

ZB BANK LIMITED
versus
ERIC ROSEN (PRIVATE) LIMITED
and
ERIC ANTHONY ROSEN
and
ELIZABETH ROSEN

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 15 January 2015 and 25 February 2015

Opposed application – special case

O. Mutero, for the plaintiff
T. K Hove, for the defendants

MAFUSIRE J: By agreement the parties referred this matter to court as a special case in terms of Order 29 of the Rules of this Court. In my view, this was a mistake. My reasons for saying this are towards the end of this judgment.

The defendants' defence was a frontal attack on the propriety of the penalty rate of interest levied and claimed by the plaintiff on the monies loaned and advanced to the first defendant. The plaintiff was a registered commercial bank. The first defendant, undoubtedly the *alter ego* of the second and third defendants - themselves husband and wife - obtained from the plaintiff, a revolving credit facility in the sum of US\$50 000-00 to boost working capital. Repayments would be made in instalments over twelve months. Interest would be charged at a flat rate of 30% per annum. In the event of a default the penalty rate of interest was pegged at 50% per annum. It would change from time to time. The second and third defendants bound themselves as sureties and co-principal debtors with the first defendant for the due repayment of the loan.

According to the statement of agreed facts the plaintiff duly disbursed the loan. The first defendant duly utilised the proceeds. However, it failed to repay as per agreement. From time to time the loan would be "rolled over". The effect of those "roll overs" was such that the total lending to the first defendant was in the sum of US\$264 371-25, being the capital

sum; US\$209 082-49 being the interest accrued, and US\$3 475-76 being the bank charges. Against that the first defendant had paid a total of US\$236 272-44. The balance outstanding was said to be in the sum of US\$51 657-06 of which US\$45 966-07 was the capital; US\$5 670-99 the interest, and US\$20-00 the bank charges. Eventually the plaintiff issued summons. The parties were agreed that if the defendants' defence did not succeed then those amounts would be the extent of their liability.

The defendants' defence was that the plaintiff's penalty rate of interest at 50% per annum was usurious, contrary to public policy and therefore unlawful. They referred to a number of statutes. The first was the Prescribed Rate of Interest Act [*Cap 8:10*]. This Act empowers the minister of justice, with the approval of the minister of finance, to prescribe or fix the rate of interest on certain debts. By statutory instrument 164 of 2009 [Prescribed Rate of Interest Notice, 2009] ("*SI 164/09*"), the prescribed rate at the time of this case was 5%.

However, it is not understood why the defendants ever made reference to this Act. It does not apply. By s 4, the prescribed rate of interest only applies to interest-bearing debts the rates of which are not governed by any other law or an agreement or a trade custom or in any other manner. In *casu* the rate was governed by the loan agreement.

The next statute referred to by the defendants was the Moneylending and Rates of Interest Act [*Cap 14:14*]. By s 8, no lender can stipulate, demand or receive from the borrower, interest (on money lent and advanced) at a rate greater than the prescribed rate.

Again it is not understood why the defendants made reference to this Act either. In terms of s 20, the Act does not apply to money lending by banks. The plaintiff was a bank.

The third piece of legislation referred to by the defendants was the Consumer Contracts Act [*Cap 8:03*]. By its preamble the purpose of the Act is to provide relief to parties to consumer contracts which are unfair or contain unfair provisions. In terms of s 2 a "**consumer contract**" is defined to mean a contract for the sale or supply of goods or services or both. The defendants argued that a loan agreement was a contract for the supply of services, namely banking services.

In terms of s 4 of the Consumer Contracts Act, the court is empowered to grant any of the specified reliefs if it is satisfied that a consumer contract is unfair. These include:

- cancelling the whole or any part of the contract;
- varying the contract;

- enforcing only part of the contract;
- declaring the contract unenforceable for a particular purpose only;
- ordering restitution or compensation or reducing the amount payable under the contract.

The court is not confined to the specified remedies. It can make any such other order upon any such conditions as it may fix.

The Act does not exactly define unfairness. However, in s 5 it lists instances when a consumer contract may be deemed unfair. These are:

- where the contract as a whole results in an unreasonably unequal exchange of values or benefits;
- where the contract is unreasonably oppressive in all the circumstances;
- where the contract imposes obligations or liabilities on a party which are not reasonably necessary to protect the interests of any other party;
- where the contract is contrary to commonly accepted standards of fair dealing;
- where the contract is expressed in language not readily understood by a party;

Subsection (2) of s 5 of the Act says that a court shall not find a consumer contract to be unfair solely because, *inter alia*, it imposes onerous obligations on a party or that a party may have been able to conclude a similar contract with another person on more favourable terms or conditions.

