

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No: A320/2017

In the matter between:

DANIEL BRINK

Appellant

and

THE STATE

Respondent

Coram Allie, J et Davis, AJ

JUDGMENT DELIVERED ON 13 MARCH 2018

DAVIS, AJ (ALLIE J concurring)

1. This appeal concerns the interpretation and application of section 35 of the National Road Traffic Act 93 of 1996 ("the Act"), which deals with the mandatory suspension of driving licenses for prescribed minimum periods in cases of conviction for specified traffic offences.

2. Section 35(1) of the Act lists a various offences under the Act which attract a mandatory minimum sentence of six months in the case of a first offence, five years in the case of a second offence, and ten years in the case of a third or subsequent offence. The question in this appeal is whether a subsequent conviction under a different subsection of the same section of the Act qualifies as a second offence, more particularly, whether a conviction under section 65(2) of the Act which is preceded by a conviction under section 65(1) of the Act counts as two offences.¹
3. The appellant was charged in the Hermanus Magistrates Court with contravening section 65(2)(a) of the Act on 21 July 2016 by driving a vehicle on a public road while the concentration of alcohol in his blood was not less than 0,05 gram per 100 millilitres, to wit 0.21 gram per 100 millilitres.
4. The appellant's attorney negotiated a plea bargain on his behalf in terms of section 105A of the Criminal Procedure Act 51 of 1977, it being agreed that the appellant would plead guilty to the charge and be sentenced to a fine of R 10 000.00 (ten thousand rand) or ten months direct imprisonment of which half is suspended for a period of five years ("the plea agreement"). The plea agreement set out the circumstances pertaining to the commission of the offence, as well as factors relevant to the sentence,

¹ Section 65(1) of the Act deals with driving under the influence of intoxicating liquor or drugs, while section 65(2) deals with driving with an excess amount of alcohol in the blood.

both mitigating and aggravating. The appellant disclosed in the plea agreement that he had a previous conviction under a 2008 case number for *“the same offence”*.

5. At the hearing on 3 May 2017 the magistrate duly convicted the appellant in accordance with the provisions of the plea agreement. Prior to sentencing the State handed in a record of the appellant's previous convictions, which he admitted. The SAP69 recorded that the appellant had been convicted in 2009 on one count of driving under the influence of liquor under section 65(1)(a) of the Act and one count of reckless and/or negligent driving under section 63 of the Act (“the 2009 conviction”), for which he had been sentence to a fine of R 5 000.00 or ten months imprisonment, plus a further R 5 000.00 or eighteen months imprisonment conditionally suspended for five years.
6. The magistrate sentenced the appellant in accordance with the plea agreement, subjecting him to a fine of R 10 000.00 or ten months imprisonment of which half is suspended for a period of five years.
7. Thereafter the magistrate went on to deal with the question of the mandatory suspension of the appellant's driving license in terms of section 35(1). He did not before doing so – or at any stage – notify the appellant of the provisions of section 35(1) or (3). Nor did he enquire whether the appellant's attorney had informed the appellant of these provisions.

8. The magistrate therefore failed to comply with the peremptory provisions of section 35(4) of the Act, which obliges the court convicting any person of an offence referred to in section 35(1) to inform the person of the provisions of sections 35(1), (2) and (3) before imposing sentence. The procedural rights afforded to an accused in terms of section 35(4) are an important aspect of the right to a fair trial, and due care must therefore be taken to comply strictly with the requirements of the section. I agree with the observations by Tshiki J in *S v Botha* 2013 (1) SACR 353 (ECP) that:

“... the wording of s 35(3) of the Act envisages a hearing in compliance with the constitutional provisions, before the convicted person’s right to keep or obtain his or her license can be taken away by operation of law. It is for this reason that the court, in terms of s 35(4) of the Act, has to advise the convicted person of the provisions of ss 35(1) – (3) of the Act before the imposition of sentence. Sentencing, in the sense used in s 35(4) of the Act, includes the suspension of a license or disqualification to obtain one, as the case may be.”²

9. In this case the appellant was legally represented at the trial, and no point was taken on appeal regarding the magistrate’s failure to comply with the provisions of section 35(4) of the Act. Furthermore, the appellant, duly assisted by his attorney, did in fact testify in the section 35(3) enquiry. It can therefore safely be inferred that appellant’s attorney had informed him of the provisions of section 35(1) and (3), and I am satisfied that the appellant could not have been prejudiced by the magistrate’s failure to comply with the requirements of section 35(4).

