

SOUTH AFRICA / JUDGMENT

Mega Works Trading Enterprise 200 (Pty) Ltd and Another v Firststrand Bank Limited (CIV APP FB 23/22) [2023] ZANWHC 58 (23 May 2023) [2023] ZANWHC 58

COURT

North West High Court, Mafikeng

BEFORE

Hendricks, Petersen, Reddy

CASE / FILE NUMBER

CIV APP FB 23/22

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Source record

IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION -
MAHIKENG
CASE NO.: CIV APP FB
23/22

COURT A QUO CASE NO: M232/21
Reportable: YES
Circulate to Judges: YES

Circulate to Magistrates: NO
Circulate to Regional
Magistrates: NO
In

the matter between: MEGA
WORKS TRADING
ENTERPRISE
200 (PTY) LTD
First
Appellant
MOLEFI
SETLALELENG
Second
Appellant
and
FIRSTRAND
BANK LIMITED
Respondent

CIVIL
APPEAL

CORAM:

HENDRICKS JP, PETERSEN J AND REDDY AJ

ORDER

(i)

The appeal is upheld
with costs.

(ii)

The order of the court
a quois set aside and replaced
with the following order:

“1.

The application is dismissed with costs.

2.

Such costs to be on a party and party basis, to be taxed.”

JUDGMENT

PETERSEN J

Introduction

[1] This appeal turns on the relationship between a bank and a customer in the context of a written overdraft facility agreement. Two central questions come to the fore. Firstly, when can an authorised and registered financial services provider, as well as a registered credit provider (in this appeal First Rand Bank Limited “FRB”), duly registered as such in terms of the National Credit Act, 34 of 2005 (“the NCA”), call up an outstanding amount on a credit facility; and secondly, if this can be done unilaterally without any breach on the part of the customer. The court a quo essentially found that the outstanding amount on a credit facility is payable at any time upon the written demand of the credit provider.

[2] The appeal is with leave of the court a quo (per Mahlangu AJ) against the whole of the judgment and order granted by the court a quo on 22 February 2022, in favour of the respondent (applicant in the court a quo) in the following terms:

“1. That the first and second respondents make the payment to the amount of R1 469 043.73 (One Million, Four Hundred and Sixty-Nine Thousand and Forty-Three Rand and Seventy-Three cents) to the applicant;

2. That the first and second respondents make the payment of interest on the amount of R1 469 043.73 (One Million, Four Hundred and Sixty-Nine Thousand and Forty-Three Rand and Seventy-Three cents) at the prime rate of 7% per annum compounded monthly from 1 February 2021 to date of payment;

3. That the first and second defendants to pay costs of this application on a party and party scale jointly and severally, the one paying the other to be absolved.”

The judgment of the court a quo

- [3] The judgment of the court a quo is particularly brief. The relevant parts are quoted to appreciate the grounds of appeal:

“[6] On 16 September 2020 and 9 February 2021 the applicant caused letters of demand to the respondents in terms of clause 8.1 of the credit facility agreement.

- [7] The credit facility agreement provides that:

“8.1 In addition, since the overdraft facility is a credit facility, FNB can at any time, with at least ten

- (10) Business Days written notice to you, terminate the overdraft facility and thereafter claim the full outstanding amount of the overdraft facility, without affecting our other legal rights.”

- [8] The respondents were served with letters of demand but despite the demand, the payment was not made.

- [9] The respondents disputed that the amount of the overdraft facility claimed by the applicant was not due and payable. The respondents dispute was based on the allegation that the applicants letters of demand were relating to clause 5.4 of the credit facility agreement.

- [10] Clause 5.4 of the credit facility agreement provides that:

“5.4 FNB can cancel your facility agreement at any time in the event of a change in your behavioural, financial and/or transactional circumstances. If the law allows, FNB has the right, if it becomes necessary because you are in default under this agreement.”

- [11] The applicant submitted that the respondents dispute is irrelevant given the wording of clause 8.1 mentioned here in above. It was further the applicant’s submission that their claim was in terms of clause 8.1 of the credit facility agreement.

DISCUSSION

- [12] It is in my view that the respondents failed to provide the court with a valid and proper defence on why they did not comply with the letters of demand served on them.

- [13] The respondent’s are aware of clause 8.1 and they did not dispute that they receive the letters of demand. It is in my view that, and as per clause 8.1 of the credit facility agreement that, the outstanding amount of the credit facility payable at any time upon the written demand by the applicant. Clause 5.4 of the credit facility agreement is not relevant in this matter. The applicant is in terms of clause 8.1 permitted to terminate the credit facility agreement and claim the outstanding amount.

