Court of Appeal
New South Wales

Case Title:	Mahmoud v Sutherland
Medium Neutral Citation:	[2012] NSWCA 306
Hearing Date(s):	12 September 2012
Decision Date:	26 September 2012
Jurisdiction:	
Before:	Barrett JA (at [1]), Tobias AJA (at [54]), Blanch J (at [55])
Decision:	1. Order that the order of dismissal made by the District Court on 6 May 2011 be set aside insofar as it dismissed the appeal of Tosson Mahmoud against the costs order made against him by the Local Court on 20 April 2010. 2. Order that the appeal of Tosson Mahmoud against the said costs order be remitted to the District Court for determination according to law. 3. Order that the summons filed by Tosson Mahmoud in this Court on 4 October 2011 be otherwise dismissed. 4. No order as to costs of the proceedings in this Court. *[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]*
Catchwords:	ADMINISTRATIVE LAW - judicial review -

	apprehended violence order - Local Court dismisses application for apprehended violence order and makes costs order against applicant - appeal by applicant to District Court dismissed - applicant seeks review of District Court's decision by Court of Appeal - scope of review limited to jurisdictional error - function of District Court on appeal by way of rehearing - no jurisdictional error with respect to decision on making of apprehended violence order - failure to address statutory pre-condition to existence of power to make costs order - jurisdictional error established in relation to the costs order.
Legislation Cited:	Crimes (Appeal and Review) Act 2001, ss 18, 19 Crimes (Domestic and Personal Violence) Act 2007, ss 19(1), 20(1), 20(2), 84, 99 District Court Act 1973, ss 127, 176
Cases Cited:	Allesch v Maunz [2000] HCA 40; (2000) 203 CLR 172 Commissioner of Taxation v Futuris Corporation Limited [2008] HCA 32; (2008) 237 CLR 146 Craig v South Australia [1995] HCA 58; (1995) 184 CLR 163 Da Costa v Cockburn Salvage & Trading Pty Ltd [1970] HCA 43; (1970) 124 CLR 192 DAR v Director of Public Prosecutions (Qld) [2008] QCA 309 Fox v Percy [2003] HCA 22; (2003) 214 CLR 118 Garde v Dowd [2011] NSWCA 115 Kirk v Industrial Court of New South Wales [2010] HCA 1; (2010) 239 CLR 531 Spanos v Lazaris [2008] NSWCA 74 Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan [1931] HCA 34; (1931) 46 CLR 73
Texts Cited:	Aronson, "Jurisdictional error without the tears", in Groves and Lee (eds), Australian Administrative Law - Fundamentals, Principles and Doctrines (2007)
Category:	Principal judgment

Parties:	Tasson Mahmoud - Plaintiff Vincent Sutherland - First Defendant District Court of New South Wales - Second Defendant
Representation	
- Counsel:	In person - Plaintiff In person - First Defendant Submitting Appearance - Second Defendant
- Solicitors:	In person - Plaintiff In person - First Defendant I V Knight, Crown Solicitor - Second Defendant
File number(s):	2011/316382
Decision Under Appeal	
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JUDGMENT

1 **BARRETT JA**: On 4 October 2011, Tosson Mahmoud filed in the Court of Appeal a summons by which he sought an order setting aside orders made by the District Court on 6 May 2011. Vincent Sutherland, the other party to the District Court proceedings, was named in the summons as the sole defendant. By order made by the Registrar of the Court of Appeal, the District Court was added as second defendant. It filed a submitting appearance.

2 The challenged decision of the District Court is a decision of Knox DCJ upon an appeal from the Local Court which, on 20 April 2010, dismissed an application by Mr Mahmoud for an apprehended violence order against Mr Sutherland and made an order that Mr Mahmoud pay Mr Sutherland's costs in a fixed sum of $4,547.95. The District Court dismissed Mr Mahmoud's appeal.

3 Both Mr Mahmoud and Mr Sutherland were self-represented upon the hearing of the proceedings in this Court, as they had been in the District Court. In the Local Court, Mr Mahmoud was self-represented but Mr Sutherland was represented by a solicitor, Ms Dahl.

The basis of the proceedings in this Court

4 It is necessary to refer to the foundation for the proceedings in this Court. It is clear that no attempt is made to rely on s 127 of the *District Court Act 1973* (leave to appeal has been neither granted nor sought). When regard is had to the statutory background, the claim is, of necessity, one for prerogative relief.

