A SHORT DISCUSSION ON THE EFFECTS OF THE *IN DUPLUM* RULE UPON COMMENCEMENT OF LITIGATION AND AFTER JUDGMENT: A VIEW BOTH "INSIDE" AND "OUTSIDE" THE NATIONAL CREDIT ACT

1 Introduction

It has repeatedly been confirmed by the courts that the *in duplum* rule forms part of South African law, and more recently section 103(5) of the National Credit Act 34 of 2005 (hereinafter "the Act") has concretized the rule into statutory form (*LTA Construction Bpk v Administrateur, Transvaal* 1992 1 SA 473 A; *Union Government v Jordaan's Executor* 1916 TPD 411; *Van Coppenhagen v Van Coppenhagen* 1947 1 SA 576 (T); *Stroebel v Stroebel* 1973 2 SA 137 (T); *Absa Bank v Leech* 2001 All SA 55; *cf* Vessio *The Effects of the In Duplum Rule and Clause 103(5) of the National Credit Bill 2005 on Interest* (LLM Dissertation, University of Pretoria (2006), for a detailed discussion of the rule, its history and application); and for a summary of the rule in its statutory form see Kelly-Louw "Better Consumer Protection under the Statutory *in duplum* Rule" 2007 19 *SA Merc LJ* 337). This note examines the effects of the *in duplum* rule once the litigation process has been initiated by the creditor and the implications of the rule after judgment is granted against the debtor.

Preceding such discussion, however, one needs first to consider whether South Africa still has a common-law *in duplum* rule, or whether the statutory *in duplum* rule has ousted the "old" rule *in toto* (for ease of reference and practicality the rule as developed by the courts shall be referred to as the "common law rule" and the rule as set out in s 103(5) of the Act shall be referred to as the "statutory rule"). It is submitted that while the statutory rule has superseded the common law rule in terms of all credit agreements that fall within the jurisdiction or ambit of the Act there are those credit agreements that are not regulated by the Act and it is those credit agreements where the ("old") common-law rule shall apply and regulate the interest component collectable by the creditor *vis-a-vis* the debtor. Thus the two rules must now operate together; both rules applying to different sectors of society; at least society whilst it wears its consumer cap. The codified *in duplum* rule as will be seen below – affects only natural persons and the juristic entity, as defined by the Act, remains to be protected by the common-law rule. Furthermore, the common-law rule will be applicable to those credit agreements which fall outside the auspices of the Act.

2 Limitation of the Act

Section 6 of the National Credit Act delineates the limited application of the Act when the consumer of a credit agreement or proposed credit agreement is a juristic person. The section makes reference to various parts and sections in Chapters 4 and 5 of the Act which are not applicable to juristic entities, but more specific to the topic under discussion, section 6 excludes juristic persons when they are consumers to credit agreements from the auspices of Part C of Chapter 5. This Part of the Act deals with the consumer's liability, interest, charges and fees. Section 103(5) falls under this section and is thus not applicable to juristic persons as consumers but only to natural persons. It is submitted that in such instances juristic persons shall be entitled to rely on the common law *in duplum* rule.

Besides the statutory *in duplum* rule not being applicable to juristic persons due to section 6 of the Act, the statutory rule will also not influence credit agreements where the Act itself simply does not pertain. In terms of section 4, the Act does not apply to the following situations:

1 In credit agreements where the consumer is the State or an organ of State;

2 where the credit provider is the Reserve Bank;

3 where the credit provider is located outside of the Republic (subject to approval by the Minister);

4 where the parties are not dealing at arm's length. In terms of the Act parties are not dealing at arm's length in the following situations:-

   a A shareholder loan or credit agreement where the consumer is a juristic person and the credit provider has a controlling interest in that juristic person;

   b a loan to a shareholder or a credit agreement where the consumer is a person who has a controlling interest in the juristic person who is a credit provider;

   c where the parties are in a familial relationship and are co-dependent or one is dependent on the other;

   d where each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction; and

   e any other situation where it has been held in law not to be an arm's-length transaction.

In such instances, that is, where the statutory *in duplum* rule is ousted by the fact that the Act itself does not apply to the transaction, it is submitted, the common-law *in duplum* rule may be called upon to protect the debtor/consumer.

