Federal Court of Australia

Nyoni v Bird [2022] FCAFC 61

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| Appeal from: | *Nyoni v Bird* [2021] FCA 959 |
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| File number(s): | VID 501 of 2021 |
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| Judgment of: | **MORTIMER, ROFE AND MCELWAINE JJ** |
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| Date of judgment: | 14 April 2022 |
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| Catchwords: | **ADMINISTRATIVE LAW –** application for judicial review of a decision of the primary judge dismissing an application for review of a decision of the Registrar to refuse to accept documents for filing pursuant to r 2.26 of the *Federal Court Rules 2011* (Cth) – whether the primary judge erred in finding that the Court could not grant prerogative relief against itself applying *Bird v Free* (1994) 126 ALR 475 – whether the primary judge erred in concluding that a breach of the rules of natural justice had not occurred – no grounds made out – appeal dismissed  |
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| Legislation: | *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5*Federal Court of Australia Act 1976* (Cth) s 23*Federal Court Rules 1979* (Cth) O 46 r 7A*Federal Court Rules 2011* (Cth) r 2.26*Industrial Relations Act 1988* (Cth) s 412*Judiciary Act 1903* (Cth) s 39B*Poisons Act 1964* (WA)*De Smith’s Judicial Review* (8th ed, Sweet and Maxwell, 2018)SA de Smith, *The Prerogative Writs* (1951)11CLJ 40SA de Smith, *Wrongs and Remedies in Administrative Law* (1952) 15 MLR 189  |
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| Cases cited: | *Anthony v Maxam Australia Pty Ltd* [2012] TASFC 5*Bird v Free* (1994) 126 ALR 475*Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2007) 157 FCR 260; [2007] FCAFC 32*Conybeare v Lewis* (1880)13 Ch D 469*Cory v Registrar of the Federal Court of Australia* (2010) 190 FCR 240;[2010] FCA 1215*EnergyAustralia Yallourn Pty Ltd v Construction, Forestry, Mining and Energy Union* (2014) 218 FCR 316; [2014] FCAFC 8*Groenvelt v Burwell* (1700) 1 Ld Raym 454; 91 ER 1202*Kostov v Australian Financial Security Authority* [2020] FCA 1105*Mbuzi v Baldwin* [2016] FCA 1314*National Retail Association v Fair Work Commission* (2014) 225 FCR 154; [2014] FCAFC 118*Nyoni v Bird* [2021] FCA 959*Nyoni v Cho* [2019] FCA 560*Nyoni v Morgan* [2019] FCA 2039*Nyoni v Pharmacy Board of Australia (No 6)* [2018] FCA 526 *Pharmacy Board of Australia v Nyoni* [2018] WASAT 134*Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; [2003] HCA 2*Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1; [2018] HCA 4*R v Cowle* (1759) 2 Burr 834; 97 ER 587 *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190*R v Gray; Ex parte Marsh* (1985) 157 CLR 351*R v Justices of the Central Criminal Court; Ex parte London City Council* [1925] 2 KB 43*Re* *Jarman; Ex parte Cook* (1997) 188 CLR 595*Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Qld)* (1995) 184 CLR 620*Saad v Commissioner of the Australian Federal Police* (2021) 361 FLR 261; [2021] VSCA 246*Satchithanantham v National Australia Bank Ltd* (2010) 268 ALR 222; [2010] FCAFC 47*Somasundaram v Luxton* [2020] FCA 1076*Walton v Gardiner* (1993) 177 CLR 378*Wheaton,* *in the matter of various applications by Wheaton* [2020]FCA 463*Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515; [2004] HCA 16 |
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| Division: | General Division |
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| Registry: | Victoria |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Number of paragraphs: | 55 |
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| Date of hearing: | 24 February 2022  |
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| Counsel for the Appellant: | Mr Nyoni appeared in person |
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| Counsel for the Respondent: | The Respondent filed a submitting notice, save as to costs |
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| Amicus curiae: | Ms J Moir |

ORDERS

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|  | VID 501 of 2021 |
|   |
| BETWEEN: | EMSON NYONIAppellant |
| AND: | REGISTRAR BIRDRespondent |

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| order made by: | MORTIMER, ROFE AND MCELWAINE JJ |
| DATE OF ORDER: | 14 April 2022 |

THE COURT ORDERS THAT:

1. The appeal is dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MORTIMER J:

1. I have had the advantage of reading the reasons of McElwaine J in draft. I agree with his Honour that the appeal must be dismissed, and I agree generally with the reasons his Honour gives.

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| I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment of the Honourable Justice Mortimer. |

Associate:

Dated: 6 April 2022

REASONS FOR JUDGMENT

ROFE J:

1. I have also had the benefit of reading the reasons of McElwaine J in draft form and agree that the appeal should be dismissed.

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| I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment of the Honourable Justice Rofe. |

Associate:

Dated: 6 April 2022

REASONS FOR JUDGMENT

MCELWAINE J:

