11/95

SUPREME COURT OF VICTORIA

GIANNOPOULOS v GECCU TRADING PTY LTD and ANOR

Smith J

6, 15 June 1995

CIVIL PROCEEDINGS – SELF-EXECUTING ORDER MADE BY CONSENT – NOT COMPLIED WITH – COMPLAINT DISMISSED – APPLICATION TO EXTEND TIME FOR COMPLIANCE – REFUSED – WHETHER JURISDICTION TO GRANT APPLICATION.

G. agreed to an order being made whereby he would make discovery of documents by a certain date in default his complaint stand dismissed. G. failed to comply with the order and subsequently applied to the court for an extension of time for service of his affidavit of documents. In refusing the application the magistrate found that by operation of the self-executing order G.'s proceeding was dismissed and accordingly there was no action on foot in which an order extending time for service could be made. Upon appeal—

HELD: Appeal dismissed.
There were no provisions in the relevant legislation or rules which conferred jurisdiction on the court to grant the application. Accordingly, it was open to the magistrate to rule that there was no jurisdiction to grant the application for an extension of time.
[NOTE: See now *Magistrates' Court Civil Procedure (Miscellaneous Amendments) Rules* 1995, r6. Ed.]

SMITH J: **[1]** John Giannopoulos has commenced two proceedings in this Court arising out of orders made in a proceeding in the Magistrates' Court Industrial Division against Geccu Trading Pty Ltd. In those proceedings he sought to recover allegedly outstanding salary payments of $131,608.99. The proceedings before this court are an appeal pursuant to s109 of the *Magistrates' Court Act* 1989 and proceedings under O56 of the *Supreme Court Rules* seeking relief in the nature of *certiorari* in respect of an order made on 20 January 1995 at the Melbourne Magistrates' Court dismissing an application by him for the extension of time for service of an affidavit of documents.

The circumstances giving rise to the present proceedings are that on 21 September 1994, Geccu Trading Pty Ltd served a notice for discovery on Mr Giannopoulos. On 14 December 1994 an application which had been issued on 8 December 1994 by Geccu Trading Pty Ltd (Geccu) for an order for discovery was heard. An order was made by consent which provided amongst other things:

> "(1) that the plaintiff make discovery with[in] seven (7) days from the 14th December 1994;
> (2) that should the plaintiff fail to make discovery of documents on or before the 21st December 1994 the plaintiff's complaint stand dismissed pursuant to O11.07(1)(b)."

On 21 December 1994 Mr Giannopoulos's solicitors forwarded to Geccu's solicitors an unsworn affidavit of documents. On the following day Mr Giannopoulos swore an affidavit of documents and a copy of the sworn affidavit was sent that day by fax to the solicitors for Geccu. The sworn affidavit was not filed until early January 1995. The solicitors for **[2]** Geccu, then and since, maintained the position on behalf of their clients that the original complaint had been dismissed as a result of breach of the self-executing order. In an attempt to resolve his difficulties, Mr Giannopoulos issued the application for an extension of time for service of the affidavit of documents. The application was heard on 20 January 1995. Counsel for Mr Giannopoulos submitted that:

> (a) the self-executing order had been complied with;
>
> (b) alternatively, the self-executing order was so ambiguous that it could not operate and that, therefore, the magistrate had jurisdiction to extend time within which the plaintiff could make discovery of document;
>
> (c) that in any event the magistrate had jurisdiction to extend time for the making of discovery.

On the material before me it appears that the learned magistrate found that:

(a) the unsworn affidavit of documents sent on 21 December 1994 was not an affidavit of documents within the meaning of that term under the *Magistrates' Court Civil Procedure Rules* 1989 O18;

(b) as a result Mr Giannopoulos had failed to comply with the self-executing order;

(c) by operation of the self-executing order the proceeding in the Magistrates' Court was dismissed. As a result there was no action on foot in which an order to extend the time for service of the sworn affidavit of documents could be made and, therefore, **[3]** there was no jurisdiction to hear the application.

As a result the magistrate ordered that the application be refused and that the applicant pay Geccu's costs of the application fixed at $375. He ordered a stay of one month on the payment of the costs. The affidavit filed in the appeal proceeding, identified the following alleged errors:

"(i) The magistrate erred in law in ruling that he had no jurisdiction to grant the application for an extension of time for service of the sworn affidavit of documents.

(ii) The magistrate erred in law in ruling that the terms of the consent order required the appellant to serve a sworn affidavit of documents by 21 December 1994 on the respondent.

(iii) The magistrate erred in law in finding that the self-executing order, consented to by the parties, was sufficiently certain so as to give rise to a dismissal of the complaint, notwithstanding the service by the appellant of an unsworn affidavit of documents on the respondent, on the 21st of December 1994:

(iv) The magistrate erred in law in ordering that the complaint be removed from the court's hearing list."

