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DIE STAAT teen: PATRICK MABUYA BALEKA EN 21 ANDER

VOOR: SY EDELE REGTER VAN DIJKHORST EN 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

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(Bladsye 10 229 - 10 297)

COURT RESUMES ON 31 MARCH 1987.

MR CHASKALSON : My Lord, may I hand back to Your Lordship the original replying affidavit which now seems to be in order. Yesterday I was at page 49 of our heads and I think I should just finish that section and then deal with the legislate of history before proceeding on to the next section of the argument. We have read to Your Lordship in the case of WESSELS which stresses the impossibility determining what would have happened had an argument taken place at the time and of course the difficulty of arguing once a decision has been (10) made, but we have submitted to Your Lordship that if the procedure were to be irregular that the matter falls within the second category of MOODIE and that there is *per se* an irregularity which means that the issue of prejudice would be irrelevant. Of course the prejudice is presumed from that nature of irregularity, but may I say that on the facts in the light of Your Lordship's statement yesterday and in the light of Professor Joubert's report, that on the facts there would be prejudice because it seems clear from what Your Lordship told us yesterday that the view which was being (20) advanced by Professor Joubert was a view favourable to the defence case and that opinions which he had formed, as I understand Your Lordship's report of yesterday, were opinions favourable to the defence case. So, clearly the loss of that view in the light of Your Lordship's statement is something which would be prejudicial for a whole variety of reasons which I do not really need to develop. So, even if we needed to go so far as to show prejudice on the very peculiar circumstances of this case and in the light of the statement made by Your Lordship, I suggest that (30)

prejudice/...

prejudice is there.

Let me now move to look at the legislate of history. Now, the provision enabling a Court to continue a trial without one of the assessors was first introduced in 1955. It followed the decision in PRICE's case and the amendment first came in in the Criminal Procedure Amendment Act, no. 29 of 1955. Section 33 of that Act introduced a new Section 216 into the Criminal Procedure and Evidence Act of 1917 and it provided - the Act was in fact signed in English at that time, well, amending the Act was in English(10) and it provided that if at any time during a trial in respect of which the presiding judge was not in terms of proviso to sub-section ... (Court intervenes)

COURT : Have you got the Act there?

MR CHASKALSON : I have got the statute in front of me.

COURT : Could you have a copy made of that page, please? I would like to have it.

MR CHASKALSON : Yes.

COURT : It is difficult to get it altogether.

MR CHASKALSON : I understand. We should have done it. (20)

COURT : You can do it at some stage during the day, please. I need the English as well as the Afrikaans.

MR CHASKALSON : It is actually Dutch?

COURT : Well, the Dutch as well as the English.

MR CHASKALSON : And then it became Afrikaans.

MNR. DE VILLIERS : Miskien kan ek van hulp wees en hierdie kopie ophandig.

HOF : Baie dankie.

MR CHASKALSON : Can I just tell Your Lordship what the structure was, before one looks at the details. Originally(30)

at/...

at that time the Act distinguished between the case where assessors were obligatory and where assessors were not obligatory. Where assessors were obligatory, the case could not be continued without the consent of the accused. Where the assessors were not obligatory then the case could be continued at the discretion of the presiding judge and the language the situation contemplated is the same in both instances, though the rights of the Court are different depending on whether assessors were obligatory or not and Your Lordship will see if you look first at the English (10) in which the Act was signed :

> "If any assessor dies or becomes in the opinion of the judge incapable of continuing to act as assessor, the judge may ..."

Section 216bis(i). In the Dutch version Your Lordship will see that the words used :

> "het oordeel van de regter onbekwaam word om verder als assessor te dien."

So, we have that structure introduced immediately following PRICE's case and of course the PRICE case was a case (20) of death and we know therefore that the type of event which led to the introduction of this, was as it were the physical incapacity of an assessor arising out of death. It was a physical situation. Something which had happened to the assessor and Your Lordship will see that the language becomes - it is during a trial becomes incapable. So, from the very earliest moment, the legislature is dealing with a situation in which an assessor who was sitting has become, an event occurred during the trial, something happens during the trial as a result of which he becomes incapable and it (30)

did/...

did not deal with the recusal situation at all and indeed never has. At no stage has there ever been any statutory provision dealing with recusals and in our law the question of recusal has at all times been left to the common law, though the judge always has a power to stop a trial if in his view the trial should be stopped.

When the 1955 Act, the Consolidation Act was signed the Act, the 1955 Consolidation, took over in identical terms the provision which had appeared in the earlier amendment which was introduced following the PRICE case (10) and it now became Section 110. The language is the same but now the version - there is no longer a Dutch version. We now have an Afrikaans version and the Act was signed in Afrikaans. The Afrikaans expression is :

> "... volgens die oordeel van die regter onbekwaam word om verder as assessor te dien."

It is really I think exactly the same as the previous Dutch version. I do not detect any difference at all, though I hesitate to express any views on the connotation of the wording of the Dutch, but it seems to me to be precisely (20) the same.

The next event in the legislative history ... (Court intervenes)

COURT : But is there not a new section included "met die instemming van die beskuldigde", with the consent of the accused?

MR CHASKALSON : That I think was there in 1959. I was under the impression that the ... (Court intervenes)

COURT : I think I have sorted it out now.

MR CHASKALSON : I think they are exactly the same. (30)

I/...

I think that the structure was that where assessors were obligatory, you needed the consent of the accused, but if the assessors were not obligatory, you did not and one can understand the reason for that and that would be that if assessors were obligatory that the accused person was entitled, as a matter of law, to have three people sit on a case of a particular nature and should not be disadvantaged by it.

Then the next matter in the legislative history which I think is relevant is in 1959 where in terms of the (10) Criminal Law Further Amendment Act, no. 75 of 1959, there was an amendment to Section 109 of the Principle Act. I think Your Lordship has the Principle Act before you and what happened there was that the proviso to Section 109 provided that if the accused is to be tried upon a charge of having committed or attempted to commit treason, murder, rape ... (Court intervenes)

COURT : What sub-section of Section 109?

MR CHASKALSON : Sub-section (2) and if Your Lordship turns to the proviso. Basically what happened there was that (20) the deletion, the proviso which made it obligatory for assessors to be called was deleted and with the deletion, the effect of that was to render redundant the previous provisions of Sub-section (3) which left it, which required the consent of the accused in a case where that proviso applied. Of course the proviso had gone away and that the fact that it had become redundant was pointed out by the Appellate Division in the case of R v MATI 1960 (1) SA 304. At page 306 B His Lordship SCHREINER, J. giving the judgment of the Court said : (30)

"Section/...

"Section 110(3) was not deleted by Act 75 of 1959 although after the deletion of the proviso to Section 109(2) there seems to be no justification for its continued presence in the Act."

What happened then was that the section was then deleted some years later by Section 9 of the Criminal Procedure Act, no. 92 of 1963. The Act remained in substantially the same form until 1977 when there was a new consolidation and at that stage the language what was Section 110 now became Section 147 of the new consolidation and though (10) the Afrikaans version continued to use the word "onbekwaam word", the English section changed from the use of the word "incapable" and introduced the word "unable". I have seen the argument of My Learned Friend, he was kind enough to let us have it yesterday afternoon and I have noticed that in his argument he makes the submission without giving any authority for it that the word "unable" has a broader meaning than the word "incapable" and that for that reason the inference can be drawn that the legislature was seeking to broaden the scope of the section and to make it clear(20) that what was contemplated was something more than the physical disability which had been referred to in GUBUDELA's case. Now, of course, GUBUDELA's case was decided on language for practical purposes the same as Section 110 in the form in which it was prior to the 1977 consolidation and he suggested that that is a basis for distinguishing GUBUDELA's case.

I want to say immediately and here I think I talk with a little more confidence than I might in regard to the meaning of the Dutch or even the Afrikaans version, but (30)

that/...

that the word "unable" has a narrower meaning in this context than the word "incapable", because one of the recognised meanings of the word "incapacity" - one of the recognised meanings of the word "incapable" is legally incapable. Can I hand up to Your Lordship extracts from the shorter Oxford Dictionary and also from Websters. Your Lordship will see that under item 6 in the shorter Oxford Dictionary "incapable", Your Lordship will see "not legally qualified or entitled, disqualified" and if Your Lordship looks at Websters 2(a) "lacking legal qualification because of some (10) fundamental legal disqualification." Now, that particular meaning is not a meaning, we have given Your Lordship the dictionary definitions, which appears in the ordinary meaning of the word "unable" and Your Lordship has those definitions in our heads of argument dealing with "unable".

So, in effect, leaving the Afrikaans as it was, and changing the English from "incapable" to "unable", would show an intention to deal with a type of situation contemplated in the PRICE case, something analogous to that and not as empowering the judge to - not as vesting in the (20) judge a power of recusal which did not exist otherwise in the common law and so we make the submission to Your Lordship that in fact the legislative history shows support for the contention which we advanced yesterday on the proper construction of the statute. If one takes with it the fact that the common law deals with the situation and indeed if one is thinking of why there may have to be this distinction, there is after all a big difference between - this case is quite an extraordinary case as Your Lordship realises. Nothing like this has ever happened before to my (30)

knowledge/...

knowledge in the practice of law.

COURT : Let us say we hope it never happens again.

MR CHASKALSON : That is right, but it has happened and we have to deal with the situation which has arisen because it has happened, but I am complete(ly) unaware of any previous occasion on which it has been ruled during the course of a trial that an assessor is obliged to recuse himself on the grounds of I assume the likelihood of bias coming from his knowledge or actions prior to the trial. I think that would be a fair way of putting Your Lordship's ruling. If Your (10) Lordship feels that I put that wrongly, I would be glad to know but I think that that is a fair way of putting how Your Lordship ruled.

That of course was a situation - ordinarily if that situation were to arise, it usually arises in relation to an accused person that the prejudice is against the accused and that because it should not be thought as it was said in MATSEGA's case that there should not be any suspicion about the fairness of the trial that though there may be no actual bias, the person should leave the court, because (20) no accused person could ever feel that something has happened during the trial which would lead him under the belief and his friends and his family and the public generally that he has not had a fair trial and of course if a member of a small court is prejudiced against the accused or there is a likelihood of prejudice against the accused in the membership of a small court, the public perception could well be that if the remaining members of the Court stay, they may be affected by the prejudice and therefore where prejudice comes into it, the ordinary common law would apply and (30)

the/...

the Court should be discharged and after all it will be an exceptionally rare incident. It is not the sort of thing that happens every day. That after all was the rule with jury trials for centuries while they are still existing and we are dealing now here with chosen people from the legal profession. It seems exceptionally unlikely one would ever get that situation. In the highly unlikely contengincy the legislature simply did not apply his mind and it would be right or may be right that in such circumstances the case should start afresh, so as that the (10) accused person should not be under the impression that some how or other the prejudice which he might have seen in some way affect the other members of the Court.

But whatever the reason, one does not need to speculate on the reason, may be, the legislature did not deal with the situation and it was dealing with something which fortuitous, which happens during the trial which makes the - which results in the assessor becoming unable to continue. And even if one were to take a very broad meaning of "unable" and not in the context that we suggest the meaning should (20) be taken of the physical or mental incapacity, the legislative history might suggest what was in mind of the legislature. Even if one were to say that having recused himself an assessor has become unable to continue. One were to say that. That would not confer and have the power to create the inability, because the inability stems from the fact of having recused, you are unable and it does not vest in the court the power to recuse the assessor and as long as the assessor remains willing and able to carry out his duties, then the Court - the section does not apply and (30)

there/...

there is very good reason for that too. There is very good reason why as long as the members of the Court are willing and able to continue, a situation should not arise where one member of the Court has the power to dismiss another member of the Court and there may be very good public policy reasons for that, because on this level all members are equal and since the common law provides the remedy and since the judge ultimately has the power to quash proceedings if in his view the case should not continue for any possibility. Every situation is adequately taken care of. (10) Your Lordship said to me yesterday "Well, postulate a situation which might never arise, but assume that in the course of the case an assessor said to the Judge "I have been bribed", what could the Judge do.

Assuming and I say equally and I say very decidedly that postulation could not happen, but assuming that a Judge were to say to an assessor during the course of the trial "I have been bribed" or assuming a Judge were to say to an assessor during the course of the trial "These accused are evil people and it is our job to convict them and we must (20) sit here and see what we can do", assume that were to happen, why would the situation by any different if the Judge says it to the assessor than if the assessor says it to the judge. There is no reason why it should be, because in both instances it would be an illegality, it will be a clear breach of duty and in both instances the other party would be obliged to make known that breach of duty and allow the common law to take its course, an application for a recusal.

Assume Your Lordship said "What happens if the assessor said 'I have been bribed'" and you say you must recuse (30)

yourself/...

yourself and the assessor says I would not, you said "What can I do?" But if the Judge says to the assessor "I have been bribed and the assessor says to him "You must recuse yourself" and he sayd "I would not", what does the assessor do? Then I suggest they both have to do the same thing. They both have to make known to the parties what has happened, their inability - the fact that they have no power either of them to do anything about it and therefore they make public what the situation is and in such a situation the case would stop, because whether the assessor was (10) lying and being vexatious or whether the Judge was lying and being vexatious and both of them we assume to be impossible. The accused could not possibly accept in that situation a properly constituted Court. That I suggest to Your Lordship is why these remarkable circumstances which the legislature cannot provide for and does not provide for get covered by the common law and have to be dealt with in accordance with the common law.