1. The appellant, Mr Nyoni,has been involved in multiple proceedings in this Court, the Supreme Court of Western Australia and the State Administrative Tribunal (**SAT**) of Western Australia. At their genesis is a decision made by officers of the Department of Health of Western Australia in 2011 to conduct an audit of Mr Nyoni’s pharmacy business in Kellerberrin, Western Australia. That audit led to the preferring of charges against Mr Nyoni for six breaches of the *Poisons Act 1964* (WA) and the associated regulations. In broad terms, those charges related to the failure to maintain a register for scheduled drugs and failing to keep a safe containing those drugs locked. Mr Nyoni pleaded not guilty to each charge, but on 23 January 2013 was convicted, fined and ordered to pay court costs.
2. Summaries of the various proceedings involving Mr Nyoni may be found in the decisions of *Nyoni v Pharmacy Board of Australia (No 6)* [2018] FCA 526 per Siopis J; *Nyoni v Cho* [2019] FCA 560 per Griffiths J; and *Nyoni v Morgan* [2019] FCA 2039 per Banks-Smith J. It is not necessary to elaborate upon the proceedings of Mr Nyoni in order to decide the appeal that is before this Court.
3. This appeal concerns the decision of Snaden J of 17 August 2021: *Nyoni v Bird* [2021] FCA 959 (**PJ**). In that decision, the primary judge dismissed an application for review of a decision of the respondent, Registrar Bird (**the Registrar**), who on 26 March 2020 refused to accept for filing an originating application of Mr Nyoni lodged on 27 February 2020. The power exercised by the Registrar is conferred by r 2.26 of the *Federal Court Rules 2011* (Cth) (**Federal Court Rules**), which provides:

**Refusal to accept document for filing – abuse of process or frivolous or vexatious documents**

A Registrar may refuse to accept a document (including a document that would, if accepted, become an originating application) if the Registrar is satisfied that the document is an abuse of the process of the Court or is frivolous or vexatious:

(a) on the face of the document; or

(b) by reference to any documents already filed or submitted for filing with the document.

1. The Registrar set out her reasons for the exercise of that power in correspondence addressed to Mr Nyoni of 6 March 2020 in the following terms:

I refer to the following documents you sought to file with the Court Registry (in Victoria), which were received on 27 February 2020:

* Form 66 Originating application: and
* Affidavit sworn on 20 January 2020.

After considering the document, I have refused to accept the documents for filing pursuant to s 2.26 of the *Federal Court Rules 2011*, as I am satisfied that it constitutes an abuse of process on the basis that the documents do not disclose a cause of action against all of the respondents named in the application.

I recommend that you seek legal advice in relation to this letter, and prior to filing any further documents with the Court.

1. From that decision, Mr Nyoni, on 6 May 2020 filed an originating application which he described as:

Originating application for judicial review of the decision of Registrar Bird pursuant to s 5 of the *AD(JR) Act 1977* (Cth), s 39B of the *Judiciary Act 1903* (Cth) and the accrued jurisdiction of the Federal Court of Australia.

1. That application relied on three grounds of review broadly summarised as a breach of the rules of natural justice, error of law in the conclusion that the proposed application did not disclose a cause of action and an improper exercise of the power at the direction of or on behalf of another person or persons. Particulars of each of those grounds were set out in the application, though they are somewhat difficult to follow.
2. Mr Nyoni appeared for himself at the hearing of the application before the primary judge. Ms Moir appeared as amicus curiae. The primary judge was not satisfied that any of the grounds were made out and accordingly dismissed it.
3. On 21 August 2021, Mr Nyoni filed his notice of appeal from the decision of the primary judge. Thereafter, he was granted leave to amend in accordance with his further amended notice of appeal filed on 4 January 2022. His grounds of appeal provide as follows:

**Grounds of appeal**

1. The Honourable Justice Snaden erred in law and fact in holding that the interpretation of Section 39B of the Judiciary Act 1903 (Cth) relied on in the case of Bird v Free was sound law, contrary to the evidence [35].

**Particulars**

i. In his outline of written submissions in the proceeding to which this appeal is made, the Appellant submitted that the case of *Bird v Free* (1994) 126 ALR 475 (“***Bird v Free***”) is not sound law on the basis that Drummond’s J interpretation of s 39B ‘fails to accord with the view adopted by the Parliament in the second reading of the Judiciary Bill 1903.’ In particular, the Appellant submitted:

Relevantly, s 39B of the Judiciary Act 1903 (Cth) – inserted by the Statute Law (Miscellaneous Provisions) Act (No 2) 1983 (Cth) – was made concurrent to s 75(v) of the Constitution to meet the gradually increasing requirements of the people to keep officers of the Commonwealth accountable for jurisdictional error. This supports the view of the Parliament that any ‘federal’ courts other than the High Court have to secure the proper administration of the judicial business of the Commonwealth.

ii. In [35] of the decision of Snaden J, his Honour held that ‘Drummond’s J reasoning in Bird v Free is sound and is supported by subsequent authority (including High Court authority in the form of Re Jarman). This court is bound to follow that reasoning. To do otherwise would be contrary to principles more than a century old. This court does not have jurisdiction to review or grant prerogative relief in respect of its own decisions.’

iii. In the face of overwhelming evidence in the Applicant’s affidavit and submissions that Drummond’s J ‘century old’ interpretation of s 39B of the Judiciary Act fell against the view of the Parliament and thus ought to be held as unsound law, the learned Justice Snaden fell into error by failing to purposively interpret s 39B in light of the Parliament’s intention of granting the Courts identical jurisdiction to issue a writ or prohibition or an injunction against another judge of the court acting as such.

iv. The learned Justice Snaden erred in law and fact by not examining the evidence of the Appellant and basing his dismissal of ground two on the fact that ‘to do otherwise would be contrary to principles more than a century old.’ The absence of such expressed exclusion in s 39B of the Judiciary Act rightfully warrants a proper examination by this Court and an overturning of the ruling of the Federal Court in *Bird v Free*.

1. The Honourable Justice Snaden erred in law and fact in concluding that a breach of the rules of natural justice had not occurred in connection with the making of the decision of Registrar Bird [22].

