A VALUATION OF THE EFFECTIVENESS OF THE PROPOSED GUIDELINES ON THE INTERPRETATION AND APPLICATION OF SECTION 103(5) OF THE NATIONAL CREDIT ACT 34 OF 2005 AGAINST THE BACKDROP OF THE COMMON-LAW IN DUPLUM RULE.

DISSERTATION IN PARTIAL FULFILMENT OF THE DEGREE LLM (COMMERCIAL LAW)

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INTRODUCTION

For centuries, the common-law in duplum rule has served to protect debtors who fall into financial difficulty, from greedy creditors who would use the vulnerability of debtors to exploit financial advantage from the situation. The introduction of section 103(5) in the National Credit Act 34 of 2005 "codified" a statutory rule that resembles the common-law in duplum rule but which has additional protection built in for consumers who default under a credit agreement that is governed by the National Credit Act.

Several problems with the interpretation and application of section 103(5) arose when, on closer inspection of the drafting of section 103(5), it becomes clear that the section lacked guidance on the expected application of the section by credit providers. Words such as "default" existent in section 103(5) lacks precise definition in the National Credit Act and adds to the interpretation difficulties faced by the credit industry, which has further led to the multiplicity of matters that have been referred to South African courts to aid with the interpretation and application of section 103(5). The industry has also called out to the National Credit Regulator ("NCR"), the enforcement body of the National Credit Act, to provide clarification on the intended application of section 103(5), to little avail.

Eight years after the National Credit Act came into effect, the NCR published the Proposed Guidelines for the Application and Interpretation of Section 103(5) (the "Proposed Guidelines") for industry comments in March 2015. Although the guidelines were long overdue and anticipated by the industry, many drafting errors and questionable directives are present in the Proposed Guidelines, which has provided little clarity and has led to further cries from the industry for the NCR to correct the inadequacies present therein.

This thesis attempts to critically analyze the common-law in duplum rule against its statutory counterpart in section 103(5) of the National Credit Act and to provide commentary on the effectiveness and impact to the industry of the Proposed Guidelines

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CHAPTER 1

1 *The common law in duplum rule*

1.1. What is the common-law in duplum rule?

"Nothing is more wholesome than the quoted not to go above the double, provided that we know what the single is."[1] The common-law in duplum rule emerged in Roman law as one of the methods to limit the interest which could be claimed by greedy money lenders thus providing a measure of relief to loan borrowers (or debtors). Except in countries like South Africa, Roman law is in the modern world of more historical than practical interest.[2] Through time, contractual agreement developed and could be categorized according to their purpose. Interest on contracts could only be included by what was known as a stipulation, which was generally a verbal agreement between parties to an agreement and which allowed for interest at an agreed rate to be claimed.[3] Roman Emperors under rule saw the need to protect debtors from vicious creditors who exploit the situation to earn excessive interest and fees and therefore developed the law to ban the charging of usurious interest rates and eventually banned the charging of interest in excess of the capital amount loaned. And so the in duplum rule was born, which is the common-law in duplum rule we are familiar with today.

The common-law in duplum rule asserts that all arrear interest ceases to run when it reaches the amount of the outstanding capital. 'In duplum' directly translated is 'double the amount'. The common law rule therefore provides that arrear interest ceases to accrue once the sum of the unpaid (or accrued) interest equals the amount of capital outstanding at the time (and not the amount of capital originally advanced). What this means is that when a debtor who falls into arrears with payments owing under an agreement with a creditor, such creditor may not claim an amount of interest on the amount owing that exceeds the amount of the outstanding capital at any given time.

[1] Huber *Heedensdaegse Rechtsgeleertheyt* 1 37 12.
[2] Van Zyl *History and principles of Roman private law* (1983) 73.
[3] Zimmermann *The Law of Obligations* (1990) 14.

*Acknowledgement to the commentary submitted by the members of the Large Non-Bank Lenders Association and the Consumer Goods Council of South Africa

> "The in duplum rule is confined to arrear interest and arrear interest alone. In my judgment 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…" [4]

Once the interest reaches the amount of the unpaid capital there are two known instances under which interest may begin to accrue again, namely:

(a) If the debtor makes a payment towards the outstanding debt; or
(b) If the creditor takes judgment against the defaulting debtor.

In scenario (a), once the debtor makes a payment towards the debt, the payment is allocated to the arrear interest due thus enabling interest to accrue once again until it reaches the sum of the outstanding capital amount. And for each subsequent payment made by the debtor, the cycle continues. It is clear that the common-law in duplum rule does not set a maximum amount of interest that may be charged but rather that it caps the amount of interest that can be charged in relation to the outstanding capital amount.[5] Scenario (b) is a statutory process that differs by type of agreement.

1.2 Development of the common-law in duplum rule by case law

The common law in duplum rule has been a part of South African law for more than 100 years, being applied and developed through South African case law from as early as the year 1830.[6]

i. Joubert JA in the case of *LTA Construction Bpk v Adminstrateur*[7] conducted a thorough analysis of the origin and purpose of the common-law in duplum rule in his judgment and

[4] *Bank of Lisbon* 1988 3 SA 580 (A) 655.
[5] Vessio *The Effects of the In Duplum Rule and Clause 103(5) of the National Credit Bill 2005 on Interest* (2006) SA Merc LJ 116.
[6] Elliot "Correctly applying the in duplum rule" (2013) 1 https://www.kpmg.com/ZA/en/IssuesAndInsights/ArticlesPublications/Financial-Services/Documents/In%20duplum%20factsheet.pdf (21-11-2015).

in the headnotes of his judgement held that "Die renteverbod in duplum is alles behalwe 'n anachronisme. Dit vorm deel van ons daaglikse ekonomiese lewe. Dit vervul 'n ekonomiese funksie om skuldenaars wat hul in finansiële verknorsing bevind, te help." [8]

ii. *Stroebel v Stroebel*[9] is the authority for the proposition that, if the duplum has been reached, interest does not again commence to run pendente lite or pending the litigation.[10]

iii. *Stroebel v Stroebel* also provided that once a debtor is obliged by judgment to repay the capital and interest, the interest runs anew until it is again equal to the capital, but this does not occur on litis contestatio unless the debtor has delayed proceedings by malicious tricks and this is proven.[11] This preference was also followed in *Administrasie van Transvaal v Oosthuizen*[12].

In *Standard Bank of South Africa Ltd. v Oneanate Investments (Pty) Ltd* [13], Zulman JA disagreed with the position in *Stroebel v Stroebel* and concluded that (i) the in duplum rule is suspended pendente lite, where the lis is said to be upon service of the initiating process, and (ii) once judgment has been granted, interest may run again until it reaches the double of the capital amount outstanding in terms of the judgment.

[7] 1991 ZASCA 147 (A).
[8] *LTA Construction Bpk* (n 13) 31. "…the prohibition on interest in duplum, viz that interest may not exceed the capital sum, has been applied in a long list of reported 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."
[9] 1973 2 SA 137 (T).
[10] *Stroebel* (n 9) 139A-E.
[11] Huber (n 1) 1 3 7 and Vessio "A short discussion on the effects of the in duplum rule upon commencement of litigation and after judgement: A view both "inside" and "outside" the National Credit Act" (2010) 729.
[12] 1990 3 SA 387 (W) 397.
[13] 1998 1 All SA 413 (A).

The court in *Oneanate Investments* confirmed that the rule is one that is based on public policy designed to protect borrowers from the exploitation of lenders[14] and as such cannot be waived by borrowers and cannot be altered by banks (or lenders)[15]. The uncertainty was thus clarified that if on application of the in duplum rule during the course of litigation the duplum is reached, interest stops running and only begins to run again once judgment is pronounced. Zulman J held that there is no dispute that the entitlement of interest applies from the date of judgment at the agreed rate and in spite of the double being reached. Zulman J further explained that as soon as the in duplum rule suspends the running of further interest, all credits to the account should be appropriated to pay the interest before they are applied to pay the capital[16].

iv. Wallis JA in *Paulsen and Another v SlipKnot Investments 777 (Pty) Ltd*[17] explained that the expression pendente lite as its ordinary meaning is 'pending the suit' and clarified that if the duplum has been reached prior to litigation commencing interest will accumulate afresh on the capital debt from the date of service of the summons or the application papers.

v. The matter of *Coppenhagen v Coppenhagen*[18] clarified the next steps in application of the rule stating that when the debtor again pays part of the debt, the payment has the effect of decreasing the interest amount and thereby reviving the running of interest. Arrear interest will run again until such time as it again reaches the unpaid capital amount.

vi. The court in *Verulam Medicentre (Pty) Ltd v EThekwini Municipality*[19] explained that for in duplum to apply, the interest cannot be due as long as no demand for payment of the

[14] as was also held in *LTA Construction Bpk*.
[15] *Oneanate Investments* (n 13) 534.
[16] *Oneanate Investments* (n 13) 576.
[17] 2014 4 SA 253 (SCA). This is an important case in the development of the common law in South Africa as the most recent judgment passed since inception of the common law in duplum rule and will be discussed at length in the chapters to follow.
[18] 1947 1 SA 576 (T) and Vessio (n 5) 34.
[19] 2005 2 SA 451 (D).

