The *in duplum* rule: relief for consumers of excessively-priced small credit legitimised by the National Credit Act

1. Introduction

The National Credit Act 34 of 2005\(^1\) as read with the National Credit Regulations\(^2\) prescribes limits on the cost of credit that may be charged by credit providers. The limits on interest rates are cold comfort for consumers of small credit, because the combined impact of interest and the newly-introduced initiation and service fees cause the cost of small credit to be potentially exorbitant.\(^3\)

What legal recourse does a consumer have in the face of exorbitantly priced credit legitimised by the Act and Regulations? Contract provisions that are contrary to public policy, as fortified by Constitutional values, may be declared to be unenforceable.\(^4\) Further, excessively priced credit could be challenged on the ground that it is usurious if it amounts to ‘extortion or oppression akin to fraud’.\(^5\) It is, however, unlikely that these common law principles will be able to make a meaningful contribution towards contractual fairness, especially if the agreed cost of credit, although excessive, is within the legislated limits.\(^6\)

The common law so-called ‘*in duplum* rule’, now effectively codified and significantly expanded by the Act,\(^7\) has become the single most important measure to limit the excessive cost of small credit made possible by the Regulations, and to protect consumers from entrapment by debt.

It is not the primary purpose of this paper to discuss in detail the nature and scope of the statutory *in duplum* rule, which has been thoroughly analysed elsewhere.\(^8\) It is, however, necessary to briefly review the essential tenets of the common law and statutory rule in order to ensure that it is correctly understood.

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\(^1\) Sections 100-106.


\(^3\) For a thorough analysis of the full impact of the cost of credit provisions on small credit, see J Campbell ‘Excessive Cost of Credit Under the National Credit Act’ (2007) 19 SA Merc LJ 251 at 260-268.

\(^4\) See, eg, Sasfin v Beukes 1989 (1) SA 1 (A); Brisley v Drotsky 2002 (4) SA 1 (SCA); Napier v Barkhuizen 2006 (4) SA 1 (SCA); Barkhuizen v Napier 2007 (5) SA 323 (CC).

\(^5\) Dyason v Ruthven 1860 Searle 282 at 311-2.

\(^6\) See par 2 below.

\(^7\) Section 103(5).

The paper will then go on to demonstrate the clear need for the *in duplum* rule, which is to curtail the devastating socio-economic consequences of high credit costs. The application of the rule to practical scenarios will be shown, illustrating the full extent of the *in duplum* rule as we have it today. The paper will conclude with an exploration of the practical ways in which the rule should be applied by the courts, consumers and their legal representatives.

2. Common law illegality of the high cost of small credit

The excessive cost of small credit allowed by the National Credit Regulations may still be able to be challenged by consumers in terms of the common law on a case by case basis. The residual common law will still be applicable in view of the presumption that a statute alters the common law as little as possible, and the courts will interpret an act as ousting the common law only if this appears clearly from the intention of the legislature. The question then is: was it the intention of the legislature to cause the cost of small credit to be excessive? The background to the Act indicates a contrary intention, namely to combat poverty and the dual economy, and to promote consumer protection through various means, including the capping of the cost of credit. This intention is borne out in the Act, which provides that when the Minister prescribes methods for calculating maximum interest rates and fees, the Minister must consider, *inter alia*, the social impact on low income consumers. It therefore seems clear that the Regulations do not accord with the intention of the legislature.

Agreements that are contrary to public policy, as informed by constitutional values, will not be enforced. An argument that the cost of small credit is excessive and therefore contrary to public policy would have to consider: current industry practice and the purpose of the Act; the combined impact of interest and fees on the total cost of credit; the negative socio-economic impact of the high cost of credit on small loans; and the specific circumstances of the lender, the borrower and other aspects of the case before the court. It therefore appears that a court would be able to

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11 Section 3, sections 101–106.
12 Section 105(2)(c).
13 Smalberger JA in *Sasfin (Pty) Ltd v Beukes* supra note 4 at 8C-D, read with Cameron JA in *Brisley v Drotsky* supra note 4 at 34H–35B, *Napier v Barkhuizen* supra note 4 at 7A–B, and *Barkhuizen v Napier* supra note 4 at par 28-30.
declare a very high cost small credit agreement contrary to public policy and unenforceable, even if this cost is within the limits of the Regulations.

