



IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED
<u>2013.10.24</u> DATE
<u><i>JM Mabu</i></u> SIGNATURE

CASE NUMBER: 33265/13

DATE: 24 October 2013

STANDARD BANK OF SOUTH AFRICA LTD AND OTHERS

APPLICANTS

v

S NDLOVU AND OTHERS

RESPONDENTS

JUDGMENT

MABUSE J:

1. On 22 October 2013, I had to deal with a number of matters in which the plaintiffs had applied for default judgments against the defendants. The second defendants

in all the matters were sued in their capacities as the duly appointed executrix or executors of the deceased estates. The causes of action on which the plaintiffs relied in all these matters were the loan agreements concluded between the deceased and the banks. The said loans were secured by mortgage bonds registered in favour of the banks. The mortgage bonds were registered over the deceased's properties. It was contended by the plaintiffs that the deceased fell into arrears and that for that reason, the plaintiffs issued summons against the executrices or executors in order to recoup the amounts of the loans. In affidavits furnished by the legal managers of the plaintiffs it was stated that the executors or executrices had failed to finalise the estate.

2. When counsel stood up in order to address me on the matters I requested him to direct me to a paragraph in the papers that showed that, before launching their actions, the plaintiffs had complied with the provisions of sec. 29 of the Administration of Estates Act No. 66 of 1965 ("the Act"). Sec. 29 of the said Act reads as follows:

"Every executor shall, as soon as may be after letters of executorship have been granted to him, caused a notice to be published in the gazette and in one or more newspapers circulating in the district in which the deceased ordinarily resided at the time of his death and, if at any time within the period of twelve months immediately preceding the date of his death he so resided in any other district, also in one or more newspapers circulating in that other district, or if he was not ordinarily so resident in any district in the Republic, in one or more newspapers circulating in a district where the deceased owned property, calling upon all

persons having claims against his estate to lodge such claims with the executor within such period (not being less than 30 days or more than three months) from the date of the latest publication of the notice as may be specified herein.

(2) All claims which would be capable of proof in the case of insolvency of an estate may be lodged under (1)."

He was unable to do so. He submitted, however, that it was the plaintiff's contention that the executors were dragging their feet, acknowledging thereby that the plaintiffs were aware that someone had been appointed as the executors or executrix in each of the estates. I was reluctant to entertain the matters unless I was satisfied that the plaintiffs had lodged their claims with the executor or executrix in compliance with the provisions of the said Act and furthermore that their claims had either been rejected by the executrices or executors or their objections, if any, to the Accounts in each of such matters had been overruled by the respective Masters of the High Courts.

3. I stood the matters down and after a while counsel came back. This time he was armed with a law report. He referred me to the authority of *Nedbank vs. Samsodien N.O. 2012(5) S.A. 642 GSJ* and, relying on that authority, submitted that the plaintiffs in all the matters that were before me were entitled to issue summons against the defendants, in particular, the second defendants in order to recover the amounts of loans. These matters were:

- 1) *Standard Bank of South Africa Ltd vs Ndlovu S Case No. 33265/13;*

- 2) Standard Bank of South Africa Ltd vs Modise EM Case No. 39733/13;
- 3) Nedbank Limited vs Steyn APS Case No. 45338/13;
- 4) Standard Bank of South Africa Ltd vs Masilela PS Case No. 45692/13;
- 5) Standard Bank of South Africa Ltd vs Ngema RA N.O. Case No. 45693/13;
- 6) Standard Bank of South Africa Ltd vs Ngele HL N.O. Case No. 46543/13;
- 7) Nedbank Limited vs Masema VP N.O. Case No. 46886/13;
- 8) Nedbank Limited vs Figlan LM N.O. Case No. 46887/13; and
- 9) Nedbank Limited vs Muller PH Case No. 50637/2013.

I stood the matters down to 24 October 2013 in order to enable me to study the said authority on which counsel relied. I am indebted to counsel for he gave me an opportunity to read and understand the said authority. More similar matters came before me on 24 October 2013. These matters were:

- 1) Standard Bank of South Africa Ltd vs Mathibela PF Case No. 34943/13;
- 2) Standard Bank of S.A. Ltd vs Van Der Westhuizen WC Case No. 37215/13;
- 3) Nedbank vs Kgopa TB N.O. Case No. 38578/13;
- 4) First Rand Bank t/a Wesbank vs Mokgoshi N.S. Case No. 45202/13;
- 5) Standard Bank of South Africa Ltd vs Dzimbiri M N.O. Case No. 45694/13;
- 6) Nedbank vs Ntombela LP Case No. 46883/13;
- 7) Standard Bank of South Africa Ltd vs Mikheswa M N.O. Case No. 50643/13;
- 8) Standard Bank of South Africa Ltd vs Dipale BP Case No. 50644/13;

