Debts – reaching beyond the grave

Marriage, death and the National Credit Act

By Fareed Moosa

It is not uncommon for spouses married in community of property to borrow funds under a secured loan or to be mortgagors under a mortgage agreement in which they pledge their immovable property as security for a loan. In such instances, they are 'consumers' as defined in s 1 of the National Credit Act 34 of 2005 (NCA). The lender or mortgagee (as the case may be) is a 'credit provider' as defined (s 1) (see *ABSA Bank Ltd v Brown and Another; ABSA Bank Ltd v Van Deventer and Another* [2012] JOL 28445 (ECP)).

If one spouse dies, the joint estate terminates and control of it vests in an executor appointed to administer the estate. He or she is obliged to discharge the liability under the relevant 'credit agreement' as defined (s 1).

This article aims to discuss the implications of certain provisions of the NCA on marriages in community of property and deceased estates.

In particular, attention will, firstly, be focused on whether it is competent for a credit provider to issue a notice in terms of s 129 of the NCA to an executor alone for payment of a debt under a credit agreement, or whether, in order to be valid, it must be issued to both the executor *nomine officio* and the surviving spouse to whom the deceased was married in community of property.

Secondly, consideration will be given to whether a deceased estate may, pursuant to the receipt of such notice, be the subject of debt review proceedings.

Section 129 notice

Section 129 of the NCA stipulates that a credit provider may not commence legal proceedings against the consumer to enforce an agreement between the parties without first giving written notice of default to the consumer, proposing that the consumer may refer the credit agreement to a debt counsellor or alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date (see *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) and the authorities cited therein).

In *ABSA Bank Ltd v Magiet NO* (WCC) (unreported case no 15967/07, 10-9-2009) (Le Grange J) Le Grange J held that a s 129 NCA notice must be given to an executor where the deceased was, at the time of death, a consumer.

The judge held, at para 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.'

Lopes J in *Subramanian v Standard Bank Ltd* (KZP) (unreported case no 7008/11, 13-3-2012) (Lopes J) held, at paras 6 to 10, that notices that fall to be given under the NCA to spouses married in community of property must, in order to be valid, be given to both spouses. The judge held that the rationale for this lies in the fact that there is community of assets and liabilities between the spouses. Accordingly, the rights of both spouses are affected by the provisions of the NCA, such that 'it would accord with justice' for both to be given the relevant NCA notice.

However, a different view was adopted in *Motor Finance Corporation v Herbert* (WCC) (unreported case no 16098/2011, 24-4-2012) (Binns-Ward J).

In this matter Binns-Ward J commented, *obiter*, that the requirement imposed on credit providers in the *Subramanian* judgment was 'without foundation'.

Binns-Ward J opined that the question whether a spouse is entitled to a notice turns squarely on whether he or she qualifies as the consumer for purposes of the NCA. Only if the answer to this is in the affirmative does a duty arise on a credit provider to give notice to a spouse. Accordingly, since the defendant was the sole lessee under a 'lease' as defined (s 1), Binns-Ward J held that the credit provider was not obliged to give notice to the defendant's spouse to whom she was married in community of property.

I submit that, although Binns-Ward J was correct in stating that the NCA requires notice to be served on the consumer (as opposed to 'the spouse'), it is, with respect, incorrect to conclude that because a contract is concluded with one spouse, the other spouse is not a party thereto as 'the consumer'.

This runs counter to the provisions in ss 14 and 15 of the Matrimonial Property Act 88 of 1984.

Section 15(1) of the Matrimonial Property Act empowers a spouse to unilaterally 'perform any juristic act with regard to the joint estate without the consent of the other spouse', except in defined instances dealt with in s 15(2) and (3), which require the consent of the other spouse. However, subject to an exception, such acts may be ratified *ex post facto* (s 15(4)).

Spouses married in community of property are joint debtors as regards both antenuptial and postnuptial debts (see *Du Plessis v Pienaar and Others* 2003 (1) SA 671 (SCA)).

Therefore, I submit that the approach adopted in the *Subramanian* case is correct. It not only 'accord[s] with justice', but also with the law governing marriages in community of property.

In addition, it accords favourably with the cumulative effect of the provisions in, *inter alia*, ss 3, 79(1), 86(5), 87(1) and 88(1) of the NCA.

Binns-Ward J reached his conclusion without considering the implications of these provisions.

Meeting the purpose of the NCA

The s 129 NCA notice cannot be effective in serving the statutory purposes contained in s 3 unless it is served on both spouses married in community of property. This is because, firstly, s 86(5) obliges a consumer who has applied for debt review protection to 'comply with any reasonable requests by the debt counsellor to facilitate the evaluation of the consumer's state of indebtedness and the prospects for responsible debt rearrangement' (see *Seyffert and Another v FirstRand Bank Ltd t/a First National Bank* 2012 (6) SA 581 (SCA)).

