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In this case the vendor is not the cause of the delay, the delay lay entirely with the purchaser, and I think the magistrate exercised a proper discretion in refusing to extend the time.

[Appellant's Attorney: ALLAN FRASER.
Respondent's Attorney: GORDON FRASER & MCHARDY.]

[Reported by R. C. STREETEN, Esq., Advocate.]

FAWKES, Acting J.P.
WARD, J.
June 27th and 30th.

MATOKO *vs.* WELLBELOVED.

Magistrate's Court.—Withdrawal before Trial.—Costs.—Power of Magistrate to award Costs.—Ordinance 7 of 1902, *sec.* 51.

Where a case is formally withdrawn before trial, a magistrate has no power to make any order as to costs on the original summons.

Where in a Magistrate's Court case the plaintiff's attorney, in the absence of the Clerk of the Court, had indorsed the word "withdrawn" on the records and had verbally notified the defendant's attorney of the withdrawal prior to the case being called on:—Held, *that the case had been formally withdrawn before trial.*

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Appeal from a decision of the Resident Magistrate of Ladybrand. The appellant (plaintiff in the Court below) sued the respondent, as Messenger of the Court, for the delivery of certain cattle wrongfully attached. From the magistrate's record it appeared that defendant's attorney appeared and asked for costs, stating that he had no notice of the withdrawal of the case, that he had come to Court when plaintiff's attorney informed him that he had withdrawn the case, and that as far as he was concerned the case was on the roll. The order read "costs allowed."

From affidavits subsequently filed it appeared that shortly before the opening of the Court on the day of

hearing, plaintiff's attorney went to the office of the Clerk of the Court; and, in the latter's absence, indorsed the case cover "withdrawn" and signed it. On leaving the Court-house he met defendant's attorney and told him what he had done and the latter stated he would apply to Court for his costs. The defendant, in the absence of the Clerk of the Court, acted on his behalf and affirmed that he only noticed the withdrawal indorsement in Court after some other cases had been called on.

H. F. Blaine, K.C.: The case was withdrawn from the roll and the magistrate erred in giving a judgment for costs. No formal roll is made and no formal notice is required. Plaintiff's attorney was bound by his withdrawal and could not have proceeded with the case. See *Terblanche* vs. *Oudtshoorn Municipality* (13 S.C. 275).

[The Court referred to *Parker* vs. *Feder* (23 S.C. 631).]

P. C. Fischer, for respondent: In *Terblanche's* case there was a formal withdrawal. If plaintiff's contention be correct, there can be no appeal, but only review. See sec. 51, Ordinance 7, 1902.

As to the necessity of a formal withdrawal, see *Buckle's Magistrate Court Practice*, p. 178. Defendant's attorney was not entitled to consider that there had been a withdrawal and remain away from Court. The roll consists of the Civil Record Book in the keeping of the Clerk of the Court who should be notified of a withdrawal—see rule 8, Schedule "B," Ordinance 7, 1902. Withdrawal should be within a reasonable time. There is no provision in the Magistrate's Court Ordinance permitting a withdrawal; the words implying the power in the Cape Act have been omitted in the local Ordinance—see Act 20, 1856, Schedule "B", rule 14. Alternatively there was sufficient notice of the intention to apply for costs, and the application was not opposed.

H. F. Blaine, K.C.: Any costs incurred should be recovered on summons and not on motion.

Cur. adv. vult.

Postea, on June 30th.

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FAWKES, Acting J.P.: This is an appeal from a judgment of the Resident Magistrate of Ladybrand for the costs of the defendant in a case which the plaintiff (now appellant) alleges was withdrawn, before the Court sat on the day the case had been set down for trial.

What occurred is not in dispute.

The plaintiff's attorney went to the office of the clerk of the Court during office hours, before the hour at which the Court, sat, and, finding no one in the office, wrote across the record which was lying on the clerk's desk the word "withdrawn" and signed his name. On returning he met the defendant's attorney coming to the Court and informed him that the case had been withdrawn.

Defendant's attorney replied that he intended making an application to the Court for his costs.

