IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

GCINUMUZI PETRUS MALINDI	First Appellant
TSIETSI DAVID MPHUTHI	Second Appellant
NAPHTALI MBUTI NKOPANE	Third Appellant
TEBELLO EPHRAIM RAMAKGULA	Fourth Appellant
SEKWATI JOHN MOKOENA	Fifth Appellant
SERAME JACOB HLANYANE	Sixth Appellant
THOMAS MADIKWE MANTHATA	Seventh Appellant
HLABENG SAM MATLOLE.....	Eighth Appellant
POPO SIMON MOLEFE	Ninth Appellant
MOSIUOA GERARD PATRICK LEKOTA	Tenth Appellant
MOSES MABOKELA CHIKANE	Eleventh Appellant

and

THE STATE	Respondent

CORAM: CORBETT CJ, BOTHA, SMALBERGER, KUMLEBEN, JJA, et NICHOLAS AJA.

DATE OF HEARING: 27 November 1989

DATE OF JUDGMENT: 15 December 1989

/ J U D G M E N T...

J U D G M E N T

CORBETT CJ:

The eleven appellants, together with eleven others, appeared before Van Dijkhorst J and two assessors in the Transvaal Provincial Division on charges of treason, alternatively terrorism (in terms of sec 54(1) of the Internal Security Act 74 of 1982), subversion (in terms of sec 54(2) of Act 74 of 1982), murder (five counts) and, after an amendment to the indictment granted on 4 November 1985, furthering the objects of an unlawful organization (in terms of sec 13 of Act 74 of 1982). After a trial lasting approximately three years (believed to be the longest in South African legal history) and in November 1988 certain of the appellants were convicted of terrorism and the remaining appellants were found guilty of treason. In all cases sentences of imprisonment were imposed, but in some

instances the sentence was suspended.

The Court a quo granted leave to appeal to this Court, on certain grounds, to those of the appellants who had been convicted of treason and also made certain special entries. On 24 August 1989 this Court (consisting of Botha JA, Nicholas AJA and myself) heard an application on petition by the appellants for an order in terms of AD Rule 13 decreeing, inter alia, that two of the special entries, numbered 1 and 2 by the trial Judge, be argued and adjudicated upon in limine and separately from the main appeal, and that for this purpose only a limited portion of the whole record, being the papers contained in annexure "A" to the petition, be placed before the Court. (I shall call this "the preliminary application".) The preliminary application was opposed by the State. During the course of the hearing the petitioners applied for the amendment of special entry number 1 (which contained four parts, numbered

1.1, 1.2, 1.3 and 1.4) by the substitution of a newly-worded part 1.2. On 25 September 1989 this Court gave judgment on the preliminary application, allowing the amendment and granting an order directing that the appeal on special entry no 1 (as amended) be heard as a preliminary appeal, separately from the main appeal, and on the record comprised of annexure "A". On 28 November 1989 this Court heard argument on the preliminary appeal and reserved judgment. I now proceed to give that judgment and in doing so to deal with special entry no 1.

The events giving rise to special entry no 1 occurred on 9 and 10 March 1987. At that stage the trial had been in progress for some seventeen months. In terms of sec 145(2) of the Criminal Procedure Act 51 of 1977 ("the Act") the trial Judge had summoned as assessors to assist him at the trial Dr W A Joubert, formerly dean of the Faculty of Law of the University of South Africa and as from

1980 an honorary professor of that university, and Mr W F Krugel, the president of the Regional Court for the Northern Transvaal. Until 10 March 1987 these two assessors had sat with the trial Judge throughout the hearing of the case. On that date and at the commencement of the proceedings for the day the trial Judge made an order in terms of sec 147(1) of the Act, holding that Dr Joubert had become unable to act as assessor in the case and directing that the trial proceed before the remaining members of the Court, ie himself and Mr Krugel.

This order was preceded by a statement by the trial Judge, in which he explained the reasons for making the order. The full text of that statement is set forth in the judgment on the preliminary application, delivered by Nicholas AJA. In brief it amounts to this. The case of the State against the appellants was that they, acting in concert under the banner of an organization known as the

