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Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case number: 2749/2020

Before: The Hon. Mr Justice Binns-Ward
Hearing: 19 March 2021
(Written submissions received in mid-April 2021)
Judgment: 26 April 2021

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED

Plaintiff

and

NTOMBOXOLO GLADYS NKHAHLE

First Defendant

NTOMBOXOLO GLADYS NKHAHLE N.O.

Second

Defendant

(in her capacity as executrix of the Estate late M.A. Nkhahle)

THE MASTER OF THE HIGH COURT, CAPE TOWN

Third

Defendant

JUDGMENT

**(Delivered by email to the parties' legal representatives and by release to SAFLII.
The judgment shall be deemed to have been handed down at 10h00 on
26 April 2021.)**

BINNS-WARD J:

[1] In this matter, which came before me in the unopposed motion court, the plaintiff bank applied for the following relief:

1. *Default judgment ... in favour of the Plaintiff against the First and Second Defendants, jointly and severally, the one paying, the other to be absolved, for:*
 - 1.1 *Payment of the amount of R445 624,99*
 - 1.2 *Payment of interest on the amount of R445 624,99 at a rate of 10.85% per annum, calculated and capitalized monthly in arrears from 7 June 2019 to date of payment, both dates inclusive.*
2. *The immovable property known as portion 49 of Erf ... (“the property”) is hereby declared specially executable.*
3. *The plaintiff is hereby authorised to execute against the property, as envisaged in Rule 46(1)(a)(ii) of the Uniform Rules of Court and the Registrar of the above Honourable Court is hereby authorised to issue a Warrant of Attachment.*
4. *The Sheriff is hereby authorised to execute the Writ of Execution.*
5. *An order in terms of Section 30(b) of the Administration of Estates Act directing that the mortgaged immovable property may be sold.*
6. *The First and Second Defendants shall pay the Plaintiff’s costs of suit, jointly and severally, the one paying the other to be absolved, on the attorney and client scale.*

[2] The second defendant was joined in the action in her capacity as the executrix of a deceased estate. Being a joint debtor with the deceased, to whom she was married in community of property, she was also cited as the first defendant in her personal capacity. The Master was joined as the third defendant. No relief was sought against the third defendant. The particulars of claim indicated that the Master had been joined by virtue of her possible interest in the order sought by the plaintiff in terms of s 30(b) of the Administration of Estates Act 66 of 1965. The Master did not file a report or play any part in the proceedings.

[3] Section 29 of the Administration of Estates Act provides that every executor shall, as soon as may be after letters of executorship have been granted to him, cause a notice to be published in the Government Gazette and in at least one newspaper circulating in the area in which the deceased ordinarily resided at the time of his death calling upon all persons having claims against the deceased's estate to lodge such claims with the executor within a stipulated period. Section 30 of the Act then provides as follows:

'Restriction on sale in execution of property in deceased estates

No person charged with the execution of any writ or other process shall –

- (a) before the expiry of the period specified in the notice referred to in section *twenty-nine*; or
- (b) thereafter, unless, in the case of property of a value not exceeding R5 000, the Master or, in the case of any other property, the Court otherwise directs, sell any property in the estate of any deceased person which has been attached whether before or after his death under such writ or process: Provided that the foregoing provisions of this section shall not apply if such first-mentioned person could not have known of the death of the deceased person.'

[4] There was no allegation in the summons or the supporting affidavit in the application in terms of Rule 46A that notice as prescribed in terms of s 29 of the Administration of Estates Act had been published by the second defendant. I raised the omission with the plaintiff's counsel when he moved the application for default judgment as it appeared to me to present an obstacle to granting the order that was sought by the plaintiff in terms of s 30(b) of the Act authorising the sheriff to sell the mortgaged property.

[5] The written argument subsequently submitted by counsel at my request suggests that he may have misapprehended the import of my query. He seems to have understood that I was querying the right of the plaintiff to pursue its claim by way of litigation under the common law instead of by submitting a claim to the executrix under the scheme for the liquidation of deceased estates provided in the Administration of Estates Act. He referred me to the judgment of the appeal court in *Nedbank Limited v Steyn and Others* [2015] ZASCA 30 (25 March 2015); [2015] 2 All SA 671 (SCA); 2016 (2) SA 416 (SCA), in which it was confirmed that the statutory scheme did not oust a creditor's right to pursue its claim under the common law.

[6] *Nedbank v Steyn* did not, however, in any manner address the point that concerned me, which was whether, in the absence of an allegation in the particulars of claim that notice had been given as prescribed in s 29 of the Administration of Estates Act, it would be competent, in terms of s 30(b) of the Act, for the court to authorise the sheriff to sell the mortgaged property in execution. The judgment does not deal with that issue directly, but, if anything, it suggests an appreciation by the court that it would not be competent to do so. I say that because Brand JA expressly recorded in the last two sentences of para 4 of the judgment that ‘(t)he court a quo found as a fact that there had been compliance with the requirements of s 29 regarding the publication of notice to creditors in the Government Gazette. I have no reason to doubt the correctness of this finding.’ In my view, the only reason that the learned judge of appeal would have thought it necessary to record that there had been compliance with s 29 was because he was cognisant that the property could not be sold in execution before that was done. No order in terms of s 30(b) was made in *Nedbank v Steyn*, however, and it is not apparent from the judgment that such an order was sought in that case.¹ The order made in *Nedbank v Steyn* authorising the issue and execution of a writ of execution did not imply that any property attached in terms of such writ might be sold in execution without the necessary leave being obtained in terms of s 30(b).

