REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: A159/2011

DATE:06/09/2011

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

DI PASQUALE GERALD Appellant

and

THE STATE Respondent

J U D G M E N T

WEPENER, J:

[1] The appellant was charged with a contravention of section 65(5)(b) of Act 93 of 1996 – driving with an excessive amount of alcohol in his breath. He appeared in the Magistrates Court for Hillbrow. He was convicted and sentenced to a fine of R4000.00 or 4 months imprisonment, a portion of which was suspended on certain conditions. After an application for leave to appeal the magistrate granted such leave.

[2] One of the issues that arose in the trial was the use of a measuring instrument referred to as a Dräger machine. Although no evidence was placed before the magistrate regarding the manner in which the machine operated or that it indeed operated correctly, the magistrate said the following in her judgment: “The court can at this point take judicial notice of the accuracy of the machine because we have all been trained in the use of this machine and in the accuracy of the machine. We had been taken to (it); the machine had been brought to the complex at the Magistrates Court. We have seen how it works. We have seen that this machine gives you an accurate turn of events that happened on the day in question… Because the machine; it has two testers and you had to give them a thousand millimetres or a litre of breathe for the reading to be accurate; it will not measure your breathe if you have not given enough breathe. It will read, fail blowing and then the machine resets itself; so if you have blown twice into the machine it means absolutely nothing. It does not mean that there is a larger reading that then recorded by the machine. The machine is quite well manufactured for this kind of

measurements. The serial number indicates also the calibration number; the fact that no documents were proved does not mean that this machine is not working."

[3] In her judgment on the merits the magistrate stated as follows: (read breath for breathe) "Now as the court has mentioned earlier this machine has been put into dispute which resulted in the court officials been (sic) taken to see exactly how the Dragga machine works. We were given a physical demonstration which were made for people who were given blood alcohol consumed given the machine was then tested (on) these persons; directly after consumption of alcohol and then 15 to 20 minutes after. So we could see exactly how the machine works. Again we were seeing how the machine worked when you did not blow upon you taken to the machine and when you blew more that once into the machine. The Dragga machine that is currently used to test your breathe alcohol is in fact a sealed unit that performs its functions without the need of anyone to test for a (indistinct) breathe that has been put into because the breathe is burned within the machine, so that its ethanol reading can be obtained. Ethanol is the active ingredient in alcohol and once this is done the ethanol it burned up; your reading is then given and the machine is reset to work again. So there's no need for this machine to be tested (indistinct) off on numerous occasions because there is scope for error. There is no scope for error. The machine is intelligent enough to realise; not sufficient breathe has been given into the machine; so it will not give you a reading. The machine is intelligent enough to realise that this is the ethanol reading in the breathe cycle given and this is the reading that it comes up with and that is the reading that the court will then have to.

There is no evidence to suggest that:

The machine operated because she could not verbalise that a litre of breathe had to be given in order for her to get this reading. That verbalisation does not reflect or does not detract from accuracy on the reading of this machine.

She indicated that is her job to get you to blow into the machine. The machine does everything else for it. She did not have to tell you that you have not blown sufficiently into the machine. The machine will tell you that you have not blown into the machine.

She did not have to tell you need to blow again. The machine will tell you you need to blow again. So there is no evidence to suggest that this particular machine is defective. This is not a mobile machine that has been taken from one location to another. This is a machine that is housed at Wemmer where people are taken to the machine for their breathes to be tested. These machines are calibrated every six months; the documents are there. The fact that it has not been brought to court is not to say that this machine is not working" and further "and therefore it was necessary for all court officials to see how this machine works to be given a physical and practical demonstration so that we can sit in court and know that when the witness tell us this is what happened that we know this is exactly what happened. And the court finds no reason not to accept the evidence of the state today.

The court can find no reason to just trust (distrust) the working of this machine simply because it is not being an expert is not standing there and telling us that this machine is now working 24/7".

[4] Unfortunately none of the evidence regarding the machine supplied by the magistrate was placed before her in evidence by witnesses. She relied on her own experience having attended a demonstration of how the machine works and the appellant did not have the opportunity to deal with issues raised by the magistrate in her judgment.

[5] It has been held that whenever a measuring instrument is used to prove the guilt of the accused the state needs to explain how that instrument operates. It is required to prove that it operated correctly and that its result is proven to be correct. S v van der Sant 1997 (2) SACR 116 W at 131 F. The state should lead evidence of the trustworthiness of the instrument used as well as to the trustworthiness of the method used by the operator. S v Chetty 1970 (2) SA 640 (N) at 642 E – G and S v Mthimkulu 1975 (4) SA 759 (A) at 764 A – C.

[5] In the matter under consideration the state did not lead any evidence regarding the operation, correctness or trustworthiness of the machine's reading. Upon being questioned regarding the operation of the machine the expert witness and operator merely testified that she "will operate as I use it".

[6] The state also did not present any evidence as to the operator's skill and competence in using the machine. During cross-examination the operator said that she was trained for two days but she has not yet received her certificate of training. It is also unclear what training she received. During judgment the court a quo relied on the evidence quoted above and took judicial notice of the accuracy of the machine.

[7] Leach J (as he then was) said in S v Lourens 2000 (2) SACR 164 ECD at 167 i – 168 a that "…it is wholly improper for judicial officers to attend seminars hosted by the prosecuting authorities of the State in order for it so be 'explained' to them why certain equipment, upon which the State relies in proving the guilt of alleged offenders, should be accepted as being accurate. If the State wishes to rely upon such equipment, it must lead the necessary evidence in court and then, after cross-examination and argument from both sides, the judicial officer must reach a decision. It is certainly not the function of the judicial officers to attend courses to learn about the accuracy of the equipment concerned and then take judicial notice thereof in subsequent hearings. It may well be that the machinery in question is highly reliable, but it is for the prosecuting authorities to convince the magistrate of the fact in court, and not at some other place, and one must wonder whether the magistrates who attended the seminar are not hereafter disqualified from hearing matters of this nature."

[7] It is to be repeated that courts cannot take judicial notice and accept facts which are not easily ascertained. Only if a fact is straight forward and

easily verified can a court take judicial notice thereof. S v Mthimkulu supra at 765 E.

[8] The magistrate erred in relying on her own experience and she should not have done so in view of the clear judgment in S v Lourens supra.

[9] I would in the circumstances propose that the conviction and consequent sentence be set aside.

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W L WEPENER
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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I agree,

H MAYAT
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

Date delivered 6 September 2011