Subsection (3) of s 5 of the Act says that in determining whether or not a consumer contract is unfair the court shall have regard to the interests of both parties. In particular, it shall take into account, where appropriate, any prices, charges, costs or other expenses that might reasonably be expected to have been incurred if the contract had been concluded on terms and conditions other than those on which it was concluded.

Finally, in terms of the Act, the rights conferred by it cannot be waived by agreement unless such waiver is made during the proceedings.

The last legislation referred to by the defendants was the Contractual Penalties Act [Chapter 8:04]. The preamble to this Act says, *inter alia*, it is an Act to provide for the enforcement of penalty clauses in contracts. A “**penalty**” is defined to include any money

which a person is liable to pay, or any money which a person is liable to forfeit under a penalty stipulation. A “**penalty stipulation**” is defined to include a contractual provision under which a person is liable to pay any money as a result, or in respect of, an act or omission in conflict with a contractual obligation.

Section 4 of this Act starts by saying that a penalty stipulation is enforceable. However, it goes on to empower the court to reduce a penalty stipulation that may appear to be out of proportion to any prejudice suffered by the creditor as a result of the act or omission under a penalty stipulation. The court may grant any other relief as it may consider fair and just to the parties.

The Act ends by outlawing any purported waiver of any rights or benefits conferred under it.

As I understood him, and in my own words, I synthesise Mr *Hove*'s argument as follows:

- (1) The plaintiff's penalty rate of interest was excessive, burdensome, oppressive and out of proportion to any prejudice that it may have suffered by reason of the defendants' failure to pay the rest of the debt on time.
- (2) An interest rate of 50% per annum was usurious, contrary to public policy and therefore illegal. The empirical evidence necessary to show this was self-evident and the court could take judicial notice of certain economic aspects such as the annual rate of inflation obtaining in the country.
- (3) The annual rate of inflation in Zimbabwe was no more than 5%. Even though the Zimbabwean economy had adopted the multi-currency system, the United States dollar was predominate. It was the currency against which all the other currencies of the world are bench-marked. In the United States of America, the source country for the currency in use in Zimbabwe, interest rates are no more than 3% per annum.
- (4) A penalty rate of interest of 50% per annum betrayed a hang-over from a by-gone era in Zimbabwe before the advent of the multi-currency in 2009 when exploitive trade practices ran rampant owing to super-hyper-inflation that obtained in the economy.
- (5) Other commercial banks such as Stanbic Bank and the Standard Chartered Bank have pegged their interest rates at no more than 15% per annum. The plaintiff's rate at 50% was so way out of range as to stifle economic growth.
- (6) The plaintiff was the defendants' bank for a long time. The defendants could not have been expected to start another relationship with another bank which might have been offering cheaper money.

- (7) By the Acts of Parliament referred to above, the Legislature had given the courts the green light to close up the gap in the law as far as fixing appropriate rates of interest under the common law was concerned. It was time for judicial activism. The courts should put a cap on the maximum rates of interest charged on loans and put a stop to the mischief brewed by greedy moneylenders¹.
- (8) The courts should not shirk from their responsibility to legislate. It is part of their judicial function. The Supreme Court has given the green light. In *Zimnat Insurance Company Limited v Chawanda*², GUBBAY CJ said³ (McNALLY and MANYARARA JJA concurring):

“Law in a developing country cannot afford to remain static. It must undoubtedly be stable, for otherwise reliance upon it would be rendered impossible. But at the same time if the law is to be a living force it must be dynamic and accommodating to change. It must adapt itself to fluid economic and social norms and values and to altering views of justice. If it fails to respond to these needs and is not based on human necessities and experience of the actual affairs of men rather than on philosophical notions, it will one day be cast off by people because it will cease to serve any useful purpose. Therefore, the law must be constantly on the move, vigilant and flexible to current economic and social conditions.

Today the expectations amongst people all over the world, and particularly in developing countries, are rising, and the judicial process has a vital role to play in moulding and developing the process of social change. The Judiciary can and must operate the law so as to fulfil the necessary role of effecting such development.

It sometimes happens that the goal of social and economic change is reached more quickly through legal development by the Judiciary than by the Legislature. This is because judges have a certain amount of freedom or latitude in the process of interpretation and application of the law. It is now acknowledged that Judges do not merely discover the law, but they also make law. They take part in the process of creation. Law-making is an inherent and inevitable part of the judicial process.

