E-MANTSHI

A KZNJETCOM Newsletter

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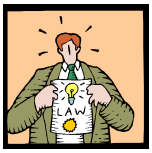
Welcome to the twenty seventh issue of our KwaZulu-Natal Magistrate's newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Your feedback and input is key to making this newsletter a valuable resource and we hope to receive a variety of comments and suggestions – these can be sent to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or faxed to 031-368 1366.



New Legislation

1. The Children's Amendment Act, Act 41 of 2007 has been published in Government Gazette No. 30884 dated 18 March 2008. This Act must be read with the Children's Act, 2005 because it is an extension and amendment of that Act. It will take effect on a date fixed by the President by Proclamation in the Gazette.

2. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill has been introduced in Parliament on 7 March 2008.

   The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 (Act No. 19 of 1998), hereinafter referred to as "the Act", came into operation on 5 June 1998. The intention of the Act was to provide for the prohibition of unlawful eviction, and to put in place fair procedures for the eviction of unlawful occupiers who occupy land without the permission of the owner or the person in charge of such land.
   However, since its inception, various interpretation and implementation problems have been identified. The Amendment Bill, 2008 (the Bill) seeks to address these problems. There has been confusion as to whether or not the Act applies to proceedings for the eviction of erstwhile tenants, or mortgagors who refused to vacate land after their leases were cancelled or on foreclosure of their bonds.
   The Supreme Court of Appeal has held that these categories of persons do Indeed fall under the provisions of the Act (see *Ndlovu, Ngcobo, Bekker & v Jika* 2003 (1) SA113 (SCA)). It was not the intention that the Act should apply to tenants and mortgagors who default in terms of their prior agreements with

landlords and financial institutions, respectively. The Act should cover only those persons who unlawfully invade land without the prior consent of the landowner or person in charge of land.

It has thus been necessary to amend section 2 of the Act to state specifically that the Act does not apply to a person who occupied land as a tenant, in terms of any other agreement or as the owner of land and who continues to occupy despite the fact that the tenancy or agreement has been validly terminated or the person is no longer the owner of the land.

A problem that may arise as a result of the amendment of section 2, is that an owner or person in charge of land may try to avoid the application of the Act, e.g. by entering into a simulated agreement with unlawful occupiers, only to terminate it shortly afterwards. In this regard the Bill seeks to grant a court the power to order that the Act applies if it is satisfied that any act or omission by the owner or person in charge of land was calculated to avoid the application of this Act.

3. The Prevention of and Treatment for Substance Abuse Bill has also been introduced in Parliament on 13 March 2008.

The Bill proposes the establishment of programmes for the combating of substance abuse and guidelines in managing the diversity of programmes ranging from prevention and early intervention services to community-based services.
The review process of the Prevention and Treatment of Drug Dependency Act, 1992, was informed by the new Policy on the Management of Substance Abuse and the National Drug Master Plan.

The objects of the Bill are to –

(a) provide for a coordinated effort to combat substance abuse;

(b) provide for the conditions for registration of all programmes, including those in treatment centres and halfway houses;

(c) provide for the conditions and procedures for the admission of persons to treatment centres and the release of persons from treatment centres;

(d) provide for early intervention, treatment and reintegration programmes for vulnerable persons; and

(e) establish a Central Drug Authority, whose powers and duties are to monitor and oversee the implementation of the National Drug Master Plan.

Both the above Bills can be accessed on website of the Parliamentary Monitoring group at www.pmg.org.za/bill .

4. A Reform of Customary Law of Succession and Regulation of Related Matters Bill has also been introduced in Parliament on 7 March 2008.

The Bill emanates from an investigation and report of the South African Law Reform Commission (SALRC). The purpose of the Bill is –

(i) to abolish the customary rule of primogeniture in as far as it applies to the law of succession in order to bring it in line with the Constitution; and

(ii) to give effect to the judgment of the Constitutional Court in the case of Bhe and Others v The Magistrate, Khayelitsha and Others CCT 49/03, Shibi v Sithole and Others CCT 69/03, which declared the principle of male primogeniture incompatible with the Bill of Rights.

Some of the Objects of the Bill are as follows:

Clause 2(1) extends the application of the Intestate Succession Act, 1987 (Act No. 81 of 1987), to deceased estates of Africans who die intestate. These estates were previously dealt with in terms of the repealed Black Administration Act, 1927. *Clause 2(2*) deals with the different scenarios which present themselves in terms of customary law and how the Intestate Succession Act, 1987, must be applied in these scenarios, for instance how the variety of supporting marital unions in customary law must be dealt with. In terms of the Intestate Succession Act, 1987 (Act No. 81 of 1987), children born out of unions entered into by or on behalf of males and those entered into by women for purposes of raising children or increasing the number of off-spring of the deceased do not qualify to inherit the intestate estates of their fathers because they are regarded as extra-marital children. *Clause 2(2*) entitles a woman who has entered into a union with a man for the purpose of raising children and a woman who has entered into a union with another woman so that the latter woman can procreate children, to be regarded as a descendant for the purposes of the application of the Intestate Succession Act, 1987.

