THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 234/10

AFRICAN DAWN PROPERTY FINANCE 2 (PTY) LIMITED	Appellant
and	
DREAMS TRAVEL AND TOURS CC	First Respondent
ISMAIL HASSEN AMOD	Second Respondent
MOHAMMED AMOD NO	Third Respondent
FAATIMA MIA NO	Fourth Respondent

Neutral citation: ***African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC*** **(234/10) [2011] ZASCA 45 (30 March 2011)**

BENCH: **PONNAN, TSHIQI and MAJIEDT JJA**

HEARD: **14 MARCH 2011**

DELIVERED: **30 MARCH 2011**

SUMMARY: **Interest – rate of - in terms of the common law must amount to extortion or oppression or something akin to fraud to constitute usury – common law rule not inconsistent with the spirit, purport and objects of the Constitution.**

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Saldulker J sitting as court of first instance).

1 The appeal succeeds with costs, including those consequent upon the employment of two counsel.

2 The order of the court below is set aside and in its stead is substituted the following:

'a. The application is dismissed with costs.

b. The counter application succeeds with costs.

c. It is ordered:

1 That the First Applicant, the Second Applicant, and the Ismail Amod Family Trust (No. IT8815/04) represented by the Second, Third and Fourth Applicants in their capacities as the duly appointed trustees ("*the Trust*"), jointly and severally, the one paying the other(s) to be absolved, but subject to 2 hereunder, pay to the Respondent:

1.1 the sum of R3,900,247.50;

1.2 interest on the aforesaid sum of R3,900,247.50 calculated at the rate of 6.5% per month *a tempore morae* from 1 July 2009 to date of payment;

1.3 costs of suit on the attorney and client scale.

2 That the liability of the Trust in terms of 1 above is limited to the security held by the Respondent under:

2.1 covering mortgage bond B038860/08 registered over Erf 12018 Lenasia

Extension 13 Township, Registration Division IQ, the Province of Gauteng, in extent 680 square metres, held under deed of transfer T49903/2005; and

2.2 covering mortgage bond B037987.08 registered over Erf 11954 Lenasia Extension 13 Township, Registration Division IQ, the Province of Gauteng, in extent 800 square metres, held under deed of transfer T50215/2005.

3 That the following immovable properties registered in the name of the Trust are declared specially executable for the liability of the Trust in terms of 2 above:

3.1 Erf 12018 Lenasia Extension 13 Township, Registration Division IQ, the Province of Gauteng, in extent 680 square metres, held under deed of transfer T49903/2005;

3.2 Erf 11954 Lenasia Extension 13 Township, Registration Division IQ, the Province of Gauteng, in extent 800 square metres, held under deed of transfer T50215/2005.'

JUDGMENT

PONNAN JA (TSHIQI and MAJIEDT JJA concurring):

[1] Over a century ago Innes CJ stated in *Reuter v Yates*.[1]

'The law of Holland prohibited excessive usury; and the courts of this country, administering that law, will refuse to enforce contracts shown on due inquiry to be usurious and extortionate in their nature. But our law does not in my opinion define any particular rate of interest as being necessarily usurious; it does not fix a limit up to which interest is legitimate and proper, and beyond which it becomes illegal and excessive. That must depend upon the circumstances of each case. Usury is a good defence; the difficulty arises in deciding when a contract is usurious and when it is not. And that difficulty is not to be solved by a mere reference to the rate of interest agreed upon; it requires a careful inquiry into all the circumstances surrounding the transaction which is challenged. And the onus in my opinion is upon the person who sets up the defence, to satisfy the court upon the facts that it is applicable and sufficient.'

The difficulty that the learned Chief Justice alluded to arises in this appeal, which involves the question as to whether the rate of interest levied in respect of a money lending agreement is usurious. The South Gauteng High Court (per Saldulker J) held that it was. The high court accordingly declared the relevant provisions of the written agreement pertaining to interest to be 'unlawful and contrary to public policy' and substituted in its stead a rate of interest that it thought 'fair' and ordered each party to pay its own costs. The present appeal serves before this court with the leave of Boruchowitz J.

[2] The issue arises for determination against the following backdrop: According to the second respondent, Mr Ismail Hassen Amod (Amod), the sole member of the first respondent, Dreams Travel and Tours CC (the CC), he approached a number of registered banks on behalf of the CC during 2008 for 'bridging finance'. Those applications were declined because of, as he put it, 'the credit crunch under the present economic climate'. He then turned to a private financier Gateway Capital Ltd (Gateway) for a loan of R5 million. Gateway declined the application but with the approval of Amod

1 *Reuter v Yates* 1904 TS 855 at 856.

forwarded the loan application to the appellant, African Dawn Property Transfer Finance 2 (Pty) Ltd (African Dawn).

