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The Effects of the *In Duplum* Rule and Clause 103 (5) of the National Credit Bill 2005 on Interest.

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My mom, for all her love. My dad because he never ever gives up on his children, it is the most beautiful thing in the world. Papa' non lo avrei fatto sensa di te. Grazie, vi voglio tanto bene.

Bryan, thank you my sweet.
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Foreword

This dissertation deals with the common-law maximum limit for interest charged in credit transactions. Consumer protection has been a relatively recent development in the legal sphere. Charging of interest however has not. From simple interest, to no interest, to compound interest the history of usury is lengthy. Its significance, and more importantly, the debate over how it should most effectively be regulated, is equal in length and still a most contemporary discussion. Credit consumer protection, being an obvious hybrid of this development, has also had a fair share of academic literature devoted to it.

Consumer protection is perhaps a misnomer. The term tends to be consumer focused, whereas the actual regulatory exercise directs towards the parameters of the *relationship* between consumer and lender. The concept initially developed from the need to protect (perceptibly) vulnerable consumers against exploitation by lenders, who were in the better position to determine the contractual terms of the loans. The *status quo* has since evolved: not only must legislation caution against over-protection of the consumer, but it has to be considered that the credit industry has economic effects and that the withdrawal of investors due to overbearing legislation would have detrimental effects on the credit market. Moreover, overly zealous consumer protective practices would furthermore leave borrowers with an exclusive selection of lenders, offering credit at exceedingly high rates of interest.

The dissertation investigates a rule of Roman-Dutch origin that polices the interest which may be charged on lending or credit transactions. The *in duplum* rule has, since its inception in Roman law, remained in use. In fact, over and above the many cases that have mentioned its fertile existence over the years, the rule has freshly been included in the recent Credit Bill.[1] While the rule is potentially a very workable consumer protection device, with the prospect to save

[1] The short title, if promulgated, will be The National Credit Bill. The previous Bill which was published in the Government Gazette (vol 470 no 26678, Cape Town 17 August 2004) was entitled the Credit Consumer Bill of August 2004 and also encoded the *in duplum* rule.

the consumer from becoming overextended and forcing the lender to take timely action against a defaulting debtor, it needs to be defined and controlled, less its potential as an 'unruly horse' could create both confusion as to its scope and application. Moreover, this would have the effect of downloading the expenses of legal costs on consumers as well as lenders in order to have outstanding issues resolved.

To provide a theoretical basis from which this rule has developed, a brief examination of the historical overview of usury and the control of prices and consumer credit, have been provided.

In this dissertation I shall point out that although, as mentioned above, the *in duplum* rule is a useful consumer credit tool, it needs to be carefully considered. The rule, as developed by the courts, is reasonable and practicable in scope. However, the form in which it is to be represented in codified form must be just as unambiguous in application. A full discussion of the *in duplum* rule in its current common-law form and an analysis of the rule in its codified form both in the Bill published in the Government Gazette of August 2004, the *Consumer Credit Bill* and the *National Credit Bill* tabled at Parliament in 2005 (the Bill in its suggested 'new' format) will be provided.

The need to enact an already well-established and well-defined common-law rule is mysterious. The South African common law is well entrenched in its respect for the hierarchy of precedent, and the rule has, as recently as 2001, been valued as 'part of our law' by the Supreme Court. In the last 10 years the *in duplum* rule has appeared in our case law no less than 10 times; three times the issue has come before the Supreme Court of Appeal. Simply to say that it is important to codify the common law on usury, as has been noted in the Credit Law Review of 2003, does not sufficiently justify the encoding of the *in duplum* rule. A dysfunctionality of the rule in its common-law form would perhaps justify its re-enactment in legislation, but no such dysfunctionality has emerged over the years. Not only was the rule inaccurately represented in the Credit Law Review,

but its scope and application appeared further confused (perhaps misinterpreted?). Ironically, the rule was exemplified in the Credit Law Review as 'well-known' but 'commonly misunderstood'. The new suggested format in the *National Credit Bill* of the *in duplum* rule in its codified form appears to amend the ambiguities created in clause 76 of the *Consumer Credit Bill* 2004. However, its not without blemish itself.

Through analyses of clause 79 of the *Consumer Credit Bill*, this dissertation will demonstrate how the rule, had it maintained its clause 79 format, would have had the effect of disabling the common law in this area, as it now stands. This would have simultaneously caused high individual costs to consumers, who, seeking the protection of clause 79, would inevitably have been forced to approach the courts to have clause 76 deciphered. Attorneys would have been in no better position to advise perplexed consumers, and *even more so*, perplexed and frustrated lenders, as clause 79 left too many questions open to interpretation. If the wording had remained in its clause-79 sonata, these interpretations would have been able to be engaged only by the most competent of courts. The interpretative dilemma is not, however, completely dissolved with the configuration of the new Bill's codification of the *in duplum* rule. Although the new clause, presently clause 103(5), does more clearly define the limitations that the Bill purports to place on consumers who are in default, it *noticeably* limits the charges, which may be imposed by credit-lenders. There is a concern that the limitations proposed by this clause tip the scales of protection of the relationship of lending too much towards the consumer.

In Western economies, and with particular reference to the South African economy, interest in money-lending transactions or on due payments, is the most common of phenomena. It is a 'strangulation', so to speak, of overextended debtors that the *in duplum* rule was designed [and thereafter preserved] to prevent, while at the same time protecting the interests of the lender.

Chapter 1: A Brief Introduction to the History of Usury

1.1 Introduction

1.1.1 Preliminary Remarks

A brief introduction to the history of the subject-matter is pertinent, both in order to serve as precedent and further to authenticate the focus. The following paragraph substantiates this view and elucidates the reasons for an inclusion of a brief milieu:[2]

> Down the ages, different types of contract and commercial practices have led to so much exploitation and malpractice that even since ancient times lawmakers have had to lay down rules in order to regulate the relations among those subject to the law. It is necessary to take notice of the historical developments in this regard because they provide social, economic and juridical background to the present as well as the future legislation.

Academic and historical research has demonstrated the fallacy of the impression that mercantile loans and banking transactions are the invention of the 17th century. Modern discoveries have shown that the history of banking transactions refers back to a period not less than two thousand years before Christ.[3]

The history of banks and evidences of early traces of banking transactions, are dated back to antiquity. Pastoral nations such as Hebrews, while maintaining moneylenders, had no system of banks that would be considered adequate from the modern point of view. However, as early as 2000 BC, the Babylonians had in effect developed just such a system. This was a result of services performed by the organized and wealthy institutions: the temples of Babylon, like those of Egypt, which were also banks; their documents – clay tablets, with inscriptions on them such as the following: [4]

> The shekels of silver […] have been borrowed by Mas-Schamach, the son of Adadrimeni, from the Sun-priestess Amat-Schamach,

[2] Otto & Grové *The Usury Act and Related Matters* 18.
[3] http://www.albalagh.net/Islamic_economics/riba_judgement.shtml#74-75.
[4] *Ibid.*

> daughter of Warad-Enlil. He will pay the Sun-God's interest. At the time of the harvest he will pay back the sum and the interest upon it.

The priestess Amat-Schamach, it seems, was the accredited agent of one of these institutions. The clay tablet with the inscription can easily be likened to what we would refer to today as a negotiable commercial instrument.[5]

Banking operations developed from religious institutions to private business institutions until in 575 BC, when a formal banking institution was established in Babylon: the Igibi Bank of Babylon. The records of this bank show that it acted as buying agent for clients; loaned on crops, attaching them in advance to ensure reimbursement; loaned on signatures and deposited and received deposits on interest. Similar banking institutions existed in Greece, Rome, Egypt and other developed nations, centuries before Christ, and they too deposited money, lent it on interest and extensively used letters of credit and financial papers and traded in them.[6]

Initially temples served as banks, and lent to individuals and states at moderate interest rates. In the 5th century private individuals began to receive money on deposit and to lend it to merchants at interest rates that varied from 12 to 30 percent according to the risk involved. In this way these individuals became 'private' bankers. These early private bankers were Greeks named *trapezites* or 'the men at the table', who took their methods from the near East, improved on them, and passed them on to Rome, which handed them down to modern Europe.[7] The practice of commercial, industrial and agricultural loans advanced on the basis of interest were so prevalent in the Roman Empire that Justinian[8] had to promulgate a law determining the rates of interest which could be charged from different types of borrowers. In his Code, Justinian allowed the rate of 4%

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[5] A further example is another Babylonian document of the same period, which states: 'Warad-Ilisch, the son of Taribum, has received from the Sun-Priestess Iltani, daughter of Ibbatum, one shekel silver by the sun-God's balance. This sum is to be used to buy sesame. At the time of the sesame-harvest, he will repay in sesame, at the current price, to the bearer of this document'.
[6] http://www.albalagh.net/Islamic_economics/riba_judgement.shtml#76.
[7] (Will Durant) http://www.albalagh.net/Islamic_economics/riba_judgement.shtml#77.
[8] Byzantine emperor (527-565 A.D).

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charged as interest from illustrious people, 6% charged from general people as ordinary rate of interest, 8% from the manufacturers and merchants and 12% from nautical insurers.[9]

This law[10] was promulgated in the Byzantine Empire shortly before Justinian's death, and remained in force for some time after its promulgation. The Arabs, especially of Makkah, had constant business relations with Syria, one of the most civilized provinces of the Byzantine Empire.[11] Their economic and financial relations with the Byzantine Empire were so prominent that the currency used throughout the Arabian Peninsula was the *dirhams* (of silver) and *dinars* (of gold) coined by the Byzantine Empire.[12]

The above overview demonstrates that the practice of charging interest on loans has been a widely popular practice, involving theologians, economists and jurists. Interest or the legitimacy of charging interest is, in all spheres, underpinned by religious origin. Judaic, Christian and Islamic scriptures pronounce on the issue of charging of interest. It is with these that we begin. South African common law in this area, with its Roman origins, was mostly fostered on the Old Testament.[13] However, the common law in this regard has been highly evolved through case law and later through legislative intervention. Both the religious and legal aspects will briefly be examined, before looking at the current consumer credit environment.

[9] http://www.albalagh.net/Islamic_economics/riba_judgement.shtml#78.
[10] Novellae 121, 138 and 160.
[11] The business relations of the Arabs were not restricted to Syria. They extended to Iraq, Egypt and Ethiopia.
[12] These Byzantine coins remained in use throughout the Muslim world till the year 76 A.H., when Abdulmalik ibn Marwan started coining his own dinars.
[13] Grové NJ *Gemeenregtelike en Statuere Beheer oor Woekerrente* (thesis RAU 1989) 8 and Otto & Grové *The Usury Act and Related Matters* 18.

1.1.2 Judaic Belief Regarding Interest

The Judaic belief regarding interest is viewed in light of its sources in the Hebrew Bible, are found in the law books of the Pentateuch, in particular the books of Exodus, Leviticus and Deuteronomy.[14] According to the Judaic understanding of charging of interest, Jewish people may extract usury from foreigners,[15] but not from each other (fellow Jews).[16] The term 'usury' here is different in content from the modern term, which implies interest charged at a rate higher than the law permits, whereas in terms of Biblical interpretation, it implies – simply - 'interest'.[17]

Usury however, was not a forbidden concept to the Jewish nation; it was only believed forbidden amongst fellow Jews. Huber[18] reflects that this may have been an adaptation to the particularities of their country and state. The Jewish economy was founded on agriculture as opposed to trade, much like the old Roman experience.[19]

The following excerpts, from the Bible, show that the word 'usury' is used in the sense of any amount claimed by the creditor over and above the principal advanced by him to the debtor:[20]

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[14] Buckley SL *Teachings on Usury in Judaism, Christianity and Islam* 82.

[15] Known as '*nokri*'.

[16] Deuteronomy 23:19-20: 'Thou shalt not lend upon usury to thy brother; usury of money, usury of victuals, usury of anything that is lent upon usury'.

[17] Buckley 83. See also in this regard *The Code of Maimonides (Mishneh Torah) Book Thirteen: The Book of Civil Laws*.

[18] Huber *Heedensdaegse Rechtsgeleertheyt* 1 37 3.

[19] The argument has often followed that barred from owning land, serving in the army, and other occupations, Jews, had of necessity to be based in the occupation of money-lending, from which Christians were forbidden because of their religious injunction against taking interest; but as Susan Buckley points out 'the major flaw in this argument seems to be the existence of Jewish bankers and moneylenders established in the Muslim world where the economic basis of Jewish life was not restricted as in Christian Europe'. (Buckley 69). The following from Meir Tamari, 'With All your Possessions', *Jewish Ethics and Economic Life* 69, is of interest in this regard: 'Although Islam, like Christianity, forbade taking interest, Islamic oral law provided a mechanism for banking and credit, so there was no necessity to create a special class of largely Jewish moneylenders. At the same time, the mosques, because of the egalitarian nature of Islam and its lack of clearly defined clergy, never assumed the same economic functions as the Catholic Church of medieval Europe. The mosques served neither as major landowners nor as depositories of wealth, so that there was very little religious incentive for economic discrimination against Jews. Furthermore, Islam, while opposed to non-believers, provided for their existence within the body politic, so that the Jew did not have to exist as chattel of the church or the crown.

[20] They also demonstrate that the Judaic interpretation of the Old Testament can be noted as somewhat selective.

> Lord, who shall abide in thy tabernacle? Who shall dwell in thy holy hill? He that walketh uprightly, and worketh righteousness and speaketh the truth in his heart. He that putteth not out of his money to usury, nor taketh reward against the innocent.[21]
>
> He that by usury and unjust gain increaseth his substance, he shall gather it for him that will pity the poor.[22]
>
> Then I consulted with myself, and I rebuked the nobles, and rules and said unto them, Ye exact usury, every one of his brothers. And I set a great assembly against them.[23]
>
> He that hath not given forth upon usury, neither hath taken any increase, that hath withdrawn his hand from iniquity, hath executed true judgment between man and man, hath walked in my statues, and hath kept my judgments, to deal truly; he is just. He shall surely live, said the Lord God.[24]
>
> In thee have they taken gifts to shed blood; thou hast taken usury and increase, and though hast greedily gained of thy neighbours by extortion, and hast forgotten me, said the Lord God.[25]

Two reasons are given for the justification of the concept of usurious lending in modern economic Israel today. Firstly, lending at interest to the stranger is seen as permissible due to the Deuteronomic interpretation.[26] Secondly, viewed from an economic rationale money-lending involves an element of risk and one of time. For the time during which the lender has extended the loan, he is unable to invest his money in alternative endowment schemes. Moreover, the risk factor means that the debtor may ultimately be unable to pay the loan and interest in time, or at all.[27]

To cover inter-Judaic loans, a standard form of contracting was established known as *hetter iskah*, which means the permission to form a partnership. Such a deed would stipulate that the lender supply to the borrower a certain sum of

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[21] Psalms 15:1, 2, 5.
[22] Proverbs 28:8.
[23] Nehemiah 5:7.
[24] Ezekiel 18:8.9.
[25] Ezekiel 22:12.
[26] See fn 16 above.
[27] Buckley 77-8.

money for a joint venture. The borrower would manage the business and guarantee the lender's investment against loss; as well as a fixed amount of minimum profit. The deed would also stipulate that the borrower will receive a nominal salary and an agreement by the lender that he will share in the losses. The amount of the capital loan, as well as the guaranteed minimum profit is recoverable on the deed, at the stipulated time of maturity.[28] Over the centuries this form of legalising interest has become very well established.[29]

Israel has also developed a free loan policy, which condones large public free loan societies, some organised by synagogues and others through private initiatives. These free loan societies lend money to their members and to the Jewish general public. The borrower must operate within Jewish law; he must also have a guarantor that will pay the loan if the borrower should default. The free loan has not been envisaged as a form of consumer protection but rather as an act of righteousness.[30]

This understanding of the Deuteronomic text is seen to have fostered two types of economic systems within the Jewish community; the first being the interest-free loan between Jews, the second being the interest-bearing loan between Jew and *nokri* or foreigner. This system can be seen[31] to have conjured up private concepts of brotherhood on the one hand, and on the other had the effect of cultivating a spirit of capitalism.

1.1.3 The Christian Belief Regarding Interest.

The following from Huber[32] is both succinct and pertinent:

---

[28] Parallels between the Judaic system and the Islamic system of investment, may be noted in this regard.
[29] Buckley 78-9.
[30] *Ibid*. This is in line with the religious concept of *chesed* that fostered a responsibility towards the poor in the Jewish community and encouraged gifts of money.
[31] Buckley 83-4.
[32] Huber 1 37 1.

> [B]y the law of Moses [usury] was entirely forbidden to the Jews,[33] from which many think that Christians too, who owe one another no less fraternal duty than the Jews owe among themselves, ought to take no usury, but to lend one another money readily without gain according to Christ's command. That was the opinion of most of the early fathers; it was confirmed by the Canon Law; and even in the last century many of the theologians and still more jurists[34] were of the same opinion.

Huber[35] interprets no similar provision in the New Testament, that is, one forbidding any sort of interest. However, from the Book of Luke, Huber appreciates that Jesus stated that money should be lent to poor and distressed persons without profit. This is not the same interpretation captured by the writer hereof. The relevant passage, from the Book of Luke, quoted by Huber makes no distinction between poor and distressed and other people, Christian, Jewish or Muslim:[36]

> But you must love your enemies and do good, *and lend without expecting any return*; and you will have a rich reward: you will be sons of the Most High, because he himself is kind to the ungrateful and the wicked.

Mills,[37] for example, understood the Christian teachings on usury in a much wider scope than those captured by the Judaic understanding. Essentially Mills interpreted the teaching in Deuteronomy[38] from anyone who needs to borrow, to anyone who wants to borrow[39] and furthermore lending to only 'brothers'[40] is understood to lending to anyone without expecting a return.[41]

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[33] Exodus 22.5.25; Leviticus 25.5.36; Deuteronomy 23.5.20; Ezekiel 18.5.17; Proverbs 28.5.8; Psalms 15.5.5.

[34] Hugo de Groot was one of these jurists in his *De Jure Belli ac Pacis* 2 12 20. However, Huber points out that in his previous *Introduction to the Dutch law* 3 10 9, De Groot had very clearly demonstrated that according to 'sound reason' it was legitimate to take interest for money loaned.

[35] 6 5 35.

[36] This passage is taken from the Revised English Bible with Apocrypha. The same passage from The Holy Bible Good News Edition reads: 'No! Love your enemies and do good to them; lend and expect nothing back. You will then have a great reward, and you will be sons of the Most High God. For he is good to the ungrateful and the wicked'.

[37] *Interest in Interest: The Old Testament Ban on Interest and its Implications for Today.*

[38] 15:8.

[39] Matthew 5:42: 'Give to him who begs from you, and do not refuse him who would borrow from you'.

[40] Deuteronomy 23:19.

[41] Luke 6:34: 'And if you lend to those from whom you hope to received, what credit is that to you? Even sinners lend to sinners, to receive as much again. But love your enemies, and do good, and lend, expecting nothing in return.

There are not many other references in the New Testament to debt or usury; and in light of these sparse references to lending and interest the Hebrew Bible commands have been regarded as relevant to Christians.[42] However, perhaps not with the wider interpretation given above.

Needless to say that the Christian view having evolved from the Old Testament law has now come, through early Church and Patristic positions, casuistry and Calvinism, to accept the charging of interest in today's moneylending transactions.

1.1.4 The Islamic Belief Regarding Interest.

The word '*riba*' is similar to the English word 'usury' but the two are not synonymous. The word 'usury' implies in contemporary as well as legal parlance excessive or exorbitant interest.[43] The Arabic word '*riba*'[44] however refers to any addition; however slight, above the principal sum lent and therefore includes both 'usury' and 'interest'. A usurious transaction can be identified by two primary components; that is, firstly that the two things of exchange between the parties must be homogenous or of the same character but must differ in size, quality or measurement; and secondly, where there is a stipulation for an excess to be paid (over and above the principal amount), this excess is considered usury.[45] *Riba* is unambiguously prohibited in Islam.[46] There has been an attempt over the years to sub-divide the word '*riba*' into various different definitions, some of which it has been argued, should be allowed and some of which should not.

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[42] Buckley 95.

[43] The word 'usury' has two separate meanings: the first being interest in any form whatsoever; the second exorbitant or excessive interest. Because the practice of charging interest has become so accepted in the modern commercial arena, 'usury' has more commonly become understood as excessive or unlawful rate of interest. The Oxford Dictionary, 8th ed, defines 'usury' as ' 1. the lending of money at interest, esp. at an exorbitant or illegal rate. 2. interest at this rate'

[44] The word 'r*iba*', in Arabic language, literally means an 'increment' or 'addition'. The term '*riba*' is an unjustified increment in borrowing or lending money, paid in kind or in money above the amount of loan, as a condition imposed by the lender or voluntarily by the borrower. Dr. Abdel-Rahman Yousri Ahmad, 'Riba, Its Economic Rationale and Implications' Director General, Institute of Islamic University Pakistan. (http://www.islamic-banking.com/shariah/shariah_aom/ar_yousri.php).

[45] SH Muhammad Ashraf, *Sahih* 831 fn 2021.

[46] Surah XXX 39; Surah III.130 and Surah II.275-280.

Pakistan became the first Muslim country to officially declare modern bank interest as unlawful.[47] The Federal Shariah Court of Pakistan declared the laws permitting interest repugnant to Islam in 1991. The Federal Government of Pakistan and certain banks and financial institutions filed 67 appeals against this judgment in the *Shariah* Appellate Bench of the Supreme Court. The court had to consider whether or not commercial interest of modern financial systems fell within the definition of '*riba*' prohibited by the Qur'an, and if it did, whether it should be allowed on the basis of necessity. This also led to the examination of whether modern financial transactions could be designed without interest and whether or not the proposed alternatives were feasible; taking into consideration the modern structure of commerce and finance. The Court found contemporary money and finance systems destructive and held that these systems should be viewed as economically inefficient.[48]

One of the arguments that the Federal Court was faced with on appeal was that the prohibition of *riba* is applicable only to those interest transactions where the rate of interest is exorbitant or excessive. This argument was sought to be supported by the verse of the Qur'an, which states:[49]

> O ye who believe! Devour not Usury, doubled and multiplied; but fear Allah; that ye may (really) prosper.

It was argued that this verse qualified the prohibition of interest by the words 'doubled and multiplied' to show that the practice of charging interest in Islamic law, is forbidden only when the rate is so excessive that it makes the payable amount twice that of the principal debt. Essentially if applied, this interpretation

[47] *United Bank Limited v. Farooq Brothers and Others* (PLD 2002 SC 800).
[48] (http://www.albalagh.net/Islamic_economics/riba_judgement.shtml#150). Despite that *riba*, in Islam, is viewed as preventing people from engaging in 'real' economic activities and unlawful in terms of Islamic law, Pakistan's Supreme Court reversed its own ruling in 2002 (*Dr M Aslami Khaki and others v Syed Muhammed Hashim and others* PLD (ALL PAKISTAN LEGAL DIVISIONS) 2000 Supreme Court 225). The decision came just before the deadline set by the Supreme Court (in the 1999 decision), for financial institutions in the country to adopt the Islamic system of banking. A number of financial institutions had warned the government that the new system was not viable and some of the foreign banks implied that they would be forced to withdraw investment from Pakistan. (http://news.bbc.co.uk/1/hi/world/south_asia/576435.stm)
[49] Surah III.130.

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would imply that prohibition would not be applicable if the rate of interest was not too high.[50]

The Court found the verses of the Qur'an, which it held were to be read as a whole as no verse could be interpreted in isolation from other relevant material available in other parts of the Qur'an, to clear any ambiguity with regard to the concept of charging of interest as a whole. It was held that the words 'doubled and multiplied' are not restrictive in nature and therefore found not to be indicative of a necessary condition for the prohibition of interest.[51]

The words 'doubled or redoubled' were not understood to qualify the prohibition of interest, as it is qualified in the South African common law by the *in duplum* rule; but interpreted as emphasizing the added severity of the 'sin' of charging of interest if the interest charged is so exorbitant or excessive as to reach double or more. The limitation of interest in Islamic law is not at all qualified by quantification of interest, for example by allowing only interest in the double, interest, in whatsoever form, is termed *riba* and cannot be charged.

The role of loans, in countries ruled by Islamic law,[52] in commercial activities is thus limited, and the whole financing structure in Muslim countries is equity-based. In order to limit the use of loans, Islamic law has permitted loans only in cases of dire need, and has discouraged the practice of incurring debts for living beyond one's means or to grow one's wealth.

The Islamic system, in particular the argument of interest being viewed as usurious only when it reaches the double, is germane in that it demonstrates that the notion of 'not over the double' interest has been distinguished in more than one legal system.

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[50] Essentially the argument which was being put forward by the appellants in the abovementioned case was that the interest charged by the (then) present banking system, was not normally so high as to make the payable amount double the principal, and, therefore, the banking interest was not covered by the prohibition. (http://www.albalagh.net/Islamic_economics/riba_judgement.shtml#90).
[51] http://www.albalagh.net/Islamic_economics/riba_judgement.shtml#91-4.
[52] http://www.bbc.co.uk/religion/religions/islam/features/banking/.

1.2 Roman and Roman-Dutch Law

In *Dyason v Ruthven*,[53] the court looked at the laws of Holland as authority, in the absence of specific local enactments or declarations. Watermeyer J[54] expressed himself as follows:

> I shall endeavour to state succinctly the rules which appear to me to have guided the Courts of Holland in deciding questions of interest or of usury, and the foundation upon which these rules rested. In the absence of direct local enactments absolutely fixing a rate of interest, the law which prevailed in Holland is our law.

An examination of the laws of Holland turned the discussion to Roman law, which was viewed as 'provid[ing] the most essential foundations of the "civilian" tradition'.[55]

From the earliest times in the Republic of Rome lending and borrowing was a common feature of commercial society.[56] The contract of loan of money for consumption was known as *mutuum*.[57] If the lender wanted to demand interest to such loan, he would have to do so by way of another contract known as a *stipulation*. The stipulation would novate the *mutuum* for payment of the capital amount and interest.[58] While Roman law emphasized the autonomy of contracting parties, the one area where the state intervened from an early stage was in the control of interest rates, [59] and usually because in contracts of loan it

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[53] 3 Searle 282.
[54] 305.
[55] Zimmermann R *The Law of Obligations* 167.
[56] Grotius 2 12 1 & 6; Voet 12 1 1 & 19; Lee *An Introduction to Roman-Dutch Law* 128; *Tucker v Ginsberg* 1962 2 SA 58 (W) 62; *Credit Corporation v Roy* 1966 1 SA 12 (D). The loan for consumption was the oldest of the real contracts; its predecessor was *nexum*, which was a formal moneylending transaction by which the debtor gave himself by way of formal transaction as hostage to the creditor for payment of the debt. The creditor could then choose to enslave him, execute him or sell him! (Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* 269).
[57] It must be noted however, that the contract of *mutuum* involved the transfer of ownership of the money or other consumable to the borrower who then had an obligation to return the equivalent (in quantity and quality) to the lender at a stipulated or reasonable future time. (Grotius 3 10 6; Voet 12 1; Lee *An Introduction to Roman-Dutch Law* 128; Thomas Van der Merwe and Stoop 269; *Damont NO v Van Zyl* 1962 4 SA 47 (C)).
[58] If interest were to be paid without a *stipulatio* then the payment went to reduce the capital amount loaned, as an informal agreement to pay interest would impose only a natural obligation, it being a rule of classical law that no action arose from a pact. (Thomas JAC *Textbook of Roman Law* 272).
[59] There were always maximum rates of interest that varied from period to period. (Thomas JAC 273).

was the creditor who dictated the terms, thereby essentially subtracting from the freedom of contract ideal. A ceiling rate was contained in the XII Tables; in case of contravention the usurer would incur criminal liability.[60] Lenders persistently ignored stipulated interest rate ceilings and this led to a complete ban on the practice of charging interest – the ban was imposed through the *Lex Genucia*.[61] However, this did not eradicate the institution of charging for the extension of credit, time and practice having sanctioned it.[62] Such severe provisions proved counterproductive and culminated in the slaying of a praetor.[63] Thus, towards the end of the Republic, fixed interest rates were set at 12 percent and 6 percent for senators. When Justinian came into power, being heavily influenced by his Christian beliefs, he lowered the rate to 6% and 4% respectively.[64] Compound interest was forbidden and thus simple interest was charged.[65]

The Canon Law, which was the dominant rule in the Middle Ages,[66] forbade charging of interest altogether.[67] However, the economic realities were more forceful than religious tenet, with the 11th and 12th centuries marked by rampant development and huge growth in capitalism. As finance was required for both production and investment, thus various transactions were evolved in order to circumvent the prohibition on interest.[68] Consequently, during the 16th century and with the Reformation, the prohibition on usury was no longer tenable and by the time imperial legislation was decreed in 1654, which acknowledged the possibility of allowing the charging of interest, the Canonical prohibition had been abrogated by convention. This realized a general move back towards Roman

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[60] Digest 22 1 & 2; *Voet* 22 1 2; Lee *Elements of Roman Law* 284; Kaser *Roman Private Law* 202; Thomas 272.
[61] Earlier, there existed the *Lex Marcia* (104 B.C.).
[62] Zimmermann 167.
[63] Praetor Aesillio, who, unable to resolve their differences, allowed the creditors and debtors to proceed against each other in the courts, was murdered in the centre of the *forum Romanum*. Bringing the issue before judges was seen as a resuscitation of the almost obsolete *Lex Genucia*, the moneylenders' exasperation led to the praetor's murder and then the concealment of its evidence. (Zimmermann 168).
[64] *Ibid*.
[65] Thomas 273.
[66] Zimmermann 170.
[67] The courts in Holland mainly disregarded this law, especially after the Reformation (*Dyason v Ruthven* 292-4).
[68] Zimmermann 173. Furthermore, the Church endured usury by Jews: 'excluded from agriculture, not allowed to own landed property, unable to join the guilds and thus become artisans or ordinary merchants, they were forced to take up the shadier business of money lending/pawn broking'. (Zimmermann 172). However, cf fn 19 above.

rules on usury and interest, with certain modifications, for example the interest rate for general loans was reduced from 6 to 5 percent.[69]

Without the Canon Law, the courts of Holland had to look back to various authorities regarding the rate of interest; at least Justinian's Code sanctioned that charging of interest was not unlawful. Van der Linden[70] seemed to stipulate that 6 percent interest should not be exceeded and anything above that should be considered usurious. Grotius[71] distinguished between two types of loan; both Van der Linden and Grotius looked to reasons why the borrower required the money. If the borrower looked to the loan in order to obtain necessities, the loan ought to be granted, according to Grotius, without any expectation of return. If however, the borrower required the loan in order to make a profit, or for his convenience, it would only be natural to require a return from the loan.[72] Grotius deemed lenders to be generally selfish; and therefore concluded that their unchecked rates may in time have burdened borrowers; thus requiring provisions stipulated by the Municipal laws to come into effect.[73]

Loenius[74] in his 21st case stated that in Holland there was no '*certum modum usurarum*, but that the same [was] regulated according to the circumstances of time, places and persons, and therefore it [was] never seen that any one from the circumstance of his taking higher interest [was] accused as being usurer'.[75] In effect, however, Loenius, one of the Judges of the High Court, was not advocating a non-interventionist approach. In 1610 certain interest rates were adjusted in various cases in accordance to the very circumstances surrounding the cases.[76] Bell J examined various other cases[77] that allowed the charging of interest, with the rate always varying between 6 and 12 percent. However, Bell J

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[69] Zimmermann 175.
[70] *Inst.* 1 15 3.
[71] 3 10 9.
[72] Interestingly enough this is similar to the argument provided by Islamic Jurists, in an attempt to allow the charging of interest in certain circumstances relating to financial business enterprises.
[73] *Dyason v Ruthven* 295.
[74] *Decis.* 21
[75] *Dyason v Ruthven* 296.
[76] *Ibid.*
[77] These include: case no 166 of 1563; case no 248 of 1590; a case mentioned by *Neostadius* in 1592 and two cases commented on by *Christinaeus* in 1596 and 1601.

