THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 610/06

In the matter between :

KERI GWYN LEWIS Appellant

and

THE STATE Respondent

Before:	**HARMS ADP, STREICHER & JAFTA JJA**
Delivered:	**2 MARCH 2007**
Summary:	**Contempt of court *in facie curiae* – s 35(3) of Constitution – right to a fair trial – summary procedure not to be followed if not necessary.**
Neutral citation:	**This judgment may be referred to as *Lewis v S* [2007] SCA 3 (RSA)**

J U D G M E N T

STREICHER JA

STREICHER JA:

[1] The appellant was convicted in the Witwatersrand Local Division of contempt of court and sentenced to one month's imprisonment for having allowed his cell phone to go off in court while the court was in session and for answering it as he was leaving the court. The court a quo granted him leave to appeal against the sentence to the full court but refused him leave to appeal against the conviction. This court subsequently granted leave for an appeal against the conviction to this court and that is the appeal now before us.

[2] Subsequent to leave to appeal having been granted the judge a quo furnished reasons for the conviction in which he related the facts that gave rise to the conviction as follows:

> '7 The appellant, who did not have a jacket nor tie on on the particular day, was seated more or less in the middle of the public gallery behind all advocates during the daily roll call in court CG. This section within the court where counsel sit at the bar was full, as usual.
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> 8 His cell phone, which was evidently not on silence, went off. The level of the noise was quite loud (high) and caused a disturbance in court as everybody's attention was turned to the loud noise that pierced the silence of an otherwise orderly and quiet roll call session. The cell phone was not immediately switched off nor placed on silence. The

proceedings in court paused for a while as the cell phone continued to ring. The appellant stood upright in the middle of the court gallery and started walking towards his left (that is, to the right of the presiding judge) in between the pews with his ringing cell phone in his hand. Court GC is a fairly large court and it thus took a few seconds for the appellant to reach the end of the pews in order to start walking to the rear of the public gallery where the public entrance, which is also the exit from the court, is situated. While so walking, the appellant answered the cell phone and started talking to the caller while walking upright in the packed court room. It was as if there was nothing of significance occurring in his presence other than the conversation he engaged in on the phone. The court proceedings were halted until the applicant took his conversation right to the back of the public gallery, then behind the partition at the back, and presumably out of the court room while talking on the phone. Once the appellant and his cell phone had moved out of the court and the disturbing voice of the conversation had disappeared and attention was again back to the bench, before resuming with the proceedings, I instructed the court orderly to follow the appellant outside court and to call him back into court as soon as he was through with his telephonic conversation. In the mean time the court proceedings resumed.

9 Once the appellant was back in court, the normal proceedings of the court once more stopped; the appellant was asked to take the witness stand and he took the oath. On inquiry he confirmed that he was the

person whose cell phone had gone off in court and who had answered it and spoke on it while walking in the court room.

10 He was invited to furnish reasons why he should not be found guilty / convicted of contempt of court for his conduct and all he said was 'I am sorry' or words to that effect. He also said that he apologized for his conduct. He was asked whether he was aware of the signs at the public entrance to the court room which called for silence and also indicated that cell phones were not allowed, and he responded positively. He was asked whether he was aware when his cell phone went off that he was inside a court room and that the court was in session and he again responded positively. He was asked why then he had behaved as he had done and all he said was that he should not have acted as he did and that he was sorry. I noted that his response might be relevant to sentence and again enquired if he could give reasons why he should not be convicted. He shrugged his shoulders and said he could give no reasons or words and / or conduct to that effect. I informed him there and then that I found him guilty of contempt.'

[3] In the light of the fact that the transcription of the proceedings in the court a quo makes no mention of a sign which indicated that no cell phones were allowed in court, the judge a quo's reference to 'signs at the public entrance to the court room which called for silence and also indicated that cell phones were not allowed' was probably intended to

mean that the sign calling for silence, by implication, indicated that cell phones were not allowed.

[4] The judge a quo concluded as follows:

'Contempt

13. In my view the appellant was in contempt as he showed no regard or respect for the court proceedings and the convenience of the many litigants in a busy roll call. His contempt was evident not only in his apparent disrespect for court proceedings but also in his whole conduct and the attitude he displayed. The contemptuous attitude continued right through until he was sentenced. Even as the court was addressing him although the appellant in words said 'I am sorry" or something to that effect, his whole manner and body language was something different. It was as if he did not make out what all the fuss was all about as he repeatedly shrugged his shoulders upwards at the same time bending his hands inward and opening them in front. It was only after the sentence was passed that the seriousness of his conduct, the enquiry proceedings and of the moment appeared to dawn upon him.

