

CITATION: *Pizanias v Sultana* [2020] NTLC 016

PARTIES: Pantelis Pizanias

V

Nigar Sultana

TITLE OF COURT: LOCAL COURT

JURISDICTION: CIVIL

FILE NO(s): 22019107

DELIVERED ON: 13 November 2020

DELIVERED AT: DARWIN

HEARING DATE(s): 6 November 2020

JUDGMENT OF: Norrington JR

CATCHWORDS:

CIVIL LAW – DOMESTIC AND FAMILY VIOLENCE ACT 2007 (NT) – Whether leave is required for the Commissioner for Police to withdraw or discontinue proceedings to confirm a police DVO.

CIVIL LAW – DOMESTIC AND FAMILY VIOLENCE ACT 2007 (NT) – Whether the authorised officer or the Commissioner for Police have the power to rescind or revoke a police DVO.

Domestic and Family Violence Act 2007 (NT), s 3, s 4, s 19(1), s 35(1), s 41, s 44, s 53, s 56, s 67, s 74, Part 2.8, Part 2.9, Part 2.10, s 80, s 81.

Interpretation Act 1978 (NT), s 3(3), s 43

Local Court (Civil Jurisdiction) Rules 1998, r 5.18.

Atkinson v Bardon & Ors [2018] NTSC 9

Boal Quay Wharfingers Ltd v King's Lynn Conservancy Board [1971] 1 WLR 1558

CEO Department of Children and Families v MGM [2012] NTSC 69

Police v Natasha George [2015] NTMC 018

Police v RA [2010] NTMC 061

Schipp v Herfords Pty Ltd (1975) 1 NSWLR 412

REPRESENTATION:

Counsel:

Commissioner for Police: Ms Thomson

Defendant: Ms Gardiner

Protected Person: Ms Van Wyk

Solicitors:

Commissioner for Police: Solicitor for the
Northern Territory

Defendant: Da Silva Hebron

Protected Person: Darwin Family Law

Judgment category classification: A

Judgment ID number: 016

Number of paragraphs: 40

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 22019107

BETWEEN

Pantelis Pizanias

Commissioner for Police

AND

Nigar Sultana

Defendant

AND

Mohammad Hossain

Protected Person

CORAM: NORRINGTON JR

REASONS FOR JUDGMENT

(Delivered 13 November 2020)

Introduction

1. The matter before me originated as a Police DVO made under Part 2.6 of the *Domestic and Family Violence Act 2007* (“the Act”).
2. The defendant did not consent to the confirmation of the police DVO at the first mention or subsequent mentions of the matter. On 9 October 2020 the matter was listed for hearing at 2.00 pm on 5 February 2021 with trial directions being made for witness statements to be filed. At a further mention on 16 October 2020 the trial directions were varied by consent but the matter remained listed for hearing at 2.00 pm on 5 February 2021.

3. At a further mention of the matter on 7 August 2020 counsel for the police made an oral application to ‘withdraw the application’ and/or have the police DVO revoked. The defendant supported this application. The protected person opposed the revoking of the police DVO and sought that the matter remain listed for hearing. Ultimately, the protected person seeks that the Police DVO be confirmed.
4. I heard oral submissions in which Counsel for each party briefly addressed what could be described as two matters requiring judicial determination:
 - (a) Whether the police could withdraw a police DVO, either with or without leave; and
 - (b) Whether the police could unilaterally revoke a police DVO before it is confirmed by the Court.
5. After hearing submissions from counsel for each party, I declined to grant leave for the police DVO to be withdrawn and I ordered that the matter remain listed for hearing at 2.00 pm on 5 February 2021.
6. I indicated to the parties that I would deliver my reasons for that decision at a later date. These are the reasons for that decision.

Police contentions

7. The counsel for the police submitted that the police are no longer of the view that a DVO is required because circumstances have changed since the police DVO was made.
8. The matter had been adjourned for 3 months to allow the defendant to show compliance with the order and for the defendant to attend counselling. The police are satisfied that the defendant has been attending counselling and has been complying with the police DVO. Given these changes in circumstances, the police now contend

that “the risk to the protected person has reduced significantly”.¹ The Police do not seek the confirmation of the police DVO.

9. Counsel for the police submitted that their client is the applicant to the application and as such, they can withdraw the application. It was further submitted that:

There is nothing in the Act which explicitly states that the police cannot withdraw their own application. There is considerable authority that where there is nothing in an Act or relevant Regulations or rules to the contrary, a party making an application to the Court may withdraw that application at any time prior to judgment being announced. The authority to that is *CEO Department of Children and Families v MGM* [2012] NTSC 69 at 33.

