

MASON, J.: I concur.

GREGOROWSKI, J.: I concur.

At the request of counsel on both sides, the Court granted an adjournment to enable parties to consult. After the adjournment, counsel informed the Court that the parties had agreed to abandon the allegations of double voting, and the Court was asked to give judgment on the case as it stood, each party agreeing to pay its own costs.

WESSELS, J.: Ordered that the Court declares that the respondent was not duly elected, and that no other person was or is entitled to be declared duly elected. The Registrar to certify forthwith to the Governor-General. Each party to pay his own costs. The papers examined to form part of the records. Court expresses a wish that, in making report of case the numbers of the ballot papers should be omitted, if possible.

Attorneys for Petitioner: *Ludorf & Strange*. Attorneys for Respondent: *Webb & Dyason*.

[G. v. P.]

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REX v. RUBEN.

1915. November 29, December 7. DE VILLIERS, J.P., WESSELS and BRISTOWE, JJ.

*Shop hours.—Ord. 11 of 1914, sec. 4 (1).—Keeping dairy.—Shop open after hours.—Defence that it was a refreshment shop.—No licence.*

An occupier of a dairy shop, on being charged with contravening sec. 4 (1) of Ord. 11 of 1914, in that he sold bread on a certain day after the closing hours, set up the defence that he kept a refreshment shop. The magistrate, in convicting him, stated that the accused had admitted that he had no refreshment shop licence, or a licence to sell bread after hours. *Held*, on appeal (DE VILLIERS, J.P., *diss.*), that as the evidence of the accused that he kept a refreshment shop was apparently uncontradicted, and as the magistrate did not find as a fact that he had no such shop, that the conviction should be set aside.

Appeal from a conviction by the assistant resident magistrate at Johannesburg.

Accused was charged with contravening sec. 4 (1) of Ord. 11 of 1914, in that he, being the occupier of a dairy shop, unlawfully kept it open at 5.10 p.m., and sold therefrom a loaf of bread on a Wednesday, when shops wherein bread was sold, viz., bakers' shops, should close at one o'clock. He was found guilty and sentenced to a fine of £1.

The magistrate stated in his reasons that the accused did not deny that he sold bread in his shop at 5.10 p.m. on a Wednesday, but that his defence was that he kept a refreshment shop, and consequently was entitled to sell bread after closing hours. That the accused admitted that he had no refreshment shop licence or any licence entitling him to sell bread after closing hours. That for these reasons the accused was convicted.

*P. Millin*, for the accused: The accused stated that he also had a refreshment shop, that evidence is uncontradicted; if that evidence is correct he was entitled to sell bread after hours. Under sec. 72 (16) of Ordinance 9 of 1912 the Council can make bye-laws for licences of refreshment shops, but there is no evidence that such bye-laws have been made. If he had a refreshment shop, then the fact that he did not have a refreshment-shop licence did not affect the present question; he could be charged with keeping a refreshment shop without a licence, but that is not the charge here.

*C. W. de Villiers, Attorney-General*, for the Crown: The charge is that the accused sold bread as a baker after hours. The magistrate did not believe the accused when he stated that he kept a refreshment shop. His statement is merely an excuse.

*Millin* replied.

*Cur. adv. vult.*

*Postea* (December 7).

WESSELS, J.: The accused was charged with a contravention of the Shop Hours Ordinance, in that he, being the occupier of a dairy shop, situated at 55, Commissioner Street, in the municipality of Johannesburg, unlawfully kept it open at 5.10 p.m., and sold therefrom a loaf of bread on a day on which shops wherein bread is sold, viz., bakers' shops, should close at one o'clock. Upon this charge he was found guilty. The defence of the accused was that, although he had a dairy shop, he also had a refreshment shop, and, under those circumstances, he was entitled to keep open until seven o'clock. If, however, he had no refresh-

