

THE IMPACT OF THE NATIONAL CREDIT ACT 34 OF 2005 ON INSOLVENCY LAW

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“Speak to one another with psalms, hymns and spiritual songs. Sing and make music in your heart to the Lord, always giving thanks to God the Father for everything, in the name of our Lord Jesus Christ” Ephesians 5: 19-20

ABSTRACT

The National Credit Act 34 of 2005 introduced measures in an attempt to prevent overspending by consumers and, more importantly measures to prevent credit providers from lending money to consumers who cannot afford either to pay the loan amount or the interest on the loan amount. A debtor who becomes over-indebted may apply for debt review. The NCA also provide for the reorganisation of debt of a person who is over-indebted, to afford such person the opportunity to survive the immediate consequences of his financial distress. Its purpose is to *inter alia*, prevent reckless credit granting and address the problem of over-indebted and in particular to protect the consumer.

The sequestration process in terms of the Insolvency Act 24 of 1936 may provide debt relief to individual debtors because following the sequestration order the debtor may be rehabilitated. Rehabilitation has the effect of discharging all pre-sequestration debt and further relieving the debtor of every disability resulting from sequestration. The debtor can apply sequestration by way of voluntary surrender while it is possible for a creditor to sequestrate a debtor's estate by way of compulsory sequestration. The process of compulsory sequestration is often used as a debt relief measure in form of a so-called friendly sequestration. In a friendly sequestration the debtor will arrange with a friend or a family member to whom he owes a debt that he will commit an act of insolvency in terms of section 8(g), that is, where the debtor gives written notice to a creditor that he is unable to pay all or any of his debts.

When enacting the NCA, the legislature did not specifically make any mention of the Insolvency Act. The question is whether the NCA impact on the Insolvency Act. However the court in *Ex Parte Ford And Two Similar Cases* 2009 3 SA 376 (WCC) held that section 85 of the NCA was applicable to proceedings under voluntary surrender. The court further held that an application for voluntary surrender should not be granted where the machinery of the NCA was the appropriate mechanism to be used. In *Investec Bank v Mutemeri* 2010 1 SA 265 (GSJ) the court held that section 130(1) do not apply to sequestration because an application for sequestration is not application for enforcement of the sequestering creditor's claim. It is therefore not subject to the requirement of section 130(1) of the NCA. The court also held that an application by a credit provider for the sequestration of a consumer does not constitute litigation or a judicial process in terms of section 88(3). On Appeal in the case of *Naidoo v Absa* (391/2009)[2010] ZASCA 72 (27 May 2010) the Supreme Court of Appeal confirmed the decision of *Mutemeri*. The appeal court held that a credit provider need not to comply with section 129(1)(a) before instituting sequestration proceedings against a debtor. The research will be conducted as to whether the NCA impact on the Insolvency Act.

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CHAPTER 1

INTRODUCTION

Credit plays a vital role in the economy. When a consumer applies for credit and the credit is granted, a contract usually has to be concluded. The credit grantor occupies a position of contractual power in which he or she dictates the contractual terms. The consumer on the other side, because of his or her need for the credit, does not have as much bargaining power as the credit grantor.¹ These contracts resulted in an unequal bargaining position between the consumer and the credit grantor. Therefore a contract may easily be misused in order to exploit the consumer (especially the illiterate consumer). This occurred where the consumer had assets which could be attached in order to pay the debt. An example of a situation in which the contract may be misused in order to exploit the consumer will be where there is lack of proper disclosure in the contract of the consumer's obligation, exorbitantly high finance charges and misuse of remedies by the credit grantor.² At that time, the consumer credit was governed by the Credit Agreement Act³ and the Usury Act.⁴

The exploitation of consumer's by credit grantors or micro lenders⁵ raised serious concerns about over-indebtedness and over-spending by consumers. This led the Department of Trade and Industry to establish a task team to review the legislation that impacts on consumer credit. This task team was established in 2002.⁶ In August 2004, the Department of Trade and Industry published a policy framework for consumer credit.⁷ In June 2005, it was tabled (as the National Credit Bill) in Parliament.⁸ The National Credit Bill was assented

¹ Collier-Reed and Lehmann *Basic Principles of Business Law* (2006) 156.

² Nagel *et al Business Law* (2007) 150.

³ 75 of 1980. This Act was aimed primarily at the elimination of malpractices and at limiting the free exercise of legal remedies. See Grove and Otto *Basic principles of Consumer Credit Law* (2002) 24-56.

This Act has now been replaced and repealed by the National Credit Act 34 of 2005 (hereafter 'the NCA'). See Roestoff and Renke "A Fresh start for individual debtors: The role of South African insolvency and consumer protection legislation" 2005 *Int.Insolv.Rev* 93 104.

⁴ 73 of 1968. This Act was aimed at the limitation of finance charges (and other amounts claimable by the creditor) and the disclosure thereof to the debtor. This Act has also now been replaced and repealed by the NCA. See Roestoff and Renke 106; Grove and Otto 66-99.

⁵ Often infamously referred to as "loan sharks".

⁶ See Roestoff and Renke "Debt relief for consumers: The interaction between insolvency and consumer protection legislation" (part 1) 2005 *Obiter* 561 562-564.

⁷ The Department of Trade and Industry South Africa *consumer credit law reform: Policy framework for consumer credit* 2004. Roestoff and Renke state that "in post-apartheid, many people from previously disadvantaged communities have become and are continuing to become part of the credit industry in some way or another. The policy framework points out that that majority of the South African population consists of low-income consumer who do not have access to reasonably priced credit. This causes large numbers of South African consumers to be over-indebted, Roestoff and Renke 563.

⁸ *Ibid.*

to by the President on 10 March 2006. The President signed a proclamation in order to put the Act into operation at different stages.⁹

The NCA introduces measures in an attempt to prevent over-spending by consumer and, more importantly, to prevent money lenders from lending money to consumers who cannot afford either to pay the loan amount, or to pay the interest on the loan amount. In particular it introduces the concepts of “over-indebtedness” and “reckless credit”. In terms of the NCA a consumer is over-indebted when he is unable to satisfy all his obligations under all his credit agreements in a timely manner, having regard to his financial means, obligations and history of debt repayment.¹⁰ A credit agreement is reckless if the credit provider failed to conduct an assessment as required, irrespective of what the outcome of such an agreement might have been.¹¹ The second instance of reckless credit is where the credit provider, conducted an assessment but concludes a credit agreement with the consumer despite the fact that the preponderance of information available to him or her, indicated that;

- (a) the consumer did not generally understand or appreciate the consumer’s risks, costs or obligations under the proposed credit agreement;¹² or
- (b) entering into that credit agreement would make the consumer over-indebted.¹³

The purpose of the NCA, as set out in section 3 of the Act, is to *inter alia* prevent reckless credit granting and address the problem of over-indebtedness and, in particular to protect the consumer.¹⁴ In addition to this a debtor who becomes over-indebted may apply for debt review¹⁵ in order for his debts to eventually be rescheduled and to enable him to pay the creditors over an extended period of time.

The sequestration process in terms of the Insolvency Act¹⁶ may provide debt relief to individual debtors. The purpose of the sequestration process in terms of the Act is to provide for a collective debt collecting process that will ensure an orderly and fair distribution of the debtor’s assets in circumstances where these assets are insufficient to satisfy all the

⁹ The NCA came into operation in a piece-meal fashion on 1 June 2006, 1 September 2006 and 1 June 2007. The part dealing with credit-marketing practices, over-indebtedness, reckless credit and rearrangement of debts came into operation on 1 June 2007.

¹⁰ S 79.

¹¹ S 80(1)(a).

¹² S 80(1)(b)(i).

¹³ S 80(1)(b)(ii).

¹⁴ The court in *FirstRand Bank Ltd v Olivier* 2009 3 SA 353 (SECLD) 357 stated that “the purpose of the NCA is *inter alia*, to provide for the debt reorganisation of a person who is over-indebted, thereby affording that person the opportunity to survive the immediate consequences of his financial distress and to achieve a manageable financial position”.

¹⁵ S 86.

¹⁶ 24 of 1936 (hereafter “the Insolvency Act”).

creditors' claims.¹⁷ The debtor can apply for sequestration by way of voluntary surrender¹⁸ while it is possible for a creditor to sequester a debtor's estate by way of compulsory sequestration.¹⁹ The process of compulsory sequestration is often used as a debt relief measure in form of a so-called friendly sequestration. In a friendly sequestration the debtor will arrange with a friend or a family member to whom he owes a debt that he will commit an act of insolvency in terms of section 8(g), that is, where the debtor gives written notice to a creditor that he is unable to pay all or any of his debts.²⁰ The reason why some debtors rely on the sequestration process to force a discharge of their debts on their creditors²¹ is that sequestration allows the debtor to eventually be rehabilitated.²² Rehabilitation has the effect of discharging all pre-sequestration debts and further relieving the debtor of every disability resulting from sequestration.²³

Some debtors prefer to use the process of voluntary surrender rather than to have their credit agreements dealt with under section 86 of the NCA²⁴ in spite of the fact that their credit agreements fall within the NCA. This is evident from the decision of *Ex Parte Ford And Two Similar Cases*.²⁵ The court however held that an application for voluntary surrender should not be granted where the machinery of the NCA was the appropriate mechanism to be used. In *Investec Bank v Mutemeri*²⁶ the credit provider applied for compulsory sequestration. The respondent argued that the credit provider is precluded by section 130 (1) of the NCA, from seeking the application for compulsory sequestration.²⁷ The respondent also invoked section 88(3) of the NCA.²⁸ The court held that an application for sequestration is not application for enforcement of the sequestering creditor's claim. It is therefore not

¹⁷ Bertelsmann *et al Mars The Law of insolvency in South Africa* (2008) 2.

¹⁸ Ss 3-7.

¹⁹ Ss 9-12.

²⁰ See in general Smith "Friendly and not so friendly sequestrations" 1981 *MB* 58. See also Evans and Haskins "Friendly sequestrations and the advantage of creditors" *SA Merc LJ* 1990 246.

²¹ See Boraine and Roestoff "Fresh start procedures for consumer debtors in South African bankruptcy law" 2005 *Int.Insolv.Rev* 1 6.

²² S 129.

²³ *Ibid.*

²⁴ S 86 deals with the application for debt review.

²⁵ 2009 3 SA 376 (WCC).

²⁶ 2010 1 SA 265 (GSJ).

²⁷ S 130(1) deals with the debt enforcement procedure in court. It provide that a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default under that credit agreement for at least 20 business days and (a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer (b) in case of a notice contemplated in s 129(1), the consumer has not responded to that notice or responded to the notice by rejecting the credit receiver's proposal (c) in case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider.

²⁸ S 88(3) applies only to credit providers who want to enforce any rights or security under a credit agreement by means of litigation or other judicial process. It provides for various instances when credit provider may proceed to enforce a credit agreement.

subject to the requirement of section 130(1) of the NCA. The court also held that an application by a credit provider for the sequestration of a consumer does not constitute litigation or a judicial process in terms of section 88(3). On Appeal in the case of *Naidoo v Absa*²⁹ the Supreme Court of Appeal confirmed the decision of *Mutemeri*. The appeal court held that a credit provider need not to comply with section 129(1)(a) before instituting sequestration proceedings against a debtor.³⁰ The court held that such proceedings are not proceedings to enforce a credit agreement and the credit provider need not to comply with requirements of section 130(3)(a).³¹

The purpose of this dissertation is to investigate the impact of the NCA on insolvency law. Firstly, the research will ascertain whether the NCA excludes the application of the Insolvency Act. Secondly the impact of section 130(1), 88(3) of the NCA on sequestration will be investigated. Thirdly, the impact and role of section 85 on sequestration will be discussed.³² Fourthly the impact of the *Ford* decision on voluntary surrender, compulsory sequestration and friendly sequestrations. Finally the decision in *Mutemeri* and that of the appeal court in *Naidoo* will be discussed and commented on.

This dissertation is divided into five chapters. This chapter, contains the introduction, to the research. Chapter 2 will explain, in detail, Part D of Chapter 4³³ of the NCA that deals specifically with the concepts of over-indebtedness and reckless credit. This chapter further discusses Part C³⁴ of the NCA, which provides for debt enforcement by repossession or judgement. Chapter 3 discusses the debt relief measures provided for by the Insolvency Act, namely sequestration process followed by rehabilitation. Chapter 4 contains the essence of the dissertation as it concerns the impact of the NCA on the insolvency law. In this chapter the interaction between the debt relief measures in terms of the NCA and Insolvency Act with reference to section 130(1), section 88(3) and section 85 of the NCA will be discussed. In addition the decision in *Ford*, *Mutemeri* and *Naidoo* will be discussed. Chapter 5 contains the conclusion to the research.

²⁹ (391/2009)[2010] ZASCA 72 (27 May 2010).

³⁰ S 129(1)(a) provides that, if a consumer is in default under a credit agreement, the credit provider may draw the default to the attention of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction with the intent that the parties resolve any dispute under the agreement or develop and agree on plan to bring the payments under the agreement up to date.

³¹ S 130(3)(a) states that in case of credit agreement the court may determine the matter only if is satisfied that in case of proceedings to which section 127, section 129 or section 131 apply, the procedure required by those section have been complied with.

³² S 85 grants the court a discretion in any court proceedings where the credit agreement is being considered after the allegation that the consumer is over-indebted, whether to refer the matter to a debt counsellor for an evaluation or may itself declare the consumer over-indebted.

³³ Ss 78-88.

³⁴ Ss 129-133.

CHAPTER 2

OVER-INDEBTEDNESS, RECKLESS CREDIT AND DEBT ENFORCEMENT IN TERMS OF THE NCA

2.1 Introduction

As mentioned above³⁵ credit plays a huge role in the economy and in the society in general. Consumers who cannot pay or buy cash for the credit products are given such product on credit prior to payment provided that they pay in instalments. Some consumers borrows the money in order to buy a product. In both instances the contract has to be concluded. Consumers should make sure that they afford the credit before entering into a credit agreement. Other consumers enter into a credit agreement despite the fact that they can afford to pay the credit. Previously also the credit providers overlooked the consumer's ability to pay and credit were granted even though many of them would never be able to pay back all the amount of the debt.³⁶ This is called reckless credit. Therefore reckless credit and over-indebted has consequently became a big problem in our society. The credit provider on the other side will be intending to enforce the payment of such debt. The legislature therefore made the assessment test for a credit mandatory in terms of the NCA. The test aims to prevent consumers borrowing more than they can ultimately pay back.

This chapter will explain, in detail, Part D of Chapter 4³⁷ of the NCA that deals specifically with the concepts of over-indebtedness and reckless credit. It contains debt relief measures to deal with the problem of over-indebtedness and further measures which are aimed at preventing reckless credit granting. This chapter further discusses Part C³⁸ of the NCA, which provides for debt enforcement by repossession or judgement. It deals with two stages of debt enforcement, firstly the required procedure before debt enforcement and the debt enforcement in court.

2.2 The purpose of the National Credit Act

As set out in section 3, the purpose of the NCA is to promote and advance the social and economic welfare of South Africa, promote a fair, transparent, competitive, sustainable,

³⁵ Ch 1.

³⁶ Campbell *et al The Credit Guide* (2008) 4.

³⁷ Ss 78-88.

³⁸ Ss 129-133.

responsible, efficient, effective and accessible credit market and industry. Section 3 further provides that the purposes of the Act are *inter alia*, to:

- (a) Promote responsibility in the credit market by encouraging responsible borrowing, avoidance of over indebtedness and fulfilment of financial obligations by consumers;³⁹
- (b) Discourage reckless credit-granting by credit providers and contractual default by consumers;⁴⁰
- (c) Address and prevent over-indebtedness of consumers and provide mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligation;⁴¹ and
- (d) Provide for a consistent and harmonised system of debt restructuring, enforcement and judgment which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.⁴²

The court in *FirstRand Bank Ltd v Olivier*⁴³ stated that the purpose of the NCA is, *inter alia*:

"to provide for debt reorganisation of a person who is over-indebted, thereby affording that person the opportunity to survive the immediate consequences of his financial distress and to achieve a manageable financial position".

Otto states that the NCA provides "a debtor who is over-committed with a "second chance" by rescheduling his debt payments".⁴⁴

In *Absa Bank v Prochaska t/a Bianca Cara Interiors*,⁴⁵ the court per Naidu AJ stated that:

"it is abundantly clear that the Act has introduced innovative mechanisms and concepts directed more at the protection and in the interest of credit consumers than of credit providers".

