Short notes on

THE IN DUPLUM RULE – HOW FAR DOES IT GO? LIMITED TO CREDIT AGREEMENTS – OR NOT?

Introduction

The in duplum rule has been part of South African law for more than 100 years, translated, in duplum means 'double the amount'. This common law rule provides that interest on a debt will cease to run where the total amount of arrear interest has accrued to an amount equal to the outstanding principal indebtedness.

It was developed in response to considerations of public interest and sought to protect borrowers from exploitation by lenders who permit interest to accumulate unchecked. It also has the effect of encouraging lenders to exercise their rights to be repaid, promptly and without delay.

Section 103(5) of the National Credit Act (NCA) 34 of 2005 as amended, incorporates a statutory version of the in duplum rule. This section provides that: *"Despite any provision of the common law or a credit agreement to the contrary, the amounts contemplated in section 101 (1) (b) to (g) that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the default occurs."*

Accordingly, the amounts referred to in section 101(1)(b) to (g) include initiation fees, service fees, interest, the cost of any credit insurance, default administration charges and collection costs.

So, what about agreements other than credit agreements and further, matters pendente lite?

Paulsen and Another v Slip Knot Investments

In Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd 2015 (3) SA 479 (CC), several related issues were considered:

1. *" The scope of the Constitutional Court's jurisdiction under s 167(3)(b)(ii) of the Constitution;*
2. *whether an agreement which is exempted from the National Credit Act 34 of 2005 (the " NCA") is*

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nevertheless invalidated by a party's failure to register as credit provider; and

3. *whether the in duplum rule — which stops the running of interest when the unpaid interest equals the outstanding capital — continues to operate once ligation to recover the debt commences. "*

In brief, the facts of the matter were as follows:

In 2006 Winskor, a property developer concluded a loan agreement with Slip Knot, a finance company. Under the agreement, Slip Knot loaned Winskor R12 million for 12 months at an interest rate of 3% per month. The Paulsens bound themselves as sureties for Winskor's liabilities to Slip Knot. I By July 2007 Winskor had defaulted. Slip Knot sued the Paulsens for the R12 million capital plus interest accrued, which by this time far exceeded the capital sum. No relief was sought against Winskor, which was in the process of being liquidated. In their defence, the Paulsens argued that the loan agreement was invalid because Slip Knot was not registered as a credit provider under the NCA; that even if the contract were valid the in duplum.

For purposes of this article, we will only focus on the answer to the third point. The Court found that it is settled law that the in duplum rule permits interest to run anew from the date that the judgment debt is due and payable.

Also, the Court found that there are three further closely related questions with similar practical implications. First, does post-judgment interest run on the whole of the judgment debt or only on the original capital amount of the loan? Second, does the in duplum rule cap the running of such additional interest at double the sum of the whole of the judgment debt or double the sum of the original capital amount of the loan? Third, does this interest run at the contractual rate or the statutorily prescribed rate of interest?

Concerning the first two questions, the order of the Supreme Court of Appeal provided that interest runs on — and is limited to an amount equal to — the whole of the judgment debt. The Court upheld this position.

The Supreme Court of Appeal also held that the post-judgment interest runs at the rate agreed upon contractually, in this matter the applicants have provided no persuasive arguments justifying a departure from the accepted practice of applying the contract rate to post-judgment interest. The Court, therefore, upheld the Supreme Court of Appeal's position.

Conclusion

The in duplum rule applies to various agreements, not only credit agreements. In the case of a judgement debt, interest runs afresh as awarded from the date on which it becomes due and payable. Litigants should, therefore, take note of this position and ensure that they deal with it where needs be to safeguard

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