



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	<u>NOT</u> REPORTABLE
(2)	<u>NOT</u> OF INTEREST TO OTHER JUDGES

CASE NO: 2024-036920

DATE: 13 MAY 2026

In the matter between:

FINO INVESTMENTS (PTY) LTD

Applicant

and

NISELA FINANCIAL SERVICES (PTY) LIMITED

First Respondent

VICRIC INVESTMENT PROPERTIES (PTY) LIMITED

Second Respondent

Neutral Citation: *Fino Investments v Nisela Financial and Another* (2024-036920) [2026] ZAGPJHC --- (13 May 2026)

Coram: Adams J

Heard: 4 May 2026

Delivered: 13 May 2025 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 14:30 on 13 May 2026.

Summary: Monetary judgment – application for – written loan agreement between the applicant and the first respondent – second respondent bound himself as surety for and co-principal debtor with the first respondent in favour of the applicant – loan also secured by a continuous covering mortgage bond in

favour of the applicant over the second respondent's property – first respondent failed to repay the loan amount on time – 'penalty interest rate' kicked in – Calculation of penalty interest – to include interest on capitalised raising fee – interpreting loan agreement in order to calculate the interest payable – agreement interpreted textually and contextually – respondents only liable for a once off raising fee – court calculated the amount due by the respondents to applicant – Application to declare immovable property specially executable refused – on the basis of the proportionality principle – other legal points by parties dismissed out of hand – such as the renunciation of the *exceptio erroris calculi* – not an absolute defence – only shifts the onus of proof relating to the correctness of the calculations to the respondents – Judgment granted in favour of the applicant against the respondents for a substantially reduced amount, plus interest thereon – each party ordered to pay its own costs – on the basis that each had a measure of success in the advancement of their respective cases,

ORDER

Judgment is granted in favour of the applicant against the first and the second respondents, jointly and severally, the one paying the other to be absolved, for: -

- (a) Payment of the sum of R9 682.35.
- (b) Payment of interest on the sum of R14 866.20 at 1.25% per week, compounded weekly in arrears, from 16 May 2024 to 17 April 2025, both days inclusive.
- (c) Payment of interest on the sum of R9 682.35 at 1.25% per week, compounded weekly in arrears, from 17 April 2025 to date of final payment, both days inclusive.
- (d) Each party shall bear its own costs of this opposed application.

JUDGMENT

Adams J:

[1]. This is an opposed application by the applicant for judgment against the first and the second respondents, jointly and severally, for payment of the sum of R301 801.52, plus interest thereon and costs of suit, as well as for a foreclosure order in respect of the second respondent's immovable property. The applicant's cause of action is based on a written loan agreement ('the loan agreement') concluded at Sandton on 13 November 2023 between the applicant, as 'the borrower', and the first respondent, as 'the lender', in terms of which the applicant lent and advanced to the first respondent an amount of R2 500 000. Interest was payable by the first respondent to the applicant on the aforesaid capital sum of R2 500 000 at the 'applicable interest rate' of '2% (two percent), nominal annual compounding monthly'.

[2]. The said sum was advanced to the first respondent on 13 November 2023 and was to be repaid by the first respondent to the applicant, together with interest thereon and other charges provided for in the loan agreement, on the 'repayment date' being 'the date falling 30 (thirty) days after the advance date, being the final date for repayment of the loan outstandings'.

[3]. The second respondent, in terms of a written Continuing Suretyship, limited to R2 500 000, plus such further sums for interest, charges, expenses and costs, bound itself as surety for and co-principal debtor with the first respondent in favour of the applicant. The loan was furthermore secured by a continuous covering mortgage bond in favour of the applicant over the second respondent's property, being unit 12, 51 Shandon Lane, Parkmore ('the property'), as security for the sum of R2 500 000.

[4]. This application, in which the applicant claimed a monetary judgment for payment of the sum of R3 052 628.91 plus interest, and a foreclosure order, was issued during April 2024 and served on the first respondent by the Sheriff of this Court on 9 April 2024. On or about 25 September 2024, the applicant caused to be delivered an amended notice of motion, still claiming payment of the aforesaid sum, but amending the prayer relating to the payment of interest. During February 2025 the respondents – somewhat belatedly – delivered their answering affidavit, in which they deny liability to the applicant for the amount claimed. They, in particular, alleged that the first respondent has settled in full its indebtedness to the applicant arising from the loan agreement and they denied that at present there remains an amount owing in terms of the loan agreement.

