THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case No: 434/2013

In the matter between:

ANDRÉ FRANCOIS PAULSEN	**First Appellant**
MARGARETHA ELIZABETH PAULSEN	**Second Appellant**
and	
SLIP KNOT INVESTMENTS 777 (PTY) LIMITED	**Respondent**

Neutral citation: *Paulsen v Slip Knot Investments* (434/13) [2014] ZASCA 16 (25 March 2014)

Coram: MPATI P, SHONGWE, WALLIS and WILLIS JJA and MATHOPO AJA

Heard: **4 March 2014**

Delivered: **25 March 2014**

SUMMARY: Credit agreement to which the National Credit Act 34 of 2005 does not apply – not invalid because credit provider not registered in terms of s 40 (1) of Act – mezzanine financing – application of *in duplum* rule.

ORDER

On appeal from: Western Cape High Court, Cape Town (Louw, Ndita JJ and Dolamo AJ sitting as court of appeal):

1 The appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

2 The cross-appeal succeeds with costs, such costs to include those consequent upon the employment of two counsel.

3 Paragraph 2 of the order of the court below is amended to read as follows:

The orders made by the court a quo are set aside and the following substituted orders are made:

'1 The Eighth and Ninth Respondents are ordered to pay, jointly and severally, the following amounts:

(a) The sum of R 12 million.

(b) Interest on the sum of R 12 million up until 10 February 2010 in the amount of R 12 million.

(c) Further interest on the capital sum of R 12 million at a rate of 3% per month from 10 February 2010 to 24 February 2012.

(d) Interest on the total of the amounts set out in paras (a), (b) and (c) above at a rate of 3% per month from 25 February 2012 to date of payment thereof, such interest to be limited to the total of the said amounts.

(e) Costs of suit on the party and party scale, such costs to include the costs of two counsel.'

JUDGMENT

Wallis JA (Mpati P, Shongwe JA and Mathopo AJA concurring)

[1] In 2006, a company, optimistically named Winskor 139 (Pty) Ltd (Winskor), had the opportunity to purchase a portfolio of properties in Pretoria and resell them at what it anticipated would be a substantial profit. It had obtained a loan for the bulk of the purchase price, but there was a shortfall of R12 million. In order to obtain this amount it approached Slip Knot Investments 777 (Pty) Ltd (Slip Knot), which conducts business as a provider of what is termed mezzanine finance, an expression meaning nothing more than short term bridging finance. Such finance is high risk and those who provide it demand commensurately high returns. How high, will be seen when I come to examine the provisions of the agreement in relation to the return that Slip Knot required on this loan. Needless to say, Winskor's dreams of a speedy and substantial profit dissipated during the course of the world economic downturn that commenced in 2007 and the result is the present litigation. In it Slip Knot seeks to recover what it lent, together with interest, from Mr and Mrs Paulsen (the Paulsens), who bound themselves as sureties for and co-principal debtors with Winskor for the repayment of the loan.

[2] The litigation commenced in the Western Cape High Court before Blignault J. He upheld all of Slip Knot's claims. The Paulsens sought and obtained leave to appeal to the full court of that division. There they enjoyed substantial success in that their liability for the payment of

interest was held to be limited by virtue of the operation of the *in duplum* rule. In addition Slip Knot's claims for the payment of interest over and above a fixed amount were dismissed. The judgment was delivered by Louw J, and concurred in by Ndita J and Dolamo AJ. However, that did not entirely satisfy the Paulsens, who believed that they had grounds, in terms of the provisions of s 40(4)*(a)*, read with s 89(2)*(d)*, of the National Credit Act 34 of 2005 (the NCA), for defeating the claim in its entirety. They accordingly sought and obtained the special leave of this Court to appeal against the full court's judgment. Slip Knot likewise was dissatisfied and sought and obtained special leave to appeal in regard to the dismissal of its claims for interest. It is that appeal and the cross-appeal that are before us.

[3] My colleague Willis JA has prepared a judgment that I have had the opportunity of reading. I agree with it in part and disagree with it in part. On the parts where we agree on the result my reasoning is different from his. I accordingly express my views separately. For convenience I have adopted his nomenclature to refer to the parties.

[4] The Paulsens bound themselves as sureties for and co-principal debtors with Winskor for the latter's liabilities arising from the loan agreement concluded with Slip Knot. The latter agreement was a large agreement as described in s 9(4) of the NCA and Winskor was a juristic person the asset value or annual turnover of which exceeded the prescribed threshold. Accordingly, in terms of s 4(1)*(b)* of the NCA it was one of the credit agreements to which the Act does not apply and to which I will refer as 'excluded agreements'. In their appeal the Paulsens contend that it was nonetheless invalid in terms of the provisions of

s 89(2)*(d)* of the NCA, because Slip Knot was not registered as a credit provider in terms of s 40 (1) of the NCA.

[5] The argument and my colleague's analysis focus on the obligation to register in terms of s 40 (1) of the NCA. With respect I believe that is the wrong starting place. If the loan agreement between Slip Kot and Winskor is invalid that is because of the provisions of s 89(2)*(d)* of the NCA. That much is apparent from s 40(4) of the NCA, which provides that a credit agreement entered into by a credit provider who is obliged to register in terms of the NCA is 'an unlawful agreement and void to the extent provided for in section 89'. Accordingly it is to s 89 that we must turn to ascertain whether this agreement is void and, if so, to what extent.

[6] Section 89 is the opening section in Chapter 5 of the NCA dealing with 'Consumer Credit Agreements'. That heading immediately alerts the reader to the question whether the chapter applies generally to all credit agreements, or only to those to which the NCA applies. In my view it is clear that it applies only to those credit agreements in respect of which it is elsewhere provided that the NCA shall apply. For that reason s 89(2)*(d)* does not apply to the loan agreement between Slip Knot and Winskor and does not serve to invalidate it. My reasons for reaching that conclusion are the following.

[7] The starting point is s 4 of the NCA, which deals with the scope of application of the NCA and provides that, subject to the limitations spelled out in ss 5 and 6, the NCA 'applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic'. That broad statement is then qualified by the word 'except' and there follows a list of exceptions, of which a large

agreement entered into by a juristic person whose turnover or assets exceed stipulated limits is one. These exceptions are the excluded agreements. They are all credit agreements, but they are excluded from the application of the NCA. The plain meaning of that exclusion is that the provisions of the NCA that would otherwise apply to them because they are credit agreements do not apply to them.

