THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

REPORTABLE
Case No: 20085/2014

In the matter between:

NEDBANK LIMITED	**APPELLANT**
and	
ALETTA PETRONELLA SUSANNA STEYN	**FIRST RESPONDENT**
ANTOINETTE MARTIN NO **(In her capacity as duly appointed Executrix in the Estate of the Late Mr Pieter Stefanus Steyn)**	**SECOND RESPONDENT**
VUSIMUZI PHINEAS MASENYA NO **(In his capacity as duly appointed Executor in the Estate of the Late Ms Lindiwe Maureen Masenya)**	**THIRD RESPONDENT**
LUCAS MLUNGISI FIGLAN NO **(In his capacity as duly appointed Executor in the Estate of the Late Mr Themba David Figlan)**	**FOURTH RESPONDENT**
PETRUS HENDRIK MULLER	**FIFTH RESPONDENT**
PETRUS HENDRIK MULLER NO **(In his capacity as duly appointed Executor in the Estate of the Late Ms Wilma Roelien Muller)**	**SIXTH RESPONDENT**
TSHEPO BETHUEL KGOPA NO **(In his capacity as duly appointed Executor in the Estate of the Late Mr Malahlela Stephen Kgopa)**	**SEVENTH RESPONDENT**
LINDIWE PRINCESS NTOMBELA	**EIGHTH RESPONDENT**
NORAH THONNY MATHE NO **(In her capacity as duly appointed Executrix in the Estate of the Late Mr Wardson Sandile Mathe)**	**NINTH RESPONDENT**

Neutral citation: *Nedbank Ltd v Steyn* (20085/2014) [2015] ZASCA 30 (25 March 2015).

Coram: Brand, Lewis, Mbha JJA Meyer *et* Mayat AJJA

Heard: **20 March 2015**

Delivered: **25 March 2015**

Summary: Administration of Estates Act 66 of 1965 – whether claims procedure provided by the Act precludes a creditor from instituting an action against the executor/executrix of a deceased estate for debt owed by the deceased – high court's judgment that it does set aside on appeal.

ORDER

Six appeals from: Gauteng Division of the High Court, Pretoria (Mabuse J sitting as court of first instance):

1 The six appeals are upheld with no order as to costs.

2 The order of the court a quo in the first appeal of *Nedbank Ltd v Aletta Petronella Susanna Steyn & another* under GPPHC case number 45338/2013 is set aside and replaced by the following:

'Default judgment is granted in favour of the applicant/plaintiff against the first and second respondents/defendants, jointly and severally, the one paying the other to be absolved for:

(a) Payment of the sum of R647 286.25;

(b) Interest on the sum of R647 286.25 at the rate of 6.80% per annum calculated and capitalised monthly in arrears from 19 June 2013 to date of payment, both dates inclusive.

(c) An order declaring:

A unit consisting of –

(i) Section no 64 as shown and more fully described on Sectional Plan No SS321/2009 in the scheme known as Elephant Mews in respect of the land and building or buildings situated at Erf 468 Vanderbijl Park South East 4 Township,

Local Authority: Emfuleni Local Municipality, of which section the floor area, according to the said Sectional Plan is 73 (Seven Three) square metres; and

(ii) an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan.

Held by Deed of Transfer No ST29384/2009.

A unit consisting of –

(i) Section no 120 as shown and more fully described on Sectional Plan No SS321/2009 in the scheme known as Elephant Mews in respect of the land and building or buildings situated at Erf 468 Vanderbijl Park South East 4 Township, Local Authority: Emfuleni Local Municipality, of which section the floor area, according to the said Sectional Plan is 23 (Two Three) square metres; and

(ii) an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan;

Held by Deed of Transfer No ST29384/2009.

Specially executable.

(d) An order authorising the plaintiff to execute against the said property as envisaged in Rule 46(1)(a)(ii) of the Supreme Court Rules;

(e) An order authorising the sheriff to execute the writ of execution;

(f) An order for costs on the attorney and client scale.'

3 The orders of the court a quo in the other five appeals are set aside and these matters are remitted to the court a quo for reconsideration of the applications for default judgment in the light of this judgment.

JUDGMENT

Brand JA (Lewis, Mbha JJA Meyer *et* Mayat AJJA concurring):

[1] In October 2013, 17 applications for default judgment came before Mabuse J in the North Gauteng High Court, Pretoria in matters of a similar kind. I say similar because these matters had at least the following features in common:

(a) In all of them the plaintiffs were commercial banks.

(b) At least one of the defendants in every one of them was the executor/executrix in a deceased estate.

(c) The plaintiff's cause of action in every case relied on a loan to the deceased, secured by a mortgage bond.

