**COURT RESUMES ON 21 JANUARY 2010 (at 15:11)**

COURT: Mr Lewis?

MR LEWIS: I believe I am expected to deliver some kind of final argument based on the evidence.

COURT: Yes.

MR LEWIS: Is that correct?

COURT: That is correct, ja, it is for argument.

MR LEWIS: I have just written up some things so I am just going to read it if that is okay.

COURT: That is fine, of course.

**MR LEWIS ADDRESSES COURT:** M'Lord, yesterday we heard testimony from an individual who is unable to admit there was a problem with overtime at the company, but is willing to admit in the final analysis there was to quote: "A problem with the carpool on a Friday night." We have a document which has been accepted as evidence by the other party detailing the Jewish belief with regard to Friday night. Furthermore the recent amendment by the respondent tabled before this evidence was led goes so far as to attack the very basis for my existence as a Jew and one can only presume that this is an example in writing of the kind of direct discrimination experienced at the company.

We have delivered evidence regarding the company's historical legacy in an evil, racist and anti-Semitic Apartheid system and its unconscionable behaviour towards fellow South

Africans. We have shown the Court documents detailing the ongoing failure by the company to come clean about its activities under Apartheid and in fact its resistance to and non-participation in the Truth Commission.

This is not simply a company which aided and abetted the Apartheid regime by delivering goods and services like the plaintiffs listed in the Khulumani victims of Apartheid case in New York. This is the selfsame company who set up by D F Malan himself and which to this very day has board members who can trace their history and positions of privilege back to P W Botha and Hendrik Verwoerd in the cabinets and governments of that time.

Yet this company with such enormous resources at its disposal has made the most simplest of errors. The company has been unable to show the Court a bona fide contract of employment and in fact there is no settlement or termination document which can be relied upon which might point to adherence to any part of the LRA. Furthermore the company does not – and admits this – it does not keep record of overtime and whenever the issue of overtime has come up we have been told it is the prerogative of management, not the worker.

For any contract to be accepted as legally binding there must be at very least an agreement and hopefully a document setting out what was agreed to or not. In fact, the Court is

obliged to protect the rights of citizens to enter into contracts and to contract their labour in this way. This is a labour court in which there are very strict laws and presidents governing the manner in which employment contracts are entered into and terminated. In fact, one of the startling facts about this court is that it has gone so far as to protect the rights of workers to negotiate contracts of employment and has even set aside provisions which might be interpreted as preventing such negotiation and the reasonable expectation of renewal.

Furthermore there are laws governing the working week and the 36 hour weekly interval. Although I have brought this case in terms of the Employment Equity Act, the same laws which govern contracts in any other division should also apply. According to the Act discrimination in terms of any of the listed reason under section 6 is considered a contravention of the Act. I presented a case alleging that two of the listed grounds, namely political belief and religious and/or cultural affiliation have been contravened.

The respondent's Annelien Dean was adamant yesterday that no controversy would be tolerated in the workplace. We heard how – what she considered a case of infringement of the internal rules of the company or a case of quote: "borderline plagiarism", could not be rectified by rewriting or resubmitting the piece. We heard how she rejected my second article and we heard no doubt my own assertion that I stand one hundred

percent behind the second piece of writing.

M'Lord, this Court is not a media tribunal. I am not asking for the Court to deliver an opinion as to whether or not my writing is good or bad or whether what I did was borderline plagiarism or controversial or whatever subjective reason that has been offered by the respondent. I am however asking the Court to protect my fundamental rights not to be subject to politically motivated discrimination and Judeophobia. To not be subject to the kind of cheap ploys and tactics of an individual or group of individuals who believe that they can simply rewrite events to suit their own aims and objectives irrespective of the evidence.

Yesterday we entertained questioning regarding Annelien Dean's diary. We entertained questions about the sequence of events and the causality of events and we put the question to the witness that essentially the events could not have occurred in the way that they maintain that they occurred. At the end of the day whether one sees the problem of the topic of conversation at the evaluation meeting to be one of overtime talk, whether it was a disciplinary hearing or whether it was a simple meeting gathered to discuss a carpool, the issue invariably comes back to: What was I doing on Friday night.

The two dimensions of this case – the one to do with the day to day political intrigue of a community newspaper and the other to do with the law of contract and the manner and

perception of my Jewish identity both presume a question which the respondent has not been able to answer. In what way has the respondent provided reasonable accommodation? In what way has there been any attempt to provide accommodation either for my political views or my Jewish identity.

Clearly the respondent has sought to hide behind the fact that it is a very large corporation, that its views are therefore the norm and status quo which governs society and should be accepted as such. People such as me should just shut up. The minority view has no relevance in terms of the majority. M'Lord, the LRA was crafted to avoid this homogeneity. We live in a heterogeneous society in which human beings have fundamental human rights. Workers are no longer canon fodder for bosses to simply boss around without reference to the LRA.

Although Ms Dean do not mix with people such as myself outside the context of work, although she, like so many of the managerial class of Media 24, they think it demeaning to associate with people of colour outside of the workplace. She is forced to confront issues of cultural, religious and political identity in a modern and transforming South Africa. What am I doing working on a Friday night with a contract that presumes an eight hour day, Monday to Friday, but in an environment in which anything goes. This is the question foremost on my

mind. This was the question foremost on my mind at the evaluation and it is the selfsame question which is echoed in my report, that is part of the bundle of evidence.

If there is nothing immediately protecting me against the might of a very large corporation then it is perhaps easier to turn to the Torah and Talmud for assistance than it is to the LRA. At Media 24 it was not the LRA that I carried around in my back pocket, but rather the beliefs and traditions and cultural heritage which inform my identity as a Jew in South Africa. Where does the company begin and end? What are my rights *vis-à-vis* the corporation? Can the respondent dictate to me what I do on a Friday night?

And when faced with such political opposition to its own authority can the corporation simply terminate my contract without any negotiation whatsoever for whatever reason and shut me out into the street? M'Lord, this Court may not perceive the significance which Friday night has in the life of ordinary Jews in South Africa. It may not understand the mystery which is at the heart of Judaism, but surely it understands that in a world of 24/7 some landmarks and reference points remain the same, even in the chaos of a production cycle.

It is clear from Annelien Dean's testimony yesterday that this production cycle, this chaos, was a limited, for a limited time. It was a limited period of chaos in which the editor of one

small title suddenly found herself confronted with four new editions. The question in my mind is how long would it have taken for the company to rectify its actions? Did it have to resort to the kind of punishment, penalising, browbeating abuse in flagrant denial of human rights that it did?

Surely there are disciplinary procedures, there are methods to rectify lack of discipline or problems in an organisation that are referred to by legislation. I therefore ask the Court to find in my favour, to restore my dignity as an individual, to state unequivocally that Jews such as myself have an inherent right to Friday night observance and that irrespective of the political or religious outlook of an organisation there should be at very least a modicum of reasonableness, due consideration and fairness shown towards both parties in a dispute. Thank you.

MR KAHANOVITZ: M'Lord ...(intervention)

COURT: Mr Kahanovitz?

MR KAHANOVITZ: I have prepared written heads of argument which I would – unless Your Lordship insists – prefer not to read in court. If – it may expedite matters if Your Lordship would maybe, if we could maybe even just take a 10 minute break now so that – I am in Your Lordship's hands obviously. I mean, the one option is obviously that I take Your Lordship through my heads. The other option is that we just stand down briefly to allow Your Lordship time to read the heads so that I

do not need to read through them in court. I will leave it in Your Lordship's hands.

COURT: I just want the applicant to be able to hear the argument against him, so that although he would read it as well, I think it is probably best if you do not read your heads of argument – you can assume that I can speed read – and that you just take me through the main points and then I can respond to them.

MR KAHANOVITZ: All right.

COURT: So I think the best thing to be is that we should hear you so that the applicant can hear what argument he has to meet because he is entitled to respond.

MR KAHANOVITZ: As the Court pleases.

**MR KAHANOVITZ ADDRESSES COURT:** M'Lord, in paragraph 1 I summarise the pleaded case. My submission is that it is important to restrict oneself for purposes of this case to the pleaded case because there is far-ranging set of allegations have been made about all manner of matter and I do not address many issues that have been raised that fall outside of the ambit of what this case is really about, so what this case is really about on the pleadings and the case which we came to court to meet is firstly – and those quotes in paragraph 1.1 and so on and so forth are from the statement of claim.

"Media 24 applies a policy in terms of which it caters to

and maintains previously segregated areas by printing newspapers that comply with racial profiling and thus uphold racial divisions. Compliance with the applicant as an employee with the above racial profiling policy is contrary to his religious and political views, his right to express his cultural life as a person of Jewish descent was denied and that he was forced to work a seven day week, sorry, to work seven day weeks which prevented him from observing particular cultural Jewish expressions such as Shabbat. "

M'Lord, the language I am using is his language, not my own. The failure to renew his fixed contract, fixed term contract, was in breach of the EEA as he had a legitimate expectation that it would be renewed. The true reason for the failure to renew is to be found in a conspiracy involving systematic abuse and unfavourable treatment both towards colleagues and leadership as a result of newsroom policy. Although the phrase dismissal is sometimes used in certain of the documents it is clear at this stage that the claim pleaded and advanced in this court is not an unfair dismissal claim brought under the LRA. Instead the applicant relies exclusively on the EEA.

COURT: So it is a termination of the employment relationship, which is not a dismissal in the sense that it is an expiry of the three month period and it is not renewed. That is – and that is

a discriminatory act is really what he is suggesting. So it is not a dismissal claim, it is a discriminatory act. Had he not – had he fitted in – that is his argument.

MR KAHANOVITZ: Yes.

COURT: Had he fitted in the contract would have been renewed.

MR KAHANOVITZ: Well ...(intervention)

COURT: That is his argument. There is a reasonable expectation ...(intervention)

MR KAHANOVITZ: Yes, I suppose there could be two – I mean – hypothetically – I get to this later – you do not – the only reason I actually deal with the concept question of renewal is because he has pleaded it, but ...(intervention)

COURT: Yes, but he also says he was dismissed, so let us – I mean, the issue really is his complaint, whether it is a dismissal or whether it is a failure to renew the contract.

MR KAHANOVITZ: Yes.

COURT: It really is that the contract gets terminated on a date when he says he had a legitimate expectation that it would continue. That is the allegation.

MR KAHANOVITZ: Well, yes, but what I think is that again, you could allege that your contract is terminated in a discriminatory fashion without needing to allege that you had a reasonable expectation that it would be renewed, so.

COURT: True, yes, no I agree with that.

MR KAHANOVITZ: So in that sense the expectation issue is legally insignificant unless the claim is brought under the Labour Relations Act.

COURT: Yes.

MR KAHANOVITZ: It is factually significant here because he pleads it ...(intervention)

COURT: It is only factually significant here. Yes, no, no, I agree with you entirely. Then 1.2, just my understanding of the applicant's case, he claims harassment and I suppose that is really what falls under what you say 1.2, that he is compelled to comply with a policy that is contrary to his religious and political beliefs and when he does not comply by writing articles that do not fit into that policy, by raising his struggle record etcetera, his claim is that he gets harassed, so there is a definite claim in the statement of claim around harassment and that he is harassed because of his religious beliefs and political views. I am at the level of allegation only at the moment.

MR KAHANOVITZ: I am not sure ...(intervention)

COURT: Where does harassment fit into the allegations? They are very clear in the statement of claim.

MR KAHANOVITZ: Well, they are not – once you start trying to deal with that analytical, because let us go into the pleadings. You see, it operates at, as I understand it, at different levels. I think there is a claim that – I think the word

harassment is used in relation to – you will see in 4.4.3 is where the word harassment comes in.

