SUPREME COURT OF QUEENSLAND

CITATION:	*Mbuzi v Favell* [2007] QCA 393
PARTIES:	**JOSIYAS ZIFANANA MBUZI** (applicant) **v** **PAUL JOSEPH FAVELL** (respondent)
FILE NO/S:	Appeal No 3029 of 2007 DC No 1021 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application – Civil
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	16 November 2007
DELIVERED AT:	Brisbane
HEARING DATE:	5 November 2007
JUDGES:	McMurdo P, Williams JA and Jerrard JA Judgment of the Court
ORDER:	**1. Application for leave to appeal refused** **2. Applicant to pay the respondent's costs assessed on an indemnity basis**
CATCHWORDS:	PROCEDURE – COURTS AND JUDGES GENERALLY – SUPREME COURT PROCEDURE – QUEENSLAND PRACTICE AND RULES OF COURT – JUDGMENTS AND ORDERS – OTHER MATTERS – where the applicant had unsuccessfully defended a defamation claim in the District Court – where the applicant sent a letter making defamatory statements in relation to the respondent – where the judge hearing the respondent's claim held that the *Defamation Act 1889* (Qld) s 11 did not apply – where applicant sought to introduce a fee note into evidence after judgment pursuant to r 668 of the *Uniform Civil Procedure Rules 1999* (Qld) – whether r 668 was enlivened *Defamation Act 1889* (Qld), s 11 *Uniform Civil Procedure Rules 1999* (Qld), r 668 *Mann v O'Neill* (1997) 191 CLR 204, applied *Rockett & Anor v The Proprietors "The Sands" Building Unit Plan No. 82* [2002] 1 Qd R 307, applied *Woods v Sheriff of Queensland* [1895] QLJR 163, applied

COUNSEL: The applicant appeared on his own behalf
P J Flanagan SC, with A J Taylor, for the respondent

SOLICITORS: The applicant appeared on his own behalf
Gail Malone & Associates for the respondent

[1] **THE COURT**: This was an application for leave to appeal from a decision in the District Court given on 12 March 2007, dismissing Mr Mbuzi's application dated 5 March 2007, in which Mr Mbuzi asked for orders, purportedly to be made under *Uniform Civil Procedure Rules 1999* (Qld) r 668, that orders made in the District Court on 18 November 2005 and 30 November 2005 between the same parties "be dispensed with".

[2] *UCPR* r 668 reads as follows:

> "**[r 668] Matters arising after order**
> **668 (1)** This rule applies if –
>
> (a) facts arise after an order is made entitling the person against whom the order is made to be relieved from it; or
>
> (b) facts are discovered after an order is made that, if discovered in time, would have entitled the person against whom the order is made to an order or decision in the person's favour or to a different order.
>
> **(2)** On application by the person mentioned in subrule (1), the court may stay enforcement of the order against the person or give other appropriate relief.
>
> **(3)** Without limiting subrule (2), the court may do one or more of the following -
>
> (a) direct the proceedings to be taken, and the question or issue of fact to be tried or decided, and the inquiries to be made, as the court considers just;
>
> (b) set aside or vary the order;
>
> (c) make an order directing entry of satisfaction of the judgment to be made."

[3] The circumstances in which it is appropriate to exercise the powers given by that rule are discussed in three cases to which this Court has been referred, by counsel for the respondent, *Woods v Sheriff of Queensland* [1895] QLJR 163; *KGK Constructions Pty Ltd v East Coast Earthmoving* [1985] 2 Qd R 13; and *IVI Pty Ltd v Baycrown Pty Ltd* [2006] QCA 461.

[4] In the first of those (*Woods v Sheriff of Queensland*) Griffith CJ wrote that:

> "An application for such relief is not in the nature of an appeal or re-hearing; each of these is founded on the contention that the order

> appealed from ought not to have been made. An application for a new order which has the effect of suspending in whole or in part the operation of a previous order starts with the assumption that that order was rightly made. ...[I]f it should turn out that the application is based upon the assumption that the order, the operation of which it is desired to modify, was wrongly made, it must fail."

[5] In *Rockett & Anor v The Proprietors "The Sands" Building Unit Plan No. 82* [2002] 1 Qd R 307, McPherson JA wrote (at page 312), of Sir Samuel Griffith's views in *Woods v Sheriff of Queensland*, that Griffiths CJ:

> "drew a firm distinction between a claim to relief from a judgment or order that was challenged as erroneous as distinct from one that was accepted as being correct at the time it was made. It is only in the latter case that the release may be sought under Rule 668(1)(a) by reason of facts arising after the order was made or the judgment was given. Otherwise it is the procedure by way of appeal that must be resorted to. In saying this I leave out of account the possibility that Rule 668(1)(b) may have some operation in relation to applications for new trials on the basis of the discovery of fresh evidence. This is not a question that arises here."

