override or detract from the Court's inherent jurisdiction to make orders of a fair and equitable nature, designed to facilitate and expedite the process of the administration of justice. Thus, where it is clear to the Appeal Court that an issue before it can be determined in relation to only part of the trial record, it has the power to order that that portion only should be placed before it, notwithstanding that one or other of the parties has withheld its consent to such procedure.

4.6. Indeed, this Court has in effect held in S v Hlatswayo 1982(4) SA 744 (A) that non-compliance with Section 316(5) can be condoned. The situation there addressed was that no statement of the grounds of appeal was contained in the appeal record transmitted to this Court, notwithstanding that Section 316(5) - as it then was - identified such statement as forming part of the record which 'shall' be transmitted to the court of appeal. At 745H, it was held that 'these sections should always be observed'. Nonetheless, the Court held at 746A that it 'considered it fair to hear argument against the finding that there were no extenuating circumstances'.

4.7. It has been held in civil cases that an appellant must lodge the full record unless the respondent consents to portions being omitted or if the Appellate Division under Rule 13 excuses the appellant from putting up the full record. (Our underlining)

Omega Africa Plastics (Pty) Ltd v Swisstool Manufacturing Co (Pty) Ltd 1978(4) SA 675 (A) at 680 in fin - 681C

4.7.1. An order to that effect was made by this court in Standard Bank of South Africa, Ltd v Estate Van Ryhn 1924 AD 612.

4.7.2. Conversely, where an attorney took it upon himself to omit portions of the record, such conduct was strongly disapproved.
Legg and Co v Premier Tobacco Company 1926 AD 132 at 133

4.7.3. In Zieve v National Meat Supplies Ltd 1936 AD 466, application was made for an order for part of the record to be omitted, where a question of law was at issue. It was however not clear that

the further evidence would not be relevant to this question and it appeared that the applicant himself was uncertain in this regard. The order was accordingly refused. It is nevertheless clear from the judgment that the Court considered that it would be competent for it to make such order if it were clearly shown that there would be no prejudice to the other party (at 471).

4.7.4. There is no reason why Sections 316(5)(a) and 318(2) should be construed as depriving the Appellate Division of this power.

4.8. The test is whether a litigant would be prejudiced if an abridged record is lodged. Where prejudice exists, the consent will not be given. However, once absence of prejudice has been demonstrated there is no reason in logic or in law why this Court should not give directions under Rule 13 that an abridged record be lodged. To construe the statute as requiring a record of 40 000 pages to be lodged in circumstances where it is clearly unnecessary for

that to be done, would be an absurd consequence, which would materially infringe the primary objective of the expeditious and, if possible, inexpensive administration of justice. It is submitted that the statute does not compel such consequence, at the expense of a proper exercise of the Court's own discretion pursuant to its inherent jurisdiction.

4.9. In general, the purpose of the Rules of Court is to expedite the business of the courts - and, in so doing, to facilitate the speed and to minimise the cost at which parties to disputes, whether civil or criminal, may achieve finality in respect of those disputes. In consonance with such purpose, this Court has expressed concern that the Rules should not lend themselves to procedural objections which may interfere with the expeditious and inexpensive decision of cases on their real merit.

See for instance:

Hudson v Hudson and Another 1927 AD 259 at 267 et seq

Trans-African Insurance Co Ltd v Maluleka 1956(2) SA 273 (A) at 278F - G

4.10. This Court has regularly expressed the need for an appeal record to be confined to that portion necessary for the disposal of the point in issue and for unnecessary procedures to be avoided.

See for instance:

Dreyer and Others v Schmidt 1943 AD 508 at 513

R v Van Heerden and Another 1956(1) SA 366 (A) at 369A - B

R v Summers 1956(2) SA 786 (A)

AA Mutual Insurance Association Ltd v Van Jaarsveld and Another 1974(4) SA 729 (A) at 731D - F

Santam Versekeringsmaatskappy Bpk v Rehberg 1975(1) SA 679 (A) at 680B - C

Machumela v Santam Insurance Co Ltd 1977(1) SA 660 (A) at 663 in fin - 664C

Woji v Santam Insurance Co Ltd 1981(1) SA 1020 (A) at 1030H

Levco Investments (Pty) Ltd v Standard Bank of SA Ltd 1983(4) SA 921 (A) at 929A

Government of the Republic of South Africa v Maskam Boukontrakteurs (Edms) Bpk 1984(1) SA 680 (A) at 692E - 693B

It is submitted that the circumstances of the present matter are such as to make the aforegoing expressions of concern with unnecessary documentation to be of particular applicability.

