



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

Case No. CA&R 46/2025

OF INTEREST

In re contempt proceedings against **LUVUYO MELANI** in the Whittlesea
Magistrate's Court

REVIEW JUDGMENT

HARTLE J

[1] A magistrate of the Whittlesea Magistrate's Court referred half-completed contempt of court proceedings to this court as a "*special review*".

[2] The pretext of the review was that although she believed that the actions of the alleged contemnor - a Legal Aid practitioner who in bail proceedings had addressed her in isiXhosa (whereas the official language in court is English) amounted to contempt of court, she wanted to be assured that she was correct in her handling of the matter before continuing. The reason advanced for this approach is that a similar matter (concerning a different Legal Aid practitioner) was pending in the Makhanda High Court, the outcome of which review (so I was led to believe) would settle in her mind whether Mr. Melani's behaviour under consideration had been properly vindicated as contempt of court.

[3] The provisions of section 108 (2) of Magistrate's Court Act, No. 32 of 1944 ("MCA"), contemplate a matter-of-course review to this court of completed *in facie curiae* contempt proceedings initiated in a magistrate's court under the ambit of section 108 (1), but this is not the typical situation that resorts under such a category.¹ This is so because the supposed contemnor, Mr. Melani, was never convicted, the magistrate having reserved her judgment pending this so-called special review. This notwithstanding, she is confident that she had every reason notionally to have invoked contempt of court proceedings against Mr. Melani in the unique circumstances of the matter which I relate below.

¹ Section 108 (2) of the MCA provides in this respect that:

"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."

It is not clear if Mr. Melani was served with a copy of the present review application. Absent the proceedings having culminated in him having been convicted and a penalty imposed, the peremptory obligation on the judicial officer to have provided the statement indicated for a review would not have been triggered. It would have been useful however to have known the magistrate's grounds and reasons for the proceedings taken (as far as they were), and to have heard the attorney's views in response, rather than to have grappled with hypothetical notions.

[4] Her equivocation that she was on the right track however drove her to seek the “*advice*” of a reviewing judge. In her first covering letter to the Registrar she wrote as follows:

“I am sending this matter on review to request the Honourable Reviewing Judge for advice.

I believe the actions of the Attorney amount to Contempt of Court. However since I am still awaiting a decision from the Grahamstown High Court on an Application to stay a conviction and sentence on my previous findings I made for Contempt of court, I believe it prudent to therefore seek your valued advice in this current matter.”

[5] After directing certain queries to the clerk of the Whittlesea Magistrate’s Court for clarification (the record was deficient and I was uncertain as to both the status of the contempt proceedings and the relevance of the pending matter before the Makanda High Court), the magistrate amplified her referral as follows:

“Mr Melani wasn’t convicted nor sentenced.

I stated previously I believe his actions to be contemptuous. However due to a previous and unrelated incident, where I did convict a different legal Aid attorney of contempt of court but which legal Aid South Africa brought an application to the High Court in Makanda to set aside the conviction, the decision of the Makanda High Court (is) still pending, and has delayed the district court matter for more than 6 months.

I therefore thought it prudent to rather send this matter on review for guidance and advice. Thus being in an attempt to save time and to ensure my understanding of contempt of court behaviour is not lacking.” (sic)

[6] Asked to clarify how the pending decision of the Makhanda High Court related, she replied as follows:

“The decision awaited by the Makanda High Court is not related to this matter. I only mention it to explain my motivation and justify my need to send this current matter on special review. I believe this was fully answered under 2 above. I would value the High Courts assessment of the incident and any opinion and advice the court may have to ensure my understanding of what may or may not amount to contempt of court behaviour is correct.” (sic)

[7] The matter co-incidentally came before me again as a chamber review when I had my clerk request direct particulars of the pending High Court matter.² In response the magistrate amplified its relevance and again put forward her ultimate basis for the review:

“The matter referred to which created my confusion in respect of what amounts to contemptuous behavior before court is Case B 60/2024 in which I found a legal aid practitioner, a Mr J...., guilty of contempt of court on the 23rd of July 2024.

At his request I postponed the matter for sentencing purposes as he wanted to appoint an attorney to mitigate on his behalf. A meeting between his manager and my senior magistrate was held in chambers in which it was agreed that sentencing should take place

² Since the offending behaviour of the other Legal Aid attorney under scrutiny in the Makhanda High Court was not mentioned, I was interested to ascertain if a true language issue had been in contention in that matter as well and if the High Court had pronounced thereupon. The 2017 Directive of the then Chief Justice, which sets the tone for an English-only-language-in-court Policy for reasons of practicality has posed certain challenges in our courts and faces criticism for not reflecting our country’s linguistic reality or meeting the constitutional imperative of promoting the status and use of all 12 official languages (which includes the recent addition of sign language). See *A handbook on Legal Languages and the quest for linguistic equality in South Africa and beyond*, Docrat, Kaschula and Ralarala, 2021, at 95 – 127 especially, read together with Chapter 7 which highlights certain South African cases on the subject. The trend of our reviewing courts in recent years has been to promote, rather than sanction, the usage of indigenous languages in courts where it has been constitutionally apt to do so, and/or to enforce accused persons’ constitutional rights to interpretation as an adjunct right to the implementation of language rights in a multilingual court context.

when next the main matter was on the roll and thereafter the entire contempt finding would be sent on review.

However despite this undertaking and before sentence, Legal Aid South Africa proceeded with an application the High Court of Makanda to set aside the guilty verdict of contempt. Their papers cited bias and the fear that Mr J... would receive a term of imprisonment as a sentence. I as the magistrate didn't oppose the application nor did I present or was I asked to present any reasons for my finding. I let the transcribed record speak for itself.

This entire procedure has and is creating a delay in the main matter.

The case number in the high court is C.A & R 13/2025 (in respect of the contempt conviction of Mr J...) was argued as far as I have been able to establish in my absence before the Honourable Acting Judge (Molony).

Legal Aid filed their application in respect of Mr J... in August 2024.

The current matter in respect of Mr Melani and placed before Honorable Judge Hartle occurred after this incident on the 24th of October 2024.

Due to the confusion created by the matter involving Mr J..., I decided to prevent a recurrence of the same happening and despite my belief that *Mr Melani's behavior on the 24th of October by addressing court in vernacular amounts to contempt of court*, had it not been for the experience I endured by the matter with Mr J..., I would have found Mr Melani Guilty of contempt of court.

I however decided to instead refer the matter to the High Court on review to determine if my opinion as to what I believe amounts to contemptuous behavior is indeed correct and if I should therefore proceed under case number B130 A/2024 to hold Mr Melani Guilty of contempt of court or not." (sic)

(Emphasis added)

[8] Section 108(1) of the MCA gives a magistrate's court³ the power to invoke summary proceedings to vindicate certain forms of contempt committed *in facie curiae*. The sub-section provides as follows:

“Custody and punishment for contempt of court.—(1) If any person, whether in custody or not, 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 (in addition to his liability to being removed and detained as in subsection (3) of section 5 provided) be liable to be sentenced summarily⁴ 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.”

