

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER:

16901/2010

5 **DATE:**

17 OCTOBER 2011

In the matter between:

10 **FIRSTRAND BANK LIMITED (FORMERLY**
KNOWN AS FIRST NATIONAL BANK
OF SOUTHERN AFRICA LIMITED)

Applicant
(Plaintiff)

and

15 **RUWEYDA ALEXANDER**

Respondent
(Defendant)

J U D G M E N T

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BOZALEK, J:

25 This is an opposed summary judgment application in which the
defendant filed an opposing affidavit, but was neither
represented nor appeared in person when the application was
moved. The applicant/plaintiff seeks judgment in the sum of
R538 000,00 odd, plus interest, being the monies due by
reason of the defendant's defaulting on her obligations in
terms of a loan agreement. In addition the plaintiff seeks an

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order declaring executable certain immovable property mortgaged to it by the defendant as security for her obligations in terms of the underlying loan agreement.

5 The only defence raised by the defendant is a technical one, namely that she had initiated debt review proceedings in terms of the particular credit agreement and, although the plaintiff had purported to give notice terminating such proceedings, it had done so prematurely, i.e. within the period of 60 business
10 days prescribed in section 86(1) of the NCA. Plaintiff seeks to counter this defence by pointing out that its notice of termination applied to earlier debt review proceedings initiated by the defendant. This in itself is no answer to the defendant's complaint since I am aware of no provision in the
15 NCA stipulating that a debtor is limited to only one opportunity to institute debt review proceedings. It is unnecessary, however, to make any finding on this question since the summary judgment application can be determined on another issue.

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In its summons the plaintiff merely alleges that it has complied with the provisions of s86(10) without furnishing any further detail, nor does it take the matter any further in its affidavit in support of its summary judgment application. Its case, in
25 regard to its section 86(10) termination, is only set out in its

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practice note affidavit, in terms of practice note 33, where it simply states that on 23 June 2010 it terminated the applicant's debt review process and annexes a copy of such a letter. It bears mentioning that such termination would, on the
5 face of it, be premature in relation to the debt review proceedings apparently initiated by the defendant on 14 May 2010. In any event, as was held in Rossouw v FirstRand Bank, a creditor in the position of the plaintiff herein, must set out its case of compliance with the notice and termination provisions
10 of the NCA in its summons or affidavit in support of summary judgment.

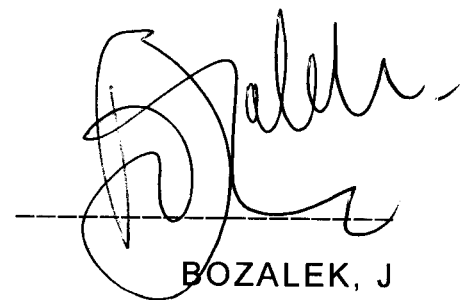
In the present case neither document even mentioned the defendant's debt review proceedings, let alone referred to the
15 specific notice of termination upon which the plaintiff relies. On behalf of the plaintiff, Mr Jonker, relied upon a combination of a judgment by Cleaver, J in Standard Bank v Die Rassie & Ronel Kleyn Familietrust & 2 Ander, an unreported judgment handed down on 3 December 2010, and the fact that the
20 present summons was issued prior to the judgment in Rossouw to justify plaintiff's non-compliance with the requirements of proving proper notice or termination in terms of section 86(10) of NCA.

25 In my view the judgment of Cleaver, J is distinguishable, since

the defendants therein did not deny compliance by the plaintiff with the relevant provisions in contrast to the defendant herein, who squarely disputes proper compliance by the plaintiff. As far as the timing of the Rossouw judgment is
5 concerned, that judgment declared the correct position in law and there is no question of it only having a prospective effect.

For these reasons I consider that the applicant has failed to make out a case for summary judgment and in the
10 circumstances summary judgment must be refused and the defendant granted leave to defend the action with the cost of the application for summary judgment to stand over for determination by the trial court.

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BOZALEK, J