3 The common-law *in duplum* rule

The common-law rule effectively limits interest recoverable in terms of loan or credit transactions: it prevents unpaid interest from accruing further, once it reaches the unpaid capital amount. According to the rule, therefore, "arrear" interest that is legally demandable (in terms of the agreement between the parties and within the legal limits set by statute) may not exceed the capital sum on which interest is due; and in this computation, what has already been paid by way of interest will not be reckoned (*Sanlam Life Insurance Ltd v South African Breweries Ltd* 2000 2 SA 647 652H-J). A creditor is not, therefore, prevented by the rule to collect more than double the unpaid (or paid) capital amount in interest, (*Sanlam Life Insurance Ltd v South African Breweries Ltd supra* 652H-J) provided that at no time he allows unpaid arrear interest to reach the unpaid capital amount. Should this augmentation occur, interest would then cease to run. When the debtor, again, pays part of his debt, his payment has the effect of decreasing the interest amount and thereby reviving the running of interest. Interest will run again until such time as it (arrear interest) again reaches the unpaid capital amount (*Van Coppenhagen v Van Coppenhagen supra*). This is an important aspect of the *in duplum* rule and is often misinterpreted (*Verulam Medicentre (Pty) Ltd v Ethekweni Municipality* 2005 2 SA (W); and *cf* Vessio "A Limit on the Limit on Interest? The *In Duplum* Rule and the Public Policy Backdrop: *Verulam Medicentre (Pty) Ltd v Ethekweni Municipality* 2005 2 SA 451" 2006 39 *De Jure* 25 for a fuller discussion). The prohibition on interest *in duplum* is not limited to money-lending transactions, but applies to all contracts arising from a capital sum owed, which is subject to a specific rate of interest (*LTA Construction Bpk v Administrateur, Transvaal supra* 482J-483A; *Bellingham v Clive Ferreira & Associates CC* 1998 4 SA 382; and *Meyer v Catwalk Investments 354 (Pty) Ltd* 2004 6 SA 107 TPA 120).

It is submitted that 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 the loan while not affecting his right to recovery of interest and simultaneously obliging him not to permit a burdensome amount of interest to accrue against the debtor, should he (the creditor), "tolerate fiscal indiscipline" (*Commercial Bank of Zimbabwe v MM Builders (Pty) Ltd* 1997 2 285 SA (Z) 292; and for a discussion of the public policy considerations of the rule *cf* Vessio 2006 39 *De Jure* 25). Southwood J's comments in *Bellingham v Clive Ferreira* in this regard are pertinent:

> "I therefore conclude that under the Roman-Dutch law in force in Holland and Friesland the prohibition of interest *in duplum* was by 1613 limited to unpaid arrear interest and that the jurisprudential foundation for the restriction was the policy consideration that debtors whose affairs are declining should not be entirely drained dry while persons who contrive to look after their interest have no need of such relief. I am fortified in this conclusion by the passage from *Huber Praelectiones ad* D 22 1 28, which was quoted by Joubert JA in the original Latin in *LTA Construction Bpk v Administrateur, Transvaal*" (*supra* 382 401B-D).

4 The statutory *in duplum* rule

The fact that the rule was well established in its common-law form, as is evident from the above, did not prevent the legislature from codifying it. However, the rule did not remain in its classical form in the Act but was expanded, it appears, in order to increase its function as a consumer protective device (see Vessio LLM Dissertation 36 for a detailed discussion on the differences between the Classical rule and the Justinianic rule).

In its statutory format the rule has been modified; section 103(5) of the Act reads as follows:

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

The amounts set out in sections 101(1)(*b*)-(*g*) are *initiation fees*; (s 101(1)(*b*)) *service fees*; (s 101(1)(*c*)) *interest*; (s 101(1)(d)) *costs of any credit insurance*; (s 101(1)(e)) (including credit insurance premiums payable) *default administration charges*; (s 101(1)(f)) and *collection costs* (s 101(1)(*g*)). The difference between the common-law rule and the statutory rule is patent from the above definitions. While the common law rule allows only arrear interest that accrues to equal the unpaid capital amount to activate the effects of the *in duplum* rule and temporarily ceases the accretion of interest on the debt, the statutory rule adds to this accrued, arrear component more than just interest. Thus the accrued, arrear and unpaid amount which the courts must consider when looking at whether the statutory *in duplum* has taken effect shall be made up of: arrear interest, initiation fees, service fees, credit insurance costs, administration charges for defaulting and collection costs (*cf* Kelly-Louw 2007 19 *SA Merc LJ* 339 for a discussion on the application of the statutory *in duplum* rule).

