DISCHARGE AS A COMPONENT OF DEBT RELIEF IN SOUTH AFRICA

BY

DAVID DAVI MASILELA

Submitted in part fulfilment of the requirements

for the degree of

MASTER OF LAWS

at the

UNIVERSITY OF PRETORIA

SUPERVISOR: PROF CM VAN HEERDEN

MAY 2013

DECLARATION

I declare that this research project is my own work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws at the University of Pretoria. It has not been submitted for any degree or examination at any other university. I further declare that I have obtained the necessary authorization and consent to carry out this research.

Name : David Davi Masilela

Signature:_____

Date: May 2013

TABLE OF CONTENTS

CHAPTER ONE: AN OVERVIEW OF THE DEBT RELIEF MEASURES IN INSOLVENCY LAW

CHAPTER 2 : DEBT RELIEF OUTSIDE INSOLVENCY LAW

CHAPTER 3: ANALYSIS, CONCLUSIONS AND RECOMMENDATIONS

BIBLIOGRAPHY

Chapter One An overview of debt relief measures in insolvency law

Introduction

South African debtors who are unable to pay their debts have a number of debt relief options which they can access. On the one hand the debtor who finds himself in serious financial trouble may make use of the collective debt relief remedies that are offered in terms of the Insolvency Act 24 of 1936. On the other hand a debtor may wish to avoid insolvency or may not qualify for the debt relief offered in terms of the Insolvency Act and such a debtor may attempt some of the other individual debt relief measures that are available outside insolvency law. It may however be asked whether the debt relief remedies that are currently available in South African law are adequate and whether they indeed serve the purpose of alleviating the debtor's debt burden. From the discussion hereinafter, it will appear that the debt relief remedies available in insolvency law as well as outside insolvency law contain various flaws or impediments which make their debt relief efficiency doubtful. The basic premise upon which this dissertation is based is that the only real relief that would alleviate a consumer's debt burden and enable him to have a chance at a fresh (financial) start, is the discharge of some of his debts. As aptly stated by Maghembe and Roestoff:[1]

" Providing a fresh start to a debtor who cannot reasonably repay all of his pre-existing debts is the recognition by society that over-indebtedness is, in many cases excusable. It is the key-element of any consumer-debtor insolvency law or rehabilitation procedure, based on the principle that it is in society's interest that the debtor should be able to begin afresh, free from past financial obligations and not suffer indefinitely. It is the distinction between the punishment of yesteryear and the economic reality of the twenty-first century."

[1] Maghembe and Roestoff " Bankruptcy and alternative debt relief for consumers in Tanzania- a comparative investigation" XL111 *CILSA* (2010)292.

This dissertation will firstly consider the various debt relief remedies that are available in insolvency law. Thereafter the formal remedies available outside insolvency law will be analysed and discussed.[2] Finally the disadvantages of the various remedies within the context of their ability to provide the debtor with a discharge of his debt and a chance at a fresh start will be dealt with and some observations will be made regarding law reform towards a regime with effective debt relief measures that can be accessed by debtors without undue constraints and which would provide alleviation of the debtor's debt burden by allowing for a discharge of certain debt.

2. Debt relief remedies available in insolvency law

2.1Introduction

Insolvency Law developed as a collective debt enforcement procedure in order to enable a more fair distribution of the debtor's property between his creditors in circumstances where the debtor has inadequate means to satisfy his debts.[3] The effect of sequestration is to establish a *concursus creditorum* which means that the general interest of the creditors as a group takes precedence over the interests of an individual creditor.[4] The Insolvency Act[5] also gives the trustee unique procedures which are not available during the course of ordinary execution and which can be used to locate assets[6] and impeach certain transactions.[7]

---

[2] The focus of this dissertation is on formal debt relief remedies. An informal arrangement between a consumer-debtor and his creditors thus fall outside the scope of this dissertation.
[3] Boraine and Delport in Nagel *et al Commercial Law* (4th ed) 409 (hereinafter *Commercial Law*).
[4] *Walker v Syfret NO* 1911 AD 141 .
[5] Act 24 of 1936. All references to sections hereinafter are to section of the Insolvency Act unless expressly indicated otherwise.
[6] S69(3) provides for a search warrant to locate assets.
[7] S26,29,30 and 31.

The essence of the administration of an insolvent estate is that thetrustee realizes the assets and distributes the proceeds under the creditors in the order as set out in the Insolvency Act.[8] In terms of debt relief the main advantage of sequestration is that eventually the debtor can get rehabilitated and once rehabilitated, all his pre-sequestration debts are discharged.[9] It can thus be said that the debt relief offered by the discharge offered by sequestration is a form of indirect debt relief as a result of the discharge that follows upon rehabilitation.[10] Rehabilitation may occur at various stages in accordance with section 124 of the Act and can happen after as little as six months from date of sequestration if no claims are proven.[11] At worst the debtor will be automatically rehabilitated after 10 years had passed since the date of his sequestration.[12]

In terms of the Insolvency Act, a debtor's estate may be sequestrated by way of voluntary surrender of his or her estate, while it is also possible for a creditor to sequestrate a debtor's estate by way of compulsory sequestration. It is to be noted that both these type of applications must be brought in the High Court.[13] . A third type of sequestration also exists, namely friendly sequestration, as discussed below.

It should however be noted that the primary purpose of sequestration of an estate has been stated to be the benefit of the creditors and not the relief of the harassed debtor[14]. This has found application in the so-called "advantage to creditors"-principle which effectively means that a sequestration order will not be granted if it cannot be proved that sequestration of the debtor's estate is to the advantage of his creditors.

---

[8] *Commercial Law* 410.
[9] S124.
[10]
[11] S124(3).
[12] S127.
[13] S149 of Act 24 of 1936. A high court applications is required because sequestration affects the status of the debtor.
[14] *Ex parte Pillay* 1955 2 SA 309(N) 311.In *R v Meer* 1957 (3) SA 614 (N) 619 it was stated that " the Insolvency Act was passed for the benefit of creditors and not for the relief of harassed debtors." See also *Fesi v ABSA Bank Ltd* 2000 (1) SA 499 (K).

