

SOUTH AFRICA / JUDGMENT

S v Burger (R15/20) [2020] ZANCHC 73 (30 October 2020)

[2020] ZANCHC 73**COURT**

Northern Cape High Court, Kimberley

BEFORE

Lever AJ, Williams J

CASE / FILE NUMBER

R15/20

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IN
THE HIGH COURT OF SOUTH AFRICA
(NORTHERN
CAPE DIVISION, KIMBERLEY)
Case No: R15/20
Delivered
30/10/2020
In**the matter between:**THE
STATE
v
JEFFREY
BURGER**Coram:**

Lever AJ et Williams J

JUDGMENT

ON REVIEW

Lever AJ

1. This is a review that was directed to me in chambers under the provisions of s108(2) of the Magistrates' Courts Act 32 of 1944 (the Act). The accused was convicted of contempt of court in facie curiae under the provisions of s108(1) of the Act and sentenced to 2 months imprisonment in a process which took place summarily.
2. Regional Magistrate Schneider convicted the accused of contempt of court in facie curiae on the 15 September 2020. The record was prepared in terms of the provisions of s108(2) of the Act and the learned Regional Court

Magistrate provided his reasons, which also formed part of the record placed before me. The said review reached my chambers on the 9 October 2020.

3. It appears that at the time the contempt was committed the accused was facing 5 charges of contravening the conditions of domestic violence protection orders. The accused was in custody for the entire duration of these proceedings and appeared to have abandoned his application for bail pending the outcome of the matter. At the time that the accused was convicted for contempt, the domestic violence case had reached the stage where the matter was being postponed for final argument. At that time the accused represented himself in those proceedings.
4. The accused appears to have lost control as a result of the fact that the prosecutor and the magistrate were looking at a short postponement, which happened to coincide with a visit in custody that the accused was entitled to, and had apparently been arranged for him.
5. I intend to quote the record extensively so as to put the matter in its proper context. The relevant portions of the record read:

“HOF: Goed. Goed. Meneer, u het nou gehoor dat die aanklaer sê hy versoek dat die saak uitgestel word na eerskomende Maandag, hopelik vir betoë, sluit... slot argumente voor uitspraak...

voordat die hof later sal uitspraak gee. Verstaan u dit so?

BESK: Ek gaan nie bereid is om Maandag dan by die hof te is nie.

HOF: En hoekom is dit dan nou so?

BESK: Dis besoeke by die tronk. En ek sukkel al lank, since die hele Maartmaand om besoek te kry. Ek kan die hele Septembermaand nie eers nie.

HOF: Ja, kyk, dit is nou nie dat u kon noodwendig kan kies nie, maar die punt is, u is die person wat benadeel word want u is in hegtenis. U verstaan dit so?

BESK: Dis... dis waaroor dit gaan. Dis wat hy dan maak (from the context referring to the prosecutor), U Edele. Van Maartmaand af het hy dit gedoen en dit is wat hy wil laat maak. Voor die hof nou begin het hy my in die hof geroep en my kom beoordeel hier in die hof watter tipe mens ek nie is nie. So die is die manier wat Mnr Steyn my sal altyd treat. Altyd as dit hom kant is om 'n ding te kan doen, dan sal hy altyd die saak laat hy lei met alle maniere wat hy kan. Hoe lank is die saak nie gedelay nie, U Edele. Vanaf laas jaar Desembermaand af. Hier gaan ons dan weer Desember toe.

HOF: Ja, kyk ek wil nou nie 'n vinger na u wys nie. Dit was seker nou nie u wat die ... uitstelle ... [tussenbeide]

BESK: Nee, maar U edele ek ken nie wat ... [tussenbeide]

HOF: ...in baie gevalle veroorsaak het nie.

BESK: ...is die verhouding tussen jy en Mnr Steyn... en Mnr Steyn nie.

HOF: Nee, moet nou asseblief nie beledigind wees nie.

BESK: Nee, maar dit is dan so, Edelagbare.

HOF: Maar as u nie weet nie, moet nou nie bespiegel nie.

BESK: Almal wat van L Hof af kom het altyd 'n problem het.

HOF: Goed.

BESK: En die is dan wat Mnr Steyn ... die getuies was hier toe word bly kop geskud.

