a verdict based upon the unanimous opinion of more than one trier of fact, inspires a far greater degree of confidence than one based upon the opinion of a single trier of fact'.

7.16.4. In S v Malinga 1987(3) SA 490 (A) at 498D - J the court outlined the history of the provisions relating to assessors and observed that the proviso to Section 145(2) (which makes the summoning of assessors peremptory where the judge is of the opinion that the death sentence may be imposed) constituted acknowledgement by the legislature of 'the merit of appointing two assessors to assist the judge when in the result the death penalty is to be imposed'.

7.16.5. In such circumstances it would require clear and specific language to support the conclusion that the legislature intended to change the common law of recusal and to vest in the judge a subjective discretion enabling him to direct an assessor to recuse himself.

The language of the section falls far short of what would be required to justify such a conclusion.

7.17.

7.17.1. Section 33 of Act 29 of 1955 which originally dealt with the incapacity of assessors used the words 'incapable of continuing to act as assessor'. The Dutch version used the words 'onbekwaam wordt om verder als assessor te dienen'. When the Criminal Procedure Act was passed later in the year, the provisions were incorporated in identical terms into Section 110 of the new Act. The Afrikaans version now read 'onbekwaam word om verder as assessor te dien'.

7.17.2. The 1955 amendment, which was later incorporated into the 1955 consolidation, in effect followed language which had existed in the 1917 Act in relation to jurors.

See: Sections 214(1) and (3) of the Criminal Procedure and Evidence Act 1917.

Similar language was used in the 1955 consolidation.

See: Section 149 of Act 56 of 1955.

7.17.3. These sections all deal with an incapacity which comes into existence during the trial. Hence the empowering of the registrar to discharge the jury where the judge becomes incapacitated.

7.17.4. Both the 1917 and 1955 Acts made provision for the discharge of a juror, on the grounds of bias, before the hearing of evidence.

See: Section 201 of Act 31 of 1917
Section 136 of Act 56 of 1955

No provision was made for the discharge of a juror on such grounds after evidence had been heard. The reason presumably was that the bias and impartiality could affect the rest of the jury and in such circumstances, the correct procedure if bias or partiality existed, was to discharge the entire jury.

7.17.5. In 1977 a new consolidated Act was passed. Section 147 took the place of the old Section 110, but the wording of the English version was changed. The English text now uses the word 'unable' but the Afrikaans word 'onbekwaam' remains the same.

7.17.6. It is submitted that the difference in wording between the 1955 Act and the 1977 Act is significant. The word 'incapable' which appeared in both Sections 110 and 149 of Act 56 of 1955 has a wider meaning than 'unable' which is used in the 1977 Act.

7.17.6.1. The Shorter Oxford English Dictionary includes in its definition of 'incapable' the following:

'6. not (legally) qualified or entitled; disqualified'.

7.17.6.2. Similarly, Webster's Third New International Dictionary includes in its definition of

'incapable' the following:

'2a. :lacking legal qualification or power esp because of some fundamental legal disqualification.

7.17.7. It is also significant that notwithstanding the wide connotation of the word 'incapable', it was held that the use of that word in Section 149 of the 1955 Act should be confined to physical or mental incapacity and could not be invoked when a juror showed bias.
R v Gubudela 1959(4) SA 93 (E) at 95G - 96B

7.17.8. The narrower meaning of 'unable' supports the argument that the legislature intended the section to apply to cases of physical or mental incapacity.

7.18.

7.18.1. The approach by the trial judge to the interpretation of the section was

erroneous. He failed to have due regard to the apparent scope and purpose of the legislation, and adopted a strained construction of the wording of the section.

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

7.18.3. Similarly, the only Afrikaans dictionary to which he refers for the meaning of 'onbekwaam' is the Handwoordeboek van die Afrikanse Taal but he only cites one of the definitions, namely, 'ongeskik', leaving out all the other definitions as well as the examples giving the use of the word in its context.

7.18.4. He refers to the Oxford English Dictionary, not for the meaning of the word 'unable' but for the meaning of

the word 'able' and uses that definition to support his conclusions.