In my view, this clearly contemplates the state of indebtedness of a joint estate and not that of the spouse married in community of property who concluded the relevant credit agreement.

It must also be borne in mind that, subject to certain exceptions, spouses married in community of property do not have an estate apart from the joint estate (see *Nedbank Ltd v Van Zyl* 1990 (2) SA 469 (A)).

Secondly, the view espoused herein is further exemplified in s 79(1), read with s 87(1), of the NCA. A consumer is over-indebted if he or she is unable to satisfy financial obligations in a timely manner, having regard to his or her financial means, prospects, obligations and history of debt repayment (s 79(1)). A court hearing an application for a consumer's debt rearrangement is obliged to consider 'the consumer's financial means, prospects and obligations' (s 87(1)). (For a discussion on these provisions, see *Nedbank Ltd and Others v National Credit Regulator and Another* 2011 (3) SA 581 (SCA)).

The community of debts in a marriage in community of property means that an inability to satisfy a debt amounts to a failure by both spouses to settle such debt, for which they are, in law, jointly liable.

Thus, I submit that the financial means, prospects, obligations and history of debt repayment referred to in the statutory provisions are those of both spouses in the joint estate, which, in turn, reinforces the view that 'the consumer', for purposes of the NCA, refers to both spouses married in community of property.

Fourthly, s 88(1) places a moratorium on a consumer incurring further debt in those circumstances where, for example, an application has been lodged under s 86(1) for debt review. I submit that the restriction on, *inter alia*, the right to apply for credit conferred by s 60 of the NCA cannot achieve the objectives of responsible debt incurrence envisaged by s 3(*g*), (*h*) and (*i*) unless it applies to both spouses married in community of property. It

could not have been the legislature's intention that one spouse married in community of property be subject to this statutory limitation while the other can freely incur further debt for which both are jointly liable. Such a state of affairs would, in my view, be absurd and run contrary to the stated objectives in s 3 of the NCA.

In light of the above, I submit that a s 129 NCA notice, in order to be valid, must be given to both spouses married in community of property, irrespective of whether the relevant debt is incurred by one of them acting alone. They constitute 'the consumer' for purposes of s 129.

Separate *personae*

The above applies equally to a situation where one spouse dies and an executor is appointed to the joint estate. Although the executor administers same, he or she does not become the *persona* of either the deceased or the surviving spouse. They are separate and distinct *personae* (see *Clarkson NO v Gelb and Others* 1981 (1) SA 288 (W) and WA Joubert (ed) *LAWSA* 31 (first reissue) at para 185).

The surviving spouse retains an independent legal personality so that he or she remains entitled to be served with all NCA notices separately, apart from the executor, in the same manner as he or she would have been during the deceased's lifetime.

The death cannot place the surviving spouse in a worse position than he or she would otherwise have occupied.

Failure to serve the NCA notice on both the executor and the surviving spouse, in my view, renders the service thereof materially, and thus fatally, defective. Any legal proceedings instituted pursuant thereto would, by virtue of s 130(4)(*b*) of the NCA, be susceptible to suspension pending compliance with the obligatory procedural requirement contained in s 129 (see *Nedbank Ltd v Binneman and Thirteen Similar Cases* 2012 (5) SA 569 (WCC); *ABSA Bank Ltd v Mkhize and Another and Two Similar Cases* 2012 (5) SA 574 (KZD)).

It must also be borne in mind that an executor is not the representative of the surviving spouse.

There is no provision in law that deems notice to an executor of a joint estate as notice to the surviving spouse. Thus, notices served on such an official *nomine officio* do not constitute notice to the surviving spouse in his or her personal capacity and vice versa. Accordingly, a separate notice must be given, even if the surviving spouse is the executor or a co-executor. Alternatively, in such circumstances a single notice may be given, provided it expressly states that notice is given to the executor both in his or her capacity *nomine officio* and in his or her personal capacity as a consumer under the NCA.

Debt review

A further consideration necessitating that a separate s 129 NCA notice be issued to both the executor and the surviving spouse stems from the fact that each has the right to make an election regarding the different options referred to in s 129(1)(*a*).

Importantly, in my view, whereas the surviving spouse may apply for debt review, the executor may not.

Section 86(1) of the NCA provides: 'A consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted.'

The legislature's use of the singular 'a consumer' is to be distinguished from 'the consumer' used in, for example, s 129.

