

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT61/14

SCA CASE NO: 434/13

WCC APPEAL CASE NO: A413/12

WCC CASE NO: 26398/09

In the matter between

PAULSEN, ANDRE FRANCOIS

First Applicant
(Eighth Respondent in the
court of first instance)

PAULSEN, MARGARETHA ELIZABETH

Second Applicant
(Ninth Respondent in the
court of first instance)

and

SLIP KNOT INVESTMENTS 777 (PTY) LIMITED

Respondent
(Applicant in the
court of first instance)

RESPONDENT'S PRACTICE NOTE

1. The nature of the proceedings

1.1. The applicants seek leave to appeal against a judgment and order of the Supreme Court of Appeal.

1.2. The application for leave to appeal concerns the validity of a loan agreement with reference to section 40 of the National Credit Act, 34 of 2005 (“the NCA”) and the operation of the *in duplum* rule.

2. Issues to be argued

The questions for determination include:

2.1. Is every credit provider, even those who transact outside the ambit of the NCA, required to register as a credit provider in terms of the NCA;

2.2. What legal effect, if any, the non-registration by a credit provider has upon the validity of a credit agreement which falls outside the ambit of the provisions of the NCA;

2.3. Whether the operation of the *in duplum* rule is suspended after legal proceedings have been instituted;

2.4. Whether the *in duplum* rule remains suspended against the sureties in circumstances where no relief is claimed against the principal debtor.

3. Parts of the record that are to be read for the determination

In the respondent's view, the record has been vastly reduced already and the whole record needs to be read, save for pages 48 to 60 which is a duplication of pages 6 to 18.

4. Estimated duration

No more than one day.

5. Summary of the respondent's argument

5.1. Three questions arise for decision by this court.

5.2. The first question for decision is whether the respondent is required to register as a credit provider

in terms of the NCA. Related to this question is what effect non-registration has on the validity of a credit agreement. The respondent contends that:-

5.2.1. the respondent does not conclude credit agreements which fall within the purview of the definition of "credit agreement" or "credit transaction" as defined in the NCA;

5.2.2. section 40 should be interpreted restrictively, i.e. the words "credit agreements" in section 40(1), should, by definition, be restricted to include only those credit agreements to which the NCA applies. The need for a restrictive interpretation appears from the purpose behind the NCA as contained in section 3 of the NCA;

5.2.3. section 40 should be read in conjunction with section 4 of the NCA to the extent that the words "credit agreements" as used in section

40(1) is to be construed and limited to credit agreements to which the NCA applies; and

5.2.4. even should the court conclude that the respondent is required to register as a credit provider for purposes of section 40 of the NCA, the provisions of section 89(2)(d) – which provides for a credit agreement to be unlawful if, at the time the agreement was entered into, the credit provider was not registered, whilst the NCA requires such credit provider to be registered – do not find application to the agreement *in casu* as same is not a credit agreement for purposes of the NCA.

5.3. The second question involves the application of the *in duplum* rule, more specifically the question whether the judgment of the Supreme Court of Appeal in **Standard Bank of South Africa Limited v Oneanate Investments (Pty) Ltd (in liquidation)** 1998 (1) SA 811 (SCA) was correctly decided.

5.4. The third question relates to what effect, if any, Slip Knot's failure to seek payment from the principal debtor has on the accrual of interest against the Paulsens. More specifically, whether interest continues to accrue against a surety in circumstances where proceedings have been commenced against the sureties only and not against the principal debtor. The respondent argues that the creditor has an election from whom it wishes to seek payment. Once action is instituted against the surety, even if no claim is made against the principal debtor, the surety becomes the debtor from whom payment is being claimed and interest accordingly accrues as against that surety.

