Case number 211/98

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter of

G F H V BEKKER First Appellant

A J N BEKKER Second Appellant

and

OOS-VRYSTAAT KAAP KOöPERASIE BEPERK Respondent

CORAM: Vivier, Nienaber, Harms, Schutz JJA and Farlam AJA.

DATE OF HEARING: 12 May 2000

DATE OF JUDGMENT: 26 May 2000

Validity of conclusive evidence clause in co-operative society statute –
where no written objection by member within three months – when additional finance charges recoverable under sec 4(1) – whether finance charges recoverable despite non-compliance by creditor with sec 10(6)

J U D G M E N T

/FARLAM AJA:

FARLAM AJA:

[1] In this matter the respondent co-operative society instituted action in the Eastern Cape High Court against the appellants for payment of an amount alleged to be due upon a running account which was initially operated by a company G B A van Ginkel (Edms) Bpk ("the company"), of which the appellants were the directors and shareholders and in respect of which they bound themselves as sureties and co-principal debtors.

[2] After hearing evidence the trial court (Zietsman JP) granted judgment in favour of the respondent against both appellants, jointly and severally, in an amount of R392 683,33 (being the amount alleged to be due under the running account); interest thereon at a rate of 24.75% per annum, such interest to be capitalised monthly from 1 April 1995 to date of payment, and costs on the scale as between attorney and client, together with interest thereon at the current legal rate from the date of taxation to the date of payment.

[3] The respondent co-operative society came into existence on 11 August 1993 upon the amalgamation in terms of sections 165 and 166 of the Co-operatives Act 91 of 1981, as amended, of two co-operatives, Oos-Vrystaat Koöperasie Bpk ("OVK") and Albert Koöperasie Bpk ("AKB").

[4] The appellants are two farmers, each of whom conducted separate farming

operations in his own name and who are both members of the respondent co-operative society. Before the amalgamation between OVK and AKB they were members of AKB. The accounts which they have with respondent in their individual capacities are not in issue in this case. What is in issue, as appears from what has been said already, is the account of the company of which they were the directors and shareholders.

[5] The company was the owner of two farms known as Fonteintjie and Komkommerhoek, which were situated in the district of Steynsburg. Although, as has been said, its two directors and shareholders were at that stage members of AKB, it was not. Despite this fact it applied in July 1988 to AKB for a production credit of R180 000 in order to enable it to produce a crop of wheat on its two farms. At the end of the application was provision for a suretyship contract which was signed by both appellants as sureties and co-principal debtors in favour of AKB in respect of the company's obligations The application for a production credit was approved by AKB.

[6] In February 1989 the company applied once again to AKB for a production credit, this time to enable it to grow crops of sunflowers, manna, lucerne and wheat on its farms. Once again the appellants signed as sureties and co-principal debtors and the production credit applied for was approved by AKB.

[7] On 3 March 1989 the appellants signed a separate deed of suretyship in favour

of AKB in respect of the debts of the company, which was limited to R210 000,00, plus interest, costs and certain other expenses, as well as any attorney and client costs incurred by AKB as a result of the institution of legal proceedings against the company or the appellants for any amount covered by the deed.

[8] Further agreements for production credits were concluded between the company and AKB each year thereafter and this state of affairs continued until December 1991 when an amount in excess of R443 000 was owed by the company to AKB in terms of the then current production loan and it was assumed by both the appellants and AKB that the latter had a statutory pledge over the crops on the farms in terms of section 173 of the Co-operatives Act 91 of 1981, as amended, relating to the amount owed to it by the company in respect of this loan.

[9] When the company's application to AKB for a production credit had been granted the company was not accepted as member of AKB, it not being the policy of AKB to accept companies as members. Usually when AKB allowed its facilities to be used by non-members the credit conditions were more stringent than in the case of members. I say "usually" because it appears from the evidence that companies all of whose shareholders and directors were members of AKB were more readily allowed to trade with and use the facilities of the society. Such a company was for practical purposes treated as a partnership with its

members being the partners, and its separate corporate identity being ignored. The society allowed it all the privileges and facilities of a member and charged it interest at the rates charged to members and not at the higher rates charged to non-members. At the same time the society accepted that a company allowed to trade with it on terms available to members and not available to non-members would be bound to the same rules and obligations applicable to members and would thus be bound, *mutatis mutandis* (regard being had to the fact that the company was not a member and could thus not vote at meetings of the society), in terms of the statutes and rules of the society.

