

REPUBLIC OF SOUTH AFRICA



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

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
27 May 2015	
DATE	SIGNATURE

29/5/15
Appeal Case no: A762/2012

Court *a quo* case number: 14408/2008

In the matter between:

BUSINESS PARTNERS LIMITED

Appellant

And

SILVERSTARS TRADING 245 CC

1st Respondent

MULLER, HERMAN PAUL

2nd respondent

JUDGMENT

MOLOPA-SETHOSA J

- [1] This is an appeal against parts of the judgement and order granted by Mr Justice Kollapen on 10 May 2012 at the Gauteng Division, Pretoria, in which part of the claim of Business Partners Limited ("the Appellant"), against Silver Stars Trading 245 CC ("the 1st Respondent") and Herman Paul Muller ("the 2nd Respondent") (claim B) was dismissed with costs.
- [2] For purposes of this appeal, the only relevant claim on appeal is the claim for royalties pleaded by the appellant in paragraphs 6.3 and 6.4 of the particulars of claim; and the only relevant defence for purposes of the appeal is the defence pertaining to royalties, pleaded by the respondents in paragraph 3.7 (3.7.1 – 3.7.2) of the plea.
- [3] The appellant was the plaintiff and the respondents were the 1st and 2nd defendants in the court *a quo*. The parties will be referred to herein as in the Appeal, i.e. as appellant and respondents respectively.
- [4] With the leave of the court *a quo*, granted on 05 October 2012, the appellant appeals against those parts of the judgement and order adverse to it. The respondents, without obtaining leave from the court *a quo* also seek to cross-appeal those parts of the judgment and order adverse to them.
- [5] At the commencement of the hearing of the appeal before us, two applications were made, one on behalf of the appellant and the other on behalf of the respondents.

[6] The appellant's application was for:

[6.1] condonation for:

[6.1.1] the late application for a date for the hearing of the appeal;

[6.1.2] the late filing of the record;

[6.1.3] the late service of copies of the record on the respondents.

[6.2] that the appeal be reinstated insofar as it may be necessary;

[6.3] that the appellant be ordered to pay the costs of the application,
save in the event of opposition;

[6.4] that any party opposing the application be ordered to pay the costs
thereof.

[7] The appellant fully explains in a comprehensive affidavit deposed to by one Dorothea Regina Van Heerden why the record was not filed timeously. It is apparent from the explanation in the affidavit that the delay in the filing of the record was not due to any delaying tactics, recklessness or intentional disregard of the rules of court. The major delay was due to the record not being timeously transcribed by iAfrica (court transcribers), and the appellant through its attorneys seems to have done everything in their power to ensure that the record was filed timeously.

[8] Counsel for the respondents, Mr Van Coller, indicated to this court that the respondents were not opposing the appellant's application for condonation.

[9] Condonation was thus granted to the appellant.

[10] The respondents' application was for condonation for:

[10.1] the late filing of the respondents' cross-appeal in the appeal;

[10.2] the late filing of this application in terms of the provisions of Rule 30 of the Uniform Rules of Court;

[10.3] Ordering the respondents to pay the costs hereof, except in the case of opposition.

[11] The respondents' grounds of cross-appeal are set out in the respondents' notice of cross-appeal, **pp.535-537**, and are specifically incorporated herein.

[12] The appellant opposes the respondents' condonation application on the basis that the respondents did not seek the leave of the court *a quo* to cross appeal. Counsel for the appellant relied heavily on two cases, *viz.* **Goodrich v Botha and others 1954 (2) SA 540 (AD)** and **Gentiruco AG v Firestone SA (Pty) Ltd 1972 (1) SA 589 (A)**, in which two cases it was basically held that the appeal court has no jurisdiction to entertain a proposed cross-appeal where leave to cross-appeal was not sought from the court *a quo*.

- [13] It is common cause that the respondents did not seek leave from the court *a quo* to cross-appeal. The respondents' counsel Mr Van Coller, indicated that based on the authorities cited by the appellant's counsel above, the respondent will not proceed with the cross-appeal; he however implored this appeal court to *mero motu* entertain the cross-appeal. Clearly the respondents are indirectly pursuing the cross-appeal by stating that this appeal court should *mero motu* entertain the cross-appeal. Basically they still require this appeal court to adjudicate on the cross-appeal.
- [14] As already stated above, it is common cause that the respondents did not seek leave of the court *a quo* to cross-appeal. The authorities are very clear in this regard. An appeal court does not have jurisdiction to entertain a cross appeal where leave to cross appeal has not been sought from the court *a quo*; refer Goodrich *supra* and Gentiruco *supra*, both of which are Appellate Division decisions.
- [15] On the authorities aforesaid, it is clear that this court does not have the jurisdiction to entertain the cross-appeal, and there is no basis upon which this court can *mero motu* entertain the cross-appeal.
- [16] In the result, no leave to cross- appeal having been obtained by the respondents from Kollapen J at the court *a quo*, this court does not have jurisdiction to entertain this cross-appeal. The cross-appeal should thus be struck off the roll with costs, such costs to include the costs consequent upon the employment of two counsel.

