29/98

SUPREME COURT OF VICTORIA

O'DEA & ANOR v MAGISTRATES' COURT of VICTORIA & ANOR

Gillard J

6, 7, 20 July 1998

CIVIL PROCEEDINGS – REHEARING – FACTORS TO CONSIDER ON APPLICATION FOR REHEARING – ORDER MADE ON INCREASED CLAIM WITHOUT NOTICE TO DEFENDANTS – ARGUABLE DEFENCE ON THE MERITS – PLAUSIBLE EXPLANATION FOR FAILURE TO ATTEND – WHETHER MAGISTRATE IN ERROR IN REFUSING APPLICATION TO SET ASIDE – JURISDICTION – CERTIFICATE FILED IN SUPREME COURT – WHETHER MAGISTRATES' COURT HAS JURISDICTION TO HEAR APPLICATION TO SET ASIDE: *MAGISTRATES' COURT ACT* 1989, SS110(5), 112.

The defendants failed to appear on the hearing of a claim. On application by the plaintiff, the magistrate amended the claim by increasing the amount and made an order on the amended amount plus interest and costs. Subsequently the plaintiff filed a certificate of the judgment in the Supreme Court whereby the order made in the Magistrates' Court was deemed to be a judgment in the Supreme Court. The defendants applied to the Magistrates' Court to have the order set aside and reheard but failed to appear. On the hearing of a later application for leave to apply, the evidence revealed that the defendants had a plausible explanation for their failure to appear and had an arguable defence on the merits. The magistrate refused the application for leave to apply. Upon an application for an order to quash the order made—

HELD: Application granted. Order set aside.
1. Where a Magistrates' Court hears an application under s110(5) of the *Magistrates' Court Act* 1989 (Act) for leave to reapply to set aside an order and rehear, an important factor to consider is the explanation given for failing to attend the hearing of the application to set aside. Another relevant factor is whether the judgment debtor has any possible defence to the claim; if not, to grant leave would be a futile exercise. Another important factor is whether there are circumstances which establish that the order was irregularly obtained or the judgment debtor would suffer a grave injustice if the order was allowed to stand.

2. In the absence of notice to the defendants, the magistrate should not have increased the amount claimed and made the order. In so doing the defendants were denied natural justice which constituted a grave miscarriage of justice. Further, on the hearing of the application for leave to reapply, the evidence revealed that the defendants had a plausible explanation for their failure to attend the hearing and that they had an arguable defence on the merits. Accordingly, the magistrate was in error in refusing the application for leave to reapply.

3. Where a certificate of judgment is filed in the Supreme Court pursuant to s112 of the Act, it does not make the order of the Magistrates' Court a judgment of the Supreme Court; it is deemed to be a judgment of the Supreme Court. Once the certificate is filed in the Supreme Court, the jurisdiction of the Magistrates' Court is not ousted; an application can be made to set aside the order made in the Magistrates' Court and rehear.

***Wrixon v Deehan* (1865) 2 WW&A'B(L) 16; and**
***Madin v McMahon* [1986] VicRp 14; [1986] VR 134, followed.**
***Rushton v Braun & Whydah Solutions Pty Ltd* (1997) MC 89, not followed.**

GILLARD J: *[After setting out the facts, the nature of the Supreme Court's jurisdiction on appeal and what constitutes the court record, his Honour continued]*...**[6] ERROR OF LAW** What was before the Magistrate was an application for leave to reapply to set aside the order, and if leave was granted an application that the original order be set aside and the proceeding reheard. The certified extract merely records that the application was refused. In those circumstances the plaintiffs will have to establish error on two bases, namely, that the Magistrate refused leave and, secondly, did grant leave but refused the application to set aside the order. In the absence of any reasons the plaintiffs assume the heavy burden of showing that on the materials before the court which constitute the record of the court below, no Magistrate acting reasonably and in accordance with the law could have refused leave or having granted leave refused the application.

