REPORTABLE

CASE NO: CA 127/2005

IN THE HIGH COURT OF NAMIBIA

In the matter between:

BLAAUW'S TRANSPORT (PTY) LTD **1st APPELLANT**
ERASTUS HAIMBODI **2nd APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: Tötemeyer AJ

Heard: 16 March 2006
Delivered: 13 April 2006

APPEAL JUDGMENT

TÖTEMEYER AJ:

[1] During January 2005 both appellants were convicted in the Magistrate's Court of Walvis Bay on a charge of having contravened Regulation 254 (1) read with Regulations 259 (e) (iii), 267, 384 and 369 and further read with sections 1, 60, 63, 64, 67, 86, 87, 88, 91 and 106 of the Road Traffic and Road

Transport Act, Act 22 of 1999 (hereafter the "Road Transport Act"), in that they wrongfully and unlawfully operated a goods vehicle on 29 September 2004 whilst exceeding its permissible maximum axle unit mass load.

[2] Both appellants appealed against their conviction only.

[3] In the Magistrate's Court as well as in this Court the appellants were represented by Mr J H Olivier whilst the respondent on appeal was represented by Mr O S Sibeya.

[4] Upon a scrutiny of particularly the regulations made under the Road Transport Act, it appears that the essence of the appellants' conviction – read against the background of the allegations made in the charge sheet – is to be found in regulation 254 (1) (c) read with Regulation 259 (e) (iii). Read together, these two regulations have the effect that a person may not operate a vehicle on a public road if the mass load of an axle unit of the vehicle – in the case of appellants' type of vehicle – exceeds 1 800 kilograms.

[5] In the notice of appeal appellants rely on numerous grounds of appeal. In summary the appellants allege that the Magistrate erred in making the following findings:

[5.1] That the State proved beyond reasonable doubt that the combination of vehicles of the appellants exceeded the permissible maximum axle mass load of 1 800 kilograms;

[5.2] That the appellants had the necessary intent to contravene the relevant statutory provisions.

[5.3] That Exhibit D handed in by respondent as part of the record in the Magistrate's Court appearing at **Record, 208** – which purported to be a certificate of "*verification or testing*" as contemplated by section 87 of the Road Transport Act and in respect of the relevant weighing device concerned – complied with the prescriptions of the said section 87 so as to invoke the presumption set out in that section. In this regard appellants further contend that:

[5.3.1] The Magistrate erred in finding that Exhibit D sufficiently sets out the status or identity of the author of the said certificate as contemplated by section 87;

[5.3.2] That the contents of the said Exhibit D do not sufficiently indicate that the said weighing device was indeed inspected or tested as required by section 87 or otherwise, nor does Exhibit D set out the date on which the inspection was done. No evidence was further

tendered that the weighing device was otherwise officially approved;

[5.4] By failing to uphold appellants' contention that the evidence did not contain any reference to the traceability of measurement of the measuring standard whereby the weigh bridge was ostensibly tested in relation to the national measuring standard.

[6] At the hearing of the appeal the appellant abandoned the ground of appeal which is based on the alleged absence of intent as referred to in paragraph [5.2] above.

[7] Central to the enquiry concerning the appellants' other grounds of appeal, was the issue concerning the contents and correctness of the certificate as per Exhibit D. As a result, the bulk of the arguments on appeal centered around Exhibit D and the requirements for same as contained in section 87 of the Road Transport Act.

[8] In order to properly appreciate the submissions of both parties, I deem it appropriate to, at the outset, quote the text of section 87 in full:

"*87: Where in any prosecution for an alleged contravention of this Act, evidence to prove such contravention is given of*

any mass as ascertained by means of a weighing device, such mass shall be deemed to be correct in the absence of any evidence to the contrary, provided there is produced in respect of such weighing device a certificate purporting to have been issued by an inspector as defined in section 1 of the Trade Metrology Act, 1973 (Act no. 77 of 1973) indicating that the weighing device was inspected for purposes of verification or testing in terms of that Act on a date being not more than one year before the date of the alleged contravention and that it was found to be correct in accordance with the requirements of that Act."

[9] Central to securing a conviction under the Road Transport Act (and the regulations made thereunder), on a charge of exceeding a permissible axle mass load on an axle unit, is proof of the correctness of the measurements of the relevant weigh bridge or weighing device which determined the excess weight alleged in the charge sheet. In order to consider the purpose of section 87, regard should be had to the common law principles which underly the proof of this aspect.

