified activists?

CAPT HECHTER: Dit is ook korrek.

ADV VALLY: The assault of Scheepers Morudi?

CAPT HECHTER: Dit is korrek.

ADV VALLY: And assault of various unidentified activists.

CAPT HECHTER: Dit is ook korrek.

ADV VALLY: Dankie, kaptein. You have given evidence in relation to your amnesty application before the Amnesty Committee?

CAPT HECHTER: Dit is korrek.

ADV VALLY: The issue of informers came up at the Amnesty Committee hearing wherein you said under oath, when you were asked about the identities of these informers:

"Their information led to the death of these people, so I cannot think that those persons would be able to move around in their areas freely. I am thus asking the Commission to give serious consideration to this. I may be able to mention names, but I think that it is grossly unfair to these persons."

Did you say this to the Amnesty Committee?

CAPT HECHTER: Ek het so gesê, ja, Voorsitter.

ADV VALLY: Now let's talk about Dr Ribeiro and his wife, their killings. Were the killings a lawful act?

MR DU PLESSIS OBJECTS: Mr Chairman, I object against this question. If Capt Hechter is going to answer that question it is going to incriminate him and in terms of Section 31 he cannot be compelled to give incriminating evidence in this procedure, unless the procedure in Section 31 is followed. I am not going to allow Capt Hechter to be prejudiced by being questioned again on the Ribeiro matter, where he has already given evidence pertaining to his amnesty application. He is going to incriminate himself and the procedure in terms of Section 31 has to be followed before he can answer that question.

ADV NTSEBEZA: Do I understand you Adv Du Plessis, to be saying you are not going to advise him to answer that question?

ADV DU PLESSIS: Yes, Mr Chairman, I have advised him beforehand not to answer any questions which are self-incriminating, and this question, the answer to this question will be self-incriminating.

ADV NTSEBEZA: No, I was just asking on the question of your allowing him or not allowing him.

ADV DU PLESSIS: Yes, well, Mr Chairman - miskien het ek dit verkeerd gesê. Die punt wat ek wou maak is ek het hom geadviseer om nie getuienis te gee met betrekking to enigiets wat selfinkriminerend kan wees nie, en as ek dit in Engels nie reg gestel het nie, Engels is nie my eerste taal nie. Ek will u verwys na artikel 31; artikel 31 bepaal, verwys - and I can refer to the English - Section 31 says that:

"Any person who is questioned by the
Commission in the exercise of its

powers in terms of this Act or who has been subpoenaed to give evidence, at a hearing of the Commission ..."

Which is the case here -

"... shall, subject to the provisions of subsections 2, 3 and 5 be compelled to produce any article or to answer any question put to him, although with regard to subject matter in the hearing, notwithstanding the fact that the article or his or her answer may incriminate him or her."

But then it says, 31(ii) -

"A person referred to in subsection (i) shall only be compelled to answer a question or to produce an article which may incriminate him or her if the Commissioner has issued an order to that effect, after the Commission;

(a) has consulted with the Attorney-General who has jurisdiction;

(b) has satisfied itself that to require such information from such a person is reasonable, necessary and justifiable in an open and democratic society, based on freedom and equality; and

(c) has satisfied itself that such a person has refused or is likely to refuse to answer a question or produce an article on the grounds of such answer or article that might incriminate him or her."

Now, Mr Chairman, my submission to you, with respect, is that if Capt Hechter is compelled to answer this question, an order in terms of Section 31(ii) has to be made and we want to be sure that the procedure in terms of Section 31 was followed.

ADV POTGIETER: Well, I don't follow that. Are you suggesting that if Capt Hechter responds to the question whether or not the killing of Dr Ribeiro and his wife was an unlawful act or unlawful acts or not, that will incriminate him?

ADV DU PLESSIS: Well, in his answer he may refer to something that is going to be incriminating evidence, Mr Chairman.

ADV POTGIETER: But ...

ADV DU PLESSIS: The question was: was the killing of Dr Ribeiro and his wife lawful or not.

ADV POTGIETER: Yes or no. Now how would that incriminate him? How would an answer to that question incriminate Capt Hechter? I don't understand that. The answer is either yes or no.

ADV NTSEBEZA: If I may just ask further on that question.

In what way would the reply to that question be any more

incriminating than his recent admission now that he applied for amnesty in relation to the matters of Dr Ribeiro and his wife? Murders. In what way would a reply yes or no, and I note that in the question as to whether he has replied for amnesty, in relation to the murders of Dr Ribeiro and his wife, he answered in the affirmative. Now what would an answer in reply to this question be more incriminating than that reply?