- [17] I now turn to the merits of the appeal. The appellant's grounds of appeal are set out in the appellant's notice of appeal, **pp.527 to 532**, and are specifically incorporated herein.

Background

- [18] The appellant is a corporate entity whose main business is to finance small and medium businesses. From the facts it appears that the 1st respondent needed finance to purchase a liquor store and applied for a loan of R590 00.00 at the appellant.

- [19] On 26 May 2004 the parties entered into a loan agreement (Annexure A), in terms of which the 1st respondent was loaned R500 100.00 by the appellant. The loan would bear interest at a rate of prime plus 1% and was repayable over 60 months; **refer clause 5.1 p17.**

- [19.1] On the same day (26 May 2004) the parties entered into a Royalty Agreement (Annexure C), that formed part of the loan agreement with the following relevant terms:

- [19.1.1] In terms of clause 4.1 royalties were payable monthly over the same 60 months period as the loan; **refer p34 read with clause 6 p17.**

- [19.1.2] In terms of clause 2.1 royalties were payable at a rate of 1.4% on the monthly actual or projected turnover (indicated in **Annexure "2" to the royalty agreement**), whichever was the greater; **refer pp. 33 and 36.**

[19.1.3] In terms of clause 4.2, if the 1st respondent repaid the loan prior to the end of the 60 month term, or sold the business, it would be liable to repay all royalties for the unexpired period of the loan together with any outstanding royalties.

[19.1.4] In terms of clause 3.3 any royalties due and payable but unpaid would form part of the principal debt and would be subject to finance charges in accordance with the rate applicable to the loan from to time.

[20] The 1st respondent's business does not seem to have been doing well, and the 1st respondent apparently began defaulting on payments in terms of the loan and the royalty agreements. In or about August 2005, the 1st respondent sold the business to Redlex 283 (Pty) Ltd to curb its losses.

[21] The 1st respondent also negotiated with the appellant to write off R145 249.38 from R249 115. 00 of the outstanding royalties. The remaining balance of R118 406.81 on the royalty account was payable over a 36 month period in instalments of R3 289.08 per month; **refer letter dated 5 October 2005 from the appellant to the 2nd respondent, p37.**

[22] The 1st respondent fell behind with the payment of both the loan and the royalties of R3 279.94 plus interest at 10% per annum; **refer certificate of balance prepared by Daniel Johannes Frey, p458.**

- [23] On 18 March 2008 the Appellant issued Summons against the 1st and 2nd Respondents for payment of monies in terms of the loan agreement and the royalty agreement, annexures **A** and **C** to the particulars of claim respectively, and costs.
- [24] The 2nd respondent was sued jointly with the 1st appellant as he had bound himself as surety and co-principal debtor for the 1st respondent's indebtedness to the appellant in an unlimited amount. For present purposes of the appeal, this court was informed by Counsel for the respondents, Mr Van Coller, that the only party remaining [in this appeal] is the 2nd respondent. No explanation was proffered to this court why the 1st respondent is no longer party to this appeal; counsel for the respondents, Mr Van Coller, merely stated to that "the 1st respondent has fallen out of the picture". The 2nd respondent is thus the only respondent remaining.
- [25] Pertaining to the royalty agreement, the appellant pleaded as follows in paragraph 6.3 and 6.4 of its Particulars of Claim:
- "6.3 Plaintiff attaches hereto as Annexure "C" a copy of the Royalty Agreement, as attached to Annexure "A" hereto, the terms of which are incorporated herein by reference. In terms of Annexure "C" the First Defendant was to pay a royalty of 1.4% on the higher of actual monthly turnover or of the Projected Monthly Turnover contained in the Schedule to Annexure "C", before or on the 1st day of each and every month, the first payment to have been*

made on or before 01 June 2004. If the First Defendant breaches any term of the loan agreement the First Defendant shall pay to the Plaintiff an amount equal to the royalty for the unexpired term of the loan together with outstanding royalties.

