Appellants' Attorneys: *Hertzberg & Stupel,* Germiston; *Sapirstein, Shapiro & Pokroy,* Pretoria. Respondent's Attorneys: *Leon Seligson,* Johannesburg; *Klagsbruns Inc,* Pretoria.

PREMIER FINANCE CORPORATION (PTY) LTD v McKIE

(TRANSVAAL PROVINCIAL DIVISION)

1979 *May* 23; *June* 4 MOLL J, BOTHA J and KRIEGLER AJ

Finance charges—Limitation and Disclosure of Finance Charges Act 73 of 1968—Money lending—Finance charges—Acceleration clause in agreement—Rate of finance charges claimable a tempore morae *under s 4—Not governed by Prescribed Rate of Interest Act 55 of 1975—But latter Act would be applicable where a loan evidenced by a promissory note is not governed by Act 73 of 1968.*

Interest—Money-lending transaction—Acceleration clause in agreement —Rate of finance charges claimable a tempore morae *in terms of s 4 of Act 73 of 1968—Section 1 of Prescribed Rate of Interest Act 55 of 1975 not applicable—But such Act would be applicable where a loan evidenced by a promissory note is not governed by Act 73 of 1968.*

Where a money-lender, as defined in the Limitation and Disclosure of Finance Charges Act 73 of 1968, seeks to obtain judgment from the borrower, whether by way of provisional sentence or otherwise, and he complies with the relevant requirements of s 5 of the Act, he is entitled and limited by virtue of s 4 for the purposes of *mora* interest to the rate "initially" charged on the principal debt in terms of the agreement between the parties. This follows *ex lege* and not by reason of an acknowledgment of indebtedness in respect of the rate of interest contained in the liquid document itself. The provisions of s 1 of the Prescribed Rate of Interest Act 55 of 1975 would not be applicable in such circumstances.

In the same way a loan evidenced by a promissory note not governed by the Limitation Act would, in the absence of acknowledgment of indebtedness in a particular rate of *mora* interest, entitle the legal holder of the instrument to a rate of interest *a tempore morae* in accordance with s 1 of Act 55 of 1975.

Quaere: Whether the schedule signed by the parties in terms of s 3 (1) of Act 73 of 1968 is to be regarded as incorporated into or forming part of the promissory note to which it is annexed.

Appeal from the decision of a single Judge. The facts appear from the reasons for judgment.

S E Marcus for the appellant.

No appearance for the respondent.

Cur adv vult.

Postea (June 4).

MOLL J: This appeal is concerned with the rate of *mora* interest to

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which the present appellant, a money-lender, is entitled where it sues for provisional sentence to recover the balance of a loan governed by the provisions of the Limitation and Disclosure of Finance Charges Act 73 of 1968, and based on a promissory note in terms whereof it has anticipated payment by reason of an acceleration clause. The appellant, plaintiff in the Court *a quo,* obtained leave to appeal against that part of the order made by the learned Judge *a quo* which relates to interest *a tempore morae.* Although the notice of the hearing of the present appeal was properly served upon the respondent he failed to appear.

In its action for provisional sentence the appellant in its summons called upon the respondent to pay to it:

"(*a*) An amount of R2 808,17 being the balance of the principal debt and finance charges calculated at the rate of 12 per cent per annum on the amount of the principal debt outstanding from time to time from the date upon which the principal debt came into existence to the date that the defendant was *in mora,* namely 1 May 1974.

(*b*) For finance charges on R2 808,17 at the rate of 12 per cent per annum from 1 May 1974 to date of payment;

claimed by the plaintiff from the defendant under and by virtue of and in terms of a promissory note bearing date 10 November 1972 made and signed by the defendant in favour of the plaintiff for an amount of R3 896,09."

The summons sets out that the latter amount was in terms of the said promissory note payable in certain monthly instalments, the final instalment being payable on 10 December 1977.

The said promissory note of which the appellant is alleged to be the legal holder provided that upon failure to pay any individual instalment provided for therein on due date the total amount of all the payments then remaining unpaid shall forthwith become due and payable by the respondent.

