REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case number: A173/21

Magistrate's Court Case Nr. C214/21

Coram: **Goliath DJP et Montzinger AJ**

Heard: **05 November 2021**

Delivered: **12 November 2021**

In the matter between:

PETER HALL Appellant

and

THE STATE Respondent

JUDGMENT

(DELIVERED BY E-MAIL ON 12 NOVEMBER 2021)

MONTZINGER AJ (GOLIATH DJP concurring)

[1] On 21 May 2021 the appellant was convicted in Worcester Magistrate's Court on one count of contravening section 65(2)(a) of the National Road Traffic Act 93 of 1996 ("the Traffic Act"). It was alleged that he drove a motor vehicle on a public road, while the concentration of alcohol in his blood exceeded the legal limit of 0.05 g/100 milliliters, to wit 0,25g/100 milliliters. He was sentenced to a fine of R2000 or six months imprisonment, wholly suspended for a period of two years. With the leave of the court a quo, the appellant now appeals against his conviction.

[2] The appellant pleaded not guilty to the charge and made admissions in terms of the provisions of section 220 of the Criminal Procedure Act 51 of 1977 ("the CPA"). He admitted that on 10 September 2019, he was the driver of the motor vehicle with registration number [….] on the Robertson Road, Worcester, a public road. At the outset, the appellant's legal representative conveyed to the court a quo that he disputed that the blood specimen was correctly obtained, sealed, handled, or analysed.

[3] The state called Mr Ayanda Botla, a traffic officer at Breede Valley Municipality as a witness. The state also presented evidence by handing in a certificate by Mr Kojak Bastian Samuels in terms of the provisions[1] of the CPA. After leading the evidence by Mr Botla and Mr Samuels, the state closed its case. The appellant did not testify in his own defence and closed his case. No other evidence was presented on behalf of the appellant.

[1] s 212 (4)(a) read with s 212(8)(a)

The evidence before the lower Court

[4] Officer Botla testified that on 10 September 2019 he was on patrol duty when he observed the appellant driving a car with registration number NU 63997, with a cell phone in his hand. Botla immediately activated the patrol car's lights and siren, and signaled to the appellant to stop, which he eventually did at a nearby petrol station. Botla explained to the appellant the reasons why he was stopped. During their engagement, Botla detected the smell of alcohol and questioned the appellant to determine whether he drank alcohol. The appellant denied that he consumed alcohol. According to Botla the time of the incident was approximately 16:05 in the afternoon.

[5] Botla was suspicious of the appellant's level of alcohol intoxication, and requested a colleague to bring a breathalyser dragger machine. On arrival of the machine, he requested the appellant to submit himself to a breathalyzer test. The appellant agreed and the machine registered a reading of 0.24 g/100 millimeter. Since this reading was over the allowable legal limit, he informed the appellant of his rights and arrested him at approximately 16:15.

[6] Botla testified that he instructed the appellant to accompany him to the police station, and they travelled together in the patrol car. At the police station, Botla collected a blood sample kit with serial number DD397719, and thereafter, he accompanied the appellant to Worcester hospital. They arrived at the hospital at approximately 17:05.

[7] Botla explained that on their arrival at the hospital, the appellant was registered on the system, and they were escorted to a waiting room. At approximately 17:50, the doctor, Dr Naidoo, arrived and Botla handed the blood sample kit to him. Dr Naidoo did the mandatory interview with the accused in the presence of Botla. The interview was concluded and at approximately 17:55 Dr Naidoo drew the appellant's blood and sealed the sample in front of the appellant and Botla. The serial number of the sealed blood sample was DD397720, and was booked into the SAP 13 store with Worcester SAPS 13/1727/2019.

[8] During cross-examination, Botla remained consistent in his recollection of the events on that day. Two material issues arose during cross-examination. Firstly, the appellant's legal representative disputed the exact time when the appellant's blood was allegedly drawn by Dr Naidoo. Having been arrested at 16:15, the blood sample had to be obtained before 18:15. However, Botla insisted that although he and the appellant waited approximately an hour at the hospital, the blood was drawn by 17:55.

