

SOUTH AFRICA / JUDGMENT

S v Malindi and Others (115/89)

[1989] ZASCA 114; [1990] 4 All SA 45 (AD) (25 September 1989)

[1989] ZASCA 114

COURT

Supreme Court of Appeal

BEFORE

CORBETT, BOTHA, NICHOLAS

CASE / FILE NUMBER

115/89

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IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

GCINUMUZI PETRUS MALINDI First Petitioner
TSIETSI DAVID MPHUTHI Second Petitioner
NAPHTALI MBUTI NKOPANE Third Petitioner
TEBELLO EPHRAIM RAMAKGULA .. Fourth Petitioner
SEKWATI JOHN MOKOENA Fifth Petitioner
SERAME JACOB HLANYANE Sixth Petitioner
THOMAS MADIKWE MANTHATA Seventh Petitioner
HLABENG SAM MATLOLE Eight Petitioner
POPO SIMON MOLEFE Ninth Petitioner
MOSIUOA GERARD PATRICK LEKOTA Tenth Petitioner
MOSES MABOKELA CHIKANE Eleventh Petitioner
and
THE STATE Respondent
Coram: CORBETT C J, BOTHA J A et NICHOLAS A J A
Heard: 24 AUGUST 1989
Delivered: 25 SEPTEMBER 1989

JUDGMENT

NICHOLAS A J A

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This is an application on petition for directions concerning the prosecution of a criminal appeal. The petitioners (who will be referred to collectively as "the appellants") were 11 of 22 persons who were indicted in the Transvaal Provincial Division on charges of treason, alternatively terrorism (in terms of s 54(1) of the Internal Security Act 74 of 1982), subversion (in terms of s 54(2) of that Act), murder and, after an amendment granted on 4 November 1985, furthering the objects of an unlawful organisation (in terms of s 13 of that Act). In terms of s

145(2) of the Criminal Procedure Act 51 of 1977 ("the Act"), the trial judge VAN DIJKHORST J, summoned two assessors to assist him in the trial. They were Dr W A Joubert, formerly a professor of law, and since 1980 an honorary professor of law, at the University of South Africa; and Mr W F Krugel, the President

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of the Regional Court for the Northern Transvaal. The trial began at Bethal on 16 October 1985, and continued at Delmas from 4 November. The first two months were occupied with preliminary legal argument. The accused pleaded on 20 January 1986, and the first State witness was called on the following day. The State case closed in September 1986, and an application for discharge resulted in three of the accused being acquitted. The defence case was begun on 21 January 1987. On 15 November 1988 the learned judge began reading the trial court's judgment. The seventh, ninth, tenth and eleventh petitioners were convicted of treason, and the first, second third, fourth, fifth, sixth and eight petitioners were convicted of terrorism. The remaining eight accused were acquitted. The first, seventh, ninth, tenth and eleventh petitioners were sentenced to terms of imprisonment which they are now serving on Robben

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Island. The remaining petitioners received suspended sentences. The appellants made application to the trial judge for the noting of special entries on the record in terms of s 317 of the Act and for general leave to appeal. The trial judge made certain of the special entries sought, but refused to make the others. He granted leave to appeal on the merits, limited in certain respects, to those accused who had been convicted of treason, and refused it to the others. The appellants intend to petition the Chief Justice for leave to appeal in respect of the areas in which leave was refused by the trial judge. The trial, which became known as the Delmas trial, is believed to be the longest in South African legal history. It stretched over 37 months, during which

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the court sat on 437 days. 278 witnesses: (152 for the

State and 126 for the defence) gave evidence. The record of evidence and argument comprises 459 volumes containing 27 194 pages. There are 1556 documentary exhibits which are composed of 14 425 pages. There were put in at the trial 42 video and audio tapes, 5 rolls of 16 mm film and numerous photographs and maps. The trial court's judgment took four days to deliver and runs to over 1500 pages. The hearing of the case in mitigation occupied four days, and the application for leave to appeal spanned three days.