[3] African Dawn conducts business as a short term financier and is a registered credit provider in terms of s 40 of the National Credit Act 34 of 2005 (the NCA). The main business of African Dawn, according to its director, Pierre Bezuidenhout (Bezuidenhout) 'comprises short term secured finance, including bridging finance'. He describes bridging finance as 'a form of short term secured finance, the distinguishing feature thereof being that the repayment of the loan facility is effected from a specific source of funds'.

[4] Bezuidenhout states that following upon the referral of the loan application to African Dawn, he discussed the application with Amod, who informed him that the moneys were urgently required by the CC to fund the importation into South Africa of a consignment of branded jeans. The market for such jeans, according to Amod, was seasonal and it was therefore important for the CC to place the order for those jeans as soon as possible. Indeed, in the loan application itself, the loan is stated to be for an 'import and export deal to be done' and three to four months is reflected as the period for which the loan is required. Further, various immovable properties were listed as 'security available for required facility'. Those properties included Amod's own residential property in Glenvista, Johannesburg and certain trust properties. The trust in question is the Ismail Amod Family Trust. The beneficiaries of the trust are the children born of the marriage between Amod and Faatima Mia. The trust is represented in these proceedings by its trustees Mr Mohammed Amod NO (the third respondent) and Ms Faatima Mia NO (the fourth respondent).

[5] To properly consider the loan application, African Dawn sought and obtained certain additional information from Amod including a copy of the trust deed, letters of authority of the trustees of the trust and a copy of the most recent annual financial statements of the CC. On 6 June 2008 African Dawn wrote to Amod informing him that it had approved the CC's loan application in the amount of R5 million plus costs and

stipulated the security that it required. Amod was asked to confirm whether the loan terms were acceptable to the CC. Certain discussions then ensued and on 11 June 2008 draft documents including the loan agreement and suretyships (to be signed by Amod in his personal capacity and the trustees on behalf of the trust) were dispatched to Amod by African Dawn. After considering the draft documentation, Amod requested that the suretyships to be furnished on behalf of the trust be amended so as to limit its liability to R9 million. Moreover, he requested that such liability be restricted to mortgage bonds to be registered over two - instead of three (as had originally been mooted by African Dawn) - of the trust's immovable properties. African Dawn acceded to those requests and duly amended the suretyship agreements, which were then dispatched to Amod on 12 June 2008.

[6] Amod, on behalf of the CC, confirmed his acceptance of the terms of the loan as negotiated and on 17 June 2008 the CC (as borrower) and African Dawn (as lender) concluded a written loan agreement. In terms of that agreement African Dawn lent and advanced the sum of R5 175 162.80 (inclusive of a raising fee, an agent's commission, the costs of the drafting of the loan agreement and other documents and the bond registration costs) to the CC. Clause 3 of the loan agreement provided:

'3.1 This loan plus interest thereon would be repaid by the Borrower to the Lender upon the following date and in the following amounts:

3.1.1	30 June 2008	-	R112,128.53
3.1.2	31 July 2008	-	R258,758.14
3.1.3	31 August 2008	-	R258,758.14
3.1.4	30 September 2008	-	R258,758.14
3.1.5	31 October 2008	-	R258,758.14
3.1.6	30 November 2008	-	R258,758.14
3.1.7	17 December 2008	-	R5, 321, 792.41'

The CC sought to discharge that obligation by furnishing African Dawn with seven post-dated cheques.

[7] Clause 4 of the agreement headed 'Interest' provided:

'4.1 The parties agree that interest will be charged on the loan and calculated at the rate of 5% per month from the date that the loan was advanced.

4.2 In the event of the loan amount plus interest not being repaid within the required time period and on the dates as per 3.1 above, the Borrower shall become liable to pay interest on the loan amount at a rate of 6,5%, calculated from the date that any payment due as per 3.1 and is not paid on the required date.

4.3 In the event of the Borrower paying an amount greater than the amount recorded in paragraph 3.1 above, the Borrower shall remain obliged to make any and all payments thereafter in the same amounts as recorded in paragraph 3.1 and shall only be entitled to reduce the amount after obtaining the Lender's prior written consent.'

