60/08; [2008] VSC 571

SUPREME COURT OF VICTORIA

BAHONKO v CASEY CITY COUNCIL

Williams J

9, 18 December 2008

CIVIL PROCEEDINGS – APPLICATION FOR A REHEARING – APPLICATION REFUSED BY MAGISTRATE – APPEAL AGAINST MAGISTRATE'S DECISION – WHETHER REFUSAL OF AN APPLICATION FOR A REHEARING IS INTERLOCUTORY – WHETHER MAGISTRATE'S ORDER CAN BE APPEALED: *MAGISTRATES' COURT ACT* 1989, S109.

The refusal of an application for a rehearing in relation to a default judgment is interlocutory as it does not finally dispose of the rights of the parties. Accordingly, an order made by a magistrate in respect of a rehearing application is not appellable under s109 of the *Magistrates' Court Act* 1989.

***Guss v Johnstone*, unrep, VSC 23 March 1994, Beach J; and**

***Carr v Finance Corp of Aust Ltd* [1981] HCA 20; (1981) 147 CLR 246; 34 ALR 449; 55 ALJR 397, applied.**

WILLIAMS J:

1. Under the terms of a judgment entered in default of appearance on 3 August 2006, Mrs Bahonko was ordered by the Magistrates' Court at Dandenong to pay to the Casey City Council the sum of $1,286.82 for arrears of rates, $27.15 by way of interest and costs of $529.40.

2. Mrs Bahonko applied under s110 of the *Magistrates' Court Act* 1989 ("the Act") for a rehearing and her application was refused by Magistrate Lauritsen on 17 September 2008. She was ordered to pay the Council's costs to be taxed in default of agreement.

3. Mrs Bahonko then appealed from those orders to the Court under s109 of the Act. On 19 November 2008, Master Daly first refused an application for adjournment by Mrs Bahonko and then dismissed the appeal on the grounds that the appeal was from an interlocutory rather than from a final order.

4. The Master also said that she would, in any event, have dismissed the appeal on the basis that neither the notice of appeal or the amended notice of appeal identified a question of law upon which the appeal was brought. The Master went on to say:

> Having regard to the evidence and the submissions, there is no evidence upon which I could find any arguable question of law, nor can the deficiencies of the proposed notices of appeal be cured by amendment.

5. Mrs Bahonko now appeals from the Master's decision under r77.05 of the *Supreme Court (General Civil Procedure) Rules* 2005 ("the Rules"). She argues that the Master erred in concluding that both the order refusing her application under s110 of the Act and the order for costs made against her in the application were interlocutory rather than final in nature and therefore not appellable under s109 of the Act. The appeal is by a re-hearing *de novo* under r77.07(5) and I must consider the matter afresh.

6. Mr Shirrefs who appeared for Casey City Council relied upon the decision of Beach J in *Guss v Johnstone*[1] for the proposition that an order refusing an application for a rehearing in the Magistrates' Court is properly characterised as interlocutory because it does not finally dispose of the parties' rights, it being open to the disappointed party to apply again to have the judgment set aside. Mr Shirrefs noted Beach J's reliance upon the relevant statement of principle by the High Court in *Carr v Finance Corporation of Australia Limited*.[2] He contended that the grant or refusal of an order under s110 could be only challenged by judicial review under O56 of Chapter 1 of the Rules.

7. Mrs Bahonko in turn sought to rely upon the Court of Appeal's decision in *Anglo-Italian Holdings Pty Ltd v Varallo*,[3] in support of the proposition that leave to appeal was not required in relation to a question of law. She argued that, as a result, the Master erred in refusing her appeal from the decision of the Magistrates' Court. She also submitted that *Guss* was wrongly decided on the basis of that authority.

8. I am not persuaded by Mrs Bahonko's argument to the effect that the Court's decision in *Guss* was wrong and that the orders made by the learned Magistrate were final in character. The refusal of an application for a rehearing in relation to a default judgment is interlocutory, as it does not finally dispose of the rights of the parties.