It is moreover alleged that the said promissory note was duly presented for payment of the instalment due on 10 November 1973 at the place where it was payable but that it was dishonoured by non-payment thereof; that it remained unpaid, and that the appellant was consequently entitled to claim the full amount outstanding under the said promissory note. The following averment then appears in the summons:

"The underlying *causa* of the said promissory note is a money-lending transaction within the meaning of the Limitation and Disclosure of Finance Charges Act 73 of 1968 and attached to the said promissory note is a schedule duly completed in terms of s 3 (1) of the said Act, and duly signed by the defendant at the time of his signing of the said promissory note. Copies of the said promissory note and schedule are hereunto annexed marked 'A' and 'A 1' respectively."

The only other part of the summons to which, for the sake of completeness, it is necessary to have reference is the averment that the amount claimed by the appellant was further secured by a first mortgage bond over certain property belonging to the respondent and in respect whereof an order declaring the said property to be executable was sought.

Apart from the aforegoing the credit manager of the appellant filed an affidavit to which he attached, in the first instance, a schedule in terms of s 3 (1) of the said Act, and which, as I have indicated, already appears as an annexure to the summons (annexure A 1). In this schedule the principal debt as provided for in ss (*a*) and (*b*) of that section is set out in the amount of R2 903,90. The amount in rands and cents of the finance charges is expressed to be R992,19. The finance charges expressed as an annual finance charge rate are stated to be 12 per cent. The principal debt together with the finance charges is indicated in the amount of R3 896,09 which said amount is stated to be payable by 59 equal instalments of R64,93 and one final instalment in the sum of R65,22. The first instalment is payable on 10 January 1972 and subsequent instalments are payable on the same day of each and every succeeding month. The said schedule is signed by the parties. In the second instance there is attached to his affidavit, as annexure "8", a document which sets out the principal debt of R2 903,90 and thereafter indicates finance charges commencing on 10 December 1972 being the date upon which the loan was actually received by the respondent, and terminating on the accelerated date. In addition thereto it reflects the instalment payments made by the respondent until the date of his default.

In its action for provisional sentence based upon the said promissory note the appellant, as it was obliged to do, indicated to the Court that the underlying cause of the said promissory note was a money-lending transaction governed by the provisions of the said Act.

That being so the appellant was not entitled to obtain judgment in an amount calculated otherwise than in accordance with the provisions of s 5 of the said Act.

Apart therefore from placing before the Court the balance of the principal debt owing (s 5 (1) (*a*)) the appellant in the instant case was required to indicate the finance charges on the principal debt at the permissible annual finance charges rate which said finance charges would have to be calculated on the balance of the principal debt owing from time to time. It would moreover have to be calculated

"in respect of the period commencing on the date upon which the cash amount of the loan is actually received . . . by or . . . on behalf of the borrower or . . . in terms of the agreement between the parties."

Finally where, as in the present case, the debt is to be paid in instalments over a stated period and the appellant relying on an acceleration clause in the agreement anticipates the date of payment by reason of the respondent's default then it must be shown that the finance charges have been calculated up to the accelerated date (as to the aforegoing see *Ex parte Minister of Justice* 1978 (2) SA 572 (A) at 593-596). The importance of the latter calculation, as pointed out by WESSELS JA in *Ex parte Minister of Justice* (*supra* at 595), lies in the fact that s 4 of the said Act provides that the money-lender may recover an additional amount in respect of finance charges at the annual finance charge rate at which finance charges were charged initially in respect of the period during which the borrower is in default. It is significant that the learned Judge says in this regard:

"In effect s 4 thus authorises the recovery of *mora* interest at a rate not exceeding that laid down in the section."