Clause 3 seeks to provide how the Intestate Succession Act is to be interpreted in order to give effect to provisions proposed in the Bill.

Clause 4(1) provides for the property accruing to a woman or her house under customary law by virtue of her customary marriage to devolve in terms of a will. (If she dies without a will, her property will devolve in terms of the Intestate Succession Act, 1987.) In terms of *clause 4(2)* any reference in a will of such a woman to a "child" and any reference in section 1 of the Intestate Succession Act to a "descendant" in relation to such a woman who dies without a will, must be interpreted to include any child born out of any ancillary union entered into in terms of customary law for the purpose of raising or increasing the number of children for such woman or her house.

Clause 5 contains procedures for resolving disputes and uncertainties pertaining to the devolution of family property, among others. Disputes or uncertainties in

connection with the devolution of family property will be determined by the Master of the High Court having jurisdiction. The Master may also refer a matter to a magistrate who must hold an inquiry into the matter and make recommendations to the Master.

Recent Court Cases

1. S v VAN AARDT 2008(1) SACR 336 (ECD)

Where an accused had deliberately refrained from obtaining medical assistance for a deceased because he did not want the police to be involved intent in the form of *dolus eventualis* can be inferred.

The appellant had been convicted of the murder of a 15-year-old youth and sentenced to 12 years' imprisonment. It appeared from the evidence that the appellant had assaulted the deceased causing very serious injuries, including severe brain injuries. The cause of death was a 'cerebral injury secondary to multiple blunt trauma'. Early the following morning the appellant had seen the deceased lying where he had fallen after the assault in a serious state, unconscious and groaning. The trial court found that the State had failed to prove beyond reasonable doubt that the appellant had had the intent to kill the deceased at the time of his assault upon him. It was found further, however, that the State had proved beyond reasonable doubt that the appellant had caused all the injuries to the deceased referred to in the post-mortem report and that, despite the appellant having appreciated the risk that the deceased could die in consequence of those injuries, had deliberately chosen not to obtain medical assistance for him because he feared that the matter would be reported to the police, notwithstanding that there was, in the circumstances, a legal duty on him to secure such medical assistance. The appellant therefore had the requisite intent in the form of *dolus eventualis* to kill the deceased. He was accordingly convicted of murder. In an appeal to a full bench of the provincial division,

Held, that the appellant's counsel had conceded, correctly, in the trial court that the appellant had been under a legal duty to provide the deceased with medical assistance. It had further been conceded that his failure to do so causally contributed, at the least, to the shortening of the deceased's life.
(At 345*a*-*b*.)

Held, further, that it must have been obvious to the appellant when he found the deceased lying in an unconscious state in the early hours of the morning, having spent the night in the open in the rain, that the deceased was severely injured and in dire need of medical assistance. At that stage the deceased was unconscious and continually groaning. (At 346*b* and 346*c*.)

Held, further, that, having regard to the deceased's obviously severely injured state and his unsatisfactory physical responses to the stimuli applied by the appellant (shining a torch in the deceased's eye to see whether the pupil contracted or not), the appellant must have foreseen, and by necessary implication did in fact foresee, that there was a reasonable possibility that the deceased might die if not medically treated. (At 346*f-g*.)

Held, further, that, despite this, the appellant had deliberately refrained from obtaining medical assistance for the deceased. It was clear from the acceptable evidence that the appellant did so because he did not want the police to become involved. (At 346i.)

Held, further, that, in the circumstances the finding by the trial judge that the appellant had subjectively reconciled himself with the foreseen consequences was clearly correct. (At 346*i*.)

Held, accordingly, that the appellant was correctly convicted of murder on the basis of *dolus eventualis*. (At 346*j*.) Appeal dismissed.

2. S v ABADER 2008(1) SACR 347 (WLD)

The failure of accused's legal representative to put his case to the State witnesses does not necessarily indicate that the accused is guilty of fabricating

The appellant appealed to the High Court against his conviction and sentence in the magistrates' court on one count of murder arising out of a shooting incident outside a nightclub during the course of which both the deceased and the appellant were shot, the deceased fatally so. It appeared from the record that the evidence of the State witnesses was contradictory and often unclear regarding the details of the incident. It appeared further that, in assessing the evidence and convicting the appellant, the magistrate sometimes placed store on the failure of the appellant's attorney to have accurately or fully put the appellant's version to the State witnesses or, possibly, to have put it at all. That failure, together with other features in the evidence of the appellant and his brother (who also participated in the incident), impelled the magistrate to conclude that their version was false beyond reasonable doubt.

Held, that, as regards the duty of defending counsel to put his client's version to witnesses for the other side (whether the other side was the State, in a criminal prosecution, or the plaintiff, in a civil matter), the rule that an accused or his legal representative had to put to witnesses whom he cross-examined the version of witnesses whom he intended calling to testify and who would contradict the version of the witness being cross-examined was not an inflexible, axiomatic rule, cast in stone. It was founded upon logic and judicial experience in assessing evidence and making credibility findings. A failure on the part of an accused or his legal representative to act in accordance with the rule might indicate that the particular witness was guilty of fabrication. But, equally, it might not. Whether or not the consequence followed depended on the particular circumstances of the case. The

rule served as an aid to a judicial officer in drawing the correct conclusions from the evidence presented to the court. (At *355j*-356*c*.)

