REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Review Case No: 39/2018

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

7 November 2018 **RT SUTHERLAND**

In the matter between

THE STATE

and

GEORGE MEIRING **ACCUSED**

J U D G M E N T
(ON REVIEW)

SUTHERLAND J:

Introduction

[1] A Magistrate held that the Accused, Meiring, was in contempt of court and fined

him R5000 or three months' imprisonment. This matter comes before this court by way of automatic review pursuant to the provisions of section 108(2) of the Magistrates Courts Act 32 of 1944. The provisions of section 108 read:

"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 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. In this subsection the word "court" includes a preparatory examination held under the law relating to criminal procedure.

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

(Underling supplied)

[2] It is immediately apparent that the magistrate was unaware of the provisions of this section. That is evident from the sentence of R5000 exceeding the maximum sum permissible. The magistrate, in addition, failed to submit the statement prescribed by section 108(2). On those grounds alone, the magistrate's conduct is irregular.

[3] I have received a helpful and constructive submission from the Deputy Director of Public Prosecutions, Johannesburg, Adv Z J Van Zyl SC who, with Adv A M Persad, a State Advocate, recommends the judgment and sentence be set aside. I agree, the

events which took place, as addressed by the magistrate, do not constitute contempt of court at all still less a transgression of section 108.

A critique of the facts

[4] The circumstances are described in a transcript of exchanges that took place after the critical events and occurred whilst the court was either not in session or was no longer dealing with Meiring's matter. That, too, is a ground why the events could not constitute *contempt in facie curia* as held by the magistrate.

[5] Meiring was appearing for a third time in the matter. It was again postponed. He evidently was aggrieved by this turn of events. He gave expression to his frustrations. Meiring used the word "Fuck" once, perhaps twice. The Prosecutor claimed to have heard Meiring say "this country is fucked", which Meiring did not admit to saying. The prosecutor later in cross-examination declared that this was an act of disrespect not only to the court but to the country. Meiring admitted using foul language after he had heard it announced that the case was postponed yet again. He apologised at once, and repeatedly apologised.

[6] Meiring was also accused of shoving an orderly. He denied this accusation; he claims that the orderly grabbed him. It was later surmised by the prosecutor that when Meiring uttered the word "Fuck" the orderly asked what he had said, and Meiring had replied "who are you?' The magistrate also took umbrage at Meiring having the audacity to lean on the 'bench' – I presume this refers to the dock.

[7] Meiring was then detained in the cells. He had been released on bail. Why the magistrate thought this was necessary is not explained on the record. The only inference to draw is that it was done out of spite. Whether or not this gratuitous incarceration for some hours founds a civil claim, I express no view.

[8] Upon resumption, Meiring testified. He explained that he was experiencing many frustrations. He described his personal circumstances as losing everything. His marriage was crumbling, he was losing his house, he had to care for his parents, and he was in financial trouble, which was exacerbated by paying for his attorney for each appearance when nothing happened again and again. He said: " ...the word that I uttered was not pointed at anyone in this court, I am truly sorry for the word that I used and ....I am just frustrated with life at this moment ...."

[9] The prosecutor then subjected Meiring to an extensive cross examination. The bulk of the questions dealt with the exchange between Meiring and the orderly. It was a harassing attack calculated to humiliate rather than to extract facts. That approach is at variance with the ethical obligations of counsel, whether for the defence or the prosecution. Despite the intensity of the cross examination, not one iota of information was elicited that could found a basis upon which to contend that an act of contempt of court had occurred, not least of all that any wilfulness was present.[1]

[1] The presence of wilfulness is essential. As long ago as *Rex v Rosenstein 1943 TPD 65,* that had been established. In that case, an attorney was held to have insulted a magistrate by accusing him of keeping an inaccurate record and justifying his interruption of the prosecutor's cross examination. He refused to apologise when called upon to do so. The wilfulness was established by his persistence therein.

