

# **CONSUMER DEBT RELIEF IN NIGERIA: A COMPARATIVE ANALYSIS**

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## **Dedication**

I return all the glory to God my father who is able to do exceedingly, abundantly, above all that we ask and think of him. You made this possible and you deserve all the glory for ever more.

I also dedicate this work to my late father, Professor Samuel Olufunmilade Osunlaja who wanted this so much and made it possible even though he is not around to see the end of it. I would always love and appreciate you for your love, support, encouragement and the example you have laid down for me in life. Continue to Rest in Peace.

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## Summary

Nigeria arguably has one of the largest economies in Africa and boasts of a high level of economic activity. This is in part attributable to a large population of 160 million, with most being youths (65%). It would be expected that due to the high level of economic activity, there would be a workable and practical system for indebted consumers to obtain debt relief. Paradoxically, Nigeria boasts of a bankruptcy practice system that is comatose and non-existent. Laws regulating bankruptcy in Nigeria have been in existence in Nigeria since 1979 and are entrenched in the Bankruptcy Act. However, the nation is yet to record a successful case of bankruptcy through the available legal channels. A plethora of problems are responsible for the dire state of insolvency practice in Nigeria. These problems include the present legislative frame work, problems of obsolete laws, judicial attitudes, problems of enforcement, challenge of overburdened courts, to mention but a few. The Bankruptcy Act provides for bankruptcy proceedings as a major debt relief measure available to a consumer debtor and composition and re-arrangement as alternative debt relief measures to bankruptcy. These debt relief measures are said to be cumbersome in nature as the Bankruptcy Act provides that debt must first be judicially established in a separate proceeding before bankruptcy proceedings can be instituted against a debtor. Also, the Bankruptcy Act does not provide for adequate debt relief measures for consumer debtors. For instance, in New Zealand, England and Wales, there is a debt relief measure for debtor's that do not have assets or income that is the No Income No Assets (NINA) debtors. Provision for this category of debtors is not available in Nigeria.

This work is a comparative study of consumer debt relief measures in South Africa, Denmark and New Zealand and is intended to highlight the strengths of these systems so that Nigeria can learn from them and fashion out a better debt relief system from the findings made. This work seeks to make recommendations and propose reforms for a better debt relief system principally through the amendment of the present Bankruptcy Act. Also that the Nigerian system must provide for a comprehensive and unified bankruptcy legislation that makes provision for non-judicial and viable alternative debt relief measures other than bankruptcy proceedings. This would give a consumer debtor the opportunity to choose the most appropriate procedure that would grant relief from indebtedness. These non-judicial procedures would also help solve the problem of over burdening of the courts,

enhance speedy adjudication of bankruptcy matters and make debt relief measures available to a consumer debtor at little or no cost.

Furthermore, the work also incorporates recommendations from the International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL International) Consumer Debt Report and the World Bank report on “The treatment of the insolvency of natural persons”. These recommendations propose policy guidelines for insolvency reforms in nations of the world and gives practical suggestions on how to make these procedures less cumbersome and readily available for debtors.

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## **Bibliography**



## CHAPTER 1

### INTRODUCTION

#### 1.1 Background

Nigeria is the most populous country in Africa and obtained political independence from British colonialists in the year 1960.<sup>1</sup> The Nigeria legal system has been greatly influenced by English law as a result of its past affiliation with the British kingdom and therefore the Nigerian legal system can be said to be based on the English common law.<sup>2</sup>

Insolvency practice in Nigeria is said to have started since the time of British colonialist rule when liquidators were appointed over the indigenous banks that were in existence then.<sup>3</sup> In Nigeria, the word “bankruptcy” is often used to refer to an individual or consumer debtor while insolvency is used for corporate bodies.<sup>4</sup> The system of insolvency practise in Nigeria generally draws its inspiration from the English law system and the current legislation that regulates bankruptcy practice in Nigeria is the Bankruptcy Act of 1979<sup>5</sup> which regulates bankruptcy of natural persons and partnerships.

The ancient Romans are said to have the first written work on “bankruptcy”, and the word is said to have been derived from the Latin terms “bancus” meaning a tradesman’s table and “ruptus” meaning “broken”.<sup>6</sup> This simply refers to one whose business is broken or gone and when this happens the trade man is deemed to have been put out of business.<sup>7</sup>

Looking at the evolution of insolvency practice generally, the ancient insolvency law practise was not debtor friendly and was characterised by a harsh treatment of debtors as debtors were seen by the system as crooks. However, modern insolvency systems have evolved into more liberal systems which emphasize reorganization, rehabilitation and

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<sup>1</sup> See Dina Akintayo and Ekundayo 2005 <http://www.nyulawglobal.org/globalex/nigeria.htm> 1 (Assessed 20/08/2014).

<sup>2</sup> See Ezera *Constitutional Developments in Nigeria* 12 .See also Obilade *The Nigerian Legal System* 17.

<sup>3</sup> See Akinwunmi and Busari <http://www.akinwunmibusari.com/images/documents/> 2 (Assessed on 20/08/2014).

<sup>4</sup> See Akinwunmi and Busari <http://www.akinwunmibusari.com/images/documents/> 3 (Assessed on 20/08/2014).

<sup>5</sup> *Bankruptcy Act* Cap 30 LFN 1990.

<sup>6</sup> Calitz 2010 *Fundamina: A Journal of Legal History* 4.

<sup>7</sup> Ibid.

discharge in order to guarantee humane societal treatment of the defaulting debtors.<sup>8</sup> Modern insolvency laws have incorporated various debt relief measures for a consumer who is insolvent in order to get relief from his debt and further efforts are being made by legislators, law reforms, international bodies and organizations to ensure that a better consumer debt relief system evolves.

The International Association of Restructuring, Insolvency and Bankruptcy Professionals (Insol International) published a report in the year 2001<sup>9</sup> which dealt with consumer debt relief. The policies laid down in the 2001 report were further re-emphasised in a second report in the year 2011.<sup>10</sup> The report in its findings and recommendations, states that nations should have a balanced system which promotes a fair and equitable system, devoid of maximum advantage to creditors. The system should however not be abusive to debtors and should provide for the discharge, rehabilitation and a fresh start for debtors. Finally, the report proposed that the system should provide for alternative debt relief measures that are extra judicial rather than through judicial proceedings. These alternative debt relief measures should take into account the debtors specific needs whilst simultaneously saving time and cost when compared to judicial proceedings.<sup>11</sup>

The World Bank also published a report titled “The treatment of the insolvency of natural persons”<sup>12</sup> which looked into consumer debt relief. The report recognised the absence of a standard legislative system that deals with the insolvency of natural persons especially in low and middle income countries. The report also highlighted policies that need to be reformed in ensuring insolvency regimes that provide consumer debt relief. Guidelines were also given on how these policy reforms should be implemented by nations and how the debt relief procedure would be less cumbersome and costly for individuals.

The concept of insolvency law and practice is unknown to an average Nigerian as the general notion of insolvency in Nigeria is simply failure of either a business or an individual whilst there is more to insolvency law than the concept of failure.<sup>13</sup> Furthermore,

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<sup>8</sup> Goode *Principles of Corporate Insolvency Law* 10.

<sup>9</sup> Insol International 2001 *Consumer Debt Report: Reports of Findings and Recommendations*.

<sup>10</sup> Insol International 2011 *Consumer Debt Report II: Reports of Findings and Recommendations*.

<sup>11</sup> *Ibid* 13.

<sup>12</sup> World Bank Report on the *Treatment of the Insolvency of Natural Persons* 125.

<sup>13</sup> See Akinwunmi and Busari <http://www.akinwunmibusari.com/images/documents/> 1 (Assessed on 20/08/2014).

bankruptcy practice in Nigeria is neither vibrant nor effective as in practice, bankruptcy is not frequently filed and till date, there is no recorded instance of debtor bankruptcy application or any judgment on bankruptcy generally.<sup>14</sup> The reasons for this set back have been observed to be connected to the legislative framework of bankruptcy practice in Nigeria and beliefs of the people.<sup>15</sup>

In the light of the underdeveloped nature of the Nigerian bankruptcy system, there is an urgent need for a revaluation and strengthening of the system, bringing it to par with best practises. This research work would discuss consumer debt relief measures in Nigeria in light of the problems and failures of the system. After consumer debt relief measures in Nigeria have been considered, consumer debt relief measures in selected countries would be considered. The countries are South Africa, New Zealand and Denmark and recommendations of the INSOL international and the World Bank.

Furthermore, this research work provides a comparative study of consumer debt relief measures in Nigeria, South Africa, New Zealand and Denmark with the aim of drawing lessons from South Africa, New Zealand and Denmark on how Nigeria can emulate their system and fine tune her debt relief measures in other to suit her local needs. The reasons why these jurisdictions have been chosen for this comparative study would be explained in the relevant chapters.

## **1.2 Aim of Study**

Bankruptcy practice in Nigeria is underdeveloped and very few cases of bankruptcy have ended up in the law courts, even though bankruptcy laws have existed in the statutes for decades. The primary motivation for this research work is to investigate reasons for the few cases of bankruptcy in Nigeria in line with the adequacies of the debt relief measures that are available to a consumer debtor. Another purpose of this research is to propose reforms of the Nigeria bankruptcy system specifically consumer debt relief measures by learning from South Africa, New Zealand and Denmark.

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<sup>14</sup> See Agbakoba and Fagbohunlu 1992 <http://www.agbakoba-associates.com/media/> 4 (Accessed 16/07/2014).

<sup>15</sup> Agbakoba and Fagbohunlu 1992 <http://www.agbakoba-associates.com/media/articles/> (Accessed 26/06/2014) 2. See also, Akinwunmi and Busari <http://www.akinwunmibusari.com/images/documents/> 3.

### **1.3 Research Questions**

1. How effective are the available consumer debt relief mechanisms in Nigeria, South Africa, New Zealand and Denmark?
2. Can the practice of consumer debt relief in Nigeria draw lessons from South Africa, New Zealand and Denmark?
3. How can Nigeria improve its present consumer debt relief measures to ensure a more comprehensive and effective debt relief system from lessons learnt from South Africa, New Zealand and Denmark?
4. How can the recommendations of INSOL and the World Bank on consumer debt relief be incorporated into the existing insolvency legal framework of Nigeria?

### **1.4 Research Methodology and Approach**

This research work is a comparative analysis of consumer debt relief measures in Nigeria South Africa, New Zealand and Denmark. This would serve as a model for measuring the effectiveness and adequacy of consumer debt relief measures available in Nigeria. The research methodology to be used is the comparative method of legal research. The information sources that would be used in the course of this research work include both primary and secondary sources. Contributions by different authors in journals, articles, case law and internet sources will be evaluated and reviewed to ascertain the insolvency practices of the countries under study.

### **1.5 Scope and Delimitation of the Study**

This research work focuses on consumer debt relief measures in Nigeria, South Africa, New Zealand and Denmark. An overview of the provisions of the laws of these jurisdictions will be considered and the effectiveness of the consumer debt relief measures will be discussed. The existing laws of various jurisdictions would be evaluated together with the INSOL international consumer debt report published in 2011 and the World Bank report on treatment of insolvency of natural persons in 2014. The scope of this work does not include corporate insolvency.

## **1.6 Overview of the Chapters**

Chapter one of the dissertation includes an introduction, the aim of the study, research questions, research methodology, scope and delimitations of study, and overview of the chapters.

Chapter two would examine consumer debt relief measures in Nigeria, the procedures and the problems identified in the system.

Chapter three would examine consumer debt relief measures in South Africa, the procedures, the problems identified with consumer debt relief in the system and a comparative study of South Africa with the Nigerian system.

Chapter four would look at the consumer debt relief measures in New Zealand and Denmark, the procedures and also make a comparative study between New Zealand Denmark and Nigeria.

Chapter five would discuss the relevant recommendations of INSOL in its consumer debt report and also the World Bank report on treatment of insolvency of natural persons and provide a summary of the lessons that can be learnt by Nigeria.

Chapter 6 would provide a summary of all findings, conclusions, and recommendations for the Nigerian debt relief system.

## Chapter 2

### CONSUMER DEBT RELIEF MEASURES IN NIGERIA.

#### 2.1 Introduction

The practice of insolvency in Nigeria started prior to the nation's independence in the year 1960, when liquidators were appointed over the indigenous banks that were then in existence.<sup>16</sup> The Nigerian legal system is greatly influenced by English common law and this stems from the fact that Nigeria was colonized by the British. Thus, a substantial part of Nigeria's laws is from English laws.<sup>17</sup>

In this chapter, the debt relief measures available to consumers in Nigeria are extensively discussed. These measures range from conventional bankruptcy proceedings to alternative bankruptcy proceedings. Also, the problems of the system and proposed solutions are briefly discussed. It is important that the Nigerian debt relief system, in light of consumer debt relief measures are discussed and evaluated in order to determine the effectiveness of these debt relief measures, and provide a comparative study with other jurisdictions such as South Africa, New Zealand and Denmark as this is the primary focus of this study. This would be discussed in light of the various problems that have been identified in the system and reforms that have been proposed.

Furthermore, it is important to discuss consumer debt relief measures in Nigeria as it has been observed that only few works have been done in the area of consumer debt relief in Nigeria and no comparative study exists, therefore this has necessitated the need for a discussion of consumer debt relief measures in Nigeria in this chapter.

#### 2.2 Nature of Consumer Debt Relief in Nigeria

The word "bankruptcy" is used to refer to personal insolvency proceedings in Nigeria.<sup>18</sup> The primary law that regulates these proceedings is the Bankruptcy Act.<sup>19</sup> The word

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<sup>16</sup> See Akinwunmi and Busari <http://www.akinwunmibusari.com/images/documents/> 2 (Assessed on 20/08/2014).

<sup>17</sup> See Obilade *The Nigerian Legal System* 17. See also Dina Akintayo and Ekundayo 2005 <http://www.nyulawglobal.org/globalex/nigeria.htm> 9 (Assessed 20/08/2014).

<sup>18</sup> See Akinwunmi and Busari <http://www.akinwunmibusari.com/images/documents/> 3 (Assessed on 20/08/2014).

“insolvency” is used when a corporate body is involved and corporate insolvency is regulated by the Companies and Allied Matters Act.<sup>20</sup> The primary aim of the Act as stated in its introduction is to make provision for situations whereby a person who is unable to pay his debt can be professed bankrupt and also to debar such persons that have been established as bankrupt from holding certain elective and public offices or from practising any regulated profession except as an employee.<sup>21</sup> Bankruptcy law is said to have been developed to perform the dual function of protecting the debtors from any form of harassment and duress from the creditor while at the same time protecting creditors’ rights as much as possible in ensuring that their rights are enforced against the debtor.<sup>22</sup>

The Nigerian Bankruptcy Act provides for debt relief measures which can be explored by an indebted consumer in order to get relief from his debts which are:

- (a) Bankruptcy proceedings.
- (b) Composition and re-arrangement; this can be explored by a consumer debtor as an alternative to bankruptcy.

### 2.3 Bankruptcy Proceedings in Nigeria

Bankruptcy in Nigeria has been simply defined as the inability of an individual to pay his debts and a person can only be established bankrupt by the order of court.<sup>23</sup>

The Nigerian Bankruptcy Act provides for bankruptcy proceedings as a form of debt relief for a consumer debtor. Bankruptcy proceedings can be instituted by way of petition<sup>24</sup> and there are 2 types of bankruptcy proceedings in Nigeria which are voluntary bankruptcy which is also referred to as the debtor bankruptcy proceedings and the involuntary bankruptcy proceedings, also known as creditor(s) bankruptcy proceedings.<sup>25</sup>

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<sup>19</sup> Cap 30 LFN 1990.

<sup>20</sup> *Companies and Allied Matters Act* (CAMA) 1990.

<sup>21</sup> See the long title of *Bankruptcy Act*. See also section 126 of the *Bankruptcy Act*.

<sup>22</sup> Opara Okere and Opara 2014 *Canadian Social Science Journal* 62.

<sup>23</sup> See Oyedepo 2008 <http://ssrn.com/abstract=1089345> 1 (Assessed on 20/08/2014).

<sup>24</sup> Section 3 of the *Bankruptcy Act*.

<sup>25</sup> See Nwobike 2013 <http://www.jnclawfirm.com/articles> 5 (Accessed on 16/07/2014). See also sections 1 and 4 of the *Bankruptcy Act*.

### 2.3.1 Voluntary Bankruptcy Proceedings

Voluntary bankruptcy proceedings are usually instituted by the debtor and entail the debtor initiating legal proceedings due to his inability to pay his debts and also for protection against creditors of his estate. In Nigeria, voluntary bankruptcy proceedings are not common and no case has been reported so far on it.<sup>26</sup> This is not because individuals do not go into debt but because of societal beliefs<sup>27</sup> that exists in Nigeria as debtors are seen as outcast that should be ostracized and therefore, relatives or friends do not have the culture of reporting such cases but would rather find a way of settling it or writing such debts off.<sup>28</sup>

In debtor proceedings also known as voluntary bankruptcy the very act of the debtor presenting a bankruptcy petition establishes debt in itself upon which bankruptcy proceedings can be established.<sup>29</sup>

### 2.3.2 Involuntary Bankruptcy Proceedings

An involuntary bankruptcy proceeding is when creditors institute bankruptcy proceedings against a debtor in order to lay claims on his estate for payment of the debts owed. The primary purpose of instituting bankruptcy proceedings is to obtain a receiving order from the court against the estate of the debtor in order to satisfy the debts being owed to the creditors of the estate.<sup>30</sup>

In commencing involuntary bankruptcy proceedings, debt must first be judicially established in a separate proceeding before bankruptcy proceedings can be instituted.<sup>31</sup> Thus just as is the position under English law, bankruptcy proceedings cannot be used to establish debt but can only be used to enforce the payment of debts.<sup>32</sup>

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<sup>26</sup> See Agbakoba and Fagbohunlu 1992 <http://www.agbakoba-associates.com/media/> 4 (Accessed 16/07/2014).

<sup>27</sup> See Akinwunmi and Busari <http://www.akinwunmibusari.com/images/documents/> 3 (Assessed on 20/08/2014).

<sup>28</sup> See Agbakoba and Fagbohunlu 1992 <http://www.agbakoba-associates.com/media/> 2 (Accessed 16/07/2014).

<sup>29</sup> See section 8 of the *Bankruptcy Act*. See also Oyedepo 2008 SSRN(<http://ssrn.com/abstract=1089345> 5 (Accessed 17/07/2014).

<sup>30</sup> Sections 7 and 8 of the *Bankruptcy Act*.

<sup>31</sup> See Oyedepo 2008 <http://ssrn.com/abstract=1089345> 5 (Assessed on 20/08/2014).

<sup>32</sup> Nwobike 2013 <http://www.jnclawfirm.com/articles> 8 (Accessed on 16/07/2014).



### 2.3.3 Acts of Bankruptcy

- (a) In Nigeria, a person is said to be bankrupt in any of the following circumstances;<sup>33</sup> If a creditor obtains a final judgment or final order against the debtor for any amount, and while execution has not been stayed, serves a bankruptcy notice on the debtor and if the debtor does not, within fourteen days after service of the notice, comply with the requirements of the notice or satisfy the court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment.
- (b) If execution was levied against the property of the debtor via court proceedings and the goods have either been sold or held by the bailiff for 21 days.
- (c) When a debtor files a declaration in court declaring his inability to pay his debt.
- (d) When a debtor presents a bankruptcy petition against himself.

A receiving order can only be made against a debtor if an act of bankruptcy has been established according to these provisions of the law.<sup>34</sup> Acts of bankruptcy committed as regards (a) and (b) above, can be relied upon by the creditor in filing a petition for bankruptcy against the debtor while (c) and (d) are circumstances whereby the debtor can initiate bankruptcy proceedings on his own.

In instituting a valid bankruptcy proceeding, the first thing that must be done is to establish an act of bankruptcy committed by the debtor according to the provisions of the Bankruptcy Act. After an act of bankruptcy has been established, a petition can be filed either by a creditor or the debtor himself<sup>35</sup> and the court would grant the petition having been convinced that the petition satisfies certain requirements of the law.

A creditor is entitled to present a petition against a debtor:<sup>36</sup>

- (a) If the debt owed by the debtor to the petitioning creditor or creditors, is more than N2,000;<sup>37</sup>

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<sup>33</sup> Section 1 of the *Bankruptcy Act*.

<sup>34</sup> Blankson 2010 <http://www.ainabblankson.com/pdftemp/> 4 (Assessed 20/08/2014).

<sup>35</sup> Section 8(1) of the *Bankruptcy Act*.

<sup>36</sup> Section 4(1)(a)-(d) *Bankruptcy Act*.

<sup>37</sup> 2,000 Nigerian Naira was the equivalent of approximately 12.3 United States dollars on 2014.09.12.