[8] The next step is to determine the scope of this exclusion and to identify the provisions of the NCA to which it relates. Counsel correctly pointed out that the NCA deals with many matters. Chapter 1 defines the different types of credit agreements and delimits the scope of application of the NCA in relation to those agreements. Chapter 2 deals with consumer credit organisations and Chapter 3 with regulation of the industry. It is here that the provisions governing registration of credit providers are to be found. Chapter 4 deals with policy in regard to consumer credit. If one pauses at this point it is not immediately clear why the fact that certain agreements are excluded from the application of the NCA should necessarily mean that persons who seek credit in relation to such agreements should not be protected against discrimination under s 61, or disentitled to reasons for the refusal of credit in terms of s 62, both of which fall in Chapter 4. Nor is it clear that the regulation of the consumer credit industry should not encompass all credit providers and not merely some.

[9] In order for the exclusion in s 4 to have operative effect the portions of the NCA that are not intended to apply to excluded agreements must be identified. That brings me to Chapter 5, which is the chapter that deals expressly with consumer credit agreements. Its provisions, and those of Chapter 6 dealing with collection, repayment,

surrender and debt enforcement, are the provisions of the NCA that apply generally to credit agreements. Accordingly when s 4 says that the provisions of the NCA do not apply to excluded agreements, it is to these provisions that we must look. These chapters are the obvious place in which to find the provisions that do not apply in respect of excluded agreements. And s 89(2)*(d)*, on which the Paulsens depend for their contentions, falls squarely within the opening section of Chapter 5.

[10] Does Chapter 5 or any of its provisions apply to credit agreements in respect of which the application of the NCA has been specifically excluded? The answer lies in a closer consideration of the provisions of the chapter. It consists of ss 89 to 123 of the NCA. It is manifest from reading most of these provisions that they cannot apply to agreements that are otherwise excluded from the application of the NCA. To apply them to such agreements would render their exclusion from the application of the NCA pointless. Thus Part F of Chapter 5 (ss 121 to 123) affords consumers rights to terminate agreements that would otherwise be legally binding upon them. Conversely it constrains the ability of the credit provider to terminate the agreement where the consumer is in default of their obligations. Part E (ss 116 to 120) permits consumers unilaterally to alter the terms of the credit agreements to which they are party; precludes alterations to agreements unless they reduce the consumer's liabilities under the agreement and limits the alterations that the credit provider can effect. Part D (ss 107 to 115) deals with the content and form of statements. Significantly it is careful to exclude (in s 107) certain types of credit agreement that are clearly subject to the provisions of the NCA. That shows that those responsible for drafting the NCA were alive to the need to exclude certain agreements from its area of operation.

[11] Part C of Chapter 5 (ss 100 to 106) deals with prohibited charges, the cost of credit, fees and charges and interest and makes provision for these to be capped by way of regulations. It also governs the basis upon which interest, fees and charges may be adjusted. If these provisions apply to excluded agreements they would render their exclusion from the application of the NCA pointless. Part B (ss 92 to 99) deals with pre-agreement disclosure, the form of agreements, notices and other related matters. Although it distinguishes between small agreements on the one hand, and intermediate and large agreements on the other, with special provision for pawn brokers in s 99, there is no indication that it is intended to apply to excluded agreements.

[12] That brings me to Part A, in which we find s 89(2)*(d)*. Part A identifies in s 89 those credit agreements that are unlawful and in s 90 the provisions of credit agreements that are unlawful. These latter include provisions that are commonplace and would be expected to appear in agreements covering most large commercial transactions such as ‘no misrepresentation’ or ‘whole agreement’ clauses; waivers of common law rights such as, in the case of a surety, the right to demand that the principal debtor be excussed before resort is had to the surety; limitation of liability or exemption clauses; and provisions requiring the conclusion of supplementary agreements, such as deeds of suretyship or contracts of insurance. The notion that the NCA intended such provisions to be invalidated in all commercial transactions falling within the broad notion of a credit agreement (see s 8 of the NCA read with various definitions in s 1) is obviously incorrect. That would fly in the face of the entire purpose of the NCA, which is to regulate the provision of credit to natural

persons and small businesses and even then only at the lower end of the credit market.

[13] Against that background I am unable to see on what basis s 89(2)*(d)*, of all the provisions in Chapter 5, should apply to excluded agreements, when none of the other provisions in the chapter do so. That being so, it is unnecessary for me to consider whether Slip Knot was required to register as a credit provider under the regulatory provisions of the NCA. Conceivably those provisions may serve some purpose in relation to a credit provider that only enters into excluded agreements. I appreciate that in the definition of 'credit provider' in s 1 the term is only defined in relation to 'a credit agreement to which this Act applies' and that is a strong indication that the credit providers that are obliged to register do not include those that confine their activities to the conclusion of excluded agreements,[1] but prefer not to express a final view on this when it is unnecessary to do so.

[14] For those reasons I agree with my colleague that the Paulsens' appeal falls to be dismissed with costs, such costs to include those consequent upon the employment of two counsel. I turn then to deal with Slip Knot's cross-appeal.

[15] The cross appeal relates to Slip Knot's claims in terms of clause 6 of the loan agreement. The clause reads as follows:

'6. Interest

SLIP KNOT shall be entitled to payment from the Borrower of interest accrued on the loan amount, such interest which shall be calculated at 25% (twenty five percent) of

---

[1] This is the view expressed in JW Scholtz, JM Otto, E van Zyl, CM van Heerden and N Campbell *Guide to the National Credit Act* (looseleaf) Vol 2, at 5-3 (Issue 5), fn 12, where they describe it as 'logical'.

the nett profit in the development, the Borrower having however guaranteed a minimum interest repayment of R17 000 000.00 (Seventeen million rand). For example, should 25% of the nett profit in the development be R16 000 000.00, the Borrower will be liable to pay SLIP KNOT the loan amount of R12 000 000.00 (Twelve million rand) plus interest in the sum of R17 000 000.00 (seventeen million rand). Should 25% of the nett profit in the development be R18 000 000.00, the Borrower will be liable to pay SLIP KNOT the loan amount of R12 000 000.00 (Twelve million rand) plus interest in the sum of R18 000 000.00 (Eighteen million rand).'

