29/99; [1999] VSC 476

SUPREME COURT OF VICTORIA

JACOBSON v BIGGS

Beach J

15, 17 November 1999

NATURAL JUSTICE – CIVIL PROCEEDINGS – APPLICATION BY ONE PARTY FOR ADJOURNMENT – PARTY SAID TO BE OVERSEAS OR INTERSTATE ON RETURN DATE – APPEARANCE BY PARTY'S LEGAL PRACTITIONER ON RETURN DATE TO MAKE APPLICATION FOR ADJOURNMENT – NO AFFIDAVIT OR EVIDENCE TENDERED/GIVEN IN SUPPORT OF APPLICATION – APPLICATION OPPOSED – APPLICATION REFUSED BY MAGISTRATE – MATTER PROCEEDED IN PARTY'S ABSENCE – ORDERS MADE AGAINST ABSENT PARTY – WHETHER PARTY DENIED NATURAL JUSTICE.

Some time well prior to the return date, parties to a claim and counterclaim were notified of the date of hearing. J. told his legal practitioner that the date of hearing would have to be adjourned because J. had important business overseas. When the matter came on for hearing, counsel appeared for J. and requested that the matter be adjourned. No explanation was given to the magistrate as to the nature of the business which required J. to be overseas on that day or why it was so urgent that he be there. No affidavit or any evidence in support of the application was filed with the court. B. opposed the application. In refusing the application, the magistrate said that there was not sufficient detail as to why the absent party had to leave the jurisdiction. The magistrate then heard the matter, made an order in B's favour and dismissed J's counterclaim. On appeal—

HELD: Appeal dismissed.
It is entirely within the discretion of a magistrate whether or not to grant an application for an adjournment of proceedings before the court. In this case, there was no evidence whatsoever to support J's application. In particular, there was no material as to the nature of J's business overseas that day, why it was necessary for J. to be overseas that day, why it was so urgent that J. had to be overseas that day and when he would be returning to Victoria. It is incumbent upon the person making the application to place before the court appropriate material in support of the application. Accordingly, it could not be said in the circumstances that in refusing J's application for an adjournment J. was denied natural justice.

BEACH J:

1. I have before me two proceedings arising from the decision of the Ringwood Magistrates' Court made on 26 July 1999, whereby the Magistrate refused the appellant's application for an adjournment of the proceedings. One is an appeal pursuant to s109 of the *Magistrates' Court Act* 1989, the other is an originating motion filed pursuant to the provisions of Rule 45 of the *Supreme Court Rules*.

2. The background to the two proceedings may be summarised as follows.

3. The respondent's claim before the Magistrates' Court was for the price of goods sold and delivered and the cost of repairs to certain jewellery totalling $9,866.25.

4. The appellant filed a counterclaim in the proceeding alleging breach of contract to supply certain services and goods. The amount of the counterclaim was $22,000.

5. The proceeding was fixed for hearing by the Magistrates' Court Registry on 26 July 1999.

6. On 15 June 1999, the respondent's solicitors wrote to the appellant's solicitor informing him of that fact. It was not until 16 July 1999 that the appellant's solicitor informed the appellant of the fact. Apparently a letter written by the appellant's solicitor on 8 July 1999 had been mistakenly sent to a former address of the appellant.

7. According to the affidavit of the appellant's solicitor, when told that the date for the hearing was 26 July, the appellant stated that the date had been organised without his knowledge, that it would have to be adjourned as he had important business overseas.

8. I note that in his affidavit the appellant's solicitor has stated that was what he originally thought the appellant had told him. Later, however, when he spoke to the appellant, he realised that he had misunderstood what the appellant had said and that he in fact had told him he would be interstate.

9. At all events, the respondent's solicitors refused to consent to the adjournment.

10. On 26 July 1999, counsel for the appellant appeared before the Ringwood Magistrates' Court and made application for the proceeding to be adjourned. Counsel for the respondent opposed the application.

11. Having heard submissions in relation to the matter, the Magistrate dismissed the application saying:

> "The application is rejected. The defendant and the other party were aware the matter had been listed. There was not sufficient detail as to why the defendant had to leave the jurisdiction. The application is refused."

The Magistrate then proceeded to hear the respondent's claim.

12. At the conclusion of the hearing, the Magistrate entered judgment in favour of the respondent for $8966.25, with interest of $1,350.57, and costs of $4,395. The Magistrate dismissed the appellant's counterclaim.

13. The first thing to note about the application for the adjournment made that day was that no affidavit evidence or, for that matter, any other evidence was placed before the Magistrate in support of the application.