COURT: No, it is earlier. It starts in 4.4 at the opening sentence: In due of the following harassment. And that he is harassed by being denied, by being required to work seven days a week and that he is harassed because the respondent is aware and prevented him from doing so and then he was harassed in 4.4.3 by Mr Taljaard, by making an appointment, etcetera, etcetera.

MR KAHANOVITZ: But, M'Lord, 4 ...(intervention)

COURT: And his evidence, and his evidence ...(intervention)

MR KAHANOVITZ: Ja.

COURT: And his evidence was that this was because of his struggle record.

MR KAHANOVITZ: M'Lord, what the pleadings say, let us leave out 4.4.3 for the moment, but all the harassment which he suffers in point 1, point 2 and point 4 is because he is Jewish.

COURT: Yes.

MR KAHANOVITZ: So his harassment for purposes of those three legs of the pleadings really amounts to the claim based on – it is anti-Semitism.

COURT: Yes.

MR KAHANOVITZ: That is the – he is treated differently and in an offensive manner because he is ...(intervention)

COURT: And that is ...(intervention)

MR KAHANOVITZ: Because he is Jewish.

COURT: And that is what you state is the – what 1.3 in your heads of argument are dealing with.

MR KAHANOVITZ: No, no, I do not, because again – you see, the footnote refers to paragraph 4.3 of the statement of claim. Paragraph 4.3 refers to paragraph 4.2. 4.2 says:

> "At Media 24 a system exists in terms of which ...(intervention)"

COURT: Yes, no, no, I am happy with that.

MR KAHANOVITZ: 'The above discriminates against applicant'.

COURT: Yes.

MR KAHANOVITZ: As I understand it what he is saying is: I as a journalist, you have forced me to do work that complies with your racial profiling policy. That is discrimination. And then 4.4 appears to be a new thought or a new different – a different cause of action. So my understanding is and what I am saying in 1.2 is that – it is referenced back to paragraph 1.1 of my heads:

> "Media 24 applies a policy in terms of which it caters to and maintains previously segregated areas by printing newspapers that comply with racial profiling and thus."

And the impact of that policy on the staff is that because they are forced to comply with that policy it is offensive to the

religious and political views of someone like Mr Lewis. That is what my understanding of that – that is one cause of action. Then there is another which – that his right to express his cultural life as a person of Jewish descent was denied. It is the next cause of action. And I am not sure where the Mr Sedrick Taljaard part and having to come in to deliver newspapers fits into that claim because that would – if it were true it really would seem to be more about a – there has not been any evidence that the true reason why he was asked to hand out newspapers at Grassy Park six o'clock in the morning was he was singled out because of his political views or because he was Jewish.

I would rather just deal with that at the basis of a factual ...(intervention)

COURT: Ja, in other words what you are saying is that 4.4.3 has nothing to do with the discrimination claim under the Employment Equity Act.

MR KAHANOVITZ: Well, neither – on a first blush reading of the pleadings you might think it has, but now having heard the case as it is presented in court it appears to have nothing to do with the claim under the Employment Equity Act. And certainly my argument is that it has nothing to do with the claim under the Employment Equity Act.

COURT: It might be an allegation of a breach of contract.

MR KAHANOVITZ: Yes.

COURT: It might be – and basic conditions of Employment Act and.

MR KAHANOVITZ: It really appears to have been raised in the context of the applicant saying he was generally speaking unhappy with the way in which he was treated. Some of that unhappiness is due to features which he says amount to discrimination, other he is unhappy because he is unhappy. And I do not, my respectful submission, it is not – if it is not a claim for discrimination then it is not something which this court needs to decide in this case because whether or not he was asked to come in at 5:00 or 6:00 in the morning to hand out newspapers – although he may point out in reply that exactly what he has pleaded is that he was told to do those things because he was being picked on because who he was. And if that is his case I have an answer to that as well, is that as a matter of evidence he has not come close to showing that the real reason why he was asked to assist in the launch of People's Post lay in discrimination of any sort.

Then the next leg is the failure to renew ...(intervention)

COURT: I have got the legs. The only issue for me was in fact ...(intervention)

MR KAHANOVITZ: Okay, all right.

COURT: And it has become quite clear now, so just where harassment fitted in and what I understand your argument to be is that the allegation at 4.4.3 had nothing to do with the

claim under section 6 of the EEA to the extent that he might state that the harassment was targeted because of his political beliefs and his religious views. You say there is no evidence, he led no evidence of that.

MR KAHANOVITZ: Yes. I think also what has become clear to me now, which was not clear to me when we filed this amended statement of defence, was based on certain assumptions that we were making about what the case was about because we could not quite work out from this, but having read this and having heard the evidence I now understand what the pleaded case is and I concede that some of the assumptions that we made in our amended statement of defence where we made certain suppositions about what his case was now appear to have been wrong. I mean, to give one example is the issue of discrimination against Islamic culture, which is referred to in the referral, but is not part of the case before this court and has not been dealt with and has not pleaded, so we do not need to deal with it.

COURT: In any event, it does not – does it fall under section 6 of the Employment Equity Act? Because ...(intervention)

MR KAHANOVITZ: My submission is we do not ...(intervention)

COURT: It has to be discrimination against the applicant. The fact that ...(intervention)

MR KAHANOVITZ: My submission is we do not – there is no

point in going there because you can say a lot of things in your referral to the CCMA and on subsequent reflection you can decide look, this is the case that I actually want to ventilate. Some of these issues, I have raised a whole lot of issues when I made my referral, but I do not want to take all of those to the labour court. These are the ones I am taking to the labour court.

COURT: Okay, so in fact the allegation about – although it appears throughout the pleadings – was initially in the CCMA referral, but not, but certainly not included in the statement of case?

MR KAHANOVITZ: Well, not only is it not included in the statement of case, it has not been part of the evidence ...(intervention)

COURT: Of the evidence.

MR KAHANOVITZ: Evidence, so when you are dealing with an unrepresented person – firstly one bears in mind though that this pleading was in fact drafted by a lawyer, so it is not a pleading drafted by – but when you are dealing with an unrepresented person I suppose you can say: Look, it may not be explicitly stated in the pleading, but where it is clearly part of his case – which we infer from the evidence which we led – then in effect we will amend his pleadings or help him to amend his pleadings and I am saying there was not evidence about those issues, so we do not need to go there.

COURT: Well, he did make, he did in fact in his evidence say that this was evidence of discrimination, the rejection of those two pieces - I mean, the one piece is only a paragraph – and without putting any words in his mouth, that might be evidence, part of the sort of evidential picture that he is trying to build around the discriminatory profile of the respondent, so it might have that factual relevance, but as a matter of – and yes, it is a statement made by the applicant in his evidence. I do remember him saying that. But in any event, listen, we do not ...(intervention)

MR KAHANOVITZ: Let us put it this way, some of that stuff may fall into the category of what one would say would be some of the fact evidence in the sense that because these people discriminate generally ...(intervention)

COURT: Yes.

MR KAHANOVITZ: There is lots of evidence about historical discrimination. There is lots of evidence or purported evidence about other contemporaneous discrimination, but it is not 'the'. So it is dealt with at the level of evidence that is not part of the cause of action and I think also one must also bear in mind here that the – because of difficulties a pre-trial was held chaired by a Judge and because one of the problems that any employer in a discrimination case obviously need to know what is the ambit of what it is that you need to deal with in court, what evidence must you put up to deal with the

allegation, so there is in fact a directive that gives an applicant a further chance to elaborate on what exactly are the grounds and you will see in the pleadings there is a practice note on cases with discrimination which obliges an applicant, Judge's directions. It is page 52 of the pleadings. So there are a series of questions and answers that both parties must deal with.

COURT: Yes, no, I have got that.

MR KAHANOVITZ: M'Lord, I do not – paragraphs 1 through to 19 really just canvas the evidence which is well-known to Your Lordship. I do not really want to – it is the chronology of the significant facts. Maybe I must just highlight the issues that I am going to ...(intervention)

COURT: Maybe just highlight the ones you wish to ...(intervention)

MR KAHANOVITZ: ... to dwell on later, that paragraph 9:

> "Because it was the launch date staff asked to volunteer to arrive early for distribution to (indistinct) traffic. Applicant was involved in distributing newspapers in Grassy Park from approximately 06h00 to approximately 08h30. These working hours are highly unusual because it was the launch of the publication. The editorial team moved to Tokai on or about 10 May 2006. This was his first exposure to the actual production of the newspaper as compared to being trained on a system. It was soon

noticed that he was unable to lay out copy at the standard to be expected from someone with the level of skill and experience that had been claimed by him in his CV. For example the article in respondent's."

COURT: Ja, okay.

MR KAHANOVITZ: Etcetera, etcetera. We dealt with that yesterday, the open spaces that Dean testified were below the required standard. Paragraph 13 deals then with the Dludlu article and the evidence of Dean and the concessions and I made the point firstly he cannot dispute that Dean's concerns – even on his own version he cannot dispute that Dean's concerns were legitimate nor was it put to her that her true motives for criticising the piece were due to racism.

"The line of cross-examination (indistinct) that any defects in the article were caused by the paper being under resourced and therefore it was unfair to criticise him."

In other words you will recall the: How can I be expected to be a journalist, a sub-editor, to do the verification, all the checking in this kind of context, therefore it is unfair to criticise me for lifting stuff from the internet, you know, if you had given me a ticket to fly to Johannesburg and I can go and interview people, that line of cross – it was not said. There is no basis for criticism or valid basis for criticism of this article and your true reason for sending me out on this has to do with

racial profiling.

Then the Robbie Jansen article and let us get to paragraph 15:

"Dean was concerned about running the article without further verification. The reference to a warning made to Jansen by his producer not to talk to the press was of concern, especially in the light of ...(intervention)"

COURT: Ja, that is yesterday's evidence.

MR KAHANOVITZ: That is yesterday's evidence.

COURT: Very fresh.

MR KAHANOVITZ: And that the use of the F word and so on and so forth, yesterday's evidence. Again, paragraph 16, yesterday's evidence, the withdrawal of the article, the meeting with Taljaard, what applicant said at the meeting, the circumstances under which he was asked to leave the premises. Then just moving on then to the law, I set out – this is using the recent judgment of Judge Van Niekerk in Mangena, of which I have a copy here.

M'Lord, this judgment is particularly useful because it is a claim under the Employment Equity Act and the – one cannot merely go to the claims board under the Labour Relations Act which deal with automatically unfair dismissals or unfair wage claims and it does not – I just say as a note of caution that when dealing with the Employment Equity Act one must be astute to what is actually said in the words of that Act about

what kind of discrimination we are dealing with and I will also deal with – there is a provision – I do not know if anything turns on it in this case – dealing with presumptions and onuses.

So the basic legs are, 22.1:

"You must establish the differentiation that forms the basis of the claim. You must establish a causal link between that differentiation and one of the listed grounds or an unlisted ground."

The unlisted grounds are not relevant for purposes of this case.

"The mere existence of different treatment of people, for example different races, are not discrimination on the grounds of race unless difference in race is the reason for the disparate treatment. Put differently the applicant must prove that his different treatment, for example his lower salary, is because of his race or his religion etcetera, etcetera."

Next leg then is if he establishes that the conduct amounts to discrimination. The next issue to be determined is whether it is unfair discrimination. And, M'Lord, you will see later I am submitting we do not get that far. In this case it is not necessary for the Court to get involved in establishing whether there has been unfair discrimination because there is actually no evidence that would lead one to find that there is

*prima facie* evidence of discrimination which – and then we go onto the next step to see whether it is unfair discrimination.