The full court held that this clause embodied arrangements for the payment of interest and that it fell foul of the provisions of the *in duplum* rule that restricts the amount of interest that a creditor may recover on a debt to the capital amount of that debt. It accordingly held that Slip Knot's recovery was to be limited to the capital sum of R12 million and interest on that sum of R12 million.

[16] Slip Knot contended that this was a profit sharing arrangement and, notwithstanding the terminology of the clause, that it did not provide for the payment of interest at all. Accordingly it said that the *in duplum* rule found no application. Like my colleague, I disagree, and believe that the contention that this is a profit sharing arrangement is easily disposed of. A claim to rectify the agreement to remove the description of this amount as interest and to describe it instead as a profit share was not pursued. The matter is therefore one of interpretation. Apart from the fact that the R17 million is described repeatedly as interest, it is payable even if no profit accrues from the venture in which Winskor was engaged and for which the loan was advanced. That excludes the notion that this was a profit share. In its ordinary connotation 'interest' describes the reward or return that a lender expects the borrower to pay in return for the loan. That is what the R17 million is. The fact that further interest was payable in

terms of clause 7 of the agreement if the capital was not repaid within six months merely reinforces that conclusion.

[17] Once interest is payable on a debt the *in duplum* rule potentially comes into play. The effect of that rule is clear. Where a debt is owed and bears interest, the amount of such interest may not exceed the capital amount.[2] It was argued that this restriction only applied to arrear interest,[3] but as the cases show that expression merely means accumulated interest on the amount in arrears.[4] It excludes amounts already paid by way of interest and relates only to interest that has accrued but is unpaid.[5] Then it was argued that this court in *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC and Others*,[6] sanctioned the charging of interest exceeding the amount of the capital. That is a misreading of that judgment, which dealt with usury and not the operation of the *in duplum* rule. All that it held was that there is no rate of interest that is automatically usurious and therefore contrary to public policy. It did not sanction breaches of the *in duplum* rule.

[18] It follows that the stipulation for the payment of interest in clause 6 contravened the *in duplum* rule. That is readily illustrated by the following example. Had Slip Knot stipulated that it be paid interest at a

---

[2] *Union Government v Jordaan's Executors* 1916 TPD 411 at 413 per, de Villiers JP: 'No interest runs after the amount is equivalent to the amount of the capital.' Wessels and Curlewis JJ concurred in the decisions which was accordingly rendered by a court of which all three members went on to become Chief Justice. The rule in this form was held by this court still to be the law in *LTA Construction Bpk v Administrateur, Transvaal* 1992 (1) SA 473 (A) at 482B-H.

[3] *Sanlam Life Insurance Ltd v South African Breweries Ltd* 2000 (2) SA 647 (W) at 655D-E. Neither that judgment, which dealt with the determination of the price payable for immovable property by way of the application of an interest factor, nor *Ethekwini Municipality v Verulam MediCentre* [2006] 3 All SA 325 (SCA), which dealt with the calculation of restitution in respect of a failed property transaction making use of an interest factor, has any bearing on the facts of this case, which involves a straightforward money loan.

[4] That is clear from the Afrikaans expression 'opgehoopte rente'.

[5] *Van Coppenhagen v Van Coppenhagen* 1947 (1) SA 576 (T) at 581-582.

[6] *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC and Others* 2011 (3) SA 511 (SCA) para 19.

rate of 23.5 per cent per month on the capital it lent to Winskor, on condition that the interest was repayable with the capital after six months, the effect would have been that Winskor was obliged to repay the R12 million in capital together with an amount only fractionally less than R17 million by way of interest. It could not be disputed that after the end of the fourth month the *in duplum* rule would have operated to prevent the accumulation of further interest. The position cannot be any different where the interest is payable in a lump sum.

[19] I accordingly agree with my colleague that clause 6 stipulated for the payment of interest and that the interest for which it stipulated exceeded the *duplum*. The full court was accordingly correct to hold that up until the date of commencement of the proceedings at first instance, which was the 10 January 2010, the interest recoverable was limited to R12 million. It is at this point and in regard to the recovery of further interest that I diverge from my colleague in regard to the fate of the cross-appeal.

[20] The operation of the *in duplum* rule after the commencement of legal proceedings was the subject of the decision in this court in *Oneanate*.[7] At the end of a discussion of the relevant authorities Zulman JA rejected the views of *Huber* that, where the *duplum* had been reached prior to the institution of action, interest did not run during the pendency of the litigation, but only began to run after judgment, and concluded[8] that the true position is that:

'(i) the *in duplum* rule is suspended *pendente lite*, where the *lis* is said to begin upon service of the initiating process, and (ii) once judgment has been granted, interest may

---

[7] *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (In Liquidation)* 1998 (1) SA 811 (SCA).

[8] At 834H-I.

run until it reaches the double of the capital amount outstanding in terms of the judgment.'

[21] Some confusion may arise from Zulman JA's use of the expression *pendente lite* in this passage, as its ordinary meaning is 'pending the suit',[9] and he was dealing with the situation during the pendency of the suit, that is, after the litigation was underway. In this passage it means during the litigation and not before the litigation. Once that is understood its effect is clear. If the *duplum* has been reached prior to litigation commencing, interest will accumulate afresh on the capital debt from the date of service of the summons or application papers. Once judgment is pronounced, in this case on 24 February 2012, the capital and interest accumulated up to that date are consolidated and interest begins to run again on the consolidated debt until it reaches the *duplum*. The *in duplum* rule will accordingly operate to limit the interest recoverable on a debt at two points in time. Prior to litigation it will prevent interest accumulating beyond the full amount of the debt. If that point has been reached prior to litigation interest will start to run again and will accumulate until judgment is pronounced. At the stage of judgment the whole judgment debt, that is, capital plus all accumulated interest to date of judgment, will bear interest until it again reaches the *duplum*.