4. In the said authority the defendant raised a special plea that the plaintiff's claim was premature. I understand this word "claim" to mean the "action". In other words the defendant's special plea was that the action that the plaintiff in the said matter had instituted against it in order to recover the amount of the loan was premature. In my view, the defendants were correct to plead a special plea and it should have been upheld. It was the right step to take. It is not clear from the facts as set out by the Court in the aforementioned authority whether or not the defendant had lodged any claim following the notice referred to in sec. 29 of the Act or at all. I must however assume that they had done so because they would have had to comply with the provisions of sections 129 and 130 of the National Credit Act 34 of 2005. A notice in terms of the said sections issued by the creditor of the deceased estate to the executor or executrix or the surviving spouse, if the marriage was in community of property, would in my view, be sufficient compliance by the creditor with the provisions of section 29 of the Act. If the plaintiff had lodged a claim in terms of the provisions of the said section, and the claim had been acknowledged by the executor or executrix and taken into account in the liquidation in the first and final liquidation and distribution account ("the Account"), there was, in my view, no reason in law why the plaintiff in that authority instituted an action against the estate.
5. The principal purpose of administering a deceased estate is to preserve the assets of the estate to safeguard the interests of the creditors, the heirs in general and ultimately to satisfy the debts of the deceased and to pay the heirs and the inheritances. Accordingly, no action alongside the administration of the deceased

estate should be launched and entertained before the Account has been approved by the Master. This is so because any such action would distract the executor or executrix in the due performance of administering the deceased's estate; it will in that manner delay the satisfaction of other creditor's debts; funds that would ordinarily have been used to settle the claims of the creditors would be expended on defending such litigation. This would have the effect of reducing the gross value of the estate to the detriment of the estate. It would also constitute an involved and costly procedure to claim payments of the debts from the estate when the Act itself provides for an inexpensive and speedy manner of doing so.

6. The plaintiffs in the said matter had therefore no lawful justification to proceed with an action before the Master of the High Court ("the Master") had approved the Account. Accordingly the plaintiff, if it had lodged a claim in terms of sec. 29, and the claim had been acknowledged by the executor and reflected in the Account the plaintiff, could still object to the Account it did not reflect its claim or if the claim had not been properly dealt with in the account.

7. After receiving the approved account from the Master's Office, the executor is obliged by the provisions of sec. 35(5)(a) of the Act to publish a notice in the Government Gazette and another in one or more newspapers circulating in a district in which the deceased was ordinarily resident at the time of his death and to indicate the Master's Office where the account lies open for inspection and the period during which such account will lie for inspection. The period during which an account lies for inspection is 21 days. The plaintiffs would then, in terms of the

provision of sec. 35(7) of the Act lodge an objection with the Master against the account. Sec. 35(7) provides as follows:

“Any person interested in the estate may at any time before the expiry of the period allowed for inspection lodge with the Master in duplicate any objection, give the reasons therefore, to any such account and the Master shall deliver or transmit by registered post to the executor a copy of any such objection together with copies of any documents which such person may have submitted to the Master in support thereof.”

8. In paragraph 3 of the authority of *Nedbank vs Samsodien supra* the court stated that:

“3. The question for my determination, in a nutshell, therefore is whether the claim procedure provided for in sections 29, 32, 33, and 35 of the Act precludes the creditor from his common law rights to enforce his claim against a deceased estate. The weight of authority is in favour of allowing the creditor to avail himself of the common law enforcement procedure.”

There is, in my view, no magic in using the words “common law rights’ or claim. Whether it is a “common law right’ claim or not the fact remains that such claim constitutes a claim against the deceased estates. There is in the Act no separate provision that deals specifically with “common law claims” quite distinctly from other claims. I already have referred to sec. 29(2) which states that all claims which would be capable of proof in the case of insolvency of estate may be lodged under (1). The word

claim has not been specifically described in section 1 of the Act. It therefore carries its ordinary meaning.