[9] A lower court, unlike the high court, has no inherent right to punish an offender summarily for contempt of court. Its powers in this respect are derived from and limited to the three categories of contempt offences provided for in section 108(1) of the MCA.⁵

[10] The common law crime of contempt of court consists in unlawfully and intentionally violating the dignity, repute or authority of a judicial body, or interfering in the administration of justice in a matter pending before it.⁶

[11] Section 108 (1) of the MCA caters for conduct which could fall short of the common-law concept of contempt. Hence the caution has been sounded that is not

³ The section establishes statutory offences that apply only to magistrate courts. *In re Clark* 1958 (3) SA 394 (A) at 399C.

⁴ The summary type of procedure envisaged in section 108 (1) of the MCA that permits a contemnor to be “sentenced summarily” to the penalty provided for, is in contradistinction to the alternative option of vindicating his offending conduct through the issue of a summons, that is by way of the ordinary process of law.

⁵ *S v Lavhengwa* 1996 (2) SACR 453 (W), at 474I-475A.

⁶ Hunt *South African Criminal Law and Procedure* Vol II Revised Edition (1990) at 185.

useful to apply the common-law definition of contempt in an effort to decide what is contemplated by the section.⁷

[12] The section by obvious import deals only with contempt committed *in facie curiae*.

[13] Whilst a magistrate's court has jurisdiction to try the offence of contempt committed *ex facie curiae*, its *summary jurisdiction* provided for in section 108 (1) is limited to the three possible situations of unlawful conduct specified therein. The court has no jurisdiction to summarily punish the common-law offence of contempt of court, even if committed *in facie curiae*.⁸

[14] While the section includes conduct which could be contempt in the conventional sense, such as wilfully insulting a judicial officer, it also includes such lesser conduct as “*misbehaving*”, and also conduct which is directed not only at the judicial officer himself but also at an officer of the court during the latter’s attendance at a court sitting.⁹

[15] The subsection envisages three categories of statutory contempt:

- (a) wilfully insulting the judicial officer (or other officer of the court) during his sitting (or the other officer during the latter’s attendance at a court sitting);
- (b) wilfully interrupting the court proceedings; and

⁷ *S v Memani* 1994 (1) SA 515 (W) at 517H–J. See also *S v Lavhengwa*, *supra*, at 465H.

⁸ *Duffey v Attorney-General, Transvaal* 1958 (1) SA 630 (T); *R v Van Rooyen* 1958 (2) SA 558 (T).

⁹ *S v Memani* 1994 (1) SA 515 (W) at 517H–J; *Pheko v Ekurhuleni City* 2015 (5) SA 600 (CC) at 617B and 617C.

(c) (wilful) misbehaviour committed in the place where the court is held.¹⁰

[16] There must be evidence, given the element of wilfulness indicated in each of the possible situations above, that the insult or interruption as the case may be is intentional or deliberate. It must, therefore, be shown that the accused acted in the knowledge that what he was doing, or was about to do, could amount to contempt of court. Intention in the form of *dolus eventualis* however suffices.¹¹

[17] When it comes to the generic “*in any other respect*” misbehaviour contemplated, such offending conduct must also have been committed intentionally in the context of interfering with the proper functioning of a magistrate’s court. Looking at it from an opposite perspective, the conduct warranting the unique remedy to summarily punish a person for contempt under the section for “*other misbehaviour*” entails an *actus reus* connoting impropriety or a departure from the established mode of conduct of legal proceedings in the magistrate’s court which tends to undermine or interfere with such proceedings, with an intention to cause the disruption or disorder.¹²

[18] In *S v Lavhengwa*¹³ the court conducted a useful investigation into the proper interpretation of section 108 (1) of the MCA as follows:

¹⁰ *S v Lavhengwa, supra*, at 465G. See also Jones & Buckle, *The Practice of Magistrate’s Courts in South Africa* (Volume I & II) The Act/ Act with Commentary/ MCA 32 of 1944/108 *Custody and Punishment for Contempt of Court*, RS31, 2024 Act – page 669.

¹¹ *S v Lavhengwa, supra*, at 467D. Jones & Buckle *Commentary, Supra*, at 669 -70 and the cases cited therein on the issue of wilfulness and intention.

¹² *S v Lavhengwa, supra*, at 466F-H. It makes logical sense that read in context, not every misbehaviour in the place where the court is held constitutes a statutory offence under the third category. What is denoted is impropriety that undermines or interferes with proceedings, or detracts from the proper functioning of the magistrate’s court, not just up-in-the-air misbehaviour. Of course such *actus reus* must be associated with the necessary *mens rea* for the contravention.

¹³ 1996 (2) SACR 453 (W).

“It will at once be seen that this subsection establishes statutory offences which in certain respects renders criminal certain conduct which falls short of the common-law concept of contempt of Court. Common-law contempt is directed more at the judicial *office* than the particular judicial officer (See *R v Silber supra* at 480G). It is conceivable that conduct falling within the three categories of the statutory offences created in s 108(1) need not necessarily be contumacious conduct under the common law, but could very well constitute a contravention of this section. In *S v Memani* 1994 (1) SA 515 (W) Eloff JP and Le Grange J said at 517I-518C:

'It is in other words designed to provide for a sort of disciplinary proceedings to take care of a wide variety of misbehaviours from contempt of court downwards. It is accordingly not useful to apply the common-law definition of contempt in an effort to decide what is contemplated by s 108. One of the elements of contempt is an intention to violate the dignity of the court. It is conceivable that misbehaviour within the meaning of that word as used in s 108 could include conduct not necessarily designed to insult a judicial officer, but still serious enough to justify the invocation of the discipline created by s 108. At the same time, it has been held by this Court that the element of wilfulness is a feature of the offence created by s 108. Accordingly, while it is conceivable that in a proper case the judicial officer may find the person concerned guilty of misbehaving without necessarily conducting himself contemptuously to the court, that misbehaviour should be wilful.'