The events which gave rise to the special entries to which this application relates, had their beginning on 10 March 1987. When the court sat on that day VAN DIJKHORST J made an announcement. He said:

"Before the witness is sworn in, I would like to make a statement. It is the case for the State that the ANC called

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for the formation of a United Democratic Front which was to organise, mobilise, condition, and politicise, inflame, indoctrinate, co-ordinate and/or activate the Black masses to participate in activities, deeds, projects, and/or violence whereby the Republic of South Africa is made ungovernable. It is the State's case that the UDF was formed with its aims, the unlawful overthrow and/or endangerment of the lawful government by violence and/or threats of violence and/or by other means which include or intend violence. It is the State's case that the UDF knows that it must unite, organise, mobilise, politically incite, condition and/or activate the Black masses to participate in acts and/or violence whereby the Republic of South Africa is made ungovernable and that, to attain

this goal, inter alia propaganda attacks are used. It is the State's case that the UDF adopted broad guidelines for a program of action and in furtherance

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of its aim to organise, mobilise and activate the Black masses around day-to-day issues, certain campaigns were decided upon. On 5 and 6 November 1983 the National Executive Council discussed a strategy to further the ANC and South African Communist party and/or UDF's campaign against the new constitutional policy of the government by a million signature campaign against the constitution, so it is alleged. It is alleged that this campaign was to improve the organisational capabilities of activists and general organisation of the UDF, to strengthen affiliated organisations and to create enormous propaganda against the government and its policies. This is the State's case. It has to be proved. I express no opinion on the State's chances in this respect. What is clear is that the million signature campaign is an important facet of the State's case. It follows that it merits dispassionate and unfettered consideration by judge and assessors.

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When I approached my learned assessors

to act in that capacity, I enquired whether

they had had any relationship with the UDF. The answer was negative in both

cases. Yesterday during the course of the morning, accused no. 6 was cross-examined on the million signature campaign. During the tea adjournment in a discussion of the case the learned assessor, Dr W.A. Joubert, informed me that he had

in fact participated in the million signature campaign by signing one of its declarations. An example is EXHIBIT AS1 document 2 which has as its logo the UDF and on top One Million Signature Campaign and then the following declaration is set out to which the signatories subscribe :

'We, the freedom loving South Africans, declare for the whole world to know that we reject apartheid, we support the struggle and unity of our people against the evils of apartheid, we stand for the creation of a

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non-racial democratic South Africa free of oppression, economic exploitation and racism, we say no to the new constitution because it will further entrench apartheid and White domination, no to the Koornhof laws which will deprive more and more African people of their birthright, yes to the United Democratic Front, UDF, and give it our full support in its efforts to unite our people in their fight against the constitution and Koornhof bills.' Whether the UDF's efforts to unite the people in their fight against the constitution, and inter alia the Black Local Authorities, that is the Koornhof bills, are unlawful and treasonable is one of the main issues in this case. I was perturbed at the implication of these facts and considered the matter from all angles last night. I also

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consulted the learned judge-president
of the Transvaal Provincial Division.

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

I hold that Dr Joubert has become unable
to act as assessor and in terms of Section
147 of the Criminal Procedure Act, no.

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which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained." (ibid at 754 H - 755 A).

The inherent power of the court to regulate its own procedure is epitomized in A D Rule 13, which provides -

"13. The court may, for sufficient cause shown, excuse the parties from compliance with any of the foregoing rules and may give such directions in matters of practice and procedure as it may consider just and expedient." It is plain that the remedies sought by

the appellants are procedural remedies and do not concern the court's substantive jurisdiction.

In their first prayer the appellants ask in effect that the appeal on the ground of the irregularities and illegalities stated in special entries 1 and 2 should

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be heard at a preliminary hearing, and that the issues in the main appeal should stand over for later decision, if that should prove necessary. This court is in principle strongly opposed to the hearing of appeals in piecemeal fashion. (See *R v Adams and Others* 1959 (3) SA 753 (A) at 763 B - F; *S v Naude* 1975(1) SA 681 (A) at 695 H). An exception may be made, however, where unusual circumstances call for such procedure (*Adams*, loc.cit;) or in "enkele gevalle van 'n besondere aard" (*Naude*, loc.cit). An illustration is afforded by the recent decision in *Gqeba & Others v The State* 1989 (3) SA 712 (A). In that case, after a protracted trial before a judge and two assessors, in the course of which one of the assessors had been discharged, seven of the fourteen accused were convicted of murder and sentenced to death. They appealed against the convictions and sentences,

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and also on a special entry of an irregularity alleged to have stemmed from the discharge of the one assessor during the trial. When the appeal was called on 16 May 1989, an application was made for the postponement of the appeal on the merits, on the ground that the appellants' counsel had not had sufficient time to master the lengthy record. The court granted the postponement, but in the special circumstances of the case, agreed to hear the appeal on the special entry. On 24 May 1989 the appeal was allowed and the convictions and sentences were set aside. There are no reported cases which discuss the factors which may influence the court to direct that an appeal be heard in stages. Guidance may, however, be obtained from the judgment of MILLER J in *Minister of Agriculture v Tonqaat Group Ltd* 1976(2) SA 357 (D & C L D). The learned judge was there dealing with an application under

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subrule (4) of rule 33 of the Rules of the Supreme Court, which deals with an analogous situation in trial actions.

