

SOUTH AFRICA / JUDGMENT

De Villers Mouton v S (A449/10)

[2010] ZAWCHC 357 (1 January 2010)

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COURT

Western Cape High Court, Cape Town

BEFORE

Weinkove, Cleaver

CASE / FILE NUMBER

A449/10

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IN THE HIGH COURT OF

SOUTH AFRICA

WESTERN CAPE HIGH

COURT, CAPE TOWN

CASE NO: A449/10

LOWER COURT CASE NO.

458/09

In the matter of:

JOHANNES

DE VILLIERS MOUTON

.....Appellant

and

THE

STATE

.....Respondent

JUDGMENT

WEINKOVE, AJ

1. Appellant was charged with contravening Section 65(1)(a) of Act 93 of 1996 in that on Saturday, 19 July 2008, he drove a motor vehicle, CVY 11989 while under the influence of alcohol. The alternate charge was that he drove at a time when his blood alcohol level was in excess of 0.05g/100ml, i.e. being 0.20g/100ml. A second alternative charge was that he drove recklessly or negligently. 2. Both in the court a quo and before us, appellant's counsel challenged the evidentiary value of the affidavit in terms of

section 212 of the Criminal Procedure Act No 51 of 1977 ("the Act") which had been handed in to the trial court as evidence.

The document recorded the procedure followed in analysing the sample which had been taken of the appellant's blood and recorded the conclusion that the concentration of the alcohol in the blood specimen was 0.20g/100ml. Relying on the full bench decision in *S v Van der Sandt*¹ counsel submitted that the affidavit lacked the necessary averments concerning the reliability of the apparatus used and also that no evidence had been placed before the court in regard to the calibration of the apparatus used to test the blood sample. In view of this challenge, it is necessary to quote the relevant portions of the affidavit in full. "In terms of subsections 212 (4) (a) and 212 (8) (a) of the Criminal Procedure Act, 1977 (Act 51 of 1977), I, Lunga Soboyisi. hereby certify as follows:

1. I have a National Diploma in Analytical Chemistry from the Cape Peninsula University of Technology and am in the employ of the State as an Assistant Forensic Analyst at the Forensic Chemistry Laboratory of the National Department of Health. Cape Town.
2. On 24 July 2008, the Laboratory received from the South African Police Service, Moorreesburg, a polystyrene container, sealed with seal number FA121177 and bearing the identification mark: MOORREESBURG 98-07-2008 3. The polystyrene container was kept in an access- controlled area until

analysis.

On 22 August 2008, in the performance of my official duties, I broke the intact seal and found a blood specimen with a label attached to it bearing the following identification mark: FA121177 4. I analysed the blood specimen by means of the method described in Paragraphs 5 and 6, which requires skill in chemistry, and obtained

the following results: 4.1. The concentration of the alcohol in the blood specimen was 0.20 grams per 100 millilitres. 4.2. The concentration of the sodium fluoride in the blood specimen was 1.4%.

WEINKOVE, AJ

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2. Both in the court a quo and before us, appellant's counsel challenged the evidentiary value of the affidavit in terms of

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The document recorded the procedure followed in analysing the sample which had been taken of the appellant's blood and recorded the conclusion that the concentration of the alcohol in the blood specimen was 0.20g/100ml. Relying on the full bench decision in *S v Van der Sandt*¹ counsel submitted that the affidavit lacked the necessary averments concerning the reliability of the apparatus used and also that no evidence had been placed before the court in regard to the calibration of the apparatus used to test the blood sample. In view of this challenge, it is necessary to quote the relevant portions of the affidavit in full.

"In terms of subsections 212 (4) (a) and 212 (8) (a) of the Criminal Procedure Act, 1977 (Act 51 of 1977), I, Lunga Soboyisi. hereby certify as follows:

1. I have a National Diploma in Analytical Chemistry from the Cape Peninsula University of Technology and am in the employ of the State as an Assistant Forensic Analyst at the Forensic Chemistry Laboratory of the National Department of Health. Cape Town.
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MOORREESBURG 98-07-2008

3. The polystyrene container was kept in an access- controlled area until

analysis.

