Drover v Northern Territory of Australia & Ebatarinja [2004] NTCA 11

PARTIES:	SERENA DROVER v NORTHERN TERRITORY OF AUSTRALIA and ROLAND EBATARINJA
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 3 of 2003 (20207688)
DELIVERED:	22 October 2004
HEARING DATES:	26 August 2004
JUDGMENT OF:	ANGEL & RILEY JJ, PRIESTLEY AJ

CATCHWORDS:

APPEAL – statutory interpretation – extension of time – legal proceedings – whether learned Judge erred in finding that she had no power to extend time for seeking leave to appeal.

APPEAL – statutory interpretation – whether s 44(1) of Limitation Act applies to s 19(3) of the Local Court Act 1999 (NT).

LIMITATION ACT – limitation period – prescribed by "other enactment" - whether provision to extend time applies – Limitation Act 1981 (NT) s 5.

LEGISLATION:

Local Court Act s 19
Limitation Act s 44, s 5 and s 3

CASES:

LMP v Collins & Ors (1993) 112 FLR 289
Patterson v Northern Territory of Australia & Anor (2001) 165 FLR 296
Pucciarmati v Walker Nominees Pty Ltd (In Liquidation) [2002] NTSC 13
Vershuuren v Toms' Tyres Corporation Ltd (1992) 86 NTR 1
Fersch v Power and Water Authority & Ors (unreported, 14 August 1989, NTSC)
House v R (1936) 55 CLR 499
Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541
The Commonwealth of Australia v Amann Aviation Pty Ltd (1991) 174 CLR 64

REPRESENTATION:

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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Drover v Northern Territory of Australia & Ebatarinja [2004] NTCA 11
No AP 3 of 2003 (20207688)

BETWEEN:

SERENA DROVER
Applicant

AND:

NORTHERN TERRITORY OF AUSTRALIA
First Respondent

ROLAND EBATARINJA
Second Respondent

CORAM: ANGEL & RILEY JJ, PRIESTLEY AJ

REASONS FOR JUDGMENT

(Delivered 22 October 2004)

ANGEL J:

[1] I agree that the time limit in s 19(3) Local Court Act is a time limit which can not be extended pursuant to s 44 Limitation Act.

[2] The particular provisions of s 19 Local Court Act pointedly permit extensions of time for appeals from final orders but not for applications for leave to appeal from other orders. This indicates a clear intention that the

general operation of s 44 Limitation Act is to have no application to the particular operation of s 19 Local Court Act.

[3] Contrary to the submission of the applicant, the decision – if not the reasoning – in *Patterson v Northern Territory of Australia & Anor* (2001) 165 FLR 296 is consistent with the reasoning of the Court of Appeal in *Vershuuren v Toms' Tyres Corporation* (1992) 86 NTR 1 at 7–8.

[4] Section 44 Limitation Act operates generally to legislative time limits but only in the absence of an intention to the contrary. In the present case s 19 Local Court Act indicates a contrary intention.

[5] Although, strictly speaking, the correctness of the reasoning in *Vershuuren* at 7–8 does not arise in the present appeal, given the respondent's reliance on *Patterson* and *Fersch v Power & Water Authority & Ors* (unreported 14 August 1989, NTSC), it is appropriate that we affirm the correctness of the reasoning in *Vershuuren* and the incorrectness of the reasoning in *Patterson* and in *Fersch*. The construction of s 5 Limitation Act favoured in *Patterson* and in *Fersch* emasculates the plainly intended general remedial effect of s 44. As Lord Selborne LC said in *Caledonian Railway Company v North British Railway Company* (1881) 6 App Cas 114 at 122:

> "The more literal construction ought not to prevail, if …it is opposed to the intentions of the Legislature, as apparent by the statute; and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated."

[6] I agree that in respect of file 20207688 the appeal should be allowed, that leave to appeal with an extension of time should be granted, and that otherwise the appeal should be dismissed. I also agree that no order for costs should be made.