5 Mr Mahmoud's unsuccessful application in the Local Court was made under Part 10 of the *Crimes (Domestic and Personal Violence) Act 2007*. Section 84(2)(a1) of that Act allows an appeal to the District Court by the applicant for an apprehended violence order against dismissal of the application to the Local Court. Section 84(2)(b) allows an applicant for an apprehended violence order to appeal against the awarding of costs under s 99.

6 Sections 84(3) and 84(4) of the *Crimes (Domestic and Personal Violence) Act* cause provisions of the *Crimes (Appeal and Review) Act 2001* to apply, with adaptations, to such appeals. A combination of s 84(3)(a) of the *Crimes (Domestic and Personal Violence) Act* and s 18 of the *Crimes*

(Appeal and Review) Act produces the result that the appeal is to be by way of rehearing on the basis of evidence given in the original Local Court proceedings, subject to the possibility of further evidence being received by the District Court under s 18(2) or s 19 of the *Crimes (Appeal and Review) Act*.

7 The exercise by the District Court of this appeal function forms part of the criminal jurisdiction of the District Court, with the result that s 176 of the *District Court Act* applies: *Garde v Dowd* [2011] NSWCA 115 at [9]. Section 176, which is within Part 4 headed "The Criminal Jurisdiction of the Court", is in these terms:

> "No adjudication on appeal of the District Court is to be removed by any order into the Supreme Court."

8 The effect of s 176, in this type of case, was described by Basten JA (with the concurrence of Giles JA and McColl JA) in *Garde v Dowd* as follows (at [10]):

> "It is accepted that the effect of this provision is not to exclude proceedings by way of judicial review by this Court, but to limit their availability to cases involving jurisdictional error: see, eg, *Downey v Acting District Court Judge Boulton (No 5)* [2010] NSWCA 240; 272 ALR 705 at [133]-[134]. No greater intrusion on the powers of this Court would be constitutionally valid: *Kirk v Industrial Relations Court of New South Wales* [2010] HCA 1; 239 CLR 531 at [54]-[55]."

9 The only question that may be agitated in this Court, therefore, is whether the decision of the District Court of 6 May 2011, on appeal from the Local Court, is affected by jurisdictional error.

The Local Court proceedings

10 Before examining the decision of the District Court, it is necessary to say something about the proceedings in the Local Court.

11 Mr Mahmoud appeared before Heilpern LCM in the Local Court at the Downing Centre on 20 April 2010 seeking an apprehended violence order against Mr Sutherland. The magistrate began by outlining the procedure he intended to follow. The transcript records the following:

> "HIS HONOUR: And what is going to happen is this. If you wish to proceed to seek an order then I am going to ask you whether you want to give evidence. You will come up to the witness box and give your evidence and then, Ms Dahl, on behalf of Mr Sutherland, will be able to ask you questions. That is called cross-examination.
>
> COMPLAINANT: Right.
>
> HIS HONOUR: Following that - do you have any witnesses here apart from yourself sir?
>
> COMPLAINANT: No, sir.
>
> HIS HONOUR: Fine.
>
> COMPLAINANT: But I - I--
>
> HIS HONOUR: Just a moment.
>
> COMPLAINANT: Okay, sure.
>
> HIS HONOUR: Just a moment. Following that, provided it is appropriate, I will be asking whether Mr Sutherland wishes to give evidence and whether he wishes to call any witnesses. Obviously Mr Sutherland will be available for cross-examination by you if he does give evidence and so will his witnesses. Following the evidence being given, the test that I have to apply is whether I am satisfied, on the balance of probabilities, that it is appropriate to make an order. The test that I apply is whether I am satisfied that you are suffering fear, whether those fears are reasonable and whether it is an appropriate matter to make an order.
>
> So, just to recap what I have just said, you will be giving evidence, cross-examination. Mr Sutherland will be giving evidence, cross-examination. Any other witnesses, cross-examination and then I will hear from both of you about whether I am to make an order or not to make an order. Do you understand that process?
>
> COMPLAINANT: Yes but I'm not having fear and the plaintiffs ..(not transcribable).. adjourn.

HIS HONOUR: I think I made that reasonably clear.

COMPLAINANT: Yeah, okay.

