23/97

SUPREME COURT OF VICTORIA

RUSHTON v BRAUN and WHYDAH SOLUTIONS PTY LTD

Cummins J

14, 18 February 1997

CIVIL PROCEEDINGS – JUDGMENT ENTERED AGAINST DEFENDANT – CERTIFICATE OF JUDGMENT FILED IN SUPREME COURT – EFFECT OF – WHETHER MAGISTRATE HAD POWER TO HEAR AN APPLICATION TO SET ASIDE AFTER CERTIFICATE FILED: *MAGISTRATES' COURT ACT* 1989, S112(2).

When a certificate is given under s112 of the *Magistrates' Court Act* 1989 and filed in the Supreme Court, the judgment is deemed to have been entered in the Supreme Court. Accordingly, a magistrate lacked jurisdiction to hear an application to set aside a judgment in respect of which a certificate had been filed in the Supreme Court.

***Madin v McMahon* [1986] VicRp 14; [1986] VR 134, distinguished.**

CUMMINS J: [1] There is a short pair of points for determination in this matter. The first is the proper construction and application of s112 *Magistrates' Court Act* 1989 in relation to a judgment entered in this court pursuant to it and the second is the relief sought for remittance to the Magistrates' Court that judgment should be set aside and the plaintiff given leave to file a defence in this court. The plaintiff, Miss Lorryn Rushton, by summons on originating motion moves against the first defendant, Mr B Braun, Magistrate, and the second defendant, Whydah Solutions Pty Ltd, for certiorari to quash the ruling of the first defendant on 18 December 1996 that he lacked jurisdiction to hear the plaintiff's application to have the judgment in that court set aside. The plaintiff thereafter seeks mandamus that the plaintiff's application be remitted to the Magistrates' Court to be heard by a different magistrate; alternatively that the judgment below be set aside and the plaintiff be given leave to file a defence.

The initial process was issued in the Magistrates' Court on 8 November 1995. The order was made on 13 December 1995, the complaint being served on the plaintiff on 19 November 1995. Judgment was in the sum $5,495 together with $75 interest and $430 costs in relation to an agreement for the provision of a computer. The first defendant was a company conducting a gymnasium business named "Healthworks". The second defendant was an officer of the first defendant. The third defendant was alleged to be the proprietor of a business name "Healthworks Squash and Fitness" and the wife of the **[2]** second defendant.

The hearing before the magistrate for the setting aside of the judgment was on 18 December 1996. According to the affidavit of Mr R Halfpenny, the solicitor for the plaintiff, the proceedings were truncated and peremptory. Material in support of that contention is set forth in his affidavit. There is, however, an affidavit of Ms S Sillitoe, barrister, sworn 14 February 1997 which sets out with particularity what she deposes occurred before the magistrate, including the time taken for the submissions on the afternoon of its resumption and the ruling and reasons therefor by the magistrate. On the material contained in Ms Sillitoe's affidavit, it appears to me that the magistrate did not deal with the matter in peremptory form but correctly addressed himself to the issues before him on the application to set aside.

The provisions of s112 *Magistrates' Court Act* 1989 are as follows, having in subs(1) dealt with certification by the Magistrates' Court as to the amount due under the order:

> "(2) A person who is given a certificate under subs(1) may file the certificate in the Supreme Court and, on the filing of the certificate, judgment is deemed to have been entered in the Supreme Court for the sum mentioned in the certificate as being unpaid together with all fees paid for obtaining and filing the certificate and the prescribed amount for costs.
>
> (3) After the issue of a certificate under subs(1) no further proceedings (other than proceedings under the *Judgment Debt Recovery Act* 1984) must be taken in the Magistrates' Court but, on the filing of

> the certificate in the Supreme Court, the judgment deemed to have been entered may be enforced by the same means as any other judgment entered in the Supreme Court, including enforcement under the *Foreign Judgments Act* 1962."

[3] The terms of that Act stand in contrast to the equivalent provision in the *Magistrates (Summary Proceedings) Act* 1975 wherein s143 provided in relevant part as follows:

> "(2) The person obtaining the certificate may file the certificate in the Supreme Court, and thereupon without any further or other process a writ of execution may be issued out of the Supreme Court in the same manner as upon final judgment of that Court for the sum mentioned in the certificate to be unpaid, and the fee paid for the certificate to the clerk of the Magistrates' Court as well as the fees paid in the Supreme Court for filing the certificate and issuing the execution and the sum of $10 for costs.
>
> (3) After any such certificate has been granted no further proceedings shall be taken in the Magistrates' Court or before justices in the matter in which the order was made but any error in a certificate may be amended by the Supreme Court or a judge thereof."

