

The codification of the in duplum rule in South Africa and Zimbabwe

TD Madzokere



orcid.org 0000-0001-8354-270X

Mini-dissertation submitted in partial fulfilment of the requirements for the degree *Masters of Law* in *Import and*

Export Law at the North West University

Supervisor: Prof SF Du Toit

Graduation May 2018

Student Number: 28245156

"The rich rules over the poor and the borrower is the slave of the lender"

Proverbs 22:7 The Bible (RSV)

DEDICATION

To the strongest woman I know, my mother, Mrs Tsitsi Barbara Madzokere, without whose prayers, love and support I would have given up.

ABSTRACT

The *in duplum* rule is a common-law rule which is aimed at alleviating the liability of debtors to creditors by prescribing that interest ceases to run once it equals the capital sum borrowed. The rule has been part of Zimbabwean and South African common law from time immemorial. Both countries have "codified" the rule and moved towards its application statutorily without however making the common law rule inapplicable. This research is aimed towards the assessment of whether both legislatures have achieved their aims in "codifying" the rule and if so whether the "codification" may be termed a success. In so doing, an exposé into the strengths and weaknesses of both the common law *in duplum* rule and the statutory *in duplum* rule is carried out. The research further lays out problems encountered during the administration of the common-law *in duplum* rule, the reasons why the legislatures in both countries decided to "codify" the rule and the success of the "codification" thereof.

Key Words: *in duplum*, debtor, creditor, over-indebtedness, common law, statute.

ACKNOWLEDGEMENTS

First and foremost, I would like to give thanks and praise to the Lord Almighty, who has made this journey possible, for it surely is a dream come true to have walked this journey. Secondly, I would like to thank my mother, Mrs T.B Madzokere, for her unwavering love, support and prayers. I could never have sailed through without you Mum! To my sisters, Tafadzwa Madzokere, Takudzwa Madzokere and Tapiwanashe Madzokere, thank you for never giving up on me, listening to my endless thoughts and your unmatched love.

To my supervisor, Prof S.F du Toit, thank you for the unwavering support, never tiring and being pleasant even when I made no sense. I only pray my work adequately reflects the support you gave me.

Last but not least, many thanks to the North West University Faculty of Law staff for making the journey a pleasant one and to the many friends who encouraged me all through the journey. Special mention goes to Miss D.E Kawenda and Mr R Mohanoe who pushed me to soldier on through the worst days, I appreciate and salute you.

TABLE OF CONTENTS

DEDICATION	II
ABSTRACT	III
LIST OF ABBREVIATIONS	V
Chapter 1: Introduction	1
1.1 Background	1
1.2 Interest	2
1.2.1 <i>The history of interest.....</i>	<i>2</i>
1.2.2 <i>The regulation of interest.....</i>	<i>3</i>
1.3 The in duplum rule	5
1.3.1 <i>The application of the rule</i>	<i>5</i>
1.3.2 <i>The appropriation of payments.....</i>	<i>7</i>
1.4 Statutory v Common Law in duplum	8
1.4.1 <i>Application</i>	<i>9</i>
1.4.2 <i>Waiver</i>	<i>10</i>
1.4.3 <i>Appropriation</i>	<i>10</i>
1.4.4 <i>During and after litigation</i>	<i>11</i>
1.5 Conclusion.....	12
Chapter 2: The codification of the in duplum rule in South Africa	13
2.1 Introduction.....	13

2.2	<i>Problems encountered in enforcing common law in duplum in South Africa</i>	14
2.2.1	<i>The identity of the Debtor</i>	14
2.2.2	<i>Which amounts became subject to the in duplum rule?</i>	15
2.2.3	<i>Debt repayment</i>	15
2.2.4	<i>Pendente lite and post lite</i>	16
2.3	<i>The Promulgation of the NCA</i>	17
2.4	<i>The NCA</i>	18
2.4.1	<i>Statutory in duplum; Section 103(5) of the NCA</i>	19
2.5	<i>The achievements of statutory in duplum</i>	20
2.5.1	<i>The identity of the debtor, surety and public policy</i>	20
2.5.2	<i>The amount subject to the in duplum rule</i>	21
2.5.3	<i>Appropriation</i>	21
2.5.4	<i>Pendente lite and post lite</i>	22
2.6	<i>The defects of section 103(5) of the NCA</i>	23
2.6.1	<i>A lack of clarity</i>	23
2.6.2	<i>The amount to which the rule applies</i>	24
2.6.3	<i>Knowledge of the existence of the rule</i>	25
2.6.4	<i>Debt alleviation</i>	25
2.6.5	<i>Change in time</i>	25
2.7	<i>Conclusion</i>	26

Chapter 3: The in duplum rule in Zimbabwe	28
3.1 Introduction.....	28
3.2 Interest	28
3.3 Application of the in duplum rule in Zimbabwe	29
3.3.1 Where the rule applies.....	29
3.3.2 State debt.....	30
3.3.3 Novation	31
3.3.4 Waiver.....	32
3.3.5 Sureties	32
3.3.6 The application of the in duplum rule during litigation.....	32
3.3.7 Appropriation	33
3.4 Weaknesses in the application of the rule.....	34
3.5 Conclusion.....	35
Chapter 4: Has the in duplum rule been codified effectively in both South Africa and Zimbabwe	36
4.1 Introduction.....	36
4.2 The aims of statutory in duplum.....	36
4.3 Considerations for the efficiency of the in duplum rule	37
4.3.1 The prescribed rate of interest	37
4.3.2 Socio-economic stability.....	37
4.3.3 Inflation.....	38

4.4 Recommendations 38

4.4.1 *Creditor protection.....38*

4.4.2 *Simplicity 40*

4.4.3 *The extended protection of juristic persons 41*

4.4.4 *Education on the existence of the rule 41*

4.5 Noteworthy recommendations for Zimbabwe..... 42

4.6 Noteworthy recommendations for South Africa..... 43

4.7 Conclusion..... 43

BIBLIOGRAPHY 45

LIST OF ABBREVIATIONS

ALR	Albany Law Review
DTI	Department of Trade and Industry (South Africa)
NCA	<i>National Credit Act 34 of 2005</i>
SA Merc LJ	South African Mercantile Law Journal

Chapter 1: Introduction

1.1 Background

Credit, which is the ability of a customer to obtain goods or services before payment, based on the trust that payment will be made in future¹ dates back to Biblical times.² It unlocks a diverse range of opportunities, which include economic breakthroughs, educational advancement and development plus an improved of standard of living.³ Credit does this by enabling people who may not afford commodities, be they basic or luxury commodities and those who need to start income-generating projects to afford to do as such despite not having the personal funds necessary to do so. Credit thus uplifts the lives of consumers.⁴ The granting of credit has developed from being a practice related chiefly to persons on a social level to becoming a wide income base for the economies of nations which rely on the income generated by credit.⁵ The collapse of an economy is evidence of the ill regulation of credit and as such, nations seek to ensure the regulation of the credit industry.⁶ Legal regulation of credit has developed to affect the community and to protect the consumer.⁷ As such, credit is now widely available to all persons worldwide and monitored to ensure its efficiency and the growth of economies. The benefits of having a sound credit market include being able to give assistance to individuals to accumulate assets to exploit economic opportunities and for businesses to grow and create employment.⁸ The regulation of credit can be dated as far back as the beginning of the granting of credit. The *actio quanti minoris* and the

¹ Anon date unknown https://www.google.co.za/?gws_rd=ssl#q=what+is+credit.

² *The Bible (RSV)* Exodus 22: 25; Leviticus 25:35-37; Luke 6:30; Deuteronomy 23:19-20.

³ DTI 2004

http://www.ncr.org.za/documents/pages/background_documents/Credit%20Law%20Review.pdf
para 1.5.

⁴ Kelly-Louw 2011 *SA Merc LJ* 352.

⁵ Countries regarded as poor by the International Monetary Fund depend on funding from the fund for sustainability and thereby live on credit grants. Griffith-Jones with Karwowski and Dafe 2014 https://www.die-gdi.de/uploads/media/ODI_Report.pdf.

⁶ Fratzcher, Konig and Lambert 2016 *Journal of International Money and Finance* 113.

⁷ Maleson 1959 *ALR* 298.

⁸ DTI 2004

http://www.ncr.org.za/documents/pages/background_documents/Credit%20Law%20Review.pdf
para 1.3.

actio redhibitoria are prime examples of consumer credit regulation in Roman times.⁹ This regulation has developed over time and has led to the development and prescription of rules,¹⁰ regulatory bodies¹¹ and rates for returns on credit,¹² thus ensuring economic growth on a national scale.

1.2 Interest

1.2.1 The history of interest

Interest, which is the price of money,¹³ has evolved over time and the charge thereof has been present since time immemorial. The charging of interest as evidenced in the Bible¹⁴ was met with criticism as Christian virtue entailed the assistance of one another in society and not the enrichment of the rich at the expense of the poor. According to the Judaic understanding, Jews could extract interest from foreigners but not from one another,¹⁵ therefore making the collection of interest from a fellow Jew a prohibited act.¹⁶ Similarly, in Islam, if one advances a loan, they are entitled to recover only the capital amount from the borrower and nothing more,¹⁷ with Pakistan being the first Muslim country to officially declare the charging of modern bank interest as unlawful.¹⁸ The charging of interest is allowed only where a borrower is late in repaying a loan, when the lender would be compensated for losing the benefit of the use of the money during the period between the date on which repayment should have been made and the actual date of repayment.¹⁹ Justinian on the other hand, allowed the charging of interest subject to different rates and according to the relationship between the debtor

⁹ Otto 2010 *Fundamina* 258.

¹⁰ *National Credit Act* 34 of 2005 (hereafter *NCA*).

¹¹ National Credit Regulator of South Africa.

¹² *Prescribed Rate of Interest Act* 55 of 1975 (South Africa); *Prescribed Rate of Interest Act* [Chapter 8:10] (Zimbabwe).

¹³ *Verulam Medicentre (Pty) Ltd v Ethekwini Municipality* 2005 (2) SA 451 (D) para 15.

¹⁴ *The Bible (RSV)* Deuteronomy 23:19-20.

¹⁵ Vessio *The Effects of the* in duplum Rule 9; *The Bible (RSV)* Deuteronomy 23:19-20.

¹⁶ Otto 2010 *Fundamina* 258.

¹⁷ Swartz 2012 *African Journal of Business Management* 1.

¹⁸ Vessio *The Effects of the* in duplum Rule 14.

¹⁹ Swartz 2012 *African Journal of Business Management* 2.

and the creditor.²⁰ In Roman-Dutch law the charging of interest was thus allowed, subject to prescribed maximum rates.²¹

1.2.2 The regulation of interest

The regulation of interest has existed for 4000 years with first enactments found in the Code of Hamurabi.²² Such regulation is aimed at alleviating the plight of the overly indebted from the high costs of credit and consequent poverty. It is thus warranted that the first stage of credit regulation focused on the types of penalties imposed for the violation of prescribed interest rates.²³ There are different types of interest which include compound and nominal interest and these may be charged on a debt subject to regulation. Present-day interest regulation aims to curb over-indebtedness by prescribing rates of interest for credit providers and imposing penalties for the contravention of these rates. A consumer is over-indebted if the preponderance of the available information at the time of determination indicates his inability to timeously satisfy his obligations under the credit agreements to which he is a party.²⁴ Because credit is a dangerous instrument that may lead to poverty, the need for regulation thereof cannot be under-estimated. The regulation of credit is also important in order to foster consumer confidence in the financial industry and thus facilitate national economic growth. Credit legislation may further be used to level possible imbalances which may exist between credit grantors and credit consumers.²⁵ All modern consumer credit legislation may be thought to have been derived from the same origin, which is the Old Testament²⁶ proscription of the charging of interest.²⁷

²⁰ Swartz 2012 *African Journal of Business Management* 3.

²¹ Otto 2010 *Fundamina* 261.

²² Otto 2010 *Fundamina* 260.

²³ Maleson 1959 *ALR* 297.

²⁴ *Nedbank v National Credit Regulator* (662/ 2009 & 500/ 210) [2011] ZASCA 35 (28 March 2011) para 10.

²⁵ Grové and Otto *Basic Principles of Consumer Credit Law* 2.

²⁶ *The Bible (RSV)* Exodus 22: 25.

²⁷ Otto and Grové *The Usury Act and Related Matters* 18.

The *Prescribed Rate of Interest Act*²⁸ prescribes the percentage of interest which may be charged on debt and the repercussions for the contravention thereof. This placing of a ceiling rate of interest dates back to the Twelve Tables, which stipulated a ceiling rate and imposed criminal liability in the event of contravention by the usurer.²⁹ In Islamic communities the rate of prescribed interest is fixed at zero,³⁰ loans are permitted only in cases of dire need, and debt is strongly discouraged for living beyond one's means or to grow one's wealth.³¹ The curbing of overcharging or exorbitant interest rates is evidenced by the prohibition of usury³² even in Biblical times. In Israel and other countries a free loan policy also existed in a bid to protect credit consumers.³³

Despite the existence of regulations curbing interest rates, consumers remain in need of protection from credit grantors to ensure debt alleviation. Methods of debt alleviation and rules to ensure the further protection of consumers have been devised, they include the application of the *in duplum* rule, debt review, disclosure (prior disclosure, wherein the creditor fully explains to the debtor, before the granting of credit, the full terms of the agreement in a language the debtor fully understands and post disclosure, wherein the debtor is subsequently informed of payments due or any changes in rates of interest) and rearrangement of debt. The methods designed to alleviate debt are however insufficient, if each method is applied on its own, and are thus to be employed together to achieve full debtor protection. The *in duplum* rule is a rule aimed at debt alleviation and the protection of the debtor from the creditor, and it will be effective only if it is employed with other debt alleviation tools like disclosure, which addresses a lack of information and ensures informed credit.