[8] Further, in terms of the agreement the closed corporation warranted that:

'10.1 . . . it has an annual income in excess of one million rand and/or assets in excess of one million rand and furthermore that its nett monthly income is sufficient to repay the loan upon the terms contained herein.

10.2 . . . it has obtained independent financial and legal advice prior to entering into this agreement and that it understands the contents and consequences thereof.'

[9] The CC's obligations were secured by way of an unlimited suretyship by Amod personally and a limited suretyship by the trust. In terms of those deeds of suretyship each of Amod and the trust bound and interposed themselves as a surety and co-principal debtor *in solidum* for the CC's indebtedness to African Dawn. And pursuant to the agreement, mortgage bonds were registered in favour of African Dawn over two of the trust's properties in the amounts of R5 million and R4 million, respectively.

[10] On the instructions of Amod, African Dawn paid the net value of the loan to the CC, 1 Time Import and Export and LCG in the amounts of R1 410 000, R2 277 305 and R1 312 695, respectively. Although fairly substantial payments were effected by the CC to African Dawn, all too frequently they were not effected timeously. Since August 2008 interest in the higher amount of 6.5% per month has been applicable to the loan and as at 30 June 2009 the former was indebted to the latter in the sum of R3 900 247.50 together with interest thereon at the rate of 6.5% per month.

[11] On 26 June 2009 the respondents caused an application to be issued out of the South Gauteng High Court. They sought an order:

‘1 Declaring that the agreement . . . alternatively, clauses 4.1 to 4.3 and 6.1 thereof to be unlawful and contrary to public policy.

2 Alternatively to paragraph 1 above, declaring that interest payable on all outstanding amounts arising from the agreement to be 15,5% per annum, alternatively, the maximum rate permissible in terms of the National Credit Act.

3 Costs of this application only in the event of the Respondent opposing this application.

4 Granting to the Applicants further and alternative relief as may seem just to this Honourable Court.’

[12] Amod who deposed to the affidavit in support of the application stated:

’38 This is usurious and against public policy. It is unlawful. I submit that the Court should sever these provisions from the contract.

39 As such the provisions are void.

THE NATIONAL CREDIT ACT 34 OF 2005

. . .

41 I point out further that in terms of the National Credit Act 34 of 2005 specifically regulation 42, a copy of which is attached marked F, 5% interest per month may only be levied on short term credit transactions which are transactions where a deferred amount is under R8 000-00 (Eight Thousand Rand) (see regulation 39(2)).

42 The Respondent was not in law therefore entitled to charge 5 to 6.5% in respect of the contract in issue.

43 Interest may not exceed the rates provided for in the Usury Act 73 of 1968. In this regard it must be pointed out that the Usury Act was repealed by s 172(4)(a) of the National Credit Act 34 of 2005 (the NCA), with effect from 1 June 2006. Item 5 of s 3 of the NCA provides that a maximum annual finance rate set in terms of the Usury Act and in effect immediately before the effective date (ie, 1 June 2006) continues in force despite the repeal of the Usury Act, until the Minister (ie, the Member of the Cabinet responsible for consumer credit matters) first prescribes a maximum rate of interest in terms of s 105. Section 105 of the NCA came into operation on 1 June 2007. My calculation is that the maximum rate of interest is 28% in terms of the formulae for calculation.

THE COMMON LAW

44 In any event I am advised and so submit that the court has a discretion to reduce the interest rate under the common law. The rate of interest charged by the Respondent is excessive, unconscionable and against public interest.

45 I submit that the Court should exercise its discretion in the Applicants’ favour.

46 The trust property is designed for the benefit of my minor child. It will all but be lost if the Respondent is allowed to enforce the agreement.

47 The Respondent took advantage of the vulnerable position the Applicants found themselves in.

The loan was designed to pay staff and to rescue the business. Staff of the First Applicant may lose their jobs as it is impossible to retain them. The First Applicant has staff members who all are married and have dependants to support.'

[13] In addition to opposing the application, African Dawn caused a counter application to be filed, seeking an order:

'1 That the First Applicant, the Second Applicant, and the Ismail Amod Family Trust (No. IT8815/04) represented by the Second, Third and Fourth Applicants in their capacities as the duly appointed trustees ("*the Trust*"), be and are hereby ordered, jointly and severally, the one paying the other(s) to be absolved, but subject to 2 hereunder, to pay the Respondent:

1.1 the sum of R3,900,247.50;

1.2 interest on the aforesaid sum of R3,900,247.50 calculated at the rate of 6.5% per month *a tempore morae* from 1 July 2009 to date of payment;

1.3 costs of suit on the attorney and client scale.

