

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 61/14

In the matter between:

ANDRÉ FRANCOIS PAULSEN First Applicant

MARGARETHA ELIZABETH PAULSEN Second Applicant

and

SLIP KNOT INVESTMENTS 777 (PTY) LIMITED Respondent

Neutral citation:	*Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5
Coram:	Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Nkabinde J and Van der Westhuizen J
Judgments:	Madlanga J with Jafta J and Nkabinde J concurring (main judgment): [1] to [102] Moseneke DCJ with Mogoeng CJ, Khampepe J, Leeuw AJ and Van der Westhuizen J concurring (concurring judgment): [103] to [119] Cameron J (dissenting judgment): [120] to [150] Order: [102]
Heard on:	16 September 2014
Decided on:	24 March 2015
Summary:	arguable point of law — general public importance — ought to be considered — National Credit Act 34 of 2005 — obligation to register as credit provider — excluded credit agreements — *in duplum* rule — development of common law — public policy

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the Western Cape High Court, Cape Town):

1. Leave to appeal is granted.
2. The orders made by the Western Cape High Court, Cape Town on 24 February 2012 and 12 February 2013 are set aside.
3. The appeal against the order of the Supreme Court of Appeal is upheld only to the extent reflected in paragraph 4 below.
4. The applicants are ordered to pay to the respondent, jointly and severally—
    (a) the sum of R12 million;
    (b) interest on that sum at the rate of 3% per month calculated from 21 July 2007 to 10 January 2010, up to a total of R12 million;
    (c) interest on the sum of R24 million, being the total of the amounts in (a) and (b) above, at the rate of 3% per month from the date of judgment, 24 March 2015, to date of payment, limited to R24 million.

JUDGMENT

MADLANGA J (Jafta J and Nkabinde J concurring):

Introduction

[1] This is an application for leave to appeal against an order of the Supreme Court of Appeal[1] upholding the validity of a R12 million loan agreement and finding sureties to that agreement liable for up to R72 million, made up of the capital sum of R12 million and accrued interest. A whopping R60 million difference between capital and interest! The application arises from the Supreme Court of Appeal's rejection of arguments by the applicants, Ms Margaretha Paulsen and her husband Mr André Paulsen (Paulsens), that: the loan agreement was invalid because the respondent, Slip Knot Investments 777 (Pty) Limited (Slip Knot), was not registered as a credit provider in terms of the National Credit Act[2] (NCA or Act); and the *in duplum*[3] rule limited interest payable under the loan agreement to a maximum of R12 million.

Background

[2] In 2006 Winskor 139 (Pty) Ltd (Winskor), a company involved in the business of property development whose shares are held by the trustees of the Paulsen Family Trust,[4] sought to purchase a portfolio of properties in Brooklyn, Pretoria and resell them at a handsome profit. It was able to obtain funding for the bulk of the purchase price. There was a shortfall of R12 million. Winskor concluded a loan agreement

[1] *Paulsen v Slip Knot Investments* [2014] ZASCA 16; 2014 (4) SA 253 (SCA); [2014] 2 All SA 527 (SCA) (Supreme Court of Appeal judgment).

[2] 34 of 2005.

[3] As explained in much greater detail below (see [42] to [45]), the common law *in duplum* rule, precludes the recovery of arrear interest in excess of the capital amount.

[4] The Paulsens are two of the three trustees of this Trust.

with Slip Knot.[5] In terms of this agreement Slip Knot advanced R12 million to Winskor on 10 July 2006 (commencement date). The R12 million was payable within 12 months from the commencement date. Winskor was liable to pay interest at 3% per month on the outstanding capital amount from the seventh month after the commencement date to the date of final payment.[6] The interest was to be capitalised monthly.

[3] As security for the loan, the Paulsens, acting in their personal capacities and as trustees of the Paulsen Family Trust and Keurbos Beleggingstrust, bound themselves jointly and severally as sureties and co-principal debtors with Winskor for its indebtedness to Slip Knot under the loan agreement.

[4] As fate would have it, an economic downturn commenced in 2007. It wreaked havoc throughout the world. Winskor was not spared. As a result, by the due date, 9 July 2007, Winskor had defaulted on its obligation to settle its indebtedness in terms of the loan agreement, including interest. Slip Knot instituted an application against the Paulsens, the Paulsen Family Trust and the Keurbos Beleggingstrust to recover what was owed to it by Winskor in the Western Cape High Court, Cape Town (High Court). The application was served on 10 January 2010. Since litigation for the liquidation of Winskor was already afoot, Slip Knot cited it without seeking any relief from it.

[5] Slip Knot is a provider of short-term "bridging" or "mezzanine" finance to large-scale property developers. In the context of property development, "bridging" and "mezzanine" finance are synonymous terms referring to short-term loans provided to property developers who are in need of immediate cash flow in order to fully finance development projects. Significantly, because of their short-term and relatively high-risk nature, such loans are generally accompanied by exceedingly high interest rates. It is common cause that Slip Knot was not at any relevant time registered as a credit provider in terms of section 40 of the NCA.

[6] Under clause 6 of the loan agreement, Slip Knot was entitled to an additional payment "which shall be calculated at 25% (twenty five percent) of the nett profit in the development, [Winskor] having however guaranteed a minimum interest repayment of R17 000 000". Both the Full Court and the Supreme Court of Appeal concluded that this clause provided for the payment of interest (rather than of a profit share), and that the *in duplum* rule functioned to limit the amount of interest which could accrue prior to the beginning of litigation to R12 million. (See the Supreme Court of Appeal judgment above n 1 at paras 15-9 and Full Court judgment at paras 15-24.) Slip Knot does not challenge this finding and has abandoned its pursuit of any pre-litigation interest above the amount of R12 million.

[5] In relevant part, the claim was for: (a) the capital sum of R12 million; (b) interest on the capital sum which, as at the date of commencement of litigation, had accumulated to R12 million and been limited to that amount by the *in duplum* rule; (c) further interest on the capital sum at the rate of 3% per month from the date of institution of proceedings to date of judgment; and (d) interest on the sum of the amounts set out in (a) to (c) at the rate of 3% per month from the date of judgment to date of payment, subject to the interest being limited by the *in duplum* rule to an amount equal to that sum.

[6] The Paulsens defended the suit. Their defences, which mutated somewhat as the litigation progressed, eventually concretised to three. The first was that, because Slip Knot was not registered under the NCA, the loan agreement was invalid.[7] 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, if the institution of proceedings had the effect in law of suspending the operation of the *in duplum* rule, interest in this matter could not exceed R12 million as no proceedings had been instituted against Winskor, the principal debtor.[8]

[7] The High Court upheld all of Slip Knot's claims, but against the Paulsens only.[9] An appeal by the Paulsens to the Full Court, based on the same core issues, was partially successful. That Court upheld the Paulsens' third defence.[10] The

[7] This is discussed fully at [32] to [41].

[8] The foundation of this defence was that, as mere sureties, the Paulsens' liability could never exceed that of Winskor. Since interest against Winskor would remain at R12 million as proceedings had not been instituted against it, the Paulsens' liability for interest had to be capped at this amount as well.

[9] The claims were dismissed against the two trusts because only the Paulsens, and not all the trustees, had purported to bind the trusts as sureties and co-principal debtors. Relying on *Thorpe v Trittenwein* [2006] ZASCA 30; 2007 (2) SA 172 (SCA) at 176H, the High Court held that all the trustees ought to have signed the deeds of suretyship on behalf of the trusts and, as that was not the case, the Paulsens by themselves could not incur liability for the trusts. High Court judgment at paras 33 and 41.

[10] The Full Court proceeded from the underlying reasoning of the High Court that, once proceedings had been instituted, the operation of the *in duplum* rule was suspended with the effect that interest began to run again. But, reasoned the Full Court, at the time of judgment against the Paulsens interest against Winskor, the principal debtor - which was cited with no relief sought against it and was as good as not being a party to the proceedings - would remain limited to R12 million by the *in duplum* rule. That being the case, the Paulsens, whose liability as sureties was accessory to that of Winskor, could not be liable for more interest than Winskor.

Paulsens, who were intent on invalidating the entire liability based on their first defence, further appealed to the Supreme Court of Appeal. Unhappy with the Full Court's capping of interest at R12 million, Slip Knot cross-appealed.

[8] In a majority decision authored by Wallis JA, the Supreme Court of Appeal dismissed the Paulsens' appeal with costs. The majority commenced by pointing out that if the agreement is invalid, this would be due to the provisions of section 89(2)(d) of the NCA.[11] This was because, as directed by section 40(4),[12] in order to determine whether the loan agreement is invalid, regard must be had to section 89. The majority held that section 89(2)(d) only operates in respect of those credit agreements to which the NCA applies. Therefore, to determine whether this specific loan agreement is invalid, the starting point is section 4 of the NCA, which sets out "excluded agreements" or agreements to which the Act does not apply.[13] The majority thus found that the loan agreement between Slip Knot and the Paulsens was not invalidated, because the loan agreement fell under the section 4 exclusions. The majority thus found no need to consider whether or not Slip Knot was required to register as a credit provider in terms of the Act.

[9] The majority upheld the cross-appeal and reversed the partial success of the Paulsens before the Full Court. It concluded that "[i]f the *duplum* has been reached prior to litigation commencing, interest will accumulate afresh on the capital debt

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[11] Section 89(2) reads:

> "Subject to subsections (3) and (4), a credit agreement is unlawful if—
>
> . . .
>
> (d) at the time the agreement was made, the credit provider was unregistered and this Act requires that credit provider to be registered."

The qualification in subsections (3) and (4) is irrelevant for present purposes.

[12] Section 40(4) provides:

> "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*." (Emphasis added.)

[13] For the text of section 4 of the NCA, see [35].

from the date of service of the summons or application papers".[14] For this position, the majority relied on *Oneanate*,[15] where Zulman JA held that—

> "the *in duplum* rule is suspended *pendente lite* [during the pendency of litigation], where the *lis* [litigation] is said to begin upon service of the initiating process."[16]

The majority also held that when proceedings were instituted, the Paulsens became liable for further interest on that debt, just as Winskor would have been if it had been sued. Interest accrues because of the surety's failure, upon the institution of proceedings, to meet its own obligation – which was equivalent to the principal debtor's. If the surety does not pay, it should not be able to shelter behind the fact that proceedings were not taken against the principal debtor.[17]

[10] The minority[18] disagreed with the conclusion that the *in duplum* rule must be lifted when litigation begins.[19] It held that "it cannot have been the intention of the court in *Oneanate* to enfeeble the *in duplum* rule almost entirely"[20] and that the context of its application plays an important consideration.[21] It held that a residual discretion must remain for a court, in appropriate circumstances, to apply the *in duplum* rule even after proceedings have been instituted.[22] As the suspension of the *in duplum* rule in this case would be "inordinately onerous" upon the debtor, the

[14] Supreme Court of Appeal judgment above n 1 at para 21.

[15] *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)* [1997] ZASCA 94; 1998 (1) SA 811 (SCA) (*Oneanate*).

[16] Id at 834H.

[17] Supreme Court of Appeal judgment above n 1 at paras 23-6.

[18] Willis JA id at paras 33-58.

[19] Id at paras 50-7. Willis JA concurred in the majority's decision that the loan agreement was not invalid, albeit for different reasons. He also agreed with the majority that the accessory nature of a suretyship agreement could not serve to limit the amount of interest which could be recovered to R12 million.

[20] Id at para 53.

[21] Id.

[22] Id at paras 55 and 57.

minority would have exercised the Court's discretion not to suspend the operation of the *in duplum* rule even during the course of litigation.[23]

In this Court

[11] The Paulsens persist in the arguments that: (a) the loan agreement was invalid due to Slip Knot's failure to register as a credit provider; (b) if the loan agreement is valid, due to the *in duplum* rule, the Paulsens cannot be held liable for any interest above the capital amount of R12 million; and (c) even if the institution of proceedings does have the effect in law of suspending the operation of the *in duplum* rule, interest in this matter is limited to R12 million as no proceedings had been instituted against Winskor, the principal debtor. These, together with whether leave to appeal should be granted, are the issues for determination.

Leave to appeal

[12] The Paulsens apply for leave to appeal on the basis that the issues sought to be determined raise arguable points of law of general public importance that ought to be considered by this Court. Slip Knot argues the opposite. Significantly, the Paulsens have not alleged that the application raises any constitutional matters.[24]

[13] The Court's jurisdiction is governed by section 167(3) to (7) of the Constitution. Whereas previously section 167(3) conferred jurisdiction on the Court to "decide only constitutional matters and issues connected with decisions on constitutional matters", the section has been amended by the Constitution Seventeenth Amendment Act[25] to make the Constitutional Court the highest court in all matters. The amended section 167(3) provides:

[23] Id at paras 55-7.

[24] I note that, as discussed in more detail at [14], the interpretation of the NCA and the constitutionally informed policy debate regarding the *in duplum* rule could have been brought under this Court's constitutional jurisdiction.

[25] 72 of 2012.

"The Constitutional Court—

(a) is the highest court of the Republic; and

(b) may decide—

(i) constitutional matters; and

(ii) *any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court*; and

(c) makes the final decision whether a matter is within its jurisdiction." (Emphasis added.)

[14] At first glance, it would seem obvious to base this Court's jurisdiction on the claim that this matter raises a constitutional issue. That is so because this Court has previously found that the interpretation of the NCA implicates constitutional issues.[26] However, the Paulsens have rested their case for leave to appeal solely on the assertion that this matter raises arguable points of law of general public importance. Generally a finding of jurisdiction must stand or fall on this basis. That is so because this Court has held that "[j]urisdiction is determined on the basis of the pleadings . . . and not the substantive merits of the case".[27]

[15] It is therefore only to the Constitution's Seventeenth Amendment that we may look. The most significant consequence of this amendment is to extend the ambit of the Constitutional Court's jurisdiction "beyond constitutional matters so as to embrace any other matter where it grants leave to appeal".[28] In other words, the amendment

[26] *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC) (*Kubyana*) at paras 16-7 and *Sebola and Another v Standard Bank of South Africa Ltd and Another* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) (*Sebola*) at para 36.

