

JUSTICE COLLEGE



EVIDENCE

PROOF OF FACTS ESTABLISHED BY AN EXAMINATION OR PROCESS REQUIRING CERTAIN SKILLS

**[SECTION 212(4) OF THE CRIMINAL
PROCEDURE ACT, 1977 (ACT NO 51 OF 1977)]**

EVD 21

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PROOF OF FACTS ESTABLISHED BY AN EXAMINATION OR PROCESS REQUIRING CERTAIN SKILLS

STATUTORY PROVISIONS

Section 212(4) of the Criminal Procedure Act, 1977 (Act No 51 of 1977) provides as follows:

212 Proof of certain facts by affidavit or certificate

(4)(a) *Whenever any fact established by any examination or process requiring any skill-*

- (i) *in biology, chemistry, physics, astronomy, geography or geology;*
- (ii) *in mathematics, applied mathematics or mathematical statistics or in the analysis of statistics;*
- (iii) *in computer science or in any discipline of engineering;*
- (iv) *in anatomy or in human behavioural sciences;*
- (v) *in biochemistry, in metallurgy, in microscopy, in any branch of pathology or in toxicology; or*
- (vi) *in ballistics, in the identification of finger prints or palm-prints or in the examination of disputed documents,*

is or may become relevant to the issue at criminal proceedings, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is in the service of the State or of a provincial administration or is in the service of or is attached to the South African Institute for Medical Research or any university in the Republic or any other body designated by the Minister for the purposes of this subsection by notice in the Gazette, and that he or she has established such fact by means of such an examination or process, shall, upon its mere production at such proceedings be prima facie proof of such fact: Provided that the person who may make such affidavit may, in any case in which skill is required in chemistry, anatomy or pathology, issue a certificate in lieu of such affidavit, in which event the provisions of this paragraph shall mutatis mutandis apply with reference to such certificate.

[Para. (a) amended by ss. 46 and 47 of Act 97 of 1986, by s. 40 of Act 122 of 1991 and by s. 9 of Act 86 of 1996 and substituted by s. 6 of Act 34 of 1998.]

- (b) *Any person who issues a certificate under paragraph (a) and who in such certificate wilfully states anything which is false, shall be guilty of an offence and liable on conviction to the punishment prescribed for the offence of perjury.*

Section 150(2)(b) or 151(2)(b) of the Criminal Procedure Act is applicable if any of the parties in the proceedings wish to produce a document. The said section reads as follows:

- (2)(b) *Where any document may be received in evidence before any court upon its mere production, the prosecutor [s 150(2)(b)] / and the accused wishes to place such evidence before the court, he [s 151(2)(b)] shall read out such document in court unless the accused/prosecutor is in possession of a copy of such document or dispenses with the reading out thereof.*

REQUIREMENTS FOR ADMISSIBILITY

In terms of the above-mentioned statutory provisions, the following requirements must be met:

- The fact(s) sought to be proved must be relevant to the issue(s) in the particular proceedings;
- The fact(s) sought to be proved must have been established by an examination or process requiring any skill in any (or more) of the following fields/disciplines:

- Biology;
- Chemistry;
- Physics;
- Astronomy
- Geography;
- Geology
- Mathematics;
- Applied mathematics;
- Mathematical statistics;
- The analysis of statistics;
- Computer science;
- Any discipline of engineering;
- Anatomy;
- Human behavioural sciences;
- Biochemistry;
- Metallurgy;
- Microscopy;
- Any branch of pathology;
- Toxicology;
- Ballistics;
- The identification of finger or palm-prints; or
- The examination of disputed documents

See *Dlamini* 2004 (1) SACR 179 (NC) at 180 d – e where the deponent stated that she had conducted an examination requiring skills in genetics. Genetics is not one of the fields mentioned in subsections (i) to (vi) of section 212(4)(a) nor was there any information to justify an inference that it forms part of one of the sciences that are mentioned in those provisions. The conviction was set aside on review.

