

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case Number: 29/2014

In the matter between:-

THE STATE

and

GILBERT MOTAUNG

CORAM:

DAFFUE, J et MURRAY, AJ

JUDGMENT BY:

MURRAY, AJ

DELIVERED ON:

7 AUGUST 2014

[1] This is an automatic review pursuant to the summary conviction and sentence of the accused for contravention of Section 108 of the Magistrates' Court Act, Act 32 of 1944, on 21 May 2014 in the Magistrates' Court Wesselsbron.

[2] Section 108(1) of Act 32 of 1944 makes provision for such a summary procedure for contempt of court, namely:

“(1) If any person ... wilfully insults a judicial officer during his sitting or a clerk or messenger or other officer during his attendance at such sitting, or wilfully interrupts the proceedings of the Court or otherwise misbehaves himself in the place where such Court is held, he shall ... be liable to be sentenced summarily or upon summons to a fine not exceeding R2 000 or in default of payment to imprisonment for a period not

exceeding six months or to such imprisonment without the option of a fine.”

- [3] Should Section 108(1) be invoked, Section 108(2) provides as follows:

“(2) In any case in which the Court commits or fines any person under the provisions of this section, the judicial officer shall without delay transmit to the registrar of the court of appeal for the consideration and review of a judge in chambers, a statement, certified by such judicial officer to be true and correct, of the grounds and reasons of his proceedings, and shall also furnish to the party committed a copy of such statement.”

- [4] I shall deal first with Section 108(2) since in two respects the requirements therein have not been complied with. First of all, the relevant judicial officer did not set out the grounds and reasons for his proceedings in “*a statement certified by [him] to be true and correct*” but in a letter, and, secondly, there is no indication that the letter was “*furnished to the party committed*”. The Court therefore needs to determine whether the judicial officer’s failure to comply with the provisions of Section 108(2) is fatal.

- [5] In **S v Nxane**¹, a two-bench decision of this Division it was held that the provisions of Section 108(2) are merely administrative in nature and do not constitute an indispensable part of the proceedings under Section 108(1). The Court therefore held that non-compliance with Section

¹ See: 1975 (4) SA 433 (O) at 436 (A)

108(2) did not result in the invalidity of the summary proceedings before the Court *a quo*.²

[6] In view of the above, and since in the instant case the judicial officer's letter bore an official stamp and his signature, and since the contents thereof are confirmed by the extract from the written record of the proceedings which accompanies the letter, I am satisfied that the failure to provide a certified statement of events does not invalidate the Section 108(1) proceedings.

[7] That leaves the judicial officer's apparent failure to furnish the committed party with this letter. The Court in **S v Mitchell**³ held that the reasons for the statement to be furnished to the accused are twofold, namely to enable him or her to confirm that the facts stated are correct and to give him or her an opportunity to express his or her remorse.⁴

[8] The accused *in casu* was sentenced to six months' direct imprisonment. From the letter it appears that, after invoking Section 108(1) on 21 May 2014, the Court postponed the main trial for one week, to 28 May 2014. However, when the trial had to resume on 28 May, the judicial officer was informed that the accused had already been released on 27 May 2014 from his imprisonment for contempt.

[9] As in **S v Nxane**, the accused herein had already been

² See: Jones & Buckle: **THE CIVIL PRACTICE OF THE MAGISTRATES' COURTS IN SOUTH AFRICA**

³ See: 2011 (2) SACR 182 (ECP)

⁴ See: At para [15] at p. 186

released by the time the review was filed. The extract from the proceedings supports the judicial officer's version of the proceedings. I therefore respectfully agree with the Court in Nxane that the failure to furnish the accused with the letter does not invalidate his conviction although it might be said to impact on his rights, an aspect which is addressed later herein.

[10] As far as the provisions of Section 108(1) are concerned, in my view the judicial officer *in casu* on the facts of the matter, was justified in invoking the summary procedure the section provides for.

[11] "Contempt" in terms of Section 108(1) is committed, *inter alia*:

- (a) Where a judicial officer, or other officer of the Court, is wilfully insulted during a sitting; or
- (b) Where the court proceedings are wilfully interrupted; or
- (c) Where the person misbehaves himself in Court and thereby interferes with the proper functioning of the Court.⁵

[12] The record leaves one in no doubt that the accused's conduct during the trial meets all of the above criteria. It is

⁵ See: Misbehaviour should be wilful (See: **S v Memani** 1993 (2) SACR 680 (W) at 681 (e) – 682e, and the *mens rea* required can either be *dolus directus* or *dolus eventualis* (**S v Foley** 1968 (1) SA 694 (T) at 697 H)

clear that he interrupted the Court proceedings and interfered with the proper functioning of the Court, and that he did so wilfully.

- [13] When the Court during the proceedings requested the accused to stand up, for instance, his answers were: *“For what your worship”; “I don’t want to”; and “You are also sitting”*. When the Court, after explaining to him that his conduct could amount to contempt of court and warning him of the sentence that could be imposed if he were to be so convicted, asked him if he understood the explanation, he kept denying that he was in contempt and produced answers like: *“You want me to stand up so you can tell me again that you find me guilty”; “Can the Court just find me guilty”; “Find me guilty now, Your Worship, I’m telling the Court to find me guilty, Your Worship”; “Continue and find me guilty”; and “Yes, do your job”*.

