be allowed. It would put the credibility of the court itself at issue. Such a situation is unthinkable. It is also against public policy. A court should be extremely reluctant to put on record observations made of occurrences where the parties are not present, because of the definitive nature of such recording. It could give rise to a situation where the court itself becomes a "witness". This should be avoided, if possible. But where it is necessary to act thus in the interests of justice and the facts have after due consideration been recorded by the court, that is the end of any dispute about the matter'.

Annexure 'A': Vol 4 p 349 lines 14 - 28

10.6.4. By ruling that his statement of 30 March could not be contradicted there was, from the judge's point of view, only one version of events, namely, his own. Even Professor Joubert's first report counted for nothing, insofar as it was at variance at what the judge placed on record.

10.6.5. The prejudice caused to the accused by the procedure that was adopted becomes apparent in the light of the manner in which the judge apparently approached the substantive issue of recusal.

11. WERE THERE SUBSTANTIVE GROUNDS FOR THE RECUSAL OF PROFESSOR JOUBERT?

11.1. The judge initially gave no reasons for his decision other than to indicate that he considered that the fact that Professor Joubert had signed the Million Signature form necessitated a recusal.

Annexure 'A': Vol 1 pp 36 - 38

11.2. It seems that he did not consider whether the circumstances in which the form was signed, and the reasons why the form was signed, were such as to preclude Professor Joubert from giving a true verdict upon the issue to be tried.

Annexure 'A': Vol 4 p 271 line 18 - p 273 line 29

11.3. It is submitted that the test as formulated by the judge at Vol 4 p 272 lines 8 - 10 shows that he misdirected himself.

11.4. The actual petition form is nothing more than a statement of rejection of the constitution and the Koornhof Bills. In principle and in effect it was no different from voting 'no' in the referendum on the proposed constitution. The

last sentence of the petition which states that 'we say: ... 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' has to be read in the context of the petition as a whole. It is an expression of support for the UDF in its efforts to fight the constitution and Koornhof Bills. That effort is set out in the body of the form itself and constitutes a rejection of apartheid and the desire for the creation of a non-racial, democratic South Africa free of oppression, economic exploitation and racism. It does not constitute membership of the UDF, nor indeed, does it constitute support for the UDF as an organisation or for the allegedly violent intentions of the UDF as set out in the indictment.

Annexure 'A': Vol 2 p 101

11.5. The trial judge made it perfectly clear that he considered that the mere signing of the declaration was not unlawful, would not have made the signatory a party to the conspiracy nor was it in any way improper.

Annexure 'A': Vol 4 270 line 24 - 271 line 28

11.6. The simple issue to be determined, therefore, was whether a trained and eminent lawyer who had taken an oath that on the evidence placed before him he would give a true verdict upon the issues to be tried and who signed the document in innocence and for the sole purpose of expressing opposition to the constitution, was unable to exercise an unbiased evaluation of the evidence (if any) that the organisers of the campaign had an ulterior motive. This, the judge failed to consider.

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

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

> 'When the court adjourned for tea, I remarked to the judge that I remembered signing one of the declarations in the Million Signature Campaign in 1983 because I was also opposed at that time to the new constitution. I could not and still cannot recollect exactly where or when I signed this document or exactly what it contained. I believe, however, that the document was

presented to me during the white referendum at a meeting of voters which had been held to campaign against the new constitution'.

11.7.2. The judge was at pains to emphasise that Professor Joubert was mistaken about the date on which he signed the document. During the course of argument he stated 'could these facts conceivably be correct while you rely on them? The white referendum was concluded in 1983. This campaign started in 1984'.
Annexure 'A': Vol 4 p 275 lines 9 - 11

In his statement before the application commenced he said 'the declaration could not have been signed by him in 1983 as the campaign only started in 1984. See Exhibit 06 paragraph D3'.
Annexure 'A': Vol 4 p 261 lines 12 - 14

11.7.3. In fact, the issue of the date of signature raises the possibility of a mistake which was not considered at all by the trial judge. The judge's attitude is predicated upon the

conviction that Professor Joubert was mistaken about the date of signature. However, if Professor Joubert was in fact correct about the date of signature (a possibility apparently not entertained by the judge) then the question arises as to what it was that he signed. In his first report he stated that he could not recollect exactly what the document contained. In his third report which the judge refused to read he states:

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

Annexure 'A': Vol 5 p 395 line 18 - 396 line 12

The admissibility of the third report is dealt with below.

