SUPREME COURT OF QUEENSLAND

CITATION:	*WBI v HBY & Anor* [2020] QCA 24
PARTIES:	**CONSTABLE WBI** **(applicant)** **v** **HBY** **(first respondent)** **LAP** (second respondent)
FILE NO/S:	Appeal No 6713 of 2019 DC No 4040 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave to Appeal
ORIGINATING COURT:	District Court at Brisbane – Unreported, 31 May 2019 (Koppenol DCJ)
DELIVERED ON:	21 February 2020
DELIVERED AT:	Brisbane
HEARING DATE:	18 November 2019
JUDGES:	Morrison JA and Mullins AJA and Lyons SJA
ORDER:	**Application for leave to appeal struck out for absence of jurisdiction.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – ORDERS SET ASIDE OR VARIED – where a domestic violence order was made against the first respondent in 2018 – where the first respondent appealed that decision to the District Court – where a judge of the District Court heard an interlocutory application and ordered that the substantive appeal in the District Court was to be heard afresh and in whole in accordance with s 168(2) of the *Domestic and Family Violence Protection Act* 2012 (Qld) (DV Act) – where the applicant (with the support of the second respondent) seeks leave to appeal that order on the basis that the decision is wrong and raises a significant question of law with respect to the circumstances in which the discretion to order appeals in domestic violence cases be heard afresh, should be exercised – where s 169(2) of the DV Act provides that "the decision of the appellate court upon appeal shall be final and conclusive" – whether the Court of Appeal has jurisdiction to hear an appeal from an interlocutory decision of the District Court with respect to an appeal pursuant to s 168 of the DV Act

District Court of Queensland Act 1967 (Qld), s 118, s 169
Domestic and Family Violence Protection Act 2012 (Qld), s 37, s 142(2), s 164, s 168, s 169
Uniform Civil Procedure Rules 1999 (Qld), r 751(b), r 765(1), r 766(1)(c)

CAO v HAT & Ors [2014] QCA 61, applied
Stinson v The Pharmacy Board of Queensland [1995] 1 Qd R 567; [1993] QCA 520, cited
ZXA v Commissioner of Police [2016] QCA 295, applied

COUNSEL: P McCafferty QC, for the applicant
G Page QC for the first respondent
The second respondent appeared on her own behalf

SOLICITORS: Queensland Police Service Legal Unit for the applicant
PHV Law Solicitors and Consultants for the first respondent
The second respondent appeared on her own behalf

[1] **MORRISON JA:** I have read the reasons of Lyons SJA and agree with those reasons and the order Her Honour proposes.

[2] **MULLINS AJA:** I agree with Lyons SJA.

[3] **LYONS SJA:**

This Application

[4] On 17 October 2018 Magistrate Bradford-Morgan made an Order pursuant to s 37 of the *Domestic and Family Violence Protection Act* 2012 (Qld) (DV Act), against the first respondent HBY for the protection of the aggrieved second respondent. The period of the order was seven years.

[5] The first respondent appealed that decision to the District Court. On 31 May 2019 Koppenol DCJ heard an interlocutory application and ordered that the substantive appeal in the District Court was to be heard afresh and in whole in accordance with s 168(2) of that Act.

[6] The applicant seeks leave to appeal that order of 31 May 2019 on the basis that not only is the decision wrong but it also raises a significant question of law with respect to the circumstances in which the discretion to order appeals in domestic violence cases be heard afresh, should be exercised. The aggrieved second respondent supports that application.

[7] Counsel for the applicant concedes however that there is a preliminary issue as to whether the application for leave to appeal the interlocutory order is competent, given the requirements of s 169(2) of the DV Act. That section provides that "the decision of the appellate court upon appeal shall be final and conclusive". The relevant appellate court in this case being of course the District Court hearing the interlocutory application.

[8] Before turning to a determination of that preliminary issue it is necessary to consider the history of the proceedings.

Chronology

[9] On 14 November 2017 the applicant, a police officer, made application for a protection order to the Magistrates Court for the aggrieved second respondent.

[10] On 5 April 2018 the first respondent issued a request for a subpoena to the aggrieved.

