IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 388/2015

In the matter between:

BHEKINKOSI BRIGHT TSABEDZE		**Applicant**
And		
FIRST FINANCE (PTY) LTD	**1st**	**Respondent**
THE ACCOUNTANT GENERAL	**2nd**	**Respondent**
THE ATTORNEY GENERAL	**3rd**	**Respondent**

Neutral citation: ***Bhekinkosi Bright Tsabedze v First Finance (Pty) Ltd And 2 Others (388/2015) [2015] SZHC182 (23rd October 2015)***

Coram: **M. Dlamini J.**

Heard: **09th September 2015**

Delivered: **23rd October, 2015**

Money Lending and Credit Facility Act No. 3 of 1991 - In simpler words, the legislature allows the lender to charge interest (the costs of credit or borrowing as per ***Blienden J*** *supra) on the principal debt. If the borrower defaults or defers payment the lender is to charge further interest. The figure on the interest does not vary. It remains the same as determined at the period of conclusion of the agreement. What is adjusted is the principal debt as it keeps on fluctuating depending on payment and non-payment. In all these cases dealing with an additional financial charge other than interest, the court*

scrutinises the finance charge with a view to ascertaining whether once added upon the interest, the total interest is in line with the provisions of section 3(1). If the sum interest is above, the court is bound to declare the transaction usurious. As it was propounded in ***Arkansas*** *case, it is immaterial what this interest is defined or described as whether it is service fee, administrative fee or finance charge or whatsoever name, should it render interest above 8% plus prime rate, where the principal debt is E500 or above, the agreement must be declared a nullity. If not so, the Act would be defeated by what is commonly referred to as predatory lending. Is an usurious transaction to be declared a nullity in our jurisdiction? In this country, our economy is at its developing stage (emerging). It is the duty of not only those in business to nurture emerging businesses but even the court must be seen to put its weight behind the protection of businesses especially where coercion or fraud is not alleged. It is my considered view that an appropriate order of costs and interest tempore more is sufficient to send a message to the respondent's predatory conduct*.

Summary: By means of motion proceedings, the applicant seeks for a declaratory order in respect of a loan agreement entered into between himself and the first respondent on the basis that the interest levied is contrary to the Money Lending and Credit Financing Act No. 3 of 1991.

Applicant's application

[1] The applicant asserts that the loan agreement concluded by respondent and himself violates the Money Lending and Credit Financing Act No. 3 of 1991 (Act) in that it levied "*administrative fee*" which is not provided for in the Act. It is the applicant's contention that had the legislature intended that the lender pays any other charges, it would have specifically provided for in the Act. The applicant submits that the term "*finance charge*" is inclusive of administration fee. It is absurd for the lender to levy a further 1% per month which equals to 12% per annum, same rate as the finance charge. This 1% per month administrative fee is nothing but disguised finance charge totaling 24%, a rate prohibited by the Act, according to applicant.

Respondents' contention

[2] The respondent on the other hand informs the court that the applicant, a lawyer by profession, and an officer of this court, concluded the agreement with his eyes wide opened. He cannot at the stage of the loan, that is, after few months before the discharge of the entire debt, turn around and call upon this court to declare the agreement *void ab initio*. This is more so because he selected to pay by means of a stop order. This 1% per month is fee for handling his stop order paid to the third party (ITQ Net); an agent that processes payments through stop order. The respondent argues that had applicant intended to avoid the 1% per month administrative fee, he should have chosen another mode of payment such as direct cash deposit over the counter of the lender. Since he chose payment by means of a stop order, a convenient mode to him, he should pay for such luxury.

Adjudication

[3] The bone of contention is whether the 1% per month interest levied is lawful in terms of the Act.

The Act

Section 6 (2) and (3) reads:

> *"(2) No lender shall in connection with any money-lending or credit transaction obtain judgment for or recover from a borrower or credit receiver an amount exceeding the sum of –*
>
> *a) The principal debt owed by the borrower or credit receiver;*
>
> *b) The interest charges on the principal debt;*
>
> *c) The additional finance charges calculated in the manner prescribed by section 7;*

d) In the case where judgment is obtained for recovery of the principal debt or finance charges due from the borrower or credit receiver, legal costs awarded in terms of such judgment.