²⁸ *Prescribed Rate of Interest Act* 55 of 1975 (South Africa); *Prescribed Rate of Interest Act* [Chapter 8:10] (Zimbabwe).

²⁹ Vessio *The Effects of the in duplum Rule* 17.

³⁰ Swartz 2012 *African Journal of Business Management* 13.

³¹ Vessio *The Effects of the in duplum Rule* 15.

³² Maleson 1959 *ALR* 300.

³³ The Israel free loan association is the largest Jewish interest free loan organization in the world to date. It caters particularly for Israelites wherever they may be located globally. Anon 2016 www.israelfreeloan.org-il/en/about-ifla/what-is-ifla/.

1.3 The *in duplum* rule

The *in duplum* rule is a rule which states that interest on a debt will cease to run where the total amount of the arrear interest has accrued to an amount equal to the outstanding principal debt.³⁴ The phrase *in duplum* stems from the Latin word *duplo*, meaning double.³⁵ The rule is founded on public policy and has its roots in Roman law. It was introduced to protect debtors against creditors who are sluggish in enforcing the recovery of their debt, thereby contriving to charge an unreasonable amount of interest for an indefinite period.³⁶ The rule is thus a method of debt alleviation and a consumer protection mechanism for debtors who might otherwise be unable to defend themselves against the bargaining power of creditors in debt provision. It is a part of our daily economic life and fulfils the important function of alleviating debtors in financial difficulties.³⁷ Furthermore, the rule is an effective mechanism for limiting the cost of credit, thereby curtailing the devastating socio-economic consequences of the high costs of credit.³⁸ The rule also encourages creditors to be more vigilant of consumers who do not service their debts, and dissuades them from providing reckless credit through the over extension of debtors' limited financial resources.³⁹ It is thus a motivational tool to avoid reckless lending and facilitates the exercise of diligence in lending.

1.3.1 The application of the rule

The *in duplum* rule generally applies to all contracts under which a debt is subject to interest at a fixed rate.⁴⁰ Because of its foundation in public interest, the rule may not be waived,⁴¹ whether prior⁴² to contracting or post contractually. The rule is thus an

³⁴ Elliot 2013 www.sablog.kpmg.co.za/2013/09/understanding-the-application-of-the-in-duplum-rule.

³⁵ Khaseke 2008-2010 *Kenya Law Review* 3.

³⁶ Anon 2014 <http://www.marisit.co.za/wp-content/uploads/2014/11/impact-of-the-national-credit-act.pdf>.

³⁷ Schulze 2006 *SA Merc LJ* 419.

³⁸ Campbell 2010 *SA Merc LJ* 2.

³⁹ Kelly-Louw 2011 *SA Merc LJ* 359.

⁴⁰ Schulze 2006 *SA Merc LJ* 427.

⁴¹ Schulze 2006 *SA Merc LJ* 420.

⁴² Campbell 2010 *SA Merc LJ* 6.

exception to the general principle of freedom of contract⁴³ as it cannot be excluded by means of a contractual provision.⁴⁴ Further, banking practice may not alter the rule⁴⁵ although restructuring of the debt may be allowed. In seeking to mitigate the effects of the operation of the rule, a creditor cannot thus simply agree with the debtor that the *in duplum* rule shall not apply to their transaction, as such agreement would be contrary to public policy and unenforceable.⁴⁶

Argument has been raised, however, as to exceptions where the rule does not apply,⁴⁷ with regards to situations where interest has been said to serve a purpose other than the ordinary function that interest fulfils, and where a debtor has been regarded as unworthy of protection by the rule.⁴⁸ The argument has however been met with criticism, as the system it proposes would necessitate an enquiry into the identity of the debtor instead of the nature of the debt.⁴⁹ However, annual income and interest paid periodically are held as instances in which the rule does not apply.⁵⁰ It is also argued that the rule does not apply to interest on money owed to the revenue authority, as those debts arise by operation of statute and not by contract.⁵¹

Novation, which is a means of replacing an existing obligation with a new obligation,⁵² may be allowed, and this may be a diversion from the rule but not necessarily a waiver thereof, as the rule will continue to apply to the new debt or obligations created. In South Africa, argument as to whether novation is subject to the *NCA* has been concluded in the affirmative.⁵³ Further, the inclusion of a non-novation clause into an acknowledgement of debt will not serve to exclude the agreement subsequently

⁴³ Khaseke 2008-2010 *Kenya Law review* 8.

⁴⁴ Otto 2012 *Journal of Contemporary Roman-Dutch Law* 130.

⁴⁵ *Absa Bank Ltd v Leech and Others* (442/98) [2001] ZASCA65; [2001] A All SA 55 (A) (23 May 2001) para 314.

⁴⁶ Kawonde 2003 www.theindependent.co.zw/2003/05/30/in_duplum_rule_and_inflation/.

⁴⁷ *Verulam Medicentre (Pty) Ltd v Ethekwini Municipality* 2005 (2) SA 451 (D) para 15.

⁴⁸ Schulze 2006 *SA Merc LJ* 427; A non-juristic consumer has been considered as unworthy of Protection in regard to annual turnover, and the presumption that it is a natural person that is at the mercy of a creditor, rather than a juristic consumer.

⁴⁹ Schulze 2006 *SA Merc LJ* 423.

⁵⁰ *Commissioner for South African Revenue Service v Woulidge* 2002 (1) SA 68 (SCA) 69.

⁵¹ Honiball and Nortje 2014 *Without Prejudice* 7.

⁵² Christie *The Law of Contract* 521.

⁵³ *Da Silva v Slip Knot Investments* (661/2009) [2010] ZASCA 174 (2 December 2010).

concluded from the ambit of the *NCA*.⁵⁴ In Zimbabwe, the novation of a debt has similarly been held to remain subject to the *in duplum* rule,⁵⁵ regard given to statutory *in duplum*⁵⁶ or common-law *in duplum*. As such, parties may reconsider their obligations as per existing debts and may restructure the debt, but the *in duplum* rule will continue to apply to the debt in as much as the new obligations or former obligations have equated the capital debt. Thus, even if parties agree to waive the application of the *in duplum* rule, public policy will prevent such a waiver as it is a benefit laid down by law⁵⁷ and the waiver thereof would effectively negate the authentic purpose of the rule.⁵⁸

With regards to surety, which is an accessory obligation,⁵⁹ there will need to be a valid principal debt which does not exceed the capital debt⁶⁰ in order for the *in duplum* rule to apply at the defence of the surety. Any defences which are available to the debtor are also available to the surety unless they are of a personal nature to the debtor. In circumstances where the creditor does not reflect the capital debt separately from interest it does not stand as a defence for the surety to be absolved from payment of the debt as long as there is proof of surety.⁶¹

1.3.2 *The appropriation of payments*

The freedom of contract is upheld with regards to debt repayment and as such an agreement between the debtor and creditor on how funds are to be appropriated to extinguish the debt will be upheld. The debtor has the right to make an allocation of the funds and in the absence thereof the creditor will have the right to appropriate.⁶² With regards to circumstances wherein no such provision is made in the contracts, then the funds will first be appropriated to interest to curb the continued increase in interests.

⁵⁴ Anon 2016 <https://heyns.co.za/press-room/standard-acknowledgements-of-debt-and-the-national-credit-act-nca/?id98>.

⁵⁵ Zimbabwe Development Bank v Naga Salons and Nyarai Chiwaura and Betty Chiwaura HH 43-2006 HC 12639/04.

⁵⁶ Section 9 *Moneylending and Rates of Interest Act* [Chapter 14: 14] (Zimbabwe).

⁵⁷ Vessio *The Effects of the in duplum Rule* 59.

⁵⁸ Vessio *The Effects of the in duplum Rule* 64.

⁵⁹ Christie *The Law of Contract* 142.

⁶⁰ Schulze 2006 SA *MERC LJ* 423.

⁶¹ *Volkscas Bpk v Meyer* 1966 (2) SA 379 (T) 382.

⁶² *Standard Bank v Oeanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA) 815.

The presumption (the rule in the *Clayton's case*⁶³) that the first item on the debit side is reduced by the first item on the credit side suffices, despite its not being law and a presumption.⁶⁴ The application of the presumption, however, is subject to the facts of the case and does not apply mutually with the *in duplum* rule,⁶⁵ as it would result in the debtor getting a double benefit.⁶⁶ The double benefit would be as a result of the capital debt being reduced by a payment and interest being curbed from recurring. The limit on the application of the rule, subject to facts of each case, despite ensuring debtor protection, is however not aligned towards injustice to the creditor. The allocation of payments, however, remains a matter of agreement between the parties.⁶⁷

1.4 Statutory v Common Law in duplum

Due to the continued application of the *in duplum* rule in many jurisdictions, in a bid to make concrete consumer protection, law makers have codified the rule to strengthen the application of the rule. The reason for codification is different per nation with regards to the codification of common law policies in existence. The rule in becoming codified is either extended or reduced in application, and variations are created thereof. Statutory provisions are generally considered to offer better protection than common law provisions. There are thus vast differences between the statutory *in duplum* and the common law *in duplum* rule. Zimbabwean and South African common law are generally similar, given the fact that both are based on Roman-Dutch law. The following explains the differences in application of the rule, either in its statutory or its common law form. Both the common-law *in duplum* rule and the statutory *in duplum* rule are founded on public policy and are aimed at providing financial relief for debtors.⁶⁸

⁶³ *Devaynes v Noble* (1816) 1 Mer. 572;35 E.R. 781.

⁶⁴ *Commercial Bank of Zimbabwe v MM Builders and Suppliers (Pvt) Ltd and Others and Three Similar Cases* 1997 (2) SA 285 (ZH) 288.

⁶⁵ *Standard Bank of South Africa Ltd v Oeanate Investments Pty Ltd* (in liquidation) 1998 (1) SA 811 SCA 831.

⁶⁶ *Commercial Bank of Zimbabwe v MM Builders and Suppliers (Pvt) Ltd and Others and three similar Cases* 1997 (2) SA 285 (ZH) 318.

⁶⁷ Schulze 2006 *SA Merc LJ* 425.

⁶⁸ Kelly-Louw 2011 *SA Merc LJ* 372.

1.4.1 Application

In both South Africa and Zimbabwe, the statutory *in duplum* rule applies only to those agreements falling within the ambit of statute,⁶⁹ whilst the common law rule remains absolute and continues to apply to all other agreements not covered by the statute.⁷⁰ Further, in South Africa, despite the vast span of the agreements covered by statute, the common law will continue to cover credit agreements which were entered into before the operation of the *National Credit Act*.⁷¹ Despite the rule's applying only to arrear and unpaid interest⁷² according to common law, it also applies only to contractual and default interest; thus, other amounts may continue to run. In South Africa, however, statutory *in duplum* provides that other amounts like initial and service fees⁷³ also cease to run.⁷⁴ Statutory *in duplum* further does not apply to juristic persons where they are consumers under South African law,⁷⁵ whilst the common law rule remains absolute and applies to all other agreements not covered by statute. The outstanding debt per statutory *in duplum* in South Africa will thus reach the limit more quickly than that per the common law rule, as the statutory rule will include a vast number of credit costs.⁷⁶ In Zimbabwe, however, the statutory *in duplum* does not specify the costs encompassed in the interest; nor does it mention the costs of granting the credit as a consideration when calculating the *duplo*. According to the common-law rule, interest will not include amounts which have been already been paid towards extinguishing the debt, which would have reached the *duplum* limit. The debt will rerun upon debt reduction per common law *in duplum*, whereas according to statute, in both South Africa and Zimbabwe interest will re-run only once the debtor is no longer in default.⁷⁷ Under the common-law, the court would not ordinarily raise the *in duplum* rule as a defence for the debtor if the debtor fails to raise it, but it would apply it if according to the facts it is obvious that the rule should apply, just as the court would reject the

⁶⁹ *National Credit Act* 34 of 2005 (South Africa), *Moneylending and Penalties Act* (Zimbabwe).

⁷⁰ Vessio 2010 *Obiter* 725.

⁷¹ 34 of 2005.

⁷² Otto and Otto *The National Credit Act Explained* 95.

⁷³ Section 101 (1) *NCA*.

⁷⁴ Section 103 (5) *NCA*.

⁷⁵ Section 6 *NCA*.

⁷⁶ Section 101 (1) *NCA*.

⁷⁷ Kelly-Louw 2011 *SA Merc LJ* 361.

application of usurious interest.⁷⁸ Per statute, the court will, however, consider whether the rule has been contravened, regardless of the debtor's raising the defence.⁷⁹

1.4.2 Waiver

The application of the rule may not be waived under statute⁸⁰ in either Zimbabwe or South Africa, as it is founded on public policy and exists for the protection of the debtor.⁸¹ Whilst common law, despite also advocating for non-waiver of the rule, it is evident that the courts⁸² have been reluctant to sanction waiver in advance of the rule.⁸³ An exception has been made of the application of the rule to tax,⁸⁴ but exceptions based on the worthiness of a debtor to be granted protection have been dismissed with regards to the notion that the rule would then be diverted to an enquiry into the identity of the debtor rather than into the outstanding debt.⁸⁵ It has consequently been emphasized that more important than the identity of the debtor is whether there is some commercial contract between the debtor and the creditor.⁸⁶ The enquiry into the existence of a commercial contract in this context is an enquiry into whether the debt is acknowledged by the debtor,⁸⁷ who may be a surety in this regard, and whether the contract thereof is of the nature of a money lending contract which attracts interest and the repayment of the debt or the interest thereof owing.