4.11. This Court has from time to time expressed itself in relation to the nature of the factors which fall to be considered when condonation is sought. Typically, these include the degree of non-compliance, the explanation therefor, the importance of the case, the prospects of success, the respondent's interest in the finality of his judgment, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice.

See for instance:

Federated Employers Fire and General Insurance Company v McKenzie 1969(3) SA 360 (A) at 362G - 363A

United Plant Hire (Pty) Ltd v Hills and Others 1976(1) SA 717 (A) at 720E - H

Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en 'n Ander 1986(2) SA 57 (A) at 75E - 76B

These requirements are satisfied in the present case. There are additional features in the present case which arise from its unique length; these are in particular, the further lapse of time and the extensive costs which would be incurred should the main appeal on the merits of the case be proceeded with in the normal course of events. Particulars in this regard are set out in paragraph 16.3 of the petition at pages 19 to 20.

4.12. We deal below with the question of prejudice and the Appellants' prospect of success on the points in limine.

5. PREJUDICE

5.1. As set out in paragraph 2.6 above, the State contends that even if the Appellants show the proceedings to have been irregular or unlawful, they must also satisfy this Court that they have been prejudiced thereby. It is on this basis that the State opposes the hearing of the special entries in limine and separately, with reference to an abridged record.

5.2. It is submitted that this contention by the State rests on a misconception by it of the nature, extent and consequences of the proceedings concerning and attendant upon the dismissal of Professor Joubert as an assessor. The Appellants contend that the relief sought is not dependent upon demonstration by them of prejudice in relation to the proceedings in question, in that the steps taken by the trial judge were fundamentally flawed in two basic ways.

5.2.1. Firstly, it is contended by the Appellants that the trial judge acted ultra vires the statutory provision in question, being Section 147(1) of Act 51 of 1977, when ruling that the assessor had become 'unable' to act. This amounted to a fundamental irregularity of such an order that it constituted per se a failure of justice. If it is held that the ruling by the trial judge was not competent, it follows that the Court was no longer properly constituted and that its findings can therefore not stand. This was the conclusion of this Court in the as yet unreported decision in S v

Mzwandile Gqeba and Others, handed down on 24 May 1989. See page 13 of the judgment of Grosskopf JA and Grosskopf AJA. Prejudice plays no part in the reaching of such conclusion.

See also: R v Price 1955(1) SA 219 (A) at 224C - F

S v Malinga 1987(3) SA 490 (A)

5.2.2. Secondly, if it is held that the trial judge did have the power to make the order that he did, it is then contended that he committed irregularities in the procedures that he followed before making the order and in the rulings that he made in the course of the application to quash the trial, alternatively, for recusal, and that these irregularities constituted so fundamental a departure from the established rules of procedure as to vitiate the proceedings in their entirety. Again, in such result, the notion of prejudice does not fall to be considered.

5.2.3. Similarly, in regard to the rulings made concerning the admissibility of Professor Joubert's reports, and the binding effect of the judge's statement, it is contended that these constituted irregularities which per se resulted in a failure of justice.

5.2.4. These issues are dealt with more fully below. Annexure 'A' contains all the information necessary to decide such issues.