[4] From the reading of the above section, the legislature was very precise in prescribing what ought to be recovered by a money lender and these are: The lender is entitled to recover firstly the principal amount. Secondly, interest. This interest is prescribed in terms of the maximum rate under section 3 (1) of the Act. Where the principal amount is E500 or less, the interest levied is 10 percentage point plus rates of discounts or rediscounts or advances as published by Central Bank (Central Bank rates). Where, however as *in casu*, the principal debt is E500 or above, the interest is 8 percentage point plus Central Bank determined rates. Thirdly, additional finance charges. These additional finance charges are computed in a manner prescribed under section 7 of the Act. Section 7 provides:

"*7. Where a borrower or credit receiver:*

a) fails to pay an amount owed by him when such amount becomes due; or
b) enters into an agreement with the lender to defer payment of the amount owed by him;
the lender shall be entitled to recover from him in respect of the finance charges an additional amount which shall be calculated by reference to the total amount due but which is unpaid, the annual finance charge rate at which the finance charges were initially levied on the principal debt and, as the case may be, the period during which the default continues or the period for which payment is deferred."

[5] From this section, it is clear that a lender is entitled to levy "*additional finance charges*" as per 6 (2) (c) only once the borrower defaults in payment of the monthly installment or by agreement to defer payment. Fourthly, as can be seen from section 6 (2) (c) the lender is entitled to recover from the borrower, legal costs should a court grant the same in its judgment. In essence, section 6 (2) stipulates that the lender shall recover the principal debt, and interest at the rate prescribed by the Act. Should

however, the borrower default in payment, the Act allows for recovery of legal costs pursuant to a judgment and also where there is default or agreement to defer, then additional finance charges. Turning to the issue at hand *viz*., is interest or finance charges inclusive of administration fees such as costs of maintaining stop orders?

Definition of interest and finance charges

[6] It is apposite to commence by defining "*interest*" as provided for under Section 6 (2) (b) of the Act. **Blienden J** in **Sanlam Life Assurance Ltd 2000 (2) S.A. 647** at 652 defined interest:

> *"... the price of making money available or penalty for not paying what was owing on the date when payment was due*."

Finance charge

[7] This term is described in the **Business Dictionary** as "*total cost of borrowing, including interest charge, commitment fee, and other charges paid by the borrower for availing the loan facility.*" The I**nvestopedia** reads: "*A finance charge is often an aggregated cost including the costs of the carrying the debt itself along with any related transaction fees, account maintenance fees or late fees charged by the lender*." The **Wikipedia** on the other hand informs that "*In United State law a finance charge is any fee representing the costs of credit or the costs of borrowing. It is interest accrued on, and fees charged for, some of credit. It includes not only interest but other charges as well such as financial transaction fee*." The **Legal Dictionary** takes the position that "*a finance charge sometimes called the costs of credit, is expressed as an annual interest rate levied upon purchase price. It does not include any amounts that the lender might require for insurance premium, delinquency*

charges, attorney's fees, court costs, collection expenses or official fees that might be incurred should the debtor default in the repayment of the debt."

[8] Glaringly, what runs across as the thread from all the various sources defining finance charge is the deduction that finance charge is inclusive of interest. It is for this reason that the Act refers under section 6 (2) (c) to additional finance charges and allows the lender to levy such upon default of payment or by deferred agreement.

[9] By reason that a finance charge is inclusive of interest, one needs to refer to the Act to view what interest is. In terms of Section 3 (1) (a) and (b) interest is, *in casu*, the annually 8% plus prime rate at the period of concluding the agreement. In simpler words, the legislature allows the lender to charge interest (*the costs of credit or borrowing as per* **Blienden J** *supra*) on the principal debt. If the borrower defaults or defers payment the lender is to charge further interest. The figure on the interest does not vary. It remains the same as determined at the period of conclusion of the agreement. What is adjusted is the principal debt as it keeps on fluctuating depending on payment and non-payment.