The learned Judge then discusses the method of calculating the "period during which the borrower is in default" regard being had to the provisions of ss 5 (1) (*d*) and 4 of the said Act. He concludes that in terms of s 4 the additional amount in respect of finance charges is to be calculated both in respect of the principal debt and the finance charges calculated in accordance with the provisions of s 5 (1) (*c*) which are owing but unpaid at the relevant date. It is the learned Judge's exposition on the effect of s 4 in regard to *mora* interest to which the money-lender is entitled that is of crucial importance in the present appeal. At 597 he says the following:

"In my opinion s 4 was clearly intended to limit the finance charges recoverable by a money-lender from a borrower who is in default to

'the annual finance charge rate at which finance charges were charged initially on the principal debt.'

If that rate is less than the maximum permitted by the Act, the money-lender may not recover additional finance charges in terms of ss 4 and 5 (1) (*d*) of the Act at any higher rate than that 'initially' charged on the principal debt in terms of the agreement between the parties.

In my opinion, the additional finance charges referred to in ss 4 and 5 (1) (*d*) were intended to supplant the common law rules governing the rate of *mora* interest. Because s 4 of the Act governs the rate at which *mora* interest is to be calculated, the provisions of s 1 of the aforementioned Act 55 of 1975 would, in my opinion, not be applicable, even if the rate of interest prescribed in terms of s 1 (2) of the last-mentioned Act were to be higher than that 'initially' charged by the money-lender on the principal debt."

From this it follows, in my view, that where a money-lender, as defined by the said Act, seeks to obtain judgment against the borrower whether by way of provisional sentence or otherwise, and he complies by way of affidavit with the relevant requirements of s 5 as set out above, he is entitled and limited by virtue of s 4 for purposes of *mora* interest to the rate "initially" charged on the principal debt in terms of the agreement between the parties. This follows *ex lege* and not by reason of an acknowledgment of indebtedness in respect of the rate of interest contained in the liquid document itself. In the same way a loan evidenced by a promissory note not governed by the provisions of the said Act would in the absence of acknowledgment of indebtedness in a particular rate of *mora* interest entitle the legal holder of the said instrument to a rate of interest *a tempore morae* in accordance with s 1 of Act 55 of 1975.

The order granted by the learned Judge *a quo* in regard to interest read as follows:

"(*b*) Interest on the sum referred to in (*a*) hereof (ie the sum of R2 808,17) at the rate of 11 per cent per annum as from 10 September 1977 to date of payment."

In his judgment delivered on the application for leave to appeal the learned Judge *a quo* indicates that "September" must have been erroneously recorded; it should have been "December". It also seems that he might well at the time of making the order have considered interest at the rate of 12 per cent as from "10 December 1977 to date of payment".

What, however, appears to have persuaded him against the last-mentioned rate of interest was his view that in terms of its summons the appellant had based its claim against the respondent upon a promissory note. The learned Judge *a quo* refused to be persuaded that the schedule, annexure A 1, could be regarded as incorporated into the promissory

note so as to justify the rate of interest at the rate of 12 per cent. He regarded the said schedule and the reference thereto in the summons merely as compliance with the provisions of s 3 (1) of the said Act. In the light of the aforegoing the learned Judge came to the conclusion that, although the appellant might in terms of the said Act be entitled to *mora* interest at the rate of 12 per cent, it was necessary that it should so be acknowledged in the said liquid document. He suggested that in his view interest from 1 May 1974 until 16 July 1976, when Act 55 of 1975 came into operation, should be 6 per cent per annum and thereafter 11 per cent per annum up to the date of payment.

As to whether the schedule, annexure A 1, is, in the circumstances of the present case, to be regarded as incorporated into, or forming an integral part of, the promissory note, is by reason of the conclusion I have come to not necessary to decide. As to the other view expressed by the learned Judge I am, for the reasons already set out, with respect, not able to agree.

Mr *Marcus,* who appeared on behalf of the appellant, did not ask for costs against the respondent.

In the result, and for reasons set out, the said order made by the Court *a quo* is set aside and the following order is substituted therefor:

"(*b*) Finance charges on the said sum of R2 808,17 at the rate of 12 per cent per annum from 1 May 1974 to date of payment."

There will be no order as to costs.

BOTHA J and KRIEGLER AJ concurred.

