Interest in a nutshell (*prime*, *repo*, *mora*, *usury*, *in duplum*)

DEFINITION

1. '*Interest*' is an amount of money payable by the borrower to the lender for the use of money.

ECONOMIC JUSTIFICATION

2. The conventional economic justification for interest is that it is the return on capital in a market economy. Now that inflation has come to be a permanent feature in the economy, the argument is advanced that it is a form of compensation for the erosion of the value of money due to inflation.

INTEREST IN THE LAW

3. The law was initially slow in accepting the necessary function of interest.

4. However, in the early 1950s, the courts began referring to it as the '*life blood*' of commerce. So, for instance, in ***Linton v Corser***[1] the erstwhile Appellate Division (*per* Centlivres, CJ, with whom Greenberg, JA, and Van den Heever, JA, concurred) stated:

> 'The old authorities regarded interest *a tempore morae* as *'poenaal ende odieus*', *vide Utrechtsche Consultatien*, 3, 63, p. 288. Such interest is not in these modern times regarded in that light. To-day interest is the life-blood of finance, and there is no reason to distinguish between interest *ex contractu* and *interest ex mora*. Milner's case is, as far as I have been able to ascertain, the only case which applied the old authorities, and in *Johnston v Harrison*, 1946 NPD 239 at p. 251, the Court was not slow in distinguishing that case. **The question that now arises is whether we should apply the old Roman-Dutch Law to modern conditions where finance plays an entirely different role. I do not think we should. I think that we should take a more realistic view than in a matter such as this to have recourse to the old authorities**. It is interesting to note that in the *West Rand* case this Court declined to be bound by the Roman-Dutch rule that the order of Court could only be amended if application therefor were made on the day the judgment was delivered.' (Emphasis added).

5. The latter sentiments steadfastly gained traction, and since then it gained a firm foothold in our law and has become, as some might say, trite. In ***Crookes Bros Ltd v Regional Land Claims Commission, Mpumalanga***[2] the Supreme Court of Appeal (**SCA**) stated:

> '… our courts have come to accept — without requiring special proof — that a party who has been deprived of the use of his or her capital for a period of time has suffered a loss (*Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) ([2001] 4 All SA 161) para 85). And that, in the normal course of events, such a party will be compensated for his loss by an

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1 1952 (3) SA 685 (AD) at 695G – 696A.

2 2013 (2) SA 259 (SCA) at paras [16] and [17], p 269 C – F.

award of *mora* interest (*Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A) at 1145D – G). As it was put in *Bellairs*:

> *"*(U)nder modern conditions a debtor who is tardy in the due payment of a monetary obligation will almost invariably deprive his creditor of the productive use of the money and thereby cause him loss. It is for this loss that the award of mora interest seeks to compensate the creditor."

The term mora simply means delay or default.

TYPES OF INTEREST

6. At the risk of stating the obvious, there are various types of interest of significance in the law. They are not all creatures of law and some, being matters of fact, must be proved by evidence. The various types of interest will now be considered.

(a) ***Interest at the prime overdraft rate***

General:

7. Surprisingly, although that phrase is used daily in legal documents, it is difficult to find a definition thereof in the law reports. The most recent is that:[3]

> 'The prime overdraft rate is **the lowest rate that a private borrower could expect when she borrows money to finance an asset** other than a house.'
>
> (Emphasis added).

8. That description is not accurate and the prime rate is also described as the rate offered to the bank's best customers, who are in good standing with it. But that, too, is also inaccurate because banks also lend at below prime.

9. In fact, there is no single prime overdraft rate, and each bank has its own overdraft rate which is adjusted in response to an adjustment of the '*Repo Rate*'; and, whenever that happens, the different banks adjust their rates on different days in response to such changes in the Repo Rate. Proof of a particular bank's prime overdraft rate used to be especially difficult before the establishment of the internet.

