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, if 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 aforegoing 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.

W.G. BURGER S.C.

J.C. SWANEPOEL
COUNSEL FOR APPLICANTS

CHAMBERS
CAPE TOWN
8 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 HEADS OF ARGUMENT

A INTRODUCTION

[1] Presently before court is an application for leave to appeal against a judgment and order of the Supreme Court of Appeal. The application for leave to appeal is by and large premised on three questions, all of which require a decision by this court. These three questions may be summarised as follows:-

(1.1) The first question on appeal is whether the respondent, Slip Knot Investments 777 (Pty) Ltd (hereinafter “Slip Knot”) is required to register as a credit provider in terms of the National Credit Act[1] (hereinafter "the NCA"). Should this question be answered in the affirmative, then a further but related question arises for decision, namely, what effect, if any, does Slip Knot's failure to register as a credit provider in terms of the NCA has on its right to claim payment from the applicants (hereinafter “the Paulsens”) in circumstances where the subject loan agreement does not fall within the ambit of the NCA.

[1] Act 34 of 2005.

(1.2) 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)**[2] was correctly decided. This is an issue which was not previously raised nor ventilated in any of the courts below.

(1.3) 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.

[2] We propose to deal *ad seriatim* with each of the above questions. However and before we do so, it may be convenient to briefly summarise the salient facts leading up to the questions presently before court.

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[2] 1998 (1) SA 811 (SCA).

B BACKGROUND FACTS

[3] During July 2006 the principal debtor, a company known as Winskor 139 (Pty) Ltd (hereinafter "Winskor"), and Slip Knot entered into a written loan agreement.[3] In terms of the loan agreement the parties agreed that Slip Knot would loan and advance an amount of R12 million to Winskor. At the time, and pursuant to the conclusion of the loan agreement, Mr Paulsen, Mrs Paulsen and two trusts – the Paulsen Family Trust and the Keurbos Beleggings Trust (hereinafter "the Paulsen Trust" and "the Keurbos Trust" respectively) – all executed deeds of suretyship in terms of which they bound themselves, *in solidum*, for the due and punctual performance by Winskor of its obligations towards Slip Knot.

[4] Following upon Winskor's failure to repay the loan and it having breached the terms of the aforementioned loan agreement, Slip Knot caused an application to be issued in which it sought payment from the sureties. The said application was launched under Western Cape High Court case number 26398/09 (hereinafter "the money judgment application"). This is the matter presently before

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[3] Volume 1 at p 6 to 18.

this court. In the money judgment application, Slip Knot sought judgment against the Paulsens, the Paulsen Trust and the Keurbos Trust. Judgment was sought on the strength of deeds of suretyship which the aforementioned parties had signed in favour of Slip Knot. Although Winskor was cited as a party in the money judgment application, no relief, as such, was sought against Winskor.

[5] We interpose to mention that, by the time when the money judgment application had been launched, there was an application pending before the Western Cape High Court in which another creditor of Winskor sought the winding-up of the affairs of Winskor. Prior to it issuing the money judgment application, Slip Knot also launched a liquidation application under case number 26257/09 (hereinafter "the liquidation application"). It is *inter alia* by reason of the aforesaid two pending winding-up applications that Slip Knot, at that stage, deemed it appropriate not to seek any relief against Winskor in the money judgment application. In the liquidation application, Slip Knot sought that the affairs of Winskor be wound-up on the grounds that Winskor is deemed to be unable to pay its debts. The liquidation application was enrolled for hearing during August 2010.

[6] However, and prior to the hearing of the liquidation application, settlement negotiations were entered into between Slip Knot and Winskor. These discussions eventuated in a written deed of settlement (hereinafter "the settlement agreement") being concluded. The settlement agreement was subsequently made an order of court on 17 August 2010. It was made an order of court both in the liquidation application as well as in the money judgment application.