The advantage to creditors requirement entails that the reasonable prospect of some pecuniary benefit to the general body of creditors is of paramount importance.[15] Thus it implies that creditors must at least receive a dividend[16]. However there is no advantage if there is no dividend or if the dividend is negligible.[17] Boraine and Roestoff point out that the fact that the available funds for distribution will only be known once the estate assets have been sold, gives rise to difficulties regarding the practical application of the advantage to creditors requirement.[18]

The court will have regard to the assets available in the estate and will also take into account the fact that the debtor will retain his employment after sequestration and that there will be surplus funds available for distribution to his creditors after deducting the amount necessary for the maintenance of the debtor and his dependants.[19] Another factor that the court will consider is that after sequestration the estate can be taken control of for the benefit of the creditors as a group.[20] The court thus considers all these factors to decide whether they indicate that the creditors as a group will be in a better position if the estate is sequestrated than if it is not sequestrated.[21]

2.2 Voluntary Surrender

[15] Boraine and Roestoff " Fresh Start Procedures for Consumer Debtors in South African Bankruptcy Law" 2002 *Insol International Insolvency Review* 1(Hereinafter Boraine and Roestoff *Insol*).
[16] Trust Wholesalers and Woollens (Pty) Ltd v Mackan 1954(2) SA 109 (N).The size of the dividend depends on the facts and circumstances of each case , as well as the attitude of the creditors.
[17] London Estates (Pty) Ltd v Nair 1957 (3) SA 591 (D); Absa Bank Ltd v De Klerk 1999 (4) SA 835 (SEC).

[18] Boraine and Roestoff *Insol* 2.
[19] *Commercial Law* 418. See further s23(5) and 23(9).See also Boraine and Roestoff *Insol* 5 where they indicate that the possibility of a surplus and the size thereof could be used as determinants to decide if the advantage to creditors would be best served by seqyestrating the estate or not.
[20] Ibid.
[21] Ibid.

The court may accept the voluntary surrender of a debtor's estate on application by the debtor, or his agent with special power of attorney or the *curator bonis* of a person unable to handle his own affairs or the executor of a deceased estate.[22] Voluntary surrender is thus a debt relief measure in the sense that the debtor can invoke it.[23]

2.2.1 Formalities

Before a debtor can apply for voluntary surrender of his or her estate compliance with the following formalities are required:

- Minimum 14 days and maximum 30 days prior to the date on which the application for voluntary surrender will be made, the debtor must publish a notice of voluntary surrender in the Government Gazette and in a newspaper that circulates in the district where he resides or carries on business.[24] The notice must comply with Form A to the First Annexure to the Insolvency Act and must be signed by the debtor or his attorney. [25]The notice can only be withdrawn with the consent of the Master by means of a further written notice in the Government Gazette. It will also lapse if the court refuses the application for voluntary surrender or if the debtor does not continue with the application on the stated date.[26] The latter however constitutes a deed of insolvency on which an application for compulsory sequestration of the debtors' estate may be based.[27] Further effects of publication of the notice of voluntary surrender are that sales in execution are stayed[28]; the Master can appoint a *curator bonis* to take control of the

[22] *Commercial Law* 415.
[23] Boraine and Roestoff *Insol* 2.
[24] S4(1).
[25] *Commercial Law* 415.
[26] Ibid.
[27] Ibid.
[28] S5 of Act 24 of 1936.

estate [29]and as indicated, the debtor commits a deed of insolvency if he fails to bring the application.[30]

- Within 7 days after the date of publication (including the date of publication) the debtor must send or deliver a copy of the notice of voluntary surrender to all creditors whose addresses are known to him.[31] He must also within this time send a copy of the notice to the South African Revenue Services and to each registered Trade Union that represents employees of the insolvent debtor.[32] Notice of the application must be given to employees by affixing the notice of voluntary surrender to a notice board at the debtors premises to which the employees have access.[33]If they have no such access then it must be placed at an entrance gate to the premises or on the front door of the premises.[34]
- The debtor must draw up a statement of affairs that must comply with Form B of Annexure 1 to the Insolvency Act and it must lie for inspection at the Master's office.[35]

The purpose of these formalities is so that creditors may get notice of the intended application and that they are given opportunity to oppose the application if they so wish.[36]

2.2.2 Burden of Proof

In terms of section 6 the applicant must prove the following:

- Compliance with the aforesaid formalities
- Factual insolvency
- Sufficient free residue to defray the cost of sequestration
- That the sequestration will be to the advantage of the creditors of the insolvent

[29] S5(2) of Act 24 of 1936.
[30] S7 of Act 24 of 1936.
[31] S4(2)(a).
[32] S4(2)(b).
[33] S4(2)(b).
[34] Ibid.
[35]S4(3).
[36] *Commercial Law* 416.

2.2.3 Advantage to creditors

In the context of the court's discretion to grant an application for voluntary surrender the requirement of advantage for the creditors of the insolvent as a group plays a pivotal role. For applications for voluntary surrender this requirement is very stringent as it must be established that there will definitely be advantage for creditors if the estate of the debtor is sequestrated. If the debtor fails to prove advantage to creditors the estate will not be sequestrated and the debtor will ultimately not receive the statutory discharge[37].

2.3 Compulsory Sequestration

The debt relief in the form of a discharge upon rehabilitation can also be accessed by a debtor in an indirect manner, namely where a creditor decides to bring an application for the compulsory sequestration of the debtor. Where a debtor finds that he himself is unable to successfully apply for the voluntary surrender of his estate there at least exists the possibility that a creditor, who is no longer prepared to wait for payment of his debt, may decide to apply for the compulsory sequestration of the debtor- and so the debtor may eventually get some debt relief even though it was not the intention of the creditor to apply for sequestration with the object of facilitating the debtor's debt relief.

2.3.1 Formalities

A creditor who wants to have a debtor sequestrated must comply with the following formalities:

- Security must be furnished to the Master for payment of the costs of the sequestration application until a trustee is appointed.[38]
- A copy of the sequestration application must be furnished to the debtor, the South African Revenue Services and a registered Trade Union who represents the debtor's employees.[39]

[37] The law of insolvency and Bill of Rights Prof A Boraine assisted by R Evans
[38] S9(3),(4),(5) and s14(1).

2.3.2 Onus of proof for provisional sequestration order

The applicant-creditor must *prima facie* prove the following in order to obtain a provisional sequestration order against the debtor:[40]

- He has a liquidated claim of at least R100 [41]
- The debtor is factually insolvent or has committed a deed of insolvency[42]
- There is reason to believe that sequestration will be to the advantage of the creditors

If the creditor proves the above the court will grant a provisional sequestration order with a return date (*rule nisi*).

.

2.3.3 Onus of proof for final sequestration order

If the sequestrating creditor can on the return date prove the factors mentioned in 2.3.2 above, despite all possible objections, the court will grant a sequestration application against the debtor.

2.3.4 Advantage to creditors

The advantage to creditors requirement also plays a pivotal role in compulsory sequestration proceedings. However, in compulsory sequestration proceedings this requirement is not as stringent as in the case of voluntary surrender applications because the sequestrating creditor in an application for compulsory sequestration only has to prove a *reasonable possibility* of advantage for creditors.[43] This less stringent requirement is obviously because the creditor in the case of a compulsory sequestration application does not necessarily have the detail knowledge of the debtor's financial position that the debtor himself has who applies for voluntary surrender.