When the matter came before the Listing Master the question arose whether the order appealed from, namely, the order refusing the application for an extension of time, was an interlocutory order and thus whether the appeal procedure under the Act was available. As a result, by order made 17 February 1995, the Listing Master gave leave to the appellant to file an originating motion under O.56 in the same proceeding. An originating motion was filed on 8 March 1995 and it relied upon the above matter but added two other **[4]** grounds. The first contained an allegation that irrelevant matters were taken into account but as I understood the submissions put that argument was not pursued. The other matter raised was pursued and the ground was formulated as follows:

"(f) Alternatively, this Honourable Court in its appellate jurisdiction has a discretionary power to extend the time for the service of the said Affidavit of Documents, irrespective of whether the Second Defendant has erred in law, so as to avoid the dismissal of the said Complaint by operation of the self-executing order, made by the consent of the Plaintiff and First Defendant, on the ground that a substantial injustice will otherwise be done to the plaintiff."

I am satisfied that the attacks made on the Magistrate's decision relating to the period within which the order required an affidavit of documents to be made and alleging uncertainty in the order are not made out. The latter argument essentially turned on the suggestion that there was an inconsistency between para1 and para2 of the consent orders made on 14 December 1994. In my view, there is no conflict. Para1 had the effect that the plaintiff had to "make discovery" on or before 21 December 1994 being within seven days from 14 December 1994. The argument misinterpreted cl1 to have the effect that the time arrived at by operation of the words "within seven (7) days from the 14th December 1994" was the 22nd December 1994.

The critical issues remaining for consideration are:

(a) whether the learned magistrate erred in ruling that he had no jurisdiction to grant the application for an extension of time for making an affidavit of documents; and **[5]**

(b) whether, as alleged in ground (f) of the originating motion, a general discretionary power exists in this court to extend the time for making the affidavit.

As to the first issue – that the magistrate wrongly ruled that he had no jurisdiction – counsel for Mr Giannopoulos was unable to draw my attention to any authority that would suggest that

the learned magistrate was wrong. Counsel was unable to direct me to any provisions in the relevant legislation or rules that would suggest that jurisdiction was conferred in the circumstances of this case. Thus, I have come to the conclusion that this alleged error is not made out. As to the other issue, the ground raised in the originating motion proceeding relying upon an alleged discretionary power vested in this court to extend time, reliance was placed upon statements made in the cases of *Maher v Wallace Dairy Co Ltd* [1984] VicRp 10; (1984) VR 129 and 132 and *Freeman v Rabinov* [1981] VicRp 52; (1981) VR 539 at 544. These cases were concerned with appeals to the Full Court of this court in circumstances where a party had failed to comply with a self-executing order made at first instance by the court with the result that the proceeding had been dismissed or struck out.

While one can sympathise with the problems facing Mr Giannopoulos in failing to comply with the self-executing order, there appear to me to be insuperable obstacles in the way of the argument advanced in support of the alleged discretionary power. The authorities in question acknowledge the existence of the power in the Full Court but do so in terms **[6]** at 132) that acknowledge that it is a unique discretion. For example, in *Maher's* case (above Fullagar J commented that:

> "... the authorities to which I later refer show that the discretion of a Full Court to extend time for doing an act, after non-performance within the set time has resulted in a striking out of the action, is in some ways a unique one. It is at all events a discretion of the very widest kind, not to be restricted by any arbitrary or tyrannical rules supposedly to be derived from case law."

Those authorities, are authorities which concerned the discretionary power of the Full Court of this court to extend time in situations where self-executing orders of judges or masters of this court have caused a proceeding to be dismissed. That is a very different situation from the one with which I have to deal. The O56 proceeding is a proceeding in which relief is sought in the nature of *certiorari*. It is a review proceeding and relevant error must be shown before this court can intervene. Thus, the review procedure with which I am concerned is a limited one and quite different from the jurisdiction of the Full Court in the matters I have mentioned. Significantly, counsel was not able to direct me to any authority that would support the proposition that such a discretion is available in proceedings by way of originating motion such as the present ones. For the foregoing reasons the challenges made to the decision made below must fail. In light of the above conclusions it is not necessary to consider the question of whether the appeal proceeding was available. The appropriate order will be in any event, that the appeal be dismissed. A **[7]** similar order should be made in relation to the originating motion proceeding.

Before concluding I suggest that consideration be given to conferring upon magistrates a power, similar to that in R24.06 of the *Rules of the Supreme Court*, enabling them to set aside a judgment entered or given on failure of a party to comply with an order. For many years, the situation in this court was that the only remedy available to parties who had had their action or defence struck out for non-compliance with a self-executing order was to appeal to the Full Court – as in the cases abovementioned. To confer a R24.06 power does not detract significantly from the value of the power to impose self-executing orders. Instead it enables justice to be done between the parties in circumstances where the non-compliance with the self- executing order warrants a less draconian result than that of dismissal of the action or the striking out of defences. It must be borne in mind that there are and will be cases where the non-compliance occurs with no fault on the part of the party concerned or his or her solicitor.

APPEARANCES: For the plaintiff Giannopoulos: Mr AFA Lindeman, counsel. Papasavas & Co, solicitors. For the first-named defendant Geccu Trading: Mr PC Golombek, counsel. Mr JR Morrow, solicitor.