² Paragraph [7].

10. Although the magistrate did not articulate the purpose therefor, he proceeded to conduct an enquiry as envisaged in section 35(3) in order to ascertain whether there were circumstances which warranted deviating from the prescribed minimum suspension period.
11. The appellant testified in the section 35(3) enquiry. During the course of his evidence in chief he volunteered that he was currently without a driving license because his license had been *“revoked during a previous incident.”*
12. During cross-examination he testified that his license had been suspended for six months in 2008, and that his license was currently suspended for five years until 2020 for *“n vorige dronkbestuur.”* He admitted that he had been driving without a license when he committed the offence for which he was being tried.
13. The conviction which gave rise to the current five year suspension did not appear on the SAP69. Nor was it referred to in the plea agreement.
14. The magistrate then questioned the appellant as follows regarding the 2015 conviction:

Court: *Mnr Brink, as die Hof nou so mooi kyk na die tydperk van opskorting was eers verstrek in 2020, blyk dit dat u in 2015 moes skuldig bevind gewees het op 'n klagte as ek dit reg verstaan sê u dit is ook 'n dronkbestuur klagte?*

Appellant: *Ja.*

Court: Die hoofklagte of was dit die alternatiewe klagte beteken dat te veel alkohol in u bloed of was dit die hoofklage waarop u skuldig bevind is?

Appellant: Dit klagte was vir alkohol ja, maar ek het voordat hulle enige bloedtoetse gedoen het, het ek gesê ek wil net skuldig pleit.

Court: Ek verstaan dit, maar die Hof wil vasstel is u skuldig bevind op die hoofklagte, beteken die hoofklagte van dronkbestuur beteken u het geen vermoëns gehad om daardie voertuig to bestuur nie of was dit die alternatiewe klagte wat beteken u het die vermoëns gehad om'n voertuig to bestuur, u het net to veel alkohol in u bloedsisteem gehad?

Appellant: Ek het die vermoë gehad om te bestuur, maar ... (tussenbeide)

Court: Dit is nou die ene van 2015. Ek praat van hierdie ene.

Appellant: Ja

Court: Is dit die alternatiewe klagte waarop u skuldiging bevind is?

Appellant: Ja.

Court: Die rede hoekom – die Hof sou in elk geval vir u gevra het wat was die rede vir die opskorting aangesien dit nie aangewys word op hierdie vorige veroordelings, die enigste vorige veroordeling aangewys hierop is die een van 2009, is dit korrek so?

Appellant: 2008.

Court: Ja, 2009 is u skuldig bevind.

Appellant: Ja, dis korrek.

Court: Ek wil net vasstel eers laastens voor ek afsluit, waar was u skuldig bevind in 2015?

Appellant: Pretoria.

Court: Pretoria se hof se wees. Kan u die datum onthou?

Appellant: Nee.

Court: So as die Hof dit reg het is dit u derde oortreding, derde soortgelyke oortreding waarop u vandag skuldig bevind is?

Appellant: Soortgelyk.

Court: Is dit korrek so?

Appellant: ... (no audible answer)"

15. On the strength of the appellant's answers the magistrate accepted that the appellant had been convicted for an alcohol related offence in 2015, despite the absence of any record thereof on the SAP69. He therefore considered that the appellant had three relevant convictions, all alcohol-related, being the 2009 conviction in terms of section 65(1), the 2015 conviction in terms of section 65(2) (apparently), and the current conviction in 2017 under section 65(2).
16. The magistrate further found that there were no circumstances relating to the offence which warranted a departure from the prescribed minimum period of suspension, and he accordingly ordered that the Appellant's license be suspended for a period of 10 (ten) years in accordance with section 35(1)(iii) of the Act.

