**CONSTITUTIONAL COURT CHANGES THE APPLICATION OF THE COMMON LAW IN DUPLUM RULE**

The *in duplum* rule is a common law rule that provides that arrear interest ceases to accrue once the sum of the unpaid (accrued) interest equals the amount of capital outstanding at the time (and not the amount of capital originally advanced). *"In duplum"* directly translates to “double the amount”.

Some have understood the *in duplum* rule to mean that it applies to arrear or default interest - in other words, interest accruing on amounts that are due and payable but not paid on due date. In *Paulsen v Slip Knot Investments (434/13)* [2014] ZASCA 16, the Supreme Court of Appeal made it clear that the *in duplum* restriction merely refers to accumulated interest on the (capital) amount in arrears. It is clear that the effect of the *in duplum* rule is therefore that interest ceases to accrue once the sum of the unpaid (accrued) interest equals the amount of the outstanding capital, whether or not any capital and/or interest is payable at the time.

Previously the *in duplum* rule was qualified in that it was suspended *pendente lite* (during the pendency of litigation), in other words, even if the *duplum* had been reached prior to litigation commencing, interest would accumulate afresh on the outstanding capital from the date of service of the summons or application papers. However, the constitutional court in *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5, has now overruled previous authority and held that the suspension of the *in duplum* rule *pendente lite* indiscriminately targets all debtors and that debtors may be entirely drained by the accumulation of interest during the pendency of litigation. The constitutional court held that there are strong public policy considerations in favour of maintaining the operation of the *in duplum* rule even if litigation has been commenced. Therefore, the law currently is that the *in duplum* rule permits interest to run anew only from the date the court issues judgment in favour of the creditor and the judgment debt is due and payable, and not from commencement of litigation proceedings.

In summary, the *in duplum* rule provides that a creditor is entitled to the following:

- repayment of the unpaid capital sum;
- interest on the unpaid capital sum at the contract rate up to an amount equal to the unpaid capital sum *(in duplum)*; and
- interest on the aggregate of the above amounts (unpaid capital and accrued interest up to an amount equal to the unpaid capital sum), at the contract rate from the date of judgment of the court to date of payment by the debtor.

Mezzanine lenders in particular should be mindful of the application of the *in duplum* rule. Mezzanine lenders typically provide loans to borrowers who are not able to obtain funding from banks, and such loans typically carry higher risk and high interest rates. Often the funding transactions are structured such that the loans (capital and interest) will only become repayable after some time, during which period interest accrues on a compounded basis. During the tenure of such loans, it sometimes happens that the aggregate accrued and unpaid interest reaches the amount of the unpaid capital. At this point interest ceases to accrue until, for instance, an interest payment is made and the aggregate accrued (and unpaid) interest is again less than the unpaid capital.

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