**Particulars**

i. In his original outline of submissions, the Appellant submitted that a breach of natural justice had occurred in connection with the making of the decision of Registrar Bird because the satisfaction that was garnered to conclude that the Document – on its face - was an abuse of process had no basis as r 9.07 of the Federal Court Rules 2011 provided that proceedings will not be doomed to fail only because a party had been ‘improperly or unnecessarily joined as a party.’ Since this was the only reason under which Registrar Bird purported to reach her satisfaction, this deprived the right of the Applicant’s substantive grounds against the decisions of the Registrars and Justices of this Court to be properly heard and determined in the Court, resulting in a breach of natural justice.

ii. In support of the finding of the learned Justice that no breach of natural justice had occurred in relation to the making of the decision of Registrar Bird, Snaden J held that ‘there was no requirement for Registrar Bird to give [the Appellant] the opportunity to make submissions or provide a hearing before deciding to refuse to accept the documents: *Somasundaram v Luxton* [2020] FCA 1076, [41] (Murphy J).’ The learned Snaden J also held that ‘there was no requirement for Registrar Bird to indicate to [the Appellant], in advance of the decision, that she was contemplating the refusal to which she later gave effect: *Rahman v Hedge* [2012] FCA 68, [8] (Perram J).’

iii. The authority in *Somasundaram* to which the finding of the learned Justice Snaden is made is irrelevant and distinguishable to this current proceeding. The case of *Somasundaram* was concerned with the review of a Registrar’s decision that was made with the proper consideration and satisfaction required to make a decision under r 2.26 to refuse to file a document. The Registrar in *Somasundaram* refused to file a proposed defamation proceeding on the basis of the fact that the defence of absolute privilege would most definitely apply as the allegations were made in the course of judicial proceedings. *Somasundaram* is distinguishable from the current proceeding under appeal because the decision of Registrar Bird was not made with the same consideration and satisfaction as required under r 2.26 the Federal Court Rules 2011. The single ground upon which the refusal garnered the satisfaction of the Registrar is a misdirection in law. Rule 9.07 of the Federal Court Rules 2011 expressly provides that a proceeding cannot ‘clearly be seen to be doomed to fail’ solely on the basis of ‘not disclosing causes of action.’

iv. Secondly, the authority in Rahman is distinguishable in much the same way. The Appellant has not submitted anything to the effect that a Registrar under r 2.26 is required to give the applicant the opportunity to make submissions or provide a hearing before deciding to refuse to accept the documents. Nor has the Appellant submitted anything to the effect that a Registrar is required to give a running commentary on their state of mind.

v. What the Appellant has submitted to this Court is that a Registrar’s state of satisfaction that a document is an abuse of process must be ‘honestly and actually formed.’ In order to ‘honestly and actually’ form a state of satisfaction, a Registrar is required to act ‘in good faith’6, and not act ‘merely arbitrarily or capriciously.’ Registrar Bird advised the Appellant that she was satisfied that the Document constituted an abuse of process ‘on the basis that the documents do not disclose a cause of action against all of the respondents named in the application.’ The basis of Registrar Bird’s satisfaction was not honestly and actually formed as the Registrar has both misdirected herself in law contrary to r 9.07 of the Federal Court Rules 2011, and thus has not acted in good faith to protect the Appellant’s immediate right to be heard in this Court.

vi. It follows that the finding of the learned Justice Snaden in [22] of his Honour’s reasons is an irrelevant consideration that constituted an error of law and fact, and ought to be quashed.

1. Mr Nyoni appeared for himself when his appeal was argued, by remote technology, on 24 February 2022. Once again, Ms Moir appeared as amicus curiae and I am very grateful for the considerable assistance that she provided.

# The claims that Mr Nyoni seeks to make

1. There are two relevant proceedings Mr Nyoni has sought to commence in this Court. The first is his originating application lodged on 28 January 2020 (**January 2020 proposed application**). The second is his originating application lodged on 27 February 2020 (**February 2020 proposed application**).

## The January 2020 proposed application

1. The January 2020 proposed application names eighteen respondents commencing with Katzmann J. Each of the other named respondents in order are Flick J, Banks-Smith J, the SAT, Charlotte Wallace, Patricia Le Miere, Wayne Burg, the Pharmacy Board of Australia, the Australian Health Practitioner Regulation Agency, White J, McKerracher J, Jackson J, Colvin J, the State of Western Australia, the CEO of the Department of Health, Jillian Murphy, Theresa Beech and Kristen Beadle in her capacity as trustee of the bankrupt estate of Mr Nyoni.
2. The introductory paragraph to the January 2020 proposed application reads:

The applicant applies to the Court to review the decision of the First Respondent that allowed a transfer of venue application without proper consideration. The decisions and the proposed conduct of the Second and Third Respondents resulted in the improper delegation of discretionary powers and the improper removal of [the] Fourth Respondent from proceeding NSD1345/2019.

1. That document, under the heading “details of claim” provides that Mr Nyoni is aggrieved by decisions and proposed conduct as follows:
2. A breach of the rules of natural justice occurred in connection with the making of the decision of Justice Katzmann of 12 November 2019.
3. A breach of the rules of natural justice occurred in connection with the making of the decision of Justice Banks-Smith of 3 December 2019.
4. The making of the decision of Justice Katzmann of 12 November 2019 was an improper exercise of power.
5. The making of the decisions of Justice Flick of 19 November 2019 were an improper exercise of power.
6. The making of the decision of Justice Banks-Smith of 3 December 2019 was an improper exercise of power.
7. A breach of the rules of natural justice has occurred, is occurring, or is likely to occur in connection with the conduct of Justice Katzmann for the purpose of determining proceeding NSD1345/2019 and NSD1716/2019.
8. A breach of the rules of natural justice has occurred, is occurring, or is likely to occur in connection with the conduct of Justice Banks-Smith for the purpose of determining proceeding NSD1345/2019 and NSD1716/2019.
9. The making of the proposed interlocutory decision of Justice Banks-Smith would be an improper exercise of power conferred by the enactment in pursuance of which the decision is proposed to be made.