[27] *Gcaba v Minister for Safety and Security and Others* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at para 75.

[28] Du Plessis et al "Jurisdiction" in *Constitutional Litigation* (Juta & Co Ltd, Cape Town 2013) (Du Plessis) at 33.

confers jurisdiction upon the Court to decide matters that this Court has come to regard as non-constitutional.[29]

[16] This Court has not yet determined the full scope of its new jurisdiction or definitively granted leave to appeal on the basis of section 167(3)(b)(ii). Reduced to bare essentials, this section provides for this Court to grant leave if—

(a) the matter raises an arguable point of law;

(b) that point is one of general public importance; and

(c) the point ought to be considered by this Court.

[17] What is the import of the words "which ought to be considered by that Court" in section 167(3)(b)(ii)? Although a point of law may be both arguable and of general public importance, there may be factors that militate against its receiving the attention of this Court. It seems to me that, on this, some of the factors that are of relevance to the interests of justice factor in the context of our jurisdiction based on constitutional matters may find application.[30]

[18] To summarise, a holding that a matter raises an arguable point of law of general public importance does not inexorably lead to a conclusion that the matter must be entertained. Whether the matter will, in fact, receive our attention will depend on the interests of justice, a subject I deal with later.

[19] The discussion that follows demonstrates that we are here concerned with arguable points of law of general public importance which ought to be considered by this Court.

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[29] In *Van der Walt v Metcash Trading Limited* [2002] ZACC 4; 2002 (4) SA 317 (CC); 2002 (5) BCLR 454 (CC) at para 32 Ngcobo J observed that—

> "[w]hether one can speak of a non-constitutional issue in a constitutional democracy where the Constitution is the supreme law and all law and conduct has to conform to the Constitution is not free from doubt. However . . . we must accept that such distinction exists and try to make sense of that distinction." (Footnotes omitted.)

[30] See Du Plessis above n 28 at 33-4.

(a) Arguable point of law

[20] This is a bifurcated requirement. The point must be one of law; and it must be arguable. Starting with the first prong, quite axiomatically, the point must not be one of fact. This Court's jurisprudence on purely factual matters, developed in the context of what constitutes a constitutional, as opposed to a factual issue, is an instructive guide on this.[31] In this matter this subject should not detain us. Definitely there are points of law, namely:[32]

(a) Does the NCA require a person, whose business of providing credit falls outside the ambit of the Act, to register?

(b) Does failure to register render a credit agreement to which the NCA does not apply invalid?

(c) Does the *in duplum* rule apply during the pendency of litigation?

(d) If it does not apply, can a surety be held liable for more interest than that for which the principal debtor is liable if legal proceedings have not been instituted against the principal debtor?

[21] Moving on to the second facet, not infrequently, even in a most hopeless case a skilful arguer may ingeniously craft an argument on a point of law which, at first blush, may appear convincing. That is not necessarily enough for purposes of this jurisdictional requirement. It cannot be any and every argument that renders a point of law arguable for purposes of section 167(3)(b)(ii). Surely, a point of law which, upon scrutiny, is totally unmeritorious cannot be said to be arguable. Indeed, in *Baloi* Centlivres JA said "there are very few cases which are not arguable in the wide meaning of that word".[33] The notion that a point of law is arguable entails some degree of merit in the argument. Although the argument need not, of necessity, be

[31] See *Minister of Safety and Security v Van Niekerk* [2007] ZACC 15; 2007 (10) BCLR 1102 (CC) at para 10; *Minister of Safety and Security v Luiters* [2006] ZACC 21; 2007 (2) SA 106 (CC); 2007 (3) BCLR 287 (CC) at para 28; and *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) (*Boesak*) at para 15.

[32] The first two are closely related.

[33] *R v Baloi* 1949 (1) SA 523 (A) at 524.

convincing at this stage, it must have a measure of plausibility. In what appears to have been a judge-created test, leave to appeal under section 369 of the then applicable Criminal Procedure and Evidence Act[34] could be granted if the question at issue was arguable. Not surprisingly, in *Beatley & Co*[35] Tindall AJP held that the word "arguable" is used "in the sense that *there is substance in the argument advanced*".[36]

[22] I make bold to say in order to be arguable, a point of law must have some prospects of success. Support for this is to be found in decisions of this Court, albeit made in a different context. In *SATAWU* Mogoeng CJ said:

> "The exercise of the right to assemble by trade unions and other organisations is an important constitutional issue. The riot damage allegedly caused by the gathering, which is said to have affected vulnerable people in the business sector, underscores the public interest in the matter. This judgment will have significant implications for the exercise of the right to assemble, not only for the applicants, but also for the public at large. The applicants *have an arguable case and therefore have some prospects of success on appeal.* It is thus in the interests of justice that leave to appeal be granted."[37] (Emphasis added.)

[23] Without derogating from the breadth of what I have just said, some factors may be of assistance on this question. Needless to say, these factors are no more than indicators and are by no means decisive. In any given case this Court has to make a value judgment on whether the point of law is indeed "arguable". The examples I itemise here do not purport to be exhaustive. They are just that – examples:

(a) The Supreme Court of Appeal may have expressed itself on the matter by a narrow majority;

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[34] 31 of 1917.

[35] *Beatley & Co v Pandor's Trustee* 1935 TPD 365 at 366.

[36] Quoted with approval in *Baloi* above n 33 at 524. Emphasis added.

[37] *SATAWU and Another v Garvas and Others* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) at para 33.

(b) A minority view in the Supreme Court of Appeal may be quite forceful;

(c) Different divisions of the High Court may have expressed divergent views on the point, with no pronouncement on it by the Supreme Court of Appeal;[38]

(d) There may be no authoritative pronouncement on an issue; with available, cogent academic or expert views on it being divergent;

(e) The matter may raise a new and difficult question of law; or

(f) The answer to the question in issue may not be readily discernible.[39]

Ultimately, whether a point of law is arguable depends on the particular circumstances of each case.

[24] As appears from a discussion of the merits below, some of the points raised by the Paulsens are arguable. Their defence on the validity of the loan agreement requires this Court to make a determination as to the proper interplay between sections 4, 40 and 89 of the NCA. As has been noted, "the NCA cannot be described as the 'best drafted Act of Parliament which was ever passed' . . . [and] [n]umerous drafting errors, untidy expressions and inconsistencies make its interpretation a particularly trying exercise".[40] Given the confusion inherent in the NCA, it is at least arguable that the Act could be interpreted as the Paulsens propose. More significantly, the Paulsens' defence on the application of the *in duplum* rule certainly does bear prospects of success. This will become apparent when this issue is discussed under the merits section.

[38] This may arise in instances where, for example, leave to appeal is sought from this Court without an approach to the Supreme Court of Appeal.

[39] Although in *De Klerk v Griekwaland Wes Korporatief Bpk* [2014] ZACC 20; 2014 (8) BCLR 922 (CC) at para 14 this Court assumed, without deciding, that it had jurisdiction in terms of the Constitution Seventeenth Amendment Act, what it itemised in para 13 is consonant with the view I take here.

[40] *Nedbank Ltd and Others v National Credit Regulator* [2011] ZASCA 35; 2011 (3) SA 581 (SCA) (*Nedbank*) at para 2. See also *Sebola* above n 26 at para 66 and *Starita v Absa Bank Ltd and Another* 2010 (3) SA 443 (GSJ) at para 18.9.

(b) General public importance

[25] This Court has yet to lay a standard as to when a point of law qualifies as being of general public importance. There are other jurisdictions where apex courts grant leave to appeal only where a matter is of general public importance. It would be useful to consider what the courts of those jurisdictions have said on the standard.[41] For example, the Constitution of Kenya provides for appeals to the Supreme Court "in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved".[42] With the exception of the reference to a matter of fact,[43] the interpretation of the relevant provision by the Supreme Court of Kenya is instructive:

> "Before this Court a matter of general public importance warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: its impacts and consequences *are substantial, broad-based, transcending the litigation-interests of the parties, and bearing upon the public interest*."[44] (Emphasis added.)

[41] See *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18; 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC) at para 26 where this Court said "[c]omparative research is generally valuable and is all the more so when dealing with problems new to our jurisprudence".

Of course, "[w]e can derive assistance from . . . foreign case law, but we are in no way bound to follow it". *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 39.

[42] Article 163(4)(b) of the Constitution of Kenya. Similarly, the United Kingdom Supreme Court's jurisdiction is limited to "arguable point[s] of law of general public importance which ought to be considered by the Supreme Court at that time". (UKSC Practice Direction 3 at 3.3.3.) This is because the Court—

> "must necessarily concentrate its attention on a relatively small number of cases recognised as raising legal questions of general public importance. It cannot seek to correct errors in the application of settled law, even where such are shown to exist."

House of Lords, in *R v Secretary of State for Trade and Industry, ex parte Eastaway* [2000] 1 WLR 2222 at 2228. See also *Uprichard v Scottish Ministers and Another* [2013] UKSC 21 at para 60.

[43] At the risk of being repetitive, section 167(3)(b)(ii) of our Constitution gives this Court jurisdiction in respect of only points of law, not matters of fact.

[44] *SAJ v AOG & 2 Others*, Supreme Court of Kenya Petition No. 1 of 2013; [2013] eKLR at para 31 (available online at http://kenyalaw.org/caselaw/cases/view/84298/) and *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone* Supreme Court of Kenya Application No. 4 of 2012; [2013] eKLR (*Hermanus Steyn*) at para 58 (available online at http://kenyalaw.org/caselaw/cases/view/88828).

[26] This does not mean the requirement will be met only if the interests of society as a whole are implicated. English courts have found that an issue is of general public importance when it is likely to arise again in other cases and where its determination would affect a large class of persons rather than merely the litigants.[45] As stated in *Wiltshire Primary Care Trust*, "issues do not have to be of importance to all citizens or the whole nation in order to be of 'general public importance'", it is enough to be "of importance to a sufficiently large section of the public".[46] In sum, for a matter to be of general public importance, it must transcend the narrow interests of the litigants and implicate the interest of a significant part of the general public.[47] It will serve a litigant well to identify in clear language what it is that makes the point of law one of general public importance.[48]

[27] It is manifest that both the proper interpretation of the NCA on the issues raised and determination of the question whether the *in duplum* rule is suspended *pendente lite* will have a significant impact on the general populace. As noted in *Kubyana*, the NCA "regulates commercial activity undertaken by many people and institutions on a daily basis. The issues at stake are therefore of fundamental importance to many South Africans."[49] Charging interest on commercial transactions is so widespread as to affect a large number of members of society. Likewise, there are countless people and entities that charge and derive a financial benefit from interest. A pronouncement either way on whether the *in duplum* rule is suspended *pendente lite* will affect many on either side of the scale.

[28] So there is an "arguable point of law of general public importance".

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[45] See *Pioneer Shipping Ltd and Others v BTP Tioxide Ltd; The Nema* [1981] 2 All ER 1030; and *Glancare Teorada v A. N. Board Pleanala* [2006] FEHC 250, as quoted in *Hermanus Steyn* id at para 57.

[46] *R (on the application of Compton) v Wiltshire Primary Care Trust* [2008] ECWA Civ. 749; [2009] 1 All ER 978 (*Wiltshire Primary Care Trust*) at para 16, quoting with approval Holman J in *The Queen on the Application of Val Compton v Wiltshire Primary Care Trust* [2008] EWHC 880 (Admin) at paras 32 and 36.

[47] See Du Plessis above n 28 at 33.

[48] Compare *Malcolm Bell v Daniel Toroitich Arap Moi & Another* Supreme Court of Kenya Application No. 1 of 2013; [2013] eKLR at para 53(vi) (available online at http://kenyalaw.org/caselaw/cases/view/91707).

[49] *Kubyana* above n 26 at para 17.

(c) Interests of justice

[29] Where, in an application for leave to appeal founded on a constitutional matter, this Court holds that there is indeed a constitutional issue, that does not automatically lead to the grant of leave. This Court has a discretion and on this the fundamental criterion is the interests of justice. In *Boesak* we held:

> "A threshold requirement in applications for leave relates to the issue of jurisdiction. The issues to be decided must be constitutional matters or issues connected with decisions on constitutional matters. This is dealt with more fully below.
>
> *A finding that a matter is a constitutional issue is not decisive. Leave may be refused if it is not in the interests of justice that the Court should hear the appeal.* The decision to grant or refuse leave is a matter for the discretion of the Court and, in deciding whether or not to grant leave, the interests of justice remain fundamental. In considering the interests of justice, prospects of success, although not the only factor, are obviously an important aspect of the enquiry. An applicant who seeks leave to appeal must ordinarily show that there are reasonable prospects that this Court will reverse or materially alter the decision of the SCA."[50] (Emphasis added and footnotes omitted.)

[30] The interests of justice factor aims to ensure that the Court does not entertain any and every application for leave to appeal brought to it. Coming to this Court's non-constitutional appellate jurisdiction, the question arises: do interests of justice not come into the equation? I think they do. This is what the words "which ought to be considered by that Court" in section 167(3)(b)(ii) of the Constitution are directed at. If – for whatever reason – it is not in the interests of justice for this Court to entertain what is otherwise an arguable point of law of general public importance, then that point is not one that "ought to be considered by [this] Court". The interests of justice criterion is firmly entrenched in this Court's jurisprudence on applications for leave to

[50] *Boesak* above n 31 at paras 11-2. See also *Magajane v Chairperson, North West Gambling Board and Others* [2006] ZACC 8; 2006 (5) SA 250; 2006 (10) BCLR 1133 (CC) (*Magajane*) at para 29 and *National Education Health and Allied Workers Union v University of Cape Town and Others* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU*) at para 25.

appeal involving constitutional matters.[51] Whatever its true provenance in respect of applications for leave to appeal on constitutional matters from the Supreme Court of Appeal,[52] I cannot conceive of any basis why it should not be applicable here. On the non-constitutional appellate jurisdiction we must borrow from this Court's existing jurisprudence on interests of justice.

[31] With the exception of the last, the points the Paulsens raise have some prospects of success.[53] On this I need do no more than to refer to the ensuing discussion on the merits. Without doubt, the points are of import.[54] Clamantly, it is in the interests of justice that this appeal be entertained. I grant leave to appeal.