The joint estate terminates on death of a spouse married in community of property. I submit that the surviving spouse then becomes 'a consumer' for purposes of s 86(1) and is entitled to apply for debt review insofar as such portion of the debt for which he or she is liable in law is concerned. This is particularly so in view of the right of a credit provider under s 17(5) of the Matrimonial Property Act to sue the surviving spouse separately for the debt in question. This may occur where, for example, there are insufficient assets under the executor's administration to settle the debt concerned.

On the other hand, in my view, an executor is not empowered to initiate debt review proceedings as regards the deceased estate.

The trite principle of statutory interpretation is that effect must be given to the intention of the legislature, having regard to, *inter alia*, the language used in the enactment under consideration (see *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC)).

There are, to my mind, no provisions in the NCA evidencing a legislative intention that the right of a consumer to apply for debt review passes to his or her estate and, concomitantly, to an executor.

Firstly, the language used to define the various categories of 'consumer' refers only to 'the party', 'the mortgagor', 'the guarantor', 'the lessee' and 'the borrower' (s 1).

In *Magiet NO* Le Grange J pointed out, at para 13, that no reference is made to the executor of any such 'consumer' (nor, I submit, to his or her estate or successors in title).

Secondly, the NCA does not confer on every person all rights created by it. For example, the right to apply for credit (s 60(1)) is limited to '[e]very adult natural person, and every juristic person or association of persons'.

This provision makes no reference to the estate of any natural person, nor to his or her executor or successors in title.

Consequently, it may be inferred that the legislature did not intend to confer on every person all the rights embodied in the NCA.

In other words, certain rights are reserved for certain persons exclusively.

Thirdly, the definition of 'juristic person' (s 1) also does not refer to a deceased estate.

In addition, the Interpretation Act 33 of 1957 provides no assistance in this regard.

Fourthly, *in Commissioner for Inland Revenue v Emary NO* 1961 (2) SA 621 (A) it was held that, in the absence of a statutory provision casting a deceased estate in the mould of juristic personality, no such *persona* can be said to exist for purposes of a particular statute.

By parity of reasoning, in view of the NCA not conferring such *persona* on a deceased estate for its purposes, I submit that the right to apply for debt review cannot be said to exist for executors representing same.

I am fortified in the view expressed by s 35(12) of the Administration of Estates Act 66 of 1965, which provides that, after certain procedural steps are met in relation to the advertising and inspection of a liquidation and distribution account, an executor 'shall forthwith pay the creditors'. This is a peremptory obligation couched as a categorical imperative (see *Griffiths v Barclays Bank Trust Co Ltd (UK) NO* 1986 (4) SA 1 (C) at 2).

This indicates a legislative intention that there shall be an expeditious process of settling creditors' claims once the executor complies with the procedural requirements imposed by s 35. This indicates the absence of a legislative intention empowering an executor to initiate debt review proceedings for the restructuring of debts forming part of a deceased estate. This is so because a debt review, if granted by a court, invariably leads to the postponement of the settlement of creditors' claims beyond the time frame contemplated by s 35. If the legislature intended to override this provision, then it can reasonably be expected that it would have enacted provisions in the NCA that expressly indicate this.

Conclusion

In conclusion, a deceased estate is not a legal or a statutory *persona*. It is an aggregate of assets and liabilities. The estate vests in the executor in the sense that the *dominium* and other rights, obligations and powers of dealing with same reside in him or her alone (see *Du Toit v Vermeulen* 1972 (3) SA 848 (A) at 856B).

The office of executor is a creature of the Administration of Estates Act. Its provisions regulate the rights, responsibilities and functions of this official. However, it does not perform an exclusive role in this regard. Other statutes are relevant too; for example, the Insolvency Act 24 of 1936 empowers an executor to apply for the voluntary surrender of a deceased estate. An executor acts *ultra vires* if he or she performs an act

beyond the scope of this statutory authority and any such act may be set aside.
I submit that Le Grange J in *Magiet NO* correctly concluded that an executor is entitled to receive a notice under s 129 of the NCA. However, the purpose of such notice is narrower than in the case of another consumer. Its purpose is simply to draw the executor's attention to the alternative dispute resolution mechanisms referred to in s 129(1)(*a*) in the event that the executor declares a dispute in relation to the credit agreement concerned.

In my view, it cannot serve as an invitation to an executor to refer the relevant credit agreement for debt review.

Consequently, until a legislative amendment is effected to the NCA or the Administration of Estates Act, I submit that sequestration under the Insolvency Act is an executor's only recourse if the estate under his or her administration is over-indebted and unable to satisfy its financial obligations timeously.

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