ASSIGNED ESTATE OF BOLTMAN BROS. v. BURGER.

1909. *February* 2. MAASDORP, C.J., and FAWKES, J.

Practice.—Summons.—Demand.—Costs.

Where A sued B in the lower court for £16, 11s. 9d. for goods sold and delivered, and the magistrate held that only £1, 11s. of that amount, in respect of a debt contracted in 1907, was due, giving costs against A on the ground that owing to a mistake of A's there had been no demand for that amount prior to summons, and that B had produced a receipt purporting to cover the year 1907, *Held*, on appeal, on the question of costs, that the magistrate's decision must be upheld.

The appellants (plaintiffs in the court below) were trustees in the assigned estate of Messrs. Boltman Bros., general dealers at Kroonstad. They had sued the respondent in November, 1908, in the resident magistrate's court at Kroonstad for £16, 11s. 9d. for goods sold and delivered. The magistrate found that all the items in the account, except one, amounting in all to £15, 0s. 9d., referred to debts incurred during the year 1908, and that the appellants had agreed to allow the respondent a year's credit. On the remaining item of £1, 11s. in respect of a bag of meal purchased in 1907, as appeared from the summons, the magistrate gave judgment for the appellants, but awarded costs to the respondent. The appeal was based on this award of costs. It appeared from the evidence that in August, 1908, the appellants had sent the respondent a letter of demand for £15, 0s. 9d. and on the 30th October issued summons for £16, 11s. 9d. This was the first intimation received by the respondent that the amount of £1, 11s. was due. It appeared that the appellants had previously sent the account for this amount in error to another customer of the same name as the respondent, and

only discovered the mistake between the time of writing the letter of demand for £15, 0s. 9d. and the issue of summons. Two other points of importance appearing from the record were: (1) that the respondent had produced a receipt for payments in respect of debts due by him to Boltman Bros. for the year 1907; and (2) that the respondent in giving his evidence had repudiated liability for the amount of £1, 11s.

Blaine, K.C., for the appellants.

Dickson, for the respondent: The magistrate exercised his discretion judicially in awarding costs to the respondent.

Blaine, K.C., in reply: The failure to make a demand before issue of summons does not deprive the successful party of costs. The magistrate should have treated the summons as a demand as regards the item of £1, 11s., but he had no further discretion as to costs. See *Van Wijk* v. *Faber* (2 E.D.C. 152) and *Hepworth* v. *Dunkley* (3 S.C. 400).

MAASDORP, C.J.: The Court is of opinion that the appeal must be dismissed. The authorities quoted by Mr. *Blaine* do not really touch the question at issue here. The plaintiffs first send out a letter of demand for certain debts, amounting in all to £15, 0s. 9d., in which no mention is made of the item of £1, 11s., and this latter item is introduced for the first time in the summons. Prior to this Messrs. Boltman Bros. had given a receipt in full for the year 1907, and surely they ought to have given an explanation in the account attached to the summons, as to why this item was suddenly sprung upon the defendant after he had paid, as he thought, his whole account for 1907. The defendant has no information as to this item, goes into court, and hears then for the first time what it represents. His ignorance was due to the plaintiffs' mistake. The defendant might well say, "I do not know anything about this." The explanation ought to have been given to him before he went into court. The magistrate was entitled to use his discretion, and it is a discretion that this

Court might reasonably have exercised in a similar case if sitting as a court of first instance.

FAWKES, J., concurred.

Appellants' Attorneys: *Botha & Goodrick;* Respondent's Attorney: *G. A. Hill.*