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held that these cases were simply demonstrative of the Courts' of Holland willingness to intervene, by allowing the charging of interest where none had before been stipulated. It is shown in this case that Van der Keessel stated that there was no express law in Holland on the matter of interest.

After the Reformation, the courts of Holland allowed the charging of interest. It was found that South African common law also had no *certum modum usurarum*[78] and that certain varying principles based on public policy (together with the influence of the common law of Holland) had developed through the cases.

In Roman-Dutch law 'interest properly so called'[79] was only of two kinds: either an estimation of damage to property or loss suffered that consequently led to a prevention of recovery of anticipated profit.[80] It was thus left to judges –who had to make use of the guidance of fixed general rules - to make accurate estimations of interest due, according to the specific circumstances in the cases before them.[81]

Interest for money loans was referred to as 'usury' or 'rent'.[82] Usury was payment for money owed, as well as for goods handled in terms of length, capacity and weight. Any other type of goods that could not be measured by length, weight or capacity or any immovable property could not have this particular interest charged to them because, it was reasoned, that to constitute usury, the property had to be of a decisive ratio.[83] What is interesting to note is Huber's constant reference to the fact that interest or usury should not be charged because loans for consumption should be made without profit, as these were contracts to be entered 'by way of charity and affection'. However, he furthered his argument by stating that it was the avarice of mankind, which

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[78] Otto & Grové *The Usury Act and Related Matters* 19.
[79] Huber 1 37 1.
[80] Huber 1 36 2.
[81] Huber 1 36 4. Huber further identifies the rules used to determine this type of interest.
[82] 'Next comes usury, though, because the name is odious, we rather use in place of it the name of rent or interest (*interessen*)'. Huber 1 37 1.
[83] Huber 1 37 5; D 22 1 4; D 19 5 24; Code 4 32 11, Code 4 32 12.

attached usury to these contracts under the name of interest, but that this nevertheless, could only be extracted by way of a separate and express stipulation.[84]

Usury became divided into three types: compensative, punitive and lucrative interest. Compensative was a reimbursement of any loss for damage sustained or profit lost. Punitive interest was the penalty charge paid by a defaulting debtor for making a late payment. Lucrative interest was simply interest charged in view of making profit from money loans.[85]

Interest upon interest was strictly forbidden[86] and a debtor who acknowledged this interest would simply decrease, upon payment, his capital amount or alternatively had the option to claim it back.[87] This view was so strictly adhered to, that even if a debtor defaulted on a judgment debt he would not owe more interest; other than that declared owed by the judgment derived from the capital amount. The *ratio* was that a debtor not servicing his debt, implied at face value his depreciating financial state and that the incurrence of even more interest upon his already outstanding interest, would evidently run him (the debtor) 'aground'. Compound interest was seen as nothing more than 'a canker to the commonwealth [… as] a country cannot languish more quickly than by the decay of its households'.[88] The exception to this rule lay in a debtor who acted capriciously or *mala fide* delaying payment caused not due to need, but avarice. In such cases, a judge could then order that interest upon interest be charged, not only from the time of judgment, but even from *litis contestatio*.[89]

[84] Huber 1 16 11; D 12 1 17 3; Voet 12 1 4.
[85] Huber 1 37 6.
[86] Huber 1 37 7. This rule however was only applicable to interest upon unpaid interest. (Cf 577 12). Code 4 32 11, Code 4 32 12; D 22 1 29; Code 4 32 28.
[87] Huber 1 37 6.
[88] *Ibid.*
[89] Lee *An Introduction to Roman-Dutch Law* 128; Huber 1 37 10; Grotius 3 10 10; Voet 12 1 18; *CIR v Lever Brothers* 1946 AD 441 450-1. In modern times it has been held that there is an implied agreement to pay interest on bank overdrafts. (*Standard Bank v Lotze* 1950 2 SA 698).

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Interest was charged in three ways: by stipulation, when a debtor was in *mora* and judicial demand.[90] With a stipulation, no more interest could be charged other than that stipulated for in the contract. Thus, if one year's worth of interest was contemplated in the contract and the debtor did not pay within the year, he could not be charged more interest on this debt. If, however, a debtor paid beyond the stipulated time this would amount to a tacit agreement on further interest.[91] *Mora* gave rise to interest in all spheres of contract, with the exception of book debts, which required stipulation in order to bear interest.[92]

Voet defended the charging of interest. He did not perceive interest as being in conflict with the principles of fairness or of natural law. When use of cash, he argued, is granted to another by a loan for consumption, the lender essentially deprives himself of the power to gain from that money, but provides a chance for others to gain - therefore he should be entitled to claim a moderate and definite interest.[93]

1.3 South African Law

1.3.1 Introduction

Consumer credit protection in South Africa has developed slowly and perhaps not always under the guise of this label. It initiated or rather came to the fore, like in all other countries, through the continued and increased 'commerce' of money. Throughout human history, lending and lending rates have always been critically debated themes. South Africa's teething problems in the area of credit consumer protection started with a public requirement of the control of interest rate charges. These controls developed both through the common law and legislative enactments. The advancement of these enactments was however slow and they developed in piecemeal fashion. At first, there was no statutory or common-law

[90] Huber 1 37 13.
[91] Huber 1 37 15-16.
[92] Huber 1 37 17.
[93] Voet 12 1 4.

control over finance charges.[94] We shall here look at the common law evolution and legislative development.

1.3.2 The Common Law and Case Law

The South African common law is of Roman and Roman-Dutch extraction. Thus, understandably, the first cases to deal with the question of usury, as shown above, looked to these authorities in order to settle the common law position. Initially, according to common law, usurious contracts were considered void.[95] However, presently there is no *certum modum usurarum* or stipulated common law maximum rate of interest.[96] This is regulated by statute.[97] Where an illegal rate of interest has been stipulated, the maximum rate may still be recoverable.[98] The common law position has changed, it now gives the courts the power to decrease excessive interest rates and allow the contract to be maintained.[99]

In *Dyason v Ruthven*[100] both Roman and Roman-Dutch authorities were analysed, in order to assess the South African common-law position with regard to consumer credit protection in terms of interest rate charges. The action in this case was instituted in order to recover £65 together with interest owed at 12 percent per annum. It was contended by the defendant that the plaintiff was not entitled to contract or stipulate for interest at such an amount and that the law of the Cape Colony (as it then was) permitted only 6 percent per annum.[101] The

[94] Otto & Grové *The Usury Act and Related Matters* 19.
[95] *Sutherland v Elliot Brothers* 1841 1 Menz 99; *Dyason v Ruthven*; Wessels *The Law of Contract in South Africa* 2 21 573: 'The practical difficulty is to determine when a contract is usurious and when not'.
[96] *Dyason v Ruthven*; *Reuter v Yates* 1904 TS 835; per Wessels J in *S.A. Securities v Greyling* 1911 TPD 352: 'It is difficult for me to find any definite principle upon which a case of usury has been or can be decided. I think the most you can say is that the transaction must show that there has been extortion or oppression or something akin to fraud'. This case involved a holder of a promissory note for £100, refusal to renew the note unless the promissor agreed to pay £140 after 4 months. The court did not find any fraud, extortion or oppression and thus ordered the payment of the £140.
[97] Usury Act 73 of 1968. The maximum amount of interest that may be charged per annum and on what amounts are announced by the Minster of Trade and Industry in the Government Gazette. The same provisions have been made, in this regard, in the National Credit Bill, 205.
[98] *Spencer v The Merchant's Credit Corporation* 1933 WLD 69; Wessels 2 21 583.
[99] Rendering a contract with excessive interest rate charges void, would have grossly unfair results.
[100] *Dyason v Ruthven* 767
[101] *Dyason v Ruthven* 282 - 3

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court looked at various Governmental resolutions and Placaats issued to see whether the legal rate of interest at the time - as the defendant claimed - was in fact 6 percent. The 1793 Instructions to Notaries was held to be pertinent only to notarial instruments, and even then did not render the instruments invalid if the 6 percent watermark was not adhered to.[102] The court examined the directions issued to the Government Loan Bank in 1794, which stipulated that loans under 100 rix dollars should be charged at 9 percent per annum and anything above that should be charged at 6 percent. In 1803 the rate was altered to a standard 5 percent per annum for all loans. In 1808 a further change was made and that was to a rate of 6 percent. The court held that this was a direction to the Bank and did not create an overseeing rate of interest in respect of the whole Colony, and that in any event the rate had varied from 5 to 9 percent. No invariable rate had been fixed.[103] Ordinance 42 1828, regulating the Orphan Chamber also stipulated a 6 percent interest rate, but was held to apply only to itself and not to affect the rest of the community. A Placaat of 1743 declaring: 'upon all obligations [...] made by parties before their departure for India or return to Holland, from whatever nature they may arise, in no case shall more interest be allowed than at the highest at the rate of 6 percent', was held by the court to be referring only to special matters regarding parties leaving Holland for India and thus did not affect the Colony as a whole.[104]

In conclusion Watermeyer J stated that he did not doubt that the same government which issued the very Ordinances and Placaats here abovementioned, would have no difficulty in 'fixing the price of money, as they had no difficulty in fixing the price of sheep, corn, and wine', however, he stated that 'they have left us no enactment of the kind'.[105] Having reviewed the relevant Placaats, Resolutions, Decisions, Proclamations and Comments the court concluded that no law existed in the Colony that stipulated a fixed amount of

[102] The court noted that the stipulation of a higher rate of interest in a notarial bond might have had adverse effects on the notary such as suspension for example.
[103] *Dyason v Ruthven* 301
[104] *Dyason v Ruthven* 302
[105] *Dyason v Ruthven* 312

interest be charged in loan contracts.[106] Bell J, however, held that the dictum would not lead to the conclusion that no law regulated what interest could be charged, whether stipulated or not:[107]

> The question whether this or that rate of interest may be taken in any particular case will be a question of circumstances of the case, and according to what may be found to be the current market-rate of interest from information howsoever derived.

Circumstances[108] that should be taken into account included (i) the interest rate agreed on by the parties; (ii) the amount of money lent; (iii) the period of repayment; (iv) the security furnished; (v) the risk attached to the loan; (vi) the market-rates at the time of loan; and (vii) the parties' particular circumstances in relation to each other.[109]

In *Reuter v Yates*[110] the case of *Dyason v Ruthven*[111] was cited with approval and Innes CJ emphasized that there was no fixed common-law rate that would render a loan transaction usurious *per se*, but that illegal and excessive interest would not be enforced:[112]

> The law of Holland prohibited excessive usury; and the courts of this country, administering that law, will refuse to enforce contracts shown on due enquiry to be usurious and extortionate in their nature. But our law does not define any particular rate of interest as being necessarily usurious; it does not fix a limit up to which interest is legitimate and proper, and beyond which it becomes illegal and excessive. That must depend upon the circumstances of the case.

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[106] 'I am aware that many persons have entertained an opinion that an usury law is in operation in this Colony, […]. This may have arisen from the circumstances, which I have already averted to, i.e. that 6 percent has been the usual and accustomed rate of interest allowed by this Court, and stipulated between lenders and borrowers of money. But law taken for granted often fails when its sources are reached' (*Dyason v Ruthven* 291-2).
[107] *Dyason v Ruthven* 302.
[108] *Van Leeuwen* states 'Where, however, it has not been stipulated and expressed how much, and how, interest should be paid, it is computed at so much as it is usual to contract for, according to the custom of the country or place where the contract is made'. (*SA Securities Ltd v Greyling* 356)
[109] Grové & Otto *The Usury Act and Related Matters* 20
[110] 1904 TS 855 859.
[111] *Supra*.
[112] 856.

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In *SA Securities Ltd v Greyling*[113] Wessels J found the common-law view in this regard rather vague and would not consider interest charged at 120 percent as usurious.[114] Rather, he found that a usurious transaction should show 'either extortion or oppression, or something akin to fraud'.[115] Wessels J's difficulty with determining a 'definite principle' in this regard, was demonstrative of the need for legislation.

1.3.3 Legislation

Only in 1926 was the first national consumer legislation passed in South Africa, *viz* the Usury Act 37 of 1926.[116] Prior this act the various colonies regulated their own consumer legislation. There was, however, a period where neither statutory nor common-law controls over maximum interest rates of finance charges existed. Both Natal and the Free State Law Books read that people were entitled to demand as much interest as they deemed fit.[117] The Cape Colony had the Cape Usury Act 23 of 1908, which applied to money-lending transactions but did not incorporate business transactions. Different rates were allowed according to different amounts lent. Anyone requesting or exacting more than was allowed by the act was guilty of an offence, and could be ordered by a court to pay the extra interest back to the debtor. The act further extended to sale transactions where interest could be charged on amounts outstanding. For the first time various disclosure requirements were legislatively stipulated. These are what have been termed first generation consumer credit legislation, the main feature of which was the autonomy of the colonies.[118]

[113] 356.
[114] 358.
[115] *Ibid*. In *Taylor v Hollard* 1888 2 SAR 78 85 the court concluded that where an excessive rate of interest has been agreed to by the parties such rate could be lawfully reduced because it would not be in the public interest to allow usurious rates.
[116] Otto & Grové *The Usury Act and Related Matters* 24. It must be noted that at first the act did not create complete homogeneity, whereas both the Free State and Cape Colony repealed their laws to make way for the 1926 Act, Natal did not. Natal only conformed in 1967 with the Pre-Union Statute Law Revision Act 78.
[117] Free State Law Book and Act 6 of 1858. (Otto & Grové The *Usury Act and Related Matters* 22).
[118] Otto & Grové The *Usury Act and Related Matters* 22-4

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The Usury Act of 1926 prescribed a maximum fixed interest rate. This rate varied according to the principal amount loaned. Any person exacting more than the prescribed rate was found guilty of an offence and held liable for a fine not exceeding £100.[119] The act was not applicable to banks,[120] hire-purchase contracts[121] and to commercial transactions where a moneylender was not a party to the contract.[122] The money-lending agreement had to be in writing and the act prescribed various other conditions regarding the form and content of the agreements. However, the act did not cover credit for the purchase of goods on credit, better known as hire-purchase contracts. It regulated only money-lending transactions. Thus, in 1943 the Hire-Purchase Act 36 of 1942 was brought into force. The two Acts affected different transactions.[123]

In 1967 the Minster of Finance appointed a committee known as the Franszen Committee headed by Dr Franszen to consider the 1926 Usury Act, and subsequently suggest possible improvements. The committee's main areas of focus were: how to impose maximum prescribed interest rates; whether the Usury Act should apply to hire-purchase and leasing agreements; and, if so, what rates should be charged in regard to these transactions and, finally whether the credit grantor should be obliged to furnish the credit receiver with information regarding the total cost of the loan (interest and all other sundry charges thereto related). The report[124] was extensive and shortly thereafter a new act called the Limitation and Disclosure of Finance Charges Act[125] was passed. However, the new act did not replace the Hire-Purchase Act.[126] In 1973, the sale of land on instalments became regulated by the Sale of Land on Instalments Act 72 of 1971.[127]

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[119] S 1(2)
[120] S 14 (3)
[121] S 14 (2)
[122] S 14 (4)
[123] Otto & Grové The *Usury Act and Related Matters* 24-6
[124] RP 11/1968
[125] 73 of 1968
[126] Otto & Grové The *Usury Act and Related Matters* 27
[127] Otto & Grové The *Usury Act and Related Matters* 28

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This fragmented approach to credit protection was to set a trend that has appeared to remain in vogue until the recent Consumer Credit Bill and National Credit Bill.[128] The various credit areas, namely the purchase of goods or services on credit, leasing of goods or services on credit, money loans and the alienation of land on credit are currently governed by separate acts: The Credit Agreements Act75 of 1980, the Usury Act73 of 1968 and the Alienation of Land Act 68 of 1980. The Credit Agreements and Usury Acts are discussed in later Chapters[129] in as far as they are concerned with the limitation of interest. The National Credit Bill, which if enacted, shall repeal both the Credit Agreements and Usury Acts will also be discussed in the following Chapters,[130] specifically in light of its codification of the *in duplum* rule.

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[128] The National Credit Bill being the more recent.
[129] Chapter 4 para 4.2.
[130] Chapter 4 para 4.3.

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Chapter 2: The History of Controlled Prices and Interest

2.1 Introduction

The limitation of profit in certain kinds of contracts has prevailed through the ages and has not been confined to the limitation of interest in credit or loan transactions, but extended (however no longer) to the profit one could make when trading. Sale agreements had a similar, though not identical, limitation as credit agreements. This limitation did not survive, perhaps due to the more balanced bargaining position of purchaser and seller, or perhaps due to the inflation rates that affect assets.

2.2 Laesio Enormis

The doctrine of *laesio enormis* was abolished by Parliament in 1952 by virtue of the General Law Amendment Act 32 of 1952.[131] The act only abolished the doctrine in the Natal and Transvaal, as it had already been discontinued in the Cape and Orange Free State by legislation.[132] The doctrine is said to emanate from the emperors Diocletian and Maximian of AD 285 and 293.[133] The doctrine was started *C* 4 44 2 and C 4 44 8.[134] The abolishment of *laesio enormis* appears to have been the decision of the Appellate Division in *Tjollo Ateljees (Eins) Bpk v Small*.[135] In this case, Van den Heever JA emphasised that there was no mention of this doctrine in the Institutes or the Digest of Justinian. Hahlo and Kahn[136] add that it was not part of classical Roman law[137] but rather a

[131] Section 25.
[132] General Law Amendment Act, No 8 of 1879 and General Law Amendment Ordinance No 5 of 1902. Despite the above, the doctrine was recognised in the Magistrates Court Act 32 of 1917 and the Prescription Act 18 of 1843.
[133] These opinions became the new law and were in conflict with the previous opinions of Paulus, Ulpianus, Pomponius and Hermogenianus who had directed that save for fraudulence in establishing price, negotiations of all kinds was permissible in sale and lease agreements. (Thomas Ph J, '*Laesio Enormis* Outdated, Enormous Profits Not', 2002 (65) *THRHR* 247 249).
[134] Dias RW in Daube D *Studies in the Roman Law of Sale* 46.
[135] 1949 1 SA 853 (A).
[136] Hahlo & Kahn 'Goodbye *Laesio Enormis*: Section 25 of the General Law Amendment Act, 1952' 1952 69 *SALJ* 392

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doctrine born of the exploitation of owners of smallholdings through variant pressure tactics of wealthy landowners.[138] Van den Heever JA[139] distinguished Justinian's visionary exploits as sometimes confusing religious with economic principle.

The rule was, nevertheless, later reinforced by the Canon law,[140] which placed great emphasis on good faith and thus concerned itself with the just value of things.[141] The restriction of the rule to land was soon extended to include movables.[142] The South African courts applied the rule to 'valuable movables'[143] until 1949 when the Appellate Division, in the *Tjollo Ateljees*[144] case, condemned the doctrine as a whole after an exhaustive investigation into its somewhat dubious historical roots.[145]

The doctrine, despite its allegedly spurious inception, was over the years and during reception developed in various ways. Its evolution involved practical concepts such as ascertaining the 'true value' of the item sold at the time and place of the sale, the value at the time of action being immaterial and if the value was found to be constantly fluctuating the doctrine was not applicable.[146] The doctrine was extended to include other transactions such as, *inter alia*, letting and hiring,[147] compromise, partition and exchange.

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[137] See Van den Heever JA in *Tjollo Ateljees (Eins) Bpk v Small* 862 where he states that 'no Roman would have conceived or entertained such a remedy,' as ultimately the Romans considered bargaining and profits legitimate. He sites D 4 4 16 4, D 19 2 22 3 & D 19 2 23 as authority.
[138] Hahlo & Kahn *loc cit*.
[139] *Tjollo Ateljees (Eins) Bpk v Small* 863.
[140] Decretum Gregorii IX, *De Emptione et Venditone*, 2 17 3 6.
[141] Dias RW *op cit* 47.
[142] The principle was absorbed into Western Europe. *Tjollo Ateljees (Eins) Bpk v Small* 863
[143] *Levishon v Williams* 1875 5 Buch 108, *Couch v Lipshcitz* 1918 WLD 78, *Botha v Assad* 1945 TPD 1, *Cotas v Williams* 1947 2 SA 1154 (T).
[144] *Supra*.
[145] As per Hoexter JA, 'It is impossible to abolish a well-recognized doctrine of the common law by a stroke of the judicial pen; that is a matter for the lawmaker'. (877) However, in the same case: 'It is desirable that the doctrine should be abolished'. (882) The following from Thomas Ph J is an interesting, strong dissenting view: 'Thus Schreiner JA stated "*laesio enormis* is out of place in the modern world, with its highly complicated commercial organisation and its ingenious selling devices" (860), while Hoexter AJA held that it is obvious that it "does not accord with our modern ideas of contract" (882). However, the axe was wielded by Van den Heever JA who, in an impressive misuse of the sources of the common law and abuse of learning, provided antagonists of the common law with ample ammunition'. (2002 (65) *THRHR* 247 250).
[146] Dias RW 49.
[147] Pothier's *Treatise on the Contract of Letting and Hiring* s 125-128.

Zimmermann refers to the doctrine as 'an awe-inspiring piece of legal architecture, built upon the frail foundations of two texts from Justinian's code' and while also identifying the link to Diocletian[148] he suggests that it was in fact a 'Justinianic interpolation'.[149] There were further problems with the doctrine, in that once it was extended to be a remedy also available to the purchaser, the issue of what amount the purchaser would have had to pay in order to have suffered *laesio enormis* became pertinent. Zimmermann makes use of a helpful example, using the amount of 100 as the true value of the object. If the vendor sold it for 49 or less he would have suffered *laesio enormis*; but when would the purchaser be said to have suffered - when paying 150 or more, for the item or when 201 or more? Zimmermann concludes:[150]

> On purely logical grounds, neither of these approaches can be faulted, and thus the dispute was never conclusively resolved….In the course of time, most of the features of *laesio enormis* came under attack. *Dimidia pars veri pretii* was not always perceived to be a sensible limit of *laesio enormis* and thus different (equally arbitrary) criteria were set: two-thirds for the region of Württemberg, the charmingly extravagant figure of five-twelfths in the French code civil; and canon law even made provision for what was known as *laesio enormissima*.

2.3 Pretium verum

A further issue leading to extensive discussion was the *pretium verum* or true price. A lengthy discussion on this topic will not ensue here. The market forces currently are such that a true market orientated price is easily assessable with

[148] '[I]t sounds unlikely that a conservative and classicist emperor such as Diocletian should have been responsible for as uncouth an intrusion into a core principle of classical contract law as the remedy for *laesio enormis* represents.' (Zimmermann 260) However, it is evidenced that Diocletian did in fact intrude into the classical concept of freedom of contract by instituting public-law regulations with regards the price of goods. (*Ibid.*)

[149] Zimmermann 259. Zimmermann also comments on the exploitation of peasant farmers by 'urban capitalists', who were forced to sell their land at very low prices in order to satisfy the heavy taxation policies imposed on them. (261).

[150] Zimmermann 263-4.

reference to competitive conditions. This was the view taken by the supporters of this doctrine.[151]

The main dilemma that faces juristic writers today is the conundrum of the classical notion of freedom of contract. This view that is that too much interference by the Courts in private contracts would be a paternalistic invasion on the fundamental common law rule that respects private contractual autonomy. Huber explains, with reference to the Digest,[152] that Jurisprudence is the science of what is just and fair. Thus the ultimate aim of Jurisprudence is justice. He then divides justice into two types: commercial and distributive. He explains commercial justice as that type of justice that ensures everyone receives that which rightfully (Huber uses the word 'fully') belongs to him, thus entitling everyone to the right to demand it. He gives the example of ownership in a thing that is in the possession of another or a debt that has not been paid. Distributive justice is described as that type of justice that gives all people that which 'rationally' belongs to them. However, this type of justice does not have a correlative right of demand.[153] As examples, one can look at charity or gratitude. Thus, commercial justice he divides according to 'arithmetical proportion' or 'simple equity', whereas distributive justice he divides according to 'geometric proportion' or 'relative equality'.[154]

Law must thus agree with the rules of justice. This 'agreement' Huber labels 'equity'.[155] Equity can be both relative and universal. Relative in the sense that what may be fair and just in one case may not be so for another similar one, due to certain particular circumstances. This can be assimilated to the problem of having the rule of *laesio enormis* in place. However, some laws are universally equitable, that is, they apply across the board regardless of special

[151] For examples of natural lawyers who took equality of exchange to be a priority principle of contract law, see Zimmermann 265.
[152] D iii.
[153] Huber 1 1 1.
[154] Huber 1 1 2.
[155] *Ibid*.

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circumstances. This can be assimilated to the very essence of an interest rate ceiling.

Despite the fact that in the following case[156] Marais J was referring to the doctrine of *laesio enormis*, he seems to here capture the quintessential difference between the doctrine of *laesio enormis* and that of *in duplum*:

> [O]ne should not lose sight of the broad philosophy which permeates the modern Roman-Dutch law of contract. Speaking broadly, the central thesis is that seriously intended agreements, which are neither illegal, immoral or contrary to public policy and which have not been induced by misrepresentation or mistake common to the parties, will bind the parties to them and will be enforced by the Courts. Again, speaking broadly, the Courts have no inherent power to relieve parties of the obligations undertaken by them on the basis of appeals as *misericordiam* or nebulous appeals to 'equity'. The position is of course otherwise where the Legislature has deliberately stepped in to limit statutorily freedom of contract in any particular respect, or to place fetters upon the enforcement of particular provisions in contracts, or where the rule of law having the same effect has evolved clearly and unambiguously.

