

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case no: 16801/12

In the matter between:

ABSA BANK LIMITED

Applicant/Plaintiff

and

MARIA MAGRIETHA LOUW N.O.

duly appointed EXECUTRIX in the

ESTATE OF THE LATE MOERIEDA

FREDERICKS

First Respondent/ Defendant

ISMAEL FREDERICKS

Second Respondent/ Defendant

(ID NO)

JUDGMENT DELIVERED ON 06 DECEMBER 2012

SAVAGE AJ

[1] On 16 October 2012 I granted an order in favour of the plaintiff against the defendants, jointly and severally, the one paying the other to be absolved for:

- (a) Payment of the sum of R57 965, 92 (fifty seven thousand nine hundred and sixty five rand and ninety two cents).
- (b) Interest on the above amount at the rate of 8.5% per annum as from 23 May 2012 to date of final payment, such interest to be capitalised monthly in advance.
- (c) An order declaring Erf. 20420 Mitchells Plain, situate in the area of the

Transitional Metropolitan Substructure of Cape Town, Cape Division, in the Province of the Western Cape In extent: 140 metres, held under deed of transfer No. T27353/1989, to be specially executable, inclusive of authority thereto in terms of the Administration of Estates Act.

(d) Costs of suit on an attorney and client scale.

[2] The grant of this order followed an application for summary judgment in which the plaintiff sought judgment against the defendants for an amount of R57 965. 92 with interest and costs arising out of the defendants' default under certain mortgage bond agreements, as well as an order declaring the property concerned to be specially executable. The relevant agreements are credit agreements and the National Credit Act 34 of 2005 were applicable.

[3] Subsequent to the order having been granted, the defendants requested reasons for the order. Reasons for the order granted are set out in this judgment.

[4] On 6 November 2012 the parties were requested to submit written argument to the court regarding whether there existed a patent error in the order granted on 16 October 2012 in that the second defendant had passed away on 8 January 2012, prior to the issue of the summons on 3 September 2012. Submissions were received from the second defendant's attorneys only and in spite of an additional period provided, no submissions were received from the plaintiff.

The facts

[5] The facts relevant to the matter are set out in the particulars of claim. Erf 20420 Mitchells Plain held under deed of transfer No. T27353/1989 (“the property”) was hypothecated as security under various mortgage bonds for the debt obligations of the late Moerieda Hendricks and the second defendant. The monthly repayments on the loan amount are R1207.12. Defendants were in arrears with instalments in the amount of R28 887.80, being equivalent to arrears of just over 23 months. The property was not acquired by means of or with the assistance of a state subsidy and has a market value of R300 000.00, confirmed by an internal bank valuation report that was annexed to the particulars of claim. Despite demand the arrears outstanding in respect of the loan amount remain unpaid. The executrix of the estate of Mrs Fredericks was appointed as such on 31 May 2011, following the death of Mrs Fredericks on 6 September 2010.

[6] The defendants filed a notice of intention to defend the action. Thereafter application was made for summary judgment and an affidavit in support of summary judgment was deposed to by Mr Guguiethu Zulu of the plaintiff. In this affidavit it was stated that the defendants do not have a *bona fide* defence to the claim and had entered an appearance to defend solely for the purpose of delay.

Reasons for grant of Summary judgment

[7] The first ground of opposition to the application for summary judgment is that the defendants have no knowledge regarding the progress made in winding up the estate of the late Mrs Fredericks and inaction on the part of the first defendant is suggested by the second defendant’s attorneys. This does not provide a *bona fide*

defence to the claim of summary judgment and other remedies exist insofar as the non-performance by an executor of his or her functions is concerned in circumstances in which it is an undisputed fact that the executrix in this matter has been appointed by the Master of the High Court as such.

[8] The second ground of opposition is that the plaintiff is acting in bad faith given that the first defendant is an employee of the plaintiff, in seeking summary judgment in this matter when it ought to have known that its employee was the executor of the estate of the first defendant. Once again, I am satisfied that this does not constitute *a bona fide* defence to a claim of summary judgment given the appointment of the executrix under a letter of executorship by the Master of the High Court and the fact that the office of executor is distinct from the legal persona of the plaintiff even in circumstances in which an employment relationship may exist between the two.

