

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG  
REPUBLIC OF SOUTH AFRICA

Case No RC 1081/10

In the matter between:

**THE STATE**

versus

**SPHA MABASO**

**IN RE**

**THE STATE**

versus

**XOLANI INNOCENT HADEBE**

**SIHLE NXELE**

**THEMBINKOSI NDLOVU**

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**REVIEW JUDGMENT**

Delivered on:

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**GORVEN J:**

[1] This matter has been sent on special review from Pietermaritzburg Regional Court by the learned acting regional magistrate Ms. MS Linda. It is headed 'Request for Special Review in terms of S 304(4) of the Criminal Procedure Act, 51 of 1977' (the Act). She convicted the

accused, an attorney, of contempt of court and fined him R5 000 or ten days' imprisonment by way of summary proceedings.

[2] The proceedings arose out of a criminal trial where the accused appeared on 15 August 2013. Although the written record kept by the learned magistrate indicates that the proceedings were mechanically recorded, they do not appear to have been transcribed in respect of his initial appearance. What follows is therefore derived from the handwritten record kept by the learned magistrate.

[3] The accused indicated to the learned magistrate that he was instructed to represent one of the accused (the trial accused) but was not ready to proceed as he had a matter in Estcourt. The learned magistrate ordered that the accused consult with the trial accused and that the matter should proceed shortly thereafter whereupon the matter stood down. Approximately one and a half hours later the court re-convened and one Ms Zondi indicated that she was standing in for the accused. When she said that she was not ready to proceed with the trial but had simply been asked to stand in, she was excused. The learned magistrate procured the attendance of the accused some four hours fifteen minutes later.

[4] On his attendance, the proceedings were mechanically recorded and have been transcribed. The trial accused was not present. The learned magistrate addressed the accused as follows:

‘[E]arlier on the Court gave you an order that you consult and proceed with trial since the matter was at the stage of the defence case and the Court was not willing to give you a further postponement. Later the matter was called, the Court was told that you have left for Estcourt.’

The accused agreed with this assertion and, when asked why that had happened, explained that the trial accused had requested that he place

himself on record even though he was meant to be in court in Estcourt. He stated that when he appeared previously he had not placed himself on record. The following interchange then took place:

'COURT Did you not address the Court that you have been instructed to deal with the matter, that you were not ready to proceed because you were engaged in Estcourt and that you had not properly consulted, and for those reasons I gave you an order that you – the matter stand down and we will proceed, and I proceeded to tell you that it is unethical to take a mandate that you cannot carry out.

MR MABASO Your Worship, I understand that clearly – loudly and clearly, however, I was of the impression that given the fact that we had placed, or we – I had received instruction at the late hour, the eleventh hour, the matter would not be able to proceed because I would not have gotten proper instruction, would not have consulted, would not have read the statements and been able to represent the client to the best of my ability. In relation to being ordered, at that stage I do not recall, or if I did not hear clearly, I did not hear the Court saying I should come back to the Court and advise the Court, or proceed with the trial.

COURT So you are saying that I – the pronouncement of the Court saying to you the matter stand down, you will consult and proceed with the trial, you did not understand that you were required to come back and inform the Court .... [indistinct] proceed with the matter?

MR MABASO No, Your Worship.

COURT Mr Mabaso, I am of the view that your behavior is disrespectful and you are undermining the authority of this Court and that I am going to – I am not going to allow.

MR MABASO Yes, Your Worship.

COURT Just address me, why should I not hold you in contempt?'

[5] A lengthy interchange then took place during a summary inquiry into the conduct of the accused, during which interchange there were clearly differences of opinion between the learned magistrate and the accused as to what transpired and also as to what was understood to be happening in the matter. During the interchange the learned magistrate

twice repeated her question as to why she should not find the accused in contempt for defying the court order given. The accused did not concede that he had misconducted himself.

[6] After the interchange, and after he was not prepared to concede that he had misconducted himself, the learned magistrate said the following:

‘This Court finds you GUILTY OF CONTEMPT OF COURT, Mr Mabaso, you are FINED FIVE THOUSAND RAND OR TEN DAYS’ IMPRISONMENT.’

The accused then applied for a deferred fine and the learned magistrate deferred the fine in such a way that it would have been fully paid by the end of November 2013. The accused then asked for leave to withdraw as attorney of record of the trial accused and such leave was granted.

[7] The learned magistrate sent the matter on special review, indicating that she had summarily found the accused of contempt *in facie curiae*. Her report states that the accused had not been given a right to legal representation nor an opportunity to mitigate on sentence as this was done summarily. She records that she is of the view that such was unnecessary as he was not an accused person and the summary hearing was not unconstitutional in the terms set out in, inter alia, *S v Mamabolo (E TV & others intervening)*.<sup>1</sup>

[8] The learned magistrate, in the referral, proceeds to set out reasons for her decision and the summary process as well as reasons for requesting a special review in terms of s 304(4) of the Act. Those reasons are embraced in the following paragraphs:

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<sup>1</sup> 2001 (1) SACR 686 (CC) paras 51 – 59.

‘3.1 The Magistrate seek for a declaration by the Honourable Reviewing Judge on whether the Contempt inquiry which was held Summarily against the Attorney was procedurally fair in terms of section 303 of Act 51 of 1977.