1.4.3 Appropriation

With regards to the appropriation of funds in both South Africa and Zimbabwe to extinguish the debt where no prior agreement exists (which would be upheld by the law) between debtor and creditor, the common-law appropriation of first reducing

⁷⁸ *Micro Plan Financial Services (Pvt) Ltd v Chesets Trading (Pvt) Ltd and Charity Madyara and John Maxwell Chishakwe and Portia Nyamutsamba* HH 513-15 HC 3182/15.

⁷⁹ Campbell 2010 *SA Merc LJ* 11.

⁸⁰ Schulze 2006 *SA Merc LJ* 428.

⁸¹ Schulze 2006 *SA Merc LJ* 420.

⁸² *Georgias and Another v The Standard Chartered Finance Zimbabwe Limited* 1998 (2) ZLR 488 497.

⁸³ *Local Authorities Pension Fund v Chegutu Municipality* HH 115-2006 HC 1885/06.

⁸⁴ Honiball and Nortje 2014 *Without Prejudice* 7.

⁸⁵ Schulze 2006 *SA Merc LJ* 423.

⁸⁶ Honiball and Nortje 2014 *Without Prejudice* 7.

⁸⁷ *Central African Building Society v Zimslate Quartzite (Pvt Limited and Arminco Investments (Pvt) Limited and Tinashe Able Chimanihire and Beaver Pamhidzai Chimanihire and Mohamed Iqbal Mohamed* HH 49-16 HC 9692/13.

interest and then capital suffices. The common-law in this regard provides that interest be paid first before capital, an enforceable debt be paid before an unenforceable debt, a personal debt before the debt of another, a certain debt before an uncertain debt, and a more burdensome debt before a less burdensome debt (debt bearing interest, secured, bearing a penalty or enforced by judgement).⁸⁸ Further, the presumption of appropriation first to the reduction of the earliest debit item⁸⁹ which is upheld by common law will not apply where the *in duplum* rule applies,⁹⁰ as to do so would be said to enable a debtor to doubly benefit.⁹¹

1.4.4 During and after litigation

In both South Africa and Zimbabwe, statutory *in duplum* caps the judgement debt amount as it will not be beyond double the capital debt.⁹² Where court proceedings are instituted per common law, interest ceases to run during trial and recommences to accumulate upon judgement on the judgement debt.⁹³ The interest in this regard may once again accumulate until it reaches double the judgement debt, when the operation of the *in duplum* rule will curtail continued interest accumulation. The statutory rule is not suspended during litigation, however.⁹⁴ In regard to statutory *in duplum*, it has been held in this context, that a debtor will not be exploited where the creditor will be kept out of pocket through being subject to delays related to legal proceedings.⁹⁵ The arguments for and against the suspension of the rule during and prior to litigation will be explained in greater detail in the following chapters. It is important to note, however, that case law in this regard has shown inconsistency and is thus unstable, with the circumstances of each case in both countries being the factor influencing the decisions.

⁸⁸ Schulze 2006 *SA Merc LJ* 425.

⁸⁹ *Devaynes v Noble* (1816) 1 Mer. 572; 35 E.R. 781.

⁹⁰ *Commercial Bank of Zimbabwe v MM builders and Suppliers (Pvt) Ltd and Others and Three Similar Cases* 1997(2) SA 285 (ZH) 318.

⁹¹ *Standard Bank of South Africa Ltd v Oeanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA) 831.

⁹² De Villiers 2010 *PER* 151.

⁹³ Schulze 2006 *SA Merc LJ* 427.

⁹⁴ *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) 482.

⁹⁵ *Standard Bank of South Africa Ltd v Oeanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA).

1.5 Conclusion

The *in duplum* rule is thus a consumer protection mechanism aimed at alleviating the debtor from being debt stricken into poverty and encouraging creditors not to issue reckless credit or to delay enforcing debt repayment. The codification of the rule is thus a reform akin to an extension of the rule and an attempt to increase debtor awareness of the existence of the rule. The application of the rule per common law is similar in Zimbabwe and South Africa, whilst the variations in the statutory provisions regarding the rule are mainly influenced by the differing economies of the two countries. In South Africa, statutory *in duplum* is further explicated and caters for various amounts, whilst the Zimbabwean statutory provision is rather vague, leaving room for interpretation and determination, due to the existence of a harsh economic climate evidenced by a multi-currency system and marred by exorbitant inflation rates.

Chapter 2: The codification of the *in duplum* rule in South Africa

2.1 Introduction

The *in duplum* rule, which states that interest due in respect of a debt ceases to run when it reaches the amount of the unpaid capital sum⁹⁶ has been part of South African law from as early as 1830 and has its origins in Roman Dutch law.⁹⁷ Authorities under Roman-Dutch law used various methods to limit the interest which could be claimed, thereby limiting the greed of money lenders, and the rule forms part of this effort at restrain⁹⁸ The rule is meant to protect debtors from being continually indebted to creditors who fail to insist on timeous debt repayment. Further, it is a rule founded on public policy to ensure the alleviation from over-indebtedness of debtors, and can therefore not be waived, nor are there exceptions to its application.⁹⁹ A consumer is over-indebted if the preponderance of the available information at the time of determination indicates his inability to timeously satisfy his obligations under the credit agreements to which he is a party.¹⁰⁰ In South Africa, despite recommendations for the abolition of the rule,¹⁰¹ it has neither been abolished nor abrogated by disuse¹⁰² but has rather been continually applied as per South African common law and has become "codified" under Section 103(5) of the *National Credit Act*¹⁰³ (hereafter *NCA*). However, the rule limits the freedom of contract, which is not an absolute right,¹⁰⁴ by prescribing that interest stops accumulating despite contractual agreements to the contrary.

⁹⁶ *Union Government v Jordaans Executor* 1916 TPD 411 p 413.

⁹⁷ *Nedbank v National Credit Regulator* (662/2009 & 500/210) [2011] ZASCA 35 (28 March 2011) para 36.

⁹⁸ The limit on the rate at which interest could be charged and the prohibition of the levying of interest on interest were attempts at limiting interest charged (the beginning of credit regulation); *Sanlam Life Insurance Ltd v South African Breweries Ltd* 2000 (2) SA 647 651.

⁹⁹ *Verulam Medicentre (Pty) Ltd v Ethekwini* 2005 (2) SA 451 (D) 454.

¹⁰⁰ *Nedbank v National Credit Regulator* (662/2009 & 500/210) [2011] ZASCA 35 (28 March 2011) para 10.

¹⁰¹ Otto and Grové *The Usury Act and Related Matters* 376.

¹⁰² *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2014 (4) SA 253 (SCA) para 43.

¹⁰³ 34 of 2005.

¹⁰⁴ *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2014 (4) SA 253 (SCA) para 70.

2.2 Problems encountered in enforcing common law in duplum in South Africa

2.2.1 The identity of the Debtor

Regarding the common-law *in duplum* rule, the identity of the debtor was an influential factor in assessing whether such a debtor was worthy of the protection afforded by the rule. This was considered in *Verulam Medicentre (Pty) Ltd v Ethekekwini Municipality*,¹⁰⁵ wherein the court employed the lenient test, which sought to determine whether public policy dictated the need for the protection of the debtor against exploitation by the creditor. The argument that the rule be lifted with regards to the ability of the debtor to pay the interest was misunderstood from a prior judgement¹⁰⁶ but was settled having regard to the notion that the prior *dicta* did not intend the determination of the identity of a debtor be the deciding factor as to the application of the rule.¹⁰⁷ As such, the application of the rule to all debtors regardless of their financial stability or identity was questionable and gave rise to questions as to which debtors were worthy of protection by the rule as regards their income or identity as natural or juristic persons.

A further problem with the common-law *in duplum* rule was that the court was not inclined to piece together evidence and adduce the application of the rule wherein a party failed to raise the rule as a defence.¹⁰⁸ The general lack of the relevant information amongst debtors meant that they would be unlikely to raise the *in duplum* rule as a defence. Further, such lack of information could result in the waiver of the rule or debt novation by creditors in a bid to escape the operation of the *in duplum* rule, despite its being guarded by public policy provisions and not legally subject to waiver.¹⁰⁹

¹⁰⁵ 2005 (2) SA 451 (D) 454.

¹⁰⁶ *Commissioner for South African Revenue Service v Woulidge* 2002 (1) SA 68 70.

¹⁰⁷ *Verulam Medicentre (Pty) Ltd v Ethekekwini Municipality* 2005 (2) SA 451 (D) 455.

¹⁰⁸ Kelly-Louw 2011 *SA Merc LJ* 369.

¹⁰⁹ *Verulam Medicentre (Pty) Ltd v Ethekekwini Municipality* 2005 (2) SA 451 (D) 454.

2.2.2 Which amounts became subject to the *in duplum* rule?

Under common law *in duplum*, it was accrued arrear interest that was to be subjected to the rule once it equated to the capital amount having been borrowed.¹¹⁰ Questions arose however, in situations wherein anticipated interest was argued with regards to its payment,¹¹¹ and the court ruled that the *in duplum* rule did not apply. Further, gratuitous transactions were also declared as not being covered by the common-law rule.¹¹² The issue of the amounts covered by the *in duplum* rule were often determined with regards to the variation in transactions on a case-by-case basis, which meant that despite the law's seeking to achieve uniformity in the application of the common-law *in duplum* rule, applicability had to be decided on a case-by-case basis, depending on the type of debt owed. The sum of the capital debt under the common-law *in duplum* rule did not include charges or other costs of credit such as service fees or debt levies, and therefore the accumulation of interest before it reached the double would be over a considerable time and as such, creditors were not encouraged to institute action towards debt recovery.

2.2.3 Debt repayment

The issue of debt repayment; with regards to the *in duplum* rule has been characterized by problems with regards to the appropriation of amounts towards debt repayment. The capitalization of interest into capital has been discredited with the conclusion that interest does not lose its character and nature due to its becoming capitalized.¹¹³ Further, appropriation as per the legal presumption¹¹⁴ embedded in the rule in the *Clayton's case* has been held inapplicable in situations wherein the *in duplum* rule operates, in that it would result in the double benefit of the debtor¹¹⁵ where both the debt and interest are extinguished, ultimately resulting in a loss for the creditor, who

¹¹⁰ *Sanlam Life Insurance Ltd v South African Breweries Ltd* 2000 (2) SA 647 (W) 648.

¹¹¹ *Sanlam Life Insurance Ltd v South African Breweries Ltd* 2000 (2) SA 647 (W) 656.

¹¹² *Commissioner of SA Revenue Service v Woulidge* 2000 (1) SA 600 (C) 612.

¹¹³ *Standard Bank of SA Ltd v Oeanate Investments (Pty) Ltd (In Liquidation)* 1998 (1) SA 811 (SCA) 828.

¹¹⁴ Hood 2013 *Juridical Law Review* 510.

¹¹⁵ *Standard Bank of SA Ltd v Oeanate Investments (Pty) Ltd (In Liquidation)* 1998 (1) SA 811 (SCA) 832.

would have made an investment by lending the money to another. The issue of the appropriation of funds towards debt extinction has, however, usually been left to be settled by the debtor and creditor as per agreement. Questions thus remain as to whether anticipated interest stands to be governed by the *in duplum* rule, and whether the application of the rule in Clayton's case would not be a route to be rather followed, given that the aim is to alleviate over-indebted debtors from debt; and if the creditor stands to be repaid what was lent plus interest, would not the double benefit of debtors be a further debt alleviation mechanism.

2.2.4 Pedente lite and post lite

The running of interest when it equals capital, before litigation, during litigation or after litigation, has been a major issue with regard to the application of the common-law *in duplum* rule. This has been foregrounded by the argument as to whether the delays inherent in court processes would result in disadvantaging the creditor, who will have already been kept out of his money for longer than anticipated, or whether protection should remain biased towards the debtor, who, despite having delayed repayment of the debt, will also be able to take further advantage of the delays inherent in court process, as the payment of the interest will have been put into abeyance by the *in duplum* rule. Where a creditor instituted legal proceedings against a defaulting consumer by issuing a summons, the common-law *in duplum* rule was suspended and interest would once again accrue on the judgement debt.¹¹⁶ Further, case law¹¹⁷ has argued that upon service of the summons the *in duplum* rule should be suspended, only resuming upon the judgement of the debt. Thus the question remains as to whether upon the commencement of the litigation, interest should stop running or continue to run until the *duplo* is reached. In so deciding, the scale is to be tipped towards the party worthy of more protection than the other, between debtor and creditor.

The problems encountered in administering the common-law *in duplum* rule have been variously addressed in application, leading to an inconsistency in the law in that regard.

¹¹⁶ Kelly-Louw 2011 *SA Merc LJ* 357.

¹¹⁷ *Standard Bank of SA Ltd v Oeanate Investments (Pty) Ltd (In Liquidation)* 1998 (1) SA 811 (SCA) 834.

The South African Law Reform Commission pleaded for the repeal of the rule as early as 1974,¹¹⁸ suggesting that it be abolished and its application stopped due to the complications and problems surrounding its application.¹¹⁹ Further, advocacy of the repeal of the rule was strongly supported as the protection of consumers and debtors was not considered as important then compared to at present. The legislature, however, did not heed these sentiments and instead "codified" the rule.