---

[39] S9(4A).
[40] S10.
[41] Where more than one creditor brings the application they must prove that together they have a liquidated claim of at least R200.
[42] There are eight deeds of insolvency which are set out in s8 of the Insolvency Act. See Commercial Law 421,422. A detailed discussion of these acts of insolvency is beyond the scope of this dissertation.
[43] *Commercial Law* 423.

Here the court will also have regard to the assets available for distribution and the question whether the debtor will retain his employment which may cause surplus funds to become available for distribution.[44] Advantage is not only confined to a dividend but may lie in the fact that assets which are concealed may be recovered or certain transactions may be impeached which can yield benefit for the group of creditors.[45] The court can also take opposition by creditors into account as an indication of lack of advantage to creditors but this aspect is not necessarily decisive.[46] The court however retains an overriding discretion whether to grant compulsory sequestration or not but it is submitted that in the absence of defects in the application, it is usually the possibility of advantage to creditors that determines whether the court is going to grant the order or not.

2.4 Friendly Sequestration

Because of the stringent onus to prove advantage for creditors in voluntary surrender applications, debtors sometimes rely on sequestration proceedings to force a discharge of their debt on their creditors.[47]The debtor who is tired of being harassed by the creditors may thus opt for so–called "friendly sequestration".[48] This form of application is actually a compulsory sequestration initiated by a creditor. Smith points out that that the term "friendly sequestration" generally implies that the main objective of the sequestrating creditor is to come to the assistance of the debtor and that he or she is actuated by friendly considerations.[49]

In *Craggs v Dedekind* Conradie J remarked that "friendly sequestration, like pornography, is difficult define but easy to recognize. The debt upon which the

[44] Ibid.
[45] Ibid.
[46] Ibid.
[47] A Boraine and M Roestof De Jure 229
[48] See further Smith "Cast a cold eye: Some Unfriendly views on Friendly Sequestrations?" 1997 *Jutas Business Law* 50 (hereinafter Smith).
[49] Ibid.

sequestration creditor relies is usually a very small unsecured loan, often made in circumstances where it is obvious that the debtor is in dire financial circumstances. There is usually no documentary evidence of the loan, and often the debtor and creditor are related".[50]

Friendly sequestration is triggered by s8 (g) of the Act, one of eight acts of insolvency.[51] It entails that the debtor deliberately notifies the creditor in writing of his or her inability to pay to enable the creditor to rely on that notification to institute a sequestration proceeding against the debtor.[52] The act of insolvency in terms s8 (g) is satisfied when the written notice given by the debtor to the creditor conveys that the debtor is at present unable to pay his or her debts when they fall due and payable.[53]

It is common cause that a friendly sequestration is a means of avoiding both preliminary formalities for voluntary surrender and necessity of establishing that sequestration will be to the advantage of creditors as opposed to merely that there is reason to believe that it will.[54] Therefore a court will subject such an application to detailed scrutiny to ensure that the interests of creditors are not prejudiced.[55]

Courts are thus sceptic about friendly sequestration. In *Dunlop Tyres (Pty) Ltd v Brewitt* [56] the court remarked that courts should not grant a friendly sequestration unless satisfied that there is a valid and subsisting indebtedness; that there was an underlying transaction; that the indebtedness still exists and that there are clear and unequivocal proof of advantage to creditors.

---

[50] ibid
[51] For an overview of the eights acts of insolvency see *Commercial Law* 424.
[52] *Commercial Law* 424.
[53] Ibid.
[54] *Epstein v Epstein* 1987 (4) SA 606(C); *Craggs v Dedekind* 1996 (1) SA 935 (C).
[55] *Commercial Law* 424.
[56][1999] 2 ALL SA 328 (W)

A good example of how the advantage for creditors can be a drawback to obtaining debt relief by means of friendly sequestration is demonstrated by *Epstein v Epstein*.[57] The court denied the debtor an opportunity to be sequestrated as a passage to a discharge, even though his mother in her application relied on the letter which constitutes an act of insolvency and the debt was not less than R100.00 [58] The court found that the sequestration application had been brought solely to avoid committal proceedings and turned down the application which would have lifted the debtor's debt burden because of the advantage to creditors' formality. Seligson AJ stated : [59] "The court should not readily encourage the avoidance of the statutory safeguards for creditors by sanctioning recourse to a friendly sequestration via the easy route of s 8(g) of the Act, unless it is clear that the general body of creditors will benefit."

In *Vermeulen v Hubner*[60] Van Dijkhorst J took the view that friendly sequestrations were being abused to escape the strict formality requirements of voluntary surrender applications. The court therefore held that in the case of a friendly sequestration (which is actually a compulsory sequestration application) the creditor must also comply with certain formalities that are applicable to voluntary surrender applications, namely that a detailed statement of the debtors affairs must be provided well as notice to all the insolvent's creditors.[61] In *Sellwell Shop Interiors v Van Der Merwe*[62] the court however criticized the *Hubner*-case and said it is not competent for the court to set new formality requirements outside the Insolvency Act.

It is however clear that applications for friendly sequestration, apart from having to meet the requirements for compulsory sequestration as discussed above, will

[57] *Epstein v Epstein* 1987 (4) SA 606 (C).
[58] s 9(1)
[59] At 611.
[60] Unreported case no 1165/1990(T).
[61] *Commercial Law* 425.
[62] Unreported case no 27527/1990 (W).

be scrutinized by the courts and that it will not be granted if there is no advantage for creditors.

CHAPTER 2 Debt relief outside Insolvency Law

1Introduction

This chapter will focus on two other forms of formal debt relief that are available outside insolvency law, namely administration orders in terms of section 74 of the Magistrates Court Act[63] and Debt review under the National Credit Act.[64]

2. Administration in terms of section 74 of the Magistrates Court Act 32 of 1944

A debtor whose debts do not exceed R50000 can apply for an administration order in terms of s74 of the Magistrate‘s Court Act 32 of 1944. It is interesting to note that although the monetary jurisdiction of district Magistrate courts is R100 000. 00 and the monetary jurisdiction of regional magistrates courts is R300000 the R50000 cap in respect of administration orders has remained unchanged for many years.