[5]. The applicant alleges that, following further payments on account of their indebtedness to it by the respondents after the issue of this application, there at present remains an outstanding balance of R301 801.52 owing, due and payable by the first respondent to the applicant. The respondents disagree and allege that, as and at 17 April 2026, the outstanding balance on the first respondent's account was the total sum of R5 183.43, which was settled on the said date, leaving a nil balance.

[6]. Therefore, the central question before this Court is a narrow one: whose calculation of the outstanding indebtedness is correct – that of the applicant or that of the respondents? The foregoing issue is to be decided and the calculations done against the factual background in the matter. The facts are by and large common cause and are set out in the paragraphs which follow.

[7]. In addition to the clauses in the loan agreement alluded to *supra* relating to the payment of interest, the agreement also contained the following relevant provisions: -

- '4.4. The Borrower shall be liable to pay a capitalised raising fee of 8% (eight percent) upfront which shall be payable on the repayment date of each loan advanced. For the avoidance of any doubt this raising fee shall apply to each subsequent loans advanced should the Lender elect to roll over the agreement.
- 4.5. If the Borrower fails to make any payment to the Lender of any amount owing (or any part thereof) on the repayment date, then such amount outstanding shall bear interest at the penalty interest rate. The penalty interest rate shall be levied on the overdue amount from the next day after the repayment date until the actual date of payment, both days inclusive. *Such interest shall be calculated on a daily basis from the due date of each such overdue amount up to and including the date of actual payment thereof and be compounded monthly in arrears.*' (Emphasis added).

[8]. The 'Penalty Interest Rate' is defined in clause 1.1.1.7 of the loan agreement as 'an interest rate of 1.25% (one point twenty-five percent) compounded weekly'.

[9]. Arising from the foregoing provisions, the first dispute between the parties relates to the provision that the first respondent became liable to pay a raising fee of 8% upfront, which equates to R200 000. The applicant debited this amount twice presumably on the basis that the first respondent, by its failure to pay the loan advanced by the due date, had 'rolled over' the loan agreement and had therefore received a second 'advanced loan'. In their calculations of the sums due under and in terms of the agreement, the respondents seem to accept that

the applicant is entitled to debit the raising fee twice, I don't and I do so for the reasons set out hereunder.

[10]. This interpretation by the applicant is misplaced for the simple reason that the clause in question does not say that. Moreover, the agreement provides a mechanism to regulate the contractual relationship in the event of the first respondent failing to timeously effect repayment of the loan advanced, that being payment of interest at a 'penalty interest rate', which is well in excess of the interest rate agreed upon for the repayment of the loan amount. The point is this: If the parties intended a failure to timeously repay the loan advanced to translate into a new loan agreement, they would have agreed so expressly. Therefore, interpreted textually and contextually, the agreement provided that the first respondent, in the circumstances of this matter, would be liable only for payment of a once off raising fee of R200 000 to be capitalised, which means that interest at the 'applicable interest rate' was to run on this sum as well. To hold otherwise would fly in the face of the wording of the agreement and would contradict wholly the context of the agreement as a whole. Any calculation of the amount of the first respondent's liability pursuant to the loan agreement should therefore disregard the second R200 000 debited by the applicant in its calculations.

[11]. Axiomatically, if one is to accept that the first respondent is liable only for a once off raising fee of R200 000, the applicant's calculations are wrong as being premised on incorrect bases. However, the penalty interest is payable on the amount outstanding (Including the R200 000 capitalised) as and when it fell due after thirty days from date of advancement of the loan amount.

[12]. The applicant also charges the penalty interest for the period from 13 to 14 November 2023, in addition to levying interest at the applicable interest rate during that period. That approach is clearly wrong as it is not based on the provisions of the agreement, which makes it clear that 'the penalty interest rate shall be levied on the overdue amount *from the next day after the repayment date until the actual date of payment, both days inclusive*'. For the foregoing reasons,

there is a discrepancy between the calculations of the court and those of the applicant, which, at the relevant date, being 16 May 2024, comes to R301 801.52.

[13]. As for the respondents' calculations, which, as at 16 May 2024, results in a total amount outstanding of R1 488.77, it likewise contain discrepancies, which account for the difference between their final amount and that of the court's calculations. Firstly, the payment on 5 January 2024 by the first respondent of the sum of R250 000, according to the respondents' calculations, incorrectly reduces the outstanding balance by R354 571.32 (as against the actual reduction of R250 000). Secondly, as already indicated *supra*, the respondents' calculations add a second raising fee of R200 000, which is misplaced for the reasons alluded to above. And thirdly, the respondents' calculations omit to debit interest during the period from 5 January to 5 February 2024. But for these discrepancies, the respondents' calculations and the resultant grand total, would have corresponded with the court's grand total as at 16 May 2024, that being R14 866.20.

