COURT RESUMES ON 6 NOVEMBER 2009 (at 14:56)

MR KAHANOVITZ: M'Lord.

COURT: Mr Kahanovitz.

MR KAHANOVITZ: We have reached agreement that what is contained in this document called “Evidence in the tramlines concerning issues pertaining to Judaism” may be placed before Your Lordship as evidence without the need for a witness to be called and maybe then we should just insert it into... The parties haven't signed, it but I don't think that's necessary. You can take it on – as agreed on record that this must – may be placed before the Court without the need to call Dr Reisenberger. I just want to find out where we are in the pleadings bundle.

COURT: Pages 130 to 134.

MR KAHANOVITZ: Yes M'Lord.

COURT: Because we have a 129 which is the Summary of Evidence Delivered by Dr Reisenberger.

MR KAHANOVITZ: Yes.

COURT: And then the (indistinct).

MR KAHANOVITZ: So then let's number this 130 to 134. Thank you, M'Lord.

COURT: Mr Lewis, are you content?

MR LEWIS: I'm happy with that, M'Lord. I have another piece of evidence that needs to be entered into...

COURT: Ja no, no wait, wait. Let's just finish this first.

MR LEWIS: Alright.

COURT: So this is acceptable?

MR LEWIS: I believe so ja.

COURT: I just want to look at it if I may. Yes thank you. Mr Lewis.

MR LEWIS: Can I hand you a document? There's a...

COURT: What is it?

MR LEWIS: It's an online note on the Zoopy website of the – the videos that were referred to by the respondent from one Ciska Verster who is an employee of – at People's Post. This is with regards to substantiating my version of the facts *vis-à-vis* the respondent's version of the facts. There was an allegation of plagiarism.

COURT: Ja but...

MR LEWIS: Right.

COURT: You know, to – you can't just put up a document. The document has to be proved.

MR LEWIS: Yes.

COURT: The person has got to come and give evidence to that effect. It's not a matter of just submitting a document.

MR LEWIS: My problem is, is a lot of the evidence from the respondent is of a similar nature. He's referred to online videos.

COURT: He...

MR LEWIS: He's referred to all sorts of...

MR KAHANOVITZ: M'Lord, might I make a suggestion in order to speed up the process? I'm happy for the document to be placed before Your Lordship for what it is worth. Our submission is it's not relevant, but if Mr Lewis wishes Your Lordship to have sight of the document then we do not object.

COURT: Okay, on that basis you can...

MR LEWIS: Your Lordship, just with regards to yesterday's cross-examination of my testimony, I haven't been – I wasn't given the opportunity to rebut certain facts put before the Court. I have it on good authority that Annelien Dean is a former news editor of the – the Express Newspaper in Bloemfontein.

COURT: Ja but...

MR LEWIS: Which was a Naspers publication.

COURT: Mr Lewis...

MR LEWIS: Sorry.

COURT: You know, really, you have displayed considerable knowledge of law, so although you are a lay person you really do know what – how courts operate. You had an opportunity yesterday to give evidence. You gave evidence. Mr Kahanovitz, would you just – have you – do you have knowledge of this? Would you...?

MR KAHANOVITZ: No M'Lord.

COURT: Would you discuss with him and see whether you have – you can take the same attitude in relation to this, as

you've done in relation to the document?

MR KAHANOVITZ: I'll see.

COURT: And may I ask you, Mr Lewis, is this the last? Is this the last of the issues?

MR LEWIS: Yes, that would be it.

COURT: The court will adjourn.

MR KAHANOVITZ: M'Lord, maybe we... Maybe I can just find out without adjourning and...

COURT: Okay.

MR KAHANOVITZ: It could speed up the process.

DISCUSSION ASIDE

MR KAHANOVITZ: M'Lord, once again, I don't know where this goes but if Mr Lewis feels it's important to put this on record he may do so. I don't think it's relevant, but...

COURT: Fine.

MR KAHANOVITZ: Once again, if it speeds up the process he may put it on record.

COURT: Thank you, Mr Kahanovitz. Okay Mr Lewis.

MR LEWIS: For the record, Annelien Dean is a former news editor of the Express Newspaper in Bloemfontein. She joined the DistrictMail in 1999. According to the Helderberg News ...(intervention)

COURT: Just please, you know.

MR LEWIS: Sorry.

COURT: Please. It's just a little too fast.

MR LEWIS: Sorry.

COURT: Former editor of the...?

MR LEWIS: Express Newspaper in Bloemfontein.

COURT: Yes.

MR LEWIS: She joined the DistrictMail in 1996.

COURT: Yes.

MR LEWIS: Sorry, I'm not – I'm not sure of the exact date but this is according to the Helderberg News, 8 October 1999. Both publications appear to be Naspers publications. She was also currently studying a BA in Communications.

COURT: Okay, fine.

MR KAHANOVITZ: Thank you, M'Lord. M'Lord, I would like to...

COURT: Well, let me just ask Mr Lewis. Mr Lewis, have you closed your case?

MR LEWIS: H'm, have I closed my case?

COURT: Yes.

MR LEWIS: I believe I should have an opportunity to present the closing arguments in the case.

COURT: Oh, no no the... Yes, I'm talking about evidence.

MR LEWIS: Yes, in – with regards to evidence.

COURT: Okay, that's fine.

CASE FOR THE PLAINTIFF

MR KAHANOVITZ ADDRESSES COURT: Thank you, M'Lord. M'Lord, if I could then hand up some authorities. I have given

this to Lewis, copies. The first authority is from Erasmus's textbook on Superior Court Practice and it deals with the test to be applied in respect of the granting of absolution from the instance and I have highlighted certain passages which I submit are relevant, that the test is:

> "When absolution from the instance is sought at the close of the Plaintiff's case, the test to be applied is not whether the evidence established what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, or ought to) find for the Plaintiff."

That's the one relevant passage. At the following page, B1-293, second paragraph from the top:

> "In the case of an inference, the test at this stage of the trial is as follows: the Court will refuse the application for absolution unless it is satisfied that no reasonable court could draw the inference for which the plaintiff contends."

And the further passage that we rely on is near the bottom of the same page, is that:

> "In the case where there is only one Defendant it can be fairly inferred that at the stage when the Plaintiff has closed his case the Court has heard all the evidence which is available against the Defendant. Any further

> "evidence that would be forthcoming if the case continued would be likely to operate to the detriment of the Plaintiff. That being so, it is considered unnecessary in the interest of justice to allow the case to continue any longer if, after the Plaintiff has closed his case, there is no *prima facie* case against the Defendant."

Then I would like to draw Your Lordship's attention to a decision from this court in which absolution was granted in a discrimination matter. It's on point for another reason. It is the leading decision in the Labour Court on the test for religious discrimination. It's a judgment of Judge Pillay in Dlamini v Green Four Security (2006) 27 ILJ 2098 (LC) and the facts were that the applicants were dismissed for refusing to shave or trim their beards. They belonged to the Baptised Nazareth group which they submitted did not allow them to trim their beards.

> "Mr Ngcongo, who appeared for the applicants, accepted that the applicants bore the onus of proving that this was an essential tenet of Nazareths."

Then you will see in paragraph 7, last sentence:

> "As the respondent applied for absolution at the end of the plaintiff's case, there was no evidence led for the respondent. Consequently, this dispute of fact cannot be resolved. Nor is it necessary to do so."

And paragraph 13 the Judge outlines the conceptual framework

for the analysis of the dispute:

> "Stage One: Are the facts relied upon to substantiate the complaint of discrimination proved?"

And we will submit that we don't in this case need to go any further than the stage one. We don't need to get involved in questions of justification because it does not arise in this case.

Paragraph 17 quotes the Constitutional Court decision in Prince v President of the Law Society and paragraph 18 just sets out what happened in that case, is that the respondents didn't question the applicants' beliefs. Its principal defence was that the Nazareth faith did not prohibit the cutting of hair or beards. It's not relevant to this case.

Paragraph 27 the Court poses certain questions that need to be asked and the particular paragraphs that we say are of use in this case is the Court points to the question of diversity in the workplace and striking the balance between diverse religions and the obligations of employers. At paragraph 31 at the top of page 2107, next to the letter (a) the Court says:

> "Workplaces are typically home to diverse religions and the balance has to be struck sensitively. To balance freedom of religion against other rights and the interests of a diverse workforce, even-handedness is required, not subtle or explicit bias in front(sic) of one or other

"religion, or scrupulous secularism, or complete neutrality. However the balance is struck, it cannot be detrimental of the enterprise or other workers.

Society in general and workplaces in particular can cohere if everyone accepts that certain basic norms and standards are binding. Workers are not automatically exempted by their beliefs from complying with workplace rules. If they wish to practise their religion in the workplace, an exemption or accommodation must be sought."

Now I'm going to later on in my argument take Your Lordship to the, what I think is a leading Canadian decision, Simpsons-Sears, on what the reciprocal obligations of the various parties are where an employee in consequence of their religious belief seeks an accommodation.

My submission then is that there are three questions that need to be answered for purposes of this application for absolution. The first is:

"Has evidence been produced which could lead a reasonable court to draw the inference that the failure to renew the contract was

(a) the result of the application of an employment policy or practice and

(b) for reasons prohibited by section 6, namely discrimination on the grounds of religion, cultural or

"political views."

The second question is:

"Has evidence been produced from which a reasonable court could draw the inference that the hours worked by the applicant were

(a) consequent upon an employment policy or practice;

(b) the application of which discriminated against the applicant on the grounds of his Jewish faith."

The third question is:

"Has evidence been produced from which a reasonable court could draw the inference that

(a) consequent upon an employment policy or practice;

(b) the Jimmy Dludlu and Robbie Jansen articles were rejected due to the application of a policy which is racially discriminatory."

Now M'Lord, we submit that the answer to a lot of what we have heard in this court is not going to be found in law textbooks. The problems which the applicant experienced, although they find some echo in the real world, are largely figments of his own imagination. In his mind the things that happened to him at work can only be experienced by himself through a paradigm in which he is the victim of persecution.

He identifies strongly with persecuted people to the extent that he has become one of them. So when he works long hours on a Friday or he's asked to volunteer to hand out

pamphlets before dawn or when his stories are not published, then he is not capable of understanding that it doesn't automatically follow that these experiences must inexorably result from a motive to get David Lewis because David Lewis was part of the struggle or because he is Jewish or because he is not in the NGK or because he is not a Boer.

With respect to him, he was a tiny or insignificant cog in a very large machine. I have no doubt that his feelings were hurt. It may even be that he briefly worked excessive hours, but he has not come close to providing any concrete proof of discrimination and by that I mean facts which go to substantiate the claim.