[22] The full court held that these principles do not apply in this case because Slip Knot did not sue Winskor. The reasoning on which this was based is the following. Before the commencement of litigation Slip Knot could only recover the capital of R12 million plus interest of a further R12 million from Winskor. As it did not sue Winskor that is at present the limit of Winskor's liability to it. The Paulsens are sued as sureties and

---

[9] V G Hiemstra and H L Gonin *Trilingual Legal Dictionary* 2 ed, 253 sv '*pendente lite*'

their liability is accessory to that of Winskor. They cannot therefore be held liable to pay further interest on the amount of their existing liability because Slip Knot would then recover more from them than it could recover from Winskor.

[23] I do not agree. This approach conflates what are different matters, namely the accessory liability of the surety and the obligation on a debtor to pay interest on the debt. The liability of Winskor as at the date of commencement of these proceedings was limited to the total amount of R24 million by virtue of the operation of the *in duplum* rule, and so was that of the Paulsens. However, once they were sued, there is no reason why interest on what they owed Slip Knot as co-principal debtors, should not run again. That is not to impose upon them a liability different from that of Winskor, because Winskor would similarly have been liable had it been sued. The surety is generally entitled to raise any defence that the principal debtor could raise. Accordingly the Paulsens were entitled to raise the operation of the *in duplum* rule in order to limit their liability before the institution of proceedings to a total of R24 million. However, Winskor had no defence to a claim for the payment of further interest if litigation was commenced against it. There is accordingly no reason why the Paulsens should have one.

[24] By permitting a claim for further interest after the commencement of proceedings a liability to pay interest is imposed on the Paulsens in respect of a debt that they owed to Slip Knot. They were the only ones who could limit that liability by paying what they owed. If they did not do so there is no reason why they should be able to shelter behind the fact that proceedings were not taken against an entity in respect of which liquidation proceedings were pending.

[25] The contention that interest does not run against the sureties unless the principal debtor is sued, where prior to litigation the *duplum* has been reached, has extraordinary consequences. It could compel a claimant to sue a manifestly insolvent principal debtor in order to ensure that interest ran against the sureties. That would be pointless and would result in costs being incurred for which the sureties would very likely be liable on the ordinary form of commercial suretyship. What is to happen if the principal debtor has already gone into liquidation and the liquidator is prepared to recognise the claim by the creditor in the winding up? Does that mean that interest will not run against the sureties when they do not do what they have undertaken to do and pay the debt? Can the sureties defeat any further claims against them for payment of interest on the debt beyond the *duplum* by causing the principal debtor to be liquidated and rendering it worthless as a target for the creditor? If the principal debtor was excussed and, only after that process was complete, it transpired that it could not pay the judgment debt, the sureties would be entitled to say that interest above the *duplum* would only be recoverable from them once they were sued. Why should they be able to avoid paying interest when they are sued but the principal debtor is not? If the benefit of excussion has not been waived the claim against the surety will arise at a later date than the claim against the principal debtor, so that they cannot be sued simultaneously. What happens if both are sued, but in different proceedings that proceed at a different pace, for example, because the proceedings take place in different divisions of the high court for jurisdictional reasons? If the approach of the full court were correct, there is no answer to these and other problems, the existence of which can easily be imagined.

[26] Where I think the problem lies with the full court's reasoning is in its failure to recognise that the accessory nature of the surety's obligations in relation to the principal debtor relates only to the existence and extent of the principal debt itself.[10] That is why our courts have held that an interruption in the running of prescription against the principal debtor also interrupts the running of prescription against the surety.[11] Whilst the surety's liability may be less than the amount of the principal debt it cannot be more.[12] That does not, however, mean that, once the surety is sued for the debt and accumulated interest, the principles governing the recovery of interest laid down in *Oneanate* and set out in para 20 above cease to be applicable. It is clear that the inability to pursue a claim against the principal debtor, for example because it is a company and has been deregistered, does not bar a claim against the surety.[13] There is no reason why it should bar the continued running of interest on the claim and no authority was cited for this proposition, nor have I been able to find any. The fact that the interest reached the *duplum* before the surety was sued is no reason for not permitting it to commence running again once litigation commences in accordance with the ordinary application of the rule. Nor is the fact that, if it transpired that the liquidated company had hitherto undisclosed assets, the claim against those assets would be limited to the capital and interest up to the *duplum*. 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.

---

[10] *Kilroe-Daley v Barclays National Bank Ltd* 1984 (4) SA 609 (A) at 622H-623H.
[11] *Jans v Nedcor Bank Ltd* 2003 (6) SA 646 (SCA).
[12] *Pfeiffer v First National Bank of SA Ltd* 1998 (3) SA 1018 (SCA)
[13] *Traub v Barclays National Bank Ltd; Kalk v Barclays National Bank Ltd* 1983 (3) SA 619 (A) at 634A and *Norex Industrial Properties (Pty) Ltd v Monarch SA Insurance Co Ltd* 1987 (1) SA 827 (A) at 840F-H.

[27] My colleague accepts this, but nonetheless upholds the conclusion of the full court. He does so in paras 53 and 54 of his judgment on the basis that the *in duplum* rule is founded on the public interest and that to apply it in the present case in the manner set out in *Oneanate* would enfeeble the rule in its entirety. He concludes (para 54) that 'a residual discretion must remain for a court, in appropriate circumstances, to apply the *in duplum* rule in the traditional manner'. In reaching this conclusion he is much concerned at the effect of applying the judgment in *Oneanate* in accordance with its terms and expresses the view that mezzanine finance lenders must be incentivised to commence proceedings quickly in order to recover debts owed to them so as to avoid prejudice to their debtors.

[28] I respectfully disagree. My colleague points to no authority that supports what is in effect an equitable approach that invokes the *in duplum* rule in some circumstances, such as mezzanine financing, and not in others. He suggests that the approach in *Oneanate* is not to be used to enfeeble the *in duplum* rule. But that is precisely what it does not do. It explains how the rule operates and is to be applied once litigation is commenced. He contends for a residual discretion to apply the rule in what he describes as 'the traditional way'. But that is what *Oneanate* does. None of this is supported by any authoritative statement of the scope of the rule and it is an entirely novel approach to the *in duplum* rule. In the absence of argument that we should depart from existing authority or adapt the rule in some way I am not persuaded that it is either permissible or desirable to follow the route he suggests.

