REPORTABLE

CASE NO.: (P) 1760/2010

IN THE HIGH COURT OF NAMIBIA

THE STATE **PLAINTIFF**

and

L SAMARIA **DEFENDANT**

(HIGH COURT REVIEW) CASE NO. 1760/2010

CORAM: Hoff J, et BOTES AJ

DELIVERED ON: 08/02/2011

BOTES, AJ

SPECIAL REVIEW JUDGMENT

[1] The accused in this matter is a prosecutor, who on the 20th of October 2010 was convicted of contempt of court and fined N$1,000.00 or 4(four) months imprisonment by the magistrate, Mariental. From the record of the proceedings submitted, as well as, the reasons of the learned magistrate, it is evident that the magistrate proceeded, summarily, against the accused in terms of section 108(1) of the Magistrate Court Act, 32 of 1944 ("the Act"). The circumstances leading to the conviction are described in the statement submitted by the magistrate in terms of section 108(2) of the Act, the relevant portions of which are referred to verbatim hereunder.

> **"Reasons by the presiding magistrate for the case of contempt of court, which includes the statement in terms of Section 108 (2) of the Magistrate Court Act, Act 32 of 1944**

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8. The state had no witnesses that could testify in English, or in a language that could be interpreted by the available interpreters.

9. The state refused to close its case, on which the court deemed the state case closed and called the defence case. This was about 12:35, and this is where the cause of this review started.

10. The prosecutor at that point requested for a brief adjournment of the case, saying he would like to visit the toilet. The court then suggested five minutes and the prosecutor confirmed five minutes will be ok. The court adjourned for five minutes.

11. After ten minutes the defence lawyer knocked by my chambers and inquired when the case resumes as five minutes have passed. I said look around for the prosecutor and inform me when the court is ready.

12. At 12:55, after 20 minutes since the adjournment I instructed the court orderly to call the case and it was done and every one else except the prosecutor was in court. The court then adjourned for lunch.

13. At 14:00 the case was called, and the prosecutor was present.

14.Without mentioning anything about the morning's happenings, I called the defence case and section 174 application was launched by the defence.

15. I didn't mention the morning's happenings deliberately, in a hope that the prosecutor will use the opportunity to explain or apologize to the court for his behaviour. This didn't come forward.

16. The prosecutor rose to address the court, starting accusing the court for unprocedurally closing the state case etc., without even informing the court what his address was all about. I had to stop him to ask whether his address is to oppose the section 174 application, on which he said yes, and then he proceeded with his address which is not relevant to the application at hand. The court tried to bring the attention of the prosecutor to the merits of the application, and rather put those arguments in an appeal should the decision goes against the state. The prosecutor refused to budge, which in my view is a continuation of

display of contempt for the decision earlier taken by the court.

17. At this point the court gave up and decided to dispense with the address of the prosecutor on the section 174 application, and adjourned the court for ten minutes, and at the resumption of court, the accused was acquitted in terms of section 174.

18. The court then preceded with the contempt of court proceedings against the prosecutor.

19. The contempt of court is based on the fact that the court believes that the prosecutor lied to the court as to the true reasons for requesting a stand down for five minutes, thereby misleading the court. He knew he was not going to the toilet, nor was he planning to return to court after five minutes, and believing him the court adjourned for five minutes, and the prosecutor disappeared.

20. To confirm the above, the prosecutor never even explained at the resumption of the court at 14:00, why he was unable to return to court after five minutes, or show some respect to court and at least apologize.

21. I believe the true reason for the request for the adjournment by the prosecutor and the subsequent disappearance was a reaction to the decision taken by the court not to grant the request for a stand down. The true reason for the request was to frustrate the proceedings because he was dissatisfied with the decision taken against the state. This was also evident from the attitude with which this request was made and with which the submission against the section 174 application was made.

22. The prosecutor was informed of the charge of contempt and responded "no comment". The court proceeded and pronounced the conviction of contempt, and since the prosecutor again responded "no comment" on sentence, proceeded to sentence the prosecutor. The pronouncement of the conviction was erroneously not recorded. This I ascribe to the tensed atmosphere (to me, at least) under which the events took place.

23. The contempt was categorize *in facie curiae* as it is based on intentionally misleading the court as to the true reasons for the adjournment by lying to it with an intention of showing contempt for the decision taken by the court. The true reason for the request was to turn his back on the court and to disappear.

24. This case was supposed to be transmitted to the High Court for review, but got delayed up to

this time due to the shortage of typing staff and the fact that I, as the presiding am in Windhoek and therecord have to be couriered over and again between Mariental and Windhoek for checking by the presiding magistrate."

[2] It is trite law that a magistrate's court is a creature of statute and as such has no inherent jurisdiction, and only has the jurisdiction to deal with matters provided for by its statutes, and in terms of such statutes.[1]

[3] Section 108 of the Act provides as follows:

> "108 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 the section five provided) be liable to the sentenced summarily or upon summons to a fine not exceeding one hundred rand or in default of payment to imprisonment for a period not exceeding three months or to such imprisonment without the option of a fine. In this subsection theword "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

1 S v Smith 1999 NR 182 (HC) at 186 A-B, and as such the only competent conviction and sentencing of an officer of court for the offence of contempt of court in *facie curiae* in summary fashion as was done by the learned magistrate in this matter under review, is contained in section 108 of the Act.

