IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA

(TRANSVAALSE PROVINSIALE AFDELING)

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SAAKNOMMER: CC 482/85

DELMAS

1987-03-30

DIE STAAT teen: PATRICK MABUYA BALEKA EN 21 ANDER

VOOR: SY EDELE REGTER VAN DIJKHORST E

ASSESSORE: MNR. W.F. KRÜGEL

NAMENS DIE STAAT: ADV. P.B. JACOBS
ADV. P. FICK
ADV. W. HANEKOM

NAMENS DIE VERDEDIGING: ADV. A. CHASKALSON
ADV. G. BIZOS
ADV. K. TIP
ADV. Z.M. YACOOB
ADV. G.J. MARCUS

TOLK: MNR. B.S.N. SKOSANA

KLAGTE: (SIEN AKTE VAN BESKULDIGING)

PLEIT: AL DIE BESKULDIGDES: ONSKULDIG

KONTRAKTEURS: LUBBE OPNAMES

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HOF HERVAT OP 30 MAART 1987.

MNR. DE VILLIERS : Ek verskyn namens die Staat in hierdie aansoek, bygestaan deur My Geleerde Vriende, mnre. Jacobs, Fick en Hanekom.

MR CHASKALSON : May I first thank Your Lordship for allowing us time this morning. Affidavits were filed by the State late Friday afternoon and with most of the accused being in custody there was some difficulty in getting papers ready for them before this morning. With twenty-two people then having to depose to an affidavit, I am afraid time was necessarily taken. (10)

COURT : Have you completed the affidavits?

MR CHASKALSON : We now have the affidavit and I would like to hand up two copies. The one copy has a pagination number which is the original. I regret that the copy does not have, but we will attend to pagination of the Learned Assessor's copy during the adjournment. The Learned Assessor's copy also does not, I am afraid, bear the signatures. There just has not been time to fill those in, but the original of course does. (20)

COURT : Mr Chaskalson, before you commence and before I read this, I would like to place certain facts on record. They are as follows :

1. I received a statement by Dr W.A. Joubert which he sent to the defence, the State President, the Minister of Justice, the Chief Justice, the Judge-President of the Transvaal Provincial Division, the Governing Bodies of the Advocates' and Attorneys' Professions and the Attorney-General. It concerns the conduct of this trial. (30)

2. As the statement was placed before Court by the defence in the application for my recusal and is being relied on heavily by the defence I am obliged to react here and now.

3. I read the statement with sorrow. It is an attempt by Dr Joubert to justify his refusal to recuse himself by attacking my integrity. In the process a serious breach of confidence is committed by the disclosure of the nature of discussions between Judge and assessors. Thereby he deliberately places the continuation of (10) this trial in jeopardy. A distorted picture is portrayed by omissions, half truths and untruths. One can but guess at the detrimental effects of this unfortunate act on the image of the administration of justice in the country.

4. I will not deal with every allegation made, only with those that I deem relevant at this stage. This does not mean that I necessarily accept the other allegations as correct.

5. Dr Joubert emphasises his experience as an assessor.(20) From our conversations I concluded that he had last acted in that capacity more than twenty-five years ago. I found him totally out of touch on factual matters and on the assessment of witnesses.

6. I asked Dr Joubert to join the Bench as an assessor knowing that he had been active in politics and had been a candidate for the Progressive Federal Party in a general election. I probably at some stage must have heard of some of his other political activities, but not in detail as set out. I am not politically inclined(30)

and/...

and did not inquire nor did I think it relevant. I have an open mind on political issues and I thought that Dr Joubert's presence on the Bench would be beneficial when political perspectives were discussed. I adhere to that view subject to what follows.

7. I did remark to Dr Joubert that his political views and mine did not necessarily co-incide, but that this was a judicial trial and that it was irrelevant.

8. I expressly asked him whether he had had any relationship with the United Democratic Front. The answer (10) was negative. I was not informed that he had signed in the United Democratic Front's one million signature campaign.

9. This case commenced in Bethal on 16 October 1985. There was merely legal argument and I sat without assessors. Prior to that date the indictment had been handed to me and to my assessors. The case resumed in Delmas on 4 November 1985 and though only legal argument was to be adduced, I requested my assessors to sit with me in order to become better acquainted with the issues. (20) They took the required oath. The indictment and its particulars were extensively debated for two days. Evidence only commenced on 21 January 1986 after the pleas on 20 January 1986.

10. In paragraphs 65 and 66 of the annexure to the indictment (p. 263 - 277) is set out the State's case in respect of the alleged campaign of the UDF and/or ANC and SACP against the Government's policy and legislation on the constitutional proposals, the new constitution, the Black local authorities and control (30)

over/...

over Blacks (the latter two called Koornhof legislation). Paragraphs 26 and 27.1 of the request ~~of~~ for the further particulars required copies of each publication referred to in inter alia paragraphs 65 and 66. These were furnished on 22 October 1985. Amongst them is EXHIBIT O6 which deals extensively with the UDF million signature campaign and the content of the signature form.

My assessors and I received these documents in October 1985. The aforementioned campaigns are also mentioned inter alia in the further particulars of 22 October (10) 1985 in paragraphs 10.1, 10.2.2 and 34.1.1.

In the further and better particulars filed on 2 December 1985 EXHIBIT O6 is specifically referred to at p. 29 and p. 62. At p. 46 it is specifically tied to the allegations in paragraph 65 of the annexure to the indictment. The million signature campaign is by name referred to in the further and better particulars at pp. 58, 76 and 78. The million signature campaign is alleged to have had as its aim the mobilisation and politization of the masses and the extension of the (20) UDF's organisational ability. The State's case is that the aim of all this activity was to bring about a violent revolution.

The tie between the Government's constitutional policy and legislation and the campaign on the Black local authorities is alleged at p. 63 of the further and better particulars and at p. 75 it is alleged that at the founding of the United Democratic Front on 20 August 1983 it was resolved to unite against the Government's policy and legislation on the new constitution and (30) Black local authorities.

On/...

On 5 November 1985 in the presence of Dr Joubert I granted an amendment to the indictment. An alternative charge was inserted alleging inter alia that the ANC and SACP had as their aims to wage campaigns against the Goverment's policy on the new constitution and tri-cameral Parliament and on Black local authorities and the so-called Koornhof legislation.

11. From the above it is clear that the million signature campaign was from the outset an important feature of the State's case. (10)

In the circumstances there was a duty on Dr Joubert to disclose to me that he had participated in this campaign. His political background and his motives for participating are irrelevant. He was from November 1985 until 9 March 1987 in breach of his duty to be frank with the presiding Judge. It is significant that at no stage, not even in his statement, does he say that the matter had slipped his mind. Had he informed me timeously, I would have investigated the matter fully. I would have withdrawn my invitation to him to sit as assessor. (20)

12. I am embarrassed that by reason of Dr Joubert's reference to his perception of my political views and to confidential discussions between Judge and assessors I have to some extent to disclose what should not be disclosed in a pending trial. I do so with great reluctance and only insofar as is deemed absolutely necessary. I cannot let his distorted version go unchallenged.

13. There was a tacit understanding between Judge and assessors that we ~~could~~ would not discuss party politics. That understanding was generally adhered to though (30)

on a few occasions the conversation did stray into general politics. This is not strange where one is Delmas bound with two assessors for more than a year. I do not recall "very great differences" between us, but we did not have the same point of view in all respects.

14. There were numerous discussions in the course of the case. They concerned documents, evidence, demeanour and credibility of witnesses, the probabilities, and motivations for courses of conduct. At times there were sharp differences of opinion. (10)
It was not only understood but also stated explicitly that all opinions held and conclusions reached were prima facie and subject to what would emerge further during the evidence and argument. To this end I furnished my assessors with copious notes made by myself on the evidence, the documents and the witnesses to serve as a basis for discussion.

15. The difference of opinion was sometimes sharp when I found Dr Joubert injudicious where factual matters and the credibility of witnesses were concerned. (20)
As far as matters touching on politics were concerned I found him to be opinionated and not open to reason. In fact I gained the impression that he totally associated himself with the defence case. On an occasion I admonished him by stating that he was going further than being merely devil's advocate.

16. The insinuation that my view of the case is or will be politically tainted, I reject with contempt. The attempt to portray my political views as strong or right wing is rejected. I have no political (30)

credentials/...

credentials. I have never been a member of any political party or organisation. I attended a public meeting of a political party only once in my life and that was approximately thirty years ago. I never belonged to any secret society.

17. The account given of the discussions on 9 and 10 March 1987 is incorrect.

When the Court adjourned for tea Dr Joubert, exasperated at the cross-examination on the million signature campaign, blurted out that there was nothing wrong with the campaign. He had signed the form himself.

My other assessor and I were dumbfounded, and just looked at each other. Dr Joubert did not say that he could not recollect where he signed it or what it contained. The Court resumed. In court I noticed that Dr Joubert studied the form, EXHIBIT AS1 and I expected that he would raise the matter at the adjournment. During the luncheon adjournment Dr Joubert disappeared, probably to have lunch. I discussed the problems arising out of the disclosure with my other assessor, and I decided not to act immediately. Dr Joubert returned just before the Court resumed and the matter was not discussed.

When the Court adjourned at 15h00 I told Dr Joubert that he had embarrassed me (in 'n verleentheid geplaas). I asked him whether he had read EXHIBIT AS1 and upon receiving an affirmative answer asked him twice whether he did not feel embarrassed. Dr Joubert asked me what I was insinuating and told me he was "moeg vir insinuasies." I told him my embarrassment stemmed from the fact that he had signed in support of the UDF, which

was/...

was on trial. I told him that he should think about the matter and that I would consider the matter overnight. I did nothing to prevent Dr Joubert from discussing the matter further. I was deeply perturbed by this turn of events and Dr Joubert's attitude that he saw nothing wrong. I was greatly concerned at the effect this could have on this trial.

18. I immediately telephoned the Judge-President for an appointment and went to see him directly. I asked his advice.

19. Thereafter I reached the conclusion that it would be (10) improper for Dr Joubert to continue to act as assessor.

20. On the morning of 10 March 1987 Dr Joubert said nothing about the matter, so I broached the topic. I asked him whether he had thought about the matter. He said that he had, and asked me whether I had. I told him that I had considered the matter the previous night and that I had also consulted the Judge-President. Dr Joubert's reaction was a defiant - "What did he have to say?" I told Dr Joubert that his view was that he had to recuse himself. He angrily asked what right (20) the Judge-President had to interfere in this trial. I thereupon told Dr Joubert that we should leave the Judge-President out of it and that I hold the view that he should recuse himself. I explained to him shortly the relevant issues in the case and that having signed the document he would find it difficult to judge if it was part of a plot to overthrow the Government or not. He stated that he had taken an oath as assessor and that he refused to recuse himself. I told him that he would leave me no option but to (30)

discharge/...

discharge him. He told me angrily that I could not do so and that if he had to recuse himself, so had I and the other assessor and stormed out of the room. He returned soon afterwards and to my surprise totally ignored me and the vexed question, and commenced a conversation with my other assessor about his wife's motor-car. Some ten minutes later the court started. Dr Joubert had ample time to put his case across and did not do so. What he sets out in paragraphs 25.1 to 25.7 is news to me. I find it strange, if it is the truth, that he never mentioned it.

