

SOUTH AFRICA / JUDGMENT

S v Bock (43/2012) [2012] ZANCHC 49 (14 December 2012)

[2012] ZANCHC 49

COURT

Northern Cape High Court, Kimberley

BEFORE

MV Phatshoane, BM Pakati

CASE / FILE NUMBER

43/2012

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IN THE HIGH COURT OF SOUTH AFRICA [NORTHERN CAPE HIGH COURT, KIMBERLEY] HIGH
COURT REF NR :43/2012 MAGISTRATE'S COURT : UPINGTON CASE NUMBER: C3489/2010

THE STATE

Versus

TREVINO BOCKACCUSED

CORAM: PHATSHOANE Jet PAKATI J

DATE OF JUDGMENT: 14 December 2012

JUDGMENT ON REVIEW

This is a belated review application in terms of sec 108(1) of the Magistrates Court Act, 32 of 1944.
This provision reads as follows:

"(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."

On 14 August 2012 the Acting Senior Magistrate of Upington, submitted this case for review with the following remarks:

"RE: REVIEW IN CASE C3489/10 STATE VERSUS TREVINO BOK

During a Judicial Quality Assessment in June 2012, it came to light that the above case has not been sent for review by the judicial officer [Ms L Myles]. The accused was convicted and sentenced on two counts of contravening s108 of Act, 32 of 1944, which sentence is reviewable in terms of s 108(2) Act 32/1944.

Unfortunately the judicial officer in question has been absent from work for many months and is currently suspended from duty, her comments could not be obtained. As acting senior magistrate I only started duty at this office on [01 July 2012]. Kindly accept my apology for the oversight that occurred, unfortunately the accused concerned has already served the sentence. Every effort will be made to avoid re-occurrence of same."

What appears to be an extract from the judicial quality assessment accompanies the magistrate's remarks and reads:

"In case C3489/10 the accused was convicted and sentenced on two counts of contravening s108 of Act, 32 of 1944, which is reviewable in terms of s 108(2). The magistrate indicated that the case was reviewable, then again that it was not reviewable as the accused was defended. The magistrate failed to cause the case to be sent on review to the High Court and failed to submit a statement, certified by such judicial officer to be true and correct, of the grounds and reasons of his/her proceedings, and also failed to furnish to the party committed with a copy of such statement.

Kindly explain and confirm that the case has now been sent on review to the High Court as a matter of urgency as gross irregularities occurred"

I have requested the Office of the Director of Public Prosecution to give inputs on the matter. I am indebted to advocate CG Jansen for her contribution in this regard.

The contempt of court proceedings of 13 and 14 December 2010, whereat the accused is said to have insulted the presiding magistrate and for which he was accordingly convicted and sentenced, are the subject of this review. Not much of what was said and done on 13 December 2010 appears on the record. The alleged insults hurled at the magistrate on the day in question are also not apparent. The transcribed record merely reflects that there was a loud voice in the background. The magistrate, in a perfunctory manner, noted the following:

"Beskuldigde vloek Hof vieslik – Hof rekuseer haarself.

Postea:Bepaling van datum vir borgeansoek in ander hof en vir minagting van die hof in facie curiae verrigtinge."

What one gathers from the above note is that following the alleged insults that were directed at the magistrate she recused herself. In so doing she disqualified herself from hearing the matter any further. Despite this recusal, in the very next day, in what appears to be a heated dialogue between the magistrate and the accused, she nevertheless proceeded to conduct the enquiry in terms of s 108 of the Magistrates' Court Act, 32 of 1944. In the magistrates hand written notes the following contrasting statements appear:

"The accused refuses to appear in front of Court.

Mr Kambi: I warned accused yesterday and today that his conduct is in contravention (sic) and he could be sentenced. The case stands down for Mr Kampie to talk to the accused in connection + sentence (sic)

Resumption:

Court: guilty -s 108 Act 32/44

Nie hersienbaar

Postea

Besk verskyn: sê hy het nie geyell of geskree nie

Hof : skuldig Art 108 wet 32/44

Vonnis 1) 6 (ses) maande g/s (besk sê"jy's gek; AWB; gee my nog; jy's mal, ma se bloedkont"

Saak op hersiening te gaan. Beskuldigde hou aan vloek: teruggeroep weier te kom"

Far from what appears on the magistrate's hand written notes the transcribed record of 14 December 2010 reveals the following:

"COURT: Mr Kampie, did you explain to him that (inaudible) conducting an inquiry in terms of Section 108 of the Magistrate's Court Act? That he is warned?