10. A bank's prime overdraft rate is therefore a matter of evidence. That means that it must be proved. The internet has created a particular advantage because the page of a bank's website with the prime overdraft rate is admissible in evidence in terms of section 15 of the Electronic Communications and Transactions Act 25 of 2002.

11. In the statistics section of its website, the South African Reserve Bank (**SARB**) has a dedicated web page entitled '*Prime Overdraft Rate*', with a schedule of the prime overdraft

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[3] ***Florence v Government of the Republic of South Africa*** 2014 (6) SA 456 (CC) at para [72] 483 B; (2014 (10) BCLR 1137; [2014] ZACC 22).

rate(s). Presumably, it reflects the latest changes that were made when the bank adjusted its rate. That web page is similarly admissible.

Discretion to change rate to be exercised *arbitrio bono viri*:

12. Of course, an agreement in terms of which the customer has a change in the prime rate imposed on him is contrary to the usual rule of contract that an agreement can only be changed by the consent of both parties.

13. The change in the rate of interest in terms of a loan agreement has been recognised as an accepted exception, provided that the moneylender exercises the unilateral discretion bestowed on it *arbitrio bono viri*, which simply means that any such discretion must be exercised reasonably by the bank, which must recognise that it does not have an unfettered right to act capriciously or unreasonably in adjusting the rate.[4]

(b) ***The repurchase rate – abbreviated as the 'Repo Rate'***

The meaning of this concept:

14. In the Government Notice 166 published in Government Gazette of 26 February 2007, the Minister of Trade and Industry declared (for the purposes of the then Usury Act) that:

> 'The **Repo Rate** is the Repurchase Rate as determined by the Monetary Policy Committee of the South African Reserve Bank.' (Emphasis added).

15. On the SARB's website the '*Repo Rate*' is defined as:

> 'The Repurchase or Repo Rate is the interest rate at which the bank lends money to private banks.'

The practice that has evolved around it:

16. The SARB acts as a banker for private banks. Banks experience a cash shortfall or a need for liquidity on a daily basis, and their lender of last resort is the SARB. A formal system – called the '*Repurchase Transactions System*' (**Repo System**) – is in place to guide the process through which banks borrow from the SARB.

17. As an economic practice, the Repo Rate determines the prime overdraft rate, which is adjusted to a few percentage points above the Repo Rate and is then used as the commercial benchmark for loans. Again, as can be gleaned from the Reserve Bank's website, the ruling Repo Rate serves as a benchmark for the level of short-term interest

[4] ***NBS Boland Bank Ltd v One Berg River Drive CC*** 1999 (4) SA 928 (SCA) at paras [25] and [26], p. 937 A – E.

rates. As a rule of thumb, the prime interest rate is usually about 2% more than the ruling Repo Rate.

18. The Reserve Bank has on its website (www//resbank.co.za) a web page with a schedule of the changes in the Repo Rate from time to time, which can be similarly used for the purposes of proving the interest rates at any particular points in time.

(c) ***Mora interest***

Interest in the absence of an agreement (express or implied) to pay interest:

19. At common law, where there is no express or implied agreement (e.g. a money lending agreement), whether a debt bears interest or not depends on two issues, namely: (i) Whether the debt is due; and (ii) whether the debt is liquidated.

20. If the debt is liquidated and the day for performance is fixed, *mora* operates *ex re* and no demand (*interpellatio*) is necessary to place the defendant in *mora*. The creditor is then entitled, in keeping with general principles, to *mora* interest from the day for performance.[5]

21. Interest starts running from due date automatically and no '*fault*' or '*wrongfulness*' is required.[6] In this regard, *mora* interest is often translated as '*default interest*' and it is then incorrectly conflated with the concept of '*fault*'.[7]

22. The common law rate of *mora* interest was 6%. Rampant inflation since the 1960s, and the consequent erosion of the value of money, made it apparent that inflation had come to stay as a permanent feature of the South African economy. This, in turn, was that the common law *mora* interest rate of 6% was inadequate to compensate creditors who were being kept out of their money.