Case law

[10] The view taken by respondent is that the applicant entered into the contract with his eyes wide open. He consented to the contract. He cannot at a later stage resile from the term of the contract. He remains bound by the contract. Mr. Jele submitted that *in casu*, the applicant's position to comply with the terms of the contract is more warranting because he is a legal *fundi.*

[11] The position taken by respondent finds support from the case of **Mandla James Dlamini v Select Management Services (Pty) Ltd and 2 Others, Civil Case No.338/2009** where his Lordship **M.C.B. Maphalala J**, as he then was, at para 15 of the judgment propounded: *"The applicant does not deny that he concluded the said agreement with the first respondent in which he bound himself to pay the collection commission, finance charges inclusive of interest, the balance of the loan account as well as costs at attorney and client scale. The reason advanced by the Applicant in challenging the collection commission is that it is unlawful in as far as it is not provided for in the Money Lending and Credit Financing Act 1991".* The learned Judge then held*: "This argument does not take applicant's case any further. He is bound by the agreement to pay the commission as agreed in the same way that he is bound to pay the costs at attorney and client scale."* (my emphasis)

[12] Again **Ngcobo J** in **Barend Petrus Barkhuizen v Ronald Stuart Napier CCT 75/05 [2007] ZACC 5** enunciating on freedom of contract alluded at para [57]:

"*On the one hand, public policy as informed by the Constitution requires in general, that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim pacta sunt servanda as ... 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*." (my emphasis) At para 87 the learned Judge writes: "*Pacta sunt servanda is a profound moral principle, on which the coherence of any society relies. It is also a universally recognized legal principle."*

[13] Similarly, **Cameron J** in **Andre Francois Paulsen and Another v Slip Knot Investment 777 (Pty) Ltd** C**ase 61/2014** advocating for the principle

pacta sunt servanda on a case where the defence was that the agreement imposed an excessive interest, therefore it should be declared a nullity, the honourable Judge of the Constitutional court held at para 128:

> "*In this case there is no suggestion that Paulsen were misled or coerced into signing the suretyship Slip Knot seeks to enforce. And they were fully aware of the loan's tough interest provisions. So the spectre of "financially ruinous interest" the main judgment invokes should not blind us to the facts. The Paulsens acting as sound, forward looking and tough minded business entrepreneurs agreed to pay precisely this when they concluded their contract with Slip Knot. And they happily took Slip Knot's money in the expectation that they would invite huge profit with it. That is the way of enterprise. The stiff interest rates they undertook to pay were he corollary of the considerable benefits they expected to reap from Slip Knot's money. [129] This points to a further reason why freely concluded commercial agreements should be upheld. It is instrumental. Enforcing freely agreed contracts means parties can and will agree to deals that confer a net benefit on them both, and so vitlise our economy. This includes deals like the one here – whose viability depends on a very high rate of return for the lender. [130] If they had been reasonably ignorant of the interest provisions, those could not have been enforced against them. Rightly, Paulsens did try to run these defences."* (my emphasis)

[14] From the *dicta* and *ratios* highlighted above, their Lordships held that the freedom to contract in terms of the parties' choices should not be interfered with on the ground that the interest rate agreed upon is exorbitant especially in the circumstances where both parties consented to the agreement.

Applicable principles

[15] A close reading of the *ratios* enunciated above, reflects however as follows: **M.C.B. Maphalala J**, as he then was, having come to the view that once a debtor agrees to pay "*collection commission, finance charges inclusive of interest the balance of the loan account as well as costs at attorney and client scale,*" he is bound by the terms of the contract quickly, pointed out: "*That depends on the legality of the contract.*" In other words, the court should

not end by considering *consensus ad idem* but go further to examine if the entire contrary is not in violation of either a statutory provision or a common law rule such as *in duplum*.

[16] Justice **Cameron J** also hit the nail on the head by also ending on the note:

> "*If they had been vulnerable consumers stout statutory protections would have shielded them from excessive harm."* [142]

[17] **Madlanga J** in **Andre Francois Paulsen** *et al*, *supra* writing the majority judgment expounded with eloquence on the factors to be considered where interest violates statutory provisions or common law principles. His Lordship highlights:

> "*Under common law the principle of freedom of contract (often expressed in the maxim pacta sunt servanda) has never been absolute. Rather it has always been subject to limiting rules intrinsic to the law of contract."* (my emphasis)

[18] In **Barend Petrus Barkhuizen v Ronald Stuart Napier**, **Ngcobo J** shrewdly put it:

> "*I do not understand the Supreme Court of Appeal as suggesting that the principle of contract pacta sunt servanda is a sacred cow that should trump all other consideration*" [para 15] (my emphasis)

[19] The learned Judge, **Madlanga J** explains the reason for this proposition as: "*one should be careful not to over emphasise the apparent financial strength of debtors and thus the equality of the arms of contracting parties*." While **Ngcobo J** in **Barend** *supra* at para 65 observed: "*Indeed, many people in this country conclude contracts without bargaining power and without understanding what they are agreeing to."*

[20] **Justice Cameron J** also appreciated this point as he stated at para 133: *"The common law justification for subverting the parties' deal was always that the debtor is vulnerable to the creditors' unscrupulous wiles*." This same position is evident in this country. It is for this reason that the legislature in its wisdom promulgated the Act. Their Lordships in **Reckson Mawelela v M. B. Association of Money Landers 43/1999 [1999] SZSC 23 (3rd December 1999)** stated as reason *d'etre* for the Act:

> "*The raison d'etre of this legislation is obviously to protect borrowers in need of financial assistance by way of monetary loans from unscrupulous lenders. It is to regulate the micro lending industry.*"

[21] In **Sosebee v Boswell 242 Ark 296 414 SW 2nd 380 (1967)** an American case – **Arkansas**: The argument on behalf of respondents was: "*The contract, quoted above, declares that the escrow deposits are to be forfeited as "liquidated damages, processing fees, and refund of legal charges and expenses incurred and to be incurred" by Blaylock. Blaylock's manager, Cooksey, came up with this lame explanation: "The $150.00 is a fee that we have determined from past experience that would cover our expense and justify us committing ourselves for a period of three years. *** We, of course, have to maintain our office and our staff. We have to contact banks for verification of applicant's deposits, many cases the employers.*" The court held: "*In short Blaylock had overhead expenses that stemmed not from Sosebee's duty to sell lots but from its own business of lending money."* The court then stated: "*If this transaction is not usurious, then any transaction can be dressed up so as not to constitute usury although *384 it would be clear that it was merely a scheme to evade the usury laws."* It then concluded: "*The Escrow Agreement likewise runs counter to the rule that the lenders' overheads expenses cannot be fostered off the borrower as something other than interest on the loan*."

[22] Again in **Fausett & Company v G & P Real Estate, Inc. 269 Ark 481 602 SW 2nd 669 (1980),** the facts of which were that a 1% service charge

was levied upon each note. The court held that the transaction was usurious in respect of the 1% interest in each note on the basis that when adding this 1% service charge to the stipulated interest, the interest exceeded the regulated interest. The **Arkansas** case *supra* was decided on the same vein.

[23] In all these cases dealing with an additional financial charge other than interest, the court scrutinises the finance charge with a view to ascertaining whether once added upon the interest, the total interest is in line with the provisions of section 3(1). If the sum interest is above, the court is bound to declare the transaction usurious. As it was propounded in **Arkansas** case, it is immaterial what this interest is defined or described as whether it is service fee, administrative fee or finance charge or whatsoever name, should it render interest above 8% plus prime rate, where the principal debt is E500 or above, the agreement must be declared a nullity. If not so, the Act would be defeated by what is commonly referred to as predatory lending *viz.*, "*unscrupulous actions carried out by a lender to entice, induce and / or assist a borrower in taking a mortgage that carries high fees, a high interest rate, strips the borrower of equity or places the borrower in a lower credit rated loan to the benefit of the lender. As with most things of dishonest nature, new and different predatory lending schemes frequently arise*" (as per **Investopedia**). This predatory lending transaction has the effect of upholding the very mischief intended to be prevented by the Act.

In casu

[24] The above principle is fortified by section 3 of the Act. The section reads:

> *3. No lender shall in any proceedings against a borrower or credit receiver in respect of any loss, damage or expense alleged to have been incurred by him in connection with a money-lending or credit transaction, obtain judgment for any sum not recoverable under subsection (1) of this*

section." (my own observation, it should read subsection (2) and not subsection (1)) (my emphasis)

[25] In other words, the legislature in an unequivocal and unambiguous words or plain language prohibited any further charges by the lender against the borrower which is not prescribed in the Act.