[9] The second issue under cross-examination related to a demonstration by Botla as to the security of the seal on the container that holds the tube with the blood sample. The appellant contends that it is apparent from the demonstration by Botla that the seal can be placed back on the container and can thus be tampered with. The appellant's representative invited Botla to do the demonstration, but it was not clarified what the relevance of the demonstration was. It was also never put to Botla that the seal of the container that held the tube with the appellant's blood sample had been tampered with.

[10] As mentioned, at the conclusion of Botla's testimony the state handed in a certificate in terms of s 212 (4)(a) of the CPA deposed to by Mr Kojack Samuels. This certificate was admitted by the appellant and was accepted as part of the record. Mr Samuels was a forensic analyst in the service of the Forensic Chemistry Laboratory of the Department of Health, in Cape Town. On 13 September 2019, the laboratory received a container sealed with number D397720, and bearing the identification mark of Worcester SAPS 238/09/2019 from the South African Police. Samuels confirmed that the container was kept in an access-controlled area until the analysis was executed. He confirmed in his section 212 (4)(a) certificate that the seal remained intact. On 9 October 2019, he broke the intact seal and found a blood specimen with a label attached, bearing the mark Worcester SAPS 238/09/2019 and reference number D397720. He analysed the blood specimen by using a chemical separation technique called gas chromatography and found that the blood specimen contained a concentration of alcohol of 0,25g per 100 milliliters. The concentration of the sodium fluoride in the blood specimen was 1,7g per 100 milliliters.

[11] Samuels further stated that the gas chromatograph was calibrated before the specimens were analysed. He confirmed that he was responsible for the calibration of the gas chromatographic machines before analysing the blood samples. He explained that calibration is done by using certified outdoor standards of different conditions to obtain a calibration curve, and the certified standards are supplied by the National Metrology Institute of South Africa. He would also regularly verify the performance of the instruments by testing a quality control sample to check that the gas chromatograph was still operating in accordance with acceptable standards.

The Grounds of appeal and the appeal court's approach

[12] The appellant contends that the magistrate materially erred and misdirected herself by finding that: (1) the appellant's blood was obtained within the two-hour period; (2) a registered medical practitioner drew the appellant's blood, (3) the state proved the chain of custody of the blood sample beyond reasonable doubt, (4) the section 212(4)(a) certificate for the calibration of the measuring instrument is admissible evidence.

[13] In analyzing the grounds of appeal this Court is aware of the approach it is obliged to follow as confirmed in *S v Hadebe & others*[2]. It is trite that a court of appeal will only interfere with the trial court's factual findings if the lower court committed a demonstrable and material misdirection and if the findings of fact were clearly wrong.

[14] It follows that if we are not convinced that the lower court materially misdirected itself in respect of its findings that relates to any of the grounds advanced, then the appeal must fail. The grounds will be considered in turn.

Was the blood drawn within the two-hour period?

[15] The only evidence that served before the lower court regarding the time the blood was drawn was that of Botla. The appellant's attack on Botla's evidence on this aspect are twofold. Firstly, that the *'manner'* in which the evidence regarding time was placed before the court was inadmissible. The *'manner'* referring to Botla relying on a

[2] 1997 (2) SACR 641 (SCA) at 645 e – f

piece of paper that contained information that he obtained from his pocketbook and police statement to refresh his memory for his testimony. Secondly, it was contended that Botla's recollection of the events on 10 September 2019 is not reliable, as he had to testify from the mentioned piece of paper, and not his notebook. Consequently, it was argued that he had no independent recollection of the day in question, and therefore the evidence he presented was inadmissible.