Having now acquired a basic understanding of both rules the enquiry is twofold:

1. Once a creditor or credit provider has instituted the legal process by the issue and service of summons on the debtor or consumer – does the *in duplum* rule (both common law and statutory) cease to affect the accrued arrear amounts?
2. What effects do the *in duplum* rules have on the judgment debt?

The questions will have to be answered separately for the two *in duplum* rules.

5 The position with commencement of litigation and after judgment under the common-law *in duplum* rule

In *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)* (1998 1 All SA 413 (A)) the court considered the issue of whether interest stops running in accordance with the *in duplum* rule where the

amount of unpaid interest reaches the amount of the unpaid capital during the course of litigation instituted by the creditor to enforce payment of the debt. The court found that the *in duplum* rule is not applicable in respect of arrear interest accruing after the creditor has commenced proceedings to enforce payment of the debt (Sharrock *Business Transactions Law* (2002) 301). The reasons given by Zulman JA, for the view taken, were as follows:

> "It appears as previously pointed out that the rule is concerned with public interest and protects borrowers from exploitation by lenders who permit interest to accumulate. If that is so, I fail to see how a creditor, who has instituted action can be said to exploit a debtor who, with the assistance of delays inherent in legal proceedings, keeps the creditor out of his money. No principle of public policy is involved in providing the debtor with protection *pendente lite* against interest in excess of the double … a creditor can control the institution of litigation and can, by timeously instituting action, prevent the prejudice to the debtor and the application of the rule. The creditor, however, has no control over delays caused by the litigation process" (834).

Prior to answering the second question posed in the previous paragraph, there is an ancillary issue, but a nevertheless crucial one that must be dealt with. The query concerns the determination of the date from when interest is to be calculated: whether from the date of judgment or (retrospectively) from close of pleadings. In ancient Roman law *litis contestatio* brought about a novation of the debt and thus interest ran anew at close of pleadings (Itzikowitz *Annual Banking Law Update* 1998 2). In *Stroebel v Stroebel* (*supra* 139A-E) the contrasting views of Van der Keessel. (Van der Keessel refers to the whole doctrine in *Praelectiones* 1178 and states: "It is, however, alleged that this rule permits an exception in respect of interest which accrues *pendente lite* and somewhere I found it recorded that such a decision was given by the *Hooge Raad*." Afrikaans translated by Gonin Vol iv 239). The latter and Huber were compared on the issue (Huber 1 3 37 and 40: "After the debtor is obliged by judgment to pay capital and interest, the interest runs anew, until it is again equal to the capital, but this does not occur on *litis contesatio* except if the debtor by malicious tricks has delayed the pleading for a long time and this is proven."). Cillié JP (*Stroebel v Stroebel supra* 140) gave preference to the statement by Huber; and this preference was followed in *Administrasie van Transvaal v Oosthuizen* (1990 3 SA 387 (W) 397E-H).

The effect of novation is said to extinguish the original debt and therefore to extinguish accessory obligations (Kerr *The Principles of the Law of Contract* 6ed (2002) 544). However, two forms of novation have been identified by the courts: voluntary novation (contractual) and compulsory novation, with judgments falling within the latter category (*Swadif (Pty) Ltd v Dyke NO* 1978 1 SA 928 (A) 940-1; and see also *Weltmans Custom Office Furniture (Pty) Ltd v Whistlers CC* [1997] 3 All SA 467 (C) 472C-E). Notwithstanding the above case law, to view judgments in all circumstances as having the effect of novation has been held by the Supreme Court as being somewhat of an "artificial view" (per Fannin J in *Trust Bank of Africa Ltd v Dhooma* 1970 2 SA 304 (N) 310; his view was accepted by the Appellate Division in *Swadif (Pty) Ltd v Dyke NO supra*). The following are relevant examples: judgment for the balance of the price under a hire-purchase contract leaves the rest of the contract, for example the right to claim the return of goods or the right to claim damages, intact (*Gatenby v*