It is this very authority, the authority of the rule of law, which delineates the so far obdurate legislative and common law control over the amount of interest and interest accrued that may be levied on borrowers. This authority due perhaps to uncertainty of derivation and exactitude in application dwindled and dissipated in the area of price controls. Quite contrarily, this has not been the case with the *in duplum* rule and the control and limitation over interest rate charges. In effect there is a move towards more efficient codification of this area of law.[157]

While price control in South Africa is not applicable to most commodities, there are serious considerations in this regard when applying control over credit. In a credit agreement, that is, an agreement for the loan of money or deferment of the full price of goods made payable over time, there is usually inequality as between credit lender and credit borrower. This inequality does not exist in sale

[156] *Hurwitz & Others v Table Bay Engineering (Pty) Ltd & Another* 1994 3 SA 449.
[157] Consumer Credit Law Bill of 2004 and National Credit Bill, 2005.

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agreements. While the debtor is in need of the money or credit, the purchaser is not in the same position of need; nor is the seller for that matter. Furthermore, while a purchaser has the value that he has paid for in the form of the asset, which he can then sell for the same or more value, the debtor has less value for the credit he has 'paid' for – in the form of credit or a loan. In addition credit, due to its fragmentary nature, in the sense that money is often paid in instalments and susceptible to varying interest rates, makes it difficult for consumers to assess its cost. No amount of consumer education and campaigning can change that. The following statement with reference to interest rate caps from the Consumer Credit Law Review of August 2003 accurately depicts valid justifications in this regard:[158]

> The reality is that consumers cannot assess the real cost of credit and will hardly be in a better position after millions of rands have been spent on consumer education and after credit disclosure has been standardized and enforced. Interest for small loans will always be high. The enforcement of a cap requires technical provisions to ensure the disclosure of 'all in costs' at an annual rate, which became blurred where different loan repayment terms, bonuses and revolving credit creep in.

Further on, and in relation to codification, the Committee reports: '[i]t is important to codify the common law on usury. The only well-known requirement of the common law when it comes to usury is the *in duplum* rule'.[159] Hence one can understand the latest legislative endeavour to codify the rule in the Consumer Credit Bill. It is, however, mystifying why the rule, after its inception into South African common law in its classical and not 'Justinianic' interpolated form, was codified as the latter in the Consumer Credit Bill, 2004. This position has, however, been modified in the new National Credit Bill, 2005. In the following detailed discussion I hope to demonstrate the distinction between the classical and the 'Justinianic' understanding of the rule. In the discussion I shall also attempt to elucidate the rational behind the rule, in its present form, being adopted into the common law as it was construed in the classical period.

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[158] *Credit Law Review* August 2003, Summary of Findings of the Technical Committee, Department of Trade and Industry 8.
[159] *Ibid*.

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Chapter 3: The *In Duplum* Rule[160]

3.1 Introduction

It is now trite that the common-law *in duplum* rule forms part of South African law.[161] The rule effectively limits interest recoverable in terms of loan or credit transactions. It prevents unpaid interest from accruing further, once it reaches the unpaid capital amount. The rule differentiates between 'accrued' interest and 'arrear' interest.[162] 'Accrued' interest is all that interest which a debtor pays throughout the life of his debt; and 'arrear' interest is that interest which has remained unpaid and therefore accumulated. According to the rule, therefore, 'arrear' interest that is legally demandable (in terms of the agreement between the parties and within the legal limits set by statute) may not exceed the capital sum on which interest is due; and in this computation, what has already been paid by way of interest will not be reckoned.[163] A creditor is not, therefore, prevented by the rule to collect more than double the unpaid (or paid) capital amount in interest,[164] provided that, at no time he allows unpaid arrear interest to reach the unpaid capital amount. Should this augmentation occur, interest would then cease to run.[165] When the debtor, again, pays part of his debt, his payment has the effect of decreasing the interest amount and thereby reviving the running

[160] In *Commercial Bank of Zimbabwe v MM Builders (Pty) Ltd* 1997 2 SA 285 292, Gillespie J refers to the nomenclature '*in duplum*' being technically incorrect as the rule itself prohibits charging of more than twice the capital. The judge goes on to state that therefore the proper reference to this rule should in fact be '*ultra duplum'*. Although the rule prohibits more than double the capital, it *allows* less than double; and only prohibits beyond double the capital amount when the interest is in arrears. Coupled with the fact that the rule has, for many years, been referred to as the '*in duplum* rule', it is respectfully submitted that it would in effect not be detrimental to retain its original title. (Another attempt at renaming the *in duplum* rule can be found in *LTA Construction v Administrateur, Transvaal*, 1992 1 SA 473 (A) at 477F and 481I where Joubert J referred to it as '*ultra sortem*'.)

[161] *LTA Construction Bpk v Administrateur, Transvaal* 1992 1 SA 473 A; *Union Government v Jordaan's Executor* 1916 TPD 411; *Van Coppenhagen v Van Coppenhagen* 1947 1 SA 576 (T); *Stroebel v Stroebel* 1973 2 SA 137 (T); *Absa Bank v Leech & Others* 2001 All SA 55. The rule has also been described as a principle of South African banking law. (Itzikowitz AJ, *Annual Banking Law Update*: 23 April 1998 2).

[162] *Commercial Bank of Zimbabwe Ltd v MM Builders* 295.

[163] *Sanlam Life Insurance Ltd v South African Breweries Ltd* 2000 2 SA 647 652H-J.

[164] *Ibid*.

[165] Southwood J's in *Bellingham v Clive Ferreira* 1998 4 SA 382 401B-D comments in this regard are pertinent: 'I therefore conclude that under the Roman-Dutch law in force in Holland and Friesland the prohibition of interest *in duplum* was by 1613 limited to unpaid arrear interest and that the jurisprudential foundation for the restriction was the policy consideration that debtors whose affairs are declining should not be entirely drained dry while persons who contrive to look after their interest have no need of such relief. I am fortified in this conclusion by the passage from *Huber Praelectiones ad* D 22 1 28, which was quoted by Joubert JA in the original Latin in *LTA Construction Bpk v Administrateur, Transvaal*'.

of interest. Interest will run again until such time as it (arrear interest) again reaches the unpaid capital amount.[166] This is an important aspect of the *in duplum* rule and is often misinterpreted.[167] The prohibition on interest *in duplum* is not limited to money-lending transactions, but applies to all contracts arising from a capital sum owed, which is subject to a specific rate of interest.[168]

3.2 History

The *in duplum* rule has come a long way since its naissance in Roman law.[169] The rule traced back, in *Commercial Bank of Zimbabwe v MM Builders (Pty) Ltd*,[170] to the Digest[171] was stated as:

> *Supra duplum autem usurae, et usurarum, nec in stipulatum deduci nec exigi possunt: et solutae repetuntur…*

This is translated by Gillespie J as 'interest, and interest on interest, however, can neither be stipulated for nor recovered beyond twice the amount, and if paid, may be recovered'.[172] In *Union Government v Jordaan's Executor*[173] De Villiers JP expressed himself as follows:

> The Roman law is quite clear, and our law is based on the Roman law in this respect. This is what is said by the Code (4, 32, 27, 1).

[166] *Van Coppenhagen v Van Coppenhagen* 1947 1 SA 576 (T), here the plaintiff sued on a promissory note for £300 with interest at 10 percent per annum. The note had been due in February 1933; payments amounting to £54 had been made between 1943 and 1945. The plaintiff claimed interest in the sum of £300 and the court upheld this claim finding that after the last payment (in 1945) interest had started to run again and when summons was issued interest had reached the amount of unpaid capital.
[167] *Verulam Medicentre (Pty) Ltd v Ethekweni Municipality* 2005 2 SA (W). Interestingly enough in a recent judgment Classen R took a closer look at the cases surrounding the *in duplum* rule and made this distinction in his order. That is, he capped the already accumulated *arrear* interest and then ordered interest thereon (judgment debt), until date of payment. (*Meyer v Catwalk Investments 354 (Pty) Ltd en Andere* 2004 6 SA 107 TPA 120).
[168] *LTA Construction Bpk v Administrateur, Transvaal* 482J-483A; *Bellingham v Clive Ferreira & Associates CC and Others* 1998 4 SA 382; *Meyer v Catwalk Investments*.
[169] *Niekerk v Niekerk* 1830 1 Menz 452. (This case appears to be the earliest reported case of the application of the *in duplum* rule in Southern Africa); *Heydenrich v Du Preez* (7 CTR. 1); *Roberts v Booy* (4 EDC. 22) *Van Diggelen v Triggs* 1911 (Record No. 2709): in this case Watermeyer J applied the law as it was known in Classical Roman law and in the form which it was received in Holland and not with the variation by Justinian. *Oosthuizen and another v South African Railways and Harbours 1928 WLD 52*; *Van Coppenhagen v Van Coppenhagen* 1947 1 SA 576 (T).
[170] *Supra*.
[171] D 12 6 26 1.
[172] *Commercial Bank of Zimbabwe v MM Builders (Pty) Ltd* fn 1 292.
[173] 1916 TPD 413.

> "*Cursum insuper usurarum ultra duplum minime procedure concedimus*". Many of the authorities are to the same effect. *Groenewegen* says: "*Usurae non currunt ultra duplum*";[174] *Voet*: "*Sortem excedere non potuerunt usurae*". No interest runs after the amount is equivalent to the amount of capital. […] Under the circumstances, we must follow what appears to be the unanimous opinion based upon the Roman law, that the right is extinguished, that the interest does not run after it amounts to the capital sum.

Wessels[175] states that it is in fact a principle of our law that the *unpaid* interest may not exceed the capital amount. As authority, he states the 1886 case of *Taylor v Hollard*[176] where an agreement made to repay double the capital amount plus 8% interest thereon, was held by the High Court to be contrary to Roman-Dutch law. In 1920 Van Zyl J in *Solomon v Jearey*,[177] with *Van der Keessel*[178] and the *Du Preez*[179] case as authorities, affirmed that a creditor was not entitled to recover by way of arrear interest a larger sum than the capital amount of his debt.

The rule, however, has two historically divergent interpretations. The Justinianic understanding placed serious inroads into the autonomy of contracting parties as it prevented all interest, whether in arrears or not, to run beyond the capital amount loaned:[180]

> *Cum igitur leges nostrae nihil ultra duplum solvi velint: et nos in hoc tantum differentiam habeamus cum prioribus, quod illae quidem debita constituant usque ad duplum, si nulla particularis facta fuisset solutio: nos vero recipiamus, ut particulares etiam solutiones debita dissolvant, si usque ad duplum pertingant...*

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[174] Interest does not run beyond the capital amount.
[175] Wessels 2 21 580.
[176] 1886 2 SAR 78.
[177] 1920.
[178] *Th. Sel.,* 549.
[179] *Heydenrich v du Preez.*
[180] *Novella Constitutionis* CXXI Cap 2: Emperor Justinian to Basil, Governor of Tarsus. Translated by Gillespie J - 'Since therefore our laws intend that no payment should be made beyond the double, and since we differ to this extent from our predecessors, at least as to what debits might make up to the double, if no part payment made might so do: we repeat in truth that even payments in part discharge the debt once they attain the double'. (*Commercial Bank of Zimbabwe v MM Builders (Pty) Ltd* 293).

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However, the Classical interpretation of this rule allowed only the restriction on the accumulation of arrear interest:[181]

> *Usurae per tempore solutae non proficiunt reo ad dupli computationem. Tunc enim, ultra sortis summam usurae non exiguntur, quoties tempore solutionis summa usurarum excedit eam computationem.*

The Classical interpretation has been the favoured one as it also embodies a limitation on the creditor's capacity to extend the debtor's performance by allowing interest to accumulate, by placing the onus on the creditor to chase after his debtor within a specified time.[182] Roman-Dutch law has evidently received the Classical understanding of this rule[183] and it has since been absorbed into South African case law as such.[184] Huber[185] states in this regard:

> [I]n all fixed and defined matters interest cannot amount to more than double, that is, the value of the property in issue, and so much again.

Huber[186] also discusses the divergent views on *in duplum*. His reasoning as to why the old Roman law was adopted, as opposed to Justinian's interpretation of the rule, is insightful and much along the same reasoning as to why the South African courts have enforced the rule in that form:

> The States of Friesland, however, reintroduced the old Roman law by resolution of the year 1613, and that with good reason; for in curtailing interest the legislators have in view that debtors whose affairs are declining should not be entirely drained dry, while persons who contrive to look after their interest have no need of such relief; and, therefore, so long as the same is paid, it is not necessary to come to their rescue at the expense of the creditors,

[181] *Codex* 4 32 10 Emperor Antoninus Pius (AD 138-161) translated by Gillespie J as: 'Interest paid from time to time is of no assistance to the debtor in calculating the double. For then, whenever the amount of interest as paid from time to time exceeds this calculation, that interest is not considered to be beyond the sum of the capital'. (*Commercial Bank of Zimbabwe v MM Builders (Pty) Ltd* 293).
[182] Lubbe GF 'Die verbod op die oploop van rente *ultra duplum* – 'n konkretisiering van die norm van *bona fides*?' 1990 (53) *THRHR* 190.
[183] Simon á Groenewegen van der Made *De Legibus Abrogatis, ad Cod* IV 32 1 27 *'de usuris'* and Simon van Leeuwen *Censura Forensis* 1 4 4 35.
[184] Lubbe 1990 (53) *THRHR* 190.
[185] Huber 1 36 15.
[186] Huber 1 37 38-9.

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> but it is enough that this should happen after the cessation to pay interest has begun to reveal the distress of the debtors.

In the *Commercial Bank of Zimbabwe*[187] case this was said to be not only the preferred, but also the more sensible view. While it permits the lender to insist on regular servicing of the loan, it does not affect his right to recovery of interest and simultaneously does not allow him to permit a burdensome amount of interest to accrue against the debtor, should he (the creditor), 'tolerate fiscal indiscipline'. The classical perspective alarmingly did not appear to have been the selected view in the recent Consumer Credit Bill.[188] Should this understanding have succeeded in a subsequent act or in interpretation, it could, as will be seen in the ensuing discussion, have caused problems in terms of availability of finance for seeking debtors and may have proved especially disruptive in the home-loan sector.

In 1972, the *in duplum* rule was succinctly summarised by the Transvaal Provincial Division:[189]

> In our law there is considerable authority for the statement that interest may not exceed the amount of the capital itself, as soon as the interest reaches an amount equal to the capital the interest ceases to run, if the accrued interest or a part thereof is paid, it starts to run again, but again only until it is again as high as the capital.

The *in duplum* rule, in this very formula, has since appeared again and again in South African case law: *Bellingham v Clive Ferreira & Associates CC and Others*;[190] *Administrasie van Transvaal v Oosthuizen en 'n Ander*;[191] *LTA Construction v Adminstrateur, Transvaal*;[192] *Standard Bank of South Africa SA Ltd v Oneanate Investments (Pty) Ltd*;[193] *Commercial Bank of Zimbabwe v MM*

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[187] 294E-F.
[188] Clause 76 of the Consumer Credit Bill of 2004. See in this regard Chapter 5 below. Also to be noted is the new form of the *in duplum* rule in the National Credit Bill, 2005.
[189] *Stroebel v Stroebel* 1973 2 SA 137 (T).
[190] *Supra*.
[191] 1990 3 SA 387 W.
[192] *Supra*.
[193] 1995 4 SA 510 CPD.

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Builders & Suppliers (Pty) Ltd;[194] *Standard Bank of South Africa SA Ltd v Oneanate Investments (Pty) Ltd (in liquidation)*;[195] *F & I Advisors (Edms) Bpk v Eerste Nasionale Bank van SA Bpk*;[196] *Commissioner for SA Revenue Service v Wouldige*;[197] *Sanlam Life Insurance Ltd v South African Breweries Ltd*;[198] *Georgias v Standard Chartered Finance Zimbabwe Ltd*;[199] and *Absa Bank Ltd v Leech*.[200] This rule is thus, now, trite law. The following statement from the *LTA Construction*[201] case is of particular importance:

> The prohibition of interest *in duplum*, *viz.* that interest may not exceed the capital sum, has been applied in a long list of cases in South African law. It is anything but an anachronism and is part of our daily economic life where it fulfils a useful function of aiding debtors in financial difficulties. There is no available authority for the proposition that the prohibition *in duplum* has been abrogated.
>
> Nothing is more wholesome than the quoted rule not to go above the double, provided that we know how much the single is; for if that is uncertain, we must follow the evidence, subject to the prudent check of the Judge.

The fact that the rule is well established,[202] as can be seen, is not in doubt. However, it is submitted that the rule cannot be viewed as a simple determination of what 'the single is'. Rather, the rule is augmented by interesting and sometimes very complex developments of the common law, associated with its ancillary and subsidiary regulations. These are discussed in the following pages

3.3 Appropriation of Payments

A debtor who owes to the same creditor more than one debt may indicate, expressly or tacitly, when making payment, how such payment is to be

[194] 1997 2 SA 285 (Z).
[195] 1998 1 All SA 413 (A).
[196] 1999 1 SA 515 (A).
[197] 2000 1 SA 600 (C).
[198] 2000 2 SA 647 (W).
[199] 2000 1 SA 126 (Z).
[200] *Supra*.
[201] 472.
[202] Despite the single attempt by the Witwatersrand Local Division to declare the rule abrogated by misuse, per Southwood J in *Bellingham v Clive Ferreira* 402A.

allocated.[203] The creditor is not always bound to accept the payment on the terms upon which it is tendered.[204] Where the debtor does not appropriate the payment, the creditor gains the right to do so.[205] The creditor can appropriate the payment provided that he does so immediately and that he communicates his decision to the debtor within a reasonable time. The creditor does not have an unlimited right; he must act equitably.[206]

If neither the debtor nor the creditor appropriates the payments, the courts are guided by residual rules developed by the common law, unless the parties have expressly or tacitly excluded one or more of these rules.[207] The common-law principle is to appropriate payments first to the debt that is most onerous to the debtor.[208] When capital and interest are due on a debt, the payment or periodical instalment must be accredited first to interest and then, if not exhausted, to capital.[209] This common-law rule is trite and is applicable unless there is agreement between the parties to the contrary, and the rule is applicable whether or not the running of interest is affected by the *in duplum* rule. This is an exception to the rule that appropriation should favour the debtor.[210] If instalments on loans were not so appropriated, the debtor would in fact be able to obtain a double benefit: firstly, he would be able to decrease his principal debt (capital) very rapidly while, simultaneously, he would be able to invoke the protection of the *in duplum* rule.

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[203] D 46 3 1; Wessels 2 38 2285.
[204] *Stiglingh v French* 1892 9 SC 386 at 411; *Brink NO v The High Sheriff and Others* 1895 12 SC 414 420.
[205] D 46 3 1; Wessels 2 38 2287.
[206] D 46 3 1; D 46 3 3, 4, 5, 7, 97, 103; Grotius 3 39 15; Voet 46 3 16; Van der Linden 1 18 1; *Watermeyer's Executor v Watermeyer's Executor* 1870 Buch 69; *Macrae v First National Bank Co Ltd* 1927 AD 62 66-7; *South African Metropolitan life Assurance Co Ltd v Ferreira* 1962 4 SA 213 (O) 217; Wessels 2 38 2288.
[207] Voet 46 3 16; Wessels 2 38 2306-2313; *Ebrahim (Pty) Ltd v Mahomed and Others* 1962 1 SA 90 (D) 97-100; Christie 498.
[208] Wessels 2 38 2307; *Wolhouter v Zeelderberg* 1885 3 HCG 437 441; *Standard Bank of South Africa SA Ltd v Oneanate Investments (Pty) Ltd* 572.
[209] *Bank of Africa v Craven NO* 1888 5 HCG 112 118; *Brink NO v The High Sheriff* 420; Van Coppenhagen v Van Coppenhagen 1947 1 SA 576 (T) 582; *Western Bank v Ltd v Adams* 1975 4 SA 648 (C) 655E; *Western Bank Ltd v Lester and McLean and Others* 1976 3 SA 457 (SE) 466D-E; *Western Bank Ltd v Woodroffe and Others* 1976 1 SA 482 (N) 488D-F; *Standard Bank of South Africa SA Ltd v Oneanate Investments (Pty) Ltd* 573; *Trust Bank of Africa v Senekal* 1977 2 SA 587 (W); Christie 500.
[210] Christie 500.

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The issue of appropriation of payments came before the court both in *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd*[211] and on appeal in *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)*.[212] In the court *a quo* Selikowitz J examined an English law principle known as the rule in *Clayton's* case.[213] In the *Clayton case* the court held that in the case of current accounts the ordinary residual rules of appropriation are replaced by the rule that credit items or payments go to the reduction of the earliest debit first, more commonly known as the first-in-first-out principle. Selikowitz J found that the rule developed in *Clayton's* case could not be faulted:[214]

> The rule in *Clayton's case* involves no apparent disadvantage to the customer. Each advance is a separate debt which is repayable on demand and the interest on such debt is payable as soon as it is debited […] As compound interest is charged by calculating interest on the cumulative balance of the capital and accrued interest, the effect of the application of the rule in *Clayton's case* upon the debtor's liability to the bank does not cause any real prejudice to the customer.

The only difficulty which Selikowitz J recognised with the application of the *Clayton* rule, was with regard to instances where the *in duplum* rule came into operation. Since, as stated above, when interest on the unpaid capital has reached an amount equal to it, then the effect of applying the *in duplum* rule would be to give the debtor a double benefit. The example of the cessation of R 1 000 arrear interest having accrued from an unpaid capital amount of R 1 000 is apt. If the debtor pays to the creditor R 100, and the *Clayton* rule were to be applied, then R 100 would reduce the capital amount. At the same time the *in duplum* rule would take effect with the implicative consequence of the creditor only being able to recover R 1 800 in total, R 900 in capital and an equal R 900 in interest, which could not exceed the capital. In effect this would mean that the debtor has benefited double that which he has paid, that is R 200 from payment

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[211] *Supra*.
[212] *Supra*.
[213] *Devaynes v Noble; Clayton's case* 1816 1 Mer 572.
[214] *Standard Bank of South Africa SA Ltd v Oneanate Investments (Pty) Ltd* 574-5.

of only R 100. The next payment by the debtor would have much the same effect and the first-in-first-out rule would prevent interest from running after payment, as the *in duplum* rule intrinsically instructs. Selikowitz J held that the law could not tolerate such a situation, especially in light of the fact that the application of these residual rules was 'intended to do justice between the parties where neither of them has exercised his right to appropriate payment'.[215] The courts view was to the effect that justice demanded that, where no appropriation of payment was effected by the parties and the *in duplum* rule had taken effect, then any payments made should be appropriated to the interest first only before it appropriated to the capital.

> I would add that any attempt by the debtor to appropriate any part of his payment to capital while the *in duplum* rule has frozen interest is inequitable and ought not to be permitted.[216]

The rationale behind the court's decision for the deviation from the *Clayton* rule when the *in duplum* rule takes effect on a debt was due to the fact that interest begins to run again whenever the outstanding amount of interest drops below the unpaid capital. Selikowitz J went on to state that a creditor bank could ensure that payment offsets the interest first when the *in duplum* rule is operative but that even where such creditor fails to make the appropriation, the common law ought to step in and appropriate the payment to the outstanding interest, so that the interest may run again, at least until *in duplum* takes effect again.[217]

Conversely, the Appeal decision took a very different view with regard the matter. Zulman JA was in accord with the view in *Commercial Bank of Zimbabwe*,[218] which held that two distinguishing features were to be found in *Clayton's* case. The first was, that the facts of the case established a system of accounting

[215] 575.
[216] *Ibid*.
[217] 575. Selikowitz J went on to say: 'In my judgment, therefore, in the absence of effective appropriation by the customer or the bank, the rule in Clayton's case applies in our law to current accounts with banks for so long as the account is not affected by the *in duplum* rule. As soon as – and for so long as –the *in duplum* rule suspends the further running of interest, all credits to the account should be appropriated to pay interest before they are applied to pay the capital. I am convinced that in today's world of computerisation, where the banks in this country have taken the lead in computerising their accounting processes, there can be no difficulty in implementing the scheme of appropriation which I have found applicable. After all, it is in their interest to do so.'
[218] 316H-317A.

involving a passbook being issued to the customer where the bank was shown as debtor, the customer as creditor and, which contained two columns for chronological, entries on each side, of transactions effected. Secondly, the debits in *Clayton's* case were all capital debits. This differentiated from the *Oneanate*[219] case in that the facts *in casu* did not involve two competing debits nor was there a simple accounting divide between debits and credits. The principle in the *Clayton*[220] case was held to be a presumption of fact in two earlier cases,[221] with Zulman JA concurring. The facts in the *Oneanate*[222] case were held not to support any presumption of facts akin to those in *Clayton's* case:

> Once one accepts that the Clayton rule amounts to no more than the presumption of fact, there is no warrant for its adoption in the present case. In any event nothing is to be derived from the way in which banks keep their books to support a factual presumption of the type contended for. The evidence led at the trial reveals no more than that banking practice is to calculate interest accrued on a daily balance and then simply to add it monthly to previous balance owing so as to reflect a single balance figure from which deposits made to the account are deducted.

Zulman JA went on to quote Gillespie J[223] stating that his remarks 'apply with equal force to our law:'[224]

> Properly examined, it seems to me that the rule in Clayton's case cannot possibly apply to our law and practice of banking so as to justify the appropriation of credits in an overdrawn account first to capital and then to interest accrued. As regards law, this is because the distinction must be drawn between the situation of competing debits relating to capital and interest accrued on the same debt'.

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[219] *Supra*.
[220] *Supra*.
[221] *Commercial Bank of Zimbabwe v MM Builders* 318B: 'The important principle once again is that the so-called rule in *Clayton's* case is no more than a factual presumption arising from the general circumstances pertaining to the keeping of a current account by a banker in the absence of any express appropriation by either party'. And Lord Atkinson in *Deeley v Lloyds Bank Ltd* 1912 AC 756 (HL) 771: 'It is no doubt quite true that the rule laid down in Clayton's case is not a rule of law to be applied in every case, but rather a presumption of fact, and that this presumption may be rebutted in any case, by evidence going to shew that it was not the intention of the parties that it should be applied'.
[222] 429H-I.
[223] *Commercial Bank of Zimbabwe v MM Builders* 318B-D.
[224] 429J.

The comments of Wessels[225] regarding the rule in *Clayton's* case were held not to be applicable in the above case, as the author's remarks were not made in the context of the appropriation of interest debits but only where there are capital debts of different ages.[226] The Court concurred with the view in the *MM Builders* case[227] that the rule of appropriation would be better stated as appropriation to interest first and then to capital, as opposed to appropriation to the most onerous or the most burdensome debt first.[228] Zulman JA[229] then turned to analyse the difficulty, identified by Selikowitz J, in applying the *Clayton* rule when the *in duplum* rule comes into effect. Zulman JA[230] found that the qualification to the rule, which Selikowitz J used to try and overcome the incompatibility between the two rules, would be rendered unnecessary if the 'clear rule' of the common law and appropriation of payments first to interest then to capital was applied, where neither debtor nor creditor had so appropriated.

3.4 Whether Interest Accrues to Original Capital Amount or Reduced Capital Amount

Commercial Bank of Zimbabwe v MM Builders & Suppliers[231] examined the question 'whether interest accrues until it reaches the amount of capital originally advanced or whether, in the event of reduction of capital by partial payments, it accrues only to the amount of the capital outstanding'.[232] The manner of formulation of the rule adopted in Roman times, does not suggest that interest

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[225] Wessels 2 38 2310.
[226] Wessels was here referring specifically to current accounts between debtor and creditor, in which case there exists a possibility of prescription and thus the *Clayton* rule would then apply: 'The reason is because the parties intend that the current account should be kept alive, and thus the creditor would not allow if the debtor could appropriate the payments to the later items and so cause the earlier ones to be prescribed.' (*Ibid*)
[227] 318H.
[228] 430C-D. Where a debt produces interest, the money paid must be applied in the first instance to the payment of the interest and then to the capital. (C 8 42 43 1); *Bank of Africa v Craven* NO 1888 5 HCG 112) Even if the payment is made on account of principal and interest, law will appropriate it first to the interest and then to the capital (D 46 3 5 3). If no mention is made of the principal, but only of the interest, the surplus after paying the interest will nevertheless be appropriated to the capital (D 46 3 102), provided the capital is then due. (Wessels 2 38 2308)
[229] 430H-I.
[230] *Ibid.*
[231] *Supra.*
[232] 298 F.

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should be charged on a notional amount, even though the original capital amount had been reduced by payment.[233]

This was the understanding of the rule noted in *Niekerk v Niekerk*,[234] which case was referred to with approval in *Commercial Bank of Zimbabwe,*[235] where the court accepted that the limit to which interest will be accrued is the unpaid capital amount. This formulation was deemed correct, as it would allow for 'consistency of application of the rule in both cases where there is an advance of a single lump sum, and in other cases, such as bank overdrafts, where the amount of capital outstanding may be susceptible of constant variation, whether upwards or downwards'.[236]

Consequently, the only rule that can apply is that interest stops running when it is equal to the capital amount outstanding.

