e-MANTSHI

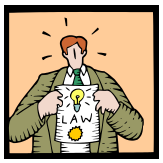
A KZNJETCOM Newsletter

July 2014: Issue 100

Welcome to the hundredth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.
Your feedback and input is important to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.

Dedication

This hundredth edition of the *e-Mantshi* newsletter is dedicated to Mr Thamsanqa Mabaso the Chief Magistrate of Durban and the Judicial Head of Administrative Region 6. Mr Mabaso was the driving force behind the establishment of the KwaZulu-Natal Judicial Education and Training Committee (KZNJetcom) which was formed on the 6th July 2003 at a joint cluster meeting in Durban. Since then Mr Mabaso has been instrumental in the training and development of Magistrates throughout KZN. His encouragement and vision led to the establishment of the *e-Mantshi* newsletter as an instrument to assist in the training of magistrates not only in KZN but also throughout South Africa. As he is now retiring we wish him well and we will endeavour to continue to uphold his vision regarding the training of magistrates.



New Legislation

1. The Minister of Justice and Correctional Services has, under section 1(2) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), and after consultation with the Minister of Finance, prescribed a rate of interest of 9,0 per cent per annum as from 1 August 2014 for the purposes of section 1(1) of the said Act. The notice to

this effect was published in Government Gazette no 37831 dated 18 July 2014. Government Notice No. R. 1814 of 1 October 1993 was thereby withdrawn.

2. The Department of Justice and Constitutional Development are inviting written proposals in respect of the categories of persons regarded as being competent to conduct an evaluation of the criminal capacity of children (criminal capacity evaluations) in terms of section 11 of the Child Justice Act, 2008 (Act 75 of 2008) (the Act) and the aspects of criminal capacity in respect of each of these categories. Comments can be sent to Ms T Skhosana at ThSkhosana@justice.gov.za by no later than Friday, 29 August 2014.

Recent Court Cases

1. S v BM 2014 (2) SACR 23 (SCA)

Questions directed at eliciting speculative answers from an accused, such as why another witness would have lied are impermissible and should be disallowed.

The appellant was charged in a regional magistrates' court with two counts of contravening the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The first count was that he had committed a sexual assault on a 12-year-old girl by putting his tongue into her mouth and the second count was of attempting to commit a sexual offence on the same day by pushing the same girl onto a bed and removing her clothes. He was convicted on both counts and sentenced to four years' imprisonment. An appeal to the high court was dismissed. With leave of the present court, the appellant appealed against the convictions and sentence. The conviction was based largely on the evidence of the complainant who testified that, whilst she was watching television, the appellant entered the bedroom, closed the door, but did not lock it, approached her and kissed her for a lengthy period, putting his tongue into her mouth in the process. She tried to push him away, but was unable to do so. He then pushed her onto the bed and removed her skirt, leggings and knickers. He then removed his own trousers and underwear. At that stage her sister called her and she left the room.

Held, that charging the appellant with two separate counts, arising out of what was clearly one and the same incident, involved an improper duplication (splitting) of charges. The test was whether, taking a common sense view of matters in the light of fairness to the accused, a single offence or more than one had been committed. The purpose of the rule was to prevent a duplication of convictions on what was essentially a single offence and, consequently, the duplication of punishment. (Paragraph [3] at *26b-c.)*

Held, further, as to the question of what the appropriate charge(s) should be, if the evidence was insufficient to prove attempted rape, but sufficient to prove a sexual assault, the latter was a competent verdict in terms of s 261 (1) *(c)* of the Criminal Procedure Act 51 of 1977. In view of the overlap that may exist between different offences under the Act, prosecutors must, when faced with a single incident, formulate the most appropriate charge bearing in mind the need to avoid duplication, the competent verdicts on that charge and the possibility of adding alternative counts. Furthermore, charges must be formulated with clarity and, where reliance is placed on statutory provisions, the appropriate provisions must be identified. (Paragraph [6] at 27 *h-j.)*

Wallis J A : "[22] That brings me to the issue of cross-examination that asks the witness to speculate. I have quoted the passage from the cross-examination of Mr Maseti in which the prosecutor demanded to know why SM should lie in her evidence. That is a question that is frequently asked in cases such as these. It is not a proper question because, as Mr Maseti quite correctly pointed out, it calls upon witnesses to speculate about matters in respect of which they can have no knowledge. Later in his evidence, in response to another similar question, he said he could not get into the mind of SM or her mother. The question requires the witness to express an opinion about the subjective state of mind of another person. That is a matter of speculation or conjecture and as such the answer is irrelevant and inadmissible. It follows that questions directed at eliciting this type of evidence are impermissible and should be disallowed.

[23] This was not a case where the accused had, in evidence in chief, expressed a belief that the case against him had been fabricated for a particular reason, the validity of which might have been the proper subject of cross-examination. Instead the prosecutor was the one who asked Mr Maseti to say why SM would make false allegations against him. The question was asked on the postulate that he was being falsely accused. Accepting that postulate, it was unfair to expect him to speculate on the matter. That was especially so in the environment of a court where he was being pressed for an answer under cross-examination. The natural human inclination in that situation is to provide some answer, however speculative or far-fetched, which may then be used to attack their credibility. That is what happened here and Magistrates and judges must be alert to disallow such cross-examination. An accused person

who claims that they have been falsely accused is under no obligation to explain the motives of their accuser and should not be asked to do so.

[24] Instead of disallowing the cross-examination, the magistrate elevated Mr Maseti's perceived inability to provide a plausible reason for SM to fabricate these allegations against him into the major reason for convicting him, as appears from the passage from her judgment quoted in para 19. She returned to this theme later in the judgment when she said: The court finds that there is no motive for the complainant to falsely implicate the accused. The accused's evidence is not compatible with the general circumstances of the case, as reflected and facts which are common cause.' However, as there had been no prior analysis of the 'general circumstances of the case' the latter statement added nothing to the magistrate's reasons."

2. S v MABENA 2014 (2) SACR 43 (GP)

The trial magistrate is the only person who can certify that a record that has been reconstructed is a reconstruction of the record of the proceedings.

