

NEL v. VON MOLTKE.

1910. November 25, December 15. MAASDORP, C.J., and
FAWKES and WARD, JJ.

Tender.—In full settlement.—Conditional.—Costs.

The question whether a tender is or is not conditional depends upon the proper interpretation of the words used.

A tender "in full settlement of the claim" is a conditional tender; but, *semble*, a tender "in settlement of all that I admit to be due" would be unconditional.

The facts sufficiently appear from the judgment.

Blaine, K.C., for the appellant (plaintiff in the court below): There were no exceptional circumstances in this case to justify the magistrate in refusing to allow costs to the successful party. It was decided in the case of *African Agricultural and Finance Corporation, Ltd., v. Bouguenon* ([1904] T.S. 535) that a tender "in full settlement" is not an unconditional tender.

[MAASDORP, C.J.: At first sight I do not follow the reasoning in the judgment delivered in that case. What is meant by a tender if not in full settlement?]

It is clearly a rule of English law. See the authorities cited in the case quoted. I admit that this case has been the subject of criticism at the hands of KORZÉ, J.P., in *Reid v. Carnofsky's Trustee* ([1910] E.D.L. at p. 171).

Dickson, for the respondent: See rule 53 of schedule B to Ordinance 7 of 1902 (Magistrates' Courts). The magistrate exercised a judicial discretion. See *Malooi v. Windvogel* (19 C.T.R. 306).

Cur. adv. vult.

Postea (December 15):—

MAASDORP, C.J.: This is an appeal from a judgment of the relieving resident magistrate sitting at Marquard in the district

of Senekal in a case in which the plaintiff sued the defendant for the sum of £20 as damages caused by a grass fire negligently lit by the latter, and to which the defence was a plea of tender, the plea being based on a letter written by defendant's agent to plaintiff, in which he tendered him "the sum of £5 in full settlement of the claim." To this plea plaintiff replied that the tender was not a good tender, inasmuch as it was conditional.

An unconditional tender of £5 was, however, made in court, and evidence was then led as to its sufficiency, whereupon the magistrate gave "judgment for plaintiff for £5; each party to pay his own costs," and it is against the judgment as to costs that the plaintiff now appeals, maintaining that, the magistrate having held that the tender was a conditional tender, the judgment ought to have been for the plaintiff with costs.

Now there can be no doubt that as a general rule, and in the absence of any exceptional circumstances, costs ought to follow the result, and the question is whether there were any such circumstances present in this case as would tend to take it out of the general rule. It is impossible for the Court to find any such circumstances, and the reasons advanced by the magistrate would seem more calculated to lead to an opposite conclusion from the one at which he arrived. He came to the conclusion that the tender made before action was a conditional tender, and yet refused the plaintiff his costs on the ground that the amount of the damage proved approximated to the amount so conditionally tendered.

There having been no cross-appeal by the defendant upon the decision of the resident magistrate as to the tender "in full settlement of the claim" being a conditional tender, it was suggested by Mr. *Blaine* that therefore the Court is not called upon to give a decision as to that point. Seeing, however, that if the tender was in law an unconditional tender the plaintiff would only be entitled to costs up to the date of the tender, it will be necessary for the Court to come to a decision on that point. Now a legal tender is an unconditional offer of payment made by a defendant of so much of the amount claimed by the plaintiff as he, the defendant, himself admits to be due. The object of such offer is to protect the defendant from costs in case

the plaintiff should insist upon suing for the full amount of his claim, or of the balance of the same, should he accept the amount tendered by the defendant. The acceptance of the amount tendered will not prejudice the plaintiff in any way, if the tender is unconditional, because it merely amounts to his saying to the defendant: "I accept the amount as being what you say is due," and there will therefore be nothing to prevent the plaintiff from suing for the balance of his claim even after accepting the amount tendered, if he is prepared to run the risk of being mulcted in costs in case he is unsuccessful.

The case is different where a tender is clogged with a condition, *e.g.*, "provided you will accept this in full settlement." In such a case the tender is not a tender pure and simple, but amounts to an offer of a compromise which, if accepted simply and unconditionally by the plaintiff, will bind him to the terms of the offer and amount to an acceptance by him of the amount subject to the condition, that is to say, in full settlement. In such a case the plaintiff will not be entitled to sue for the balance of his claim, but is regarded as having accepted the amount tendered in full settlement (see *Attwell & Co. v. Purcell, Yallop & Everett*, 14 S.C. at p. 372).

In the present case the tender was in the terms "the sum of £5 in full settlement of the claim," and the question is whether this tender was or was not conditional. In the case of *Allie and Others v. Parker & Barsdorf* (14 C.T.R. at p. 60) HOPLEY, J., is reported to have stated that he believed that in our practice a tender "in full settlement of the matter" has always been looked upon as unconditional in its nature and terms. And in *Reid v. Carnofsky's Trustee* ([1910] E.D.L. at p. 171) KOTZÉ, J.P., raised a doubt as to whether a tender "in settlement" or "in full settlement" must necessarily in all cases be regarded as conditional. But, on the other hand, in the case of *Attwell & Co.*, already quoted, Lord DE VILLIERS held that a payment "in full settlement" was a conditional payment, and that, if not accepted as such, it might be recovered back, at any rate to the extent to which it was in excess of what was actually due. And in the case of *African Agricultural and Finance Corporation, Ltd., v. Bouguenon* ([1904] T.S. 535) the Transvaal Supreme Court

(INNES, C.J., and SOLOMON and BRISTOWE, JJ.) held that a tender "in full settlement" was a conditional tender. Now in every case the question as to whether a tender is or is not a conditional tender must depend upon the proper interpretation of the words used in making the tender. In the present case the words were "in full settlement *of the claim*," that is to say, not "in settlement of all that I admit to be due," which would be an unconditional tender, but "in full settlement of what you claim to be due." Now what other meaning can be attached to these words than what was put upon the words "full settlement" in the two cases last referred to, namely, "I pay you this amount upon the condition that you admit it to be all that is due and accept it as such"? The tender was clearly, therefore, a conditional tender and of no legal value as a tender, and ought to have been wholly disregarded by the resident magistrate in giving his judgment.

Appeal must therefore be allowed with costs of appeal and costs below, and the judgment altered into "judgment for the plaintiff for £5 with costs."

Appellant's Attorney: *C. J. Reitz*; Respondent's Attorneys: *Botha & Goodrick*.