[7] Following upon the conclusion of the settlement agreement, the parties attempted – for more than a year – to implement and give effect to the terms of the settlement agreement. They did so without success. The failure by the parties to implement and give effect to the settlement agreement led to a third application being launched. This application was launched by Winskor, the Paulsen Trust, the Keurbos Trust and the Paulsens under Western Cape High Court case number 16823/11 (hereinafter “the urgent application”). In their notice of motion they sought an order declaring the settlement agreement to be null and void. In addition they sought that the orders of court, in terms of which the settlement agreement was made orders of court, be set aside.

[8] The urgent application was initially opposed by Slip Knot. However, and by virtue of the lapse of time during which the parties attempted to implement the settlement agreement, Slip Knot – in order to bring matters to a head – relented by consenting to the settlement agreement being declared null and void. In response to the urgent application, Slip Knot launched a counter application. In its counter application, Slip Knot again sought that the affairs of Winskor be wound-up. In addition, an order was sought that the estates of the two trusts and the Paulsens be sequestrated (hereinafter "the counter application"). Slip Knot's decision to bring a new application for the winding-up of the affairs of Winskor, rather than by proceeding with the initial liquidation application, was premised thereon that the initial liquidation application had, for all practical purposes, been rendered stale.

[9] The urgent application and the counter application were set down for hearing on 22 November 2011. By reason of the settlement agreement being set aside, Slip Knot in addition decided to persist in seeking a judgment in pursuance of the money judgment application.

[10] On 24 February 2012, the Honourable Mr Justice Blignault granted a monetary judgment against the Paulsens and Winskor in the money judgment application. The judgment granted against Winskor was granted in error and this was later corrected by Blignault J on 16 May 2012. The liquidation application was dismissed with costs by Blignault J.

[11] Since the handing down of judgment by the court of first instance, Slip Knot has caused a new money judgment application to be issued against Winskor. In this application – issued under Western Cape High Court case number 12625/2012 – Slip Knot seeks repayment of the loan amount, its profit share and interest from Winskor. This application is at present still pending. Winskor, in that application, raises similar defences to those which presently serve before this court.

[12] The conclusion of the written loan agreement, entered into between Slip Knot and Winskor, is not in issue for purposes of the present proceedings. Similarly, the terms of the loan agreement are not in issue. The parties are furthermore *ad idem* that deeds of suretyship were duly executed by the Paulsens on the terms as

evidenced in the deed of suretyship.[4] It is also not in issue that an amount of R12 million was duly lent and advanced by Slip Knot to Winskor and that neither the capital amount of the loan nor any interest thereon (including the profit share) has been paid to Slip Knot. It is in fact common cause that no payments whatsoever have been made to Slip Knot by either Winskor or any of the sureties.

[13] Against the aforesaid backdrop we now turn to the three questions for decision.

C THE VALIDITY OF THE LOAN AGREEMENT

[14] Turning to the question whether Slip Knot is required to register as a credit provider in terms of the NCA, we, at the outset, emphasise that Slip Knot's business model does not allow for it to involve itself in business transactions or the conclusion of credit agreements which fall within the purview of the definition of "credit agreement" or "credit transaction" as defined in the NCA.

[15] In the judgment of the Supreme Court of Appeal there was a difference in approach between Wallis JA and Willis JA. Irrespective

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[4] Volume 1 at p 19 to 30.

of their differences as to the correct approach on the question whether the credit agreement *in casu* is valid or not, they both arrived at the same conclusion. In our submission it matters not from which side a court approaches the question – both approaches lead to the same conclusion. For present purposes we do not propose to elaborate on the two approaches but rather focus on what we will call the main argument and the alternative argument.

C1. THE MAIN ARGUMENT

[16] The duty to register as a credit provider is to be found in section 40(1) of the NCA. The section reads 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).*"[5]

[17] In our submission a restrictive interpretation of section 40 is called for. We submit that the words *"credit agreements"*, used by the legislature in section 40(1), should, by definition, be restricted to include only those credit agreements which are subject to or to which the NCA finds application.

[18] That a restrictive interpretation and not an extensive or wide interpretation – as is contended for by the Paulsens – is called for appears *inter alia* from the purpose behind the NCA. The purposes of the NCA is set out in section 3 of the Act, which provides that:-

> "*The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers…*"

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[5] At present the threshold has been set at R500,000,00. See section 42(1) of the NCA read with Government Notice 713 published in Government Gazette 28893 dated 1 June 2006.

