

23/98

## SUPREME COURT OF VICTORIA

**COMMONWEALTH BANK of AUSTRALIA v ZOLIS**

Hampel J

16 February, 18 March 1998 — [1998] 4 VR 459

**PROCEDURE – CIVIL PROCEEDINGS – GARNISHEE ORDER MADE ON BANK – PASSBOOK NOT PRODUCED – WHETHER NECESSARY FOR PRODUCTION OF PASSBOOK TO WITHDRAW FUNDS: MAGISTRATES' COURT CIVIL PROCEDURE RULES 1989 R27.01(2); RULES OF THE SUPREME COURT, R71.03.**

**1. The purpose of Rule 27.01(2) of the *Magistrates' Court Civil Procedure Rules 1989* is to dispense with all pre-conditions to the obtaining of funds by a judgment creditor.**

**2. Where a garnishee order had been made requiring the judgment debtor's bank to pay a certain amount, it was not necessary for the judgment creditor to present to the bank the judgment debtor's passbook in order to obtain the funds.**

**HAMPEL J:** [1] This is an appeal from the decision of a Magistrate ("the Magistrate") on 5 August 1997, to amend a garnishee order of a Registrar ("the Registrar"). The substantive issue raised by this appeal is whether a passbook must be presented by a judgment creditor to the bank holding the passbook account of a judgment debtor in order for the creditor to obtain the funds in the account pursuant to a garnishee order. The relevant *Magistrates' Court Civil Procedure Rule* ("the Magistrates' Court Rule") is Rule 27.01(2):—

"(2) For the purposes of the definition of "garnishee" in paragraph (1), an amount standing to the credit of a judgment debtor in an account in a bank, building society, co-operative housing society or similar society, credit union, credit society or investment fund or corporation is a debt due or accruing to the judgment debtor, whether or not a demand or notice is required before money may be withdrawn."

Order 71.03 of the *Rules of the Supreme Court* is in the same terms as its predecessor, which was in force before the Magistrates' Court Rule was introduced. It provides that:

"(1) An amount standing to the credit of a judgment debtor in an account in a bank or in a society shall, for the purpose of this Order, be a debt due or accruing to the judgment debtor, notwithstanding that any of the following conditions applicable to the account has not been satisfied—

- (a) that a demand or notice is required before money is withdrawn;
- (b) that a personal application must be made before money is withdrawn;
- (c) that a deposit book must be produced before money is withdrawn;
- (d) that a receipt for money deposited in the account must be produced before money is withdrawn."

The facts giving rise to this appeal may be summarised briefly. The Respondent, George Zolis ("Zolis"), provided legal services to Vera Ivanovic ("the [2] debtor") giving rise to a debt in Zolis' favour. On 10 May 1996, Zolis obtained a judgment in the Magistrates' Court for the outstanding debt. The debt was not paid, and the Registrar granted a garnishee order under Rule 27.30 of the *Magistrates' Court Rules* in respect of the debtor's passbook account at the Commonwealth Bank. He ordered that:—

"The garnishee...pay to the judgment debtor without delay \$2235.90 or such lesser amount which is the balance of the account held by the Defendant at the COMMONWEALTH BANK at PRESTON Numbered 763-898-5002475 on the date of the service of this Order, the debt due from the garnishee to the judgment debtor and if the garnishee defaults in payment, execution may issue against the garnishee."

Zolis was unable to obtain the passbook from the judgment debtor. The Commonwealth

Bank refused to comply with the order on the basis that a condition of the use of the debtor's passbook account is production of the passbook before the funds can be withdrawn. Zolis applied by way of summons to the Magistrates' Court seeking amendment of the Registrar's order expressly to dispense with the need for the production of the passbook. The Magistrate made an order in the same terms as the order above, however, a new paragraph 1A was inserted:-

"1A The Garnishee shall dispense with the production of any pass-book, in accordance with Supreme Court Rule 71.03."

The Commonwealth Bank still refused to comply with the order of the Magistrate and has now appealed to this Court seeking the determination of a number of procedural questions and its liability to pay without the production of the passbook.

First, I will deal with the procedural issues raised by Mr Shepherd, counsel for the Appellant. He argued that the application to vary the order of the Registrar was unnecessary and procedurally incorrect. The correct procedure would have been for the Commonwealth Bank to have applied to the Court within 14 days of the order of the Registrar to have the question of its liability determined pursuant to Order 27.31 of the *Magistrates' Court Rules*. He argued that there are now two of the same orders in place. [3] Whilst there may be procedural irregularities I shall, pursuant to section 109 of the *Magistrates' Court Act* 1989 and by agreement between the parties, determine the substantive dispute between the parties raised by this appeal.