> debt has been made, but, once such demand has been made interest will run for the entire period thus rendering the debt subject to the in duplum rule.[20]

Whilst most courts concurred that the in duplum rule affects the running of interest on a judgment debt, courts could not agree on which amount interest should be charged i.e. whether it was to be charged on the capital sum alone or on the 'new capital amount' where interest was added to the capital before judgment was taken. In *Stroebel v Stroebel* the court referred to Voet (Book XXII, translation Horwood note to Title I para 10)[21] 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 on 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."

Gillespie J who provided the minority judgment in *Commercial Bank of Zimbabwe v MM Builders and Supplies*[22] was not convinced of this view and believed that in duplum applied to interest accruing after judgment. He further 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 and in the event of a novation of this type there was no basis warranting a distinction between capital and interest on the judgment debt.[23]

The Prescribed Rate of Interest Act altered that view in that section 2(1) 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.[24] This section however, must be read

[20] *Verulam Medicentre* (n 19) 7.
[21] *Stroebel* (n 9) 731.
[22] 1997 2 SA 285 (ZHC).
[23] *Commercial Bank of Zimbabwe* (n 22) 430.
[24] *Commercial Bank of Zimbabwe* (n 22) 439.

together with section 2(3) of the same Act which states that 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.

Upon proper reading and application of section 2(3) it is evident that the legislature did intend, where interest or 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. 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.[25] Gillespie J aptly concluded that to extrapolate a notional capital amount, despite a judgment debt including an amount of interest accrued on the debt in question, would amount to an absurd inconsistency.[26]

CHAPTER 2

2 Section 103(5) of the National Credit Act 34 of 2005

2.1 The statutory provision

With the birth of the National Credit Act in 2005, what is commonly known as the statutory in duplum rule came to life. The provisions of the National Credit Act[27] came into operation incrementally from 01 June 2006 and apply to a wide variety of credit agreements. The National Credit Act was, like other consumer legislation in the rest of the world, influenced by economic, social and political considerations and places limitations on the costs of credit including

[25] Vessio (n 11) 732.
[26] *Commercial Bank of Zimbabwe* (n 22) 441.
[27] 34 of 2005.

interest.[28] The origins of the in duplum rule in ancient Roman societies saw the development of the rule through its continued application to protect their citizens. The history and origins of the common law rule is said to have inspired and provided the rationale behind the provisions in the National Credit Act that deal with the limitation of arrear interest and charges.

The statutory rule (that resembles the common law in duplum rule) incorporated in section 103(5), is limited in its application as it only applies to credit agreements that are covered under the ambit of the National Credit Act. In addition, section 103(5) is excluded when a juristic person enters into an agreement as a consumer and section 103(5) is also not applicable to credit agreements that came into operation before the commencement of the National Credit Act on 01 June 2007.

Section 103(5) has been referred to in literature as a codification of the in duplum rule,[29] but this section is not a code (because a code is explained by Malan JA as a word frequently encountered in the literature on the subject, particularly in respect of section 103(5). It does not do away with the common law rule except as provided for in its extension of the common law rule and there is no particular advantage in using the word codification[30]). It is said to be a statutory provision with limited operation, with which I am inclined to agree.[31] Section 103(5) deals with the same subject matter as the common law rule but this does not mean that it incorporates all or any of the aspects of the common law rule. It is a self-standing provision and must be construed as such.

Section 103(5) 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.[32] Section 103(5) states 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

[28] http://www.consumersinternational.org/media/1137336/update_withlink_the%20state%20of%20consumer%20protection%20around%20the%20world.pdf
[29] Kelly-Louw "The statutory in duplum rule as an indirect debt relief mechanism" (2011) *SA Merc LJ* 352 372.
[30] Malan JA in the case of *Nedbank v The National Credit Regulator* 2011 (3) SA 581 (SCA) 601.
[31] Elliot (n 6) 2.
[32] Kelly-Louw "The common law versus the statutory in duplum rule" (2006) *SA Merc LJ* 142.

consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under the credit agreement as at the time that the default occurs."

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) which are initiation 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[33] to the National Credit Act. For purposes of understanding the statutory rule and its application, it is not necessary to know the actual monetary amounts applicable as they have no direct impact on the application of section 103(5).

It follows then that once a consumer is in default of his obligations under a credit agreement and if all the amounts catered for in section 101(1)(b) to (g) combined have accrued to an amount equal to the principal debt then no further charges can be raised.

CHAPTER 3

3 A comparison of the common law in duplum rule and section 103(5)

3.1 The differences between the common law in duplum rule and section 103(5)

A rule of interpretation of statutes is that a statutory provision should not be interpreted so as to alter the common law more than is necessary unless the intention to do so is clearly reflected in the enactment, whether expressly or by necessary implication.[34] Section 103(5) departs from the common law rule in various aspects. The common-law in duplum rule is firstly far wider in its scope of application compared to its statutory counterpart in that section 103(5) only applies to

[33] *GG* 28864 of 31 May 2006.
[34] Devenish *Interpretation of statutes* (1992) 159 and 160.

all credit agreements that are governed by the National Credit Act whilst the common law rule applies to all other types of agreements.

One of the main differences between the common-law in duplum rule and section 103(5) is that whilst under the common law rule only unpaid and arrear interest on the capital amount is capped, section 103(5) provides for all paid, unpaid and arrear interest together with other charges provided for in section 101(b) to (g) that accrue during the time that the consumer is in default under the credit agreement may not in aggregate exceed the unpaid balance of the capital as at the time the default occurs.

The ceiling for in duplum in terms of the common law rule is outstanding capital when calculating the double which means the capital or principal loan amount advanced to the consumer excluding charges. The principal debt amount contemplated in section 103(5) is a far higher ceiling when calculating in duplum than the common law in duplum ceiling of only the outstanding capital amount. Principal debt is defined in the National Credit Act to include the amount calculated in accordance with section 101(1)(a) as the amount deferred in terms of the agreement, plus the value of any item contemplated in section 102. The deferred amount is defined in regulation 39 to the National Credit Act as any payment which is deferred on which interest, or a fee or charge is payable. Also, section 102 lists specific inclusions that a credit provider may add to the principal debt amount where applicable to instalment (sale) agreements, mortgage agreements, secured loans and leases of moveable property.

It follows that the relief provided to debtors from the application of the common law in duplum rule is only temporary. The reason for this conclusion is that once the debtor makes a payment on an overdue account, thereby reducing the interest on the debt (because payments are allocated first to interest and then to the principal debt[35]) the interest starts to accumulate again until the capital amount is reached. If a subsequent payment is made the payment is again

[35] Wessels Wessels *Law of contract in South Africa* (2nd edition Vol 2) 23. "Where a debt produces interest, the money paid must be applied in the first instance to the payment of the interest and then to the capital. Even if the payment is made on account of principal and interest, it will by law be appropriated first to the interest and then to the capital. If no mention is made of the principal, but only of the interest, the surplus after paying the interest will nevertheless be appropriated to the capital provided that the capital is then due."

allocated to interest thereby reducing the interest again, and so the vicious cycle continues. In contrast, section 103(5) operates once the principal debt amount has been reached by paid, unpaid and arrear interest and charges and remains in force until the default is completely cured by the debtor. Similar to the common law rule, when a debtor makes a payment towards the debt and the payment is also allocated first to interest then costs and finally to capital in terms of the National Credit Act, the interest charged on the account cannot begin to run again until the entire default is cured by the debtor[36]. This could mean that lengthy periods could pass by without the credit provider earning or the debtor being liable to pay any more interest and could further result in a clever or devious debtor always just paying enough to make a dent towards the debt but not quite enough to cure the default and so the debtor will have the unqualified benefit of a payment holiday.

3.2 Similarities between the common law in duplum rule and section 103(5)

It is as useful to understand the similarities between the common law in duplum rule and section 103(5) as it is to understand the differences. From the purposes of the National Credit Act stated in section 3 it is clear that the Act aims to address the imbalances that have arisen between consumers and credit providers and to cater for the incompleteness of previous legislation.[37]

It is thus evident that the purpose of the National Credit Act and section 103(5) is consistent with the purpose of the common law in duplum rule which is understood to be the protection of debtors against insurmountable interest and excessive litigation.