Hilton Motor Repairs (Pty) Ltd 1955 4 SA 412 (N) 418; and also Christie *The Law of Contract in South Africa* 4ed (2001) 527) and although a party who has cancelled or rescinded a contract cannot thereafter claim performance, the reverse is not true and cancellation may be claimed after a claim for performance has been granted through judgment, but has not been satisfied (*Sarann Furnishers (Pty) Ltd v Brink* 1966 3 SA 48 (N) 50-51). Thus, despite Wessels's view that "when one party institutes an action against another the judgment always and sometimes *litis contesatio*, brings about a *novatio necessaria*", modern law has since changed (Wessels *The Law of Contract in South Africa Vol 1* 2ed (1951) 38 2371). It is now clear that a judgment does not always have the effect of *novatio necessaria* and despite the fact that *litis contestatio* may have had this effect in Roman law (D 46 2 29) it does not have the same result today (Christie 528).

In *Trust Bank of Africa v Dhoom* (*supra* 310) the court remarked that the judgment debt is not novated in all circumstances. However, Fannin J stated that in some cases this is precisely the effect of a judgment. Only when the purpose of a judgment is to enable a plaintiff to enforce his rights should the judgment more realistically be regarded as reinforcing the rights and not as a novation. "The right of action will have been replaced by a right to execute, but the enforceable right remains the same" (*Trust Bank of Africa v Dhoom supra* 310).

After close inspection of the above-mentioned modern progression of novation, the court in *Commercial Bank of Zimbabwe v MM Builders & Suppliers (Pty) Ltd* (*supra* per Gillespie J 300A-B) observed that there is even less cause today, than in Huber's day, to regard interest as commencing afresh from the time of *litis contestatio*. Joubert (*Law of South Africa* v 15 1996 291) followed the Van der Keessel viewpoint, but this contention was refuted in a later judgment, (*Commercial Bank of Zimbabwe v MM Builders & Suppliers (Pty) Ltd supra* 300B-D) on the basis that Joubert neither cited Huber's view in this regard, nor the reasoning for the preference taken by Cillié JP in *Stroebel v Stroebel* (*supra*) over Van der Keessel in coming to his conclusions. (Regard *Commercial Bank of Zimbabwe v MM Builders & Suppliers (Pty) Ltd* (*supra* 300E-G): "I ask myself: 'What sort of evil devices? When Gillespie J leaves open the issue whether, in the event of "evil devices" of the debtor, interest may commence to run afresh from *litis contestatio*. He states in this would they have to be perpetuated? If before joinder of issue, why would interest run only from joinder of issue? If after joinder of issue, why should interest run retroactively from the earlier date? Most importantly – what is it about *litis contestatio*, as that expression is understood in our law, which would provide a theoretical basis for it to be the date from which interest should run?' I do not favour the notion that interest could run from it in the event of improper machinations by the debtor, but I prefer to leave the question open.")

Therefore interest is not affected by the common-law *in duplum* rule if proceedings are commenced by the creditor. The answer to the second question of the effects of the common-law *in duplum* rules on a judgment debt, is more complex. The courts appear to have concurred on the issue of whether the *in duplum* rule affects the running of interest on a judgment debt – it does (*Stroebel v Stroebel supra* 139; and *Commercial Bank of*

Zimbabwe v MM Builders & Suppliers (Pty) Ltd supra 301). The judges, however, could not agree on which amount interest should be calculated on – whether on the capital sum originally lent or on a "new" lump sum – being capital plus interest before judgment. In *Stroebel v Stroebel* (*supra* 139) the court referred to Voet (Book XXII, translation Horwood; note to Title 1 par 10) and stated:

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

However, Gillespie J was not convinced of this view. He stated in his judgment that the old authorities expressed in a definitive way so as to leave no doubt that the *in duplum* rule applies to interest accruing after judgment. Gillespie J based his conclusions on the fact that the translation by Horwood was not *Voet's* own viewpoint, but Horwood's (301B-D). Furthermore, it was reasoned that the inference that interest running afresh on the judgment debt, was based on the view that judgment in these cases brought about a *novatio necessaria* of the original debt (301A-B). In the event of a novation of this type, the judge foresaw no basis warranting a distinction to remain between capital and interest on the judgment debt.