- (b) If the debt owed is a liquidated sum, payable either immediately or at certain future time;
- (c) If the act of bankruptcy on which the petition is brought against the debtor occurred within three months before the presentation of the petition; and
- (d) The debtor is ordinarily resident in Nigeria, or within a year before the date of bringing the petition, has ordinarily resided or had a dwelling-house or place of business in Nigeria, or has carried on business in Nigeria, personally or by an agent or manager.

The law states that a creditor petition must be verified by an affidavit and same must be served on the debtor in such prescribed manner by the law.<sup>38</sup> At the date of the hearing of the application by the court, the creditor would be required to present judgment of the proceedings where the debt has been established and a proof of service of application on the debtor and also, establish that an act of bankruptcy has been committed by the debtor.<sup>39</sup>

After the court hearing of the bankruptcy petition, the court would either rule in favour of the petitioner and make a receiving order,<sup>40</sup> or rule against the petition setting aside the bankruptcy notice.<sup>41</sup> The receiving order would be made by the court at the court hearing if the court is satisfied with the petition that the petition meets specific required standards of the law which are:<sup>42</sup>

- (a) That debt has been established;
- (b) That an act of bankruptcy has been committed;
- (c) That the petition was served on the debtor.

After the receiving order has been made by the court, the receiving order would thereafter be published in the federal gazette.<sup>43</sup>

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<sup>38</sup> Section 7(1) of the *Bankruptcy Act*.

<sup>39</sup> Section 7(2) of the *Bankruptcy Act*.

<sup>40</sup> See Section 3 of the *Bankruptcy Act*. Order 45 of the *Bankruptcy Rules*.

<sup>41</sup> See Rule 21 of the *Bankruptcy Rules*.

<sup>42</sup> Section 7(2) (a)-(c) of the *Bankruptcy Act*.

<sup>43</sup> Section 14 of the *Bankruptcy Act*.

The receiving order has an effect of barring the creditors from commencing any action or legal proceedings against the debtor except with the leave of the court except in the case of a secured creditor in relation to his security.<sup>44</sup>

If the court is satisfied with the petition filed, and a receiving order has been made, an official receiver would be appointed<sup>45</sup> and a statement of affairs would thereafter be drawn up by the debtor and submitted to creditors of his estate or the official receiver appointed.<sup>46</sup> This statement of affairs would be submitted within 14 days that the receiving order was made<sup>47</sup> and the control of the estate of the debtor thereafter vests in the official receiver appointed for the benefit of the creditors of the estate.<sup>48</sup> A meeting of the creditors and official receiver is however called and then a decision is made either to continue with the bankruptcy proceedings or initiate composition or rearrangement if any has been proposed by the debtor.<sup>49</sup> If the debtor is eventually declared bankrupt, the assets of the estate are eventually distributed amongst the creditor(s) according to the provisions of the Act.<sup>50</sup>

#### **2.3.4 Effects of Bankruptcy**

When a person has been declared bankrupt according to the Bankruptcy Act, there are certain restrictions that come into play by virtue of his or her bankruptcy status. Section 126 of the Bankruptcy Act imposes certain restrictions on a person who has been adjudged bankrupt. Such persons cannot:<sup>51</sup>

- (a) Be elected to the office of the President, Vice President, Governor, or Deputy Governor;
- (b) Be elected to, sit or vote in the Senate House of Representatives or the State House of Assembly;
- (c) Be elected, sit or vote in any local government council in any State or the Federal Capital;

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<sup>44</sup> Section 10(1)(2) of the *Bankruptcy Act*.

<sup>45</sup> Section 11 of the *Bankruptcy Act*.

<sup>46</sup> Sections 6(2) and 72 of the *Bankruptcy Act*.

<sup>47</sup> Section 16(1) of the *Bankruptcy Act*.

<sup>48</sup> Section 18(1) of the *Bankruptcy Act*.

<sup>49</sup> Section 15(1) of the *Bankruptcy Act*.

<sup>50</sup> Sections 20(1) and 24 of the *Bankruptcy Act*.

<sup>51</sup> Section 126(1)(b) of the *Bankruptcy Act*.

- (d) Be appointed, sit or vote in, any Governing Board of any statutory body;
- (e) Be appointed or act as a Justice of the Peace;
- (f) Be appointed or act as a trustee of a trust estate;
- (g) Practice any profession that is regulated by the law or enter into partnership or any association with any other person except as an employee.

Also, in situations whereby a person that has been adjudged bankrupt was holding any of these offices prior to his bankruptcy, such position is deemed automatically terminated upon bankruptcy.<sup>52</sup>

### 2.3.5 Discharge of the Bankrupt

The Bankruptcy Act provides for the discharge of the debtor from all his debts that was proved in the bankruptcy proceedings.<sup>53</sup> The court would grant a discharge in any of the following ways:

- (a) Through the application of a debtor to the court. A debtor can make an application to the court for his discharge at any time after which he has been declared bankrupt and this application would not be heard until the public examination of the debtor has been closed;<sup>54</sup> or
- (b) Through a court motion or application of an official receiver, trustee or any creditor who has hitherto proved a claim.<sup>55</sup> In situations whereby the debtor that is the bankrupt does not apply for a discharge within a reasonable time, the court may of its own volition raise a motion or on the application of the official receiver or the trustee or any creditor that has proved claim, call upon the debtor to come for his discharge; or
- (c) Through an automatic discharge five years after a receiving order was issued against the debtor.<sup>56</sup>

The court would however refuse an application for discharge on certain grounds stated in the act such as:<sup>57</sup>

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<sup>52</sup> Section 127 of the *Bankruptcy Act*.

<sup>53</sup> Section 29(2) of the *Bankruptcy Act*.

<sup>54</sup> Section 28(1) of the *Bankruptcy Act*.

<sup>55</sup> Section 28(2) of the *Bankruptcy Act*.

<sup>56</sup> Section 31 of the *Bankruptcy Act*.

- (a) If the total value of the bankrupt's assets is not up to 50 per cent of his unsecured liabilities unless he is able to convince the court that the shortfall of the required percentage is as a result of circumstances he cannot be held responsible for;
- (b) When the bankrupt has failed to keep books of accounts of business carried on by him or failed to disclose information with regard to his financial transactions and status for the period of 3 years preceding his bankruptcy;
- (c) If the bankrupt had incurred liabilities with the aim of making his assets equal to 50 per cent of his unsecured liabilities within the period of 3 months preceding the date that the receiving order was made;
- (d) When the bankrupt has continued to carry on with trading activities knowing that he is insolvent;
- (e) If there is a loss of asset of the estate or shortfall of assets to meet his liabilities and the bankrupt had failed to account for such shortfall or loss;
- (f) If the bankrupt had contributed to his bankruptcy in any way such as by making wrong financial decisions, living an unjustified extravagant life, by gambling, incurring unjustifiable expenses, or by neglecting his business affairs;
- (g) If the bankrupt has been unfair to his creditors by putting them through unnecessary expenses by filing any frivolous defence to an action lawfully brought against him;
- (h) If the bankrupt has within 3 months prior to the date the receiving order was made, given undue preference to any of his creditors;
- (i) If the bankrupt had been previously adjudged bankrupt either in Nigeria or anywhere else or had made a composition or rearrangement with his creditors previously;
- (j) If the bankrupt has been found guilty of any fraudulent breach of trust before.

The court would refuse an order for discharge under any of these conditions stated above. It is however pertinent to note that, an order of discharge does not release the debtor from debts or liabilities incurred through fraudulent practices or debts in which a bankrupt may be charged in a suit against the state.<sup>57</sup> Furthermore, discharge granted to a debtor does not release cover the debtor's partner, co-trustee, or a surety.<sup>59</sup>

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<sup>57</sup> See section 24(4) (a-i) of the Bankruptcy Act.

<sup>58</sup> See section 29(1) of the *Bankruptcy Act*.

<sup>59</sup> See section 29(4) of the *Bankruptcy Act*.

In granting a discharge, the court on the day of hearing of the application for discharge, would take recourse to the report of the official receiver with regard to the debtor's conducts, disposition all through the bankruptcy proceedings and then exercise its discretion and make any of the following orders:<sup>60</sup>

- (a) The court may grant an absolute order of discharge; or
- (b) Refuse an absolute order of discharge; or
- (c) Suspend the operation of an order of discharge for a specific period of time or until a dividend of not less than 50 per cent is paid to the creditors; or
- (d) Grant an absolute order of discharge subject to certain conditions such as conditions with regard to earnings and properties acquired after bankruptcy for any balance of debt that is outstanding and has been proven under bankruptcy.

### **2.3.6 Effect of Discharge**

An order of discharge granted by the court to a person who is bankrupt would:<sup>61</sup>

- (a) Release a bankrupt person from all debts that was provable in bankruptcy consequently, the debtor is re-instated to his original position before adjudged bankrupt and all limitations responsibilities imposed are automatically terminated;
- (b) Also, serve as a conclusive evidence of an act of bankruptcy and therefore serves as an automatic bar to proceedings that may be instituted against the debtor with regard to any debt that was a subject of the bankruptcy proceeding.
- (c) Put an end to the bankruptcy proceedings instituted against the debtor.

## **2.4 Alternative Debt Relief Measures**

### **2.4.1 Composition and Schemes of Arrangement**

The Bankruptcy Act provides for composition or scheme of arrangement as a debt relief measure for a debtor. This avenue can only be explored after a bankruptcy proceeding has been initiated. It can be explored by the debtor in securing relief from his indebtedness.<sup>62</sup>

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<sup>60</sup> Section 28(3) of the *Bankruptcy Act*.

<sup>61</sup> See section 29 of the *Bankruptcy Act*. See also Opara, Okere and Opara 2014 *Canadian Social Science Journal* 66.

<sup>62</sup> See sections 18 and 20(1) of the *Bankruptcy Act*.

After commencing a bankruptcy proceeding under the Bankruptcy Act, a debtor is given the opportunity to make a proposal for composition or scheme of arrangement of his obligations. Proposals for these debt relief measures would be made after the official receiver has been appointed and after the debtor must have submitted his statements of affairs. A proposal for composition or scheme of arrangement is expected to satisfy the following requirements of the law:<sup>63</sup>

- (a) A proposal for composition or scheme of arrangement must be in writing and signed by the debtor;
- (b) Must be lodged with the official receiver within 7 days of submitting statement of affairs;
- (c) Must state the terms of composition or scheme intended and particulars of the sureties or securities proposed;

After a proposal has been made, a meeting of the creditors of the estate is called together with the official receiver and the proposal is deliberated upon.<sup>64</sup> Any creditor of the estate who has proved claim is given the opportunity to accept or dissent a proposal made and this must be done not later than 3 days before the meeting of the creditors. In situations whereby a creditor dissents to the proposal, such would be counted as a vote against the proposal of the debtor.<sup>65</sup>

The proposal is considered accepted if two third majorities in number of the creditors who have proved their claims assents to. The debtor may request that a proposal be amended at the creditors meeting, and amendments would only be granted if the official receiver is convinced that such would be to in the general interest of the creditors.<sup>66</sup> Based on this analysis, the court would decide either to approve the proposal or not.<sup>67</sup> If the creditors reject the proposal, the court would within 14 days from the date the rearrangement was rejected, adjudge the petition and declare the debtor bankrupt.<sup>68</sup>

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<sup>63</sup> Section 18(1) of the *Bankruptcy Act*.

<sup>64</sup> See section 18(2) of the *Bankruptcy Act*.

<sup>65</sup> Section 18(4) of the *Bankruptcy Act*.

<sup>66</sup> See section 18(3) of the *Bankruptcy Act*.

<sup>67</sup> Section 18(9) and (11) of the *Bankruptcy Act*.

<sup>68</sup> See section 20(19) of the *Bankruptcy Act*.

## 2.4.2 Effect of Composition and Schemes of Arrangement

A composition or rearrangement scheme approved by the court has a binding effect on all the creditors of the debtor with regard to the debts that are provable against the debtor in bankruptcy.<sup>69</sup> Also, a certificate of composition or re arrangement scheme issued by an official receiver is a conclusive evidence of an accepted scheme binding on all the creditors of the estate and enforceable in case of any breach.<sup>70</sup>

## 2.4.3 Discharge under Composition and Schemes of Arrangement

A discharge under a composition and arrangement scheme is subject to the provision of the law with regards to discharge under the Bankruptcy Act. Therefore a debtor who would ordinarily not get a discharge under bankruptcy would not be discharged from his debt under a composition or a scheme of arrangement.<sup>71</sup> The provisions and conditions of discharge under bankruptcy proceedings apply to discharge under composition and re arrangement.<sup>72</sup>

## 2.5 Problems Identified with the Nigerian Bankruptcy System and Reform Initiatives.

A plethora of problems have been identified as being responsible for the dire state of bankruptcy practice in Nigeria such as problem of the current legislative frame work, challenge of overburdened courts, obsolete laws<sup>73</sup> and lack of unified legislation.<sup>74</sup>

The legislative frame work of bankruptcy practice in Nigeria has been criticised and is the problem hindering the effectiveness of the system. The practice of establishing debt in a separate proceeding before filing for bankruptcy of an indebted individual is said to be a major challenge as its costly and also time consuming. Furthermore, Nigeria has a challenge of congestion in the court rooms therefore, this practice of establishing debt in a

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<sup>69</sup> Section 18(13) of the *Bankruptcy Act*.

<sup>70</sup> Section 18(14) and (15) of the *Bankruptcy Act*.

<sup>71</sup> Section 18(21) of the *Bankruptcy Act*.

<sup>72</sup> See sections 28 and 29 of the *Bankruptcy Act*.

<sup>73</sup> Agbakoba 1992 <http://www.agbakoba-associates.com/media/articles> 8 (Accessed 2/08/2014).

<sup>74</sup> See Insol International Report: *Africa Round Table on Insolvency Reform* 3.



separate proceeding would only amount to further burdening on the courts which would elongate the entire process and eventually discourage filing of bankruptcy proceedings.<sup>75</sup>

Proposals have been made that bankruptcy proceedings should no longer be made an ancillary proceeding and therefore the practice of establishing debt should be abolished. Furthermore, there should be a unified legislation and also other alternative channels of debt relief measures should be provided for in order to ease the pressure on conventional debt recovery methods and most especially the courts.<sup>76</sup>

In the year 2010, the World Bank carried out a survey on insolvency reform in twelve countries from the Sub-Sahara African region which included Nigeria. From the survey,<sup>77</sup> a number of problems were highlighted as being the problems of the insolvency system in Nigeria: no unified legislation, lack of expedient procedures, no official framework for out of court debt negotiations, and lack of regulatory bodies for insolvency practitioners.

The World Bank in its survey identified eight best practices elements for measuring an effectively functioning insolvency regime. These elements are:

- (a) Provision for a unified and broad legislation;
- (b) Availability of accelerated bankruptcy procedures such as reorganization;
- (c) Availability of legal frameworks for out of court procedures;
- (d) The possibility of converting informal procedures to formal procedure;
- (e) Provision for application of insolvency law to unincorporated entities, such as sole proprietorships;
- (f) Provision of regulatory bodies for insolvency practitioners;
- (g) The law provides a regulatory body with monitoring, oversight and disciplinary powers over insolvency practitioners; and
- (h) There should be law imposed deadlines for duration of different stages of insolvency cases.

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<sup>75</sup> See Agbakoba and Fagbohunlu 1992 <http://www.agbakoba-associates.com/media/articles> 7 (Accessed 2/08/2014).

<sup>76</sup> See Agbakoba <http://www.agbakoba-associates.com/media/articles/> 2 (Accessed 12/09/2014).

<sup>77</sup> See Insol International Report: *Africa Round Table on Insolvency Reform* 2.

The Nigerian insolvency system was measured in light of these elements and on the graph that was plotted, Nigeria was adjudged to have just two elements out of the eight elements proposed for an effective system.

Proposals were made such as the need for debt restructuring procedures, encouraging out of court procedures, need for greater effectiveness of the courts and need for regulation of insolvency practitioners. Furthermore, in ensuring a more effective system the Alternative Dispute Resolution (ADR) Regulatory Commission Bill and the Financial Ombudsman Bill are currently being reviewed in order to encourage resolution of disputes that relates to finances out of the courts, as a means of reducing the pressure on the courts.<sup>78</sup>

## 2.6 Conclusion

The Nigerian Bankruptcy Act provides for bankruptcy procedures, composition and schemes of arrangement as debt relief measures for an indebted consumer.<sup>79</sup> Bankruptcy proceedings are major debt relief measure that can be applied for either by the debtor or a creditor through the filing of petition. This is a court related procedure that eventually grants discharge to the debtor.

Under the Nigerian Bankruptcy Act, a debtor's application for bankruptcy is less onerous compared to a creditor's application even though no case of debtor's application has been recorded thus far in Nigeria.<sup>80</sup> A debtor can either decide to file a declaration in court declaring that he is unable to pay his debt or file a bankruptcy petition and he would thereafter be adjudged bankrupt.<sup>81</sup> However, in case of a creditor's application for bankruptcy, debt has to be first established in a separate proceeding before a petition for bankruptcy can be filed.<sup>82</sup>

Furthermore, the Bankruptcy Act provides for alternative debt relief measures in form of compositions and re-arrangement which can be explored by only the debtor and after bankruptcy proceeding must have commenced.<sup>83</sup> After bankruptcy proceedings have

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<sup>78</sup> See Insol International Report: *Africa Round Table on Insolvency Reform* 3.

<sup>79</sup> See par 2.2 above.

<sup>80</sup> See par 2.3.1 above.

<sup>81</sup> See par 2.3.3 above.

<sup>82</sup> See par 2.3.2 above.

<sup>83</sup> See Par 2.4.1 above.

commenced through a debtor or creditors petition, a debtor can make a proposal for composition or rearrangement of his obligations and this can be done after he must have filed his statement of affairs.

The Bankruptcy Act provides for a discharge under both bankruptcy proceeding and the composition and re-arrangement proceeding. Discharge would be granted either automatically after five years or through the application of a debtor within the period of five years. Furthermore, the Bankruptcy Act provides that in situations whereby the debtor has failed to apply for his discharge within a reasonable time, the court can on its own, raise a motion for the discharge of a debtor or through the application of an official receiver, trustee or any creditor who has proved claim.<sup>84</sup>

Looking at the Nigerian Bankruptcy Act, there seem to be an effort to balance the interest of both the creditors and the debtor. Some provisions seem favourable to the debtors and other provisions seem favourable to the creditors. Looking at the creditor's bankruptcy application, there seems to be a form of disadvantage to the creditors considering the stress a creditor would need to go through in establishing bankruptcy against a debtor.

On the other hand, looking at the discharge provisions of the Act, the law seems to ensure that discharge is made available to a debtor at every available opportunity and with less hassle by providing for different avenues of discharge such as; an automatic discharge after five years, discharge via the application of the debtor and most especially the provision for discharge through the courts motion or application of either an official receiver, a trustee or any creditor who has proved claim.<sup>85</sup> These seem to be aimed towards ensuring a fresh start for a debtor.

Furthermore in the same provision for discharge, we note that in order for a debtor to get a discharge the law provides for a number of requirements that must be fulfilled and also situations whereby the debtor would be denied a discharge.<sup>86</sup> This can be interpreted as a form of check on the discharge provision, whereby the law seeks to ensure that there is a sort of advantage to creditors in the entire proceeding and that the debtor is not just discharged without fulfilling his obligations to the creditors.

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<sup>84</sup> See par 2.3.4 above.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

It has been opined by several writers that the debt relief system in Nigeria is characterised with various shortcomings like the Bankruptcy Act does not provide for comprehensive debt relief measures such as out of court procedures, the bankruptcy proceedings are cumbersome in nature especially with regards to a creditor's application for bankruptcy, there is a lack of unified legislation and finally the problem of overcrowding of the courts which leads to lingering court cases.<sup>87</sup>

Considering the number of challenges facing the debt relief system in Nigeria, various recommendations have been made by both academic writers and Insolvency International. These recommendations include that Nigeria should adopt a unified legislation, adopt other alternative channels such as out of court procedures and set up regulatory bodies for insolvency practitioners.<sup>88</sup>

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<sup>87</sup> See par 2.5 above.

<sup>88</sup> Ibid.

## CHAPTER 3

### CONSUMER DEBT RELIEF MEASURES IN SOUTH AFRICA

#### 3.1 Introduction

Insolvency law in South Africa evolved from ancient Roman law times and has its roots in Roman-Dutch law.<sup>89</sup> The current Insolvency Act<sup>90</sup> repealed the Insolvency Act of 1916 and 1926 and provides that any proceedings dealing with sequestration or assignment of an estate prior to the commencement of the Act in 1936 shall be dealt with as if the Act had been passed.<sup>91</sup> At present, the insolvency law system in South Africa has different debt relief procedures for individuals and corporate entities.

In this chapter, there will be a critical examination and discussion of the South African debt relief system especially as it pertains to individual debtors and this would be compared with the Nigerian debt relief system. This is imperative as one of the core aims of this research endeavour is to provide a comparative analysis of the South African debt relief system with that of Nigeria. South Africa is an African nation like Nigeria and can be said to have recorded huge successes in the development and practise of individual insolvency. Nigeria can learn by drawing lessons from the present structure of the debt relief system in South Africa, understanding the challenges presently facing the system and benefit from a critical appraisal of the reform initiatives presently being considered by South Africa.