(d) Apart from an order for payment of the amount owing under the loan agreement, the plaintiff in each case sought an order declaring the properties mortgaged executable and also applied for the issue of writs of execution in respect of these properties.

(e) The applications were predicated on the failure by the defendants to defend the actions instituted by the banks.

[2] In the event, Mabuse J ordered all these applications for default judgments to be removed from the roll, in order to enable the plaintiffs to comply with the provisions of the Administration of the Estates Act 66 of 1965 (the Act). For reasons that will soon become apparent, this order meant that the plaintiffs would have to start proceedings all over again and that, in consequence, the applications were effectively dismissed. The appellant in this matter, Nedbank Ltd, was the plaintiff in six of these applications. Those are the matters on appeal before us. Mabuse J, however, gave his judgment with reference to all seventeen applications before him in the case of *Standard Bank of South Africa Ltd v Ndlovu* (case number 33265/13) on 24 October 2013. Leave to appeal against that judgment, which also pertains to the six appeals before us, is with the leave of Mabuse J. As in the court a quo, there was no appearance for any of the respondents on appeal.

[3] In broad outline the reasons given by the court a quo for refusing to grant the default judgments sought, was that the plaintiff banks, including the appellant, had instituted action against the executors or executrixes in the deceased estates under common law, instead of adopting the claims procedure provided for by sections 29, 32, 33 and 35 of the Act. This decision is in direct conflict with the conclusion arrived at by Van Oosten J in *Nedbank Ltd v Samsodien NO* 2012 (5) SA 642 (GSJ), which Mabuse J pertinently held to have been wrongly decided. Succinctly stated the issue

arising in this appeal is therefore whether the provisions of the Act, in the four sections that I have referred to, preclude a creditor from its common law right to institute action against the deceased estate for payment in terms of a loan agreement. In *Samsodien* Van Oosten J held that they do not, while Mabuse J decided that they do.

[4] Although there are six appeals before us, only the papers in the Steyn matter were incorporated in the record on appeal. The papers in the other five matters were not so included. From the papers in Steyn it appears that the deceased, Mr Steyn, passed away on 4 June 2012. Although the second respondent was appointed executrix in his estate in December 2012, she had failed to finalise the estate. The immovable property in the estate is fully bonded. The monthly bond instalment is R4 925.97. At the time when the appellant issued summons on 24 July 2013, the arrears were R132 005.71 which equates to 27 months arrear payments. The 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.

[5] In the main, the claims procedure prescribed by s 35, read with sections 29, 32, 33 and 34 of the Act boils down to this:

(a) As soon as may be after an executor or executrix (I shall from now on, for convenience, refer only to an executor) is appointed he must, in terms of s 29, cause a notice to be published in the Government Gazette and in newspapers, calling upon persons with claims against the deceased estate to lodge these claims within a stipulated period which is not to be less than 30 days (or more than three months).

(b) Claims are then to be submitted in the prescribed form within the period so stipulated.

(c) On the expiry of the period specified in the s 29 notice, the executor should satisfy himself as to the solvency of the estate and if it is found to be insolvent, he is to proceed under s 34 of the Act.

(d) Otherwise the executor is obliged to submit an account, in the prescribed form, of the liquidation and distribution of the estate as soon as possible after the last day of the period specified in the s 29 notice, but not later than six months after

letters of executorship have been granted. This account will indicate, of course, whether or not a particular claim had been admitted.

(e) The account lies open for inspection in the Master of the High Court's office for a period not less than 21 days.

(f) Within that period any person, including a purported creditor whose claim has been rejected, who wants to object to the account, must file that objection with the master.

(g) The executor is then afforded an opportunity to respond to the objection.

(h) Thereafter the master decides whether the objection is well-founded or not.

(i) If the master concludes that it is not, s 35(10) comes into play. This section provides:

'Any person aggrieved by . . . a refusal of the Master to sustain an objection so lodged, may apply by motion to the Court within thirty days after the date of such . . . refusal or within such further period as the Court may allow, for an order to set aside the Master's decision and the Court may make such order as it may think fit.'

[6] The question, whether the claims procedure thus prescribed by the Act must be understood to have taken away a creditor's common law right to proceed by way of action against the deceased estate, is not new. It also arose in a number of reported decisions with reference to the claims procedure stipulated by the predecessor of the Act, the Administration of Estates Act 24 of 1913 (the old Act). For present purposes it can be accepted that the procedure prescribed by the old Act had virtually been re-enacted in terms of the new Act. The first of these decisions under the old Act was *Estate Stanford v Kruger* 1942 TPD 243, which held that there was nothing in the old Act to indicate that the legislature intended to deprive a creditor of his or her common law right to sue the deceased estate.

