20/00; [2000] VSC 158

SUPREME COURT OF VICTORIA

WILSON v MYLES

Ashley J

19 April 2000

NATURAL JUSTICE – ORDER OF MAGISTRATE SUCCESSFULLY REVIEWED – MATTER REMITTED FOR HEARING AND DETERMINATION – COMMENTS MADE BY JUDGE ABOUT POTENTIAL WITNESS – FAILURE BY WITNESS TO ATTEND REHEARING – APPLICATION BY DEFENDANT FOR ADJOURNMENT TO ISSUE SUB-POENA – APPLICATION BY PLAINTIFF TO RE-INSTATE ORIGINAL ORDER – ADJOURNMENT APPLICATION REFUSED – ORIGINAL ORDER RE-INSTATED BY MAGISTRATE – NO REHEARING HELD – NO EVIDENCE GIVEN – WHETHER MAGISTRATE IN ERROR IN RE-INSTATING ORIGINAL ORDER WITHOUT CONDUCTING A HEARING.

M. claimed a sum from W. for unpaid wages during a period of alleged employment in 1993. On the hearing, M. was successful and an order made on the claim together with interest and costs. Subsequently, an appeal from this decision to a judge of the Supreme Court was successful and the matter was remitted to the Magistrates' Court for further hearing. In the reasons for decision, His Honour referred to a potential witness who had sworn an affidavit to the effect that she gave perjured evidence in support of M's claim before the magistrate. In ordering that W. could relitigate the original claim, His Honour contemplated that, as a matter of probability, the outcome of the rehearing might depend on whether the witness gave evidence and in that event, what that evidence was. When the rehearing came on before the magistrate, the witness did not attend. Without any evidence being given, M. applied for the reinstatement of the original order. W. sought an adjournment so that the witness could be sub-poenaed to attend court. The magistrate refused the application for an adjournment and reinstated the original order with costs. Upon appeal—

HELD: Appeal allowed. Order set aside. Remitted for further hearing.
The magistrate misunderstood the nature of the order made by the judge of the Supreme Court. His Honour ordered that the original order be quashed and the matter be remitted to the Magistrates' Court for hearing and determination according to law. Upon the plain terms of the order it was not open to the magistrate not to conduct a hearing because a particular potential witness was not available.

ASHLEY J:

1. David Myles, the respondent, made a claim for moneys which he said were due to him for wages against Robert Wilson, the appellant. The claim related to a period of alleged employment in 1993.

2. Following an abortive pre-hearing conference, the matter came on for hearing at the Magistrates' Court at Horsham on 24 June 1994. In a hearing that was evidently hotly contested the claim succeeded and Wilson was ordered to pay Myles $12,628, together with interest of $908.80 and costs of $1,912.50.

3. What happened thereafter is reminiscent of the proceeding described by Charles Dickens in "Bleak House". The sequence of events is disclosed in Exhibit JMB.1 to the affidavit of Janelle Maree Brown sworn 16 December 1999. The saga has included:

* the issue and execution of a warrant for seizure of property;
* interpleader proceedings brought in the Magistrates' Court and orders thereon;
* application to this court to restrain the Sheriff from disposing of items held under the warrant of seizure pending an appeal in the interpleader proceeding;
* resolution by Balmford J of the appeal in the interpleader proceeding, that leading on to transfer of that proceeding to the County Court;
* disposition of the interpleader proceeding in the County Court by his Honour Judge Ross;
* institution of an appeal from that decision to the Court of Appeal, which appeal was later deemed abandoned;
* application in July 1997 for leave to appeal out of time against the Magistrate's decision made in 1994;
* an unsuccessful appeal against the decision of a Master to refuse that application;

* application to restrain the Sheriff from proceeding with the sale of seized items, successfully made before Hedigan J but later unsuccessful before Beach J;

* initiation in December 1997 of a proceeding seeking judicial review of the June 1994 decision.

