THE NATIONAL UNIVERSITY OF LESOTHO

FACULTY OF LAW

REGULATION OF FINANCIAL INTEREST UNDER LESOTHO'S LEGAL SYSTEM: THE IN DUPLUM RULE REVISITED

A dissertation submitted in partial fulfilment of the requirement of Bachelors of Laws Degree (LLB) 5 Year Programme (Hons)

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DEDICATION

This dissertation is dedicated to my mother ‘Mafumane Tsie who has been there throughout my entire academic years and showed me support.

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DECLARATION

I declare that this dissertation is my work and that all sources that have been used and/quoted in this work have been indicated and acknowledged by complete references.

SIGNATURE

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DATE……………………MAY 2020

CHAPTER 1

1.1 INTRODUCTION

The practice of charging interest on loans has been a widely popular practice that dates back to the 17th to the 18th century. Interest or the legitimacy of charging interest is, in all spheres, underpinned by religious origins. However, the practice of charging interest on loans as evidenced in the bible was met with criticism as Christian virtue entails the assistance of one another in society and not the enrichment of the rich at the expense of the poor. The charging of interest is allowed only where a debtor is late in repaying a loan, when the creditor would be compensated for the benefit of the use of the money during the period between the date on which repayment should have been made and the actual date of repayment.[1]

The arrear interest that is charged to the debtors has to be regulated and there has to be a ceiling on the interest. From the earliest times, interest was limited by government in various ways based on the economic consideration aimed at limiting the usury of creditors and in order to protect debtors responsible for payment of interest.[2] It is because of this limit that the common law in duplum rule on regulation of interest was adopted and used in countries such as Lesotho, South Africa and Kenya with its Roman origin mostly fostered on the Old Testament.

1.2 HISTORICAL BACKGROUND

In duplum is a Latin phrase derived from the word in duplo which means "in double". The principle of in duplum originates from Roman Dutch law and has been implemented in South African law since 1830.[3] The rule states that the interest on arrears ceases to accrue on an outstanding debt once the sum of the unpaid interest equals the amount of the outstanding capital. The rule differentiates between accrued and arrear interest.[4] 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 has accumulated.

[1] Swart T.M, "African Journal of Business management" 2012 @ page 10.
[2] LTA Construction Bpk v Administrateur Transvaal 1992 (1) SA 473 @ 482
[3] Janson Van Ransburg, "In duplum rule: statutory v common law," 2014.
[4] Commercial Bank of Zimbabwe v MM Builder (Pty) 1997 (2) SA 295

It is important to state that the in duplum rule is based on public policy interest and has been part of South African law since the 1800's. It could be arguable that the Lesotho common law in duplum rule borrows heavily from the South African in duplum rule. The purpose of the in duplum rule was to protect the financial interest of consumers from being crushed by the never ending accumulation of interest on an outstanding debt. Our courts have applied the rule in a number of cases. It is in fact the principle in our law that the unpaid interest may not exceed the capital amount.[5] In 1886, the High court in the case of Tylor v Hollard[6] held that an agreement made to repay double the capital amount plus 8% interest thereon, was contrary to the Roman Dutch law.

In addition, De Villiers JP in Union Government v Jordaan's Executor[7] stated that the Roman law is quiet clear, and our law is based on the Roman law in this respect. 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 Dutch Law that the interest does not run after it amounts to the capital sum.

The High Court in Commercial Bank of Zimbabwe v MM Building and supplies PVT Ltd[8] said the following:

> It is a principle firmly entrenched in our law that interest, whether it accrued as simple or compound interest, ceases to accumulate upon any amount of capital owing once the accrued interest equals the amount of capital outstanding, whether the debt arises as a result of a financial loan or out of any contract whereby a capital on sum is payable together with interest thereon at the determinable rate.

1.3 APPLICATION OF THE RULE

Arguments have been raised, however, as to the exceptions where the rule does not apply with regard to situations where interest has been said to serve a purpose other than the ordinary function that it fulfils and where a debtor has been regarded as unworthy of the protection by the rule.[9] The argument has however been met with criticism, as the system it proposes would

[5] Kelly-Louw M.L, "Better consumer protection under the in duplum rule," 2007 SA Merc LJ 352 at 372.
[6] 1888 2 SAR 78
[7] 1916 TPD 313
[8] 1997 (2) SA 285
[9] Kawonde P, "In duplum rule and inflanation," May 30, 2003.

necessitate an inquiry into the identity of the debtor instead of the nature of the debt.[10] It has also been said that the rule does not apply to interest on money owed to the revenue authority, as those debts arise by operation of statutes and not by contract.

There is the application of the rule **pendente lite.** The running of interest when it equals capital, before litigation, during litigation or after litigation, has been a major issue with regard to the application of the common-law in duplum rule. This has been fore grounded by the argument as to whether the delays inherent in court processes would result in disadvantaging the creditor, who will have already been kept out of his money for longer than anticipated, or whether protection should remain biased towards the debtor, who, despite having delayed repayment of the debt, will also be able to take further advantage of the delays inherent in court process, as the payment of the interest will have been put into abeyance by the in duplum rule. Where a creditor instituted legal proceedings against a defaulting consumer by issuing a summons, the common-law in duplum rule was suspended and interest would once again accrue on the judgement debt.[11] Further, it has been argued in case law that upon service of the summons, the in duplum rule should be suspended and only resume upon the grant of judgement on the debt.[12] Thus the question remains as to whether upon the commencement of the litigation, interest should stop running or continue to run until the *duplo* is reached. In so deciding, the scale is to be tipped towards the party worthy of more protection than the other, between debtor and creditor.

The case of Standard Bank of South Africa Ltd v Oneanate Investment (Pty) Ltd[13] is one of the cases that introduced the law stating that initiating legal proceedings suspends the operation of the in duplum rule. The meaning of this is that interest would run uncapped and could therefore exceed the values of the capital sum claimed. Once judgement was given, the in duplum rule was revived and interest would once again be limited to the value of judgement given.

1.4 STATEMENT OF THE PROBLEM

[10] Madzokere T.D, "The codification of the in duplum rule in South Africa and Zimbabwe," 2018.

[11] Kelly Louw M.L, "Better consumer protection under the in duplum rule," 2011 SA Merc LJ 357.

[12] Standard Bank of South Africa v Oneanate Investment (Pty) Ltd 1998 (1) SA 811

[13] 1998 (1) SA (SCA)

Lesotho's common law is derived from Roman Dutch law and it recognises a substantive right to interest without any statutory add-on; if money is wrongly withheld, the courts have power to award interest for the period of delayed payment. This is known as an **ex mora rule** and that rule is subject to the common law in duplum rule in Lesotho.[14]

In many countries, lending and lending rates have always been a big debate. The real problem regarding consumer protection started with the public requirement that interest rate charges should be controlled. In Lesotho, our law on interest is mostly regulated by common law and the above case of **LHDA v Impregilo** demonstrates that there is no statutory legislation dealing with the issue on the cap of interest. We have legislations such as the Financial Institutions Act 1999, Central Bank Act of Lesotho 2000 and the Money lenders Act 1989. The weakness of regulations in our legal system for financial services offered by credit providers and Financial Institutions still leaves a great concern and consumer protection claims have risen.[15]

South Africa introduced the National Credit Act NO. 34 of 2005[16] which addressed the issues on the charging of interest and developed the practice of common law in duplum rule and Kenya introduced the Banking (Amendment) Act 2006[17]. However, Lesotho seems to be far and slow in developing a comprehensive piece of credit law that will address the issues such as consumer indebtedness and regulation of interest in cases where a consumer has defaulted. The Money Lenders Act 1989[18] has remained stagnant and failed to take into account in the development of the industry. Due to its old age, the Act fails to provide for more comprehensive and enhanced supervision of the industry. Consequently, there is lack of a coordinated system of deterrence against the abuse within the industry.