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[51] Id.

[52] I have noted that in the case of appeals emanating from the Supreme Court of Appeal this Court has not always been consistent on what the basis for reliance on interests of justice is. Is it section 167(6) of the Constitution? Is it the Court's inherent jurisdiction provided for in section 173? Or, is it some other basis? A number of our decisions, including *Prophet v National Director of Public Prosecutions* [2006] ZACC 17*;* 2007 (6) SA 169 (CC); 2007 (2) BCLR 140 (CC) at paras 45 and 48 read with fn 29; *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa and Another* [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 19 read with fn 12; *Boesak* above n 31 at paras 10-2; and *Frasier v Naude and Others* [1998] ZACC 13; 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 7 read with fn 10, grounded this approach in the language of section 167(6), which requires that national legislation provide the means for any person to "bring a matter directly" or "appeal directly" to the Constitutional Court. Further, in *S v Pennington and Another* [1997] ZACC 10; 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC) (*Pennington*) at para 10, this Court explicitly stated that "the words 'any other court' [in section 167(6)] would include the Supreme Court of Appeal". In contrast, this Court held in *Director of Public Prosecutions: Cape of Good Hope v Robinson* [2004] ZACC 22; 2005 (4) SA 1 (CC); 2005 (2) BCLR 103 (CC) at para 22 that "[s]ection 167(6)(b) does not concern itself with appeals to this Court in the ordinary course . . . it is concerned with a situation in which the SCA . . . is bypassed". Although *Pennington* said the source of applying the "interests of justice" test was section 167(6), it held at para 22 that another viable alternative was this Court's "inherent power to regulate its own process" under section 173 of the Constitution. In *Pennington*, applicants appealing a decision of the Supreme Court of Appeal could not rely on section 167(6) because the national legislation required to give effect to that provision had not yet been adopted. It was because of this that the Court looked to section 173 and held at para 26 that because "[l]eave to appeal is also a requirement needed to protect the process of this Court against abuse by appeals which have no merit, and it is in the 'interests of justice' that this requirement be imposed" section 173 granted it the authority to apply the "interests of justice" test to determine whether leave to appeal should be granted. I do not find it necessary to decide what the true origin of the "interests of justice test" is in the context of appeals from the Supreme Court of Appeal. It suffices that the test is firmly entrenched.

[53] See *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* [2013] ZACC 48; 2014 (5) SA 138 (CC); 2014 (3) BCLR 265 (CC) at para 53; *Boesak* above n 31 at paras 11-2; and *NEHAWU* above n 50 at para 25.

[54] The discussion on general public importance above demonstrates as much. As we noted in *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 14, "[a] further consideration relevant to the interests of justice is the question of the public interest in a determination of the constitutional issue". See also *National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and Another* [2002] ZACC 30; 2003 (3) SA 513 (CC); 2003 (2) BCLR 182 (CC) at para 16.

Merits

(a) Invalidity of the credit agreement

[32] The Paulsens' argument that the loan agreement is invalid because at the time of its conclusion Slip Knot was not registered as a credit provider rests on two contentions. One is that a credit provider like Slip Knot, which exclusively provides credit in respect of agreements falling under the exceptions provided for in section 4 of the NCA, is nonetheless required to register under section 40(1). The other is that Slip Knot's failure to register renders its loan agreement with Winskor invalid under section 40(4) read with section 89, even if the specific agreement was not subject to the Act.

[33] Section 40 of the NCA, entitled "Registration of credit providers", stipulates:

> "(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)."

[34] All accept that the total number of agreements under which credit was provided by Slip Knot and the principal debt owed to it under all these agreements exceeded the relevant thresholds.

[35] Section 4, entitled "Application of Act", provides:

> "(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 an 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);
>
> . . .
>
> (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 determined by the Minister in terms of section 7(1)."

It is common cause that all of the loans provided by Slip Knot, including the loan agreement concluded between Slip Knot and Winskor that gave rise to this suit, qualify for the exceptions set out in section 4(1)(a) and (b).

[36] For the purpose of calculating whether a credit provider meets the threshold levels in section 40(1)(a) and (b), the question is, do we count all credit agreements (as the Paulsens contend), or only those credit agreements subject to regulation under the Act (as Slip Knot contends)? While there is some ambiguity, the more sensible interpretation, both on a textual and purposive reading of the statute,[55] is that only those credit providers who provide the threshold number of "credit agreements" that are subject to the Act must register. Although the Paulsens contend that there is absolutely no relationship between section 4 and section 40, they were unable to articulate a convincing rationale for this proposition.

[37] In section 4(1)(a)(i), the Legislature exempts credit agreements in respect of which the consumer is a large juristic person (like Winskor). This evinces a conscious legislative choice not to protect this type of consumer under the Act. It is to this

[55] See *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) where this Court held at para 21 that "[o]ur Constitution requires a purposive approach to statutory interpretation".

category of consumers that Slip Knot provided credit. Since none of them enjoyed protection under the provisions of the Act, there is little, if any, reason why Slip Knot and similarly placed credit providers should register in terms of the NCA.[56]

[38] In oral argument both before this Court and the Supreme Court of Appeal,[57] the Paulsens conceded that if a person provided over 100 loans to her friends, none of which was made at arm's length, she would not have to register in terms of the Act. Bridging finance agreements to large juristic persons, just like agreements that are not at arm's length, are exempted from regulation under the Act by section 4(1). As it is illogical and unnecessary to require registration by a person who provides loans solely to her friends, it would be similarly illogical to require registration by Slip Knot, which solely provides bridging finance loans to real estate developers that are not protected by the NCA.[58]

[39] Even if Slip Knot were to be required to register under section 40(1), its failure to do so would not render this agreement void. Section 40(4) provides for the consequences of a credit provider failing to register in accordance with section 40(1): any agreement with that credit provider is "an unlawful agreement and void to the extent provided for in section 89".[59] Therefore, in order to determine the validity of

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[56] "The interpretation of the NCA calls for a careful balancing of the competing interests sought to be protected, and not for a consideration of only the interests of either the consumer or the credit provider." *Nedbank* above n 40 at para 2. Thus we must consider the administrative and regulatory burdens that otherwise exempt credit providers would be subjected to if required to register. Moreover, requiring funders who only do business outside the ambit of the Act to register may well prove to be counterproductive for consumers, as it may stifle an effective and accessible credit market for large-scale consumers and investors who do not need the Act's protection.

[57] Supreme Court of Appeal judgment at para 46.

[58] See id. See also Van Zyl "Registration and the Consequences of Non-registration" in Scholtz (ed) *Guide to the National Credit Act* SI 5 (LexisNexis, 2013) at 5.2.2.1:

> "It stands to reason that only credit agreements to which the Act applies should be taken into account when determining whether a person is required to register as a credit provider. If this were not the case, even the South African Reserve Bank, whose credit agreements are all excluded from the application of the Act [by section 4(1)], would have had to register as a credit provider and report to the National Credit Regulator on all its credit agreements." (Footnotes omitted.)

[59] Section 40(4) is quoted in full at n 12.

the agreement, section 40(4) must be read with section 89(2)(d).[60] Section 89 is contained in Chapter 5 of the NCA, entitled "Consumer Credit Agreements". The term "credit agreement" in this chapter can only be understood to refer to those credit agreements which are subject to the Act.[61] To understand the term differently would render many of the provisions in this chapter entirely meaningless.

[40] For example, section 90 sets out certain unlawful provisions which may not be contained in "a credit agreement". Clearly, these unlawful provisions are irrelevant to a credit agreement which is not subject to the Act. The majority in the Supreme Court of Appeal makes the point aptly:

> "I am unable to see on what basis section 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."[62]

[41] In conclusion, the plea for the invalidation of the agreement on the ground that Slip Knot was not registered as a credit provider in terms of the Act is unmeritorious and must fail in its entirety.

(b) The in duplum rule during the pendency of litigation

[42] The *in duplum* rule is a long-standing and well-established part of our law. It provides that arrear interest ceases to accrue once the sum of the unpaid interest equals the amount of the outstanding capital.[63] For perspective, it is necessary to give a brief outline of the history of the *in duplum* rule in South African law. The rule has its origins in classical Roman law.[64] The rule was carried through to Roman-Dutch law,

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[60] Section 89(2)(d) is quoted in full at n 11.

[61] See Supreme Court of Appeal judgment above n 1 at paras 9-13.

[62] Id at para 13.

[63] *LTA Construction Bpk v Administrateur, Transvaal* [1991] ZASCA 147; 1992 (1) SA 473 (A) (*LTA Construction*) at 482A-B and *Bellingan v Clive Ferreira & Associates CC and Others* 1998 (4) SA 382 (W) (*Bellingan*) at 399B-D.

[64] *Leech and Others v ABSA Bank Limited* [1997] 3 All SA 308 (W) (*Leech*) at 313C-G. In fn 1 of *Commercial Bank of Zimbabwe Ltd v MM Builders & Suppliers (Pvt) Ltd and Others and Three Similar Cases* 1997 (2) SA

reference to it being made by various old authorities, including, most pertinently for this case, Huber and Van der Keessel.[65] Our common law is based on the same Roman law rule[66] and the rule has been recognised in local case law as far back as 1830.[67]

[43] More recently, in *LTA Construction* the rule was confirmed as still forming part of South African law, not having been abrogated by disuse.[68] Indeed in that case the Appellate Division noted that the *in duplum* rule is far from an anachronism, and is in fact an aspect of daily economic life under our common law.[69]

[44] As stated in numerous cases and academic writings stretching back over centuries, the overarching purpose of the rule is to protect debtors from being crushed by the never-ending accumulation of interest on an outstanding debt.[70] As Tuchten AJ neatly put it in *Bellingan*:

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285 (ZHC) (*Commercial Bank of Zimbabwe*), Gillespie J gives an interpretation of the original Justinian maxim: "Interest, and interest on interest . . . can neither be stipulated for nor recovered beyond twice the amount, and if paid, may be recovered."

[65] See *Union Government v Jordaan's Executor* 1916 TPD 411 (*Union Government*) at 412-3, which refers to the writings of Van der Keessel, Voet, Grotius and Groenewegen, and *Leech* id which refers to the writings of Huber. This is how Van der Keessel in his *Praelectiones* (English translation of Van der Keessel by Lorenz *Select Theses on the Law of Holland and Zeeland* 2 ed (Juta and Co Ltd, Cape Town, 1901) (Lorenz translation)) at 192 para DLXIX captured the rule: "The amount of unpaid interest may not exceed the principal". See also Huber *Heedensdaegse Rechtsgeleertheyt* at 3.37.38-43.

[66] *Union Government* id at 413.

[67] *Niekerk v Niekerk* (1828 - 1849) 1 Menz 452 at 454, a judgment of the Supreme Court of the Cape of Good Hope. Even articulating the rationale, the Supreme Court of the Transvaal in the 1886 case *Taylor v Hollard* (1885 - 1888) 2 SAR TS at 85 said of the rule:

> "In like manner the provisions of the Roman-Dutch law, that the interest may not exceed the capital or be turned into capital, are still observed in practice. This Court will refuse to enforce, to its full extent, a contract made by our citizens, in which double the amount advanced, with interest, is stipulated for, not so much in protection of the promissor, but because to countenance such proceedings would be contrary to good morals, the interests of our citizens, and the policy of our law." (Citation omitted.)

In this, one observes the articulation of the basis of the rule as, *inter alia*, public policy.

[68] *LTA Construction* above n 63 at 482F.

[69] Id, where Joubert JA described the *in duplum* rule as "alles behalwe 'n anachronisme" - "anything but an anachronism" (my translation).

[70] *Leech* above n 64 at 313-4; *Taylor v Hollard* above n 67 at 85; Vessio "A Limit on the Limit on Interest? The *In Duplum* Rule and the Public Policy Backdrop" (2006) 39 *De Jure* 25 at 32; Vessio *The Effects of the In*

> "[T]he jurisprudential foundation for the restriction [of interest to the *duplum*] was the policy consideration that debtors whose affairs are declining should not be entirely drained dry."[71]

[45] Similarly, as the Appellate Division stressed in *LTA Construction*, the rule serves generally to aid debtors in adverse financial positions:

> "Dit vorm deel van ons daaglikse ekonomiese lewe. Dit vervul 'n ekonomiese funksie om skuldenaars wat hulle in finansiële verknorsing bevind, te help."[72]

[46] The issue concerning us on the *in duplum* rule stems from the unanimous judgment in *Oneanate*. In that case the Supreme Court of Appeal was faced with the question whether the *in duplum* rule should operate *pendente lite* – meaning from the date of service of the process initiating the proceedings until the date of judgment.[73] According to the leading case at the time, *Stroebel v Stroebel*,[74] it was clear that the rule applied even *pendente lite*. Nonetheless, *Oneanate* held that the operation of the *in duplum* rule should be suspended *pendente lite*, based on two grounds: (i) the Court's reading of the old authorities and (ii) public interest considerations. I will demonstrate that the Supreme Court of Appeal was wrong on both counts and that *Oneanate* falls to be overruled.

Duplum Rule and Clause 103(5) of the National Credit Bill 2005 on Interest (LLM Dissertation, University of Pretoria, 2006) (Vessio UP) at 53-4; and Huber above n 65 at 3.37.39.

[71] *Bellingan* above n 63 at 401C.

[72] Id at 482E-F. My translation of this is: "It forms part of our daily economic life. It fulfils the economic function of helping those debtors who find themselves in a financial plight."

[73] *Oneanate* above n 15. Lest there be any confusion about the meaning of this Latin term, it may be helpful to quote the Supreme Court of Appeal judgment above n 1 in the present matter, which noted at para 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', 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." (Footnote omitted.)

[74] *Stroebel v Stroebel* 1973 (2) SA 137 (T) (*Stroebel*).

[47] *Oneanate* canvassed Roman-Dutch law authorities on the rule, including Van der Keessel and Huber, as well as South African case law. As that decision acknowledges,[75] according to Huber, the rule clearly did apply *pendente lite*.[76] However, *Oneanate* read Van der Keessel to have said that it did not.[77] As I will show, this, with respect, is a misreading of Van der Keessel.

