Interest, usury, and the *boni mores*

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The Devil of Usury. From John Blaxton's pamphlet against loan sharks, *The English Usurer*, printed by John Norton for Francis Bowman of Oxford, 1634.

Introduction

The legislature has stipulated maximum interest rates in the National Credit Act 34 of 2005, the Prescribed Rate of Interest Act 55 of 1975, and in various other Acts by reference to the Prescribed Rate of Interest Act.

In all other instances there is no statutory maximum interest and it is for the courts to determine whether the interest rate in a specific instance offends against public policy. This can only be done with reference to all the facts of the case before court.

The imposition of interest higher than what is acceptable is defined as usury. As long ago as 1700 BC the Babylonian Code of Hammurabi addressed usury and it is still frowned upon today.[1]

The legislation

▪ The Usury Act 73 of 1968 and earlier legislation

The Usury Act 73 of 1968 was of limited application, and so were its forerunners, the Usury Act 37 of 1926 and the pre-Union legislation. In the Free State, Chapter 98 of the Law Book of the Orange Free State provided that: 'The trade in money shall be free, and everyone shall have the right to demand as much interest for his money as he may think fit.' In Natal, the position was similar subject to exceptions.[2]

▪ The National Credit Act 34 of 2005

The National Credit Act 34 of 2005 repealed the Usury Act 73 of 1968, the Credit Agreements Act 75 of 1980, and the Integration of Usury Laws Act 57 of 1996 with effect from 1 June 2006.[3] The legislature turned its attention to interest in Part C of Chapter 5 (section 100 to 106) of the Act.[4]

Schedule 3 to the Act reads as follows:

5 Maximum interest rate

The maximum annual finance charge rate set in terms of the Usury Act, 1968 (Act 73 of 1968), and in effect immediately before the effective date continues in force despite the repeal of that Act, as the maximum interest rate, until the Minister first prescribes a maximum rate of interest in terms of section 105.

The Minister determined the method of calculating interest rates for the purposes of the National Credit Act in terms of section 105 in GN 166 in GG 29661 of 26 February 2007:

For the purposes of this Notice the Repo Rate is the Repurchase Rate as determined by the Monetary Policy Committee of the South African Reserve Bank.

1 For the purpose of section 2 (1) [Money-lending transactions] (2) [Credit transactions] and (3) [Leases] of the Usury Act, 1968 (Act 73 of 1968), which was repealed by this Act, the different percentages contemplated in that section shall be calculated as follows:

(a) For transactions not exceeding R10 000, the Repo Rate plus one third thereof, plus 11 percentage points;

(b) For transactions exceeding R10 000 the Repo Rate plus one third thereof, plus 8 percentage points;

(c) Where the percentage as calculated per paragraph 1 (a) or 1 (b) does not result in a whole number, such percentage must be rounded down to the closest whole number without any decimals.

2 The different percentages as calculated in terms of paragraph 1 become effective –

(a) seven days after the date of this Notice; and

(b) thereafter, seven days after any change in the Repo Rate.

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Like its predecessors, the National Credit Act 34 of 2005 is limited in its application. The provisions relating to interest, charges and fees do not apply when the consumer is a juristic person.[5]

▪ The Prescribed Rate of Interest Act

If a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or a trade custom or in any other manner, such interest shall be calculated at the rate prescribed by the Minister of Justice when such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise.[6] The rate is 15.5% per annum.[7]

A number of other Acts then limit or determine interest rates with reference to this Act. See section 13(2)(b) of the Agricultural Produce Agents Act 12 of 1992, section 38(3)(b) of the Companies Act 61 of 1973, section 164(7) of the National Credit Act 34 of 2005, section 21(9) and section 62(2)(b)(i) of the Consumer Protection Act 68 of 2008, section 33A(9) and s 143(2) of the Labour Relations Act 66 of 1995, section 75 of the Basic Conditions Of Employment Act 75 of 1997, section 1 of the Divorce Act 70 of 1979, section 19(3)(b) of the Estate Agency Affairs Act 112 of 1976, section 45(2)(b) of the Attorneys Act 53 of 1979, section 23(3) of the Public Audit Act 25 of 2004, and section 65(10) of the Competition Act 89 of 1998.

