granting of an order must be weighed. If overall, and with due regard to the divergent interests and considerations of convenience affecting the parties, it appears that the advantages would outweigh the disadvantages, the court would normally grant the application. When deciding an application under the sub-rule, the court is not called upon to give a decision on the merits. But it must consider the cogency of the point concerned, because unless it has substance a separate hearing would be a waste of time and costs.

So, the court should not grant an application for a separate hearing "unless there appears to be a reasonable degree of likelihood that the alleged advantages would in fact result" (at 364 H).

There is a similar rule in England. It is discussed in Halsbury's Laws of England, 4th ed. Vol 37, pp 366-371. Sec 484 (p367) states that the court

has wide powers to order the separate trial of separate issues, and continues

> "Under these powers the court is enabled, in appropriate circumstances, to isolate particular issues or questions for separate trial, and thus avoid, or at any rate reduce, the delay and expense in preparing for the trial of unnecessary questions or issues. An order should therefore be made for the separate trial of a preliminary point of law or other issue which, if decided in one way, is likely to be decisive of the litigation, and it is not necessary that the decision should be such as to dispose of the entire action whichever way it is decided."

The appellant's second prayer is for an order that, in the event of prayer 1 being granted, the papers contained in Annexure "A" to the petition stand as the record for the purpose of the adjudication of special entries 1 and 2.

An appeal on a special entry

lies in pursuance of ss (1) of s 318 of the Criminal Procedure Act 51 of 1977, which provides :

> "(1) If a special entry is made on the record, the person convicted may appeal to the Appellate Division against his conviction on the ground of the irregularity or illegality stated in the special entry if, within a period of twenty-one days after entry is so made or within such extended period as may on good cause be allowed, notice of appeal has been given to the registrar of the Appellate Division and to the registrar of the provincial or local division, other than a circuit court, within whose area of jurisdiction the trial took place, and of which the judge who presided at the trial was a member when he so presided."

Ss (2) of s 318 governs the transmission of the record. It reads:

"(2) The registrar of such provincial or local division shall forthwith after receiving such notice give notice thereof to the attorney-general and shall transmit to the registrar of the Appellate Division a certified copy of the record, including copies of the evidence, whether oral or documentary, taken or admitted at the trial and of the special entry: Provided that with the consent of the accused and the attorney-general, the registrar concerned may, instead of transmitting the whole record, transmit copies, one of which shall be certified, of such parts of the record as may be agreed upon by the attorney-general and the accused to be sufficient, in which event the Appellate Division may nevertheless call for the production of the whole record."

(There are similar provisions in ss (5) of s 316, which deals inter alia with appeals, rule 5(5) of the Appellate Division Rules and rule 52 of the Supreme Court Rules.)

The Attorney-General has not consented to the transmission of parts of the record as proposed by the appellants. His attitude throughout has been that special entries 1 and 2 cannot be adjudicated upon without a consideration of the whole of the indictment and all of the evidentiary material before the trial court. It was submitted in argument on his behalf that this court has no power to grant dispensation from the peremptory provisions of s 318(2), which, it was contended, give the Attorney-General a right to have the complete trial record before the Appellate Division. In my opinion it is not now material whether the sub-section is peremptory or directory in its terms. Nor is it correct to say that the sub-section confers a "right" on the Attorney-General. What the proviso does is to give the Attorney-General the power to withhold his consent. The consequence of his not consenting is merely

that the proviso cannot operate. The substantive portion of the sub-section does not trench at all on the inherent power of the Appellate Division to regulate its own practice and procedure in the interests of the administration of justice. It is directed to the registrar of the provincial or local division concerned, and does no more than provide for the transmission of the record to the Appellate Division. In Republikeinse Publikasies (Edms) Bpk. v Afrikaanse Pers Publikasies (Edms) Bpk 1972(1) SA 773 (A), RUMPFF J A said at 783 A - D:

> "In verband met die vraag wat appellant presies moes gedoen het nadat respondent sy aansoek gestaak het, is dit wenslik om te herhaal wat in die algemeen van toepassing is, nl. dat die Hof nie vir die Reëls bestaan maar die Reëls vir die Hof. Uitspraak wat hieraan uitdrukking

gee, is die in Ncoweni v Bezuidenhout, 1927 C.P.D. 130, waar o.a. gesê word:

> 'The rules of procedure of this Court are devised for the purpose of administering justice and not of hampering it, and where the Rules are deficient I shall go as far as I can in granting orders which would help to further the administration of justice. Of course if one is absolutely prohibited by the Rule one is bound to follow this Rule, but if there is a construction which can assist the administration of justice I shall be disposed to adopt that construction.'

Met verwysing na hierdie uitspraak het WILLIAMSON, R., hom soos volg uitgedruk in Brown Bros. Ltd. v Doise 1955 (1) S.A. 75 (W) op bl. 77:

> 'In my view this is a case where the Rules of Court as framed do not provide for one particular set of circumstances which can arise, and I think that the Court has inherent power to read the Rules applicable to the procedure of the Court in a manner which would enable practical justice to be administered and a matter to be handled along practical lines'".