7.18.5. He places reliance on The Law of South Africa Vol 5 p 428 and on Hiemstra Suid Afrikaanse Strafproses (4th ed) p 320. Both these authorities are written by the same author, and it should be pointed out that in the first edition of Hiemstra's Suid Afrikaanse Strafproses the author wrote that 'onbekwaam' referred to physical incapacity, a view that he modified in subsequent editions, but without reference to authority.

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

7.20. In all the circumstances it is submitted that the trial judge misconstrued Section 147 and as a result acted beyond the powers vested in him by that section. The result of his having acted in this manner was that the composition of the Court

was changed. This constituted a material irregularity which per se resulted in a failure of justice.

S v Gqeba (supra)

7.21. Since the question of purjudice does not arise, no purpose would be served by lodging the full record with the Court. Indeed, the Attorney-General does not suggest anywhere in his affidavit that the full record is necessary to determine the scope of the judge's powers under Section 147 of the Act. The contention that the full record is necessary is advanced on the hypothesis that the special entry should only be upheld if the Appellants establish both irregularity and prejudice resulting therefrom.

8. THE EXERCISE OF THE POWERS UNDER SECTION 147

8.1. Two issues arise if Section 147 is indeed wide enough to empower a judge to direct that an assessor has to recuse himself: firstly, whether the requirements of procedural fairness were observed in relation to the forming of the opinion by the trial judge; secondly, whether the trial judge misdirected himself in forming the opinion that he did.

8.2. There were two separate and distinct issues in respect of which the trial judge was required to exercise a judicial discretion:

8.2.1. firstly, whether Professor Joubert had become unable to act as assessor and, if so,

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

8.3. The trial judge was faced with a number of alternatives. On the substantive issue he had to consider whether or not the circumstances warranted the recusal of Professor Joubert. Even if he had the power to order recusal, the issue was essentially one for the parties themselves. He could have asked Professor Joubert to make a statement concerning the matter, and have then asked the parties for their views as to what should be done. Having deliberately decided to take the decision without consulting the parties, he was then faced with three choices:

8.3.1. He could have ordered the trial to proceed before the remaining members of the court;

Section 147(1)(a) of Act 51 of 1977

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

8.3.3. He could have directed that the trial be stopped and the proceedings be quashed. The effect of such an order is that the court hearing the trial is discharged, and the Attorney-General can elect to charge the accused persons (or some of them) again on the same or different charges. It is akin to the power of a judge to recuse himself, and can be exercised when an irregularity has occurred which makes it undesirable for the trial to be continued.
R v Matsego 1956(3) SA 411 (A) at 417H
S v Apolis 1965(4) SA 178 (C) at 179D
S v Gcaba 1965(4) SA 325 (N)
S v Moseli 1969(1) SA 650 (O)

8.4. The trial judge took the decision to invoke Section 147 without calling on the State or the defence 'after due deliberation' (Annexure 'A'

Vol 4 p 323 lines 17 - 19). He considered that the audi alteram partem rule does not apply to the exercise of the judge's power under Section 147 to form an opinion as to whether or not an assessor has become unable to act; and chose to make the decision without asking the parties their views.

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

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

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

Judgment Record: Vol 4 p332 lines 12 - 23

8.6.

8.6.1. The trial judge acknowledges that the parties would 'normally' be afforded a hearing on these matters. (The suggestion that this would 'often' be by means of 'a private conference in chambers' is, with respect, untenable). Annexure 'A': Vol 4 p 332 lines9 - 15

8.6.2. In this context the statement by the judge that he could 'not get a clear answer from defence counsel' when he asked what the argument would have been had the assessor died, is not correct. In the course of argument, counsel said that he could not be certain what would have happened if the assessor had died, and that the situations were not really comparable. But he went on to say that the following submissions would probably have been made

8.6.2.1. The nature of the indictment is so oppressive that it is exceptionally difficult for the accused to conduct their defence. Instead of having 'this monstrous trial with an indictment covering years and witnesses which we have to go round the country looking for and the enormous burden which has been placed upon the accused ... it would have been far more desirable to stop the trial and to start again ...'

