



IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)

Case Number: 22258/20

(1) **REPORTABLE: NO**  
(2) **OF INTEREST TO OTHER JUDGES: NO**  
(3) **REVISED.**

.....  
**DATE**

.....  
**SIGNATURE**

In the matter between:

**BENEFICIO DEVELOPMENTS (PTY) LTD**

Plaintiff

**Registration Number: 2009/007912/07**

and

**TARENTAAL CENTRE INVESTMENTS (PTY) LTD**

First Defendant

**Registration Number: 2005/000028/07**

**THE VILLAGE MALL INVESTMENTS (PTY) LTD**      Second Defendant  
**Registration Number: 2004/030240/07**

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**JUDGEMENT**

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**MOLOPA-SETHOSA J**

[1] The plaintiff, has instituted an action against the first and second defendants for an order in the following terms:

1.1      *Payment of the sum of R16 358 068.25; interest on the sum of R16 358 068.25 at the rate of 1% per week calculated daily and capitalised monthly from 1 June 2020 to date of payment;*

1.2      *costs of suit on the scale as between attorney and client.*

2 *Against the First Defendant:*

2.1 *an order declaring the property described as*

*PORTION 56 OF THE FARM BESTERS LAST NO 311*

*REGISTRATION DIVISION J.T., PROVINCE OF  
MPUMALANGA MEASURING: 1.9781 (ONE COMMA  
NINE SEVEN EIGHT ONE)*

*HECTARES*

*HELD BY DEED OF TRANSFER T81755/2005*

*be specially executable in favour of the Plaintiff;*

*2.2 an order that the plaintiff is entitled to payment of all rentals in respect of tenants on the property described in 2.1 hereinabove;*

*3 Against the Second Defendant: -*

*3.1 an order declaring the property described as:*

*1. ERF 3383 NELSPRUIT EXTENSION 2*

*REGISTRATION DIVISION J.U., PROVINCE OF  
MPUMALANGA MEASURING 6003 (SIX THOUSAND  
AND THREE) SQUARE METRES HELD BY DEED OF  
TRANSFER T37420/2005*

*2. REMAINING EXTENT OF ERF 1496 NELSPRUIT  
EXTENSION 2 REGISTRATION DIVISION J.U.,  
PROVINCE OF MPUMALANGA MEASURING 1325 (ONE*

THOUSAND THREE HUNDRED AND TWENTY-FIVE)  
SQUARE METRES  
HELD BY DEED OF TRANSFER NUMBER T37420/2005

*be specially executable in favour of the Plaintiff;*

3.2 *an order that the plaintiff is entitled to payment of all rentals in respect of tenants on the property described in 3.1 hereinbefore;*

4 *Further and/or alternative relief.”*

[2] The plaintiff’s claim against

[2.1] the first defendant is based upon:

[2.1.1] a written loan agreement concluded on 13 December 2017 between the plaintiff and the first defendant in terms whereof an amount of R40 166 116.50 was loaned and advanced by the plaintiff to the first defendant, and interest at the rate of 1% per week, capitalised monthly, was payable by the first defendant to the plaintiff. The term of the first loan agreement was approximately 3 ½ months from 13 December 2017 to 31 March 2018.

- [2.1.2] an addendum to the written loan agreement concluded between the plaintiff and first defendant on 27 March 2018 in terms whereof an amount of R41 974 404.84 was loaned and advanced by the plaintiff to the first defendant, and interest at the rate of 1% per week, capitalised monthly, was payable by the first defendant to the plaintiff. The term of the loan was extended to 31 May 2018.
- [2.1.3] a further addendum to the loan agreement concluded between the plaintiff and the first defendant on 27 July 2018 in terms whereof an amount of R5 000 000.00 was loaned and advanced by the plaintiff to the first defendant, and interest at the rate of 1% per week, capitalised monthly, was payable by the first defendant to the plaintiff. The outstanding loan amount in terms of the loan agreement and the first and second addenda thereto, was R32,521 000.00. A capital payment of R5,000,000.00 had to be made by 15 August 2018.
- [2.1.4] a loan agreement concluded between the plaintiff and the first defendant on 31 October 2018 in terms whereof an amount of R4 000 000.00 loaned and advanced by the plaintiff to the first defendant, and interest at the rate of 1% per week, capitalised monthly, was payable by the first defendant to the plaintiff. Payment of the loan amount, together with

interest and all costs were to be paid by 31 December 2018

and

[2.1.5] a loan agreement concluded between the plaintiff and the first defendant on 3 December 2018 in terms whereof a further amount of R6 000 000.00 was loaned and advanced by the Plaintiff to the first defendant, and interest at the rate of 1% per week, capitalised monthly, was payable by the First Defendant to the Plaintiff. Payment of the loan amount, together with any balance interest and any outstanding costs were to be paid by 31 December 2018

[2.1.6] a mortgage bond executed by the first defendant in favour of the Plaintiff over the property mentioned in 2.1 above

[2.2] against the second defendant is based upon: -

[2.2.1] a written suretyship dated 13 December 2017 executed by the Second Defendant in favour of the Plaintiff;

[2.2.2] a mortgage bond executed by the Second Defendant in favour of the Plaintiff over the property mentioned in 3.1 above.

[3] The second defendant has signed as surety thereof, and both the first and second defendants (“defendants”) have passed Mortgage Bonds over the immovable property belonging to them.

