

SOUTH AFRICA / JUDGMENT

ABSA Bank Ltd v Magiet NO (15967/07) [2009] ZAWCHC 144 (10 September 2009)

[2009] ZAWCHC 144**COURT**

Western Cape High Court, Cape Town

BEFORE

LE GRANGE

CASE / FILE NUMBER

15967/07

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA [WESTERN CAPE HIGH COURT, CAPE TOWN]****Coram:**

LE GRANGE, J
CASE
NO: 15967/07
In
the matter between: -
REPORTABLE-
ABSA
BANK LIMITED Plaintiff
And
NAFIESA
MAGIET NO Defendant

JUDGMENT**: 10 SEPTEMBER 2009****LE GRANGE, J:-**

- [1] This is an opposed application for summary judgment.
- [2] In this matter the crisp issue for consideration is whether the provisions of section 129 of the National Credit Act, 32 of 2005 ("the Act") are applicable to an executor of an estate where the deceased was a consumer as defined in section 1 of the Act upon death.

- [3] Briefly stated, the common cause facts are the following: On 28 July 2005 the Plaintiff, a credit provider, entered into an agreement with the late Achmat Magiet "the deceased" in terms whereof the Plaintiff lent and advanced the amount of R841 442.75 to the deceased, subject to certain terms and conditions. As security for these amounts, the Plaintiff registered certain mortgage bonds over immovable properties of the deceased.
- [4] In terms of the provisions of the mortgage bond, payments were due to the Plaintiff in monthly instalments. Failing which, the full outstanding balance would become due and payable forthwith and the Plaintiff would be entitled to have the immovable properties declared executable.
- [5] The deceased passed away in October 2006 and the Defendant (the deceased's wife) was duly appointed as executrix of the estate.
- [6] In November 2007, the Plaintiff instituted action against the Defendant in her capacity as executrix of the deceased estate, for the payment of the outstanding amount due in terms of the mortgage loan. According to the particulars of claim of the Plaintiff, the total amount due and payable on 12 September 2007 was R799 206.60. The monthly instalments in arrears as on 1 September 2007 were

R21 086.01.

- [7] Subsequent to the death of the deceased, the Defendant approached the Plaintiff for a loan to be secured by registering a mortgage bond over the immovable properties she expected to inherit in terms of the deceased's Will. The proceeds of the loan, according to the Defendant, will then be used to extinguish the claim by the Plaintiff and other debts owing by the deceased's estate. The application for the mortgage bond was successful. The registration of the bond by the Plaintiff was however suspended, pending the finalisation of the liquidation and distribution account of the estate. The delay in the finalisation of the liquidation and distribution account may directly be attributed to the amnesty application that was lodged on behalf of the deceased with the South African Revenue Services, which is still pending. According to the Defendant, a draft Liquidation and Distribution Account was submitted to the Master in November 2007, wherein the amount of R804 142.51 is reflected as being owed to the Plaintiff.
- [8] The Plaintiff, in its particulars of claim, pleaded that the provisions of section 129 of the Act do not apply to this claim as the Defendant is not a consumer as defined by the Act.
- [9] The Plaintiff's counsel, Mr P d B Vivier, contended that the deceased's estate was in arrears in a substantial amount with the

mortgage bond instalments when summons was issued. Moreover, the Defendant was not the consumer as defined in section 1 of the Act, to whom the Plaintiff provided credit and therefore not entitled to a notice in terms of the provisions of section 129 of the Act. He also argued that it would be untenable if the Plaintiff, in circumstances of this nature, is obliged to notify the executor of an estate before commencing legal proceedings as the executor does not succeed to

the persona of the deceased. In support of this proposition, reference was made to Lawsa Vol 31 First re-issue at para 185.

[10] Counsel for the Defendant, Mr B Atkins, principle submission was that the estate of the deceased vested in the Defendant and the Plaintiff was obliged to have given the Defendant notice in terms of section 129(1) of the Act. It needs to be mentioned that Mr Atkins also filed a supplementary note. The information in the supplementary note did not advance any new argument and did little to assist in preparing my

judgment.

[11] In terms of the provisions of section 129 of the Act, a credit provider may not commence any legal proceedings against a consumer to enforce an agreement between the parties without first giving notice of default to the consumer, proposing that the consumer may refer the credit agreement to a debt counselor or other competent authority.

[12] In the Act, the definition clause defines consumer as:-

- 1) the party to whom goods or services are sold under a discount transaction, incidental credit agreement or instalment agreement;
- 2) the party to whom money is paid, or credit is granted, under a pawn transaction;

the party to whom credit is granted under a credit facility; the mortgagor under a mortgage agreement; the borrower under a secured loan;

the lessee under a lease, not for immovable property;

the guarantor under a credit guarantee; the party who receives money or credit under any other credit.

[13] The definition of a consumer makes no reference to an executor of an estate, but I could also not find any provision in the Act that absolves the credit provider from the requirement of giving notice of default to the consumer after his or her death.

[14] The juristic nature of a deceased estate and the legal position of the executor has been the subject to much legal debate. In this regard see Lawsa Vol 31 First re-issue at para 184-185 and the decided cases referred to therein. Even if it is accepted that the executor does not succeed to the persona of the deceased, the estate ultimately vests in the executor in the sense that the dominium and other rights and obligations of the estate reside in him. In this regard see *Du Toit v Vermeulen* 1972 (3) SA 848 (A) at 856B.

[15] The rights, responsibilities and functions of an executor are described in the Administration of Estates Act, 66 of 1965. Any further functions other than those set out in the Act may be contained expressly in a will. These functions include inter alia the drawing up of an inventory, taking over the temporary custody of the deceased estate, if necessary the liquidation and distribution of the deceased's property and setting up the necessary account.

In essence, the executor winds up the deceased's estate by paying the necessary creditors and collecting outstanding debt if it is owed to the estate and redistributing it to the beneficiaries as nominated, and in the manner in which the deceased described it in his or her will.

- [16] In most instances, it is fair to assume, that the only time a credit provider may learn of the death of the debtor, is once the executor of the estate contacts them whilst in the process of winding up the estate.
- [17] The underlying purpose of the Act is to regulate the relationship between the consumer and credit provider. The act also confers a majority of rights upon the consumer to ensure that the "main purpose" of the Act, namely to protect consumers, is met.
- [18] If a credit agreement continues after the death of the debtor, the death of the debtor, in my view, does not nullify the creditors'

burden of giving notice to the estate of the debtor if payments are not made in terms of the credit agreement.

- [19] The contention by Mr Viviers that it would be untenable if the Plaintiff, in circumstances of this nature, is obliged to notify the executor of an estate before commencing legal proceedings, is misplaced. The executor is an interested party in matters of this nature and is entrusted with the control and administration of the deceased's estate. The amount the Plaintiff claims in this matter constitutes a liability to the estate which the executor will have to pay to the Plaintiff, if there are sufficient funds in the estate.
- [20] The dominium and other rights and obligations of the estate vests in the executor. In my view, the credit provider should comply with the requirements of section 129(1) by serving a notice on the executor to exercise its rights in the proper administration of the estate. A failure to do so, would be inconsistent with and a total disregard of the main purpose of the National Credit Act, 32 of 2005.
- [21] For these reasons the application for summary judgment cannot succeed.
- [22] In the result the following order is made.

The Application for summary judgment is dismissed. The Defendant is granted leave to defend the action. Costs stand over for later

determination.

LE GRANGE, J

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