

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape High Court, Kimberley)

Case Nr: 349/2009
Magistrate's Nr: 02/2009
Date delivered: 13/07/2009

In the matter between:

The State

and

John Booí

Coram: Henriques AJ

JUDGMENT ON REVIEW

Henriques AJ:

1. The accused was summarily convicted of contempt of Court *in facie curiae* on 4 June 2009, and sentenced to five days imprisonment. This case now serves on review.
2. A perusal of the record of 4 June 2009 indicates that the conviction and sentence was not properly recorded. The record in relation to the conviction and sentence reads as follows:-

"Mrs Gerrits not placed on funds. Attorney also notice that the accused is intoxicated. So she is not on record for the accused.

Accused under the influence of liquor. He said he spoke to Ms Gerrits. He will be able to pay her in a months time.

Court called Insp Albertus Jacobus as witness in contempt of court.

Accused convicted of contempt of court.

Sentenced to 5 (Five) days imprisonment.

NB: Accused was highly under the influence of liquor even difficult for court to postpone this matter today because of the state he was in.

Postponed 11/06/2009 Further date.

Accused in custody.

Bail cancelled until 11/06/2009.

Mrs Mtini

04/06/2009".

3. In addition the record reveals that the accused's right to review and appeal was also not explained to him.
4. Section 108(1) and (2) of the Magistrate's Court Act 32 of 1944 provides as follows:

"If any person, whether in custody or not, wilfully insults a judicial officer during his sitting or a clerk or messenger or any 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 (in addition to his liability to being removed and detained as in subsection (3) of section provided) be liable to be sentenced summarily or upon summons to a fine not exceeding R2 000,00

or in default of payment sent to imprisonment of a period not exceeding six months or to such imprisonment without the option of a fine. In this subsection the word “court” includes a preparatory examination held under the law relating to criminal procedure.

“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 furnished to the party committed a copy of such statement.”

5. From a perusal of the documents provided, including the covering letter of Mr J D Wessels, it is clear that this was not done. Wessels explains that he came by chance upon this matter on 11 June 2009, after the proceedings had been finalized and also after the accused had served his sentence. The magistrate appears to have been on a workshop and only discussed the case with Wessels on 17 June 2009. It is also apparent from the record that the magistrate, NP Mtini, had not complied with the obligation in terms of section 108(2).
6. In her explanation dated 19 June 2009 the magistrate indicates the following:

“The accused in this case appeared before me on the 04 June 2009 in Britstown. The matter was called late during that day. The matter was postponed for attorney Ms Gerrits. Ms Gerrits was present and indicated that she is not going to represent the

Accused. Upon appearance accused was drunk I notice that because he was staggering and mumbling. I then decided to question him on his state. I convicted him for contempt of court. I could see that warning him will not help as he was highly under the influence and to order that he be kept in custody until he recover was not going to work as it was late in the afternoon. So I sentenced him to 5 days imprisonment.

I did not inform him of his rights to review. A week after that I was away on a workshop and on 17 June 2009 I discussed the case with you and unfortunately then the accused has served the said 5 days.

It is on the above that I refer this matter to you even if it is at this late stage for forwarding it for review."

7. I have read the covering note in support of the setting aside of the conviction and sentence. I am in agreement with the views expressed therein.
8. In **Duffey v Attorney General, Transvaal and Another** 1958 (1) SA 630 (T) at 630 specifically at 633 E Boshoff J held as follows:

"A magistrate's court, as a creature of statute, must seek its jurisdiction in the statute creating it. Sec. 108 (1) of the Magistrates' Courts Act confers jurisdiction on a magistrate's court to deal summarily with contempt of court committed in facie curiae. In terms of sec. 89 of the said Act, a magistrate's court has jurisdiction to entertain the common law offence of contempt of court brought before it as a criminal charge in the

ordinary way by summons. ... But for sec. 108 (1), a magistrate's court has no jurisdiction to punish summarily contempt of court committed in *facie curiae*. It consequently has no jurisdiction to punish summarily the common law offence of contempt of court committed in *facie curiae* and is limited to the provisions of sec. 108 (1) and the penalties therein provided, in this respect.