[10] Notwithstanding that, the magistrate in his judgment purported to find that Meiring had committed contempt of court. The judgment is no more than a sanctimonious plethora of clichés unsupported by reference to facts. It is a disgrace. I cite the transcript in full:

> "Alright. These are contempt of court proceed in *facie curia* and this shall be *extempore*. The behaviour or conduct of this particular accused, Mr Meiring, is disturbing and I say that with the greatest of respect, the word, I cannot find appropriate English term to describe the conduct this court witnessed, blatant, (indistinct), careless behaviour on his part, showing no regard for this court, its institution or its personnel that uphold its sanctity and gives it the respect it requires. He displayed it right in front of the public gallery, much to their dismay and the court had to call him back. And I do not have to repeat it, because he knows what he did and understa... he understood (indistinct) the gravity of his conduct, which is completely unacceptable. And his attitude that he exhibited, the way he carried himself, completely unacceptable. And his attitude that he exhibited, the way he carried himself, completely, completely showing disregard to this court.
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> After the matter was adjourned, giving him an opportunity to explain himself, it became pretty clear, there is no justification, all he has is excuses for his outbursts, which were derogatory and placed the court's system, this court's reputational or integrity in disrepute and that cannot go unnoticed or unpunished. And I cannot find any reason why this court can condone or accept the explanation as provided. I find him GUILTY of contempt."

[11] When the case moved onto sentence, the prosecutor got properly stuck in. He belaboured the point that Meiring had been disrespectful towards the orderly. The orderly was not called to testify. The prosecutor elided the exchange between Meiring and the orderly into disrespect for the court. Furthermore, the prosecutor, as alluded to earlier, was especially excited about the remark that "the country is fucked", an alleged

utterance not admitted. The prosecutor concludes with a contention that a suspended sentence would be inadequate, and says this:

> " ...if need there should be a sentence that is meted out to him that will make him tomorrow to respect the [decorum] of this court with sanctity and every individual that [he?] come across."

[12] The Judgment on sentence was approached as if sentence was being imposed after conviction of a conventional crime, a clear lack of awareness that such a perspective is inappropriate.[2] The "offence" is said to be serious. Again, the Magistrate, like the prosecutor, elides the exchange with the orderly with notions of the Court's role as a 'gatekeeper' between "order and anarchy". He expresses the view that the sentence must act as a deterrent to others in society. Ultimately, the magistrate concludes with this statement:

> " ... I have concluded the following as a suitable sentence to cater not only for the seriousness of the offence and give you another opportunity to reintegrate into the society and hopefully there will be an evolution of your mindset not only mindset but it also contaminate your behaviour in a positive manner. You are hereby fined R5000 or three months imprisonment." (sic)

[13] The judgment is quite manifestly an utter misdirection. A point to emphasise, is that not only does the magistrate impose a sentence two and half times the maximum jurisdiction, but he imposes a fine of R5000, an objectively large sum, on a man who had told him he is already under financial stress. The judgment is a disgrace.

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[2] See: State v Nel 1991 (1) SA 730 (AD) at 753H – 753B.

[14] There is extensive case law on what constitutes contempt of court. It is plain that the magistrate was unacquainted, not only with section 108 of the Magistrates' Court Act but also with the case law.

[15] I can do no better than cite the Memorandum composed by Advocates Van Zyl and Persad:

> "5. The power of the court to convict and sentence a person for contempt of court is ordained by s 108 of Act 32 of 1944. However, this power is to be applied by the court within very strict guidelines. In *S v Van Niekerk* 1970 (3) SA 655 (T) the Court held at 657F that:
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> '(B)efore a conviction can result, the act complained of must not only be wilful and calculated to bring into contempt but must also be made with the intention of bringing the Judges in their judicial capacity into contempt or of casting suspicion on the administration of justice'.
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> Similarly, in *S v Harber and Another* 1988 (3) SA 396 (A) the Court held at 413H that: 'Apart from the so-called newspaper cases, I am not aware of any South African authority for the proposition that contempt is a crime of strict liability. On the contrary, in the last two decades it seems to have been generally accepted that intention is an element of the offence'.
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> In *S v Kaakunga* 1978 (1) SA 1190 (SWA) at 1193G the Court held that:
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> '(A)lvorens 'n person skuldig bevind kan word aan minagating van die hof, die Staat moet aantoon dat hy deur sy optrede, hetsy deur sy handeling, hetsy deur die woorde wat gebruik is, inderdaad die opset gehad het om die waardigheid, eer of gesag van die hof in diskrediet te bring of te minag'.
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> See also *S v Molapo* 2004 (2) SACR 417 (T) at 417g – 418a where the above case law was quoted with approval per Grobbelaar J, Jordaan J concurring.

5.1 The full bench of the ECD (per Schoeman J, Chetty J concurring) found in *S v Mitchell* 2011 (2) SACR 182 (ECD) at 185 a – b that contempt is inter alia committed:

(a) where a judicial officer, or other officer of the court, is wilfully insulted during a sitting; or
(b) where the court proceedings are wilfully interrupted; or
(c) where the person otherwise misbehaves himself in the place where the court is held, and thereby interferes with the proper functioning of the magistrates' court.