[11] On 8 April 2018 the first respondent's solicitor appeared before Magistrate Strofield to challenge the refusal to issue the subpoena. The matter was adjourned.

[12] On 18 April 2018 the challenge was argued before Magistrate Strofield who rejected the application on the basis that it was too broad and not relevant to the proceedings on foot.

[13] On 2 May 2018 the matter came before Magistrate Bradford-Morgan where orders were obtained by the first respondent for an adjournment of the trial. Counsel for the first respondent also informed the court that the challenge to the refusal to issue the subpoena was not pressed.

[14] On 16 May 2018 the proceedings commenced before Magistrate Bradford-Morgan. Counsel for the first respondent referred to the fact that the Family Court proceedings indicated that the second respondent's assets were in the order of $3 million. Orders were made that any further requests for subpoenas were to be made by 23 May 2018 and the trial was adjourned to 23 July 2018. Two further requests for subpoenas were issued: one in relation to an MRI the second respondent had on her right knee; the other to AAI Limited, her motor vehicle insurer, seeking information in relation to a payout for her personal injuries claim.

[15] On 5 June 2018 Magistrate Bradford-Morgan heard applications in relation to the subpoenas. The second respondent was self-represented and informed the court she had received $350,000 in February 2018 and would provide copies of the bank statements of her payout from AAI Limited. Counsel for the first respondent stated that given that undertaking he considered that the subpoena would be superfluous and commented "so perhaps that disposes of the issue of the subpoenas".

[16] The substantive hearing was held on 23 and 24 July 2018. On 17 October 2018 Magistrate Bradford-Morgan made a protection order and an ouster order against the first respondent. Detailed reasons for judgment were published.

[17] On 12 November 2018 the first respondent filed an appeal against the magistrate's orders in the District Court seeking to have the protection order set aside. There were 21 grounds of appeal.

[18] On 29 March 2019 the first respondent filed an application seeking leave to amend the Notice of Appeal pursuant to r 751(b) of the *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR) by adding a further ground of appeal. The first respondent also sought orders that:

(a) the appeal be heard afresh and in whole under s 168(2) of the DV Act; and

(b) pursuant to r 766(1)(c) of the UCPR the court receive further evidence as to questions of fact by the documents referred to in Annexure A.

The Interlocutory Application in the District Court

[19] On 31 May 2019 Koppenol DCJ heard the application for those orders.

[20] Prior to the hearing of the application the parties had filed outlines of argument. The first respondent argued in the outline that the appeal should be heard afresh and in whole on the basis that if the magistrate had been aware of the Annexure A documents, then the magistrate would not have made the order she did. It was contended therefore that the Annexure A documents were not available at the hearing before the magistrate. The outline of argument specifically provided that it was in the interests of justice that the first respondent be allowed to adduce the evidence contained in Annexure A as the evidence "is relevant, credible, was not available at the original hearing".[1]

[21] The current applicant's outline of argument for that hearing indicated however that there was no basis to displace the mandatory procedure for the hearing of the appeal as provided for by s 168(1) of the DV Act and the discretion in s 168(2) should not be exercised. Furthermore, it was argued that in any event the Annexure A documents were in the possession of the first respondent at the time of trial, could have been obtained with reasonable diligence or would not have had an important influence on the result of the case.[2] It was also argued that the procedure for appeals is set out in the DV Act and the starting point is that the appeal must be decided on the evidence and proceedings before the court that made the decision being appealed. Accordingly it was argued that the appeal was an appeal by way of rehearing and not an appeal in the strict sense. This was on the basis of s 142(2) of the DV Act which provides that the UCPR applies to appeals under the DV Act and r 765(1) provides that appeals are by way of rehearing. Accordingly it was argued that the judge on appeal was to bear in mind the advantage the magistrate would have had in seeing and hearing the witnesses but was required to review the evidence, weigh the conflicts and reach their own conclusion. It was argued that the discretion for a de novo hearing would only be invoked if there was "some legal, factual or discretionary error on the part of the magistrate and even then there must be legitimate reasons for allowing the appeal to be heard afresh rather than on the evidence and proceedings before the magistrate".[3]