[16] An overview of the evidence before the lower court reveals that Botla, by virtue of his position, had been involved in numerous situations where he dealt with motor vehicle drivers who are suspected of driving under the influence of alcohol. In the normal course of his duties, he would accompany the driver to a hospital to have his/her blood drawn by a medical practitioner, and subsequently analysed. Botla testified that because of his experience, he has a pocketbook in which he records the times, and the serial numbers of the blood sample kits in respect of each incident. He is therefore aware of the critical importance of maintaining an adequate record of firstly, the time the blood was drawn and secondly, whether the blood sample belongs to the correct accused.

[17] Botla was not challenged on this issue. His evidence that he recorded 17:55 as the time Dr Naidoo extracted the blood from the appellant in his pocketbook, was thus uncontested. He also deposed to an affidavit at the police station on the evening of 10 September 2019, confirming the time. In addition, he reviewed his statement and his pocketbook in preparation of his testimony. We are accordingly satisfied that Botla's testimony is thus prima facie proof of the time the blood was drawn, and in the absence of evidence that rebut his recollection of the events on 19 September 2019, becomes conclusive proof.

[18] In the face of this prima facie evidence presented by the testimony of Botla, the only person who could rebut Botla's evidence on the time issue was the appellant. Although no duty rests on an accused to advance evidence in rebuttal, there are two legal principles that directs a court how to deal with the probative value of the evidence in such a situation.

[19] The first principle was confirmed by the Supreme Court of Appeal in *S v Boesak*[3] that it is necessary for an accused to '*put his version'* when he or his legal representative cross-examines a particular witness by challenging each statement that he disputes, otherwise the trial court will accept that the relevant statement is not in dispute. In this case, an attempt was made to create doubt in the mind of Botla that he could not be certain about the time the blood was drawn from the appellant. However, no version by the accused was put to Botla about the time the blood of the accused was allegedly drawn. Beside Dr Naidoo, the appellant was the only person who could testify about the time. In the absence of a version by the appellant in this regard, the lower court was correct to conclude that the issue remained unchallenged.

[20] The second principle obliges an accused to rebut evidence, which establishes a prima facie case. This was confirmed by the Constitutional Court, also in *S v Boesak*[4]*,* where the court emphasised that an accused has to rebut evidence particularly in circumstances where the prima facie evidence proves the elements of the alleged crime. In this matter, the evidence before the lower court relating to the time the blood was drawn, was not seriously challenged, save for an unsuccessful attempt to create uncertainty with regard to the time. The appellant, as one of only three persons, was

[3] 2000 (3) SA 381 (SCA) par 50 - 52
[4] 2001 (1) BCLR 36 (CC) also reported at 2001 (1) SA 912 (CC) paras 24 – 25

silent on the issue, and failed to present evidence on the critical issue of the time his blood was drawn.

[21] We therefore find that the magistrate did not misdirect herself when she found that the blood of the appellant was drawn within the prescribed time of two hours.

The chain of custody of the blood sample

[22] Two of the grounds of appeal relate to the chain of custody. First, whether the blood was obtained by a registered medical practitioner. Tied to this ground is the further consideration whether the practitioner made sure that the appellant's skin area from where the blood sample was drawn, was properly cleaned, sterilized, and not contaminated with an agent that contains alcohol. Secondly, Botla presented evidence that the seals can be tampered with and in the face of that evidence, led by the state, reasonable doubt exists about the chain of custody of the blood sample.

Was Dr Naidoo a registered medical practitioner?

[23] Botla testified that the doctor was attending to patients on their arrival at the waiting room. Botla further stated that he spent approximately an hour with the appellant in the waiting room and thereafter a medical practitioner extracted the blood sample from the appellant. According to Botla the doctor introduced himself as Dr Naidoo. It was not put to Botla that the appellant disputes that Naidoo was indeed a doctor. Nor did the appellant indicate that his interaction with the person of Dr Naidoo left with him the impression that a doctor was not treating him and was by implication

not a registered medical practitioner. At no stage was it conveyed to Botla that the appellant disputed his version of the events as they unfolded at the hospital that afternoon. The principles laid down in *S v Boesak* therefore again operate against the appellant on this score.