[19] We submit that, requiring of mezzanine funders, who only do business outside the ambit of the Act, to register as credit providers, will not promote or advance the *"social and economic welfare"* in South Africa nor will it promote an *"effective and accessible credit market"*. In our submission, any requirement that credit providers, who trade outside the ambit of the NCA, should register, will not serve any of the purposes of the NCA, but may well stifle an effective and accessible credit market for property developers.

[20] Section 2(1) of the NCA in fact echoes that the Act must be interpreted in a manner that would give effect to the provisions of the NCA.[6] The NCA, we submit, is directed at regulating certain levels or categories of the credit market and industry. That having been said and following upon the remark that the NCA is not the "*best drafted Act of parliament which was ever passed*", Malan JA held that *"(t)he interpretation of the NCA calls for a careful balancing of the competing interest sought to be protected, and not for a consideration of only the interests of either the consumer or the credit provider"*.[7]

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[6] See **National Credit Regulator v Opperman and Others** 2013 (2) SA 1 (CC) par [19] at p 10.

[7] See **Nedbank Ltd and Others v National Credit Regulator** 2011 (3) SA 581 (SCA) par [2] at p 585B-C; **Sebola and Another v Standard Bank of South Africa and Another** 2012

[21] The requirements for registration, we submit, are directed at identifying and collecting information of the relevant role players who trade within the ambit of the NCA. Registration is necessary in order for the Regulator[8] to better police and achieve the purpose intended by the legislature when enacting the NCA. Bearing in mind the purpose of the NCA and the intention of the legislator behind the establishment of the office of the Regulator, the question arises: why should credit providers, who do not venture into the playing fields of the NCA, be required to register as credit providers in terms of the NCA? Requiring those credit providers, who only transact outside the parameters of the NCA, to register, would serve no legislative or other purpose. We emphasise that none of Slip Knot's business or related affairs fall within the jurisdiction of the Regulator or that of the NCA.

[22] Whilst we readily concede that the object of the NCA "*is to prevent the exploitation of the public by credit providers*", the public, in the context of the NCA, is the general everyday member of the public, being the public at large. The provisions of the NCA, we

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(5) SA 142 (CC) par [40] at p 153; See also Gautschi AJ in **Starita v Absa Bank Ltd** 2010 (3) SA 443 (GSJ) at par 18.9.

[8] Both the National Credit Regulator as well as the Provincial Credit Regulator.

submit, are however limited to those members of the public who require protection, but not juristic persons venturing into the open ocean.[9] Accordingly, a requirement that all credit providers register will be meaningless and is, in our submission, not required. We submit that the NCA is directed at protecting only those consumers who enter into credit agreements which fall within the ambit of the NCA. It is for purposes of policing those transactions that creditor providers - who do business within the purview of the NCA – are required to register. In our submission, the legislature never intended a blanket registration of all credit providers, nor does it require that credit providers, who conclude credit transactions to which the provisions of the NCA do not apply, should be registered for purposes of section 40.

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[9] Sections 4(1)(a), 4(1)(b) and 4(2)(c) of the NCA; see also **Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd and Another (No 1)** 2010 (1) SA 627 (C) where the court, with reference to **Harksen v Lane NO and Others** 1998 (1) SA 300 (CC), held at par [25] that *"(t)here can be no doubt that there is a rational connection between the differentiation created by the relevant provisions of s 4 of the National Credit Act and the legitimate governmental purpose behind its enactment. I have not been persuaded, on a balance of probabilities, by the defendants, who bear the onus in this regard, that any differentiation or discrimination, even if it exists, is unfair. I have not been persuaded that the first defendant's exclusion from the protection of the relevant sections of the Act has any negative effect on it."* Leave to appeal the aforesaid was refused by both the Supreme Court of Appeal and the Constitutional Court. See further **Standard Bank of South Africa Ltd v Hunkydory Investments 188 (Pty) Ltd and Others (No 2)** 2010 (1) SA 634 (WCC) par [3] at p 637 and par [6] at p 638.

