

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' HEADS OF ARGUMENT

LEAVE TO APPEAL

1. It is respectfully submitted that the issues raised by the Applicants are of general public importance. The first issue, regarding the validity of the loan agreement, necessitates the proper interpretation and concordance of sections 4, 40 and 89 of the National Credit Act No. 34 of 2005 (hereinafter "the Act"). The two other issues require an assessment of the application of the in duplum rule in the calculation of arrear interest and the liability of a surety for interest. All these matters are of importance not only to the parties but also to the general public.

2. For the reasons set out below, Applicants respectfully submit that they not only have an arguable case but also that their appeal should succeed.

INVALIDITY OF CREDIT AGREEMENT

3. The Respondent, Slip Knot Investments 777 (Pty) Ltd. (hereinafter “Slip Knot”) is a credit provider in a big way and on a reading of section 40(1) of the Act it would have to be registered as a credit provider to prevent its loans from being invalid in terms of section 40(4) read with section 89(2) of the Act. Slip Knot is not registered but contends however that it restricts its loans to the transactions set out in section 4(1), which are exempted from the provisions of the Act. Hence, it says, section 40 does not apply to it and it has accordingly not registered.
4. By way of an approach to the problem it is submitted that the true meaning and effect of sections 4 and 40 cannot be ascertained by considering the wording of each of them in isolation. They have to be considered in the wider context of the purpose and scheme of the Act read as a whole.

Department of Land Affairs & ors. v. Goedgelegen Tropical Fruits (Pty) Ltd. 2007 (6) SA 199 (CC) at p. 218 par. [52]

5. The task is not made easier by the fact that the Act is not a model of clarity, as was recognised in the matter of Nedbank Ltd. & ors. v. National Credit Regulator & anor. 2011 (3) SA 581 (SCA) at p. 585B.

6. Section 3 of the Act makes the protection of consumers its main purpose. A perusal of the long title of the Act makes it clear that the lawgiver has a number of other associated important objects which it seeks to achieve, inter alia, “to provide for the general regulation of consumer credit” and “to provide for registration of credit bureaux, credit providers and debt counselling services”. This object is achieved by section 40 by providing that credit providers operating above a certain threshold may not lawfully provide credit unless they are registered. The further sections of the Act dealing with registration make it clear that the point of registration is to have oversight and control over these activities. The conclusion is thus inevitable that the regulation of, and control over, the provision of credit is an important object of the Act.
7. Chapter 5 (sections 89 to 123) of the Act in turn governs all aspects of credit agreements – their conclusion, their form, their content, their validity and so forth, which is an aspect of the Act, aimed at giving protection to credit consumers.
8. The purpose of requiring “big” credit providers to register is therefore not a mere bureaucratic flourish. It is intended to maintain oversight and control over them, as a perusal of related provisions shows. Thus section 48(1) enjoins the National Credit Regulator to consider an application for registration with due regard to black economic empowerment, the applicant’s commitment to combating over-indebtedness and its registration with SARS. The National Credit Regulator may propose imposing reasonable conditions

on the registration (section 48(3)). Further, it is a statutory condition of every registration that the National Credit Regulator is entitled to enter the credit provider's premises and to conduct reasonable enquiries, as set out fully in section 50. The powers to enter and search premises are quite wide and are set out in section 154. Section 46(3) lists a number of matters which disqualify a natural person from being registered as a credit provider, while section 47(2) disqualifies a juristic person from being so registered if a disqualified natural person is in a position of management or control. Final proof of the importance which the lawgiver attaches to registration is the draconian sanction attached to a failure to register. Indeed, section 89(5)(c) of the Act was held to be unconstitutional in National Credit Regulator v. Opperman 2013 (2) SA 1 (CC).