#### 3.2 Nature of South African Insolvency Law

Loosely speaking, a person is said to be insolvent when their liabilities exceed their assets. In legal parlance, an insolvent person is someone whose estate has been sequestrated. The primary law that regulates insolvency practice in South Africa is the Insolvency Act.<sup>92</sup> The Insolvency Act deals with insolvency of individuals that is natural persons, partnerships or estates of a person or partnership, while the Companies Act<sup>93</sup> regulates

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<sup>89</sup> Smith *The Law of Insolvency* 5.

<sup>90</sup> *Insolvency Act* 24 of 1936.

<sup>91</sup> Section 1 of the *Insolvency Act*.

<sup>92</sup> *Insolvency Act* 24 of 1936.

<sup>93</sup> *Companies Act* 61 of 1973.

insolvency of non-natural persons such as a body corporate or a company. The Insolvency Act provides for a special debt collection procedure whereby creditors of an insolvent estate can collectively sue for the sequestration of an insolvent's estate. The purpose of this is to ensure the fair distribution of the proceeds of the debtor's estate amongst the creditors.<sup>94</sup> This special collective debt recovery procedure is referred to as a *concurso creditorum*.<sup>95</sup> *Concurso creditorum* is formed once an order of sequestration is granted and the collective interest of creditors is preferred above that of an individual creditor. The primary aim of the Insolvency Act is advantage to creditors and this is a major requirement of the law before a sequestration order can be granted. The South African insolvency system in light of its primary aim has been described as "largely creditor orientated".<sup>96</sup>

There are three main debt relief measures available to a consumer debtor under the South African system in the event of over indebtedness. The Insolvency Act only provides for one debt relief measure which is the sequestration process while there are two other debt relief measures which are alternatives to sequestration.<sup>97</sup> The other two debt relief measures are the administrative procedure under the Magistrates' Courts Act<sup>98</sup> and debt review in terms of the National Credit Act.<sup>99</sup>

Rehabilitation after sequestration in terms of the Insolvency Act provides for a discharge of debt while other procedures do not provide for a discharge. It has been submitted that discharge under the Insolvency Act,<sup>100</sup> is not a primary aim of the Insolvency Act but an eventual consequence of sequestration.<sup>101</sup>

### 3.3 Sequestration in Terms of the Insolvency Act

The Insolvency Act provides for sequestration as a debt relief measure for a consumer debtor and this application can either be brought by the debtor himself called voluntary surrender or by the creditor(s), in which case it is termed compulsory sequestration. It is

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<sup>94</sup> Sharrock *et al Hocklys Insolvency Law* 4.

<sup>95</sup> *Walker v Syfret* 1911 AD 141 166.

<sup>96</sup> Roestoff and Coetzee 2013 *International Insolvency Review* 2.

<sup>97</sup> Bertelsmann *et al Mars: The Law of Insolvency in South Africa* 3.

<sup>98</sup> Section 74 of the *Magistrates' Courts Act*.

<sup>99</sup> Section 86 of the *National Credit Act*.

<sup>100</sup> Section 129(b) of the *Insolvency Act*.

<sup>101</sup> Roestoff and Coetzee 2013 *International Insolvency Review* 3.

pertinent to note that the main purpose of a sequestration order is to ensure there is an orderly and just distribution of a debtor's assets among the creditors of the estate.<sup>102</sup>

### 3.3.1 Voluntary Surrender

Voluntary surrender is when an insolvent debtor or partnership petitions the court for acceptance of surrender of his estate in relief from his indebtedness. This however must be done in accordance with the provisions of the law.<sup>103</sup> This petition can be made by the insolvent debtor himself, his agent or a person entrusted with the administration of the estate of a deceased insolvent debtor and this must be done to the advantage of the creditor(s) of the estate.<sup>104</sup> The court must be satisfied that sequestration of the estate would be to the advantage of the creditors of the estate and not for the purpose of a distraught debtor.<sup>105</sup> When a debtor is bringing an application for voluntary surrender, a full and frank disclosure of his income, assets, liabilities, expenditures, and value items must reflect in his application which would determine if sequestration of the estate would be to the advantage of the creditors of the estate in the long run.<sup>106</sup>

There are certain preliminary formalities that the Insolvency Act provides for which an application for sequestration must comply with and certain standards that must be met. These preliminary formalities and standards can be referred to as substantive and procedural requirements.<sup>107</sup> These requirements of the law must be met before an application for voluntary surrender of the debtor can be granted and they are discussed below.<sup>108</sup>

### 3.3.2 Procedural Requirements of the Law

The procedural requirements of the law are summarized as follows<sup>109</sup>:

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<sup>102</sup> Kanamugire JC *Mediterranean Journal of Social Sciences* 19.

<sup>103</sup> Sections 3-7 of the *Insolvency Act*.

<sup>104</sup> Section 3 of the *Insolvency Act*.

<sup>105</sup> *Ex parte Pillay; Mayet v Pillay* 1955 2 SA 309 (N).

<sup>106</sup> *Ex parte Bouwer and Similar Applications* 2009 6 SA 382 (GNP).

<sup>107</sup> Sections 4 and 6 of the *Insolvency Act*.

<sup>108</sup> *Ex parte Cloete* 2013 ZAFSHC 45.

<sup>109</sup> See section 4 of the *Insolvency Act*.

- (a) That a notice of surrender in the prescribed form is to be published not more than 30 days and not less than 14 days before the date upon which an application will be made to the court for acceptance of the surrender of his estate and this must be published in the Government Gazette as well as in a newspaper circulating in the district in which he resides (or if he is a trader, in the district in which his principal place of business is situated).
- (b) Within 7 days after publication of the notice, the applicant must deliver or post a copy of the notice to every creditor whose address is known or can be ascertained. The notice must also be posted to the South African Revenue Service (SARS) and posted to the registered trade union representing any of the debtor's employees and the employees themselves must be notified.
- (c) Statement in duplicate of the applicant's affairs shall be lodged and lie open for inspection at the office of the Master or where there is no Master's office, at the office of the magistrate of any creditor for a period of 14 days from the date mentioned in the notice of surrender.

The law requires strict compliance with these procedures, however whenever there is a breach or non-compliance with these procedures, the court would consider if such breach has caused substantial injustice prejudicing the creditors or if it is a mere irregularity. When it is a mere irregularity, the court may condone it in line with the provisions of the law in section 157<sup>110</sup> and where non-compliance has caused substantial injustice then the application may be stalled. However, varying arguments exists as to whether noncompliance with dates for publication can be condoned by section 157 or not.<sup>111</sup>

### 3.3.3 Substantive Requirements of the Law

After the applicant has fulfilled the procedural requirements of section 4, the court will consider the substantive requirements.<sup>112</sup> These substantive requirements of the law can be summarized as follows:

- (a) That the estate of the debtor is insolvent.

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<sup>110</sup> Section 157(1) of the *Insolvency Act*.

<sup>111</sup> See *Ex parte Oosthuizen* 1995 2 SA 694 (T). See also *Ex parte Van Rooyen* 1975 2 SA 364 (O).

<sup>112</sup> Section 6 of the *Insolvency Act*.



- (b) That the debtor in question owns realizable property of a sufficient value to settle sequestration costs.
- (c) That sequestration would be to the advantage of creditors.

After the procedures provided for in section 4 have been followed, the court would consider the application filed before it and determine if the substantive requirements of the law have been satisfied before an order for sequestration of the debtor's estate can be granted.<sup>113</sup> The court is strict in ensuring these conditions are met by an applicant because of the likelihood of abuse and stringent onus of proof is on the debtor to discharge<sup>114</sup>

The underlying principle that must be established is that the sequestration of the debtor's estate would be to the advantage of creditors, and this advantage has been defined as some form of pecuniary benefit accruing to the concurrent creditors of the estate.<sup>115</sup> The purpose of these preliminary requirements in cases of voluntary surrender is to notify the creditors of the debtor's application and to give room for possible objections.<sup>116</sup> If the court is satisfied with the debtor's compliance with provisions of the law in section 4 and 6 of the Act and that the overall sequestration of the debtor's estate would be to the advantage of the creditors, the court would grant a final order of sequestration of the debtor's estate.<sup>117</sup>

### 3.3.4 Compulsory Sequestration

A creditor or two or more creditors of an insolvent estate may apply to court by way of a petition that the estate of a debtor who has committed the act of insolvency or who has been declared insolvent be sequestrated.<sup>118</sup> A creditor is defined in this situation as one who has a liquidated claim of not less than R100<sup>119</sup> or two or more creditors who have aggregate claims of not less than R200 against a debtor.<sup>120</sup> A creditor who brings an application for compulsory sequestration of the debtor's estate is referred to as an

<sup>113</sup> Section 6(1) of the *Insolvency Act*. See also *Mthimkhulu v Rampersad and Another (BOE Bank Ltd, Intervening Creditor)* 2000 3 All SA 512 (N).

<sup>114</sup> See *Ex parte Arntzen v Nedbank Limited* 2013 1 SA 49 (KZP). See also *Ex parte Cloete*.

<sup>115</sup> See *London Estates (Pty) Ltd v Nair* 1957 3 SA 591 (D). *Braithwaite v Gilbert* 1984 4 SA 717 (W). *Ex parte Ogunlaja and Others* 2011 JOL 27029 (GNP).

<sup>116</sup> Bertelsmann *et al* *Mars: The Law of Insolvency in South Africa* 79.

<sup>117</sup> Section 6(1) of the *Insolvency Act*.

<sup>118</sup> See sections 9-12 of the *Insolvency Act*.

<sup>119</sup> 100 South African rands was the equivalent of approximately 9.3 United States dollars on 2014.09.08.

<sup>120</sup> Section 9(1) of the *Insolvency Act*.

applicant creditor. There are certain preliminary requirements<sup>121</sup> that the law requires an applicant creditor to fulfil before an application for compulsory sequestration can be brought.

These preliminary requirements are:

- (a) The applicant creditor must provide the master of the high court with security for the purpose of settling all costs of sequestration until a trustee is appointed for the insolvent estate.
- (b) The petition presented to court must be served on the trade unions representing the employees of the debtor, the employees, South African Revenue Service (SARS) and the debtor unless the court states otherwise.

Also, there are certain substantive requirements of the law, expected of an applicant creditor before a petition for compulsory sequestration can be brought before the court.

These substantive requirements are as follows:

- (a) That the applicant creditor has a liquidated claim of not less than R100 or where there are two or more creditors who have aggregate claims of not less than R200 against a debtor.<sup>122</sup>
- (b) The petitioning creditor has to establish that the debtor is insolvent or has committed an act of insolvency<sup>123</sup> and
- (b) That there is reason to believe that if the estate of the debtor is sequestrated; it would be to the advantage of creditors of the estate.<sup>124</sup>

There are two stages under the compulsory sequestration process. At the first stage, an applicant brings a petition in compliance with the preliminary requirements of the law and the court would grant provisional order sequestrating the estate of the debtor. Upon provisional sequestration of the debtor's estate, the court would order the service of a rule *nisi* on the debtor and order that the debtor appears in court on a certain date to show why

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<sup>121</sup> Section 9(3)-(5) of the *Insolvency Act*. See also section 9(4A)(a)-(iv) of the *Insolvency Act*.

<sup>122</sup> Section 9(1) of the *Insolvency Act*.

<sup>123</sup> See section 8 of the *Insolvency Act*.

<sup>124</sup> Bertelsmann *et al Mars: The Law of Insolvency in South Africa* 138.

his estate should not be sequestrated finally.<sup>125</sup> At the return date, which is the second and final stage of the application, the applicant creditor would be expected to prove the substantive requirements of the law as listed above and the court would grant a final order of sequestration if the court is satisfied with the applicant's petition that it complies with the requirements of the law.<sup>126</sup> However, if the debtor has a defence why the order should not be granted and comes before the court, the court if satisfied by this defence may discharge the provisional order.

### 3.3.5 Friendly Sequestrations

Another method of compulsory sequestration is when a debtor approaches a friendly creditor (relative or a friend) and expresses his insolvency and the friendly creditor will approach the court and file a petition for compulsory sequestration of the debtor's estate.<sup>127</sup> This usually occurs in situations in which the debtor realises that he does not have enough assets to establish advantage to creditors and cannot sustain a voluntary surrender application before the court. The creditor bringing the application is known as the petitioning creditor<sup>128</sup> and the application brought by a friendly creditor is referred to as a friendly sequestration. This friendly sequestration takes the form of a compulsory sequestration and as such the preliminary and substantial requirements of the law with regards to compulsory sequestration would apply. It has been observed that friendly sequestration applications are prone to abuse and often times there is a collusion between the friendly creditor and the debtor in order to escape the stringent requirements of the law to the detriment of the other creditors of the estate.<sup>129</sup> The South African insolvency system in order to dissuade the abuse of friendly sequestration applications and to ensure that there is advantage to creditors in the long run<sup>130</sup> laid down some practice guidelines in the case of *Mthimkhulu v Rampersad*.<sup>131</sup> These practice guidelines given to safeguard the integrity of friendly sequestration applications are that:

The debtor must make full and frank disclosure and adequate proof of necessary facts and information's such as:

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<sup>125</sup> Section 11 of the *Insolvency Act*.

<sup>126</sup> Section 12 of the *Insolvency Act*.

<sup>127</sup> Smith *The Law of Insolvency* 74-77. *Mthimkhulu v Rampersad and Another (BOE Bank Ltd, Intervening Creditor)*.

<sup>128</sup> Nagel *et al Commercial Law* 416.

<sup>129</sup> Evans 2001 *South African Mercantile Law Journal* 489.

<sup>130</sup> Section 12(1)(c) of the *Insolvency Act*.

<sup>131</sup> See *Mthimkhulu v Rampersad and Another (BOE Bank Ltd, Intervening Creditor)*.

- a) Proof of indebtedness which gives the debtor *locus standi*.
- b) Full disclosure of the debtor's entire assets both movable and immovable which establishes advantage to creditors.
- c) A valuation report by a qualified valuer stating the value of the assets of the estate and also proving the authenticity of the valuation arrived at.

### 3.3.6 Rehabilitation of the Insolvent

The Insolvency Act provides for rehabilitation of the consumer debtor who has gone through the sequestration process. Rehabilitation in terms of the Insolvency Act can take place in any of these ways:

- (a) Automatic rehabilitation ten years from the date of sequestration of the debtor's estate which is known as rehabilitation by effluxion of time.<sup>132</sup>
- (b) Rehabilitation via order of court, that is by application to court within the period of ten years after sequestration subject to the provisions of the law.<sup>133</sup>

A debtor is deemed automatically rehabilitated after ten years that his estate has been sequestrated if he has not been rehabilitated by the court within the period of ten years. Rehabilitation by effluxion of time can be denied in situations whereby an interested party had made an application to the court within the said period objecting to the debtor's rehabilitation.<sup>134</sup> A consumer debtor can apply to court for his rehabilitation within the period of ten years after sequestration. This is however subject to the court's discretionary power.<sup>135</sup> This application for rehabilitation would be granted subject to the court's sole discretion and under certain circumstances as stated by the law.<sup>136</sup> The court would only grant the order, if the court is convinced that the consumer debtor deserves to be rehabilitated having learnt lessons from his sequestration.<sup>137</sup>

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<sup>132</sup> Section 127A of the *Insolvency Act*.

<sup>133</sup> Section 124 of the *Insolvency Act*.

<sup>134</sup> Section 127A of the *Insolvency Act*.

<sup>135</sup> *Ex parte Hittersay* 1974 4 SA 326 (SWA).

<sup>136</sup> See sections 124(2) (a-c), 124 (3)(a) and 124(5) of the *Insolvency Act*.

<sup>137</sup> *Ex parte Hittersay*.

Rehabilitation puts an end to the sequestration process and grants debtor discharge from all debts incurred prior to sequestration.<sup>138</sup> Rehabilitation also has the effect of re-instating the status of the debtor before sequestration.<sup>139</sup>

### 3.4 Alternative Debt Relief Measures

There are some alternative debt relief measures that serve as alternatives to the sequestration process and are available to an indebted consumer. These alternative debt relief measures exist outside the ambit of the Insolvency Act and are often used by debtors with smaller estates. These alternative debt relief measures are:

- (a) Administration Orders under the Magistrates' Courts Act,<sup>140</sup> and
- (b) Debt Review under the National Credit Act.<sup>141</sup>

#### 3.4.1 Administration Orders

This is a form of debt relief that is regulated by the Magistrates' Courts Act.<sup>142</sup> Administration orders are provided for as an alternative to the sequestration process and is a simple and inexpensive procedure that is most appropriate for persons with small estates and who have regular sources of income.<sup>143</sup> Administration orders are available to persons whose debts do not exceed R50 000<sup>144</sup> or any amount that may be determined by the Minister from time to time.<sup>145</sup>

An administration order is a form of debt rearrangement whereby a debtor's obligations can be rescheduled.<sup>146</sup> This can only be granted in one of the following circumstances:<sup>147</sup>

- (a) Where a debtor is unable to pay up any judgment debt obtained against him by a judgment creditor,

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<sup>138</sup> Section 129(1)(a-c) of the *Insolvency Act*.

<sup>139</sup> Kanamugire 2013 *Mediterranean Journal of Social Sciences* 19.

<sup>140</sup> *Magistrates' Courts Act* 32 of 1944.

<sup>141</sup> *National Credit Act* 34 of 2005.

<sup>142</sup> Section 74 *Magistrates' Courts Act*.

<sup>143</sup> Paterson Eckard's *Principle of Civil Procedure in the Magistrates' Courts* 318.

<sup>144</sup> 50 000 South Africa rand was the equivalent of approximately 4649 United States dollars on 2014.09.08.

<sup>145</sup> Section 74(2) of the *Magistrates' Courts Act*.

<sup>146</sup> See Roestoff and Coetzee 2013 *International Insolvency Review* 13. See also Borraine 2003 *De Jure* 217.

<sup>147</sup> Section 74(1)(a) of the *Magistrates' Courts Act*.

- (b) Where a debtor cannot meet any of his financial obligations because he does not have assets to be committed to satisfying such judgments or obligations.

In commencing this procedure, the debtor would file an application for an administration order at the magistrate's court and would thereafter present a statement of his affairs before the court which would show detailed information as required by the law and in the prescribed form.<sup>148</sup> When the court is satisfied with the debtor's application, the court would grant an administration order and thereafter appoint an administrator to see to the implementation of the administration orders made.<sup>149</sup> The administration order would lay down rules as to the terms of the payments of the debts either monthly or weekly<sup>150</sup> and if there is any asset that needs to be realised for the purpose of distributing among the creditors. When a list of the debts being owed is drawn up, the list is lodged with the clerk of the court and also delivered to the creditors. This list would be open for inspection and objections can be made by a dis-satisfied creditor within 15 days after the letter of administration was received.<sup>151</sup>

It is pertinent to note that administration orders terminate when all creditors on the list have been paid and all costs of administration have been taken care of in full.<sup>152</sup> Also, this debt relief measure does not provide for discharge of the debtor from his debts and it is limited in scope of application because debtors who owe more than R50 000 cannot qualify for administrative orders.

### 3.4.2 Debt Review

The National Credit Act<sup>153</sup> provides for debt review as an alternative debt relief measure available to a consumer in financial distress. Debt review is a form of debt restructuring procedure provided for by the National Credit Act.<sup>154</sup> The primary objective of the National Credit Act is to encourage reasonable borrowing, avoid over indebtedness and ensure that

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<sup>148</sup> Section 74 A of the *Magistrates' Courts Act*.

<sup>149</sup> Section 74E of the *Magistrates' Courts Act*.

<sup>150</sup> Section 74 I of the *Magistrates' Courts Act*.

<sup>151</sup> Section 74G (10) of the *Magistrates' Courts Act*. See also, rule 48(2) of the *Magistrates' Court Rules*.

<sup>152</sup> Section 74U of the *Magistrates' Courts Act*.

<sup>153</sup> *National Credit Act*.