3.2 The Magistrate seek for a declaration by the Honourable Reviewing Judge on whether the Contempt inquiry which was held Summarily against the Attorney was in accordance with justice, in terms of section 304 of Act 51 of 1977.

3.3 The Magistrate seeks a declaration by the Honourable Reviewing Judge on whether the Sentence imposed was competent and fair.’ (The grammar in the reference has not been corrected.)

She concluded that if the proceedings were found to be procedurally unfair and not in accordance with justice, a directive as to how contentious conduct by practitioners should be dealt with was requested.

[9] There are a number of difficulties with the procedure adopted by the learned magistrate. In the first place, it is clear that the inquiry concerned conduct not committed *in facie curiae*.<sup>2</sup> If contempt is not committed *in facie curiae*, a summary procedure is not competent.<sup>3</sup> In *Mathoho*, an attorney refused to re-enter the court room when instructed to do so by a magistrate. It was held that s 108 of the Magistrates’ Court Act 32 of 1944 did not make provision for summary punishment for contempt committed *ex facie curiae* in that the court was able to try such offence only if brought before it by way of summons. The conviction and sentence were set aside.

[10] Secondly, the learned magistrate did not invoke the provisions of s 108 of the Magistrates’ Court Act. This provides a summary procedure for a person who:

‘[W]ilfully 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

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<sup>2</sup> S v Mbaba 2002 (1) SACR 43 (E)

<sup>3</sup> S v Mathoho; In re Da Silva Pessegueiro v Tshinanga 2006 (1) SACR 388 (T).

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.'

It is clear that this was not invoked for a number of reasons. First, the learned magistrate made no reference to the section. Secondly, she did not refer to it in sending the matter on review. Thirdly, she did not comply with its provisions. In this regard, s 108(2) provides that, if any sanction has arisen under the section, 'the judicial officer shall without delay transmitted 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.'

She did not certify the statement, neither does it appear that she furnished the accused with a copy of the statement. Fourthly, the sanction imposed exceeded that provided for in the section.

[11] In *Mamabolo*, Kriegler J, dealing inter alia with s 108 of the Magistrates' Court Act 32 of 1944 and ss 159(1), 178(1) and (2) and 189 of the Act, which empowers a presiding officer to deal with a particular form of disruptive conduct on the part of an accused, held that none of these deals with allegedly contentious conduct outside court and after the event. He also indicated that the inquiry was limited to proceedings in superior courts as lower courts have no extraordinary jurisdiction to deal with instances of scandalizing the court. In doing so he distinguished 'between prosecutions in the ordinary course at the instance of the prosecutorial authorities, which may be tried before a lower court, and the

special proceedings initiated by the presiding judicial officer'.<sup>4</sup> He held that a person summoned in respect of extra curial alleged contempt is an accused person as contemplated by Section 35 (3) of the Constitution of the Republic of South Africa, 1996. He found as follows:

'Manifestly the summary procedure is unsatisfactory in a number of material respects. There is no adversary process with a formal charge sheet formulated and issued by the prosecutorial authority in the exercise of its judgment as to the justice of the prosecution; there is no right to particulars of the charge and no formal plea procedure with the right to remain silent, thereby putting the prosecution to the proof of its case. Witnesses are not called to lay the factual basis for a conviction, nor is there a right to challenge or controvert the evidence. Here the presiding Judge takes the initiative to commence proceedings by means of a summons which he or she formulates and issues; at the hearing there need be no prosecutor, the issue being between the Judge and the accused. There is no formal plea procedure, no right to remain silent and no opportunity to challenge evidence. Moreover, the very purpose of the procedure is for the accused to be questioned as to the alleged contempt of court.'<sup>5</sup>

The court there held that such a procedure was irreconcilable with standards of fairness called for by Section 35 (3) of the Constitution. It constitutes a major inroad into an accused's fair trial rights and such an accused enjoys little benefit or protection from the law and its processes. He held that such proceedings should be reserved 'for the most exceptional cases only'. Regardless of the constitutionality of the sections considered by Kriegler J in *Mamabolo*, it is clear that, since the alleged contempt took place *ex facie curiae*, the proceedings by the learned magistrate were fundamentally procedurally flawed.

[12] In addition, and in any event, the Magistrates' Court, being a creature of statute, has no jurisdiction to deal with contempt of court by

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<sup>4</sup> Para 51.

<sup>5</sup> Para 54

way of a summary procedure.<sup>6</sup> The only basis upon which contempt *in facie curiae* can be dealt with by way of summary procedure is if it falls within the four corners, and is dealt with in terms, of s 108. The court has jurisdiction over the common law crime of contempt of court. It is obliged, however, to deal with it as it deals with every other crime, by way of summons and a formal hearing.

[13] I decline the invitation of the learned magistrate to give legal advice as to what should take place. The law is sufficiently clear in this respect if she takes the trouble to establish its contours. This means that the conviction and sentence must be reviewed and set aside and the learned magistrate, or any other person, is then entitled to take whatever steps may be deemed appropriate to prosecute the accused since the setting aside is done on procedural rather than substantive grounds.

[14] In the result, the conviction and sentence of the accused is reviewed and set aside.

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**GORVEN J**

I agree

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**VAHED J**

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<sup>6</sup> *S v Mkize* 1962 (2) SA 457 (N) at 459G-H; *Mathoho*, note 3 supra.