10. It was also submitted that section 43 of the *Interpretation Act 1978* (NT) empowers the police to withdraw the police DVO.

11. Counsel for the police also submitted that if the matter proceeded to hearing they did not intend to file any further material.

Defendant’s contentions

12. The defendant supported the police’s contention that as the applicant police can withdraw their application.

Protected Person’s contentions

13. Counsel for the protected person confirmed that their client did not consent to the revoking of the police DVO. The protected person wanted the matter to proceed to a confirmation hearing at which they will be asking the Court to confirm the police DVO. In the event that the police DVO was revoked, the protected person was intending to file a fresh application for a DVO.

Relevant Legislation

14. The power for an authorised police to make a police DVO is found in section 41 of the Act. The section provides:

¹ Oral submissions of counsel for the protected person.

41 When authorised police officer may make DVO

- (1) An authorised police officer may make a domestic violence order under this Part (a *police DVO*) if satisfied:
 - (a) it is necessary to ensure a person's safety:
 - (i) because of urgent circumstances; or
 - (ii) because it is not otherwise practicable in the circumstances to obtain a Local Court DVO; and
 - (b) a Local Court DVO might reasonably have been made had it been practicable to apply for one.
- (2) The police DVO may be made even if the defendant has not been given an opportunity to answer any allegation made in relation to the making of the DVO.

Note

For provisions about the content of DVOs, see Part 2.3.

15. Once a police DVO is made and the order is given to the defendant, the order is taken to be a summons on the defendant to attend court under section 44. The section provides:

44 DVO taken to be summons to appear before Court

The copy of the police DVO given to the defendant is taken to be a summons to the defendant to appear before the Court, at the time and place shown on it for its return, to show cause why the DVO should not be confirmed by the Court.

Notes

- 1 *Part 2.10 deals with the confirmation of DVOs.*
- 2 *On confirmation of a police DVO, conduct that constitutes a contravention of the DVO may still be an offence even if the Court order made on the hearing is not given to the defendant before the defendant engages in the conduct, see section 120(2).*

16. Part 2.10 of the Act provides for the process to be followed when a defendant is summoned to attend court for a hearing to decide if the police DVO is to be confirmed or revoked. The Part provides:

Part 2.10 Confirmation of domestic violence orders

This Part applies if the defendant is summoned to appear before the Court to show cause why a DVO should not be confirmed.

Note

Sections 37, 44, 59, 71 and 79 provide for a summons to the defendant.

81 Appearing at hearing

- (1) Subject to applicable procedural directions, a protected person may appear at the hearing of the proceeding.
- (2) If the defendant has been summoned under section 44 or 71, the Commissioner is a party to the proceeding.

82. Decision at hearing

- (1) At the hearing, the Court may, by order:
 - (a) confirm the DVO (with or without variations); or
 - (b) revoke the DVO.
- (2) The Court must not confirm the DVO unless:
 - (a) it is satisfied the defendant has been given a copy of the DVO; and
 - (b) it has considered any evidence before it and submissions from the parties to the DVO.

Can the Police withdraw or discontinue the application?

17. An Applicant has a common law right in a civil matter to unilaterally withdraw or discontinue an application before the final determination of the matter, unless such rights have been abrogated by statute.²

18. Proceedings under the *Domestic and Family Violence Act 2007* fall within the civil jurisdiction of the Local Court. The Act does not have its own dedicated rules. However, the general civil jurisdiction of the Local Court does have rules. Acting Justice Mildren considered a similar issue with the *Personal Violence Restraining Orders Act 2016 (NT)*, in the matter of *Atkinson v Bardon & Ors* [2018] NTSC 9. In that matter His Honour said:

The Act does not contain any provision for the making of rules of court or regulations in respect of the Act. However, s.14 of the *Local Court Act* provides that the Court's civil jurisdiction also includes any other jurisdiction that is conferred on the Court by another Act. Section 48 (1) of the *Local Court Act* provides for the making of Rules of Court providing for "the practice and procedure of the Court in the exercise of any of its jurisdiction, whether conferred by this or another Act." Accordingly, to the extent that the *Local Court (Civil Jurisdiction)*

² *Schipp v Herfords Pty Ltd* (1975) 1 NSWLR 412 at 423-424 and *Boal Quay Wharfingers Ltd v King's Lynn Conservancy Board* [1971] 1 WLR 1558 at 1569. It is noted that Counsel for the police relied upon the matter of *CEO Department of Children and Families v MGM* [2012] NTSC 69 at 33 as the authority for this principle. Whilst in that case counsel for the appellant made this submission and referred to *Schipp v Herfords Pty Ltd (Supra)*, the matter of *CEO Department of Children and Families v MGM (supra)* is not the relevant authority.