Whilst this Court on judicial review has jurisdiction to consider an error of law which does not go to jurisdiction – see *Re Gray ex parte Marsh & Anor* [1985] HCA 67; (1985) 157 CLR 351 at 386; (1985) 62 ALR 17; (1985) 59 ALJR 804 per Deane J – this Court cannot interfere merely because a judge thinks a decision is wrong. What is in issue here is the exercise of a discretion. The principles **[7]** which guide a court in an application to set aside a discretionary order or judgment are well established. In the absence of reasons a party seeking to set aside the order carries a heavy burden. It has to show that the result is "so unreasonable or plainly unjust" that the court may infer there has been an error of law made by the Magistrate in arriving at the decision. See *Australian Coal and Shale Employees' Federation v The Commonwealth* [1953] HCA 25; (1953) 94 CLR 621 at 627.

The jurisdiction to set aside a decision tainted by an error of law which did not go to jurisdiction was described by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 939; [1985] AC 374 as follows at p410:

> "By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable."

Section 110 deals with applications for a rehearing when an order is made against a person who did not appear. Section 110(5) of the Act provides:

> "5. If an applicant under this section fails to appear at the time fixed for the hearing of the application and the application is struck out, the applicant can reapply only if the applicant first obtains the leave of the court."

The application referred to in that sub-section is a reference to an application that the original order be set aside and the proceeding be reheard. See s110(1) of the Act. One looks in vain in the Act for the criteria which guides the court in an application under s110(5). In determining what are relevant factors it is necessary to consider the purpose of the provision. It is obviously aimed at deterring judgment debtors who do not have a defence delaying the course of justice. It follows that on an application for leave to re-apply an important factor to consider is the explanation for failing to attend on the application to set aside. Another factor which is relevant is whether the judgment debtor has any possible defence at all to the proceeding. If not to grant leave would be a futile exercise. Whilst the question of the merits of the defence to the proceeding is a matter which must be weighed up if leave is granted to re-apply, in my opinion it is not an irrelevant consideration on the application for leave **[8]** to re-apply. The circumstances may be such that a grave injustice may result if leave is not granted and this may come about because there is a clear defence to the proceeding or there are circumstances which establish that the order was irregularly obtained or the judgment debtor would suffer a grave injustice if the order was allowed to stand.

It would be unwise for any court to attempt to compile an exhaustive list of factors that should be taken into account on an application under s110(5) where the legislature has chosen not to do so, and accordingly the factors that I have just mentioned are the more important ones but the list is not exhaustive. It follows that all relevant factors must be taken into account and the weight which should be accorded each factor will vary according to the circumstances. It would follow that what might not be a plausible excuse for non-attendance may carry very little weight in the application where the circumstances are so compelling that a grave injustice would be perpetrated if leave was not granted and the original order set aside.

In his application issued on 1 April 1998 for a rehearing which according to the rules is to be treated as an application for leave, the first plaintiff set out his reasons for non-attendance on 30 March 1998 in an affidavit sworn the same day. He said:

> "I failed to understand that my previous application for rehearing stated the date of hearing. Inexperienced in court procedures I failed to note the hearing date."

Later in the same affidavit he said:

> "My inability to attend the rehearing was an oversight. I was anticipating a hearing date to be forwarded to me, when the court official signed the documents I thought it was part of the swearing in process."

In a further affidavit sworn by the first plaintiff on 27 April 1998 he gave evidence as to his failure to appear at the original hearing. On a fair reading of the affidavit it appears to me that the references to his non-appearance were references to the first hearing and not his failure to appear on 30 March 1998. **[9]** In the second affidavit the first plaintiff sets out facts which, if accepted, would constitute a defence to the claim brought by the second defendant. The complaint made by the second defendant and dated 7 May 1997 form part of the record of the court before the Magistrate on the application for leave to rehear the application. The complaint asserted a debt for work and labour done in the sum of $2,931.20. The record also revealed that the two plaintiffs caused a Notice of Intention to Defend to be filed and there was an adjournment of a pre-trial conference. The record of the court reveals that at the hearing of the complaint the presiding Magistrate amended it by increasing the amount claimed from $2,931.20 to $5,331.20 in the absence of the two plaintiffs as defendants to the proceeding and made an order in the latter sum. There is no evidence that the two plaintiffs were given notice of the proposed amendment. In the absence of notice to the two defendants to the proceeding, the Magistrate should not have increased the amount claimed. In so doing he denied natural justice to the two defendants. They were not given an opportunity to contest what was a new case.