[48] *Oneanate* proceeds to express a preference for Van der Keessel for the reason that Huber's formulation relies on the German author Carpzovius. The views of Carpzovius are said to stem from an understanding that the *total* interest paid may never exceed the capital amount. He also relies on the fact that Huber wrote primarily on the law of the Dutch province of Friesland, under which a judgment always novated the original debt, which is different from the position adopted in the South African common law. According to *Oneanate*, Van der Keessel's understanding of the *in duplum* rule more closely accorded with South Africa's common law basis of the rule, apparently originating as it did from a decision of the Dutch Hooge Raad.

[49] Does Van der Keessel enunciate the principle *Oneanate* attributes to him? I say he does not. This is how *Oneanate* deals with this aspect:

> "*Stroebel*'s case is, however, authority for the proposition that, *in spite of the contrary view of Van der Keessel*, if the *duplum* has been reached, interest does not again commence to run *pendente lite*."[78] (Emphasis added and citation omitted.)

Van der Keessel writes in the *Praelectiones*:[79]

> "Daar word egter beweer dat hierdie reël 'n uitsondering toelaat ten aansien van rente wat *pendente lite* oploop, en ek het dit êrens opgeteken gevind dat so 'n beslissing

[75] *Oneanate* above n 15 at 833D.

[76] Huber above n 65 at 3.37.38-43.

[77] *Oneanate* above n 15 at 832I-833C.

[78] Id at 832I.

[79] Afrikaans translation of Van der Keessel by Gonin *Voorlesinge Oor Die Hedendaagse Reg na Aanleiding van de Groot se "Inleiding tot de Hollandse Rechtsgeleerdheyd"* 1 ed at 239 (AA Balkema, Cape Town 1966) (Gonin translation).

> deur die Hooge Raad gegee is. 'n Verdere uitsondering, en dié is onbetwisbaar geld in die geval van jaargelde."[80] (Endnote omitted.)

[50] From this it appears that Van der Keessel, in relation to the *pendente lite* exception, is saying no more than that it is alleged that such an exception exists, and that he found it written "somewhere" that the Hooge Raad had made the decision – apparently without having seen the decision himself. Crucially, he then goes on to talk about a further exception to the *in duplum* rule that is "*indisputable*". This contrast – that is, the reference to the other exception being "indisputable" – is not without significance. There is an implicit acceptance by Van der Keessel that the exception to the *in duplum* rule may well be questionable. This is a far cry from a categorical exposition of a rule that suspends the *in duplum* rule *pendente lite*. If anything, after mentioning what has been "said" about the possible existence of the "suspending" rule, he – in essence – proceeds to express doubt that it, in fact, exists. That much is manifest from the contrast he makes about the rule on annuities which is "indisputable".

[51] On this reading of Van der Keessel, the difference between what he says, and the law as expounded by Huber (that the *in duplum* rule applied even *pendente lite*), is more apparent than real.

[52] It is certainly not readily apparent that some source exists where Van der Keessel ever embraced the *pendente lite* exception to the *in duplum* rule. If, as seems to be the case, reliance for the existence of this exception is the *Praelectiones*,[81] then *Oneanate* was wrong in this regard. Likewise, to the extent that my colleague, Cameron J, whose judgment (dissenting judgment) I have had the pleasure of reading, relies on this part of the *Oneanate* reasoning,[82] he too must, with respect, be wrong.

[80] My translation of this is as follows: "It is, however, claimed that this rule allows for an exception in respect of interest which runs *pendente lite*, and I have found it written somewhere that such a decision was given by the Dutch Hooge Raad. A further exception, and this one is indisputable, applies in the case of annuities."

[81] Above n 79.

[82] Dissenting judgment at [132] to [133].

Thus, insofar as the perceived existence of this exception informed the *Oneanate* conclusion, I cannot agree.[83]

[53] *Oneanate* accepted that *Stroebel*, which based its formulation of the rule on Huber[84] and which was followed in later decisions,[85] conclusively established that under South African common law, the *in duplum* rule continued to operate *pendente lite*. However, *Oneanate* chose to depart from this established position, justifying its decision as follows:

> "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 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. . . . 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'."[86] (Emphasis added and citation omitted.)

[83] I also note that there appears to be a discrepancy between the Gonin and Lorenz translation. The Lorenz translation does not mention the exception at all. I place reliance on the Gonin translation.

[84] *Stroebel* above n 74 at 139C, wherein Cillié JP stated:

> "Na my mening moet aan die stelling van Huber en Carpzovius voorkeur gegee word omdat dit konsekwent is en ook duideliker as die van Van der Keessel."

I translate this as follows: "In my opinion, preference must be given to the view of Huber and Carpzovius as it is consistent and also clearer than that of Van der Keessel."

[85] *LTA Construction* above n 63; *Administrasie van Transvaal v Oosthuizen en 'n Ander* 1990 SA (3) 387 (W) at 397E-H; and *Commercial Bank of Zimbabwe* above n 64 at 300D-F.

[86] *Oneanate* above n 15 at 834B-F.

[54] The Paulsens argue that the Supreme Court of Appeal in *Oneanate* was not at liberty to depart from a well-established common law principle on considerations of public policy or the public interest.[87] For this, they argue that the *in duplum* rule had become part of our positive law and, consequently, even though its origin was based in public policy, it was not subject to the whims of further policy-based application or amendment by a court.

[55] While I accept, as I must, that public policy may dictate that courts develop the common law in appropriate instances, I take the view that there is no comparison between *Oneanate* and cases like, for example, *Carmichele*.[88] In accordance with *Carmichele*, it was certainly wrongful of the police not to protect a section of vulnerable people in our society – women – from sexual and physical abuse at the hands of men with utter disrespect for women's rights to bodily and psychological integrity[89] and dignity.[90] There could not possibly be *cogent* public policy considerations pointing in the opposite direction. Public policy pointed in one direction, and one direction only.[91]

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[87] In our law, the concepts "public policy" and "public interest" are often used interchangeably. See, for example, *Minister of Education and Another v Syfrets Trust Ltd NO and Another* [2006] ZAWCHC 65; 2006 (4) SA 205 (C) (*Syfrets Trust*) at para 24, where the High Court referred to "public policy" and "its synonyms, *boni mores*, public interest and the general sense of justice of the community" and *Curators, Emma Smith Educational Fund v University of KwaZulu-Natal and Others* [2010] ZASCA 136; 2010 (6) SA 518 (SCA), where the Supreme Court of Appeal, citing *Syfrets Trust*, echoed this understanding, stating "public interest (the term is a synonym of 'public policy')".

[88] *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (*Carmichele*).

[89] Section 12(2) of the Constitution provides that "[e]veryone has the right to bodily and psychological integrity".

[90] Section 10 of the Constitution provides that "[e]veryone has inherent dignity and the right to have their dignity respected and protected".

[91] The primary dispute in this case was whether the common law should be developed such that the Minister of Police could be held liable for the failure by the police and prosecutor to oppose bail for a serial violent and sexual offender. The Court found that the police and prosecutor owed Ms Carmichele a legal duty to act positively to prevent the offender's release and that there were no considerations of public policy militating against the imposition of such a duty. The police had control over the offender, who was known to be likely to commit further sexual offences against women should he not be detained. The Court found further that reasonable and practical measures could have been taken to prevent his subsequent attack on Ms Carmichele.

[56] When faced with valid policy considerations pointing in opposite directions, on the other hand, short of making a choice based on nothing more than personal preference and predilections – to the total disregard of the countervailing considerations – it is not easy to decide what public policy actually dictates. *Oneanate* is a case in point. I am going to show that there are persuasive competing public interest considerations that are at the opposite end of those on which *Oneanate* relied.[92] And I am going to conclude that *Oneanate* was wrong in developing the common law in these circumstances. Why do I say it was wrong?

[57] Where public policy considerations do not chart the path of desired common law development with sufficient clarity, courts are not suitably placed to take the leap and make a judgment call one way or the other. To do otherwise, courts may find themselves straying into terrain that may well be legislative in nature. That would be at variance with the separation of powers doctrine. On the vexing issue before us, at the moment,[93] that role is best left to the Legislature. As this Court stated in *Carmichele,* "[i]n exercising their powers to develop the common law, Judges should be mindful of the fact that the major engine for law reform should be the Legislature and not the Judiciary". [94] Likewise, in *Masiya* this Court held:

> "The development of the common law . . . is a power that has always vested in our Courts. It is exercised in an incremental manner as the facts of each case require. This incremental manner has not changed, but the Constitution in section 39(2) provides a paramount substantive consideration relevant to determining whether the common law requires development in any particular case. This does not detract from the constitutional recognition, as indicated above, that it is the Legislature that has the major responsibility for law reform. Courts must be astute to avoid the appropriation of the Legislature's role in law reform when developing the common law."[95]

[92] If I were obliged to make a choice, I would opine that these countervailing public policy considerations are much weightier than those that led to the decision in *Oneanate*.

[93] I say "at the moment" because I do not know if different considerations may be at play at some future time.

[94] Above n 88 at para 36.

[95] *Masiya v Director of Public Prosecutions, Pretoria and Another* [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (CC) (*Masiya*) at para 31.

[58] The question at stake in *Oneanate* (and here) is so heavily laden with polycentricism that a court ought not to make a choice on what considerations best advance the public interest. It is exactly in matters that raise polycentric issues that courts should defer to the Legislature. Entering that boggy terrain and making policy choices would be but a usurpation of the legislative function in contravention of the separation of powers doctrine. That said, I am not suggesting that this Court should be servile and not do its duty in accordance with section 39(2) of the Constitution.[96] Where it is appropriate for it to develop the common law, it must.

[59] Now to demonstrate the competing policy considerations.

[60] In *Oneanate* the Supreme Court of Appeal does not appear to have been alive to, or at the very least does not mention, the fact that in our present constitutional dispensation, public policy stems from, or is informed by, the Constitution itself.[97] In particular, it completely ignored an important policy consideration founded on the Constitution – namely, the right of access to courts, which is enshrined in section 34 of the Constitution.[98]

[61] This is what this Court has said of this right:

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[96] Compare *R (on the application of ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23 at paras 75-6. These paragraphs were quoted with approval in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (*Bato Star*) at para 47. At para 46 *Bato Star* also quoted *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* [2003] ZASCA 46; 2003 (6) SA 407 (SCA) at para 50 where Schutz JA said "[j]udicial deference does not imply judicial timidity or an unreadiness to perform the judicial function".

[97] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (*Barkhuizen*) at paras 28-9; *Carmichele* above n 88 at para 56; *Du Plessis and Others v De Klerk and Another* [1996] ZACC 10; 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) (*Du Plessis v De Klerk*) at para 110; and Cameron JA's concurring judgment in *Brisley v Drotsky* [2002] ZASCA 35; 2002 (4) SA 1 (SCA) (*Brisley*) at para 91.

[98] Section 34 of the Constitution provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

"Our democratic order requires an orderly and fair resolution of disputes by courts or other independent and impartial tribunals. This is fundamental to the stability of an orderly society. It is indeed vital to a society that, like ours, is founded on the rule of law. Section 34 gives expression to this foundational value by guaranteeing to everyone the right to seek the assistance of a court.

When we had occasion to consider section 34, we alluded to these matters saying:

> 'Section 34 is an express constitutional recognition of the importance of the fair resolution of social conflict by impartial and independent institutions. The sharper the potential for social conflict, the more important it is, if our constitutional order is to flourish, that disputes are resolved by courts. As this Court said in *Lesapo*:
>
> > 'The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance.''

Section 34 therefore not only reflects the foundational values that underlie our constitutional order, *it also constitutes public policy*."[99] (Emphasis added and footnotes omitted.)

[62] Section 39(2) of the Constitution stipulates that "when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights". Among these noble objects, this Court has repeatedly noted that access to courts is "of cardinal importance".[100] This is because "[t]he fundamental right of access to courts

[99] *Barkhuizen* above n 97 at paras 31-3 (quoting *Zondi v MEC for Traditional and Local Government Affairs and Others* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at para 61).

[100] *Chief Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at para 22. See also *Mukaddam v Pioneer Foods (Pty) Ltd and Others* [2013] ZACC 23; 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC) at para 29.

is essential for constitutional democracy under the rule of law".[101] Thus "when the Judiciary exercises its constitutional powers to develop the common law, it must thereby seek to give expression to the right of access to courts".[102]

[63] By suspending the application of the *in duplum* rule *pendente lite*, *Oneanate* indiscriminately targets all debtors – regardless of whether they are defending the claim in good faith or not.[103] To hit all debtors in this manner would surely have an undesirable, chilling effect. Some debtors, despite a genuinely held belief that they have a valid defence, may sooner opt to settle a claim than face the potentially financially ruinous interest that would again commence to pile up once court process was served. We need look no further than this very case where, upon the application of the *in duplum* rule, the Paulsens would have been exposed to a maximum of R24 million, excluding interest that might accrue after date of judgment. With the suspension of the rule in accordance with *Oneanate*, the amount due by them, again excluding interest after judgment, has sky-rocketed to an amount in excess of R72 million.[104]

[64] Surely, with the effect that it has, the *Oneanate* principle does implicate a debtor's section 34 right. Indeed, it inhibits rather than promotes it; this, contrary to what the Supreme Court of Appeal said in *Van Zijl v Hoogenhout*: litigants are

[101] *Road Accident Fund and Another v Mdeyide* [2010] ZACC 18; 2011 (2) SA 26 (CC); 2011 (1) BCLR 1 (CC) at para 1 and *Barkhuizen* above n 97 at para 31.

[102] *Government of the Republic of Zimbabwe v Fick and Others* [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) at para 63.

[103] What Blignault J said of the defences made in the High Court is worth noting:

> "Winskor has thus far defended Slip Knot's payment application on grounds such as the invalidity of the loan agreement by reason of the provisions of section 40 of the NCA and the application of the *in duplum* rule. Neither of these defences can be described as frivolous or *mala fide*." (High Court judgment at para 56.)