ADV DU PLESSIS: Mr Chairman, with respect, in that question he confirmed that he applied for amnesty. He confirmed that fact. He did not say anything which implicated him specifically to the murders of those peoples. He simply applied for amnesty. This question: was the killing of Dr Ribeiro lawful or not, is he is going to give evidence about the killing of Dr Ribeiro, he is going to incriminate himself pertaining to the killing of Dr Ribeiro and his wife, and there is no basis upon which Capt Hechter can be compelled to give self-incriminating evidence except on the basis of Section 31.

ADV NTSEBEZA: I didn't see in the question that there was any reference to him having been the author of the killings, not at this stage anyway, but I am anticipating something that has not been put before us on record. The question was merely put: were the killings of Dr Ribeiro and his wife lawful acts.

ADV DU PLESSIS: Mr Chairman, a further point is, I thought the questioning would be about the identity of alleged informers relevant to the investigations being conducted by the Commission. This question is was the killing of Dr Ribeiro lawful or not. It has a direct bearing upon the

contents of the amnesty application of Capt Hechter, and apart from that, even the applicability of Section 31, it goes wider than what the ambit of the question should be.

ADV POTGIETER: Well, I don't share that difficulty that you have raised. The indications are from the testimony of Capt Hechter which he confirms he had given at the Amnesty proceedings, relevant to the question of informers arose within the context of the killing of Dr and Mrs Ribeiro. So I don't quite understand your submission that this is entirely beyond the ambit of what is envisaged in the subpoena that was served on your client. I don't follow that. I don't follow that argument, but that's the one thing. The other thing is, your client has confirmed that he has applied for amnesty in respect of the - let me get the proper wording. In respect of the murder of Dr Fabian Ribeiro and his wife. Now inherent in that question is the indication that your client has confessed for some or other role in regard to this murder. So I still have the difficulty, I don't understand how, if he responds now to the question, whether or not those were lawful acts, yes or no, how that would implicate him.

ADV DU PLESSIS: But Mr Chairman, with respect, the questioning has a bearing upon the contents of the amnesty application. This questioning relates to the questions: who were the informers. If the question is asked who were the informers, we can deal with that. But Mr Chairman, the whole - and I want to say this. If this questioning is going to relate and intends to relate to the merits of the amnesty application of Capt Hechter, it is also **ultra vires**. It is another ground for saying that the Commission

is exceeding its powers. With respect, Mr Chairman, one cannot go beyond what is said in Section 31. Section 31 says:

"A person who has been subpoenaed to give evidence or to produce an article at the hearing, can be compelled to produce any article or to answer any question put to him or her, with regard to the subject matter of the hearing, notwithstanding that the article may incriminate him."

Then it goes on:

"He can only be compelled to answer a question or produce an article which may incriminate him or her ..."

May incriminate him or her -

"... if the Commission has issued an order to that effect after the Commission has complied with the three requirements."

ADV POTGIETER: Yes.

ADV DU PLESSIS: Now I have consulted with my client and I am of the view, and with respect, I make that submission, that Capt Hechter's answer may incriminate him.

ADV POTGIETER: Yes, we heard you and we know ...

ADV DU PLESSIS: And on that basis he can't answer the question.

ADV POTGIETER: We know the procedure. We are not talking about the procedure. We know what subsection (ii) says.

The point is, you must establish the jurisdiction facts for

you to rely on this, and that is the question I am asking you. Why do you say, on what basis do you make the submission that this would incriminate your client; a yes or no answer to this question, and that's really all we want to know. We don't want to know about the procedure. If you convince us that an answer, a response to this question would incriminate your client, then of course, you would in all likelihood be right in your submission that ... (intervention).

ADV DU PLESSIS: But Mr Chairman ...

ADV POTGIETER: ... there is a procedure that should be followed.

ADV DU PLESSIS: Yes, Mr Chairman, but the question is: was the killing of Dr Ribeiro lawful or not. To be able to answer that, Mr Chairman, this witness will have to go into the background of the orders that were given to him. He has to go into the background of who participated in the killing, who did what in respect of the killing, where the orders came from, who executed the killing, what was his involvement in the killing, to be able to explain to the Committee if it was lawful or not. The question, if it was lawful or not, entails every single element of the crime committed towards Dr Ribeiro and his wife. And the answer, to answer that, to say was it lawful or not, means he has to go into all that detail; who did the killing; who gave the orders; who had **mens rea**; what were the circumstances.

This question entails a whole criminal investigation. It actually entails what a criminal case would have entailed, on the basis of that. So clearly, Capt Hechter, if he has to answer this question has to divulge his involvement in

the killing of Dr Ribeiro or not. He has to divulge that, and that is going to incriminate him. With respect, Mr Chairman.

ADV POTGIETER: I follow. And he is not prepared to make any disclosures about this incident to this body?

ADV DU PLESSIS: Mr Chairman, Section 31(ii) says he can be compelled to answer such a question if the Commission has issued an order to that effect, after the Commission has consulted with the Attorney-General. The Commission has to make an order, that is how I read Section 31.

