Republic of South Africa

In The High Court of South Africa
(Western Cape High Court, Cape Town)

In the matter between | Case Number: A413/12

ANDRE FRANCOIS PAULSEN — First Appellant
MARGARETHA ELIZABETH PAULSEN — Second Appellant

And

SLIP KNOT INVESTMENTS 777 (PTY) LIMITED — Respondent

Judgment delivered on 12 February 2013

LOUW J

[1] Blignault, J heard and decided three applications together in the court a quo as the parties and the issues were closely interrelated. This appeal is brought with the leave of the court a quo against the judgment and order granted by Blignault, J on 24 February 2012, in one of those applications. There is no appeal in the remaining two applications.

[2] The first and second appellants were ordered to pay, jointly and severally, the following amounts:

(a) The capital sum of R12m;

(b) Interest of the sum of R12 000 000, 00 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 000 000, 00.

(c) Interest on the sum of R12 000 000, 00 at the rate of 3 % per month, calculated from 11 January 2010 to the date of judgment.

(d) Interest on the sum of R12 000 000, 00 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 000 000, 00.

(e) The sum of R17 000 000, 00.

(f) Interest on the sum of R17 000 000, 00 at the rate of 15, 5% per annum, calculated from the date of judgment to the date of final payment.

[3] The litigation between the parties arises from a written loan agreement concluded on 10 July 2006 between a company known as Winskor 139 (Pty) Ltd (Winskor) and the respondent, Slip Knot Investments 777 (Pty) Ltd (Slip Knot), in terms whereof Slip Knot advanced a loan of R12m for a period of one year to Winskor. At the time of the conclusion of the loan agreement the two appellants (Mr Paulsen and Ms Paulsen, or together, the Paulsens), and two Trusts, the Paulsen Family Trust and the Keurbos Trust, 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 toward Slip Knot.

[4] In terms of the loan agreement Winskor would pay the capital sum of the loan together with all accrued interest within twelve months after the commencement date. Should Winskor fail to effect payment on the due date of the capital sum and accrued interest, additional mora interest would accrue at the rate of 3% per month until the outstanding amounts are paid.

[5] Slip Knot duly advanced and paid the capital amount of R12m to Winskor on 10 July 2006. The twelve month period of the loan expired on 9 July 2007. Winskor defaulted on its obligation to repay the loan and to pay any accrued interest.

[6] Following on Winskor's default, Slip Knot issued the application (the money judgment application) now on appeal. It sought payment of the R12m capital advanced plus interest of R17m against the sureties, that is, against the Paulsens, the Paulsen Family Trust and the Keurbos Trust. At the time the money judgment application was launched, two winding up applications were pending against Winskor and it was apparently for this reason, inter alia, that although Winskor was cited as a party, Slip Knot sought no relief against Winskor in the money judgment application.

[7] The court a quo gave judgment in the three interrelated applications on the same day, 24 February 2012. In the money judgment application Blignault J granted judgment against the Paulsens, as sureties, and against Winskor as the principal debtor. Judgment against the Paulsen Family Trust and the Keurbos Trust was refused. Since no relief was sought against Winskor, the judgment granted against Winskor was granted in error and this error was later corrected by Blignault J on 16 May 2012 and on the same date, the Paulsens were granted leave to appeal to the full bench of this division.

[8] On appeal the dispute had narrowed down to two principal issues.

[9] First there is the Paulsens' all-inclusive defence that the loan agreement is invalid by reason of the fact that Slip Knot has not been registered as a credit provider under the provisions of s 40 of the National Credit Act, 34 of 2005 (the NCA).

[10] Secondly, if the defence of invalidity should not succeed, the Paulsens do not dispute that as sureties, they are obliged to pay the R12m capital amount of the loan advanced to Winskor. What is in dispute is the amount Slip Knot is entitled to recover over and above the capital amount of R12m. The Paulsens contend that by reason of the operation of the *in duplum* rule, Slip Knot cannot recover more than a further R12m in interest. In this regard two issues remain.