6.4 On or approximately 05 October 2005, the Plaintiff represented by Mr. H Windell, allowed the First Defendant , represented by the Second Defendant , a reduction of arrear Royalties not paid at that stage and further granted the First and/or Second Defendant the opportunity to make payment of the balance then due of R118 406. 81 in 36 equal instalments of R 3 289.88 each, subject to the balance being paid in full on expiry of the 36 month period and subject further to the remaining terms and conditions of annexure "C", which arrangement the First and Second Defendants accepted. The confirmatory fax is attached as annexure "D", the terms of which are incorporated herein by reference."

[26] In response to the appellant's claim set out above, the 1st and 2nd respondents pleaded as follows in paragraph 3.7 of their plea:

3.7.1 The so called royalty agreement annexed to the Plaintiff's Particulars of Claim (Annexure "C") is a simulated agreement;

3.7.2 The Defendants deny that they entered into a royalty agreement with the Appellant. There exist no underlying cause for the royalty agreement;

3.7.3 *The true agreements between the parties are annexed to the Plaintiff's Particulars of Claim as Annexures "A" and "B", and was an agreement of loan;*

3.7.4 *The royalty agreement is nothing more than an attempt by the Plaintiff to charge extra interest, which is contra bonos mores and contrary to the common law and the Conventional Penalties Act, (1962) and is accordingly illegal and void.*

From what is pleaded by the respondents in their plea here above, it is clear that the crux of the respondents' defence on the appellant's royalty claim is that the royalty agreement is against public policy (*contra bonos mores*), in that it was a simulated transaction.

[27] The court *a quo* granted the appellant's claim on the loan agreement but found that the royalty agreement was contrary to public policy and therefore void and unenforceable.

[28] The court *a quo*'s findings of fact [that the royalty agreement amounts to interest on the loan, and not 'royalties' as envisaged in, for example, franchise agreements as envisaged in *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA)], seem to be accepted by both parties as correct, save that the appellant disputes the finding by the court *a quo* that the interest rate charged by the appellant was 28.6%.

[29] At issue in this appeal is whether the Court *a quo* correctly found that the royalty agreement is contrary to public policy and void.

[30] The appellant's evidence at the trial, regarding royalties, was the following:

[30.1] royalties are charged by the appellant as compensation for the risk that the appellant took in advancing the loan to the 1st respondent.

[30.2] the amount of the royalties depends on the nature of the risk involved in granting the loan to the 1st respondent. In this regard **Harold Douglas Windell** ("Windell"), the business development manager of the appellant, testified as follows:

"....Nou hierdie tantieme wat u nou verdien of wat Business Partners nou verdien, dit is 'n bedrag geld wat gehef word in ruil vir die feit dat u aan die klient geld geleen het, is dit korrek?-Dit is korrek maar dit gaan oor die finansiele risiko wat ons geneem het."

.....

"Die enigste rede waarom julle die tantieme hef is in ruil vir die feit dat julle geld gleen het aan mnr Muller, is dit korrek? Dit is korrek, U Edele."

.....

“Jammer, u se die bedrag van die tantieme hang af van die risiko waaraan Business Partners blootgestel word, is dit korrek? ---- Dit is korrek, U Edele.”

[30.3] Windell further testified that the loan was granted in the amount of R500 100.00 in order to fall outside the limit of the Usury Act, Act no. 73 of 1968 (“The Usury Act”), which limit at the time was R500 000.00.

[30.4] That the appellant wanted at least a 28.6% return on the amount of the loan over a period of 5 years, and for that reason the amount of royalties was fixed at 1.4% of the projected turnover.

[31] The 2nd respondent, **Herman Paul Muller** (“Muller”) testified on behalf of the 1st respondent that:

[31.1] he/Muller accepted that the 1st respondent was bound by the royalty agreement throughout, until he obtained advice from counsel to the contrary.

[31.2] after he received the summons he was advised by counsel that the royalty agreement may be invalid and/or void.

[31.3] the respondents' counterclaim consist of royalties paid, that the 1st respondent claims back on the basis that the royalty agreement was void.

[31.4] the royalty and the rationale behind it were explained in detail to him/Muller as the representative of the 1st respondent, prior to the 1st respondent entering into the royalty agreement with the appellant. That he/Muller wrote a letter in 2007, prior to the institution of litigation, in which he confirmed this; **refer pp. 396, 397, and 490.**

[31.5] further that he/Muller understood prior to entering into the Loan and royalty agreement that the royalties were part of the compensation the appellant charged for advancing the loan to the 1st respondent. In this regard he/Muller testified as follows at **p352:**

"Nee, maar wat dink u nou waarvoor vra hulle 'royalty', vir watter doeleindes? --- Ek het vir Herald gevra waarom die royalties gaan, ja, en hy het aan my verduidelik dat dit wil oor die risiko gaan.