On 22 August 2008, in the performance of my official duties, I broke the intact seal and found a blood specimen with a label attached to it bearing the following identification mark:

FA121177

4. I analysed the blood specimen by means of the method described in Paragraphs 5 and 6, which requires skill in chemistry, and obtained

the following results:

- 4.1. The concentration of the alcohol in the blood specimen was 0.20 grams per 100 millilitres.
- 4.2. The concentration of the sodium fluoride in the blood specimen was 1.4%.
5. The concentration of ethanol (hereinafter referred to as 'alcohol') in blood specimens and other fluids of biological origin, is established by using gas chromatography. This blood specimen (CTN-DD08690/2008) was analysed in duplicate using the following

method: 5.1. The gas chromatographs are calibrated before the specimens are analysed. Calibration is done by using certified alcohol standards of different concentrations 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.

5.2. The blood specimen and internal standard (tertiary butanol) are dispensed into a headspace vial by means of a diluter/dispenser that has been verified with respect to volume. 5.3. The headspace vial referred to in 5.2 is then equilibrated in a headspace autosampler and, after a set period of time, a sample of the headspace in the vial is injected onto a column in a gas chromatograph. The headspace sample containing the alcohol and internal standard flows with the mobile phase (nitrogen) through the column where, as a result of interactions between the compounds (alcohol and internal standard) and the column material, the compounds are separated. The two gas chromatographs are operated under different experimental conditions using columns of differing polarity. 5.4. At the end of the column a detector is situated that detects the compounds flowing with the mobile phase through the column. The signal generated by the detector is captured by chromatographic software and a chromatogram is illustrated. The chromatogram represents the detector's response to the alcohol and internal standard, which are observed as separate peaks, and provides the information necessary to calculate the alcohol concentration. Alcohol and internal standard are identified by their retention times (i.e. their time of residence on the column). 5.5 Reliability of the gas chromatographs is constantly checked by having recourse to the reproducibility of the retention times of the compounds on the column, base-line appearance and resolution between alcohol and internal standard peaks. In addition, a quality control specimen is chromatographed regularly to verify instrument performance. 5.6. This method has been validated.

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5.2. The blood specimen and internal standard (tertiary butanol) are dispensed into a headspace vial by means of a diluter/dispenser that has been verified with respect to volume.

5.3. The headspace vial referred to in 5.2 is then equilibrated in a headspace autosampler and, after a set period of time, a sample of the headspace in the vial is injected onto a column in a gas chromatograph. The headspace sample containing the alcohol and internal standard flows with the mobile phase (nitrogen) through the column where, as a result of interactions between the compounds (alcohol and internal standard) and the column material, the compounds are separated. The two gas chromatographs are operated under different experimental conditions using columns of differing polarity.

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5.5 Reliability of the gas chromatographs is constantly checked by having recourse to the reproducibility of the retention times of the compounds on the column, base-line appearance and resolution between alcohol and internal standard peaks. In addition, a quality control specimen is chromatographed regularly to verify instrument performance. 5.6. This method has been validated.

6. The concentration of the sodium fluoride in blood specimens and other fluids of biological origin is established by using a fluoride

electrode connected to an ion selective meter. This blood specimen (CTN-DD08690/2008) was analysed using the following method: 6.1. The ion selective meter is calibrated by using certified reference standards of different concentrations, which are obtained from the National Metrology Institute of South Africa (NMISA). 6.2. The electrode is placed directly into the blood specimen and the concentration is displayed and recorded. 6.3. In addition, a quality control standard is analysed regularly during the analysis of a batch to check instrument performance. 6.4. This method has been validated." 3. In Van der Sandt Van Dijkhorst J embarked on a detailed examination of the case history at the time, found that the subsection was not unconstitutional and in regard to the point made to the appellant before us in respect of the calibration of the apparatus used, made the following finding: "If therefore a gas chromatograph is calibrated and as part of such calibration, eg a set of weights is used to determine mass, a statement that they have been officially assized (albeit hearsay as to their correctness) would be adequate. No further proof is required to establish that that set of weights conforms with an official standard. '2 and further

6. The concentration of the sodium fluoride in blood specimens and other fluids of biological origin is established by using a fluoride

electrode connected to an ion selective meter. This blood specimen (CTN-DD08690/2008) was analysed using the following method:

6.1. The ion selective meter is calibrated by using certified reference standards of different concentrations, which are obtained from the National Metrology Institute of South Africa (NMISA).

6.2. The electrode is placed directly into the blood specimen and the concentration is displayed and recorded.

6.3. In addition, a quality control standard is analysed regularly during the analysis of a batch to check instrument performance.

