

REPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

REVIEW JUDGMENT

CR NO: 44/2018

In the matter between:

**THE STATE**

**v**

**JOHANNES IYAMBULA**

**ACCUSED**

**In re CORNELIUS HAIPUMBU**

HIGH COURT NLD REVIEW CASE REF NO: 233/2018

**Neutral citation:** *S v Iyambula* (CR 44/2018) [2018] NAHCNLD 105 (2 October 2018)

**Coram:** TOMMASI J and CHEDA J

**Delivered:** 11 April 2018

**Reasons Released:** 2 October 2018

**Flynote:** Criminal Law — Contempt of court — Difference between contempt committed *in facie curiae* (s 108 of the Magistrate's Court Act 32 of 1944) and *ex facie curiae* (and s 106 of the Magistrate's Court) — Contempt pursuant to the provisions of s 108 of the Magistrates' Courts Act 32 of 1944 must be committed during the court's sitting or during an officer's attendance at such a sitting - conduct

herein took place prior to court sitting and cannot be classified as contempt *in facie curiae*.

Criminal Procedure — Contempt of Court in terms of s108 of Magistrate's Court Act — Summary Procedure — The court is still required to adhere to the principles of natural justice particularly the *audi alteram partem rule* — Procedure patently unfair and an abuse of the summary procedure provided for in terms of s 108.

**Summary:** The State Prosecutor complained to the court that the clerk of court (accused) refused to attest to an affidavit relating to a missing court record. The magistrate instructed the court orderly to call the clerk of court. The magistrate questioned him and, not being satisfied with his answers, charged and convicted him of contempt of court. He was given the opportunity to address the court in mitigation and was sentenced to a periodical imprisonment.

The matter was brought before the judges in chambers for an urgent review and the conviction and sentence were set aside.

Held: that the court was not empowered to enquire into the conduct of the clerk of court in the summary fashion as provided for in section 108 of the Magistrate's Court Act. The contemptuous conduct complained of, was committed *ex facie curiae*; and the conduct *in facie curiae* does not fit any of the conduct described in section 108.

Held further that at the very least a court ought to notify an accused that he is likely to be convicted and sentenced for contempt of court and afford him/her the opportunity to make representations. The process adopted herein constitutes an abuse of the summary process provided for in section 108.

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### ORDER

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The conviction for contempt of court and the sentence imposed on the 11<sup>th</sup> of April 2018 in respect of Cornelius Haipumbu are set aside with immediate effect.

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### REVIEW JUDGMENT

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TOMMASI J (CHEDA J concurring):

[1] This matter was brought to our attention on 11 April 2018 for an urgent review. This court issued an order setting aside the conviction for contempt of court and the sentence. What follows are the reasons for that order.

[2] The main case (*S v Iyambula*) was postponed to 11 April 2018. On this day the clerk of court, Mr Haipumbu (hereinafter referred to as the accused) was convicted of contempt of court by the magistrate sitting in Ondangwa and he was sentenced to serve periodic imprisonment.

[3] The facts which form the basis of the conviction are best gleaned from the record which is quoted below *verbatim*.

'PP: Says (*sic*) in this of Johannes Iyambula, the State did not receive the charge sheet. The State informed Mr Haipumbu who is responsible (*sic*) to give us charge sheets on behalf of Mr Ndafyaaloko and the State informed him that if he cannot find the charge sheet then he must provide the State with a written affidavit indicating what he has done so that he can give a go ahead to the State to make out a duplicate, and he informed the State that he cannot give the State an affidavit, then the State said (*sic*) to him that if it is so the State will make application in court for him to be called in court and then he said yes you call me to court.

Crt: Warrant Officer Benisia Aindji can you please call Mr Haipumbu

Crt: Q Can you please tell the court as to why you refused to give a sworn statement to the State Prosecutor today?

Mr Haipumbu, says no I just said she must call me to court to come and explained as what I did.

Q Are you saying that the Prosecutor (*sic*) she just falsely accusing you out of nothing and you did not refuse or what are ( really) (*sic*) saying now?

A I did not refuse but I just said she can just call me to Court that is all.