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

Possibly it was this petition that Professor Joubert signed, and not the form reflected in Annexure 'A' at p 101 (Vol 2).

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

11.8. On the facts set out in Professor Joubert's report and given the trial judge's acceptance of the fact that Professor Joubert had acted innocently and in good faith, it is submitted that he was not disqualified from continuing to act as an assessor, that good cause did not exist for him be recused by the presiding judge if he

had such power, and that if a proper hearing had taken place, this would have been demonstrated.

11.9. The test to be applied in applications for recusal is an objective one.

S v Radebe 1973(1) SA 796 (A) at 813E - F

SA Motor Acceptance Corporation (Edms) Bpk v Oberholzer 1974(4) SA 809 (T) at 812H

11.10. If an application had been made by the State for the recusal of Professor Joubert, on the grounds that he had signed the Million Signature declaration, and on the assumption that he signed the form which appears at p 101 of Vol 2 of Annexure 'A' the question which would have arisen for decision, would have been whether that act, viewed objectively, could reasonably have created in the mind of the State the belief that Professor Joubert would not carry out his duties as an assessor fairly.

S v Radebe (supra) at 813E - F

SA Motor Acceptance Corporation (Edms) Bpk v Oberholzer (supra) at 812C - H

S v Suliman 1969(2) SA 385 (A) at 389H

11.11. Professor Joubert makes it clear in his report that his object in signing the document was to express opposition to the new constitution and not to express support for any particular political group. This, as he says, could not conceivably have had any impact on his assessment of the issues in the trial.

Annexure 'A': Vol 2 paras 25.1 - 25. 7 pp 90 - 92

11.12. In these circumstances there was no real likelihood of prejudice.

> 'The mere fact that a judge holds strong views on what he conceives to be an evil system of society does not, in my view, disqualify him from sitting in a case in which some of those evils may be brought to light. His duty is to administer the law as it exists but he may in administering it express his strong disapproval of it'.
>
> R v Milne and Erleigh (6) 1951(1) SA 1 (A) at 12A - B

11.13. There is also reason to believe from the statement made by the trial judge at the commencement of the application, that extraneous factors were taken into account by him in deciding to order Professor Joubert to recuse himself. In that statement he responded to

Professor Joubert's first report and said that he would deal only with those allegations which he deemed relevant at that stage. In the course of this statement he made the following comments about Professor Joubert:

11.13.1. Professor Joubert's competence as an assessor is questioned and the trial judge states that he found him 'totally out of touch on factual matters and on the assessment of witnesses'.
Annexure 'A': Vol 4 p 254 lines 20 - 24

11.13.2. He states that 'at times there were sharp differences of opinion' and further that 'the differences of opinion were sometimes sharp when I found Dr Joubert injudicious where factual matters and the credibility of witness were concerned. As far as matter touching on politics were concerned I found him to be opinionated and not open to reason. In fact I gained the impression that he totally associated himself with the defence case. On an occasion I admonished him

by stating that he was going further than being merely devils advocate'.

Annexure 'A': Vol 4 p 258 lines 18 - 26

11.13.3. Professor Joubert is accused of not keeping 'proper notes of the evidence and frequently seemed to be dosing off'.
Annexure 'A': Vol 4 p 262 lines 6 - 11

11.13.4. Mr Krugel was consulted on 'procedural questions' because 'this is not Dr Joubert's forte'.
Record: Vol 4 p 262 lines 15 - 16

11.13.5. It is difficult to see how any of these personal attacks on Professor Joubert were relevant to the issue which the judge had to consider. Moreover, these accusations were never put to Professor Joubert, and Professor Joubert's answer to the allegations against him which are set out in this third report were ruled inadmissible, were not considered by the trial judge who proceeded on the

basis that his statement of 'facts' was not open to contradiction.

11.13.6. It has frequently been held that where a decision is motivated by a variety of considerations, the entire decision is vitiated if there was any 'bad' reason which could be considered as material.

Patel v Witbank Town Council 1931 TPD 284 at 290

Kahn v Ceres Liquor Licensing Board 1954(3) SA 232 (C) at 240A - E

Jabaar v Minister of the Interior 1958(4) SA 107 (T) at 114B - D

12. WAS AN ADEQUATE HEARING GIVEN TO PROFESSOR JOUBERT?

12.1. Professor Joubert says that the judge did not give him any opportunity to being properly heard on the issue of his recusing himself.

