REPORTABLE

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE No: **40475/2010**

DATE:25/10/2011

In the matter between:

THE NATIONAL CREDIT REGULATOR Applicant

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED Respondent

JUDGMENT

CANE AJ

[1] The applicant is the National Credit Regulator and the respondent is The Standard Bank of South Africa Limited. The applicant seeks an interdict (alternatively a declarator) restraining the respondent from charging an administration fee in relation to housing loan agreements concluded in terms of the Usury Act, 1968 ("***the Usury Act***") prior to its repeal ("***the pre-***

existing agreements housing loan agreements") by the National Credit Act, 2005 ("***the NCA***") in excess of the maximum amount stipulated in paragraph 3(b)(i) of the schedule to the Usury Act ("***the cap***").

[2] At the outset I should state that I raised with counsel whether their clients had any difficulty with me adjudicating this matter, as I had acted for the respondent against the applicant in a previous matter. Counsel assured me that their clients had no difficulty.

[3] The NCA does not contain a definition of an administration fee, nor does it expressly provide for the payment of an administration fee in respect of the pre-existing housing loan agreements. It provides for a 'service fee', which is currently set at a maximum of R50,00 per month. It is common cause that sections 100 to 106 of the NCA, which make provision for the imposition and collection of interest, charges and fees (including service fees), do not apply to the pre-existing housing loan agreements.

[4] The repeal of the Usury Act was made subject to certain transitional arrangements contained in schedule 3 to the NCA, relating *inter alia* to credit agreements that were concluded before the NCA came into operation. (Item 4(1) of schedule 3.) Schedule 3 of the NCA contains no express provision relating to the payment of administration fees in respect of the pre-existing housing loan agreements.

[5] During 2010 it appears that the respondent charged an administration fee of

R37,50 per month (including VAT) and that it increased this fee to R40,00 per month (including VAT) with effect from 1 January 2011. It has undertaken not to increase the administration fees beyond the maximum permitted for service fees under the NCA. The respondent contends that since the Usury Act has been repealed, there can be no change to the cap of R5,00 per month in respect of the pre-existing housing loan agreements, which was imposed in 1990 and has not been amended since. Thus if the relief sought by the applicant were to be granted, the cap of R5.00 would apply indefinitely and this, submitted the respondent, could not have been intended. The applicant sought to persuade me that the Minister could simply appoint the Regulator as the 'Registrar' for the purposes of increasing the cap under the Usury Act. I doubt whether this is correct, but in view of my findings below, it is unnecessary to decide this point.

[6] Paragraph 5(1)(k) of the Usury Act provides as follows:

> *"No moneylender or credit grantor shall in connection with a money lending transaction or a credit transaction or a leasing transaction obtain judgment for or recover from a borrower or credit receiver or lessee an amount exceeding the sum of –*
>
> *(k) in the case of a housing loan, administration fees to the extent and on the conditions mentioned in the Schedule."*

[7] An administration fee was defined in the Schedule to mean:

> *"an amount payable by the borrower to the moneylender –*
>
> *(a) Where such amount is in terms of an agreement in writing*

between the moneylender and the borrower recoverable from the borrower;

(b) As valuable consideration for the moneylender's administering the borrower's account; and

(c) Where the total amount payable per month does not extend the amount mentioned in paragraph 3(b)(i);"

[8] Paragraphs 2 and 3(b)(i) of the Schedule to the Usury Act provide as follows:

"2. Subject to the conditions mentioned in paragraph 3, the following amounts may in respect of a housing loan be recovered, by obtaining judgment or otherwise, from a borrower:
(a) An initiation fee;
(b) administration fees;
(c) security variation fees; and
(d) loan guarantee premiums.

3. The provisions of paragraph 2 shall apply on condition that-
(a)…..;
(b) the amount of-
(i) *administration fees shall not exceed R5,00 per month;"*

[9] In regard to the contention that the aforesaid provisions continued to be operative, notwithstanding the repeal of the Usury Act by the NCA on 1 June 2006, the applicant relies on two statutory provisions, namely item 7(2) of schedule 3 to the NCA and section 12(2)(c) of the Interpretation Act, 1957 ("***the Interpretation Act***").

[10] Schedule 3 of the NCA deals with transitional provisions. Item 7(2) thereof provides as follows:

> "Any other right or entitlement enjoyed by, or obligation imposed on, any person in terms of any provision of the previous Act, which had not been spent or fulfilled immediately before the effective date, must be considered to be a valid right or entitlement of, or obligation imposed on, that person in terms of any comparable provision of this Act, as from the date that the right, entitlement or obligation first arose, subject to the provisions of this Act."
>
> (Underlining added)

[11] Section 12(2)(c) of the Interpretation Act provides as follows:

> "(2) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not –
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed."

[12] Both sections require as a precondition to their operation that the relevant right, entitlement or obligation be acquired or incurred under or in terms of the repealed Usury Act. The terms 'accrue', 'acquire' and the entitlement envisaged have already been authoritatively defined. *Chairman of the Board on Tariffs and Trade v Volkswagen of South Africa (Pty) Ltd and another* 2001 (2) SA 372 (SCA) at [13]. A prior entitlement which is specific and not general, actual and not abstract, live and not hypothetical, is envisaged.