THE QUESTIONS WHICH ARISE IN THIS APPEAL

17. Three questions arise in this appeal, namely:

17.1. whether it is only convictions under an identical provision of the Act which constitute previous convictions for the purposes of section

35(1)(ii) and (iii), or whether successive convictions for any of the similar offences grouped together under subsections 35(1)(a), (aA), (b) or (c) are relevant for purposes of determining whether one is dealing with a second or third offence for purposes of section 35(1)(ii) and (iii);

17.2. whether or not the magistrate ought to have taken into account the 2015 conviction which was not reflected on the SAP 69;

17.3. whether or not there are circumstances which warrant a deviation from the prescribed minimum period of suspension in this case.

THE INTERPRETATION OF SECTION 35(1) OF THE ACT

18. Section 35 reads as follows:

“(1) Subject to subsection 3, every driving license or every license and permit of any person convicted of an offence referred to in –

(a) section 61(1)(a),(b) or (c), in the case of the death of or serious injury to a person;

(aA) section 59(4), in the case of a conviction for an offence, where

(i) a speed in excess of 30 kilometres per hour over the prescribed general speed limit in an urban area was recorded; or

(ii) a speed in excess of 40 kilometres per hour over the prescribed general speed limit outside an urban area or on a freeway was recorded;

(b) section 63(1), if the court finds that the offence was committed by driving recklessly;

(c) section 65(1), (2) or (5)

where such person is the holder of a driving license or a license and permit, shall be suspended in the case of –

- (i) *a first offence, for a period of at least six months;*
- (ii) *a second offence, for a period of at least five years;*
- (iii) *a third or subsequent offence, for a period of at least ten years,*
calculated from the date of the sentence.

- (2) *Subject to subsection (3), any person who is not the holder of a driving license or of a license and permit, shall, on conviction of an offence referred to in subsection (1), be disqualified for the period mentioned in paragraphs (i) to (iii), inclusive, of subsection (1) calculated from the date of the sentence, from obtaining a learner's license or driving license or a license and permit.*
- (3) *If a court convicting any person of an offence referred to in subsection (1), is satisfied, after the presentation of evidence under oath, that circumstances relating to the offence exist which do not justify the suspension or disqualification referred to in subsection (1) or (2), respectively, the court may, notwithstanding the provisions of those subsections, order that the suspension or disqualification shall not take effect, or shall be for such shorter period as the court may consider fit.*
- (4) *A court convicting any person of an offence referred to in subsection (1) shall, before imposing sentence, bring the provisions of subsection (1) or (2), as the case may be, and of subsection (3), to the notice of such person.*
- (5) *The provisions of section 36 shall with the necessary changes apply to the suspension of a driving license or a license and permit in terms of this section."*

19. Section 35(1) can be understood in one of three ways:

19.1. First, an offence for the purposes of subsections (i), (ii) and (iii) can be understood as meaning an offence referred to in any of

subsections (a), (aA), (b) or (c), so that, for instance, a conviction under section 63(1) for reckless driving, which is listed in subsection (b), followed by a conviction under section 65(1) for driving under the influence of alcohol, which is listed in subsection (c), will count as two offences for purposes of section 35(1)(ii) (“the first interpretation”).

19.2. Second, an offence for the purposes of subsection (i), (ii) and (iii) can be understood as meaning any offence referred to in one of subsections (a), (aA), (b) or (c), so that a conviction for reckless driving, referred to in subsection (b), followed by a conviction for driving under the influence, referred to in subsection (c), would not count as two offences, whereas a conviction under section 65(1) for driving under the influence followed by a conviction under section 65(2) for driving with excess alcohol in the blood, would count as two offences for purposes of subsection (ii), since both are referred to in subsection (c) (“the second interpretation”).

19.3. Third, an offence for the purposes of subsections (ii) and (iii) can be understood as meaning a second, third or subsequent conviction for the same offence, i.e., a subsequent conviction under the identical provision on which the previous conviction was based, so that a conviction under section 65(1) for driving under the influence followed by a conviction under section 65(2) for driving with excessive blood alcohol would not count as two offences for the

purposes of subsection (ii), even although both offences are referred to in subsection (c) (“the third interpretation”).

