a reasonable fear that the judicial officer will not be impartial.
SA Motor Acceptance Corp (Edms) Bpk v Oberholzer (supra) at 812C - H

2.27. The trial judge, however, construed section 147(1) of the Act as empowering him to order an assessor to recuse himself.

'I have regretfully come to the conclusion that there is no option but to rule that Dr W A Joubert has to recuse himself.'

Record: Vol 1 p 38 lines 9 - 10

2.28. There is nothing in the language of section 147(1) of the Act as originally enacted, or in its subsequent legislative history, or its apparent scope and background to suggest that the legislature intended thereby to change the common law relating to the recusal of members of the court.

2.29. The law of recusal was well known and of long standing and there was no need to introduce statutory provisions to deal with a situation in which a party might wish to make an application for the recusal of a member of the court.

2.30. There is no reason to believe that the legislature intended by section 147(1) of the Criminal Procedure Act 1977 to create an entirely new standard and procedure for recusals - one left to the presiding judge to determine according to 'his opinion' on his own initiative, without prior reference to the parties, without affording them an opportunity of being heard, and irrespective of their wishes.

2.31. There is, moreover, no need to interpret section 147 as bringing about so radical a departure in the existing law.

2.32. This is not required by the background and apparent purpose of the legislation, which prima facie was directed to a situation such as that which existed in R v Price where a sudden catastrophe overtook an assessor during the course of a trial. The catastrophe in Price's case made it impossible for the remaining members of the court to complete the case, in circumstances in which it was appropriate for them to do so and where the parties wanted this to be done.

2.32.1. It is submitted that the approach by the trial judge to the interpretation of the section was erroneous. He misconceived the apparent scope and purpose of the legislation, and adopted a strained construction of the wording of the section.

2.32.2. The only English dictionary to which he refers for the meaning of 'unable' is the Shorter Oxford English Dictionary but he neglects to cite the full definition by excluding the third meaning of the word, namely, 'physically weak, feeble'.

2.32.3. He refers to the Oxford English Dictionary, not for the meaning of the word 'unable' but for the meaning of the word 'able' and uses that definition to support his conclusions.

2.32.4. He places reliance on The Law of South Africa Vol 5 para 594 p 428 and on Hiemstra Suid Afrikaanse Strafproses (4th ed) p 320. Both these authorities are written by the same author, and it

should be pointed out that in the first edition of Hiemstra's Suid Afrikaanse Strafproses the author wrote that 'onbekwaam' referred to physical incapacity, a view that he modified in subsequent editions, but without reference to authority.

2.32.5. He takes the view of Hiemstra in his later writings out of their context and elevates to the status of legal disqualification, factors which at the most could have made Dr Joubert the subject of an application for recusal.

2.33. Finally, it is submitted that if any ambiguity as to the meaning of the section exists, it should be construed in conformity with the existing law, and not as introducing a radical and seemingly unwarranted departure therefrom.

2.34. In all the circumstances it is submitted that the trial judge misconstrued section 147 and as a result acted beyond the powers vested in him by that section. The result of his having acted in this manner was that the composition of the court was unlawfully changed. This constituted a

material irregularity which per se resulted in a failure of justice.

S v Gqeba (supra)

3. SPECIAL ENTRIES NOS 1.2 AND 1.3

3.1. Special entry No 1.2, as amended in terms of the AD judgment, and special entry No 1.3 read as follows:

> '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.
>
> '1.3. Thereafter, having made such a ruling, and without hearing any argument thereon, the trial judge irregularly continued the trial before an improperly constituted court consisting of himself and the remaining assessor, Mr W F Krugel.'

3.2. These special entries raise issues of procedural fairnes and can conveniently be dealt with together.

3.3. Section 147(1) required the judge to exercise a judicial discretion in relation to two issues:

3.3.1. firstly, whether the circumstances were such that Dr Joubert was indeed unable to act as assessor and, if so

3.3.2. secondly, what action to take in consequence thereof.