9. I am not persuaded by Mrs Bahonko's argument that any interlocutory order in this case can be appealed under s109 of the Act because it was held in *Anglo-Italian Holding Pty Ltd* that no leave was required for an appeal brought under s52(9) of the *Accident Compensation Act* 1985. [4]

10. I note further that I am not persuaded by Mrs Bahonko's submissions to the effect that there was really a rehearing held on 17 September 2008 and that the learned Magistrate had acted fraudulently to disguise this fact by noting in the Magistrates' Court records produced to the Court that the application had been one for a rehearing. There is no evidence to satisfy me that this very serious allegation had any substance at all.

11. Mrs Bahonko went on to dispute the Master's conclusion that neither her Notice of Appeal dated 1 October 2008, nor her Amended Notice of Appeal dated 20 October 2008, identified the question of law upon which the appeal was brought. I have taken all Mrs Bahonko's submissions and the material before me into account and I agree with the Master's conclusion.

12. Mrs Bahonko also argued that the costs order made by the Magistrate was, in any event, a final order. Mr Shirrefs responded that any costs order in an interlocutory application was also interlocutory in character, because it would be taken into account in some way in the making of a final costs determination. He was unable to refer to any relevant authority.

13. Mrs Bahonko did not suggest that any appeal as to the order for costs made in the Magistrates' Court would have been other than one dependent upon the consequences of the success of the appeal on the merits.[5] In other words, she made no submissions challenging the order for costs on any different basis from that on which she challenged the order refusing a rehearing. An order for costs made in the exercise of discretion is a matter of practice and procedure and limited accordingly.[6] Courts are loathe to interfere with decisions made in the exercise of the discretion relating to the costs of an application or a proceeding.[7] It is enough to say that I see no basis in any of the materials upon which I would grant an appeal in relation to the Magistrate's costs order, even if it were to be properly characterised as a final order for the purposes of s109 of the Act.

14. Mrs Bahonko made wide ranging submissions to the Court in support of her appeal. She referred to many areas of law. None of her submissions persuaded me that she was entitled to appeal from the Magistrate's decision under s109 of the Act. Even if she were permitted to challenge the order refusing her application for a rehearing or the order for costs made against her in the Magistrates' Court, she failed to identify a question of law upon which she brought an appeal in either case.

15. I note that the Master appears to have mistakenly referred to s92 of the Act both in "Other Matters" and in the body of the impugned orders dismissing the appeals brought under s109. The decisive issue, however, remains the same, as only a final order of the Magistrates' Court can be appealed under each provision. In other words, the learned Master's decision to dismiss the appeal is correct in light of the requirements of s109.

16. I will dismiss the appeal.

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[1] Supreme Court of Victoria, Beach J, No 4038/1994, 23 March 1994, unreported.
[2] [1981] HCA 20; (1981) 147 CLR 246 at 248 per Gibbs CJ; 34 ALR 449; 55 ALJR 397.

[3] [2005] VSCA 257; (2005) 12 VR 257.
[4] [2005] VSCA 257; (2005) 12 VR 257 at 260 per Hollingworth AJA.
[5] See: discussion of the requirement for need for leave to appeal from a costs order under s17A *Supreme Court Act* 1986 in *Etna v Arif* [1999] VSCA 99; [1999] 2 VR 353 at 378 at [66] per Batt JA; [1999] V Conv R 54-609.
[6] See: Williams, *Civil Procedure Victoria* commentary at [263.5] and the authorities cited there.
[7] *Transport Accident Commission v O'Reilly* [1998] VSCA 106; [1999] 2 VR 436, at 457; (1998) 28 MVR 327; (1998) 14 VAR 189 per Ormiston JA.

APPEARANCES: The plaintiff Bahonko appeared in person. For the respondent Casey City Council: Mr DK Shirrefs, counsel. Maddocks Lawyers.