[29] The concern appears to be the large sums of interest that the Paulsens may be called upon to pay. I agree that they are large,[14] but that is because the loan was large and the Paulsens were engaged on a transaction that they confidently thought would generate a profit of R68 million within the short space of six months. The accumulation of interest beyond the sum of R12 million to which it was initially limited is not, as my colleague appears to believe, due to any dilatoriness on the part of Slip Knot. Their entitlement was capped at R24 million from the outset. What has caused additional interest to accrue has been the Paulsens' dogged resistance to Slip Knot's claims before three courts. Had they tendered to pay R24 million at the outset they would not have been liable for any further amount. Instead they offered to pay R12 million and the present litigation ensued.

[30] The amounts involved are to any ordinary person substantial, but that flows from the size of the loan. A loan of R1 000 bearing interest at the maximum permissible rate for unsecured credit transactions of a little over 32 per cent per annum[15] would pass the *duplum* after a little more than 2 years and would double again to R4 000 two years after judgment was obtained if that was sought and obtained immediately the two years had passed. At the maximum rate of five per cent per month applicable to short term credit transactions the *duplum* is reached within 15 months. A person needing a loan in that amount is probably more deserving of concern than those borrowing large sums in the hope of making even larger profits. Yet my colleague's approach does not suggest that the rule

---

[14] The maximum they may be called upon to pay is about R72 million. That is calculated as R24 million prior to the commencement of litigation, plus approximately R12 million of interest between that date and judgment and further interest on the judgment debt, which would total approximately R36 million, up to the *duplum*. That gives R72 million.

[15] The maximum prescribed rate for unsecure credit transactions is (Repo Rate x 2.2) + 20% per year, which at the current SA Reserve Bank Repurchase Rate (the Repo Rate) of 5.5% is a little over 32%. Regulation 42 in GN 713 of 1 June 2006.

as expounded in *Oneanate* should not apply to such transactions or should be subject to a residual discretion vested in the court to relax its effect.

[31] In the circumstances I would uphold the cross-appeal to the extent of permitting Slip Knot to recover interest from 10 January 2010 to 24 February 2012 on the sum of R12 million at the agreed default rate of three per cent per month capitalised monthly in arrears. I would also permit them to recover further interest on the judgment debt of R24 million, plus the interest accumulated between 10 January 2010 and 24 February 2012, at the same rate from 24 February 2012 to date of payment, subject to the amount of that interest not exceeding the amount of the judgment debt. That success on the cross-appeal should carry with it an order for costs of the appeal including the costs of two counsel. In the court below, however, the Paulsens enjoyed substantial success on the *in duplum* rule and in having some of the claims for interest deleted from the judgment. The order for costs in their favour should accordingly not be disturbed.

[32] I accordingly grant the following order:

1 The appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

2 The cross-appeal succeeds with costs, such costs to include those consequent upon the employment of two counsel.

3 Paragraph 2 of the order of the court below is amended to read as follows:

The orders made by the court a quo are set aside and the following substituted orders are made:

'1 The Eighth and Ninth Respondents are ordered to pay, jointly and severally, the following amounts:

(a) The sum of R 12 million.

(b) Interest on the sum of R 12 million up until 10 February 2010 in the amount of R 12 million.

(c) Further interest on the capital sum of R 12 million at a rate of 3% per month from 10 February 2010 to 24 February 2012.

(d) Interest on the total of the amounts set out in paras (a), (b) and (c) above at a rate of 3% per month from 25 February 2012 to date of payment thereof, such interest to be limited to the total of the said amounts.

(e) Costs of suit on the party and party scale, such costs to include the costs of two counsel.'

M J D WALLIS
JUDGE OF APPEAL

Willis JA (concurring in part and dissenting in part)

[33] The appellants were sureties, binding themselves jointly and severally, *in solidum,* for a loan agreement concluded between a company known as Winskor 139 (Pty) Limited ('Winskor') and the respondent, Slip Knot Investments (Pty) Limited ('Slip Knot') in terms of which the respondent lent Winskor R12 million for a twelve month period from 10 July 2006 to 9 July 2007. Slip Knot had lent Winskor the money to assist with the funding of a property development in Brooklyn. Winskor

defaulted on its obligation to repay the loan together with interest. An application by Slip Knot for the liquidation of Winskor is still pending.

[34] Slip Knot brought an application in the Western Cape High Court for an order that the two appellants (the sureties), together with two trusts which had also been sureties for the debt, the Paulsen Family Trust and the Keurbos Beleggingstrust, be ordered to be jointly and severally liable to pay the sum of R12 million, being the capital sum lent to Winskor, together with R17 million as interest and costs of suit.

[35] Clause six of the loan agreement entered into between Winskor and Slip Knot reads as follows:

'6. Interest

SLIP KNOT shall be entitled to payment from the Borrower of interest accrued on the loan amount, such interest which shall be calculated at 25% (twenty five percent) of the nett profit in the development, the Borrower having however guaranteed a minimum interest repayment of R17 000 000.00 (Seventeen million rand). For example, should 25% of the nett profit in the development be R16 000 000.00, the Borrower will be liable to pay SLIP KNOT the loan amount of R12 000 000.00 (Twelve million rand) plus interest in the sum of R17 000 000.00 (seventeen million rand). Should 25% of the nett profit in the development be R18 000 000.00, the Borrower will be liable to pay SLIP KNOT the loan amount of R12 000 000.00 (Twelve million rand) plus interest in the sum of R18 000 000.00 (Eighteen million rand).'

Slip Knot contended in its founding affidavit that the relevant portion of clause six should read as follows:

'Slip Knot shall be entitled to payment from the Borrower of a profit share, such profit share which shall be calculated at 25% (twenty five percent) of the net profit in the development, the Borrower having however guaranteed a minimum profit share of R17 000 000.00 (Seventeen million rand)'.

Slip Knot provided the emphasis given to the underlined words and applied for the rectification of the agreement in order to replace the word 'interest' with 'profit share'. The application for rectification was opposed by the sureties in their answering affidavit.

