CONSTITUTIONAL COURT OF SOUTH AFRICA

Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd

CCT 61/14

Date of hearing: 16 September 2014
Date of judgment: 24 March 2015

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today, the Constitutional Court handed down a judgment defining its extended jurisdiction; determining whether a credit provider's failure to register under the National Credit Act (NCA) invalidates a loan agreement where that agreement is exempted from the operation of the NCA; and clarifying whether, once litigation has commenced, a debtor can be held liable for accumulated interest greater than the capital amount of the loan.

Winskor 139 (Pty) Ltd entered into a finance agreement with Slip Knot Investments 777 (Pty) Ltd (Slip Knot) to borrow R12 million. Mr and Mrs Paulsen (Paulsens) bound themselves as sureties in respect of Winskor's liability to Slip Knot. Winskor subsequently defaulted on its obligation to repay the loan, together with a large amount of accrued interest.

Slip Knot sued the Paulsens in the Western Cape Division, Cape Town (High Court) seeking the capital amount; interest that had accrued to R12 million at the time proceedings were instituted; additional interest that would commence from the date of institution of the proceedings; and interest on the judgment debt. The interest had at that stage been capped at R12 million by the *in duplum* rule, which caps interest at an amount equal to the outstanding capital debt. The Paulsens advanced three defences. The first was that, because Slip Knot was not registered under the NCA, the loan agreement was invalid. The second was that even if the loan agreement was valid, the amount of interest payable under it was limited to an overall total of R12 million by the *in duplum* rule. The third was that, even if the operation of the *in duplum* rule was suspended by the institution of proceedings, interest in this matter could not exceed R12 million as no proceedings had been instituted against Winskor as the principal debtor.

Slip Knot was successful in the High Court in all that it had claimed. The Paulsens appealed to the Full Court of the High Court. That Court confirmed that the Paulsens owed the capital amount, but upheld the Paulsen's third defence. Interest thus had to be capped at R12 million by virtue of the *in duplum* rule. The Paulsens appealed the finding of liability to the Supreme Court of Appeal. Slip Knot cross-appealed in respect of the disallowed interest. The Supreme Court of Appeal agreed that the Paulsens owed the capital sum and upheld the cross-appeal, thus finding that the *in duplum* rule ceases to operate once litigation commences.

Before the Constitutional Court, the Paulsens persisted with all of the contentions they had raised before the High Court. The Court produced three separate judgments. In the main judgment, Madlanga J discussed the extension of this Court's jurisdiction by the Constitution Seventeenth Amendment Act to include an "arguable point of law of general public importance". The Court found that the point must be one of law and not of fact; have some degree of merit; and must have an impact not only on the litigants, but on a significant part of the general public. Madlanga J also found that where a credit provider only enters into credit agreements exempted from the operation of the NCA, that credit provider need not register under the NCA. These findings were unanimous.

Madlanga J (Jafta J and Nkabinde J concurring) went on to hold that the longstanding *in duplum* rule should be applicable during the litigation process. He thus reversed the contrary decision of the Supreme Court of Appeal in *Standard Bank Ltd v Oneanate Investments* [1997] ZASCA 94 (*Oneanate*) because it ignored debtors' right of access to courts and other valid policy considerations and, in doing so, failed to conduct a proper balancing exercise. This rendered it inappropriate for a court to make a choice one way or the other.

In his majority concurring judgment, Moseneke DCJ (Mogoeng CJ, Leeuw AJ, Khampepe J and van der Westhuizen J concurring) supported the outcome and reasoning of the main judgment, except where the main judgment disavowed that it developed the common law by overturning *Oneanate*. He found that the main judgment made a mistake in reasoning that the separation of powers precluded it from adapting the common law in this case, as the *in duplum* rule is a common law norm that has always been under the oversight of the courts, and its development thus will not encroach on any exclusive terrain of the legislature.

In a dissenting judgment on one point only, Cameron J affirmed the interpretation of the common law in *Oneanate*. He found that the purpose of the *in duplum* rule is to protect debtors from creditors who allow interest to run without taking steps to recover the debt. However, where a creditor institutes litigation, a debtor will be vindicated by a valid defence, or by paying the debt. As the Paulsens had freely entered into the agreement, there was no reason to interfere with it once litigation had commenced.

In the result, leave to appeal was granted and the appeal upheld only to the extent that the accrued interest may not exceed the outstanding capital debt. There was no order as to costs.