In *FirstRand Bank Ltd v Maleke and Three Similar Cases*⁴⁶ the court stated that NCA is a:

"piece of consumer legislation which introduces new forms of protection for debtors in South Africa, both rich and poor. It seeks to balance the inequalities arising from unequal bargaining power between the large credit providers on the one hand and the credit seekers on the other".

³⁹ S 3(c)(i).

⁴⁰ S 3(c)(ii).

⁴¹ S 3(g).

⁴² S 3(i).

⁴³ 2009 3 SA 353 (SECLD) 357.

⁴⁴ Otto *National Credit Act explained* (2006) 54.

⁴⁵ 2009 2 SA 512 (D) 516.

⁴⁶ 2010 1 SA 143 (GSJ) 148.

2.3 Over-indebtedness

The concept of over-indebtedness was not addressed in the repealed Usury Act and Credit Agreements Act. In this regard the NCA affords consumers who entered into credit agreements and later become over-indebted, an opportunity to obtain debt relief in the form of debt restructuring.⁴⁷ It further provides for the credit agreement to be declared reckless, if at the time the agreement was entered into, the creditor failed to conduct an assessment,⁴⁸ or having conducted an assessment, the consumer did not understand and appreciate the risks, costs or obligations under the proposed credit agreement, or entered into that agreement that will make the consumer over-indebted.⁴⁹ As a result, such credit agreement can be set aside or be suspended.⁵⁰ Overlapping between over-indebtedness and reckless credit granting can occur. It can occur when the credit provider conduct the assessment as required but ignores the indications in the assessment that opening that credit agreement will make the consumer over-indebted. Clearly in this situation other obligation of the consumer under the credit agreements may be restructured and such credit agreement may be suspended.⁵¹

Par D of Chapter 4 of the NCA applies to natural person consumer and is not available to and cannot be used by a consumer who is a juristic person.⁵² In other words Part D does not affords the protection of over-indebtedness and reckless credit to juristic person despite the fact that in certain instances apply to juristic person.⁵³ Furthermore Part D applies to pre-existing credit agreements and the consumer under a pre-existing credit agreement can raise the over-indebtedness but cannot raise the issue of reckless credit.⁵⁴

2.3.1 The concept of over-indebtedness

Section 79(1) of the NCA states that the consumer is over-indebted:

⁴⁷ Scholtz *et al* *Guide to the National Credit Act* (2008) 11-2.

⁴⁸ S 80(1)(a).

⁴⁹ S 80(b).

⁵⁰ S 83(2).

⁵¹ S 80(1)(b)(ii).

⁵² S 78(1). See *Standard Bank of South Africa Ltd v Hunkydory Investments (Pty Ltd)* 2010 1 SA 627 (CPD), where the defendants resisted the application for summary judgment on the ground, *inter alia*, that ss 4(1)(a), 4(1)(b) and 4(2)(c) of the NCA were unconstitutional in so far as it stated that the protection by the NCA was not applicable to juristic person. The unconstitutionality of the provisions was alleged to subsist in the breach by the provisions of the right to equality, as contained in s 9(1) of the Constitution of the Republic of South Africa Act 108 of 1996. The court was not persuaded that any differentiation or discrimination, even if it existed was unfair. Furthermore the court was also not persuaded that the defendant's exclusion from the protection of the relevant section of the NCA had any negative effect on it.

⁵³ See item 4(1) of Schedule 3.

⁵⁴ *Idem* 4(2).

“if the preponderance of available information at the time a determination is made, indicates that the particular consumer is or will be unable in a timely manner all the obligations under all the credit agreements to which the consumer is a party, having regard to that consumer’s:

- (a) financial means, prospects and obligations; and
- (b) probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer’s history of debt payment”.

The court in *Standard Bank of South Africa v Panayiotts*⁵⁵ stated that the NCA is for the benefit of every consumer who can prove that he is over-indebted as contemplated in section 79 of the NCA. More importantly, however, is whether the consumer who wants to take advantage of the NCA provisions has made a proper disclosure to enable the court to exercise its discretion. Scholtz states that there is general and reckless over-indebtedness. General over-indebtedness refers to the situation in which a consumer is not over-indebted when he enters into a credit agreement but becomes over-indebted at a later stage. Reckless over-indebtedness refers to the situation in which the consumer becomes over-indebted the moment he enters into a credit agreement.⁵⁶ Vessio submits that this differentiation will ultimately prove artificial and inconvenient. Her reasons are that the labels of “general” and “reckless” over-indebtedness blur the concept of “indebtedness” and “reckless lending” and thereby confuse attributes that have specifically and statutorily been assigned, independently, to the credit consumer and the credit provider.⁵⁷

2.3.2 Debt relief for over-indebtedness

Section 85 of the NCA states that:

“despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may:

- (a) refer the matter directly to a debt counsellor with a request that he evaluate the consumer’s circumstances and make a recommendation to the court in terms of section 86(7); or
- (b) declare that the consumer is over-indebted as determined in accordance with this part, and make an order contemplated in section 87 to relieve the consumer’s over-indebtedness.

Section 86(1) provides that a consumer may apply to a debt counsellor in the prescribed manner and form to be declared over-indebted. In this regard, the consumer can only apply in terms of section 86 if the credit provider has not instituted proceedings to enforce the

⁵⁵ 2009 3 SA 363 (WLD) 372.

⁵⁶ Scholtz 11.3.2.

⁵⁷ Vessio “Beware the provider of reckless credit” 2009 TSAR 274 281.

credit agreement in terms of section 129. Section 129(2) stipulates that a credit provider cannot institute legal proceedings against the consumer who is undergoing debt review.

The court in *Olivier*⁵⁸ pointed out that the defendant when it receives the notice in terms of section 129, has the option of either refer the agreement to a debt counsellor with the intent that the parties attempt to reach some agreement, or await the receipt of the plaintiff's debt enforcement process and only then applying to the court to declare or relieve his over-indebtedness in terms of section 85. This means that the consumer can either apply directly for a debt review to a debt counsellor in terms of section 86 or indirectly by raising the over-indebtedness in court according to section 85(a). In *Panayiott*⁵⁹ Masipa J stated that it is for a consumer who raises the defence of over-indebtedness to establish on a balance of probabilities that he or she over-indebted as envisaged by the section. In *Standard Bank of South Africa v Hales*⁶⁰ the court held that section 85 confers discretion upon the court whether to grant relief under this section, even where the consumer demonstrates that he or she is over-indebted.

2.4 Debt review

Section 86(1) state that the consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted. Debt review commences when the consumer applies to the debt counsellor for an evaluation to determine whether the consumer is over-indebted.⁶¹ The debt review process comprises various stages, namely the consumer's application for debt review, the duties of the debt counsellor, the obligation of the consumer and credit provider during the debt review process, the debt counsellor's determination of over-indebtedness, steps to be taken after determination and termination of debt review in certain circumstances.

2.4.1 Application for debt review

The consumer may make an application to the debt counsellor to be declared over-indebted. Section 86(2) states that the application may not be made at the time that the credit provider

⁵⁸ *Olivier supra* 360.

⁵⁹ *Panayiotts supra* 372-373.

⁶⁰ 2009 3 SA (D&CLD) 321-322.

⁶¹ See Van Heerden and Boraine "The interaction between the debt relief measures in the National Credit Act 34 of 2005 and aspects of insolvency law" 2009 12(3) *PER*.

has started proceedings under that credit agreement, and has proceeded to take steps contemplated in section 129 to enforce the agreement.⁶² Section 86(4) provides that:

“on the receipt of an application, a debt counsellor must:

- (a) provide the consumer with proof of receipt of the application; and
- (b) notify, in the prescribed manner and form:
 - (i) all credit providers that are listed in the application ; and
 - (ii) every registered credit bureau”.

Regulation 24, in addition provides that a consumer who wishes to apply to a debt counsellor to be declared over-indebted must submit to the debt counsellor a completed form 16. It is submitted that the consumer should provide the debt counsellor with all the substantial information.⁶³ Failure to do so can result in the court arriving at the conclusion that the consumer had not applied for debt review. In *BMW Financial Services (SA) (Pty) Ltd v Donkin*,⁶⁴ the court had to decide whether the defendant made application for debt review as contemplated by section 86(1) read together with regulation 24, prior to institution of the action by the plaintiff to enforce the credit agreement. The defendant’s contention was that the plaintiff had approached the court during the time that the matter was before a debt counsellor and that that was impermissible. The plaintiff’s response to this contention was primarily that the application for debt review did not include the plaintiff’s claim by virtue of the provisions of section 86(2) of the NCA, which provides that:

“an application for debt review may not be made in respect of a particular credit agreement if, at the time of the application, the credit provider under that credit agreement has proceeded to take steps contemplated in section 129 to enforce that agreement”.⁶⁵

The court stated that making an application for debt review has important consequences.⁶⁶ Ordinarily debt review process commence on the completion of form 16. Where form 16 is

⁶² See Roestoff *et al* “The debt counselling process-closing the loopholes in the National Credit Act 34 of 2005” 2009 (12) 4 *PER*.

⁶³ Regulation 24(1) states that a “consumer who wishes to apply to a debt counsellor to be declared over-indebted must (a) submit to the debt counsellor a completed form 16; or (b) provide the debt counsellor with the following information (i) personal details, including: name, initials and surname; identity number, if the consumer does not have the identity number, the passport number and the date of birth, postal and physical address, contact details (ii) all income inclusive of employment income and other sources of income (specify). (iii) monthly expenses, inclusive of, but not limited to: taxes, unemployment insurance fund, pension, medical aid, insurance, court orders and other (specify) (iv) list of all debts, disclosing monthly commitment, total balance outstanding, original amount and amount in arrears (if applicable) inclusive of, but not limited to: home loans, furniture retail, clothing retail, personal loans, credit card, overdraft, educational loans, business loans, car finances and leases, securities signed and other (specify) (v) living expenses, inclusive of, but not limited to: groceries, utility and continuous service, school fees, transport costs and other(specify) (vi) A declaration and undertaking to commit the debt restructuring (vi) a consent that a credit bureau check may be done (vii) confirmation that the information is true and correct”.

⁶⁴ 2009 6 SA 63 (KZD).

⁶⁵ *Ibid* 69.

not completed regulation 24 requires the debt counsellor to be furnished with all the information that would be provided if the statutory form had been completed by the consumer. The court further stated where information furnished to a debt counsellor, without a form 16 being completed, there is always a substantial risk that the information will fall short of what is required in order for there to be compliance with regulation 24(1)(b). The court noted that the information which the defendant says she provided to the debt counsellor does not contain the following: Identity number; Physical and Postal address; telephone numbers and the name her employer.⁶⁷ This information is essential when the debt counsellor contacts credit bureax and credit providers so that there can be some certainty that the information sought and given relates to the correct person. The court held that the defendant had not applied for debt review and in those circumstances, where such a defective application is made before the steps to enforce a credit agreement have been taken, section 88(2) applies, so that the credit agreement between the consumer and the credit provider is excluded from debt review.⁶⁸

2.4.2 Duty of good faith

Section 86(5) imposes a duty of good faith on the consumer who applies to a debt counsellor for a debt review and a credit provider. This section is couched in peremptory terms. The consumer and the credit provider must co-operate with the debt counsellor. They are obliged to comply with any reasonable request by the debt counsellor to facilitate the evaluation of the consumer's state of indebtedness and the prospects for responsible debt re-arrangement.⁶⁹ They should further participate in good faith in the review and in any negotiation designed to result in the responsible debt re-arrangement.⁷⁰

2.4.3 Debt counsellor and his or her administrative duties

The NCA creates the office of a debt counsellor to facilitate the investigation of over-indebtedness and reckless credit granting. The debt counsellor plays an important role during the debt review process. In particular his function is to assist the over-indebted consumer with the process of debt review. The debt counsellor must evaluate the consumer's over-indebtedness. A debt counsellor, in terms of regulation 1, "means a natural

⁶⁶ *Ibid* 72.

⁶⁷ *Ibid* 73

⁶⁸ *Ibid* 74.

⁶⁹ S 86(5)(a).

⁷⁰ S 86(5)(b).

person who is registered in terms section 44 of the Act offering a service of debt counselling”. Section 44(2) states that a person must not offer or engage in the services of a debt counsellor or hold themselves out to the public as being authorised to offer any such service unless that person is registered in terms of this Act. This section is couched in peremptory terms. An applicant in terms of section 44(3) must satisfy any prescribed education, experience or competency requirements or be in a position to satisfy within a reasonable time such requirements as the National Credit Regulator may determine as a condition of the applicant’s registration.⁷¹ The court in *National Credit Regulator v Nedbank Ltd and Others*⁷² stated that a debt counsellor who refers a matter to the Magistrate’s Court in terms of section 86(7)(c) and 86(8)(b) of the NCA has a duty to assist the court and should be available and able to render such assistance by way of furnishing evidence or making submissions as to his or her proposal or to answer any queries raised by the court. In *Mutemeri*⁷³ the court stated that:

“the role of the debt counsellors under the NCA, is confined to the functions they perform in terms of section 71 and 86. They are facilitators between consumers who have become over-indebted, on the one hand, and their credit providers, on the other. The purpose of their intervention is ultimately to afford relief to consumers in distress in appropriate cases. But the debt counsellor’s role goes no further than that of mediator and facilitator”.

2.4.4 Determination of over-indebtedness and reckless credit granting

Section 86(6) states that a debt counsellor who accepted an application of debt review must determine within the prescribed time whether the consumer appears to be over-indebted and, if the consumer seeks a declaration of reckless credit, whether any of the consumer’s credit agreements appear to be reckless.

Regulation 24(7)(a)-(c) provides that:

“when assessing the consumer’s application in terms of section 86(6)(a) of the NCA, the debt counsellor must refer to section 79 and further consider the following:

- (a) a consumer is over-indebted if his or her total monthly debt payments exceed the balance derived by deducting his or her minimum living expenses from his or her net income;
- (b) net income is calculated by deducting from the gross income, statutory deductions and other

⁷¹ See s 45-53 for application for registration. See also reg 4 for registration requirements for all registrants, reg 9 for cancellation of registration, reg 10 for further criteria for registration. See also Roestoff 2009 (12) 4 *PER* for proposed amendments to legislation on the gaps which are major obstacles in the debt counselling process.

⁷² Case no. 19638/2008 (GNP) (unreported). See 30 and 47 of the typed manuscript.

⁷³ *Mutemeri supra* 277.

- deductions that are made as a condition of employment;
- (b) minimum living expenses are based upon a budget provided by the consumer, adjusted by the debt counsellor with reference to guidelines issued by the National Credit Regulator”.

Regulation 24(8) states that:

“in making a determination that a particular debt is reckless as per section 86(6)(b) of the NCA, a debt counsellor must refer to section 80 of the NCA and further consider the following;

- (a) the level of indebtedness of the consumer after that particular agreement was entered into; and
- (b) whether, when that particular credit agreement was entered into, the total debt obligations including the new agreement exceeded the net income reduced by minimum living expenses;
- (c) the consumers’ bank statement, salary or wage advice and records obtained from a credit bureau;
- (d) any guidelines published by the national Credit Regulator proposing evaluative mechanisms, models and procedures in terms of section 82 of the Act”.

In terms of section 86(7)(a) a debt counsellor may make a determination that a consumer is not over-indebted. In this regard the debt counsellor must reject the application even if he has concluded that a particular credit agreement was reckless at the time it was entered into. Section 86(9) states that if a debt counsellor rejects an application, the consumer, with the leave of the Magistrate’s Court, may apply directly to the Magistrate’s Court, in the prescribed manner and form, for an order contemplated in subsection (7)(c). Regulation 25 provides that if a debt counsellor finds that a consumer is not over-indebted and makes a finding in terms of section 86(7)(a), the debt counsellor must provide the consumer with a letter of rejection.⁷⁴

In terms of section 86(7)(b) a debt counsellor may make a determination that the consumer is not over-indebted but likely to experience problems in the future.⁷⁵ Section 86(7)(b) states that the debt counsellor may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt re-arrangement. Section 86(8) states that if a debt counsellor makes a recommendation in terms of section 86(7)(b), and the consumer and each credit provider concerned accept that proposal, the debt counsellor must record the proposal in the form of an order, and if it is consented to by the consumer

⁷⁴ The letter of rejection in terms of reg 25 must contain the consumers’ full names, surname and identity number, if the consumer does not have the identity number, the passport and the date of birth. Name, contact details and NCR registration number of debt counsellor must also be included. The basis for finding the consumer not to be over-indebted including calculated income considered, statutory and other deductions considered, living expenses considered and other debts considered. A copy of assessment form must be given to the consumer. There must also be a statement advising the consumer of his or her right to approach the court in terms of s 86(9) within 20 business days for an order to be declared over-indebted, have agreements declared reckless and/or restructuring of his or her obligations. Finally, inclusive of a statement advising the consumer that the application for debt review will be removed from all registered credit bureau within 5 business days which will result in credit providers being entitled to take legal steps against the consumer.