The present matter had come before the court by way of an appeal from a conviction of theft in a magistrates' court. The full record was, however, not before the court, nor the record of the plea; the defence case of two other accused; the argument of the legal representatives; the argument of the public prosecutor; and the application for, as well as the granting of leave to appeal. Reassured by the legal representatives, the court accepted that leave to appeal had in fact been granted and noted that there had been no explanation from any of the relevant officials as to why the complete record was not before the court. The court held that in its view the duty to reconstruct the record had to be considered against the background of the different experiences, training and skill of the officers of the court, as well as of the practical implications for magistrates' courts. The only person who could certify that the record was a reconstruction of the record of proceedings in the matter was the magistrate. The court clerk was the recorder of court proceedings, and the clerk of the court was the custodian of the court records. In these circumstances the duty to reconstruct the record lay with the trial magistrate. When the record was placed before him or her by the clerk of the court, who should have observed that the record was not proper, the magistrate should have taken steps to ensure that the missing parts of the record were traced, and, if they were misplaced, were found and filed; and, if missing, he or she reconstructed the record before transmitting it to the registrar. This had clearly not been done in the present case. (Paragraphs [17] at 47*i* and [I8] at 48*e-f)* The court in the present matter was, however, able to infer from the rest of the record what had

transpired at the hearing, and on the merits of the matter upheld the appeal and set aside the conviction.

3. S v MADIBANE 2014(2) SACR 88 (GP)

If a presiding officer disbelieves an accused's version under oath on sentence s/he is obliged to express his/her doubts to the accused.

The accused, an unrepresented first offender, was convicted in a magistrates' court of dealing in 188 g of dagga. He was sentenced to pay a fine of R6000 or, in default of that, to three years' imprisonment. The fine was imposed, in spite of the accused's unchallenged evidence in mitigation under oath, that he was unable to pay the fine because of his meagre and uncertain income as a self-employed brickmaker. From the reasons provided by the magistrate for imposing the sentence, it appeared that the magistrate disbelieved the accused, that he was unable to pay the fine, although this was never put to him whilst he testified. On review,

Held that the magistrate had erred in the manner in which he dealt with the accused's evidence in mitigation. If he were skeptical about the accused's assertions, particularly when made from the witness box, he was obliged to disclose his misgivings to the accused immediately. His failure to do so put the accused at a significant disadvantage and denied him the right to address every issue the presiding officer might consider for or against him prior to imposing sentence. The magistrate's failure to express his doubts concerning the accused's veracity rendered the sentencing proceedings unfair and prejudicial to the accused. (Paragraph [7] at 90c-e.)

Held, further, that the sentence was manifestly excessive and failed to accord appropriate weight to the accused's personal circumstances and the small amount of dagga involved in the commission of the offence. (Paragraph [8] at 90*f.)* The court accordingly set aside the sentence and replaced it with a sentence of three months' imprisonment, wholly suspended for five years on certain conditions.

From The Legal Journals

Roestoff, M & Van Heerden, C

"Nedbank Ltd v Swartbooi Unreported Case No 708/2012 (ECP). Termination of debt review in terms of the National Credit Act – not the end of the road for over-indebted consumers"

2014 De Jure 140

Stevens, G P

"Assessing the interpretation of the elements of "dispose" and "child" for purposes of establishing the offence of concealment of birth –*S v Molefe* 2012 (2) SACR 574 (GNP)"

Obiter 2014 145

Kelly-Louw, M

"A credit provider's complete defence against a consumer's allegation of reckless lending"

(2014) 26 SAMercLJ 24

(Electronic copies of any of the above articles can be requested from gvanrooyen@justice.gov.za)

Contributions from the Law School

How do we deal with criminal defamation?

The Constitutional Court of Zimbabwe has recently held that criminal defamation should be struck down. (The judgment in *Madanhire v Attorney-General* can now be accessed at http://www.veritaszim.net/node/1027 (editor)) (information will be gleaned from media sources for the discussion which follows – see Friedman 'Zimbabwe's High Court Says Goodbye To Criminal Defamation' in http://afkinsider.com/60933/zimbabwes-high-court-says-goodbye-criminal-defamation accessed 2014/07/21; 'Zimbabwe's top court strikes down criminal defamation' in http://cpj.org/2014/06/zimbabwes-top-court-finds-criminal-defamation-to-b.php , accessed 2014/07/21; Benjamin 'Zim ConCourt finds criminal defamation is "unconstitutional"' in the *Law Report* supplement to the *Mail & Guardian* June 27 to July 3 2014 at 2 (quotations from the judgment are based on this last source)). The offence of defamation, set out in section 96 of the Criminal Law (Codification and Reform) Act, was challenged by two journalists who had been arrested in 2011 for allegedly defaming former Reserve Bank Governor's advisor Munyaradzi Kereke in an article which stated that the Green Card Medical Aid Society, of which Mr Kereke was founder and chairman, was unable to pay its members or creditors, and faced imminent financial collapse. (The firm apparently did eventually collapse under the weight of unpaid debts and obligations).

The court found in favour of the two journalists – the former editor of the *Standard* newspaper, Nevanji Madanhire, and one of its reporters, Nqaba Matshazi – holding that the criminalization of defamation contravened the freedom of expression guarantee contained in section 20(2) of the erstwhile Zimbabwean Constitution:

'I take the view that the harmful and undesirable consequences of criminalising defamation, namely the chilling possibilities of arrest, detention and two years' imprisonment, are manifestly excessive in their effect.'

Notably, the court cited an article written by Bhardwaj and Winks in the *Mail & Guardian*, entitled 'The dangers of criminalising defamation' (published 2013/11/1, see http://mg.co.za/print/2013-10-31-the-dangers-of-criminalising-defamation accessed 2014/7/21) which contended that

'Civil law exists to provide relief and restitution when one person harms or threatens to harm another's private interests. Criminal law exists to ensure retribution and protection of the public, by detaining offenders and deterring others from offending. For assault, imposing imprisonment or supervision is essential to protect the victims and the public at large. For damaging speech, however, the civil law is as effective, if not more so, in providing the public with proportionate protection from offenders.'

On the basis that a civil remedy provided 'an appropriate and satisfactory alternative', and that imposing a criminal sanction was a disproportionate remedy which stifled the free flow of defamation, the court held that it is not necessary to criminalise defamatory statements.

As one might expect, this ruling has been praised, not least for the fact that it was remarkable in the context of a society characterised by the ruthless crushing of dissent (see Manatsa 'Constitutional Court judgment on criminal defamation progressive' *Newsday* June 25, 2014 (http://www.newsday.co.zw/2014/06/25/constitutional-court-judgment-criminal-defamation-progressive accessed 2014/07/21; 'Zimbabwe journalists win free speech victory' (http://www.news24.com/Africa/Zimbabwe/Zimbabwe-journalists-win-free-speech-victory accessed 2014/07/21); Graham 'Zimbabwe court rules criminal defamation unconstitutional' (http://www.freemedia.at/special-pages/newssview/article/zimbabwe-court-rules-criminal-defamation-unconstitutional accessed 2014/07/21). In its editorial in the June 27 to July 3 2014 issue (on page 26), the *Mail & Guardian* commented thus:

'Freedom of expression and the media are inalienable elements of democracy and open societies; journalists are essential watchdogs when it comes to abuses of power. Regimes that jail and harass journalists for doing their job expose themselves as undemocratic and despotic.'