[7] On this aspect *Estate Stanford* was followed in a closely reasoned judgment by Watermeyer AJ in *Davids v Estate Hall* 1956 (1) SA 774 (C). Davids had lodged a claim against the estate of Hall, which was rejected by the executors in the estate. He then objected to the omission of his claim from the liquidation and distribution account, but this objection was not sustained by the master. Thereafter he instituted

action against the executors in the magistrates' court. In their plea the executors raised the defence that Davids' action was not competent in that his exclusive remedy was to apply on motion for the setting aside of the master's decision in terms of s 68(9) which was the counterpart of s 35(10) of the Act. Davids filed an exception to this plea on the basis that it disclosed no defence, but this exception was denied by the magistrate. Thereupon Davids took the dismissal of his exception on appeal to the Cape Provincial Division.

[8] From the judgment of Watermeyer AJ on appeal, it appears that the executors sought to support their defence, ie that Davids' action was excluded by the provisions of the old Act, on the basis of a principle recognised, for instance in *Madrassa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718, that where a statute creates a right or an obligation and gives a special remedy for enforcing it, the remedy provided by the statute must be followed and it is not competent to proceed by way of action at common law. But Watermeyer AJ held that this principle found no application. His reasons for this finding appears from the following statement (at 776H-777A):

'The principle as stated above has however no application to the present case because the Administration of Estates Act did not create the right which the appellant seeks to enforce. That right arose from a contract and under the Common Law appellant was entitled to enforce it by action. In any event, even if the principle in the *Madrassa* case, *supra*, does extend to cases where the statute does not itself create the right or obligation, then it must at least be clear that the Legislature intended that the remedy provided is to be the only remedy available. As was stated by Tindall JA in *Mhlongo v Macdonald* 1940 AD 299 at p 310, the question is one depending upon the construction of the particular statute and:

"If the Legislature's intention be to encroach on existing rights of persons it is expected that it will manifest it plainly, if not in express words, at least by clear implication and beyond reasonable doubt. . . ."

There are no express words in the Act which deprive a creditor of his Common Law right to proceed by way of action against an executor for recovery of his debt, nor, in my opinion, are there any words from which that conclusion must be implied.'

[9] *Davids* was in turn followed by Smuts J in *Benade v Boedel Alexander* 1967 (1) SA 648 (O). In that case Benade lodged no claim in response to the executor's notice in the Government Gazette. Instead, he instituted action for the recovery of his claim and obtained judgment in the magistrates' court. On the basis of this judgment he then sought to sequestrate the deceased estate. In answer the executrix in Alexander's estate contended that the magistrates' court judgment was invalid since Benade was bound to follow the claims procedure laid down in the old Act. On the basis of *Stanford Estate* and *Davids,* Smuts J held, however, that this answer could not be sustained. Subsequently, these decisions were also approved and applied to the virtually identical provisions of s 35 of the (new) Act in *Jones & another v Beatty NO & others* 1998 (3) SA 1097 (T) 1101D-1102D.

[10] This brings me to the judgment of Van Oosten J in *Nedbank Ltd v Samsodien NO* 2012 (5) SA 642 (GSJ), which Mabuse J refused to follow because, in his view, it had been wrongly decided. Samsodien was also the executrix in a deceased estate. When Nedbank instituted action against the estate by way of summons, she raised the special plea that the procedure adopted by Nedbank was incompetent in that it should have followed the claims procedure laid down in the Act instead. On the authority of *Estate Stanford*, *Davids* and *Benade*, Van Oosten J held, however, that this claims procedure does not deprive a creditor of its common law right to enforce a claim against the deceased by way of action against his or her estate. Hence he held the special plea to be unfounded.

[11] Mabuse J analysed the decisions relied upon in *Samsodien NO* and came to the conclusion that they do not support that judgment. In all these cases, so Mabuse J held, the plaintiffs had submitted claims against the estates and when the executor nonetheless omitted those claims from his account, the plaintiffs had lodged an objection against the account to the master who in turn rejected their objections. It is only then, so Mabuse J concluded, that the plaintiffs in those three cases instituted action. On that basis he found these cases distinguishable from the present case on the facts. Purely with reference to the facts of the three cases under consideration, I believe that Mabuse J's analysis holds true of *Estate Stanford* and of *Davids*, but not

of *Benade*. In the latter case the plaintiff did indeed bypass the claims procedure of the old Act completely. He never lodged any claims against the estate. To that extent *Benade* is therefore not distinguishable from the facts in the present consideration. But be that as it may, in my view Mabuse J's analysis of the three cases misses the *ratio decidendi* of all three. That *ratio decidendi,* as I see it, is in short that the procedure laid down in the Act does not preclude the plaintiff from instituting an action in common law against the estate. Thus understood, all three judgments do indeed lend direct support to the judgment of Van Oosten J in *Samsodien NO.*