[36] After some preliminary skirmishes between the parties, the application came before Blignault J. He refrained from deciding whether the underlined words in the preceding paragraph should read as 'profit share', as contended for by Slip Knot, or interest contended for by the sureties. On 24 February 2012 Blignault J granted judgment against the sureties but dismissed the application against both the Paulsen Family Trust and the Keurbos Beleggingstrust. The court of first instance exonerated the trusts by relying on *Thorpe v Trittenwein,* [16] which confirmed the common law principle that unless the trust deed requires otherwise, all trustees of a trust are required to act jointly in order to incur liability for the trust. The court of first instance failed to apply the *in duplum* rule, in terms of which arrear interest ceases to run once it reaches the equivalent of the amount of the capital lent.[17] The order of the court of first instance was that the sureties were jointly and severally liable to pay Slip Knot:

'A. (1) The sum of R12 million;

(2) Interest on the sum of R12 million at the rate of 3% per month, calculated from 21 July 2007 to 10 January 2010, such interest to be limited to a maximum amount of R12 million;

(3) Interest on the sum of R12 million at the rate of 3% per month, calculated from 10 January 2010 to the date of judgment;

---

[16] *Thorpe & Others v Trittenwein & Another* 2007 (2) SA 172 (SCA) at 176H.

[17] See, *Union Government v Jordan's Executors* 1916 TPD 411 at 413; *LTA Construction Beperk v Administrateur, Transvaal* 1992 (1) SA 473 (A) at 482B-H.

(4) Interest on the sum of R12 million at the rate of 3% per month, calculated from the date of judgment to the date of final payment, such interest to be limited to a maximum amount of R12 million;

(5) The sum of R17 million;

(6) Interest on the sum of R17 million at the rate of 15,5% per annum, calculated from the date of judgment to the date of final payment;

(7) Subject to the provisions of B below, the costs of the application under case No 26398/09 on an attorney and client scale, such costs to include the costs of two counsel.

B. The claims of Slip Knot Investments 777 (Pty) Ltd for payment of the above amounts by the trustees for the time being of the Paulsen Family Trust and the trustees, for the time being, of the Keurbos Beleggingtrust, are dismissed with costs, including the costs of two counsel.'

[37] Sitting as a court of first instance, the high court granted leave to appeal to the full court. On 12 February 2013 the full court (Louw and Ndita JJ and Dolamo AJ) upheld the appeal in part but dismissed the remainder. The full court, applying the *in duplum* rule, ordered the sureties to pay the sum of R12 million, being the capital sum lent to Winskor but limited interest thereon to R12 million (ie a further R12 million, over and above the R12 million that was to be repaid in terms of the capital lent to Winskor). The full court held that a surety is not obliged to pay more interest than the principal debtor.[18] As at the time of delivering judgment no action had been brought by Slip Knot against the principal debtor, the full court reasoned that, at the time of judgment, the principal debtor would be obliged to pay no more than R12 million plus interest in the same amount under the *in duplum* rule. For this reason the full court granted the order which it did. The full court, allowing the

[18] It relied on *Neon and Cold Cathode Illuminations (Pty) Limited v Ephron* 1978 (1) SA 463 (A) at 471C-H and *Jans v Nedcor Bank Limited* 2003 (6) SA 646 (SCA) para 10.

costs of two counsel, ordered the sureties to pay the costs of suit on a party-and-party scale.

[38] The sureties sought the special leave of this court to appeal hereto, contending that their appeal should have been upheld in its entirety, to the extent that Slip Knot's application should have been dismissed with costs. Slip Knot then sought special leave to cross-appeal against that part of the judgment and order of the full court which upheld the appellant's appeal. Slip Knot essentially sought the reinstatement of the order of the court of first instance. This court granted special leave both to appeal and to cross-appeal further. Accordingly, this court now has before it both the appeal and the cross-appeal against the decision of the full court (sitting as a court of appeal). I have profited from reading the judgment prepared by my brother Wallis

The appeal

[39] The relevant facts are not in issue. This is, in large measure, illustrated by the sureties having disclosed a tender to pay Slip Knot R12 million together with interest *a tempore morae* thereon up to the sum of R12 million. In the appeal the issues are (a) whether, on a correct interpretation of s 40, read with s 4, of the National Credit Act 34 of 2005 ('the NCA'), Slip Knot should have been a registered credit provider in terms of the NCA and (b) if Slip Knot was not so registered, the suite of agreements in question, including the deeds of suretyship signed by the sureties, were void. The cross-appeal is concerned with the interpretation of clause six in the loan agreement concluded between Slip Knot and Winskor, more particularly the application of the *in duplum* rule to the calculation of interest.

[40] In the founding affidavit Slip Knot asserted that the provisions of the NCA are not applicable either to the loan or the deeds of suretyship by reason of the fact that Winskor was, in terms of s 1 of the NCA, a juristic person the asset value of which or annual turnover of which, together with the combined asset value and annual turnover of all related juristic persons, at all relevant times exceeded R1 million. In the answering affidavit the sureties were content that the matter be one for argument but contended, in addition to interest exceeding the maximum that is allowed under the *in duplum* rule in our common law, that the rates of interest which Slip Knot sought to claim were usurious and contrary to public policy.

[41] Both the court of first instance and the full court hearing the appeal accepted that the transaction was one known as 'mezzanine funding'. 'Mezzanine funding' has come to the fore increasingly in recent years.[19] It features not infrequently in transactions related to property development.[20] It involves high risk.[21] Typically, the lender borrows money from the banks to provide bridging finance to the property developer at very high rates of interest for a period that is envisaged to be short term.[22]

[42] The relevant portions of ss 4(1)(*a*) and (*b*) of the NCA read as follows:

'4. Application of Act

---

[19] See, for example, *Slip Knot Investments 777 (Pty) Limited v Project Law Prop (Pty) Limited & Others* (*36018/2009*) [2011] ZAGPJHC 21 (1 April 2011) paras 2 and 4.
[20] Ibid.
[21] Ibid.
[22] Ibid.

(1) Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having effect within, the Republic, except –

(a) A credit agreement in terms of which the consumer is –

(i) A juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7(1);

(ii) the state; or

(iii) an organ of the state;

(b) A large agreement, as described in section 9(4), in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time the agreement is made, below the threshold value as determined by the Minister in terms of section 7(1).'