3.5 'Capitalisation'

In *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd*,[237] the plaintiff bank attempted to blur the effect of the *in duplum* rule by arguing that the practice of banker's is to 'capitalise' unpaid interest by periodically adding it to the capital sum owed, with the result that it becomes part of the capital and thereby forever loses its identity as interest.

Two possible meanings of 'capitalisation' have been distinguished.[238] These are capitalisation in a 'broad sense' and capitalisation in a 'literal or narrow sense'. Capitalisation in its broad sense is a process whereby interest due by a debtor for

[233] *Ibid*.
[234] *Supra*.
[235] *Ibid*.
[236] 298H-299A.
[237] 560 B-C.
[238] 560 G-I.

a previous payment period is added to the existing balance owing by that debtor for the purposes of calculating the interest due in the subsequent period:[239]

> In this sense it connotes nothing more than the charging of compound interest –interest on interest. The adding of the debited interest to the outstanding balance is here simply an accounting convenience to avoid a more cumbersome process of recording unpaid interest and unpaid capital in separate columns.

The second meaning of capitalisation, that is capitalisation in its narrow sense, is the process whereby a debt for unpaid interest is substituted by a new debt for capital. In this situation the interest liability ceases to exist and only the substituted capital becomes owing:[240]

> Juridically, narrow or literal capitalisation can only occur if the creditor, instead of pursuing his claim for unpaid interest, agrees to advance to his debtor – albeit only notionally- an amount of capital sufficient to enable the debtor to discharge his interest debt. When this occurs the debit which is added to the balance represents a fresh advance of capital rather than unpaid interest.

Since South African courts have traditionally looked to English law for guidance in matters of banking, and since, until *Oneanate*,[241] the treatment of capitalisation of interest had not been directly considered, Selikowitz J[242] investigated the English authorities on the matter. The court concluded that the present state of English law regarding the term and practice of 'capitalisation' is that it is a way of merely signifying the charging of compound interest: [243]

> The traditional form in which banks account to their customers is merely the convenient and businesslike manner of reflecting the charging of compound interest; that capitalised interest does not lose its character as interest by being capitalised; and that capitalisation in its narrow literal sense involves a fiction which lost

[239] *Ibid*.
[240] 560J-561A. Selikowitz J appeared to be referring to a novation. As will be seen below on the discussion on novation, it is submitted that, just as waiver of *in duplum* may not occur with regards a normal contract of loan, so should it not occur once the allowable maximum interest charged has been exceeded, in terms of a novation; unless certain criteria have been met.
[241] *Supra*.
[242] 565H-J.
[243] 565I-J.

> its significance and utility after 1854 and to which the Courts have never been willing to give substantial effect.

South African usury legislation has never outlawed the charging of compound interest: previous prohibitions by the old authorities having been abrogated by disuse.[244] Compound interest may be charged provided that it has been expressly agreed upon or acquiesced to by the customer, thus rendering a provision for compound interest enforceable.[245]

In *Rooth & Wessels v Benjamin's Trustee and the National Bank Ltd*[246] Innes CJ and Selikowitz J in *Oneanate*[247] took similar views on the matter, notwithstanding that the *Rooth & Wessels* case concerned a different set of facts. The latter judgment examined the extent of a preference in insolvency enjoyed by interest on a bond. Innes CJ was of the opinion that although the contract contained terms that intimated capitalising the interest on a monthly basis, the interest, in the court's opinion, still retained its character as interest, whether compounded or not.[248] Similarly, Selikowitz J concluded that interest remains interest and does not lose its character to become capital due to a bookkeeping exercise done for convenience and practicability.[249]

On appeal Zulman JA in *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)*[250] case was again faced with argument by counsel that in fact banking practice is to capitalise interest, thereby making it lose its character as interest, and become capital. Counsel argued that the practice was long established, notorious, reasonable, certain and it did not

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[244] *Natal Bank v Kuranda* 1907 TH 155 171; *Davehill (Pty) Ltd and Others v Community Development Board* 1988 1 SA 290 (A) 298G-299A.
[245] Christie 594; *National Bank of SA v Graaf and Others* (1904) 21 SC 457 461; *Standard Bank of SA v Kaplan* 1922 CPD 214 216; *Baliol Investment Co (Pty) Ltd v Jacobs* 1946 TPD 260; *Boland Bank v The Master* 1991 3 SA 387 (A) 388F-I.
[246] 1905 TS 624.
[247] *Supra*.
[248] 633-4: 'But it is urged that the present rule should not be applied in this case, because the bonds contain a special clause that interest shall be capitalised every month, from which it follows, it is said, that no more than one months interest can be preferent. In other words, that during the first month after insolvency interest up to the 30th of the months is preferent, but after that date it is not preferent, but becomes capital, and so on during the second month. I do not follow that contention. That clause is merely a provision for compound interest, which is none the less interest because it is compound'.
[249] 572A-D
[250] *Supra*.

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conflict with the positive law. The view of the court was to find that the pleaded legal effect (that interest becomes capital due to banking practice) was in conflict with a rule of positive law[251] – here the *in duplum* rule – which the parties could not and cannot by agreement or conduct waiver.[252] The following principle from *Golden Cape Fruits (Pty) Ltd v Fotoplate*[253] is pertinent. Corbett J examined the circumstances where a trade usage would be implied into a contract and found, *inter alia*, that before a trade usage will be implied, it cannot 'conflict with positive law in the sense of endeavouring to alter a rule of law which the parties could not alter by their agreement'. While parties can and often do agree to vary tacit terms that would otherwise be implied into their contract, they cannot 'validly contract illegally'.[254]

Thus, Zulman JA found that the practice of capitalisation of interest by bankers and financial institutions could not result in interest losing its character[255] for the purposes of *in duplum*. In conclusion he quoted the court *a quo*:[256]

> Words like 'capitalisation' are used to describe the method of accounting used in banking practice. However neither the description nor the practice itself affects the nature of the debit. Interest remains interest and no method of accounting can change that.

If lenders were to be allowed to 'employ the expedient of a book entry to convert what is interest into capital' it would afford them an easy way to avoid the effects of not simply the *in duplum* rule but also of the Usury[257] and Prescription Acts,[258]

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[251] *Freeman v Standard Bank of SA Ltd* 1905 TH 26; *Golden Cape Fruits (Pty) Ltd v Fotoplate* 1973 2 SA 642 (C); Christie 185 &188.
[252] See discussion below on waiver.
[253] *Golden Cape Fruits (Pty) Ltd v Fotoplate.* Note also Bristowe J's comment in *Freeman v Standard Bank* 33*:* 'And I need hardly say that a local usage cannot overrule the general law.'
[254] Christie 188.
[255] He dismissed the argument by counsel that the dicta in *Du Toit v Barclays Nasionale Bank Bpk* 1985 1 SA 563 (A) 586D-H was in support of the submission that once interest is capitalised it loses its distinguishing attribute as interest. According to Zulman JA the remarks were not intended to be of general application, but applied only to the particular facts of that case. He found these remarks to be *obiter* and in so far as they were inconsistent with the finding of the court a quo on the matter and those in the *MM Builders* case, incorrect. (829G-H)
[256] 427.
[257] *Supra*.
[258] 828-9.

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thus it can only be that '[w]hen interest is compounded it remains interest'.[259] The rule is based on public policy and amongst other things its function is to protect the debtors from exploitation by creditors and therefore could not be altered by banking practice.[260] Both Selikowitz J and Gillespie J have been commended for rejecting the fallacious and technical argument advanced by the banks in each case.[261]

3.6 Overdrafts and the Effects of the In Duplum Rule thereon

In *Commercial Bank of Zimbabwe v MM Builders*[262] counsel for the plaintiff argued that despite all that was found in the *Oneanate* case,[263] the *in duplum* rule should not apply in cases of bank overdrafts. The argument contended that bank overdrafts were different from loans in that they are provisions for a facility where money is drawn, rather than where money is being advanced. These monies advanced in an overdraft facility are not advanced simultaneously, but from time to time up to the limit of the facility. Each debit against the facility is viewed as a separate loan. Counsel submitted that just like every cheque, drawn on the facility, implied a separate loan, so were all bank charges, *inter alia* ledger fees, commissions and so on, and that all these 'loans' were totalled up at the end of each day and shown as an amount owed by the customer to the bank, and that at the end of the day the amount owing by the customer was not a number of separate loans but a single amount. On such outstanding amount, interest was charged and at the end of the month debited to the account. From this, counsel concluded that just as the abovementioned charges are loans to the customer by the bank, so too is the interest debited, a loan to the customer by the bank. Gillespie J found that counsel was essentially attempting to persuade the court that the *in duplum* rule cannot apply to overdrafts, since overdrafts do not attract

[259] 572C; *Pfeiffer v First National Bank of SA Ltd* 1998 3 SA 1018 (A) 1032C, and see Christie 594.
[260] 828D-E.
[261] 'It is encouraging that such a formalistic argument was not allowed to succeed'. (Itzikowitz AJ *Annual Banking Law Update* 9).
[262] 303E.
[263] *A quo*.

interest but only 'augment by successive capital debits'. He quickly disposed of this contention in the following manner:[264]

> This argument requires me to find that interest is capital. There may be those silvertongued orators who prove that black is white, but I am unable to hold that the argument advanced on this point is valid. There is fallacy in the submission that the charges are loans – they do not constitute advances to the customer, they are debits in respect of charges for services. The fallacy is repeated in the suggestion that debits for interest are loans to the customer. There is incoherence in the assumption that a debit as to interest accruing on amounts outstanding is jurisprudentially indistinguishable from a debit arising out of moneys advanced or a debit constituting charges for services. The snake swallows its tail when the conclusion is reached that interest is capital.

Selikowitz J in *Oneanate*[265] arrived at much the same conclusion:

> [T]here is no basis for saying that the interest debited by a bank to an overdrawn current account and added to the total amount outstanding loses its character as interest and becomes capital or anything else. The debit balance shown in a customer's bank statement is made up of separate debits, each one which has its own separate identity and origin. Some arise from money's lent and advanced, other's from the bank's service charges or commissions, still others from taxes or even from the sale to the customer of stationery such as cheque or deposit books. The lumping together of all the amounts which are owed to the bank and which remain unpaid does not change their origin or their nature.

The above two judgments were cited with approval by Zulman JA in the *Oneanate*[266] case on appeal. Thus, one can quite confidently conclude that interest does not lose it character as such due to book-keeping practices, this is applicable to normal loans and to overdraft facilities: the policy ground forming the basis of the rule remains, in these instances, protected.

However, what should be discussed is the matter of the applicability of the *in duplum* rule in cases of each successive 'loan' drawn on overdraft accounts. If

[264] 304B-D.
[265] 572A-D.
[266] *Supra*.

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there is no date specified for the repayment of the loan amount and interest, then interest could run to the double of that particular loan. The solution can be found in two rules of law, the first being the common-law rule that instructs, when there has been no agreement, payment made by the debtor to decrease interest first and then capital.[267] The second is that the *in duplum* rule specifies that interest stops running when interest reaches the capital amount due only if interest is in arrear (due and payable).[268]

Once established that the *in duplum* rule only becomes operative when interest is in arrears, an analysis of the nature of overdraft accounts is necessitated. Overdraft accounts are granted in two ways: firstly there may be an automatic overdraft to a client dependant on his/her credit history, or, secondly, the client may organise the overdraft through application subject to approval by the banking institution. The client may decrease his overdraft amount by fixed-amount monthly instalments[269] by agreement with the financial institution. A client who has a reason for requesting an overdraft, for example he/she is in the process of selling property and at the same time purchasing another, in which case he requires the overdraft to finance the purchase and which overdraft amount he/she will quash when the money from the sale is effected for example on transfer,[270] will be able to contract such terms with the financial institution.[271] Furthermore, an overdraft account is distinguished from a loan account. If the financial institution grants an overdraft of, for example R 100 000, and the debtor only makes use of, or borrows R 20 000, he will only be charged interest on the amount loaned, that is R 20 000 and not on the full overdraft amount. If he or she should make successive withdrawals, then each such withdrawal will be subject to interest.[272] In a loan account, the debtor pays interest on the full capital amount loaned.

[267] See the discussion in section 3.3 *supra*.
[268] See the discussion section 3.10 *infra*.
[269] Whether by fixed amounts, or percentage of the amount due.
[270] Another example is the client needs the finance immediately but will within say six months be able to repay the overdraft amount, as they shall receive finance from elsewhere for example work bonus.
[271] The Controlling Officer of Absa Bank, Mpumalanga (Interview May 2005).
[272] *Ibid*.

As can be seen from the above, each overdraft transaction is determined contractually between lender and borrower. The effects of the *in duplum* rule may be regulated, again, with reference to the arrear and accrued interest concepts. If it is agreed that a debtor may be granted an overdraft repayable within six months with interest (as in the example of the simultaneous property sale and purchase) and interest becomes due only when the capital loan amount is due, then interest accrues and not arrears. Therefore the interest augmenting on the overdraft (or any part of the overdraft), equals the amount loaned (or becomes greater than the initial amount) then it will not be subject to the *in duplum* rule. However, should the debtor and the financial institution contract that the debtor must pay the interest owing on the overdraft in instalments, then interest which accumulates due to non-payment will be subject to the *in duplum* rule, as this interest is in fact arrear interest.

With regard to which overdraft amount the *in duplum* rule is applicable to, differentiation between the overdraft amount approved and the overdraft amount actually utilised is again necessary. Staying with the above overdraft example of R 100 000, if the debtor draws R 20 000, his debt is in fact only R 20 000, his capital amount owing is R 20 000 and interest is only charged on this amount. Therefore, it is submitted that if interest accumulates and it is in arrears, the *in duplum* rule would come into effect when the arrear interest reaches the unpaid capital amount which, in this example, would be the actual borrowed amount of R 20 000 (assuming that the capital amount has not been decreased by any instalments).[273]

[273] A further and equally interesting debate, which Wessels (2 38 2310) considers, is the issue of prescription on each successive 'loan' or individual debited amount. His discussion and reference on the *Clayton* case are interesting but the nature of this dissertation does not allow for a fuller discussion at this point. See the comments in fn 226 above.

3.7 Interest During the Litigation Process and after Judgment

A further issue that was discussed and decided in *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)*[274] was whether interest stops running in accordance with the *in duplum* rule where the amount of unpaid interest reaches the amount of the unpaid capital during the course of litigation instituted by the creditor to enforce payment of the debt. The court found that the *in duplum* rule is not applicable in respect of arrear interest accruing after the creditor has commenced proceedings to enforce payment of the debt.[275] The reasons given by Zulman JA,[276] for the view taken, were as follows: -

> It appears as previously pointed out that the rule is concerned with public interest and protects borrowers from exploitation by lenders who permit interest to accumulate. If that is so, I fail to see how a creditor, who has instituted action can be said to exploit a debtor who, with the assistance of delays inherent in legal proceedings, keeps the creditor out of his money. No principle of public policy is involved in providing the debtor with protection *pendente lite* against interest in excess of the double … a creditor can control the institution of litigation and can, by timeously instituting action, prevent the prejudice to the debtor and the application of the rule. The creditor, however, has no control over delays caused by the litigation process'.

It is submitted that exactly because the *in duplum* rule is, as stated by the court, concerned with the public interest, that its scope should not be limited in terms of the public policy issues which it seeks to protect and which it has been held to protect. The rule should therefore not be perceived as only protecting borrowers from exploitation by lenders. In addition, it prevents the over-extending of debtors by limiting their liability in terms of debt. Whether action has been instituted or not, the *in duplum* rule should take effect, since as will be seen that once judgment is granted, the interest immediately begins to run on the judgment debt. This in effect means that a creditor in whose favour a judgment is granted, recovers[277] his capital outlay, interest thereon (which is not necessarily limited to

[274] *Supra*.
[275] See also Sharrock *Business Transactions Law* 301.
[276] 834.
[277] Except in the case of the insolvent debtor.

double, as paid instalments do not fall under the *in duplum* umbrella), *mora interest* and costs in the matter. While it is true that the creditor cannot control delays caused by litigation, the two-pronged policy effect of the *in duplum* rule should be considered and the debtor should be protected from incurring an unforeseen and burdensome amount of interest, especially in light of the fact that judgment, as shall be seen, will cause interest to run on the whole judgment debt.

With regard to the debt, once judgment has been granted in favour of the creditor, the question to be posed is twofold: firstly, whether the interest, which commences to accrue upon a judgment debt for an amount of capital together with interest that has attained the double, itself is subject to the *in duplum* rule; and, secondly, if the interest on the judgment debt is subject to the *in duplum* rule, whether arrear interest on the judgment debt ceases to accrue when it amounts to the original principal (capital) sum or only when it reaches the amount of that principal together with the accrued interest also awarded as part of the judgment debt, that is on the whole amount outstanding in terms of the judgment debt.

An ancillary point, but a nevertheless crucial one, in order to effectively answer the questions posed above, is the determination of the date from when interest is to be calculated, whether from the date of judgment (the *in duplum* rule not applicable), or (retrospectively) from close of pleadings. In ancient Roman law *litis contestatio* brought about a novation of the debt and thus interest ran anew at close of pleadings.[278]

In *Stroebel v Stroebel*[279] the contrasting views of Van der Keessel and Huber were compared on the issue. Huber states:[280]

> After the debtor is obliged by judgment to pay capital and interest, the interest runs anew, until it is again equal to the capital, but this

[278] Itzikowitz AJ, *Annual Banking Law Update* 1998 2.
[279] 1973 2 SA 137 (T) 139A-E.
[280] Huber 1 3 37 & 40; Huber makes reference to Carpzovious, *Definitiones Forenses*, part 2, const 30, def 28 n2.

> does not occur on *litis contesatio* except if the debtor by malicious tricks has delayed the pleading for a long time and this is proven.

Van der Keessel, on the other hand, refers to the whole doctrine in *Praelectiones* 1178[281] and says:

> It is however alleged that this rule permits an exception in respect of interest which accrues *pendente lite* and somewhere I found it recorded that such a decision was given by the *Hooge Raad*.

Cillié JP[282] gave preference to the statement by Huber; and this preference was followed in *Administrasie van Transvaal v Oosthuizen en 'n Ander*.[283]

The effect of novation is said to extinguish the original debt and therefore to extinguish accessory obligations.[284] However, two forms of novation have been identified by the courts:[285] voluntary novation (contractual) and compulsory novation, judgment falling within the latter category. Notwithstanding the above case law, to view judgments in all circumstances as having the effect of novation has been held by the Supreme Court as being somewhat of an 'artificial view'.[286] The following are relevant examples: judgment for the balance of the price under a hire-purchase contract leaves the rest of the contract, for example the right to claim the return of goods or the right to claim damages, intact[287] and although a party who has cancelled or rescinded a contract cannot thereafter claim

[281] Afrikaans translated by Gonin, vol. iv 239.

[282] *Stroebel v Stroebel* 294: 'I think that preference should be given to the statement of Huber and Carpzovious because they are consequent and clearer than that of Van der Keessel. According to them the judgment is the reason for interest starting to run and the time when it starts to run. The granting of interest *pendente lite* is also excluded (subject to one exception) for good reason.

[283] 397 E-H. This particular judgment was of interest in this regard because the case involved an arbitration award. In a counter application the second respondent requested that the arbitrator's award be made an order of Court. However the applicant had paid the amount of the award together with interest up to the amount of capital and contended that as interest could not exceed capital he had complied with his obligations. The second respondent contended, *inter alia*, that interest commenced anew after 'judgment' i.e. that it ran again after the award. The Court however held that the award of an arbitrator was not a 'judgment' and interest accordingly did not recommence after the award.

[284] Kerr 544.

[285] *Swadif (Pty) Ltd v Dyke NO* 1978 1 SA 928 (A) 940-1 where Trengrove AJA stated: 'Wessels, 2 38 2370, points out that although the two forms of novation had a common origin in the early days of the Roman law, they are at present juridically quite distinct. Although a judgment was regarded as a form of novation under Roman-Dutch law, it appears to have been generally accepted that its consequences differed materially from those of a voluntary novation'. Seen also *Weltmans Custom Office Furniture (Pty) Ltd v Whistlers CC* [1997] 3 All SA 467 (C) 472C-E.

[286] Per Fannin J in *Trust Bank of Africa Ltd v Dhooma* 1970 2 SA 304 (N) 310; his view accepted by the Appellate Division in *Swadif supra*.

[287] *Gatenby v Hilton Motor Repairs (Pty) Ltd* 1955 4 SA 412 (N) 418; Christie 527.

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performance, the reverse is not true and cancellation may be claimed after a claim for performance has been granted through judgment, but has not been satisfied.[288] Thus, despite Wessels'[289] view that 'when one party institutes an action against another the judgment always and sometimes *litis contesatio*, brings about a *novatio necessaria',* modern law has since changed. It is now clear that a judgment does not always have the effect of *novatio necessaria* and despite the fact that *litis contestatio* may have had this effect in Roman law[290] it does not have the same result today.[291]

In *Trust Bank of Africa v Dhoom*[292] the court remarked that the judgment debt is not novated in all circumstances. However, Fannin J stated that in some cases this is precisely the effect of a judgment. Only when the purpose of a judgment is to enable a plaintiff to enforce his rights, should the judgment more realistically be regarded as reinforcing the rights and not as a novation. 'The right of action will have been replaced by a right to execute, but the enforceable right remains the same'.[293] It is, however, submitted that for the purposes of a judgment sounding in money the judgment debt should be regarded as a *novatio necessaria*, as judgment is one of the only instances where capital and interest dissolve into a single body, thereby losing their identities as capital and interest and becoming a single amount for the purposes of interest accrual in terms of the judgment debt.

After close inspection of the above-mentioned modern progression of novation, Gillespie J[294] observed that there is even less cause today, than in Huber's day, to regard interest as commencing afresh from the time of *litis contestatio*. Joubert[295] followed the Van der Keessel viewpoint, but this contention was refuted in a later judgment,[296] on the basis that Joubert neither cited Huber's view

[288] *Sarann Furnishers (Pty) Ltd v Brink* 1966 3 SA 48 (N) 50-51.
[289] Wessels 2 38 2371.
[290] D 46 2 29.
[291] Christie 528.
[292] 310.
[293] *Ibid*.
[294] Gillespie J in *MM Builders* 300A-B.
[295] *Law of South Africa* v 15 1996 291.
[296] *MM Builders* 300B-D.

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in this regard, nor the reasoning for the preference taken by Cillié JP in *Stroebel v Stroebel*[297] over Van der Keessel in coming to his conclusions.[298]

Turning back to our original questions; the view taken by the Court in *Stroebel v Stroebel*[299] is that interest which begins to run afresh once judgment is given ceases to accrue once it reaches the amount of capital upon which judgment was given. In coming to this conclusion Cillié JP[300] relied on a translation of Voet by Horwoord:[301]

> It is further submitted that the Court would not grant a prayer for future interest, whether due *ex mora* or *ex conventione*, upon the whole amount of a judgment debt, made up of principal and interest. Future interest will run only upon that part of the judgment debt which consists of the principal sum due. If conventional interest runs only upon the principal after judgment, in spite of the necessary novation of the whole debt, it is difficult to see why conventional or mora interest should ever run upon the whole amount of the judgment debt.

However, Gillespie J was not convinced of this view. He stated in his judgment that the old authorities expressed in a definitive way so as to leave no doubt that the *in duplum* rule applies to interest accruing after judgment. He thus refuted Cillié JP's view that interest ceased once it reached the principal amount after judgment.[302] Gillespie J based this conclusion on the fact that the above translation by Horwood was not in fact *Voet's* own viewpoint, but Horwood's.[303] Furthermore, it was reasoned that the inference that interest running afresh on the judgment debt, was based on the view that judgment in these cases brought

[297] *Supra*.
[298] Gillespie J leaves open the issue whether, in the event of 'evil devices' of the debtor, interest may commence to run afresh from *litis contestatio*. He states in this regard at 300E-G: 'I ask myself: "What sort of evil devices? When would they have to be perpetuated? If before joinder of issue, why would interest run only from joinder of issue? If after joinder of issue, why should interest run retroactively from the earlier date? Most importantly -what is it about *litis contestatio*, as that expression is understood in our law, which would provide a theoretical basis for it to be the date from which interest should run?" I do not favour the notion that interest could run from it in the event of improper machinations by the debtor, but I prefer to leave the question open'.
[299] 139.
[300] *Ibid*.
[301] Book XXII, translation Horwood; note to Title 1 para 10.
[302] The principal amount being that capital amount first loaned to the debtor.
[303] 301B-D.

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about a *novatio necessaria* of the original debt.[304] In the event of a novation of this type, the learned judge foresaw no basis warranting a distinction to remain between capital and interest on the judgment debt.

Moreover, Gillespie J pointed out that whether or not Horwood's view was correct or not at time of writing, the Prescribed Rate of Interest Act 55 of 1975[305] altered the position. This was pointed out in the case of *Davehill (Pty) Ltd and Others v Community Development Board.*[306] This act provides that every judgment debt that would otherwise not bear any interest after the date of the judgment, shall bear interest from the day on which such judgment debt is payable, unless that judgment or order provides otherwise. The act also provides that where interest accrues on a debt and no law or agreement as to the rate of interest is available, it shall then accrue at the prescribed rate.[307] In conclusion Gillespie J in *MM Builders* states:[308]

> [T]he result of this investigation is such as to persuade me that it is a principle firmly entrenched in our law that interest, whether it accrues as simple or compound interest, ceases to accumulate upon any amount of capital owing, whether the debt arises as a result of a financial loan or out of a contract whereby a capital sum is payable together with interest thereon at a determined rate, once the accrued interest attains the amount of capital outstanding. Upon judgment being given, interest on the full amount of judgment debt commences to run afresh but will once again cease to accrue when it waxes to the amount of the judgment debt, being the capital and interest thereon for which cause of action was instituted.

To find, that despite a judgment debt including an amount of interest accrued on the debt in question (whether compounded or not) and despite that there is a

[304] 301A-B.
[305] Section 2(1).
[306] 1988 1 SA 290 (A).
[307] S 2 (1) and 1(1) of the act respectively. The following sections are also of interest in that they confirm that interest in fact does accrue on a judgment debt. '(3) In this section "judgment debt" means a sum of money due in terms of a judgment or an order, including an order as to costs, of a court of law, and includes any part of such a sum of money, but does not include any interest not forming part of the principal sum of a judgment debt'.
[308] 303B-E.

novatio necessaria in pronouncing judgment,[309] a notional capital amount would, as the learned judge stated, amount to an 'absurd inconsistency'.[310]

3.8 Waiver and Novation

A waiver consists of an abandonment of an existing right.[311] It is a unilateral decision not to avail oneself of 'a right or a remedy, a privilege or power, an interest or benefit'.[312] A distinction exists between waiving a right created by a contract and waiving a benefit laid down by law. In the latter case, public policy may prevent the waiver of a certain benefit even though the parties agree that it be waived. Kerr[313] refers specifically to the *in duplum* rule as a situation where public policy does not in fact allow waiver. Novation, on the other hand, is a means of replacing an existing obligation by a new one and thereby extinguishing the old one provided both new and old contracts are valid.[314]

A court may not order interest in contravention of the *in duplum* rule, just as it cannot order payment of usurious interest. However, a court will not *mero motu* determine whether the rule has been contravened, nor will it act on grounds of mere suspicion.[315] In *F & I Advisors*[316] the court likened the issue of recognising the applicability of the *in duplum* rule *mero motu* to that of a claim in breach of s 2(1) of the Conventional Penalties Act 15 of 1962, whereby the recovery of damages, in addition to or instead of a penalty clause, is prohibited. A debtor cannot by prior agreement waive these rights, but where a defendant neglects, for whatever reason, to raise such a defence it does not follow that a court would

[309] That is pertaining specifically to the amount owing in terms of the judgment debt.
[310] *Ibid*. An interesting point is to be found in *Ebrahim (Pty) Ltd v Mahomed* 1962 2 SA 183 (N) 189-190 where it was held that the rule that holds that interest is payable before capital applies only to interest-bearing debts and not to judgment debts on which *mora* interest is payable. (See also Christie 500).
[311] Farlam & Hathaway *Contract Cases Materials* 420.
[312] *Road Accident Fund v Mothupi* 2000 4 SA 38 (SCA) para [15]; Kerr 464.
[313] Kerr 469.
[314] Christie 521ff.
[315] *F & I Advisors (Edms) Bpk v Eerste Nasionale Bank* 1999 1 SA 515 (SCA); *Senekal v Trust Bank of Africa Ltd* 1978 3 SA 375 (A); Schultz WG, 1999 11 *SA Mercantile Law Journal* 112.
[316] *Supra.*

have to do so on its behalf, or 'to manufacture it from fragments of evidence'.[317] The court in this case, went further to hold that while it is the duty of the court to raise a point of illegality *mero motu*, even if the defendant had not raised it, a court could only do so where the illegality appeared *ex facie* the document or from the evidence before the court. Thus, the duty of the court to uphold the law and moral standards only arose when the facts were clear and all evidence had been placed before it.[318] It is submitted, however, that once the court's attention is drawn to the transgression, whether a right has been waived or not and whether by settlement or not, the court should uphold the law and not the illegality.