[6] That approach to the power given in *UCPR 668* was reflected in the judgments of two members of this Court in *IVI v Baycrown*, at [13]-[14] per Jerrard JA and [43] per Mackenzie J. It results in recourse to *UCPR* r 668 being inappropriate when the applicant party in fact contends that the decision originally made was wrong when made, and when that party's position is really that of an appellant challenging the validity of the original order.

[7] Mr Mbuzi is in that position in this matter. He had unsuccessfully defended a claim for defamation brought, by a Mr Favell, heard in the Brisbane District Court on 17 and 18 October 2005, with judgment delivered on 18 November 2005, awarding Mr Favell damages in the sum of $15,000. Mr Mbuzi was also ordered to pay interest at the rate of 10 per cent per annum from 14 February 2005 to the date of judgment, and it was those orders which he asked a different District Court judge to "dispense with", in his application under *UCPR* r 668 dated 5 March 2007.

[8] The respondent Mr Favell, a barrister in practice in Queensland, had represented a Mr and Mrs Averono in an originating application in which the Averono's sought injunctive relief pertaining to easements affecting their property, and a property owned by the Mbuzis. Those proceedings instigated by the Averono's, BS No 10869 of 2004, came on at different times before different judges in the Trial Division of this Court. That included a hearing on 20 December 2004 before Byrne J (as His Honour then was), and a further hearing later that day before Muir J (as His Honour then was), a hearing on 21 December 2004 before Muir J, and another hearing on 20 January 2005 before Muir J.

[9] On 9 February 2005 Mr Favell conferred with the Averonos and prepared affidavits, and prepared what the trial judge hearing the matter on 12 March 2007 described as an amended originating application, apparently prepared on 11 and 15 February 2005. It seems that Mr Favell did not appear for the Averonos on 15 February 2005, when there was a further hearing before Muir J, and nor on 15 March 2005,

when there was a hearing before Mullins J. On those two dates a Mr Taylor of counsel appeared for the plaintiffs, the Averonos.

[10] On 14 February 2005, five days after Mr Favell's conference, Mr Mbuzi wrote a letter to a Mr Colwell, who was the solicitor instructed by the Averonos, and who was in turn instructing Mr Favell in the proceedings in application number BS No 10869 of 2004. Mr Mbuzi also sent a copy of his letter to the Registrar of this Court, and the Listings Manager of this Court. On 18 February 2005 he sent a letter to Ms Gail Malone, a solicitor who had been instructed by Mr Favell to act on the latter's behalf in respect of the first letter. Mr Mbuzi published a copy of that second letter to the Registrar of the Supreme Court.

[11] The letter of 14 February was a two page document. The learned District Court judge, who gave judgment for Mr Favell against Mr Mbuzi on the defamation claim, considered that the first page of the letter was uncontentious and could fairly be described as being in the category of a document properly incidental to judicial proceedings and necessary for them, referring to the proceedings on foot between Mr Mbuzi and the Averonos. The letter referred to Mr Mbuzi's forthcoming application relating to costs orders, set for hearing on 15 February 2005, and advised that Mr Mbuzi would be asking for an adjournment to a suitable date on or after 7 March 2005, for reasons appearing on the first page.

[12] The second, short, page advised that:

> "We will also be requesting the court to consider recommending the charges of perjury be laid against your clients, Mr and Mrs Averono, and your barrister Mr Paul Favell. In addition, we will be requesting the court to censure Mr Favell and yourself, for misleading conduct before the court."

[13] The learned judge hearing Mr Favell's defamation claim considered whether s 11 of the *Defamation Act 1889* (Qld) provided a defence for the publication of the defamatory matter, found by the judge to be contained in that second page. Section 11 relevantly read:

> "**11 Absolute protection – privileges of judges, witnesses and others in courts of justice**
>
> A person does not incur any liability as for defamation by publishing, in the course of a proceeding held before or under the authority of any court of justice, or in the course of an inquiry made under the authority of a statute, or under the authority of the Government, or of the Governor-in-Council, or of the Legislative Assembly, any defamatory matter."

[14] The judge considered and relied on the statement in the joint judgment in *Mann v O'Neill* (1997) 191 CLR 204 at 211-212, that:

> "It is well settled that absolute privilege attaches to all statements made in the course of judicial proceedings, whether made by parties, witnesses, legal representatives, members of the jury or by the judge. It extends to oral statements and to statements in originating process, in pleadings or in other documents produced in evidence or filed in the proceedings. It is said that it extends to any document published

> on an 'occasion properly incidental [to judicial proceedings], and necessary for [them].'"

[15] The learned trial judge adjudicating in the defamation proceeding held that the defence given by s 11 of the *Defamation Act* does not extend to the defamatory imputations contained in the second page and final paragraph of that first letter, because the judge was satisfied that those imputations were not published:

> "On an occasion properly incidental to judicial proceedings and necessary for them".