- [14] It is therefore my view that the outstanding amount as per the applicant’s claim is due and payable.”

The grounds of appeal

[4] The grounds of appeal assail the judgment and order of the court a quo on its finding that clause 8.1 of the agreement was applicable in terms of which the claim became due and payable. The appellants contend that FRB's claim as set out in its founding affidavit and replying affidavit was predicated on clause 5.4 and not

clause 8.1, which was relied on for the first time in the replying affidavit. Further that the first letter of demand sent to the

appellants made specific reference to clause 5.4 whilst the second letter demand was silent on which clause FRB relied on for its claim. The court a quo is ultimately said to have failed to consider the case the appellants were called upon to meet in the founding affidavit and not the replying affidavit.

Issues of common cause between the parties

[5] On 5 April 2019, FRB, entered into a written overdraft facility agreement ("the OFA") with the first appellant duly represented by the second appellant. The material terms of the OFA are not in dispute. FRB duly complied with its obligations in terms of the OFA, advancing to the first appellant an amount of R1 400 000.00 (one million, four hundred thousand rand). The first appellant subsequently drew down on the OFA. On 21 May 2018, the second appellant bound himself as surety and co-principal debtor in solidum with the first appellant in favour of FRB in terms of a deed of suretyship. On 31 July 2017, the second appellant caused to be registered a first mortgage bond over his immovable property.

[6] On 14 September 2020, FRB caused letters of demand to be delivered to the appellants, the relevant content of which reads as follows:

"In terms of clause 5.4 of the facility agreement, "FNB can cancel your facility at any time in the event of a change in your behavioural, financial and/or transactional circumstances."

It has come to the bank attention that Credit Card Division has proceeded with legal action to collect the debt owed under the credit facility.

In the circumstances, we now advise that the full outstanding amount will become due and payable within 10 days from date of this letter and we hereby call upon you to repay: ..."

[7] Following the demand of 14 September 2020, a subsequent demand was delivered to the appellants on 9 February 2021 by the attorneys of FRB. The only aspect common to the demand of 14 September 2020 was that the outstanding amount of the credit facility had been called up and payment of the full indebtedness was due and payable. The outstanding balance was demanded within 7 (seven) days, unlike the previous 10 (ten) days. It is not clear in terms of which clause in the OFA this demand was made.

[8] FRB, as is clear from the demand made on 14 September 2020, relied on clause 5.4 of the OFA to call up the credit facility and demand payment. The letter of demand follows the wording of clause 5.4 of the OFA which reads as follows:

“5.4 FNB can cancel your facility agreement at any time in the event of a change in your behavioural, financial and/or

transactional circumstances. If the law allows, FNB has the right, if it becomes necessary because you are in default under this agreement to: ...”

Issue in dispute between the parties

[9] In the founding affidavit deposed to by Gertruida Maria Gesina Koegelenberg, a major female employed by FRB as Recoveries Manager of FNB Business Recoveries, the deponent re-asserts the demand by FRB predicated on the letters of demand of 14 September 2020 and 9 February 2021.

[10] Save for referencing the material terms of the OFA at paragraph 7 of the founding affidavit, no reference is made with specificity to clause 8.1 of the OFA, except as per clause 7.2 that “The overdraft facility would be repayable on demand.” In the replying affidavit, FRB for the first time, following the first appellant’s denial in the answering affidavit that it was in breach of clause 5.4, raises clause 8.1.

[11] The context of raising clause 8.1 in the replying affidavit must be considered with regard to FRB’s reply to its reliance on clause 5.4. The following is said at paragraphs 22 to 25 of the replying affidavit:

“22. I reiterate that the Applicant was entitled to enforce clause 5.4 of the overdraft facility by virtue of the fact that it came to the Applicant’s attention that its credit card division has proceeded with legal action to collect the debt owed under the credit facility. Despite diligent attempts, I have been unable to obtain the documentation in support of the aforesaid allegation. This is due to the challenges posed by the Covid-19 pandemic and the fact that much of the Applicant’s staff work from home. I will ensure that the documentation is made available to the Honourable Court as soon as it is available.

23. Moreover, the wording of clause 5.4 of the overdraft facility entitles the Applicant to cancel the facility at any time. The provisions of clause 6 and 7 of the overdraft facility therefore find no application.