I respectfully agree with this interpretation of the parameters of s 108. The provision broadens the scope of punishable conduct which otherwise may not have constituted the common-law crime of contempt of court. In particular the third category of 'misbehaviour' created by s 108(1) establishes a wide range of conduct which may not otherwise be indictable. As far as I could ascertain, the range of misbehaviour falling within the scope of this third category of statutory contempt, has never been judicially defined. In trying to do so, much will depend upon the wide and uncertain meaning of the words 'otherwise misbehaves himself'. What is the meaning of the word 'misbehave' in this context? The *Oxford English Dictionary* 2nd ed at 847 defines the word 'misbehave' as 'to behave wrongly; to conduct oneself improperly'. The words 'otherwise misbehaves' as used in the section must be interpreted *eiusdem generis* (*Duffey v Attorney-General, Transvaal and Another* (*supra* at 635A); *S v Shapiro* 1987 (2) SA 482 (B) at 489A) because these words follow the provisions relating to: (i) wilful insults of a judicial officer 'during his sitting', and(ii) the wilful interruption of the proceedings 'of the court'. The words are also used in conjunction with the words 'in the place where such court is held'. In this context the 'other misbehaviour' which the Legislature intended to render a statutory offence, must therefore be restricted to wilful improper conduct which tends to interfere with the proper functioning of the magistrate's court. As used in s 108(1) it would seem to me that the word 'misbehave' connotes impropriety which undermines or interferes with such proceedings. Thus a mere departure 'from the established mode of conduct of legal proceedings' in the magistrate's court which is wilfully perpetrated (as

in *Zungo's* case *supra* at 271D) will be a contravention of the third category of statutory contempt contemplated in s 108(1) provided of course that it is not *de minimis*. For example, smoking in court may not necessarily be contumacious conduct entitling a conviction in terms of the common-law crime of contempt of court but it could very well result in improper behaviour justifying a conviction under the third category of misbehaviour contemplated in s 108(1). In *In re De Bruyn* 1939 NPD 1 at 3 Feetham JP said the following:

'No doubt most people are perfectly well aware that they should not smoke in court, and any person who smoked in court, when he was aware that he ought not to smoke, or who persisted in smoking in court after being told not to smoke, might properly be dealt with under the section.'

The section with which Feetham JP was concerned was s 103 of the old Natal Magistrates' Courts Act 32 of 1917 which for all intents and purposes was the same as the present s 108(1) of the Magistrates' Courts Act of 1944. Other examples of misbehaviour which need not amount to common-law contempt or conduct contrary to categories 1 and 2 of s 108(1), but may contravene category 3 are: giving evidence in a state of intoxication (*R v Lloyd* (1905) 22 SC 347); appearing in court improperly dressed (*In re Camrodeen* (1894) 15 NLR 335; *R v Mnyongo* 1931 EDL 157; H R Hahlo 'Judge and the miniskirt' 1970 *SALJ* 244/5; shouting in court (*Q v Rocke* (1884) 4 EDL 274; *R v Benson* 1914 AD 357); singing in court (*R v Khupelo* 1961 (1) PH H92 (E)). It would therefore seem possible that conduct in a magistrate's court which is neither insulting nor disruptive but merely improper could very well constitute misbehaviour under the third category of punishable conduct set out in s 108. To satisfy the prerequisites for a conviction under s 108(1) such improper conduct must of course be associated with the necessary *mens rea* in the form of *dolus directus* or *dolus eventualis*. (See *In re De Bruyn* (*supra*); *S v Foley* 1968 (1) SA 694 (T) at 696A; *S v Sekoyi* (*supra* at 942C).)¹⁴

[19] A magistrate's court possesses the authorization through the statutory empowerment aforesaid to self-protect and guard against the disruption of the orderly progress of proceedings before it. The power permits it to restore its authority promptly, and to allow the administration of justice to continue unhindered. By its very nature the kind of transgressions envisaged by the section require "swift intervention", that is quick and effective judicial intervention that serves the purpose of nipping the disruptive conduct in the bud so that both the

¹⁴ At 465H-467D.

dignity and authority of the court is restored, and its capacity to carry out its function is maintained.¹⁵

[20] The primary objective of any conviction for contempt of court is to maintain the reputation and dignity of the court and the orderliness of its proceedings and it achieves that object through the power to summarily punish the offender.¹⁶ Thus the most important function of the imposition of punishment for such offence is to enforce the court's authority.

[21] Summary jurisdiction under this section should be exercised only when the case (of possible statutory contempt) is clear beyond reasonable doubt and when immediate action is necessary to vindicate the dignity of the court.¹⁷ If an indictment will meet the case, the summary jurisdiction should not be resorted to. Contraventions of court etiquette or interferences of court procedure which are of a trivial nature should be ignored or dealt with by the presiding magistrate in a restrained manner.¹⁸

[22] Importantly, in *S v Ntshwence*,¹⁹ a Full Court of this Division held that the summary procedure does not limit the rights of an accused set out in section 35(3)(a), (b), (f), (g), (h), (i) and (j) of the Constitution of the Republic of South

¹⁵ *S v Mamabolo (E TV & Others Intervening)* 2001 (3) SA 409 (CC) at [51- 52]. See also *Coetzee v Government of the Republic of South Africa; Matiso & Others v Commanding Officer, Port Elizabeth Prison, and Others* 1995 (4) SA 631 (CC) at [61] on the nature of the institution of contempt of court proceedings and its critical importance in upholding the rule of law.

¹⁶ *S v Nel* 1991 (1) SA 730 (A), reading from the English translation of the headnote at 733 A-F with specific emphasis on the uniqueness of the offence, its distinct procedure whereby the offender can there and then be found guilty and sentenced, and the unique characteristics of the punishment. See also *S v Lavhengwa, supra*, at 464G-I and 474F-I and *S v Ntshwence* 2004 (1) SACR 506 (TkD) at [11].

¹⁷ See *S v Ntsane* 1982 (3) SA 467 (T) at 473A-B; *S v Nyalambisa* 1993 (1) SACR 172 (Tk) at 175i.

¹⁸ See generally the summary in Jones & Buckle *Commentary* concerning section 108 of the MCA (*supra*) and the myriad authorities cited therein.

¹⁹ *Supra*. Also reported as 2004 (1) All SA 328 (Tk). See also *S v Nel* 1991 (1) SA 730 (A) (albeit concerning contempt *in facie curiae* committed in the High Court) on the salutary starting point of applying the *audi alterem partem* principle before convicting a person of contempt in summary proceedings.

Africa, 1996. The limitation (by the summary procedure) on the right to a public trial before an ordinary court as set out in s 35(3)(c) is, further, justifiable in terms of s 36(1) of the Constitution.²⁰

[23] Accordingly, in summarily dealing with an offender under s 108 (1) of the MCA, the court must have regard to the fact that the offender has the following fair trial rights:

- (i) The right to be informed of the charge with sufficient detail to answer it.
- (ii) The right to have adequate time and facilities to prepare a defence.
- (iii) The right to legal representation.
- (iv) The right to adduce and challenge evidence.
- (v) The right to be presumed innocent, to remain silent and to testify during the proceedings.²¹

[24] It has been emphasized that a court of appeal or review should be slow to interfere with the measures which a lower court considers necessary to take in self-protection and in order to secure the decorum of its own proceedings, for it is difficult for the court of appeal *'to realise the atmosphere in which the incident took place and all the circumstances surrounding it, which are so essential for a right estimate of its real character'*.²²

²⁰ At 334e-340b and 340c-341e.