5.2 Satchwell J .....stated as follows in *S v Bresler and Another* 2002 (2) SACR 18 (C) at 25 a – b:

"It is necessary to delineate the scope of the offence. Firstly, the interest to be served is not the private interest of the member of the court. Secondly, it is not sought to protect the self-esteem, feelings or dignity of any judicial officer, or even the reputation, status or standing of a particular court. The interest served and protected is 'the moral authority of the judicial process as such":

'The purpose which the law seeks to achieve by making contempt a criminal offence is to "protect the fount of justice" by preventing unlawful attacks upon individual judicial officers of the administration of justice in general which are calculated to undermine public confidence in the court'.
(Per Corbett CJ in Argus Printing and Publishing (supra at 29E – F)

5.3 Satchwell J then, at 35h – 36i applied some of the considerations identified by the Constitutional court in *S v Mamabolo* (ETV and Others Interviewing) 2001 (1) SACR 686 (CC)

(a) Who is the author?
(b) What was done?
(c) When did such action take place?

(It is of some import to note that Satchwell J here finds "This was not a once-off loss of temper or expression of distress or dissatisfaction" We pause to note: as is obviously the case in the present matter).

(d) Where did the action take place?
(e) To whom were these actions directed?
(f) What triggered the action?
(g) What was the underlying motive?

5.4 The Constitutional Court had dealt extensively with this offence in the matter of *S v Mamabolo* supra at paras 44 – 46.
We can do no better than quoting extensively from that judgement, with some own emphasis added:

"....Ultimately, whether the test is worded this way or that, the real question is whether the trier of fact has been satisfied, with the requisite preponderance depending on the nature of the case, that the publisher of the offending statement brought about a particular result. In the case of scandalizing the court that result must have been to bring the administration of justice into disrepute.
[45] In any event and moreover, now that we do have the benefit of a constitutional environment in which all law is to be interpreted and applied, there can be little doubt that the test for scandalizing, namely that one has to ask what the likely consequence of the utterance was, will not lightly result in a finding that the crime of scandalizing the court has been committed. Having regard to the founding constitutional values of human dignity, freedom and equality, and more pertinently the emphasis on accountability, responsiveness and openness in government, the scope for a conviction on this particular charge must be narrow indeed if the right to freedom of expression is afforded its appropriate protection. The threshold for a conviction on a charge of scandalizing the court is now even higher than before the superimposition of constitutional values on common-law principles; and prosecutions are likely to be instituted only in clear cases of impeachment of judicial integrity. It is a public injury, not a private delict; and its sole aim is to preserve the capacity of the Judiciary to fulfil its role under the

Constitution. Scandalizing the court is not concerned with the self-esteem, or even the reputation, of Judges as individuals, although that does not mean that conduct or language targeting specific individual judicial officers is immune. Ultimately the test is whether the offending conduct, viewed contextually, really was likely to damage the administration of justice.

[46] It would be unwise, if not impossible, to attempt to circumscribe what language and/ or conduct would constitute scandalizing the court. Virtually the only prediction that can safely be made about human affairs, is that none can safely be made. The variety of circumstances that could arise, is literally infinite and each case will have to be judged in the context of its own peculiar circumstances: what was said or done; what its meaning and import were or where it happened; to whom it was directed; at whom or what it was aimed; what triggered the action; what the underlying motivating factors were; who witnessed it; who witnessed it; what effect, if any, it had on such audience; what the consequences were or were likely to have been".

6 Contempt in facie curiae

6.1 Contempt in facie curiae is committed when a person who is in court insults the presiding judicial officer or otherwise misbehaves in a manner calculated to violate the dignity of the court or judicial officer while the court is engaged in its proceedings or, as it is sometimes said, "in open court".

S v Magerman 1960 (1) SA 184 (O)[3]
R v Butelezi 1960 (1) SA 284 (N)[4]

6.2. The acts of swearing at the magistrate and laughing at a magistrate have been held to constitute the offence of contempt in facie curiae.

