REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 24/2013

In the matter between:

THE STATE **APPLICANT/APPELLANT**

and

RAYMOND HEATHCOTE **ACCUSED/RESPONDENT**

Neutral citation: *State v Heathcote* (CC 24/2013) [2013] NAHCMD 195 (12 JULY 2013)

Coram: NDOU AJ
Heard: 9 July 2013
Delivered: 12 July 2013

ORDER

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1. Leave to appeal is refused

2. The application is hereby dismissed.

I**n chambers, application by the state for leave to appeal in terms of Section 310 of** the Criminal Procedure Act 51 of 1977.

JUDGMENT

NDOU AJ [1] .The state applied for leave to appeal against the decision of the Regional Magistrate of Swakopmund in terms of Section 310 (1) of the Criminal Procedure Act 51 of 1977, as amended. The appeal is against the decision of the Regional Magistrate declaring GN 100 of 2003, published in terms of Section 82 (7) of the Road Traffic and Transport Act, 1999 [Act 22 of 1999] *ultra vires* the Road Traffic and Transport Act, 1999. The grounds upon which the applicant desires to appeal are captured as follows in the Notice of Application:

“The learned magistrate misdirected herself, alternatively erred in law and/or in fact by declaring the notice ultra vires.

(a) Without considering alternatively properly considering that the matter was authorized by section 82 (7) [of] the Road Traffic and Transport Act, 1999 to issue the said notice;
(b) By finding that the aforesaid notice should comply with the provision of section 94 of the Road Traffic and Transport Act 1999;
(c) Without requiring or allowing any evidence on the application.”

[2] **Background**

The background facts of the matter are the following:

The accused/respondent appeared before the Regional Magistrate of Swakopmund on the main count of driving under the influence of intoxicating liquor, alternatively,

driving with an excessive blood-alcohol level in contravention of Section 82 (1) (a) and 82 (5) (a), respectively, of the Road Traffic and Transport Act 22 of 1999.

[3] He pleaded not guilty to main and alternative charges. He thereafter handed a plea explanation in term of Section 115 of the Criminal Procedure Act, ***Supra***. The gravamen of his plea explanation was that Government Notice 100 of 2003 (published in Government Gazette 2917) used by the Ministry of Works, Transport and Communications to authorize the use of an instrument in breathalyzer test, is *ultra vires* the enabling Act and invalid. He said the state may not rely on any evidence purportedly produced by the said breathalyzer device used to test the alcohol levels in his breath. In the alternative charge the Regional magistrate ruled that the Government Notice was *ultra vires* for non-compliance with the provisions of subsection (3) and (4) of section 94 of the Road Traffic and Transport Act, *supra*. For the record, the ruling subject of this application is only in connection with the alternative charge. The Regional magistrate did not deal with the main charge and it is thus still pending before that court. At page 99 of the record the Regional Magistrate commented as follows: " *It is indeed so that there is still a main charge outstanding that the court must listen to*" (emphasis added).

[4] At the commencement of the proceedings the state raised a point *in limine* on the appearance of the respondent or his legal representative in light of his failure to lodge a written submission in terms of Section 310 (4) of the Criminal Procedure Act, *supra*. Relying on the authority of s v Mujiwa 2007 (1) NR 34, the state submitted that because the accused did not make use of the opportunity provided to him in terms of section 310 (4), supra, to lodge written submissions, there cannot be any appearance on his behalf. Mr Botes, for the respondent, submitted inter alia, that the judgment in s v Mujiwa, *supra*, was wrongly decided. I granted the respondent appearance and indicated that the reasons for doing so will be provided in this judgment. These are they. In arriving at the decision to grant Respondent appearance, I did not deem it necessary to deal with the question as whether the case of s v Mujiwa was wrongly decided. The way I understand Mr Botes, for the Respondent, he was making an oral application for the extension of the period on the basis that he has shown good cause. The good cause submitted is that the record of

the proceedings was only availed to the Respondent on Friday, 5th July 2013, ie after the matter was set down. The Respondent's counsel was only served with the application's "Short Heads of Argument" just before this hearing. The said Heads were in fact filed of record a day before this hearing at 10H55. In the circumstances I dealt with the matter in accordance with justice as enshrined in the provisions of Section 310, supra and the *audi alteram partem* principle. In the circumstances of the case as I have just highlighted it would have been unfair to close the court doors on the Respondent. In an event I do not see any prejudice that may be suffered by applicant if the Respondent is allowed appearance. The Applicant has not submitted possible prejudice it may suffer if the Respondent appears. The fact that this is not a full-scale hearing, as stated in s v Mujiwa, supra, it within my discretion to be flexible in the procedure to be followed. It is for that reason that the Respondent is given the discretion to make submissions. Even if he does not do so, the matter will still be decided on its merits in accordance with justice. There is *per se*, no sanction for such failure, with all this in mind I allowed the Respondent appearance in the interest of justice.