[10] In the matter of ***S v Mthimkulu, 1975 (4) SA 759 (A)***, Corbett JA (as he then was) held at ***763 H*** as follows: "*Whenever the facta probanda include concepts such as weight, speed, time, length (or distance) or a combination of two or more of these concepts,*

proof thereof must normally be presented in terms of the measures in current use at the time". He further held [at ***763 H -*** to ***764 A***] that "*Theoretically, such evidence of measurement would always comprehend proper testimony as to the trustworthiness of the method or process followed in order to make the measurement and as to the accuracy of any instrument used in that process*".

[11] Corbett JA (at ***764 C***) in principle accepted that, depending on the circumstances, a proper testimony of the aforesaid nature will be "*preliminary professional testimony (1) to the trustworthiness of the process or instrument in general (when not otherwise settled by judicial notice) (2) to the correctness of the correctness of the particular instrument*",

[12] In the ***Mthimkulu*** –matter, the aforesaid requirement to present expert evidence (and in respect of both the trustworthiness of the process or instrument concerned, as well as the correctness of the particular instrument in question), was further discussed and qualified and the following principles can be abstraced therefrom:

[12.1] A Court is entitled to take judicial notice of a process as notorious and straightforward as weighing on a scale. No expert evidence is necessary to explain this process or attest to its reliability (at ***765 E***);

[12.2] At ***765 A –*** B the Court held that the issue as to whether or not the State is required to present expert evidence to prove the aforegoing, depends on:

[12.2.1] The nature of the process and the instrument involved in the specific case;

[12.2.2] The extent, if any, to which the evidence is challenged;

[12.2.3] The nature of the enquiry and the *facto probanda* in the case.

No hard and fast rule can, or should be, laid down.

[13] The excess mass load is a core element of the charge in this matter. The relevance of the correctness of the measurement of this excess is, to an extent, demonstrated by the fact that the alleged excess of 1 800kg is only 10% of the permissible axle unit mass load of 18 000kg.

[14] The single witness who gave evidence on behalf of the State, was a Mr Malinga, a transport inspector employed by the Roads Authority of Namibia. When considering his evidence, it becomes clear that the weigh bridge in the vicinity of Walvis Bay which

allegedly determined the excessive axle unit mass load of appellants' vehicle, is technically a fairly sophisticated and computer-aided device. The weighing process and procedures which are followed when using this weigh bridge can also be described as complicated to some extent. In my view this weigh bridge – as well as the manner in which it is ordinarily used – cannot be equated with weighing done by means of an ordinary scale.

[15] In applying the abovementioned principles expressed in ***Mthimkulu*** –matter – and without, for the moment, considering the effect of section 87 of the Road Transport Act – I am driven to the conclusion that, in order to secure a conviction of the abovementioned nature, expert evidence would ordinarily be required by the State on the issue of whether or not the weigh bridge in question properly and correctly functioned at the time when the vehicle concerned, was weighed. *In casu* this conclusion is fortified by reason of the fact that the defence, from the outset, challenged the accuracy and proper functioning of the weigh bridge as at the time of the alleged offence. This was done in terms of appellants' statement made under section 115 of the Criminal Procedure Act, 1977 (Exhibit A1 to the proceedings). In addition, the validity of the verification certificate in respect of the weigh bridge was also challenged. I will deal with this latter aspect in more detail later.

[16] The legislature – apparently mindful of the burden that would be placed on the State in order to secure convictions on charges concerning excessive mass loads of vehicles – introduced the presumption contained in section 87 of the Road Transport Act. This presumption was clearly intended to assist the State in the sense that, where evidence is given of any mass as ascertained by means of a weighing device in order to prove a contravention, such mass is deemed to be correct in the absence of evidence to the contrary. In terms of the *provisio* contained in section 87, this presumption is invoked only once a certificate is produced in respect of the weighing device concerned.

[17] It is apparent from a proper reading of section 87 that, in terms of the aforesaid *provisio*, the relevant certificate should comply with certain prescriptions before the presumption will be invoked. Those are:

[17.1] It should be a certificate "purporting to have been issued by an inspector as defined in section 1 of the Trade Metrology Act, 1973 (Act. No. 77 of 1973);

[17.2] The certificate should indicate that the weighing device

[17.2.1] was inspected for the purposes of verification or testing in terms of the Trade Metrology Act;

[17.2.2] on a date being not more than a year before the date of the alleged contravention;

[17.2.3] was found to be correct in accordance with the requirements of that Act.