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

In dealing with this issue it is necessary to have regard to the judge's statement and also to Professor Joubert's third report in which, inter alia, he responds to the judge's account of the

events, and elaborates on the circumstances in which he was discharged. The admissibility of the third report is dealt with below.

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

Annexure 'A': Vol 2, p 89 para 21
Vol 4, p 259 lines 6 - 15
Vol 5, p 339 lines 7 - 19

12.3. Professor Joubert was not in the judge's chambers during the lunch adjournment on that day. A discussion took place between the judge and the other assessor, Mr Krugel; the judge decided not to act immediately.

Annexure 'A': Vol 4, p 259 lines 15 - 22

12.4. After the adjournment the matter was briefly raised and the judge and Professor Joubert then departed on the basis that consideration would be

given to it overnight. There is a difference in their views as to whether or not Professor Joubert had a proper opportunity to discuss the issues involved. It is apparent, however, that the judge enquired neither into the circumstances of the signature nor the implications thereof.

Annexure 'A': Vol 2, p 89, para 22;
p 90 para 23
Vol 4, p 259 line 23
- p 260 line 7

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

Annexure 'A' Vol 4, p 260 lines 8 - 11

This conclusion was reached without further recourse to Professor Joubert, and without knowing why he signed the form, and what his answer was to the charge that he should recuse himself.

12.6. The judge's conclusion that he should recuse himself was conveyed to Professor Joubert on the following morning, 10 March 1987. He refused to

do so. Again, the judge and Professor Joubert differ on the question as to whether Professor Joubert had a proper opportunity to express his views. It is nevertheless apparent that the judge formed the opinion on the basis of the events of the previous day, the discussions with Mr Krugel, and with the Judge President, and that he did not ask Professor Joubert for any explanation, clarification or amplification of the circumstances surrounding the signature of the document in question, or the implications thereof for his office as assessor.

Annexure 'A': Vol 2, p 90 para 24
p 90 para 25
lines 20 - 23
pp 92 - 93 paras 26, 27 and 28
pp 93 - 94, para 30
Vol 4, pp 260 - 261, para 20
Vol 5, p 399 line 21 - p 400 line 7

12.7. Professor Joubert stated that he had not been informed before that commencement of the proceedings in court that the judge intended to

make the statement which he in fact made. The form and terms thereof had not been canvassed with him. He evidently did contemplate, however, that the judge might indicate, in court, that he felt that Professor Joubert should recuse himself, and had decided upon a response thereto.

Annexure 'A': Vol 2, p 93 para 29
p95, para 32

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

Annexure 'A': Vol 4, p 261 para 24, lines 22 - 23

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

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

12.11. The conflict as to what actually occurred, and the recriminations which now exist in relation to the incident, arise directly out of the way the judge chose to exercise his powers. If he had acted in the ordinary way by raising the matter in open court and asking all interested parties, including Professor Joubert, to deal with the matter, allowing them adequate time to consider their postions and formulate a response, the uncertainty which now exists, and the sense of aggrievement felt by Professor Joubert and the accused, would have been avoided. It is precisely because the judge did not observe the

elementary rules of procedural fairness that these issues now exist.

Annexure 'A': Vol 2, para 33, p 95
para 20, p 69
Vol 5, pp 383 - 404

12.12. The irregularity committed by the trial judge in failing to observe the requirements of procedural fairness is of such a character as to vitiate the exercise of his powers under Section 147 of the Criminal Procedure Act, and in the circumstances, the irregularity per se resulted in a failure of justice.

13. THE ADMISSIBILITY OF PROFESSOR JOUBERT'S REPORTS

13.1. Paragraph 6 of Professor Joubert's second report and the whole of his third report were ruled inadmissible by the trial judge. The reasoning can be summarised as follows:

13.1.1. The case is analogous to that of a jury and members of a jury 'could not give evidence to prove what had been discussed in a jury room'. Authority for this proposition is R v Krasner 1950(2) SA 475 (A) and a number of English decisions cited therein.

13.1.2. It is generally regarded as undesirable that a judge should give evidence about proceedings in which he was involved.

13.1.3. 'The court exists for the protection of the rights of the community, individual as well as public. Its foundation is the law itself but its legitimacy depends upon the trust of the community. No legal system can afford that that confidence be undermined. Therefore the integrity of both the law and the judiciary must be maintained not for its own sake but for the benefit of the community as a whole'. Accordingly, evidence which would be contrary to the public interest must be excluded. Since the third report contradicted the statement made by the trial judge, 'it would put the credibility of the court itself at issue. Such a situation is unthinkable. It is also against public policy'.