The common law

Any matter not dealt with in the legislation is to be dealt with in terms of the common law, and the common law has therefore remained relevant despite the usury legislation.[8]

▪ Usurious interest

In the common law in Holland two principles are discernable. The first principle is that preference must be given to the spiritual aspects of life over the materialistic and the second is that the poor and others in an inferior bargaining position must be protected from exploitation by the rich and powerful. There was however no uniform rate of interest and also no universal maximum interest rate.[9]

The authors of *The Law of South Africa* concluded with reference to case law reported in South Africa during the years 1860 to 1908 that:

> 'The courts held that the legal rules limiting interest in Holland did not apply in South Africa and in the absence of some local statute there was no legal limit to the interest a money-lender was permitted to charge.'[10]

In *Dyason v Ruthven 3 S. 282*, Hodges J said at page 291:

> 'I should not be prepared to say that this Court, or any other Court can, by a mere decision, or by a series of mere decisions, declare authoritatively what shall be the rate of interest which being exceeded, shall be accounted usury."

In the same case Bell J said at page 305: 'It by no means follows that the Justinian law is to be regarded as fixing the rate of interest, that fixing of interest being from its very nature fluctuating, and not belonging to the class of laws fixing principles of right and wrong which are to govern future laws.'

Contracts *contra bonos mores*, or against public policy

A distinction must be made between contracts that are *contra bonos mores* and invalid and those which although valid are unenforceable.[11]

A contract is not invalid because it is unjust.[12] The test is not whether the contract is just but rather whether it offends against public policy on constitutional grounds.

The term *contra bonos mores* is used to denote, and as shorthand for, a contract or a contractual provision in conflict with the *'appropriate norms of the objective value system embodied in the Constitution'* as referred to in *Brixley v Drotsky 2002 (4) SA 1 (SCA) par 93*. In this case, Cameron JA said that the *boni mores* (the legal convictions of the community) is a concept open to misinterpretation. It is submitted however that the Latin phrase remains a suitable one, but now wearing a constitutional cloak.

In *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC and Others* 2011 (3) SA 511 (SCA) par 26 the Supreme Court of Appeal confirmed that the illegality or unenforceability of usurious interest provisions is a facet of the stance of the law relating to contractual provisions that are against public policy.

In *Juglal NO v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004 (5) SA 248 (SCA) par 12 -13 Heher JA summarised the correct approach to contractual provisions that are *contra bonos mores* as follows:

> [12] Because the courts will conclude that contractual provisions are contrary to public policy only when that is their clear effect (see the authorities cited in Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) at 8C - 9G) it follows that the tendency of a proposed transaction towards such a conflict (Eastwood v Shepstone 1902 TS 294 at 302) can only be found to exist if there is a probability that unconscionable, immoral or illegal conduct will result from the implementation of the provisions according to their tenor. (It may be that the cumulative effect of implementation of provisions not individually objectionable may disclose such a tendency.) If, however, a contractual provision is capable of implementation in a manner that is against public policy but the tenor of the provision is neutral then the offending tendency is absent. In such event the creditor who implements the contract in a manner which is unconscionable, illegal or immoral will find that a court refuses to give effect to his conduct but the contract itself will stand. Much of the appellant's reliance before us on considerations of public policy suffered from a failure to make the distinction between the contract and its implementation and the unjustified assumption that, because its terms were open to oppressive abuse by the creditor, they must, as a necessary consequence, be against public policy.
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> [13] An attempt to identify the tendency of contractual provisions may require consideration of the purpose of the contract, discernible from its terms and from the objective circumstances of its conclusion …'

The legal onus of establishing that a term or a contract is *contra bonos mores* rests on the defendant who must satisfy the court and would usually have to adduce evidence.[13]

This would apply to usury also. In *Dyason v Ruthven* Watermeyer J said at p 305 that 'if any stipulation of interest be

attacked as liable to reduction, on the ground of usury or extortion, this can only be done by offering proof of the usury and extortion in the particular case.'

The typical provisions relating to interest in the loan agreement can not be against public policy in a vacuum. An evaluation must be done by comparing the rate with what is considered the norm in commerce, and by evaluating the contract as a whole in its proper contextual setting. It was held in *Reuter v Yates* 1904 TS 855 p 862 that the *'rate of interest agreed upon would of course be a most important circumstance to consider; but it would not be the only one.'*[14] In *Merry v Natal Society of Accountants 1937 AD 331 p 336* De Villiers JA expressed himself as follows: '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.'

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The approach to constitutional challenges to contractual terms under the Constitution Act 108 of 1996 may be gleaned from *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) par 6-8, 12-15, and 28, *Barkhuizen v Napier* 2007 (5) SA 323 (CC) par 29–36, 48, *Curators, Emma Smith Educational Fund v University of Kwazulu-Natal and Others* 2010 (6) SA 518 (SCA) par 39-43, and *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) par 10 and 21.