United Democratic Front ("UDF"), which had been called into being by the African National Congress, embarked upon a campaign aimed at making the Republic of South Africa ungovernable and at overthrowing the lawful government of the country by violence. To this end it was necessary to unite and activate "the Black masses" to participate in acts designed to attain these goals. A programme of action adopted by the UDF in order to achieve this included a campaign to obtain the signatures of a million persons in support of the UDF's opposition to the new constitution sponsored by the government and the so-called "Koornhof Bills" (which dealt, inter alia, with Black local government). This was referred to as the Million Signature Campaign ("MSC"). The MSC was, in the words of the trial Judge, "an important facet" of the State case and it consequently merited "dispassionate and unfettered consideration" by Judge and assessors. When he initially

approached Dr Joubert and Mr Krugel to act as assessors in the case he enquired whether they "had any relationship" with the UDF. They had both replied in the negative. During the morning of 9 March 1987 one of the accused was cross-examined about the MSC. In the course of a discussion of the case in the tea adjournment Dr Joubert informed the Judge that he himself had in fact participated in the MSC by signing one of the declarations. The text of such a declaration reads as follows:

> "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 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."

The Judge was perturbed at the implications of this revelation and during the night of 9/10 March considered the matter from all angles and consulted the Judge-President of the Transvaal Provincial Division. He thereafter came to the conclusion "regretfully" that there was no option but to "rule that Dr W A Joubert (had) to recuse himself"; and he accordingly made the order referred to above.

The extent to which the matter was discussed by the learned Judge with Dr Joubert, and the opportunity given

for such discussion, prior to the announcement in Court on 10 March, are matters upon which there is some dispute. It is clear, however, that Dr Joubert did not consider that there were adequate grounds for his recusal and did not wish to withdraw from the case. Nor, it would seem, was he specifically told before going into court that day of the statement and order which the trial Judge proposed to make. It is also clear that prior to the announcement the parties, ie the accused and the State, had no inkling of what was afoot and were not given any opportunity to debate the matter or place their views before the Court. Moreover, it appears that the learned Judge proceeded in this manner "after due deliberation" and that he was of the view that the decision, once taken, could not be reconsidered.

Thereafter, on 30 March 1987, the accused, having previously reserved their rights in this regard, brought an

application for the quashing of the trial on three separate grounds, alternatively for the recusal of the Judge, and further alternatively for the recusal of the other assessor, Mr W F Krugel. The three (alternative) grounds for quashing the trial were (i) that the dismissal of Dr Joubert as assessor was made without power and that the Court then hearing the trial was not a properly constituted court; (ii) that the dismissal constituted a material irregularity so gross that the accused could no longer properly be tried by the court hearing the trial; and (iii) that the failure by the Judge to hear the accused on how the discretion given to him by sec 147 of the Act should be exercised, prior to ruling that the trial be continued before himself and the remaining assessor, constituted a material irregularity which could not then be remedied and in consequence whereof the trial could not properly be continued.

During the course of argument on these

applications the trial Judge gave rulings on the admissibility of certain reports, and the applications for recusal were withdrawn. At the conclusion of the argument Van Dijkhorst J dismissed the application in toto and about a week later handed down his reasons for doing so. This statement of reasons has been reported (see S v Baleka and Others (4) 1988 (4) SA 688 (T)) and I shall refer to this as "the reported judgment". The trial thereafter proceeded before the trial Judge and Mr Krugel to the eventual verdicts and sentences described above.

The special entry (no 1) which this Court ordered to be considered in limine by way of a preliminary appeal reads as follows:

> "1.1 The trial judge wrongly construed Section 147(1) of the Criminal Procedure Act No 51 of 1977 as being applicable to the circumstances described in the statement made by him on 10 March 1987,

as a result of which, and without hearing any argument thereon, he wrongly concluded that he had the power to rule that in such circumstances Dr W A Joubert had become unable to act as assessor.

1.2 Thereafter, and on 10 March 1987, the trial judge, purporting to act in terms of section 147(1) of the Criminal Procedure Act, No 51 of 1977, acted irregularly by ruling, without hearing any argument thereon, that the assessor Dr W A Joubert, had to recuse himself and had become unable to act as assessor, notwithstanding that no application for recusal had been made either by the State or the accused, that Dr Joubert was not willing to recuse himself and that he was willing to continue as assessor.

1.3 Thereafter, having made such a ruling, and without hearing any argument thereon, the trial judge irregularly continued the trial before an improperly constituted Court consisting of himself

and the remaining assessor Mr W F Krugel and/or

1.4 During the course of the application for the quashing of the trial and the recusal of the trial judge alternatively the assessor Mr W F Krugel, the trial judge having made a statement on the morning of 30 March 1987, thereafter ruled that paragraph 6 of the second report of Dr W A Joubert, and the whole of the third report (which he refused to read notwithstanding the fact that to his knowledge it had come to the attention of the Accused) were inadmissible, and that the Accused had to accept the correctness of and could not contradict what he had put on record in his statement, and thereby made it impossible for the Accused to rely on the contents of the third report and paragraph 6 of the second report, and make submissions which, but for such ruling, would have been relevant to and relied upon in the application for the quashing of the trial."