4. The proceeding to which I have last referred went forward with what should be regarded as undue haste in the context of this matter. It came on for hearing before Harper J on 21 August 1998. At the conclusion of the hearing, his Honour ordered that the June 1994 decision of the Magistrates' Court be quashed, and that the matter be remitted to the Magistrates' Court at Horsham to be heard and determined according to law.

5. The matter originally commenced in the Magistrates' Court in late 1993, and first heard in June 1994, came on again for trial on 28 September 1999. Both Wilson and Myles were represented.

6. A potential witness at the hearing, Ms Valadia Hutchings, was unavailable. Ms Hutchings had sworn an affidavit in the proceeding heard by Harper J. The import of the affidavit was that at the original hearing in the Magistrates' Court she, Ms Hutchings, had given perjured evidence on behalf of Myles, that is, the successful plaintiff. In doing so, she had falsely supported Myles' account that he had been employed on a weekly wage by Wilson for a period of months in 1993. Her affidavit gave some explanation why she had given false evidence: that is, that as Myles' then wife, she had suffered physical and mental abuse over a long period of time, and that in such a context she fell in with his fraudulent scheme to get money out of Wilson.

7. When Myles' solicitor learned, on 28 September 1999, that Ms Hutchings would not be giving evidence, the solicitor applied for the reinstatement of the order made in June 1994. The Magistrate granted the application. Before doing so, her Worship refused an application made by Wilson's counsel for an adjournment so that Ms Hutchings, who was then living in Queensland, could be got to court.

8. There was, I hope I have made clear, no hearing in the conventional sense in the Magistrates' Court on 28 September 1999. Rather, the Magistrate, having been informed of Ms Hutchings unavailability as a witness on the particular day, and not being prepared to grant an adjournment, considered that the import of the orders made by Harper J on 21 August 1998 required that the original order be reinstated. That is what the Magistrate did, only adding an order for additional costs.

9. The precise order was that on the claim there be an order for $12,628 and interest of $908.80, and costs of $1912.50, with a stay of 28 days, and that the defendant pay the plaintiff's costs of the day fixed at $964.

10. Now Wilson appeals against the final order made by the Magistrates' Court on 28 September 1999. He does so pursuant to s109 of the *Magistrates' Court Act* 1989.

11. The questions of law to be decided, according to an order made by a Master on 22 October 1999, are as follows:

> "(1) whether the learned Magistrate erred in law in—
> (a) holding that if the appellant was unable to establish fraud through the evidence of Valadia Hutchings, the original Magistrates' Court order was to be reinstated;
>
> (b) determining that in the absence of Valadia Hutchings the original Magistrates' Court order was to be reinstated;
> (c) failing to receive available evidence from and/or on behalf of the parties; and
>
> (d) failing to rehear and determine the matter according to law.
>
> (2) Whether the learned Magistrate interpreted and applied correctly the decision of the Honourable Mr Justice Harper dated 21 August 1998 as contained in Exhibits CJS.3 and CJS.4 to the affidavit of Christopher John Singleton sworn 1 October 1999 in holding that if the appellant was unable to establish fraud through evidence of Valadia Hutchings, the original Magistrates' Court order was to be reinstated".

12. I have not the slightest doubt that the appeal must succeed. It seems to me crystal

clear that the learned Magistrate misunderstood the nature of the order made by Harper J. His Honour ordered that the original order of the Magistrates' Court be quashed and that the matter be remitted to the Magistrates' Court for hearing and determination according to law. Upon the plain terms of the order, it was not open to the Magistrate not to conduct a hearing because a particular potential witness was not available.

13. The way in which the matter went wrong in the Magistrates' Court is easy enough to understand.

14. Ms Hutchings had sworn in the proceeding heard by Harper J the affidavit to the contents of which I have briefly referred. She was called for cross-examination but did not attend. A question arose whether her affidavit should be received. His Honour ruled that it should be received.

