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.]

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

the words "Rex v. J. H. Munnik" at the head of the charge sheet were a sufficient notification to the accused that the prosecution was a public one. *Held*, further, that there was no provision in law that a charge sheet in a magistrates' court should be signed, and that the appeal should, therefore, be dismissed.

Appeal from a conviction by a magistrate at Johannesburg.

Accused was charged with the crime of criminal slander, in that he, on September 29th, 1915, did maliciously publish, by speech at a public meeting, the following defamatory words: "I would ask General Botha (meaning the Prime Minister of the Union) what had been done with the 134 bars, worth, roughly, £750,000, which I had recovered from the mines, and which, at President Kruger's departure, were left in the hands of the Commandant-General—General Botha, and two others, by Government resolution. Thus far the gold has never been accounted for, and if General Botha can give a satisfactory explanation, and there is any gold left, he would say: 'Hand it over to help the Empire,'" meaning thereby that the said General Botha was a person of dishonest character, in that he was, with two others, handed the said 134 bars of gold, in trust for the late S.A. Republic, on the departure of the late President Kruger from the Transvaal, and that he had never accounted for the same; further, that he had used the whole or a portion for his own use and benefit, or, in the alternative, meaning thereby that General Botha was holding a position of responsibility and trust as Commandant-General of the Boer forces at the time of the late President Kruger's departure from South Africa; that it was the duty of the said Botha, in his office of trust aforesaid, to take faithful care of the sum of money alleged to have been committed to his trust and to render a true and just account of the eventual disposition of such gold; that the said gold had never been accounted for by the said Botha, or any other person, and that no satisfactory explanation had ever been given by the said Botha of the disappearance of the said gold, and that the said Botha had therefore failed in his duty and was unworthy to occupy any office of trust or responsibility.

The accused appeared before the magistrate on October 14th, but it did not appear from the records how he came there; the case was then remanded till October 26th. On October 22nd, the attorney for the accused received the charge, headed: "Rex v. John Henry Munnik. Charged with criminal slander," which charge-sheet set out the charge as stated above. When the case

was heard on October 27th objection was taken to the charge-sheet that it was bad in law on the grounds (1) that it did not state in whose name the prosecution took place, and (2) that it was not signed by any person. The objection was overruled, as also an objection that the words did not bear the innuendoes placed upon them.

The defence was that the words used were true and spoken in the public interest, and were a fair comment on the acts of a public man. The magistrate found that the accused had failed to establish his defence, and had been actuated by malice. He was found guilty and sentenced to a fine of £50 or three months' imprisonment.

A. S. van Hees, for the accused: The objection to the indictment should have been upheld, as the indictment (1) does not state in whose name the prosecution took place, and (2) was unsigned. The charge is insufficient. See Magistrates' Courts' Rules 62, 67 and 68. See also *van Zyl* v. *Graaff* (24 S.C. 72); Ord. 1 of 1903, sec. 120. Accused should have been brought before the Court by way of summons under Rule 67, and that summons should follow the form set out in the rule. I submit further that the words complained of do not bear the innuendo placed upon them.

C. W. de Villiers, Attorney-General, for the Crown: The charge-sheet stated that the case was that of "Rex v. Munnik," and that was sufficient to show in whose name the charge was brought. It is not necessary that somebody should sign the charge-sheet; a public prosecutor appears in Court, and that is sufficient. A person might be brought before a magistrate under a warrant, and then he is only charged when he comes before the magistrate. See Rule 74 of the Magistrates' Courts' Rules. The Court is not concerned with the fact as to how an accused has been brought before it; if necessary, he can always ask for time. The *onus* is on the accused to show that he had been improperly brought before the Court.

van Hees replied.

Cur. adv. vult.

Postea (December 17).