Furthermore, the extremely high cost of small credit could amount to “extortion and oppression akin to fraud”, and the offending clause could be declared usurious and unenforceable.\textsuperscript{14} Alternatively, the usurious nature of the offending clause could be pleaded as a ground in support of a claim that a high cost credit agreement is contrary to public policy. It is doubtful, however, that the courts will be willing to rely on cases that are nearly a century old in the face of current legislation.

The defence to a claim that a provision of a loan agreement is unenforceable due to common law illegality (contrary to public policy or usurious) will likely be that the provision is lawful in that it complies with the Regulations, even if they are flawed. A court will for this reason very likely take the view that such a claim cannot be upheld, and that an appropriate approach would rather be to challenge the allegedly flawed Regulations themselves by way of judicial review proceedings.

It can therefore be seen that reliance on common law illegality to challenge excessive credit costs that comply with the Regulations will be fraught with difficulty. Further practical considerations would militate against such an approach being viable: first, a suitable test case will need to be brought; second, it will not be financially viable for a consumer of small credit to litigate in regard to such credit; third, a consumer of small credit is unlikely to be able to afford the legal fees to litigate; fourth, many courts will be hesitant to develop the law in regard to contractual fairness and usury in the face of the principle of freedom of contract and \textit{pacta sunt servanda}.\textsuperscript{15}

\textbf{3. The common law \textit{in duplum} rule}

The \textit{in duplum} rule has for many years been entrenched in the common law of South Africa, developed in response to the common law’s inability to provide a workable mechanism for setting limits on the interest that can accrue on a debt. In short, the common law rule provides that interest stops running on a debt when the unpaid (arrears) interest equals the outstanding capital.\textsuperscript{16} When, due to payment, unpaid interest drops below the outstanding capital, interest again begins to run until it once

\textsuperscript{14} Dyason v Ruthven supra note 5 at 311–312; Reuter v Yates 1904 TS 855 at 858; SA Securities Ltd v Greyling 1911 TPD 352 at 356.

\textsuperscript{15} For further discussion of these considerations, see J Campbell op cit note 3 at 253-254.

\textsuperscript{16} See, for example, Standard Bank of South Africa v Oneanate Investments (in liquidation) 1998 (1) SA 811 (SCA) at 827H.
again equals the amount of the outstanding capital.\textsuperscript{17} This law has been applied in a long line of reported cases.\textsuperscript{18}

The \textit{in duplum} rule has its origins in public policy designed to protect borrowers from exploitation by lenders.\textsuperscript{19} In the Appellate Division case of \textit{LTA Construction Bpk v Administrateur, Transvaal},\textsuperscript{20} Joubert JA conducted a thorough analysis of the origin and purpose of the rule, reviewing in the process the Roman law, the Roman-Dutch law and the South African authorities. The \textit{in duplum} rule emerged in Roman Law as one of the methods to limit the interest which could be claimed because of the greed of moneylenders, providing a measure of protection or relief to credit receivers,\textsuperscript{21} and the rule still exists for similar reasons today.

\section*{4. The statutory \textit{in duplum} rule}

The National Credit Act 34 of 2005 sought, \textit{inter alia}, to enhance consumer protection. It effectively codified the \textit{in duplum} rule for the first time in South Africa’s legislative history, and extended the rule further:

\begin{quote}
‘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.’\textsuperscript{22}
\end{quote}