Appellant's Attorneys: *Broomberg, Graff & Korb,* Johannesburg; *Rein & Verster,* Pretoria.

ELCO STEEL DEALERS v BLACKWOOD HODGE (SOUTH AFRICA) (PTY) LTD

(TRANSVAAL PROVINCIAL DIVISION)

1979 *May* 2; *June* 1 BOSHOFF AJP, MCEWAN J and PHILIPS AJ

Practice—Applications and motions—Respondent claiming return of certain excavator from appellant—Appellant having purchased excavator from party who had purchased it from applicant, subject to retention of ownership until purchase price paid—Such party's cheque dishonoured—Such party a second-hand dealer in machinery—Appellant raising defence of estoppel to respondent's claim—Respondent averring in replying affidavit that party to whom it had sold the excavator had been informed that it was not to dispose or display machines unless purchase price paid—Issue of estoppel bona fide ***raised—Should not be decided without hearing*** viva voce ***evidence—Matter referred for the hearing of oral evidence.***

The respondent had sold excavators to a second-hand dealer, B, and it was agreed

that ownership of the excavators would remain vested in the respondent and would not pass to B until the whole of the purchase price had been paid and that B would not part with possession, create any charge upon or dispose of the excavators until the purchase consideration had been paid in full. Against the delivery to B, B handed the respondent a post-dated cheque for the full purchase price which cheque was dishonoured. Respondent proved that one of the excavators was in the possession of the appellant who had purchased it from B, and in motion proceedings claimed its return and costs. The appellant relied upon an estoppel which it based upon the following conduct of the respondent: (*a*) the respondent placed and left B in possession of the excavator in such a way that B was able to sell and deliver it to the appellant, (*b*) the respondent allowed the appellant to remain in possession of the excavator for some weeks prior to the date on which the post-dated cheque was made payable and against payment of which ownership would have passed to B; (*c*) the respondent took no judicial proceedings against B from about the beginning of May 1977, when B's cheque was dishonoured, until 19 July 1977. Respondent was aware of the fact that appellant was relying on such estoppel even before the motion proceedings had been launched. In a replying affidavit respondent had averred that it had been brought to the attention of B that ownership would not pass and that he was not to dispose of or display any of the machines unless the purchase price was paid. A single Judge had granted the application and, relying, *inter alia,* on the replying affidavit, had held that appellant had failed to establish the estoppel. In an appeal to the Full Court,

Held, that it was a general rule of our practice that, where material facts are in dispute, final relief will not be granted merely on the affidavits: this was particularly so when there was a real dispute of facts which could not be satisfactorily determined without the aid of oral evidence.

Held, further, that the respondent was relying on the alleged agreement between itself and B not to display the excavator until the purchase price had been paid, a defence raised in its replying affidavit.

Held, further, that the question of estoppel had been *bona fide* raised by the appellant and, even though there might be a balance of probabilities in favour of the respondent's version, the Court *a quo* should have been satisfied that a *viva voce* examination and cross-examination would not disturb this balance of probabilities before making the final order.

Held, further, although, in view of appellant's attorney's warning to respondent's attorney before the proceedings were launched that appellant would raise the defence of estoppel, the proceedings should have been by way of action and not motion and consequently the application should have been dismissed, that, in order to save further costs, the fairest order would be to refer the matter for the hearing of oral evidence on the defence of estoppel.

The order in *Blackwood Hodge (South Africa) (Pty) Ltd* v *Elco Steel Dealers* 1978 (3) SA 852 (T) varied.

Appeal from a decision of GOLDSTONE AJ (reported at 1978 (3) SA 852 (T)). The facts appear from the reasons for judgment.

R L Selvan for the appellant.

H v R Woudstra for the respondent.

Cur adv vult.

Postea (June 1).

PHILIPS AJ: This is an appeal against a judgment of GOLDSTONE AJ in this Division. In that judgment the respondent (now appellant, and to whom I shall refer as appellant) was ordered to deliver to the applicant (now respondent, and to whom I shall hereafter refer as respondent) one