[18] Respondent's witness Mr Malinga was not qualified in evidence to be an expert concerning the proper functioning of the weigh bridge as at the time of the alleged offence, nor did he purport to give expert evidence on this issue.

[19] In order to prove this element, the State attempted to invoke the presumption contained in section 87 of the Road Transport Act. For that purpose the State submitted Exhibit D, in evidence, purporting to be a certificate in terms of section 87. In considering Exhibit D, I will firstly confine myself to the requirement set out in paragraph [17.1] above:

[19.1] In his argument, Mr Sibeya relied on the authority of ***S v Van Vuuren, 1992 (2) SACR 313 (T)***:

[19.2] During argument I raised with both counsel the principles as expressed in ***S v Van Vuuren***, also with reference to the authorities there referred to, such as ***R v Moosa & Others, 1960***

(3) SA 517 (A), at 522 F and 528 C, and ***S v Van der Merwe, 1979 (2) SA 760 (T), at 762 G***. All these cases correctly express the principle that a statutory presumption which, is in the nature of the presumption contained in section 87 of the Road Transport Act, assists the State in proving its case and thus makes inroads upon the common law presumption of innocence. As a result, presumptions of this nature should be interpreted restrictively and strictly;

[19.3] On my understanding of section 87, it is a requirement that it should appear – *ex facie* the contents of the certificate – that it has been issued by an inspector as defined in section 1 of the Trade Metrology Act, 1973;

[19.4] If the contents of Exhibit D are considered, the following appears:

[19.4.1] The head of Exhibit D (to the right) reflects the letters "*SABS*";

[19.4.2] In the left corner at the head of Exhibit D the following typed inscription appears "***SELF-INDICATING SCALES VERIFICATION REPORT***".

[19.4.3] Nearer to the foot of the certificate the word "*CERTIFICATE*" appears in the center of the page. It

was apparently issued under an illegible signature above the following typed wording

"TRADE METROLOGIST
for PRESIDENT";

[19.4.4] The pro forma certificate makes provision for a date to be inserted. The date inserted in handwriting on Exhibit D is "*2004-7-08*";

[19.4.5] The terms of the aforesaid certification – and above the aforementioned signature – sets out the following:

"*This is to certify that the above instrument meets the requirements of the Trade Metrology Act (Act 77 of 1973) and may be used in trade*".

[19.4.6] At the foot of Exhibit D, it contains the typed inscription "*SOUTH AFRICAN BUREAU OF STANDARDS*" with a South African address;

[19.5] The Trade Metrology Act, 1973, was amended in Namibia by the Trade Metrology Amendment Act, Act No. 14 of 1995. The definition of "*inspector*" contained in section 1 of the Act, was left

unamended and states that the term "*inspector*" means "*any inspector appointed under section 3*";

[19.6] Both counsel have incorrectly quoted the contents of section 3 of the Trade Metrology Act in their heads of argument in that they have either failed to consider the terms of the ***Trade Metrology Amendment Act, Act No. 14 of 1995*** or the provisions of the ***Executive Powers (Industries) Transfer Proclamation AG 5 of 1978***. The following is the correct text of section 3:

"3. *Appointment and qualifications of inspectors*. – *(1) Subject to the provisions of the laws governing the public service, the Minister may from time to time appoint inspectors to verify or test all measuring instruments or any particular kind of measuring instrument in accordance with the provisions of this Act, and to perform such other functions as may be assigned to inspectors by this Act.*

(2) *No person shall in terms of subsection (1) be appointed as an inspector unless he has shown in undergoing an examination a knowledge of the appropriate provisions of this Act and –*

(a) *has, in accordance with a curriculum laid down from time to time by the director, passed an examination in –*

(i) *subjects so laid down; and*

(ii) *practical work in verifying and testing all measuring instruments or the kind of measuring instrument in question; or*

(b) *has satisfied the Minister that he holds a certificate qualifying him to act as an inspector,*

and no person shall act as an inspector in respect of any particular kind of measuring instrument unless he holds a certificate issued to him on the instructions of the Minister to the effect that he is qualified to act as an inspector in respect of all measuring instruments or that kind of measuring instrument.

