SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM	The Registrar, Supreme Court of Appeal
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Please note that the media summary is for the benefit of the media and does not form part of the judgment.

African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC
(234/10) [2011] ZASCA 45 (30 March 2011)

Media Statement

Today the Supreme Court of Appeal (SCA) upheld an appeal by African Dawn Finance 2 (Pty) Ltd (African Dawn), a short term financier and registered credit provider, against a judgment of the South Gauteng High Court (Johannesburg) that held that a money lending agreement was usurious.

In June 2009, the respondents being Dreams Travel and Tours CC (the CC), Ismail Hassen Amod (Amod) and the Trustees of the Ismail Amod Family Trust applied to the South Gauteng High Court, for an order that the loan agreement entered into between them and African Dawn, be declared unlawful. They contended that the rate of interest of 5% or 6.5% (in the event of default) per month, fixed by the agreement was unlawful and contrary to public policy. African Dawn opposed the application. It, moreover, filed a counter application seeking payment of the outstanding balance and for certain properties that had furnished as security to be declared executable.

Amod, the sole member of the CC, had approached several banks in an attempt to secure a loan for R5 million. Those applications were declined. Amod then approached a private financier, Gateway Capital Limited, who rejected the application but referred it to the African Dawn. African Dawn was informed by Amod that the CC was in desperate need of funds to secure a consignment of branded jeans, to meet the demands of a seasonal market. Certain immovable properties were furnished as security for the loan which included amongst others the immovable properties of the Trust represented by its Trustees.

African Dawn, upon receiving the financial statements relating to the CC and the Trust, approved a loan in the sum of R5 million plus costs. Before concluding the agreement on behalf of the CC, Amod requested that the suretyship to be furnished on behalf of the trust, be amended so as to restrict the Trust's liability to R9 million and further that such liability be confined to mortgage bonds to be registered over the two – instead of three - of the trust's immovable properties. African Dawn duly complied and a written loan agreement was concluded, whereafter the appellant advanced the sum of R5 175 162.80 to the CC, which was payable within 6 months. The CC furnished African Dawn with seven post dated cheques in repayment of the debt. Both Amod and the Trustees on behalf of the trust bound

themselves as sureties and co-principal debtors for the CC's indebtedness. The loan agreement provided that interest shall be charged at the rate of 5% per month but in the event of the loan amount plus interest not being paid on time then interest at the rate of 6.5% shall be levied. Despite the CC making substantial payments, they were not effected timeously and as a result interest came to be levied on the principal debt at a rate of 6, 5 per cent per month.

The high court held that the interest clauses contained in the agreement were unlawful and contrary to public policy. The SCA found that in light of the fact that the CC is a juristic entity whose asset value and annual turnover at the time of the loan agreement exceeded the threshold value determined by the Minister in terms of s 7(1) of the National Credit Act (NCA), neither the NCA nor the Usury Act governed the loan agreement and that accordingly there was no statutory limitation on the interest payable in terms of the loan agreement. The SCA held whether or not the transaction was usurious could only be determined with reference to the common law. At common law, a usurious transaction is one which is tainted with oppression or extortion or something akin to fraud. The CC, however contended that the common law rule was inconsistent our Constitution and that the common law had to be developed to accord with the spirit, purport and objects of the Constitution. According to the SCA, faced with such a task, a court is obliged to embark on a two-stage enquiry: first, it should ask itself whether, taking into account the objectives of s 39(2) of the Constitution the common law should be developed beyond existing precedent. If the answer is a negative one that should be the end of the enquiry. If not, the next enquiry should be how the development should occur and which court should embark on that exercise. The SCA held that had this exercise been undertaken by the high court the first enquiry would have yielded a negative response.

The SCA found that no case had been established for the conclusion that the CC was subjected to the dictates of the appellant. In fact Amod had warranted in the agreement that he had sought independent legal and financial advice. The SCA stated that Amod in his founding affidavit had been evasive on why each of the banks declined the initial loan application. The SCA took the view that the CC was neither uninformed nor a vulnerable borrower. The SCA held that whilst the rate of interest was high it was not necessarily incommensurate with the risk to which African dawn was exposed as a lender. The SCA further held that as there were no circumstances that indicated that there was any oppression, extortion or something akin to fraud on the part of the African Dawn the transaction was not usurious. The SCA accordingly ordered the respondents jointly and severally to pay to African Dawn the outstanding balance of R3 900 247.50 together with interest at the rate of 6,5 per cent per month *a tempore morae* from 1 July 2009 to date of payment and declared certain properties executable..

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