ADV POTGIETER: No, no ...

ADV DU PLESSIS: ... on the basis of 31(ii).

ADV POTGIETER: No, no, I understand that.

ADV DU PLESSIS: Yes.

ADV POTGIETER: I mean we must compel if he refuses. So my question is simply, I just want to understand what your client's attitude and approach is towards the Commission. So are you telling us that your client is not prepared ...

ADV DU PLESSIS: He is not ...

ADV POTGIETER: Your client - just hold on, hold on. Your client is not prepared to answer any questions relating to this particular issue that is now raised in questioning, he is not prepared to disclose anything about the particular incident unless he is compelled to do that. He is not prepared to voluntarily co-operate in this regard and give information? We must compel him. Is that your client's attitude towards these proceedings here today?

ADV DU PLESSIS: Mr Chairman, my client's attitude towards these proceedings is the fact that he applied for amnesty voluntarily out of his own, he participated in the whole

process of truth and reconciliation in his amnesty application. He has told the Commission everything he knows about the De Ribeiro matter. He is being asked in a different procedure now the same questions and he is asked to incriminate himself in respect of this hearing, which is a Section 29 hearing. He ... (intervention).

ADV POTGIETER: No, no, fair enough.

ADV DU PLESSIS: ... and our view, Mr Chairman, is that we will participate if the requirements of Section 31(ii) have been complied with and if the Commission, after having taken into account the requirements of Section 31(ii), and have made a decision in that regard. As you all know, Mr Chairman, and surely you yourself know, that we were the first security policemen who participated in this process. We did that voluntarily and Capt Hechter will participate as he has indicated in the Amnesty Hearing as well. He will participate if it is necessary to divulge the names of the informers.

ADV POTGIETER: I hear, I hear. That's fine, that's fine. I was just trying to gauge the attitude of your client here today and I was going to suggest that perhaps you must consider whether you shouldn't take instructions from your client. Whether he in fact wants to approach this on the basis of being compelled and getting the law used against him or whether he might be minded to assist in this process that we are engaged in. So you might very well want to discuss this with your client and take an instruction from him and hear whether this is in fact the approach that he wants to adopt here.

ADV DU PLESSIS: Mr Chairman, I will take instructions from him, if you will allow me the adjournment.

(ADV DU PLESSIS TAKES INSTRUCTIONS FROM CLIENT).

ADV NTSEBEZA: Yes, Adv Du Plessis?

ADV DU PLESSIS: Thank you, Mr Chairman. Mr Chairman, the instructions of my client is that he participated in the process of this Commission, voluntarily. He testified at his amnesty hearing about this matter. If he is going to be asked about this matter, which falls outside the auspices of these proceedings today, he is going to prejudice his amnesty application. He has made full disclosure in respect of his amnesty application. It was decided that he need not divulge the name of the informers at that hearing, and our client's attitude is that in so far as he is asked incriminating questions in these proceedings, it could only be done on the basis of Section 31(ii) and as far as he is going to be asked to divulge any names pertaining to any informers, that he invokes the normal common law privilege pertaining to the divulging the names of informers.

In that regard, Mr Chairman, we are of the view that we are acting in the spirit of reconciliation, where we say that we are not going to divulge the names of the informers. Because of the fact that we view that it would not contribute to reconciliation and peace in this country.

ADV POTGIETER: Kan ek net voordat ons voortgaan, net op rekord plaas, sodat u kliënt kan kennis neem daarvan. Ons is nie 'n vervolgingsliggaam nie. Die uiteindelijke doelwitte van die Kommissie is nie om te vervolg nie. Dit is juis met die breëre oogmerke van die bevordering van versoening, die genesing van wonde wat veroorsaak was in

die konflik, waaraan ons se land onderwerp was vir so lank, dat die Kommissie sy werk doen. Dit is die gees waarin die werk gedoen word. Ons will as 'n baie uitsonderlike geval die dwingende bepalings van die Wet, wat wel beskikbaar is tot die Kommissie, gebruik. Regtig, as 'n uitsondering. Ons - die gees waarin ons ons se werk benader, is dat persone moet - hulle moet vrywillig uit hulle eie vrye wil moet hulle saamwerk en moet hulle van hulp wees vir die Kommissie. En ek wil baie graag hê dat u kliënt moet dit verstaan en in daardie lig sien, en nie die idee vorm dat daar is strikke wat gestel word vir hom, in verskillende afdelings van die Kommissie nie, maar dat die Kommissie as een, met een beleidsbenadering en met een uitgangspunt te werk gaan, en dit is om daardie breëre belange te probeer bevorder.

So ek hoop van harte dat u kliënt dit so verstaan en dat hy in daardie gees kan met die Kommissie en met hierdie paneel saamwerk. Baie dankie.

ADV NTSEBEZA: Mr Vally?