S v Ntsane 1982 (3) SA 467 (T)[5]

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[3] The magistrate wrongly held a latecomer as having committed contempt.
[4] An Accused failed to attend a hearing of a Tribal Court. The Chief fined him in his absence. This outcome was set aside.
[5] A Court Orderly was held to be in contempt. He made a lot of unnecessary noise in speaking to the prisoners in the cell blow the courtroom so that he disturbed the proceedings. The court directed him to stop doing so. He

S v Poswa 1986 (1) 215 (NC)[6]

6.3. The crime of contempt in facie curiae exists and is essential in order to uphold the dignity and authority of the court.

S v Silber 1952 (2) SA 475 (A)[7]
S v Nel 1991 (1) SA 730 (A)[8]

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then stood in a spot that obscured the view of the witness. He was asked by the Court to set aside. He then expressed the word "Hell'. When the Court asked him to come forward to explain himself, he took a seat and say with his back to the court. When ordered to come forward he got up and left the courtroom. The finding of contempt was upheld.

[6] Counsel for the defence was held to be in contempt. He chuckled after an adverse ruling was given. When interrogated he refused to explain himself and announced that he had been expecting to be challenged on this score for some time. Prior to that there had been a number of hostile exchanges with the prosecutor. He was held that the pattern of behaviour taken together justified the finding of contempt. (This finding, on the facts, in my view, seems suspect.)

[7] The Accused persisted in an accusation of bias by the magistrate because of a series of adverse rulings. On the 15th day of trial he applied for a recusal. The finding was upheld.

[8] An unrepresented litigant persisted in sparring with the judge, accusing the judge of playing cat and mouse with him an also accused the judge of being a coward. The finding of contempt was upheld. The lengthy headnote gives, in English, an excellent summary of the Court's findings given in Afrikaans:

> "A presiding Judge or magistrate who is of the opinion that someone has acted in contempt of the court should first consider whether it is necessary and desirable for him to take action. Very often conduct which strictly speaking constitutes contempt of court can quite fittingly merely be ignored without really impairing the dignity or the authority of the court or the orderly conduct of the proceedings. Too liberal a use of the court's powers to punish persons for contempt can undermine the very reason for the existence of such power. If a Judge or magistrate decides that the relevant contemptuous conduct is not of such a nature that it can merely be overlooked, there are two avenues open to him. He can refer the matter to the Attorney-General to decide whether the person concerned should be prosecuted in the ordinary course. That will 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. On the other hand, if there is such a need the Judge or magistrate should there and then attend to it. If he decides to do this he then acts 'summarily', in the wide sense of the word, against the person concerned, ie in contrast with the ordinary process of law applicable in criminal proceedings. But in such a case he will generally still not act 'summarily' against the person in the narrow sense of the word, ie by finding him guilty of contempt without first giving him the opportunity of being heard. The idea of finding someone guilty of a criminal offence without being given an opportunity of making representations in regard thereto is such a drastic deviation from the most fundamental principles of our legal system that it cannot be permitted other than in the most exceptional circumstances. Although there is no inflexible rule that a person must first be heard before he can validly be found guilty of contempt it is a salutary point of departure that he be given an opportunity of addressing the court before he be found guilty. Whether a conviction has been validly entered without a prior opportunity for representations having been given depends on the particular circumstances of each case. What will be looked at *inter alia* is the run-up to the conduct which is contemptuous and the nature of the contempt itself; and in addition thereto it is of importance whether the person is a legal practitioner or a layman and in the latter case what his knowledge and experience of court procedures is.
> In the instant case the Court found on appeal that the appellant, who had appeared in person in motion proceedings, had correctly been convicted of two counts of contempt of Court in that he had at various

6.4. In order to ascertain whether an accused had the necessary intention his words must be considered in the context in which they were employed.

S v Van Staden 1973 (1) SA 70 (SWA)

6.5. The offence of contempt in facie curiae must occur in the presence of the court. The court in the matter of *S v Mbaba* 2002 (1) SACR 43 (ECD) at 49 b – c found that even though the accused was warned the day before to be in court, his absence in court did not constitute contempt in facie curiae. The court held that the magistrate should have dealt with the accused's conduct as an instance of contempt of court ex facie curiae and to have prosecuted the accused in the ordinary course. This was because there clearly was a dispute of fact.