There is also a growing trend of "irresponsible and illegal lending" among local Financial Institutions and this has become a concern in Lesotho. Some Financial organisations operating in Lesotho are not taking into account the debtors repayment ability when approving loans and as a result, when they default in payment, they are faced with payment of large amounts of money and interest pilling up. The most common credit providers or money lenders that people use in Lesotho are those that tend to over burden them with a lot of interest to pay and leave creditors in endless credit because some of them do not follow the rule on regulation of interest.

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[14] LHDA v Impregilo 2002 EWHC 2435
[15] Finmark Report 2014 at page11
[16] National Credit Act NO. 34 of 2005
[17] Central Bank of Kenya (Amendment) Act NO. 4 of 2006
[18] Money Lenders Act 1989

There are still laws somehow that regulate credit and interest in Lesotho but the adequacy of credit regulations that does exist is unfortunately questionable. Although money lending is regulated in Lesotho, there is lack of effective regulations, legislation and supervision of money lenders, and inconsistent monitoring even across other financial institutions.

The Money Lenders Act 1989, section 20(1) does away with adding of any costs, charges or expenses relating to the negotiations for or granting of a loan or proposed loan and considers such agreement void and unenforceable.

Section 6(1) (b) of the Money Lenders Act 1989 provides for the interest rate of 25% per annum. As a result of this interest rate, there has been a number of licensed and unlicensed money lenders, charging interest as high as 40% per month resulting in consumer over-indebtedness and disregarding of the in duplum rule. Some creditors claim that the charging of 40% is done as a result of section 20 of the Act because the 20% interest rate provided by the statute is very low and there is a high credit prevalence within the industry.

Apart from that, there are claims that the in duplum rule interferes with the parties' freedom of contract. The courts of law still exercise a degree of caution before making any interference with contracts that are entered into between parties and they make it a point that they do not re-write the terms of the contract for both parties to the contract.[19] They further claim that the in duplum rule interferes with the parties freedom of contract by placing a ceiling to the amount of interest to be paid. A contract that has a clause that violates the in duplum rule is taken to be void.

Also, the running of interest when it equals capital, before litigation, during litigation or after litigation, in regard to the application of the rule **pendente lite** has been a major issue with regard to the application of the common-law in duplum rule.

1.5 LITERATURE REVIEW

Many scholars criticise the common law in duplum rule and call for development of legislations that can be applied and put a cap on interest in all aspects. The common law in duplum rule applies only to unpaid interest and does not cater for costs in addition to interest which in

[19] Makadia Khasake, "Introduction to the in duplum rule in Kenya: A legal mechanism of equitable distribution of resources and poverty," 2008 at page 5.

aggregate may not exceed the unpaid principal debt at any point while the consumer is in default under the credit agreement.[20]

Also some scholars argue on the regulation of interest and how the rule is applied during litigation. Where court proceedings are instituted per common law, interest ceases to run during trial and recommences to accumulate upon judgement on the judgement debt. Finn Elliot[21] argues that under the South African common law, the suspension of the in duplum rule is discriminatory to all debtors and targets them and those that believe have a good defence and leaves them in ruins. He further states that the common law limit on a debt takes a lot time to be reached, but where there is a statutory legislation like in South Africa (National Credit Act), the limit is reached much faster because other fees are calculated too.[22]

In countries where there has been the enactment of statutory legislation on the rule, the rule no longer applies only to the unpaid interest but to other fees too. In South Africa where the National Credit Act has been enacted, the statutory in duplum rule applies also to all credits paid, unpaid and arrear interest together with other charges provided for under section 101(b) to (g) during the time that the consumer is in default under the credit agreement.[23]

However, in Andre Francois Paulsen v Slip Knot Investment[24], it was said that the statutory in duplum rule is not suspended during litigation. It has also been argued that a debtor will not be exploited where the creditor will be kept out of pocket through being subject to delays related to legal proceeding.

Apart from that, there are some scholars who advocate for freedom of contract in every contract. Sir George observed that if there is one thing that public policy requires, it is that men of full age and competent understanding shall have utmost liberty in contracting and their contracts shall be held sacred and enforced by courts justice and no rule should hinder that. He argues that the rule should be excluded in contracts if parties do not want it to exclude it.[25] However, Vessio M.L.[26] is of a different view and states that the rule cannot be excluded in

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[20] Finn Elliott, "Correctly Applying the in duplum rule," 2013 at page 412.
[21] Supra footnote 19
[22]Supra footnote 16
[23] Section 101 (b) to (g) of the National Credit Act NO. 34 OF 2005
[24] 2015 (3) SA 479 99 (cc) 483
[25] Makadia Khasake "Introduction to in duplum rule in Kenya: A legal mechanism of equitable distribution of resources and poverty" 2008.
[26] Vessio ML, "The effects of the in duplum rule and Clause (5) of the National Credit Act Bill 2005 on Interest"2006 @page 10.

contract law by means of a contractual provision and where there is such a provision, the contract will be invalid.

1.6 HYPOTHESIS

The common law in duplum rule must be developed into a piece of legislation since it does not protect debtors entirely from the never ending debts. Freedom of contract should be limited by the rule for protection of debtors.

1.7 RESEARCH QUESTION

Whether our laws allows for regulation of interest and our financial institutions and credit providers follow the in duplum rule.

1.8 METHODOLOGY

The dissertation will be broken down into chapters that will address the above mentioned problems. I am going to achieve answering or addressing the above questions by relying on the secondary data available from secondary sources such as books, from the law journals, articles unpublished reports, official letters and websites from the internet. The field case study will be conducted in order to make a determination if credit providers and credit institutions apply the rule in our country Lesotho. Interviews and questionnaires will be used too.

1.9 CHAPTER BREAKDOWN

This dissertation will be broken into four chapters.

- Chapter one introduces the research on the regulation of financial interest under Lesotho's legal system and revisiting of the in duplum rule. It will have an introduction and the background of the rule, the statement of the problem and the hypothesis. Chapter one will also have the literature review and the research question.
- Chapter two will be on the definition of terms and how the in duplum rule operates. There will also be a discussion on the purpose of the rule.

- Chapter three will be on the discussion of the issues that affect debtors in countries that use the common law in duplum rule and have not developed the rule into its statutory form. Findings will be presented and analysed, so as to make a comparison with how

far other jurisdiction have gone in regard to the development of the common law in duplum rule into its statutory form.

- Chapter four will be on conclusions and recommendations that will be made.

CHAPTER 2

1.1 INTRODUCTION

In Lesotho, we have statutes such as the Money lender's Act, Financial Institution Act, and the Central Bank Act and others which regulates the financial institutions providing credits to debtors. Credit under the Financial Institutions Credit Only and Deposit Taking Micro-Finance Institutions Regulation 51 of 2014, is defined as "the granting of a loan, the creation of debt any form of differed payment."

Apart from that, there are rules that are adopted for the main purpose of putting a limit to interest on a loan. Lesotho like many other countries uses the in duplum rule in order to regulate and put a cap on interest. The in duplum rule is a common law rule, and some countries have developed it into its statutory form. However that will be discussed in the next chapter. Our main focus is on the common law in duplum rule in this chapter. The in duplum rule has been a subject of much academic debate and juristic opinions for so many times.