MR KAMPIE: I did inform him Your Worship.

COURT: You also informed him?

MR KAMPIE: Yes Your Worship.

COURT: That he can be punished?

COURT: You did that already yesterday?"

MR KAMPIE: And then again today Your Worship."

COURT: (inaudible)... he has anything to say in mitigation then. Mnr Bok, toe u gister hier af geloop het, al vloekend, toe het ek geskryf dat ek myself rekuseer, want ek onthou..... Ek wil egter vir u sê – en u weet ook gister Mnr Kampie het u aandag daarop gebring dat u gedrag – dat almal gehoor het, tot die Landdros van D Hof – u vloekery van my is minagting van die Hof.

BESKULDIGDE: Nee, ek het nie vir u gevloek nie. Daardie mense daar binnekant het gevloek.

HOF: Nee.

BESKULDIGDE: (Onhoorbaar). Daardie mense gister – u kan die mense van gister vra daarso. Ek het nooit vir u gister gevloek nie. Daardie

mense het gevloek daar binnekant.

HOF: Jou wit hoer. Jou "p", jou "c" – ek het alles gehoor en u het my van ook genoem.

BESKULDIGDE: Nie ekke nie.

HOF: Dit was u.

BESKULDIGDE: Ek weet dan nie nou eers wat is u van nie. Ek weet nie eers nou wat is u van nie. Dis hoekom ek kom hierso, want ek hoor – daardie mense het gister daar binnekant het hulle so geraas, dan het ek vir hulle gesê. Toe vloek hulle. 'n Mannetjie wat voor my in gekom het wat ... (tussenkoms).

HOF: Ek het opdrag gegee dat u afgevat word na die onderste selle toe, omdat u so tekere gegaan het, want die ander howe kon nie aangaan nie.

BESKULDIGDE: Daardie mense het gevloek. U hoor moes hoe sê ek. Ek het nie gevloek nie.

HOF: In die eerste plek het u vir my ge-jy en ge-jou, verwyf ek vir u gesê het u. Ek het reeds gesê u. U het vir my gesê jy wil onafhanklik wees. (onhoorbaar) ... u hoef nie my werk vir my te vertel nie. U hele optrede was van die begin af minagtend.

BESKULDIGDE: Nee, u het vir my ook – u het vir my geminag. Dis hoekom ek ... (tussenkoms).

HOF: Nonsens. Ek het vir u verduidelik (tussenkoms).

.....

MR KAMPIE: He did not hear ... (inaudible) Your Worship.

HOF: U het duidelik geweet dat dit 'n oortreding is om die Hof te vloek.

BESKULDIGDE: Edele, u sien dit is wat die probleem hier inkom.

HOF: Deur finger te wys en tekere te gaan.

BESKULDIGDE: Ek het nog nooit vir u vinger gewys nie. Dit is die probleem wat(tussenkoms).

HOF: U het vir my gesê jy wil onafhanklik wees.

BESKULDIGDE: Nee.

HOF: U stry net heeltyd. Ek vind u skuldig aan oortreding van Artikel 108 van Wet 32 van ... (onhoorbaar). Minagting van die Hof .. (onhoorbaar) in die teenwoordigheid van die Hof. Anything in mitigation?

BESKULDIGDE: Nee, ek sê niks. Ek wil ook nie(onhoorbaar).

VONNIS – ONDERSOEK (MINAGTING)

HOF:U word gevonniss tot 6 (SES) maande gevangenisstraf.

BESKULDIGDE: Ah, jy is mal.

HOF: Jy is mal, stapelgek.

BESKULDIGDE: Jy is gek. Jy is self ...(onhoorbaar).

PROSECUTOR: You should have gone to another 6 months Your Worship.

HOF: Né?

PROSECUTOR: On top of that one.

COURT: I think it best to call him back and give another.

PROSECUTOR: Yes, give him another one.

HOF: Sê vir hom dis nog 6 (SES) maande by.

BESKULDIGDE: Jou ma se(onhoorbaar).

HOF: Mnr die Hof Ordonans, kan u net 'n vorm ... (onhoorbaar).

BESKULDIGDE: (onhoorbaar).

COURT: Mr Kampie, impose another 6 (SIX) months imprisonment (inaudible) ... leave you with the report form and then the case is referred to B Court for a bail application.

MR KAMPIE: (inaudible) ... Your Worship, it seems as if ... (interjection)."