9. Against the background of registration of big credit providers, it is submitted, section 4(1) assumes its proper perspective. After stating that the Act applies to all credit agreements section 4(1) provides for certain exemptions in paragraphs (a) and (b). These exemptions apply in terms only to credit agreements with certain types of consumers. There is no mention of credit providers in these paragraphs, in sharp contrast to paragraphs (c) and (d) where the exemptions in terms also relate to credit providers. Nevertheless Slip Knot, a credit provider, claims to be exempted from registration by paragraphs (a) and (b) of section 4(1).
10. It is submitted that Slip Knot's contention is untenable. On Slip Knot's version the obligation of a credit provider to be registered would depend not only on

the criteria set out in section 40 but also on the exemptions provided by section 4(1)(a) and (b). Thus to take a hypothetical example a credit provider with say 100 credit agreements would prima facie appear to be obliged to register in terms of section 40(1)(a) but if it turns out that one of these agreements is exempted under either section 4(1)(a) or (b) he need not be registered. Furthermore in order for an exemption in section 4(1)(a) or (b) to apply, certain thresholds have to be met, such as the asset value of a juristic person (section 4(1)(a)(i)) or the agreement being a large agreement (section 4(1)(b)). These thresholds can be changed by the Minister from time to time. Thus on Slip Knot's version the whole enquiry as to registrability could become very complicated and the apparent clarity of section 40(1) is illusory.

11. Slip Knot says that it specialises only in deals which are exempted but the question is a matter of statutory interpretation which affects all credit providers, who may deal in all types of credit agreements.

12. In view of the above, it is submitted that the only sensible way to reconcile section 4(1)(a) and (b) with section 40 is as follows. Section 4(1)(a) and (b) in effect exempts certain credit consumers from the protection provided by the Act to credit consumers, the underlying idea being that a big consumer can look after himself. The thresholds set in section 4(1) would be matters particularly within the knowledge of the contracting parties and it would not be difficult for them to decide in a particular case whether a threshold is met or not and therefore whether Chapter 5 applies or not. In short, section 4(1)(a) and (b) is intended to operate ad hoc in particular cases and to exempt a

particular agreement. It is not intended as a general exemption for credit providers. Section 40, on the other hand, is a general regulating provision applicable to all big credit providers. It does not deal with individual transactions concluded with individual credit consumers.

13. On Slip Knot's approach, on the other hand, one would have to conclude that in section 4(1)(a) and (b) the lawgiver has tacitly, almost as an aside, created a huge gap as far as control over big credit providers is concerned without mentioning it there, or in section 40 or anywhere else. Furthermore, the National Credit Regulator would ex hypothesi have no power of investigation under section 50(2)(a) to ascertain whether an unregistered big credit provider is indeed limiting its activities to section 4(1)(a) and (b) transactions or not. In short, it is submitted, Slip Knot has attempted to exploit what it has mistakenly perceived as a loophole in the Act. Why it has taken this risk in order to avoid registration is known only to itself.

THE SUPREME COURT OF APPEAL'S JUDGMENT

14. Wallis J.A., delivering the majority judgment, approached the interpretation of section 4(1) by focusing on section 89(2)(d) of the Act. Thus the learned Judge says in paragraph [5] of the judgment:

"If the loan agreement between Slip Knot and Winskor is invalid, that is because of the provisions of s. 89(2)(d) of the N.C.A."

The learned Judge then concludes in paragraph [13] that since section 89(2)(d) is part of Chapter 5 and since it is clear that Chapter 5 as a whole does not apply to the credit agreements referred to in section 4(1), the Slip Knot agreement is not hit by section 89(2)(d).

15. It is respectfully submitted that the learned Judge erred in placing the full weight of the argument on section 89(2)(d). One must agree, as has indeed been argued by the Applicant above, that the various regulatory provisions of Chapter 5 do not apply to the credit agreements exempted by section 4(1). But the invalidity of credit agreements by unregistered credit providers is to be found in section 40(4), not in section 89(2)(d). Section 89(2) is a list of all the possible causes of unlawfulness envisaged by the lawgiver and it would therefore also obviously refer to unregistered credit providers, since section 40(4) provides for unlawfulness of credit agreements by unregistered credit providers. The operative provision is therefore clearly section 40(4) and it refers to section 89(2)(d) only for ease of reference to the consequences of unlawfulness. In the event, it is submitted the learned Judge looked through the wrong end of the telescope, as it were, and came to a conclusion which is incorrect because he failed to give due weight to section 40. In other words, the credit provider was held to be exempt because the credit agreement was held to be exempt.
16. It is consequently respectfully submitted for the reasons set out above that the credit agreement upon which the Applicants' suretyship is based is unlawful and invalid. This conclusion would make a consideration of the in

duplum rule unnecessary. What follows is therefore relevant only in the event of this Honourable Court holding that the credit agreement is indeed valid.