In principle the administration procedure provides for a rescheduling of a debtor’s debt without sequestrating the debtor’s estate.[65] In terms of an administration order a court will assist the debtor by appointing an administrator to take control of the debtor’s financial affairs and to manage the payment of debts due to creditors.[66] In terms of the order the debtor has an obligation to make regular payments to the administrator. [67]The administrator, after deducting necessary

[63] Act 32 of 1944.
[64] Act 34 of 2005.
[65] Boraine ,Van Heerden and Roestoff 2012 *De Jure* (hereinafter Boraine , Van Heerden and Roestoff).
[66] Ibid.
[67] Ibid.

expenses and a specified remuneration determined by tariff,[68] will in turn make a regular distribution in weekly or monthly instalments or otherwise out of such received payments to all creditors.[69]

2.1 Application for an administration order

In terms of section 74(1)(a) a debtor who has a regular income and where the burden of debt is reasonably manageable may obtain an administration order from the court of the district in which he or she resides, carries on business or is employed, in the following circumstances:

a. where the debtor is unable to pay the amount of any judgment obtained against him or her in court; or
b. where the debtor has insufficient funds or assets at hand to meet his or her financial obligations, even where no judgment has as yet been granted.

Additionally, in terms of section 65I, an administration order may also be granted against a debtor who applies for such an order during a section 65 *in camera* inquiry into the debtor's financial position.[70]

2.2 The application

The procedure for applying for an administration order is based on an application[71] together with a prescribed statement of affairs[72] in which the debtor

[68] In terms of s 74L(2) deducted expenses and remuneration may not exceed 12.5% of the collected amount.
[69] Ibid.
[70] The administration order may be made subject to conditions such as security, preservation or disposal of assets or the realization of movables subject to a hypothec or otherwise.
[71] Annexure 1 & Form 44.
[72] S 74A(1) & (2). For the sake of convenience Form 45 may be used to set out all the required particulars. Form 45 may also be used where the application is made in terms of s 65I(2). The required particulars are; name and address of debtor's employer, a list of debtor's assets, debtor's trade or occupation and income, a list of debtor's living expenses, a list of creditors and amounts owing, details of goods purchased under credit, mortgage bonds, wife's income and names of dependants etc.

affirms on oath that the names of the creditors and the amounts owed to them and all other statements or declarations made in the statement are true.[73]

2.3 The hearing of the application for administration

The application is heard before a magistrate in a section 65 court and in the presence of the debtor or an appointed legal representative as well as creditors and their respective legal representatives.[74] All the debts listed in the statement of affairs are deemed to be proved, subject to any amendments the court may make, except where a creditor objects to a listed debt or the court rejects or requires the debt to be substantiated by evidence.[75] If the debtor objects to a creditor's claim, the court will require the creditor to prove the claim.[76] The court, or any creditor or legal representative may question the debtor with regard to assets and liabilities; present and future income including the income of a spouse; standard of living and possibilities of economising and any other relevant matter.

2.5 The contents of an administration order

The content of an administration order takes a prescribed form and must set out that

- the debtor's estate has been placed under administration;
- an administrator has been appointed;
- the amount the debtor is obliged to pay has been stipulated.[77]

---

[73] S 74A(3). The application is lodged with the clerk and delivered personally or by registered post to the creditors at least three calendar days before the hearing.See Boraine, van Heerden and Roestoff.
[74] S 74B(1)(a).
[75] S 74B(1)(b).
[76] S 74B(1)(c).
[77] The content is regulated by s 74C and the form by Annexure 1 Form 51.

The order must specifically state a weekly or monthly amount to be paid over to the administrator by the debtor.[78]**.**[79]

It is important to note that *in futuro* debts[80] are excluded from the administration order. Boraine , Van Heerden and Roestoff points out that this means that the court will exclude a certain amount of money from the weekly or monthly payments made to the administrator for the purpose of allowing the debtor to make periodical payments in terms of a credit instalment sale agreement or existing maintenance or mortgage bond obligations.[81] Where the administration order provides for the payment of instalments out of future income, the court shall authorise the issue of an emoluments or garnishee attachment order to facilitate payments by the debtor.[82]

2.5 Execution of the administration order

The court appoints an administrator to give effect to the order. Security must be given where the administrator is not a legal practitioner or an officer of the court.[83] The giving of security by the administrator to the satisfaction of the court serves as a guarantee for moneys received and paid into the trust account of the administrator. The administrator's main duty is to draw up a list of creditors and to distribute moneys collected from the debtor amongst them.[84]

---

[78] S 74I(1). This amount is calculated in terms of section 74C(2) by taking into account the difference between the future income of the debtor and certain prescribed "necessary expenses". Unless the court or Act provides otherwise, the cost of the application in terms of section 74(1) becomes a first claim against the moneys controlled by the administrator

[79] S 74O.

[80] Debts that become due and payable in the future, including mortgage bonds and assets subject to credit agreements and certain micro-loans.

[81] S 74C(2)(a) & (b) & (c) & (d). Boraine , Van Heerden and Roestoff.

[82] S 74D.

[83] Boraine, Van Heerden and Roestoff.

[84] See s 74E, G and H; Forms 47 - 50. A copy of the list is forwarded to all creditors by the administrator.

2.6 Other important aspects

The following aspects which are relevant to this discussion relating to administration orders must also be noted:[85]

- in terms of section 74K the court may request the administrator to realise any asset of the estate under administration, except assets which are subject to the Credit Agreements Act;
- in terms of section 74R an administration order is not a bar to sequestration, especially where the total debt exceeds R 50 000;
- Administration orders do not provide for a discharge of debt after a certain period of time.

2.7 Amendment and lapsing of an administration order

The administration order may be suspended, amended or rescinded.[86] Once the costs of the administration and all the listed creditors have been paid in full, the administrator must lodge a certificate indicating payment in full with the clerk of the court and send copies of the certificate to the creditors, whereupon the administration order lapses.[87]

3 The National Credit Act 34 of 2005

3.1 Introduction

The National Credit Act (NCA) is a comprehensive piece of legislation establishing rules on consumer lending and creating a legal framework for credit reporting activities[88]. The Act introduces debt relief remedies in respect of over-

[85] Van Heerden , Boraine and Roestoff.
[86] S 74Q & Form 52A.
[87] S 74U.
[88]

indebtedness[89] and reckless credit[90] into South African credit law. Only natural persons who have entered into credit agreements to which the NCA applies are entitled to access these debt relief remedies[91]. It is important to note that the National Credit Act aims for the eventual satisfaction of all responsible credit agreement debt obligations.[92]

3.2 Debt Review

Debt review (debt counseling) is a debt relief remedy that can be accessed by natural person consumers who are over-indebted.93 "Over-indebtedness" is an issue that may be raised in respect of a credit agreement to which the NCA applies in an attempt to access the debt relief provided for by the Act.[94] In terms of section 79 of the NCA a consumer is over-indebted "when the preponderance of available information at the time that a determination is made indicates that the particular consumer is or will be unable to satisfy 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[95]; and

---

[89] S79, 85,86,87 and 88 of the NCA.
[90] S80,83 and 84 of the NCA.
[91] Insolvency Systems in South Africa. Publication prepared by Gordon W Johnson and Gerald E for Chemonics International Inc
[92] See s3(i).
[93] Scholtz *et al Guide to the National Credit Act* (Service Issue 4) chapter 11(hereinafter Guide to the National Credit Act..
[94] See Scholtz Guide to the National Credit Act par 12
[95] "Financial means, prospects and obligations" have an extended meaning in terms of s 78(3) of the NCA and includes
"(a) income, or any right to receive income, regardless of the source, frequency or regularity of that income, other than income that the consumer or prospective consumer receives, has a right to receive, or holds in trust for another person;
(b) the financial means, prospects and obligations of any other adult person within the consumer's immediate household, to the extent that the consumer, or prospective consumer, and that other person customarily
(i) share their respective financial means; and
(ii) mutually bear their respective financial obligations; and
(c) if the consumer has or had a commercial purpose for applying or entering into a particular credit agreement, the reasonably estimated future revenue flow from that business purpose.