2.3 The Promulgation of the NCA

The *Cape Usury Act*¹²⁰ may be regarded as first-generation consumer credit legislation and the *Usury Act*,¹²¹ as the first credit legislation applied on a national basis.¹²² *The Usury Act*¹²³ which sought to discourage the charging of usurious interest and protect debtors from creditors, was an effort to ensure an efficient credit market and was enacted in 1926 and later replaced by the *Limitation and Disclosure of Finance Charges Act*,¹²⁴ which was in turn amended in 1980 to the *Usury Act*.¹²⁵ The *Usury Act*, however, was applied with regard to the *Credit Agreements Act*.¹²⁶ The application of two pieces of legislation which, despite their commendable similarities, also had remarkable differences resulted in confusion as to which act would apply or which definition from which act would apply to which matters.¹²⁷ Uniformity, clarity and simplicity were needed. The *NCA* thus presented itself as an embodiment of essential credit legislation which had been previously provided for by the different acts. The drafters of the *NCA* tried to incorporate mechanisms to prevent consumers of credit agreements from becoming over-indebted.¹²⁸

¹¹⁸ Kelly-Louw 2011 *SA Merc LJ* 372.

¹¹⁹ Otto and Grové *The Usury Act and Related Matters* 376.

¹²⁰ Act 23 of 1908.

¹²¹ Act 37 of 1926.

¹²² Otto and Grové *The Usury Act and Related Matters* 24.

¹²³ 37 of 1926.

¹²⁴ 42 of 1968.

¹²⁵ 73 of 1986.

¹²⁶ 75 of 1980.

¹²⁷ Otto and Grové *The Usury Act and Related Matters* 50.

¹²⁸ Kelly-Louw 2011 *SA Merc LJ* 352.

2.4 The NCA

The *NCA* is not an amendment of previous legislation dealing with consumer credit as it seeks to achieve much more. Instead, it could be said to replace previous consumer credit legislation.¹²⁹ According to the *NCA*, the protection of debtors is afforded by provisions aimed at prohibiting the reckless extension of credit.¹³⁰ It establishes the office of the national credit regulator,¹³¹ debt monitoring, evaluation and advisory services, and referral for review.¹³² All these aims of the credit legislation were enacted with the object of enhancing debtor protection. Further, the *NCA* sought to increase consumer awareness to enable increased consumer protection. As such, it also provided that disclosure be upheld¹³³ in credit transactions with regard to rates of interest and the continuous issuing of statements to remind the debtor of his credit status. With regards to the rate of interest, the Minister of Finance was tasked with publishing the prescribed rate of interest¹³⁴ in the government gazette with reference to the *Prescribed Rate of Interest Act*.¹³⁵ The *NCA* is a huge improvement on its predecessors but is not without its shortcomings.¹³⁶ It does not protect juristic persons¹³⁷ nor apply to credit agreements prior to 2007¹³⁸ or statutory debt,¹³⁹ but applies only to credit agreements falling within the ambit of the act,¹⁴⁰ with common law *in duplum* continuing to apply to all other credit agreements.¹⁴¹

¹²⁹ *Nedbank v National Credit Regulator* (662/2009 & 500/210) [2011] ZASCA 35 (28 March 2011).

¹³⁰ Section 81(3) *NCA*.

¹³¹ *NCA* 34 of 2005.

¹³² Section 86 *NCA*.

¹³³ Section 92 *NCA*.

¹³⁴ Section 105 *NCA*.

¹³⁵ 55 of 1975.

¹³⁶ Otto 2010 *Fundamina* 271.

¹³⁷ Kelly-Louw 2011 SA *Merc LJ* 359.

¹³⁸ Kelly-Louw 2011 SA *Merc LJ* 360.

¹³⁹ Honiball and Nortje 2014 *Without Prejudice* 7.

¹⁴⁰ Section 4 *NCA*.

¹⁴¹ Kelly-Louw 2011 SA *Merc LJ* 360.

2.4.1 *Statutory in duplum; Section 103(5) of the NCA*

The *in duplum* rule, which is a provision or a rule aimed at debt alleviation and credit protection, may be said to have been "codified" by Section 103(5)¹⁴² which 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.

This provision has been the cause of concern in the credit sector. Through section 103(5) the *in duplum* rule has not only been amended from the common-law provision but has been extended.¹⁴³ In clarifying the common-law *in duplum* rule, the statutory provision has led to the development of various concerns of stakeholders in the credit industry, which finds the statutory form of the rule being considered as unclear and ambiguous.¹⁴⁴ The recommendation by the South African Law Commission that it be abolished¹⁴⁵ seems to have been a recommendation which should have been carefully considered (taking note of how to improve the rule by doing away with previous complication and taking note of the bias against consumer protection at the given time) rather than one which the legislature should have completely overridden. Further, the lack of clarity with regards to the application of the legislative provision and lack of knowledge of the application thereof by both legal practitioners and creditors has led to the rule's being inadequately applied and not being welcomed in practice.

¹⁴² Section 103(5) *NCA*.

¹⁴³ *Nedbank v The National Credit Regulator* (662/2009 & 500/210) [2011] ZASCA 35 (28 March 2011) para 38; Kelly-Louw 2011 SA *Merc LJ* 355.

¹⁴⁴ *Nedbank v The National Credit Regulator* (662/2009 & 500/210) [2011] ZASCA 35 (28 March 2011) para 44.

¹⁴⁵ Kelly-Louw 2011 SA *Merc LJ* 372.

2.5 The achievements of statutory in duplum

2.5.1 The identity of the debtor, surety and public policy

The issue of the identity of the debtor was settled by the promulgation of the *NCA*, which stipulated the agreements which the *Act* would govern¹⁴⁶ and as such dismissed all the previous disputes¹⁴⁷ on enquiries to assess whether the debtor was worthy of protection. The *Act* has made it easily determinable who will be afforded protection by the rule based on turnover and whether the person is a natural or a juristic person. The public policy ambit of the provision has been a further determining factor of the worthiness of a debtor for protection by the *in duplum* rule where a party is rendered unworthy of protection¹⁴⁸ or where there is no question of a party's being sufficiently disadvantaged to invoke the principles of public policy.¹⁴⁹ The determination of the meaning of "public policy" was a cause for debate in *Paulsen*,¹⁵⁰ wherein the court had to decide whether the court's jurisdiction was warranted, with the consideration of the matter being one of public policy protection, the decision being that where no party is unduly disadvantaged the rule will not be held applicable and public policy principles will not be invoked.¹⁵¹

The liability of sureties was also settled in the case of *Paulsen*¹⁵² (which was decided after the promulgation of the *NCA*), wherein the appellants objected to being approached before the principal debtor had been approached for debt repayment. It was unchallenged that as per the suretyship, it was necessary to require the principal debtor to extinguish the debt before the surety was approached for the repayment of the debt.¹⁵³ Further, the amount due for repayment by the surety was not questioned in so far as it was the same amount which the principle debtor was to repay. Thus,

¹⁴⁶ Section 4(1) *NCA*.

¹⁴⁷ *Verulam Medicentre (Pty) Ltd v Ethekwini Municipality* 2005 (2) SA 451 (D); *Commissioner of South African Revenue Service v Wouldge* 2000 (1) SA 600 (C); *Sanlam v South African National Breweries Ltd* 2000 (2) SA 647 (W) 648.

¹⁴⁸ *Verulam Medicentre (Pty) Ltd v Ethekwini Municipality* 2005 (2) SA 451 (D) 455.

¹⁴⁹ *Sanlam Life Insurance Ltd v South African Breweries Ltd* 2000 (2) SA 647 (W) 648.

¹⁵⁰ *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) 493.

¹⁵¹ *Sanlam Life Insurance Ltd v South African Breweries Ltd* 2000 (2) SA 647 (W) 648.

¹⁵² *Paulsen And Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC).

¹⁵³ *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) 516.

regarding suretyship, statutory *in duplum* has followed suit with common law *in duplum*, placing the accessory obligation of the debtor on the surety, with the underlying credit agreement between the debtor and creditor and the deed of suretyship being the founding contracts for the surety's liability.

2.5.2 The amount subject to the *in duplum* rule

The statutory *in duplum* rule¹⁵⁴ has also established certainty as to the amount capped by the *in duplum* rule when it reaches double the capital. It is settled that it is accrued arrear interest owed by a debtor. Interest in this regard further has to be interest intended by the *in duplum* rule, which is the price of making money available or the penalty for making money available or the penalty for not paying what was owing on the date when payment was due.¹⁵⁵ Thus, issues of the capitalization of interest and anticipated interest have been settled.¹⁵⁶ Further, as per Section 103(5),¹⁵⁷ other costs of debt have been added to the interest, and these include service fees and collection costs, amongst others. The addition of these amounts¹⁵⁸ ensures better consumer protection to the detriment of the credit provider¹⁵⁹ and further ensures that the "double" is reached much quicker than it would have taken before the enactment of the *Act*.¹⁶⁰ Creditors are now under more pressure to claim repayment of debts timeously; otherwise once the *duplum* is reached interest will stop accruing.

2.5.3 Appropriation

The debates surrounding appropriation have also been settled by the statutory *in duplum* rule as per the *NCA*, which appropriates payment first to due or unpaid interest charges, secondly to due or unpaid fees or charges, and thirdly to the principle debt,¹⁶¹ where no prior agreement as to appropriation has been made. Freedom of contract is

¹⁵⁴ Section 103(5) *NCA*.

¹⁵⁵ *Sanlam Life Insurance Ltd v South African Breweries Ltd* 2000 (2) SA 647 (W) 647.

¹⁵⁶ *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd (In Liquidation)* 1998 (1) SA 811 (SCA) 828; *Sanlam Life Insurance Ltd v South African Breweries Ltd* 2000 (2) SA 647 (W).

¹⁵⁷ *NCA* 34 of 2005.

¹⁵⁸ Section 101(b)-(g) *NCA*.

¹⁵⁹ *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) 531.

¹⁶⁰ Kelly-Louw 2011 *SA Merc LJ* 370.

¹⁶¹ Section 126(3) *NCA*.

thus upheld regarding the appropriation agreement between the debtor and the creditor.¹⁶² The stipulation by the *NCA* of the appropriation has done away with argument about the application of the rule such as occurred in the *Clayton's case*¹⁶³ which would result in double benefit for the debtor.¹⁶⁴

2.5.4 *Pendente lite and post lite*

With regards to the application of the *in duplum* rule during litigation and after litigation, the case of *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd (In Liquidation)*¹⁶⁵ suspended the application of the rule prior to the handing down of judgement based on the premise of debtor protection, so that the debt due would not continue to accumulate. A creditor was held as having control over the institution of litigation, which he could exercise by timeously instituting the action to prevent prejudice towards the debtor.¹⁶⁶ However, the *Paulsen* case¹⁶⁷ overturned the Oneanate¹⁶⁸ decision ten years later. The majority decision of the court took into consideration the fact that creditors, just like debtors, deserved protection from unruly debtors seeking to benefit from the delays in the court process.¹⁶⁹ It was therefore decided that the *in duplum* rule was not to be suspended but would apply during the duration of the litigation, as it would be unfair to penalize a creditor with the application of the *in duplum* rule whilst proceedings were pending and to subject him to the delays inherent in litigation.¹⁷⁰ The decision of *Paulsen*¹⁷¹ further took into consideration public policy provisions and the need to develop the common law as justified by the judiciary.¹⁷² After litigation, however, a new debt becomes payable, and this would be the judgement debt upon which interest would re-accumulate, subject to the *in duplum*

¹⁶² *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) 510.

¹⁶³ Hood 2013 *Juridical Law Review* 538.

¹⁶⁴ *Standard Bank Of SA Ltd v Oneanate Investments (Pty) Ltd (In Liquidation)* 1998 (1) SA 811 (SCA) 832.

¹⁶⁵ 1998 (1) SA 811 (SCA) 834.

¹⁶⁶ *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd (In Liquidation)* 1998 (1) SA 811 (SCA) 834.

¹⁶⁷ *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) para 89.

¹⁶⁸ *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd (In Liquidation)* 1998 (1) SA 811 (SCA).

¹⁶⁹ *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) para 82.

¹⁷⁰ *Margo v Gardner* (564/09) [2010] ZASCA 110 (17 September 2010) para 12.

¹⁷¹ *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) para 82.

¹⁷² *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) para 116.

rule.¹⁷³ Thus the uncertainties and the shifts in law as to the suspension of the rule pending judgement were settled with the enactment of the *NCA*.

The enactment of the statutory *in duplum* has thus proven beneficial to the over indebted debtor by ensuring that interest does not become exorbitant and the double is reached quicker by the incorporation of service charges in the interest amount. Further, the freedom of contract has been maintained and disparities in the decisions regarding to whom the rule applies have also been settled. The promulgation thereof has also encouraged credit providers to be vigilant of consumers not timeously servicing their debts.¹⁷⁴ Apart from clarifying previous problematic interpretation, the statutory *in duplum* also asserts that the rule cannot be waived, and it does not uphold novation by creditors to escape the application thereof. Thus, it is evident that the statutory *in duplum* was promulgated in accord with common law principles. There is still doubt, though, that the *NCA*¹⁷⁵ achieves its purpose, which is to alleviate indebtedness.

2.6 The defects of section 103(5) of the *NCA*¹⁷⁶

2.6.1 A lack of clarity

In *Nedbank v National Credit Regulator*,¹⁷⁷ the banking association sought for the rule to be clarified and also sought to understand whether the *NCA* provision¹⁷⁸ was an amendment¹⁷⁹ or codification of the common-law rule and the implications thereof with regards to the codification and thus the falling away of the common-law provision. The evident lack of understanding by the legal practitioners and court officials concerned highlighted the danger of the rule's being incorrectly applied and therefore not attaining its object.¹⁸⁰ The court¹⁸¹ held that the legislative provision was an extension of the

¹⁷³ *Margo v Gardner* (564/09) [ZASCA] 110 (17 September 2010) para 10.

¹⁷⁴ Kelly-Louw 2011 *SA Merc LJ* 373.