INTEREST AND THE *IN DUPLUM* RULE

17. It is not in issue in the present proceedings that the in duplum rule is part of our law. As expounded in the leading case of LTA Construction Bpk. v. Administrateur, Tvl. 1992 (1) SA 473 (A) it means that a creditor cannot recover arrear interest in an amount larger than the capital debt.
18. The LTA case confirmed that the in duplum rule is a rule of positive law and part of our common law (at page 487). This means that the parties cannot contract out of the in duplum rule (Standard Bank of SA v. Oneanate Investments (in liquidation) 1998 (1) SA 811 (SCA) at p. 838C) and it also means that a Court has no discretion in applying it (Ethekwini Municipality v. Verulam Medicentre (Pty) Ltd. 2006 (3) All SA Law Reports 325 (SCA at Plaintiff. 33[22]). As Maya A.J.A. put it at page 331[23]:

“Furthermore, while it may be so that the in duplum rule is founded on public policy considerations, it now forms part of positive law. Consequently, public policy is not the criterion in decision whether or not the rule applies.”

19. In the present matter, the validity and applicability of the in duplum rule is not in issue. What is in issue, however, is the decision by the Supreme Court of Appeal in the Standard Bank case (supra) to graft a qualification on to the in

duplum rule to the effect that the in duplum ceases to operate once litis contestatio has been reached. The Court came to this conclusion not because it was based on authority but simply because

“No principle of public policy is involved in providing the debtor with protection pendente lite against interest in excess of the double” (p. 834 C-D).

20. This approach, with respect, is incorrect. A rule of positive law is not subject to limitation or erosion by considerations of public policy. It is submitted that Zulman J.A. erred in thinking that because the in duplum rule was historically based on public policy it remained amenable ad infinitum to further considerations of public policy.

21. The learned Judge’s reasoning went along the following lines:
 - (a) he accepted that the in duplum rule was a rule of positive law (at page 828C);

 - (b) a consideration of the old authorities as well as the case of Stroebel v. Stroebel 1973 (2) SA 137 (T) did not lead to the conclusion that a suspension of the rule pendente lite was part of the rule, indeed, the opposite was the case (page 832H to 834A);

- (c) nevertheless, a recalcitrant debtor should not benefit by the law's delays, thus interest should again commence running pendente lite (page 834 C-D).
22. It is submitted that step (c) simply does not follow from steps (a) and (b). In applying the rule one is not entitled to alter it.
23. As far as the common law authorities referred to by Zulman J.A. are concerned it is obvious that Van der Keessel does not himself support the existence of such a qualification to the in duplum rule. Van der Keessel uses the word "aiunt" ("it is said") and the immediately following sentence commences with the words "Alia exceptio, eaque certa ..." ("Another exception, which is certain ..."). Furthermore, as the in duplum rule would naturally have featured in actual litigation from the earliest times such an important exception would surely have featured in the very formulation of the rule but significantly that is not the case.
24. It must be borne in mind that interest on a loan can take the form of a lump sum to be paid by the borrower. This is a common feature of micro loans for short periods and is exemplified also in clause 6 of the loan agreement in the present matter. In the Supreme Court of Appeal this aspect was dealt with in paragraph [16] of the judgment of Wallis, J.A. From this it follows that the qualification introduced in the Standard Bank case cannot apply in such an event, since a lump sum does not allow for accrual. Thus the anomalous

situation arises that only creditors who stipulate a rate are accommodated pendente lite.

25. It is accordingly respectfully submitted that a correct application of the in duplum rule does not allow an accretion of interest pendente lite beyond the amount of the capital.