6. THE DISMISSAL OF PROFESSOR JOUBERT AS AN ASSESSOR

6.1. In the judgment (Annexure 'A' Vol 4, page 322, line 2) it is said that the word 'dismissal' is a misnomer.

6.2. It is, however, clear that Professor Joubert did not recuse himself and that he was in effect dismissed. Thus, in the statement made by the trial judge on 10 March 1987, he said 'I have regretfully come to the conclusion that there is no option but to rule that Dr W A Joubert has to recuse himself. I hold that Dr Joubert has become unable to act as assessor...' (Annexure 'A', Vol 1, p 38 lines 9 - 12) Moreover, in the statement made by the trial judge at the

commencement of the application, the following appears:

6.2.1. 'I read the statement with sorrow. It is an attempt by Dr Joubert to justify his refusal to recuse himself by attacking my integrity'.
Annexure 'A': Vol 4 p 254 lines 5 - 7

6.2.2. 'Thereafter I reached the conclusion that it would be improper for Dr Joubert to continue to act as assessor'.
Annexure 'A': Vol 4 p 260 lines 10 - 11

6.2.3. 'I told Dr Joubert that his (the Judge-President's) view was that he had to recuse himself. He angrily asked what right the Judge-President had to interfere in this trial. I thereupon told Dr Joubert that we should leave the Judge-President out of it and that I hold the view that he should recuse himself'.
Annexure 'A': Vol 4 p 260 lines 19 - 24

6.2.4. 'Dr Joubert was told in no uncertain terms that I intended to discharge him'.

Annexure 'A': Vol 4 p 216 lines 22 - 23

7. DOES SECTION 147 OF THE CRIMINAL PROCEDURE ACT EMPOWER A JUDGE TO ORDER AN ASSESSOR TO RECUSE HIMSELF?

7.1. Section 147(1) of the Criminal Procedure Act provides:

'(1) If an assessor dies or, in the opinion of the presiding judge, becomes unable to act as assessor at any time during a trial, the presiding judge may direct -

(a) that the trial proceed before the remaining member or members of the court; or

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

7.2. The trial judge concluded that the section was wide enough 'to embrace not only physical and mental disability but also disability flowing from legal impediments and disqualifications'.

Annexure 'A': Vol 4 p 326 lines 24 - 28

Furthermore, he held that 'Section 147 applies to all disqualifications whether they arise during the trial or, having been latent, come to light only during the trial'.

Annexure 'A': Vol 4 p 329 lines 2 - 4

It is submitted that the trial judge's interpretation of the section is wrong in law.

7.3. The meaning of the phrase 'unable to act as assessor', interpreted in the light of the context of the section and the purpose of the statute, does not cover the situation which arose in the present case.

7.4. The basic approach to the interpretation of these words in Section 147 is that articulated by Schreiner J A in Jaga v Dönges NO 1950(4) SA 653 (A) at 662G - 663A:

> 'Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that "the context", as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of

> more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background. The second point is that the approach to the work of interpreting may be along either of two lines. Either one may split the enquiry into two parts and concentrate, in the first instance, on finding out whether the language to be interpreted has or appears to have one clear ordinary meaning, confining a consideration of the context only to cases where the language appears to admit of more than one meaning; or one may from the beginning consider the context and the language to be interpreted together'.

See also: Melmoth Town Board v Marius Mostert (Pty) Ltd 1984(3) SA 718 (A) at 728G-H

Santam Insurance Ltd v Taylor 1985(1) SA 514 (A) at 526I - 527C

University of Cape Town v Cape Bar Council 1986(4) SA 903 (A) at 914A - D

7.5. A provision enabling a court to continue a trial without one of the assessors was first introduced in 1955, following the decision in R v Price 1955(1) SA 219 (A). At that time, the Criminal Procedure Act contained no provisions dealing specifically with such a situation, and this omission was met by the enactment of Section 33 of the Criminal Procedure Amendment Act 29 of 1955 which introduced a new Section 216 bis into the Criminal Procedure and Evidence Act 31 of 1917. The amending statute was assented to in English on 10 May 1955.

7.6. Shortly thereafter the law of criminal procedure was consolidated into the Criminal Procedure Act 56 of 1955. The new Act re-enacted Section 216 bis of the amending statute in identical form in Section 110 which originally provided as follows:

'(1) If at any time during a trial in respect of which the presiding judge was not in terms of the proviso to sub-section (2) of Section one hundred and nine obliged to summon assessors to his assistance, any assessor dies or becomes in the opinion of the judge incapable of continuing to act as assessor, the judge may, if he thinks fit, direct that the trial shall proceed without such assessor.