¹⁷⁵ Section 3 *NCA*.

¹⁷⁶ 34 of 2005.

¹⁷⁷ *Nedbank v The National Credit Regulator* (662/2009 & 500/210) [2011] ZASCA 35 (28 March 2011) para 33.

¹⁷⁸ Section 103(5) *NCA*.

¹⁷⁹ *Nedbank v The National Credit Regulator* (662/2009 & 500/210) [2011] ZASCA 35 (28 March 2011) para 38.

¹⁸⁰ Campbell 2010 *SA Merc LJ* 12.

common-law rule and not necessarily a codification thereof. This ruling went against the recognition in the *Sanlam case*¹⁸² that commercial and economic exigencies of the modern world required a limitation rather than an extension of the rule, as the opprobrium attached to moneylending transactions in Roman Dutch law no longer applied.

Further, there are numerous drafting errors, untidy expressions and inconsistencies in the legislation (*NCA*), which make its interpretation a trying exercise, in addition to the need for a careful balancing of competing interests.¹⁸³ The court in *Paulsen*¹⁸⁴ contented that weighing of importance of the protection of creditors rather than debtors was a point of personal affiliation by the authorities, and that it was therefore necessary to maintain neutrality in adjudication.¹⁸⁵ Such complexities in the legislation embodying the *in duplum* rule are symptomatic of the complexities of the legislation as a whole. It is noteworthy that the reasonable expectation of a person who grants credit that he will make a profit and recover his expenses is worthy of protection,¹⁸⁶ and in this regard the statutory *in duplum* rule is lacking.

2.6.2 *The amount to which the rule applies*

The inclusion of other costs of credit in the sum of the debt raises calculation problems and brings about the need for expert evidence to be adduced.¹⁸⁷ The complexity of the calculations which in itself is a laborious task,¹⁸⁸ stands to prolong trials as evidence as to the sum of the debt will need to be adduced. Practitioners who do not understand how to do the calculation or even the rule itself may thus confound the confusion of their ill-educated clients, marring the whole process with imprecision. Further, to be

¹⁸¹ *Nedbank v The National Credit Regulator* (62/2009 & 500/210) [2011] ZASCA 35 (28 March 2011) para 38.

¹⁸² *Sanlam Life Insurance Ltd v South African Breweries Ltd* 2000 (2) SA 647 (W) 648.

¹⁸³ *Nedbank v National Credit Regulator* (662/2009 & 500/210) [2011] ZASCA 354 (25 March 2011) para 2.

¹⁸⁴ *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) para 56.

¹⁸⁵ *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) para 56.

¹⁸⁶ Otto and Grové *The Usury Act and Related Matters* 59.

¹⁸⁷ Campbell 2010 *SA Merc LJ* 12.

¹⁸⁸ Campbell 2010 *SA Merc LJ* 12; calculation is a problem for practitioners and spills over to the debtors thereby creating variances in calculations between debtors and creditors.

more specific, it is questionable as to where the additional costs of credit list ends, and whether or not the determination of those amounts included is not also subject to the circumstances of each case, which lack of clarity suggests that the law is neither predictable nor certain. The calculation of the debt and the interest due is thus a cause for concern, and in order for the *NCA* to be efficient, revision thereof is necessary.

2.6.3 Knowledge of the existence of the rule

The *in duplum* rule is a technical legal rule not widely known amongst consumers.¹⁸⁹ This lack of knowledge of the existence of the rule by consumers is a major challenge to its application. The legislative duty of disclosure in credit agreements,¹⁹⁰ despite being a hallmark educative attempt aimed at consumer protection, is not an easy duty to discharge and its success will be determined only over time. The *NCA* will also assist only those already in debt and it will leave other abuses unchecked¹⁹¹ thereby questioning the cliché of prevention being better than cure.¹⁹²

2.6.4 Debt alleviation

Despite the *NCA*'s extension of the common-law *in duplum* rule, it does not however prevent the creditor from collecting double the unpaid capital amount provided that at no time the creditor allows the unpaid arrear interest to reach the unpaid capital amount.¹⁹³ The rule will therefore not be in a position to shelter those debtors who repay their debts timeously.

2.6.5 Change in time

The *in duplum* rule does not address current global financial realities in that the cost of credit has increased and there is an increase in the dishonesty of present day debtors. Further, interest rates now depend on principles of supply and demand rather than on

¹⁸⁹ Campbell 2010 SA *Merc LJ* 12.

¹⁹⁰ Section 92 *NCA*.

¹⁹¹ Swartz 2012 *African Journal of Business Management* 9.

¹⁹² Swartz 2012 *African Journal of Business Management* 6.

¹⁹³ *Margo v Gardner* (564/09) [2010] ZASCA 110 (17 September 2010); Kelly-Louw 2013 SA *Merc LJ* 356.

the moral considerations that applied in the past.¹⁹⁴ In the event of inflation, the *in duplum* rule stands to leave the creditor in dire loss,¹⁹⁵ and in modern commerce, the rule serves to provide dishonest debtors with an opportunity to escape their obligations instead of alleviating their plight.¹⁹⁶

2.7 Conclusion

The protection afforded by the *in duplum* rule has a far broader basis than merely preventing a creditor from purposefully delaying bringing suit in order to gain huge sums of money.¹⁹⁷ By providing for the rule,¹⁹⁸ the legislature had in mind the protection of the consumer, who may under the common-law rule end up paying much more than the capital originally owing.¹⁹⁹ This then raises questions as to whether the objects of the enactment of Section 103(5)²⁰⁰ have been fulfilled. Case law suggests that the rule is a complex one and its application will be determined on a case-by-case basis, dependent on the merits of each case. The discrepancies in the rule's interpretation and application prove that in certain circumstances the court has departed from what the legislature intended.²⁰¹

Effective "codification" is thus highly questionable, as the problems that marked the application of the rule as per common law have actually been carried over into the legislative *in duplum* rule, and if anything have been increased, with complex calculations becoming part of the application. The rule also provides an opportunity to dishonest modern debtors to escape their obligations rather than alleviating their over-indebtedness.²⁰² It is to be noted that despite the purpose of the rule being to protect debtors from having to pay more than double the capital, it is not aimed at punishing investors who are entitled to more than double their investment because the addition of

¹⁹⁴ *Sanlam Life Insurance Ltd v South African Breweries Ltd* 2000 (2) SA 647 (W) 648.

¹⁹⁵ Otto and Grové *The Usury Act and Related Matters* 376.

¹⁹⁶ *Sanlam Life Insurance Ltd v South African Breweries Ltd* 2000 (2) SA 647 (W) 647.

¹⁹⁷ *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2014 (4) SA 253 (SCA) para 79.

¹⁹⁸ Section 103(5) *NCA*.

¹⁹⁹ *Nedbank v National Credit Regulator* (662/2009 & 500/210) [2011] ZASCA 35 (25 March 2011) para 49.

²⁰⁰ *NCA*.

²⁰¹ *Verulam Medicentre (Pty) Ltd v Ethekwini Municipality* 2005 (2) SA 451 (D) para 8.

²⁰² *Sanlam Life Insurance Ltd v South African Breweries Ltd* 2000 (2) SA 647 (W) 647.

interest to their capital investment would provide such a result.²⁰³ This shows that despite the good intentions of those who framed the legislation it runs counter to public policy as it gives rise to the unfair treatment of creditors, who are ill protected by it. The point has frequently been made that there is a need for creditor protection as much as there is a need for debtor protection.²⁰⁴ Thus, one may wonder if the initial recommendation that the rule be abolished should not have been accepted rather than ignored (consideration given to the ill recognition of consumer protection at the time). In the alternative, the rule could have been left as it was, rather than developing it in the direction of confusion. It is noteworthy, however, that the abolition was advocated at a time when consumer protection was not thought to be as important as it is today, when consumer protection is considered to be of the utmost importance. It is unlikely, however, that the rule will be amended unless major role players show that they are experiencing serious problems in applying it.²⁰⁵

²⁰³ *Sanlam life insurance ltd v South African Breweries Ltd* 2000 (2) SA 647 (W) 648.

²⁰⁴ *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2014 (4) SA 253 (SCA) para 144.

²⁰⁵ Otto 2012 *Journal of Contemporary Roman-Dutch Law* 139.

Chapter 3: The *in duplum* rule in Zimbabwe

3.1 Introduction

The *in duplum* rule stipulating that interest ceases to run when it equates to the principal debt has been part of Zimbabwean common law from time immemorial. The rule stems from Roman-Dutch law, as does its foundation in South Africa. As per Roman times, interest may be claimed only in circumstances where it is expressly included in a promise for repayment.²⁰⁶ The rule is not limited to moneylending transactions but applies to all transactions in which a debt is subject to interest at a fixed rate, with the exception of relationships which are not those of a borrower and a lender.²⁰⁷ The circumstances of each case be considered however, with regard to the party requiring protection,²⁰⁸ usurious rates of interest,²⁰⁹ and interest rates.²¹⁰ Per statute the *in duplum* rule is provided for by the *Moneylending and Rates of Interest Act*,²¹¹ which prohibits the recovery of excess interest. The statutory *in duplum* rule is however inapplicable, in hire purchase agreements, transactions of registered banks, transactions excluding moneylenders, or those of pawnbrokers.²¹² The statutory *in duplum* rule in Zimbabwe thus excludes the major role players of debt financing from its ambit, which then leaves the common law rule as applicable in such transactions.

3.2 Interest

The charging of interest²¹³ has its roots in the Bible²¹⁴ and has developed to present day. The rate of interest forms the beginning of credit regulation, and in Zimbabwe it is

²⁰⁶ *ZB Bank v Eric Rosen (Private) Limited and Eric Anthony Rosen and Elizabeth Rosen* HH 183-15 HC 1745/14 8.

²⁰⁷ *Bindura Nickel Corporation Ltd v The Zimbabwe Revenue Authority* HH 30-08 HC 1033/06 10.

²⁰⁸ *Bindura Nickel Corporation Ltd v The Zimbabwe Revenue Authority* HH 30-08 HC 1033/06 11.

²⁰⁹ *Conforce (Pvt) Ltd v City of Harare* 2000 (1) ZLR 455 (H) 457.

²¹⁰ *Geoffrey Nyarota v Associated Newspapers of Zimbabwe (Pvt) Ltd* HH 183-15 HC 1745/14 6.

²¹¹ Section 9 (1) [Chapter 14:14].

²¹² Section 20 *Moneylending and Rates of Interest Act* [Chapter 14:14].

²¹³ The profit on a loan that the lender receives and the cost of the loan which a borrower pays per *ZB Bank Limited v Eric Rosen (Private) Limited and Eric Anthony Rosen and Elizabeth Rosen* HH 183-15 HC 1745/14 7.

²¹⁴ *The Bible (RSV) Exodus 22:25.*

determined by the Minister of Finance²¹⁵ in the government gazette. However, the prescribed rate applies only to interest bearing debts, the rates of which are not governed by any other law or an agreement or a trade custom or in any other manner.²¹⁶ Due to the hyperinflationary period in the country (2007-2009) and the use of a multi-currency system, the rate of interest, despite being prescribed, has usually been a matter of contractual agreement between the parties concerned. The uncertainty in the determination of the rate of interest has led to questions of usury wherein the mere allegation that interest rate is too high has been rendered insufficient.²¹⁷ In cases where usury has been alleged it is the party alleging usury that must prove his case. In agreements, the rate of interest has been held²¹⁸ to be influenced by a number of factors, which include the state of the economy, the risk associated with the loan, the costs of providing the credit, and the state of the international markets. There is no limit as per common law as to the legitimate and proper rate beyond which an interest rate becomes illegal and excessive. Instead rates must be determined on the circumstances of each case.²¹⁹ The determination of the rate of interest has thus been left mostly to the parties to agree upon, with the government prescriptions standing only as guidelines subject to high inflation rates and organizational determinations. The instability of the rates demonstrates that they are influenced by extraneous factors like the state of the economy of the country.

3.3 Application of the in duplum rule in Zimbabwe

3.3.1 Where the rule applies

As previously explained, the statutory rule in Zimbabwe is subject to exceptions, and where the statutory provision does not apply, the common-law rule will be applied. The

²¹⁵ Section 7 *Prescribed Rate of Interest Act* [Chapter 8:10].

²¹⁶ *ZB Bank Limited v Eric Rosen (Private) Limited and Eric Anthony Rosen and Elizabeth Rosen* HH 183-15 HC 1745/14 4.

²¹⁷ *ZB Bank Limited v Eric Rosen (Private) Limited and Eric Anthony Rosen and Elizabeth Rosen* HH 183-15 HC 1745/14 4.

²¹⁸ *ZB Bank Limited v Eric Rosen Private Limited and Eric Anthony Rosen and Elizabeth Rosen* HH 183-15 HC 1745/14 6.

²¹⁹ *African Dawn Property Finance (Pty) Ltd v Dreams Travel And Tours CC and Others* (2011) (3) SA 511 (SCA); [2011] 3 All SA 345 (SCA) [2011] ZASCA 45; 234/10 (30 March 2011) 1.

common-law rule applies to all contracts wherein a rate of interest is prescribed and the transaction is a money-lending transaction. The application of the rule is not limited to money-lending transactions, however, as the rule applies to all debts wherein the debt is subject to interest at a fixed rate.²²⁰ Further, the identity of the debtor in regard to whether he is worthy of protection has also been considered,²²¹ as in South Africa. The nature of the debt as per the *Bindura Nickel* case²²² was held to be rather more important than the identity of the debtor²²³ in determining the application of the *in duplum* rule.