COURT: But the applicant – I mean, he stated that, I mean stated in his evidence and when he put questions to Ms Dean, the thrust of the questioning was that there is a policy, an hours of work policy, which is premised on the Christian calendar in that it is Monday to Friday and that that calendar changes in a particular newspaper, the production cycle, so when they create a production cycle – that is the contractual basis. Then – which he signs on and which does not conflict with, as I understand it, if work ends at – I do not know when Shabbat begins, is it six o'clock in the evening? Okay, is it, Mr Kahanovitz?

MR KAHANOVITZ: I am not an expert on it, M'Lord, because ...(intervention)

COURT: Okay, oh sorry. All right, so just assume that it does not start before six, but even on that basic structure of eight hours a day, five days a week, an employee can be called on to work overtime on Friday which would then, as I understand it, up to three hours, which would then conflict with Shabbat, so even on the contractual model. Then on the production cycle for People's Post itself was that, as I understood it, you started on Wednesday and you worked through Friday, Saturday and then Monday, Sunday, Monday. Now that production cycle, he suggests, seems to me he suggests, that

that practice or – has the effect of affecting or contravening his or requiring him to work contrary to his religious beliefs. So then ...(intervention)

MR KAHANOVITZ: Yes, yes.

COURT: But let me just finish the argument so that ...(intervention)

MR KAHANOVITZ: Ja, I am sorry.

COURT: So that you can address me on it. Then I understand that to mean if that is, if that case is demonstrated then it seems to me that the respondent has to demonstrate why it is fair. In other words even imposing that might still be fair. So there is a residual fairness issue that may have to be addressed. It may not have to be addressed factually. The question is if his allegations are correct on that there is still – there may be an issue on fairness.

MR KAHANOVITZ: M'Lord, with respect, yes, but not on his case because – and I deal with that at paragraph 31 and following ...(intervention)

COURT: Okay, all right, well, let us deal with it then.

MR KAHANOVITZ: Should we deal with it then or now?

COURT: Deal it – I do not want to interrupt your – I just – I suppose I am just asking these issues ...(intervention)

MR KAHANOVITZ: Yes, no, I understand the issue, M'Lord, and I deal with it. Paragraph 26, I just mentioned the wording of section 11 of the EEA which has always confused and

troubled me and I – because it says under the heading 'burden of proof':

"Whenever unfair discrimination is alleged in terms of this Act the employer against whom the allegation is made must establish that it is fair."

And Grogan aptly describes it as a particularly ill-phrased provision because it suggests in conflict with what was held in Harksen, that it is the respondent who must prove from the outset that the discrimination is fair. And as opposed to what Harksen said is that once different treatment which is linked to the prohibited ground has been proved by the applicant then, only then, must the employer have to prove that it is unfair. So in other words – sorry, that is fair. The problem in section 11 is ...(intervention)

COURT: Is you might never get to the question of fairness because it might never be discrimination.

MR KAHANOVITZ: Yes, but the wording of the Act is – it says:

"Whenever unfair discrimination is alleged."

So it seems to suggest that a mere allegation in a pleading triggers a burden of proof to ...(intervention)

COURT: On fairness.

MR KAHANOVITZ: To prove unfairness and ...(intervention)

COURT: But don't you discharge that burden if you – you do not have to discharge the burden if you do not prove discrimination.

MR KAHANOVITZ: Well, I think that is the logical way of trying to ...(intervention)

COURT: Is that not the way of trying to understand it?

MR KAHANOVITZ: Of reading the section and I submit in footnote 12 that that is the way in which Judge Van Niekerk appears to have applied it in Mangena. Because there he held that:

> "In the absence of the production of sufficient evidence of different treatment because of race absolution will be granted and the employer will have no case to meet."

In other words he did not say: I can't give you absolution because you have still got to come along and show under section 11 that the alleged discrimination, which I do not find to be proved, is fair. So it is just – I think it is inelegantly phrased and therefore confusing.

COURT: I have not – it may be that this case does not have to raise issues of burden of proof, but what do you think the – what is the effect of the burden of proof provisions in PEPUDA, in the Promotion of Equality Prohibition(sic) of Unfair Discrimination Act? Where it says that, where it sets out a much more detailed shifting onus or shifting burden of proof, that once you have proved discrimination then the employer is obliged to prove that it was not discrimination and then only then do you get to the question of fairness. It is quite a separate issue. Have you applied your mind to it at all?

MR KAHANOVITZ: I did not come prepared to deal with that, M'Lord, and anything I say would not be of much assistance to Your Lordship.

COURT: No, I mean, I agree, section 11 is problematic and I wondered if – and it may not be relevant, so.

MR KAHANOVITZ: If Your Lordship accepts my primary submission we do not ...(intervention)

COURT: You do not need ...(intervention)

MR KAHANOVITZ: We are not going to get there.

COURT: Yes.

MR KAHANOVITZ: Okay, then I deal under separate heading with employment policy or practice and that is relevant because that is really the feature which distinguishes the Employment Equity Act from other legislative acts which prohibit discrimination. And I point out there is some debate as to whether a single event can ever constitute a policy or practice. There is however no debate that the claims under the EEA, the policy or practice must relate to the treatment of the claimant *qua* employee.

> "It is accordingly submitted from the outset that the political grandstanding that the applicant has engaged in regarding the respondent's history is of no relevance to these proceedings. His objective appears to have been to tar and feather the respondent. This then serves as a building block for the spurious argument that because a

corporation supported the discrimination in the past it must surely follow that it would continue to this day to do so, so much so that it forces all of its employees, including the applicant, to perpetuate the policies of Apartheid."

And I think part of the argument, if I understand it, is it must follow because it did so in the past. And this must be so, so the argument must then, there is a word missing there, run.

"Also in the case of People's Post, a small community based title, taken over by the respondent many years after the defeat of Apartheid. The only way, so it was argued, that this chain of shame could ever be broken was through the ritual purging of the corporation via the TRC. My submission is the argument only needs to be stated to realise that it is ridiculous, least of all was there proof that racial profiling was implemented as an employment policy or practice at People's Post. The editor's denial that such practices do not exist were not seriously challenged by the applicant. It is so that he came to believe that his work could only have been rejected for this reason, but that only tells one that the applicant is a person who is persistent and stubborn in his denial of reality."

So, M'Lord, if he cannot prove the existence of a policy or a practice in respect of racial profiling he has no case under

the EEA and then you would not get – because the next question that then arise, if you prove the existence of such a policy or practice, the next question would be: In what way does it affect you as an employee? This company, whatever, sells arms to, into civil wars. Okay, that you say is a noxious policy or practice and then you will say: Well, I am a pacifist. I work for this company. They force me to – but first you would need to show the existence of some sort of employment-related policy or practice that is discriminatory and then move onto how it actually impacts on you as a worker.

The Act cannot be that this Court is going to be police the commercial morality of all corporations unless and until somebody can come along and actually show that this is an employment policy and practice, not that the company does horrible things or not merely.

COURT: Just on – assuming it, well, okay, let us say it is a policy or practice. The question then is to be an employment policy or practice, yet it has to be linked to one of those matters listed.

MR KAHANOVITZ: Yes. Includes, but – so. I mean one for example is job assignments, promotion, etcetera, etcetera. So it has a practice ...(intervention)

COURT: So working environment (indistinct). So job assignments.

MR KAHANOVITZ: With respect, I do not think – again, this

does not arise in this case, but it is a potentially difficult provision to apply in cases outside of – the restaurant refuses to allow me to serve black customers. I mean that case is not difficult to deal with, but there are other issues that one could imagine where people with a particular set of beliefs would say that what a corporation does is treats different kinds of people differently and therefore the Court must hold that by telling its employees to make whatever it is, poor people standing longer queues than rich people or whatever the example is that one could come up with, that that is conduct prohibited under the Employment Equity Act.

If you work in a large commercial law firm you would say that the fees that you are forced to charge prohibit most members of the population from having access to or to legal services and therefore you wish to be able to charge a quarter of what that large commercial law firm insisted you charge. I think – I am not sure that this Court should get involved in those sorts of controversies. Religious discrimination – the question of working hours that discriminate against, it is paragraph 31:

> "Members of minority religious groupings is yet to be considered in our courts. It is respectfully submitted that given the case pleaded by the applicant it is unnecessary to dwell at any length on the complex foreign law on the subject. A particular significant case is that he alleges

direct discrimination. In particular he alleges the following: Respondent was aware that the applicant was Jewish and that the above work week would prevent him from observing particular cultural, Jewish cultural expressions such as Shabbat."

Now there are factual, there are legs to that claim and my submission is that – and then the other one is that, you know, he was prevented from expressing his cultural life as a person of Jewish descent in that he was forced to work seven day weeks. And the answer to those claims is that the factual averments relied upon him to support his claim are simply not true and this leg of his claim must therefore be dismissed on the basis alone.

Because you will recall I referred Your Lordship in the absolution argument to Canadian case law on this issue. All those cases on rereading them, they adverse impact indirect discrimination cases where the employer says: These hours are universally applied in respect of all employees. The case is then brought that the employee said: Well, if you apply those ordinary working hours in my case, because I am Jewish or a Seventh-day Adventist or whatever it is, I will not be able to attend services or it will offend my religious beliefs. And then the Court does not get involved in – they are not brought as cases of a direct discrimination, for obvious reasons, because it will be a rare day where you will have facts where it

can be said that the employer deliberately structured its working hours in order to prevent members of various minority groupings from being able to observe their religious and cultural practices.

And I think that what Your Lordship was alluding to, in the context of that sort of case you may then – the employer may then be required to show or is then required to show under the Canadian case law what steps it took to reasonably accommodate the needs of the employee short of undue hardship. That is the Canadian test. What an employee then pleads in that case is: I went to them. I said to them I have now become a Seventh-day Adventist. I was not when I started and therefore I now have a difficulty working on a Saturday. Can I have Saturdays off?

And then the case concerns whether or not the employee has done what the law requires of it to attempt to, to endeavour to meet ...(intervention)

COURT: To accommodate ...(intervention)

MR KAHANOVITZ: Yes, to accommodate that person.

COURT: To accommodate the employee without undue hardship to the employer.

MR KAHANOVITZ: But that is not the applicant's case. These obligations cannot arise out of the air. It requires – and again I do not even necessarily want to get involved in that debate. I would say let us look at what he says happened. What he says

– and he repeated that again yesterday when he was cross-examining Annelien Dean – he put it to her under cross-examination, he asked her: Did you change the production cycle to cut into Shabbat because of conflicts in the newsroom? That is in paragraph 37. In paragraph 36 I point out:

> "His case is that the employer intentionally treated him differently because he was Jewish."

Again I go back to the wording of his pleadings:

> "Was aware that the applicant was Jewish and that the above work week would prevent him from observing Shabbat."

So that is the case before Your Lordship and it is simply answered on the facts. They were not aware that he was Jewish and secondly there is absolutely not a shred of evidence to suggest that even if they had been aware that he was Jewish that they altered his working hours in order to cut into his observance of the Sabbath and in either event, as I point out later, this case is a construction that has been invented to – in order to push certain emotive buttons.

The applicant's ordinary working hours would not actually have affected his ability to attend synagogue on a Friday evening because his ordinary working – it is only, it was only unusual overtime that had any impact whatsoever. So to come to court – if Your Lordship has to just – imagine hypothetically

what would have happened in a company such as Media 24 if an employee comes along and says: Look here, please, if there is going to be unusual overtime in the future, I am a Jewish person. I need to go to synagogue on Friday evening. Please make sure that I am not asked ever to work beyond point X because it offends my religious beliefs.