8.6.2.2. The example of Accused No 1 was cited as being a case which could have been dealt with in a week, yet the effect of the order made by the judge may require him to be in court for another year. (In fact this turned out to be an underestimation.)

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

8.8. On the substantive issue the judge concluded that the signing of the Million Signature Campaign form would constitute an absolute bar to Professor Joubert's acting as an assessor.

8.9. We will deal separately with the issues of procedural fairness and the substantive decision.

9. PROCEDURAL FAIRNESS

9.1. The requirement that a party to litigation be heard in all matters in which he has an interest is fundamental to all civilised legal systems. Two basic requirements of natural justice which apply to persons whose rights may be

prejudicially affected by the exercise of a particular power are notice of the intended action and a proper opportunity to be heard. Both requirements are expressed and understood by the maxim audi alteram partem. The basis of the audi alteram partem rule is natural justice or fundamental fairness.

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

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

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

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

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

9.3. It is a fundamental principle of our criminal law and procedure that an accused person is entitled to be heard on every decision taken during a trial which might affect his rights. A decision as important as one which changes the composition of the court during the course of the trial, is one in relation to which an accused is entitled to be heard. It can be assumed therefore that the legislature would have contemplated that such an opinion would be formed by the judge in the manner judges ordinarily form opinions relevant to the trial of an accused person, namely, after hearing all interested parties.

If this is so, failure to hear the accused vitiates the decision.

R v Ngwevela 1954(1) SA 121 (A) at 123A

Momoniat v Minister of Law and Order 1986(2) SA 264 (T) at 274D

Nkwinti v Commissioner of Police 1986(2) SA 421 (E) at 439F

Attorney-General, Eastern Cape v Blom 1988(4) SA 645 (A) at 669J and 658H - I

9.4. This is not the sort of case where it can be said that a hearing would have made no difference. In John v Rees [1970] Ch 345 Megarry J stated at 402C - E

'It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. "When something is obvious", they may say, "why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start". Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow were not; or unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without them being afforded any opportunity to influence the course of events'.

See also S v Moodie 1961(4) SA 752 (A)

Stead v State Government Insurance Commission 1986 ALJR 662

Mahon v Air New Zealand Ltd [1984] 3 ALL ER 201 (PC) at 210B - E

9.5. In Mahon's case (supra) Lord Diplock stated at 210B - E:

'The rules of natural justice that are germane to this appeal can, in their Lordship's view, be reduced to those two that were referred to by the English Court of Appeal in R v Deputy Industrial Injuries Commissioner, ex parte Moor [1965] ALL ER 81 at 94 - 95,

> (1965) QB 456 at 488 - 490. ... The first rule is that the person making a finding in the exercise of such a jurisdiction must base his decision on evidence that has some probative value in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the enquiry whose interests (including in that term career or reputation) may be adversely effected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.
> ....
> The second rule requires that any person represented at the enquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision maker, might have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result'.

9.6. The question whether the trial judge should or should not have acted in terms of Section 147 (and if he chose to act under that section, what order he should make) raised issues which affected the interests of the accused. They were accordingly entitled to be heard thereon before any decision was taken. They were not given this opportunity. In the circumstances, the failure to hear the accused before taking a decision to act under Section 147 of the Act, and thereafter to continue the trial notwithstanding a request

for a postponement, constituted a fatal irregularity.

9.7. Furthermore it appears tht Professor Joubert, himself, was not given a proper hearing before the judge discharged him.

9.8. We deal below with the circumstances in which Professor Jouobert was dismissed and the injustice resulting from the failure to observe procedural fairness.

10. THE CIRCUMSTANCES IN WHICH PROFESSOR JOUBERT WAS DISMISSED

10.1. The following is common cause:

10.1.1. Professor Joubert was dismissed without affording the State or defence an opportunity to be heard.

10.1.2. The trial judge consulted with the Judge President of the Transvaal Provincial Division in the absence of and without informing Professor Joubert or counsel for the State and defence.