(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 repayment."[96]

When a determination is to be made whether a consumer is over-indebted or not, the person making that determination must apply the aforementioned criteria as they exist at the time that the determination is made.[97]

A consumer who is over-indebted may apply voluntarily to a debt counsellor[98] to have his debt reviewed in terms of section 86 of the Act. The procedure for voluntary debt review is set out in section 86 of the NCA which has to be read with regulation 24 of the Regulations to the NCA. This process gives a consumer the opportunity to be pro-active about his debt situation before a credit agreement is enforced and to apply for debt review and obtain debt relief.[99]

Debt review in terms of section 86 occurs in two distinct stages.[100] The first stage occurs before the debt counsellor[101], when the review of debtor's the credit agreements is conducted and a determination with regard to over-indebtedness and reckless credit is made.[102] The second stage occurs when a voluntary agreement repayment plan is filed at court as a consent order or the court is approached to restructure the debtor's credit agreement debt.[103]
Note should also be taken of the impact of section 86(2) of the NCA on debt review. Section 86(2) provides that an application for debt review under section

[96] S79(1)(a) and (b).
[97] S79(2). See Scholtz et al Guide to the National Credit Act at par 11…..where it is pointed out that this means that a consumer could have been in a financial position where he was able to afford the credit that was extended to him at the time that the credit agreement was entered into but that he became over-indebted at a later stage for istance as a result of retrenchment. This position has to be distinguished from the situation where entering into a spesific credit agreement was the trigger that immediately caused the consumer to become over-indebted, in which event the credit provider has engaged in reckless credit granting as contemplated in s 80(1)(b)(ii) and in respect of which the determination is made with regard to the moment the credit agreement was entered into.
[98]
[99] Scholtz *et al Guide to the National Credit Act* par 11.3.
[100] Boraine, Van Heerden and Roestoff.
[101]
[102] Boraine, Van Heerden and Roestoff.
[103] Ibid.

86 cannot be made in respect of a particular credit agreement if, at the time of that application the credit provider under that credit agreement has proceeded to take steps contemplated in section 129 of the Act to enforce that agreement. The Supreme Court of Appeal in *Nedbank Ltd v The National Credit Regulator*[104] has held that the section 86-procedure can however only be accessed in respect of a specific credit agreement if the credit provider has not yet delivered a section 129(1)(a)-notice[105] to the consumer in respect of that agreement. This limits the scope of debt review in that it forecloses voluntary debt review in respect of such a credit agreement.

3.2.1The process before the debt counsellor

In accordance with section 86 a consumer may apply to a debt counsellor to have the consumer declared over-indebted.[106] Section 86 read with regulation 24 provides detail on the debt review process before the debt counsellor.[107]

The application for debt review entails that a completed Form 16 is submitted to the debt counsellor.[108] Alternatively, the following information must be provided to the debt counsellor:[109]

a)Personal details, including name, initials, surname, identity number or passport number and date of birth, postal address, physical address and contact details.

b)All income, inclusive of employment income and other sources of income to be specified by the debtor.

c)Monthly expenses, inclusive of but not limited to taxes, unemployment insurance, pension, medical aid, insurance, court orders and others to be specified by the debtor.

---

104 2011(3) SA 581 (SCA).

105 S129 provides for a notice to be given to a defaulting debtor and proposing that he approaches a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction with the intent to bring payments under the agreement up to date or to resolve a dispute under the agreement.

106 In Scholtz *et al Guide to the National Credit Act* at par 11.3.

107 Regulation 1 to the NCA define “debt counselling” as “performing the functions contemplated in section 86 of the Act.”

108 Reg 24(1)(a).

109 Reg 24(1)(b).

d)List of all debts,[110] 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, sureties signed and others to be specified by the debtor.

e)Living expenses, inclusive of but not limited to groceries.

The aforesaid information must be accompanied by a declaration and undertaking to commit to the debt restructuring; a consent that a credit bureau check may be done and a confirmation that the information is true and correct.[111] All the documents specified in Form 16 must be submitted to the debt counselor and the debt counselor's prescribed fee of R50-00 must be paid. [112]

After the application for debt review as set out above is received by the debt counselor, he or she must provide the consumer with proof of receipt of the application and deliver a completed Form 17.1 to all credit providers that are listed in the application and to every registered credit bureau.[113]The debt counsellor must verify the information as provided by requesting documentary proof from the consumer, contacting the relevant credit provider or employer or any other method of verification.[114]

The consumer who applies for debt review as well as each creditor provider listed in the application for debt review must[115]

a) comply with any reasonable requests by the debt counselor to facilitate the evaluation of the consumer's state of indebtedness and the prospects for responsible debt re-arrangement, and

---

[110] Not only credit agreement debt.

[111] Scholtz et al Guide to the National Credit Act par 11.3.

[112] Section 86(3) read with Reg 24(1)(c) and (d).

[113] S 86(4). Reg 24(2) - 24(5).

[114] Reg 24(4) states that where a credit provider fails to provide a debt counselor with corrected information within 5 (five) business days after verification is requested, the debt counselor may accept the information provided by the consumer as being correct.

[115] Boraine, Van Heerden and Roestoff.See further s 86(5)(a) and (b).

b) participate in good faith in the review and in any negotiations designed to result in responsible debt rearrangement.

Within 30 (thirty) business days after receiving an application for debt review, a debt counsellor is obliged to determine 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. [116]

3.2 The determination

The assessment by the debt counsellor may lead to any of the following conclusions:[117]

a) The consumer is not over-indebted, or
b) The consumer is not over-indebted, but is nevertheless experiencing, or likely to experience, difficulty satisfying all the consumer's obligations under credit agreements in a timely manner; or
c) The consumer is over-indebted.