Next, Mr Shepherd submitted that the Magistrate erred in finding that the money in the passbook account was a debt due and accruing. He relied on *Re Australia and New Zealand Savings Bank Limited; Mellas v Evriniadis* [1972] VicRp 79; [1972] VR 690 in which the Court held that production of a passbook was a condition precedent to any obligation on the part of the bank to repay moneys deposited to the credit of an account. In that case, as that condition had not been met, there was no debt owing or accruing from the bank to the judgment debtor. Mr Shepherd then referred to a 1973 article in the *Australian Law Journal* 47 at 210-211 in which the author wrote:-

"Short of legislative action, the judgment creditor will remain frustrated as regards a fund which, on any policy evaluation, should be available to him on garnishee proceedings."

He argued that Rule 71.03 of the *Supreme Court Rules* is an example of legislation that overcomes this difficulty because it expressly removes the requirement for the production of the passbook before certain moneys may be withdrawn. The *Magistrates' Court Rule* 27.01 on the other hand, does not achieve this end as it simply removes the necessity for a demand or notice before money may be withdrawn. It is silent on the question of the passbook. Mr Shepherd argued that the legislature could easily have put the question beyond doubt by expressly excluding the need for the production of the passbook. However, as the Rule fails to do so, the position in *Evriniadis* prevails and the amount in the bank account does not become a debt due and accruing until the passbook is produced.

Mr Rinaldi, who appeared for Zolis, submitted that the Court is obliged to promote the purpose of the relevant rule, which, in this instance, is to overcome the problems presented by the judgment in *Evriniadis*. He argued that the production of the passbook and/or the completion of a withdrawal slip fall within the scope of the words "demand or notice" in Rule 27.01(2). Mr Rinaldi referred to the difference in [4] construction between the Supreme Court Rule and the Magistrates' Court Rule and argued that, even though the Magistrates' Court Rule was introduced after the Supreme Court Rule, Rule 27.01 is intended to be a broader expression of an intention to dispense with any other precondition to the obtaining of funds by a judgment creditor. I agree with Mr Rinaldi's submission that Rule 27.01 should be interpreted broadly. It is intended to remove the requirement of provision of the passbook. If this were not the case, then judgment creditors would have to comply with different requirements depending on whether their claim fell within the jurisdiction of the Magistrates' Court or the Supreme Court. In my view, the purpose of both the Supreme Court and the Magistrates' Court Rules is to address the difficulty produced by *Evriniadis* and discussed in the *Australian Law Journal* article. The fact that the Rules are expressed differently, and that the current form of the Supreme Court Rule was in existence at the time the Magistrates' Court Rule was introduced, is of little consequence. The Supreme Court Rule is in the form of a more specific, itemised provision, whereas, the Magistrates' Court Rule is a broader statement of the intention to dispense with all pre-conditions.

The final issue in this appeal is the application of the Magistrate of Rule 1.14 of the *Magistrates' Court Rules*. Rule 1.14 provides:—

"Where the manner or form of the procedure—

(a) for commencing, or for taking any step, in a proceeding; or

(b) by which the jurisdiction, power or authority of one court is exercisable—

is not prescribed by these Rules or by or under any Act the general principles of practice and the Rules and forms observed and used in the Supreme Court may, at the discretion of the Court, be adopted and applied to any proceeding with such modification as may be necessary."

In his reasons, the Magistrate said:—

"However, if I am wrong then I am of the opinion that Rule 1.14 should apply. It seems to me that if there is some defect or omission in the manner or form of procedure then this is a circumstance which is appropriate for me to exercise my discretion under Rule 1.14 to apply the provisions of rule 71.03 of the *Supreme Court Rules*."

[5] Mr Shepherd submitted that the Magistrate should have found that Rule 1.14 has no application because Rule 27.01 covers the field and therefore there is no need to import the provisions of the Supreme Court Rule. In my opinion, it was unnecessary for the Magistrate to consider the application of Rule 1.14 of the *Magistrates' Court Rules*. It follows that the appeal must be dismissed with costs.

**APPEARANCES:** For the appellant: Mr RD Shepherd, counsel. IF Purbrick, solicitor. For the respondent: Mr MG Rinaldi, counsel. Zolis, barristers & solicitors.

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