It will also create an absolutely impossible situation because given those extraordinary situations which I have(20) described, there could well be a conflict of fact between Judge and assessor and assessor and Judge and either the Judge has to sit and decide and say though the assessor denies this happened, I say it happened and I rule, which is absolutely contrary to the fundamental principles of our law that anybody should sit in judgment on a question of fact to which he is a party to the dispute and we all know that in cases where that arises, if it happens to counsel they withdraw from the case and if it happens to Judges they withdraw from the case. (30)

Again/...

Again the assessor may - let us postulate the situation where the assessor comes and says "I regret it is my duty to inform, to make the following statement. In the course of discussions during deliberations yesterday the Judge said this to me" and he says everything that was said and that that shows that this Judge is not fit to continue with this trial. The judge could not then rule and say "I did not say it." What would happen is that the Judge would say "I regret that this has happened. It is not correct, but in view of what has happened, I cannot continue in this (10) trial." And the question as to whether that did or did not happen, be resolved elsewhere by somebody else if it was necessary for such resolution to take place, but it could never have been a contemplation of the legislature that the sort of situation that Your Lordship gave me yesterday, where there is a conflict of fact between members of the Court, is left to the decision of one of the members of the Court to form an opinion in private on his own without reference to hearing anybody else and coming to court and announce that that is so. So, the extraordinary situation(20) Your Lordship put to me yesterday as an example, I suggest shows or gives support to the submissions which I have put to Your Lordship yesterday and I do submit to Your Lordship that these very unfortunate events have left Your Lordship in a situatin where it is in fact impossible to continue in the trial, but let me turn now to another part of our argument.

At page 33 of our heads of argument we deal with the what we suggest is another irregularity which has been committed and that is that Your Lordship not only ordered(30)

the recusal of Professor Joubert without hearing anyone, but Your Lordship thereafter ruled, exercised a discretion you decided to envoke your powers to continue the trial with yourself and the remaining assessor without asking for argument on that issue.

I deal with this at the bottom of page 33 of our heads of argument and the argument there develops from the proposition that if the presiding judge felt that a member of the Court ought to recuse himself, he had the power to quash the proceedings and discharge the Court. I think (10) that is clear from all the cases I have referred Your Lordship to yesterday.

If, contrary to the submissions we have made, the presiding judge also had the power to order the recusal of the assessor under Section 147 of the Act, he was not obliged to exercise the power given to him under Section 147. He could, had he chosen to do so, have exercised the power which underlines all his powers which is to discharge the Court and start again or let a new Court start again and the question whether Your Lordship should have acted, (20) exercised that power or how you should have exercised that power, are matters we suggest which do affect the accused.

Now I realise Your Lordship will say that the case had gone for a year and there would be good reasons why the case should not start afresh, either before me and a new tribunal or before an entirely differently constituted tribunal. One can understand why such an order should be made, but the fact of the matter is that there is another view which could have been put to Your Lordship and I cannot now really argue to Your Lordship, nor do I believe Your (30)

Lordship can decide what you would have done, had an argument been presented here, because the fact remains here it was not and it is impossible having taken a decision then to sit as it were objectively and say "Well, if I had known that, my decision would still have been the same", but I think that is the point made in WESSELS's case and all the other cases referred to, but can I put to Your Lordship why I say there is an argument of substance that a different course should be taken and I do not intend to develop that argument fully, because I do not think that anything would (10) be achieved by that. I am not arguing that point now. All I am trying to show Your Lordship is that there is an argument of substance the other way.

As far as the argument of substance is concerned, the case is one in which Your Lordship has summoned two persons to sit with you. It is the sort of case in which the statute may indeed - I do not know why Your Lordship did it and I cannot ask Your Lordship, nor would I, but it may be the sort of situation in which Your Lordship felt obliged on the indictment. (20)

Now the very reason why in a sort of situation where a court feels to obliged to summon additional assessors, the very reason for that provision. It is not a question of form or question of appearance. It is a question of substance. It is in a particular type of case. It is considered necessary that different views should be held amongst members of the Court. That the cases of such moment and the consequences of a conviction are so great, that it is proper that there should be different views and not just a view of one person, nor even of two persons, (30)

but/...

but the view of three persons as to what the outcome should be. So that in the course of the case, when it comes to the evaluation of the evidence and the consequences of what is taking place, all these, if I might borrow a phrase from Professor Joubert's report, these countervailing views will enter into the pot and that influence will be bought to bear different people, that one person's perception might influence another person's perception and in the end of the day, that the accused in that type of case, there will be greater assurance with regard to convictions or acquittals and (10) because of the particular seriousness of the case, it is not only what the legislature expects. It is what fairness requires that the different views of different peope should be put into the scale.

Your Lordship himself has known what Your Lordship told us yesterday, I would not have known it, nor would the accused have known it, but they may have suspected it, but Your Lordship would have known, if I were to address such an argument to you that what Your Lordship was going to lose for the rest of the case was a view different in (20) some respects to the views of other members of the Court and a view within the Court which would be favourable as I understand Your Lordship's statement yesterday to the accused.

Your Lordship would know when I put the argument to you, that that was a factor and Your Lordship would quite clearly have taken that into account in deciding whether this was a sort of case which should properly be dealt with by three persons and not by two persons who might possibly - let me put it differently. What I want to say is this. I am talking, and please do not understand me to be saying (30)

about/...

about questions of bias or anything like that and when one is sitting in a court, one gets different views. One gets different perceptions and one gets totally honest but different reactions to people. One person sees a witness and there is something about the way that witness gives the evidence or something about a particular contradiction in the evidence or what is perceived by one person to be an improbability, which another person with a different life experience sees differently and - so, one has these different views within a court and Your Lordship may well have thought that the (10) loss of a view which was favourable to the accused was in the particular circumstances of this case such that it would have been undesirable to continue the case without that view.

COURT : What would your argument had been had Professor Joubert died?

MR CHASKALSON : I do not know what my argument would have been.

COURT : Well, should your argument not have been exactly the same as it is now? Because there cannot be any (20) difference in principle.

MR CHASKALSON : It may have been the same. I think there is a slight difference, in fact quite an important difference, because ... (Court intervenes)

COURT : You are now arguing on the basis that the decision having been reached, that the Court consisted of two people, whether to continue or not?

MR CHASKALSON : I really do think there is a difference because we are always looking at perceptions. We are looking at public perceptions and we are looking at the perceptions (30)

of/...

of the accused and I do think there is a vast difference when one is looking at the whole structure of justice what was really in the interest of justice and how you can exercise your discretion as it was said in the MATSEGA's case that you should do nothing which would leave the accused under the impression that their trial is not a fair trial and when you are confronted with the situation as to what to do, as to whether to discharge a Court or to continue, it is hard to exercise that power.

COURT : Well, let us look at the matter objectively. (10) Had Professor Joubert died, would it have been fair to anybody concerned in this trial, especially the accused, not to continue with the trial?

MR CHASKALSON : Well, I think it would have been, but I also want to go one stage further. I want to say something to Your Lordship about the continuation of the trial as well which are some of the factors which I would have argued or may have argued, but it is very difficult. I think I can with confidence say that I would have argued it, but I was not put in the position of having to consider (20) it, but the structure of the argument would have gone beyond what I had said to Your Lordship. If I can do the best now to think what sort of argument I would have thought of had the situation then arisen. I think I would have argued this to Your Lordship. I would have argued what I have argued from an early stage in this case, that the nature of this particular indictment is so oppressive that it is exceptionally difficult for the accused to conduct their defence. I would have argued, I think, that the bringing together of people such as these nineteen who (30)

are/...

are left, we now know in hind-sight to have been the wrong thing and it should never have happened in the first instance and I think I would have argued to Your Lordship that if the case were now to stop and instead of having this monstrous trial with an indictment covering years and witnesses which we would have to go around the country looking for and the enormous burden which has been placed upon the accused, that it would have been far more desirable to stop the trial and to start again with five trials or four trials or three trials, each of which I would suggest could have been (10) easily completed before this case will in fact run out its course, because the very nature of this indictment is going to keep us here for probably and I hesitate to make statements without knowing whether they in fact will turn out to be correct, we may be here for more than a year because of the nature of this case. I would suggest to Your Lordship if these accused had been tried properly, each one of their cases and they are individuals, you can point out to immediately, the case of accused no. 1. That case could be conducted for a week, yet he has got to wait here for (20) another year.

If there is any case against accused no. 1 it can be dealt with within a week. The State's evidence we know. The defence evidence could be run off in no time and there are a number of people ... (Court intervenes)

COURT : Can I take it for granted that the state will restructure its case should we start afresh? Would one not have to go through the whole process all over again?

MR CHASKALSON : Well, I think that one would expect that everybody would act reasonably and knowing what the (30)

position/...

position is, particularly if Your Lordship were to say "I do not think it proper to continue with this case" and I do also do not think that the Attorney-general considers re-charging any of the accused, that he should do so in this way that he should deal with them in a different way which will enable the matter to be dealt with quickly and I think that that would happen.

But all I am suggesting to Your Lordship is that these are arguments and they are arguments of substance and that the opportunity to put the argument has been lost and we (10) can never get it back again and Your Lordship cannot now attempt to recapture the lost moment.

So, I suggest to Your Lordship that there were arguments of substance as to why the case should not have been continued. Your Lordship will remember that right at the beginning of this case I referred Your Lordship to the ADAM's case and the question of joinder and how RUMPFF, J. said that you had to accept the allegation which made it possible for people to be joined and how I also pointed out there at the time we were asking for particulars (20) about the need for that. I do not want to say any more now, but that after a year of this case, I suggest that Your Lordship is in the position or it may have been possible to persuade Your Lordship had I set about that task, gathering all the evidence and looking at the position to say that in fact the grounds for joinder which are alleged in the indictment had not been shown to exist out of the State case itself and I would have welcomed that opportunity and if Your Lordship had come to that conclusion Your Lordship may then have said that in fact the joinder was bad, we (30)

know/...

know it to be bad and in the exercise of my discretion I will stop the proceedings and tell the Attorney-General to join only those people who ought to be joined and to try people in the way they ought to have been tried in the first instance and that I suggest would have been a very proper exercise of Your Lordship's discretion. All I am saying is that we did not have that opportunity. Your Lordship did not give it to us. I do say too that for the rest of the - well, I think I have made the point that has to be made. (10)

I would like to deal with one matter My Learned Friend having been good enough to give is heads of argument. I think I ought properly at this stage to deal with one matter raised by My Learned Friend in his heads of argument upon which he might like to know what our views are before he argues.

He puts to Your Lordship in argument that the Court has no power to sit in review or on appeal against one of its own orders and that the remedy, and the only remedy that the accused's persons have is either the reservation (20) of a point of law or the statement of a legal issue. Either a special entry or a reservation of a point of law and he quite properly points out in his heads of argument that there is no procedure whereby such matters could be dealt with by the Appellate Division until the end of the case. There is no procedure which our law recognises and indeed there are other authorities My Learned Friend has not referred to which I could let Your Lordship have if they became relevant. That it has been tried on many occasions to get the Appellate Division to rule on a matter which (30)

may/...

may be of fundamental importance during the course of the case and it is always declined to do so. It says that the accused must wait till the end of the case and if they are convicted, their remedy is to appeal against the conviction.

The first answer that I have to that is that we are not asking Your Lordship to review your order and we are not appealing against that order, it is precisely because Your Lordship cannot review the order and it is precisely because there can be no appeal that we say that Your Lordship must now look to what has happened and we are not (10) asking Your Lordship to set aside anything that you have done. We are asking Your Lordship to rule that the consequences of what you have done is to create a situation which constituted a material irregularity and which has vitiated the trial.

Can I give Your Lordship an example. Let me assume that in cases where the Court has stopped the trial because evidence had been put before assessors and which they should not have heard, let me assume that in the course of a trial the evidence was led, that there was an objection and the (20) Judge said "Well, I am satisfied that my assessors can sit here, I do not see anything wrong with that." Then the case has continued for a day or two and after a day or two somebody had found the Appellate Division judgments of MABASO, MATSEGA and others and had come back to the Court at that stage and had said "What you had done is such that you ought to quash the proceedings." The Appellate Division says that this is what you should have done. Could there be any doubt that Your Lordship would have the power to quash the proceedings? There cannot be. (30)

Since/...

Since Your Lordship never considered the question as to - never asked us to deal with the issue as to your powers, never I think contemplated that what was happening might be an irregularity. If now, in the light of this argument Your Lordship were to come to the conclusion that what has happened is in fact an irregularity. It would, I suggest, be an exercise in futility to continue the case for a year and so we are not asking Your Lordship either to review or to appeal or to set aside anything. We are asking Your Lordship to have regard to the consequences of what has (10) happened and to decide in your discretion as the person in control of the proceedings whether it is right to continue.