[10] One of the requirements applicable to members in the regulations of AKB was that a member's life would be insured so as to cover the outstanding amount owing from time to time by that member to AKB so that that amount would be paid immediately to the society on the member's death. The insurance was arranged by AKB and the member's account was debited with the premiums payable in respect thereof. In the case of a partnership the life of each partner was insured to cover the full amount of the debt.

[11] The company was dealt with in this manner by AKB. The accounts rendered by AKB to the company show quite clearly that it was dealt with on the same terms as members were. The same rates of interest were charged as were charged to members. Although the interest rates charged by the respondent were initially not reflected in the monthly

statements, from July 1994 they were. These statements were checked regularly by the first appellant and he never queried them or objected to them. The lives of the two appellants were insured as though the company was a partnership whose partners were members of AKB. The statements sent to the company reflected as debits the premiums payable from time to time in respect of insurance. To these debits no query or objection was raised.

[12] It is clear from the accounts submitted to the company that compound interest was charged. The rates of interest charged varied from time to time. This was because from time to time the directors of the society determined the rates of interest to be charged in respect of members' accounts. Their decisions were arrived at after they had determined what money the society would require to enable it properly to perform its functions, the aim being not to make a profit for the society but to obtain the maximum benefit for the members.

[13] The Credit Policy of AKB provided (in paragraph 13.1 and 13.2) that the rate at which interest was charged on accounts was determined from time to time by the board of directors and that interest was capitalised monthly.

[14] Accounts which were not paid on due date were classified as overdue and were transferred to different account categories in respect of which higher rates of interest were charged. This was determined by the board of directors in terms of the society's statute. The interest charged in respect of these overdue accounts exceeded the annual finance charges

determined from time to time in terms of sec 2 of the Usury Act 73 of 1968, as amended.

[15] In December 1991 the appellants sold their shares in the company to one De Lange and it was a term of the contract between them and De Lange that the crops on the farm would be released from the statutory pledge to which it was assumed they were subject. The appellants accordingly approached representatives of AKB and two written agreements were entered into between the appellants and AKB, one of which was annexed to the respondent's declaration as D2, while the other was annexed to the appellant's plea as V1. Both were signed on behalf of AKB on 4 December 1991 and by the appellants on 6 December 1991.

[16] Two documents were prepared since the buyer of the shares in the company was not satisfied with the release of the pledge terms contained in the first document, with the result that a further document was also concluded. They must be read together.

[17] The contract D2, as far as is material, reads as follows:

> "NADEMAAL die Skuldenare [appellants] Direkteure is van die Maatskappy . . . welke belange nou verkoop is aan ene D M DE LANGE . . .
>
> EN NADEMAAL die Skuldenare hulleself verbind het ten gunste van die Skuldeiser [i.e AKB] as borg in solidum vir en as mede-hoofskuldenaar, gesamentlik en afsonderlik vir [the company].
>
> EN NADEMAAL die Skuldeiser `n pandreg gehad het oor die oeste . . . en aangesien die Skuldeiser afstand gedoen het van die pandreg,

NOU DERHALWE kom die partye soos volg ooreen:

1.

Die Skuldenare sal nog aanspreeklik wees vir enige bedrag wat verskuldig is deur [the company] . . . in terme van die borgstelling wat deur die Skuldenare onderteken is en soos hierbo uiteengesit.

2.