²¹ Buckle & Jones, *Commentary*, *supra*, read with corresponding footnotes indicating related authorities. Both *S v Lavhengwa* and *S v Ntshwence* provide useful analyses of the consideration of each fair trial right in the context of summary contempt proceedings.

²² *R v Benson* 1914 AD 357 at 359; *R v Silber* 1952 (2) SA 475 (A) at 481B–C; *S v Pitje* 1960 (4) SA 709 (A) at 710D; *S v Ngcemu* 1964 (3) SA 665 (N) at 668A; *S v Sokoyi* 1984 (3) SA 935 (NC) at 942A; *S v Poswa* 1986 (1) SA 215 (NC) at 221D; *S v Memani*, *supra*, at 518F–G.

[25] The present review concerns incomplete proceedings. Since no grounds or reasons have been provided to this court which may be of assistance in determining the matter, it is necessary to consider as best as it can, through the prism of the particular atmosphere that pertained in court at the relevant time, the circumstances under which the highlighted conduct came to be recognized by the magistrate as notionally contumacious.

[26] It appears that, in an attempt to be heard in court over the noise of the air conditioner at an appearance before her on 24 October 2024, instead of meeting the magistrate's expectation of speaking up as requested by her (in English, which is regarded as the official language of record), Mr. Melani resorted to speaking in isiXhosa. Before embarking on this route, however, he requested to rather be assisted by the interpreter if the magistrate could not understand him. Evidently he perceived that the reason she could not hear him was because he might not be arguing sensibly in a language that is not his mother tongue.²³ An exchange ensued thereafter, with Mr. Melani speaking in the vernacular. The magistrate warned him that he was "*now bringing (the) court into disrepute*", no doubt because he insisted on addressing the court in isiXhosa on the premise that it was one of the official languages that he was entitled to use. The magistrate corrected him, indicating that he knew very well that the only language in court is English. After surmising that

²³ In *Cultural and Linguistic Prejudices Experienced by African Language Speaking Witnesses and Legal Practitioners at the Hands of Judicial Officers in South African Courtroom Discourse: The Senzo Meyiwa Murder Trial*, Zakeera Docrat & Russell H. Kaschula, *International Journal for the Semiotics of Law* (2024) 37:1309–1322 (<https://doi.org/10.1007/s11196-023-10071-6>) the authors list three types of linguistic prejudice in a courtroom discourse context: Linguistic inequality where a communicative participant lacks lexical items - as in having sufficient English vocabulary, communicative inequality where a participant lacks semiotic appropriateness (the goal of achieving "appropriateness" in a semiotic sense is to enable effective and ethical communication where the meaning intended by the sender is successfully and respectfully interpreted by the receiver within a given context), and subjective inequality where value judgments are based on an interlocutor's statements. In this instance Mr. Melani from his perspective certainly imagined a void in communication, but the magistrate on the other hand appears to have been oblivious to his perceived linguistic prejudice.

Mr. Melani was “*going to continue on this trajectory*”, she announced that she was going to resort to contempt proceedings.

[27] It is necessary to outline what happened in the court in the figurative twinkling of an eye before things got messy:

“MR MELANI : As it pleases the Court, Your Worship. I am informed the Honourable Court dealt with the bail application in respect of one of the accused. This falls in line with the previous matter. Your Worship.

COURT : Okay. Are you going to bring an application for my recusal?

MR MELANI : Yes.

COURT : Is that what you’re saying?

MR MELANI : Yes.

COURT : On the 29, a written application?

MR MELANI : Yes

COURT : Good. Right.

MR MELANI : In fact, Your Worship, it would have been preferred that I will make my legal submissions ... [intervenes]

COURT : Pardon?

MR MELANI : Relating to all these cases that I’m referring to.

COURT : You want to do what? You want to?

MR MELANI : I’m not sure ... [intervenes]

COURT : Sorry, I’m, I can’t hear you.

MR MELANI : Maybe you can interpret for me, sir. Unfortunately.

COURT : No, no. Maybe you need to speak up Mr Melani with all due respect. Please speak up. I’ve got an aircon behind me ... [intervenes]

MR MELANI : I’m not, I’m not speaking softly. That’s one thing I do not do. You are constantly not hearing me. Hence maybe it’s a problem with the English language. Of course it’s not my mother tongue. Hence I will then I will use the services of the interpreter. Unfortunately.

COURT : No, you won't have ... [intervenes]

MR MELANI : I will ... [intervenes]

COURT : Something about ... [intervenes]

MR MELANI : [speaks in vernacular]...[intervenes]

COURT : Excuse me?

MR MELANI : [speaks in vernacular]...

INTERPRETER : Your Worship?

COURT : Oh, my goodness.

MR MELANI : [speaks in vernacular]...

INTERPRETER : Hmm.

COURT : Mr Melani ... [intervenes]

MR MELANI : [speaks in vernacular]

COURT : You are now speaking isiXhosa

MR MELANI : Mm-hm.

COURT : And you are now bringing this court into disrepute. Do you want to continue on this trajectory Mr Melani?

MR MELANI : isiXhosa is one of the official languages.

COURT : Oh, absolutely but ... [intervenes]

MR MELANI : [speaks in vernacular]

COURT : Mr Melani stop right now. You know very well that the only official language in court is English. Not any other language. There has been a constitutional court decision to that regard. If you now wish to address in isiXhosa you are now bringing this court into disrepute. So, you are going to continue on this trajectory?

MR MELANI : [speaks in vernacular]...[intervenes]

COURT : Fine. Mr ... [intervenes]

MR MELANI : [speaks in vernacular]

COURT : Mr Pukwana, please place case B130/2024 on record. Actually, it's the lunch hour. Court adjourns.

PROSECUTOR : I'm keeping the charge sheet."

[28] It is not clear from the record provided what transpired after the lunch hour or indeed why not, with the benefit of the customary one hour break in between, any imagined threat to the administration of justice could not have been resolved by trying again without the air conditioner running to hear Mr. Melani's submissions on behalf of his clients. In fact there is no indication in the record provided to this court at all that supports any suggestion that the bail application which before the lunch interval was underway was hindered from being continued.

[29] When Mr. Melani appeared to face the charge of contempt a week after the fracas on 5 November 2024,²⁴ the following exchange occurred in the court:

“COURT : Right this is case B130A. I've separated it from the main count which is obviously B130. And last week, sorry, the week before Mr Melani seemed to take extreme umbrage to the court's request to repeat what he had said, because I hadn't heard what he'd said, and he then decided that he would no longer address Court²⁵ and would only be speaking to the Court through the use of the interpreter and proceeded to address Court in a most hostile fashion in isiXhosa.²⁶ And after that happened I asked Mr Melani to please address this Court on why he shouldn't be held in contempt of court. He requested Court to explain why he would be held in contempt of court, on what grounds.