The Prescribed Rate of Interest Act 55 of 1975 (**PRIA**):

23. The promulgation of the PRIA heralded a new approach to issue *mora* interest.

24. Section 1(1) thereof provided that

> 'If a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or a trade custom or in any other

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5 ***Westrand Estates Ltd v New Zealand Insurance Co Ltd*** 1926 AD 173 at 195/6; ***Davehill (Pty) Ltd v Community Development Board*** 1988 (1) SA 290 (A) at 298 D – F; and ***Bellairs v Hodnett and Another*** 1978 (1) SA 1109 (A) at 1145D – G, as well as at 1146 H – 1147 A.

6 ***Scoin Trading (Pty) Ltd v Bernstein NO*** 2011 (2) SA 118 (SCA) at para [20], pp. 122 I to 123 D.

7 ***Steyn NO v Ronald Bobroff and Partners*** 2013 (2) SA 311 (SCA) at paras [35] and [36], pp. 322 I to 323 F.

> manner, such interest shall be calculated at the rate contemplated in subsection (2) (a) as at the time when such interest begins to run …'

and then subsection (2) (b) empowers the Minister of Justice (**the Minister**) to prescribe a rate of interest from time to time.

25. Section 2 originally provided that where no provision was made as to the date from when interest would otherwise commence to run, interest would then run (at the same rate) from the date of any judgment. That is to say where a damages claim had been liquidated by the grant of a judgment order.

26. It soon became apparent that plaintiffs with claims for damages which were unliquidated, and which therefore only ran from date of judgment, were being prejudiced by the erosion of the value of money while litigation was pending. With effect from 11 April 1997, section 2A was introduced into the PRIA with the promulgation of the Prescribed Rate of Interest Amendment Act 7 of 1997 (**the 1997 Amendment Act**). Section 2A provides that claims for damages will bear interest from the date of demand rather than from the date when the quantum of damages is only liquidated by a judgment.

27. It should be noted that in terms of the ***Davehill*** case[8] it was held by the erstwhile Appellate Division that the *mora* rate remains the rate as at the date of issue of summons and does not fluctuate if and when there is a change in the rate as prescribed by the Minister.

28. This ruling leads to anomalies in practice. The Minister does not have his fingers on the pulse of market fluctuations in interest rates. Delays and irregular changes of the *mora* rate by the Minister has led to anomalies and, in some cases, undue hardship. With effect from 8 January 2016, an innovative amendment[9] was made to the PRIA that linked the *mora* rate to the Repo Rate, and pursuant to such amendment, section 1 of the PRIA included the following new subsection (2):

> '(2) (a) For the purposes of subsection (1), the **rate of interest is the repurchase rate as determined from time to time by the South African Reserve Bank, plus 3,5 percent per annum**.
>
> (b) The Cabinet member responsible for the administration of justice must, whenever the repurchase rate is adjusted by the South African Reserve Bank, publish the amended rate of interest …
>
> (c) The interest rate contemplated in paragraph (b) is effective from the first day of the second month following the month in which the repurchase rate is determined by the South African Reserve Bank.'
>
> (Emphasis added).

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8 1988 (1) SA 290 (A).

9 Introduced by Judicial Matters Amendment Act 24 of 2015.

Court's discretion in terms of section 2A (5) of PRIA:

29. Section 2A (5) of PRIA, which was introduced by section 1 of the 1997 Amendment Act, provides:

> '(5) Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law, or an arbitrator or an arbitration tribunal may **make such order as appears just in respect of the payment of interest on an unliquidated debt**, the rate at which interest shall accrue and the date from which interest shall run.' (Emphasis added).

30. The judicial discretion to make '*such order as appears just*' does not appear to have been exercised very often. It appears that the courts will not exercise it lightly so as to allow *mora* interest to commence from a date prior to demand when statutory *mora* would otherwise intervene in terms of section 2A. In ***Adele Builders (Pty) Ltd v Thompson***,[10] the SCA declined to interfere with the discretion of the court at first instance where no provision was made in a settlement for interest and the trial court was asked to decide the issue. In exercising its discretion it decided to award from when the quantum was agreed to between the parties despite the debtor already being in *mora* due to a letter of demand having preceded the date of such agreement.

