Contempt and the Bench

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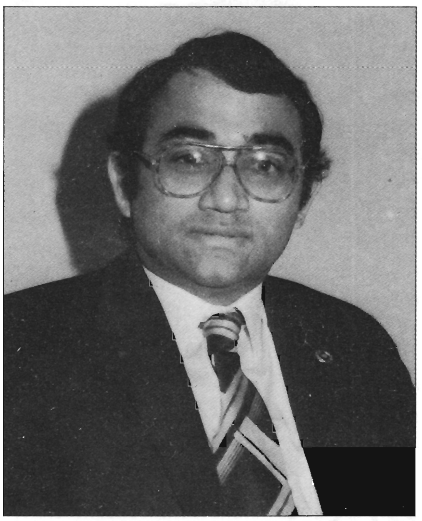

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Unjudicial behaviour

Tyebela 1989 2 SA 22 (A) is perhaps one of the most poignant reported instances of unjudicial behaviour by a presiding judicial officer *vis-à-vis* an accused (who by his own choice was unrepresented). The appeal judgment is peppered with a plethora of strictures turning on the presiding officer's conduct of the trial (the Judge's 'attitude of hostility' 29F; 'unfortunate [remarks]' 31C; 'very brief and sarcastic remarks by the trial Judge:' 31F; 'unjudicial language . . . hostile to the appellant' . . . 'he was not able to bring an unclouded mind to bear on the adjudication of the issues before him' 32F; 'he did not apply his rules even-handedly.' 33A; 'unjudicial and unjustified interruption' 34E; 'he was sarcastically or sneeringly suggesting that . . .' 34J; 'the strong impression of bullying hostility' 35B; 'not legitimate . . . sarcastic tone' 35I; 'the tone is rough, hostile and unjudicial' 36D; 'sarcastic remark' 39F; 'excessively strong language.' 42D). Yet, at the end of it all, Milne JA, on appeal, graciously restores whatever lost confidence might have been occasioned to the integrity of the judiciary by deftly concluding that 'the Judge was not fair and impartial during the trial.' 42F.

Turbulence from bench

Be that as it may, it is indeed accepted that in everyday life, '[m]embers of the public are necessarily expected and required to be hardened to a certain amount of criticism, rough language and to occasional acts and words that are definitely inconsiderate and unkind.' (*Roberts v Saylor* 1981 230 Kan 289, 637 P 2d 1175); that even in a court of law, 'verbal knocks' are to be accepted and that the courtroom contest cannot 'be equated to the proceedings of a young ladies' debating society.' (cf *Tromp* 1966 1 SA 646 (N) 655-6); that comments that are 'bona fide and reasonable, made in temperate and proper terms, and expressed for the advancement or interest of the better administration of justice' (Hunt *South African Criminal Law and Procedure* Vol 2 2ed 1982 187) should not qualify as contempt, irrespective of whether it emanates from the bench or is directed at it. Indeed, it is sometimes necessary that the presiding officer intervenes in order, eg, to restrain a zealous lawyer from unduly harassing a witness. But it is unnerving when such intervention assumes varying forms and degrees of tyranny. Still, whatever be its impulse, turbulence from the bench is a reality. It is therefore not surprising that some presiding officers have consequently acquired notoriety in being ascribed the attributes of 'a stark raving maniac', 'a real tiger', or, in the lament of a novice attorney, 'what a way to be initiated!' Such radical nominations are regrettably common in the gossip of practitioners. For the valiant among their ranks, this knowledge of their tribunal determines their game plan; the less intrepid resign themselves to reticence. For most, the fear of victimisation, a lack of gall or the conviction that the presiding officer is above the law, anaesthetises any creative gallantry that could later, on more sober reflection, be the cause of contrition. In any event, vituperation from the bench under cover of the law is endured with stoicism; it is serviently accepted as going with the territory.

Active judicial rancour

The judicial rancour that overwhelms legal practitioners in particular can be classified widely into two types: active and passive. The active type may constitute eg a continuous tirade, usually monologic, since the recipient invariably accepts it without challenge; blatant rudeness; unsolicited abuse; exhibitions of impatience; frequent outbursts touching upon the lawyer's conduct of his case; or a morose and cantankerous disposition that by that justice's own habit has become synonymous with him and

unfortunately his office. Examples are legion. However, the saving feature of this general active type of harassment is that the practitioner is always acutely aware of the tribunal's cognition of his own existence.

Passive intimidation

Not so with the passive type of intimidation which, depending on one's disposition, can sometimes enthrall as an extraordinary experience in nihilism: the practitioner becomes uncertain of his own existence. The responsible officer may: display complete apathy to the proceedings; exhibit a total lack of interest in the jurist's conduct of his case; maintain a continuous and audible knocking of his pen on the bench, or the tapping of his heel on the floor, apparently totally oblivious of the audience this demonstration alerts; himself take over, eg, the cross-examination holus bolus or, worse still, in the middle of serious cross-examination, conduct with his underling a nearly audible and more than brief conversation pertaining to tea arrangements or some or other of his personal commitments that he suddenly realises require immediate attention.