It is submitted that *but for* the Prescribed Rate of Interest Act 55 of 1975 this view would have been the logical view. It is surprising that despite considering the Prescribed Rate of Interest Act, Gillepsie J still arrived at such a conclusion. He pointed out that whether or not Horwood's view was correct or not at time of writing, section 2(1) of the Prescribed Rate of Interest Act altered the position. This act provides that every judgment debt that would otherwise not bear any interest after the date of the judgment, shall bear interest from the day on which such judgment debt is payable, unless that judgment or order provides otherwise (*Davehill (Pty) Ltd v Community Development Board* 1988 1 SA 290 (A)). What must be pointed out is the very deliberate import by the Legislature of subsection 2(3), which states:

> "In this section 'judgment debt' means a sum of money due in terms of a judgment or an order, including an order as to costs, of a court of law, and includes any part of such a sum of money, but does not include any interest not forming part of the principal sum of a judgment debt."

This is an important factor, because according to the Prescribed Rate of Interest Act, interest after judgment should only accrue on the principal capital amount together with legal costs but not on the interest component. Despite the wording of section 2(3) and in conclusion Gillespie J in *Commercial Bank of Zimbabwe v MM Builders & Suppliers (Pty) Ltd* states:

> "[T]he result of this investigation is such as to persuade me that it is a principle firmly entrenched in our law that interest, whether it accrues as simple or compound interest, ceases to accumulate upon any amount of capital owing, whether the debt arises as a result of a financial loan or out of a contract

> whereby a capital sum is payable together with interest thereon at a determined rate, once the accrued interest attains the amount of capital outstanding. Upon judgment being given, interest on the full amount of judgment debt commences to run afresh but will once again cease to accrue when it waxes to the amount of the judgment debt, being the capital and interest thereon for which cause of action was instituted" (303B-E).

Gillepsie J was of the view that to extrapolate, despite a judgment debt including an amount of interest accrued on the debt in question (whether compounded or not) and despite the *novatio necessaria* upon pronouncing judgment, a notional capital amount would amount to an "absurd inconsistency" (*Commercial Bank of Zimbabwe v MM Builders & Suppliers (Pty) Ltd supra* 303B-E). Despite the court's judgment, it is submitted that upon a true reading of section 2(3) of the Prescribed Rate of Interest Act – it is evident that the legislature did intend, where interest on judgment debts is concerned, that interest should accrue on the "notional" so-called capital amount together with costs and exclude any interest already accrued thereon.

While this may render the situation rather convoluted, convolution should not prohibit the intention of the Legislature. It is submitted further that the Gillepsie judgment is of persuasive value and not, like the *Stroebel* judgment, binding on our courts. The effect of implementing the Cillié JP logic (which is in alignment with the Prescribed Rate of Interest Act directive) is that the conventional interest will run from the contractual due date until date of judgment (assuming that it is uninhibited by the *in duplum* rule prior issue of summons). From the date of judgment, judgment interest, whether at the contractual rate, the rate ordered by the court or in terms of the Prescribed Rate of Interest Act, shall run on the principal debt and costs awarded until date of payment or until such time as the *in duplum* rule once again affects the running of interest.

6 The position with commencement of litigation and after judgment under the statutory *in duplum* rule

It was previously the author's submission, (Vessio LLM Dissertation 53), albeit in relation to the common-law rule the Act at the time not yet having become promulgated, that exactly because the *in duplum* rule is, as stated by the court, concerned with the public interest, that its scope should not be limited in terms of the public policy issues which it seeks to protect and which it has been held to protect. The rule should therefore not be perceived as only protecting borrowers from exploitation by lenders. In addition, it prevents the over-extending of debtors by limiting their liability in terms of debt. Whether action has been instituted or not, the *in duplum* rule should take effect once judgment is granted, with interest immediately beginning to run on the judgment debt. This in effect means that a creditor in whose favour a judgment is granted, recovers (except in the case of the insolvent debtor) his capital outlay, interest thereon (which is not necessarily limited to double, as paid instalments do not fall under the *in duplum* umbrella), *mora interest* and costs in the matter. While it is true that the creditor cannot control delays caused by litigation, the two-pronged policy effect of the *in*

duplum rule should be considered and the debtor should be protected from incurring an unforeseen and burdensome amount of interest.

