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**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN**

**CASE NO: 5311/2017
DATE HEARD: 08/11/2018
DATE DELIVERED: 15/11/2018
NOT REPORTABLE**

In the matter between:

FIRST NATIONAL BANK LTD

APPLICANT

and

LINDA OCEAN MATEBESE N.O

1ST RESPONDENT

MASTER OF THE HIGH COURT

2ND RESPONDENT

JUDGMENT

PLASKET J

[1] The applicant, First National Bank Ltd (FNB), has applied for an order directing the first respondent, Mr Linda Ocean Matebese (Mr Matebese), the executor of the deceased estate of Mandisa Blossom Matebese (the deceased), to submit a liquidation and distribution account to the second respondent, the Master of the High Court (the Master), in respect of the estate, and to do so within 30 days. In addition, in the event of non-compliance, FNB seeks leave to apply on the same papers, duly amplified, for the removal of Mr Matebese from office. A costs order is also sought against Mr Matebese *de bonis propriis*.

Background

[2] The deceased died on 29 October 2009. Mr Matebese, to whom the deceased had been married in community of property, was appointed executor of her estate on 3 December 2009.

[3] The estate and Mr Matebese in his personal capacity are the registered owners of a property, [...]. On 20 July 2006, FNB had advanced the deceased and Mr Matebese a loan of R350 000. A mortgage bond over the property secured the loan.

[4] A certificate of balance attached to the founding affidavit certified that the estate and Mr Matebese owed FNB R642 213.65 as at 18 May 2017.

[5] It was not disputed by Mr Matebese that he had never submitted a liquidation and distribution account to the Master. Strangely, his answering affidavit is completely silent on this issue, which is central to the matter. On the basis of the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), his failure to deny the allegation that he has not submitted a liquidation and distribution account has the result that FNB's factual allegation to this effect prevails.

[6] Section 35(1) of the Administration of Estates Act 66 of 1965 (the Act) places an obligation on an executor to submit a liquidation and distribution account to the Master within six months of his or her letters of executorship being granted or within a longer period that the Master may allow. Mr Matebese did not allege that an extension of time had been granted to him by the Master.

[7] Section 36 provides for the enforcement of an executor's obligations, including the obligation to submit a liquidation and distribution account. It states:

'(1) If any executor fails to lodge any account with the Master as and when required by this Act, or to lodge any voucher or vouchers in support of such account or any entry therein in accordance with a provision of or a requirement imposed under this Act or to perform any other duty imposed upon him by this Act or to comply with any reasonable demand of the Master for information or proof required by him in connection with the liquidation or distribution of the estate, the Master or any person having an interest in the liquidation and distribution of the estate may, after giving the executor not less than one month's notice, apply to the Court for an order directing the executor to lodge such account or voucher or vouchers in support thereof or of any entry therein or to perform such duty or to comply with such demand.

(2) The costs adjudged to the Master or to such person shall, unless otherwise ordered by the Court, be payable by the executor, *de bonis propriis*.'

[8] FNB called upon Mr Matebese to comply with his obligations, giving him 30 days' notice as required by s 36(1). He has not complied.

[9] Mr Matebese has raised various points *in limine*. They are his non-joinder in his personal capacity; that this court lacks jurisdiction to hear the matter; and that FNB lacks standing for various reasons to compel Mr Matebese to submit the liquidation and distribution account.

The issues

Non-joinder

[10] There is no merit in the non-joinder point because the purpose of this application is to compel Mr Matebese in his capacity as the executor of the estate to comply with his statutory duty. Mr Matebese in his personal capacity has no interest in that relief.

Jurisdiction

[11] It was argued that this court lacks jurisdiction to hear the matter for two reasons: first, Mr Matebese resides in Port Elizabeth and the property concerned is situate there; secondly, clause 22 of the mortgage bond provides for a magistrate's court to have jurisdiction. There is no merit in either submission for the reasons that follow.

[12] This court, as the seat of the Eastern Cape Division of the High Court has jurisdiction over the entire province of the Eastern Cape and concurrent jurisdiction with its local seats in Bhisho, Mthatha and Port Elizabeth. It consequently has jurisdiction in respect of persons living in, and property situate in, Port Elizabeth. See the Superior Courts Act 10 of 2013, s 6(4) and s 21. See too *Thembani Wholesalers (Pty) Ltd v September & another* [2014] 3 All SA 722 (ECG).

[13] Clause 22 of the mortgage bond reads:

'Any proceedings at law which the Bank may desire to institute for the enforcement of any rights conferred upon it under this Bond, or for the recovery of any indebtedness covered by this Bond may, at the sole option of the Bank, be instituted in the Magistrate's Court of any district having jurisdiction in respect of the Mortgagor in terms of Section 28(1) of the

Magistrates' Court Act 1944 (Act No. 32 of 1944), to the jurisdiction of which Court the Mortgagor hereby consents in terms of Section 45 of the Act, or the relevant sections of any amending or substituted enactment.'