The starting point in the evaluation must be that freedom to contract is a right implicit in a democratic state founded on the values of dignity, equality, and human rights and freedoms.[15] In *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC and Others* 2011 (3) SA 511 (SCA) par 15 the Supreme Court of Appeal concluded at paragraph 27 that the common law principles relating to usury accord with the principles of the Constitution.

Public policy favours the utmost freedom of contract taking into account the necessity of doing simple justice between people, and the power to intervene must be exercised sparingly. The power may be exercised when the contract or the provision is inimical to the interests of the society, contrary to law or morality, unduly harsh and oppressive, unconscionable, or in conflict with social or economic expedience.[16]

The situation where an agreement is entered into as part of a business venture must be distinguished from the situation where a lender in an inferior bargaining position (and with limited options) obtains finance for necessary expenses. By way of example, where an individual borrows money to pay for an essential medical procedure the law should come to a conclusion that interest is usurious more readily than in a commercial transaction.[17]

When usurious interest is claimed, an applicant may be entitled to judgement on the remainder of the claim, including the interest portion that is not usurious.[18] This does not mean that the Court should make a contract for the parties, by determining *ex post facto* what a reasonable return on the lender's investment in the loan would be. **A**

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Endnotes

1 See Voet 22–1–2 Van Der Keesel 1171-8, Grové *De Jure* 1989 (22) p 233-4, and Otto par 3.

2 See Grové *De Jure* 1990 (23) p 128-9.

3 See section 172 of the National Credit Act, read with the proclamation of the Act.

4 See Scholtz, Chapter 10.

5 See Scholtz Chapter 4 and par 10.1; Otto p 76, and Moorcroft par 23.7, as well as section 4(1)(a) and (b), 4(2)(d), and 6(d) of the National Credit Act 34 of 2005 of the National Credit Act 34 of 2005, read with Part C of Chapter 5 and with GN 713 published in Government Gazette 28893 on 1 June 2006.

6 See section 1 of the Prescribed Rate of Interest Act 55 of 1975.

7 See GN R1814 GG 15143 of 1 October 1993.

8 See Grové *De Jure* 1989 (22), p 233.

9 See the historical survey by Grové *De Jure* 1989 (22) p 233, and *De Jure* 1990 (23) p 118.

10 See Joubert par 305, footnote 8.

11 See *Reeves v Marfield Insurance Brokers* CC 1996 (3) SA 766 (A).

12 *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) par 7, *Brisley v Drotsky* 2002 (4) SA 1 (SCA) par 88 – 95, *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

13 See *Diners Club SA (Pty) Ltd v Singh* 2004 (3) SA 630 (D) 645G and *Volkskas Bank Ltd v Wilkinson & Three Similar Cases* 1992 (2) SA 388 (C).

14 See also *Dyason v Ruthven 3 S. 282 p 305, SA Securities Ltd v Greyling* 1911 TPD 352 p 356.

15 See section 1 of the Constitution Act 108 of 1996.

16 See *Barkhuizen v Napier* 2007 (5) SA 323 (CC) par 35-36,. *Brixley v Drotsky* 2002 (4) SA 1 (SCA) par 94, and *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C) 475B–F, as well as Christie p 358 See also *Juglal v Shoprite Checkers (Pty) Ltd* 2004 (5) SA 248 (A) par 12, *Botha (now Griesel) v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) 782I-783C, *Sasfin v Beukes* 1989 (1) SA 1 (A) 7 I –9A, *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) par 6-8, 12-15, and 28, *Barkhuizen v Napier* 2007 (5) SA 323 (CC) par 29–36, 48, *Curators, Emma Smith Educational Fund v University of Kwazulu-Natal and Others* 2010 (6) SA 518 (SCA) par 39-43, and *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) par 10 and 21, as well as *Voet* 2–14–16.

17 See *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) par 8 and *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC and Others* 2011 (3) SA 511 (SCA) par 33.

18 See Voet, 22–1–5, Grové, *De Jure* 1990 (23), p 131, *Taylor v Hollard* (1885-1888) 2 *SAR* 78 p 84-5, and *Cassimjee v Naidoo; Cassimjee v Singh* 1959 (4) SA 139 (N) 142A-F. See also *Vermeulen v Ogilvy* 1981 (4) SA 92 (ZH) p 95G-96E, *Klerck NO v Kaye* 1989 (3) SA 669 (C) 677F-H, *Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd and Others* 1976 (2) SA 856 (W) 861A, *Radnan v Rabinowitz* 1949 (4) SA 497 (C) 508-9, and *Mahomed v Nagdee 1952* (1) SA 410 (A) 416B. The general principle was discussed in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A).