Die Skuldenare onderneem om die bedrag verskuldig soos volg terug te betaal:

2.1 OP 31 DESEMBER 1992 ‘n bedrag van R340 000,00 synde ‘n bedrag wat aan die Skuldenare betaal word in terme van [the contract of sale with De Lange] en

2.2 Op 31 DESEMBER 1992 ‘n bedrag van R40 000,00 synde rente [which was to be paid to them by De Lange]

2.3 Die Skuldenare bevestig hiermee dat hulle tans `n eis het teen VOLKSKAS BANK BEPERK en indien hierdie eis slaag sal die Skuldenare `n bedrag van R70 000,00 aan die Skuldeiser betaal sodra die fondse aan hulle oorbetaal word.

3.

. . .

4.

. . .Indien die bedrae soos genoem in paragraaf 2 hierbo wel vereffen word sal die partye `n verdere ooreenkoms aangaan met betrekking tot die vereffening van die balans dan nog verskuldig.

5.

Indien die genoemde Koopooreenkoms gekanselleer word . . . bevestig die partye hiermee dat die Skuldeiser . . . nie afstand sal doen van die pandreg nie en sal die pandreg bly voortbestaan."

[18] The contract V1, as far as is material, reads as follows:

"NADEMAAL die Skuldeiser [AKB] 'n produksielening aan die Skuldenaar [the company] toegestaan het . . .
EN NADEMAAL die Skuldeiser `n pandreg het daaroor . . . en die Skuldenare [the appellants] erken dat [the company] `n bedrag van R443 693,12 verskuldig is aan die Skuldeiser in terme van die lening wat toegestaan is en nademaal die Skuldenare die eiendom waarop die bogenoemde gewasse geproduseer word en waarop die Skuldeiser `n pandreg het . . . verkoop het aan [De Lange]

NOU DERHALWE kom die partye soos volg ooreen:

1.

Die Skuldeiser onderneem en doen hiermee afstand van die pandreg . . .

2.

Die Skuldenare onderneem hiermee om voldoende sekuriteit te verskaf aan die Skuldeiser vir die bedrag nog verskuldig soos hierbo genoem . . .

3.

Die partye bevestig hiermee dat die borgstelling wat beide die Skuldenare onderteken het as borg vir die bogenoemde Maatskappy nog van krag bly en aanvaar die Skuldenare aanspreeklikheid vir die

bogenoemde skuld van die Maatskappy in terme daarvan.

4.

Die partye bevestig verder dat die Skuldeiser en Skuldenare bevredigende reëlings getref het vir die terugbetaling van die bedrag verskuldig en dat die Skuldeiser slegs die Skuldenare aanspreeklik sal hou vir die skulde van die Maatskappy soos hierbo genoem."

(According to the evidence the appellants sold to De Lange their shares in the company and not the company's property as stated in the preamble to the contract V1. Nothing turns on this point.)

[19] At the trial the respondent relied, in order to prove its case against the appellants, on clauses in the various statutes of AKB and the respondent which provided that if within a certain period of time after a statement had been posted to a member and the member concerned had not objected in writing against any debit or credit appearing on the statement, it would be considered for all purposes that the contents of the statement were correct and it would in any legal proceeding be conclusive evidence that the goods and services mentioned therein were provided by the society to the member and that the debit and credits appearing on the statement were correct. (The relevant clauses were paragraph 112(3) of the 1982 statute of AKB (in which the relevant period was three months), paragraph 114 (3) of the 1991 statute of AKB (in which the relevant period was six months) and paragraph 116 (3)

of the 1993 statute of the respondent (in which the relevant period was three months and the written objection had to be sent to the society by registered post).)

[20] In attempting to prove its case against the appellants the respondent also relied on a clause printed on the statements forwarded to the company from 31 March 1990 onwards which provided as follows:

> "Indien skriftelike beswaar nie binne 1 (een) maand vanaf datum van maandstaat by die koöperasie ingedien word nie, sal die gegewens op die maandstaat as korrek aanvaar word. Daarna sal die bewyslas op die debiteur rus."