HOF: Wanneer ... wanneer sal u beskikbaar wees dan nou?

BESK: Ek is eerste beskikbaar volgende jaar. En volgende jaar is ook nie beskikbaar nie. Ek sal nie [onduidelik]

HOF: Goed. U saak word... hou hom net daar asseblief?

BESK: Ek gaan nie in die hof in kom nie asseblief. Ek sal nie.

HOF: Hou hom net daar. Hou hom net daar asseblief. Bring hom net in asseblief?

BESK: Nee ek sien dan wat is ... dit is wat jy wil gehad het. Jou ma se poes. Die is wat jy wil gefokken het het.

...

BESK: Die is wat jy wil gehet jy.

HOF: Goed. Meneer [tussenbeide]

BESK: Jou ma se poes daardie Steyn.

BESK: Die is wat jy wil gehet het jy. O.

HOF: Mnr Burger u maak uself nou skuldig aan minagting van die hof.

BESK: Nee, die is wat jy wil hê. Naai daie man vir jou.

HOF: U maak uself nou skuldig aan minagting van die hof.

BESK: Naai die man jou?

HOF: U word gevonnissen ... wag hou hom net daar. Nee, dit gaan nou nie help om nou vir u op die verweer te plaas as u op die... hou hom net vas asseblief? As u op hierdie gedrag gaan voort borduur nie. Ek gaan nou u vonnis vir minagting... ek gaan u skuldig vind aan minagting van die hof. Ek gaan u vonnis tot 2 maande gevangenisstraf.

BESK: Ek worry nie. Naai die man jou?

HOF: Ja. Maar dit is nou so.

BESK: Naai hy jou?

HOF: Die saak word uitgestel ...[tussenbeide]

BESK: Steyn naai jou.

HOF: Meneer, die saak word uitgestel ... [tussenbeide]

BESK: Steyn naai jou. Daardie is die rede jy gaan so aan.

HOF: Die saak word uitgestel tot 2 Oktober ... [tussenbeide]

BESK: Steyn naai jou Schneiders. Steyn naai jou. Jou ma se poes ook. Hoor jy my.

HOF: Ai meneer, weet jy watse karaktereienskappe ... [tussenbeide]

BESK: Ek gaan jou wys wat.

HOF: ... u nou blootstel?

BESK: Ek gaan jou wys.

HOF: Goed. Die saak is uitgestel ... [tussenbeide]

BESK: Ek kom volgende keer vir jou. Jy naai daardie magistraat jy.

HOF: Saak is uitgestel tot 2 Oktober vir argumente. Beskuldigde bly in hegtenis. ...”

6. On the face of it, it appears from the exchange reflected in the record quoted above that the conduct of the accused was wilful in insulting and denigrating of the learned Regional Magistrate as well as the prosecutor. On the face of it this is contemptuous of the Office of the Magistrate and thereby the Court.