(a) The nature of the additional amount of R17m claimed by Slip Knot (with interest) in terms of clause 6 of the loan agreement. Slip Knot contends that this amount is not interest but an agreed share in Winskor's profits. As such, the amount of R17m is not affected by the *in* duplum rule. The Paulsens maintain that the amount is nothing but interest which is subject to the *in duplum* rule; and

(b) The proper application of the *in duplum* rule regarding the interest claim on the capital of R12m.

INVALIDITY OF THE LOAN AGREEMENT

[11] The defence of invalidity was raised in the papers in one of the other applications before the court a quo. It was not raised in the answering affidavits in the money judgment application and in that application, it was first raised in argument before Blignault, J. The issue was decided by Blignault, J in favour of Slip Knot and by reason of the appeal we are seized with the correctness of that finding.

[12] Mr Stockwell, who appeared with Mr Pretorius on behalf of Slip Knot, submitted that not having raised the point in the answering affidavits, the Paulsens were precluded from raising the defence based on the provisions of the NCA. In my view, there is no unfairness to Slip Knot in allowing the point, which is in essence a legal question, to be taken by the Paulsens, both in the court a quo and now on appeal.

[13] In deciding the issue in favour of Slip Knot, Blignault, J found that while the loan agreement fell outside the meaning of 'credit agreement' in terms of subsection 4 (1) (a) (i) and 4 (1) (b) of the NCA, it did fall within the ambit of the transactions defined as credit agreements in s 1, read with s 8. Since Slip Knot was not registered as a credit provider in terms of s 40 (1), the provisions of sections 4 and 40 contradict each other insofar as they relate to the loan agreement concluded by Slip Knot in this case. Blignault, J held that it was possible to reconcile the two provisions by giving due regard to the introductory phrase to s 1 of the NCA, 'In this Act, unless the context, indicates otherwise'. The effect of s 4 is that the NCA does not apply to the loan agreement. If credit agreement in s 40 (1) is construed as a credit agreement to which the NCA applies, the conflict is resolved and the fact that Slip Knot was not registered in terms of s 40 (1) does not affect the validity of the loan agreement.

[14] Mr Burger who appeared with Mr Swanepoel on behalf of the Paulsens submitted that the reconciliation of the two sections requires that the court go beyond a mere literal-grammatical approach. Full effect must be given to the overriding aims and purpose of the NCA which he submitted, is generally to regulate credit providers. A measure such as s 40 which is aimed at regulating credit providers should consequently be given an extensive interpretation, while a measure such as s 4 (1) (a) which in effect exclude credit consumers from the protection of the act in regard to certain credit agreements, should be read restrictively. Thus, credit agreement in s 4 (1) (a) and (b), should be given the meaning of a credit agreement which would

otherwise be valid and lawful. The validity of a credit agreement should therefore first be determined before an exemption under s 4 (1) (a) or (b) is considered. Thus it follows that if the loan agreement is invalid (as it should be) by reason of Slip Knot's failure to register in terms of s 40 (1), the nature of the consumer is irrelevant and s 4 (1) (a) or (b) does not apply.

[15] I have considered the arguments advanced on both sides in this regard. I agree with and adopt the reasoning of Blignault, J. In my view, for the reasons set out in the judgment of the learned Judge, the conclusion of the court a quo in regard to the issue of the validity of the loan agreement, is correct.

THE IMPORT OF CLAUSE 6 OF THE LOAN AGREEMENT

Clause 6 must be read in the context of the loan agreement as a whole and, in particular, the relevant parts of clauses 7 and 9, which all read as follows:

"6. **Interest**

1. 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 per centum) 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)."

7. **Amounts to be repaid**

7.1. The Borrower shall pay the capital sum or any outstanding balance thereof in cash, without deduction or set-off of any nature, within twelve calendar months of the commencement date.