21. The declaration could not have been signed by him in 1983 as the campaign only started in 1984. See EXHIBIT O6 paragraph D3.

22. The only answer of Dr Joubert I had, namely that Dr Joubert had taken an oath as an assessor and would therefore adjudicate properly, I did not regard as an answer at all. I did not deem it worth mentioning that reason in court.

23. In fact I said as little as possible about Dr Joubert in court as I wanted to spare him embarrassment.

24. Dr Joubert was told in no uncertain terms that I intended to discharge him.

25. It is not necessary here to deal with legal contentions on the lawfulness of his dismissal.

26. The accused have in their application made certain allegations concerning the conduct of this trial which do not appear from the record.

26.1 As no facts are set out in paragraph 14.1 of the general memorandum, no comment is called for at this/...

this stage.

26.2 It is correct that in court there was more communication between myself and Mr Krugel than between myself and Dr Joubert. The words "close" and "regularly" are an overstatement.

26.3 Most communications between myself and Mr Krugel were to check the correctness of our notes of evidence. We both keep a full current record. As Dr Joubert did not keep proper notes of the evidence and frequently seemed to be dozing off, it would have been futile to consult him on this aspect.

26.4 Furthermore, Mr Krugel keeps a full list of exhibits and when I could not immediately find an exhibit on my list, I consulted him.

26.5 When procedural questions arose I often asked Mr Krugel's opinion. This is not Dr Joubert's forte.

26.6 There were no deliberations in court about the merits of the case from which Dr Joubert was excluded.

26.7 Due to seating arrangements Dr Joubert's chair was further away from mine than that of Mr Krugel.

27. The allegation that there is animosity towards the accused on the part of myself and Mr Krugel is rejected. In fact the atmosphere in court was reasonably relaxed.

28. The suggestion that the recusal of Dr Joubert was done with ulterior motives, is rejected.

29. I am at a loss to understand the allegation that I by tone, gestures or otherwise, favour the State. In the absence of detailed information I cannot comment upon this matter at this stage.

30. The facts set out above and my assessment of Dr Joubert as assessor, are fully supported by Mr Krugel, who was present at the conversations on 9 and 10 March 1987 and at the deliberations during the course of the trial.

31. Certain allegations have been made in the application against my assessor, Mr W.F. Krugel. I requested him to clarify his position insofar as this trial is concerned. The following explanation is put on record.

32. Mr W.F. Krugel joined the Afrikaner Broederbond in (10) 1975 and is still a member. He does not hold any position in the executive of that organisation.

33. When approached to join the Afrikaner Broederbond he explicitly asked whether his membership could directly or indirectly influence his functions as a judicial officer. He was told that it could not. That statement was correct. He also asked whether in undertaking to serve and promote the best interests of his own people it would be expected of him to love his neighbour less or to prejudice the interests of others. He was (20) assured that it would not and that everything is to be seen within the broader interests of the country as such and all its people. He has not found this assurance incorrect. At no stage has the Afrikaner Broederbond in any way attempted to influence the course of the administration of justice where he was involved and he is not aware of any executive directive that inhibits his freedom of conscience or requires him to adopt a particular position in respect of any public matter.

34. Mr Krugel was unaware of the fact (if it is a fact) (30)

that/...

that Major P.E.J. Kruger was a member of the Afrikaner Broederbond, till it was stated by the defence in this application. He has had no contact with Major Kruger except for greeting him (and others of the State team) and exchanging a few remarks about matters totally unrelated to this case. He has no special affinity to Major Kruger nor does his membership of the Afrikaner Broederbond lead to it.

35. Mr Krügel had never read the books on the Afrikaner Broederbond to which the application refers. He has(10) now read the portions referred to of the"Super Afrikaners". The book was first published in 1978. There has been a strong fermentation process in political thinking amongst Afrikaners since that date. A discussion of historical data would serve no purpose. Not being a member of the executive he is unable to admit or deny the correctness of the said portions.

36. Mr Krügel regards the Afrikaner Broederbond as an Afrikaner cultural and political think tank. It does not prescribe to its members what political beliefs to(20) adhere to. He has no knowledge whether the so-called Koornhof bills and the council system were ever discussed by it. It was not done in his presence. The members of the Afrikaner Broederbond at local level are entitled to discuss any contemporaneous or historical issue with a view to reflect on what is best for the moral, intellectual, social and political advancement of the Afrikaner. However, no member may speak in favour of any existing or contemplated political party or on party politics or in favour of or against a particular(30)

candidate/...

candidate. Members were requested to comment on the constitutional proposals for the tri-cameral parliament and they were discussed at local level. The expressed view of Mr Krugel, to which he still adheres, was that he was not content with the proposed tri-cameral parliament, as any constitutional dispensation which does not have the support of and cater for the political aspirations of all the people of South Africa, including the Blacks, will not work. At best in his view the tri-cameral parliament can be a step in an evolutionary constitutional process. (10)

37. Mr Krugel has not received any information or reports, secret or otherwise, from the Afrikaner Broederbond pertaining to any issue in this case.

38. Mr Krugel was designated liquidator of the assets of certain unlawful organisations on 19 October 1977 in terms of section 3(1)(b) of Act no. 44 of 1950, with the powers and duties set out in section 4 of that Act. He acted accordingly. The organisations were: (20)

Association for the Educational and Cultural Advancement of the African People of South Africa (ASSECA)

Black Parents' Association

Black People's Convention

Black Women's Federation

Border Youth Organisation

Christian Institute of Southern Africa

Eastern Province Youth Organisation

Medupe Writers' Association

Natal Youth Organisation

National Youth Organisation (30)

South/...

South African Students' Movement

South African Students' Organisation

Soweto Students' Representative Council

Black Community Programs Limited

Transvaal Youth Organisation

Union of Black Journalists

Western Cape Youth Organisation

Zimele Trust Fund.

39. The task was for all practical purposes completed on 19 February 1979, except for a few loose ends. (10)

40. At no stage since becoming an assessor was Mr Krügel aware that any of the accused had been a member of any of these organisations. It might be that a search of old files might turn up their names. The names of the members of these organisations were, however, irrelevant for his purposes, except if they were creditors. He does not remember if this was the case.

41. He knows of no facts detrimental to the accused or to Dr Naude which came to his knowledge during the liquidation process. (20)

42. The assets of the organisations were attached and removed to police stations throughout the country, inter alia John Vorster Square. Mr Krügel had no office at John Vorster Square. His office was in Veritas Building, Pretoria. On one occasion he interviewed Dr Naude in an office in John Vorster Square.

43. He was accompanied by Colonel Wernich of the Security Police to various police stations where assets were stored, for the purpose of introduction. He did not work in close co-operation with other members of the (30)

Security Police, except that in various places where assets were, he utilised their services to help arrange the liquidation process. He did not receive information from the Security Police or executive on the so-called dangers of such organisations.

These are the matters I place on record. I have made a copy of what I placed on record and handed a copy thereof to the defence and to the State.

COURT ADJOURNS.

COURT RESUMES.

MR CHASKALSON : My Lord, we are ~~greatful~~ grateful to Your Lordship for the full and frank statement made by you. It will obviously call for careful attention and discussions between ourselves and the accused.

My Lord, as Your Lordship knows there are notices being given of the intention to move or notice was given of the intention to move three separate applications. It seems ... (Court intervenes)

COURT : You mean by Dr De Villiers? (10)

MR CHASKALSON : No, by us. It seems that the first application which raises purely a legal issue, though we appreciate that the facts now stated by Your Lordship in the statement may possibly have some bearing on the law points raised. It is not yet clear to me what the implications are, but I do think that I am in a position to start with that argument. I would not like to deal with the other applications ... (Court intervenes)

COURT : What we can do, Mr Chaskalson, is that I can ask you to argue the legal aspect. That is the validity of the (20) decision that the assessor was unable to continue and I think I will ask Mr De Villiers to answer that then. Then we can deal with the whole legal contention and that will give you, I think, ample time to consider your position as far as the rest is concerned.

MR CHASKALSON : That was what I was going to ask Your Lordship. I think that we will need time to study the report. We need time to discuss it with the accused, but that may

be/...

be taken - if we could do it this way and that Your Lordship would give us a day possibly after the legal argument when Your Lordship would consider the legal argument and we could take instructions from the accused.

COURT : Let us see how far we go and how fast you go before we decide on time. Just before you start, I see from the papers that Mr De Villiers has an application.

Mnr. De Villiers, gaan u voort met daardie aansoek?

MNR. DE VILLIERS : U Edele, ons gaan voort met die aansoek, maar ons wil aan die hand doen dat die aansoek aan die einde van die aansoek bereg word, soos wat meermale gebeur in dié tipe van aansoek.

HOF : Wel, in elk geval, wat betref die tussenbeitrede van die Prokureur-generaal, ek het nog nooit beskou dat dit nodig is nie, want as ek die verdediging aanhoor oor dié punt, dan moet ek sekerlik die Prokureur-generaal ook aanhoor oor dié punt. Dit is nie nodig om 'n formele aansoek in daardie opsig te bring nie.

MNR. DE VILLIERS : U Edele, ek het dit met My Geleerde Vriend uitgeklaar vanoggend. Ons was net ietwat verbaas dat die Prokureur-generaal inderdaad nie as 'n respondent gesiteer is nie, maar dit is blykbaar 'n blote oorsig van hulle kant. Hulle het dit aanvaar dat hy 'n respondent is.

HOF : Wel, die reëling is dan dat ons eers voortgaan met die regsargumente wat nie te doen het met my persoonlike onttrekking nie en dan dat u daarop antwoord en dan kan ons kyk waar ons kom met die res.

MNR. DE VILLIERS : Soos u behaag.

MR CHASKALSON : May I raise another matter before I turn to the argument. Mr Molefe, who was accused no. 19, there

is/...

is an arrangement, a provisional arrangement been made for a doctor's appointment tomorrow. May he have permission to confirm that appointment to attend the doctor tomorrow?

COURT : Yes, certainly.

MR CHASKALSON : We have prepared some written heads of argument to deal with the law point. I may say it deals early with the law point and so there can be no problem about handing those heads of argument up to Your Lordship. Your Lordship will realise that it obviously will be based upon the information in the papers and will have no regard to anything Your Lordship may have said.

COURT : That is quite in order.

MR CHASKALSON : If I may then hand up two copies of our heads of argument. The first of the applications arises out of the order made by Your Lordship directing that Professor Joubert must recuse himself as an assessor and as I understand it, in fact recusing him. It seems that that is the effect. He ceased at that moment after Your Lordship's order to be ... (Court intervenes)

COURT : After the order the bench consisted of two members.

MR CHASKALSON : There has been some disagreement by the State as to whether the word dismissed is correct or discharged. I do not want to get into semantics ... (Court intervenes)

COURT : Well, if you want to use the word, you are welcome to use it, but it is not a word used by me. What I decided that he was unable to continue to set as an assessor. If you want to call that a dismissal, I am happy with that and you can go on on that basis.

MR CHASKALSON : I think we know what we are talking about and I do not think that language, anything turns on the word and the appropriate description of it. The effect of the order was that Professor ceased from that moment to be a member of the Court.