You would not have any case in court. Every large corporation in South Africa has got many people of multi faiths, Muslims who need to take hours off on Friday to attend mosque etcetera, etcetera, etcetera. These cases do not – it is a rare employer that at that point turns around and says: No, you know, go and hop. I am not going to do anything to try and accommodate you. So to make a big song and dance about two nights on which you worked excessive overtime in circumstances where you did not even go to tell the editor that this was a problem very much points to a case that has been invented after the fact in order to allow the applicant to push certain emotive buttons.

I pointed out in paragraph 38:

"The applicant is clearly a hypocrite who when it suited him was content to use staff transport to visit a jazz club to do work on a Friday night. When it suits him he is variously multicast, a Philosemite and/or of Orthodox background and much else besides. He is self-defines how and when he will observe the Sabbath and his claims

on this leg are a subsequent fabrication where he sought to play the anti-Semitism card, an emotive button to push in pursuing his vendetta against his former employer."

And if Your Lordship looks at some of those internet postings that I put to the applicant in cross-examination, the themes, the campaign that he launched before he came to court is the themes that he has pursued in order to attempt to capture the public imagination has been – the one is the chain of showing D F Malan Apartheid and this is a company that is like that and other is in the same breath and consistent with having been inspired by the ideology of Adolph Hitler, this is a company that unto this day persecutes Jews.

His letter to the Jewish Board of Deputies states – that is the one he did not discover, M'Lord – that his claim is strictly speaking not about the Sabbath nor do we submit is it even broadly speaking about the Sabbath. So there was no obligation on the employer on these facts to come along to lead evidence about why it as a newspaper might need to require staff to work hours that might impact upon the ability of people of certain religious views or cultures or so on to be able to – that would be, M'Lord, in another case at another time if one was presented by a factual matrix where somebody who was required to work at Die Burger on a Sunday because Die Burger comes out on a Monday says: I cannot work on a Sunday because of my deep Christian beliefs. Can you

reasonably accommodate that? And the employer says: No, I am sorry. I am going to have to fire you or retrench you because it is an essential operation requirement.

Then we would come along and say this is how the newspaper industry works and so on and so forth and that is why even were you to find that Christians who are forced to work on Sundays are being differently treated from Jews who are forced to work on Sundays and therefore that is *prima facie* discrimination. It is not unfair discrimination because it is justified by the operational requirements of the newspaper business.

We did not present such a case because in our submission we were not required to. Then the failure to renew his fixed term contract:

> "While a single failure to renew a fixed term contract could be arrived at an unfair dismissal claim under the Employment Equity Act here the complainant would need to show the existence of a policy or a practice. This would suggest the need to demonstrate the existence of some discriminatory policy or practice in failing to renew the employment contracts of some or other vulnerable grouping in society. Even on the applicant's own version he can point to only a single non-renewal involving himself only. There is thus no evidence of an employment policy or practice."

And I think again here must – what is the purpose of this Act? It is to deal with discrimination and I think that is one of the reasons why it says – it does not say any single aggrieved individual who has had a once off non-renewal of his contract can come along and claim that what the Court is being presented with is a policy or a practice where people who are members of vulnerable groupings in society tend to be badly treated by this employer.

I mean the case that one would imagine would be presented is more that there were five people where the employer had to consider whether their contract should be renewed. All the people who were members of the *NGK* had their contracts renewed and lo and behold none of the Jews. This points to a policy or practice of preferring members of the *NGK* over Jewish people. That sort of case.

COURT: But his allegation is that there is racial profiling policy and that that – the application of that policy had the effect that they would remove him because of his political beliefs. They were contrary to the company's policy and for that reason they dismissed him. All right, I am using – the word dismissal is used in that list, but remember it is not an exhaustive list and analogist grounds would clearly include a failure to renew the contract. I think if you took employment practice you could say including and then it says dismissal at the every end. I think it would (indistinct) to say a non-renewal

would constitute the employment part of a policy or practice.

MR KAHANOVITZ: Well, the phrase I have used in the heads is to say – he in essence says: I was forced out of the organisation. And I think that could fall under the ...(intervention)

COURT: And he is forced out because, he says, of the broad racial profiling policy, all of which is subject to then whether he has proved that or not, but assuming that he has ...(intervention)

MR KAHANOVITZ: Well, he says he – yes.

COURT: But assuming that he has – is that not a policy or is that not a policy or practice?

MR KAHANOVITZ: Well, what he says is: I was forced out because I hold, essentially he says: Because I hold progressive views. I believe in non-racialism. I don't accept the – what he says then: I am not a member of the *NGK*. And you are supposed to then make the link that if you are therefore it must follow that you are a racist. But if you are going to show the existence of such a policy – what I am submitting is that it is unlikely, factually unlikely that it is applied in the case of one individual only, because a policy – there is a difference between saying – I can understand what Your Lordship – there is obviously a bit of (indistinct), but a policy is not something that tends to be uniquely evolved and applied in the case of one individual only. A policy – there will

– you would tend to have to produce evidence about a pattern of behaviour. You say: Well, why do you say these people have such a policy of not – by renewing the fixed term contracts of such. Because in my case and that case and in the other case ...(intervention)

COURT: Ja, that is the pattern.

MR KAHANOVITZ: Yes, yes, the pattern.

COURT: That proves the policy – that is an inference if you do not actually have a document which states the policy. But you know that this harks back to the whole issue as to when one particular act could constitute an unfair labour practice in the industrial court.

MR KAHANOVITZ: Yes.

COURT: There they use the word practice.

MR KAHANOVITZ: Yes.

COURT: And the problem is what happens if this is the first time? Does it mean that you allow a policy of anti-Semitism to operate for four or five times and those people have no claim and it is only on the sixth applicant ...(intervention)

MR KAHANOVITZ: Yes, no, I understand Your Lordship's problem.

COURT: So the issue is that, what you are raising though, that it is easier to infer a policy or practice where there has been a pattern, but it does not mean that you cannot infer a policy or practice from one single incident.

MR KAHANOVITZ: No, I am one hundred percent in agreement with Your Lordship and ...(intervention)

COURT: So he has a harder case to demonstrate than ...(intervention)

MR KAHANOVITZ: You have, yes, because you are just an isolated single individual. Where is the practice as opposed to they do not like you? Because if it is not about you, but it is about Jews, yes, it is not inconceivable that only you got singled out if it is about Jews, but it is far more unlikely. So paragraph 40 – so that is the one version, that people who oppose transformation get routed out of the organisation. As against this one has the evidence of the editor, which is simply to the effect that the applicant behaved badly, performed poorly and for these reasons he was informed that his contract would not be renewed and that he should leave the workplace forthwith.

So the Court has to decide which of those versions it is going to believe. There is also no evidence of a pattern of conduct and we have discussed this. I have also already dealt with the issue of whether the concept of reasonable expectation is of any relevance, but in so far that he has alleged it we say there is absolutely no evidence that he could have held any reasonable expectation.

COURT: Well, except, okay yes, well except that the contract itself refers to renewal.

MR KAHANOVITZ: Well, it is on his version, M'Lord, it is a fraudulent fabrication.

COURT: No, no, I – no, well, I mean, he relied on the contract yesterday in the cross-examination of Ms Dean.

MR KAHANOVITZ: Yes.

COURT: Both in terms of hours of work and the job description.

MR KAHANOVITZ: Ja.

COURT: But – and really it is his legal submissions on the validity of the contract, but I do recollect that there was a condition that at a certain stage they would ...(intervention)

MR KAHANOVITZ: If there is, M'Lord, it is a very (indistinct-speaking away from microphone).

COURT: Look, I do not want to comment on this contract. Since they have been wise enough to employ you, you might ...(intervention)

MR KAHANOVITZ: Yes, the clause says, M'Lord, 3.2, page 5 of respondent's bundle:

> "The employee hereby accept that he is employed for a fixed term and confirms that he has no expectation of the contract of employment."

COURT: Ja, but we all know – there are two bases, there are two issues here. The first of course is signing at the beginning.

MR KAHANOVITZ: Yes.

COURT: At the beginning of the contract he cannot have an expectation of renewal. The second of course the expectation can arise thereafter.

MR KAHANOVITZ: Yes.

COURT: And but then you have a look at 3.3, so having said there is no expectation, it goes immediately on to say any negotiations regarding the contract will take place in the last two months of its duration.

MR KAHANOVITZ: But, M'Lord, again my primary submission is we do not need to go there, but my secondary submission is this, and which is what I deal with in the heads, is that what happens if on the first day you have a legitimate basis to harbour such an expectation, but things go downhill after that. I mean, how can somebody who is continuously in trouble during the duration of a fixed term contract come and say that they had a reasonable expectation of renewal on the day that after all the – you know, the troubles have now been going on and on and on and eventually they say to you: Not only are we not renewing your contract, we want you out of here today pronto. I mean, how could anyone ...(intervention)

COURT: Yes, what you are saying is at the moment of termination of the contract ...(intervention)

MR KAHANOVITZ: Yes.

COURT: You must have the expectation.

MR KAHANOVITZ: Yes.

COURT: And that expectation might have been built up during the – by statements made by the employer or previously renewals. All of that would build up an expectation.

MR KAHANOVITZ: Yes.

COURT: But in a sense your expectation is lost if you materially breach. And I am not referring to whether he did or did not materially breach.

MR KAHANOVITZ: Yes.

COURT: I am just looking at this abstractly now. So what you are saying to me is that or arguing is that the – if there is a material breach, even though you might have had expectation immediately prior to the breach, the breach itself terminates or would terminate the notion of any expectation thereafter.

MR KAHANOVITZ: Well, in the case of a reasonable person it should. Let us put it that way.

COURT: Ja, of course.

MR KAHANOVITZ: Yes, because that then deals with – because in the repeated renewal type cases where you say: Where did you get your expectation from? Your contract says that it will never be renewed. And the guy says: Yes, but I have had this contract seven times over again and this was the eighth time coming up. And you say well that pattern of behaviour on the part of the employer has created an expectation in my mind that it was going to be renewed. So too it must be that behaviour by the employer that would have

created an expectation that it was not going to be renewed must also be given value.

COURT: And the point is that if the employee's conduct is such during the course of the contract – the conduct that would have led to the employee being dismissed would also be conduct effectively that would extinguish the expectation.

MR KAHANOVITZ: Exactly, M'Lord, yes. I mean, just to give a simple example: You employ me and I hit you over the head with a baseball bat on day three. I mean, it would be somewhat ridiculous for me to say on day four I still had a reasonable expectation of renewal.

COURT: Ja. I never quite thought of it quite so clearly now. Now I understand the – thank you very much.

MR KAHANOVITZ: Then, M'Lord, the racial profiling as an employment policy or practice, it is paragraph 42:

> "The case which the applicant set out to establish was the following: That there is a policy that the content of the People's Post must perfectly fit the racial demographics of the readership. The race of the journalists must also fit the racial demographics of the leadership. The Dludlu and Jansen articles were rejected because they did not conform with the policy of racial profiling. The argument is untenable for at least the following reasons: The first building block is that the newspaper must only publish material of interest to

Coloured readers, but as the editor has pointed out, the geographic footprint of the newspaper is not homogenous."

So not only did they not do it, but why in heaven's name would they want to do what he says they do. Then page 19:

"He could not explain why, if respondent was practising this policy, a white female was chosen by the editor who then in turn went and employed a white male to write articles about, on his version, would then be Coloured arts and culture. The applicant's contention that: I."

And that quote is from my notes of his evidence:

"I wanted to assist them because I am coloured – was a feeble attempt to set up a version consistent with this thesis."