It is common cause that the agreement is a 'large agreement'. It has not been disputed that, at the time when the agreements in question were concluded, the asset value and annual turnover of Winskor exceeded the threshold values determined in terms of ss 4(1)*(a)* and 4(1)*(b)* of the NCA.

[43] The relevant portions of ss 40(1) and (4) of the NCA provide as follows:

'(1) A person must apply to be registered as a credit provider if –

(a) that person, alone or in conjunction with any associated person, is the credit provider under at least 100 credit agreements, other than incidental credit agreements; or

(b) the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42(1).[23]

…

[23] The parties were ad idem that this threshold currently stands at R500 000. See Reg 5 in terms of the National Credit Act, GN 713, GG 28893, 1 June 2006.

(4) A credit agreement entered into by a credit provider who is required to be registered in terms of subsection (1) but who is not so registered is an unlawful agreement and void to the extent provided for in section 89.'

It is immediately apparent that s 40 (1), which requires registration, is not unqualified. Section 89(2)(d) of the NCA is also not unqualified: it renders unlawful an agreement if, 'at the time that it was made, the credit provider was unregistered <u>and this Act requires that credit provider to be registered</u>' (the emphasis is my own). In other words, the NCA envisages situations where credit may be provided by a credit provider which is not registered in terms of the NCA. Moreover, s 89 has to apply to credit agreements to which the NCA applies and not to credit agreements to which the NCA does not apply. Not only does this follow as a matter of logic but it is reinforced by the fact that chapter five, under which 89 falls, nowhere refers to agreements to which the NCA does not apply.

[44] Section 1 of the NCA sets out the definitions that are applicable to the NCA. The section qualifies all definitions with the words, 'In this Act unless the context indicates otherwise'. A 'credit agreement' is defined in s 1 of the NCA as 'an agreement that meets all the criteria set out in section 8'. Section 8 enumerates a lengthy list of transactions. There is no dispute that the loan agreement in question falls within the criteria set out in s 8. It is neither in dispute that Slip Knot was not registered as a credit provider in terms of s 40(1) of the NCA nor that the challenged transaction exceeded the threshold amount prescribed in terms of s 40(1)(*b*) of the NCA.

[45] Ex facie the NCA, Slip Knot was not required to be registered in terms of s 4 but may be required to apply for registration as a credit provider in terms of s 40. Both the court of first instance and the full

court reconciled that apparent conflict by reference to the words 'In this Act unless the context indicates otherwise' with which s 1 begins. This is the correct approach. See *Amalgamated Packaging Industries Limited v Hutt*.[24] The fact that s 89(2)*(d)* of the NCA stipulates both (i) non-registration as a credit provider and (ii) the qualification that the NCA requires that particular credit provider to be registered, in order for a credit agreement to be void, gives further impetus to the construction that non-registration is not necessarily fatal to the provision of credit. The reference to 'credit agreements' in s 40(1) necessarily must be restricted to include only those agreements which are subject to the NCA or to which the NCA otherwise extends application.

[46] Mr Burger, who appeared for the sureties, conceded that not every person who lends money in excess of R500 000 has to be registered as a credit provider. The example, during argument, of the benevolent uncle lending money to his nieces and nephews to buy houses for themselves in different parts of the country, put paid to any notion that good sense required willy-nilly an interpretation in favour of obligatory registration for all who lend money in excess of R500 000, no matter what the circumstances may be.

[47] The appeal on the ground that Slip Knot was not a registered credit provider in terms of the NCA must fail. The agreements in question were not void *ab initio*.

<u>The cross-appeal</u>

[48] As the full court correctly observed, clause six refers, in terms, to the payment of R17 million, as 'interest' no less than five times (even

[24] *Amalgamated Packaging Industries Limited v Hutt & Another* 1975 (4) SA 943 (A) at 949H.

though it also refers to it as a payment for net profit in the development). The word ‘interest’ is also used in clause 1.1.5 when referring to this sum as ‘the total amount accrued in interest in terms of clause six. Clause six provides that the payment is due, even if, as so happened, there was no profit arising from the venture. The full court correctly found that, upon a proper reading of clause six, it referred, without rectification, to interest claimed by Slip Knot and not to profit share.

[49] I agree with Wallis JA that the full court was incorrect in placing reliance upon the accessory nature of a suretyship agreement as the reason for limiting the amount of interest that could be recovered to R12 million, being the amount of the capital sum which had been lent to the borrower. In *Millman v Masterbond Participation Bond Trust* [25], Friedman JP and Farlam J , after a comprehensive review of the common law authorities, held that where, as in this case, sureties had renounced the benefit of excussion, a creditor has an unqualified election whether to sue the principal debtor or the surety and may do so directly.[26] The fact that a surety’s obligation is accessory does not have the consequence that it is contingent.[27] What is relevant is not whether or, if so, when the creditor sued the principal debtor but whether, as matter of law, it could at any time material to the litigation, have done so.

[50] Slip Knot invoked *Standard Bank of SA Limited v Oneanate Investments (Pty) Ltd (in liquidation)*[28] in support of its arguments. Zulman JA, who delivered the judgment of the court in *Oneanate*,

---

[25] *Millman and another NNO v Masterbond Trust Managers (Pty) Limited (under Curatorship) and others* 1997 (1) SA 113 (C)
[26] Ibid at 116B-123C.
[27] Ibid at 122C.
[28] *Standard Bank of SA Limited v Oneanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA) at 828C-E and 834B-D.

observed that the *in duplum* rule is concerned with public interest.[29] Having accepted that interest is 'the life-blood of finance', he decided that the application of the rule should be relaxed to the extent that it was suspended *pendente lite*.[30] In *Oneanate* this court held that 'once judgment has been granted, interest *may* run until it reaches double the capital amount outstanding in terms of the judgment' (The emphasis is my own).[31] The mischief against which *Oneanate* was directed was a debtor's dilatoriness, which may include taking advantage of the courts' civil procedures and the law's delays to avoid the prompt payment of a debt that was obviously due.[32]

[51] *Oneanate* was concerned with an ordinary unpaid banker's overdraft.[33] The case was decided before the repeal of the Usury Act 73 of 1968 in terms of s 172(4)*(a)* of the NCA. Section 2(1)*(a)* of the Usury Act provided for the regulation of 'the annual finance charge rate' (largely coextensive with interest) by a 'money lender' under the direction of the Minister by notice in the *Gazette.* The definition of a 'money lender' in terms of s 1 of the Usury Act was widely cast to include any person granting a loan for a 'money lending transaction' which was, in turn, broadly defined as meaning 'any transaction which, whatever its form may be, and whether or not it forms part of another transaction, is substantially one of money lending.' It is reasonable to suppose that, until the coming into operation of the NCA, the collective consciousness of the general public was that interest rates were controlled across-the-board in South Africa. At the time when *Oneanate* was

---

[29] At 834B.
[30] At 834D..
[31] At 834H.
[32] See at 834B-E.
[33] See at 816J.

decided, the kind of issues with which the courts have been grappling since the coming into operation of the NCA were not on the horizon.