(3) *Subject to the provisions of section 22, no inspector shall derive any profit from or be employed in the making, repair, adjusting or selling of any measuring instrument.*"

[19.6] It is thus clear that an inspector is someone who should be appointed in a specific manner by the Minister after having been qualified in a specific manner;

[19.7] The Trade Metrology Act does not contain any definition of a term or designation such as a "*Trade Metrologist*".

[19.8] *Ex facie* Exhibit D, there is no indication that the "*Trade Metrologist*" who had purportedly issued same, is an "*inspector*" as contemplated by section 87 of the Road Transport Act (and read with sections 1 and 3 of the Trade Metrology Act). Indeed the reader of Exhibit D is entirely left in the dark as to what position a "*Trade Metrologist*" actually holds, and more importantly, as to whether or not such a "*Trade Metrologist*" in any manner holds the appointment or qualifications of an "*inspector*" as referred to in the aforesaid statutory provisions or has purported to act as an "*inspector*" when issuing Exhibit D.

[19.9] Mr Sibeya submitted that, on the basis of the ***Van Vuuren's*** case, *supra*, the presumption in section 87 came into operation and the State was absolved from the obligation to tender expert evidence in order to prove the proper functioning of the weigh bridge. The presumption assisting the State as contained in the relevant South African statute (as set out in ***Van Vuuren's*** case, *supra,* ***315 D***), differs from section 87 in a significant respect: The

relevant South African statute deems the weighing device to be correct (unless the contrary is proved) as soon as evidence is presented of the mass ascertained by that device. The South African statute does not set the prerequisite condition for invoking the said presumption, which is contained in section 87. The reliance on ***Van Vuuren's*** case, *supra*, accordingly does not assist the respondent;

[19.10] Mr Sibeya also relied on section 7 of the Trade Metrology Act (as amended) and submitted that in terms of section 7, the South African Bureau of Standards ("SABS") was appointed by the relevant Minister in Namibia as a trade metrology agency. On this basis, so the submission went, Exhibit D was properly issued with regards to its author;

[19.11] Section 7 was substantially amended by the Amendment Act 14 of 1995. In order to properly appreciate the submission of Mr Sibeya, I quote the amended section 7 in full:

"*7. (1) The Minister may enter into agreement with –*

(a) *any board, council or body or persons established by statute whether in Namibia or elsewhere;*

(b) *any department or branch of a foreign government having statutory functions with regard to trade metrology; or*

(c) *any laboratory, workshop or other establishment, whether public or private, and whether in Namibia or elsewhere, which is duly accredited, licensed or otherwise authorised by any board, council or body or department or branch or a foreign government referred to in paragraphs (a) and (b) to perform functions with regard to trade metrology,*

to be a metrology agency for the performance of any function under this Act.

(2) The Minister shall give notice in the Gazette of any agreement entered into under subsection (1) and any such agreement shall take effect for the purposes of this Act upon its publication."

[19.12] A similar submission was also made by the State during the Magistrate's Court proceedings. It appears from pages **141 to 143** of the appeal record that the State relied on an alleged agreement between the Namibian and the South African Governments in terms of which the SABS would execute

certain functions under the Trade Metrology Act on behalf of the Namibian Government. It was submitted that this agreement was concluded during 1991. No reference was made to any notice given by the Minister in the Government Gazette of any such agreement as contemplated by section 7 (2) of the Trade Metrology Act (as amended), or its publication in the Gazette. Likewise no such reference appeared in the original heads of argument of the respondent, nor was I referred to any such notice or publication in terms of section 7 (2) during argument on appeal;

[19.13] During the course of the appeal proceedings I enquired from both Mr Sibeya and Mr Olivier if they have any knowledge of any notice and publication in the Gazette of the alleged agreement as contemplated by the said section 7 (2). Both undertook to make the necessary investigations and, if anything could be found, to cause such publication to be delivered to me in chambers before close of business the following day. In order to expedite the finalisation of the appeal, I requested both counsel to exchange any such information found, between each other and invited them to make further written submissions thereon before close of business on 6 April 2006;

[19.14] As a consequence of the above arrangement, respondent caused delivery to me, of a letter issued by the Minister of

Trade and Industry dated 29 June 2004 addressed to the Chief Executive Officer of the Road Authority of Namibia. I was also furnished with further heads of argument by both Mr Sibeya and Mr Olivier. Under cover of the supplementary heads of Mr Sibeya, an agreement between the Government of Namibia and The Council of the South African Bureau of Standards dated July 1991 was presented. I will hereafter deal with the submissions and issues which arise from the aforegoing.