Both the common-law in duplum rule and section 103(5) have the effect of starting interest to run afresh if the new judgement debt has the effect of replacing the old debt. This would mean that once judgement has been delivered the common-law in duplum rule will apply in both instances i.e. whether or not section 103(5) applied from the onset of the default. Remember that section 103(5) only applies when a consumer is in default under a credit agreement. Once

[36] s 126(3) of the NCA
[37] http://www.ncr.org.za/documents/pages/background_documents/Credit%20Law%20Review.pdf.

judgment has been granted and the consumer falls into default, section 103(5) will no longer be applicable because the consumer will no longer be in default under the credit agreement as judgement has the effect of novating the credit agreement and the consumer will instead be in default of the judgement which will then call for the common-law in duplum rule to apply. Interest will therefore begin to accrue afresh on the judgement debt amount in terms of the common law rule.

Section 103(5) however has further limitations in respect of instalment sale, mortgage agreements, secured loans and leases of moveable property and the maximum fees and charges allowed to be charged by a credit provider under any of these types of agreements stipulated in section 102 and the accompanying regulations. Sections 100 to 106 (excluding section 102) places limitations on the amounts that may be charged in the case of a credit agreement. Although section 101 also provides for initiation fees and credit insurance costs, it follows that once these charges are included as part of the principal debt on the specific allowed agreements under section 102 these amounts cannot be again included in the calculation when giving the effect to section 103(5). There are however certain requirements that must be fulfilled before the credit provider can add these charges to the principal debt amount where for example section 102 stipulates that the consumer must choose the credit provider to act as the agent of the consumer and then too it is a further requirement of the section[38] that any of the charges provided for in section 102 (1) must not be in excess of the actual amount payable by the credit provider for the service or alternatively the fair market value if the credit provider delivers the service itself.[39]

In contrast, the common law in duplum rule does not differentiate between the treatment of the rule against different types of agreements nor does it specify any particular type or category of agreement for its application. It has general application across all agreements where the rule would apply, except of course on those agreements that are governed by section 103(5) of the Act. Further to this, the common law rule does not make provision for any charge other than interest.

[38] s 102(c).
[39] Kelly-Louw (n 32) 150.

CHAPTER 4

4 Proposed guidelines to the interpretation and application of section 103(5) of the National Credit Act

4.1 Valuation

Given the uncertainty in the credit industry regarding application of the statutory rule incorporated in section 103(5), leaders in the credit industry including the major banks, financial services providers, smaller micro lenders and industry association bodies called upon the NCR to provide guidance and thus clarity on the intended application of section 103(5). The NCR has this power in terms of section 16(1)(b) of the National Credit Act. The NCR somewhat heeded the calls of the industry and on the 30th of January 2015 it published the Proposed Guidelines for the Interpretation and Application of Section 103(5) of the National Credit Act[40] (the "Proposed Guidelines") for information and comment by the public. Interested parties were asked to submit their written comments to the Regulator by the 27th of February 2015. This represents an endeavor by the NCR to harmonize the practices of credit providers (which have been varied), who have to date been required to employ best efforts to reasonably interpret this rule without any official guidance from the NCR.[41]

Whilst credit providers appreciate that section 103(5) does not represent a mere codification of the common law rule (as was determined through judicial precedent), there remains uncertainty as to the ambit and operation of the rule, which has left credit providers open to regulatory censure based on the real risk of incorrect application of this rule in practice. The Proposed Guidelines, to the extent that they represent the NCR's requirements in respect of the statutory rule, could operate to prevent this uncertainty in future. Some industry players consider that the intention of the NCR (who is aware of the uncertainties plaguing credit providers and other

[40] *GG* 38419 of 30 January 2015.
[41] Elliot and Boyce "Statutory in duplum rule – draft guidelines issued by the NCR" 2015 1 https://www.kpmg.com/ZA/en/IssuesAndInsights/ArticlesPublications/Financial-Services/Documents/Induplum%20factsheet-update.pdf (21-11-2015)

affected parties) in issuing these guidelines is commendable. This being said, upon a review of the guidelines, there are a number of points which will certainly require further clarity if these guidelines are to fulfil their stated purpose.[42]

The practical problems encountered when dealing with the interpretation and application of section 103(5) was interpreted by the Supreme Court of Appeal in *Nedbank Ltd v NCR* [43] and can further be seen from the wording of the proposed guidelines which takes into account the decision by the same court. South African courts have been tasked with assisting to interpret and apply section 103(5) in an attempt to aid affected parties to properly understand and give effect to the section. This is understandable though, given that since inception of the National Credit Act the courts have been flooded with a plethora of cases dealing with interpretation of the National Credit Act to the extent that hardly a decision goes by without the judge commenting on the quality of the drafting of the Act.[44] Malan JA commented when he delivered judgment in *Nedbank v the NCR*[45] that unfortunately the National Credit Act cannot be described as the best drafted Act of Parliament that was ever passed. Numerous drafting errors, untidy expressions and inconsistencies make its interpretation a particularly trying exercise.[46]

Similarly then, many credit providers struggled with the interpretation of section 103(5) in comparison to the common law in duplum rule. Two landmark cases decided by the South African courts that cleared many ambiguous aspects on the application of section 103(5) are pivotal to understanding the application of the section to credit agreements.

The first of these landmark cases is *Nedbank Ltd v The NCR*[47] where the respondents in the court a quo argued inter alia that section 103(5) of the National Credit Act 'operated as a moratorium against payments whilst the consumer was in default but did not affect an

[42] Elliot and Boyce (n 41) 1.
[43] *Nedbank v The National Credit Regulator* 2011 (3) SA 581 (SCA) 601. For a full discussion of this case see Friedman and Otto "Section 103(5) of the National Credit Act 34 of 2005 as inspired by the common-law *in duplum* rule" 2013 *THRHR* 132 361.
[44] Eiselen "National Credit Act 34 of 2005: The confusion continues" 2012 *THRHR* 389.
[45] *Nedbank v The NCR* (n 43) 585.
[46] *Nedbank v The NCR* (n 43) 585.
[47] See n 43.

underlying obligation to make full payment in the future of the underlying obligation once the consumer was no longer in default'.[48] Therefore if a consumer makes a payment, such payment will be allocated against the section 101(1)(b) to (g) charges that accrued and these charges can thus accrue again to the extent of the payment made. Du Plessis J, the presiding officer in the court a quo gave the following order in respect of the interpretation of section 103(5):

> "on proper interpretation of section 103(5) read with section 101(1) (b) to (g) of the National Credit Act:
>
> (a) The amounts contemplated in section 101(1)(b) to (g) which accrue whilst the consumer is in default may not in aggregate exceed the unpaid balance of the principal debt when the default occurred;
> (b) Once the total charges referred to in section 101(1)(b) to (g) equal to the amount of the unpaid balance, no further charges may be levied;
> (c) Once the total charges referred to in section 101(1)(b) to (g) equal the amount of the unpaid balance, payment made by the consumer thereafter during the period of default do not have the effect of permitting the credit provider to charge further interest whilst such default persists."[49]

The Banks on appeal against the ruling made by Du Plessis J each advanced a different construction of section 103(5) and suggested variations of the declarator made by the court a quo. Unpacking the suggested variations leads one to believe that the banks were directed at preserving the common law in duplum rule that payments of arrear and unpaid interest decrease the amount of interest owing and allowing interest to run again up to the capital. Malan JA however held that the banks required words to be read into the section that just aren't there.[50] Malan JA concluded that interest charged under a credit agreement must be consistent with the National Credit Act and in doing so one must consider the objects of the National Credit Act which includes the encouragement of responsible borrowing, avoidance of over-indebtedness and the fulfillment of financial obligations by consumers.[51]

[48] *National Credit Regulator V Nedbank Ltd And Others* 2009 6 SA 295 (GNP) 319.
[49] *NCR v Nedbank Ltd* (n 48) 320.
[50] *Nedbank v NCR* (n 43) 603.
[51] *Nedbank v NCR* (n 43) 606.

The National Credit Act seeks to promote equality in the credit market by balancing the rights of consumers and credit providers, and promoting responsibility in the credit market. Malan JA explained that section 100 incorporates this purpose by requiring that a credit provider must not charge an amount to or impose a monetary obligation on a consumer in respect of a charge or fee prohibited by the National Credit Act or recover a fee or charge that exceeds the amount allowed to be charged under the Act or charge an amount of interest that is inconsistent with the amount allowed to be charged by the Act. Section 103 then governs these charges "despite any provision of the common law or credit agreement to the contrary".

> "There is thus no contractual entitlement to interest (or other charges) except as allowed for by section 103. The intention of the legislature could not have been expressed in clearer terms. Section 103(5) does not merely give rise to a 'moratorium' on payments whilst the consumer is in default but indeed determines the latter's obligations under the credit agreement."[52]

In response to the Banks'' arguments, the court a quo granted the declarator sought by the NCR. Malan JA confirmed in the Supreme Court of Appeal judgment that the court a quo was correct to make the declaratory order in respect of section 103(5). Malan JA explained that the legislature had in mind the protection of the consumer who may, under the common law rule, end up paying much more than the capital originally owing.[53] Nedbank's appeal and all other appeals were dismissed.