[104] The maximum that the Paulsens would have been required to pay under the Supreme Court of Appeal order was R72 million, R36 million of which consisted of the judgment debt. (Supreme Court of Appeal judgment above n 1 at fn 14.) However, the Supreme Court of Appeal used 24 February 2012 – the date upon which Blignault J at the court of first instance handed down judgment – as the judgment date for its order. Before us, both parties have agreed that this Court's date of judgment should replace that of the High Court. (See [96].) On the authority of *Oneanate*, interest would be continuing to accrue at 3% per month from the date of service of process to the date of this Court's judgment. Thus, the liability of the Paulsens would exceed even the numerical cap given in the Supreme Court of Appeal judgment above n 1.

"entitled to the benefits of a constitutional dispensation that promotes rather than inhibits access to courts of law".[105] This ought to have been one of the factors that should have been uppermost when the Supreme Court of Appeal developed the common law in *Oneanate*. But that was not the case.

[65] The dissenting judgment disputes this conclusion, arguing that the right of access to courts is of little importance because enforcing the *in duplum* rule simply shifts the burden of litigation from debtors to lenders.[106] It takes the view that preventing interest from accumulating once litigation has started may cause creditors to abandon their claims against defaulting debtors as their money is eroded by inflation.[107]

[66] We need to look at South Africa's socio-economic realities. A large percentage of the providers of credit are large, established and well-resourced corporates. On the other hand, although there may be what the dissenting judgment refers to as "stout-boned" credit consumers, it would be ignoring our country's economic reality to suggest that there is any comparison between these corporates and most credit consumers. To many credit consumers, who fall on the wrong side of this country's vast capital disparities, astronomical interest may mean the difference between economic survival and complete financial ruin. While in some cases creditors may lose money to inflation during litigation, this is very unlikely to have the same catastrophic effect on the creditor compared to what the accumulation of run-away interest will have on the debtor.[108] If I were to be forced to make a choice between the two, it would be an easy one for me.

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[105] *Van Zijl v Hoogenhout* [2004] ZASCA 84; [2004] 4 All SA 427 (SCA) at para 7. See also *Shange v MEC for Education, KwaZulu-Natal* [2011] ZAKZDHC 28; 2012 (2) SA 519 (KZD) at para 40.

[106] Dissenting judgment at [143] to [145].

[107] Id at [143].

[108] This is because the interest rate will usually be significantly higher than the rate of inflation. For example in this case, the agreed interest rate between the parties amounts to 43% per annum, while the most recently available data indicates that the current inflation rate in South Africa is 3.9% per annum, down from 4.4% in January 2015. Statistics South Africa "CPI History 1960 Onwards", available at http://beta2.statssa.gov.za/publications/P0141/P0141February2015.pdf. The interest rate is over ten times the

[67] Applying the *in duplum* rule *pendente lite* does not inhibit creditors' access to courts nearly to the same extent that lifting the rule inhibits debtors' access to courts. It is difficult to imagine that creditors will abandon meritorious claims against debtors merely because the amounts they are set to recover upon victory will be limited to double the principal amount of the loan.

[68] To allow for uncapped, and possibly exorbitant, interest to run *pendente lite* grants a powerful tool to creditors to bully and possibly annihilate debtors using the litigation process to their best advantage. And this is made possible by the sheer imbalance in financial muscle. By allowing uncapped interest to run as a result of a debtor exercising her right of access to courts by suspending the *in duplum* rule *pendente lite* we risk rendering the debtors' right of access to courts tenuous, if not illusory.

[69] In sum, suspension of the *in duplum* rule *pendente lite* serves as a significant impediment to debtors seeking assistance from courts, inhibiting rather than promoting the right of access to courts. Conversely, the continued application of the rule does not serve as an equivalent impediment to creditors. This policy consideration against the suspension of the rule, founded as it is on the Constitution itself, is weighty indeed[109] and ought to have been considered in *Oneanate*.

[70] There is a countervailing policy consideration, also founded on constitutional values, which comes into play here. That is the respect for freedom of contract which, as this Court has noted, "gives effect to the central constitutional values of freedom and dignity".[110] Holding a debtor bound to the interest obligation contained in an

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current inflation rate. Thus, the passage of a year with interest accruing will result in the Paulsens facing a debt, the value of which is more than 37% greater in constant value terms; while the passage of a year without interest accruing will result in a 3.9% loss in the value of Slip Knot's money in constant value terms.

[109] For the relationship between public policy and the Constitution see *Barkhuizen* above n 97 at paras 28-9; *Carmichele* above n 88 at para 56; and *Du Plessis v De Klerk* above n 97 at para 110.

[110] *Barkhuizen* id at para 57.

agreement regardless of the double having been reached may be seen to accord with freedom of contract; and thus with the rights to freedom and dignity.

[71] Under common law the principle of freedom of contract (often expressed in the maxim *pacta sunt servanda*)[111] has never been absolute. Rather, it has always been subject to limiting rules intrinsic to the law of contract.[112] The *in duplum* rule, including its application *pendente lite*, is one of these rules. It is perhaps so that, based on the *Barkhuizen* principle on freedom of contract,[113] some of these rules may not pass constitutional muster. In the context of this case, it would be well-nigh impossible to determine which ones may and which ones may not. In *Barkhuizen* itself this Court made it clear that freedom of contract is by no means absolute under our constitutional dispensation. It endorsed an "approach that leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them".[114]

[72] Indeed, in *Barkhuizen* the Court had to weigh up the same two constitutional interests at stake here – freedom of contract and access to courts – and it laid down the following principle:

[111] Meaning: "agreements must be kept".

[112] Well-established common law rules render certain contractual provisions void or unenforceable, even when contained in an otherwise valid and binding contract, including provisions that: tend to produce forced labour; oust the jurisdiction of the courts; provide for excessive attorney's fees or witness expenses; permit *parate executie* (right of a creditor to execute without a court order) of immovable property; are injurious to the institution of marriage; constitute an unreasonable restraint of trade; contain certain penalty clauses; relate to time-bar; or provide for conclusive proof. See Christie "Illegality and Unenforceability" in his *The Law of Contract* 6 ed (LexisNexis, Pietermaritzburg 2011) at 351.

[113] *Barkhuizen* above n 97 at para 57.

[114] Id at para 30. This Court's recent opinion in *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2014] ZACC 28; 2015 (1) SA 1 (CC) at para 65 further underscores that *Barkzuizen* id stands not for the proposition that the freedom of contract is inviolate, but merely that "within bounds, contractual autonomy claims some measure of respect".

> "[A] court will bear in mind the need to recognise freedom of contract, but the court will not let blind reliance on the principle of freedom of contract override the need to ensure that contracting parties must have access to courts."[115]

Thus it cannot be said that respect for freedom of contract must always trump all other considerations.

[73] To say *pacta sunt servanda* should prevail here because debtors like the Paulsens are "stout-boned" and should be held to bargains they concluded open-eyed misses the point. The plain reality is that in South Africa debtors are typically not as financially resourced as the large corporates that dominate the credit market. That there may be some "stout-boned" debtors does not detract from this economic reality.

[74] Also, in this country there may be those emerging out of the ranks of the financially vulnerable. On the face of it, they may appear to resemble – in financial terms – those who were never the subject of disadvantage under apartheid. This may give the semblance that they too are "stout-boned". In some cases though, the reality may be that, because they are new entrants into this new status, their financial strength is actually precarious. One mishap – which could even take the form of unbridled interest – may cause them complete financial ruin.

[75] It cannot be plausibly gainsaid that for our democracy to be meaningful, it is only fitting that those previously denigrated by racism and apartheid, confined to the fringes of society and stripped of dignity and self-worth must also enter the terrain of meaningful, substantial economic activity.[116] Surely, our hard-fought democracy could not have been only about the change of the political face of our country and such upliftment of the lot of the downtrodden as the public purse and government policies permit. Entrepreneurship and the economic advancement of those with no

[115] *Barkhuizen* id at para 55.

[116] As stated in the preamble of the Constitution, "[w]e, the people of South Africa, . . . through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to . . . [i]mprove the quality of life of all citizens and free the potential of each person".

history of being financially resourced must be given room to take root and thrive. This can hardly happen without finance. The sort of interest to which *Oneanate* exposes our legal system is deleterious to this necessary economic advancement.[117]

[76] I am not unmindful of the fact that the financial position of some of those who were not disadvantaged by apartheid may be precarious although, on the face of it, appearing solid. Rather than detract from, this bolsters my point: one should be careful not to overemphasise the apparent financial strength of debtors and thus the equality of arms of contracting parties.

[77] Beyond the important constitutionally-based policy considerations of access to courts and freedom of contract – neither of which was addressed in *Oneanate* – there are other policy considerations both for and against the suspension of the rule *pendente lite*. This judgment, on the one hand, and the dissenting and *Oneanate* judgments, on the other, show us as much.

[78] The major problem I have with *Oneanate* is that its approach was one-sided. I find it problematic that *Oneanate* focused only on the effect of the rule on creditors (or "finance") rather than weighing the interests of creditors and debtors equally. Once *Oneanate* gets past the application of the rule pre-litigation, there is not a single word about the interests of debtors. Debtors are no more immune to the vagaries of the litigation process than are creditors. *Oneanate* does not explain why only the interests of the creditor are of relevance in this regard. Why should the *in duplum* rule not continue to cap interest even *pendente lite*? With the exception of some devious ones, debtors also have no control over the litigation process.

[117] The preamble of the Broad-Based Black Economic Empowerment Act 53 of 2003 warns that "unless further steps are taken to increase the effective participation of the majority of South Africans in the economy, the stability and prosperity of the economy in the future may be undermined to the detriment of all South Africans irrespective of race".

[79] Must the debtor get the short end of the stick purely because, as it was held in *Oneanate*, "interest and indeed compound interest is the 'life-blood of finance' in modern times" and that we "should not apply all of 'the old Roman-Dutch law to modern conditions where finance plays an entirely different role'"?[118] In *Oneanate*, the Court seemed to believe that the sole basis for the application of the rule pre-litigation is to prevent a creditor from purposefully delaying bringing suit in order to rack up huge sums of interest. The dissenting judgment appears to have adopted this view as well.[119] In fact, as described above at [42] to [43], the protection afforded by the *in duplum* rule has a far broader basis than this. The possible total financial ruin of debtors by uncapped interest *pendente lite* is at least as much an important public interest consideration as the interest of finance.

[80] Debtors may be drained entirely dry by the accumulation of interest during the pendency of litigation just as well as prior to the initiation of litigation. The consideration that the *in duplum* rule is aimed at aiding debtors is not diminished by the initiation of legal proceedings. This overarching purpose of the *in duplum* rule augurs for its application both before and during litigation.[120]

[81] The dissenting judgment correctly notes that inflation rates are significantly higher today than they were during the 16th and 17th century. But it is also true that interest rates are commensurately higher. So while the passage of time without interest accruing hurts lenders in today's high-inflation rate environment, it is equally

[118] *Oneanate* above n 15 at 834E-F.

[119] See dissenting judgment at [133].

[120] A similar critique of the holding in *Oneanate* was argued by Vessio:

> "It is submitted that exactly because the *in duplum* rule is, as stated by the court [in *Oneanate*], concerned with public interest, that its scope should not be limited in terms of the public policy issues which it seeks to protect and which it has been held to protect. The rule should therefore not be perceived as only protecting borrowers from exploitation by lenders. In addition, it prevents the over-extending of debtors by limiting their liability in terms of debt. . . . While it is true that the creditor cannot control delays caused by litigation, the two-pronged policy effect of the *in duplum* rule should be considered and the debtor should be protected from incurring an unforeseen and burdensome amount of interest, especially in light of the fact that the judgment, as shall be seen, will cause interest to run on the whole judgment debt." Vessio UP above n 70 at 53-4.

true that the passage of time with interest accruing at contractual rates prejudices borrowers' interests during litigation significantly in today's high-interest rate environment. Thus the broad basis for the existence of the rule – protecting debtors from being buried under a mountain of debt – applies with at least equal force in today's modern world of finance, both before and during the litigation.

[82] Another purpose of the *in duplum* rule was to enforce sound fiscal discipline upon creditors by serving to disincentivise lending money to a bad risk.[121] Given that the recent global financial crisis (which has affected South Africa no less than many other countries) arose in large part from a failure of fiscal discipline, this concern is still quite relevant. As with the larger purpose of protecting debtors, *Oneanate*'s suspension of the *in duplum* rule *pendente lite* serves to weaken the effectiveness of the rule in incentivising fiscal discipline among creditors.

[83] We must also consider how the application of the rule *pendente lite* affects creditors. A creditor in whose favour a judgment is granted recovers her capital outlay, interest thereon (which is not necessarily limited to the double, as paid instalments are not capped by the *in duplum* rule), post-judgment interest[122] and costs. Of course, creditors would be better off if they could recover additional interest accumulating in excess of double the capital amount during the pendency of litigation. But general notions of fairness would seem to dictate that the hardship faced by creditors who must forgo the collection of this interest is less than the hardship incurred by debtors who, because they chose to litigate claims in good faith, must pay multiple times the borrowed capital amount in interest. And on this, I again emphasise that preponderantly debtors are more financially vulnerable than creditors.

[84] Suspending the *in duplum* rule is not the only possible way of ameliorating a creditor's situation. Vexatious litigation or delaying tactics by a debtor who truly has

[121] *Commercial Bank of Zimbabwe* above n 64 at 321F-I.

[122] Which also may accumulate, but is limited to an amount equal to the whole of the judgment debt. See [96] to [100].

no defence may, for example, be addressed by means of summary judgment. Even mechanisms such as punitive costs awards exist to counteract reprehensible behaviour on the part of a litigant. While some unscrupulous debtors may employ meritless defences in an attempt to stretch out litigation for as long as possible, it does not make sense for this to continue after the judgment of the court of first instance has been handed down. That is so because the judgment debt will be due – and ordinarily attracts interest – from the date of judgment of the court of first instance.[123] This should serve to limit the amount of undue harm to be suffered by lenders.