In my opinion the failure to accord natural justice to the defendants constituted a grave miscarriage of justice and on that ground alone the first defendant should have granted leave to the plaintiffs in their application to set aside the original order. The Magistrate should have accepted the excuse of the first plaintiff with respect to his failure to attend on 30 March 1998 and, further, should have given weight to the fact that the application before him was issued on 1 April 1998. In my opinion a Magistrate acting reasonably and in accordance with the law could have come to no other conclusion than to grant leave to make the application to set aside the order. This brings me to the issue of whether or not the original order should have been set aside and an order made that the proceeding be reheard pursuant to s110(1) of the Act.

[10] Section 110 does not set out the criteria which should guide a court on such an application. But a provision similar to s110 has been part of the legislation regulating Magistrates' Courts for well in excess of 100 years. Speaking in 1924 Cussen ACJ in *Khyat v Schmidt* [1924] VicLawRp 83; [1924] VLR 499; 30 ALR 352; 46 ALT 72 said at VLR p504 after referring to the section in the *Justices Act* empowering a court to set aside an order said:

> "As to the latter section itself, I think it is very desirable that it should not be given any limited meaning and that the authorities show that in the past it has been extended in the interests of justice to cover a large number of cases."

Dixon AJ in *Chitty v Mason* [1926] VicLawRp 60; [1926] VLR 419 discussed the principles to apply at VLR p423 when he said:

> "Judgments given by Courts of justice in the absence of one of the parties may be set aside for a variety of reasons, and, generally speaking, the principles upon which they are set aside are well settled. There is a great difference between judgments which are regularly obtained in good faith and judgments which are irregularly obtained or obtained in bad faith. The first class are not in general set aside save upon an affidavit of merits. The second class are set aside *ex debito justitiae*, irrespective of the merits of the party applying."

I respectfully agree with the observations made by the two learned judges and I adopt them. More recently the Full Court in *Kostokanellis v Allen* [1974] VicRp 71; [1974] VR 596 considered the principles that should apply when an application is made to set aside what in effect is a default judgment. The Full Court exhaustively considered the authorities. The Full Court at VR p605 summarised the principles as follows:

> "What emerges from these authorities is that under a rule such as 05 r14, what the judge is required to do is to determine what, in his opinion, is the just way in which the court's discretion should be exercised. To do this must involve weighing up the extent to which the defendant is prejudiced by allowing the order and judgment to stand and the prejudice to the plaintiff in setting them aside. In many cases the situation will be that the plaintiff will not suffer any prejudice that cannot be remedied by an appropriate order as to costs. So far as the defendant is concerned, if he is unable to comply

> with r14(b), the order and judgment cannot be set aside and there would appear to be little **[11]** purpose in doing so. On the other hand, if the defendant does show on affidavit a prima facie defence on the merits it would seem that usually he will be seriously prejudiced if he is debarred from being able to present his defence at a trial of the action. One cannot tell until this has been done whether or not the defendant will succeed in such a defence. While it is undoubtedly relevant to the judge to consider what explanation the defendant has for not appearing on the return of the summons of final judgment, the weight to be attached to his explanation will depend upon the circumstances. Thus, for example, where the explanation shows that his non-appearance was due to some mistake or to his being misled, this may well assist the court in deciding to exercise its discretion in his favour. Again, the explanation given may reflect on the question whether the defendant has made out a prima facie defence on the merits. However, it does not necessarily follow that if the explanation does not amount to something which can be categorized as a 'sufficient reason' the defendant's application should fail. It must all depend on the circumstances."

It is clear that the factors to be considered include the explanation for the failure to attend the hearing, whether there is an arguable defence on the merits, and any prejudice which may be suffered by either party depending upon the result. On the other hand, all matters being equal, a defendant who has an arguable defence on the merits should not be shut out from contesting the proceeding. Whilst these are the more important factors there may be other factors which are relevant to the exercise of the discretion. In this regard the weight that should be attached to the explanation for the delay must depend on all the circumstances. However, it would be a grave error to deny a defendant his opportunity in court where he has an arguable case that his explanation for failing to attend or the delay taking steps was inadequate.