The grounds of the application are set out in the notice of motion at page 1 and the grounds are first that the dismissal of the assessor, Professor W.H. Joubert, was made without power, was wrong in law and in consequence the Court which is now hearing the trial, is not a properly (10) constituted Court. Alternatively that the dismissal of Professor Joubert by Your Lordship constituted a material irregularity which was such a gross departure from established rules of practice and procedure that the accused can no longer properly be tried by the Court which is hearing the trial and thirdly that the failure by Your Lordship to hear the accused on how the discretion given to him by Section 147 of the Criminal Procedure Act should be exercised prior to ruling that the trial be continued before Your Lordship and the assessor, Mr Krugel, constituted a (20) material irregularity which cannot now be remedied and in consequence whereof the trial cannot properly be continued.

I should make it clear that in this part of the argument we intend to argue that Your Lordship also had to decide whether to act in terms of that Section or in terms of Your Lordship's ordinary common law powers. In other words, once that Professor Joubert had ceased to be a member of the Court, a number of courses were open to Your Lordship, either to exercise the ordinary power of a presiding officer at a trial to discharge the Court, and quash the (30)

proceedings/...

proceedings as a result of what had happened or to consider the powers that you had under Section 147. In other words, what we want to argue, the matter has been made clear to the State, we communicated with them during the week, is that in the third alternative we will be arguing whether or how the discretion should have been exercised and we make that clear in our heads of argument so that there should be no misunderstanding. We did make that clear to the State during the week.

We propose to deal with these issues each in turn and to begin with the power of the Court to make an order such as that which we are seeking in prayer 1. In other words, the power of the Court to quash the proceedings in the course of the trial. We make the submission and we do so in paragraph 3 of our heads or argument that a judge presiding over a criminal trial has the power to direct that the trial be stopped and that the proceedings be quashed and that the effect of such an order, if it is made, is that the Court hearing the trial is then discharged and the Attorney General can elect to charge the accused persons or some of them again on the same or on different charges. It is akin to the power of a judge to recuse himself and it can be exercised when an irregularity has occurred which makes it undesirable that the trial be continued.

That this is so appears from a number of cases. We cite first the judgment of the Appellate Division in the case of MATSEGA and what had happened there is that during the course of a trial and at a time when the Court which was sitting composed of a judge and two assessors had

retired/...

retired to consider its verdict. It came to the attention of one of the parties or came to the attention I think of - there was only - there were three accused and I am not sure whether they were all represented by the same counsel or not, but it came to the attention of an accused that one of the assessors had had a discussion with a member of the bar prior to his taking office as assessor, which contained information prejudicial to the accused in the case. The fact therefore that the assessor may have possessed such information as such, ought not to have taken office as assessor and ought not to have sat in the proceedings, was raised by counsel for the accused and the presiding judge, who was His Lordship MALAN, J. ruled that the Court, thought it had not yet given judgment, had completed its discussion and that he and his assessors had reached a decision and that he decided that on the facts there could be no prejudice to the accused because the assessor had participated in the deliberations without making any linking between the discussion which he had had in private and the accused in the case and he then proceeded, an affidavit was furnished by the assessor and some discussions took place in judge's chambers which are not really relevant, but Your Lordship will see from the report, and he then proceeded to rule that there was no need for him to do anything, counsel had in fact asked that the Court be discharged as his main request. The judge ruled that he need not do that, that he need not quash the proceedings, he proceeded to convict the accused saying that that was a judgment of the Court which had been taken without knowledge of any dangerous or any information which it should not have had and the matter then went on

appeal and at page 417 CENTLIVRES, C.J. dealt with the rule that though assessors are trained judicial officers when in the course of a case information prejudicial to the accused is brought to their attention, such as an inadmissible confession or any other such information, the case should be stopped because in such circumstances it is important that no accused person should be under the impression that he is not being dealt with fairly and therefore he should not believe that his trial has been conducted in a way which is not fair and that evidence has been given which ought not to have been given. His Lordship continues as follows. He says :

"The principle enunciated by GREENBERG, J.A. is applicable to the present case. Here one of the assessors was given information of a most damaging nature concerning the first appellant. In principle it is immaterial how he acquired that information. Whether he acquired it by perusing inadmissible evidence in the record of preparatory examination or otherwise, can make no difference. In my opinion MALAN, J. should have acceded to the request made by counsel for the first appellant to quash the proceedings and to direct a new trial. When the request was made, the verdict of the Court had not been announced and the assessor's memory had been refreshed as to what had been told him about the first appellant. The first appellant was entitled to demand that each member of the Court should keep an open mind until the announcement of the verdict. In these circumstances it seems to me that an irregularity occurred during the course of the trial. In my opinion

the/...

the learned judge should not, after reading the affidavit of the assessor concerned, have proceeded with the trial. I accept that statements made in the assessor's affidavit are true, but that does not conclude the matter. It is essential in the interests of a proper administration of justice that an assessor should retire from the case as soon as it is proven that he has been given information detrimental to the accused which has not been proved in evidence, for nothing should be done which creates even a suspicion that there has not been a fair trial."

My Lord, that is the principle in MATSEGA's ... (Court intervenes)

COURT : Before we leave that case, I read that case. I saw a passage there where the learned chief justice said that one cannot hold a trial about an assessor and I would like you at some stage to address me on that. How does one deal, let me put to you my difficulty which I would like an answer to at some stage and that is this. Say for example an assessor comes along and tells me that he has taken a bribe, but, he says it would not affect me at all, I will still sit. That is just a hypothetical case. How does a judge deal with that question?

MR CHASKALSON : I appreciate that and I have also been troubled by the statement in MATSEGA's in relation to the statement made by Your Lordship this morning and it is something which I want to reflect upon, because ... (Court intervenes)

COURT : Because at some stage I want you to address me on if you say that the procedure was wrong, what should a judge/...

judge then do.

MR CHASKALSON : I will certainly do that and that is my intention to do that to suggest what we in our submission to Your Lordship will put forward as being the correct procedure to have been followed in this case, but Your Lordship will realise that the dictum in MASEGA's case does present another problem arising out of the conflict between Professor Joubert's affidavit and the statement made by Your Lordship this morning. It pretends a problem which I need to give some thought to. To my knowledge there has never been such a situation before and I am not entirely sure how one deals with events which become the subject of such a dispute, but that, of course, I need time to think about.

COURT : That brings us to Professor Joubert's statement and to my, what I put on record, we are not dealing with that.

MR CHASKALSON : No.

COURT : I merely put to you the hypothetical question of how is one to deal with an assessor - let us make it still stronger, the assessor has become mentally incapable, what should be done?

MR CHASKALSON : I understand that. I am going to make the submission to Your Lordship if I can put it very briefly now, but I will develop it later ... (Court intervenes)

COURT : If you are coming to it, do not come to it now, because we will merely have a repetition, but I mention this because you wanted to put the case down, but seeing you are going to pick it up again, just leave it.

MR CHASKALSON : We then refer Your Lordship to the case of APPOLIS which had some similarities to the MATSEGA case in the sense that the irregularity which had occurred again

related/...

related to inadmissible evidence getting onto the record during the course of a trial. The trial proceeded and then the parties began to wonder about what the consequences of that may have been and His Lordship DUMONT, J. in APPOLIS's case then said this. He said :

"I am satisfied that the evidence complained of (this is at page 179 D) was inadmissible and since it was in direct conflict with the evidence given by the accused I think it would not be unfair to say it was damaging and prejudicial to him." (10)

His Lordship then cites MATSEGA's case and he then makes the order. He said :

"I think the only just course is for me (that is at the bottom against H) to order that the proceedings be set aside on the ground of an irregularity. The Attorney General may direct a new trial or take such other course as he thinks proper. The proceedings are accordingly quashed."

In the case of KHABA which is the third case which we cite, this is from Natal, again some information damaging (20) to an accused person had come out during the course of the case and His Lordship HARCOURT, J. decided that that was an irregularity, that it was an irregularity prejudicial to the accused and he then he said :

"In accordance with the dictum in MATSEGA's case I conceive the proper course to be to quash the present proceedings and to direct that a new trial should take place at a time and a place to be decided by the Attorney General. I so order."

The third case is the case of MOSELLI. It is a judgment (30)

of/...

of the Orange Free State Provincial Division and what had happened there was a very unusual incident and that is that counsel who had been acting for more than one accused, took instructions from an accused which conflicted with his duty to others and incorrect information got before the Court and in effect what had happened was that :

"Die onreëlmatigheid hier ter sprake is tot (this is at page 654 - perhaps I should go back to 653)

At 653 there is a reference to MATSEGA's case and then at 654 what is said is this : (10)

"Die onreëlmatigheid hier ter sprake is tot die effek dat die advokaat van die twee beskuldigdes aan die regter en assessore deur middel van getuienis verduidelik het dat beskuldigde nr. 2 nie die waarheid getuig nie en dit kan beskuldigde nr. 2 se geloofwaardigheid as 'n geheel aantas en nie 'n besondere greep uit die getuienis nie."

Then His Lordship went on to say that credibility was important and that this had created a problem and he said there had been a breach of privilege, the fact that certain information had come before the Court in circumstances on (20) which it should not and he says at page 654 G :

"Onder hierdie omstandighede bestaan daar by my geen twyfel dat die onreëlmatigheid beskuldigde nr. 2 se saak geheel en al benadeel het en dat hy nie 'n billike verhoor gehad het nie."

Then there is a reference to APPOLIS's case. Then there was the question would it also affect accused no. 1 and His Lordship concluded that it would and he ordered :

"Die Hof het derhalwe die aansoek toegestaan en beveel dat die verrigtinge nietig verklaar word." (30)

So/...

So, My Lord, it seems clear that if an irregularity occurs during the course of a case and that irregularity is of a character which cannot be cured, that the proper course to take is to quash the proceedings, because it is obviously futile to continue once that has happened. If indeed it is something which cannot be cured, then there is no purpose in the case continuing on its way because nothing can possibly be achieved by such continuation. The proceedings will inevitably if the irregularity be of that character, be set aside. (10)

We develop the argument from there then by reference to the case of MOODIE and we remind Your Lordship of the test formulated by His Lordship HOLMES, J. in the MOODIE case with regard to irregularities and he said, he divided the irregularities into two categories and he said :

"(1) That the general rule with regard to irregularities as that the Court will be satisfied that there has in fact been a failure of justice if it cannot hold that a reasonable trial court would inevitably have convicted if there had been no irregularity. (20)

(2) In an exceptional case where the irregularity consists of a such a gross departure from established rules of procedure, that the accused has not been properly tried, this is per se a failure of justice and it is unnecessary to apply the test of enquiring whether a reasonable trial court would have inevitably convicted if there had been no irregularity."

Then His Lordship says :

"Whether a case falls within (1) or (2) depends upon (30)

the/...

the nature and degree of the irregularity."