20. Ms Jansen, who appeared on behalf of the appellant, relied on *S v Van Rooyen*³ (“*Van Rooyen*”), a decision of Van Zyl J (with whom Mjali J concurred), in which the Court opted for the third interpretation.
21. The Court in *Van Rooyen* understood the task of interpreting section 35(1) of the Act as a search for the intention of the legislature, to be gleaned from the ordinary meaning of the language used in the provision in the context of the statute as a whole.⁴ The Court first set about ascertaining the so-called ordinary meaning of the phrase “*second offence*” divorced from its particular context in section 35(1). In this regard the Court called into aid English cases in which the phrases “second offence” and “subsequent offence” have been construed to mean successive offences committed under the same section.⁵ No detail appears from the judgment regarding the wording of the provisions or the relevant statutory context under consideration in the English authorities relied upon.
22. Having concluded that the “ordinary” meaning of the phrase “second offence” was a second conviction for the same offence, the Court in *Van Rooyen* proceeded to determine whether this ordinary meaning led to an absurdity which justified a departure therefrom. The State submitted in this

³ 2012 (2) SACR 141 (ECG)

⁴ *Id* para [17].

⁵ *Id* para [19].

regard that it would be absurd if the license of a person with successive convictions under sections 65(1), (2) and (5) could only be suspended for a period of 6 months on each occasion, as this would negate the public interest in suspending the licenses of drivers who pose a danger to the public. It was also contended that it would be anomalous that a prior conviction for driving under the influence could be considered an aggravating factor for purposes of imposing sentence for a subsequent conviction for driving with excessive blood alcohol, but could not be considered a previous offence for purposes of subsections (ii) and (iii).

23. Neither of these arguments found favour with the Court in *Van Rooyen*. It reasoned that section 35(1) does not do away with the court's power under section 34 of the Act to impose a longer period of suspension than the minimum prescribed in section 35(1).⁶ Thus, where an offender has three successive convictions for alcohol-related offences under different sections of the Act, a court is not confined to the minimum suspension of six months for a first offence, but may exercise its general discretion under section 34 to impose a longer period of suspension.

24. The Court in *Van Rooyen* considered that:

*"In terms of its ordinary meaning section 35(1) is intended to strike at repeat offenders of the same offence as opposed to repeat offenders of the offences listed in section 35(1) or, on the proposed interpretation of the State, of related offences."*⁷ ...

⁶ *Id* para [23].

⁷ *Id* para [24].

[The phrase ‘a second offence’ in subsection (1)] *must be accorded its ordinary meaning, namely a second contravention of the same section in the Act.*”⁸

[Emphasis added]

25. The approach in *Van Rooyen* to the task of statutory interpretation is based on outdated authorities and is not in keeping with the current law on interpretation, which was expressed as follows by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁹ (“*Endumeni*”):

*“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant on its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.... The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”*¹⁰

26. The Court in *Van Rooyen* attempted to ascertain the so-called ordinary meaning of the words “second offence” in abstract, without having regard to their particular statutory context. This, with respect, is a flawed

⁸ *Id* para [27].

⁹ 2012 (4) SA 593 (SCA).

¹⁰ *Id* para [18].

approach for, as Lewis JA observed in *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd*, “Words without context mean nothing.”¹¹ It has been made clear that, while the starting point in the task of interpretation remains the words of the document, the process of interpretation does not stop at a perceived literal or “ordinary” meaning of the words. From the outset the words used are to be considered in the light of the relevant context. Interpretation is no longer a process that occurs in stages, but is “essentially one unitary exercise”.¹²

27. I am therefore of the view that the interpretation of section 35(1) undertaken by the Court in *Van Rooyen* falls to be reconsidered, having due regard to context and the purpose of the provision in question.
28. Commencing with a consideration of the context provided by the Act as a whole, it is important to note that section 34 of the Act empowers a court convicting a person of an offence related to the driving of a motor vehicle (whether in terms of the Act or at common law), in addition to any sentence which it may impose, to suspend the person’s driving license, or disqualify him or her from obtaining a driving license for such period as the court may deem fit. The period of the suspension or disqualification therefore lies in the discretion of the court, which is not limited.