It is submitted that it was for similar public policy considerations that the legislature enacted the statutory *in duplum* rule in its current form, and it is further submitted that in its current statutory form the effects of the rule are *not* curtailed by the issue of summons by the credit provider. The Act specifically stipulates "despite any provision of the common law or credit agreement to the contrary" and later in the section "during the time that the consumer is in default". It is submitted that these words leave no doubt that the statutory form of the rule will not be curbed by the issue of legal processes and, if during the course of litigation regarding a credit agreement that falls under the auspices of the National Credit Act unpaid interest together with the costs listed in section 101(1)(b)-(g) of the Act accrues to equal the unpaid capital amount, the statutory *in duplum* rule will prevent the accrued and unpaid interest and other charges from exceeding the unpaid capital amount. Despite the ongoing legal process the consumer, (assuming it is proved) being in default during the process of litigation he/she should not be deprived of the protection of the rule. On a correct interpretation, it is submitted, the consumer cannot be deprived of this protection as the wording of the statute is indubitable.

In terms of the second question posed in the previous paragraph it has been submitted that, with respect, the court in *Commercial Bank of Zimbabwe v MM Builders & Suppliers (Pty) Ltd* (*supra*) erred and while interest should run afresh on a judgment debt – the judgment debt has been specifically and deliberately defined to include costs but to exclude interest. In terms of the statutory *in duplum* rule costs and fees which would otherwise have been incorporated in the principal capital amount lent – are in terms of section 103(5) of the Act now incorporated under what was traditionally an interest-only component. The question then is, do these costs, save the interest (s 101(1)(d)), fall under the principal debt or under the interest component for purposes of a judgment debt? It is submitted that what is not "interest" cannot become "interest". Thus, while statutorily the Act, and specifically section 103(5), incorporate the other costs (initiation fees, service fees, costs of credit insurance, default administration charges and collection costs) for purposes of limiting the consumers exposure, the wording in the Act does not leave room for doubt. Section 103(5) refers to "amounts contemplated in section 101(1)(b) to (g) and does not clump them under an interest heading". The Prescribed Rate of Interest Act refers to interest and it is submitted – this is interest proper. Accordingly, and in light of both the National Credit Act and the Prescribed Rate of Interest Act it is submitted that the wording of the statutory *in duplum* rule does, however, require further examination.

The issue lies in how to establish what makes up the principal debt. Do the amounts contemplated in section 101(1)(b), (c), (e), (f) and (g) "revert" to forming part of the principal debt for purposes of calculating the judgment interest or would they remain as part of the "interest component"? It is submitted that for purposes of calculating interest on the judgment debt that these costs and fees would indeed form part of the principal debt. However, if the statutory *in duplum* rule should take effect on the judgment debt

interest – then these costs should once again form part of the "interest component" in order not to fall foul of section 103(5).

7 Conclusion

It is with the enactment of the National Credit Act that South Africa gained two *in duplum* rules or at least two versions of this rule: one inherited from the common law and the other a codification, albeit amendment, of the rule. While conceptually the rules are similar – the consequences are quite marked for the consumer as well as the credit provider. The statutory *in duplum* rule includes in the calculation of what the "double is" much more than just interest, and while the common law *in duplum* rule temporarily ceases the running of interest only when unpaid and accrued and equal to the unpaid capital, the credit provider now has more pressure to enforce the credit agreement, as the statutory costs (if unpaid and accrued) that are added to the accrued and unpaid interest component will hurry the unpaid and accrued quantum closer to the unpaid capital sum under the statutory rule.

The commencement of litigation affects the statutory and common-law rules differently. Under the common law, issue of summons, stopped the *in duplum* rule from operating and once the creditor had commenced legal proceedings the debtor's unpaid interest could accrue to more than the unpaid capital. However, it has been submitted in this article that because of the strict wording of section 103(5) the same will not occur under the statutory *in duplum* and, if during the course of litigation or after the issue of summons the consumer's unpaid costs as listed in section 101(1)(b)-(g) accrue to the unpaid capital amount then the costs, as listed, together with interest, will stop running until such time as the consumer starts paying again or the debt is novated by the judgment.

Upon judgment, interest starts to run again and both the common law and the statutory rule will affect the running of interest on the judgment debt if unpaid interest reaches the unpaid judgment debt.

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