[5] I now propose to deal with the merits of the application for leave to appeal in terms of Section 310 (1), as read with Section 310 (2), *supra*. The test applicable in such an application was captured by Davis AJA in R v Ngubane and others 1945 AD 185 at 187 in the following terms –

"In all cases, no matter what form of words were used, the same thing was, in my opinion, intended to be conveyed, namely that it is for applicant for special leave to satisfy the court that, if that leave be granted, he has a reasonable prospect of success on appeal. That was the test applied, for instance, in Bezuidenhout v Dippenaar 1943 AD at 195, and it is, in my view, the correct one." This test was followed years later in S v Sikosana 1980 (4) SA 559 (A) at 561 – 3 and S v Nowaseb 2007 (2) NR 640 (HC). The application should not be granted if it appears to the judge that there is no reasonable prospect of success. The judge must exercise his power judicially.

[6] Further, the mere possibility that another court might come to a different conclusion is not sufficient to justify the grant of leave to appeal. S v Ceaser 1977 (2) SA 348 (A) at 350. Nor is it enough that the case is fairly arguable – R v Baloi 1949 (1) SA 523 (A). The primary consideration for decision is whether or not there is a reasonable prospect of success. See also R v Shafee 1952 (2) SA 484 (A). It is also trite that when leave is granted, the leave may be limited so as to allow only particular grounds of appeal to be advanced, or leave may be granted generally so that all the issues may be canvassed – R v Jantjies 1958 (2) SA 273 (A) at 275. I now proceed to apply these legal principles to the facts of this matter. The issue here is whether General Notice 100 of 2003, *supra*, was properly promulgated. The court *aquo* found that it was not. This finding has grave consequences as the state relies heavily in use of breathalyzer test evidence in the prosecution of drunken driving cases. In particular section 82 (7), supra, provide as follows:-

"7. For the purposes of subsection (5), the concentration of alcohol in any breath specimen shall be ascertained by means of a type of device which is approved by the Minister by notice in the Gazette or which conforms to such requirements, including the requirements of an standard publication contemplated in Section 94 (4), as may be specified in such notice."

In casu, the alternative charge, subject matter of this application, was framed under Section 82 (5), *supra*, so the provisions of subsections 82 (5) and 82 (6) are applicable.

[7] It is trite law that before a law becomes effective, it must be promulgated. This applies not only to statutes but also to regulations or by-laws which are intended to have the force of law – R v Koening 1917 CPD 225, Benator NO v Worcester Court (Pty) Ltd 1983 (4) SA 126 (C) and S V Carracelas and others (1) 1992 NR 322 (H).
GN 100 of 2003 was published on 30 April 2003 in the following terms:

"Road Traffic and Transport Act 1999.

The Minister of Works, Transport and Communication has in terms of Section 82 (7) of the Road Traffic and Transport Act, 1999 (Act Wo 22 of 1999), approved that the concentration of alcohol in any breath specimen shall be determined by means of any device that complies with the requirements of the South African Bureau of Standards, Standard specification "SABS 1793: 1998 evidential breath testing equipment."

M Amweelo
Minister of Works,
Transport and Communication, Windhoek, 30 April 2003"

That this General Notice does not comply with the provisions of subsections 94 (3) and 94 (4) is, with respect, beyond dispute. What the applicant submits is that there is no requirement for such compliance because "If the aforesaid is understood it is abundantly clear that the prerequisites of Section 94 (3) and (4) dealt with the chapter 11 regulation and not the power/discretion given by the legislative to the Minister to approve the type of device by which any breath specimen shall be ascertained."

[8] Strictly speaking this submission is not what the trial prosecutor advanced during the hearing. The essence of the applicant's case, as presented by the trial prosecutor, is captured as follows in pages 87 to 88 of the record of proceedings – "Ms Ashipala [prosecutor]: …… It is the State submission your worship that as I believe also indicated by my leaned colleague the Minister had the authority to make such notice or regulation to put that in the gazette and it is the submission of the state your worship that in doing so in exercising his authority he did not act outside the scope of his authority. *It is the submission of the state Your Worship to at the stage say that yes he acted inside the scope of his authority but did not do so he did not do so as per the requirements. He did not meet the necessary requirements in doing so, in putting forth or gazetting this Notice Your Worship or regulations in not meeting such requirements* (intervention) Court: What you saying he did not comply with the Act as it stipulates?

Ms Ashipala: No Your Worship *what I am saying is that he acted in his authority to put the Notice into the Gazette to make that Notice your Worship and to argue that in doing so acting in his authority yet not meeting the requirements are per the Road Traffic and Transport Act, to say that because he did not do something or omitted to follow to the letter or all of these requirements Your Worship that now makes the Notice ultra vires*. The state wishes to submit (intervention) Court: *So you say it is still valid although it did not meet requirements*? Ms Ashipala: *Yes Your Worship that is the argument of the state*. The fact that he did act within his authority to do so and as such as Your Worship the state submits that for that reason the Government Gazette or that Notice as published in the Government Gazette be valid. Leading to the fact that the state during the cause of the trial will be in a position to lead evidence proceed with the alternative and lead evidence on that Your Worship. That is the submission of the state, as the court pleases.
Court: Thank you Ms Prosecutor in short (intervention)
Mr Botes: I will be very short Your Worship.
Court: Okay
Mr Botes: "As I wish to express my (indistinct) *to the state in concession as he did not comply* (indistinct) the fact, *therefore having regard to peremptory provision only* can follow one (indistinct) of (indistinct) having regard to the circumstances (indistinct) that is in that (indistinct) as the court pleads" (emphasis added)