3.3 Determination that the consumer is not over-indebted

3.3.1General

If the debt counselor reasonably concludes that the consumer is not over-indebted, the debt counsellor must reject the application for debt review.[118]

---

116 Sec 86(6) read with reg 24(6).
117 Boraine, Van Heerden and Roestoff. See further s 86(7).
118 S 86(7)(a). This is the situation even if the debt counselor has concluded that a particular credit agreement was reckless at the time it was…….

The consumer, with leave of the Magistrate's Court, may then apply directly to the Magistrate's Court for an debt restructuring order contemplated in section 86(7)(c) as discussed below.[119]

3.3.2 Debtor not yet over-indebted but likely to experience problems

In this instance the debt counselor may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt re-arrangement.[120] If the consumer and each credit provider concerned accept that proposal the debt counselor must record the proposal in the form of an order, and if is consented to by the consumer and each credit provider concerned, file it as a section 138 consent order.[121]If no such agreement can be reached the debt counselor must refer the matter to the Magistrates Court with the recommendation.[122] The Magistrates Court must then conduct a hearing and may exercise the powers contained in section 87 basically means that it may either reject the recommendation or make an order declaring any credit agreement reckless and/or re-arranging the consumers (credit agreement) obligations.

3.3.3 The consumer is over-indebted

In this instance the debt counselor may issue a proposal recommending that the Magistrate's Court make an order rearranging the consumer's (credit agreement) obligations and/or declaring one or more of the consumer's credit agreements reckless.[123]

3.4 Court ordered debt rearrangement

---

[119] For further detail regarding this process see Scholtz et al Guide to the National Credit Act par 11.3.3.3.
[120] S 86(7)(b).
[121] S 86(8)(a).
[122] S 86(8)(b).
[123] S 86(7)(c).

Section 87 provide that in those instance where a consumer approaches a court after his application for debt review has been rejected, in order to be declared over-indebted or in those instances where a debt counsellor refers a recommendation that a debtor be declared over-indebted to court, the Magistrates' Court is obliged to conduct a hearing.[124]

During the hearing the court must have regard to the proposal and information before it and the consumer's financial means, prospects and obligations[125]. The Court may then reject the recommendation or application as the case may be. Alternatively it can make an order

- declaring any credit agreement to be reckless and an order contemplated in section 82(2) or (3);
- an order re-arranging the consumer's obligations in any manner contemplated in section 86(7)(c);
- or both orders contemplated above relating to reckless credit and debt rearrangement.

In terms of section 86(7)(c) the court may restructure the consumer's credit agreement debt in the following ways:[126]

a) extending the period of the agreement and reducing the amount of each payment due accordingly;
b) postponing during a specified period the dates on which payments are due under the agreement;
c) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or
d) recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5 or Part A of Chapter 6.

---

124 S 87(1).

125

126 S 86(7)(c)(i)(aa)-(dd).

It is important to note that section 86(7)(c) however does not authorise the court to write of interest when restructuring credit agreement debt.[127]

3.5 Termination

The debt review process itself has a limited " life span". Section 86(10) provides that if a consumer is in default under a credit agreement that is being reviewed in terms of section 86, the credit provider in respect of that agreement may give notice to terminate the review in the prescribed manner.[128]

Van Heerden points out that this does however not necessarily mean that the debtor will not have a further opportunity at debt review in the same matter.[129] The reason therefore is that section 86(11) provides that if a credit provider who has given notice to terminate a debt review as aforesaid, proceeds to enforce that agreement in terms of Part C of Chapter 6 of the NCA, the Magistrates Court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances.

3.6 Clearance certificate

A debt counsellor must issue a clearance certificate in Form 19 if the consumer has fully satisfied *all* the debt obligations under every credit agreement that was subject to the debt rearrangement order or agreement in accordance with that order or agreement.[130]

---

[127] Scholtz *et al Guide to the National Credit Act.*

[128] Such notice must be given to the consumer, the debt counsellor and the National Credit Regulator at any time at least 60 (sixty) business days after the date on which the consumer applied for the debt review.

[129] Scholtz et al Guide to the National Credit Act par 11.3.5.

[130] Reg 27.

3.10 Court-ordered access to debt review in terms of section 85

Sometimes it will happen that a consumer is really over-indebted but that such consumer was unable to apply for voluntary debt review , for instance because the credit provider promptly delivered a section 129(1)(a)-notice to the consumer upon his first default under a credit agreement. In such a case it would however still be possible for the consumer to attempt to access the debt review–process by virtue of section 85 which provides as follows:

"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 a consumer under a credit agreement is over-indebted, the court *may*

(a) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to the court in terms of section 86(7)[131]; *or*

(b) declare that the consumer is over-indebted, as determined in accordance with this Part[132], and make any order contemplated in section 87[133] to relieve the consumer's over-indebtedness."

---

[131]Thus in the case of a determination in terms of section 86(7)(b) that does not result in a consented rescheduling agreement as well as in the event of a finding of over-indebtedness as contemplated in section 86(7)(c), the court has the discretion[131] to make a debt rescheduling order as contemplated in section 86(7)(c), namely:
" (i) 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;
(ii) that one or more of the consumer's obligations be re-arranged by
(aa) extending the period of the agreement and reducing the amount of each payment accordingly;
(bb) postponing during a specified period the dates on which payments are due under the agreement;
(cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or
(dd) recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6."

[132] Part D of Chapter 4.
[133] Section 87(b) is relevant with regard to the powers that a court can exercise in terms of section 85(b) and provides that a court may
"(b) make
(i) an order declaring any credit agreement to be reckless, and an order contemplated in section 83(2)[133] or (3)[133]
(ii) an order re-arranging the consumer's obligations in any manner contemplated in section 86(7)(c)(ii)[133]; or

3.11 Effect of (pending) debt review, debt rearrangement order or debt rearrangement agreement

Debt review aims to give a consumer some form of debt relief by means of debt restructuring but it also prevents consumers from incurring more credit agreement debt while they are under debt review or while their debt is being restructured. Section 88 is instructive in this regard.

Section 88(1) provides that a consumer who has filed an application for debt review in terms of section 86(1) or who has alleged in court that he or she is over-indebted, is prohibited from incurring any further charges under a credit facility or entering into any further credit agreement with any credit provider.[134] This prohibition applies until one of the following events have occurred:

a) the debt counsellor rejects the application and the prescribed time period for direct filing in terms of section 86(9) has expired without the consumer having so applied;[135]
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;[136] 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.[137]

Further debt relief is also provided by section 88(3) which creates a moratorium on enforcement of a credit agreement while a consumer is under debt review

---

(iii) both orders contemplated in subparagraph (i) and (ii).