⁷⁵ S 86(7)(b).

and each credit provider concerned, file it as consent order in terms of section 138⁷⁶ or if the parties do not reach agreement, the debt counsellor must refer the matter to the Magistrate's Court with the recommendation. Regulation 24(9) states that any arrangement made by the debt counsellor with credit providers must be reduced in writing and signed by all credit providers mentioned the debt counsellor and the consumer.

In terms of section 86(7)(c) a debt counsellor may make a determination that the consumer is over-indebted. Section 86(7)(c) states that if as result of the debt review assessment a debt counsellor reasonably concludes that the consumer is over-indebted may issue a proposal recommending that the Magistrate's Court make either or both of the following orders:

- (a) "that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless; and
- (b) that one or more of the consumer's obligation be arranged by-
 - (i) extending the period of the agreement and reducing the amount of each payment due accordingly;
 - (ii) postponing during a specified period the dates on which payments are due under the agreement;
 - (iii) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or
 - (iv) recalculating the consumer's obligations because of contravention of Part A or B of Chapter 5, or Part A of Chapter 6".

2.4.5 Termination of debt review

Section 86(10) states that if a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that agreement may give notice to terminate the review in the prescribed manner to the consumer, the debt counsellor and the National Credit Regulator, at any time at least 60 business days after the date on which the consumer applied for debt review. It is submitted that a debt counsellor must not terminate a debt review in terms of this subsection once he has referred the matter to the to the Magistrate's court for consideration.⁷⁷

⁷⁶ Section 138 states that if a matter has been resolved through the ombud with jurisdiction, consumer court or alternative dispute resolution agent or investigated by the National Credit Regulator, and the National Credit Regulator and the respondent agree to the proposed terms of an appropriate order, the tribunal or a court, without hearing any evidence, may confirm that resolution or agreement as a consent order.

⁷⁷ In *Standard Bank of South Africa v Kruger* 2010 4 SA 635 (GSJ), the court had to determine whether s 86(10) of the NCA empowers a credit provider to terminate a debt review process where a debt counsellor had already referred the review with recommendation, to the Magistrate's court for consideration. The court ruled

2.5 Effect of debt review or rearrangement order or agreement

Section 88(1) states that a consumer who has filed an application in terms of section 86(1), or who has alleged in court that the consumer is over-indebted, must not incur any further charges under a credit facility or enter into any further credit agreement, other than a consolidation agreement, with any credit provider until one of the following events has occurred:

- (a) “the debt counsellor rejects the application and the prescribed time period for filing in terms of section 86(9) has expired without the consumer having so applied;
- (b) the court has determined that the consumer is not-over-indebted or has rejected a debt counsellor’s proposal or the consumer’s application; or
- (c) a court having, made an order or the consumer and the credit providers having made an agreement re-arranging the consumer’s obligations, all the consumer’s obligations under the credit agreements as re-arranged are fulfilled, unless the consumer fulfilled the obligations by way of a consolidation agreement”.

Section 88(3) states that:

“a credit provider who receives a notice of court proceedings contemplated in section 83 or 85 or notice in terms of section 86(4)(b)(i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until-

- (a) the consumer is in default under the credit agreement; and
- (b) one of the following has occurred:
 - (i) an event contemplated in subsection (1) (a) through (c); or
 - (ii) the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal”.

A credit provider runs the risk of the credit agreement constituting reckless one, if he or she concludes an agreement with the consumer who is under debt review or while debt re-arrangement is in place.⁷⁸ Section 88(5) states that if a consumer applies for or enters into a credit agreement contrary to this section, the provisions of this part will never apply to that agreement. The consumer cannot invoke the debt relief provisions relating to over-indebtedness and reckless credit contained in Part D of Chapter 4 should he or she become

that once a debt review is referred by a debt counsellor with recommendations to the Magistrate’s Court for consideration in terms of s 86(8)(b) of the NCA, it falls within the ambit of s 87 and not s 86 of the NCA and any termination of the debt review in terms of s 86(10) would be unlawful. See also Stadler “Section 129 and s 86(10) notice in terms of the National Credit Act: Conflicting judgments” 2010 *De Rebus* 42-44.

⁷⁸Otto 55. See Van Heerden and Otto “Debt enforcement in terms of the National Credit Act 34 of 2005” 2007 *TSAR* 655. See also Boraine and Renke “Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005” (part 1) 2007 (1) *De Jure* 222.

even further over-indebted as a result of the prohibited credit agreement he or she should never have entered into.⁷⁹

2.6 Reckless credit

Section 81(3) states that a credit provider must not enter into a reckless credit agreement with a prospective consumer. This section is couched in peremptory terms and the legislator intended to prohibit such conduct. The provisions in the NCA dealing with the prevention and consequences of reckless credit are extremely important to all concerned.⁸⁰ Vessio makes the following observation: “credit providers in South Africa must now be aware of what will turn them into reckless lenders and avoid practices, which may lead them to suffer the legislative consequences”.⁸¹ Vessio is of the view that reckless lending includes not only the act of disregarding the consequences, but also the act of not analysing at all, or analysing incorrectly one’s client or potential client in the carrying out of certain prescribed assessment or investigation.⁸² Section 78(2) states that:

“section 81 to 84, and any other provisions of this part to the extent that they relate to reckless credit, do not apply-

- (a) a school loan or a student loan;
- (b) an emergency loan;
- (c) a public interest credit agreement;
- (d) a pawn transaction
- (e) an incidental credit agreement; or
- (f) a temporal increase in the credit limit under a credit facility,
provided that any credit extended in terms of paragraph (a) to (c) is reported to the National Credit Register in the Prescribed manner and form, and further provided that in respect of any credit extended in terms of paragraph(b), reasonable by the credit provider”.

2.6.1 Prevention of reckless credit

The question may be asked as to which mechanism can be used to prevent reckless credit. The legislature has created machinery that will prevent such reckless credit granting. Section 81(1) states when applying for a credit agreement, and while that application is being considered by the credit provider, the prospective consumer must “fully and truthfully”

⁷⁹ Scholtz 11.3.3.4.

⁸⁰ Otto 65.

⁸¹ Vessio 274 .

⁸² *Idem* 275.

answer any requests for information made by the credit provider as part of the assessment. Section 81(2) states that:

- “a credit provider must not enter into a credit agreement without first taking reasonable steps to assess:
- (a) the proposed consumer’s-
 - (i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;
 - (ii) debt re-payment history as a consumer under credit agreement;
 - (iii) existing financial means, prospects and obligations; and
 - (b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement”.

2.6.2 Assessment mechanisms and procedures

In order for a credit provider to avoid the dire consequences of reckless credit granting, it can be expected that he or she pays full attention in conducting these assessment.⁸³ Otto states that “the credit provider may use its own means of evaluation, as long as is fair and objective.⁸⁴ Section 82(2) states that the National Credit Regulator may pre-approve the evaluative mechanisms, models and procedures to be used in order to prevent reckless credit in respect of proposed developmental credit agreements and publish guidelines proposing evaluative mechanisms, models and procedures to be used when preventing reckless credit, applicable to their credit agreements. It is submitted that this mechanisms play an important role and only credit providers who ignore these mechanisms and procedures will suffer the consequences of the credit agreement that was declare reckless.

2.6.3 Circumstances in which the credit granting can be regarded as reckless credit

Section 80 provides instances in which credit agreement could be regarded as reckless. It states that a credit agreement is reckless if:

“at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119(4)-

- (a) the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time; or
- (b) the credit provider, having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that-

⁸³ Scholtz 11.4.2.

⁸⁴ Otto 6. See also s 82(1).

- (i) the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement; or
- (ii) entering into a that credit agreement would make the consumer over-indebted".

The first type of reckless credit, namely where no assessment was done, the creditor's providers failure is inexcusable leading to the transaction's being regarded as reckless credit. The second type of reckless credit occurs, when the credit provider conducts an assessment, thereafter enters into a credit agreement with the consumer. This is regarded as reckless because, even though the credit provider complied with the assessment requirement in section 81(2), but he disregarded the fact that the preponderance of available information indicated that the consumer lacked an understanding or appreciation of his risks, costs or obligations under the proposed credit agreement, like in a situation where a creditors provider conducts a credit assessment and then enter into an agreement with type consumer without advising him properly about the interests to be charged or how the amounts of monthly instalments are to be calculated. The third type of reckless credit refers to the situation in which there is an overlap with over-indebtedness. A consumer may, after a proper credit assessment and with a fully understanding of his risks and obligations under the agreement, enters into a credit agreement without being over-indebted and at a later stage become over-indebted because he, for instance, loses his job and cannot afford to pay timeously.⁸⁵

2.7 The power of the court

It is only the court that can declare the consumer over-indebted. The debt counsellor will make the recommendation to the court as to whether the consumer appear to be over-indebted or any of his or her credit agreement appear to be reckless.⁸⁶ A court can declare a consumer over-indebted in terms of section 85 only if it is alleged that the consumer is over-indebted but section 83 appears to differ from section 85 in the sense that a court may *sou motu* declare a credit agreement reckless or even take the initiative to determine whether an agreement constitutes a reckless one in terms of section 83.⁸⁷

⁸⁵ Scholtz 11.4.3.

⁸⁶ See *National Credit Regulator supra* 47-48 of the typed manuscript.

⁸⁷ See Scholtz 11.4.3; Otto 66.

2.8 Effect of suspension of credit agreement

Section 84(1) states that during the period that the force and effect of a credit agreement is suspended, the consumer is not required to make any payment required under the credit agreement. It also provides that no interests, fee or other charge under the credit agreement may be charged to the consumer and the credit provider's rights under the agreement are unenforceable, despite any law to the contrary. It further provides that after such suspension of the force and effect ends, all the respective rights and obligations of the credit provider and consumer are revived and are fully enforceable except to the extent that a court may order otherwise.

2.9 Debt enforcement by repossession or judgment

2.9.1 Enforcement of credit agreement

Part C⁸⁸ of the NCA deals with debt enforcement by repossession or judgments. People commit breach of contract. Some of the creditors common-law remedies are an interdict, a claim for specific performance, a claim for damages and cancellation of the contract.⁸⁹ Enforce in Part C refers to enforcement of a creditor's provider's remedies by means of legal proceedings.⁹⁰ Debt enforcement under Part C also includes cancellation of the agreement and the occupying claim to repossess the goods.⁹¹ The NCA lays down the procedure for debt enforcement. It state two procedures. Firstly, the procedure before debt enforcement and secondly, the procedure that are dealt with as a debt procedure in court.⁹²

2.9.1.1 Section 129 of the NCA

Section 129(1) states that if the consumer is in default under a credit agreement, the credit provider-

- (a) "may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor,⁹³ alternatives dispute resolution agent,⁹⁴ consumer court⁹⁵ or

⁸⁸ Ss 129-133.

⁸⁹ Otto 84.

⁹⁰ See Van Heerden and Otto 655. See also Boraine and Renke 222.

⁹¹ Van Loggerenberg, Dicker and Malan "Aspects of debt enforcement under the National Credit Act" 2008 *De Rebus* January –June 40-44.

⁹² Scholtz 12.3.

⁹³ Regulation 1 states that a "debt counsellor" means a natural person who is registered in terms of section 44 of the Act offering a service of debt counselling.

ombud with jurisdiction,⁹⁶ with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date”.⁹⁷

In *Standard Bank of South Africa v Maharaj*⁹⁸ the court pointed out that section 129(1)(a) has three objectives. Firstly to bring to the attention of the consumer the default complained of. Secondly to propose to the consumer that the consumer seeks the assistance of debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction. Thirdly a resolution of the dispute under the agreement or the development and arrangement of a plan that will bring payments under the agreement up to date.

In *Munien v BMW Financial Services (SA) (Pty) Ltd and another*,⁹⁹ Wallis J rejected the contention that the section 129(1) notice had to come to the attention of the consumer, and held that a notice is deemed delivered if it is sent by registered post to an address selected by the consumer, irrespective of whether it comes to the attention of the consumer. In *FirstRand Bank v Dhlamini*,¹⁰⁰ Murphy J criticised the ruling that it is irrelevant whether the notice in fact came to the attention of the consumer. Murphy J stated that the correct question to ask when considering if there has been compliance with section 129(1)(a), in terms of the wording of the section, is not whether the notice has been delivered to the consumer, but is rather whether the credit provider has ‘drawn the default to the notice of the consumer in writing’. Murphy J applied and approved the *dicta* of Naidu AJ in *Prochaska t/a Bianca Cara Interiors*¹⁰¹ the requirement of drawing the default to the notice of the consumer in section 129(1)(a) and the prohibition in section 129(1)(b)(i) against commencing legal proceedings to enforce a credit agreement before ‘first providing notice to the consumer’ cumulatively reflect an intention on the part of the legislature to impose upon the credit provider an obligation which requires more than the mere dispatching of the notice to the consumer in the manner prescribed in the Act and regulations for delivery.

⁹⁴ S 1 of the Act states that an “alternative dispute resolution agent” means a person providing services to assist in the resolution of consumer credit disputes through conciliation, mediation or arbitration.

⁹⁵ S 1 states that a “consumer court” means a body of that name, or a consumer tribunal, established by provincial legislation.

⁹⁶ S 1 states that “Ombud with jurisdiction” means in respect of any particular dispute arising out of a credit agreement in terms of which the credit provider is a “financial institution” as defined in the Financial Services Schemes Act, 2004 (Act No.37 of 2004), means an “ombud”, or the “statutory ombud”, as those terms are respectively defined in that Act, who has jurisdiction in terms of that Act to deal with a complaint against that financial institution.

⁹⁷ See further Coetzee and Van Heerden “Marimuthu Munien v BMW Financial Services (SA) (Pty) Ltd Unreported Case no 16103/08 (KZD)” 2009 (4) *PER*. See also Stadler 42-44.

⁹⁸ 2010 5 SA 518 KZP 520.

⁹⁹ 2010 1 SA 549 KZD.

¹⁰⁰ 2010 4 SA 531 GNP.

¹⁰¹ *Prochaska t/a Bianca Cara Interiors supra* 512.

It is submitted that the word “may” in section 129(1) is misleading in that one might think that the credit provider is not compelled to employ the section 129(1)(a) procedure prior to debt enforcement.¹⁰² In the case of *Frederick v Greenhouse (Pty) Ltd*,¹⁰³ the court found that the only step which a credit provider can take in terms of section 129, is the step in section 129(1)(a) namely, the sending of the letter. The court rejected the argument that the sending of the letter is not a step to enforce the agreement and found with reference to the matter of *Nedbank Ltd v Motaung*:¹⁰⁴

“if section 86(2) is read to mean that the sending of the letter is not a step under section 129 to enforce the agreement, then the section is rendered nugatory. In my view a proper interpretation must be provided to the section. The section must be interpreted so as not have an absurd result and so as to reflect commercial reality. Such an interpretation would involve an interpretation of Section 86(2) as meaning that the sending of a letter constitutes a step contemplated in Section 129 to enforce the agreement”.¹⁰⁵

Roestoff submits that it does not make sense to propose to the consumer to approach a debt counsellor and at the same time also preclude the consumer from applying for debt review.¹⁰⁶ In *Prochaska*¹⁰⁷ the court stated that the notice in section 129(1)(a) was indeed a pre-requisite for a credit provider’s commencing legal proceedings to enforce a credit agreement. Section 129(1)(b) provides that a credit provider may not commence any legal proceeding to enforce the credit agreement before first providing a section 129(1)(a) notice to the consumer and meeting any further requirements in section 130.¹⁰⁸

Section 129(3) states that a consumer may at any time before the credit provider has cancelled the agreement re-instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider’s default charges and reasonable costs of enforcing the agreement up to the time of re-instatement and may resume possession of any property that has been repossessed by the credit provider pursuant to an attachment order. Section 129(4) prohibits the consumer from re-instating a credit agreement after the sale of any property pursuant to an attachment order or surrender of property in terms of section 127. The consumer is further prohibited from re-instating a credit agreement after the execution of any other court order enforcing that agreement. Lastly, the consumer is prohibited from re-instating a credit agreement after the termination thereof in accordance with section 123.