(2) Where the judge has given a direction in terms of sub-section (1) the trial shall proceed as if the said assessor had not been called by the judge to his assistance.

(3) If at any time during a trial in respect of which the presiding judge was in terms of the proviso to sub-section (2) of Section one hundred and nine obliged to summon assessors to his assistance, one of the assessors dies or becomes in the opinion of the judge incapable of continuing to act as assessor, the judge may if he thinks fit, with the consent of the accused and prosecutor, direct that the trial shall proceed without such assessor.

(4) Where the trial proceeds in pursuance of a direction given in terms of sub-section (3) the decision of the court shall, notwithstanding anything in paragraph (d) of sub-section (3) of Section one hundred and nine contained, be unanimous.

(5) If the judge does not direct as provided in sub-section (1) or (3) or where the court is unable, as required by sub-section (4), to agree to a decision on any charge in the indictment, the provisions of sub-section

(2) of section one hundred and forty-nine shall mutatis mutandis apply.

(6) If the court is unable, as required by sub-section (4) to agree on a decision on any charge in the indictment, and the person accused is again tried on such charge, then the judge and the assessor who were members of the court which failed to agree as aforesaid shall not be competent to be members of any subsequent court constituted to try the accused on such charge.'

7.7. There is nothing in the language of the section as originally enacted, or in its subsequent legislative history, or its apparent scope and background to suggest that the legislature intended thereby to change the common law relating to the recusal of members of the Court.

7.8. The law of recusal was well known and of long standing and there was no need to introduce statutory provisions to deal with a situation in which a party might wish to make an application for the recusal of a member of the Court.

7.8.1. The right of a litigant to ask a member of the court to recuse himself is part of the common law of South Africa. S v Radebe 1973(1) SA 796 (A) at 812A - B

7.8.2. The procedure is well known. It is the exceptio recusationis or the exceptio suspecti judicis, and can be brought both before and during a trial.
SA Motor Acceptance Corp (Edms) Bpk v Oberholzer 1974(4) SA 808 (T) at 811F - H

7.8.3. The application for recusal is made to the judicial officer himself.
S v Radebe (supra)
Kruger v Sekretaris van Binnelandse Inkomste 1970(4) SA 687 (A) at 691H
S v Adams (Special Criminal Court: 4 August 1958 unreported)

7.9.

7.9.1. The test to be applied in applications for recusal is an objective one, i.e. whether, seen objectively from the point of view of the litigant, there is a reasonable fear that the judicial officer will not be impartial.
S v Radebe (supra)
SA Motor Acceptance Corp (Edms) Bpk v Oberholzer (supra)

7.9.2. There is no reason to believe that the legislature intended to create an entirely new standard and procedure - one left to the presiding judge to determine according to 'his opinion' on his own initiative, without prior reference to the parties, and without affording them an opportunity of being heard.

7.9.3. There is, moreover, no need to interpret Section 147 as bringing about so radical a departure in the existing law.

7.10. This is not required by the background and apparent purpose of the legislation, which prima facie was directed to a situation such as that which existed in R v Price where a sudden catastrophe overtook an assessor and made it impossible for the Court as originally constituted to continue to hear the case.

7.11. Nor is it required by the literal meaning of the words or the legislative history of the section.

7.12.

7.12.1. The section literally applies to cases

where 'an assessor ... becomes unable to act as an assessor at any time during the trial'; 'Indien 'n assessor te enige tyd gedurende 'n verhoor ..., onbekwaam raak om as assessor op te tree'. Whatever the words 'unable to act as an assessor' or 'onbekwaam raak om as assessor op te tree' may mean in the context of Section 147, the language is *prima facie* directed to events which occur *after* the trial has commenced, as happened in *R v Price*, and not to any impediments which may or may not have prevented an assessor from being appointed as such and taking office as a member of the court. Assuming for the purpose of argument that there were valid grounds for objecting to Professor Joubert as an assessor, those grounds existed before the trial commenced. He did not *become* disqualified *during* the trial. On the assumption made, he was always disqualified and the remedy for that, was an application for his recusal.