EXTENT OF SURETY'S LIABILITY

26. In the present case the Applicants undertook liability to Slip Knot as “sureties and co-principal debtors”. In so doing they did not become principal debtors on a par with Winskor. They remain sureties and their obligations remain those of a surety. The effect of signing as “co-principal debtor” is only that some of the benefits otherwise available to a surety, such as the benefit of excussion, are waived.

Neon and Cold Cathode Illuminations (Pty) Ltd. v. Ephron 1978 (1) SA 464 (A) at 471 C-G

27. The surety's liability is accessory, i.e. he stands in for the debt of another. To ascertain the extent of a surety's liability one must therefore ascertain the liability of the principal debtor. And this means, as a matter of course, that a surety can never be liable for more than the principal debtor.

Caney The Law of Suretyship 6th ed p. 102-3 and authorities there cited

Heathfield v. Maqalepo 2004 (2) SA 636 (SCA) at 642 A-B

28. This basic principle was however, with respect, lost sight of by the Supreme Court of Appeal. In paragraphs 23 and 26 of the judgment by Wallis J.A. it appears to be argued that once the surety is sued, his liability becomes uncoupled from that of the principal debtor, so that he may eventually be liable for more than the principal debtor.
29. This reasoning, with respect, is fallacious. A surety cannot in principle be liable for more than the principal debtor. Suing the surety means suing him as surety for payment of the debt owing by the principal debtor, no more. By being sued, the surety does not become a principal debtor in his own right. The surety's liability always remains accessory to that of the principal debtor. It follows that the creditor cannot claim more by way of interest on the main debt from the surety than he can claim from the principal debtor.

EXTENT OF PAULSENS' LIABILITY

30. Clearly, if the loan agreement is unlawful and invalid, the claim based thereon falls away and the Paulsens cannot be held liable on the cause of action set out in the motion proceedings. Since no alternative cause of action based on enrichment was advanced by Slip Knot, the correct judgment would then be to dismiss the application.

31. On the other hand, if the loan agreement is held to be valid, there can be no doubt, on the evidence set out in the affidavits, that the principal debtor and hence the Paulsens, would be liable for the amount of the capital i.e. R12 million.
32. The next question then relates to the amount of interest which the principal debtor was liable for on the date when motion proceedings were launched against the Paulsens, i.e. on 10 January 2010. Here clause 6 of the loan agreement is relevant. It provides for the payment of at least R17 million and is clearly interest on the loan, albeit in the form of a lump sum. This was the conclusion of the Full Court of the Western Cape Division and Slip Knot's cross-appeal against that finding was not upheld in the Supreme Court of Appeal.
33. This means that the in duplum rule "kicked in" as soon as clause 6 became operative and that Winskor was then liable for R12 million interest on the loan of R12 million. And there it would stay since no part-payment of any interest was made and at no stage prior to 10 January 2010 was Winskor sued for payment, so that even the qualification created in the Standard Bank case could not have caused interest to start running.
34. As a surety cannot be liable for more than the principal debtor, it follows that Slip Knot could not claim payment from the Paulsens of an amount greater than that owed by Winskor on 10 January 2010, i.e. R12 million capital plus R12 million interest. This was in fact the conclusion reached by the Full Court

of the Western Cape Division and in the premises it is submitted that such a conclusion is the correct one.

35. In its Notice of Motion Slip Knot however claimed interest as if the sureties were in the same position as the principal debtor, namely payment of interest based on the contractual rate until date of payment. In the event, this was also the order made by the Supreme Court of Appeal. This is, with respect, an error, for as long as the in duplum rule held in regard to Winskor, the sureties would not be liable for additional interest. As motion proceedings consist not only of the pleadings but also of the evidence in the matter, there was no evidence on which to base a finding that the in duplum rule had ceased, or would cease to apply.
36. In the premises, it is submitted, interest on the judgment debt would also run, not at the contractual rate but at the normal rate applicable to judgment debts.

CONCLUSION

37. In the light of all the foregoing it is respectfully submitted that the Applicants should be granted leave to appeal and that the appeal should be upheld with costs including the costs of two Counsel.

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