3.4. The trial judge took the decision to invoke section 147 without calling on the State or the defence 'after due deliberation' (Record: Vol 4 p 323 lines 17 - 19). He considered that the audi alteram partem rule does not apply to the exercise of the judge's power under section 147 to form an opinion as to whether or not an assessor has become unable to act; he chose to make the decision without asking the parties their views.

> 'The parties have no right to be heard before the judge forms his opinion. They have no right to complain if they are not.'
>
> Judgment: Vol 4 p 329 line 30 - p330 line 2

3.5. Having taken that decision he was then faced with three choices:

3.5.1. He could have ordered the trial to proceed before the remaining members of the court;
Section 147(1)(a) of Act 51 of 1977

3.5.2. He could have ordered that the trial start de novo and for that purpose summon an assessor in the place of the assessor who had 'become unable to act as assessor';
Section 147(1)(b) of Act 51 of 1977

3.5.3. He could have directed that the trial be stopped and the proceedings be quashed. The effect of such an order is that the court hearing the trial is discharged, and the Attorney-General can elect to charge the accused persons (or some of them) again on the same or different charges. It is akin to the power of a judge to recuse himself, and can be exercised when an irregularity has occurred which makes it undesirable for the trial to be continued.

R v Matsego 1956(3) SA 411 (A) at 417H

S v Apolis 1965(4) SA 178 (C) at 179D - H

S v Gcaba 1965(4) SA 325 (N)

S v Moseli(2) 1969(1) SA 650 (O)

3.5.4. In the result he chose to order that the trial be continued before himself and the remaining assessor, and did so without affording the accused an opportunity of being heard on that issue.

3.6. In dealing with the issue as to whether he was obliged to afford the parties a hearing before deciding whether to invoke sub-section (a) or (b) of section 147(1) the trial judge stated:

> 'Though normally it would be done (often by means of a private conference in chambers) I do not regard it as a requirement laid down by the Act. I did not call upon the parties to address me in this regard as I did not think it possible that any accused after having been through a trial of some seventeen months would prefer to start de novo. Nor do I believe the present protestations to be genuine in this respect. When I asked what would the argument have been had the assessor died, I could not get a clear answer from defence counsel. It seems to me that defence counsel are shaping their argument according to facts learnt ex post facto.'

Judgment Vol 4 p332 lines
12 - 23

3.7. Why the trial judge sought to assert that he did not believe 'the present protestations to be genuine in this respect' is not clear. Whatever the judge may or may not have thought when he made the order that the trial be continued, it was thereafter plainly apparent that the accused did want the trial to start de novo. Otherwise, they would not have brought an application for the relief that they claimed, which, if successful, may have resulted in the prosecution having to commence de novo.

PROCEDURAL FAIRNESS

3.8. 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. Two basic requirements of natural justice which apply to persons whose rights may be prejudicially affected by the exercise of a particular power are notice of the intended action and a proper opportunity to be heard. Both requirements are expressed and understood by the maxim audi alteram partem. The basis of the

audi alteram partem rule is natural justice or fundamental fairness.

Winter v Administrator- in-Executive Committee 1973(1) SA 873 (A) at 890H

Turner v Jockey Club of South Africa 1974(3) SA 633 (A) at 645C - 646E

Momoniat v Minister of Law and Order 1986(2) SA 264 (W) at 274B - C

Attorney-General, Eastern Cape v Blom 1988(4) SA 645 (A) at 662H

3.9. It is submitted that the audi alteram partem rule is not excluded by the provisions of section 147 of the Act. There is nothing in the general tenor and policy of the section which points to such an exclusion. On the contrary, fairness demands that it be scrupulously observed, particularly in a criminal trial, where nothing should be done which might create even a suspicion that the trial is not being conducted fairly (R v Matsego 1956(3) SA 411 (A) at 418B).

3.10.

3.10.1. It is a fundamental principle of our criminal law and procedure that an accused person is entitled to be heard on every decision taken during a trial

which might affect his rights. Related to this are the requirements of sections 152 and 158 of the Act that, subject to express exceptions which are not relevant to this case, all criminal proceedings be conducted in the presence of the accused in open court.

