ROUXVILLE MUNICIPALITY v. HAUPT.

1909. *March* 26. MAASDORP, C.J., and FAWKES and WARD, JJ.

Appeal. — Tender. — Waiver by acceptance. — Costs. — Discretion of magistrate.

Where H, acting as town clerk for the R municipality, accepted a cheque in payment of his salary, but on being sued by the municipality for a certain amount due to them, counter-claimed for an extra 14s. 6d. for salary, and the magistrate gave judgment for the municipality in convention and for H in reconvention, but ordered the municipality to pay the costs of both parties, *Held*, on appeal, that H had waived his right to claim the 14s. 6d., and that the judgment in reconvention must be struck out, but that the magistrate had exercised a judicial discretion in the matter of costs. No order as to costs of appeal.

This was an appeal from a decision of the Assistant Resident Magistrate of Rouxville.

The appellant had sued the respondent under the Petty Debts Recovery Ordinance (2 of 1906) for 15s. in respect of an account for the removal of slops for the months of November and December, 1908. The respondent had set up a counter-claim for 17s., which included a sum of 14s. 6d. due to him as salary. The respondent had been engaged temporarily to act as town clerk at £15 a month, and had occupied the position throughout the month of September and for seventeen days in October. He had duly received the £15 due for September, and at the end of his engagement was offered £7, 10s. This he had at first refused, but subsequently took a cheque for the amount. The amount of 14s. 6d. claimed in reconvention for salary was the amount due to him over and above the £7, 10s. he had received, reckoning the salary at the rate of £15 for thirty-one days. Judgment had been given in the lower court for the plaintiff in convention for 15s. and for the plaintiff in reconvention for 14s. 6d., on the ground that the cheque had not under the

circumstances been accepted in full settlement. The appellant had been ordered to pay the costs of both parties, on the ground that its conduct had been vexatious.

P. U. Fischer, for the appellant: There was clearly a tender in full settlement and an acceptance. The order as to costs was not in the exercise of a judicial discretion. The evidence shows that the appellant considered that the respondent had been engaged for a month and a half, and therefore offered payment accordingly; consequently its conduct cannot be held to have been vexatious. Even where the court wishes to express its disapproval of the conduct of the successful party, it is contrary to the practice of the South African courts to make him pay the costs of both parties. See *Jerry John* v. *John Jiba* (11 E.D.C. 70).

MAASDORP, C.J.: The question here practically turns upon the judgment of the magistrate as to costs. He was wrong in allowing the respondent the 14s. 6d. he claimed in reconvention, because by accepting the cheque for £7, 10s. he had in point of law waived the payment of that amount. But he was equitably entitled to the 14s. 6d., and he had been forced into a corner by the municipality. When it offered him £7, 10s. he required it very much; and he accepted it thinking he might get the 14s. 6d. out of them in some other way. The law will not allow this: a tender cannot be accepted conditionally unless it is expressly so stated, and even if it is so stated, but the condition is not agreed to by the tenderer, the amount tendered will be regarded as accepted in full payment. The question remains as to whether the magistrate, if he had given judgment for the 15s. in full, would have been wrong on the question of costs. Was it a judicial discretion he exercised in making the appellant pay the respondent's costs? We are not prepared to say that he exercised anything else than a judicial discretion. Morally the appellant was not entitled to the money. It is true it made a tender of 6d. when the respondent had asked for 2s. 10d.; but even that was made without prejudice. Practically the whole debt of 15s. was wiped out by the respondent's moral right, and he only failed

to establish that right because the municipality had put him in a corner. The Court is therefore of opinion that the magistrate exercised a judicial discretion as to costs. The magistrate's judgment must be altered by striking out the 14s. 6d. awarded to the respondent and giving the appellant 15s. in full. But how about costs in this court? Practically the council is insisting on taking advantage of the position in which it has placed the respondent morally, and, though we have altered the judgment, we have decided to make no order as to the costs of appeal.

FAWKES and WARD, JJ., concurred.

Appellant's Attorney: *G. A. Hill.*