[2015] QCA 221

COURT OF APPEAL

MARGARET McMURDO P
GOTTERSON JA
APPLEGARTH J

Appeal No 1984 of 2015
SC No 62 of 2015

BEVAN ALAN MOWEN **Appellant**

v

ELECTORAL COMMISSION OF QUEENSLAND **Respondent**

BRISBANE

MONDAY, 9 NOVEMBER 2015

JUDGMENT

APPLEGARTH J: On 23 January 2015 the appellant filed what was styled an "Ex Parte" originating application which sought

> "An Ex Parte Injunction to the Queensland State Election of 2015, any Act passed by a Parliament, either State or Federal, that is contrary to the Constitution of the Commonwealth of Australia as void ab initio".

His application and supporting material were served on the Queensland Electoral Commission. The Commission was not named as a respondent. It had an obvious interest in the relief being sought.

The matter came before a judge of the trial division on Friday, 30 January 2015. Counsel for the Commission initially appeared as a friend of the court. After some discussion, the Commission

was made a respondent to the application, without objection by the appellant. After hearing the matter, the primary judge gave reasons as to why the case advanced by the appellant was simply unarguable. It is unnecessary for present purposes to set out the reasons of the primary judge for dismissing the application. They appear in *Mowen v Electoral Commission of Queensland* [2015] QSC 16.

In accordance with standard practice, the primary judge inquired whether counsel for the successful party had any application whereupon counsel applied for costs. After hearing the applicant on the question of costs, the primary judge made a further order that he pay the respondent's costs of and incidental to the application.

On 25 February 2015 the applicant filed a notice of appeal which contains six grounds. Two of them relate to the conduct of the hearing on 30 January 2015.

First, the appellant alleges that the primary judge failed to allow natural justice. There is no substance to this allegation. The primary judge heard the appellant's arguments and invited the appellant to respond to the respondent's written outline of submissions. The primary judge told the appellant that "now is your opportunity to say anything you'd like to say in response to Mr Scott's submissions". The appellant concluded his oral submissions. He was not cut short. At the end of his oral submissions, he said "thank you" to the judge. The appellant was given a fair hearing.

The fact that the primary judge was able to give *ex tempore* reasons for dismissing a misconceived case does not mean that the application was predetermined or that the primary judge was prejudiced. It means that a judge, assisted by written submissions of the respondent's counsel about the legal flaws in the appellant's case, was able to determine the matter promptly, as he should have in the circumstances. The appellant provided no reasonable argument to the primary judge as to why the respondent's submissions on the points of law raised by the appellant were wrong. He still has not done so. The ground of appeal that the primary judge denied the appellant natural justice should be rejected.

Next, the notice of appeal asserts the primary judge coerced him to amend the ex parte proceedings and then encouraged lawyers for the Electoral Commission of Queensland to apply for costs. The transcript of the hearing shows that these allegations are without substance. The primary judge helpfully pointed out to the appellant that courts do not "make injunctions to the world at large". The primary judge pointed out the procedural defect in the application could be rectified by naming the Electoral Commission of Queensland as a respondent. His Honour invited the appellant to seek an order and the appellant agreed to do so. No coercion was involved. Without a proper respondent, the order sought would have had no utility and the application would properly have been dismissed without a hearing on the merits. By making an order that the Commission be joined as a respondent, the primary judge facilitated the appellant having a hearing on the merits.

The complaint that the primary judge encouraged the lawyers for the Electoral Commission of Queensland to apply for costs is without merit. As noted, following the dismissal of the application, the primary judge adopted the common practice of inquiring of counsel for the successful party as to whether he had an application. The inquiry was entirely appropriate.

The notice of appeal alleges that the primary judge

> "Failed to point to any Enumerated Power in the Constitution of the Commonwealth of Australia, under Chapter III, The Judicature that gives the Judiciary of Queensland plenary power".

This ground is without merit. The primary judge was not required to point out the power of the Supreme Court of Queensland to issue an injunction. The appellant's originating application relied upon the court having that power and nothing required the primary judge to address the source of the court's power to issue an injunction, or the Constitutional recognition given to the Supreme Court of Queensland by the Commonwealth Constitution. In hearing, determining and dismissing the appellant's proceeding, the primary judge was not purporting to exercise any legislative power under the Constitution. His Honour was exercising the judicial power which the appellant asked the court to exercise.

Next, the notice of appeal seeks to clarify that the application was sought "not because of the illegality of a specific section of the Electoral Act, the challenge is to the legality of the whole Act". This does not advance the appellant's case. The terms of the ex parte originating application identify the appellant's contentions and the primary judge dealt with those contentions. The appellant's contentions do not provide a basis to invalidate a section of the Act, let alone the whole Act.

The remaining two grounds appearing in the notice of appeal make assertions of abuse of power in contravention of the *Crimes Act* 1914 (Cth) s 34(4) and assert "Criminals cannot write law and criminals cannot nominate persons to the bench". The appellant's outline of submissions filed 10 April 2015 and his document Submission in Response to the Application filed 3 August 2015 make allegations about public officers refusing to do their duty and extravagant allegations of treason and criminal conduct. The allegations are scandalous and irrelevant to the subject matter of this appeal. They do nothing to assist this court to understand any alleged error of law made by the primary judge in disposing of the arguments that were before him on 30 January 2015.

The primary judge was clearly correct in concluding that the appellant's arguments were misconceived. He was correct to dismiss the application. The appellant's notice of appeal and his submissions simply do not engage with the reasons given by the primary judge. They do not provide any basis in law to set aside the orders made on 30 January 2015.

I would dismiss the appeal, and subject to any submissions on costs, order the appellant to pay the respondent's costs of the appeal.

THE PRESIDENT: I agree.

GOTTERSON JA: I also agree.

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THE PRESIDENT: The orders are the appeal is dismissed with costs. A transcript is required and is to be placed on the file so that Mr Mowen can read it if he wishes. Adjourn the court.