REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA **MAIN DIVISION, WINDHOEK**

JUDGMENT

Case no: CR 61/2013

CR 64/2013

CR 65/2013

In the matter between:

THE STATE

and

WILLEM TITUS
LASONGA JOHANNES KASOMA
KARUUO TITUS

(HIGH COURT MAIN DIVISION REVIEW REF NO.: 1435/2011)

Neutral citation: *S v Titus* (CR 61/2013; CR 64/2013; CR 65/2013) [2013] NAHCMD 359 (28 November 2013)

Coram: SHIVUTE J *et* SIBOLEKA J *et MILLER* AJ
Heard: 04 November 2013
Delivered: 28 November 2013

Flynote: Device used for breathalyzers testing approved by the Minister in terms of section 82 (7) of Act 22 of 1999. Such must meet the requirements of section 82 (7) read with section 94 (3) and 94 (4) of the Act. GN 100 of 2003 which contains the approval not meeting those requirements conviction and sentences in all cases are set aside.

ORDER

The conviction and sentences imposed in each of the cases are set aside.

JUDGMENT

MILLER AJ (SHIVUTE, J and SIBOLEKA, J concurring):

[1] There are before us three matters, emanating from the Magistrate's Court and forwarded to this Court for review purposes.

[2] What they have in common is that in each case the accused was charged with and convicted of having contravened Section 82 (5) of the Road Traffic and Transport Act, Act 22 of 1996. The section reads as follows:

'(5) No person shall on a public road.

(a) Drive a vehicle; or

(b) Occupy the driver's seat of a motor vehicle of which the engine is running, while the concentration of alcohol in any specimen of breath exhaled by such person exceeds 0.37 milligrams per 100 millilitres.'

[3] Section 82 (5) must be read together with section 82 (7) which reads as follows:

'(7) For the purposes of subsection (5), the concentration of alcohol in any breath specimen shall be ascertained by means of a type of device which is approved by the Minister by Notice in the Gazette and which conforms to such requirements, including the requirements of any standard publication contemplated in section 94 (4) as may be specified in such notice.'

[4] Pursuant thereto the Minister of Works, Transport and Communication, who is the "Minister" for purposes of the Act published the following Notice in Government Gazete 2978 on 15 May 2003:

'MINISTRY OF WORKS, TRANSPORT AND COMMUNICATION

Road Traffic and Transport Act

The Minister of Works, Transport and Communication has in terms of section 82 (7) of the Road Traffic and Transport Act, 1999 (Act 22 of 1997 approved that the concentration of alcohol in any breath specimen shall be determined by means of any device that complies with the requirements of the South African Bureau of Standards: Standard Specification "SABS 1973 : 1998 Evidential breath testing equipment.'

M. Amweelo
Minister of Works
Transport & Communication, Windhoek, 30 April 2003.'

[5] Insofar as the relevant Notice contains a reference to a standard publication it is necessary to also refer to sections 94 (1), 94 (2) and 94 (3) of the Act. They read as follows:

'(1) The power confined by section 91 or 92 to make regulations shall include the power to incorporate in any regulation so made any standard publication contemplated in subsection (4), or any part thereof, without stating the text thereof, by mere references to the number, title and year of that standard publication or any particulars by which it is sufficiently identified.

(2) Any provision of a standard publication incorporated in regulations under subsection (1) shall, for the purposes of this Act in so far as it is not inconsistent with such regulations, be deemed to be a regulation.

(3) Regulations incorporating any standard publication under subsection (1) shall state the place at and times during which a copy of such publication shall be available for free inspection, including copies of any supplementary standard publication or specification or document incorporated by references in the main standard publication.'

[6] This legal framework was the setting in which the matter of *S v Heathcote* (CA 24/2013) [2013] NAHCMD 195 (12 July 2013) came before this Court.

[7] In that matter Ndou AJ was requested to grant to the state leave to appeal against a decision of the learned Regional Magistrate at Swakopmund in which the learned Magistrate held the GN 100 of 2003 (quoted above) is *ultra vires* the Act.