Then follows five separate grounds with prolix particulars that occupy twelve pages which, frankly, and with respect to Mr Nyoni, are unintelligible.

1. The gravamen of the complaint so far as it concerns Katzmann J is founded upon an order made by her Honour on 12 November 2019 in proceeding NSD1345/2019 whereby she ordered, upon the application of the Pharmacy Board of Australia and the Australian Health Practitioner Regulation Agency, that the proceeding be transferred to the Western Australian District Registry. Her Honour made that decision “on the papers” and after considering submissions filed by Mr Nyoni and each of those applicants. Proceeding NSD1345/2019 was commenced by Mr Nyoni against Registrar Morgan and eight other respondents being the SAT, Charlotte Wallace, Patricia Le Miere, Wayne Burg, the Pharmacy Board of Australia, the Australian Health Practitioner Regulation Agency, White J, and McKerracher J. Mr Nyoni sought review of the decision made by Registrar Morgan on 29 July 2019 to refuse to accept for filing an application for judicial review.
2. The complaint so far as it relates to Flick J concerns an interlocutory application filed by Mr Nyoni on 14 November 2019 whereby he applied to have the transfer order made by Katzmann J set aside. On 19 November 2019, Flick J made an order that the interlocutory application be stood over for mention before a judge of the Western Australia Registry on a date to be fixed. Amongst other claims, Mr Nyoni contended that his Honour erred in that he “blindly accepted the direction by Katzmann J to transfer proceedings to West Australia when ordering that proceedings NSD1345/2019 and NSD1716/2019 be stood over to the West Australia registry.”
3. The complaint made about Banks-Smith J concerns her Honour’s decision of 3 December 2019 whereby she made a number of case management orders in proceedings NSD1345/2019 and NSD1716/2019 so that various interlocutory applications and a notice of objection to competency could be heard and decided in a timely way: *Nyoni v Morgan* [2019] FCA 2039. Just what complaint Mr Nyoni sought to make about that decision upon judicial review is opaque but appears to be founded upon the contention that her Honour failed to sufficiently engage with the arguments that Mr Nyoni put to her.
4. Separately, on 22 October 2019, Mr Nyoni commenced proceeding NSD1716/2019 and in it named Registrar Segal and six other respondents being Jackson J, Colvin J, the State of Western Australia, the CEO of the Department of Health, Jillian Murphy and Theresa Beech. In that proceeding Mr Nyoni sought review of the decision of Registrar Segal of 13 September 2019 to refuse to accept for filing an originating application for judicial review dated 28 August 2019 pursuant to r 2.26 of the *Federal Court Rules* and for the following reasons:

In accordance with that rule, I refused to accept the document. My reasons for doing so are as follows. I note that the document, in form 66, to commence an application in the original jurisdiction of the Federal Court for judicial review. The document names as respondents Justice Jackson of the Federal Court and the state of Western Australia. In relation to Justice Jackson, I note that various orders are sought in relation to his Honours conduct as a judge in proceedings in the Federal Court. I note that no orders are sought against the state of Western Australia. In my view, the proposed application is an abuse of process as it is foredoomed to fail: *Walton v Gardiner* (1992 – 93) 177 CLR 378 at 393. The reason it is foredoomed to fail is that the Court (constituted by a judge) cannot order that the Court (constituted by a judge) do or not do an act or thing: see *Bird v Free* (1994) 126 ALR 475. It is also foredoomed to fail to the extent that it seeks to duplicate matters presently before the court in proceedings WAD343/2019 and NSD810/2019. In relation to the state of Western Australia, there appears to be no legal basis for naming it as a party.

1. Registrar Hird refused to accept the January 2020 proposed application for filing for the reasons set out in correspondence to Mr Nyoni of 31 January 2020 as follows:

…

In the documents, you name a number of respondents including current Federal Court Judges, various Government Departments of Western Australia, a trustee, and various individuals. From my perusal of the documents, you appear to seek various forms of relief, including *“orders quashing the decision”* of Justices Flick, Katzmann and Banks-Smith.

After considering the documents, I have refused to accept them for filing pursuant to s 2.26 of the *Federal Court Rules 2011*, on the basis that I am satisfied that they constitute an abuse of process for the following reason:

* The documents do not disclose a cause of action against all respondents; and
* The matter is foredoomed to failed (sic) as the Court (constituted by a Judge) cannot order that the Court (constituted by a Judge) do or not do an act or thing.

## The February 2020 proposed application

1. In the February 2020 proposed application, Mr Nyoni named Registrar Hird as the first respondent together with each of the other persons and authorities that he had named in the January 2020 proposed application. This is despite that application being concerned only with the decision of Registrar Hird made on 31 January 2020.
2. The February 2020 proposed application is described as one for judicial review of the decision of Registrar Hird pursuant to s 5 of the *Administrative Decisions (Judicial Review) Act 1977*, section 39B of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) “and the accrued jurisdiction of the Federal Court of Australia”.
3. In that application, Mr Nyoni claims that he is aggrieved by the decision of Registrar Hird because:

1. The decision of Registrar Hird directly impeded the right of the applicant to be given a fair hearing and be heard without bias.

2. Registrar Hird misinterpreted the application of s39B of the judiciary act 1903 (Cth) to issue a writ of prohibition or an injunction against another judge of the federal court acting as such.

