

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	NOT REPORTABLE
(2)	NOT OF INTEREST TO OTHER JUDGES

CASE NUMBER: 27120/2017

DATE: 22nd April 2024

In the matter between:

FIRST RAND BANK LIMITED t/a *inter alia* as

RMB PRIVATE BANK AND AS FNB

Applicant

and

ERASMUS, NICOLETTE

(ID NO. 6105270046007)

Respondent

Neutral Citation: *First Rand Bank Limited t/a inter alia as RMB Private Bank and as FNB v Nicolette Erasmus (2017/27120) [2024] ZAGJHC --- (22nd April 2024)*

Coram: R. Strydom, J

Heard: 24, 25 & 26 January 2024

Delivered: 22 April 2024

Summary: *Applicant sought an order that the respondent's immovable property be declared specially executable – In the counter application, Respondent sought an order that the credit agreements entered into between the parties are void in terms of certain sections of the National Credit Act 34 of 2005 – The counterclaim was*

dismissed—The court found that the applicant has proven the breaches of the facility agreement by the Respondent and the quantum of the claim –The Registrar of the Court was authorized and instructed to issue a warrant of execution against Respondent's aforesaid immovable property – Respondent to pay cost of suit including the cost of the striking out application.

ORDER

It is ordered that:

- (1) Condonation is granted to respondent for the late filing of her notice of intention to defend and answering affidavit;
- (2) The supplementary affidavits filed by the parties are allowed into evidence;
- (3) The following paragraphs are struck out of respondent's answering affidavit: 14.4, 61, 77, 78, 103, 104, 106, 107, 112.5, 112.6, 130.4, 140, 141, and 143;
- (4) The Respondent to pay the Applicant the sum of R1 542 221.47 with interest thereon at the rate of 8.45% per annum calculated daily and compounded monthly in arrears from 18 May 2017 until date of payment, both days inclusive;
- (5) That the immovable property of the Respondent, being Portion 2 (a portion of portion 2) Erf 327 Waverly, Johannesburg Township, Registration Division I.R, the Province of Gauteng, measuring 2973 square metres in extent and held by Deed of Transfer number T53393/1997 and situated at Knox Street, Waverley, be and is hereby declared executable;
- (6) The Registrar of this court is authorized and instructed to issue a warrant of execution against immovable property in respect of the aforesaid immovable property;
- (7) That a reserve price of R3 250 000 is set for purposes of a sale in execution;
- (8) The Respondent to pay cost of suit including the cost of the striking out application.

JUDGMENT

STRYDOM, J

Introduction

- [1] The applicant ("FirstRand") seeks judgment against the respondent ("Ms Erasmus") for payment of an amount of R1 542 221.47 (one million five hundred and forty-two thousand, two hundred and twenty-one rand, forty-seven cents) together with an order that the property identified as Portion 2 (a Portion of Portion 2) of Erf 327 Waverley, Johannesburg, in the province of Gauteng, situated at 23 Knox Street, Waverley ("the immovable property"), be declared specially executable, and costs of suit on the scale as between attorney and client ("the main application").
- [2] Ms Erasmus brought a counter application in three parts. In part A, condonation is sought for the late filing of her notice of intention to oppose and answering affidavit. This application is not opposed and condonation should be granted. The relief in Part C relates to a request in terms of the Promotion of Access to Information Act, 2 of 2000 ("PAIA"). Ms Erasmus did not persist in this relief and no finding needs to be made in this regard.
- [3] In Part B, extensive relief is sought starting with a direction in terms of Rule 33(4) of the Rules of Court for the separation of certain issues. This claim has not been persisted with. Further, for a declarator that the credit agreements entered into between the parties are void in terms of sections 72, 74, 89, 90, 91, 92, 116, 126A, 164, 166 and 169, and are in conflict with the provisions of the National Credit Act, 2006 ("NCA") alternatively are void, voidable, unlawful and/or

otherwise unenforceable in terms of the common law. Ms Erasmus further sought a declarator that various acts and/or omissions of FirstRand are prohibited conduct in terms of sections 61, 62, 66, 74A, 72, 75(1), 76, 81, 82, 89, 90, 91, 92, 100, 101, 102, 103, 111, 118, 126, 164, 166 and 169 and are in conflict with the provisions of the NCA, alternatively wrongful and/or unlawful, and/or unenforceable at common law. Further relief is sought upon such a finding for the refund to Ms Erasmus of all monies paid by her to FirstRand as a result of, or arising out of, or in connection with any of the agreements found to be unlawful.

- [4] Applicant filed a conditional counterclaim based on enrichment. This claim was filed late in the proceedings. This did not constitute an amendment of the original notice of motion but was filed in response to Ms Erasmus's counterclaim and should be allowed to stand for consideration. Also, should be allowed is a supplementary affidavit filed by FirstRand to place evidence before court relating to the value of Ms Erasmus's immovable property to set a reserve price, should an order be made declaring Ms Erasmus's immovable property executable. Rule 46A was only inserted on 17 November 2017.
- [5] This was followed by a full court judgment delivered on 12 September 2018 in the matter of *Absa Bank v Mokebe*¹ in which the court found that a monetary judgment is part of the cause of action when execution against immovable property is sought and that a court must scrutinise the evidence to set a reserve price. This matter established what issues should be dealt with in affidavit where foreclosure is sought and a supplementary affidavit to bring an application in line

¹ case number 2018/00612

with the directions provided should be allowed. The Practice Directive dated 18 August 2019, further dealt with the required allegations in such an affidavit. Consequently, this directive caused supplementary affidavits to be filed in these foreclosure matters which affidavits should be received in evidence.

- [6] In Ms Erasmus's answering affidavit and a further supplementary affidavit, she disputed that the contractual relationship between her and FirstRand was only governed by a 2006 facility agreement as averred by FirstRand. She alleged that the contractual arrangement between the parties included various agreements entered into during 2001, 2004, 2005 and 2006. She referred to these agreements as Term Loan Agreements secured by three mortgage bonds. FirstRand in a supplementary affidavit agreed with Ms Erasmus that the contractual arrangement between the parties included the various agreements and explained that it wrongly placed sole reliance on the 2006 single facility agreement. It thus became common cause between the parties what agreements constituted the agreement between the parties. What remained in dispute, however, is whether a term loan agreement, similar to a bond account, was unilaterally amended by FirstRand to become an "*interest only loan*".
- [7] The supplementary affidavit filed by FirstRand further explained that the wrong version of the terms and conditions applicable to the 2006 Facility letter was inadvertently attached to the founding affidavit. Version RSF 400-2 2003-SF(Amd) was attached instead of Version RSF400-1 2005. I will deal with this aspect later in this judgment.
- [8] The contractual relationship between the parties is recorded in various facility letters dated 2001, 2004, 2005 and 2006 and the annexures thereto, as well as three mortgage bonds ("the facility" or "facility agreement"). The court will use

this description as in each one of the facility letters references are made to "Facility Letter". The various applicable versions of Terms and Conditions also refer to "Facility".