¹⁰² See Scholtz 12.7. See also Otto 87.

¹⁰³ Case no 31825/2008 (WLD) (unreported).

¹⁰⁴ Case no 22445/07 (TPD) (unreported).

¹⁰⁵ See 4 of the typed manuscript.

¹⁰⁶ Roestoff 2009 (12) 4 PER.

¹⁰⁷ *Prochaska t/a Bianca Cara Interiors supra* 520.

¹⁰⁸ The court in *Nedbank Ltd v Mokhonoana* 2010 SA 5 551 (GNP) 554 held that the legal proceedings for the purpose of s 129 (1)(b) are commenced, not by the issue of a summons, but by the service thereof.

2.9.1.2 Debt procedure in court

The credit provider who wishes to enforce the credit agreement in court will have to comply with the provision of section 130(1) and 130(3). The compliance section 130(1) and 130(3) is peremptory, whereas section 130(2) can be used to enforce the remaining obligation. Section 130(1) states that:

“subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and:

- (a) at least 10 business days have elapsed since the creditor provider delivered a notice to the consumer as contemplated in section 86(9), or section 129(1), as the case may be;
- (b) in the case of a notice contemplated in section 129(1), the consumer has-
 - (i) not responded to that notice; or
 - (ii) responded to the notice by rejecting the credit’s proposals; and
- (c) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127”.

Section 130(1) will be satisfied if the credit provider act in 20 days business days after breach has occurred. This means that 20 and 10 days may run concurrently.¹⁰⁹

Section 130(2) states that:

“in addition to the circumstances contemplated in subsection (1), in the case of an instalment agreement, secured loan, or lease, a credit provider may approach the court for an order enforcing the remaining obligations under a credit agreement at any time if-

- (a) all relevant property has been sold pursuant to-
 - (i) an attachment; or
 - (ii) surrender of property in terms of section 127; and
- (a) the net proceeds of sale were insufficient to discharge all the consumer’s financial obligations under the agreement”.

Section 130(2) applies to the remaining obligation in terms of a credit agreement. This section further applies to specific types of credit agreement namely secured loan, lease and instalment sale agreement.

¹⁰⁹ The court in *Standard Bank of South Africa v Rockhill* 2010 5 SA 252 (GSI) 257 held that since the NCA has its primary purpose to protect the consumers and sets a minimum standard of protection, this does not preclude parties from incorporating into their agreement additional protection for the consumer in particular an agreement for an extended period by which notices are deemed to have been received. The court held that this is not repulsive to the general purpose of the NCA.

Section 130(3) states that:

“despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if it is satisfied that in a case of proceedings to which sections 127,129 or 130 apply, the procedure required by those section have been complied with and there is no matter arising out of that credit agreement and pending before the tribunal, that could result in an order affecting the issues to be determined by the court. The court must be satisfied that the credit provider has not approached the court during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction or the consumer having:

- (i) surrendered property to the credit provider, and before that property has been sold;
- (ii) agreed to a proposal made in terms of section 129(1)(a) and acted in good faith in fulfilment of that agreement
- (iii) complied with an agreed plan as contemplated in section 129(1)(a); or
- (iv) brought the payments under the credit agreement up to date, as contemplated in section 129(1)(a)”.

The court may determine the matter firstly if it is satisfied that certain section of the NCA have been complied with, secondly there is no matter arising under that credit agreement and pending before the tribunal and thirdly the matter is not already pending before *inter alia*, a debt counsellor or alternative dispute resolution agent. If the court determines that the credit agreement is subject to a pending debt review, it may adjourn the matter, pending a final determination of the debt proceedings or order the debt counsellor to report directly to the court. The court can also order the debt counsellor to discontinue the debt review proceedings and make an order in terms of section 85(b).¹¹⁰ The court will dismiss the matter if it determines that the credit agreement is suspended or subject to a debt re-arrangement order or agreement and that the consumer has complied with such order or arrangement.¹¹¹

2.10 Conclusion

It is evident from this chapter that the NCA accommodates all the people, both rich and poor. It is notable that the NCA contains provisions that are aimed at the protection of consumers who are over-indebted and further contains measures that are aimed at preventing reckless credit granting. This is an improvement from the repealed Usury Act and Credit Agreements Act and consumers are protected against unscrupulous credit grantors who abuses their power to the detriment of consumers. Credit providers who allowed the consumers to enter into the credit agreement regardless of the credit worthiness of the consumer are now

¹¹⁰ S 130(4)(c).

¹¹¹ S 130(4)(e).

obliged to comply with mandatory financial assessment to determine whether the consumer afford the credit. Consumers on the other side will feel the practical effect of the NCA should they not afford the credit after the assessment. Failure to comply the financial assessment prior to entering into credit agreement can result in the credit agreement constituting reckless one. As indicated above, the credit provider has the recourse in the event of non-payment of credit agreement against the consumer. It is also evident that a credit provider who has not delivered the necessary section 129(1) notice is precluded from proceeding with any legal action. Therefore compliance with the necessary section 129(1) notice is vital.

CHAPTER 3

DEBT RELIEF MEASURES BY THE INSOLVENCY ACT: SEQUESTRATION PROCESS

3.1 Introduction

The sequestration process in terms of the insolvency Act may provide debt relief to individual debtors. When a person is insolvent we do not necessarily mean that he is unable to pay his debts but rather his liabilities exceed his assets.¹¹² The legal test for insolvency¹¹³ is whether the debtor's liabilities, fairly estimated, exceed his assets, fairly valued.¹¹⁴ A debtor¹¹⁵ can be actual insolvent or commercial insolvent. The former refers to the situation where a debtor's liability exceed his assets, whereas the latter refers to the situation where a debtor is unable to pay his debts due to a cash flow or other problem, but his assets exceed his liabilities.¹¹⁶

It should be noted that it is not a debtor who is sequestrated but his estate.¹¹⁷ Legally a person is insolvent pursuant to a sequestration order granted by the court.¹¹⁸ In other words a sequestration order is a formal declaration granted by the court that a debtor is insolvent.¹¹⁹ A debtor's estate may be sequestrated by way of voluntary surrender¹²⁰ of his estate, while it is also possible for a creditor to sequestrate a debtor's estate by way of compulsory sequestration.¹²¹ The process of compulsory sequestration is often used as debt relief measure in form of a so-called friendly sequestration. In a friendly sequestration the debtor will arrange with a friend or a family member to whom he owes a debt that he will commit an act of insolvency in terms of section 8(g), that is, where the debtor gives written notice to a creditor that he is unable to pay all or any of his debts.¹²²

¹¹² Smith *et al* *Law of insolvency* (1988) 1.

¹¹³ The word insolvency is derived from the latin word *insolutus* which means inability to pay.

¹¹⁴ *Venter v Volskas Ltd* 1973 3 SA 175 (T) 179; *Ex parte Harmse* 2005 1 SA 323 (N) 325.

¹¹⁵ A "debtor" is defined in s 2 of the Insolvency Act as "a person or a partnership or the estate of a person or partnership which is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to companies".

¹¹⁶ Fourie "Feitelike insolvensie en handelsinsolvensie" 1980 *THRHR* 298 301.

¹¹⁷ *Land-en landboubank van Suid Afrika v Joubert NO* 1982 3 SA 643 (C) 648.

¹¹⁸ Mars 1. A sequestration application can only be heard in the High Court. S 2 states that the court means the Provincial or local division of the Supreme Court which has the jurisdiction in that matter. A Magistrate's Court has the jurisdiction in regard to the offences committed under Act.

¹¹⁹ S 2 defines an "insolvent" as "a debtor whose estate is under sequestration and includes such a debtor before the sequestration of his estate, according to the context".

¹²⁰ Ss 3-7.

¹²¹ Ss 9-12.

¹²² See in general Smith 58. See also Evans and Haskins 246.

Debtors sometimes rely on sequestration proceedings to force a discharge of their debts on their creditors.¹²³ The reason why some debtors rely on the sequestration process to force a discharge of their debts on their creditors¹²⁴ is that sequestration allows the debtor to eventually be rehabilitated.¹²⁵ Rehabilitation has the effect of discharging all pre-sequestration debts and further relieving the debtor of every disability resulting from sequestration.¹²⁶ This chapter will explain the sequestration process which could either be an application for voluntary surrender or an application for compulsory sequestration, followed by rehabilitation.

3.2 Sequestration process

3.2.1 The purpose of sequestration

The main objective of the sequestration process is to provide a collective debt collecting process that will ensure an orderly and fair distribution of a debtor's assets in circumstances where his assets are insufficient to meet the claims of all his creditors.¹²⁷ The sequestration of a debtor's estate results in a *concursum creditorum* literally "a coming together of creditors". The *Locus classicus* with regard to the concept *concursum creditorum* is *Walker v Syfret*¹²⁸ where Innes J (as then he was) stated that:

"the object of the [Insolvency Act] is to ensure a due distribution of assets among creditors in the order of their preference... The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order."

It is not a primary object of the Insolvency Act to grant debt relief to a debtors.¹²⁹ The primary object is that the sequestration should be to the advantage of creditors, not one creditor or some creditors, but the general body of creditors.¹³⁰ In *R v Meer*¹³¹ the court remarked:

¹²³ Boraine and Roestoff "Vriendskaplike sekwestrasies - 'N produk van verouderde beginsels?" 1993 *De Jure* 229; Roestoff and Jacobs "Statutere akkoord voor likwidatie: 'N toereikende skuldenaarremedie?" 1997 *De Jure* 89; Loubser "Ensuring advantage to everyone in a modern South African insolvency law" 1997 *SA Merc LJ* 325.

¹²⁴ See Boraine and Roestoff 6.

¹²⁵ S 129.

¹²⁶ *Ibid.*

¹²⁷ Mars 30.

¹²⁸ 1911 AD 141 166.

¹²⁹ Mars 3.

¹³⁰ Smith 4.

“the Insolvency Act was passed for the benefit of creditors and not the relief of harassed debtors”.

In *Ex Parte Pillay*¹³² the court also said the following:

“the procedure of voluntary surrender was primarily designed for the benefit of creditors, and not for the relief of harassed debtors”.

3.2.2 Voluntary surrender

In terms of section 3(1), a debtor himself or his agent¹³³ may apply for acceptance of the surrender of the debtor’s estates. The application can also be brought by a *curator bonis* of a person who is incapable of managing his own estate, or even the executor of a deceased estate. Section 17(4)(a) of the Matrimonial Property Act¹³⁴ provides that where the parties are married in community of property, both spouses must apply for the voluntary surrender because they are regarded in law as equal managers of their joint estate.

The applicant for voluntary surrender must show that:¹³⁵

- (a) All the formalities prescribed in the section 4 have been complied with.
- (b) The debtor is factually insolvent.
- (c) There are sufficient assets in the free residue of his estate to defray all the costs of the sequestration.
- (d) It will be to the advantage of his creditors if his estate is sequestrated.

3.2.2.1 Preliminary formalities to be complied with

3.2.2.1.1 Notice of intention to surrender

Prior to presenting the application, the debtor must publish a notice of intention to surrender of his estate in the Government Gazette and in any of newspapers circulating in the district in which the debtor resides, or if the debtor is a trader, in the district in which his principal place of business is situated.¹³⁶ Such notice must correspond substantially with Form A of the first schedule to the Act. The notice must *inter alia* describe the debtor, state the day on

¹³¹ 1957 3 SA 614 (N) 619.

¹³² 1955 2 SA 309 (N) 311.

¹³³ If an agent applies, he must be expressly authorised to do so - *Ex parte Brown* 1951 (4) SA 246 (N).

¹³⁴ 88 of 1984.

¹³⁵ S 6.

¹³⁶ It was held in *Ex Parte Goldman* 1930 WLD 158, that a weekly journal devoted to Jewish interests and printed mostly in Yiddish and using Hebrew character, is therefore not a newspaper in terms of the a statute.

which application will be made to court and the period during which the debtor's statement of affairs will lie for inspection. The purpose of the notice is to ensure that creditors know of the intention to apply should they wish to oppose the application. The notice shall be published not more than 30 days and not less than 14 days before the date of the hearing.¹³⁷ The tearsheet or cuttings of the newspaper and Gazette are attached on the Affidavit as proof of publication of the surrender. Where the applicant advertise a date which falls upon a Saturday, Sunday or even public holiday, the intended surrender will have to be advertised again. However if the notice is advertised on the date which is a court day but not for motion court, such application will be called in court and be postponed to another motion court day.¹³⁸ The notice of surrender lapses if the court does not accept the surrender within 14 days from the date specified in the notice as the date upon which application will be made for the acceptance of the surrender of the estate.¹³⁹ The notice cannot be withdrawn without the consent of the Master¹⁴⁰ unless the Master is satisfied that it was published in *good faith* and good cause exists for its withdrawal.¹⁴¹

Section 5 states that all sales in execution are stayed. The master may appoint the *curator bonis* and take interim control of the estate.¹⁴² Failure to apply for voluntary surrender once advertised to finality or failure to lodge a statement of affairs has the effect that the debtor commits an act of insolvency in terms of section 8(f). Within 7 days from the date of publication the debtor must deliver the notice of surrender to all known addresses of possible creditors.¹⁴³ The debtor must further furnish a copy of the notice by post to every registered trade union that to the applicants' knowledge represents any of the debtor's employees¹⁴⁴ and to the South African Revenue service.¹⁴⁵ He must also furnish a copy of the notice to the employees themselves by affixing it to any notice board to which the employees have access inside the debtor's premises.¹⁴⁶ A debtor must prepare in duplicate the statement of

¹³⁷ S 4(1). The date of advertisement is excluded and the date of application is included. In *Ex Parte Oosthuysen* 1995 2 SA 694 (T) the court per Nugent J with whom Eloff JP and Streicher J (as he then was) concurred, refused to entertain an application for voluntary surrender where the notice of surrender was published 39 days before the court date. In *Ex Parte Harmse* 2005 1 SA 323 (N) the court per Magid J with whom Tshabalala JP and Van Der Reyden J concurred, criticised *Oosthuysen* and did not follow that judgment. The court found that non compliance is a factor to be taken into account in exercising its discretion. See also Roestoff and Burdette "Premature publication of a notice of surrender of an insolvent estate – is it fatal to the application?" 2005 *THRHR* 681.

¹³⁸ Mars 52.

¹³⁹ S 6(2).

¹⁴⁰ S 7(1).

¹⁴¹ S 7(2).

¹⁴² S 5(2).

¹⁴³ S 4(2)(a).

¹⁴⁴ S 4(2)(b)(i).

¹⁴⁵ S 4(2)(b)(iii).

¹⁴⁶ S 4(2)(b)(ii).

affairs in accordance with Form B of the Schedule to the Act. Two copies must lie for inspection for 14 days at the Master's office or in a Magistrate's court if the debtor resides in or carries on a business in an area where there is no master for that district. Section 4(3) states that the notice must be sent to provincial Master's office and one to the Magistrate's office of the specific district where no local Master's office exist. After 14 days the Master or Magistrate (if a copy has lain for inspection at the Magistrate's office) will issue the certificate stating whether the statement of affairs has duly lain for inspection as advertised.

3.2.2.2 Proof that the applicant is actually insolvent

The debtor must be insolvent. The test is whether the debtor's liabilities, fairly estimated, exceed his assets, fairly valued.¹⁴⁷ Proof of inability to pay debts merely constitute a *prima facie* case which shift the onus of proof to the debtor to prove that his assets exceed his liabilities".¹⁴⁸ The extent of the debtor's asset and liabilities is usually determined by reference to the statement of affairs, but the court is not bound by the valuations in the statement and may make a finding of insolvency even where the statement (or other evidence adduced by the debtor) indicates that his assets exceed his liabilities.¹⁴⁹ Facts must given to show that the applicant has by misfortune and without fraud or dishonesty on his part became insolvent, since the court will not come to the assistance of an applicant whose conduct is shown to have been dishonest or reprehensible.¹⁵⁰

3.2.2.3 Sufficient residue to cover sequestration costs

Section 2 states that free residue means "that portion of the estate which is not subject to any right of preference by reason of any special mortgage, legal hypothec, pledge or right of retention". A debtor must show that he or she owns sufficient realisable assets to defray the costs of sequestration from the free residue. In Gauteng and the Cape,¹⁵¹ the value of the free residue must be at least R20 000 to pay the costs of sequestration, however this

¹⁴⁷ *Venter supra* 179; *Harmse supra* 325.

¹⁴⁸ *Mars* 2.

¹⁴⁹ *Ex Parte Van den Berg* 1962 4 SA 402 (O) 404.