<sup>154</sup> See Van Heerden and Boraine 2009 *Potchefstroom Electronic Law Journal* 23.

a debtor fulfils his obligations to his creditors.<sup>155</sup> Debt review can only be explored when a debt relates to a credit agreement entered into in terms of the National Credit Act.<sup>156</sup> The primary purpose of debt review does not lie in granting an indebted consumer relief but for the sole purpose of achieving a debt re- arrangement scheme for the indebted consumer.<sup>157</sup>

In commencing a debt review procedure, a consumer debtor makes an application to a debt counsellor for debt counselling. The debt counsellor would determine either of the following:

- (a) That the consumer debtor is not over indebted and therefore the application for debt review may be rejected.<sup>158</sup>
- (b) That the consumer debtor is not over indebted but is likely to experience some financial constraints in the process of satisfying all financial obligations to his credit providers in due time.<sup>159</sup> In this situation, the debt counsellor may make any of the two recommendations:<sup>160</sup>
  - (i) That the consumer together with his credit providers voluntarily consider and agree on a plan of debt re-arrangement which can be filed at the Magistrates' Court or at the National Consumer Tribunal as a consent order; or
  - (ii) Where the consumer debtor and his credit providers cannot reach an agreement, recommendations can be made to the Magistrates' Court to either make an order for rearrangement or to declare any of the consumer credit agreement reckless.
- (c) That the consumer debtor is over indebted and therefore makes a proposal to the Magistrates' Court that any one or two of the following orders be made:
  - (i) That one or more of the consumer credit agreement is declared reckless.<sup>161</sup>

<sup>155</sup> See section 3(c)(i)(ii) and 3(g). See also Ma Du Plessis 2007 *Journal for Juridical Science* 75.

<sup>156</sup> Section 4 of the *National Credit Act*. See also section 8 for the definition of "credit agreements".

<sup>157</sup> *Collett v Firststrand Bank Ltd* 2011 4 SA (SCA) 508 514.

<sup>158</sup> Section 86(7)(a) of the *National Credit Act*.

<sup>159</sup> Section 86(7)(b) of the *National Credit Act*.

<sup>160</sup> Section 86(8) of the *National Credit Act*.

<sup>161</sup> Section 86(7)(c)(i) of the *National Credit Act*. See also regulation 24 of *National Credit Regulations*.



- (ii) That one or more of the consumer commitments to his credit providers is re-arranged.<sup>162</sup>

The Magistrate can decide to make any one or two of the orders proposed by the credit counsellor or reject the proposal outright.<sup>163</sup> In situations where the application is rejected as stated above, the debtor may apply directly to the magistrate court seeking the leave of the court in such prescribed manner by the law.<sup>164</sup>

### 3.4.3 Re-organization

The consumer debtor's obligation can be re-arranged either as a voluntary re-arrangement between the consumer debtor and the creditors or as a directive by the court.<sup>165</sup>

When a re-organization agreement is reached by a consumer debtor and creditors, the agreement can be taken to the magistrate to be enforced as a consent order in terms of section 138 of the National Credit Act.<sup>166</sup> The magistrate court would conduct a hearing with regards to the proposal made and make an order accordingly.

Also, a magistrate can order a re-organization in the absence of an agreement by the concerned parties and this re-organization can take different forms. Re-organization can be made either by prolonging the time frame of the agreement made between the parties or by prolonging the due dates of the debts under the credit agreement or finally by re-calculating the consumer's obligations.<sup>167</sup>

### 3.4.4 Reckless Credit

The National Credit Act provides for cancellation of any credit agreement that is believed to have been extended to the consumer by the credit provider carelessly. This type of credit is referred to as reckless credit under the National Credit Act.<sup>168</sup> In considering if a credit is

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<sup>162</sup> Section 86 (7)(c)(ii) of the *National Credit Act*.

<sup>163</sup> Section 87(1)(a-b) of the *National Credit Act*.

<sup>164</sup> Section 86(9) of the *National Credit Act*.

<sup>165</sup> Van Heerden and Boraine 2009 *Potchefstroom Electronic Law Journal* 23.

<sup>166</sup> Section 86(8) of the *National Credit Act*.

<sup>167</sup> Section 86(7)(c)(ii) (aa)-(dd) of the *National Credit Act*.

<sup>168</sup> Section 80(1) of the *National Credit Act*.



reckless credit, recourse would be taken to the circumstances surrounding the granting of the credit to the consumer debtor such as lack of due diligence on the part of the credit provider.<sup>169</sup> The effect of a credit agreement being declared reckless credit is that the credit agreement is suspended and the debtor is not required to make any payments with regard to the agreement and the credit provider cannot enforce obligations with regard to such credit agreements. Also interests would not accrue to a credit agreement that has been declared reckless credit within that period until the order has been lifted.<sup>170</sup>

Debt review has been said to be inadequate as a debt relief measure because it does not provide for a discharge and is also limited in scope of application.<sup>171</sup> Also, there is no time limit within which a debtor is expected to pay off his debt in full. This however means that debt rearrangement can be in effect indefinitely.

### 3.5 Problems of the Debt Relief System in South Africa and Reform Initiatives

A number of problems have been identified in the South African debt relief system such as the policy of “advantage to creditors”, high cost of sequestration proceedings, the problem of inadequate alternative debt relief measures<sup>172</sup> and the non-existence of a unified legislation to cater for all insolvency related procedures in South Africa.<sup>173</sup>

These problems have necessitated the South African Law Reform Commission to propose a number of recommendations and solutions to the identified problems.<sup>174</sup>

The South African Law Reform Commission is of the opinion that advantage to creditors should still be maintained but however, the system should ensure better treatment of the debtors and that a debtor deserves a fresh start.<sup>175</sup>

Furthermore, the South African Law Reform Commission in its 2000 Insolvency Bill proposed that there should be an alternative to insolvency proceedings in form of a pre-

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<sup>169</sup> Section 80(1)(a) and (b) of the *National Credit Act*.

<sup>170</sup> Section 83 (2)(a) and (b) of the *National Credit Act*.

<sup>171</sup> See Roestoff and Renke 2006 *Obiter* 99.

<sup>172</sup> See Roestoff and Coetzee 2012 *Mercantile Law Journal* 55.

<sup>173</sup> See also Rochelle 1996 *Tydskrif vir die Suid-Afrikaanse Reg* 315.

<sup>174</sup> See Calitz 2007 *Obiter* 414. See also South Africa Law Commission Report 2000: *Report on Review of the Law of Insolvency* 17.

<sup>175</sup> See South Africa Law Commission Report 2000: *Report on Review of the Law of Insolvency* 19. See also Evans 2008 LLD Thesis 431 on the discussion of the commission's report.

liquidation composition<sup>176</sup> which would be inserted into the Magistrates' Courts Act through section 74X. This pre-liquidation provision would allow for a form of composition between the debtor and his creditors before liquidation which would be supervised by the magistrate and binding on all creditors if adopted by the required majority of creditors.<sup>177</sup>

Various writers have also recommended reforms and there are opinions that the policy of "advantage to creditors" should be abolished and the American fresh start policy should be adopted.<sup>178</sup> The American fresh start policy primarily aims at balancing the interest of debtors and creditors by ensuring that measures are in place for a debtor to fulfil his financial obligations to his creditors and discharge is consequently granted giving the debtor, an opportunity to have a fresh start.<sup>179</sup>

A number of writers have evaluated the alternative debt relief measures that are available under the South African system, such as administration orders and debt review and are of the opinion that these alternative debt relief measures have various limitations, and suggestions on how to overcome these limitations have also been made.<sup>180</sup> It has also been suggested that there should be a uniform legislative framework that would regulate insolvency proceedings in its entirety, which would provide for three major procedures such as the assets liquidation procedure, an income restructuring procedure and a procedure for debtors that do not have income or any assets to pay off their debts. This class of debtors are referred to as the No Income No Assets (NINA) debtors just as is the case in New Zealand, England and Wales.<sup>181</sup>

### 3.6 Conclusion

In this chapter, debt relief measures in South Africa were discussed and the unique features of the South African system were highlighted. The rationale behind this is to

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<sup>176</sup> See Roestoff and Renke 2005 *Obiter* 562.

<sup>177</sup> See Roestoff and Renke 2006 *Obiter* 101.

<sup>178</sup> Rochelle 1996 *Tydskrif vir die Suid-Afrikaanse Reg* 315.

<sup>179</sup> Keay 2001 *Common Law World Review* 208.

<sup>180</sup> See Roestoff and Coetzee 2013 *International Insolvency Review* 32. See also University of Pretoria 2000 Final Report viii.

<sup>181</sup> See Roestoff and Coetzee 2012 *Mercantile Law Journal* 75.

determine how Nigeria can possibly learn from the strengths and weaknesses of the South African system.<sup>182</sup>

South Africa has largely remained a creditor based system in terms of its insolvency practice.<sup>183</sup> In South Africa, the primary focus of insolvency practice is not to secure relief for indebted debtors but rather to ensure advantage to creditors.<sup>184</sup> The Insolvency Act of South Africa provides for sequestration proceedings as a major debt relief measure and other alternative debt relief measures such as administration orders in terms of the Magistrates' Courts Act and debt relief under the National Credit Act.<sup>185</sup>

Sequestration proceedings in South Africa can be likened to bankruptcy proceedings under the Nigeria Bankruptcy Act. There are similarities between these proceedings and also sharp contrasts in the way they operate. Sequestration proceedings can be instituted either by a creditor or a debtor subject to certain requirements of the law just as in the case of bankruptcy proceedings under the Nigerian Bankruptcy Act. In all sequestration proceedings in South Africa, advantage to creditors must be established and the court would not grant applications for sequestration if an advantage to creditors has not been proven especially in cases of voluntary surrender applications.<sup>186</sup> In Nigeria there is no advantage to creditors, and in cases of debtor's bankruptcy, an application made by a debtor would ordinarily establish his indebtedness and no further proof is required from the debtor. However, in a creditors application for bankruptcy in Nigeria, a creditor needs to first establish debt in a separate proceeding before bankruptcy proceeding can be instituted, while in South Africa, a creditor need not establish debt first before sequestration proceedings can be instituted.

Also, there are alternative debt relief measures available to a debtor in South Africa such as administration orders and the debt review procedure. These alternative debt relief measures in South Africa are said to be characterised with limitations as they are not available to all debtors but are limited in scope and also do not provide for discharge of a

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<sup>182</sup> See pars 2.1 and 3.1 above.

<sup>183</sup> See par 3.2 above.

<sup>184</sup> Ibid.

<sup>185</sup> See par 3.4 above.

<sup>186</sup> See par 3.3.1 above.

debtor.<sup>187</sup> In Nigeria a consumer debtor has an alternative of composition and re-arrangement instead of going for bankruptcy proceedings.<sup>188</sup> These alternatives can be explored by any consumer debtor that ordinarily would qualify for bankruptcy and not limited in scope unlike the alternative debt relief measures in South Africa.<sup>189</sup> Furthermore, composition and re-arrangement in Nigeria provides for a discharge of the debtor<sup>190</sup> while administration orders and the debt review procedure in South Africa do not provide for a discharge of the debtor and are said to be limited in scope of application.

In South Africa, a debtor can get discharged from his debt and rehabilitated automatically after ten years from the date of sequestration, or by the order of court through the application of the debtor within ten years of sequestration.<sup>191</sup> While discharge in Nigeria can be obtained in any of the following ways:<sup>192</sup> through an automatic discharge five years after a receiving order has been issued, through the application of a debtor any time after he has been pronounced bankrupt, or through a court motion, application of an official receiver, trustee or any creditor that has proved a claim.<sup>193</sup> The discharge conditions under the Nigerian debt relief system are more comprehensive and favourable to a debtor as an automatic discharge comes after five years unlike the position in South Africa where it is after ten years. Furthermore, in Nigerian law, if a debtor fails to come forward for his discharge and the court is of the opinion that a discharge should be granted, the court can on its own volition raise a motion or through the application of an official receiver, trustee, or any creditor who has proved claim, ask a debtor to come forward for his discharge.<sup>194</sup>

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<sup>187</sup> See par 3.5 above.

<sup>188</sup> See par 2.4.1 above.

<sup>189</sup> Ibid.

<sup>190</sup> See par 2.4.3 above.

<sup>191</sup> See par 3.3.5 above.

<sup>192</sup> See par 2.3.5 above.

<sup>193</sup> Ibid.

<sup>194</sup> Ibid.

## CHAPTER 4

### CONSUMER DEBT RELIEF MEASURES IN NEW ZEALAND AND DENMARK

#### 4.1 Introduction

Consumer debt relief measures vary from country to country and each jurisdiction has its own unique provisions. The study of consumer debt relief measures in New Zealand and Denmark in this chapter is necessary in order to appraise consumer debt relief system in some of the developed countries of the world. Also, New Zealand is known for her unique provision for relief for debtors without income or assets termed No Income No assets (NINA) debtors.<sup>195</sup> There are other debt relief measures available to a consumer debtor in New Zealand and the country can be said to have recorded huge successes in the practice of consumer debt relief and Nigeria therefore has a lot to learn from her. Denmark has also been chosen in this study as it is the first European country to introduce a definite procedure for consumer debtors in the year 1984<sup>196</sup> which inspired other Scandinavian countries. Therefore, Denmark would have some lessons to aid the Nigerian procedure of debt relief.

The purpose of this chapter is thus to identify the consumer debt relief measures that are available in these jurisdictions making a comparative study of these debt relief systems with that of Nigeria and eventually to ascertain the lessons to be learnt by Nigeria to improve its present consumer debt relief measures and to ensure a more comprehensive and effective debt relief system.

#### 4.2 Consumer Debt Relief in New Zealand

##### 4.2.1 Background

The first Act enacted on insolvency practice in New Zealand was the Debtors and Creditors Act of 1862 and this is said to have repealed the Imprisonment for Debt Ordinance of 1844. Subsequently, there were various amendments and development of the law of insolvency in New Zealand which brought about the Bankruptcy Acts of 1892,

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<sup>195</sup> See New Zealand Ministry of Economic Development 2011 *Report on Evaluation of the No Asset Procedure* 2.

<sup>196</sup> Kilborn 2009 *International Insolvency Review* 156.

1908 and the Insolvency Act of 1967.<sup>197</sup> The Insolvency Act of 1967 repealed the Bankruptcy Act of 1908 and also laid the foundation for liberal models of bankruptcy practice in New Zealand which primarily balanced the interest of both the creditors and the debtor.<sup>198</sup> The Insolvency Act of 1967 introduced an alternative to bankruptcy procedure which allowed debtors to make proposals to creditors as a means to fulfil their obligations. This procedure was said to be flexible in nature and helped debtors fulfil their obligations without necessarily going through the stigma of bankruptcy. This procedure was introduced through part XV of the 1967 Insolvency Act.<sup>199</sup>

The Insolvency Act of 1967 has subsequently been amended and the current Insolvency Act is the Insolvency Act of 2006.<sup>200</sup> This Act provides for a number of debt relief measures which can be explored by a consumer debtor in the event of insolvency.<sup>201</sup> The primary debt relief measure available to a consumer debtor in New Zealand is bankruptcy proceedings. However, the Act provides for other debt relief measures which serve as alternatives to bankruptcy. These alternative debt relief measures are proposals, summary instalment order and no asset procedure.<sup>202</sup>

#### 4.2.2 Bankruptcy in New Zealand

Bankruptcy proceedings are commenced by way of petition to the court. These proceedings can be instituted either by creditors<sup>203</sup> which is called creditors bankruptcy or by a debtor<sup>204</sup> which can also be referred to as voluntary bankruptcy.

A debtor would be deemed to have committed an act of bankruptcy if he commits any of the following acts.<sup>205</sup>

- (a) If the debtor fails to comply with bankruptcy notice that was issued on him by the creditor.

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<sup>197</sup> New Zealand Law Commission 2001 *Advisory Report on Insolvency Law Reform* 8.

<sup>198</sup> New Zealand Law Commission 2001: *Advisory Report on Insolvency Law Reform* 9.

<sup>199</sup> Heath 1999 *Osgoode Hall law Journal* 435.

<sup>200</sup> Public Act No 55 of 2006 (NZ) (hereafter referred to as the Act).

<sup>201</sup> See <http://www.insolvency.govt.nz/cms>.

<sup>202</sup> Sections 8 and 312(1) of the Act.

<sup>203</sup> Section 10(2) (a) of the Act.

<sup>204</sup> Sections 10(2)(b) and 48 of the Act.

<sup>205</sup> Sections 17-28 of the Act.

- (b) If the debtor disposes all or a substantial amount of his property fraudulently or in such a way as to prefer one creditor above the other.
- (c) If the debtor departs, intends to depart or prepares to depart from New Zealand with the intention of delaying or avoid fulfilling his obligations to his creditors.
- (d) If a debtor notifies any of his creditor(s) of intention to suspend or suspension of payment of his debts.
- (e) If the creditor makes an admission at a creditors meeting that he is insolvent.
- (f) If the property of a debtor has been taken into possession under an execution process and the debtor had failed to satisfy the order or judgment made 5 working days after the property has been taking into possession.
- (g) If an execution process is issued against the debtor or his property and sufficient goods and chattels are not found in the estate of the debtor to execute the judgment.
- (h) If the debtor conceals any of his property with intent to prejudice his creditors or to give advantage to one creditor over another.
- (i) If judgment is given against a debtor for non-payment of trust money and judgment is not satisfied within 5 working days that the judgment was made.

#### 4.2.3 Voluntary Bankruptcy

Voluntary bankruptcy is when the debtor files a petition with the official assignee in the event of not being able to fulfil his financial obligations as they fall due. Voluntary bankruptcy is not a court related proceeding. A debtor's petition can only be filed by a debtor whose total debt amounts to \$1,000<sup>206</sup> or more.<sup>207</sup> There are certain procedural requirements of the law which the debtor is expected to comply with when filing a voluntary bankruptcy petition which are:<sup>208</sup>

- (a) A debtor must first of all file a correct statement of his affairs in the prescribed form;<sup>209</sup>

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<sup>206</sup> 1,000 New Zealand dollars was the equivalent of approximately 830 United States dollars on 2014.09.08.

<sup>207</sup> Section 45 of the Act.

<sup>208</sup> Section 46(1) and (2) of the Act.

<sup>209</sup> See Sections 46 and 67 of the Act.

- (b) A debtor must complete and lodge an application for adjudication with the official assignee for endorsement; and
- (c) A debtor must file the endorsed application for adjudication

When a debtor files an application for adjudication in compliance with these procedural requirements, the debtor becomes automatically bankrupt having the same implications as if the debtor had been adjudicated bankrupt by the court.<sup>210</sup>

#### **4.2.4 Creditors Bankruptcy**

Creditor(s) bankruptcy is when one or more creditors apply to the High Court by way of petition presenting evidence and seeking that the debtor be declared bankrupt.

There are certain preliminary requirements of the law in filing a creditor's petition. These requirements are:<sup>211</sup>

- (a) That the debtor owes the creditors a total sum of \$1,000 or more.
- (b) The debtor has committed an act of bankruptcy within the period of three months prior to filing of the application.
- (c) The debt owed is a certain amount.
- (d) The debt owed is due for repayment either immediately or at a definite date in the future.

While considering the creditors bankruptcy application, the court would consider the following things before adjudging the debtor bankrupt:<sup>212</sup>

- (a) That the creditor filed an application for adjudication in compliance with preliminary requirements of the law in section 13 of the Act.
- (b) That the debtor has committed an act of bankruptcy in terms of the Act.

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<sup>210</sup> Section 47 of the Act.

<sup>211</sup> Section 13 of the Act.

<sup>212</sup> See section 11 of the Act.



Bankruptcy is said to have an effect on the legal status of an adjudicated bankrupt by placing a limitation on the legal capacity of such person. The effects of bankruptcy are as follows:<sup>213</sup>

- (a) The bankrupt's property vests in the official assignee.
- (b) There is limitation to the business activities that can be undertaken by the debtor
- (c) Asset transferred prior to bankruptcy may be recovered by the official assignee.

#### **4.2.5 Discharge of a Bankrupt**

Discharge signifies an end to bankruptcy. The Insolvency Act provides for discharge of the debtor from all provable debts that was incurred by the debtor at the time of adjudication and all through the period of adjudication, but before discharge.<sup>214</sup> The court has the unfettered discretion to determine if a debtor would be discharged or not. The court may however decide not to discharge a debtor or may order the discharge of a debtor subject to certain conditions.<sup>215</sup>

There are two types of discharge provided for by the Insolvency Act which are: automatic discharge,<sup>216</sup> which comes into effect three years after the bankrupt has filed his statement of affairs; and discharge via the application of the bankrupts' which can be brought at any time during the period of the three years.<sup>217</sup>

Discharge is granted automatically after three years except in situations such as:

- (a) When an official assignee or a consumer has objected to the discharge of a debtor and such objection had not been withdrawn at the end of the 3 years period.<sup>218</sup>
- (b) When a bankrupt person is to be publicly examined under section 173 and has not completed that examination.<sup>219</sup>
- (c) When a bankrupt has not been discharged from an earlier bankruptcy.<sup>220</sup>

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<sup>213</sup> Section 102 of the Act.

<sup>214</sup> Sections 231(1) and 232(1) of the Act.

<sup>215</sup> Section 298 of the Act.

<sup>216</sup> Section 290(1) of the Act.

<sup>217</sup> Section 294(1) of the Act.

<sup>218</sup> See sections 292 and 290(2) of the Act.

<sup>219</sup> Section 290(2)(b) of the Act.