The general rule, as stated above, is that a person may waive his rights conferred by law solely for his benefit.[319] However, a person may not waive his rights where public as well as individual interests are concerned.[320] In the *Leech and others v ABSA Bank Limited*[321] case the following statement was considered:

> But when public policy requires the observance of the provision it cannot be waived by the individual. *Privatorum conventio juri publico non derogat*. Private contracts are not permitted to render sufficient between themselves that which the law declares essentially insufficient or to impair the integrity of a rule necessary for the common welfare.

[317] *F & I Advisors* 525E-G/H.
[318] *F & I Advisors* 525H/I-526A & C and 519A-B: '[T]he settlement which the parties had reached was specifically aimed at excluding disputes about the *quantum* and there was, as a result of the way in which the matter had been conducted up to that stage, no clear evidence that the *in duplum* rule had indeed been breached'.
[319] D 50 17 38: *Quibilet potest renuntiare juri pro se introducto*.
[320] *Morrison v Anglo Deep Gold Mines Ltd* 1905 TS 755 781-2; *Ritch & Bhyat v Union Government (Minister of Justice)* 1912 AD 719 734-5. Authority for this, stems from C 2 3 29; Grotius 3 24 6.
[321] 1997 3 All SA 308 (W). The trustees claimed from the bank an amount of money, which they had paid to the bank, and which they alleged was in part an accumulated amount of interest, which was in excess of a capital sum that had previously been loaned to the trust. The bank conceded this but averred that by subsequent agreement the trustees had waived the benefits of the *in duplum* rule. Even though the court found that there had been a waiver of the rule, it found against the bank on the ground that the rule was founded on public policy and therefore could not be waived.

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The question that both the judges in the *Leech*[322] and the *MM Builders*[323] case were faced with, was whether the *in duplum* rule is intended to serve public or individual interests. Despite both cases having been heard in the same year, it appears that the two judges, when ruling, were not aware of each other.[324] Both decided the matter independently, without reference to the other and arrived at the same conclusion. Boruchowitz J, in the *Leech*[325] case, examinined the policy principles underlying the in *duplum* rule and quoted various authorities which, it is submitted, are relevant for our purposes. Huber[326] explained that the purpose of the rule is to ensure that debtors are not 'endlessly consumed by charges' and that those debtors whose affairs are declining should not entirely be 'drained dry'. Lubbe[327] examines the rule and concludes:

> Die oogmerk van die klassieke reeling was dus om a spesifieke vorm van benadeling, naamlik die uitbuiting van 'n skuldenaar se onvermoë om reëlmatig te betaal, teen te werk.

Boruchowitz J recognised the great emphasis which should be placed on the influence of credit and interest law in the consumer field and beyond, stating that 'usury legislation is governed and has a strong social, economic and moral basis'.[328] In this regard he quotes the following lengthy, but pertinent segment concerning the common law, by Grové:[329]

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[322] *Supra*. In *ABSA Bank v Leech and others* 2001 4 All SA 55 (A) the decision in the court *a quo* was reversed, however the basis for the reversal of the decision was that the respondents, in leading evidence of several witnesses in an attempt to prove its submission that the payment had been made in the mistaken belief that it was owing, had in fact proved that the amount in question, was paid because the respondent trustees thought it to be beneficial for the trust. Per Streicher JA at 61F-G: 'The evidence established conclusively that the reason the sum of R 4, 125m was paid was not because of a belief on the part of the trustees of the Trust that it was owing. The Trustees agreed to pay that amount, and paid the whole amount of it in order to benefit the Trust. It is true that a portion of the sum of R 4, 125m was considered to be owing but, on evidence, it cannot be said that that portion was more than R 2 362 068, 66, being the amount which, according to the respondents, was the maximum amount, which could have been owing by the trust in view of the operation of the *in duplum* rule. It cannot therefore be said that any portion of the amount in excess of R 2 362 068, 66 was paid in the belief that it was owing'. It is submitted that the public policy rationale which lie behind the enforcement of the rule are not based on the reasons for paying an amount of arrear interest over the unpaid capital. If the rule is breached, as a matter of public policy, it should be enforced.

[323] *Supra*.

[324] Schultz WG 1999 11 *SA Mercantile Law Journal* 115.

[325] *Supra.*

[326] Huber 1 37 38; see also *LTA Construction v Administrateur, Transvaal* 428G.

[327] Lubbe 1990 53 *THRHR* 193.

[328] *Leech v Absa Bank Limited* 313.

[329] Thesis RAU 1989.

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> Alhoewel die sake wat die gemeenregtelike posisie met betrekking tot woeker behandel, almal ouer as tagtig jaar is, is genoemde sake heeltemal in pas met moderne kontrakregtelike beginsels. In *Taylor v Hollard* het regter Kotzé tot die gevolgtrekking gekom dat waar partye op 'n buitensporige finansieringskostekoers ooreenkom, so 'n koers regtens verminder kan word omdat dit nie in die openbare belang is om koerse van die aard af te dwing nie.
>
> Buitensporige koerse het egter nie nietigheid van 'n kontrak tot gevolg nie. 'n Hof is bevoeg om 'n beding met betrekking tot finansieringskoste slegs gedeeltelik af te dwing. Hierdie benadering is in ooreenstemming met die uitspraak van die appèlhof in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*. Alhoewel laasgenoemde beslissing oor die juridiese geoorloofdheid van 'n kontraktuele verbod op mededinging gehandel het, word aan die hand gedoen dat die regspolitieke oorwegings waarop genoemde beslissing gebaseer is, ook van toepassing gemaak kan word waar die hef van oormatige finansieringskoste ter sprake is.
>
> Dit beteken dat die openbare belang die toetssteen bly waar die vraag beantwoord moet word of 'n ooreengekome finansieringskostekoers buitensporig is.

Boruchowitz J concluded that the *in duplum* rule cannot be waived by borrowers by means of contractual provision,[330] because its purpose is to protect debtors from exploitation by lenders. This very protection is afforded to debtors as a matter of public policy. The rationale, as seen above, is that the rule is in existence to protect *all* borrowers from exploitation by lenders.[331] The protection afforded to the debtor in such cases has been perceived as a necessary one.[332] The *in duplum* rule cannot, furthermore, be waived by banking practice, this, also a public policy decision based on the same rational as above.[333]

[330] *Commercial Bank of Zimbabwe v MM Builders & Suppliers (Pvt) Ltd; Leech & Others v Absa Bank Limited (W); Standard Bank v Oneanate Investments (in Liquidation) and F & I Advisors (Edms) Bpk v Eerste Nasionale Bank.*

[331] *LTA Construction Bpk v Administrateur, Transvaal; Standard Bank v Oneanate Investments (in Liquidation).*

[332] *Commercial Bank of Zimbabwe v MM Builders & Suppliers (Pvt) Ltd* 321F-G; Schultz WG 1999 11 *SA Mercantile Law Journal* 114.

[333] *Morrison v Anglo Deep Gold Mines Ltd* 1905 TS 755*; Ritch & Bhyat v Union Government (Minister of Justice)* 1912 AD 719.

In his analysis, Lubbe, suggests that the *in duplum* rule falls under the *naturalia* of a contract of loan, and could possibly be capable of exclusion by agreement. Lubbe goes on to say that there may be circumstances where the aim of a particular *naturale* is of such a compelling nature and that its exclusion would amount to such a glaring injustice that public policy would require a limitation of the parties' right of freedom of contract.[334] This view was considered, but ultimately rejected by the court in *Leech v Absa Bank*.[335] *Naturalia* or implied terms are those terms that are connected with or that flow naturally from a specific contract.[336] These are not normally implied if they conflict with the actual or presumed intention of the parties.[337] Thus Boruchowitz J concludes:[338]

> The purpose of the rule would clearly be undermined if it were merely one of the *naturalia* of a contract of loan, capable of exclusion by agreement. Significantly Prof Lubbe himself cautions that an attempt to exclude the operation thereof by means of a contractual provision may in appropriate circumstances be regarded as contrary to public policy.[339]

Gillespie J, in the *MM Builders* case,[340] similarly (and, it is submitted, sagaciously) opined that an agreement seeking to waive the *in duplum* rule in advance would be contrary to the policy background, formulated to protect the debtor who has not properly serviced his loan from facing an 'unconscionable claim' for arrear interest, and to enforce sound fiscal discipline upon a creditor. On this policy reasoning a loan that is properly serviced would not fall foul of the *in duplum* rule. A creditor who does not extend credit to a bad risk or who calls

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[334] Lubbe 1990 53 *THRHR* 200-1; translated from the Afrikaans by Schultz WG 15.
[335] *Leech v Absa* 314.
[336] Vorster JP *Implied Terms in the Law of Contract in England and South Africa* 18: 'All legal rules ought in final analysis to be justified by reference to some considerations of policy. In practice, however, it is usually unnecessary for a court to justify in this way its decision to recognise a rule of law. This is because it is generally assumed that a rule which has legislation or precedent as its source is based on sound considerations of policy. It is usually only necessary to advert expressly to policy considerations if it is argued that an existing rule should be changed or if a dispute has arisen which is not covered by statute or precedent. These general remarks apply equally to legal incidents, which are after all legal rules. Every legal incident of any kind of contract should be based on the policy considerations which are relevant to the kind of contract in question.'
[337] *Alfred McAlpine and Son (Pty) Ltd Transvaal Provincial Administration* 1974 3 SA 506 (A) 531E-F
[338] *Leech v Absa* 314.
[339] The topic of implied terms is not a small one and has Vorster identifies in his Thesis implied terms are a subject in the law of contract which have provoked much judicial disagreement (p 1). Christie identifies various types of implied terms namely: terms implied by law, terms implied by trade usage, terms implied from the facts.
[340] 321F-H.

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up his debt at a proper time (when the loan is not being serviced), or so soon thereafter as would be reasonable in the circumstances, would not suffer from an application of the rule. Therefore it was concluded by that court, and it is submitted correctly so, that to allow an agreement in advance waiving the rule would leave these abuses unchecked.[341] The prohibition of the waiver of *in duplum* is an instance where public policy requires an invasion into the autonomy of the contracting parties to regulate their affairs.

As far back as 1886 in the case of *Taylor v Hollard*,[342] Kotze CJ had arrived at the same conclusions, (again) based on policy decisions. He stated:

> This Court will refuse to enforce, to its full extent, a contract made by our citizens, in which double the amount advanced, with interest, is stipulated for, not so much in protection of the promissor, but because to countenance such proceedings would be contrary to good morals, the interests of our citizens, and the policy of our law.

The courts thus disallow waiver. If left unchecked, waiver of the *in duplum* rule would inevitably become a standard clause in all loan agreements.[343] This would leave a debtor, who is in need of a loan, obliged to sign an agreement 'waiving his or her right to *in duplum*' – without full knowledge of and/or understanding of the consequences thereof. Such debtor may later find himself charged 'overreachable' amounts of interest. The authentic purpose of the *in duplum* rule would in this way be effectively wiped away.

It has, however, been held that the parties may, after the debt is called up, agree to a novation of the debt.[344] In these situations a new contract of loan arises, comprising of the capital and the accrued interest (which may or may not have accrued to equal the amount of capital). In essence capitalisation of the interest would occur and the parties will agree to new terms and conditions for the servicing of the 'new' capital amount. The court remarked that such novation

[341] *Commercial Bank of Zimbabwe v MM Builders & Suppliers (Pvt) Ltd* 321D-H.
[342] *Taylor v Hollard* 1886 2 SAR 78 83.
[343] Which, with larger financial institutions, are often standardised, with little or no room for negotiation by the debtor who ultimately finds himself in the weaker bargaining position.
[344] *Commercial Bank of Zimbabwe*.

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would amount to a true capitalisation of the interest, and that this is often the practice of many merchant banks. This practice stems from the old Roman agreement of *anatocismus*,[345] being an agreement which proved a useful evasion device for Roman credit lenders. It was used to avoid the restrictions of interest on interest (*usurae usurarum*) being charged. This agreement amounted to a mere capitalisation of the interest from the previous debt in order to begin charging interest on the 'new' debt, which comprised of capital plus interest.[346]

It has been held that this type of renewal, when it occurs with the full knowledge and understanding of both parties when the debt is called-up, is acceptable. This is distinguished from waiver of the rule in advance, in that a novation leaves the debtor with a choice of either increasing his indebtedness or of preventing the accrual of further interest by the *in duplum* rule.[347] It is, nevertheless, important to note that simply because the debtor novates after the debt is called up, he may not necessarily be informed of his right to induce the *in duplum* rule and thereby stop the running of interest.[348] It is submitted that it is in fact a mere assumption that a debtor makes an *ex post facto* 'informed' decision regarding his rights. The question is how, by not allowing a debtor to waive his right to *in duplum* at the initiation of the contract, but allowing him to waive his right after the debt has been called up, alter the public policy basis of the rule? How do public interest considerations, which are supposed to here be protected, fall away after the debt has been called up? The following from Christie[349] is relevant: '[t]o allow an illegal or unenforceable contract to be validly novated would be to allow the parties to evade the prohibition of the law'.[350]

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[345] The transaction was called *versura*, and could be concluded orally or in writing. Only Justinian prohibited *anatocism* (C 4 32 28; C 7 54 3); Zimmermann 169.
[346] Schultz WG 1999 11 *SA Mercantile Law Journal* 114.
[347] *Commercial Bank of Zimbabwe* 321B – D.
[348] Christie 523. The case of *Darymple, Frank & Co v Schochat* 1972 2 SA 15 W 17 is also relevant.
[349] *Ibid*.
[350] The rule is there as a protective measure, however a compromise may very well be a better option for a debtor who would otherwise be facing sequestration by that creditor. Because the creditor is being forced into a corner as to the amount of interest he can collect on the amount he loaned to the debtor in terms of the *in duplum* rule he may very well take the option of sequestrating rather than limiting his interest. Concurrently the creditor would have to consider the costs of sequestration which he may have to bear.

It is submitted that the debtor should be entitled to novate *if* he is properly informed of his choice *and* if any arrear interest which exceeds the capital amount, is caused to fall away.[351] A simplified scenario would explain: Debtor 'D' owes creditor 'C' R 10 000, in capital plus R 10 000 in arrear interest. D does not service his debt and C does not approach D in this regard; the capital plus interest amounting to R 25 000. C now approaches D and states that should D not pay his debt, he (C) will institute action against D. C and D agree to novate. What terms can D and C novate on? It is these very terms of novation that should be directed by the same public policy based rationale. For that reason, it is submitted, that C should be entitled to capitalise the arrear interest, but only that arrear interest which he is legitimately entitled to: that is the R 10 000. Thus, C should be compelled, upon novation, to abandon the R 5 000. C may then start charging interest on the 'new' capital amount of R 20 000. Interest would start running afresh on the 'new' capital amount loaned as agreed upon by the parties. In this way neither the debtor nor the creditor are severely prejudiced and the public policy basis of the rule is not neglected.

This method allows the public interest dynamic to remain intact: C should have insured that D serviced his debt or otherwise instituted action before arrear interest amounted to unpaid capital. If C neglected do this, the *in duplum* rule would come into operation preventing D from being endlessly consumed by charges (a novated debt is still a debt) and ensuring that D's affairs are not entirely drained dry.[352] Disclosures of the terms of credit transactions form an important aspect of consumer-credit protection.[353]

[351] The judgment of Gubbay J in *Georgias v Standard Chartered Finance Zimbabwe Ltd* 2000 1 SA (ZSC) 126 140 is relevant: 'Where there is a dispute about moneys owing and the debtor, knowing that he cannot be forced to pay accrued interest over the double for good cause, agrees to settle his obligations and pay the creditor a sum which includes or embraces such interest, he has put himself outside the purpose of the rule.' See also the discussion on compromise below.

[352] *Leech v Absa Bank Ltd* 313; *Sanlam Life Insurance Ltd v South African Breweries Ltd* 2000 2 SA 647 653I-J.

[353] S 2(9); 3(1), (2) & (2A) of the Usury Act and s 5(1)(b) & (h) and Chapter 5 of the National Credit Bill, 2005.

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3.9 Compromise

The court in *Georgias v Standard Chartered Finance Zimbabwe Ltd*[354] considered the applicability of the *in duplum* rule in cases where there is a compromise between the parties. Christie[355] defines compromise in the following manner:

> [T]he settlement by agreement of disputed obligations, whether contractual or otherwise. Even a criminal charge may be settled by compromise by the process known as plea bargaining, and the resulting compromise agreement will be enforceable. If there is no dispute there can be no compromise. It is a form of novation differing from ordinary novation in that the obligations novated by the compromise must previously have been disputed or uncertain, the essence of compromise being the final settlement of the dispute or uncertainty. Unlike a novation, a compromise is binding on the parties even though the original contract was invalid or even illegal.

In the *Georgias*[356] case the respondent bank initiated proceedings against the appellant based on three hire-purchase agreements and a lease. The banks sought against the appellants jointly and severally payment of Z$ 1 256 954, 70: the amounts for the hire-purchase agreements plus interest at 45% from 30 April 1993 to date of payment, which amounted to Z$ 1 187 707, 10. The lease was for an amount of Z$ 252 600 plus interest at 44% from 27 February 1993 to date of payment. The parties carried on discussions, during 18-20 November 1996 and reached a settlement which was then submitted to the Judge and incorporated into the order. In terms of the settlement, the appellants agreed to pay the respondent the sum of Z$ 4 351 269, 77 with interest at 40% from 1 January 1997 to the date of payment. In March 1997 the appellants applied for a rescission of judgment on the basis that a final agreement had not been reached, and that in the event of the court finding that a final agreement had been reached, the judgment breached the *in duplum* rule and therefore fell to be set aside on that ground.

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354 1380.
355 529.
356 *Supra*.

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The Supreme Court found that the appellants had failed to show that a final agreement had not been reached by 20th November 1996.[357] The issue of the application of the in duplum rule, however, had to be considered within the dimensions of the compromise, which had taken place between the parties. Gubbay J of the Supreme Court differed from Blackie J in the court a quo, with regard to the rule. The court a quo stated that the onus was on the applicants to show that the consent to judgment had been entered on an amount which contravenes the provision of the in duplum rule. Gubbay J followed the same line as the obiter dictum of Gillespie J in *Commercial Bank of Zimbabwe*[358] where the court was of the opinion that an ex post facto novation concluded knowingly by freely contracting parties would not be objectionable. The scope of compromise was defined, in the *Georgias*[359] case, as follows:

> The settlement by agreement of disputed obligations, or of a lawsuit the issue of which is uncertain. The parties agree to regulate their intention in a particular way, each receding from his previous position and conceding something – either diminishing his claim or increasing his liability. The purpose of compromise is to end doubt and to avoid inconvenience and risk inherent in resorting to the methods of resolving disputes. Its effect is the same as *res judicata* on a judgment given by consent. It extinguishes *ipso jure* any cause of action that previously may have existed between the parties, unless the right to rely thereon was reserved. As it brings legal proceedings already instituted to an end, a party sued on a compromise is not entitled to raise defences to the original cause of action. But a compromise induced by fraud, duress, *justus error*, misrepresentation, or some other ground for rescission, is voidable at the instance of the aggrieved party, even if made an order of court. Unlike novation, a compromise is binding on the parties even though the original contract was invalid or even illegal.

Gubbay J[360] contemplated the public policy consideration behind the *in duplum* rule and identified two main objectives; being protection of the debtor against exploitation; and enforcement of sound fiscal discipline on the creditor. He concluded, much the same as Gillespie J,[361] that waiver of the rule in advance

[357] 136J-137A.
[358] *Supra*.
[359] 138I-J.
[360] 139F-G.
[361] *Commercial Bank of Zimbabwe v MM Builders*.

could not be sanctioned; but that an *ex post facto* compromise involved different considerations. The court held that in a dispute involving money, where a debtor, knowing that he could not be forced to pay arrear interest over the double agrees to settle his obligations and pay the creditor a sum, which includes such interest, puts himself outside the purpose of the rule. The court thus concluded that such debtor will then no longer be exposed to the 'perceived evils, which the rule is formulated to combat'; and thus not being so exploited, he would no longer require protection against himself; as he would be making an informed choice.

The court emphasised that if the creditor was able to secure himself such a compromise, the policy of the law was not being defeated. As, it was reasoned, to allow him to rely on the new agreement would not amount to an avoidance of the enforcement of sound fiscal discipline against him.[362] The new agreement which the creditor secures entitles him to recover the money, while the 'rule which disadvantaged him due to his dilatoriness is not being breached'. His right of recovery is based on his securing the compromise:[363]

> In short, where an obligation to pay accrued interest in excess of the unpaid capital is included in a compromise, the public policy behind the original cause no longer applies.

The court referred to the *Leech* case[364] stating that according to the facts there might well have been a compromise by the trustees[365] and that instead the decision had been approached from the point of view of a purported waiver.[366] Gubbay J then moved on to find an analogy in the decision in *Dennis Peters Investments (Pty) Ltd v Ollerenshaw and Others*[367] where an acknowledgment of debt by the defendant had been given as a settlement pursuant to plaintiff's

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[362] The learned Judge contrasted this case with the policy basis of recovery of betting debts being unenforceable. A compromise of such a debt would still breach the public policy element. 'A gambling debt always remains just that. Its essential character or the public policy behind it is not altered by its being the subject of a compromise'. (139J-140B).
[363] 139G-J.
[364] 312G-H
[365] Gubbay CJ sates at 140D-E that at 311d and 312e-f of the *Leech* case: 'The facts seem to show however, that there might well have been a compromise by the trustees.'
[366] This decision and *obiter* comment on the *Leech* pronouncement came a year before the appeal, which reversed that decision. However, the appeal court also did not consider whether there had been a compromise. (G*eorgias* 140D-E).
[367] 1977 1 SA 197 (W)

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claims. Defendants alleged that the money lent by plaintiff to them was in contravention of the Limitations and Disclosure of Finance Charges Act 73 of 1968, and thus usurious in nature. The judge, in this case, refused to go behind the settlement, even though the defendant contended that the original *causa* was invalid. The judge found that the loan itself was not invalid but merely that the finance charges above the permitted rates that could not be recovered, and furthermore that even if the loans were invalid, such invalidity would not affect the subsequent transaction or compromise.[368]

Gubbay J[369] emphasised the importance of the reasoning by the judge in the above-mentioned case, that is, that even if the defendants had been charged usurious interest rates as alleged and 'contrary to law and offensive to good morals and public policy, the learned judge was not prepared to go behind the acknowledgment of debt'. It was held that the sanctity afforded to the implementation of a compromise could not be overlooked as this also was also a matter of public policy.

The issue appeared to be the balancing of two mutually exclusive public policy issues, the one being the sanctity afforded to compromise and the second being the public policy basis for the implementation of the *in duplum* regulation of interest. These two policies are directly opposed to each other and the courts appear to have chosen the former as the weightier. Thus, the sanctity of compromise is preserved over the control of interest in accordance with the *in duplum* rule.[370]

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[368] *Dennis Peters Investments (Pty) Ltd v Ollerenshaw* 202H-203A.
[369] *Absa Bank Ltd v Leech* 140I-J.
[370] In the abovementioned decision the debtor knew that he could have made use of the *in duplum* rule but still chose to compromise with the creditor. The question remains open whether, if the debtor does not know that the *in duplum* rule is available to him; his compromise thereafter circumvents him from relying on the rule. It is suggested that the same considerations as in an *ex post facto* novation should be contemplated. 'The Roman orator, politician, philosopher and part-time jurist Cicero writes in *De officiis* 3 17 that it is contrary to nature, which he held to be a source of law, to make a profit from the ignorance of another'. (Thomas J 2002 (65) *THRHR* 247 248).

3.10 Lump-sum Payments

The issue that has, as yet, not come before the Supreme Court of Appeal, but has, to some extent, been considered by the Witwatersrand Local Division, is that of lump-sum transactions. The lump-sum payment with regard to the *in duplum* rule can be explained by using a simple example: A loans B R 3 000 000. The terms of the agreement are that B, without having to service the loan on a monthly basis, must pay back the loan, plus interest at a later or stipulated date. The question posed is whether the rule will have an effect on this type of transaction, if at the time that the loan plus interest is called up, interest amounts to more than the capital amount. Both the interests of the debtor and the investments of the creditor must be considered and protected.

In *Sanlam Life Insurance Ltd v South African Breweries Ltd*[371] the court was faced with what appeared to be an issue of a lump-sum payment plus interest. The case concerned the applicability of the *in duplum* rule to the calculation of the price the respondent had to pay the applicant for the acquisition of immovable property after the applicant decided to exercise a 'put' option contained in an agreement between the parties. Before the conclusion of this agreement, the applicant had entered into a lease agreement in respect of the same immovable property with Ok Bazaars Ltd (the tenant). The lease was of an indefinite duration subject to 12 months notice by either party. It did, however, require the applicant to expend a 'capital outlay' (being R 3 811 369) in order to acquire and develop the property. The tenant's successor gave written notice of termination of the lease, at which point the applicant decided to exercise his right in terms of the agreement and 'put' the property to the respondent against payment of an amount equal to the 'capital outlay' as defined in the lease plus interest at 10% per annum compounded annually from the day of commencement of the said lease to the date of transfer of the property to the respondent. The total amount claimed by the applicant was R 28 851 000.

[371] *Supra*.

The respondent contended that, based on the *in duplum* rule, it was liable only for the capital amount expended on the premises plus the interest thereon not exceeding the capital amount, being a total of R 7 622 738.[372]

The applicant contended that the respondent's indebtedness only arose when it gave notice to the respondent that it intended to exercise the put option, and therefore there was no question of arrear interest in the calculation of the sum it claimed from the respondent and consequently the *in dupum* rule did not apply. It was also demonstrated that because the respondent had never had access to the applicant's assets or its funds or capital, the 'interest' component of the sum due under the agreement was not 'interest' in the sense of remuneration payable by a debtor to a creditor, nor was it fruits of the capital.[373]

The court concurred with this viewpoint, stating that the term 'interest' as intended when considering the *in duplum* rule, is the price of making money available (loan or credit) or the penalty for not paying what was owing on the date when payment was due. The court found that the 'interest' agreed upon had simply been a means upon which to fix what the parties considered to be a fair price for the property if the lease was cancelled within the 25-year period referred to in the agreement between the parties with regard to the tenant. Blieden J held that there was no question of any party being so unduly disadvantaged that public policy principles had to be invoked.[374]

The court reiterated that the *in duplum* rule was confined to arrear interest alone and that the purpose of the rule was to protect debtors from having to pay more than double the capital owed by them at the date on which the debt was claimed, and not to punish investors who were entitled to more than double their investment because the addition of interest to their capital investment would produce such a result. Public policy would not prevent an investor who had invested his money over a period of time and who by agreement had delayed

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[372] 379.
[373] 650I-653A.
[374] 655B-D.

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receiving the fruits thereof from getting more than double his money.[375] The court distinguished the present case from the *LTA Construction*[376] and *Niekerk*[377] cases, where the interest was in arrears. In the present case the interest was at no time in arrear, but was to be calculated as future interest in the relevant time period involved.

It is submitted that perhaps the learned judge being of the strong opinion that 'the effect of the *in duplum* rule in modern commerce is to provide a legal means for the dishonest debtor to escape his obligations to comply with what he has agreed to pay rather than to alleviate the plight of overburdened debtors,'[378] attempted to blur the facts in the present case to one where interest is charged on a loan or money-lending transaction, with 'interest' owing on an amount at a future specified date as a means of calculating the value of the *merx* purchased. In the present case the 10% 'interest' as was agreed between the parties, was a means of ensuring that the applicant could receive from the respondent the actual current commercial value of the property at the time of transfer. It was a means of giving feasible commercial value to the immovable property as at the time of transfer, or, differently stated, it was a means of ascertaining the purchase price at the time of the future sale. The respondent could not take transfer of the said property until such time as the tenant gave notice or the applicant decided to exercise its right on the 'put' option, both were uncertain future events and thus a variable value for the sale needed to be placed on the property. There was no prior loan of money or other similar consideration made to the respondent. The agreement was one of sale and not a money lending transaction. As a result the factual foundation for the operation of the *in duplum* rule was absent.[379] It is submitted that the debtor was attempting to confuse the operation of a loan of

[375] 655D-G.
[376] *Supra*.
[377] *Supra*.
[378] 656C-D.
[379] The following from *Bellingham v Clive Ferreira* 398I-J is relevant: '[A]lthough a moneylending transaction lay at the root of the relationship between Prima Bank and the partnership, the applicant is claiming under a contract of sale which provides a mechanism for the determination of the purchase price.' A more extensive discussion follows. Furthermore, even if the interest due had been interest due on money loaned or a money lending transaction – the mere fact that the whole amount of capital plus interest was not due (and therefore not in arrears) until the applicant exercised its 'put' option, the *in duplum* rule would not have been operative; as only arrear interest is subjected to the rule.