In the case of MOODIE the Court in the course of its judgment cited a number of examples of irregularities falling into the second category and it is really since the time of the MOODIE judgment that the Courts have been looking more closely in regard to which category the irregularity falls. Some of the earlier judgments before MOODIE tended not to distinguish between the two, because in the nature of things most of the cases came before the Court on appeal and in the nature of things the irregularity usually if it was in the(10) second class of the MOODIE type would cause prejudice and therefore to be unnecessary for the Court to give consideration to this issue, but despite that, His Lordship HOLMES, J. examined a number of cases. One of the cases he referred to is the case of PRICE. I am going to come back to that later, but Your Lordship will remember the case of PRICE. That was a case in which the accused had been tried by a judge and two assessors. The trial had been upon the direction of the Minister of Justice and while the case stood adjourned for the consideration of verdict, one of(20) the assessors died. Later, and by consent, the remainder of the Court delivered its verdict. On appeal the conviction was set aside on the ground that the Court who convicted the appellant was not a properly constituted court and that its proceedings and convicting amounted therefore to an irregularity.

COURT : Am I right when I say that after R v PRICE the Act was amended and Section 147 was included, which is now 147?

MR CHASKALSON : After PRICE an amendment was introduced into the Statute which has ultimately taken the form of(30)

Section 147.

Then there is the case of NEAHELLIS. That was a case where the accused had not been given the opportunity of answering certain evidence and it was held that that was a fatal irregularity of the type or His Lordship HOLMES, J. categorised it as such.

The third case that we referred to - all of these come from the MOODIE judgment, is the case of KETTERICH and that was a case in which the jury was about to retire to consider its verdict and one of the jurors absented himself for (10) fifteen minutes and in the appeal it was argued that the Court should not quash the conviction in the absence of evidence that the juror had communicated with any person or that the appellant had been prejudiced and the Court rejected that approach, quashed the conviction, holding that the irregularity was of such a nature as to renter the whole proceedings abortive.

Again, there was another example given from a jury trial where after a jury had retired to consider its verdict, it was allowed to leave the Court and to dispurse for lunch, (20) thereby leaving the custody of the bailer who had been sworned to keep them in some private and convenient place and the Court of criminal appeal held that this was so serious an irregularity and departure from procedure recognised by law that it had no option but to quash the conviction without enquiry into the merits at all.

These are all in the MOODIE case and where we give references, as Your Lordship will see to 758 A and 758 C, those of course are to the MOODIE judgment. There is where they are cited in MOODIE. That is not from the judgment (30)

themselves/...

themselves and then we have collected a number of other examples of irregularities which fall into the second class of the MOODIE irregularity. In other words, irregularities which per se constitute a failure of justice and can never be cured.

The first is a case of HARRY CHARAN in which the State and the defence had both closed their cases and the Court had adjourned for argument and judgment. Then the magistrate hearing the case intimated that he wished to recall a State witness. That witness gave evidence as to the weight of (10) a certain article which formed the basis of the theft charge and under cross-examination it appeared that after the adjournment the magistrate had asked him in private without the public prosecutor and the defence having been invited to be present to ascertain the weight of the article. The defence then applied for the magistrate to recuse himself which he refused to do and this was held to be a gross irregularity which amounted to a failure of justice per se without the necessity of applying the test whether a reasonable trial court would inevitably have convicted (20) if there had been no irregularity and at page 36 to 37 His Lordship HENOCHSBERG, J. who gave the judgment of the full court in Natal said this. He said :

"No complaint whatsoever is made about the actual recalling of Detective Sergeant Rautenbach. The irregularity which was relied upon in that case (then there is a reference to a case of MAGARASH and it was in that context that it was said) was what took place while the case stood adjourned for recall of the doctor. During that period the magistrate addressed(30)

a letter to the doctor enclosing a transcript of the evidence given by the accused and a list of questions arising out of the evidence to which he required answers. At a later stage the doctor called on the magistrate in his chambers and there was a discussion of the points raised and a general discussion of the evidence in the case. This was done entirely without the knowledge of the defence. It is clear from the fact that I have related in the instant case that all that took place was that the magistrate in the absence of the (10) appellants and the public prosecutor requested the detective sergeant to have this rail weighed and did not intimate to the applicants and apparently did not intimate to the public prosecutor that he had done so. In giving judgment in MAGARASH's case, BROOME, J.P. said it is a principle of justice administered in this country that trials must take place in open court and that judicial officers must decide solely upon evidence heard in open court in the presence of the accused. If that principle is violated, then quite (20) apart from the question as to whether the accused has is manifestly guilty, the proceedings are bad because it might be supposed that justice was being administered in a secret manner instead of in open court. It is elementary that a judicial officer should have no communication whatever with either party in a case before him except in the presence of the other and no communication with any witness except in the presence of both parties."

His Lordship then goes on to apply that dictum to the (30)

facts/...

facts before him, in other words the request to a witness to conduct a particular investigation. He says :

"It seems to me that it was a gross irregularity for the magistrate to have done what he did do in that case. Furthermore, an irregularity of this nature seems to me to be of such a nature as per se to amount to a failure of justice without the necessity of applying the test that is often applied, namely whether a reasonable trial court would inevitably have convicted if there had been no irregularity." (10)

His Lordship then refers to MOODIE.

Three is another case and I do not need to take time with that. It was a case in terms of which there had been cross-examination on evidence which ought not to have been permitted and that was held to be a MOODIE type irregularity.

The next case which we refer to was a case of SIVAMBO. There the magistrate after the close of the State case had refused to allow the accused who was represted by an attorney to make an unsworn statement from the dock and that too was held to be such a gross irregularity that there had (20) not been a proper trial.

In MASHIMBE which is the next case, there members of the staff of a firm of attorneys who had defended the appellants had been given copies of statements by the appellants and by defence witnesses and other confidential and

K606 privileged documents to the security police. These statements and documents were given to the investigating officer who was the officer who gave instructions to counsel. I think it was accepted that counsel in the case had not seen them. In other words that it stayed with the investigating (30)

officer/...

officer, that it did not get to counsel. The Appellate Division held that the breach of privilege constituted so gross an irregularity that it could not have been so passed and that the proceedings had to be set aside.

Then in SOWELO's case which Your Lordship will know there had been faulty interpretation and that was held to constitute a gross irregularity. I think it should be construed as a gross irregularity of the MOODIE type because there was a reference to a Natal judgment which seemed to apply that dictum. (10)

Then finally in this list of cases there is a case of CAVALERO AND COETZEE in which the Attorney General had unlawfully delegated to a prosecutor the discretion to decide where the trial of an accused person was to take place. The applicant had appeared in a district court on certain charges and after some postponements the trial was transferred to a regional court at the request of the prosecutor. No reasons were given by the prosecutor. The applicant pleaded guilty, was found guilty and he was sentenced. On appeal it was held that the Attorney General had no right as he (20) had purported to do in a circular to prosecutors to delegate his discretion in terms of Section 75 of the Criminal Procedure Act to determine the court where the trial of an accused was to take place and his Lordship VAN DER WALT, J. after referring to MOODIE's case said this - we quote a passage in our heads of argument but Your Lordship will of course look at the whole judgment :

"In my view the trial of the applicant, before the second respondent in the regional court of Klerksdorp, however regular on the face of it and however properly (30)

conducted/...

conducted and inspite of the fact that he had pleaded guilty and was duly convicted and sentenced upon that plea, was a trial which took place in flagrant disregard of the provisions of Section 75(1)(a) and (c) of the Criminal Procedure Act and such a flagrant irregularity does not call for an analysis of prejudice or otherwise, but as was stated by HOLMES, J.A. is per se sufficient to have the applicant succeed in his application."

So, Your Lordship will see that the Courts will investigate not only what takes place in court during the course of a trial, but what has taken place outside of court as long as it is relevant to the trial of the accused. In other words, the passing of information from the attorney to the security police. The Court did not investigate whether it had got to - did not look to see whether it in fact had any impact on the trial. It simply said it is so gross a breach of privilege that those proceedings are unfair.

In the judgment of His Lordship VAN DER WALT, J. - there was a plea of guilty and yet the person who prosecuted was the wrong person to prosecute because the delegation had not been done properly. So, one is concerned here with the propriety of procedure affecting the case. It is going to be our submission to Your Lordship that the constitution of the court, how it is composed, is clearly a ruling affecting that. It is clearly a ruling relevant to the conduct of the trial. It is clearly a ruling which has bearing on the proceedings and if in fact the Court should have been disturbed irregularly, that would be a MOODIE type irregularity and we are going to develop that argument. We are going to say and we proceed now to examine on page 10 of our heads of/...

or argument when the power to quash should be exercised. We make the submission that clearly if an irregularity falls into the second category of irregularities described in the MOODIE case that there can be no doubt whatever that the power to quash the proceedings ought to be exercised. I think the proposition need only be stated to be accepted, because the effect of the irregularity itself is to nullify the proceedings. Once committed, the proceedings can never be put right and no purpose would possibly be served by continuing. So, if there has been an irregularity and if (10) the irregularity is a MOODIE type irregularity in the second category, it is our submission to Your Lordship that if we persuade Your Lordship to that view, that Your Lordship would clearly not allow what is a futile exercise then to be continued.

We go further and we say that the power exists even where the case falls into the first category of the MOODIE case - type of MOODIE and that is clear from the cases of MATSEGA and the other three cases to which we have referred, because what was so interesting in the MATSEGA case was (20) although the Chief Justice ruled that His Lordship MALAN, J. ought to have quashed the proceedings, he came to the conclusion that notwithstanding his failure to do so, the evidence was so clear that a conviction would inevitably have been made and therefore he concluded that no prejudice had resulted. So, it seems clear therefore and that has been followed in the other cases that there may be circumstances appropriate to a quashing of the proceedings, that the irregularity is of a type which does not fall into the second category of MOODIE but because it affects the (30)

trial/...

trial, the perceptions of the trial, the fairness of the trial, how the parties concerned with the trial and the general public would perceive the trial, ought to be quashed. Now, that is clear from MATSEGA's, because the point made is that nobody should be brought under the impression that their trial has not been conducted fairly, so that if an irregularity has been committed, which may have the result of such an impression being created, then even if it is not a MOODIE type two irregularity, the proceedings should none the less be quashed and the trial court has that discretion to exercise. We will address Your Lordship on that point as well. (10)

We then state at page 11 of what we suggest the issues are raised by this application. First, was an irregularity committed? And obviously if Your Lordship were to rule that no irregularity has been committed, that would be the end of the matter, as far as the first application is concerned. If an irregularity was committed, two questions arise. First, does the irregularity fall into the second category of irregularities described in the MOODIE case and if not, should the proceedings none the less be quashed. (20)

We turn now to deal with the issue whether Your Lordship has the power to order an assessor to recuse himself, because as I understand the ruling you made, those were Your Lordship's words. I cannot remember the exact words. I think Your Lordship said ... (Court intervenes)

COURT : Let us say it was the effect.

MR CHASKALSON : An assessor who takes the prescribed oath to become a member of the Court, that is Section 145(4) - it says specifically : (30)

"An/...

"An assessor who takes an oath or makes an affirmation under sub-section (3) shall be a member of the Court." So, he is now part of the Court and he is no different to the other members of the Court save that on questions of law certain rulings have to be given by the presiding judge, but on questions of fact he, unlike a jury, is part of the Court.

So, we are now concerned with the composition of the Court. We then make the submission to Your Lordship that it seems clear, both from what was said in court on 10 (10) March and what was not said, in other words Professor Joubert did not say "I recuse myself", that Professor Joubert did not recuse himself. He was, we say, in effect dismissed and I do not think the word really matters. What happened is that Professor Joubert did not recuse hismelf. That I think is clear and in the light of Your Lordship's statement this morning, I need say no more about that.