14. But perhaps of more significance is the fact that no explanation was given to the Magistrate as to the nature of the business which required the presence of the appellant overseas that day, or why it was so urgent that he be there. The appellant had been informed of the date of hearing well prior to 26 July and had had ample opportunity to put that material before the court had he been minded to. In that situation, as the Magistrate made clear in the brief reasons he gave for refusing the application, the Magistrate was completely in the dark in the matter.

15. On 7 October 1999 the appellant obtained an Order to Review the Magistrate's decision. The questions of law to be decided by the review are stated to be:

> "1. Whether the learned Magistrate was wrong in law in rejecting the then defendant's application that the proceedings be adjourned in circumstances where there was no evidence of prejudice to be occasioned thereby, could not be adequately compensated for by an award of costs, and the defendant was not present to conduct his case and to give evidence.
>
> 2. Whether the learned Magistrate in rejecting the application and then proceeding to hear and determine the matter in the absence of the defendant denied the defendant natural justice."

16. I turn then to the two proceedings before the court. Clearly any appeal pursuant to the provisions of s109 of the *Magistrates' Court Act* in relation to the Magistrate's refusal to grant the adjournment must fail. Under that section, there can only be an appeal to this court on a question of law from a final order of the Magistrates' Court. The Magistrate's order refusing the appellant's application for an adjournment is not a final but an interlocutory order. See *Guss v The Magistrates Court of Victoria and Anor*, unreported, 16 June 1994 (No.6194 of 1994) and *Guss v Johnstone*, unreported, 23 March 1994 (No.4038 of 1994).

17. As to the appeal in relation to the Magistrate's decision in respect of the respondent's claim and the appellant's counterclaim, I simply say that there is no material before me which demonstrates that the Magistrate made any error of law in the matter.

18. I turn then to the originating motion seeking an order in the way of certiorari to quash the orders of the Magistrates' Court. The record for the purpose of this proceeding consists of the court record, as such, and the Magistrate's reasons for his decision.

19. In my opinion, there is again simply no error on the face of the record. Once the Magistrate refused to grant the adjournment, he was bound then to proceed to determine the respondent's claim and the appellant's counterclaim.

20. As to the allegation of denial of natural justice, I say this. It is entirely within the discretion of a Magistrate as to whether he will grant an application for adjournment of a proceeding then before him. This court will be slow to interfere with the exercise of such a discretion, and will only do so where it is clear that the Magistrate has fallen into error in the matter, for example, by applying some principle of law incorrectly or by failing to apply some recognised and applicable principle of law when he should, or by making a determination on the facts which was not reasonably open to him.

21. In my opinion, the Magistrate in this case made no error in any of those respects so far as the application for an adjournment was concerned. The simple fact of the matter is that there was no evidence whatsoever before him to support the appellant's application. In particular, there was no material before him as to the nature of the appellant's business overseas that day, why it was necessary that the appellant be overseas that day, why it was so urgent that he had to be overseas that day, and when he would be returning to Victoria. The fact of course is that the appellant was not overseas but was simply interstate. Where an application for an adjournment is opposed, as it was in this case, I think it is incumbent upon the person making the application to place before the court appropriate material in support of the application.

22. If appropriate material is placed before a court, and nevertheless the court refuses the application, it may well be successfully contended that there has been a denial of natural justice so far as the applicant is concerned. But, in my opinion, such a contention cannot be made when no such material is placed before the court.

23. I should also point out that this case is a very good example of the problems which can arise if an applicant for an adjournment is permitted to support his application by nothing more than statements made by his counsel from the Bar table. Through no fault whatsoever on the part of the appellant's counsel, the appellant's counsel made his application to the Magistrate on the basis that the appellant had left for overseas urgently on 22 July 1999. The fact is, the appellant had not. He had simply gone interstate.

24. In the circumstances of this case, I am not satisfied that it can be said that, in refusing the appellant's application for an adjournment, the appellant was denied natural justice.

25. If that view of the matter is correct, it must follow that in hearing and determining the respondent's claim, as he was then bound to, the Magistrate could not be said to have denied natural justice to the appellant.

26. Both proceedings will be dismissed with costs to be taxed, including reserved costs, and paid by the appellant.

APPEARANCES: For the appellant Jacobson: Mr J Brett, counsel. Patrick W Dwyer, solicitors. For the respondent Biggs: Mr M Clarke, counsel. Mulcahy Mendelson & Round, solicitors.