[21] Zietsman JP held that the conclusive evidence clause in the statutes of AKB and the respondent was incorporated in the contract between the company and the society, and that it was valid and could be invoked against the appellants. As it was common cause that such objections to the statements as were raised were dealt with at the time, and that the appellants did not object during any of the relevant periods either orally or in writing to any other items in statements received from AKB and after amalgamation from the respondent he held that (subject to arguments raised under the Usury Act, which arguments he dealt with and rejected later in his judgment) the statements sent to the appellants which contained debits covering the amount claimed from the appellants constituted conclusive proof of the amount owed to the society and were binding on the appellants.

[22] Zietsman JP also held that if he was wrong about the effect of the conclusive proof clauses in the statutes the shifting of onus clause printed on the statements of account from 31 March 1990 had been acquiesced in by the appellants and was binding on them. On this basis also he found against the appellants.

[23] Details of the arguments raised on behalf of the appellants under the Usury Act, which were also rejected by Zietsman JP, appear from the judgment to be delivered by Harms J A where the appellants' contentions in this regard, which were repeated in this Court, are considered.

[24] Zietsman JP also rejected two other arguments advanced on behalf of the appellants: firstly, that the company had been overcharged by the AKB in respect of a centre point which it had purchased from the society in 1985 and that the company was entitled to have the amount overcharged and the interest debited thereon deducted from the respondent's claim; and, secondly, that the amounts which were owing by the company were paid to the respondent by the State, under what was referred to as the State Guarantee Scheme, when the State, after OVK amalgamated with AKB, paid to the respondent an amount of R3,7 million in respect of the overdue amounts owed to AKB by its members.

[25] On appeal before this Court counsel for the appellants attacked the judgment of the court *a quo* on the following grounds.

(a) that the conclusive evidence clauses in the statutes of AKB and the respondent were not binding on the company (and therefore on the appellants who were not sued *qua* members in respect of the amount owed by the company) because it was not a member of the society and was accordingly not bound by the terms of the society's statutes;

(b) that, if those clauses were binding on the company and the appellant as persons who were liable to the society for its debts, they were invalid as being *contra bonos mores* and unenforceable;

(c) that the shifting of onus provision printed on the society's statements from 31 March 1990 was not binding on the company;

(d) that if the shifting of onus provision was binding on the company the onus so shifted to the company was not transferred to the appellants when they assumed liability for the debts of the company in respect of its account with the respondent;

(e) that if the onus of proof rested upon the respondent to prove the amount owing to it by the company and it was not entitled to rely on the conclusive evidence clauses, it had not succeeded in showing that it was entitled to judgment against the appellant;

(f) that AKB had overcharged the company in respect of the centre point sold to it in 1985 and that the company was entitled to have the amount of the overcharge and the

interest debited in respect of it deducted from the amount claimed by the respondent;

(g) that the State had discharged the debt owing by the company to the respondent when it paid the sum of R3,7 million to the respondent, after the amalgamation between OVK and AKB, in respect of overdue amounts owed to AKB by its members;

(h) that the respondent lacked what was called *locus standi* in the matter to enforce its claim against the appellants because according to the evidence of its general manager it had ceded its claim against the appellants to the Land and Agricultural Bank of South Africa and had accordingly divested itself of its claim against the appellants;

(i) that the respondent was not entitled to recover finance charges in respect of the amount provided for in the agreements D2 and V1, in terms of which the appellants assumed liability for the debts of the company, because these agreements constituted instruments of debt as contemplated in sec 2(9) of the Usury Act, and no finance charges were disclosed therein;

(j) that the method of charging interest or finance charges adopted by AKB and the respondent and the capitalisation thereof was in effect in conflict with the provisions of sec 4 of the Usury Act;

(k) that in view of the failure by AKB and the respondent over a period of some five years to comply with the provisions of sec 10(6) of the Usury Act, the finance charge rates

which were varied from time to time by the board of directors of the society were not recoverable as it would be against public policy for the courts to come to the assistance of a party seeking to recover interest charged in contravention of the provisions of sec 10(6); and

(l) that the court *a quo* erred in granting an order for costs on the scale as between attorney and client.