It is important to note that automatic discharge and discharge via the application of the bankrupt has the same effects on a debtor. The effect of discharge is consequent release of a debtor from all debts that formed the basis of bankruptcy proceedings except debt(s) acquired by fraud or breach of trust, or any debt or liability in which the debtor obtained forbearance through fraud in which the debtor is a party.<sup>221</sup>

#### 4.2.6 Alternatives to Bankruptcy

There are debt life options available to a debtor in New Zealand. The system has provided for other alternatives that can be explored by a debtor other than the conventional bankruptcy proceedings which are often seen as a last resort.<sup>222</sup>

#### 4.2.7 Proposal

The New Zealand system of bankruptcy practise makes provision for alternatives to bankruptcy as a debt relief measure. A proposal is when a debtor makes an offer to his creditors with the primary purpose of fulfilling his financial obligations to them. The proposal can take any of the following forms.<sup>223</sup>

- (a) A proposal to vest part or all of his estate to a trustee for the sole benefit of his creditors.
- (b) A proposal to pay debts being owed in instalments.
- (c) A proposal to compromise the debts owed at less than 100 cents in the dollar.
- (d) A proposal to pay up the debts at a future date.
- (e) Any other form of arrangement to pay up the debts.

A Proposal made in any of these forms is also expected to fulfil certain requirements before it can be filed in the court of law. These preliminary requirements are as follows:<sup>224</sup>

- (a) The proposal must be signed by the debtor;<sup>225</sup>

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<sup>220</sup> Section 290(2)(c) of the Act.

<sup>221</sup> Section 304(2) of the Act.

<sup>222</sup> Brown 2007 *Journal of South Pacific Law* 90.

<sup>223</sup> See section 326(2) of the Act.

<sup>224</sup> Section 327(1)(a) of the Act.

- (b) The proposal must be endorsed with the name of a certain person who is willing to act as a trustee, and accompanied with a statement by the supposed trustee stating willingness to act as a trustee;<sup>226</sup> and
- (c) The proposal must be accompanied with the debtor's statement of affairs which would be verified by an affidavit.<sup>227</sup> This statement of affairs would furnish necessary information's as to the name, address, occupation, assets, debts, liabilities of the debtor and securities being held by the secured creditor(s).<sup>228</sup>

After the proposal has been filed in the court, the trustee named in the proposal that is the provisional trustee<sup>229</sup> would call for a meeting of the creditors by issuing notices as to the details of the meeting.<sup>230</sup> In order for the court to approve a proposal, the court would take cognisance of the resolution approving the proposal by ensuring that a majority in number and three quarters in value of the creditors who voted either in person, by proxy or by mail, assented to the approval.<sup>231</sup>

After the proposal has been approved by the creditors, the trustee has the responsibility to apply to the court for approval and send hearing notices to the debtor and all the creditors.<sup>232</sup> The purpose of this is to afford the creditors the opportunity to raise objections if any before the proposal is approved by the court.<sup>233</sup>

The court would however reject any proposal in any of the following circumstances:<sup>234</sup>

- (a) If the proposal does not conform to the provisions of part 5, subpart 2 of the Act.<sup>235</sup>

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<sup>225</sup> Section 327(3)(a) of the Act.

<sup>226</sup> Section 327(3) of the Act.

<sup>227</sup> Section 327(1)(b) of the Act.

<sup>228</sup> Section 327(2) of the Act.

<sup>229</sup> Section 329 of the Act.

<sup>230</sup> See Section 330(1) of the *Insolvency Act*. See also *Henderson v Westpac Banking Corporation Ltd* H C Auckland CIV-2010-404-1212, for the importance of issuing notices to all creditors informing them of the meeting and their consequent opinion on the proposal.

<sup>231</sup> Section 331(3) of the Act.

<sup>232</sup> See section 333(1)(b) of the Act.

<sup>233</sup> Section 333(2) of the Act.

<sup>234</sup> Blackwells 2011 <http://www.blackwells-law.co.nz/> 5 (Assessed 8/06/2014).

<sup>235</sup> See *Re Wang ex parte CIR HC Auckland* CIV-2010-404-3177, where the court refused a proposal that did not comply with the provisions of part 5 sub part 2 especially in the area of non-disclosure in statement of affairs.

- (b) if the terms in the proposal is such that it can be regarded as unreasonable and would not benefit the creditors as a whole.
- (c) When it is not practical to approve the proposal.

After the court's approval of the proposal, the proposal becomes binding on all the creditors who are affected by the proposal.<sup>236</sup> The courts approval serves as conclusive evidence of the validity of the proposal.<sup>237</sup> The proposal can however be cancelled or varied by the court under certain circumstances provided by the law.<sup>238</sup>

#### 4.2.8 Summary Instalment Orders

A summary instalment order (SIO) is another debt relief measure that can be explored by a consumer debtor in New Zealand. This is a form of a debt repayment plan whereby a debtor makes an arrangement with his creditor(s) to pay back all or an agreed part of his debts by instalments. This is also regarded as an alternative to bankruptcy and most suitable in circumstances where the debtor has an income and owes relatively small debts.<sup>239</sup> A SIO is an order usually made by an assignee stating either that the debtor would pay his debts in instalments or in full or in circumstances that the assignee may deem fit.<sup>240</sup>

An assignee would only make an order for summary instalment in the following circumstances:<sup>241</sup>

- (a) When the total of the debtors unsecured debt provable in bankruptcy amounts to NZ\$40,000<sup>242</sup> or less; and
- (b) When the debtor cannot afford to pay the debt as they fall due.

Payment under SIO can only be made within the period of 3 years but can be extended to 5 years in situations that the court considers justifiable.<sup>243</sup> An application for a SIO can

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<sup>236</sup> Section 334(1) of the Act.

<sup>237</sup> Section 334(2) of the Act.

<sup>238</sup> Section 339 of the Act.

<sup>239</sup> Heath 1999 *Osgoode Hall Law Journal* 435.

<sup>240</sup> Section 340 of the Act.

<sup>241</sup> Section 343(a) and (b) of the Act.

<sup>242</sup> 40,000 New Zealand dollars was the equivalent of approximately 33,163 United States dollars on 2014.09.08.

either be made by the debtor or by a creditor with the consent of the debtor.<sup>244</sup> The application by the debtor for a summary instalment order must be detailed enough giving information of the total amount to be paid, the mode of payment, details of a proposed supervisor who is to oversee the procedure, the debtor's personal details and details as to his assets, liabilities and earnings.<sup>245</sup> The supervisor would issue notices of an instalment order on the creditors whose names are listed on the application or creditors who have proved claims to the satisfaction of the supervisor.<sup>246</sup> The purpose of issuing the notices is to give the creditors the opportunity to object to any claim accepted or excluded by the supervisor.<sup>247</sup>

When an order of SIO is made, there is an automatic bar to instituting proceedings or continuation of any proceedings against the debtor unless permission of the assignee has been sought or when the debtor has defaulted under the order.<sup>248</sup> Furthermore, all debts included in the order must be paid by the debtor at the exact time and in the proportion prescribed by the order.<sup>249</sup> Also, a debtor under a current summary instalment order cannot alone or jointly with another person obtain credit, enter into a higher purchase agreement or incur liability of NZ\$1,000 or more<sup>250</sup> except where he had informed the person giving the credit of being under an instalment order or the person was aware he is under an instalment order.<sup>251</sup> A debtor who violates this provision of the law would be deemed to have committed an offence under section 360 of the Act and liable to imprisonment for a term not more than 1 year or a fine not exceeding NZ\$5,000<sup>252</sup> or both as the court may deem fit in the circumstance.<sup>253</sup>

It is important to note that a SIO maybe varied or discharged at any time by the assignee. A creditor, debtor or supervisor may make an application to the assignee to vary or discharge a summary instalment order. The assignee would however grant any order deemed fit in the circumstance.

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<sup>243</sup> Section 349(a) and (b) of the Act.

<sup>244</sup> Section 341(a) and (b) of the Act.

<sup>245</sup> Section 342(2)(a)-(d) of the Act.

<sup>246</sup> Sections 353(a)-(c) and 356(1) of the Act.

<sup>247</sup> Section 356(2) of the Act.

<sup>248</sup> Section 352(a) and (b) of the Act.

<sup>249</sup> Section 351 of the Act.

<sup>250</sup> Section 360 (1)(b)(i)-(iii) of the Act.

<sup>251</sup> Section 360 (2)(a)and(b) of the Act.

<sup>252</sup> 5,000 New Zealand dollars was the equivalent of approximately 4,147 United States dollars on 2014.09.08.

<sup>253</sup> See section 360(3) of the Act.

A SIO would only be discharged when all instalments required to be paid has been paid in full as specified by the order.<sup>254</sup>

#### 4.2.9 No Asset Procedure

No asset procedure (NAP) was introduced in New Zealand in the year 2007<sup>255</sup> through the Insolvency Act of 2006.<sup>256</sup> This is an additional debt relief measure that has been introduced into the system which is available to a consumer debtor who has no assets or income to repay debts without having to go through bankruptcy procedures.<sup>257</sup> The no asset procedure is thus an alternative debt relief measure for debtors who do not have income or assets and therefore would not qualify for bankruptcy. This procedure is specifically for debtors who do not have any assets that can be realised for the benefit of their creditors. It is a once off out of court procedure that is being administered by an official assignee.<sup>258</sup>

The requirements for a debtor to qualify for NAP are:<sup>259</sup>

- (a) The debtor has no realisable assets (excluding retainable assets under section 158).
- (b) That the debtor has not previously gone through the no asset procedure.
- (c) The debtor had not been judged bankrupt prior to that time.
- (d) That the total debt being owed by the debtor excluding student loans is not more than NZ\$40,000.00 and not less than NZ\$1,000.00.
- (e) That subject to the means test prescribed by the law, the debtor does not have the resources to pay back any amount out of the debt owed.

Ordinarily, a debtor would be admitted to NAP if he or she qualifies under section 363 of the Act. However, there are certain situations whereby the assignee may refuse to admit the debtor to the no asset procedure such as when the debtor does not make disclosure of

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<sup>254</sup> Section 360(3) of the Act.

<sup>255</sup> See New Zealand Ministry of Economic Development 2011 *Report on Evaluation of the No Asset Procedure 2*.

<sup>256</sup> Brown 2007, *Journal of South Pacific Law* 90.

<sup>257</sup> Mofat 2008 <http://www.buddlefindlay.com/> 2 (Accessed on 07/08/2014)

<sup>258</sup> Section 362(1) of the Act.

<sup>259</sup> See section 363(1) and (2) of the Act.

his assets with the intention to cheat the creditors,<sup>260</sup> has committed an offence under the Insolvency Act,<sup>261</sup> has incurred debt(s) knowing that there was no means to repay them<sup>262</sup> and if a creditor has the intention of applying that the debtor be adjudicated bankrupt.<sup>263</sup>

A debtor who applies for the no asset procedure cannot obtain credit, enter into an higher purchase agreement or incur any liability worth more than NZ\$100<sup>264</sup> either alone or jointly with another person except he has first informed the credit provider that he had applied for a no asset proceeding.<sup>265</sup>

There are certain debts that are excluded under the no asset procedure such as:<sup>266</sup> Debt(s) owed under a maintenance order,<sup>267</sup> debts owed with regard to child support<sup>268</sup> and the balance of student loans.

NAP has certain effects such as it serves as an automatic stay on any action that has been instituted against the debtor to recover the debts being owed as at the time the debtor applied under the NAP or debts that are provable in bankruptcy if the debtor were to be adjudged bankrupt. NAP would also serve as an automatic bar to instituting any further action against the debtor with regard to these debts.

After a debtor has been finally admitted into the NAP, the debtor cannot alone or jointly with another person obtain credit, enter into an higher purchase agreement or incur liability of NZ\$1,000 or more<sup>269</sup> except if he had informed the credit provider of being under a NAP or the credit provider had prior information that the debtor was under a no asset procedure.<sup>270</sup> A debtor who commits this offence would be deemed to have committed an offence of obtaining credit.<sup>271</sup>

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<sup>260</sup> Section 364(a) of the Act.

<sup>261</sup> Section 364(b) of the Act.

<sup>262</sup> Section 364(c) of the Act.

<sup>263</sup> Section 364(d) of the Act.

<sup>264</sup> 100 New Zealand dollars was the equivalent of approximately 82.9 United States dollars on 2014.09.08.

<sup>265</sup> Section 366 of the Act.

<sup>266</sup> Section 369(20)(a)-(d) of the Act.

<sup>267</sup> See *Family Proceedings Act* 1980.

<sup>268</sup> See *Child Support Act* Public Act 1991 No142 (NZ).

<sup>269</sup> Section 371(1) of the Act.

<sup>270</sup> Section 371(2) of the Act.

<sup>271</sup> Section 371 of the Act.

A debtor's participation under no asset procedure can either be terminated or discharged. The assignee retains the right to terminate a debtor's participation under the no asset procedure if the trustee is of the opinion that the debtor is in any of the following situations:

- (a) The debtor was wrongly admitted under the procedure; or
- (b) The debtor's financial status has improved such that he can repay his or her debts;  
or
- (c) When a debtor has applied to court for his adjudication; or
- (d) When a debtor has been discharged from the no asset procedure; or
- (e) When a creditor under a maintenance order, child support or student loan applies for debtors adjudication.<sup>272</sup>

Termination would be effected once the assignee has sent a written notice of termination to the debtor and a notice of termination will also be served on each creditor of the debtor.<sup>273</sup>

When a debtor's participation is terminated under the no asset procedure, the debts that could not be enforced against the debtor by virtue of being under the procedure, once again becomes enforceable by the creditors except in situations whereby the debtor had been discharged under section 377 of the Act. A debtor whose procedure has been terminated would also be liable to pay interest that has accrued to the debts and penalties that have been levied and this also would become enforceable.<sup>274</sup>

A debtor under no asset procedure would be granted a discharge automatically 12 months after the date that the debtor was admitted to the no asset procedure. There are situations where a debtor under the no asset proceedings would not get a discharge after 12 months such as when the assignee extended the period or where the assignee had issued a deferral notice stating an alternative date.<sup>275</sup>

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<sup>272</sup> See section 369(2) of the Act.

<sup>273</sup> See section 373(3) of the Act.

<sup>274</sup> Section 375 of the Act.

<sup>275</sup> See Section 377(2)-(7) of the Act.



When a debtor is discharged under the no asset procedure, the debtor is released from all debts that were enforced under the procedure that is the debtor is free from all obligations that arose at the entry point into the procedure including penalties and interests and the implication of this is that the debts can no longer be enforceable against the debtor.<sup>276</sup> There are however exceptions to this, which are debts or liabilities incurred through fraud, and debts or liabilities for which a debtor had obtained forbearance fraudulently.<sup>277</sup>

A discharge under no asset procedure debtor does not cover a business partner, co-trustee, and a guarantor of the debtor.<sup>278</sup>

### 4.3 Consumer Debt Relief Measures in Denmark

#### 4.3.1 Background

Denmark is said to be the first European country to introduce a definite procedure for consumer debtors in the year 1984,<sup>279</sup> which served as a model to all other Scandinavian countries in drafting their laws. This definite practice for consumer debtor was introduced through the amendment of the Danish Bankruptcy Law<sup>280</sup> by introducing part IV to the Bankruptcy Act which provided for a discharge and rehabilitation of an individual debtor.<sup>281</sup> The provision of discharge and rehabilitation was aimed at granting a debtor relief from debt, but due to the possibility of abuse it was restrictive in its application and a debtor was consequently expected to pass 2 tests in order to qualify which are:<sup>282</sup>

- a) The debtor was expected to show a state of “qualified insolvency” which means that there is complete impossibility of fulfilling his financial obligations; and
- b) The court must be convinced that granting relief to the debtor is appropriate considering all the factors and circumstances surrounding his indebtedness.

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<sup>276</sup> Section 377A(1) of the Act.

<sup>277</sup> Section 377A(2) of the Act.

<sup>278</sup> Section 377B of the Act.

<sup>279</sup> Niemi 2003 *Osgoode Hall Law Journal* 482.

<sup>280</sup> Act no. 187 of 9 May 1984.

<sup>281</sup> Kilborn 2010 <http://dx.doi.org/10.2139/ssrn.1663108> 13.

<sup>282</sup> See Kilborn 2012 *Loyola Consumer Law Review* 18.

However, these tests however made it difficult for a debtor to access the system of debt relief. The process of debt relief under the Danish system was said to have been characterized by a restrictive approach towards debtors and more protective of the creditors.<sup>283</sup> This system is said to have been characterized by two major features which are:<sup>284</sup> debtors were forced to initiate negotiation with creditors before initiating formal reliefs and even after seeking formal reliefs which was said to have been counterproductive and court developed and discretionary standards for the requirements of reliefs were employed which brought about disparities in the standards laid down by the courts.

The above mentioned two features of the Danish Act did undergo reforms in 2005<sup>285</sup> these reforms addressed these two areas of concern that were raised and walked away from the historical ideology of abuse. However, the Danish Act has recently been extensively amended with regards to these and the current Act<sup>286</sup> provides for debt relief measures for a consumer debtor.

The Bankruptcy Act is a unified legislation that regulates both individual and corporate insolvency practice in Denmark and is also known as the “*Konkursloven*”.<sup>287</sup> A person is considered insolvent under the Bankruptcy Act if he cannot meet his financial obligations as they fall due unless the condition of not being able to meet his financial obligations is temporary.<sup>288</sup> The Bankruptcy Act has a primary purpose of ensuring equal distribution of the debtor’s assets amongst creditors.<sup>289</sup>

Under the Bankruptcy Act there are three debt relief measures available to consumer debtors which are Danish *konkurs*,<sup>290</sup> Danish *rekonstruktion*,<sup>291</sup> and Danish *gaeldsanering*.<sup>292</sup>

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<sup>283</sup> Eide 2009 Msc Thesis 116.

<sup>284</sup> Kilborn 2009 *International Insolvency Review* 185.

<sup>285</sup> Kilborn 2012 *Loyola Consumer Law Review* 17-19.

<sup>286</sup> *Danish Bankruptcy Act (Konkursloven)*, Consolidation Act No 11 of 2014 (hereafter referred to as Bankruptcy Act).

<sup>287</sup> Bigaard, Gronborg and Copenhagen 2010 *International Insolvency Institute* 1.

<sup>288</sup> See Eide 2009 Msc Thesis 116.

<sup>289</sup> Bigaard, Gronborg and Copenhagen 2010 *International Insolvency Institute* 2.

<sup>290</sup> See section 17 *Bankruptcy Act* (*konkurs* can also be referred to as bankruptcy or liquidation in English).

<sup>291</sup> See section 10 *Bankruptcy Act* (*rekonstruktion* which is also known as re-construction).

<sup>292</sup> See sections 197-237 *Bankruptcy Act* (*gaeldsanering* is also known as debt restructuring).

#### 4.3.2 Danish *konkurs*

An application for Danish *konkurs* can be filed by a debtor who is insolvent or by creditors of an insolvent debtor. Being insolvent according to the Act, is when a person is unable to pay his or her debts, as they fall due.<sup>293</sup>

The primary purpose of Danish *konkurs* is to ensure fair distribution of the debtor's assets among the creditors in accordance to the provisions of the law.<sup>294</sup> Danish *konkurs* can be filed either by the debtor or the creditor however the pre-condition for filing any bankruptcy petition is establishing insolvency of the debtor.

A debtor is assumed to be insolvent in any of the following circumstances:<sup>295</sup>

- (a) When a debtor acknowledges his insolvency.
- (b) When a debtor is under a reconstruction procedure.
- (c) When a debtor defers payment.
- (d) That the financial expenditure of the debtor three months prior to the receipt of the petition for *konkurs* by the court did not commensurate with the debtor's financial capability.

#### 4.3.3 Debtors Petition

A debtor who acknowledges being insolvent can file a debtor's petition and the debtor is expected to file the petition together with a statement of assets, liabilities and list of all the creditors of the estate.<sup>296</sup> After the debtor has filed the petition, the bankruptcy court would summon the debtor to a meeting and if the debtor fails to attend the court meeting, the petition for *konkurs* would be dismissed.<sup>297</sup> The law requires that the debtor's petition for *konkurs* must comply with certain formal requirements such as:<sup>298</sup>

- (a) The application must be in writing.

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<sup>293</sup> Section 17 *Bankruptcy Act*.

<sup>294</sup> Sections 93-98 *Bankruptcy Act*.

<sup>295</sup> Section 18 *Bankruptcy Act*.

<sup>296</sup> Section 22 *Bankruptcy Act*.

<sup>297</sup> See section 22(3) *Bankruptcy Act*.

<sup>298</sup> See section 7 *Bankruptcy Act*.

- (b) The application must give adequate details about the debtor.
- (c) The application must be accompanied with the necessary documents such as statement of assets and liabilities and a list of creditors.<sup>299</sup>

#### 4.3.4 Creditors Petition

Also, the preliminary requirements of the law in filing a creditor's petition for Danish *konkurs* are:<sup>300</sup>

- (a) The petition must be in writing.
- (b) The petition must be filed in two copies, giving adequate details of the debtor against whom the application is brought.