2 That the liability of the Trust in terms of 1 above is limited to the security held by the Respondent under:

2.1 covering mortgage bond B038860/08 registered over Erf 12018 Lenasia Extension 13 Township, Registration Division IQ, the Province of Gauteng, in extent 680 square metres, held under deed of transfer T49903/2005; and

2.2 covering mortgage bond B037987.08 registered over Erf 11954 Lenasia Extension 13 Township, Registration Division IQ, the Province of Gauteng, in extent 800 square metres, held under deed of transfer T50215/2005.

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3.2 Erf 11954 Lenasia Extension 13 Township, Registration Division IQ, the Province of Gauteng, in extent 800 square metres, held under deed of transfer T50215/2005.

4 Granting to the Respondent further and/or alternative relief.'

[14] The high court concluded:

'In the result I make the following order:

1 Clauses 4.1 to 4.3 and 6.1 of the agreement, marked annexure "A" to the founding affidavit of Ismail Hassen Amod, is declared to be unlawful and contrary to public policy.

2 The first applicant is ordered to pay to the respondent the capital loan plus interest at the rate of 28% per annum, provided that the payments already made by the first applicant to the respondent, be first

appropriated to interest and then to capital.

3 In the event of the first applicant failing to pay the outstanding balance due and owing to the respondent within 30 days from the date of this order, the respondent shall be entitled to approach the court on these papers for further relief.

4 Each party is to pay its own costs.'

[15] Contracts valid in form are prima facie enforceable in South African law and effect will be given to them unless grounds for their avoidance are proved (per Didcott J in *Roffey v Catterall, Edwards & Goudré (Pty) Ltd*[2]). But, as Cameron JA correctly observed, our Constitution 'requires us to employ its values to achieve a balance that strikes down the unacceptable excesses of freedom of contract, while seeking to permit individuals the dignity and autonomy of regulating their own lives'.[3] Indeed, on appeal to it (*Barkhuizen v Napier*)[4] the majority of the Constitutional Court (per Ngcobo J) made that much clear in these terms (para 57):

'On the one hand public policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt servanda,* which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. 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.'

[16] Our courts have however recognised that *pactum sunt servanda* is not a holy cow (*Bredenkamp v Standard Bank).*[5] As Ngcobo J observed in *Barkhuizen* (para 87): '*Pacta sunt servanda* is a profoundly moral principle, on which the coherence of any society relies. It is also a universally recognised legal principle. But the general rule that agreements must be honoured cannot apply to immoral agreements which violate public policy. As indicated above, courts have recognised this and our Constitution re-enforces it.'

And, thereafter Harms JA in *Bredenkamp* (para 38):

'This court in *Sasfin* consequently restated the obvious, namely that our common law does not recognise agreements that are contrary to public policy. Our courts have always been fully prepared to reassess public policy and declare contracts invalid on that ground. Determining whether or not an agreement was

2 *Roffey v Catterall, Edwards & Goudré (Pty) Ltd* 1977 (4) SA 494 (N) at 503H.
3 *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) para 13.
4 *Barkhuizen v Napier* 2007 (5) SA 323 (CC).
5 *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) para 37.

contrary to public policy requires a balancing of competing values. That contractual promises should be kept is but one of the values.'

[17] Here the CC is a juristic entity whose asset value and annual turnover at the time of the loan agreement exceeded the threshold value determined by the Minister in terms of s 7(1) of the National Credit Act (NCA). The NCA therefore does not apply to the loan agreement (s 4(1)). The effect of the loan agreement not being governed by the NCA is that there is no statutory limitation on the interest payable in terms of the agreement. Moreover, as the principal debt under the loan agreement exceeds R500 000, the loan agreement was not subject to the Usury Act (s 15(g)). It follows that the maximum annual finance rate set in terms of the Usury Act likewise does not apply. That notwithstanding the high court held:

'Having regard to all of the aforegoing, I find that the rate of interest charged by the respondent is usurious given the reality of the situation the first applicant found itself in, the inherent inequality in the bargaining power. It is harsh, excessive and against public policy. The respondent was not entitled to charge 5 to 6.5% interest per month in respect of the loan it advanced to the first applicant. 60% per annum is *per se* gross and unreasonable being more than twice that of the last declared maximum permissible interest rate chargeable to a debtor or borrower and four times more than the permissible prevailing legal interest rate. 78% is for the same reasons excessive.'