HIS HONOUR: If you have any questions at any time about the process because you are not legally represented and Mr Sutherland is - if you have any questions, please do not hesitate to ask me and I will do my best to assist you. Okay. Now, are we ready to proceed."

12 Mr Mahmoud then sought an adjournment because he believed that a "crime of fraud" had been committed and that his application should not proceed until after the police had investigated this, his view being that "[I]t changes the course of everything". The magistrate dealt with that application as follows:

> "Okay. So what is being suggested is that this is an application for an adjournment of the proceedings that have been set down for hearing since 6 January 2010. The applicant for an apprehended violence order is seeking to adjourn this matter on the basis that he says that he has uncovered a fraud involving court papers and involving the defendant and any other witnesses in a large scandal whereby certain documents have been replaced with other documents. I am not satisfied that it is appropriate to adjourn the matter. It has been set down for hearing for a significant period of time and other investigation - or a police investigation - could take many months, if at all, and I fail to see the relevance of that police investigation to any issue that is before me from the submissions that have been made. Accordingly, the application for an adjournment is denied. Now, sir, do you wish to give evidence in this matter?"

13 Mr Mahmoud said that he did wish to give evidence. He was affirmed and, largely in response to questions put to him by the magistrate, gave evidence of certain incidents of interaction between himself and Mr Sutherland that formed the basis of his case for the making of the apprehended violence order he sought. I shall describe these incidents presently. There was then discussion about access to certain documents produced on subpoena by the police. Remarks made by the magistrate suggest that the content of the documents was potentially relevant to questions about Mr Mahmoud's credibility. The matter of access was left to one side at that point.

14 Cross-examination of Mr Mahmoud by the solicitor for Mr Sutherland then began. He was first asked questions about whether he had a middle name and what it was. He eventually accepted that he had "gone by" a name that included a particular middle name. Thereafter, the course of events recorded in the transcript was as follows:

> "Q. And what is your date of birth?
> A. That's - that's personal, they cannot do it because --
>
> HIS HONOUR
>
> Q. Sir, sir, it is not personal. You are the person who is seeking this Apprehended Violence Order. The defendant is clearly able to ensure that the identification of the person seeking the order. Now please answer the question.
> A. Date of birth, I was told by another chamber Magistrate not to mention the date of birth.
>
> Q. Sir, you either answer the question or I am going to dismiss the claim.
> A. Sir, I - a - if you have a look at this, I will appeal to the Supreme Court about the whole matter, about your decision, to insist on the date of birth and the other matters and I - I believe that you are in ..(not transcribable) sir, I have ..(not transcribable).. I am going to the Supreme Court because --
>
> HIS HONOUR
>
> Q. That is enough, thank you sir.
>
> THE WITNESS WITHDREW
>
> HIS HONOUR: These papers are to be marked 'The applicant is refusing to answer questions'. IN THOSE CIRCUMSTANCES, PARTICUILARLY GIVEN THE NATURE OF THE ORIGINAL COMPLAINT, THE APPLICATION IS DISMISSED."

15 Mr Sutherland's solicitor then sought costs in the sum of $4,547.95. Mr Mahmoud also asked for costs. The decision of the magistrate on the question of costs was as follows:

> "There are two applications for costs in this matter. The application for costs is made by the applicant and there is an application for costs made by the defendant. As a general rule in proceedings of this type,

costs ought follow the cause. That is, in this case, because the applicant refused to give his name and address when directed to do so, he said he had had enough, that he was going to appeal the decision.

I indicated to him that because he was not answering the questions, his application was dismissed. That means that the defendant has, for all intents and purpose, won today's proceedings and costs ought follow the cause in that way. It appears to me that in terms of the legislation, costs in these matters must be for a costs order to be made in an apprehended personal violence order then it is simply a question of assessing at what cause in and whether there is any rule of reason to vary the order that would ordinarily flow. That is, costs follow the cause.

In this case, clearly, the fact that Mr Mahmoud is not prepared to give his date of birth and was, to say the least, unhelpful in giving his middle name so that he could even be identified properly, indicates to me that there is no reason to vary the ordinary course of events which is the costs would follow the cause. Given that the matter was listed for hearing and the time now is ten past 3; that there was two witnesses for the defence here; that there has been previous argument about the subpoenas; and that the matter has been listed for hearing, in my view preparation for a hearing of a matter of this type, the costs that are being sought are fair and reasonable.