The petition must establish an act of insolvency by the debtor, basis and circumstances of the claim, and also, notice of the *konkurs* petition would be issued on the debtor except in situations whereby the debtor has been informed and is aware of the petition.<sup>301</sup> The court would order a hearing of the court not later than 3 days after application for *konkurs* has been filed where both the debtor and the creditors would be present and the court would decide whether a *konkurs* order should be issued or not.<sup>302</sup>

#### 4.3.5 Effects of Danish *konkurs*

When an order for *konkurs* is issued against the debtor, the debtor can no longer transfer, alienate, give, dispose any property in his estate or enter into any obligation, receive payments and other services with regard to properties of the estate.<sup>303</sup> This however means that obligations that were created after a *konkurs* order was issued cannot be enforced against the estate.

When a debtor is found insolvent by the court, the court would make an order declaring the debtor insolvent and thereafter appoint one or more bankruptcy trustees. The trustees are vested with the responsibility of preparing an account of fair distribution of the debtor's

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<sup>299</sup> See section 22 *Bankruptcy Act*.

<sup>300</sup> See section 7 *Bankruptcy Act*.

<sup>301</sup> Section 23 *Bankruptcy Act*.

<sup>302</sup> See section 23(2) *Bankruptcy Act*.

<sup>303</sup> Section 29 *Bankruptcy Act*.

funds.<sup>304</sup> The account would be sent to the creditors of the debtor and also the bankruptcy court for approval. Upon approval by the creditors and the bankruptcy court, the funds realised from the debtor estate would be distributed according to the accounts drafted and thereafter, proceedings would be terminated.<sup>305</sup>

It is important to note that looking at the Danish Bankruptcy Act, the traditional Danish *konkurs* proceeding as discussed above does not offer a discharge to a debtor.

#### **4.3.6 Alternative Debt Relief Measures**

#### **4.3.7 Danish *rekonstruktion***

The Danish *rekonstruktion* procedure can be in form of either a compulsory composition or in form of a merger and acquisition.<sup>306</sup> A compulsory composition under *rekonstruktion* can be in form of a payment deferral, a cancellation of debt, or a reduction of debt.<sup>307</sup>

*Rekonstruktion* procedures can be commenced either by a creditor or a debtor through the petitioning of the bankruptcy court.<sup>308</sup> When a creditor files a *rekonstruktion* proposal against a debtor, the petition would summon the parties to a court hearing and the debtor would be given the opportunity to decline *rekonstruktion* procedures. In such a situation, *konkurs* proceeding will commence against the debtor.<sup>309</sup> However, when a debtor files an application for *rekonstruktion*, the application would be heard and *rekonstruktion* proceedings would commence immediately.<sup>310</sup>

The bankruptcy court would appoint one or more re-constructor who would see to the reconstruction proceeding.<sup>311</sup> The re-constructor would serve a draft of a recovery plan and issue notices of commencement of *rekonstruktion* proceedings and court hearing on all the creditors and meeting of creditors according to the provisions of the law.<sup>312</sup> Creditors meetings would be held within four weeks of commencing *konkurs* proceeding in

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<sup>304</sup> See Sjørølev and Højslet 2013 *The International Insolvency Review* 98.

<sup>305</sup> See sections 30, 38 and 40 *Bankruptcy Act*.

<sup>306</sup> See section 10 *Bankruptcy Act*.

<sup>307</sup> See section 10(a) *Bankruptcy Act*.

<sup>308</sup> See section 11 of the *Bankruptcy Act*.

<sup>309</sup> See section 11(4) *Bankruptcy Act*.

<sup>310</sup> See section 11(3) *Bankruptcy Act*. See also Sjørølev and Højslet 97.

<sup>311</sup> See section 11(a) *Bankruptcy Act*.

<sup>312</sup> See sections 11(a)(2), 11(b) and 11(c) *Bankruptcy Act* on notices to be issued by the re-constructor.

which the creditors would be given the opportunity to oppose the *rekonstruktion* proposal. Proposals for reorganization would ordinarily be accepted except if a majority of creditors represented at the creditors meeting oppose the application for *rekonstruktion*.<sup>313</sup> If a proposal for *rekonstruktion* is refused, a *konkurs* notice would be issued immediately against the debtor.

On the day of the meeting, a *rekonstruktion* proposal will be presented and the proposal must satisfy certain conditions of the law such as<sup>314</sup> the proposal must give detailed information as to the debts being owed most especially those with specific interests attached and the name of creditors, the proposal must also be accompanied by the debtor's statement of affairs and accompanied with a statement from the constructor given detailed information on the debtors status report, financial statement, liabilities, financial difficulties, estimated dividend to the creditors, level of cooperation of the debtor and if *rekonstruktion* is the most appropriate procedure to be followed.

Thereafter, another creditors meeting would be held not later than six months after the commencement of the *rekonstruktion* proceedings giving the creditors a second opportunity to oppose the *rekonstruktion* proposal. If a qualified majority of the creditors oppose the *rekonstruktion* proposal, the debtor would be sent for *konkurs*.<sup>315</sup>

A *rekonstruktion* proposal that has been accepted would only become valid after it has been confirmed by the bankruptcy court.<sup>316</sup> The court may grant confirmation of the proposal conditionally based on certain conditions,<sup>317</sup> or may deny confirmation of the proposal outright under any of the following circumstances:<sup>318</sup>

- (a) If there was any form of mistake or non-disclosure of information whatsoever made in the process of arriving at the *rekonstruktion* proposal that affected the votes on the outcome of the proposal.
- (b) If the proposal was made in violation of the law.

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<sup>313</sup> See section 13(d) *Bankruptcy Act*.

<sup>314</sup> See section 13(b)(1)-(3) *Bankruptcy Act*.

<sup>315</sup> See section 13(1) *Bankruptcy Act*.

<sup>316</sup> See section 13(e) *Bankruptcy Act*.

<sup>317</sup> See section 13(e)(6) *Bankruptcy Act*.

<sup>318</sup> See section 13(e)(3) *Bankruptcy Act*.

- (c) If a third party or debtor had influence on any vote made with regard to the *rekonstruktion* proposal.
- (d) If the terms of the *rekonstruktion* proposal was disproportionate to the debtors financial capability.<sup>319</sup>

A reconstruction procedure that has been accepted is said to have the effect of a court settlement,<sup>320</sup> therefore it is binding on all the parties involved such as the creditors and any guarantor for the debts.<sup>321</sup>

Looking at the Bankruptcy Act, there is no provision for the discharge of a consumer debtor under the *rekonstruktion* procedure.

#### 4.3.8 *Gaeldsanering* Procedure

The *gaeldsanering* procedure is a debt restructuring procedure which has been translated into different English phrases by various authors such as “consumer bankruptcy” or “personal bankruptcy” procedure<sup>322</sup> or debt adjustment<sup>323</sup> or debt rescheduling.<sup>324</sup> *Gaeldsanering* is a debt settlement procedure which is used for dealing with over indebtedness<sup>325</sup> and is usually carried out by the bankruptcy court specifically for natural persons.<sup>326</sup> This procedure can only be instituted by a debtor<sup>327</sup> and it is the only debt relief procedure that provides for the discharge of a consumer debtor under the Danish Bankruptcy Act.

An application may be brought by a debtor prior to insolvency requesting that his debt be restructured. This application would be granted if it is established that the debtor cannot meet his or her debt obligations and there is no likelihood of meeting it in the next few

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<sup>319</sup> See section 13(e)(5) *Bankruptcy Act*.

<sup>320</sup> See section 14(1) *Bankruptcy Act*.

<sup>321</sup> See section 14(2) *Bankruptcy Act*.

<sup>322</sup> Kilborn 2012 *Loyola Consumer Law Review* 1. See also Kilborn *Comparative Consumer Bankruptcy* 20.

<sup>323</sup> Niemi 2003 *Osgoode Hall Law Journal* 488.

<sup>324</sup> Rasmussen and Borling 2004 [file:///C:/Users/user/Downloads/ 2](file:///C:/Users/user/Downloads/2).

<sup>325</sup> Storme *Procedural Law in Europe: Towards Harmonization* 101.

<sup>326</sup> Steen and Herbing 2011 [file:///C:/Users/user/Downloads/ 6](file:///C:/Users/user/Downloads/6).

<sup>327</sup> See section 197 *Bankruptcy Act*.

years and that the debt restructuring will help improve the debtor's financial situation.<sup>328</sup> The debtor's application for *gaeldsanering* would be denied if:<sup>329</sup> the debtor is in an unresolved financial state, or the debts were incurred by unlawful or tortious acts, or the debtor had failed to fulfil his obligation when he had opportunity to do so, or if the debtor did arrange his insolvency with the sole purpose of debt relief or the debtor incurred additional debts after the commencement of the debt relief procedure if the debtor had acted irresponsibly in economic matters such as; the debtor incurred debt(s) while insolvent, the debtor incurred debts disproportionate to financial state, the debts incurred were for consumption purpose or if the debt was being owed to the public.

The Bankruptcy Act gives the court a discretionary power to determine other grounds on which debt relief can be denied that is unspecified grounds that the court may deem fit.<sup>330</sup>

Application for debt relief under this procedure must be in writing stating the debtor's full names, address, and other vital information's as required by the law.<sup>331</sup> This application must be accompanied with the debtor's statement of affairs, disclosing assets liabilities and income, information of claims being made by the creditors of the estate<sup>332</sup> and the debtor's declaration on oath as to the correctness of information disclosed. The bankruptcy court would not grant an application for *gaeldsanering* if <sup>333</sup> based on the information's disclosed by the debtor in his application, the court is of the opinion that there are no reasonable grounds for granting it, or the debtor had not disclosed the information in good faith or the debtor has failed to attend the meeting of the creditors in which the proposal is being considered.<sup>334</sup>

This decision to deny debt relief to the debtor can be taken by the court at any stage of the proceedings. However, the debtor would be given the opportunity to defend his actions before the decision is taken by the court.<sup>335</sup>

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<sup>328</sup> Section 197 of the *Bankruptcy Act*. See also Rasmussen and Borling 2004 file:///C:/Users/user/Downloads/ 3 (Accessed on 12/08/2014).

<sup>329</sup> Section 197(2) of the *Bankruptcy Act*. See also Heuer 2014 LLD Thesis 486.

<sup>330</sup> Section 197(4) *Bankruptcy Act*.

<sup>331</sup> See section 7 *Bankruptcy Act*.

<sup>332</sup> Section 202 *Bankruptcy Act*.

<sup>333</sup> Section 212(1) *Bankruptcy Act*.

<sup>334</sup> See section 214 *Bankruptcy Act*.

<sup>335</sup> Section 212(2) *Bankruptcy Act*.



After the receipt of the debtor's proposal, the bankruptcy court would convene a meeting of the creditors and debtor and notice would be issued at least two weeks before and in accordance to the specifications of the law.<sup>336</sup> At the meeting, the debtor's proposal for a payment plan would be considered, questions would be asked, and the debtor would be expected to give an answer to the question asked, and thereafter, a decision would be reached.<sup>337</sup>

The final proposal must be adopted by the creditors no later than six months after the *gaeldsanering* proceedings have commenced.<sup>338</sup> A proposal filed can be granted either in full or part by the court subject to the courts discretion and the award made by the court takes effect.<sup>339</sup> This final proposal that has been awarded would give details of the debts that have been granted by the order of the court, the rates at which the debts have been reduced, or payments that have been deferred and the modes of instalments payable, and funds that are available how available funds are to be distributed.<sup>340</sup> A payment plan can be modified either to extend the period of payment but this would only be granted under exceptional cases.<sup>341</sup>

A debt relief order granted by the court to a debtor can be repealed by the bankruptcy court on application of a creditor stating that a debtor has been involved in fraudulent practices or a debtor under the debt relief order has failed in carrying out obligations imposed under the order.<sup>342</sup>

The effects of *gaeldsanering* are: when a *gaeldsanering proceeding* is initiated, further proceedings cannot be instituted by any creditor against the debtor's assets or properties neither can they be attached in judgments. Furthermore, the institution of *gaeldsanering* proceedings serves as a stay on any other debt enforcement proceedings.<sup>343</sup> This

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<sup>336</sup> Section 214(2) *Bankruptcy Act*.

<sup>337</sup> Sections 215 and 216 *Bankruptcy Act*.

<sup>338</sup> Section 13 *Bankruptcy Act*.

<sup>339</sup> Section 216 *Bankruptcy Act*.

<sup>340</sup> Section 216(3)-(7) *Bankruptcy Act*.

<sup>341</sup> See section 228 *Bankruptcy Act*.

<sup>342</sup> Section 229 *Bankruptcy Act*.

<sup>343</sup> Section 207 *Bankruptcy Act*.

however does not include any claim against the debtor which is not affected by the outcome of the debt relief proceedings.

Furthermore, a *gaeldsanering* procedure would be deemed to have closed<sup>344</sup> when there is no objection to the application within the time stated, or an award has been made by the court,<sup>345</sup> or when a debtor does not comply with the provisions of the law with regard to filling an application.<sup>346</sup>

#### 4.3.9 Discharge under *Gaeldsanering*

After the court has exercised its discretionary powers in granting a *gaeldsanering order*, a debtor receives a discharge immediately after the payment plan is awarded. The discharge can however be a full or partial discharge subject to the courts discretion.<sup>347</sup>

#### 4.4 Conclusion

The purpose of a discussion of the New Zealand and Denmark system in this section was to evaluate the debt relief practice system of these developed countries and identify the various lessons that can be learnt by Nigeria.

The New Zealand Insolvency Act provides for comprehensive debt relief measures which a debtor can explore in the event of going insolvent. The bankruptcy proceeding in New Zealand is similar to that of Nigeria, as a bankruptcy petition in these two jurisdictions can be filed either by a debtor or creditor of the estate.<sup>348</sup> However, there are also striking differences. In New Zealand, the voluntary bankruptcy proceeding is not a court proceeding,<sup>349</sup> the application by a debtor is lodged by an official receiver who adjudicates over it while in Nigeria it is a court proceeding just like involuntary bankruptcy proceedings. Also, a creditor can apply for bankruptcy in New Zealand directly while in Nigeria where

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<sup>344</sup> Section 218 *Bankruptcy Act*.

<sup>345</sup> See section 216 *Bankruptcy Act*.

<sup>346</sup> See sections 205 and 212 *Bankruptcy Act*.

<sup>347</sup> Section 226 *Bankruptcy Act*. See also Heuer 2014 LLD Thesis 487.

<sup>348</sup> See pars 2.3 and 4.3 above.

<sup>349</sup> See par 4.3.1 above.

debt must first be established in a separate proceeding before bankruptcy proceeding can be instituted.<sup>350</sup>

The New Zealand Insolvency Act provides for a discharge under the bankruptcy proceedings. This discharge can be obtained automatically three years after a bankrupt files his statement of affairs or alternatively if a bankrupt applies to court for his discharge within the period of three years.<sup>351</sup> Bankruptcy proceedings in Nigeria also provides for automatic discharge five years after a receiving order has been issued, discharge via application of the debtor any time within the five years and discharge through a court motion or application of an official receiver, trustee or any creditor who has proved claim.

<sup>352</sup>

New Zealand provides for a shorter period of time for its automatic discharge than Nigeria. However the Nigerian Bankruptcy Act provides for more discharge provisions for a bankrupt. The Nigerian Bankruptcy Act provides that the court on its own discretion can decide to raise a motion for the discharge of a bankrupt if such person has failed to come forward for discharge within a reasonable time. Also, an official receiver, a trustee or any creditor of the estate who has proved a claim can in good faith apply for the discharge of a bankrupt.<sup>353</sup>

New Zealand provides for other viable debt relief measures which can be explored as alternatives to bankruptcy namely proposals, summary instalment order and the no asset procedure. These alternative debt relief measures can be said to afford debtors the opportunity to fulfil their financial obligations through a more affordable and speedy medium. The Nigeria Bankruptcy Act also provides for alternative debt relief measures in the form of composition and scheme of arrangement. These can be likened to the proposal in New Zealand whereby a debtor can make an offer to his creditors on an alternative way of fulfilling his obligations other than going through bankruptcy. However in order for a proposal to be accepted under the New Zealand Act, three-quarters in value and majority in number of creditors must assent to the proposal while a proposal for composition or

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<sup>350</sup> See par 2.3.2 above.

<sup>351</sup> See par 4.3.4 above.

<sup>352</sup> See par 2.3.5 above.

<sup>353</sup> Ibid.

scheme of arrangement under the Nigerian Bankruptcy Act would be valid if two third majorities in number of the creditors assent to it.<sup>354</sup>

The New Zealand Insolvency Act also makes provision for the No income No Asset debtors in, whereby debtors who do not have assets nor income are given a once off debt relief measure that relieves them from their indebtedness. There is no provision for such class of debtors under the Nigerian Bankruptcy Law.

The proposal and summary instalment order procedures under the New Zealand Insolvency Act do not provide for a discharge of the debtor while the no asset procedure (NAP) provides for a discharge. Under the Nigeria Bankruptcy Act, there is provision for a discharge of the debtor under composition and schemes of arrangement procedure.<sup>355</sup>

One striking feature of the debt relief system in Denmark is that it operates a unified legislation for both individual and corporate practice of insolvency.<sup>356</sup> The Danish Bankruptcy Act is a unified legislative framework just as is the case with the American Bankruptcy Code. Furthermore, the Danish Bankruptcy Act provides for a number of consumer debt relief measures namely *konkurs* (bankruptcy) *rekonstruktion* (reconstruction) and the *gaeldsanering* which is also known as debt restructuring.<sup>357</sup>

*Konkurs* proceedings in Denmark can be likened to bankruptcy in Nigeria as both proceedings can be filed either by a debtor or creditors of the estate. However, *konkurs* in Denmark does not offer a discharge to a debtor from his indebtedness unlike in Nigeria where a debtor would receive discharge from his indebtedness under bankruptcy.<sup>358</sup>

*Rekonstruktion* is a form of debt relief measure which can be explored as an alternative to bankruptcy. An individual debtor who is brought under this procedure by his creditors has an option to decline this procedure and opt out for *konkurs* instead,<sup>359</sup> and a debtor can thus not be forced to go for *rekonstruktion* proceedings. Even though this procedure can

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<sup>354</sup> See pars 2.4.1 and 4.4.1 above.

<sup>355</sup> See par 2.4.3 above.

<sup>356</sup> See par 4.5 above.

<sup>357</sup> See par 4.5 above.

<sup>358</sup> See par 2.3.5 and 4.5.1.1 above for discussion on issue of discharge in Nigeria and Denmark.

<sup>359</sup> See par 4.5.2 above.

be explored by a consumer debtor, and is seen as a debt relief measure it does not grant adequate relief to a consumer debtor because it does not provide for a discharge.<sup>360</sup> This debt relief measure can be likened to composition and scheme of arrangements in Nigeria as it can be explored by a debtor alternatively to bankruptcy and can be applied for either by the debtor or creditor subject to creditor's approval. However, if this does not work out, bankruptcy proceedings would automatically take effect.<sup>361</sup> The major difference between *rekonstruktion* in Denmark and composition and scheme of arrangement in Nigeria is that *rekonstruktion* does not provide for a discharge and seems more like its primarily intended for corporate debtors as against consumer debtors while these composition and scheme of arrangement as a debt relief measure in Nigeria provides for discharge of a debtor and is primarily intended for consumer debtors.<sup>362</sup>

The *Gaeldsanering* procedure is a debt relief measure that is originally made for a consumer debtor in Denmark. This can be said to be the major debt relief measure provided for by the Danish Act which grants a discharge to a consumer debtor and which can be explored as an alternative to bankruptcy.

Amongst all the debt relief measures provided for under the Danish Act, *gaeldsanering* appears to be the only debt relief measure<sup>363</sup> that offers discharge to a consumer debtor. The bankruptcy and reorganization proceedings can be likened to the United States Chapter 7 and Chapter 11 procedure under the United States Bankruptcy Code which can be said to be primarily intended for businesses and although they can be explored by a consumer debtor, they do not provide for the discharge of a consumer debtor.

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<sup>360</sup> See par 4.5.2.1 above.

<sup>361</sup> See pars 2.4.1 and 4.5.2 above.

<sup>362</sup> See pars 2.4.1 and 4.3.7 above.

<sup>363</sup> Steen and Herbing 2011 <file:///C:/Users/user/Downloads/7>.

## CHAPTER 5

### POLICY CONSIDERATIONS

#### 5.1 Introduction

Individual consumer bankruptcy has attracted the attention of governments and researchers all over the world. Of crucial importance is what constitutes an acceptable consumer insolvency regime and what the core requirements are before any consumer insolvency regime can be deemed to be acceptable. Two reports have been produced in recent times that serve as guidelines for insolvency regimes all over the world. The first is the Insol<sup>364</sup> International consumer debt report<sup>365</sup> and the second is the World Bank working group report<sup>366</sup>. In this chapter both reports would be extensively analysed and discussed. This is imperative in order to have a basic grasp of international best practises in the area of individual consumer debt relief. The analysis of both reports is also motivated by the need to juxtapose international consumer insolvency guidelines for the Nigerian insolvency system and determine if Nigeria can glean some insights from the guidelines enshrined in both reports and obtain recommendations that can be adapted to her own local circumstances.