"Proceeding" in the *Magistrates' Court Act* 1989 s3 is defined to mean "any matter in the court" (so far as is relevant). The significant differential between the 1989 Act and its predecessor is that in s112 both subs(2) and subs(3) state that judgment is deemed to have been entered in the court. In the 1975 Act, there was no judgment of the Supreme Court, deemed or otherwise. Rather, the judgment of the court below was registered in the Supreme Court for the purposes of execution. The 1975 provision was facultative; the 1989 provision is determinative. It determines that the order is deemed an order of the Supreme Court. Thus it was that in *Madin v McMahon* [1986] VicRp 14; [1986] VR 134, Tadgell J considered the substance and effect of s143(3) of the 1975 Act. In that case, judgment in the Magistrates' Court was made on 7 May 1984 against the defendant. The certificate was filed in the Supreme Court on 15 April 1985. Justice Tadgell held as follows at **[4]** p136:

> "Neither the filing in the Supreme Court of a certificate granted under s143(1) of the *Magistrates (Summary Proceedings) Act*, nor the issue in accordance with subs(2) of a writ of *fi. fa.*, creates any judgment of the Supreme Court: *Borough of Queenscliff v England* (1897) 18 ALT 230. Nor, in my opinion, does s143(3) deprive the proper officer of the Magistrates' Court of jurisdiction to entertain an application under s6 of the *Judgment Debt Recovery Act* when a certificate has been granted under s143(1). An application of that kind is not 'further proceedings' within the meaning of s143. S143 has a long history."

His Honour refers to that history and then states:

> "In *Wrixon v Deehan* (1865) 2 WW & A'B(L) 16 at p17, Stawell CJ, speaking for the Full Court upon the meaning of that provision, said: 'I think “proceeding” means “proceeding with a view to advance,” and that an attempt to set aside proceedings is not a proceeding'."

Thus it was in that case on that legislation His Honour held that s143(3) did not deprive the clerk of jurisdiction to entertain the application. However, the 1989 legislation is demonstrably in different terms. On its face it establishes that the entity is now a judgment of this court. Further, upon ordinary principles of construction, the legislation is taken to have been made in contemplation of the decision three years earlier in *Madin v McMahon.* I thus consider that for both those reasons the impugned judgment became a judgment of this court and thus the magistrate was correct in his finding of being *functus officio*.

As to the further and other relief sought in the summons on motion, that this court set the judgment aside and give the plaintiff leave to defend, I am unpersuaded that relief should issue in the circumstances of this case. The history of the matter is to be found in the **[5]** affidavits and the exhibits thereto. I find the complaint was issued on 8 November 1995, the plaintiff being the third defendant to the complaint. The goods were delivered in 1995. Judgment was entered on 13 December 1995. The plaintiff, being the third defendant below, says in her affidavit on 17 November 1996 in para 8 as follows:

> "That up until receipt of a letter received from the sheriff's office dated 15 October 1996 I have not at any time been aware of relevant proceedings issued in this matter. I was not served personally with the relevant process, although I understand my husband received service on my behalf, but I

am advised by my husband and verily believe that he was keeping the matter of the summons from me on the basis that the matter could be resolved without going to court."

However, it appears from Exhibit SC.1 of the affidavit of Ms Sillitoe and the statutory declaration by an officer of the sheriff that on 27 July 1996 the officer spoke to a female who identified herself as Lorryn Rushton and that she said she was the same person as that named as the judgment debtor in the warrant. In those circumstances, it appears to me that no explanation has been made as to the recalcitrance of the plaintiff in the making of this application and, in particular, the contrast between para 8 of her affidavit and the statutory declaration SC.1.
In the circumstances, I am not prepared to set aside the judgment regularly entered below. For those reasons, I refuse the relief sought in the summons and the originating motion.

I think costs should follow the event and, in the circumstances, I order the costs of the second defendant be paid by the plaintiff. The first defendant has agreed to abide by the order of the court.

APPEARANCES: For the plaintiff: Mr P Lennon, counsel. Lawpower, Solicitors. For the Second Defendant: Mr R Cameron, counsel. Berry & Maloney, Solicitors.
