SUPREME COURT OF SOUTH AUSTRALIA

(Magistrates Appeals: Criminal)

MCDOUGALL v CITY OF PLAYFORD

[2017] SASC 169

Reasons for Decision of The Honourable Justice Nicholson

17 November 2017

TRAFFIC LAW - TRAFFIC REGULATION - RESTRICTIONS ON STOPPING AND PARKING - OTHER PLACES WHERE STOPPING IS RESTRICTED

LOCAL GOVERNMENT - REGULATION AND ADMINISTRATION - OFFENCES AND PENALTIES - POWER TO PROSECUTE

MAGISTRATES - APPEAL AND REVIEW - SOUTH AUSTRALIA - APPEAL TO SUPREME COURT

The appellant seeks an extension of time within which to file his Notice of Appeal. Following a trial in the Magistrates Court, the appellant was found guilty of a parking infringement by a Magistrate who subsequently made orders against the appellant. The appellant appeals against those orders on the bases, inter alia, (as was his defence at the time of trial) that the respondent has no lawful authority to fine any person as councils are not recognised, and therefore have no legal status, on federal constitutional grounds, and that the Magistrate proceeded with the matter without observing the requirements of section 78B of the Judiciary Act 1903.

Held:

1. The application for an extension of time within which to file the Notice of Appeal until 7 September 2017 is allowed.

2. The appeal is dismissed.

3. The appellant is to pay the respondent's costs of the appeal in the amount of $500.

On Appeal from MAGISTRATES COURT OF SOUTH AUSTRALIA (MAGISTRATE FORREST) MCPAR-16-18700

Appellant: GRANT ROBERT MCDOUGALL In Person
Respondent: CITY OF PLAYFORD Counsel: MR D MAZZACHI - Solicitor: NORMAN WATERHOUSE

Hearing Date/s: 16/11/2017

File No/s: SCCIV-17-1157

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Australian Road Rules r 197; *Road Traffic Act 1961* (SA) s 174A; *Local Government Act 1999* (SA) s 292; *The Constitution Act 1934* (SA) s 5, s 64A; *Judiciary Act 1903* (SA) s 78B; *Summary Procedure Act 1921* (SA) s 189; *Criminal Law (Sentencing) Act 1988* (SA) s 13, referred to.

Maurici & Anor v State of South Australia [2008] SASC 145; *Daniels v Deputy Commissioner of Taxation* [2007] SASC 431; *Glennan v Commissioner of Taxation* [2003] HCA 31; *Glew v Shire of Greenough* [2006] WASCA 260; *Adelaide City Council v Lepse (No 2)* [2016] SASC 69, considered.

MCDOUGALL v CITY OF PLAYFORD
[2017] SASC 169

Magistrates Appeal: Criminal

NICHOLSON J.

Introduction

1 Yesterday, after hearing from the parties, I made orders granting the appellant an extension of time within which to file a Notice of Appeal but dismissing the appeal from a Magistrate's decision. The Magistrate, after a trial, found the appellant guilty of a parking infringement which constituted an offence contrary to rule 197(1) of the *Australian Road Rules* and section 174A(2) of the *Road Traffic Act 1961*. His Honour made the various consequential orders referred to below. I indicated at the end of the appeal hearing that I would publish my reasons this morning. These are those reasons.

2 The City of Playford is a local government council constituted pursuant to and in accordance with the provisions of the *Local Government Act 1999* (SA). The power of the Parliament of the State of South Australia to have passed the *Local Government Act* rests with section 5 of the State Constitution, that is, *The Constitution Act 1934* (SA). Section 5 adopts as the powers of the Parliament those formerly exercised by the Legislative Council constituted pursuant to section 7 of the Act of the Imperial Parliament, 13 and 14 Victoria, Chapter 59 entitled "An Act for the better government of Her Majesty's Australian Colonies". It has never been doubted that the power thus vested in the Parliament of the State of South Australia is one "to make laws for the peace, welfare and good government of [the State]". This is a plenary power subject to limitations on its exercise derived from the Australian Constitution.[1]

3 The establishment of local government councils in South Australia, including the City of Playford, is undoubtedly within the legislative competence of the Parliament of South Australia.[2] In addition to section 5 of the State Constitution, section 64A provides as follows:

> **64A—Constitutional guarantee of continuance of local government in this State**
>
> (1) There shall continue to be a system of local government in this State under which elected local governing bodies are constituted with such powers as the Parliament considers necessary for the better government of those areas of the State that are from time to time subject to that system of local government.