RILEY J:

[7] On 17 May 2002 the applicant filed 14 applications for extension of time for the commencement of applications for assistance under the Crimes (Victims Assistance) Act. The applications related to alleged assaults upon the applicant by her husband, Roland Ebatarinja, which were said to have occurred between April 1996 and October 1999. Each application was given a separate Local Court file number.

[8] The applications were heard by the Deputy Chief Magistrate and, on 18 December 2002, each of the 14 applications was dismissed. The applicant then applied for leave to appeal to the Supreme Court against the decisions of the magistrate.

[9] On 20 December 2002 the solicitor for the applicant sought to lodge one application for leave to appeal in respect of the 14 separate files. He was advised by the registry staff that it would be necessary to lodge a separate application in respect of each file. Notwithstanding that advice the solicitor elected to file only one application and nominated the file numbered 20207688 as the relevant file. Although it was submitted to this Court that the concern of the solicitor related to the amount of filing fees payable

should 14 separate applications be filed, it is to be noted that he was informed that a stay of payment of such fees could be sought. He chose not to proceed in that manner.

[10] When the matter came before the Supreme Court a threshold issue between the parties was whether the court had before it one application for leave to appeal or 14 such applications. During the course of the hearing two of the applications were withdrawn leaving a balance of 12 applications for the consideration of the court. The learned judge determined that she could only deal with the application for leave to appeal in relation to the file numbered 20207688, that being the only file the subject of an application. She concluded that she did not have power to amend the single application to include the other 11 applications because the applications were out of time and there was no power available to her to extend time for seeking leave to appeal. This decision is now the subject of challenge in this Court.

[11] The situation is governed by s 19 of the Local Court Act. Subsections 19(1), (2) and (3) are in the following terms:

> "(1) A party to a proceeding may –
>
> (a) within 28 days; or
>
> (b) with the leave of the Supreme Court, after the expiration of 28 days,
>
> after the day on which the order complained of was made, appeal to the Supreme Court, on a question of law, from a final order of the Court in that proceeding.

(2) The Supreme Court may grant leave under subsection (1)(b) and the appellant may proceed with the appeal if the Supreme Court –

(a) is of the opinion that the failure to institute the appeal within the period referred to in subsection (1)(a) was due to exceptional circumstances; and

(b) is satisfied that the case of any other party to the appeal would not be materially prejudiced because of the delay.

(3) A party to a proceeding may, within 14 days after the day on which the order complained of was made, appeal to the Supreme Court from an order of the Court, (other than a final order) in that proceeding, with the leave of the Supreme Court."

[12] The parties agree that each of the applications is governed by s 19(3) rather than s 19(1) of the Act. The order made by his Worship was, in each case, an order "other than a final order".

[13] Section 19(3) provides a period of 14 days within which leave to appeal to the Supreme Court may be sought. In contrast with s 19(1), which deals with final orders, there is no power under s 19(3) to extend the limitation period. The Local Court Act specifically permits an extension of time where the matter is an appeal from a final order but does not make provision for an extension of time within which to seek leave to appeal.

[14] Section 19(3) of the Local Court Act has been the subject of consideration in a series of single judge decisions in the Supreme Court. In *LMP v Collins & Ors* (1993) 112 FLR 289 Kearney J held (at 299-300) that the time limit found in s 19(3) is "an express mandatory statutory time limit" which could

not be extended. This view was accepted by Mildren J in *Patterson v Northern Territory of Australia and Another* (2001) 165 FLR 296 and by Martin J in *Pucciarmati v Walker Nominees Pty Ltd (In Liquidation)* [2002] NTSC 13. Before this court the applicant submitted that her Honour erred in adopting the same approach.

[15] It was submitted by the applicant that, whilst s 19(3) of the Local Court Act itself did not provide power to grant such an extension of time, section 44(1) of the Limitation Act had application to achieve that end. It was submitted that the decisions in *Patterson's* case and those cases to like effect were inconsistent with the earlier decision of the Court of Appeal in *Vershuuren v Toms' Tyres Corporation Ltd* (1992) 86 NTR 1.