The opportunity to play a meaningful and constructive role in development and moulding the law to make it accord with the interests of the country may present itself where a judge is concerned with the application of the common law, even though there is a spate of judicial precedents which obstructs the taking of such a course. If judges hold their precedents too closely, they may well sacrifice the fundamental principles of justice and fairness for which they stand. In a famous passage LORD ATKIN, referring to judicial precedents, said:

‘When these ghosts of the past stand in the path of justice clanking their medieval chains the proper course is for the judge to pass through them undeterred.’”

¹ Mr *Hove* called them ***Shylocks***, after a character in the Shakespearian play: *Merchant of Venice*, who was a ruthless moneylender.

² 1990 (2) ZLR 143 (SC)

³ At pp 153 - 154

In counter, Mr *Mutero*, for the plaintiff, stressed the principle that where parties have entered into a contract freely and voluntarily its validity ought to be preserved. He submitted that other than the Contractual Penalties Act, none of the other pieces of legislation referred to by the defendants was applicable. With regards the Consumer Contracts Act in particular, Mr *Mutero* said it applies only to contracts for the sale or supply of goods or services. Banks lend money. To offer loans is not to sell or supply goods or services.

Mr *Mutero* further submitted that while the Contractual Penalties Act did apply, nonetheless the onus had been on the defendants to provide empirical evidence to show that a penalty rate of 50% per annum was disproportionate to the cost incurred by the plaintiff in procuring the money that it had lent to the defendants. Without that evidence, the court could not possibly grant relief. The plaintiff did not agree with the defendants' statistics.

Finally, Mr *Mutero* submitted that the defendants' call for judicial activism to fix the interest rates was misplaced. Interest rates on loans are influenced by a number of factors, not least, the state of the economy, the risk associated with the loan, the cost of funds to the lender and the international markets.

That was the case before me. I then wondered what interest is.

(a) Interest in general

It appears that since the beginning of time the question of interest has vexed lenders, borrowers, princes, emperors, rulers and virtually every other society. Even God seemed apprehensive about the practice of charging interest by Israelites on fellow Israelites. It seems the basic question has been to find the right balance between the competing interests of lenders and borrowers. In my view, since time immemorial, interest ceased to be a private concern of the individual parties to the transaction. It became very much a public policy issue. So what really is interest? What is its purpose?

(b) What is interest? What is its purpose?

WEBSTER's *New Twentieth Dictionary*, Unabridged Series, 2nd ed. and the Concise Oxford Dictionary define interest as money paid for the use of money lent or for not exacting

repayment of a debt. FA MANN *The Legal Aspect of Money*⁴, (quoted with approval by CHINHENGO J in *Mawere v Mukuna*⁵) says⁶:

“... interest is awarded to compensate for the deprivation of the use of money due until payment.”

In the field of commerce I would say, to the lender, interest is the profit on the loan that the lender receives. To the borrower, it is the cost on the loan that he pays. MANN says it is not the purpose of interest to preserve the real value of the sum due or to provide protection against inflation: see *Pickett v British Rail Engineering Limited*⁷.

It seems there are a number of factors that are taken into account in arriving at the rate of interest in any given situation. These include the cost of the funds to the lender; the risk associated with the borrower, taking into account his creditworthiness, or lack of it; the lenders' overheads and the margin of profit desired; the country risk, and so on. In *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC*⁸: PONNAN JA said:

“... [The rate of interest levied depends upon various factors, not least the risk to the lender, which in turn is usually dependent upon whether the creditor is well or ill-secured. And, it can hardly be disputed that inasmuch as profit varies and fluctuates, so too must interest, which by its very nature is representative of profit.”

(c) Interest in Biblical Times

In the Bible God simply forbade the Jews from charging interest on monies lent to fellow Jews in need. In the Book of EXODUS, Chapter 22, verse 25, God, through Moses, decreed⁹:

“²⁵If you lend money to one of my people among you who is needy, do not be like a moneylender; charge him no interest.”

In DEUTERONOMY 23, verses 19 and 20 God said:

“¹⁹Do not charge your brother interest, whether on money or food or anything else that may earn interest. ²⁰You may charge a foreigner interest, but not a brother Israelite, so that the LORD your God may bless you in everything you put your hand to in the land you are entering to possess.”

⁴ 4th ed.

⁵ 1997 (2) ZLR 361 (H)

⁶ At p 110 (n 146)

⁷ [1980] AC 136

⁸ 2011 ZASCA 45

⁹ New International Version [NIV]

In LEVITICUS 25, verses 35 – 36 God said:

“³⁵If one of your countrymen becomes poor and is unable to support himself among you, help him as you would an alien or a temporary resident, so he can continue to live among you. ³⁶Do not take interest of any kind from him, but fear God, so that your countryman may continue to live among you.”