[22] The transcript of the hearing[4] before Koppenol DCJ makes it clear that Counsel for the first respondent argued that the appeal hearing should be a de novo hearing due to the "large amount of evidence that [had] been disclosed subsequent to the hearing before the magistrate" which was "relevant to the matters that were before her Honour".[5] The major thrust of the submissions to the primary judge was that the aggrieved second respondent had intentionally withheld evidence about her financial position. Indeed Counsel stated:

> "So it - there's evidence that was either just mis - or purposely left out intending to influence the magistrate as to the impecunious nature in which she was left as a result of the renting of the property and otherwise, which is very relevant to the question of the ouster order that was made."[6]

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1 ARB Vol 2 187 at [18].
2 ARB Vol 2 p 194 at 4(b).
3 ARB Vol 2 p 195 at 8.
4 ARB Vol 3 pp 461-530.
5 ARB Vol 3 p 463 at ll 33-37.
6 ARB Vol 3 p 499 at ll 31-35.

[23] It was contended by Counsel that the absence of such material was such "that it be best that this matter be simply started again".[7] In a very brief ex-tempore decision his Honour ordered the appeal in the proceedings was to be heard "afresh in whole" on the basis that if documents, particularly the aggrieved's financial statement, which were directly relevant to the appeal had been before the magistrate, an opposite result on the question of the aggrieved's credibility may have resulted. Accordingly pursuant to the orders made and the reasons given,[8] the substantive appeal which is yet to be heard by the District Court is to be a de novo hearing. The appeal hearing is currently listed for a re-hearing with an estimate of four days.

This Appeal

[24] Counsel for the applicant argues that the DV Act contains no guidance as to what factors are relevant to the exercise of the discretion and as a matter of principle those factors must be determined by implication from the subject matter, scope and purpose of the DV Act. Counsel noted that one of the main objects of that Act is to maximise the safety, protection and wellbeing of people who fear or experience domestic violence and to minimise disruption to their lives. It is argued that consistent with this object to order an appeal to be heard afresh in whole necessarily exposes a person who has experienced domestic violence to go through the trial process again, including cross-examination. It is argued that this is a drastic measure which should only be exercised in the most appropriate cases. Counsel argues that this is particularly so in this case where the magistrate who made the protection order made a number of adverse findings about the conduct of the first respondent.

[25] As already outlined the primary argument before the District Court judge that the appeal should be heard afresh was on the basis that a number of documents were said to have not been available at the original hearing and were relevant to the credit of the aggrieved. The submission being that had the documents been before the magistrate, the protection order and ouster condition would not have been made.

[26] At the hearing Counsel for the applicant took the court to a number of documents to indicate that in fact the first respondent had in his possession thirteen of the twenty documents in Annexure A. Furthermore it was argued that there was no effort to explain to the District Court judge why those documents were not relied upon before the magistrate. In particular, documents which shall be referred to as 1, 2, 3 and 4, which were not available at the first hearing, comprised bank records of the second respondent and are said to have been relevant to the credit issue because they demonstrate that on 16 March 2018, the aggrieved had $373,533 deposited into her account from an insurance claim which was inconsistent with an affidavit provided by her that she could not afford to live in the two properties identified or pay for dental work in April 2018.

[27] As previously noted the transcript of the earlier proceedings before Magistrate Bradford-Morgan on 5 June 2018 indicates that the first respondent had this information in the form of a bank statement confirming the payout and the information was provided following the hearing on 5 June 2018 before the second respondent was cross-examined and indeed she was cross-examined about the precise payment on the second day of trial. Significantly it was not put to her that the statement that she

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7 ARB Vol 3 p 500 at l 6.
8 ARB Vol 3 p 479 at ll 28-43.

could not afford to pay for dental work was false. An extract of Counsel for the applicant's submission is as follows:

> "MR McCAFFERTY: All his Honour has simply done is formed the view that there were documents deprived to the first respondent which may have had – in reasons – in argument, he said 'would have'. In his reasons, he said 'may have' – a serious impact on the aggrieved's credibility. That's all his Honour took into account. Of course, that premise was wrong.
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> MORRISON JA: Not sure how you form that sort of view without looking at the documents.
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> MR McCAFFERTY: Quite, because if your Honour looks at the documents – they're in appeal record book 2 commencing at page 19. And I should say that the way the documents were presented is they were exhibited to an affidavit of Mr Ciotorello – I think I've pronounced that correctly – and there was an annexure. And your Honours will see at page 19, there's one through 12. There's actually 20 documents. There was a second page missing from that document.
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> MORRISON JA: So they're numbered at the top one, two - - -
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> MR McCAFFERTY: They're numbered at the top. So one, two, three and four are, quite simply, documents which show the payment by AAI Limited – the insurance payment, and your Honours will see that at page 21.
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> MORRISON JA: Yes. That payment was known.
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> MR McCAFFERTY: Correct. Well, perhaps I can – I should make this general observation. Documents number 6, 7, 8, 9, 10, 11 and 12 – in fact, I'll express it this way. All of the 20 documents, with the exception of one, two, three, four, which are the NAB statements – and your Honour Justice Morrison's rightly said they knew – five, which I'll take your Honours to in a moment, and 16, were all in the possession of the first respondent during the trial.
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> MORRISON JA: Sorry. Say – you'll have to say that again because you did it - - -
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> MR McCAFFERTY: I'm sorry.
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> MORRISON JA: - - - all but.
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> MR McCAFFERTY: So there's 20 documents. With the exception of documents 1, 2, 3, 4, 5 and 16, all documents were in the possession of the first respondent."[9]

[28] The applicant's outline of argument set out in great detail further examples of documents which were said not to have been provided. Reference was made to document 5 in Annexure A which is a statement of reasons about the financial assistance provided to the second respondent by Victim Assist. Counsel for the applicant's submission was that the appeal should not be heard afresh simply because an appellant has further evidence upon which they wished to rely at the appeal hearing. It was also submitted that it cannot be the position that an appeal

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9 T 1-13 l 45 to 1-15 l 31.

should be heard afresh merely because an issue concerning the credit of a witness is raised on appeal by a party because if there is any substance to an issue of credit raised on appeal the District Court has power to set aside the decision appealed against and remit the matter back to the Magistrates Court.

[29] An objective examination of the documents set out in Annexure A reveals that the seven documents which were not provided at the primary hearing are not inherently of such a nature or quality which could provide a basis for the primary judge to order the appeal be heard afresh. Furthermore, it would seem to me that they were not such that had they been before the magistrate, it would have resulted necessarily in a different result.

[30] Counsel also argued that there are two further errors made by the District Court judge. First a failure to give sufficient weight to relevant matters, namely the actual content of the Annexure A documents and second the result is unreasonable or plainly unjust.

[31] The applicant argues that the appeal should be allowed and this court should exercise its own discretion in substitution.

[32] There can be no doubt that the applicant has raised some serious issues as to the basis upon which the orders of 31 May 2019 were made and whether the correct factual basis was identified to the District Court judge. I consider that there is a real issue as to whether the District Court judge's discretion miscarried. I also accept that this application raises some serious questions as to the circumstances in which orders should be made for an appeal to be heard afresh and in whole under s 168(2) of the DV Act.

[33] I must however now turn to consider the preliminary issue as to whether this court has jurisdiction to hear the appeal from an interlocutory decision of the District Court with respect to an appeal pursuant to s 168 of the DV Act.

Does this Court have jurisdiction to hear an appeal from the interlocutory Orders

[34] Section 169 is in the following terms:

> "**169 Powers of appellate court**
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> (1) In deciding an appeal, the appellate court may—
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> (a) confirm the decision appealed against; or
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> (b) vary the decision appealed against; or
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> (c) set aside the decision and substitute another decision; or
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> (d) set aside the decision appealed against and remit the matter to the court that made the decision.
>
> (2) The decision of the appellate court upon an appeal shall be final and conclusive."

[35] Counsel for the applicant argues that on its proper reading s 169(2) should be construed to mean the final decision on the appeal and should not include an interlocutory decision as it is not "the decision of the appellate court upon an appeal". The most recent examination of the provisions of s 169 of the DV Act was

by this court in *ZXA v Commissioner of Police*.[10] In that case the applicant was named as the respondent in a domestic violence protection order under s 37 of the DV Act. He filed an appeal to the District Court under s 164 of the DV Act, and the District Court judge dismissed the appeal. The applicant then sought leave to appeal under s 118 of the *District Court of Queensland Act* 1967 (Qld) (District Court Act) against the District Court judge's order. In her reasons,[11] McMurdo P noted that under s 169(2) of the District Court Act, the decision from which the applicant sought leave to appeal was final and conclusive.