ment shop and sold bread, he had to close at one o'clock, because a baker's shop has to be closed at that hour, for if on the same premises there are two shops, the law provides that the closing must take place at the hour laid down for the trade which must close first. The magistrate who heard the case came to the conclusion that he could not accept the defence of the accused, because he had not proved that he had a licence for a refreshment shop. As far as I can see that reason is not a sound one. If the accused had a refreshment shop he was entitled to keep open until midnight and to sell bread off the premises. His evidence that he had a refreshment shop was apparently uncontradicted; there was nothing in the evidence of the Crown to show that he had no refreshment shop, and the magistrate does not find as a fact that he did not have one. I must take it, therefore, that the shop which he had there was a refreshment shop.

Then come the questions: (1) Suppose he had no licence for it, did he then contravene the Shop Hours Ordinance? (2) Supposing he had a refreshment shop and that the refreshment shop was open at 5.10, was it necessary for him to have a licence for that refreshment shop? It appears to me that the question of licence or no licence has really nothing to do with the case. The accused is charged with a contravention of the Shop Hours Ordinance, which says nothing about his having or not having a licence. If a licence was necessary for a refreshment shop it may be evidence to show whether the shop was or was not a refreshment shop, but that is all. Looking at the regulations, I doubt whether it is necessary to have a licence for a refreshment shop. No bye-law or regulation has been laid before us which shows that a refreshment shop of the kind kept by the accused, where apparently no cooking is carried on, need have a licence. At any rate, the Crown has not satisfied me that a licence was required. In these circumstances I do not think the magistrate was entitled to find the accused guilty of a contravention of the section, and the appeal must, therefore, be upheld, and the conviction quashed.

BRISTOWE, J., concurred.

DE VILLIERS, J.P.: I regret the misunderstanding\* which has arisen in this case. In my opinion the appeal should have been

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\*In delivering judgment, WESSELS, J., stated under a misunderstanding that DE VILLIERS, J.P., concurred. The judgment of the latter was delivered a few days afterwards.--ED.

dismissed on the ground that, in the view I took of his reasons, the magistrate came to the conclusion that the accused did not keep a refreshment shop as he alleged he did. No doubt a person can run a café, tea-room, restaurant, or confectionary (for all of which licences are required) without a licence, but then the Court must be satisfied that he is actually doing so; in which case he can be prosecuted for conducting the business without a licence. But it is not sufficient for a person to sell bread and then rely upon the excuse that he is keeping a refreshment shop. It was proved that he kept a dairy, and the *onus* was upon him to satisfy the magistrate that he kept a refreshment shop, which he failed to do.

[G. v. P.]

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REX v. MUNNIK.

1915. November 29, December 17. DE VILLIERS, J.P., WESSELS and BRISTOWE, JJ.

*Criminal law.—Procedure.—Magistrate's court.—Whether summons necessary.—Essentials of charge sheet.—Whether it should be signed.—Magistrates Courts' Rules 62, 63 and 67.—Ord. 1 of 1903, sec. 114.*

It is not necessary to issue a summons against an accused in every case falling under Rule 67 of the Magistrates' Courts' Rules; a summons is only required when the accused is not otherwise before the Court.

Under Rules 62 and 63 of the Magistrates' Courts' Rules, the charge sheet should formulate the nature of the complaint with accuracy and precision, and should state whether the prosecution is a private or a public one.

The provisions in sec. 114 of Ord. 1 of 1903 requiring that an indictment should be signed, do not apply to prosecutions in magistrates' courts.

M. appeared—the records not showing how—before a magistrate on October 14th on a charge of criminal slander. The case was postponed till October 26th, and on October 22nd M's attorney received an unsigned charge sheet headed "Rex v. Jan Hendrik Munnik, charged with criminal slander," and giving the particulars of the charge. At the trial a public prosecutor appeared for the prosecution, and two objections to the charge sheet, based on the grounds (1) that it did not state in whose name the prosecution was, and (2) that it was not signed, were overruled by the magistrate. *Held*, on appeal, that