Constitutional Court judgement altered operation of in duplum rule

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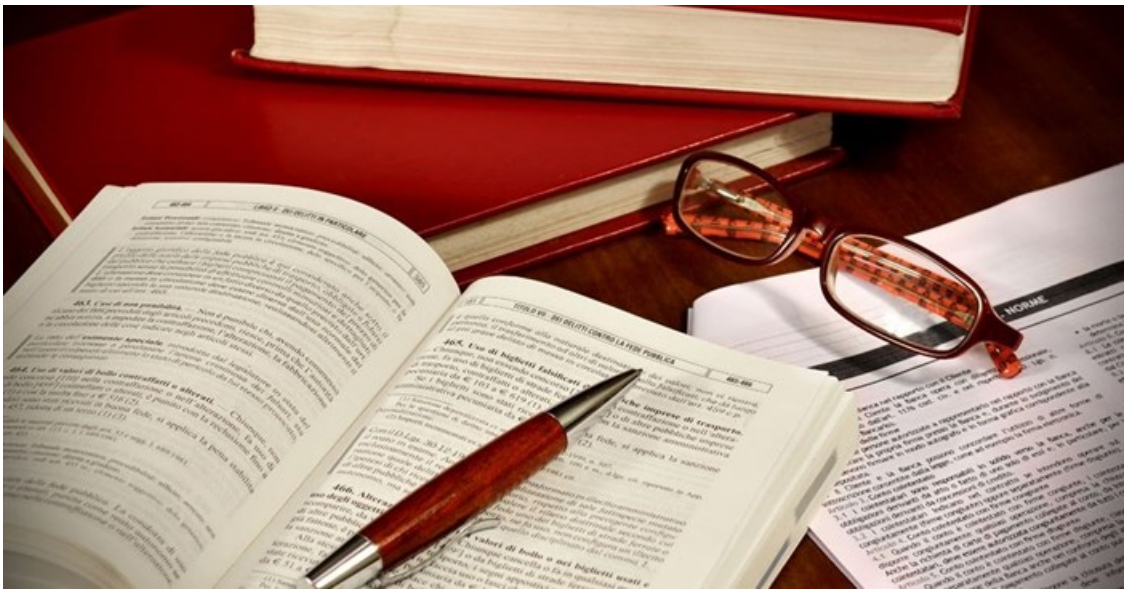
On 24 March 2015, the Constitutional Court handed down judgement in the case of Paulsen and Another v Slip Knot Investments 777 Proprietary Limited [2015] ZACC 5, which has altered the position of our law for the past 17 years in relation to the operation of the in duplum rule.



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The in duplum rule is a common law rule which provides that arrear interest ceases to accrue on an outstanding debt once the sum of unpaid interest equals the amount of the outstanding capital. It effectively limits the amount of interest recoverable by a creditor from a debtor on an outstanding debt in order to protect the latter from the never-ending accumulation of interest.

Prior to the Slip Knot judgement, the Supreme Court of Appeal (SCA) in Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation) 1998 (1) SA 811 held that the operation of the in duplum rule was suspended from the date of service of process initiating legal proceedings until the date of judgment. This meant that interest on an outstanding debt was permitted to accumulate during the course of litigation even though an amount equal to double the amount of the outstanding debt was reached prior to the institution of such litigation. Accordingly, once litigation proceedings commenced, there was no limitation on the amount of interest that a creditor could claim from a debtor until judgement was delivered.

Decision overturned

Madlanga J, in delivering the main judgement in the Slip Knot case, overturned the Oneanate decision in relation to the operation of the in duplum rule on the basis that the SCA had incorrectly developed the in duplum rule by focussing only on the effect of the rule on creditors (or finance) rather than weighing the interests of creditors and debtors equally. Madlanga J went on to demonstrate and acknowledge that there are strong public policy considerations in favour of and against the operation of the in duplum rule during the course of litigation for both creditors and debtors, but ultimately did not make a decision on which policy considerations should prevail, stating that in decisions 'so heavily laden with polycentricism...the court ought not to make a choice on what considerations best advance the public interest' as such decisions are best left to Parliament.

Through judicial deference to Parliament Madlanga J does not develop the in duplum rule but effectively reverts its operation during litigation to the position before the Oneanate judgement, being that outstanding arrear interest is not permitted to run during the course of litigation once double the amount of the outstanding capital has been reached.

In the dissenting judgement, Cameron J was of the view that the Supreme Court of Appeal's decision in the Oneanate case was correct, in that the operation of the in duplum rule after litigation commences does not impede a debtor's constitutional right of access to courts (this being one of the considerations raised by Madlanga J in the main judgement), it simply shifts part of the risk the litigation process imposes to the debtor. The main judgment does not allow for depreciation of a creditor's claim. Creditors may be discouraged from pursuing claims against defaulting debtors if the in duplum rule prevents interest from accruing once litigation has commenced.

Inflationary costs

Cameron J stated 'Lenders who choose to pursue a claim must now bear the inflationary costs imposed by dilatory debtors who may extend the legal process as long as possible, to avoid paying a debt that is becoming less valuable every day....It cannot be right to make [a] lender incur this loss, rather than to require a debtor, who holds the power to forestall or end litigation by repaying the debt, to incur liability for the interest accruing during litigation'.

In light of Madlanga J's judgement it is now clear that under our common law the in duplum rule continues to operate after the commencement of litigation (meaning outstanding arrear interest is not permitted to run during the course of litigation once double the amount of the outstanding capital has been reached); however, as noted by Madlanga J throughout his judgement, whether this position is in the best interest of the public at large depends on a host of opposing policy considerations in respect of both debtors and creditors for which Parliament is most aptly suited and empowered to make an appropriate decision.

Accordingly, as stated by Madlanga J, '[i]f the credit market or financial sector feel that there is a case to be made for the suspension of in duplum rule [during litigation] or, indeed for its entire scrapping, it is at liberty to lobby Parliament' for such legislative reform.

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