Having considered the applicants' proposition with regard to the rate of interest, in my view, the rate of 28% per annum is fair and clearly ameliorates the harshness of the interest rate as set out in clause 4.1 to 4.3 read with 6.1, in favour of an interest rate that does justice to both parties. Consequently the rate of interest at 28% per annum is just and equitable in the circumstances. This court is therefore entitled in the interest of public policy to declare paragraphs 4.1 to 4.3 and 6.1 of the loan agreement to be unlawful and contrary to public policy. The first applicant has proposed that each party pay its own costs. In the circumstances of this case it appears to be a fair proposition.'

The rate of 28 percent per annum was fixed by the high court with reference to 'the maximum annual finance rate set in terms of the Usury Act prior to its repeal'. In that the high court may have misdirected itself, for as it had earlier observed:

'The Usury Act 73 of 1968 was repealed and replaced with the National Credit Act (NCA) with effect from 1 June 2007. The loan agreement is not governed by the NCA nor would it have been subject to the Usury Act.'

[18] Moreover, although the agreement falls outside the scope of the NCA, it is instructive to note that for 'short term credit transactions'[6] – being a transaction in respect of a deferred amount at the inception of the agreement not exceeding R8 000 and in terms of which the whole amount is repayable within a period not exceeding six months – the maximum rate of interest fixed by the legislature is five percent per month. Thus even if one were to assume in the high court's favour that it was justified in its resort to the NCA and the Usury Act as aids in the determination of public policy it should not have lost from sight the provisions relating to short term credit transactions. Those provisions, most notably the loan period of six months and the interest rate of five percent per month, resonate more strongly with the transaction encountered here than the provisions relied upon by the high court.

[19] In this case whether or not the transaction was usurious fell to be determined in terms of the common law, which does not fix a rate of interest beyond which a transaction becomes usurious. In *SA Securities, Ltd v Greyling*,[7] Wessels J held:

'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 as sixty per cent., and in his judgment in *Reuter vs 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 "the 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 either extortion or oppression, or something which is akin to fraud. I do not think we can put the principle any higher that that. Therefore in each case we have to decide whether there has been extortion, oppression, or any actions akin to fraud.'

[20] In arriving at that conclusion Wessels J stated that it was not necessary for the court to inquire minutely into what the Roman Dutch law was in respect of usury for that

6 Regulation 39(2).
7 *SA Securities Ltd v Greyling* 1911 TPD 352 at 356.

had been done in *Dyason v Ruthven.*[8] In *Dyason*, the judges after elaborately tracing its history, held that usury to be a good defence to an action founded on an agreement to pay interest, must involve extortion amounting to fraud. Indeed, in *Merry v Natal Society of Accountant*s,[9] De Villiers JA affirmed that principle in these terms:

'In South Africa the common law has always been that in order to render a transaction usurious, it must be shown that it is tainted with oppression, or extortion, or something akin to fraud (*Dyason v Ruthven* (3 Searle 282); *Reuter v Yates* (1904, T.S. 855); *South African Securities v Greyling* (1911, T.P.D. 352).'

[21] In this case the high court observed:

'The applicants do not contend that there is anything present in the loan agreement and/or the circumstances under which it was concluded which amounts to extortion or oppression akin to fraud. The applicant's case is that the "rate of interest charged by the respondent is excessive, unconscionable and against public interest".'

That one would have thought would have been the end of the enquiry. But, it was urged upon this court and the one below that the common law rule is inconsistent with our Constitution and that we consequently are under a duty to develop the common law to reflect the changing, social, moral and economic fabric of the country.[10]

[22] The common law derives its force from the Constitution. It is thus only valid to the extent that it complies or is congruent with the Constitution. Every rule has to pass constitutional muster. Public policy and the boni mores are now deeply rooted in the Constitution and its underlying values. And our courts are indeed enjoined to develop the common law, if this is necessary.[11] As it was put in *City of Tshwane Metropolitan Municipality v RPM Bricks*[12]

'That power is derived from ss 8(3) and 173 of the Constitution. Section 39(2) of the Constitution makes it plain that, when a court embarks upon a course of developing the common law, it is obliged to 'promote the spirit, purport and objects of the Bill of Rights' (*S v Thebus* 2003 (6) SA 505 (CC) para 25). This ensures that the common law will evolve, within the framework of the Constitution, consistently with the basic norms of the legal order that it establishes (*Pharmaceutical Manufacturers Association of South Africa*; *In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 49). The