²⁴ There is no indication in the record why, what began with a flurry as an ostensible summary procedure, was then deferred to be dealt with a week later. The mere fact that the magistrate saw no compunction to deal with it forthwith probably suggests that it had been unnecessary to invoke the summary procedure at all. As was held in *S v Nel, supra*, at 732F-G, even assuming that in the magistrate's estimate of things the conduct under scrutiny was of such a nature that it could not be overlooked, she could have referred the matter to the Director of Public Prosecutions to decide whether Mr Melani should be prosecuted in the ordinary course. That would be the “*obvious choice if it is not necessary to act more speedily against the person concerned in protection of the reputation or the authority of the court or the maintenance of the orderliness of the proceedings.*” It is only when there is such a need that the judicial officer should “*there and then attend to it.*”

²⁵ Without a proper translation of the vernacular provided to the court, such an attitude cannot be discerned.

²⁶ In the correspondence underpinning the so-called special review the only offending action by Mr. Melani was supposedly constituted by his addressing the court in the vernacular against the stream of English being the mandated language of record in the court. The words “*umbrage*” and “*hostile fashion*” related by the magistrate to Mr. Melani when she was summarizing the tenor of the prior proceedings (which have a hubris of their own, especially when narrated with superlatives), however suggest something of an undercurrent denoting disrespect. As can be seen though, Mr. Melani when confronted with the accusation refuted any hostility on his part. He also refuted the alleged umbrage, explaining that it had rather come down to exasperation on his part for the fact that the magistrate could not properly hear him on the day in question, or understand what he was trying to convey.

And I advised that it would be because he had brought the court into disrepute. Thank you, Mr Melani, you may proceed.

MR MELANI : Just before I may proceed, Your Worship, I just wanted to confirm whether Court is acting in terms of common law or in terms of Section 108?

COURT : I am acting in terms of common law.

MR MELANI : Firstly, I would submit that no conduct of mine in speaking isiXhosa, which is a constitutionally guaranteed right, is contemptuous to the dignity of the court. It is my submission that this is not a subjective but rather an objective test. I will start off by quoting the words of now current Chief Justice Maya, in the interview of the judge president of the Western Cape which is Boqwana, wherein she stated that other official languages should be encouraged in spite of the challenges with the translation of the records. Further, it is not out of the ordinary that I had to resort to speaking isiXhosa. It was on more than four occasions on that day that the honourable Court could not hear me. As such I submitted that indeed there's a problem then with my command of the English language to an extent I elected to address the Court in isiXhosa in the presence of the interpreter who then in turn interpreted for the Court.²⁷ The Court in its introduction indicated that (it was) in the most hostile fashion. One now wonders where the hostility comes into play, in that on the previous date the Court had indicated that that record should be made available to the Court and I'm quite certain whoever would have interpreted to the Court would not sense any hostility there. Be that as it may, in this regard it is my submission that these summary proceedings are no longer appropriate in that they are not, as they are happening now, meant to restore the dignity of the court which may have been impaired at the time. So, the most appropriate way to deal with a current situation would be for the NPA, the honourable Court to give a statement, the NPA to decide whether to prosecute or not. But now those summary proceedings are no longer applicable in that even if we were to say the dignity of the court was impaired in way, that is no longer the case to restore the dignity of the court. But rather it is my submission that this is a draconian inquiry which only seeks to feed the ego of the honourable Court. This is my submission.

²⁷ As can be seen from the record, the interpreter did not translate any of the vernacular on 24 October 2024. It is essential that the record fully reflects what transpired so that an independent assessment can be made of the proceedings by the reviewing court. See *S v Ntshwence supra* at [43].

COURT : Thank you very much, Mr Melani. Matter postponed then to the same date, the 11 November for my judgment, and my decision. Thank you.

MR MELANI : Is the State not given an opportunity to address Court.

COURT : No, the State does not need an opportunity. This is solely on you to address why you should or shouldn't be held in contempt of Court.

MR MELANI : Pleases Court.

COURT : As you said, it's common law, and I'm doing it *sui motu*.²⁸ Right, are we going to adjourn then?"

[30] The matter was postponed initially to 11 November 2024. Mr. Melani was absent on this date. The matter was postponed to 18 November 2024 for its continuation to a date when he was expected to be present at court for other matters.²⁹ It was on this date that the magistrate seems to have begun to have reservations. She explains that: "*Judgment being that although I found his actions amount to contempt of court (I didn't convict Mr. Melani) I would rather send the matter on Special review, for reasons related hereunder, instead.*" (sic).

[31] On the court's time sheet the magistrate noted on this date under the column of the official outcome of the case: "*Judgement- out of time to listen to the record to have what was said interpreted- p/p 27/ 11/ 2024 for such purpose - Matter to be transcribed and sent on special review, to determine if a guilty finding is necessary or not. Postponed sine die for such.*"

²⁸ "*Suo moto*" was probably meant. The adverb indicates an action taken by a court without any prior application or request by the parties involved.

²⁹ It is of concern that whereas Mr. Melani was now an "*accused*" entitled to fair trial rights, his next appearance in his capacity as a Legal Aid practitioner should be considered as a convenient opportunity to continue the contempt proceedings against him.

[32] The court's related appearance sheet dated 18 November 2024 bears an entry to the following effect:

"Matter sent on special review but postponed to have the vernacular interpreted."³⁰

[33] The record was supplemented with reference to later proceedings held on 28 November 2024 when a translation of the vernacular spoken by Mr. Melani in court on 24 October 2024 was attempted. (The related time sheet indicates that "*recording heard and interpreted for record purposes.*") The supposed translation, however, hardly provides any assistance. It is not clear that the person who assisted her in this exercise was an official interpreter of the court. The person is referred to indiscriminately in the latter transcript as both Ms. and Mr. Jikolo and there is also the hint of a Mr. Joyi having been involved in the process.³¹ The exercise was ostensibly undertaken in open court and in the presence of Mr. Melani but many of the prior "*speaking in the vernacular*" notes highlighted in the transcript of the defining events of 24 October 2024 were ultimately not translated. From one of his objections voiced in isiXhosa that was indeed translated, the gist of what Mr. Melani had been trying to communicate to the court at the relevant time however is that if the magistrate was not "*hearing*" him - a fear that many second language speakers hold that what they are trying to convey in the target language is not

³⁰ This would have been the correct next step for the court to have taken in the context of an anticipated review or appeal. In *Mathebula v S* (A31/2017) [2019] ZAMPMHC 1; 2020 (1) SACR 534 (ML) (22 July 2019), the court pointed out that in view of the policy that the court language of record is English and should be adhered to uniformly, if the trial is conducted in any language other than English, the presiding officer has a *duty* to see to it that the record that is submitted to the High Court is translated into English. This same sentiment was expressed by this Division in *Oosthuizen and Another v S* (Appeal) (CA&R 248/2021; CA&R 45/2023) [2024] ZAECKMKHC 101; 2024 (2) SACR 600 (ECMk) (19 September 2024).