[16] Section 44(1) of the Limitations Act is in the following terms:

> "(1) Subject to this section, where this or any other Act, or an instrument of a legislative or administrative character prescribes or limits the time for –
>
> (a) instituting an action;
>
> (b) doing an act, or taking a step in an action; or
>
> (c) doing an act or taking a step with a view to instituting an action,
>
> a court may extend the time so prescribed or limited to such an extent, and upon such terms, if any, as it thinks fit."

An "action" is defined to include any proceeding in a court of competent jurisdiction. The word "proceeding" has a wide and general application and

the applications for leave to appeal in the present matter would fall within the meaning of that word for the purposes of the Limitation Act. Prima facie s 44(1) of the Limitation Act provides the court with jurisdiction to allow an extension of time for leave to appeal under s 19(3) of the Local Court Act. However, as was pointed out in *Patterson's* case, there is a need to consider the impact of s 5 of the Limitation Act which provides:

> "This Act does not apply to any action for which a period of limitation is prescribed by any other enactment other than an enactment referred to in s 3."

[17] The enactments referred to in s 3 include Imperial Acts and Acts of the State of South Australia which are "to cease to apply as laws of the Territory". The section also refers to Acts of the State of South Australia and of the Territory which are, in part, amended. The section goes on to make provision for the transition from the repealed or amended legislation to the Limitation Act. The Local Court Act is not an enactment referred to in s 3. In those circumstances the respondent submitted there is no power to extend the time limited by s 19(3) of the Local Court Act by reference to s 44 of the Limitation Act or otherwise.

[18] The contrast between s 5 of the Limitation Act which provides that the Act does not apply to any action for which a period of limitation is prescribed by any other enactment and s 44(1) of the Act which provides that it will apply to "this or any other Act" is evident. Efforts have been made to reconcile

the two in *Fersch v Power and Water Authority & Ors* (unreported, 14 August 1989, NTSC) and in *Vershuuren v Toms' Tyres* (supra).

[19] In *Vershuuren* the Court of Appeal was dealing with s 23(3) of the Workers Compensation Act 1951 (NT). The appellant had wished to take proceedings against his employer for damages pursuant to that section. Section 23(3A) provided that:

> "A worker shall not be entitled to take proceedings under sub-section (3) unless he commences those proceedings –
>
> (a) within three years after the date upon which he received payment, or the first payment of compensation under this Act; or
>
> (b) if, on that date, he is under a legal disability or, as a result of the injury, a physical disability that prevents or hinders him from commencing the proceedings, then within three years after the date on which the disability ceases."

[20] The trial judge ruled that the appellant had received compensation for the purposes of s 23(3) of the Act and that his cause of action was, accordingly, subject to the inflexible limitation period prescribed by s 23(3A) of the Act. Further it was held that the appellant was not entitled to an extension of time pursuant to the Limitation Act.

[21] The Court of Appeal disagreed with the trial judge. The court determined that the worker had not received compensation under the Workers Compensation Act and therefore concluded that the provisions of s 23(3A) were not engaged in any event. That being so the provisions of the

Limitation Act applied. In those circumstances it was unnecessary for the court to address the question that now confronts this Court.

[22] However in addressing the submissions placed before it the court observed that a person may be entitled to an extension of the time limited by s 23(3A) of the Workers Compensation Act by reference to s 44(1) of the Limitation Act. The argument focused upon the correct interpretation of s 44(1) read in conjunction with s 5 of the Limitation Act. The trial judge had concluded that since the Workers Compensation Act prescribed a period of limitation and was not an enactment referred to in s 3 of the Limitation Act then, by virtue of s 5, s 44 of the Limitation Act had no application. It followed that the Supreme Court had no jurisdiction to extend the time prescribed in the Workers Compensation Act. In disagreeing with the trial judge the court said (at 7):

> "Section 44(1), on its face, gives power to the court to extend a time limitation prescribed in 'this or any other Act …' This broadly expressed power should only be confined within narrow limits if there is a plain and unambiguous provision elsewhere in the Act which requires this to be done. We do not think s 5 is such a provision. In our opinion the words of that section are concerned with the preservation of special limitation periods prescribed by enactments other than those referred to in s 3. The effect of s 5 is only that those limitation periods are preserved. The effect of the section is not to deprive s 44 of its efficacy to permit the making of orders for extensions of periods of time which are prescribed by the Limitation Act or any other Act."

