

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

In the matter between:

ANDRÉ FRANCOIS PAULSEN

First Applicant

MARGARETHA ELIZABETH PAULSEN

Second Applicant

and

SLIP KNOT INVESTMENTS 777 (PTY) LIMITED

Respondent

APPLICANTS' SUPPORTING AFFIDAVIT

I, the undersigned, ANDRÉ FRANCOIS PAULSEN, hereby declare under oath:

1. I am the First Applicant in the above matter. The facts stated hereinbelow are within my personal knowledge and the legal submissions are based on advice I have received from my legal advisers.
2. The Applicants seek leave to appeal against the judgment and order delivered by the Supreme Court of Appeal of South Africa on 25 March 2014. The points of law on which leave to appeal is sought are set out below and I respectfully submit that they all raise arguable points of law

which are of general public importance and which ought to be considered by this Honourable Court.

3. A copy of the majority and minority judgments of the Supreme Court of Appeal is annexed hereto marked "A". The majority judgment was delivered by Justice of Appeal Wallis and the minority judgment by Justice of Appeal Willis.

4. The points of law that the Applicants wish to argue address the following issues:
 - 4.1 The correct interpretation of section 4(1)(a) and (b) of the National Credit Act No. 34 of 2005 in the context of the said Act as a whole, in particular section 40 thereof. The Applicants contend in this regard that in the light of section 40(4) the loan agreement on which their suretyship is based is unlawful and invalid and that they are accordingly not liable as sureties.

 - 4.2 Whether the Supreme Court of Appeal in Standard Bank of South Africa Ltd. v. Oneanate Investments (Pty) Ltd. (in liquidation) 1998 (1) SA 811 at page 834 was correct in holding that the in duplum rule (which limits arrear interest to a maximum equal to the amount of the capital debt) is suspended once the creditor has instituted litigation

against the debtor, i.e. that interest will continue to accrue beyond the amount of the capital while the litigation is proceeding.

- 4.3 In any event, even if the rule in Oneanate is good law, whether the Supreme Court of Appeal erred in the present case in applying the rule by suspending the in duplum rule vis-a-vis a surety when litigation had been instituted only against the surety and not against the principal debtor.

For the convenience of the Honourable Court I shall first sketch the relevant facts of the present matter before dealing with the points of law mentioned above.

RELEVANT FACTS

- 5.1 The litigation between the parties arises from a written loan agreement concluded on 10 July 2006 between a company known as Winkor 139 (Pty) Ltd (“Winkor”) and the Respondent Slip Knot Investments 777 (Pty) Ltd “B”.
- 5.2 The present Applicants, Mr. and Mrs. Paulsen, executed deeds of suretyship in terms of which they bound themselves, in solidum, for the due and punctual performance by Winkor of its obligations towards Slip Knot.

- 5.3 Slip Knot advanced the capital amount of R12 million to Winskor on 10 July 2006. Winskor did not repay the loan and accrued interest to Slip Knot.
- 5.4 On 10 January 2010 Slip Knot then issued a money judgment application seeking payment of the R12 million capital advanced plus interest of R17 million against the sureties.
- 5.5 At the time the money judgment application was launched, two winding up applications were pending against Winskor and it was apparently for this reason, inter alia, that although Winskor was cited as a party in the said application, Slip Knot sought no relief against Winskor in the money judgment application.
- 5.6 It is common cause that Slip Knot was and is not registered as a credit provider under the provisions of section 40 of the National Credit Act No. 34 of 2005.

INVALIDITY OF THE LOAN AGREEMENT

- 6.1 Justice of Appeal Wallis who delivered the majority judgment in the Supreme Court of Appeal rejected the Paulsens' contention that the loan agreement is invalid in terms of the provisions of sections 40(4) and 89(2)(d) of the Act because Slip Knot was not registered as a credit provider in terms of Section 40(1) of the Act.

- 6.2 In stating the reasons for his conclusion the learned Judge firstly refers to the exceptions in section 4 and says that these exceptions are excluded agreements. They are all credit agreements, but they are excluded from the application of the Act. The next step he says is to determine the scope of this exclusion and to identify the provisions of the Act to which it relates. In order for the exclusion in section 4 to have operative effect, the portions of the Act that are not intended to apply to excluded agreements must be identified.
- 6.3 The learned Judge then analyses Chapter 5, which includes section 82(2)(d), in order to ascertain whether Chapter 5 or any of its provisions apply to credit agreements in respect of which the application of the Act has been specifically excluded. He finds that it is manifest from reading most of these provisions that they cannot apply to agreements that are otherwise excluded from the application of the Act. To apply them to such agreements would render their exclusion from the application of the Act pointless. Accordingly the learned Judge held that section 89(2)(d) does not apply to credit agreements excluded from the provisions of the Act in section 4(1). Hence Slip Knot need not be registered.
- 6.4 It is submitted that the Honourable Judge erred in making the finding with regard to the validity of the loan agreement as set out above, more particularly for the following reasons:

- 6.4.1 Since section 4(1) excludes certain credit agreements from the operation of the Act it is with respect a futile endeavour to look for sections in the Act which deal with excluded agreements. The proper enquiry should be to establish the meaning and ambit of the exemptions contained in section 4(1), read in the context of the Act as a whole. The learned Judge therefore erred, with respect, in searching for sections which deal with excluded agreements.
- 6.4.2 The learned Judge should have considered the overriding aims and purpose of the Act, particularly with regard to section 3 of the Act. The “mischief” that is sought to be regulated lies in the main with credit providers, not with consumers. Consumers must be protected. Thus proper control over credit providers, including the registration of the bigger ones in terms of section 40, is one of the main objects of the Act. Registration would subject a credit provider to oversight and control, as appears from sections 46 to 49 of the Act.
- 6.4.3 Accordingly, the Act draws a fundamental distinction between lawful and unlawful credit agreements in section 89 and visits unlawful credit agreements with certain sanctions.
- 6.4.4 Section 40(1)(b) requires a credit provider like Slip Knot to be registered in order to be able to conclude a lawful credit agreement. It should be noted that whenever the Act refers to “credit agreement”

it refers to a lawful credit agreement. Unlawful credit agreements are designated by the adjective “unlawful”.

6.4.5 Accordingly, it is submitted that the words “credit agreement” in section 4(1)(a) should be given a restrictive interpretation, namely “a credit agreement which would have been valid and lawful, if this exemption had not existed”. The validity and lawfulness of a credit agreement is therefore basic and must come first before an exemption can be considered because otherwise the exemption would be unnecessary and pointless.

6.4.6 The learned Judge turned to section 89 as a starting point and with reference to other sections in Chapter 5 which he found to be inapplicable to the loan agreement in casu, concluded that for that reason section 89(2)(d) does not apply to the loan agreement between Slip Knot and Winskor and does not invalidate it. One cannot with respect use portions of the Act not intended to be applicable to an agreement to conclude that an agreement falls outside the ambit of the Act. The correct question to be posed is whether the exclusion in section 4(1)(a) refers to lawful credit agreement.

6.4.7 On this construction of section 4(1) the loan agreement with Slip Knot, which is unregistered, would be unlawful and invalid.

SUSPENSION OF *IN DUPLUM* RULE

7. The in duplum rule is to the effect that agreed interest on a debt stops running once it has reached the amount of the capital debt. That this rule is a part of our positive law was unambiguously affirmed by the Supreme Court of Appeal in LTA Construction Bpk. v. Administrateur, Transvaal 1992 (1) SA 473 (A), which is the leading case on the subject. Subsequently, in Ethekwini Municipality v. Verulam Medicentre (Pty) Ltd. 2006 (3) All SA 325 the Supreme Court of Appeal in reaffirming the legal position, again made it clear that while the rule is founded on considerations of public policy, the rule is one of positive law and it has to be applied as it stands. Whether or not it is to be applied in a given case cannot depend on further considerations of what public policy may demand or allow. This point is clearly made in paragraph 23 of the Ethekwini judgment.

8. In the present case the Supreme Court of Appeal purported to apply an exception to the in duplum rule which was formulated by the Supreme Court of Appeal in Standard Bank of South Africa Ltd. v. Oneanate Investments (Pty) Ltd. (in liquidation) 1998 (1) SA 811. There it was held that once the creditor had instituted proceedings against the debtor for payment of the debt the in duplum rule was suspended pendente lite, i.e. interest could accrue beyond the capital sum of the debt. The purported application of this exception to the rule in Applicants' case thus squarely raises the question whether the Supreme Court of Appeal was correct in Oneanate.

9. The reasoning of the Supreme Court of Appeal in Oeanate on this point is contained in pages 832 to 834 of the report. A perusal of these pages makes the following clear, it is submitted:
 - 9.1 The suspension of the in duplum rule pendente lite is not based on any Roman-Dutch authority; indeed it is in conflict with the authority of Huber.
 - 9.2 The only rationale for the suspension of the in duplum rule is provided at page 834 B-D. Essentially, a consideration of public policy is employed to make an exception to a firm rule based on public policy. The fact however, that public policy underpins a firm rule of positive law does not justify repeated considerations of public policy to crate ad hoc exceptions to the rule.
10. With respect, it is exactly this sort of reasoning employed in Oeanate that has been firmly rejected in Ethekwini. It is accordingly submitted that on this point the decision in Oeanate is wrong.
11. The insidious watering down of the in duplum rule by the repeated consideration of public policy in particular cases is further exemplified by the purported application of the Oeanate decision by the Supreme Court of Appeal in the present case.