.....

Ja, maar het u vir hom gevra voor u die ooreenkoms aangegaan het? --- Ek kan nie presies onthou watter tydstop nie, maar dit is waarskynlik so, ja.

Ja, toe weet u mos nou waarom dit gaan, oor risiko. Hulle leen vir u geld op risiko? --- Ja.

Hulle wil 'n opbrengs maak, is ek reg? --- Korrek. Hulle sien dit as 'n opbrengs, ja."

.....

"So u weet baie mooi dat dit is eintlik maar, kom ons noem dit addisionele rente wat hulle vra omdat hulle die geld vir u uitleen? --- Korrek, u Edele.

Ja, u weet dit voor die tyd, mnr Windell verduidelik dit in soveel woorde aan u?.....korrek."

.....

"Dit is wat die word beteken? --- Ja, dit is ook hoe ek dit verstaan het.

Goed, maar dit was nooit wat hier gebeur het nie. U het dit nooit so van die begin af verstaan nie? --- Nee, ek het dit nie verstaan as royalties in dieselfde begrip as 'franchises' of kundigheid of wat ook al nie".

[32] Muller further testified that he understood the principle that the higher the risk the higher the interest rate charged on the loan will be; that when he/Muller was searching for finance to purchase the business for the 1st respondent he had various options other than the appellant.

[33] From the facts and the evidence it shows that the royalty agreement and the rationale behind the paying of royalties were explained to the 2nd respondent, who at all material times acted on behalf of the 1st respondent.

[34] In re-examination, for the first time, Muller stated that he accepted that the contracts the appellant presented to him to sign contained the terms upon which appellant was prepared to enter into the agreement with him and that he would not be entitled to change anything in the contracts.

[35] It is worth noting that the above evidence ([34] here above) was never canvassed in Muller's examination in chief, nor did he state this anywhere in cross examination; significantly this was not put to appellant's witnesses, especially Windell. Muller seems to want to create the impression that he had no choice and/or was under duress to sign. On the facts this cannot be. From his evidence he had understood what 'royalties' were and the reasoning behind the concept; he had all the facts before he signed. He himself testified that prior to entering into the agreement herein with the appellant, he had various options other than the appellant, but chose to do business with the appellant on the terms set out in annexures A and C to the particulars of claim.

[36] On the facts and the evidence the court *a quo* found that:

“(a) On the face of it the royalty agreement was a simulated agreement and was nothing other than an agreement to pay interest.

(b) The loan amount of R500 100.00 was contrived to avoid the provisions of the Usury Act.

(c) The rate of 28.6% was considerably higher than the maximum permissible on loans of R500 000.00 in terms of the Usury Act.

(d) The terms of the Royalty Agreement were oppressive and harsh to the extent that it created the obligation to pay interest even after conditions that ordinarily in contract would result in the cessation of interest payments (the full amount of the loan being paid) would be met.”

[37] The court *a quo* thus concluded that the royalty agreement “... *undermines public policy in that the objective it seeks to advance is a calculated avoidance of the Usury Act and a desire to levy interest beyond that permissible in law.*” **Refer para [56] and [57], pp.515 – 516.**

[38] The two main considerations upon which the court *a quo* decided that the royalty agreement was against public policy and therefore void was that because it amounts to a calculated avoidance of the Usury Act; and that the interest is levied in terms of the agreement beyond that permissible in law.

[39] The appellant contends that the royalty agreement is in no way simulated. Further, that on a correct calculation the interest rate charged was 18.45%

and not 28.6%% as found by the court *a quo*. This aspect is dealt with further below.

- [40] The onus to establish that a contract is void and unenforceable because it is contrary to public policy is upon the party who alleges it; **refer Diners Club SA v Singh 2004 (3) SA 530 (D) at 645 G where Levinsohn J** said the following:

“The legal onus of establishing that a term in a contract (admittedly entered into by the defendants) is contra bonos mores rests on the defendants. This carries with it the duty finally to satisfy the court that it ought to succeed on the issue and they have also the duty to adduce evidence in regard to the factual background relevant to the defence.” **Refer also Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 at 893**

- [41] There is authority for the proposition that in determining whether a contractual provision ought to be enforced, the circumstances existing at the time the enforcement is sought should be taken into account; **refer Magna Alloys *supra* at 898 C – D; Nyandei Local Municipality v Hlazo 2010 (4) SA 271 (ECM) at 278 – 279.**

- [42] When the loan agreement was entered into by the parties in May 2004, the Usury Act was applicable to loans up to R500 000.00. The Usury Act was repealed by the National Credit Act no 34 of 2005 (“*the NCA*”) on 1 June 2007.