Q Are you now saying you can only comply to the State's instruction for you (*sic*) search for the original case record or to give a sworn statement once you are called to court or what, because the court cannot understand you.

A Yes is what I'm saying. (sic)

Crt: The court is not satisfied with you explanation and as (sic) thus you are charged with contempt of Court, and convicted accordingly.

PP: Says, no previous conviction

Crt: Explains mitigation

Mr Haipumbu: Have nothing to say

PP: Says the state leaves it in the hands of the court.

Sentence: This court had experience (sic) this problem for the C/C at this station who do not do want to follow lawful instructions from the State on numerous occasions, and this caused unnecessary delay for the State to bring cases before court the C/C was instructed to give a sworn statement to the State but bluntly refused, that on its own can be regarded as a complete disrespect of the court and the delay of the administration of justice to prevail. In casu, the court sees (sic) that the sentence which is appropriate under the circumstances is that one thousand hours imprisonment, and this sentence to be served on week-ends starting on 13/04/2018 and you have to surrender yourself to the Oluno Correctional Services every Friday at 18H00 and to be released at 18H00 on Sundays.'

[4] The first question which arises is whether the conduct of the clerk of court is contempt *in facie curiae* or *ex facie curiae*. The second question is whether the magistrate was empowered to convict the accused of contempt of court and whether the procedure he adopted was in accordance with the principles of natural justice.

[5] The Magistrates' Court Act, 1944 (Act 32 of 1944) makes provision for contempt of court *ex facie curiae* in terms of s106 and *in facie curia* in terms of s108.

[6] The material part of Section 106 reads as follow:

'Any person willfully disobeying or neglecting to comply with any order or judgment of a court or with a notice lawfully endorsed on a summons for rent prohibiting the removal of any furniture or effects, shall be guilty of contempt of court and shall, upon conviction, be liable to a fine not exceeding N\$ 1 000 or, in default of payment, to imprisonment for a period not

exceeding three months or to such imprisonment without the option of a fine: Provided that for the purposes of this section the word "order" or "judgment" shall not include-

(a) ...

(b) ...'

It is evident that the magistrate did not act in terms of this section. The court *a quo* gave no order or a notice endorsed on a summons as envisioned by the above section. In any event, this offence is to be prosecuted in terms of the normal procedure for a criminal offence i.e. by way of a substantive and fair trial.

[7] The hearing of the common-law crime of contempt of court *ex facie curiae* similarly requires substantive proceedings in accordance with the law and compliance with the requirements of a fair trial.<sup>1</sup> The magistrate could not have tried the accused for the common law crime of contempt given the summary nature of the proceedings on record.

[8] The procedure adopted by the magistrate most closely resembles the summary procedure provided for in section 108 of the Magistrate's Court Act., 32 of 1944 which provides for contempt of court *in facie curiae*, and it reads as follows:

'(1) If any person, whether in custody or not, willfully insults a judicial officer during his sitting or a clerk, or messenger or other officer during his attendance at such sitting, or willfully 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 ss (3) of s 5 provided) be liable to be 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 the word 'court' includes a preparatory examination held under the law relating to criminal procedure.'

[9] In *S v McKenna* 1998 (1) SACR 106 (C) the court held that, in view of the context in which the phrase occurred, and upon application of both the *eiusdem generis* rule of construction, and the rule that penal provisions had to be given a narrow meaning, it was clear that the legislature had never intended to give

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<sup>1</sup>See *S v Ndakolute* 2005 NR 37 (HC) at 39C, s 89(1) Magistrate's Court Act and *S v Paulus* 2007 (2) NR 622 (HC) at 624 para 11.

magistrates' courts the power to punish under s 108(1) for misbehavior which occurred when the court was not sitting. I agree.

[10] The summary procedure provided for in section 108 gives the court the option not to follow the ordinary procedure for a criminal trial. The court, however, is still required to adhere to the principles of natural justice particularly the *audi alteram partem* rule. In *S v Bogaards* 2013 (1) SACR 1 (CC) at page 23, para 66 the court stated that:

'Notification encapsulates the concept of audi alteram partem, which, as a principle of natural justice, forms a foundational part of any fair procedure. The audi alteram partem principle requires that each party be given a meaningful opportunity to present its case.'