[13] In *Mahomed NO v Union Government (Minister of Interior)* 1911 AD 1 the Appellate Division, when considering the effect of the repeal of a statutory provision, held as follows (at p9):

> "A thing acquired under an Act must necessarily be conferred by the Act; it must be something which, but for the passing of the measure, the beneficiary would not have been entitled to ....The

> right or privileges which the Indians in this case claim is the right, by virtue of their South African domicile, to enter the Cape Province at pleasure, in spite of the fact that they are prohibited immigrants under the existing law. They say that they enjoyed that privilege prior to the repeal of the Act of 1902. No doubt they did; but did they acquire it under the Statute? Because if they did not, then it was not kept alive by the repealing clause. ... it is clear that the privilege in the present case sprang not from Statute, but from the Common Law."

[14] In *Garydale Investment Co v Jo'burg Western Rent Board* 1958 (1) SA 466 (T) the full bench, in considering this type of statutory provision, held that an exemption from the Rents Act conferred no additional or further rights than those acquired by virtue of the common and other laws of the land. Similarly, in my view the limitation in issue in this matter conferred no additional or further rights than those that were acquired by virtue of the common and other laws of the land.

[15] In amplification of the aforesaid, neither the entitlement to charge an administration fee, nor the corresponding obligation to pay it, was acquired, nor incurred, under or in terms of paragraph 3(b)(i) of the schedule to the Usury Act. Such rights and obligations were acquired and incurred by way of contract under the common law. That paragraph in no way enabled the acquisition of rights or incurring of obligations which otherwise could not have been acquired or incurred. It merely imposed an overriding statutory limitation on the contractual rights and obligations which the mortgagor and mortgagee acquired and incurred by way of contract. The effect of the repeal of that statutory limitation was that the agreement between the parties continued to govern their relationship. The accrued rights and obligations of

the parties had their origin in contract and no right or privilege was acquired by or accrued to any borrower by virtue of the provisions of paragraph 3(b)(i) of the schedule to the Usury Act. Hence, the limitation imposed by paragraph 3(b)(i) of the schedule to the Usury Act did not give rise to any right, privilege, obligation or liability, nor was any right, privilege, obligation or liability acquired, accrued or incurred *"under"* paragraph 3(b)(i).

[16] It is apparent from a consideration of the schedules to the NCA that where the legislature thought fit to preserve particular provisions of any statute after the coming into force of the NCA, it did so expressly. I refer to schedule 2 to the NCA. The legislature also made provision, in schedule 1 to the NCA, for conflicts between other legislation and the NCA. Where the legislature intended that provisions of the Usury Act were to continue in force notwithstanding its repeal, it did so in express terms in item 10 of schedule 3 to the NCA, which preserved certain provisions of the Usury Act for a limited period. Thus one would have expected that if the legislature intended that paragraph 3(b)(i) of the schedule to the Usury Act were to continue in force for any period subsequent to the repeal of that Act, the legislature would have included it in this list. For the reason set out above, I do not consider that the paragraph's continued operation was ensured through the more general provisions of item 7(2) of schedule 3 to the NCA or section 12(2)(c) of the Interpretation Act.

[17] The applicant submitted that if paragraph 3(b)(i) of the schedule to the Usury Act were held not to be applicable to the pre-existing housing loan

agreements, it would mean that the determination of the applicable administration fees would be in the unilateral discretion of a financial institution. It was submitted further that the respondent and all other financial institutions would have an 'unbridled discretion', which would result in exorbitant administration fees being charged, and that this would be inconsistent with the purposes of the NCA and thus could not have been intended.

[18] In my view this argument is not persuasive. To the extent that the terms of the pre-existing agreements permit the financial institution to vary the administration fees from time to time, the financial institution would be constrained to do so *arbitrio bono viri* (as a good man would). The right to fix administration fees conferred on mortgagees by the pre-existing housing loan agreements are subject to this limitation imposed by the common law. *NBS Boland Bank v One Berg River Drive and Others; Deeb and Another v ABSA Bank Ltd; Friedman v Standard Bank of South Africa Ltd* 1999 (4) SA 928 (SCA)

[19] My conclusion is that neither item 7(2) of Schedule 3 to the NCA, nor section 12(2)(c) of the Interpretation Act, render paragraph 3(b)(i) of the schedule to the Usury Act applicable to the pre-existing agreements. In the result it is unnecessary for me to consider a further issue raised by the respondent, namely whether the applicant had *locus standi* to seek the relief it did.

[20] The following Order is made:

The application is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

JMA CANE
ACTING JUDGE OF THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

DATE OF JUDGMENT:	2011-10-25
ON BEHALF OF APPLICANT :	MD KUPER SC
	MA CHOHAN
ON BEHALF OF RESPONDENT:	CDA LOXTON SC
	JA BABAMIA

- - - - - - - -