- [9] As referred to hereinabove, before this court it became common cause between the parties that their legal relationship was encapsulated in these facility letters forming one facility. From time to time the facility was increased and further terms and conditions applied to the facility. A first, second and third mortgage bonds were registered against the immovable property of Ms Erasmus, securing the repayment of the facility.
- [10] The 240 months facility terminated through the effluxion of time during or about August/September 2021. Before this, in a letter pursuant to section 129(1) of the NCA, FirstRand's attorney issued and served a second section 129(1) notice in terms of which notice was given to Ms Erasmus of termination of the facility agreement within a specified time. Ms Erasmus alleged that this constituted a repudiation of the facility agreement, which she accepted and cancelled the facility. The effect of this is that the facility cannot be reinstated in terms of section 129(3) of the NCA. In any event, after the first notice, the parties engaged into settlement negotiations indicating that these negotiations were triggered by the notice. In my view, the section 129 notices were not issued in contravention of section 129, but even if this was the case, a failure to comply with section 129(1) has only dilatory consequences. It does not behove Ms Erasmus to now, for the first time, belatedly, in heads of argument, rely on a defective section 129 notice.
- [11] The common cause fact of the termination of the facility agreement, albeit for different reasons and at different times, as alleged by the parties, also means that any other defences relating to the breach, reinstatement of the facility, the

applicability of a SARS judgment and the outstanding rates and taxes are now moot. The relief sought by Ms Erasmus declaring that certain conduct of FirstRand is prohibited by the NCA is therefore also moot. This is not a claim for damages where the wrongfulness of a cancellation may become relevant.

[12] The only issue which remains is whether the facility agreement was unlawful, and ought to be declared void, either in terms of the NCA or the common law. Hence, sections 89 and 90, and sections referred to in these sections, of the NCA are the relevant sections to be considered, as well as the common law with reference to the law of contract.

[13] FirstRand also brought an *in limine* application for the striking out of certain paragraphs in the affidavits of Ms Erasmus. This issue will be dealt with later in this judgment.

The facility agreement

[14] The granting of the facility by FirstRand to Ms Erasmus, which facility amount was increased on 2 (two) occasions, was not disputed and became common cause. The amount of the facility granted increased and slightly different terms and conditions were rendered applicable, as will be described hereunder.

[15] During 1996 FNB granted Ms Erasmus a home loan to buy residential property repayable over 240 months. This was a FNB home loan with a separate bond account, payable in instalment debited in terms of a debit order against the cheque account of Ms Erasmus.

[16] During 2001 Mr Norman Keel of RMB (formally Origin) approached Ms Erasmus to replace her FNB home loan with a term loan product called a "Single Credit Facility". Ms Erasmus agreed to this. The bond in favour of FNB was cancelled.

- [17] On or about 18 April 2001, the parties concluded a Single Credit Facility agreement ("the 2001 facility") for the full facility sum of R600 000.00. This facility was available to Ms Erasmus in an account with number 01-005-554-1. In terms of the facility letter the facility amount became repayable in instalments of R7 089.09 per month, over a period of 240 months.
- [18] Important for a decision in this matter, the previous home bond was cancelled and a first covering mortgage bond was again registered in favour of FirstRand over the immovable property of Ms Erasmus as security for the 2001 facility. In paragraph 7 of the credit facility letter Ms Erasmus authorized a debit order in favour of FirstRand to debit amounts which became due in terms of the 2001 facility, to be debited against Ms Erasmus's FirstRand Bank Limited (trading as First National Bank) account number 50510107200.
- [19] As of 31 October 2001, the full facility sum of R600 000.00 was advanced to Ms Erasmus in account number 01-005-554-1. On Ms Erasmus's bank statements for this account the credit facility was described as "Credit Line Amount".
- [20] On or about 16 April 2004 Ms Erasmus signs a Single Facility Application form for the increase of her facility. On 29 April 2004 Ms Erasmus signs a further facility letter ("the 2004 facility"). The 2004 facility increased the facility sum with R370 000.00 to R970 000.00. This facility was subject to RMB SCF 100 4 2003 terms and conditions and introduced a new facility schedule which included additional security of a second covering mortgage bond registered over the immovable property of Ms Erasmus. The facility was now repayable over the remaining 209 months of the 240 months which started to run from 2001. The monthly instalments increased to R9 772.56.

- [21] After Ms Erasmus was handed a marketing brochure explaining the nature and terms of a so-called "Deposit Facility". On 6 October 2005 she then signed the Deposit Facility ("the 2005 facility"). In terms of the 2005 facility Ms Erasmus had to pay the existing loan facility of R970 000.00 over the remaining 192 months at monthly instalments of R9 160.55. The terms and conditions applicable which Ms Erasmus agreed to be bound by was version number RSF400 1 2005. On or about 18 October 2005, a new FNB account was opened in the name of Ms Erasmus under account number 62092497611.
- [22] On 18 August 2006, a further increase in the facility amount was granted to Ms Erasmus which extended the full facility sum to R1 550 000.00 ("the 2006 facility"). The 2006 facility was subject to the RMB Single Facility terms and conditions RSF 400 1 2005. It should be noted that the FirstRand relied upon and attached a wrong version, to wit version RSF 2 2003-SF, to its founding papers. This has been explained in a supplementary affidavit and in my view, despite Ms Erasmus's protestations, the mistake was properly explained and rectified by FirstRand. Nothing turns on this and FirstRand should be allowed to rely on the correct terms and conditions as described as version RSF400-1 2005.
- [23] A third mortgage bond was registered in favour of FirstRand over the immovable property of Ms Erasmus as security for the increased facility. The full amount of R1 550 000.00 was advanced to Ms Erasmus into account number 62092497611 and this amount became repayable in monthly instalments of R16 098 23 over 181 months.
- [24] Thus, the facility consists of four facility letters dated 2001, 2004, 2005 and 2006. The initial repayment term of 240 remained in place but this term was reduced

as the months went by. Three mortgage bonds were registered over the immovable property of Ms Erasmus as security for the facility.

- [25] Thus, Ms Erasmus conducted a single facility account with FirstRand from 2001 until the account was frozen on 1 May 2017. From 2001 under account number 01-005-554-1 and from 18 October 2005 under account number 62092497611.

How the facility was operated and conducted

- [26] Ms Erasmus's main complaint in this matter is that FirstRand in breach of its contractual undertakings and legal obligations to her, and without her express knowledge or informed consent, failed and or refused for a period of approximately thirteen years, from 2005 to 2017, to apply her payments made into account number 62092497611 to "pay down" the principal loan. Before 2005 a debit order was in place against her transactional account number 5051010722 and the term facility, held in account number 01-005-554-1, was repaid. When her new deposit account came into effect on 18 October 2005 she, according to her, remained under the impression that this situation would prevail and that she would have continued to repay her facility amount either by way of debit order or by using the funds she paid into account number 62092497611.

- [27] But this is not what happened having regard to the relevant bank statement for account 62092497611 from October 2005 and thereafter. The debit order payments were no longer received in account number 62092497611 and interest was debited against this account on the outstanding balance. The conclusion of the 2005 facility, which introduced a deposit facility, and which was implemented in a manner which done away with the collection of the monthly repayments of the facility through debit order, according to Ms Erasmus, was prompted by a

unilateral action of FirstRand. She alleges that despite signing the 2005 facility letter she was coerced into doing this and was not properly informed. She goes as far as accusing FirstRand of misrepresentation.

[28] According to Ms Erasmus this situation prevailed when she signed the 2006 facility letter, which merely increased the facility but otherwise was conducted in the same manner as after 18 October 2005. It is what transpired during the conversion of the account into a deposit facility which Ms Erasmus alleges to be unlawful in terms of the common law and the NCA.

[29] From an analysis of the relevant facility letters, bank statements and evidence it is shown that, initially, Ms Erasmus had a separate bond account. This account was closed when the bond over her home was cancelled and when the 2001 facility was granted. A new bond was registered in favour of FirstRand which bond stood as security for the facility granted. From this date onwards account number 01-005-554-1 was debited with interest on the outstanding balance, but a debit order payment would be paid into this account from Ms Erasmus's FirstRand account number 50510107200. The debit order payment would be marginally higher than the interest levied, which would mean that if there were no other transaction, the facility would gradually be repaid.

[30] Ms Erasmus no longer had a separate bond account but a credit facility. When the 2001 facility was provided the debit balance was transferred into the facility account. The transactions in account number 01-005-554-1 were largely limited to entries connected to repayment of the facility, interest and costs. This situation prevailed up to the stage that the deposit account was opened on or about 18 October 2005 which consolidated some of Ms Erasmus's accounts into the facility account under account number 62092497611.