[85] I am well aware of the possibility of abuse of the litigation process by debtors. And I accept that it was, indeed, a factor worth taking into account when considering whether to develop the common law rule. But *Oneanate* does not appear to have been alive to the fact that, upon the suspension of the *in duplum* rule *pendente lite*, creditors could themselves abuse the litigation process to derive the best possible advantage for themselves. Yet, where the debtor is not of means, this would not be of advantage to a creditor. But not all debtors are impecunious. Racking up interest of the nature as we have in this case against a financially-endowed debtor could be a real incentive for creditors to abuse the litigation process.[124] On the contrary, the non-suspension of the *in duplum* rule may incentivise creditors to act swiftly.

[86] I have said all of the above to illustrate a simple point: there are strong public policy considerations in favour of maintaining the operation of the *in duplum* rule

[123] See [96] to [98] where the implications of this subject are discussed.

[124] There is also the possibility – explained ably by Chinhengo J in the Zimbabwean case of *Conforce (Pvt) Ltd v City of Harare* 2000 (1) ZLR 445 (H) at 458C-F, and quoted with approval in *Zimbabwe Development Bank v Salons and Others* [2006] ZWHHC 43 (*Zimbabwe Development Bank*) at 12 – that creditors could exploit the suspension of the *in duplum* rule created by *Oneanate* to avoid the application of the rule entirely:

> "In my view, the danger in adopting the approach in *Oneanate* . . . is that an unscrupulous creditor only has to institute action to defeat the *in duplum* rule. He may so act as to ensure that the institution of proceedings and the attainment of the double coincide with the result that the rule is rendered inoperative. I do not see anything that is against the public interest or the interest of modern finance, if the *in duplum* rule operates in the manner outlined by Gillespie J and the old Roman Dutch authorities which espouse the view that once the double has been reached, interest must stop to run regardless of the institution of proceedings or that the stage of *litis contestatio* has been reached. . . . I am therefore unpersuaded by the conclusion reached on this point in *Oneanate*."

pendente lite. Of course there are, as illustrated by the dissenting and *Oneanate* judgments, competing considerations suggesting the opposite. In my book, though, those in favour of the continued application of the *in duplum* rule outweigh those that are not. But, if I make a definitive choice in this regard, I too will be guilty of exactly that which I have cautioned against.[125] Whatever my personal views may be on the relative weight of the competing public interest considerations, the point is that there is something to be said for the considerations put forth in the dissenting judgment. In these circumstances, it would be improper and beyond the judicial function for me to impose my view and preference. *Oneanate* did exactly that: it disregarded cogent countervailing considerations. That was wrong, plain and simple. The dissenting judgment is falling into the same trap.

[87] I have had the pleasure of reading the concurring judgment by the Deputy Chief Justice (concurring judgment). I welcome the fact that the difference between it and this judgment does not relate to what I see as the core principle: that is, where competing public policy considerations – infused, as they should be, with constitutional values and norms – are such that it is difficult to make a choice one way or the other, it would be inappropriate for a court to impose its preferred choice. I understand it to say that in this case the choice is not difficult to make.[126]

[88] The concurring judgment commits the exact same mistake that the dissenting judgment commits. It too reaches its conclusion based on its preferred public policy considerations. Interestingly, it does so by opting for the extreme opposite of the policy choice made by the dissenting judgment. I must pause here and make this observation. The very fact that two esteemed, eminent colleagues make – *each with conviction* – diametrically opposed choices on the true path shown to us by public policy underscores the very point I am making. That is, each of the choices they make is but a personal preference.

[125] See [56] to [58].

[126] See concurring judgment at [113].

[89] This leads to one conclusion; and that is, *Oneanate*'s development of the common law was misplaced. Therefore, the *in duplum* rule, even *pendente lite*, should have been left intact.[127] Had *Oneanate* been appealed to it, this Court would have been at liberty to uphold the appeal and upset this development of the common law.[128] That would not have been a development of the common law; it would merely have been a rejection of the Supreme Court of Appeal's development and a retention of what the common law had always been. And that would not have been at variance with the pronouncement that "[c]ourts must be astute to avoid the appropriation of the Legislature's role in law reform when developing the common law".[129] The question now is: are we prevented from setting right a wrong policy choice, because of the passage of years and the fact that *Oneanate* did not come on appeal? I say not.

[90] This Court has no control over what matters are brought before it. It has never been faced with the operation of the *in duplum* rule. That is a function of the fact that it has not been brought before us by litigants. An incorrect decision cannot be allowed to bed down and become part of our common law purely because of the fortuitous nature of what lands on our plate for adjudication. Not being able to upset *Oneanate* just because it did not come before us on appeal would be inimical to this Court's status as the apex Court in the judicial hierarchy. For those reasons, I proceed to overrule *Oneanate* insofar as it held that the *in duplum* rule is suspended *pendente lite*. That means the law reverts to what it was, to the benefit, not only of the Paulsens, but

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[127] The views of the High Court of Zimbabwe in *Zimbabwe Development Bank* above n 124 at 9-10 are worth noting:

> "[Zulman JA] held that public policy considerations would not favour the debtor who kept the creditor who had timeously instituted recovery but was frustrated by delays endemic in the legal system out of his money when interest is the lifeblood of finance in modern times. It was his conclusion that such a creditor could not be held to have exploited the debtor. *The conclusion of Zulman JA, with respect, is difficult to follow, and appears out of sync with his reasoning on the entrenchment of the in duplum rule in our law*." (Emphasis added.)

[128] Based on the fact that public policy is now informed by the Constitution (*Barkhuizen* above n 97 at paras 28-9; *Carmichele* above n 88 at para 56; *Du Plessis v De Klerk* above n 97 at para 110; and *Brisley* above n 97 at para 91), the decision in *Oneanate* could, even at that time, have been appealed to this Court.

[129] *Masiya* above n 95 at para 31.

all debtors, except those whose matters have been finalised with no possibility of appeal. For the reasons stated in [86] above,[130] I disavow any suggestion that this conclusion constitutes a development of the common law. This is but a rejection of the *Oneanate* development, which, because of the competing public policy considerations, could not appropriately be made by a court. The time lapse between 1997, when *Oneanate* was decided, and now makes no difference in this regard.

[91] As I indicated, it is for Parliament – not the courts – to make a policy choice in this polycentric morass. If the credit market or financial sector feels that there is a case to be made for the suspension of the *in duplum* rule *pendente lite* or, indeed, for its entire scrapping, it is at liberty to lobby Parliament. It is there that, in a matter like this, the separation of powers doctrine dictates the matter should receive attention.

[92] The short point: at the moment,[131] this is not a matter on which courts should be of assistance. Of course, in deserving cases courts are enjoined not to shirk their duty to develop the common law in accordance with section 39(2) of the Constitution.

[93] In conclusion on this subject, in deference to the Legislature, in *Oneanate* the Supreme Court of Appeal ought not to have taken the quantum leap of grafting into the long-established rule a suspension of the *in duplum* rule *pendente lite*.

[94] Accordingly, I would uphold the Paulsens' appeal on the application of the *in duplum* rule *pendente lite*, with the effect that outstanding arrear interest is not permitted to run during the course of litigation once the double of the capital debt has been reached.

[130] Pursuant to the discussion at [56] to [58], canvassing *Carmichele* above n 88 and *Masiya* above n 95.

[131] Again, I say so because I have no idea what tomorrow's public policy may tell us.

(c) Suretyship

[95] The Paulsens raised an argument that a surety can never be liable to pay interest in excess of what would be due in accordance with the *in duplum* rule where proceedings claiming the amount owing have not been instituted against the principal debtor. In light of my findings on the *in duplum* rule, it is unnecessary to decide this issue.

Post-judgment interest

[96] It is settled law that the *in duplum* rule permits interest to run anew from the date that the judgment debt is due and payable.[132] The usual practice for appellate courts, including this Court, is to retain the date on which the court of first instance handed down judgment as the date on which judgment debts are due and payable.[133] In oral argument, counsel for both the Paulsens and Slip Knot accepted that in the order, for the purposes of calculating post-judgment interest, the date on which the High Court entered judgment should be replaced with the date on which this Court hands down judgment.

[97] Were the High Court's date of judgment to be used as the date from which the judgment debt is due and payable, this would have the effect of suspending the *in duplum* rule for the pendency of the appellate litigation, thus allowing interest to accrue during this period. The same reasons that led me to conclude that the rule applies *pendente lite*, lead to the conclusion that the date this Court hands down judgment should be the date from which the running of interest recommences. I am, therefore, of the view that we should oblige the request of the parties.

[132] See *Oneanate* above n 15 at 834H; *Stroebel* above n 74 at 139D-E; *Commercial Bank of Zimbabwe* above n 64 at 300B-C; and *Absa Bank Ltd v Erasmus* [2006] ZAWHCC 25; 2007 (2) SA 545 (C) (*Erasmus*) at paras 29-30.

[133] See *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another* [2012] ZACC 9; 2012 (9) BCLR 951 (CC) at paras 7-8 which quoted, with approval, *General Accident Versekeringsmaatskappy Suid-Afrika Bpk v Bailey NO* 1988 (4) SA 353 (A) at 358H-I.

[98] However, I emphasise that this logic applies because the Paulsens' appeal was meritorious, and indeed the order I propose differs materially from that of the High Court and Supreme Court of Appeal. I am here not concerned with totally unmeritorious, unsuccessful appeals brought as a dilatory tactic. In such instances, different considerations must apply, for the reasons explained by Labe J in *Certain Underwriters*.[134]

[99] There are three further closely related questions with similar practical implications. First, does post-judgment interest run on the whole of the judgment debt or only on the original capital amount of the loan? Second, does the *in duplum* rule cap the running of such additional interest at double the sum of the whole of the judgment debt or double the sum of the original capital amount of the loan? Third, does this interest run at the contractual rate or at the statutorily prescribed rate of interest?

[100] With regard to the first two questions, the order of the Supreme Court of Appeal provided that interest runs on – and is limited to an amount equal to – the whole of the judgment debt, including the portion which consists of previously accrued interest.[135] The parties do not dispute these aspects of the Supreme Court of Appeal's order, and therefore this Court will not disturb them.[136] The Supreme Court of Appeal also held that the post-judgment interest runs at the rate agreed upon

[134] In a dissent in *Certain Underwriters at Lloyds v South African Special Risks Association* [2000] ZAGPHC 2; 2001 (1) SA 744 at para 15, Labe J explained that it is "common sense" that interest should run from the date of judgment in the court of first instance and not from the date of the judgment in the court of appeal because "it is unthinkable that a [losing] party . . . should be entitled to lodge a frivolous appeal against an award, and thereby delay the period from which interest should run on the award". This reasoning plainly does not apply to meritorious, successful appeals.

[135] Supreme Court of Appeal judgment above n 1 at para 3(d) of the order.

[136] There does appear to be conflicting authority on this point. The Supreme Court of Appeal's approach in this case is in accord with other recent cases including *Oneanate* above n 15 at 833G-I; *Commercial Bank of Zimbabwe* above n 64 at 300G-301A; and *Erasmus* above n 132 at paras 28-30 (quoting *Oneanate* with approval). However, *Stroebel* above n 74 at 139H, which I have generally approved of as an accurate reflection of the state of our common law at the time, held that post-judgment interest would only run on the original capital amount, and would be capped once it reached a sum equal to this amount.

contractually; that is 3% per month.[137] The Paulsens do challenge this finding, arguing that the statutorily prescribed default rate of 15.5% per annum should apply instead. However, the clear weight of authority is against the Paulsens,[138] and they have provided no persuasive arguments justifying a departure from the accepted practice of applying the contract rate to post-judgment interest.

Costs

[101] The Paulsens wanted to obliterate their entire liability to Slip Knot. They have succeeded only in undoing the development of the *in duplum* rule. Likewise, the accrued interest to which Slip Knot would have been entitled, but for this Court's conclusion on the *in duplum* rule, would have been far more than it is now able to recover.[139] Thus although Slip Knot has succeeded on the NCA point, it has lost on a significant part of what it set out to achieve. It seems only fair that there should be no order of costs in all four Courts.

Order

[102] The following order is made:

1. Leave to appeal is granted.
2. The orders made by the Western Cape High Court, Cape Town on 24 February 2012 and 12 February 2013 are set aside.

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[137] Supreme Court of Appeal judgment above n 1 at para 3(d) of the order.

[138] See, for example, *Stroebel* above n 74 at 139E ("Omdat die rente uit die ooreenkoms van die partye vloei, is die koers ook die een waarop die partye ooreengekom het" – which I translate as "[b]ecause the interest flows from an agreement by the parties, the rate is also that to which the parties had agreed"); *Oneanate* above n 15 at 836B-C; and *Commercial Bank of Zimbabwe* above n 64 at 325H. The language of the Prescribed Rate of Interest Act 55 of 1975 at section 1(1) also makes it clear that the prescribed rate of interest is to be used when "the rate at which the interest is to be calculated is not governed by any other law *or by an agreement*". (Emphasis added). As the loan agreement concluded between Slip Knot and Winskor expressly provides for interest to be calculated at 3% per month, there is no reason to have resort to the prescribed statutory rate.

[139] According to fn 14 of the judgment of Wallis JA in the Supreme Court of Appeal above n 1, this would have amounted to around R72 million in total, as opposed to the R24 million to which they would now be entitled, excluding post-judgment interest. Based on the parties' positions with respect to the proper judgment date, the Paulsens could have been liable for an amount above even this figure had they been entirely unsuccessful in their arguments before this Court. (See [63] and n 104.)

3. The appeal against the order of the Supreme Court of Appeal is upheld only to the extent reflected in paragraph 4 below.

4. The applicants are ordered to pay to the respondent, jointly and severally—

    (a) the sum of R12 million;

    (b) interest on that sum at the rate of 3% per month calculated from 21 July 2007 to 10 January 2010, up to a total of R12 million;

    (c) interest on the sum of R24 million, being the total of the amounts in (a) and (b) above, at the rate of 3% per month from the date of judgment, 24 March 2015, to date of payment, limited to R24 million.

MOSENEKE DCJ (Mogoeng CJ, Khampepe J, Leeuw AJ and Van der Westhuizen J concurring):

Introduction

[103] I have profited from reading the judgment by Madlanga J (main judgment) and the dissent of Cameron J (dissenting judgment). I support the order that the main judgment makes and most of the grounds on which it rests. It follows that, persuasive as it is, the dissenting judgment opts for an outcome on the reach of the *in duplum* rule *pendente lite*, which I cannot support. This, my concurrence, is directed at expressing a residual but vital difference between my reasoning and that of the main judgment.