The sub-rule is in these terms :

"(4) If it appears to the court mero motu or

on the application of any party that there is, in any pending action, a question of law or fact which it would be convenient to decide either before any evidence is led or separately from any other question, the court may make an order directing the trial of such question in such manner as it may deem fit, and may order that all further proceedings be stayed until such question has been disposed of."

Some of the points made by MILLER J in the course of his judgment were these. Substantial grounds should exist for the exercise of the power. The basis of the jurisdiction is convenience — the convenience not only of the parties but also of the court. The advantages and disadvantages likely to follow upon the

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granting of an order must be weighed. If overall, and with due regard to the divergent interests and considerations of convenience affecting the parties, it appears that the advantages would outweigh the disadvantages, the court would normally grant the application. When deciding an application under the sub-rule, the court is not called upon to give a decision on the merits. But it must consider the cogency of the point concerned, because unless it has substance a separate hearing would be a waste of time and costs. So, the court should not grant an application for a separate hearing "unless there appears to be a reasonable degree of likelihood that the alleged advantages would in fact result" (at 364 H). There is a similar rule in England. It is discussed in Halsbury's Laws of England, 4th ed. Vol 37, pp 366-371. Sec 484 (p367) states that the court

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

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

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

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An appeal on a special entry lies in pursuance of ss (1) of s 318 of the Criminal Procedure Act 51 of 1977, which provides :

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The conclusion is that the court has the power to grant the relief claimed in prayer 2 of the petition. As to factors which may affect the exercise of the power, see *Zieve v National Meat Supplies Ltd* 1936 A D 466. Each case must depend on its own particular facts.

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To justify the court in ordering the omission of the evidence or a part thereof, it must clearly appear that what is proposed to be omitted does not and cannot affect the point to be decided. The onus in this regard is on the applicant (at 470). Although the court is always desirous of welcoming and encouraging the simplification of proceedings and the saving of costs, it has no right to make orders for the cutting down of a record unless there is clear proof of no prejudice to the other party (at 471). Annexure "A" to the petition comprises some 430 pages. It includes a copy of the indictment as originally served and deals mainly with the events which gave rise to the exclusion of Dr Joubert and the subsequent application for quashing and recusal, and with the making of the special entries. The petition alleges that special entries 1 and 2 deal with discrete issues in the trial;

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

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1. the time which would have been occupied in the preparation of the entire record; 2. the time which would have been required for preparation by counsel on both sides; and
3. the time which would have been

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

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

Special entry 1.1 relates to the proper

interpretation of s 147(1) of the Criminal Procedure Act, 51 of 1977, which provides:

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

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

The appellants' contention is that, as a matter of law, the learned trial judge could not, on the basis of the facts set out in his statement of 10 March 1987, properly have formed the opinion that Dr Joubert "had become unable to act as an assessor at any time during (the) trial". Two points are made: he was not "unable to act" within the meaning of s 147(1); and, such inability to act as there may have been existed before the trial began. These points were dealt with by VAN DIJKHORST J in the reported judgment at pp 691 E to 693 F. The argument on behalf of the appellants on the other hand was in outline the following.

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The words "unable to act as assessor" when properly interpreted in the light of the context and the purpose and history of the provision, do not cover the situation which arose in the present case. While Dr Joubert might have been subject to an application by way of the exceptio

recusationis (or exceptio iudicis suspecti) at the instance of the State or the defence, the legislature did not, in enacting s 147(1), intend to empower a trial judge to exclude an assessor from further participation in the trial because in the judge's view he ought to recuse himself. The use of the word "unable" points to physical or mental incapacity short of death. An assessor is a member of the court, who is sworn "that he will on the evidence placed before him give a true verdict upon the issues to be tried". It is only when he cannot perform that role and function that he is unable to act as assessor; it is not enough that he ought

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not to act. Even if Dr Joubert was liable to impeachment

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

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

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to his assistance. These requirements are peremptory, and "unless in the opinion of the trial judge concerned the possibility of a death sentence can be discounted he is obliged to appoint two assessors". *S v Malinga* 1987(3) SA 490 (A) at 495 I - J). The appellants were charged inter alia with crimes for which the death sentence was competent. VAN DIJKHORST J thought it right to summon two assessors to his assistance. When they were duly sworn, the appellants thereupon became entitled to have their case considered by every member of the fact-finding tribunal. The effect of the exclusion of Dr Joubert was to deny that right to the appellants (cf *R v Price* 1955(1) SA 219 (A)), with the result that the convictions were a clear miscarriage of justice. The complaint covered by special entry 1.2. was two-fold: the requirements of procedural fairness were not observed in relation to the forming of his opinion