These words are unarguably correct, and the *Mail & Guardian* can be justifiably proud at the fact that one of its articles contributed to such a ground-breaking decision in the Zimbabwean law. It bears noting that there have been a number of calls for the decriminalisation of defamation internationally (see, for example, the 2007 Declaration of Table Mountain of the World Association of Newspapers and News Publishers (http://www.wan-ifra.org/articles/2011/02/16/the-declaration-of-table-mountain , accessed 2013/01/31); in the Caribbean context by the International Press Institute (http://www.freemedia.at/home/singleview/article/ipi-special-report-criminal-defamation-laws-remain-widespread-in-the-caribbean.html, accessed 2014/7/21); and in the context of the Commonwealth by the Commonwealth Human Rights Initiative (Cowell 'The Human Rights Case for Libel Law Reforms in the Commonwealth – Commonwealth Human Rights Initiative (CHRI)' 2011 *Commonwealth Law Bulletin* 329). Despite these strong arguments, and the demise of the analogous offence of criminal libel in English law, it is notable that a large number of states retain such laws, including: Canada; Australia; India; numerous other African, Asian and Caribbean Commonwealth states; a number of European countries; and South Africa (see generally, Hoctor 'The crime of defamation – still defensible in a modern constitutional democracy?' 2013 *Obiter* 125).

A challenge to the continued existence and constitutionality of the common-law crime of defamation in South Africa was repelled by the Supreme Court of Appeal in *S v Hoho* 2009 (1) SACR 276 (SCA). Pointing out that the paucity of prosecutions for the crime did not mean that it was abrogated by disuse, the court held (contrary to the views of writers such as Burchell *Principles of Criminal Law* 4ed (2013) 631 and Snyman *Criminal Law* 5ed (2008) 476) that: (i) the drastic nature of the criminal

remedy was balanced by the much heavier burden of proof in a criminal case (par [33]-[34]); (ii) just as it was necessary to have the crime of assault to protect bodily integrity, so the crime of defamation is necessary to protect reputation – as an assault on reputation 'may have more serious and lasting effects than a physical assault' (par [35]; and (iii) the need for a criminal remedy (as opposed to a civil remedy) is demonstrated by the facts of the case, where the source of the defamatory statements could not have been determined without the involvement of the law enforcement authorities (par [35]).

Intrigued by the antagonism between the right to freedom of expression and the crime of defamation, I explored the matter a little further (in 2013 *Obiter* 125), in particular focusing on the arguments in favour of abolition of the crime. In each case, I found that such arguments could be refuted. My conclusions, stated as briefly as possible, were (i) that the crime does have a cogent rationale (it protects a significant personality interest); (ii) that infrequency of prosecution does not entail that the crime can be scrapped (this state of affairs could simply indicate that the law is functioning effectively, as stated by the Privy Council in *Worme v Commissioner of Police of Grenada* [2004] UKPC 8 at par [42]); (iii) that the availability of a civil remedy for defamation does not negate the need for a criminal remedy; (iv) that the crime is constitutionally sound; and (v) that the argument that the crime is selectively *prosecuted* does not undermine the *existence* of the crime. I therefore concluded that the crime of defamation should therefore continue to exist.

It is perhaps useful to briefly revisit these views, in the light of the ruling of the Zimbabwean Constitutional Court, as well as the current challenge to the crime arising out of the appeal against the criminal defamation conviction of journalist Cecil Motsepe for reporting – incorrectly, apparently arising out of his lack of knowledge of Afrikaans - that a Meyerton magistrate, Marius Serfontein, had been biased in favour of a white offender drunk driving offender, who he had sentenced more harshly than a black drunk driving offender. It is this appeal against conviction which is the foundation for the arguments of Bhardwaj and Winks, which in turn found favour with the Zimbabwean court.

Thus the authors argue that the decision in *Hoho* was 'unsound', given the 'profound threat' that the crime of defamation poses to press freedom, and in particular the court's failure to consider the differences between criminal and civil liability. Their argument, in essence, is that in the case of damaging speech, there is no need to resort to criminal liability, as the civil law is 'as effective, if not more so' in providing protection against defamatory publications.

It may first be noted that even if the civil law is effective – and the need for a civil remedy for defamation is beyond dispute - this does not in itself constitute a compelling reason to dispense with the criminal remedy (see the *Worme* case at par [42], and as stated in the Canadian case of *R v Lucas* ((1998) 157 DLR (4^{th}) 423 at par [72], the ability to claim damages does not exclude the need for a 'corresponding public expression of society's profound disapproval'). Can the civil remedy replace the crime?

First, it should be noted that the harm that may be caused by defamation may exceed what can properly be dealt with in terms of mere monetary compensation arising out of a successful civil suit. This point was made in no uncertain terms by the Supreme Court of Canada in *R v Lucas* at par [73]:

'Defamatory libel can forever cause long-lasting or permanent injuries to the victim. The victim may forever be demeaned and diminished in the eyes of her community…The harm that acts of criminal libel can cause is so grievous and the object of the section to protect the reputation of individuals is so meritorious that the criminal offence is of such importance that the offence should be maintained.'

Moreover, it is trite that civil defamation actions are prodigiously expensive and thus only available to those with significant resources. Hence, the civil remedy does not provide a practical alternative where the victim does not have the financial means to pursue it, or, for that matter, where the offending party does not have the means to satisfy an order of monetary damages to the victim (Freedman 'Constitutional application' 2009 *SACJ* 474). Would it be consistent with access to justice to deny a defamed person a remedy because she is poor, or because (as in *Hoho*) the identity of the party publishing the defamatory statements cannot be identified?

The authors are at pains to draw a distinction between freedom of expression, which is constitutionally protected, and 'freedom to wield fists and firearms', which enjoys no similar protection. A more useful comparison may be between the right to freedom of expression and another common-law crime, unique to South African law, *crimen injuria*. A person's right to her dignity – *dignitas* – in terms of this crime entails that anyone who intentionally uses language that humiliates or disparages her may be convicted. If this is so, in the context of *crimen injuria*, in relation to all the personality rights (other than reputation and bodily integrity) which are protected by this crime, then should this restriction on speech not equally apply when the complainant's reputation is at stake? If criminal liability can flow from intentionally violating someone's dignity (or her bodily integrity), why should this be so surprising and unwelcome in relation to the intentional violation of someone's right to their reputation?

