

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

Criminal Appeal No. 40 of 1996
High Court Misca 364 of 1994

In the matter between:

THEMBA JOINA

Appellant

and

THE STATE

Respondent

Mrs. Mtashu for the Appellant

Mrs. L. I. Dambe for the Respondent

J U D G M E N T

CORAM: Amissah, P.
Steyn, J.A.
Tebbutt, J.A.

STEYN, J.A.:

The Appellant is an admitted attorney of this Court. He was due to appear before Nganunu J in a civil matter due for hearing in the High Court at 9.30 a.m. on November 7 1996.

When the matter was called he failed to appear. The record of the proceedings reads as follows:

“7 November, 1996

9.30 a.m.

Mr. Moeng for the Respondent
Mr. Joina (Not Present)

J: I understand that Mr. Joina thought he must start somewhere, in some other court and he will come here in the afternoon, I said I was not agreeable to it.

M: I have not been consulted at all.

J: Any of these people the applicants.

A: Yes.

J: Where is your lawyer.

A: He is supposed to be here this time.

J: I am going to adjourn, go and find him, if he is not here sometimes later we dismiss this case. If there is nobody and the other party is there we throw it out. Go and find out if he is in Justice Barrington-Jones's Chambers, Mr. Moeng will assist you, and you can go to the Registrar and ring at his office if he is not around.

M: I was told he is around.

J: You have thirty minutes."

Proceedings resumed at 10.30 on the same day and the record now reads as follows:

"10.30 a.m.

Mr. Joina for the Applicants

Mr. Moeng for the Respondent

JO: May I apologise for delaying the court this morning I was in the other court.

J: Why did you not have the courtesy to come to my chambers this morning to come and explain.

JO: I did come to your chambers yesterday I left a message.

J: That is only to leave a message you could have come here earlier and say I am sorry but I must go to another court. Tell me why I should not punish you.

JO: I came to your chambers and I was told you were in court and I left a message.

J: Have you got any reason why I must not punish you for contempt.

JO: I was attending the other matter in another court.

J: Why did you not come in the morning to my office and say I have two matters can I go to the other matter then I will come to this, so that I have some idea and do something else. Even your clients did not know where you were.

JO: It is because I did not have the opportunity to meet them yesterday.

J: But you have accepted the indulgence.

JO: I am sorry.

J: I have in mind to punish you. I am going to fine you P1000.00 which must be paid in 7 days from today, if you don't, they must take you to prison for 3 days. Do you understand clearly.

JO: I want to come and explain.

J: I have asked you to explain and I did not get an explanation, I asked you three times. I have made an order now, you can appeal. Are you ready to proceed. Let's start."

It is not disputed by the Respondent that:

1. Appellant had indeed left a message with a certain Joseph - a clerk in the administration of justice - to the effect that he would be attending to a short matter before Barrington-Jones J. and had requested that his matter be stood down to 10.30 a.m.
2. Appellant had telephoned his opponent's office and had requested him to phone the Appellant back; the call was not returned;
3. Without taking any further steps to inform anyone, Appellant appeared before Barrington-Jones J at 9.30. His matter was disposed of by 10 a.m. and he then appeared before Nganunu J when the proceedings as recorded above took place and Appellant was summarily tried, convicted and sentenced for contempt of court.

Appellant has appealed against his conviction and sentence. In so far as his conviction is concerned the principal argument presented on his behalf was that there was insufficient evidence to justify a conviction. It had not been established - so it was submitted - that Appellant had intentionally violated "the dignity, repute and authority of [the Court] or interfered with the administration of justice in a matter pending before it". (See the definition of contempt of Court in Hunt, (Vol. II) South African Criminal Law and Procedure p.179 and that of Melius de Villiers

The Roman and Roman Dutch Law of Injuries p.166.

That mens rea in the form of the intention aforesaid is a requisite element of the offence is clear from a long line of cases in the Courts in Southern Africa. See in this regard:

Stephen Rugwaro v. State Criminal Appeal No. 4 of 1996 (Botswana Court of Appeal.)

See especially p.6 of the judgment where Aguda JA. with whom Schreiner and Hoexter

JJA. agreed - says the following:

“Now I would like to say that it has for long been recognised in most Commonwealth judicial systems that a Superior Court of Record, must as such, have the power to punish summarily any person who has been in contempt. It is a power which is considered to be a necessary adjunct of every Superior Court of Record to administer justice. However it must also always be borne in mind that the position has always been that it is not every act of discourtesy to the court that will amount to contempt, nor will every breach by counsel of his duty to his client necessarily amount to contempt. To amount to contempt punishable summarily, the act of counsel must be one calculated or intended to cause an interference with or an obstruction to the smooth administration of justice or of intentionally violating the dignity of the Court.”

See also Mushonga v. State 1994 (1) Z.L.R. 296 where Gubbay C.J. says the following:

“Non-appearance (or late appearance) of a lawyer in a case may go beyond mere discourtesy and amount to a criminal contempt of court provided that there was intention to interfere with the process of the court and the administration of justice.”

Aguda JA. in the Rugwaro case cited above also refers to other decisions in the Commonwealth from which it is clear that whilst an act of discourtesy may well amount to contempt of court, summary grounds of punishing for contempt should be used sparingly and only in serious cases. The learned Judge refers in this regard with approval to the decisions in Izoura v. R 1953 (1) All E.R. 827; 1953 13 WLA 313 and Shamdasami v. King Emperor 1945 (AC) 264 at 270. (Privy Council). See also Weston v. Courts Administrator of Central Court 3 W.L.R. 103 and R.v. Silber 1952 (2) S.A. 475 (A.D.)

It is clear that Appellant's conduct was not only discourteous, but that he failed to exercise proper care to ensure that neither the Court nor the litigants were inconvenienced by the manner in which he was conducting himself. His casual - indeed cavalier approach to the performance of his duties is evident from the summary of the facts cited above. Thus e.g. he made no effort to determine whether his proposed conduct was acceptable to the Court or whether his opponent was even aware that he (Appellant) would not be available to appear at the appointed time for the hearing of the matter. In this respect he was at least negligent, if not grossly so.

However, as Mrs. Dambe who appeared for the State very fairly pointed out, this does not necessarily lead to the inevitable inference that he acted intentionally - with the purpose of either bringing the Court into disrepute or by interfering with the administration of justice. See the Weston case cited above at p.109 and Izoura v. The Queen also cited at 1953 A.C. 327. See particularly Lord Tucker's judgment at p.336.

In the circumstances Ms. Dambe, in my view correctly conceded that the most appropriate and indeed the proper course for the Court to have adopted would have been to refer the matter to the Attorney-General for investigation. Ms Dambe indicated that the reaction of the Court may well have been prompted by on-going unacceptable conduct by practitioners, ignoring the need for an observance of the requisite rules of good behaviour, punctuality and due consideration of the convenience of the Court and of their colleagues, thus hampering the efficient administration of justice.

This Court has itself repeatedly cautioned against the failure of legal practitioners to observe not only the Rules of Court, but also the need to facilitate sound administration of justice by conscientious observance of the need for punctuality and rigorous observance of elementary courtesy. However, such behaviour needs to be regulated and proper disciplinary steps taken by the profession itself. Now that a Law Society has at last been established, Courts of this