[4] The plaintiff avers that the defendants failed to make payment of the capital and interest payable in terms of the loan agreements and the addenda thereto.

[5] The defendants defended the action and filed a counterclaim. The defendants contend that the interest rate imposed/charged by the plaintiff is unlawful, against public policy, unconstitutional, and therefore falls to be set aside as being void and unenforceable as being against public policy.

[6] The defendants contend that they have repaid the capital amount to the plaintiff and that they ended up paying some R23 250 763.74 more than the capital, therefore they are claiming by way of an unjust enrichment action.

[7] The plaintiff contends that there is no unjust enrichment on the part of the plaintiff; that the plaintiff has performed completely in terms of the agreement and there can be no question of the plaintiff having been enriched at the expense of the defendant.

[8] The following is *inter alia* common cause: -

[8.1] The conclusion of the loan agreements, the suretyship and the mortgage bonds.

[8.2] The plaintiff advanced to the first defendant the amounts provided for in terms of the loan agreements.

[8.3] The calculation of the amount outstanding as set out in the expert report [an actuary, De Vos] filed by the plaintiff.

[8.4] The first defendant breached the loan agreements in not having made payment in full to the plaintiff, in particular interest.

[9] As per the defendants' plea and counterclaim, the defendants' case is that:

[9.1] The interest rate provided for in terms of the loan agreements, being 1% per week, capitalised monthly: -

[9.1.1] equates to a nominal interest rate of 52% per annum; and is usurious

[9.1.2] Inasmuch as the interest rate provided for in terms of the loan agreements is usurious: -

9.1.2.1 the various clauses of the loan agreements providing for interest are void and unenforceable, such that: -

9.1.2.2 the plaintiff is only entitled to interest at the applicable *mora* rate in terms of the Prescribed Rate of Interest Act 55 of 1975; and



9.1.2.3 the plaintiff is obliged to repay to the first defendant, on the basis that the plaintiff has been unjustly enriched, the difference between the amounts paid by the first defendant to the plaintiff in respect of the usurious interest rate and the total amount of interest that the plaintiff was entitled to at the applicable *mora* rate, amounting to R19 667 817.67.

9.1.2.4 alternatively, the various clauses of the loan agreements providing for interest are void and unenforceable, such that: -

9.1.2.4.1 such clauses cannot be severed from the loan agreements;

9.1.2.4.2 the loan agreements are void;

9.1.2.4.3 the plaintiff is obliged to repay to the first defendant, on the basis that the plaintiff has been unjustly enriched, the difference between the total amount paid by the first defendant

to the plaintiff, being R78 416 880.24 and the total of the amounts paid by the plaintiff to or on behalf of the first defendant totalling R55 166 116.50, amounting to R23 250 763.74.

9.1.2.5 the mortgage bonds are to be cancelled, inasmuch as the Defendants are not indebted to the Plaintiff.

[10] In so far as the quantum of the plaintiff's claim is concerned, the parties are *ad idem* that the plaintiff's claim of R15 673 572.00, together with interest thereon to the maximum of R15 673 572.00, applying the *in duplum* rule, amounts to R31 347 144.00

[11] The defendants contend that the plaintiff is not entitled to the order sought. They refer to the loan agreements as "*putative loan agreements*"

[12] The defendants allege that the amount in excess of the amount due was paid in the *bona fide* and reasonable but mistaken belief that it was due, owing and payable by the first defendant to the plaintiff.

[13] The defendants further aver that the plaintiff and the defendants were aware that the loan amount was needed and would be used by the Nova Property Group of Companies (“*Nova Group*”) to fund certain essential capital requirements, in circumstances where Nova Group had been unable to secure loan finance by conventional means from recognised banks and financial institutions; that at the time of conclusion of the putative agreements, the positions of the parties were not “*equipoise*” and in the peculiar circumstances as set out in paragraph 9 of the defendants’ plea, the first defendant was compelled to agree to the imposed interest rate, even though such rate was and remains excessive, unconscionable, unlawful, a contravention of the first defendant’s Constitutional rights to, *inter alia*, property and freedom of trade and against public policy.

[14] In essence, the defendants aver that for the reason aforesaid and that the plaintiff’s insistence to charge the imposed interest rate and to compel the first defendant to accept same was extortionate and/or oppressive and the imposed interest rate being excessive and unconscionable, is usurious and falls to be set aside as being void and unenforceable as being against public policy, unlawful and unconstitutional.

### **Issues for determination**

[15] The essential issues for determination, and in respect of which the defendants accept they have the onus, are whether: -

[15.1] the interest rate as provided for in terms the loan agreements is usurious;

[15.2] if the interest rate in terms of the loan agreements is usurious: -

[15.2.1] the various clauses of the loan agreements providing for interest are void and unenforceable;

[15.2.2] alternatively, the various clauses of the loan agreements providing for interest are void and unenforceable such that: -

[15.2.2.1] such clauses cannot be severed from the loan agreements; and

[15.2.2.2] the loan agreements are void.

[16] It was submitted on behalf of the defendants that the interest rate provided for in terms of the loan agreements is usurious; that therefore the various clauses of the loan agreements providing for interest are void and

[16.1] unenforceable; that such clauses cannot be severed from the loan agreements, and consequently, the loan agreements are void.