\begin{itemize}
\item[17] \textit{Commercial Bank of Zimbabwe Ltd v MM Builders & Suppliers (Pty) Ltd and Others and Three Similar Cases} 1997 (2) SA 375 (W) at 303C-E; \textit{LTA Construction Bpk v Administrateur, Transvaal} 1992 (1) SA 473 (A) at 482C.
\item[18] See, most recently: \textit{Stroebel v Stroebel} 1973 (2) SA 137 (T); \textit{Commercial Bank of Zimbabwe Ltd v MM Builders & Suppliers (Pty) Ltd and Others and Three Similar Cases} supra note 17; \textit{Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in Liquidation)} supra note 16; \textit{F & I Advisors (Edms) Bpk en 'n Ander v Eerste Nasionale Bank van Suidelike Afrika Bpk} 1999 (1) SA 515 (SCA); \textit{Georgias and Another v Standard Chartered Finance Zimbabwe Ltd} 2000 (1) SA 126 (ZS); \textit{Sanlam Life Insurance Ltd v South African Breweries Ltd} 2000 (2) SA 647 (W); \textit{Commissioner, South African Revenue Service v Woulidge} 2002 (1) SA 68 (SCA); \textit{Meyer v Catwalk Investments 354 (Pty) Ltd en Andere} 2004 (6) SA 107 (T); \textit{Verulam Medicentre (Pty) Ltd v Ethekwini Municipality} 2005 (2) SA 451 (D).
\item[19] \textit{LTA Construction Bpk v Administrateur, Transvaal} supra note 17 at 482F-G; \textit{Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)} supra note 16 at 828D-E.
\item[20] Supra note 17.
\item[21] \textit{477C}. Other methods for limiting of interest referred to in the judgment were: imposing a limit on the rate of interest that could be charged, and prohibiting the charging of interest on interest.
\item[22] Section 103(5).
\end{itemize}
Section 103(5) is a succinct articulation of the meaning of the common law in duplum rule, which it clearly intended to codify. The Act does more than this, however, since the common law rule was limited to interest only. Section 103(5) extended the ambit of the in duplum rule to include all types of consideration\(^\text{23}\) that a credit agreement may require a consumer to pay in terms of section 101(1)(b) to (g) of the Act, namely: an initiation fee, a service fee, interest, the cost of any credit insurance, default administration charges and collection costs.\(^\text{24}\) The aggregate, or total, of all such amounts that accrue “during the time that a consumer is in default under the credit agreement”\(^\text{25}\) may not exceed the unpaid balance of the principal debt.

**5. A brief analysis of the meaning of the in duplum rule today\(^\text{26}\)**

In analysing its meaning, and for a fuller exposition of the rule, however, reference must be made to the interpretation of the common law in duplum rule as handed down by the courts.\(^\text{27}\) The common law in duplum rule can be seen to amplify the rule set out in section 103(5), where the common law is not in conflict with the Act.\(^\text{28}\)

All listed fees, costs and interest incurred in the ordinary course whilst the consumer is not in default of the credit agreement are not subject to the codified rule. In terms of the common law, the in duplum rule was similarly applicable to arrear interest only, and not to accumulated interest.\(^\text{29}\)

In the absence of an agreement to the contrary, the common law provides that payments are appropriated first to interest, and then to capital,\(^\text{30}\) and it follows that the same should apply also to the fees and costs now subject to the rule. Further,

\(^{23}\) Excluding, of course, the principal debt, referred to in s101(1)(a).

\(^{24}\) Section 101(1)(b) to (g) respectively.

\(^{25}\) Section 103(5).

\(^{26}\) For an in-depth analysis of certain contentious issues in relation to the in duplum rule, see WG Schulze ‘The in duplum Rule: A Short List of Some Unresolved Issues’ (2006) 18 SA Merc LJ 486.

\(^{27}\) It is submitted that this approach should not be negated by the opening words of s103(5): ‘Despite any provision of the common law…”

\(^{28}\) Of relevance here is the presumption in South African law of interpretation of statutes that statute law does not alter the existing law more than is necessary. Statutory provisions have sometimes been construed as mere extensions or supplements to the common law. (Du Plessis op cit note 9 at 177–181).

\(^{29}\) See, for example, *Sanlam Life Insurance Ltd v South African Breweries Ltd* supra note 18, in which Blieden J stated at 655D–E: “[T]he in duplum rule is confined to arrear interest and to arrear interest alone”.

\(^{30}\) JW Wessels *The Law of Contract in South Africa* Vol 2, 2 ed (1951) at para 2308 (xi) states: “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. Even if the payment is made on account of principal and interest, it will by law be appropriated first to the interest and then to the capital.”
the practice of capitalisation of interest by bank-
ers does not result in the interest losing its character as such for the purposes of the *in duplum* rule.\textsuperscript{31}

It is clear from the National Credit Act that a debtor cannot waive his/her right to the protection of the *in duplum* rule by prior agreement.\textsuperscript{32} Indeed, this principle has always been firmly entrenched in the common law in regard to the rule.\textsuperscript{33} But can this right be waived later on? It has been held that it may be possible for a debtor, when interest has accumulated to an amount equalling the capital, to agree with the creditor, to avoid litigation, that he (the debtor) would not rely on the *in duplum* rule.\textsuperscript{34} Yet section 103(5) seeks to preclude the common law as well as the credit agreement.\textsuperscript{35} Further, the words “may not” in section 103(5) suggest strongly that the *in duplum* rule is peremptory and a waiver will not be permitted.