In other words to him his thesis only made sense if he said that he was coloured because only Coloureds were used to do this sort of work, but he is however not a Coloured, but a white male.

MR LEWIS: Right (speaking in an undertone).

MR KAHANOVITZ:

"Geographic footprint will because of our history often coincide with old group areas. These communities are a reality. The stories are only of those of interest to the community and readership sells advertising. So he must show not only the existence of the policy, which we say

he has failed to do, but moreover in what way this policy affected him as an employee. His endeavours to do so by claiming that his stories were rejected because they did not – he endeavours to do so by claiming that they were rejected because they did not conform with racist policies. It cannot be disputed that the editor has raised valid questions about the contents of both articles. His own note describes the one article as a vapid piece hastily put together from music industry bumph and promo material. He also does not dispute that the editor said to him that she was concerned about running with the Jansen quote until it was checked. The employer's version is thus simply that there is no policy of racial profiling and Dean's refusal to run the articles prepared by him were due to legitimate editorial concerns. Even if there had been such a policy, which is denied, there is no nexus shown between it and the rejection of the articles. Against that one has a fantastic conspiracy theory requiring the sins of the fathers to be visited upon every editor currently working on any title falling under the control of the respondent. On this argument Dean is an automaton programmed to perpetuate the ideologies of Verwoerd when deciding whether to run a story on a shark attack in Fish Hoek."

Right, then, M'Lord, on credibility:

"It is respectfully submitted that Dean was an excellent witness. On the other hand the applicant was an extremely poor witness whose version is replete with inherent contradictions. To the extent that there is conflict between the versions of the two witnesses, her version should obviously be preferred. Mention has already been made of some of the problems in his evidence. Further problems which I wish to highlight are as following: 1. If Dean needed to hire him to help her fake it because of his community contacts and struggle background why would he have been hired to do layout and not as a journalist? Why would they need to entice him to write at a later stage if he had been hired so that his byline could make the papers credible in the eyes of Coloured people?"

In other words his version makes absolutely no sense. He says: They wanted me because my byline would buy them credibility in the eyes of Coloured people. But we know he was not hired, on his version, on his version, he was not hired for – he was hired to do layout only on his version, which would be very strange for them to do if they needed to hire this famous struggle journalist to buy them credibility in the eyes of Coloured people.

COURT: And that he – and he claimed that he was forced to do that. He was forced ...(intervention)

MR KAHANOVITZ: Yes.

COURT: Isn't one of his claims that he was forced to provide these articles?

MR KAHANOVITZ: Well, again, there are two versions there. There is the 'I was forced' and then there is 'due to the attractiveness of Annelien Dean I agreed to do it' and what Dean said yesterday was that she never forced him to do it. In fact if anything he was terrifically keen to the extent that he – so terrifically keen he kept on bothering her to the point of distraction from her work about this issue.

COURT: His other – he did also say that he agreed to do this because it would improve his chances of renewal. I think he did give evidence ...(intervention)

MR KAHANOVITZ: I think he put it to the witness that ...(intervention)

COURT: No, no, but he himself in his evidence ...(intervention)

MR KAHANOVITZ: Oh, yes, yes.

COURT: Said that.

MR KAHANOVITZ: All right, then there is his initial refusal to answer any questions under cross-examination until and unless they are put in writing.

COURT: But, mister – that is because he did not understand what was required of him and so ...(intervention)

MR KAHANOVITZ: I do not know, M'Lord. I mean, he appears

to have done considerable reading about the law and anybody who has ever watched any American court drama will know that witnesses do not and cannot do that. You do not need to go to get a BA at UCT which he has as well, so. He made grandiose claims about his role in the liberation struggle. He namedropped, he alleged links to heroes of the struggle. He alleged substantial influence which he had on ANC policy and he went so far as to write up his own biography on Wikipedia in which he purported, depicted himself as a major struggle figure. And the point that I am making ...(intervention)

COURT: Was that part of the evidence?

MR KAHANOVITZ: It was put to him based on the articles that are at the back of the – oh, you are talking about the Wikipedia point, not the others?

COURT: Ja, ja. Okay, well, just to answer me – the articles at the back. I do remember you referring to blogs and the like.

MR KAHANOVITZ: It is at page 76 of the respondent's bundle. It is an article – it was taken off by the editors of Wikipedia because they, hm.

COURT: Was this document ever – okay, it has been, it is what it purports to be.

MR KAHANOVITZ: Let me see if I can find – it was put to him, as far as I recall, that it had been deleted by the editors because it did not have verifiable, any verifiable – the claims made had no verifiable sources.

MR LEWIS: And Media 24 delete me and then? It is the only verifiable resource.

COURT: Mr Lewis, are you addressing the Court or are you addressing mister ...(intervention)

MR LEWIS: I am objecting, Your Honour.

COURT: Well, first of all if you want to address me you stand up.

MR LEWIS: Right.

COURT: And second ...(intervention)

MR LEWIS: M'Lord, I object, I object to the manner in which this charade is occurring. It is an absolute charade.

COURT: Okay, well, will you – I have heard your objection. It is overruled. Please sit down. You will have an opportunity to reply in due course. And next time – the next time you wish to address the Court you stand up and ask for an audience. Mr Kahanovitz?

MR KAHANOVITZ: M'Lord, I cannot right now – maybe we should – I cannot find a note from my attorney's notes about cross-examination where I cross-examined Mr Lewis on page 76. I know that I definitely cross-examined on his claim for example that Nelson Mandela had sold out in the liberation struggle which is at page 72. Maybe my attorney can just check whether I in fact put that document to him, but nothing much turns on it, so. M'Lord, unless I tell you that we found the reference maybe in the cross-examination, maybe one

should just – it is in the bundle, but I am not sure as I stand here now that there was in fact cross-examination on it. Although my memory tells me that there was. I will get back to Your Lordship on that later if we find the note.

"Wild and unfounded allegations were made by him in the media against not only the respondent, but the lying Irishman O'Reilly and Associates."

And that was put. The people of South Africa he says he intends suing.

"Nelson Mandela, who was literally brainwashed into identifying with his jailors."

Etcetera. And the footnotes are there of the documents that he wrote up.

"The inference that he appears to wish one to draw is that he is the only person who has not sold out on his beliefs. He claims without foundation that the copy of his contract and employment placed before the Court is a fraudulent document. In circumstances where he – not only does he have no evidence to back up this claim, but there is nothing in the document that would have served to advance the respondent's case if it had been fraudulent. He thus makes an accusation of fraud in a court of law with no basis whatsoever."

And there is ample case law to say that such baseless allegations are treated seriously.

"He claim that he would have applied for a job with the TRC, sorry, with the respondent, had he known it had not been exonerated by the TRC is ridiculous. Although the TRC report is a public record he said he had not read it."

Even though it seems to feature significantly in his thought processes.

"In either event no journalist would need to read the TRC report to know something about the history of Naspers and it is obvious that he applied for the job with full knowledge of the history of the respondent. When these contradictions were pointed out to him he said that he would continue to hold onto the belief that had he known that Naspers had not been given a clean bill of health by the TRC then he would not have applied for the job. His claim that he was forced to work a seven day week was untrue. His claim that he was required to distribute newspapers every Tuesday morning was false. Dean testified that the newspaper is not just distributed by staff, but by."

Obviously that should have been outsourced company.

"This version was not challenged. His claim that 'I am a Coloured' is ridiculous. The note which he prepared for the evaluation meeting supports the contention that many of his claims are fabricated as he makes no mention of any intention on his part to raise what are now claimed to

have been the burning issues at that time, namely discrimination against him as a Jew and rejection of his articles due to racial profiling."

Your Lordship must bear in mind the evidence there, that note is his aid, memoir – he says he does not know that he is being called to this meeting to be given his marching orders. You can see from what he has done in the note he is going to give them what for, tell them what needs to be changed at the newspaper, to just – let me just get – in order to turn things around. But nowhere – it is in his bundle.

COURT: It is page 27 of applicant's first bundle and it is headed: Problems encountered at the second production cycle.

MR KAHANOVITZ: Ja. You can see, this is the speech that he was going to make at the meeting by advertising the need for editorial directives about what constitutes community-driven, about the great scoop he got in getting an interview, about his time being spent on the story late Friday night, the story was rejected out of hand, etcetera, etcetera.

"A khoki board that we need so that we can write them down as leads come in."

Etcetera, etcetera. Nothing about what we are now told are these terrible hours that conflict with his ability to practice his Jewish religion and nothing about a claim that his work is being rejected because of racial profiling. In other words what

I am submitting to Your Lordship, that stuff is his reaction to what then happens to him at the meeting.

COURT: But he is called to a meeting.

MR KAHANOVITZ: Yes.

COURT: Isn't it consistent that he – he is of the view that the meeting is to deal with problems encountered in the second production cycle?

MR KAHANOVITZ: Yes.

COURT: And Ms Dean and Mr Taljaard have a very different reason for the meeting.

MR KAHANOVITZ: Yes, all ...(intervention)

COURT: But what we do not have is Mr Taljaard's evidence because Ms Dean says she never called him – she never – she spoke to Mr Taljaard, but Mr Taljaard is the person who called the meeting. So what we have on record is simply his version of what the meeting was about.

MR KAHANOVITZ: No, no, what I am saying, M'Lord, the allegation ...(intervention)

COURT: What he thought the meeting was about, ja.

MR KAHANOVITZ: The events which he says form the core of the case before this Court are events that happened before that meeting. If he was going along to a meeting where he was going to raise with management his problems, it is strange that the first time we hear about those problems is when he decides to take up the cudgel against his former employer and

not at the time that he is working there. In other words Ms Dean says – these things that he is now saying in court about treatment of Jews, about an editorial policy involving racial profiling, did he say anything about this while he was working for you? And the answer is no.

COURT: Ja.

MR KAHANOVITZ: So what I am saying is when it comes to credibility and believing him I am submitting to Your Lordship that this case is part of a vendetta which he is pursuing against his former employer. He has looked for buttons to push which he believes are most hurtful to the respondent and he has constructed his case around those, without properly considering – or I do not know if he really cares to be quite honest – whether he has a sustainable case in law. 49.11:

> "He made false claims about the religious and cultural background of Dean in order to."
>
> That should be 'bolster his case'.
>
> "He included vehemently anti-Semitic cartoons in the bundle that have absolutely nothing to do with the respondent, that do not."
>
> And they are vile cartoons, M'Lord.
>
> "They do no emanate from any of his publications, but from some publication called The Owl(?). Asked to explain why the editor of the Sowetan would be promoting the views of D F Malan all he could say was

that: I believe the Court should accept my hypothesis."

In other words everybody who is an editor of any Media 24 title, on his version, is in effect a practising racist.

MR LEWIS: Yes.

MR KAHANOVITZ: Well, there you have it.

COURT: Well, maybe you should just put on record.

MR KAHANOVITZ: What?

COURT: What he has just said.

MR KAHANOVITZ: Well, I am putting it on record then that his answer to my assertion is yes. And if you made an allegation of that nature, which a Court finds that you cannot sustain, then you must accept the consequences of what is coming your way, which then brings me to the question of costs:

"Submitted that costs should be awarded in favour of the respondent. There is no ongoing relationship between the parties which needs to be preserved. This ill-conceived litigation has run for five days in court and has further been complicated by numerous procedural skirmishes as the applicant does not observe the rules of court, but generates papers that (indistinct) suits him. He also uses subpoenas without justification."

Your Lordship will remember we had a string of people pulled away from their work to bring all sorts of manner of documents that have got nothing to do with this case.