134 S 88(1).
135 S 88(1)(a).
136 S 88(1)(b).
137 S 88(1)(c).

or whilst his credit agreement debt is subject to a debt restructuring order in terms of which he is making regular and timeous payments.In this regard section 88(3) gives extensive protection to such a consumer by providing as follows:

”Subject to section 86(9) and (10), a credit provider who receives 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. This prohibition applies until:

a) The consumer is in default under the credit agreement, and
b) one of the following has occurred:
   (i) an event contemplated in section 88(1)(a) to (c) as indicated above;
   or
   (ii) the consumer defaults on any obligations in terms of re-arrangement agreed between the consumer and credit providers or ordered by the court or the Tribunal.

Thus section 88 protects the debt and affords him some form of debt relief by placing a moratorium on enforcement whilst attempting to limit the increase of his debt burden by not allowing the debtor to incur any further credit agreement debt in the circumstances as contemplated in the section.

Chapter 3 Analysis, conclusions and recommendations

1 Introduction

As stated in chapter one, the basic premise upon which this dissertation is based is that the only true form of debt relief is in the form of a discharge of debt. From the aforementioned overview of insolvency proceedings as well as administration orders and debt review it appears that meeting this objective is extremely difficult to achieve due to problems posed by the so-called “debt relief” afforded by these aforementioned proceedings. As will be pointed out the lack of discharge is the greatest drawback in the remedies that are available outside insolvency law whereas in the insolvency remedies where such a discharge is provided for there are various stumbling blocks which may prevent a party from being sequestrated and thus obtaining a discharge.

Each of the aforementioned remedies will now be analysed with regards to their ability to provide debt relief.

2 The remedies provided for by insolvency law

The discussion that follows will collectively addresses all the remedies available under insolvency law. It is clear that the great debt relief advantage of insolvency proceedings is that it provides a discharge from pre-sequestration debt upon rehabilitation.

2.1 Voluntary surrender

It is submitted that when one has regard to insolvency proceedings, applications for voluntary surrender appear on the face of it to be the prime debt relief vehicle that a consumer can access. This is because it enables the consumer to pro-

actively do something about his debt situation and because, upon rehabilitation, it yields a discharge from pre-sequestration debt.

However there are various drawbacks to this procedure which often have the result that consumers are unable to attain the much sought after discharge. In the first instance this is a complex and costly procedure involving the use of lawyers and expensive high court applications and advertising and other costs which impede access to the process. It further carries a very onerous burden insofar as it has to be proved by the debtor that sequestration of his estate *will be* to the advantage of his creditors.

2.2 Compulsory sequestration

In the case of compulsory sequestration the procedure itself and its requirements makes it difficult to eventually get sequestrated and obtain a discharge of pre-sequestration debt on rehabilitation. This is not a debt relief vehicle which the consumer can ordinarily access himself so he is at the mercy of a creditor who decides to sequestrate the debtor. One of its big drawbacks thus is that it is in the first place dependent on being initiated by a creditor. A debtor who is unable not apply for voluntary surrender of his estate because he cannot prove advantage for creditors will therefore have to hope that one of his creditors sequestrates him so that he may eventually get a discharge of his pre-sequestration debt. Also in the context of compulsory sequestration proceedings the requirement of having to prove that there is reason to believe that the sequestration will be to the advantage to creditors, even though it involves a lighter evidentiary burden than in the case of voluntary surrender, is still problematic because it can prevent a court from exercising its discretion in favour of granting a sequestration order if the creditor cannot meet this requirement.

2.3 Friendly Sequestration

Friendly sequestration is a form of compulsory sequestration which means that the debtor has to firstly get the "co-operation" of a creditor to access the debt relief offered by insolvency law. As indicated courts appear to be reluctant to grant these orders and subject them to scrutiny in order to decide whether there is real advantage for creditors. Also in this case the advantage to creditors appears to be the pivotal criterium for granting of such an order and proving such advantage may be problematic especially for those over-indebted consumers who have limited or no assets.

As it was outlined in *Craggs v Dedekind* most of the friendly sequestration applicants are unsecured creditors. It is submitted that they do not stand a good chance if the major creditor is opposing. In *Fesi and another v ABSA Bank Ltd* [138] The applicant minor creditors were holding a mere claim of 4% in the estate , whereas the major creditor , who was secured by the creditor was holding 96% claim on the estate. ABSA Bank opposed the sequestration application on basis that ground that it was majority.[139]The court found that the sequestration would not be to the advantage to creditors since the majority of creditors reckoned according value (the mortgagee) knows what is to their advantage.

2.4 Further remarks

The discharge of debt that is provided by Insolvency law sometimes takes a very long time to materialize, especially where the debtor has to await automatic rehabilitation after 10 years from the date of sequestration. It is further submitted that insolvency proceedings actually have limited scope in providing debt relief because of the fact that the advantage to creditors requirement hampers the granting of sequestration orders for many consumers. It is especially consumers who do not have assets that can be realized to yield sufficient proceeds to create an advantage for creditors or consumers who are unemployed or which fall into

[138] 2000 (1) SA 499 (C).
[139] Advantage to creditors is determined value and not number. Therefore , when a secured creditor is owed 96% of the debt in the estate and concurrent creditors 4% of the debt, if there will not be an advantage to secured creditor and the secured creditor opposes the application , advantage to creditors is not present and the application for voluntary surrender will fail

both of the aforementioned categories[140], that are foreclosed from benefitting from the discharge that insolvency proceedings may provide.

Roestof and Coetzee[141] find the situation to be exactly, as aptly explained by Rochelle,[142]that a consumer in South Africa can be " too poor to go bankrupt". As to the dilemma of the overburdened debtor seeking relief, Evans comes with the following conclusion regarding current insolvency legislation[143]:

"Insolvency invariably almost overreaches itself in regulating the position of the different classes of creditors, however the debtor is apparently merely defined, with no further attention being given to him, her or it. Although the Act does not provide for different classes of debtors who are treated differently in accordance with differing or changing circumstances, it does in fact differentiate between those "rich debtors" who are able to prove advantage to creditors, and the "poor debtors" who are cannot. This raises the question whether under present legislation, the door has been opened for the "poor debtor" to question the constitutionality of their position."

3. Administration orders

In the context of administration orders it is submitted that the lack of a discharge of debt after a certain period of time means that this process does not yield true debt relief. On the contrary, this process actually perpetuates the consumers debt predicament by keeping him " locked into" his debt situation for years. The process does not even provide for interest to be written off and many debtors who go under administration find themselves paying off their debts for many years while their indebtedness does not shrink.

---

[140] So-called NINA-debtors (no income no assets).
[141] Roestoff and Coetzee "A critical Evaluation of consumer debt relief in South Africa –Lessons from the United States of America, England and Wales and Suggestions for the way forward" (hereinafter Roestoff and Coetzee)
[142] Michelle R Rochelle " Lowering the penalties for failure : Using the Insolvency Law as a tool for spurring economic growth ; the American experience , and possible uses for South Africa "(1996)
[143] Roestoff and Coetzee.