I have drawn the Court's attention to the decision in Dlamini v Green Four Security and drawing on what is set out in that case I make the following submission. An employer is lawfully entitled to set hours that suit the operational requirements of the business. For example, every shop in Cavendish Square or the Waterfront is open until a time that cuts into the Jewish Sabbath on Fridays and Saturdays or is open on Sundays, which cuts into the Christian Sabbath.

It is absurd to suggest that it therefore follows that every one of these shops is discriminating against each member of the Jewish faith or the Christian faith. Either evidence must be produced of differentiation, which goes to show that one of the shops treats members of different religious groups

differently, or there must be evidence that the law has imposed an obligation on them to treat all religious groups differently.

The obligation to treat differently cannot arise in a vacuum. The law obliges the employee in discrimination case of this nature to show that a duty was triggered to accommodate the religious beliefs of the complainant and the logical starting point would be the raising of a legitimate complaint by the employee.

Now the case law that was most useful on this point is the Canadian case law, because there have been a number of cases mainly involving Seventh Day Adventists and I have handed Your Lordship a copy of the headnote in the Canadian Supreme Court decision in Ontario Human Rights Commission v Simpsons-Sears and the principle is really contained in one sentence in the second page of the headnote, the second paragraph.

> "In a case of adverse effect discrimination, the employer has a duty to take reasonable steps to accommodate short of undue hardship in the operation of the employer's business. There is no question of justification because the rule, if rationally collected(sic) to the employment, needs none. If such rational(sic) steps do not fully reach the desired end, the complainant, in the absence of some accommodation steps on his... part, must sacrifice either his religious principles or his

"employment. The complainant must first establish a *prima facie* case of discrimination."

Now what that means and what happens in these cases is employers don't sit there, designing their work hours around the work – the beliefs of a multiplicity of religious groupings in multi-religious societies. But if you do have someone who is working for you who then comes to you and says, "I have a problem with working on this particular day because this is my genuine religious belief", then the parties need to engage in a consultative process to see whether that employee's religious beliefs can be reasonably accommodated and in that context there's a weighing up of a balance between the beliefs of the employee and the operational needs of the business.

No such process ever happened in this case, which means that there is no *prima facie* case to meet because *prima facie* case on these facts would have required evidence from the employee that he went to the employer to complain that his working hours were in conflict with the central tenet of his faith.

What the employer would then need to do is either reasonably accommodate, in which case the case doesn't come to court at all or if it refuses, then it may need to come to court to justify what then is arguably *prima facie* discrimination. There is no refusal. In this case there is no such process. It never happened here.

In fact, the evidence reveals that his ordinary working hours and the phrase in the Employment Equity Act, “policy or practice”, I would imagine that on these facts then the ordinary working hours would be the policy or practice that one would make reference to if you were going to say that that policy or practice is discriminatory in nature.

His ordinary – the policy or practice would not have required any accommodation because it actually would not have, so it turns out, have been in conflict with his need to practice his faith in the way that he sees. In other words his complaint is that on two particular Fridays, because of some crisis, he was either obliged or felt obliged to work late and in working late that cut into his Sabbath. Those were not his ordinary working hours, M'Lord.

So if we had to have the hypothesis of well, what would have happened if he had raised this complaint, you wouldn't actually get into the question of is there a need to accommodate him because the short answer would be: David, we didn't know about that. It's not actually – we don't need to change your working hours because your working hours actually don't require you to work on that part of the Jewish Sabbath which you say is your holy time. So all we need to do is to make sure that you don't ever need to work overtime on a Friday. That would have solved the problem.

So the only question is whether notionally an employee

working unusual overtime on two occasions could be a policy or a practice that is discriminatory and with respect, M'Lord, it's academic because the employee actually never even asked to be excused so the process that I referred to that is described in Simpsons-Sears, it just never arose on the facts.

I am then going to move on to the leg of the allegation that the failure to renew the contract was discriminatory. M'Lord, it's difficult to understand this claim outside the context of an unfair dismissal case, so we have to remind ourselves this is actually an unfair discrimination case and the submission is that as a matter of law there is in fact no claim presented to this Court under the Employment Equity Act because the Employment Equity Act does not impose any obligation on an employer to renew a fixed term contract.

This isn't a case where one – where we'd be engaging in the production, whether there has been evidence produced of a reasonable expectation and whether or not we are dealing with a deemed dismissal. My submission is that before discrimination can arise there must be some obligation in law either to do something or to refrain from doing something. So section 9 of the Employment Equity Act for example recognises that in extending the obligations to applicants for employment.

So it says: Not only is an obligation triggered in the context of section 6, but we are extending it to applicants for employment. It does not extend it to people who come along

and say: I have an expectation and your failure to meet my expectation constitutes discrimination. The Labour Relations Act does provide a remedy. Then you would say that: I had a reasonable expectation of renewal. It's a deemed dismissal. The reason for you not renewing my contract lies in discrimination.

COURT: But Mr Kahanovitz, employment policy and practice includes dismissal. If one looks at, if in understanding that and the concept of dismissal through the prism of the right to fair labour practice in the Constitution, although the LRA doesn't specifically apply to a termination here, wouldn't one or couldn't one in..., shouldn't one give an expanded constitutional meaning to dismissal in the same way that one might say that a resignation constitutes a dismissal?

MR KAHANOVITZ: Well M'Lord it's... Yes.

COURT: The High Court has made that finding at common law.

MR KAHANOVITZ: M'Lord, I think it – you'd get involved then in that debate then of where is a legislative vehicle that already provides a remedy, do you need to go scratching around in other places to see whether there is a remedy in those other places as well?

COURT: I think that's a separate argument and it's what the, I mean the applicant, he said that he had run out of time and the reason for framing his case in this way was because he didn't

want to apply for condonation and have his claim for an unfair dismissal subject to a claim for condonation. It was evidence that he led in chief.

MR KAHANOVITZ: M'Lord...

COURT: But let's just separate it out.

MR KAHANOVITZ: Yes.

COURT: I'm just asking on the proposition that you put forward that dismissal in the definition of employment policy and practice, whether one can't give a constitutionally expanded meaning to that in the way that the High Court did with the resignation, saying that a constructive – although it's a resignation of the common law it constitutes a constructive dismissal and it inferred that and it's constitutionally... I'm only raising it.

MR KAHANOVITZ: M'Lord, I would imagine as an academic proposition it's linguistically possible, but it's legally unnecessary and I mean, if one wants to engage in hypothetics I would say that hypothetically, if you have a policy or practice of always refusing to renew fixed term contracts in the compelling and substantial of say Jews, that would probably be discrimination under the Employment Equity Act, even if it was not a dismissal. In other words...

COURT: Because it's an employment policy.

MR KAHANOVITZ: Yes.

COURT: And it's including and it's wide enough to include

such things.

MR KAHANOVITZ: Yes, yes. I mean that would be the way I would approach it.

COURT: Okay.

MR KAHANOVITZ: So on these facts he must show the existence and under the Employment Equity Act he must show the existence of a policy or practice which was the cause of the failure, a discriminatory policy or practice which was the cause of the failure to offer him a renewed contract and in that regard the submission is that we have no evidence of any policy or practice which had that effect.

The facts were simply that Mr Lewis was called in to discuss the Jansen article. She was unhappy. That's not contested. The next day three people attended a meeting at which the applicant concedes he may have sworn. He was told to leave the premises and that he will be paid out on the balance of his contract and that he should not return to the workplace. LegalWise then instituted a claim.

COURT: Sorry, before you go there.

MR KAHANOVITZ: Ja.

COURT: I don't recollect him saying that he was told that he would have the balance of the contract, he was paid... His evidence was that he was physically removed from the premises.

MR KAHANOVITZ: I would have to check the notes.

COURT: I mean you put that to him.

MR KAHANOVITZ: Oh.

COURT: But I don't remember him making the concession.

MR KAHANOVITZ: Oh I'm...

COURT: He kept on saying that he was physically removed from the premises.

MR KAHANOVITZ: Well he certainly made the concession that he was paid out.

COURT: No but that was when you examined him on the question of the two letters, the one – the two from LegalWise.

MR KAHANOVITZ: Yes.

COURT: The claim and then his..., the signing and full and final settlement letter.

MR KAHANOVITZ: Yes M'Lord. I'm not clear enough on...

COURT: Alright. So the issue nevertheless is that he was told to leave the premises.

MR KAHANOVITZ: The premises.

COURT: And he did more than concede the swearing.

MR KAHANOVITZ: Yes.

COURT: He told us what he might have said, so...

MR KAHANOVITZ: And then we know that LegalWise sent a letter threatening to institute a claim and we know that there was then a letter which said that the dispute had been settled. So if I can just draw those threads together to summarise the submission on the – the allegation that the failure to renew the

contract is discriminatory.

Firstly we submit there was no legal obligation to offer to renew his contract. Secondly, even if there had been there's no evidence to show that the reason why the employer did not offer to renew it was because of the chain of shame stretching from Adolf Hitler, D F Malan, Hendrik Verwoerd through to Annelien Dean because the sustainability of the discrimination thesis in that context rests on that proposition. So could a reasonable court draw the inference that Annelien Dean or other members of management did not offer to renew his fixed term contract because they had been brainwashed by the chain of shame?

Then to deal with the allegation ...(intervention)

COURT: Sorry Mr Kahanovitz.

MR KAHANOVITZ: Yes.

COURT: Before you go onto the next one. His claim is that the reason for the spiking of the article was because of his political struggle, political views.

MR KAHANOVITZ: Yes.

COURT: And that led to the meeting and the abuse, his – that's his version and that led to his termination. Now isn't the argument that then, wouldn't it be that he, that the reason for not renewing his contract is because of his politics which was not in line with the politics that or the political standpoints of the newspaper group?

MR KAHANOVITZ: There is a link but the way I've understood it is in the sense they're two separate causes of action. The one I'm about to address...

COURT: Sorry, sorry.

MR KAHANOVITZ: ...is that the articles were spiked because of the application of the policy of racial profiling, right.

COURT: Ja.

MR KAHANOVITZ: And that is a distinct cause of action in and of itself which is pleaded.

COURT: True, but wouldn't it be linked in here as well?

MR KAHANOVITZ: It...

COURT: Because remember there are two things that are in issue in the final meeting.

MR KAHANOVITZ: Yes.

COURT: It's both the Jewishness, because that's where he gets challenged as to whether he's really and truly a Jew or not.

MR KAHANOVITZ: Yes. Yes.

COURT: And the second issue... Again, this is his version and it's the only version that I can work on, given that you're giving an absolution from the instance at the moment.

MR KAHANOVITZ: Yes.

COURT: And the second was around the spiking of the articles.

MR KAHANOVITZ: Yes, well maybe the – my answer to that is

to say that if I can show you that there is no evidence on which a reasonable court might find that the articles were spiked because of the application of a policy of racial profiling, then the next stage of whether or not that act influenced what he then says is the failure to renew his contract, becomes academic because the piece of evidence in the chain is then missing.