- [43] The court *a quo*’s conclusion stems from the fact that the appellant granted the 1st respondent a loan of R500 100.00, which is above the limit

of the Usury Act, which act imposed a maximum interest of 18% on loans of R500 000.00 or less. The court *a quo* thus found that the loan amount of R500 100.00 was contrived to avoid the provisions of the Usury Act.

[44] Windell did testify that the loan was granted in the amount of R500 100.00 in order to fall outside the limit of the Usury Act, which Act stipulated the interest to be charged on amounts of R500 000.00 or less; which interest was 18% at time the contract was entered into by the parties herein on 26 May 2004. It is important that Windell, who represented the appellant, never attempted to hide this fact; **refer p226.**

[45] The interest rate applicable to the loan agreement herein was 12%, i.e. prime, which was 11% at the time, plus 1%. The effective “*interest rate*” that a royalty fee of 1.4% on the projected turnover would amount to 16.6%. It must be noted that the projected turnover amounts were provided to the appellant by the respondents. **Refer Annexure ‘2’ to the royalty agreement, P36.**

[46] The effective interest rate payable on the loan of R500 100.00 was, therefore, calculated by the court *a quo* as 28.6% (12% plus 16.6%). The court *a quo* thus concluded that the rate of 28.6% was considerably higher than the maximum permissible on loans of R500 000.00 in terms of the Usury Act.

[47] The appellant contends that the court *a quo* made an important misdirection of fact when it came to the conclusion that the interest rate

charged amounted to 28.6%. That the court *a quo* did not take into account that R145 249.38 of the royalty amount was written off during October 2005, this taking into consideration that an amount of R149 249.38 on royalties was written off from debt/arrears of R249 115.00, which effectively reduced the interest rate charged, and the parties had agreed that the 1st respondent was only to pay R118 406.81. The appellant thus contends that on a proper calculation the amount of interest paid by the respondent equals 18.45% and not 28.6% as found by the court *a quo*.

[48] The court *a quo* also specifically took into account the interest rate applicable in terms of the Usury Act to determine if the royalty agreement was invalid. In the matter of *African Dawn Finance (Pty) Ltd. v Dreams Travel & Tours CC* 2011(3) SA 511 (SCA) at para [19] the Supreme Court of Appeal said that where neither the Usury Act nor the NCA applied to the transaction, it fell to be determined in terms of the common law, which does not fix a rate of interest, to determine whether or not a transaction was usurious.

[49] It would thus amount to misdirection if a court takes the interest rate prescribed by either the Usury Act or the NCA into consideration to decide if a transaction is usurious if neither of the acts applied to the transaction. In order to decide if a transaction is usurious the interest rate in itself is not a criteria but merely an element to be taken into consideration.

[50] On a proper analysis of the facts, the loan and the royalty agreements between the parties are not subject to the Usury Act, nor are they subject to the NCA; therefore, there is no limitation on the interest rate the appellant may charge, as long as it can be shown that there was no extortion amounting to fraud, and that would not be contrary to the common law in my considered view.

[51] The question then becomes whether it was wrong and *contra bonos more* for the appellant to grant a loan which would not be subject to the provisions of the Usury Act. It must be noted that the 1st Respondent, represented by the 2nd Respondent, had applied for a loan of R590 000.00. This much was also confirmed by the 2nd respondent's counsel, Mr Van Coller during argument. The amount itself (R590 000. 00), applied for by the 1st respondent, fell outside the limit of the Usury Act.

[52] With regard to the court *a quo*'s finding that the agreement was entered into with the specific purpose of avoiding the provisions of the Usury Act the following was said by Innes CJ in ***Dadoo LTD and others v Krugersdorp Municipal Council 1920 (A.D) 530 at 548:***

“But an Act ... may nevertheless be evaded; parties may generally arrange their transactions so as to remain outside its provisions. Such a procedure is, in the nature of things, perfectly legitimate.

