DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

29.09.2016 DATE SIGNATURE

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

29/09/2016

CASE NO: 33910/2009

In the matter between:

ABSA BANK LIMITED **PLAINTIFF**

And

COETZEE, CHRISTOFFEL FRANS **1ST DEFENDANT**

COETZEE, ESTHER **2ND DEFENDANT**

JUDGMENT

RAULINGA J

[1] In this matter, the defendant was declared over indebted and through the process as envisaged by the National Credit Act 34 of 2005 was placed under debt review in terms of Section 87 on 18 March 2008.

[2] The plaintiff subsequently applied for a rescission of that order and that application is still pending as it was (postponed sine die).

[3] The defendants are indebted to the plaintiff in terms of four mortgage loans advanced by the plaintiff to the defendants. The defendants failed to comply with their obligations in terms of the mortgage loan agreements and/or mortgage bonds and to attend to payment of the agreed monthly instalment payments.

[4] Accordingly and as a result of the aforesaid breach as well as the defendants' failure to remedy the said breach, the plaintiff caused for legal action to have been instituted against the defendants for payment of the monies lent and advanced as well as seeking to have the immovable property declared specially executable.

[5] In essence the defendants in defence alleged that:

[5.1] The estate of the first defendant at the stage when the plaintiff enforced the debt was subjected to a debt review order as provided for in terms of section 86(7)(c)(ii) of the Act;

[5.2 The first defendant applied for debt review on 28 February 2008 and notice to this extent was provided to the plaintiff on 28 February 2008;

[5.3] The first defendant's debt counsellor concluded an assessment and found the first defendant to be over indebted and consequently proceeded to in terms of section 86(7)(c)(ii) of the Act to issue a proposal to restructure the first defendant debt repayments which was provided to the plaintiff on 12 March 2008;

[5.4] The plaintiff was notified of the first defendant's over indebtedness on 12 March 2008. The plaintiff purportedly elected not to oppose the first defendant's debt review application and such an order restructuring the first defendants debt was made on 18 March 2008 ("the debt review order");

[5.5] The plaintiff in response to the debt restructuring order granted in its absence, launched an application on 3 June 2008 to have the said order set aside;

[5.6] The rescission application was postponed sine die in order to facilitate settlement discussions between the parties. ABSA never proceeded with the rescission application due to the judgment in Firstrand Bank Ltd v Fillis and Another 2010 (6) SA 565 (ECP) which renders it superfluous;

[5.7] The defendants admitted at all stages that they are in arrears with the debt review order, but submitted that until the Court Order for Debt Review is set aside, the debt is not due and payable or enforceable.

[5.8] On 22 December 2008 the plaintiff caused for a notice in terms of section 129 of the Act to have been forwarded to the applicants which notice according to the defendants was without force or effect by virtue of the debt restructuring order;

[5.9] A subsequent notice in terms of section 86(10) was delivered by the plaintiff on 22 September 2008 was irregular and without any legal basis on the grounds that:

(a) The circumstances described in section 88(3) of the Act had not been in existence at that stage and as such the attempt to terminate the debt review

was without any effect; and

(b) The first defendant had been making payments in terms of the debt restructuring order;

[5.10] The summons was instituted in the total disregard of the debt restructuring.

[6] At the commencement of the trial it was common cause;

6.1 The conclusion of the various loan agreements as well as the registration of the subsequent mortgage bonds;

6.2 That the monies provided for in terms of the lending instruments referred to had indeed been advanced to the defendants;

6.3 That the defendants were in breach of their obligations as far as the loan agreements were concerned more specifically the payments terms provided; and

6.4 The defendants had failed to remedy the aforesaid breach.

[7] The action proceeded to adjudication by trial on 31 July 2012 and by virtue of the limited issues raised by the defendants, the plaintiff closed its case after having led evidence in respect of the certificate of balance only.

[8] On behalf of the defendants Mr Francois Greeff the attorney of record acting on behalf of the defendants and who is also the debt counsellor of the defendants, testified and, inter alia, under cross examination conceded that;

8.1 a notice in terms of section 129 of the Act had been received by the first defendant prior to the first defendant having approached the debt counsellor;

8.2 in a letter dated 25 July 2008 marked as **Annexure "A1"** Mr Greeff confirmed that notwithstanding the debt restructuring order having been granted on 18 March 2008, that no payments had been received from the defendants;

8.3 Mr Greeff on 11 August 2008 had received the notice in terms of section 86(10) in terms whereof the debt review of the first defendant had been, terminated.

[9] The history of this matter is that it was heard on the 31st of July 2013, and request for reasons in terms of rule 49(1) (c) was done on the 14th August 2013. Application for leave to appeal was filed on the 22nd of July 2014 which is a year after the trial of the matter. All these only landed on my desk on 05 September 2016.

[10] Be that as it may, this is now water under the bridge and I will therefore proceed with the reasons for judgment.