DE VILLIERS, J.P.: The accused was charged with the crime of criminal slander before the resident magistrate of Johannesburg, found guilty and sentenced to pay a fine of £50, or three months' imprisonment. He first came before the magistrate on the 14th

October; how, does not appear on the records, and was remanded till 26th October. On the 22nd October his attorney received the charge, under what circumstances does not appear, and signed the following receipt:

"Received charge in Rex v. Munnik, 22.10.15. Time: 11.35 a.m.

"S. A. MINNAAR, Accused's attorney."

The case was actually heard on the 27th October, when Mr. *van Hees*, on his behalf, took the following objections, *inter alia*: that the indictment was vague, embarrassing, and bad in law because (1) it does not state in whose name the prosecution took place, and (2) that it is not signed by any person. The objection was overruled, and one of the questions now before us is as to whether the magistrate was right. The records do not contain any form of summons. The only document before us is what has been called the indictment, or charge, which is not signed by any person duly authorised, or at all, and is headed "Rex v. John Henry Munnik, charged with criminal slander," and then proceeds to set forth the particulars of the charge, which are not relevant for our present purpose. The case is one of peculiar difficulty, because of the incomplete information before the Court. We do not know, for example, how the accused came before the Court, whether upon summons, or voluntarily, or after having been arrested. But counsel for the accused stated that he did not wish to apply for an amendment of the record, and the *Attorney-General* expressed himself as satisfied that the case should proceed upon the record as it stood. It was argued on behalf of the appellant that the Magistrates Courts' Proclamation only contemplates two ways of bringing an accused person before the magistrate's court; the one was by way of summons (which should, at the same time, embody the charge), under Rule 67, and the other (in the case of less serious charges) under Rule 68, which is a summary prosecution without summons, where the charge is described in the charge-sheet. It was urged that the present case falls under Rule 67, and that the charge should have been embodied in the summons, which should follow the form set out in the rule, and should have stated that the prosecution was taken "upon the complaint and information of . . . .., who prosecutes in the name and on behalf of His Majesty," or of the private person at whose instance the prosecution was brought.

Now, I agree that there are other ways of bringing an accused person before the Court than are contemplated in Rules 67 and 68. The accused may, *e.g.*, appear voluntarily (*cf.* sec. 56, Ordinance 1 of 1903), or he may be brought before the magistrate on being arrested. Indeed, sec. 32 of Ordinance 5 of 1864, which was also repealed by Ordinance 1 of 1903, and which was, therefore, still in force when Proclamation 21 of 1902 was passed, makes express provision for this. In such cases a summons in the sense of a citation to appear would be superfluous. But the necessity to formulate the nature of the complaint with accuracy and precision would, of course, still remain. And equally necessary would it be to set out in the charge upon whose complaint and information the prosecution is undertaken. An accused person is entitled, under the rules, to know whether the prosecution is a public prosecution or a private prosecution, and this information should be embodied in the charge, as appears from Rules 62 and 63. That this view is the correct view follows, too, I think, from the analogy of the indictment in a superior Court, which corresponds to the charge in the magistrate's court. Sec. 114 of the Criminal Procedure Code provides that when the prosecution is at the public instance the indictment shall be in the name of the *Attorney-General*, and when the prosecution is a private one, the indictment is to be in the name of the party at whose instance it is preferred (who must be described therein with certainty and precision). And this is not merely a matter of form. It is a matter of real importance to an accused, for, under Rule 71, under certain circumstances he is entitled to be awarded his costs against a private prosecutor. I am of opinion, however, that the words: "Rex v. John Henry Munnik," at the head of the charge, were a sufficient notification to the accused that the present prosecution was not a private prosecution, but was undertaken "in the name and on behalf of His Majesty the King." But, even so, the accused was entitled to know the name of the public prosecutor, and this was not stated in the charge. In my opinion this is, however, not a point of importance as long as some public prosecutor appears to prosecute. Which particular public prosecutor in the first instance took the decision to prosecute is a matter which can be ascertained by looking at the complaint lodged with the clerk of the Court.

