

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Review No.: 483/2006

In the matter between:

THE STATE

and

BONGANI TSATSA

REVIEW OF JUDGMENT

CORAM: KRUGER, J *et* EBRAHIM, J

JUDGMENT BY: EBRAHIM, J

DELIVERED ON: 30 JUNE 2006

[1] The accused, an 18 year old male was convicted of the offence of contravening section 108 of Act 32 of 1944 (The Magistrate's Court Act 1944) that is of the offence of contempt of court and sentenced to undergo 4 months of imprisonment on the 27th of March 2006 by the Magistrate, Ficksburg. In accordance with the provisions of the Criminal Procedure Act 51 of 1977 the matter was

forwarded to this Court on ordinary review.

[2] When the matter was placed before me on the 16 May 2006, after perusing the record of the proceedings in the lower court I addressed a query to the magistrate requesting him to furnish reasons for the conviction and sentence. The magistrate responded with those reasons which I received on the 13th of June 2006. I quote from his letter:

“Accused 1 misbehaved himself while the court was still in session. He could not leave the dock even though he was requested by court to leave. Thereafter the court advised the accused in regard with the provisions of Section 108 of the Magistrate’s Courts Act 32 of 1944 that if he continues misbehaving in court while in session such conduct shall amount to an offence called Contempt of Court and he shall be liable to be sentenced summarily to a fine not exceeding R2 000,00 or in default of payment, to imprisonment for a period not exceeding six (6) months or to such imprisonment without the option of fine.

Even though he was advised by court about the consequences of his conduct

in court, he insisted behaving in the manner that is appearing at the last paragraph in page 2 and the first paragraph at page 3 of the court record. He then on page 1 at line 11 on Mechanically recording asked the court to proceed and charge him with contempt of court."

From a perusal of the court record as well as the mechanically recorded portion of the proceedings it is apparent that the accused became aggrieved by the fact that his case on the merits was not being proceeded with on that day and consequently vented his frustration on the prosecutor by pointing at the said prosecutor with an empty 1,25ℓ glass bottle to indicate his discontent. That part of the proceedings, which were mechanically recorded, is attached to the record and from it at page 2 the following exchange between the magistrate and the accused took place.

"COURT Mr Tsatsa the Court advises you that it is going to charge you with contempt of Court with what you are doing.

Now the Court orders you to step down.

ACCUSED (own language)

COURT This Court informs you to step down. What is he saying?

INTERPRETER I ask the Court to proceed and charge him with contempt of Court.

COURT Thank you. Interpreter?

INTERPRETER Mr Letuba is a witness to the fact that the complainant when proceed the police asked him not to proceed with this matter Your Worship.

COURT Now the Court is not dealing with a trial. You were advised about that from your first complaint that this Court is dealing with your release on bail and you further informed the Court that you do not care for your release on bail.

ACCUSED That is not what I told Court that I do not care to be released on bail.

COURT What did you say?

ACCUSED I was informed that a formal bail application was going to be held today where the CID or the I.O. in this matter was to be called in the witness box and proceed with his reasons and I did not see that happening today.

COURT Now that a formal bail application has not been conducted, what bothers you on that?

ACCUSED I am bothered with what the Court is handling, how the Court is handling this matter because even the Prosecutor on the previous occasion indicated that the I.O. will be called to testify today.

COURT Do you still remember you pointed the Prosecutor with an empty of Coca-Cola, 1,25 litre.

BESKULDIGDE Liseki.

COURT You, you, you were behind the dock, pointing this Prosecutor with an empty bottle of Coca-Cola, aiming at assaulting him up until I requested the Court Orderly to take off that empty bottle. Do you still remember?

ACCUSED Yes I still remember that Your Worship.

COURT That on each date you appear before Court, you want to rule this Court.

ACCUSED (own language)

COURT Even now you pointed that investigating officer, why did you point the investigating officer with your fingers?

ACCUSED (own language)

COURT And even now you are rotating around that behind the dock. And the Court advised you are in contempt of Court by your conduct.

ACCUSED No that is not correct Your Worship.

COURT And you requested the Court to charge you for contempt of Court.

ACCUSED Yes Your Worship but now I am not in contempt, I am on telling the Court the truth.

COURT Do you have a right to point the Court Officer?

ACCUSED No I do not have such right."

[3] The magistrate has made annotations in manuscript that the accused shouted loudly, had numerous complaints, that the Court Orderlies had to be requested to dispossess him of the empty 1,25ℓ bottle and remove him from the dock.