Held, further, that it was also not uncommon for a cross-examiner not to put something to a witness because his client might genuinely have forgotten about it, only to be reminded of it when he (the client) was later cross-examined by the prosecutor. To seize upon something like that as evidence of the accused's dishonesty was very unfair to the accused because it might lead to an incorrect finding of fact being made by the presiding officer. (At 356e.)

Held, further, that there were very few cross-examiners (even very experienced ones) who had not found themselves in a position of having put a version which, with the benefit of hindsight, was not put as precisely as it should have been put, or not having put something in cross-examination because, for whatever reason, it might not have arisen during consultations. One had to appreciate how easy it was to slip up as a cross-examiner. To apply some or other inflexible rule in such circumstances might result in grave injustice being done to the cross-examiner's client. (At 356*j*-357*b*.)

Held, further, that, although the failure to put a version on a particular issue might create the impression to the other side that the issue was not disputed, that was not the position in the present case where contradictions in the evidence of the State witnesses abounded. In those circumstances, the failure on the part of the defence attorney to have fully put a version could hardly be found to have had any impact on the credibility of anyone who testified in the case. (At 357*b*-*c*.)

Held, further, that, on a proper evaluation of the evidence, the deceased had been the aggressor and the appellant merely acted in self-defence in shooting and killing him. (At 359*i*-360*a*.)

Held, further, that it followed that the conviction and sentence could not stand. (At 360*c*.)

3. S v SAAYMAN 2008(1) SACR 393 ECD

Restorative justice must be applied only in appropriate circumstances and must be developed in a constitutionally acceptable manner

The appellant was convicted in a regional court of six counts of fraud, totalling some R13 000. She had 203 previous convictions for fraud, and one for theft. She was sentenced to two years' imprisonment, conditionally suspended. One of the conditions of suspension was that she should stand for 15 minutes in the foyer of the court carrying a placard bearing her name, the fact of her conviction, and an apology to certain of the victims of the frauds. According to the magistrate, this condition had been imposed in an attempt to 'restore the relations between the parties by assisting the accused to tender an apology in public to the complainants'. The appellant appealed against this condition of suspension, but subsequently withdrew the appeal. However, due to its concern over the constitutionality of the condition, the court decided to deal with the matter on review.

Held, that the sentence as a whole was both thoughtful and comprehensive. Given the nature of the offences and the appellant's record, a period of imprisonment might well have been justified. However, the sentence was to be considered against the background of s 10 of the Constitution, which provided that everyone had inherent dignity and the right to have their dignity respected and protected; and of s 12(1)(e), which guaranteed the right not to be punished in a cruel, inhuman or degrading way. It was in no way consistent with the right to human dignity to require a convicted person to stand in public, under the watch of a police officer, carrying a placard proclaiming her guilt. The effect of this condition of suspension of the sentence would be to expose the appellant to public ridicule and humiliation, and as such would amount to degrading punishment. (At 397*d*-399*c*.)

Held, further, that the need to avoid unconstitutional punishment did not imply that the rights of offenders trumped the interests of victims and the needs of society; offenders must be appropriately punished. The magistrate had stated that the imposition of the condition had been an attempt to 'restore the relations' between the appellant and her victims. However, if restorative justice was indeed to make a significant contribution to sentencing options then it must be applied only in appropriate circumstances and must be developed in a constitutionally acceptable manner. It was desirable for purposes of restorative justice that, where possible, there should be an encounter between the offender and the victim, enabling the former to apologise personally to the victim. This could not be achieved by requiring an accused to stand holding a placard publicly proclaiming her guilt. Clearly, the active and willing participation of the victims was also required, but the magistrate had failed to involve the victims, and there was no reason to suppose that they would have been present to note the apology. In the result, the condition of suspension could not stand. (At 401*f*-404*b*.)

From The Legal Journals

Vermaak, L.

"Crime and Punishment in South Africa: Correctional Supervision as an alternative to imprisonment".

De Rebus April 2008

Van Loggerenberg, D.; Dicker, L. & Malan

"Debt enforcement under the National Credit Act: Jurisdiction".

De Rebus April 2008

(Both these articles can be accessed on the De Rebus website at www.derebus.org.za .

Contributions from Peers

[1]*A CRITICAL LOOK AT THE ADMISSIBILITY REQUIREMENTS FOR DISPUTED BREATH-ALCOHOL TEST RESULTS IN S.65 (5) OF ACT 93/1996 PROSECUTIONS

Introduction

One of the most basic problems currently facing criminal courts is the slow pace with which forensic investigations are being finalised by the Police Forensic Unit. This has resulted in the State increasingly using breath-alcohol equipment in prosecutions under s.65 (5) of the National Road Traffic Act 93/1996.