[16.2] It was further submitted that the plaintiff has been unjustly enriched at the expense of the first defendant in the amount of R23 250 763.74, alternatively (insofar as the clauses of the loan agreements provided for interest can be severed), R19 667 817.67 and the first defendant is entitled to recover payment thereof from the Plaintiff.

[16.4] That at the very least, the plaintiff's claim must fail.

**THE LAW:**

[17] The applicable legal principles in regard to usurious interest rates in terms of a loan agreement which is not subject to the Usury Act 73 of 1968 nor the National Credit Act 34 of 2005, have been dealt with in *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel & Tours CC* 2011 (3) SA 511 (SCA) and *Structured Mezzanine Inv (Pty) Ltd v Davids and Others* 2010 (6) SA 622 (WCC), wherein the Supreme Court of Appeal dealt with a challenge to an imposed interest rate which would initially be 5%, thereafter 6.5% per month if any payment was not paid.

[18] The following was stated in *African Dawn*:

*“[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,<sup>7</sup> 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 than 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 had been done in *Dyason v Ruthven*.<sup>8</sup> 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 Accountants*,<sup>9</sup> 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.<sup>10</sup>*

*[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.<sup>11</sup> As it was put in *City of Tshwane Metropolitan Municipality v RPM Bricks*<sup>12</sup>*

*‘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* [\[2003\] ZACC 12; 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* [\[2000\] ZACC 1; 2000 \(2\) SA 674](#) (CC) para 49). The 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* [\[2001\] ZACC 22; 2001 \(4\) SA 938](#) (CC) para 55).’*

[23] In *S v Thebus & another*,<sup>13</sup> 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 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.<sup>14</sup> 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.<sup>15</sup> 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'<sup>16</sup> - 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.<sup>17</sup>*

[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 foregoing, 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 was 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 — 5% 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*, 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 (ie 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 creditworthiness, performance and general risk profile of the first applicant.'*



*All of those were weighty considerations. None received appropriate recognition in the 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 arm's 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 H 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.”*

[19] In essence the Supreme Court of Appeal found that:

[19.1] Contracts valid in form are *prima facie* enforceable in South African law and effect will be given to them unless grounds for the avoidance are proved;

[19.2] Relying on **Barkhuizen v Napier**,<sup>1</sup> public policy, as informed by the Constitution, requires in general that parties should comply with their contractual obligations freely and voluntarily undertaken

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<sup>1</sup> 2007 (5) SA 323 (CC)

which is expressed in the maxim *pacta sunt servanda* and gives effect to the central Constitutional values of freedom and dignity of which self-autonomy, or the ability to regulate one's own affairs, is the very essence of freedom and a vital part of dignity and that the extent to which the contract was freely and voluntarily concluded is clearly a vital factor as will determine the weight that should be afforded to the values of freedom and dignity;

[19.3] It found however that *pacta sunt servanda* is not a holy cow;

[19.4] Confirmed that the common law test as to whether an agreement was usurious or not did not rely simply on the amount of interest charged, but the test was whether there had been extortion, oppression or any actions akin to fraud;<sup>2</sup>

[19.5] While there was no suggestion in that matter that the common law rule is inconsistent with a specific Constitutional provision<sup>3</sup> it considered the correctness of the common law principle and found that “*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*”; and

[19.6] The person relying thereon has the onus of showing that the applicable interest rate was usurious in the sense that it amounted to extortion or oppression or something akin to fraud.

### **THE CONSTITUTIONAL CHALLENGE:**

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<sup>2</sup> Parr 19 to 21

<sup>3</sup> Par 24

[20] The defendants, in their plea, allege that for the reason set out in their counterclaim, the agreements and the addenda thereto, are invalid, unlawful, unconstitutional and/or against public policy.

[21] In the counterclaim the basis of the alleged unconstitutionality is stated to be “*a contravention of the first defendant’s Constitutional rights to, inter alia, property and freedom of trade*”.

[22] The sections of the Constitution relied upon are not particularly identified in the counterclaim. It is trite that facts rendering those sections relied upon applicable need to be pleaded; See *Van Zyl v Auto Commodities (Pty) Ltd*, [2021] ZASCA67 (3 June 2021) par [14].

[23] From the Rule 16A notice delivered by the defendants, it appears that reliance is indeed placed on sections 22 and 25 of the Constitution.

[23.1] Section 22 of the Constitution provides that:

*“Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”*

[23.2] Section 25(1) of the Constitution provides that:

*“No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”*

[24] There does not seem to be any correlation between the facts relating to the agreements between the plaintiff and the defendants in this matter and an infringement of section 22. The defendants’ reliance on this section seems to be clearly misplaced.

[25] In so far as section 25 is concerned, the purpose of section 25 is to protect citizens from expropriation without compensation by the State. It cannot conceivably be applied to regulate agreements freely entered into between citizens, See **Curry and De Waal, The Bill of Rights Handbook**, 5<sup>th</sup> Edition pp 531 to 565. The agreements, the addenda thereto and the interest clauses cannot conceivably infringe the provisions of section 25 of the Constitution.

[26] The Common Law rule *in casu*, was confirmed in **African Dawn**. This Court is bound by **African Dawn**. It is trite that the law, as stated by the SCA is the law unless and until changed or set aside by the SCA or the Constitutional Court.