The special entry thus raises four distinct points. In truth there are four special entries. The first of these is, in effect, that the power vested in the trial Judge by sec 147(1) of the Act to determine that an assessor has become "unable to act" as such does not pertain to the case where, as here, the alleged inability consists of what would amount to a ground for the recusal of the assessor concerned. This is a question of law which depends upon the construction of sec 147(1).

Section 147(1) reads as follows:

> "If an assessor dies or, in the opinion of the presiding judge, becomes unable to act as assessor at any time during a trial, the presiding judge may direct -
>
> (a) that the trial proceed before the remaining member or members of the court; or
>
> (b) that the trial start <u>de novo</u>, and for that purpose summon an assessor in the place of the assessor who has died or has become unable to act as assessor".

The Afrikaans text reads:

> "Indien 'n assessor te eniger tyd gedurende 'n verhoor sterf of, na die oordeel van die voorsittende regter, onbekwaam raak om as assessor op te tree, kan die voorsittende regter gelas -
>
> (a) dat die verhoor voor die oorblywende lid of lede van die hof voortgaan; of
>
> (b) dat die verhoor de novo begin, en te dien einde 'n assessor oproep in die plek van die assessor wat gesterf het of onbekwaam geraak het om as assessor op te tree".

Although the Afrikaans version is the signed version, it is only where the two versions conflict, ie are not capable of reconciliation, that the Afrikaans version prevails. Where the meaning of one version is wider than the other, then they may be reconciled by regarding what is common to both versions as conveying the legislative intent (see S v Moroney 1978 (4) SA 389 (A), at 407 G - 408 G).

The critical words in sec 147(1) are "becomes unable to act as assessor at any time during a trial" (Afrikaans: "te eniger tyd gedurende 'n verhoor...onbekwaam raak om as assessor op te tree"). The Oxford English Dictionary gives as the first two meanings of the word "unable", used adjectivally, the following:

> "1. Not able, not having ability or power, to do or perform (undergo or experience) something specified. (Chiefly of persons.)
> 2. Of persons: Lacking ability in some implied respect; incompetent, inefficient."

A third meaning, reading -

> "3.a Of persons: Incapable of, not qualified for, some position."

is marked obsolete, the latest known instance of its occurrence having been in the 15th century.

The relevant meaning of the word "onbekwaam" is, according to H A T (Verklarende Handwoordeboek van die Afrikaanse Taal) -

"Sonder kundigheid, onbedrewe, ongeskik".

The word "unable", in the context of sec 147(1), conveys to my mind an actual inability to perform the function of acting as an assessor. Such an inability could derive from an inherent physical or mental condition or possibly also a situation which physically prevented the assessor from attending the trial, such as for example indefinite detention here or in a foreign country. I do not think, however, that the word "unable" is appropriate to describe or comprehend the situation where an assessor becomes legally incompetent to continue to act in a case because of some act or occurrence which warrants his recusal. I am also doubtful whether the word "onbekwaam", even in the sense of "ongeskik", is wide enough to

comprehend such a situation; but even if it is, it seems to me, applying the principles enunciated in S v Moroney, supra, that the ambit of sec 147(1) should be restricted to what is common in the meaning of "unable" and "onbekwaam".

The common law basis of the duty of a judicial officer in certain circumstances to recuse himself was fully examined in the cases of S v Radebe 1973 (1) SA 796 (A) and South African Motor Acceptance Corporation (Edms) Bpk v Oberholzer 1974 (4) SA 808 (T). Broadly speaking, the duty of recusal arises where it appears that the judicial officer has an interest in the case or where there is some other reasonable ground for believing that there is a likelihood of bias on the part of the judicial officer: that is, that he will not adjudicate impartially. The matter must be regarded from the point of view of the reasonable litigant and the test is an objective one. The fact that in reality the judicial officer was impartial or is likely to be

impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important.