COURT: Okay.

MR KAHANOVITZ: So maybe the argument would be better ordered in dealing with the racial profiling claim and the link between that and the failure to publish his articles.

COURT: Ja.

MR KAHANOVITZ: Although once again, M'Lord, I mean I think one must also be cautious here in the sense that... Ja, no no I'm just wondering what his, the difficulty again of what is his version and the question of drawing inferences because the... Even if he could produce a *prima facie* case of showing that it was racial profiling that influenced the attitude towards his articles, you would then still have to ask yourself what was the more likely proximate cause of the failure to offer him a new contract. Was it that or was it the fact that: You swore at three senior members of management in a meeting. And but I don't think we need to go there. Ja.

COURT: Well that's the problem because that's the only evidence that – that's the evidence that the respondent could

lead, very simply lead.

MR KAHANOVITZ: No it's his opinion.

COURT: Yes.

MR KAHANOVITZ: It's his opinion that it wasn't the swearing, it was the paradigm which in the company operates. What is the plausible inference that you would draw. Well maybe I don't need to, maybe I'm just confusing matters unnecessarily. Let me...

COURT: Ja I think you don't want to go there.

MR KAHANOVITZ: Ja. Let me deal with the policy of racial profiling. The elements which the applicant set out to establish are the following:

1. The policy that exists is that the content must fit. The contents of articles must fit the racial demographics.
2. The journalist must fit the racial demographics.
3. The Dludlu and Jansen articles were rejected for these reasons.

Now M'Lord, this thesis is so implausible so as to be rejected without the need for further examination. If it needs analysis it can be rejected on his own evidence as the editor who rejected the stories is a white female and the journalist who wrote the stories is a white male. He claims, however, and I quote:

"I wanted to assist them because I am a coloured."

But he is clearly not, so that is also implausible.

A further inherent implausibility in the thesis is that on

his own version the copy goes into a common pool. So any editor can pick up any copy written by any journalist. So how would it be possible on that system to pick only copy from journalists who fit the racial demographics of the model that he proposes is in existence?

In addition he concedes that on both occasions the editor raised valid questions about the content of the articles. On the Dludlu article his own words in a document at applicant's bundle page 52 are the following:

> "A vapid piece hastily put together from music industry bumph and promo material."

He also conceded that the quotes attributed to Dludlu are not Dludlu's words but those of a Mr Chris Syren, nor can he dispute that the editor said that she was concerned about running the Jansen quote until it was properly checked. He also concedes that the Jansen article contains some what he called conceits. So on the one hand you have a fantastic conspiracy theory which is required to sustain the section 6 claim; on the other hand you have an editor who was unhappy with the article until it was vetted further.

So you have to then ask yourself, could a reasonable court find that the true reason for the editor not being willing to run with the Dludlu and Jansen article was the chain of shame, Jimmy Dludlu's skin colour and the other factors or as he put it, the real reason was the psychological problems that

Annelien Dean has? Is his version, does his version even begin to be a version that a reasonable court could accept?

Another logical problem with his entire thesis is that racists do not avoid writing about black people. Racists, if anything, are obsessed with black people. More column space is probably devoted by racists to Julius Malema or Jacob Zuma than to Bles Bridges. So it doesn't follow that if you operate from a racist paradigm that you're going to reject articles about black people.

M'Lord, on the question of costs we ask for our costs, subject to furnishing the following undertaking, that the respondent will enforce the Court's costs order only if the applicant continues to pursue this litigation or any other litigation arising out of his employment relationship with the respondent.

COURT: That's just merely an undertaking that you're making? It wouldn't be...

MR KAHANOVITZ: That is... Well it can be recorded. It may be recorded in the order.

COURT: I...

MR KAHANOVITZ: And it then has, it has the same validity as an order of this Court. In other words if we give an undertaking it is enforceable and if we breach that undertaking it constitutes contempt. So it has equivalent status of a court order. I would be happy for it to go into the court order but I

can't see how it can actually be framed as a court order.

COURT: (Indistinct – speaking in an undertone).

MR KAHANOVITZ: So it can be framed as an undertaking and then it would have the same status as a court order. We cannot breach it.

COURT: But I mean if it's an undertaking it's an undertaking and it's an undertaking made in court.

MR KAHANOVITZ: Yes.

COURT: Okay, I'll have to, ja. Let me just, you raised three issues. You said that there were... I'm not sure that I... There were three questions. The one was concerning the failure to renew the contract. Then the discrimination on the grounds of... and that was the hours of work.

MR KAHANOVITZ: Yes.

COURT: Course(?) and policy.

MR KAHANOVITZ: Yes.

COURT: Now you're not addressing on the hours of work?

MR KAHANOVITZ: I have, M'Lord. That was...

COURT: Oh yes, that's the, sorry the Cavendish, the Cavendish yes, yes okay.

MR KAHANOVITZ: Yes. It says, that Simpsons-Sears and Cavendish and so on.

COURT: Sorry I'm just...

MR KAHANOVITZ: Yes.

COURT: And then the article.

MR KAHANOVITZ: Yes. I think I've covered everything but it is...

COURT: Ja.

MR KAHANOVITZ: I went through the statement of claim as slightly – evolved slightly as it was by the proceedings and I don't think I've missed out on any aspect.

COURT: Mr Lewis.

MR LEWIS: M'Lord, could I take a break? I need to go to the toilet.

COURT: What is the time now? Just come through.

MR KAHANOVITZ: M'Lord, maybe we can take – it's half past ten now.

COURT: Ah.

MR KAHANOVITZ: Should we take the break until 11:00? Or...

COURT: Yes, let's do that.

MR LEWIS: Alright.

COURT: Okay.

MR KAHANOVITZ: Excuse me?

UNIDENTIFIED SPEAKER: It's five to eleven.

MR KAHANOVITZ: Oh sorry, is it five to eleven?

COURT: Ja okay, let's go.

COURT ADJOURNS (at 15:50)

COURT RESUMES (at 14:58)

COURT: Mr Lewis.

MR LEWIS ADDRESSES COURT: Yes M'Lord. Just in opening my argument, the Labour Relations Act and the Employment Equity Act weren't written in a vacuum. One has to essentially look at the purposes of the Labour Relations Act with – and specifically with regard to the Constitution. The South Africa Constitution has various relevant clauses regarding unfair labour practices, the rights to fairness in labour practices. There is also an equality clause. So essentially my argument would be that the reading of the two bills, the two acts have to be read in conjunction with the Constitution.

The respondent has brought up various judgments. There's a Canadian judgment that has absolutely no relevance to this case. It's a Commonwealth judgment written without the benefit of a bill of rights, so I would argue that South Africa is a unitary state. We have a bill of rights that is essentially a framework in which the labour legislation and the equality clauses operate.

I will argue further that the equality clauses and the labour clauses of the Constitution need to be read in conjunction and the relevant acts associated with those clauses need to be read. If I could point the Court to section 187(1) of the LRA regarding automatically unfair dismissals:

"A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if

"the reason for the dismissal is-

- that the employee(sic) unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual discrimination, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility."

I don't want to get into the definition of what a dismissal is or is not or what a termination of contract is or is not. The issue is that the exact – similar wording appears in the Employment Equity Act 55 of 1998 on the prohibition of unfair discrimination:

"No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth."

Then nature of my case is that essentially I'm alleging discrimination based upon two grounds with regard to the relevant clause in the Equality Act. That does not exclude the Labour Relations Act or the issues that would be normally

dealt with under the Labour Relations Act. There are two opinions that I can find that are before me right now with regard to the onus and burden of proof and before I get into, just into my essential argument, just to put up some basis for the onus.

The Harksen test. Actually let's, I'll just go on to deal with this first because I'm right here. This is the Dlamini & Others v Green Four Security on the last page, "Stage Three: Accommodation". It's the last paragraph. This case actually sets up an onus with regard to proving discrimination. It says here:

> "The respondent bore the onus of proving that it considered ...(intervention)"

COURT: What – you must tell me which paragraph you're reading from.

MR LEWIS: H'm... It's not, is it... 69, 70.

COURT: Sorry? Ja.

MR LEWIS: Sorry. It says here:

> "The respondent bore the onus of proving that it considered accommodating the applicants. Its alleged failure to do so in this case was not a ground on which the applicants challenged their dismissal."

And it goes on. So there were, this issue was discussed in this case with regard to religious discrimination and it is the relevant case because my grounds are religious in nature.

Fact of the matter is my case isn't purely based upon religious issues. It's also based on political considerations.

COURT: Sorry, I don't understand your point in paragraph 70 as to why it's not relevant to your case.

MR LEWIS: Sorry?

COURT: I didn't ...(intervention)

MR LEWIS: No, no 70 is relevant. I'm not arguing it isn't.

COURT: Oh I see. Oh it...

MR LEWIS: I'm just saying that it's one of the, one of the factors of my case. There's a issue of religious discrimination.

COURT: Okay.

MR LEWIS: This case here, Dlamini, clearly says that the onus is on the respondent to prove that the discrimination was fair. It essentially echoes the Harksen ruling. The Harksen ruling set up a test. It broke it down into various stages that one first had to prove that there was differentiation, that one would have to prove disparate treatment and therefore that there was discrimination. The onus was, the shift – the burden of evidence was shifted towards the respondent.

I don't have to prove that any of the discrimination that I've experienced is fair. All I have to prove is that there was disparate treatment, that the disparate treatment arose as a result of differentiation within the community, that different policies perhaps were applied, that there was a failure to accommodate, that there was discriminatory practices or

systems in place at Media 24 that prejudiced me.

The facts before the Court are twofold. On the one hand there's a – I'm alleging that there was a climate and there was a context in which all of this occurred. It wasn't something that just occurred out of nowhere. This wasn't a fabrication, a concoction or an invention. It occurred within a historical material context in which discrimination had occurred over many years in fact.

The fact that I joined a company that had previous – a legacy of discrimination isn't really the crux of the matter. That's just *prima facie* evidence that I've led as to presuming that any reasonable court would be tasked with presuming that the certain relevant facts occurred and the historical context, the statements uttered by Bishop Desmond Tutu et cetera, I do not have to prove that apartheid was a policy of the previous government. I don't have to prove that Naspers even engaged in and facilitated those policies.

I believe I've shown through my testimony that the – there was some sort of a dispute with regard to the various articles and that this dispute occurred not as a factor of the, how the respondent puts it, as a – it was just a minor issue and I'm someone who is essentially just a lunatic and their actions come out of no – there's no reasonable assumptions that can be drawn...

COURT: I..., okay.