We say that the right of a litigant to ask a member of the Court to recuse himself is part of the common law of South Africa and I really do not need to say anything about (20) that. That is wellknown and I do not really need to read any judgments, but the procedure which is a wellknown one is the exceptio recusationis or the exceptio suspecto iudicis and it is clear too that it can be brought both before a trial and it can also be brought during a trial and there is a discussion of the exceptio by His Lordship JOUBERT, J. in the SA MOTOR ACCEPTANCE CORPORATION case which we cite. It apparently goes right back into Roman law and goes through the canon lawyers. It is referred to by Damhouder. Damhouder quotes the most exacting test which I think would impose (30)

great/...

great difficulties on many judicial officers. Your Lordship will pardon my prenunciation of Damhouden. He says :

"Geen recht nog justisie is en est of dat hy te hoofdig is en hardnekkig by zijn opinie blyft of dat hy sy sententie te seer presipiteerd of onervaren is."

It seems to be the most exacting test and I am not suggesting that Your Lordship should apply that test to the case of Professor Joubert. The point I am making is that it is a wellknown common law remedy that a person becomes a member of the Court in circumstances where he ought not to do so, (10) that the common law provided a remedy and the remedy provided by the common law is either that there is an application made initially or if facts become known during the course of a trial, then the application to be made during the trial. It seems that the application ought properly to be addressed to the member of the Court concerned and it seems also that the member of the Court is expected to be the person to take the decision and I will come to that a little late. The point I want to make for the moment is that our common law has a well recognised procedure of dealing with such (20) situations in which judicial officers either by virtue of bias or knowledge or any other impediment which the law recognises, can be asked to remove themselves from office and that the application can be dealt with at any time during the proceedings, either before or during the proceedings.

At top of page 13 we say that the application for recusal is made to the judicial officer himself ... (Court intervenes)

COURT : What type of officer was dealt with in KRUGER's (30)

case?

MR CHASKALSON : It is the judge. I may be wrong. I am talking too quickly. Perhaps I am wrong. I have an idea of who it was.

"As die eiser die Regter-president van onregverdigheid verdink het, dan moes h aansoek om rekusasie tot die verhoorregter self gerig gewees het."

Whereas in the present case the Court has more than one member, the practice in the Transvaal at any rate seems to be that the member whose recusal is sought must deal with (10) the application himself. The other members of the Court apparently have no say there. That was what happened in the treason trial. In the treason trial there were applications for the recusal of His Lordship LUDORFF, J., His Lordship RUMPFF, J. There was a special court consisting of three judges and it seems clear from the judgments which were given that the Court did not give the judgment. In other words the applications were not considered by the Court as a whole. His Lordship LUDORFF, J. considered the application directed to him and dealt with it. In fact His Lord-(20) ship LUDORFF, J. recused himself. His Lordship RUMPFF, J. considered the application directed to him and did not recuse himself. His Lordship KENNEDY, J. who was the third member, took no part in the decisions one way or another. It is clear that LUDORFF, J's judgment dealt only with his position and RUMPFF, J.'s judgment deals with his position and passing he agrees that His Lordship LUDORFF, J. correctly had recused himself, but he was not purporting to do so as a member of the Court.

Can I hand up to Your Lordship these two judgments (30)

which were taken from the record in that case. In the case of ROSE v JOHANNESBURG LOCAL ROAD TRANSPORTATION BOARD there is a statement by His Lordship LUCAS, A.J. in respect of whom an application for recusal was subsequently brought in the MILNER(?) case, but he was dealing with somebody else's recusal at this stage.

COURT : As counsel?

MR CHASKALSON : No, no, as judge and he is there, it is the Local Road Transportation Board and at page 282 it is pointed out that there a member of the Local Road Transportation Board had been asked to recuse himself and he apparently had dealt with the application himself and His Lordship LUCAS, J, says :

> "At the meeting when Huddle was asked to recuse himself Gordon, as a member of the Board, rightly pointed out that the Board itself had no jurisdiction to consider any such application for Huddle to recuse himself."

It was really a matter for Huddle himself to deal with.

In SLADE v PRETORIA RENT BOARD his Lordship MURRAY, J. giving judgment in that case, it is a very wellknown case and it is referred to in many of the cases dealing with recusal, said :

> "The request involved in attach on the impartiality of each one of the three members upon which he would have to decide for himself.

I have some difficulty in seeing how the decision of each member, either to recuse or not to recuse himself, could effectively be overriden by the other two members and he be compelled against his will either to participate or to refrain from participating in the investigation."

His Lordship says there is really no decision by the Board itself. It is a decision of an individual whose recusal is sought.

Sometimes a member of the Court will recuse himself of his own initiative, but there is no case of which we are aware in which it has ever been held that a presiding officer can recuse a member of the Court against the will of such person. We are simply not aware of this ever having happened before and the question which then arises is whether such a power is conferred upon a presiding judge under the Criminal Procedure Act.

So, we turn to Section 147. Again we must say that we have been unable to find any decided case dealing with the meaning of Section 147, but we make the submission to Your Lordship that the section does not vest in the trial judge the power to recuse an assessor. I assume Your Lordship, like us, has read the section many times and it covers a case where an assessor dies or in the opinion of the presiding judge becomes unable to act as an assessor at any time during the trial. The Afrikaans version is:

> "Indien 'n assessor te enige tyd gedurende 'n verhoor sterf of na oordeel van die voorsittende regter onbekwaam raak om as assessor op te tree."

Whatever the words "unable to act as an assessor" or "onbekwaam raak om as 'n assessor op te tree" and I am going to come back to those words later on, but whatever they mean, the submission we put to Your Lordship is that in the context of Section 147 that section is not applicable to the circumstances of the present case, because the Section is directed to events which occur after the trial has

commenced, i.e. during the trial. It is not directed to impediments which may or may not have prevented an assessor from being appointed as such and taking office as member of the Court. That is dealt with by the common law. Assuming, and let me assume for the purposes of my argument and I am going to address argument to Your Lordship later on this issue, but if I were to make the assumption that for the purposes of the argument that there were valid grounds for objection to Professor Joubert as an assessor, those grounds existed before the trial commenced. He did not become disqualified during the trial. On the assumption made, he was (10) always disqualified and the remedy, and the only remedy, our law knows for that situation is an application for recusal and we say that the application, if the facts had been known and if there were good grounds and I have made that assumption if good grounds, I am coming back later to suggesting that they are not good grounds, but if they were good grounds, the application could be made either when he was sworn in as a member of the Court or if facts became known during the trial, the party objecting could (20) take the point then.

We make the submission to Your Lordship that there is nothing in the context of the section which requires a strain meaning to be given to the words "becomes unable to act" at any time during the trial. Prima facie the words apply to a situation in which an assessor becomes unable to carry out his duties as a result of something that happens during the trial. That is clearly what the section was intended to deal with, because the common law dealt adequately with applications for recusal. What it did not (30)

deal/...

deal adequately with was the unforeseen circumstances which might arise during a trial such as death, illness and other related matters and we make the submission to Your Lordship that the words can have no application to a situation in which an assessor is in fact willing and able to act.

COURT : What would in your submission be the position if during the course of a trial the judge finds out or finds that an assessor had taken a bribe before the trial started, he puts it to the assessor, the assessor admits it, he tells the assessor "you have to recuse yourself", he refuses, he tells both counsel that these are the facts, the assessor refuses to recuse himself, what would be the position? Would the trial have to continue?

MR CHASKALSON : No, Your Lordship always has the power to stop the proceedings. You could have done that as the Court did in MATSEGA's case. You could have quashed the proceedings in the unlikely event of such a contingency.

COURT : And start afresh?

MR CHASKALSON : Yes. In the case of GUBEDELA it dealt with a section which was in the statute prior to Section 147 relating to jury trials and there was a provision that in the case of jury trials the - if a juryman became - where a juryman dies or becomes incapable of serving as a juror - I will give Your Lordship the exact wording, but the contingency dealt with was dies or becomes incapable. I am going to come back to the word incapable which in fact have a wider meaning than unable and I will show Your Lordship in a legislate of history how the legislature moved from incapable to unable, because incapable could be understood as including legal incapacity. Unable ordinarily refers

to a different situation and I will deal with that later too. I think I should try and find the section so that Your Lordship has it when I am reading :

"If at any time during the trial (it is 149 sub-section (3) of Act 56 of 1955 and I think it was in that form when His Lordship O'HAGAN, J. dealt with the matter. I would have to make absolutely sure that there was not an amendment between 55 and 59, but the language there is this) a juror dies or becomes in the opinion of the judge incapable of continuing to serve as a juror or ... (and a number of other things happen)."

His Lordship O'HAGAN, J. says this :

"The only question with which I am concerned (he says that at page 95 G) is whether I should discharge this particular juror, because the juror had in fact indicated bias. Should I discharge this particular juror or discharge the jury as a whole, there is a passage in Gardiner and Lansdown which suggests that Section 149(3) of the Act authorises and empowers the discharge of a single juror in a case such as this and the con-(20) tinuation of the trial before the remaining jurors. I very much doubt if Section 149 has anything to do with the kind of situation that has arisen in this case. Sub-section (3) of Section 149 refers to the case where a juror dies or becomes incapable of serving as a juror. I am inclined to think that the incapacity referred to in the section is physical or mental incapacity and it is not the sort of incapacity which arises from the conduct of a juror during the trial."

His Lordship then goes on to say the present section (30)

repeats/...

repeats the terms of Section 214(3) of the old Criminal Procedure Act and I have found that the Court in the Cape Province on finding that during the course of a trial the jurymen had expressed the view after having heard the accused's evidence that the accused was guilty, ruled that the jury should be discharged and that the trial start de novo. I refer to the case of KHATSE. He says he does not deal with the case, they are not similar. This His Lordship goed on to rule that he should do what was done in KHATSE's case. (10)

We make the submission to Your Lordship - we do so in paragraph 23 that the word "unable", no suggestion of any disqualification or any legal impediment or anything of the kind, that it suggests that the legislature intended to refer to physical incapacity short of death of such a nature as to render an assessor incapable of fulfilling his statutory obligation. We refer to dictionary definitions of the words. The English we have taken from the shorter Oxford where "unable" is referred to as not able to do something specified, unequal to the task or need incompetent, ineffi-(20) cient, physically weak, feable. Webster says not able, incapable, the sun is to melt the snow down to this underlying part, unqualified, incompetent, inefficient, impotent, helpless, like a phoenix in hot ashes. Black's law dictionary says that unable, this term as used in the statute providing that evidence giving in a former trial may be proved in a subsequent trial where the witness unable to testify, means mentally and physically unable.