[26] In support of his submission that the conclusive evidence clause was not binding on the company, counsel for the appellants relied on the fact that the company was not a member of the respondent or, before amalgamation, of AKB. He submitted further that it was not treated as a member in that no shares were issued to it and in the event of the members being required to make a contribution no potential contribution would have been owing by it. He submitted further that the mere fact that the respondent and, before amalgamation, AKB chose to operate the account of the company in the same manner as the accounts of members were conducted did not *per se* render the company bound by the provisions of the various statutes.

[27] In rejecting this submission in the court *a quo* Zietsman JP said the following:

"The company's account was in all respects dealt with in the same way as any

> other member's account and I have no doubt in the circumstances that it was the intention of the parties, and their tacit agreement, that this should happen, that the company would be bound by the statute and regulations of the society like any other member, that its accounts would be debited with interest in the manner and at the rate applicable to members and that it would be liable for all other expenses for which members were liable. The fact that shares in the society were not issued to the company does not in my opinion indicate that it was the intention of the parties that the company's accounts should be treated differently from that of members. It was not treated differently, and the fact that no query or objection was raised to the accounts sent regularly to the company in my opinion confirms the fact that both parties intended, and accepted, that the company would be treated on the same basis as any other member of the society."

[28] I agree with these views. In granting the company terms as advantageous as those granted to members the company must be taken, in my view, to have intended what one may call the disadvantages connected therewith, including the conclusive proof clause, to apply as well, and it was clear, in my opinion, that the appellants must have had the same intention. Certainly if one applies the test for the implication of a tacit term, what the parties would have said to the more imaginative bystander who had asked them, when the contract was being concluded, whether the conclusive proof clause would apply, the answer would clearly have been in the affirmative.

[29] The next question to be considered is whether the conclusive proof claim is valid.

[30] Counsel for the appellants based his attack on the validity of this clause on the decision of this Court in *Ex parte Minister of Justice: In re Nedbank Ltd v Abstein Distributors (Pty) Ltd and Others and Donelly v Barclays National Bank Ltd*, 1995 (3) SA 1 (A), in which it was held that a conclusive proof clause (i e a clause providing for a certificate of balance to constitute conclusive proof of indebtedness) in favour of a creditor in an agreement, in terms whereof the creditor is to be the author of the certificate of balance issued under the clause, was *contra bonos mores* and therefore void, regardless of the content of the agreement in which it bound itself. (In what follows I shall refer to that decision as "the *Abstein Distributors* case".) Two conclusive proof clauses were considered by this Court in the *Abstein Distributors* case. Both were contained in deeds of suretyship signed in favour of banks. Each of them provided for the indebtedness of the principal debtor in respect of whom the deed of suretyship had been signed to be "determined and proved" by a certificate of an official of the bank (in one of the deeds a general manager or the manager of a branch, in the other "any manager or accountant") and for the certificate to be binding on the surety and to be conclusive proof of the amount of the surety's indebtedness.

[31] The factor present in this case, that the debtor has a period during which the statement is not binding or conclusive in which he or she can raise such objections as he or she has to the statement, and if he or she does so, the statement does not become conclusive, did

not arise for consideration in the *Abstein Distributors* case and the case is clearly distinguishable in consequence. In essence the clause presently under consideration is the counterpart of clauses commonly encountered in, for example, insurance contracts which provide that a claim under the contract must be instituted within a certain time. Such contractual time bars relating to the institution of claims are valid; why should a clause providing for a time bar relating to the raising of a defence or objection be invalid? Indeed, if demonstration were required of the desirability of such a clause in certain contexts, there could be no better demonstration than is afforded by the almost endless litigation in this case over events which had taken place many years before.

[32] When this point concerning contractual time bars was put to the appellants' counsel he changed tack and argued that the period of three months after which any defence to the debits in a statement was time-barred was too short. There are several problems with this submission. Firstly, it was not raised in the court below so that the respondent did not have the opportunity to lead evidence at the trial to show why three months was a reasonable period in the circumstances. Secondly, the clause in question , being part of the statute of the society, would have had to have been adopted by a special resolution passed by the votes of not less than two thirds of the members present at a general meeting of the society, which had been convened by a notice in which particulars of the proposed resolution introducing the

clause were specified, if it did not form part of the original statute (see secs 32 and 130 of the Co-operatives Act 91 of 1981 as amended). In other words, if the period of the conclusive proof clause in the present case had been considered unfair and unreasonable by the members who would be affected by it, they could have opposed its introduction, if it was not part of the original statute, or voted to amend it if it was part of the original statute.