[24] In the written submissions and during argument before us the proposition was advanced that since no evidence was led by the state whether Dr Naidoo was registered and has paid his registration fees[5] the state has failed to prove a crucial element of the offence. It bears mentioning that this issue was never raised in the lower court and was advanced for the first time before this court.

[25] In any event, we are not convinced that the lower court misdirected itself. The CPA defines a medical practitioner to mean *any person registered as such in terms of* the Medical, Dental and Supplementary Health Service Professions Act ("the Health Professions Act")[6]. Section 17 of the Health Professions Act expressly prohibits a person from performing health services if that person is not registered in terms of the act. Sections 39 and 40 of the same act makes it a criminal offence if someone should profess to be a registered medical practitioner, and it is found not to be the case.

[26] Therefore, considering the testimony of Botla, it is inconceivable that Dr Naidoo would be allowed to be at a public hospital creating the impression that he is a registered medical practitioner, while he in fact is not. Botla testified that he went to a hospital and was requested to wait for a doctor. The doctor later arrived, and it

[5] This requirement flows from s 17(3) of the Health Professions Act
[6] (56 of 1974) This Act underwent a title change and is now known as the Health Professions Act

was Dr Naidoo. What is more, both Botla and the appellant was aware that Dr Naidoo had been working on a patient in another room. There is thus no doubt that the person that obtained the blood from the appellant was a medical practitioner as defined. These are all objective facts from which it can be inferred that Dr Naidoo was a registered medical practitioner as defined in the Health Profession's Act. As per *S v Mtsweni*[7] and *R v Blom*[8] our law supports inferences from objective facts from which other facts, which are sought to be establish, can be inferred. Considering the objective proven facts, the possibility that Dr Naidoo was not a registered medical practitioner as defined in the relevant act, can safely be excluded.

[27] Continuing to press this issue the appellant's counsel relied on the judgment of *S v Conradie*[9] to support a proposition that the failure by the state to call the doctor or to proof that Dr Naidoo was a registered medical practitioner was fatal to its case. This is so as it was important for the doctor to testify about his clinical observations of the appellant at the time, the blood was drawn. *S v Conradie* is clearly distinguishable on the facts as evidence in that case was led by the appellant that the clinical observations by the doctor on behalf of the state was at odds with the blood alcohol level as alleged. Furthermore, in *S v Conradie* the clinical observations were directly in dispute and evidence was thus led by the state and the accused on the issue. That was not the case in this matter. *S v Conradie* is thus not support for the proposition that a doctor must testify to give evidence on the clinical observation of the accused at the time the blood is drawn.

<u>No evidence that the skin was not contaminated</u>

[7] [1985] 3 ALL SA 344 (A) 345-346 also reported at 1985 (1) SA 590 (A) 593D-594G
[8] 1939 AD 188 202 -3
[9] 2000 (20 SACR 386 (C)

[28] For the second leg under this ground of appeal strong reliance is placed on the authority of *S v Glegg*[10] for the proposition that the presumption in s 65 (4) of the Traffic Act does not assist the state. It was argued that according to *S v Glegg* the presumption does not cover the cleanliness of the skin from where the blood was taken. Based on this authority, it was contended that since the doctor did not testify there is no evidence that the skin was not contaminated.

[29] The presumption contained in s 65(4) of the Traffic Act provides for the following:

> "(4) Where in any prosecution in terms of this Act proof is tendered of the analysis of a specimen of the blood of any person, it shall be presumed, in the absence of evidence to the contrary, that any syringe used for obtaining such specimen and the receptacle in which such specimen was placed for despatch to an analyst, were free from any substance or contamination which could have affected the result of such analysis."

