**48/01; [2001] VSC 290**

**SUPREME COURT OF VICTORIA**

# *WILSON v MAGISTRATES' COURT of VICTORIA and ANOR*

**Beach J**

**8, 21 August 2001**

**CIVIL PROCEEDINGS – APPLICATION FOR REHEARING – AFFIDAVIT IN SUPPORT CONTAINED NO DETAILS AS TO THE DEFENCE – APPLICATION GRANTED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT ACT* 1989, S110(1); *MAGISTRATES' COURT CIVIL PROCEDURE RULES*, R30.01(2).**

**1. Whilst a court always has a discretion as to whether to set aside a judgment entered against a person who did not appear in the proceeding, as a general rule, where the judgment has been obtained regularly, the court will not set aside the order except upon an affidavit of merits being filed.**
***Chitty v Mason* [1926] VicLawRp 60; [1926] VLR 419, followed.**

**2. Where an order had been obtained regularly and upon an application for rehearing the affidavit in support simply stated that the applicant "believed and continue to believe that I have a defence to this action" a magistrate was in error in granting the application and setting aside the order.**

**BEACH J:**

1. On some unspecified date in 2000 the plaintiff Brett Wilson sued the second defendant Jason Huber in the Magistrates' Court at Dandenong seeking to recover the sum of $13,076.71 which he alleges were moneys due to him under a guarantee given to him by the second defendant.

2. On 9 November 2000 the second defendant filed a notice of defence to the claim in which he disputed his indebtedness to the plaintiff on the ground that if he gave any guarantee to the plaintiff (which he denied) there was no consideration provided by the plaintiff for it.

3. The matter came before the Court for hearing on 12 April 2001. The second defendant did not appear at the hearing and not surprisingly the Magistrate entered judgment in favour of the plaintiff for the amount claimed, interest of $806.37 and costs of $3,200.

4. On 8 June the second defendant made application to the Court for a re-hearing. The application was made under s110 of the *Magistrates' Court Act* 1989 the relevant sub-sections of which read:

> "**110** (1) If a final order is made by the Court in a civil proceeding against a person who did not appear in the proceeding, that person may, subject to and in accordance with the Rules, apply to the Court for an order that the order be set aside and that the proceeding be re-heard. (2) On an application under this section, the Court may set aside the order subject to any terms and conditions that it thinks just and re-hear the proceeding."

5. Rule 30.01(2) of the *Magistrates' Court Civil Procedure Rules* 1999 reads:

> "(2) At least 14 days before the day specified in the application, a copy of the application and of any affidavit in support upon which the applicant intends to rely must be served on the other party or parties at the address for service in the complaint or notice of defence (as the case may be) unless the Court otherwise orders."

6. The application for re-hearing was returnable before the Magistrates' Court on 29 June 2001.

7. Although the application was served on the plaintiff's solicitor on 8 June 2001 the second defendant's affidavit in support was not served on the plaintiff's solicitor until 28 June. Clearly service of the application and supporting affidavit was in breach of R30.01(2).

8. When the matter came before the Magistrates' Court on 29 June 2001 counsel for the plaintiff submitted to the Court that the application should be dismissed firstly on the ground that there had been short service of the second defendant's affidavit and secondly on the ground that the second defendant had not deposed to the existence of any defence on the merits and had not stated on oath what the defence was.

9. Insofar as the latter submission is concerned the affidavit of the second defendant sworn in support of his application for a re-hearing simply states:

> "2. At all material times I believed and continue to believe that I have a defence to this action."

10. The proceedings before the Magistrates' Court on 29 June were tape recorded.

11. The passage in the transcript relevant for present purposes commences at paragraph 33 and continues to paragraph 50. Those paragraphs read:

> "33. Mag: I wouldn't dismiss the application simply because the circumstances in which the [indecipherable] struck out. That is to say it has gone through pre-hearing [indecipherable]. 34. Def: I'll seek an adjournment - 35. Mag: I certainly wouldn't shut the defendant out on that basis alone. 36. Def: I'll seek an adjournment of two weeks Your Worship. 37. Mag: The question is really whether one should even adjourn it because the only consequence of that, on a reasonable [indecipherable] would be that costs will increase and time will pass, and the result will be exactly the same. 38. Def: Well, Your Worship, I note my friend's instructor is in court and I think his client is probably even in court. Someone is in the back. But I know it is his instructor. I'm sure they've heard your comments. If he maintains what he maintains, I have to seek an adjournment Your Worship for a couple of weeks. Well I suppose the wheel always turns in these sorts of cases. 39. Mag: Mr. Hardy? 40. Pl: It is hard to really oppose an application for an adjournment. Then there are the costs consequences of the adjournment Your Worship. It is not hard to read rule 30 Your Worship. 41. Mag: What did you say? 42. Pl: It is not hard to open the rules and read rule 30 and see what is required - 43. Mag: Yes, well let me take the broad view. The laws always give way to the interests of justice, don't they Mr. Hardy. 44. Pl: Yes, and that is why I have attended today Your Worship. 45. Mag: I am glad you did Mr. Hardy, but I intend to grant the application notwithstanding. What are your costs? 46. Pl: Costs today is $196.00. 47. Def: Is it the adjournment or the full application Your Worship, which one? 48. Mag: I am granting the application for the re-hearing. 49. Pl: Sorry, you are granting the application to re-hear? 50. Mag: Yes. I will ask you again what your costs are on that basis."

12. The Magistrate then set aside the order made on 12 April 2001 and made an order in favour of the plaintiff in respect of the costs of the application.

13. On 27 July 2001 the plaintiff filed an originating motion in the Court naming as defendants the Magistrates' Court of Victoria and Jason Huber and by which he seeks an order in the nature of *certiorari* quashing the order of the Magistrates' Court of 29 June 2001.

14. The plaintiff relies on numerous grounds in support of his application. I do not consider any good purpose will be served by setting them out in my reasons for judgment as I have come to the conclusion that in making the order he did the Magistrate failed to apply himself to the real issue in question namely whether the second defendant had a defence to the plaintiff's claim on the merits and in failing to do so made an error of law which went to his jurisdiction.

15. Whilst a court always has a discretion as to whether to set aside a judgment entered against a person who did not appear in the proceeding, as a general rule, where the judgment has been obtained regularly, it will only do so upon an affidavit of merit. One need go no further in that regard than *Chitty v Mason*[1]. At p423 Dixon AJ as he then was said:

> "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."

16. Clearly the rule is not inflexible. See for example *Collins Book Depot Pty Ltd v Bretherton*[2] and *Microsoft (International) Pty Ltd v Total Peripherals Pty Ltd*[3]

17. But there were no circumstances justifying a departure from the rule in the present case.

The plaintiff was entitled to require the second defendant to file an affidavit on the merits and the simple fact of the matter is that he did not do so.

18. I order that the order made by the Melbourne Magistrates' Court on 29 June 2001 setting aside the order made on 12 April 2001 in a proceeding in which the present plaintiff was plaintiff and the present second defendant was defendant be set aside.

19. I order that the second defendant pay the plaintiff's costs of this proceeding including any reserved costs.

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[1] [1926] VicLawRp 60; [1926] VLR 419.
[2] [1938] VicLawRp 11; [1938] VLR 40; [1938] ALR 87.
[3] (1998) VSC 50 (unreported 31 August 1988).

**APPEARANCES**: For the Plaintiff Wilson: Mr SP Hardy, counsel. Einsiedels, solicitors. For the second Defendant Huber: Mr D Dealehr, counsel. GR Campbell, solicitor.

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