1.1 Definition of in duplum rule

The common law so-called in duplum rule is a measure that limits the excessive cost of small credit made and it is used to protect consumer from entrapment by debt.[27] In duplum is translated "double the amount".[28] It is a common law rule that states 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 debt.

What this means is that when a debtor who falls into arrears with payments owing under an agreement with a creditor, such a creditor may not claim an amount of interest on the amount owing, which exceeds the amount of outstanding capital at any time. The in duplum rule in its common-law form was fashioned, and subsequently retained in South African law, as a practical public policy rule which permits the lender to insist on regular servicing of loan while not affecting his right to recovery of interest and simultaneously obliges him not to permit a

[27] Campbell J, "The in duplum rule: relieve of consumers of excessively priced small credit" 2006.

[28] Vessio M.L "Effects of the in duplum rule and Clause 103 (5) of the National Credit Act Bill 2005 on interest" 2006.

burdensome amount of interest against the debtor should he (the creditor), "tolerate fiscal indiscipline."[29]

The following two aspects of the common law in duplum rule that will be mentioned are important. Firstly, where the total amount of arrear and unpaid interest has accrued to an amount equal to the outstanding capital sum, interest ceases to run. Secondly, any payments made by the debtor thereafter will lead to the amount of interest decreasing after which interest again starts to accrue to an amount equal to the outstanding capital amount. In addition, the in duplum rule is confined to arrear interest alone. The reason for this is plain; it is to protect debtors from having to pay more than double the capital owed by them at the date on which the debt is claimed.[30]

It should also be noted that the court will not order interest that is in conflict with the in duplum rule if the breach is clear, as little as a court will order payment of a usurious rate of interest in such circumstances. This does not mean that a court must mero mutu initiate a search to ascertain whether such a rule has been contravened and the court will not act on such suspicion. This was said by the court of appeal in the case of Sekhonyana v Standard Bank of Lesotho.[31]

The rule has also been explained in a lot of cases in South Africa, Lesotho and other jurisdictions. One of them is the South African leading case of Andre Francois Paulsen v Slip Knot Investment[32] where Mandlanga J. observed that:

> The in duplum rule is a long-standing and well-established part of our law. The rule provides that arrear interest ceases to accrue once the sum of the unpaid interest equals the amount of the outstanding capital. The rule has its origin in classical Roman law. It was carried through Roman Dutch law, reference to it being made by various old authorities. The rule has also been recognised in local case laws as far back as 1830.

In addition, in 1972 the in duplum rule was succinctly summarised by the Transvaal Provincial Division[33] as follows:

[29] Julian Kagan "Personal Finance'' 2020 @page 17.
[30] Bank of Lisbon 1988 SA 580 (A) 588
[31] (C of A (CIV) 1 /2000 LSHC 150 (13 OCTOBER 2000)
[32] 2015 (1) SA 479
[33] Stroebel v Stroebel 1973 2 SA 137

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

The case of LTA Construction Bpk v Administrateur Transvaal[34] is also of great importance when it come to the rule. The court in that case emphasised that the prohibition of interest in duplum, viz. that interest may not exceed the capital sum, has been applied in a long 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 in duplum has been abrogated.

2.2.1 Arrear interest

Arrear as a word is a financial and legal term that refers to the status of payments in relation to their due dates. The word is most commonly used to describe an obligation or liability that has not received payment by its due date. Therefore the term arrear applies to an overdue payment. If one or more payments have been missed where regular payments are contractually required such as mortgage or rent payment utility or telephone bills, the account is in arrears.[35] In regard to the in duplum rule, arrear interest is the interest which has remained unpaid and therefore has accumulated.

2.2.2 Accrued Interest

Accrued is a term used to describe the ability of something to accumulate overtime, and is mostly commonly used when referring to the interest, income, expenses of an individual or business. However, accrued interest is all the interest which a debtor pays throughout the life of his debt.

2.3 Purpose of the in duplum rule

The common law rule was made for the purpose of protecting the rights of consumers or debtors by putting a ceiling on the amount of interest that a debtor had to pay. It was also to enforce a fiscal discipline upon creditors by serving to disincentivise lending money to a sad risk. The in duplum rule was also made in order to be used as a stop gap measure to prevent abusive lenders

[34] 1992 1 SA 473

[35] Julian Kagan, "Personal Finance" 2020 @page 17.

from delaying enforcement of the debt. The gap meant that they extract no benefit from delay once the total interest is equal to the original sum borrowed.

In addition, the rule was made in order to ensure that debtors do not suffer the requirements upon them to pay large interests. This payment of large interest may be caused by the indolence and lapse or deliberate failure by the creditors so as to let the unserviced loans accumulate interest to unimaginable levels. It will protect the debtors as well as ensuring that the creditors get their money back for further circulation and hence the economy will be healthy.

One of the purpose of the in duplum rule is for public policy considerations. The jurisprudential foundation for the restriction of interest to the duplum was the policy consideration that debtors whose affairs are declining should not be entirely left dry. In Taylor v Hollard[36] the court had the following to say in regard to public policy considerations:

In like manner, the provisions of the Roman Dutch Law that the interest may not exceed the capital or be turned into capital are still observed in practice. The court will refuse to enforce to its full extend a contract made by our citizens in which double the amount advanced with interest, is stipulated for, not so much in protection of the promisor, but because to countenance such proceedings would be contrary to good morals and public policy, the interest of our citizens and the policy of our law.

Apart from that, the in duplum rule encourages creditors to be more vigilant of consumers who do not service their debt, and dissuades them from providing reckless credit through the over extension of debtor's limited financial resources.[37] It is thus a motivational tool to avoid reckless lending and facilitates the exercise of diligence in lending. The rule can only be applied in the real world of commerce and economic activity where it serves considerations of public policy in the protection of borrowers against exploitation by lenders.[38]

2.4 Application of in duplum rule

The common law in duplum rule is not limited to interest on money-lending transactions. In fact, it applies to all types of contracts in terms of which a capital sum is due by the debtor to the creditor and on which amount a specific amount of interest is payable.

[36] 1888 2 SAR 78-85
[37] Kawonde P, "In duplum rule and Inflanation" 2003 @page 26.
[38] CSARS V Woulidge 63 SATC 483

2.4.1 Exclusion of the rule from contracts

In order to have a great understanding of the rule, we will look at its application in different circumstances. The in duplum rule applies to all contracts under which a capital sum owed is subject to a particular interest rate.[39] This seems to limit the application of the in duplum rule to circumstances where a contract exists between parties. Apart from that, the rule acts as an exception to the general principle of freedom of contract as it cannot be excluded by means of contractual provision. For instance, a creditor may not agree with a debtor and enter a provision that excludes the rule. Where there is such contract then the contract will be deemed to be void because of that provision.

It should also be noted that the in duplum rule serves to aid debtors in financial difficulty by holding that it is unlawful to recover interest equal to or more that the capital sum upon which interest had accrued. The rule serves an important social function by providing that any clause in the contract that seek to deprive any person of the protection afforded to them by the law is unenforceable by reason of its illegality or on the basis that it offends public policy. [40]

2.4.2 The application of the rule on capitalisation of interest

When applying the rule, the rule does not allow capitalisation of interest at all. There is a common practice among money lenders to treat the interest accrued on the loan, after the debtor defaults, as capital so that interest on the capital also attracts interest. This practice is called compounding, which is the capitalisation of interest so that interest itself yields interest.[41] Capitalisation is done mostly by banks as financial institutions giving service of credit to borrowers. Capitalisation is the addition of the unpaid interest to the principal balance of one's loan.[42] The principal balance increases when payments are postponed during periods of deferment or forbearance and an unpaid interest is capitalised. As a result more interest may accrue over the life of the loan, the monthly payment amount may be higher, or more payment maybe acquired.

