10.4. In Ellis v Deheer [1922] 2 KB 113 Atkin LJ articulated the rule at 121 as follows:

> '... the Court does not admit evidence of a juryman as to what took place in the jury room, either by way of explanation of the grounds upon which the verdict was given, or by way of statement as to what he believed its effect to be.'

After citing this authority, the court in Nanan v The State [1986] 3 ALL ER 248 (PC) at 253 stated:

> 'The same principle applies to discussions between jurymen in the jury box itself. If a juryman disagrees with the verdict pronounced by the foreman of the jury on his behalf, he should express his dissent forthwith; if he does not do so, there is a presumption that he assented to it. It follows that, where a verdict has been given in the sight and hearing of an entire jury without any expression of dissent by any member of the jury, the court will not thereafter receive evidence from a member of the jury that he did not in fact agree with the verdict, or that his apparent agreement with the verdict resulted from a misapprehension on his part.'

10.5. The rationale for this rule is twofold: 'the first is the need to ensure that decisions of juries are final; the second is the need to protect jurymen from inducement or pressure either to reveal what has passed in the jury room, or to alter their view'.

Nanan v The State [1986] 3 ALL ER 248 (PC) at 253h

Ellis v Deheer [1922] 2 KB 113 at 121

Boston v W S Bagshaw and Sons [1967] 2 ALL ER 87 at 88

10.6. The rule in these cases is concerned solely with evidence intended to impeach a verdict. Even that rule is subject to exceptions.

10.6.1. Evidence may be given that the verdict was not pronounced in the sight and hearing of one or more members of the jury, who did not in fact agree with that verdict, or may not have done so.

R v Wooller 171 ER 589

Ellis v Deheer [1922] KB 113

Nanan v The State [1986] 3 ALL ER 248 at 254a - b

10.6.2. Evidence may be given that a juryman was not competent to understand the proceedings, resulting in a clear miscarriage of justice.

Ras Behari Lal v The King Emperor [1933] LT 3

In that case, Lord Atkin stated:

> 'It would be remarkable indeed if what may be "a scandal and perversion of justice" may be prevented during the trial but after it has taken effect the courts are powerless to interfere. Finality is a good thing but justice is a better.'

Ras Behari Lal v The King Emperor has been cited with approval by the Appellate Division.

R v Krasner 1950(2) SA 475 (A) at 482 - 483

S v Moodie 1961(4) SA 752 (A) at 758D - E

10.6.3. Further, in R v Krasner (supra) at 483 the Appellate Division cites with approval a passage from Hume's Commentaries in which it is said:

> 'To withstand and control any attempt, by any of their own number, to influence, constrain or misguide them, was both the duty of the assize, and within their power; and rather, if there were no other remedy, to continue inclosed till the Court meet, and then dissolve their sederunt and state the reason to the Judge (though it should invalidate the whole proceedings), than to acquiesce in a downright usurpation and injustice.'

10.6.4. The list of exceptions to the rule is not closed.
Nanan v The State [1986] 3 ALL ER 248 (PC) at 254e - f

10.6.5. The Appellate Division has in fact had regard to an affidavit by an assessor, other than for the purpose of impeaching a verdict.
R v Matsego 1956(3) SA 411 (A) at 417E

The court referred to Krasner's case (at 418F) but in a different context. It is clear, however, that the court was aware of the case and did not regard the principle enunciated therein as applying to a situation where an affidavit from an assessor was used for purposes other than the impeachment of a verdict.

10.6.6. The rule against the admissibility of a juror's testimony in order to impeach the verdict has no application to the present case. The facts deposed to in Dr Joubert's affidavits were collateral to the issues in the trial. In

relation to his dismissal, Dr Joubert was the subject of an investigation and not the trier of an issue. The rule relating to the impeachment of verdicts by juror testimony cannot be extended to exclude evidence such as that tendered in the present case, which is materially relevant for other purposes.

10.6.7. The appellants' complain in special entries 1.2 and 1.3 that procedural fairness was not observed. Statements in Dr Joubert's reports are relevant to that complaint and accordingly to the issue as to whether or not the court was properly constituted. No privilege can attach to communication or lack of communication between the judge and assessor in relation to that issue. On the contrary, the passages from Dr Joubert's affidavit dealing as they do with alleged irregularities in proceedings which were not conducted in public fall squarely within the dictum of Hume which was approved in Krasner's case.

10.6.8. To the extent that public policy requires confidentiality between judge and assessors, it must be borne in mind that public policy has many aspects. One is that confidences of what takes place in chambers should be respected. But equally important is that irregularities in the proceedings should be disclosed. When the two conflict, the interests of justice require that the latter should prevail.

11. It is submitted, therefore, that the evidence in Dr Joubert's reports was admissible. If that is so, then the evidence in those reports can be taken into account in the consideration of special entries 1.2 and 1.3; also, the rulings made by the trial judge in regard to Dr Joubert's reports in the final stage of the events, aggravated the effect upon the trial of the previous irregularities, and in itself was an irregularity which per se resulted in a failure of justice.

12. CONCLUSION

It is submitted that individually and cumulatively, the special entries constitute such a departure from accepted

principles of law and procedure as to have resulted *per se* in a failure of justice. For the reasons advanced, it is submitted that the appeal be upheld.

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