6.4. This method has been validated."

3. In Van der Sandt Van Dijkhorst J embarked on a detailed examination of the case history at the time, found that the subsection was not unconstitutional and in regard to the point made to the appellant before us in respect of the calibration of the apparatus used, made the following finding:

"If therefore a gas chromatograph is calibrated and as part of such calibration, eg a set of weights is used to determine mass, a statement that they have been officially assized (albeit hearsay as to their correctness) would be adequate. No further proof is required to establish that that set of weights conforms with an official standard. '2

and further

"One question remains: Must the deponent to the affidavit or certificate in addition to an explanation of the process and instrument used and its efficacy set out that it has been calibrated against assized units of measure or draw the line right through to the national measuring standard? Neither, in my view. A court of law should be practical. If a court can take judicial notice of hearsay evidence about assized scales, as was done in *S v Mthimkulu*³ (supra), there can be no serious objection to judicial notice of the fact that there is a high likelihood that scientists in designated government laboratories when calibrating their instruments will do so against correct standards. The mere allegation of proper calibration will in my view be adequate prima facie proof thereof. This conclusion is in conformity with the wording of s 212

- (4) which requires no more than that the process be set out. 4 In my view the affidavit accepted by the court a quo complies in all respects with the requirements set out by Van Dijkhorst J as well as the requirements set out by Du Plessis J in his concurring minority judgment. These relate to the manner in which the qualifications of the deponent are to be set out and the detail required in respect of the process requiring skill and chemistry which has been used, as also the requirement that the deponent must state that the chromatographs were properly calibrated. In argument before us, appellant's counsel expanded his attack on the acceptance of the affidavit by submitting that information was required as to the standard used by the NMISA in regard to the weights used for the calibration. It is clear from the certificate that no weights were required and that the calibration was done by using certified alcohol standards of different concentrations to obtain a calibration curve. In my view the averment to the effect that the certified standards are supplied by the NMISA is sufficient, having regard to the portion of the Van der Sandt judgment quoted above.

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above.

4. Appellant's counsel also asked us to find that there was a reasonable doubt that the appellant's blood may have been contaminated prior to the test being completed. This submission was based on the fact that according to the affidavit filed in terms of section 212 (4) the deponent broke the intact seal in which the blood specimen of the appellant was contained on 22 August 2008 while it appeared from document supplied as further particulars to the charge sheet that the "date of injection" (apparently in respect of the sample) was 26 August 2008. Counsel made much of the fact that he had informed the state that he intended to attack virtually every element of the state's case, and in particular the section 212 affidavit and that he expected the state to call the deponent to the affidavit so that he could be cross-examined. The state elected not to do so and relied on the certificate. We have no knowledge as to the meaning of the "date of injection" or whether the appellant's blood could have been contaminated by a delay in examining it, but a remedy was available to the appellant's

counsel. As pointed out in *Van der Sandt*,⁵ section 212 (12) of the Criminal Procedure Act permits the court to call the deponent to the affidavit to testify viva voce and a court which refuses a fair request to the accused to do so will put the outcome of the trial at risk. Appellant's counsel could therefore have requested the magistrate to call the deponent to give evidence or he could of course have called an expert himself. That such steps were available was also made clear in *S v Tshabalala*⁶ a judgment given in this division. Where the requirements of section 212 (4) (a), as discussed in *Van der Sandt*'s case have been complied with, the fact established in terms of that

section shall upon the mere production of an appropriate affidavit

be prima facie proof of such fact. In the present case thus the finding was that the concentration of the appellant's concentration of alcohol in the blood specimen was 0.20g/100ml. In *S v Veldthuizen*⁷ it was made clear that the words "prima facie evidence" cannot be brushed aside or minimised and in *S v Greeff*⁸ also a judgment of the Supreme Court of Appeal, Grosskopf JA said the following: "Die vraag is nou of die appellant se skuld bo redelike twyfel bewys is. As die sertifikaat sy voile regs krag het ingevolge art 212(4)(a) van die Strafproseswet, moet die antwoord bevestigend wees. (Sien *S v Veldthuizen* 1982