The accused was not properly informed of the accusation against him to enable him to reply thereto. What he was accused of is also not clear from the record. It only emerges from the transcribed record of 14 December 2010 that he is alleged to have passed some derogatory remarks against the magistrate on 13 December 2010. Whether these remarks were passed in or outside the Court room is unclear. Nevertheless the accused attempted to exonerate himself and imputed the blame to others. He was not afforded an opportunity to fully and effectually rebut the allegation and call witnesses. Neither was his counsel invited to address the Court prior to the convictions and the two sentences. In truth the accused cannot be said to have been legally represented. His legal representative was passive throughout the drama that played itself out. He was in reality denied legal representation.

The basis upon which the magistrate concluded that the convictions were sustainable was not traversed in a judgment to show that the magistrate had brought her mind to bear on the issues.

In *S v Mamabolo* (ETV and others intervening) 2001(1) SACR 686 (CC) at para 54-56 the Constitutional Court held:

" [54]Manifestly the summary procedure is unsatisfactory in a number of material respects. There is no adversary process with a formal charge-sheet formulated and issued by the prosecutorial authority in the exercise of its judgment as to the justice of the prosecution; there is no right to particulars of the charge and no formal plea procedure with the right to remain silent, thereby putting the prosecution to the proof of its case. Witnesses are not called to lay the factual basis for a conviction, nor is there a right to challenge or controvert their evidence. Here the presiding Judge takes the initiative to commence proceedings by means of a summons which he or she formulates and issues; at the hearing there need be no prosecutor, the issue being between the Judge and the accused. There is no formal plea procedure, no right to remain silent and no opportunity to challenge evidence. Moreover, the very purpose of the procedure is for the accused to be questioned as to the alleged contempt of court.

[55]The composite effect of these departures from the normal procedure where an accused person is called upon to face a charge of criminal conduct is fundamental. Indeed, there is no adversarial process where an impartial judicial officer presides over and keeps the scales even in a contest between prosecution and defence. The process is inquisitorial and inherently punitive and unfair. Moreover, this procedure which rolls into one the complainant, prosecutor, witness and Judge - or appears to do so

- is irreconcilable with the standards of fairness called for by s 35(3).

[56] There can be no doubt that a procedure by which an individual can be haled before a Judge for the sole purpose of enquiring into the possible commission of a crime, there to be questioned and, depending on the Judge's view of the responses to the questioning, possibly to be punished by a fine or imprisonment, constitutes a major inroad into his fair trial rights. Nor can it be denied that such an individual enjoys little protection or benefit of the law and its processes."

The Court proceeds as follows at 712 para 58 and 59:

"58.....Indeed, what transpired in the Court below in this case demonstrates the pitfalls of the procedure and underscores why it should be reserved for the most exceptional cases only.

[59] Justice would have been better served had the learned Judge reported the matter to the Director of Public Prosecutions and left it to that office to take up as it deemed best.

Jones & Buckle Civil Procedure in the Magistrates Court of South Africa makes comments under sec 108 of the Magistrates Court Act, 32 of 1944, at Act668, amongst others:

"Summary jurisdiction under this section should moreover be exercised only when the case is clear beyond reasonable doubt and when immediate action is necessary to vindicate the dignity of the court. If an indictment will meet the case, the summary jurisdiction should not be resorted to. The power to commit or fine summarily for contempt should be used with caution, for, though in exercising the power the judicial officer is protecting his office rather than himself, the fact that he is personally involved and that the party affected is given less than the usual opportunity of defending himself makes it necessary to restrict the summary procedure to cases where the due administration of justice clearly requires it.

In *S v Ntshwence* the Full Court held that the summary procedure does not limit the rights of an accused set out in s 35(3)(a), (b), (f), (g), (h), (i) and (j) of the Constitution of the Republic of South Africa, 1996. The limitation on the right to a public trial before an ordinary court as set out in s 35(3)(c) is, however, justifiable in terms of s 36(1) of the Constitution. Accordingly, in summarily dealing with an offender under s 108, the court must have regard to the fact that the offender has the following rights:

The right to be informed of the charge with sufficient detail to answer it.

The right to have adequate time and facilities to prepare a defence.

The right to legal representation.

The right to adduce and challenge evidence.

(v) The right to be presumed innocent, to remain silent and to testify during the proceedings.'

The summary proceedings must be recorded."