- A document purporting to be an affidavit must have been prepared and the original thereof must be available. However, if the skill required to ascertain the particular fact(s) falls within the ambit of –
 - chemistry;
 - anatomy; or
 - pathology,
 the person who may make the required affidavit may, in lieu of an affidavit, issue a certificate in which event the provisions of section 212(4) shall *mutatis mutandis* apply to such certificate (see proviso in section 212(4)(a));

- The person who made the affidavit must, at the stage when the examination was conducted or process followed, have been -
 - in the service of the State
 - in the service of a provincial administration;
 - in the service of or attached to the South African Institute for Medical Research;
 - in the service of or attached to any university in the Republic; or
 - in the service of or attached to any body designated by the Minister of Justice for purposes subsection 212(4) of the Criminal Procedure Act, 1977 by notice in the Government Gazette
 and this fact **must be alleged explicitly in the affidavit;**

See *Dlamini* 2004 (1) SACR 179 (NC) at 180 b – d where the deponent stated that she was in the service of the Agricultural Research Council. She failed to state that she was in the service of any of the institutions envisaged in section 212(4)(a) and no information was available from which an inference could be drawn that the mentioned council formed part of any of these institutions. The conviction was set aside on review.

Arising from *Dlamini* above, the Minister designated the Agricultural Research Council as a body for the purposes of section 212(4)(a) (see Government Notice R. 889 of 30 July 2004 (Government Gazette 26603 of 30 July 2004)).

- The deponent must explicitly allege in the affidavit that (s)he has established such fact(s) by means of such an examination or process and must indicate which skill(s) was/were required.;

[NOTE: It is suggested that the above chronology is followed in assessing the admissibility of a document purporting to be formulated in terms of section 212(4) and that, before the actual fact(s) to be proved is placed on record, the court should rule on the question whether all the statutory requirements for production of the document have been met (thereby ruling the production of such probative material admissible).]

CONSEQUENCES IF REQUIREMENTS FOR ADMISSIBILITY ARE MET

If the affidavit/certificate complies with the above-mentioned requirements, the document (affidavit/certificate) may be produced as probative material into court by –

- the prosecutor reading out the contents of the document in court; **unless**
- the accused (or his/her legal representative) is in possession of a copy of the document; or
- the accused (or his/her legal representative) dispenses with the reading out thereof.
(See section 150(2)(b) of the Criminal Procedure Act, 1977 above)

and **upon mere production of that document**, it **shall** constitute *prima facie* proof of the fact(s) thus established.

The word *shall* indicates that the court is compelled to accept the document. The court has no choice and no further prerequisites/requirements/qualifications are necessary.

[NOTE: It is always safe practice to have the entire contents of a document read into the record even if such reading is not strictly necessary.]

Prima facie proof means that admissible and credible proof to the contrary by means of rebutting evidence is still possible. In the absence of such proof to the contrary, the *prima facie* proof will become conclusive proof.

(**Veldthuisen** 1982 (3) SA 413 (A); **Mkhize** 1998 (2) SACR 478 (W))

The mere fact that the defence indicate that they do not accept the contents of the affidavit/certificate, does not affect the value of the *prima facie* proof at all. They must submit substantial admissible evidential material to rebut the contents of the document. If not, the *prima facie* proof will become conclusive.

(**Britz** 1994 (2) SACR 687 (W))

When production of the affidavit/certificate is contemplated, experience has learned that the defence may indicate that they object to the production thereof because:

- all facts or the fact(s) contained in the affidavit/certificate have been placed in issue and that the prosecution must therefore prove all its allegations or, at least, the fact(s) contained in the affidavit/certificate; and/or
- the accused, in terms of section 35(3)(i) of the Constitution of the Republic of South Africa, 1996, has "... a right to a fair trial, which includes the right - ... to adduce and challenge evidence and that they therefore have the right to insist on the author of the affidavit/certificate to appear in court to give oral evidence on the contents of the document and to be cross-examined.