There is nothing in the authorities, as I understand them, to forbid it. Nor can it be rendered illegitimate by the mere fact that the parties intend to avoid the operation of the law, and that the selected course is as convenient in its result as another which

would have brought them within it.” Refer also Automotive Tooling Systems v Williams 2007 (2) SA 271 (SCA) at 277 B – C

- [53] From the facts and the evidence there is nothing that indicates that the respondents wanted a lesser loan amount which fell within the limitation of the Usury Act [i.e. R500 000.00 or less], but that the appellant fraudulently granted a loan amount above what the respondents had applied for, and falling outside the limitation of the Usury Act, to merely avoid the operation of the law so that they could charge extra interest amounting to extortion akin to fraud.
- [54] This is not a transaction which is in truth within the provisions of the Usury Act, which was cloaked by the parties in a guise calculated to escape those provisions. In other words, it cannot be said that the transaction was *in fraudem legis*. The appellant was within its right to grant a loan amount outside the limitation of the Usury Act.
- [55] In order to determine if the transaction was usurious the common law must then be applied. The common law does not fix a rate beyond which a transaction becomes usurious; **refer African Dawn Property Finance supra at para [19].**
- [56] In terms of the common law a transaction or agreement would be considered usurious if it is shown that there has either been extortion or oppression, or something which is akin to fraud; **refer S A Securities**

Limited v Greyling 1911 TPD 352 at 356; Dyson v Ruthven (1860 Searl 282; Merry v Natal Society of Accountants 1937 AD 331 at 336; African Dawn *Supra* at para [20].

- [57] In the recent decision of the Supreme Court of Appeal, *African Dawn Property Finance supra*, the court had to decide if an interest rate of between 60%-78% per annum was without more *per se* usurious and *contra bonos mores*. The Supreme Court of Appeal **in finding that it was not**, per Ponnann JA said the following:

“[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 the transaction become usurious. Rates of interest vary with the nature of the financial transaction, the social 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.

... 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 the 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.”

“[28]...our constitution and its value system do not confer on judges a general jurisdiction to declare contracts invalid on the basis of their subjective perceptions of fairness or on the ground of imprecise notions of good faith. 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.”

“[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 offering proof of extortion or oppression, or something akin to fraud.”

[58] From the above mentioned case, the Supreme Court of Appeal specifically decided that the following circumstances will be an indication that the transaction was not usurious; refer p511 D-F, where:

[58.1] The borrower had approached the lender without inducement or compulsion. This is indeed the position in the present case.

The 2nd respondent, testifying for and on behalf of the 1st

respondent, admitted that he approached other finance houses before he settled on the appellant.

[58.2] **The lender had made full disclosure of the applicable interest rate.** This is also the position in the present case. The appellant disclosed the interest rate and the amount of the royalties prior to the 2nd respondent entering into the transaction on behalf of the 1st respondent. The 2nd respondent was also informed of the reason for charging royalties, and he testified to this effect.

[58.3] **The money was borrowed to allow the borrower to exploit a business opportunity.** This is again the position in the present matter. The money was advanced to the 1st respondent in order to put it in the position to purchase a liquor store which it intended to operate.

[58.4] **There was no evidence to show that the interest rate was incommensurate with the risk run by the lender.** The only evidence offered was the evidence on behalf of the appellant that the rate of interest was specifically linked to the security, or lack of it, that the 1st respondent could provide. The 1st respondent could not provide sufficient security to obtain a loan from the normal commercial banks. These banks considered the risk too high to lend money to the 1st respondent where he could not provide more security. The court stressed that it is incumbent upon a respondent to lead evidence of what the prevailing rate of

interest was for similar transactions. In circumstances where the respondent fails to provide such evidence the court is left in the dark and cannot come to the aid of the respondent; **refer African Dawn Property Finance *supra* at para [33].**

[58.5] The borrower was unable to point to any particular circumstances to show that the transaction was not an ordinary one. The 1st respondent did not lead any evidence to the effect that the transaction was not an ordinary transaction.

[59] Our authorities, referred to above, are clear that contracting parties are well within their rights to arrange their affairs in such a way that they suit their circumstances; of importance is that the other party is not defrauded, and/or does not know what the contract entails.

[60] The interest of 28.6% was well within the appellant's right to charge such, as long as the respondents knew that this is what would be charged. The 2nd respondent/Muller testified that he understood, as Windell had testified, that royalties represented compensation for the risk the appellant took in advancing the loan to the 1st Respondent. It is common cause that the 1st Respondent did not have security which would have been required by conventional financing entities like banks, to secure a loan.

[61] The 2nd respondent, representing the 1st respondent accepted the status quo. There is no evidence whatsoever that he was coerced, bullied, and/or

put under duress to sign or enter into the loan agreement, including the royalty agreement with the appellant.