[9] The third basis for opposition is that the loan amount outstanding, is not due and payable until the estate is properly wound up in accordance with section 35(12) of the Administration of Estates Act 66 of 1965. In *Nedbank Ltd v Samsodien NO* 2012 (5) SA 642 (GSJ), Van Oosten J held that a creditor's common-law competence to enforce, a claim against a deceased estate has not been abolished by the provisions of the Administration of Estates Act 66 of 1965, concluding that 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 *Stanford v Kruger* 1942 TPD 243; *Dauids v Estate Hall* 1956 (1) SA 774 (C); *Benade v Estate Alexander* 1967 (1) SA 648 (O)).

[10] In the circumstances, I am satisfied that the plaintiff is entitled to pursue its claim for payment of the outstanding loan amount against the first defendant. For reasons set out below however, I am not persuaded that an order is competent against the second defendant.

[11] The final basis for opposition is that there may exist some form of insurance over the bond which would cover any loan amount outstanding. The existence of insurance does not provide a defence to the claim instituted and accordingly does not provide a *bona fide* defence to a claim of summary judgment.

[12] For the reasons set out above, I am satisfied that no *bona fide* defence to the plaintiff's claim was placed before this court. The first defendant had defaulted on payments and is over twenty three months in arrears. There was compliance with the terms of the National Credit Act and the relevant track and track reports were filed in this regard. It is not disputed that the first defendant has been unable to advance alternative means and/or arrangements to satisfy the arrears and/or indebtedness. Consequently, there exists no basis in law on which to; refuse judgment in respect of payment of the amount of R57 965, 92, plus interest and costs in the terms sought.

[13] The order sought in the plaintiff's particulars of claim included a prayer that:
"The sheriff for the district of the High Court wherein the property is situate is hereby authorised and directed, in terms of Section 30 of the Administration of Estates Act

No. 66 of 1965 (as amended) to sett in execution the immovable property referred to in paragraph 3 above". *The applicant did not persist with this relief at the hearing of the matter and no order is granted in this regard.*

Rescission

[14] After having received the defendants' request for reasons, written; argument was requested from the parties: regarding whether the order had been erroneously granted against the second defendant given that it was apparent from the opposing affidavit of Nadeema Fredericks that the second defendant had died on 8 January 2012; prior to the institution of these proceedings by the plaintiff. The fact that the second defendant had died prior to the institution of proceedings in this matter was not which was drawn pertinently to my attention at the hearing of the matter.

[15] Death marks the end of legal personality; to this rule there are no exceptions (Boberg's Law of Persons and Family (2nd ed) at 50). Accordingly, as the second defendant is deceased he is not capable of being sued given that he is no longer a person in the eyes of the law. In terms of section 13 of the Administration of Estates Act 66 of 1965, deceased estates are to be liquidated by a person under letter of executorship and in terms of section 33(2), a court may adjudicate a claim against a deceased estate.

[16] The plaintiff is entitled to pursue its claim against the second defendant not in his own name but against the executor of the second defendant's estate given that he is deceased. In the circumstances, given the death of the second defendant, the order was erroneously granted by this court against the second defendant in his own

name as opposed to in the name of the executor of his estate. Consequently, the order made against the second defendant was one erroneously made given his death and is accordingly *mero motu* rescinded in accordance with the provisions of rule 42.

[17] Although the immovable property in question is not a primary residence, the non-joinder of the executor of the second defendant's estate in these proceedings has the result that an order of special execution against such property was erroneously granted insofar as the second defendant's executor was not cited in these proceedings. Accordingly, the order of special execution against erf 20420. Mitchells Plaint granted on 16 October 2012 is hereby *mero motu* rescinded.

[18] In the result, and for the reasons set out above, the order made on 16 October 2012 is corrected to read as follows:

1. Judgment is granted in favour of the plaintiff against the first defendant for-

1.1. Payment of the sum of R57 965, 92 (fifty seven thousand nine hundred and sixty five rand and ninety two cents).

1.2. interest on the above amount at the rate of 8.5% per annum as from : 23 May 2012 to date of final payment, such interest to be capitalised monthly in advance.

1.3. Costs of suit on an attorney and client scale.

KM Savage Acting

Judge of the High Court