- [31] These accounts included her Gold Card, Fuel Card and facility account. On 18 October 2005 the debit balance in the amount of R969 976.14 was transferred from account number 01-005-554-01 to account number 62092497611. Ms Erasmus started, as was advised, to pay her income into this account and used this account as her transactional account with daily entries.
- [32] For a period of a few months during which the conversion was made into the new account these two accounts existed independently. Accounting adjustments were made but nothing turns on this. What should be noted is that very little of the facility amount of R970 000.00, which was in place at that time, was already paid off as the debit amount transferred to account number 62092497611 from account 01-005-554-01 was only R23.86 short of R 900 000.00. Thus, after approximately 4 years of the facility being in place the outstanding balance was not reduced or "paid down" (as Ms Erasmus refers to payment) despite the debit order being in place.
- [33] After the single facility account became a deposit facility in account 62092497611, the facility instalments were no longer paid by way of a debit order. On the monthly statements appeared various debit order payments that went off the account but no debit order payments from other accounts were made into the account. This would mean that Ms Erasmus's cheque or transactional account was no longer debited with an amount for the repayment of the facility. Ms Erasmus, who have not attached any bank statement for her FNB account number 50510107200 to her answering affidavit, must have realised from inception of account number 62092497611, or at least shortly thereafter. What was debit against the facility account was interest on the outstanding balance on the account.

- [34] The account number 62092497611 was now used for many transactions, providing a single facility, which was different from what transpired before under account number 01-005-554-01 (except for the transitional period of a few months before this account was opened). What now appeared on the account is regular deposits and various other payments out of the account including Gold Credit Card debits and other payments. The facility was incorporated in a single facility account where interest was monthly charged against the total outstanding debit amount. On the monthly bank statements it was shown what the minimum required monthly payment was.
- [35] The full facility could be used as the facility amount remained available to Ms Erasmus. The entitlement to make use of re-advances was always part of the facility terms and conditions from 2001 up to the 2006 facility and further. Ms Erasmus made full use of this. From inception of the facility her account was close to, and quite often over, the facility amount. Ms Erasmus carefully managed her account to keep it within the limits. This is evidenced by relatively small payments into the account from time to time to bring the account within the limit.
- [36] Considering that the facility had to be repaid over a fixed period the monthly minimum instalments would increase if the full facility was continuously used to its full extent and the repayment term became shorter. This was clearly to be seen from the statements. Importantly, it remained a term facility and a minimum monthly instalment had to be paid and the facility amount was not to be exceeded. This issue lies at the heart of the complaint of Ms Erasmus and should further be considered with reference to the various facility letters and monthly bank statements provided to Ms Erasmus.

[37] Ms Erasmus avers that up to 2017 she still laboured under the impression that her bond was repaid separately. This is not what the bank statements reflect. Ms Erasmus must have been aware that her cheque account number 50510107200, pursuant to the previous debit order, was no longer debited with repayments. She must have seen that no credit was made into account number 62092497611 in terms of a debit order. Her version appears to be that the repayment or “paying down” of her facility should have happened within the facility account. Some bond account within the facility agreement? She laboured under the impression that payments into the account would be used to repay the facility amount on the basis that the repayment was “ring fenced” and separate from the other transactions which took place within the account.

[38] Ms Erasmus stated that FirstRand misled her into a believe that her term loan agreement was being paid off whilst it was not. FirstRand converted her bond account into an overdraft account and this was done unilaterally by FirstRand without her informed consent. To consider this version I shall again return to the historical situation on how the contractual relationship between the parties developed.

[39] The starting point is the 2001 facility which in terms of the single credit facility letter was clear in its terms that it was a term facility repayable over 240 months. The facility was repayable in equal monthly instalments of R7 085.09 per month. The instalment amount could change for various reasons but mainly as a result of interest rate changes. The instalment was calculated to ensure that the outstanding balance is repaid in equal monthly instalments over the period of 240 months. The terms of the facility also provided Ms Erasmus with the option to use all of that balance already paid off as a re-advance.

- [40] The right to re-advances remained part of the facility agreement before and after the conversion into a deposit facility and Ms Erasmus made use of this right. She now alleges that to avoid the consequences of the NCA pertaining to mortgage loans FirstRand unilaterally converted her bond account into an overdraft account. In my view, this facility account never became an overdraft account despite that during 2007 such a reference to indicate the facility amount on the bank statement was used.
- [41] The account remained a term facility account payable over a term with a monthly minimum amount payable. It also did not become an overdraft credit agreement which is reviewed on an annual basis but without a requirement of a monthly minimum payment. In my view, nothing turns on this description which was used to indicate the facility amount available. It merely indicated the maximum amount advanced to Ms Erasmus, but at the same time the minimum payment required was stated on the statement. Ms Erasmus would have realised that this was a reference to her facility granted which she signed up for. The terms and conditions applicable did not change. The reference to "overdraft limit" could not have misled Ms Erasmus as she maintains that she was still paying off her bond. Moreover, when she agreed to the deposit facility during 2005, and in months thereafter, the inscription of "overdraft" did not appear on her account.
- [42] The terms and conditions applicable to the 2001 facility, and the subsequent facilities, provided, *inter alia*, that each payment received by "Origin" (the predecessor of FirstRand) from the customer shall be appropriated firstly towards costs, then interest and the balance, if any, shall thereafter be appropriated towards the repayment of the facility sum then owing by the customer.

- [43] All the facility letters were signed by both Ms Erasmus and FirstRand. In September 2005, FirstRand introduced a deposit facility and an explanatory pamphlet explaining how this account would operate was provided to Ms Erasmus. She admitted that she received this pamphlet. This document explained how the single facility was going to work and how Ms Erasmus could use it to her advantage. Interest was going to be calculated daily and capitalised monthly, so that she could save interest.
- [44] A cursory perusal of this document would have made it clear to Ms Erasmus how the deposit account was going to be conducted. Various scenarios were provided to show how interest could be saved. The bottom line was that more money should be paid into the account than withdrawn from it, bearing in mind that monies deposited should first be allocated to pay interest and costs. Only thereafter deposits will be used to repay the facility. Ms Erasmus was amenable to enter into an arrangement whereby an account with a wider functionality was provided to her. She could now make deposits into this account.
- [45] On 27 September 2005, Ms Erasmus signed the deposit facility letter which had the main feature of creating one account where credit in the amount agreed (at this stage R970 000.00) was advanced to Ms Erasmus in a single facility where the loan and the transactional facility are combined. The stated advantage of the single facility is that an account holder can enjoy the flexibility of a current account while deposit made into the account will save on interest at the rate charged to the facility. Importantly, a minimum amount was payable into this account to reduce the balance of this account to nil over the remaining period of the facility. If, however, the facility is used to its full extent, the consequence would be that the minimum monthly payment would increase but the repayment

term would decrease. This situation will prevail if only the minimum monthly instalment is paid whilst the full facility is utilised. Theoretically, if the full facility is utilised up to the last month of the 240 months, the full outstanding balance would become due and payable in that month.