3.10.2. In R v Maharaj 1960(4) SA 256 (N), Broome J P stated at 258B - C:

> 'It is a principle of justice as administered in this country that trials must take place in open court and that judicial officers must decide them solely upon evidence heard in open court in the presence of the accused. If that principle is violated, then, quite apart from the question as to whether the accused 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.'

Cited with approval in S v Moodie 1961(4) SA 752 (A) at 756H - 757B

S v Rousseau 1979(3) SA 895 (T) at 898F - G

S v Ngcobo 1979(3) SA 1358 (N) at 1359H

R v Hertrich and Others (1982) 137 DLR (3d) 400

R v Fenton (1984) 11 CCC (3d) 109

S v Leepile and Others 1986(2) SA 333 (W) at 338 - 339

3.11.

3.11.1. The consequences of the decision to dismiss Dr Joubert as an assessor transformed the court from one of three members in which the facts found to have been proved would depend upon the decision of a majority of the three members of the court, into one of two members in which the decision of the trial judge would be definitive. Section 145(4)(a) of the Criminal Procedure Act

3.11.2. A decision as important as that one which changes the composition of the court during the course of the trial, is a decision in relation to which an accused is entitled to be heard.

3.11.3. It can be assumed therefore that the legislature would have contemplated that the decision would be based on an opinion which would be formed by the judge in the manner judges ordinarily form opinions relevant to the trial of an accused person, namely, after a hearing in open court in which all interested parties have been given the

opportunity of bringing material information and arguments to his attention. If this is so, failure to hear the accused vitiates the decision.
R v Ngwevela 1954(1) SA 123 (A) at 133A
Momoniat v Minister of Law and Order 1986(2) SA 264 (W) at 274D
Nkwinti v Commissioner of Police 1986(2) SA 421 (E) at 439F
Attorney-General, Eastern Cape v Blom 1988(4) SA 645 (A) at 669I - J
R v Fenton (supra)
R v Hertrich and Others (supra)

3.11.4. It follows that the irregularity was one which has vitiated the proceedings.

4.

4.1. The facts of the present case demonstrate the necessity for a proper hearing. It appears from the record that the judge did not make full enquiries as to the circumstances in which the document was signed and the reason why it was signed, before he formed the opinion that Dr Joubert was unable to act as assessor. Also, that he erred in law in the approach he adopted to the recusation issue.

4.2. In dealing with these matters, it will be necessary to have regard to the judge's statement and also to Dr Joubert's third report in which, inter alia, he responds to the judge's account of the events, and elaborates on the circumstances in which he was discharged. The admissibility of the third report is dealt with below.

4.3. Dr Joubert says that the judge did not give him any opportunity of being properly heard on the question of his having to recuse himself.

Joubert: First Report: Vol 2
paragraph 25, p 90

4.4. The issue concerning the signature by Dr Joubert of a Million Signature Campaign declaration first arose during the tea adjournment on 9 March 1987. Although the precise terms and manner in which this occurred is in dispute as between the judge and Dr Joubert, it is clear that there was no discussion concerning the matter.

Joubert: First Report: Vol 2, para 21 p 89
Record: Vol 4 p 259 lines 6 - 15
Joubert: Third Report: Vol 5, p 399 lines 7 - 19

4.5. Dr Joubert was not in the judge's chambers during the lunch adjournment on that day. A discussion

took place between the judge and the other assessor, Mr Krugel; the judge decided not to act immediately.

Record: Vol 4, p 259 lines 17 - 22

4.6. After the adjournment the matter was briefly raised and the judge and Dr Joubert then departed on the basis that consideration would be given to it overnight. There is a difference in their views as to whether or not Dr Joubert had a proper opportunity to discuss the issues involved. It is apparent, however, that the judge enquired neither into the circumstances of the signature nor the implications thereof.