In two cases in the Eastern Cape Division, the High Court was critical regarding the admissions made by an accused in terms of s.112 (1) of Act 51/1977, particularly in light of the nature of the equipment used in conducting the breath-alcohol-tests.[2] A full bench of the same division, however, refused to follow these judgements and, with respect, correctly held that the court is not concerned with whether the accused is proved to be guilty, but whether it is satisfied from the admissions made, and their reliability, that he is guilty.[3]

There is ample authority for the aforementioned approach, that an accused is clearly entitled to admit facts not falling within his personal knowledge.[4] The position is a little more complicated where an accused disputes the accuracy and reliability of the breath-alcohol-equipment or due to ignorance, even after an enquiry, is unable or refuses to accede to the correctness of the breathalyser test result. The purpose of this contribution is to establish to what extent a court may be prepared to relax the rules of admissibility in the case of the breathalyser equipment results.

What must be proved?

When an accused is charged with a contravention of s.65 (5) of Act 93/1996 the State bears the onus of proving the following:

1. That the accused drove a vehicle on the date and place as set out in the charge sheet.
2. Whilst the concentration of alcohol in her breath specimen exceeded the statutory limit of 0,24 milligramms/1000 millilitres and;
3. With the requisite mens rea.

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[1] * An extract from an unpublished article by G. Harmse & B. Pedro: A Practical Approach to Writing a Judgement in a Criminal Trial.

[2] *S v Lindorst* 2000 (2) SACR 161 (E); *S v Lourens* 2000 (2) SACR 164 (E).

[3] *S v Aukamp and Six Similar Cases* 2002 (1) SACR 524 (ECD) at 528.

[4] *S v Naidoo* 1985 (2) SA 32 (N); *S v Adams en Tien Soortgelyke Sake* 1986 (3) 733 (C) at 742-744; See also Heher J A in *S v Adendorff* 2004 (2) SACR 185 (SCA) at 195 where he held: **"** *That such an admission could properly be made and accepted in evidence despite its correctness not falling within the personal knowledge of the accused was, I think correctly, found to be law in S v Naidoo 1985 (2) SA 32 (N).***"**

How will the State go about discharging the onus of proof?
The task of the State is alleviated by the operation of a presumption contained in s.65 (6), which stipulates that if it is proved that the concentration of alcohol in a specimen of breath of an the accused was not less than 0, 24 milligrams per 1000 millilitres within two hours after driving or occupying the driver's seat whilst the engine was running, it shall be presumed that it also exceeded the statutory limit in those circumstances.
It is clear from s.65 (6) that the State will have to establish the following before the presumption operates in its favour:

(a) That a breath-alcohol test was conducted within two hours after the alleged commission of the offence, and;
(b) That the concentration of alcohol in the breath of the accused was not less than 0, 24 milligrams per 1000 millilitres.

In this regard the State will have to present evidence to prove that the breath-alcohol test was conducted within two hours of the accused driving/or occupying the driver's seat whilst the engine was running. In addition to the breath-alcohol tests results, it may also present evidence that the accused had consumed alcohol or showed such signs of alcohol consumption prior to the driving or occupying the driver's seat of the vehicle, from which such a high degree of probability is raised that it may be inferred by the Court that the concentration of alcohol in his breath exceeded the legal limit. This, however, will largely depend upon the nature and the strength of the evidence of the State.

How will the State go about proving the aforementioned?
(i) Instrument/equipment used
Where the evidential material is in dispute, the court must scrutinise the evidence very carefully, in particular the process followed to conduct the breath-alcohol-test, in order to determine whether or not the statutory requirements had been complied with, specifically with regard to the accuracy and the reliability of the tests conducted.
It must also be mindful of the fact that the Act, in s.65 (7) of Act 93/ 1996, prescribes the use of particular types of instruments to measure the concentration of alcohol in the breath of an accused for the purpose of ss.65 (5).[5] Regulation 332 of the National Road Traffic Act Regulations further provides that such equipment shall be evidential breath-testing equipment complying with the requirement of the South African Bureau of Standards in terms of SABS 1973.[6]

Notwithstanding the use of scientific equipment during the analysis of the breath sample, our courts in the past have confirmed the position that the evidential material will be admissible, provided that the equipment has been shown to be reliable. In *S v Greef* 1995 (2) SACR 687

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[5] . Regulation 332 of the National Road Traffic Act Regulations 93/1996, provides that such equipment shall be evidential breath-testing equipment complying with the requirement of the South African Bureau of Standards and comprises the following equipment;
(a) The Drager Alco-test 7110 MKIII part number 8314647 (Germany); or
(b) The Drager Alco-test 7110 MKIV part number 35307791 (Australia); or
(c) Intoxilyser 1-400 (South African version is the Intoxilyser 5000 P-SA)

[6]. Perusing these specifications, it becomes clear that little reliance can be placed upon a lay person's admission that the instrument complies with the specifications without knowing what they entail.