- [46] When the balance outstanding on Ms Erasmus's account number 01-005-554-01 was transferred as a debit on her new account she, in my view, must have realised that her debt was now consolidate in a single account with a credit limit but also with a minimum repayment limit.
- [47] This account was extensively used by Ms Erasmus to do cash withdrawals, issue cheques, pay debit orders, pay her credit card and bank charges. Interest was charged on debit balances. For many years the debit balance of this account remained close to, and sometimes more than, the limit of the facility.
- [48] In terms of the deposit facility letter, Ms Erasmus acknowledged that she had been provided with a copy of the RMB Private Bank Single Facility terms and conditions, version No. RSF 400-1 2005 and agreed to be bound by them. It should also be noted that at this stage the remaining repayment period reduced to 192 months. The monthly instalment stood at R9 160.55.
- [49] During August 2006, Ms Erasmus requested a further increase of R580 000.00 to her facility, raising it to R1 550 000.00. The 2006 single facility was concluded. In terms of the facility letter signed by Ms Erasmus, she acknowledged that the features and benefits of the recommended products and services had been explained to her, including how the facility will operate and the charges and interest rates that will apply. She acknowledged that she was provided with a

copy of the RMB Private Bank Single Facility terms and conditions, version RSF 400 1 2005 and agreed to be bound by them.

- [50] After this further facility was provided to Ms Erasmus, the remaining period was now 181 months and the monthly instalments to be paid escalated to an amount of R16 098.23. A third bond to the extent of R900 000.00 was registered against the immovable property of Ms Erasmus.
- [51] The applicable terms and conditions stipulated that the facility type was a "term" type. According to clause 5.1 of the terms and conditions, Ms Erasmus had to repay the debit balance in equal monthly instalments on the instalment date. The instalment amount indicated on the facility schedule is calculated on the basis of an advance of the full facility sum, repayment over the remaining term and interest at the rate prevailing as at the date of the facility letter.
- [52] Ms Erasmus was entitled to repay more than the monthly instalment or to repay all or part of the debit balance at any time. Further, the terms and conditions also dealt with the deposits and how the deposits would be apportioned. First to costs, then to debit interest and lastly towards repayment of any portion of the facility then owing. The remainder would be credited to the facility. Clause 2.5 of the Terms and Conditions provided that Ms Erasmus may obtain a re-advance of any part of the facility sum repaid.
- [53] Against this contractual background, this matter must be decided and whether Ms Erasmus was coerced and or mislead to agree to the deposit facility and the 2006 facility on the bases that her facility would not be "paid down" over the remaining term of the facility.

- [54] The crux of Ms Erasmus' defence against FirstRand's claim for the full outstanding balance of the facility and for the declaration of executability of the immovable property lies in how she perceived that this facility would have operated. According to her, she initially started to pay off her facility by way of debit order which, over the period of 240 months, would have culminated in the loan facility being paid off. When the deposit facility was introduced during or about 2005/2006, she thought that this situation would prevail whilst and in fact it only later appeared to her that she was not paying off her facility and would have ultimately been faced with an enormous monthly instalment to pay off the facility in the last months before the expiry of the 240 months.
- [55] She stated that she was not aware that she was continuously was using the *paid off part* of the facility agreement by way of a re-advances. She stated that she was misled in this regard by the representatives of FirstRand. If one considers the terms and conditions applicable to the single facility, there can be no doubt that FirstRand conducted the account according to the various facility letters and the terms and conditions applicable at any given stage.
- [56] There is no evidence that Ms Erasmus was misled or that any relevant information was withheld from her during the period when this single facility account was conducted. The terms and conditions of the single facility, including the 2006 facility, was provided to her. Just above her signature on the 2006 facility letter she acknowledged that she was provided with a copy of the RMB Private Bank Facility Terms and Conditions, version number RSF 400 1 2005 and agreed to be bound by them. Ms Erasmus received monthly bank statements in which all transactions were reflected and where it was clearly stipulated what the minimum payment required should be.

- [57] Nowhere on the bank statements, since account number 62092497611 was opened, is there any indication that a debit order was collected in relation to the repayment of a bond or that the facility was repaid separately within the facility account. Only interest was charged. If Ms Erasmus had paid the minimum amount required without any other transactions on the account, this would have caused the facility to be repaid over the remaining period. Instead, she made extensive use of the facility by paying for various other transactions. The balance remained close to, and sometimes more than, the credit limit.
- [58] Ms Erasmus calculated that she has paid considerably more than the extent of the facility into the account and stated that she could not understand why her facility was not paid off. Her calculations lack one very important consideration and that is she never calculated what the sum total of all the other items being paid for over the years added up too. If the total amount of withdrawals, interest and costs are then compared to the deposits she would have seen that more was withdrawn or allocated to interest and cost, than deposited.
- [59] Apart from the withdrawals, the account was debited with bank charges and interest on the debit balances. All of this was clearly stipulated on the bank statements. Importantly, from around 2005 there was no longer a debit order going off this account to pay a bond account. Clearly, as the name of the account suggested, to wit, a "single facility", this account incorporated the entire facility and there was no separate bond account which was paid from this account reducing the extent of the facility.
- [60] Ms Erasmus' version that she did not understand how this account operated and never agreed to its terms cannot be accepted. This defence and/or claim is disingenuous considering that Ms Erasmus is an experienced attorney and, on

her own version, she also has experience in financial services as a trustee on investment committees of retirement funds, which included experience in mortgaged-backed lending by retirement funds. She was a director of a small bank and worked with investment products in the long-term and short-term insurance industry.

[61] For many years Ms Erasmus used this account extensively and made use of re-advances at her own discretion. She never complained how the account was operated by FirstRand. She used the full extent of the facility whilst the term for the repayment of the facility was getting shorter and shorter. This caused increases in the minimum monthly instalment which she must have observed. At all times she must have known that all payments made into the account would first be allocated towards costs and interest and only if there is an excess of payments into the account beyond other debits this excess amount would have reduced the capital of the facility.

[62] Only about 7 years after the introduction of the 2005 facility did Ms Erasmus enquired why her total outstanding amount was not coming down. She then made a specific R10 000.00 payment which lowered her available facility to R1 540 000.00. She maintained that her misunderstanding of how her facility was conducted continued unabated despite a claim made against her during 2009 as a result of her breach of the facility agreement. In my view, this version is far-fetched and cannot be sustained. Moreover, even if Ms Erasmus failed to understand the workings of the facility, this does not avail her as a defence against a claim pursuant to the terms of the facility agreement, which she freely and voluntarily entered into without being misled or unduly influenced.

[63] Ms Erasmus was at no stage misled and the evidence which cannot be disputed indicated that she quite often allowed her debit balance to extend beyond her facility amount. This caused a breach of the facility agreement entitling FirstRand to call up the facility. Apart from this, Ms Erasmus was further in breach of the conditions of the facility as a judgment was obtained against her by SARS. She explained that she disputed this debt, but if this judgment stood, she would have acted in default of her obligations. Her allegation that she was misled by FirstRand especially by way of non-disclosure has no merit.

[64] That Ms Erasmus made extensive use of the facility, as she was entitled to do, can be gleaned from a perusal of the bank statements. By way of example reference can be made to Ms Erasmus's bank statement for the period 4 October 2006 to 4 November 2006. The available facility was R1 550 000.00. The opening balance on the account was a debit of R1 303 839.35 and the closing balance was R1 385 615.47. The minimum balance to be paid was R14 750.13.

[65] The amount of R11 506.69 was for interest and cost. This amount would be deducted first before capital is repaid. But capital could not be repaid as the total of withdrawals amounted to R118 269.43 against deposits of R48 000.00. That explains the increase in the debit balance. In my view, the version of Ms Erasmus that she did not understand how this account was conducted by FirstRand cannot be accepted. Her version of ignorance whilst FirstRand singled her out to discriminate against her is untenable and far-fetched. Why would FirstRand have treated her different from other clients in an endeavour to maximise profits at her expense?

[66] The bank statement for the period 4 January 2010 to 4 February 2010 clearly states what the "overdraft limit" was, to wit, R1 550 000.00. This limit was

exceeded by R7 381.81. This constituted a breach of the facility. On the statement the minimum amount payable to reduce the facility was indicated as R17 530.94. The total of deposits was only R15 000.00. This caused the account to run over the limit. Clearly, the purpose of a minimum payment is to lower the facility over the remaining period of the term of the facility. Ms Erasmus must have realised this. She now blames FirstRand for allowing her to use the full extent of the facility causing the balance not to come down. This is far-fetched.