[62] As already stated above, the appellant contends that actually, on a proper calculation, the interest rate paid by the 1st respondent equals 18.45%, and not 28.6% as found by the court *a quo*; this taking into account that an amount of R149 249.38 on royalties was written off from the debt/arrears of R249 115.00, and the parties had agreed that the 1st respondent was only to pay R118 406.81. The appellant contends that had the court *a quo* calculated the interest rate taking into consideration what is set out by the appellant here above, the court *a quo* would not have found the royalty agreement to have been void.

[63] True, this might have influenced the court *a quo*; but, still, looking at the 28.6% interest/return that the appellant wanted on the amount of the loan over a period of 5 years, it would, in my considered view, and on the authorities referred to, still be within its right to charge such high interest, as long as this was not done fraudulently and/or deceitfully, and this [fraud/deceit], in my view has not been proved.

[64] The plaintiff worked towards a return of 28.6% on monies lent. The interest payable on the loan agreement together with royalty agreement would together constitute the return of 28.6%. To achieve this, over and above the interest payable on the loan amount, the 1st respondent would pay 1.4% on the royalty, and this is stipulated in clause 2.1 of the royalty agreement which forms part of the whole transaction between the parties.

[65] Clause 2.1 specifically provides as follows

“2. *Royalty*

2.1 *The borrower shall pay to Business Partners a Royalty in the amount of 1.4% (one comma four per centum) on the higher of actual monthly turnover or of the Projected Monthly Turnover.”*

[66] The 2nd respondent never testified that he was not aware of this clause; on his own version he was well aware of the clause; he may not have been happy with it but nowhere does he say that he tried to negotiate his way out and was told it was this or never. Even if that could have been the case, he on his own version had other options other than the appellant, but he chose the appellant, he acquiesced to all their terms including the terms of the royalty agreement. From the evidence, the appellant was transparent from the beginning.

[67] It has thus been established that at all material times the 2nd respondent understood that royalty payments were in fact additional interest on the loan amount.

[68] No evidence was led at the trial and no case was established that the 1st respondent was subject to the dictates of the appellant when entering into the royalty agreement. The 2nd respondent specifically stated in his

evidence that he approached various finance houses and that he had options other than the appellant.

[69] From the evidence of 2nd respondent/Muller, he clearly knew from the beginning what the royalties were, and he entered into this transaction with his eyes wide open; he surely knew what he was getting into. He testified that he had other options other than the appellant, yet with the full knowledge he had, more specifically here pertaining to the royalty agreement, he still went ahead and did business with the appellant.

[70] As stated above, in re-examination the 2nd respondent for the first time said that he accepted when he signed the agreements that, that was the terms upon which the appellant was prepared to lend the money to him and that he believed he could not really insist on any changes to the documentation. This amounts to mere speculation on his part and it was never put to any of the appellant's witnesses that there was any inequality.

[71] Neither the 1st nor the 2nd respondent was an uninformed and vulnerable borrower. The 2nd respondent was a businessman and the 1st respondent was not his first business venture. The 1st respondent unsolicited and without any inducement or compulsion approached the appellant for finance and prior to entering into the agreement the appellant made full disclosure of the terms of the Royalty Agreement. It is clear that Muller is an astute businessman. The argument that he was a lay person and did not have any legal representative when he signed the agreements cannot hold.

- [72] There is no evidence that at the time the parties entered into this agreement the appellant was represented by attorneys/legal representatives. Windell represented the appellant; Muller/2nd respondent represented the 1st respondent. The parties were on an equal footing. All that was required was business acumen.
- [73] The 1st respondent, understood all along that the royalty agreement provided the basis to pay additional interest on the loan advanced to the 1st respondent; **refer judgement para [37] p 507; Muller's evidence at pp. 351 and 352.**
- [74] The royalty agreement was not a trap for the unsuspecting borrower. No evidence was led to indicate that the 1st respondent was in dire need of finances. It needed the finances to exploit the very specific venture for which it needed finance to pay the purchase price.
- [75] The 2nd respondent contends that the court a quo was entirely correct in finding that the royalty agreement was a simulated agreement, on the basis that Windell testified that the royalty agreement was actually an agreement to charge extra interest on the loan is common cause that the royalty is nothing else but interest.
- [76] Counsel for the 2nd respondent submitted that there was no full disclosure on the applicable interest, that therefore the African Dawn case does not apply. This is contrary to Muller's evidence, who testified that

all was explained to him prior to signing the agreement. Clause 2.1 of the royalty agreement does stipulate that the first respondent shall pay 1.4% on the monthly turnover or the projected turnover, whichever is the highest. The schedule of the projected turnover is annexure “2” to the royalty agreement; it is contained on page 36 of the record, and it forms part and parcel of the royalty agreement. Thus, the 1st respondent and/or the second 2nd respondent knew exactly how the royalty amount would be calculated.