¹¹ 2016 (1) SA 518 (SCA) para [29].

¹² See *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at para [12], quoting Lord Clarke SCJ in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 ([2012] Lloyd’s Rep 34 (SC) para 21).

29. The power conferred under section 34 is subject to section 35. The effect of this is that the Court's general discretion to determine the period of suspension is limited in the particular circumstances referred to in section 35, inasmuch as minimum periods of suspension are prescribed in specified circumstances.
30. It is settled law that provisions, such as section 35, which provide for the suspension of a driving license serve two purposes, namely to punish the offender and to protect the public.¹³
31. Section 35(1) lists various offences, grouped by type in four subsections, which attract minimum license suspensions. Thus subsection (a) deals with offences related to breaches of duty in the case of an accident; subsection (aA) deals with serious speeding offences; subsection (b) deals with reckless driving and subsection (c) deals with alcohol-related offences.
32. If one considers all the offences contained in the Act, it is immediately apparent that the offences listed in section 35(1) are the most serious offences. The punishment for these serious offences is not left to the court's discretion; instead the court must ordinarily, i.e., absent circumstances contemplated in section 35(3), impose the prescribed minimum licence suspension periods. It seems to me that the objective of section 35(1) is to ensure that courts impose harsher penalties for the

serious offences listed in section 35 than those which might typically be imposed by courts exercising their general discretion under section 34.

33. Section 35(1)(i) to (iii) provides for progressively longer periods of suspension in the case of repeat offenders. The obvious reason is the need to protect the public by removing dangerous road users who have not been deterred or corrected by previous punishment.
34. The various offences in section 35(1) which attract a minimum mandatory license suspension are grouped in four categories according to the nature of the offence. Thus:
 - 34.1. Section 35(1)(a), which refers to sections 61(1)(a), (b) or (c), deals with offences relating to dereliction of a driver's duty in the event of an accident in which any person is killed or seriously injured.
 - 34.2. Section 35(1)(aA), which refers to section 59(4), deals with exceeding the speed limit by more than 30 kilometres per hour in an urban area and more than 40 kilometres per hour outside an urban area or on a freeway.
 - 34.3. Section 35(1)(b), which refers to section 63(1), deals with reckless driving.

¹³ See, for instance, *S v Van Rensburg* 1967 (2) SA 291 (C) at 296 E – F; *S v Markman* 1972 (3) SA 650 (AD) at 655 D – G; *S v Greef* 2014 (1) SACR 74 (WCC) at 78 f – g.

- 34.4. Section 35(1)(c), which refers to section 65(1), (2) or (5), deals with driving under the influence of alcohol or drugs, or with an excessive amount of alcohol in the blood or breath.
35. The words “first offence”, “second offence” and “third offence” in subsections (i), (ii) and (iii) are qualified by, and must be understood with reference to, the introductory words at the beginning of section 35(1), “...*every driving license ... of any person convicted of an offence referred to in* – [subsections (a), (aA), (b), (c)]”.
36. It is significant that the offences referred to in section 35(1) are grouped in subsections (a), (aA), (b) and (c) according to type rather than being listed individually. This suggests, to my mind, that the emphasis is on the nature or type of the offence rather than the particular elements of the offence. By emphasising the latter the Court in *Van Rooyen* failed to take into account the deliberate grouping or categorization of the listed offences in the subsections.
37. In my view the relevant question when determining whether an offence is a first, second or third offence for purposes of section 35(1) is, “does the offence fall under subsections (a), (aA), (b), (c)?” and not “does it fall under an identical statutory provision?”
38. On this approach an offence qualifies as a second or third offence for the purposes of subsection (ii) and (iii) if it is listed under the same subsection

or category as the previous conviction. Thus a previous conviction under section 65(1)(a) for driving while intoxicated plus a subsequent conviction under section 65(5) for driving with excess blood on the breath would count as two offences. A conviction under section 61(1)(a) for failing to report an accident in the case of a death, plus a subsequent conviction under section 61(1)(c) for failing to render assistance in the case of a serious injury, would count as two offences. But a conviction under section 59 for serious speeding followed by a conviction under section 63(1) for reckless driving would not count as two offences, since the offences fall under different subsections or categories.