31. The recent decision in ***Venter Joubert Inc and Another v Du Plooy***[11] emphasises that a trial court's exercise of the discretion must be approached with circumspection and that it could only be set aside if the lower court's discretion had not been exercised judicially.[12]

(d) ***The Usury Act and the Limitation and Disclosure of Finance Charges Act***

32. The Limitation and Disclosure of Finance Charges Act 73 of 1968 (**LADOFCA**) was enacted on 20 June 1968. It repealed the previous Usury Act 37 of 1926. To add to the confusion LADOFCA was later renamed as the '*Usury Act*', i.e. the short title of its repealed predecessor. The latter provided for the Minister of Trade and Industries to stipulate maximum rates of interest. The renamed Usury Act was itself subsequently repealed by the National Credit Act 34 of 2005 (**NCA**).

(e) ***The NCA***

33. The NCA has wide-ranging provisions for the protection of consumers, both with regard to credit agreements which they conclude and also with regard to debt relief schemes. That is all beyond the scope of the present article.

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10 2000 (4) SA 1027 (SCA) at para [11], p. 1031 B – F; and para [15], p. 1032 F – J.

11 2017 (5) SA 439 (NCK) at paras [9] to [15], pp. 443 B to 444 G.

12 *Id*., at paras [8] to [15], pp. 442 J – 444 G.

34. What is relevant in the present context, is that section 105 of the NCA empowers the Minister, after consultation with the National Credit Regulator (**the Regulator**), to prescribe the method for calculating a maximum rate of interest and maximum fees '*applicable to each subsector of the consumer credit market*, *as determined by the Minister*'. That, in effect, means that the interest ceilings are limited to credit agreements (including incidental credit agreements), as defined in the NCA. These are typically consumer-orientated agreements, but such limitations do not apply to a wide range of commercial transactions that fall outside those definitions and include transactions involving large sums.

35. What, then, happens in those cases where high interest rates are stipulated in agreements which fall outside the NCA? These are subject to the principles discussed below.

COMMON LAW USURY RETURNS

36. In ***African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC***[13] the SCA (*per* Ponnan JA, with whom Tshiqi JA, and Majiedt JA concurred) held that where the interest rate in terms of an agreement is not limited by statute, the court has a discretion under the common law to reduce interest rates. The SCA's judgment proceeded as follows (footnotes omitted):

> '[19] In this case whether or not the transaction was usurious fell to be determined in terms of the common law, which does not fix a rate of interest beyond which a transaction becomes usurious. In *SA Securities, Ltd v Greyling*, Wessels, J, held:
>
> > *"*From the fact that there is no standard rate it follows that the amount of interest is in itself no criterion. It may, however, be an element in considering whether a transaction is or is not usurious. The Court has allowed as much as sixty per cent, and in his judgment in *Reuter vs. Yates*, Mason, J., saw no reason why an amount of ninety per cent. Should not be allowed. It seems difficult to see how or where a limit can be fixed. If ninety per cent. Can be allowed, why not ninety-one? If ninety-one, why not ninety-two; and so on to 120 per cent. Therefore, the mere fact that the amount of interest seems high is not sufficient to make the transaction usurious. What then is there in a transaction which makes it usurious? If it is not the mere amount of interest, what other circumstances are there? A great deal has been said by various judges with regard to the circumstances. It is very difficult for me to find any definite principle upon which a case of usury has been or can be decided. I think the most you can say is that the transaction must show that there has been either extortion or oppression, or something which is akin to fraud. I do not think we can put the principle any higher than that. Therefore in each case we have to decide whether there has been extortion, oppression, or any actions akin to fraud.*"*
>
> [20] In arriving at that conclusion Wessels, J, stated that it was not necessary for the court to inquire minutely into what the Roman-Dutch law was in respect of usury, for that had been done in *Dyason v Ruthven*. In *Dyason* the judges, after elaborately tracing its history, held usury to be a good defence to an action founded on an agreement to pay interest, must involve extortion amounting to fraud. Indeed, in *Merry v Natal Society of Accountants*, De Villiers, JA, affirmed that principle in these terms:

[13] 2011 (3) SA 511 (SCA).