7.2. Notwithstanding the above, the Borrower will be liable for further interest payments as from the seventh month following the commencement date to date of final payment, which further interest shall be calculated daily and capitalized monthly in arrears at 3% per month on the outstanding capital sum.

7.3. The further interest referred to in 7.2. shall be paid on the same date that the capital sum becomes due and payable.

9. **Default**

9.3. From the time of a default referred to in clause 9.1. until the date on which any overdue amount is paid and/or until date of repayment by the Borrower of the outstanding capital sum, in addition to the capital sum mora interest shall accrue which shall be calculated at 3% per month on the outstanding capital sum.

[16] The determining issue regarding the interpretation of clause 6 is whether the R17m is to be regarded as interest on the capital of R12m or whether it is some other agreed benefit to Slip Knot.

[17] The learned Judge a quo found that on a proper interpretation, the amount of R17m provided for in clause 6 is an agreed share in the profits and not interest on the capital sum of R12m.

[18] Mr Stockwell on behalf of Slip Knot supported the conclusion of the court a quo. The stipulation of the R17m must be seen against the background of the nature of Slip Knot's business in the niche market of mezzanine financing where funders such as Slip Knot serve the needs of those seeking large short term loans, he submitted.

[19] In my view, the plain grammatical meaning of clause 6, read in the context of the loan agreement as a whole is clear. Clause 6 expressly calls the R17m 'interest'. The word 'interest' is used not only in the heading to clause 6, but no less than five times thereafter in the same clause. Interest is used again in clause 1.1.5 to characterise the R17m as 'the total amount

accrued in interest in terms of clause 6'. In clause 7.2 it is provided that Winskor 'will be liable for further interest payments (i.e. in addition to the provisions of clause 6) as from the seventh month following the commencement date ...'

[20] There is no indication in the loan agreement that Slip Knot is involved in a joint venture with Winskor. The minimum sum of R17m is guaranteed even if there should be no profit. The agreement read as a whole shows that Slip Knot has done nothing more than lend money to Winskor. There is nothing in the factual context of the loan agreement which suggests that Slip Knot was going into a joint venture with Winskor. If any, the facts (if regard should be had to it) show that instead of determining the reward for making the loan available on the plaintiff's usual basis of 5% per month of the capital, 3 % was agreed together with a percentage of Winskor's profit with a guaranteed minimum of R17m. Clauses 6 and 7.2 amount to no more than the stipulation of the reward payable to Slip Knot in exchange for Slip Knot lending the R12m to Winskor. Clause 9.3 provides for the calculation of the amount to be paid to Slip Knot if Winskor should delay the repayment of the capital beyond the due date.

[21] It may be that interest is most often determined as a percentage of the capital advanced over a period of time, as Mr Stockwell emphasised. However, there is nothing to stop the parties from agreeing another basis for the determination of the interest to be paid to the lender. It may be a once off

agreed amount or, as in this case, a percentage of some other determinable amount, being Winskor's profit, with an agreed minimum payment of R17m.

[22] This construction of clause 6 accords with the core meaning of 'interest' in the context of money lent. The Concise Oxford English Dictionary 10th Ed (revised) gives the meaning of the word interest as ... 'money paid for the use of money lent, or for delaying the repayment of a debt.' Interest therefore, in the case of a money loan, includes all moneys, however determined, that a lender of money is entitled to in return for advancing a loan. It also includes, as is provided for in clause 9.3, the money to be paid for delaying the repayment of the debt beyond the due date for payment. It does not matter what such remuneration for a loan is called. For example, calling it 'capitalised' interest will not render it anything but interest. Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd (in liquidation) 1998 (1) SA 811 (SCA) at 828 F – 829, firmly established that 'compounding' or 'capitalisation' of interest does not result in interest losing its character as interest. The Romans were wise to the practice of disguising interest as something else. Digest 22.1.20 gives a case of the application of the principle as follows: 'It is clear that illegal interest disguised as capital is not owed, but the claim for capital is not thereby vitiated.' In LTA Construction BPK v Administrateur Tvl, 1992 (1) SA 473 (A), the court considered the Roman Law origins of the concept of interest on borrowed money and stated 'Rente (*usurae, faenus, fenus, foenus*) was geld wat vir die gebruik van die uitgeleende kapitaalsom (*sors of pecuniae creditae*) betaal word: *pro usu pecuniae creditae.*'