[12] Moreover, I believe these cases were correctly decided. Unless it can be said that the Act must be construed to deprive the plaintiff of the common law action against the estate, that action remains extant. The finding by Watermeyer AJ that there is no express provision to that effect in the old Act, also holds true of the Act. Moreover, in the same way as Watermeyer AJ, I do not find any clear implication to that effect in the provisions of the Act. In this regard Mabuse J seems to have found that clear implication in the considerations that the institution of common law actions alongside the application of the statutory claims procedure, will delay the finalisation of the estate. And that, so he said, 'would also constitute an involved and costly procedure to claim payments of the debts from the estate when the Act provides for an inexpensive and speedy manner to do so'. I believe, however, that there is more than one answer to these considerations. First, the claims procedure can hardly be said to be speedy if, as happened in Steyn, the executor delays the finalisation of the estate for years. Secondly, there appears to be no factual basis for the suggestion that the statutory claims procedure would be less expensive. It seems to lose sight of the fact that the creditor would have to launch a review application in the high court and, if a factual dispute should arise, it would lead to the hearing of oral evidence, which is akin to a trial. Hence it raises the rhetorical question: why would an action in the magistrates' court, for example, be more expensive than an opposed high court application with the concomitant risk of the proceedings being converted into a trial? Thirdly, and in any event, even if there is some merit in these considerations, they do not constitute sufficient grounds for a finding that by implication the common law action had been repealed.

[13] Finally, in the light of the legislative history there is in my view another consideration why the ultimate conclusion by Mabuse J cannot be sustained. It is this. We know that prior to the Act (ie Act 66 of 1965) there was a line of decisions in which the courts attributed a particular meaning to the pertinent provisions of the old Act (ie Act 24 of 1913). According to established authority, the legislature is presumed to have known of these decisions. When it subsequently introduced virtually the same provisions in the new Act, it must be taken to have endorsed the meaning attributed to those provisions by the courts.

[14] It follows that, in my view, the six appeals before us should be upheld and the orders of the high court be set aside. Since the appeal was not opposed by any of the respondents, I think the appellant should bear its own costs on appeal, which translates into no order as to costs. With reference to the facts, counsel for the appellant submitted that in the Steyn appeal a good case had been made out for default judgment in the terms it was sought. Since I can find no reason to believe otherwise, that is the order I propose to make. But with regard to the other five matters on appeal, counsel for the appellant conceded, rightly in my view, that there is insufficient evidence before us to consider these applications for default judgment on their merits. In consequence I believe they should be remitted to the high court for reconsideration in the light of this judgment.

[15] In the result:

1 The six appeals are upheld with no order as to costs.
2 The order of the court a quo in the first appeal of *Nedbank Ltd v Aletta Petronella Susanna Steyn & another* under GPPHC case number 45338/2013 is set aside and replaced by the following:
‘Default judgment is granted in favour of the applicant/plaintiff against the first and second respondents/defendants, jointly and severally, the one paying the other to be absolved for:
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(c) An order declaring:

A unit consisting of –

(i) Section no 64 as shown and more fully described on Sectional Plan No SS321/2009 in the scheme known as Elephant Mews in respect of the land and building or buildings situated at Erf 468 Vanderbijl Park South East 4 Township, Local Authority: Emfuleni Local Municipality, of which section the floor area, according to the said Sectional Plan is 73 (Seven Three) square metres; and

(ii) an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan.

Held by Deed of Transfer No ST29384/2009.

A unit consisting of –

(i) Section no 120 as shown and more fully described on Sectional Plan No SS321/2009 in the scheme known as Elephant Mews in respect of the land and building or buildings situated at Erf 468 Vanderbijl Park South East 4 Township, Local Authority: Emfuleni Local Municipality, of which section the floor area, according to the said Sectional Plan is 23 (Two Three) square metres; and

(ii) an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan;

Held by Deed of Transfer No ST29384/2009.

Specially executable.

(d) An order authorising the plaintiff to execute against the said property as envisaged in Rule 46(1)(a)(ii) of the Supreme Court Rules;

(e) An order authorising the sheriff to execute the writ of execution;

(f) An order for costs on the attorney and client scale.'

3 The orders of the court a quo in the other five appeals are set aside and these matters are remitted to the court a quo for reconsideration of the applications for default judgment in the light of this judgment.

F D J Brand
Judge of Appeal

APPEARANCES:

For the Appellant:	A C Ferreira SC; C G v O Sevenster Instructed by: Vezi & De Beer Attorneys Pretoria c/o Symington & De Kok, Bloemfontein
For the Respondents:	No appearance for the respondents