Only once this was done did the learned trial magistrate decide to record the evidence mechanically.

[4] It is not clear at what point the accused was convicted of contempt of court as no verdict to that effect was recorded anywhere in the case record, except on that portion of the form J14 which is the covering page of the case record, reserved for the recording of the judgment or verdict. From the mechanically recorded portion of the proceedings, the magistrate appears to have embarked on the sentencing stage of the hearing immediately after the exchange referred to earlier on in this judgment. It is also apparent from the record that the magistrate merely informed the accused that he was going to be charged with contempt then followed the exchange, then followed the sentence.

[5] The issue which arises is whether the conduct of the accused amounted to misbehaviour within the meaning of section 108 of Act 32 of 1944. The shorter Oxford English Dictionary defines the word “misbehave” as “behave badly;

to conduct oneself improperly”.

- [6] It is apposite, however, to first comment on the summary nature of the proceedings. In **REX v SILBER** 1952 (2) SA 475 (A) at 480 F – H the court said:

“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.”

In **S v NEL** 1991 (1) SA 730 (A) at 733 C the following appears in the English headnote:

“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.”

- [7] The constitutionality of the summary procedure was settled in **S v SINGO** 2002 (2) SACR (CC) 160. This case dealt with the constitutionality of the provisions of section 72(4) of the Criminal Procedure Act 51 of 1977 namely the procedure dealing with the issue of a warrant of arrest in respect of an accused person who fails to appear in court after being duly and properly warned to do so. In my view, the reasoning employed by Ngobo J, is equally applicable to the summary procedure invoked under the provisions of section 108 of Act 32 of 1944 by reason of the fact that in both instances the summary procedures conducted are inherently similar. The constitutionality of the provisions of section 108 of Act 32 of 1944 were dealt with extensively in **S v LAVHENGWA** 1996 (2) SACR 453 (W), a decision of

the Witwatersrand Local Division. I am in respectful agreement with the views expressed in that judgment; albeit that the case was decided under the provisions of the interim constitution.

- [8] I turn now to an analysis of the facts of this present matter. There is no indication anywhere in the record of the proceedings before me that the provisions of section 108 were fully explained to the accused. The presiding officer merely informed the accused that he was going to be charged with contempt. The accused appears however to have adopted an arrogant and disrespectful attitude to the presiding officer by inviting him to proceed to charge him. Moreover, during the exchange referred to earlier on in this judgment, the accused admitted having threatened to assault the prosecutor with the empty bottle but denied that he was in contempt. In addition the further allegations of misconduct which apparently were put by the magistrate to the accused and the accused's answers thereto have not been recorded. The magistrate thereafter proceeded to

convict him of contempt and sentenced him to imprisonment without an option of a fine.

[9] In my view, the magistrate, quite correctly considered the type of aggressive conduct exhibited by the accused in open court to be grossly disrespectful of the prosecutor as an officer of the court and to be seriously undermining of the dignity and integrity of the court. The accused was rightly convicted of contempt.

[10] When it comes to the sentence imposed by the learned magistrate however, I am of the view, that it is unnecessarily harsh and disproportionate to the contemptuous conduct complained of. It is important to remember that the purpose of the summary contempt procedure is to preserve the dignity of the court as the axis on which the administration of justice turns and accordingly the reputation and orderly conduct of the court's proceedings must be preserved. The purpose of sentencing in such a case is not to belittle and dehumanise

the accused person but rather to draw to his attention the importance of preserving the dignity of the court (**S v NEL** *supra* at 754 E – F). It is also essential that accused persons understand that under the new constitutional dispensation in this country, the role of the courts has been strongly underscored as watchdogs of constitutional rights. Imprisonment for this offence should not be summarily imposed without the option of a fine, except perhaps in highly exceptional circumstances (**S v NEL** *supra* at 754 I – J). A sentence of imprisonment coupled with the option of a fine would in my view have been an appropriate and fair sentence in the circumstances of this case and would have sufficed to draw to the attention of the accused the purpose of the punishment.

- [11] It is regrettable that this matter could only be finalised by me at this stage due to the delays in forwarding the record to this court initially and thereafter returning it with the necessary responses to the enquiry addressed.

[12] The following order is made:

1. The conviction is confirmed;
2. The sentence is set aside and substituted with a sentence of R500 or 2 months' imprisonment.
3. In terms of section 282 of Act 51 of 1977 the sentence is deemed to have been imposed on 27 March 2006.

S. EBRAHIM, J

I concur.

A. KRUGER, J

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