[104] The main judgment favours us with a handy interpretation of section 167(3) of the Constitution as altered by the Constitution Seventeenth Amendment Act.[140] It

[140] Section 167(3) of the Constitution now provides:

"The Constitutional Court—

(a) is the highest court of the Republic; and

gives us a useful understanding of when this Court's apex and general jurisdiction is engaged. For the considerations outlined in the main judgment, it is in the interests of justice to grant leave to appeal.

[105] I also support the manner in which the main judgment disposes of the meaning of the implicated provisions of the National Credit Act[141]. It is quite correct that the Paulsens may not take refuge in, or escape liability on account of, the construction of the NCA that they prefer. I adopt the emphatic result of the main judgment that "the plea for the invalidation of the agreement on the ground that Slip Knot was not registered as a credit provider in terms of the Act is unmeritorious and must fail in its entirety".[142]

[106] I also embrace the manner in which the main judgment resolves the debate over post-judgment interest. For good reason, it concludes that the *in duplum* rule permits post-judgment interest to run afresh at the rate set by the loan agreement from the date of the judgment to the date of payment.[143] I support its order that the Paulsens must pay interest on the sum of the capital and the capped interest, being R24 million, at the contract rate from the date of judgment to the date of payment, limited to R24 million.

The residual difference

[107] In this dispute there is no grumbling about what the *in duplum* rule lays down or its longstanding pedigree as part of our law.[144] It is a common law norm that

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(b) may decide—

(i) constitutional matters; and

(ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and

(c) makes the final decision whether a matter is within its jurisdiction."

[141] Above n 2.

[142] Main judgment at [41].

[143] Id at [100].

[144] *Ethekwini Municipality v Verulam Medicentre (Pty) Ltd* [2005] ZASCA 98; [2006] 3 All SA 325 (SCA) (*Ethekwini*) at paras 9-10; *Leech* above n 64 at para 9; *LTA Construction* above n 63 at 482B-C; *Sanlam Life*

regulates the accrual of interest on a debt that is due and payable. The rule is that arrear interest stops accruing when the sum of the unpaid interest equals the extent of the outstanding capital. The plain policy consideration underlying the rule is to prevent a broken debtor from being pounded by the ever-growing interest burden. The purpose of the rule is dual. It permits a creditor to recover double the capital advanced to the debtor whilst it seeks to alleviate the plight of debtors in financial distress.

[108] The contested question here is whether the *in duplum* rule is suspended during litigation aimed at recovering the debt owing. The pendency of litigation starts when the process that initiates an action to recover a debt is issued and ends when judgment is delivered. In *Oneanate* the Supreme Court of Appeal (per Zulman JA) held that the beginning of a suit to recover the debt suspends the operation of the *in duplum* rule.[145] This meant the limitation the rule placed on the accrual of arrear interest, to the extent of the outstanding capital, fell away once litigation had started. On this take, unpaid interest may balloon at the agreed rate for as long as litigation persists and until the date of payment.

[109] Up until *Oneanate*, judicial authority had favoured the rule being applied, even *pendente lite*.[146] Nonetheless, *Oneanate* adapted and developed the common law by holding that the protection afforded to debtors under the *in duplum* rule should be suspended *pendente lite*. This the Court did because of its reading of the old authorities, and because public policy supported the alteration of the ruling common law. The Court in *Oneanate* reasoned that:

> "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

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Insurance Ltd v South African Breweries Ltd 2000 (2) SA 647 (W) at 652F-G; and *Union Government* above n 65 at 413.

[145] *Oneanate* above n 15 at 834H.

[146] *Stroebel* above n 74.

> Huber does not serve the public interest, I do not believe that we should consider ourselves bound by it."[147]

[110] The 1997 decision in *Oneanate* in effect developed the common law in order to align it with public policy. It altered positive law, but without even the slightest reference or regard to constitutional values. The main judgment holds, correctly in my view, that the Supreme Court of Appeal was wrong in its understanding of the old authorities on the *in duplum* rule and on the conclusion that the rule does not serve the public interest. The main judgment acknowledges that the decision in *Oneanate* is not before this Court on appeal but even so concluded that it was entitled to consider it and overrule it.[148] The main judgment does in fact overrule *Oneanate* and thus restores the common law on the *in duplum* rule to what it was before.

[111] The main judgment reversed the development of the *in duplum* rule favoured in *Oneanate* on the ground that it offends the constitutional injunction that everyone must have access to courts. It concedes that there is at least one other countervailing consideration, being the constitutionally authorised norm of *pacta sunt servanda*. The main judgment goes ahead and refuses to commit to a particular form of development of the common law save to reverse the development in *Oneanate*.[149] Its approach overrules *Oneanate* insofar as it holds that the *in duplum* rule is suspended *pendente lite* and finds that the law would revert back to what it was. Thus, the *in duplum* rule, even *pendente lite*, should have been left intact.

[112] At this point of its reasoning, the main judgment holds that it has not and may not develop the common law related to the *in duplum* rule because it is a task best left to the Legislature.[150] It does not want to make the same error of changing the *in*

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[147] *Oneanate* above n 15 at 834C-D.

[148] Main judgment at [89] to [90]

[149] In *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) at paras 16-7, this Court sets out some of the ways in which the common law can be developed.

[150] Main judgment at [57].

duplum rule made in *Oneanate.* Doing so, the main judgment holds, would offend the separation of powers and usurp the role of Parliament of making "a policy choice in this polycentric morass".[151]

[113] I am in respectful disagreement with the main judgment's approach to set aside the suspension of the *in duplum* rule preferred by *Oneanate* without acknowledging that in doing so it has also developed the common law. What it has in effect done is to discard the public interest evaluation of *Oneanate* in favour of public policy considerations animated by the right of access to courts and to a fair hearing founded on the Constitution.[152] This the main judgment has done even after weighing up the countervailing and constitutionally sanctioned consideration that a contractual obligation validly assumed must be fulfilled, and that not every contracting party may be assumed to be financially "stout-boned".[153] The main judgment did not find that these opposite public policy considerations were equally poised and many-sided. Instead it found that *Oneanate* was so clearly wrong and one-sided in its assessment of public policy that it was entitled to set aside its precedent and reinstate the displaced common law rule.

[114] The main judgment has not merely corrected a little error of assaying public policy made in *Oneanate*. It has altered and developed the common law that ruled the roost for more than a decade and a half.[154] Its reasoning has rightly recognised the financial and often class inequality between lenders and borrowers. It points to the financial injustice of an uncapped and mounting interest yoke where the lender is rewarded well beyond a fair return on money advanced.[155] It draws attention to the adverse impact of uncapped interest *pendente lite* on access to courts. It gives a

[151] Id at [91].

[152] Id at [60].

[153] Id at [73] to [74].

[154] See *Nedbank* above n 40 at paras 36-8; *Ethekwini* above n 144 at paras 9-10; and *F & I Advisors (Edms) Bpk & 'n Ander v Eerste Nasionale Bank van Suidelike Afrika Bpk* [1998] ZASCA 65; 1999 (1) SA 515 (SCA) at 522G-H.

[155] Main judgment at [68].

constitutional nod in favour of sanctity of contract, but holds that the value of that principle alone is not sufficient to permit an onerous and crushing debt burden on the debtor. A burden of that kind cannot properly be imposed, not even under the guise of free will, particularly in a society where equal worth is an ideal that is prized perhaps more than financial gain. In fact, the Paulsens have succeeded here, and others similarly situated may succeed only because the common law on the *in duplum* rule has been changed.

[115] The main judgment makes another mistake in reasoning that the separation of powers precludes it from adapting the common law in this case. There may be cases where Parliament is entitled to judicial deference.[156] But we must keep in mind that Parliament may alter the common law in order to procure one or other legitimate public good through legislative reform.[157] Even after a court has developed a common law rule, nothing precludes Parliament from revisiting that rule and changing it. Ordinarily, a development of the common law takes away nothing from the power of Parliament to alter the common law provided that the change it makes does not offend the Constitution.[158] Developing the *in duplum* rule, a common law norm that has always been under the oversight of the courts, will not encroach on any exclusive terrain of Parliament.

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[156] In respect of judicial deference, see *S v Lawrence; S v Negal; S v Solberg* [1997] ZACC 11; 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) at para 42 and *Du Plessis v De Klerk* above n 97 at para 180. In respect of separation of powers, see *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) at para 65; *Law Society of South Africa and Others v Minister for Transport and Another* [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) (*Law* Society) at paras 40, 54, and 70-1; *S v Dodo* [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC) at paras 22-3; *Pharmaceutical Manufacturers Association of South Africa and Another*; *In re: Ex parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 26; and *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* [1995] ZACC 8; 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC).

[157] See *Carmichele* above n 88 at para 36, in which this Court held that—

> "[i]n exercising their powers to develop the common law, judges should be mindful of the fact that the major engine for law reform should be the legislature and not the judiciary."

[158] See *Law Society* above n 156 at para 69, in which this Court held that—

> "the Constitution [does not] limit . . . the legislative power of Parliament in relation to adapting or abolishing parts of the common law".

[116] If anything, the Constitution enjoins and permits courts to develop the common law in line with the objects of the Bill of Rights.[159] It is well within the place of courts to shape the common law in a way that advances constitutional values. The authority imposed upon courts by section 39(2) of the Constitution is thus extensive, requiring courts to be alert to the normative framework of the Constitution not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue.[160] The overall purpose of section 39(2) is to ensure that our common law is infused with the values of the Constitution, and the normative influence of the Constitution must be felt throughout the common law.[161] Furthermore it is implicit in section 39(2) read with section 173[162] that, where the common law as it stands is deficient in promoting the section 39(2) objectives, the courts are under a general obligation to develop it appropriately.[163]

[117] In addition not even the parliamentary sovereignty of our past held courts back from adapting the common law. Our courts have long held that common-law rules include concepts that are open to policy considerations – such as "public policy",

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[159] Section 39(2) of the Constitution.

[160] See *K v Minister of Safety and Security* above n 149 at para 17. See also *Fourie and Another v Minister of Home Affairs and Others* [2004] ZASCA 132; 2005 (3) SA 429 (SCA); 2005 (3) BCLR 241 (SCA) at paras 39-40, where the Supreme Court of Appeal held that—

> "[d]evelopment of the common law entails a simultaneously creative and declaratory function in which the Court perfects a process of incremental legal development that the Constitution has already ordained. Once the Court concludes that the Bill of Rights requires that the common law be developed, it is not engaging in a legislative process, nor, in fulfilling that function, does the Court intrude on the legislative domain.
>
> It is precisely this role that the Bill of Rights envisages must be fulfilled, and which it entrusts to the Judiciary. . . . Section 8(3) envisages just . . . [such situations where] legislation to give effect to a fundamental right is absent. In this circumstance, the Constitution deliberately assigns an imperative role to the court. Subject to limitation, it is obliged to develop the common law appropriately."

[161] *K v Minister of Safety and Security* id.

[162] Section 173 of the Constitution provides—

> "the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[163] *Carmichele* above n 88 at para 39.

"*boni mores*" or "reasonableness" – and courts have used these notions of fairness and justice to influence the formal structures of the law.[164] That treasured role of the courts has not been seen as, and it is not, to trespass into the terrain of the Legislature.

[118] This Court in *Thebus and Another v S* dealt with the manner in which courts must carry out this exercise. [165] Section 39(2) requires that *when* every court develops the common law it must promote the spirit, purport and objects of the Bill of Rights. This section does not specify what triggers the need to develop the common law or in which circumstances the development of the common law is justified. In *Carmichele* this Court further recognised that there are notionally different ways to develop the common law under section 39(2), all of which might be consistent with this provision.[166] This Court in *Thebus* also held that the Constitution embodies an "objective normative value system" and that the influence of the fundamental constitutional values on the common law is authorised by section 39(2).[167] It is within the matrix of this objective normative value system that the common law must be developed. Thus, under section 39(2), concepts which are reflective of, or premised upon, a given value system "might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution".[168]

[119] But for the residual difference I have outlined, I support the outcome of the main judgment that the order of the Supreme Court of Appeal be set aside. That Court sanctioned the validity of a R12 million loan agreement and found sureties to that

[164] See *Amod v Multilateral Motor Vehicle Accident Fund* [1998] ZACC 11 (CC); 1998 (4) SA 753; 1998 (10) BCLR 1207 at paras 21-2; *National Media Ltd v Bogoshi* [1998] ZASCA 94; 1998 (4) SA 1196 (SCA) at 1215A-1216-J; *Jajbhay v Cassim* 1939 AD 537 at 542 and 550-1; and *Eastwood v Shepstone* 1902 TS 294 at 302.

[165] *Thebus and Another v S* [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) (*Thebus*) at para 27.

[166] *Carmichele* above n 88 at para 56.

[167] *Thebus* above n 165 at para 27.

[168] *Carmichele* above n 88 at para 56.

agreement liable for up to R72 million, made up of the capital sum of R12 million and accrued interest of a more than handsome gain of R60 million. I respectfully disagree.

CAMERON J

[120] I have had the benefit of reading the judgments of Madlanga J (main judgment) and Moseneke DCJ (concurring judgment). I endorse the main judgment's conclusion that this Court has jurisdiction to hear the matter and that the credit agreement was valid, on the basis of the interpretation of the Act set out in the judgment.[169] But I do not agree that the Supreme Court of Appeal's decision in *Oneanate*[170] should be overruled. Nor do I agree with the main judgment's approach to the development of the common law in this case. In that respect, I endorse the reasoning in [113] and [115] through [118] of the concurring judgment.

[121] In my view, *Oneanate* was right. Once a creditor institutes legal proceedings, *Oneanate* lifts the operation of a common law rule that caps the maximum arrear interest the creditor may claim. This is the *in duplum* cap on accumulated arrear interest. It is just, and constitutionally proper, that the rule barring a creditor from claiming full interest at the rate the debtor agreed should be suspended once the creditor has issued court process to recover the debt.