[23] Section 40, we submit, should in addition be read in conjunction with section 4 of the NCA. That being the approach, the interpretation of the words *"credit agreements"*, as used in section 40(1), is to be construed and limited to credit agreements to which the NCA applies.[10]

[24] In furthering our argument, we also draw attention to section 5(1) of the NCA, which excludes lenders, entering into incidental credit agreements, from the requirement to register as credit providers. Those lenders need not register despite the fact that the NCA finds application to those agreements – albeit limited to only those portions of the NCA mentioned in section 5(1). We submit that, in circumstances where the legislator exempted providers of incidental credit from the requirement to register, so much the more it would be the legislator's intention to exempt credit providers who transact outside the provisions of the NCA from registering.

[25] A distinction stands to be drawn between the exemptions provided for in terms of the NCA, exempting persons or transactions

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[10] See also section 89(2)(d) of the NCA, which suggest that not all credit providers are required to be registered.

from the provisions of the NCA and the limited application of the NCA. For example:-

(25.1) Transactions where the borrower to a loan agreement is a juristic person with an annual turnover or asset value exceeding R1 million or where the borrower enters into a large agreement[11] are excluded or exempted from the provisions of the NCA. Those agreements are exempted and are thus not considered as credit agreements "*to which the Act applies*".

(25.2) The provisions of the NCA is also of limited application. The NCA *inter alia* has limited application to incidental credit agreements. This is specifically provided for in the NCA.[12]

[26] The learned authors to Guide to the National Credit Act,[13] rightly confirm that "*(t)he National Credit Act has limited application to incidental credit agreements, credit guarantees, pre-existing*

[11] Any transaction above the threshold of R250 000,00. See section 4(1)(b) read with section 9(4) and section 7(1) of the NCA. See further sections 5 and 6 of the NCA.

[12] **JMV Textiles (Pty) Ltd v De Chalain Spareinvest 14 CC & Others** 2010 (6) SA 173 (KZD) later confirmed by the Full Bench of the South Gauteng High Court in **Renier Nel Inc & Another v Cash On Demand** (KZN) (Pty) Ltd 2011 (5) SA 239 (GSJ) per Willis J (Satchwell and Monama JJ concurring).

[13] Otto JM *et al* **Guide to the National Credit Act**.

agreements, and all agreements in which the consumer is a juristic person."[14] The reference to *"juristic person"* is a reference to "*small*" juristic persons – i.e. legal entities with an asset value or annual turnover below R1 million. This much is evident from a subsequent paragraph, where the authors further opine that "*(a)s stated in paragraph 4.3 above, the National Credit Act seeks to protect, in addition to natural persons, only small juristic persons who enter into small or intermediate credit agreements.*"[15]

[27] Turning to the nature of the credit agreement, the authors continue by stating that "*(t)he first enquiry in determining the scope of application of the Act should always be whether the Act applies to the agreement or whether the agreement is exempted from the application of the Act. Only once it is established that an agreement is a credit agreement to which the Act applies should the provisions limiting the extent to which the Act applies to that credit agreement be considered*"[16] and *"... a credit provider need be registered only if its*

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14 **Guide to the National Credit Act** *supra* par 4.4 at p 4-6.
15 **Guide to the National Credit Act** *supra* par 4.4.2 at p 4-8.
16 **Guide to the National Credit Act** *supra* par 4.4 at pp 4-6 to 4-7.

credit agreements (other than incidental agreements) exceed a certain threshold."[17]

[28] It is thus not surprising that the learned authors, under the heading "*Duty to Register*", conclude that "*(n)ot every person who grants credit is required to be registered as a credit provider in terms of the Act*"[18], "*(t)hresholds and exemptions apply, the effect of which is that a person who grants credit only occasionally and in small amounts need not register*".[19] "*It seems logical and in keeping with the objects of the Act that only credit agreements to which the Act applies should be included in this total*"[20], as "*(i)t stands to reason that only credit agreements to which the Act apply should be taken into account when determining whether a person is required to register as a credit provider*."[21]

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17 **Guide to the National Credit Act** *supra* par 5.1 at p 5-1. The thresholds are set out in s 40(1)(a) and (b).