I refer to what the New South Wales Court of Appeal said in *Danny Kidron and Andrew Spaile Architects Pty Ltd v Garrett* (1994) 35 NSWLR 572 at 578 concerning the lack of an adequate explanation in an application to extend time to appeal:

> "Where delay is small, an appeal is not hopeless, and no relevant prejudice will be caused by an extension of time, it seems to me that a due exercise of discretion requires the granting of an extension of time. To refuse to grant an extension in such circumstances solely because of lack of satisfaction with the reasons for delay seems to me to show failure to take into account the other highly relevant factors I have mentioned and in this case to have led to a miscarriage of discretion."

[12] I respectfully agree. In the end result it is a question of doing justice between the parties. The evidence before the Magistrate revealed that the plaintiffs had a plausible explanation for their failure to attend the hearing before the Magistrate, that they had an arguable defence to the merits but what is more significant were the victims of a grave miscarriage of justice with respect to the increasing of the claim at the hearing without notice. There are a number of reasons why a court should not amend a claim in the absence of a party and in the absence of any notice that application will be made to amend. First, a defendant knowing that a claim is made in a certain sum may make a decision not to contest the matter. On the other hand if the same defendant was alerted that the claim would be increased nearly two-fold then a different decision may be made with respect to defending the proceeding. Secondly, it is a denial of natural justice to make a decision against a party without giving that party proper notice of the claim to enable that party to contest all or part of it.

In my opinion no Magistrate acting reasonably and applying the law could have refused the application by the plaintiffs that the order made in the original proceeding be set aside. Accordingly, I am of the opinion that the order made on 28 April 1998 refusing leave and refusing the application to set aside the order was vitiated by an error of law and cannot stand. The error is disclosed on the face of the record of the court. In reaching that conclusion I note that there is no suggestion of any prejudice being suffered by the second defendant if the order is set aside and costs are paid.

DOES THE MAGISTRATES' COURT NOW HAVE JURISDICTION?

Mr Herskope of counsel who appeared for the second defendant submitted that by reason of a series of events which occurred subsequently to 28 April 1998, the Magistrates' Court no longer has any jurisdiction to hear any application **[13]** pursuant to s110 of the Act. Accordingly to quash the order would be futile and in the exercise of its discretion the Court should dismiss the application. On 29 December 1997 the solicitor acting for the second defendant caused a Warrant to Seize Property to be issued by the Magistrates' Court to enforce payment of the judgment debt

resulting from the order made on 10 December 1997. The said solicitor received a report from the Sheriff's Office on 11 March 1998 that the Sheriff had been unable to seize any property belonging to the two plaintiffs. The warrant authorised the Sheriff to seize personal property only.

Section 112 of the Act prescribes a procedure whereby the order made can be enforced as a judgment of the Supreme Court. The second defendant's solicitor obtained a certificate from the Registrar of the Magistrates' Court pursuant to s112(1) of the Act and on 18 May 1998 filed that certificate in this Court. On the same day a Warrant of Seizure and Sale was issued and the Sheriff was directed to execute the warrant against the real estate of the plaintiffs. Mr Herskope submits that by reason of the provisions of s112 the Magistrates' Court is precluded from hearing any application to set aside the original order and is to all intents and purposes functus officio. He relies upon a decision of Cummins J in *Lorryn Rushton v Mr Barry Braun (A Magistrate) and Whydah Solutions Pty Ltd* (an unreported judgment delivered 18 February 1997). In that case Cummins J held that once the certificate under s112 was filed in the Supreme Court the Magistrates' Court no longer had any jurisdiction to hear an application to have an order of the Magistrates' Court set aside under s110.

Legislation enabling orders of the Magistrates' Court and judgments of the County Court to be filed in the Supreme Court to enable execution against real estate have been part of the law of this State since the middle of the last century. There is a considerable body of case law on the legislation which establishes that an application can be made to set aside a judgment or order in the lower court even though the certificate has been filed in the Supreme Court. On the other hand the present Act which came into operation in 1990 contains different **[14]** wording to that used in the past and this led Cummins J to conclude that under the present legislation it was not possible for a party to set aside an order made in the Magistrates' Court ex parte against him after a certificate had been filed in the Supreme Court. It becomes necessary therefore to consider the legislation going back to the middle of last century and the authorities and to consider and determine whether the Legislature in 1989 has unequivocally provided that it is no longer open for a judgment debtor to set aside the order or judgment made in his absence after the certificate has been filed in the Supreme Court.

