THE ESSENCE AND IMPORTANCE OF THE STATUTORY AND COMMON-LAW IN DUPLUM RULES

South African law contains two related but distinct in duplum protections. Section 103(5) of the National Credit Act 34 of 2005 contains the statutory rule. The common-law rule continues to apply where section 103(5) does not apply. The first question is therefore not simply whether the borrower is a company, but which legal regime governs the particular consumer and agreement.

For a natural-person consumer whose credit agreement falls under the NCA, section 103(5) provides that, while the consumer remains in default, the aggregate of the amounts listed in section 101(1)(b) to (g) may not exceed the unpaid principal debt at the time of default. Those amounts include initiation fees, service fees, interest, the cost of credit insurance, default administration charges and collection costs. The rule cannot be contracted out of because section 103(5) applies despite any contrary provision of the common law or a credit agreement.

The simplified statutory example is straightforward. If the genuine unpaid principal debt at default is R1 million, the section 103(5) amounts accruing during that continuous period of default may not, in aggregate, exceed a further R1 million. The simplified ceiling is therefore R2 million. This is tied to the unpaid principal at default—not automatically to the amount originally advanced—and depends on lawful payment allocation and accurate account records.

The position of a juristic-person consumer requires special care. Section 6(d) of the NCA states that Chapter 5 Part C does not apply to a credit agreement in terms of which the consumer is a juristic person. Section 103 falls within that Part. Accordingly, even where parts of the NCA otherwise apply to a juristic-person agreement, the statutory in duplum rule in section 103(5) does not. The applicable interest-limiting protection is the common-law in duplum rule, which the Constitutional Court has confirmed is founded on public policy.

The threshold rules answer a different question: whether the NCA applies generally. A juristic person whose asset value or annual turnover, together with related juristic persons, equals or exceeds the current R1 million threshold when the agreement is made is excluded under section 4(1)(a)(i). A juristic person below that threshold is also excluded if the agreement is a 'large agreement' under sections 4(1)(b) and 9(4)—currently a mortgage agreement or another qualifying credit transaction with principal debt at or above R250,000. A below-threshold juristic person entering a small or intermediate agreement may therefore receive limited NCA protection, but not section 103(5), because section 6 still excludes Chapter 5 Part C.

In short: common-law in duplum governs juristic-person consumers for the interest cap. The asset/turnover threshold and the size of the agreement determine whether other provisions of the NCA apply. They do not make section 103(5) applicable to a juristic person.

A credit guarantee follows the underlying agreement only to the extent provided in section 4(2)(c). The identity of the principal consumer, the nature of the agreement and the applicable exclusions must therefore be established before applying either rule.

Key statutory references: National Credit Act 34 of 2005, sections 4(1), 4(2)(c), 6(d), 9(4), 101 and 103(5).

Key authority: Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd 2015 (3) SA 479 (CC), [2015] ZACC 5.

Note:

Editorial note: This version deliberately distinguishes the scope of the NCA from the scope of section 103(5). It is suitable for Episode 2 because it remains understandable while avoiding the incorrect suggestion that every below-threshold juristic person receives the statutory in duplum protection.