IN THE HIGH COURT OF SOUTH AFRICA / JvZ

(TRANSVAAL PROVINCIAL DIVISION)

Date: 21 September 2005

Magistrate
Louis Trichardt

Case No: 3773/04
High Court Ref: 1464

The State vs Mathoho In Re: E Da Silva Pessegueiro vs Calvin Tshinanga

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REVIEW JUDGMENT

SHONGWE ADJP

1. This review case raises an interesting point whether or not a presiding officer can summarily sentence a person accused of contempt of court in contravention of Section 108 of the Magistrate's Court Act 32 of 1944.

2. The accused, a practising attorney, was convicted of contempt of court by the magistrate, Louis Trichardt and sentenced to R1000-00 (one thousand rand) or 3 (three) months imprisonment.

3. Section 108 reads as follows:

"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 five provided) be liable to be sentenced summarily or upon summons to a fine not exceeding R2000 or in default of payment to imprisonment for a period not exceeding six months or to such imprisonment without the option of a fine under the law relating to criminal procedure."

4. When this case came before me on review the J4 form, which normally forms the first page of the proceedings clearly showed that this was a Civil case. It was a matter of E Da Silva Pessegueiro(Plaintiff) versus Calvin Tshinanga(Defendant). Mr Mathoho ("the accused") in these proceedings appeared in his

official capacity as the attorney for the Plaintiff. Mr Mabunga, another attorney appeared for the Defendant.

5. Due to the scarcity of the information gleaned from the record, it is not so clear as to what happened. It appears that the civil matter was before court for judgment in terms of Rule 27(5) of the Magistrates Court Rules. The Defendant/Respondent requested a postponement in order to prepare, the Plaintiff/Applicant objected and insisted that the matter proceeds.

6. According to the sequence of events as they unfold on the record the court granted the postponement. Immediately thereafter Mr. Mothoho requested that the Defendant be given 15 minutes to address the court. The court then warned him that his conduct was bordering on contempt of court as it had already granted the postponement. A date for the postponement was requested, Mr Mathoho did not provide one however, the Defendant's attorney furnished a date. The case was then postponed to the 2/3/05 at 09h00.

7. One would have thought that the matter was sorted out, suddenly the presiding officer again warns Mr Mathoho that if he insists on Judgment being given his conduct would amount to contempt of

court. The atmosphere suddenly changed as the language used also changed to Afrikaans, whereas the proceedings were conducted in English all along. The record shows again that Mr Mathoho insists on Judgment.

8. At this stage the court adjourned in order to obtain the services of a court orderly. The court resumed but Mr Mathoho refused to get inside the court room. The court ordered the court orderly to bring Mr Mathoho inside the court room.

9. Mr Mothoho who was now inside the court was given an opportunity to say why he should not be convicted of contempt of court. His answer was “The court cannot find me guilty of contempt of court, I did not object to the findings of the court.” [sic]

10. He was therefore summarily found guilty of contempt of court. Mr Mothoho was given an opportunity to mitigate his sentence, apparently he elected to remain silent. However the record shows that he refused to address the court. That is how he was fined R1000-00 (one thousand rand) or 3 (three) months imprisonment. His rights of review were explained to him.

11. After reading the record I was very much uneasy about the constitutionality and the procedure followed by the presiding officer and decided to send few questions to the magistrate for clarification and comment.

12. On the question whether or not Mr Mothoho, while standing accused on a charge of contempt of court, was he an "accused person" as contemplated in Section 35(3) of the Constitution Act 108 of 1996, the response was "no". On the question whether or not, the enquiry or hearing held against him, was fair as contemplated in Section 35(3) of the Constitution, the answer was "yes". On the question whether the contempt was *in facie curiae* or *ex facie curiae*, the answer was "*in facie curiae*". Lastly on the question as to who was the complainant, prosecutor and presiding officer in the hearing where the accused was convicted of contempt of court, the answer was "not applicable".

13. I thought it prudent to refer the matter to the DPP's office for their comments. The Deputy Director of Public Prosecutions is of the view that Mr Mothoho was indeed an accused person as contemplated in Section 35(3) and therefore was entitled to a fair hearing, including the right to legal representation. He also

agreed that the alleged contempt was *in facie curiae* as contemplated in Section 108 of Act 32 of 1944.

14. My concerns are that firstly, did the alleged contempt occur after or before the matter had been postponed, secondly, did Mr Mathoho wilfully insult the presiding officer, or wilfully, interrupt the proceedings or otherwise misbehave himself in court, thirdly was he properly informed of the charge against him and given an opportunity to prepare his case and of crucial importance was he given the opportunity to elect whether or not to obtain legal representation.

15. If I read the record correctly and also follow the sequence of events, I am of the view that after the matter had been postponed to the 02/03/05, the proceedings had been finalised. The accused could not have committed any contempt of court at that stage. It is said that the accused refused to enter the court room when the court resumed, after the adjournment. Could it be that the contempt of court arises from the fact that he refused to enter the court room or did it arise from insisting that Judgment be given? After the court resumed the accused said or did nothing to be construed as contempt of court save for refusing to enter the court room. It is not clear from the record if he was called to

enter the court by the presiding officer. Did he assume (perhaps justifiably so) that the case had been postponed and that he was now free to go? One can speculate until the cows come home, which is very unhealthy. **(See S vs Mamabolo (E T and others intervening) 2001(1) SACR 686 on p710 at para [52] etc seq.** I pause to mention that in Mamabolo's case the Constitutional Court dealt with a situation which took place *ex facie curiae*. It relates to a conviction for contempt of court resulting from the publication of a criticism of a Judicial order.