24. In any event, it must be emphasized and reiterated that the overdraft facility is repayable on demand. For the avoidance of doubt, I quote the wording of clause 8.1, which reads as follows:

25. I reiterate that the balance of the overdraft facility is due and payable.”

The nature of the relationship between FRB as a bank and the appellants as customer

[12] Before turning to a consideration of the merits of the appeal, it is apposite to have regard to the nature of the relationship between the parties. In *Bredenkamp and Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA), Harms DP recognized the discussion by Moseneke AJ (as he then was) regarding the complex relationship between a bank and its customers in *Standard Bank of SA Ltd v Absa Bank Ltd* 1995

- (2) SA 740 (T) ([1995] 1 All SA 535) at 746G - 747E. Moseneke AJ said the following in this regard at 747A-E:

“In an unreported judgment, dated 21 February 1994, delivered in the Witwatersrand Local Division under case 31228/92, Nedcor Bank Ltd t/a Nedbank v H Bhyat Wholesalers CC and Another, Duke AJ examined the banker/customer relationship extensively and concludes,

as the learned writer Cowen in Negotiable Instruments 4th ed does, that the relationship between the bank and its customer is one which is sui generis. May I to this observation respectfully add that the relationship which exists between a banker and its customer is a collection of a number of complex juristic relationships which tend to vary from customer to customer, depending on the specific agreement which has been entered into between the customer and the bank. Naturally such relationship would exhibit in varying degrees certain features which have been recognised both in our common law as well as in various judicial dicta. However, in any given case, in my view, the proper course to take is not to apply a rigid and pre-existing characterisation of the customer-banker legal relationship, but to examine the specific legal nexus which exists between a particular banker and its customer. Indeed, some such relationships would have strong features of a principal and an agent; sometimes characteristics of a loan for consumption; and indeed sometimes such relationship is, as I have indicated earlier, one between a debtor and a creditor and very often the relationship would be a collection of features of each of these legal institutions I have referred to. I am consequently not persuaded by the argument that the only way to characterise or typify the right relationship between a banker and its customer is by resorting to agency.”

- [13] In the Bredenkamp judgment by way of analogy, the application and reasons for termination before the court a quo was summarized as follows:

“The application

- [6] The bank sought to justify its right to terminate its relationship with the appellants on two grounds. The first was that it had the right in terms of an express term of its contracts to close the accounts with reasonable notice. It also relied on an implied term with the same effect, namely that an indefinite contractual relationship may be terminated with reasonable notice. (An implied term is one implied by law into all contracts of a particular nature (a naturale). This means that it is a rule of law that can be varied or made inapplicable by agreement. A tacit term is one that has to be implied with reference to the presumed intention of the parties to a particular contract.)
- [7] The bank did not initially inform the appellants of its reasons for termination. One would assume that in the ordinary course of events the motive of a party in exercising a right - contractual in this case - is irrelevant. (A possible exception could be the abuse of rights.)
- [8] The final relief sought in the notice of motion was multi-pronged and wide-ranging. It was based primarily on the supposition that the contracts between the parties did not contain the express term. Probably realising that the term could be said to be implied, the appellants

sought an order declaring that the common-law rule is that an indeterminate contract may be terminated only in the event of a breach by the other party. In the event the affidavit of Bredenkamp, dealt with later, sought to make out a different case without an amendment of the notice of motion.

- [9] In the alternative, the appellants sought to attack the validity of the implied term and by implication, the express term. Apart from a generalised attack on the basis of both being contra bonos mores, the constitutional attack was particularised with reference to a breach of the following rights contained in the Bill of Rights, viz: s 9 (equality); s 10 (human dignity); s 14 (privacy); s 15 (freedom of religion, belief and opinion); s 16 (freedom of expression); s 18 (freedom of association); s 22 (freedom of trade, occupation and profession); s 25 (property); s 32 (access to information); s 33 (just administrative action); and s 34 (access to courts).
- [10] There was also a prayer for review of the bank's decision in terms of administrative justice principles on the basis that the appellants were entitled to a hearing before the decision to close the accounts was taken. The appellants have abandoned this leg of their case. However, they harked back to a right to be heard (not a right to a hearing) in another context.
- [11] The crucial relief sought was for an order that the bank had to 'maintain the accounts'
- presumably until the appellants were to commit a breach of contract. The apparent basis for the relief was that the term was invalid or that it flowed from the new common-law rule that was to be developed.