Was, then, the omission to sign the charge a fatal defect? There can be no two opinions as to the desirability that the charge should be signed by some responsible officer. And, indeed, the

older legislation seems to have provided for this. Sec. 73 of Ordinance 5 of 1864 prescribed that the indictment (Acte van Beschuldiging) was to be signed by the State Attorney or his representative, and had to be served at least eight days before the trial, except in summary cases, where there is merely a complaint (klagte), when it will be sufficient to serve the complaint at the time prescribed for summonses (sec. 25). And art. 3 of Law No. 1 of 1874 (in criminele zaken) provides that a private prosecutor should likewise have to present to the Registrar of the Court a written complaint signed by him ("zal hij insgelijks eene geschreven klagt door hem onderteekend"), which seems to imply that the written complaint mentioned in the previous article is to be signed by the State Attorney or public prosecutor. But art. 3 then proceeds: "of anders zal de Griffier aanteekening daarvan maken," which shows that in such a case even the written complaint was not insisted upon.

Our rules are obviously taken over from Law No. 1 of 1874, but no provision was made for the signing of the complaint, and under these circumstances it is impossible for the Court to say that the complaint should be signed. Sec. 281 of the Code, it is true, provides that "the provisions of this Code shall apply to all proceedings in inferior Courts, except: (*a*) where it appears from the context that such provisions are not applicable to inferior Courts; (*b*) where such provisions relate to matters of procedure which are provided for by any law, rule or regulation prescribing the procedure of inferior Courts"; and sec. 114 provides that an indictment, if at the public instance, is to be signed by the Attorney-General, and if a private one, by such private party or some advocate for him, but I think it is clear from the context that by indictment here is meant the written charge preferred before the Supreme or Circuit Court. We are not, therefore, entitled to apply this provision to a charge before the magistrate's court. However desirable it may be that for serious offences the written charge should be signed by the public or private prosecutor, as the case may be, there is no law to that effect, and the second objection must, therefore, also be declared untenable.

As regards the third point raised on appeal, viz., that the words complained of do not bear either of the innuendoes placed upon them, I am of opinion that while there may be some doubt as to whether they bear the construction placed upon them in the first innuendo, the alternative construction must be considered established. And the fact that the accused at a later stage, but at

the same meeting, said that he had made no charge, can at most only affect the penalty. In my opinion the appeal fails, and must be dismissed.

WESSELS, J.: In this matter Mr. *van Hees*, on behalf of the accused, has urged us to set aside the proceedings on the ground of irregularity. His case is that on the 27th October, when the appellant was brought before the magistrate, he excepted that the indictment was vague, embarrassing and bad in law, because:

1. It did not state in whose name the prosecution took place.
2. That it was not signed by any person.
3. That the words complained of were not slanderous.
4. That the innuendoes were not borne out by the words complained of.

The records do not set out the first two objections, but the *Attorney-General* admits that they were made.

Mr. *van Hees'* contention, on appeal, is that the magistrate should have dismissed the case and discharged the accused, because it was not proved by the Crown that the accused was properly summoned in terms of Proc. 21 of 1902, secs. 62 and 67.

The argument advanced on behalf of the appellant is that there are only two ways of bringing an accused before the Court: (1) by a summons such as it set out in sec. 67, and (2) by summary prosecution as set out in sec. 68. This was not a summary matter under sec. 68, and, therefore, a formal summons embodying the charge and signed by the clerk of the Court was necessary.

Now, it appears from the record that the accused appeared before the magistrate on the 14th October, and that the case was remanded until the 27th. There is nothing in the record to show that the accused raised any objection on the 14th to the method by which he was brought before the Court. We do not know whether he came voluntarily to hear the charge against him, or whether he was arrested, or whether he received a summons, defective in some respects. All we know is that his case was remanded on the 14th October. On the record it appears that the accused agreed to appear on the 27th, and that the indictment was handed to the accused's attorney on the 22nd and received by him without any protest. By indictment is here meant the charge-sheet. In the notice of appeal the term indictment also means the charge-sheet. In the proceedings before the magistrate on the 27th, the term indictment also means the charge-sheet, for this was, as far as I am aware, the only document read before the Court.