[19.15] I will firstly deal with the letter of 29 June 2004 which has the following text:

"APPOINTMENT OF A METROLOGY AGENCY

This letter serves to inform you that in terms of Section 7 of the Trade Metrology Act, 1973 (Act No. 77 of 1973) as amended, the Minister of Trade and Industry has, from time to time, assigned certain functions to the South African Bureau of Standards (SABS), including the functions of a Metrology Agency. Additionally, the government entered into an Agreement in 1991 in terms of which the SABS renders certain services and performs certain functions within the Republic of Namibia.

Mr D Swarts, a qualified Verification Officer is hereby appointed to conduct the verification of six (6) road vehicle weigh bridges (scales) in an agreed period not exceeding one (1) calendar month from the date of assumption of duties with the Road Authority (RA) of Namibia. The verification costs are borne by the client owner of the aforementioned weigh bridges."

[19.16] As far as the alleged assignment of "*functions*" referred to in the first paragraph of the letter is concerned, I again point out that before an agreement relating to an assignment of functions in terms of section 7 (1) of the Trade Metrology Act could take effect, notice and publication thereof in the Gazette should occur under section 7 (2). I was not referred to any such notice or publication in the Government Gazette in terms of section 7 (2) of the Trade Metrology Act;

[19.17] In terms of section 224 of the Criminal Procedure Act, 1977, I am required to take judicial notice of any law or matter published in a publication which purports to be the Government Gazette and of any law which purports to be published under the superintendence or authority of the Government Printer;

[19.18] The aforegoing does, of course, not mean that section 224 of the Criminal Procedure Act requires me to take judicial notice of the contents of the letter of 29 June 2004. I nevertheless refer to its contents with regards to the, albeit rather vague, reference to an alleged assignment of functions to the SABS by the Minister in terms of section 7 of the Trade Metrology Act;

[19.19] It has been held that, since judicial notice is taken of the matters referred to in section 224 of the Criminal Procedure Act, it is not necessary to hand in a copy of the relevant Gazette to Court in order to admit same as part of the record or to make formal production thereof in evidence. I refer to **S v Hoosen, 1963 (2) SA 340 (N), at 341 G; S v Mbatha, 1963 (4) SA 476 (N), at 477 H and S v Di Stefano, 1977 (1) SA 770 (C), at 773**;

[19.20] The least however, which is expected of the State – bearing the onus of proof in proceedings of this nature (and should it wish to rely on a particular publication in the Government Gazette) - is to produce to the Court a specific reference of the Gazette in which the relevant publication occurred. That is also the import of the dictum in **S v Di Stefano** at **773 D – E**. It cannot be expected of a Court to wade and search through the vast number of notices given in the Government

Gazette, often ranging over a period of many years, in order to ascertain if any relevant Government notice concerning a particular subject-matter has been published. I may add that I have searched the annotations and references to the Trade Metrology Act, 1973, as contained in the work "***Index to the laws of Namibia***" published by the Legal Assistance Centre (as updated to 30 June 2003). It does not contain any reference to a Government Notice issued under section 7 of the Trade Metrology Act (as amended). In his supplementary heads of argument Mr Olivier submits that he did a similar search which also did not reveal anything;

[19.21] I am thus unable to take judicial notice of any assignment of functions under the Trade Metrology Act (as is seemingly alleged in the letter of 29 June 2004) and as contemplated by the current sections 7 (1) and 7 (2) of that Act;

[19.22] The letter of 29 June 2004 additionally refers to an alleged agreement concluded by the Namibian Government in 1991, whereunder the SABS would render certain services. This could obviously not have been an agreement as contemplated by sections 7 (1) and 7 (2) of the current Trade Metrology Act, since the current section 7 was only introduced by virtue of Amendment Act No. 14 of 1995;

[19.23] As already stated, an agreement of 1991 between the Government of Namibia and the SABS was produced by respondent under cover of its supplementary heads of 6 April 2006;

[19.24] I may add that the earlier provisions of section 7 stated that "*The Minister may, after consultation with council, assign in writing to any statutory body the carrying out, subject to such conditions and requirements as may be prescribed by regulation, of any function specified in this Act*";

[19.25] The aforesaid 1991 agreement does not contain any assignment to the SABS of the specific functions of an "*inspector*", as defined in section 1 read with section 3 of the Trade Metrology Act;