The same principle must apply in a case where it is a statutory provision relating to procedure which falls to be interpreted. The Appellate Division is not prohibited by s 318(2) from deciding what material it should consider in order to decide an appeal, and it is inconceivable that the legislature, in enacting ss(2), intended thereby to oblige the court to consider an appeal only on the basis of the complete record.

A practice direction approved by the Appellate Division in May 1938 provides some precedent for the course proposed. S 372 of the Criminal Procedure and Evidence Act 31 of 1917 (which was then in force) dealt with the reservation of a question of law. In the 5th (1946) edition of Gardiner & Lansdown's South African Criminal Law & Procedure, the following appears (vol 1 p 354):

> "The following procedure upon the reservation of a question of law under S 372, or the granting of a special entry under 370, Act 31, 1917, was approved by the Appellate Division in May, 1938 :- When in a criminal case a superior court reserves a question of law for decision by the A.D. in terms of S 372, Act 31, 1917, the registrar of the trial court shall forthwith notify the registrar of the A. D. thereof (by telegram if the A.D. is in session at the time) and forward

to him a copy of such question reserved, and as soon as possible thereafter forward 8 copies of the record of the proceedings, including a certified copy. Where the question reserved is one of law, not dependent on the construction of the evidence, and facts are necessary for its determination, and such facts are agreed upon or stated by the trial judge, copies of only such portions of the record as may be agreed upon, or as the trial judge may direct, shall be prepared."

The conclusion is that the court has the power to grant the relief claimed in prayer 2 of the petition.

As to factors which may affect the exercise of the power, see Zieve v National Meat Supplies Ltd 1936 A D 466. Each case must depend on its own particular facts.

To justify the court in ordering the omission of the evidence or a part thereof, it must clearly appear that what is proposed to be omitted does not and cannot affect the point to be decided.The onus in this regard is on the applicant (at 470). Although the court is always desirous of welcoming and encouraging the simplification of proceedings and the saving of costs, it has no right to make orders for the cutting down of a record unless there is clear proof of no prejudice to the other party (at 471).

Annexure "A" to the petition comprises some 430 pages. It includes a copy of the indictment as originally served and deals mainly with the events which gave rise to the exclusion of Dr Joubert and the subsequent application for quashing and recusal, and with the making of the special entries. The petition alleges that special entries 1 and 2 deal with discrete issues in the trial;

that the appeal thereon is capable of being argued separately; and that for its adjudication only the contents of Annexure "A" are relevant or necessary. It says that if the procedure envisaged is followed there will be an immense saving in expense. The estimated cost of preparing the trial record, which will comprise about 40 000 pages of evidence and documentary exhibits, is between R388 000 and R480 000.The cost of briefing counsel in an appeal on the complete record would be enormous in comparison with the cost involved in an appeal on a record limited to special entries 1 and 2. The procedure will also have the beneficial result of an expeditious resolution of the issues. A decision on these special entries, if favourable to the appellants, would probably dispose of the entire appeal. If so, there would have resulted a considerable saving of time, namely

1. the time which would have been occupied in the preparation of the entire record;
2. the time which would have been required for preparation by counsel on both sides; and
3. the time which would have been occupied in reading the whole record by the judges who are to hear the appeal.

If, on the other hand, the appeal on the two special entries were to be dismissed, there would have resulted no prejudice to the State or waste of the time of the court as a result of the separate hearing, because these matters would have had to be considered in any event if the whole appeal were to be heard at one stage. The only disadvantage could be one suffered by the appellants, who would have had to wait for a longer period for the appeal to be finally disposed

of. They say in the petition that they accept that risk.

In dealing with the cogency of the arguments relating to the special entries, it must be emphasized that it is no part of the functions of the court at this stage to make any finding on the merits. The only enquiry now is whether there is sufficient substance in the contentions raised on behalf of the appellants to justify a separate hearing.

Special entry 1.1 relates to the proper interpretation of s 147(1) of the Criminal Procedure Act, 51 of 1977, which provides:

> "(1) If an assessor dies or, in the opinion of the presiding judge, becomes unable to act as assessor at any time during a trial, the presiding judge may direct-
> (a) that the trial proceed before the remaining member or members of the court; or

(b) that the trial start de novo, and for the purpose summon an assessor in the place of the assessor who has died or has become unable to act as assessor."

The appellants' contention is that, as a matter of law, the learned trial judge could not, on the basis of the facts set out in his statement of 10 March 1987, properly have formed the opinion that Dr Joubert "had become unable to act as an assessor at any time during (the) trial". Two points are made: he was not "unable to act" within the meaning of s 147(1); and, such inability to act as there may have been existed before the trial began.

These points were dealt with by VAN DIJKHORST J in the reported judgment at pp 691 E to 693 F. The argument on behalf of the appellants on the other hand was in outline the following.