"This case is clearly part of a vendetta being pursued by

the applicant against respondent in which he has in this court sought further to publicise the various themes on which he has waxed lyrical in his internet based campaign. It is respectfully submitted that court proceedings are a serious and expensive business and the Court's valuable time should not be wasted with what amounts to little more than a badly researched Hyde Park corner soapbox lecture. A cost order should thus be made, not only because the respondent is entitled to it as a successful party in these proceedings, but also to discourage further similar litigation. Troubled people who imagine that they are constantly the victim of persecution should not treat courts of law as a port of call in which to seek solace."

Those are my submissions, M'Lord, unless you have any questions?

COURT: Mr Lewis?

MR LEWIS: M'Lord, I request perhaps if I could be given just a bit of time to formulate my response to Mr Kahanovitz. He has delivered quite an interesting fantasy of the version of events and I believe I have the right to respond in some kind of rational fashion. It would do us a disservice if I just gave an immediate response.

COURT: Yes, well. What is the time? 12:20, 20 to 12:00. (Soft discussion with unidentified person).

MR KAHANOVITZ: M'Lord, might I suggest – I am in Your Lordship's hands – it is 20 to 12:00 now – that we stand down till 12:30 to give him an opportunity to prepare that argument?

COURT: Yes, that will be fine. Mr Lewis?

MR LEWIS: I am agreeable with that, Your Honour.

COURT: All right, we will stand down till 12:30.

**COURT ADJOURNS (at 16:50)**

**COURT RESUMES (at 15:18)**

COURT: Will you go outside and see if he is around? (soft discussion with unidentified person).

MR KAHANOVITZ: M'Lord, my instructing attorney is going to have a look, because he tends to stand in one place sometimes, so we are just going to see if he is there by any chance. I do not know.

COURT: Okay. Ja, for the record I just wish to say that I entered the Court at half past, it is not twenty-five to. There is no appearance on behalf of the applicant. My associate has gone outside the court to see where he is and the respondent's instructing attorney is now going to have a further attempt to locate him and I will wait another five minutes I suppose. (Long pause and silence in court).

MR KAHANOVITZ: M'Lord, I understand this is Mr Lewis' friend who knows something of his whereabouts.

COURT: Yes.

UNIDENTIFIED SPEAKER: Sorry, may I apologise, because I

also understood otherwise I would have reminded. He said I must meet him here again at half past one because he went down to the internet café to do – to just type up his ...(intervention)

COURT: It was at.

UNIDENTIFIED SPEAKER: I also misunderstood it, because he said the Court will take a break till two o'clock.

COURT: Till 12:30. It was clear ...(intervention)

UNIDENTIFIED SPEAKER: Both me and him misunderstood it and I am, I am just going to get out to get him now.

COURT: Okay, I do not want to argue with you. Thank you very much for the information.

UNIDENTIFIED SPEAKER: Should I go call him now?

COURT: I think you better call him.

UNIDENTIFIED SPEAKER: It is quite a distance for me now to walk because I do not know if his cell phone is on.

COURT: (Indistinct). Mr Kahanovitz ...(intervention)

UNIDENTIFIED SPEAKER: Give me 10 minutes, give me 10 till ...(intervention)

COURT: Please, please, please just do not address me there. Will you – you can go and find the applicant if you wish. I am going to – I think we will ...(intervention)

MR KAHANOVITZ: Adjourn.

COURT: Adjourn and if he arrives then we will deal with that then.

MR KAHANOVITZ: Should we make a time when we – either if he – a cut-off period.

COURT: Yes, my sense is that he – he better be here by one o'clock.

UNIDENTIFIED SPEAKER: Thanks.

**COURT ADJOURNS (at 15:26)**

**COURT RESUMES (at 15:10)**

MR KAHANOVITZ: M'Lord, while Your Lordship was out of the court the applicant made threats to me and my instructing attorney saying: 'You guys are going to need tickets to New York. I am not going to be bullied by you because you have got suits. I have also got a suit'. I did not ask him to elaborate on exactly what he meant, but by his body language and his tone I understood it as a threat, as did my instructing attorney.

COURT: Mr Lewis, did you make those remarks?

MR LEWIS: I don't believe it was a threat. It was casual conversation. They were mentioning Pillay – the Pillay judgment. I suppose I should not be talking to them. I am sorry.

COURT: Will you explain why you were late?

MR LEWIS: Sorry?

COURT: Will you explain to me why you were late?

MR LEWIS: I believed it was recess until 2:00.

COURT: It was very clear that it was 12:30.

MR LEWIS: I did not hear that, sorry. I have only one pair of

ears.

COURT: Will you proceed with your argument, Mr Lewis?

MR LEWIS: Indeed.

**MR LEWIS ADDRESSES COURT IN REPLY:** M'Lord, I am not an attorney. I am not a qualified member of the Bar. I have no authority to speak or exegete on labour law. I am not here to argue the minutiae of discrimination laws, of evidence and so forth. In fact, I am at your mercy. I am forced to represent myself because my legal insurance was repudiated. I sought legal assistance. I have – as you know, well know, there is an IFP application at High Court. I have approached the Cape or President of the Cape Bar Association attempting to find some kind of solace and I have yet to find anyone who has stepped into the breach to argue my case.

So therefore I am at an extreme disadvantage when it comes to the various arguments and the effects on the legal framework and jurisprudence and so forth. So I am going to attempt just to essentially answer some of the new tone and the new voices that are emanating from this fantastical document that is called respondent's heads of argument. Perhaps if we could turn to the page, page 12. So I am going to take it from there.

M'Lord, there seems to be some debate about whether or not a single event or series of events can constitute an employment policy or practice. Can discrimination or racial

profiling against a group be considered discrimination against an individual? If an individual objects to such discrimination and is not a member of that group which is being discriminated against can that individual object and if his objections are then met with violence and oppression by the other side, a naked aggression by the other side, and that person then in turn suffers discrimination is this enough to fall within the ambit of the Employment Equity Act?

M'Lord, it is submitted there is a pattern of discrimination in Media 24 that does not fit the discreet compartments into which the respondent would like us to fit this discrimination. If only we could just package the discrimination and file it away in cabinets, brush it under the carpet, maybe this whole case will just simply disappear. The objective of the respondent has been to attempt to remove the cause of action by fabricating an issue regarding my conduct as an employee.

Whether or not the cause of action stems from an act of discrimination or the action stems from a disciplinary hearing about my own conduct, there are certain facts which the respondent has been unable to prove and when confronted with the evidence against it has sought to distract the Court. If the issue at the evaluation was indeed my conduct why would I write an evaluation report talking about the problems in the production process and illustrating the fact that whilst in the employ of Media 24 I am now working on a Friday night.

Why would I write such a document? No mention of the incident to which Dean refers to in the – either the – in fact, either the Jimmy Dludlu story or the Robbie Jansen – none of that is referred to. Sorry, I am getting confused. The mistake that we are making is the problem with the Jimmy Dludlu story and the Robbie Jansen story, which in fact was a topic of conversation at the evaluation meeting, has absolutely nothing to do with my conduct as an individual.

Me breaching some internal rule at Media 24 has absolutely no bearing on this matter. If the issue was my conduct why would Dean's diary on the day refer to that of overtime talk and why would she, when under cross-examination, suddenly at the end of a painstaking process of cross-examination, why would Ms Dean suddenly reveal to us that the problem was in fact, as she put it: A problem with the carpool.

All of a sudden the issue of the car suddenly manifests itself in this court. I have made no reference to it in any of my documents. In fact, the issue of the car quite by chance escaped my mind and I find it very interesting because it reminds me of those Jews who refuse to drive on a Friday night citing their own beliefs. The only valid reason for rejecting the Dludlu story that Dean can offer us is the apparent lack of a citation to an URL.

That is quite aside from my own characterisation of these

articles. I am not prepared to defend the first article. I don't believe it is a great piece of prose or work or whatever, journalese, but it is my right to defend my byline in any court and anybody confronted with the kind of prejudice meted out by the respondent would seek to defend their record. The respondent has not given me such an opportunity. Instead it has resorted to the lowest form of bully-boy tactics.

The People's Post continues to act in a way that discriminates. Not by publishing shark articles or glowing reviews about the dog that died next-door, but by refusing to publish the true life stories of those who live in the very community serviced by the supposed community newspaper. The true life stories of suffering and antagonism and conflict and the resolution and transformation through a beautiful opportunity, the new South Africa, for growth.

So one of my allegations is that this is an example of, as you in fact put it, I am a progressive person stepping into a right wing organisation confronted with conservative and right wing prejudices that affect me as an individual. The editor continues to deny opportunity to people such as Robbie Jansen to supply comment to the newspaper. If this is not an act of direct censorship against those affected communities then I do not know what is.

The editor's denial that the discriminatory policies or practices do not exist merely because they are not written

down in writing is not enough to deflect suspicion that what is merely happening is a policy of expedience which reinforces the last vestiges of what can only be called white power in the Cape. It is my right as an individual to dissent. The Constitution specifically mentions in a variety of paragraphs and even in the preamble, it mentions freedom of thought, freedom of conscience, belief, association and religion all in the same breath in the same document.

This dissent, M'Lord, is therefore synonymous with our democratic values as a nation. A significant aspect of this case is the manner in which my beliefs as a person of Jewish descent have been attacked by the respondent. The respondent was well aware that I was Jewish and the work week as it was constituted – I would never have joined such an organisation if there was not some kind of modicum of value system. And yet the manner in which this contract has been interpreted willy-nilly, anything can happen, and I am objecting against the grounds, whether it is a material breach or whatever how one wants to construe it, that essentially this contract is the antithesis of everything a Jewish person might agree with.

Surely working on a Friday night in such circumstances would be open to a form of review. M'Lord, this is not a case about somebody who was employed and who from day one was problematic. Why would the company even employ me in the

first place if that was the case? No, M'Lord, this is rather a case about the limits and constraints of private law *vis-à-vis* labour law and the rights of the worker or employee *vis-à-vis* the rights of the corporation.

The respondent has consistently treated me as a social inferior, a person with less status than a hundred percent white person. The respondent has chosen to cynically hide behind the racial categories of the past, have many illustrated their own hypocrisy by on numerous occasions raising this issue of race, as if it is a defence in any court of law.

No-one in today's age can – should be allowed to walk into a court and say: No, Your Honour, this person is a white person. This person is a coloured person. This person is a black person and therefore I am off the hook because race is some God ordained fact of nature. These are not scientific facts. Even science, the scientific establishment, would frown upon such prejudice and discrimination illustrated in the 21st century.

So therefore again, what are the rights and duties of an employee *vis-à-vis* the obligations of an employer? It is very clear from the very outset that the contract of employment has gross defects. Not only does the contract lack a page setting out what the responsibilities of the employee may or may not be or what any rights the person who is employed might have, but there appears to be some issue about whether the

negotiation in terms of the contract begins on the third, second or third month or what, how one should approach these issues of interpretation of the contract.

The fact of the matter is that I was not able to retain an attorney of the stature of a Mr Kahanovitz to come and plead my case before Mr Taljaard for leeway in my contract. No, I was treated like every other garden boy or kitchen servant by a person who believes that if we evenly apply discrimination that somehow validates the discrimination of the past.

Respondent has targeted me because of my political and religious beliefs. They were obliged to hire me. This is the new country, people are transforming, yet we still have these problems in the newsroom. There appears to be some issue – right. Right, M'Lord, I objected to the ethical standards that Ms Dean holds up in such high regard, her standards, her standards of loyalty for instance, her standards of obedience to authority, her standards of kowtowing and yay saying. Would a progressive Jew have a problem with driving on a Friday night? I do not think this is the issue, Mr Kahanovitz.