- (3) SA 413 (A) op 416g-h.) Die feit wat bewys moes word was dat die monster bloed nie minder nie as 0,80 gram per milliliter alcohol bevat het. Die sertifikaat voldoen aan al die formele vereistes om prima facie bewys te vorm dat die bloedkonsentrasie 0,27 gram per milliliter bloed was." 5. In my view therefore the magistrate was correct to treat the affidavit in terms of the section as one which established prima facie that the appellant's blood alcohol content was 0.20g/100ml.
6. The State called various witnesses: 4.1. Mr. Alexander ("Alexander"), who was the driver of the vehicle whose car Appellant collided with on the night in question; 4.2. Julene Alexander, who was a passenger in Mr. Alexander's car at the time; 4.3. Constable Collin Felix ("Felix") of the South African Police; 4.4 Inspector Engelbrecht of the South African Police; and 4.5. Dr. van Heerden.
7. The accident happened late on Saturday night at about 23h00. Alexander explained that while he was travelling he noticed a vehicle driving closely behind him. He moved to the left to allow that vehicle to pass. The vehicle in passing him collided with the back of his vehicle and then drove off. Alexander thought the vehicle was going to stop but when it did not do so he gave chase only to find that Appellant, who was driving the vehicle, was following another vehicle, apparently in the belief that it was the vehicle with which he had collided.
4. Appellant's counsel also asked us to find that there was a reasonable doubt that the appellant's blood may have been contaminated prior to the test being completed. This submission was based on the fact that according to the affidavit filed in terms of section 212 (4) the deponent broke the intact seal in which the blood specimen of the appellant was contained on 22 August 2008 while it appeared from document supplied as further particulars to the charge sheet that the "date of injection" (apparently in respect of the sample) was 26 August 2008. Counsel made much of the fact that he had informed the state that he intended to attack virtually every element of the state's case, and in particular the section 212 affidavit and that he expected the state to call the deponent to the affidavit so that he could be cross-examined. The state elected not to do so and relied on the certificate. We have no knowledge as to the meaning of the "date of injection" or whether the appellant's blood could have been contaminated by a delay in examining it, but a remedy was available to the appellant's

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4.4 Inspector Engelbrecht of the South African Police; and

4.5. Dr. van Heerden.

7. The accident happened late on Saturday night at about 23h00. Alexander explained that while he was travelling he noticed a vehicle driving closely behind him. He moved to the left to allow that vehicle to pass. The vehicle in passing him collided with the back of his vehicle and then drove off. Alexander thought the vehicle was going to stop but when it did not do so he gave chase only to find that Appellant, who was driving the vehicle, was following another vehicle, apparently in the belief that it was the vehicle with which he had collided.

8. When Alexander caught up with appellant, he spoke to him and testified that he detected a strong smell of alcohol on Appellant's breath and noticed that his eyes were red and bleary. As he put it, it was clear to him that Appellant's eyes were not normal. Inspector. Engelbrecht gave similar evidence, as did Felix.
9. Appellant was arrested and taken to Dr. van Heerden for examination. Felix testified that in his view Appellant was drunk, his speech was slurred and he was unstable on his feet. He staggered slightly and his presentation was similar by the time he got to the doctor. Dr. van Heerden's opinion was that, after his clinical examination, Appellant was moderately under the influence of liquor and that his condition was such that he could not drive a motor vehicle. Naturally, he gave no opinion as to whether Appellant could have driven a vehicle at an earlier stage.
8. When Alexander caught up with appellant, he spoke to him and testified that he detected a strong smell of alcohol on Appellant's breath and noticed that his eyes were red and bleary. As he put it, it was clear to him that Appellant's eyes were not normal. Inspector. Engelbrecht gave similar evidence, as did Felix.
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10. The Magistrate found that both Dr. van Heerden and Alexander's evidence was acceptable, reliable and creditworthy and that they had given a fair account of what had happened. Appellant did not give evidence at all. 11. In his reasons for judgment, the Magistrate found that there was no reason not to accept the evidence of Dr. van Heerden and he also found that Felix was an experienced police officer although he had only had 5 years service at the time. Felix's evidence was that Appellant was considerably under the influence of alcohol. The Magistrate correctly observed that while all the witnesses noticed signs of drunkenness upon Appellant, their observations were not exactly the same because in his experience not two people necessarily noted exactly the same symptoms,, particularly when one is a policeman and the other is an ordinary member of the public. 12. The Magistrate in his judgment was critical of Appellant for not keeping the vehicle he had collided with under observation in his rear view mirror so that he could stop at the same place where that vehicle had stopped instead of giving chase to another vehicle which had not been involved in the accident. He considered this another indication that Appellant's behaviour was influenced by the alcohol he had ingested. He found that there was a strong smell of alcohol on Appellant, his eyes were red, his speech was affected, he was involved in an accident in which he drove into the back of a vehicle that was

travelling in front of him and he was perspiring when he was observed by the witnesses. Evidence was that he was unsteady on his feet and he staggered when he walked. The cumulative effect of all these considerations led him to accept that Appellant had been driving while under the influence of intoxicating liquor.