[23] In *Fersch* Martin J had approached the matter in the following way:

> "Not without some hesitation I have decided that s 5 must be given its plain meaning. That can be achieved by construing the words

> ‘any other Act’ in s 44(1) as being a reference to those Acts referred to in s 3, so that where any of those Acts prescribe a limitation period, a court may exercise the general unfettered discretion. Section 9(b) permits actions commenced before the commencement of the Limitation Act to continue as if that Act had not been passed, and s 9(2) provides that the time for bringing proceedings in respect of a cause of action that arose before that commencement shall, if it has not then expired, expire at the time it would have expired had the Act not come into operation. Those proceedings and causes of action continued to be governed by the law in operation prior to the commencement of the Act, notwithstanding the repeal or amendments affected to the Acts referred to in s 3. It is those Acts which are referred to in s 44(1).”

[24] The Court of Appeal in *Vershuuren* was unable to agree with this reasoning, noting that the interpretation of s 44(1) provided the section with “virtually no work to do save in respect of extensions of limitation periods prescribed by the Limitation Act itself”. It was noted that the Act was intended to codify the law and to make provision for extensions of limitation periods in appropriate cases.

[25] The approach of the Court of Appeal in *Vershuuren* to s 44(1) reflects the intention of the provision as expressed by the responsible Minister in his second reading speech. Section 44(1) relates to the future and, in particular, to Acts other than the Limitation Act passed after the Limitation Act. Where such an Act prescribes a limitation period of the kind defined in paragraphs (a), (b) or (c) of s 44(1) and says nothing about the extension of time prescribed or limited then s 44(1) will have application. If, as in the present case, the later provision (s 19(3) of the Local Court Act) itself provides for an extension of time, then the intention of the legislature can be seen to be to depart from the extension provided for by the Limitation Act to

the extent of any difference between them. As I have pointed out, s 19 of the Local Court Act permits extensions of time for appeals from final orders but not for applications for leave to appeal. There is a clear expression of intention that s 44(1) of the Limitation Act does not have application in relation to s 19 of the Local Court Act.

[26] In my view there is no power to extend the time limited by s 19(3) of the Local Court Act whether by use of s 44 of the Limitation Act or otherwise. The same conclusion was reached in *Patterson's* case and her Honour did not err in following that case.

[27] The result is that the trial judge was correct in concluding that she could only deal with the application for leave to appeal in relation to the file numbered 20207688. It is therefore necessary for this Court to consider the application in relation to that file.

FILE 20207688

[28] In determining the applications for extension of time the learned Deputy Chief Magistrate undertook a painstaking review of the voluminous material placed before him. That material included hospital notes, Congress notes, ambulance notes, various affidavits and the lengthy report of a psychologist. His Worship sought to extract from that material the information relevant to each application. He then delivered detailed and careful reasons for dismissing each application.

[29] When the matter came before the Supreme Court on appeal the judge considered it in light of the oft quoted principles expressed by the High Court in *House v R* (1936) 55 CLR 499 at 504-505:

> "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for so doing. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

Those principles apply equally to the consideration of the matter in this Court. Her Honour dismissed the appeal.

[30] In considering each of the applications the test applied by his Worship was identified by him as being to consider: "(1) the reason for getting out of time; (2) any delay since the discovery of the omission; (3) whether the party out of time has an arguable case; and (4) any prejudice caused to the other party or parties by the omission".

[31] His Worship referred to *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541. In that case the application of similar statutory

provisions was discussed by members of the High Court in different ways. Dawson J observed that the section there under consideration "confers a discretion upon a court to extend time and that discretion should only be exercised in favour of an applicant where, in all the circumstances, justice is best served by so doing". He said the onus of satisfying the court that the discretion should be exercised in favour of the applicant lies on the applicant. His Honour also agreed with McHugh J that once the legislature has selected a limitation period, to allow the commencement of an action outside that period is prima facie prejudicial to the defendant who would otherwise have the benefit of the limitation.