The administration process also appears to be problematic for various other reasons, namely:

- Its scope of application is limited because of the R50000 cap which means it is only debtors with a relatively small debt burden who can access this procedure
- Even though this procedure takes place in the magistrates costs which means it is cheaper than sequestration which occurs in the high courts, the fact that this process is a court-based process inevitably implies that it will still be complicated and costly
- The fees that administrators may charge for attending to the administration of the debtor's debts are excessive and compounds the debtor's debt burden
- *In futuro* debts are excluded from administration orders – and it is submitted that it is often these *in future* debts with their exorbitant interest rates which are the very cause of the consumer-debtor's indebtedness. To exclude them from administration orders thus means that the problem which is causing the over-indebtedness is not being addressed and that no relief is granted in respect thereof.
- There is no time limit upon administration orders which effectively has the result that many consumers remain under administration for excessively long periods thus keeping them "locked –in" their debt situation without providing any real debt releif.

4 Debt review under the National Credit Act

The debt relief offered by the process of debt review under the NCA can also be said to be illusory. The procedure focuses on eventual satisfaction of obligations under credit agreements and the main problem of this process is that it also yields no discharge of debt after a specific period of time. This means that debtors can pay off their debt over many years without really reducing their debt burden. Although section 88 creates a moratorium on enforcement of credit

agreement debt in certain instances this moratorium only provides temporary relief in the form of a bar against court proceedings. It does not itself yield a discharge of any kind.

Research conducted on behalf of USAID/ Southern Africa has outlined among others the following problems posed by NCA[144]:

- Protection of the NCA is limited to consumers and excludes juristic persons. This exclusion was included to avoid limiting access to credit for SMEs. The definition of juristic person[145] as per the NCA includes a partnership , association or other body of persons , corporate or incorporated or a trust if there are three or more individual trustees or the trustee itself is a juristic person, but does not include a stokvel.
- Despite that the NCA aims to assist over-indebted consumers, it perpetuates the over-indebtedness by not providing a simple debtor discharge mechanism and extended repayment periods may increase the over –indebtedness.
- The NCA does not provide comprehensive relief to over-indebted consumers but rather limited relief in respect of credit agreements to which the NCA applies.
- The NCA imposes no time limitation upon debt restructuring with the result that debt restructuring orders that may run over unrealistically long periods-occasionally decades –are granted by courts. This leads to increasing numbers of consumers with “negative credit histories”.
- Interest is not stayed. If the monthly installment is less that the interest on the debt, the consumer may find find that the interest may become, in the end, too much to overcome[146].

[144] Insolvency Systems in South Africa. Publication prepared by Gordon W Johnson and Gerald E for Chemonics International Inc
[145] S1 of the NCA.
[146] 2(n)(i)

- A particular credit agreement in terms of which debt enforcement has already commenced will be excluded from the debt review application as a result of the bar contained in section 86(2)[147].

5 Conclusion

The advantage to creditors requirement limits the chances under insolvency law to obtain a real discharge and as indicated, the administration order process and the current debt review process under the NCA provide no real debt relief because they do not offer a way to obtain a discharge of debt. It is submitted that what is needed in order to resolve the debt problems of South African consumers is a process that addresses the consumer's debt situation comprehensively. Preferably this should be a unified process consolidating the fragmented pieces of so-called debt relief remedies available in South African law . It is submitted that this process should not be confined to a specific type of debt and that access to this process should not be hampered by imposing a monetary cap such as in the case of administration proceedings. Preferably court involvement in this process should be done away with or limited and the facilitation of the process should occur by a state official who is paid by the State so as to prevent cost considerations from hampering access to the process.

An essential component of such a process should be that a specific time limit is laid down after which the consumer will qualify for a discharge from his debt and be able to make a "fresh start". The process should further not be subject to any requirement such as "advantage to creditors" as this appears to be the main problem standing in the way of a discharge in terms of insolvency law.

It is submitted that the legislature should realize that sometimes there is no other way to assist an over-burdened debtor , especially those who have no income or assets, than to stipulate that their debt will be written of after they have paid

147 Note on debt relief measures in SA consumer insolvency Law: A Boraine

towards such debt for a spesific period of time or for instance after they have repaid a certain percentage of their debt. It is submitted that such a process should specifically address the issue of how interest that is levied on debt may contribute towards keeping debtors in a “debt trap”. Furthermore it should be realized that with some debtors their situation is so dire that a discharge of their debt on a “ welfare basis “ should be considered as a creditor would just be wasting money and energy by harassing these debtors for payment.

Finally it is submitted that maybe a conditional discharge can be considered in the sense that a discharge is granted conditionally for a specific period (for example 5 years) after the debtor made certain payments over a certain amount of time. If the debtor’s financial situation improves within that 5 years (he for instance wins the Lotto or gets employment again) the creditor then has the choice whether to require further payment of the balance of the initial debt. If the debtor’s position does not improve within the aforesaid 5 years then the discharge becomes final.

Bibliography

Books

- Nagel *et al Commercial Law* (4th ed)
- Scholtz *et al Guide to the National Credit Act* (Service Issue 4)

Journals

- Brown 2005 *American Law Journal* 419
- Tabb 1991 *American Bankruptcy Jnl* 344
- Howard 1987 *Ohio State LJ* 55
- Jackson 1984 *Harvard Law Review* 1393
- Maghembe and Roestoff XC111 *CILSA* 2010 292
- Boraine and Roestoff *INSOL Int L R* 1
- Smith 1997 *JUTAS Bus L* 50
- Boraine,Van Heerden and Roestoff 2012 *De Jure* 80 (Part1) and 254(Part 2)
- Roestoff and Coetzee 2012 *SA Merc LJ* 53

Legislation

- Insolvency Act 24 of 1936
- Magistrates Court Act 34 of 2005
- National Credit Act 34 of 2005

Cases

- *Walker v Syfret* NO 1911 AD 141
- *Ex parte Pillay* 1955 (2) SA 309 (N)
- *R v Meer* 1957 (3) SA 614 (N)
- *Fesi v Absa Bank Ltd* 2000 (1) SA 499 (C)
- *London Estates (Pty) Ltd v De Klerk* 1999 (4) SA 835 (SEC)
- *Epstein v Epstein* 1987 (4) SA 606 (C)
- *Craggs v Dedekind* 1996 (1) SA 935 (C)

- *Dunlop Tyres v Brevitt* [1999] 2 All SA 935 (C)
- *Vermeulen v Hubner* unrep case 1165/1990 (T)
- *Sellwell Shop Interiors v Van der Merwe* unrep case nr 27527/1990 (W)