It has been held that the *in duplum* rule can be applied in the real world of commerce and economic activity only where it serves considerations of public policy in the protection of borrowers against exploitation by lenders.\textsuperscript{36} Thus, for example, when unpaid interest reaches the equal of the unpaid capital during the course of litigation, it has been held that the *in duplum* rule is not applicable, and a debtor is not protected “*pendente lite* against interest in excess of the double.”\textsuperscript{37} The rationale for this finding is that a debtor is not being exploited when a creditor is being kept out of pocket with the assistance of delays inherent in legal proceedings.\textsuperscript{38} Upon judgment being given, interest on the full amount of the judgment debt (including any interest for which judgment has been granted) commences to run afresh.\textsuperscript{39} Again, given the

\textsuperscript{31} As pointed out by Selikowitz J in *Standard Bank of South Africa v Oneanate Investments (Pty Ltd)* 1995 (4) SA 510 (C) at 572 C-D: “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 methods of accounting can change that.”

\textsuperscript{32} See the opening words of s103(5): “Despite any provision of the common law or a credit agreement to the contrary...”

\textsuperscript{33} *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)* supra note 16 at 828C; *Commercial Bank of Zimbabwe Ltd v MM Builders & Suppliers (Pty) Ltd and Others and Three Similar Cases* supra note 17 at 321D–322D.

\textsuperscript{34} F & I Advisors (Edms) Bpk en ‘n Ander v Eerste Nasionale Bank van Suidelike Afrika Bpk supra note 18 at 25I–J.

\textsuperscript{35} “Despite any provision of the common law or a credit agreement to the contrary...” (my emphasis).

\textsuperscript{36} *Commissioner, South African Revenue Service v Woulidge* supra note 18 at 75B–C; *LTA Construction Bpk v Administrateur, Transvaal* supra note 17 at 482F-G; *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)* supra note 16 at 828D.

\textsuperscript{37} *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)* supra note 16 at 834C.

\textsuperscript{38} 834B–C.

\textsuperscript{39} *Commercial Bank of Zimbabwe Ltd v MM Builders & Suppliers (Pty) Ltd and Others and Three Similar Cases* supra note 17 at 303D.
proscriptive nature of section 103(5), it is unlikely that this more lenient adoption of the in duplum rule will pertain.

6. The socio-economic consequences of the high cost of credit

Why is the in duplum rule necessary? As indicated above, the rule has its origins in public policy, designed to protect consumers from exploitation by credit providers. What follows is an attempt to demonstrate the negative impact of high credit costs on lower-income communities by way of a number of examples of small money loans.

In Table A below, the maximum cost of credit permissible in terms of the National Credit Regulations for short-term loans is applied to a range of loan amounts and loan periods. The total monthly cost of credit is indicated in rand and as a percentage of the initial loan amount.

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40 “…the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt…” (my emphasis).
41 LTA Construction Bpk v Administrateur, Transvaal supra note 17 at 482F-G; Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation) supra note 16 at 828D–E.
42 Regulation 39(2): a short-term credit transaction is defined as ‘a credit transaction in respect of a deferred amount at inception of the agreement not exceeding R8000, and in terms of which the whole amount is repayable within a period not exceeding 6 months’.
43 The maximum cost of credit has been utilised in Table A in accordance with the results of a recent study commissioned by the National Credit Regulator, which found that 50% or more of lenders charge the maximum fees and interest permitted by the Regulations [see ‘Pricing of and access to consumer credit: a review of the impact of the National Credit Act one year after its implementation’ by Feasibility (Pty) Ltd (Jun 2009) http://www.ncr.org.za/publications/Pricing%20and%20Access%20Summary%20Cover%20June%202009.pdf (accessed on 8 Jul 2009) at 20].
Table A: Application of the total cost of credit permissible in terms of the National Credit Regulations