The equivalent of "unable" in the Afrikaans text of the Act is "onbekwaam", not "onbevoeg", "onbekwaam". (30)

The dictionary definitions of "onbekwaam" also do not connotate necessarily legal disqualification. We have taken from HAT "onbekwaam - sonder kundigheid, onbedrewe, ongeskik: onbekwame werkman, onryp: vrugte wat nog onbekwaam is; dronk, geswael: Onbekwaam by sy werk opdaag" and the Tweetalige Woordeboek the translations given are unable. So, the primary meaning given there corresponds with the English meaning of unable. Incapable, incompetent, inefficient, unfit, inept. The Afrikaans word "onbekwaam" may have a wider meaning than the English and Your Lordship (10) will know better than me whether that is so, but they clearly both have a primary meaning which the English word "unable" has. Have not been able to do something and that there is in fact no conflict between the Afrikaans and the English versions of the statute. In other words, if you take the English, the Afrikaans means the same or was capable of meaning the same. So, even if in the circumstances "onbekwaam" has a wider meaning than "unable" what is common to both versions should be accepted and we give Your Lordship the wellknown authority for that which is collected in the (20) case of MARONI.

We make the submission to Your Lordship that there is no reason to believe that the language of Section 147 of the Act was intended to change the existing law concerning the recusal of a member of the Court or to vest in the presiding judge the power to decide whether or not an assessor should recuse himself. Our common law deals with that and there was really no reason to vest that power in the judge.

COURT : Well, actually, it is a new section to provide for the situation that arose in the case of PRICE. (30)

MR CHASKALSON/...

MR CHASKALSON : Yes, but what happened in PRICE was where someone died.

COURT : Yes, but even in that case the judge could do nothing about it and therefore the section was brought in.

MR CHASKALSON : But the section was brought in to deal with the consequences of death. I am going to address Your Lordship a little later as to whether or not it deals with the consequences of recusal. It is a very different thing to say that the section might have application to the consequences of a recusal and that the section vests in the judge the power to recuse. The law deals adequately with it. The law always dealt with it. The law made provision for how somebody has to be recused and what procedure to follow and what tests to be applied and what enquiries to be conducted and how the enquiry should be conducted. All that is governed by the law and it would really take much clearer language in our submission to assume that the legislature is going right across our common law destroying the law which existed previously and introducing a new procedure. How it is to take place it does not tell. What criteria ought to be applied, it does not say and I will deal later with what one might infer from that if indeed the power were there. I will come back to that.

It is a very far reaching proposition to say that in a section designed and introduced to deal with the consequences of the death of an assessor, change the common law in regard to the procedures to be applied for recusal of members of the Court, introducing entirely new tests which have never been applied before, leave the matter to the subjective discretion of a member of the Court who never

previously had the power to make such a decision and those one might have expected if the legislature were going to address that that the presiding officer, the judge, might possibly give a ruling as to the legal principles applicable but questions of recusal are questions of fact.

COURT : Are they?

MR CHASKALSON : Yes. There is authority for that.

COURT : Should one not determine the facts and apply the law, the law being that in certain circumstances one has to recuse oneself? (10)

MR CHASKALSON : The question really is one of fact and the law is and the law has certain categories where a person should recuse himself. I would then say that if you fall into category X you should recuse yourself. It is then a question of fact as to whether you fall into category X or not.

COURT : Having determined that one falls within category X, is it not the duty of the judge to say well, you fall in category X, you have to recuse yourself?

MR CHASKALSON : No, because the - first of all, the (20) category - we will come to that a little bit later, but the question as to whether you are or are not in category X is a question of fact.

COURT : Yes, that is so.

MR CHASKALSON : So, one would first have to make the decision of fact and the judge's opinion of fact would not be fundamental there.

COURT : Unless the section refers to the judge's opinion, which it does.

MR CHASKALSON : Well, it is a question then as whether (30)

Your Lordship is going to hold that the section has changed the common law of recusal, has changed the whole procedure to be followed in a recusal and has given the judge what amounts to a arbitrary power.

COURT : Well, prima facie it has brought in some changes. It may well be a matter of debate how far the section goes, but it is clear that it did bring in changes because what can be done under the section could not be done previously.

MR CHASKALSON : That is right. It could not be done previously because the - because once an accused person has pleaded before the Court, he is entitled to a verdict of the Court. That is the ordinary reasoning and either that Court must be discharged and he must be tried again or if the composition of the Court changes and it was really to deal with what happens when the composition of the court changes and certain circumstances are referred to as to when the power exists, but it did not deal with the question as to whether a person who is able to sit as an assessor and in respect of whom an application for recusal may or may not be brought. After all, it is really for the State to apply to recuse if it feels that a member of the Court is biased against it, in the same way as it will be for the defence to apply if it felt that a member of the Court is biased against him. It is not really the judge's function.

COURT : What would happen in the may be farfetched case where an assessor becomes mentally incapacitated and neither the defence nor the State, for their own purposes, want him removed, what should the Court do?

MR CHASKALSON : I would say that that would be covered by the passage - by the word "unable" because I would say that it applies to physical and mental incapacity and as I will address Your Lordship later, I would say that the proper course to be followed in that case would be for the presiding judge to bring to the attention of the parties the fact that the question of mental incapacity is now in issue and would ask the parties for their attitudes and their views and that he would then make a decision and after hearing both parties and all relevant information. (10)

COURT : That is not the point we are dealing with at the moment. One of your points you are coming to is that you should have been heard?

MR CHASKALSON : Yes.

COURT : But say for example that both parties say we leave it to the Court, what should the Court do?

MR CHASKALSON : The statute says that if the person is unable and unable ... (Court intervenes)

COURT : No, the statute does not say that. The statute says in the opinion of the Court. (20)

MR CHASKALSON : He is unable?

COURT : Yes.

MR CHASKALSON : If you ask me to deal with mental incapacity, I would say that a person who is mentally incapable is physically unable. It is one of the ordinary connotations of unable. May be it is not. May be Your Lordship would have to discharge the Court if that were to happen. Either he is unable, either the member is unable within the meaning of that word or Your Lordship would have to discharge the Court and start again. And that has happened often in (30)

courts.

COURT : Well, is that not exactly what Section 147 was intended to prevent. It starts of with the death of an assessor. They did not want to have the whole thing over again if the assessor died. Now they include something else. Is it not exactly what they want to prevent by Section 147 a re-trial?

MR CHASKALSON : Only if the section is applicable.

COURT : Yes, that is obvious.

MR CHASKALSON : It was gleaming with a limited category (10) of cases. It certainly does not purport to deal - does it not in many words say that the power to decide upon the recusal of a member of the Court shall vest in the presiding judge?

COURT : No, clearly not, because it does not speak of recusal. It speaks of inability, when somebody gets unable to - becomes unable to continue, then the Court may continue consisting of the remaining members. That is actually all it says.

MR CHASKALSON : What our argument is to Your Lordship (20) is that Your Lordship cannot read into that a power which is contrary to the common law to say that the questions of recusal have now been taken away from the normal common law rules and the normal common law tests and that they vested in the opinion of the judge to do as he likes without hearing anybody, which is the way it was applied in this case.

COURT : The last word one can use in this case is the judge doing as he likes. There was no pleasantness in it at all.

MR CHASKALSON : I appreciate that. (30)

COURT/...

COURT ADJOURNS. COURT RESUMES.

COURT : Mr Chaskalson, I read through the applicant's replying affidavit during the luncheon adjournment and I noticed that at page 181 the oath has not been taken by I think it is accused no. 20. I think you should rectify the matter, less we get technical difficulties.

MR CHASKALSON : My Lord, at the adjournment I was at page 18 of the heads and we were dealing with the language of Section 147. I am going to come back to the language a little later. I would like to look at the previous language used and I will - Your Lordship asked me whether the section was introduced immediately following the PRICE case and indeed it was. I will come back to that a little later, but I want to make sure I have got all the correct documents in front of me before I do that. When I come back to that I will make some more submissions about the language at that time.

The submission which we make in paragraph 27 is that Your Lordship in fact did not have the power to order Professor Joubert to recuse himself and that in the absence of such power the order directing Professor Joubert to recuse himself was invalid and it constituted an irregularity and that the proceedings which have continued since 10 March have continued before an improperly constituted Court and that that would constitute an irregularity which on the basis of MOODIE's case has per se resulted in the failure of justice.

I want then to turn to the question whether assuming a power to order a recusal was that power property exercised? We begin again with the proposition that an

assessor is a member of the Court, that he takes an oath in terms of the Criminal Procedure Act, that he will on the evidence placed before him give a true verdict upon the issues to be tried and that he remains a member of the Court until he is lawfully discharged from his duties, that an accused person is ordinarily entitled to a verdict from the Court before whom he has pleaded and that means all the members of the Court. This in PRICE's case His Lordship GREENBERG, J. in the course of his judgment said that : (10)

"Prima facie when a decision is entrusted to a tribunal consisting of more than one person, every member of that tribunal should take part in the consideration of the decision. In RASBAHERILAL v THE KING EMPEROR which is followed in this court in R v SILBER the privy council set aside the verdict of the jury because one of its members did not understand the language in which the proceedings or a material part of them were conducted. Lord Afcon said that the Board thought that the effect of the incom- (20) petence of a juror is to deny to the accused an essential part of the protection afforded to him by law and that the result of the trial in the present case was a clear miscarriage of justice. What was denied to the accused in these cases was his right to consideration of his case by every member of the fact finding tribunal."

We submit to Your Lordship that it is a fundamental principle of our criminal law and procedure that an accused person is entitled to be heard on every decision taken (30)

during/...

during a trial which might affect his rights and that a decision as important as one which changes the composition of the Court during the course of the trial is one in relation to which an accused person is entitled to be heard, because it affects his right as it is put by the Appellate Division to have his case considered by everybody who is a member of the Court.

So, we make the submission to Your Lordship then that if Section 147 did not vest in Your Lordship the power to form an opinion on the issue of the recusal of the Professor(10) it can be assumed that the legislature would have contemplated that such opinion would be formed by the judge in the manner judges ordinarily form opinions relevant to the trial of an accused person, namely after hearing all interested persons. We say that this is not only consistent with the way the Court proceedings are ordinarily conducted, but it is required by the rules of natural justice and we make the submission to Your Lordship that neither the State nor the accused were heard and we say that according to Professor Joubert's report the decision was taken without affording(20) him a proper hearing on the issue.

Your Lordship made a statement this morning and I will have to give attention to the statement and I will have to read it carefully in relation to these events. One thing that did occur to me was that on Your Lordship's statement what was said according to that statement was that Your Lordship told Professor Joubert that he would leave you no option but to discharge him and he told me angrily that I could not do so and that if he had to recuse himself, so had I and the other assessor and he stormed (30)

out of the room and it seems that nothing was said after that. So, it would seem from Your Lordship's statement though Professor Joubert does not mention the sentence "I told him that he would leave me no option but to discharge him " and the answer "He cannot do so." Professor Joubert does not mention that, but it would seem that if one takes Your Lordship's statement that Professor Joubert did not know and that Your Lordship did not hear him on what your power was to discharge him, that Your Lordship did not hear him and tell him I now intend to exercise this option, but before I do so, is there anything more that you want to say? Why do you say that I cannot do so or should not do so? Clearly he is saying that that is something which not only you cannot do but should not do. So, it would seem that if one - whether one has regard to Professor Joubert's statement or to Your Lordship's statement that indeed there was not the sort of inquiry which one ordinarily expects in this sort of matter.