R STOCKWELL SC

JF PRETORIUS

Respondent's counsel

Chambers

Sandton

August 2014

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT61/14

SCA CASE NO: 434/13

WCC APPEAL CASE NO: A413/12

WCC CASE NO: 26398/09

In the matter between

PAULSEN, ANDRE FRANCOIS

First Applicant
(Eighth Respondent in the
court of first instance)

PAULSEN, MARGARETHA ELIZABETH

Second Applicant
(Ninth Respondent in the
court of first instance)

and

SLIP KNOT INVESTMENTS 777 (PTY) LIMITED

Respondent
(Applicant in the
court of first instance)

RESPONDENT'S LIST OF AUTHORITIES

	AUTHORITIES	PAGE IN HEADS
1.	<i>African Dawn Property Finance 2 (Pty) Ltd v Dream Travel and Tours CC and Others</i> 2011 (3)	25

	SA 51903 RS 571 1 (SCA)	
2.	<i>Afrox Healthcare (Edms) Bpk v Strydom</i> 2002 (6) SA 21 (SCA)	26
3.	<i>BN Aitken (Pty) Ltd v Tam Arillo (Pty) Ltd</i> 1979 (4) SA 1063 (N)	28
4.	<i>Brisley v Drotsky</i> 2002 (4) SA 1 (SCA)	26
5.	<i>Burger v Central South African Railways</i> 1903 TS 571	26
6.	<i>Dayson v Ruthven</i> (1860) 3 Searle 282	25
7.	<i>Ethekeweni Municipality v Verulam Medicentre (Pty) Ltd</i> [2006] 3 All SA 3225 (SCA)	28
8.	<i>George v Fairmead (Pty) Ltd</i> 1958 (2) SA 465 (A)	26
9.	<i>Harksen v Lane NO and Others</i> 1998 (1) SA 300 (CC)	14
10.	<i>JMV Textiles (Pty) Ltd v De Chalain Spareinvest 14 CC & Others</i> 2010 (6) SA 173 (KZD)	16
11.	<i>LTA Construction Bpk v Administrateur, Transvaal</i> 1992 (1) SA 473 (A)	22
12.	<i>Merry v Natal Society of Accountants</i> 1937 AD 331	25
13.	<i>National Regulator v Opperman and Others</i> 2013 (2) SA 1 CC	12
14.	<i>Nedbank Ltd and Others v National Credit Regulator</i> 2011 (3) SA 581 (SCA)	12
15.	<i>Otto JM et al Guide to the National Credit Act</i>	16
16.	<i>Renier Nel Inc & Another v Cash On Demand (KZN)(Pty) Ltd</i> 2011 (5) SA 239 (GSJ)	16
17.	<i>Reuter v Yates</i> 1904 TS 855	25 & 27
18.	<i>Rosenfels v Botha</i> 4 SAR 1	25 & 27

19.	<i>Sanlam Life Insurance v South African Breweries Limited</i> 2000 (2) SA 647 (W)	28
20.	<i>Sasfin v Beukes</i> 1989 (1) SA 1 (A)	27
21.	<i>Sebola and Another v Standard Bank of South Africa and Another</i> 2012 (5) SA 142 CC	12
22.	<i>Slip Knot Investments 777 (Pty) Ltd v Project Law Prop (Pty) Ltd and Others</i> (36018/2009) [2011] ZAGPJHC 21	27
23.	<i>Standard Bank of South Africa c Hunkydory Investments 194 (Pty) Ltd and Another (no 1)</i> 2010 (1) SA 627 (C)	14
24.	<i>Standard Bank of South Africa v Hunkydory Investments 194 (Pty) Ltd and Another (no 2)</i> 2010 (1) SA 634 (WCC)	14
25.	<i>Standard Bank of South Africa v Oneanate Investments (Pty) Ltd (in liquidation)</i> 1998 (1) SA 811 (SCA)	3
26.	<i>Starita v Absa Bank Ltd</i> 2010 (3) SA 443 (GSJ)	13
27.	<i>Verulam Medicentre (Pty) Ltd v Ethekeweni Municipality</i> 2005 (2) SA 451 (D)	28

R STOCKWELL SC

J F PRETORIUS

Respondent's counsel

Chambers

Sandton

August 2014