I want to say no more and if Your Lordship were to form the view that this - that you acted wrongly and that you were to form the view that you acted wrongly because you did not hear argument on the matter and that having heard argument you now decide that you acted wrongly, I think that it would be a very clear case for exercising a discretion to quash the case, because what could be greater prejudice than all of us continuing here for a year or more (20) knowing that at the end of the day, if there is a conviction, the case will be a nullity.

So, we then make the submissions which we do to Your Lordship at page 34 of our heads of argument. We say that if it appears now to the Court that there have been some material irregularities which <u>per se</u> constitute a failure of justice, that the correct action to take would be to quash the proceedings and we say that even of the irregularities have not resulted in the failure of justice and contrary to what we have submitted the Court as presently (30)

constituted/...

constituted is competent to hear the case. It is undesirable, well, I think that I should leave it until a later stage, but a factor I think that will be difficult to leave out of mind is the consequences, that the events taken a course since the moment that Your Lordship made a ruling which orally unparalleled I think were totaly unforeseen and all that must weigh with Your Lordship in thinking what really is the right thing to do now in the light of all that has happened.

This is a theme I may have to come back to in the (10) other applications, but one cannot ignore I suggest in the exercise of your discretion, if you think of what was said in MATSEGA's case, one cannot ignore the events of the past week or two. It is going to be ultimately, not only the question of prejudice per se or prejudiced established but I think it is going to also involve perceptions of prejudice. The right time for me to do that, to advance that argument, may be later and I do think Your Lordship will bear it in mind and I do not think it will be wrong for Your Lordship to bear it in mind than when a Court is (20) asked to exercise its power and to quash proceedings, it will have regard not only to actual and legal prejudice but to perceptions of prejudice and that is what is said in MATSEGA's case.

Those then are our submissions to Your Lordship in relation to our application to quash the proceedings. And we ask that the proceedings be quashed.

MNR. DE VILLIERS : U Edele, My Geleerde Vriend het by die slot van sy argument gehandel met die eerste punt wat ons opper, naamlik dat inderdaad wat hy vir u vra om te doen (30)

is/...

is om u eie uitspraak te hersien of om as 't ware as 'n hof van appèl te sit om u eie uitspraak te hersien.

Die antwoord wat hy gee op daardie argument, wat hy so pas gegee het, is dat hy u nie vra om nie so 'n hersiening of appèl te behartig nie, maar tog sê hy dat wat die Hof gedoen het neerkom op 'n onreëlmatigheid "which vitiates the trial".

In ons submissie is hier nie 'n geval waar daar vanweë feite soos in die MATSEGO saak waar daar ontoelaatbare (10) getuienis deur 'n assessor bekend geraak het nie. Wat hier inderdaad gebeur het, is dat die Hof die aangeleentheid oorweeg het en na aanleiding daarvan 'n beslissing gegee het.

So, dit is heeltemal onderskeibaar in ons submissie van die geval waar daar 'n bloot in die loop van die verhoor 'n onreëlmatigheid plaasgevind het. Wat hier gebeur is dat My Geleerde Vriend inderdaad vir u sê u uitspraak is verkeerd, u benadering tot die uitspraak was verkeerd, die artikel waarop u u beroep het, is nie die korrekte artikel nie, dit verleen u nie die bevoegdheid om te doen wat u gedoen het nie. Dit is baie duidelik, daardie aspekte is reeds (20) deur u beslis.

Dit is wel waar dat daar is 'n paar aangeleenthede, enkele aangeleenthede wat My Geleerde Vriend nou opper en wat nie spesifiek mee gehandel is in die uitspraak nie, maar dit wil nie sê dat daardie aangeleenthede nie deur U Edele oorweeg is toe u die uitspraak oorweeg het en gelewer het nie. Ek dink hier aan die vraag of die Hof die geleentheid aan die verdediging en Staat moes gegee het om aangehoor te word ten opsigte van die vraag of die Hof sy diskresie onder artikel 147 moet uitoefen. Hoewel dit (30)

nie/...

nie in die uitspraak spesifiek mee gehandel word nie, is dit seer sekerlik ŉ aangeleentheid wat U Edele in terme van u diskresie ingevolge artikel 147 sou oorweeg het of dit nodig is vir U Edele om daardie stap te volg, al dan nie en soos ek later sal betoog wanneer ek by dié aspek kom, was dit nie vir U Edele, in ons submissie nodig, om dit te gedoen het om die Staat of die verdediging ten opsigte van dié aangeleentheid aan te hoor nie en die rede is, om dit effens vooruit te loop, dat die artikel aan U Edele ŉ baie duidelike diskresie verleen en soos ek later sal (10) aantoon, ook met verwysing na ander artikels in die Strafproseswet, is dit een van talle artikels in die Strafproseswet wat aan die Hof se oordeel sekere aangeleenthede oorlaat waar die Hof die besluit doen in die - op die basis van die billike beregting van die verhoor.

So, my submissie is dat - die hoofsubmissie is nog steeds dat inderdaad wat My Geleerde Vriend nou vir u vra is om te sê heroorweeg die beslissing, kom tot die gevolgtrekking dat u eie beslissing verkeerd is, dat dit nie gegrond is nie en op grond daarvan moet u dan volgens sy(20) argument bevind dat daar ŉ onreëlmatigheid begaan is.

Die beginsels wat hier ter sprake is, is eintlik baie bekend en ek wil aan die hand gee dat dit nie vir my nodig is om alles te herhaal wat ten opsigte van daardie punt in die hoofde gesê word nie. Ek wil net ŉ paar punte uitlig. Dit is nou in paragraaf 1 van die hoofde.

Die basiese beginsel wat ten grondslag lê van hierdie reël is die beginsel wat ons op bladsy 4 van die hoofde noem, naamlik dat wanneer ŉ Hof ŉ aangeleentheid oorweeg het en daaroor beslis het, hy <u>functus officio</u> is. So, (30)

in/...

in die onderhawige geval is ons submissie dat My Geleerde Vriend inderdaad vir u vra om te doen wat u regtens nie bevoeg is om te doen nie. My Geleerde Vriend is nie geregtig om te vra om ten opsigte van 'n beslissing ten aansien waarvan u functus officio is vir u te vra om tog nog weer op daardie beslissing terug te gaan nie.

Die tweede paragraaf wat ons op bladsy 6 behandel het te doen met Bede 1.1 van die Kennisgewing van Mosie en in daardie bede word daar aangevoer "That the proceedings should be quashed on the grounds that the dismissal of (10) the assessor, Professor W.A. Joubert, was made without power and was wrong in law and in consequence thereof, the Court which is now hearing the trial is not a properly constituted Court."

Ons submissie is dat die bevel wat U Edele gemaak het is wel wettig en dat die Hof gevolglik tans wel 'n behoorlik saamgestelde hof is en op bladsy 7 verwys ons na die bevoegdheid waaronder u gehandel het, artikel 147(1) van die Wet wat die bepalings bevat wat in paragraaf A vermeld word en wat ek nie weer hoef te lees nie. Dit is al telkemale (20) aan u voorgelees.

Wat die artikel betref, is dit baie duidelik dat die Hof 'n diskresie verleen word wat daar duidelik gevind word in die woord "kan", maar naas die woord "kan" is daar ook die belangrike woorde "na die oordeel van die voorsittende regter" en soos ek later sal aantoon is daar talle ander bepalings in die Strafproseswet waar dit aan die oordeel van die regsprekende beampte gelaat word om te besluit of hy die een optrede volg of die ander. Hierdie is een van die gevalle waar baie duidelik deur die wetgewer beoog was dat die (30)

voorsittende/...

voorsittende regter die besluit sal neem of die assessor onbekwaam geraak het om as assessor op te tree.

Dan is dit baie belangrik dat hier ook vermeld word die woorde "onbekwaam raak om as assessor op te tree" en die Engels "becomes - in the opinion of the presiding Judge becomes unable to act as an assessor." My Geleerde Vriend het gewag gemaak van die woorde "becomes unable to act as an assessor at any time during a trial."

'n Mens moet na hierdie artikel kyk in sy samehang van die artikels wat handel met assessore. In artikel 145 (10) van die Wet word daar in sub-artikel (2) die bevoegdheid aan die Hof verleen om in sekere gevalle hoogstens twee assessore op te roep om hom by die verhoor by te staan en in artikel 145(1)(b) word gesê dat 'n assessor iemand is wat na die oordeel van die regter wat by die verhoor voorsit ondervinding van die regspleging het of bedrewe is in 'n aangeleentheid wat by die verhoor oorweeg mag word.

Daar is dit ook baie belangrik dat in artikel 145(1)(b) dieselfde woorde voorkom "na die oordeel van die regter wat by die verhoor voorsit." Die wetgewer het klaarblyklik (20) bedoel dat die edele voorsittende regter in daardie geval op die feite dan tot sy beskikking self die oordeel sal vel of die betrokke persone geskik is om as assessore op te tree, al dan nie. Daar kan ook geen sprake daarvan wees dat daar op daardie stadium 'n geleentheid deur die voorsittende regter gebied moet word aan die beskuldigdes om hulle sê te sê oor die vraag of die betrokke assessor geskik is, al dan nie, om te sit as 'n assessor.

Die bedoeling van die wetgewer was klaarblyklik ook hier om dit dan te laat aan die volkome diskresie van (30)

die/...

die regter of hy 'n assessor wil kies om hom by te staan en indien hy die persoon kies, watter persoon dit gaan wees. Dus ook by die toepassing van sy diskresie onder artikel 145(2) waar daar gesê word hy kan hoogstens twee assessore oproep, is daar ook geen verpligting op die Hof of liewer op die Regter om enigsins die Staat of die verdediging die geleentheid te gee om hom toe te spreek oor die vraag op welke wyse hy daardie diskresie moet uitoefen nie en dan die voorbehoudsbepaling tot artikel 145(2) in ons submissie is ook van belang. Dit lees : (10)

> "Met dien verstande dat waar die misdryf ten opsigte waarvan die beskuldigde verhoor word, 'n misdryf is ten opsigte waarvan die doodsvonnis 'n geoorloofde vonnis is, die voorsittende regter, indien hy van oordeel is dat in geval van 'n skuldigbevinding en met inagneming van die omstandighede van die geval, die doodsvonnis opgelê kan word of opgelê moet word, twee assessore moet roep om hom by te staan."

Weer eens die belangrike woorde wat ek onderstreep "indien hy van oordeel is". In die Engelse teks "if he is of (20) opinion" en dan ook die belangrike woorde "en met inagneming van die omstandighede van die geval.

Daar kan weer eens geen sprake daarvan wees in ons submissie dat die Edele Regter in so 'n geval die Staat of die verdediging die geleentheid moet gee om hom toe te spreek oor die vraag of hy sy diskresie aldus moet uitoefen nie.

Die beklemtoning van die oordeel van die voorsittende regter vind u ook in artikel 145(4)(b) waar daar gesê word : (30)

Dat/...

"Dat 'n assessor is 'n lid van die Hof met dien verstande dat indien die voorsittende regter van oordeel is dat dit in belang van die regspleging sal wees dat die assessor of assessore wat hom bystaan nie deelneem aan 'n beslissing oor die vraag of getuienis van 'n bekentenis of ander verklaring gedoen deur 'n beskuldigde as getuienis teen hom toelaatbaar is nie, slegs die regter oor bedoelde vraag beslis en hy vir dié doel alleen kan sit."

Ook wat daardie sub-artikel betref is ons submissie (10) dat die artikel dit duidelik beoog dat die oordeel van die voorsittende regter daar deurslaggewend is, maar meer as dit is ons submissie dat die bedoeling nie was dat daar die geleentheid gegee moet word aan die Staat of die verdediging of die assessore in so 'n geval deelneem aan die betrokke beslissing, al dan nie. Of beter gestel, die Staat of die verdediging het nie in ons submissie onder daardie artikel die geleentheid - die bedoeling was nie dat hulle die geleentheid sal hê om die Hof toe te spreek op die vraag of die Hof sy diskresie aldus behoort uit te (20) oefen nie.

Artikel 145(4)(c), hoewel dit nie die woorde bevat "die oordeel van die voorsittende regter nie", is dit klaarblyklik ook 'n geval wat aandui dat dit 'n aangeleentheid is wat suiwer in die diskresie van die regter is.

Mag ek u kortliks ook op hierdie stadium verwys na etlike ander bepalings in die Strafproseswet waar 'n mens, in ons submissie, dergelike bepalings kry waar 'n diskresie òf aan 'n regsprekende beampte òf byvoorbeeld aan die Prokureur-generaal gelaat word of 'n ander beampte en dat die (30)

bedoeling/...

bedoeling nie is dat daar ŉ audi ulteram partem toegepas sal word nie.

Mag ek verwys na artikel 112 van die Wet wat lui :

"Waar ŉ beskuldigde in ŉ summiere verhoor in enige hof

K609 skuldig pleit aan die ten laste gelegde misdryf of aan ŉ misdryf waaraan hy op die aanklag skuldig bevind kan word en die aanklaer daardie pleit aanvaar :

(a) kan die voorsittende regter, indien hy van oordeel is dat die misdryf nie die doodsvonnis regverdig nie, of kan die voorsittende regter, streekland- (10) dros of landdros, indien hy van oordeel is dat die misdryf nie gevangenisstraf of ŉ ander vorm van aanhouding sonder die keuse van boete of lyfstraf van meer as R300,00 regverdig nie, die beskuldigde slegs uit hoofde van sy pleit van skuldig skuldig bevind ten opsigte van die misdryf waarop hy skuldig gepleit het."