It is submitted that such an objection should be overruled for the following reasons:

- Facts in issue (*facta probanda*) and facts relevant to the facts in issue (*facta probantia*) can be proved by any form of evidential material (i.e. oral evidence, documentary evidence, real evidence, admissions, judicial notice and presumptions). The requirements for admissibility and the method of adducing such evidential material are determined by either the common law or by a statutory provision. If, therefore, a statutory provision (like, *in casu*, section 212(4) of the Criminal Procedure Act, 1977) exists and all the requirements for admissibility and the method of adducing that evidential material have been complied with, the affidavit/certificate “...**shall**, upon its mere production at such proceedings be *prima facie* proof of such fact”. The court will therefore have no choice but to admit such evidential material.
- Item 2(1) of Schedule 6 of the Constitution of the Republic of South Africa, 1996 provides as follows:

“All law that was in force when the new Constitution took effect, continues in force, subject to –

- (a) any amendment or repeal; and
- (b) consistency with the new Constitution”

Section 212(4) of the Criminal Procedure Act, 1977 was in force when the Constitution took effect and had not been amended or repealed since. Section 212(4) of the Criminal Procedure Act, 1977 has not been ruled unconstitutional by any court competent to rule on constitutional matters (see section 172 of the Constitution) and also does not affect the accused’s right to a fair trial in general or the right to adduce and challenge evidence in particular (section 35(3)(i) of the Constitution). The accused can still adduce evidential material to rebut the *prima facie* proof established by the production of the affidavit/certificate meeting all the requirements set out above and (s)he can challenge the facts (evidence) contained in the affidavit/certificate through other means than cross-examination. See *Ndhlovu* 2001 (1) SACR 85 (W) and *Ndhlovu* 2002 (2) SACR 325 (SCA) 225a – 341b

- The phrase “...**shall**, upon its mere production at such proceedings be *prima facie* proof of such fact” in section 212(4) is peremptory and cannot be interpreted as permitting the court to exercise a discretion or worse, to refuse to apply the provisions as a result of one’s personal preferences.

However, section 212(12) of the Criminal Procedure Act, 1977 provides that “*the court ... may in its discretion cause the person who made the affidavit or issued the certificate to be subpoenaed to give oral evidence in the proceedings in question, or may cause written interrogatories to be submitted to such person for reply, and such interrogatories and any reply thereto purporting to be a reply from such person, shall likewise be admissible in evidence at such proceedings*”.

REMEMBER: If the court exercises its discretion in terms of section 212(12), -

- it does not alter -
 - the **procedure** in terms of which the initial document (affidavit/certificate) is submitted to court (or, if applicable, formally admitted to by the defence);
 - the **way** in which the fact(s) contained in the initial document is proved; nor
 - the **reality** that the mere production of the affidavit/certificate constitutes *prima facie* proof of the fact(s) contained therein unless properly rebutted by the defence;
- the witness thus subpoenaed, is the court’s witness (see section 186 of the Criminal Procedure Act, 1977) and both the prosecution and the defence may cross-examine him/her;
- the oral evidence or reply on written interrogatories will become **additional** probative material to be considered, assessed and weighed **together with** the initial probative material

(*prima facie* proof unless **properly** rebutted by the defence) contained in the section 212(4) document and all other probative material at the end of the case.

EVIDENTIAL VALUE

Admission of evidential material (*in casu* documentary evidence ruled admissible after the requirements set out in section 212(4) of the Criminal Procedure Act have been complied with) and the weight to be attached to such evidential material should not be confused.

There are no degrees of admissibility. Evidential material is either admissible or inadmissible. Once ruled admissible, however, it may carry more or less weight according to the facts and circumstances of each case. Evidential material must be weighed and evaluated in its totality at the end of the trial.

(P J Schwikkard and Others *Principles of Evidence* (Juta 1997) 18)

The fact that the evidential material under discussion was admitted by mere production in terms of a statutory provision and that its veracity was not tested under cross-examination (if section 212(12) was not applied), may certainly have an influence on the evidential weight a court may attach to it.

The party deciding to adduce evidential material in terms of section 212(4) of the Criminal Procedure Act, 1977 (usually the prosecution), must realize the risk of doing so. If this method is selected and the opposing party adduces admissible rebutting oral evidence, the court will most probably attach more weight to the oral rebutting evidence than to the (untested) affidavit/certificate.

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