[52] Slip Knot put its confidence in *African Dawn Property Finance (Pty) Limited v Dreams Travel and Tours CC*[34] to submit that the courts must be careful not to let their subjective views interfere with a bargain deliberately entered into between parties dealing at arm's length with one another, even though the rate of interest may be high. The *African Dawn* case dealt with the rate of interest, not the capping thereof in terms of the *in duplum* rule. In this case there has been no interference with the rate. That point has not even been argued. It has been accepted throughout that 'mezzanine funding' involves high risk and therefore attracts high rates of interest.

[53] Having had the benefit of reading Wallis JA's judgment in this matter, I remain of the view that it cannot have been the intention of the court in *Oneanate Investments* to enfeeble the *in duplum* rule almost entirely. As Lord Steyn said in *R v Secretary for the Home Department, ex parte Daly,*[35] 'In law, context is everything'. This was approved by this court in *Aktiebolaget Hässle and Another v Triomed (Pty) Ltd.*[36] Similar views were expressed by Harms DP in *KPMG Chartered Accountants (SA) v Securefin Limited and another.*[37] The context of *Oneanate* was an ordinary commercial overdraft.[38] 'Mezzanine funding' is, in the words of Slip Knot itself, a niche market: useful though it may be, it performs a different role from that of the banks. The money which

[34] *African Dawn Property Finance (Pty) Limited v Dreams Travel and Tours CC & Others* 2011 (3) SA 511 (SCA).
[35] [2001] 3 All ER 433 (HL) at 447 a.
[36] 2003 (1) SA 155 (SCA) at para [1]
[37] *KPMG Chartered Accountants (SA) v Securefin Limited and another* 2009 (4) SA 399 (SCA) para39.
[38] See at 834E.

the banks lend is derived from the deposits therewith of the general public; the funding for 'mezzanine' loans arises from speculative investments.

[54] *LTA Construction Beperk v Administrateur Transvaal*[39] remains unaltered with regard to the retention in our law of the *in duplum* rule.[40] The *in duplum* rule remains the standard, the benchmark, the yardstick, the mainstay by which to test the capping of interest.[41] As this court said in *LTA Construction*, the *in duplum* rule fulfills a valuable role and a vital economic function.[42] The court quoted Ulrich Hüber as saying, inter alia; '*ne homines augusta et inclinata re destruantur*',[43] the law is not there to destroy people with a grim and sanctimonious self-righteousness. It is not creditors alone who deserve the law's saving hand: debtors may also qualify. The *in duplum* rule operates to mitigate a 'domino effect' whereby one debtor's insolvency triggers another, creating a spiral of economic misfortune with deleterious consequences for society including the loss of jobs. A relevant factor, when it comes to 'mezzanine funding', is that by its very nature – the lending being short term – a debtor's default will very quickly become apparent. In consequence thereof a creditor should quickly be able to obtain judgment either before or soon after the *in duplum* rule caps the interest.

[55] As Zulman JA remarked in *Oneanate*: 'A creditor can control the institution of litigation and can, by timeously instituting action, prevent

---

[39] *LTA Construction* at 482B-83B.
[40] *LTA Construction* at 482H; *Nedbank Limited v National Credit Regulator* 2011 (3) SA 581 (SCA) para 36.
[41] Ibid.
[42] *LTA Construction* at 482H.
[43] *LTA Construction* at 482H; Ulrich Hüber *Praelectionum Juris, Romani et Hodierni, Pars III* (1725) 22.1.28.

prejudice to the debtor and the application of the rule.'[44] When it comes to 'mezzanine funding', prompt action by a creditor to recover the debt, together with interest, has to be incentivised: the public interest in proceeding speedily with litigation for the recovery of debt due is not merely to discourage debtors from ensuring that a *litis* is *pendens* for as long as possible; potential prejudice to the debtor is a relevant factor too. A residual discretion must remain for a court, in appropriate circumstances, to apply the *in duplum* rule in the traditional manner. When it comes to 'mezzanine funding' in cases where a debtor has been 'playing for time', the suspension of the *in duplum* rule, as envisaged in *Oneanate*, may come into operation.

[56] The sureties for a loan of R12 million, if they were to pay today, would have to pay an amount of the order of R72 million, if the order of the court of first instance were to stand. That cannot be correct, especially in the light of the appellant's tender. The order which Wallis JA envisages, although less crippling than that sought by Slip Knot, would remain inordinately onerous. I come to this conclusion notwithstanding the fact that the prohibition in Roman and Roman-Dutch law against 'interest on interest' has become obsolete.[45]

[57] It is appropriate in this case for a court to exercise a discretion which will have the consequence that the *in duplum* rule is applied in the traditional way. I arrive at the same conclusion as the full court, albeit by a different route.

---

[44] At 834D-E.
[45] See *Davehill (Pty) Limited and others v Community Development Board* 1988 (1) SA 290 (A) at 298G-H.

[58] The complexity of the issues and the magnitude of the quantum have justified the costs of two counsel. I should have dismissed both the appeal and the cross-appeal with costs.

N P WILLIS

JUDGE OF APPEAL

APPEARANCES:

For the Appellant:	W G Burger SC (with him J C Swanepoel)
Instructed by:	
	Joubert Attorneys, Strand
	c/o McIntyre & Van der Post, Bloemfontein
For the Respondent:	R Stockwell SC (with him, J F Pretorius)
Instructed by:	
	Sim & Botsi Attorneys, Johannesburg
	c/o Lovius Block, Bloemfontein