Now it is quite possible that the summons required by section 67, may be termed an indictment, but it is more usual in the magistrates' courts to call the charge sheet the indictment, because it corresponds to the formal indictment of a prisoner before the higher Courts. See *R.* v. *Dada Gia* (1906, T.S. p. 26).

The objection before the magistrate was that the charge sheet did not disclose in whose name the prosecution was, and that it was not signed by the clerk of the Court. This objection was overruled, and in my opinion rightly. I quite agree that if a person is summoned to appear before a magistrate, the summons must be in accordance with the form prescribed, and if it does not conform to the requirements of the law, the person upon whom it is served may ignore it, or may ask the magistrate to say that it is informal and to dismiss the charge which purports to be brought under the informal summons.

But after all, the summons contains two elements, (1) the citation and (2) the charge. If the citation is in order the accused cannot refuse to attend because he thinks there is a flaw in the method the charge is set out. If he does refuse, he will be dragged into Court in terms of sec. 70. If he does attend, the charge is read out to him, and if he thinks fit he may object to it. But the summons as set out in sec. 67 is not the only way of compelling attendance. The accused may be brought before the magistrate by arrest in terms of sec. 43 of the Criminal Code, and then the charge sheet must necessarily be a different document from the summons under sec. 67 of Proc. 21 of 1902. Nor are these the only methods in practice by which an accused may come before the Court. He may also appear voluntarily to hear the charge read against him. It has been the practice as long as I have been acquainted with these Courts, for the police to warn persons that a charge has been lodged against them, and to ask them whether they would prefer to come voluntarily or to be formally arrested or summoned. If they agree to come voluntarily, nothing further is done until they appear in Court, and then the charge sheet is read to them. This practice has been adopted sometimes to save unnecessary expense and sometimes to prevent unpleasantness. Once the accused is before the Court and is charged, his objection can only be directed against the charge.

Now we do not know in what way the accused appeared before the Court on the 14th October. It may be that he was warned, or it may be that he was arrested on a warrant. No objection

was taken on that day to the manner in which he was brought before the Court. His attorney received his charge or indictment on the 22nd, I presume by arrangement. No protest was made, no objection taken; the document was received and signed for. It is therefore quite clear to me that the objection raised on the 27th was not against the citation before the Court, but against the form and contents of the charge sheet. Now this charge sheet states that it is in the case of Rex *v.* Henry Munnik, and this is enough to show the accused that he is criminally charged. It need not be signed by anyone. It is read to the accused in open Court, and constitutes the indictment against him. The objections therefore which were raised before the magistrate in terms of the notice of appeal were rightly dismissed by him, and therefore on this point the appeal fails. On the second point raised, that the words *per se* are not slanderous, and that the inuendoes are not borne out by the evidence, I am of opinion that the words are *per se* slanderous, and that they will bear the inuendoes as set out. The appeal must be dismissed.

BRISTOWE, J: I wish to add a few words with regard to the objection that the document which was served on the accused's attorney on the 22nd October was irregular because it did not comply with the form of summons prescribed by Rule 67 of the Magistrates Courts' Proclamation.

It is clear in the first place that it was not by this document that the accused was brought before the Court, because he came before the Court first on the 14th October, and this document was only received by him on the 22nd October. Whether his attendance was secured by some other document, such as a summons or warrant of apprehension which is not disclosed, or how it was obtained, it is impossible to say. The parties deliberately refrained from asking for an amendment of the record; and as the question how the accused was brought before the Court is not in issue, the Court did not consider it necessary to postpone the case in order to obtain the information. It must be assumed for the purpose of this appeal that the accused was properly before the Court.