[30] The reliance on *S v Glegg* is misplaced. In fact, the judgment rather confirms the approach that the presumption[11] did not place a heavier burden on the state as was already the case. In addition, the judgment rather confirms that the state does not have to proof that the skin was not contaminated. The court in fact found as follows[12]:

> "In the absence of any admission or evidence that contaminations, regarding quality and quantity, could affect the percentage alcohol it is difficult to propose what more the State had to prove in a case like this that was actually proved"

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[10] 1973 (10 SA (A)

[11] The presumption at the time was codified in s 140 (20 of Ordinance 21 of 1966 (C). The presumption now in s 65 of the Traffic Act reads identical to the presumption contained in the ordinance.

[12] p 38 paragraph F - G (translated from Afrikaans to English)

[31] Botla was not challenged by the appellant's legal representative that the syringe used was contaminated. In the circumstances of the facts of this case, where no evidence to the contrary was advanced, the presumption finds application in favour of the state. Furthermore, Botla testified that he handed the blood sample kit to Dr Naidoo and that the doctor used what was provided in the blood sample kit. Botla was present when the blood sample was extracted from the appellant. This is thus one of those situations where his testimony would be sufficient to conclude that the sample was free of contamination[13].

[32] The appellant now seems to speculate on the possible source of contamination of the blood sample. This is done in the absence of any evidence or the reasonable existence of evidence that can support an inference. The legal position is trite as established in *S v Malan*[14] and *S v Glegg*[15] that the possibility of contamination is not reasonable without some supporting evidence more or less directly related to the possibility that some substance, which may have been on the accused's skin, had contaminated the specimen of blood taken by the doctor.

[33] Reliance was also placed on *S v Brumpton*[16] and *S v Greef*[17] to drive the point home that it is the duty of the state to prove that the skin area from where the blood was taken was free from substance, and the nature of the agent used to clean the skin of the accused was such that it did not influence the percentage of the alcohol in the blood sample analysed. Both these judgments are distinguishable for the simple

[13] *S v Van Wyk* 1977 (1) SA 412 (NK) at 415 A
[14] 1972 (1) PH H (5) confirmed in *S v Francis* 1976 (2) SA 70 (K)
[15] par 36 B
[16] 1976 (3) SA 236 at 240 F
[17] 1970 (4) SA 704 at 706 B – C

reason that in each evidence was presented by medical doctors on the possibility of contamination. Furthermore, neither of these judgments repealed the position as established in *S v Malan* that considering the presumption in s 65(4) of the Traffic Act the appellant must show that contamination resulted because of a particular substance used on the accused's body.

[34] We therefore find that consistent with the evidence before the lower court there was no misdirection with regards to whether the skin of the appellant was contaminated when the blood sample was drawn.

The chain of custody of the blood sample

[35] In support of this ground, reliance is placed on various case law to support the proposition that the state had to prove the chain relating to the collection of the blood sample from the SAP 13 register, and the dispatch and delivery to the laboratory analyst, Mr Samuels.

[36] However, this ground is premised on the obscure evidence by Botla that the seals can apparently be removed without being broken. There is no evidence on record that the seals that contained the blood sample of the appellant was broken. In fact, such a proposition was not even put to Botla. Finally, the certificate by Mr Samuels confirmed that the seals were intact when he opened the blood samples for analysis.

[37] The authority of *S v Jantjies and another*[18] is also incontrovertible that if you start with a properly sealed sample and end with that same sealed sample at the laboratory, it is irrelevant where/how; the sample was kept/stored.

[38] The appellant's attempt to rebut the evidence of the state based on some obscure and irrelevant demonstration under cross-examination about the possibility of how the seals may possibly be manipulated amounts to mere theories or hypothetical suggestions and not based on some substantial foundation of fact. In *Trust Bank of Africa Ltd v Senekal* 1977 (2) SA 587 (T)[19] the principle was confirmed that such an approach will not avail a litigant and must the answer in response to prima facie evidence be based on some substantial foundation of fact. On this aspect, the prima facie evidence presented by the state was not rebutted on any substantial factual foundation.