18 See **Guide to the National Credit Act** *supra* par 5.2.2.1 at p 5-2. In par 5.1 at p 5-1 of the **Guide to the National Credit Act**, *supra*, the learned authors write *"A credit provider who is exempt from registration (that is, who does not meet the requirements set out in section 40(1)) is still subject to the provisions of the Act."* It is submitted that the learned authors refer to "smaller"' juristic persons as "larger" juristic persons are fully excluded from the provisions of the NCA as mentioned above.

19 **Guide to the National Credit Act** *supra* par 5.2.2.1 at p 5-2.

20 **Guide to the National Credit Act** *supra* footnotes 12 and 13 at p 5-3.

21 **Guide to the National Credit Act** *supra* par 5.2.2.1 at p 5-4 (second paragraph).

[29] The fact that an agreement with a borrower, who falls within the definition of a *"large juristic person"*,[22] is exempted from the provisions of the NCA, means, by necessary implication, that a credit provider who conclude agreements only with large juristic persons are similarly exempted from the provisions of the NCA. We submit that credit providers whose business model is limited to the above category are not required to register as credit providers in terms of section 40 of the NCA. As previously submitted, any requirement for registration as a credit provider would be a futile exercise in circumstances where the credit provider does not do business or enter into transactions which fall within the ambit of the NCA.

C2. THE ALTERNATIVE ARGUMENT

[30] As an alternative to the aforesaid, and even should the court conclude that Slip Knot is required to register as a credit provider for purposes of section 40 of the NCA, we submit that 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

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[22] That is juristic persons with an asset value or annual turnover in excess of R1 million.

provider to be registered – do not find application to the agreement *in casu*.

[31] We firstly emphasise the words *"and this Act requires that creditor provider to be registered"*.[23] The words, we submit, not only confirm our earlier argument that not all credit providers are required to be registered, but also render unlawful only those credit agreements to which the NCA finds application. The provisions of section 89, we submit, cannot be said to apply to all credit agreements. The reference to credit agreements in section 89, we submit, is limited and caters only for those credit agreements to which reference is made in section 4.

[32] Accordingly, section 89 confirms that not all credit providers are required to be registered. It further provides for an exemption in as much as only those credit agreements to which the NCA applies will be hit by the prohibition and the resultant unlawfulness and voidness provided for in section 89.

[33] In the circumstances the court of first instance, the Full Bench and the Supreme Court of Appeal correctly held that:-

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[23] Section 89(2)(d) of the NCA.

(33.1) the loan agreement falls within the category of credit agreements which are excluded from the NCA as provided for in section 4(1) of the NCA;[24] and

(33.2) the loan agreement is valid and that the Paulsens' defence, attacking the validity of the loan agreement, stands to be dismissed.

[34] This concludes the first question referred to in paragraph (1.1) above. We propose to now deal with the two arguments raised with reference to the *in duplum* rule.

D THE ONEANATE PRINCIPLE

[35] There are a few milestones in the application of the *in duplum* rule in the South African Law. One such milestone is when the

[24] The record indicates that the annual turnover of Winskor exceeds the threshold as prescribed by the NCA: see par 2.4 of the respondent's statement of factual findings in Vol 1 at pp 39-40 read with annexures "R3.1" and "R3.2" in Vol 1 at pp 61-63.