ADV VALLY: Well, on this issue, Mr Chairperson, we are fully conversant with Section 31(i) and Section 31(ii). 31(i) is very clear that a person shall answer such a question, notwithstanding the fact that the article or his or her answer may incriminate him or her. Then 31(ii) kicks in that we can only compel them if they refuse to answer the question.

Now with all that argument, et cetera, we just want definite clarity to the question; was the murder of Dr Ribeiro and his wife unlawful. What is your answer there, Mr Hechter? You are saying that you refuse to answer the SECTION 29 HEARING

TRC/CAPE TOWN

question. Then please say so.

CAPT HECHTER: Geen antwoord daarop nie.

ADV VALLY: And why do you refuse to answer that question?

CAPT HECHTER: Ek het geen antwoord daarop nie, ek weier om te antwoord.

ADV VALLY: And why do you refuse to answer that question?

CAPT HECHTER: Die hele argument was nou net gewees daaromtrent, Voorsitter, ek laat dit daarby.

ADV VALLY: Let's carry on. You set out in your amnesty application and during evidence given under oath, that you were involved in the murder of Dr Ribeiro and his wife.

ADV DU PLESSIS: Mr Chairman, we are exactly at the same point. It is going to elicit an answer which is self-incriminatory. The purpose of this question relates to the identity of the informers and I don't know why Mr Vally doesn't get to that point.

ADV VALLY: Mr Chairperson ...

ADV NTSEBEZA: I understand Mr Vally to be laying a ground on which he can come to that point. He cannot just make it in the air. He is either - the evidence was given in the context of the matter of Dr Ribeiro, in which your client was testifying or it wasn't. He is merely laying the basis on which he can come to the question.

ADV DU PLESSIS: Mr Chairman, the evidence which Mr Vally referred to at the beginning, referred to information that was given to Capt Hechter by certain informers pertaining to the Ribeiro matter. Now if Capt Hechter is asked the question: who were the informers who gave you information pertaining to Dr Fabian Ribeiro and his wife, that would deal with it sufficiently.

ADV NTSEBEZA: Can we get on record, therefore, that your client in his own words, is refusing to answer that question on the basis for that.

ADV DU PLESSIS: He refuses to answer any questions which are self-incriminatory in terms of Section 31, Mr Chairman.

ADV NTSEBEZA: Let's get the witness to say so.

CAPT HECHTER: Dis positief. Ek weier om enige antwoorde te gee wat myself kan inkrimineer ingevolge artikel 32, 31, 31(i).

ADV NTSEBEZA: Mr Vally?

ADV VALLY: Are you willing to answer any questions relating to what you stated under oath, either in your amnesty application or at the amnesty hearing, reflecting on any alleged unlawful acts you performed?

ADV DU PLESSIS: Mr Chairman, I am going to object to any such question because that is outside the ambit of the subpoena and outside the ambit of this inquiry. This inquiry relates to the identity of alleged informers, relevant to the investigations being conducted by the Commission. If questions pertaining to alleged informers are asked, Capt Hechter will consider answering those questions. Any other questions pertaining to the amnesty application and the evidence already given by Capt Hechter in his amnesty applications, any answers to those questions will be refused. Either on the basis of self-incrimination, otherwise on the basis of unfair administrative action.

ADV VALLY: Can we get on record from Capt Hechter very simply, and I want to also refute what Adv Du Plessis is saying. Our subpoena is such:

"To give evidence and/or to answer questions relating to the identity of alleged informers relevant to the investigations being conducted by the Commission in respect of ...

And we go on in point number 5:

"The murder of Dr Fabian Ribeiro and his wife."

Now in order to determine whether, as you have told us a number of times that you are going to refuse to answer the questions on the basis of privilege, the common law right to privilege. In order to establish that, one has to lay the groundwork to the question. I think it is clear in practice, when one asks questions, when you are subpoenaed over a specific issue, you ask questions around the issue, and lay the groundwork for the issue. Now my question is this, which I would like Capt Hechter to put on record. You are not willing to answer any questions relating to any unlawful acts, even though you have stated, made your statements under oath, both in your amnesty application as well as during hearings, again under oath, before the Amnesty Committee.

ADV NTSEBEZA: Let him answer, let the ...

CAPT HECHTER: Dit is korrek, ek is nie bereid nie, Voorsitter.

ADV VALLY: Mr Chairperson, we certainly have invoked Section 31(ii) before and it won't create much difficulty for us to invoke in this particular matter. However, I think for the sake of convenience, we should get to the other issue now, so that we can use whatever procedures are

necessary and come back to this issue where we will invoke the necessary subsection to compel the witness, should we find it necessary.

ADV NTSEBEZA: Very well, Mr Vally.

