

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT61/2014

In the matter between:-

PAULSEN, ANDRÉ FRANCOIS

First Applicant

PAULSEN, MARGARETHA ELIZABETH

Second Applicant

and

SLIP KNOT INVESTMENTS 777 (PTY) LIMITED

Respondent

RESPONDENT'S OPPOSITION IN TERMS OF RULE 19(4)

KINDLY take notice that the respondent hereby gives notice of its intention to oppose the applicants' application for leave to appeal.

KINDLY take notice further that the applicants' application for leave to appeal is opposed by the respondent on the grounds set out below:-

A. IN LIMINE

1. The applicants' application for leave to appeal, dated 13 April 2014, is incorrectly premised upon the provisions of rule 11 of the rules of the above honourable court. Rule 19 is however the applicable rule, when making

application for leave to appeal. Although very little turns on the employment of the incorrect rule, it is important to emphasise that the provisions of rule 19 do not allow for the filing of a reply.

2. The dispute which served before the Supreme Court of Appeal involved a commercial dispute which relate to the provisions of the National Credit Act, Act 34 of 2005 ("the NCA") and the applicability and operation of the *in duplum* rule. As such there is no constitutional question which arises for determination.
3. The applicants ostensibly premise their application for leave to appeal on the provisions of section 167(3)(b)(ii) of the Constitution of the Republic of South Africa 1996 ("the Constitution"), to wit that "the matter raises an arguable point of law of general public importance which ought to be considered" by the above honourable court. This is disputed by the respondent on the grounds that the matter is not of general public importance and as such does not require the consideration of the above honourable court. Furthermore and before it can be said that a matter is "arguable" for purposes of section 167(3)(b)(ii), a reasonable prospect of success on appeal must exist. The applicants are thus required to demonstrate that another court may reasonably come to a different conclusion than the Supreme Court of Appeal. This, it is submitted, the applicants failed to do.
4. The issues which served before the Supreme Court of Appeal appears from that court's judgment. For present purposes the grounds relied upon by the

applicants will be dealt with in the same order as they are dealt with in the application for leave to appeal.

B. VALIDITY OF THE LOAN AGREEMENT

5. Dealing with the first issue, namely whether the loan agreement entered into between Winskor 139 (Pty) Ltd ("Winskor") and the respondent is valid or not, it is significant that no less than three courts have pronounced on this question. In the court of first instance, Blignault J found the loan agreement to be valid and binding. Thereafter, and in an appeal to the full bench of the Western Cape High Court, three judges similarly found the loan agreement to be valid and binding and confirmed the order of Blignault J. More recently the Supreme Court of Appeal yet again confirmed the findings of the court of first instance and that of the full bench. The Supreme Court of Appeal found that the loan agreement is valid and binding and as such is enforceable by the respondent.

6. Although his Lordship Justice Wallis, speaking on behalf of the majority of the court a quo, arrived at the above conclusion following a somewhat different route than Willis JA, that court was ultimately *ad idem* that the loan agreement is valid and binding. There is, with respect, merit in both these approaches. In their heads of argument, counsel acting for the respondent presented the two approaches as alternative arguments, both culminating in the conclusion that the loan agreement is valid and enforceable as found by the Supreme Court of Appeal.

7. The two approaches may be summarised thus:-
 - 7.1 It was firstly argued that the respondent is not required to register as a credit provider in terms of the NCA. This is so by reason of it not doing business or entering into agreements which are subject to the provisions of the NCA or which fall within the ambit of the definition of a credit agreement, as is provided for in the NCA. Reference was inter alia made to the views expressed by the learned authors *Otto JM et al, Guide to the National Credit Act*, more particularly paragraph 4.4 at pp 4-6 to 4-8 and paragraphs 5.1 and 5.2 at pp 5-1 to 5-2. Willis JA followed this approach as appears from inter alia par [45] of the judgment.
 - 7.2 As an alternative to the aforementioned argument, it was argued that even should the court find that the respondent needs to register as a credit provider, then the NCA, specifically section 89(2)(d), does not apply to the agreement in question. In support of this argument reliance was placed on *Ribeiro & Another v Slip Knot Investments 777 (Pty) Ltd* 2011 (1) SA 575 (SCA). This is the approach followed by Wallis JA, as appears from inter alia par [12] of the judgment.
8. The applicants' argument that the validity and lawfulness of a loan agreement must be evaluated before the exemption in terms of section 4 of the NCA can be considered is fallacious and has no merit. The answer to this argument is, with respect, quite simple. Logically one must commence the enquiry by determining whether the NCA finds application to the loan