It is trite that notwithstanding the right to freedom of expression, not all speech is deserving of protection, and this is certainly true of defamatory speech, which can cause serious harm. A balance must be struck between the right to reputation (associated with the right to dignity) and the right to freedom of expression (*National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) at 1207). The balance between dignity and freedom of expression has been discussed in a number of recent Constitutional Court cases dealing with defamation (*Le Roux v Dey (Freedom of Expression Institute & Restorative Justice Centre as Amici Curiae* 2011 (3) SA 274 (CC) at par [171]; *The Citizen 1978 (Pty) Ltd and Others v McBride (Johnstone and Others Amici Curiae)* 2011 (4) SA 191 (CC) at par [146]-[153]) along with how such balance is brought about by means of the defences to defamation (in the *McBride* case, fair comment – see par [154]-[203]).

The primary concern of the authors is however the impact which criminal defamation has on the freedom of the press, that the crime 'could easily be used to cow

courageous journalists'. They cite both the United Nations Commission on Human Rights (regarding the reprehensibility of detention as a sanction for the peaceful expression of opinion) and the African Commission on Human and Peoples Rights (regarding the obstacle that criminal defamation laws can be to the media). The right to freedom of expression includes freedom of the press and other media (s 16(1) of the 1996 Constitution), and this freedom is hard-won, and is a cornerstone of our democracy. However, so is the right to assemble, to demonstrate, to picket and to present petitions (s 17 of the 1996 Constitution) – provided that such right is exercised peacefully and without being armed. Failure to meet such proviso can attract criminal liability for public order offences. Similarly the right to freedom of expression in the context of the media is not unlimited, and criminal liability for expression may be required where such expression involves intentional harm to the reputation of the complainant, and such expression does not fall within (that is, is balanced by) such defences as truth for the public benefit or fair comment, or 'reasonable publication' (in terms of the case of *National Media v Bogoshi*, confirmed by the Constitutional Court in *Khumalo v Holomisa* 2002 (5) SA 401 (CC)).

No doubt criminal defamation could have a 'chilling effect' on the right to speak – but all criminal laws operate in this way in deterring certain specified conduct. As Skweyiya J stated, in the context of defamation, in *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at par [141]-[142]:

'The chilling effect on freedom of expression envisaged in defamation cases would play out in the following manner. A person who suspects that he might possibly be about to defame someone else is cognisant of the fact that if he does there may be legal consequences. As a result, he either refrains from making the utterance or does some background checking first. So the kind of utterances which are chilled are those which an ordinary person may suspect to be defamatory in nature. The chilling of this kind of expression is by no means an undesirable result and is in line with the framework of intersecting rights…in which freedom of expression may well have to take a back seat to dignity in certain circumstances….Thus rather than being contrary to the constitutional scheme for the protection of expression, "chilling" of defamatory statements, or those that may be suspected as such, is precisely what the Constitution requires in light of its commitment to dignity as a foundational value.'

Criminal defamation should never be used as a tool to subvert legitimate criticism or to stifle dissenting views, and thus it follows that it ought never to be used as a weapon against the media. Prosecutions should continue to be few and far between, as has been the case in the past, and these should be limited to serious cases (here one parts company with the finding to the contrary in *Hoho* at par [21]), and should not result in imprisonment in all but the most exceptional cases. Nevertheless, it is submitted that there remains a place for criminal defamation in South African law, for the reasons outlined above, and no-one (not even the media) should be able to unlawfully and intentionally violate another person's right to her or his reputation with impunity.

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Matters of Interest to Magistrates

THE EFFECT OF *ROSS 2013 (1) SACR 77 (WCC)* AND *VAN DER SANDT 1997* (2) SACR 116 (W) ON PROSECUTIONS IN TERMS OF SECTION 65(2) OF THE NATIONAL ROAD TRAFFIC ACT, 1996 (ACT 93 OF 1996)

1. The current legal position in the Western Cape Province in terms of S *v Ross* and *S v Mouton.*

The recent decision of the Western Cape High Court, Cape Town in *Ross* 2013 (1) SACR 77 (WCC) delivered by Bozalek J on 25 September 2012, cast the proverbial cat amongst the pigeons.

In analysing the decision of the court, it becomes clear (compare paragraphs [8] to [12] of the decision) that the additional information (concerning the apparatus that had been used, its calibration and accuracy) which was included in the relevant 212(4) blood analysis certificate, was, in the view of the court, inadmissibly included. The merits of the court's decision that such information should be adduced in terms of section 212(10) of the Criminal Procedure Act, 1977 (Act 51 of 1977) is subject to criticism and will be addressed later in this paper.

The Ross-decision came to many as a big surprise as it is directly in conflict with an earlier Western Cape High Court decision (unfortunately not reported) (*S v Mouton*, case no A 449/10, judgment delivered by Weinkove, AJ during 2010) of which Bozalek J (and the representative of the State) was obviously not aware. In this decision Weinkove, AJ held that the additional information (concerning the apparatus that had been used, its calibration and accuracy) that was included in the section 212(4) certificate is admissible evidence.

As lower courts under the jurisdiction of the Western Cape High Court (Cape Town) are bound by that court's decisions, it leaves those courts in the peculiar (and

unsatisfactory) position that they are now confronted with two directly conflicting decisions of the same Province which they are bound to follow!

This situation is obviously not supporting proper law enforcement in the Western Cape and one could only hope that the issue would receive proper attention and that legal certainty would be established sooner than later.

a) The legal requirements.

In the past the "traditional" 212(4) blood analysis certificates only provided prima facie proof of the results obtained by the analysts. No proof was tendered in these documents as to how the results were obtained/established and no proof was provided concerning the accuracy/reliability of the devices used in the analytical process.

South African law is clear: If the results or readings of measuring instruments which are used in criminal proceedings to prove an offence are not directly placed in dispute or if they are admitted by the defence, the courts will normally accept such results or readings without detailed proof of how these devices function, that they are reliable and that their readings or results have been correctly determined. (See in this regard *Israel* 1966 (1) SA 610 (C) on 610 F and *Wells* 1990 (1) SA 816 (A)).

The use of machines or devices to prove issues in dispute has in the past led to a number of important decisions. The message is clear: If placed in dispute by the defence, the courts normally require extensive and detailed proof of the operation and accuracy of such devices prior to convicting the accused.

In *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 instruments: Professional evidence (1) to the trustworthiness of the process of the instrument in general; and (2) to the correctness of the particular instrument. (Compare in this regard similar sentiments expressed in the decision of *Dickenson* 1982 (3) SA 84 (A) on 95A).