13.1.4. 'A court should be extremely reluctant to put on record observations made of

occurrences where the parties are not present, because of the definitive nature of such recording. It would give rise to a situation where the court itself becomes a "witness". This should be avoided, if possible. But where it is necessary to act thus in the interests of justice and the facts have after due consideration been recorded by the court, that is the end of any dispute about the matter'.

13.1.5. The third report was 'an attempt at interference with the administration of justice in a pending trial'.
Annexure 'A': Vol 4 p 343 line 27 - p 352 line 5

13.2. Despite these rulings, the trial judge admitted Professor Joubert's first report. It is necessary to have regard to the sequence of events in this regard.

13.2.1. Professor Joubert's first report was mentioned in court on 19 March 1987 during the discussion of an appropriate date for the hearing of the

application. In this regard the trial judge stated:

'As far as the document is concerned, which you have mentioned, I have perused it, because you have given me a copy and I would like to inform counsel that I and my assessor do not agree that it is factually correct in all material respects. I would not take it any further. I have not considered the position as to whether I should do something about it and what I should do about it, but do not take it for granted that what is stated therein is factually correct'.

Annexure 'A': Vol 1 p 47 lines 16 - 23

13.2.2. No suggestion was then made by the trial judge that the report was inadmissible, that it ought not to have been shown to the accused or ought not to be used in the application.

13.2.3. The trial judge stated in open court that he was not sure what he should do with the report. He could have indicated what the inaccuracies were but chose not to do so. Instead, he put counsel on terms to have the founding affidavit filed by the following morning, well knowing that

the intention was to refer to Professor Joubert's report in the affidavit.

13.3. Before reading the replying affidavit to which Professor Joubert's second report was annexed, the trial judge placed on record a lengthy statement. This was before the argument of the application commenced.

Annexure 'A': Vol 4 p 334 lines 23 - 24

13.4. Having ruled that paragraph 6 of the second report and the whole of the third report were inadmissible, the trial judge clarified his rulings stating that this precluded the leading of evidence to contradict what he had put on record.

Annexure 'A': Vol 4 p 335 lines 18 - 20

13.5. With regard to the first report, the trial judge felt that he had only two options: 'strike the report (or major sections of it) off the record, leaving in the minds of the accused (and all others who have read it) an entirely incorrect impression of my political perspectives and my approach to this case and of what happened in my

chambers on 9 and 10 March 1987. Or admitting the report in evidence and setting the record straight. This would necessarily entail a conflict between my version and that of Dr Joubert. In the interests of justice I chose the latter'.

Annexure 'A': Vol 4 p 338 lines 8 - 18

13.6. The trial judge stated that the reasoning applicable to paragraph 6 of the second report and the third report 'would hold true for the first report'. He stated that there were, however, complicating factors.

> 'The accused alleged in their application that as a result of the first report they had been strengthened in and formed certain conviction on which they founded their application for my recusal. I could not in fairness to them leave them with a warped impression, strike out the first report and continue with the trial. The true facts had to be stated. Having done this I deemed it unfair thereafter to delete that to which I had replied. For this reason I admitted the first report'.

Annexure 'A': Vol 4 p 352 lines 6 - 16

13.7. This notwithstanding, he refused to read the third report or to consider the impact it might have had on the minds of the accused, and refused to consider whether its contents were such that

he ought to exercise a discretion similar to that exercised by him in respect of the first report.

13.8. It is proposed to consider the question of admissibility from two points of view. Firstly, whether once having admitted Professor Joubert's first report and dealt with it, it was permissible to rule that the version of events given by the trial judge was definitive and could not be contradicted by further relevant evidence on the issue. Secondly, whether the rule of public policy concerning the inadmissibility of statements by jurors to impeach a verdict has any application to the present case.

13.9. The decision 'in the interests of justice' and in 'fairness' to the accused to admit Professor Joubert's first report was entirely meaningless in the light of the ruling that the version of events placed on record by the trial judge could not be contradicted. Having taken the decision to admit the first report, the trial judge effectively closed his mind to further evidence which was directly in issue.

Cf: R v Venter 1944 AD 359 at 362

Mcunun v R 1938 NLR 229