agreement in question or not. In the event of the provisions of the NCA not being of application, that is the end of the enquiry. Any enquiry into the question whether the loan agreement is lawful or unlawful for purposes of the NCA will be superfluous. Put somewhat differently the lawfulness of an agreement, or otherwise, can only be determined once a court has satisfied itself that the agreement falls within the ambit of the NCA.

9. In the circumstances the first issue raised has no prospect of succeeding on appeal.

C. THE ONEANATE PRINCIPLE

10. The operation of the *in duplum* rule and the suspension thereof has been authoritatively dealt with in *Standard Bank of SA Limited v Oneanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA). The application and operation of the *in duplum* rule has since been consistently applied by our courts. The applicants' submission that *Ethekwini Municipality v Verulam Medi Centre (Pty) Ltd* [2006] 3 All SA 325 (SCA) rejected the *Oneanate* principle (see par 10 of the founding affidavit) and changed the operation of the *in duplum* rule is wrong. *Ethekwini* merely pronounced on the question whether the *in duplum* rule should find application in the circumstances of that case or not. If anything the court did not adversely pronounce on the principles laid down in *Oneanate* but in fact followed the judgment (see par [9] of the *Ethekwini* judgment). In the circumstances there is no conflict between the two judgments as suggested by the applicants.

11. The *stare decisis* principle requires that the law be applied as formulated and laid down in decided cases in accordance with the principle *rebus iudicatis standum est*. This is necessary in order to ensure consistency, legal certainty and a legal system which enables lawyers to properly advise their clients on the applicable legal principles.

D. SUSPENSION OF IN DUPLUM VIZ-A-VIZ A SURETY

12. In paragraph [55] of the Supreme Court of Appeal's judgment, the minority, per Willis JA, held that a court should have a residual discretion to apply the *in duplum* rule "in the traditional manner", and not to suspend the application thereof *pendente lite*. Willis JA however fails to give any guidance as to how this discretion should be exercised nor does he motivate why the *in duplum* rule should be applicable in circumstances where our courts have thus far held it to be suspended. Not surprisingly this conclusion, by the minority, did not find favour with the majority of the Judges in the Supreme Court of Appeal.
13. The submission that interest does not run against a surety unless the principal debtor has also been sued is, with respect, misguided. Wallis JA convincingly motivates why a plaintiff may deem it appropriate to only institute proceedings against a surety whilst no action is taken against the principal debtor. Wallis JA also recognises that the principal debtor may be sued in separate proceedings, a process which has since occurred in the present instance.

14. There is simply no merit in the argument advanced by the applicants. Willis JA, in paragraph [49] of the judgment, in fact concurred with Wallis JA on this question.

E. CONCLUSION

15. In the circumstances, so it is submitted, there is no merit in any of the points raised by the applicants. More pertinently none of the issues raised by the applicants present arguable points of law which are of general public importance which ought to be considered by the Constitutional Court of South Africa.

WHEREFORE it is respectfully submitted that the applicants' application for leave to appeal should be dismissed with costs.

Dated at JOHANNESBURG on this 30th day of APRIL 2014.

Lana Janse van Rensburg
SIM & BOTSI ATTORNEYS INC.
Attorneys of the Respondent
3 Dudley Road
Parkwood Upper
Johannesburg
Tel: 011 880 4075
Fax: 011 880 3623
Email: lane@simattorneys.co.za
Ref: LVR/S284

TO:
THE REGISTRAR OF THE ABOVE
HONOURABLE COURT
CONSTITUTIONAL COURT

AND TO:

JOUBERT ATTORNEYS

Attorneys for the Applicants

Tel: 021 854 6609

Fax: 021 853 3413

Email: hln22@telkomsa.net

C/o ROSSOUWS ATTORNEYS

8 Sherborn Road

Parktown

Tel: 011 726 9000

Received copy hereof on this
_____ day of MAY 2014.

For: Applicant's Attorneys