¹⁵⁰ Legal Education And Development (LEAD) *Insolvency law Practice Manual* (LEAD) 2010 21, 42 Notes compiled by E Le Roux, Wevind & Wevind, Pretoria. See also the decision of *Ex Parte Anthony & another* 2000 4 SA 116 (CPD), in which the full bench of the CPD held that the usual practice of estimating the costs of sequestration to be in the region of R10 000 was not sufficient given that the costs could often exceed R10 000.

¹⁵¹ *Insolvency law Practice Manual supra* 22.

amount is adjusted from time to time. The costs of sequestration include the costs of application, and also the general costs of the administration.¹⁵²

3.2.2.4 Proof that sequestration will be to the advantage of creditors

The court must be satisfied that the sequestration will be to the advantage of creditors should the debtors' estate be sequestrated. The onus of proving advantage to creditor in a voluntary surrender application is more strenuous than the requirement to show reason to believe that there will be advantage in a compulsory sequestration.¹⁵³ Creditors in this regard mean all the creditors.¹⁵⁴ The court generally demand a dividend of not less than 10c in the rand for concurrent creditors before an advantage to creditors has been established unless there are special circumstances which would make the sequestration advantageous to creditors, for example, saving of ongoing expenses in respect of levies in a sectional title property".¹⁵⁵ Roestoff and Boraine states that advantage to creditors can be seen as the gateway to bankruptchy regime.¹⁵⁶ They state that:

"if a debtor is insolvent but he or she cannot put up the funds to apply for the proper relief in terms of the Insolvency Act or cannot proof advantage to creditors, a sequestration order that would eventually lead to discharge of debt, would be out of reach of such a debtor".¹⁵⁷

3.2.2.5 Application

The notice of motion¹⁵⁸ must be supported by a founding affidavit and must contain the following information:¹⁵⁹

¹⁵² S 97.

¹⁵³ See *Ex Parte Steenkamp* 1996 3 SA 822 (W).

¹⁵⁴ *In re Provincial Trading Co* 1921 CPD 781. In *Stainer v Estate Bukes* 1933 OPD 86 89 De Villiers JP illustrated this principle with the following example: "Proceedings are taken to sequester the debtor's estate compulsorily, and the question arises whether it will be to the advantage of creditors to sequester. It is shown to the court that a sequestration order will benefit the large creditor to the extent of some £200, but will damnify the two small creditors to the extent of some £10. Now it seems that in such a case it would be 'to the advantage of creditors' to sequester, for the body of creditors as a whole will benefit by the sequestration". See also Mars 75.

¹⁵⁵ *Ibid.*

¹⁵⁶ Boraine and Roestoff 4.

¹⁵⁷ *Ibid.*

¹⁵⁸ Regulated by Rule 6 of the High Court Rules known as application proceedings. This is an *Ex Parte* application and therefore Form 2 of the Uniform Rules of Court must be used.

¹⁵⁹ Smith 25.

- (a) The applicant's personal information (full names, ID number, occupation, name of employer, if he is married details in respect of the marriage regime and spouses name and address);
- (b) An allegation that the applicant has by misfortune and without fraud or dishonestly on his part become and is insolvent and that he wishes to surrender his estate for the benefit of his creditors.¹⁶⁰
- (c) An averment of compliance with all preliminary formalities;¹⁶¹
- (d) An allegation, supported by a statement of the insolvent's affairs that the debtor is in fact insolvent;
- (e) The causes of the applicant's insolvency;
- (f) An allegation that there is sufficient free residue to meet the cost of sequestration;
- (g) An averment that the sequestration will be to the advantage of creditors;
- (h) A statement of the amount of the applicant's salary or other income.

3.2.2.6 Court's discretion

If the court is satisfied that the debtor had satisfied all the requirements stated above, it may sequester the debtor's estate. However the court still retains its discretion to dismiss the application or postpone it.

3.2.3 Compulsory sequestration

This is the second way in which a debtor's estate may be sequestered. Compulsory sequestration is instituted by way of notice of motion also known as application proceedings supported by an affidavit. It is regulated by rule 6 of the High Court Rules and the long notice of motion namely Form 2A of the Uniform Rules of Court is used.

An applicant needs to prove the following in an application for compulsory sequestration:¹⁶²

- (a) That all the preliminary formalities have been complied with.
- (b) That he has established a claim which entitles him to apply for compulsory sequestration.
- (c) That the respondent debtor is actually insolvent, or the debtor has committed an act of

¹⁶⁰ There is no provision in the Act requiring such allegation to be mentioned. However the court will not come to assistance of an applicant whose conduct is shown to have been dishonest - *Ex Parte Swart* 1935 NP 432. Smith states that "it is obvious that there should be such allegation", Smith 25.

¹⁶¹ This is done by attaching documentary proof to the affidavit.

¹⁶² Ss 9-12.

insolvency.

- (d) That there is reason to believe that it will be to the advantage of creditors if the debtor's estate is sequestrated.

3.2.3.1 Preliminary formalities

3.2.31.1 Security for costs

The sequestrating creditor is required before lodging of an application for compulsory sequestration to deposit with the Master security for payment of all fees and charges necessary for the prosecution of all sequestration proceedings until the appointment of trustee, if no trustee is appointed, of all fees and charges necessary for the discharge of the estate from sequestration.¹⁶³ The Master, upon the receipt of the security will issue the certificate confirming that the security has been given. The certificate must be issued not more than 10 days before the application for sequestration and has to be filed with the Registrar of High Court or served with the respondent, but it must be available at the hearing.¹⁶⁴

3.2.3.1.2 Copy of papers to debtor and other parties

Section 9(4A)(a)(iv) requires the applicant to furnish a copy of the application to the debtor. Prior to this, the Insolvency Act did not require the debtor to be served with the notice. The court in the case of urgency may dispense with the necessity of furnishing the copy to the respondent debtor, where there is possibility of irreparable loss to the applicant should the debtor be furnished and forewarned of the impending application.¹⁶⁵ Section 9(4A)(a)(i)-(iii) further provides that when an application is presented to the court, the applicant is required to furnish a copy to every registered trade union that, as far as he can reasonably ascertain, representing any of the debtor's employees themselves and to the South African Revenue Service.¹⁶⁶

¹⁶³ S 9(3)(b).

¹⁶⁴ *Court v Standard Bank of South Africa Ltd v Bester* NO 1995 3 SA 123 (A).

¹⁶⁵ *Fisher v Pujol* 1972 2 SA 496 (T), Rule 6(2) read with Rule 6(5)(a) of the Uniform Rules of court.

¹⁶⁶ See *Standard Bank of South Africa Ltd v Sewpersadh* 2005 4 SA 148 (C).

3.2.3.2 What the applicant must prove

The sequestrating creditor has to prove that he has a liquidated claim of not less than R100, or where two or more creditors apply they must prove that they have a liquidated claim in the aggregate of not less than R200.¹⁶⁷ Joint creditors in respect of one claim of not less than R100 can apply for the sequestration of their debtor's estate.¹⁶⁸ The creditors claim must be liquidated. The liquidated claim means a money claim, the amount of which is fixed and determined by agreement, judgment or otherwise.¹⁶⁹ If a creditor relies on claim for R100 or more, he is confined to that claim. However if the respondent, in opposing the application alleges that the claim is less than the required amount and this allegation is uncontroverted by the applicant, he will not be entitled to an order for sequestration.¹⁷⁰

3.2.3.3 Actual insolvency and acts of insolvency

The creditor can elect to rely on the actual insolvency or any act of insolvency committed by a debtor in terms of section 8. The legislature has designated certain behaviour of or actions by a debtor as acts of insolvency and if the sequestrating creditor can prove to the satisfaction of the court that the debtor has committed one of these acts of insolvency, then it will not be necessary to prove the actual insolvency.¹⁷¹ The act of insolvency ranges from subsection 8(a)-(g). A practical problem often exist where a creditor has to prove that the debtor is actually insolvent. The creditor will often have to rely on indirect evidence, such as dishonouring of a cheque or the debtor's request for an extension of time to pay.¹⁷² Factual insolvency may be established, directly or indirectly. It will be established directly when evidence of the debtor's liabilities and the market value of his assets are provided or indirectly by evidence of facts and circumstances from which the inference of insolvency is fairly and properly deducible.¹⁷³

¹⁶⁷ S 9(1).

¹⁶⁸ *Simelane v Painter* 1942 TPD 306.

¹⁶⁹ *Kruger v Van Vuurens Executors* SC 162 168; Paterson *Eckard's Principles of Civil Procedure in the Magistrate's Courts* (2005) 123-125; Harms *Civil Procedure in the Superior Courts* (2003) 129-132. See also *Ex Parte Berson* 1938 WLD 107 115; *Stephan v Khan* 1917 CPD 24; *Wood v Bastin* 1923 CPD.

¹⁷⁰ *Moodley v Cassim* 1953 4 SA 516 (N) 517.

¹⁷¹ *De Villiers NO v Maursen Properties (Pty) Ltd* 1983 4 SA 670 (T) 676.

¹⁷² Nagel 413.

¹⁷³ *Absa Bank Ltd v Rhebokskloof (Pty) Ltd & Others* 1993 4 SA 436 (C) 443.

3.2.3.3.1 Acts of insolvency

3.2.3.3.1.1 Absent from Republic or dwelling.

In terms of section 8(a) a debtor is absent from South Africa or his or her home with the purpose of avoiding or delaying payments of debts. The applicant need to prove absent or delay of payment of debts.¹⁷⁴ The intention of the debtor to evade or delay payment of his debts can be established, *inter alia* by showing that the debtor has taken a large sum of money with him; that he was disposing of his assets with the object of realising money with which to get away.¹⁷⁵

3.2.3.3.1.2 Failure to satisfy judgment

Section 8(b) creates two separate acts of insolvency where a warrant of execution is presented to the debtor by sheriff and the debtor fails to satisfy it or to point out sufficient disposable property to satisfy it. The second act is where the sheriff or messenger without presenting the writ to the debtor fails to find sufficient disposable property to satisfy the judgment and state this fact in his return.¹⁷⁶ It is not sufficient for the debtor simply fail to satisfy the judgment debt. The debtor must also fail to indicate sufficient disposable property to satisfy the writ. The second act of insolvency can only be committed where personal service of the writ on the debtor is not possible, for example only when the first act cannot be established can the second one be committed.¹⁷⁷

3.2.3.3.1.3 Disposition prejudicing creditors or preferring one creditor

Section 8(c) also envisage two situations: an actual disposition of property and an attempted disposition of property. The intention of the debtor is not relevant here as one merely looks at the effect, that is, the amount of disposition. The effect is of great important and consideration in this regard. Thus, where a debtor in embarrassed circumstances sells property at very much less than its appraised value and creditors are thereby prejudice, he commit this act of insolvency.¹⁷⁸

¹⁷⁴ *Barclays Bank v Hansen* 1927 OPD 206 207; *Estate Salzmann v Van Royen* 1944 OPD 1 9. See also *Bishop v Baker* 1962 2 SA 679 (N); *Abell v Strauss* 1973 2 SA 611 (W).

¹⁷⁵ *Savage & Son v Flowers* 18 EDC 45. See also Mars 82.

¹⁷⁶ See *Lorac (Pty) Ltd v Musa* 1991 1 SA 152 (ZHC) for requirements of the *nulla bona* return.

¹⁷⁷ *Beira v Raphaely-Weiner & another* 1997 4 SA 332 (SCA) 338.

¹⁷⁸ *Estate De Jager v Van Niekerk* 1918-23 GWL 73 78.

3.2.3.3.1.4 Removal of property with intent to prejudice or prefer

Section 8(d) differs from the preceding one in that an actual disposition of property is not required. The mere removal is sufficient and the intention which is of the utmost important to determine whether or not an act of insolvency was committed. The outcome of the removal of the property is therefore not the determining factor. The test is a subjective one.¹⁷⁹

3.2.3.3.1.5 Offer of arrangement

In terms of section 8(e) a debtor will be committing an act of insolvency if he makes an offer to enter into an arrangement with any of the creditors to release him wholly or partially from his debts. Requiring for an extension of time within which to pay in full does not constitute an act of insolvency within the meaning of section 8(e).¹⁸⁰ However if such request is made in writing it might constitute an act of insolvency in terms of section 8(g).¹⁸¹ In order to constitute an act of insolvency, it must be clear from the offer that the debtor is unable to pay his entire debts.¹⁸²

3.2.3.3.1.6 Failure to apply for surrender

In terms of section 8(f), a debtor commits an act of insolvency if after publication of a notice of surrender, he fails to either lodge a statement of affairs with the Master; or lodges a statement which is incorrect or incomplete in any material respect or fails to apply for acceptance of surrender of his estate on the advertised date. In each case, the notice of surrender published by a debtor must not have elapsed or been withdrawn.¹⁸³

3.2.3.3.1.7 Notice of inability to pay

In terms of section 8(g) a debtor is committing an act of insolvency when he informs the creditor in writing that he or she is unable to pay his or her debts. The notice given by the

¹⁷⁹ *De Villiers No v Maursen Properties (Pty) Ltd* 1983 4 SA 670 (T) 676.

¹⁸⁰ *Mackay v Cahi* 1962 4 SA 193 (O).

¹⁸¹ See *Standard Bank of South Africa Ltd v Court* 1993 3 286 CPD.

¹⁸² *Laeveldse Kooperasie Bpk v Joubert* 1980 SA 1117 (T) 1126.

¹⁸³ Notice of surrender lapses 14 days after the date on which the application was set down for s 6(2).

debtor must be in writing.¹⁸⁴ Such written notice must be given formally and deliberately.¹⁸⁵ An oral notice will not constitute this act of insolvency.¹⁸⁶

3.2.3.3.1.8 Inability to pay debts after notice of transfer of business

In terms of section 8(h), if the debtor is a trader and does not give notice in terms of section 34(1) of the Act that he or she is selling the business and if he is thereafter unable to pay all the debts, he is committing an act of insolvency. Section 34(2) provides that as soon as the notice is published in terms of section 34(1), every liquidated liability of the trader in connection with the business, which would be due at some future date shall fall due forthwith, if the creditor concerned demands payment.

3.2.3.4 Reason to believe that sequestration will be to advantage of creditors

The sequestrating creditor bears the onus of proving that the sequestration will be to the advantage of creditors, even where it is clear that the debtor has committed an act of insolvency.¹⁸⁷ The onus is less stringent than in the case of voluntary surrender applications. This is because of the wording of section 10(c). Voluntary surrender requires proof of advantage for creditors, whereas compulsory sequestration requires only a reasonable prospect that it will be to the advantage of creditors if the debtor's estate is sequestrated. The burden will be heavier if there is only one creditor and he has to prove why sequestration will be more advantageous than execution.¹⁸⁸

In *Peyke v Nathoo*,¹⁸⁹ it was held that advantage of creditors does not mean the advantage of all creditors nor the advantage of one creditor, but the advantage of general body of the creditors.¹⁹⁰ Although some courts have set the bar higher, the courts generally require proof

¹⁸⁴ *Patel v Sunday* 1936 CPD 466 469.

¹⁸⁵ *Union Government v Milne* 1948 3 SA 1153 (T). See *Absa Bank v Chopdat* 2000 2 SA 1088 (WLD) where it was ruled that an act of insolvency in terms of s 8(g) is admissible even if is marked "without prejudice".

¹⁸⁶ *Patel v Sunday* 1936 CPD 466 469.

¹⁸⁷ *Wilkins v Pieterse* 1937 CPD 165.

¹⁸⁸ *Garelee v Dhanmanta Holdings* 1978 1 SA 1066 (N); *Absa Bank Ltd v De Klerk* 1999 4 SA 835 (SE).

¹⁸⁹ 1929 50 NLR 178 185.

¹⁹⁰ See also *Lotzof v Raubenheimer* 1959 1 SA 90 (O) 94, where the court stated that the expression "to the advantage of creditors" in s 12(1)(c) means the advantage of all the creditors or at least the general body of creditors.

that there is good reason to believe that there will be, a free residue of not less than 10 cents in the Rand.¹⁹¹

3.2.3.5 Application

Care should be taken not to exclude or conceal any relevant facts. The applicant's affidavit must contain the following information:¹⁹²

- (a) The personal information of the sequestrating creditor (full names, occupation and addresses) and the fact that he has *locus standi* to apply
- (b) The personal information of the debtor (full names, ID Number or date of birth, occupation, name of employer, details of marriage regime & spouses name, address);¹⁹³
- (c) The amount, cause and nature of the applicant claim and statement as to whether the claim is secured or not.
- (d) A statement to the effect that due security has been lodged with the Master of the High court;
- (e) The act of insolvency alleged to have been committed by the debtor or his or her *de facto* insolvent;¹⁹⁴
- (f) An allegation that the sequestration of debtors estate will be to the advantage of creditors;
- (g) Evidence of the compliance with the preliminary formalities, example security has been lodged.