MR LEWIS: ...with regard to newsroom policies at the company. I have objected based upon my political beliefs to the racial profiling that I experienced at Media 24. So the context in which the rejection of my stories occurred, occurred in a political environment. They occurred – there was a history, a legacy, a system at respondents that essentially was the antithesis of what I believed.

I'm someone who believes in a non-racial paradigm. The respondent believes in a multiracial paradigm. They have admitted that their, that these categories exist. They haven't contested the categorisation. In fact, throughout this court hearing the respondent has insisted that I am either one or the other of a particular racial category. I find it completely ridiculous that this continues in today's age. So M'Lord, I'm really contesting the nature of the rejection of my stories in a racialized and political climate. So that's the one part of the complaint.

The other part of the complaint is that the respondent discriminated against me because of my religious outlook. It's clear that the dispute would not have arisen if there wasn't an issue. The respondent has tried to suggest that all of this occurred after the fact, that there was no dispute as such and there's just a spurious claim by an aggrieved ex-employee wanting to get his – get back at the employer.

Now this is a direct contradiction to the evidence that has

been heard and has been led by the respondent. There's no doubt that the respondent has attacked and contested the very fact of my observance as a Jew. I would just like to read, if I can find my... Sorry, I've just gotten a bit lost in my documents. I've got to find the – it's out of the discrimination law, the responses.

COURT: Take your time, Mr Lewis.

MR LEWIS: Oh here we go. This was raised with regard to the Practice Direction regarding discrimination. I wish I had actually gone to the trouble of making copies, but it is in my, one of my documents.

COURT: Well just give me the citations.

MR LEWIS: It's in Essential Discrimination Law by Dupper, Garbers, Landman, Christianson, Basson, Strydom. Editors Juta Law 2004.

COURT: Oh so it's Essential Labour Law?

MR LEWIS: Yes, Discrimination Law.

COURT: Essential Discrimination Law?

MR LEWIS: Ja, right, right.

COURT: Who is the first author?

MR LEWIS: Dupper.

COURT: Dupper.

MR LEWIS: Dupper.

COURT: Ockie(?) Dupper ja. Okay. I know the work.

MR LEWIS: Alright:

"In South Africa direct ...(intervention)"

COURT: You don't have a page number, do you?

MR LEWIS: H'm, do I? Djuu... Not.

COURT: Okay but quote it.

MR LEWIS: There's a 42. It might be page 42.

COURT: Okay.

MR LEWIS:

"In South Africa, direct discrimination is said to occur when people are not treated as individuals. It occurs when characteristics, which are generalised assumptions about groups of people, are assigned to each individual who is a member of that group, irrespective of whether that particular individual displays the characteristics in question."

The exact words appear in Leonard Dingler Employee Representative Council & Others v Leonard Dingler (Pty) Ltd & Others (1997) 11 BLLR 1438. It's one of the reports.

COURT: 131?

MR LEWIS: 1438.

COURT: 1438.

MR LEWIS: Also the following paragraph from Essential Discrimination Law is useful.

"Firstly, an employer may feel comfortable in his or her bigotry. Secondly, it may be that the employers feel that they are acting in the best interests of the group or

"employee they are, in fact, discriminating against. Thirdly, the discrimination may also be based upon an ingrained stereotype, which is accepted as 'general knowledge'. Fourthly, an employer may feel safe in reliance on the prejudices of co-employees as motivation for its, supposedly inevitable, conduct. In the fifth place, the employer may discriminate overtly, but feels that it is doing so on a neutral basis or for a praiseworthy purpose. Lastly, and this is perhaps especially true of South Africa, an employer may simply be caught by the times."

Now I find this, for me it's a very helpful way of looking at the, at the problems faced by someone who's being discriminated and is alleging discrimination. I don't think there's any contest that I have been stereotyped. In fact, I've been stereotyped to the degree where the respondent has made assertions as to what kind of Jew, what particular Jewish observance I am expected to be practising. They have maintained that the issue was a Saturday morning and I've countered that my – I have no issue with Saturday morning.

This is not the same case as the – that was brought before the Canadian Court in Simpsons-Sears. This is not a very Orthodox, ultra-Orthodox Jew maintaining that he was forced to work on a Saturday morning. I have merely maintained that it is the traditions and customs and my

practice to observe the Sabbath on a Friday evening and that any test with regard to reasonable accommodation and the inherent requirements of the job need to tackle the experience of a Jew such as myself. I'm not an isolated example of Judaism. I've shown – there's evidence before the Court and the respondent has agreed that such evidence exists, that there is a school of thought that would put me essentially at the centre of Progressive Judaism.

COURT: Where is that?

MR LEWIS: It was brought before Your – M'Lord today.

COURT: Is that in the document?

MR LEWIS: Today. It was...

COURT: The agreed facts?

MR LEWIS: The agreed upon facts.

COURT: Ja. The called evidence.

MR LEWIS: Called evidence.

COURT: Will you refer me to the actual paragraph?

MR LEWIS: Yes.

COURT: It's on page, the pleadings bundle page 130.

MR LEWIS: "Evidence", so are we referring here to the document called Evidence?

COURT: Yes. It's, can you just...?

MR LEWIS: Point 1 is that:

"Judaism is not monolithic. There are many kinds of Jews, *Ashkenazim*, *Sephardim*, *Kohanim*, Levites and

"there are many legal definitions of Jewishness."

COURT: I just want, I don't want you to read out the whole document.

MR LEWIS: Right.

COURT: Just, won't you just tell me where it is where you make these points?

MR LEWIS: Sorry.

COURT: The point that you made that you said there's evidence: There is evidence that places me in the middle of Progressive Judaism. Isn't that what you were alleging?

MR LEWIS: Yes. 5, point 5.

"While observance of the Sabbath can be considered an essential tenet of Judaism and particularly Orthodox Judaism, abstinence from work is not a fundamental tenet but rather a principle of Progressive Judaism in the Reform Movement. According to the tenets of Reform Judaism it is a *mitzvah* to abstain from work on the Jewish Sabbath and this abstinence is not a commandment *per se*, nor listed as one of its fundamental principles such as belief in a Supreme Being or Creator. Since the *Torah* was written by human hands with divine inspiration according to the language of its time, Reform Judaism regards the 613 *mitzvot* associated with the Twelve Commandments as the product of human interpretation. In other words the *mitzvah* in this case is

"a tradition, the recommended course of action based upon a commandment in which an adherent receives and imparts spiritual merit or not. Likewise, the Sabbath is treated by many Jews as a bride and it is considered a *mitzvah* for a husband and wife to engage in sexual intercourse on a Friday night. The applicant would be in a similar predicament if the respondent was demanding conjugal rights and not performance of services on a Friday evening. More to the point, the commandment referred to is a positive injunction, 'Observe the Sabbath and keep it holy', and it is not a negative *mitzvah*, for example, 'Thou shalt not work on the Sabbath'. Those words do not appear in the Ten Commandments. The *Torah*, may be argued, does not prohibit work *per se*. Rather, it restricts labour in terms of *melacha*. Be that as it may, there are 39 categories of work or *melachot*..."

Or *melachot*, however one wants to pronounce the Hebrew.

"...which are to be avoided by strict adherence of the Jewish faith and elucidated by the formulators of the *Talmud*."

I can go on to point 6.

COURT: I mean, if... You just wanted to – I just wanted you to tell me where you relied on or what you relied on, so...

MR LEWIS: Right.

COURT: So it's...

MR LEWIS: So there is, my views aren't contrary to Progressive Judaism. In fact, they are very much a part of the Progressive outlook.

COURT: Okay.

MR LEWIS: Right. So applicant has – I have alleged direct discrimination in terms of section 6 of the Employment Equity Act on the grounds of religious and political affiliation.

> "The facts of the discrimination and unfairness thereof have been recorded in several documents before the Court. The fact that respondent has taken exception to the applicant's practice of observing the Sabbath in the manner in which he chooses, is surely evidence of the unfairness of the matter. Furthermore, there is no objective criteria for the dismissal and consequent failure to renew a contract for a prohibited reason."

I have received absolutely no clarity on this point. There's been nothing in writing. Despite my correspondence and demands there's been absolutely no clarity on the issue of the contract. In fact, the contract hasn't even appeared in court. A reasonable facsimile that I would presume is a fraudulent version of the original document since it clearly bears my signature but not, it hasn't been countersigned on various pages. None of the amendments that were tabled were included. That document instead has been brought before the Court.

In my filing sheet, h'm, I'll find it. I just want to go back to my original filing sheet. Point 5, the legal issues that arise from the facts that have been put before the Court...

COURT: Just hold a second. It's point 5.

MR LEWIS: Right.

COURT: Page 5 of the pleadings bundle.

MR LEWIS: Right.

"5.1 The legal issues are the discriminatory system or policy as applied by respondent amounts to unfair discrimination as prohibited by section 6 of the Employment Equity Act 55 of 1998.

5.2 The harassment set out above amounts to unfair discrimination and is prohibited by section 6 of the Employment Equity Act.

Failure..."

And this is for me quite important.

"5.3 The failure of respondent to renew applicant's contract for the above reasons is also prohibited by section 6 of the Employment Equity Act."

In fact, there is no escape from the terms of the Act. There's no escape from the Labour Relations Act. In fact, there is no escape from the founding principles of the Constitution. The respondent is obliged to uphold the documents that have created our nation.

I continue. Not only have I alleged that there's direct

discrimination in terms of section 6 on the grounds of religious and political affiliation, I've also alleged indirect discrimination with regard to the abuse and unfavourable treatment meted out by the respondent as a result of newsroom policy.

> "It is clear that the apparent neutral policy at the newspaper concerned did nothing but reinforce the stereotypes and racial divisions of which the respondent stands accused and that this policy has had the result of in(?) forming both direct and indirect discrimination against the applicant, since its failure to participate in or accept the political and religious beliefs and political *mores* of the respondent has cast the respondent in an unfavourable light and has led to disparity in treatment as an individual and to a situation in which negotiation in terms of the contract resulted in dismissal and/or either/or(?) an invalid termination."

Which I have also said was an invalid termination of a contract which was in any event invalid for the reasons that I've already given.

> "The applicant does not carry the onus to prove direct discrimination. The onus is on the respondent to prove that the discrimination was fair."

This was the essence of the Harksen test.

> "The applicant has sought the anticipated costs of his contract of employment at the amount tendered by the

"respondent."

In other words 12 months'...

I just wish to quote from the following, Demons of Apartheid by Cecil Ngcokovane. It's in my – it's part of my pleadings, the response to amendment. Don't know what page it would be on.

COURT: You must give me the page number, please.

MR LEWIS: If I can find it in the pleadings. It would be page 108 in the pleadings and it's point 70.1:

> "Proponents of Apartheid use an array of euphemisms and/or other subthemes in their articulation and justification of it. For example, euphemisms such as 'multinational development', 'pluralist democracy', 'parallel development', 'vertical differentiation', 'friendly nationalism', 'good neighbour', etc are more frequently used by Afrikaner ideologues than the term Apartheid itself."