[77] The defence in the plea pertaining to the Conventional Penalties Act, Act 50 of 1962 (“ The Conventional Penalties Act”), does not seem to have been persisted with; even on the record of the proceedings at the court *a quo* it was not pursued. In any event the Conventional Penalties Act contains no prohibitions and does not render anything illegal; **refer Christie, Law of contract in South Africa, 6th edition, p584-585**. The Conventional Penalties Act thus cannot play a role in this appeal.

[78] It does appear from the evidence of both parties already dealt with above, that these royalties were charged by the appellant as compensation for the risk that the appellant took in advancing the loan to the 1st respondent; and most importantly the rationale behind the paying of royalties was explained to Muller, who at all material times herein represented the 1st respondent.

[79] Counsel for the 2nd respondent further submitted that the appellant inappropriately charged VAT on the royalty amount. This aspect was

never raised in the pleadings, nor was it ever dealt with in the evidence at the court *a quo*. It is therefore not an issue which this appeal court should deal with.

[80] From the facts and evidence, in my considered view, it cannot be said that the respondents were in an unequal bargaining position, as found by the court *a quo*. Further, the royalty agreement cannot be said to be a simulated agreement; which will be something akin to a sham/fake or bogus contract aimed at deception. One cannot read into the evidence that the respondents were deceived in the sense that they did not know what they were getting into; **refer Mackay v Fey NO and another 2006 (3) SA 182 at 194 para [26]**.

[81] On the facts and the evidence there are no circumstances that show either extortion or oppression or anything akin to fraud, and therefore the royalty agreement cannot be said to be contrary to public policy and therefore void, as found by the court *a quo*.

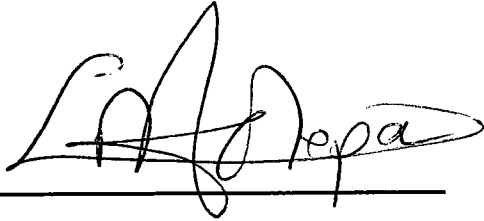
[82] The learned Judge in the Court *a quo* should have thus upheld the Appellant's claim B as well, and should therefore have granted judgement in the Appellant's favour, and should have dismissed the 1st and 2nd respondents' counterclaim with costs.

[83] In the result

1. Condonation is granted to the appellant in terms of prayers 1 and 2 of the notice of motion dated 19 March 2013.
2. The 2nd respondent's cross-appeal is struck off the roll with costs, such costs to include the costs consequent upon the employment of two counsel.
3. The Appeal is upheld with costs, such costs to include the costs consequent upon the employment of two counsel.
4. Prayers 3, 4 and 5 of the order of the court *a quo* is set aside and in its stead is substituted the following:

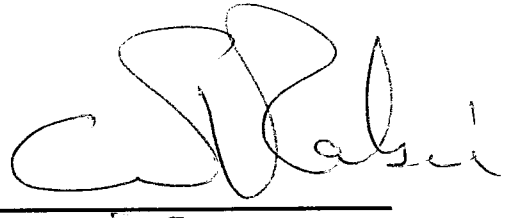
“3. In respect of claim (B) the appellant's claim is upheld in the sum of R3 279.94 plus interest at 10% per annum from 25 January 2012 to date of payment with costs, such costs to be paid by the 1st and 2nd defendants jointly and severally the one paying the other to be absolved.

4. The respondents' counterclaim is dismissed with costs.”



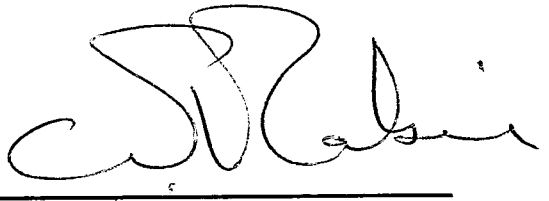
L M MOLOPA-SETHOSA
JUDGE OF THE HIGH COURT

I agree



p/v **K E MATOJANE**
JUDGE OF THE HIGH COURT

I agree



C P RABIE
JUDGE OF THE HIGH COURT

It is so ordered.