The second landmark decision delivered by the Constitutional Court in the matter of *Paulsen v Slipknot Investments*[54] which court handed down a defining judgment clarifying whether, once litigation has commenced, a debtor can be held liable for accumulated interest greater than the capital amount of the loan.

Madlanga JA, who delivered the main judgement in the Constitutional Court, begins by quoting from the *Nedbank v NCR* case heard in the Supreme Court of Appeal that the National Credit Act cannot be described as the best drafted Act by parliament which was ever passed and reiterated what has already been stated in case law and numerous pieces of academic writing stretching back over centuries that the overarching purpose of the in duplum rule is to protect

[52] *Nedbank Ltd v NCR* (n 43) 607.
[53] *Nedbank Ltd v NCR* (n 43) 607.
[54] 2015 (3) SA 479 (CC).

debtors from being crushed by the never ending accumulation of interest on an outstanding debt.[55]

Madlanga JA then discussed the position in *Oneanate Investments* and held that by applying the in duplum rule pendente lite does not inhibit a creditor's access to courts nearly to the same extent that lifting the rule inhibits a debtor's access to courts.[56] Indeed, to allow uncapped and uncontrolled interest to run pendente lite grants a powerful tool to creditors to possibly annihilate debtors by using the litigation process to their best advantage.[57] This is of course due to the imbalance of power by allowing creditors to utilize power over debtors by charging exorbitant interest amounts. Madlanga JA explains that by allowing uncapped interest to run as a result of a debtor exercising a right to access a court by suspending the in duplum rule pendente lite, there is a risk of rendering the debtor's rights of access to court tenuous if not illusory.[58] The suspension of the in duplum rule pendente lite serves as a significant impediment to debtors seeking assistance from courts, inhibiting rather than promoting the right of access to courts. Conversely, the continued application of the rule does not serve as an equivalent impediment to creditors and this policy consideration is against suspension of the rule.

Another purpose of the in duplum rule was held as to enforce sound fiscal discipline amongst creditors by serving to not incentivize lending money to bad risk consumers. The effect that the application of the in duplum rule has on creditors must be considered as well; for of course a creditor would be better off recovering uncapped interest during the pendency of litigation but general notions of fairness would dictate that the hardship faced by debtors who are probably already financially strapped and must now incur more than double the cost of capital as interest plus litigation costs is unreasonable.[59]

The court held that racking up interest to an exorbitant amount against a debtor who is in financial difficulty could be a real incentive for creditors to abuse the litigation process and

[55] *Slipknot Investments* (n 54) 500 par 44.
[56] *Slipknot Investments* (n 54) 509 par 67.
[57] *Slipknot Investments* (n 54) 509 par 68.
[58] *Slipknot Investments* (n 54) 509 par 68.
[59] *Slipknot Investments* (n 54) 513 par 83.

perhaps on the contrary the non-suspension of the rule may incentivize creditors to act swiftly.[60] Madlanga JA illustrated a simple point, with which I am in agreement, that there are strong policy considerations in favour of maintaining the operation of the in duplum rule pendente lite and although there are competing considerations suggesting the opposite those that are in favour of the continued application of the rule pendente lite outweigh those that are not.[61] For these reasons the court overruled the *Oneanate Investments* judgment insofar as the in duplum rule was concerned and held that the in duplum rule must apply pendente lite.[62]

In its current form the Proposed Guidelines for section 103(5) may lead to unintended consequences which are unfairly prejudicial to consumers. It may be so that the NCR would need to consider further proposals on further amendments to be made to section 103(5) itself and the Proposed Guidelines to alleviate the current problems encountered when dealing with section 103(5) and the possible risk posed to consumers as it seems that the poor drafting prevails in the guidelines as well.

For instance, the Proposed Guidelines are silent on their nature and this leads one to assume that it is non-binding.[63] This non-binding opinion on the NCR's interpretation of this section will not sufficiently address the concerns with regards to the interpretation of section 103(5) and the NCR should consider resolving the application of section 103(5) through legislative process. This will ensure that the correct levels of scrutiny, research and public consideration is taken into account before a new regulation is published and will further ensure that application of the regulation is applied consistently throughout the industry being controlled, monitored and tested by internal audit functions of credit providers and ultimately the NCR itself.

Notwithstanding the above, it is worthwhile to analyze the proposals made by the NCR for there is no certainty that legislative process will in fact be followed before the guidelines are "enforced." The Proposed Guidelines begin by outlining its purpose as being to "provide

[60] *Slipknot Investments* (n 54) 514 par 86
[61] *Slipknot Investments* (n 54) 514 par 86.
[62] *Slipknot Investments* (n 54) 516 par 94.
[63] See s 16(1)(b)(i).

guidance to credit providers, debt counsellors and payment distributions agents[64] on the interpretation and application of section 103(5)."[65] The purpose therefore specifically identifies the target groups that are expected to follow the guidelines. This may be an unintended consequence but it is a consequence of the wording of the purpose that seems to imply that the guidelines are only applicable to credit providers, debt collectors, debt counsellors and payment distribution agents in respect of the recovery of debt from consumers, arising from credit agreements to which the National Credit Act applied and that the entire legal fraternity has been excluded. Judges, magistrates, advocates and attorneys are all professionals in the legal field and who are academically trained to interpret and provide guidance on the application of statutes and regulations promulgated. However, the wording of the purpose of the Proposed Guidelines implies that the legal fraternity does not have to follow the guidelines provided and can thus interpret section 103(5) in accordance with the established rules of interpretation provided by the courts.

Perhaps this was, in fact, an unintended consequence by the drafters and if this is proven to be correct, the correction of the Proposed Guidelines for Section 103(5) when the amended version is published will state that the purpose is to provide guidance to all stakeholders or affected persons faced with the task of interpreting and applying section 103(5). Failure to correct the guidelines as aforesaid could result in the legal fraternity having valid legal argument should the NCR or other related parties ever challenge their non-compliance with the Proposed Guidelines, in addition to the fact that the guidelines are non-binding on the courts in any event.

4.2 The insurance limitation

In consultation with the members of the Consumer Goods Council of South Africa, it was evident that the critical review discussed hereinafter was unanimously agreed to by its members in relation to the Proposed Guidelines. Section 103(5) has the effect of preventing a credit provider from continuing to charge a consumer, amongst other costs, the costs of credit

[64] A payment distribution agent means a person who on behalf of a consumer, that has applied for debt review in terms of this Act, distributes payments to credit providers in terms of a debt rearrangement, court order, order of the Tribunal or an agreement. See s 1 inserted by The National Credit Amendment Act 19 of 2014.
[65] *GG* (n 40) 8.

insurance premiums once the amounts contemplated in sections 101(1)(b) to (g) that accrue during the period of default exceed the balance of the principal debt as at the time the default occurred. In addition, unsecured lending transactions that fall under the National Credit Act are limited against charging credit life insurance premiums or the costs of credit insurance to the debtor. If the credit provider wants the credit insurance to remain in existence, the credit provider will have to absorb the costs on its own until such time that the costs under section 101(1) (b) to (g) no longer exceed the principal debt and in the case of an instalment agreement, mortgage agreement, secured loan or lease, section 102 provides that the cost of the insurance may be added to the principal debt.[66]

This shows an inconsistency of application of the National Credit Act, where one credit provider may continue to increase the principal debt amount by the charges allowed under section 102 but another credit provider who only provides unsecured loans or credit facilities will not be able to add such charges to the principal debt. Further, the credit provider in the first scenario will benefit by being able to charge interest on an increased amount as principal debt which includes the amounts provided for in section 102 whereas the credit provider who provides credit under the other types of agreements provided for under the National Credit Act may not include such charges in the principal debt amount. These latter credit providers are further prejudiced by the application of section 103(5) when the consumer falls into default under the agreement.

Very often when a consumer is experiencing financial difficulty it is realized that credit insurance is valuable to the consumer. For example, if the consumer purchased a lounge suite on credit from a furniture retailer and the consumer's house is flooded due to a burst geyser causing irreparable damage to the lounge suite, the consumer would still be indebted to the credit provider (in this case most probably the furniture retailer or a bank if the purchase is made with a credit card or through the provision of an unsecured loan) for the cost of the lounge suite but would not have the benefit of use of the lounge suite. If the consumer elected to take out credit insurance via the furniture retailer or with an independent insurance provider, the credit insurance cover would ensure that the balance owing by the consumer under the credit

[66] Scholtz JW *Guide to the National Credit Act* 10.6.4 and Kelly Louw (2007) 19 SA *Merc LJ* 337-345.

agreement would be settled in full to the credit provider and the lounge suite could possibly even be replaced depending on the type of insurance cover that the consumer purchased.