[8] The learned judge's reasons for concluding that the learned Magistrate was correct appears from the following passage in his judgment:

'[9] My reading of this submission by prosecutor is that the minister did not comply with the provisions of subsection 94 (3) and (4) but that such omission is not fatal so as to render the Notice *ultra vires* the said statutory provisions of the Road Traffic and Transport Act. The Prosecutor was conceding that there are flaws in the promulgation of the said Government Notice. As alluded to above, Mr Small's submission is that there were no flaws in the promulgation as the Minister did not have an obligation to comply with the provisions of subsection 94 (3) and (4), *supra*, in making the Notice. In other words, subsections 94 (3) and (4) did not apply to the promulgation of the said Government Notice.

[10] I propose to consider these two submissions in turn. As far as the submission made by the trial prosecutor is concerned, it is beyond dispute that the Minister is empowered by Section 82 (7) to make the Notice in issue. But, the Minister is enjoined to do so in compliance with the requirements enshrined in Section 94 (3) and (4). Section 94 (3) is peremptory and it provides – "(3) Regulations incorporating any standard publication under subsection (1) *shall state the place at and times during which a copy of such standard publication shall be available for free inspection, including copies of any supplementary standard publication or specification or document incorporated by reference* in the main standard application" (emphasis added). Because of the peremptory nature of the provisions of Section 94 (3), *supra*, the application has no reasonable prospect of success on appeal. Coming to the ground set out in the Notice of Application for Leave to Appeal, as alluded to above, it is essentially submitted that the provisions of Section 94 (3) and (4) are not applicable to the making of the Notice. It is beyond dispute that Notice 100 of 2003 incorporates "The South African Bureau of Standards specification – Evidential Breath Testing Equipment" (SABS) (ie a standard publication) by reference pursuant to provisions of Section 94 (4), *supra*.

[11] It is further beyond dispute that this SABS was not published as required by Section 94 (3), *Supra*. Even without the provisions of Section 94 (3), before a law becomes effective, it has to be promulgated, this applies not only to statutes but also to regulations or by-laws which are intended to have the force of law - R v Koening, *supra*, and S v Carracelas and others, *supra*. In essence, what the applicant is saying is that the mere reference to a foreign standard publication, SABS, in the Notice is sufficient. It is up to the Namibian citizens affected by the use of the breathalyzer equipment to source for such standard publication from South Africa. It is clear that Section 94 (3)

was specifically introduced by the legislature to curb such half-hearted publication by the Minister. The effect of the use of the breathalyzer device, as an evidential aid, is indeed grave to several Namibian drivers. The penalties for contravention Section 82 (5) are indeed severe. The use of such a device leads in certain instances, to an adverse inference operating against the offender. How is an offender charged under Section 82 (5) to know about the equipment being used to determine his guilty if the Notice does not provide access thereof?'

[9] The learned judge for those reasons refused to grant leave to appeal.

[10] Thus the situation now exists that the state cannot rely on the devices mentioned by the Minister of GN 100 of 2003.

[11] This clearly has serious consequences for the law enforcement agencies and the State in its prosecutions.

[12] It is for that reason that the learned Judge-President directed that the three matters be placed before us to determine whether the convictions are competent in view of the judgment of Ndou AJ in *S v Heathcote* supra.

[13] We are indebted to Mr. Hinda SC who appeared amicus curiae, to argue the matter on behalf of the accused.

[14] Mr. Small together with Mr. Marondedze appeared for the State.

[15] Before I consider that issue I deem it necessary to consider the fact that each of the accused pleaded guilty when the charge was put to them. When questioned in terms of section 112 (1)(b) of Act 51 of 1977 each accused admitted that at the

relevant time the concentration of alcohol in the breath specimen taken exceeded the statutory maximum.

[16] A document reflecting the reading determined by the device used to take the specimen was handed in, in respect of each case.

[17] The admissions made by the accused regarding concentration of alcohol, were admissions of facts outside their personal knowledge.

[18] In *S v Naidoo* 1985 (2) SA 32 (N) at 37 G it was held that the Court not only has to ascertain, where facts outside the knowledge of the accused are admitted, whether the admitted facts, if accepted as correct will establish all the elements of the offence, but also whether the admission is reliable.