[36] Her Honour emphasised that although s 118(3) of the District Court Act allows for a party dissatisfied with a judgment of the District Court, whether in its original or appellate jurisdiction,[12] to appeal to the Court of Appeal with the court's leave, that section does not apply to a decision of the District Court in its appellate jurisdiction under s 169(1).[13] The President emphasised that the scheme under the District Court Act clearly contemplates only one level of appeal, and that "[t]he plain words of s 169(2) that such an appeal is 'final and conclusive' indicate[s] that the legislature intended that there be no further appeal".[14] Her Honour concluded in that case that the single right of appeal from the Magistrates Court to the District Court had been exhausted and that the earlier decision of this Court in *CAO v HAT & Ors*[15] was clearly rightly decided.

[37] In *CAO v HAT & Ors*, the applicant was named as the respondent in a domestic violence protection order under the *Domestic and Family Violence Protection Act* 1989 (Qld). An appeal against that order was dismissed by a District Court judge, and the applicant then applied to the Magistrates Court to have the order revoked. That application was also dismissed. When the applicant then appealed the magistrate's dismissal of the application to revoke the order to the District Court, a District Court judge disposed of her application. The applicant subsequently sought leave to appeal in the Court of Appeal, pursuant to s 118(3) of the District Court Act.

[38] In her reasons, Mullins J (as her Honour then was, and with whom McMurdo P and Morrison JA agreed) highlighted the second respondent's submission that the decision of the primary judge on the appeal from the magistrate's decision dismissing the applicant's revocation application was final and conclusive, as provided for in s 169(2) of the DV Act.[16] Her Honour also noted that the second respondent had relied upon the case of *Stinson v The Pharmacy Board of Queensland*[17] where the Court of Appeal considered a legislative provision where a decision on appeal (in relation to applications for registration as a pharmacist) was expressed to be "final".[18] In that case, Williams J (with whom the other members of the court agreed) held, based on a review of authorities that considered the meaning

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10 [2016] QCA 295.
11 At p 2.
12 Other than those referred to in s 118(1) and (2).
13 *ZXA v Commissioner of Police* [2016] QCA 295 per McMurdo P at 2, referring to *CAO v HAT & Ors* [2014] QCA 61 at [25] – [27] per Mullins J.
14 At p 4.
15 [2014] QCA 61.
16 Under which the domestic violence order was taken to have been made – see *CAO v HAT & Ors* [2014] QCA 61 at [13] per Mullins J.
17 [1995] 1 Qd R 567.
18 See *CAO v HAT & Ors* [2014] QCA 61 at [26] per Mullins J.

of similar provisions, that the word "final" must in the relevant statutory context mean "without any appeal".[19]

[39] On that basis Mullins J concluded that "the approach in *Stinson* is appropriate to the interpretation of s 169(2) of the [DV] Act" and disposed of the applicant's application for leave to appeal against that part of the primary judge's decision that dismissed her appeal against the refusal of the magistrate to revoke the order.[20]

[40] This application involves interlocutory orders about the hearing of the appeal in the District Court and not a final hearing in the District Court. There can be no doubt that the District Court judge who actually hears the appeal can revisit the interlocutory orders made on 31 May 2019. Accordingly it would seem clear that the proper interpretation is that when s 169(2) refers to a decision of an appellate court upon an appeal being final and conclusive that must also preclude an appeal against any interlocutory orders as well. Counsel for the applicant conceded at the hearing that it would be unusual "if the hearing of an appeal in the District Court could not be appealed to the Court of Appeal and yet, an interlocutory order in connection with the appeal could be appealed to the Court of Appeal."[21]

[41] Accordingly the application for leave to appeal is struck out for absence of jurisdiction.

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19 See *CAO v HAT & Ors* [2014] QCA 61 at [26] per Mullins J.
20 *CAO v HAT & Ors* [2014] QCA 61 at [27] per Mullins J.
21 T 1-4 ll 17-20.