SUSPENSION OF IN DUPLUM AGAINST A SURETY

12. It is to be noted that in Oneanate the suspension of the in duplum rule occurred in litigation between the creditor and the principal debtor, no surety being involved. Assuming that Oneanate was correct, it is respectfully submitted that it was not applicable in the present case.
13. In the present case, the principal debtor, Winskor, was not sued for payment. Only the sureties, i.e. the present Applicants, were sued by Slip Knot. Nevertheless, the Supreme Court of Appeal held that the in duplum rule had become suspended on the day when litigation was instituted against the present Applicants as sureties.
14. It may be noted in order to prevent confusion that the Applicants undertook liability as sureties and co-principal debtors. This did not render them liable as principal debtors. The effect of a surety being a “co-principal debtor” as well does not make him anything more than a surety. If authority for such a well-established rule is needed it can be found in the leading case of Neon and Cold Cathode Illuminations (Pty) Ltd. v. Ephron 1978 (1) SA 464 (A) at page 471 C-G.
15. The legal position in the present case was that the in duplum rule was in force at the time when proceedings were instituted against the Applicants as sureties. This meant that no further interest accrued against the principal debtor, Winskor.

16. Nevertheless, in applying the Oeanate decision against the Applicants, the Supreme Court of Appeal ruled that further interest had accrued against them, though not against the principal debtor, from the date the litigation commenced.
17. The inevitable consequence of this ruling is that the sureties are saddled with a far greater burden of interest than the principal debtor.
18. It is submitted that such a situation conflicts with the basic principle underlying the law relating to suretyship, namely that the obligation of the surety is merely accessory to the obligation of the principal debtor. This entails the following:
 - 18.1 The surety's obligation is to stand in for the principal debtor, i.e. to pay what is owed by the principal debtor.
 - 18.2 Accordingly the creditor cannot claim more from the surety than what is owed by the principal debtor.
 - 18.3 As far as interest on the principal debt is concerned, it does not run against the surety; it only runs against the principal debtor, as the surety only stands in for the principal debtor.
19. If authority were needed for such well-established law it can be found in the leading textbook Caney on Suretyship (6th edition) at page 102 and in the

decision of the Supreme Court of Appeal in Heathfield v. Maqalepo 2004 (2) SA 636 (SCA) at page 642 A-B.

20. The reasoning of the Supreme Court of Appeal is, with respect, somewhat opaque on this point. The relevant portions of the judgment are paragraphs 23 and 26 and it seems that the surety, when sued, is regarded as a principal debtor or as akin to a principal debtor. Thus in paragraph 23 it is stated:

“However, once they were sued, there is no reason why interest on what they owed Slip Knot as co-principal debtors, shouldn’t run again. This is not to impose upon them a liability different from that of Winskor, because Winskor would similarly have been liable had it been sued.”

To place a real liability for interest on a surety by equating it with a non-existent liability of the principal debtor is with the utmost respect a quite untenable proposition in law and logic and in direct conflict with a basic principle of the law of suretyship.

21. In paragraph 26 the reasoning appears to be that a surety incurs his own, separate, obligation when he is sued, for it is stated:

“Once the creditor turns to the surety for payment of that debt, the surety’s obligation is to discharge that debt and if they fail to do so

the surety is in breach of their own obligations and therefore liable to pay interest on the outstanding indebtedness.”

Again, it is submitted, this reasoning simply ignores the basic obligation of a surety.

22. On the strength of this reasoning the Supreme Court of Appeal simply extended the application of Oneanate to the case of a surety, without proper regard for the legal position of a surety. It is submitted that, even on the assumption that Oneanate was correct regarding the suspension of in duplum, the Supreme Court of Appeal erred in applying it in the present case.
23. It is respectfully submitted that it is in the general public interest that the correctness of the rule in Oneanate, alternatively the correctness of the application of that rule in a case like the present against a surety, be settled by the Honourable Constitutional Court.
24. I accordingly respectfully pray that leave to appeal be granted in respect of all the points of law mentioned in paragraph 4 above.

ANDRÉ FRANCOIS PAULSEN

I certify that:

1. The deponent acknowledged to me that:
 - 1.1 He knows and understands the contents of this declaration;
 - 1.2 He has no objection to taking the prescribed oath;
 - 1.3 He considers the prescribed oath to be binding on his conscience.

2. The deponent thereafter uttered the words: "I swear that the contents of this declaration are true, so help me God".

3. The deponent signed this declaration in my presence at the address set out hereunder on

COMMISSIONER OF OATHS