[14] Clause 22 gives FNB an option to institute proceedings in a magistrate's court if it wants to. In other words, its right to institute proceedings in a high court is not limited in any way by clause 22. Secondly, the option only arises in relation to proceedings instituted by FNB 'for the enforcement of any rights conferred upon it under this Bond, or for the recovery of any indebtedness covered by this Bond'. Neither of these instances arise in this case.

Standing

[15] It was argued that because FNB's claim was filed late and was disputed it had no interest in the liquidation and distribution of the deceased estate, and consequently no standing to compel Mr Matebese to submit a liquidation and distribution account. It was also argued that whatever claim FNB may have had has now prescribed and, on that account too, FNB lacks the necessary interest and, consequently, standing.

[16] Section 31 of the Act makes provision for late claims against a deceased estate. It provides:

'If any person fails to lodge his claim against any deceased estate before the expiry of the period specified in respect of that estate under subsection (1) of section twenty-nine, he shall-

- (a) if he lodges his claim thereafter and does not satisfy the Master that he has a reasonable excuse for the delay, be liable for any costs payable out of the estate, in connection with the reframing of any account or otherwise, as a result of the delay; and
- (b) whether or not he lodges his claim thereafter, not be entitled in respect of his claim to demand restitution from any other claimant of any moneys paid to such other claimant at any time or before he lodged his claim, as the case may be, in pursuance of a valid claim against the estate.'

[17] It is clear from s 31 that a late claim is not disqualified with the result that even if FNB's claim was lodged late, it retains its interest as a creditor in the liquidation and distribution of the estate.

[18] The disputed claim must be seen in context. Mr Matebese does not deny that he and the deceased entered into the loan agreement with FNB and that their indebtedness to FNB was secured by the mortgage bond. Indeed, in the letter he wrote to FNB on 2 February 2018, more than two months after FNB's application was launched, he denied 'that the estate owes the amount as claimed in your letter' and acknowledged that 'we borrowed an amount of R350 000 from the Bank'. He therefore only disputes the amount owed, requesting 'a full statement of account of all our payments towards the loan account'. He did not dispute the claim in terms of s 32 because he did not 'by notice in writing' require FNB to lodge 'within a period stated in the notice, an affidavit setting forth such details of the claim as the executor may indicate in the notice'. He certainly did not reject the claim in terms of s 33 of the Act. Consequently, FNB still has an interest as a creditor in the liquidation and distribution of the estate.

[19] The point that FNB's claim has prescribed was only taken in the heads of argument filed on behalf of Mr Matebese. No factual basis for this assertion was laid in the answering affidavit. There is consequently no evidence that the claim has prescribed.

[20] I find that for purposes of s 36(1) of the Act, because FNB has a claim based on the loan agreement, even if it is disputed as to amount, it is a 'person having an interest in the liquidation and distribution of the estate'. The consequence of this finding is that FNB has standing to compel Mr Matebese to submit a liquidation and distribution account to the Master.

Conclusion

[21] I have dealt with the defences raised by Mr Matebese. None has merit and all are spurious. Two results flow from that. First, the application must succeed, albeit that the terms of the order I shall make will be in terms that differ slightly from the notice of motion. For instance, I do not believe it would be proper for me to order that Mr Matebese must incorporate FNB's claim in the liquidation and distribution account. Such an order would fetter his powers as executor. Secondly, Mr Matebese will be ordered to pay FNB's costs *de bonis propriis*, in terms of s 36(2) of the Act, because there is no basis to order otherwise (and good reason, given the way he has conducted himself in this matter, why such a costs order should be made).

Those costs will include costs that were reserved on 23 January 2018 and 6 February 2018

[22] I make the following order:

(a) The first respondent is directed to submit to the Master of the High Court the liquidation and distribution account in respect of the estate of the late Mandisa Blossom Matebese within 30 days of service of this order on the first respondent and to inform the applicant's attorneys that the liquidation and distribution account has been submitted to the Master.

(b) If the first respondent fails to comply with the order set out in paragraph (a), the applicant is granted leave to approach this court on the same papers, duly amplified, for an order directing that the first respondent be removed from office as the executor of the estate of the late Mandisa Blossom Matebese and directing the Master to appoint an executor nominated by the applicant in the first respondent's place.

(c) The first respondent is directed to pay the applicant's costs, including the costs reserved on 23 January 2018 and 6 February 2018, *de bonis propriis*.

C Plasket

Judge of the High Court

APPEARANCES

For the applicant:

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For the first respondent:

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