Roman-Law principles, underscoring the *in duplum* rule, were authoritatively confirmed as being part of our law.[25]

[36] In **Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)**,[26] the Supreme Court of Appeal was called upon to consider the application of the *in duplum* rule after summons had been issued. Rather than attempting to rephrase what the court found, it is deemed more expedient to quote *in extenso* the following regarding the applicability of the *in duplum* rule:-

> *"It might at this stage be helpful to repeat the justification for the in duplum rule. (There is a useful collection of authorities in the judgment of Boruchowitz J in Leech's case supra at 313C—314D.) It appears as previously pointed out that the rule is concerned with public interest and protects borrowers from exploitation by lenders who permit interest to accumulate. If that is so, I fail to see how a creditor, who has instituted action can be said to exploit a debtor who, with the assistance of delays inherent in legal proceedings, keeps the creditor out*

[25] **LTA Construction Bpk v Administrateur, Transvaal** 1992 (1) SA 473 (A).
[26] 1998 (1) SA 811 (SCA).

of his money. No principle of public policy is involved in providing the debtor with protection pendente lite against interest in excess of the double. Since the rule as formulated by Huber does not serve the public interest, I do not believe that we should consider ourselves bound by it. A creditor can control the institution of litigation and can, by timeously instituting action, prevent the prejudice to the debtor and the application of the rule. The creditor, however, has no control over delays caused by the litigation process."[27] [emphasis added]

"If one accepts that interest and indeed compound interest is 'the life-blood of finance' in modern times I am of the opinion that one should not apply all of 'the old Roman-Dutch law to modern conditions where finance plays an entirely different role' (per Centlivres CJ in Linton v Corser 1952 (3) SA 685 (A) at 695H)."[28]

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[27] At 834B-E. We emphasise that it is the service of legal action which suspends the operation of the *in duplum* rule and not *litis contestatio* as seemingly suggested in the applicants' heads of argument.

[28] At 834F.

> *"Once judgment has been delivered the question again arises as to what the public interest demands. It is arguable that the creditor is in duty bound to execute and bring to a close the further accumulation of interest. That can be achieved by accepting the approach adopted in the Commercial Bank case supra at 300G-I that interest on the amount ordered to be paid may accumulate to the extent of that amount, irrespective of whether it contains an interest element. This would then mean 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 run until it reaches the double of the capital amount outstanding in terms of the judgment."*[29]

[37] The *in duplum* rule, insofar as it may be applicable, only applies in respect of interest accruing up to an including the date when the application for the payment of the capital sum, interest and the share in profits was served. Thereafter further interest accumulates, which in law, may exceed the *in duplum*. This was

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[29] At 834G-I.

indeed the approach which the majority of the Supreme Court of Appeal, per Wallis JA, followed.

[38] In his minority judgment, Willis JA proverbially speaking, set the cat amongst the pigeons by relying on what would be "inordinately onerous".[30] It would seem that Willis JA may have been influenced by the conditional tender which had previously been made. The interest rate provided for in the loan agreement cannot be said to be extortionate.[31] In those circumstances it can hardly be said that the terms of the loan agreement, specifically those dealing with interest, are *contra bonos mores*.[32] After all, the onus of proof rests on the Paulsens to show that the terms of the loan agreement are *contra bonos mores*. To this extent, it is submitted that the Paulsens have dismally failed to place any evidence before the court in support of their contention that the terms of the loan agreement are *contra bonos mores*. We reiterate that the applicability of the rule, as pronounced upon in **Oneanate,** was never previously raised by the

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30 See par [56] of the SCA judgment at p 148.

31 See **Reuters v Yates** 1904 TS 855 at 857 per Innes CJ; see also **Rosenfels v Botha** 4 SAR 1; **Dayson v Ruthven** (1860) 3 Searle 282; **Merry v Natal Society of Accountants** 1937 AD 331 at 336.

32 **African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC and Others** 2011 (3) SA 511 (SCA).

Paulsens as an issue. It is only now that the Paulsens for the first time, raise this issue in their application for leave to appeal.

[39] It needs to be emphasised that the parties to the loan agreement are all experienced businessmen who enjoyed equal bargaining powers when the loan agreement as well as the deed of suretyship, were negotiated and signed. It is not alleged that Slip Knot was in a better bargaining position, nor is it alleged that the Paulsens were misled or coerced into signing. In the circumstances, we submit, there is no reason to deviate from the well-established *caveat subscriptor*-rule.[33]

[40] The approach to be followed, when determining whether a contractual term offends public policy – or the Constitution – was eloquently dealt with by Cameron JA in his separate, but concurring, judgment in **Brisley v Drotsky**.[34] Cameron JA held as follows:

> *"I share the misgivings the joint judgment expresses about over-hasty or unreflective importation into the field of contract law of the concept of 'boni mores'. The 'legal convictions of*

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[33] See **Burger v Central South African Railways** 1903 TS 571 at 578 – 579; See also **George v Fairmead** (Pty) Ltd 1958 (2) SA 465 (A) at 472A-C; **Afrox Healthcare (Edms) Bpk v Strydom** 2002 (6) SA 21 (SCA) at 41F-H.