³¹ On 28 November 2024 a separate appearance record states as follows: "*Mr Joyi assists to interpret the vernacular on record by Mr. Melani.*" Reading between the lines, Mr. Joyi is also a Legal Aid practitioner, but his involvement in the latter regard is not explained.

being meaningfully communicated or understood, he would ask someone (evidently the interpreter) to “*help (the magistrate) out.*”

[34] In the absence of the interpreter having interpreted (or “*translated*” as the case may be) all the vernacular into English, whether on 24 October, or 28 November 2024, it serves to demonstrate how “*tone-deaf*” courts have become to other languages intruding into the monolingual court space. And how courts fail to give voice to such interludes afterwards in official court records in a uniform and regulated fashion so that meaning and nuance important to the linguistically prejudiced, who ought to have equal access to language and justice rights in court, is not lost.

[35] A further curious incident occurred when the magistrate asked a Mr. Dyuwa, a legal aid attorney ostensibly present in court on 28 November 2024 (there is nothing that suggests that he was appearing on behalf of Mr. Melani), whether “*listening to the record*” and “*being an isiXhosa speaking man*”, the words expressed in the vernacular on 24 October 2024 had been correctly interpreted. What his views were, I daresay, is hardly a substitute for an official translation of the vernacular spoken in court for record purposes.³²

³² The magistrate was on the right track to issue a directive that the vernacular spoken on 24 October 2024 be translated. Indeed she should have insisted as the proceedings were underway, in real time as it were, that the interpreter interpret what was being said by Mr Melani once he indicated that he was not understanding her. It is unclear what the procedure is in the magistrate’s courts for a translation of vernacular spoken in court after the fact. Presumably the function to translate *ex post facto* falls to official interpreters of the court according to an acceptable and uniform process. It strikes me that the bizarre process followed in this instance cannot be the standard. A true translation into writing should no doubt be undertaken by an interpreter after listening to the audio record, alone, without the presence of the magistrate or original interpreter, both of whom are in effect witnesses to what was said in court as well as possibly the demeanour with which the words were said. See further *S v Ntshwence supra* at [43] on the obligation of the court to give a proper record upon review of the cause of the complaint that led to the charge, on the basis of *S v Mongwe* 1974 (3) SA 326 (T), which confirms the principle that the magistrate’s court is one of record.

[36] As emphasized above the jurisdiction of a magistrate's court to summarily try the offence of contempt committed in court is limited to the cases specified in section 108 (1) of the MCA. It has no jurisdiction to punish summarily a common law offence of contempt of court, even if committed *in facie curiae*.³³ As the record suggests, the magistrate purported to act in terms of the common law (she twice said to Mr. Melani that this was her approach), but at the same time evidently employed facets of the summary procedure.³⁴

[37] Without even going further this constitutes a gross irregularity in the proceedings inasmuch as she purported to exercise a jurisdiction that the court did not have.

[38] Further, even assuming that she was in effect trying Mr. Melani under the auspices of section 108 (1) of the MCA, the proceedings, for this reason also, cannot be said to be in accordance with justice. As an accused, Mr. Melani was entitled to be informed under what category his unlawful behaviour resorted and why the magistrate considered it appropriate to summarily discipline him for a supposed contravention of section 108 (1).³⁵ All that was said to him is that he had brought the court into disrepute. One has to glean from the context that the magistrate meant that it was because he had spoken in the vernacular well knowing the English-only language policy in court. She also referenced a Constitutional

³³ *Duffey v Attorney-General, Transvaal* 1958 (1) SA 630 (T); *R v Van Rooyen* 1958 (2) SA 558 (T).

³⁴ Whereas a template charge sheet for the common law offence of contempt of court was added to the record of the court's proceedings (J15), marked Annexure A, a line has been drawn through it and the following words annotated below it: "Not referred to the prosecutor for prosecution - court holds enquiry for Mr. Melani's disrespectful conduct."

³⁵ *S v Lavhengwa, supra*, at 482F-483I concerning the court's discussion of a contemnor's right to be informed, in terms of section 25 (3) (b) of the Constitution, with sufficient particularity of the charge he has to meet, especially understood in the context of the provisions of section 108 (1) of the MCA. See also *S v Ntshwence (supra)* at [44] in the context of the court's obligation to explain to the accused how his conduct amounted to contemptuous behaviour.

Court decision, the details of which she did not disclose. The fact that she later offered that she was disciplining him under the common law suggests that she had no clear basis in mind that his behaviour, which ostensibly offended her, constituted a contravention under section 108 (1) of the MCA. Indeed, if she imagined that his conduct could be brought within the ambit of the statutory contempt envisaged in the subsection, she would have said so.

[39] On the issue of the case that he was told he had to meet, the magistrate appears to have been under a misconception that speaking in the vernacular in court is absolutely prohibited and contumacious in itself. This cannot be a correct premise given the constitutional aspirations of the language provisions articulated in sections 6 (1) and (2) of the Constitution, read together with the fair trial right indicated in section 35 (3) (k) that every accused person has to be tried in a language that he understands or, if that is not practicable, to have the proceedings interpreted into that language.³⁶

[40] In February 2003, the Heads of Court established a committee tasked with preparing a report on the usage of the various official languages of the country in the courts, to determine whether there are any issues with their usage and to offer recommendations, if necessary.

[41] The Committee recommended that for reasons of practicality, English should be regarded as the language of record for all courts but that this should not deny the litigant, witness *or legal practitioner* (emphasis added) the right, where practicable, to address the court in the language of his or her choice.

³⁶ Although Mr. Melani was not the accused person, the linguistic benefit conferred on the persons represented by him in the bail proceedings extended to him as the practitioner. (See paragraph [41] above).

[42] It reported further that in instances where a language other than English is used during court proceedings, it must be “*translated*” (sic) contemporaneously into English. Where contemporaneous “*translation*” (sic) is not available, the court record, or portions of the court record in a language other than English, must be translated into English.³⁷

[43] In March 2017 the Heads of Court under the auspices of the Chief Justice accepted the recommendation that English be the language of record at the Superior Courts and passed its resolution accordingly which it indicated should be implemented in the absence of a policy decision from the Executive in this regard.