3.2.3.6 Provisional sequestration order

The sequestrating creditor must approach the court twice. Firstly for the provisional order of sequestration and secondly for the final order of sequestration. The court cannot grant a final order of sequestration unless a provisional order of sequestration has been granted and therefore this provisional order of sequestration cannot be dispensed with.¹⁹⁵ The court must be satisfied that there is *prima facie* proof of the aforementioned facts. The court must

¹⁹¹ Mars 75, 139.

¹⁹² Smith 54-56. S 9(3).

¹⁹³ S 17(4)(a) of Matrimonial Property Act 88 of 1984.

¹⁹⁴ The applicant must also state the facts which give rise to the alleged act of insolvency (*Johnstone v Brewick* 1906 27 NLR 182.

¹⁹⁵ *Provincial Building Society of South Africa v Du Bois* 1966 3 SA 76 (W).

compare the position of creditors if there is no sequestration together with the position, if the debtor's estate were sequestrated when it has to decide whether or not there is *prima facie* reason to believe that the sequestration will be to the advantage of creditors.¹⁹⁶ When the court grant the provisional order, it will simultaneously issue a *rule nisi* calling upon the debtor to show cause as to why the provisional order of sequestration should not be made final.¹⁹⁷

3.2.3.7 Final sequestration order

The sequestrating creditor bears the onus to prove the requirements stated above on the return day before the court could grant the final sequestration order.¹⁹⁸ The degree of proof required here is higher than that required for a provisional order of sequestration.¹⁹⁹ The court can also dismiss application for sequestration, set aside or postpone it for further proof to be furnished.²⁰⁰

3.2.4 Friendly sequestration

The degree of proof required regarding the advantage of creditors for voluntary surrender applications is more stringent than in case of compulsory sequestration.²⁰¹ Secondly the process of voluntary surrender is characterised by an array of technical formalities that have to be complied with.²⁰² For this reasons a debtor normally arrange with a friend to have his estate sequestrated in an amicable way by way of a so-called friendly sequestration.²⁰³

Friendly sequestration applications are based on an act of insolvency in terms of section 8(g). A debtor commits an act of insolvency in terms of section 8(g) if he or she gives notice in writing to any of his or her creditors that he or she is unable to pay all or any of his or her debts. Therefore a creditor will rely on this act of insolvency in order to institute compulsory sequestration proceedings against the debtor. The word "friendly sequestration" carries the implication that the main object of the sequestration is to come to the assistance of the

¹⁹⁶ *O'Flaherty & Co v Meiklejohn* 1940 NLR 371.

¹⁹⁷ S 11(1).

¹⁹⁸ S 12(1).

¹⁹⁹ *Trust Wholesalers and Wollens (Pty) Ltd v Mackan* 1954 2 SA 109 (N) 113.

²⁰⁰ S 12(2).

²⁰¹ Compare the wording of s 6(1) with that of s 10(c) and 12(1)(c).

²⁰² See Boraine and Roestoff "Developments in American consumer bankruptcy law: Lessons for South Africa" (part 1) *Obiter* 241 261.

²⁰³ Sharrock *et al Hockly's Insolvency Law* (2007) 40.

debtor.²⁰⁴ Friendly sequestrations applications are used in order to grant the debtor relief from his debts. Where a friendly sequestration application is brought by a party who does not appear to be acting at arm's length, the court should pay special attention to the interests of creditors.²⁰⁵ The fact that a special relationship exist between the debtor and creditor should not prevent the granting of the sequestration order provided that all the requirements prescribed for compulsory sequestration are genuinely satisfied.²⁰⁶

The difference between friendly sequestrations and arm's length transactions is that in case of friendly sequestration the creditor should be able to furnish full details about the debtor's financial position so as to enable the court to assess whether there will be an advantage to creditors. Whereas in arm's length transaction the sequestrating creditor does not have to set out the details and intensity of averments required in friendly sequestrations. It will be sufficient if the sequestrating creditor in an overall view on papers can show that there is reasonable grounds for concluding that upon an investigation by way of an inquiry in terms of section 65 a trustee may be able to discover assets which might be attached and sold and the proceeds disposed for distribution among creditors.²⁰⁷ In *Brewitt*²⁰⁸ the court stated that the difference between "friendly sequestrations" and "arms length" is that in case of friendly sequestration details of causes of action in respect of the original indebtedness should be required and in case of arm's length transaction it was not required that a sequestrating creditor provide in his founding Affidavit the details and intensity of averments required in the case of friendly sequestration applications.

3.2.4.1 The court's duty in friendly sequestration

The court must take a critical view of the friendly sequestration application as there is "considerable potential for collusion and abuse".²⁰⁹ The court has a duty to scrutinise the application of friendly sequestration with great care to ascertain advantage for creditors and to prevent prejudice to them where a friendly relationship or family relationship exists between the debtor and creditor.²¹⁰ It has been held that if a creditor brings the application, not only with the motive of assisting the debtor but also with the object of sharing any dividends, which may become payable because of the sequestration, his application cannot

²⁰⁴ Smith 75.

²⁰⁵ *Klemrock (Pty) Ltd v De Klerk* 1973 3 SA 925 (W) 927; *Epstein v Epstein* 1987 4 SA 606 (C) 610 and *Campher v Campher* 1978 3 SA 797 (O) 798.

²⁰⁶ *Jhatam v Jhatam* 1958 4 SA 36 (N) 40.

²⁰⁷ *Dunlop Tyres (Pty) Ltd v Brewitt* 1999 2 SA 580 (WLD) 583.

²⁰⁸ *Ibid.*

²⁰⁹ Mars 98; Sharrock 41.

²¹⁰ *Epstein supra*; *Ex Parte Steenkamp supra*.

be regarded as collusive.²¹¹ In *Esterhuizen v Swanepoel and Sixteen Other cases*,²¹² it was stated that the court must exercise its discretion to ensure that the procedure is not abused and a friendly sequestrating applicant must place sufficient evidence before it to satisfy it, of the veracity of the claim.

3.2.4.2 Abuse of friendly sequestration

Friendly sequestration applications are being abused. An example of such abuse of the process of court occurred in *R v Meer & Others*.²¹³ In *casu* the debtor committed an act of insolvency under section 8(g). The court found that the application for friendly sequestration where brought solely to assist the debtor as the creditor had no intention of pursuing such investigation, and further no intention to obtain a final order of sequestration. The court must prevent the abuse of friendly sequestration application especially if its hidden motive could lead to the abuse of the court process. The court will not grant an order of application where the true intention of the parties is to achieve a sequestration for some ulterior motive even where the case for sequestration has been established.²¹⁴ This can happen where provisional sequestration is sought with the sole aim of prolonging the *rule nisi* through repeated extensions, so placing an object in the way of a judgment or a sale in execution”.²¹⁵

*Mthimkhulu v Rampersad*²¹⁶ is an example of the abuse of the process of court in friendly sequestration. In this case the applicant applied for the sequestration of the first respondent's estate alleging that the first respondent was indebted to her in the sum of R6000. The applicant stated in her affidavit that the first respondent had made no payments in respect of the acknowledgment of debt which she signed. On 1 April 2000 the respondent sent a letter to the applicant stating she was unable to repay the money. It was not stated what the purpose of the loan was. BOE Bank Limited (intervening creditor) applied for leave to intervene in the matter and disclosed that it had foreclosed on a mortgage bond which it held over the first respondent's property and attached the property which was initially to be sold in execution on 21 January 2000. On 20 December 1999, another party by way of friendly sequestration applied for and was granted a provisional order of sequestration against the first respondent. BOE successfully applied for the discharge of the

²¹¹ *Yenson & Co v Garlick* 1926 WLD 53 57.

²¹² 2004 4 SA 89 (W).

²¹³ *Meer supra* 614.

²¹⁴ Evans "Friendly sequestrations, the abuse of the process of court, and possible solutions for overburdened debtors" 2001 13 SA *Merc LJ* 492.

²¹⁵ *Ibid.*

²¹⁶ [2000] 3 All SA 512 (N).

provisional order and arranged another date for the sale of the property. The applicant then filed the papers in the present application. The court scrutinise the application. It dismissed the application and held that the case illustrated the manner in which the process of friendly sequestrations was being abused.

3.3 Rehabilitation

The Insolvency Act provides that an insolvent whose estate has been sequestrated may be rehabilitated. Rehabilitation ends insolvency. It enables the insolvent to make a “fresh start”. Rehabilitation has the effect of discharging all pre-sequestration and of relieving the debtor of every disability resulting from the sequestration.²¹⁷ The effect of rehabilitation on an insolvent is to restore him fully to the market place and more importantly to the obtaining of credit.²¹⁸ Rehabilitation may take place automatically after a period of ten years from the date of sequestration as well as by application to court before the expiry of the prescribed period.

3.3.1 Automatic rehabilitation

An insolvent not rehabilitated by the court within a period of ten years from the date of sequestration of his estate is deemed to be rehabilitated after the expiry of that 10 years if there was no application made to the court to rehabilitate the insolvent’s estate.²¹⁹ Any interested party may apply to the court, with notice to the insolvent, before the expiry of 10 years to prevent rehabilitation.²²⁰

3.3.2 Rehabilitation by court within 10 years

3.3.2.1 Acceptance of composition

An insolvent who has obtained the certificate from the Master confirming that the creditors have accepted an offer of composition of not less than 50 cent in the rand of every claim proved and that the payment has been made or security for payment has been furnished to

²¹⁷ S 129(1)(c). See also Mars 555.

²¹⁸ *Ex Parte Le Roux* 1996 2 SA 419 (C) 423.

²¹⁹ S 127A(1).

²²⁰ See Roestoff and Renke “A fresh start for individual debtor: The role of South African insolvency and consumer protection legislation” in which they suggest that provision should be made for automatic rehabilitation after 3 years as a starting point, Roestoff and Renke 101.

the satisfaction of the Master, may give notice of the intention to apply for rehabilitation in the Government Gazette and to his trustee.²²¹

3.3.2.2 After lapse of one, three or five years

The Act provides for the lapse of certain period after when the insolvent may apply for rehabilitation:

- (a) After twelve months have elapsed from the confirmation of the first trustee's account in the estate provided the insolvent does not fall within the provision of section 124(2)(b) or (c).²²²
- (b) After three years have elapsed from such confirmation if the insolvent's estate have been sequestrated provided the insolvent does not fall within the provisions of section 124(2)(c).²²³
- (c) After five years have elapsed if the insolvent had been convicted of any fraudulent act in relation to his existing or any previous insolvency or any offence under section 132-134 of the Act.²²⁴

The test whether the applicant is fit and proper to trade with the public on the same basis as any other honest man.²²⁵ If an application is brought within 4 years from date of sequestration, the Master's recommendation is required.

3.3.2.3 If no claim is proved

An insolvent can apply for his rehabilitation if no claims were proved within the period of six months after the date of provisional sequestration provided that the he was not convicted of any fraudulent action and that the insolvent's estate was not previously sequestrated.²²⁶ The insolvent has to give the master and the trustee 6 weeks notice in writing and further publish

²²¹ S 124(1) read with s 52(5) and 120(1).

²²² S 124(2)(a).

²²³ S 124(2)(b).

²²⁴ S 124(2)(c).

²²⁵ *Kruger v The Master* 1982 1 SA 574 (W).

²²⁶ S 124(3).

in the Government Gazette six weeks before making the application of notice of intention to apply for his rehabilitation.²²⁷

3.3.2.4 After full payment of all proved claims

The insolvent may bring an application on three clear weeks notice in writing to the master and the trustee after the confirmation by the master of a distribution plan providing for full payment of all proved claims, including interest by the insolvent.²²⁸

3.3.3 Court's discretion

The decision to grant, refuse or postpone an application for rehabilitation is vested in the sole discretion of the court.²²⁹

3.4 Conclusion

In conclusion, the Insolvency Act as the consequence provides debt relief to the debtor which is the sequestration process. Following the sequestration order, the debtor may be rehabilitated.²³⁰ Rehabilitation has the effect of discharging all pre-sequestration debts and relieving the debtor of every disability resulting from sequestration.²³¹ A debtor may be sequestrated by way of voluntary surrender of his estate. The process of voluntary surrender is cumbersome and is characterised by an array of technical formalities that have to be complied with.²³² The process of voluntary surrender and compulsory sequestration rely on the requirement that advantage to creditors must be proved although the burden of proof in voluntary surrender is more stringent than in case of compulsory sequestration. Advantage of creditors places a stumbling block in the way of debtors wishing to use the sequestration process as a debt relief measure.

Because of the formalities in section 4 and fact that the degree of proof required regarding the advantage of creditors requirement is more stringent in voluntary surrender, the debtor sometimes make use of friend or relative to obtain a sequestration order in easy way by

²²⁷ *Ibid.*

²²⁸ S 124(5).

²²⁹ S 127(2).

²³⁰ S 129.

²³¹ *Ibid.*

²³² Boraine and Roestoff 4.

means of friendly sequestration. In view of the fact that friendly sequestration are abused the court have accepted that they must scrutinise every friendly sequestration with particular care to ensure that the requirements of the Act are not subverted and the interests of creditors are not prejudiced.²³³

²³³ Sharrock 43.

CHAPTER 4

THE INTERACTION BETWEEN THE DEBT RELIEF MEASURES BY THE NCA AND INSOLVENCY ACT

4.1 Introduction

When enacting the NCA the legislature did not make any specific mention of the Insolvency Act. Because of this, it is apparent that the court will have to clarify the applicability of some provisions of the NCA which have an impact on the insolvency law. It was already pointed out²³⁴ that the NCA, *inter alia*, aims to protect the debtor, both rich and poor in terms of which the debtor can apply for debt review if he is over-indebted or have his credit agreement declared reckless if it was granted recklessly.²³⁵ However, the Insolvency Act provides for a debt relief measure namely the sequestration process. The debtor can apply for sequestration by way of voluntary surrender while it is possible for a creditor to sequester a debtor's estate by way of compulsory sequestration. Following the sequestration order, the debtor may be rehabilitated.²³⁶ Rehabilitation has the effect of discharging all pre-sequestration debts and further relieving the debtor of every disability resulting from sequestration.²³⁷ Some debtors prefer to use the process of voluntary surrender, rather having their credit agreements dealt with under section 86 of the NCA. They do not want their credit agreement debt to be dealt with, by an application to the debt counsellor for debt review in spite of the fact that their credit agreement falls within the NCA. This is evident from the decision in *Ford*²³⁸ where the court held an application for voluntary surrender should not be granted where the machinery of the NCA was the appropriate mechanism to be used.

In *Mutemeri*, the credit provider applied for compulsory sequestration. The respondent argued that the credit provider is precluded by section 130(1) of the NCA from seeking the application for compulsory sequestration.²³⁹ The respondent also invoked section 88(3) of

²³⁴ Ch 2.

²³⁵ See *Prochaska supra* 516; *Maleke and Three Similar cases supra* 147.

²³⁶ S 129.

²³⁷ *Ibid.*

²³⁸ *Ford supra*.

²³⁹ As explained in ch 2 s 130(1) deals with the debt enforcement procedure in court. It provide that a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default under that credit agreement for at least 20 business days and (a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer (b) in case of a notice contemplated in s 129(1), the consumer has not responded to that notice or responded to the notice by rejecting the credit receiver's proposal (c) in case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider.

the NCA.²⁴⁰ The court held that an application for sequestration is not application for enforcement of the sequestrating creditor's claim. It is therefore not subject to the requirement of section 130(1). The court also held that an application by a credit provider for the sequestration of a consumer does not constitute litigation or a judicial process in terms of section 88(3). On appeal in the case of *Naidoo*, the Supreme Court of Appeal confirmed the decision of *Mutemeri*. The appeal court held that a credit provider need not to comply with the section 129(1)(a)²⁴¹ before instituting a sequestration proceeding against a debtor. The court held that such proceedings are not proceedings to enforce a credit agreement and the credit provider need not to comply with the requirements of section 130(3)(a).²⁴²

This chapter deals with the interaction between the debt relief measures in terms of the NCA and the Insolvency Act. Specific reference is made to section 88(3), section 85 and section 130(1) of the NCA. Finally, the decisions of *Mutemeri*, *Naidoo* and *Ford* will be discussed and commented on.