That this evidential principle reverberates in the South African law is apparent from later cases which deal with the operation of measuring instruments. Compare in this regard *Van Der Sandt* 1997 (2) SACR 116 (W), where a full bench of the Witwatersrand Local Division of the High Court per Van Dijkhorst J, on 131 held as follows:

"In prosecutions for contravention of s 122(2) of the Road Traffic Act 29 of 1989 [now section 65(2) of Act 93 of 1996] *the State has to prove that the measuring instrument gives the correct measurement. This entails that its* ***operation be explained, that it is proved to be trustworthy in its operation and that its results is*** **(sic)** ***proved to be correct. This includes proof that it is properly calibrated to official measurements."*** (My emphasis and inclusion).

Similar sentiments have been expressed in *Bester* 2004(2) SACR 59 (C), in *Price v Mutual & Federal Insurance Co. Ltd* 2007 (1) SACR 501 (SECLD and in the more recent decision in the case of *Molahlane* [2009] JOL 23937 (E). In view of the above it should be accepted that, in order to succeed in prosecutions for contravening section 65(2) of the National Road Traffic Act, 1996, the State not only has to prove the results of the blood analysis (**via** a certificate in terms of section 212(4)), but proof must also be adduced as to how the gas-chromatograph operates, how reliable its readings are and that it has been calibrated. In *Ross supra*, the court ruled that such evidence cannot be adduced **via** a section 212(4) certificate.

b) The way forward in the Western Cape.

Evidence concerning the operation of the gas-chromatograph, its trustworthiness and accuracy and evidence relating to the calibration of these devices, will primarily have to be sourced from the Forensic Chemistry Laboratory.

If the section 212(4) certificates issued by the Forensic Chemistry Laboratory Western Cape contains the additional information concerning the accuracy and calibration of the device that had been used during the analysis, prosecutors should, so is submitted, proceed to adduce such documents. The prosecutors should however, before closing the state's case and with reference to all the authority discussed below in Chapter B *infra*, address the court and request the court to rule such evidence admissible**.** The court should then be requested to make a ruling in that regard (Compare the discussion of a courts obligation in this regard in *Ramavhale* 1996 (1) SACR 639 (A) , *Ndhlovu* 2002 (2) SACR 325 (SCA) and *Molimi* 2008 (2) SACR 76 (CC).)

Should the court for some or other reason rule that the statement contains inadmissible evidence and refuses to accept the statement in evidence, prosecutors should then consider the points discussed below.

It is submitted that this evidence can also be submitted to court in the following ways:

1. Prosecutors in the Western Cape can present such evidence *viva voce.* This obviously entails that adequate arrangements will have to be made to ensure the availability on the date of trial of the analyst who analyzed the relevant blood sample. If such evidence is not disputed or if it is admitted by the defence, this *viva voce* evidence will not be necessary. (This will obviously put a tremendous strain on the laboratory staff and might affect their ability to cope with their workload.)

2. The evidence can be contained in a section 213 (of the Criminal Procedure Act) statement after proper regard is had to the rules of admissibility provided for in the section. If not in dispute, the presentation of evidence in this format will satisfy the legal requirements. If the defence

however objects to the presentation of evidence in this format, the evidence shall not be admissible during the proceedings (compare section 213(2)(d)).

3. An accused may be willing to admit the operation, trustworthiness and calibration of the device in terms of section 220 of the Criminal Procedure Act. If so, then *cadit quaestio!*

4. The State may consider presenting the evidence in terms of section 3 of the Law of Evidence Amendment Act, 1988 (Act 45 of 1988). Although a court may rule the presentation of such evidence admissible, the evidential value thereof remains uncertain until a court finally makes a favorable decision in that regard. Should prosecutors consider this avenue, proper regard should be had to the section and to case law dealing with this issue. Prosecutors ought to remember however that if the court allows the statement in terms of section 3 of Act 45 of 1988, the statement no longer has the *prima facie* status it enjoyed in terms of section 212(4)!

5. The State might consider presenting a statement by the analyst containing the relevant evidence, in terms of section 222 of the Criminal Procedure Act. The provisions of this section should be carefully considered by prosecutors before submitting same.

In the long run and to avoid many arguments and uncertainties, it may be more prudent to present the required evidence *viva voce.*

2. The legal position in the rest of South Africa *S v Van Der Sandt.*

An attempt was made under the heading *The legal requirements* to provide a brief compendium of the general legal principles applicable in cases where the State makes use of machines / devices to prove issues in dispute during criminal court cases.

In that paragraph reference was made to a number of recent High Court decisions where the courts followed the rules laid down by the Appeal Court. For the sake of clarity and to ensure that prosecutors understand the issue, it is perhaps appropriate to quote a few remarks made by the judges in these cases.

In *Van Der Sandt* 1997 (2) SACR 116 (W), a full bench of the Witwatersrand Local Division of the High Court held as follows on 131 (per Van Dijkhorst J) :

"In prosecutions for contravention of s 122(2) of the Road Traffic Act 29 of 1989 [now section 65(2) of Act 93 of 1996] *the State has to prove that the measuring instrument gives the correct measurement. This entails that its* ***operation be explained, that it is proved to be trustworthy in its operation and that its results is*** **(sic)** ***proved to be correct. This includes proof that it is properly calibrated to official measurements."*** (My emphasis and inclusion).

In Bester 2004(2) SACR 59 (C), Erasmus J remarked in a case dealing with the contravention of section 65(5), after extensive reference to the principles laid down in *Van Der Sandt, supra, Strydom* 1978 (4) SA 748 (E) on 751 F-H and *Mthimkulu* 1975 SA 759 (A) as follows:

"In die onderhawige geval is daar geen getuienis aangebied ten opsigte van die korrektheid van die toetsingsproses nie ... Veral in 'n geval, soos hierdie, waar gebruik gemaak word van gesofistikeerde en outomatiese apparaat ....., word daar na my mening vereis dat daar bewys van betroubaarheid van die apparaat in die analise moet wees.

Die Staatsaak in die onderhawige geval gaan mank daaraan en derhalwe kan die bevinding ten opsigte van die appellant se alkoholasemkonsentrasie nie bevestig word nie."

In *Price v Mutual & Federal Insurance Co. Ltd* 2007 (1) SACR 501 (SECLD), Sangoni J, on 512 h refers with approval to the above quoted passage in *Van Der Sandt,* supra and indicates that, apart from requiring proof that breathalysers are properly calibrated before they are used, proof needs to be adduced that *"…the* ***specific machine used*** *was in a good working order* ***at the time****…*". He further states " *It is trite that, with regard to evidential breath testers, there are standards or specifications to be met that are laid down or prescribed within the relevant jurisdictions. …. Such specification seeks to eliminate the risk of a false result with regard to breath-alcohol value. With such specifications and stringent requirements one in effect moves from the generality of a brand to the specificity of an individual instrument, with a view to eliminating the risk of false or incorrect results.*" (My emphasis).