15. In the course of his ruling his Honour said that he ought to receive the evidence contained in the affidavit, despite the deponent not attending for cross-examination as required, because there were exceptional circumstances. He explained those circumstances this way: The witness had not attended for cross-examination. But one might take it that Ms Hutchings' evidence had been material in the Magistrate's consideration of the outcome of the hearing in 1994. Now she swore that she had perjured herself. The effect of her affidavit was that the basis upon which the Magistrate gave judgment for Myles had been supported only by fraudulent evidence. In admitting to perjury in the Magistrates' Court Ms Hutchings had presumably been aware of the significance of what she was doing. On balance the affidavit should be admitted, though it must be acknowledged that, had Ms Hutchings been present, she might have conceded that her affidavit was untrue.

16. Further in the course of his ruling Harper J said this:

> "It seems to me that ultimately it is most likely to be productive of justice if, in the present circumstances, Mr Wilson is enabled to relitigate the original claim. If Mrs Hutchings does not, in any subsequent proceeding that reagitates the matter before the Horsham Magistrates' Court in 1994, give evidence in accordance with that of her affidavit of 23 January this year, then Mr Wilson's attempt to have the original decision overturned will fail. All that can happen today is that I give or deny Mr Wilson the opportunity to reagitate those matters. Without Mrs Hutching's evidence he cannot take the matter further. Even with it, he may ultimately fail. Before he can succeed it will be incumbent upon him to satisfy the Magistrates' Court that the original decision was based upon fraud. That will almost certainly only be done if Mrs Hutchings is called to give evidence along the lines of that of her affidavit, and in fact does so."

17. Later, in his Reasons for granting relief in the nature of *certiorari*, his Honour said this, speaking of Mrs Hutchings' affidavit:

> "Having accepted it, and having read it, it seems to me that the balance of justice indicates that the matter should be sent back to the Magistrates' Court; in other words, that the application for *certiorari* should be granted".

That passage suggests no inhibition upon the re-hearing that must necessarily take place.

18. His Honour noted, referring to an affidavit sworn by Myles, that:

> "If Mr Myles is to be believed, then there was no fraud perpetrated on the Magistrates' Court at Horsham, and if that ultimately is the view taken by the court then its judgment of 1994 will not be disturbed".

19. His Honour pointed out that it was not for him to determine the ultimate outcome of the proceedings, but rather to determine whether there was sufficient evidence to warrant the grant of relief in the nature of *certiorari*.

20. On 28 September 1999, at the Magistrates' Court, Myles' solicitor seized upon passages in the Ruling, and perhaps in the Reasons, and submitted that his Honour had determined, in substance, that if Ms Hutchings did not give evidence on the further hearing in the Magistrates' Court then the defendant could not succeed; and moreover, that the original order must be reinstated. Whilst the solicitor's *bona fides* are not in question, what his Honour said, whether in his Ruling or in his Reasons, did not warrant such a submission, nor warrant its acceptance by the Magistrate.

21. In saying in his Ruling that before Wilson could ultimately succeed it would be incumbent upon him to satisfy the Magistrates' Court that the original decision had been based upon fraud, and that that would almost certainly only be done "if Mrs Hutchings (was) called to give evidence along the lines of her affidavit, and in fact (did) so", his Honour was making two things very clear. First, that he contemplated there would be a re-hearing. Second, that he contemplated, as a matter or probability, that the outcome of the re-hearing might be different depending upon whether Ms Hutchings gave evidence or not and, in the event that she did so, what that evidence was.

22. The import of what his Honour said in that connection was reinforced by the observation in his Reasons that if Myles was to be believed then there was no fraud perpetrated, in which case the judgment of 1994 would not be disturbed. In context his Honour undoubtedly meant that if Myles' account was accepted the outcome of the re-hearing must be the same as it had been in 1994.