In those circumstances I am making a costs order in the sum of $4,547.95 by the applicant to the defendant within twenty-one days. The papers are marked "The application is dismissed". The subpoenaed documents I am now going to reseal and they may be sent back to the police service by the registry."

The District Court proceedings

16 The subsequent appeal to the District Court was, as I have said, by way of rehearing on the basis of the evidence given in the Local Court proceedings, subject to the particular possibilities of additional evidence recognised by the statutory provisions governing the appeal. In the event, there was no further evidence and Knox DCJ recorded in his judgment that "Mr Mahmoud has not sought to call or give further evidence"; also that no witness statements had been prepared. The judge then dealt with (and refused) an adjournment application. In the course of doing so, his Honour referred to

(a) the procedural history in the District Court;

(b) Mr Mahmoud's failure to identify any defects of substance in the Local Court transcript;

(c) Mr Mahmoud's "unsubstantiated assertions of bias" against the magistrate and of "corruption and collusion" of transcription services, court officers and solicitors;

(d) Mr Sutherland's having been brought to court on numerous occasions;

(e) costs orders against Mr Mahmoud not having been met.

17 The judge then said:

> "Mr Mahmoud also argues that the Magistrate was in error in making a reference to witnesses to be called by the Respondent as being 'here' - inferred as being in court. It is agreed by both parties that there were, at the relevant time of the hearing of this matter, no other witnesses in the courtroom or the court complex. Mr Sutherland, in response to a question from the Court, indicated that the witnesses were available to give evidence and were on call. One of the witnesses was apparently in that category because he was in a wheelchair although there was no sworn evidence to that effect.
>
> Whatever the situation is as to the relevance of those matters, it is clear that this issue was ventilated before Judge Garling on 24 March 2011 when his Honour made it clear to Mr Mahmoud that it was his responsibility, not the responsibility of the court, to subpoena witnesses, as part of his overall responsibility to prepare evidence, appropriately."

18 The reference to Judge Garling concerns an interlocutory stage of the District Court proceedings.

19 The substantive decision of Knox DCJ was then announced:

> "CONSIDERATION
>
> In my view, on the rehearing of the matter, the Appellant has not established any basis for the making of an apprehended domestic

> violence order in relation to the events which occurred on 18 December 2009 or the other dates referred to.
>
> Accordingly I dismiss the appeal."

20 Finally, the judge dealt with the matter of costs:

> "I also consider that the Magistrate made appropriate costs orders in the circumstances and for the reasonable brief reasons he outlined, including the conduct of the Appellant during the proceedings.
>
> In the circumstances of the nature of the complaint, the evidence led and the conduct of the proceedings by the Appellant, the Magistrate was justified in making the orders he did. Costs may be awarded against an unsuccessful applicant under s 99(3) of the *Crimes (Domestic and Personal Violence) Act* (NSW) 2007 on the basis that the complaint was made either frivolously or vexatiously. It is a clear inference that that is the basis on which the costs orders were made by Magistrate Heilpern.
>
> Further, the amount ordered seems to have been a proper quantification of the legal costs involved and are reasonable in the circumstances given what is apparent from the court file as to the history and nature of proceedings and the period of time Mr Mahmoud's application was in court as well as the desirability of Mr Sutherland having legal representation to answer the charges against him.
>
> Mr Mahmoud has sought costs for himself based on his own time spent in pursuing the matter. Given the outcome of the primary proceedings, the appeal and the amount ordered, I do not regard the application as having any merit."

The statutory provisions about apprehended violence orders

21 Central to the Local Court's power in apprehended violence order matters are s 19(1), s 20(1) and s 20(2) of the *Crimes (Domestic and Personal Violence) Act*. These provisions are as follows:

> "19(1) A court may, on application, make an apprehended personal violence order if it is satisfied on the balance of probabilities that a person has reasonable grounds to fear and in fact fears:
> (a) the commission by the other person of a personal violence offence against the person, or
> (b) the engagement of the other person in conduct in which the other person:
> (i) intimidates the person, or

> (ii) stalks the person,
> being conduct that, in the opinion of the court, is sufficient to warrant the making of the order."