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money or interest on money due with one of sale; and while *in casu* the debtor may have been attempting to use the *in duplum* rule to escape his obligations, this is certainly not the effect of the *in duplum* rule *per se*, which is based on sound public policy. The abuse seems one of legal process rather than the actual rule, or more likely a misunderstanding or misappropriation of the effects of the rule.

Blieden J made the following comments:[380]

> Moneylending as a means of affording financial assistance constitutes the very lifeblood of modern commerce, enabling parties with initially insufficient capital to build up profitable and successful business ventures which they would not have been able to do without the assistance of the loans granted to them. In modern societies, as opposed to the societies which prevailed in ancient and medieval times, maximum interest rates are normally controlled by central banks established by the State. In the business world of today the rate of interest charged on any transaction depends on principles of supply and demand rather than the so-called 'moral' considerations which applied in times past.

Although much of what is stated in the above passage is true, it is somewhat oversimplified. With today's credit system and facilities, money is available to people who would not otherwise have the opportunity to build profitable or successful business ventures. However, this money must be viewed as money purchased. It is not given without a return value expected for its use. Maximum interest rates are not controlled by central banks established by the State. The 'repo' rate is the 'initial' lending rate at which banking institutions lend their capital to financial institutions. The maximum rate at which these banking institutions, in turn, lend 'out,' is governed by legislation. Moreover, one can say that, but for this legislation, these rates would otherwise not be limited by anything other than a competitive environment. The economist may try to convince one that at perfect equilibrium the market value of credit may be forced to equalise at a low competitive rate, but this is not always the case, especially when only a small amount of the population of the country can afford to pay for credit. In South Africa in particular, the money-lending market is under the control of a handful of

[380] 656.

institutions and competition is thus lacking. Furthermore, one must consider that a large sector of South African society is unable, due to a lack of ability to provide security for credit, to gain access to the credit facilities established by these elite few,[381] in which instance this sector of society turns to the microlending industry in order to gain access to credit. The fact is that these are smaller institutions, not in the eye of the public, who lend to a less wealthy sector and are also at a greater risk of losing any investment made thereby, often exploit debtors, or otherwise charge an extraordinary amount of interest.[382]

In a recent judgment[383] the Witwatersrand Local Division was faced with the in duplum rule in a lump-sum payment scenario. However, the court neglected to recognise the applicability of the already established application of the in duplum rule. The facts of the case are relevant. In December 1993 the applicant and the

[381] Part D clause 78 – 85 of the National Credit Bill deal with the issue of over-indebtedness and reckless credit and these clauses of the Bill place an onus on the credit provider to investigate or assess the financial viability of the credit consumer with whom they may potentially enter into a credit agreement with. If the provider neglects this onus it may result in a court suspending the effects of the credit agreement, with a provider losing interest and any other service charges and fees that he would otherwise have been entitled to. Lost charges may not be backdated or accrued to the consumer if a credit agreement is found to be reckless and therefore suspended.

[382] From time to time the Minister of Trade and Industry, whose department is responsible for the administration of the Act, sets the maximum interest rates at which loans can be made within given amount limits. Section 15A, provides the Minister with the authority to exempt certain categories of loans from the provisions of the Usury Act subject to such conditions as he may deem fit. The Minister has accordingly promulgated such exemption on 31-12-1992 in GNR3451 (later amended by GN713 of 1-6-1999). In terms of this notice, loans of amounts less than R10 000 (excluding loans over repayment periods longer than 36 months, credit-card schemes and overdrafts resulting in debit balances) are exempted from the Act. The lender must be registered with the Finance Regulatory Council (MFRC) and must comply with the requirements set out in *Annexure A* to the exemption notice. This includes conditions with regard to confidentiality and disclosure; including the condition that a standard loan agreement approved by the MFRC be used. It also includes conditions regarding consideration and early settlement of loans; cooling-off periods and collection methods that may be used. The exemption also excludes such acts as the retention of personal information such as bankcards and PINs as security or as methods of collection of payment. It also excludes the use of documents signed in blank and any other illegal collection methods. However, despite these precautions the following remarks, must be considered: 'As a result of this exemption and the unlimited rate of interest that may be charged within this category, a multi-billion rand industry came into being and mushroomed over the following few years. So-called 'cash loans' offices sprung up on every street corner. Unsecured small loans, mostly repayable on the borrower's next pay date, were suddenly available to a section of the population, which in the past had only the black market available to it. The success with which these unsecured loans were made and collected can be ascribed only to the practice that was generally used – retaining borrowers' bank card and personal identification numbers (PINs) with which payments were collected in the early hours of the morning, directly from their bank accounts. It did not take long for banks and companies to take heed. Small amounts of capital were replaced with enormous amounts of corporate capital, the retention of the bankcard was replaced by payroll deductions and within the course of a few years most of the lower and low-medium income groups were over-borrowed and practically bankrupt. The widely publicised news in regard to Unifer and Saambou is still fresh in our memory. It can be added that if nothing changes others will still follow'. (*De Rebus* July 2004, Johan Grobler and Bennie Burger).

[383] *Verulam Medicentre (Pty) Ltd v Ethekweni Municipality* 2005 2 SA 451 (W).

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respondent concluded a written agreement whereby the applicant purchased certain immovable property from the respondent, transfer to be passed upon payment of the last instalment. The purchase price amounted to R 1 592 000. In the subsequent two years the applicant paid the respondent R1 141 153, 48 made up of the deposit, the instalments and interest. The applicant had, at all times, been willingly to pay the outstanding purchase price and interest thereon and thereafter take transfer of the property. However, in October 1996 it was discovered that at the time of conclusion of the original agreement the respondent had failed to comply with certain provisions of the Local Authorities Ordinances 25 of 1974, and that the agreement was thereby rendered invalid. The respondent was thus obliged to repay the sum of R1 141 153, 48 to the applicant.

However, further negotiations between the parties ensued and in April 1999 the respondent, concluded a second agreement for the sale of the same property. The purchase price was now R3 500 000, payable on transfer. The agreement recorded that the applicant would apply for rezoning of the property and it was agreed that transfer would take place after the rezoning application was granted. It was further agreed that the respondent would retain the amount of R1 141 153, 48 as payment in part of the total purchase price under the second agreement. The second agreement provided that should rezoning of the said property not be effected within one year of the date of the agreement, the applicant had the option to cancel the second agreement. If the applicant chose to cancel, it was further agreed that all amounts of money retained or paid to the seller in terms of the first or second agreement would be immediately refunded by the respondent to the applicant, with interest thereon calculated from the date of payment by the applicant to the date of repayment (by respondent) at the rate of 15, 5% per annum compounded monthly in arrears.

In August 2002 the applicant was notified that its rezoning application had been refused. The applicant elected to cancel the agreement, and did so in September 2002. It was not in dispute that the applicant then became entitled to

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repayment of the R1 141 153, 48. However, the interest thereon had already reached the double on 31st January 1999. The application was based solely on whether the *in duplum* rule was applicable on the facts before the court.

Galgut J[384] briefly examined the case law surrounding the rule. In his succinct three page decision, the learned judge seemed to base his conclusions on the principles drawn from only two cases: *Sanlam Life Insurance Ltd v South Africa Breweries Ltd*[385] and *Commissioner, South African Revenue service v Woudlige*.[386] From the former case he drew the conclusion that:[387]

> [W]here on proper construction the interest at issue serves a purpose other than the ordinary function that interest fulfils, the *in duplum* rule will not apply.

Here Galgut J was referring to the conclusion arrived at in the *Sanlam* case[388] where Blieden J stated that the interest provided for in the agreement was not interest in the sense referred to in the *in duplum* rule but that the parties had intended the interest to fix what the parties considered to be a fair price for the asset to be purchased if the lease was cancelled within the stipulated period. However, finding this 'test' not to be sufficient, he turned to the latter case from which he commented that:[389]

> It appears therefore that the test might simply be whether in the particular case public policy requires the debtor to be protected against exploitation by the creditor.

He then decided that on either test the *in duplum* rule would not apply to the facts of the case before the court. He states:[390]

> In all the said circumstances the *in duplum* rule does not apply, on the more lenient test because the respondent was and is not the

[384] 455-6; in particular, he mentioned: *LTA Construction Bpk v Administrateur, Transvaal*; *Standard Bank v Oneanate Investments (in liquidation)*; *Sanlam Life Insurance Ltd v South Africa Breweries Ltd* and *Commissioner, SAR v Woudlige* 2000 1 SA 600 (C).
[385] *Supra*.
[386] *Supra*.
[387] 454I-J.
[388] *Supra*.
[389] 455B-C.
[390] 455L-456A.

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> sort of party that required protection and the interest stipulation was not the sort of provision which public policy would regard as improper, and on the stricter test because the interest as stipulated for was intended to fulfil a purpose other than the usual function for which interest is intended.

While the conclusion arrived at in the *Sanlam*[391] case is applicable to that particular case, it is not at all applicable to the *Verulam*[392] case. The 'interest' in the *Sanlam*[393] case was in fact not interest in the true sense, but a term used in order to evaluate a proper purchase price at a future date (not certain at time of contracting). The interest in the *Verulam*[394] case, however, is interest proper. It is interest calculated on a capital amount held by the respondent for a certain period of time and which upon cancellation of contract then became due and payable to the applicant. Here is the catch. The interest plus capital only became due and payable upon cancellation. The interest was therefore until the date of cancellation neither due, nor owing and therefore it was not arrear interest and as a result it was not subject to the *in duplum* rule at all.

Instead of guessing as to what the *in duplum* 'tests' may or may not be,[395] the court needed to plainly consider the rule a little more closely. The common-law foundation, upon which the *in duplum* rule is based, is quite clear and solid. The case law speaks for itself. There was no need to flounder for 'tests' or devise a new public policy basis for the rule. The court simply needed to consider whether the interest due by the respondent was in arrear. *In casu* it was not. The *in duplum* rule was thus not operative in this case.

In conclusion one must consider that there may be *mala fide* or dishonest debtors that take advantage of the *in duplum* rule. However, a debtor may only be allowed to take advantage of certain protective measures, like the *in duplum* rule, that are in place for his benefit, if the creditor allows the debtor not to service his

[391] *Supra*.
[392] *Supra*.
[393] *Supra*.
[394] *Supra*.
[395] 455B-C.

debt at the appropriate time.[396] The transaction is also protected by the common law where agreement is reached that the loan will not be serviced regularly, but that payment of both interest and capital will ensue in lump sum. The creditor is not prevented from making double[397] his money in return and furthermore the interest calculation is compounded. The rule is there as a public policy measure. It protects those debtors who have been overextended from running their financial facilities completely dry.[398] It is thus not 'moral considerations' that have affixed this rule into South African common law; nor can these conclusions be based on a premise of supply and demand, but rather on considerations of justice, fairness, practicality, common sense and economic reality, as they are.

The spread of wealth in the South African social sector is not homogenous and consequently principles of supply and demand do not have the effect of tempering interest rate charges on ['*any*'] credit transactions. The creditor is in the position of power, this much is patent, often debtors are made to sign standard-form contracts in order to gain access to credit facilities offered by the creditor. The legal relationship between debtor and creditor would consequently, otherwise, be wholly determined by the creditor and undoubtedly almost always to his advantage, if there were no legislative and common-law measures of protection and control in place. While regard must, in addition, be had to the sanctity given by the common law to the freedom of parties to contract, one must not forget that the common law is an overseer of the contractual relationship – it regulates by means of, *inter alia*, public policy conventions.

With the above considerations in mind, we may now return to the original question posed at the beginning of the section and ask whether the following scenario would be valid: *Two parties agree that the creditor will loan to a debtor a*

[396] Moreover the effects of the Prescription Act 68 of 1968 should be considered, which limit the time in which a creditor can retrieve his debt, and which could possibly ultimately prevent him from pursuing the debtor on a prescribed debt before *in duplum* comes into operation. (See discussion on Criticisms below).
[397] Or even more than double: 'It was therefore regarded in our customs as not unfair for the obligation for interest to last until the principal sum had been repaid, even though the interest should overtop three or four times the amount of the principal sum, provided that it were paid piecemeal'. (*Voet* 22 1 19 – Gane's Translation, quoted with approval by Joubert JA in *LTA Construction* 480H)
[398] Huber 1 37 38 - 39.

certain amount of money, stipulating that the debtor will not have to service the debt regularly or at all. Interest will be compounded annually (or monthly etc) at a certain stipulated or ascertainable rate (for example bank lending rate). The amount plus all interest will become due on demand or at a stipulated time. The danger to the debtor is palpable: He may become entirely over extended by a debt that is not claimed for years on end and then suddenly once the creditor asserts his right to the debt, the interest may have accrued well beyond the double. At the same time one cannot protect the debtor at the expense of the creditor who has to all intents and purposes invested his money by loaning it and expects a return on this investment. In effect it amounts to a balancing of the debtor's need to be protected against over-indebtedness and the creditor's right of investment. The conclusion can be reached by a simple examination of the common law in this regard. The *in duplum* rule as has been shown, is only applicable to arrear interest that is due but unpaid. Secondly, a debtor who knowingly enters into a loan agreement with a view of not servicing the debt on a regular basis, but paying the lump-sum at a given future date (interest plus capital) has had the foresight of the risk that he or she is embarking on from the initiation of the contract. This type of debtor has not defaulted due to financial difficulties. He therefore knowingly 1. kept the creditor out of the money loaned; 2. had full knowledge of the risk he undertook as well as the amount he would incur, given that he was not financing the interest element. This type of debtor is therefore not in need of protection, the debtor who has stopped servicing a debt due to financial difficulties could not have foreseen his debt overextending him to such degree, intending in good faith to regularly service his debt. The *in duplum* rule controls his debt liability to allow him to stabilise his precarious financial position.

The case of *Commissioner for SA Revenue Service v Woulidge*[399] is of interest in that the court was faced with the situation of a lump-sum amount owing. However the case could not be a *locus classicus* for our lump-sum payment scenario, as it has a very particular set of facts; as will be seen in the following

[399] *Supra*.

discussion a notional transaction was restricted in terms of the rule, where interest would have accrued to beyond the double.

What is important when assessing the *in duplum* rule with regard to lump-sum payments, is the differentiation made between 'arrear' interest and 'accrued' interest.[400] 'Accrued' interest is that interest which a debtor pays on a regular basis, by agreement, on the capital amount, while 'arrear' interest is that interest which has remained unpaid and therefore accumulated. While the accrued interest does not fall within the scope of the *in duplum* rule, arrear interest does. In effect accrued interest may be more than the double. Accrued interest, the interest which the debtor has paid over the life of the whole debt, is often more than double or even more than triple.[401] While arrear interest is prevented by the rule from augmenting to more than double, even then this is only temporary. Interest ceases to accrue only until payment by the debtor lowers the interest so that it may start to run again.[402] If one looks at the issue of lump-sum payments it appears obvious that an agreement to pay the capital amount plus interest accumulating at X rate (which may at the time of payment exceed the capital) is not tempered by the *in duplum* rule. This is due to the fact that the interest on the lump-sum has not become arrear interest, because it has not been due and payable by the debtor. It only becomes due and payable on the agreed date, at which point if the lump-sum (capital amount) plus agreed interest is not paid in full (as agreed), then *mora* interest may be charged on the amount owing (which would in effect amount to a novated capital amount). It would be the *mora* interest, being due and payable, that would be ceased by the *in duplum* rule, were it to reach the double of the owing amount.[403] Moreover, one can add that a debtor who enters into an agreement not to make periodic instalments on his debt but to pay the full amount loaned plus interest at a future determined or determinable date, has in fact entered the agreement with his eyes open. It

[400] This is discussed in detail in the beginning of this Chapter.
[401] Home loan repayments may be used as an example. The actual price paid for the immovable property is often three times the amount of the original purchase price.
[402] Only until it reaches the double again.
[403] However, it is to be noted that there exists an exception to the rule that interest is payable before capital applies only to interest bearing debts and not to judgments debts on which mora interest is payable: *Ebrahim (Pty) Ltd v Mahomed supra*.

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cannot be said that he is being over extended and therefore requires protection. Nor can it be said that the creditor has not enforced fiscal discipline upon the debtor, instalments not being due, no breach can be said to have occurred. That the actual nature of the transaction must be considered and thereafter the scope of the agreement determined was shown in the case of *Sanlam Life Insurance*.[404]

The following statement by Tuchten AJ in *Bellingham v Clive Ferreira*[405] is an interesting perspective on the rationale for the *in duplum* rule not being applicable to lump-sum payments which stipulate the payment of (accumulated) interest at a future date. The application of the *in duplum* rule was pleaded in the alternative and the basis of the claim was a contract of sale which provided for a mechanism that determined the purchase price at a future date.[406]

> A debtor who has stipulated for a lengthy delay between the date of the advance of the capital sum to him and the date upon which he is obliged to pay the capital with interest is in my view even less in need of accommodation than the debtor who makes periodical payments of interest. There is no reported instance that I have found or to which counsel have referred me where the recipient of a long-term loan was excused payment of part of the interest which had accrued on the ground that ultimately such interest exceeded the capital sum. Contracts providing for the repayment of the whole of the capital advanced together with all accrued interest on a date several years after the date upon which the capital was advanced are not unknown in our commercial life. Far from being contrary to public policy, such loans are useful mechanisms for financing, for example, long-term projects.

Tuchten AJ went onto to declare the prohibition on interest *in duplum* in cases concerning accumulated interest, on lump-sum payments obsolete.[407] Despite these remarks by the judge, before considering the issue of *in duplum* in this case, Tuchten AJ commented that in fact the *in duplum* rule could not apply to

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[404] *Supra*.
[405] 401G-I.
[406] Similar to the rationale behind the determination of the purchase price of the property in *Sanlam Life Insurance Ltd v South African Breweries Ltd.*
[407] 402A, the learned judge went further to state: 'It is open to a court to find that a principle of our common law has become obsolete, having abrogated by disuse. Compare *Natal Bank v R Kuranda*; *A Kuranda v Natal Bank* 1907 TH 155 169-71 and *Davehill (Pty) Ltd and Others v Community Development Board* 1988 1 SA 290 (A) 298H. If I am wrong in concluding that the prohibition on interest *in duplum* has at least since 1613 not applied to cases like the present, then in my judgment the prohibition is *pro tanto* indeed obsolete, having been abrogated by disuse'. (401I-402B)

the facts of the case before him as the case was not one fundamentally based on any type of money-lending transaction or money due on a contract; but rather concerned a sale and the calculation of the purchase price of the property.

The judge, however, took a very accurate approach to the interpretation of the application of the *in duplum* rule. His finding that the rule, as from Roman-Dutch law is in fact limited to unpaid arrear interest is exact. The jurisprudential foundation for the control of interest in this way is that, *inter alia*, debtors whose affairs are declining should be protected and not entirely drained dry, while debtors who are not facing financial difficulties and who entered a contract on certain terms should be bound by their contract and not be allowed to protect their interest through manipulation of public policy principals.

3.11 Whether the *In Duplum Rule* is Applicable to Notional Interest Due by Taxpayer

The full bench of the Cape Provincial Division had to decide on appeal whether the *in duplum* rule would be applicable to notional interest which the taxpayer had not charged on an outstanding purchase price of shares sold to trusts created for the benefit of his minor children.

In the case *Commissioner* for SA *Revenue Service v Woulidge*,[408] the respondent's father had created two *inter vivos* trusts for the respondent's two children, who were nominated beneficiaries. The respondent had sold shares to these trusts and provided in the agreement of sale that he had the discretion to charge interest on the balance of the purchase price owing to him. The respondent had never exercised the discretion to charge interest on the outstanding purchase price. A portion of the shares was later sold to another company, placing the trust in funds to pay the outstanding purchase price. The Commissioner for South African Revenue, relying on provisions of s 7(3)[409] and s

[408] *Supra.*
[409] 7(3): Income shall be deemed to have been received by the parent of any minor child, if by reason of any donation, settlement or other disposition made by that parent of that child—

7(5)[410] of the Income Tax Act 58 of 1962, included certain amounts in the respondent's taxable income. This was confirmed by the Special Income Tax Court in terms of s 7(3), on the basis that notional interest had been due to the respondent in respect of the unpaid price of the shares sold by him to the trusts. The Special Court furthermore found that in applying the *in duplum* rule, the liability for interest could only be extended to the maximum sum of the capital debt owed to the respondent by each trust. The court directed the Commissioner to revise his assessments accordingly.

The Commissioner appealed to the Provincial Division, which found that the failure to charge interest on the purchase price constituted a gratuitous disposition within the meaning of s 7(3) and was therefore taxable in the respondent's hands.[411] However, the sale and purchase of shares did not constitute a donation, settlement or other disposition within the meaning of s 7(3), and respondent should not therefore be taxed in this regard.[412]

The court found that the failure of the respondent to exercise his discretion to charge interest on the purchase price constituted a gratuitous disposition. The quantum of this gratuitous disposition had to be determined. The court found that had the respondent acted in terms of the standard of reasonable commercial practice, the trust would have been liable for annual interest. The failure to require that such interest be charged represented a benefit so that, when income accrued to the trust, the beneficiaries stood to enjoy a greater amount of income than would have been the case had interest been credited to the respondent. Davis J stated:[413]

(*a*) it has been received by or has accrued to or in favour of that child or has been expended for the maintenance, education or benefit of that child; or

(*b*) it has been accumulated for the benefit of that child.

[410] 7(5): If any person has made any donation, settlement or other disposition which is subject to a stipulation or condition, whether made or imposed by such person or anybody else, to the effect that the beneficiaries thereof or some of them shall not receive the income or some portion of the income thereunder until the happening of some event, whether fixed or contingent, so much of any income as would, but for such stipulation or condition, in consequence of the donation, settlement or other disposition be received by or accrue to or in favour of the beneficiaries, shall, until the happening of that event or the death of that person, whichever first takes place, be deemed to be the income of that person.

[411] 612B-D.

[412] 609E-I.

[413] 612F-H.

> Accordingly, to determine the amount of income received or accrued to the trust by reason of the gratuitous disposition, it is necessary to accumulate the amount of interest that should have been so charged. If, in the absence of payment of such interest, the amount of such interest would have equalled the amount of outstanding capital, then at that point the *in duplum* rule would, on a consistent approach, have become applicable.

Selikowitz J concurring, added that he could not find that by permitting the application of the *in duplum* rule in the instant case, the rule would in effect defeat the object of s 7(3) of the Income Tax Act, as per Van Reenen J's dissenting view. The following taken from Selikowitz J's dictum is pertinent:[414]

> When interpreting s 7(3) of the Act the Court ought to favour an interpretation that upholds rather than alters or excludes the common law. Wessels J (Curlewis and Gregorowski JJ concurring) stated the following in *Casserdy v Stubbs* 1916 TPD 310 at 312:
>
> > "It is a well-known canon of construction that we cannot infer that a statute intends to alter the common law. The statute must either explicitly say that it is the intention of the Legislature to alter the common law, or the inference from the ordinance must be such that we can come to no other conclusion than that the Legislature did have such an intention."

Selikowitz J concludes:[415]

> I can find no indication in s 7(3) that justifies a finding that the Legislature intended to alter or exclude the common law nor is such intention a necessary inference from the enactment.

Van Reenen J had a different view with regard to the effects of the *in duplum* rule in the instant case. His premise that it had to be postulated that the respondent would have charged interest, where in fact he had not, resulted in his comment that 'one is dealing with an imaginary situation'.[416] The respondent neither charged the trusts for the purchase price of the agreement nor did he charge the trust for interest on the credit facility thereto granted. Thus the transaction was precisely what s 7(3) of the Income Tax Act had envisioned avoiding. The court

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[414] 615D-E.
[415] 615F-G.
[416] 613I-B.

had to 'step in' and determine what the transaction would have been in the 'standard of reasonable commercial practice;' both in terms of the sale price and the interest. Had the respondent not been trying to benefit his minor children it is unlikely that he would have sold the shares to the trusts on a credit basis without levying interest.

In terms of the *in duplum* rule interest stops running when [and if] it is in arrear to the amount of the outstanding capital. The interest in the present case had not been claimed by the respondent; had not become due and therefore had not become accrued. The respondent never intended to claim interest from the trusts; the interest was thus 'superimposed' when the Commissioner claimed the liability for interest in the respondent's tax returns, which the Special court confirmed. To take the already postulated circumstances of the respondent and extend the imaginary situation even further, as Van Reenen J suggested, would be, it is submitted, to compel the notional transaction and the concept of acting in the reasonable commercial manner in an erroneous direction. The fundamental problem with assuming that the respondent would have acted in a commercial manner with regard to 'demanding and enforcing payment of interest by means of legal proceedings culminating in execution, if necessary' and that '[o]n the basis of such an assumption interest exceeding capital owing would not have accumulated in the postulated circumstances and accordingly the *in duplum* rule could not find application'[417] is that it is simply the postulated view of one judge. Interest was never claimed by respondent, thus when it was forced on him by postulation to have been claimed, the calculation from date of sale to date of claim rendered an accrued amount that far exceeded the initial capital amount. The reasoning of the court is that the defendant should have acted in the reasonable commercial manner by charging interest to the trust. The interest then becoming, notionally, due and arrear. Thus in continuance of this imaginary situation, it is the Trust that then accumulated arrear interest owing. Once this arrear interest reached the unpaid capital amount, the effects of *in duplum* would kick in. The taxpayer cannot have been made to pay the tax on the full amount

[417] 614H-I.

of interest owing as that interest was interest, which he never received. The notion of the reasonable commercial businessman is somewhat esoteric. The notional concept, would have to be imagined down to the finest detail. One would have to enter a realm of 'what ifs' and 'whens'. Was the notional interest that should have been charged to the trust notionally envisioned on a monthly basis? Or in a lump-sum? Was such interest then arrear or accrued notional interest?

Counsel for the appellant submitted that the calculation mandated by s 7(3) was a hypothetical exercise aimed at establishing what respondent would have received had he behaved as a commercial creditor and levied interest. He submitted that therefore there was no justification for including into such a hypothetical exercise an assumption that respondent would have allowed interest to amount to the capital value such that the *in duplum* rule would apply. He suggested that a creditor would have exacted payment of interest as it arose and that accordingly a properly serviced loan would not fall foul of the *in duplum* rule.[418] Counsel seems to have hit the nail right on the head here. The hypothetical situation here suggests that the interest would have become owing, whether on a yearly or monthly compounded basis. However, the trust was not in funds until 1988 to pay the capital amount or interest levied thereon. Continuing with the hypothetical arrangement, this would therefore imply that in effect the due but notional interest (notionally due interest?) had hypothetically become arrear and therefore had in fact (but hypothetically) fallen foul of the *in duplum* rule, had the taxpayer acted in a reasonable commercial manner. Not suing the *inter vivos* trusts created exclusively for the benefit of his children for arrear notional interest appears for all intents and purposes also to be logically commercially reasonable behaviour. It is submitted that the Court was presented with a difficult value judgment and it found a fair and equitable result for both applicant and respondent in the matter. An important consideration in this regard is that interest is not an *essentialia* of a contract of loan. In which case the respondent could have loaned the purchase price to the trusts interest free.

[418] 610I-611A.

3.12 Criticisms

Some writers are of the opinion that the *in duplum* rule is fundamentally inequitable.[419] And that it should be abolished.[420] They opine that creditor's should not be prevented from making more than the capital amount in interest.[421] However, this is neither the function nor the net effect of the *in duplum* rule. The following principle has often been pointed out: [422]

> The rule applies only to interest outstanding at a particular time and does not limit the total amount of interest payable by the debtor by way of instalments or in piecemeal fashion for the duration of a particular transaction.

And:[423]

> [I]t follows as in the case of a home loan, that paid interest may exceed as yet unpaid capital, many times over. Furthermore, *in duplum* interest does not run as long as unpaid interest equals the unpaid capital, but should the unpaid interest be reduced, the *in duplum* rule falls away and interest runs anew until it again equals unpaid capital.

The creditor is, in fact, only prevented from making more than double his profit if he allows the debtor's interest to accrue for an inappropriate period, so that unpaid interest reaches unpaid capital, and even then this limitation is only temporary. Thus, the rule forces the creditor to follow up on the debtor who is not adequately servicing his debt.[424] Not only does the rule enforce sound fiscal discipline on the creditor, it also prevents him from overreaching the debtor by allowing interest to simply accrue and accrue and accrue.

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[419] Malan FR and JT Pretorius, 'Interest in Triangular Situations' 1996 8 *Mercantile Law Journal* 399 405. Besides making this sweeping statement, the authors neglect to tell us the reason for their view that the rule is inequitable. See also Otto 'Die Gemeenregtelike Verbod Teen die Oploop van Rente' 1992 *THRHR* 472 479.