[14]. That then brings me to my calculation of the interest payable, which, in my view, is a simple mathematical exercise, taking into account the reduction of the capital amount as and when payment was made by the first respondent on account of its indebtedness as follows: R250 000 paid on 5 January 2024; R500 000 paid on 10 April 2024; and R2 680 360.30 paid on 16 May 2024, totalling R3 430 360.30 as at 16 May 2024 – about a month after institution of the motion proceeding *in casu*.

[15]. The loan was advanced by the applicant to the first respondent on 13 November 2023 and therefore fell to be repaid on 14 December 2023, that being thirty days after the date on which the loan was advanced. Interest on R2.7 million at 'an interest rate of 2%, nominal annual compounding monthly' equates, according to my calculations and that of the respondents, to R54 000 to be added to the capital sum of R2 700 000 = R2 754 000, which is the amount outstanding on the date on which repayment was due (14 December 2023). On 5 January 2024 the first respondent paid R250 000, which means that interest should be

calculated on the amount of R2 754 000 at the penalty interest rate of '1.25% compounded weekly'. This amounts to R34 425 (for 15 to 21 December 2023) = R2 788 425 + R34 855.31 (for 22 to 28 December 2023) = R2 823 280.31 + R35 291 (for 29 December 2023 to 4 January 2024) = R2 858 571.31. From this amount should be deducted the R250 000 paid on 5 January 2024, giving a total amount outstanding on that date of R2 608 571.31. This result accords with the first respondent's calculations, except that there appears to be a basic arithmetic error in their calculations. The amount correlates more or less to the total resulting from the applicant's calculations, which result in a net amount payable as and at 5 January 2024 of R2 603 125.

[16]. The next payment from the first respondent was an amount of R500 000, which was received by the applicant on 10 April 2024. This means that interest at the penalty interest rate should be calculated weekly and compounded on R2 608 571.31 from 5 January 2024 to 10 April 2024 – 13 weeks and 5 days. From there onwards, the calculations are as per the following table:

DATE		DEBIT / CREDIT	BALANCE		INTEREST PAYABLE
Opening Balance			R2 608 571,00		
5 to 11 January 2024		R32 607,14	R2 641 178,14		
12 to 18 January 2024		R33 014,73	R2 674 192,86		
19 to 25 January 2024		R33 427,41	R2 707 620,28		
26 to 1 February 2024		R33 845,25	R2 741 465,53		
08-Feb-24		R34 268,32	R2 775 733,85		R167 162,85
15-Feb-24		R34 696,67	R2 810 430,52		
22-Feb-24		R35 130,38	R2 845 560,90		
29-Feb-24		R35 569,51	R2 881 130,41		
07-Mar-24		R36 014,13	R2 917 144,54		
14-Mar-24		R36 464,31	R2 953 608,85		
21-Mar-24		R36 920,11	R2 990 528,96		
28-Mar-24		R37 381,61	R3 027 910,57		
04-Apr-24		R37 848,88	R3 065 759,46		
10-Apr-24		R32 847,42	R3 032 912,04		R490 035,88
10-Apr-24		R500 000,00	R2 532 912,04		
17-Apr-24		R31 661,40	R2 564 573,44		
24-Apr-24		R32 057,17	R2 596 630,61		
01-May-24		R32 457,88	R2 629 088,49		
08-May-24		R32 863,61	R2 661 952,10		
15-May-24		R33 274,40	R2 695 226,50		R162 314,46
16-May-24		R2 680 360,30	R14 866,20		

[17]. Judgment should therefore be granted in favour of the applicant against the respondents for this amount of R14 866.20, less an amount of R5 183.85, which was paid by the respondents on 17 April 2026, therefore R9 682,35, together with interest as provided for in the loan agreement. As regards the applicant's claim for an order declaring specially executable the second respondent's immovable property, that application should fail on the basis of the principle of proportionality. The simple point is that it would be innately unfair and undoubtably iniquitous to deprive the second respondent of its ownership of the property for payment of an amount of R9 682.35.

[18]. As was held by the Constitutional Court in *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*¹, that there would be circumstances where it would be unjustifiable to order execution because the advantage that attached to a creditor who sought execution would be far outweighed by the immense prejudice and hardship caused to the debtor. This matter is such a case. Execution in these circumstances would be unjustifiable.

