

NEWS & OPINION

Executors shouldn't delay the administration of an estate

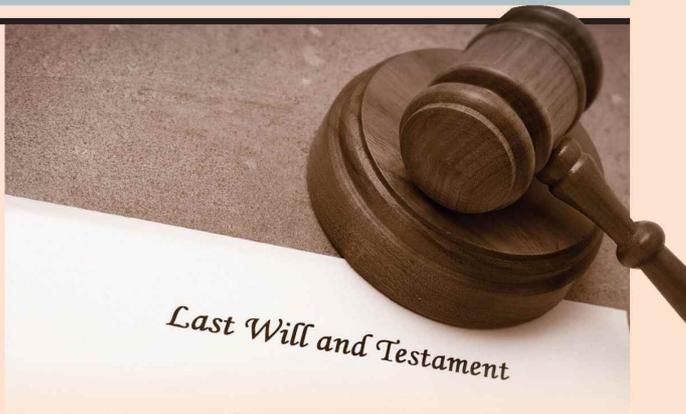


LOUIS VAN VUREN

FIDUCIARY MATTERS

Brought to you by the Fiduciary Institute of Southern Africa (FISA)

Creditor can sue deceased estate for outstanding debt



A creditor of a deceased person need not follow the process set out in sections 29 to 35 of the Administration of Estates Act, 66 of 1965, (the Act) to collect payment from the estate. According to a recent judgement of the Supreme Court of Appeals (SCA) in Bloemfontein, the creditor retains all rights under common law to apply for judgment for payment of an unpaid debt against the executor of a deceased estate.

However, this should not be of undue concern to executors in deceased estates as it would only be advantageous to creditors in cases where the claims process under the Act is unduly delayed.

In the case in question, Nedbank Ltd v Steyn and Others ([2015] ZASCA 30), the deceased owned a unit in a sectional title scheme. The property was fully bonded to Nedbank and after Mr Steyn's death in June 2012, Nedbank issued summons for payment of over R132,000 in July 2013. This was equivalent to 27 months of missed monthly payments, which indicates that the bond repayments were already in arrears at the time of Mr Steyn's death.

Nedbank approached the court for default judgement, but Mabuse J struck the case from the roll in the North Gauteng High Court (NGHC) in Pretoria in October 2013. The judge reasoned that the Act sets out a process for creditors to institute claims against deceased estates and until a creditor has exhausted this process, such creditor cannot approach a court for judgement for the unpaid debt.

Not satisfied with this

decision, Nedbank applied successfully for leave to appeal to the SCA. Brand JA delivered a unanimous judgement of five appeal judges on 25 March 2015 in which the judgement of Mabuse J was overturned.

The central question was whether the common law rights of a creditor to obtain judgement for the collection of an unpaid debt is suspended by the claims process in sec. 29 to 35 of the Act.

THIS PROCESS CAN BE SUMMARISED AS FOLLOWS:

1 After appointment, the executor must place advertisements in the Government Gazette and a local newspaper to invite creditors to lodge claims against the deceased estate within a period of at least thirty days and at most three months

3 After the period for the lodgement of claims has expired, the executor has to determine whether the estate is solvent or insolvent. If insolvent, the executor must consult creditors to indicate whether the estate should be dealt with under the Act or under the Insolvency Act, 24 of 1936

2 Creditors must then submit their claims to the executor in the prescribed format

4 The executor must lodge a liquidation and distribution account with the Master of the High Court within six months of his/her appointment, which account lies open for inspection by any interested party for twenty one days at the offices of the Master and the local Magistrate

5 Any interested party, e.g. a creditor, can lodge an objection to the account and the Master must uphold or dismiss the objection after receiving a response from the executor

6 Any person aggrieved by the Master's decision can approach the court on application to set aside the Master's decision.

The SCA referred to previous case law and also to the previous Administration of Estates Act, 24 of 1913 (the Old Act). It referred to the rule confirmed in the decision of the then Cape Provincial Division in *Davids v Estate Hall 1956 (1) SA 774 (C)* that legislation does not amend the common law unless it is explicitly stated or by necessary implication and then beyond reasonable doubt.

Brand JA then came to the conclusion that there is no indication in the Old Act or the current Act, or in any of the previous cases under either Act, that points to a suspension of common law rights. The SCA therefore upheld Nedbank's appeal. Consequently nothing stops a creditor to issue summons for an unpaid debt against the deceased estate and the executor in his/her capacity as such, despite the fact that the claims process under the Act

has not been completed.

Although sec. 30 prohibits the sale in execution of any property in a deceased estate without the direction of the Master (only if the value is R5,000 or less) or the court, the granting of default judgement on appeal in this case gives Nedbank the right to sell the property in execution of the court order.

In my view, however, creditors normally will not resort to legal action while the deceased estate is under administration if the administration process is running without undue delay, as they will incur unnecessary cost and potential delays while litigation is underway. Executors should therefore take care to not unduly delay the administration of an estate.

FISA is a non-profit organisation that represents fiduciary practitioners and sets high minimum standards for the industry to protect the public's interests. FISA is the only professional body focusing solely on fiduciary practitioners in Southern Africa.

Membership is drawn from trust companies and banks, as well as the legal, accounting and financial planning professions. Activities of FISA members include but are not restricted to estate planning, the drafting of wills, administration of trusts and estates, beneficiary funds, tax and financial advice and the management of client assets. FISA members collectively manage in excess of R280 billion. They draft several thousand wills each year and administer around 50 percent of deceased estates reported to the Master's Office. FISA helps to make processes smoother for members and the public, particularly through its good working relationship with the Master's Office and SARS.