[420] 'Despite its antiquity and the learning that has gathered around it, the rule has been tellingly criticised as arbitrary and inappropriate and may have a limited lifespan'. (Christie 594). In 1975, the SA Law Commission recommended that the rule be abolished. Also of relevance: Otto 1992 *THRHR* 472 479.

[421] 'This means that a creditor may not recover more than the unpaid capital together with interest equal to the unpaid capital from the debtor'. (Malan and Pretorius 403). This, however, seems to be an incorrect understanding of the application of the rule.

[422] Loubser MM and Muller MA, 'Bank Overdrafts: Limitation of Interest by the *In Duplum* Rule; and Prescription', 1998 *SALJ* 115 599. The principle was taken from *LTA Construction v Administrateur, Transvaal case* 482.

[423] Holliday C, 'Collecting Costs and Interest in the Magistrate's Court', *De Rebus*, September 2001 34-5.

[424] Zimmermann 166.

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We may take a hypothetical situation as an example: Debtor D and creditor C agree that C will lend D R 9 000 at 50% *per annum*.[425] The first instalment is due on the 1st day of the following month. Let us assume that D does not even pay the first instalment. It would take 17 months for *compounded* interest at 50% *per annum* to reach the unpaid capital. What is C doing in these 17 months? Why has he not proceeded against the debtor? It is C's own fault if it takes him 17 months to mobilize against the defaulting D.

The loan above is typical of a micro-lending loan that has no ceiling rate of interest.[426] If one takes the example of a loan that is limited by the Usury Act,[427] one realises that an even longer period has to elapse for unpaid interest to reach unpaid capital. Let us say that C lends D R 11 000 at 20% per annum. In order for unpaid interest to reach unpaid capital it would take longer than three years, that is, if the debtor did not make a single monthly instalment into his account over a period of 36 months.[428]

Prescription and the effects of the Prescription Act 68 of 1968 *vis-à-vis* the *in duplum* rule and outstanding debts pose a separate concern. The question that needs to be considered is whether the *in duplum* rule obstructs or contradicts the purposes of the Prescription Act. The Act allows for various periods to run before a debt becomes prescribed.[429] Some of the periods prescribed by the Act

[425] This loan amount falls under the Usury Act Exemption Notice and thus is not subject to any form of Usury ceiling rate. We assume that C is a properly registered microlender.

[426] *Lurama Vyftien (Pty) Ltd and 49 Others v The Minister of Trade and Industry and the Micro Finance Regulatory Council* C/N 23453/99 unreported, TPD, 11/11/1999.

[427] 73 of 1968. Maximum annual finance charge rates which may be charged in connection with money lending transactions, credit transactions and leasing transactions shall not stipulate for or demand finance charges at an annual finance charge rate greater than the percentage determined by the Registrar by notice in the *Gazette* in accordance with the directions of the Minister. (S 2 of the Usury Act).

[428] Again this calculation is based on compounded interest.

[429] Section 11 of this Act provides for the periods of prescription of debts; which are:

'(*a*) thirty years in respect of—

(i) any debt secured by mortgage bond;

(ii) any judgment debt;

(iii) any debt in respect of any taxation imposed or levied by or under any law;

(iv) any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;

(*b*) fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of para (*a*);

(*c*) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of para (*a*) or (*b*);

(between three and thirty years) could be more than the years that would pass for the *in duplum* ruling to set in, according to the rates of interest stipulated in the agreement. It is submitted, however, that the Prescription Act and the *in duplum* rule are not contradictory in nature. The Prescription Act regulates the time in which a creditor has to claim his or her debt by legal means.[430] After the specified time he or she may no longer pursue the debtor on the unpaid debt. The Act also addresses, *inter alia*, when prescription starts to run[431] as well as the effects of an admission of liability.[432] The *in duplum* rule in effect is not a rule related to time limitations, but rather to amount limitations. Thus, while both the Prescription Act and the *in duplum* rule regulate the fiscal discipline of the creditor in that the creditor has certain obligations placed on him in order to ensure the recovery of the debt or debts owing to him, the act places a duty on the creditor to act within a certain time or not at all,[433] while the *in duplum* rule forces the creditor to act before a certain event.[434] Accordingly, the Prescription Act and the *in duplum* rule can have a coincident but not an incongruous effect on a single debt.

Rather than contradicting the *in duplum* rule, the Prescription Act is an example of the codification of the same underlying ideology upon which the *in duplum* rule is based. The legislature intended to limit the amount of time within which a debtor may be pursued for his debt, forcing the creditor to retrieve his debt or forever hold his peace, thereby preventing the debtor from having a Damocles sword hanging above his head for an infinite period. The creditor has a right which he is entitled to protect, but at the same time the law (both common and codified) force him to do so before a specific time or event, thereby shielding the sanctity of the legal relationship as well as the pecuniary station of the debtor.[435]

(*d*) save where an Act of Parliament provides otherwise, three years in respect of any other debt'.

[430] See s 10 & 11 of the Act.

[431] S 12.

[432] S 14.

[433] According to the specified time periods stipulated in the Act, specifically section 11. (See Fn 308, above)

[434] The temporary cessation of interest, if unpaid interest reaches the unpaid capital amount.

[435] The Prescription Act also envisions the obvious protection of evidence and the problems that would be encountered with dilatory claims, if certain time limits were not so provided.

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One of the biggest criticisms levelled at the *in duplum* rule has been its seeming incursion on parties' contractual freedom.[436] Yet, without firm rules regulating credit agreements or agreements of loan, the freedom of contract ideology would more or less surrender to creditor dictation of the terms of the contract. The borrower is usually in the weaker position economically, and this creates a high preponderance of debtor exploitation. With this imbalance in view, coupled with the fact that without certain fixed common-law rules, the very cardinal role of contract law would be undermined, the regulation of the relationship between the parties to a contract, especially a loan contract, is inevitable. The view that the *in duplum* rule creates serious inroads into parties' contractual freedom, thus, cannot seriously be entertained.

In *LTA Construction*,[437] referred as authority by the court in *Oneanate*,[438] Joubert JA held:

> Rente is die lewensbloed van die handelsverkeer. Die afskaffing van die renteverbod *in duplum* is in die huidige omstandighede nie die funksie van hierdie Hof nie. Hierdie Hof het geen bevoegheid om 'n nuttige, geldende, gemeenregtelike regsreel af te skaf nie. Dit is 'n aangeleentheid vir die Wetgewer. Ten spyte daarvan dat die Suid Afrikaans Regskommisse reeds in Junie 1974 die afskaffing van die renteverbod *in duplum* voorgestel het, het die Wetgewer tot op hede dit nie gedoen nie.

In fact, not only has the legislature not implemented the recommendation of the 1974 Law Commission,[439] but it has gone further and has now codified the *in duplum* rule in the new National Credit Bill.[440]

The *in duplum* rule places a positive duty on the creditor to pursue his debtor. It enforces sound fiscal discipline on the creditor. It is a well-established common-law rule that has been enforced by the South African courts many times over. Each case has polished a different aspect of the common-law implications and

[436] Schultz WG 1999 11 *SA Mercantile Law Journal* 109
[437] 482.
[438] *Supra*.
[439] *Supra.*
[440] 2005.

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effects of the *in duplum* rule. The rule has become so entrenched and has been so effective in the protection of the debtor, whilst maintaining fairness towards the creditor, that its efficiency has been recognised by the legislature, which is currently endeavouring to incorporate the rule into codified form.[441]

With increasing consumer reliance on credit and credit-based facilities, plus increased accessibility to credit for a much larger sector of society (both middle and lower income groups), the need for greater control of the credit industry and the debtor-creditor relationship is more prominent. The *in duplum* rule is one of the very few, very well defined and if correctly applied, most effective common law measures of control in this field.

[441] National Credit Bill 2005; clause 103(5) in particular.

Chapter 4: Consumer Credit Legislation

4.1 Introduction

Since the end of the Second World War the increase of credit consumers has been manifest. This has largely been due to rising incomes creating an increase of equal distribution of wealth to a larger segment of society. Due to this universal benchmark increase in affluence, family unit desires and needs have increased and this, in turn, has increased consumption. However, the satisfaction level of the family unit has in fact not increased proportionally to the household income and thus it is no longer possible to satisfy demands and needs on this 'limited' income, creating, in turn, a desire-based need for credit.[442] These factors coupled with consumer pressure — both vertically and horizontally — have increased the demand for credit and credit facilitators. The vertical pressure here refers to the argument, which expounds that, rather than the consumer determining the pattern of consumption it is in fact suppliers, producers and marketers that control consumer demand. This manipulation is realised through advertising, marketing and packaging, with the foundational origin being market research.[443] The following remarks from Gailbraith are relevant:[444]

> The fact that wants can be synthesized by advertising, catalyzed by salesmanship, and shaped by the discrete manipulations of the persuaders shows that they are not very urgent. A man who is hungry need never be told of his need for food … [thus] … [p]roduction only fills the void that it has itself created.

However, consumer desires are not solely the doing of producers; demands and needs can also be cultivated by what Gailbraith refers to as a value system that in effect evaluates people by what they consume.[445] This is what is meant by horizontal pressure; that is, a theme of social construction which perpetuates that:[446]

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[442] Stephenson G *Consumer Credit* 3.
[443] Scott C & Black J *Cranston's Consumers and the Law* 1.
[444] Galbraith JK *The Affluent Society* 131 & 127.
[445] Galbraith 129.
[446] Scott & Black 2.

> [C]onsumption is in affluent societies based not on needs and enjoyment but on complex codes in which what an individual consumer buys indicates their social class and status [thus]…[c]onsumption is for communicating at once social affiliation and social demarcation. [...] Consumption, or more particularly, the language of consumption, the language of what different commodities signify, is furthermore a system that has to be learnt: 'the consumer society is also the society of learning to consume, of social training in consumption'.

Whether the source of credit consumption is vertical or horizontal, the protection of the consumer is, and has in most countries become a common feature of every legal system. Although the nature and scope of consumer legislation may differ, it nevertheless exists for the protection of the consumer as consumer contracts can and do give rise to misuse; and for the regulation of the creditor/supplier-consumer relationship. Besides the abovementioned horizontal tactics, the credit consumer is often exploited by long contractual agreements the terms of which he/she may not understand. The consumer is also confronted with alluring methods of payments; which may at the onset appear affordable but later (after all overheads have been incorporated) these may leave the credit consumer exposed and liable. Some terms may even prove dishonest or may be misrepresentations of the truth excluding, *inter alia,* liability, common law warranties and including exorbitant finance charges, forfeiture clauses with extreme rights of cancellation.

The consumer is often helpless against these forces, especially in light of the most common standard-form contract.[447] Furthermore, because the borrower is usually in a weaker economic position (this is why he is seeking a loan), it is likely that without protection his position may be exploited.[448] Thus, governments and courts have stepped into the consumer credit realm to assist the consumer in his plight through both legislative enactments and developments in the common law.

Consumer credit legislation is the means by which the relationships between consumers -people, who borrow credit or purchase goods and services on credit

[447] Nagel *et al Business Law* 164.
[448] Zimmermann 166.

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or lease goods and services on credit – and the grantors of such credit, are regulated. Consumer credit has been on the increase for the last 30 to 40 years, and while it has supported upgrading in living standards, it has simultaneously caused inflation in prices of goods.[449] The main purpose for consumer legislation is said to be the protection of the consumer from exploitation,[450] however what is equally, if not more important, is an actual balancing of interests. That is the interests of the credit-consumers and those of the credit grantors. The reason for the emphasis on this balance, is, that over-protection of the consumer may result in the investor (credit grantor) withdrawing his funding from the consumer credit market as the return or general administrative expenses of making credit available no longer proves a lucrative venture due to unwonted but stringent consumer laws.[451]

In South Africa, two types of credit have been identified,[452] termed 'vendor credit' and 'lender credit'. The former is credit given by a person selling or leasing goods or services, which would allow them to be paid for at a later date or in instalments; the latter is money loaned for a fee, that charge being interest.[453] Today three separate Acts largely control South Africa's consumer (both vendor and lender) credit use: the Alienation of Land Act 68 of 1981, the Usury Act 73 of 1968 and the Credit Agreements Act 75 of 1980. There is some overlap between the Alienation of Land Act and the Usury Act[454] and the Usury Act and the Credit Agreements Act. It is submitted that the common-law rules are the vital supplement which sustain the whole. While the *in duplum* rule, in particular, is the main focus of this dissertation, a consumer credit contextualization with a background on developing and already developed common-law rules is important. A sound knowledge of the current legislative backdrop is also vital.

[449] Grové & Otto *Basic Principles of Consumer Credit Law* 2
[450] Grové & Otto *Basic Principles of Consumer Credit Law* 4.
[451] The inclusions of many of these administrative expenses into the calculation for limitation of interest *in duplum* in the National Credit Bill, 2005 may present this risk. See further discussion below in 4.3 ff.
[452] *Ibid*.
[453] Otto & Grové *The Usury Act and Related Matters* 19.
[454] Albeit small, as property prices are increasing, dramatically leaving the Usury Act behind. The Usury Act only covers transactions where the principal debt loaned does not exceed the amount of R500 000.

Without this milieu there is a danger that its significance may become indistinct.[455]

Credit has been a common trait of most, if not all, commercial transactions spanning back many centuries. At first credit was granted in terms of actual money loans and later in other types of contracts on credit. The view is taken that all modern Western consumer credit protection is derived from the same origin, namely the Old Testament, in the form of regulation of the charging of interest.[456] The charging of interest and maximum rates chargeable discussion has been carrying on for thousands of years; the earliest Act being the Code of Hammurabi, dating back 4000 years. Some authors suggested[457] the modern view in this area of law is that there should be little or no interference and that already existing legislation, which lays down maximum rates of finance charges, should be repealed. It is submitted that in light of modern realities like the unmistakably weaker bargaining position of the consumer; the take-it-or-leave attitude adopted by corporations and banks with regards standard form contracts; the obvious pressure from producers, manufacturers and credit facilitators, as well as the social realities of the Gailbraith consumer value system discussed above, this should not and perhaps even dare not be allowed to be the modern view. It is in light of these very particularities of the modern commercial world that consumer protection in its many diverse forms – one being control of interest rates – should be highly advocated. This appears, in light of the new pending consumer credit legislation, to be the 'post modernist' view; and the protection of the consumer through the control of interest rates and charges associated with credit transactions, is very much on the legislative agenda.

[455] 'It is a well known canon of construction that a statute should be construed in conformity with the existing law, and that the legislature does not intend to alter existing law more than necessary. The phrase 'existing law' refers to all the sources of law. This means that one should … possess a sound knowledge of what the existing law (and specifically the common law) allows'. (Grové & Otto *Basic Principles of Consumer Credit Law* 8).
[456] Otto & Grové *The Usury Act and Related Matters* 19.
[457] *Ibid*.

4.2 Credit Agreements Act and Usury Act

The current South African credit legislation covers four types of contracts: purchase and sale, lease, money loans and contracts for the rendering of services.[458] The Credit Agreements Act regulates credit transactions, such as the sale of goods on instalments or rendering of services on instalments and leasing transactions.[459] The Usury Act applies to money-loans, credit, and leasing transactions.[460] Section 1 of the Usury Act defines a money lending transaction, as a transaction that, whatever its form, and whether or not it forms part of another transaction, is substantially one of money lending.[461] One of the main purposes of the Usury Act is to limit the finance charges, which may be recovered by a creditor from a debtor in a money lending transaction.[462] The Usury Act currently controls the interest rates or finance charges that may be levied in a credit agreement, the Act is not, however, exhaustive.[463] This does not mean that where the credit agreement or transaction does not fall within the

[458] Grové & Otto *Basic Principles of Consumer Credit Law* 8.
[459] Grové & Otto *Basic Principles of Consumer Credit Law* 13. This Act is more closely associated to vendor credit.
[460] Thus the Act applies to interest rates where movable goods are sold or leased or their use or enjoyment is transferred, where money is lent, where goods are sold and bought back for a higher price, where use is made of a credit card and where parties enter into an agreement covering improvements to immovable property or to buy and sell immovable property. (Otto *Credit Law Review* para 46). The Usury Act covers both vendor and lender credit transactions.
[461] It is respectfully submitted that a money-lending transaction, as defined by the Usury Act, does *not* in fact have a far greater scope of application than a money loan transaction at common law, as alleged by Grove & Otto *supra* 17. The Usury Act is limited according to the amount loaned whereas the common law has no limitation in that respect, and in fact covers all that is not by the Usury Act. *C & T Products (Pty) Ltd v M H Goldschmidt (Pty) Ltd* 1981 3 SA 619 (C) 628: 'A transaction is substantially one of money lending if "in all essential characteristics or features" it is a money lending transaction. (*Westinghouse Bank Ltd v Registrar of Financial Institutions* 1975 4 SA (T) 53). A loan of money is a contract whereby one person delivers a sum of money to another who undertakes to repay an equal sum at some future time. In the present case defendant undertook, in advance, to lend money to the plaintiff (by paying plaintiff's creditor). The fact that the undertaking to pay plaintiff's creditor was also given to the creditor concerned does not detract from the fact that in essence the defendant agreed to lend money to the plaintiff. The undertaking given to the plaintiff's creditor, although not in itself a money lending transaction, formed an integral part of a money lending transaction, and therefore the transaction, viewed as a whole, was substantially one of money lending.
[462] Otto *Credit Law Review* para 52. Section 2 of the Act; see fn 426 above.
[463] The Usury Act does not interfere with other legislation prescribing interest rates. Section 9 of the Act specifically provides that the Act may not be construed as authorising a person to stipulate for, demand or receive finance charges or interest at a rate exceeding the rate recoverable where the law has fixed such rate at less than the rate allowed by the Usury Act. Furthermore, the act does not derogate from any power or jurisdiction, which a court may have to refuse an order for the payment of finance charges or interest claimed, or to reduce the rate. (See for example section 24 (1)(a) of the Alienation of Land Act). This is so even when such rate is less than that allowed by the Act. A related provision is section 9A (Inserted by the Limitation and Disclosure of Finance Charges Amendment Act 90 of 1980) which provides, *inter alia*, that the Act may not be construed as 'limiting, amending, repealing or otherwise altering' any provision of another act. Section 9 essentially provides for the situation where another statute prescribes a lower rate than the Usury Act. The creditor is then limited to the lower rate. (Otto *Credit Law Review* para 58).

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scope of the Usury Act, there is no limit as to the interest rates that may be charged. The common law on contracts comes into play in this regard; this area of the common law may declare a contract void if it is construed as being against public policy or *contra bones mores*.[464] A common-law rate of interest does not exist; however, the creditor may not claim interest charged on a credit agreement falling outside the scope of the Usury Act, which interest is proved to be extortionate or usurious.[465] This does not necessarily imply that the whole contract is rendered void but it has been suggested that such contract be declared partially enforceable, to the extent that the interest is not usurious.[466] Furthermore there exists authority in the case law that supports the view that the creditor may only claim his capital and so much of the interest that is not regarded as usurious.[467]

Whether a rate of interest will be determined usurious or not will depend upon the circumstances of the case, and according to what may be found to be the current market-rate of interest, the risks involved in the transaction, the amount lent and the relative positions of the parties.[468] The onus to prove that a rate of interest is too high or usurious, is on the debtor.[469] Although a court will be loath to interfere with a contractually agreed rate of interest, it will also not allow a usurious rate to be charged.[470]

The Usury Act provides for maximum finance rates that may be charged in money lending, leasing and credit transactions.[471] The fact that the maximum rates are prescribed by the Act does not signify that a creditor may not charge a

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[464] *Eastwood v Shepstone* 1902 TS 294; *Sasfin (Pty) Ltd v Beukes* 1988 1 SA 626 (W); *Botha v Finance Credit (Pty) Ltd* 1989 3 A 783 (A); Otto JM *Credit Law Review* para 52.
[465] *Dyason v Ruthven* 3 Searle 305; *Reuter v Yates* 1904 TS 855; *Taylor v Hollard* 2 SAR 78; see also Chapter 1 in this regard.
[466] Grové Thesis 138; 1990 *De Jure* 131; Otto *Credit Law Review* paras 7-13. The Courts have held that the interest may even be lawfully reduced. (*Taylor v Hollard* 84-5).
[467] *Dyason v Ruthven* 312; *Taylor v Hollard* 85; *Prudential Shippers SA Ltd v Tempest Clothing Co Pty Ltd* 1976 2 SA 856 (W); Otto *Credit Law Review* para 52.
[468] *Dyason v Ruthven* 310; *Reuter v Yates* 857, 858, 863; Grové Thesis 140; 1990 *De Jure* 132; Otto & Grové *The Usury Act and Related Matters* 20; Otto *Credit Law Review* para 52.
[469] *Reuter v Yates* 856; Otto *Credit Law Review* para 52.
[470] *Dyason v Ruthven* 310; *Reuter v Yates* 856 & 859; Otto *Credit Law Review* para 52.
[471] S 2.

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lesser rate.[472] The Act differentiates interest rates for transactions of different values.[473] These rates are determined by the Registrar from time to time in the government Gazette, in accordance with the directions of the Minister. The Act allows for change in the limitation of maximum finance charge rates as these are determined by economic changes and are constantly in flux.

The differences in the two Acts, besides that only the Usury Act covers money-lending transactions, are sometimes inconsistent.[474] Which Act applies depends on each individual circumstance.

> This placed a very difficult burden on the shoulders of both businesspersons and lawyers. The definitions in the two Acts differ radically, there are about ten differences as regards the fields in which they apply and the sanctions attaching to contraventions do not always correspond either. In short, it is a confusing and unhealthy state of affairs.[475]

It has been suggested that the legislative reason for having two statutory enactments to cover credit protection was to differentiate between contractual and financial aspects of credit-granting agreements, the former covered by the Credit Agreements Act, and the latter by the Usury Act. Grové and Otto[476] maintain that the separation was indeed unnecessary and artificial and that instead of being complementary due to, *inter alia*, initially being governed by two separate government departments for some time, the acts in fact drifted apart. The authors further maintain that this separation (of the Acts) creates and perpetuates problems for credit consumers and the industry as a whole.

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[472] S 3(5).
[473] S 2(1)-(3).
[474] There are also inconsistencies between the Credit Agreements Act and the Insolvency Act 24 of 1936. Some of these are discussed by Patrick O'Brien 'Interpretational Difficulties Arising from the Cross-Reference to the Credit Agreements Act 75 of 1980 in Section 84 of the Insolvency Act 24 of 1936' *TSAR* 2004 1
[475] Otto & Grové *The Usury Act and Related Matters* 51.
[476] Grové & Otto *Basic Principles of Consumer Credit Law* 4.

A report[477] submitted to the law commission in 1993,[478] recommended that in order to remedy the complexity of the existing credit legislation, an amalgamation of the Acts was in order:[479]

> The research committee was of the opinion, […], that one of the greatest difficulties with consumer credit legislation in South Africa was actually the fact that different Acts sought to cover the same ground in incompatible ways. We were of the opinion that this legislation should be examined as a whole and consolidated as far as possible. An investigation relating solely to the Usury Act would once again result in fragmented and unsatisfactory legislation.

Despite these problems and despite the fact that the Law Commission agreed with the above view, and instructed the committee to conduct the extensive research and to make recommendations regarding credit legislation, no new legislation was passed. It has, in fact, taken thirteen years, since that report, for a consolidated piece of legislation in the Credit Consumer field to become existent, in the form of a Bill – The Consumer Credit Bill, which has recently been amended and republished as the National Credit Bill. This delay may have been due to the fact that law reform in the consumer-credit field is very technical and simultaneously very costly – 'the capacity of the credit industry to continually absorb new credit legislation being exhaustible'.[480] The expense of new legislation may have to be distributed among the consumers themselves or in the alternative cross-subsidized, with investors receiving lower interest rates on deposits or cash buyers having to pay higher prices.[481]

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[477] *Supra*. This report has not, however, been an exclusive report finding that weaknesses exist in the current consumer credit legislation; others include: the Strauss Report on Rural Finance; the Policy Board Report on SME Finance (Falkena Report, 2001); and the National Small Business Regulatory Review by Ntiska Enterprise Promotion Agency in 1999. Furthermore, in March of 2002, the Director-General of the Department of Trade and Industry requested the Micro Finance Regulatory Council to co-ordinate a review on consumer credit and to make proposals for a new regulatory framework. This appeal culminated in the Credit Law Review of August 2003.

[478] The investigation was originally launched due to a request from the Registrar of Financial Institutions to the South African Law Commission and the research committee as the Registrar and his staff encountered considerable problems in applying the Usury Act. Some of the problems included, *inter alia*, the continual differences of interpretation, which the Act gave rise to, the lack of mechanisms created by the Act to resolve disputes and the inadequate sanctions provided by the Act in relation to contraventions. (Otto & Grové *The Usury Act and Related Matters* 2).

[479] *Ibid*.

[480] Grové & Otto *Basic Principles of Consumer Credit Law* 3.

[481] Grové & Otto *Basic Principles of Consumer Credit Law* 4.

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South African law is not so defunct that it affords no protection to a huge sector of contracting society, whose dealings may not fall under the Credit Agreements or Usury Acts. Legislation, in all spheres of law, is supplemented by the common law. It is only this form of supplementation that allows a legal system to function judiciously and fluidly. Often, however, the common law does not necessarily become recognised under a single heading or category, such as that of consumer credit protection and thus not utilized as such by the courts. Many common law forms of consumer protection are neither acknowledged nor referred to as such, by the courts. It is the common law that prevents legislation in this area (consumer protection and consumer credit law) from having to be either extraordinarily long and complex or due to its limited scope -failing to protect a large sector of contracting society. One can say that the common law could be seen as South Africa's legal system's 'polyfiller,' which satisfies what would otherwise be consecutive rancid legislative dilemmas.

That a fused system may cause less confusion and be more practicable, in terms of actual legislation is, nevertheless, not contested. This does not mean that through a more incorporated and inclusive Act the necessity and reliance of the common law in the consumer protection[482] field will fall away or become redundant. A simpler and unified Act may in fact become more reliant on existing common law rules for supplementation, as the common law is less likely to vary.[483] The following words from Olivier JP should summit any legislative progress:[484]

> Toekomstige wetgewing moet helder, duidelik en eenvoudig wees sodat die verbruiker self kan bepaal wat die wettige omvang van sy verpligtinge is. Hy moet dus in staat wees om self teen oortredinge en wanpraktyke aan die kant wan ondernemer te waak.

[482] Or any other codified area of law, for that matter.
[483] 'As the rights of man are founded on the common law, and as the common law is less subject to change than the statutory law, which may vary from year to year according to the whim of a particular legislature, common law rights should be more jealously guarded than statutory law ones'. (Beadle CJ in *Van Heerden NNO v Queen's Hotel (Pty) Ltd* 1973 2 SA 14 (RA))
[484] Coetzee 'Woeker: Instellings onder die Vergrootglas' 9 December 1989 *Finansies en Tegniek* 12 13.

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It is submitted, that the lawmaker, when drafting legislation, should draft legislation that is not so complicated and open to ambiguities so as to result in an endless amount of court cases in order to have the ambiguous clauses interpreted by the courts. Along with the intention to keep new legislation simple and unambiguous the legislator should keep in mind that South Africa has a large amount of common law that practically embellishes legislation and when drafting, especially when codifying rules from the common law, Court decisions should be considered. It appears to the writer hereof that codifying a rule which has been brought down from case to case and moulded carefully and insightfully, without meticulously scrutinising the rule in its present common law context would be taking two steps back, as opposed to two forwards.[485] This was specifically the case with clause 76 of the Consumer Credit Bill, which has now been amended in the new National Credit Bill, with particular reference to clause 103(5) both are discussed in the following pages.

4.3 The National Credit Bill, 2005

4.3.1 Introduction

The following, taken from the August 2003 *Consumer Credit Review*, which was requested by the Department of Trade and Industry, reflects the current mood:[486]

> The need for a review of the consumer credit legislation has long been recognized. There is broad agreement that current laws are weak and outdated; they reflect the political reality of the apartheid era. The Department of Trade and Industry made certain changes to address specific problems such as increasing the protection on

[485] The Bill has been described as 'radical' in many respects and DG Astrid Lund of the Department of Trade and Industry has said she never expected an easy passage for the many changes she has proposed, a good deal of which counters the 'traditional way of doing things'. (http://0-www.sabinet.co.za.innopac.up.ac.za/sabinetlaw/#). While enthusiasm for new potentially improved (and combined) consumer credit legislation is a good sign, an unnecessary fervour to make 'radical' changes, without placing into perspective the value of a past system and the learning that can be gained from observing a structure, notwithstanding imperfections, is not to be undermined. It is submitted that the worth of the already existing and developed areas of law should be appreciated and at the very least closely examined before releasing the new Bill to become law.

[486] The Department of Trade and Industry *Credit Law Review August 2003: Summary of Findings of the Technical Committee* 'Credit Law Review: Setting the Scene' 1.

> micro-loans, one change that was introduced in the revised exemption notice. The approach has, nevertheless, been piecemeal and a thorough and holistic assessment became essential.