[34] 2002 (4) SA 1 (SCA) par [93] at p 34 – 35.

the community' – a concept open to misinterpretation and misapplication – is better replaced, as the Constitutional Court itself has suggested, by the 'appropriate norms of the objective value system embodied in the Constitution'. What is evident is that neither the Constitution nor the value system it embodies give the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith."[35]

[41] Having regard to the nature of the transaction in question, more particularly the niche market which mezzanine funders serve and the requirements of that market, together with the demands of the general economy, we submit that the interest rate, agreed upon in terms of the loan agreement, is in the circumstances not *contra bonos mores*.[36]

[42] Ultimately a delicate balance needs to be maintained between the freedom to trade, the sanctity of contract and the general public's

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[35] At 35C-E. The aforesaid, we submit, also recognises the earlier warning sounded in **Sasfin (Pty) Ltd v Beukes** 1989 (1) SA 1 (A).

[36] **Reuter v Yates** 1904 TS 855 at 857; **Rosenfels v Botha** 4 SAR 1; **African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC and others** [2011] 3 All SA 345 (SCA); **Slip Knot Investments 777 (Pty) Ltd v Project Law Prop (Pty) Ltd and Others**.

interest.[37] The mere fact that a term may, with the benefit of hindsight, be unfair or even operate harshly, will not *per se* lead to a contract or its terms being held *contra bonos mores*. A court should be cautious to allow its own feelings and perceptions to influence its mind when interfering with what parties had contracted upon.

[43] Having digressed with the *boni mores* issue, we return to the suspension of the *in duplum* rule post service of a legal process. In the Supreme Court of Appeal, Slip Knot *inter alia* relied upon the judgment of Blieden J in **Sanlam Life Insurance v South African Breweries Limited**[38] and **Verulam Medicentre (Pty) Ltd v Ethekweni Municipality**[39] in support of the argument that clause 6 is not hit by the *in duplum* rule as *"the rule applies only to arrear interest"*.[40] The Supreme Court of Appeal rejected this argument and no cross-appeal has presently been lodged by Slip Knot. In the circumstances the reliance by the Paulsens on clause 6 and the argument that interest can only accrue where an interest rate applies – not to a lump sum – is of no assistance. By reason of the fact that

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37 See **B N Aitken (Pty) Ltd v Tam Arillo (Pty) Ltd** 1979 (4) SA 1063 (N).
38 2000 (2) SA 647 (W).
39 2005 (2) SA 451 (D).
40 Per Maya AJA in **Ethekweni Municipality v Verulam Medicentre (Pty) Ltd** [2006] 3 All SA 3225 (SCA) par [18] at p 330e.

the Supreme Court of Appeal concluded that the profit share provided for in clause 6 of the loan agreement is interest, the *duplum* was reached before the money judgment application had been issued. Accordingly, the question at hand is crisp, being whether the *in duplum* should be suspended after service of the money judgment application. Willis JA who found the interest "*inordinately onerous*", seemingly suggesting that the court has an inherent discretion to intervene in the bargain struck by parties in an attempt to achieve a less crippling effect. By so doing Willis JA opens the door for unscrupulous debtors to delay, with impunity, payment for as long as possible. They can do so by deliberately delaying the process of the court by appealing each and every judgment. Such a disregard to the rights of a creditor cannot be tolerated. We find it somewhat disconcerting that Willis JA not only disregarded the judgment of the Supreme Court of Appeal in **Ethekweni**[41] without any motivation but, in addition, failed to give any guidelines or lay down any tests which should be applied when determining whether the *in duplum* rule should be suspended or not.[42] In our submission this creates

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41 [2006] 3 All SA 325 (SCA) par [23] at p 331.