> "In South Africa, the common law has always been that, in order to render a transaction usurious, it must be shown that it is tainted with oppression, or extortion, or something akin to fraud (*Dyason v. Ruthven* (3 Searle 282); *Reuter v Yates* (1904, T.S. 855); *South African Securities v Greyling* (1911, T.P.D. 352)."

IN DUPLUM: ARREAR INTEREST NOT TO EXCEED CAPITAL

37. The common law *in duplum* rule is that arrear interest, whether accruing as simple or compound interest, ceases to run when it reaches the capital amount of the unpaid loan.

38. In ***Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* (*in liquidation*)**[14] the SCA (*per* Zulman, JA, with whom Mahomed CJ, Van Heerden DCJ, Harms JA and Plewman JA concurred) held that once any credit is passed (whether a voluntary repayment or not) then interest begins to run afresh and continues to do so until the *in duplum* ceiling is reached again.[15] The apparent policy reason for the *in duplum* rule in medieval common law that interest should not be excessive is questionable in modern economics where there is a constant erosion of the value of money and inflation is the norm.[16] While recognising that, at some point, the exponential snowballing of interest becomes crippling, it is also evident that the *in duplum* rule, which effectively penalises the compliant debtor who pays his or her debts, is anomalous in this respect.

39. The courts had seemed to come around to recognising the anomalies of the *in duplum* rule and to be more amenable to circumscribe the application of the *in duplum* rule. For example, in ***Margo and Another v Gardner and Another; Gardner and Another v Margo and Another***,[17] the SCA (*per* Shongwe JA, with whom Harms DP, Heher JA, Leach JA and Ebrahim AJA concurred) held that the *in duplum* rule is suspended and interest runs while litigation is pending.[18]

40. However, this promising trend was soon reversed by the Constitutional Court in ***Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd***[19] when it held that the decision in the ***Oneanate*** case, which is to the effect that the *in duplum* rule was suspended *pendente lite* (i.e. after institution of action), was wrong and that the *in duplum* cap remained in place

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14 1998 (1) SA 811 (SCA).

15 *Id*., at 834 B – D, as well as 834 G – I.

16 ***Commercial Bank of Zimbabwe v MM Builders & Suppliers (Pvt) Ltd*** 1997 (2) SA 285 (ZH), where the creditor bank was held to the *in duplum rule* despite the then runaway hyper-inflation in Zimbabwe.

17 2010 (6) SA 385 (SCA)

18 *Id*., at para [12], p. 388 G -J.

19 2015 (3) SA 479 (CC).

even after institution of the litigation.[20] This decision seems to have reversed the previous tendency of the courts to restrict the application of the *in duplum* rule.[21]

41. ***Paulsen's*** case confirms that post-judgment interest runs regardless of the *in duplum* rule.[22]

Adv AW (Mark) Harcourt, SC
19 February 2021
Durban

20 *Id*., at paras [42] to [95], pp. 499 G - 517 I, as well as the majority judgment at paras [113] – [119], pp. 522B – 525D (*per* Moseneke, DCJ, with whom Mogoeng CJ, Khampepe J, Leeuw AJ and Van der Westhuizen J concurred)

21 ***Makate v Vodacom Ltd*** 2016 (4) SA 121 (CC) at para [131], p. 165 B – D.

22 *Id*., at para [96] to [95], p. 517 A – C; and ***Drake Flemmer & Orsmond Inc v Gajjar NO*** 2018 (3) SA 353 (SCA) at para [90], p. 378 G.