> "20(1) In deciding whether or not to make an apprehended personal violence order, the court must consider the safety and protection of the person seeking the order and any child directly or indirectly affected by the conduct of the defendant alleged in the application for the order.
>
> (2) Without limiting subsection (1), in deciding whether or not to make an apprehended personal violence order, the court is to consider:
> (a) in the case of an order that would prohibit or restrict access to the defendant's residence-the effects and consequences on the safety and protection of the protected person and any children living or ordinarily living at the residence if an order prohibiting or restricting access to the residence is not made, and
> (b) any hardship that may be caused by making or not making the order, particularly to the protected person and any children, and
> (c) the accommodation needs of all relevant parties, in particular the protected person and any children, and
> (d) any other relevant matter."

22 The power of a Local Court to award costs in such a proceeding is created and regulated by s 99:

> "(1) A court may, in apprehended violence order proceedings, award costs to the applicant for the order or decision concerned or the defendant in accordance with this section.
>
> (2) Costs are to be determined in accordance with Division 4 of Part 2 of Chapter 4 of the Criminal Procedure Act 1986.
>
> (3) A court is not to award costs against an applicant who is the person for whose protection an apprehended domestic violence order is sought unless satisfied that the application was frivolous or vexatious.
>
> (4) A court is not to award costs against a police officer who makes an application unless satisfied that the police officer made the application knowing it contained matter that was false or misleading in a material particular.
>
> (5) Subsections (3) and (4) have effect despite any other Act or law."

23 The power to make an apprehended violence order is enlivened if the court is, on the balance of probabilities, "satisfied" in the way described in s 19(1). If (and only if) that state of satisfaction is reached, the question becomes whether the power should be exercised and the duty to consider

the matters in s 20(1) and s 20(2) arises. The first and indispensable task of a magistrate, therefore, is to address the questions regarding reasonable grounds for fear by the applicant and whether fear in fact exists.

24 Section 99, dealing with costs, compels rejection of a claim for costs against the applicant for the apprehended violence order unless the court is satisfied in the way stated in s 99(3). A corollary is that a costs order can be made against that person only if the relevant state of satisfaction as to the "frivolous or vexatious" criterion has been realised.

25 In each case (that is, under s 19(1) and under s 99(3)), therefore, the positive power to make an order is enlivened and available to be exercised only if the court has reached the specified state of satisfaction.

The jurisdictional error concept

26 I turn to the issue of jurisdictional error described compendiously by Basten JA (Beazley and Bell JJA agreeing) in *Spanos v Lazaris* [2008] NSWCA 74 at [15] as "failure to comply with an essential precondition or limit to the valid exercise of a power, whether either the precondition or power arises under the general law or under statute".

27 In *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163, the High Court gave examples of situations in which an inferior court acts beyond jurisdiction by entertaining a matter outside the limits of its functions and powers. One of them was as follows (at 177-8):

> "[J]urisdictional error will occur where an inferior court disregards or takes account of some matter in circumstances where the statute or other instrument establishing it and conferring its jurisdiction requires that that particular matter be taken into account or ignored as a pre-condition of the existence of any authority to make an order or decision in the circumstances of the particular case. Again, an inferior court will exceed its authority and fall into jurisdictional error if it misconstrues that statute or other instrument and thereby misconceives the nature of the function which it is performing or the

> extent of its powers in the circumstances of the particular case. In the last-mentioned category of case, the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern."

28 Jurisdictional error of this kind was established in *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531. The inferior court, by misconstruing a statutory provision, misapprehended the limits of its functions and powers and thereby made orders in circumstances where it had no power to do so French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ said (at [74]):

> "It had no power to do that because no particular act or omission, or set of acts or omissions, was identified at *any* point in the proceedings, up to and including the passing of sentence, as constituting the offences of which Mr Kirk and the Kirk company were convicted and for which they were sentenced. And the failure to identify the particular act or omission, or set of acts or omissions, alleged to constitute the contravening conduct followed from the misconstruction of s 15. By misconstruing s 15 of the OH&S Act, the Industrial Court convicted Mr Kirk and the Kirk company of offences when what was alleged and what was established did not identify offending conduct."