39. To my mind this interpretation of section 35(1) honours the text and promotes what I consider to be the clear purpose of the provision, namely to protect the public from road users who pose a risk because they have a tendency for certain dangerous conduct. Repeat offences attracting heavier penalties are determined with reference to multiple related offences which go to show a particular propensity in the offender – such as drunken driving or perilous speeding.
40. I respectfully disagree with the reasoning of the Court in *Van Rooyen* that the answer in cases of repeat offences under related, but not identical, statutory provisions is that a heavier penalty can be imposed in terms of the Court's general discretion under section 34 of the Act. To my mind the clear objective of section 35(1) is to limit the Court's discretion in the case of the most serious offences under the Act. It therefore makes no sense,

in my view, to fall back on the general discretion under section 34 in cases where a person is repeatedly convicted of offences listed in section 35 which are similar but not the same.

41. I am therefore not persuaded by the argument that the appellant's previous conviction under section 65(1) Act was not relevant and should not have counted as a first offence in relation to his current conviction under section 65(2) of the Act. I consider that the correct interpretation of section 35(1) is the second interpretation referred to above. Accordingly both the 2009 and the 2017 convictions are relevant since they are both alcohol-related offences referred to in section 35(1)(c).
42. I should mention, for the sake of completeness, that I do not regard the first interpretation as correct. Had the Legislature intended that an offence referred to in any one of subsections (a), (aA), (b) or (c) would count as a previous offence for purposes of subsections (ii) and (iii), it would have included the word "*or*" between subsection (b) and subsection (c). The absence of the word "*or*" is significant; it indicates that previous offences should be determined with particular reference to subsection (a), (aA), (b) and (c) as opposed to all these subsections. Furthermore, the first interpretation would, in my view, lead to arbitrary and oppressive results. For instance, a person convicted of driving at 95 kilometres per hour in a 60 kilometre zone, and subsequently for the unrelated offence of driving while over the alcohol limit, would be susceptible to a mandatory license suspension of five years. It is well-established that where two meanings

can be given to a statutory provision, the Legislature is presumed to have intended the milder rather than the harsher meaning.¹⁴ Hence I prefer the second of the three possible interpretations of section 35(1) referred to.

Should the magistrate have taken the 2015 conviction into account?

43. The minimum license suspension provisions in section 35(1) of the Act are penal in character. Proof of a second or third offence within the meaning of section 35(1) is a jurisdictional fact for the applicability of the increased minimum suspension periods in sections 35(1)(ii) and (iii).
44. In keeping with the ordinary allocation of the burden and standard of proof in criminal matters, it seems to me that the State must bear the onus of proof beyond reasonable doubt that the convicted person has been convicted of a second or third offence as contemplated in section 35(1) before the minimum mandatory suspension periods come into operation.
45. A court must be satisfied, beyond a reasonable doubt, that the convicted person has previously been convicted of a relevant offence before it can impose the increased penalties referred to in section 35(1)(ii) and (iii). The evidence must be clear and reliable in order to sustain the imposition of the penalty.

¹⁴ See J R de Ville *Constitutional & Statutory Interpretation* para 2.7, p 193 and para 2.7.1.3, p 198.