More recently in the case of *Molahlane* [2009] JOL 23937 (E), Plasket J, with reference to prosecutions in terms of section 65(5) of the National Road Traffic Act 93 of 1996 held as follows in paragraph [7] of the case: *"It is required of the State when prosecuting a person on a charge of contravening s 65(5)(a) of the Act to prove that the accused's alcohol concentration had been tested by the 'prescribed equipment' as envisaged by the Act. It is also incumbent on the State to prove the reliability of the apparatus used and of its analysis. With reference to Bester and the subsequent case of Price v Mutual and Federal Insurance Co Ltd, Hoctor summarizes the position thus:*

'In terms of s 65(7), the concentration of alcohol in the accused's breath is ascertained by using the prescribed equipment. Such equipment, in terms of reg 332 of the Regulations, must comply with the requirements of the standard specification SABS 1793 "Evidential breath testing". 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." In casu the state failed to adduce such evidence and the conviction was set aside.

A careful study of the cases leaves one in no doubt about the obligation resting on the State in this regard.

In Chapter A above it was indicated that the *Ross*-decision clearly held that the evidence regarding the general functioning of the gas-chromatograph, its trustworthiness /accuracy and the calibration of the device, **cannot be adduced** by a section 212(4) certificate. If it is done in this fashion, that evidence will be ruled inadmissible. This decision is, as was pointed out below, is however in conflict with the earlier decision of the Western Cape High Court in *Mouton.*

a) What is the legal position regarding this issue in the rest of South Africa?

The answer to this problem, so is submitted, is found in the decision of *Van Der Sandt* 1997 (2) SACR 116 (W). This particular case was heard by a Full Court due to a number of predating conflicting decisions on other aspects of the law which are not relevant to the current discussion. Being a decision of a Full Court, and although many of the rulings may be viewed as *obiter* remarks, it is submitted that this decision **carries strong persuasive force** which at least deserves serious consideration by prosecutors and magistrates.

The decision in *Van Der Sandt supra* was approved and followed (by implication) in the subsequent cases of *Gamede* [2009] JOL 24178 (KZP), *Price v Mutual & Federal Insurance Co. Ltd* supra and in the very recent, as yet unreported decision of the court in *Sithole and The Stat***e**, (a decision of the High Court North Gauteng Pretoria, case number A 1051/11, delivered on 8 October 2012 by Bam AJ. (Compare paragraph 24 of the decision)).

It is appropriate to refer here to some of the remarks made by Van Dijkhorst J in *Van Der Sandt supra***.** The judge clearly identifies the problem facing the state as follows on 131: *"This brings me to the real problem facing the State. A requirement that in every case viva voce evidence should be adduced of the operation, effectiveness and correctness of the gas chromatograph will put a severe strain on the staff of the State laboratories"*.

The judge then proceeds to provide the solution, making very important remarks in 133 and further.

Due to the wide dimensions of the judgment, an attempt will be made to tabulate the most important findings of the court and then to give a discussion thereof. The following remarks were made in the course of the judgment:

3.1 The gas-chromatograph is not an apparatus which can be operated reliably by a layman.

3.2 The courts cannot take judicial notice of the operation of the apparatus, because the functioning thereof is at present not well known.

3.3 The "*measuring standard"* which is referred to in section 7(5) of Act 76 of 1973 (which measuring standard "*... for the purposes of any law or any other legal purpose, be traceable to a national measuring standard* ..."), is not a reference to a measuring apparatus, but reference to an official measuring standard which is used by officials of metrology to test measuring apparatus which are generally used in the trade. These measuring standards are also called departmental, regional and inspection standards. These measuring standards are used in compliance with the provisions of the Trade Metrology Act, 1973 (Act 77 of 1973). It is these latter standards which must be "*traceable"* to the "*measuring standards"* set out in section 7(5) of Act 76 of 1973. These measuring standards can be used to calibrate other measuring apparatus.

3.4 Evidence that instruments were calibrated (assized), was in the past accepted by our courts as *prima facie* proof of the correctness thereof. This included acceptance of three aspects:

1. That a duly qualified and authorized person in his official capacity had tested the instruments and found them to be in proper working order;

2. That the yardstick he had used in checking its calibration was reliable (i.e. that it conformed with the national measuring standard); and

3. That the instrument had not since assizement become unreliable.

(The court in this regard referred to *Mthimkulu* 1975 (4) SA 759 (A) on 763A-D, 765 B-H).

3.5 The court will not to the same extent accept that instruments which have not been calibrated, also function reliably.

3.6 For the purposes of prosecutions in terms of section 65(2) of the Road Traffic Act, 1989 (Act 29 of 1989) the state will have to prove that the measuring instrument which was used gave a correct measurement. This means that the **operation of such apparatus will have to be explained, that proof must be adduced that such apparatus is reliable for the purpose for which it was used and that the result obtained was reliable and correct.** Proof must also be adduced that the apparatus was properly calibrated to official measurements.

3.7 This does not mean that a court will not be entitled to take judicial notice of and accept as adequate proof of the trustworthiness that the particular instrument has been properly calibrated.

3.8 A gas-chromatograph as such cannot be calibrated. The "*weights"* which are used in the process, can however be calibrated.

3.9 Although section 212(4) of the Criminal Procedure Act attaches *prima facie* proof to the certificate wherein the result of the blood analysis is mentioned, it does not mean that the section necessarily does away with proof, that the applicable apparatus was reliable and functioning correctly. If no judicial notice can be taken of the applicable apparatus's functioning and reliability, the expert who used the apparatus, should still be compelled to explain which apparatus has been used, explain the functioning of the apparatus and why it is reliable.

3.10 Proof of the reliability of the applicable apparatus, can be ignored in cases where there is a high degree of probability that it is reliable or in cases where it was tested. **If during the analysis use is made of a measuring standard, proof that it was calibrated is normally also proof of its accuracy**. (Compare *Mthimkulu* 1975 (4) SA 759 (A).)

3.11 When the gas-chromatograph is calibrated and part of the calibration includes the use of a set of weights to determine mass, **a statement to the effect** that the weights were calibrated (despite the fact that this might be hearsay evidence) will be sufficient proof thereof. **No further proof that the weights are traceable to the official measuring standard is required.**

3.12 The operation of the gas-chromatograph is not of general knowledge to the courts. Judicial notice cannot be taken of the instrument's reliability. It would therefore not be unreasonable to expect the chemical analyst, should he wish to avoid having to give *viva voce* evidence, to set out fully in his statement in terms of section 212(4), his qualifications, the process used to analyse the blood, the result of the analysis and the reasons for its reliability. Such comprehensive explanation is an indispensable part of the required evidence which must be adduced.