29 In *Commissioner of Taxation v Futuris Corporation Limited* [2008] HCA 32; (2008) 237 CLR 146 at [134], Kirby J observed that the recognised "jurisdictional error" categories in Australia are not closed and that the following have been recognised by "a leading Australian academic authority on the subject" (Aronson, "Jurisdictional error without the tears", in Groves and Lee (eds), *Australian Administrative Law - Fundamentals, Principles and Doctrines* (2007) 330 at 335-336):

1. A mistaken assertion or denial of the very existence of jurisdiction.
2. A misapprehension or disregard of the nature or limits of the decision maker's functions or powers.
3. Acting wholly or partly outside the general area of the decision maker's jurisdiction, by entertaining issues or making the types of decisions or orders which are forbidden under any circumstances.
4. Acting on the mistaken assumption or opinion as to the existence of a certain event, occurrence or fact or other requirement, when the Act makes the validity of the decision maker's acts contingent on the actual or

objective existence of those things, rather than on the decision maker's subjective opinion.

5. Disregarding a relevant consideration which the Act required to be considered or paying regard to an irrelevant consideration which the Act required not to be considered, in circumstances where the Act's requirements constitute preconditions to the validity of the decision maker's act or decision.

6. Misconstruing the decision maker's Act in such a way as to misconceive the nature of the function being performed or the extent of the decision maker's powers.

7. Acting in bad faith.

8. A breach of natural justice.

Appeal by way of rehearing

30 The task of the District Court was to determine an appeal by way of rehearing. It was therefore incumbent upon the District Court to consider for itself the issues the Local Court had to determine and the effect of the evidence the Local Court received as appearing in the record of the proceedings before the Local Court: *Da Costa v Cockburn Salvage & Trading Pty Ltd* [1970] HCA 43; (1970) 124 CLR 192 at 208. A right to a rehearing "smacks rather of original jurisdiction" (*Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* [1931] HCA 34; (1931) 46 CLR 73 at 109 per Dixon J) so that the appeal "becomes, in substance, a hearing of the case for a second time" (*DAR v Director of Public Prosecutions (Qld)* [2008] QCA 309 at [9] per Keane JA).

31 In *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118 at [23], Gleeson CJ, Gummow and Kirby JJ, referring to the requirements and limitations of an appeal by way of rehearing, said (at [23]):

> "On the one hand, the appellate court is obliged to 'give the judgment which in its opinion ought to have been given in the first instance'. On the other, it must, of necessity, observe the 'natural limitations' that exist in the case of any appellate court proceeding wholly or

> substantially on the record. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the 'feeling' of a case which an appellate court, reading the transcript, cannot always fully share. Furthermore, the appellate court does not typically get taken to, or read, all of the evidence taken at the trial. Commonly, the trial judge therefore has advantages that derive from the obligation at trial to receive and consider the entirety of the evidence and the opportunity, normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole."

32 It follows that the appeal court is not required to proceed as if the decision of that court had never been made. The focus must be on the question whether there was "some legal, factual or discretionary error": *Allesch v Maunz* [2000] HCA 40; (2000) 203 CLR 172 at [23].

The task of the District Court

33 In the light of both the nature of the appeal and the statutory provisions set out at [21] above, it was the duty of the District Court to make an assessment of the Local Court's treatment of the pre-condition to which s 19(1) of the *Crimes (Domestic and Personal Violence) Act* directs the central attention of the court and, as to costs, to come to a conclusion on the "frivolous or vexatious" pre-condition imposed by s 99(3).

34 Uppermost in the District Court's approach to these matters should have been the question whether the Local Court had adequately identified and dealt with the several matters with which it was required to deal and what the correct outcome was in relation to those matters.

35 The magistrate began by giving a fair outline of the function of the court with respect to applications for apprehended violence orders and of the matters to be addressed: see the third last passage of the magistrate's remarks at [11] above. In that way, he showed that he understood the relevant tasks and the nature of the jurisdiction. In the result, however, he gave only very brief reasons for dismissing Mr Mahmoud's application. The

reasons were, first, that Mr Mahmoud was "refusing to answer questions"; and second, "the nature of the original complaint".

36 The reason concerning failure to answer questions reflected a view of the magistrate that Mr Mahmoud was withholding, without reasonable excuse, information of potentially probative value - in other words, that he was hindering the process of fact finding in a case where it was he who bore the burden of establishing the necessary facts.