8 *Dyason v Ruthven* 3 Searle 282.
9 *Merry v Natal Society of Accountants* 1937 AD 331 at 336.
10 *Carmichele v Minister of Safety and Security & another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC).
11 *Manong & Associates (Pty) Ltd v Minister of Public Works & another* 2010 (2) SA 167 (SCA).
12 *City of Tshwane Metropolitan Municipality v RPM Bricks* 2008 (3) SA 1 (SCA) para 20.

Constitutional Court has already cautioned against overzealous judicial reform. Thus, if the common law is to be developed, it must occur not only in a way that meets the s 39(2) objectives, but also in a way most appropriate for the development of the common law within its own paradigm (*Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 55).'

[23] In *S v Thebus & another,*[13] Moseneke J stated:

'It seems to me that the need to develop the common law under s 39(2) could arise in at least two instances. The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the "objective normative value system' found in the Constitution.'

[24] In this case there is no suggestion that the common law rule in question is inconsistent with a specific constitutional provision. Rather, as best as I can discern the argument, it is that the common law rule falls short of the spirit, purport and objects of the Constitution. Faced with such a task, a court is obliged to undertake a two-stage enquiry. First, it should ask itself whether, given the objectives of s 39(2) of the Constitution, the common law should be developed beyond existing precedent. If the answer to that question is a negative one, that should be the end of the enquiry. If not, the next enquiry should be how the development should occur and which court should embark on that exercise. (See *S v Thebus* para 26.) Had that exercise been undertaken by the high court, the first enquiry would, in my view, have yielded a negative response.

[25] Notwithstanding the authority of *Merry v Natal Society of Accountants*, which was clearly binding on it, the high court ignored the 'oppression or extortion or something akin to fraud' requirement. It simply jettisoned that requirement without embarking upon the first enquiry postulated by *Thebus*, namely, whether the common law should be developed beyond existing precedent. Nor did it interrogate what yardstick should be substituted in its stead. The high court's point of departure appeared to be that a rate of interest of either 60 or 78 percent per annum was, without more, per se usurious and

13 *S v Thebus & another* 2003 (6) SA 505 (CC) para 28.

thus contra bonos mores. With respect to the high court that approach cannot be endorsed.

[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, that the loan was worth the rate of interest fixed to the borrower. One looks in vain for a declaration by a 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.

[27] The CC's attack invites us to reconsider the correctness of the common law principle endorsed by *Merry*. We are obliged to do so in terms of Constitution. To that end we have to undertake the first enquiry postulated by *Thebus.* I do not believe that the attack by the CC can succeed. Weighty considerations of commercial and social certainty render the common law principle as sound today as it was when first articulated over a century ago. Constitutional considerations far from detracting from it appear to enhance it. For as I have attempted to show, what comes to be branded with the opprobrious appellation 'usurious' may well depend on the whim of a particular judge. That, I daresay, would run counter to the spirit, purport and objects of our Constitution. Harms JA made precisely that point in *Bredenkamp* (para 39) when he said:

'A constitutional principle that tends to be overlooked, when generalised resort to constitutional values is

made, is the principle of legality. Making rules of law discretionary or subject to value judgments may be destructive of the rule of law.'

[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 perceptions of fairness or on grounds of imprecise notions of good faith.[14] 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* 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.[15] 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.

[29] I therefore conclude that the common law rule is not inimical to the values that underlie our constitutional democracy and that if any stipulation for interest be attacked as being liable to reduction on the ground of usury, it can only be done by offering proof of extortion or oppression or something akin to fraud. It is indeed so that what amounts to extortion or oppression or something akin to fraud may not be capable of easy or exact definition. The same holds true of our attempts to define that expression of 'vague import'[16] - public policy. Those difficulties notwithstanding our courts have not shrunk from the duty of declaring a contract contrary to public policy when the occasion has demanded it.[17]

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14 *Napier v Barkhuizen* para 7.
15 *Napier v Barkhuizen* para 12 and 13.
16 Per Innes CJ in *Law Union & Rock Insurance Co Ltd v Carmichael's Executor* 1917 AD 593 at 598.
17 *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).

