# Better Consumer Protection Under the Statutory In Duplum Rule

**By Michelle Kelly-Louw***

[*Editor's Note*: In April I attended the *11th International Conference on Consumer Law,* presented in Cape Town, South Africa, by the International Association of Consumer Law and the Centre for Business Law, College of Law, University of South Africa. At the Conference, I heard a presentation regarding the "in duplum rule," a concept that stops the running of interest when unpaid interest equals the outstanding capital balance. I found the discussion to be very interesting and asked the presenter if the *Journal* could publish her paper. She agreed, and what appears below is her original paper, formatted consistent with South African rules of style. I hope you find the discussion as interesting as I did. ]

**1 Introduction**

The common-law in duplum rule, as it is generally known in South African law, provides that interest stops running when unpaid interest equals the outstanding capital amount. If the total amount of unpaid interest (both contractual and default interest: our courts apply the limitation to both kinds of interest: see *Stroebel v Stroebel* 1973 (2) SA 137 (T); and *Administrasie van Transvaal v Oosthuizen & 'n Ander* 1990 (3) SA 387 (W)), has accrued to an amount equal to the outstanding capital sum, the defaulting debtor (ie, the borrower of the money) must first start making payments on his loan again (and so decrease the interest amount), after which interest may once again accrue to an amount equal to the outstanding capital sum. The rule thus effectively prevents unpaid interest from accruing further once it reaches the unpaid capital sum. Even if interest is capitalised (and interest is therefore charged on interest), the capitalised interest does not lose its character as interest and become part of the capital amount for purposes of applying the in duplum rule. (See *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) SA 510 (C), in particular at 560 and 566-72; confirmed on appeal in *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 SCA; unless otherwise indicated, all further references to *Standard Bank v Oneanate Investments* will be to the decision on appeal).

So, the common-law in duplum rule implies that the *total amount of unpaid interest* on a loan or credit transaction may accrue only to an amount equal to the outstanding capital sum, and that all arrear interest ceases to run when that interest has reached the outstanding capital amount. (See *Sanlam Life Insurance Ltd v South African Breweries Ltd* 2000 (2) SA 647 (W) at 652G-I). The rule does not mean that a creditor (ie, the lender) is prevented by the rule from collecting more than double the unpaid (or paid) capital amount in interest, as long as he at no time allows the unpaid interest to reach the unpaid capital amount. However, should this escalation occur, interest would then cease to run. Once payments on the account are again made and the interest element of the total amount owed is decreased, the interest can start running again until it equals the outstanding capital. (see Monica L Vessio A Limit on the Limit on Interest? The in duplum Rule and the Public Policy Backdrop (2006) 39 *De Jure* 25 at 26 and 36). It is thus clear that the rule only prevents the interest from running on a temporary basis and does not set a maximum amount of interest that may be charged. (idem at 36).

It is settled that the common-law in duplum rule forms part of the modern South African law. (See *Union Government v Jordaan's Executor* 1916 TPD 411; *Van Coppenhagen v Van Coppenhagen* 1947 (1) SA 576 (T); *Stroebel v Stroebel* supra; *LTA Construction Bpk v Administrateur, Transvaal* 1992 (1) SA 473 (A) at 482, discussed by JM Otto Die Gemeenregtelike Verbod teen die Oploop van Rente (1992) 55 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 472; *ABSA Bank Ltd v Leech & Others NNO* 2001 (4) SA 132 (SCA); and *Standard Bank v Oneanate Investments* supra at 827G-H).

In the recent past there have been a number of decisions dealing with and explaining the application of the common-law in duplum rule. (S*-+

***The view of table mountain from the harbor, Cape Town, South Africa.***

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ee, eg, *Commercial Bank of Zimbabwe Ltd v MM Builders & Suppliers (Pvt) Ltd & Others & Three Similar Cases* 1997 (2) SA 285 (Z); *Standard Bank v Oneanate Investments* supra; *Bellingham NO v Clive Ferreira & Associates CC* 1998 (4) SA 382 (W); *F & I Advisors (Edms) Bpk & 'n Ander v Eerste Nasionale Bank van Suidelike Afrika Bpk* 1999 (1) SA 515 (SCA), discussed by WG Schulze Can a Borrower Waive the Benefits of the In Duplum Rule? (1999) 11 *SA Merc LJ* 109; *Sanlam Life Insurance v South African Breweries* supra; *ABSA Bank v Leech* supra; *Commissioner, South African Revenue Service v Woulidge* 2002 (1) SA 68 (SCA); *Meyer v Catwalk Investments 354 (Pty) Ltd & Andere* 2004 (6) 107 (T); and *Verulam Medicentre (Pty) Ltd v Ethekweni* 2005 (2) SA 451 (D), discussed by Vessio op cit, and its appeal sub nom *Ethekwini Municipality v Verulam Medicentre (Pty) Ltd* [2006] 3 All SA 325 (SCA), both decisions analysed by WG Schulze The in duplum Rule: A Short List of Some Unresolved Issues (2006) 18 *SA Merc LJ* 486 and Heinrich Schulze Are there Exceptions to the in duplum Rule? (2006) 14 *Juta's Business Law* 20).