Normally recusal would follow upon an application (exceptio recusationis) therefor by either or both of the parties, but on occasion a judicial officer may recuse himself mero motu, ie without any such prior application (see S v Suliman 1969 (2) SA 385(A), at 390 F-G, 391 B - C; also R v H 1955 (2) SA 288 (T) and The State v Stevens 1961 (3) SA 518 (C)). In R v H, where the assessors through their association with another case were acquainted with certain activities of a witness called in the case and this knowledge caused them to have an opinion as to his credibility which prevented them from having an unbiased approach in the matter, Murray J discharged himself and the assessors. As examples of the case where a party sought by way of application the recusal of an assessor or the setting aside of the proceedings on the ground that the assessor

should no longer sit in the case, see R v Matsego and Others 1956 (3) SA 411 (A); S v Apolis 1965 (4) SA 178 (C); S v Gcaba 1965 (4) SA 325 (N); S v Moseli en 'n Ander (2) 1969 (1) SA 650 (O). In Matsego's case there was communicated to an assessor prior to the delivery of judgment information of a most damaging nature concerning one of the accused. An application to the Judge, sitting alone, for an order setting aside the proceedings, or alternatively for an order that the Court recuse the assessor or declare him incapable of continuing to act, was dismissed. On appeal Centlivres CJ expressed the view (at p 417 H) that the trial Judge ought to have acceded to the application, quashed the proceedings and directed a new trial.

It would thus seem that at common law the recusal of an assessor is a proceeding in open court and that it is an issue upon which the parties would be afforded an opportunity to be heard. Obviously this would be so where

one of the parties moved for the assessor's recusal; and, in my opinion, it should also be so even where the assessor or the court acts mero motu. A recusal would normally result in the proceedings being quashed and a new trial being directed.

A proviso to sec 145 (2) of the Act, which empowers the presiding judge to summon not more than two assessors to assist at the trial, provides that -

> "....where the offence in respect of which the accused is on trial is an offence for which the sentence of death is a competent sentence, the presiding judge shall, if he is of the opinion that, in the event of a conviction and having regard to the circumstances of the case, the sentence of death may be imposed or may have to be imposed, summon two assessors to his assistance."

It is common cause that in the present case the trial Judge

was obliged, in terms of the proviso, to sit with two assessors. (Cf. S v Malinga 1987 (3) SA 490 (A), at 495 I).

An assessor appointed in terms of sec 145 is a member of the Court and participates in all decisions of the court on questions of fact. Where the judge sits with two assessors the decision of the majority (on factual questions) constitutes the decision of the court. Where, on the other hand, the judge sits with only one assessor, then in the event of a difference of opinion the decision of the judge prevails (sec 145 (4)). An accused person has a right to have his case considered by every member of the fact-finding tribunal (see R v Price 1955 (1) SA 219 (A), at 224 D - E) and it is especially important that this should be so in cases covered by the proviso to sec 145(2). (See also R v Mati and Others 1960 (1) SA 304 (A), at 306 F; S v Malinga, supra, at 498 I - J; S v Gqeba and Others 1989 (3)

SA 712 (A), at 718 A - C.) And, as was pointed out by Grosskopf JA in Gqeba's case, supra, at 718 B - C, although sec 147(1) of the Act does permit, in certain circumstances, the continuation of a trial without one of the assessors even in cases covered by the proviso to sec 145(2), these circumstances should not be extended beyond those clearly falling within the language of sec 147(1).

Having regard to the aforegoing, I am of the view that it is very unlikely that the Legislature intended the provisions of sec 147(1) to cover cases where there were grounds for the recusal of an assessor. It would amount to a drastic alteration of the common law relating to the recusal of assessors, particularly in the procedural sphere: it would permit of the continuation of the case before an attenuated tribunal, even where the law demanded the initial appointment of two assessors, in circumstances where under the common law the proceedings would have been quashed.

Had this been the aim of Parliament I would have expected a clearer indication of the legislative intent.

Sec 147(1) has reference in terms to an assessor who -

> "....becomes unable to act as assessor <u>at any time during a trial</u>...." (My emphasis.)

The words emphasized indicate, to my mind, an inability to act which occurs or comes into being during the trial. The words do not cover the situation where the inability existed prior to the inception of the trial and persisted during the trial. I shall elaborate on this point later, but if the correctness of this interpretation be accepted, then it tends to confirm the notion that "unable" was not intended to comprehend the recusal situation. Though the <u>causa</u> for a recusal may relate to something which occurs during the course of the trial, it often relates to some fact or circumstance which existed prior to the commencement of the

trial. The Legislature could hardly have overlooked this and consequently the express words in sec 147(1) limiting the inability to one that comes into existence during the trial are a pointer to the subsection not having been intended to apply to cases of recusal. This is in contrast to cases of inability such as physical or mental infirmity, which would normally not have existed at the time when the judge chose the assessor and invited him to act in the case: for obviously had they then existed the assessor would not have been so appointed.