All this is very impressive behaviour – power politics from the safety of the bench. Whether this is not really a projection of personal insecurity is a matter for conjecture; whether the bench is not sometimes used as a vehicle to ferry the ego trips and fantasies of its occupant, must remain an item for speculation.

Contempt of court

At this point the logical question is whether a presiding judicial officer can himself be in contempt of court. The answer to the problem must *inter alia* depend on the definition of the offence 'contempt of court', with particular reference to the non-technical construction of the word 'court'.

According to Caney J in *Tromp* (653E) '. . . contempt of court concerns itself only with that conduct which impinges upon the administration of justice in or by the courts. . . .' What is crucial here is that violation is to the dignity, repute or authority of a judicial body. Melius de Villiers *The Roman and Roman-Dutch Law of Injuries* 1899 166 points out that a judicial body includes any 'person or body occupying a public judicial office', provided that the offensive conduct pertains to the performance of judicial duties. This enunciation invites a dual construction: the offensive conduct may arise from, or refer to, the performance of judicial duties. In other words, lawyers and the presiding judicial officer are themselves capable of violating each other's dignity, repute or authority and therefore rendering themselves liable for contempt of court. Hunt *op cit* 195 in fact concedes that the court's 'dignity, repute or authority . . . may be indirectly violated by conduct immediately directed at someone such as a deputy-sheriff, prosecutor, attorney or advocate, or even an opposing litigant who is not himself a judicial officer.' This definition too incorporates the possibility that such violation may arise between judicial officers *inter se*, or that the source of the violation may be the tribunal itself. Again in point is Melius de Villiers' definition of contempt (166): 'An injury committed against a person or body occupying a public judicial office, by which injury the dignity and respect which is due to such office or its authority in the administration of justice is intentionally violated.'

Kotze J. in *In re Phelan* 1877 Kotze 5 at 9 legitimised fair criticism of the judiciary, but warned that '[i]t is only when the bounds of moderation and of fair and legitimate criticism have been exceeded, that the Court has power to interfere.' That this *dictum* can also refer to criticism from the bench, is reinforced when one has regard to *R v Davies* 1906 (1) KB 32, 40: 'The object of the discipline enforced by the court in the case of contempt of court . . . is not to vindicate the dignity of the court or the person of the judge, but to prevent undue interference with the administration of justice.' The English view that all forms of contempt are a species of the offence of obstructing the administration of justice (*Attorney General v Leveller Magazine Ltd* 1979 2 WLR 247) was to an extent reiterated in *Harber* 1988 3 SA 396 (A) 415E. (See too *Afrikaanse Pers-Publikasie (Edms) Bpk v Mbeki* 1964 4 SA 618 (A) 626.)

A commendable definition of contempt of court, not without warts, but one which strikes at the heart of the matter, is that of Gardiner and Lansdown Vol 2 (6ed 1117) which describes the offence as being 'committed by any wilful act or omission calculated to bring into contempt or disrepute the administration of justice, whether by insulting the officials charged therewith or by rendering it ineffective.' That contempt of court, generally, is a crime of intention, appears undisputed (*Van Staden* 1973 1 SA 70 (SWA)), and more so where such contempt consists in an interference with the administration of justice.

Significant also is the perception of Snyman *Criminal Law* 1984 293 that 'blind compliance with an obviously unlawful command which has been issued *mala fide* (by the presiding officer) would itself tend to weaken respect for the administration of justice.' The obvious question is, who really is in contempt in such an instance – the commander or the commanded? Furthermore, and as an adjunct to this, the inescapable conclusion is that there are potential contempt cases in those instances that come before the superior courts on review, more specifically where there has been proved on the part of the presiding judicial officer:

(a) interest in the cause, bias, malice or corruption; and
(b) gross irregularity in the proceedings.

Meaning of 'court'

Now, more pertinently, to the meaning of the word 'court': is the arbiter, in the absence of special statutory provisions according him the status of a court, alone the court, or is he merely one component which together with others, cumulatively constitute the court? Is it not the position that he is merely one of the several integrative elements, *inter alia* witnesses, accused, prosecutors, defence lawyers, court officials in general, the curial venue and the abstraction called the justice system, who comprise the court? (See, eg, Snyman 296 who significantly distinguishes between insult to or violation of the dignity of the 'court or judicial officer', thereby acknowledging a separation of these components.)

As a justification for the above postulate, assume the following: once the court has adjourned, the presiding officer returns to an empty courtroom. For the sheer thrill of it, he decides to tango by himself, fully robed, in the dock. There is surely no contempt here, there being no 'court' of which to talk. Conversely, in open court, but before the presiding officer has appeared, it is highly unlikely that trivial misbehaviour by anyone would be regarded as contempt. Of course the answers in both situations could be different were the court fully constituted.