[44] There has been no policy decision from the Executive regarding official language to be used in courts since then.³⁸

[45] Whilst the expectation is that legal practitioners should respect the Judiciary’s directive that an English medium is to obtain in courts for reasons of practicality, consistency in appeals or reviews, and accessibility of judgments, it follows logically in a country of heterogenous language usage that there will be

³⁷ A distinction is to be drawn between the functions of “*interpretation*” and “*translation*”. Interpreters, such as we are accustomed to in our courts facilitate live court conversation. They must process and render speech quickly and accurately. This requires skills such as active listening, keen memory and a good command of both the source language being interpreted as well as the target language which is the subject of the interpretation. In the context of court proceedings in South Africa this entails the simultaneous translation or rendering of conversations from other languages into English, or sign language, in real time. Translation, especially when required after the fact, however, entails the conversion of written text or documents into the official court language, for now by interpreters as opposed to linguistically trained translators. One translating would work with source documents, such as transcripts in this instance, or court documents and exhibits. I would hasten to add that audio recordings might also require scrutiny when there is a dispute or a lack of interpretation of the vernacular. Both functions require the specialist skills or expertise of a linguist, but bring different objectives to the administration of justice and entail a different use of expertise. A translator ought to have the advantage of time at his disposal, enabling the rendering of a more precise result. In a situation like the present, the interpreter was expected in real time, in terms of the Heads of Court Resolution, to have promptly interpreted what Mr. Melani said in the vernacular into English. However no translation of the kind envisaged by the Resolution (whether contemporaneously or after the fact), appears to have been properly undertaken in this matter. (Also see fn 31 above).

³⁸ See *Oosthuizen and Another v S (Appeal)*, *supra*, which confirms this stalemate several years after the Heads of Court Resolution.

that case where a recourse to the vernacular is justified, indeed permitted and encouraged (provided a translation can be effected) no doubt so as not to undermine critical linguistic or access to justice rights. Thus where a practitioner necessarily has to resort to another language he should not be punished for contempt for breaking the English as official language of record protocol. Indeed the magistrate appears to have overlooked the proviso to the Judiciary's language directive.³⁹ In not exploring why Mr. Melani thought it necessary to speak in the vernacular, or having what he said in IsiXhosa interpreted contemporaneously by the court interpreter who bears that duty to bring everything said back to English for practical record keeping purposes, justice was not served.

[46] As for the question whether Mr. Melani had otherwise misbehaved, this was clearly not the type of situation provided by the example in *S v Zungu*⁴⁰ where the court held that there was wilful disobedience to a court's ruling that a certain line of argument was irrelevant,⁴¹ or in *S v Lavhengwa*⁴² in which the magistrate was found

³⁹ The caution sounded that the monolingual language policy should not deny a person the right to address the court in the language of his or her choice seems to have derived from the Committee's observation that: "*An appropriate balance must be struck among the various cultural interests by addressing the need for factors such as the following: • Providing for our constitutional imperatives on official languages, whilst taking practicality and expense into cognisance; • Developing and advancing the official indigenous languages, with particular regard for the development of legal terminology in all official languages; • Ensuring fair trials and hearings to make sure justice is served and access to justice is promoted, and • Accommodating reasonable and legitimate expectations of all language groups in our country, within the severe constraints of various resources.*"

⁴⁰ 1966 (1) SA 268 (N).

⁴¹ In that matter the court remarked that an order made 'even though wrongly', must be contested on appeal or review and not by defiance in court. The court held at 271 D-E that:

'By persisting in pressing the point, notwithstanding the ruling, the appellant was departing from the established mode of conduct of legal proceedings. He was obliged, for the present, to accept the ruling, once it had been finally made; otherwise the conduct of legal proceedings would become chaotic. It cannot be open to a litigant to disregard the rulings of a judicial officer and to persist in advancing contentions upon which the judicial officer has already ruled against him. His remedy, if he considers the judicial officer to be wrong, is, ... to raise the matter on appeal.'

⁴² *Supra*.

to have issued a lawful order dismissing the appellant's objection to a charge sheet.⁴³ Mr. Melani was not accused of being in disregard of a procedural ruling issued by the magistrate. Indeed if she had regarded his trend of continuing (despite the single warning uttered before) on the supposed trajectory of bringing the court into disrepute as contemptuous of a ruling which she had made (which would have been an unlawful or invalid order because speaking isiXhosa in court is not *per se* contemptuous), she did not warn him that it was his wilful disobedience to *that* ruling or order that she considered to be a contravention of section 108 (1) of the MCA. Mr. Melani was indeed wise to the fact that he should not be rebuked for speaking in the vernacular, which is his (and the clients who were represented by him in the bail proceedings) constitutionally guaranteed language right. Indeed leaving aside the provisions of section 6 of the Constitution that provides that indigenous languages enjoy parity of esteem with English, coupled with the import that courts may not treat vernacular use as inherently disrespectful or improper, section 6 of the MCA also underscores the duty on a magistrate to have a competent interpreter fill the gap of insufficient language conversancy by appropriate translation.

⁴³ The court, at 468E-H, analyzed the appellant's behaviour in the following terms:

"In the present instance the magistrate issued a lawful order as he was entitled to disallow the appellant's objection to the charge-sheet. The magistrate correctly interpreted s 85(1) whereas the appellant's interpretation thereof was patently wrong. It is not in dispute that the appellant had failed to give notice of his intention to object to the charge-sheet as he was obliged to do in terms of the proviso to s 85(1). Also, the prosecutor did not waive the requirement of such notice. In these circumstances the magistrate issued a lawful order when dismissing the appellant's objection to the charge-sheet. The appellant's failure to appreciate the significance of the fact that the provisos followed upon s 85(1)(e), and thus made all the paragraphs including (d) subject to the provisos, is no excuse for his conduct. He should have known: (i) of the existence of such provisos; and (ii) its significance in governing all the subsections of s 85(1). He could not have been ignorant of the above interpretation. Also, his failure to comprehend that the portion from *Hiemstra's* book which was read to him was not comment, but a verbatim recordal of the Afrikaans version of the relevant provisos, is also totally inexcusable for an officer of the court and a legal practitioner such as the appellant. At no stage was it suggested that the appellant did not understand the Afrikaans which was read to him. Nor would such a defence have been credible, if it was raised. The only inference which can be drawn from the appellant's conduct is that he wilfully chose to maintain his patently erroneous understanding of the section and to disobey the magistrate's ruling merely because he disagreed with it. Such conduct constitutes disobedience and undoubtedly undermined the authority of the presiding officer in the magistrate's court."

[47] Even for the moment assuming that Mr. Melani was objectionable in insisting on his right to speak in the language of his own choice, a little forethought and patience might have saved the day in this situation. What is abundantly obvious is that neither magistrate nor practitioner could hear the other above the noises and distractions of a typical South African court environment.⁴⁴ She had asked him to repeat himself. He imagined that she was not understanding him. One senses upon a reading of the transcript of the proceedings and mindful of the caution that one must bring oneself into the incendiary atmosphere of the proceedings to understand what caused the fire, that that caused Mr. Melani to stumble a bit and doubt the efficacy of his English language proficiency. He was certainly not disrespectful in asking to be assisted by the interpreter. Though he seemed to regain his confidence by expressing the sentiment that IsiXhosa is one of the official languages, and pressing ahead in the vernacular after the magistrate laid down the gauntlet to him to desist or else, I perceive no disrespect or insolence in his comeback. In the moment when he advanced his position he was already the judged, and the magistrate was the accuser and adjudicator on the basis that he had crossed a line merely by speaking in the vernacular. If it was *that* behaviour she considered actionable as contempt (as “*other misbehavior*” under the provisions of section 108 (1) of the MCA)) she ought to have warned him clearly.