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

The second complaint relates to the merits of the opinion: it was contended that there were no sufficient grounds for the recusal of Dr Joubert. The Attorney-General's representatives submitted that a decision on this complaint could not be made without a consideration of the importance to the State case of the Million Signature Campaign (which was referred to in the trial judge's statement on 10 March

1987) and that this would require a consideration of the whole record. In order to meet the objection the appellants asked, during the hearing of the application, for the amendment of special entry 1.2 so as to read:

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

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

The object of the amendment was to exclude from the special entry the ground of complaint relating to the merits of the opinion, and to leave only the complaint that the opinion was formed in disregard of the rules of procedural fairness. The application for amendment was not opposed by the Attorney-General and it will be granted. The complaint which remains was dealt with in the reported judgment at 693 F - 694 C. The learned trial judge was of the view (at 693 J) that the parties had

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

The argument of the appellants to the contrary was in outline the following. The requirement that a party to litigation should be heard on all matters in which he has an interest, is fundamental to all legal systems. Two basic requirements of natural justice, expressed in the injunction *audi alteram partem*, are that notice of intended action must be given to persons who may be prejudicially affected by the exercise of a particular power, and that they should be afforded a proper opportunity to be heard. The *audi alteram partem* rule is not excluded by the provisions of s 147(2). The forming of the opinion referred to in s 147(2) was a matter which might prejudicially affect the accused: it is the jurisdictional fact on which⁴⁷ the power to exclude an assessor depends. It is implicit

in the sub-section that once the opinion has been formed, the trial judge is under a duty to exercise the power by adopting one of the two courses of action which are set out.

S.147(1) necessarily implies that in order to form the opinion, the trial judge must be possessed of information enabling him to do so. There was therefore a duty resting on the judge before reaching his opinion to notify Dr Joubert and the accused of such information, and to afford an opportunity to Dr Joubert to defend himself and to afford to the accused an opportunity to be heard. (Cf *R v Nqwevela* 1954(1) SA 123

(A)). The learned trial judge formed his opinion *mero motu* and in private, without informing Dr Joubert or the accused what he proposed to do, and without affording either of

them the opportunity of being heard. This constituted a departure from established rules of procedure so gross that

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it had the result that the accused were not given a proper trial. Special entry 1.3 concerned the decision of the trial judge, after he had made his ruling that Dr Joubert was unable to act as an assessor, to continue the trial before a court consisting of himself and the remaining assessor. This was dealt with in the reported judgment at 695 B - D. The learned judge said that he did not regard it as a requirement laid down by the Act to afford the parties a hearing before deciding to invoke paragraph (a) of S 147(1). He did not call upon the parties to address him in this regard as he did not think it possible that any accused, after having been through a trial of some 17 months, would prefer to start *de novo*. And he did not believe their protestations at the later stage to be genuine in this respect.

The main submissions made on behalf of

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the appellants were these. Having formed the opinion that Dr Joubert was unable to act as an assessor, the trial judge was faced with three choices: to order the trial to proceed before the remaining members of the court (in terms of para (a) of s 147(1)); to order the trial to start *de novo*, and for that purpose to summon an assessor in the place of Dr Joubert (para (b)); or to direct that the trial be stopped and the proceedings be quashed (in the exercise of his inherent power). (Cf *R v Matsego & Others* 1956(3) SA 411 (A) at 417 H). His choice was a matter which affected the composition of the trial court, in which the accused were vitally interested, and on which they had a right to be heard. The learned judge was not entitled to assume that the accused would not prefer to start *de novo*. The fact that they made an application to quash the proceedings made it clear that they did prefer to have the trial start *de novo*. The

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failure to give the accused a hearing was therefore an irregularity which vitiates the convictions. Special entries 1.4 and 2 arise out of the learned judge's ruling that Dr Joubert's third report and paragraph 6 of his second report were inadmissible and could not be received in evidence; and that the contents of the statements made by the learned judge were not open to contradiction. The defence had sought to rely on material in Dr Joubert's reports both in support of the application to quash the trial, and in support of the application for the recusal of the trial judge, alternatively of Mr Assessor Krugel. The effect of the rulings, so they informed the trial judge, was to make it impossible for them to continue with the recusal application. (Here special entry 2 has application). The rulings also reduced the thrust of the appellants' argument for quashing. (Here special entry 1.451 has application.) At the end of the argument in this court counsel for the appellants stated that they would not ask

for the inclusion of special entry 2 in any order the court might make on the petition.