The reasons for termination

- [12] The bank disclosed its reasons for termination in its first set of affidavits. The decision came about because of the listing of Bredenkamp, and a number of entities owned or controlled by him, as 'specially designated nationals' (SDNs) by the US Department of Treasury's Office of Foreign Asset Control (OFAC) on 25 November 2008. OFAC administers and enforces economic and trade sanctions based on US foreign policy and national security goals. The bank became aware of the listing on 26 November.
- [13] MasterCard, a US company, is not permitted by US law to conduct any business directly or indirectly with any listed person or entity, and the Bank, by virtue of its relationship with MasterCard, could not permit an SDN to use a MasterCard. The bank was accordingly obliged to cancel the MasterCard account and Bredenkamp accepted before us that he was not entitled to any relief in relation to this account..."

(my emphasis)

- [14] In dealing with the Constitutional Court judgment of *Barkhuizen v Napier* [2007] ZACC 5; 2007

- (5) SA 323 (CC) (2007 (7) BCLR 691), Harms DP said the following in respect of the enforcement of a valid contractual term in Bredenkamp supra:

“[50] With all due respect, I do not believe that the judgment held or purported to hold that the enforcement of a valid contractual term must be fair and reasonable, even if no public policy consideration found in the Constitution or elsewhere is implicated. Had it been otherwise I do not believe that Ngcobo J would have said this (para 57):

‘Self-autonomy, or the ability to regulate one’s own affairs, even to one’s own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity. The other consideration is that all persons have a right to seek judicial redress.’

- [15] As to the question of fairness in the relationship of a bank and its customer, the following was said in Bredenkamp supra:

“Fairness

- [53] In the light of my conclusion that fairness is not a freestanding requirement for the exercise of a contractual right it is strictly unnecessary to consider the facts relating to fairness, but, because of the way the matter was argued, it is preferable to deal with the issue.
- [54] Fairness remains a slippery concept, as was illustrated by the fact that Jajbhay J found that the closing of the account was unfair, while Lamont J, on basically the same facts, found otherwise. I am in general agreement with the approach of Lamont J.
- [55] The appellants’ case in simple terms is this. They require bank accounts to conduct business locally. The closing of a bank account is a serious matter. If they were to approach one of the remaining three major banks in the country for an account they would have to disclose the fact of closure. Those banks would then establish from them the reason for closure. When informed, they would not grant the appellants banking facilities. The result of the closing of their accounts, they say, effectively ‘unbanked’ them (a term coined by counsel). This is due to the fact that the banking industry is in the hands of few who enjoy significant market power. It is accordingly a case ‘where private power

approximates public power or has a wide and public impact’, when everyone ‘is entitled to effective relief in the face of unjustified invasion of a right expressly or otherwise conferred by the highest law in our land’.

- [56] The appellants’ argument is in many respects circuitous, self-destructive and, in any event, without merit. They accept that in terms of the valid agreement the bank was entitled to terminate without any cause, but they ask for an order that the bank may only terminate on good cause. This would require a tacit term or the development of the common law, both of which they eschew. But, they say, in this case the bank cannot close the account with a bona fide reason because of consequences to them that cannot be laid at the door of the bank.

[57] The fact that the appellants as business entities are entitled to banking facilities may be a commercial consideration, but it is difficult to see how someone can insist on opening a banking account with a particular bank and, if there is an account, to insist that the relationship should endure against the will, bona fide-formed, of the bank...

...

[59] The fact that banks may not wish to provide listed entities with banking facilities is unrelated to the fact that there are only a few major banks in the country. A proliferation of banks would not have made any difference. The impact on the appellants was not caused by the decision to close the accounts; it was caused by the listing. It is therefore not a case of the abuse by the bank of private power that approximates public power.

[60] I find it difficult to perceive the fairness of imposing on a bank the obligation to retain a client simply because other banks are not likely to accept that entity as a client. The appellants were unable to find a constitutional niche or other public policy consideration justifying their demand...

[61] The appellants also submitted that the bank's decision was procedurally and substantively unfair. This argument was built on

quicksand because they abandoned an administrative law review; they do not suggest that the common law must be developed so that a party who is entitled to cancel a contract has to give the other party a hearing before cancellation; and they do not rely on a tacit term to that effect. Furthermore, a hearing in the form of a discussion would not have had any effect and would have been an exercise in futility. Bredenkamp presumably would have told the bank that the listing was not justified, and he may have produced evidence to that effect. But the bank's cancellation was not premised on the truth of the allegations underlying the listing; it was based on the fact of the listing and the possible reputational and commercial consequences of the listing for the bank.