However, if the credit provider is forced to stop charging the consumer the credit insurance premiums as a result of the application of section 103(5) the consumer would be completely exposed and would have to repay the entire credit amount and would have no lounge suite for use either. It makes sense then that the limitation on credit insurance increases the risk to a consumer who is already in financial difficulty and both the credit provider and the consumer will be in a worse off financial position.

In addition, those consumers who have a small arrear balance on their account and who can in fact afford the insurance and want to continue to keep the protection will be prejudiced by the strict interpretation of section 103(5) as well. This is also of particular relevance to a consumer who makes regular payments on his account but who on occasion misses a payment or two, or who perhaps pays slightly less than the monthly instalment due to many economic or personal circumstances. Some months bear more expenses to consumers as a result of which short payments are made to creditors, thus resulting in these consumers never actually being 100% up to date with their account at all times. Applying a technical understanding to this scenario it is evident that these consumers remain continuously in default or are often in default with payments on their accounts but the credit provider would not usually take action against these consumers for reason that they maintain regular payments on their accounts and the costs of legal action would not justify approaching a court which may more than likely rule against the credit provider in any event. It would simply be foolish to proceed as stated.

The result of the application of section 103(5) on this type of consumer is that the double amount will be reached before the consumer repays the entire amount owing under the credit agreement which means that no further charges will be allowed to be raised by the credit provider against the consumer's account. For those remaining months towards the end of the term of the agreement, the consumer will not have the benefit of credit insurance despite the consumer being able to afford the protection. Thus section 103(5) seems to have the unintended consequence of disadvantaging as opposed to protecting consumers by denying

consumers who are not significantly in arrears the right to insurance, despite the fact that these consumers are able to afford the premiums. It is arguable that this was the intention of the legislature and such adverse consequences to consumers could be avoided by the simple removal of the cost of credit insurance from the limitation contemplated in section 103(5) when one calculates the double on the account. As an alternative, the consumer could be allowed the option to waive the application of section 103(5) with respect to credit insurance amounts only, thereby promoting the purpose of the common law in duplum rule and the National Credit Act to protect debtors.

The SCA in the *Nedbank* decision did not consider these consequences of applying the limitation of section 103(5) to the costs of credit insurance. The Proposed Guidelines also do not contemplate the consequences of increased risk to consumers by insisting that the limitation applied in section 103(5) must include the costs of credit insurance.

Guidance note 3.3 of the Proposed Guidelines states that section 103(5) came into effect on 01 June 2007 and that all credit providers and debt collectors should have applied it from that date. As absurd as it sounds this seems to imply that the NCR expects that credit providers and debt collectors must have retrospectively complied with the Guidelines from as far back as 2007 when the Act was implemented, but at which time no form of any guidelines existed and thus credit providers were required to interpret and apply section 103(5) on their own volition. The reported case law bears testimony to the fact that from the very outset there has been great confusion on the interpretation and application of section 103(5). The Policy Review Framework also dedicates an entire section to the challenges faced with the National Credit Act and provides examples of such legislative failures, ambiguous drafting errors, incomplete provisions and unintended consequences leading to weak outcomes such as interpretation or implementation discrepancies that exist within the Act.[67]

Any provision in issued guidelines implying retrospective compliance thereof is inappropriate. On application of the rule of law, a person should be able to know the law in order to be able to

[67] *Document in respect of project re policy review of the National Credit Act 34 of 2005* 2015 *GG* 36504 in 29 May 2013 12.

arrange his actions accordingly. In this regard Mokgoro J, in the Constitutional Court case of *The President of the Republic of South Africa v Hugo*[68] held that "the need for accessibility, precision and general application flow from the concept of the rule of law. A person should be able to know of the law, and be able to conform his or her conduct to the law." Where for a period of time the law was uncertain, it cannot be expected that any consequential clarity provided on the matter should have been applied retrospectively. Whilst the declaratory order on the interpretation of section 103(5) in the *Nedbank* case did provide some clarity, the order only considered the meaning of the word 'accrue'. Further, uncertainty should receive legislative attention. Until such time, uncertainty of the law will remain.

Guidance note 4.1 of the Proposed Guidelines provides that a consumer cannot waive his or her right to the protection of section 103(5) at any time by agreement with the credit provider or debt collector. We understand from earlier discussion on *Oneanate Investments* that this rule was enforced to ensure that consumers are not cheated out of the protection afforded to them by the in duplum rule and this is an inarguable benefit. However, when one considers the possible prejudice those consumers will suffer by being prevented to continue maintaining credit insurance, section 103(5) may actually be harmful to the consumer who is willing and able to pay for insurance but who is prevented from continuing to be insured once the relevant threshold has been reached. This is notwithstanding the fact that the National Credit Act actually contemplates in section 106 that a consumer maintains credit insurance for the length of the agreement. It can thus be argued that despite the express wording of section 103(5), that "despite any provision of the common law or credit agreement to the contrary" it is unreasonable and prejudicial to prevent a consumer who is willing and able to pay for insurance from continuing to maintain such insurance.

Understandably, the aim of the Proposed Guidelines is to prevent the already indebted debtor from becoming further indebted. In any event, it is an express requirement of the National Credit Act that no interest may be charged on the costs of credit insurance if the consumer falls into default on his account. Therefore, once a consumer is in default on his account and section 103(5) is applied, no further interest can or will be charged on the premiums of credit insurance if the consumer is so allowed to maintain his credit insurance. The risk faced herein is of course

[68] 1997 4 SA 1 (CC).

faced by both the consumer and the credit provider. The risk to the consumer has already been discussed earlier and the risk to the credit provider is of course, that if the goods that form the subject of the credit agreement are damaged and the consumer is in default with payment of the instalments due under the credit agreement, the consumer will have no incentive to continue to make payments on the credit agreement. Credit providers therefore need to ensure that outstanding debts are enforced as soon as possible.[69]

The extension of the in duplum rule in this way, rather than alleviating the plight of overburdened debtors, makes it easier for a consumer to escape his obligations.[70] It is no secret that legal costs are in fact costly especially for credit providers to continuously incur, and credit providers are thus forced into incurring unnecessary expenses to recover the outstanding amounts due by consumers whereas, if the consumer is able to waive the protection of section 103(5) in respect of insurance only and actually maintain the credit insurance under the credit agreement, then both the interests of the consumer and the credit provider will be taken care of. One of the stated purposes of the National Credit Act is to balance the rights of consumers and credit providers and it is respectfully submitted that guidance note 4.1 in its current form is prejudicial to both consumers and credit providers alike. However, waiver in itself remains a problem in the light of section 90(2)(b)(i) of the Act. Legislative intervention therefore remains the ideal solution.

Guidance note 4.2 is a lot to absorb on a single reading, but if one has to unpack guidance note 4.2 it boldly suggests that once a consumer is in default, any section 101(b) to (g) charges that accrue during the first period of default (notwithstanding that the initial default has been purged) are further taken into account for the purposes of the application of section 103(5) in the second and any subsequent periods of default.[71] Once the initial default has been purged by the consumer section 103(5) will no longer apply and the consumer will continue to the pay the monthly instalment due under the credit agreement. Should the consumer then default for a second time the amount of the section 101(b) to (g) charges that accrued during the first period of default will be added to the amount which accrues during the second period of default. It is

[69] Scholtz (n 66) par 10.6.4.
[70] Scholtz (n 66) par 10.6.4.
[71] Scholtz (n 66) par 10.6.4.

possible that in such an instance the amount of section 101(b) to (g) charges that accrued during the first period of default which is taken into account at the time of the second period of default could exceed the balance of the principal debt as at the second date of default and consequently in such a situation no further section 101(b) to (g) charges may accrue because of course the balance of the principal debt at the time of the second default would have reduced by the amount of any payment made by the consumer between the first and second default. The proposition assumes a situation where a defaulting consumer pays all the arrear amounts so that he is no longer in default, but some time thereafter defaults again. I am inclined to reject this interpretation on the contention that if the legislature intended for such an application of section 103(5) it would have said as much when drafting the section, which it did not do. The suggestion is untenable because a consumer who regularly defaults on his repayment obligations could easily hide behind this guideline and, by the time of his final default, not have any fees or interest accrue on the principal debt due (as the interest and fees previously accrued would have reached the double).[72]

This interpretation of section 103(5) set out in guidance note 4.2 is not reflective of the judgement delivered in the landmark *Nedbank* decision, which was the authority on the application of section 103(5) prior to the publishing of Proposed Guidelines for Section 103(5) for comment. It is therefore suggested that the following should be considered as an alternative interpretation of section 103(5):

i. The charges that accrue under section 101(b) to (g) whilst the consumer is in default may not exceed the unpaid balance of the principal debt at the time that the default occurs.
ii. Should the consumer purge his default by paying all the amounts in arrears, section 103(5) will no longer apply.
iii. Once the default is purged, section 101 (b) to (g) charges may again accrue against the principal debt.
iv. Should the consumer who has purged his first default, default for the second time on the same credit agreement, the same process defined in i, ii and iii above then applies to the second period of default and the ceiling for the charges that accrue during this second

[72] Scholtz (n 66) par 10.6.4.

period of default will be the unpaid balance of the principal debt as at the date that the second default occurred.

v. If the consumer then purges the second default under the credit agreement, the same process should be followed if the consumer defaults for a third or subsequent time.

vi. If the consumer however fails to purge the entire default amount but rather makes small payments towards the account under the credit agreement, the credit provider will not be able to charge any further amounts contemplated in section 101(b) to (g) on the debt until all the arrear amounts under the credit agreement have been settled in full.