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1 See generally Chapter V of the *Australian Constitution* (sections 106-120) and as to particular express limitations see, for example, sections 52, 90, 114 and, of course, the overarching section 109 which provides: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid".

2 See generally *Maurici & Anor v State of South Australia* [2008] SASC 145.

> (2) The manner in which local governing bodies are constituted, and the nature and extent of their powers, functions, duties and responsibilities shall be determined by or under Acts of the Parliament from time to time in force.
>
> (3) No Bill by virtue of which this State would cease to have a system of local government that conforms with subsection (1) of this section shall be presented to the Governor for assent unless the Bill has been passed by an absolute majority of the members of each House of Parliament.

4 There is nothing in the Australian Constitution of which I am aware which serves to make invalid or otherwise restrict, in a manner material to this appeal, the State Parliament's power to legislate for the existence and powers of local government authorities such as the City of Playford.

5 Furthermore, and in any event, section 292 of the *Local Government Act 1999* provides:

> It is not necessary in any legal proceedings to prove the existence or constitution of a council, the appointment of an officer of a council, or the appointment of an authorised person.

6 I am not aware of anything nor has anything been drawn to my attention by the appellant in this matter which would even hint at the suggestion that section 292 of the *Local Government Act* might not be within the legislative competence of the South Australian Parliament and available to be applied according to its terms.

7 The purpose behind this, somewhat dry, introduction to these reasons will become apparent shortly.

8 On 20 December 2016, a Complaint and Summons was filed in the Magistrates Court of South Australia on behalf of the City of Playford alleging that the appellant was the owner of a motor vehicle that had been stopped on a nature strip, contrary to rule 197(1) of the *Australian Road Rules* and section 174A(2) of the *Road Traffic Act 1961*. The prosecution of this traffic offence proceeded to trial on 16 May 2017 before a Magistrate. The Magistrate resolved the matter in the manner earlier indicated.

9 Before the Magistrate, the facts and the application of the purportedly relevant law to the facts were not contested by the appellant. A statement of agreed facts was provided to the Magistrate which statement together with other evidence adduced by the respondent established all of the elements of the offence. Rather, the essence of the appellant's defence at trial, insofar as I am able to understand it, was that the City of Playford has no lawful authority to fine any person, essentially, because on federal constitutional grounds councils are not recognised; that is, the City of Playford has no legal status.

10 In pursuing this argument, it would appear that the appellant has been quite persuaded by his rather singular understanding of the Australian Constitution and

a somewhat random collection of other legal materials, in the context of a failure to have regard to the terms of the State Constitution. According to the appellant's understanding, the Australian Constitution provides for only two tiers of government, that is, a Federal Government and a State Government with each having three components: the legislative, the executive and the judiciary. However, there is no provision for and therefore no scope for local government as a third tier. Not surprisingly, the latter submission was not accepted by the Magistrate. I have examined the transcript of the proceedings before the Magistrate which extended over 23 pages including some five pages of a detailed and well reasoned *ex tempore* judgment. The appellant was earnest in his presentation and the Magistrate treated the appellant at all times with courtesy and patience.

11 The Magistrate in his remarks on penalty, delivered on the day of trial, recorded a conviction, imposed a fine of $150, noted the compulsory victims of crime levy of $160, and ordered that the appellant was to pay the City of Playford's legal costs in the amount of $3,680, calculated in accordance with the relevant Magistrates Court scale. His Honour directed that the fine and the costs be remitted to the City of Playford.

12 The appellant filed a Notice of Appeal to this Court on 7 September 2017, approximately three months out of time. Rule 281 of the *Supreme Court Civil Rules 2006* (SA) provides that any appeal in a matter such as this should be filed within 21 days from the date of decision. As such, the appellant requires an extension of time within which to file his Notice of Appeal. According to the appellant, he attempted to file his Notice of Appeal within time. However, it was not accompanied by the required filing fee and was rejected by the Registry. It took three months for the appellant to complete the necessary paperwork for a fee waiver in a manner satisfactory to the Registry. Ultimately, the Notice of Appeal was accepted for filing. I will return to the question of an extension of time after I have dealt with the merits of the proposed appeal.