37 The reason concerning "the nature of the original complaint" no doubt refers to the complaint contained in Mr Mahmoud's written application (dated 24 December 2009) and referred to in his exchanges with the magistrate. The written grounds of complaint were as follows:

> "The Applicant and the Defendant are residents in a large Department of Housing Unit complex located at [address], Surry Hills.
>
> The Defendant is the Chairperson of a group calling itself the [address] Tenant Group. The Group purports to represent all of the tenants of the complex at [address], Surry Hills although only a minority of residents participate in the group. The Applicant has complained to the Department of Housing that the Group does not represent the majority of the tenants and the Defendant is hostile to the Applicant as a result of the Applicant's opposition to the group.
>
> On 18th December, 2009 at 1.40pm the Applicant entered an elevator on the 15th floor. The elevator descended to Level 14 where the Defendant entered the elevator. As the elevator descended the Defendant became agitated, stepped close to the Applicant, raised his right hand appeared to be about to hit the Applicant. The Defendant took objection to the Applicant standing on a piece of newspaper in the elevator, shouting repeatedly at the Applicant 'this is filthy vandal'. The Defendant appeared furious at the Applicant for no apparent reason. The Defendant hit the wall of the elevator several times with his fist in a violent and threatening manner towards the Applicant. The Defendant kicked the Applicant's trolley, shouted at the Applicant and said 'move that shit out of there'.
>
> The elevator arrived at the entry level of the building and the Applicant exited the elevator. The Defendant exited the elevator after the Applicant. The Applicant walked through a hallway towards the building exit/entry doors to the street. The Defendant followed behind, yelling at the Applicant all the way to the street.

> The Defendant's behaviour was threatening and intimating and the Applicant held genuine fears for his safety."

38 In the course of the hearing, the magistrate summarised this written complaint and obtained Mr Mahmoud's agreement with the accuracy of the summary. The magistrate then obtained from Mr Mahmoud brief particulars of subsequent events:

(a) on 31 December 2009, when Mr Sutherland allegedly placed a bundle of newspapers outside the front door of Mr Mahmoud's flat and banged loudly on the door which, Mr Mahmoud said, caused him to be frightened;

(b) on 18 March 2010, when Mr Sutherland again allegedly deposited a bundle of newspapers outside Mr Mahmoud's front door;

(c) on 26 March 2010, when Mr Sutherland allegedly encountered Mr Mahmoud in the street, made a gesture with his fingers and nose suggesting a bad smell, said either "another smelly bastard" or "a bloody smelly bastard" and spat.

39 The magistrate's reasons for dismissing Mr Mahmoud's application were, as I have said, very briefly stated. But the statement of them was made after the quite adequate explanation (at [11] above) of the function that the magistrate was required to perform and upon which he intended to embark.

40 Taken in context, the brief statement of the magistrate as to his reasons shows, with sufficient certainty and clarity, in my view, that the central reason was that Mr Mahmoud's evidence in chief (which had concluded, in circumstances where he did not seek to call any other witness), particularly regarding the first incident - the one outlined in his original complaint - did not satisfy the magistrate that Mr Mahmoud had reasonable grounds to fear (and in fact feared) conduct involving physical violence on the part of Mr Sutherland of the kind described in s 19(1) of the *Crimes (Domestic*

and Personal Violence) Act. The emphasis of the statutory provisions is upon conduct grounding physical fear or fear of physical violence going beyond rude, offensive and boorish behaviour. That being so and having regard to the evidence Mr Mahmoud gave (as well as the content of his written application), the finding must be taken to have been that the necessary statutory pre-condition for the making of an order had not been satisfied, so that the need to consider the s 20(1) and s 20(2) matters did not arise.

41 It was perhaps irregular to bring the hearing to an end while Mr Mahmoud's cross-examination was in progress. But any such irregularity occurred in circumstances where, as it were, the evidence could not get any better from Mr Mahmoud's perspective. The cross-examiner was laying the ground for an attack on Mr Mahmoud's credibility. That may or may not have been successful. If it had been successful, Mr Mahoud's case would have been dealt a blow. If it had not been successful, his evidence would not have risen to any higher level than it had already reached. The important point is that the whole of the evidence that Mr Mahmoud wished to be before the court had already been forthcoming; and that the course the magistrate had outlined in that respect had been followed.

42 In relation to the matter of costs, the magistrate gave a much fuller statement of reasons. Those reasons show that he applied a general principle that costs should follow the event and considered whether there was any reason to depart from that principle; but that the specific matter essential to the power to award costs against an applicant (that is, the matter of the "frivolous or vexatious" quality of the application) was not addressed at all.