Record: Vol 2 p 105 lines 7 - 9
Vol 2 p 90 para 24 lines 8 - 18
Vol 4 p 260 para 20 lines 12 - 24

10.1.3. The Judge President apparently expressed the view that Professor Joubert should recuse himself. He did so, however, without hearing Professor Joubert or his side of the dispute, or the accused and the State.

10.1.4. It is not known exactly what information was placed before the Judge President or exactly what was said to him.

10.2. In the result the constitution of the court before whom the accused pleaded and from whom they were entitled to a verdict was disturbed by a decision taken mero motu by the presiding judge in private, without hearing any of the parties with an interest in the matter, and without even fully investigating the issues with Professor Joubert himself. This constitutes so gross a departure from established rules of procedure,

that it can be said that the accused were not properly tried. In S v Wessels 1966(4) SA 89 (C) it was stated at 97G - H:

> 'The failure to allow audience through a legal practitioner to a person who objects to giving evidence in a criminal trial is a gross irregularity. It is so gross a departure from established rules of procedure that it can be said that the accused have not been properly tried. It seems to me that any reasonable person hearing of what took place would say the accused have not had justice. They have not been allowed to put their respective cases to the court as they wanted them presented. In these circumstances nothing is achieved by speculating whether the acumen and persuasiveness of the legal practitioner could rightly or wrongly have persuaded the court a quo to come to a decision favourable to the accused. The fact remains that the accused have been deprived of this opportunity. It is not for this Court to speculate on what would have happened had the accused not been so deprived'.

10.3. In fact, there were two secret enquiries: The first was before the Judge President from which all parties including Professor Joubert were excluded and the second, by the judge concerning Professor Joubert's actions, from which the State and defence were excluded.

10.4. The dangers of the approach adopted by the trial judge are self-evident. The prejudice to the

accused by the dismissal of a member of a court and thereby depriving them of a statutory safeguard without affording counsel an opportunity to address the court is present in all cases. In the present case, however, the prejudice was clear and obvious. The judge in his own statement records that Professor Joubert had taken a view of the case more favourable to the accused than his own view. Professor Joubert stresses this in his statements (including the statement admitted by the judge), and the accused say the same in their affidavits in support of the application. It is surprising that in such circumstances the judge, even if he thought as he did, that the accused had no right to be heard, should have chosen to exercise the power he claims to have, without calling on counsel for the accused to address him.

Annexure 'A': Vol 2 para 18, pp 87 - 88
Vol 4 para 15, p 258
Vol 5 para 14, pp 18 - 21

10.5. It is not surprising, therefore, that the accused should have felt aggrieved, not only by the decision, but also by the way it was reached. In their founding memorandum, the accused stated inter alia: 'It is difficult to describe the

impact on us of this event. We have seen the disappearance of the only member of the court whom we believed was not hostile to us ... We are particularly distressed that a consequence of the dismissal will be the loss of the countervailing influence mentioned by Professor Joubert ...'

Annexure 'A': Vol 2 pp 68 - 69 paras 19 and 20

10.6. In the result, the procedure followed, apart from being unfair, has led to factual conflicts which would never have arisen had the matter been conducted in the ordinary way in open court. The effect of the procedure adopted by the trial judge and the rulings made by him during the course of the argument was the following:

10.6.1. By ruling that his statement made on 30 March 1987 could not be contradicted, the judge effectively held that there was only version of events, namely, his own. In fact, he gave judgment on the very issues which were being argued (but before they were argued) and what is more, gave judgment in his own favour. He was witness and judge in his own cause.

10.6.2. The accused, who were most vitally affected by these proceedings, had no reason whatsoever to prefer the trial judge's version, and to reject the version of events given by Professor Joubert.

10.6.3. Having made his statement at the commencement of the application and having ruled that it could not be contradicted, the trial judge thereafter refused not only to admit Professor Joubert's third report, but did so without having seen its contents (and having refused to do so), an attitude he persisted in even at the stage of the application of the noting of the special entries on the record. Accordingly, he deliberately set out to exclude evidence which he knew to be at variance with the version of events put on record by him. This much is made explicit in his judgment. It is stated that the third report -

'... was intended to some extent to contradict the detailed facts which I had put on record (with the concurrence of my assessor Mr Krugel). That cannot