[19.26] In view of the absence of an assignment of the aforesaid nature in the 1991 agreement, I expressly leave open the question if - given the definition of the term "**statutory body**" as contained in section 1 of the Trade Metrology Act - section 7 (in terms of its aforementioned earlier wording) would have empowered the Minister, after the independence of Namibia, to assign any powers to a foreign statutory body such as the SABS;

[19.27] The last aspect set out in the letter of 29 June 2004, refers to the appointment of a certain Mr D Swarts as a qualified verification officer. This aspect was not relied by the State in the Magistrate's Court proceedings, nor did it form part of the argument on appeal. Since this aspect is referred to by the State in the supplementary heads of Mr Sibeya, I will deal therewith:

[19.27.1] In terms of section 3 of the Trade Metrology Act quoted above, the Minister of Trade and Industry is entitled to appoint inspectors;

[19.27.2] I am of the view that the letter of 29 June 2004 can in this respect also not assist the respondent nor render Exhibit D a valid certificate in terms of section 87 by virtue of the following:

[a] It does not appear from the letter of 29 June 2004 that the Minister purported to appoint Mr D Swarts as an inspector in terms of section 3 of the Trade Metrology Act, but rather as a verification officer. Indeed section 3 does not make provision for an appointment as a verification officer. An appointment of a verification officer (as an alternative to an appointment as an inspector), was only made possible by virtue of later

amendments of the Trade Metrology Act in South Africa which were never made applicable to Namibia;

[b] Even if the letter of 29 June 2004 can be interpreted as an appointment of a Mr D Swarts as an inspector under section 3, it does not appear *ex facie* Exhibit D that it was issued by a Mr D Swarts. No link has thus been established between such appointment and Exhibit D;

[c] Although a reference is contained in the evidence before the Magistrate's Court concerning the author of Exhibit D, witness Malinga, at Record 55 – 56, appears to be uncertain about the identity of the author of Exhibit D. One possibility which he mentioned was a certain "Mr Swart". Apart from this uncertainty, there is also no other evidence linking this "Mr Swart" to the "Mr D Swarts", who is referred to in the letter of 29 June 2004 (i.e if this at all refers to one and the same person). This aspect is in any event not strictly relevant, due to the above finding that it should appear *ex facie* a proper certificate issued under section 87 of the Road Transport Act, that it was issued by an inspector as defined in section 1 (read with section 3) of the Trade Metrology Act. The latter is not the case with Exhibit D.

[20] In view of the aforegoing, I come to the conclusion that Exhibit D does not meet the requirements of a certificate as required by section 87 of the Road Transport Act. The restrictive and strict interpretation which I am constrained to apply in respect of the requirements pertaining to such certificate, fortifies this conclusion.

[21] I therefore conclude that the Magistrate has erred when she found (at **Record, 184**) that in terms of section 87, the State presented a valid certificate that was issued by an "*inspector*" as defined by section 1 of the Trade Metrology Act. The learned Magistrate also erred in seemingly relying on section 7 of the Trade Metrology Act in arriving at the conclusion that Exhibit D was valid (at **Record, 184**). It follows that the learned Magistrate erred in finding (at **Record, 184**) that the presumption as contained in section 87 has come into operation.

[22] In view of this conclusion reached, it is not necessary to consider appellants' other grounds of appeal concerning the further contents of Exhibit D or the traceability issue as referred to under sub-paragraphs [5.3.2] and [5.4] above.

[23] A further issue which arises from this appeal, requires consideration: In respondent's heads of argument on appeal reliance was also placed on the presumption contained in

Regulation 267 (1) of the Regulations made under section 91 of the Road Transport Act:

[23.1] Regulation 267 (1) reads as follows:

"*267. (1) If, in a prosecution for an offence under regulations 253 to 262 inclusive, an allegation is made in the charge sheet or summons in relation to –*

(a) *the gross vehicle mass;*

(b) *the gross axle mass;*

(c) *the gross axle unit mass load;*

(d) *the gross combination mass;*

(e) *the net power in kilowatts of any bus or goods vehicle;*

(f) *the permissible maximum vehicle mass referred to in regulation 255;*

(g) *the permissible maximum combination mass referred to in regulation 256; or*

(h) *the permissible maximum axle mass load or maximum axle unit mass load, referred to in regulation 253 or 254 respectively.*

The allegation is, in the absence of evidence to the contrary, presumed to be correct."

