(tho95027)

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

SC No. 62 of 1995

BETWEEN:

V. BRANCATISANO AND SONS FRUIT PTY LTD
Applicant

AND:

FAHRI BASACAR and
SENEL BASACAR
Respondents

Coram: THOMAS J

REASONS FOR DECISION

(Delivered 20 December 1995)

This is an application for leave to appeal from a decision of the learned stipendiary magistrate sitting in the Local Court at Alice Springs.

Leave to appeal is required by s19(3) of the *Local Court Act* 1989 (as amended) which section provides as follows:

> " A party to a proceeding (other than a small claim 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."

The application for leave to appeal and the substantive appeal proceeded to hearing at the same time.

The application for leave to appeal is in respect of an order made by the learned stipendiary magistrate on 29 November 1995 refusing an application by the applicant to have judgment set aside.

The grounds of appeal as set out in the Notice of Appeal filed on 6 December 1995 are as follows:

"1. The Learned Magistrate erred in law in not providing reasons for her Decision.

2. The Learned Magistrate erred in law in dismissing the Plaintiff's Application to set aside Judgment on the basis that:

(a) There was no prejudice to the Defendant that could not be cured by an order for costs;

(b) A Defence has been filed and the Learned Magistrate had been provided with an unsworn copy of an Affidavit by the Defendant as to its Defence and accepted that the Defence had merit.

3. The Learned Magistrate erred in law in failing to consider the prejudice to the Defendants in not setting aside the Judgment."

The applicant seeks the following orders:

"1. The Plaintiff be granted leave pursuant to Section 19(3), Local Court Act 1989 (as amended) to proceed with this Appeal.

2. That the whole of the Decision be quashed.

3. That the Judgment granted on the 28th day of September, 1995 be set aside.

4. That the action be referred to the Registrar's List for a Pre-hearing Conference.

5. That the Applicant be granted the costs of this Appeal."

On 11 July 1995, the respondents issued a Statement of Claim in the Local Court claiming the sum of twelve thousand dollars ($12,000) plus costs "for the supply of rockmelons and cherry tomatoes in December 1994 from Ti-Tree N.T. to Melbourne Vic."

On 24 August 1995, the applicant filed a Notice of Defence in which the applicant objected to the jurisdiction of the Alice Springs Court and also denied that it is indebted to the plaintiffs for the sum of $12,000 upon grounds in paragraph 2:

"(a) as the goods were supplied on consignment and were not sold by the Defendant on behalf of the Plaintiffs.

(b) the goods were not of merchantable quality nor fit for their purpose and were unsaleable.

(c) the goods were disposed of pursuant to the provision of the *Fruit and Vegetable Act 1958* and *Farm Produce Wholesale Act 1990* as they were rotten and unsaleable."

A pre-hearing conference was set for 9.00 am on 28 September 1995. Solicitors for the applicant failed to attend the pre-hearing conference on that date and the Registrar made an order that the "plaintiff may proceed as if the defence is not filed". On 2 October the plaintiff (respondent to this application) obtained judgment against the defendant (the applicant in these proceedings) in the sum of $12,000. By application dated 17 October 1995, the applicant applied for judgment to be set aside. This application was listed on 23 October 1995, on which date solicitors for the applicant attended and the matter was adjourned to 30 October 1995. On 30 October 1995, solicitors for the applicant again failed to attend and the application to set judgment aside was dismissed. On 14 November 1995, the applicant filed a further application to set aside judgment, which was listed for hearing on 29 November 1995. On 29 November, solicitors for the applicant appeared before the learned stipendiary magistrate and the respondent, Mr Basacar, attended in person. Solicitors for the applicant presented an affidavit sworn by Anthony John Morgan, solicitor, stating the reasons why solicitors for the applicant had failed to attend on 28 September 1995 and 30 October 1995. On 29 November the applicant also presented an affidavit of Joe Brancatisano, a director of the applicant company, in support of the Notice of Defence. This affidavit was presented to the learned stipendiary magistrate unsworn at the time of the hearing of the application and was sworn later the same day on 29 November 1995. At the hearing before the learned stipendiary magistrate, Mr Basacar stated that he had travelled 400 kilometres each time the case had been listed and referred to the difficulties and inconvenience this had caused him in having to leave his farm at Ti Tree on each occasion and on two occasions the applicant had failed to appear.

In refusing to grant the application to set aside judgment, the learned stipendiary magistrate stated (transcript p4):

> "I'm not prepared to grant the application, Ms Ridsdale. You've had two opportunities to appear in this Court and failed to appear on both occasions, so the application is dismissed."

At the hearing of the application for leave to appeal from this order, Mr Morgan, counsel for the applicant, did not dispute that solicitors for the applicant had failed to appear on 28 September 1995 at the first pre-hearing conference and on 30 October 1995 on the first application to set aside judgment. Mr Morgan accepted personal responsibility for the fact that neither he nor a member of his staff attended Court on either of these dates. In his affidavit sworn 6 November 1995, Mr Morgan refers to pressure of business and the fact that his firm was moving offices as reasons why there had been a failure on his part to attend on the above mentioned dates.