13 In his Notice of Appeal, the appellant relies upon the following 14 grounds of appeal.

1. The Magistrate is wrong in Law and Fact: when he disregarded the Commonwealth Constitution of Australia 1901 and stated state acts and statutes.

2. The Magistrate is wrong in Law and Fact: when he failed to abide by the decision of the High Court, this being *Sydney Council v Reid [1994] 34 NSWWLR*, there for committing contempt of the High Court.

3. The Magistrate is wrong in Law and Fact: when he failed to abide by the decision of the High Court, this being *Lipohar v The Queen 12 [1999] HCA 65, 9 December 1999 A14/1999*, there for committing contempt of the High Court.

4. The Magistrate is wrong in Law and Fact: when he failed to abide by the decision of the High Court, this being *Allied Services Union of Australia and Ors v Queensland Rail Ltd*, there for committing contempt of the High Court.

5. The Magistrate is wrong in Law and Fact: when he failed to abide by the decision of the Australian Government (Australian Tax Office), this being *ATO ID 2005/337*.

6. The Magistrate is wrong in Law and Fact: when he failed to abide by the Commonwealth Constitution Act 1901, *this being Chapteer 1 section 51 sub-section 20*, there for committing treason of the Constitution Act 1901.

7. The Magistrate is wrong in Law and Fact: when he failed to abide by the *Fair Work Act 2009 section 35*, there for committing an offence of 31 this Act.

8. The Magistrate is wrong in Law and Fact: when he failed to abide by the Corporation Law 588FA.

9. The Magistrate is wrong in Law and Fact: when he failed to abide by the Federal Government's Referendum Results of 1974 and 1988, *this being 1974 Local Government Bodies and 1988 Local Government*, there for committing Treason of Common Law and the "Will of the People".

10. Magistrate Forrest, processed with the matter even when the required 78B Notice Matter of a Constitutional Matter was never Received nor Filed within the Court Registry.

11. Magistrate Forrest, made Judgment on this matter when the matter should not of proceeded once the 78B Notice was NOT within any court documents presented to the Magistrate.

12. Paul Kelly and or any acting associate authorized to prepare and or submit the require Notice failed to comply with the Federal Registrar of Legislation. This being mentioned with the accompanying Affidavit.

13. City of Playford employee has also signed and submitted misleading evidence within a statement, this also being out of time for any corrections to be amended. It shows that the Employee does not know what day the offence was committed on.

14. This making the Judgement made by Magistrate Forrest and the Fine both INVALID and Un-Constitutional.

14 I have before me on the appeal and have reviewed the following materials:

(i) the lower court file;

(ii) the Notice of Appeal;

(iii) an affidavit sworn and filed by the appellant on 7 September 2017 comprising 119 paragraphs and five exhibits;

(iv) a document filed by the appellant on 7 September 2017 headed "Notice to Produce";

(v) a document filed by the appellant on 7 September 2017 headed "Notice of Constitutional matter under s 78B of the *Judiciary Act 1903*";

(vi) a second affidavit sworn and filed by the appellant on 7 September 2017 headed "Notice Affidavit of Constitutional matter under s 78B of the *Judiciary Act 1903*";

(vii) the appellant's written outline filed 15 November 2017 headed "Appellant's Reply Summary Argument"; and

(viii) the respondent's summary of argument and list of authorities provided to the Court and to the appellant on 8 November 2017.

15 The grounds of appeal on their face make little or no sense and the appellant has been unable to assist further in this respect in either his written or oral submissions.

16 Appeal grounds 1 to 9 and 14, as best I can understand them, would appear to be directed to the appellant's constitutional argument. The argument is plainly untenable. None of these grounds have any merit and none of the legislative provisions or authorities referred to by the appellant in support of those grounds are of any assistance.

17 Appeal grounds 10 to 12 complain, in effect, about the Magistrate continuing to proceed with the matter without observing the requirements of section 78B of the *Judiciary Act 1903*.[3] It is unnecessary to set out the full terms of section 78B. Section 78B(1) is in these terms.

