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MAASDORP, C.J.: There are no costs which the respondent can reasonably incur upon the mere noting of an appeal. If he does so it is entirely at his own expense and should the matter not be set down for hearing as was the case here, he cannot demand that the other party shall pay those costs. The application must be refused, with costs.

[Applicant's Attorney, J. H. BEYERS.
Respondent's Attorney, J. W. MACLAREN.]

[Reported by C. A. BECK, Esq., Advocate.

MAASDORP, C.J. August 1st and 15th, 1912.

MULLER *vs.* CRONIN, N.O., AND ANOTHER.

Costs.—Taxation.—Review.—Power of Supreme Court to Review Taxation in Magistrate's Court.—Ord. 10 *of* 1902, *sec.* 17.—*Costs of the day.*

Where an appeal from a magistrate is successfully prosecuted in the Supreme Court, and that Court in remitting the case to the magistrate for hearing, grants the appellant costs of the day, and subsequently the Bill of costs is taxed in the inferior court in such a way as in effect to nullify the judgment of the Supreme Court, notwithstanding Ord. 10 *of* 1902, *sec.* 17, *the Supreme Court has power to review such taxation.*

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This was an application for a revision of a taxation of the Magistrate at Kroonstad. The original case had come up in the inferior court on February 13th and again on February 27th, when the case was dismissed on the ground that the Court had no jurisdiction. From this decision an appeal had been successfully prosecuted, the judgment being set aside with costs of the day against the respondent Botha. Thereafter the matter again came before the Magistrate on June 4th and June 25th, when judgment was given against the plaintiff (the present appellant) with costs. The bill of costs was then taxed and the question on review was whether certain

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costs had been allowed against the plaintiff which the Supreme Court had already given in his favour.

G. T. Morice, K.C., for the applicant.

C. L. Botha, for the respondent: The decision of the Magistrate was final, and not subject to appeal or review. See section 17 of Ordinance 10 of 1902. The grounds for review were laid down in section 26 of Ordinance 4 of 1912. None of those special circumstances were present in this case. The decision of the Magistrate was absolutely final.

G. T. Morice, K.C.: The Magistrate nullified the order of a judge. That gave the Court the right of review. See *Ochse Bros.* vs. *Brayshaw* (1911, O.F.S. 72).

As to the meaning of costs of the day, the practice in South Africa was to push on the costs and to include in that even costs that came afterwards. See *Carlis* vs. *Hay* (1903, T.S. 317). *Van Zijl's Judicial Practice*, 2nd Ed., 784.

[MAASDORP, C.J.: Is there any authority for stating that the Court, without saying so, will give judgment for costs still *in nubibus*?]

Counsel then argued on the items, in particular with reference to certain witness fees.

C. L. Botha, for the respondent: No objection was taken to any of the witness fees except those of the 4th of June. The Magistrate had not interfered in any way. By not objecting the plaintiff had assented. These items, therefore, could not now be reviewed.

G. T. Morice, K.C., in reply.

The Court declined to go into the the bill of costs generally, but referred the matter to the registrar for report as to whether the Magistrate had allowed any costs to one party which the Court had already awarded to the other.

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The Registrar reported as follows:—

The costs of the 13th and 27th February, 1912, are costs in the cause and payable by the Plaintiff, except the expenses of the witness Du Plessis for the 13th February, as he had not been subpœnaed for, nor given evidence on, that day.

The extra costs incurred in bringing the matter before the Court on the 4th June, 1912, including the expenses of the witnesses for that day, are costs of the day and payable by the defendant.

The costs of the 25th June, 1912, are costs in the cause and payable by the plaintiff.

G. T. Morice, K.C., for the applicant, moved for an order revising the taxation of the Magistrate in terms of the Registrar's report.

Section 17 of Ordinance 10 of 1902 did not affect the Court's right to review, *Ochse Bros.* vs. *Brayshaw* (1911, O.F.S. 72); *London and S.A. Exploration Co., Ltd.* vs. *Kimberley Town Council* (2 H.C.G. 331).

C. L. Botha, for the respondent: The *London and S.A. Exploration Company's* case was not in derogation of a similar provision to that of section 17 of Ord. 10 of 1902. See the judgment of LAURENCE, J., at p. 313. The magistrate did not disregard the order of Court. He made a mistake in law. Even if injustice were done there was no remedy, see *Prince Albert Board of Management* vs. *Jooste and others* (4 S.C. 400). If the disregard were wilful there was a remedy, but otherwise not.

MAASDORP, C.J.: I do not say Mr. *Botha's* arguments have not a great deal of weight attaching to them, but we have this fact before us (it is an unusual case) that this Court gave judgment that the costs of the day were to be paid in a certain manner. The Magistrate in revising the taxation of the costs in his Court has made an order in taxing, and quite *bona fide*, which really nullifies the order of this Court as regards certain items. There is no doubt as to the fact that according to the finding of the Magistrate the order of this Court is being

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set aside as regards these items, and it is contended that this Court is powerless to see its own judgment carried out because of section 17 of Ordinance 10 of 1902 which provides that the decision of the Magistrate upon revision of taxation shall be final and not subject to review or appeal.

I do not think that that applies to a case of this sort. It applies only to taxation in the ordinary way, not to taxation upon an order of this Court. There must be a remedy in a case of this sort, in which the Court has made an order with respect to the costs in the Court below. In such a case no provision is made for the taxation of such costs by the Registrar, and he cannot step in without an order of Court authorising him to do so, but there must be some remedy where an order of this Court has been disregarded.

It would be really absurd to say that the Magistrate's clerk has power to upset the judgment of this Court. Upon these grounds I say that the taxation or whatever it may be called, must be corrected to that extent in terms of the Registrar's report, viz., the costs included in terms (*a*) and (*b*) on page 3 of the summons, being costs of the day, will be allowed to the plaintiff, with costs.

[Appellant's Attorney, G. A. HILL.
Respondents' Attorneys, BOTHA & GOODRICK.]

[Reported by C. A. BECK, Esq., Advocate.]