Evidently, God did not ban the charging of interest *per se*. Nonetheless, He seemed concerned that the practice had the potential to cause social problems.

In Jesus’ times it seems the charging of interest was permissible. In the parable of the talents in MATTHEW Chapter 25, Jesus rapped the lazy servant who had failed to invest the gold coin given him. In verse 27 Jesus said:

“²³Well then, you should have put my money on deposit with the bankers, so that when I returned I would have received it back with interest.”

(d) Interest in Roman and Roman-Dutch times

It seems in Roman and Roman-Dutch times the question of interest, as in Biblical times, continued to be a cause for concern amongst the authorities. The charging of interest on monies lent was permissible. But some restrictions were imposed. According to JOUBERT JA in *LTA Construction BPK v Administrateur, Transvaal*¹⁰, quoted with approval by BLIEDEN J in *Sanlam Life Insurance Limited v South African Breweries Limited*¹¹, the concept of interest was conceived and practised from about 150 BC to 250 AD during the times of the Roman Empire. The economy of the Roman Empire was flourishing. It had a well-developed monetary system. Moneylenders had emerged. They charged interest on the capital amount. The interest was money paid for the capital sum advanced. Then interest was known as usury. It was the proceeds of the monies lent. The person paying the interest was called the *usurarius*.

One of the restrictions placed on the charging of interest in Roman times was that it could only be claimed if it had expressly been included in a promise, called *stipulatio*. Furthermore, the ruling authorities, from time to time, employed various methods to limit the interest which could be claimed. The moneylenders had become greedy. Measures were deemed necessary to provide protection or relief to the borrowers. One such measure was to limit the rate at which interest could be charged. A Watchtower Bible and Tract Society

¹⁰ 1992 (1) SA 473 (A)

¹¹ 2000 (2) SA 628 (W)

publication that I once came across, titled *Insight on the Scriptures*, Volume one (1988), said¹² that at Babylon, which had a well-developed loan system, the rate of interest, according to the CODE HAMMURABI, was, in the second millennium BCE, 20 percent on money and grain lent. A merchant charging a higher rate would forfeit the amount lent.

Another measure to protect borrowers from money lenders, according to JOUBERT JA in *LTA Construction BPK*, (*supra*), was to prohibit the levying of interest on interest. Yet another measure was the prohibition against interest *in duplum*. The learned judge of appeal noted that as early as 529 AD the Emperor Justinian issued the following decree:

- “(i) We by no means permit more than double interest to be collected, not even where pledges have been given to the creditor to secure the debt, under which circumstances certain ancient laws authorised more than double interest to be collected.”
- “(ii) We decree that this rule shall be observed in all *bona fide* contracts, and all other cases in which interest can be collected.”

Today the *in duplum* rule is part of our law. According to cases such as *Deggelen v Triggs*¹³; *Commercial Bank of Zimbabwe Limited v MM Builders and Suppliers (Private) Limited & Ors*¹⁴, *Mawere v Mukuna*, (*supra*), and *Conforce (Private) Limited v City of Harare*¹⁵ interest ceases to accumulate upon any amount of capital owing once it equals the amount of the capital, whether the debt arises out of a financial loan or out of any contract whereby a capital sum is payable together with interest thereon. The *in duplum* rule is conceived in public policy to protect the borrower from avaricious moneylenders.

(e) Interest in modern times

The question of interest has continued to vex societies even in these modern times. The courts in this jurisdiction and elsewhere have from time to time advocated or taken measures to cushion borrowers from hardships that may be caused by the charging of excessive interest. They have sometimes agitated for the discarding of antiquated Roman-

¹² At p 1212

¹³ 1911 SR 154

¹⁴ 1996 (2) ZLR 420

¹⁵ 2000 (1) ZLR 445 (H)

Dutch principles in an effort to bring the law at par with, or make it relevant to, the society governed by it. In *Linton v Corser*¹⁶ CENTLIVRES CJ said¹⁷:

“Today interest is the life-blood of finance ... The question that now arises is whether we should apply the old Roman-Dutch Law to modern conditions where finance plays an entirely different role. I do not think we should. I think that we should take a more realistic view than in a matter such as this to have recourse to the old authorities.”