[7] The deponent to the supporting affidavit in support of the plaintiff’s application for an order of special executability averred that the object of s 30 of the Administration Act is to avoid the potential of an undue preference being obtained by judgment creditors of a deceased debtor. Her opinion is supported by the authorities; see *De Faria v Sheriff, High Court, Witbank* 2005 (3) SA 372 (T) in para 34 and *Gounder NO v Absa Bank Ltd and Another* 2008 (3) SA 25 (N) in para 14.² She stated that there was no room for concern in that regard in the current case because the plaintiff was a wholly secured creditor in respect of the proceeds of the mortgaged property. That may be correct, but it appears to me, with respect, that the deponent misconceived the scope of the court’s powers in terms of s 30 if she believed that it could grant an order in terms of s 30(b) without first being satisfied that there has been compliance with s 29.

¹ *Nedbank v Steyn* in fact involved six separate matters and in all but one of them the applications for default judgment were remitted to the court of first instance to be disposed of there in the light of the appeal court’s judgment. In the single case that the appeal court determined, no order was made in terms of s 30 of the Administration of Estates Act. Any property attached in terms of the writ of execution authorised in that case could therefore not be sold until leave was obtained in terms of s 30(b).

² The plaintiff’s counsel submitted that the judgment in *Nedbank v Steyn* had by necessary implication overruled the judgment in *De Faria*. For the reasons provided in para [6] above, I do not consider there is any merit in that contention.

[8] Section 30 makes it plain that a sale in execution of a deceased's property cannot occur until after the deceased estate has been advertised in terms of s 29 of the Administration of Estates Act and the period stated in such advertisement within which claims may be lodged with the executor has expired. The only exception provided for is when a sale in execution proceeds in circumstances when the sheriff could not reasonably have known of the judgment debtor's demise. The effect of the proviso to s 30 is that such a sale would not be invalid despite non-compliance with s 29.

[9] Subject to the aforementioned sole exception, the provisions of s 30(a) constitute an absolute bar to the sale in execution of property out of a deceased estate until s 29 has been complied with, and s 30(b) permits the court to authorise a sale in execution only after there has been such compliance. That is the effect of the adverb '*thereafter*' at the beginning of s 30(b). Contextually, the word '*thereafter*' denotes any time after the period stipulated in terms of the required advertisement of the deceased estate in terms of s 29 has elapsed. It contrasts with the preposition '*before*' at the beginning of s 30(a), which refers to the time preceding the completion of the period stipulated in the advertisement in terms of s 29.

[10] Section 30(b) does not, as the deponent to the supporting affidavit would appear to apprehend, permit a court to authorise a sale in execution of a deceased judgment debtor's property without there having been compliance with s 29. On the contrary, a sale in execution of a deceased's property valued at more than R5 000 can take place only after the expiry of the period of notice referred to in s 29, and then, only with the court's leave; see *Gounder supra*, at para 17-26.

[11] In *Gounder*, Koen J expressed the opinion that it would be only in exceptional cases that leave to sell an estate asset through a process of execution would be granted before at least the first liquidation and distribution account had been approved and lain for inspection without objection. In *Nedbank Ltd v Samsodien NO* [2012] ZAGPJHC 95 (14 May 2012); 2012 (5) SA 642 (GSJ), which was referred to with approval in *Nedbank v Steyn*, the learned judge (Van Oosten J) did not set out the basis made out in the papers for an order in terms of s 30(b), merely recording (in para 4) that he was '*satisfied that a proper case for the granting of such leave has been made out*'. It is not necessary in the current matter for me to make any finding as to what might make out a proper case because the threshold requirement for an application for an order in terms of s 30(b) has not been satisfied. It has not been established that there has been compliance with s 29 of the Act.

[12] In the result, the application for default judgment will be granted, but an order will not be made authorising the sale in execution of the mortgaged property. The property may be attached in execution, but any sale thereof must be deferred until after there has been compliance with s 29 of the Administration of Estates Act and fresh application made on proper grounds for leave from the court in terms of s 30(b). The order that will be made will be suitably framed to make that clear. I consider that it would be more appropriate to consider fixing a reserve price for the property in terms of Rule 46A at the time that an order is made in terms of s 30(b).

[13] If, as appears to be the case, the appointed executrix is not discharging her duties in terms of the Act, the plaintiff will have to prevail on the Master to discharge her from office (see s 54(1)(b)(v) of the Administration of Estates Act) and replace her with a person who will effectively attend to the administration of the estate.

[14] Default judgment is granted against the first and second defendants, jointly and severally, the one paying the other being absolved, for-

1. Payment of the sum of R445 624.99
2. Interest thereon calculated daily and compounded monthly in arrears from 7 June 2019 to date of payment at 2.1% above the plaintiff's base rate (being the plaintiff's published annual variable Home Loans interest rate).
3. The judgment debt is hereby declared to be specially executable against
Portion [.....]
Registration Division JR
Province of Gauteng
Measuring 430 (Four Hundred and Thirty) square metres in extent
Held by Deed of Transfer Number [.....]
Subject to the conditions therein contained.
4. The plaintiff is accordingly authorised to obtain the issue of a writ of execution against the aforementioned immovable property as envisaged in Rule 46(1)(a)(ii) of the Uniform Rules of Court.
5. The Sheriff is authorised to execute the writ of execution; save, however, that the Sheriff may not sell the property in execution before leave thereto has first been

granted by the Court in terms of section 30(b) of the Administration of Estates Act 66 of 1965.

6. Costs of suit on the scale as between attorney and client.



A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Plaintiff's counsel:

M. Holland

Plaintiff's attorneys:

Vezi & De Beer Incorporated
Cape Town