[32] In a joint judgment Toohey and Gummow JJ said (at 548-549):

> "A material consideration (the most important consideration in many cases) is whether, by reason of the time that has elapsed, a fair trial is possible. Whether prejudice to the prospective defendant is likely to thwart a fair trial is to be answered by reference to the situation at the time of the application."

[33] McHugh J discussed the rationales for the enactment of limitation periods (552) and noted that a limitation period should not be seen as an arbitrary cut-off point unrelated to the demands of justice or the general welfare of society. Rather it represents the judgment of the legislature that the welfare of society is best served by causes of action being litigated within the limitation period. He observed that a limitation provision is the general rule and an extension provision is the exception to it. The discretion to extend time should be seen as requiring the applicant to show that his or her case is

a justifiable exception to the rule that the welfare of the state is best served by the limitation period in question. The applicant has the positive burden of demonstrating that the justice of the case requires the extension. He went on to say (555):

> "… But the justice of a plaintiff's claim is seldom likely to be strong enough to warrant a court reinstating a right of action against a defendant who, by reason of delay in commencing the action, is unable to fairly defend itself or is otherwise prejudiced in fact and who is not guilty of fraud, deception or concealment in respect of the existence of the action …
>
> The general rule that actions must be commenced within the limitation period should therefore prevail once the defendant has proved the fact or the real possibility of significant prejudice."

[34] The only application that remains on foot before this Court is that dealt with in file 20207688. The file relates to an incident said to have occurred on 28 October 1999 at Larapinta Valley Camp where Mr Ebatarinja is alleged to have assaulted the appellant with a rock. Although the date of the incident was identified as 28 October 1999, reference to the hospital records suggests the correct date was 27 October 1999.

[35] His Worship dealt with the matter by observing that it did not appear to have been reported to the police and the applicant was relying upon hospital notes. However he also noted that there was a reference in the notes to the fact that "she has been to police, given statement". His Worship said:

> "Judging this case will be made difficult by a number of factors. Firstly, there is the lack of a police report, although, I have pointed out that a social worker's note of 1 November 1999 (which may, or

may not relate to this incident) points out that she did make a statement to police. The notes also state:

> (27 October 1999) 'rang police when finished – PROMIS number 183520'.

Unfortunately, we do not have any note from the police to support these alleged reports. Secondly she was admitted to hospital (at least outpatients) on 27 October 1999, the date before the alleged incident. The notes for that date state:

> 'Hit all over body with a rock. Kicked to chest'."

[36] In another part of his reasons for decision his Worship recorded the information from the hospital notes as follows:

> "27 October 1999: At ED, with injuries from assault with rock 'Hit all over body with a rock. Kicked to chest. Stitches to the scalp'."

[37] Later in his reasons his Worship noted that dealing with this particular case "is complicated by the question of its being reported to police". The hospital notes record that she has "been to police, given statement". The evidence of the matter having been reported to the police was bolstered by the identification of a PROMIS number. PROMIS is, as his Worship noted, the "police computer system for reporting offences". His Worship recorded that there were no copies of statements proffered at this stage and there was "no evidence whatsoever" of the circumstances surrounding the claim. He said there was no evidence that the assailant was the second respondent and observed that it would be difficult to quantify the applicant's claim due to the paucity of medical information.

[38] His Worship stated that the court was put in "an invidious position in endeavouring now, years after the events, in trying to quantify" the claims. He also observed that the respondents would be placed in "an impossible situation in trying to verify or refute the applicant's claims".

[39] His Worship dealt with the issue of delay in general terms and concluded that it was inordinate. He stated that no satisfactory explanation had been given for "not bringing these actions straight away, once she was told of her right to do so". Reasons for the failure had been put forward in affidavits filed on her behalf. Those reasons related to her hospital attendances and time "out bush". His Worship correctly discounted those explanations for reasons that he detailed. However his Worship did note that the applicant suffered a deficit in intellectual functioning and went on to comment that the deficit "may well be a factor in her failure to commence action sooner". He observed that she is a person who, with assistance from others, is able to function and that she knew her way to the Domestic Violence Legal Service, the hospital, Congress Medical Centre and the Central Australian Aboriginal Legal Aid Service.