[48] In *S v Lavhengwa*⁴⁵ the court set out guidelines when implementing the provisions of section 108 (1) of the MCA urging that a conviction under the section after a summary procedure would stand if the magistrate has adopted the following rules and principles:

⁴⁴ October brings its own hot weather challenges which are barely ameliorated by quiet air conditioners in courts.

⁴⁵ *Supra*.

- “1. The magistrate should first carefully consider whether he/she should resort to the normal procedure of referring the matter to the Attorney-General or the summary procedure. Considerations which would become important at this stage are whether or not he can disregard the accused’s conduct as unimportant (*S v Nel* (*supra* at 749G) or merely stupid and not willfully contumacious (*R v Silber* (*supra* at 483 E) or whether the matter can be disposed of by merely removing the accused from the court (*Duffey v Munnik* (*supra* at 395 E) or whether the conduct is insulting or insolent in its nature towards the magistrate personally. In the instances mentioned above it would be better to take evasive action (such as e.g. the removal of the accused from the court or an adjournment or requesting an apology from the accused or reporting him to his professional body if the accused is a practitioner) which would obviate the necessity to embark upon a trial under s 108 (1) or to take the normal route of referring the matter to the Attorney-General rather than resorting to the summary procedure.
2. If, however, the circumstances are such that the summary procedure is called for (e.g. in cases of disobedience to rulings, interruption of the proceedings etc.) he should warn the accused of his intention to proceed with a summary trial under the provisions of s 108 (1) of the Magistrate’s Courts Act. *Depending on the accused’s prior knowledge of the contents of s 108 (1), it would be advisable for the magistrate to read out the section to the accused so as to inform him of the provisions thereof and thus inform the accused of the nature of the offence with which he is being charged.*
3. *The magistrate must then proceed to inform the accused of the latter’s conduct which in his view contravened s 108 (1) and which of the three categories mentioned in section 108 (1) his conduct is alleged to have transgressed.*
4. The magistrate thereafter should inform the accused of his constitutional rights as set out in s 25 (3) of the Constitution and enquire from the accused whether he wishes to remain silent, testify, give an explanation or call witnesses. If the accused is a lay person he should be afforded the right to obtain legal representation should he wish to do so, subject to such time and feasibility constraints as may seem reasonable in the circumstances of the case. Depending

on the decision of the accused, the magistrate should then afford the accused full opportunity to exercise his rights in order to ensure that his constitutional rights are not infringed nor that the rules of natural justice are transgressed.

5. After the accused has been given an opportunity to exercise these rights the magistrate should then weigh up all the circumstances, evidence and arguments and convict the accused only if the facts before him prove beyond a reasonable doubt that the accused wilfully contravened any of the offences (sic) mentioned in s 108 (1).⁴⁶

(Emphasis added).

[49] Clearly there was no such accommodation in this instance, evidently because the magistrate imagined that Mr. Melani's speaking in the vernacular *per se* brought the judiciary into disrepute and constituted an offence under the common law crime of contempt of court, which offence the court certainly had no jurisdiction to try on a summary basis. In that respect she was clearly misdirected.

[50] Since the proceedings after the lunch break were not recorded, it is also not clear that Mr. Melani was properly informed of any other of his fair trial rights in anticipation of the 5 November 2024 proceedings. In that respect as well, leaving aside the more glaring irregularity, the proceedings seem not to be in accordance with justice.

[51] I should add that, in the proceedings before the Makhanda High Court, the outcome of which the magistrate believed co-incidentally might provide guidance as to whether she was on the right track in *casu*, the conviction of the legal practitioner concerned was set aside. It appears that in that matter the convicted contemnor had expressly objected to the magistrate intervening during his cross

⁴⁶ *Supra* at page 495 c – 496 a.

examination of a state witness. A verbal exchange between the practitioner and magistrate led to her holding him in contempt of the court. The alleged misconduct at the core of her overreaction concerned the practitioner's refusal to continue with the trial and his being argumentative with her. In the reviewing court's view the magistrate unnecessarily escalated a fairly innocuous disagreement between practitioner and court and threatened contempt of court at the first sign of discontent with the practitioner. The effect of her threat to hold him in contempt was to distress him to such an extent that he felt he could not continue, but neither was she prepared to excuse him from the trial, hence the underlying trial proceedings remaining in limbo. The chief reason though for setting aside the conviction was the fact that the magistrate found the practitioner to be in contempt without permitting him time to prepare, seek legal advice, or invite submissions as to why he should have been found to have been in contempt of court.⁴⁷

[52] In the present instance, although the proceedings were at first hastily and summarily commenced, but thereupon deferred, there is no indication in the record that any recognition was given to Mr. Melani's fair trial rights, assuming for the moment that there may have been a statutory basis to try him for contempt. Even at the hearing there is an absence of any adherence to these important safeguards.

[53] Finally, I need to emphasize that it is not for this court to provide advice to lower courts as to how they should conduct proceedings. The magistrate was not suggesting that she imagined that the proceedings were "*not in accordance with justice*", neither it seems, had the thought occurred to her that Mr. Melani might be entitled to an acquittal. Both reasons may provide a basis for a special review of

⁴⁷ There is no transcript of the judgment. The case number as indicated above is CA & R 13/2025. The review was heard before Lowe J and Molony AJ. The decision was delivered *ex tempore*. These facts were however gleaned from the court's notes.

proceedings before sentence as provided for in section 304A of the Criminal Procedure Act, No. 51 of 1977 (“CPA”). On the contrary, she seemed to want to prove that she was right in her estimate that Mr. Melani’s conduct of speaking in the vernacular in an English language of record court is *per se* contumacious. The special review process should not be invoked to merely eliminate doubt on the part of a judicial officer that he or she is right in respect of a particular view taken.

[54] The further consequence of the irregular referral on review, in terms of section 304A of the CPA, rather than in accordance with the provisions of section 108 (2) of the MCA, means that this review has come before us an exercise in the abstract. Had the proper process been followed, this court would have been assisted by a proper statement of the magistrate’s grounds and reasons having been provided rather than having to make its own estimate of the proceedings. Mr. Melani was further denied an opportunity to make appropriate representations to this court, which he would have been entitled to had the proper process been implemented.

[55] Be that as it may, this court can assume review jurisdiction if the irregularity that occurred in the lower court is of such a nature that the proceedings in that court will eventually have to be set aside. I believe this to be such a case.

[56] In the result the following order issues:

1. The contempt proceedings commenced under case number B130A against the alleged contemnor, Mr. Melani, are set aside as irregular.

B. HARTLE
JUDGE OF THE HIGH COURT

I AGREE:

I.T. STRETCH
JUDGE OF THE HIGH COURT

DATE OF JUDGMENT: **27 January 2026**