#### 5.2 INSOL International Consumer Debt Report

The International Association of Restructuring, Bankruptcy and Insolvency Practitioners (Insol International) in its inaugural world congress in 1997 considered problems usually encountered by consumers in their quest to get debt relief. This led to the carrying out of a survey on insolvency regimes for individual debtors in nations of the world spanning developed, developing and underdeveloped countries. This survey considered opinions of professionals, judges, insolvency practitioners and academics with the aim of providing information for countries that intend to develop or reform their laws with regard to insolvency of consumer debtors which led to the publishing of the Insol Report.<sup>367</sup>

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<sup>364</sup> International Association of Restructuring Insolvency and Bankruptcy Professionals.

<sup>365</sup> Insol International 2001 *Consumer Debt Report: Reports of Findings and Recommendations* (hereafter referred to as the Insol Report).

<sup>366</sup> World Bank Report 2011: *Report on the Treatment of Insolvency of Natural Persons*.

<sup>367</sup> Ibid.

The report emphasises key principles that must be considered in formulating viable consumer bankruptcy law. Another edition of this report was also published in the year 2011 which expanded and re-affirmed the basic principles laid down in the first edition<sup>368</sup> however, the 2001 report would be considered in this work.

Insol International in its report defined consumer debtors as natural persons, that is individuals who have incurred debts (debts that stem either from private or commercial transactions) which exceeds their capacity to repay.<sup>369</sup> The report further identified that the cause of over indebtedness is due to the expansion of economies, high rate of unemployment and the fact that consumers have access to large amounts of credit which is not commensurate with their income.<sup>370</sup> Furthermore, various problems of consumer debts were identified and listed below.<sup>371</sup>

- (a) Survival debts: These are debts incurred as a result of the need for survival. Examples include debts incurred on food, housing, clothing, shelter electricity bills and so on.
- (b) Over consumption debts: These are incurred as a result of extravagant living or lack of financial management skills.
- (c) Compensation debts: These are debts incurred by a debtor who suffers social rejection and deprivation and in an attempt to achieve social class and power result to alcoholism, gambling, and illness.
- (d) Relational debts; This can be as a result of liabilities incurred as a result of relationship with people that is marriage, liabilities incurred by a spouse and so on.
- (e) Accommodation debts: This can be incurred due to unforeseen circumstances such as sudden loss of job, drop in income, increase in house rents and bills.
- (f) Fraudulent debts: Debts incurred as a result of fraudulent dealings with creditors.

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<sup>368</sup> Insol International 2011 *Consumer Debt Report II: Reports of Findings and Recommendations*.

<sup>369</sup> Insol Report 3.

<sup>370</sup> Insol Report 1.

<sup>371</sup> Insol Report 4.

In order to solve these problems, Insol International in its report, formulated 4 main principles<sup>372</sup> that would help solve consumer debt problems and these principles are given as:

Principle 1: Fair and equitable allocation of consumer credit risks

Principle 2: Provision of some form of discharge of indebtedness, rehabilitation or “fresh start” for the debtor

Principle 3: Extra-judicial rather than judicial proceedings where there are equally effective options available

Principle 4: Prevention to reduce the need for intervention.

The aforementioned four principles are thoroughly discussed in the following sub sections.

### **5.2.1 Fair and Equitable Allocation of Consumer Credit Risks**

The principle of fair and equitable allocation of consumer credit risk means that the society must defray from apportioning all the blames to the consumer debtor but must begin to see debtors also as victims just as the creditors, especially those debtors who have not wilfully gone into debt but cannot pay their debts due to circumstances that are beyond their control, that is debtors who acted in good faith.<sup>373</sup> Therefore, the report stated that legislator's must determine:<sup>374</sup>

- (a) The properties that must be excluded from a debtors estate;
- (b) Avoid powers, to abolish certain actions and to redress the damage which are unfavorable to the interest of all the creditors
- (c) Automatic stay provisions, that is provide for an automatic stay which would stop creditors from instituting action against the debtor when a relief has already been sought;
- (d) Non-discriminatory provisions, that is develop a humane approach to treating consumer indebtedness by avoiding discriminatory provisions.

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<sup>372</sup> Insol Report 11.

<sup>373</sup> Insol Report 14.

<sup>374</sup> Insol Report 15.



In ensuring a fair and equitable allocation of consumer credit risks, the report therefore made the following recommendations:

- (a) Legislators should develop laws that would provide for:
  - i. Fair and Equitable treatment of both the debtor and creditors. That is the interest of both parties should be considered by the law by ensuring a fresh start for the debtor and at the same time making available the assets of the debtor for the benefit of the creditors;
  - ii. Efficient debt relief system which would provide for cost effective and speedy debt relief procedures;
  - iii. Cost-effective procedures which can be affordable by the debtor, by apportioning costs in a fair manner;
  - iv. Accessible debt relief system which would provide for debt relief measures that are affordable and an opportunity to choose from any that is so desired by the debtor; and
  - v. Transparent process of debt relief devoid of secrecy or manipulation, whereby both the creditors and debtor have a clear picture of the entire process.
- (b) Consider providing for separate proceedings, depending on the specific conditions of the consumer debtor. This in essence means that a debtor who has a problem of survival debt and has no hope whatsoever that his financial situation can improve should be treated differently from a debtor who is only battling with accommodation debt, as the debtor in the former scenario has no hope for repayment while the latter has an hope of repayment upon rescheduling of his debts. And these procedures must provide for a discharge of the debtor.
- (c) Consider providing for separate or alternative proceedings for consumer debtors and small businesses. These alternative proceedings would deal with peculiar cases of debts being incurred by consumers as a result of engaging in small business activities. Specific provisions with regards to how the businesses should be treated, responsibilities of trustees, creditors and so on.
- (d) Ensure that consumer insolvency laws are reciprocally accepted in other jurisdictions and this should aim at standardization and consistency. This is important in situations whereby debtors have assets or creditors in other

jurisdictions and this situation is referred to as cross border insolvency. For example, there are various treaties regarding the recognition of insolvency procedures between countries recognizing the consumer-debtor insolvency laws, such as the UNCITRAL Model Law on Cross-Border Insolvency which ensures judicial cooperation, access and recognition across borders.

### **5.2.2 Provision of Some Form of Discharge of Indebtedness, Rehabilitation or “Fresh Start” for the Debtor**

The major aims of ensuring that relief is granted to a debtor are for the purpose of rehabilitation, discharge and ensuring a fresh start for the debtor. A discharge of the debtor would release the debtor from all debts and liabilities incurred prior to bankruptcy.<sup>375</sup> Furthermore, it has been said that an opportunity should be given to the debtor to start afresh which in the long run is in interest of the society.

In order to ensure the discharge, rehabilitation and fresh start of a consumer debtor, recommendations were made that the legislators should ensure that a discharge is provided for consumer debtors as an end of a liquidation or rehabilitation procedure and in order to obtain relief from all pre-existing debts and have a fresh start.

### **5.2.3 Extra-Judicial rather than Judicial Proceedings**

Extra judicial or out of court proceedings are known to be faster and cheaper than judicial proceedings. Therefore recommendations were made that debtors and creditors should be encouraged to go for extra-judicial or out of court proceedings which would be less expensive and less time consuming before initiating court settlements and governments and quasi-governmental or private organisations are encouraged to make available adequate, proficient and self-regulating debt counselling programmes for the debtors.

### **5.2.4 Prevention to Reduce the Need for Intervention**

The need to prevent the problem of over indebtedness rather than solving the problem of over indebtedness has been identified. Therefore, it has been opined that there is the need

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<sup>375</sup> Insol Report 22.

for legislators, governments at both local and national levels, credit providers together with representatives of debtors to come together in order to set up educational programmes which would help educate consumers on the risks associated with consumer credit, review the conditions on which credit is made available to consumers, see to debt collection processes, see to the general Improvement of the environment and look into data collection and publication in order to ensure understanding and transparency.

Therefore, recommendations were made with regards to ensuring prevention rather than intervention and the recommendation are as follows:<sup>376</sup>

- (a) Private organizations, quasi-governmental or governmental organizations should set up educational programs that would give information and advice on the risks attached to consumer credit in order to avoid over indebtedness.
- (b) Credit providers should observe due diligence in their mode of operations and before credit is made available to consumers and small businesses.
- (c) That both the credit providers and consumers set up an organization that would monitor consumer loan activities and offences.

In summary, the Insol report states that in order for a good insolvency system to achieve the four principles listed above, responsibilities lie on the government, legislator's credit providers and organisation of creditors and credit providers. That is:<sup>377</sup>

- (a) The legislators must ensure that laws are enacted that provides for:
  - i. Fair, equitable, efficient, cost effective, accessible, transparent system, and discharge of a consumer and small businesses;
  - ii. Appropriate alternative debt relief measures which would cater for the peculiar circumstances of an individual debtor;
  - iii. More appropriate alternative non-judicial debt relief measures;
  - iv. Laws for the purpose of recognition of consumer debt insolvency laws across border in order to ensure uniformity;
  - v. Provision for rehabilitation and a consequent discharge of a consumer debtor.

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<sup>376</sup> Insol Report 27.

<sup>377</sup> Insol Report 11.

- (b) The Government, semi-governmental and private organizations must ensure that there are readily available, adequate, proficient and self-regulating pre and post-bankruptcy debt-counseling programs and also establish voluntary educational programs to advance information and guidance on the dangers of consumer credits.
- (c) Credit providers should see to it that there are proposal procedures in the way in which credit is made available to consumers and small business and the way these debts are collected.
- (d) Organizations of credit providers and creditors should ensure policies are in place to monitor consumer loan crimes and make available reliably correct credit reporting and up to date information available to individuals.

## 5.3 World Bank Report

### 5.3.1 General

The global financial crunch in the year 2008, which brought about global recession was said to have affected individuals and homes and in turn affected economic development and stability.<sup>378</sup> This occurrence prompted the World Bank to create a working group which looked into insolvency of natural persons.<sup>379</sup> The findings and recommendations of the group led to the very first World Bank report that dealt with insolvency of natural persons.<sup>380</sup> The working group comprised of expert academics, judges, practitioners and policy makers<sup>381</sup> who looked into issues relating to insolvency of natural persons taking into cognisance various policies, options and peculiarities of individual insolvency practise all over the world. A survey was carried out on 59 countries of the world in order to get information on existing consumer legislations and these 59 countries comprised of 25 high income economies and 34 low and middle economies.<sup>382</sup> The outcome of the survey showed that a good number of the low and middle income countries did not have legislative systems at all that dealt with insolvency of natural persons. The report is said to not be a prescription for best practices of insolvency of natural persons but merely to serve

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<sup>378</sup> Kilborne 2014 <http://ssrn.com/abstract=2426622> 2.

<sup>379</sup> Ibid.

<sup>380</sup> World Bank Report 2011: *Report on the Treatment of Insolvency of Natural Persons* (hereafter referred to as World Bank report).

<sup>381</sup> World Bank Report 1.

<sup>382</sup> World Bank Report 2.

as a guide to identifying policies that needs to be addressed in developing a viable system of insolvency practice of natural persons.<sup>383</sup> Therefore the report is referred to as a “reflective document” in the sense that it suggests guidance for the treatment of various issues concerned in insolvency of individuals around the world with regards to various policies and varied sensitivities.<sup>384</sup>

Considering the fact that the subject on treatment of insolvency of natural persons is a wide concept, which varies in features, basic goals, characteristics and scope, the World Bank in its report having looked at all the varying differences across different jurisdictions limited its scope of coverage to the following key features and characteristics of insolvency of natural persons:<sup>385</sup>

- (a) Treatment, not prevention, of insolvency: The policy of treatment not prevention of insolvency has been the subject of policy discussions and legal reforms in many jurisdictions. This however means that current systems must develop means of financial trainings and educations in order to avoid the problems of insolvency. This however is not a cure to existing insolvency but a preventive method to insolvency.
- (b) Treatment of insolvency not poverty: It has been observed that treatment of insolvency is seldom confused with treatment of poverty that is social support; therefore a distinction was made between the two. Social support or assistance are generally designed to ensure that basic amenities are available to every individual such as food, shelter and healthcare while insolvency regimes are more like social insurance which helps protect individuals from financial misfortune.
- (c) Insolvency of natural persons means insolvency of consumers and those engaged in a business that is, Insolvency of natural persons also extends to natural persons as it relates to their businesses.
- (d) Distinction between business insolvency and the insolvency of natural persons: A distinction was made in the sense that that insolvency for natural persons does have elements of human empathy and the collective interest of the individual debtor, dependents and family members are usually considered while business insolvency is driven solely by economic concerns and often times businesses in distress are allowed to die off without much consideration.

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<sup>383</sup> World Bank Report 3.

<sup>384</sup> World Bank Report 4. See also Kilborn 2014 <http://ssrn.com/abstract=2426622> 2.

<sup>385</sup> World Bank Report 10.

- (e) The variations that exists across jurisdictions in the treatment of natural person insolvency under national legal regimes: The fact that a single practice model of insolvency of an individual cannot work for all systems considering the variations in culture, moral values, norms and ideas. Therefore, mainstream approach that would compel countries to adopt an insolvency regime which is incompatible with local conditions of the country is hereby discouraged. Therefore, the report does not offer specific instructions but offers thoughts of experts on a variety of approaches that can be incorporated into various insolvency systems.<sup>386</sup>

In considering insolvency regimes across these countries, the benefits and purpose of an individual insolvency regime in summary were listed as follows:<sup>387</sup>

- (a) Benefits for creditors: The core focus of an insolvent regime is to ensure that there is a rational sharing of property realized among the creditors in such a way as to establish the collective interests of all creditors.
- (b) Benefit for debtors and their families: It has been observed that indebtedness posts a whole lot of problems on a debtor such as problems of insecurity, harassment from creditors, and the emotional and psychological trauma and sickness of the body. This in essence means that the burden of indebtedness on a debtor is overwhelming. Therefore while trying to ensure that creditors are being paid that which is due to them, considerations are also being made for “honest but unfortunate debtors” such that they can be free from their indebtedness and have the opportunity to live a normal life again. These considerations have also been extended to the debtor’s family in order to ensure that they do not suffer for what they are totally ignorant of.
- (c) Benefits for the society at large: The entire process of an insolvency regime should have a positive contribution to the society at large. Therefore it has been opined that proper account evaluation must be established in order to ensure transparency and proper functioning of the system. Furthermore, the collection costs being incurred carelessly must be avoided or reduced to the barest minimum. Such costs

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<sup>386</sup> World Bank Report 18.

<sup>387</sup> World Bank Report 19.

are costs incurred in the process of pursuing enforcement actions against hopelessly insolvent persons and thus should be avoided.

The report identified a number of challenges that are often encountered which hinders the effectiveness and successful implementation of an effective personal insolvency system such as:<sup>388</sup>

- (a) Moral hazard: Concerns are being raised by policy makers saying that the provision of incentives for debtors often make them act irresponsibly. For example, debtors are not seen to act with due diligence in their dealings and avoid fulfilling their obligations simple, because there are incentives in form of insolvency reliefs which would simply come to their rescue. Therefore, proper access requirements are required both at the point of entry into the insolvency process and the point of discharge in order to ensure that a debtor has not acted in an undesirable manner.
- (b) Fraud: The tendency of debtors trying to take advantage of the system for their sole benefit and seeking means to evade their obligations to the creditors through fraudulent means such as non-disclosure of financial state, concealing of assets and income have also been identified. This has been said to be an incurable problem however the only effective way of clamping down on these devices is effective monitoring by administrators and creditors.
- (c) Stigma: The problem of stigmatization being faced by honest but unfortunate debtors. This is said to be in existence even in well-developed jurisdictions. The process of having to make public your financial failures in the presence of the public is said to be an embarrassing and stigmatizing process for a debtor and brings a feeling of guilt, disgrace and stigma. This has been said to act as a major discouragement to debtors in seeking insolvency reliefs.

The report finally enumerated the core legal attributes which can be used to evaluate an existing or yet to be implemented individual insolvency system. These core attributes are summarized in this work into three and are discussed in the following subsections.

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<sup>388</sup> World Bank Report 40.

### 5.3.2 Formal Legal Mechanisms

The essential legal issues dealing with insolvency law are said to be primarily focused on the rights and obligations of debtors in relation to their creditors and creditors among themselves. These rights and obligations are said to be adjudged and imposed by the courts.<sup>389</sup> Therefore, there is the evident involvement of the court in insolvency related procedures and this is said to be a confirmation of right of access to courts for the determination of rights of a person. There are various insolvency statutes provided for by various jurisdictions which are known as insolvency laws or bankruptcy laws, but most often when it relates to individual insolvency, they are called bankruptcy laws. These legislative frameworks do provide for court related insolvency mechanisms or procedures by which an over indebted person can seek relief in the form of a discharge from all or some of their debts. These procedures are called bankruptcy or insolvency procedures.<sup>390</sup>

Furthermore, the report evaluated the historical background to the insolvency process and stated that in history, insolvency systems saw the debtor's assets as the only source of value that can be distributed among creditors in payment of their claims. Quite a number of modern systems continue this practice, however while focusing on the debtors assets for satisfying creditors, a number of assets should be excluded as debtors cannot be left with no assets whatsoever with which to support themselves and their families. The process of dealing with the debtors property, termed the liquidation process, is however to be considered with the issue of exemption of assets. The reason for this is in order to see to it that when a debtor has been discharged and has obtained a fresh start, that there is sufficient property available to the debtor with which to meet the needs of himself, his family and business.<sup>391</sup>

The report listed three approaches to determining properties that should be exempted which are:<sup>392</sup>

- (a) Exemption of a narrow range of assets: When all the assets of the debtor are vested in the insolvency representative, certain assets are exempted. Assets

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<sup>389</sup> World Bank Report 49.

<sup>390</sup> World Bank Report 51.

<sup>391</sup> World Bank Report 75

<sup>392</sup> Ibid.



exempted under this approach are limited and they are assets such as tools of the debtor's trade, wearing apparels, and beddings for the debtor and his family. This approach was said to have been used during the era when insolvency law was punitive in nature.<sup>393</sup>

- (b) Exemption of particular assets: This is said to be a modern adaptation of the former approach and would offer the debtor the opportunity to exempt some assets of his estate to the tune of a particular amount, after the entire assets have been vested in an insolvency representative. These exemptions vary and are determined by a number of factors such as where the debtor lives, his profession and whether he has a family or not. This exemption approach is said to be broad in nature and covers a wide range of assets and may include family homes, automobiles, and household goods.<sup>394</sup>
- (c) Standard based approach: This is the opposite of the first two approaches. In this instance, the debtors' entire assets are exempted and the burden lies on the insolvency representative to petition to reclaim specific items which are of excess value for the benefit of the creditors and the estate.

### 5.3.2 Informal or Out of Court Negotiated Mechanisms

The report takes note of the fact that informal procedures or out of court procedures are encouraged by various systems for a number of reasons such as in order to save time, avoid the stigma of insolvency and save cost that is usually expended in formal procedures.<sup>395</sup> Legislators have stressed the need to prioritise these procedures preferring negotiated solutions as against formal procedures. Furthermore, the report states that in a number of countries, informal procedures such as voluntary agreements between creditors and debtors are preconditions for filing for formal insolvency procedures. In order for these procedures to succeed, "some institutional support and incentives are needed,"<sup>396</sup> such as free or low-cost assistance from professional advisors with experience negotiating with creditors. Therefore, the laws are seen to provide for an institutionalized debt negotiation and settlement framework.

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<sup>393</sup> World Bank Report 76.

<sup>394</sup> World Bank Report 77.

<sup>395</sup> World Bank Report 45.

<sup>396</sup> World Bank Report 48

There are various advantages that informal settlement agreements provide for a creditor and debtor such as:<sup>397</sup> a debtor is saved from having to suffer from the stigma that is associated with insolvency; it saves cost because it is more cost effective than court procedures, creditors benefit from the procedure when good offers are made by the debtor to the creditor in order to avoid court proceedings, it is a faster procedure and less expensive because the entire preliminary work have already been done by debt counsellors and insolvency lawyers and it allows for more flexibility as both the debtor and creditors have an input in drafting the plan and the interests of both parties are considered in arriving at a plan.

The report observed that there are low rates of filing of informal settlement agreements, and various reasons have been highlighted as the cause of these which are:<sup>398</sup>

- (a) The problem of dissenting creditors which poses a problem to negotiation.
- (b) Some creditors have trust in formal procedures rather than informal procedures especially public creditors such as tax authorities.
- (c) Regulations such as tax and banking regulations give preference to formal procedures as against informal procedures.
- (d) The fact that some creditors are difficult to locate and some do not respond to calls for settlement unless the law provides that passive creditors would be bound by a settlement.