3. Registrar Hird failed to see that the underlying proceedings disclose causes of action against all of the listed respondents in the document.

1. What Mr Nyoni failed to disclose to us is that on 10 August 2020 (dated 4 August 2020) he filed a notice of discontinuance, with consent, in proceedings NSD1345/2019 and NSD1716/2019. The Court did not receive any submission from him as to the utility of the January or February 2020 proposed applications in consequence of his abandonment of each of the underlying claims, a point to which I return later in these reasons.
2. As I have observed, on 26 March 2020, Registrar Bird refused to accept for filing the February 2020 proposed application and it is that decision which was the subject of the originating application to the primary judge and which is now before us on appeal.

# The decision of the Primary Judge

1. The primary judge commenced by correctly acknowledging that a decision by a registrar pursuant to r 2.26 is of an administrative character and is susceptible to judicial review; *Satchithanantham v National Australia Bank Ltd* (2010) 268 ALR 222; [2010] FCAFC 47 per Marshall, Cowdroy and Buchannan JJ. His Honour summarised the argument of Mr Nyoni to the effect that the February 2020 proposed application was not, on its face, an abuse of process for the reason that it is “regular in form” and “contains intelligible grounds of review”: PJ [19]. Thus (in accordance with the argument) the decision of Registrar Bird to the contrary in substance deprived Mr Nyoni of his “right to be heard” upon the contentions that he sought to make out pursuant to it: PJ [20].
2. The primary judge rejected that submission for two reasons. One, the February 2020 proposed application did amount to an abuse of process and the other, that the Registrar was not bound to give Mr Nyoni the opportunity to make submissions before deciding to exercise the power conferred by r 2.26: *Somasundaram v Luxton* [2020] FCA 1076 at [41] per Murphy J.
3. Dealing next with the argument that neither the January or February proposed applications amounted to an abuse of process, the primary judge was unpersuaded by the submission that this Court has jurisdiction to judicially review its own decisions for the reasons given by Drummond J in *Bird v Free* (1994) 126 ALR 475 (**Bird v Free**), which his Honour followed and applied.
4. As to the final ground, which his Honour understood to be a contention that Registrar Hird had improperly exercised her power in that she purported to do so at the behest or direction of another, being one or more present or former justices of this Court, he reasoned that the contention “…is plainly without foundation and, to the extent that it was put, it must fail”: PJ [41].

# Submissions upon the appeal

1. In support of his grounds of appeal, and in summary, Mr Nyoni advanced two arguments. First, that the primary judge was wrong to conclude that this Court does not have jurisdiction to judicially review its own decisions and was therefore wrong to follow the decision in *Bird v Free*. Secondly, that Registrar Bird did not “honestly and actually” reach a state of satisfaction that the February 2020 proposed application was an abuse of process with the consequence that he was denied procedural fairness. The gravamen of that complaint would appear to be that the consequence of the decision made by Registrar Bird is to deprive Mr Nyoni of his ability to argue the merit of the January and February 2020 proposed applications.
2. Ms Moir, in summary, framed her submissions as follows. The primary judge was correct to conclude that it is not open to this Court to judicially review itself and the reasoning in *Bird v Free* is sound. He was also correct to find that there was no breach of the rules of procedural fairness; in particular, the Registrar was not obliged to receive and consider submissions before deciding not to accept the application for filing. Although it may be that the Registrar was incorrect to conclude that the application was an abuse of process because it did not disclose a cause of action against all of the respondents, it would be futile to set aside the decision of the Registrar in that it is doomed to fail as ultimately Mr Nyoni seeks to quash the decisions of Katzmann, Flick and Banks-Smith JJ where manifestly there is no jurisdiction to do so.
3. For the reasons that follow, each submission of Ms Moir is correct and the appeal must be dismissed.

# Consideration

1. The first argument of Mr Nyoni is contrary to the historical origins of the prerogative writs, hundreds of years of case law and authority that binds this Court. The history of the prerogative writs is traced by Professor SA de Smith in two prominent articles and is summarised in his eponymous work: SA de Smith, *The Prerogative Writs* (1951) 11 CLJ 40; SA de Smith, *Wrongs and Remedies in Administrative Law* (1952) 15 MLR 189 and *De Smith’s Judicial Review* (8th ed, Sweet and Maxwell, 2018) at [15-001]–[15-027]. What is clear is that from the earliest origins, the writs were confined to inferior courts and authorities. Thus, Professor de Smith writing in 1952 in the second of the articles just mentioned said at p 191:

From the last years of Henry III’s reign until the end of the sixteenth century writs of certiorari issued for a great variety of purposes. From 1600 onward we find reports of cases in which certiorari issued for a purpose relevant to the present inquiry: the King’s Bench awarded certiorari to quash convictions made by justices out of sessions. Gradually it became settled that to move the Kings Bench for a certiorari was the appropriate method of attacking orders and convictions by inferior courts for irregularity or want of jurisdiction, and by 1700, Holt CJ was able to generalise in the broadest terms: “It is a consequence of all jurisdictions to have their proceedings returned here by certiorari…. Where any court is erected by statute, a certiorari lies to it.

(citations omitted.)

1. The reference to Holt CJ is *Groenvelt v Burwell* (1700) 1 Ld Raym 454 at 469; 91 ER 1202 at 1212. He made the same point in his 1951 article: *The Prerogative Writs*, at p 53:

Certiorari was historically linked with the King’s person as well as the King’s Bench; it was of high importance for the control of inferior tribunals, particularly with respect to the administration of criminal justice; it was a writ of course for the King but not for the subject.