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[39] LTA Construction Bpk v Administrateur Transvaal 1992 (1) SA 473
[40] Kgololesego Financial Company (Pty) Ltd v Ketshotseng 2008 (2) BLR 269 (HC) @ 274
[41] Mark Hapgood, "Paget's Law of Banking" Butterworths, 12th Edition 2007 at page 157.
[42] Julian Kagan "Personal Finance" 2020 page 29.

In Standard Bank of South Africa v Oneanate Investment (Pty) Ltd,[43] one of the issues was whether the in duplum rule was applicable where a bank had followed its banking practice of capitalising unpaid interest on a customer's overdraft. The bank argued that because the interest had been capitalised, it has lost its character as interest and became capital, with the result that the in duplum rule did not apply to it. The court did not agree and it was said that the in duplum rule is one based on public policy designed to protect borrowers from exploitation by lenders and as such cannot be altered by banking practices.

2.4.3 Waiver of the in duplum rule

The in duplum rule cannot be waived by borrowers nor can it be altered by banking practices.[44] The acknowledgement of a debt has been held not to be a compromise leading to the abandonment of the application of the rule, wherein the debtor lacks knowledge of the rule and creditor pleads that the rule does not apply. In circumstances where debtors lack knowledge of the existence of the rule, and creditors seek to adduce waiver thereof, it is the duty of the court to exercise its public protector role and ensure the application of the rule the alleviation of the debtor.

2.4.4 Application of the rule to money owed to the tax authority

The rule does not apply to interest on money owed to the revenue authority, since a tax debt arises by operation of the statute and only by a contract between taxpayers and revenue authorities. Also, public policy may also not require the taxpayer to be protected, for instance, where the interest only arises years after the relevant tax period and the revenue authority was unaware of the amounts outstanding and therefore was unable to pursue the debt until it had conducted an audit.[45] What this shows us is that where a person has failed to pay revenues for a certain period then he or she is supposed to pay up for the period that he has failed to do so and will not get protection from the rule.

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[43] 1998 (1) SA 811 (SCA)

[44] Standard bank of South Africa Ltd v Oneanate Investment Ltd 1998 3 SA 387

[45] Milner E, "The in duplum rule and SARS, Tax shock," Horror Newsletter, The practice Manager April 2013.

2.4.5 Sureties and the in duplum rule

Surety is an accessory obligation, and as such, there will need to be a valid principal debt which does not exceed the capital debt[46] in order for the in duplum rule to apply at the defence of the surety. Any defences which are available to the debtor are also available to the surety unless they are of a personal nature to the debtor. In circumstances where the creditor does not reflect the capital debt separately from interest it does not stand as a defence for the surety to be absorbed from payment of debt as long as there is proof of surety.[47]

2.5 Operation of the in duplum rule pendente lite

The meaning of suspending the operation of the rule pendente lite is that interest on a debt continues to accumulate during the period between the issuing of the summons and judgement by court, regardless of the in duplum rule. This may be the case regardless of whether it is the debtor or the creditor who has instituted proceedings in court.

The issue of applying the rule pendente lite or not has been discussed in a lot of cases but it originally stems from the unanimous judgment in Standard Bank of South Africa Ltd v Oneanate investment (Pty) Ltd.[48] The Supreme Court of Appeal in that case was faced with the question of whether the in duplum rule should operate pendente lite, meaning from the date of service of the process initiating the proceedings until the date of judgement. Zulman JA. held that the beginning of a suit to recover the debt suspends the operation of the in duplum rule. This meant that the limitation the rule placed on the accrual of arears interest, to the extent of the outstanding capital fell away once litigation had started. On this take, unpaid interest may balloon at the agreed rate for as long as litigation persists and until the date of payment.

However, in the South African case of Stroebel v Stroebel,[49] it was clear that the rule applied even pendente lite. Nevertheless, the case of Oneanate held that the operation of the in duplum rule should be suspended based on the two grounds;

(i) the courts reading of old authorities; and

(ii) public policy considerations.

[46] Atiyah P.S, "Introduction to the law of contract" Butterworths, 2016 at page 200.
[47] Schulze WG "The in duplum rule: A short list of some unanswered Issues" SALJ 2006 418-429.
[48] Paulsen and Another v Slip Knot Investment 2015 (3) SA 474
[49] 1973 (2) SA 137 (T)

In the case of Andre Paulsen v Slip Knots Investment case[50] the facts were that in 2006, Winskor 139 (Pty) Ltd, was involved in a business of property development whose shares were held by the trustees of Paulsen family Trust. Paulsen family trust sought to purchase a portfolio of properties in Brooklyn, Pretoria and resell them at a handsome profit. It obtained funding and there was a shortfall of 12Million; they concluded a loan agreement with Slip Knot which advanced the 12 million and as payable within 12months of the commencement date. Winskor was liable to pay interest of 3% per month to the date of final payment and interest was to be capitalised every month.

The Paulsen bound themselves severally and jointly as sureties in their personal capacity as trustees of Paulsen Family Trust under the loan agreement. In 2007 by the due date, they had defaulted in its obligation of indebtedness and Slip Knot instituted proceedings against Paulsen.

The Supreme Court of Appeal in this case emphasised that by suspending the application of the in duplum rule pendente lite, Oneanate indiscriminately targets all debtors, regardless of whether they are defending the claim in good faith or not. To hit all debtors in this manner would surely have an undesirable chilling effect. Some debtors despite a genuine belief that they have a valid defence may sooner opt to settle the claim than to face the potentially financially ruinous interest that would again commence to pile up once the court processes was served.

However, preventing interest from accumulating once litigation has started may cause creditors to abandon their claims against defaulting debtors as their money maybe eroded by inflation.[51]

While in some cases creditors may lose money in inflation if the rule applies during litigation, this is very unlikely to have the same catastrophic effect on the creditors compared to what the accumulation of run-away interest will have on the debtors. Applying the rule pendente lite does not inhibit creditor's access to courts nearly to the extent that lifting the rule inhibits debtor's access to courts.[52] It is difficult to imagine that creditors will abandon meritorious

[50] 2015 (3) SA 474
[51] Leech and Others v ABSA Bank Limited 1997 3 ALL SA 308
[52] Justin Roberts, "Limited Application of in duplum rule" 2019.

claims against debtors merely because the amounts they are set to recover upon victory will be limited to double the principal amount of the loan.[53]

To allow for uncapped and possibly exorbitant interest to run pendente lite grants a powerful tool to creditors to bully and possibly annihilate debtors using the litigation process to their best advantage. This is made by the sheer imbalance in financial muscles.

The Supreme Court of Appeal in Slip Knot also stated that the major problem with Oneanate is that its approach was one-sided. It found it problematic that Oneanate focused only on the effect of the rule on creditors rather than weighing the interests of the creditors and debtors equally when saying the rule should apply pendente lite. Once Oneanate gets past the application of the rule pre-litigation, there is not a single word about the interests of debtors. Debtors are no more immune to the vagaries of the litigation process than are creditors. Oneanate does not explain also why the interest of the creditors are of relevance in this regard, and why the in duplum rule should not continue to cap interest even pendente lite.