[27] Both the SCA and the Constitutional Court in *Beadica 231 CC v Trustees for the time being of the Oregon Trust* 2020 (5) SA 247 (CC)), confirmed that a

court may not refuse to enforce contractual terms on the basis that the enforcement would in its subjective view be unfair, unreasonable or unduly harsh.

[28] The plaintiff correctly submitted that there is no merit whatsoever in the Constitutional attack.

[29] *In casu*, one is not dealing with any ordinary man in the street, but with:

[29.1] Directors of a company which controls assets on its valuation of R2,400,000 000.00, who acted as the directors of the subsidiary first and second defendants;

[29.2] Directors who are not only hard-nosed businesspersons, but also in the form of Mr Myburgh, an experienced senior commercial attorney;

[29.3] A group of companies who had previously entered into various loans with the Plaintiff at a higher interest rate;

[29.4] Directors who were able to not only negotiate a reduction of the interest rate from 1,25% per week to 1% per week, but who

dominated the negotiations and regulated when, where and how documents would be signed or consultations would be held; and

[29.5] Borrowed monies on a number of occasions at the same interest rate; in this case there were in fact 4 (four) loans.

[30] Reliance on the said two sections of the Constitution, is misplaced and without of any merit.

### **THE EVIDENCE:**

[31] The plaintiff led the evidence of Dr Andre Otto Laas “(Dr Laas). He testified that he is the plaintiff’s sole shareholder and director. He was approached by Mr Myburgh and Ms Haese. They explained that the NOVA Group required a short-term loan of R40,000,000.00, which would be repayable from the proceeds of the sale of two properties. Registration of transfer was expected sooner but it was agreed that the loan would be repaid by 31 March 2018. The plaintiff’s usual interest rate for a short-term loan was 1,25% per week but Mr Myburgh and Ms Haese negotiated Dr Laäs down to 1% per week.

[32] He testified that the first defendant, Tarentaal, was the company that borrowed the money and the second defendant, Village Mall, signed surety for the loan. Both defendants mortgaged immovable properties to the plaintiff, as security for the loan. Importantly, the mortgage bonds could only be registered after the disbursement of the loan. As security during the interim period, Mr Myburgh and Ms Haese bound themselves as sureties to the plaintiff. The

defendants never complained about the agreed interest rate and, on numerous occasions, expressed their gratitude to Dr Laäs.

[33] Dr Laäs explained the extensions granted to the defendants and the conclusion of the addenda and the further loan agreement. According to Dr Laäs the interest rates charged by him is in line with the interest rates charged by lenders in the market for similar short-term loans. This evidence was not challenged in cross-examination and was confirmed by both the plaintiff's and defendants' expert witnesses, Messrs Dekker and Greyling respectively.

[34] It is important to note that the evidence of Dr Laäs was not meaningfully challenged in cross-examination. In particular, and most importantly, it was never put to him that the interest rate charged by the plaintiff was usurious, in the sense that it amounted to extortion or oppression on something akin to fraud. His evidence thus stands uncontested, and it is not open to the defendants to argue that the interest rate was usurious in the sense held by the SCA in **African Dawn**, See *President of the Republic of South Africa and others v South African Rugby Football Union and Others*, 2000 (1) SA 1 (CC) at 36 to 37. (my emphasis)

[35] For the defendant one Mr Cornelius Myburgh ("Mr Myburgh) testified. He testified that he is a director of all the companies in the NOVA Group and in particular of a company called NOVA Property Group Investments (Pty) Ltd ("*Investments*") and of a company called NOVA Prop Gro Group Holdings Ltd. He also is a practicing attorney of many years' standing. Ms Haese is one of his co-directors in each of the companies in the NOVA Group of companies. They

are also the directors of the first and second defendants. They, at all relevant times, represented the NOVA Group and the first and second defendants.

[36] He testified that during approximately March 2017 a decision was made by the NOVA Group through NOVA Investments to repay certain debenture holders from the sale of two properties, described as Silver Water Crossing and Magalieskruin. The payment to debenture holders would be made by a cash payment from Investments. Investments would, in turn, receive loans from the subsidiaries involved in amounts equating the sale prices of the underlying properties. The registration process of the properties was delayed. It was decided that the NOVA Group would suffer reputational risk as a result of non-payment to the debenture holders and it became urgent for NOVA Investments to obtain funding in order to stay within its commitment to make the payments to debenture holders.

[37] He testified that the NOVA board decided that it needed to find short-term funding to bridge the period that it would take for these two transactions to be finalised. They approached Dr Laäs to provide the short-term bridging finance.

[38] He testified that Dr Laäs was known to him. NOVA needed R40,000,000.00 worth of funding. The NOVA Group had done business with Dr Laäs previously and had obtained bridging finance from Dr Laäs previously.

[39] He testified that the reason for approaching Dr Laäs was that the NOVA Group was unable to obtain funding from banks. The bridging finance was required urgently. The reason for requiring bridging finance urgently was because the NOVA Group had committed itself to make a payment to the



debenture holders, and they wanted to make payment to the debenture holders before Christmas of 2017.

[40] He testified that conventional banks could not have been approached for urgent finance, even had the NOVA Group not been blacklisted by the regular banks. That Dr Laäs was approached because he was known to the NOVA Group.