1. Lord Mansfield CJ is generally understood to be the first judge to classify and group the various writs in *R v Cowle* (1759) 2 Burr 834 at 855–856; 97 ER 587 at 599–600, which concerned an order nisi directed to the corporation-justices of Berwick to remove and quash an indictment for assault. On showing cause it was argued that the court lacked jurisdiction over Berwick, where the proceeding was according to the former laws of Scotland, not England. Ultimately the order nisi was discharged on discretionary, not jurisdictional, grounds. Lord Mansfield said:

Writs, not ministerially directed, (sometimes called prerogative writs, because they are supposed to issue on the part of the King,) such as writs of mandamus, prohibition, habeas corpus, certiorari, are restrained by no clause in the constitution given to Berwick: upon a proper case, they may issue to every dominion of the Crown of England. There is no doubt as to the power of this Court; where the place is under the subjection of the Crown of England; the only question is, as to the propriety.

1. In 1925, the English Court of Appeal discharged an order nisi directed to the justices and judges of the Central Criminal Court who, many years earlier, had purportedly ordered that there should be paid to various officers of the court certain salaries and allowances by the treasurers of the counties of London, Middlesex, Surrey and Essex: *R v Justices of the Central Criminal Court; Ex parte London City Council* [1925] 2 KB 43. Lord Hewart CJ characterised as “the rather ludicrous position” of a superior court being “invited to quash that which itself has done”: at 58. Similarly, Avory J observed: “at first sight one would say that it cannot be correct to assert that any court can issue a writ of certiorari directed to itself to quash an order made by itself.”: at 60.
2. More recently, Gageler J essayed the history of the writ of certiorari in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1; [2018] HCA 4 at [62]–[72]. It is useful to set out a portion of his Honour’s analysis to emphasise the point that the issue of the writ was limited, at first to courts of inferior jurisdiction and later to statutory decision-making bodies that were not inferior courts:

62. Historically, and until well into the twentieth century, certiorari was conceived of primarily as a writ issued by a superior court of general jurisdiction to an inferior court of record of special and limited jurisdiction.  The writ "called up", or "removed", into the superior court the record of a proceeding in the inferior court.  If the proceeding had not been concluded by judgment in the inferior court, the proceeding could be continued to judgment in the superior court.  If the proceeding had been concluded by judgment or order in the inferior court, the judgment or order could be "quashed" by the superior court.  The jurisdiction of the superior court so to quash the judgment or order of the inferior court the record of which the superior court had called up was capable of being exercised on either of two bases, which were distinct in concept but which were capable of overlapping in practice:  one was jurisdictional error on the part of the inferior court, which could be established to the satisfaction of the superior court by evidence led in the superior court; the other was error of law on the part of the inferior court, which could only be established to the satisfaction of the superior court by the superior court's examination of the removed record.

 …

64. During the nineteenth century and increasingly during the first half of the twentieth century, certiorari came to be recognised as available at common law to enable a superior court to call up and to quash the public record of a purported exercise of statutory decision-making authority by a person or body that was not a court of record where it could be shown that the person or body had acted in excess of their statutory authority.  That can be seen, at least with hindsight, to have accorded with the practice of the Court of King's Bench established at the beginning of the eighteenth century when it was said:

"[T]his Court will examine the proceedings of all jurisdictions erected by Act of Parliament.  And if they, under pretence of such Act, proceed to incroach jurisdiction to themselves greater than the Act warrants, this Court will send a certiorari to them, to have their proceedings returned here; to the end that this Court may see, that they keep themselves within their jurisdiction:  and if they exceed it, to restrain them."

(citations omitted.)

1. There is no historical example of the issue of a prerogative writ by one court of coordinate jurisdiction to another.
2. Of course the jurisdiction of this Court is statutory, not inherent, pursuant to s 39B of the *Judiciary Act* which relevantly provides:

**Original jurisdiction of Federal Court of Australia**

Scope of original jurisdiction

1. Subject to subsections (1B), (1C), and (1EA), the original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth.

(1A) The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:

1. in which the Commonwealth is seeking an injunction or a declaration; or
2. arising under the Constitution, or involving its interpretation; or
3. arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.

...

