

***Shahin v El-Shafei; El-Shafei v Shahin* [2018] SASC 167 (6 November 2018) – South Australia Supreme Court**

‘Disclosure’ – ‘Domestic, family or apprehended violence or for personal safety’ – ‘Orders and convictions’ – ‘Orders to restrain’

Proceeding: Private application for final intervention order.

Appeal type: Appeal against Magistrate’s revocation of interim intervention order.

Facts: Mr Shahin is the owner of two adjacent properties, numbers 17 and 18. His family occupies number 17, while his sister occupies number 18. Dr El-Shafei owns number 19, which is adjacent to number 18. There have been ongoing disputes between the parties regarding a number of matters. Dr El-Shafei alleges he was assaulted by Mr Shahin, claiming a resulting wrist injury. Dr El-Shafei is charged with an offence relating to damage caused to the boundary fence. Following the dismissal of a police application for an intervention order, Dr El-Shafei filed a private application which proceeded *ex parte* with Dr Cannon (then Deputy Magistrate) granting an interim order pursuant to s 21 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA). The application for a final intervention order was heard a week later by Magistrate Sheppard. The interim order was revoked and the matter referred back to Dr Cannon for further hearing. Dr Cannon declined to award costs of the intervention order application in favour of Mr Shahin. Mr Shahin filed a notice of appeal against Dr Cannon’s dismissal of his application for costs. Dr El-Shafei subsequently filed a notice of appeal against Magistrate Sheppard’s revocation of the interim intervention order on 29 June 2018. A second and third amended notice of appeal were filed by Dr El-Shafei on the 12 July and 5 September 2018. The second notice amended an incorrect identification of the parties. The third notice filed the day before the appeal hearing, was not served on Mr Shahin’s representatives until the morning of the hearing.

Issues:

- > Whether an applicant for an intervention order is required to make full and fair disclosure on the same basis as any other person seeking an *ex parte* order.
- > Whether s 76A of the *Criminal Procedure Act 1921* (SA) was available to set aside an interim intervention order or whether the operation of s 76A is precluded by s 26(5) *Intervention Orders (Prevention of Abuse) Act 2009* (SA) (‘IO Act’).
- > Whether Magistrate Sheppard erred in revoking the interim order or denied Dr El-Shafei procedural fairness by declining to adjourn proceedings until Dr El-Shafei arranged legal representation.

- Whether Dr Cannon misdirected himself as a matter of law and fact by referring to his own conduct rather than by inquiring whether Dr El-Shafei had acted in bad faith or unreasonably pursuant to s 189C of the [Criminal Procedure Act 1921](#) (SA).

Decision and reasoning:

Permission to appeal

As a criminal proceeding (per R 4.07 of the [Magistrates Court Act 1991](#) (SA), the jurisdiction conferred on by the IO Act is vested in the Criminal Division), any appeal relating to an intervention order is subject to s 42 of the [Magistrates Court Act 1991](#) (SA) at [41]. S 42(1a) of the [Magistrates Court Act 1991](#) (SA) does not preclude an appeal against interlocutory judgment in these circumstances. Per Sulan J in *Groom v Police (No 3)* [2013] SASC 93, the words “before commencement or completion of the trial” in s 42(1a)(c) have no operative effect unless there is a trial. Accordingly, ‘the Court has power to grant permission for an interlocutory appeal if ... there are special reasons why that would be in the interests of the administration of justice’ at [45]. Granting permission, his Honour was satisfied special reasons existed due to the significant questions of law raised (ie the application of s 76A of the [Criminal Procedure Act 1921](#) (SA) and validity of referring the matter for further hearing) at [48].

Dismissing Dr El-Shafei’s appeal, Parker J held

‘An applicant for an interim intervention order is not required to make full and fair disclosure in the same manner as an applicant for an *ex parte* order’ at [76]. ‘The relevant issue is not whether one party is more or less blameworthy than the other, but rather whether it is reasonable to suspect that an act of abuse may be committed’ (grounds for issuing an intervention order per s 6 IO Act) at [77]. S 23 IO Act provides the Defendant with an opportunity to respond before the Court concludes whether a final order is appropriate at [78]. ‘There is a real risk that the imposition of a full and fair disclosure obligation in such an environment is likely to frustrate or impede the object of providing prompt intervention to protect those at risk of abuse’ at [78]. Given the impracticality of subjecting the police to full and fair disclosure, private applications should be under no greater obligation at [81].

S 26 IO Act does not operate to preclude the Court from exercising its powers under s 76A where the operation of s 76A is considered necessary to remedy an injustice. The power conferred by s 76A was available to the Magistrate at [109], [112].

- S 76A was not applied to frustrate the operation of a legislative scheme (the IO Act) but to rectify a situation considered unjust (*Police v Clayton-Smith* [2010] SASC 127 per Gray J).
- The requirement to award persons with a relevant interest an opportunity to be heard before the revocation or variation of an order, as enacted by s 26(5)(a) IO Act, exists at common law and is

therefore a relevant consideration in applying s 76A at [107], [109], [112].

- > Likewise, s 26(5)(b) does not extend the requirements of the common law as the same matters will be considered in making an order as in the varying or revoking that order at [110].

There was no process or outcome error in the decision of Magistrate Sheppard. Her Honour's concern about the accuracy and timing of the information provided by Dr El-Shafei was a proper reason for revoking the interim order at [117]. As the 'decisive issue was the reliability of the information put before the Court' and as Dr El-Shafei was awarded ample opportunity to address those issues, he was not unfairly disadvantaged by a lack of legal representation at [129]. The orders of Magistrate Sheppard required a rehearing of the application for an interim order. A rehearing did not occur and the proceedings of 18 May 2018 before Dr Cannon therefore miscarried at [132]. If Dr El-Shafei pursues his application the matter should proceed to a hearing to determine whether a final order should be made (per s 23 IO Act) at [135].

Upholding Mr Shahin's appeal against the dismissal of his costs application, Parker J held

There were not proper grounds to reject Dr El-Shafei's application for costs as Dr Cannon 'did not have sufficient information to decide whether or not Dr El-Shafei had acted in bad faith or unreasonably' at [139]:

- > Given Justice Parker's finding that an applicant for an *ex parte* intervention order is not required to provide full and fair disclosure, Dr El-Shafei's failure to provide all relevant information did not warrant a cost order against him at [137]-[138]
- > While Dr El-Shafei may have caused the Court to be misled (a proper basis for setting aside the interim order), without a determination of the factual allegations made against him, Dr El-Shafei cannot be said to have acted in bad faith or unreasonably at [138]. That question should be determined if and when a final order is determined at [140].