Rules deal with the practice and procedure of the Court relating to its jurisdiction under the Act, those rules would apply.³

19. Based upon the same reasoning, the *Local Court (Civil Jurisdiction) Rules 1998* would also apply to proceedings under the *Domestic and Family Violence Act 2007*.

20. Rule 5.18 of the *Local Court (Civil Jurisdiction) Rules 1998* provides:

5.18 Discontinuance or withdrawal

- (1) At any time before the date fixed for the hearing of proceedings, a party may, without the leave of the Court:
 - (a) discontinue a statement of claim, counterclaim or claim by third party notice; or
 - (b) withdraw a notice of defence.
- (2) A notice of discontinuance or withdrawal in accordance with Form 5B is to be filed and served on each other party.
- (3) Discontinuance or withdrawal is not effective until the notice is filed under subrule (2).
- (4) A party who discontinues or withdraws must pay the costs of the other party incurred before the discontinuance or withdrawal unless the Court orders otherwise.
- (5) Where a party is liable to pay the costs of another party because of discontinuance or withdrawal and the party, before paying the costs, commences further proceedings for the same or substantially the same cause of action, the Court may stay the proceedings until the costs are paid.

21. It is clear that Rule 5.18 does abrogate a parties common law rights to discontinue proceedings. A party can only discontinue proceedings without leave of the Court if the matter has not been fixed for a hearing. The rule also requires a process to be followed in relation to forms to be filed and served.

22. Apart from not having filed the requisite forms, there are two other obstacles to the Commissioner of Police relying on rule 5.18 to discontinue or withdraw the proceedings.

23. Firstly, whilst it may be convenient to describe the Commissioner of Police as the ‘Applicant’ for administrative and procedural purposes, it is not an accurate description. A police DVO is not an application to the Court⁴. It is an order made by

³ *Atkinson v Bardon & Ors* [2018] NTSC 9at 39

⁴ *Police v RA* [2010] NTMC 061 at 12.

an ‘authorised police officer’ which is subject to confirmation by the Court. Under section 81(2) of the Act, the Commissioner of Police becomes a party to the proceeding for the Part 2.10 hearing of a police DVO. The protected person and the defendant are also parties to the proceeding⁵.

24. Given that the Commissioner of Police is not the applicant to an application, the Commissioner of Police has no right to withdraw or discontinue to the police DVO proceedings either under the common law or under rule 5.18.

25. Secondly, a police DVO is fixed for a hearing of the matter on the date and time that is stated on the summons contained within the police DVO. The Court may adjourn this hearing to a later date⁶, or conduct the hearing at the scheduled time. However, even if the matter were adjourned to a hearing at a later date, it does not undo the fact that the matter was fixed for hearing when the order was made.

26. In any event, this matter has already been fixed for hearing by way of order made on 16 October 2020. Accordingly, if I were wrong and the Commissioner of Police were indeed an ‘Applicant’ to proceedings, leave of the Court would need to be granted to discontinue the proceedings.

27. In considering whether leave should be granted, I note that the protected person, as a party to proceedings, seeks that the police DVO be confirmed. The protected person wants the matter to proceed to hearing where a Judge can determine whether there is sufficient evidence to confirm the police DVO.

28. For the police DVO to have been made in the first place, the authorised police officer had to have been satisfied that the Local Court might reasonably have made the DVO⁷. Whether circumstances have changed since the making of that order to now make it less likely that the order will be confirmed, is a matter for a Judge to determine at a Part 2.10 hearing. At that hearing each party will have the right to

⁵ Section 4 – definition of ‘party, for a DVO’, *Domestic and Family Violence Act 2007*.

⁶ *Police v Natasha George* [2015] NTMC 018 at 8 – 23.

⁷ Section 41(1)(b), *Domestic and Family Violence Act 2007*.

present evidence to the Court, test the evidence of opposing parties and to make submissions as to why their contentions should be preferred.

29. In considering whether leave should be granted, I further note that section 3 of the Act provides:

3 Objects of Act and their achievement

- (1) The objects of this Act are:
 - (a) to ensure the safety and protection of all persons, including children, who experience or are exposed to domestic violence; and
 - (b) to ensure people who commit domestic violence accept responsibility for their conduct; and
 - (c) to reduce and prevent domestic violence.

30. Section 19(1) of the Act also requires the Court to apply a paramountcy principle. The section provides:

19 Matters to be considered in making DVO

- (1) In deciding whether to make a DVO, the issuing authority must consider the safety and protection of the protected person to be of paramount importance.