[23.2] In respondent's heads it was contended that section 87 of the Road Transport Act should be read in conjunction with Regulation 267. Upon my enquiry – and after hearing argument of Mr Olivier on this issue – Mr Sibeya conceded that Regulation 267 (1) should be read subject to section 87 of the Road Transport Act. He conceded that the presumption contained in Regulation 267 - concerning the correctness of the actual maximum load of an axle unit as alleged in the charge sheet – would only come into operation once the presumption in section 87 was invoked;

[23.3] The latter would obviously only occur once the State produces a proper certificate as contemplated by section 87;

[23.4] The effect of the above interpretation is that Regulation 267 is not an overriding presumption assisting the State (irrespective of whether or not the presumption set out in section 87 is invoked), but should, for the purposes of the actual axle mass load of a vehicle or axle unit as alleged in the charge sheet, only come into operation once the presumption contained in section 87 has been invoked (or, for that matter, the State presents expert evidence on the proper functioning of the weighbridge in the absence of a certificate contemplated by section 87). I am of the view that the aforesaid concession has correctly been made by Mr Sibeya. I come to this conclusion for the following reasons:

[23.4.1] It is true that the Minister enjoys wide ranging powers to make regulations under section 91 of the Road Transport Act. I, *inter alia*, refer to sections 91 (1) and (2) read with section 91 (2) (iv) of the Road Transport Act;

[23.4.2] An interpretation contrary to the above, and which favours the operation of Regulation 267 to presume a measured axle unit mass load to be correct once it is alleged in the charge sheet (without expert evidence and irrespective of whether or not the presumption contained in section 87 is invoked), would directly concern the essential content and effect of section 87 and in fact render its terms and provisions meaningless: If the latter interpretation is favoured, all that the State would be required to do, is simply to rely on the presumption contained in Regulation 267, namely that the axle unit mass load is correct, without any need to invoke the presumption contained in section 87;

[23.4.3] It is a recognised principle that regulations should be interpreted in conjunction with the terms of the enabling statute. It is not permissible to treat the statute and a regulation made thereunder as a single piece of legislation. Indeed the proper approach is that the

statute must be interpreted before the regulation is looked at and that the regulation may not cut down or enlarge (and thus generally alter) the meaning of the statute. I refer to ***Moodley v Minister of Education and Culture, House of Delegates, 1989 (3) SA 221 (AD),*** *per Hoexter JA, at* ***233 E – F*** and ***Hamilton-Brown v Chief Registrar of Deeds, 1978 (4) SA 735 (T)****, per Nicholas J, at* ***737 C – D.***

[23.4.4] *A fortiori,* I conclude, it is not permissible for a regulation to negate or negative the essential contents or purpose of a provision of its enabling statute;

[23.4.5] In conclusion, an interpretation of regulation 267 as contended for in paragraphs [23.2] and [23.4] above:

(a) Gives effect, and does not negate, the true and proper meaning of section 87 of the Road Transport Act;

(b) Accords with the well recognised presumption of validity which favours a construction which will uphold subordinate legislation (such as, for instance, Regulation 267) rather than declaring same to be *ultra vires* (Compare: **Hamilton**

Brown's case, *supra)*. This principle was expressed and approved in **Port Elizabeth Municipality v Uitenhage Municipality, 1971 (1) SA 724 (A), at 738 D**;

(c) Accords with the principle that a presumption in the nature of Regulation 267 should be restrictively interpreted. The principles underlying this approach have already been dealt with earlier.

[23.5] I thus conclude that Regulation 267 (1) should be interpreted subject to section 87 of the Road Transport Act and to the extent that the State is only entitled to rely on the presumption created in its favour by section 267 (1) read with section 267 (1) (a), (b), (c) and (d) thereof,

[23.5.1] once the presumption contained in section 87 is invoked. The latter, of course, occurs when a certificate as contemplated by section 87 is produced;

[23.5.2] or – in the absence of a section 87 certificate - presents the requisite expert evidence on the proper functioning of the weighbridge;

[23.6] Since the presumption contained in section 87 was never invoked (and no expert evidence as aforesaid, was presented by the State), the presumption contained in Regulation 267 (1) did not operate in favour of the State in this matter.

[24] Accordingly the State has not discharged its onus of proof in respect of the correctness or the proper functioning of the weighbridge concerned and has thus not discharged its onus of proof in respect of the correctness of the excessive axle unit mass load as alleged in the charge sheet.

[25] In the result the appeal is upheld and the convictions and sentences of both appellants are set aside.

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TÖTEMEYER, AJ

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