1. By subparagraph (2), an officer of the Commonwealth does not include a reference to a judge or judges of the Federal Circuit and Family Court of Australia (Division 1). The reference in subparagraph (1) to matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth is clearly founded upon the original jurisdiction of the High Court at cl 75(v) of the Constitution and judges of this Court are officers of the Commonwealth within the meaning of that clause: *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 215 per Gibbs J; *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Qld)* (1995) 184 CLR 620 at 652 per Toohey, McHugh and Gummow JJ (**Re McJannet**).
2. It does not follow from the failure to reference certiorari in s 39B of the *Judiciary Act*, that this Court lacks jurisdiction to grant relief of that character, the effect of which is to quash an impugned decision. In *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; [2003] HCA 2, Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [80] observed that while cl 75(v) of the Constitution makes no reference to certiorari “it has long been accepted that certiorari may issue as ancillary to the constitutional writs of mandamus and prohibition”. In this Court certiorari, or like relief, may be granted in the original jurisdiction conferred by s 39B(1)(c) of the *Judiciary Act* when read with s 23 of the *Federal Court of Australia Act 1976* (Cth): *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2007) 157 FCR 260; [2007] FCAFC 32 at [56]–[59] per Spender, French and Cowdroy JJ; *EnergyAustralia Yallourn Pty Ltd v Construction, Forestry, Mining and Energy Union* (2014) 218 FCR 316; [2014] FCAFC 8 at [49]–[55] per Dowsett J; and *National Retail Association v Fair Work Commission* (2014) 225 FCR 154; [2014] FCAFC 118 at [8] per Collier, Bromberg and Katzmann JJ.
3. Whilst the jurisdiction of this Court to issue writs of mandamus or prohibition or to grant an injunction directed to an officer of the Commonwealth is statutory, and for that reason “notions derived from the position of the pre-judicature common law courts of Queens Bench, Common Pleas and Exchequer, as courts of the widest jurisdiction with respect to subject matter and identity of parties and therefore superior courts, have no ready application in Australia to federal courts” (*Re McJannet* at 652 per Toohey, McHugh and Gummow JJ; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 384–385 per Deane J), the historical analysis and development of the writs remains relevant to “provide the starting point for an assessment of the particular provisions of the Act which are relied upon”: *Re* *Jarman; Ex parte Cook* (1997) 188 CLR 595 at 636 per Gummow J (**Re Jarman**).
4. Despite all of this, Mr Nyoni submits that this Court has jurisdiction (not by way of an appeal regularly brought) to review decisions made by its judges, that *Bird v Free* was wrongly decided and this Court is not bound to follow the subsequent endorsement of that decision by several justices of the High Court in *Re Jarman*. Self-evidently that submission must be rejected for the following reasons.
5. First, I am satisfied that *Bird v Free* was correctly decided and is determinative of the argument. In that case a judge of this Court, Kiefel J, heard a notice of motion brought by certain respondents to strike out a proceeding commenced by Mr Bird. Mr Bird applied that her Honour should recuse herself on certain grounds, which she refused to do. She reserved her decision on the strikeout application. Before doing so she refused to grant leave to Mr Bird to pursue an appeal against her decision not to recuse herself. Mr Bird then sought to file an application for a writ of prohibition directed to her Honour together with a writ of certiorari to quash certain interlocutory orders that she had made. Another judge of this Court, Spender J, directed a district registrar not to accept for filing the application for prohibition and certiorari. At that time order 46, r 7A of the *Federal Court Rules* *1979* (Cth) provided that a registrar may refuse to accept for filing any proceeding which appeared on its face to be an abuse of process or to be frivolous or vexatious.
6. Being dissatisfied with the decision of Spender J, Mr Bird sought to file a further application for leave to appeal the decision of Spender J. That application was referred by a registrar to Drummond J who ultimately ordered the district registrar to refuse to accept the application for leave to appeal against the direction of Spender J pursuant to O 46, r 7A. In three passages which have subsequently been approved of in several cases, including by the High Court in *Re Jarman*, Drummond J said (at 478–479):

In my view a judge of the Federal Court has no jurisdiction to issue a writ of prohibition or an injunction against another judge of the court acting as such. Section 39B confers jurisdiction on the Federal Court in terms identical to that vested in the High Court of Australia by s 75(v) the Commonwealth Constitution. It is well established that that provision of the Constitution empowers the High Court to issue prohibition against a judge of a court or tribunal set up by the Commonwealth Parliament notwithstanding that it is declared, as is the Federal Court of Australia, to be a superior court, because all such judges are officers of the Commonwealth: *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 263; 9 ALR 551, and the case there cited *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 399. See also *R v Judges of the Federal Court of Australia and Adamson; Ex parte Western Australian National Football League Inc* (1979) 23 ALR 439 at 446-7. The High Court's jurisdiction in that very regard is declared by s 38(e) of the Judiciary Act to the exclusive of the jurisdiction of the courts of the States.

The Federal Court's jurisdiction with respect to prerogative writs conferred by s 39B is, as I have mentioned, expressly declared by s 39B(2) not to extend to issuing such process against, among others, judges of the Industrial Relations Court and judges of the Family Court. It was unnecessary, however, for the Parliament to also expressly exclude from the jurisdiction of the Federal Court authority to issue prerogative writs and injunctions against judges of that same court. By s 19(1) the Federal Court of Australia Act 1976 (Cth) the Federal Court has such original jurisdiction as is vested in it by laws made by the Commonwealth Parliament. This includes the jurisdiction vested in the court by s 39B the Judiciary Act.

The Federal Court of Australia consists of the judges of the court: s 5(3) of the Federal Court of Australia Act. The original jurisdiction of the court is exercised by a single judge: s 20(1). But when a single judge hears an application that invokes the jurisdiction of the Federal Court, he or she is not exercising an authority vested in him or her as an individual, but rather the authority which is vested in that judge and all the other judges of the court, as a group. To say that a judge of the Federal Court can prohibit or enjoin another judge of the court acting as such would mean that the authority vested only in all the judges as a group can be treated, as occasion arises, as an authority vested in all save one of the judges and exercisable against that one judge, by the rest. Section 39B of the Judiciary Act does not permit of such a segmented or divisible exercise of the authority it confers. It permits only the exercise of the authority vested by the statute in the court, ie, in all the judges who make up the court. It matters not that the authority vested only in the group is by force of s 20(1) of the Federal Court of Australia Act exercisable by a single member of the group: the single judge is still exercising the authority that is vested not in him or her, but in that judge together with all of the other judges of the court. Authority conferred only on the entire group cannot be exercised by one member, or by some of the members, of that group against another member of the group. To so exclude one member from the exercise of the authority in question by making that member the object of the exercise of that authority would be to do something quite different from exercising the collective authority.