The in duplum rule is based on public policy, as its purpose is to protect the debtor from exploitation by the creditor. (See *Standard Bank v Oneanate Investments* supra at 828D; and Vessio op cit at 35-6 for a discussion of the role of public policy and consumer protection in the rationalisation of the perpetual application of the rule). It has been held that this rule is part of our daily economic life where it fulfils the useful function of assisting debtors in financial difficulties. (See *LTA Construction v Administrateur, Transvaal* supra at 482E-F). The rule protects a debtor who is in financial difficulty and is unable to service his debts from an ever-increasing accumulation of interest. The rule prevents the over-extension of a debtor's limited financial resources. But it provides him with temporary relief only, as the escalation of the ever-continuing interest is merely tempered by the rule. (See Vessio op cit at 36).

The common-law in duplum rule is not limited to interest on money-lending transactions. In fact, it applies with equal force to all types of contract in terms of which a capital sum is due by the debtor to the creditor and on which amount a specific rate of interest is payable. One such an example is where a debtor owes money to a creditor in terms of a contract of letting and hiring of work on which interest is payable. (See *LTA Construction v Administrateur, Transvaal* supra at 482I-483A; GF Lubbe Die Verbod op die Oploop van Rente *ultra duplum* – n Konkretisering van die Norm van *Bona Fides*? (1990) 53 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 190 at 200; Schulze (2006) 14 *Juta's Business Law* 20 at 20; Schulze (2006) 18 *SA Merc LJ* 486 at 487; and Vessio op cit at 26-7).

Until now debtors could rely only on the common-law in duplum rule to protect them from exploitation by their creditors. However, from 1 June 2007 (see Proc 22 in *Government Gazette* 28824 of 11 May 2006) they will be able to rely on the protection afforded by the statutory in duplum rule as set out in s 103(5) of the National Credit Act 34 of 2005.

The statutory rule drastically alters the common-law rule and provides for better protection for debtors (or rather, for the consumers of credit: the term consumer is used in the Act to describe a debtor, and it will so be employed here) against their creditors (or rather, credit providers, the term used in the Act).

This analysis sets out briefly to explain the practical application of the new statutory in duplum rule and to address certain problems that credit providers may experience when the rule is applied. A few of the differences and similarities between the statutory rule and the common-law rule will also concisely be highlighted here.

## 2 The Statutory in duplum Rule

### 2.1 The General Principles and Application

Section 103(5) of the National Credit Act contains the statutory rule. It provides as follows:

> 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 defaults occurs.

Briefly, the statutory in duplum rule provides that when a consumer of credit is in default, *all the combined amounts set out in §101(1)(b)-(g)* (ie, the costs of the credit) cease to run when they reach the outstanding balance of the consumer's principal debt at the time of the default. To understand this statutory rule fully, one has to establish to what exactly "the amounts contemplated in section 101(1)(*b*) to *g*)" refers. They are:

- *initiation fees* (§101(1)(*b*); and see also reg 42(2)(Table B) of the National Credit Regulations of 2006 (see GN R489 in Government *Gazette* 28864 of 31 May 2006 ("the Regulations")): the maximum limits that apply to the initiation fees that may be charged according to the seven different types of credit agreement, and reg 41(1): the dates upon which an initiation fee may be levied);
- *service fees* (§101(1)(*c*); and see also reg 44: the maximum monthly and annual service fees that may be charged);
- *interest* (both contractual and default) (§101(1)(*d*); and see also reg 42(1)(Table A) read with §105: the maximum prescribed contractual interest rates that may be charged on the seven different types of credit agreement; §103(1): stipulating that the maximum interest rate applicable to the principal debt set out in reg 42(1)(Table A) also applies to the maximum default interest that may be charged on a specific credit agreement; and reg 40: the interest calculation that should be done);
- *costs of any credit insurance*, including the credit insurance premiums payable (see §101(1)(*e*) read with § 106, on the permitted costs of credit insurance that may be charged);
- *default administration charges* (see §101(1)(*f*) read with reg 46, on the permitted default administration charges that may be levied (a default administration charge refers to a charge that a credit provider may impose to cover administration costs incurred because of the consumer having defaulted under the credit agreement: see §1; eg, this will refer to the costs of a notice of default letter sent to a consumer in terms of §129(1)(*a*)); and
- *collection costs* (see §101(1)(*g*) read with reg 47 on the permitted collection costs that may be charged (collection costs refer to the amounts, ie, legal fees, that a credit provider may charge a defaulting consumer, but not including a default administration charge, in respect of enforcing the consumer's monetary obligations under the credit agreement: §1)).