[64] This leaves for consideration the question whether the Bank had (in terms of the relief presently sought) good cause to close the accounts. The bank had a contract, which is valid, that gave it the right to cancel. It perceived that the listing created reputational and business risks. It assessed those risks at a senior level. It came to a conclusion. It exercised its right of termination in a bona fide manner...

[65] The appellants' response was that, objectively speaking, the Bank's fears about its reputation and business risks were unjustified. I do not believe it is for a court to assess whether or not a bona fide business decision, which is on the face of it reasonable and rational, was objectively 'wrong' where in the circumstances no public policy considerations are involved. Fairness has two sides. The appellants approach the matter from their point of view only. That, in my view, is wrong."

The pleadings

- [16] The overarching submission by Adv Louw, notwithstanding the letter of demand of 14 September 2020 in which FRB relies on clause 5.4 of the OFA, is that FRB is entitled to cancel and call up the overdraft facility in terms of clause 8.1. The reliance on clause 8.1 as the papers reflect was raised for the first time in the replying affidavit, when FRB was unable to present proof that its Credit Card Division had commenced legal proceedings against the first appellant. This begs the question whether it is permissible for FRB to rely on what it has set out in its replying affidavit in respect of clause 8.1 to address the deficiency in respect of proof of legal proceedings against the first appellant in respect of its credit card facility in the founding affidavit and the replying affidavit.
- [17] It is trite that a Court is vested with a discretion whether or not to permit shortcomings in founding affidavits with reference to allegations made in a replying affidavit. This discretion can, however, only be exercised after having careful regard to the basic principles applicable to application proceedings.
- [18] It is a basic premise of application proceedings that an applicant must make out its case in the founding affidavit. In *Titty's Bar and Bottle Store (Pty) Limited v ABC Garage (Pty) Limited* 1974
- (4) SA 362 (T) at 369A-B, the principle was made clear that the case made out in the founding affidavit is what the respondents are called

upon to answer or meet. The founding affidavit constitutes both the pleadings and the evidence on which the applicant relies. See: *Transnet Limited v Rubenstein* 2006 (1) SA 591 (SCA) at para 28; *Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008 (2) SA 184 (SCA) at para 43. In *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger* 1976 (2) SA 701 (D) at 704G to 705C and 706I to 707B, Miller J said:

"...In proceedings by way of motion the party seeking relief ought in his founding affidavit to disclose such facts as would, if true, justify the relief sought and which would, at the same time, sufficiently inform the other party of the case he was required to meet. If the founding affidavit is allowed to be supplemented by adding further facts in a replying affidavit, the consequence would often (but not necessarily always) be that a fourth and possibly also a fifth set of affidavits would be required – a situation the development of which the Court would not lightly be disposed to facilitate or encourage..."

In consideration of the question whether to permit or to strike out additional facts or grounds for relief raised in the replying affidavit, a distinction must, necessarily, be drawn between a case in which the new material is first brought to light by the applicant who knew of it at the time when his founding affidavit was prepared and a case in which facts alleged in the respondent's answering affidavit reveal the existence or possible existence of a further ground for the relief sought by the applicant. In the latter type of case the Court would obviously more readily allow an applicant in his replying affidavit to utilise and enlarge upon what has been revealed by the respondent and to set up such additional ground for relief as might arise therefrom.

It is one thing to say that an applicant might or ought, by careful consideration of a piece of information conveyed by the respondent

before commencement of proceedings to have made certain deductions therefrom which would or might have led him to investigate and

discover further facts relative to his claims; it is, however, an entirely different thing to say that the applicant knew all the

relevant facts when he commenced proceedings but for some unexplained reason omitted to state or rely on them in his founding affidavit – it is when that may properly be said of an applicant, that the rule against the introduction will otherwise than in very exceptional cases be strictly applied against him.”

See too: *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd* 2013 (2) SA 204 (SCA) at para [26].

