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**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: 1162/2023

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

FIRST RAND BANK

Applicant

And

CAREL JOHANNES DU TOIT N.O.

1st Respondent

[In his capacity as the executor of the estate of the late Andries Smith Myburgh (“the deceased”) administered by the Master of the Free State High Court, Bloemfontein under deceased estate reference number: 1519/2022]

And

**THE MASTER OF THE FREE STATE HIGH COURT
BLOEMFONTEIN**

2nd Respondent

HEARD ON:

31 AUGUST 2023

JUDGMENT BY:

DANISO, J

- [1] During February 2015 and June 2019 the applicant and Mr. Andries Smith Myburgh (the deceased) concluded three credit agreements involving two loans totalling the amount of R4 600 000.00 and an overdraft facility in the amount of R120 000.00. The credit agreements were secured by mortgage bonds and repayable by way of monthly instalments. The deceased breached the terms of the credit agreements by failing to make the required monthly instalments as repayment of the loan and the overdraft facility as a result on 17 September 2021, the deceased was declared to be over-indebted pursuant to an order (“debt review order”) granted by the Magistrate Court, Koffiefontein in terms of section 87 (1) of the National Credit Act, 34 of 2005 (“The NCA”).
- [2] In terms of the said order, the deceased’s debts including the applicant’s credit agreements were re-arranged with the effect that the instalments repayable were reduced, the repayment periods were extended for about ninety-three months and a moratorium was placed on the enforcement of the credit agreements. On 25 January 2022, four months after the debt review order was granted the deceased passed away.
- [3] Following the death of the deceased, the first respondent was appointed as the Executor of the deceased estate on 14 February 2022. The applicant submitted its claim against the deceased estate on 26 May 2022 however, eighteen months from the date of appointment as Executor the first respondent has still not lodged a liquidation and distribution account nor informed the applicant whether the claim has been accepted or not.
- [4] It is the applicant’s case that, the debt review order terminated *ex lege* upon the death of the deceased therefore, the applicant is entitled to enforce the

credit agreements and it is in that regard that the applicant has launched this application seeking a declaratory order on the following terms:

“1.1. The debt re-arrangement order granted by Magistrate Van der Westhuizen of the Magistrates Court for the district of Koffiefontein, held at Koffiefontein on 17 September 2021, and under civil case number 25/2021 (“the order”), was terminated upon the death of the Late Andries Smith Myburgh on 25 January 2022 (“the deceased”); and

1.2. The deceased estate, as represented by the first respondent in his nominal capacity as duly appointed executor, is indebted to the applicant in respect of three credit facility agreements respectively administered by the applicant under account numbers 4[...], 4[...] and 6[...], in the amount of R3,163,063.57 as at 1 March 2023 exclusive of such further interest which such amount attracts and that said amount is due, owing and payable to the applicant.

2. Alternatively, to prayers 1 and 1.2 above, declaratory orders that:

2.1. The applicant is entitled to enforce the three credit facility agreements respectively administered by the applicant under account numbers 4[...], 4[...] and 6[...] against the deceased’s estate, as represented by the first respondent in his nominal capacity as duly appointed executor;

2.2. The deceased estate, as represented by the first respondent in his nominal capacity as duly appointed executor, is indebted to the applicant in respect of three credit facility agreements respectively administered by the applicant under account numbers 4[...], 4[...] and 6[...], in the amount of R3,163,063.57 as at 1 March 2023 exclusive of such further interest such amount attracts and that said amount is due, owing and payable to the applicant.

3. *That the general notarial covering bond duly registered as such in favour of the applicant under notarial bond number B[...] (“the bond”), be perfected to the maximum amount of R600,000.00 plus the additional amount of R120,000.00 as referred to in the bond and to the extent necessary FNB is granted leave in terms of the provisions of sections 88(3)(a) and (b)(ii) of Act 34 of 2005;*
4. *That the Sheriff of the Court be authorised to attach all movable assets of the deceased’s estate, as represented by the first respondent in his nominal capacity as duly appointed executor, at the farm “V[...] D[...] M[...] 2[...]”, KOFFIEFONTEIN, FREE STATE PROVINCE and/or wherever such movable assets of the deceased’s estate are situated and to be found;*
5. *That the Sheriff of the Court be authorised to hand over such movable assets, attached in terms of this order and under the bond, to the applicant in order for the applicant to keep such movable assets in its possession and under its control as security, pending the finalisation of the administration of the deceased’s estate by the first respondent;*
6. *That the costs of this application be costs in the deceased estate of the Late Andries Smith Myburgh, such costs to include the costs consequent upon the employment of two counsel when used.”*