Ek hoef nie die res van die artikel te lees nie. Wat betref 112(1)(b) kry ŉ mens weer eens die inleidende woorde :

"... moet die voorsittende regter, indien hy van (20) oordeel is dat die misdryf die doodsvonnis regverdig of indien hy deur die aanklaer daartoe versoek word ..."

dan moet hy die beskuldigde met betrekking tot die beweerde feite van die saak ondervra. In ons submissie, in die twee artikels waar die woorde "indien hy van oordeel is" voorkom, kon dit nooit die bedoeling van die wetgewer gewees het dat hier die Staat en die verdediging albei aangehoor hoef te word of hoegenaamd aangehoor hoef te word oor die aangeleentheid nie. (30)

ŉ Ander/...

ŉ Ander voorbeeld wat ek nie hoef uit te lees nie is artikel 113 waar ŉ bevoegdheid aan die Hof gegee word om ŉ pleit reg te stel. Artikel 114 wat soos volg lui :

"Indien ŉ Landdroshof na skuldigbevinding wat op ŉ pleit van skuldig volg maar vonnis van oordeel is dat die misdryf ten opsigte waarvan die beskuldigde skuldig bevind is van so ŉ aard of omvang is dat dit ŉ straf regverdig wat die regsbevoegdheid van ŉ Landdroshof te bowe gaan; of ..."

(b) wat ek nie hoef te lees nie die vorige veroordelings (10) sodanig is dat dit ŉ straf regverdig wat die regsbevoegdheid te bowe gaan

"staak die Hof die verrigtinge en verwys die beskuldigde na ŉ Streekhof vir vonnis wat regsbevoegdheid het."

Weer eens, in ons submissie, kon dit nooit die bedoeling van die wetgewer gewees het dat wanneer die Landdroshof sy oordeel moet - of wanneer die landdros sy oordeel moet vorm, dat hy daardie geleentheid sou gee aan die Staat of die verdediging om hom daaroor toe te spreek (20) nie. Mag ek net dit ook nog byvoeg, indien dit in ŉ geval sou gebeur dat die voorsittende beampte in hierdie tipe van gevalle wat ek noem tog die Staat of die verdediging die geleentheid daartoe sou gee om hom toe te spreek, is dit ŉ vergunning wat die regsprekende beampte dan verleen aan die Staat en die verdediging maar iets wat hy nie verplig is om te doen nie.

Vervolgens verwys ons u na artikel 116 van die Strafproseswet wat bepaal dat indien ŉ Landdroshof na skuldigbevinding wat op ŉ pleit van onskuldig volg, maar voor (30)

vonnis/...

vonnis van oordeel is dat die misdryf ten opsigte waarvan die beskuldigde skuldig bevind is van so 'n aard of omvang is dat dit straf regverdig wat die regsbevoegdheid van 'n *Landdroshof te bowe gaan of dat die vorige veroordelings* sodanig is dat dit straf regverdig wat die regsbevoegdheid van 'n Landdroshof te bowe gaan, staak die Hof die verrigtinge en verwys die beskuldigde vir vonnis na 'n Streekhof wat regsbevoegdheid het.

Weer eens is dit ons submissie dat die woorde "van oordeel is" nooit bedoel kon gewees het deur die wetgewer (10) om die audi ulteram partem reël te inkorporeer nie. Dit is 'n oordeel wat die landdros self vel op die feite tot sy beskikking.

Insgelyks is artikel 123 wat handel met 'n voorlopige ondersoek :

> "Indien 'n Prokureur-generaal van oordeel is dat dit *vir doeltreffende regspleging noodsaaklik is dat 'n* verhoor in 'n hoërhof voorafgegaan word deur 'n voorlopige ondersoek in 'n Landdroshof, na die bewerings teen die beskuldigde, kan hy, waar hy nie die prosedure inge- (20) volge artikel 119 volg nie, of waar hy dit volg, die verrigtinge teen die beskuldigde ingevolge sekere artikels verdaag word in afwagting van die beslissing van die Prokureur-generaal, gelas dat 'n voorlopige ondersoek teen die beskuldigde ingestel word.

En ook (b) wat ek nie nou hoef te lees nie. Weer eens die gebruikmaking van die woorde "oordeel van die Prokureur-generaal, in ons submissie weer eens die bedoeling dat hy daardie diskresie uitoefen sonder om enigsins die verdediging daaroor te ken. (30)

Dieselfde/...

Dieselfde ten opsigte van artikel 125 van die Wet, 125(1) wat ŉ bevoegdheid aan die Prokureur-generaal verleen. Ook daardie bevoegdheid in ons submissie is een waar hy nie die audi ulteram partem reël hoef toe te pas nie.

Dan artikel 145 se bepalings het ek reeds genoem.

147 se bepalings kom ek later weer by terug.

148. Daar vind u dat ŉ spesiale hoërhof kan saamgestel word en u vind daar die woorde dat die Minister van oordeel is.

Dan artikel 167 wat ŉ bevoegdheid verleen aan die Hof (10) om ŉ persoon te roep as ŉ getuie. Dit is ŉ bevoegdheid wat weer eens in ons submissie uitgeoefen word deur die regsprekende beampte sonder dat hy in ons submissie die verdediging of die Staat hoef te ken alvorens hy dit doen.

Dan artikel 185 wat gaan oor aanhouding van getuies onder sekere omstandighede. Daar vind u ook die woorde dat die Prokureur-generaal van oordeel is en daarmee saam gekoppel dan die diskresie wat aan die Prokureur-generaal verleen word om ŉ beëdigde verklaring voor ŉ regter in kamers te lê en aansoek te doen vir ŉ bevel dat die betrokke persoon (20) aangehou word in afwagting van die verrigtinge. Ook daar, is ons submissie, dat dit nooit die bedoeling kon gewees het dat die Prokureur-generaal alleen so kan optree nadat hy die betrokkene die geleentheid gegee het om gehoor te word nie.

Dan ook artikel 186 van die Wet wat bepaal dat die Hof in enige stadium van die verrigtinge iemand as ŉ getuie by daardie verrigtinge kan dagvaar of laat dagvaar. Ook in hierdie geval, in ons submissie, is dit nie vir die Hof nodig om die Staat en die verdediging te ken alvorens hy (30)

daardie/...

daardie besluit neem nie. In ons submissie is dit nie ŉ uitputtende lys van al die betrokke artikels wat handel met die oordeel van die betrokke beamptes nie, maar ons wil aan die hand gee dat dit van die vernaamstes is wat ons die hande op kon lê.

Die volgende argument wat My Geleerde Vriende ten opsigte van artikel 147 aangevoer het handel met die woorde "becomes unable to act as an assessor at any time during a trial." Daardie woorde moet dan in ons submissie klaarblyklik saamgelees word met die res van die tersaaklike (10) bepalings in die Wet en in besonder moet dit saamgelees word met artikel 145(1) en (2). Artikel 147 veronderstel dat die Regter, die voorsittende Regter sy diskresie uitgeoefen het om assessore op te roep om hom by te staan of selfs van oordeel was in terme van die voorbehoudsbepaling van 145(2) dat hy twee assessore moet oproep om hom by te staan. Dit veronderstel dan ook dat die Agbare Voorsittende Regter wanneer hy daardie assessor opgeroep het om hom by te staan oorweeg het of die assessor ondervinding van die regspleging het of bedrewe is by ŉ aangeleentheid wat by die verhoor (20) oorweeg moet word en dit veronderstel ook klaarblyklik dat die Agbare Voorsittende Regter van oordeel was dat die betrokke assessor bekwaam was om as assessor op te tree toe hy hom aldus opgeroep het.

Nou kom ŉ mens by artikel 147 en dit maak voorsiening dat indien ŉ assessor te enige tyd gedurende ŉ verhoor sterf of na die oordeel van die voorsittende Regter onbekwaam raak om as assessor op te tree, die Voorsittende Regter die diskresie het om te gelas dat die verhoor voor die oorblywende lid of lede van die Hof voortgaan of dat die (30)

verhoor/...

verhoor de novo begin. Iets wat aan die begin van die verhoor toe die assessor opgeroep is bestaan het, naamlik die bekwaamheid van die assessor, het nou in die loop van die verhoor verander en wat verander het is dat volgens artikel 147 hy òf gesterf het òf na die oordeel van die voorsittende Regter onbekwaam geraak het om as assessor op te tree.

HOF VERDAAG. HOF HERVAT.

MNR. DE VILLIERS : In Straut, Judicial Dictionary, vierde uitgawe onder die woord "become" eerste paragrafie daar (10) is 'n uittreksel uit 'n beslissing in 'n Engelse Hof :

> "The word 'become' in its usual and proper acceptation imports a change of condition. That is the entering into a new state or condition by a change from some former state or condition."

In ons submissie is dit ook wat dan hier gebeur het. Die Agbare voormalige assessor, prof. Joubert was by die aanvang van die verhoor toe hy versoek is om as assessor op te tree klaarblyklik deur die Hof as bekwaam beskou in die sin wat die artikel bedoel. Die Hof het in ons submissie (20) tereg die voorsorgmaatreël getref om vir prof. Joubert te vra of hy enige verhouding met die United Democratic Front het.

MNR. BIZOS VRA VERLOF VIR BESKULDIGDES NRS. 14 EN 19 OM NA DIE DOKTER TE GAAN.

MNR. DE VILLIERS : In paragraaf 8 van die verklaring wat u gister gemaak het in die hof het u gesê dat prof. Joubert op daardie vraag ontkennend geantwoord het en dat u nie meegedeel is dat hy die UDF se One Million Signature Campaign onderteken het nie. (30)

Ook/...

Ook in u uitspraak op 10 Maart het u dieselfde punt in die uitspraak vermeld.

Op die feite tot U Edele se beskikking was prof. Joubert dus by die aanvang van die verhoor toe hy die eed geneem het bekwaam om as assessor op te tree, maar hy het in ons submissie onbekwaam geraak en u het bevind dat hy onbekwaam geraak het gedurende die loop van die verhoor.

Die uitleg wat Ons Geleerde Vriende aan artikel 147 gee in paragraaf 21 en 22 van hulle hoofde, kom in ons submissie neer op 'n woordwysigende uitleg van die artikel. (10) Onder aan bladsy 14 van die hoofde word gesê in paragraaf 21 - dit is die derde reël van onder op bladsy 14 of mag ek 'n bietjie hoër op begin lees, omtrent so sewe reëls van onder :

> "The section is not applicable to the circumstances of the present case. The section is directed to events which occurred after the trial has commenced, that is during the trial, not to any empediments which may or may not have prevented an assessor from being appointed as such and taking office as a member of the Court. Assuming for the purpose of argument (20) that there were valid grounds for objecting to Professor's Joubert as an assessor, those grounds existed before the trial commenced. He did not become disqualified during the trial."

Ons submissie ten opsigte daarvan is dat inderdaad het hy volgens U Edele se mening onbekwaam geraak en het u daardie oordeel inderdaad gevorm gedurende die loop van die verhoor en het hy ook inderdaad gedurende die loop van die verhoor onbekwaam geraak toe die feite bekend geraak het en hy u meegedeel het wat U Edele vermeld het. (30)

Die woordwysigende uitleg in ons submissie is dat Ons Geleerde Vriende sê dat die smet, as ek daardie woord kan gebruik, die vitium, dat die beswaar "the grounds existed before the trial commenced" sê Ons Geleerde Vriende onder aan bladsy 14 en bo aan bladsy 15. Met ander woorde, hulle sê die smet het bestaan voordat die verhoor begin het. Wat hulle dus in die artikel wou inlees is daar moes iets gebeur het tydens die verhoor en die smet wat aan die lig kom tydens die verhoor moes dan ook tydens die verhoor ontstaan het. As My Geleerde Vriende korrek is, sou ŉ mens die volgende (10) voorbeeld kan postuleer, na analogie van die voorbeeld wat U Edele vroeër aan My Geleerde Vriend genoem het. Voordat die verhoor begin aanvaar ŉ assessor byvoorbeeld omkoopgeld. Op My Geleerde Vriende se benadering kan ons sê selfs ŉ dag voor die verhoor voordat die assessor die eed neem. As dit gedurende die loop van die verhoor aan die lig sou kom dat hy dit gedoen het, sou dit op My Geleerde Vriende se argument nie moontlik wees vir die Hof om op te tree onder artikel 147 nie, want die smet het ontstaan ŉ dag voor die verhoor. Daarenteen, op My Geleerde Vriende se argu- (20) ment as hy die omkoopgeld sou ontvang het die dag nadat die verhoor begin het, sou die artikel van toepassing wees. Dit kon klaarblyklik nooit die bedoeling van die wetgewer gewees het nie. Dit sou ŉ onsinnige situasie tot gevolg hê en die doel van die wetgewer sou daardeur totaal verydel word. Die bedoeling is klaarblyklik dat as dit aan die lig sou kom gedurende ŉ verhoor dat ŉ assessor omkoopgeld ontvang het, sy dit ŉ dag voor die tyd of ŉ dag na die verhoor sou begin, dat die Hof hom onbekwaam kan beskou om voort te gaan. (30)

Die woordwysigende uitleg wat Ons Geleerde Vriende dus voorstaan kom eintlik daarop neer dat hulle ŉ tipe van voorbehoudsbepaling in artikel 147 inlees of wil inlees en dit sou min of meer op die volgende woorde neerkom dat met dien verstande, alle aangeleenthede wat ter sake is met betrekking tot sodanige onbekwaamheid gedurende die loop van die verhoor ontstaan het. In ons submissie is die onderhawige geval volkome gedek deur die bepalings van artikel 147(1).