[40] The general history provided by the applicant, upon which his Worship relied, included a report by a clinical psychologist who interviewed the applicant. The report is quite detailed and contained the conclusion of the psychologist that the applicant "appears to have considerably compromised intellectual function". It was observed that it is likely that her verbal comprehension is limited and very concrete and the compromised

intellectual function combined with her lack of education compounded her problem. The psychologist expressed the view that the history of violence provided by the applicant in relation to her relationship with Mr Ebatarinja has "perpetuated her trauma and a sense of learned helplessness". It was reported that the applicant is "unlikely to be able to manage her own affairs without considerable support". These expressions of opinion seem to have been overlooked by the magistrate. They strongly support a conclusion that whatever may have been the cause of the delay it should not be attributed to the applicant to her detriment.

[41] The learned magistrate accepted that there was an explanation for the failure to commence some actions within time because of ignorance of her rights until 18 June 1999. However he went on to say that the explanation thereafter (and this must apply to file 20207688) was unsatisfactory and "not wholly explained by the intellectual deficit/psychological trauma".
His Worship did not go on to explain why he considered the intellectual deficit did not explain the delay. He concluded that the delay was "not only unexplained, it is inordinate".

[42] A significant factor in the reasoning of the learned magistrate was the failure of the applicant to identify in her application the "precise physical effects" of the incident upon her. He stated this would require the court to make "some sort of guesstimate" as to the amount payable. He said that it would be "difficult to quantify the applicant's claim due to the paucity of medical information".

[43] In proceeding in this way his Worship has fallen into error. It is well established that difficulty of assessment of damages is not a bar to recovery. In such circumstances the court must do the best it can: *The Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 83. The difficulty perceived by his Worship was not a matter to be weighed in the balance in the exercise of his discretion.

[44] In my view his Worship failed to correctly identify all of the relevant facts in this particular matter. There is clear evidence of an assault on the applicant on 27 October 1999. The applicant attended at the Alice Springs Hospital on that day complaining that she had been "hit all over body with a rock". She was again seen at the hospital on 30 October 1999 when the records note "scalp assault 3 days ago". She was then admitted to the hospital on 31 October 1999 with the recorded diagnosis "multiple infected scalp wounds – infected from stitching four days before". The treating doctor is identified in the hospital records. There is no suggestion that he is not available.

[45] In relation to the identity of her assailant on that occasion it is relevant to note that the applicant refers to many assaults upon her by Mr Ebatarinja, including assaults with rocks. There is no suggestion that she has been assaulted by anyone else. The hospital notes of her attendance make reference to domestic violence, to her "boyfriend" and to the names "Roland" and "Ebatarinja".

[46] The hospital notes also refer to this matter having been reported to the police and the fact of that report is supported by the identification of a PROMIS number. There is no suggestion in the material that the alleged offending was not reported or that the report is not available to the parties.

[47] The only prejudice to the respondent which has been identified relates to the imprecision of the available information and the prospect that information may not be available. However the reference to the report to police has not been pursued and the hospital notes provide information as to persons who treated the applicant, including the doctor in charge of her treatment.

[48] When all of these matters are drawn together it is clear that there is an arguable case to be presented on behalf of the applicant, there is an acceptable explanation for her failure to pursue matters over the period of delay, there is no identified prejudice to the respondent that cannot be overcome by reference to further apparently readily available information. In my view a fair trial remains possible and justice is best served by allowing the matter to proceed.

[49] The learned magistrate erred in failing to consider and address these matters. The learned judge followed the approach of the magistrate. I would allow the appeal in relation to file 20207688. I would grant leave to appeal and grant the extension of time. In all other respects I would dismiss the appeal.

[50] Because of the way in which the application was presented to the learned magistrate and to the court below and again in this Court, and notwithstanding the limited success of the applicant, I would make no order as to costs.

PRIESTLEY AJ:

[51] I agree with Riley J.

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