Respect for Court

14. The respect for the court that those before it have to show is not for the convenience or ego of the presiding officer. I certainly demand no respect for myself as an individual. I do however expect that respect be shown for the nature of proceedings and that due regard

be given to the convenience of all those in court and those who look forward to courts to function with dignity and without being disturbed. When the orderly running of the court is disturbed with disrespect and contempt as aforesaid, the action to protect and restore the order and respect for the court, in order to be effective, had to be taken there and then.

15. Since this case I am pleased that whatever the outcome of the appeal there is calm and respect in the court room. In addition to the written warnings the court orderlies in our courts now announce that cell phones be switched off before the court commences.'

[5] Milton *South African Criminal Law and Procedure* 3ed p175 defines the offence as follows:

'Contempt of court *in facie curiae* occurs when during the sitting of a court ('in open court') a person by word or conduct interferes with the administration of justice or violates the dignity or authority of the court.'

In regard to the requirement of intent Van Heerden JA said in *S v Harber and Another* 1988 (3) SA 396 (A) at 413H – 414A:

'[D]uring the last two decades it seems to have been generally accepted that intention is an element of the offence. In *S v Van Staden en `n Ander* 1973 (1) SA 70 (SWA), Trengove J pertinently held that intention is a requisite of that form of contempt consisting of an interference with the administration of justice and, indeed, of all manifestations of the offence. And, in *S v Van Niekerk* 1970 (3) SA 655 (T) at 657 and *S v Kaakunga* 1978 (1) SA 1190 (SWA) at 1193, it was held that an accused cannot be

found guilty of contempt merely because his conduct constituted a violation of the dignity, repute or authority of a Court; he must also have intended to bring about that consequence. Reference may also be made to *S v Gibson NO and Others* 1979 (4) SA 115 (D) at 121, in which Milne J expressed agreement with a submission that contempt of court is a crime of intention.'

[6] It follows that the appellant's conduct would only have constituted the offence of contempt of court if he left his cell phone on and answered it while leaving the court room with the intention of interfering with the administration of justice or of violating the dignity and authority of the court. That would have been the case if he foresaw that his conduct would or may possibly have that effect but nevertheless left the phone on and answered it.[1]

[7] Before the advent of the Constitution a judge, in the case of contemptuous conduct *in facie curiae*, if he considered that the conduct warranted punitive action, could either refer the matter to the Attorney-General to decide whether the person concerned should be prosecuted or, if it was necessary to act more expeditiously in order to preserve the dignity, repute or authority of the court or to permit the administration of justice to continue unhindered, deal with the matter summarily (see *S v Nel* 1991 (1) SA 730 (A) at 749H-I).

[1]Cf *S v Foley* 1968 (1) SA 694 (T) at 697 *in fine*.

[8] The Constitution now provides:

> '35(3) Every accused person has a right to a fair trial, which includes the right-
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> (a) to be informed of the charge with sufficient detail to answer it;
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> (b) to have adequate time and facilities to prepare a defence;
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> (c) to a public trial before an ordinary court;
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> (d) . . .
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> (e) . . .
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> (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly:
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> (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;'

[9] In *S v Mamabolo (E TV and others intervening)* 2001 (3) SA 409 (CC) para [51] – [59] the Constitutional Court considered the constitutionality of the summary procedure which led to a conviction of contempt, categorised as 'scandalising the court', *ex facie curiae*. The Court, referring to *S v Nel supra* prefaced its discussion of the constitutionality of the summary procedure by stating:[2] 'It should also be noted that we are not concerned here with the kind of case where the orderly progress of judicial proceedings is disrupted, possibly requiring

[2] Para [52].

quick and effective judicial intervention in order to permit the administration of justice to continue unhindered.' After having referred to several unsatisfactory features of the summary procedure the court held that the 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)'.[3] It then proceeded to consider whether the summary procedure is saved by s 36(1) of the Constitution and held that in cases of alleged scandalising of the court 'there is no pressing need for firm or swift measures to preserve the integrity of the judicial process' and added: 'If punitive steps are indeed warranted by criticism so egregious as to demand them, there is no reason why the ordinary mechanisms of the criminal justice system cannot be employed.'[4] It concluded that the summary contempt procedure in respect of alleged contempt *ex facie curiae*, 'save in exceptional circumstances such as those in *Chinamasa's* case[5] where ordinary prosecution at the instance of the prosecuting authority is impossible or highly undesirable, [is] a wholly unjustifiable limitation of individual rights and must not be employed'.[6] The Constitutional Court thus recognized that there may be circumstances in which a summary procedure, at which the constitutional rights referred to are not afforded to an alleged offender, may be adopted.

[3] Para [55].
[4] Para [57].
[5] 2001 (2) SA 902 (ZS). At the time of the trial Chinamasa was the Minister of Justice of Zimbabwe and the case concerned a statement he had made in his capacity as Attorney-General of Zimbabwe.
[6] Para [58].