Joubert: First Report: Vol 2, para 22 p 89
para 23 p 90

Record: Vol 4, p 259 line 23 - p 260 line 7
Vol 5, p 399 line 6 - p 400 line 7

4.7. Immediately thereafter, the judge sought and obtained the advice of the Judge-President, whereafter he 'reached the conclusion that it would be improper for Dr Joubert to continue to act as assessor'.

Record Vol 4, p 260 lines 8 - 11

This conclusion was reached without further recourse to Dr Joubert, and without knowing why he had signed the form, nor what his answer was to the charge that he should recuse himself.

4.8. On the following morning the judge informed Dr Joubert that he considered that Dr Joubert should recuse himself. Dr Joubert indicated that he did not agree with this view. Again, the judge and Dr Joubert differ as to what took place between them and on the question as to whether Dr Joubert had a proper opportunity to express his views.

4.9. It is, however, apparent that the judge formed his opinion on the basis of the events of the previous day and his discussions with the Judge President, and that he did not invite discussion thereon, nor did he ask Dr Joubert for any explanation, clarification or amplification of the circumstances surrounding the signature of the document in question, or the implications thereof for his office as assessor.

Joubert: First Report: Vol 2, paras 24 - 30
pp 90 - 94

Record: Vol 4, para 20
pp 260 - 261

Joubert: Third Report: Vol 5, p 399 line 21 -
p 400 line 7

4.10. In the course of the statement which he made before argument on 30 March 1987, the judge said that 'Dr Joubert was told in no uncertain terms that I intended to discharge him.'

Record: Vol 4, para 24 p 261

4.11. This is disputed by Dr Joubert, who says that he was not consulted in any way as to what the presiding judge proposed to do.

Record: Vol 2 para 28 p 93
Vol 2 para 30 p 94 lines 8 - 9
Vol 5 para 13 p 399 line 19 -
p 400 line 7

4.12. He evidently did contemplate that the judge might indicate, in court, that he felt that Dr Joubert should recuse himself, and had decided upon a response thereto.

Record: Vol 2, para 29 p 93
para 32 p 95

4.13. Irrespective of the conflict between Dr Joubert and the judge, it would appear that the summary nature and terms of the step taken by the judge in delivering the statement of 10 March 1987 had not been anticipated by Dr Joubert. He was clearly taken by surprise, and was afforded no opportunity to say anything in court.

Record: Vol 2, para 33 p 95

4.14. Leaving aside the conflict between Dr Joubert and the judge in regard to the course of events and what took place between them, it seems clear that the judge took the view that the signing of a Million Signature Campaign form per se disqualified Dr Joubert and as a result, he asked for no explanation and conducted no enquiry himself in regard to the circumstances in which and the reason why the form was signed. Clearly, a full and proper enquiry was not conducted in regard to the issue whether Dr Joubert should recuse himself.

4.15. The trial judge made it perfectly clear that he did not consider the signing of the declaration by Dr Joubert to be unlawful, or to make Dr Joubert a party to the alleged conspiracy or to have been in any way improper.

Record: Vol 4 p 270 line 24 - p 271 line 28

He apparently dealt with the matter on the basis that the signing of the declaration, albeit innocent, disqualified Dr Joubert from sitting as an assessor.

4.16. He did not consider whether Dr Joubert, a trained and eminent lawyer who had taken an oath that on the evidence placed before him, he would give a true verdict upon the issues to be tried, and who had signed the document in innocence and according to him, for the sole purpose of expressing opposition to the constitution, was unable to carry out an unbiased evaluation of the evidence (if any) that the organisers of the campaign had an ulterior motive.

4.17. The failure by the trial judge to conduct a full and proper enquiry also resulted in his failing to give consideration to the significance of the time mentioned by Dr Joubert as the time when he signed the petition against the constitution.

4.17.1. The facts were as follows. In his first report, Dr Joubert stated the following:

'When the court adjourned for tea, I remarked to the judge that I remembered signing one of the declarations in the Million Signature Campaign in 1983 because I was also opposed at that time to the new constitution. I could not and still cannot recollect exactly where or when I signed this document or exactly what it contained. I believe, however, that the document was presented to me during the white referendum at a meeting of voters which had been held to campaign against the new constitution.'