Ek kom vervolgens by die vraag - by die woorde (10) "onbekwaam raak" - "becomes unable to act as an assessor", "onbekwaam raak om as assessor op te tree." In ons hoofde het ons op bladsy 11 daarna verwys dat in 1935 is die ou Strafproseswet gewysig om voorsiening te maak vir assessore. In daardie Wet, soos My Geleerde Vriend daarop gewys het, was daar geen voorsiening gewees op daardie stadium vir die geval waar ŉ assessor onbekwaam word. Toe, soos My Geleerde Vriend aangedui het, was die Wet gewysig in 1955, Wet 29 van 1955 om voorsiening te maak vir die geval waar ŉ assessor in die loop van die verhoor na die oordeel van (20) die voorsittende Regter onbekwaam raak.

Dit is wel waar soos My Geleerde Vriend betoog het dat die geval van R v PRICE 1955 (1) SA 219 ŉ geval was waar een van die assessore gesterf het voordat die uitspraak gegee is, maar dit is duidelik dat die wetgewer, toe hy artikel 216bis op die wetboek geplaas het, nie net vir hom beperk het tot die geval van ŉ sterfgeval nie, maar toe ook die voorsiening gemaak het vir die geval waar ŉ assessor onbekwaam word. Met die toevoeging van die woorde in verband met onbekwaamheid, is dit duidelik dat die wetgewer wyer (30)

voorsiening/...

voorsiening wou maak as bloot vir die geval waar 'n assessor te sterwe kom. In ons submissie is dit duidelik dat om onbekwaam te word om as assessor verder op te tree baie verskillende vorms kan aanneem. Daar is geen aanduiding dat die wetgewer bedoel het om dit te beperk tot fisiese of geestelike onbekwaamheid nie. As die wetgewer dit daartoe wou beperk het, sou hy dit waarskynlik gesê het. Deur die woord "onbekwaam" te gebruik het hy 'n woord van wye omvang gekies en in ons submissie is dit doelbewus gekies om juis voorsiening te maak vir die wyer verskei- (10) denheid van moontlike onbekwaamhede wat 'n assessor tydens die loop van 'n verhoor kan ondergaan.

Dit is opvallend dat die woord "onbekwaam" van die begin af in die Afrikaanse teks was van 1955 tot in die huidige wet van 1977. Daarenteen, in die Engelse teks, is aanvanklik die woord "incapable" gebruik om die woord te vertaal. In dié verband is dit ook ter sake om aandag daarop te vestig dat beide die 1955 Strafproseswet en die 1977 Strafproseswet in Afrikaans onderteken is, maar daardie feit is waarskynlik nie van wesenlike belang nie, vanweë die (20) feit dat daar in ons submissie geen onderskeid is tussen die trefwydte van die woord "unable" wat nou in die Engelse teks van artikel 147 verskyn nie. In ons submissie is die trefwydte van "unable" en "onbekwaam" dieselfde. Van die doelbewuste verandering van die woord "incapable" na die woord "unable" moet daar afgelei word, in ons submissie, 'n bedoeling van die wetgewer om die Engelse en Afrikaanse tekste van die Wet in ooreenstemming te bring met mekaar.

My Geleerde Vriend het vanoggend betoog dat "unable" het 'n enger betekenis as "incapable". In ons submissie (30)

is/...

is dit nie die geval nie, maar watter denkbare rede kan daar bestaan dat die wetgewer 'n enger betekenis, 'n woord van enger betekenis, soos My Geleerde Vriend betoog, naamlik "unable" sou wou vervang in die plek van 'n woord van wyer betekenis, soos My Geleerde Vriend betoog, van "incapable", veral waar die Afrikaanse woord deurgaans dieselfde bly, naamlik "onbekwaam", 'n woord van wyer betekenis.

Die enigste redelike afleiding wat gemaak sou kon word is in ons submissie dat die wetgewer van oordeel was dat "incapable" miskien nie die volle omvang van die woord (10) "onbekwaam" weergee nie en dat die wetgewer om daardie rede geoordeel het dat dit beter sou wees om die woord "unable" te vervang in die plek van die woord "incapable".

Die woordeboekbetekenisse wat My Geleerde Vriend beskikbaar gestel het vanoggend, as 'n mens eerstens kyk na die Shorter Oxford English Dictionary. My Geleerde Vriend het u aandag gevestig en blykaar sy hoop gevestig op die sesde betekenis daarvan wat lui "not legally qualified or entitled, maar daar is ook ander betekenisse waarop ek u aandag wil vestig. Die eerste betekenis wat daar weergegee (20) word is "not capable, the opposite of capable". Die derde een "of such a nature or in such a condition as not to allow or admit of, not succeptible of", die vierde een "not having the capacity, power or fitness for, unable".

Die betekenis van "incapable", die vierde een is waarskynlik die naaste tersaaklike een en moontlik ook nog die sede een, wat My Geleerde Vriend gelees het. Ek noem net die ander om u aandag daarop te vestig dat die ander darem nie buite rekening gelaat word nie. Selfs al sou die woord "incapable" in die onderhawige artikel behou (30)

gewees/...

gewees het, is ons submissie dat die optrede van prof. Joubert sou meebring in die betekenis wat My Geleerde Vriend daaraan gee "that he is not legally qualified or entitled, maar seer sekerlik sou dit tuis kom onder die vierde betekenis "not having the capacity, power or fitness for, unable". As ek dit ook mag toets aan die voorbeeld wat U Edele genoem het van die assessor wat omkoopgeld byvoorbeeld ontvang het, dit sou nie verkeerd wees om in die vierde betekenis te sê dat so 'n persoon "does not have the capacity, power or fitness for being an assessor" nie. Dit sou ook van pas (10) wees om in daardie omstandighede in die laaste betekenis van paragraaf 4 daar te sê "he is (soos wat artikel 147 nou lui) he has become unable to act as an assessor, maar as 'n mens in dieselfde woordeboek kyk na die betekenis van die woord "unable", "not able to do something specified chiefly of persons" en tweedens "unequal to the task or need, incompetent, inefficient" en vir sover My Geleerde Vriend op fisiese omstandighede wil staatmaak, sal u sien dat daar word gesê "somewhat archage like middle English" ten opsigte van twee en dan het hy 'n derde een gegee (20) "physically weak, feable." Maar "unable" is klaarblyklik nie op die bedoeling van die artikel beperk tot iemand wat fisies swak is nie. Dit moet saamgelees word met die woorde wat volg "unable to act as assessor". So, sy bekwaamheid moet dus geoordeel word aan sy vermoë om as assessor te kan optree en sy vermoë om as assessor op te tree is nie net afhanklik van sy fisiese en geestelike vermoëns nie, maar ook van sy moraliteit. Sou 'n assessor dus in die voorbeeld wat u genoem het omkoopgeld ontvang het, al sou hy nie skuldig bevind gewees het nie, maar as hy (30)

omkoopgeld/...

omkoopgeld ontvang het, is hy moreel nie meer van die nodige vermoë om as assessor te dien nie en insgelyks op die gronde wat U Edele in u uitspraak op 10 Maart genoem het in ons submissie, was u geregverdig om te bevind dat gesien al die omstandighede wat u daar genoem het, dat prof. Joubert onbekwaam geraak het om as assessor op te tree.

Om weer terug te kom op die woorde "unable" en "incapable" as ŉ mens net die twee stelle betekenisse en die tersaaklike betekenisse wat ek uitgelig het vergelyk, dan in ons submissie is "incapable" inderdaad ŉ woord van enger (10) betekenis as "unable" en veral as ŉ mens dit vergelyk met die Afrikaanse woord "onbekwaam". Die woordeboekbetekenisse van "onbekwaamheid" verwys ons na op bladsy 7 na 8 van ons hoofde. In die HAT word "onbekwaam" beskryf as "Vr. sonder kundigheid: onbedrewe, ongeskik. Ek beklemtoon veral die woord "ongeskik".

Dan die volgende punt waarby ons wil kom is die punt wat Ons Geleerde Vriend vanoggend geopper het toe hy gesê het maar wat van die gemene reg. Wat die gemene reg betref is dit belangrik om in gedagte te hou die vanselfsprekend- (20) heid dat assessore nie in die gemene reg bekend was nie en dat dit ŉ skepping van die statuut is van 1935 soos ek dit het toe artikel 216 ingevoeg is in die Strafproseswet, 31 van 1917 wat voorsiening gemaak het vir assessore. Tot op daardie stadium was daar nog net voorsiening gewees vir ŉ regter en jurie en daar is toe voorsiening gemaak vir ŉ regter en assessore.

HOF PLAAS OP REKORD DAT BESKULDIGDE NR. 14 TERUGGEKOM HET.

MNR. DE VILLIERS : *U Edele, mag ons vir u ook dan ŉ fotokopie van 216 beskikbaar stel soos hy afgedruk is in die* (30)

ou/...

ou Union Statutes. Daaruit blyk dat die wetgewer - ek wil nie nou die artikel lees nie, maar dit is duidelik dat die bedoeling van artikel 216 was om redelik uitvoerig voorsiening te maak vir verskillende eventualiteite soos byvoorbeeld wie die bevoegdheid het om sekere aangeleenthede te beslis en wie nie. Soos byvoorbeeld toe reeds was die bepaling in 216(3)(a) dat enige regspunt wat by die verhoor ontstaan, word deur die Hof beslis en dat ŉ assessor nie ŉ stem het in sodanige beslissing nie. Mettertyd soos sake gevorder het en soos ons vroeër genoem het, het dit (10) toe in 1955 nodig geword om ook dan 216bis by te voeg om voorsiening te maak vir die geval van die onbekwaamheid van ŉ assessor of die dood van ŉ assessor. In kort, ons submissie is dat die wetgewer het dus hierdie hele aangeleentheid van ŉ verhoor van ŉ regter en assessore uitvoerig gereël en dit is opvallend dat daar is ook sekere gedagtes wat uit die verhoor van ŉ regter en jurie ontstaan het oorgeplaas en van toepassing gemaak ook op ŉ verhoor van ŉ regter en assessore.

Soos byvoorbeeld onder andere die feit dat die (20) voorsittende regter die regspunte moet besleg. As ek u aandag mag vestig ook in die ou wet van 1917 op artikel 214(3) - dit is Wet 31 van 1917, wat soos volg lees :

> "If at any time during the trial a juror dies or become in the opinion of the judge incapable of continuing to act as a juror or is absent, the judge may in his discretion discharge the jury under the provisions hereinbefore contained or may, if he thinks fit at the request of the accused and with the consent of the prosecutor discharge the juror, so becoming (30)

incapable/...

incapable or being absent and direct that the trial shall proceed with the remaining jurors. In any such case the verdict of the remaining jurors, not being less than seven, who shall if they are seven only be unanimous shall have the same effect as if all the jurors had continued present."

Hierdie is eintlik die begin, kan 'n mens sê van die gedagte dat waar een van die regsprekers op feite onbekwaam word om as jurielid op te tree, die Hof die bevoegheid het om een van twee dinge te doen, naamlik om òf die jurie (10) te ontslaan, òf "if he thinks fit" òf in die Hollands "naar goeddunken op versoek van de beskuldigde en met toestemming van de vervolger het jurielid dat al zoo onbekwaam word of afwesig is ontslaan en gelasten dat die beregten voortgeset worde met die overgeblefen jurieleden."

Ons beklemtoon die woorde daar "dat op versoek van de beskuldigde en met toestemming van de vervolger", kan die jurielid wat onbekwaam geword ontslaan word en kan die beregting voortgesit word met dir oorblywende jurielede.

Daardie artikel is toe herverorden in artikel 149(3) (20) van die Strafproseswet van 1955. Ek sal hom maar net gou weer lees in die Engels :

"If at any time during the trial a juror dies or becomes in the opinion of the judge incapable of continuing to serve as a juror or is absent, the judge may in his discretion discharge the jury under the provisions hereinbefore contained or may, if he thinks fit at the request of the accused and with the consent of the prosecutor discharge the juror who so becomes incapable or is so absent and direct that the trial (30)

shall/...

shall proceed before the remaining jurors."

En dan weer soos in die ou Wet :

"(b) In any such case the verdict of the remaining jurors who shall be not less than seven and who shall if they are seven only be unanimous, shall have the same effect as if all the jurors had continued present."