Therefore, what the amounts referred to in §101(1)(*b*)-(*g*) entail are either self explanatory or have briefly been explained. However, a description of the exact amounts that form part of the costs of credit insurance, as contemplated in §101(1)(*e*), is still required. To understand precisely what is meant by the term "costs of any credit insurance" one has to look at the definition of credit insurance. Section 1 provides that credit insurance means:

> [a]n agreement between an insurer, on one hand, and a credit provider or a consumer or both, on the other hand, in terms of which the insurer agrees to pay a benefit upon the occurrence of a specified contingency, primarily for the purpose of satisfying all or part of the consumer's liability to the credit provider under a credit agreement as at the time that the specified contingency occurs, and includes –
> (*a*) a credit life insurance agreement;
> (*b*) an agreement covering loss of or damage to property; or
> (*c*) an agreement covering –
> (*i*) loss or theft of an access card, personal information number or similar device; or
> (*ii*) any loss or theft of credit consequential to a loss or theft contemplated in subparagraph (*i*)

As the definition of credit insurance includes a reference to "credit life insurance", one also has to establish what is meant by that. Section 1 states that credit life insurance includes cover that is payable by the insurer in the event of a consumer's death, disability, terminal illness, unemployment, or other insurable risk that is likely to impair the consumer's ability to earn an income or meet the obligations under a credit agreement.
It follows from these two definitions that only those costs specifically relating to credit insurance, and not also costs relating to insurance generally, are relevant for purposes of the statutory in duplum rule.

**The statutory rule does apply with slight changes where the credit agreement involved is an instalment agreement, a mortgage agreement, a secured loan or a lease of movable property.**

The statutory in duplum rule implies that if all the amounts set out in §101(1)(*b*)-(*g*) combined have accrued to an amount exceeding the outstanding principal debt, the defaulting consumer must first start making payments on his account, after which these types of amount may once again accrue to an amount not exceeding the outstanding principal debt.

The statutory in duplum rule as provided for in §103(5) of the National Credit Act does not protect juristic persons (for the definition of which, see §1), but effectively protects only natural persons, that is, individual consumers of credit. (See §6(*d*)). Further, it applies only to those credit agreements that fall within the ambit of the Act. (See §§4-6 and 8). Thus, the common-law rule will continue to apply to all the other agreements (ie, contracts in terms of which a capital sum is due by a debtor to the creditor and on which amount a specific rate of interest is payable) falling outside the scope of the Act. (See §8(2)). For instance, a loan between a stokvel and its member will still be governed by the common-law in duplum rule. (See §8(2)(*c*)).

However, as will be explained shortly, the statutory rule does apply with slight changes where the credit agreement involved is an instalment agreement, a mortgage agreement, a secured loan or a lease of movable property.

A practical problem might arise where the credit agreement involved is, for example, an unsecured credit agreement (eg, a credit facility, such as an overdraft facility on a current account), as the credit provider will in such a situation not be able to charge the consumer for the costs of the credit insurance (if applicable), including the insurance premiums that are payable, and the credit provider could then run the risk that the insurance might lapse. However, if the credit provider does not want that consumer's credit insurance to lapse, it will have to ensure that, for the time being, the premiums and the other costs of credit insurance are paid by itself until the combined costs set out in §101(1)(*b*)-(*g*) no longer exceed the outstanding principal amount. There is no statutory duty on a credit provider to pay these premiums on behalf of the consumer during that period, but from a financial point of view it might be worth its while to prevent the credit insurance from lapsing especially, if there is a possibility that a claim could be made under the insurance policy later. However, this will be a problem only in the case of unsecured credit agreements (such as normal credit facilities), as a different rule applies to cases where the credit agreement involved is an instalment agreement, a mortgage agreement, a secured loan or a lease of movable property.