23. Today, Mr Barker of counsel for the respondent submitted that, whilst it might be said that Harper J had contemplated that there would be a re-hearing, nonetheless, his Honour had, in effect, given a direction under s109(6) of the *Magistrates' Court Act* that the issue for determination was not the general issue whether Myles had proved his claim against Wilson, but rather a determination of the question whether the judgment obtained by Myles in 1994 had been obtained by fraud.

24. In my opinion, nothing that his Honour said could properly be regarded as such a direction. It seems to me that all his Honour was saying in the various passages to which I have referred was that, in substance, Myles either had a good claim or a fraudulent claim. It was a good claim if there had been a wages agreement, as Myles alleged and the defendant denied, because it was indisputable that Wilson had not paid Myles amounts that would have been payable under such an agreement. On the other hand, if there was no such agreement, then it was fraud and not a matter of mere misunderstanding. So, for example, Myles had introduced into evidence at the first trial a diary which purported to show hours worked and moneys due. Yet according to Ms Hutchings' affidavit the diary entries had been late-concocted, and she had been a party to their preparation. There was, I think, a stark dispute between the parties, and it was a dispute which eschewed, as I said a moment ago, any suggestion of parties of honest mind misapprehending the true situation.

25. His Honour's references to fraud, then, should be understood in the way I have described. It would be greatly surprising, indeed, if his Honour had meant anything different. On a re-hearing, it might or might not be the case that Ms Hutchings would give evidence. One can imagine more than one reason why she should not wish to do so. She had admitted perjury in her affidavit and, as his Honour said, she had either perjured herself in the affidavit or she had perjured herself at the first trial. It could hardly be supposed that cross-examination would have been a pleasant experience for her. Again, her affidavit referred to a long and unhappy relationship with Myles, a relationship punctuated by physical and mental abuse, together with a variety of court proceedings. If there was any truth to those allegations at all, one might anticipate her being a reluctant witness against Myles in open court.

26. If Ms Hutchings did not give evidence, the significance attaching to that fact might be seized upon by one or other party. For the defendant, it might be said that she was allegedly the author of part of the diary relied upon by Myles, yet she was not called. For Myles, it might be said that she had been a deponent in the review proceeding, yet was not prepared to go into the witness box; and that his own failure to call her was readily explicable by the history of matrimonial disputation.

27. What a Magistrate might make of the failure of one party or the other to secure Ms Hutchings' attendance must be conjectural, as his Honour would have realised. Moreover, if Ms Hutchings did not give evidence, then, as I understand the proceedings in the Magistrates' Court, the case was likely to resolve very much into one man's word against another. And in that situation — bearing in mind that Myles carried the onus of proof — it would not necessarily follow that his case would prevail.

28. On the other hand, suppose Ms Hutchings were to give evidence. It might be to one effect

or the other. Either way, it would be subject to attack. Its impact upon the court's decision would be difficult to predict.

29. Matters such as those to which I have briefly referred would be such as could influence the outcome of a re-hearing. Certainly it could not be supposed that his Honour did not have such obvious considerations in mind. That makes it even less likely that he intended that the re-hearing in the Magistrates' Court be a re-hearing confined to the question whether the original order had been obtained by fraud.

30. In the event, as I said a little earlier, the appeal must be allowed, the order of the Magistrates' Court made 28 September 1999 set aside, and the proceeding — by which I mean the proceeding commenced in the Magistrates' Court by complaint issued 7 December 1993 — be reheard in accordance with the order of Harper J made 21 August 1998.

31. The costs of the Magistrates' Court hearing on 28 September 1999 should be costs in the cause.

32. The respondent must pay the costs of this appeal.

33. I grant the respondent a certificate under the *Appeal Costs Act* 1998.

APPEARANCES: For the appellant Wilson: Mr MH Whitten counsel. Saines & Partners, solicitors. For the respondent Myles: Mr L Barker, counsel. Power & Bennett, solicitors.
