The *in duplum* rule has been part of South African law for more than 100 years, being applied through South African case law from as early as 1830. Literally translated, *in duplum* means ‘double the amount’. This common law rule provides that interest on a debt will cease to run where the total amount of arrear interest has accrued to an amount equal to the outstanding principal debt. It was developed in response to considerations of public interest, and seeks to protect borrowers from exploitation by lenders who permit interest to accumulate unchecked. It also has the effect of encouraging lenders to exercise their rights to be repaid, promptly and without delay.

The National Credit Act (NCA), No 34 of 2005, incorporates a statutory version of the *in duplum* rule in section 103(5), which is commonly referred to as the statutory *in duplum* rule. This section provides that “*Despite any provision of the common law or a credit agreement to the contrary, the amounts contemplated in section 101(1)(b) to (g) that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the default occurs.*” The amounts referred to in section 101(1)(b) to (g) include: initiation fees, service fees, interest, the cost of any credit insurance, default administration charges and collection costs (charges).

The *in duplum* rule, in both its guises, has been the subject of much academic debate and juristic opinion. As the application of these rules has very real, and sometimes costly, ramifications, particularly for an impoverished debtor, the focus of this debate and challenge has been particularly prevalent in the field of credit agreements and the new creditor protection regime ushered in with the NCA.

The statutory *in duplum* rule is not a mere ‘codification’ of the common law *in duplum* rule and differs from the common law rule in a number of significant respects. As already mentioned, the common law *in duplum* rule applies only to unpaid interest, whereas the statutory rule includes a number of costs, in addition to interest, which in aggregate may not exceed the unpaid principal debt at any point while the consumer is in default under a credit agreement. The statutory *in duplum* rule is, as such, more onerous on credit providers in that the ‘*in duplum* limit’ will be reached much sooner than the common law limit would have been reached.

Importantly, the common law *in duplum* rule does not bar interest from accruing again once the outstanding interest has been reduced below the ‘*in duplum* limit’. In other words, if a payment is made and the amount outstanding is reduced below the outstanding principal debt, the *in duplum* rule will no longer apply and interest can start running until it reaches the ‘*in duplum* limit’ once again. Whereas the statutory rule applies for the entire duration of the default, meaning that as long as a consumer remains in default of his/her payment obligations, the credit provider is not entitled to levy any further charges, notwithstanding that a consumer may reduce the outstanding charges through repayments, which is in stark contrast to the common law rule.

As a result of its wider ambit, the statutory rule provides greater consumer protection, whilst credit providers are left considerably worse-off.

**The interaction between common law and statutory *in duplum***

Does the statutory rule override the common law rule or can both rules apply simultaneously? Alternatively, is there an election regarding which rule to apply?

In the Nedbank case, the Supreme Court of Appeal confirmed that the statutory *in duplum* rule is by no means a mere codification of the common law rule. The SCA stated that this is explicitly indicated in the introductory words of section 103(5), “*despite any provision of the common law…to the contrary.*” Instead, according to the SCA, the statutory *in duplum* rule embodies a distinct rule, which effectively extends the ambit of the common law rule that is applicable to a limited category of agreements (ie those agreements regulated by the NCA). For all other credit agreements not regulated by the NCA, the common law rule still applies. In other words, the statutory *in duplum* rule applies to all credit agreements under the NCA, to the exclusion of the common law *in duplum* rule, and there is no election as to which rule to apply. Importantly, credit providers are precluded from trying to contract out of the statutory *in duplum* rule.

**Statutory *in duplum*: practical difficulties**

There remains a lot of uncertainty regarding the application of the statutory *in duplum* rule in practice, which has resulted in much litigation and resultant judicial interpretation. For example, there is no clear indication of all the charges that may fall within the ambit of section 101(1)(b) to (g). In practice, it is still unclear what range of costs would qualify as “service costs” or “collection costs”. Would collection costs include the costs of third-party debt collection agents that have been appointed? It is necessary to understand the ambit of each of the charges listed in section 101, as this will have a very real impact on the *in duplum* calculation for section 103(5).

As section 103(5) is applicable for the entire duration that the consumer is in ‘default’, credit providers must have a clear understanding of when a default as contemplated may arise, the events that encompass a default, as well as the events that extinguish that default. This may be particularly pertinent in the circumstances where credit providers ‘restructure’ a consumer’s debt in an effort to assist consumers to meet their obligations (for example, through a change in the repayment terms) – does this restructuring end the default in question, or does the original default persist?
Another interpretational difficulty has arisen in the context of credit life insurance, which is included in the calculation of the *in duplum* amount. Very briefly, credit life insurance is a form of insurance paid on a loan, where, upon the occurrence of certain insured events (such as death, disability or retrenchment of the debtor/insured), the insurer will pay out the outstanding capital on a short- or long-term debt to the credit provider. This insurance is usually required by credit providers as per section 106 of the NCA as a condition to providing credit to consumers. There is the very real possibility that the application of the *in duplum* rule, which is intended to protect the debtor, may actually prejudice the debtor in these circumstances – in that the statutory *in duplum* rule may prevent the consumer from paying, and the credit provider from receiving, any premiums on the consumer’s credit life insurance policy. For the entire duration of the default after the *in duplum* limit has been reached, the creditor will not be obliged or be able to pay any premiums towards the credit life insurance.

**Statutory *in duplum* in practice: compliance**

The statutory *in duplum* provisions are being misinterpreted and incorrectly applied by many credit providers, placing them at risk of a breach of section 103(5). This may be a consequence of the confusion between the application of the common law *in duplum* rule and the statutory *in duplum* rule, and the interpretational difficulties accompanying the statutory *in duplum* rule. The result, however, is that credit providers are being placed at risk of non-compliance with section 103(5) of the NCA.

This statutory *in duplum* rule applies to all credit providers providing credit in terms of the NCA, including banks, motor vehicle and asset finance companies and all financial institutions that extend credit as part of their business. A failure to adhere to the statutory *in duplum* rule will result in a breach of the NCA, exposing credit providers to regulatory censure. In addition to this regulatory risk, a breach of the statutory *in duplum* rule may also expose credit providers to reputational risk and financial risk. The consequences of failing to properly apply the statutory *in duplum* rule can be significant and it is therefore very important that all credit providers consider how section 103(5) of the NCA is being applied in their businesses and are they compliant and further consider whether any remedial action is required to correct any potential contraventions thereof.

KPMG has designed a methodology to assist credit providers in identifying and remedying breaches of the statutory *in duplum* rule. The model will assist with the identification and analysis of breaches and potential breaches of the *in duplum* principle with our clients’ product environments and details the processes to be applied in remedying such breaches.

About Finn Elliott

Provides legal and regulatory support to clients in the financial services sector on their regulatory oversight, including legal opinions and advice on FAIS, FICA, NCA, FMA, CISCA and JSE Rules.

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