3.3.2 State debt

The rule has been held not to apply in circumstances wherein the debt is a state debt.²²⁴ State debts in this regard have been held as inclusive of tax debts, which accrue from the time a determination of tax due is made until the payment of the amount determined at the prescribed interest rate. It was held²²⁵ that the *in duplum* rule does not apply to tax debts due to the fact that tax is collected by the revenue authority on behalf of government for use towards the development of society, as such revenue collection is founded on public policy interests, and the collection of the greatest possible amount of revenue should thus not be subjected to the *in duplum* rule. This is further provided for by Section 44(2) of the *Finance Act*²²⁶ which provides that:

the rule of the common law known as the *in duplum* rule that prohibits the payment of outstanding interest in excess of the amount representing the capital or principal sum of a debt shall, from the date of expiry of such notice issued in accordance with subsection (3), not apply to debts by way of outstanding taxes or duties or penalties in respect of the non-payment thereof that are owed to the authority by a person referred to in the notice('the debtor') who is liable to pay such taxes, duties or penalties under the scheduled acts.

²²⁰ *Bindura Nickel Corporation Ltd v The Zimbabwe Revenue Authority* HH 30-08 HC 1033/06 10.

²²¹ *Bindura Nickel Corporation Ltd v The Zimbabwe Revenue Authority* HH 30-08 HC 1033/06 11.

²²² *Bindura Nickel Corporation Ltd v The Zimbabwe Revenue Authority* HH 30-08 HC 1033/06 11.

²²³ *Conforce (Pvt) Ltd v City of Harare* 2000 (1) ZLR 445.

²²⁴ *Bindura Nickel Corporation Ltd v The Zimbabwe Revenue Authority* HH 30-08 HC 1033/06 7.

²²⁵ *Bindura Nickel Corporation Ltd v The Zimbabwe Revenue Authority* HH 30-08 HC 1033/06 7.

²²⁶ *Finance Act (No 2)* 8 of 2005.

The exclusion of revenue and state debts from subjection to the *in duplum* rule in Zimbabwe is thus similar to the exclusion of such debts in South Africa²²⁷ with regards to the notion that the relationship between the taxpayer and the revenue authority is not that of a lender and a borrower. Interest on tax debts is thus due from the time the debt becomes due at the rate prescribed by the Minister to the time when the debt is extinguished.²²⁸ In transactions involving registered banks, pawnbrokers and hire purchase agreements the rate of interest is as per the rate agreed by the parties with guidance from the rate prescribed by the Minister but not subject to the statutory *in duplum* rule.²²⁹

3.3.3 Novation

The capitalization of the interest debt has been held as valid novation wherein the debtor is held to have exercised his freedom to contract and thereby subjects himself to a new debt comprising the old capital amount and all the accumulated interest.²³⁰ Thus where a debtor and a creditor agreed to capitalize the interest owing, it is not the existence of a new debt which becomes questionable but rather the usurious rate of interest which commenced on the new debt owing.²³¹ In Zimbabwe novation is thus recognized, but the court will step in to protect the debtor in situations where not to do so would prove contrary to public policy or to the detriment of the debtor. This approach differs from that adopted in South Africa which places novation on a pedestal only in as far as upholding the freedom of contract but diverts to public policy in a bid to protect debtors who may not fully comprehend the application of the rule and would as such remain over-indebted. South African courts seek to ensure that creditors do not take advantage of their bargaining power and deliberately keep the debtor over-indebted.

²²⁷ *Commissioner for South Africa Revenue Service v Woulidge* 2000 (1) SA 600 (C) para 13.

²²⁸ Section 71 (2) *Income Tax Act* [Chapter 23:06].

²²⁹ Section 20 *Moneylending and Rates of Interest Act* [Chapter 14:14].

²³⁰ *Local Authorities Pension Fund v Chegutu Municipality* HH 115-2006 HC 1185/06.

²³¹ *ZB Bank Limited v Eric Rosen (Private) Limited and Eric Anthony Rosen and Elizabeth Rosen* HH 183-15 HC 1745/14 4.

3.3.4 Waiver

The waiver of the *in duplum* rule in advance is sanctioned in Zimbabwe, as it has been held that to do so would defeat the protection of the debtor against exploitation and nullify the enforcement of fiscal discipline on a creditor.²³² Further, the acknowledgement of debt has been held not to be a compromise leading to the abandonment of the application of the rule, wherein the debtor lacks knowledge of the rule and the creditor pleads that the rule does not apply.²³³ In circumstances where debtors lack knowledge of the existence of the rule, and creditors seek to adduce the waiver thereof, it is the duty of the court to exercise its public protector role and ensure the application of the rule for the alleviation of the debtor.

3.3.5 Sureties

The indebtedness of sureties is as per common law wherein they are indebted in as far as the principal is concerned. In a case where the existence of the underlying contract existence was questioned,²³⁴ the sureties thereof pleaded against being indebted to the creditor, and the existence of the contract had to be determined in order to determine whether indeed the sureties were liable to pay. The contract was decided as having been concluded regard being given to the behaviour of the contracting parties to prove that their minds had agreed, and the sureties were therefore liable. However, sureties who had been excluded from the contract were as such held not to be liable. Sureties will thus also have the *in duplum* rule apply to the debts they owe from the suretyship, where the rule applies to the debtor.

3.3.6 The application of the *in duplum* rule during litigation

The application of the *in duplum* rule and its suspension upon commencement of litigation have been major subjects of debate for the courts in Zimbabwe. The courts

²³² *Zimbabwe Development Bank v Naga Salons And Nyarai Chiwaura and Betty Chiwaura* HH 43-2006 HC 12639/04 11.

²³³ *Local Authorities Pension Fund v Chegutu Municipality* HH 115-2006 HC 1885/06.

²³⁴ *Central African Building Society v Zimslate Quartzite (Pvt) Limited and Arminco Investments (Pvt) Limited and Tinashe Able Chimanihire and Beaver Pamhidzai Chimanihire and Mohamed Iqbal Mahmed* HH 49-16 HC 9692/13.

have taken various stances and borrowed from South African judgements²³⁵ in coming to decisions as to when the *in duplum* rule applies with regard to litigation and when it is suspended. The proposition that the rule be suspended upon the issue of summons was discussed in the case of *ZB Bank limited*,²³⁶ in which after considering that the ongoing legal action would be interrupted by court process²³⁷ the court referred the parties to the Supreme Court for a final determination thereof due to the constant shifts in decisions over time.²³⁸ In the prior case of *CBZ v MM Builders*²³⁹ the rule was held suspended *pendente lite*. The notion that interest re-accumulates after the service of a summons was also argued with a negative result and the contrary decision that interest would rerun when judgement was given upon the judgement debt.²⁴⁰

3.3.7 Appropriation

In regard to the appropriation of funds towards debt extinction, the law in Zimbabwe upholds the debtor-creditor contract as to how funds are to be appropriated. Appropriation was discussed in great detail in *CBZ V MM Builders*, which upheld common law appropriation in circumstances where there is no agreement to the effect. The common law rule of appropriation stipulates that payment is to be first appropriated to interest and then to capital, and credit in this regard is appropriated towards the earliest of competing credits.

²³⁵ *Standard Bank of South Africa Ltd v Oeanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA).

²³⁶ *ZB Bank Limited v Eric Rosen (Private) Limited And Eric Anthony Rosen And Elizabeth Rosen* HH 183-15 HC 1745-14 11.

²³⁷ *Standard Bank of South Africa Ltd v Oeanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA.)

²³⁸ *ZB Bank Limited v Eric Rosen (Private) Limited and Eric Anthony Rosen and Elizabeth Rosen* HH 183-15 HC 1745-14.

²³⁹ *Commercial Bank of Zimbabwe v MM Builders and Suppliers (Pvt) Ltd and Others and Three Similar cases* 1997 (2) SA 285 (ZH).

²⁴⁰ *Zimbabwe Development Bank v Naga Salons and Nyarai Chiwaura and Betty Chiwaura* HH 43-2006 HC 12639/04 6.

3.4 Weaknesses in the application of the rule

The exemptions²⁴¹ in the *Moneylending and Rates of Interest Act*, which provides a statutory *in duplum* rule,²⁴² is to the detriment of debtors in that the main debt financiers are excluded from subjection to the law. This means that credit providers face a common law *in duplum* rule application which is subject to variations with regard to the circumstances of each case. Further, the power given to credit providers to negotiate the rate of interest between them and borrowers gives the creditors an upper hand in their dealings with vulnerable people who seek financing. The inflation rate does not make it any better for the debtor who, already indebted, faces the possibility of becoming further indebted after a judgement debt is passed.

Despite their being protected by the *Contractual Penalties Act*,²⁴³ in terms of which the courts will interfere if the provisions of a contract are irrational, debtors remain at the mercy of creditors who may plead the desperate state of the economy as warranting their high interest rates and the cost of credit. A further lack of stipulation of when the interest rate becomes usurious per common law grants a further opportunity to credit providers to take advantage of debtors. The application of the common law *in duplum* rule in Zimbabwe thus leaves questions as to whether the statutory provision is necessary, as it will not apply to "those" that debtors need protection from.

Despite the courts application of the *in duplum* rule and its aim being the protection of debtors, it is nevertheless questionable that in *Interfin Bank*,²⁴⁴ the court still granted summary judgement as pleaded by the plaintiff and despite acknowledging the existence of the *in duplum* rule, which was not applied because the defendants did not raise it. This failure to apply the rule and rescue the debtors gives rise to concerns with regard to debtor education as to how they may protect themselves and leaves much to be desired. To ensure full protection, the duty to apply debtor protection despite failure on the debtor's part to raise such a defence should be inferred in contracts and applied

²⁴¹ Section 20 *Moneylending and Rates of Interest Act* [Chapter 14:14].

²⁴² Section 9 *Moneylending and Rates of Interest Act* [Chapter 14:14].

²⁴³ [Chapter 8: 04].

²⁴⁴ *Interfin Bank t/a Interfin Banking Corporation Limited v Ritesh Dhirajlal Anand and Potain Investments Private Limited* HH 70-16 HC 4701/14.

by courts uniformly, whether or not the debtor knows of the existence of such measures.

3.5 Conclusion

Due to the variety in the circumstances of each case and the economic instability of Zimbabwe, the *in duplum* rule stands to be applied variably, with regard to the particular facts of each case. Pure certainty in the application of the rule therefor does not exist; creditors are subject to different rates of interest and depend on the debtors' determination of the rate thereof as reflected in contractual agreements. The court, however, maintains the discretion to intervene by operation of the law in the interest of the due administration of justice, regardless of what the contract says,²⁴⁵ and this intervention may occur through the application of the *Contractual Penalties Act*²⁴⁶ with regard to interest rates. There is a need to strike a balance between the competing interests of borrowers and lenders,²⁴⁷ and the courts are granted the power²⁴⁸ under common law to reduce usurious rates to permissible rates.

²⁴⁵ *Micro Plan Financial Services (Pvt) Ltd v Chessets Trading (Pvt) Ltd and Charity Madyara and John Maxwell Chishakwe and Portia Nyamutsamba* HH 513-15 HC 3182/15 4.

²⁴⁶ Section 4 *Contractual Penalties Act* [Chapter 8:04].

²⁴⁷ *ZB Bank Limited v Eric Rosen (Private) Limited and Eric Anthony Rosen and Elizabeth Rosen* HH 183-15 HC 1745/14 6.

²⁴⁸ *ZB Bank Limited v Eric Rosen (Private) Limited and Eric Anthony Rosen and Elizabeth Rosen* HH 183-15 HC 1745/14 5.

Chapter 4: Has the *in duplum* rule been codified effectively in both South Africa and Zimbabwe

4.1 Introduction

The aim of the *in duplum* rule is to ensure that debtors are not left in a dire position wherein they lose all their assets and become forever indebted to creditors. With the rule having been "codified" in both South Africa and Zimbabwe, the question remains whether the move away from the common-law *in duplum* rule has been met with success. In South Africa, the common-law *in duplum* rule has been "codified" through Section 103 (5) of the *NCA*,²⁴⁹ whilst in Zimbabwe it has been codified by Section 9 of the *Moneylending and Rates of Interest Act*.²⁵⁰ In order to evaluate the success or efficiency of the codification, it is necessary to examine the aims of credit regulation in this regard the *in duplum* rule.

4.2 The aims of statutory *in duplum*

The legal regulation of consumer credit has been developed for two distinct purposes: first to affect the economy of the community, and second to protect the consumer.²⁵¹ In South Africa the statutory *in duplum* rule as embedded in the *NCA* is aimed at the creation of a responsible credit market,²⁵² the correction of imbalances in negotiating power between consumers and credit providers,²⁵³ the addressing and preventing of the over-indebtedness of consumers, and the provision of mechanisms for resolving over-indebtedness²⁵⁴ amongst other purposes. In Zimbabwe the aims of the *Moneylending and Rates of Interest Act*²⁵⁵ are similar, as evidenced by the provisions of the *Act*.²⁵⁶ Thus the two Acts aim to alleviate the plight of debtors who fall victim to creditors who fail to timeously request repayment of the debt. The "codification" of the rule despite

²⁴⁹ 34 of 2005.

²⁵⁰ [Chapter 14:14].

²⁵¹ Maleson 1959 *ALR* 298.

²⁵² Section 3 *NCA*.

²⁵³ Section 3 *NCA*.

²⁵⁴ Section 3 (g) *NCA*.

²⁵⁵ [Chapter 14:14].