We have already heard evidence about the non-dogmatic nature of Judaism. I am not obliged by any doctrine to strict adherence to the Torah and yet that document informs my day to day – my identity, my life. What else have I got? Respondent believes that merely, merely being who I am, I am simply playing the anti-Semitism card and it is a card which I

have been very careful not to play. I am not trying to appear as one of those Jews who is paranoid about persecution. I am not afraid to go out on a limb. I have gone out on a limb for the people of Palestine. I have gone out – I am on record as supporting the end of the siege of Gaza.

I am not a person in the community who hides behind the synagogue or hides behind a church. I am someone, because of my beliefs, has essentially gone the whole gamut of experience. And here I stand having experienced the same kind of oppression than any South African who can truly call themselves a South African would have experienced.

I am not – no longer a privileged white person as Mr Kahanovitz would like us to believe. Now the problem in the company has to do with the set of norms and circumstances informed by the former white rule and the deals which were being made in terms of the sunset clauses. Surely the sunset of white power is at an end. M'Lord, Judeophobia is intolerance of Jewish expression. I am not referring to people who do not like Jews. I am referring to people who do not tolerate the experience and existence of the Jewish personality and the Jewish identity within a corporate context.

I am not referring to how I dress or where I worship, but rather to my personality as a Jew. Media 24 on the other hand have merely dished up their Calvinistic Protestant informed views in which Ms Dean herself was not able to reveal that she

was a Catholic. How can I trust a work environment in which the editor herself is not able to assert: Yes, I am a Catholic and proud of it. No, she has had to conform and kowtow to the *NG Kerk* and she has had to hide her Catholicism. It is the only reasonable explanation for her telling me in a newsroom that no, she has got a problem, she comes from the *NG Kerk* and all of a sudden in this court lo and behold she is a Catholic.

M'Lord, I am not one of those yes people and I have in fact gone into detail that one could argue that my sense of argument and my sense of rationality is a result of the Socratic tradition that is a result of Judaism in fact, where people are taught from a very early age to question authority. Now, Your Honour, this Court is tasked with protecting my rights as a journalist, as a citizen and as a worker. Can a single instance in which media managers acted out of hand be construed as policy or should the question rather be: Can a single instance, which media managers acted beyond the pale be construed as discrimination?

I am not alleging a direct policy affecting all Jews in South Africa. I am alleging a policy which is the antithesis of my own beliefs as a Jew. As far as the respondent is concerned, Ms Dean has merely to step into the court to declaim about my conduct and that is enough for them. They have proved their case. She has – in fact the exact opposite

is true, M'Lord. She has contradicted her statement on numerous occasions and in any event is not the sole perpetrator of the crime.

The problem is not the result of one individual's actions, but several. Yes, there was a reasonable expectation of renewal and if not, then where, then there was at least a reasonable expectation that the termination would at the very least occur in an orderly, disciplined and a legally binding manner, which obviously has not.

There are no documents that have been offered up as the blue chip document in which we should look and study and find no, this was a perfect example in which termination of contract happened without there being some kind of legal problem. The respondent has been unable to show any evidence contradicting my own statement. There is no written warning, no written reason for termination, only the words of Dean.

If there was a material breach of the contract – and one may assume there was – was the material breach the result of the actions of the respondent or the actions of the applicant or both? Were we both to blame perhaps? I vouch that the only rational explanation provided is my own and that the explanation provided by the respondent is inconsistent. Instead or rather the explanation provided by the respondent is consistent with a person who believes they may act with impunity, who believes that the LRA is just a document that

can fix with some expensive legal counsel, that they do not have any – have to worry about such a document.

They can just send in their finest counsel and all their problems will suddenly disappear, because they can wrap up the plaintiff in red tape. The respondent has expatiating at length about the supposed homogeneity of the various communities and it is very fancy words that suddenly start appearing. The truth is in the four communities in which I worked there was a degree of homogeneity and there was a homogeneity of class reflecting the poverty caused as a result of the Apartheid system.

The Jansen article was rejected because it did not conform with the well-mannered sensitivities of a person living in Fish Hoek. Can the same be said of previously disadvantaged communities? How would they have received this article? Surely they would have acted differently. Now Ms Dean may not think that Robbie Jansen is of any value or is not a hero. Surely he is a hero in the communities of Grassy Park and surely I would not be standing here with a letter from Rashid Lombard expatiating upon how the audience for the Cape Jazz Festival is drawn from precisely those target markets and what a wonderful opportunity this would be if we could redress these issues and a past as we know it where black jazz men were forced to perform behind curtains, behind a veil of secrecy and segregation that was informed by the

selfsame corporation that this action is pending.

Now, Your Honour, M'Lord, the respondent has set up spurious tests to make us believe that everything is under control. Ms Dean has a handle on the situation. There was no chaos at the evaluation as she put it. Respondent would like us to believe that Ms Dean's position should rather be seen as one of a fragile minority within the context of a vast black majority, that my appointment was not controversial, was just merely the corporation doing business.

M'Lord, for the record, I believe that in numerous statements I have indicated that race is a social construct, that race should not be considered a res or a thing in the domain of law and that the definition, delineation of race, should rather be a personal, private thing between one self and one's maker. The existence of a direct or indirect policy of discrimination therefore is not crucial to my case. It is merely the circumstantial evidence and framework surrounding the true problem which is racism itself, anti-Semitism as it stands and as it is and the complete intolerance shown by the respondent to differences of opinion.

I stand one hundred percent behind my second article and as this Court knows it was the only piece that was – not the only piece that was rejected, there are several other pieces of information that have been thrown out. It just so happens that we have come to this point because of the

manner of the LRA and the way it is proceeding before this Court where we spend an enormous amount of time discussing one or two documents, but what happened to all those other documents that were rejected? There are no explanations for them.

Is any of this consistent with a corporation that would like to be seen as the perfect example of a community-driven organisation, no racism whatsoever, or is this consistent with an organisation that really is just perpetuating a certain lackadaisical oppress – you know – a light from of oppression, the banality of evil in our day and age.

COURT: Mr Lewis, you are giving a speech.

MR LEWIS: Right.

COURT: I would prefer you to ...(intervention)

MR LEWIS: To tackle the points.

COURT: To give me an argument.

MR LEWIS: Yes.

COURT: And again I have given you really very wide berth. Normally the purpose of a reply is there to address the issues raised by the respondent's counsel.

MR LEWIS: Right.

COURT: So rather than restate what you say at length in the pleadings I would prefer it if you would just direct your attention to the arguments that you have raised by the respondent in his heads of argument and give me your

responses to them. You started I thought rather aptly on page 13, but we never got any further, so.

MR LEWIS: Right. Perhaps if it might please the Court – I am essentially addressing the issues that are raised from page 12 onwards. I have not had time because of the pressures involved to put note and sort of cross-reference.

COURT: No, no, you do not have to.

MR LEWIS: You see, this is my problem. I would have been able to do that ...(intervention)

COURT: I really am now – I am now on top of the documentation. You can be assured that I will be able to do it.

MR LEWIS: All right.

COURT: Anyway, you have now ...(intervention)

MR LEWIS: May I continue ...(intervention)

COURT: You have addressed really fully on, on ...(intervention)

MR LEWIS: It is just a little bit and then I will get back to where I sort of – I was phoned in the middle of this to – I had not realised that the recess was until 1:00.

COURT: It was 12:30 actually.

MR LEWIS: 12:30, sorry.

COURT: But – okay, finish what you want to do and then.

MR LEWIS: All right.

COURT: But again, do not restate things that you have said both in evidence and you have said it in the pleadings.

MR LEWIS: All right.

COURT: Try and direct yourself as to why I should not follow what Mr Kahanovitz has said in his heads of argument. That is the thrust of what you should be doing.

MR LEWIS: Yes. M'Lord, I am essentially talking to this document, so I feel that if I continue ...(intervention)

COURT: Well, talk to the document, but please do not rehash anything that has been done before.

MR LEWIS: All right.

COURT: You could be quite sure that I really do understand what you have said.

MR LEWIS: All right. So, M'Lord, I am essentially – my argument is surely a person of the stature, Annelien Dean, with her history in Media 24, she is the poster child of Media 24. She has had an exemplary career, beginning from day one working for the company. It is not something that I can say – I can't say I have worked for Media 24 from day one. Surely the poster child for the company, with her history in the District Mail and the Express and now the People's Post, surely someone of her enormous weight and stature and authority should be under some pressure to correct the imbalances of Apartheid.

M'Lord, I submit that Ms Dean has done absolutely nothing rectify or change the policies which no doubt were in place at District Mail and Express and would stem from that

evil system. Consequently, M'Lord, Dean has no credibility. She is not an exemplary witness. It is no conjecture, but rather a fact, a fact before this court. I have worked for Swelaki Sisulu. I have also worked for Sandile Dikeni. Dean on the other hand would have to fake her CV to have any struggle luminaries on it. Respondent would like to have its cake and eat it. It would like the authority of the struggle press in our communities, but it is not prepared to offer in return an equitable employment contract recognising rights of workers and the rights of various minority groups.

And this is not to say that any time such a history has been up for sale. No, M'Lord, I find the problem of my own existence in the new South African, in which separate development is still occurring, undeniable. In fact it is a tragedy, an ongoing tragedy. How can I deny my friendship with Rashid Lombard for instance? Ms Dean, on the other hand, can only presume to know Mr Lombard. She can only presume to know his personal history.

My claims therefore are no less grandiose than offering up my own family to this court for inspection. M'Lord, Media 24 continues to oppress. The People's Post, I dare say, one could very easily lead such evidence, People's Post has not even bothered to mark the death of Dennis Brutus. The history of the communities affected by Apartheid is essentially being thrown down the drain. Perhaps it is out of a cynical diabolical

notion that if we all die off at some point we will forget about the struggle, it will all just go away and the white race will be better off for it.

That is the total of what I managed to write in the interval. So we are just going to revise where the – where I left off in the document. I think I am just going to – from page 15 – look at this accusation of hypocrisy.

Now I find it amazing that new accusations keep emanating. This is not a solid story that is coming from the other side. It is a constant revision. One minute it is a story about my conduct as an individual. The next minute it is a story about the staff transport. The next thing it is an issue of whether or not I was working on a Friday night. And who gets to decide what is a multi faith or a Philosemite or who gets to decide who is an Orthodox Jew or not?

I do not see why I have to apologise for being a Jew self-defined by his Jewishness, as a result of my Jewish background. I do not have to apologise for being someone who thinks that Friday is of any significance and that God forbid I am not one of those ultra Orthodox Jews. This is not a case about an ear piercing, M'Lord. This is not a case about whether or not I am wearing a *kippot*. This is not a case about one of those very Orthodox people. This is a case about the rigmarole ordinary progressive Jew, in fact, of a particular breed and a particular strain. I am not the only one.

Mr Kahanovitz would like the Court to believe that I am just one example, one instance, of a dissenting Jewish person in South Africa. There are many examples. Ronnie Kasrils is a very good example of someone who quite similar to me, but holds completely different views about the Middle East. I am not the only person to stray from my flock and think differently. It is a characteristic of the Jewish people to think different, M'Lord.

So Mr Kahanovitz walks in here with a letter from the Jewish Board of Deputies. Sorry, my own letter to the Jewish Board of Deputies – in which he takes everything out of context, strips it of all meaning and delivers it up as this is an example of me confessing: No, this has got nothing to do with Friday night.

COURT: Listen, I do not think you have to deal with that argument. I do not believe that the Jewish Board of Deputies has anything to say what this case is about or not about. That is my job, so you do not have to take it any further.