On the interpretation applied by the NCR under guidance note 4.2, the word 'aggregate' used in section 103(5) should be read to refer only to the section 101(b) to (g) charges which accrue during the time that the consumer is in default under the credit agreement, which aggregated amount may not exceed the balance of the unpaid principal debt at the time that the default occurred. "In aggregate" refers to the aggregate of each of the charges contemplated in section 101(b) to (g) being the total sum of the initiation fees, service fees, interest, costs of credit insurance, administration charges and collection costs, may not exceed the unpaid balance of the principal debt at the time of the default.

Section 103(5) does not refer to an aggregation of all the section 101(b) to (g) charges over the entire term of the credit agreement, but only as at the time that the consumer is in default. If the interpretation of guidance note 4.2 is to be construed to mean that the words "in aggregate" includes the section 101(b) to (g) over the entire term of the credit agreement, then words would need to be added into the section to refer specifically to both or to all periods of default that occur during the term of the credit agreement and to the section 101(b) to (g) charges that accrue during each of the default periods. If this were to be effected, section 103(5) would then require that all charges under section 101(b) to (g) that accrue during the first period of default must be aggregated to include the section 101(b) to (g) charges that accrue in aggregate during the second period of default and all subsequent periods of default thereafter.

The question that arises is which amount is then to be used as the ceiling for the double amount of charges that accrue during each period of default. The above interpretation offered by guidance note 4.2 presupposes that there will be multiple periods of default in the term of the credit agreement and thus multiple unpaid balances of the principal debt that would need to be applied each time to give effect to section 103(5). Surely if this interpretation is to be applied (assuming also that this interpretation is the intention of the legislature), the ceiling to be applied when calculating the double in terms of section 103(5) should be the total amount of the principal debt at the time of the origination of the credit agreement and not the unpaid balance of the principal debt at a particular point in time that each default occurs under the credit agreement. It is thus absurd to believe that the legislature intended that a credit provider may retrospectively fall foul of section 103(5) because amounts that previously legitimately accrued during periods of default are taken into account.

In support of the above, the *Nedbank v NCR* case makes reference to a period of default and acknowledges that a default may end. The court held that "payments during the time of default cannot revive obligations that never accrued."[73] The court went on to state that these amounts accrue whether they are paid or not and will only accrue if the credit provider has a contractual right to them. Section 103(5) makes no distinction between paid and unpaid charges. Once the amounts referred to in section 101(b) to (g) that accrue during the period of default, whether they are paid or not, equal in aggregate the unpaid balance of the principal debt at the time the default occurs, no further charges may be levied. It is not that a moratorium against payment is introduced by section 103(5): no amount in respect of the fees, costs and charges may accrue any further.[74]

There is a correlation between the phrases 'accrue during the time of default' and 'may not exceed the unpaid balance at the time the default occurred'. It seems that the intention of the legislature was to place reliance on the term "default" and that "default" is an event that occurs. Thus, the court acknowledged that a default may end and reference is made to the amounts that accrue during the period of default and not under the term of the credit agreement generally. This supports the interpretation of section 103(5) that each default under the credit

[73] *Nedbank v The NCR* (n 43) 606 par 48.
[74] *Nedbank v The NCR* (n 43) 606 par 49.

agreement should be treated as separate and distinct of the others, rather than the interpretation that all defaults under a credit agreement should be aggregated over the term of the agreement and treated as one group of charges for the purposes of applying the restriction of accrued charges contemplated in section 103(5).

It is clear from section 103(5) that there are three periods of default relevant to the reaching of the double amount provided for in section 103(5) as follows:

1) The date at which the default occurs from when section 103(5) applies and one begins calculating the double in respect of the section 101(b) to (g) charges, which amount cannot exceed the unpaid balance of the principal debt as at the date at which the default occurred;
2) The period during which the consumer is in default, during which time the section 101(b) to (g) charges accrue; and
3) The date at which the default is purged and the consumer continues to make payments towards the debt, and the consumer is no longer in default.

It is therefore important to determine the moment when a consumer falls into default, because that moment determines the amount of charges that may accrue during the period the consumer is in default; and the moment when the default is cured or purged, because only then would the credit provider again have an enforceable right to the charges outlined in section 101(1)(b) to (g).

In its literal and broad sense the term 'default' can be defined as the situation where any amount in respect of a debt is outstanding and overdue for payment, even if that amount is one cent. For purposes of compliance with the Act, when a consumer is in default, details of such default will be reported to the credit bureau to update the consumer's credit profile and repayment behavior patterns. The adverse classification of default will thus negatively affect the consumer's credit rating and his ability to secure additional credit in the future. Also, technically once a consumer is in default of his obligations under the credit agreement the credit provider can take legal action against the consumer to enforce the credit agreement and recover the

debt. Default can also lead to the lapse of any credit insurance as most policies require that the consumer maintain the credit agreement in good standing for the policy to apply and for the premiums of the credit insurance to be paid and to be up to date before processing of any claims under the insurance policy is allowed.

In 2013 when the Policy Review Framework was published[75] it recognized the dilemma surrounding the meaning of the term default. It was opened to debate whether the definition of the term should be legislated or whether it should have been left to the parties involved determining its own definition[76]. The Policy Review Framework also questioned whether the term default should be interpreted to relate to a default on a payment due under a credit agreement or whether the scope should be broader to include any breach of a contract. However, this Policy Review Framework did not address the material issue to provide clarity on the meaning of the term default and its application. It is still not clear whether a consumer is regarded as being in default under a credit agreement when the consumer has breached any term of the credit agreement, for example if the consumer fails to update a change in his address or the location at which the goods that form the subject of the credit agreement is stored, or whether the consumer will be in default for non-payment of any amount owing under the credit agreement or even whether both instances will be regarded as a breach of the agreement, one exclusive of the other.

It is further unclear, with regards to payment, if default means that the consumer has failed to make payment of one full instalment due under the credit agreement or whether the consumer will be in default for failing to pay any amount or any portion of an amount due. For example, if the consumer only pays half of the monthly instalment due under the credit agreement or if a very minimal amount is unpaid by the consumer perhaps due to an error when the consumer made the payment. There could be several situations under which these circumstances may arise. The point that needs to be illustrated is that regardless of the reason there is no certainty at what point and due to what action the consumer should be regarded as having breached the agreement and thus deemed to be in default of his obligations under the credit agreement.

[75] *GG* 36504of 29 May 2013.
[76] Which can in many ways prove to be problematic.

In the absence of a clear definition of the term default, and in line with the arguments presented earlier, it would make sense that the point at which a consumer should be regarded as being in default for purposes of the National Credit Act is when a material amount due under the credit agreement is in arrears. By using this approach it is submitted that the consumer will have shown a true inability to make the payments required in terms of the credit agreement which will then justify the consequences that will be faced by the consumer in respect of the adverse listings against the consumer's credit profile and the possible legal enforcement action that can be taken by the credit provider against the consumer. It is submitted that these key purposes will be ignored if the above mentioned consequences and the consumer protection afforded by section 103(5) is permitted to be exercised against the consumer for non-payment of a minimal amount under the credit agreement.

In addition, the de minimis principle, which provides that "the law does not concern itself with trifles" assists to justify that default on a minimal balance or an immaterial amount under a credit agreement can be allowed to go unpunished due to its triviality.[77] Decisions in the criminal law may serve as examples. An example of such a decision is where the Appellate Division in *S v Kgagong*[78] refused to convict a person of theft because the accused stole a worthless piece of paper. Another example would be from the case of *S v Dane*[79] where a person accused of malicious damage to property was acquitted because all he has done was to cut a small portion of another person's hedge.

The lack of a definition of the term "default" is therefore a clear shortfall on the part of the NCR when drafting the Proposed Guidelines. By establishing a clear definition and possibly a threshold to determine the materiality of a default by a consumer under a credit agreement, will enable the adverse consequences contemplated in section 103(5) to apply only where the consumer is in material breach or default under the credit agreement.

[77] http://succeedblog.co.za/MyLawyer/?tag=de-minimis-non-curat-lex-rule.
[78] 1980 3 SA 600 (A).
[79] 1957 2 SA 472 (N).