(A)**,** with reference to the analysis of a blood sample, the Court held that the Act places no limitation on the type of equipment to be used in analysing the specimen.[7]
Similarly, with regard to offences under s.65 (5), the Act allows for breath-alcohol-testing to be conducted by an electronic device, provided that it complies with the provisions of s.65 (7).

(ii) Competency of the operator:

Before considering the accuracy of evidentiary material resulting from the equipment and determining the reliability of the instrument, it is important for the prosecution also to establish the competency of the person who operated the equipment in order to determine whether or not the breathalyser was properly operated. The State will have to prove that the operator received training with an accredited authority on the proper use of the equipment. Usually, the training is conducted by properly trained or qualified personnel attached to the Traffic College, within the Province. Experience has shown that the instrument is usually dispatched to the different test centres with an operating guide/manual or written instructions on the proper use of the instrument.
It is advisable, if, not necessary, for the State to adduce evidence in the form of a certificate regarding the competency of the person who operated the equipment. During his/her testimony the prosecution should establish whether the operating manual in respect of the instrument was used, and the witness will be obliged to testify in detail what the instructions entailed and whether they were followed to satisfy the court that the equipment was properly used.
The witness will have to testify about the type of instrument used to conduct the test and convince the court that everything was done correctly when the breath-sample was taken. Similarly, the court will have to be convinced that no irregularities occurred when the accused was breathalysed and the State will have to convince it that the instrument was used according to protocol.

(iii) Accuracy and reliability of the machine

Where it appears from the court record that the defence had requested the prosecution before the commencement of the trial to furnish reports and statements or certificates and/or any documents relating to the calibration and functioning of the relevant breathalysing equipment, as well as copies of expert reports relating to the equipment used, and intimated their resolve to challenge the accuracy and reliability of the equipment used, the State will have to adduce evidence to establish the accuracy and reliability thereof.
If the most important issue in dispute relates to the accuracy and reliability of the equipment used, the prosecution will have to enquire whether or not one of the instruments listed in the regulations, or one belonging to a generic group was used, and whether the specific instrument was in good working order at the time of the breath-alcohol test.

Assizement, calibration and technical knowledge of scientific equipment

A further important issue to be determined relates to whether or not the instrument or equipment used was tested against a measuring standard as set out in s.7 (5) of the Measuring

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[7] . At 690 the court held as follows: **"***Die artikel plaas geen beperking op die apparaat wat die skeikundige mag gebruik om sy ontleding te doen nie. Dat daar gedurende die proses berekeninge deur 'n rekenaar gedoen word doen dus myns insiens nie afbreek aan die bewys krag van die sertifikaat nie.***"**

Units and National Measuring Standard Act 76/1973, i. e. assized by an employee of an accredited laboratory or by a departmental official in the employ of the SABS.

To understand what is meant by a measuring standard it is important to have regard to the Trade Metrology Act 77/1973, which provides for measuring standards used by the director of trade metrology, his inspectors and verification officers.
These measuring standards, in terms of ss.8, 9 and 10 of Act 77/1973, are called departmental standards, regional standards and inspection standards, respectively. These measuring standards are the benchmark of measuring instruments used by the inspectorate of verification officers to test measuring instruments in general use in the trade.
The measuring standard referred to in Act 76/1973, must be traceable to a national measuring standard, which, is a reference to an official standard such as the measuring standards of the Trade Metrology Act 77 of 1973.
As Act 76/1973 does not contain a definition of standard, reference must be made to its ordinary meaning, which, according to the *Oxford English Dictionary* includes:
'the authorised exemplar of a unit of measure or weight; e g a measuring rod of unit length; a vessel of unit capacity, or a mass of metal of unit weight, preserved in the custody of public officers as a permanent evidence of the legally prescribed magnitude of the unit.'
According to *Webster's Third New International Dictionary*, standard, *inter alia*, means:
'something that is set up and established by authority as a rule for the measure of quantity, weight, extent, value or quality; esp; an original specimen measure or weight…or an official copy of such a specimen used as the standard of comparison in testing other weights and measures.'
Standard, therefore, means official standard, founded in Act 77 of 1973. Section 7 (5) bears no relation to measuring instruments, but refers to measuring standards which may have been used to assize such instruments.
Our courts have in the past taken judicial notice of the correctness of measuring instruments which are shown to have been assized, which includes;

1. That a duly qualified and authorised official had in the course of his/her official duties tested the measuring instrument and found it to be in proper working order.
2. That the yardstick he/she had used in checking the calibration was correct, i. e. that it conforms with the national standard if any such existed; and
3. That the instrument had not since such assizing become unreliable.'[8]

If the operation of the equipment is well known, evidence that it was tested, calibrated and that it has not since assizement became unreliable will be sufficient for a court to accept the *prima facie* correctness of the measuring instrument. In *S v Mthimkulu* 1975 (4) SA 759 (A), the court referred with approval to *Wigmore on Evidence* 3rd ed vol III at 189-190, where two preconditions are set before testimony may be based on scientific instructions: Professional