[26] Applying the above principle *in casu*, it is clear that the respondent levied a 1% per month charge. Simple arithmetic sum this 1% per month into 12% per annum (1% x 12 months). This 12% per annum added to the interest charged on the principal debt of 8% plus prime rate equals 12%, translates into an astronomic interest of E24% per annum. This transaction by any stretch of imagination violates the Act.

Is an usurious transaction to be declared a nullity in our jurisdiction?

[27] Two provisions in the Act have precipitated me to address the above issue. Section 6 (1) reads:

> "*6 (1) Any agreement in connection with any money-lending or credit transaction that is not in conformity with the provisions of this Act shall be null and void, and shall not be enforceable against the borrower or the credit receiver by the lender*."

[28] There is also section 8 which stipulates:

> *"Recovery of overpaid principal debt and interest charges.*
>
> *8. Any borrower or credit receiver who in connection with a money-lending or credit transaction pays an amount in excess of the amount which in terms of this Act is lawfully recoverable from him may, at any time within three years from the date of such payment, recover from the person to*

whom the payment was made a sum equal to the amount overpaid him." (my emphasis)

[29] The applicant urged this court to apply section 6 (1) and order the respondent to return all interest paid over to it as a measure upon which the court shows its disapproval of applicant's predatory transaction. From the two provisions cited, it is clear that in as much as the legislature intended that usurious transactions be declared a nullity, it was also open for the court to opt for Section 8. If the legislature intended section 6 (1) to be peremptory, it would not have included section 8 in the Act.

[30] It would appear to me that the court in examining an agreement whether to be declared null and void on the basis of excessive interest, it should consider as a factor the status of its society or what is commonly referred to as public policy. This position was applied in **Andre Francois** *op. cit* case at paragraphs 74 and 75 when the court held:

> *"[74] Also, in this country there may be those emerging out of the ranks of financially vulnerable. On the face of it, they may appear to resemble in financial terms – those who were never the subject of disadvantage under apartheid. This may give the semblance that they too are "stout-boned." In some cases though, the reality may be that, because they are new entrants into this new status, their financial strength is actually precarious. One mishap – which could even take the form of unbridled interest – may cause them complete financial ruin.*
>
> *[75] It cannot be plausibly gainsaid that for our democracy to be meaningful, it is only fitting that those previously denigrated by racism and apartheid, confined to the fringes of society and stripped of dignity and self-worth must also enter the terrain of meaningful, substantial economic activity. Surely, our hard-fought democracy could not have been only about the change of the political face of our country and such upliftment of the lot of the downtrodden as the public purse and government policies permit. Entrepreneurship and the economic advancement of those with no history of being financially resourced must be given room to take root and thrive. This can hardly happen without*

finance. The sort of interest o which Oneanate exposes our legal system is deleterious to this necessary economic advancement." (my emphasis)

[31] I am inclined to take the same approach. In this country, our economy is at its developing stage (emerging). It is the duty of not only those in business to nurture emerging businesses but even the court must be seen to put its weight behind the protection of businesses especially where coercion or fraud is not alleged. I appreciate that their Lordships in **Reckson Mawelela** *op. cit.* declared the entire agreement unlawful and ordered that the entire interest be returned to the applicant. However, as correctly pointed out by Counsel on behalf of respondent, and as can be read from the judgment, the applicant in the case had no opponent. The attorney for the respondent did not assist the court in any way. The court was faced with a one sided argument. For that reason, I elect to apply section 8 of the Act. It is my considered view that an appropriate order of costs and interest at *tempore more* is sufficient to send a message to the respondent's predatory conduct.

[32] In the result, I enter the following orders:

1. Applicant's application succeeds;

2. It is hereby declared that the 1% per month administration fee is unlawful in terms of the Money Lending and Credit Facility Act No. 3 of 1991;

3. Respondent is ordered to pay applicant the sum equal to the amount overpaid by him, mainly 1% per month commencing from date of first deduction from his salary to the date of last deduction;

4. Interest at the rate of 9% *tempore more*;

5. Costs of suit.

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M. DLAMINI
JUDGE

For Applicant: **In Person**

For 1st Respondent: **Z. Jele of Robinson Bertram**