[41] Dr Laäs was advised that the NOVA Group needed the funding urgently because they had a requirement to make a payment to their debenture holders by 15 December 2017 and needed the funding by 14 December 2017. The loan would be repaid from the proceeds of the transfers of the two properties owned by Magalieskruin and Silver Water Crossing.

[42] He testified that he/Mr Myburgh and Ms Haese negotiated the interest rate asked for by Dr Laäs down from 1,25% per week to 1% per week.

[43] He testified that on 27 March 2018 an extension was agreed to, in terms whereof there was an extension to 31 May 2018. The extension of the repayment date was asked for and agreed to because the transfer of the Magalieskruin property had not yet been concluded; and the proceeds from the Silver Water Crossing property were used to repay the second tranche of debenture holders. A further extension was agreed to and an additional R5,000,000.00 for capital improvements was advanced by the plaintiff to the

first defendant. The R5,000,000.00 was utilised in order to do revamps of shopping centres and tenant installation and also for working capital.

[44] He testified that on 31 October 2018 a further loan of R4,000,000.00 was made to the first defendant, repayable on 31 December 2018. The R4,000,000.00 loan was needed for work to be done on shopping centres and for working capital. The Magalieskruin transfer was still being delayed.

[45] He testified that on 3 December 2018 Tarentaal applied for and received yet a further loan in the amount of R6,000,000.00 repayable on 31 December 2018, i.e. a loan only for a period of 4 weeks at 1% per week. The R6,000,000.00 loan was required for work to be done on buildings and to supplement the NOVA Group's working capital.

[46] Under cross-examination he stated that from the beginning, when they approached the plaintiff in November 2017, he as a lawyer held the view that the interest rate charged by the plaintiff might well be usurious and invalid but he, as an experienced commercial attorney, decided to withhold his belief from the plaintiff because they desperately needed the money urgently and they could not find the money anywhere else

[47] Mr Myburgh conceded that the loans granted constituted "*classic bridging finance*". Further that charging 1% per week was not unusual for bridging companies in respect of bridging loans for 3 ½ months.

[48] He stated that the NOVA Group elected not to wait for the proceeds of the sale but to pay the second tranche to the debenture holders; further that it made commercial sense to borrow expensive money to honour the NOVA Group's promise to the debenture holders.

[49] He stated that NOVA Group received R53,600,000.00 from the proceeds of the Silver Crossing property and could have repaid the plaintiff its R40,000,000.00; however, the NOVA Group was happy with the extension even at 1% per week for two months, as it made sense to the NOVA Group.

[50] He stated that the first defendant, Tarentaal, did not require any funding for itself. That the property transactions would not be concluded before December 2017 and that is why they borrowed the money.

[51] He testified that the July loan was used for working capital. The loan was not repaid in 2019 because NOVA Group needed the money for other purposes. He stated that Dr Laäs had no risk as that is what is stated in his financial statement.

[52] He stated that the NOVA Group's financial position was irrelevant for purposes of the loan and Dr Laäs only had to look at Tarentaal, the first

defendant. He stated that even in September 2019 he thanked Dr Laäs for being good to the NOVA Group.

[53] He stated that Tarentaal and Village Mall are wealthy companies, which own unencumbered property to the value in excess of a R100,000,000.00. That Tarentaal did not need the money for itself, it borrowed the money to on-lend to the group.

[54] He confirmed the defendants' reliance on section 25 of the Constitution

[55] He conceded that the plaintiff had a risk of not being paid timeously [**which actually happened *in casu***] and having no money to do business with. [my emphasis]. He stated that the defendants intend to go to the Constitutional Court, and confirmed that that will delay the matter by another two to three years.

[56] He conceded that the plaintiff lending out 80% of its capital to Tarentaal constituted a risk; further that the plaintiff took the risk of paying out the money on 14 December 2017 without security or bonds. That objectively speaking there was a risk of the plaintiff not receiving repayment timeously.

[57] He stated that as things stood on 14 December 2017 the loan would have been repaid from the proceeds of the two transactions at the end of March 2018; but that Tarentaal had an operating loss for the 2017 financial year, it owed almost R24,000,000.00 to its holding company and its cash flow was negative for that year. Tarentaal would have been placed into funds on the two transactions, Silver Water and Magalieskruin, to repay what it owed to the plaintiff; but in 2018 Tarentaal again had an operating loss, a negative cash flow, and could not repay the loan from its own resources.

[58] He conceded that at present the plaintiff is owed approximately R32,000,000.00 by Tarentaal. That the loan was not repaid at the end of May 2018 because the defendants and the group did not have the funds to repay the loan.

[59] He stated that there was always a possibility of the NOVA Group not receiving the proceeds from the property transactions.

[60] He conceded that people who cannot borrow from regular banks always pay more than what the regular banks charge. That a regular bank would not have been able to grant the urgent loans.

[61] The next witness to testify for the defendants was one Allan Greyling (“Mr Greyling”). He testified that he is a forensic accountant, like Mr Dekker who testified for the plaintiff. He/Mr Greyling did not dispute the correctness of Mr Dekker’s evidence, contained in his report delivered, in any material respects and Mr Dekker’s evidence was also not seriously challenged in cross-examination.