2.5.1 The effects of allowing the in duplum rule to operate pendente lite

The effects of letting the in duplum rule operate pendente lite is that debtors will need to scrutinize their existing debts to determine whether any will be hit by the 'new' law that allows the operation of the rule pendente lite. Also, it will now make financial sense for creditors to institute claims earlier and prosecute them more aggressively. Most importantly, it also means that in an already constraint economy, lenders will be even more cautious about who they lend money to.[54]

2.6 Conclusion

It should be noted from the discussions made above that the in duplum rule is a common law rule and originates from Roman Dutch law. This common law in duplum rule applies only to arrear interest and not any other charges, meaning that a longer period of interest cannot be levied. The rule is also aimed at alleviating the liability of debtors to creditors by prescribing that interest ceases to run once it equals to the capital sum borrowed.

[53] Vessio ML "Effects of the in duplum rule and clause 103 (5) of the National Credit Act Bill" 2006.

[54] Danielle McConnell, "The Constitutional court restores the in duplum rule" 2002.

It can also be summarised that the rule is part of the South African law as stated above. The in duplum rule also applies to all contracts under which a debt is subject to interest at a fixed rate. It should be noted that because of its foundation in public policy, the rule maybe waived, whether prior to contracting or post contracting. The rule is thus an exception to the general rule of freedom of contracts as it cannot be excluded by means of a contractual provision. It should be noted further that banking practices may not alter the rule although restructuring of the debt may be allowed. Also, a creditor cannot thus simply agree with a debtor that the in duplum rule shall not apply to their transaction, as such agreement would be contrary to public policy and unenforceable. The in duplum rule as stated above does not apply to interest owed to money owed to revenue authority, as those debts arises by operation of the statutes and not by contracts.

CHAPTER 3

3.1 Introduction

With the increasing consumer reliance on credit and credit-based facilities, and 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 contracts is more prominent. The in duplum rule is one of the few, very well defined and if correctly applied, is the most effective measure of control in this field. The rule has become so entrenched and effective in the protection of the debtor whilst maintaining fairness towards creditors, that its efficiency has been recognised by legislatures in many countries such as Kenya and South Africa.

3.2 The Position in Lesotho

In many countries, lending and lending rates has always been a big debate. The real problem regarding the consumer protection started with the public requirements that interest rate charges should be controlled. In Lesotho, our law on interest is mostly regulated by common law and the case below of **LHDA V Impregilo** demonstrates that there is no statutory legislation dealing with the issue on the cap of interest (in duplum rule). We have legislations such as the Financial Institutions Act 1999, Central Bank Act 2000 and the Money lenders Act 1989. The weakness of regulations in our legal system for financial services offered by credit providers and Financial Institutions still leaves a great concern and consumer protection claims has risen.

In the case of Lesotho Highlands Development Authority v Impregilo,[55] the court in deciding the liability of the parties and the rate of interest which parties had to pay stated that the law which was applicable was the law of Lesotho. The tribunal in that case explained Lesotho's position of the law in the following manner:

> Lesotho's law is derived from Roman Dutch law, recognises a substantive right to interest without any statutory add-on; if money is wrongly withheld, the courts have power to award interest for the period of delayed payment. This is known as an **ex-mora rule** and that rule is subject to the common law in duplum rule in Lesotho.

[55] 2002 EWHC 2435

South Africa introduced the National Credit Act No.34 2005[56] which addressed the credit industry issues and developed the practice of common law in duplum rule. On the other hand, Kenya introduced the Banking (Amendment) Act 2006[57]. However, Lesotho seems to be far behind and slow in developing a comprehensive piece of credit law that will address the issues such as consumer indebtedness and regulation of interest in cases where a consumer has defaulted. The Money Lenders Act of 1989 has remained stagnant and failed to take into account the development of the industry. Due to its old age, the Act fails to provide for more comprehensive and enhanced supervision of the industry. Consequently, there is lack of a coordinated system of deterrence against the abuse within the industry.

There is also a growing trend of "irresponsible lending" among local Financial Institutions and this has become a concern in Lesotho. Some Financial institutions operating in Lesotho are not taking into account the debtors repayment ability when approving loans and as a result, when they default in payment, they are faced with payment of large amounts of money and interest pilling up. The most common credit providers or money lenders that people use in Lesotho are those that tend to over burden debtors with a lot of interest to pay. This leaves creditors in the endless credit because some of them do not follow the in duplum rule on regulations of interest.

There are still laws that regulate credit and interest in Lesotho but the adequacy of credit regulations that does exist is unfortunately questionable. Although money lending is regulated, there is lack of effective regulations, legislations and supervision of money-lenders, and inconsistent monitoring even across other financial institutions.

3.2.1 Problems encountered by debtors as a result of high interest rates

Section 6(1) (b) of the Money Lenders Act 1989[58] provides for the interest rate of 25% per annum. As a result of this interest rate, there has been a number of licenced and unlicensed money lenders, charging interest as high as 40% per month resulting in consumer over-indebtedness and disregarding of the in duplum rule. Some creditors claim that the charging of 40% is done as a result of section 6 of the Act in order to sustain a high credit prevalence within the industry. The interest rate of 25% per annum is rather low considering the fact that money lenders use their own capital and do not require collateral. The interest rate has also resulted in the distortion of the money lending business because lenders do not comply with the prescribed

[56] National Credit Act NO.34 of 2005
[57] Kenya Central Bank (Amendment) Act NO.4 of 2006
[58] Money Lenders Act 1989

rates, and borrowers driven by desperation agree to unlawful rates. Many money lenders do not even follow the rule on regulation of interest (in duplum rule) and debtors are forced to pay large sums of money on interest.

3.2.2 Supervision of the industry

A certain amount of detailed regulatory responsibility are set out in a range of other legislations. The most far reaching instrument of the Central Bank of Lesotho's legislation is the Financial Institution Act 2012[59]. In the preamble to the Financial Institutions Act, it is stated that **"**It is an Act to repeal and replace the Financial Institutions Act of 1999, to provide for the authorisation, supervision and regulation of the banking and the non-banking financial institutions, agents of the Financial institutions and ancillary financial services and for related matters.**"** Essentially, the Financial Institutions Act provides for the supervision of the industry of banks and non-bank financial institutions. It contains a provision in section 71 which bears a heading "credit requirements" but on closer inspection of this section, it is evident that it has nothing to do with credit regulation but rather with the regulation of credit risk by the Central Bank who is also referred to as the "Commissioner" in the Act. This somehow leaves the credit industry unregulated.

Apart from that, section 6 of the Central Bank of Lesotho Act 2000, states that the bank shall license or register and supervise institutions pursuant to the Financial Institutions Act of 1999 and Money Lenders Act of 1989, and to promote safe and sound development of the financial system. In 2004, the Central Bank of Lesotho started the supervision, but later stated that it does not have the capacity to supervise all institution. The supervision was done in order to see if the laws and regulations of the industry are still followed, and also to see if the consumers are not being overburdened by creditors within the industry.[60] This lack of supervision resulted in many microfinances operating illegally.[61] Although the Act empowers the Central Bank to supervise the industry, the Central Bank of Lesotho stated in the Central Bank of Lesotho Annual Supervisory report (2002) that it lacks capacity to effectively supervise these institutions such as the micro-finances and its main focus has only been on the supervision of banks.

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[59] Financial Institution Act of 2012

[60] Finmark Report 2014 page 16.

[61] Central Bank of Lesotho Annual Supervisory Report 2002 page 3.