[8] *S v Van Der Sandt* 1997 (2) SACR 116 (W) at 132; -136. See also s.212 (10) of Act 51/1977, which empowers the Minister in terms of s.1 of the Trade Metrology Act, 77/1973, to determine measuring standards with which the measuring instruments must comply before a fact which it purports to prove may become admissible in a criminal trial. This section envisages either *viva voce* proof, or proof on affidavit from a person with qualifications and/or personal knowledge with regard to the operation of the instruments as well as the conditions and requirement the instruments have to comply with.

evidence - (1) as to the trustworthiness of the process of the instrument in general; and, - (2) as to the correctness of the particular instrument.
A court will not easily be inclined to relax the standards of proof which applies when evidential material involving scientific instruments is presented. Much will depend on the nature of the process, the instrument used, the extent to which the evidence is challenged and the issues in dispute, as well as the circumstances of the particular case.[9]

It is clear that the breath-alcohol-testing equipment as listed in Regulation 332 are not instruments which can be reliably operated by a layman. Neither are they instruments of which the workings are so well known that a court may take judicial notice thereof.
If the evidence show that the instrument or equipment was assized by an accredited laboratory designated by the SABS Council in terms of s.7 (2) of Act 77/1973 to verify measuring instruments through verification officers in terms s.3 (1) of that Act, the court will be inclined to infer, because of its assizement, that the equipment measured the breath-alcohol content correctly.
There is also no compelling probability that measuring instruments which have not been assized give correct results. As is the position with man, so too are machines fallible, and prone to mistakes. The consequences for an accused are too serious for any court to blindly rely on untested sophisticated instruments without proof of their reliability. The State will have to convince the court that the instrument gave an accurate and reliable reading.[10]
According to the approach of the court in the *Van Der Sandt* case, an expert or person who conducts a breathalyser test with a scientific instrument which falls outside the scope of judicial notice should name the instrument and explain its operation and why it should be regarded as being trustworthy.

Where the instrument was tested, or there exists such a high degree of likelihood that the machine is accurate, proof of reliability can be dispensed with. Where the test entails the use of a yardstick, proof that it has been assized is normally accepted as evidence of the correctness thereof.[11] If the State proves that the equipment was calibrated, the court after considering the totality of the evidence may be inclined to accept that the equipment was operating correctly.

It is appropriate to understand why an instrument needs calibration and what calibration entails. 'To calibrate, as defined in *The Concise Oxford English Dictionary*, means *'correlate the readings of (an instrument) with a standard.'* Many definitions on the Web are in

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[9] See *S v Mthimkulu supra* at 759 (H).
[10] See *S v Van Der Sandt supra* at 131 (d-f), where it held: "*As man is fallible, so are machines. Considerations of effectiveness lose their persuasion when serious repercussions for the accused of high fines, moral turpitude and even imprisonment are borne in mind. The stakes are too high for blind reliance on untested instruments. Even if we are entitled to, there is no reason to differ from the Appellate Division authority of S v Dickson based on S v Mthimkulu…the State has to prove that the measuring instruments gives the correct measurements. This entails that its operation be explained, that it is proved to be trustworthy in its operation and that its result is proved to be correct. This includes that it is properly calibrated to official measurements*."
[11] See *S v Mthimkulu, supra* at 763 (G)-764 (G).

agreement with this definition. One such goes like this: *'Calibration is correcting a measuring instrument by measuring values which are known.'*

The reason for proper, regular instrument calibration is to prevent concentration readings that are inaccurate and to ensure, therefore, the accuracy of the equipment. In order to properly calibrate the breathalyser equipment, it is essential that the manufacturer's guidelines, especially with regard to the frequency of calibration, are followed.
One of the rules of calibration is that a certified calibration gas should be used to calibrate the machine before the expiration date. It is also accepted practice for calibration purposes, that gas be blown into the machine and that the instrument reading is then compared with the actual quantity of gas present in the cylinder.

It goes without saying that the person calibrating the machine should have the necessary knowledge of what is blown into the machine, the reason why this is done and the effect it has on the instrument's readings. If he/she is unable to explain what procedure was followed and the effect the procedure had on the instrument readings, one may successfully argue that the calibration process was flawed.
In this regard, evidence about the calibration process should be presented to the court, as well as relating to the training the person received and his experience in the calibration of the breathalyser equipment. He/she should explain the calibration process and have the knowledge or the necessary technical expertise on how the instrument functions. There should be reliable evidence to prove that the instrument used was properly, effectively and adequately calibrated, especially where the accuracy of the equipment is put in issue. In this regard it will not be sufficient to state that there was nothing wrong with the equipment and the outcome of the calibration process itself should be disclosed. It is also important that the results of the calibration and the frequency of calibration of that particular instrument are disclosed to the court. A lack of technical knowledge on the part of the witness pertaining to how the machine works will cast serious doubt on the correctness of the calibration process.[12]

It is common knowledge that the operators themselves, conducting these breathalyser tests, don't understand the process the breath undergoes whilst inside the instrument. The fact that they lack the necessary technical knowledge about the workings of the breathalysers itself makes it difficult for them to convince a court that the reading the instrument made was accurate.