The publication of the Consumer Credit Bill of 2004 was intended as a practicable reflection of the call for more prominent progresses in the consumer protection and more specifically in the *credit* consumer protection field. South Africa's consumer debt crisis has been alleged to be costing the country an approximate R 500 million a month in productivity losses.[487] The Bill purported 'to promote a fair and non-discriminatory marketplace' providing general regulation of consumer credit.[488] The same wording is used in the more recent National Credit Bill. The new Bill hopes to, *inter alia,* improve standards of consumer information whilst promoting responsible credit granting. Its main aim appears to be to provide not only regulation by way of legislation[489] but also through the setting up of various regulatory bodies such as the The National Credit Regulator[490] and the Consumer Tribunal.[491] The 2004 Bill endeavoured to provide consultation between the Minster and representatives of the credit industry and consumers, and for that purpose provided for the establishment of a National Consumer Credit Advisory Committee,[492] however in the new Bill; administrative matters have been delegated to a CEO who shall be appointed by the Minster[493] and whom, *inter alia*, will be responsible for all responsibilities pertaining to the functions of the National Credit regulator and who may employ an inspector[494] whose functions shall also be created and limited by the Act.[495] Furthermore, the Bill if enacted shall repeal the Usury and Credit Agreements

[487] A recent study by the Department of Economic Affairs and Tourism revealed that 40% of households nationally were experiencing financial difficulty, unable to pay loan instalments to micro lenders and others other credit providers. ('Debt sinking into Poverty' Pretoria News 2004 –10-04 1; Renke S and Roestoff M, 'The Consumer Credit Bill – A Solution to Over-Indebtedness?' 2005 (68) *THRHR* 115).
[488] From the Preamble of the Consumer Credit Bill 2004.
[489] From the Preamble of the National Credit Bill 2005.
[490] Chp 2 Part A, s 12-22 of the Bill. The 2004 Bill made had made provision for a National Consumer Credit Council.
[491] Chp 2 Part B, s 23-31 of the Bill.
[492] Chp 2 Part B, s 11 of the 2004 Consumer Credit Bill.
[493] Chp 2 Part B, s 32 of the Bill. The CEO is accountable to the Board. (National Credit Regulator)
[494] Chp 2 Part B, s 34 of the Bill.
[495] Specifically chp 8 and s 139 of the Bill.

Acts[496] and purports to promote black economic empowerment and ownership within the consumer credit industry, prohibit unfair credit and credit marketing practices and provide for debt re-organisation in cases of over-indebtedness.[497] The purposes of the Act, when enacted, are to, *inter alia*, advance the social and economic welfare of South African citizens by promoting a fair and transparent and competitive credit market together with a sustainable and responsible credit industry.[498]

The Bill was the culmination of various developments that indicated that the current consumer credit legislation was somewhat inadequate. Some of these developments included, *inter alia*, growth in the microlending sector, concern about over-indebtedness and abuses in relation to administration orders. The weaknesses in the legislation have been reflected in a number of reports over the years such as the Law Commission's 1994 Review of the Usury Act; the Strauss Report on Rural Finance; the National Small Business Regulatory Review by Ntsika Enterprise Promotion Agency in 1999; and the Falkena Report of 2001 on SMME Finance. The general discernment being that the inadequacy of the current legislation lay mainly in regulatory weaknesses; a regulatory framework found to be 'fragmented, outdated and ineffectual in dealing with the complex market that increasingly affects consumers at all income levels'.[499]

The preoccupation with these pressing inadequacies resulted in a request from the Director-General of the Department of Trade and Industry to the Micro Finance Regulatory Council to co-ordinate a review of the current legislation on consumer credit: wherefrom proposals for a new regulatory structure could follow. The report is lengthy and intricate with all of its contents not germane for our purposes. However, certain statistics resulting from the various researches and surveys are pertinent as the Bill on Consumer Credit is largely based on these statistical findings. In order to have the paramount objectives of the

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[496] Preamble of the National Credit Bill, 2005. The Consumer Credit Bill, 2004 made the same provision.
[497] Preamble of the National Credit Bill 2005.
[498] Chp 1 Part B, s 3 &4 of National Credit Bill 2005.
[499] *Credit Law Review August* 2003 3.

Department of Trade and Industry, which are to promote a stable, efficient and competitive credit market, where consumers' rights are adequately protected and where access to finance is improved, especially for development purposes, achieved,[500] it is imperative that any new legislation should not be rushed, but rather to have the old bi-legislative system replaced by a single potent and feasible Act. This requires every clause of the Bill to be virtually infallible; this being a *not* completely unattainable ambition, having had the benefit of many years of experience with an imperfect system. Consumer credit legislation – by nature – is complicated, as it is extremely technical, difficult to comprehend and difficult to apply in practice.[501]

Much of the research demonstrated a very high cost of credit, with many consumers expressing dissatisfaction in these areas, finding that the cost of credit was often much higher than disclosed, further, indicating frustration with mechanisms for protection and redress.[502]

The South African credit market was – according to research conducted[503] – found to consist of approximately R 361 billion in the private or household sector; a further R 366 billion going to incorporated entities. The household sector mortgages, accounting for 53% of consumer credit, with overdrafts and loans consisting of 18%. In the non-private sector mortgages only came in at 15%, however overdrafts and loans consisted of 71% of corporate credit.[504]

Different types of credit ranges in terms of cost were discovered; while in certain market segments the cost of credit is very high, despite the fact that South Africa was found to posses sophisticated management, available information technology and a relatively developed capital market able to provide loan capital.

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[500] *Credit Law Review August* 2003 4.
[501] Grove & Otto *Basic Principles of Consumer Credit Law* 3. The authors, referring to the current consumer credit legislation in place (the Credit Agreements and Usury Act), stated that '[i]n a certain sense it is the current antithesis of what good consumer legislations should in fact be'. A repeat of this state of affairs is both unnecessary and would in effect also be redundant.
[502] *Credit Law Review August* 2003 4 - 5.
[503] The above figures are based on research as at September 2002.
[504] *Credit Law Review August* 2003 16.

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This dysfunctionality in the consumer credit market continues, with certain segments of the market facing an exceptionally high cost of credit, whilst the supply of credit in other segments falls significantly below demand. Furthermore, high cost to consumers was not always found to correlate with profitability of suppliers; this in turn does not attract new entrants and thus does not increase competition and therefore does not lead to lower prices.[505]

The research committee identified various factors that contribute to the distortion of credit allocation as well as to the increase of the cost of credit in certain market segments. These include, according to the committee, *inter alia*: the Usury Act cap, inadequate disclosure,[506] legislative deficiencies and uneven enforcement, fragmented and incomplete credit risk information, current requirements for granting of court orders,[507] predatory behaviour in certain market segments, manipulation of limitation of competition, disparate availability of mortgage finance across market segments, limitations of banking license in the Banks Act[508] restricting competition and bias fee structures related to the National Payments System against small and short term transactions that add directly to the cost of credit and contribute to limiting competition.[509]

Given this perceived dysfunctionality of the current system, the Review Committee identified certain regulatory objectives upon which future credit legislation should adhere to. The list comprised sixteen primary objectives, all of which shall not be cited. However, *inter alia*, the objectives mentioned included promoting and protecting the economic interest of the consumers as well as revising the approach to interest rate control in order to ensure that it does not

[505] *Idem* 18-9.
[506] Research conducted demonstrated that the actual cost of credit is often much higher than the interest rate which has been disclosed.
[507] At present the requirements to obtain a court order against debtors who are *in mora* are such that the court need not consider whether the creditor acted responsibly before issuing the court order, which in turn allows creditors to over extend their debtors in that the creditors assume that they can recover through easily accessible court orders.
[508] 94 of 1990.
[509] A more detailed discussion on each point can be found in the Review.

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distort the market or pose an obstacle to low cost housing and SMME[510] finance.[511]

These regulatory aims would be designed in support of national policy objectives, and in support of the President's *Integrated Action Plan*. Amongst other objectives, the revisions to the regulatory framework for consumer credit are envisioned to further the *Integrated Plan*; through enhanced growth and employment induced by a more effective credit market. The vision here is to better allocate credit thus stimulating domestic demand and thereby ensuring that domestic demand better reflect consumer preferences. Additionally, it is envisioned that the removal of the distortions created by perceived legislative weaknesses would augment economic efficiency.[512]

The proposed changes also forecast an improvement in competitiveness of the financial services sector. The weaknesses in the current legislation and regulatory framework have been identified with anti-competitive market practices, benefiting uncompetitive suppliers. The regulatory weaknesses have further been linked to distortion of the allocation of finance; a change in this environment anticipates benefit to small business development, these having been among the primary losers in the current defunct setting.[513]

The Review Committee highlighted the particular importance of cultivating a culture of competitiveness:[514]

> [I]t has become clear that neither the cost nor the access to consumer credit or SME finance will improve substantially and in a sustainable manner if there is not *more effective competition* between banks, and between bank and non-bank credit providers. This is the key to sustainable improvement in the access to finance and lowering of the cost of finance.

[510] Small Medium and Micro Enterprises.
[511] *Credit Law Review* August 2003 25-6.
[512] *Idem* 2003 29.
[513] *Credit Law Review August* 2003 30.
[514] *Idem* 31.

Now, while the goal of a new and unified Act is to 'make the world of credit safer for debtors, and thus more sustainable for the industry,'[515] and while the centrepiece of this creation is to facilitate and expedite competition, the fundamental flaw here may lie in too much credit-*consumer* protection and not enough credit-*supplier* protection. While the credit supplier is one of the most elemental ingredients in the credit market economy; even more basic is the supplier's investment and profit motive. Drastically reducing or regulating the turnover may not encourage competition within the supplier market but may rather dissuade suppliers to invest in the lending panorama, and in effect dramatically decrease competition, which may, in turn, increase both the price of credit and seriously hamper availability across all levels of income groups.

While it is important to understand that one of the functions of consumer legislation is to protect the consumer, it is equally important to keep in mind that additional costs for additional services (an example may be all the new bodies to be set up that are envisioned in the new Bill[516]) will have to be 'down-loaded' onto credit consumers, if this is impossible then these costs will have to be recovered by way of cross-subsidisation – implying that investors may receive lower interest rates on deposits or that cash prices may have to be increased.[517] The underlying principles for the existence and/or modification-creation of consumer-credit legislation are often determined in the attractiveness of their social charisma and economic deliberations are not fittingly taken into consideration. The relevant question to be posed is: which policy issues should endure in this regard? While one of the main concerns in the development of consumer-credit legislation should be the protection of credit-consumers from exploitation, it is not the establishment of legislation 'that may at the very best save the consumer from petty vexations',[518] without considering the advantages against the

[515] *Credit Law Review* August 2003, 'Credit Contract Disclosure and Associated Factors' 2. A Market Research Report, incorporated in the Credit Law Review, was conducted by Rudo Research and Training and AfriData Research, their objective: to obtain comments on the perceived weaknesses in the credit legislation in South Africa with the further aim to improve the protection of consumers of credit.
[516] The 2004 Bill envisioned even more!
[517] National Commission on Consumer Finance: Consumer Finance in the United States 1972 103-105; Grove & Otto *Basic Principles of Consumer Credit Law* 3-4.
[518] Credit Contracts: *Report of the Contracts and Commercial Law Reform Committee* (chairperson C I Patterson) 1977 18-19, from Grové & Otto *Basic Principles of Consumer Credit Law* 4.

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disadvantages it entails, which is welcomed, but a weighing up of the demands of the individual consumer for protection in any given transaction as against the interests of society at large.[519]

The credit industry's' legislative development can be likened to the human eye; while the eyesight can be adjusted by science, the eye will not sustain over-correction or under-correction of its system for long periods of time without manifest impairment. So too will under-protection or over-protection of the credit consumer vis-à-vis the credit-grantor have far-reaching depressing implications on the credit market and economy as a whole.

4.3.2 The National Credit Bill and the Limitation on Interest

Part C of Chapter 5 of the National Credit Bill of 2005 is entitled '*Consumer's Liability, Interest, Charges and Fees*'.[520] The limitations of finance charges or interest will in future, if the Bill is passed, be almost completely regulated by the clauses found in *Part C* of the Bill; including limitation on the consumer's liability in terms of certain charges;[521] cost of credit;[522] maximum rates of interest and fees;[523] interest;[524] credit insurance;[525] fees or charges[526] and changes to credit fees or charges.[527] Clause 103 – the clause which essentially codifies the *in duplum* rule, is incorporated in *Part D* of the Bill.[528]

[519] Grové & Otto *idem* 4, where they end by stating that these demands made on the lawmakers make for 'a daunting task'.
[520] Government Gazette, 17 August 2004 No. 26678.
[521] Clause 100.
[522] Clause 101.
[523] Clause 105.
[524] Clause 103.
[525] Clause 106.
[526] Clause 102.
[527] Clause 104.
[528] Clause 103(5). In the Consumer Credit Bill the *in duplum* rule was found in a separate Chapter to the other clauses, which limited the Consumer's liability.

Clause 101 sets out the cost of credit and determines that the credit provider may not charge the consumer[529] any money or consideration other than the principal debt together with the value of any item contemplated in clause 102;[530] which items include an initiation fee and service fee both of which may not exceed the prescribed amount relative to the principal debt[531] and interest expressed in percentage terms as an annual rate that must not exceed the maximum prescribed rate,[532] which is determined by the Minster by regulation.[533]

When discussing and calculating interest, the terms 'interest' and 'capital' are normally used; interest expressed as a percentage of the capital.[534] However, these terms have not been adopted in the new Bill, nor were they used in the Usury Act. For capital the Usury Act makes use of the term 'principal debt' and for interest, 'finance charges'.[535] Under *Chapter 1 Interpretation, Purpose and Application* of the Bill, the definition of 'principal debt' 'means the amount calculated in accordance with clause 101(1)(a)'. Clause 101(1)(a) states that the principal debt is the amount deferred in terms of the agreement plus the value of any item contemplated in clause 102. These items include: costs of an extended warrantee agreement; delivery, installation and initial fuelling charges, connection fees, levies or charges or taxes, licenses or registration fees.

[529] Both terms can be found in the definitions clauses of the Bill; the 'consumer' is defined as the party to whom goods or services are sold under a discount transaction, incidental agreement or instalment agreement, the party to whom money is paid or credit granted under a pawn transaction, party to whom money is granted under a credit facility, the mortgagor under a mortgage; borrower under a secured loan; lessee under a lease; the guarantor under a credit agreement or a party to whom money is advanced or credit granted under any other credit agreement. While the 'credit provider' is a party in respect of a credit agreement who supplies goods or services under discount transactions, incidental credit agreements or instalment transactions; a party who advances credit under a pawn transaction, credit facility or any credit agreement and includes a mortgagee, lessor and lender under a secured loan; as well as a party to whom an assurance or promise is made under a credit agreement; any party who advances money or credit to another under any credit agreement and any person who acquires the rights of a credit provider under a credit agreement after it has been entered into. (Clause 1(1) of the Bill) In the 2004 Bill a consumer was defined as 'the party to a credit agreement to whom money or credit is advanced under that agreement', while a credit provider had a similar definition except where the words assurance are used in the 2005 Bill the word 'indemnity' was used in the 2004 Bill. The 2005 Bill has included in its definition of credit provider a person who acquires the rights of the credit provider after conclusion of contract, which the 2004 Bill had not envisioned.

[530] Clause 101(1)(a).

[531] Clause 101(1)(b) & (c).

[532] Clause 101(1)(d).

[533] Clause 105.

[534] Grové & Otto *Basic Principles of Consumer Credit Law* 66.

[535] Finance charges incorporate much more than merely interest, for example charges by the moneylender. See section 1 of the Usury Act. (Grové & Otto *Basic Principles of Consumer Credit Law* 66 fn 2).

The previous Bill created some confusion in this regard; the 2004 Consumer Credit Bill defined 'principal value' in the definitions clause as 'the total amount to be paid by a consumer under a credit agreement, minus the total of all interest, charges and fees, as calculated in accordance with clause 79'.[536] However, when one turned to clause 79 or clause 76 or clause 83,[537] none of these clauses made reference to 'principal value', rather they referred to a 'principal amount'.[538] This would have lead to a fair amount of interpretative turmoil. The new Bill keeps in line with the pre-used and therefore familiar term 'principal debt' and eliminates further confusion by actually using the term as defined in the definitions clause, where applicable.

While the Minster, after consulting with the National Credit Regulator may prescribe a maximum rate of interest and the maximum fees to be charged in a credit agreement he must consider the need to make credit available to persons who have been historically disadvantaged, persons and communities of low income; the needs of remote, isolated or low density populations and communities; the social impact on low-income consumers, as well as conditions prevailing in the credit market, including the cost of credit and the optimal functioning of the consumer credit market.[539] The interest rate which is then applicable, as determined by the Minster, applies equally to any part of the unpaid principal debt and to any amount which is overdue under the

[536] The relevant part of clause 79 of the Consumer Credit Bill 2004, read as follows: ' (1) A credit agreement must not require payment by the consumer of any money or other considerations except- (a) the principal amount deferred in terms of the agreement, together with the value of any item contemplated in clause 83; (b) an application fee, which may not exceed the prescribed amount relative to the principal amount; (c) a service fee, which- (i) in the case of (aa) a credit facility, may be payable monthly, annually, on a per transaction basis, or on a combination of periodic and transaction basis; or (bb) in any other case, may be payable monthly, annually; and (ii) must not exceed the prescribed amount relative to the principal amount; and (d) interest, which – (i) must be expressed in percentage terms as annual rate calculated in the prescribed manner; and (ii) must not exceed the maximum prescribed rate determined in terms of clause 80[.]'

[537] These are the corresponding clauses to the new Bill, now contained in Clause's 101; 103(5) & 102 respectively.

[538] Clause 83(1), made provision for various fees and charges, including the cost of an extended warranty agreement (Clause 83 (1)(a)); delivery, installation and initial fuelling charges (Clause 83 (1)(b)); connection fees, levies and charges (Clause 83 (1)(c)) and taxes, license or registration fees (Clause 83 (1)(d)) to be included in 'principal amount'. But clause 79(1)(a) stated that the cost of credit prevented, *inter alia*, the consumer from paying any consideration other then the principal amount plus the value of any item contemplated in s 83. Why s 79 did not use the wording 'principal value', since the clause 79 'principal amount' appeared to imply the principal value plus any charges set out in clause 83, is confusing. The phrasing of clause 79, was the same as that in clause 76.

[539] Clause's 105 (1) and 105 (2).

agreement.[540] However, interest which may be charged once (if) the Bill is enacted will be subject to clause 103 (5).

4.3.3 Clause 103(5) of the National Credit Bill, 2005

Clause 103(5) of the National Credit Bill, 2005 reads as follows:

> Despite any provision of the common law or a credit agreement to the contrary, the amounts contemplated in section 101(1)(b) to (g) that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the default occurs.

The amounts that are referred to in clauses 101(1)(b) to (g) include initiation fees, service fees, interest, credit insurance, administration charges in case of default, collection costs. All these charges are subject to their own internal precincts.[541] However, in aggregate they may not exceed the principal debt plus any item listed in clause 102(1).[542] The codification of the *in duplum* rule in this form, as essentially, it is submitted, this is what clause 103(5) does, albeit a lot closer to the common law position with regards the rule as opposed to the contemplated format in the 2004 Consumer Credit Bill, it is still not what the common law *in duplum* rule as developed exemplifies.

Clause 76 of the Consumer Credit Bill, 2004 read as follows:

> Despite any other provision of the law or a credit agreement, the maximum liability of a consumer under a credit agreement to the credit provider, irrespective whether the consumer fulfils all of the obligations under that agreement, or defaults on any such obligation, must not exceed the total of-
> (a) the principal amount deferred under the agreement;
> (b) any applicable amounts permitted in terms of-
> (i) sections 79(b), (c) and (e); and

[540] Clause 103 (1).
[541] See 101(b)-(g).
[542] The cost of an extended warrantee agreement; delivery, installation and initial fuelling charges, connection fees, levies or charges or taxes, licenses or registration fees.

(ii) this Act to be charged to the consumer in event of prepayment, collection or enforcement; and

(c) interest as calculated in accordance with section 79, subject to a maximum aggregate interest not exceeding the principal amount deferred under the agreement.

The problem with clause 76 seemed to lie with the ambiguous meaning of the word 'aggregate' in clause 76(c).[543] There being no correlative definition in Chapter 1, one would have had to have turned to the Oxford Dictionary[544] definition, which tells us that 'aggregate' means 'sum total or amount assembled'. If 'amount assembled' taken to mean the unpaid interest amount then there would have been no contradiction with the current common law interpretation of the *in duplum* rule.[545] However, had the word 'aggregate' been taken to mean interest *in toto* or 'sum total' that is interest – paid or unpaid, it would not only have conflicted with the current *in duplum* rule; but also have provided problems for the credit industry as a whole. A strict rule such as this would seriously have curtailed the amount of finance charges that credit grantors may charge on their trade in stock – money. This could have lead to a possible massive withdrawal of credit supply by investors; if their investments were caused by this legislation, to be curtailed. A serious investigation and analysis would have to have been carried out with regards the feasibility of clause 76; as it appears to have been and the result was a complete turn around in terms of the corresponding clause in the new Bill.

However, clause 103(5) still leaves much to be considered by the courts. The new clause states that despite any common law provision, the amounts contemplated in clause 101 (b) to (g) which become *in toto* an accrued but arrear amount, may not exceed the principal debt. This can be ascertained from the words 'as at the time that the default occurs'. The position differs from the

[543] There was no definition of interest in chapter 1 of the Bill. However s 81 informed that the interest rate applicable under a credit agreement applied equally to any overdue payments under the agreement and to any part of the unpaid balance. (S 81(1)). The rest of the clause dealt with the method in which a credit provider may request payment and the time at which he may so do). Unfortunately clause 76 did not make reference to the limitation of interest *per se*; but rather the maximum liability of the consumer and the word 'interest' in this clause was further qualified by the mystifying adjective 'aggregate'.

[544] *The Pocket Oxford Dictionary of Current English*, 8th ed.

[545] Why the legislature did not look to the common law in order to better define the rule if its intention was to codify it, is a further mystery.

common law arrangement and in effect renders the rule more severe in terms of the limitation on the credit consumer's liability. The cases that have ruled on the *in duplum* rule have referred to either 'unpaid capital' or 'unpaid principal debt' no explanation was given for these terms as perhaps none was foreseen required; taking into consideration that these were terms used in the Usury Act and essentially accepted by the credit community.[546] Clause 103(5) limits not only interest when it reaches the amount of the principal debt, but interest plus the initiation fee, service fee, cost of credit insurance, default admin charges and collection costs may together when in arrears not amount to more than the principal debt.

Clause 103(5) is much clearer and less convoluted than its, not long-lived predecessor – clause 76 of the 2004 Bill. Clause 103(5) defines principal debt, one is easily able to conclude what is included and what is excluded from principal debt through the definitions clause and clause 101(1)(a) and 102. In addition clause 103(5) determines exactly which values, besides interest may not exceed, when in arrears, the unpaid principal debt. The problem with this clause may not lie with its interpretation; however, clause 103(5) is not a true reflection of the actual *in duplum* rule as developed by the courts. The common law *in duplum* rule does not contemplate an initiation fee, service fee, cost of credit insurance, default admin charges and collection costs in calculating the interest limitation. The new clause therefore provides a greater limitation to interest as that envisioned by the common law. The credit-grantor would consequently find greater restriction in the above clause as to what he may retrieve from the defaulting debtor. The source of these inclusions is unknown; the common law is certainly not the beck.

The difficulties that may therefore be anticipated in terms of clause 103(5) are its application in relation to the construal of the common law *in duplum* rule, as it

[546] As it has already been stated above, the Usury Act refers to the term 'principal debt' as opposed to 'capital'; and 'finance charges' as opposed to interest. However, finance charges are not limited to interest; they include charges that the moneylender or credit grantor makes to the credit receiver (Section 1 Usury Act No 73 of 1968, Grové & Otto *Basic Principles of Consumer Credit Law* 66).

already exists; and the fact that the limitation of accrued amounts is not limited to interest but to other costs and charges contemplated in the Bill. The logistics surrounding interpretative issues should be scaled down to a minimum because the rule as it has been represented in its clause 103(5) format, is now closer to its common law counterpart. The already existing common law elucidation can be utilised by attorneys and legal advisors (and judges) as precedent and or guideline. Whether the effect of these inclusions will have a positive effect or a negative effect on the lending market and whether the impact of the limitation of interest *and* charges on credit providers and their reaction to such controls remains necessarily to be seen.

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Conclusion

The aim of credit law is to regulate the relationship between debtor and creditor. Both parties need protection in some or other form. For this purpose both legislation and the common law have become indispensably executive in the sphere of consumer credit and lending. Interest and the law on interest form important elements. Lending, at a price, has become a commercial reality and is intrinsically entwined in daily economic activities. Interest rate caps have accordingly, for many years, been incorporated in legislation as forms of consumer protection and as preventative measures of over-extension of consumers. Accordingly, the common law, *inter alia*, has developed, fostered and preserved one rule that lends a helping hand in regulating the control over interest rate charges.

The *in duplum* rule is a fastidious consumer protection mechanism. Based on sound public policy rationale, the rule does not prevent the creditor from obtaining all his/her allowable charges for money loaned or credit extended. It does force the creditor to act with sound fiscal discipline, timeously, as against the debtor. However, despite the creditor not acting within a reasonable time against the debtor, it still does not place a total limitation on the amount which a creditor may extract from his/her debtor. The *in duplum* rule only limits interest from running on a temporary basis. The only type of interest that may be susceptible to the *in duplum* rule is arrear accrued interest, that is, interest which is owing and payable. Once the debtor initiates payment again, such payment will decrease the interest element of the total amount and interest will run again. It is therefore impossible for a court to foretell what the maximum amount of interest will be. This is not the function of the *in duplum* rule. It does not cap the interest *in toto*. The *in duplum* rule must be understood as a consumer protection regulator. It stops arrear interest from running when that interest has reached the amount of unpaid capital. It does not set a maximum amount of interest.

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At the same time a debtor who is faced with financial difficulty and who is unable to service his debts, will be protected from an ever-increasing avalanche of interest accruing to him, in view of the rule. The rule prevents the over-extension of a debtor's limited financial resources. It grants him however, only temporary reprieve – the avalanche of ever continuing interest is merely tempered by the rule. The creditor may at any time after default (and, of course, before interest reaches the double) initiate legal action.

Moreover, the rule does not contemplate favouring the defaulting debtor over those debtors that dutifully service their debts. The credit relationship is endowed with its many duties, rights and obligations which fall squarely on both the debtor and creditor, and which are not through the rule negated or annulled. The debtor has a duty to service his debt as per his contractual obligations. Nothing (except, perhaps, prescription) can alter this fact. The dutiful debtor is therefore not suffering through the application of the *in duplum* rule on his defaulting counterpart. Interest has not ceased for his corresponding debtor, but has merely been prevented from running non-stop, and, immediately after recommencement of instalments (this is not an option otherwise court action with execution follows or possibly even sequestration), the interest constituent of the wayward debtor's debt is revived.

The rule provides such a compelling and fair regulation of interest, that it has found its way into the most recently proposed credit legislation. Despite its being criticised as 'arbitrary and inappropriate', the rule seems to face an unlimited lifespan. Its continued existence is dependant on a proper understanding of its implementation. In light of the new credit legislation, the subsequent accurate interpretation of the rule must be what is accepted in codified form.

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SUMMARY

The *in duplum* rule is a rule of Roman-Dutch origin which has been preserved by the South African common law. A useful consumer-protection device, it temporarily ceases interest once arrear interest has reached the unpaid capital. The rule distinguishes between arrear and accrued interest. Arrear interest is interest that has become due but because of non-payment it has accumulated. While accrued interest is also accumulated interest, this type of interest has not become due and payable. The *in duplum* rule prevents arrear interest from accumulating to more than the unpaid capital amount. This preclusion is only temporary, however, and as soon as the debtor makes payment towards the debt, the interest begins to run again. The *in duplum* rule has no effect on accrued interest. Thus, when parties agree that the capital amount plus the interest component of the debt will be paid at a future date, without installments by the debtor in the interim, the *in duplum* rule will have no effect on the total amount owing.

The rule has recently been incorporated into the National Credit Bill of 2005. The rule seems to have been codified without due caution to its carefully sculpted common law developments. The courts have over the years cleared misconceptions that the rule prevented any interest from accruing to more than the unpaid capital or that the rule permanently affected the running of interest. The work of the courts has somewhat been neglected in clause 103(5) of the National Credit Bill which appears to include in its interest component more than just interest. This may have a very dramatic effect on the profit element of the risk takers (credit lenders) and may in the long term curb investment in the lending market.

The effect of the codified *in duplum* rule remains to be seen through the actions of the lawmaker, and if the codified form of the rule is accepted into law, the burden will once again lie with the judiciary.

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