The Central Bank also stated in the report that the cost of supervising the institutions are greater than those of commercial banks. This may be because some are in rural areas and sometimes the Central bank does not have a budget.[62] This lack of supervision has resulted in the charging of more interest than the one that is required by the Money Lenders Act and many disregard to the common law in duplum rule that is used by Lesotho. The Central Bank of Lesotho's supervisory powers are also limited and do not extend to other sectors which provide credit such as retailers.[63] There is no law allowing the Central Bank to supervise these retailers and as a results, these retailers end up charging desperate consumers more interest than the one required by the law to desperate consumers.

Also, Lesotho has the Money Lenders Act and the Financial Institutions Act. This creates uncertainty in the market stemming from the co-existing of credit institutions under both the Money lenders Act and the Financial Institutions Act, and from the lack of clarity over when those registered under the Money Lender Act will be required to migrate to licencing under the Financial Institution Act.[64]

3.3 PRACTICAL EXPERIANCES OF CONSUMERS AND MONEY LENDERS

The consumers are the ones who are affected mostly. Below is A Study that has been conducted in order to show some of the problems that consumers faces in regard to interest in the credit industry. Creditors may sometimes be affected too by consumers who take a longer time to service their loan. In practice, some debtors have to pay large sums of money when they have defaulted, and some of the financial institutions such as money lenders do not even follow the common law in duplum rule. They sometimes claim that such a common law rule does not exist or that they are not aware of such a rule.

In order to show that the common law in duplum rule is treated as a theory by some financial institutions rather than being applied in practice, there are interviews that have been conducted to show what happens in practice in some financial institutions.

One Mrs Mathato Moejane from Khubetswana indicated that she works at Thetsane firms and was a debtor from a company named J.P Financial Service which is registered with the Central Bank of Lesotho. In January 2017, Mrs Moejane took a loan of M2000.00 (initial debt) from

[62] Supra footnote 5
[63] Sekhosana, L.B, "Pre-Agreement assessment to prevent reckless credit granting" 2017.
[64] Vessio M.L, "The effects of the in duplum rule and clause 103(5) of the National Credit Bill 2005 on interest" 2006.

J.P Financial Services in Maseru which had the interest of 30%. She had on several occasions borrowed money from them and paid back in time with the interest requested. However this time she was unable to do so, she only paid the first M1000.00 on the initial debt but defaulted in payment on the debt. Her explanation was that her husband who was the bread winner died and as a result she had to prepare for the funeral. After that, she was unable to pay the loan as she was the only one working at the firms in Ha-Thetsane supporting 4 children.

When she later went in January 2019 to pay part of the money, she found out that the debt had escalated to M9000.00, which was more than what she had borrowed. She was told that during the time that she was not paying, the interest was increasing and that is one of the reasons that she would have to pay that said amount. There were also the cost of fees on her loan such as administration fees and service fees too. She ended up paying that money in part slowly until she finished it. She paid more than what she was supposed to pay

The interview was done with one Mr Leburu Leburu from J.P Financial Services Roma. He is the manager at the Roma branch. J.P Financial Services which is also registered with the Central Bank of Lesotho. Mr Leburu stated that the Roma Branch was established in 2018 in Roma and has been providing credit to Roma community. He stated that they are allowed to charge interest at any rate and at the moment, the interest that they are charging in Roma branch is 15% of any money borrowed by the customer. Their credits starts from M100.00. He stated that when giving credit to customers, they provide them with a contract and the contract states that the debtor should give out a surety in the case of a default.

He stated that sometimes debtors give out fake names and numbers while seeking credit. He stated that he also knew little about the common law in duplum rule and only knew about the about the Money Lenders Act, the Financial Institutions Act, and the Central Bank Act. He also stated that some of the challenges that they face are customers who borrow money and wait for interest to pile up. He stated that the Central Bank of Lesotho had promised to give them workshops in which they will be taught on how the rules on interest operate because of consumers who sometimes claimed that they were being over burdened by credit providers. Unfortunately to this day they have not made those workshops.

The above interviews demonstrate that money lenders in Lesotho still violates the in duplum rule and over burden consumers with credit without following any in duplum rule. On the first interview, the debtor was charged more than what she was supposed to pay and there was a violation of the rule. Some money lenders know very little of the rule and continue to charge

large interest rates. Out of desperation for money, borrowers agree to this interest rates. Since there is no regulation and supervision of the industry, they continue charging large interests and disregarding the rule.

3.4 In duplum rule and freedom of contract

Debtor and creditor in contract law are two parties concerned with the borrowing and lending of funds. When a creditor gives credit to a debtor, there exists a contract in which both parties enter into. If there is one thing more than another that public policy requires, it is that men of full age and competent understanding shall have utmost liberty of contracting. They must enter into those contracts freely and voluntarily and their contracts shall be held sacred and enforced by courts of law. The courts still exercise a great measure of caution before interfering with contracts as executed by the parties.[65]

However, one of the issues of the in duplum rule on contracts entered between a debtor and creditor is of freedom of contract. The freedom of contract in most cases of credit agreements would more or less surrender to the 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's exploitation.[66] With the imbalance in view, coupled with the fact that without certain fixed common law rules, the very cardinal role of contract law will 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 in roads into parties contractual freedom, thus, cannot seriously be entertained. The rule only protects debtors who are in desperate need of money so that creditors do not enter provisions that would put debtors at a disadvantaged position.

We should also remember that one of the purposes of the in duplum rule is for the protection of the debtors from being overburdened by the never ending debts, and also to ensure that debtors do not suffer the requirements….. upon them to pay large interest caused by indolence and lapse or deliberate failure by creditors so as to let the unserviced loans accumulate

[65] Kerry Edmondson, "Interested about the interest in debt? The in duplum rule revisited" 2015 DR @page 38.
[66] Makadia Khasake, "Introduction to the in duplum rule in Kenya: A legal mechanisms of equitable distribution of resources and poverty" 2008-2010 Kenya Review, @page 9.

interest…. unimaginable levels.[67] Provisions that violates the in duplum rule are taken to be void and unenforceable.

3.5 DEVELOPMENT OF THE INDUPLUM RULE SOUTH AFRICA AND KENYA

The rule has been developed in some jurisdictions from common law in duplum rule to statutory in duplum rule in order to afford more protection to debtors.

3.5.1 SOUTH AFRICA

South Africa falls under one of the countries that has made a development to the in duplum rule into its statutory form. It introduced the National credit Act NO. 34 of 2005. In a developing economy such as South Africa, where lending has become easily accessible, the courts and the legislature are now obliged to develop the common law so as to afford greater protection to the debtor.[68] For this purpose, the legislature promulgated The National Credit 34 of 2005. The legislature enacted the statute in order to promote responsibility in the credit market by encouraging responsible borrowing, avoidance of the over-indebtedness and fulfilment of financial obligations by the consumer. It was also made to discourage reckless credit-providers and contractual default by consumers and to address and prevent over-indebtedness of consumers; and to provide mechanisms for resolving over indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations.[69]

Before the National Credit Act came into operations, consumers in credit agreements could only rely on the common law in duplum rule to protect them from exploitation. However, with the birth of the National Credit Act in 2005, what is commonly known as the statutory rule came into operation incrementally from 01 June 2006 and applied to a wide variety of credit agreements.[70]

The history and origin of the common law rule is said to have inspired and provided the rationale behind the provisions in the National Credit Act that deals with the limitations of arrear interest and charges. Section 103(5) has been referred to in literature as the codification of the in duplum rule. It does not do away with the common law in duplum rule except as

[67] Pelican Investment Ltd v National Bank of Kenya 1888 SA (2) 78
[68] Julian Kagan "Personal Finance"2020 @page 21.
[69] Sekhosana "Pre-Agreement assessment to prevent reckless credit granting" 2017.
[70] Campbell J, "The cost of credit in micro-Finance in South Africa" LLM Thesis of Rhodes University, December 2006.

provided for in its extension of the common law rule and there is no particular advantage in using the word codification.[71]

Section 103 (5) of the National Credit Act NO.34 of 2005[72] showed another version of the in duplum rule, which was then referred to as the statutory in duplum rule. It vastly differs from the common law in duplum rule and it is clear that the statutory provision offers better consumer protection than its common law counterpart.[73] 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, aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time of a the default.