[67] Further bank statements indicate that Ms Erasmus must have carefully calculated the extent of what she could utilise of the facility to remain within the limit. For months the balance was close to the limit without exceeding same. This is an indication of a person well aware of how the facility was conducted. How under these circumstances could she have laboured under the misunderstanding that her facility was "paid down" is not understood.

[68] It was clearly indicated on the statements, as the months and years went by, that the minimum payment was fast increasing. Ms Erasmus must have seen this. To maintain that she was under the impression that her bond was still being paid off would beg the question why did she not at the time ask for bond account statements to ascertain what the position was? She entered into an agreement to have a single facility and that was what was provided to her.

[69] The debit order signed by Ms Erasmus was contained in paragraph 7 of the 2001 facility letter. This debit order was not included in the facility letters of 2005 and 2006. The reason was obvious. A debit order was no longer required as a separate bond account was no longer applicable. Moreover, the 2001 debit order was an authorization granted to FirstRand to debit the account of Ms Erasmus. It was not in the form of an obligation incurred by FirstRand to collect payment in

terms of the debit order. FirstRand was under no obligation from November 2005 to collect instalments and apply them to "*pay down*" the capital of the term loan. FirstRand was entitled to collect monthly interest on the outstanding balance, but the responsibility and obligation was on Ms Erasmus to "*pay down*" her facility with FirstRand. This she could achieve by paying more into the account than what was required to pay for all her debits which included costs and interest.

[70] To aver now that she was misled and/or that her facility was not separately being paid down and/or that she never consented to the facility terms is disingenuous. Particularly, her version that the facility was not capable of being paid off. It was always capable of being paid off if sufficient deposits were made. This could even have been done by payment of a lump sum.

[71] Ms Erasmus's complaint that FirstRand unilaterally altered and varied its contractual undertakings to her is also without merit. No undertaking was provided that payments into the deposit account would first be allocated to pay off her facility. On the contrary, the agreement was that interest and costs would be paid first. The entire extent of the facility was made available to her and she used it when she wanted to.

[72] The 2001 facility letter provided in clause 22.3 for variations and amendments of the facility agreement as long it was in writing and signed by the parties. This is what happened, and Ms Erasmus signed the 2004, 2005 and 2006 facility letters to which the applicable terms and conditions were attached. It was not necessary to sign the terms and conditions separately as Ms Erasmus, in the signed facility letters, acknowledged that she was provided with the terms and conditions. Her account was not unilaterally altered or varied but without her informed consent.

[73] As previously stated, Ms Erasmus's right to re-advances was always part of her facility agreement. In the 2001 facility this right was contained in paragraph 6 of the facility letter.

[74] Her defence that repayment was rendered an impossibility as the monthly instalment would "balloon" to an amount which would become too high to repay, alternatively, that the facility agreement was *contra bonos mores* is also without merit. Performance has not become objectively impossible. The debt can be repaid in a lump sum. Moreover, a debtor cannot rely on a supervening impossibility if it is self-created.²

[75] A contract (or a term of a contract) is illegal if it is against public policy or good morals. In its modern guise, public policy is rooted in the Constitution and the fundamental values enshrined therein.³ Nothing in the facility agreement is in my view *contra bonos mores*. The facility agreement provided Ms Erasmus with an opportunity to manage her own finances and to pay off her debt according to her financial ability. This required self-control and financial planning, which was apparently lacking. Ms Erasmus must have realized that her debt would escalate to levels which rendered repayment difficult for her. There is nothing reprehensible in the facility or its terms except, maybe, the terms dealing with the renouncing of certain defences. FirstRand did not rely on these terms and these terms are readily severable from the remainder of the facility agreement.

[76] Ms Erasmus argued that a mutual or unilateral error occurred in the conclusion of the facility agreement which goes to the root of the contract and that she may

² *King Sabata Dalindyebo Municipality v Landmark Mthatha (Pty) Ltd and Another* [2013] 3 All Sa251 SCA

³ *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC), 2007 (5) SA 323 (CC)

be excused from the contract if the mistake is *iustus*, or reasonable under the circumstances. She alleges that she was confused by the product of a single credit facility where deposits could freely be made into such facility. Ms Erasmus failed to prove any mutual error as she was, according to her, the party which was confused. She failed to prove that she would not have entered into the facility agreement if the facility was not going to be repaid by way of a debit order but rather by paying the minimum repayment per month beyond her other debits on the account. Her mistaken belief how the facility amount would be repaid is not reasonable and she remains liable in terms of the facility agreement.

[77] The 2006 facility letter in paragraph 3.2 provided for Ms Erasmus to sign a power of attorney which FirstRand could rely on, should she have failed to meet the monthly instalments or exceeded the facility, entitling FirstRand in terms thereof to sell her immovable property. Ms Erasmus signed the power of attorney. This power of attorney allows for her property to be sold without an order of court declaring the immovable property executable. This is contrary to law and would amount to "self-help" and/or a form of "parate executie". FirstRand placed no reliance on this clause or the special power of attorney. On the contrary, FirstRand is seeking an order from this court for a declaration of executability of the immoveable property.

[78] Ms Erasmus argued that paragraph 3.2 of the 2006 facility letter, read with the Special Power of Attorney, rendered the 2006 facility agreement invalid. Clause 14.8 of the terms and conditions applicable to the 2006 facility agreement provides that if any provision of the agreement is illegal, invalid or unenforceable this will not affect any of the remaining provisions of the agreement. Paragraph

of the 2006 facility letter is severable from the remainder of the agreement and does not affect the entire agreement.

[79] FirstRand was not in breach of the terms of the facility agreement and Ms Erasmus failed to identify any term which was breached. Her case is based on her own legal conclusions and not on fact. In my view, Ms Erasmus failed to make out a defence in terms of the contractual arrangements between her and FirstRand to declare the facility agreement unlawful in terms of the common law. The same applies to the counterclaim with reference to common law defences.

[80] FirstRand has proven the breaches of the facility agreement by Ms Erasmus and has proven the quantum of the claim. Moreover, the facility terminated through an effluxion of time and the outstanding balance remains unpaid. Unless the counterclaim succeeds the immovable property of Ms Erasmus, which stood as security for the repayment of the facility, should be declared to be executable. A reserve price should be set.

The NCA defences and counterclaim

[81] What remains to be considered are Ms Erasmus's defences and counterclaim in terms of the NCA. The counterclaim is aimed at a declaration of invalidity of the facility agreement rendering it void and also for a declaration that FirstRand's acts or omissions constituted prohibited conduct in terms of various sections of the NCA mentioned hereinbefore.

[82] Ms Erasmus have referred this court to many clauses of the NCA and how FirstRand allegedly acted in contravention of these clauses. Many of her defences relate to sections in the NCA not mentioned in her notice of motion and/or in her affidavits. She extensively broadened her case in her heads of

argument. Her approach can only be described as a so-called shot gun approach hoping that somehow or somewhere the target would be hit.

[83] The court will only deal with sections contained in the NCA which were specifically referred to in the counterclaim and affidavits filed by Ms Erasmus. This court's authority is confined to the issues that the parties have chosen to put into dispute through their pleadings, and it is not the role of the court to resolve matters outside of those parameters.⁴

[84] Ms Erasmus argued that in her notice of motion in her counter-application she asked for relief , *inter alia*, for FirstRand's conduct which was "*otherwise in conflict with the provisions of the National Credit Act, 20025 ("NCA")*". She further asked the court at prayer 6.8 to include in the court's considerations whether the facility agreement was enforceable between the parties "*any other provisions that the court finds to be unlawful; wrongful and/or void*". This comes down to a request that the court must scrutinize the NCA and consider whether FirstRand breached any of its sections. This is an untenable situation and request. The purpose of a notice of motion and founding affidavit is to establish a case which can be answered to by the opposing party. If a applicant's case is premised on unlawful acts in conflict with legislation the unlawfulness must be identified, and in a case like this reference should have been made to specific sections in the NCA and it should have been supported by evidence. The sections upon which reliance are placed should not for the first time be mentioned in heads of argument.