The next element to consider is when the default is seen to be purged. In the further absence of guidelines to the contrary, the general consensus is that default is purged when the debtor pays all amounts that are in arrears under the credit agreement. If novation were to occur in respect of a credit agreement, the novation will result in the extinguishing of the credit agreement and the replacement of that credit agreement with a new credit agreement. The default will therefore be purged. The credit provider would not be entitled to enforce the "old" agreement, and will only be able to rely on the new credit agreement for such purposes. The credit provider thus "loses" the right to pursue the consumer for any default in respect of the old agreement.[80]

It seems that the interpretation of section 103(5) provided in guidance note 4.2 will create a situation which encourages devious debtors to default or to continue to remain in default of their obligations under the credit agreement as a defaulting consumer could possibly in total, pay less than a consumer with a perfect payment history for reason that sometimes the credit costs under an agreement is equivalent to 150% or more of the principal debt amount. This, in its very essence goes against the purpose of the National Credit Act insofar as it encourages deceptive practices and does not adequately protect the interest of credit providers. The risk of consumers abusing the credit market in such an instance could be avoided by applying the interpretation that the application of section 103(5) should apply anew to each period of default.

Guidance note 4.3 states as follows:

> "The legal position under the common law in duplum rule is that unpaid arrear interest ceases to run when it reaches the unpaid capital amount. When, due to payment, unpaid interest drops below the outstanding capital amount, interest again begins to run until it once again equals the amount of the outstanding capital amount.
>
> The position in terms of section 103(5) as outlined by the Supreme Court of Appeal in Nedbank Ltd and others v NCR and Another (2011) 3 SA 581 (SCA) is that once the total charges in sections 101(1)(b)–(g) equal the amount of the unpaid balance of the principal debt, no further charges may be levied and payments made by a consumer thereafter during the period of default do not have the effect of permitting the credit provider to charge further charges while such default persists. It therefore means that after the

[80] Meiring "Legal challenges in 2015" 2015 5 www.rebels.co.za/resources/Feb-2015/Dr-Ina-Meiring.pptx (21-11-2015).

> section 101(1)(b)-(g) charges had reached the balance of the unpaid principal debt, the credit provider or debt collector should not levy further charges. Where the consumer had made payments while in default, the section 101(1)(b)-(g) charges will not accrue again until they reach the balance of the unpaid principal debt and the credit provider and debt collector can no longer charge these amounts in these circumstances."

Again, it is respectfully submitted that poor drafting has been replicated in this guidance note 4.3. Whilst it is clear that the intention of the NCR is to set out the position in the *Nedbank* matter, that no further charges in terms of section 101(b) to (g) can be levied against an account where the double has been reached, even where the consumer makes further payment towards the credit agreement, it is unclear what the intention of the NCR was with respect to the last sentence of this guideline wherein it states "Where the consumer had made payments while in default, the section 101(1)(b)-(g) charges will not accrue again until they reach the balance of the unpaid principal debt and the credit provider and debt collector can no longer charge these amounts in these circumstances".

Perhaps the intended meaning is that if, when a consumer is in default under a credit agreement, the charges under section 101(b) to (g) has reached the balance of the unpaid principal debt, and the consumer continues to make payments under the credit agreement whilst in default, no further charges under section 101(b) to (g) can be levied by the credit provider until the consumer has purged the default in full.

Guidance note 4.4 defines collection costs as provided for in the Act as an amount that may be charged by a credit provider in respect of an enforcement of the consumer's monetary obligations under a credit agreement and goes on to state inter alia that the fees charged by and payable to attorneys, advocates and debt collectors are incurred by credit providers when collecting the debt and accordingly form part of the collection costs. These fees are therefore covered by section 103(5) as collection costs and should be included as part of the calculation of the total charges in terms of section 101(b) to (g) for the purposes of section 103(5).

It is difficult to find reason why the NCR has suggested that collection costs for the purposes of the National Credit Act also includes fees charged by and payable to attorneys and advocates.

Fees charged by an attorney or advocate represents the costs for the professional services including time and labour rendered by professional persons of the legal fraternity to its clients. The costs incurred by credit providers for utilizing these professional services cannot be generalized and categorized as mere collection costs. Fees and charges billed by an attorney for a case being dealt with in the Magistrate's Court is allowed as between party and party and is payable in accordance with the scale of the Magistrates Court Rules.[81] It is further trite law that a credit provider can, in its terms and conditions to a credit agreement, insist that the consumer pays the legal costs incurred by a credit provider upon enforcement of a credit agreement as a result of a breach of the credit agreement by the consumer. It is also common practice that magistrates will in the ordinary course grant such a costs order in favour of the credit provider if the judgement has also been granted in favour of the credit provider.

As it is currently worded, all collection costs contemplated in the credit agreement are to be included in the in duplum calculation, even where these costs may not have been passed on to the consumer. This provision may be unduly onerous, and may cause the in duplum limit to be breached sooner (for example, a credit provider may have contractually agreed to pay an external debt collector a greater commission than that which is actually passed on to the consumer). A valid application would be that only those collections costs actually passed to the consumer should be included in the calculation.[82]

4.3 The Debt Review Guidelines

Guidance notes 4.5 and 4.6 of the Proposed Guidelines for Section 103(5) deal with the aspect of the application of section 103(5) during legal proceedings and thus should be dealt with together. Guidance notes 4.5 and 4.6 state as follows:

> "4.5 The operation of section 103(5) is not affected by the commencement of legal proceedings by the credit provider or debt collector against the consumer. If during the course of the legal proceedings, the section 101(b)-(g) charges accrues to equal the balance of the unpaid principal debt, section 103(5) will prevent these charges from

[81] 32 of 1944, s 80.
[82] Elliot and Boyce (n 41) 2.

exceeding the balance of the unpaid principal debt. The credit provider or debt collector should not levy further charges anymore once the charges have accrued to equal the balance of the unpaid principal debt. This principle also applies to applications to the court or National Consumer Tribunal in terms of section 86 of the National Credit Act to restructure the repayment obligations of consumers.

4.6 After judgment has been granted, interest at the rate granted by the court will start to run afresh on the judgment debt. If the consumer defaults on the judgment debt, the unpaid arrear interest stops running once it equals the unpaid balance of the capital amount of the judgment debt. This principle also applies to debt review orders granted by the court or the National Consumer Tribunal."

The National Credit Act also introduced a new relief mechanism for financially strung consumers called debt review.[83] Debt review is a measure that provides a consumer the choice of referring his debts to a specialized debt counsellor who is governed by and registered with the NCR or to raise a defense of over indebtedness when the credit provider takes steps to enforce the credit agreement in court. The provisions of the Act that deal with debt review disables a credit provider from enforcing that credit agreement once the consumer applies for debt review. This would mean that the credit provider's hands are tied and the operation of section 103(5) will continue in force until the consumer cures the default on the account.

The Act initially stated that a credit agreement will not fall under the debt review process if the credit provider took steps under section 129 to enforce the credit agreement. Several problems occurred with this stoppage point of action taken in terms of section 129 and the reference to section 129 was corrected with the enactment of the National Credit Amendment Act[84] which came into effect on the 13th of March 2015, where the reference to section 129 was replaced with section 130. Thus, a credit provider can reject an application for debt review once the credit provider has taken steps to enforce the credit agreement in terms of section 130. The effect of this on section 103(5) means that the credit provider can therefore continue with legal proceedings to recover the amount owing by the consumer and therefore suspend the effect of section 103(5) pendente lite.

[83] s86.
[84] 19 of 2014.

It should also be noted that a credit provider may also cancel a debt review application if the consumer defaults on its arrangements under the review.[85] This would mean that the credit provider can enforce the credit agreement and the effect of section 103(5) will be stopped sooner. A further matter that has an effect on section 103(5) is an order of debt re-arrangement that a court can make should it believe that the consumer is in fact over indebted. A debt re-arrangement order re-arranges the initial obligations of a consumer under the credit agreement that falls under debt review. Thus, section 103(5) will be applicable if the consumer is still seen to be in default under the credit agreement in spite of the re-arrangement order, whether made by consent or at the order of the courts.

In January 2015 the NCT released to all credit providers the Debt Review Task Team Agreements 2010 Guidelines ("Debt Review Guidelines") wherein the NCR recognized prejudice to consumers.[86] In October 2013 the NCR initiated a review process of the Task Team Agreements (TTA) of 2010 to align these with the current debt review process. TTA's are voluntary non-statutory measures put in place aimed at addressing operational and process weaknesses that come with implementation of debt review provisions of the Act. Further to this, they promote a uniform and consistent approach in dealing with debt review matters amongst all debt review stakeholders.[87]

There is a noticeable inconsistency within the Debt Review Guidelines itself, as well as between the Debt Review Guidelines and the National Credit Act. On the one hand, Annexure A of the Debt Review Guidelines entitled 'Proposed Debt Review Process Enhancements and Conduct Provisions' provides that, debt counsellors should as a part of the affordability assessment, verify that insurance premiums which form part of the monthly repayment obligations of a consumer under a credit agreement are maintained and included in the payment plan, and that such insurance premiums as well as any other insurance policies forming part of the consumer's contractual obligation under the credit agreement, such as asset insurance as well as life and

[85] s 86(10).
[86] Circular 02 of 2015 *Debt Review Task Team Agreements* www.ncr.org.za (21-11-2015).
[87] See n 86 at 1.

household content policies, should be dealt with as essential expenses in the consumer's budget (that is, "expenses …[which] are necessary to conduct daily life")[88].