[11] The plaintiff's course of action as indicated is contained in the declaration. The issue pertaining to pleadings was dealt with in the matter of *Du Toit obo Dikeni v Road Accident Fund* 2016 (1) SA 367 (FB) and more especially the quotation on page 381, thus:

> "The following principles enunciated by *Farlam et al Erasmus Superior Court Practice* at B1/129 – 130 with reference to several authorities are instructive.
>
> 'the object of pleading is to define the issues so as to enable the other party to know what case he has to meet. The parties are, therefore, limited to their pleadings: a pleader cannot be allowed to direct the attention of the other party to one issue, and then at the trial attempt to canvas another. However, since pleadings are made for the court it is the duty of the court to determine what are the real issues between the parties and, provided no possible prejudice can be caused to either party, to decide the case on these real issues. The general principle is that the parties will be held to the issues pleaded unless there has been a full investigation of the matter falling outside the pleadings.....'
>
> See also the decision in ***Minister of Safety and Security v Slabbert 2010*** (2) All SA 475 (SCA) where it was stated that a party has a duty to allege in pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial.

[12] In my view the plaintiff has transversed the issues as raised in its pleadings, and therefore that is in compliance with the reasoning in the two matters above. It seems to me that the defendants seek reliance on *Absa Bank Ltd v Wilkie* (1201/2013) [2013] ZAECPEHC 55 (judgment handed down on 3 September 2013) wherein Goosen J concluded that:

"[11] In order to establish its cause of action the plaintiff must allege the jurisdictional facts necessary to establish its entitlement to proceed to enforce the terms of the credit agreements which are subject to the provisions of the NCA.

[12] ...

[13] In this instance the plaintiff's entitlement to prosecute its claim against the defendant is not clearly established. On the contrary the plaintiff has failed to make any averments regarding its entitlements to proceed in terms of section 88(3) of the NCA."

[13] The findings of Goosen J were followed in the same division (Eastern Cape Division) in the matter of *First Rand Bank Ltd v Gonzales* 2014 JDR 0464 (ECP).

[14] In *Ferris and Another v FirstRand Bank Ltd* 2014 (3) SA 39 (CC) the Constitutional Court confirmed the findings in *FirstRand Bank Ltd v Fillis and Another* 2010 (6) SA 565 (ECP) and held that:

" It seems to me that the original agreement is enforceable without further notice of the relevant debt-restructuring order is breached. In Fillis the Eastern Cape Division of the high court correctly stated:

'it follows, in my view, as a matter of interruption, that once [the debtor is in default of the relevant credit agreement and is in default of the relevant debt-restructuring order] the credit provider is at liberty to proceed and to exercise and enforce, by litigation or other judicial process, any right or security under credit without further notice."

[15] The findings of Goosen J were overturned in Ferris *supra when the following is stated:*

"It follows that Mr and Mrs Ferris' breach of the debt – restructuring order entitled FirstRand to enforce the loan without further notice. However, even if further notice were required, its absence is a purely dilatory defence – a defence that suspends proceedings rather that precludes a cause of action – and is not an irregularity that established that a judgment has been 'erroneously granted' justifying rescission under rule 42(1)(a)."

[16] It therefore follows that both the Wilkie supra and Gonzales supra decisions are of no assistance to the present case for the reasons that:

16.1 Both matters concerned applications for summary judgment and the conclusions reached were relevant only in respect of the question whether the defendants in the respective matters had established a *bona fide* defence.

16.2 The objection raised by the defendants to the Bank's pleadings constitutes an issue that should rightfully be determined by way of an exception – a step which the defendants failed to take in the present matter.

16.3 Wilkie supra did not concern a termination of a debt review in terms of section 86(10) but instead related to the enforcement of a credit agreement in terms of section 129 of the Act. Although Gonzales supra did concern itself with a termination in terms of section 86(10) it did so on the principles established in Wilkie supra.

[17] Even in the event where Wilkie and Gonzales are found to be in favour of the defendants, their case is plagued by the fact that Mr Greeff under cross-examination conceded that:

17.1 A notice of section 129 of the Act had been received by the first defendant prior to the first defendant having approached the debt counsellor.

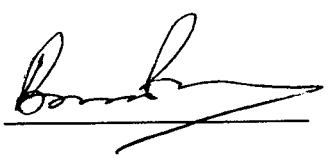
17.2 In a letter dated 25 July 2008 marked as Annexure "A1" Mr Greeff confirmed that notwithstanding the debt restructuring order having been granted on 18 March 2008, that no payments had been received from the applicants;

17.3 Mr Greeff on 11 August 2008 had received the notice in terms of section 86(10) in terms whereof the debt review of the first applicant had been, terminated.

[18] Further to this, the debt counsellor concluded that the first defendant was over indebted and issued a proposal containing a re-arrangement of the first defendant's financial obligations and over-indebtedness of the second defendant and therefore her position remains unaltered. This is also in view of the fact that the two defendants are married out of community of property.

[18] It is therefore my considered view that the submissions by the plaintiff be dismissed with costs.

[19] In the circumstances, I make an order granting plaintiff's relief in terms of prayers 1; 2 and 3 and I make no order on prayer 4. The defendants are ordered to pay the costs.



Raulinga J

APPEARANCES:

1. For the Plaintiff : Mr Aucamp

   Instructed by : Tim Du Toit & Co Inc

2. For the defendants : Mr Du Plessis

   Instructed by : Greeff & Van Wyk Attorneys

3. Date of hearing : 31 July 2013

4. Date handed down : 29 September 2016