[9] My reading of this submission by prosecutor is that the minister did not comply with the provisions of subsection 94 (3) and (4) but that such omission is not fatal so as to render the Notice *ultra vires* the said statutory provisions of the Road Traffic and Transport Act. The Prosecutor was conceding that there are flaws in the promulgation of the said Government Notice. As alluded to above, Mr Small's submission is that there were no flaws in the promulgation as the Minister did not have an obligation to comply with the provisions of subsection 94 (3) and (4), *supra*, in making the Notice. In other words, subsections 94 (3) and (4) did not apply to the promulgation of the said Government Notice.

[10] I propose to consider these two submissions in turn. As far as the submission made by the trial prosecutor is concerned, it is beyond dispute that the Minister is empowered by Section 82 (7) to make the Notice in issue. But, the Minister is enjoined to do so in compliance with the requirements enshrined in Section 94 (3) and (4). Section 94 (3) is peremptory and it provides – "(3) Regulations incorporating any standard publication under subsection (1) *shall state the place at and times during which a copy of such standard publication shall be available for free inspection, including copies of any supplementary standard publication or specification or document incorporated by reference* in the main standard application" (emphasis added). Because of the peremptory nature of the provisions of Section 94 (3), *supra*, the application has no reasonable prospect of success on appeal. Coming to the ground set out in the Notice of Application for Leave to Appeal, as alluded to above, it is essentially submitted that the provisions of Section 94 (3) and (4) are not applicable to the making of the Notice. It is beyond dispute that Notice 100 of 2003 incorporates "The South African Bureau of Standards specification – Evidential Breath Testing Equipment" (SABS) (ie a standard publication) by reference pursuant to provisions of Section 94 (4), *supra*.

[11] It is further beyond dispute that this SABS was not published as required by Section 94 (3), *Supra*. Even without the provisions of Section 94 (3), before a law becomes effective, it has to be promulgated, this applies not only to statutes but also to regulations or by-laws which are intended to have the force of law - R v Koening, *supra*, and S v Carracelas and others, *supra*. In essence, what the applicant is saying is that the mere reference to a foreign standard publication, SABS, in the Notice is sufficient. It is up to the Namibian citizens affected by the use of the breathalyzer equipment to source for such standard publication from South Africa. It is clear that Section 94 (3) was specifically introduced by the legislature to curb such half-hearted publication by the Minister. The effect of the use of the breathalyzer device, as an evidential aid, is indeed grave to several Namibian drivers. The penalties for contravention Section 82 (5) are indeed severe. The use of such a device leads in certain instances, to an adverse inference operating against the offender. How is an offender charged under Section 82 (5) to know about the

equipment being used to determine his guilty if the Notice does not provide access thereof?

[12] It is for that reason that the legislature enacted Section 94 (3), *supra,* requiring the Notice or Regulation to "…..state the place and times during which a copy of such standard publication shall be available for free inspection, including copies of any supplementary standard publication or specification or document incorporated by reference in the main standard application." How will any citizen of Namibia know about the SABS's "Evidential Breath Testing Equipment" if its incorporation by reference is dealt with surreptitiously in the Government Notice? – S v Carracelas and Others, *supra*, Du Plessis and Others v De Klerk and Another 1996 (3) SA 850 (CC) and President of the Republic of South Africa and another v Hugo 1997 (4) SA 1 at 43-4. A person should be able to know of the law, and be able to conform his or her conduct to the law. The need for accessibility, precision and general application flow from the concept of the Rule of law - Committee for Commonwealth of Canada v Canada (1991) 77 DLR (4th ed.) 385. In Sunday Times v The United Kingdom (1979) 2 EHRR 245 the following remarks were made –

"First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "Law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail" This is what the legislature of Namibia sought to achieve by enacting Section 94 (3) and (4).
These provisions ensure that the public have substantive access to matters prescribed by law in regulations made by the Minister under the Act. In the circumstances there is no reasonable prospect of the state succeeding on appeal.

[13] In her judgment, the Regional Magistrate dealt with this issue in detail. There is merit in her findings that the provisions of Section 94 (3) and (4) as read within Article 12 of the Namibian Constitution render the Government Notice 100 of 2003

ultra vires and invalid. The Minister of Traffic and Transport should have just put his house in order in light of the possible number of offenders prosecuted using this evidence of the breathalyzer test acquired in a flawed manner. All hope is not, in any event, lost, as the prosecution in main charge can still be pursued without the aid and convenience of the breathalyzer device. The Minister can easily regularize the position by publishing another Notice in compliance with the relevant statutory provisions. Whichever way one looks at this matter, the state has no reasonable prospect of success on appeal. Accordingly, leave to appeal is refused and the application is hereby dismissed.

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Acting Judge

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APPEARANCES

STATE	:	MR SMALL Of the Office of Prosecutor General, Windhoek
ACCUSED:		MR BOTES Instructed by Theunissen Law & Parnters Windhoek