In argument counsel for the State placed much emphasis on the history of the legislation and argued that this showed an intention that "unable" ("onbekwaam") should cover recusal cases. In my opinion, the legislative history tends to point the other way.

In this regard it is necessary to go back to the Criminal Procedure and Evidence Act 31 of 1917. This Act

provided for trial by jury and in certain circumstances for trial by a judge without a jury. In the latter case the judge had a discretion to summon two assessors to act with him "in an advisory capacity" on questions of fact (sec 216). Sec 216 was amended by the substitution of a new section in 1935 (see sec 36 of Act 46 of 1935). The new section retained the general discretion of the judge to summon assessors to his assistance, but made this obligatory in certain cases, including where the accused was charged with treason, murder, rape or sedition. At the same time the assessors were made full members of the court on questions of fact. Sec 214 of Act 31 of 1917 made provision for what was to happen if the judge became "incapable" (Dutch: "onbekwaam") of proceeding with the trial or directing the discharge of the jury or if at any time during the trial a juror died or became in the opinion of the judge "incapable" (Dutch: "onbekwaam") of continuing

to act as a juror or was absent. In the latter events the judge might in his discretion discharge the jury or, at the request of the accused and with the consent of the prosecutor, discharge the juror concerned and direct that the trial proceed with the remaining jurors (sub-sec (3)).

There were, however, at that stage no corresponding provisions in Act 31 of 1917 to cater for the situation where an assessor died or became incapable. This deficiency was exposed in 1954 by the decision of this Court in R v Price 1955 (1) SA 219 (A). In that case (in which it was essential that there be two assessors) an assessor died during the course of the trial. The defence made application for an order that the case proceed before the Judge and the remaining assessor. The application was supported by counsel for the Crown and granted by the Judge. Subsequently, after conviction and sentence, one of the accused appealed. On a special entry, this Court held that

the court had no power to make the order which it did; that the appellant had been convicted and sentenced by an improperly constituted court; that this was an irregularity which could not be waived by the accused; and that the convictions and sentences had to be set aside.

The Legislature reacted swiftly to the decision in Price's case. Sec 33 of Act 29 of 1955 (which was assented to on 10 May 1955) introduced into Act 31 of 1917 a new section, sec 216 bis, which made provision for the judge being vested with the power, in the event of an assessor dying or becoming in the opinion of the judge incapable of continuing to act as assessor, to direct that the trial proceed without such assessor. A distinction was drawn between cases where the judge was obliged to summon assessors and cases where he was not so obliged. In the former type of case the judge could continue with the remaining assessor only with the consent of the accused and

the prosecutor; in the latter type of case he could do so without such consent.

In 1955 a new Criminal Procedure Act 56 of 1955 (assented to on 22 June 1955) replaced Act 31 of 1917. The provisions of sec 214 (relating to what happens when a judge becomes incapable or a juror dies, becomes incapable or is absent), of sec 216 (relating to the power of a judge to appoint assessors) and of sec 216 bis (relating to what happens when an assessor dies or becomes incapable) were re-enacted in (respectively) secs 149, 109 and 110 of Act 56 of 1955 in virtually the same form. In 1959 sec 109(2) was amended by the deletion of the proviso making the appointment of assessors obligatory in certain cases (sec 5 of Act 75 of 1959). This resulted (in 1963) in a consequential amendment to sec 110 (sec 9 of Act 92 of 1963), eliminating the distinction between cases where the assessors were obligatory and where not, and simply giving

the judge the power, in all cases and without the consent of the parties, to continue the trial without the assessor who had died or become incapable.

In 1969 trial by jury was abolished (Abolition of Juries Act 34 of 1969). In terms of sec 4 of this Act a new sec 109 was substituted in Act 56 of 1955. The new section amended the original in some respects, but sec 109(2), as amended, relating to the appointment of assessors remained the same. Sec 149 was repealed, together with the rest of the chapter relating to jury trials; and a new sec 110 was substituted, without substantial amendment being made thereto.

Then came the enactment of the current Criminal Procedure Act 51 of 1977. This re-introduced the principle, though in different terms, of assessors being obligatory in certain cases (see sec 145, referred to above) and it dealt in sec 147 with the situation where during the

trial an assessor dies or becomes unable to act. The main differences between sec 147 and its predecessor, sec 110 of Act 56 of 1955, as amended, are -

(1) the change of language - from "incapable" to "unable" - in relation to the assessor who ceases to act; and

(2) the alternative power given to the judge to start the trial de novo and for that purpose to summon a new assessor. (Under sec 110(3), as amended, it was simply provided that if the judge did not direct the trial to proceed, the accused if not on bail, should remain in custody and might be tried again.)