[62] Mr Greyling, during the cross-examination during November 2021, practically conceded the plaintiff's case. He was, quite fairly, not prepared to express the view that the interest rates charged by the plaintiff was usurious. The high water mark of his evidence was that in his subjective view the interest was excessive. He did not say what, according to him, a reasonable interest rate would have been.

[63] During cross-examination on 16 May 2022, Mr Greyling noted the evidence given by Mr Myburgh, summarised above.

[64] When referred to the judgment in *African Dawn*, he agreed that:

[64.1] The defendants approached the plaintiff without inducement or compulsion;

[64.2] The plaintiff made full disclosure of the applicable interest rate (it was in fact negotiated down by the defendants);

[64.3] The borrower (Tarentaal and Village Mall) were relatively wealthy business entities (as were the NOVA Group of companies);

[64.4] The money was borrowed as a result of a business decision by the defendants and the NOVA Group to repay debenture holders and to avoid reputational damage – it was a business decision which made sense to the defendants and the NOVA Group;

[64.5] The interest rate charged by the plaintiff was in accordance with interest rates charged for similar transactions by similar financiers,

such as the bridging companies researched by Mr Greyling; [my underlining]

[64.6] He accordingly conceded that the present case was on all fours with the *African Dawn* judgment, save for contending that the interest charged was incommensurate with the risk run by the plaintiff.

[65] Mr Greyling conceded that bridging finance, as a general proposition, is risky business; that Tarentaal was an underperforming company that could not pay the loan without either selling its asset or obtaining the cash flow from within the NOVA Group; that if Tarentaal walked into a Standard Bank and asked the manager in his best of moods to grant them a loan of R40,000,000.00, not because they needed it but because they wanted to on-lend it to the group, it would not have received the money; further that Tarentaal could not obtain finance from any regular financial institution; and that is why Tarentaal had to go somewhere else and going somewhere else is associated with higher risk and higher interest rate.

[66] He stated that the NOVA Group was *persona non grata* with the regular banks; and that the NOVA Group had a weak financial position; that no bank would have been prepared to lend money to Tarentaal even if the group signed surety;

[67] He conceded that the interest rate charged by the plaintiff was in line with the interest rates charged by other similar financial institutions.

[68] He confirmed that The NOVA Group's financial statements were qualified on three occasions, on the last occasion in the worst possible manner – an adverse opinion.

[69] In his supplementary report Mr Greyling commented on the expert report of one Jan Dekker (plaintiff's expert), dated 25 April 2022 and in respect of most issues raised by Mr Dekker, Mr Greyling concurred with the findings of Mr Dekker.

[70] The high water mark of Mr Greyling's evidence was that Dr Laäs himself regarded the credit risk of the loans granted by the plaintiff as low in his financial statements. He, however conceded that Dr Laäs's subjective view in his financial statements, intended for the use of the shareholder, being himself, is not dispositive of the issue and that the risk has to be assessed objectively.

[71] Mr Greyling did not join issue with Mr Dekker in respect of the poor financial positions of both Tarentaal and the Village Mall, as well as the NOVA Group. Notably, Mr Dekker was not cross-examined on his conclusion in paragraph 11 of his report, wherein he/Mr Dekker, amongst others, delves into the risks associated with bridging finance; as well as the negative financial positions of the defendants and the NOVA Group.

[72] Mr Greyling states in paragraph 152 of his supplementary report, that in the absence of the loan being granted to Tarentaal, the NOVA Group would have been insolvent due to a liquidity shortfall. From this one can safely state that Mr Greyling does not seriously contend that the risk involved in granting the loan to Tarentaal was incommensurate with the interest rate charged by the plaintiff.



[73] Mr Greyling also conceded that *African Dawn* has practically gone out of business as a result of the high risks involved in the short-term financing business.

[74] One Mr Jan Dekker (“Mr Dekker”) testified on behalf of the plaintiff. He/Mr Dekker, like Mr Greyling, is a forensic accountant.

[75] He testified that he carefully researched the comparative bridging finance rates available in the market. There is no difference between Mr Dekker and Mr Greyling, and Mr Greyling readily accepted that the interest rate charged by the plaintiff was in line with the rates charged in the market for similar short-term finance.

[76] Mr Dekker analysed the financial statements of Tarentaal, Village Mall and the NOVA Group and concluded that there was a high risk involved in advancing funds to the NOVA Group. This finding was not challenged in cross-examination.

[77] On the basis of the analysis of the financial positions of Tarentaal, Village Mall and the NOVA Group, Mr Dekker expressed the view that advancing loans to such entities was a high risk.

[78] Mr Dekker’s final conclusion, that the interest rate charged by the plaintiff to Tarentaal is market related when compared to the other providers of bridging finance, was not challenged at all.

[79] The only point canvassed in cross-examination with Mr Dekker, was the statement in the plaintiff’s own financial statements that the credit risk associated with the loans granted by the plaintiff was low. Mr Dekker stated

that nothing turns on that particular statement in the financial statements of the plaintiff.

[80] If one has regard to the authorities and principles set out therein, as far of example in African Dawn, on the facts before the Court, and having regard to the totality of the evidence before Court, it cannot be said that the applicable interest rate of 1% per week charged by the Plaintiff is usurious, nor can it be said that there was any extortion or undue, oppression or something akin to fraud on the part of the plaintiff.