However, notwithstanding that there is a general acceptance that in some situations there may be a need to intervene and protect the borrower, eminent judges and jurist have sometimes differed sharply and contradicted one another in the process. I give a few examples:

- (i) In South Africa, in *Standard Bank of South Africa Limited v Oneanate Investments (Pty) Limited (In Liquidation)*¹⁸ ZULMAN J said legal action interrupted the running of the *in duplum* interest. He blasted the attempt to apply old Roman-Dutch concepts to modern conditions. At p 834F he said:

“If one accepts that interest and indeed compound interest is the ‘life-blood of finance’ in modern times I am of the opinion that one should not apply all the old Roman-Dutch Law to modern conditions where finance plays an entirely different role ...”
- (ii) In Zimbabwe, two years earlier, i.e. in 1996, GILLEPSIE J, sitting with two other judges, in the *MM Builders and Suppliers’* case, (*supra*), had held that *in duplum* interest would be interrupted by the commencement of litigation.
- (iii) Two years after ZULMAN’s judgement, MALABA J, as he then was, and sitting as a single judge in *Ehlers v Standard Chartered Bank Zimbabwe Limited*¹⁹, rejected GILLESPIE J’s approach and restored the position by ZULMAN J.
- (iv) It became a see-saw. After *Ehlers’* case, CHINHENGO J, in *Conforce*, (*supra*), rejected the approach by MALABA J and went back to GILLESPIE J’s position. He held that *litis contestatio* did not interrupt *in duplum*. Evidently realizing the futility of

¹⁶ 1952 (3) SA 689,

¹⁷ At p 695G - H

¹⁸ 1998 (1) SA 811 SA (A)

¹⁹ 2000 (1) ZLR 136 (H)

this trend and the resultant confusion to the public, CHINHENGO J exhorted the parties to appeal to the Supreme Court. At p 458F – G he said:

“I must respectfully express my dissent from those judgments. I appreciate that the law must be certain and that it is most undesirable for judges to differ on fundamental principles of law. There would appear to be a need for the difference of opinion on this point to be placed before the Supreme Court as soon as possible, either by way of an appeal or on a suitable case, as a reference point of law. Consistency in the law is paramount in the administration of justice.”

- (v) Given that part of the public policy considerations that have led the authorities and/or the courts to conceive of measures such as the *in duplum* rule, to protect borrowers, it sounds logical, on the face of it, that the inquiry should be on the identity of the borrower so as to determine whether in any given case he is one deserving of protection. That seemed to have been the view of GALGUT J in the court of first instance in *Verulam Medicentre (Pty) Limited v Ethekwini Municipality*²⁰. He said:

“It appears therefore that the test might simply be whether in the particular case public policy requires the debtor to be protected against exploitation by the creditor.”

In that case the learned judge had concluded that the *in duplum* rule did not apply as the respondent, Verulam Medicentre (Pty) Limited, did not require the protection that the rule was designed to provide. However, on appeal, the South African Supreme Court rejected that kind of approach. It held that the enquiry was not on the identity of the debtor, but rather on the nature of the debt. That exactly had been the approach of CHINHENGO J, five years earlier, in *Conforce*. He had rejected an enquiry based on the identity of the debtor. At p 458A – B he had said:

“... I venture to say that the public interest served by the *in duplum* rule is not to be identified with sympathy for the debtor, so as to say that the rule is designed to protect him. I view the public interest involved as encompassing a wider spectrum of interests, from the protection of the debtor, to securing fiscal discipline on the part of lenders, to considerations of justification for charging interest in the first place i.e. to compensate the creditor for deprivation of use of the money due until payment (*Mawere v Mukuna* 1997 (2) ZLR 361 (H) at 364G) and to the interests of commerce generally and to perhaps many more interests. Thus the public interest cannot be restricted to one or two considerations i.e. the protection of the debtor and the dictates of modern commerce.”

So much about that controversy.

²⁰ 2005 (2) SA 451 (D)

(f) **Usury**

Disagreements have extended to the question whether under the common law the courts can fix a rate of interest above which it becomes usurious. Perhaps this is best illustrated by the *Africa Dawn* case in 2011²¹.

The facts of that case are remarkably similar to those of the present matter. The first defendant, undoubtedly the *alter ego* of the second defendant, sought bridging finance, or a short term loan of R5 million from the plaintiff, a money lender. The second defendant stood as guarantor and co-principal debtor. So did a trust named after the second defendant the beneficiaries of which were his children with his wife. The wife, the fourth defendant, also stood as guarantor. Collateral security was in the form of two mortgage bonds registered over two properties owned by the trust.