[19] See also *S v Adams* 1986 (3) SA 733 (C). It has virtually become the practice in cases of this nature to produce proof of the analysis, as was done in the instant case.

[20] However if the device used to make the analysis is not properly approved in accordance with the Act, it cannot be said that the analysis is reliable and hence any admission made pursuant thereto equally becomes unreliable. I conclude therefore that if the device was not properly approved, any admission based upon an analysis obtained by means of it cannot be relied upon.

[21] It is now necessary to consider whether GN 100 of 2003 was issued in compliance with the provisions of section 82 (7) of the Act.

[22] Mr. Small, during the course of argument, before us, launched a two pronged attack against the judgment of Ndou AJ. He submitted firstly that section 94 finds no application. GN 100 of 2003 is not, according to him a regulation published in terms of section 91 of the Act. Instead it was a notice published in terms of section 82 (7) of the Act. It is apparent from a reading of section 91 of the Act that the Minister is entitled to make regulations regarding the method of determining any fact which is required for the purposes of the Act (Section 91 (2) (xxiii).

[23] That the Minister did not purport to act in terms of the powers vested in him by Section 91 is to my mind beyond dispute. GN 100 of 2003 makes it abundantly apparent that the Minister purported to exercise the powers conferred upon him by section 82 (7) of the Act.

[24] To that extent the submission made by Mr. Small is correct.

[25] Mr. Small advanced what I will call a fall back submission. For that submission he relies on section 376 (1) of the regulations published as GN 53 of 2001 in Government Gazette 2503 dated 30 March 2001. It reads as follows:

‘376 (1) A standard publication incorporated into these regulations in terms of section 94 of the Act is available for inspection as contemplated in that section, during office hours at the office of the Deputy Permanent Secretary of Transport of the Ministry responsible for Transportation, Windhoek.’

[26] Thus, so the argument goes, there have been compliances in any event, with the requirements of the Act.

[27] The regulations published in GN 53 of 2001 were published in terms of section 91 of the Act.

[28] There was some differences between counsel for the State and counsel for the accused whether the use of the words “these regulations” confine section 376 (1) to the regulations published in GN 53 of 2001 only or whether it is a general application in relation to all regulations published in terms of section 91 of the Act. I incline to the view that section 376 (1) is of application only to the regulations published in GN 53 of 2001. In the end it does not matter anyway. If, as Mr. Small correctly submitted, GN 100 of 2003 is not a regulation issued pursuant to section 91 of the Act, GN 53 of 2001, does not apply to it.

[29] It remains to consider whether GN 100 of 2003 meets the requirements of section 82 (7) of the Act.

[30] An analysis of section 82 (7) is to the effect that (1) The Minister may approve a type of device by notice in the Gazette, (2) The Minister may approve a device which confirms to “such requirements, including the requirements of any standard publication contemplated in section 94 (4), (3) In the latter event at least the requirements of any standard requirements must be specified in that notice.

[31] GN 100 of 2003 states merely that the device approved must comply with the requirements of the South African Bureau of Standards “Standard Specification “SABS 1973: 1998 Evidential breath testing equipment. What those requirement are is not stated.

[32] I agree with Ndou AJ in his conclusion that any member of the public who is charged with a contravention of section 82 (5) of the Act, should know or be able to ascertain in Namibia whether or not the device used complies with the requirements of SABS 1973: 1988 Evidential breath testing equipment. To hold otherwise may well render the proceedings unfair. This consideration provides the logic behind the enactment of section 94 (3) of the Act. It would be anomalous to say that when the

Minister publishes a regulation in terms of section 91 of the Act to determine the method of determining any fact which is required for the purposes of the Act, he is obliged in the case of a standard publication to comply with section 94 (3) of the Act, but equally he is not obliged to do so when he acts in terms of section 82 (7) of the Act. Section 94 (4) must be read together with section 94 (3). Both have equal application to standard publications.

[34] It follows from my reasoning and conclusions that GN 100 of 2003 does not meet the requirements of section 82 (7).

[35] Consequently the conviction and sentences imposed in each of the cases are set aside.

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P J MILLER

Judge

I agree

N SHIVUTE

Judge

I agree

A M SIBOLEKA

Judge

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