ADV VALLY: Now Capt Hechter, you have confirmed that you stated under oath during the amnesty application, a question asked a short while ago, that the information these people gave you, led to the death of - the information your informers gave you, led to the death of Dr Ribeiro and his wife.

ADV DU PLESSIS: Mr Chairman, he did not confirm that.

CAPT HECHTER: Ek het dit nie gesê nie.

ADV DU PLESSIS: And he did not confirm that.

ADV VALLY: Mr Chairperson, I quoted, and I will quote again. My question was, and I quote. You said in your amnesty application - sorry, this is where the quote starts:

"Their information led to the death of these people so I cannot think that those persons would be able to move around in their areas freely. I am thus asking the Commission to give serious consideration to this. I may be able to mention names but I think it is grossly unfair to these persons."

That was the quote I put to you earlier and you confirmed you had said that.

CAPT HECHTER: Ja.

ADV DU PLESSIS: Yes, Mr Chairman, he - sorry, he answered that question. Yes.

○ ADV POTGIETER: Well, give him that microphone and let him please answer the question.

CAPT HECHTER: Dis korrek, Voorsitter, u het dit aan my gestel.

ADV VALLY: And you did confirm you said that.

CAPT HECHTER: Dit is korrek, ja, ek het dit aan die Amnestie Komitee gestel.

○ ADV VALLY: Your counsel has got with him the relevant extracts of the record which I am putting to you, should you need to check it. There was a passage that I am looking for, that is on page 485, where Judge Wilson asked the question:

"Can I clarify one point. I take it that you are not asking the witness for the names of informants in general, you are asking the witness for the names of the informers who gave them information relating to Dr Ribeiro on which they have come to conclusions. Not just the general ..."

○
And it stops there. Now can you confirm that your statement that you agreed a short while ago, was made by you, relates to the informants regarding the murder of Dr Ribeiro and his wife?

CAPT HECHTER: (Indistinct - microphone not switched on).

ADV DU PLESSIS: May I ask for an adjournment, Mr Chairman?

ADV POTGIETER: What is the problem?

ADV DU PLESSIS: I have to consider my position pertaining to the answer of this question.

ADV POTGIETER: You want to consider ...

ADV DU PLESSIS: Consult with the witness.

ADV POTGIETER: ... your position?

ADV DU PLESSIS: I want to consult with the witness.

ADV POTGIETER: You want to consult with your client?

ADV DU PLESSIS: And advise him on exactly what the position is pertaining to possible privilege. I want to consider my position in that regard.

ADV POTGIETER: You want to advise your client on the law, I should imagine.

ADV DU PLESSIS: Yes, Mr Chairman.

ADV POTGIETER: Not in regard to the answer to the question?

ADV DU PLESSIS: Yes.

ADV NTSEBEZA: Very well, we shall adjourn for a while.

ADV DU PLESSIS: Thank you.

COMMITTEE ADJOURNS

ON RESUMPTION:

ADV DU PLESSIS: Mr Chairman - I beg our pardon. Could I go ahead?

SECTION 29 HEARING

TRC/CAPE TOWN

○ ADV NTSEBEZA: Yes.

○ ADV DU PLESSIS: Mr Chairman, I have consulted with my client on the legal situation and I think before we go ahead haphazardly, which is something that I foresee was going to happen, I want to place certain aspects on record which is our view pertaining to the questioning at this hearing. My client has been advised by myself and Mr Britz, that he should answer no questions which, whereof the answers may incriminate him. Unless and until Section 31(ii) has been invoked. So any question which might incriminate Capt Hechter he will not answer. In respect of any questions pertaining to the identity of informers, I have advised Capt Hechter not to answer the questions, because of the fact that the common law privilege pertaining to the divulgement of the identity of the informers will be invoked and on that basis he will not answer any questions pertaining to the identity of informers in relation to the De Ribeiro matter or any other matter listed in the subpoena.

○ ADV POTGIETER: I am sorry, let me just see if I understand you correctly. There seems to be a very disturbing point that you are making here. Are you telling us that you advised Capt Hechter not to answer incriminating questions?

○ ADV DU PLESSIS: Mr Chairman, I advised him, unless the requirements of Section 31(ii) has been complied with, 31 and specifically 31(ii) has been complied with. I am his legal representative and Capt Hechter has also given me instructions in that regard.

○ ADV POTGIETER: Well, that is what I can't understand. So you are telling us you have advised him specifically not to

answer these questions, as you have identified them?

ADV DU PLESSIS: Mr Chairman, I have given no advice other than advice which accords with the procedure of Section 31. Section 31 says a person referred to in subsection (i) shall be compelled to answer a question or produce an article which may incriminate him, if the Commission has issued an order to that effect. And the way I read it, is that a person can be - can refuse to answer a question which is self-incriminating and can only be compelled to do so if the Commission issues an order to that effect.

ADV POTGIETER: Yes. No, I ...