9. In S v Nel 1991 (1) SA 730A at 733C of the headnote, the court considered the objective of contempt proceedings. It held that *"The primary objective of the application of the contempt procedure is to maintain the reputation and dignity of the court and the orderliness of its proceedings. It is to achieve that objective that the court exercises its power to punish the offender. The most important function of the imposition of punishment in this case is to enforce the court's authority."*
10. In R v Silber 1952 (2) SA 475 AD at p480 Schreiner JA said the following:

"The power to commit summarily for contempt in facie curiae is essential to the proper administration of justice. ... But it is important that the power should be used with caution for, although in exercising it the judicial officer is protecting his office rather than himself, the facts that he is personally involved and that the party affected is given less than the usual opportunity of defending himself make it necessary to restrict the summary procedure to cases where the due administration of justice clearly requires it. There are many forms of contempt in facie

curiae which require prompt and drastic action to preserve the court's dignity and the due carrying out of its functions."

11. In *S v Zungo* 1966 (1) Caney J at p 270 D-F held the following:

"... The exercise of the power hereby conferred to punish summarily depends upon the question whether the appellant either (1) wilfully insulted the magistrate, or (2) wilfully interrupted the proceedings of the court, or (3) otherwise misbehaved himself in court, and the misbehaviour must be wilful misbehaviour."

12. The section therefore allows a magistrate's court with the jurisdiction to commit or fine, in a summary hearing and without the participation of a prosecutor, an offender who has committed, *in facie curiae*, any of the types of contemptuous conduct specify therein. See *S v Ntshwence* 2004 [1] All SA 328 (TK) at para 8.

13. In *Ntshwence supra* the court considered the provisions of section 108 in the light of the constitutional imperatives of section 36 of the Constitution. The court per Maya J held that in summary proceedings of this nature the court must have regard to the following rights namely:

- 13.1. The right to be informed of the charged with sufficient detail to answer it (see *Ntshwence supra* at p335 para 19);

- 13.2. The right to have adequate time and facilities to prepare a defence (see *Ntshwence* p 336 at para 21);

- 13.3. The right to legal representation (see *Ntshwence supra* p336 at paras 22 to 25);
 - 13.4. The right to adduce and challenge evidence (see *Ntshwence* at p338 at paras 28 and 29);
 - 13.5. The right to be presumed innocent, to remain silent and not to testify during the proceedings (see *Ntshwence supra* p388).
14. More importantly the proceedings that take place must be recorded. See in this regard *Ntshwence supra* p342 at para 43 wherein the Court held as follows:
- "It is implicit in section 108 (2) that everything which transpires in the Court, as is the case with any Court proceedings, must be recorded."*
- 15. This was not done in this instance, nor were the accused's right to review or appeal the matter explained.
 - 16. A perusal of the record also indicates that the sentence may not have been appropriate and induces a sense of shock.
 - 17. A person who is convicted of contempt *in facie curiae* is not to use the words of Maya J in *Ntshwence*:

'.....an ordinary criminal in the usual meaning of the word and ought not to be treated as such. Heavy sentences are

therefore generally inappropriate in these types of cases.'

See Ntshwence p 343 at para 47.

18. I agree with the sentiments of Maya J wherein she says it is only in serious or repeated cases of contempt that the Courts are inclined to impose even a suspended sentence without the option of a fine.

19. Quoting from Nel at 733D-E Maya J held as follows:

"The punishment which is imposed is meant to bring the offender to his senses in the very proceedings in which the offence is committed ... to refrain from continuing with his contemptuous conduct in the proceedings which are underway. The punishment is not meant to hurt the offender but to bring about an end to the outrage to the court's esteem and authority. The extent of the punishment stays in the background ... The authority of the Court is too precious to attempt to measure it against any punishment which may be imposed for conduct which harms it."

20. In Nel the Court also considered what principles ought to be taken into account when imposing a sentence, see the headnote at 733C:

"The most important function of the imposition of punishment is to enforce the court's authority. There is no room whatsoever for any notion of retribution. There can also be limited scope for reformation; for the most part.... the purpose of the punishment which is imposed is to bring the offender to his senses in the very proceedings in which the offence is committed. Deterrence

is by the same token often and chiefly directed at getting the offender to refrain from continuing with his contemptuous conduct in the proceedings which are underway. The punishment is not meant to hurt the offender but to bring about an end to the outrage of the court's esteem and authority. The extent of the punishment stays in the background; in the foreground is the esteem and the authority of the Court; and between the one and the other there is no direct relationship. The authority of the court is too precious to attempt to measure it against any punishment which may be imposed for conduct which harms it. Esteem for the Court cannot be achieved by heavier punishments for insults to the court. These considerations indicate why heavy sentence in these sort of cases is generally inappropriate in the ordinary course of the events."

21. It is for these reasons that I am of the view that the proceedings were not in accordance with justice and I make the following order:

The conviction and sentence are hereby set aside.

**J I HENRIQUES
ACTING JUDGE
NORTHERN CAPE DIVISION**