[33] I am accordingly satisfied that the conclusive proof clause under consideration in this case is valid and binding on the company and the appellants.

[34] As the full amount of the respondent's claim against the appellants is covered by the conclusive proof clauses to which I have referred it is not necessary to decide whether the shifting of the onus provision printed on the company's statements from 31 March 1990 was binding on the company or on the appellants.

[35] As regards the contention that the company was entitled to have the amount of the alleged overcharge which took place in 1985 and the interest debited in respect thereof deducted from the amount of the respondent's claim, it is clear that any claim for repayment which the company may have had against AKB for repayment of amounts allegedly overcharged had become prescribed at least by March 1992. This was because all amounts allegedly due by the company to AKB, including the amount charged (or overcharged) in respect of the centre point, had been paid by March 1989. It follows that the company was

not entitled after March 1992 to claim repayment or a deduction in respect of the alleged overpayment.

[36] The appellants' contention that the company's indebtedness to the respondent was discharged when the State paid R3,7 million to the respondent in respect of the overdue amounts owed to AKB by its members is in my view without merit. The onus was on the appellants to establish that the State made the payment in the appellants' name and in their discharge: see *Froman v Robertson* 1971 (1) SA 115 (A) at 124 H. It is clear from the evidence that, as Zietsman JP put it in his judgment, it remained the task of the society to attempt to recover from its members the amounts owed on the overdue accounts in respect of which the State made the payment referred to. That being so, it has not been established that the State made the payment on behalf of the appellants and in order to discharge their indebtedness.

[37] The appellants' defence based on the respondent's alleged lack of *locus standi* resulting from the cession of its claim against the appellants to the Land and Agricultural Bank was not raised in the plea. The point was not explored in depth at the trial and it was accordingly not necessary for the respondent to prove what the terms of the alleged cession to the Land and Agricultural Bank were or whether, if the claim had in fact been ceded, it had not been ceded back to the respondent before summons was issued. In the circumstances the

point cannot be upheld.

[38] The contentions advanced by the appellants' counsel under the Usury Act 73 of 1968, as amended, must, in my view, be rejected for the reasons set out in the judgment prepared by Harms J A, which I have had the advantage of reading and with which I agree.

[39] The final point argued by counsel for the appellants relates to the order made by Zietsman JP that the appellants pay the costs of the action on the scale as between attorney and client. In his judgment in support of his decision he referred to a deed of suretyship signed by the appellants in December 1993 in which they bound themselves as sureties and co-principal debtors for an alleged partnership between G and A Bekker, and in which they undertook to pay costs on the attorney and client scale, should they be sued on the deed of suretyship. The court *a quo* found that no such partnership came into existence and it was accordingly submitted on behalf of the appellants that the court *a quo* erred in granting the order for payment of costs on the scale as between attorney and client.

[40] In reply counsel for the respondent drew attention to the fact that the appellants accepted liability to pay costs on the scale as between attorney and client not only in the deed of suretyship to which the court *a quo* referred but also in a number of other contracts they signed all of which afforded a basis for the costs order made in the court *a quo*: these included the original application for production credits.

[41] In view of the fact that appellants had not placed the court in possession of facts and circumstances which supported their objection to the making of an order for costs on an attorney and client scale and there was nothing to show that the agreement to pay attorney and client costs was inequitable or oppressive or that the conduct of the respondent so rendered it, there is no basis for the Court to exercise the discretion vested in it by section 5(1)(e) of the Usury Act to refuse to order costs to be paid on the attorney and client scale despite the fact that the appellants had agreed thereto. See *SA Permanent Building Society v Powell and Others* 1986 (1) SA 722 (A).

The following order is made:

The appeal is dismissed with costs, including those occasioned by the employment of two counsel.