⁴ *Macuvele and Another v MEC for Health, Mpumalanga Province* [2023] ZASCA 129 (11 October 2023)

- [85] Reliance on certain sections as a basis to declare the facility unlawful were abandoned by Ms Erasmus and will not be referred to. These include sections 72, 74, 91, 92, 126A, 164, 166 and 169. Reference was not made to sections 71A, 100, 102, 103, 118, 126A, 164, 166 and 169 in her affidavits. The court will, however, deal with sections 89 and 90 as these sections deal with unlawfulness of credit agreements in terms of the NCA.
- [86] Ms Erasmus placed reliance on section 4 of Schedule 3 to the NCA. These transitional arrangements were referred to in her affidavits in the passing but no case placing reliance on these provisions, read together with sections 92, 93 and 108 of the NCA, have been pleaded in the counterapplication, nor have any facts been advanced to substantiate such a claim. There is no reference to regulations in the Notice of Motion or in the affidavits filed by Ms Erasmus, accordingly no reliance can be placed on an alleged breach of the regulations.
- [87] Section 4 of Schedule 3 renders certain sections applicable to credit agreements that was entered into before the effective date of the NCA. The "effective date" is defined to mean the date on which the NCA, or any relevant provision thereof, came into operation. It is to be noted that the bulk of the sections relied upon by Ms Erasmus became law on 1 June 2007. This is a date after the last supplement to the facility agreement was entered into on 18 August 2006. This supplement merely increased the amount of the facility. The facility agreement originated during 2001 and the alleged variation of the facility agreement came about during 2005. The 2005 facility agreement, which added the deposit facility, is the part of the facility agreement which Ms Erasmus argues rendered the facility agreement unlawful in terms of the common law and the NCA.

[88] This variation took place more than 1 year prior to 1 June 2005. The effect of this is that in terms of section 4(2) of Schedule 3 to the NCA only sections 89 and 90 apply to a pre-existing credit agreement and only to the extent that common law, national and provincial legislation applied, to similar effect, to such an agreement or provision as at the date the agreement was made. Section 4(3) which provides that in respect of any credit agreement, made within one year before the effective date, a credit provider must within 6 months of the effective date provide the customer with a statement that meets the requirements of section 92 and a document that meets the requirements of section 93 to the extent that these documents were not already provided, does not apply. This leaves an enquiry into possible transgressions of the common law as contemplated in sections 89 and 90 of the NCA.

[89] The court already dealt with the common law issues raised by Ms Erasmus with reference to the facility agreement and will only briefly refer to some points raised yet again. Ms Erasmus argued that FirstRand unilaterally altered add/or varied the terms of the facility agreements with her, in contravention of the NCA and other applicable legislation. She contended that each month's "re-advance" permitted in terms of the credit agreement constituted a new credit agreement for which FirstRand ought to have completed a fresh affordability assessment in accordance with section 119 of the NCA.

[90] This section deals specifically with the increase in the credit limit under a credit facility. The re-utilization of portions of a credit facility already paid back can never be considered as a new credit agreement. In terms of the facility agreement the full extent of the R1 550 000.00 was made available to Ms Erasmus. In terms of this agreement, she had the choice to use the full extent of

the facility as long as she repaid the full facility within the term of the facility. If and when she used the facility, the already granted credit limit remained the same and it is unsustainable to argue that a fresh agreement was entered into every time Ms Erasmus used the facility to its fullest.

[91] The court already dealt with the allegation that FirstRand acted without the consent of Ms Erasmus by not paying down her bond. The agreements which constituted the facility agreement was clear in their terms and Ms Erasmus consented to these agreements.

[92] A court may declare a credit agreement void in terms of sections 89(5)⁵ of the NCA if the credit agreement is unlawful as contemplated in section 89. Also, in terms of section 90(3)⁶ if a provision in a credit agreement is unlawful and cannot be severed from the remaining terms of the credit agreement and further in terms of the common law. The court already indicated that Ms Erasmus failed to establish a case in terms of the common law. Moreover, Ms Erasmus has not made a single material averment that the facility is contrary to public policy and thus unlawful and/or unenforceable in terms of the common law.

[93] Although Ms Erasmus did not refer to section 89 specifically in her affidavit, she referred to other sections mentioned in section 89. If a credit agreement results from an offer prohibited in terms of section 74(1)⁷ such credit agreement is unlawful. This section refers to *negative option marketing and opting out*

⁵ Section 89(5) of the NCA provides that if a credit agreement is unlawful in terms of this section, despite any other legislation or any provision of an agreement to the contrary, a court must make a just and equitable order including but not limited to an order that the credit agreement is void as from the date the agreement was entered into.

⁶ Section 90(3) of the NCA provides that in any credit agreement, a provision that is unlawful in terms of this section is void as from the date that the provision purported to take effect.

⁷ Section 74(1) of the NCA provides that a credit provider must not make an offer to enter into a credit agreement, or induce a person to enter into a credit agreement, on the basis that the agreement will automatically come into existence unless the consumer declines the offer.

requirements. The credit facility in this case has nothing to do with this prohibition. There was nothing which was going to take place automatically. Ms Erasmus freely and voluntarily signed the various facility agreements varying the terms of the facility agreement and extending the amount made available.

- [94] The statement of correctness at the foot of the bank statements cannot be referred to as negative option marketing. This printed statement merely says that a client must query mistakes of a bank statement and unless a query is raised the bank will assume that the client received the bank statement and that it is correct. This has nothing to do with a opting out requirement to establish a credit agreement. The facility agreement was already in place. Moreover, this inscription on a bank statement is not contrary to common law.
- [95] Section 90 pertains to unlawful provisions in credit agreements and not to unlawfulness of the credit agreement *per se*. This section is wide in its terms but if an unlawful provision is contained in a credit agreement this provision, in terms of sub-section 90(3), is void and not the entire credit agreement. In this regard a court will have a discretion, in terms of sub-section 90(4)(a) and (b) to, *inter alia*, either sever the unlawful provision from the agreement or declare the entire agreement unlawful. A court can make an order that is just and equitable. The unlawful provisions relating to the power of attorney allowing self-help and renouncement of defences were dealt with hereinbefore. None of these provisions renders the entire facility agreement unlawful either in terms of section 89 or 90 of the NCA. No reliance was placed on these terms by FirstRand and it would be just and equitable if these provisions are severed from the facility agreement.

- [96] In terms of section 4(2) of schedule 3 Chapter 5 -Part E apply fully to a pre-existing credit agreement from the effective date, which is 1 June 2007. This Part E deals with alterations of a credit agreement and includes sections 116, 118, 119 and 120. This, in my view, can only mean that from 1 June 2007 alterations of credit agreements must comply with these provisions.
- [97] But, even if I am wrong in this regard, a case has not been made out for relief in terms of these section. Ms Erasmus made no mention of section 118 in her affidavits. This section deals with a reduction to a credit limit. Ms Erasmus's credit limit was reduced at her request, but this did not render the facility agreement unlawful. The limit was reduced as requested.
- [98] Section 116 deals with a change to a credit agreement after it was signed which renders a credit agreement void unless, *inter alia*, the change is recorded in writing and signed by the parties. This is what happened when the deposit facility was introduced and Ms Erasmus signed the 2005 facility letter. The terms and conditions of the 2001 facility letter and the 2005 facility letter placed the responsibility squarely on Ms Erasmus to make payments. Nothing changed in this regard, except that the 2005 facility now introduced a deposit clause which contained a provision which was part of the facility agreement all along, to wit, that any deposits received will be apportioned first to costs, then debit interest, and lastly toward repayment of any portion of the facility owing. The remainder will be credited to the facility. The facility agreement was not rendered void in terms of this section.
- [99] Section 119 deals with increases in credit limit under the credit facility. *In casu*, the credit facility was increased at Ms Erasmus's request and with her written consent. The case of Ms Erasmus is not aimed at the increase of the facility.