The judge held those were statements made extraneous to the originating application then on foot, and that Mr Mbuzi had not demonstrated any necessity for such extravagant remarks.

[16] Regarding the second letter, Gail Malone had, by letter dated 16 February 2005, sought an apology for, and a retraction of, Mr Mbuzi's remarks about Mr Favell in the first letter. The second letter was Mr Mbuzi's response to that request by Ms Malone, and in that letter, he said, among other things:

> "3. Your letter is a clear intimidation and retaliation against me as a result of discharging my responsibilities in a court case. Mr Favell should be seen as a party to your action as he would have instigated the action in the first place.
>
> 4. I have advice to you, as an individual, your law firm, and Mr Favell should be reported for possible prosecution for intimidation and retaliation against a witness...
>
> 5. I am further advised that when the case resumes on 2 March 2005, I should let the judge know about your action, which also boarders on interference in Supreme Court proceedings."

[17] The learned judge adjudicating in the defamation trial likewise held that s 11 of the *Defamation Act* did not apply to the defamatory imputations about Mr Favell in that letter, and held that the letter demonstrated a gross ignorance of the normal legal process by which a solicitor wrote a letter upon instructions from an aggrieved client, such as Mr Favell. It should be said that the learned judge's finding, that s 11 of the *Defamation Act* gave no defence to Mr Mbuzi, was not described by the judge as depending in any way on Mr Favell not continuing to represent or advise the Averonos, after 20 January 2005.

[18] Mr Mbuzi's application under *UCPR 668* was heard by a different judge of the District Court, whose judgment – the one under appeal – delivered on 12 March 2007, records that a feature which loomed very large in Mr Mbuzi's submissions was Mr Favell's fee note dated 22 February 2005. It recorded his conference with his clients (the Averonos), and his preparation of affidavits and an amended originating application, prepared for 11 and 15 February 2005. The judge noted that the fee note made no mention of any appearance in court on 15 February 2000. It appears from other material in the record that a Mr Taylor of counsel appeared on that date, rather than Mr Favell. In any event, Mr Mbuzi was of the view in the hearing conducted on 12 March 2007, (and still of that view on this appeal), that Mr Favell had appeared on 15 February 2005; but Mr Mbuzi seems to be in error.

[19] As the learned judge hearing the proceeding on 12 March 2007 remarked, the different judge who gave judgment in the defamation proceeding on 18 November 2005 had denied a defence under s 11 of the *Defamation Act* to Mr Mbuzi, not because of any features depending upon the exact dates when the matter happened, but because Mr Mbuzi's conduct was not considered by that judge to be necessarily and properly incidental to the judicial proceeding which were then admittedly still on foot. The judge hearing Mr Mbuzi's application under *UCPR 668* then went on to hold that it was not possible to conclude that any material difference would have been made to the result of the defamation trial by the introduction into evidence in that trial, of Mr Favell's fee note. The second judge held that it followed that the application in *UCPR 668* had to be dismissed.

[20] That reasoning and conclusion is correct. Mr Mbuzi's outline of argument on this application includes the assertion that Mr Favell had falsely concealed his representation of the Averonos in the amended originating application, which was still on foot at the time of Mr Mbuzi's letters of 14 and 18 February 2005, and that Mr Favell's (continuing) representation of them only surfaced later during a costs application. That assertion wrongly attributes to Mr Favell that the latter in some fashion successfully concealed the fact of his earlier representation of the Averonos, and if accurate – which it is not – would be relevant only if the judge in the defamation trial may have come to a different conclusion, if that judge had known that Mr Favell had conferred with the Averonos some days before Mr Mbuzi wrote to the latter's solicitors.

[21] There is no basis for any such conclusion. Had the evidence now available – namely Mr Favell's fee note – been available at the trial, it would not have produced any different result at all. It does not establish that Mr Favell appeared in court on 15 February 2007, if that fact was relevant, which it is not; nor is it established as a fact. Indeed, the opposite seems very likely. Had it been the fact, it would have had no relevance to whether or not Mr Mbuzi's remarks about Mr Favell were in any way necessary, or properly incidental, to the ongoing proceedings between Mr Mbuzi and the Averonos; and that is the important issue. Their only relevance to the proceedings was as notice of an application Mr Mbuzi foreshadowed making. But that application did not depend on Mr Favell continuing to appear, or abstaining from appearing, and it need not have been foreshadowed in the terms in which it was.

[22] Proceedings under *UCPR 668* were inappropriate in this matter and were correctly dismissed by the learned judge below. The application for leave to appeal should be dismissed, and Mr Mbuzi should pay Mr Favell's costs of and incidental to this appeal. Because of the complete lack of merit in both the original application and this application, and the unjustifiably offensive manner in which Mr Mbuzi had conducted them, these should be assessed on an indemnity basis.

[23] Application for leave to appeal refused, with costs to be assessed on an indemnity basis.