When the draft loan agreement was ready it was forwarded to the second defendant for confirmation. The second defendant managed to talk down the lender into capping the upper limit of the trust's total liability at a certain amount – marginally lower than that for the rest of the defendants – in the event of default. Eventually the final loan terms were agreed upon. The loan document was signed. Among other things, the rate of interest would be 5% per month. In the event of a default of payment, a penalty rate would apply. It was pegged at 6.5% per month.

The first defendant required the loan to stock up its business. It failed to re-pay as per agreement. The plaintiff called up the loan. It foreclosed on the trust's two properties. The defendants applied to court for an order declaring, *inter alia*, that both the average and the penalty rates of interest were unlawful. They also sought that all interest on the loan be pegged and re-calculated at the rate prescribed by the statute regulating, *inter alia*, short term credit transactions.

The second defendant's detailed argument was that the plaintiff's rates of interest were usurious, excessive, unconscionable and against public policy. He said the trust property had been designed for the benefit of his minor child and that it would all but be lost if the plaintiff were to be allowed to enforce the agreement. Finally, he argued that the plaintiff had taken advantage of the vulnerable position that the defendants had found themselves in given that the loan had been designed to pay staff and to rescue the first defendant's business. It

²¹ *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Towers CC* 2011 ZASCA 45

was said the employees stood to lose their employment. Some of them were married and had dependants to look after.

The defendants' argument found favour with the High Court, the court of first instance. Despite noting that the statutes prescribing the rates of interest in certain circumstances did not apply, the High Court nonetheless held that the plaintiff's rates of interest were usurious given the reality of the defendants' situation and the inequality in the bargaining power of the parties. It found the rate of interest to be harsh, excessive, gross, unreasonable and contrary to public policy. It adopted the statutory rate of interest which it considered fair, just, equitable and consonant with public policy.

On appeal PONNAN JA, with TSHIQI and MAJIEDT JA concurring, reversed the High Court's decision. He criticised it for, among other things, calling in aid an inapposite yardstick, namely the statutory rate of interest. He noted that the nature of the loan sought and obtained by the defendants would necessarily be expensive, and that certain conclusions reached by the High Court had no foundation in facts. The court of appeal upheld the freedom of contract and adopted the definition of **usury** that had stood the test of time, namely, that a party claiming rescission of contract on the basis of usury, must show **extortion or oppression or something akin to fraud**²².

In the course of his judgment PONNAN JA said:

“[26] At common law there is no fixed customary rate that can be described as a standard rate beyond which it can be said that a transaction becomes usurious. Rates of interest vary with the nature of the financial transaction, the social and economic standing of the parties, the risks and so on. **In the absence of any proof or allegation to the contrary, it must be assumed, I would imagine, the loan was worth the rate of interest fixed to the borrower.** One looks in vain for a declaration by the court that at common law any particular rate of interest is the only legal rate. For, the rate of interest levied depends upon various factors, not least the risk to the lender, which in turn is usually dependent upon whether the creditor is well or ill-secured. And, it can hardly be disputed that inasmuch as profit varies and fluctuates, so too must interest, which by its very nature is representative of profit. **I thus hesitate to say that a court by a mere decision or a series of mere decisions can authoritatively declare what shall be the rate of interest which, without more, upon being exceeded, shall amount to usury. To declare to be usurious a bargained interest beyond a certain rate may well amount to a court legislating by judicial decree.**”(my emphasis)

Two paragraphs down the line the learned judge of appeal also said this:

²² See *Dyason v Ruthven* 3 Searle 282; *Reuter v Yates* 1904 TS 855, @ p 858; *South African Securities v Greyling* 1911 TPD 352 and *Merry v Natal Society of Accountants* 1937 AD 331, @ p 336

“[28] **It bears restating that our Constitution and its value system does not confer on judges a general jurisdiction to declare contracts invalid on the basis of their subjective perception of fairness or on grounds of impressive notions of good faith.** Nor does the fact that a term is unfair or that it may operate harshly, of itself lead to the conclusion that it offends against constitutional principles. **In my view it is essential that the law which makes a transaction usurious should be clear and explicit.** The general rule endorsed by *Merry*²³ does precisely that. **It, moreover, restrains over-zealous judicial intrusion in the sphere of contractual autonomy – a real and meaningful incident of freedom.** It permits coercive interference by a court **only in circumstances where a party to a contract can show either extortion or oppression or something akin to fraud.** That, I daresay, is consistent with the balance that has to be struck between, on the one hand, the liberty to regulate one’s life by freely engaged contracts and, on the other, the striking down of the unacceptable excesses of freedom of contract. **It also accords with the notion that judges should approach with restraint the task of intruding upon the domain of the private powers of citizens.**” (my emphasis)

I respectfully associate myself with the above remarks.