Dit is na aanleiding van daardie artikel 149(3) dat die saak beslis is in die Oos-Kaap deur O'HAGAN, R. in die saak van R v GUBUDELA EN ANDERE 1959 (4) waarna ons (10) verwys op bladsy 9 van ons hoofde. Dit is die geval wat My Geleerde Vriend na verwys het. Dit is die geval waar daar ŉ jurie verhoor was en waar een van die jurielede tydens ŉ verdaging ŉ opmerking gemaak het aan sekere persone en die opmerking het op die oog af getoon dat hy duidelik bevooroordeeld was teenoor die beskuldigdes. O'HAGAN, R. sê op bladsy 95 G tot H die volgende :

"The only other question with which I am concerned is whether I should discharge this particular juror or discharge the jury as a whole. There is a passage (20) at page 390 of 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 a continuation of the trial before the remaining judge. 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 (30)

referred/...

referred to in the section is a physical or mental incapacity and that it is not the sort of incapacity which arises from the conduct of a juror during the trial. This section in the present Act, 56 of 1955, repeats the terms of Section 214(3) of the old Criminal Procedure Act, 31 of 1917 and I have found that in the Cape Provincial Division the Court on finding that during the course of a trial a juryman had expressed the view after having heard the accused's evidence that the accused was guilty, ruled that the jury (10) should be discharged and that the trial start de novo. I refer to the case of R v KATSEF 1944 CPD 483. I need not deal with the facts of that case, but they are not dissimilar to the facts in the present case. It seems to me that I must regard what has happened in this case as an emergency which has arisen in the course of the trial. In my opinion it would be inexpedient for the interests of justice for this trial to proceed before the jury as now constituted. On the authority of KATSEF's case I think I should (20) discharge the whole jury."

Ek het na die passasie in Gardiner en Lansdown gekyk in die ou uitgawe, ek het dit ongelukkig nie hier nie. Ek sal wel ŉ kopie van daardie bladsy ook vir u beskikbaar stel. Gardiner en Lansdown het inderdaad die mening uitgespreek na aanleiding van artikel 149(3) dat waar ŉ jurielid onbekwaam word vanweë die feit dat hy opmerkings gemaak het wat nadelig is teenoor die beskuldigdes en wys dat hy vooroordeel het, dat dit ŉ gepaste geval sou wees om die artikel toe te pas. (30)

HOF/...

HOF : Die artikel het nie bestaan in die tyd van KATSEF in 1944 nie? Was hy toe al in die Wet ingevoeg?

MNR. DE VILLIERS : Ja, hy was toe al in die Wet, want hy het alreeds bestaan in 1917 in 214(3).

HOF : Wat sê KATSEF van die toepassing van die artikel?

MNR. DE VILLIERS : KATSEF se saak, kan ek net my geheue verfris, het nie artikel 149(3) of die toepassing daarvan oorweeg nie.

HOF : Nou waarom nie as hy in die wet was?

MNR. DE VILLIERS : Wel, dit skyn nie in die uitspraak (10) dat die regter hom - hy verwys nie na 149(3) nie. Hy het dit miskien in gedagte gehad, maar wat die regter daar doen is, na aanleiding van die gebeure daar, besluit die regter om die jurie te ontslaan. So, dit blyk nie of die regter hom op 'n gemeenregtelike bevoegdheid verlaat het en of hy hom verlaat het op 'n bevoegdheid wat hy het onder die Wet nie. In ieder geval O'HAGAN, R. het besluit om KATSEF se saak te volg en om nie 149(3) toe te pas nie. Dit skyn dus asof hy eintlik 'n tipe van gemeenregtelike bevoegdheid volg om die jurie te ontslaan en nie op die artikel staat(20) te maak nie.

Nou is dit wel waar dat die opmerking gemaak is hier na aanleiding van 149(3) :

> "I am inclined to think that the incapacity referred to in the section is a physical or mental incapacity and that it is not the sort of incapacity which arises from the conduct of a juror during the trial."

Ons submissie is dat daardie opmerking gemaak is spesifiek met betrekking tot artikel 149(3), soos hy destyds gelees het waar die woord "incapable" gebruik was en dit(30)

mag/...

mag wees dat die Edele Regter ŉ enger siening gehad het van die woord "incapable". Dit is duidelik dat hy aan "incapable" ŉ enger betekenis gee. Dit blyk ook uit die saak dit was ŉ verhoor wat plaasgevind het destyds op rondgang te Kokstad en dit is waarskynlik dat daar nie die nodige boekery daar was om op al die woordeboekbetekenisse in te gaan soos wat ŉ mens gebruiklik sou doen nie. In ieder geval verwys die Edele Regter na geen woordeboeke nie. Hy gaan klaarblyklik op wat sy eie siening van die woord. Hy sê : (10)

"I am inclined to think"

en hy maak staat op sy eie siening van die woord en O'HAGAN, R. se siening daarvan verwys na Straut, Judicial Dictionary vierde uitgawe volume 3 onder die hoof "incapable" en wel die vyfde betekenis wat daar gegee word aan "incapable". Daar word verwys na ŉ Skotse beslissing waarin die volgende beslis is na aanleiding van die woorde "incapable of acting" in ŉ Skotse Wet en die skrywer sê dan die volgende :

> "Incapable of acting (dan gee die verwysing na die Wet) is not limited to incapacity to act by reason of (20) some physical or mental disability, but means incapacity arising from any cause."

Insgelyks is ons submissie dat op die artikel wat O'HAGAN, R. oorweeg het, hy geregtig sou gewees het om te bevind dat "incapacity to act as a juror is not limited to some physical or mental disability, but means incapacity arising from any cause."

K610 ŉ Mens moet ŉ mens ook die vraag afvra waarom moet aan "incapacity" ŉ inperkende betekenis gegee word, veral waar dit te doen het met die vermoë van ŉ feitebevinder (30)

is/...

is dit juis in belang van die verdediging sowel as die Staat dat aan die woord ꞌn betekenis gegee word dat as daar ꞌn onbevoegdheid of ꞌn onvermoë vanweë welke rede ook al ontstaan, dat daardie onbekwaamheid dan kan lei tot die ontslag van die jurielid. Insgelyks is dit ons submissie dat dit die geval was toe die woorde "incapacity" in die artikel met betrekking tot assessore voorgekom het, dit is nou in die ou artikel 216bis van Wet 31 van 1917 en artikel 110 van Wet 56 van 1955, maar dit kan heel moontlik wees dat juis na aanleiding van GUBUDELA se beslissing waar (10) daar ꞌn skynbaar te beperkende uitleg gegee is aan die woord "incapable", dat die wetgewer gemeen het dat dit wenslik sou wees om in die 1977 Wet dit bo alle twyfel te stel deur die gebruikmaking van die woord "unable". Sover ons bekend is dit die enigste beslissing wat aan die woord "incapable" gegee is met betrekking tot die jurielid of die assessor se bepalings. So, dit is nie ondenkbaar dat die wetgewer bewus sou gewees het van die betrokke uitleg en dit doelbewus wou wyer maak deur die gebruik van die woord "unable" nie. (20)

Dan onder aan bladsy 10 van ons hoofde vestig ons die aandag daarop dat artikel 149(1) van Wet 56 van 1955 en 149(3) natuurlik nie ꞌn teenhanger het in die 1977 Wet nie. Artikel 149(1) van Wet 56 van 1955 het soos volg gelees - hier was ook ꞌn verwysing na die onbekwaamheid van die Regter :

> "Indien die Regter onbekwaam word (miskien moet ek maar die Engelse teks lees, dit is makliker)
> If the judge becomes incapable of proceeding with the trial or directing the discharge of the jury, the registrar of the Court shall discharge the jury." (30)

Ons/...

Ons kon geen teenhanger daarvan selfs van die eerste gedeelte van die sub-artikel vind in die huidige Wet nie.

HOF : U sê hy het heeltemal weggeval?

MNR. DE VILLIERS : Hy het heeltemal weggeval. Ons kon geen teenhanger van hom vind in enige vorm nie en dan sal u sien in dieselfde paragraaf van my hoofde op bladsy 10 paragraaf (g) verwys ek ook na artikel 148(6). Ek het hom self nie hier nie. Hy is later bygevoeg. Ekskuus, die verwysing is skynbaar verkeerd. Mag ek begin by Wet 92 van 1963. Artikel 10 van Wet 92 van 1963 het ŉ artikel 5bis - ŉ (10) subartikel 5bis ingevoeg in artikel 112 van Wet 31 van 1917.

HOF : Nee, ŉ mens kan tog nie in 1963 iets byvoeg by die 1917 nie. Toe was daar al weer ŉ ander Wet.

MNR. DE VILLIERS : Ja, u is heeltemal reg. Dit was ingevoeg in artikel 112 van Wet 56 van 1955. Artikel 112 van die Strafproseswet, soos u hom daar voor u het, sal u sien maak voorsiening vir spesiale strafhowe vir die verhoor van sekere misdrywe, maar in daardie artikel is daar toe ingevoeg ŉ sub-artikel 5bis deur artikel 10 van Wet 92 van 1963 soos ek gesê het en daardie artikel het soos volg gelees. (20)

> "If at any time in the course of any proceedings before a special criminal court consisting of three judges, one of the judges dies or becomes incapable of continuing to take part in the proceedings, the proceedings shall proceed as if the Court had consisted of the two remaining judges only."

In die Afrikaanse teks sal u sien word weer die woord gebruik "te sterwe kom of onbekwaam word". Maar hier is dit dan ook belangrik om daarop te let dat daar gesê word na die oordeel van die voorsittende Regter of iets van die aard. (30)

Daardie/...

Daardie artikel het nou weer sy teenhanger in die nuwe Wet en dit is in die nuwe Wet in artikel 148(6) en ek lees weer net die Engelse teks in die nuwe Wet :

> "If at any time during the trial a member of the special superior court dies or becomes unable to continue as a member of the Court, the trial shall proceed before the remaining members of the Court."

Weer opmerklik die verandering van die woord "unable" waar dit vroeër in artikel 112(5)bis "incapable" was, na die wyer woord weer eens van "unable". (10)

Al daardie soektogte deur die betrokke artikels toon maar net dat in al die artikels waar die woord "incapable" dan vroeër verskyn het, wat nou nog weer hulle verskyning maak in die nuwe Wet, dit wil sê by assessore en by lede van die spesiale hof, is die woord "incapable" doelbewus verander na "unable".

HOF : Maar die Afrikaans het deurgaans hom "onbekwaam"?

MNR. DE VILLIERS : Hy het deurgaans hom "onbekwaam" vanaf 1917 tot op datum.

As ek dan net mag kom by die eerste verskyning van (20) die onbekwaamheid van 'n assessor, het sy verskyning op die wetboek gemaak soos ons reeds genoem het en dit verskyn onder op bladsy 11 van ons hoofde, artikel 216bis van Wet 31 van 1917 wat ingevoer is deur Wet 29 van 1955 - soos reeds vermeld is daardie artikel dan ingevoer waarskynlik na aanleiding van PRICE se saak. Dit is belangrik om na PRICE se saak te kyk uit die oogpunt van die Appèlhof se beslissing in 1955 (1) - ek gee die verwysing op bladsy 11 in die tweede sub-paragraaf - 219 op 224. Ek glo My Geleerde Vriend het die passasie iewers vir u in sy hoofde(30)

gelees/...

gelees of aangehaal, 224 C tot E :

"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 a decision. In RABAHERILAL AND OTHERS v THE KING EMPEROR which was followed in this Court in R v SILBER 1940 AD 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 material part of them were conducted. Lord ATKIN said that (10) the Board thought that the effect of the incompetence 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 a trial in the present case was a clear miscarriage of justice."

Die feit dat een van die lede van die jurie nie die taal verstaan het waarin die verrigtinge gevoer is nie, is seer sekerlik nie 'n fisiese of 'n geestelike onbekwaamheid nie. Dit is 'n vermoë wat ontbreek, 'n essensiële vermoë en dit is om te begryp wat in die verhoor as getuienis (20) voor die Hof geplaas word, maar dan gaan die Geleerde Regter voort om te sê op bladsy 224 D :

"What was denied to the accused in these cases was his right to a consideration of his case by every member of the fact finding tribunal."

Hoewel die beskuldigde in daardie geval se verteenwoordiger selfs die Hof gevra het om voort te gaan nadat die een assessor oorlede is, het die Hof beslis dat dit 'n onreëlmatigheid is omdat die Hof nie die bevoegdheid gehad het om dit te doen nie. Beide die verdediging en die (30)

Staat/...

Staat het daarmee toegestem en die verdediging het self daarvoor gevra.

