

AMENDMENT OF PRESCRIBED RATE OF INTEREST

If parties to a transaction have not agreed on a rate of interest, expressly or implied, and the rate is not governed by any other law, the rate of interest is determined as prescribed in terms of the Prescribed Rate of Interest Act No. 55 of 1975. Recently an amendment was made to the rate applicable in the above instance due to the prescribed rate not being market related. What is the position now?

In the past, the maximum rate of interest that the parties may fix has been regulated by the Usury Act No. 73 of 1968. Usury is the practice of making unethical or immoral monetary loans intended to unfairly enrich the lender. Under the common law, usury, i.e. interest at a rate exceeding the maximum rate as determined from time to time, was condemned. The Usury Act was repealed by the National Credit Act No. 34 of 2005 which came into force on 1 June 2006.

Although the rate of interest is usually fixed by the agreement the parties entered into, it is also possible for an agreement to provide that the rate of interest will be determined from time to time at the discretion of one of the parties to the agreement, with the exception that such discretion be exercised reasonably.

If the parties have not agreed on a rate, be it expressly or implied, and the rate is not governed by any other law, the rate of interest is determined as prescribed from time to time by a notice in the Government Gazette by the relevant Minister in terms of the Prescribed Rate of Interest Act No. 55 of 1975.

The Prescribed Rate of Interest Act, 55 of 1975 ("the Act"), sets the maximum rate of interest that can be charged on *mora* interest. *Mora* is a Latin term which denotes the elapsing of time or a delay. *Mora* interest accrues the moment the debtor becomes obliged to pay. The obligation to pay interest on the amount owing therefore arises from the moment the debtor is in *mora*. This rate of interest as set out in the Act is also used in court orders relating to damages claims.

For nearly two decades, the prescribed rate of interest was set at 15,5% per annum. Due to the aforesaid rate not being market related, there was a demand for the interest rate to be amended.

The Act allows the Minister of Justice and Constitutional Development, following a consultation process, to prescribe the rate of interest from time to time. On 19 March 2014, a General Notice was published in the Government Gazette wherein the Department of Justice and Constitutional Development confirmed that the interest rate was no longer market related. A new prescribed rate of interest of 9% was proposed and

all interested parties were invited to submit written comments on the proposed adjustment. This amendment recently took effect (1 August 2014), when the interest rate as set out in the Act was decreased to 9% per annum.

The new prescribed rate of interest was calculated as follows. The South African Reserve Bank's current repo-rate is 5,5% per annum. Based on this repo-rate, the Department of Justice proposed a margin of 350 basis points to be added to the repo-rate (3,5%), which lead to the proposed 9% per annum for the prescribed rate of interest.

The Appellate Division in *Davehill (Pty) Ltd & Others v Community Development Board 1988 (1) SA 290 (A)* found that despite the prescribed rate of interest being changed by the Minister during the course of the interest period, the interest rate prescribed at the time the debt became due and payable stays fixed at the same rate. The aforesaid was recently confirmed by the Supreme Court of Appeal in *Crookes Brothers Ltd v Regional Land Claims Commission for the Province of Mpumalanga and Others [2012] ZASCA 128*, when the court found that the time when interest begins to run against a debtor is fixed at the time that the debtor is placed in *mora* and that the rate of interest is not a variable rate, notwithstanding that the Minister may from time to time prescribe a new rate as set out above.

This means that the prescribed rate of interest, which applied at the date when the debtor was placed in *mora*, will remain applicable to that debt.

The previous prescribed rate of interest of 15,5% per annum will therefore apply where a debtor was placed in *mora* anytime between 1 October 1993 and 31 July 2014. If a debtor was placed in *mora* after 1 August 2014, the new prescribed rate of interest of 9% will apply.

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