46. It is customary for previous convictions to be proved by the state producing a SAP69 and the person admitting the contents thereof. In this case, however, the SAP69 form produced by the State appears to have been incomplete or out of date inasmuch as it did not include the appellant's 2015 conviction. The fact of the 2015 conviction only emerged when the appellant testified during the section 35 enquiry, and the magistrate relied on his evidence for purposes of determining the applicable suspension period.
47. In my view it is insufficient, as a matter of principle, for a Court to rely solely on the evidence given by a convicted person regarding his or her previous convictions for purposes of applying the mandatory minimum suspension periods referred to in section 35(1)(ii) and (iii). I say this because our law does not permit the conviction of an accused person of an offence solely on the basis of his or her confession, but requires independent evidence of the commission of the offence.¹⁵ The reason for this is that confessions are not always reliable.
48. The same concern arises in regard to an accused's evidence of previous convictions for statutory offences under the Act, particularly those related to alcohol, which are technical in nature. In addition, memories fade so that the precise nature and dates of previous convictions cannot reliably be established solely with reference to the oral evidence of an accused. All things considered, it seems to me that a layperson's evidence

regarding previous convictions is intrinsically unreliable – or at least insufficient to meet the threshold of proof beyond a reasonable doubt.

49. But even if I am wrong as regards this general statement of principle, I in any event consider that in this case the appellant's evidence regarding the 2015 conviction can hardly be regarded as sufficiently clear and satisfactory to constitute proof beyond a reasonable doubt.
50. In my view the appellant's responses to the magistrate's questions about the charges in relation to the 2015 conviction were not such that one can be certain that he understood the questions and was able to give reliable and accurate answers. The question regarding the "alternative charge" is of a technical procedural nature, and is not an appropriate question to address to a layperson. Furthermore the magistrate's question as to whether or not the appellant had the capacity to drive a vehicle is misleading, since one may be under the influence of alcohol and yet still have the capacity to drive a motor vehicle. And in any event, the magistrate interrupted the appellant and prevented him from properly completing his answer in regard to the question whether he had the capacity to drive a motor vehicle or simply had too much alcohol in his blood. In addition, it seems to me that the appellant was hesitant when the magistrate put it to him that the present offence was his third similar offence, and his silence suggests to me that he may have been unsure how to answer. One cannot be certain that he understood the import of the

¹⁵ See section 209 of the Criminal Procedure Act 51 of 1977.

question and his response cannot be taken as an admission of the correctness of what the magistrate was putting to him.

51. I therefore consider that the magistrate erred in taking the appellant's 2015 conviction into account and therefore concluding that the appellant had three relevant convictions for purposes of section 35(1). In my view the magistrate ought to have taken into account only the appellant's 2009 conviction for contravention of section 65(1) and his 2017 conviction for contravention of section 65(2)(a) of the Act, so that the applicable minimum license suspension period is five years, in terms of section 35(1)(ii), and not ten years.

Should the prescribed minimum suspension period be applied in this case?

52. The appeal against the suspension period was aimed at the ten-year suspension which the magistrate imposed on the assumption that the appellant had two relevant previous convictions in addition to his 2017 conviction in the current proceedings.
53. In the light of the conclusion reached above regarding the 2015 conviction, it is unnecessary to consider whether the ten-year suspension was excessive in all the circumstances, because it is the five-year suspension period referred to in section 35(1)(ii) which applies in this case. The ten-year suspension period imposed by the magistrate therefore falls to be set aside and substituted with an appropriate sentence by this Court.

54. The question which then arises is whether there are circumstances relating to the offence which do not justify the minimum five-year suspension period, as contemplated in section 35(3) of the Act.
55. In *S v Greef* 2014 (1) SACR 74 (WCC) ("*Greef*"), Rogers J (Saldanha J concurring) held that the words "*circumstances relating to the offence*" are limited to circumstances which can properly and rationally be said to relate to the offence, and do not include an accused's personal circumstances, such as the need for a driver's license for purposes of employment or family responsibilities.
56. A different view was taken in *S v Lourens* 2016 (2) SACR 624 (WCC) ("*Lourens*") in which Savage J (Henney J concurring) held that section 35(3) of the Act, properly construed, does not do away with the Court's discretion, in imposing a license suspension, to consider all factors relevant to the exercise of the sentencing discretion, including an accused's personal circumstances and the interests of the community. Savage J reasoned that it is entrenched in our law that a sentence must always be individualised and based on a consideration of the sentencing triad, and that section 35(3) must be interpreted in a manner consonant with the right to a fair trial and the existing law in regard to sentencing. Had the legislature intended to limit the sentencing discretion by excluding consideration of the accused's personal circumstances or the interests of the community, it would have had to do so pertinently in clear terms. In the

absence of any such indication, the learned Judge concluded that the interpretation given to section 35(3) in *Greef* was incorrect.