[122] There is no doubt that the *in duplum* cap on accumulated arrear interest is firmly embedded in our law.[171] It has ancient roots in the common law that forms part of our legal system.[172] Before the Constitution came into effect the Appellate

[169] NCA above n 2.

[170] *Oneanate* above n 15.

[171] Id at 827H.

[172] The Bill of Rights emphatically recognises both the common law and customary law roots of our legal system. Section 39 provides in part:

Division, the predecessor of the Supreme Court of Appeal, rejected an argument that the cap on interest should be scrapped as obsolete.[173] So solidly embedded is the *in duplum* cap that contracting parties cannot waive it, nor can banking practice alter it.[174] As the main judgment explains, the cap the rule imposes is part of our Roman-Dutch legal heritage. Its purpose is to prevent lenders from exploiting borrowers.[175]

[123] But of this there can equally be no doubt: the cap is at odds with contractual autonomy. The difficult question is how far contractual autonomy extends. The court in *Oneanate* re-asserted the importance of keeping promises. It held that the debtor's promise to pay interest at the agreed rate should resume as soon as the creditor institutes court proceedings to recover the debt. So it placed a limitation on the operation of the *in duplum* cap. Was it right to do so? The main judgment says No.[176] Its principal reason is that the Supreme Court of Appeal did not consider the effect on the debtor's constitutional right of access to courts.[177]

[124] I disagree. *Oneanate* justifiably and sensibly interpreted common law authority when it concluded that the interest the debtor agreed to pay should again accumulate once litigation starts. And the result is constitutionally compliant.

"(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

[173] *LTA Construction* above n 63.

[174] *Oneanate* above n 15 at 828D-E.

[175] Id at 828D. See also *LTA Construction* above n 63 at 477C. "From olden times interest was limited by government in various ways because of economic considerations aimed at cutting off the acquisitiveness of lenders and so to afford a measure of protection or relief to interest-payers" (my translation).

[176] Main judgment at [60].

[177] Id.

[125] The reasons are three. First, the main judgment understates the importance of contractual autonomy. Second, it overstates the implications for a debtor's access to courts of allowing agreed interest to resume accumulating post-litigation – and it overlooks the parallel implications for the creditor if *Oneanate* were overruled. Third, it fails to consider the effect of inflation, which is that the cap on agreed interest unjustly erodes the creditor's money. Far from being wrong, the check *Oneanate* imposed on the *in duplum* cap on interest advances our constitutional values and accords with the rule's original purpose and operation.

[126] So the underlying question is to what extent the law should intervene in private contracts to protect parties from agreeing to burdensome terms that may harm the public interest. Respect for contractual autonomy, expressed in the common law maxim that promises should be kept (*pacta sunt servanda*), has long been a principle of our law. But freedom of contract is not absolute. Private agreements have always been subject to limitations imposed by common law principles.

[127] And courts must now develop these common law principles in keeping with the values in the Bill of Rights.[178] It is settled law that, shorn of unsightly excesses, contractual autonomy advances the constitutional values of freedom and dignity.[179] In *Barkhuizen*, this Court said so:

> "This consideration is expressed in the maxim *pacta sunt servanda* which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity."[180] (Footnotes omitted.)

[178] *Barkhuizen* above n 97.

[179] *Brisley* above 97 at para 94.

[180] *Barkhuizen* above n 97 at para 57.

The capacity to contract freely – which expresses the constitutional values of freedom and dignity – must have its place in the development of common law principles.[181] Absent adequate justification, promises willingly undertaken should be kept.

[128] In this case there is no suggestion that the Paulsens were misled or coerced into signing the suretyships Slip Knot seeks to enforce. And they were fully aware of the loan's tough interest provisions. So the spectre of "financially ruinous interest"[182] the main judgment invokes should not blind us to the facts. The Paulsens, acting as sound, forward-looking and tough-minded business entrepreneurs, agreed to pay precisely this when they concluded their contract with Slip Knot. And they happily took Slip Knot's money in the expectation that they would mint huge profit with it. That is the way of enterprise. The stiff interest rates they undertook to pay were the corollary of the considerable benefits they expected to reap from Slip Knot's money.

[129] This points to a further reason why freely concluded commercial agreements should be upheld. It is instrumental. Enforcing freely agreed contracts means parties can and will agree to deals that confer a net benefit on them both, and so vitalise our economy. This includes deals – like the one here – whose viability depends on a very high rate of return for the lender.

[130] The law of contract provides safeguards to debtors upon whom creditors have preyed. Here, if the Paulsens had been misled or coerced, all the contracts at issue could have been set aside.[183] If they had been reasonably ignorant of the interest provisions, those could not have been enforced against them.[184] Rightly, the Paulsens did not try to run these defences. If they had been vulnerable consumers, stout

[181] Id.

[182] Main judgment at [63].

[183] See, for example, Van der Merwe et al "Consensus obtained by improper means" in their *Contract: General Principles* 4 ed (Juta, Cape Town 2012).

[184] Id at "Elements of consensus" and "Mistake".

statutory protections would have shielded them from excessive harm.[185] The Paulsens tried to find ways in which to undo the agreement by invoking consumer protections. But they could not. The main judgment rightly puts paid to their attempts. The promises they made stand.

[131] So the Paulsens acted autonomously and contractual autonomy matters to our dignity and to our economy. Even so, the *in duplum* cap on accumulated arrear interest affords considerable protection. It does so, under *Oneanate*, at least until litigation commences to claim the debt. The issue the Supreme Court of Appeal had to decide in *Oneanate* was whether the parties' agreement on interest should take effect again from the moment the creditor institutes legal proceedings to recover the debt, or only from the date of judgment. *Oneanate* imposed a limitation on the operation of the *in duplum* cap. Interest should resume running immediately when the creditor initiates legal process.

[132] To reach that conclusion, the court carefully canvassed the historical development of the rule. It noted that two authoritative sources on Roman-Dutch law, Ulrik Huber (1636 – 1694) and Dionysius Godefridus van der Keessel (1738 – 1816), reached opposite conclusions on whether the *in duplum* cap applied once litigation to recover the debt had started. The court chose to rely on the formulation proposed by Van der Keessel. He was the later, more modern, writer. The court rightly preferred his reasoning. This is because his approach aligns more closely with how the *in duplum* cap functions in the South African common law. The court, in substantiating its preference for Van der Keessel, noted that—

> "[n]o 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."[186]

[185] NCA above n 2.

[186] *Oneanate* above n 15 at 834 C.

[133] So the court adopted the historical basis for suspending the *in duplum* cap that Van der Keessel propounded. But the court's reason for doing so was more fundamental. It turned on well-wrought policy considerations. These originated in the fact that the debtor had agreed to pay interest at the stipulated rate. The *in duplum* rule interfered with this agreement. Before litigation commences, there is good reason for this. But once proceedings to recover the debt have been initiated, there is no justification for affording the debtor protection against agreed interest. The common law justification for subverting the parties' agreed deal was always that the debtor is vulnerable to the creditor's unscrupulous wiles. But once litigation starts, that vanishes. The position fundamentally changes. And the justification for interfering with the parties' agreement is radically attenuated.

[134] First, after litigation starts, the creditor loses control over the enforcement of the debt, and over the accrual of interest. Further delays will be because of the legal process, and rarely the creditor's wiles. Second, the debtor can wield the power that existed all along to avoid costly and time-consuming litigation, and to stop interest from running, by repaying the debt. The Supreme Court of Appeal thus developed the application of the rule quite properly so as to advance public policy and constitutional values.

[135] For at the base of this debate lies the debtor's capacity to make a binding agreement. The agreement stands. Promises made should be enforced – especially where two stout-boned commercial parties make contractual promises to each other in pursuit of big profits. All that *Oneanate* decided is that their agreement to pay interest at the agreed rate should resume as soon as proceedings to recover the debt are initiated. For then, the spectre of the dilatory creditor no longer exists. Rather, there is now a dilatory debtor.

[136] In addition, as *Oneanate* noted,[187] the rule came into operation at a time when credit markets functioned differently from present-day markets:

> "Because of the low rates of legal interest in olden times, this question could not have been one that would have arisen readily before the era of hyperinflation and excessively high rates of interest."[188]

[137] In times of low or no inflation, it may suit a lender to let a loan lie, while the burden on the debtor grows and grows. For, under these conditions, unscrupulous lenders can delay collection of loans at little cost. As interest quietly accumulates, the unwary borrower racks up huge additional debt. So, when interest rates are low, the *in duplum* cap is a stop-gap measure to prevent abusive lenders from delaying enforcement of the debt. The cap means they extract no extra benefit from delay once the total interest equals the sum originally borrowed.

[138] Both inflation and interest rates in early modern Europe were low in comparison to present-day inflation. Even during the "Price Revolution", a time of historically rampant inflation in Europe during the 16th century, the average annual price increase was less than 1% per year.[189] Interest rates were similarly low when compared with modern mezzanine financing. Rates ranged from 4% to 8% in early 17th century Holland.[190]

[139] All this stands in stark contrast to what the Paulsens promised to pay. In 2006, when they received Slip Knot's money, the inflation rate in South Africa was 4.8%.

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[187] Id at 833C.

[188] Id.

[189] Konnert *Early Modern Europe: The Age of Religious War, 1559-1715* (University of Toronto Press, Toronto 2008) at 59.

[190] Fritschy "A 'Financial Revolution' Reconsidered: Public Finance in Holland during the Dutch Revolt, 1568-1648" (2003) 56:1 *The Economic History Review* 57 at 64 and 74-8. The comparison is, admittedly, not perfect. These were interest rates on short-term loans to the government, which raised revenue by "selling" debt at various interest rates.

Since then, the annual rate has fluctuated between 3.9% and 11.5%.[191] But they promised to pay interest vastly in excess of inflation. The original agreement between Winskor and Slip Knot provided for an effective interest rate of 142%. That was quite legitimate: our law allows stout-boned business-people, dealing at arm's length with each other in pursuit of big profits, to make deals like this.

[140] So, in today's circumstances, the effect of the *in duplum* cap is very different. It does not merely deter unscrupulous lenders from leaving the debt to lie low in order to exploit unwary borrowers. The rule also disincentivises sound deals that enable our economy to function and flourish.

[141] Before *Oneanate*, the rule imposed a cost on lenders who institute proceedings against a debtor but who do not manage to collect the debt before the interest exceeds the original capital. Once legal proceedings are instituted against a debtor and the *in duplum* cap hits home, inflation eats every day into the value of the amount the lender may recover. The lender can never recoup this loss because, even if its claim eventually triumphs in court, the *in duplum* rule puts an absolute cap on recovering any interest that accrued during proceedings, before judgment on the debt is granted. No allowance is made for depreciation pending judgment.

[142] So it was right and appropriate for the Supreme Court of Appeal to limit the operation of the rule to allow interest to run during litigation, to recover the debt. The court in *Oneanate* was doing what appellate courts ought to do: it was moulding the common law according to justice and good sense in accordance with modern requirements.[192] There is thus no basis for the main judgment's suggestion that the court's policy-based rationale for adjusting the *in duplum* rule was too weak.[193]

[191] Statistics South Africa "CPI History 1960 Onwards", available at http://beta2.statssa.gov.za.

[192] See *Pearl Assurance Co v Government of the Union of South Africa* 1934 AD 560 at 563 where Lord Tomlin stated that Roman-Dutch law "is a virile living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society".

[193] Main judgment at [55] to [56].

[143] But, the main judgment says, the Supreme Court of Appeal overlooked the chilling effect the *in duplum* cap has on debtors' right of access to court.[194] It is true that suspending the rule may deter some debtors from pursuing valid defences because they do not want to risk being held liable for a large interest payment should they lose. But enforcing the *in duplum* cap after litigation starts simply shifts the risk to lenders. They may be deterred from pursuing claims against defaulting debtors if the *in duplum* cap prevents interest from accumulating once litigation has started. Lenders who choose to pursue a claim must now bear the inflationary costs imposed by dilatory debtors who may extend legal processes as long as possible, to avoid paying a debt that is becoming less valuable every day.

[144] This is no imaginary spectre. We see it often enough in our courts, where debtors pursue tenuous arguments, knowing full well that the debt they will eventually have to repay diminishes daily because of inflation. And the court process affords adequate protection to debtors with genuinely sound defences. They will be vindicated. They will not be liable for interest if their agreements are found to be invalid. By contrast, the successful creditor has no way of recovering the money lost to inflation during the delay inherent in legal processes.

[145] Allowing interest to run at the parties' agreed rate does not bar access to courts. It merely shifts part of the risk the litigation process imposes from the creditor to the debtor. It does so in a way that respects the dignity and agency of promises solemnly made by the parties. And it is right to let interest run again as agreed once the creditor has come to law. For then the creditor has done all it can to recover the debt and the court will protect and vindicate a debtor with sound defences.

[146] In short, the "chilling effect" that may deter debtors with marginal or even good defences must be weighed against both the chilling effect on creditors' access to

[194] Main judgment at [60].

courts, and the cost of not respecting promises solemnly made – particularly those freely undertaken in the expectation of making large profits with someone else's money.

[147] The facts before us show why *Oneanate* was right to shift the risk. The Paulsens have now litigated their claim that the loan agreement was invalid four times, and they have lost all four times. Their arguments regarding the interpretation of the statute are simply not tenable. The only argument they have advanced with any prospects of success related to the application of the *in duplum* rule. The effect has been that Slip Knot has been deprived of its money for years while waiting for this litigation to be resolved.

[148] This delay has a real cost because of inflation. It cannot be right to make the lender incur this loss[195] rather than to require a debtor, who holds the power to forestall or end the litigation by repaying the debt, to incur liability for the interest accruing during litigation.

[149] The Paulsens' case surely illustrates just the type of defence that should be discouraged. Far from denying the Paulsens' access to courts, suspending the *in duplum* cap on arrear interest in this case would likely have encouraged them to do what they promised to do when they set out to make their huge profit – which is, to repay the loan quickly.

[150] The Supreme Court of Appeal in *Oneanate* soundly developed the common law to bring just balance to the operation of the *in duplum* rule in accordance with our constitutional values. I would affirm it.

[195] Main judgment at [66].

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