31. Whether the Court is considering whether to make a DVO, make an interim DVO⁸, vary or revoke a court DVO⁹, make an ex parte variation¹⁰, make an urgent variation of a court DVO or a police DVO¹¹, reviewing a police DVO¹² or confirming a police DVO¹³, the Court must consider the matters contained in section 19 of the Act.

32. Accordingly, all judicial determinations under the Act require the Court to “*consider the safety and protection of the protected person to be of paramount importance*”. Given that withdrawing or discontinuing the proceedings results in the revoking of the police DVO, the matters contained in Part 2.2 and in particular the paramountcy

⁸ See notes to section 35(1), *Domestic and Family Violence Act 2007*.

⁹ See notes to section 53, *Domestic and Family Violence Act 2007*.

¹⁰ See notes to section 56, *Domestic and Family Violence Act 2007*.

¹¹ See notes to section 67, *Domestic and Family Violence Act 2007*.

¹² See notes to section 74, *Domestic and Family Violence Act 2007*.

¹³ By virtue of the definitions of ‘court DVO’, ‘DVO’, and ‘domestic violence order’ found in section 4 of the *Domestic and Family Violence Act 2007*.

principle contained in section 19(1) must apply to this determination as to whether leave should be granted to a party to withdraw or discontinue proceedings.

33. Taking into account the evidence currently before the Court, the opposition from the protected person and after applying the objects of the Act and the paramountcy principle, I refuse to grant leave for the Commissioner of Police to withdraw or discontinue the police DVO proceedings. I make this decision having determined that it would be contrary to the objects of the Act and the interests of justice to allow a police DVO to be withdrawn or discontinued without the protected person being given an opportunity to present their case as to why the police DVO should be confirmed.

34. In summary, in the event that I am incorrect as to whether the Commissioner of Police is an applicant to these proceedings and if rule 5.18 applies, leave is not granted to for the Commissioner of Police to withdraw or discontinue the police DVO proceedings.

Do the Police retain the power to revoke or rescind a police DVO?

35. It was submitted by counsel for the police and the defendant that section 43 of the *Interpretation Act 1978* empowers the police to withdraw the police DVO. The substance of this argument is that if the police have the power to “*take action*”, then they have the power to “*repeal, rescind, revoke, amend or vary any such action*”. Section 43 of the *Interpretation Act 1978* provides:

43 Power to make includes power to rescind

Where an Act confers a power to take an action or to make, grant or issue a statutory instrument, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions to repeal, rescind, revoke, amend or vary any such action or instrument.

36. Section 43 may appear to be broad enough to empower the authorised officer to revoke the police DVO. However, this provision must yield to any contrary provision in the Act which confers the power. Section 3(3) of the *Interpretation Act 1978* provides:

3 Application of this Act

.....

- (3) In the application of a provision of this Act to a provision, whether in this Act or in another law, the first-mentioned provision yields to the appearance of an intention to the contrary in that other provision.

37. The *Domestic and Family Violence Act 2007* does not empower a police officer, an authorised police officer or the Commissioner of Police to vary or revoke a police DVO or indeed a court DVO. If a police officer is of the view that a police DVO should be varied, Part 2.8, Division 2 of the Act requires the police officer to apply to a Judge for the Police DVO to be varied. This is the case even in urgent circumstances and where there has been a substantial change in relevant circumstances since the police DVO was made. The Act clearly has a contrary intention to the proposition that an authorised police officer retains a power to revoke or vary the police DVO once it is made.

38. As has been outlined above, it is an authorised police officer who may make a police DVO. The authorised police officer is the ‘issuing authority’¹⁴ in the process for the making of the police DVO. Once a police DVO given to the defendant and the original is sent to the Court, the authorised police officer no longer has any role to play in the proceedings. The authorised police officer is *functus officio* once the police DVO is made.

39. The Court is seized of the proceedings once the police DVO is made because the order is a summons to the defendant to show cause before the Court at the date and time provided in the order¹⁵. Once seized of the proceedings, only the Court has the power to revoke or vary the police DVO prior to the Part 2.10 hearing. These are powers exercised under Part 2.8, Division 2 or Part 2.9 of the Act.

40. For the reasons outlined above, I find that neither the authorised police officer or the Commissioner of Police has no power to rescind or revoke a police DVO once it is made. Only the Court has the power to revoke or vary a police DVO.

Dated this 13th day of November 2020.

¹⁴ See definition of ‘issuing authority’ under section 4, *Domestic and Family Violence Act 2007*.

¹⁵ Section 44, *Domestic and Family Violence Act 2007*.

Judicial Registrar Norrington
LOCAL COURT
JUDICIAL REGISTRAR