The statutory in duplum rule in section 103 (5) of the National Credit Act[74], provides in essence that when a consumer of credit is in default, all the combined amounts set out in section 101 (b) to (g) of the National Credit Act, cease to run when they reach the outstanding balance of the consumer's principal debt at the time of the default. In the case of National Credit Regulator v Nedbank Ltd,[75] the court held that this cost of credit, including interest, may not exceed in aggregate the unpaid balance of the principal debt during the time that the consumer is in default, and once those charges on interest equal the principal debt at the time of the default.

To understand the application of section 103(5) one needs to first understand the exhaustive list of charges provided for in section 101(1)(b) to (g)[76] which are initial fees, service fees, interest, credit insurance premiums and other costs, default administration charges and collection costs. These charges also have maximum amounts applicable to each charge and which is detailed in the regulations to the National Credit Act. For purposes of understanding the statutory rule, it is not necessary to know the actual monetary amounts applicable as they have no direct impact on the application of section 103(5).[77]

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[71] Nedbank v The National Credit Regulator 2011 (3) SA 581 (SCA) 601
[72] National Credit Act NO.34 of 2005
[73] Kelly-Louw L "The common law versus the statutory in duplum rule" (2006) SA Merc LJ 142.
[74] Supra footnote 20
[75] 2009 (4) ALL SA 505
[76] Section 101 of the National Credit Act NO 34 of 2005
[77] Devenish M, "Interpretation of statutes" 1992 at page 159 and 160.

It then follows that once the consumer is in default of his obligations under the credit agreement and if all the amounts catered for in section 101(10(b) to (g) of the Banking Act combined have accrued to an amount equal to the principal debt, then no further charges can be raised.

The statutory in duplum rule in South Africa applies to all credit providers providing credit in terms of the National Credit Act, including banks, motor vehicle and asset finance companies and all financial institutions that extend credit as part of their business. A failure to adhere to the statutory in duplum rule is said to result to a breach of the National Credit Act, exposing credit providers to regulatory censure.[78] In addition to the regulatory risk, a breach of the statutory in duplum rule may also expose credit providers to reputational risk and financial risk. The consequences in South Africa of failing to properly apply the statutory in duplum rule can be significant and it is therefore very important that all credit providers consider how section 103(5) of the National Credit Act is being applied in their businesses and are they complaint, and further consider whether any remedial action is required to correct any potential contraventions thereof.

3.5.2 KENYA

Otien J. in 2000, while constrained to apply the in duplum rule as was the case in South Africa , advocated for its introduction in Kenya in order to bring the otherwise worsening situations under control. He stated the following in Pelican Investment Ltd v National Bank of Kenya Ltd:[79]

> I do agree that such a legal proposition of introducing in duplum rule might be ideal in Kenya as it will ensure that debtors do not suffer the requirements upon them to pay large interests caused by indolence and lapse or deliberate failure by the creditors so as to let the unserviced loans accumulate interest to unimaginable levels. It will protect debtors as well as ensuring that the creditors get their money back for further circulation and hence the economy will be healthy. However, to introduce this Dutch law by way of a judgement in a common law country will be in my opinion too drastic a step to take as it will not be based on any existing legal authority or statute whatsoever in our country. It is law that had better be introduced by way of legislation.

[78] Finn Elliot, “Correctly applying the in duplum rule” 2013 at page 27.
[79] 1888 2 SA 78-75

A couple of years later, the government of Kenya introduced the in duplum rule by way of legislation. This was done to try to put a ceiling on the amount of interest that lender can charge a borrower on a given loan. It introduced the Banking Amendment Act No.9 of 2006[80] in Kenya. It became effective on the 1st May 2007, the government effected a raft of amendments to the Banking Act Cap. 486, Laws of Kenya. This came hot on the heels from previous attempts to introduce these measures[81] through the Central Bank Act, Cap, 491, Laws of Kenya, which were thwarted by the banking industry players who had successfully urged the constitutional court to declare them illegal and unconstitutional.[82] After that decision, there was no choice but to repeal section 39 of the Central Bank Act and reintroduce that concept in Kenya through the Banking Act.

The Amendment was introduced to the Banking Act by section 17 of the said Banking (Amendment) Act by virtue of which the new section, Section 44A was incorporated. This section simply limits the amount of interest that can accrue on the principal debt/ loan or sum lent to the borrower. Though it is not explicitly provided for, it is safe to say that this section introduced the statutory in duplum rule in Kenya.

Section 44A of the Banking Amendment Act places a limit on interest during the recovery on defaulted loans. The section provides as follows:

> An institution shall be limited in what it may recover with respect to a non-performing loan to the maximum amount under subsection (2). The maximum amount referred to in subsection (1) is the sum of the following; the principal owing when the loan becomes non-performing; interest, in accordance with the contract between the debtor and the institution, mot exceeding the principal owing when the loan becomes non-performing; and expenses incurred in the recovery of any amounts owed by the debtor.

The above subsection was said to formulate what was known as the statutory in duplum rule in Kenya. It can be seen from the above subsection that that the amount of the accrued interest on the loan is restricted to equal the amount of the principal amount owing when the loan becomes non-performing. In effect, therefore, the lender cannot recover at any one given time on amount that is more than double the outstanding principal.

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[80] Central Bank of Kenya (Amendment) NO.9 of 2006

[81] Central Bank of Kenya (Amendment) Act, 2000 (Act No 4 of 2001)

[82] Kenya Bankers Association v Minister of Finance and Others NO.9 of 2004, KLR 61

Looking at other jurisdictions, they first started using the common law in duplum rule and later changed to the statutory in duplum rule. The result of this change was because the statutory in duplum rule offered more protection to debtors as opposed to the common law in duplum rule which gave less protection to consumers seeking credit. However, Lesotho is still behind as there is no piece of legislation on the in duplum rule except the common law in duplum rule. The common law in duplum rule does not allow for charges to be added to interest. Section 20 of the Money Lenders Act[83] remains extant to such an extent that the interest charged in respect of the enforceable costs, charges, fees and expenses is clearly invalid. This section shows that Lesotho still uses the common law rule which results in debtors paying large sums of money and interest taking a long time to be reached. However, there are many advantages that consumers get for using the statutory in duplum rule as opposed to the common law in duplum rule.

3.6 Advantages of using the statutory in duplum rule over common law in duplum rule

- Statutory in duplum rule includes costs in addition to interest which in aggregation may not exceed the unpaid principal debt at any point while the consumer is in default under a credit agreement.
- The statutory in duplum rule applies to the entire duration of default as demonstrated in some cases, meaning as long as the consumer remains in default of his/her payment obligations, the credit provider is not entitled to levy any further charges not withstanding that the consumer may reduce the outstanding charges through repayment which is a stark contrast to the common law rule.