The case was apparently called on in the absence of plaintiff's attorney, and the attorney for the defendant informed the magistrate that he had no notice of withdrawal, that he had come to the Court when plaintiff's attorney informed him that he had withdrawn the case, and that so far as he was concerned the case was still on the Roll.

The messenger of the Court (defendant in this case), apparently is the person accustomed to call the cases in Court. He states that the first time he saw the notice of withdrawal was in Court after some of the cases on the Roll had been called.

The clerk of the Court states that he prepares a roll of cases when he remembers to do so, but such is not usually the case, and he cannot say if he did so on this occasion or not.

The first point we have to decide is whether the case was formally withdrawn. We think that it was. The attorney attended at the office of the clerk of the Court during office hours for the purpose of withdrawing the case. Had the clerk been present no difficulty would have arisen, and we think under these circumstances the written notice on the papers amounted to a formal notice of withdrawal, although it was not made in the presence of the clerk. The defendant was not prejudiced, as until he received notice of withdrawal he would be entitled to the necessary costs incurred.

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Mr. *Fischer* has argued that, as the words "unless the case has been previously withdrawn," which occur in both the Cape and Transvaal Acts, are omitted from sec. 22 of Schedule "A" to our Magistrates' Court Ordinance, there is no power of withdrawal. This view would lead to the absurd position that a summons, once issued, must proceed to judgment and cannot be withdrawn even by leave of the magistrate in the absence of statutory provision, and of this there is none. Although these words are absent, we think the right to withdraw must be implied. As the case had in our view been formally withdrawn before the sitting of the Court, the magistrate had nothing upon which to adjudicate, and consequently had no jurisdiction to make the order as to costs. The defendant is undoubtedly entitled to his costs up to the time he received notice of withdrawal, but he mistook his remedy.

In the case of *Terblanche* vs. *Oudtshoorn Municipality*, where a similar application was made, the magistrate declined jurisdiction and the Court held that there was nothing upon which to ground an appeal. In the judgment, MAASDORP and SOLOMON, J.J., concurring, BUCHANAN, Acting C.J., is reported to have said:—

"Under ordinary circumstances, when a plaintiff withdraws a case he would have to pay the defendant his costs. If the plaintiff refuses to pay these costs, I think the only course open to the defendant is to take out a summons claiming them, and then the magistrate can give judgment. In this case nothing of the sort was done; but the attorney irregularly applied for an order for his costs."

In the present case we have a judgment of the Court for costs against the plaintiff, made by the magistrate without jurisdiction and the Court has full power under the provisions of the Administration of Justice Ordinance to set that judgment aside.

The defendant would be entitled to his costs up to the time he received notice of withdrawal. If the plaintiff refuses to pay them the defendant's proper remedy is to take out a summons and the magistrate would then have jurisdiction to determine the matter.

The appeal will be allowed with costs.

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WARD, J.: I agree. The ground upon which the sufficiency of the withdrawal is questioned is the absence of the clerk of the Court. I do not think that that in itself is any objection to the withdrawal. Clearly the attorney for the plaintiff was in time in withdrawing, and in this case he could not have withdrawn at all, if the presence of the magistrate's clerk had been essential, because in his affidavit the magistrate s clerk says he had left the office and that he did not return until after the case was disposed of. So that if the presence of the magistrate's clerk were necessary to the valid withdrawal of this case, it could not have been withdrawn at all. But no consent has to be given by the magistrate's clerk, who is apparently what is called a ministerial officer. If the notice is given, he must accept it, and, therefore, I cannot see how the validity of the withdrawal can be questioned on the ground that the magistrate's clerk was not present. Then notice was clearly given within time. I would not bind myself to say the case could not be withdrawn after the magistrate had got on the bench, but in any case it is clear that this withdrawal took place before the magistrate went on the bench, because the papers would be taken into Court when the magistrate took his seat on the bench, and they would remain in the custody of the defendant, who was acting as clerk of the Court, so that it is clear that the writing could not have been made afterwards. Turvey, the attorney for the respondent, says that he had notice of withdrawal, but it was before the magistrate sat and while on his way to the Court; this corresponds with the other attorney's version of what occurred, so that not only was the case withdrawn, but notice was also given that it had been withdrawn. It is true that this was a verbal notice. We have no rules upon the subject, but provided the notice be clearly established, even if it be verbal, I see no objection to it. Of course, a verbal notice may be questioned, and questions may arise as to whether it was given and in the accepted form. But from the facts it is clear that the notice was given and understood by the other side. So that before the magistrate sat in this case, there was sufficient notice given, and that notice of withdrawal was sufficiently given to the other side.