²⁵⁶ *Moneylending and Rates of Interest Act* [Chapter 14:14].

carrying the fashion of the common-law *in duplum* rule however differs from the common-law *in duplum* rule in that the statutory rule specifies to whom it applies. In South Africa it does not apply to juristic persons²⁵⁷ or agreements entered into before the advent of the *Act*²⁵⁸ whilst the statute in Zimbabwe does not cover any person registered in a class of banking business²⁵⁹ in terms of the *Banking Act*.²⁶⁰

4.3 Considerations for the efficiency of the *in duplum* rule

4.3.1 The prescribed rate of interest

The two pieces of legislation, however, are subject to the *Prescribed Rate of Interest Act*,²⁶¹ which will influence the rate of interest that will be charged on the debts and determine the rate of accumulation of interest to equate the capital debt. The rate of interest in both countries is prescribed by the Minister of Finance and published periodically. The prescribed rate of interest will determine at what rate the interest and accruing debt will accumulate towards equating the principal debt. This rate is subject to economic stability policy and inflation rates.

4.3.2 Socio-economic stability

The economic success and stability of a country are influenced by the socio-political situation prevailing in the country. The state of the economy, which has a ripple effect onto credit regulation, is also influenced by the political and social affairs of a country. A country undergoing political and social transformation will tend to be subject poverty and to accommodate many people who survive on debt, a situation which has a bearing on interest rates and credit. In South Africa and Zimbabwe the operation of the *in duplum* rule as a debt alleviating mechanism thus becomes dependent on the prevailing economic environment, which effects the interest rates and disposable income rates per household, and influences debt and the need for debt alleviation mechanisms for the

²⁵⁷ Section 4 (1) (a) (1) *NCA*.

²⁵⁸ *NCA* 34 of 2005; Kelly-Louw 2011 *SA Merc LJ* 359.

²⁵⁹ Section 20(1) *Moneylending and Rates of Interest Act* [chapter 14:14].

²⁶⁰ [Chapter 24:01].

²⁶¹ *Prescribed Rate of Interest Act* 55 of 1975 (South Africa) *Prescribed Rate of Interest Act* [Chapter 8:10] (Zimbabwe).

protection of society. Because both countries fall within the range of developing economies, a great number of members of their populations live in debt. The *in duplum* rule is thus an important debt alleviation mechanism to ensure that debtors do not live their lives at the mercy of creditors.

4.3.3 Inflation

Inflation is the rate at which the general level of prices for goods rises and the purchasing power of the currency falls.²⁶² It affects the value of money on a daily basis and therefore affects the *in duplum* rule, in that the money owed by the debtor may reduce in value if not repaid timeously. In some circumstances, due to a country's going through a hyperinflationary period, even when the debt is timeously repaid it may be subjected to inflation and lose its value. In such circumstances, the creditor stands to lose the value of the money he lends. In Zimbabwe, a hyperinflationary period is anticipated as inflation has risen above the normal level at rates over fifty percent,²⁶³ whilst in South Africa a steady rise has been experienced.²⁶⁴ These rates of inflation stand to affect change in the value of the creditor's profit or loss upon repayment by the debtor.

The successful application of the *in duplum* rule and its efficiency in debt alleviation is thus not solely dependent on whether it is embedded in statute or is a common law rule. This makes it necessary for both the legislature and the judiciary in Zimbabwe and South Africa in "codifying" the rule to ensure that the surrounding economic circumstances are taken into consideration if ultimate debt alleviation is to be achieved.

4.4 Recommendations

4.4.1 Creditor protection

Debtor protection is of great importance in both South Africa and Zimbabwe, but, there is a need to ensure the protection of creditors as well. No allowance is made for the

²⁶² Anon date unknown www.investopedia.com/terms/i/inflation.asp.

²⁶³ Anon date unknown www.tradingeconomics.com/zimbabwe/inflation-cpi.

²⁶⁴ Anon date unknown www.tradingeconomics.com/south-africa/inflation-cpi.

depreciation of the capital plus the interest amount pending judgement, and once legal proceedings are instituted against a debtor, inflation eats into the value of the amount the lender may recover day by day.²⁶⁵ In Zimbabwe, where a multi-currency system exists and there is a high rate of inflation, the creditors stand to receive less than the value of the capital debt, as the amounts reflected as loans due and overdrafts upon repayment will usually bear little relation to the amounts initially extended²⁶⁶ with a further threat that the currency lent will not be the currency repaid. Further, there are five different prices for products in Zimbabwe, which are: the cash price (in US Dollar), the cash price (in bond notes), the transfer price (RTGS), the transfer price (swiped) and the transfer price (mobile money such as Ecocash and other similar products)²⁶⁷ which ultimately makes creditor-debtor protection a very arduous task when it comes to debt repayment and the costs of credit.

It is noteworthy that the *in duplum* rule in modern day commerce is only serving to provide dishonest debtors with an opportunity to escape their obligations rather than serving to alleviate their plight,²⁶⁸ as most debtors seem to take advantage of the situation and not repay their debts timeously.²⁶⁹ Further, the court in *Paulsen* seems to have taken pity on the debtor without due regard to the creditor who after having been kept out of his money, still stands to endure the delay of court process and influence of economic instability on his profitability. It cannot be right to make a lender incur this loss, rather than a debtor, who has the power to forestall or end litigation by paying the debt.²⁷⁰ The court in *Paulsen* thus seemed to assume that all debtors are preyed on by creditors, who are necessarily wealthy. The court was also blind to the fact that not all creditors are financial institutions.²⁷¹ The sentiment seems to have been shared by the legislators who enacted Zimbabwean statutory *in duplum* rule, which focuses on public

²⁶⁵ *Paulsen and Another v Slipknot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC).

²⁶⁶ Kawonde 2003 <https://www.theindependent.co.zw/2003/05/30/in-duplum-rule-and-inflation/>.

²⁶⁷ Kaduwo 2017 <https://www.theindependent.co.zw/2017/03/17/economy-risk-high-inflation/>.

²⁶⁸ *Sanlam Life Insurance Ltd v South African Breweries Ltd* 2000 (2) SA 647 (W).

²⁶⁹ An example in this regard would be *Paulsen*, wherein after a debt had been unpaid they relied on all possible available defences to avoid repayment. In the event that inflation had been extreme then the post judgement debt would still have been unable to offer the creditor value for his money.

²⁷⁰ Ramdhin and Nicol 2015 www.werksmans.com/legal-briefs-view/constitutional-court-ruling-means-a-sea-change-for-banks-and-other-lenders/.

²⁷¹ Edmunson 2015 *De Rebus* 40.

policy towards debtors without making mention of creditor protection. The lack of creditor protection in Zimbabwe until recently is evidenced in the case of *Makupe*,²⁷² wherein a debtor took advantage of the rule and a situation of reckless credit left creditors without recourse. Both Zimbabwe and South Africa thus need to revise creditor protection where debtors are shielded by the *in duplum* rule. Further, it is important to note that a country's economic climate is highly influential as to the maintenance of a healthy credit market and the *in duplum* rule can have far-reaching effects on debtor-creditor relations in hyperinflationary times.²⁷³ The creditor's reasonable expectation of profit and the recovery of his expenses is thus worthy of protection²⁷⁴ and the court in *Paulsen*²⁷⁵ should have ensured that the creditor was protected.

4.4.2 Simplicity

Consumer credit legislation is complicated, extremely technical in nature, and difficult to apply in practice.²⁷⁶ Given these inherent technicalities and complications it is the duty of legislatures to ensure that they curb rather than confound the confusion that surrounds credit legislation. In South Africa, the legislature failed to make the statutory *in duplum* rule understandable and easy to apply,²⁷⁷ and instead complicated it by adding the costs of credit²⁷⁸ to the interest so that a need to calculate and determine which amounts would be considered in the "double" arose. Despite the fact that this provision comes from a public policy point of view and is aimed at protecting debtors, it has complicated the calculations, resulting in the need for expert evidence for the calculation thereof, and also questions as to where exactly the list of the costs of credit ends, as third party-costs such as the costs of debt collection are part and parcel of the credit costs.²⁷⁹ Further, the inclusion of other amounts, apart from the interest itself,

²⁷² *Terence Makupe v ZB Bank Limited* HH257-16 HC 9763/12.

²⁷³ Kawonde 2013 <https://www.theindependent.co.zw/2003/05/30/in-duplum-rule-and-inflation/>.

²⁷⁴ Otto and Grové *The Usury Act and Related Matters* 59.

²⁷⁵ *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2014 (4) SA 253 (SCA) 509.

²⁷⁶ Grové and Otto *Basic Principles of Consumer Credit Law* 2.

²⁷⁷ *Nedbank v National Credit Regulator* (662/2009 & 500/210) [2011] ZASCA 35 (28 March 2011).

²⁷⁸ 101 (1) (b)-(g).

²⁷⁹ Campbell 2010 *SA Merc LJ* 10.

may have a dramatic effect on the profit element of risk takers (credit lenders) and may in the long term curb investment in the lending market.²⁸⁰ As such, the legislature should offer clarity as to the circumstances in which related costs of credit, despite not being within the ambit of the list provided in the act,²⁸¹ will be included in the sum of the repayable debt. The education of legal professionals on the subject should also be considered, so that there would be no need to employ an expert in such calculations. Further, the calculations should be simplified to ensure that the debtor understands how the sum is calculated and does not end up feeling oppressed by the system, and so that the creditor does not feel shortchanged.

4.4.3 The extended protection of juristic persons

The application of the statutory *in duplum* rule to non-juristic consumers in South Africa is a call for concern among those who wish to promote business growth as some juristic persons may also require protection by the statutory *in duplum* rule despite the continued application of the common-law *in duplum* rule to agreements to which the NCA does not apply. In Zimbabwe, the application of the statutory *in duplum* rule excluding the banking sector which stands as a major credit provider is not necessarily detrimental to debtors, as the statutory *in duplum* rule is not much different from the common-law *in duplum* rule, which also continues to apply to credit agreements not governed by statute. The determined application of the statutory *in duplum* rule is thus an efficient move by both the Zimbabwean and the South African legislatures, as some entities do not require as much protection as others, and the extension of protection towards them would render an equality that goes against debtor protection.

4.4.4 Education on the existence of the rule

The dissemination of information on the existence of the rule is a positive aspect of implementation of the rule by both legislatures with Zimbabwe taking a further step in ensuring an efficient credit market through the setting up of a credit bureau aimed at

²⁸⁰ Vessio *The Effects of the in duplum Rule* 116.

²⁸¹ NCA 34 of 2005.

reducing the number of defaults.²⁸² Both legislatures however remain indebted to society to increase awareness of the operation of the rule. In so doing caution should be taken such that debtors do not become encouraged to delay debt repayment relying on the application of the rule, as the rule in modern commerce serves as an opportunity for debtors to escape their obligations rather than to alleviate their plight.²⁸³

4.5 Noteworthy recommendations for Zimbabwe

Zimbabwe should consider including the banking sector within the ambit of the statutory *in duplum* rule as the banking sector is the largest registered credit providing sector. The inclusion of the banking sector would ensure uniform application of the rule and would dispel problems associated with applying the common-law *in duplum* rule, such as a failure to apply it due to lack of knowledge of its existence. The inclusion of the banking sector may also ensure a decline in the extension by bankers of reckless credit amongst to debtors already classified as defaulters, and this may be further facilitated by the launch of a credit bureau. Regarding the amount subject to the *in duplum* rule, Zimbabwe should follow the South African example of including the costs of credit in the sum of accrued interest to equal the capital debt. This would ensure that crooked lenders are prevented from loading unjustified "costs" onto debtors in an effort to circumvent the common-law *in duplum* rule.²⁸⁴

Regarding creditor protection, the legislature should ensure that a timeous court process for debt recovery is employed or other quicker methods of debt recovery, so that a creditor is not kept out of his money for long and is also protected from the effects of a harsh economic climate. The fallacy that all debtors are at the mercy of creditors should also be disregarded and weighed as per the circumstances of each matter. Creditors on their part may also instead of basing their business on greed to give credit to more people, share information through the credit bureau, and ensure that defaulters are not given an opportunity to borrow money when they have been

²⁸² Bhebhe 2016 www.theafricareport.com/souther-africa/zimbabwe-sets-up-credit-bureau-as-banks-reel-from-defaults.html.

²⁸³ *Sanlam Life Insurance Ltd v South African Breweries Ltd* 2000 (2) SA 647 (W) 647.

²⁸⁴ Nyahuma 2015 www.sundaymail.co.zw/legal-matters-getting-your-head-around-in-duplum-rule/.

blacklisted. Further, creditors may also devise ways to insist on punctilious repayment²⁸⁵ in a fixed currency and at a fixed interest rate as the economy undergoes transformation.

4.6 Noteworthy recommendations for South Africa

Despite deserving applause for enacting the statutory *in duplum* rule, the legislature in South Africa should consider offering clarity as to whether third-party costs of credit are to be included in the stipulated costs of credit. Clarity should also be given to the considerations to be taken into account when deciding whether a cost forms part of the outlined costs²⁸⁶ or not. The exclusion of juristic persons who are consumers of creditors also demands reconsideration; given that not all juristic debtors are stable enough not to desire public policy protection, for they are the country's future stable debtors. The overarching protection of debtors offered in the *Paulsen* case also needs revision, as some debtors take advantage of circumstances and leave debts unpaid despite their being reminded of the need to repay. The legislature gave careful consideration to the framing of the statutory rule, and its intentions were good but it may instead have engaged in legislative overkill.

The South African judiciary and legislature are obliged to educate the populace of the existence of the rule, as most transactions will not come to court and this may leave most debtors still over-indebted. Consideration should be given to the fact that informal credit providers exist, and in most debtors in such transactions will attempt to keep repayment out of court.