Judicial officer symbolic of court

The truth of the matter is that the presiding officer is really a judicial officer himself accountable to the office he represents. As such he is merely symbolic of the court. Except in loose parlance, it is paternalistic and unjustified to elevate him to the status of the court. That is why the often heard admonition "in my court, there will be . . ." is an insecure and pretentious sentiment. The trier of fact is merely one of the cogs in the justice machinery. For the court to be effective there must be constitution, cohesion and co-ordination of all components. The gentleman in the chair is at all times charged to retain the decorum of the inquisitorial exercise for which he is responsible. He is obliged to steer the same with dignity, while trying ultimately to formulate a decision. This he cannot do if he is the only person present. There is then no court. Neither can he do so with any degree of credibility if he disregards the prescripts of dignity and decorum.

Whatever deference is shown to the presiding officer is really deference to him in his capacity as representative of the justice system and the administration of this system. Deference is not to him personally, nor specifically because he is in his ('my') court. A spectacle of himself is a spectacle of the justice system. *Tromp* 652G-H makes it clear that apropos the law relating to contempt, what is protected or upheld is not the individual's dignity, but rather the office he holds, '. . . so that judicial officers, officials associated with the functions of the court and legal practitioners shall not be deterred from doing their duty, nor the courts be influenced extraneously in coming to their decisions; and so that the public shall not lose confidence in the courts. The law's concern is for the interest of the public.'

As an appointee of the justice system, the trier of fact is not above that system, nor is he below it; he is not better than the accused, nor is he worse than him; his expertise is his propensity to dispense justice given the court scenario and the facts that unfold thereat; he has more authority than the prosecutor or the defence, but like them, he too is ultimately a functionary.

The responsible officer may fulfil his role discriminately or otherwise. If otherwise, the question becomes to what extent does the image of the administration of justice suffer? When the presiding officer by words or conduct impinges upon the dignity of a fellow officer of the court or other person, his liability must ultimately be determined by an inquiry into whether he has thereby violated the dignity and decorum of the court (cf Hunt 195: 'Something which violates Y's dignity may or may not at the same time violate the dignity of the court.' And also Hunt 197: 'In general the words or conduct must violate or tend to violate the court's dignity, repute or authority or else in some other way tend to interfere with the administration of justice.') Furthermore, surely such supercilious conduct must affect the public's image of the administration of justice or, at the very least, actually prejudice or interfere with such administration?

Judicial officer's liability

An even more germane inquiry is what quantum of his suit can equitably be ventilated by a lawyer ignominiously browbeaten by the bench? If the affected party finds that he is consequently unduly compromised, his litigatory stride so undermined, that out of a sense of futility he decides to abandon his case, or simply despairs therein, then there has been an impingement upon the administration of justice. It is submitted that there is then a case for contempt. If any party to a suit, including prosecutors and lawyers, is reluctant to make his submissions because he is impelled by fear of some form of ridicule or tyranny from the judicial auditory, then not only is the proper administration of justice interfered with, but it is also called into question.

The presiding officer's liability for contempt of court is based on the usual forms of intent. In being expressly or covertly disrespectful to any component of the justice system, *in facie curiae* or otherwise, he brings himself within the ambit of violating '. . . the dignity, repute or authority of a judicial body, . . .' or he himself perpetrates an '. . . unlawful and intentional interference with the administration of justice in a matter pending before a judicial body.' (For the meaning of 'pending' see Hunt 198.) Thus he himself commits contempt of court when his words or conduct impinge upon the administration of justice in or by the courts.

It has been held that mere violation of the dignity, repute or authority of the court will not suffice, and that the intention that one's conduct should have this consequence is paramount (*Van Niekerk* 1970 3 SA 655 (T) 657; *Kaakunga* 1978 1 SA 1190 (SWA) 1193); that what is required is an intentional violation of the administration of justice (*Beyers* 1968 3 SA 70 (A) 77). While this may be so, it is also true that besides the fact that the presiding judicial officer occupies a unique and highly informed position, he also constitutes a window through which the public perceives the administration of justice. It is therefore perhaps not unfair to expect a slightly higher responsibility from this gentleman in issues wherein he exposes himself intentionally or even negligently to behaviour contemptuous of the court or of the administration of justice. (See, eg, *Makiwame v Die Afrikaanse Pers Bpk* 1957 2 SA 560 (W) 562, albeit a newspaper case, where Hiemstra J regarded the absence of intention or *mens rea* as no defence. For arguments against the strict liability rule, see *Harber supra* 415D-H.)

Conclusion

In short then, it is submitted that just as court officals in general, inclusive of lawyers and prosecutors, may be in contempt, so too can the trier of fact. He too is accountable to the office he represents, a position he is bound to uphold fearlessly, but with dignity and respect. He is potentially in contempt the moment he behaves contemptuously, because then he is in contempt of his office. As a creature of the law, he is not above it. He is therefore precluded from bringing the administration of justice into disrepute. *Inter alia* he must refrain from curial histrionics that have the effect of raising a question in the mind of the public such that it loses confidence in the integrity of the court. In other words, at the end of the day, he is himself in contempt if his negative behaviour is at the very least capable of inciting a reaction of disbelief in the minds of reasonable men. ■