In ons submissie was die bedoeling nie net om die enge geval van PRICE dus te ontmoet waar 'n assessor dood is nie, maar ook om die wyer geval te dek waar daar 'n onbekwaamheid ontstaan en klaarblyklik moes die wetgewer bewus gewees het van PRICE se saak en PRICE se beslissing is gelewer op 18 November 1954 en in die volgende jaar deur Wet 29 van 1955. Ek het nie die datum tans beskikbaar wanneer hy aangeneem is nie, maar dit is baie duidelik dat selfs ten (10) spyte van die feit dat die wetgewer bewus moes gewees het dat later in die jaar Wet 56 van 1955 op die wetgewende program gaan kom, die hele nuwe Strafproseswet, was dit so dringend beskou om nou in Wet 29 van 1955 nog selfs voor die konsoliderende wet hierdie probleem reg te stel. So, dit was klaarblyklik 'n aangeleentheid wat dringende aandag geniet het en dit kan dan ook aangeneem word dat die wetgewer bewus was van hierdie benadering wat GREENBERG, R. in PRICE se saak uiteengesit het en wat ek netnou aan u voorgelees het en die belangrike beslissing van die (20) "privy council" waarop hy sy uitspraak baseer, naamlik dat selfs die onvermoë aan die kant van 'n jurielid om die taal te verstaan waarin die verrigtinge gevoer word, 'n onreëlmatigheid is en dit is 'n "incompetence of the juror". Dit is ook interessant dat Lord ATKIN dit beskryf as 'n "incompetence of the juror". Dit is 'n woord wat weer eens 'n sekere analogie toon met die woord "incapacity". Hoewel hulle nie presies dieselfde stam het nie, is dit in ons submissie baie dieselfde tipe van begrip.

In ons submissie het die wetgewer spesifiek met die (30)

doel/...

doel om daardie probleem wat in daardie saak ontstaan het reg te stel, so dit was nie net om voorsiening te maak dat die prosedure beëindig kon word nie, maar ook om spesifiek voorsiening te maak dat die verrigtinge kon voortgaan, want dit sou soos in die geval van PRICE - kon dit in belang van beide Staat en verdediging wees dat dit voortgaan, soos dit geblyk het. Beide Staat en verdediging het gevra dat die Hof dit doen, maar dit was nie ŉ bevoegdheid wat die Hof gehad het nie.

HOF VERDAAG. HOF HERVAT. (10)

K611

MNR. DE VILLIERS : Op bladsy 12 bo vind u die eerste drie artikels van artikel 110 van Wet 56 van 1955 afgedruk. Soos My Geleerde Vriend reeds daarop gewys het, u sien dat daar is destyds die onderskeid dan gemaak in sub-artikel (1) teenoor sub-artikel (3). In sub-artikel (1) handel hulle met die geval waar die voorsittende Regter nie verplig was om assessore te roep nie, maar waar hy nietemin ŉ assessor opgeroep het wat dan onbekwaam raak na sy oordeel. Teenoor sub-artikel (3) waar ŉ mens te doen het met die geval waar die voorsittende Regter ingevolge die Wet verplig (20) was om assessore op te roep om saam met hom sitting te neem. U sal dan sien aan die einde van sub-artikel 3 in daardie geval waar volgens die Regter se oordeel die assessor onbekwaam word om verder as assessor te dien, volg die onderstreepte woorde :

> "Die Regter kan na goeddunke en met instemming van die beskuldigde en die vervolger gelas dat die verhoor sonder bedoelde assessor voortgesit word."

Uit die volgende paragraaf op bladsy 12, die laaste paragraaf onder aan bladsy 12 wys ons daarop dat by jurielede (30)

artikel/...

artikel 149(3) 'n soortgelyke maar nie ooreenstemmende bepaling bevat het nie, want die woorde wat ons daar aanhaal is in die geval van 'n jurielid kon die Regter, as hy dit goed vind, op versoek van die beskuldigde en met toestemming van die vervolger, die jurielid wat onbekwaam geword het ontslaan. Dit is interessant om te sien wat die evolusie is wat daar plaasgevind het. In 149(3) moet die beskuldigde dit versoek in die geval van 'n jurielid wat onbekwaam word. Daar moet 'n spesifieke versoek wees van die beskuldigde. Dit verander dan in artikel 110(3) na 'n instemming van die beskuldigde. (10)

In 148(3) was die toestemming van die vervolger. Dit bly ongeveer dieselfde. Die instemming van die vervolger in 110(3), maar wat dan baie belangrik is, is dat op bladsy 13 van my hoofde paragraaf 5, as 'n mens dan kom by die vervanging van artikels 1 en 3 van 110 met net een artikel - sub-artikel (1), wat toe ingevoeg is deur artikel 9 van Wet 92 van 1963 :

"Indien 'n assessor te eniger tyd gedurende 'n verhoor te sterwe kom of volgens die oordeel van die Regter onbekwaam word om verder as assessor te dien, kan (20) die Regter na goeddunke gelas dat die verhoor sonder bedoelde assessor voortgesit word."

Dit is natuurlik so dat die wetgewer kon, as hy wou, daar is geen rede hoekom hy dit nie kon doen nie, die onderstreepte woorde van artikel 110(3) nog steeds bygevoeg het , naamlik dat die Hof se bevoegdheid alleen uitgeoefen kan word met instemming van die beskuldigde en die vervolger.

Die feit dat die wetgewer dit goed gedink het om daardie vereiste weg te laat is besonder insiggewend in ons submissie. Dit is ook opvallend om te sien dat die woorde "kan die (30)

Regter/...

Regter na goeddunke", die woorde "kan die Regter na goed-
dunke" is vervang met die woorde - ekskuus die woorde
"na goeddunke" is nog behou in hierdie wysiging. "Die
Regter kan na goeddunke gelas" en dan daarmee kan 'n mens
vergelyk in die huidige artikel 147 "if in the opinion
of the presiding judge", "indien na die oordeel van die
voorsittende Regter", wat klaarblyklik dit volkome aan
die oordeel van die voorsittende Regter oorlaat.

Onder aan bladsy 13 haal ons aan die effek van die
wysiging is dat waar 'n assessor - die effek van die feit(10)
dat die onderstreepte woorde nie bygevoeg is nie, is dat
waar 'n assessor na die oordeel van die Regter onbekwaam
word om as assessor te dien, kan die voorsittende Regter
na goeddunke gelas om die verhoor sonder bedoelde assessor
voort te sit, hoef hy nie daar die instemming van die
vervolger of verdediging te hê nie en die derde reël van
bladsy 14 "in ons submissie dui hierdie wysiging aan
dat die wetgewer dan bedoel het dat die Regter uitsluitlik
beheer het oor die handtering van die verrigtinge onder
daardie omstandighede en dat dit aan sy uitsluitlike dis-(20)
kresie toevertrou is."

In paragraaf 8 op bladsy 14 verwys ons na die SOUTH
AFRICAN DEFENCE AND AID FUNDS saak waar CORBETT, R. die
onderskeid tref tussen die twee breë kategorieë, die
eerste synde :

"It may consist of a fact or state of affairs which
objectively speaking must have existed before the
statutory power could validly be exercised. In
such a case the objective existence of the juris-
dictional fact as a prelude to the exercise of that(30)

power/...

power in a particular case, is justiciable in a court of law. If the Court finds that objectively the fact did not exist, it may then declare invalid the purported exercise of the power."

In ons submissie is dit nie die geval in die onderhawige geval nie.

Dan die tweede kategorie is die een wat ons die aanhaling van gee :

"On the other hand it may fall into the category comprised by instances where the statute itself has en- (10) trusted to the repositly of the power of the sole and exclusive function of determining whether in its opinion the pre-requisite fact or state of affairs existed prior to the exercise of the power. In that event the jurisdictional in fact is in truth not whether the prescribed fact or state of affairs existed in an objective sense, but whether subjectively speaking the repositly of the power had decided that he did. In cases falling into this category, the objective existence of the fact or the state of affairs is (20) not justiciable in a court of law. The Court can interfere and declare the exercise of the power invalid on the ground of a non-observance of the jurisdictional fact only where it is shown that the repositly of the power in deciding the pre-requisite factor state of affairs existed acted mala fide or from ulterior motive or failed to apply his mind to the matter."

Dan verwys ons na die saak van R v DAVIDSON 'n ou beslissing van 1860 in die Engelse reg.

HOF : Is dit 'n lang beslissing? (30)

MNR. DE VILLIERS/...

MNR. DE VILLIERS : Dit is vyf bladsye. Kan ons dit ook vir u laat afrol?

HOF : Ek sal bly wees as u dit sal doen.

MNR. DE VILLIERS : Wat daar gebeur het word in die kopstuk soos volg beskryf :

"The prisoner was indicted for an indecent assault upon a certain person. On his trial before Mr PAYNE, the Deputy Assistance Judge, the jury not being able to agree upon their verdict, were, after being locked up for five hours, discharged from giving a verdict, (10) the prisoner being admitted to bail to appear and take his trial at the next session ensuing. In the meantime a writ of certiorari was lodged and the prisoner surrendered to take his trial at the central criminal court. It was objected upon his arraignment there that the prisoner could not be tried again, the Judge having discharged the jury from giving their verdict of his own caprice and not from any illness of any of the jurors or any realy necessity having arisen for their discharge. It is further objected that upon (20) a jury being discharged, the calls for such discharge should appear upon the record and this record was in that particular defective. Held: (dit is dan wat ons ook aanhaal uit die uitspraak - miskien moet ek maar liewers die kopstuk lees) that the Judge presiding at the trial was sole judge as to whether a necessity for such a proceeding as discharging the jury had arisen. That a discretionary power was vested in him, that he must exercise his discretion and that there was no appeal to any other tribunal as to whether in (30)

exercising/...

exercising that discretion he had done so rightly."

In paragraaf 9 onder aan bladsy 15 maak ons die submissie dat U Edele met eerbied volkome korrek opgetree het onder die omstandighede op grond van die feite wat deur prof. Joubert aan U Edele bekend gemaak is en soos blyk uit die uitspraak en u verklaring in die hof gister, was u van oordeel dat prof. Joubert onbekwaam geraak het om as assessor op te tree.

Dan verwys ons na die saak van R v MATSEGO. U sal onthou My Geleerde Vriend het u vertel dat dit die geval (10) is waar die assessor voor die verhoor die saak bespreek het met ŉ mede-advokaat. Gedurende die verhoor was die betrokke advokaat onbewus daarvan dat die saak wat hy met sy kollega bespreek het, die saak was waarin hy as assessor dien. Hy het die twee sake nie met mekaar in verband gebring nie. Toe dit egter aan die lig kom wat die feite was, het daar ŉ prosedure gevolg wat op bladsy 416 van die uitspraak beskryf word. Ekskuus dit word reeds op bladsy 415 reeds begin. Dit het begin deurdat daar ŉ beëdigde verklaring of miskien het dit nie daarmee begin nie. Daar is ŉ (20) beëdigde verklaring van die ander advokaat wat die gesprek gevoer het voor die Hof geplaas en dan volg die volgende beskrywing op bladsy 416 :

"During argument before MALAN, J., who was sitting alone, counsel for the first appellant applied for an order setting aside the proceedings on the ground of irregularity or alternatively for an order that the Court should recuse the assessor concerned ot declare him incapable of continuing to act as an assessor and discharge him. Counsel contended that (30)

as/...

as the verdict of the Court had not been delivered when the Court adjourned on 20 March it remained possible up to the last moment that the assessor concerned, even if he had decided earlier on his verdict, to change his mind or that he might be induced to do so or inhibited from doing so by reason of a recollection of what he had been told by the advocate who was first appointed to act pro Deo. MALAN, J. then ruled that this was a question of fact, not dealt with in the assessor's affidavit and told counsel for the (10) first appellant that if he wished to argue this possibility it would have to be dealt with by evidence and asked counsel whether he desired to have the evidence of the assessor in open court and to cross-examine him thereon. Counsel replied that he did not. MALAN, J. then adjourned the court and requested counsel and the crown prosecutor to accompany him to his chambers. There he called the assessor in and in the presence of the crown prosecutor and counsel asked the assessor whether he had communicated his verdict to him (MALAN, (20) J.) before the court adjourned for lunch on 20 March and whether there was any possibility that he might have changed his mind before the court resumed. The answer to the first question was in the affirmative and the answer to the second was in the negative. MALAN, J. asked counsel whether he wished to ask the assessor any questions. Counsel asked the assessor whether he had thought about the case at all during the lunch adjournment on 20 March and the assessor replied that he had, but that he had not reconsidered (30)

his/...

his verdict at all. MALAN, J. asked counsel if he was satisfied and he replied that he was. The court then resumed. After further argument MALAN, J. dismissed the application and said certain things in the course of his reasons."

Dit blyk dus dat daar was 'n mate van ondersoek. Die geleerde Regter het selfs een van die partye uitgenooi of hy die assessor wil kruisverhoor en in dié geval het die betrokke advokaat toe die uitnodiging geweier. Daar was 'n hele ondersoek. Nou is dit opvallend dat die Appèlhof (10) oor daardie ondersoek wat die Hof onderneem het ernstige bedenkings het op bladsy 418 en dit is die passasie wat ons aanhaal op bladsy 16 in paragraaf 10 van ons hoofde :

"In my opinion the learned Judge should not have imposed upon himself the difficult and invidious task of considering whether up to the stage when the assessor's memory was refreshed the discussion with the first appellant's previous counsel has been erased from the mind of the assessor. There is, as far as I am aware, no provision in Act 56 of 1955 (20) whereby an assessor can during the trial of an accused person be put on trial as to whether he should take part in the trial of the accused."