ADV DU PLESSIS: That is how I interpret Section 31 and - but in any event, my advice to Capt Hechter is also subject to privilege and I am not going to deal further with that.

What I am trying to place on record is that Capt Hechter has been advised so and will also, has also given instructions and has indicated that he will not answer any self-incriminating questions, unless Section 31 has been complied with, and that he furthermore will not answer questions pertaining to the identity of the informers, because he relies on the common law privilege pertaining to the divulgement of information of informers.

ADV POTGIETER: Adv Du Plessis, I am not trying to get information out of you, that would breach your attorney/client relationship with Capt Hechter. I am simply asking you questions to clarify what you have told us. I am asking you quite pointedly, and I am going to ask you to give a crisp answer to this question. Are you telling us that you have advised Capt Hechter not to answer incriminating questions?

ADV DU PLESSIS: And I am saying to you, Mr Chairman, that the answer ... (intervention).

ADV POTGIETER: Yes or no?

ADV DU PLESSIS: Mr Chairman, the answer to that is - involves legal professional privilege and I am not going to answer pertaining to any advice given to Capt Hechter. All I can say to you is, Capt Hechter will not answer self-incriminating questions and Capt Hechter ... (intervention).

ADV POTGIETER: I am asking you, I am asking you ... (intervention).

ADV DU PLESSIS: I am not going to answer that, Mr Chairman.

ADV POTGIETER: I am asking you simply, let me explain to you, I am asking you simply to clarify what you have voluntarily put on record. And I am giving you an opportunity to explain to it, because - to explain it, because there are a lot of consequences that flow from that, and you know that. I am asking you, instead of advising your client what the legal position is, and then leaving your client to decide in the view of the legal position which has been fully explained to him, as you are obliged to do it, of course, as the legal representative, you have rather advised him not to answer questions?

ADV DU PLESSIS: Well, Mr Chairman, maybe I have explained it not correctly. What I did was, I explained the legal consequences and the legal position to Capt Hechter. I explained to him exactly what the situation is and what the legal position is, and he has given me instructions as the normal situation works. I don't know if there is a - if

something is being made of any actions which I did, maybe I placed something on record that wasn't hundred per cent correct. I did nothing which I shouldn't have done, Mr Chairman, and I am placing on record that I have advised Capt Hechter pertaining to the legal consequences and the legal issues involved in this matter. I will not divulge any information pertaining to the legal professional privilege between myself and Capt Hechter. And I am also placing on record that Capt Hechter will not, as I have already placed on record, answer any self-incriminating questions, unless Section 31 is followed and I will also place on record that Capt Hechter will not answer questions pertaining to the identity of the informers, on the basis that a common law privilege existing in that regard.

ADV POTGIETER: Well, I must say I am relieved to hear that. To hear that explanation. I note that what you are really telling us and I also note that our conversation is in English. But what you are telling us is you have advised your client fully of the legal position. Your client has decided what course of action your client himself would take and that he has instructed you subsequent to that to place your client's decision on record.

ADV DU PLESSIS: Yes, Mr Chairman. I never understood it - ek het dit nie verstaan as synde dat ek iets ander gesê het nie. As dit anders geïnterpreteer is dan is dit nie korrek nie.

ADV POTGIETER: Nee, gaaf. Goed, nee, baie dankie.

ADV NTSEBEZA: You may proceed, Mr Vally.

ADV VALLY: Thank you, Mr Chairperson. Capt Hechter, I want to put something to you which your advocate, Adv Du

Plessis put before the Amnesty Committee. And I need you to confirm whether it was what your instructions were. It is set out on page 486 at the bottom thereof. The last question:

"Yes, Mr Chairman, I can say to you now in this matter as well as in some of the other matters where we have given evidence, that if we are required to disclose the identity of informants, it would have one effect, that I can assure you, and that is, that it will definitely not be to the advancement of reconciliation in this country. There are people in the current Government, in current Government structures, high profile people in the current Government structures who were informers of the security police at that time. We do not believe the disclosure of such names would be to the benefit of anybody concerned, taking into account the fact that we are talking of reconciliation, and specifically not to the benefit of those people themselves."

Now this was stated by your advocate. Do you confirm that these were your instructions?

ADV DU PLESSIS: Mr Chairman, that question pertains to the legal professional privilege which exists and Capt Hechter has given me instructions at this stage, that he does not

intend to waive any rights pertaining to legal professional privilege. Any communications between himself and his legal advisers cannot be disclosed.

ADV NTSEBEZA: I am afraid I don't understand that. He is being asked about something that was being said in court as being reflective of his instructions. Are you saying that that which is now public knowledge in the form of an amnesty application testimony or argument before an Amnesty Committee, is privileged and privileged for purposes of these proceedings?