Joubert: First Report: Vol 2 para 21, p 89

4.17.2. The judge was at pains to emphasise that Dr Joubert was mistaken about the date on which he signed the document. During the course of argument he stated: 'Could these facts conceivably be correct while you rely on them? The white referendum was concluded in 1983. This campaign started in 1984.'

Record: Vol 4 p 275 lines 9 - 11

In his statement before the application commenced he said: 'The declaration could not have been signed by him in 1983 as the campaign only started in 1984. See Exhibit O6 paragraph D3.'

Record: Vol 4 para 21 p 261

4.17.3. In fact, the issue of the date of signature raises the possibility of a mistake which was not considered at all by the trial judge. The judge's attitude is predicated upon the conviction that Dr Joubert was mistaken about the date of signature. However, if Dr Joubert was in fact correct about the date of signature (a possibility apparently not entertained by the judge), then the question arises as to what it was that he signed. In his first report he stated that he could not recollect exactly what the document contained.In his third report which the judge refused to read he states:

> 'I need barely state that I have never had any "relationship" of any kind with the United Democratic Front. ... The judge may well be right ... in stating that I could not have signed the Million Signature Campaign in 1983 "as the campaign only started in 1984". As I have stated, I am not sure exactly where or when I signed the document nor what its precise contents were. This shows of what little moment the document and my act were to my mind some years later when I was sitting as an assessor.'

Joubert: Third Report: Vol 5 p 395 line 18 - 396 line 12

The admissibility of the third report is dealt with below.

4.17.4. Moreover, it was pointed out in argument during the application to quash the trial that it was part of the State case, and there was documentary evidence to support this, that by the middle of October 1983 NUSAS had already collected 14 000 signatures in a campaign against the constitution. Record: Vol 4 p 275 line 17 - p 276 line 17

Possibly it was this petition that Dr Joubert signed, and not the form reflected in the Record at p 101 (Vol 2).

4.17.5. The significance of the date was not considered by the judge, nor did he discuss it with Dr Joubert.

4.18. The conflict as to what actually occurred, and the recriminations which now exist in relation to the incident, arise directly out of the way the judge chose to exercise his powers. If he had

acted in the ordinary way by raising the matter in open court and asking all interested parties, including Dr Joubert, to deal with the matter, allowing them adequate time to consider their postions and formulate their responses, the uncertainty which now exists, and the sense of aggrievement felt by Dr Joubert and the accused, would have been avoided. It is precisely because the judge did not observe the ordinary rules of procedural fairness that these issues now exist.

Joubert: First Report: Vol 2, para 33, p 95
Founding Affidavit: Vol 2, para 20, p 69
Joubert: Third Report: Vol 5, pp 383 - 404

4.19. In the result the constitution of the court before whom the accused pleaded and from whom they were entitled to a verdict was disturbed by a decision taken mero motu by the presiding judge in private, without hearing any of the parties with an interest in the matter, and without even fully investigating the issues with Dr Joubert himself. This constitutes so gross a departure from established rules of procedure, that it can be said that the accused were not properly tried.

5.

5.1. The ruling, however, went further than this. It embraced a direction that the trial be continued before the judge and the remaining assessor.

5.2. The judge seems to have treated this part of his ruling as a formality.

> 'I did not think it possible that any accused after having been through a trial of some seventeen months would prefer to start de novo'.
>
> Judgment: Vol 4 p 332

5.3. There is nothing in the statute or its history to suggest that the legislature considered such a decision to be a 'formality'. The provision enabling a judge to continue a case without an assessor who has died or become unable to act can be traced back to R v Price (supra). The need for a power to continue a trial in such a case, does not mean that continuation of the trial should be the rule and not the exception.

5.4. When such a provision was first introduced, the accused retained the right in cases where assessors were necessary, to insist upon that right being observed, and to object to the trial