So far as I am aware, there is no decided case in our law in which the term "incapable" in the sections relating to the incapacity of jurors or in the previous sections (ie prior to the enactment of Act 51 of 1977)

relating to the incapacity of assessors has been held to include the case where there is ground for the recusal of a juror or assessor, as the case may be. Two cases involving the recusal of jurors which were cited to us, viz Rex v Katzeff 1944 CPD 483 and R v Gubudela and Others 1959 (4) SA 93 (E), tend to support a contrary view. In Katzeff's case the defence brought it to the attention of the Judge (Davis J) that after hearing the accused's story and before the conclusion of the case a juror had expressed the opinion that the accused was guilty. The juror admitted that he had said "something of the kind". The Judge ordered the discharge of the jury and a re-trial before another jury. He indicated that this was the only course open to him. Obviously the learned Judge did not consider that this was a case falling under sec 214 (as amended in 1935) of Act 31 of 1917, though admittedly no express reference was made to this section. In Gubudela's case, supra, a juror was heard

to remark during the trial that the accused looked to him "like a bunch of cut-throats". The presiding Judge (O'Hagan J) held that the trial could not proceed before the jury as constituted. He continued (at 95 G - 96 B) -

> "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 at p 390 of Gardiner & Lansdown which suggests that sec 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 jurors. I very much doubt if sec 149 has anything to do with the kind of situation that has arisen in this case. Sub-sec (3) of sec 149 refers to the case where a juror dies or becomes incapable of serving as a juror. I am inclined to think that the incapacity referred to in the section is 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 sec 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 should be discharged and the trial start de novo. I refer to the case of R v Katzeff, 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 Katzeff's case I think I should discharge the whole jury."

Matsego's case, supra, related, as I have indicated, to an assessor to whom information of "a most damaging nature" concerning one of the accused had been communicated.

An application was made to the trial Judge for an order setting aside the proceedings, alternatively for an order that the Court should recuse the assessor concerned or declare him incapable of continuing to act as an assessor and discharge him. The trial Judge dismissed the application. On an appeal it was held that the trial Judge had erred and that he should have acceded to the request by counsel for the appellant to quash the proceedings and direct a new trial (at 417 H). It was not suggested by this Court that it had been open to the trial Judge, in terms of sec 110 of Act 56 of 1955, to continue the trial with one assessor, with the consent of the parties.

Counsel for the State referred to sec 202 of Act 31 of 1917, which provided as follows:

> "If a juror is personally acquainted with any relevant fact, it is his duty to inform the judge that such is the case, whereupon he may be sworn, examined, and cross-examined in the

> same manner as any other witness or the judge may discharge him as incapable, and in that event the provisions of sub-section (3) of section two hundred and fourteen shall apply."

They argued that this section indicated that the Legislature regarded the word "incapable" (Dutch: "onbekwaam") as covering a recusal situation. I am not impressed by this argument. It could equally well be argued, especially by reason of the words "as incapable", that the Legislature was bringing within the concept "incapable" a factual situation which would not normally fall thereunder. Moreover, the situation described in sec 202 is not really a typical case of recusal. Indeed it is of some significance that when the Legislature, in sec 201, was dealing with typical grounds of recusal it used very different language. The relevant portion of this section read:

> "If, before or after a juror has been sworn, it appears to the court from his own

> statement that he is not impartial as between the prosecution and the accused or that, for any other reason, he ought not to be allowed or required to act as a juror on the trial, the court may,.....".

It is also of significance, in my view, that after the decision in Gubudela's case the Legislature retained the same wording for sec 149(3), relating to a juror becoming incapable, and for sec 110, relating to the incapacity of an assessor. Nor was any attempt made, it would seem, to expressly include recusal grounds (and thus overcome the decision in Gubudela's case) when sec 147 of Act 51 of 1977 was drafted. The change from "incapable" to "unable" certainly did not achieve this. If anything "unable" is, in my opinion, narrower in meaning than "incapable".

For these reasons, whatever the precise ambit of the words "unable to act as assessor" in sec 147(1) of the Act may be, they do not, in my judgment, comprehend the case

where there are grounds for the recusal of an assessor. It follows from this that in the instant case the trial Judge erred when he sought to invoke sec 147(1) in order to declare, on a recusal ground, that Dr Joubert could no longer act as assessor in the case.