57. I agree with the interpretation of section 35(3) adopted in *Lourens* for all the reasons articulated in the judgment of Savage J. I therefore intend to approach the question at hand by considering all the traditional sentencing factors, including the personal circumstances of the appellant.
58. The appellant's written plea explanation and his oral evidence reveal that he is 34 years old and unmarried, but in a stable relationship. He has no children. He has professional qualifications for computing and small business management, but has been unemployed for the last five years and is dependent on his family for financial support. At the time when he committed the offence in question, he was depressed about his inability to find employment. His driving license has been suspended until 2020 and he is hampered in his efforts to obtain employment as all the jobs for which he is eligible require a driving license. According to the appellant he currently drives around with his brother, who provides garden services. Presumably he assists his brother in that regard.
59. The appellant admitted that he has a tendency to drink too much. He also admitted in his plea explanation that he had been convicted on a drug possession charge around the same time as the commission of the offence in these proceedings.

60. The appellant is evidently aware that he has a problem with alcohol, as he voluntarily spent three months in a rehabilitation centre during 2016 in order to address his addiction issues, funded by his family. Unfortunately he could not afford to spend longer in the centre due to the medical costs associated with his father's cancer treatment. He currently attends Alcoholics Anonymous meetings in the area where he resides, and as at the date of his sentencing on 3 May 2017 he had not consumed any alcohol for some two to three months.
61. As regards the commission of the offence in these proceedings, the accused stated that he had been drinking since approximately 20h30 on the night in question. At around 23h00, he decided to drive to the Engen shop to buy cigarettes, regardless of the fact that he had been drinking for some 2½ hours and did not have a valid driving license. No collision occurred, and no person was injured, and the appellant's unlawful actions were only detected when he was pulled over by the police, who smelled alcohol on his breath.
62. Although I am mindful of the fact that no person or property was injured as a result of the appellant's actions, this does not, in and of itself, warrant a departure from the prescribed minimum suspension period. Nor does the appellant's difficulties in finding employment.
63. In my view there are seriously aggravating factors in the appellant's case which dictate that the minimum mandatory suspension period of five years

should be imposed. This is the appellant's second alcohol-related offence (excluding the 2015 conviction), and he has also admitted to a recent charge for drug possession. He clearly has a problem with addiction. Although there are indications that the appellant is aware of his problem and is taking steps to address it, there are also indications that he might be in denial as regards the extent of his addiction. He drank again after leaving the rehabilitation centre, and he admitted to having drunk beer, which he regarded as different from "strong alcohol", as recently as two to three months before the sentencing hearing.

64. In the circumstances it seems to me that the appellant poses a clear risk to road users as a result of his addiction issues and his inability to restrain himself from getting behind the wheel of a car even although his license has been revoked. In my view the interests of the community require that the appellant be removed from the roads for a substantial period of time so as to afford him a sufficient opportunity to deal with his alcohol addiction and reform his conduct.
65. I can see no reason in this case for deviating from the applicable minimum suspension period. Indeed, I consider it entirely appropriate that the appellant's license be suspended for a period of five years in terms of section 35(1)(ii). He has only been saved from a minimum suspension of ten years by the State's failure to produce a current SAP69 form.

Conclusion

66. In the result, I propose the following order:

1. The appeal against the suspension of the accused's driving license for a period of 10 years is upheld.
2. The 10-year suspension of the accused's driving license is set aside and replaced with a suspension for a period of 5 years.
3. The 5-year suspension shall run from 3 May 2017, being the date on which the accused was sentenced.

D M DAVIS

Acting Judge of the High Court

I agree and it is so ordered.

R ALLIE

Judge of the High Court