In determining the issue of whether leave should be granted to appeal, the decision of the learned stipendiary magistrate, I apply the principle expressed in the decision of the Federal Court of Australia *Davies v Pagett* 70 ALR 793 at 796:

> "The primary consideration is whether he has merits to which the court should pay heed; if merits are shown the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication."

and at p798:

> " Since the decision of the House of Lords in *Evans v Bartlam, supra,* the settled course of authority in England and in this country has emphasised, as fundamental to the exercise of the judicial discretion to set aside a default judgment, the need for a defendant to show a *prima facie* defence on the merits. In the language of Lord Wright, in the passage cited by the learned judge, this is 'the primary consideration'.
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> It is true, as Lord Atkin said in *Evans v Bartlam* (at 480), that it is inappropriate to lay down rigid rules to govern the exercise of the discretion. On the other hand, speaking generally, the cases show that a defendant who has an apparently good defence should not be refused the opportunity

of defending, even though a lengthy interval of time has elapsed, provided that no irreparable prejudice is thereby done to the plaintiff (see *Atwood v Chichester* (1878) 3 QBD 722; *Rosing v Ben Shemesh* [1960] VR 173; *National Mutual Life Association of Australia Ltd v Oasis Development Pty Ltd* [1983] 1 Qd R 441 at 449."

In this matter a Notice of Defence was filed within the prescribed time. At the time of the application before the learned stipendiary magistrate the Notice of Defence was supported by the affidavit of Joe Brancatisano sworn 29 November 1995. In my opinion, the defendant has shown prima facie a defence on the merits.

The decision of *Davies v Pagett* (supra) at 797 set out the following five principles to be applied in considering an application to set aside judgment:

"(1) The length of delay between the time for delivery of defence and the date of interlocutory judgment. On this aspect the giving of notice of intention to apply for judgment may be a relevant factor.

"(2) The length of delay between the entering of such judgment and the application to set it aside.

"(3) The reasons for such delay. The defendant's own contribution to the delay, as contrasted with delay caused by his legal advisers, may fall for consideration.

"(4) The evidence as to whether or not the defendant may have a defence. The probability of a successful defence need not be demonstrated and the fact that the defendant's case may appear weak, will seldom be a bar.

"(5) Whether the plaintiff will be prejudiced by setting aside the judgment, the nature of the prejudice being such that it cannot adequately be compensated by an order for costs."

Applying those principles to this case, there has been no lengthy delay in any of the steps taken in these proceedings. The Notice of Defence was filed within the prescribed time. The first pre-hearing conference was scheduled approximately one month later on 28 September 1995 when the applicant failed to attend. On 30 October, approximately a further one month later, the applicant again failed to appear on an application to set aside judgment and the application was dismissed. Two weeks later, on 14 November

1995, the applicant filed a further application to set aside judgment which was heard on 29 November 1995. I have already found that the defendant has shown prima facie a defence on the merits. I sympathise with the respondent's frustration in having to travel 400 kilometres from his farm at Ti Tree to attend Court, particularly when on two occasions the applicant failed to attend. It is a matter in which it would be appropriate to make an order for costs in favour of the respondent.

This is an application for leave to appeal from an interlocutory order, even though in this particular instance the interlocutory order is effectively determinative of the substantive legal rights between the parties.

In an appeal from an interlocutory order, the appellate Court should adopt a very stringent approach and the principles to be applied on such appeals were expressed by O'Leary CJ in *Nationwide News Pty Ltd t/as Centralian Advocate and Ors v Bradshaw and Anor* 41 NTR 1 at p4:

> ".... but if it lies from the exercise of a discretion in a matter of practice or procedure, a Court of Appeal will not as a general rule interfere unless it is satisfied that the judge has applied a wrong principle of law or that injustice will result from his order, and only if it is clearly satisfied that he is wrong: *Evans v Bartlam* [1937] AC 473 at 480, 481 and 486-7, and *Charles Osenton & Co v Johnston* [1942] AC 130."

In this matter, I am persuaded the learned stipendiary magistrate's discretion miscarried in failing to give any or sufficient weight to the following three matters: (1) the fact that the applicant had shown prima facie a defence on the merits; (2) that despite the applicant's failure to attend Court on two occasions, there had been no lengthy delay in bringing the application to set aside judgment; and (3) that the prejudice suffered by the respondent could be adequately compensated by an order for costs. In addition, I consider that an injustice would result from allowing the order to stand in that the applicant is effectively denied the opportunity to have an adjudication on the merits of the defence. In my opinion, such injustice outweighs

the time and inconvenience suffered by the respondent in travelling to attend each Court hearing.

For these reasons I would grant the application for leave to appeal pursuant to s19(3) *Local Court Act* 1989 (as amended) to proceed with this appeal. I would allow the appeal and make the following orders:

1) The order of the learned stipendiary magistrate made on 29 November 1995 be set aside.

2) That the order made for "leave to proceed as if the defence is not filed" granted on 28 September 1995 and the judgment entered on 2 October 1995 in favour of the respondent be set aside.

3) That the action be referred to the Registrar's list for a pre-hearing conference.

4) I order that the applicant pay the respondent/ plaintiff's costs thrown away in respect of the judgment and the applicant pay the respondent/plaintiff's costs on the application before the learned stipendiary magistrate.

5) I order that the costs of this appeal from the decision of the learned stipendiary magistrate be costs in the cause.