[5] The application is directed against the first respondent only. It is common cause that pursuant to the demise of the deceased, the debt review order was not adhered to in that, no payments were made by the first respondent in respect of the months February and March 2022 and short payments were made in May and September 2022. As at the date of the hearing, the balance owed to the applicant is R3 039 661.77.

- [6] The applicant contends that a debt review order cannot endure beyond the death of a consumer otherwise it would be in direct conflict with the purposes of the NCA namely: sections 3 (g) and 3(i) which encourage the fulfilment and satisfying of financial obligations by consumers together with section 35 of the Administration of Estates Act (“the Act”)¹ which requires expeditious finalisation of the administration of deceased estates.
- [7] The applicant submits that the NCA makes no provision regarding the status of a debt review order upon the demise of a consumer. The provisions of the NCA must thus be interpreted by taking into account that “*sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document...*” as guided by the principle elucidated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.² Furthermore, even if the death of the deceased does not have its commensurate effect on the termination of the debt review order, the breach of the order due to non- payment as provided for in the debt review order entitles the applicant to enforce the credit agreements, perfect the general notarial bonds and seek the attachment and possession of the movables of the deceased estate pending the finalization of the administration of the deceased estate.
- [8] The first respondent counters that there is no merit to the applicant’s case, the applicant is merely seeking to pre-empt the first respondent’s decision regarding the acceptance or rejection of its claim. According to the first respondent, the death of the deceased did not automatically bring about the termination of the debt review order instead, the order also binds the first respondent as the Executor of the deceased estate in that, the first respondent will have to discharge the obligations imposed by the credit agreements in accordance with the provisions of the debt review order.
- [9] The fact that there were instalments which were not paid as provided for by the debt review order is not in dispute. It is the first respondent’s case the

¹ Act 66 of 1965.

² 2012 (4) SA 593 (SCA).

breach has since been rectified as the outstanding payments were made. By continuing to accept the payments without any protest the applicant waived its rights to take enforcement action on account of breach of the debt review order therefore, the moratorium granted to the deceased against the enforcement of the claims remains.

- [10] The first respondent disputes that the applicant is entitled to an order of specific performance of the contractual obligations by the Executor to deliver the deceased's movable properties to the applicant in order to perfect them as security under the notarial bond. The first respondent is however amenable to tendering constructive delivery of the assets that would constitute a real right of a pledge instead.
- [11] The first respondent concedes to the delay in the lodgement of the liquidation and distribution account but explains that the applicant was aware that the first respondent had sought and obtained an extension from the second respondent till 09 October 2023. The applicant nevertheless proceeded to launch these proceedings despite being aware that if its claim is admitted it will be included into the liquidation and distribution account before then, no creditor can be paid. If the applicant is dissatisfied about the manner in which the first respondent performs its duties, the applicant is entitled to obtain a court order to compel the first respondent to act accordingly and to also institute a claim against the deceased estate in terms of the common law.
- [12] A party who seeks declaratory relief must satisfy the court that it is a person interested in an 'existing, future or contingent right or obligation'³ and then if satisfied on that point, the court must then decide whether the case is a proper one for the exercise of the discretion conferred on it.⁴
- [13] As a party to the credit agreements which culminated in the debt review order, I am satisfied that the applicant is an 'interested person' as contemplated in

³ Section 21(1)(c) of the Superior Courts Act 10 of 2013.

⁴ *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* [2005] ZASCA 50; [2006] 1 All SA 103 (SCA); 2005 (6) SA 205 (SCA) para 17.

section 21(1) (c).⁵ It was recently stated in *Pasiya and Others v Lithemba Mining (Pty) Ltd and Others*⁶ that if the court is satisfied that the applicant is an interested person then in its discretion, the court must consider whether the order should be granted or not.