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times insulted the presiding Judge by accusing him of playing cat and mouse games with him and accusing him of being a coward. The Court held that although the appellant was a layman it was clear that not only did he have the intention to insult the Judge but was also fully aware that he was thereby committing contempt of Court which is committed *in facie curiae* is a unique offence; it is a distinct procedure whereby the offender can there and then be found guilty and sentenced; and the sentence which is imposed also has unique characteristics. Someone who commits contempt *in facie curiae* is not an ordinary criminal in the everyday meaning of the word and he ought not to be treated as such. The reason for the existence of the summary procedure (in the wide sense) in terms of which the offence can immediately be dealt with is the necessity that a court, as the axis on which the administration of justice turns, must be in a position to protect its reputation and dignity and to ensure the orderly conduct of its proceedings. 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. There is no room whatsoever for any notion of retribution. There can also be limited scope for reformation: for the most part (leaving aside exceptional cases) 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 to the court's esteem and authority. The extent of the punishment stays in the background; in the foreground is the esteem and 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 a heavy sentence in these sort of cases is generally inappropriate in the ordinary course of events. This probably explains why our lower courts were in the past moderate in the punishment which they imposed for contempt *in facie curiae,* as appears from the reported cases. That is a salutary practice which deserves encouragement and no good reason exists why the same approach should not be applied in the Supreme Court....."

7 While there is case law to the effect that courts should be supported in their quest to uphold the dignity of a court, (*S v Mitchell* supra at 185g) the other side of the coin is certainly that courts should guard against being unduly zealous in doing so.

7.1 The Constitutional Court emphasized in the *Mamabolo* case supra (at paras 54 – 56) how unsatisfactory the summary procedure is in a number of material respects, that it is irreconcilable with the standards of fairness called for by section 35(3) of the Constitution and that it should be reserved for the most exceptional cases only. The Court then remarked (at para 5.9) that Justice would have been better served if the presiding officer had rather reported the matter to the Director of Public Prosecutions to deal with.

See *S v Mbaba* supra at 49 c – d for similar sentiments

8 Having regard to the facts that:

- This was a once-off occurrence triggered by the third postponement of a relatively insignificant case;
- The conduct was clearly not aimed at the presiding officer or the court as such;
- The accused was immediately repentant and apologized profusely and repeatedly;
- The conduct had no effect on any court proceedings or on the capacity of the judiciary to fulfil its role;
- The court was not in session when the conduct occurred, there was therefore no need for swift intervention (*Mamabolo*, at para 52);
- The conduct was the result of frustration with the repeated postponement of the case;
- The court's findings that there is no justification for the conduct is, at the very least, questionable;
- The fairness of the proceedings is likewise questionable, as the presiding officer had even before the beginning of the enquiry suggested to the prosecutor that he should apply that the accused's bail be cancelled and also made comments beforehand giving the impression that he had pre-judged the matter.

- The offending conduct was not really likely to damage the administration of justice.

9 It is therefore respectfully submitted that the utterance of the accused in the present matter does not constitute contempt in facie curiae as it did not occur in the presence of the court. Further, the words and actions of the accused did not bring the administration of justice by or in the courts into disrespect and disrepute. Due to the factual disputes this matter should much rather have been left to be dealt with ex facie curiae.

Lastly, in terms of Section 108(2) of the Magistrate's Court Act 32 of 1944 a statement should have been made by the magistrate which should be submitted to the reviewing judge and a copy thereof to the accused. This was not done in the present instance.

S v Mitchell, supra, at 186e – 187a."

[16] Accordingly, the finding and sentence must indeed be set aside. This case is an egregious example of both a judicial officer and a prosecutor being dangerously ignorant of the relevant law and approaching an incident of relative unimportance in a wholly inappropriate manner, ostensibly because they took umbrage at an exchange between an Accused and a Court Orderly, the exact facts about which incident, remaining uncertain. In the manner they went about the matter they have achieved what Meiring was accused of doing; ie bringing the courts into disrepute. Mature persons do not approve of foul language being used, especially in any formal setting. However, the reality of life is that people who experience exasperation will spontaneously use swear words. An overreaction is unwarranted.

[17] Appropriate steps should be taken by both the National Prosecuting Authority and the Magistrates' Commission to educate officers of the Court in the scope of the Court's powers when unseemly behaviour occurs in and about a court.

Order

[18] (1) The finding and sentence are reviewed and set aside.

(2) The fine paid by the accused shall be refunded within 30 days of the date of this judgment, and if not paid within that period shall be paid with interest at the prescribed rate of interest *a tempore mora* until date of payment.

(3) The judgment is referred to the National Director of Public Prosecutions and to the Magistrates' Commission for the taking of appropriate steps.

SUTHERLAND J

I agree.

MUDAU J

Date of Judgment: 7 November 2018