3.7 Disadvantages of using the common law in duplum rule

- Common law in duplum rule applies only to the unpaid interest, it does not include cost or any other expenses.
- The in duplum takes a long time to be reached because there are no costs or any fees involved unlike in the statutory in duplum rule that has been introduced in some countries like South Africa and Kenya.
- The common law in duplum does not prevent interest from accruing again once the outstanding interest has been reduced below the in duplum limit. In other words, if a

[83] Money Lenders Act 1989

payment is made and the amount outstanding is reduced below the principal debt, the in duplum rule will no longer apply and interest can start running until it reaches the in duplum limit again.

When looking at the above advantages and disadvantages of common law rule and statutory rule, it is clear that the statutory in duplum rule offers much better debt relief for an over-indebted consumer who has insufficient financial resources, is willing to pay arrears, but who just needs some type of relief for temporary moratorium on the further accumulation of interest and other cost of credit. This is shown in countries such as South Africa where there has been a legislation that has been adopted. The common law in duplum rule takes a long time to reach a limit but the statutory in duplum rule takes a short time to reach a limit because other cost are included, such as administration costs.

The statutory rule is a much more workable form of debt relief and provides consumers with a real opportunity to pay off their arrears if credit providers allow them to do so when compared with the common law rule.

3.8 Conclusion

Lesotho uses the common law in duplum rule and as a result of not developing the rule into its statutory form, debtors face a lot of challenges such as over indebtedness because the common law in duplum rule takes a long time to reach a limit. There is a great need for the legislature to enact laws on regulation of interest because the laws that do exist do not offer enough consumer protection. Interviews are done to show that some money lenders do not follow the in duplum rule in their businesses and there is still overcharging of interest too. Consumers that live in countries such as South Africa and Kenya that have developed the rule into its statutory form are afforded more protection than those who live in countries that have not developed the rule. We see these by some of the advantages of using the statutory in duplum rule over the common law rule.

CHAPTER 4

CONCLUSIONS AND RECOMMENDATIONS

3.1 INTRODUCTION

In duplum rule as a concept on its own is an essential component that promotes responsible lending on the part of the creditor. Creditors have to check first before lending money if such debtors will return their money. It also prevents the over indebtedness of consumers by creditors. The rule can only fulfil its function if it is developed into its statutory form rather than the common law rule. From the discussions made in this dissertation, it can be seen that Lesotho has tried to make laws that protects consumers but it still has a long way to go.

3.1 CONCLUSIONS

This paper has discussed the in duplum rule in its common law position and as enacted in Kenya and South Africa. It has demystified its application and operation. It is hoped that the case law considered herein addressing various issues concerning consumers and creditors in the credit industry will be found to be persuasive and relevant in the judicial decision of this country Lesotho.

It should also be noted that the aim of credit law is to regulate the relationship between the debtor and creditor. Both parties need protection in some other forms, especially the debtor.[84] For this purpose legislation and the common law have become indispensably executive in the sphere of consumer credit and lending. Interest and the laws on interest are very important elements in the credit industry. The common law, has developed and preserved one rule that lends a helping hand in the regulation of and control of interest charges, which is the in duplum rule. [85]

The in duplum rule is the fastidious consumer protection mechanism based on sound public policy rationale. The rule does not prevent the creditor from obtaining all his or her interest for money loaned on credit.[86] The only type of interest that maybe susceptible to the in duplum rule is arrear accrued interest, that is interest which is owing and payable. Once the debtor

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[84] Treitel G, "The Law of Contract London" 11th Edition Butterworths @page 74.

[85] World Bank Global Survey on Financial Consumer Protection 2013, @page 3.

[86] Makadia Khasake, "Introduction of the in duplum rule in Kenya: A legal mechanism of Equitable Distribution of Resources or a Poverty Redistribution Initiative?" 2008.

initiates payment again, such payment will decrease the interest element of the total amount and interest will run again. [87]The in duplum rule must be understood to be a consumer protection regulator. It stops arrear interest from running when that interest has reached the amount of the unpaid capital. It does not set a maximum amount of interest.

The rule provides such a compelling and fair regulation of interest, that is, it has found its way into the credit legislation in some countries such as South Africa and Kenya. The debtor who is faced with financial difficulty and who is unable to service his debts will be protected from the ever increasing of interest accruing to him in view of the interest. The rule prevents the over-extension of a debtor's limited financial resources.

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.

3.2 RECOMMENDATIONS

Lesotho has many cases of over indebtedness on consumers, but it has nevertheless sought to introduce measures to address the issue of over indebtedness and reckless lending through the introduction of the common law in duplum rule. The rule acts as a consumer protection against creditors who take advantage of debtors. However, since the rule does not offer full protection to debtors, the paper has put forth a case for the introduction of the rule by way of legislation rather than using the common law in duplum rule which is lacking in some respects. This will ensure that the often ignorant or illiterate consumers are not exploited due to their necessitous situations. Also, in protecting the consumers from over-indebtedness, some rights such as the freedom of contract has to be limited. The paper has also called on our legislature to see to it that laws on credit regulations are followed and ensure that there is a strict supervision of our credit industry. Where there seems to be loopholes, then legislation should be made.

Also, the in duplum rule as legislated in many countries is mainly intended for the commercial men. If the state is keen on ensuring that full protection of consumers is achieved, there is a

[87] Campbell J, "The Cost of Credit in the Micro-Finance Industry in South Africa", (2010) SA Merc LJ 4.

need to apply this rule on all kinds of debts on credit agreement. In Namibia for instance, there are attempts to apply the rule to tax debts.[88] This move is expected to improve the taxpayer's morality as they will have the assurance that the interest on unpaid taxes will be capped and cannot exceed the original tax amount owing. Also, in South Africa, the in duplum rule is applicable to the insurance industry in South Africa although there are attempts, which are bitterly opposed by consumer protection groups to remove it by way of statutory waiver.

4.3.1 Recommendations on the freedom of Contract and Supervision of the industry

One of the issues that were discussed in chapter 3 was the lack of supervision of the credit industry. The credit industry in Lesotho is regulated by Central Bank of Lesotho. It is important for Lesotho to consider whether a single financial sector regulator is still ideal in view of the challenges that has been outlined in the previous chapter. In one's view, there should be more financial sector regulator to see to it that the financial institutions are not operating illegally and causing over indebtedness to consumers or even abusing the in duplum rule.

It should be noted that the Central Bank of Lesotho is responsible for regulating banks and non-banking financial institution (including credit-only and deposit taking micro-financial institution, insurers, money lenders, money transfer operators and others) as well as the payment systems. The primary instrument of regulatory legislation is the Financial Institution Act 2012[89], which stablishes the Central Bank of Lesotho as the regulator of banks and a wide range of non-banking financial institutions. In order to see to it that there is regulation of the credit industry and that consumers are afforded full protection, then there should be more than a single financial institution regulator. In that way, all the financial institutions including non-banking institutions as well as those in rural areas will be regulated.

Another issue that was discussed was on the in duplum rule and freedom of contract. Although parties should have freedom of contracting, the legislature has to see to it that parties do not violate the in duplum rule. There may be violations because consumers who are in desperate need for money may accept any terms of the contract even if it is in violation with the rule. There must be legislation that disregards a contract that violates the in duplum rule.

In a nut shell, it is submitted that Lesotho who is in the initial phase of embracing consumer protection and over-indebtedness of consumers, can indeed look towards the in duplum rule in

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[88] Kotze C, "Achievements, Challenges and policy Insurance in Namibia" 2007 @page 68.
[89] Financial Institution Act 2012

the National Credit Act No.34 of 2005 and those in the Banking Amendment Act No.9 of 2006, for guidance on the developing of a resilient and efficient regime aimed at combating lack of consumer protection, credit regulation and reckless credit.

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