I may say that some injustice may be experienced as the result of this order, because, from the affidavits in the original action which gave rise to this appeal, it seems that the defendant, in his capacity as messenger of the Court, had seized certain cattle which were claimed by the plaintiff, the appellant in this case. And it seems from the affidavits that the cattle were given up by the defendant, and that in consequence the case was withdrawn. They were given up, but without costs. In consequence of that the plaintiff withdrew the case —I suppose he considered it would not be worth his while to go on with the case for the purpose of recovering costs, but the defendant gave up the cattle, and it was in consequence of that that the case was withdrawn, and of course, the question of costs then may be a very important one. So that it is quite clear that a judgment for costs like this, in the absence of either side to object or to urge what reason they could why costs should not be allowed, would be a very great hardship.

I may also say that at first I thought that on account of the insufficiency of the notice the respondent ought to succeed, but I do not think that the question of notice is of material importance in these cases, because the defendant in such cases would be entitled to all the costs, properly incurred, until the time he had received notice. So that I agree in the judgment that the order of the magistrate, that the plaintiff should pay the costs, should be set aside. I would just like to add that the way in which this case was withdrawn I understand is exactly the same way as it is withdrawn here: The attorney for the plaintiff, if he wishes to withdraw a case, goes to the Registrar's office, and across the "set down notice" writes "withdrawn," and adds his name as in this case. There is nothing in this case peculiar to the Magistrate's Court. In *Terblanche's* case (13 S.C. 275), the same question arose, and the Court held that it had no jurisdiction to grant an order for costs, the case having been withdrawn. In *Marbo* vs. *Dambusa* (13 E.D.C. 24), the Court also refused to grant an order, although it held that under the Rules of Court, if the case had been a Circuit Court one, it could have been

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dealt with. It may be advisable that provision should be made to keep a case alive as it were for the purpose of dealing with the question of costs, but that has not been done and we cannot do it.

[Appellant's Attorney, G. A. HILL.
Respondent's Attorney, ALLAN FRASER.]

[Reported by P. C. FISCHER, Esq., Advocate.]

FAWKES, Acting J.P., and WARD, J. July 4th, 1911.

Ex parte VAN DER MERWE.

Revenue.—Stamp Duty.—Attorney's Fee of office.—Ordinance 10 *of* 1903.—*Act* 30 *of* 1911.

The fee payable under the Stamps and Licences Ordinance of 1903 *on the order of admission of an attorney is covered by the definition of the term "fee of office" in sec.* 2 *of Act* 39 *of* 1911 *as being a payment prescribed by or under the authority of a law in respect of certain proceedings.*

1911. July 4.

Ex parte Van der Merwe.

This was an application for the admission of the petitioner as an attorney under Act 39 of 1908 and Act 14 of 1909. The question was raised as to whether tariff X of Ordinance 10 of 1903, under which an admission fee of £10 is required has been repealed by the First Schedule to the Stamp Duties and Fees Act of 1911. Sec. 34 of that Act reads as follows:—

(1) With a view to the assimilation and reduction of fees chargeable in any public office or court of law and anything to the contrary notwithstanding contained in any law or regulation in force in any Province at the commencement of this Act, the Governor-General may make regulations prescribing the fees or scale of fees to be charged in any public office or court of law and the documents, books, or entries to which stamps shall be affixed in payment thereof: provided that

(a) regulations prescribing fees to be paid in respect of any document tendered or used, or in respect of any pro-