4.2 Whether the NCA excludes the application of the Insolvency Act

As mentioned above, the legislature when enacting the NCA did not make any specific mention of the Insolvency Act. However, section 2(1) of the NCA states that the NCA must be interpreted in a manner that gives effect to the purposes set out in section 3. Section 2(7) of the NCA states that:

“except as specifically set out in, or necessarily implied by, this Act, the provisions of the act are not to be construed as:

- (a) limiting, amending, repealing or otherwise altering any provision of any other Act;
- (b) exempting any person from any duty or obligation imposed by any other Act; or
- (c) prohibiting any person from complying with any provision of another Act”.

²⁴⁰ As explained in ch 2 s 88(3) applies only to credit providers who want to enforce any rights or security under a credit agreement by means of litigation or other judicial process. It provides for various instances when credit provider may proceed to enforce a credit agreement.

²⁴¹ As explained in ch 2 s 129(1)(a) provides that, if a consumer is in default under a credit agreement, the credit provider may draw the default to the attention of the consumer in writing and propose that the consumer refer the agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction with the intent that the parties resolve any dispute under the credit agreement or develop and agree on plan to bring the payments under the agreement up to date.

²⁴² See ch 2.

It is therefore submitted that the legislature, when enacting the NCA, had in mind the provisions of the Insolvency Act.²⁴³ This is evident from Schedule 2, which contains the following amendments to section 84 of the Insolvency Act:

- (a) “the substitution for the heading of the following:
Special provisions in case of goods delivered to a debtor in terms of an [**instalment sale transaction**] instalment agreement”; and
- (b) “the substitution for the opening clause of subsection (1) of the following words:
If any property was delivered to a person (hereinafter referred to as the debtor) under a transaction [**which is an instalment sale transaction contemplated in paragraphs (a) and (b) of the definition of ‘instalment sale transaction’ in section 1 of the credit Agreements Act, 1980**] that is an instalment agreement contemplated in paragraph (a),(b) and (c)(i) of the definition of ‘instalment agreement’ set out in section 1 of the National Credit Act, 2005”.

Section 84 of the Insolvency Act provides that if any property was delivered to a debtor under a transaction that is an instalment agreement contemplated in paragraph (a)(b) and (c)(i) of the definition of “instalment agreement” set out in section 1 of the NCA, such transaction, shall be regarded on the sequestration of the debtor’s estate as creating in favour of the creditor a hypothec over that property whereby the amount still due to him under the transaction is secured. The effect of section 84(1) on such an instalment agreement is thus that the creditor acquires a hypothec on goods subject to such an agreement on sequestration of the debtor’s estate.²⁴⁴

It is apparent from above that the argument that the legislature intended to oust the working of insolvency law cannot stand and therefore would appear to be illogical. Van Heerden and Boraine state that:

“in the absence of an express provision ousting the application of the *Insolvency Act*, it might thus be argued that the amendment of section 84 of the *Insolvency Act* militates against a finding that the legislature intended to oust the application of the *Insolvency Act* by necessary implication”.²⁴⁵

²⁴³ *Ibid.*

²⁴⁴ Nagel 441; Smith 166; Scharrock 87. See also *UDC bank v Seacat Leasing and Financing* 1979 4 SA 682 (T) 692. Van Rensburg “An analysis of the Insolvency Act 24 of 1936 and the NCA 34 of 2005 as well as aspects of conflict between the two laws”.

http://legalissues.co.za/index.php?option=com_content&view=article&id=53:an-analysis-of-the-insolvency-act-24-of-1936-and-the-nca-34-of-2005-as-well-as-aspects-of-conflict-between-the-two-laws&catid=1:general&Itemid=2. (1 April 2010)

²⁴⁵ Van Heerden and Boraine 2009 12(3) *PER*.

4.3 The impact of section 130(1) and section 88(3) of the NCA on sequestration

4.3.1 *Mutemeri*

The court in *Mutemeri* had to deal with the way in which the section 130(1) of the NCA impacts on the Insolvency Act. In *casu* the credit provider being two financial institutions applied for the compulsory sequestration of the common estate of the respondents who were married in community of property. One of the defendant's prominent defences was that the applicants claims were based on the credit agreement against them within the meaning of the NCA and that the application for their sequestration was barred under it. Accordingly, their defence was that in terms of section 130(1) no legal proceedings may be instituted against them for enforcement of the credit agreement because the application for sequestration constitutes proceedings which enforces the credit agreement. The court had to decide whether an application for sequestration of a consumer's estate that is based on the applicants claim against the consumer in terms of credit agreement, is an application 'for an order to enforce a credit agreement' within the meaning of section 130(1) of the NCA.

The court agreed that the motive of the sequestrating creditor in applying for the sequestration of their debtor may be, and often is, to obtain payment of its debts.²⁴⁶ In this regard the court referred to the decision of the Appellative Division in *Estate Logie v Priest*²⁴⁷ where Solomon AJ said the following:

"it appears to me that it is perfectly legitimate for a creditor to take insolvency proceedings against a debtor for the purpose of obtaining payment of his debt. In truth that is the motive by which persons, as a rule, are actuated in claiming sequestration orders. They are not influenced by altruistic considerations or regard for the benefit of other creditors, who are able to look after themselves. What they want is payment of their debt, or as much of it as they can get".²⁴⁸

The court stated that the question whether an application for sequestration constitutes an application 'for an order to enforce a credit agreement' within the meaning of section 130(1) of the NCA, depends on the nature of the relief the creditor seeks and not on the sequestrating creditors underlying motive in bringing the application.²⁴⁹ It further referred to the decision of *Collett v Priest*²⁵⁰ in which the Appellate Division considered whether a sequestration order made by the Eastern Districts Local Division could be taken on appeal to the Cape Provincial Division of the Supreme court. The relevant statute permitted appeals

²⁴⁶ *Mutemeri supra* 274 .

²⁴⁷ 1926 AD 312 319.

²⁴⁸ *Ibid.*

²⁴⁹ *Mutemeri supra* 274.

²⁵⁰ 1931 AD 290.

from the one to the other in any civil suit.²⁵¹ The Appellate division held that a civil suit was a ‘legal proceeding in which one party sues for or claims something from another’ and that it did not include an application for sequestration. De Villiers CJ explained the reason why it could be said that an application for sequestration was a proceeding by which one party sued for or claimed something from another as follows:

“the order placing a person’s estate under sequestration cannot fittingly be described as an order for a debt due by the debtor to the creditor. Sequestration proceedings are instituted by a creditor against a debtor not for the purpose of claiming something from the latter, but for the purpose of setting the machinery of the law in motion to have the debtor declared insolvent. No order in the nature of a declaration of rights or of giving or doing something is given against the debtor. The order sequestering his estate affects the civil status of the debtor and results in vesting his estate in the master. No doubt before an order so serious in its consequences to the debtor is given the court satisfies itself as to the correctness of the allegations in the petition. It may for example have to determine whether the debtor owes the money as alleged in the petition. But while the court has to determine whether the allegations are correct, there is no claim by the creditor against the debtor to pay him what is due nor is the court asked to give any judgment, decree or order against the debtor upon any such claim”.²⁵²

In light of the above decision it is clear that sequestration not only affects a debtor’s assets but also the person of the debtor. His capacity is also restricted to hold office, his freedom to enter into contract, to follow a chosen vocation, to litigate and hold office. Trengove AJ held as follows.²⁵³

“it seems to me that the rationale of these judgments is equally applicable to the proper interpretation of s 1301(1) of the NCA, which applies only to an application to court ‘for an order to enforce a credit agreement. It does not apply to an application by a credit provider for the sequestration of a consumer’s estate based on a claim in terms of a credit agreement between them. Such an application is not one for an order enforcing the credit provider’s claim against the consumer”.²⁵⁴

According to the court²⁵⁵ the purpose and effect of the application for sequestration are merely to bring about a convergence of the claims in an insolvent estate to ensure that is wound up in an orderly fashion and that creditors are treated equally. The court therefore concluded that an application for sequestration is not an application for enforcement of the

²⁵¹ S 24 of Cape Act 35 of 1896.

²⁵² *Collett supra* 299.

²⁵³ *Mutemeri supra* 275.

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*

sequestrating creditor's claim and therefore is not subject to the requirement of section 130(1) of the NCA.²⁵⁶

Furthermore the respondent in *Mutemeri* invoked section 88(3) of the NCA. The court had to determine whether section 88(3) of the NCA prohibits a credit provider from applying for the sequestration of a consumer who is under debt review or subject to a debt restructuring order or a debt restructuring agreement that was made, as a consent order in terms of section 138 of the NCA. As explained above²⁵⁷ section 88(3) applies to credit providers who want to enforce any right or security under a credit agreement by means of litigation or other judicial process. Focus should be on the interpretation of the words "may not exercise or enforce by litigation or other judicial process" and "any right or security" under a credit agreement. The NCA did not explain the word "enforce", and it is therefore uncertain as to what it means. Legally, the word enforce refers to the enforcement of payment or an obligation. It may also include enforcement in the respect of the credit providers using any of his remedies, which include the implementation of a *lex commissoria*".²⁵⁸ Litigation refers to a legal proceeding instituted in a court of law. Van Heerden and Boraine submit that:

"enforce for purpose of section 88(3) should be interpreted restrictively with reference to Part C of Chapter 6 of the Act, which bears the heading "debt enforcement by judgment or repossession. As such it will therefore not include the insolvency proceedings".²⁵⁹

With regard to section 88(3) the court held that for the reasons already mentioned:

"an application by a credit provider for the sequestration of a consumer does not constitute litigation or other judicial process by which the credit provider exercises or enforces any right under the credit agreement between itself and the consumer. The credit provider may rely on its claim in terms of credit agreement to qualify as a creditor with standing to bring the application for the sequestration of the consumer. But it does not exercise or enforce its right under the credit agreement by doing so".²⁶⁰

The court therefore concluded that an application for sequestration is not precluded by section 88(3) of the NCA.²⁶¹

²⁵⁶ *Idem* 276. See also Van Rensburg "The National Credit Act does not protect you from an application for sequestration by creditors and the price to pay for intervention by debt counsellor in sequestration applications". http://legalissues.co.za/index.php?option=com_content&view=article&id=61:the-national-credit-act-does-not-protect-you-from-an-application-for-sequestration-by-creditors-and-the-price-to-pay-for-intervention-by-debt-counsellor-in-sequestration-applications&catid=1:general&Itemid=2 (27 August 2010)

²⁵⁷ Ch 2.

²⁵⁸ Otto 84. See also Van Rensburg 4; Van Heerden & Boraine 2009 (12) 3 *PER*.

²⁵⁹ *Ibid* Van Heerden & Boraine.

²⁶⁰ *Mutemeri supra* 276.

²⁶¹ *Ibid*.

4.3.2 *Naidoo*

In *Naidoo*, the Supreme Court of Appeal heard the appeal from the decision of Kwazulu-Natal, in which the appellant was sequestrated. The appellant was sequestrated due to his failure to meet his payments to the respondent being the credit provider under instalment sale agreements relating to six motor vehicle and two home loan agreements. The appellant's contention was that it was not competent for the respondent to have instituted proceedings for his sequestration before complying with the procedure provided for in section 129(1)(a). As mentioned above,²⁶² section 129(1)(a) provides that, if a consumer is in default under a credit agreement, the credit provider may draw the default to the attention of the consumer in writing and propose that the consumer refer the agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction with the intent that the parties resolve any dispute under the credit agreement or develop and agree on plan to bring the payments under the agreement up to date.

The appellant counsel argued that the procedure before debt enforcement in section 129(1)(a) read with section 130(3) should be interpreted to cover circumstances relating not only to the enforcement of a credit agreement, but also to sequestration proceedings since the unpaid claims which are the subject of the sequestration application, arise from credit agreements to which the NCA applies.²⁶³ As mentioned above²⁶⁴ section 130(3) introduces a number of further aspects of which the court must be satisfied before it will determine a matter in any proceedings commenced in that court in respect of a credit agreement to which the NCA applies. The court must be satisfied that in a case of proceedings to which section 127, 129 or 131 apply, the procedure required by those sections have been complied with.²⁶⁵

The appeal court referred to the decision of *Mutemeri* where Trengove AJ concluded that:

“an order for the sequestration of a debtor's estate is not an order for the enforcement of the sequestrating creditor's claim and sequestration is thus not a legal proceeding to enforce an agreement. He did so after carefully considering the authorities which have held that “sequestration proceedings are instituted by a creditor against a debtor not for the purpose of claiming something from the latter, but for the purpose of setting the machinery of the law in motion to have the debtor declared insolvent'- they are not proceedings” for the recovery of a debt’.²⁶⁶ The learned judge's reasoning accords with the court's description of a sequestration order as a species of execution, affected not only the rights of the two litigants but also of third parties, and involves the distribution of the insolvent's property to various

²⁶² Ch 2.

²⁶³ See 3 of the typed manuscript.

²⁶⁴ Ch 2.

²⁶⁵ S 130(3)(a).

²⁶⁶ *Prudential shippers SA Ltd v Tempest Clothing Co (Pty) Ltd* 1976 2 SA 856 (W) 863.

creditors, while restricting those creditors' ordinary remedies and imposing disabilities on the insolvent-it is not an ordinary judgment entitling a creditor to execute against a debtor".²⁶⁷

The appellant counsel further argued that the effect of section 130(3)(a) when read with section 129(1), indicates that the legislature intended to encompass all proceedings to which the NCA applies and not merely proceedings to enforce a credit agreement. In this regard the court referred to the decision of *Ford* in which the court was also faced with the question whether section 85 was applicable to proceedings for the voluntary surrender of an estate. The section's phraseology is almost identical to that of section 130(3) and gives the court a discretion 'despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered' to refer the matter to a debt counsellor for debt review. Once a debt counsellor becomes involved the credit provider may not exercise or enforce any right by litigation or other judicial process. The court pointed out that:

"the learned judge observed that the language of s 130(3) is cast widely and the limitation of the provision to proceedings in which a credit agreement is being considered did not imply that the proceedings in question were restricted only to those in which the enforcement of a credit agreement is in issue and so, the court concluded, s 85 was also applicable to proceedings for voluntary surrender under the Insolvency Act".

However, the court refrained to decide whether the judge in *Ford* was correct or not. The court confirmed the decision of *Mutemeri*. In this regard the court finally held:

"it is clear from the language employed in s 130(3)(a) that the proceedings referred to there do not extend the remit of s 129, as the appellant contends, but as Trengove AJ has correctly pointed out, it simply provides that where a credit provider decides to institute proceedings to enforce the agreement, he may do so only after having complied with the procedure in s 129(1)(a). Similarly the reference in s 130(3)(a) to s 127 and to s 131 refers specifically to procedures which are applicable to those proceedings involving the surrender and attachment of goods respectively under a credit agreement – not to 'any proceedings' concerning a credit agreement".²⁶⁸

The court concluded that the appellant contention that the respondent had to comply with the procedure provided for in section 129(1)(a) before commencing sequestration proceedings against him has no merit.

²⁶⁷ *Naidoo supra* 4 of the typed manuscript.

²⁶⁸ *Idem* 6.

4.4 The impact and role of section 85 of the NCA on sequestration

As indicated above²⁶⁹ section 85 grants a court a discretion in any court proceedings where a credit agreement is being considered after the allegation that the consumer is over-indebted, whether to refer the matter to a debt counsellor for an evaluation²⁷⁰ or may itself declare the consumer over-indebted.²⁷¹

4.4.1 *Ford*

In *Ford*, three applications for the voluntary surrender of the respective applicants' estate came before the Western Cape High Court on the unopposed motion court. The major portion of each of the applicants' debts arose out of "credit agreements" as intended in the NCA. In each of the applications, the respective applicants made averments to the effect that they had "become insolvent by misfortune and due to circumstances beyond [their] control, without fraud or dishonesty on [their] part". The court found it striking how disproportionately high their debt was in relation to relatively modest income of the applicants. The court stated on the facts there were grounds for cogent suspicion of at least some degree of reckless credit extension therefore present themselves strongest on the disclosed fact in each of the applications.²⁷² It further stated that the object of the NCA is to discourage reckless credit.²⁷³ The court referred to its power in terms of section 85 and pointed out that evaluation by a debt counsellor could lead to one or more of the consumer's credit agreements to be declared reckless, resulting in setting aside all or part of the consumer rights or obligations under those agreements or suspension of the force and effect thereof.