- [14] In **S v Nel**⁶ it was said, loosely translated, that:

“A presiding judge or magistrate who is of the opinion that somebody has acted in contempt of court should first consider whether it is necessary and desirable for him to take action. Very often conduct which strictly speaking constitutes contempt of court can quite fittingly merely be ignored without really impairing the dignity or the authority of the Court or the orderly conduct of the proceedings.”

- [15] From the judicial officer’s letter, as well as the record it appears that the events of 21 May 2014 were not isolated incidents, but that the accused *“has a history of swearing*

⁶ See: 1991 (1) SA 730 (A), at 749F – 750F.

and threatening both the presiding officer and the prosecutor, and on occasion spitting at the legal aid officer”.

From both documents, furthermore, it is evident that although the judicial officer had explained the provisions of Section 108 to the accused before, that the Section was only invoked on 21 May 2014. In my view it is therefore safe to accept that the judicial officer had already carefully considered whether he would be justified in invoking Section 108.

[16] I am of the view that the conduct of the accused in the instant matter was not such that the Court could have further ignored it without impairing the dignity or the authority of the court or the orderly conduct of the proceedings. It is evident that the accused wilfully refused to obey the Court orders and persisted in disrupting the process, and that such flagrant disobedience occurred *in facie curiae*⁷, that an immediate response was necessary to restore order and to deter the accused from repeating it. In my view the proceedings had reached such a point that the presiding officer had no other option than to invoke the provisions Section 108.

[17] I am satisfied, furthermore, that the necessary procedure to protect the rights of the accused was observed during the Section 108 proceedings and the *audi alteram partem* principle adequately applied so as not to unconstitutionally

⁷ See: **S v Mathoho**: *In Re: Da Silva Pessegueiro v Tshinanga* 2006 (1) SACR 388 (T) at para [19] at p. 393; **S v Lavhengwa** 1996(2) SACR 453 (W) at p. 454, 474

infringe the accused's rights.⁸ The Court explained to the accused what conduct could amount to contempt and explained his right to an attorney and to Legal Aid assistance during the Section 108 proceedings, which he refused. He was invited to give reasons why he should not be found in contempt, but talked about anything but the contempt proceedings and at no stage used any of the opportunities to express any remorse for his conduct. He was also invited to present evidence in mitigation before he was sentenced.

[18] I respectfully agree with Nugent, JA, that:⁹

"[12] ... the proper administration of justice may not be prejudiced and interfered with and that to do so constitutes the offence of contempt of court..... The integrity of the judicial process is an essential component of the rule of law. If the rule of law is itself eroded through compromising the integrity of the judicial process then all constitutional rights and freedoms ... are also compromised."

[19] I agree, too, that the primary objective in the application of the contempt procedure is to maintain the reputation and dignity of the court and the orderliness of its proceedings by enforcing the court's authority and with the court in *S v Lavhengwa* that it is of the utmost importance to protect the law and the importance of the judicial process for all

⁸ See: **S v Phomadi** 1996 (1) SACR 162 (E) at p. 165; **S v Lavhengwa**, *supra*, at p.455; **S v Nyalambisa** 1993 (1) SACR 172 (TK) at p. 176

⁹ See: **Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)** 2007 (5) SA 540 (SCA) (2007) (9) BCLR 958, at para 12.

citizens.¹⁰

[20] In **S v Mitchell**¹¹, *supra*, it was held that a review court should be slow to interfere with the measures which a lower court considers necessary in “*self-protection and in order to secure the decorum of its own proceedings*”, such as to invoke Section 108.¹² In my view the conviction and sentence at that stage of the proceedings *in casu* were indeed necessary to protect the reputation and dignity of the Court as well as to restore the orderliness of its proceedings and in so doing to protect the Court’s authority.

[21] In my view, then, the application of the summary procedure provided for in Section 108 in the present case did not result in any injustice.

THE SENTENCE:

[22] In **S v Nel**¹³ the Court stressed that the conviction for the contempt is a *sui generis* type of conviction where the accused is not a “*criminal*” in the strict sense of the word and the purpose of the sentence is not to ‘*punish*’ the accused but directed mainly at getting an offender to refrain from a continuation of his contemptuous conduct. The penal jurisdiction is R2 000 or alternatively six months’ imprisonment or both such fine and imprisonment.¹⁴

¹⁰ See: **S v Mitchell** *supra* at para [11] at p. 186 and **S v Lavhengwa**, *supra*, at p. 464.

¹¹ See: **S v Mitchell** 2011 (2) SACR 182 (ECP)

¹² See: At para [9] read with paras [8] and [5] at 185 g – 186 a; 184 i – 185 b and 185 e – f; See also: **S v Lavhengwa**, *supra*, at p. 454 and 455, 466, 467, 472, 474, 480

¹³ See: **S v Nel**, *supra* at p. 752, 753

¹⁴ See: **S v Mitchell**, *supra* at paras [17] and [18] at p. 187

[23] Although I agree that imprisonment in the circumstances of this case with the accused's history of disruptive behaviour, is the correct sentence, I am of the view that a suspended sentence would have been an effective deterrent for continued misconduct during the trial.

[24] Wherefore the following order is made:

1. The conviction for contravention of Section 108 of Act 32 of 1944 is confirmed;
2. The sentence of six months' imprisonment is set aside and substituted with a sentence of six months' imprisonment, wholly suspended for two years on condition that the accused is not convicted of contempt of court again during the period of suspension.

H. MURRAY, AJ

I concur:

J. P. DAFFUE, J