_____
I G Farlam

VIVIER JA)
NIENABER JA)
HARMS JA) CONCUR
SCHUTZ JA

HARMS JA:

[1] This judgment deals only with questions arising from the provisions of the Usury Act 73 of 1968 and should be read against the factual background set out in the judgment of Farlam AJA.

[2] It is common cause that the major portion of the respondent's claim consists of interest

on the overdue account. Interest is an element of "finance charges", the subject matter of the Act. In the plea and counterclaim, the appellants, apart from a general allegation that interest was charged in contravention of the Act, relied upon one particular provision of the Act, namely that the monthly capitalisation of interest was in contravention of s 2 (5). In their particulars for trial, the appellants refused to amplify the general allegation save by referring to sections 2, 4 and 5 of the Act. At the pre-trial conference, however, their case was said to be the following (my summary):

(m) interest was levied at rates in excess of those provided by the Act;
(n) interest was capitalised in contravention of s 2(5);
(o) interest continued to be levied after the conclusion of the agreements V1 and D2 despite the absence of any provision in these documents, being instruments of debt, for payment of interest.

That these were the issues in relation to the Act became clear from the supplementary particulars for trial. In the event, the court a quo found against the appellants on (a) and (b), a decision which was not challenged on appeal.

[3] As far as (c) is concerned, it may be useful to refer to s 2(9) at the outset:

"Save in respect of a debit balance in a cheque account with a banking institution as defined in section 1 (1) of the Banks Act, 1965 (Act 23 of 1965), and subject to the provisions of sections 4, 5 and 5A, no person shall in respect of a money lending transaction or a credit transaction or a leasing transaction stipulate for, demand or receive from a borrower or credit receiver or lessee finance charges not disclosed in an instrument of debt."

An "instrument of debt" means -
"a written contract or agreement or other document containing the terms and conditions of any contract or agreement in connection with a money lending transaction or a credit transaction or a leasing transaction."

(Section 1. This is the current definition which was introduced by way of amendment by s. 1 (b) of Act 30 of 1993. The definition as it was on 6 December 1991 - the date of D2 and V1 - was not different in any material respect.) In short, finance charges that have not been disclosed in a written instrument of debt may not be recovered. An instrument of debt need not be a contract but may, for instance, be any document forming part of a series of documents containing the terms and conditions of the contract. Thus, an account which reflects the terms of an oral agreement may, conceivably, fall within the definition. So, too, in this case, the statutes, credit policy and minuted decisions of the boards of directors of the co-operatives concerned.

[4] Point (c) was based upon the appellants' assumption that the two agreements of 6

December 1991amounted to a novation or replacement of the existing indebtedness of the company and the appellants as sureties and that their intention was to free the appellants by agreement of any obligation to pay further interest. The court below found against the appellants and held that the original debt remained and that the statute and rules of the co-operatives continued to apply to the indebtedness and governed the running of interest. There is no reason to interfere with these findings. The idea that there was a release from the existing obligation to pay interest was, on the evidence, an *ex post facto* lawyer's point. There was therefore no reason for D2 and V1 to have contained the applicable interest rate. They were not conceived as self-contained agreements existing on their own.

[5] It is noteworthy is that it was never the case of the appellants that the company's obligation to pay interest fell foul of s 2(9). Instead, they relied upon an oral agreement allegedly entered into when the first production loan was negotiated between ABK and the company in relation to interest. Their evidence in this regard was rejected. In other words, the question whether there was an instrument of debt for purposes of s 2(9) was never in issue and was not investigated. The plea falls foul of the rule that if the illegality does not appear ex facie the transaction, it and the circumstances founding it must be pleaded (*Yannakou v Apollo Club* 1974 (1) SA 614 (A) 623G-H; *F & I Advisors (Edms) Bpk v Eerste Nasionale Bank van Suidelike Afrika Bpk* 1999 (1) SA 515 (SCA) 525H-526C). What the appellants did was to direct attention in one direction and then attempt to canvass another matter (*Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) 107G-I; *Stead v Conradie* 1995 (2) SA 111 (A) 122A-J).