We've heard evidence that there was a dispute regarding the rejection of several stories. It is my evidence before the Court that the respondent used the following euphemism in their rejection of the work. They euphemistically referred to the rejection as an act of plagiarism.

There's evidence before this Court that I complained, when I complained to the respondent an evaluation meeting was called which I was subject to various forms of abuse. The

abuse experienced by the applicant is entirely in keeping with the euphemisms and the tragedies and pettiness and the banality of evil that is the crime of apartheid. This is not an isolated company working, cut adrift from the historical context. This is a company which I've demonstrated has an inherent problem with its origination in an apartheid era.

There should be a higher level of standard attached to such serial perpetrators of racism. This is not a company that has a clean bill of health from the TRC. The chain of shame that I've referred to is a very real, present danger that if left unstopped the, this, the prejudice meted out towards my kith and kin, my fellow citizens will continue unless the Court takes some kind of – the necessary – an order for rectification of some sort.

If it pleases the Court, I don't believe there is any guidance from any texts guiding me with regards the religious issues that were raised, the manner in which the termination occurred. I'm going to perhaps see whether I can go back to my notes here. Alright, the applicant has(?) that the evidence would have to have been produced in terms of the Employment Equity Act. He's talked about reasonable inferences that can be made as consequences of hours and policies at the company and the third issue was the consequences of policy or practice of Robbie Jansen's article was this discriminatory, racial discrimination.

It is alleged that I have a persecution complex, that all of this can only happen to the applicant. It is an inexorable result of my own conduct as an individual; that the legacy, the system of apartheid has absolutely no part to play in anything which transpired; that he said that the employer is lawfully entitled to set hours that suits the business.

I find it quite interesting the way that the employees are denied fundamental rights and dignities through logical gymnastics, that the respondent is – talks about the differentiation; was there an obligation imposed by any of the relevant acts; was I treated differently. You know this can only – it's only something that occurred to me, no-one else at the company.

For me the issue in my mind really is this one of reasonable accommodate of one's political or religious views. Was there reasonable accommodate? Were the actions of the company reasonable? Were their actions something one could expect from a growing, successful, multinational concern or were those actions more in keeping with the old order?

A company in which the discrimination texts that I've referred to talks about where time has essentially passed them by, caught amongst the scheme of things. The labour laws have evolved, the social context, social *mores* have evolved but the respondent essentially, the division in the company refused to change.

So the question is, are there any legal obligations that are set by the, either the contract of employment? Are there any duties that the...? You know I find this work "worker" quite a strange word. It seems to relegate workers to nonentities. Are there any duties or obligations conferred by a contract of employment on the employer *vis-à-vis* the employee and vice versa? Does the Act confer any obligations and duties with regards to reasonable accommodation, inherent requirements of the job?

I would like to visit some of the case law that I believe is in my favour as a... The Court should be well aware of the Auf Der Heyde v University of Cape Town [2000]. It's listed in the BLLR page 87 – 877, sorry, in which:

> "A reasonable expectation of renewal was held to exist, despite a disclaimer 'of any commitment to a permanent appointment' which suffice to negate any such expectation on the part of the employee since it could reasonable be inferred from the advertisement for the position that such extension would be dependent upon the fulfilment of certain conditions. It can reasonably be inferred that the Court has a duty to protect employees from discrimination and negotiation of contract.
>
> North East Cape Forests v SAAPAWU & Others [1997] 6 BLLR 711:
>
> 'Where there is a conflict between contractual

'principles in the primary objects of the Act the latter should prevail. In the facts of the case it was found that the object of orderly collective bargaining and effective expression of the fundamental rights to strike would be frustrated by relying purely on the rules of contract. However, in construing a statute on any basis, the language used in the statute cannot be ignored.'

In Dimbaza Foundries Ltd v CCMA & Others [1999] BLLR 779 the purposive approach versus the literalist-cum-intentionalist approach was explored. Suffice to say all texts should be read in the context of relevant purposes of the Act."

Those are the purposes that I've already referred to which have formulated and maintained the new dispensation in which labour is regulated, not in terms of the Canadian ethos or even the ethos of the United Stated, but within our own democratic revolution.

"In McInnes v Technikon Natal [2000] BLLR 701 it was held ...(intervention)"

COURT: So what year, sorry? 2000?

MR LEWIS: Yes.

"...it was held that the failure to renew a fixed-term contract where there was a reasonable expectation of permanent appointment constituted an automatically

> "unfair dismissal where the refusal to appoint the employee on a permanent basis was because of race. Applicant therefore admits that he was employed in terms of an agreement with the respondent as a layout sub and that there was a reasonable expectation of permanent employment. The Court should find on the basis of the evidence before it that there was an automatically unfair dismissal and although this isn't the nature of the case before it, that certainly there was a failure to renew a contract of employment for a prohibited reason and the reason being discrimination. This is the purpose of the Employment Equity Act. It is to prevent on-going discrimination according to the listed grounds."

I would be faced with a similar problem if I was applying for a job at the respondent and experiencing the failure to enter into an employment relationship for similar reasons.

> "In summing up the respondent's views of the above matter *vis-à-vis* the law of contract and labour law, the old system of slavery and servitude is over. We now have a democracy in which all South Africans enjoy inalienable rights and no document, however pernicious, badly worded or misinterpreted can derogate from this basic fact."

Just with regard to the daily and weekly rest period:

> "Respondent is required to conform to the Basic

"Conditions of Employment Act 75 of 1997 and in particular:

- section 7: Regulation of working time;
- section 8: Interpretation of day;
- section 9: Ordinary hour of work;
- section 10: Overtime;
- section 12: Averaging of hours of work;
- section 13: Determination of hours of work...;
- section 14: Meal intervals..."

And so it goes on and on.

"Respondent wishes..."

Oh sorry, applicant gosh.

"Applicant wishes to draw the respondent's – the Court's attention to section 15: Daily and weekly rest period."

It says there:

"(1) An employer must allow an employee-

(a) a daily rest period of at least twelve consecutive hours between ending and recommencing work; and

(b) a weekly rest period of at least 36 consecutive hours which, unless otherwise agreed upon(sic), must include Sunday."

I'm not hearing from the respondent that there was a failure to determine the day of rest.

COURT: I don't understand the relevance of this. You've not

raised the issue. Are you...?

MR LEWIS: Sorry, have I not raised this issues?

COURT: H'm, I mean, how is this related to your discrimination claim?

MR LEWIS: It's with regards to the issue of the hours in my filing sheet. I think I put it in my filing sheet.

COURT: You call it your filing sheet...

MR LEWIS: (Indistinct).

COURT: But in essence the filing sheet merely states that your statement of claim has been filed.

MR LEWIS: Right. Yes.

COURT: It's really your statement of claim that you're talking about.

MR LEWIS: Oh this reminds me of the...

COURT: The statement of case, right.

MR LEWIS: Of the case.

COURT: But the...

MR LEWIS: Yes, I've alleged certain forms of harassment which occurred at the company. I've alleged...

COURT: Yes I...

MR LEWIS: Sorry?

COURT: Ja. So I just don't, I'm not wanting to restrict your argument. The question is just what has this got to do with it? What does the BCA have to do with your claim?

MR LEWIS: H'm it's... I just fail to understand the arguments

of the inherent... It's an argument based upon the inherent requirements of the job which has presumably been raised as a defence and that the Court has to essentially determine whether working 14-hour days seven days a week, whether you know, the parameters, whether that was an inherent requirement of the job or whether in fact it was an act of discrimination and essentially an attempt to harass and intimidate to force compliance towards an evil plan and the politics of paternalism and racial superiority still rule the game of media in the Cape.

The respondent has made certain concessions before this Court. They've conceded essentially that there was an appointment at a certain time in the morning. They've conceded that...

COURT: No, I don't think they ever conceded that it was an appointment but they did...

MR LEWIS: (Indistinct). That it was a time...

COURT: The issue was that..., you led evidence to the fact that you had to get up at half past four in the morning.

MR LEWIS: Right.

COURT: And they didn't contest it, so that's hardly a concession but still. But nevertheless, your evidence is on record, that you had to get up early in the morning.

MR LEWIS: Right.

COURT: And that... I'm at this stage, by dealing with the

absolution from the instance I'm not really dealing with the truth of it. I've got to take it as, unless it's inherently improbably, take it as true. So you've given evidence to the fact that you had to get up at half past four in the morning and I didn't hear them in their cross-examination suggesting that you didn't have to get up at that time.

MR LEWIS: Right.

COURT: There might be an argument of whether it's five o'clock in the morning or 5:30 in the morning, but early in the morning, there's no dispute.

MR LEWIS: They've also conceded that there was an issue with the religious outlook, that such a dispute did in fact occur. There's no arguing that this dispute didn't happen.

COURT: When you say dispute didn't happen, when?

MR LEWIS: On the 30th of...

COURT: On 30 May?

MR LEWIS: Ja it... So there's no dispute as to the fact that the evaluation meeting did in fact occur. There's a dispute as to the exact nature of the – what was said. We have no way of actually knowing. There was no record.

COURT: No but your version is the version that's present before the Court.

MR LEWIS: My version, right. So my version is the version that on the balance of probability...

COURT: No, there's no balance of probability. There's just a

version.

MR LEWIS: Not?

COURT: You've got your version. There's no... They've put a contrary version and you denied it and so your version stands.

MR LEWIS: Right.

COURT: That you were abused, but that you did swear back and that you were physically removed from the premises. That's the version. That's your version.

MR LEWIS: H'm..., and that there was an issue with regard the overtime.

COURT: Yes, no both issues were also raised.

MR LEWIS: Right.

COURT: That's your version.

MR LEWIS: Yes. So the circumstances of the termination of the contract point to discrimination. The Court is obliged to find on the basis of the facts before it that there was discrimination or differentiation based upon either my political belief or my religious outlook or both.

COURT: How does it terminate? I mean how does it point to discrimination?

MR LEWIS: The issue is whether there was disparate treatment or differentiation.

COURT: Well okay, so now disparate or differentiation...

MR LEWIS: Yes, there was different – I was treated differently from any other individual. There's no denying. Essentially the

respondent is saying I was treated so differently because I'm just a different person. But this should – it's just an... It had – it amounts to nothing. The Court should just ignore it and I'm maintaining that this disparate treatment was in fact the very essence of the prejudice and discrimination experienced by struggle journalists, by anyone holding a contrary opinion to the opinions of the respondent. It's not just on the basis...

COURT: So what you're arguing is that the, that as a struggle journalist and as a Jew you were treated differently from non-Jews and non-struggle journalists?