Apart from this, there is a further reason why the learned Judge could not rely upon the powers granted by sec 147(1). As I have already remarked, that subsection contemplates an assessor becoming unable to act during the course of the trial. Assuming (contrary to what I have held above) that Dr Joubert's signature of a declaration in support of the MSC was, legally speaking, a ground for finding that he was unable to act, it is clear that he did not <u>become</u> so unable to act during the course of the trial. His inability derived from an act on his part which took place long before the trial commenced. In the reported judgment the trial judge reasoned as follows (see p 693 B -

E) :

"Counsel for the applicants stressed that the words 'becomes unable' connote a situation which did not exist previously and that the question has to be answered in the negative.

This interpretation does not take into account either the history of the phrase in which the word is found or its context. 'Becomes unable to act' was previously rendered as 'becomes incapable of continuing to act'. I do not think that any change in meaning was intended by the changed expression. It is an attempt at streamlining. It means and has always meant 'can act no more'.

The meaning is even more apparent when regard is had to the operative phrase 'in the opinion of the Judge'. A Judge who summons an assessor is always of the opinion that such assessor is able to act as assessor - physically, mentally and legally. Should the basis upon which the assessor is appointed be shown to have been wrong, the

> Judge changes his opinion to an opinion that the assessor is no longer able to act. In the opinion of the Judge he has now become unable to act.
>
> I hold therefore that s 147 applies to all disqualifications, whether they arise during the trial, or having been latent, come to light only during the trial."

In argument before us counsel for the State adopted more or less the same line of reasoning. With respect, I cannot agree with it. The reasoning appears to ignore the word "becomes" and the fact that it relates to the inability of the assessor to act. As Millin J remarked in Ex parte H J Ivens & Company, Ltd; Ex parte National Engineering, Ltd 1945 WLD 105, at 109 - 10:

> "The word 'becomes' imports a change of condition, namely, the entering into a new state or condition from some former state or condition."

In the case of sec 147(1), the change of condition is from an ability to act as assessor to an inability to act as assessor and the subsection contemplates such a change during the course of the trial. The words "in the opinion of the presiding judge" simply make him the arbiter of whether such a change has taken place during the course of the trial. The interpretation adopted by the Judge a quo, and supported by the State, would be acceptable only if the subsection read -

> "If an assessor dies or in the opinion of the presiding judge formed at any time during a trial is unable to act as assessor....."

There is no warrant for interpreting the subsection as though it read in this way. And, I might add, I do not see any significance in the fact that sec 216 bis of Act 31 of 1917 and sec 110 of Act 56 of 1955 formerly used the phraseology "becomes..... incapable of continuing to act".

I, therefore, conclude that special entry 1.1 is well-founded. The trial Judge was not entitled in the circumstances to exercise the power accorded by sec 147(1) in order to rule that Dr Joubert was unable to act as assessor. It necessarily follows, too, that the trial judge did not have the power to direct that the trial proceed before himself and the remaining assessor. The only suggested source of such a power was sec 147(1) and it was under that subsection that the trial Judge purported to act. This power, as I have held, was not available to the trial Judge. It follows from this that, contrary to the wishes of the appellants, the trial proceeded to conviction and sentence before an improperly constituted Court. The convictions and sentences must consequently be set aside (cf S v Gqeba, supra, at 717 H - 718 C).

This conclusion renders a consideration of the

other special entries strictly unneccessary. And I do not propose to say anything about special entry 1.4. Special entries 1.2 and 1.3, however, raise procedural issues of some importance and I wish briefly to say something about them.

As a general rule all proceedings in a criminal trial should take place in open court and in the presence of the accused. (See generally the discussion in S v Leepile and Others (1) 1986 (2) SA 333 (W).) In general, too, the judge presiding in a criminal court should not make rulings or give directions in regard to the trial affecting the interests of the parties without affording the parties an opportunity to be heard. The rule of fairness expressed in the maxim audi alteram partem (for the sake of brevity I shall call it "the audi principle") which is so often invoked in the realm of administrative law is virtually axiomatic in the proceedings of a court of law.

Accordingly, where a judge, acting in terms of sec 147 has found that an assessor has become unable to act as such, then it is incumbent upon him to hear the parties on the question as to the further conduct of the proceedings, and more particularly as to whether he should direct that the trial proceed before the remaining members of the court or that the trial start de novo and a new assessor be appointed. The importance to an accused person of being tried by a properly constituted court, especially in cases where the summoning of two assessors is obligatory, has already been noted and he should not be lightly deprived of this advantage. At the very least he should be heard before he is so deprived. And in this connection it must be borne in mind that, where the court is reduced to a judge and one assessor, in the event of a difference of opinion on a question of fact the judge's finding is decisive: see sec 145(4)(a).