<table>
<thead>
<tr>
<th>Amount of initial loan</th>
<th>Duration of loan</th>
<th>Interest (5% pm) (R)</th>
<th>Initiation fee (pm, when paid in instalments) (R)</th>
<th>Service fee (always R50 pm) (%)</th>
<th>Total cost of credit (interest + initiation fee + service fee) (R &amp; %)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 R200</td>
<td>1 month</td>
<td>R10 pm</td>
<td>R32 pm</td>
<td>25% pm</td>
<td>R92 pm</td>
</tr>
<tr>
<td>2 R500</td>
<td>1 month</td>
<td>R25 pm</td>
<td>R79 pm</td>
<td>10% pm</td>
<td>R154 pm</td>
</tr>
<tr>
<td>3 R1000</td>
<td>4 months</td>
<td>R50 pm</td>
<td>R42 pm</td>
<td>5% pm</td>
<td>R142 pm</td>
</tr>
<tr>
<td>4 R2220</td>
<td>4 months</td>
<td>R111 pm</td>
<td>R77 pm</td>
<td>2,25% pm</td>
<td>R230 pm</td>
</tr>
<tr>
<td>5 R2220</td>
<td>6 months</td>
<td>R111 pm</td>
<td>R53 pm</td>
<td>2,25% pm</td>
<td>R214 pm</td>
</tr>
<tr>
<td>6 R3000</td>
<td>6 months</td>
<td>R150 pm</td>
<td>R69 pm</td>
<td>1,67% pm</td>
<td>R269 pm</td>
</tr>
<tr>
<td>7 R5000</td>
<td>6 months</td>
<td>R250 pm</td>
<td>R108 pm</td>
<td>1% pm</td>
<td>R408 pm</td>
</tr>
<tr>
<td>8 R8000</td>
<td>6 months</td>
<td>R400 pm</td>
<td>R167 pm</td>
<td>0,6% pm</td>
<td>R617 pm</td>
</tr>
</tbody>
</table>

Table A illustrates that the smaller the loan, the more expensive it is, and that the positive impact of capped interest rates is to a large extent negated by the maximum initiation and service fees.

Explanatory notes to Table A:

(i) All figures in the tables in this article are rounded off to the nearest rand or percentage point.
(ii) The abbreviation ‘pm’ means ‘per month’.
(iii) It is assumed for the purposes of the calculations in Table A that:
   - the maximum rates of interest and fees are charged according to regs 42 and 44;
   - the total initiation fee is charged to the borrower and capitalised over the same period as the loan, at the same interest rate (5%); and
   - interest is charged only on the loan amount (and not on unpaid interest and other fees).

Several repayment periods are assumed in the examples, from the common one month loan to the maximum 6 month loan for short-term credit transactions.

The monthly instalment is calculated by applying the formula $FV = PV(1 + it)$, where $FV$ = future value; $PV$ = present value; $i$ = interest rate; $t$ = time.

The service fee is expressed as a percentage of the initial loan.

The monthly total cost of credit is expressed in rand and as a percentage of the initial loan.

R2220 was found to be the average size short-term loan in the study referred to in note 43 above: ‘Pricing of and access to consumer credit: a review of the impact of the National Credit Act one year after its implementation’ by Feasibility (Pty) Ltd (Jun 2009) http://www.ncr.org.za/publications/Pricing%20and%20Access%20Summary%20Cover%20June%202009.pdf (accessed on 8 Jul 2009) at 20.

R8000 is the maximum permissible short-term loan amount [Reg 39(2)(a)(i)].

For further discussion regarding the conclusions that can be drawn from the application of the cost of credit in terms of the Regulations to similar examples, see J Campbell op cit note 3 at 267-268.
In Table B below, the results of Table A are applied to a range of low-income borrowers on the assumption that they are able to meet their obligations in terms of the respective credit agreements.