Section 120 deals with unilateral changes by a credit provider. No changes were made unilaterally as all facility letters were co-signed by Ms Erasmus. Accordingly, prayer 5 of the Notice of Motion in the counterclaim stands to be dismissed.

[100] In prayer 6 Ms Erasmus seeks an order declaring certain conduct of FirstRand prohibited conduct. The alleged prohibited conduct complained of is not clearly defined in the founding affidavit and sections 61, 62 and 66 mentioned in the notice of motion do not apply to pre-existing credit agreements. The same applies to section 108 (not mentioned in the notice of motion) and section 111. In any event, Ms Erasmus was provided with monthly bank statements, as envisaged in section 108, showing all transactions pertaining to the facility. She had the right to dispute entries on the statements, as contemplated in section 111, which she never did.

[101] Reliance on section 126, which appears in Chapter 6 of the NCA, is misplaced. The sections in this Chapter apply fully to a pre-existing credit agreement from the effective date. Thus, from 1 June 2007 this section applies and will be applicable during the course of the conducting of the facility agreement. This section deals with early payments and crediting of payments. No case was made out by Ms Erasmus to show that this section was contravened.

[102] Any reliance on section 126A, which deals with restrictions on certain practices relating to credit agreements, is also misplaced. This section only became law from 31 March 2011 but was in any event not breached by FirstRand. Prayer 6 of the Notice of Motion in the counterclaim stands to be dismissed.

[103] FirstRand, on the facts as stated by Ms Erasmus, excluding those allegations which were found to be far-fetched and untenable, considered with the undisputed facts stated by FirstRand, made out a case for the monetary judgment and executability of the immovable property of Ms Erasmus. There was not need to refer the matter for the hearing of oral evidence.

The reserve price

[104] FirstRand provided the court with a market value of the immovable property in the amount of R3 500 000.00 and a forced sale value of R2 800 000.00. It suggested to court that a reserve price should be fixed in the amount of R3 250 000.00. This amount is higher than the alleged forced sale value but considering that this price was suggested by FirstRand such price will be included in the order of this court as the determined reserve price.

Applicant's conditional counterclaim

[105] This counterclaim was conditional subject to the condition that this court found the facility agreement to be void/unenforceable. Only then condonation was sought for the late delivery of the conditional counterapplication and payment of the amount of R1 550 000.00 to the extent that Ms Erasmus was unduly enriched. In light of this court's findings the condition was not fulfilled. Consequently, the condonation application and the conditional counterclaim need not to be considered. No order is to be made.

The striking out application

[106] FirstRand filed an application in terms of rule 6(15) of the Rules of Court for the striking out of matter in Ms Erasmus's affidavits which, according to FirstRand, amounts to scandalous, vexatious or irrelevant matter. A court can also strike out

matter in an affidavit which amounts to inadmissible evidence like hearsay statements, unnecessary argumentative matter, unsubstantiated attacks on credibility and new matter contained in a replying affidavit.

[107] Once it has been shown that matter fall within the categories mentioned, then a court, before ordering allegations contained in an affidavit to be struck, must also be satisfied that a party would be prejudiced by the allegations if left to remain in an affidavit. Prejudice is a wide concept and may include the prejudice which are caused to a party having to deal with allegations which strictly should not have been contained in an affidavit.

[108] The court, applying the criteria set out above, will now consider the application with reference to the relevant portions contained in Ms Erasmus's affidavits which FirstRand applied to be struck out. The court will first deal with the allegations which were said to be irrelevant contained in the answering affidavit in the main application, which is also part of the counterapplication as annexure NE1 to the founding affidavit.

[109] In paragraph 37 and 37(1) of Ms Erasmus's answering affidavit she made reference to unsigned letters authored by FirstRand which letters she never signed. The inclusion of this evidence is attacked on the basis of relevancy. In my view no prejudice should these allegations not be struck out has not been shown.

[110] The further paragraphs which FirstRand applied to be struck out are paragraphs 49-51 of the answering affidavit. It is stated that Ms Erasmus misconstrued FirstRand's obligations towards her and that the allegations contained in these paragraphs are vexatious as the PAIA request has no bearing on this application.

The allegations contained in these paragraphs placed in dispute FirstRand's allegation in a section 129 of the NCA letter that Ms Erasmus was in breach of her obligations and forms part of her narrative to indicate her communication with FirstRand and should not be struck out. Moreover, FirstRand has not shown the prejudice it would suffer should these allegations not be struck from the answering affidavit.

[111] FirstRand avers that in paragraph 63 the unlawful provisions are not identified.

Ms Erasmus failed to identify the unlawful provisions of the facility agreements in this paragraph, but the answering affidavit should be read as a whole. Ms Erasmus had to lay a base for her defence and counterclaim and the allegations contained in this paragraph has a bearing on the defence she has advanced and on her counterclaim. These allegations should not be stuck out.

[112] The complaint as far as paragraphs 65,67,69,73 and 74 are concerned is that

Ms Erasmus's own appreciation or understanding is not relevant to the relief sought and that her intention is not relevant to the interpretation of the agreement and that Ms Erasmus has not relied on a misrepresentation by FirstRand. These allegations, including those for which no factual basis was laid, must be seen against the background of Ms Erasmus attempt to have the facility agreement be declared unlawful and void. It is part of her narrative, and some leniency should be given considering that she acted in person. To some extent she expresses her beliefs and suspicions in her affidavits which are strictly speaking irrelevant. The question which remains is to what extent FirstRand was prejudiced by these statements which can be denied? These allegations are not stuck out.

[113] FirstRand attacks paragraph 79 on the basis that the account statements referred to in this paragraph were provided to Ms Erasmus. According to Ms

Erasmus these statements were only provided to her after she deposed to the affidavit. The allegation is not irrelevant and should not be struck.

[114] Paragraph 85 is attacked on the basis that the unilateral actions have not been particularised in Ms Erasmus's affidavit. The allegations contained in this paragraph is not prejudicial to FirstRand. Paragraphs 93-95 is stated to be irrelevant to the relief sought. The allegations contained in this paragraph is relevant to Ms Erasmus's case and should not be struck out.

[115] It is stated that in paragraphs 100 and 102 Ms Erasmus makes allegations about reckless lending which is not part of her case. In paragraph 100 there appears no reference to reckless lending. Paragraph 102 refers to reckless lending but, in my view, FirstRand was not prejudiced by this statement to the extent that such allegation should be struck out.

[116] It is stated that the allegations in paragraphs 114 and 122 are irrelevant. The notice of motion does not refer to supervening impossibility, that the facility agreement is *contra bonos mores*, nor of non-compliances with the Consumer Protection Act 68 of 2008 ("Consumer Protection Act"). The notice of motion in Ms Erasmus's counterapplication refer to unlawful conduct in terms of the common law. These common law defences should be considered. The reference to the Consumer Protection Act will fall under "any other provisions that the court finds to be unlawful, wrongful and void" as contained in paragraph 6.8 of the Notice of Motion. Ms Erasmus should have been more precise in her affidavit and notice of motion, but this does not mean that the allegation should be struck out.