1. The primary judge cited and applied this reasoning at PJ [29]. The High Court in *Re Jarman* approved it at 603 per Brennan CJ, 608–609 per Dawson J, 616–617 per Toohey and Gaudron JJ and 631–632 per Gummow J. Various single judges of this Court have also followed and applied the reasoning: *Kostov v Australian Financial Security Authority* [2020] FCA 1105 at [213] per Farrell J; *Cory v Registrar of the Federal Court of Australia* (2010) 190 FCR 240;[2010] FCA 1215 at [13] per Jagot J, as has the Court of Appeal of Victoria: *Saad v Commissioner of the Australian Federal Police* (2021) 361 FLR 261; [2021] VSCA 246 at [144] per Walker JA, Beach and Sifris JJA concurring.
2. Secondly, there is no merit at all in the submission of Mr Nyoni, to the effect that the principle identified and applied in *Bird v Free* is “unfounded”. There is no persuasive argument, nor any authority, that has been presented to us by Mr Nyoni in support of that contention.
3. Thirdly, Mr Nyoni also sought to persuade this Court that it should not apply and follow the reasoning of the High Court in *Re Jarman* because it is obiter dicta. It is not. The ratio of a case is the general rule of law applied as the reason for the holding: *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515; [2004] HCA 16 at [59] per McHugh J. The central question before the High Court was whether the jurisdiction of the Industrial Relations Court, upon remitter from the High Court, extended to the issue of a writ of mandamus directed to one of its judges. By majority (Brennan CJ, Dawson, Gummow and Kirby JJ; Toohey, Gaudron and McHugh JJ dissenting) that question was answered in the negative. Although the answer turned upon the construction of s 412 (2) and (3) of the *Industrial Relations Act 1988* (Cth), and the meaning of the phrase “an officer of the Commonwealth” therein, central to the reasoning of the majority was that a superior court has no jurisdiction to grant prerogative relief directed to one of its judges (603 per Brennan CJ; 608–609 per Dawson J; 631–632 per Gummow J and 649 per Kirby J) and therefore that phrase “must be construed as excluding judges of the Industrial Relations Court”: at 605 per Brennan CJ.
4. I deal next with the procedural fairness argument. Mr Nyoni accepted before us that Registrar Bird was not obliged to afford an opportunity to make submissions or to provide a hearing before deciding to exercise the power to refuse to accept for filing the February 2020 proposed application pursuant to r 2.26. Rather, his argument is that the consequence of the exercise of the power by the Registrar has deprived him of the ability to seek to make out various claims which are not frivolous, vexatious or an abuse of process. In refining this proposition before us, Mr Nyoni submitted in his written case that:

the appellant has submitted to the court below that a registrar’s stated satisfaction that a document is an abuse of process must be “honestly and actually formed”. If such state of satisfaction, on the face of the decision, is not found to be honestly and actually formed, such decision breaches the rules of procedural fairness and deprives the right of the party to be heard in this court.

1. In the submission of Mr Nyoni, Registrar Bird could not have been so satisfied in that she wrongly concluded that the proposed proceeding was an abuse of process because it did not disclose a cause of action against all of the named respondents: put another way, if it did disclose a cause of action against some of the proposed respondents, then it was not open to Registrar Bird to conclude that the entire document amounted to an abuse of process.
2. The primary judge did not directly engage with this argument, most likely because he had difficulty in comprehending the submissions that were put to him. As I have noted, Mr Nyoni named nineteen respondents in his February 2020 proposed application, including several justices of this Court, but extending to many individuals and authorities who may be amenable to the making of orders in the exercise of the jurisdiction of this Court if regularly invoked. Accepting that as theoretically open, does not solve the more fundamental difficulty faced by Mr Nyoni. It is that on its face the February 2020 proposed application and also the January 2020 proposed application are each patently an abuse of process for several reasons.
3. *First*, the primary relief that is sought is to quash the decisions of Katzmann, Flick and Banks-Smith JJ which relief, for the reasons I have explained, cannot be granted.
4. *Secondly*, relief is sought to effect a joinder, and for the determination of various interlocutory applications, in proceedings NSD1345/2019 and NSD1716/2019. Each of those proceedings were discontinued by Mr Nyoni on 10 August 2020. The effect of the filing of a notice of discontinuance is to bring a proceeding to an end: *Conybeare v Lewis* (1880)13 Ch D 469; *Anthony v Maxam Australia Pty Ltd* [2012] TASFC 5 at [6] per Evans, Tennent and Porter JJ. Abuse of process may take many forms, including if a proceeding is doomed to fail: *Walton v Gardiner* (1993) 177 CLR 378 at 393; *Wheaton,* *in the matter of various applications by Wheaton* [2020]FCA 463 at [19] per O’Callaghan J. That is clearly so where the primary proceedings have been discontinued: there is nothing that can be joined nor any primary proceeding pursuant to which interlocutory applications may be heard and determined.
5. *Thirdly*, there is nothing on the face of either of the proposed applications which discloses any arguable claim against many of the named respondents. For example, the fifth named respondent is the State Administrative Tribunal of Western Australia. What is clear from the short history set out at the commencement of these reasons is that various claims relating to the registration of Mr Nyoni as a pharmacist were dealt with by that Tribunal where he was found to have engaged in professional misconduct as a registered pharmacist: *Pharmacy Board of Australia v Nyoni* [2018] WASAT 134. In no paragraph of either of the proposed applications, is there any attempt at all to articulate a basis for the joinder of that Tribunal. That criticism extends to each of the other named respondents, apart from judges or former judges of this court. On the face of each document there is no arguable claim which invokes the jurisdiction of this court to grant any relief against those respondents and therefore it would be futile to permit either of the proposed applications to be filed: *Mbuzi v Baldwin* [2016] FCA 1314 at [36] per Rangiah J.

# Conclusion

1. For these reasons, none of the grounds of the appeal are made out and it should be dismissed.

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| I certify that the preceding fifty-three (53) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice McElwaine. |

Associate:

Dated: 14 April 2022