It is true that in the instant case the trial had been proceeding for a long time when the decision to invoke sec 147(1) was made and that there were certain manifest disadvantages inherent in a trial de novo. That, however, may well have been the accused's preference and, in any event, it can make no difference in principle whether the trial is seventeen months old or one day old.

As regards the actual decision of a judge under sec 147(1) that an assessor has become unable to act as assessor, I think, too, that in general this is a matter upon which the parties are entitled to be heard before the decision is taken. It is an issue which in some circumstances, eg the onset of mental incapacity, would have to be handled with tact and restraint by all concerned, but I cannot think that this consideration would rule out altogether the application of the audi principle to such decisions.

It was argued on behalf of the State that because the decision as to whether an assessor had become unable to act is left to the "discretion" of the judge, in the sense that it is his opinion which is decisive, the audi principle is excluded. There is no substance in this argument. The administrative law is replete with examples of the application of the principle where a decision depended solely on the opinion of a body or an official as to some matter.

State counsel also pointed out that under the earlier legislation (see sec 216 bis of Act 31 of 1917 and sec 110 of Act 56 of 1955) it was a requirement, where an assessor became incapable of continuing to act, that the judge could continue the trial with the remaining assessor in cases where two assessors were obligatory, only with the consent of the parties; and that in later legislation (including sec 147(1)) this requirement of consent was

eliminated or not to be found. From this it was argued that the audi principle was excluded from sec 147(1). I cannot agree. Consent and the right to be heard are two entirely different things and the elimination of the former does not, prima facie, affect the latter.

Counsel for the State also referred to certain other sections of the Act, contended that the decisions therein referred to were intended to be taken without reference to the parties and submitted that, therefore, the position was the same under sec 147(1). The trial Judge adopted a similar line of reasoning (see the reported judgment at 693 F - J). With respect, the reasoning is, in my opinion, flawed. It involves a finding that under these other sections the audi principle was indeed excluded (perhaps debatable in some instances) and the inference that, therefore, the principle was intended to be excluded under sec 147(1) - a non sequitur, especially as none of the

other sections is in pari materia.

It may be asked: what ought the trial Judge in this case to have done? In my view, he ought to have followed the procedure appropriate to recusal. Dr Joubert's participation in the MSC should have been raised in open court and the parties been given an opportunity to react thereto. Whether either or both of them would have requested his recusal must now remain a matter for speculation. And it is not necessary to consider what power, if any, the trial Judge would have had to order his recusal in the event of his not recusing himself and the parties not asking for his recusal. Nor is it necessary to discuss what the procedure would have been had there been an application by one or both of the parties for his recusal and a refusal on Dr Joubert's part to recuse himself.

Before I conclude this judgment there are two

matters to which I feel myself impelled to refer. It is obvious from the reported judgment, and more particularly from the papers filed in the application for quashing and recusal, that after the events of 9/10 March 1987 there developed, unhappily, a bitter and acrimonious confrontation in public between the presiding Judge and Dr Joubert. I think that this was largely due to tensions which had built up in the course of a long, wearying and politically-charged trial. And I have no doubt that in the sober light of retrospect the protagonists in that confrontation sincerely regret some of the things that were said. I say no more.

The second matter relates to the strictures passed by the learned Judge on the conduct in the Court a quo of counsel and attorneys acting for the accused (see reported judgment at 705 B - 707 D). As appears from a footnote to the judgment inserted by the editors of the South African

Law Reports, enquiries into the propriety of the conduct of defence counsel were held by the Bar Councils of the Bars of which they were members and it was found that the conduct of counsel had not been improper and that they had complied with their duty as counsel. The correctness of this information was confirmed to us from the Bar. We were also told by appellants' counsel that a similar enquiry by the appropriate Law Society had also exonerated the attorneys. In the circumstances it was, in my opinion, ill-judged and unfortunate that in argument presented to this Court counsel for the State should have persisted in an attack upon the conduct and bona fides of the appellant's legal representatives. Moreover, the attack did not appear to have any substantial relevance to the issues which this Court was called upon to decide.

/ The appeal.....

The appeal is allowed and the convictions and sentences of all the appellants are set aside.

M M CORBETT

BOTHA JA)
SMALBERGER JA)
KUMLEBEN JA) CONCUR
NICHOLAS AJA)