[30] I turn now to consider – as the high court should have done - whether the CC has discharged the onus resting upon it of showing that the applicable interest rate was usurious, in the sense that it amounted to extortion or oppression or something akin to fraud. To once again borrow from Innes CJ (*Reuter v Yates* at 858):

'It comes then to this — in deciding whether the defence of usury has been sustained, and whether the lender has taken such an undue advantage of the borrower, has so practised extortion and oppression, that his conduct, being akin to fraud, disentitles him to relief, the Court will examine all the circumstances of the case. It will not only look at the scale at which interest has been stipulated for, but will have regard to the ordinary rate prevalent in similar transactions, to the security offered and the risk run, to the length of time for which the loan was given, the amount lent, and the relative positions and circumstances of the parties.'

[31] In arriving at its conclusion that the interest levied was usurious, the high court reasoned:

'All of the aforegoing, clearly, in my view demonstrates that the first applicant was subjected to the dictates of the respondent. In this way, the respondent was able to unilaterally dictate the terms of the loan agreement. The respondent was prepared to lend and advance to the first applicant the amount of R5 million at the interest rate as set out in clause 4.1, to 4.3 (as read with clause 6.1), a rate that was not negotiable, a rate of interest that was 5% per month (60% per annum) and 6.5% per month on default (78% per annum.)

. . .

The applicants have confined their case to an attack on the interest rate provided in these clauses. No other terms of the loan agreement have been subjected to scrutiny. The applicants have established an inequality of bargaining power between the first applicant and the respondent justifying an interference by this court in the "contractual bargain" struck by the parties.

. . .

The first respondent was not indigent but needy. A situation that many South Africans sometimes find themselves in, because of the prevailing socio-economic climate. Because they are cash-strapped, they are desperate and in such circumstances have no freedom to negotiate the interest terms of the loan advanced to them and may be taken advantage of by moneylending institutions. Borrowers must be protected from lenders who exploit them by charging interest at exorbitant rates.'

[32] With respect to the learned judge none of those key factual findings survive scrutiny. First, no case was established on the papers that the CC was 'subjected to the dictates of [African Dawn]'. If anything the evidence establishes, as I have shown

earlier, that Amod did indeed negotiate terms with African Dawn and further warranted that the CC had sought and obtained independent legal and financial advice. Amod is deliberately cagey and evasive in his founding affidavit as to precisely why each of the registered banks that were approached declined the loan application. He states that it was on account of the 'credit crunch'. Whether that is something that he surmised or was told by the relevant bank officials he does not divulge. If the latter, no corroboration is offered. Second, the CC was not an uninformed and vulnerable borrower. It chose, unsolicited by African Dawn, to approach the latter and did so without any inducement or compulsion. There was full disclosure by African Dawn at the outset of the terms of the loan including the securities required and the interest payable. This was not a trap for the unsuspecting or the unwary. The CC was thus free to walk away or to turn to some other lender if it considered the terms offered by African Dawn oppressive. Third, the CC was not as the high court put it 'needy'. As appears from its annual financial statements for the year ending 28 February 2007 its turnover was R49.9 million, its retained income was R9.3 million and it was possessed of total assets of R13.1 million. The reference to 'cash-strapped', 'desperate' South Africans who may be taken advantage of, is thus plainly inapposite. Those borrowers find protection in the NCA. Although it bears emphasising that for some borrowers, who are usually the most vulnerable of this country's citizenry, the NCA has fixed a rate of interest that is not dissimilar to that encountered here – five percent per month. No doubt what influences that rate of interest is probably the heightened risk and increased administrative burden to lenders.

[33] In this case the CC sought and obtained a sizeable loan to exploit a commercial opportunity available to it. Once again Amod is evasive. He does not make full and frank disclosure as to precisely why the loan was sought. Counsel for the CC submitted that the purpose of the loan was irrelevant. I do not agree. If it was to turn a profit, as appears to be the case, that would be a relevant consideration. No doubt from the CC's perspective the anticipated profit may have caused the interest rate to pale into insignificance. Insofar as that aspect is concerned we are left to speculate. Why that should be so, is not explained, for all of that information was peculiarly within Amod's

knowledge and had he chosen to play open cards with the court (which he plainly did not) he ought to have divulged. Nor was any evidence adduced as to what rates of interest are being levied by other similarly placed short term financiers for loans of that magnitude. We are thus left in the dark as to what the prevailing industry norm is for a loan of the kind encountered here. The effect of such failure is that the high court called in aid an inapposite yardstick, namely the rate fixed by the legislature, in its determination of the matter. After all, as is evident from the judgment of the Constitutional Court in *Barkhuizen v Napier,*[18] if evidence is required to determine whether a contract is in conflict with public policy or whether its enforcement would be so, the party who attacks the clause at either stage must establish the facts.