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 the a judge in chambers, a statement, certified by such judicial officer to be true and correct, of the grounds and reasons of this proceedings, and shall also furnish to the party committed a copy of such statement."

[4] According to the statement of the learned magistrate, a copy of the reasons was forwarded to the accused.

[5] Although the types of contempt contemplated by the provisions of section 108 are also those which occur at common law, it is trite law that Magistrate Courts are not empowered to apply the summary procedure for contempt of court for contempt *ex facie curiae,* but only for contempt committed in *facie curiae.* 2

[6] In S *v Ndihalwa, supra,* Mtambanengwe J, with approval referred to the following *dicta* of Claassen J, in S *v Levhengwa* 1996 (2) SACR 453 (W) at 464 D-F:

"A convenient point to start is to refer to the modern definition of the common-law crime of contempt of court: *Hunt South African Criminal Law and Procedure* Vol II Revised Edition (1990) at 185 puts it thus:

'Contempt of court consists in unlawfully and intentionally violating the dignity, repute or authority of a judicial body, or interfering in the administration of justice in a matter pending before it.'

Contempt can occur in *facie curiae.* (See *Hunt (supra* at 180/1); Jerold *Taitz* (1980) 4 SACC 60). Taitz at 61 defines contempt *in facie curiae* as being committed "when a person by word or conduct wilfully violates or attempts to violate the dignity, repute or

2 Milton, South African Criminal Law and Procedure, 3rd Edition, Vol II at 175; S v Paaie 2006 (1) NR 250 (HC) at p254 A-F; S v Ndihalwa 1997 NR 98 (HC) on p 101

authority of the court or interferes in the administration of justice, in and during the sitting of court'."

[7] Contempt *in facie curiae* therefore is committed in a Magistrate's Court where any person, whilst the court is in sitting -

(a) Insults a judicial officer or a clerk or messenger or other officer; or
(b) wilfully interrupts the proceedings of the court; or
(c) otherwise misbehaves himself in court.[3]

[8] According to the reasons of the learned magistrate, he was of the opinion that the accused "wilfully interrupted the proceedings of the court", as according to the magistrate, the accused **lied** to the court as he knew he was not going to the toilet, nor was he planning to return to court after 5 minutes.

[9] Although, the accused did not respond to the questions of the magistrate during the summary inquiry, there is no evidence on record that the accused did not attend to the toilet after the adjournment was requested and granted. The record, in fact, is completely silent as to the movements and the conduct of the accused after the court adjourned and why he only returned to court after the lunch break at 14h00.

[10] In *Cape Times Ltd v Union Trades Directories (Pty) Ltd & Others* 1956 (1) SA 105 (N), the following was said by Milne J, who wrote for the full bench at 125 F -

> "In many cases where summary jurisdiction is exercised, it is in respect of a flagrant contempt committed *in facie curiae* where the court is itself a witness to the act of contempt. In such a case the court can and does act immediately, though it must, of course, inform the person whom he proposes to punish, what the complaint is against him and afford him a proper opportunity of answering it...." (my underlining)

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3 S v Paaie, *supra* p 254

[11] In *S v Paaie, supra* at p256, Muller AJ (as he then was) stated the following in respect of the element of wilfulness:

"The element of *mens rea* also needs some emphasis. 'Wilfulness' is a requirement for a conviction of the offence of contempt of court in terms of 108 (1). The correct approach in this regard is that set out by the Appellant Division of South Africa in *R v Silber* 1952 (2) SA 475 (A) at 482-4.

Summarized, it means that the person acts intentionally if he foresees the possibility that his words or conduct will be insulting, yet he proceeds undeterred. There has to be volition before an *actus reus* can exist, which excludes casual or accidental conduct. Something more than mere voluntary action is required for *mens rea,* and negligent action is not enough.

In respect of proof of *mens rea,* the learned author Milton in *SA Criminal Law and Procedure* Vol II, *supra,* at 195 refers to applicable authorities and case law and makes the following observations (with which I agree):

> 'Proof of *mens rea* (1) *Mens rea* may be inferred from the fact that X spoke words or was guilty of conduct which from an objective point of view plainly constituted contempt. If X then fails to explain his state of mind, the court may hold that the State has proved his guilt. But, the onus remains with the State throughout. (2) For the purposes of ascertaining *mens rea* (as indeed for the purpose of determining whether they do indeed constitute a contempt), X's words must be studied in context. (3) Courts of Appeal approach the matter of *mens rea* cautiously bearing in mind that the magistrate is in many respects in a better position "to realise the atmosphere in which the incident took place and all the circumstances surrounding it, which are so essential for a right estimate of its real character"."