**Table B: Application of the results of Table A to a sample survey of low-income borrowers**

<table>
<thead>
<tr>
<th>A</th>
<th>B</th>
<th>C</th>
<th>D</th>
<th>E</th>
<th>F</th>
<th>G</th>
<th>H</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amount of initial loan</td>
<td>Duration of loan</td>
<td>Total cost of credit per month (from Table A)</td>
<td>Total instalment per month (capital repayment + cost of credit)</td>
<td>Assumed monthly pension / wage of borrower</td>
<td>Percentage of income (E) utilised to pay cost of credit (C) every month (%)</td>
<td>Percentage of income (E) utilised to pay total instalment (D) every month (%)</td>
<td>Percentage of income available for all other expenses (after loan repayment) (%)</td>
</tr>
<tr>
<td>1</td>
<td>R200</td>
<td>1 month</td>
<td>R92 pm</td>
<td>R292 pm</td>
<td>R1010</td>
<td>9%</td>
<td>29%</td>
</tr>
<tr>
<td>2</td>
<td>R500</td>
<td>1 month</td>
<td>R154 pm</td>
<td>R654 pm</td>
<td>R1010</td>
<td>15%</td>
<td>65%</td>
</tr>
<tr>
<td>3</td>
<td>R1000</td>
<td>4 months</td>
<td>R142 pm</td>
<td>R392 pm</td>
<td>R2000</td>
<td>7%</td>
<td>20%</td>
</tr>
<tr>
<td>4</td>
<td>R2220</td>
<td>4 months</td>
<td>R230 pm</td>
<td>R785 pm</td>
<td>R3000</td>
<td>8%</td>
<td>26%</td>
</tr>
<tr>
<td>5</td>
<td>R2220</td>
<td>6 months</td>
<td>R214 pm</td>
<td>R584 pm</td>
<td>R4000</td>
<td>5%</td>
<td>15%</td>
</tr>
<tr>
<td>6</td>
<td>R3000</td>
<td>6 months</td>
<td>R269 pm</td>
<td>R769 pm</td>
<td>R4000</td>
<td>7%</td>
<td>19%</td>
</tr>
<tr>
<td>7</td>
<td>R5000</td>
<td>6 months</td>
<td>R408 pm</td>
<td>R1241 pm</td>
<td>R5000</td>
<td>8%</td>
<td>25%</td>
</tr>
<tr>
<td>8</td>
<td>R8000</td>
<td>6 months</td>
<td>R617 pm</td>
<td>R1950 pm</td>
<td>R6000</td>
<td>10%</td>
<td>33%</td>
</tr>
</tbody>
</table>

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52 Simple interest is assumed: that is interest on the capital only, not compound interest, which includes interest on interest. It is possible that compound interest is charged on arrears, but this is not clear.

53 The monthly instalment is calculated by adding the total monthly cost of credit from Table A to the amount necessary to pay off the capital in equal monthly instalments over the period indicated.

54 A range of income levels for lower income consumers is assumed.

55 R1010 is the current monthly old-age state pension.

56 A similar table to my Table B appears on the Department of Trade and Industry website in which consumers are warned of the total instalments and total interest payable for a loan of R5 000 repayable over 6, 12 or 24 months. (Department of Trade and Industry “Consumer Alert” [http://www.dti.gov.za/ccrd/YouhavetheRighttoCreditOptions.htm](http://www.dti.gov.za/ccrd/YouhavetheRighttoCreditOptions.htm) (accessed 7 Jul 2009).
Between 5% and 15% of consumers’ personal income in the eight examples has to be used merely to service this debt – that is to say, to pay the total cost of the credit (Column F). This position is worsened when one adds the capital repayment, with the result that between 15% and 65% of consumers’ personal income has to be used to meet the monthly instalments (Column G).

These are disproportionately high amounts, having the direct result that less money will be available to pay for all other necessary living expenses. These figures relate to a single loan only; additional debt owed by the consumer will raise these amounts further. Low-income earners borrowing even very small amounts of R200 or R500 are extremely vulnerable. Being already poor, they will as a result of having taken out such a loan have considerably less of their original meagre income to live on.

7. Application of the *in duplum* rule

Table B above best illustrates the potential relevance of the *in duplum* rule. Given scenario 3 of Table B, for example, supposing the borrower, as a result of unforeseen circumstances, is able from commencement of repayments to pay instalments of only R42 per month rather than the required R392 per month, s/he will after 11 months be in arrears with credit costs in the total amount of R1 000. This amount equals the outstanding capital of R1 000, and credit costs will stop accruing at the end of the eleventh month.

Should the borrower remain unemployed for another year, and be able to pay only small monthly amounts of never more than R142, no further credit costs will accrue during this period and the total debt will effectively never exceed R2 000.