At the very least a court ought to notify an accused that he is likely to be convicted and sentenced for contempt of court and to afford him/her the opportunity to make representations.<sup>2</sup>

[11] The accused was not before the court by way of a summons, but, was unceremoniously hauled before the court for something which occurred prior to the sitting of the court. The contemptuous behavior appears to be the alleged refusal by the clerk of court to attest to an affidavit. This "refusal" was communicated to the state prosecutor before the commencement of court. The inquiry during the sitting of the court was merely to establish whether or not he indeed refused. His alleged refusal to comply with the request of the state prosecutor can hardly be said to have occurred *in facie curiae*.

[12] In addition to the above, it cannot be said that the conduct of the accused *in facie curiae* fits the conduct required for a conviction in terms of section 108 of the Magistrate's Court Act. The accused did not willfully insult the judicial officer or the prosecutor nor is the evidence on record that he willfully interrupted the proceedings or that he misbehaved. The court could not have convicted him in terms of the provisions of section 108 of the Magistrate's Court Act.

[13] The summary inquiry provided for in s 108 furthermore should not be abused. This procedure is essential for the proper administration of justice. Abuse, thereof, may equally bring the administration of justice into disrepute. The courts are

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<sup>2</sup> See *S v Paaie* 2006 (1) NR 250 (HC) page 255 A – B.)

encouraged<sup>3</sup> to use their powers in terms of section 108 cautiously and to: 'restrict the summary procedure to cases where the due administration of justice clearly requires it.'<sup>4</sup> This is an issue which could so easily have been resolved administratively.

[14] In this case a number of violations of the fundamental principles of our legal system are evident from the record. Firstly, the complaint was raised in court in the absence of the accused. The accused was not privy to what the complaint against him was. He was not informed when he entered the court that the questions which the magistrate posed to him were to determine whether he was guilty of the offence of contempt of court or not.

[15] Furthermore, the magistrate's impartiality was seriously compromised when he heard the untested version of the complainant. The following question by the magistrate bears testimony of his acceptance of the untested version of the state prosecutor: 'Are you saying that the Prosecutor (*sic*) she just falsely (*sic*) accusing you out of nothing.' It came as no surprise that the learned magistrate preferred the version of the prosecutor.

[16] The manner in which the attendance of the accused was secured before the court was improper. Given the fact that the alleged contemptuous conduct took place outside court it would have been more appropriate to follow substantive procedure which prescribes the manner in which to secure the attendance of an accused.

[17] The accused was confronted with an inquiry in respect of his refusal to attest to an affidavit. He evidently wanted to explain in court why he refused. He was not given this opportunity as the questions stopped when the court was satisfied that he refused to attest to the affidavit. The platform of fairness he requested to make himself understood, dismally failed him. A simple opportunity to state his case may have resolved the issue.

[18] The manner in which the summary procedure was applied in the court *a quo* shows a total disregard for the principals of natural justice and it constitutes an abuse of the summary procedure provided for in Section 108.

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<sup>3</sup> See guidelines set out in *S v Paaie*, supra.

<sup>4</sup> *R v Silbert* 1952 (2) SA 475 (A) at 480F.

[19] In conclusion: The magistrate was not empowered by s 108 of the Magistrate's Court Act to summon the accused and to convict him for contempt of court and the conduct complained of cannot be classified as contempt of court proceedings *in facie curiae*.

[20] The patent unfairness of the procedure warranted an immediate setting aside of the conviction and sentence and this court did so on 11 April 2018.

[21] The events subsequently took an ironic turn and it is interesting to note that the learned magistrate on the 20 April 2018 addressed a letter to this court requesting the court to quash the conviction and sentence because he found the missing case record in his chambers.

[22] In the result the following order was made:

The conviction for contempt of court and the sentence imposed on the 11<sup>th</sup> of April 2018 in respect of Cornelius Haipumbu are set aside with immediate effect.

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M A TOMMASI  
Judge

I agree

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M CHEDA  
Judge