MR LEWIS: Precisely.

COURT: Okay well can you tell me how?

MR LEWIS: Well for..., well for starters the Court has already made a finding with regard to the ...(intervention)

COURT: I haven't made any findings.

MR LEWIS: Hang on, with regard to the non-existence ...(intervention)

COURT: Mr Lewis. Mr Lewis.

MR LEWIS: Sorry, can I finish? Can I finish?

COURT: Mr Lewis.

MR LEWIS: Sorry.

COURT: I am in charge of this court.

MR LEWIS: Yes.

COURT: You will listen to me. Now on two or three occasions...

MR LEWIS: H'm.

COURT: ...you've interrupted me and I want to warn you that you are sailing very close to the wind here.

MR LEWIS: Right.

COURT: I control the court. You will listen to me and if I interrupt you, you will stop speaking.

MR LEWIS: Sorry M'Lord, I must apologise. I just find it exceptionally difficult to maintain clarity of my thinking.

COURT: I have, I have tried. I have given you the leeway to speak. I have not interrupted you. I'm now wanting just to ask you in what way does the fact that you're a Jew and a struggle journalist, in what way were you treated differently from non-Jews and journalists who did not have the struggle background that you claim?

MR LEWIS: I have to, I have to, h'm, assume that the lack of a plan or a policy of reasonable accommodation for my views is evidence of a failure, general failure on the part of the respondent. Whether it is a failure to understand the inherent requirements that a Jew, inherent observance or traditions or practices of a person such as me or their failure to understand the problems that a person from a struggle background might experience.

COURT: So the link for you is the lack of a plan or policy which is an agreed fact, arising from yesterday's discussion?

MR LEWIS: Well this is, yes, this is an agreed... We've all

agreed that this policy of reasonable accommodation doesn't exist at Media 24 and I've made further..., alleged essentially that the current policies in terms of the prospectus... There are policies at the company. This is not, you know I find it very strange that on the one hand the prospectus for Media 24 refers to policies, codes but these codes and policies haven't been brought before the Court.

COURT: No, we've agreed that they... Yesterday we agreed that, I mean Mr Kahanovitz got up and said there are no policies on reasonable accommodation.

MR LEWIS: Precisely.

COURT: For religious minorities.

MR LEWIS: Right.

COURT: So there isn't such a policy.

MR LEWIS: Right so in the absence of such a policy.

COURT: Ja and that's the inference that I – that you're drawing from?

MR LEWIS: Right yes, yes and the... Right.

COURT: It's the absence of the policy.

MR LEWIS: In the absence of such a policy one can only presume the truth of the matter, of my version of events. But the – this in effect is an example of the first time in the country's history in which a Jew has presented himself with his beliefs. There's no prior experience on the parts of the applicant, sorry the respondent. There's no, there's no...

Their tradition and culture inculcated by their brotherhood in the Broederbond, in the *Afrikaner volk* has essentially neglected to incorporate persons such as myself and that I have a right to request protection from the Court in the negotiation of the terms of my contract according to better terms, terms that are not discriminatory.

It's pretty clear that the respondent is attempting to hide something. The clause referred to was an egregious clause based upon prejudice. It's completely contrary to the Act. If the document called the contract of employment was such a model document it would have been presented before this Court. There would be no question as to its validity. It would be a model of compliance with the legislation. We would be referring to it as – in glowing terms. You would have clauses there that gave employees such as myself reasonable accommodation.

So in summation of my argument, because I don't believe I can continue along this track, it's just for me very hurtful. I'm representing myself. I'm not an attorney and it's an emotional issue. In summation, the Court is obliged on the basis of evidence before it to find that the respondent unlawfully contravened section 6 of Act 55 of 1998 by applying a discriminatory practice and harassing the applicant and that the respondent unlawfully failed to renew applicant's contract due to a arbitrary prohibited reason. Thank you very much.

COURT: Now Mr Lewis, I just want to ask you just some questions quickly. You need to respond to Mr Kahanovitz's arguments. What you've really done is to some extent you've addressed them but you've really argued your own case and I think you, of course just need to respond to his arguments. He identified three questions and that, the first question which I think you have addressed...

MR LEWIS: Yes.

COURT: ...which is that it concerns the failure to renew the contract on grounds of religious or political belief, alright?

MR LEWIS: Right.

COURT: And as I understand your argument, so for clarity purposes what you are saying is that if you take the context, you take the conduct of the meeting on 30 May. No, you take the context, you take the issues that were raised on 30 May and effectively they did not renew your contract for grounds, on grounds of religious practice and political belief. Is that...?

MR LEWIS: Precisely ja.

COURT: Ja. Then the second one is on hours worked. The question is that you were discriminated against by working on the *Shabbat*, on the Friday.

MR LEWIS: Right, right.

COURT: And the third one is on that you were discriminated against on grounds of political belief and your evidence of that is that your two articles, the Jimmy Dludlu article and the

Robbie Jansen article were rejected because it was racially discriminatory. Now you've addressed the first two questions. I just want to ask you firstly, those are the three questions that have to be dealt with, is that correct? And the second is I think you need to address me on your arguments in relation to the two spiked articles.

MR LEWIS: Right.

COURT: So let me just ask the first question.

MR LEWIS: H'm.

COURT: Are those the three principal issues that need to be addressed by me in this matter?

MR LEWIS: My gosh. H'm, the problem is, is how I ...(intervention)

COURT: Please, please stand up, Mr Lewis.

MR LEWIS: Sorry. H'm, I agree that the *Shabbat* hours, that issue definitely has to be dealt with. The...

COURT: And the refusal to renew your contract?

MR LEWIS: Yes.

COURT: Is the second issue.

MR LEWIS: Right.

COURT: Alright and the third issue is the spiking of two articles.

MR LEWIS: Ja the problem with that is there's an attempt to sort of subsume these articles to sort of through sleight of hand to turn this issue into less of an issue that the...

COURT: Well, what would you like to...?

MR LEWIS: The issue, the issue...

COURT: Okay listen, the issues we haven't addressed yet, Mr Lewis.

MR LEWIS: Right. The issue is that ...(intervention)

COURT: Mr Lewis...

MR LEWIS: Alright sorry.

COURT: You haven't addressed it.

MR LEWIS: Yes.

COURT: So will you now please address ...(intervention)

MR LEWIS: Can I address that?

COURT: The issue of the articles.

MR LEWIS: Alright. The articles, the two rejected articles were rejected within a broader context of a – an appointment that occurred between myself and Rashid Lombard. I've – there were – I've got correspondence between myself and Annelien Dean and correspondence from Rashid Lombard. There's a broader context. I've illustrated there's a chronology associated with the case.

I was requested by Ms Dean to supply, at first it was the heart and soul of the community and then it was a question of the demographics associated with that community. I believe I've made some attempt to illustrate the problems faced by the demographics. I've raised the point that a neutral policy in the newsroom would merely reflect back the demographics as they

have been constructed by the Group Areas Act and the inequalities experienced by those communities.

I've also said that one can no longer presume that those, the former areas which are so-called Coloured areas, that those areas are attached to any racial group or category. Those are assumptions that one makes through a prism that is supplied to us as South Africans as a result of our history. I've also said... Sorry.

MR KAHANOVITZ: M'Lord, excuse me. Might I just be excused for one minute without disrupting the proceedings, for a comfort...?

COURT: Yes.

MR KAHANOVITZ: My attorney can remain.

COURT: Yes certainly, Mr Kahanovitz.

MR KAHANOVITZ: Thank you.

COURT: Mr Lewis, you can continue.

MR LEWIS: Can I continue?

COURT: Yes certainly.

MR LEWIS: So the issue of the demographics resulted from the request from Ms Dean to supply her with the heart and soul. There was an attempt to resolve the problems that were encountered in production. I joined a company that ostensibly was moving forward. We agreed that the jazz coverage was one area which no-one could presume that, you know, jazz is universal. This is exactly why my words to Annelien: Jazz is

universal. There's no such thing as black jazz or white jazz or coloured jazz.

Instead Ms Dean, because of her belief in her racial superiority and her issues with her *volk* and her target market and her experience in the company, decided to take a very different tack. When the first article was presented to her she didn't just reject it because of a quality issue and no-one is contesting that the – my part, that the quality wasn't a problem. No doubt, in any newsroom issues of quality arise.

No, she rejected my story for completely spurious, groundless, baseless reasons. She essentially wrote off the entire project as an invention, as an act of plagiarism, an act of imagination. Essentially my history, my relationships with people like Robbie Jansen, Hilton and Tony Schilder in fact, I know Hilton very well, my relationships with the members in the community, particularly jazz musicians, were for her something that could not be imagined nor believed.

So she chose to accuse me of a dismissible offense. In order to prove an offense of plagiarism the code and conducts of Die Burger, one can presume that there would be certain things that would have had to have been proven. It's not a subjective, it's not something that one can just subject, you know, on your own steam say no, this is an act of plagiarism. If it pleases the Court, can I point out the relevant document?

COURT: Ja, I mean the code of ethics is here.

MR LEWIS: Right.

COURT: You know, at this point it's about argument, alright? So I mean, in essence what you are arguing is that Ms Dean, that the reasons for the rejection of the first article were spurious.

MR LEWIS: Right.

COURT: And that there was no basis to the plagiarism claim and that various steps would have to be taken in order to decide whether something was plagiarised or not in accordance with the code you say and – the code of conduct.

MR LEWIS: H'm.

COURT: And I'm understanding your argument, then because of the context your inference is that this was politically motivated?

MR LEWIS: Precisely. One can demonstrate the political motivations behind the..., whether one could construe it as a directive or even an omission on the part of Ms Dean. This wasn't an isolated incident. It was an incident which occurred yet again upon the delivery of an interview with one Robbie Jansen, a well-known jazz musician in Cape Town. There is no disputing the quality of the article.

Instead, the respondent has raised various objections of a political nature. Those objections are recorded in their amendment. They are essentially objecting to the political opinions of Mr Jansen and I have told the ...(intervention)

COURT: Where's that?

MR LEWIS: It would be in the pleadings, the latest amendment. Amendment.

MR KAHANOVITZ: Page 61 of the pleadings and following, M'Lord.

MR LEWIS: Alright, I'm on page 62. It says here quite clearly item 30.1:

> "A dominant theme was the role of music "politics" in the making of music awards."

As the Court has heard, if this is – the opinions of Mr Jansen can be construed as political, then I am in fact of the same opinion and that to discriminate against Mr Jansen on the basis of the colour of his skin or his opinion or belief or any of the listed reasons given in either the Constitution or the Equality Act, or the Labour Relations Act for that matter, in fact the entire framework of our human rights Constitution, our human rights framework in which laws are actually formed, that to discriminate against Mr Jansen for any of the listed reasons, in solidarity and as a brother and a person who I identify with the struggle, I identify with the jazz, I identify with the politics, in fact the very reason that I joined the freedom struggle to begin with was because of the jazz.