But Mr. *van Hees* has argued that the Magistrates Courts' Rules require a summons under Rule 67 to be issued in every case (except a petty case within Rule 68) even when it is unnecessary to enforce the appearance of the accused person (as where he is already in the custody of the police) and even though he may have

been arrested on a warrant of apprehension which should give him substantially the same information as would be contained in the summons.

There is no doubt that if this contention were upheld it would mean overruling a practice which prevailed before the war and has prevailed ever since; and although it might be necessary to do this if the practice were inconsistent with the statute, still it certainly ought not to be done unless the language of the legislature is unmistakably clear and cogent.

After a careful consideration of the Magistrates Courts' Rules, I have come to the conclusion that, although they are not perhaps worded as clearly as might be desired, they do not bear the interpretation contended for.

A summons is only required when the accused person is not otherwise before the Court. If he has been arrested or is intended to be arrested it is unnecessary. Now the provisions with regard to arrest are codified by the Criminal Procedure Code, but they existed before and must have been present to the mind of the legislature when the Magistrates Courts' Rules were framed. It is therefore most unlikely that the procedure by summons was intended to apply to a case of this kind where it would have been entirely inappropriate.

Rule 62 requires the public prosecutor in every case in which he decides to prosecute to lodge with the clerk of the Court "a statement in writing of the charge or complaint." This commences the prosecution; and when it has been done, the books of the Court contain or should contain all necessary details of the charge which the accused is to be called upon to answer. The charge having been thus formulated, the next point is to get the accused. This may be done by arrest, and if so, then nothing more is necessary except to read to him or serve him with a copy of the charge. The justice of the case can then be met by remands sufficient to enable him to prepare his defence and obtain any legal assistance that he may desire. If he is not arrested then (except in petty cases) he must be summoned; and Rule 67 prescribes the procedure in cases where a summons is required. That the Rule is not intended to apply to cases of arrest appears, I think, from the language of the rule itself. The summons is as there described, "the process of the Court for compelling the appearance" of the accused and of the witnesses against him; and the rule does not provide for the issue of a summons in every case but only when the prosecutor so requests. I interpret this to mean that where

the prosecutor considers it necessary to "compel the appearance" of the accused by summons he can request the clerk of the Court to issue the necessary process, and the clerk is then bound to do so. Where the prosecutor does not consider a summons necessary, then he does not make the necessary request and the summons is not issued.

Reliance was placed on Rule 74, which requires the "charge and summons" to be read to the accused at the trial; and it was urged that summons meant a summons under Rule 67 (which undoubtedly it does), and that charge meant the charge referred to in Rule 68. But "charge," as I have pointed out, is also mentioned in Rule 62. The entry in the book of the clerk of the Court is the charge, and that, I think, is the charge which Rule 74 requires to be read to the accused.

I therefore agree with the other members of the Court in thinking that the complaint of irregularity in this case is unfounded. On the other point, I have nothing to add, and I agree that the appeal must be dismissed.

Attorneys for Accused: *Webb & Dyason.*

[G. v. P.]

S.A. RAILWAYS v. KEMP.

1915. *December*, 17. MASON, J.

Costs.—Taxation.—Review of.—Employment of two attorneys.—Residence of Minister of Railways.—Offices of Administration at Johannesburg.—Duplication of charges.

Where an action was instituted by the Minister of Railways in the Supreme Court, Pretoria, and it appeared that practically the whole administration of the railway service and of the particular branch concerned in the action was carried on in Johannesburg, *Held*, on a review of taxation, that plaintiff was entitled to employ an attorney both at Pretoria and at Johannesburg, but, *Semble*, that duplications of costs should not be allowed.

Review of taxation.

In an interlocutory application in the action of the *Minister of the S.A. Railways* v. *Kemp*, the defendant failed and judgment was given against him with costs. Those costs were taxed, and this application was brought by the defendant to bring that taxation in review. Defendant alleged in his petition that he had objected to the taxation of that portion of the bill of costs consisting of charges of the plaintiff's Johannesburg attorneys, on the ground that plaintiff was domiciled in Pretoria, and that he was