[117] The court will now turn to allegations which are said to be vexatious which are contained in annexure NE1 to the founding affidavit of Ms Erasmus in her counter application. NE1 is the answering affidavit in the main application.

[118] Paragraphs 14.5 and 43 are attacked arguing that the allegation is designed to harass FirstRand and is false. The statement that FirstRand failed to comply with various statutory and contractual obligations is part of Ms Erasmus's case and not vexatious. Moreover, even if it was, FirstRand is not prejudiced by the allegations contained in this paragraph to the extent that the allegations should be struck out.

[119] Paragraphs 37.2 and 37.3, according to FirstRand, raises suspicions with reference to inadmissible evidence. Ms Erasmus's case is that the 2005 facility letter whereby the facility was converted into a "deposit account" happened unilaterally. As was found by this court this was not the case but for purposes of a striking out application FirstRand was not prejudiced by these allegations.

[120] Paragraphs 57 and 58, according to FirstRand, contain repetitive allegations designed to harass and annoy FirstRand. Repetition of allegations does not prejudice FirstRand. The allegations in this paragraph were part of Ms Erasmus ventilation of her disputes with FirstRand and central to her case. By blaming FirstRand she might express an opinion which annoys FirstRand but again this court cannot find that FirstRand was prejudiced by these allegations to the extent that these paragraphs should be struck out.

[121] The court will now consider allegations which are said to be scandalous. It is stated that the allegations in paragraphs 14.2 and 14.4 are made recklessly and without foundation. It is averred that paragraphs 15-17 and 19 contain allegations

made which impute dishonesty to FirstRand without any factual basis and are reckless and defamatory.

[122] It is argued that the contents of paragraphs 40, 41 and 42 are based on speculation and conjecture as well as abusive towards FirstRand. Further, that paragraphs 45, 46, and 48 are replete with factual inaccuracies which is designed to be defamatory and which impute dishonesty on the side of FirstRand. It is stated that paragraphs 52, 54 and 55 are based on pure conjecture and by alleging that FirstRand made unilateral changes is defamatory to FirstRand.

[123] It is stated that the reference to FirstRand's intentional avoidance of the NCA in paragraphs 57 and 58 is highly inflammatory and defamatory. Paragraphs 64, 65 and 66 make reckless allegations based on suspicion. It is stated that paragraphs 71 and 72 contain allegations which boils down to speculations regarding the knowledge and intention of FirstRand. The same apply to paragraphs 123, 124, 128 and 130. As far as paragraphs 73-79 and 86 are concerned it is argued that there is no factual basis for the allegations and inferences. The same applies to paragraphs 112-115.

[124] Paragraph 84 is defamatory to the extent that an allegation is made that bank account entries were amended. Also defamatory is the allegations contained in paragraphs 140-143 which is not supported by fact. The contents of paragraphs 90-91 are said to contain irrelevant allegations and the allegations in paragraphs 103-109 is not supported by facts and are defamatory.

[125] The court have considered these paragraphs and find that the following paragraphs are to be struck out for the reasons stated by FirstRand. If these paragraphs are to remain in the affidavit of Ms Erasmus FirstRand would be

prejudiced. These paragraphs are paragraphs 14.4, 77, 78, 103, 104, 106, 107, 112.5, 112.6, 130.4, 140, 141 and 143. The next category of allegations sought by FirstRand to be struck from the answering affidavit is on the basis of hearsay evidence.

[126] The paragraphs which the court was referred to were paragraphs 29, 38, 39 and 112. Some hearsay evidence may be contained in these paragraphs, but FirstRand has not shown that it would be prejudice if these allegations are not struck from the affidavit. FirstRand also sought the striking from the answering affidavit the following paragraphs on the basis of irrelevancy and constituting legal argument. Paragraphs 17, 32, 33, 34, 35.3, 36, 44, 45, 46, 53, 62, 64, 70, 116, 117, 118, 119, 120, 121, 132, 136, 137, 140-143. To some extent the allegations contained in these paragraphs contain irrelevant fact and/or legal argument. FirstRand would not be prejudiced if these paragraphs are not struck from the affidavit.

[127] Lastly, it was argued that paragraph 61 contained privileged communications between the parties in an attempt to settle the litigation and is inadmissible in these proceedings. The attachments referred to in this paragraph refers to "without prejudice" settlement proposals which should not be included in an affidavit. Paragraph 61 should be struck out.

Costs

[128] Costs should follow the result, also in the application to strike allegations contained in Ms Erasmus's answering affidavit. FirstRand asked for cost to be awarded on an attorney and client scale as was provided in the facility agreement. Ordinarily, a cost order would be made on this scale as was agreed

by the parties. It remains a discretionary issue. I, however, do not intend to award cost on an attorney and client scale because FirstRand in its founding papers only place reliance on the 2006 facility and not the entire facility as constituted by the 2001, 2004, 2005 and 2006 facility letters. This caused Ms Erasmus to dispute the facility agreement as was initially relied upon by FirstRand. This again caused the inclusion of many paragraphs in her answering affidavit explaining the entire facility agreement.

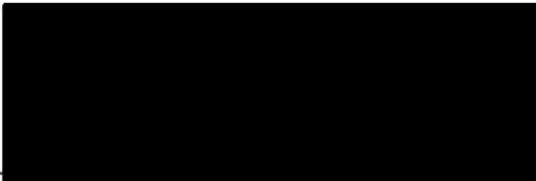
[129] Only in subsequent affidavits exchanged between the parties it became common cause what constituted the facility agreement. This initial route was taken by FirstRand even though its claim instituted during 2009 against Ms Erasmus correctly set out the contractual regime. This aspect also inconvenienced the court to ascertain the correct factual basis describing the contractual arrangement between the parties. As far as the striking application is concerned FirstRand was only successful to some extent. A punitive cost order, against a party acting in person, not knowing the established rules pertaining to allegations permissible in an affidavit, is not warranted.

[130] Ms Erasmus asked the court not to award cost against her as she raised constitutional issues. She referred the court to the "Biowatch principle"⁸ and asked the court not to award cost against her in her endeavour to rely on constitutional principles. In this matter no constitutional issue was decided and Ms Erasmus made out no case for relief in terms of the Constitution. This is not a matter where no cost order should be made.

[131] Accordingly, the following order is made: -

⁸ *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) (3 June 2009).

- (1) Condonation is granted to respondent for the late filing of her notice of intention to defend and answering affidavit;
- (2) The supplementary affidavits filed by the parties are allowed into evidence;
- (3) The following paragraphs are struck out of respondent's answering affidavit: 14.4, 61, 77, 78, 103, 104, 106, 107, 112.5, 112.6, 130.4, 140, 141, and 143;
- (4) The Respondent to pay the Applicant the sum of R1 542 221.47 with interest thereon at the rate of 8.45% per annum calculated daily and compounded monthly in arrears from 18 May 2017 until date of payment, both days inclusive;
- (5) That the immovable property of the Respondent, being Portion 2 (a portion of portion 2) Erf 327 Waverly, Johannesburg Township, Registration Division I.R, the Province of Gauteng, measuring 2973 square metres in extent and held by Deed of Transfer number T53393/1997 and situated at Knox Street, Waverley, be and is hereby declared executable;
- (6) The Registrar of this court is authorized and instructed to issue a warrant of execution against immovable property in respect of the aforesaid immovable property;
- (7) That a reserve price of R3 250 000 is set for purposes of a sale in execution;
- (8) The Respondent to pay cost of suit including the cost of the striking out application.



R STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

22/04/2024

Heard on: 24, 25 & 26 January 2024
Delivered on: 22 April 2024

Appearances:

For the Applicant: Adv. R. Shepstone
Instructed by: AD Hertzberg Attorneys

For the Respondent: Ms. N. Erasmus
Instructed by: In person.