After all, recusal is something which ordinarily is done in open court. Ordinarily there is a hearing and there is argument and interested parties take the case. Indeed, it is not the function we submit of the judge to decide whether a person may be biased in favour of one of the parties without being asked to do so. That the ordinary procedure would involve the matter being brought to the attention of the parties and those who may have an interest in deciding whether or not to take it up, there would have been nothing to have prevented the State saying that we are aware of this and we offer no objection to Professor Joubert remaining as an assessor and there could have

been argument at the time. So, indeed, the matter appears not to have been debated along these lines at all between Your Lordship and Professor Joubert.

Now we make the submission to Your Lordship and we do so at page 21 in paragraph 35 that in dismissing the assessor without hearing all the interested parties, that Your Lordship failed to exercise proper judicial discretion and we quote from the wellknown case of SHARPE AND WAKEFIELD:

> "A discretion means when it is said that something is to be done within the discretion of the authorities, that something has to be done according to the rules (10) of reason and justice, not according to private opinion, according to law and not to human."

Law of course involves procedure as well as substance. It has to be not arbitrary, vague and fanciful but legal and regular and what is legal and regular depends not only upon what was done, but upon the way it is done.

That dictum of SHARPE AND WAKEFIELD which has been cited so often in our courts was referred to as we say in the - we cite from one Appellate Division judgment, (20) but it is a wellknown dictum and Your Lordship knows it well.

In the NATHAN BROTHERS case there was also the reference to the dictum in ROUX's case :

> "That discretion is a science of understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences and not to do according to their private rules and affections."

All this implies that the exercise of a discretion involves (30)

both the application of correct principle and the adoption of fair and recognised procedure and we say that the requirement that a party to litigation be heard in all matters in which he has an interest, is fundamental to all civilised legal systems, that there are two basic requirements of natural justice, which apply to persons whose rights may be prejudicially affected by the exercise of a particular power and they are notice of the intended action and an opportunity to be heard and that both requirements are express and understood by the maxim audi alteram partem (10) and that the basis of that rule is natural justice or fundamental fairness and we again refer to cases in which this point has been made. There is a presumption that the audi alteram partem rule applies to the exercise of a judicial or quasi judicial power which could affect prejudicially the interests of an individual and that it will be held to have been explicitly excluded only if that implication is necessary or if it emerges from a clear intention or parliament.

In the CENTRAL NEWS AGENCY case we cite from the (20) judgment of his Lordship RUMPFF,J. where His Lordship at the passage cited at page 488 says :

> "It is of course firmly established in our law that when a statute gives judicial or quasi judicial powers to affect prejudicially the rights of a person or property, there is a presumption in the absence of an expressed provision or a clear intention to the contrary that the power so given is to be exercised in accordance with the fundamental principles of justice."

If I may pause for a moment. Assuming the power to (30)

discharge/...

discharge a member of the Court, that power, the exercise of that power affects fundamentally the right of an accused person to have his case tried by that person and that person to share in a verdict of his case. It is so fundamental a right that if it is lost that the Court quashed the proceedings in PRICE's case. Now that fundamental right, we say, cannot be taken away from us, the accused, without our being given an opportunity to be heard thereon. Leave aside now the question of Professor Joubert and whatever interest he may or may not have had in the matter. (10)

We say that in accordance with the CNA case, that that power could only be exercised in accordance with the fundamental principles of justice unless there is a clear intention from the legislature that this should not happen and we then make the submission to Your Lordship in paragraph 38 that the audi alteram parte rule is not excluded by the provisions of Section 147 of the Criminal Procedure Act. That there is nothing in the tenor and policy of the section which points to such exclusion. On the contrary, fairness demands that it be scrupulously observed particularly in (20) a criminal trial where nothing should be done which might create even a suspicion that the trial is not being conducted fairly. That comes from MATSEGA's case. We say that the failure to hear the accused vitiates the decision.

So we make the submission to Your Lordship that the manner in which the assessor was dismissed, constitutes an irregularity and that this is not the sort of case where it can be said that a hearing would have made no difference. Indeed from Your Lorship's statement it appears that Your Lordship was not aware of what Professor Joubert has said (30)

his/...

his reason for signing the declaration was and it appears also that Your Lordship did not ask him why he had signed it and how can one decide upon recusal without knowing that.

We quote from JOHN AND REIS a judgment of His Lordship McGARY, J. where he says :

"It may be that there are some who would decry the importance of what the Courts attach to the observance of the rules of justice. When something is obvious, they may say, why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard. The result is obvious from the start. Those who take this view do not, I think, do themselves justice, as everybody who has anything to do with the path, to do with the law is wellknown. The path of the law is strewn with examples of open and shut cases which somehow were not of unanswerable charges which in the event were completely answered of an inexplicable conduct which was fully explained or fixed and unalterable determinations that by discussion suffered a change. Nor of those with any knowledge of human nature who paused to think for a moment likely to under-estimate the feelings of resentment of those who find that a decision against them has been made without them being afforded any opportunity to influence the course of events."

I am afraid that that is indeed the attitude of the accused in this case.

COURT : Would you come to the point? At some stage in your argument will you tell me what your argument would have been if I had given you an opportunity to address me?

MR CHASKALSON : Yes. We quote from a number of judgments and I will make them available to Your Lordship later. There is the MOODIE case which we have. As far as STEAD's case - we merely do this to show that this is a universal principle. We have quoted you a case which comes from New Zealand I think, one from Australia and the MOODIE case. I think the other one might also be an Australian case. We will hand them up to Your Lordship a little later on. I do not need to read from them now.

In the MAHON case we quote a passage from LORD DIPLOX(10) judgment where he refers to the two basic principles of natural justice. One involves hearing the evidence, and the second rule is mentioned on page 26:

> "The second rule requires that any person represented at the enquiry who will be adversely affected by the decision to make the finding, should not be left in the dark as to the risk of the finding to be made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decisionmaker, might have deterred him (20) from making the finding even though it cannot be predicted that it would inevitably have had that result."

Had we been informed, the least we might have asked is for Professor Joubert to tell us why he signed the document, to tell us in what circumstances did he sign the document, to tell us how it affected him in relation to this case, matters such as that.

COURT : Then you would have had an enquiry which according to the case to which we refer should not have been held?(30)

MR CHASKALSON : Oh, no, My Lord. With all due respect not, what we would be saying there is that we would be dealing with the matter in the way recusal applications are always dealt with. When a member of the Court is asked to recuse himself, these are the matters which are raised and these are the matters which are put to them and may be, and I am not clear on that and I do not want to make any point of it here, but it may be that the procedure might be slightly different. I am not entirely sure, but certainly recusal applications take place in open court and these questions (10) are asked and the person seeking the recusal puts it to the person who is sought to be recused and the other party who may have an interest can ask for certain information. There is no reason at all to believe that the legislature intended that anything different should apply when recusal is under consideration.

We make this submission to Your Lordship that on the facts set out in Professor Joubert's report, that he was not disqualified from continuing to act as an assessor and that good cause did not in fact exist for him to recuse (20) himself or to be recused by the presiding judge if he had such power and that if a proper hearing had taken place, this would have been demonstrated.

The test to be applied in applications for recusal is an objective one. It is a curious objective test, because it is not for instance if one is dealing with the question of bias where the bias in facts exists.

COURT : Well, that is one part of it. If there is in fact bias, it is the end of the enquiry. The second leg of the enquiry is does it seem objectively as if there is bias? (30)

MR CHASKALSON : From the facts known to the person who is seeking the relief, where the accused seeks the recusal of a member of the Court, the question would be whether objectively speaking there are facts from which a reasonable person or reasonable person in the position of the accused possessed of that information might reasonably consider that he would not get a fair trial.

In RADEBE's case there had been an attack launched upon the judge during the sitting in the sense that the accused person had apparently attempted to assault the judge and the question arose following that incident if the judge should have recused himself and the Appellate Division said no. It said that the : (10)

"Wat die regter in die onderhawige saak moes besluit en wat hierdie Hof tans moet besluit, is of die gestaakte poging van die beskuldigde om die regter aan te val objektief gesien wesenlik die onpartydigheid van die regter kon benadeel."

In the MOTOR ACCEPTANCE case the test is put in this way : (20)

"Dit is noodsaaklik dat die rekusaan sy exceptio recusationis fundeer op 'n redelike oorsaak. Iusta causa recusationis wat deur hom bewys moet word. Volgens ons gemenereg is die toets wat aangewend moet word by die beoordeling van die vraag of 'n exceptio recusationis behoort te slaag of nie, is objektief van aard, naamlik of daar 'n redelike vrees bestaan dat die regterlike beampte weens partydigheid, vooroordeel of enige ander erkende grond dalk 'n uitspraak sal gee anders as wat hy regtens behoort te gee."

Then there is a question from Voet, a quotation from (30)

Voet/...

Voet to the effect that I see no reason why a whole gild of judges and not individuals merely have perchance done things which inspire a very just fear and give rise to a suspicion in one of the litigants that they will not judge according to the dictates of justice in the sense of duty of an upright mind, the whole gild of judges could not be declined as suspects in such a case on the reasons being laid before a superior judge or before the emperor.

But the question is the suspicion in the mind of the litigant, not suspicion in the mind of the other members (10) of the gild.

Then there is a quotation from DENISE's case by His Lordship HENOCHSBERG, J. :

"It seems to me that the test that has to be applied is whether the applicant can show reasonable fear that the trial will not be impartial. The matter must be looked at from the point of view of a reasonable lay litigant, but the test is an objective one. The likelihood of bias is almost if not quite as important that justice should be believed to be impartially (10) administered as that it should actually be so, but it must also be borne in mind that the mere possibility of bias apparent to a layman on the part of a judicial officer is insufficient in the absence of an extra judicial expression of opinion in relation to the case or in the absence of one or the other recognised grounds upon which an application for recusation is granted. "In SLADE v PRETORIA RENT BOARD het BARRY, R. die toets aanvaar" as to whether the impression was reasonably created in the mind of the applicant (30)

that he would not have a fair trial. "So ook in APPLE v LEEU" a reasonable litigant might fear that in the trial he would be at a disadvantage."

Then His Lordship goes on to talk about the fact that spurious reasons would not be taken into account.

In SULIMAN's case where a judge had recused himself the Appellate Division said he had done so wrongly, because objectively speaking there were not reasonable grounds for him to recuse himself, particularly, they said there since the grounds upon which he recused himself, could prejudice only the State and not the accused and they said it was only a possibility of prejudice and it was not good enough for the test and they were there concerned about the fairness of the trial aspect because obviously if the possibility of prejudice was a possibility of prejudice which might affect the State, as opposed to the accused the fairness of trial aspect would not enter into it, because the State is not in a position of a reasonably lay litigant.

We say then, assuming that Your Lordship had the power meru moto to order the recusal of Professor Joubert, that that is a question which Your Lordship would have been asked, would have had to consider.

We go on then to look at the million signature campaign. The million signature campaign forms only a small part of the State case. Very little evidence has been directed to the campaign. There will be no more than a few pages in the record which is over 10 000 pages long and similarly in the massive documents in this case, very little attention is given to the million signature campaign. There are

but/...

but few references to the campaign in the long indictment and those references do not suggest that the mere signing of a declaration would have been unlawful or would have made the signatory party to the conspiracy.