(g) Defendants’ case

In *casu*, Mr *Hove* argued that a rate of interest of 50% per annum is usurious and contrary to public policy. During argument I repeatedly asked him whether there was a cut-off point at which one could draw the line. If so, what would inform that cut-off point? If I were to declare 50% per annum usurious, would 45% be alright with public policy? What about 46%? 48%? 49.9%? And so on. At that time I was unaware of the remarks of WESSELS J in *SA Securities Ltd v Greyling*²⁴, quoted in *Africa Dawn*, cases which none of the parties herein made reference to. At p 356 WESSELS J said:

“From the fact that there is no standard rate it follows that the amount of interest is in itself no criterion. It may, however, be an element in considering whether a transaction is or is not usurious. The Court has allowed as much laxity as sixty per cent., and in his judgment in *Reuter v Yates*, Mason, J., saw no reason why an amount of ninety per cent. should not be allowed. It seems difficult to see how or where a limit can be fixed. If ninety per cent. can be allowed, why not ninety-one? If ninety-one, why not ninety-two; and so on to 120 per cent. **Therefore, the mere fact that the amount of interest seems high is not sufficient to make the transaction usurious.** What then is there in a transaction which makes it usurious? If it is not the mere amount of interest, what other circumstances are there? A great deal has been said by various judges with regard to ‘circumstances’. It is very difficult for me to find any definite principle upon which a case of usury has been or can be decided. I think the most you can say is that **the transaction must show that there has been**

²³ [*Merry v Natal Society of Accountants* 1937 AD 331]

²⁴ 1911 TPD 352

either extortion or oppression, or something which is akin to fraud. I do not think we can put the principle any higher than that. **Therefore in each case we have to decide whether there has been extortion, oppression, or any actions akin to fraud.**”(emphasis added)

Ordinarily **usury** refers to the practice of lending money to people at unfairly high rates of interest²⁵. But in commerce the term has a technical meaning. A usurious transaction is one where there is **either extortion or oppression or something akin to fraud.**

However, despite the fact that to prove that a particular rate of interest is usurious, one must show **either extortion or oppression or something akin to fraud**, and despite that the mere fact that the amount of interest seems high is not of itself sufficient to make the transaction usurious, the situation is somewhat made more complex by the provisions of the Consumer Contracts Act and the Contractual Penalties Act. As a matter of public policy our common law attaches importance to the need to uphold the sanctity of contracts made by equal contracting parties. The freedom to contract encompasses the freedom to make both a good bargain and a bad one. In *Barkhuizen v Napier*²⁶ the Constitutional Court of South Africa said²⁷

“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” (my emphasis).

That ultimately was the basis of the decision of the appeal court in *African Dawn*. It cautioned against whimsical declarations by judges to the effect that a bargained rate of interest may be said to be usurious as that might amount to a court legislating by decree.

But I consider that the Consumer Contracts Act and the Contractual Contracts Act do urge the courts, despite the freedom of contract exercised by the individuals, to nonetheless intervene and interfere if in their discretion the contract, or some terms in it, are unfair, or if the penalty is out of proportion to the prejudice suffered by the creditor. I do not agree with Mr *Mutero* that the Consumer Contracts Act does not apply to lending by banks. I consider that the definition of “**consumer contract**” is wide enough to encompass a loan contract. Banks do supply banking services. Therefore, a borrower who can satisfy any of the

²⁵ Oxford Advanced Learner’s Dictionary of Current English

²⁶ 2007 (5) SA 323 (CC)

²⁷ Para 57

requirements in s 5 of that Act may be entitled to relief. In particular, if the defendants in this case had shown that a penalty rate of interest of 50% per annum resulted in making the loan contract as a whole an unreasonable exchange of values; or made it unreasonably oppressive; or was such that it made the loan contract impose obligations or liabilities that were not reasonably necessary to protect the interests of the plaintiff; or that it made the loan contract violate commonly accepted standards of fair dealing, then they would have been entitled to relief under section 4 of the Act. The fact that they might have signed the loan contract freely and voluntarily would not be decisive of the matter. It is a matter of public policy.

Similarly, in terms of the Contractual Penalties Act, if the defendants had shown that a penalty rate of interest of 50% per annum was out of proportion to any prejudice suffered by the plaintiff as a result of their failure to pay back the loan timeously, then they might have been entitled to relief under s 4 of that Act. In particular, the court could reduce the rate to what it would consider equitable, notwithstanding that the defendants might have freely and voluntarily signed the loan contract which had stipulated such a rate.