16. **In S vs Nel 1991(1) SA 730 (AD)** it was said that

"A presiding Judge or magistrate who is of the opinion that someone has acted in contempt of 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, i.e. in contrasts 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, I e 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."

17. I associate myself with most if not all of what is said in the passage quoted above, save to say that where it refers to ……. "Although there is no inflexible rule that a person must first be heard before he can validly be found guilty of contempt of court….." I wish to introduce the fact that in 1991 when these words were uttered it was before the advent of the Constitution and the Bill of Rights. Section 35(3) provides as follows:

"(3) every accused person has a right to a fair trial, which includes the right –

(a) to be informed of the charge with sufficient detail to answer it;

(b) to have adequate time and facilities to prepare a defence;

(c)

(d)

(e)

(f) to choose, and be represented by a legal practitioner, and to be informed of this right promptly;

(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;

(i) to adduce and challenge evidence;

(j)

(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;

(l)

(m)

(n)

(o) .”

18. Upon reading the record after the first warning to the accused that his conduct is likely to be construed as contempt of court, the accused did not utter any words or do something contemptuous. After a remand date had been determined, the case was accordingly postponed. It does not appear on the record as to

what prompted the second warning. Hence my concern whether the contempt occurred before or after the postponement or on both occasions. The accused was fetched from outside court after the matter had been postponed. If I am correct to conclude that the order postponing the civil case had already been made therefore the accused could not have committed the offence of contempt *in facie curiae*. The magistrate was already *functus officio*.

19. It is axiomatic that contempt of court is under our common law an offence. **(Attorney General vs Glasson 1911 CPP 579 of X 505)** Section 108 of the Magistrate's Courts Act 32 of 1944 gives a magistrate's court power to punish summarily any contempt of court committed *in facie curiae*. However, the Act made no reference to contempt committed *ex facie curiae*. **(R vs Van Rooyen 1958(2) 558 (T.P.A.) at 560 F.G.)**. The position is that the magistrate's court has jurisdiction to try the offence of contempt of court committed *ex facie curiae* brought before it by way of an ordinary criminal summons but not summarily as in the case of contempt committed *in facie curiae*.

20. On the facts of this case the accused did not insult the judicial officer during his sitting, nor did he insult a clerk or member or

any other officer. Furthermore, the accused did not wilfully interrupt the proceedings of the court. The nearest that his conduct could be interpreted as constituting contempt of court is perhaps that he misbehaved himself in the place where a court is held, by insisting that judgment be handed down.

21. It is doubtful, in my view, that the legislature had in mind the slightest disagreement between the presiding officer and an officer of the court; (the accused in this case), to constitute contempt of court. I would imagine that there are other ways and means to deal with a situation of this nature rather than resorting to contempt charges. Where an officer of the court is involved, the presiding officer may report the Attorney's conduct to the Law Society concerned in order to take appropriate steps against him/her. An officer of the court should rather be dealt with privately or administratively. **(See S vs Lizzy 1995(2) SACR 789 (W)**). There is hardly evidence to demonstrate the extent to which the proceedings were disrupted. As this was a civil case there may not have been an audience in court. **(See also S vs Mckenna 1998(1) SACR 106)**.

22. I venture to state that the mere fact that the accused is an attorney does not necessarily mean that there was no need to

inform him of his right to legal representation, alternatively to afford him an opportunity to prepare himself to engage in the inquiry. In terms of section 35(5) of the Constitution, he is entitled to all the rights of an accused. On the strength of the matter having been postponed already I doubt if swift intervention was necessary in the sense of depriving the accused an opportunity to consider obtaining legal representation. There is a plethora of authorities dealing with contempt of court and I wish to refer to the most recent case of **S vs Ntshwenece 2004(1) SACR 506** which deals extensively with the constitutionality of the rights concerned. It was held in Ntshevenece's case that the accused's right to be presumed innocent; to remain silent and not to testify during the proceedings is no different where he is charged with contravention of section 108 of the Magistrate's Court's Act from where an accused is charged with any other offence. The element of wilfulness still has to be proved to found a conviction **(See S vs Memari 1994(1) SA 515 (W)**). Therefore section 108 does not oust the provisions of section 35(3)(i) relating to the right to adduce or challenge evidence **(See also S vs Havenga 1996(8) SACR 543 (W)**).

23. For the above reasons I do not support the conviction. The matter could have been postponed specifically to hold an inquiry,

> especially when the accused's *ipssissima verba* were not recorded. What we see on the record is a mere narration by the presiding officer of what is supposed to have transpired. I have my doubts whether this incident occurred *in facie curiae* in the sense of the phrase 'in the place where such court is held' in comparison to a situation where the matter had already been remanded. It is not clear whether the fact that the accused is said to have refused to re-enter the court room could have instigated the contempt proceedings. It is not clear why did the accused move out of the courtroom. In any event, the matter having been postponed, the accused was entitled to leave the court. I am unable to confirm that the accused wilfully interrupted the proceedings of the court or misbehaved himself.

. In the result, the conviction and sentence by the court *a quo* are set aside. The sum of R1000-00 (one thousand rand) must be refunded to the accused.

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J B SHONGWE
ACTING DEPUTY JUDGE PRESIDENT
OF THE HIGH COURT

I agree

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L O BOSIELO
JUDGE OF THE HIGH COURT