It is not difficult to think of circumstances where a grave injustice would be caused to a judgment debtor if he was shut out from setting aside an order made against him ex parte. Indeed, judgments and orders obtained by fraud or irregularly entered could not be set aside once a certificate was filed in the Supreme Court if the decision of Cummins J is correct. I have no doubt that a court should not construe a provision in an Act which may cause grave injustice unless the words clearly and unequivocally lead to that conclusion. It is necessary to trace the history of the legislation. It is noted that the legislation existed in relation to both the Magistrates' Court formerly called the Court of Petty Sessions and County Courts. Section 112 of the present Act was passed in 1989 and came into operation on 1 September 1990. Sub-section 1 authorises the Registrar of the Magistrates' Court on application to give the judgment creditor a certificate of the order in the amount remaining unpaid. *[After referring to the present legislative provisions and reviewing the relevant authorities, his Honour continued]* ... **[25]** The analysis of the cases reveal that the filing of the certificate in the Supreme Court does not oust the jurisdiction of the Magistrates' Court with respect to certain procedures in that court. As at the eve of the enactment of the 1989 *Magistrates' Court Act*, in my opinion the law was well settled in this State concerning orders of the Magistrates' Court and judgments of the County Court being enforced in the Supreme Court. In my opinion the cases establish the following principles:

(i) The prohibition in the inferior court from taking a further proceeding was in respect of taking a step to execute the order or judgment.

(ii) That the lower courts had jurisdiction to set aside the order made or judgment entered even though a certificate was filed in the Supreme Court and if it was set aside what occurred in the Supreme Court would also be set aside.

(iii) That the filing of the certificate in the Supreme Court did not preclude an appeal being lodged or continued and if successful the Supreme Court proceeding fell with the order or judgment set aside on appeal.

(iv) That if an error was made in the certificate below it could be withdrawn and reissued by the clerk

> or registrar and after 1915 any certificate from the Magistrates' Court which contained an error could be amended by the Supreme Court.

[26] I now come to the decision of Cummins J in which he held that because of the change in wording in the 1989 Act once a certificate was filed in the Supreme Court the Magistrates' Court had no jurisdiction to hear an application to set aside the order upon which the certificate was based. The facts in *Lorryn Rushton v Mr Barry Braun (A Magistrate) & Anor* can be briefly stated. A complaint was brought in the Magistrates' Court against three defendants and an order was made for $5,495. The defendants did not appear at the hearing. Application was made to set aside the order. The Magistrate refused to entertain the application holding that he lacked jurisdiction because a certificate of the order had been filed in the Supreme Court. One of the unsuccessful defendants issued a proceeding in this Court for judicial review pursuant to Order 56 of the Rules of Court. She sought an order that the ruling of the Magistrate that he lacked jurisdiction be set aside and an order in the form of mandamus compelling the Magistrates' Court to hear the application. Cummins J dismissed the proceeding. Cummins J contrasted the difference in the wording between s112 of the *Magistrates' Court Act* 1989 and the provisions of the *Magistrates (Summary Proceedings) Act* 1975 s143. His Honour noted that the difference between the two pieces of legislation was that in the former legislation "judgment is deemed to have been entered in the Supreme Court". He noted that under the old provision there was no judgment of the Supreme Court, deemed or otherwise. His Honour then said –

> "The 1975 provision was facultative; the 1989 provision is determinative. It determines that the order is deemed an order of the Supreme Court."