### 2.2 The Application of the Statutory Rule to Specific Types of Credit Agreement

The position set out above will be slightly different when the credit agreement involved is:

- an *instalment agreement* (ie, a sale of movable property where the consumer makes periodic payments and receives possession of the property, and ownership of the property either passes to the consumer only if the property is fully paid for, or passes subject to the credit provider who retains the right to re-possess the property if the consumer defaults: see §1);
- a *mortgage agreement* (ie, a loan were the security is in the form of a mortgage over immovable property: see §1);
- a *secured loan* (ie, a loan – but not including an instalment agreement – where security takes the form of, eg, a notarial bond or pledge over movable property: see §1); or
- a *lease over movable property*.

Section 102 provides that if the credit agreement is one of these four types of agreement, the credit provider *may include in the principal debt* deferred under the agreement any of the following items to the extent that they are applicable in respect of any goods that are the subject of the agreement. (on the requirements with which a credit provider should comply in order to be able to include these amounts in the principal debt, see §102(2)-(3) and reg 48):

- an initiation fee (as contemplated in s 101(1)(*b*)), if the consumer has been offered and declined the option of paying that fee separately;
- the cost of an extended warranty agreement;
- delivery, installation and initial fueling charges;
- connection fees, levies or charges;
- taxes, licence or registration fees; or
- the premiums of any credit insurance

payable in respect of that agreement (subject to §106).

Therefore, when the statutory in duplum rule has to be applied in a case where the credit agreement involved is an instalment agreement, a mortgage agreement, a secured loan, or a lease of movable property, the problem of the costs of the credit insurance (including the insurance premiums) ceasing to accumulate will not be as acute as with the other credit agreements (such as an unsecured credit facility). When the application of the statutory rule involves one of these four types of credit agreement, the credit insurance premiums do not cease to accumulate as part of the §101(1)(*b*)-(*g*) costs, as they will be deemed to form part of the principal debt. (See §102(1)(*f*)). So, even if the combined cost of the §101(1)(*b*)-(*g*) items equals the outstanding principal debt at the time of the default, the credit insurance premiums will be excluded from the calculation of costs equalling the principal debt. In any one of these instances, then, the credit provider will not have to worry about also including the credit insurance premiums in the combined costs for purposes of §101(1)(*b*)-(*g*), which costs will cease to run if they exceed the outstanding principal debt at the time of the default of the consumer, as the premiums are deemed to form part of the outstanding principal amount.

In a nutshell, where the credit agreement involved is an instalment agreement, a mortgage agreement, a secured loan, or a lease of movable property, the statutory in duplum rule will be applied as follows: the combined amounts set out in §101(1)(*b*)-(*g*) – namely initiation fees (only if the consumer decided that such a fee should be paid separately and that it should not form part of the principal debt (see also §102(1)(*a*)); service fees; interest (contractual and default); costs of any credit insurance (excluding the credit insurance premiums payable as they form part of the principal debt: See also §102(1)(*f*)); default administration charges; and collection costs – will cease to run when they reach the outstanding balance of the consumer's principal debt at the time of the default.

### 2.3 Waiver of the Benefits of the Statutory Rule

A controversial issue regarding the common-law in duplum rule is whether or not the consumer of money may waive the benefits of the rule either expressly or tacitly. (for a full discussion of this topic. See Schulze (1999) 11 *SA Merc LJ* 109 and the authorities discussed and referred to there).

Given that the common-law in duplum rule is based on public policy and its aim is to assist consumers in financial difficulties, consumers generally cannot waive the benefits of the rule. (See "Loan" by DJ Joubert (revised by JJ Henning) in: WA Joubert (ed) *The Law of South Africa* First Reissue Vol 15 (1999) in par 281; Schulze (2006) 14 *Juta's Business Law* 20 at 20; and *Standard Bank v Oneanate Investments* supra at 828B-E and the authorities cited there).

Over the last decade the Supreme Court of Appeal has in three judgments considered the circumstances under which a consumer would be allowed to waive the protection afforded by the rule. (See *Standard Bank v Oneanate Investments* supra; *F & I Advisors v Eerste Nasionale Bank* supra; and, incidentally, in *ABSA Bank v Leech* supra). It is trite that parties are not permitted to waive the protection provided by the rule in advance, that is, before or at the time of the conclusion of the credit agreement. (for a contrary view that it *may* be waived in advance, see Lubbe op cit at 200-1). However, in *F & I Advisors v Eerste Nasionale Bank* the Supreme Court of Appeal correctly observed that although the rule could not be waived beforehand, it could subsequently be waived by the consumer, for example in order to avoid litigation (see at 525F-G in n 1).