MR LEWIS: All right, I think we got to the point wherein my common law in, my own knowledge of the law as it stands – and I don't claim to be an expert – but I am prepared to entertain thoughts about whether Harksen is relevant or not.

COURT: Well, is Harksen relevant?

MR LEWIS: I believe it is. I believe that the onus is on the respondent to prove the fairness of the discrimination or

unfairness – you know. I am essentially saying that there has been a differentiation in the community. I am a result of the differentiation. I am a result of separate development. I am a result of all the choices that were made and my career in the struggle. I do not think it is an issue that is like a black hole, you know, we do not know what David Lewis did in the struggle. We know what David Lewis did in the struggle. We know where he was.

COURT: Ja, no, no, you have addressed me at length on that subject. The issue is that you brought your claim under section 6(1) of the Employment Equity Act.

MR LEWIS: Right.

COURT: Now ...(intervention)

MR LEWIS: Yes.

COURT: And that requires you to prove unfair discrimination directly or indirectly.

MR LEWIS: Right.

COURT: Against an employee - you are the employee - in any employment policy or practice and then it list the grounds. And the two grounds that you have listed are political belief, political opinion or belief and religion and culture on occasion, so the three of those are listed provisions. Now Harksen says that if discrimination is demonstrated then the burden falls on the perpetrator, in this case an employer, to prove that it is fair. But you have to jump the hurdle of discrimination.

MR LEWIS: Right.

COURT: And ...(intervention)

MR LEWIS: There are two forms of discrimination. There is the direct form and an indirect form and one could argue that the indirect form is really the circumstances, the aggriegous history, and that the direct form is the attack against me for being a Jew or not a Jew.

COURT: And the attack?

MR LEWIS: The fact that they have questioned my, me, am I a Jew or not. It is in a document. It is offensive.

COURT: Are you talking about the pleadings now or are you talking ...(intervention)

MR LEWIS: The, it is in, it is in their amendment ...(intervention)

COURT: Or are you talking about what happened ...(intervention)

MR LEWIS: It is in their amendment.

COURT: Mr Lewis, please. You know, I have, it is really very difficult. You just have to understand that when I speak you keep quiet, all right? Now the question I have asked you is this attack, what you call an attack, is that – was that – did that take place in the events material leading up to you leaving the company or are you referring now to the pleadings?

MR LEWIS: M'Lord, the problem with the political expression leading up to the evaluation, right, and the problem of the

overtime sort of – both those problems met, so the problem of the – there was a problem of the editorial and then there was a problem, a contractual issue, and those contractual issues and the editorial issues all met at the same point and this is the chaos that Ms Dean ...(intervention)

COURT: Okay, I suppose what we were debating though, of course, was just the test. So applying Harksen ...(intervention)

MR LEWIS: Yes.

COURT: The question is the fairness, the employer's obligation to prove the fairness of the discrimination.

MR LEWIS: Right.

COURT: Is dependent on whether or not discrimination has been proved.

MR LEWIS: Right.

COURT: And ...(intervention)

MR LEWIS: So – and in order for me, the Harksen breaks up the – is like in three stages. In order for there to be discrimination there has got to be some kind of differentiation and, hm.

COURT: And what do you say was the differentiation?

MR LEWIS: Right, so I mean, it is a moot point that the differentiation occurred. That is not enough on its own to be discrimination.

COURT: Yes, so it is a differentiation and then

...(intervention)

MR LEWIS: So there was differentiation. The issue is was there – I am searching now for the word.

COURT: What was the differential treatment that you have ...(intervention)

MR LEWIS: Sorry?

COURT: What was the differential treatment that you suffered?

MR LEWIS: Besides the fact that I was cast in an inferior role and that is a historical role and that there was no opportunity for me ...(intervention)

COURT: But there was no evidence to that effect. You really just got to base – you have got to base this here – we have a legal set of concepts.

MR LEWIS: Right.

COURT: One of course is which is differentiation.

MR LEWIS: Yes.

COURT: Now I have asked you what was the differential treatment?

MR LEWIS: There was – the disparate treatment.

COURT: What was the disparate treatment?

MR LEWIS: I am the only person who experienced this discrimination at Media 24.

COURT: And what was the treatment? You jumped to discrimination now. We are not yet ...(intervention)

MR LEWIS: The disparate treatment was no-one else was removed from the company ...(intervention)

COURT: Okay, so it is the termination of your employment, whether it is dismissal or renewal or whatever, okay.

MR LEWIS: Right.

COURT: And that you say was because of?

MR LEWIS: Sorry ...(intervention)

COURT: Okay, before we get there. That is the first difference in treatment.

MR LEWIS: Yes.

COURT: No-one else was, was ...(intervention)

MR LEWIS: No-one else was.

COURT: Okay.

MR LEWIS: All right.

COURT: The second? Were there any others?

MR LEWIS: I was the only person who had a problem with the Friday night.

COURT: Because of the – because you were Jewish?

MR LEWIS: Yes. So I am the sort of the odd one out.

COURT: And what you say the difference in treatment is that the policy was either intentionally introduced or unintentionally, but it had the effect of denying you your right to ...(intervention)

MR LEWIS: Right.

COURT: To observe your Sabbath, okay.

MR LEWIS: So whether it is a *de facto* policy or it is overt in intention, it has the effect that I get discriminated against and if I disagree with that discrimination then I suffer further abuse. This I think was quite remarkable. One would think if there was a disagreement there would be some attempt to accommodate. You know, the pattern, and it is a pattern of abuse that I have experienced on numerous – this is not the first time I have experienced this kind of abuse. It is – if there is a ...(intervention)

COURT: Okay, but that is really not relevant in this case, Mr Lewis. All right, so the differential treatment as I understand it is the requirement effectively being required to work in breach of your religious standards. That is the indirect effect or the impact that the production cycle established for the PP, the People's Post, has on you. The second was your non renewal or termination.

MR LEWIS: Right.

COURT: And the harassment? Now you describe harassment in different terms.

MR LEWIS: I have attempted to describe the harassment. The problem is the argument, as you well know, this is just a short-term problem. I have described this as a specious example. It is just sort of a species(?) of corporate – you know – you could look at the bright side and say this is a corporate teambuilding exercise, but if that teambuilding exercise is really: Let us put

you a dog on a leash and just move you around like you are in the army, then it has a complete adverse effect. It is not a teambuilding exercise if the intention – I think this is – the intention, you know, and I have looked at this, is that I can understand the corporate teambuilding exercise as an exception, but to do it twice in a row, to do it consecutive weeks, knowing full well that there is a problem with overtime and that there is pressures and all sorts of problems with implementing the technology in the company, surely that person who does that has some kind of idea that, you know, if we break the dissenting voices in the company – this is the attitude – break those dissenting voices through hard labour.

COURT: All right, no, I understand. What you are saying is that your – what you perceive your claim to be is that the fact that you did not comply with the policies led to you being harassed for political and religious.

MR LEWIS: Yes.

COURT: They are combined together.

MR LEWIS: Yes.

COURT: Am I paraphrasing what your argument ...(intervention)

MR LEWIS: Yes, yes, M'Lord, you are.

COURT: And then once that has been demonstrated then the question of fairness would arise, following Harksen.

MR LEWIS: Well, this is the thing, is that the rebuttal one

would have thought that ...(intervention)

COURT: Yes, no, right. And ...(intervention)

MR LEWIS: So my response really is Mr Kahanovitz has attempted to essentially dispose of this problem as if it does not exist. He has tried to dispose of Harksen. You know ...(intervention)

COURT: Well, I do not think he does. I think that there is (indistinct). You must prove differentiation, then you must link the differentiation to the ground.

MR LEWIS: Yes, yes.

COURT: Once you do that, that is discrimination.

MR LEWIS: All right.

COURT: Once there is discrimination Harksen says that there is a presumption that it is unfair, in which case the perpetrator, in this case the employer, would be required to prove it is fair. So that is certainly my understanding of what Mr Kahanovitz said and that accords with your own understanding of Harksen.

MR LEWIS: Yes, but I feel that there is a failure to accept the differentiation.

COURT: No, no, that is a factual issue.

MR LEWIS: No different ...(intervention)

COURT: No, that is a factual issue. Harksen, you know, was dealing with a completely different case. We are just dealing with the legal framework and then we apply the legal framework to the facts. Anyway, is there anything else you

wish to address me on?

MR LEWIS: Yes, M'Lord. You know, the question in my mind really, coming here yesterday and today, having been given the opportunity to look at the Dlamini and the other Canadian judgment, they are very interesting judgments and I find it quite interesting that Mr Kahanovitz walks in with Dlamini, but he has forgotten about Pillay. The question is, is this a simple nose stud case, is it a case about Friday night or is it a case about cultural identity? What comes out of the Pillay case is preservation of one's cultural heritage. It is not so much the problem of whether or not you – whether or not it is a bona fide religious issue. The fact that the Court found that it was enough to show that this was a longstanding tradition in the community were to be accepted as such.

So really I am asking the Court to accept that *Shabbat* is a longstanding tradition and that my views would have been informed, ergo the evaluation meeting in which Ms Dean acknowledges that there was a problem with driving a car on a Friday had something to do with Judaism.

COURT: I did not understand her evidence to be that, but be that as it may. I understood her to say that the issue of the West End on Friday night arose – that the – she remembers it arose and she remembered it because you had requested for a car that evening.

MR LEWIS: Well, this is the thing, there is an inconsistent

testimony. On the one hand there is an issue of the West End, other hand is an issue of Robbie Jansen and then there is the issue of the carpool. So for me to understand – how can one understand this? I do not think this was about conduct. I think we can rule out issues of conduct, unless they were in terms of my – if it was an issue of the conduct in terms of whether or not the company thought it was correct for me as a Jew to be driving a car on a Friday night or going to West End ...(intervention)

COURT: Really that was not the issue.

MR LEWIS: Was not the issue?

COURT: It just was not the issue. So let us move on. Is there anything else you wish to raise?

MR LEWIS: I do not believe so. I do not believe I have the kind of knowledge necessary to take the argument any further. I do not have the ...(intervention)

COURT: The argument is entirely factual and you have engaged me with some very real knowledge about discrimination law, so I think you are not in any legal disability as far as substantive law is concerned and ...(intervention)

MR LEWIS: Right, oh, this is where – I forgot my point that I was trying to make because we were having a bit of a conversation.

COURT: Ja.

MR LEWIS: I think that what I was trying to suggest is that is

this a case about reasonable accommodation, *vis-à-vis* nose studs or reasonable accommodation *vis-à-vis* my political views and my religious background.

MR KAHANOVITZ: M'Lord, I just want to deal with ...(intervention)

COURT: Mr Kahanovitz.

MR KAHANOVITZ: Yes.

COURT: I do not ...(intervention)

MR KAHANOVITZ: I just need to correct. I am not going to deal in any depth. I just want to tell Your Lordship the reference to Wikipedia in the heads can be scrapped.

COURT: Oh.

MR KAHANOVITZ: It was not put to the witness. Secondly the letter – there is no letter from the Jewish Board of Deputies. The reference is to a letter sent by the applicant to the Jewish Board of Deputies and thirdly the only contention made in the heads in relation to the car was that he had asked for the car so that he could work on a Friday night and we were pointing to the inconsistencies there in relation to credibility. And the - Mr Lewis is right, I no longer refer to the Green Force(?) Security judgment. That is because after having reread it I – firstly I think it is irrelevant to this case and secondly I think it is wrongly decided, so I abandoned any reference to it. I think it is inconsistent with what the Constitutional Court found in Pillay and I do not think either of the cases are of any

relevance to this case. Thank you.

COURT: Thank you very much. Judgment will be reserved.

**COURT ADJOURNS (at 16:02)**