[27] His Honour referred to the decision of *Madin v McMahon* [1986] VicRp 14; [1986] VR 134 in which Tadgell J considered the effect of s143(3) of the 1975 Act. In that case Tadgell J said at p136 the following:

> "Neither the filing in the Supreme Court of a certificate granted under s143(1) of the *Magistrates (Summary Proceedings) Act*, nor the issue in accordance with sub-s(2) of a writ of fi. fa., creates any judgment of the Supreme Court: *Borough of Queenscliff v England* 3 ALR 17; (1897) 18 ALT 230. Nor, in my opinion, does s143(3) deprive the proper officer of the Magistrates' Court of jurisdiction to entertain an application under s6 of the *Judgment Debt Recovery Act* when a certificate has been granted under s143(1). An application of that kind is not 'further proceedings' within the meaning of s143. Section 143(3) has a long history."

His Honour then went on to refer to the history of the section and stated:

> "In *Wrixon v Deehan* (1865) 2 WW & A'B (L) 16 at p17 Stawell CJ, speaking for the Full Court upon the meaning of that provision, said: 'I think "proceeding" means "proceeding with a view to advance", and that an attempt to set aside proceedings is not a proceeding'."

In my respectful opinion Tadgell J correctly summarised the law and I respectfully adopt it. Cummins J said that the 1989 legislation was demonstrably in different terms to the preceding legislation. His Honour had this to say at p4 of his unreported judgment:

> "On its face it establishes that the entity is now a judgment of this court. Further upon ordinary principles of construction, the legislation is taken to have been made in contemplation of the decision three years earlier in *Madin v McMahon*. I thus consider that for both those reasons the impugned judgment became a judgment of this court and thus the magistrate was correct in his finding of being *functus officio*."

In my respectful opinion His Honour's decision was wrong. First, the new legislation does not make the order of the Magistrates' Court a judgment of this Court upon the filing of the certificate. It is deemed to be. That is, it is to be regarded as such or to quote the words of Holroyd J in *Trent Brewery v Lehane* [1895] VicLawRp 58; (1895) 21 VLR 283 the judgment is tantamount to a judgment of the Supreme Court, but in my opinion is not a Supreme Court judgment. **[28]** The legislation has not changed what was always the law since 1860 that an application can be made to set aside the judgment or order of the inferior court even though a certificate has been filed in the Supreme Court. Secondly, even if it is a judgment of this Court that does not oust the jurisdiction of the inferior court. This is clear from the decision of 1865 and the decisions thereafter. Thirdly, the mere fact that a certificate is filed in this Court and assuming

the order below becomes the judgment of this Court, it does not follow that the jurisdiction of the inferior court is ousted. There is nothing in the legislation which leads to this conclusion. If the legislature intended that the jurisdiction of the inferior court should be ousted then it should say so in clear unequivocal words. There is no warrant in the new legislation to establish that intention. Fourthly, the only words in the section which arguably could preclude an application to the inferior court are the words "no further proceedings ... must be taken in the Magistrates' Court". These words were construed when the legislation was first introduced into the Colony of Victoria in 1865 and clearly do not preclude an application being made to set aside the original order after the certificate is filed in this Court. That has always been the effect of the case law in this State. Further if Cummins J was correct and an order was made against a party *ex parte*, a grave injustice could be caused in some circumstances if that party was precluded from setting aside the order made once a certificate was filed in the Supreme Court. In my opinion one should not proceed on the assumption that the Legislature intended to bring about a position which could result in an injustice unless the Legislature made that intention clear and beyond doubt. For all those reasons it is my respectful opinion that the Cummins J decision was wrong and I decline to follow it. I conclude that if I quash the order made by the Magistrate and order that the application for leave be reheard by another magistrate the Magistrates' Court does **[29]** have jurisdiction to entertain the application and if leave is granted to hear the application. Subject to any submissions by counsel I propose the following orders:

(i) that the order made by the Magistrates' Court at Melbourne on 28 April 1998 whereby the Magistrate refused an application for leave to bring an application for a rehearing by the plaintiffs against the order made on 10 December 1997 be quashed.

(ii) that the Magistrates' Court at Melbourne hear and determine according to law the application by the plaintiffs for leave to proceed with an application for rehearing;

(iii) that the second defendant pay the plaintiffs' costs of the proceeding.

APPEARANCES: For the plaintiffs O'Dea & Lou: Mr K Sparks, counsel. GE Dorevitch, solicitors. For the second defendant: Mr A Herskope, counsel. Davies Moloney, solicitors.