**The statutory in duplum rule, like its common-law counterpart, is also based on public policy and its aim is also to assist consumers in financial difficulties.**

Schulze has pointed out ((2006) 18 *SA Merc LJ* 486 at 488) that when one deals with the issue of waiver, one should distinguish between, on the one hand, exceptions to the in duplum rule, (in *Verulam Medicentre v Ethekweni* supra both the court a quo and the Supreme Court of Appeal considered whether or not there were any exceptions to the rule: for a discussion of these two decisions and a view that there are in fact exceptions to the rule, see Schulze (2006) 18 *SA Merc LJ* 486 and (2006) 14 *Juta's Business Law* 20)) and, on the other hand, a waiver of the benefits of the rule. Apparently, when dealing with the possible waiver of the rule, one must also further distinguish between a waiver in advance and a waiver after the fact.

Schulze is of the opinion that parties are permitted to waive the benefits of the common-law rule after the fact, that is, after the debt has been called up, provided that all the requirements for a novation (ie, the substitution of an existing obligation by a new obligation) have been met. (for arguments and authorities supporting his view, see Schulze (1999) 11 *SA Merc LJ* 109 at 114-7; and see also further Schulze (2006) 14 *Juta's Business Law* 20 at 20-1 and 23).

The statutory in duplum rule, like its common-law counterpart, is also based on public policy and its aim is also to assist consumers in financial difficulties. To avoid the possibility of having the same uncertainty exist regarding the possible waiver of the statutory rule, the issue was dealt with expressly. Section 103(5) of the National Credit Act provides that "despite any provision of the common law or a credit agreement to the contrary", the total of all amounts contemplated in §101(1)(*b*)-(*g*) that accrue during the time that a consumer is in default, may not exceed the unpaid balance of the principal debt. From the wording of §103(5) it is thus clear that it will not be possible for a consumer to waive the benefit of the protection of the statutory in duplum rule, whether at the conclusion of the credit agreement, or at any subsequent stage. (see also Schulze (2006) 18 *SA Merc LJ* 486 at 496).

**3 Conclusion**

From this exposition it is apparent that the vital difference between the common-law and the statutory in duplum rules lies in the fact that under the common-law rule it is only the interest (contractual and default) that ceases to run if it equals the outstanding capital amount. By contrast, under the statutory rule, all the amounts – such as the initiation fees, service fees, interest (contractual and default), costs of any credit insurance, default administration charges, and collection costs – cease to run if they combine to exceed the outstanding principal debt.

Clearly the statutory in duplum rule offers better consumer protection than its common-law counterpart. However, the statutory rule has worsened the position of credit providers.

It has long been argued that the common-law rule is fundamentally inequitable towards the credit provider and that attempts to limit its application should be welcomed. (See FR Malan & JT Pretorius "Enrichment in Triangular Situations, Interest and the in duplum Rule, and Personal Liability and Company Names" (1996) 8 *SA Merc LJ* 399 at 405). Vessio has also pointed out the criticism of the common-law rule as being "arbitrary and inappropriate" towards credit providers. (see Vessio op cit at 36). The South African Law Reform Commission already recommended its repeal in 1974. A committee was later appointed to investigate existing credit legislation with a view to amendment. This committee too recommended that the common-law in duplum rule should be abolished. (See Otto op cit at 478-9). However, it is clear that the subsequently appointed drafting team of the National Credit Act did not give any attention to these arguments and recommendations when they drafted the statutory in duplum rule. In the National Credit Bill of 2005 (in the final draft version of 27 Nov 2004) cl 103(5) (as it was then) provided as follows:

> Despite any provision of the common law or a credit agreement to the contrary, the *interest* that accrues during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the settlement value under that credit agreement at the time that the default occurs.[my italics]

This draft version of the in duplum rule was in line with the current common-law rule, in that it too made provision only for *arrear interest* to be taken into consideration for purposes of the rule. However, in the end this clause was drastically amended and the rule expanded to relate not only to arrear interest, but to all the prescribed costs of credit set out in §101(1)(*b*)-(*g*).

As the rule has now been codified, its continued existence has been guaranteed. From June 2007, credit providers will have to be vigilant of consumers not servicing their debts, and should timeously take the appropriate legal action (as provided for in Chapter 6 of the Act) against such consumers to avoid a situation where the statutory in duplum rule comes into play.

* *University of South Africa*. This analysis was first published in (2007) 19 *South African Mercantile Law Journal* 337-345 and is republished here with the permission of that journal's editorial staff.