- [19] FRB in the founding affidavit relied on a specific breach of the OFA with specific reliance on clause 5.4. Notwithstanding its reliance on clause 5.4, FRB failed to attach to its founding affidavit any proof of the alleged breach on the first appellant’s credit card facility and pending legal action in that regard. This is the nature of the pleadings and the evidence the appellants were called to meet and which they answered by alleging that there was in fact no such breach. I digress for a moment. The court a quo found that the appellants failed to provide a valid and proper defence on why they failed to comply with the letters of demand. Nothing turns on this issue for purposes of this appeal.
- [20] The court a quo found that clause 5.4 was not relevant to the determination of the application as the appellants were aware of clause 8.1 that permitted FRB to terminate the credit facility agreement and to claim the outstanding amount. I am in respectful disagreement.
- [21] It is clear that the case made out by FRB in the founding affidavit by relying on clause 5.4 was still persisted in, in the replying affidavit, still with no documentary proof of such alleged breach and an undertaking to adduce such proof at a later stage. Such proof was never subsequently adduced. Realising the deficiency in its case, FRB grasped at the clause 8.1 straw. Was this permissible? Certainly not.
- [22] The appellants raised a bona fide defence to causa (the alleged breach of clause 5.4) which gave rise to the application by specifically denying that any legal action was pending in respect of its credit card facility premised on a breach of that agreement. There is no basis on which the court a quo could therefore simply dismiss FRB’s reliance on clause 5.4 as being irrelevant to the matter and then to acquiesce in FRB’s alternative reliance on clause 8.1, for the first time, in the replying affidavit. What is quite apparent is the alleged breach of the credit card terms and not the overdraft facility of R1 400 000.00. And it is for this very reason that FRB was bound to make its case on its reliance on clause 5.4 which it failed to do.

[23] Fairness applies to both parties. When regard is had to Bredenkamp supra, it is clear that whilst the bank did not initially give any reason for closing the accounts held by Bredenkamp, it later specifically

identified the reason and the very basis on which it closed the accounts. In the present matter, FRB made it clear to the appellants

that the basis for calling up the overdraft facility and demanding payment was a breach of clause 5.4. This is demonstrated by FRB as its causa in the letter of demand of 14 September 2020, the founding affidavit and the replying affidavit.

[24] As quoted above, Harms DP at paragraph [64] of Bredenkamp begged the question whether the bank had (in terms of the relief sought) good cause to close the accounts. Harms DP recognised as Adv Louw sought to extract from paragraph [64] in his heads of argument, that the bank had a contract, which was valid and gave it the right to cancel. Harms DP, however, went further by having regard to the reason for termination relied on by the bank and found that after it had assessed the risks to the bank at senior level, it came to a conclusion and thereby exercised its right of termination

in a bona fide manner.

[25] FRB, in the absence of evidence, both in its founding affidavit and replying affidavit to prove a breach of clause 5.4, in respect of the overdraft facility of R1 400 000.00 and not the credit card facility, failed to act in a bona fide manner, contrary to the tenets of Bredenkamp when it changed the goal posts by relying on clause 8.1 as a matter of last resort. FRB failed to prove its case in the founding affidavit and its attempt at rescuing its case in the replying affidavit goes against accepted and trite authority on pleadings in application proceedings.

[26] It must be underscored that this appeal as is the norm, has been considered on the peculiar facts and circumstances of the matter. It should not be seen as authority that a bank cannot invoke clause 8.1 or any analogous clauses in overdraft facility agreements without affording a customer either reasons for such termination or an opportunity to advance reasons on the part of the customer why such termination should not be effected. However, a financial institution such as a bank must in clear and concise terms set out the breach in each particular agreement, which will entitle it to cancel the agreement and to call up the overdraft facility. This is not a one size fits all situation. If a customer complies with an overdraft facility on a loan account (or bond) but fails to timeously honour the credit card facility, the latter (credit card facility) can be called up and cancelled without affecting the former (the loan agreement). Every facility constitutes a new and independent agreement and should be treated likewise or according to its peculiar terms and conditions.

Conclusion

[27] The appeal accordingly stands to be upheld with costs and the order of the court a quo stands to be set aside and replaced with order dismissing the application with costs, to be taxed on a party and party basis.

Order

[28] In the result, the following order is made:

A H PETERSEN

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION OF THE HIGH COURT

I agree

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT

A REDDY

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the Appellant: Adv D Smit Instructed by Nienaber & Wissing Attorneys 4204 Palmer Crescent Leopard Park MAHIKENG For the Respondent: Adv N G Louw Instructed by: Maree & Maree Attorneys 11 Agate Avenue Riviera Park MAHIKENG DATE OF HEARING: 21 APRIL 2023 DATE OF JUDGMENT: 23 MAY 2023

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Prepared on 11 October 2026 · Esheria