[12] To proceed with the summary proceedings, in terms of section 108, it clearly is required that the court itself must be a witness to the act of contempt. As such, the *actus reus,* relied upon must have been completed, whilst the court is in sitting and where the court is itself a witness, to such an extent that if the conduct is viewed objectively, in the absence of an explanation, that it can be concluded beyond reasonable doubt that the conduct constitutes contempt of court *in facie curiae.*

[13] The learned magistrate's belief as to why the adjournment was requested, is clearly irrelevant as same is not based on any fact and constitutes pure speculation as the magistrate himself, was not a witness to the fact as to whether the accused indeed visited the toilet after the adjournment, and if not, what the reasons therefore were. As such, the *actus reus* complained of by the magistrate does not fall within the ambit of the conduct, contemplated in terms of section 108 of the Act as it cannot be remotely inferred, let alone beyond reasonable doubt concluded, that the conduct of the accused to request for a short postponement to go to the toilet, and to not return on time, studied in context with the admissible facts and or evidence, from an objective point of view, constitutes the offence of contempt *in facie curiae.*

[14] It is obvious from the reasons, provided by the magistrate, that the magistrate and the accused's relationship on the day in question, was a severely strained one. In this regard I can do no better than to reiterate the principles set out by White J in S *v Nyalambisa* 1993 (1) SACR 172 (TK) at 175 to 176, which principles have already been alluded to by Muller AJ in *S v Paaie, supra:*

> (a) Contraventions of court etiquette or interferences of court procedure which are of a trivial nature should be ignored or dealt with by the presiding magistrate in a restrained manner. Magistrates should be wary of making an issue of such minor contraventions and thereby escalating them into major confrontations between the court and the offender - *S v Nel* 1991 (1) SA 730 (A)

AT 749f. A quiet rebuke and a request that the perpetrator either desist from the offensive act, or leave the courtroom, will often be more advantageous to the dignity and decorum of the proceedings than making an issue of the violation.

(b) The summary proceedings referred to in s 108 (1) should be exercised cautiously and only when such procedure is absolutely necessary to maintain the order or dignity of the court. Although there are undoubtedly cases of contumacious behaviour which required prompt and summary action, in the majority of cases it will suffice if the magistrate orders that the perpetrator be arrested and tried in the normal course for contempt of court. In *R v Silber* 1952 (2) SA 475 (A) at 480 F Schreiner JA stated:

"The power to commit summarily for contempt *in facie curiae* is essential to the proper administration of justice. But it is important that the power should be used with caution for, although in exercising it the judicial officer is protecting his office rather than himself, the facts that he is personally involved and that the party affected is given less than the usual opportunity of defending himself make it necessary to restrict the summary procedure to cases where the due administration of justice clearly requires it. There are many forms of contempt *in facie curiae* which require prompt and drastic action to preserve the court's dignity and the due carrying out of its functions."

Furthermore, a magistrate must bear in mind that when he acts in terms of s 108(1) he is the "witness, prosecutor and Judge" -*Duffey v Munnik and Another* 1957 (4) SA 390 (T) at 391F - and that this is an undesirable state of affairs. This situation can be avoided by ordering that the offender be tried in the normal course, in which even the magistrate involved will testify, but another magistrate will adjudicate over the matter. A magistrate should also satisfy himself, especially when he has been the butt of personal insults, that he is in a fit emotional state to try and sentence the perpetrator. If there is any doubt in his mind on this issue, the magistrate should either stand the case down till later on the

same day, or order that the offender appear in his court on the following day, or order that the offender be arrested and charged with contempt of court in the normal course. If the magistrate postpones the matter to the following day, he will then still be entitled to deal with it summarily in terms of s 108(1) - *R v Lloyd* H (1905) 22 SC 347."

[15] In the present circumstances, the learned magistrate, with respect, should have given heed to the warning sounded in *R v Silber* by Schreiner AJ, referred to hereinbefore. The magistrate should not have decided to, clothe himself with the authority of the witness, the prosecutor and the judge due to not only the strained relationship that existed between him and the prosecutor, but also due to the fact that the learned magistrate's belief, that the accused made himself guilty of contempt of court, was based on the learned magistrate's own opinions which, at that point in time, were not substantiated at all by a proper factual foundation. In circumstances like this, the magistrate, if he had reasonable grounds to belief that the accused requested a postponement under false pretences, should have laid the relevant charges against the accused with the relevant authorities to be investigated.

[16] For these reasons I find that the offence of contempt of court *in facie curiae* has not been proved and the magistrate could not have convicted the accused as he did. That conviction has to be set aside. As a result of the outcome on the conviction it is not necessary to deal with the sentence imposed. The sentence imposed is clearly in excess of the prescribed sentence and as such could not have been imposed by the learned magistrate. Magistrates must be alive to the fact that the amendments to s108 of the Act in the Republic of South Africa are not applicable in Namibia. As such, the maximum sentence that can be imposed for a contravention of s108, is a fine of not exceeding N$100.00 or in default of payment to imprisonment for a period not exceeding 3(three) months or to such imprisonment without the option of a fine.

[17] In and as a result of the aforegoing, the following order is made:

1. The conviction of the accused is set aside, and

2. The fine imposed, if already paid, must be refunded to Mr L Samaria.

BOTES, AJ

I agree

HOFF J