[39] We can therefore not find any misdirection by the magistrate on this aspect of the state's case.

The calibration of the measuring instrument

[40] This ground of appeal relates to the additional information (concerning the apparatus that had been used, its calibration and accuracy) which is included in the s 212(4) blood analysis certificate. The appellant contends that the authority of *S v Ross*[20] should apply in this case.

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[18] 1993 (20 SACR 475 (A)
[19] At 593 E - F
[20] 2013 (1) SACR 77 (WCC)

[41] In the past, the "traditional" 212(4) blood analysis certificates only provided prima facie proof of the results obtained by the analyst. No proof was tendered in the certificate how the results were obtained, and no proof was provided concerning the reliability of the devices used in the analytical process. This position changed when a full bench of this Division[21] in *S v Van der Sandt*[22] held that the State must prove that the measuring instrument gives the correct measurement. This entails that the accuracy of the device be explained and proof provided that it is properly calibrated to official measurements."[23]

[42] Various judgments[24] followed which endorsed the approach adopted in *S v Van der Sandt.* The combined effect of these judgments was that: to succeed in a prosecution for contravening section 65(2)(a) of the Traffic Act 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 had been calibrated.

[43] However, the judgment of *S v Ross*[25] found that the additional information in the s 212(4) certificate confirming the calibration and accuracy of the gas chromatograph was inadmissible evidence. The court was of the view that only an affidavit in terms of s 212(10) of the CPA could be adduced as documentary proof of such fact and held that a s 212(4) certificate was inadmissible to prove the calibration of the gas chromatograph.

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[21] Under its previous name
[22] 1997 (2) SACR 116 (W)
[23] 131
[24] See also **Sithole and The State**, (a decision of the High Court North Gauteng Pretoria, case number A 1051/11, delivered on 8 October 2012 by Bam AJ.
[25] 2013 (1) SACR 77 (WCC)

[44] The aftermath of the *S v Ross* judgment appeared to create controversy since subsequent judgments in this division as well as other provincial and local divisions frequently relied on *S v Ross* in support of the proposition that evidence with regard to the calibration of the gas chromatograph should be presented in the form of an affidavit, failing which, the evidence is rendered inadmissible. The appellant in this matter also elected to rely on the approach adopted in *S v Ross.*

[45] The existence of *S v Ross* has therefore created a degree of uncertainty whether this division is bound to follow it or not, and has led to conflicting decisions. This is borne out by the fact that a full bench of the Eastern Cape Division, Grahamstown in *S v Eke 2016*[26] criticised the approach adopted in *S v Ross.* The imperative of consistency in the law was aptly summarised by the Constitutional Court in *Gcaba*[27] where the Court said that: *"[P]recedents must be respected in order to ensure legal certainty and equality before the law…"*

[46] In a later decision[28], the Constitutional Court again gave further constitutional imprimatur to the continued principled application of *stare decisis* and stated that:

> "The doctrine of precedent not only binds lower courts but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. Stare decisis is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which

[26] 2016 (10) SACR 135 (ECG)
[27] *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC) at par 62.
[28] *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) para 28)

in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos."

[47] The practical effect of the doctrine of precedent is that provincial and local divisions are bound by decisions made within their own territorial areas of jurisdiction, and not by other provincial and local divisions of the High Court. However, High Courts are bound by the decisions of the Supreme Court of Appeal and the Constitutional Court[29]. By extension inferior courts, such as Magistrate's Courts, have limited jurisdiction and are bound by decisions of the division of the High Court in a particular province. If no relevant decision exists as regards a specific circumstance, and a decision regarding such a circumstance was made by a High Court in another province, the magistrate will then follow that decision.