9. In my view, the plaintiffs could only sue the defendants under the following circumstances:

(1) If they had raised an objection against the account and the Master, having adjudicated and considered it, dismissed it or (2) if the executor had rejected the plaintiffs' claims. This is precisely what happened in *Estate Stanford vs Kruger* 1942 TPD 243 which the learned judge followed in the *Nedbank vs. Samsodien, Benadie vs Boedel Alexander* 1967(1) S.A. 648(OPA); *David vs. Estate Hall* 1946(1) S.A. 774 CPD. In *Estate Stanford vs Kruger* supra the facts of the case were as follows:

“Shortly after the death of Stanford the plaintiff wrote a letter to the executor to enquire when he could take possession of the balance of the oxen and requesting an affidavit setting out the details. Nothing was done by the plaintiff until after the executor's first and final liquidation and distribution account had lain for inspection when confirmation of the account was objected to on the ground that the plaintiff's claim had been omitted. After he had investigated and considered the objection the Master wrote a letter to the plaintiff in which he advised him that he was not prepared to sustain the plaintiff's objection to the account. In the same letter the Master directed the plaintiff's attention to the provisions of the then sec. 58(9)(a) of Act 24 of 1913 which entitled the plaintiff to approach the Supreme Court (as it then was known) within 30 days to have his approval of the account reviewed and set aside. He also warned the applicants that they should review his approval of the account failing which the executor would be allowed to pay out the heirs.”

What is of paramount importance with regard to the facts of this matter is firstly that the plaintiff had lodged his claim against the estate of Stanford with the executor; and, secondly, that the executor had omitted the plaintiff's claim from the account; thirdly, that the plaintiff had objected to the account after it had lain for inspection; and, fourthly, that the Master had considered and rejected the objection. Under these circumstances, the plaintiffs in this authority were entitled to enforce payment of their claim by approaching the Court by way of an action.

10. This was also the same position in *Benadie vs. Boedel Alexander* 1967(1) S.A. 648(OPA). In this case the applicant's attorneys lodged a claim with the executor on 12 January 1966. They ultimately received the following response:

"By wyse van 'n brief gedatteeer 10 Maart 1966 is die applikant se prokureurs uiteindelik in kennis gestel dat die executriese die bestaan van die huurkontrak tussen die applikant en die oorledene ontken en gevolglik sy eis ook." It is clear that in this case the executor rejected the applicant's claim.

"16.8 If the executor rejects a creditor's claim he must forthwith notify the claimant in writing by registered post and shall state in the notice his reasons for rejecting the claim." See in this regard sec. 33 of the Act.

"The creditor can adopt either of two causes. He can take legal proceedings to establish his claim or he can wait until the executor has lodged his account and then avail himself of the procedure objecting to the count."

See paragraph 16.8 page 16-7 Meyerowitz on Administration Of Estates And The Taxation 2010 Edition. Where the claim has been rejected the claimant may, only at this stage, establish his claim by way of taking action against the deceased's estate. In *David vs. Estate Hall 1956(1) S.A. 774 CPD* the same approach was adopted. The court stated that:

"A creditor of a deceased estate who has lodged an objection to an account with the Master and whose objection has been overruled is not precluded from instituting an action against the estate." Accordingly it is clear that the approach adopted by Van Oosten J. is that a creditor has a right to sue the executor without resorting to the provisions of the Act. I respectfully dissent from that view. Secondly, it is clear that the authorities that he relied on did not support his approach that a court may grant judgment in a matter like this without enquiring whether the provisions of the Act have been complied with. This proposition is in conflict with the law and to grant default judgment without taking into account the provisions of the Act is to emasculate the provisions of the Act and render them nugatory. That proposition will cause unnecessary confusion as it is done. Statutes are intended to be effective. There is in common law a presumption that statutes do not contain invalid or purposeless provisions. In *Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd 1993(4) SA 110 AD* the court approved of the following passage from the authority of Attorney General, *Transvaal v Additional Magistrate for Johannesburg 1924 AD 421* where Cockburn stated as follows:

" 'A statute' says Cockburn CJ, 'should be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant.' The

Queen v Bishop of Oxford (4 QBD at 261). To hold certain words occurring in a section to an Act of Parliament as insensible, and as having been inserted through inadvertence or error, is only permissible as a last resort. It is, in the language of Erle CJ: 'the ultima ratio, when an absurdity would follow from giving effect to the words as they stand.' R v St John (2 B and S 706), in the Exchequer Chamber affirming the judgment of the Queen's Bench."