COURT : That was never suggested. It has never been suggested by anybody that somebody who signs the declaration is a conspirator or does something unlawful. That was not the basis upon which the decision went and that has been repeated now for a number of times and I think I must put the record straight. (10)

MR CHASKALSON : I understand that and I accept that.

COURT : If you understand it and if you accept it, I find it strange that that same argument is repeated by the accused in their application and that is not the basis for the judgment.

MR CHASKALSON : I think that the point then is that if the person concerned ... (Court intervenes)

COURT : The point is clearly stated in the judgment and it is this that if one signs a document, where he gives support for a campaign and it is alleged that that campaign (20) is part of an unlawful conspiracy, you will have difficulty in deciding eventually whether in fact that is or is not an unlawful conspiracy. This does not mean that the people in the street who signed this campaign had anything to do with the conspiracy or acted in any way unlawful.

MR CHASKALSON : Or in any way improper.

COURT : Or in any way improper. That is the basis of the judgment.

MR CHASKALSON : Well, I do not think then it becomes necessary for me to analyse the indictment. The question (30)

would/..

would then be whether assuming then that a person was asked to sign the document and did so in good faith and intending to voice their opposition to the tricameral parliament and the laws associated with it, in the same way as everybody was at that time being invited to take one side or another in relation to this, whether the fact that person had done that ... (Court intervenes)

COURT : Would disqualify him from sitting on a case where he has to, decide exactly what this was all about. That is the question. (10)

MR CHASKALSON : No, whether it would give rise to a reasonable likelihood that he would be biased. In other words, a reasonable likelihood and we are now assuming that it is signed in good faith and in innocence and without any intention or any knowledge of anything, any ulterior purpose whatever, the question then arises whether in those circumstances there is a reasonable likelihood that a person a trained lawyer, with a legal background, would be unable to divorce from his mind the fact that he had been asked to express his opposition and had done so, whether that (20) meant that when it came to an evaluation of the evidence and the motives of the people who launched the campaign that he would be unable to exercise an objective decision in regard to what their intentions were and if it is assumed that he like every other member of the public who signed it without knowing and let me now accept for the moment for the purposes of this argument the correctness of the State's allegation without knowing that there was an ulterior purpose, that it was being used as it were, not so much to voice opposition, but to help the organisation (30)

improve its organisational machinery, help it to recruit other members, help it just to bolster itself and to make some propaganda which it saw as useful propaganda. Assuming he knows nothing of that and it emerges during the course of the case that there is evidence that this is so, how can the fact that he signed, mean that he will be biased in favour of the accused? How does the fact that he signed, mean that he would be unable to have regard to that evidence and decide whether or not that evidence existed. Indeed, if that evidence existed he would have been a victim. (10) He would have been asked to have done something and had been tricked, why should he, if that were indeed the position, be capable of saying so? After all, it will be a very private thing. Nobody in the world would know besides Professor Joubert that he had signed it. Why should anybody have any doubts, any member of the public or anybody else have doubts about it? Why should the State have any basis whatever for saying to a judicial officer, member of the Court "Because you in all good faith did something, I now say that you are incapable of evaluating the evidence (20) and forming a fair view as to what the intentions of other people were in regard to that." If the mere fact that Professor Joubert had had some marginal contact with a document put out by the United Democratic Front, cannot on the tests as set out in our courts mean that he is incapable of forming a fair and proper judgment in relation to the issued in the case and the test becomes one of prejudice. It becomes whether there is a real likelihood of prejudice resulting from the simple act of the signature.

If that was so, there would be - it would be almost (30)

impossible for judicial officers to sit in cases where events of public importance take place. If there were to be a suggestion of fraud in an election, would it mean that people who had not seen the false document and had not known it to be false but had voted in the election, would then be incapable of sitting in judgment on a party who is alleged to have falsified the document? There would be no end to the matter, because the connection between the issue and the action are so remote that I suggest to Your Lordship that objectively viewed one could not conclude (10) that merely from that fact prejudice exists and if that were the only evidence, could it be doubted with the Appellate Division if Professor Joubert had dealt with the application and said "Yes, I signed it, I signed it in good faith, I knew nothing to suggest that it was improper in any way, I am quite satisfied that I am capable of forming an opinion in relation to the evidence and that the mere fact that I signed this document prejudices me neither in favour of the accused nor of the State." On the cases there is just no basis upon which the Appellate Division (20) would set aside his refusal to recuse himself. The furthest it would go would be to raise a mere suspicion and on the cases that is not enough, but how can any of us know what would have happened if matters had taken a different course.

If Your Lordship had come into court that day and said, as I suggest Your Lordship ought to have done, if there to be such a power "I have been informed by Professor Joubert that he signed a million signature declaration some years ago and I asked the parties what they feel (30)

about/...

about that", how would anybody know what would have happened. It is impossible to say today and if at that time Professor Joubert had then when asked "How do you see your position?" had said "Well, I believe I can give a fair judgment in the case" and when asked "Why did you sign it?" had said what is said in paragraphs 25.1 to 25.7 of his report, which Your Lordship did not know, because Your Lordship says that those facts were never mentioned to you ... (Court intervenes)

COURT : Could those facts conceivably be correct while you rely on them? The White referendum was concluded in 1983. This campaign started in 1984.

MR CHASKALSON : What he was saying is - perhaps we should look at exactly what ... (Court intervenes)

COURT : He said he signed it during the White referendum.

MR CHASKALSON : Perhaps I should take Professor Joubert's report because I think he ~~says~~ said he cannot really remember exactly but thinks it was. Perhaps I am wrong. Let me just look. One thing that I think Your Lordship should look at is paragraph 46.1 of our heads of argument page 28 where there is an allegation in the indictment that on 15 October 1983 at a meeting of the Transvaal Regional Council of the UDF it was reported at that meeting that NUSAS had already ~~collection~~ collected 14,000 signatures. That is 14 October 1983. So, again there is - Your Lordship will see that Your Lordship has formed a view and it may be a correct view, I do not know, that what Joubert said could not be correct because of the dates and it has not been brought to your attention the allegation that two months before Your Lordship thinks the campaign started, there is a report of 14,000

signatures already having been collected and it really goes to show how important it is that everyone should be heard and that all relevant information should be placed before Your Lordship, but - he does say - he says :

"My signature to the document was appended some four years ago. The document had been presented during a meeting held to oppose the new constitution."

He says at 25.5 :

"I had very little recollection of the event, save for recalling that I had expressed my opposition to the new constitution by signing a declaration at a meeting during the White referendum campaign."

That is his recollection. He says "I have very little recollection of the event." And if he was wrong and if he did not sign it during the White referendum campaign, but on some other occasion, how would that have affected the validity of his explanation and how could it?

Once it is accepted that it is innocent, that he signed it in all innocence and that he was not, as Your Lordship was at pains to impress upon me, party to the conspiracy and if his recollection is so bad that he in fact got the wrong date, if anything I suggest, that would be good cause for showing that the matter was very much away from his mind, rather than very much present.

We submit to Your Lordship and we do so in paragraph 49 of our heads that the fact that the constitution of the court for whom the accused pleaded and from whom they are entitled to a verdict, has been disturbed by a decision taken meru moto by the presiding judge in private without hearing any of the parties with an interest in the matter,

constitutes so gross a departure from established rules of procedure that the accused can no longer properly be tried.

My Lord, there are two propositions I want to make here. This very unfortunate incident which has had the repercussions that it had and has in a way led to things which may not have been contemplated at the time that it occurred, none of that is likely to have happened. None of the problems arising in relation to factual conflict would have happened if the matter had been conducted, as matters ordinarily are, in open court. We would not be sitting here today in the(10) impossible position, if I may say so, of having to deal with the matter where there is a conflict between members of the Court as to whether something - a to what was said at the time because if what was relevant was said in court, the record would have spoken for itself. What Professor Joubert's reaction was we would know.What Your Lordship put to him we would know. What arguments he may or may not have had, we would know. What the attitudes of everybody would have been, we would know and that is why proceedings are conducted in an open court. It is precisely to avoid this sort of(20) situation and the dilemma we all find ourselves in now insofar as there is any factual issue involved, is because a material decision was taken in private and not in open court, it is almost impossible to resolve in a way consistent with justice, because Your Lordship may find yourself in the actually impossible position as far as the accused are concerned of making a finding that you were right and Professor Joubert is wrong and how can you do that? Why should you ever have been put in a position where it was necessary. (30)

We cite from the judgment in WESSELS, it is a judgment of the Cape Provincial Division, it is a dictum of His Lordship VAN ZYL, J. He gave the judgment of a full court. It was about whether someone was entitled to be heard who had refused to give evidence in a case before the Court dealt with him in terms of the powers that it had under the statute to deal with recalcitrant witnesses. His Lordship VAN ZYL, J. said this :

"The failure to allow audience through a legal practitioner to a person who objects to giving evidence in a criminal trial, is a gross irregularity. It is so gross a departure from established rules of procedure that it can be said that the accused have not been properly tried. It seems to me that any reasonable person hearing of what took place, would say that the accused have not had justice. They have not been allowed to put their respective cases to the Court as they wanted them presented. In these circumstances nothing is achieved by speculating whether the acumen and persuasiveness of the legal practitioner could rightly or wrongly have persuaded the Court a quo to come to a decision favourable to the accused. The fact remains that the accused have been deprived of this opportunity. It is not for this Court to speculate on what would have happened, had the accused not been so deprived."

I am suggesting to Your Lordship that no one can now speculate on what might have happened, had events taken the course which we suggest they should have taken. If Your Lordship felt under a duty to bring to the attention of the

parties something that had been said to you by the assessor and I think Your Lordship, if I may say so, would have been acting perfectly properly in saying "I think I must bring to your attention the fact that it has come to my knowledge that Professor Joubert some years ago signed this declaration", and that, with respect, is what Your Lordship ought to have done and from then onwards resume the role of judicial officer and left it to the parties to decide what they wanted done with that information.

We are approximately at 15h00 now and I would like (10) to try and get the statute in the form in which it was in PRICE's case and deal with it if I may tomorrow morning.

May I indicate to Your Lordship that I would like to finish - I think I will finish fairly soon tomorrow morning. I do not anticipate being long at all. I would not really have an opportunity of consulting properly with the accused on the statement that Your Lordship has made. I need to consider it very carefully myself and I need full discussion with them and I would like that when the argument is finished tomorrow to have that opportunity then and if (20) necessary to take instructions and to consider my own position as to what is the implications of that statement.

COURT : Well, let us see what the length of the argument is tomorrow.

MR CHASKALSON : As Your Lordship pleases.

MNR. DE VILLIERS : U Edele, mag ek met verlof van die Hof en met die verlof van My Geleerde Vriend twee dokumente inhandig. Die eerste is ons hoofde van betoog. Dit mag vir u van nut wees om dit oor die verdaging te kry. Ek sal dit vir My Geleerde Vriende ook tegelykertyd beskikbaar (30)

stel en ek neem aan My Geleerde Vriend sal nie enige beswaar daarteen hê nie en dan tweedens, daar is 'n verdere aansoek om deurhaling met betrekking tot die repliserende verklaring wat vanoggend aan u opgehandig is wat ek ook verlof vra om voor u te plaas.

HOF VERDAAG TOT 31 MAART 1987.

DELMAS TREASON TRIAL 1985-1989

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