[48] Having regard to the above, some definitive pronouncement[30] is thus necessary to clarify the legal significance of the continued reliance on *S v Ross* as a decision of this division. We are of the view that the decision in *S v Van der Sandt* is the prevailing legal position on the issue in this division. We accordingly hold that we are not bound by the decision in *S v Ross*, as it was clearly wrong for inter alia the following reasons:

(a) *S v Van Der Sandt*[31] , a judgment of this division, adopted the reasoning that proof of calibration by means of a section 212(4) certificate would be adequate if certain requirements are met.

[29] LAWSA para 287
[30] Not that it has not been done, but this does not explain the continued reliance on *S v Ross*
[31] 1997 (2) SACR 116 (W)

(b) In *S v Mouton*[32] a judgment handed down during 2010 in this division, the court followed the reasoning in *S v Van der Sandt* and 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 was sufficient, and an affidavit was not necessary.

(c) During 2016 in an unreported judgment of *S v Dandara*[33] Henney J (with Binns-Ward concurring), criticized the decision in *S v Ross* and rather relied on a decision in another division, and highlighted the prominence of *S v Mouton* on the issue as to whether the calibration of the gas chromatograph should be proved by affidavit or certificate.

(d) Section 212(10) of the CPA no longer seems operable or has become redundant[34]. The Minister never published prescribed conditions and requirements in terms of the Trade Metrology Act, 77 of 1973. The Legal Metrology Act 9 of 2014 has in any event repealed the Metrology Act of 1973. This 2014 Metrology Act also provides for the Minister to publish regulations, which was done. The published regulations[35] do not seem to contain a provision that prescribes 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*[36]*'.*

[32] case no A 449/10
[33] A186/2016
[34] A similar concern was raised in *S v Eke* 2016 (10 SACR 135 (ECG)
[35] GN 877 of 24 August 2018: Legal Metrology Regulations, 2017 (Government Gazette No. 41854)
[36] The quoted part being the wording of s 212(10) of the CPA

(e) The court in *S v Eke*[37], a different provincial division, rather followed *Van Der Sandt*[38].

(f) The court in *S v Ross* overlooked the fact, on a mere contextual reading of the entire s 212 of the CPA, that there was no evidentiary differences between a certificate in terms of s 212(4)(a) read with s 212(8)(a) or an affidavit in terms of s 212(10), if in operation, if regard is had to s 212(4)(b) and s 212(8)(b)[39] of the CPA. These subsections elevates a certificate to equal status of an affidavit as any false statement in the certificate will result in an offence of perjury and be punished on conviction. A deponent to a false affidavit attracts the same warning.

[49] For the reasons expounded on above we find that *S v Ross* cannot be relied on as support for the proposition that evidence on the issue of the calibration of measuring instruments must be on affidavit. The legal position in this division is rather as per the *S v Van der Sandt* and later the *S v Mouton* judgments. We are accordingly of the view that the appellant's reliance on *S v Ross* cannot be sustained. This ground of appeal must therefore fail.

Conclusion

[50] After due consideration of the totality of the evidence we are of the view that the appellant was correctly convicted. We cannot find any misdirection in the magistrate's

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[37] 2016 (10 SACR 135 (ECG)
[38] 1997 (2) SACR 116 (W)
[39] **Both sections read:** (*b*) Any person who issues a certificate under paragraph (*a*) and who in such certificate wilfully states anything which is false, shall be guilty of an offence and liable on conviction to the punishment prescribed for the offence of perjury.

factual or legal findings. We are not convinced that there is any basis on which to interfere with the findings by the magistrate. We are satisfied that the guilt of the appellant has been established beyond a reasonable doubt. The appeal against conviction ought to be dismissed.

[51] In the result, I propose an order in the following terms:

The appeal is dismissed.

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MONTZINGER, AJ
Acting Judge of the High Court

I agree and it is so ordered.

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GOLIATH, DJP
Deputy Judge President of the High Court

Appearances:

Appellant's counsel:	Adv M Botha
Appellant's attorney:	De Vries De Wet & Krouwkam Inc.
Respondent's Counsel:	Adv Erasmus
Respondent's Attorney:	National Director Public Prosecutions