7. The question is, in the current constitutional era, can it be said that the accused in this case has enjoyed the rights enshrined in s35(3) of the Constitution[1].
8. In the pre-constitutional era, a similar case was dealt with by the then Appellate Division (AD) in the matter of *S v Nel*[2]. In the *Nel* case, the AD held that where a Judge or Magistrate deals with a contempt matter summarily, the default position was that the court dealt with the relevant contempt not in the strict sense of the word 'summarily', but in the more general and wider sense of the word 'summarily'. In other words, generally the *audi alterem partem* principle was applied and the accused was given an opportunity to put his/her case before the court on the charge of contempt. That to do otherwise was such a fundamental departure from the principles of our legal system that it could only be done in exceptional circumstances.[3]
9. It is therefore clear from *Nel's* case that whilst the accused in a contempt matter which occurred in *facie curiae* was generally afforded an opportunity to state his/her case, the AD in *Nel's* case recognised that in certain exceptional cases a person could be convicted of contempt of court in *facie curiae* without being afforded an opportunity to put up a defence on the relevant contempt charge.
10. As already set out above the relevant question in this matter is can such exception to the general rule survive in the light of the provisions of s35(3) of our Constitution.
11. It is trite that proceedings for contempt of court whether under the provisions of section 108 of the Act or the common law are criminal proceedings. That being the case an accused in contempt proceedings is entitled to the rights set out in s35(3) of the Constitution. This approach has been adopted by the full Bench of the Transkei High Court in the matter of *S v NTSHWENCE*[4]. Where Maya J (as she then was) sets out and deals with the rights that are affected and applicable to proceedings in terms of section 108 of the Act. Maya J has dealt with these rights succinctly to the extent required. I respectfully agree with what has been set out in the *NTSHWENCE* judgment. There would be little point in burdening this judgment with a verbatim quote of six pages from that judgment.[5] Magistrates in this province would be well advised to read the *NTSHWENCE*[6] judgment in its entirety paying special attention to the pages referred to herein.
12. Whilst Maya J refers to *Nel's* case[7], she does not expressly deal with the circumstances set out in *Nel's* case when the *audi alterem partem* principle does not apply. However, it is clear from a reading of the *Ntshwence* case, Maya J assumed that the accused would always be given a hearing. In the context of s35(3) and in particular the express provisions of s35(3)(a) and what is implied in the provisions of s35(3)(b) of the Constitution, this is a fair assumption to make. I am in respectful agreement with the said assumption.
13. Accordingly, the statement in *Nel's* case that in exceptional circumstance there can be a departure from the *audi alterem partem* principle cannot survive the provisions of s35(3) of the Constitution.

14. However, making due allowance for the Constitutional provisions set out in s35(3) there is still a great deal of wisdom and insight to be gleaned from Nel's case[8] on the issue of how a judicial officer should approach and deal with contemptuous behaviour in *facie curiae*. Magistrates in this province would be well advised to read Nel's case[9] as well.
15. A further problem in the present review lies with the manner in which the sentence was imposed. The accused was not given an opportunity to address any possible mitigating factors and neither was he afforded the opportunity of addressing whether direct imprisonment was appropriate or not. This is a fundamental departure from the requirements of fairness and justice.[10]
16. In writing this review judgment I am acutely aware that I am sitting behind my desk in a quiet and calm environment as opposed to the situation the learned Regional Court Magistrate had to deal with in a busy and probably stressed regional court. I am also acutely aware, from the record, that the learned Regional Magistrate had to deal with insults and disrespect in public, which I was not subjected to. Nonetheless, it is my duty to ensure that the accused was afforded such rights as he was due in the contempt proceedings.
17. As pointed out in Nel's case, the main purpose of punishment in the context of contempt proceedings is to bring the accused to his senses and stop the offending behaviour.[11] I'm sure that it did not escape the learned Regional Court Magistrate as is evident from the record that the punishment meted out in this case did not achieve this objective.
18. For the reasons set out above, I am compelled to set aside the conviction and sentence imposed on the accused under the provisions of s108 of the Act.
19. Stripping the statements made by the accused of the vulgar language used and the sexual innuendo, the insult directed at the court was one of the most serious and injurious that can be levelled at a judicial officer. Namely, that he was conspiring with another officer of the court to subvert the ends of justice. For that reason, I think it is appropriate in the circumstances to order that my judgment in this matter together with a copy of the record in these proceedings be sent to the head of the National Prosecuting Authority in this Province with a request that such official consider whether the accused be summonsed and charged either under the common law for contempt of court or any other appropriate statutory provision.

Accordingly, the following Order is made:

- 1) The conviction and sentence of the accused for contempt of court on the 15 September 2020 is hereby set aside.
- 2) A copy of this judgment and the record in this matter is to be forwarded to the head of the office of the National Prosecuting Authority in this Province with a request to consider an appropriate prosecution of the accused from the conduct disclosed in the said record.

L Lever AJ

I Concur

CC Williams J

[1] The Constitution of the Republic of South Africa Act 108 of 1996.

[2] 1991 (1) SA 730 (AD).

[3] Nel's case, above at 749I to 750B.

[4]

[2004] 1 All SA 328 (Tk) at 334e to 341e; particularly at 336f.

[5] NTSHWENCE case, above at pp 334e to 341e

[6] Above.

[7] NTSHWENCE case, above at p332f – g.

[8] Above.

[9] Above.

[10] Nel's case, above, at 755B-C.

[11] Nel's case, above, at 755I.

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