ADV DU PLESSIS: Mr Chairman, the question is if what was said by myself was based on instructions given to me by Capt Hechter and I am saying that that involves - the answer to that involves legal professional privilege and involves discussions between myself and Capt Hechter on that issue and that cannot be divulged and Capt Hechter cannot be requested to answer that question.

ADV NTSEBEZA: Wouldn't you say you have waived that privilege by divulging it to the Amnesty Committee? You say you have waived that privilege?

ADV DU PLESSIS: No, I say it hasn't been waived. We are not waiving it and it hasn't been waived.

ADV NTSEBEZA: How so?

ADV DU PLESSIS: Yes, Mr Chairman.

ADV NTSEBEZA: How are you able to make that argument, when in fact you volunteered that information as being information that was given to you?

ADV DU PLESSIS: Mr Chairman, you must read that question. That argument says the following: we are required to disclose the identity of informers, it would have one

effect.

ADV VALLY: Mr Chairperson, I need to object here. Either Mr Du Plessis is saying that it is his position not his client's position or his client must confirm that that was the position Mr Du Plessis was mandated to put forward before him. It is a very simple question and I am not sure how professional privilege is invoked in the circumstance.

ADV DU PLESSIS: It relates exactly to what was said between Capt Hechter and myself, Mr Chairman. The answer to that question relates exactly to what was consulted about and what was said between Capt Hechter and myself, and Capt Hechter, as far as I understand him, invokes the legal professional privilege which exists.

ADV VALLY: I really think Mr Du Plessis has the wrong end of professional privilege in this situation. You know if an attorney pleads not guilty on behalf of his client in court and the Court asks the client do you confirm those are your instructions, the client will say professional privilege, I can't tell the Court that. And this is the analogy.

You know, either Mr Du Plessis was talking off his own bat or he was talking on instructions from Mr Hechter. It was said in an open court, Mr Du Plessis was not there for his own case, he was there representing Mr Hechter. And simply to say yes, I was acting on instructions is clear, must we then discount any statements made by legal counsel in a matter, because it cannot be confirmed that it was the instruction of the attorney? In the course of events it is taken for granted when counsel talks in any forum, they are talking on behalf of their client as an agent of their

client. Now legal privilege is being invoked in these circumstances. I think this is an abuse of the issue of legal privilege and it is not such a serious issue as well.

I think it is purposely the purposes of this investigative committee are being frustrated, Mr Chairperson, and I think I want to get to the crunch now. I think all of us want to do. But this sort of unnecessary delays makes one think of some of these really absurd gangster movies, where they raise obscure points all the time and refuse to take part in any hearings whatsoever. It is a very simple issue. When your counsel talks on your behalf at a hearing, is he talking for you or not? If you are saying no, he misunderstood me or he was wrong, that's one thing, but to say it was legal privilege, I find that very strange.

ADV DU PLESSIS: Mr Chairman, that was part of the argument. If you read that, that was something that was alleged by me as part of the argument. The question is, was that done on instructions of Capt Hechter. If the question is did I argue on instructions of Capt Hechter, I did. If the question is, did Capt Hechter tell me that there are high people, high profile people in current Government structures who are informers, that's part of professional, legal professional privilege. And Mr Chairman, in any event, that allegation that was made or that argument that was addressed by me, that was simply an argument which one should read for the fact that it was an argument. I never said there that informers in the De Ribeiro matter were high profile people in the current Government structures. I never said there that Capt Hechter told me so. So at the

SECTION 29 HEARING

TRC/CAPE TOWN

end of the day if the question relates to the information conveyed between Capt Hechter, from Capt Hechter to myself it relates to legal professional privilege. The question is, did I act there on behalf of Capt Hechter? - Yes, I did.

ADV POTGIETER: Well, that's fine, we can hear that from your client. I don't know, Mr Vally, are you persisting with that question or do you want to rephrase it, what is the position?

ADV VALLY: May I ask you a question directly. During your time as a security branch policeman, at the time when the De Ribeiros were killed, were there persons in the current Government, in current Government structures who were "high profile people" who were informers of the security branch at the time?

CAPT HECHTER: Ek sal nie weet wat in die veiligheidstak aangegaan het nie. Van my persoonlik, nee.

ADV VALLY: So the informers that you talk about relating to the first question I asked you, was information that led to the death of the De Ribeiros not high-profile people in Government structures?

CAPT HECHTER: Op daardie stadium was nie een "high profile people" in die regering gewees nie. Hulle was almal lede van Mamelodi se jeug gewees. So ek kan nie vir u op hierdie stadium 'n antwoord gee waar hulle almal is nie. Ek volg nie hulle meer nie, ek is nie meer 'n lid van die veiligheidsmagte nie, ek het my heeltemal onttrek van hierdie storie. Ek lei 'n privaat lewe. So ek weet nie meer waar hulle hulle bevind op hierdie stadium nie, en ek weet nie wat u bedoel by "high profile Government officials"

nie.