3.13 No support can be found in the argument that section 212(4) intended to do away with the requirement that the expert who used the apparatus to ascertain a certain fact, should also give evidence as to how the apparatus functions, that it is reliable for this purpose, what the result of the test was and that it was reliable. To expect the expert to give this information in the certificate again would not be outside the wording of section 212(4).

3.14 Before section 212(4) has any effect, the court must be convinced that the fact was determined by an examination or process requiring skill in "*chemistry"* from the person who determined the fact. The court cannot merely be convinced by a statement to this effect. The process must be explained, so that the court may be placed in a position to be able to determine whether skills in chemistry are in fact necessary to establish the fact**.** The entire process does not require the application of knowledge regarding chemistry, but the process as a whole must be of such a nature that it cannot be effectively carried out by a layman. (See in this regard also the recent decision of the court in ***Sishi*** [2000] 3 All SA 56 (N)).

3.15 Is it necessary that the expert must, apart from the explanation on the operation of the apparatus or process, the reliability thereof, etc, also set out in his statement that the instrument was calibrated against assized apparatus to such an extent that it is traceable to the national measuring standard? The answer is no. A court must be practical. If a court can take judicial notice of hearsay evidence on assized scales, as was done in *Mthimkulu supra*, the court can certainly take judicial notice of the fact that the probability exists that experts who calibrate apparatus in their laboratories, will do so against the national measuring standard. The mere allegation of such proper calibration will be sufficient *prima facie* evidence thereof**.** This inference is also in accordance with the wording of section 212(4) which only requires that the process be set out.

It is necessary to make a few comments here on the views of Bozalek J on the calibration of devices as expressed it in *Ross supra* especially as this decision is directly in conflict with the decision of the court in *Van Der Sandt supra.*

In paragraph [9] and [10] of the judgement Bozalek J explains the perceived difference between section 212(4) and section 212(10) of the Criminal Procedure Act, 1977 (Act 51 of 1977).

He indicates that section 212(4) stipulates that certain factual findings established *inter alia* by an examination or process requiring any skill in a range of scientific fields, may be *prima facie* proved by the production of a section 212(4) affidavit. In contrast to this section, he finds that if a fact is sought to be established by a reading from a measuring instrument, the calibration and accuracy of such instrument is dealt with by section 212(10) of the Criminal Procedure Act. In paragraph [11] he finds in this regard as follows: *"As is apparent from these provisions, ss10 does not allow prima facie proof of the calibration and /or accuracy of any measuring instrument by way of certificate. Notwithstanding this, the certificate proffered in the present matter purported to deal with the accuracy and calibration of the measuring instruments used in the blood specimen test as follows:*

"5 The concentration of ethanol (hereafter referred to as 'alcohol' in blood specimens and other fluids of biological origin, is established by using gas chromatography. The blood specimen (…) was analysed in duplicate using the following method (…):

5.1 The gas chromatographs are calibrated before the specimen are analysed. Calibration is done by using certified alcohol standards of different conditions to obtain a calibration curve. The certified standards are supplied by the National Metrology Institute of South Africa (NMISA), which is the custodian of national measuring standards in South Africa." (My emphasis).

In paragraph [12] Bozalek J then makes the following ruling: "*The 'evidence' in question quoted above was inadmissible since it was not proved by means of* ***an affidavit****, viva voce evidence nor was it admitted by agreement. In argument it was*

conceded on behalf of the state that this evidence should have been proved by way of an affidavit…." (My emphasis).

Finally Bozalek also remarks in the last sentence of paragraph [20] of the decision as follows: " *No explanation has been proffered as to why it* (the State) *believed that it was entitled to do so by means of a certificate, notwithstanding the provisions of s 212(10) which require the use of an affidavit."*(My inclusion and empahsis).

Without being overly critical, the decision of Bozalek J is, inter alia, respectfully subject to criticism for the following reasons:

- Section 212(10) is currently not applicable in South Africa in view of the fact that the Minister has not yet complied with the jurisdictional factor provided for in the section. The section provides as follows: "*The Minister may in respect of any measuring instrument as defined in section 1 of the Trade Metrology Act, 1973 (Act 77 of 1973), by notice in the Gazette prescribe the conditions and requirements which shall be complied with before any reading by such measuring instrument may be accepted in criminal proceedings as proof of the fact which it purports to prove,* ***and if*** *the Minister has so prescribed such conditions and requirements and upon proof that such conditions and requirements have been complied with in respect of any particular measuring instrument, the measuring instrument in question shall, for the purposes of proving the fact which it purports to prove, be accepted at criminal proceedings as proving the fact recorded by it, unless the contrary is proved."* (My emphasis).

Until the envisaged conditions and requirements are published by the Minister in Gazette, **no affidavit can be submitted to court in terms of section 212(10)!**

Ex abundanti cautela the following remarks must be made:

(i) Bozalek J is apparently of the view that calibration of devices must be proved (in the absence of *viva voce* evidence or other evidential material) by an *affidavit* (and not a certificate) in terms of section 212(10) of the Criminal Procedure Act before such evidence will be admissible. It is submitted that there is no substance in this ruling in view of the fact that section 212(10) does not refer to calibration of devices as it is currently formulated. There is further no guarantee that if the Minister does indeed formulate and publish conditions and requirements concerning measuring instruments, that the calibration process will form part of these conditions and requirements.

It is further submitted that there is currently no authority nor any substance in the view (if such view exists) that evidence concerning calibration of devices, in the

absence of *viva voce* evidence or other admissible evidential material, can only be proved via an affidavit!

(ii) Section 212(10) allows the Minister to publish conditions and requirements "*of any measuring instrument as defined in section 1 of the Trade Metrology Act, 1973 (Act 77 of 1973)"* There is apparently currently also uncertainty whether a gas chromatograph is a measuring instrument as defined in section 1 of the Metrology Act, 1973. Compare in this regard the description of the operation of a gas chromatograph as set out in *Dickenson 1*982 (3) SA 84 (A) on 95A and the remarks made by the court in 91 and a similar description in *Greef* 1995 (2) SACR 687 (A). Only time will tell whether, having regard to the above mentioned definition in the Trade Metrology Act, conditions and requirements will be published in the Gazette by the Minister concerning the gas chromatograph.