On the other hand, paragraph 2.3.10(d)(VII) of Annexure A of the Debt Review Guidelines provides that a proposed payment plan must include a clause to indicate that all the relevant provisions of the National Credit Act, including section 103(5), are to be applied in determining the settlement date and total repayable amount due by the consumer of each credit agreement. It is contradictory to place an emphasis on the maintenance of credit insurance by treating it as an essential expense, while making debt review subject to the application of section 103(5) which contains the restrictions on credit insurance, the application of which can result in insurance policies lapsing. Due to the premiums being categorized as essential expenses, the premiums are excluded from other credit-related fees, such as interest and the insurance should not be allowed to lapse due to default as required by section 103(5) without proper consultation with the consumer.

Further, paragraph 2.4.3(c) of Annexure A of the Debt Review Guidelines provides that credit providers should terminate debt review and institute collection action where the consumer is in default of the credit agreement in a respect other than payment default, such as default on maintaining the payment of credit insurance that forms part of the credit agreement. The reference to a default other than a payment default in paragraph 2.4.3(c), creates further confusion regarding the meaning of "default" under the National Credit Act.

In paragraph 2.1 of Annexure B to the Debt Review Guidelines, the NCR advises debt counsellors of the importance of credit life insurance which makes provision for retrenchment cover, which could have a beneficial effect on the recovery of debt at a future point in time (i.e. during a period of retrenchment). If the insurance premiums are stopped, the retrenchment insurance will no longer be in place - thereby justifying the need for consumers to be able to maintain credit insurance on the credit agreement even during default.

[88] See n 86 at par 2.3.8 and 2.3.9.

The Debt Review Guidelines also give recognition to the fact that where a consumer does not have an insurance policy it results in increased risk for both the credit provider and the consumer and goes on to state that retaining insurance could improve the probability that the debt review will be successful and that the consumer will comply with the terms of the credit agreement.

It is clear from Guidance note 4.5 that section 103(5) will prevent the charges provided for in section 101(b) to (g) from accumulating if these charges have reached the amount of the unpaid principal debt during the course of legal proceedings. It goes further to extend this rule to apply to matters that are referred to the court or the National Consumer Tribunal in terms of section 86 of the National Credit Act to restructure the repayment obligations of consumers. Thus, in contrast with the common law in duplum rule and related case law, it is clear that the application of section 103(5) is not suspended pendente lite.

After judgment has been granted, interest at the rate granted by the court will start to run afresh on the judgment debt. This guidance appears to create uncertainty in itself. Is it intended that the judgement be interpreted to purge the initial default which is the subject of the judgment? Surely this cannot be correct for if the default is purged it would render the judgement senseless, hence the judgement must be granted because the consumer is in default of his obligations under the credit agreement. Does the credit agreement continue in force post the judgement? Surely taking judgement against a consumer means the cancellation of the credit agreement and adherence to the judgement unless the court rules that the consumer or the credit provider must comply with certain or all obligations under the credit agreement. Does the statutory in duplum rule continue to apply after judgement? It seems that this is the intention of the NCR by implication of the words “If the consumer defaults on the judgment debt, the unpaid arrear interest stops running once it equals the unpaid balance of the capital amount of the judgment debt.”

Does the NCR have competency to provide guidance on the application of in duplum post judgement (i.e. what if the judgement sought was for cancellation of the credit agreement and damages)? Surely the mandate and jurisdiction of the NCR ends at the point that a debt is

referred to a competent court for adjudication. However, in light of the National Credit Amendment Act where the National Consumer Tribunal has been given the power of courts to make rulings and impose conditions in respect of credit related matters,[89] it is likely that courts will consider the precedents set by the National Consumer Tribunal on the application inter alia of section 103(5), notwithstanding that the courts are not bound by the decisions made by the National Consumer Tribunal. Should the National Consumer Tribunal order that the principles of section 103(5) will continue in force on a judgement debt amount, any such order may be served, executed and enforced as if it were a decision of the High Court.[90]

If the parties have voluntarily restructured a debt, the result of which is that the parties agree that the consumer is no longer in default of the original agreement, and in terms of which the consumer will only be in default if he or she defaults on the repayment obligations in terms of the restructure agreement, such an agreement will also purge the default for purposes of section 103(5). It is clear from a reading of section 3 and of sections 86 to 88 of the National Credit Act that restructuring agreements are encouraged as are the eventual fulfilment of the consumer's financial obligations.

CHAPTER 6

1. Concluding remarks

The development of the common law in duplum rule was a response to the inability of the common law and legislation in regard to usury to provide sufficient protection to consumers from the effects of accumulation of further debt from high credit costs. Although deeply entrenched in the common law, the rule has been significantly fortified through clarification and extension via

[89] s 25 of National Credit Amendment Act.

[90] s 152 of the National Credit Act. It must be pointed out that a decision of the Tribunal is binding upon magistrates' courts. S 152(1)(f).

the National Credit Act. The "codified" rule represents a clear intention on the part of the legislature to make a fundamental shift away from freedom of contract.[91]

The statutory provision in section 103(5) of the National Credit Act, like its common-law counterpart, is also based on public policy and its aim is to assist consumers in financial difficulty. To avoid the possibility of having the same uncertainty exist regarding the possible waiver of the statutory rule, the issue was dealt with expressly and a conclusion reached that the protection of neither the common-law in duplum nor section 103(5) can be waived by consumers. The wording of the Proposed Guidelines for section 103(5) clearly stipulates that it is not possible for a consumer to waive its protection, whether at the conclusion of the credit agreement or at any subsequent stage.

However, upon closer application of section 103(5) in its current form and the Proposed Guidelines for Section 103(5), the section has an unintended detrimental effect on consumers' interests and the unfairly prejudicial effect of preventing a consumer who is in default under a credit agreement from maintaining credit insurance in circumstances where the consumer is most in need of insurance and where the NCR has encouraged the maintenance of such insurance. This, as submitted, could not have been the intention of the legislature when section 103(5) was drafted. The mismatch between the limitation of credit insurance in section 103(5) and the view expressed by the NCR for credit providers to view credit insurance as a necessary expense by even consumers under debt review, does little to clear the interpretational issues that exists within section 103(5).

This places credit providers in a difficult position as they are required to comply with the requirements of the National Credit Act but at the same time are expected to expose consumers to a higher risk by cancelling the protection afforded by credit insurance. Excluding the costs of credit insurance from the ambit of section 103(5) will be undeniably beneficial to consumers. To cater for this a simple amendment to section 103(5) can be effected, to exclude the costs of credit insurance from the ceiling of costs to be applied when giving effect to section 103(5).

[91] Campbell "The in duplum rule: relief for consumers of excessively-priced small credit legitimized by the National Credit Act" (2010) SA Merc LJ 4.

In addition, the Proposed Guidelines for Section 103(5) is incorrect in its approach to the costs of credit ceiling where the intended aggregation of charges that accrue across multiple periods of default is expected to be complied with when giving effect to section 103(5) on a credit agreement and in order to determine the ceiling applicable in the circumstances. Instead, the Proposed Guidelines for Section 103(5) should be amended to require that the amounts that may be charged in relation to a particular period of default should be specific to that period of default alone; that the amounts aggregated during a particular default period do not survive the end of that particular default period and that the aggregated amount cannot be revived by the operation of section 103(5) in relation to future periods of default.

It helps very little to have proposed guidelines that is presumably non-binding on credit providers and other affected fraternities, or the fact that the proposed guidelines currently has limited application on different fraternities by excluding the legal fraternity in its entirety. The NCR should consider the promulgation of regulations rather than guidelines, defining and formalizing the interpretation and application of section 103(5) thereby extending its effect to all those that deal with and are affected by the National Credit Act and not only limit its application to credit providers, debt collectors, debt counsellors and payment distribution agents.

The section 103(5) statutory provision is therefore without a doubt the most important measure to limit excessive credit costs permitted by the National Credit Act and requires some amendment to enable its intended effectiveness to first and foremost protect the interests of consumers against prejudice and unfair treatment by unscrupulous credit providers but to also ensure sustainability of the economy by regulating the application of section 103(5) to ensure that lawful collection of what is rightfully due to credit providers is practised and enforced.

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