The decision of the District Court - the substantive question

43 As to the s 19(1) pre-condition, the District Court summarised the content of Mr Mahmoud's original complaint and the evidence he gave in the Local Court about the three later incidents. The judge then referred to various other matters of complaint ventilated by Mr Mahmoud. None of these went to the questions of fact material to the s 19(1) pre-condition concerning fear of physical violence. They were all concerned with what Mr Mahmoud saw as bias, corruption, mistakes and mis-recordings none of which was in any way relevant to the eliciting and evaluation of facts going to the s 19(1) matter. Reference was made to the burden that lay on Mr Mahmoud to bring evidence to prove his case. The finding that Mr Mahoud had not established the matters necessary to proof of his case was then announced.

44 The decision of Knox DCJ was, in these respects, unexceptionable, so far as possibility of jurisdictional error is concerned. His Honour obviously recognised the questions germane to the task he was to perform upon an appeal by way of rehearing. He addressed those questions by reference to the Local Court transcript that he had before him and gave his decision. There was no error within any of the possible categories of jurisdictional error.

The decision of the District Court - the costs question

45 In relation to costs, the District Court judge appreciated the point of which the magistrate was unaware or overlooked, that is, that, having regard to s 99, the power under s 99(1) to award costs was constrained by the section as a whole and that there was no power to award costs against the applicant and in favour of the respondent except where the court was, in terms of s 99(3), satisfied that the application was frivolous or vexatious.

46 Knox DCJ drew "a clear inference" that a finding as to the frivolous or vexatious nature of Mr Mahmoud's application was the basis for the magistrate's decision on costs.

47 I am unable, with respect, to agree that any such inference was warranted when one has regard to the fairly comprehensive reasons the magistrate gave in relation to costs. He based himself wholly on the proposition that costs should follow the event unless, for some good reason, the court sees fit to depart from that rule. There was reference to factors concerning Mr Mahmoud's conduct in relation to the proceedings that were seen as material to any decision to depart from the general rule. But none of these touched upon aspects that could characterise the application as frivolous or vexatious. The Local Court simply did not turn its mind to the pre-condition imposed by s 99(3). Nor, of course, did it articulate any finding on that matter.

48 But it is the decision of the District Court that is now under review, not the decision of the Local Court.

49 Upon the appeal by way of rehearing, it was for the District Court judge to approach the costs question on the basis of the evidence that had been elicited in the Local Court. As I have said, the judge referred to the requirement of s 99(3). In order for him to allow the magistrate's costs order to stand, it was necessary for the judge to be satisfied that Mr Mahmoud's substantive application was frivolous or vexatious. In terms of the section, that state of satisfaction was essential to the existence of any power to order that Mr Mahmoud pay costs. The judge recognised that the magistrate had not expressed any finding on that essential threshold matter. He took the view (which, as I have said, I consider to be unwarranted and erroneous) that it should be inferred that the magistrate had reached the necessary state of satisfaction. What the judge did not do was to make any finding of his own on the frivolous or vexatious question.

50 The statutory pre-condition was that an assessment of the quality of the substantive application be made and that the application be found to be frivolous or vexatious. There was no power to make (or, as here, confirm)

the costs order unless that finding had been made. There is nothing in the judge's reasons to indicate that the finding was made. The judge exceeded his jurisdiction by acting, in the absence of the necessary finding, to dismiss the appeal against the costs order.

Conclusion

51 Section 176 of the *District Court Act* makes available to Mr Mahmoud an avenue of challenge to the decision of the District Court that is confined to jurisdictional error. His attempt to impugn the decision on that narrow ground has been successful as to the aspect concerning the costs order made against him but otherwise unsuccessful.

52 I propose the following orders:

1. Order that the order of dismissal made by the District Court on 6 May 2011 be set aside insofar as it dismissed the appeal of Tosson Mahmoud against the costs order made against him by the Local Court on 20 April 2010.

2. Order that the appeal of Tosson Mahmoud against the said costs order be remitted to the District Court for determination according to law.

3. Order that the summons filed by Tosson Mahmoud in this Court on 4 October 2011 be otherwise dismissed.

53 Because neither party was legally represented, there should be no order as to costs of the proceedings in this Court.

54 **TOBIAS AJA:** I agree with Barrett JA.

55 **BLANCH J:** I agree.

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