What transpired in this matter, although distinguishable, is almost similar to what the Court was confronted with in *S v Dube* 2012 JOL 29590 [ZH]. At p3 the Court pronounced:

"From the above scant record of proceedings it is apparent that the alleged offending words were uttered outside the Court and in the absence of the Magistrate. The Magistrate only heard about the alleged offending words from the Court Interpreter. In the circumstances the alleged contempt was *ex facie curiae* – *S v Musa* 1997 (2) Z:R 149 (H) and *S v Tobias* 1966 (1) SA 656 (N) at 660 [also reported at [1966] 1 All SA 421 (N) – Ed].

Further, the accused was summarily committed for contempt of court even though he raised a defence ie the utterances were directed to "two women" who said they could not speak IsiNdebele. No evidence was adduced in this regard save for the unsworn single sentence statement by the interpreter. In the case of contempt committed *in facie curiae* the Magistrate would have heard the offending utterances himself or herself. There is no need for evidence to introduce the contemptuous utterances. In *casu*, the Magistrate was not privy to the contemptuous utterances. They were said in corridor of the Court complex. They were heard by the Court Interpreter. In the circumstances some degree of formality was required to bring him before the Court and put the allegations to him. Accused was not given opportunity to challenge the interpreter's statement. If the utterances were directed at "two

ladies" it is not clear why the accused was convicted. There is no judgment by the learned Magistrate explaining the basis of the conviction. There is no evidence showing that the Magistrate afforded the accused the opportunity to defend himself. Magistrates will be well advised to accept that the audi alteram partem principle applies to all cases in which they try an offender summarily for contempt of court in terms of section 17 of Magistrates' Court Act (chapter 7:10); *S v Musa*, supra; *S v Nyalambisa* 1993 (1) SACR 172 (TK) [also reported at [1993] 3 All SA 678 (Tk) – Ed] and *S v Mushonga* 1994 (1) ZLR 296 (S). In my view, Magistrates should summarily convict for contempt of court as [a] last resort when it is absolutely necessary. In this regard I respectfully share the sentiments of Chatikobo J in the *Musa* case, supra, at 158F-159A where the learned Judge stated:

"... I entertain serious doubt about the efficacy of routinely resorting to summary committal of a contemnor as a vehicle for preserving the dignity of the Court in each case of contempt in facie curiae. I doubt in the Court's dignity can be protected by punishing fools for their indiscretions. I respectfully share the sentiments expressed by BOTHA JA in *S v Nel* [1990] ZASCA 145; 1991 (1) SA 730 (A) [also reported at [1991] 3 All SA 976 (AD) – Ed], in which regrettably for me was in Afrikaans. The head note to the report reads in part:

"A presiding judge or magistrate who is of the opinion that someone has acted in contempt of Court should just 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 reasons for the existence of such power."

In *Masonwabe Mhambi v The State*(Case Nr CA&R 56/2012), the judgment of this Court handed down on 16/11/2012 at para 12 and 13 it was held:

"[13]Irrespective of whether the appellant had all the rights that an accused person would normally have in terms of section 35 of the Constitution, and even if it is to be assumed for the moment that a summary inquiry was proper and justified in the circumstances, the regional magistrate was "obliged to ensure that the proceedings afford an accused a fair trial."

[14]The Regional Magistrate's approach constituted a material misdirection which necessitates the setting aside of the conviction and sentence."

Following the accused's conviction he made an offensive remark directed at the magistrate. The magistrate compensated herself by returning "the complement". By so doing the magistrate stooped to the level of the accused, impugned the decorum of the court and brought the administration of justice into disrepute. Such conduct is unbecoming of a presiding judicial officer. The Magistrate lacks the requisite temperament of a judicial officer because she allowed herself to be improperly influenced by the prosecutor to impose an additional sentence, on the second occasion without even a semblance of an enquiry.

Insofar as the magistrate had, rightly in my view, initially recused herself she ought to have left the matter in the hands of the Director of Public Prosecution to determine the appropriate course to be followed. The Magistrate's deficient knowledge of the criminal procedure has led to a serious misdirection which produced a miscarriage of justice. This gross irregularity has vitiated the convictions and sentences meted out.

It would be a further travesty of justice if the accused is re-charged. This is said without derogating from the powers of the Director of Public Prosecutions.

ORDER

In the result the following order is made:

The accused's convictions and sentences in respect of contravention of s 108 of the Magistrates' Court Act, 32 of 1944, are hereby set aside.

____JUDGE MV PHATSHOANE

I AGREE.

____JUDGE BM PAKATI

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