At the end of 23 months, should the borrower pay the full R392, the amount of R250 will be paid towards arrears credit costs, which will then reduce to R750, and then

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57 In the examples in Table B, between 35% and 85% of income will be available to pay for other living expenses (Column H).
58 A loan of R1 000, repayable over 4 months in equal instalments of R392 each.
59 For example, retrenchment.
60 Monthly credit costs of R142 less R42 per month paid = R100 per month shortfall on payments of monthly credit costs. R100 x 10 months in arrears = R1 000.
61 Or “unpaid balance of the principal debt”; per s103(5) of the National Credit Act.
62 The outstanding capital is the same as the initial loan amount, since monthly payments accrue first to credit costs and then only to capital, and the monthly cost of credit due is always far greater than R42 in the first 12 months.
63 R1 000 unpaid capital + R1 000 arrears cost of credit. Note that even if the borrower paid nothing at all during this year, the total debt would never exceed R2 000.
64 R392 (amount paid) less R142 (monthly credit costs) = R250.
65 R1 000 (arrears credit costs) less R250 (paid towards arrears credit costs) = R750.
the cost of credit will start to accrue again. Should the arrears cost of credit reach R1
000 again, the cost of credit will once again stop accruing.

Given excessively high credit costs, subsequent default by borrowers is very likely, and unpaid credit costs can accrue speedily, as demonstrated in the example above. In these circumstances the in duplum rule is therefore a highly relevant and very effective mechanism for limiting the cost of credit and combating excessive credit costs permissible in terms of the Regulations.

8. Practical enforcement of the in duplum rule

There are various ways in which the in duplum rule can be enforced in order to ensure its application in practice – by the courts, consumers and their legal representatives.

The Courts have a duty mero motu to raise the illegality of interest claimed in contravention of the in duplum rule, if this is clear from the facts, even if the in duplum rule was not pleaded. It is not clear whether or not the courts are aware of this. This approach has been given added impetus by the proscriptive nature of section 103(5). The Court is, however, not required to speculate or piece together a defence on behalf of the defendant from mere fragments of evidence.

The in duplum rule can be raised by consumers as a defence (or partial defence) to a claim for credit costs. Thus, in the example referred to in paragraph 7 above, should the creditor after 18 months sue for an amount in excess of R2000, the borrower can use the rule as a defence for the amount claimed in excess of “the double”. Alternatively, the consumer could pay into court the amount of R2000 and tender payment of costs to that date, and then defend the action for the balance of the amount claimed. Further, in the event that the consumer should pay an amount for credit costs that is subject to the rule and was thus not payable, the consumer may sue the creditor for such amount on the basis of the rule. Finally, the rule can of course be used to leverage a favourable result for the consumer in settlement negotiations prior to or after debt collection proceedings are instituted.

67 F & I Advisors (Edms) Bpk en ‘n Ander v Eerste Nasionale Bank van Suidelike Afrika Bpk supra note 18 at 525H–526A.
68 F & I Advisors (Edms) Bpk en ‘n Ander v Eerste Nasionale Bank van Suidelike Afrika Bpk supra note 18 at 525H–526A.
69 Rule 18 of the Rules of the Magistrate’s Court Act 32 of 1944.
There are various difficulties associated with the practical enforcement of the *in duplum* rule which partly motivated the writing of this paper. It is a very technical legal rule which is probably not widely known amongst consumers. The calculations necessary to apply the rule correctly are complex, even at the simplest level,\(^{70}\) and expert evidence might well be required in court, which is costly. Further, the rule is possibly not clearly understood by both legal practitioners and court officials. There is thus the danger of the rule not being applied by the courts (although peremptory) or used correctly and to good effect by consumers and their legal representatives.

### 9. Conclusion

The development of the common law *in duplum* rule was a response to the inability of the common law and legislation in regard to usury to provide sufficient protection to consumers from the effects of the accumulation of further debt from high credit costs. Although deeply entrenched in the common law, the rule has been significantly fortified through clarification and extension via the National Credit Act. The codified rule represents a clear intention on the part of the legislature to make a fundamental shift away from freedom of contract / *pacta sunt servanda*.

It is likely that increased use will be made of the rule as a defence when appropriate, and if used to its full potential, it will provide some relief from entrapment by debt.\(^ {71}\) The *in duplum* rule is therefore without doubt the most important measure to limit excessive credit costs permitted by the Act.

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\(^{70}\) See, for example, paragraph 7 above.

\(^{71}\) It must be remembered though that the *in duplum* rule will not assist the consumer who diligently pays monthly instalments due (including excessive credit costs) and thus never falls into arrears, or the arrears credit costs never add up to the outstanding capital amount.