

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT  
(JOHANNESBURG)

CASE NO 47945/2010

1. REPORTABLE: YES
2. OF INTEREST TO OTHER JUDGES: YES
3. REVISED.

14 May 2012

  
FHD VAN OOSTEN

In the matter between

**NEDBANK LTD**

**PLAINTIFF**

and

**RAGIEMA SAMSODIEN NO**

**DEFENDANT**

*Practice – Default judgment – Bank's claim against deceased estate – special plea that claim premature before Master's confirmation of liquidation and distribution account – creditor's common law rights to enforce payment – whether precluded by claims procedure provided for in Administration of Estates Act – McNicol v Delport NO 1980 (4) SA 287 (W) not followed – held that creditor not deprived of common law enforcement procedures - default judgment granted*

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**J U D G M E N T**

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**VAN OOSTEN J:**

[1] This is an application for default judgment. The action was properly enrolled for trial but the defendant was in default of an appearance. Counsel for the plaintiff sought default judgment but, very properly, first addressed the issue to which I shall revert. I granted judgment by default as claimed in the summons and indicated that I would furnish reasons later. These are my reasons.

[2] The plaintiff's claim is against a deceased estate represented by the defendant in her capacity as the appointed executrix in the estate. The cause of action relied on is a loan agreement concluded between the bank and the deceased which was secured by a mortgage bond in favour of the bank, registered over the deceased's immovable property. The deceased fell into arrears, summons was issued and the defendant entered an appearance to defend. Of the further procedural steps that were taken in the action, it is only necessary, for present purposes, to refer to the defendant's special plea in which the defendant pleaded that the plaintiff's claim was premature in that it was instituted prior to confirmation by the Master of the High Court, of the liquidation and distribution account in the deceased estate. In its replication the bank averred that it was entitled at common law, subject to the provisions of s 30 of the Administration of Estates Act 66 of 1965 (the Act), to enforce its claim prior to such confirmation.

[3] The question for my determination, in a nutshell, therefore is whether the claim procedure provided for in s 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 procedures (see *Estate Stanford v Kruger* 1942 TPD 243; *Davids v Estate Hall* 1956 (1) SA 774 (C); *Benade v Estate Alexander* 1967 (1) SA 648 (O)). The opposite view may, however, be inferred from the judgment of King J in this division, in *McNicol v Delport NO* 1980 (4) SA 287 (W). In that matter the summons indicated that the plaintiff's claim had already been both admitted and included in the liquidation and distribution account but that payment thereof had not yet been effected. King J refused default judgment on the ground that, in regard to the account, "essential allegations of laying for inspection and no objections thereto" were lacking and, further, that no

avermment had been made that the interest claimed was a claim that had appeared in the account which had been filed. I am in doubt whether the learned Judge intended to lay down a general principle that the common law enforcement procedures were ousted by the statutory procedures but, insofar as the judgment may be interpreted as doing so, I am respectfully of the view that it is clearly wrong and that it is, in any event, contrary to the other authorities I have referred to. Prof FJ van Zyl, who was a renowned authority on the law of succession, in an article *Boedelskuldeiser versus eksekuteur* (1987 *De Jure* 53/308) convincingly comes to the conclusion that the creditor's common law competence to enforce his claim against a deceased estate has not been abolished by the provisions in the Act (see also W Abrie et al *Deceased Estates* 5<sup>th</sup> ed 138). Finally, some support for this view is to be found in the recent judgment of the Supreme Court of Appeal, in *Scoin Trading (Pty) Ltd v Bernstein NO 2011 (2) SA 118 (SCA)*, paragraph [23], where K Pillay AJA remarked:

'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.'

[4] This court, pursuant to the provisions s 30 of the Act, is endowed with the power to grant leave to sell the deceased's property in execution. I am satisfied that a proper case for the granting of such leave has been made out.

[5] In the result I grant default judgment against the defendant for:

1. Payment of the sum of R 479 671.92.
2. Interest on the amount in paragraph 1 above, at the rate of 8.85% per annum from 26 August 2010 to date of payment.
3. The immovable property, described as erf 1423 and erf 1424, Albertsville Township, Registration Division IQ, Province of Gauteng, measuring 248 sq metres, held by deed of transfer T76373/1999, is declared specially executable.
4. Costs of suit to be taxed on the scale as between attorney and client.



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FHD VAN OOSTEN  
JUDGE OF THE HIGH COURT

**COUNSEL FOR PLAINTIFF**

**PLAINTIFF'S ATTORNEYS**

**DATE OF HEARING**

**DATE OF REASONS FOR JUDGMENT**

**ADV SJ VAN NIEKERK**

**MARTO LAFITTE & ASS INC**

**3 MAY 2012**

**14 MAY 2012**