[23] I agree with Mr Burger's submission that Slip Knot's attempt to interpret clause 6 in a manner which would disguise the amount of R17m interest as 'profit sharing' is untenable. It is not supported by a proper construction of the loan agreement and it is in conflict with legal principle.

[24] Slip Knot did not proceed with its claim for rectification of clause 6 in the court a quo and the issue does not arise on appeal.

THE *IN DUPLUM* RULE

[25] The *in duplum* rule is a rule of positive law and prohibits the recovery of interest in excess of the capital amount of a loan. It is a rule based on public policy and cannot be waived by the debtor or excluded by agreement. See Standard Bank v Oneanate at 825 C-E. The rule does not only relate to money lending transactions but applies to all contracts where a capital amount which is subject to interest at a fixed rate, is owing. See LTA Construction v Adm. Tvl at 482 – 483.

[26] Two cases were referred to in argument. Both these cases concerned the computation of an amount to be paid by a contracting party. The computation of the amount owing involved the application of a percentage of a fixed or determinable sum, over a period. It was found in both cases that the *in duplum* rule did not apply. I discuss these cases briefly to illustrate the fact that regard must be had to the substance of the agreement to determine

whether it concerns interest in the sense described above or some agreed formula to determine some other amount payable.

[27] Sanlam Life Insurance v Smith African Breweries Ltd 2000 (2) SA 647 (WLD) is not a case which concerned a loan and interest in the sense of remuneration to be paid for the use of money advanced. The amount to be determined was not the price of making money available to a lender or the additional liability placed on a debtor for not paying what is owing on the due date (655 BC). The parties agreed a 10% interest factor as part of the formula for determining the price of an asset at any point during a period of 25 years, namely, when the owner of a property became entitled to exercise an 'option to put' the property to the other party by giving notice that it requires the other party to take transfer of the property. Once the owner exercised the option, the other party was obliged to pay the price determined by the formula, that is, by adding compound interest of 10% to the owner's initial outlay over the period in question. It is clear that the 10% is not interest in the sense of a reward for making money available to a borrower or as a penalty for a delay in paying what has become due and payable, to which the *in duplum* rule is applicable. It was no more than an agreed component in a formula which the parties agreed upon to determine the quantum of the purchase price of the asset at the time the owner exercised the 'option to put' and the purchaser was required and obliged to take transfer.

[28] The agreement regarding interest in Ethekwini Municipality v Verulam Medicentre [2006] 3 All SA 325 (SCA) was once again a component in an

agreed formula designed to determine the quantum of the amount that the seller of a property would be required to pay back to the purchaser, who had already paid a part of the purchase price, if the sale should be cancelled. Again, this was not interest in the sense referred to above and to which the *in duplum* rule properly applies.

[29] In this case, the *in duplum* rule applies to the interest agreed upon in clauses 6 and 7.2. as well as the mora interest agreed upon in clause 9.3. of the loan agreement. The interest that the plaintiff is entitled to recover under all these clauses is limited to R12m, being the amount of capital advanced.

[30] The Paulsens also appeal against the order made by Blignault, J that further interest run on the capital of R12m after 10 January 2010, being the date upon which the proceedings were instituted against the sureties. The decision is founded on the principle that the operation of the *in duplum* rule is suspended once proceedings are instituted against a debtor.