[81] Myburgh and Haese as directors and CEO of NOVA GROUP to which the defendants are part of, voluntarily acted and negotiated with Dr Laas, the sole shareholder and director of the plaintiff, on the terms of the loan, and voluntarily agreed to the interest rate charged by the plaintiff; as stated above, They actually negotiated a lesser interest rate of 1% per week, than the 1.5% that is normally charged by the plaintiff. Myburgh himself conceded that it was not unusual for bridging financiers to charges of 1% to 1.5% per week.

[82] All evidence points to the representatives of the defendants entering into the loan agreements with the plaintiff on behalf of 1<sup>st</sup> defendant freely and voluntarily without any duress or undue influence on the part the plaintiff. And in fact, on the evidence of Myburgh, it is very clear that he/Myburgh (a seasoned attorney) on behalf of the first defendant seems to have had an ulterior motive up his sleeve to keep on borrowing big sums of money from the plaintiff on behalf of the NOVA Group, while planning to later challenge the interest rate charged by the plaintiff, [which he himself, together with Ms Haese, negotiated from 1.25% to 1% per week], as being allegedly usurious, thus rendering the loan agreements to be void/unconstitutional, akin to fraud, and/or against public policy. Myburgh testifying that he knew that one day he will play

his card on usurious interest is unconscionable; he, amongst others, kept going back to the plaintiff for loans for the defendants/NOVA Group, while knowing that he intended challenging the interest rate charged by the plaintiff later on, and he never at any stage raised this with the plaintiff's sole shareholder and director, Dr Laas.

[83] In fact, looking at the evidence of Mr Myburgh summarised above, one is bound to conclude that there does not seem to have been a true intention on the part of the defendants from the beginning to eventually pay up the loaned amounts, together with interest and other charges provided for in the loan/addenda agreements

[84] The defendants put emphasis to the notion that the plaintiff did not face any risks of non-payment by the defendants because they had provided sufficient security to the plaintiff. This argument loses sight of the fact that when the first loan agreement was entered into, there was no security in place. Further on the evidence of both experts for the respective parties, bridging finance is a high risk business. Mr Myburgh himself conceded that much. Mr Greyling basically conceded the plaintiff case. Importantly he conceded that the interest rate charged by the plaintiff as in accordance with the interest rate similar financiers such as the bringing companies he researched.

[85] The conclusions of Mr Dekker were never challenged in cross examination, and thus, remain undisputed. Of importance, in his report, dated 25 April 2022, at paragraph 11, Mr Dekker highlights the financial difficulties that the defendants and the NOVA group had. The plaintiff clearly took a huge risk in lending money to the 1<sup>st</sup> defendant. Mr. Dekker, the plaintiff expert,

testified that there was high risk involved in advancing funds to the Nova Group ( the defendant being part of the Nova group). On analysis of the comparative bridging finance rates available in the markets, as set out in Mr Dekker report, the Court accepts the conclusion by Mr Dekker that the interest rate charged by the plaintiff to the first defendant is market related.

[86] It is common cause that that Banks had blacklisted the Nova Group, which includes the defendants. There was no way the defendants could borrow money from any of the banks; hence they went to the plaintiff to loan money for the NOVA Group. There is no evidence that they complained about the interest rate charged by the plaintiff; in fact, Myburgh testified that they negotiated a lesser interest rate, from 1.5% to 1% per week; further they did not even try/approach other financiers to see if they could get a lesser interest rate. Importantly, on Mr Myburgh's evidence, it was not the first time they interacted with the plaintiff.

[87] On a balance of probabilities, on the facts before this Court the defendants were content with the interest rate charged by the plaintiff, hence they kept going back to the plaintiff for more short term loans.

[88] Having regard to the totality of the evidence before this Court, there is no evidence to show that the interest rate charged was incommensurate with the risk run by the plaintiff. The interest rate charged by the plaintiff was in accordance with the prevailing rates for similar transactions; and there is no evidence to point to any particular circumstances to show that the transaction was not an ordinary one.

[89] The facts in this case are in fact on all fours with the facts in *African Dawn* and the only distinguishing feature that Mr Greyling attempted to point

out, i.e. the proceeds from which a loan would be repaid, was conceded by Mr Greyling to be non-existent and identical to the *African Dawn* case.

[90] After considering all the facts before me, the legal principles/ the authorities and the arguments of both parties, I am satisfied that on the facts and evidence before this Court, the defendants have not discharged the *onus* resting upon them of showing that the applicable interest was usurious, in the sense that it amounted to extortion or oppression or something akin to fraud; nor have they made out any case for a Counterclaim.

[91] I am satisfied that the loan agreement and the addenda entered into between the plaintiff and the first defendant are valid and enforceable, and that the plaintiff has made out a case for the relief sought.

With regard Costs sought by the plaintiff, in terms of clause 5.4 of all the loan agreements/addenda mentioned above, there is provision that ‘the defendants shall pay costs on an Attorney and Client scale’.

[92] In prayers 2.2 and 3.2 the Plaintiff sought orders that it is entitled to payment of all rentals in respect of the tenants occupying the immovable properties of the First and Second Defendants described in prayers 2.1 and 3.1 respectively which are bonded in favour of the Plaintiff.