[19]. There were also a number of other peripheral issues raised on behalf of the parties in the matter and which I will now proceed to deal with briefly.

[20]. The respondents delivered their answering affidavit out of time and applied for condonation of such late filing. The main explanation given for the lateness of the answering affidavit is the fact that the parties were endeavouring to amicably resolve the disputes between them. I accept the respondents' explanation in that regard. Moreover, there is no prejudice suffered by the applicant as a result of the late delivery of the said affidavit. I therefore grant the respondents condonation of the late filing of their answering affidavit, with no order as to costs.

[21]. The respondents furthermore delivered rather belatedly a so-called 'supplementary answering affidavit' in which they address new matters raised by the applicant in its replying affidavit. Importantly, the respondents in that affidavit

¹ *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC).

did an updated reconciliation of its indebtedness to the applicant, taking into account payments made subsequent to the issue of the main application and the filing of the applicant's heads of argument in which the applicant updates its reconciliation of the debt. The applicant filed an affidavit in opposition to the respondents' application for leave to deliver the said supplementary affidavit, but they also replied in their supplementary affidavit to the allegations made in the respondents' supplementary affidavit. It can therefore not be said with any conviction that the applicant would suffer prejudice by the admission of the said affidavit. Moreover, the supplementary affidavits ventilated issues presently alive between the parties and assisted the court in adjudicating the disputes. It is therefore in the interest of justice that I grant both the respondents and the applicant leave to file the supplementary affidavits. Such applications are hereby granted with no orders as to costs.

[22]. The next issue relates to the legal objection raised by the respondents to the main application on the basis that the dispute between the parties should have been referred to arbitration in terms of the agreement. Also, the respondents, in their supplementary affidavit raises a defence based on the provisions of the Conventional Penalties Act. There is no merit in either one of these defences. The arbitration point was raised at a very late stage and after the parties had completed all the steps in the prosecution of the applicant's main application. For that reason alone, that point is still born. As for the Conventional Penalties Act defence, the respondents did not even begin to make out a case in that regard. Those points accordingly fall to be rejected.

[23]. Lastly, the applicant raised, in response to the respondents alleging that they have settled their indebtedness in full, the point that the first respondent in the loan agreement renounced the legal benefit and exception of 'revision of accounts and *errore calculi*' and they are therefore not entitled to dispute the amount claimed. There is no merit in this contention on behalf of the applicant. The simple point being that it is trite that, in the event of such a renunciation, the first respondent in this case would have attracted the onus of proving that there

was an error in the calculation of its indebtedness, which onus it has, in my view, more than discharged.

Costs

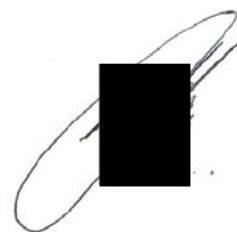
[24]. The general rule is that costs should follow the suit. In this matter, it should be borne in mind that whilst judgment is granted in favour of the applicant for payment of a small sum of money, most of the indebtedness had been extinguished by May 2024 – some two years ago. What is more is that the first and second respondents have themselves had a measure of success in opposing the applicant's application in that they have succeeded to avoid judgment for a substantial amount. Additionally, they have successfully defended the applicant's claim for a foreclosure order.

[25]. It can therefore safely be said that the parties have had equal measures of success in the advancement of their respective cases. The proper costs order would, in my view, be one in terms of which each party is to bear its own costs of this opposed application.

Order

[26]. In the result, Judgment is granted in favour of the applicant against the first and the second respondents, jointly and severally, the one paying the other to be absolved, for: -

- (a) Payment of the sum of R9 682.35.
- (b) Payment of interest on the sum of R14 866.20 at 1.25% per week, compounded weekly in arrears, from 16 May 2024 to 17 April 2025, both days inclusive.
- (c) Payment of interest on the sum of R9 682.35 at 1.25% per week, compounded weekly in arrears, from 17 April 2025 to date of final payment, both days inclusive.
- (d) Each party shall bear its own costs of this opposed application.

A handwritten signature in black ink, which appears to be 'L R ADAMS', is written over a solid black rectangular redaction box.

L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	4 May 2026
JUDGMENT DATE:	13 May 2026
FOR THE APPLICANT:	Lekale Maelane
INSTRUCTED BY:	MVMT Attorneys, Hyde Park Lane, Sandton
FOR THE FIRST AND THE SECOND RESPONDENTS:	Simon Kunene
INSTRUCTED BY:	Gwina Attorneys Incorporated, Sandown, Sandton