[34] What we do know from the papers is that the money was required urgently and what Bezuidenhout does tell us in his answering affidavit is that African Dawn was willing to and did in fact advance the moneys to the CC prior to the mortgage bonds being registered. Further, according to Bezuidenhout:

'[I]n the event of a bridging financier, such as [African Dawn], granting a loan facility to a borrower whose application to a bank has been declined, the risk associated with such loan (i.e. the risk of such loan being irrecoverable) is invariably high. The cost of such loan, in the form of the interest rate charged, in order to justify the high risk assumed by the bridging financier, is accordingly also high.

. . .

[T]he cost to the bridging financier of funding is also high. Unlike banks, due to the prohibition contained in the Banks Act, 1990 short-term financiers are not permitted to engage in deposit taking activities and accordingly are unable to utilise funds received from depositors in the provision of loan funding. Bridging financiers are accordingly required to fund the loans through equity and loan capital, the cost of which is high.

. . .

. . . An important factor impacting on the nature and scope of the security required by the Respondent, as well as the interest rate at which it was prepared to grant the loan, was that the Respondent had not previously conducted business with the First Applicant and/or Amod. From a risk assessment perspective the fact that the First Applicant was a first time borrower increased the risk of the loan as there was no prior trading history between the Respondent and the First Applicant whereby the Respondent was able to assess the credit worthiness, performance and general risk profile of the First Applicant.'

All of those were weighty considerations. None received appropriate recognition in the

18 Paras 66, 84 - 85 and 93.

judgment of the high court. They ought to have.

[35] If the CC could point to any particular circumstances which showed that the transaction was not an ordinary one, those ought to have been given due weight. But it failed to do so. Under those circumstances no facts were disclosed which ought to have induced the high court to afford the CC the relief that it sought. Courts should not – as the high court did – interfere with a bargain deliberately entered into by two parties dealing at arms' length with each other merely because it subjectively believes that the rate of interest stipulated was unfair. Amod is a man conversant with business. The rate of interest no doubt is high, but it may not be incommensurate with the risk that African Dawn ran in advancing its money to the CC. There are no circumstances here that show either extortion or oppression or anything akin to fraud, and, therefore I do not believe that the high court was entitled to say that the transaction is a usurious one.It follows that the appeal must succeed.

[36] In the result:

1 The appeal succeeds with costs, including those consequent upon the employment of two counsel.

2 The order of the court below is set aside and in its stead is substituted the following:

'a. The application is dismissed with costs.

b. The counter application succeeds with costs.

c. It is ordered:

1 That the First Applicant, the Second Applicant, and the Ismail Amod Family Trust (No. IT8815/04) represented by the Second, Third and Fourth Applicants in their capacities as the duly appointed trustees ("*the Trust*"), jointly and severally, the one paying the other(s) to be absolved, but subject to 2 hereunder, pay to the Respondent:

1.1 the sum of R3,900,247.50;

1.2 interest on the aforesaid sum of R3,900,247.50 calculated at the rate of 6.5% per month *a tempore morae* from 1 July 2009 to date of payment;

1.3 costs of suit on the attorney and client scale.

2 That the liability of the Trust in terms of 1 above is limited to the security held by the Respondent under:

2.1 covering mortgage bond B038860/08 registered over Erf 12018 Lenasia Extension 13 Township, Registration Division IQ, the Province of Gauteng, in extent 680 square metres, held under deed of transfer T49903/2005; and

2.2 covering mortgage bond B037987.08 registered over Erf 11954 Lenasia Extension 13 Township, Registration Division IQ, the Province of Gauteng, in extent 800 square metres, held under deed of transfer T50215/2005.

3 That the following immovable properties registered in the name of the Trust are declared specially executable for the liability of the Trust in terms of 2 above:

3.1 Erf 12018 Lenasia Extension 13 Township, Registration Division IQ, the Province of Gauteng, in extent 680 square metres, held under deed of transfer T49903/2005;

3.2 Erf 11954 Lenasia Extension 13 Township, Registration Division IQ, the Province of Gauteng, in extent 800 square metres, held under deed of transfer T50215/2005.'

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V M PONNAN
JUDGE OF APPEAL

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