40/11; [2011] VSC 585

SUPREME COURT OF VICTORIA

TRKULJA v GIBSONS SOLICITORS PTY LTD

Cavanough J

15 November 2011; Reasons published 16 November 2011

ADMINISTRATIVE LAW – CLAIM FOR ALLEGED DEBT FOR LEGAL FEES – SUMMARY ORDER MADE AGAINST DEFENDANT IN HIS ABSENCE – APPLICATION FOR REHEARING – ISSUES RAISED AS TO SERVICE OF APPLICATION FOR SUMMARY ORDER – MAGISTRATE REFUSED TO HEAR AND DETERMINE QUESTION WHETHER SUMMARY ORDER HAD BEEN REGULARLY OBTAINED – MAGISTRATE REQUIRED DEFENDANT TO DEMONSTRATE ARGUABLE DEFENCE – ERROR OF LAW ON FACE OF RECORD – JURISDICTIONAL ERROR – DENIAL OF PROCEDURAL FAIRNESS – DECISION REFUSING APPLICATION FOR REHEARING QUASHED BY CONSENT.

An order in civil proceedings was made against T. without any or any sufficient service of the notice of application for summary judgment. T. applied for a rehearing but the Magistrate declined to entertain the issues as to service and required T. to show that he had an arguable defence on the merits regardless of whether the prior order for summary judgment had been regularly obtained. Upon application to quash and redetermine—

HELD: Application granted. Remitted to the Magistrates' Court to be re-heard and determined by another Magistrate.

1. As the order made in the proceeding was obtained without any or any sufficient service on the defendant of notice of application for summary judgement, the judgment or order was irregularly obtained and the defendant was entitled as a matter of right to have it set aside.

2. Accordingly, as the magistrate refused to entertain the issues as to service but proceeded on the basis that the applicant needed to demonstrate an arguable defence, the Magistrate was wrong in law to do so and this led to the applicant being denied procedural fairness or natural justice.

CAVANOUGH J:

1. Final orders have been made by consent in this proceeding. The orders involved setting aside a magistrate's decision and requiring the relevant matter to be re-heard and re-determined. The orders also involved some unusual procedural steps. So it is desirable to explain the circumstances briefly.[1]

2. The plaintiff was Mr Milorad Trkulja. He challenged, among other things, a decision and orders made by his Honour Magistrate Braun on 15 March 2011. Magistrate Braun had refused Mr Trkulja's application (made under s110 of the *Magistrates' Court Act* 1989 and/or r22.15 of the *Magistrates' Court General Civil Procedure Rules* 2010 to set aside orders made by another magistrate against Mr Trkulja in his absence on 20 January 2011 upon an application for summary judgment for alleged outstanding legal fees brought by Gibsons Solicitors Pty Ltd ("Gibsons").

3. Mr Trkulja was not legally represented in the Magistrates' Court proceeding. Nor was he legally represented in this proceeding. His command of English, especially written English, is limited.

4. Mr Trkulja commenced this proceeding by filing a document entitled "Notice of Appeal". The notice recited that the appeal was brought under s109 of the *Magistrates' Court Act* 1989. However, Magistrate Braun's order refusing Mr Trkulja's application for a re-hearing was an interlocutory order, not a final order.[2] For that reason it was not amenable to appeal under s109, and any challenge to the order could only be brought by judicial review under Order 56 of the *Supreme Court (General Civil Procedure) Rules* 2005.[3]

5. When the matter came on before me for hearing, the parties consented to such orders as may be appropriate to convert this proceeding into an application for judicial review. In my view such a course was available and appropriate in this case.[4]

6. The parties also consented to the setting aside or quashing of the orders of his Honour Magistrate Braun. They did so because Mr Trkulja alleged, and Gibsons ultimately came to accept, that the learned magistrate's decision was vitiated in that he proceeded on the basis that Mr Trkulja needed to demonstrate an arguable defence on the merits regardless of whether or not the prior order for summary judgment had been regularly obtained. Having read the transcript of the hearing in the Magistrates' Court, I was satisfied that the learned magistrate did proceed on that basis. Further, I was satisfied that he was wrong in law to do so and also that this led to Mr Trkulja being denied procedural fairness or natural justice.

7. Issues in relation to service of the application for a summary order were raised before Magistrate Braun by affidavits filed by Mr Trkulja and by his foreshadowing of the submissions he proposed to make in that regard. Gibsons claimed that they had sent notice of the application for a summary order to Mr Trkulja by registered post. Mr Trkulja denied that Gibsons had done so. The registered parcel had been returned to Gibsons unclaimed on the very day (20 January 2011) of the making of the summary order. In any event, it is by no means clear that service by registered post, as distinct from ordinary post, would have been good service in this case.[5] Even assuming, contrary to Mr Trkulja's contention at the time, that the relevant documents were sent to him by registered post and that a postal notification was left for him at his address for service accordingly, it seems that the documents were not actually received by Mr Trkulja, since they were returned unclaimed. In any event, Magistrate Braun refused to entertain the issues concerning service. He referred to *Rosing v Ben Shemesh*[6] and *Kostokanellis v Allen*[7], but those cases relate to the principles applicable where a party seeks to set aside a judgment or order that has been regularly obtained. Where a judgment or order is irregularly obtained, the party affected is entitled *ex debito justitiae* to have it set aside. No affidavit of merits is required.[8] Mr Trkulja had a case to put to his Honour Magistrate Braun that the orders in question had been obtained without any or any sufficient service on him of notice of Gibsons' application for summary judgment. The learned magistrate erroneously refused to hear and determine that case.