[93] The relief is based on clause 10 of each of the mortgage bonds [Annexures ‘I’ and ‘J’ to the particulars of claim], registered by the defendants; which clauses read as follows:

*"all rents which may from time to time be due from  
the present or any future tenant or tenants of the*

*property hereby mortgaged, or any portion thereof, are hereby ceded and assigned, as collateral security to and in favour of the Mortgagee or other legal holder hereof; and the Mortgagee, or other legal holder hereof is hereby empowered with power of substitution to collect, sue for and recover the said rents and to grant valid receipts for the same; but no use shall be made of the said cession of rentals unless the Appeler's Principal shall fail to pay the capital or interest upon due date or dates thereof "*

[94] The plaintiff pleaded clause 10 of the Mortgage Bond in paragraph 23.5 of the particulars of claim. The Mortgagee referred to hereabove is the plaintiff; and the Appearer refers to the defendants.

[95] The registration of the mortgage bonds is admitted by the defendants. The content of paragraph 23 of the plaintiff's particulars of claim, which sets out the terms of the bonds is admitted by the defendants "to the extent that what is pleaded... corresponds with the wording of annexures "I" and "J" to the Plaintiffs particulars of claim." The wording of clause 10 of annexures I and J accords with what is pleaded by the plaintiff in paragraph 23.5 of the particulars of claim; and is thus admitted by the defendants.

[96] No exception was raised against the manner in which the relief sought relying on the cession of rentals was phrased.

[97] In essence, the defendants' only defence to the Plaintiff's claims that the interest rate charged was usurious, against public policy and thus where such clauses were in the opinion of the defendant unlawful, either the clauses had to be set aside or the entire agreement

[98] It must have been accepted by the defendants that, if the defendants' defence aforesaid does not succeed, the plaintiff would be entitled to the relief sought in prayers 2.2 and 3.2 respectively. The proviso to the cession clause, to the effect that no use can be made of such cession unless the defendants failed to pay capital or interest on due date, is not applicable. The defendants have indeed defaulted on the loan agreements.

[99] Counsel for the defendants submitted that prayers 2.2 and 3.2 aforesaid are a blanket order and therefore illegal and/or unlawful. The relief sought in prayers 2.2 and 3.2 accords with the terms of clause 10 of the Mortgage bonds.

[100] The prayer claiming payment of the rental is in fact referred to in the particulars of claim and the basis thereof (clause 10) is both pleaded by the plaintiff and admitted by the defendants. However, the prayers are indeed couched widely. The relief sought ought to be in line with the provisions of the said clause 10, and such shall be reflected in the order to granted.

[101] In the result an order is made in the following terms:

“The plaintiff’s claim is upheld with costs on an attorney and client scale, and an order is made in the following terms:

1. The first and second defendants jointly and severally, the one paying the other to be absolved, are ordered to pay the amount R31 347 144.00 to the plaintiff;
2. The first and second defendants are ordered to pay interest on the amount of R31 347 144.00 at the rate of 1% per week calculated daily and capitalised monthly from date of judgement, until date of payment, such subsequent interest not exceeding R31 347 144.00
3. Costs of suit on the scale as between attorney and client, including the costs of two counsel and the costs of the experts FC de Vos and JJ Dekker, including their costs for preparing and submitting reports, preparation for trial and their qualifying fees as well as the costs of the application for the postponement of the hearing on the same scale;
4. Against the first defendant an order declaring the property described as:

PORTION 56 OF THE FARM BESTERS LAST NO 311  
REGISTRATION DIVISION J.T., PROVINCE OF MPUMALANGA  
MEASURING: 1.9781 (ONE COMMA NINE SEVEN EIGHT ONE)  
HECTARES HELD BY DEED OF TRANSFER T81755/2005

specially executable in favour of the plaintiff;



5. Against the second defendant an order declaring the property described as:

ERF 3383 NELSPRUIT EXTENSION 2 REGISTRATION DIVISION J.U., PROVINCE OF MPUMALANGA MEASURING 6003 (SIX THOUSAND AND THREE) SQUARE METRES HELD BY DEED OF TRANSFER T37420/2005

and

REMAINING EXTENT OF ERF 1496 NELSPRUIT EXTENSION 2 REGISTRATION DIVISION J.U., PROVINCE OF MPUMALANGA MEASURING 1325 (ONE THOUSAND THREE HUNDRED AND TWENTY FIVE) SQUARE METRE HELD BY DEED OF TRANSFER NUMBER T37420/2005

specially executable in favour of the Plaintiff;

6.1 Pending payment of the capital amount of the judgment and interest thereon as well as any taxed costs or the transfer as a result of a sale in execution of any such properties: -it is recorded that all rents which may from time to time be due from present or future tenants of the immovable properties described in paragraphs 2 and 3 above, mortgaged in favour of the Plaintiff have been ceded and assigned as collateral security to and in favour of the Plaintiff;

6.2the Plaintiff is empowered with power of substitution to collect, sue for and recover the said rents and to grant valid receipts for same;

6.3the rentals so collected are to be credited against the amounts due in terms of the judgment such to be applied fist to interest, then capital and finally, costs,

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**L M MOLOPA-SETHOSA**  
**JUDGE OF THE HIGH COURT**

For the Plaintiff : Adv: F H Terblanche SC  
Adv: D M Leathern SC

Instructed by : Laas Doman Inc

For the Defendants : Adv: L Hollander  
Adv: C Shahim

Instructed by : Faber Goertz Ellis Austen Inc