42 See paras [27] and [28] of the majority judgment of Wallis JA in Vol 2 at p 132.

treacherous ground and is a door which the court should guard against opening. Once opened, uncertainty will be certain.

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

[45] The Paulsens' contention in their application for leave to appeal to this court, that **Ethekwini Municipality**[43] rejected the **Oneanate** principle[44] and changed the operation of the *in duplum* rule is not only wrong, but seemingly not persisted with. **Ethekwini**, we submit, merely pronounced on the question whether the *in duplum* rule should find application in the circumstances of that particular case. The court did not adversely pronounce on the principles laid down in **Oneanate** but, if anything, in fact followed that judgment[45]. In the circumstances, there is no conflict between the two judgments as was suggested by the Paulsens when applying for leave to appeal.

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43 [2006] 3 All SA 325 (SCA).
44 See par 10 at p 12 of the application for leave to appeal.
45 **Ethekwini** (SCA) (supra) par [9].

E SLIP KNOT'S OMISSION TO CLAIM PAYMENT FROM WINSKOR

[46] The third and last question relates to the 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 commenced only against the surety and not against the principal debtor. The Paulsens seemingly contend that the majority judgment of Wallis JA[46] is incorrect by reason thereof that no *lis* had been commenced by Slip Knot against Winskor. It is the Paulsens' argument that, subsequent to the money judgment application having been served, the *in duplum* rule is not suspended. This, they say, is by reason thereof that no payment as such was claimed from Winskor.

[47] We firstly emphasise that the *in duplum* rule is directed at protecting borrowers from exploitation by creditors in circumstances where the creditor may deliberately permit interest to accumulate by an inaction. However, and once a claim has been instituted against

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[46] Para [23] to [31] in Vol 2 at pp 129 – 134.

the principal debtor, the *in duplum* rule is suspended and interest commences to run afresh.[47]

[48] Premised on the principle that a surety's obligation is accessory to the liability of the principal debtor, the Paulsens contend that, by reason thereof that no action for payment had been instituted against Winskor, no further interest will accrue as against Winskor. Premised on the aforesaid, the Paulsens contend that they, as sureties, are exonerated from the obligation to pay any further interest in excess of the interest which may accrue against the principal debtor.

[49] The above approach however loses sight of the fact that a surety is a co-principal debtor and 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. In our submission the operation of the *in duplum* rule is then suspended vis-à-vis the surety, albeit that this might not necessarily be the case as against the principal debtor. Ultimately it is the

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[47] **Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (In Liquidation)** 1998 (1) SA 811 (SCA) at 834B-E.

service of a legal process which causes the operation of the *in duplum* rule to be suspended. Thereafter it is in the hands of the surety, once sued, to settle the principal debt.[48] By paying the principal debt, the surety is able to avoid further interest from accruing. To hold otherwise would result in the anomaly of interest never accruing against a surety in circumstances where the principal debtor has been liquidated or sequestrated or clearly not being able to pay its debts. If the contentions of the Paulsens are held to be correct, it will have extraordinary consequences as it will result therein that a creditor, who wishes to claim payment against a surety only, will be well advised to also cite the principal debtor as a defendant even though it would eventuate in a *brutum fulmen*.[49]

F CONCLUSION

[50] In conclusion, we submit that the Paulsens' application for leave to appeal stands to be dismissed with costs, such costs to include the costs consequent upon the employment of two counsel. Similarly and should the court be inclined to grant the Paulsens leave

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48 See par [24] of the majority judgment of Wallis JA in Vol 2 at p 129.
49 See par [25] of the majority judgment of Wallis JA in Vol 2 at p 130.

to appeal, then in such an event the appeal stands to be dismissed with a similar order on costs.

[51] However, and by reason of the further delay caused by the Paulsens in seeking leave to appeal to the this court, the date 24 February 2012 in par (c) of the order of the Supreme Court of Appeal should be amended to the date when this court hands down its judgment.

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