[14] Having regard to the facts of this matter, I am inclined to agree with the applicant's contention that a debt review order does not survive a consumer's demise for the reason that, the underlying purpose of the NCA is to protect the interests of a consumer within the consumer credit industry by preventing and also alleviating over indebtedness.⁷ These debt relief mechanisms are limited to consumers as defined in section 1 of the NCA which include:

- “(a) the party to whom goods or services are sold under a discount transaction,*
- incidental credit agreement or instalment agreement;*
- (b) the party to whom money is paid, or credit granted, under a pawn transaction;*
- (c) the party to whom credit is granted under a credit facility;*
- (d) the mortgagor under a mortgage agreement;*
- (e) the borrower under a secured loan;*
- (f) the lessee under a lease;*
- (g) the guarantor under a credit guarantee; or*
- (h) the party to whom or at whose direction money is advanced or credit granted under any other credit agreement;*

[15] An Executor of the deceased estate is not mentioned in section 1 of the NCA including under juristic persons.⁸ It is also important to note that the role of an Executor is not to become the *persona* of the deceased, he remains a separate and distinct *personae* solely vested with dominium of assets of the deceased estate namely, to administer and later distribute the estate to the

⁵ Supra at fn 3.

⁶ (264/2022) [2023] ZASCA 169 (01 December 2023) para 47.

⁷ *FirstRand Bank Ltd v McLachlan and Others* (394/2019) [2020] ZASCA 31 (01 April 2020) para 9.

⁸ A “juristic person includes a partnership, association or other body of persons, corporate or unincorporated, or a trust...”

heirs.⁹ To this end, this issue is determined in favour of the applicant. I hold that debt review proceedings terminated *ex lege* upon the death the deceased, the debt review order is no longer extant.

[16] It is common cause that that the deceased estate is indebted to the applicant as claimed therefore a declaratory as prayed for in prayer 1.2 or 2.2. is in my view, superfluous.

[17] The enforcement of credit agreements which also entitles the applicant to perfect its security under the notarial bonds, attach and take possession of the assets of the deceased estate would be untenable as it would not be consistent with the provisions of the Act. Section 26(1) requires an Executor to take into possession and retain the assets of the deceased estate until the finalization of the administration of the estate and section 30 restricts executing against the property of the deceased estate as that could result in preferring certain creditors above others. Based on these reasons, I am not persuaded that a proper case has been made out for the granting of the reliefs sought by the applicant herein.

[18] The first respondent's delay in lodging the liquidation and distribution account is indeed extreme however, as correctly pointed out by the first respondent there are sufficient legislative and common law safeguards the applicant can invoke against the first respondent's failure to comply with his responsibilities as an Executor¹⁰, the applicant can also institute a claim against the deceased estate in the event that there is in an inordinate delay in the claim's procedure.¹¹

[19] With regard to costs, the applicant has obtained partial success with its claim and taking into consideration that it is by the first respondent's own laxity in administering the deceased estate that the applicant is embroiled in these proceedings, the applicant shall be awarded its costs. I am however not

⁹ *Clarkson NO v Gelb & Others* 1981 (1) SA 288 (W) 293C-E.

¹⁰ See section 36 (1) of the Act.

¹¹ *Nedbank v Steyn* 2016 (2) SA 416 SCA para 12.

persuaded that this matter involved complex issues warranting the costs of two counsel.

[20] In the premises, the following order is made:

1. It is declared that the debt re-arrangement order granted by the Magistrates Court for the district of Koffiefontein on 17 September 2021 terminated upon the death of the late Andries Smith Myburgh on 25 January 2022.
2. The application for the declaratory relief sought in paragraph 1.2, 2 (including 2.1 and 2.2.), 3, 4 and 5 of the Notice of Motion is dismissed.
3. The costs this application shall include the costs of one counsel and shall be costs in the deceased estate of the late Andries Smith Myburgh.

N.S. DANISO, J

APPEARANCES:

Counsel on behalf of Applicant:

Adv. P. Zietsman (SC)
with him Adv. S. Tsangarakis

Instructed by:

Honey Attorneys
BLOEMFONTEIN

Counsel on behalf of 1st Respondent:

Adv. W.A. Van Aswegen

Instructed by:

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