10. The Magistrate found that both Dr. van Heerden and Alexander's evidence was acceptable, reliable and creditworthy and that they had given a fair account of what had happened. Appellant did not give evidence at all.
11. In his reasons for judgment, the Magistrate found that there was no reason not to accept the evidence of Dr. van Heerden and he also found that Felix was an experienced police officer although he had only had 5 years service at the time. Felix's evidence was that Appellant was considerably under the influence of alcohol. The Magistrate correctly observed that while all the witnesses noticed signs of drunkenness upon Appellant, their observations were not exactly the same because in his experience no two people necessarily noted exactly the same symptoms, particularly when one is a policeman and the other is an ordinary member of the public.
12. The Magistrate in his judgment was critical of Appellant for not keeping the vehicle he had collided with under observation in his rear view mirror so that he could stop at the same place where that vehicle had stopped instead of giving chase to another vehicle which had not been involved in the accident. He considered this another indication that Appellant's behaviour was influenced by the alcohol he had ingested. He found that there was a strong smell of alcohol on Appellant, his eyes were red, his speech was affected, he was involved in an accident in which he drove into the back of a vehicle that was

travelling in front of him and he was perspiring when he was observed by the witnesses. Evidence was that he was unsteady on his feet and he staggered when he walked. The cumulative effect of all these considerations led him to accept that Appellant had been driving while under the influence of intoxicating liquor.

13. The manoeuvre which Appellant was required to execute, i.e. overtaking a vehicle which was giving way for him to do so, was not a complicated manoeuvre which required expert control. Driving into the rear of a vehicle under those circumstances strongly suggests that Appellant was not capable of exercising proper control of the vehicle he was driving. 14. Whatever explanation Appellant may have had for the manner in which he drove, for the smell of alcohol on his breath, for the condition of his eyes and the way that he walked was not shared by him with the Court. In the face of prima facie evidence that Appellant was under the influence of alcohol, his failure to testify must be taken as an added factor in that a prima facie case becomes conclusive where there is a failure on the part of Appellant to give any explanation to the Court. 15. The Court found that Appellant was proved to have had 0.20g/100ml alcohol in his blood at the time that the test was made. Dr. van Heerden in fact testified that that level of alcohol was reconcilable with the observations he made when he examined Appellant. In the result, I would dismiss the appeal. WEINKOVE, AJ I agree the

appeal is dismissed. CLEAVER, J

13. The manoeuvre which Appellant was required to execute, i.e. overtaking a vehicle which was giving way for him to do so, was not a complicated manoeuvre which required expert control. Driving into the rear of a vehicle under those circumstances strongly suggests that AppeWant was not capable of exercising proper control of the vehicle he was driving.
14. Whatever explanation AppeWant may have had for the manner in which he drove, for the smell of alcohol on his breath, for the condition of his eyes and the way that he walked was not shared by him with the Coun\. In the face of prima facie evidence that AppeWant was under the influence of a\coho\, his failure to testify must be taken as an added factor in that a prima facie case becomes conclusive where there is a failure on the part of Appellant to give any explanation to the Court.
15. The Court found that Appellant was proved to have had 0.20g/100ml alcohol in his b\ood at the time that the test was made. Dr. van Heerden in fact testified that that level of alcohol was reconcilable With the observations he made when he examined Appellant.

In the result, I would dismiss the appeal.

I agree the appeal is dismissed.

CLEAVER, J

1 1997

(2) SACR 116 (WLD)

2S v Van der Sandt at 134a-b

3 1975

(4) SA 759 (A)

4At 136a-c

5At 132f-g

6S v Tshabalala 1999

(1) SACR 412 (C) at 424f-h

7 1982

(3) SA 413 (A)

8 1995

(2) SACR 687 (A) at 687j-690a

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