Consequently is it unnecessary

to consider it further.

VAN DIJKHORST J dealt with the admissibility

of the material concerned at pp 701 E - 704 H of the reported judgment. He said that, wisely, counsel for the accused did not dispute the existence of the rule that it is against public policy that there should be a disclosure of private discussions and deliberations between judge and assessor on the case before them, (at 702A). In this regard he

conceived the case of a jury to be analogous (at 702 B). He said that contradiction of the detailed facts which the

judge had put on record could not be allowed. "It would

put the credibility of the court itself at issue. Such

52 a situation is unthinkable. It is also against public policy." (at 703 F - G). Counsel for the appellants submitted that the rule of public policy concerning the inadmissibility of statements by jurors to impeach a verdict has no application to the present case. Here it was incumbent on the trial judge, once he had placed the 'facts' on record, to admit evidence in contradiction thereof. The rulings bear directly upon the fairness of the trial, and upon the propriety of the trial judge continuing to hear the case. Hence the irregularities fall into the first category of irregularities mentioned in *S v Moodie*, (1961 (4) SA 752 (A)) and have per se resulted in a failure of justice. In *Moodie's* case HOLMES J A said at 758 F - G that the following rules may be stated in regard to irregularities and the question whether they have resulted in a failure of justice:

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

(2) In an exceptional case, where the irregularity consists of such a gross departure from established rules of procedure that the accused has not been properly tried, this is per se a failure of justice, and it is unnecessary to apply the test

of enquiring whether a reasonable trial Court would inevitably have convicted if there had been no irregularity.

(3) Whether a case falls within (1) or (2) depends upon the nature and degree of the irregularity."

It seems that the reference in counsel's argument to the first

54 category was an error; the justification put forward in the

petition for the hearing of a preliminary appeal on the special entries on the basis of a limited record was that the general rule referred to in category (1) is not applicable. CONCLUSION In my opinion this case is of the exceptional kind which justifies the making of an order for the hearing of the appeal in two stages. For the reasons advanced by the appellants, it falls into a very special category. The proposed course would be convenient to all parties and the court, and it would not result in disadvantage to anyone. (A consideration not so far mentioned is the fact that some of the appellants are serving sentences of imprisonment. If their convictions are to be set aside, that should be done at the earliest stage possible.)

Special entries 1.1, 1.2 and 1.3, at

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least, raise points of substance which, if decided in favour of the appellants, will probably be decisive of the appeal. The arguments advanced in support of them are cogent. (The argument in regard to special entry 1.4 is not as strong and even if it should be decided that the learned judge's rulings were erroneous, it may well be held that such rulings were not irregularities of the kind referred to in category (2) in Moodie's case.) So far as the record is concerned, the Attorney-General's representatives did not at the end of the argument contend that adjudication of an appeal on special entry 1. as amended would require consideration of anything more than Annexure "A". Ex abundanti cautela, however, it will be made clear in the order that it is open to the State to make application to the court hearing the preliminary appeal to supplement Annexure "A" with other material which

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is shown to be relevant to the issues in such appeal.

The following order is made:

1. Special entry 1.2 is amended by the substitution therefor of the following:

"1.2 Thereafter, and on 10 March

1987, the trial judge, purporting to act in terms of section 147(1) of the Criminal Procedure Act, No 51 of 1977, acted irregularly by ruling, without hearing any argument thereon, that the assessor Dr W A Joubert, had to recuse himself and had become unable to act as assessor, notwithstanding that no application for recusal had been made either by the State or the accused, that Dr Joubert was not willing to recuse himself and that he was willing to continue as assessor."

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2.(a) It is directed that the appeal on special entry No 1 as amended be heard as a preliminary appeal separately from the main appeal.

(b)(i) The record for the purpose of the adjudication of the appeal on the said special entry shall be Annexure "A" to the petition.

(ii) Leave is granted to the State to apply to the court

hearing the preliminary appeal for leave to supplement the record being Annexure "A" with material which is shown to be relevant to the issues in such appeal.

3. In regard to the application in Case No 54/89,
the date on or before which a petition seeking leave to

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appeal upon grounds not granted by the trial judge shall be filed, is extended to the date fixed by the court hearing the preliminary appeal when giving its decision thereon;

(b) the duty of the appellants to order and prepare copies of the full trial record for the main appeal is suspended pending the outcome of the preliminary appeal and the outcome of the petition for leave to appeal referred to in sub-paragraph (a) hereof.

H C NICHOLAS A J A

CORBETT C J concur. BOTHA A J

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