Unfortunately, there was virtually nothing placed before me in this matter to help decide whether or not a penalty rate of interest of 50% per annum was usurious; or contrary to public policy; or so excessive as to contaminate the entire loan contract to enable relief to be given under the Consumer Contracts Act, or that such a rate was a penalty that was so disproportionate to any prejudice suffered by the plaintiff by reason of the defendants' default to warrant relief under the Contractual Penalties Act.

Mr *Hove* argued that the empirical evidence required to make a determination was self-evident. He urged me to take judicial notice of his own bald allegations from the Bar that the rate of annual inflation in this country was 5% and that the average rates of interest in the United States of America, the source country for the functional and dominant currency in this country, was 3% per annum. In my view it was completely inappropriate for this kind of matter to have gone by way of a special case where, among other things, the statement of agreed facts said nothing more than what the pleadings stated. This was a matter that cried out for detailed evidence on a number of aspects; not least the cost borne by the plaintiff in procuring the money for on-lending to the defendants; the risk associated with the creditworthiness of the defendants; the use to which the loan was put by the defendants; the rates of interest charged by comparative institutions in similar circumstances; the unreasonableness of the margin of profit desired by the plaintiff on the loan; the inequalities,

if any, in the economic strengths of the parties, and so on. In other words, it was necessary to show the factors that informed such a rate of interest and that influenced the parties to agree to it. The plaintiff disputed the defendants' statistics on the rates of annual inflation, the rate of interest prevailing in the United States of America or the rates of interest said to be charged by Stanbic Bank and Standard Chartered Bank.

Under the common law, the onus is on him who alleges usury, to show **either extortion or oppression or something akin to fraud**. Similarly, under the Consumer Contracts Act and the Contractual Penalties Act, the onus is also on him who alleges that a particular consumer contract is unfair, or that a particular penalty is out of proportion to any prejudice suffered. In this case it was the defendants.

However, given the provisions of the Consumer Contracts Act and the Contractual Penalties Act, it would be remiss of me to leave matters at the classical level that says that where the borrower has failed to show **extortion or oppression or something akin to fraud**, then he is not deserving of relief. The hallmark of the Consumer Contracts Act and the Contractual Penalties is fairness and justice.

In my view, it is near impossible for the borrower to show conclusively aspects that are manifestly within the knowledge and control of the lender. For example, it is the lender that knows where he sourced and procured the money for on-lending to the borrower. It is the lender that knows the cost of that money. It is the lender that calculated the risk of the borrower to him and how he translated that risk to a bankable commodity. It is also the lender that knows what mark-up or margin of profit he desired to earn on the loan, taking into account, for example, its overheads and other costs. Under normal circumstances, where, among other things, the central bank acts as the lender of last resort, there should be, in my view, minimal disparities in the rates of interest charged by the different financial institutions. There has been no evidence what the situation obtaining in this economy is like.

My view of this case is that a rate of interest of 50% per annum, albeit designed as a penalty for default, is, on the face of it, too high, given that the dominant functional currency in the economy is the United States dollar. On the face of it, such a rate induces a sense of shock. It stifles economic growth. But nothing tangible has been placed before me to use as a yardstick to assess whether such a rate is indeed usurious, or excessive, or unconscionable, or contrary to public policy, or unfair, or disproportionate to any prejudice suffered by the plaintiff by reason of the defendants' default on the loan agreement.

The plaintiff's rate needs proper interrogation. This is possible only through a trial action. Proper evidence must be led in the normal course. Order 29 r 203 reads:

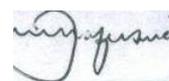
“203. Judgment and directions regarding other issues

When giving its decision upon any question in terms of this Order, the court may give such judgment as may upon such decision be appropriate and may give any directions with regard to the hearing of any other issues in the proceedings which may be necessary for the final disposal thereof.”

DISPOSAL

The decision of the parties to refer this matter to court by way of a special case was incompetent. It is hereby set aside. The matter is referred back to trial for evidence to be led on whether or not the plaintiff's penalty rate of interest at 50% per annum on the loan advanced to the first defendant was usurious, or excessive, or unconscionable, or contrary to public policy, or unfair or disproportionate to any prejudice that it may have suffered by reason of the defendants' default. The overall onus shall rest on the plaintiff. The costs shall be in the cause. Either of the parties is free to take steps to have the matter re-enrolled for the trial.

25 February 2015

A handwritten signature in blue ink, appearing to read 'Sawyer & Mkushi', is written over a horizontal line.

Sawyer & Mkushi, plaintiff's legal practitioners
T.K Hove & Partners, defendants' legal practitioners