4.7 Conclusion

The *in duplum* rule has thus been effectively codified in as far as debtor protection is concerned, despite some complications in the application of the rule. For South Africa, it is highly unlikely that the rule will be amended unless major role players show that they

²⁸⁵ Kawonde 2003 <https://www.theindependent.co.zw/2003/05/30/in-duplum-rule-and-inflation/>.

²⁸⁶ Section 101(b)-(g).

experience serious system challenges in applying the rule,²⁸⁷ whilst in Zimbabwe the common-law *in duplum* rule is likely to be the one most frequently applied, as the banking sector, which is the biggest credit provider in the country, is excluded²⁸⁸ from the ambit of the statutory *in duplum* rule. The need to protect debtors and a need to balance access to credit with the particular protection of vulnerable consumers²⁸⁹ should continue to be reflected in the credit regulations of both nations. Complications will always be evident in consumer credit legislation, for it is centered on the accommodation of divergent and conflicting interests,²⁹⁰ but that should not result in a hesitation to protect consumers in cases of their proven or potential exploitation.²⁹¹ The extension of reckless credit should also be discouraged, and it the duty of creditors to come together and ensure that the blacklisting of defaulters is carried out efficiently.

²⁸⁷ Otto 2012 *Journal of Contemporary Roman-Dutch Law* 139.

²⁸⁸ Section 20 (2) *Moneylending and Rates of Interest Act* [Chapter 14:14].

²⁸⁹ DTI 2004
http://www.ncr.org.za/documents/pages/background_documents/credit%law%20Review.pdf para 1.2.

²⁹⁰ Otto and Grové *The Usury Act and Related Matters* 58.

²⁹¹ Otto and Grové *The Usury Act and Related Matters* 59.

BIBLIOGRAPHY

Literature

Campbell 2010 *SA Merc LJ*

Campbell J "In Duplum: Relief for Consumers of Excessively Priced Small Credit Legitimized by the National Credit Act 2010" *SA Mercantile Law Journal* 1-11

Christie *The Law of Contract*

Christie RH *The Law of Contract* 7th Edition (Lexis Nexis Butterworth 2016)

De Villiers 2010 *PER*

De Villiers DW "National Credit Regulator v Nedbank Ltd and the practice of Debt Counselling in South Africa" 2010 *PER* 128-162

Edmunson 2015 *De Rebus*

Edmunson K Interested about the interest in debt? The *in duplum* rule revisited 2015 *De Rebus* 38-40

Fratzcher, Konig and Lambert 2016 *Journal of International Money and Finance*

Fratzcher M, Konig PJ and Lambert C "Credit provision and banking stability after the great financial crisis: the role of bank regulation and the quality of governance" 2016 *Journal of International Money and Finance* 113-135

Grové and Otto *Basic Principles of Consumer Credit Law*

Grové NJ and Otto JM *Basic Principles of Consumer Credit Law* 2nd ed (Juta Cape Town 2002)

Otto and Grové *The Usury Act and Related Matters*

Otto JM and Grové NJ *The Usury Act and Related Matters South African Law Commission Working Paper 46 Project 67 New Credit Legislation for South Africa* (The Commission 1993)

Honiball and Nortje 2014 *Without Prejudice*

Honiball M and Nortje L "Does the *in duplum* Rule Limit Interest Payable on a Tax Debt?" 2014 *Without Prejudice* 6-7

Hood 2013 *Juridical Law Review*

Hood P "Claytons Case and Connected Matters" 2013 *Juridical Law Review* 501-539

Kelly-Louw 2011 *SA Merc LJ*

Kelly-Louw M "The Statutory *in duplum* rule as an Indirect Debt Relief Mechanism" 2011 *SA Merc LJ* 352-375

Khaseke 2008-2010 *Kenya Law Review*

Khaseke GM "Introduction of The *in duplum* Rule in Kenya: A Legal Mechanism of Equitable Distribution of Resources or a Poverty Redistributive Initiative?" 2008-2010 *Kenya Law Review* 1-15

Maleson 1959 *ALR*

Maleson AI "Consumer Credit Regulation" 1959 *Albany Law Review* 297-314

Otto 2010 *Fundamina*

Otto J "The History of Consumer Credit Legislation in South Africa" 2010 *Fundamina* 257-273

Otto 2012 *Journal of Contemporary Roman-Dutch Law*

Otto J "The National Credit Act: Default Notices and Debt Review; the ultra *duplum* rule: Nedbank Ltd v National Credit Regulator 2011 3SA 581 (SCA)" available at SSRN:<http://ssrn.com/abstract=2126542> 2012 *Journal of Contemporary Roman-Dutch Law* 127-139

Otto and Otto *The National Credit Act Explained*

Otto JM and Otto RL *The National Credit Act Explained* 3rd Edition (Lexis-Nexis Butterworth 2013)

Schulze 2006 *SA Merc LJ*

Schulze WG "The *in duplum* rule: A Short List of Some Unresolved Issues" 2006 *SA Mercantile Law Journal* 418-429

Swartz 2012 *African Journal of Business Management*

Swartz N "The Prevention of over Indebtedness and Credit Regulation an Islamic Response" 2012 *African Journal of Business Management* 10099-10108

The Bible (RSV)

Multiple Authors *The Holy Bible Revised Standard Version*

Vessio 2010 *Obiter*

Vessio M "A Short Discussion on the Effects of the *in duplum* Rule Upon Commencement of Litigation and After Judgement: A View Both 'Inside' and 'Outside' The National Credit Act: Notes" 2010 *Obiter* 725-734

Vessio *The effects of the in duplum Rule*

Vessio M "*The effects of the in duplum Rule and Clause 103(5) of the National credit bill 2005 on Interest*" (LLM Dissertation University of Pretoria 2006)

Case law

Absa Bank Ltd v Leech and Others (442/98) [2001] ZASCA 65 [2001] All SA 55(A) (23 May 2001)

African Dawn Property Finance (Pty) Ltd v Dreams Travel and Tours CC and Others (2011 (3) SA 511 (SCA); [2011] 3 All SA 345 (SCA) [2011] ZASCA 45; 234/10 (30 March 2011)

Bindura Nickel Corporation Ltd v The Zimbabwe Revenue Authority HH 30-08 HC 1033/06

Central African Building Society v Zimslate Quartzite (Pvt) Limited and Arminco Investments (Pvt) Limited and Tinashe Able Chimankire and Beaver Pamhidzai Chimankire and Mohamed Iqbal Mohamed HH 49-16 HC 9692/13

Commercial Bank of Zimbabwe v MM Builders and Suppliers (Pvt) Ltd and Others and Three Similar Cases 1997 (2) SA 285 (ZH)

Commissioner for South African Revenue Service v Woulidge 2002 (1) SA 68 (SCA)

Conforce (Pvt) Ltd v City of Harare 2000 (1) ZLR 455 (H)

Da Silva v Slip Knot Investments (661/2009) [2010] ZASCA 174 (2 December 2010)

Devaynes v Noble (1816) 1 MER.572; 35 E.R 781

Geoffrey Nyarota v Associated Newspapers of Zimbabwe (Pvt) Ltd HH 183-15 HC 1745/14

Georgias and Another v The Standard Chartered Finance Zimbabwe Limited 1998(2) ZLR 488

Interfin Bank t/a Interfin Banking Corporation Limited v Ritesh Dhirajal Anand and Potain Investments Private Limited HH 70-16 HC 4701/14

Local Authorities Pension Fund Chegutu Municipality HH 115-306 HC 1885/06

Margo v Gardner (564/09) [2010] ZASCA 110 (17 September 2010)

Micro Plan Financial Services (Pvt) Ltd v Chesets Trading (Pvt) Ltd and Charity Madyara and John Maxwell Chishakwe and Portia Nyamutsamba HH513-15 HC 3182/15

Nedbank v National Credit Regulator (662/2009 & 500/210) [2011] ZASCA 35 (28 March 2011)

Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd 2015 (3) SA 479 (CC)

Sanlam Life Insurance Ltd v South African Breweries Ltd 2000 (2) SA 647

Standard Bank of South Africa Ltd v Oneanate Investments Pty Ltd (In Liquidation) 1998 (1) SA 811 SCA

Terence Makupe v ZB Bank Limited HH 257-16 HC 9763/12

Union Government v Jordaans Executor 1916 TPD 411

Verulam Medicentre (Pty) Ltd v Ethekewini Municipality 2005 (2) SA 451 (D)

Volkscas Bpk v Meyer 1966 (2) SA 379 (T)

Zimbabwe Development Bank v Naga Salons and Nyarai Chiwaura and Betty Chiwaura HH 43-2006 HC 12639/04

ZB Bank v Eric Rosen (Private) Limited and Eric Anthony Rosen and Elizabeth Rosen HH 183-15 HC 1745/14

Legislation

Contractual Penalties Act [Chapter 8:04] (Zimbabwe)

Finance Act (No 2) Act 8 of 2005 (Zimbabwe)

Income Tax Act [Chapter 23:06] (Zimbabwe)

Moneylending and Rates of Interest Act [Chapter 14:14] (Zimbabwe)

National Credit Act 34 of 2005 (South Africa)

Prescribed Rate of Interest Act 55 of 1975 (South Africa)

The Prescribed Rate of Interest Act [Chapter 8:10] (Zimbabwe)

Internet sources

Anon date unknown https://www.google.co.za/?gws_rd=ssl#q=what+is+credit

Anonymous date unknown *"What is Credit"*
https://www.google.co.za/?gws_rd=ssl#q=what+is+credit

Accessed July 2016

Anon 2016 www.israelfreeloan.org.il/en/about-ifla/what-is-ifla/

Anonymous 2016 *What is Israel free loan policy*
www.israelfreeloan.org.il/en/about-ifla/what-is-ifla/ Accessed January 2016

Anon 2016 <https://www.heyns.co.za/press-room/standard-acknowledgements-of-debt-and-the-national-credit-act-nca/?id=98>

Anonymous 2016 *Standard Acknowledgements of Debt and the National Credit Act (NCA)* <https://www.heyns.co.za/press-room/standard-acknowledgements-of-debt-and-the-national-credit-act-nca/?id=98> Accessed March 2017

Anon date unknown www.investopedia.com/terms/i/inflation.asp

Anonymous date unknown inflation www.investopedia.com/terms/i/inflation.asp
Accessed March 2017

Anon date unknown www.tradingeconomics.com/zimbabwe/inflation-cpi

Anonymous date unknown *Zimbabwe inflation rate*
www.tradingeconomics.com/zimbabwe/inflation-cpi Accessed March 2017

Anon date unknown www.tradingeconomics.com/south-africa/inflation-cpi

Anonymous Date unknown *South Africa inflation rate*
www.tradingeconomics.com/south-africa/inflation-cpi Accessed March 2017

Anon 2014 <http://www.marisit.co.za/wp-content/uploads/2014/11/impact-of-the-national-credit-act.pdf>

Anonymous 2014 *Impact of the new credit act on debt recovery and credit bureau industries* <http://www.marisit.co.za/wp-content/uploads/2014/11/impact-of-the-national-credit-act.pdf> Accessed July 2016

Bhebhe 2016 www.theafricareport.com/southern-africa/zimbabwe-sets-up-credit-bureau-as-banks-reel-from-defaults.html

Bhebhe N *Zimbabwe sets up credit bureau as banks reel from defaults*
www.theafricareport.com/southern-africa/zimbabwe-sets-up-credit-bureau-as-banks-reel-from-defaults.html Accessed March 2017

DTI 2004
http://www.ncr.org.za/documents/pages/background_documents/Credit%20Law%20Review.pdf

Department of Trade and Industry 2004 *Making credit markets work a policy framework for consumer credit*
http://www.ncr.org.za/documents/pages/background_documents/Credit%20Law%20Review.pdf Accessed July 2016

Elliot 2013 www.sablog.kpmg.co.za/2013/09/understanding-the-application-of-the-in-duplum-rule/

Elliot F KPMG *understanding the in duplum Rule* 2013
<https://www.sablog.kpmg.co.za/2013/09/understanding-the-application-of-the-in-duplum-rule/> accessed July 2016

Kawonde 2003 www.theindependent.co.zw/2003/05/30/in-duplum-rule-and-inflation/

Kawonde P *In duplum rule and inflation* 2003
www.theindependent.co.zw/2003/05/30/in-duplum-rule-and-inflation Accessed
July 2016

Kaduwo 2017 <https://www.theindependent.co.zw/2017/03/17/economy-risk-high-inflation>

Kaduwo T *Economy at high risk of high inflation*
<https://www.theindependant.co.zw/2017/03/17/economy-risk-high-inflation/>
Accessed March 2017

Nyahuma 2015 www.sundaymail.co.zw/legal-matters-getting-your-head-around-in-duplum-rule/

Nyahuma T 2015 *LEGAL MATTERS: Getting your head around in duplum Rule*
www.sundaymail.co.zw/legal-matters-getting-your-head-around-in-duplum-rule/
Accessed March 2017

Griffith-Jones with Karwowski and Dafe 2014 https://www.die-gdi.de/uploads/media/ODI_Report.pdf

Griffith-Jones S with Karwowski E and Dafe F 2014 ODI Report *A financial sector to support development in low income countries* https://www.die-gdi.de/uploads/media/ODI_Report.pdf Accessed January 2017

Ramdhin and Nicol 2015 www.werksmans.com/legal-briefs-view/constitutional-court-ruling-means-a-sea-change-for-banks-and-other-lenders/

Ramdhin A and Nicol B 2015 *Constitutional Court Ruling a Sea Change for Banks and other Lenders* www.werksmans.com/legal-briefs-view/constitutional-court-ruling-means-a-sea-change-for-banks-and-other-lenders/ Accessed March 2017

"Mordern slaves are not in chains,they are in debt."

Anonymous