1915. *November* 1, 15. DE VILLIERS, J.P., WESSELS and GREGOROWSKI, JJ.

Costs. — Taxation. — Magistrate's court judgment. — Defendant in default. — Process-in-aid. — Notice of taxation. — Law 12 *of* 1899, *sec.* 3.

Where judgment by default is obtained in a magistrate's court, the costs of an *ex parte* application in the Supreme Court for process-in-aid of such judgment can only be recovered after taxation on due notice to the judgment debtor.

Semble : That notice of taxation of the bill of costs of a magistrate's court judgment should be given to the judgment debtor even though the judgment was obtained against him in default of appearance. *Coetzee* v. *Feitelberg* (1907, T.H. 147), commented on.

Appeal from a decision by the magistrate of Johannesburg.

On the 20th July, 1914, the defendant in the Court below, the present appellant, guaranteed the payment of the account of one A. K. Roux with the plaintiff (the present respondent) up to an amount of £10.

On the strength of this guarantee the plaintiff supplied goods to Roux to the value of £10 15s., and as Roux did not pay, he demanded from the defendant the amount of his guarantee. The defendant instructed the plaintiff to excuss Roux, which was accordingly done at an expense of £4 4s. There was a return of *nulla bona*. The defendant still refused to pay, and pointed out that Roux had an interest in certain two farms, Hoedspruit and Duikerhoek, and he required the plaintiff to take the usual steps to make the interest in their farms available to pay Roux's debt.

An application for process-in-aid was made, and further costs to a total amount of £28 4s. 4d. were incurred, but before the fixed property could be sold Roux was declared insolvent.

The plaintiff then called upon the defendant to pay the several sums of £10, £4 4s. and £28 4s. 4d. The defendant paid the £10 and the £4 4s., but refused to pay the costs in connection with the excussion of the fixed property. In his reply to the demand for payment of this sum of £28 4s. 4d. the defendant, *inter alia*, objected that unnecessary costs had been charged for (which, however, plaintiff's attorney denied), and that he had received no notice of taxation. Admittedly no notice of taxation had been given either to the original debtor Roux or to the defendant.

The plaintiff then sued the defendant for this sum of £28 4s. 4d. This amount was composed of two sums of £17 10s. and £10 5s. 4d., taxed by the Taxing Master in the absence of notice.

The defendant raised the defence that neither he nor the principal debtor Roux had received notice of taxation, and that the plaintiff was not entitled to recover until the account had been taxed after due notice. The reply to this defence was that the principal debtor Roux had been in default in the magistrate's court, and the practice was in such cases not to give notice of taxation. The magistrate took the view that no notice of taxation was necessary in cases where the debtor was in default and gave judgment in plaintiff's favour for £28 4s. 4d. The defendant appealed.

L. Greenberg, for the appellant: The appellant resists liability for the costs of the application for process-in-aid, inasmuch as no notice of taxation of such costs was given to Roux. See Law 12 of 1899, sec. 3; *Marks and Holland* v. *Palmer and Another* (1915, T.P.D. 246). A practice has grown up not to give notice of taxation where the opposite party is in default; that practice is wrong. See *Lubbers and Canisius* v. *Davy* (1907, T.S.. 495); *Coetzee* v. *Feitelberg* (1907, T.H. 147).

M. Nathan, for the respondents: The practice laid down in *Coetzee* v. *Feitelberg* (*loc. cit.*) has been followed ever since that decision. Rule 67 (*c*) seems to contemplate the Court giving a judgment as an instruction. In *Policansky Bros.* v. *Hermann and Canard* (1911, T.P.D. 319) it was decided that Rule 67 (*c*) overrules sec. 3 of Law 12 of 1899. In an application for process-in-aid there is no opposite party. An opposite party must be one who appears in Court, and where a person is in default, he is not strictly an opposite party.

Greenberg, replied.

Cur. adv. vult.

Postea (November 15).

GREGOROWSKI, J. (after stating the facts, proceeded):

The magistrate relies upon the decision in *Coetzee* v. *Feitelberg* (1907, T.H. 147), heard on the 27th June, 1907, in which my brother BRISTOWE said, "It is a rule of practice that where payment goes by default, service of the bill of costs on the defendant is not required, and sitting alone I shall not be disposed to interfere with that rule." But in his reasons for judgment in *Lubbers and Canisius* v. *Davy* the same learned Judge said (1907, T.S., p. 496), "and as to bill 5 I was informed that it is not the practice to give

notice of taxation where the defendant does not appear at the trial. I cannot myself understand how this practice can be justified under sec. 3 of Law 12 of 1899."

From the above it does appear that a practice had arisen in the office of the Taxing Master not to require notice of taxation to be given where a defendant is in default, but the provisions of the law are perfectly clear that notice of taxation is necessary for the proper taxation of a bill of costs. This departure by the Taxing Master from the provisions of the law has not been confirmed by any judicial approval of the Court, and cannot be justified in the face of the provisions of the statute. But even if the rule could be approved, it does not seem applicable to the present case. It is true that the principal debtor was in default in the lower Court proceedings, but he could not be said to be in default in the Supreme Court proceedings, which were *ex parte*, and of which no notice was given to the debtor and in respect of which he was not expected to appear. The principal item in the amount of £28 4s. 4d. claimed is the sum of £17 10s. costs for the application made for process-in-aid, and there is no reason at all why the costs of this application should not have been taxed after notice in the usual way. This is quite a different matter from the costs of the writ, which are usually added without formal taxation. The surety was quite entitled to ask, as he did, before the action was instituted, that the costs should only be taxed after notice.

The magistrate's judgment cannot stand, and the appeal must be allowed and the judgment of the lower Court altered to absolution from the instance with costs in favour of the defendant (the present appellant), and he is also entitled to the costs of appeal.

DE VILLIERS, J.P., and WESSELS, J., concurred.

Appellant's Attorneys: *de Beer & Slade;* Respondents' Attorneys: *Findlay, MacRobert & Niemeyer.*

[G. v. P.]