What is required is proof that if the equipment gives a particular reading when breath is tested, it is reliable in that regard and is also sufficiently accurate to give a reliable reading when analysing the breath of the accused. Technical evidence to that effect by a person able to describe the process inside the machine and to vouch for its reliability, or by testing the machine against another unrelated method of analysis, is required.[13]

It has since been held by the Cape High Court, after applying the ratio in *S v Van Der Sandt*, that the reliance on these instrument has serious consequences for an accused person, and a

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[12] C f *Price v Mutual & Federal Insurance Co Ltd* 2007 (4) 51 (SECLD), where Sangoni J deals extensively with the burden of proving the accuracy and reliability of breathalyser equipment

[13] See *S v Strydom* 1978 (4) SA 748 (E) at 753 (A-C).

court should, therefore, in the absence of technical evidence by an expert witness, especially where problems occurred, be reluctant in accepting the instrument as being reliable on the mere say so of the operator, especially where he/she based his belief in the accuracy of the reading, on the fact that it was calibrated.[14]

Conclusion

Where the accuracy and reliability of scientific equipment is at issue, the State will not only have to prove the alcohol content of the breath-specimen by submitting the print-out into evidence, but will have to adduce expert evidence regarding the operation of the machine, how the process works, how many times it was tested, whether or not it was calibrated and working properly and if the reading was therefore correctly done by the machine. [15]

If the State adduces reliable evidence from an expert witness regarding the history of the particular instrument, including evidence that the equipment in question was in good working order and was properly maintained through regular calibration processes in accordance with procedural guidelines, manuals or technical requirements, to ensure proper functioning of the equipment, the court may conclude in the absence of anything to the contrary that the machine gave the correct reading. However, in the absence of such credible evidence a court won't readily accept the equipment as being accurate and reliable.[16]

Where judicial notice cannot be taken of the accuracy and reliability of an instrument, as is in the case of breath-alcohol-instruments, the State has to prove reliability, which entails that

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[14] See *S v Bester* 2004 (2) SACR 59 (C) at 61-63, where Erasmus J held: *"…Die analise word outomaties deur die apparaat gedoen en die resultaat dan op 'n drukstuk uitgedruk. Die proses wat binne die apparaat plaasvind, is duister. Geen getuienis is daaroor aangebied nie, en Du Preez (operator) is geen deskundige daaroor nie…(at 62) Hy kan egter nie instaan vir die korrektheid of betroubaarheid daarvan nie en lei dit bloot af omdat, volgens hom, as daar foute is, sal die masjien dit aantoon. Die hoogwatermerk vir sy afleiding van betroubaarheid volg uit die feit, soos hy dit stel, dat dit gekalibreer is…(at 63) Getuienis van die korrekte gebruikmaking van die apperaat is onvoldoende om die facta probanda te bewys by die ontstentenis van bewys van die korrektheid van die toetsingsproses."*

[15] See *S v Ramgobin & others* 1986 (4) SA 117 (N) at 146(D-G), where Milne JP held: *" When an expert gives evidence in Court, it is obviously insufficient if he simply describes, in general terms, the nature of his investigation and his conclusions there from. Perhaps that might be a reasonable way to approach the matter if there is no challenge, or no serious challenge, of his conclusions in a particular case. It is quite apparent, however, that where…there is a very serious challenge to the conclusions, the expert must be in a position to give detailed reasons for his conclusions, and an accurate account of the investigation that he carried out for the purpose of arriving at his conclusion."*

[16] See Milton: South African Criminal Law and Procedure, Volume III-Statutory Offences at pars. G3-76 at 54] where he states as follows: *"For a conviction it is essential for the State to lead evidence, (i) explaining the operation of the equipment, (ii) proving that the equipment is trustworthy in its operation, and (iii) establishing that the result obtained by the equipment is correct, including proof that the equipment is properly calibrated to official measurements. It seems that this method of proof constitutes the only method of proving the offence set out in s.65 (5), and the evidence other than that derived from prescribed equipment would in all probability be held to be inadmissible."*

the operation be explained. The last requirement is that there must be proof that the instrument is properly calibrated to official measurements (art.62).It was held in *Bester* that the reading produced by the operation of a breath-alcohol testing device known as a Drager Alcotest 7110 Mark III was not admissible against an accused charged with contravening s.65 (5) of the National Road Traffic Act, 93 of 1996, if no evidence was produced of the reliability of the apparatus and the analysis produced by it.[17]

Where the accuracy and reliability are not in dispute and it was a prescribed instrument that was properly operated and calibrated, supported by the fact that various certificates of competency and calibration were shown to and perused by the accused at the time the breath-sample were tested, and the accused informs the court that he was satisfied with the reading it gave, the court may well be entitled to convict, if satisfied by the admissions made by the accused.[18]

G. HARMSE

Add. Magistrate: Magistrate's Court Khayelitsha.
21/07/2007.

If you have a contribution which may be of interest to other Magistrates could you forward it via email to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or by fax to 031 3681366 for inclusion in future newsletters.