[6] The objection against the capitalisation of interest reared its head in a form different from that pleaded. Some background material is necessary to understand the issue. The respondent and its predecessor both had provisions in their statutes which permitted their boards of directors to determine the rate of interest on outstanding accounts. Credit policies were accordingly adopted. They provided that interest would be capitalised monthly. This meant that such interest became due as and when it was debited. Accounts fell into arrears at different times: current accounts after 90 days, farming accounts after six months and production loans at the end of the production season. In other words, to take an example, although a current account became overdue only after 90 days, interest thereon was debited and capitalised monthly. The appellants argue that interest could only have been capitalised after the lapse of 90 days.

[7] For this submission they rely on s 4 of the Act:

"(1) If a borrower . . . fails to pay *any amount* which is owing by him to a moneylender . . . in connection with a money lending transaction . . ., *upon the date when such amount is payable*, or if a borrower . . . enters into an agreement with a moneylender . . . to defer the payment of an amount which is owing by him as aforesaid to the moneylender . . ., the moneylender . . . shall thereupon be entitled to recover from the borrower . . . an additional amount in respect of finance charges, which shall be calculated by reference to-

(a) the total amount which is payable but is unpaid;

(b) the term during which the default continues or the term for which

payment is deferred as aforesaid, as the case may be; and

(c) the annual finance charge rate at which finance charges on the outstanding balance of the principal debt are, in terms of the instrument of debt, calculated during such term."

(Emphasis added.)

[8] Interest is, to use the words of the provision, an amount owing in connection with a money lending transaction. As soon as it is debited, it becomes due and payable. The fact that the capital amount is not yet repayable does not mean that interest is not payable. It is therefore perfectly permissible to capitalise interest in the manner adopted in this case.

[9] Overdue amounts were transferred to a special overdue account which bore a higher rate of interest. The appellants, as the court below found, failed to prove that this rate exceeded the higher rate permitted by s 4. It was not suggested that the court erred in its approach to onus - it relied on *Reuter v Yates* 1904 TS 855 - nor that its factual findings were incorrect in this regard. In this context, rather obliquely, the appellants also sought to argue the absence of an instrument of debt as required by s 4(3), but the findings in the context of s 2(9) are equally applicable: the matter was not an issue in the court below.

[10] The final argument relates to the provisions of s 10(6):

"If agreement has been reached upon a variable finance charge rate in terms of section 2B (3) and no notice in writing of any alteration of such rate and the date upon which that alteration shall commence has in advance been delivered or sent through the post by a moneylender, credit grantor or lessor to a borrower, credit receiver or lessee, the moneylender, credit grantor or lessor shall at the first reasonable opportunity but not later than three months after the date upon which the alteration of the finance charge rate has commenced, deliver or send through the post to the borrower, credit receiver or lessee a written notice of such alteration and the date upon which that alteration has commenced."

It is common cause that, at least for a period, the respondent's predecessor had failed to give the required notice of increases in the rate of interest. This breach, according to the appellants, frees them from an obligation to pay interest so levied. The same argument was rejected in *Absa Bank Bpk v Saunders* 1997 (2) SA 192 (NC) 198B-202J. I agree with the conclusion there reached. The Act draws a clear distinction between civil and criminal remedies. For instance, s 2 prohibits the recovery of finance charges if they exceed the prescribed maximum or are not disclosed in a written document. Cf also ss 4 and 5. Section 10 (6), however, merely imposes an obligation upon the moneylender to do something. The inability to recover is not part of the penalty. Should the change of interest rate be visited by a nullity, it would mean that the borrower will not be entitled to the advantage of reductions not

communicated. By way of comparison regard can had to s 10 (1): it places a duty on the lender to provide or send a copy of the contract to the borrower. Failure to do so can hardly disentitle the lender from recovering the loan.

[11] It follows that there is no merit in the various defences raised by the appellants under the Usury Act.

_____

L T C HARMS
JUDGE OF APPEAL

AGREE:

VIVIER JA
NIENABER JA
SCHUTZ JA