The words "unable to act as assessor" when properly interpreted in the light of the context and the purpose and history of the provision, do not cover the situation which arose in the present case. While Dr Joubert might have been subject to an application by way of the exceptio recusationis (or exceptio judicis suspecti) at the instance of the State or the defence, the legislature did not, in enacting s 147(1), intend to empower a trial judge to exclude an assessor from further participation in the trial because in the judge's view he ought to recuse himself. The use of the word "unable" points to physical or mental incapacity short of death. An assessor is a member of the court, who is sworn "that he will on the evidence placed before him give a true verdict upon the issues to be tried". It is only when he cannot perform that role and function that he is unable to act as assessor; it is not enough that he ought

not to act. Even if Dr Joubert was liable to impeachment (which was not conceded), that did not mean in itself that he could not give a true verdict. Furthermore the words "becomes unable to act as an assessor at any time during the trial" contemplate an incapacity which arises,and not merely one which becomes known, during the trial. Any incapacity of Dr Joubert to act as an assessor (if there was such) existed before the trial began.

In terms of the proviso to s 145(2) of the Act, where the offence in respect of which an accused is on trial is an offence for which the sentence of death is competent, the presiding judge shall, if he is of the opinion that, in the event of a conviction and having regard to the circumstances of the case, the sentence of death may be imposed or may have to be imposed, summon two assessors

to his assistance. These requirements are peremptory, and "unless in the opinion of the trial judge concerned the possibility of a death sentence can be discounted he is obliged to appoint two assessors". S v Malinga 1987(3) SA 490 (A) at 495 I - J). The appellants were charged inter alia with crimes for which the death sentence was competent. VAN DIJKHORST J thought it right to summon two assessors to his assistance. When they were duly sworn, the appellants thereupon became entitled to have their case considered by every member of the fact-finding tribunal. The effect of the exclusion of Dr Joubert was to deny that right to the appellants (cf R v Price 1955(1) SA 219 (A)), with the result that the convictions were a clear miscarriage of justice.

The complaint covered by special entry 1.2. was two-fold: the requirements of procedural fairness were not observed in relation to the forming of his opinion

by the trial judge; and the trial judge misdirected himself on the facts when forming the opinion.

The second complaint relates to the merits of the opinion: it was contended that there were no sufficient grounds for the recusal of Dr Joubert. The Attorney-General's representatives submitted that a decision on this complaint could not be made without a consideration of the importance to the State case of the Million Signature Campaign (which was referred to in the trial judge's statement on 10 March 1987) and that this would require a consideration of the whole record. In order to meet the objection the appellants asked, during the hearing of the application, for the amendment of special entry 1.2 so as to read:

> "1.2 Thereafter, and on 10 March 1987, the trial judge, purporting to act in terms of section 147(1) of the Criminal Procedure Act, No. 51 of 1977, acted irregularly

> by ruling, without hearing any argument thereon, that the assessor Dr W.A. Joubert, had to recuse himself and had become unable to act as assessor, notwithstanding that no application for recusal had been made either by the State or the accused, that Dr Joubert was not willing to recuse himself and that he was willing to continue as assessor."

The object of the amendment was to exclude from the special entry the ground of complaint relating to the merits of the opinion, and to leave only the complaint that the opinion was formed in disregard of the rules of procedural fairness. The application for amendment was not opposed by the Attorney-General and it will be granted.

The complaint which remains was dealt with in the reported judgment at 693 F - 694 C. The learned trial judge was of the view (at 693 J) that the parties had

no right to be heard before the judge formed his opinion, and they had no ground for complaint if they were not heard.

The argument of the appellants to the contrary was in outline the following. The requirement that a party to litigation should be heard on all matters in which he has an interest, is fundamental to all legal systems. Two basic requirements of natural justice, expressed in the injunction audi alteram partem, are that notice of intended action must be given to persons who may be prejudicially affected by the exercise of a particular power, and that they should be afforded a proper opportunity to be heard. The audi alteram partem rule is not excluded by the provisions of s 147(2). The forming of the opinion referred to in s 147(2) was a matter which might prejudicially affect the accused: it is the jurisdictional fact on which

the power to exclude an assessor depends. It is implicit in the sub-section that once the opinion has been formed, the trial judge is under a duty to exercise the power by adopting one of the two courses of action which are set out. S.147(1) necessarily implies that in order to form the opinion, the trial judge must be possessed of information enabling him to do so. There was therefore a duty resting on the judge before reaching his opinion to notify Dr Joubert and the accused of such information, and to afford an opportunity to Dr Joubert to defend himself and to afford to the accused an opportunity to be heard. (Cf R v Ngwevela 1954(1) SA 123 (A)). The learned trial judge formed his opinion mero motu and in private, without informing Dr Joubert or the accused what he proposed to do, and without affording either of them the opportunity of being heard. This constituted a departure from established rules of procedure so gross that

it had the result that the accused were not given a proper trial.

Special entry 1.3 concerned the decision of the trial judge, after he had made his ruling that Dr Joubert was unable to act as an assessor, to continue the trial before a court consisting of himself and the remaining assessor.

This was dealt with in the reported judgment at 695 B - D. The learned judge said that he did not regard it as a requirement laid down by the Act to afford the parties a hearing before deciding to invoke paragraph (a) of S 147(1). He did not call upon the parties to address him in this regard as he did not think it possible that any accused, after having been through a trial of some 17 months, would prefer to start de novo. And he did not believe their protestations at the later stage to be genuine in this respect.

The main submissions made on behalf of