BLOEMFONTEIN MUNICIPALITY v. TAYLOR.

1907. *October* 18. MAASDORP, C.J., and FAWKES and WARD, JJ.

Municipality.—Appeal.—Costs.—Breach of regulations.

Where the municipality applied for the judgment in the foregoing case to be reversed on the ground that no notice of the appeal had been given them, *Held*, on appeal, that the municipality must pay costs in this Court and in the court below, less the costs of appearance on the last day of hearing.

The facts sufficiently appear from the foregoing case. Notice of that appeal had been given to the Attorney-General, but not to the municipality, and costs were given against the latter though they were not before the Court.

Fischer, for appellants: We were not before the Court. Costs are not granted in cases of this nature, *i.e.* criminal appeals, unless the original action is frivolous, vexatious or wholly unfounded even when the regulation is held to be *ultra vires*. There was no special agency authorising the Public Prosecutor to appear for the municipality in the court of appeal. See *Whiteman* v. *Beaconsfield Municipality* (5 H.C.G. 296); *Grahamstown Municipality* v. *Pote* (5 E.D.C. 81); *Sayle* v. *Jones* (1876, Buch. p. 10); *Oudtshoorn Municipality* v. *Wigget* (6 S.C. 128); *Barkly East Municipality* v. *Jatho and Another* (5 S.C. 57).

[The Court referred to *Snyders* v. *Theron* (10 S.C. 309); *Visagie* v. *Booysen* (2 Roscoe, 48); *Grant* v. *Jansen and Others* (3 Menz. 458); *Municipality of Capetown* v. *Morkel and De Villiers* (3 Menz. 561); *Hunt* v. *Hoare* (1 S.C. 379); *Rex* v. *Bouwers* (15 C.T.R. 271).]

Hertzog, for respondent: Notice was given to the Attorney-General, who, through the Public Prosecutor, acted on behalf of the appellants in the court below.

MAASDORP, C.J.: Apparently there is no provision made to

enforce the giving of notice of appeal to a private prosecutor. Sec. 96 (*b*) of Ordinance 7 of 1902 provides for notice to be given to the Attorney-General. There is no doubt, I think, that the proper course of procedure would have been, when the matter was last before this Court, for the Court to have postponed the case for notice to be given to the municipality that a claim for costs was to be made against them. In not following this procedure our object was to avoid the incurring of unnecessary costs. The fact that notice was only given to the Attorney-General implied that the respondent would not ask for costs, as it is impossible to obtain them from the Attorney-General, and if he had wanted costs against another party he should have given notice. He did not give such notice. However, even if there had been a postponement, the position would have been the same as it is to-day. At any rate costs of that day could not have been claimed against such a party. But the town council reopened the matter, and nothing has been urged by them that can influence the Court to revise the decision. If the particular words of the judgment had been taken there might have been something to support the appellants' position in asking to have it set aside. There certainly are isolated expressions in the cases quoted by appellants' counsel bearing out their contention. But in *Snyders* v. *Theron* (10 S.C. 309) DE VILLIERS, C.J., said: "In the later case of *Visagie* v. *Booysen* (2 Roscoe, 48) it was held that the magistrate could not order the accused to pay the costs, inasmuch as the proceeding was a criminal one. The costs of appeal, however, were allowed to the respondent, although the Ordinance does not provide for the payment of such costs. Since that time it has not been unusual in appeals or reviews against convictions in private prosecutions to allow the successful party his costs in appeal."

Well, especially in the case of municipal regulations, the principle which is opposed to the giving of costs in criminal appeals does not hold. The contravention of such a regulation is not an ordinary crime, for in the latter the Crown wishes to encourage private prosecutors; therefore in crimes as opposed to breaches of regulations the Court is averse to giving costs against the prosecutor. But by a regulation which a munici-

pality has had created, only a statutory offence is created for their benefit. It is more of the nature of a private prosecution. In these cases the courts have allowed costs against the original prosecutor. Not only so, but also against the appellant, which is unusual when compared with ordinary criminal procedure. On appeal in ordinary crimes I would almost go so far as to say costs would never be granted. This is more a civil proceeding, and the Court is not influenced as it would be in the case of ordinary crimes. Here the municipality have made a regulation which would prohibit the respondent from putting up a hoarding on his own property. They are interfering with his common law rights. The law says that unless such an erection is a nuisance—not an offence to a man's delicate sense of art—he has a right to put it up. The municipality have enacted a regulation taking that right away, and they are not entitled to do so. They have not merely enacted this regulation, but there was even a dispute as to whether the respondent's right had really been taken away by the regulation. Instead of bringing a civil action they exposed the respondent to a criminal prosecution. Surely that was vexatious. In a civil case costs would have been given against the municipality. We have been influenced by these circumstances in deciding to give costs against the town council. In order to save costs, as we thought, in our first judgment we followed a course which was not strictly correct; but the parties are before us now just as if we had followed the correct course—so that the question is merely one of costs. We have decided to grant the respondent costs against the appellants—the latter to pay costs in this Court and in the court below less the costs of appearance on the last day.

Appellants' Attorney: *J. G. Fraser;* Respondent's Attorney: *Allan Fraser.*