I was motivated by the jazz. I was politicised not merely because of the actions of the regime, but because of the clear discrepancy between the actions on the one hand, which were

contrary to my beliefs, and the music. I could not listen to a black jazz musician or a coloured jazz musician without breaking the laws as they stood and I'm still faced with this problem.

It is outrageous that in today's age, that a man of the calibre of Robbie Jansen is still treated like a child. He is an adult. He is entitled to these opinions. The community press is not entitled to sensor those opinions. In fact, it is obliged and it is duty-bound to reflect the community to which it so faithfully maintains that it is responsible. It is sheer hypocrisy to deny the inevitable, that the very nature and fabric of society out there is no – not being reflected by the People's Post or any titles owned or maintained by Media 24.

In fact, as I have attempted to prove, not only have they pulled wool over our eyes first with their disregard for the burden of evidence put before the Truth Commission, not only have they pulled the wool over our eyes with an inaccurate prospectus but to this day they continue to maintain that they have the power, they have the economic might, they have the machinery necessary to cast the community in such a light that people till this day do not know the truth.

The truth isn't that apartheid existed and that there was pain and suffering. The truth is that there was joy and love and that love is not being reflected by the People's Post. Rather they are reflecting their own contradictions and

hypocrisy and discriminatory attitudes.

COURT: Mr Lewis, do you want to...? For the record, Mr Lewis is now very emotional. Do you want to sit down for a second, Mr Lewis? I think then this is an appropriate moment to adjourn.

COURT ADJOURNS (16:14)

COURT RESUMES (at 14:48)

COURT: Mr Lewis, are you – have you recovered?

MR LEWIS: Yes, I have. Thank you.

COURT: Okay. Is there anything else you wish to...?

MR LEWIS: Yes.

MR LEWIS ADDRESSES COURT (CONTINUED): It's just with request – with regard to the *bona fides*, that it is public – on public record, it's public knowledge that I approached Rashid Lombard, that I demonstrated my *bona fides.* Despite the insistence, despite the obvious oversight, despite the attempts at intimidation and the bullyboy tactics I was nevertheless prepared to put the past to rest. I was prepared to essentially leave my politics outside the newsroom.

I didn't submit a thesis or an ideological monologue. I didn't submit a piece of polemic and despite the fact that my polemic and my attitudes and view – views have been carried by such prestigious papers as the Cape Times – I have written up ed, editorial for the Cape Times, I have written pieces that are flagrantly one-sided, that discriminate against people who

don't hold for instance the same views as environmentalists. In fact my very views with regard to sustainable development were – were adopted as policy by the African National Congress.

It is not an open secret that my associations with various so-called struggle "heroes" have influenced the course of events in this country. I have not merely influenced events and this is not a grandiose concoction or invention. I can prove to you that the documents, the list of published work and there's no – no-one has objected to the list, my list of published work as dated would immediately show the Court that my views on sustainable development, if not the first recorded publication in this country on sustainable development, it's certainly one of the very first public articulations of such views in any forum. These words were carried, my articles were carried by South and Grass Roots.

COURT: Mr Lewis, you know, you've given this evidence.

MR LEWIS: Sorry. So, right.

COURT: So you know, I mean all this other stuff...

MR LEWIS: So where am I going?

COURT: Where are you going with it?

MR LEWIS: Right, where am I going? Because I'm just grandstanding, sorry.

COURT: Ja.

MR LEWIS: Right. To get to the point, I didn't submit a piece

of polemic to Ms Dean. I submitted a, what I considered to be an excellent story. There could be no, no criticism based on the merit of the story. It was rejected outright, without any reason given. The reasons given to me post fact and recorded have all been after the rejection of the story. Those reasons weren't the reasons given to me when the story was spiked.

I'm actually quite surprised that the respondent hasn't attempted to argue that in addition to the inherent requirements of the job there exists such a thing as editorial prerogative and that it is well within the editor's prerogative to determine not merely policy, but the editorial direction of the – of any newspaper.

Who am I to question Ms Dean's authority? It is an inherent requirement of the job that I assist the editor in the news gathering process. It is an inherent requirement of the job that I do the duties of a subeditor. I am essentially the second-in-command in an editorial process in which the next level, next tier are the reporters. Those young reporters have now been misled by Ms Dean into believe ...(intervention)

COURT: Where is this? Where are you leading to?

MR LEWIS: Sorry, this is facts before the Court.

COURT: Mr Lewis, where are you leading with this? You know really, you just ...(intervention)

MR LEWIS: The issue is of – of the inherent requirements of the job. It's an issue that's been raised as a defence and no

doubt would come up.

COURT: I don't – I don't see it as being raised as a defence. I don't understand what you mean by the inherent requirements of the job.

MR LEWIS: The inherent requirements of the job determine that the subeditor needs to check the facts. He needs to assist the reporters in the news gathering processes.

COURT: Ja.

MR LEWIS: Ms Dean was required to assist the journalist who submitted those two stories. She was required. It was an inherent duty that she had to fulfil.

COURT: To assist you in (indistinct).

MR LEWIS: To assist me.

COURT: And your argument is that she didn't?

MR LEWIS: No. The nature of the case is such that the issue of my contacts in the struggle became an issue. It's been noted. The overtures that were made by Rashid Lombard of espAfrika – in fact they're next door. We could always call him but you can take my word for it it's, I think it's pretty much in line with his letter. They suggest that he was more than willing to put his politics aside to in the interests of the nation building, to assist an old enemy.

COURT: You know really...

MR LEWIS: To... Yes.

COURT: You know, I just don't understand.

MR LEWIS: Don't understand.

COURT: What – where you're leading with this.

MR LEWIS: The issue is the *bona fides* of... The *bona fides* of the respondent and the *bona fides* of the applicant are being called into question.

COURT: It's quite clear that if you say that they are discriminating against you on political grounds, that they spiked the articles on those grounds.

MR LEWIS: Right.

COURT: And that, that's your case.

MR LEWIS: Yes and I've..., right.

COURT: And really, I don't understand what it has to do with your *bona fides* or anyone else's *bona fides*.

MR LEWIS: Alright. No I'm just substantiating that case.

COURT: And why, why I've got to hear about Rashid Lombard and Mr Jansen again.

MR LEWIS: Alright.

COURT: So just, just please direct yourself to that issue and as I understand your argument, you say that the political history, the brutal(?) context, the profiling, the structuring of the titles, your endeavour to reach out in these articles, that these articles were spiked because of that political history, political context which is manifested in the decisions made by Ms Dean.

MR LEWIS: Precisely.

COURT: Okay. Now that's your argument?

MR LEWIS: H'm.

COURT: Okay and...

MR LEWIS: Do I need to continue?

COURT: No I just, I just want to know if...

MR LEWIS: Right.

COURT: You know, I see all the stuff as utterly extraneous and...

MR LEWIS: Extraneous? It's a grounds for averring that there was discrimination on a political – of a political nature.

COURT: On the basis that the *bona fides* of the respondent are not to be accepted?

MR LEWIS: Precisely.

COURT: And your *bona fides* are?

MR LEWIS: I would believe so.

COURT: Ja okay.

MR LEWIS: So I believe I've attempted to answer those three questions that were put to me.

COURT: Alright, thank you.

MR LEWIS: Thank you.

MR KAHANOVITZ ADDRESSES COURT IN REPLY: Thank you M'Lord. M'Lord, it is submitted that the interests of justice require that there must be some threshold that an applicant has to cross before an employer can be called upon to put its witnesses into the box in order to prove a negative and I have

made submissions to you about what the legal tests are, derived from civil procedure.

But I think one also needs to, if I use this case as an example and say what is it that the employer would have to do to meet the case if absolution was not granted. If you could begin to consider mounting a case to explain how target markets are developed, what relationship they bear to demographics, what relationship those demographics have to X group areas, why it is we have women's titles, why do we have magazines that are directed towards men et cetera, et cetera. Before one goes there, there must be a reasonable threshold that needs to have been crossed before the respondent needs to put up a case.

The applicant must prove disparate treatment and to do that you need to set up a comparator and through that comparator you must show that you were treated differently. What maybe I did not focus on in Green Four Security and what may be useful is in paragraph 27, if one uses the questions that a court has to answer as per Judge Pillay and we just adapt those questions to the facts of our case and we would ask: Did the rule about hours of work differentiate amongst employees? And the answer is “No”.

If we ask: Did the rule about the manner in which editorial prerogative is exercised differentiate amongst employees? The answer is “No”. Then: Did the employer

apply the rule consistently? There's no evidence to suggest to the contrary. Thirdly: Did the rule impact on employees, all employees alike, irrespective of their religion or racial classification? The answer is "Yes". Did the rule trench upon the applicant's religion? That's the only issue that becomes slightly more complicated in this context because my submission is that for there to be a *prima facie* case, then one doesn't get involved in the question of accommodation unless somebody has actually raised the issue.

It would not make sense to say that as long as somebody can come and show that there exists a workplace rule that doesn't differentiates, that provides *prima facie* proof of discrimination, because people from the Nazareth faith, you can't have a policy, you can't say there's an obligation on all employers to have in place a policy that deals with the hairstyles of members of the Nazarene faith or everything else under the sun. So it wouldn't be simply to say if you have a rule that doesn't specifically deal with all faiths and all manners of creed, political belief and so on and so forth, that that can provide *prima facie* proof.

COURT: Let me just start with the issue of a comparator. If for example, why would you need a comparator if the reason for not – for spiking the articles is because: I don't like your politics and I don't like the politics you're espousing in this article. Now there's no comparator there. There's just, there's

a decision to spike and the reason is the discriminatory ground. So I don't have to show that the editor doesn't spike other people's articles. Once – assuming that it's demonstrated; on the assumption that it's demonstrated. So the issue of the comparator in... Applying comparators here is quite difficult. Hours maybe, but in relation to the allegation of the non-renewal and in relation to the spiking of articles it seems to me what we're dealing with here, the allegation is...

MR KAHANOVITZ: Yes.

COURT: ...and the case is that this is discriminatorily motivated conduct and to that extent it's practice in the sense that the practice is to, in this case conduct. No that's why I'm just – I just want to argue on...

MR KAHANOVITZ: H'm.

COURT: It just raises the issue of the comparator and why those questions don't really fit this case in respect of those.

MR KAHANOVITZ: Well I mean, Your Lordship highlights one of the big difficulties in applying the law of discrimination in the sense that if you worked, if you had to deal say with something like discrimination against you on the grounds of your political views, if you work on a right-wing publication and the editorial content is right-wing in nature and you wrote a left-wing article and you said that the reason, that “Because my article contains left-wing content they didn't publish it and therefore it discriminates against me”, the answer would be...