The concession made by the state advocate in paragraph [12] was, as is respectfully submitted, ill-conceived and out of order. The advocate was apparently unaware of the decision in *Van Der Sandt supra* (and obviously also unaware of the *Mouton* decision) where approval has been given for the presentation of evidence concerning the calibration etc. via the presentation of a section 212(4) **certificate.** The concession that the evidence should have been proved by way of **affidavit** is nonsensical and wrong!

- Bozalek J apparently did not know of or consider the decision in *Van Der Sandt* or *Mouton supra* in this regard. Had this been done, the final decision might have been quite different.

At the beginning of this paper it was mentioned that courts do not blindly accept the results of apparatus if they are used to prove a fact in dispute. The court will only accept such evidence if it is properly proved that the applicable apparatus or instrument which was used is reliable for this purpose, that it functioned properly and that it gave accurate results. This principle is clearly confirmed in *Van der Sandt supra*.

What is of importance, is that this court held that such evidence can be adduced **documentarily in terms of a section 212(4) certificate and that it need not be proved by *viva voce* evidence or other evidential material.** This **dictum** was followed by the judge in the *Mouton* decision! The implication thereof is that if the analyst comprehensively sets out in a section 212(4)-certificate, (or in an annexure which is clearly identifiable as part of the certificate,) the process which was used during the analysis, that such process and analysis is reliable and trustworthy and that a proper calibrated process was followed, then such certificate provides ***prima facie*** proof of what is alleged until it is rebutted by the defence. If the contents of the certificate are not rebutted by credible evidence, a court may at the end of the case, find that such **prima facie** proof is conclusive proof of the fact. See also *Sishi* [2000] All SA 56 (N) where the Kwa Zulu-Natal Provincial Division approved and required

this evidence. The value of such a comprehensive statement is that it will obviate the need to call the analyst to adduce **viva voce** evidence!

With regard to 212(4) statements, the following must be remembered: A section 212(4)(a) certificate is admissible evidential material **irrespective of whether the accused or his legal representative admits or objects thereto provided it complies with the requirements of the section!** In contrast with section 239 of the previous Criminal Procedure Act, 1956 (Act 55 of 1956) the admissibility of the certificate is not dependent on the defence's approval. Compare in this regard *Chizah* 1960 (1) SA 435 (A); *Veldhuizen* 1982 (3) SA 413 (A) *Abel* 1990 (2) SACR 367 (C) and *Britz* 1994 (2) SACR 687 (W).

Prosecutors should remember that they cannot be compelled by the court or by the defence to call the analyst to give ***viva voce*** evidence. If the court for one or other reason finds it necessary that the analyst should give **viva voce** evidence, the court is entitled to make such an order. (Compare sections 212(12); 167 and 186 of the Criminal Procedure Act, 1977 and *Sishi* [2000] 3 All SA 56 (N)).

3. Conclusion

Except for prosecutions in the Western Cape Province (where courts will obviously be in turmoil in view of the conflicting decisions) prosecutions in the rest of South Africa, so is submitted, should proceed as was the situation for the past 15 years (since the judgement in *Van Der Sandt supra*.)

This entails that the additional evidence (how the gas chromatograph functions, why it is trustworthy and accurate and that it had been calibrated) required by *Mthimkulu* 1975 (4) SA 759 (A), should be adduced by the prosecution when prosecuting offenders in terms of section 65(2) of the National Road Traffic Act, 1996 or in any other criminal case where the results or reading of a device is to be submitted as prove of issues in dispute. **The vehicle to adduce this evidence in prosecutions for contraventions of section 65(2) of the National Road Traffic Act is a certificate in terms of section 212(4) of the Criminal Procedure Act, 1977.**

It stands to reason that prosecutors should carefully consider the section 212(4) certificate in view of the fact that this certificate will only be admissible evidential material if it complies with the requirements set out in the sub-section! Prosecutors should make sure that the 212(4) certificate embodies the information (from the analyst) required by the court in *Van Der Sandt, supra* in detail!

Finally the following: It can do no harm if prosecutors, in addressing the courts before judgement and if a section 212(4) certificate, containing the relevant information, was submitted by the state in those proceedings, point out to the court that the additional evidence contained in the 212(4) certificate, is in fact legally required and that it **is admissible** in terms of the *Van Der Sandt* and *Mouton* decisions. Such address might enlighten magistrates and make them aware of these decisions. It will allow

them to mention this in their judgements and in an appeal later lodged against the decision of the magistrate, High Court prosecutors and Judges will note the reason why the court *a quo* accepted the evidence and ruled it to be admissible. This might assist the court on appeal to at least take note of the *Van Der Sandt* and *Mouton* decisions and to then make a proper finding in this regard.

J F Scheepers

Justice College

January 2013

A Last Thought

Volume 1A contains the following *pro formas* and the theory behind it:

1) Explanation of the accused's rights with regard to *legal representation* in terms of *section 35(3)(f)* and *section 35(3)(g)* of the Constitution of the Republic of South Africa, 1996
2) Proceedings in terms of *section 35(3)(g)* of the Constitution of the Republic of South Africa, 1996, where legal aid was refused, and the court rules that legal aid must be given
3) Admissions in terms of *section 220* of the Criminal Procedure Act 51 of 1977
4) Proceedings in terms of *section 115* of the Criminal Procedure Act 51 of 1977
5) Explanation of the accused's rights with regard to *cross-examination*
6) Explanation of the accused's rights *after* the State has *closed* its case against the accused
7) Explanation of the accused's rights with regard to *mitigation* before sentence
8) Explanation of the rights of the *undefended* accused with regard to the *automatic* review of the criminal proceedings
9) Explanation of the rights of the *undefended* accused with regard to *appeal*
10) Proceedings in terms of *section 112(1)(a)* of the criminal Procedure Act 51 of 1977
11) Explanation of the rights of the undefended accused with regard to *section 112(1)(b)* of the Criminal Procedure Act 51 of 1977
12) Enquiry in terms of *section 103(1)* / *section 103(2)* of the Firearms Control Act 60 of 2000
13) Record of a confession

Volume 1A consists of the following eight chapters:

1) *Chapter 1*: Explanation of the accused's rights with regard to legal representation
2) *Chapter 2*: The *rights* of the undefended accused during the criminal trial
3) *Chapter 3*: The different *plea* proceedings in terms of *section 112* and *section 115* of the Criminal Procedure Act 51 of 1977
4) *Chapter 4*: Assault with the intent to do grievous bodily harm
5) *Chapter 5*: *Crimen injuria*
6) *Chapter 6*: Unlawful possession of a *firearm*
7) *Chapter 7*: Unlawful possession of *ammunition*
8) *Chapter 8*: The *taking* of a confession