8. Given the position eventually adopted by the parties, and given that the approach taken by Magistrate Braun was evident from the oral reasons he gave for his decision, I was satisfied that the decision and orders of Magistrate Braun were vitiated by error of law on the face of the record;[9] or by jurisdictional error constituted by the magistrate misapprehending the limits of his powers;[10] or by the denial to Mr Trkulja of procedural fairness or natural justice.[11] Indeed it seemed to me that the situation probably fell under each of those classifications. Hence I considered that orders in the nature of *certiorari* and mandamus were appropriate.

9. The parties were in agreement before me that when they return to the Magistrates' Court hereafter they will seek by consent an order setting aside the summary order made in favour of Gibsons on 20 January 2011. Nevertheless the parties jointly sought a further order from this Court such that, when they so return to the Magistrates' Court, it will be constituted by a magistrate other than Mr Braun. I was prepared to include such an order by consent.[12]

10. The parties were in agreement that all previous orders for costs in this proceeding should be set aside and that each party should be left to bear their own costs of this proceeding. Given the procedural history of this matter, such a result was appropriate.

11. I saw no need to require service of originating process on the Magistrates' Court. If served, the Court, acting properly, would almost certainly have taken no active part in the proceeding.[13]

12. Accordingly, on 15 November 2011 I made orders by consent in the following form:

> "(1) The Magistrates' Court of Victoria be added as the second defendant to this proceeding.
> (2) The proceeding continue as if it had been commenced as an application for judicial review pursuant to Order 56 of the *Supreme Court (General Civil Procedure) Rules* 2005.
> (3) Service of originating process on the Magistrates' Court of Victoria be dispensed with.
> (4) The decision and the orders (including the order for costs) made by his Honour Magistrate Braun on 15 March 2011 in the matter of *Gibsons Solicitors Pty Ltd (ACN 101 209 401) v Milorad Trkulja* (case number A12605035) be quashed.
> (5) The application for re-hearing made by Milorad Trkulja in case number A12605035 be re-heard and re-determined according to law by the Magistrates' Court of Victoria constituted other than by his Honour Magistrate Braun.

(6) Each order as to costs previously made in this proceeding is set aside and the parties shall bear their own costs of this proceeding.

(7) Otherwise this proceeding is dismissed."

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[1] See Judicial Review and Appeals List Practice Note (No 4 of 2009) para 6.3.
[2] *Guss v Johnstone*, Supreme Court of Victoria, Beach J, 23 March 1994, unreported; *Bahonko v Casey City Council* [2008] VSC 571 (Williams J).
[3] See previous footnote.
[4] See *Supreme Court (General Civil Procedure) Rules* 2005 rr1.14, 1.15, 2.01, 2.02, 2.03 and 2.04 and compare r4.07; *Roy v Kensington & Chelsea Family Practitioners Committee* [1991] UKHL 8; [1992] 1 AC 624 especially at 655; [1992] 1 All ER 705; [1992] IRLR 233; [1992] 3 Med LR 177; [1992] 2 WLR 239; Bailey & Arthur, *Civil Procedure Victoria* [I 1.15.0], [I 4.07.1]. A similar course was taken in *Cooper Morrison Pty Ltd v Tennozan Pty Ltd* [2008] VSC 273 (see at [1]).
[5] See *Magistrates' Court Civil Procedure Rules* 2009 r5.07(1)(b); *Magistrates' Court General Civil Procedure Rules* 2010, r6.07(1)(b); *Interpretation of Legislation Act* 1984 s49(1) cf s49(2).
[6] [1960] VicRp 28; [1960] VR 173.
[7] [1974] VicRp 71; [1974] VR 596.
[8] *Chitty v Mason* [1926] VicLawRp 60; [1926] VLR 419 (Owen Dixon AJ) at 423; *Daly v Silley* [1960] VicRp 57; [1960] VR 353 at 355; *Wilson v Magistrates' Court of Victoria* [2001] VSC 290 at [15].
[9] *Administrative Law Act* 1978, s10; *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531 at 575-578 [78-90]; (2010) 262 ALR 569; (2010) 84 ALJR 154; (2010) 113 ALD 1; (2010) 190 IR 437.
[10] *Kirk* at 566-575 [54]-[77]; cf *Rees v County Court* [2011] VSC 67 at [13] and cases there cited.
[11] *Craig v South Australia* [1995] HCA 58; [1995] 184 CLR 163 at 175-176; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[12] *State of Victoria v Subramanian* [2008] VSC 9 at [62]; (2008) 19 VR 335 and cases there cited.
[13] *R v Australian Broadcasting Tribunal; ex parte Hardiman* [1980] HCA 13; (1980) 144 CLR 13 at 35-36; 29 ALR 289; (1980) 54 ALJR 314.

APPEARANCES: For the plaintiff Trkulja: In person. For the respondent/defendant Gibsons Solicitors: Mr Kevin Dorey, solicitor. Gibsons solicitors.