ADV VALLY: So the statement that I quoted to you made by Adv Du Plessis, you have no knowledge of that?

CAPT HECHTER: Wat bedoel u, ek het geen kennis daarvan nie?

ADV VALLY: The statement I quoted to you where Adv Du Plessis talked about persons in high Government structures, high profile people. Should I quote you the statement again?

CAPT HECHTER: Nee, nee, ek verstaan nou wat u bedoel. Ekskuus tog, ek verstaan nou waarna u verwys.

ADV VALLY: That statement was not, in terms of what you are telling me now, factually correct?

ADV DU PLESSIS: Mr Chairman, if that question relates again to information between divulged by Capt Hechter to myself, then I object to ...

ADV NTSEBEZA: No, it doesn't relate to that, Mr Du Plessis. It relates to ... (intervention).

ADV DU PLESSIS: If it doesn't relate to that, then he can answer the question.

CAPT HECHTER: Kan ek die vraag herstel, of "rephrase" sodat ek dit reg verstaan.

ADV VALLY: All right.

CAPT HECHTER: U wil weet of op daardie stadium, terwyl ek in Mamelodi betrokke was by die veiligheidstak, of daar hoëprofiel regeringslede of hulle vandag is.

ADV VALLY: Ja.

CAPT HECHTER: Ek kan nie vir u 'n positiewe antwoord gee nie, ek weet daar is, daar is van die mense wat ek wel ken wat in Pretoria se Stadsraad diens doen, huidiglik. Daar

is wel een van hulle, soverre ons kennis strek, wat wel in die Regering dien. Ek hoop dit beantwoord u vraag.

ADV POTGIETER: Maar sou u hulle beskryf as hoëprofiel persone?

CAPT HECHTER: As u praat van 'n hoëprofiel en u noem vir my een van die groot Ministers op hierdie stadium wat elke dag in die nuus is, nee. Dit is beslis nie mnr Mandela, Mbeki, wat dies meer nie, glad nie so hoëprofiel nie. Daardie mense was glad nie in ons omgewing gewees nie, ons het glad nie met hulle te doen gekry nie.

ADV POTGIETER: Goed, dankie.

ADV VALLY: My laaste vrae in die verband - relates to something which was stated by your advocate, Adv Du Plessis. Maybe we should have had Adv Du Plessis subpoenaed, but - we can. On page 489 - van daardie bundel wat voor jou is, en ek praat van die - the third sentence. Die sin begin - and I quote:

"That is also probably one of the reasons why the mechanism was created in the Act to hear certain evidence **in camera**. That is an aspect in which the Committee has to consider - but I will submit it is not the only aspect that the Committee should consider.

Mr Chairperson, Mr Chairman, I don't know how good this argument is, but I want to state again, that in all probabilities such an informer is not going to say yes, I was an informer. So that at the end of the day one doesn't

know really where such an inquiry and such information will lead. It might be that it might affect the applicant's application. It might be that it might have no effect on the applicant's application, according to how the Committee views the matter."

What I want to ask you in connection with that statement made by Adv Du Plessis, is that you would seriously consider possibly giving the names of informers at that stage, if the hearings were in camera?

CAPT HECHTER: U weet, dit is 'n argument wat adv Du Plessis op daardie stadium gemaak het, terwyl daar interaksie was tussen hom en die Kommissie. Hy het nie gestop en vir my gevra wat my opinie daaromtrent is nie. Dit was suiwer 'n argument wat aan hom gemaak is. Ons weet, ek praat nou af, ek weet nie of julle my gaan stilmaak nie, ons praat nou van die "cuff" af, en ek sal bly wees as ons hier kan afsit. Kan ons afsit? Ek vra dit vir die Kommissie. Kom ons sit af, ek wil graag met mnr Potgieter praat.

MR BRITZ: Maybe we must then adjourn then, please can we adjourn?

CAPT HECHTER: Kan ons openlik praat, ek wil graag met u praat. Jy ken my, jy weet hoe ek is.

ADV VALLY: We have an adjournment then.

COMMITTEE ADJOURNS

ON RESUMPTION:

ADV NTSEBEZA: We resume and we are at a stage where an objection was made by Adv Du Plessis to a question that was

put to the witness and the objection was on the basis that the answers that the witness might give might incriminate him. I am told by the legal teams representing the Commission as well as representing Mr Hechter, that they have agreed to these proceedings being adjourned to a date to be arranged between them, and that in the meantime a mechanism is going to be sought by them, to see what further processes can be put in place for the further consideration of the issues that form the subject matter of this inquiry. I do not find that the agreement between the legal teams is unreasonable, and in the circumstances these proceedings are adjourned to a date to be arranged against the backdrop of those considerations. The matter is adjourned.

COMMITTEE ADJOURNS