> Where a cause pending in a federal court including the High Court or in a court of a State or Territory involves a matter arising under the Constitution or involving its interpretation, it is the duty of the court not to proceed in the cause unless and until the court is satisfied that notice of the cause, specifying the nature of the matter has been given to the Attorneys-General of the Commonwealth and of the States, and a reasonable time has elapsed since the giving of the notice for consideration by the Attorneys-General, of the question of intervention in the proceedings or removal of the cause to the High Court.

18 The duty upon a court provided for in section 78B of the *Judiciary Act* is not enlivened where a constitutional matter is raised which is patently unarguable,[4] as is the appellant's. In any event, even where the duty is enlivened but not observed, such non-observance does not deprive the court of jurisdiction to hear the matter.[5]

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[3] During the appeal the appellant advised from the bar table that he had by then received a substantive response from all Attorneys-General apart from the Attorney for the Northern Territory who had indicated that a section 78B notice had not yet been received. Apparently, all other Attorneys have indicated that they have no wish to intervene or seek the removal of the matter to the High Court.

[4] *Daniels v Deputy Commissioner of Taxation* [2007] SASC 431 at [19] (Debelle J, with whose reasons Sulan and Vanstone JJ agreed).

[5] *Glennan v Commissioner of Taxation* [2003] HCA 31 at [13], *Glew v Shire of Greenough* [2006] WASCA 260 at [28].

19 Appeal ground 14 adverts to the fact that a statement prepared by an officer of the respondent and provided to the appellant by way of disclosure but which did not find its way into evidence, erroneously specified the date of the offence as 6 June 2016 rather than 7 June 2016. However, during the appeal, the appellant conceded that his car had been parked on the verge in question on 7 June 2016 as asserted in the Complaint and Summons and had not been so parked on 6 June 2016.. The matter is of no consequence and does not undermine the fact that the appellant conceded the relevant facts of the offence

20 There is also a suggestion, put before the Magistrate by the appellant and reiterated in this Court in the first affidavit sworn by the appellant on 7 September 2017, to the effect that neither the Magistrate nor a Judge of the Supreme Court has authority to hear the dispute, although there is no appeal ground to this effect. The heartland of this submission would appear to be[6] to the effect that every council within Australia and every court within Australia is nothing but a trading company and thus the court has no authority because a judge of a court is simply an employee of a company and has no jurisdiction given that only federal legislation can control companies.

21 This contention, as are all of the appellant's various constitutional contentions, is incoherent and nonsensical. Indeed, the appellant's contentions are so wide ranging and misconceived as to defy reasoned responses short of a short lecture series. The appeal against the conviction is entirely without substance. It would be fruitless to grant an extension of time for filing of the Notice of Appeal if this aspect of the Magistrate's judgment were the only consideration.

22 However, the appellant has appealed against all orders made by the Magistrate including the order as to costs. As a matter of principle, the respondent, as the successful party following contested litigation, was entitled to a costs award in its favour. Section 189(1) of the *Summary Procedure Act 1921* confers a wide discretion on the Magistrates Court with respect to the award of costs.[7] Rule 51 of the *Magistrates Court Rules* provides as follows.

> 51.01 Subject to these Rules, the provisions of any Act, or to an order of the Court, a successful party in an action is entitled to costs against an unsuccessful party.
>
> 51.02 ...
>
> 51.03 Subject to any order of the court to the contrary, the scale of costs set out in the first schedule shall apply.

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[6] See generally the affidavit sworn and filed by Grant Robert McDougall, 7 September 2017 at [97]-[98].

[7] Section 189(1) provides: "subject to sections 189A to 189D (inclusive) the Court may award such costs for or against a party to proceedings as the Court thinks fit". Sections 189A to 189D have no application to the present case. And see, for example, *Hamdorf v Riddle* [1971] SASR 398 and *Haslam v Emu Air Charter Pty Ltd* (1998) 200 LSJS 454.

23 Nothing has been put by the appellant that would justify a refusal to award costs in favour of the respondent. Further, there is no challenge to the amount ordered by the Magistrate as being in accordance with the scale entitlement. To this point it could not be said that the Magistrate had failed to properly exercise the discretion as to costs.