Matters of Interest to Magistrates

Listen hear
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By Kevin Titus, Associate, Litigation Department, Bowman Gilfillan, Cape Town

A secret tape recording of a Springbok coach making abusive and racist remarks about other rugby officials set in motion a chain of events that

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[17] See Du Toit: Commentary on the Criminal Procedure Act at 24-34.
[18] *S v Vorster supra* at 387-388.

has forever tarnished his reputation.

In addition, as the recent furore surrounding various politicians and claims of '*spying*' continues to intensify, questions have been raised about the legal enforceability of tape recordings or wire tapping activities to be balanced with other fundamental rights, such as the right to privacy.

In South Africa the interception, recording and monitoring of communications is governed by the Regulation of Interception of Communications and Provisions of Communications-Related Information Act, 70 of 2002 ('RICA').

In principle RICA provides that no person may intentionally intercept or attempt to intercept any communication in the course of its transmission in South Africa. This prohibition of interception applies to all persons, private or public, but is subject to a number of exceptions detailed in sections 3 to 11 of RICA.

The primary exceptions to the general prohibition are:
• Where the intercepting party is a party to the communication being intercepted. Effectively, therefore, where meetings are concerned, the person making a recording of a meeting must be participating in the meeting; and
• Where one of the parties to the communication has provided prior written consent to the interception. Theoretically this refers to the employer/employee relationship, where, as a condition of employment, the employee consents to his communication being intercepted. One cannot conceive of other instances where a party would voluntarily consent, in writing, to his communications being intercepted.
Although it was promulgated in December 2002, RICA only came into effect in September 2005. Being relatively new, few cases on its application and interpretation have reached the courts.

There is, however, a plethora of cases decided in terms of RICA's predecessor, the repealed Interception and Monitoring Prohibition Act 127 of 1992, dealing with the circumstances in which one of the participants to a conversation monitors the conversation; cases that should carry weight in interpreting and applying RICA's provisions on the interception of communications, which provisions are, however, less onerous than those of the 1992 Act.

In *S v Kidson* 1999 (1) SACR 338 (W), for example, the police gave an accomplice to a murder a voice-activated tape recorder which he carried in his jacket pocket, using it to record a conversation with the accused, detailing the planning and execution of her husband's murder.

In determining the admissibility of the recordings, the court distinguished between 'third party monitoring' (a conversation '*by*' a person), and 'participant monitoring' (a conversation '*with*' a person) by holding that information voluntarily imparted in a two-party conversation is not 'confidential information' in relation to the other party to the conversation, and is thus admissible as evidence.

In addition, the court confirmed that the interception of a telephone call to which one is a party does not constitute 'third party monitoring', as it would be flawed to say that one is eavesdropping on one's own conversation. Examples used by the court to illustrate the absurdity of assigning third party status to the interception of phone calls included intercepting a telephone call from a kidnapper demanding a ransom, or intercepting calls from a perverted caller.

The overriding principle in the court's decision was that the party to the conversation had a legitimate interest in intercepting a conversation or meeting, and did not intend using the recording in order to commit an offence.

It has been contended that juristic persons (typically companies) and other organisations do not have a right to privacy due to the human nature inherent in this right. However, in *Financial Mail (Pty) Ltd v Sage Holdings Ltd*, the Appeal court confirmed that although a corporation has 'no feeling to outrage or offend', it is theoretically entitled to protection from invasion of its right to privacy and its right to identity.

In this matter, an (unauthorised) 'eavesdropping' or tapping device had been installed in the basement of Sage's premises, enabling conversations on the telephone line to be intercepted and tape-recorded. The appellant, the Financial Mail, which was in no way party to the making of the tape recordings and did not solicit them, wanted to use some of the information contained on the tapes in an article.

The court held that the tape recorded information was sensitive and confidential, as it concerned Sage's internal affairs and delicate business negotiations, and that the publication by the appellant of those parts of the article derived from the tape recordings would infringe Sage's and corporate executives' rights to privacy, thus rendering it unlawful.

This is a working example of a case in which the parties to a conversation did not provide prior written consent to the interception, thus rendering the use of the recording unlawful, as the parties intending to use the tape recordings were not a party to the conversation.

In addition, the case lays bare that it is almost always illegal to record a

conversation to which one is not a party, in which one the consent to tape is absent, and which one would not naturally overhear.

While participant monitoring is, to all intents and purposes, legally valid, the admissibility and authenticity of tape recordings and transcripts are almost always disputed. A legitimate interest for wishing to use recordings should go a long way in advancing a call for having such evidence admitted.

However, one should be wary of judicial boundaries and be careful to not transgress these, as our courts would only allow the infringement of a person's or entity's right to privacy in extraordinary or exceptional circumstances.

Information supplied by Bowman Gilfillan

A Last Thought

- *Asiyeona aibu zake asione za mwenziwe.*
  - Translation: He who doesn't see his own failings should not see those of his fellow man.
  - Meaning: Don't criticize someone else's faults when you have them too. **Swahili Proverb**