An attempt to circumscribe the circumstances that would justify such a procedure would be presumptuous. It is however self-evident that if the summary procedure, as opposed to a prosecution by the prosecuting authority, is not necessary in order to preserve the dignity or authority of the court or to permit the administration of justice to continue unhindered an accused person should be afforded a fair trial as required by s 36 of the Constitution.

[10] The appellant had left the court and was clearly no longer interfering with the administration of justice. Immediate action was therefore not required in order to permit the administration of justice to continue unhindered. However, ringing cell phones and people answering those cell phones can obviously not be tolerated in courts and call for some immediate action in order to preserve the dignity and authority of the court, even after the disturbance had been discontinued. That is not to say that a summary enquiry with a view to a conviction for contempt of court is called for. Assuming that the conduct justifies punitive action, a rebuke and a notification to the offender that the matter would be referred to the Director of Public Prosecutions for a possible prosecution would in most circumstances serve to preserve the dignity and authority of the court and would in my view have done so in the present case. It was, therefore, not necessary to summarily deal with the matter and the

appellant should have been afforded his constitutional right to a fair trial including the right to have adequate time to prepare a defence and to be represented by a legal representative. It follows that the conviction should be set aside.

[11] It should be added that when the summary procedure is permissible and adopted by a court, the court should bear in mind that the alleged offender may not know what the elements of the offence are and also that he had not had any time to prepare his defence and to consult a lawyer. The court should therefore realise that the alleged offender is in no position to adequately defend himself. For these reasons the court should take great care to ensure that an alleged offender who ostensibly acted contemptuously and who is unrepresented, is indeed guilty of contempt. The court should in particular make sure that the conduct complained of occurred with the intention to violate the dignity and authority of the court or to interfere with the administration of justice. Conduct which may ostensibly point to an intention to be contemptuous may prove not to be such.

[12] In the present case the court a quo could not have been satisfied that the appellant acted with the required intent. Cell phones going off when they should not be on, is a common occurrence. It happens in

theatres, during meetings and unfortunately also in courts. Most of the time the owner inadvertently left it on, he is caught off guard and his embarrassment often causes him not to be able to deal with the problem as speedily and effectively as people irritated by the disturbance expect him to do. The court should in the circumstances at least have enquired whether the appellant was aware that his cell phone was on or whether he left it on inadvertently. If he was aware the court should have enquired whether he realised that leaving his cell phone on may be disruptive of the proceedings and may be considered to be contemptuous of the court as opposed to being inconsiderate or discourteous. The court should also have enquired whether he actually conducted a conversation while he was walking out of court. It is possible that the appellant merely told the caller to hold on until he was out of court as the appellant, in his application for leave to appeal, alleged he did. The court should also at least have enquired whether the appellant was aware that the ringing of his cell phone and his answering thereof caused an interference with the court process to the extent that it could be considered to be contemptuous. In the latter regard it should be remembered that the incident occurred in a large court during roll call at a time when the court was ‘packed’. The front part of the court would have been occupied by a number of advocates and the back part by members of the public. People, would have moved in and out of the court, those not directly concerned in the

matter that was being called, would have had little or no interest in the the matter that was being dealt with, would have paid little attention to the proceedings and may well have been whispering amongst one another without being frowned upon. In these circumstances it is possible that the appellant as a layman did not realise that leaving his cell phone on and answering it while he was leaving the court may be interpreted to be contemptuous. What may seem obvious to lawyers who practise in the courts and who know very well that a cell phone should not be answered in a court, not even to tell the caller to hold on, may not be that obvious to a layman.

[13] That the appellant in fact did not realise the seriousness of his transgression is evidenced by the court a quo's finding that '[i]t was only after the sentence was passed that the seriousness of his conduct, the enquiry proceedings and of the moment appeared to dawn upon him'. The shrugging of the shoulders and the bending and opening of the hands in front of him, which the court a quo interpreted to be a sign of the appellant's contempt, may have been an indication by the appellant of helplessness, and may have been intended to convey 'what can I do but apologise'. Furthermore, the fact that the appellant left the court to conduct his conversation outside afforded some evidence that the

appellant had no intention to be contemptuous but respected the authority and dignity of the court.

[14] It should also be added that it may at times be more dignified to simply ignore conduct that may technically constitute contempt of court or to treat it less harshly than to convict the perpetrator of the offence.[7] A rebuke or some other indication of disapproval should in most cases be an adequate measure to discourage cell phone transgressions in court.

[15] The appeal is upheld and the conviction is set aside.

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STREICHER JA

CONCUR:

HARMS ADP)

JAFTA JA)

[7] S v Nel supra 749F-H.