[31] Slip Knot has, however, not instituted proceedings against Winskor (the borrower and principal debtor). I agree with Mr Burger's submission that given the accessory nature of a surety's obligation, the extent of the Paulsens' obligations as sureties is dependent on the extent of the liability of the principal debtor and cannot be greater than that of the principal debtor. If Winskor is not liable for interest after 10 January 2010, the Paulsens as sureties cannot be liable for such interest. It was not suggested in argument that the continued operation of the *in duplum* rule beyond 10 January 2008 is

a defence that is personal to the principal debtor who has not been sued, and that therefore, such defence is not available to the sureties, who were sued by the plaintiff. In my view, the accessory nature of the surety's obligation is decisive. The operation of the *in duplum* rule determines the amount of the interest the principal debtor is obliged to pay. The surety is not obliged to pay more interest than the principal debtor. The suspension of the *in duplum* rule is conditional upon the institution of proceedings against the principal debtor. Until that occurs, no interest above the amount of the capital amount of the debt is owing at all. This principle is not affected by the fact that the surety is also a 'co-principal debtor' under the suretyship. See Neon and Cold Cathode Illumination v Ephron 1978 (1) SA 463 (A) at 471 C-H, Jans v Nedcor Bank Ltd 2003 (6) 646 (SCA) at 652 B-D. By operation of the *in duplum* rule, interest stopped running and accumulating against the principal debtor when it reached R12m. The operation of the *in duplum* rule is not suspended *vis-a-vis* the surety by the commencement of proceedings against the surety but not against the principal debtor. If it were otherwise, the effect would be that the accessory obligation of the surety will be to pay more than what the principal debtor is liable for. Such a result will offend against the principle that the liability of the surety does not exceed that of the principal debtor.

[32] It follows that the court a quo erred in granting judgment for interest on R12m after 10 January 2010.

[33] In the result the appeal must succeed to the extent that the Paulsens' liability is limited to the capital amount of R12m plus interest up to R12m.

[34] Although the Paulsens have had substantial success on appeal and should be awarded the costs of the appeal, the plaintiff has remained substantially successful in that the order of the court a quo must be changed from R29m to the recovery of R24m. The plaintiff is therefore still entitled to the costs in the court a quo, subject to one qualification. The learned judge ordered costs on an attorney and own client scale against the Paulsens. While there is a provision for the recovery of costs on such a scale in the loan agreement in respect of proceedings instituted against Winskor for the recovery of the debt, no such provision appears in the suretyships entered into by the Paulsens. They are not liable for such costs in proceedings instituted against them (as opposed to against Winskor). There is no other basis upon which a punitive costs order can be made against the Paulsens. It follows that the order as to costs made against the Paulsens in the court a quo must be changed to costs on the ordinary scale, as between party and party.

The following orders are made:

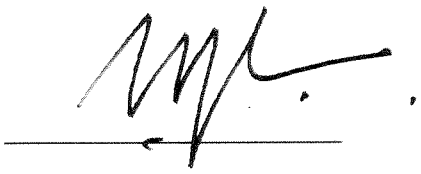
1. The appeal succeeds with costs, such costs on appeal to include the costs of two counsel.
2. The orders made by the court a quo are set aside and the following substituted orders are made:

1. The Eight and Ninth Respondents are ordered to pay, jointly and severally, the following amounts

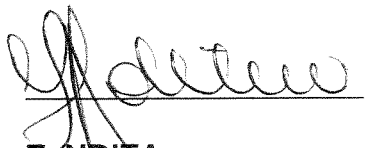
   (a) The sum of R12 million,

   (b) Interest on the sum of R12m in the amount of R12 million,

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



W.J. LOUW
Judge of the High Court



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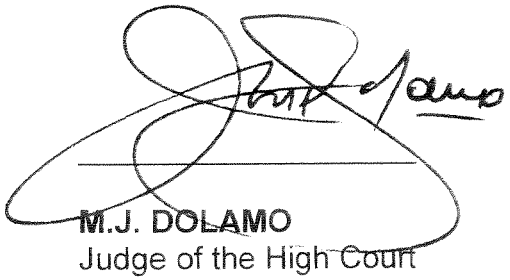

M.J. DOLAMO
Judge of the High Court