In paragraaf 11 van ons hoofde op bladsy 16 wys ons daarop dat ook in Wet 71 van 1977 is daar geen sodanige bepaling dat daar gedurende die verhoor van beskuldigdes 'n assessor as 't ware op verhoor gestel kan word oor die vraag of hy moet deelneem aan die verhoor van die beskuldigdes, al dan nie. Wat My Geleerde Vriend dus betoog het wat die Hof moet doen, is deur die hoogste hof van ons land (30)

verwerp/...

verwerp. My Geleerde Vriend het spesifiek betoog dat die tipe van verhoor wat MALAN, R. gevoer het inderdaad uitgevoer moes gewees het. Soos wat die Appèlhof in die besondere aanhaling stel "the learned Judge should not have imposed upon himself the difficult and invidious task of considering whether up to that stage, where the assessor's memory was refreshed, the discussion with the first appellant's counsel had been erased from the mind of the assessor."

Die bedoeling van artikel 147 is juis dat die Hof in ŉ geval soos die onderhawige nie na ŉ ondersoek aangaande (10) die feite in die hof nie, maar op die feite tot die beskikking van die voorsittende Regter ŉ beslissing kan neem. Dit sou inderdaad ŉ onbenydenswaardige taak gewees het, soos ons aan die hand gee in paragraaf 11, vir die voorsittende Regter en die partye om deel te neem aan ŉ verhoor of ŉ assessor moet voortgaan om as sulks op te tree. Juis daarom is ons submissie het die wetgewer dit goed gedink om dit aan die uitsluitlike diskresie van die voorsittende Regter te laat om te besluit of die assessor moet voortgaan met die verhoor. (20)

In ons submissie is die hof soos tans saamgestel met eerbied ŉ behoorlik saamgestelde hof omrede artikel 147 voorsiening maak dat die voorsittende Regter kan gelas dat die verhoor voortgaan voor die oorblywende lede van die hof. In ons submissie het u derhalwe vierkantig binne die bepalings van die artikel opgetree en u het so gelas.

Ek het reeds vroeër net gewag gemaak daarvan dat daar blyke is uit die wet dat die hele posisie van assessore, hulle kom en hulle gaan, deur die Strafproseswet gereël word. Ons Geleerde Vriend fouteer met eerbied waar hy te (30)

kenne/...

kenne gee dat die enigste prosedure wat kon plaasgevind het was om die feite in die hof bekend te maak, die probleem wat ontstaan het nadat prof. Joubert met sy ontboeseming gekom het. My Geleerde Vriend betoog dan dat die partye die geleentheid sou gekry het om daaroor vrae te vra en dan uiteindelik na aanleiding van al die vrae en antwoorde wat hulle gekry het, as ek hom reg verstaan, te besluit of die verdediging of die Staat of albei aansoek doen vir rekusering en dan as u kyk na sy hoofde op bladsy 11 stel hy die vraag : (10)

"The issues that are raised by the first application, paragraph 10, are therefore 10.1 was an irregularity committed? If so, does the irregularity fall into the second category of the irregularities described in <u>MOODIE</u>'s case, if not should the proceedings none the less be quashed"

Dan gaan hy voort blykbaar op die eerste vraag "Was an irregularity committed?", dit is die derde en vierde reël van onder, is die opskrif :

"Does the presiding Judge have the power to order an (20) assessor to recuse himself?"

Maar as 'n mens die verkeerde vraag stel, dan kry 'n mens veel al die verkeerde antwoord. Dit is nie die vraag nie, in ons submissie, dit is ook nie wat gebeur het nie. Daar was nie 'n prosedure gevolg deur U Edele om ingevolge die gemene reg te beveel dat prof. Joubert homself moet rekuseer nie en daarom is al die gesag wat My Geleerde Vriend hom op beroep klaarblyklik nie van toepassing nie. Hierdie gesag mag wel tersaaklik wees wanneer ons kom by bedes 2 en 3 van die kennisgewing van mosie, maar ons is nie nou (30)

daarmee/...

daarmee gemoeid nie. Bedes 2 en 3 is nie iets wat nou hoegenaamd ter sprake is nie.

Die fout wat My Geleerde Vriend natuurlik maak is om eenvoudig te aanvaar en van die verkeerde premisse uit te gaan dat U Edele nie die bevoegdheid gehad het om onder artikel 147 op te tree nie. As u die bevoegdheid het, soos ons aan die hand gee om onder artikel 147 op te tree, dan is u uitspraak en bevel op 10 Maart volkome geregverdig en is daar geen onreëlmatigheid hoegenaamd begaan nie. Inteendeel, ons submissie is dat U Edele opgetree het op die (10) enigste werklike korrekte metode wat daar bestaan het onder die omstandighede.

Om terug te kom op die vraag nou wat My Geleerde Vriend vanoggend dan weer gestel het, hy sê :

"The common law deals with the situation."

Dit wil sê nou rekusering en dat dit die metode is wat gevolg moet word en dan het hy ook aan die hand gegee dat artikel 147 in die lig van die gemene reg nie die vertolking gegee moet word wat ons voorstaan nie en wat U Edele met eerbied korrek bevind het die regte uitleg van die artikel (20) is.

Waar die gemene reg nie voorsiening maak vir assessore nie, is daar nie 'n gemeenregtelike agtergrond waarteen artikels 145 tot 147 gelees kan word nie, maar My Geleerde Vriend sal seker sê dan moet artikel 147 gelees word teen die agtergrond van die reg insake - die gemene reg insake rekusering.

In ons submissie kan daar met artikel 147 'n doel bereik word wat soortgelyk is aan die doel van rekusering, maar dit is in ons submissie klaarblyklik 'n heel ander (30)

prosedure/...

prosedure. Volgens die gemene reg word die exceptio gebaseer op - waarop die rekuseringsaansoek geopper word, gebring deur een van die partye tot die geding. Vir daardie vanselfsprekende submissie verwys ek u na Voet volume 2, ŉ vertaling van Gane. Dit is boek 5 titel 1.

DIT WORD OP REKORD GEPLAAS DAT BESKULDIGDE NR. 19 OOK NOU TEENWOORDIG IS.

MNR. DE VILLIERS : Dit word behandel in Boek 5 titel 1 paragraaf 43. Dit is op bladsy 49 van volume 2 van Gane en volgende. Ons sal hiervan ook afskrifte aan u beskik- (10) baar stel. Dit loop tot ongeveer bladsy 65 tot by artikel 52. Dit is baie duidelik uit ŉ lees van daardie paragrawe dit is een van die partye wat daardie beswaar aanhangig maak. So, daar het ŉ mens alreeds ŉ baie belangrike verskil tussen artikel 147 en die gemeenregtelike proses van rekusering. Voet is die gemeenregtelike skrywer op wie die howe in hierdie verband baie sterk steun, hoewel ek sien daar is ook verwysing na Damhouder.

Nêrens in die bespreking van Voet kry ons enigsins ŉ aanduiding dat een van die lede van die regbank of die (20) voorsittende regter van die regbank die bevoegdheid het om een van die ander regters as 't ware te rekuseer deur ŉ beswaar teen hom in te bring nie. Daarmee gee ek nie te kenne dat dit van pas sou wees in ŉ geskikte geval dat ŉ hof ŉ feit waarvan die partye nie bewus is kan tot die aandag bring van die partye nie. My Geleerde Vriend is dus insoverre korrek dat indien U Edele sou verkies het vir een of ander rede om nie die prosedure van artikel 147 te volg nie, u die bevoegdheid sou gehad het om die feite wat prof. Joubert u meegedeel het hier in die hof te opper (30)

en/...

en dit dan vir die partye te laat of hulle verkies om 'n aansoek om rekusering te bring, al dan nie, maar My Geleerde Vriend fouteer gruwelik in my submissie deur aan die hand te gee dat dit die enigste metode is en verder deur te kenne te gee dat dit die korrekte metode onder die omstandighede sou wees.

Daar is ook ander verskille tussen artikel 147 en die gemeenregtelike prosedure van rekusering. Volgens Voet Boek 5 Titel 1 paragraaf 43 en wel op bladsy 49 tot 50 van Gane se vertaling, behandel Voet die feit dat (10) iemand wat aanvoer dat 'n Regter hom moet rekuseer moet "just cause" aantoon en bewys en hy wys daarop op bladsy 50 teen die einde van die paragraaf :

"If assuredly we do not lay on the excipient (dit is die beswaarmaker) the statement and proof of a particular cause and that according to the wellknown rule by which an excipient has to prove an exception like a plaintiff, we shall needs have to confess that freedom has thus been granted to the litigant with impunity to cut to pieces at his whim by false (20) charges, a suspected judge, to fake reasons and to scatter falsehoods without fear of punishment. To this may be added that the Roman Laws did not in matters which appear to involve contumely allow anyone to rove at the risk of another's reputation, but bar him to specify and state something definite with particularity. Just as that was laid down in the law cited below with reference to actionable wrongs, so also it has rightly been applied by commentators to the obligation never to cast up (30)

suspicion/...

suspicion rashly and as it were to broadcast against judges who have the approval of the State."

Dit wys die - en die sake het na aanleiding hiervan gesê dit bevestig die bewyslas op die beswaarmaker. Dit mag ter sake wees op hierdie punt, ek wil nie nou die aansoek om rekusering vooruit loop nie, maar net die gesag wat by rekusering van toepassing is vir u na verwys wat ons behandel op bladsy 19 en volgende. Die SOUTH AFRICAN MOTOR ACCEPTANCE CORPORATION saak in paragraaf 2 op bladsy 19; RADEBE se saak in die Appèlhof op bladsy 19, para- (10) graaf 3, waar die Appèlhof gesê het :

"Regspleging geskied (onder aan bladsy 19) by ons soos in alle beskaafde lande in die openbaar met sekere noodsaaklike uitsonderings met die oog op die algemene vertroue wat in die regspleging behoort te bestaan, is onpartydigheid van die Regter nie net van belang vir ŉ party wat in die saak betrokke is nie, maar ook van algemene belang. Op grond hiervan behoort myns insiens ŉ Regter nie ŉ saak te verhoor nie, wanneer dit gesê kan word dat daar omstandighede is waardeur (20) die regterlike onpartydigheid in die algemeen wesenlik benadel sou kon word en dit is die taak van die Regter om self in elke konkrete geval te oordeel of die omstandighede van so ŉ aard is dat daardie benadeling sou kon gebeur."

My Geleerde Vriend het u verwys na die passasie op 813 E tot F waar RUMPFF, A.R, soos hy toe was, gesê het :

"Wat die Regter in die onderhawige saak moet besluit en wat hierdie Hof tans moet besluit is of die gestaakte poging van die beskuldigde om die Regter aan te val (30)

objektief/...

objektief gesien, wesenlik die onpartydigheid van die Regter kon benadeel."

Dit is die geval waar die Regter aangeval is deur die beskuldigde.

Dit bevestig dan, aan die hand van die sake, sal u sien kom ons dan by die toetse wat toegepas word op bladsy 22 bo. Die gesag kan opgesom word soos volg: Dat die beswaarmaker moet redelike oorsaak iusta causa recusationis bewys en dan tweedens, die toets of die aansoek slaag, al dan nie, is objektief van aard, naamlik of daar 'n redelike (10) vrees bestaan dat die Agbare Hof dalk 'n uitspraak kan gee anders as wat hy regtens behoort te gee en ek beklemtoon die vereiste van redelikheid. Dan paragraaf C die aangeleentheid moet beskou word uit die oogpunt van die redelike leke litigant en die toets is objektief naamlik die waarskynlikheid van vooroordeel, of anders gestel of daar 'n reële waarskynlikheid, "a real likelihood" van vooroordele bestaan. Dan vereiste D wat ek nie nou weer hoef te lees nie.

As 'n mens dit nou vergelyk met 147 is dit baie duide-(20) lik dat dit 'n heel ander situasie skep. Nie een van die vereistes wat die gemene reg stel word in die artikel weergegee nie. In plaas daarvan is daar die vraag of na die oordeel van die voorsittende Regter 'n situasie is waar die assessor nou onbekwaam geraak het om as assessor op te tree en dit is goed begryplik uit praktiese en regverdige redes dat dit so moet wees. Die wetgewer het klaarblyklik nie bedoel om 'n ondersoek van die voorsittende Regter te gelas of om 'n ondersoek te voer met behulp van die partye, getuienislewering, voorlegging van dokumente, argument van die (30)

partye/...

partye en dies meer nie. Die rede is dat die wetgewer klaarblyklik vertroue gehad het dat ŉ Regter - dat die voorsittende Regter as ŉ volkome onpartydige beampte die diskresie sou hê om die aangeleentheid te hanteer soos wat artikel 147 voorskryf.

Om op te som, My Geleerde Vriend slaan die bal totaal mis, met eerbied teenoor hom, as hy artikel 147 wil probeer uitlê asof dit ŉ rekuseringsaansoek is en die geskiedenis van die artikel, as ŉ mens kyk na sy voorgangers en ook die geskiedenis in ons reg vanaf 1917, toe dit gegaan het oor (10) die onbekwaamheid van ŉ jurielid, bevestig in ons submissie daardie voorafgaande submissie.

HOF VERDAAG TOT 1 APRIL 1987.

DELMAS TREASON TRIAL 1985-1989

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