COURT: The answer, Mr Kahanovitz, sorry to interrupt here...

MR KAHANOVITZ: Ja, ja.

COURT: But the answer there is that would be fair discrimination. Your answer would be to say: No, this is a right-wing publication and we're entitled to do that.

MR KAHANOVITZ: Yes.

COURT: So to get past the first hurdle here it may be that you are able to demonstrate, since we are dealing with the first hurdle here. The question is do I need a comparator when I'm dealing with, on his allegations...

MR KAHANOVITZ: Yes. I think so, M'Lord, and I even think in relation to the example that I used, because that's where the fact that we are dealing with the Employment Equity Act becomes important and we're dealing with what are employment policies or practices in the sense that we are comparing the way in which employees are treated.

So what your case may be in the Equality Court might be something different, but here we are concerned with the way in which employees are treated and I would submit that to say that there must be different treatment as amongst employees, I'm not sure that it's correct to say that in the example that I gave you need to get involved in the justification of what is *prima facie* discrimination.

In other words if you have..., if you are a right-wing newspaper and I join a right-wing newspaper, why must it be

discrimination when you tell me that you will not publish my article because the employees of that newspaper are not being treated differently. I just have, I have if you want to call it a jurisprudential for this philosophical problem with saying that in that kind of factual matrix, that the burden now rests upon the employer to justify itself in the absence of any evidence which goes to show that there is differentiation amongst employees. I mean I...

COURT: The differentiation is that the journalist put forward a left-wing article and the right-wing articles don't get spiked, the left-wings do.

MR KAHANOVITZ: Ja.

COURT: But look...

MR KAHANOVITZ: I concede to a difficulty.

COURT: No, there are difficulties okay.

MR KAHANOVITZ: Yes.

COURT: Let me then just deal with... The problem here with absolution from the instance is that I've got to take Mr Lewis's versions as basically true, unless they're inherently improbable.

MR KAHANOVITZ: Yes.

COURT: If he has, you know, that he's broken down and the like. Now on the issue of Jewishness, he says everyone knows he's a Jew. He said it in the box. So although the issue crystallises on 30 May, what I've got before me is a

statement that: Everyone knows I'm a Jew.

MR KAHANOVITZ: I don't actually see what difference that would make, even... I mean, if it was not – if it was plausible, let's start off. Let's assume it's plausible to, that...

COURT: No, no you see, I'm not allowed to test that, am I?

MR KAHANOVITZ: No you are, M'Lord.

COURT: Am I allowed to test the question, the plausible of...?

MR KAHANOVITZ: Yes. Yes.

COURT: I'm not...

MR KAHANOVITZ: "Inherently implausible" is one...

COURT: Oh inherently implausible?

MR KAHANOVITZ: Yes.

COURT: Okay.

MR KAHANOVITZ: So, so if it is inherently implausible that it must follow from the fact that a witness says, "Because everybody knows I'm a Jew", but doesn't – can't find a basis to substantiate it, then you must – must you assume that therefore everybody does know he's a Jew and take it then to the next step and say well, if everybody knows he's a Jew, do we then jump into the next logical leap and say if everybody knows that he is a Jew, then there's a *prima facie* case of discrimination which comes to existence in circumstances where he starts working after whatever it is? Half past five on a Friday.

COURT: So on the Shabbat, ja.

MR KAHANOVITZ: Ja. It – I can't see the sense in it. I mean that's why I think the analysis in the Simpsons-Sears and so on just must make sense. It cannot be the law that... Let's assume employers do actually now, for sake of discussion, bear knowledge of the religious, cultural and other affiliations of all of their employees and it is now on their database, is a *prima facie* case of discrimination to be triggered every time it's said that they didn't realise – they should have realised that it was *Ramadan*, that it was *Diwali*, that whatever the multiplicity of permutations may be in some sort of, some sort of a vacuum.

COURT: And there would be so – there would be a problem for an employer to solicit that information in the same way that because that would – that might lead to an inference that the reason why you weren't appointed was because you were a Roman Catholic or that you were Jewish or that, or that you were pregnant.

MR KAHANOVITZ: Well that's one of the, yes.

COURT: So one of the..., one of the problems about soliciting the information is that it might lead to that kind of inference and...

MR KAHANOVITZ: Or: Are you HIV positive and therefore, should I give you time off?

COURT: Or you... No exactly, so the notion of the employer having an obligation to find out the religious beliefs of its

employees is fraught with difficulty and so therefore I assume that what you're saying is that you're arguing that that's why the employee has to come forward with it and that there's also an enormous diversity and we've seen that in this case.

MR KAHANOVITZ: Yes.

COURT: There's enormous diversity in practice. There's secular Jews who would have no problem with Friday and there are Progressive Jews who might or might not have a problem with working on Friday evenings and Saturdays.

MR KAHANOVITZ: Yes and so ...(intervention)

COURT: And then you have Orthodox Jews who absolutely have a very strong issue.

MR KAHANOVITZ: Yes.

COURT: And all of those are not something that one... It would be incumbent, what I understand you to say, that it would be incumbent on the employee to raise in order for the employer then to engage(?) into the accommodation enquiry.

MR KAHANOVITZ: Exactly, M'Lord. I mean just ...(intervention)

COURT: And if that – if you couldn't accommodate then that would end up with a decision of remaining, assuming that it was reasonable, the reasonable...

MR KAHANOVITZ: Yes.

COURT: It wasn't reasonably capable of accommodating, then you would end up with the choice between following your

religious convictions or remaining in employment.

MR KAHANOVITZ: Yes and that is the stage at which you would get involved in a debate that we stayed away from, which is: What are the central tenets of your religious faith? Because the mere fact that someone is a Christian or a Jew or something else doesn't..., or there's a piece of paper that says that they may be, what they do in the cases is then they start...

It's not as, it's not as simple as seems to be suggested that people can self-identity the manner in which they adhere to a particular faith. In other words if you go and ask a rabbi... A student comes to you and he says, "I do not wish to write this exam because it falls on *Sukkot*. There must be some measure – method...", and he says to the rabbi: Please write a letter to the University of Cape Town, telling them that I'm excused from writing this exam.

There must be some sort of objective measure to see whether that particular person falls into the category of people whose religious beliefs are such that they are a deserving recipient of the obligation to accommodate his religious needs. So it doesn't, well I take it it doesn't merely follow from the fact that you may be technically speaking a member of some or other faith. It actually goes further than that.

COURT: Ja. No, no but the point is – the point is this, that what I understand the argument to be, that had the applicant,

Mr Lewis, approached the respondent and said, “Listen, these are my beliefs”...

MR KAHANOVITZ: Ja.

COURT: And then it might well have been accommodated. I think the point that you made in cross-examination, it would be – that there would be no, that it will be a question of... No, it was in fact in argument. The question is that there wouldn't be needed to be any accommodation in ordinary hours.

MR KAHANOVITZ: Yes.

COURT: It would merely be that he wouldn't be required to work overtime on Fridays. I mean, that's... But that would in a sense be the accommodation that would be reached.

MR KAHANOVITZ: Yes.

COURT: He would work on Saturdays, but he, given his, given his particular beliefs he wouldn't be required to work overtime on Friday.

MR KAHANOVITZ: Well, what I'm also saying is that there might in those situations then be a discussion wherein if Mr Lewis says, “Because I am Jewish I don't do this”, one might need to go and ask his rabbi: Excuse me, can you just confirm that what he is saying actually...

COURT: But we don't have to ...(intervention)

MR KAHANOVITZ: And we didn't want to go there.

COURT: But we don't need to go there.

MR KAHANOVITZ: We don't need to go there, yes.

COURT: Because it's – we're working on the assumption, working on an assumption and remember it's his version.

MR KAHANOVITZ: Yes, yes.

COURT: His version is that he's Jewish, there's – he regards the *Shabbat* on Friday as being his time and that fits in with his beliefs but he, in line with Progressive Judaism he works Saturdays. So that's, that's his version. We can't, we don't go into that.

MR KAHANOVITZ: Yes.

COURT: And no, I agree with you, we've just suddenly moved from hypothetical to the actual.

MR KAHANOVITZ: Yes.

COURT: But the *de facto* plea is this, the reason for why you would engage your employer would be precisely to find those issues out so that you could get into a discussion on accommodation.

MR KAHANOVITZ: Yes and the point that Your Lordship made, you could not begin to make the assumption that all Jews or all Muslims or all Seventh Day Adventists need to engage in that discussion with you because we know that most of the people working at Cavendish Square on a Sunday are Christian, but there's no obligation to engage in a process about seeing whether they need to be accommodated.

M'Lord, then the... But one of the submissions that Mr Lewis made is that even if there was a neutral policy in regard

to the way in which copy was dealt with, that would equal to racism. It just goes to show, with respect, that you can't, you cannot win because if it was neutral he said it would reflect, it would end up being racist by definition because it would, it would be tailored to the demographics that we have inherited from apartheid. So in other words his answer to the argument which I've put up to say that there isn't proof of a biased policy, he said that even if the policy was objective and neutral it would still actually by definition be racist in nature.

Just the reference to our pleadings and the use of the word “politics” and the argument that the Court should infer from that, the existence of a political motive on the part of the respondent, but it is in fact, the word “politics” is quoted from his article.

COURT: Yes.

MR KAHANOVITZ: So if you look at...

COURT: It's called music “politics” and it's...

MR KAHANOVITZ: Yes, but I have noticed that the word, the quote should be, the word, the inverted commas should be on the word “politics” and not on the word “music and politics”. In other words the actual language in the article which was written is at page 140.

COURT: Of the respondent's bundle?

MR KAHANOVITZ: Of respondent's bundle and...

COURT: Ja, no I've – I noticed the...

MR KAHANOVITZ: But where he, you'll recall Mr Jansen talks about music – the politics of music.

COURT: Music.

MR KAHANOVITZ: And the SAMA awards and so on and so forth. Then one last issue, M'Lord, is maybe just to say the obvious. It is not about the way in which we argued our case in court and what approach we took to Mr Lewis's Jewish identity or otherwise in court.

COURT: No. Yes of course.

MR KAHANOVITZ: It is about what happened at the workplace.

COURT: Yes, no you can be sure I'm aware of that.

MR KAHANOVITZ: Yes. Thank you, M'Lord, those are my submissions on issue.

COURT: Thank you. An application for absolution from the instance is one that requires a different test from the one that one normally engages in and I have to, I have to assess the evidence as to whether or not a reasonable court would find for the – that there's a reasonable basis it could find for the applicant on the basis of that evidence. Accordingly I'm going to reserve judgment, but I'll try and ensure that it's handed down shortly, not today but in due course and the registrar will inform both sides.

COURT ADJOURNS (at 15:21)