7.12.2. There is nothing in the context of the section which requires a strained meaning to be given to the words 'becomes unable to act ... at any time during the trial' 'gedurende 'n verhoor onbekwaam raak om as assessor op te tree'. Prima facie, the words apply to something that happens during the trial. They have no application to a situation in which nothing changes during the trial and the assessor is willing and able to act.

7.13. The use of the word 'unable' as opposed to a word such as 'disqualified' ('onbekwaam' as opposed to 'onbevoeg') suggests that the legislature intended to refer to physical or mental incapacity short of death, but of such a nature as to render the assessor incapable of fulfilling his statutory obligations. This would be consistent with the background to the legislation and its apparent scope and purpose. The dictionary definitions of 'unable' support this contention:

7.13.1. The Shorter Oxford English Dictionary

unable

1. not able to do something specified (chiefly of persons).

2. unequal to the task or need, incompetent, inefficient.

3. physically weak, feeble.

7.13.2. Webster's Third New International Dictionary

unable

1. not able: incapable (the sun is - to melt the snow down to this underlying part)

2a. Unqualified, incompetent, inefficient.

b. Impotent, helpless (like an - phoenix in hot ashes)

7.13.3. Blacks's Law Dictionary (5th Ed)

unable

'This term is used in a statute providing that evidence given in a former trial may be proved in a subsequent trial, were the witnesses unable to testify, means mentally and physically unable'.

7.13.4. H A T

Onbekwaam

1. Sonder kundigheid, onbedrewe, ongeskik:
'n onbekwame werkman

2. Onryp: Vrugte wat nog onbekwaam is

3. Dronk, geswael: onbekwaam by sy werk opdaag.

7.13.5. Tweetalige Woordeboek: Bosman van der Merwe and Hiemstra

Onbekwaam:

Unable, incapable, incompetent, inefficient, unfit, inept.

7.13.6. Although the Afrikaans word 'onbekwaam' may have a wider meaning than the English word 'unable' both have the primary meaning of not being able to do something and there is no conflict between the Afrikaans and the English versions of the statute. In the circumstances, even if 'onbekwaam' has a wider meaning than 'unable', what is common to both versions should be accepted.

S v Moroney 1978(4) SA 389 (A) at 407G - 408G

The Role and Function of Assessors

7.14. It is submitted that the grammatical and linguistic analysis of the section is reinforced if regard is had to the role and function of assessors in criminal trials. An assessor is a member of the court. He takes an oath in terms of Section 145(3) of the Criminal Procedure Act, 'that he will on the evidence placed before him, give a true verdict upon the issues to be tried'. He remains a member of the court unless and until he is lawfully discharged from his duties.

7.15. The denial to an accused person of the right to a consideration of his case by every member of the fact-finding tribunal is to deny him an essential part of the protection afforded to him by law.

R v Price 1955(1) SA 219 (A) at 224D - E

Hence, the requirements of Section 145(2) are peremptory, and, 'unless in the opinion of the trial judge concerned the possibility of a death sentence can be discounted, he is obliged to appoint two assessors'.

S v Malinga 1987(3) SA 490 (A) at 495I - J

7.16. The danger of denying to an accused person the protection afforded by the employment of assessors has been referred to by the Appellate Division on a number of occasions:

7.16.1. In R v Mati 1960(1) SA 304 (A) Schreiner JA at 306F observed how the case before him 'illustrates what may happen if the trial judge is without the advantage generally derived from the assistance of assessors in difficult cases or in a case where the outcome for the accused may be very serious'.

7.16.2. In S v Adriantos 1965(3) SA 436 (A) the court, at 437E - F, commented upon the danger for an accused person of ignoring the comments in Mati's case and pointed out how the disregarding of decisive evidence in favour of the accused would very possibly not have occurred had assessors been summoned.

7.16.3. In S v Balomenos 1972(1) PH H 57 (A) the Court again referred to Mati's case and observed that, 'generally speaking

Collection Number: AK2117

Collection Name: Delmas Treason Trial, 1985-1989

PUBLISHER:

Publisher: **Historical Papers Research Archive, University of the Witwatersrand**
Location: **Johannesburg**
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