The court called upon counsel appearing for the plaintiff in each of the matters, to address argument to the court as to why the over-indebtedness of the applicants should not be more appropriate be addressed using the mechanisms of the NCA, instead of the blunter instrument afforded in terms of the voluntary surrender remedy under the Insolvency Act.²⁷⁴ The applicant's counsel pointed out that the legislature had been pertinently cognisant on the Insolvency Act when it enacted the NCA. He stated that this is apparent from the express amendment of section 84 of the Insolvency Act to the extent set out in schedule 2 of the NCA. The applicants' counsel stressed in this connection that the legislature had not seen fit

²⁶⁹ Ch 2.

²⁷⁰ S 85(1)(a).

²⁷¹ S 85(1)(b).

²⁷² *Ford supra* 379.

²⁷³ *Ibid.*

²⁷⁴ *Ibid* 380-381.

to make any changes to the provision of the Insolvency act concerning voluntary surrender. The counsel submitted that section 85 of the NCA was in any event not applicable in proceedings for voluntary surrender under the Insolvency Act. The applicants counsel argued that the operation of section 85 was dependant on the satisfaction of three requirements, viz (a) the context of court proceedings, (b) allegations in these proceedings of over-indebtedness by a consumer under a credit agreement; and (c) consideration by a court in these proceedings of a credit agreement. The applicant's counsel conceded that the first two requirements had been satisfied and that there were no credit agreement before the court.²⁷⁵ The court did not agree with the counsel's contention that section 85 was inapplicable in proceedings for voluntary surrender and stated that:

"the language of s 85 is cast in very wide terms. The provision that a court may invoke it despite any provision of law or agreement to the contrary and *in any court proceedings* affords the clearest indication of the intended wide ambit for the operation of the section. The limitation of the provision to proceedings in which a credit agreement is being considered does not imply that the proceedings in question are restricted only to those in which the enforcement of a credit agreement is the issue. The reference in s 85 to a 'credit agreement' in the singular is of no significance".²⁷⁶

The court stated that an applicant has to make full disclosure of his or her other assets and liabilities in terms of section 4 of the Insolvency Act, and the court must be fully informed of the applicant's proprietary situation.²⁷⁷ The court also stated that insolvents whose misfortune arises out of credit agreement transactions would be well advised, to take into account the policy and objects of the NCA, and also the special remedies under the Act, before opting to apply for the voluntary surrender of their estates under the Insolvency Act.²⁷⁸ Each of the applicants testified that they had indeed considered debt counselling and set out in detail how financially impracticable an arrangement of debt repayment would be, but the court nonetheless found that:

"there is no indication on the evidence in any of three applications that a proper consideration was given in the context of debt-counselling to anything beyond an administered debt collection. In particular, there is no indication that the debt counsellors who were engaged by the applicants gave any consideration to obtaining declaration of reckless credit in respect of any of the debts, as contemplated in terms of s 86(7) of the NCA".²⁷⁹

²⁷⁵ *Idem* 381.

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*

²⁷⁸ *Mutemeri supra* 382.

²⁷⁹ *Ibid.*

The court however decided not to refer the applicants' credit agreement debts for investigation and report by a debt counsellor.²⁸⁰ In this regard the court finally held:

"I have determined not to refer their credit agreement debts for investigation and report by a debt counsellor. It is nevertheless open to them to take the necessary steps that appear to be indicated under the NCA on their own initiative. I am, however, not disposed to exercise the court's discretion in favour of granting their applications for voluntary surrender, in the context of their failure to properly explain why their credit agreement related debt is not amenable to administration under the NCA to their own benefit as well as that of their credit-granting creditors who acted responsibly, as distinct from recklessly, in extending credit".²⁸¹

The court also held that, the argument by the applicant's counsel that it is for them to choose the form of relief that suits their convenience by mechanically and superficially satisfying the relevant statutory requirement under the Insolvency Act is a misdirect approach. It also rejected the argument that the applicants had a "constitutional right" to acceptance by the court of the surrender of their estates and confirmed by referring to *Ex Parte Pillay; Mayet v Pillay* where Holmes J (as he then was) held that the primary object of the machinery of voluntary surrender is not the relief of harassed debtor.²⁸² The court stated that an applicant for voluntary surrender must also satisfy the court that the acceptance of the surrender of the estate in question will be to the advantage of creditors.²⁸³ It stated that these considerations in this kind of matter where over-indebtedness is almost exclusively related to debt arising from credit agreements, require the court to take the existence and effect of these agreements' into account.²⁸⁴ It stated in context, the word consider referred to in section 85 denotes that the proceedings contemplated by it must be proceedings in which a credit agreement is taken into account as a relevant matter.²⁸⁵ The court remarked that the fact that the NCA leaves the provisions of section 6 of the Insolvency Act in particular voluntary surrender unaffected acknowledges that insolvency can arise in a great variety of circumstances, many of them are quite unrelated to over-indebtedness arising out of credit Agreements as defined in the NCA. It also stated that there is moreover a consonance between the objects of the relevant provisions of the NCA and the Insolvency Act, that is "not to deprive creditors of their claims but merely to regulate the manner and extent of their payment."²⁸⁶ The court considered it as its duty in the exercise of its discretion in cases like the present one, to have proper regard to giving due effect to the public policy reflected in the NCA namely to give:

²⁸⁰ *Idem* 383.

²⁸¹ *Ibid.*

²⁸² *Ex Parte Pillay; Mayet v Pillay supra* 311 (Per Holmes J, as he then was).

²⁸³ *Ford supra* 382.

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*

²⁸⁶ *Nel No v Body corporate of the Seaways Building and another* 1996 1 SA 131 138.

“preference to rights of responsible credit grantors over reckless credit grantors and enjoined full satisfaction, as far as it might be possible, by the consumer of all responsible financial obligations”.²⁸⁷

The court on the incomplete facts disclosed in voluntary surrender application was left with the impression that the machinery of the NCA is more appropriate mechanism to be used.²⁸⁸

4.4.2 The impact of *Ford* on voluntary surrender

An applicant seeking an acceptance of surrender of his estate will have to take into consideration the decision of *Ford*. It remains to be seen as to whether or not other divisions of the High court are going to follow the decision of *Ford*. Where the applicant applies for voluntary surrender and the major portion of their debt in credit agreement falls within the NCA, the court will not be obliged to refer the matter to a debt counsellor. This is evident from the word ‘may’ in section 85 of the NCA which grants the court a discretion. It is further submitted that in light of the *Ford* decision, the court still retains the discretion to grant an application for voluntary surrender or to refuse it. The debt counsellors are also advised to not only consider over-indebtedness. They should also consider whether any credit agreement appears to be reckless credit granting or not.

4.4.3 The impact of *Ford* judgment on compulsory sequestration

The implication of *Ford* is that when the application for voluntary surrender is brought before the court, some creditors will likely oppose it and intervene. Their contention will be that the debt review process will be more appropriate and advantageous than sequestration process. Some creditors will probably apply for leave to intervene in a compulsory sequestration and contend in the case of a debtor whose credit agreement debts has not been under debt review that it might be better and reasonable for such credit agreement debt to be subjected to it. The reason will be to assist the court in deciding whether to grant application for compulsory sequestration or not. Van Heerden and Borraine state that the “judgment of *Ford* is also an indication that some judges still remain extremely pro-creditor oriented and that the NCA has to some extent entrenched this position”.²⁸⁹

²⁸⁷ *Ford supra* 383.

²⁸⁸ *Ford supra* 384.

²⁸⁹ Van Herden & Borraine 2009 (12) 3 *PER*.

4.4.4 The impact of *Ford* judgment on friendly sequestration

As indicated above,²⁹⁰ the court must take a critical view of the friendly sequestration applications as there is “considerable potential for collusion and abuse”.²⁹¹ In light of the above critical view, the court should always have in mind the debt review process as appropriate measure, before granting such an order of friendly sequestration application. This will in turn reduce and ultimately prevent any prejudice to the creditor and therefore creditor’s interests will be protected. The court by posing the question as to whether the debt review is appropriate measure, the debtor will be technically be discouraged to apply for friendly sequestration and this will in turn reduce the collusiveness and the bad motive which the friendly sequestration application is brought. Having noted the decision of *Ford*, one may reasonably conclude that the court, in friendly sequestration application, will retain the discretion to grant an order of sequestration in case of a debtor whose credit agreement debts fall within the NCA.²⁹²

4.5 Conclusion

When enacting the NCA the legislature did not make any mention of the Insolvency Act. But this does not mean that the legislature intended to oust the application of the Insolvency Act on the NCA. It is evident from section 84 of the NCA that the legislature was aware and had in mind all the provisions of the Insolvency Act, but chose to make amend section 84 of the Insolvency Act as it is affected by the NCA. The NCA definitely impact on the Insolvency Act. This is evident from the landmark decision of the South Gauteng High Court in *Mutemeri* where the court held with regard to section 130(1) that an application for sequestration of a consumer was not an application for an order enforcing the credit provider’s claim against the consumer. The court also held that an application by a credit provider for the sequestration of a consumer did not amount to litigation or other judicial process by which the credit provider exercised or enforced any right under the credit agreement between itself and the consumer as contemplated in section 88(3) of the NCA. As indicated above, the decision in *Ford*, is evidence of the impact the NCA has on Insolvency Act. The decision in *Ford* should also alert debtors who wish to apply for voluntary surrender as they should consider the debt relief provided for by the NCA. This will be the case where consumer’s debt fall within the scope of application of the NCA. The decision in *Ford* also show how the

²⁹⁰ See ch 3.

²⁹¹ Sharrock 41; Schoeman 59.

²⁹² See *Van Rooyen v Van Rooyen (Automatic Investments (EC) (Pty) Ltd, Intervening Creditor)* [2000] 2 All SA 485 (SE) in which the court held that the fact that an application for the sequestration of another’s estate may be a friendly one does not preclude a court from granting it.

court gave due effect to the public policy in the NCA, namely to give “preference to rights of responsible credit grantors over reckless credit grantors and enjoined full satisfaction as far as it might be possible by the consumer of all responsible financial obligation”. The implication of *Ford* in compulsory sequestration is that when the application for voluntary surrender is brought before the court, some creditors will likely oppose it and intervene. Their contention will be that the debt review process will be more appropriate and advantageous than sequestration process. The debtor’s in friendly sequestration applications, are further advised to always have in mind the debt relief measures provided by the NCA when an application for friendly sequestration is brought.

Debtor’s should not only rely on the sequestration process for the discharge of their debts merely for the reason that following the sequestration order, the debtor may be rehabilitated. The debtor should first opt for the mechanism provided in the NCA in the case where their credit agreement debt’s fall within the NCA. I agree with the court’s decision in *Ford* where it poses the question as to why over-indebtedness of the applicants should not be more appropriately be addressed using the mechanisms of the NCA, instead of voluntary surrender. This is so because the Insolvency Act and the NCA function separately from each other. They both provide debt relief.

CHAPTER 5

CONCLUSION

It is evident from the research done in this dissertation that the NCA has introduced fascinating concepts namely “over-indebted” and “reckless credit”. One of the main aims of the NCA is to give the over-burdened and over-committed consumer the second chance by rescheduling their debt. The consumer can apply for debt review in terms of section 86 or raise his over-indebtedness as a defence in the court in terms of section 85 of the NCA after the plaintiff has enforced the debt in light of the *Olivier* case. Consumers are advised not to follow the latter route.²⁹³ It should be noted that consumer can only be declared over-indebted by the court. The relevant debt counsellor will make the recommendation to the court as to whether the consumer should be declared over-indebted or any of his credit agreement be declared reckless. The debt counsellor’s role goes no further than that of a mediator and facilitator.²⁹⁴

In voluntary surrender applications the court will grant the order if it is satisfied that the requirements prescribed in section 6 are complied with. In case of compulsory sequestration it will grant a final order of sequestration on the return date if it is satisfied that the requirements prescribed by section 12 are complied with. Therefore, the applicant needs to satisfy the court that sequestration is more advantageous.

The sequestration process in terms of the Insolvency Act may provide debt relief to individual debtors, because following the sequestration order the debtor may be rehabilitated.²⁹⁵ Rehabilitation has the effect of discharging all pre-sequestration debt and further relieving the debtor of every disability resulting from sequestration.²⁹⁶

The advantage for creditors requirement is prescribed for both voluntary surrender as well as compulsory sequestration is a stumbling block to obtain debt relief. It can to some extent be seen as the gateway to bankruptcy regime.²⁹⁷ Furthermore the process of sequestration in general have many formalities to be complied with.²⁹⁸

²⁹³ *Supra* 360. The defendant waited for the plaintiff to institutes court proceeding before applying to the court for debt relief under the NCA. The court per AR Erasmus J stated that “it is the duty of the court, as I see it, to discourage such conduct”.

²⁹⁴ *Mutemeri supra* 277.

²⁹⁵ S 129.

²⁹⁶ *Ibid.*

²⁹⁷ Boraine and Roestoff 4.

²⁹⁸ Ss 3-7 for voluntary surrender and ss 9-12 for compulsory sequestration.

The NCA impacts on the Insolvency Act. The fact that the legislature, when enacting the NCA, did not specifically make any mention of insolvency law does not mean that it did not have in mind the provisions of Insolvency Act. The legislature was aware of the existence of Insolvency Act which is evident from Schedule 2 of the NCA. The NCA and Insolvency Act function separately from each other. However they have aspects which relate to each other as they both provide debt relief.

It is further evident from the three decisions of *Mutemeri*, *Naidoo* and *Ford* that the NCA impacts on the Insolvency Act. In *Mutemeri* the court indicated how section 88(3), 129(1), 30(1) and 130(3) impact on the Insolvency Act. Section 130(1) do not apply on the sequestration because the application for sequestration by the credit provider is not an application for an order enforcing the credit provider's claim against the consumer. Because an application for sequestration is not an application for an order enforcing the credit provider's claim against the consumer, the credit provider need not to comply with the procedure provided for in section 129(1)(a) before instituting sequestration proceedings. Such application for sequestration does not amount to litigation or other judicial process by which the credit provider exercised or enforced any right under the credit agreement between itself and the consumer within the meaning of section 88(3). On appeal in the case of *Naidoo* the Supreme Court of Appeal confirmed the decision in *Mutemeri*. The appeal court held that a credit provider need not to comply with section 129(1)(a) before instituting sequestration proceedings against a debtor. The court held that such proceedings are not the proceedings to enforce a credit agreement and the credit provider need not to comply with the requirements of section 130(3)(a).

An applicant seeking the acceptance of surrender while his or her credit agreement debt falls within the scope of the NCA will have to take into account the decision of *Ford*. The court in *Ford* concluded that section 85 was applicable to proceedings for voluntary surrender. The court also held that section 85 applies to any proceeding in which a credit agreement is being considered. Therefore a court in case where a consumer has a credit agreement debt it will be entitled to invoke the provisions of section 85 though not obliged to do so, but it has a discretion as evidenced by the word "may" in section 85.

A debtor must also have in mind the debt relief measures provided for by the NCA when making an application for friendly sequestration. The effect of *Ford* is that it would in future be even more difficult to obtain a sequestration order in a friendly sequestration application. A further implication of *Ford* in compulsory sequestration is that when an application for voluntary surrender is brought before the court, some creditors will likely oppose it and

intervene. Their contention will be that the debt relief process is more appropriate and advantageous than the sequestration process.

I agree with the court's decision in *Ford*, where it pose the question as to why the over-indebtedness of the applicants should not be more appropriately be addressed using the mechanisms of the NCA, instead of voluntary surrender. I further agree with the court where it gave effect to the public policy identified in the NCA namely to give "preference to rights of responsible credit grantors over reckless credit grantors and enjoined full satisfaction, as far as it might be possible, by the consumer of all responsible financial obligations".²⁹⁹

What is interesting and beneficial with regard to the application of the NCA is that the consumers who apply for debt review will not be divested of their assets whereas in sequestration, the debtor will be divested his assets by the trustee of the insolvent estate. Furthermore, during debt review the consumer will not be regarded as an unrehabilitated insolvent. The effect of debt review is that the consumer must not enter into any further credit agreement, other than a consolidation agreement, with any credit provider.

Finally, in light of the *Ford* decision it is suggested that where an application for sequestration is made involving credit agreement debts, it should be thoroughly investigated as to whether the NCA is not the more suitable mechanism to be used. The applicant needs to place sufficient evidence before the court and convince such court that sequestration of a debtor's estate is the more appropriate remedy to use than the mechanism provided for in the NCA.

²⁹⁹ *Ford supra* 382.

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