24 However, there is a further consideration. The Magistrate was obliged, when considering the question of the costs, to have regard to section 13 of the *Criminal Law (Sentencing) Act 1988*.[8] Section 13 provides as follows.

> **13—Order for payment of pecuniary sum not to be made in certain circumstances**
>
> (1) The court must not make an order requiring a defendant to pay a pecuniary sum (other than a VIC levy) if the court is satisfied that the means of the defendant, so far as they are known to the court, are such that—
>
> (a) the defendant would be unable to comply with the order; or
>
> (b) compliance with the order would unduly prejudice the welfare of dependants of the defendant, (and in such a case the court may, if it thinks fit, order the payment of a lesser amount).
>
> (2) Subject to subsection (3), the court is not obliged to inform itself as to the defendant's means, but it should consider any evidence on the subject that the defendant or the prosecutor has placed before it.
>
> (3) In considering whether the defendant would be able to comply with the order, the court should have regard to—
>
> (a) the fact that the defendant could enter into an arrangement under Part 9 Division 3; and
>
> (b) any information available to the court as to other pecuniary sums that have been paid, or are payable, by the defendant.

Pursuant to section 3 of the *Criminal Law (Sentencing) Act*, the term "pecuniary sum" includes "costs" and "any ... amount payable pursuant to an order or direction of a court".

25 The award of costs by the Magistrate was not, of itself, out of the ordinary or excessive. However, it does not appear, from the Magistrate's reasons, that his Honour had regard to the terms of section 13.

26 In my view, the appellant being a litigant in person and with an obvious incapacity to comprehend legal matters (and notwithstanding subsection 13(2)) ought to have been put on notice of section 13 and the right to make any relevant submissions. I raised with the appellant during the appeal, in brief, the nature of his financial circumstances. He has two small children. He works 25 hours a

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[8] *Police v Murray* [2013] SASCFC 68; (2013) 116 SASR 422, *Adelaide City Council v Lepse (No 2)* [2016] SASC 69.

week and his wife also works part-time most weeks. I have little doubt that the appellant's family struggles financially from time to time. However, when considering section 13 a court is entitled to take into account the fact that the appellant could enter into a repayment arrangement under Part 9, Division 3 of the *Criminal Law (Sentencing) Act*.[9]

27 In these circumstances and notwithstanding the Magistrate's failure to raise section 13 with the appellant, I am not satisfied that the Magistrate's costs order has given rise to a miscarriage of justice. In the circumstances I have briefly outlined, I am not persuaded that either paragraph (a) or (b) of subsection 13(1) is engaged. On the information that would have been made available to the Magistrate I would not exercise the discretion any differently.

28 I am satisfied that the respondent should be entitled to its costs at the scale rate, amounting to $3,680.

29 I accept that the appellant has given a reasonable explanation for the late filing of the Notice of Appeal. I would grant an extension of time to appeal. It was necessary to revisit the costs order for the reasons I have given. However, I dismiss the appeal against all orders made by the Magistrate.

30 The respondent has sought an order for its costs of the appeal. The starting position under the Supreme Court's supplementary rule 238(3) with respect to an appeal such as this one is that costs follow the event and are fixed at $500. However, there is a discretion to depart from that general position in a case where the appeal is patently untenable.[10] The respondent seeks an order for costs in the amount of $2,000 which it submits is a figure less than the amount that would be payable on a full taxation. I am satisfied that the City of Playford, having engaged external solicitors for this matter and given the amount of work necessarily involved in responding to an appeal of this nature, will have incurred costs that substantially exceed the rule of thumb amount of $500 ordinarily awarded.

31 Nevertheless, bearing in mind section 13 and given that the appellant is to remain fixed with a costs order for $3,680 with respect to the trial, I am not prepared to order costs in excess of the usual amount.

Conclusion

32 I make the following orders:

1. The application for an extension of time within which to file the Notice of Appeal until 7 September 2017 is allowed.

2. The appeal is dismissed.

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[9] See section 13(3) set out earlier.
[10] *Adelaide City Council v Lepse (No 2)* [2016] SASC 69 at [7].

3. The appellant is to pay the respondent's costs of the appeal in the amount of $500.