REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No. I 4071/2014

In the matter between:

FIRST NATIONAL BANK OF NAMIBIA LIMITED PLAINTIFF

And

S.S.S. MOTOR SPARES CC/2009/2761 FIRST DEFENDANT
PENEYAMBEKO UPEINGE TAAPOPI N.O.
(ESTATE LATE SAKARIA SHITUMBULENI SALOM) SECOND DEFENDANT

Neutral citation: First National Bank of Namibia Limited v SSS Motor Spares CC (I 4071-2014) [2015] NAHCMD 163 (22 July 2015)

CORAM: MASUKU, AJ

Heard: 2 July 2015

Delivered: 22 July 2015.

Flynote: PRACTICE – Summary judgment –unopposed. ESTATES – whether a plaintiff is entitled to sue a deceased estate without having lodged a claim against the estate in terms of the Administration of Estates Act.

Summary The plaintiff sued the defendants for payment of an amount loaned to the company in which the deceased signed a suretyship agreement. The executrix of the deceased estate was cited and served. Held that the defendants had not filed an affidavit opposing summary judgment and that the papers filed by the plaintiff were technically in order.

Held further that a plaintiff's right to sue a deceased estate without following the procedure set out in the Administration of Estates Act was not taken away. Summary judgment was granted as prayed.

JUDGMENT

MASUKU A.J:,

[1] On 30 June 2015, I entered summary judgment in favour of the above-named plaintiff against the defendants appearing above for payment of an amount of N$ 219 477,80, interest thereon at the rate of 13.75% per annum as from 2 October 2004, to date of payment and costs of suit at the attorney and own client scale. I indicated then that reasons for the order granted would be handed down in due course. The said reasons follow below.

[2] The plaintiff is a banking institution registered as a public company in terms of the company laws of the Republic of Namibia. It sued the defendants mentioned above for payment of N$ 129 477, 80; compounded interest at the rate of 13.75% per annum as from 2 October 2015 to date of final payment and costs on the attorney and clients costs.

[3] The claim arises out of an agreement reduced to writing in terms of which the plaintiff lent and advanced to the 1st defendant an amount of N$ 450 000. The balance outstanding of the amount advanced was duly certified in terms of the agreement to be

the amount reflected and above which amount it is alleged the defendant, despite demand has failed and/or neglected to pay. The second defendant is sued in her representative capacity as the executrix of the estate of the late Sakaria Shitumbuleni Salom, who during his lifetime, specifically on 25 September 2012, bound himself as surety and co-principal debtor with the 1st defendant for the due fulfilment of the obligations owed by the 1st defendant to the plaintiff. I shall deal with the issue relating to the 2nd defendant in due course as the judgment unfolds.

[4] Upon service of the combined summons in terms of the rules of court, the defendants entered a notice to defend dated 13 January 2015. This prompted the plaintiff to move an application for summary judgment. The said application was accompanied by the affidavit of the plaintiff's remedial manager Ms. Charlotte Morland, who verified the cause of action and further alleged that the defendants do not have a *bona fide* defence to the claim and had filed the notice to defend for no other reason but to delay the plaintiff's enjoyment of the fruits of the judgment.

[5] It is important to mention that at the case planning conference, the parties agreed to file their respective papers in relation to summary judgment as follows – the plaintiff was to file their application for summary judgment on or before 4 March 2015, whereas the defendant was to file its affidavit opposing summary judgment, if any, on or before 18 March 2015. This case plan was accordingly adopted and made an order of court.

[6] It is plain that the defendants have not complied with the case plan and as it is, both did not file the affidavit opposing summary judgment as ordered. It is clear therefore that the summary judgment application is unopposed. According to the provisions of rule 60 (5), a defendant served with an application for summary judgment has options open to him or her, namely putting up security to the satisfaction of the registrar for any judgment, including costs or by filing an affidavit before 12 noon on the court day but one before the day on which the application is to be heard.

[7] As indicated, the defendants were put to terms to file their opposing affidavit and they failed to do so. As it is, there is no defence that has been put up at all. The defendants were not even present during the hearing of the application and did not make any application therefore, whether for condonation to be allowed to file the affidavit or even for leave of court to tender oral evidence which is geared to establishing the nature and grounds of a defence together with the material grounds upon which it is predicated. I say this, not to suggest that it would have been open to the defendants to resort to the latter in view of the terms of the case planning conference. All I set out to do is to point out that the defendants did not file the affidavit as ordered and also did not appear on the day when summary judgment was to be heard.

[8] I have looked closely at the pleadings filed by the plaintiff and I have found that they are technically in order. There can be no gainsaying that the claim is for a liquidated amount in money, interest and for costs as required by rule 60 (1) (b). Furthermore, as indicated, the affidavit filed by the plaintiff complies fully with the requirements of the rule regarding the contents thereof, specified in rule 60 (2) (a) and (b). All the necessary allegations are made and the affidavit was properly commissioned before a commissioner of oaths.

[9] There is however one issue that was addressed *ex abudanti cautela* by Ms. Campbell for the plaintiff and it relates to the propriety of suing the 2nd defendant without having lodged a claim by the plaintiff against the deceased estate in terms of the Administration of Estates Act.[1] The court was referred by counsel to the case of *Nedbank Limited v Steyn and Others.*[2] In that case, the Gauteng High Court in Pretoria had refused to grant judgment by default in which commercial banks sued the defendants who were executors or executrix in certain deceased estates for loans that had been advanced to the deceased persons during their lifetime but which remained outstanding. The High Court removed these matters from the roll and ordered the plaintiffs to comply with the provisions of the Administration of Estates Act, thus effectively meaning the plaintiffs had to start the proceedings *de novo.*

[1] Act No. 66 of 1965.
[2] [2015] JOL 33036 (SCA).

[10] On appeal, the question to be answered was whether the High Court was correct in its decision, and more particularly whether the provisions of the Administration of Estates Act serve to preclude a creditor from pursuing its common law right to institute action against a deceased estate for payment of money outstanding from a loan agreement.

[11] Brandt JA, who wrote the unanimous judgment of the court, after reviewing case law on the subject dating back to the 1913 Administration of Estates Act of South Africa, held the following:[3]

> 'The *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 N.O.* 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. 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 finalization of the estate . . . 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.'

The court accordingly set aside the orders of the High Court and granted the default judgments as prayed.

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[3] *Ibid* at page8 para [11].

[12] In the instant case, the defendants were served with the combined summons and they are aware of all the allegations made against the 1st defendant and the estate of the deceased. They have not raised any issue as indicated earlier. I wish to commend Ms. Campbell for raising this issue *mero motu* and uninvited in order to assist the court. She has dutifully performed what courts expect from its officers.

[13] I have not heard the benefit of opposing argument on this issue and I accordingly find in line with the *Nedbank Limited* case that there was no need for the plaintiff to have followed the provisions of the Administration of Estates Act before launching a claim for recovery of the outstanding money from the loan before this court. The provisions of the Administration of Estates Act relating to lodging of claims thereunder does not take away a claimant's common law right to sue for recovery of money in court which is alleged to be owed by a deceased estate. I fully agree with the reasoning of the Supreme Court of Appeal in this regard. It is an incontestable fact that deceased estates do tend to take long to be wound up in cases and there are in certain instances disputes which afflict the estate and result in considerable delay, which may not suit the commercial exigencies of creditors, including commercial banks.

[14] It was for the aforegoing reasons that I granted summary judgment as prayed on 2 July 2015.

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TS Masuku, AJ

APPEARANCES

PLAINTIFF:	Y. Campbell Instructed by Fisher, Quarmby & Pfeifer
DEFENDANT:	Non appearance