This common law principle has been dealt with aptly in Re-Interpretation of Statutes by Lourens du Plessis at p. 188 paragraph (b):

"The following are examples of situations in which the presumption has been invoked almost, it seems, as a matter of course:

- (ii) ~ The presumption operates against any construction frustrating the objectives of a statutory provision which, on the face of it, is ostensibly susceptible to being rendered nugatory.*
- (iii) Where uncertainty, confusion and conflict are likely to arise, the presumption operates in favour of a construction eliminating these.*
- (iv) When the validity of a provision of a delegated enactment is at stake for some reason, '[t]he Court leans towards an interpretation ... which renders it valid, rather than giving it a meaning which is so extravagant or wide as to render it invalid.*
- (v) An interpretation favouring or permitting acts or transactions in fraudem legis should be avoided, but the provisions of an enactment may well be lawfully evaded if, for instance, a transaction is genuinely and honestly arranged so as to fall outside their scope of operation. In pursuance of the maxim plus valet quod*

agitur quam quod simulate concipitur ('the real intention carries more weight than a fraudulent simulation') an act or a transaction is said to be in *fraudem legis* when it is designedly disguised so as to escape the provisions of the law, but falls in truth within these provisions'. The presumption is therefore applied in this specific way, in a quest to avoid fraud.

(vi) If reasonably possible, a *casus omissus* should be avoided.

The ratio underlying the application of this common-law presumption of validity in the sets of circumstances (i)-(vi) above, is that legislation must be construed so that it best serves its purpose. The presumption is, in other words, consonant with and indeed conducive to purposive interpretation and therefore holds its own in the new constitutional dispensation."

11. Section 30 does not, in my view, authorise a plaintiff to issue summons. It merely means that, if at the time of the deceased's death the plaintiff is already in possession of a writ of execution, no such person "shall before the expiry of a period specified in the notice referred to in section 29 or (b) thereafter, unless, in the case of property of a value not exceeding R5 000.00, the Master or, in the case of any other property, the court otherwise directs, sell any property in the estate of any property of any deceased person which has been attached whether before or after his death and with such writ or process: Provided that the foregoing provisions of this section shall not apply of if such person could not have known of the death of the deceased person."

12. In my view, the passage that the court had relied on in *Scoin Trading (Pty) Ltd vs Berdenstein N.O.* 2001(2) S.A. 118 SCA paragraph 23 which states that:

“Except for the risk of personal liability if he overpays, it is not unlawful for an executor to pay a creditor’s claim before the confirmation of such account “ does not support the Judge’s approach that a creditor may issue summons against the defendant regardless of the provisions of the Act. It is consequently not sufficient for the plaintiff to allege in the summons that the executor or executrix delays or drags his feet in the administration of the estate and that it is unable to obtain satisfaction of the debt or claim. In such a case the plaintiff’s remedy lies in sec. 36 of the Act which provides as follows:

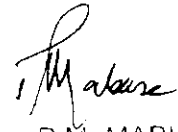
“36(1) If any executor fails to lodge any account with the Master as and when required by his act or to lodge any voucher or vouchers in support of such an account or an entry bearing in accordance with the provisions of or a requirement imposed under this Act or to perform any other duty imposed on him by this Act or to comply with any reasonable demand of the Master for information or proof required by him in connection with the liquidation or distribution of an estate, the Master or any person having interest in the liquidation and distribution of the estate may, after giving the executor not less than one month’s notice, apply to the Court for an order directing the executor to lodge such account or voucher or vouchers in support thereof or an entry therein or to perform such duty or to comply with such demand.

(2) The costs adjudged to the Master or to such person shall, unless otherwise ordered by the Court, be payable by the executor, de bonis propriis.”

13. In order to succeed with their claims against the estates, the plaintiffs must satisfy the court that:
- 1) they lodged their claims against the deceased estates with the executors whether or not in terms of section 29;
 - 2) that the executor has rejected it; or
 - 3) that they have lodged their claims with the executors;
 - 4) that the executors have omitted their claims from the Accounts or have not dealt with their claims to their satisfaction;
 - 5) that they have lodged an objection against the Master's approval of the said account and that the Master has overruled their objections.
14. In my view, the other circumstances under which a creditor may be entitled to sue the deceased estate in order to enforce payment of its claim would be where there is an unreasonable and unexplained delay in reporting the deceased estate to the office of the Master or where the provisions of sec. 36 of the Act have been exhausted but there is no progress in the matter.
15. The Act serves, in respect of the deceaseds' estates, the same purpose as the Insolvency Act 24 of 1936 does to insolvent estates and the Companies Act No. 71 of 2008 does to liquidated companies and closed corporations.
16. I am satisfied though that in all the above matters the plaintiffs have complied with the provisions of sec. 29 of the Act. That is however not sufficient. This Court

may not, on that basis alone, grant default judgments against the defendants. In the result I make the following order:

All the above applications for default judgments are removed from the roll to enable the plaintiffs to comply with the provisions of the Administration of Estates Act No. 66 of 1965.



P M MABUSE

JUDGE OF THE HIGH COURT