In jurisdictions where informal settlements were successful, it was in situations whereby the negotiation was spearheaded or facilitated by a specific persuasive government regulator such as a central bank or a government supported counselling agency. This is due to the fact that these organs of government oftentimes have a cordial and friendly relationship with creditors and are thus better positioned than the courts to extract better terms or concessions from the creditors.<sup>399</sup>

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<sup>397</sup> World Bank Report 46.

<sup>398</sup> World Bank Report 47.

<sup>399</sup> World Bank Report 48.

Having considered many systems, the report further stated that in order for these informal negotiating procedures to succeed, some elements must be present in systems:<sup>400</sup>

- (a) There must be the availability of credible professional assistance in the form of an advisor at little or no cost who would have experience in negotiating with creditors.
- (b) There should be the provision of a formal mechanism that serves as an automatic stay on debt enforcement while negotiations are on.
- (c) Provision of the law that the passiveness of a creditor would not affect the acceptance of a settlement and that such settlement would be binding on the creditor.

Rights of dissenting creditors must be regulated so that a minority dissenting creditors would not lead to automatic dismissal of the plan. Furthermore, the report considered some solutions to the insolvency process as a whole:<sup>401</sup>

- (a) The system should provide for a liquidation process which provides for exempted property: This has been described as assets of the estate that would be exempted for the purpose of survival of the debtor and his relatives and for the purpose of a fresh start for the debtor.<sup>402</sup>
- (b) There should be provision for a payment through a payment plan: Due to the fact that most debtors have little or no assets available to satisfy their debts, payment plans are being made on how they can fulfill their obligations to their creditors. These payment plans requires that the debtor pay back his debt from his future earnings in exchange for a discharge or rehabilitation. This is said to have been envisioned by various systems as an “earned start” for the debtor rather than a simple “fresh start”.<sup>403</sup> These payment plans should be implemented and monitored by insolvency representatives and there should be room for modification as the debtors financial situation can change at any time and he might lose the means of fulfilling the plan.<sup>404</sup>
- (c) Consideration for debtors with income or assets (NINA’s): There are certain classes of debtors who do not to have any form of assets or income that can give value to

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<sup>400</sup> Ibid.

<sup>401</sup> World Bank Report 74.

<sup>402</sup> See par 5.2.1 above for extensive discussion on exempted properties.

<sup>403</sup> World Bank Report 83.

<sup>404</sup> World Bank Report 101.

the creditors. This class of debtors has been excluded from relief in most jurisdictions thereby creating a form of discrimination. The rationale behind not granting this category of debtors relief is that it is supposed that there is economic benefit only when debtors who have dividends to pay creditors are granted relief. However the report posits that efforts should be made to help this class of distressed debtors to overcome their indebtedness by making relief available to them.<sup>405</sup>

### 5.3.3 Discharge

One of the primary aims of an insolvency system for natural persons should be to grant a discharge to the debtor. Discharge of a debtor seeks to reinstate the debtor's financial status, such that the debtor can be free to contract as he did before his insolvency. In other words, this is primarily aimed at ensuring a fresh start for the debtor. Furthermore, a discharge is intended for "honest but unfortunate" debtors.

After the debtor has been discharged, there would be a consequent rehabilitation of the debtor. The rehabilitation of a debtor however means the following<sup>406</sup> firstly, the debtor would be freed from excessive debt. Secondly, the debtor would be treated equally with non-debtors after relief has been granted, that is there should be no form of discrimination against the debtor. Thirdly, the debtor should avoid being overly indebted in the future and this requires educating the debtor on credit use in the future.

The concept of a discharge is viewed as a means of ensuring a fresh start for a debtor. In granting a discharge, debtors are expected to have fulfilled certain conditions of the law which varies from one jurisdiction to the other. Such conditions might include partial payment of debts or the presentation of a well mapped out payment plan in debt incurred due to which would specify the period during which the debtor is expected to repay the debt usually ranging from three to five years. Often times these prerequisites cannot be met by "honest but unfortunate" debtors due to the fact that they do not have sufficient assets or income which eventually results into a denial of a discharge.<sup>407</sup>

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<sup>405</sup> World Bank Report 56.

<sup>406</sup> World Bank Report 115.

<sup>407</sup> World Bank Report 116.

A discharge is available to every debtor that can meet the requirements of the law and it covers every form of debt that relates to the debtors insolvency. The report stated that as many debts as possible should be included in the discharge and the more debts excluded the more unsuccessful the insolvency regime would be.<sup>408</sup> However, some debts are said to be excluded in some jurisdictions, for example:<sup>409</sup>

- (a) Maintenance (child and spouse) support: This is the most common debt that does not offer a discharge and it implies maintenance obligations that relates to former spouses and children. These debts are mostly excluded from discharge due to some reasons such as most systems are often reluctant to allow debtors to evade responsibilities to their families as claims in this regard are regarded as sensitive claims. Different systems have different approaches to this. In some jurisdictions all maintenance are excluded including alimony to a former spouse while in some, only child support is excluded.
- (b) Fines and sanctions: Another common exclusion are fines that are imposed as a result of crimes committed, some systems include private claims for restitution, arising from personal damage caused or injuries.
- (c) Taxes and other government related debts: Taxes and liabilities owed by the debtor towards the state are excluded from discharge in a number of countries. This is so in order to ensure that debtors do not evade the responsibilities they have towards their country.
- (d) Educational loans: Only a few countries exclude educational loans from a discharge. The reason behind this is that these kinds of debts stem from investments in education which is highly beneficial to the debtor and the debtor in the long run will benefit from having acquired an education.
- (e) Re-affirmation agreements: In some countries, a contract between debtor and a specific individual creditor in the course of insolvency is seen as violation of the principle of equality of creditors. Therefore any attempt to favor one or more creditors at the expense of the remaining creditors is null and void in some countries and in other countries it is viewed as a criminal act.

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<sup>408</sup> World Bank Report 119.

<sup>409</sup> Ibid

- (f) Post commencement debts: A discharge of a debtor would only cover debts that were incurred before the commencement of insolvency; subsequent debts owed after commencement of a formal insolvency case or during the period of repayment plan are excluded from discharge.

## 5.4 Conclusion

The Insol report and World Bank report are considered in this chapter in order to evaluate the guidelines laid down by these reports so that Nigeria can learn from the international standards on debt relief for a consumer debtor and determine areas in the country's practice of debt relief that still needs to be improved upon.

The Insol report laid down four fundamental guidelines to ensuring a good and viable consumer debt relief system which are:<sup>410</sup> Firstly, that a system of debt relief should provide for a balance such that there would be an equal allocation of risk and balance of interests between the creditors and debtors. Furthermore, this balanced system should be fair, transparent, equitable, cost effective and accessible. Secondly, it was proposed that the system should provide for the discharge of debtors and a rehabilitation which consequently grants debtors the opportunity for a fresh start. Thirdly, the report stated that extra judicial proceedings should be encouraged and provided instead of judicial proceedings. Finally, educational programmes should be put in place by the government and private sector educating the people on the risks attached to consumer credit. Furthermore, credit lenders should see to it that proper procedures are followed in the way credits are made available to consumers and small business and also to see to the mode of collection of debts.

The World Bank Report has been described as a "reflective document" as it does not make prescriptions or recommendations for a personal insolvency system, but simply serves as a medium for making information available to policymakers on the need for a viable consumer debt relief. This was done by evaluating the basic features of the present individual insolvency systems in many nations of the world.<sup>411</sup>

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<sup>410</sup> See par 5.2 above.

<sup>411</sup> See par 5.3 above.

The World Bank Report considered insolvency regimes across 59 countries of the world which comprised of both low income and middle income economies. Having considered individual insolvency regimes across the world, the Report identified that the core purposes of individual insolvency systems across the world can be broadly classified into three. Which are providing an advantage to creditors, providing an advantage to debtors and an advantage to the society at large.<sup>412</sup>

Furthermore, challenges of individual insolvency systems were identified which are the problem of moral hazards, problems of fraud perpetrated by dishonest debtors as a means to circumvent the system and the challenge of stigma being suffered by debtors.<sup>413</sup> The report however stated that there are some core principles which can be used in evaluating an existing or yet to be implemented individual insolvency system. These core principles are the availability of a formal legal mechanism for debt relief such as liquidation proceedings. These formal proceedings majorly focus on the debtor's assets as a means of satisfying creditors of the estate. While a number of jurisdictions still provide for this practice, provision is however being made for exempted properties as a means of support for the debtor and his dependents.<sup>414</sup> Furthermore, the principle of the provision of an out of court negotiated mechanism such as payment plan and provision for debt relief for the no income no assets debtors (NINA) was considered.<sup>415</sup> Finally, that these procedures provided for should provide for a discharge of the debtor from his or her debts.<sup>416</sup>

Thus, these reports provide best practices and important guidelines in which Nigeria can learn from. From the forgoing, Nigeria debt relief system can be said to have fallen short of the guidelines listed in the reports above. Firstly, bankruptcy proceedings in Nigeria cannot be said to be cost effective time saving and accessible especially with regard to creditor's bankruptcy whereby a separate proceeding has to be instituted before the bankruptcy proceeding.<sup>417</sup> Secondly, the bankruptcy procedure does not provide for exempted properties for a debtor. Thirdly, there are no adequate out of court procedures that can be explored as alternatives to bankruptcy, the alternatives which exists in form of compositions

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<sup>412</sup> Ibid.

<sup>413</sup> Ibid.

<sup>414</sup> See par 5.3.1 above.

<sup>415</sup> See par 5.3.2 above.

<sup>416</sup> See pars 5.3.1, 5.3.2 and 5.3.3 above.

<sup>417</sup> See par 2.3.2 above.

and schemes of arrangement are court related.<sup>418</sup> Fourthly, there is no provision for the class of debtors that do not have assets or income under the Nigerian Bankruptcy Act.<sup>419</sup> Lastly, there are no educational programmes in place for the purpose of educating the people on consumer risk and no standard procedures in place for regulation of credit lenders.

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<sup>418</sup> See par 2.4 above.

<sup>419</sup> See par 4.4 above.



## CHAPTER 6

### CONCLUSION

#### 6.1 General

As discussed earlier, Nigeria arguably has one of the largest economies in Africa and boasts of a high level of economic activity. The expectation is thus that a viable bankruptcy practice would be obtainable in the country and enable indebted consumers to obtain debt relief. This however is not the case as there is no reported case on bankruptcy in Nigeria<sup>420</sup> even though laws regulating bankruptcy in Nigeria have been in existence in Nigeria since 1979. Furthermore, only a few works have been done on bankruptcy unlike corporate insolvency which appears to be more effective in Nigeria.<sup>421</sup>

In this research work, a study has been carried out on individual insolvency practices in Nigeria, South Africa, New Zealand and Denmark in the area of consumer debt relief, and a comparative study has been done between Nigeria and the other three jurisdictions in order to evaluate the consumer debt relief system in Nigeria. Furthermore, the Insol report and the World Bank report have been discussed in relation to policies and characteristics of consumer debt relief systems.<sup>422</sup>

A number of challenges hindering the effectiveness of consumer debt relief in Nigeria have been identified in this work such as: the cumbersome nature of bankruptcy proceedings, the inadequate alternative out of court debt relief measures, the lack of unified legislation and the problem of overcrowded courts which leads to lingering court cases.<sup>423</sup> Having identified these problems, recommendations would be made on how Nigeria can improve her consumer debt relief system.

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<sup>420</sup> See par 2.1 above.

<sup>421</sup> Ibid.

<sup>422</sup> See pars 1.2 and 5.1 above.

<sup>423</sup> See par 2.5 above.

## 6.2 Summary of Lessons Learnt

### 6.2.1 South Africa

In South Africa, the sequestration process is the major debt relief measure available to a debtor. However, sequestration is seen as a debt relief measure for the rich considering the fact that it is an expensive process and a substantial advantage to creditors in monetary form must be shown before a debtor can obtain relief.<sup>424</sup> Furthermore, the alternative debt relief measures that are provided for are limited in application and characterised by one challenge or the other such as they are limited in scope and do not provide for a discharge of the debtor.<sup>425</sup> Therefore, the alternative debt relief measures are said to be inadequate and all these pitfalls have necessitated the call for reform of the South African debt relief system.<sup>426</sup>

The South African Law Reform Commission and various writers have looked into these problems and have proposed reforms. There are current reform initiatives on the table in South Africa<sup>427</sup> which Nigeria can learn from and incorporate into reforms of her debt relief system. Reforms on issues such as embracing the American fresh start policy, adopting a uniform legislation, providing for more comprehensive and viable alternative debt relief measures especially for debtors without income or assets that is the No Income No Asset (NINA) debtors.<sup>428</sup> The South African advantage to creditors requirement is seen as a challenge to the effectiveness of debt relief measures as the primary aim of the insolvency system is not to grant relief per se to the debtor but to ensure advantage to creditors.<sup>429</sup> Some writers are of the opinion that this aim should be abolished, however the law reform commission failed to address this issue in its recommendations.<sup>430</sup>

Considering the South Africa debt relief system and the fact that the South Africa debt relief system suffers from a number of challenges, it can be safely concluded that Nigeria can learn from the mistakes of South Africa and avoid the same pit falls that ensnared South Africa.

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<sup>424</sup> See par 3.2 above.

<sup>425</sup> See par 3.6 above.

<sup>426</sup> See pars 3.4 and 3.5 above.

<sup>427</sup> See par 3.6 above.

<sup>428</sup> See par 3.5 above.

<sup>429</sup> See par 3.2 above.

<sup>430</sup> Ibid.

## 6.2.2 New Zealand

New Zealand debt relief system is highly functional and has a wide range of measures available to a consumer debtor. The New Zealand Insolvency Act provides for a number of debt relief measures such as bankruptcy which is a major debt relief measure and alternative measures in terms of proposals, summary instalment order and the no asset procedure.<sup>431</sup> Having carried out a comparative study in chapter 4 of this research work, there are a number of things that Nigeria can learn from New Zealand.<sup>432</sup>

Firstly, in instituting a debtor's bankruptcy proceeding in New Zealand, there is no need to go through the rigour of court processes. A debtor who is indebted would simply lodge an application with an official receiver who would adjudge him bankrupt unlike in Nigeria where it is entirely a court initiated process. This obviously is a speedy and cost effective process which Nigeria can learn from. Furthermore, in New Zealand, a creditor's application for bankruptcy can be filed by a creditor without having to first establish debt in a separate proceeding. This also is time and cost effective, Nigeria therefore needs to walk away from the cumbersome procedure of first establishing debt in a separate proceeding before initiating bankruptcy proceedings which is time consuming and expensive.

Secondly, New Zealand provides for a number of alternative debt relief measures such as a proposal, applying for the summary instalment order and furthermore, the no asset procedure for debtors who do not have any form of assets or income. Nigeria can learn from New Zealand in this regard by providing for viable alternative debt relief measures which would afford debtors the opportunity to choose the most appropriate debt relief measures considering their individual circumstances. Most importantly, the no asset procedure can be emulated, which seeks to grant relief to special groups of debtors who do not have any means of repaying their debts.

Thirdly, the New Zealand Insolvency Act provides for a discharge of the debtor under the bankruptcy proceedings within a period of 3 years after the bankrupt must have filed his statement of affairs while Nigeria provides for discharge after 5 years. Nigeria can learn

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<sup>431</sup> See par 4.2 above.

<sup>432</sup> See par 4.6 above.

from this and provide for a shorter period in order to ensure that a discharge is given to a debtor within the shortest possible period.

### 6.2.3 Denmark

Denmark is known for her remarkable impact in the area of consumer debt relief amongst the European countries.<sup>433</sup>

One of the major features of the Danish system is that Denmark operates a unified legislation.<sup>434</sup> The Danish Bankruptcy Act caters for both bankruptcy and insolvency proceedings of corporate bodies and institutions just like the American Bankruptcy Code. This has also been one of the propositions of law reforms, in South Africa.<sup>435</sup> A unified legislation is imperative as it would cater for all insolvency proceedings. This in my opinion can be emulated by Nigeria and is one major lesson that can be drawn from the Denmark system and incorporated into reforms in Nigeria.

Furthermore, there are a number of debt relief measures that the Danish Bankruptcy Act provides for, such as *Konkurs*, *rekonstruktion* and the *gaeldsanering* procedure.<sup>436</sup> As discussed earlier, *gaeldsanering* procedure happens to be the major debt relief measure for a consumer debtor as the other debt relief measures do not provide for a discharge of the debtor.<sup>437</sup> This procedure is a form of debt adjustment and debt rescheduling which grants a discharge to the debtor and can Nigeria can learn from this procedure.

### 6.2.4 Insol and World Bank Recommendations

In this work, the Insol report and World Bank report were discussed. These reports serve as a model of individual insolvency practice across countries of the world. The basic features, characteristics, advantages and problems being encountered across borders were showcased in these reports. Looking at both reports, a number of lessons can be learnt on how a good and viable debt relief system can be ensured.

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<sup>433</sup> See pars 4.5 and 4.6 above.

<sup>434</sup> Ibid.

<sup>435</sup> See par 3.6 above.

<sup>436</sup> See par 4.5 above.

<sup>437</sup> See par 4.5.2 above.

First, a good debt relief system should provide for out of court procedures which can be explored before implementing court procedures as it is often believed that these procedures are less expensive, fast and less cumbersome.<sup>438</sup>

Secondly, there should be provision for court related procedures such as bankruptcy and liquidation which would balance the interests of both the creditor and the debtor by providing for incentives such as exempted or excluded properties and would enable the debtor to take care of him/herself, their dependants and also help debtors start afresh.<sup>439</sup>

Thirdly, that the system should make available debt relief measures for the group of debtors who do not have assets or income to pay back their debts rather than neglecting such group of people. This procedure is known as No Income No Asset procedure (NINA) in and New Zealand.

Fourthly, that the system which comprises of the government and the private sector should come together and set up educational programmes which would look into debt counselling for the debtors. These programmes would deal with the need to prevent the problem of over indebtedness rather than solving the problem of over indebtedness.<sup>440</sup>

Finally, that all the debt relief measures should provide for a discharge of a debtor at the shortest possible time, the end goal of all of these should be to ensure an advantage to creditors, debtors and his family and the general society at large.<sup>441</sup>

### **6.3 Conclusion and Recommendations**

Having looked at all the various recommendations that have been made and lessons learnt, the primary objective of this work is to evaluate the Nigerian debt relief system and make necessary recommendations that would make the debt relief system more effective and efficient. Therefore the main recommendations for a more vibrant and effective consumer debt relief system in Nigeria are as follows:

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<sup>438</sup> See pars 5.2.3 and 5.3.2 above.

<sup>439</sup> See par 5.3.1 above.

<sup>440</sup> See par 5.2.4 above.

<sup>441</sup> See pars 5.2.2, 5.3 and 5.3.3 above.

- (a) There should be a total overhaul of the insolvency practice system in Nigeria starting from the legislation. The Bankruptcy Act should be unified with the Companies Act which deals with corporate bodies just as in the case of Denmark and the United States of America. This unified legislation would cater for both insolvency and bankruptcy practice in Nigeria.
- (b) The legislation should provide for a court related proceeding such as the bankruptcy proceeding and eliminate the requirement of establishing debt in a separate proceeding before initiating a bankruptcy proceeding. Furthermore, the debtor's application for bankruptcy should be modeled after the New Zealand procedure such that a debtor's application for bankruptcy would be made an out of court proceeding in order to save cost and time.
- (c) The court related proceeding should provide for exempted or excluded properties which would enable the debtor and his dependents survive through the time of bankruptcy and also enable the debtor to start afresh.
- (d) The legislation should provide for other alternative out of court procedures such as the installment order or proposal in New Zealand or the *gaeldsanering* procedure in Denmark. Also, there should be provision for the no income no asset debtors such as in New Zealand and this procedure in my opinion should be a once off provision in order to avoid the problem of abuse.
- (e) All the procedures provided for should provide for a discharge of the debtor. The discharge should furthermore be granted within a shorter time period such as within the period of 3 years in New Zealand.
- (f) The government and the private sector should come together to set up educational programs which would educate citizens on financial literacy, budgeting advice and support. Most especially an educative program which would educate citizens on the need to seek legal help while indebted especially through the out of court procedures and to do away with the archaic mentality of seeing a bankrupt person as an outcast or a fugitive.

Finally, it is pertinent to note that in the process of reforms of the Nigerian law, consideration must be given to the peculiarity and nature of Nigeria as a country. It has

been observed that legal transplantation must be carefully considered as it sometimes does not create the desired results.<sup>442</sup>

Furthermore, the World Bank in its report noted that different jurisdictions reflects various sensitivities such as divergent social, political, cultural diversities and historical tradition which makes it difficult to have uniform legislations.<sup>443</sup> Therefore, caution must be taken in reformation of the laws, as all the above mentioned factors must be taken into consideration.

Bankruptcy laws for example have been in existence for quite some time in Nigeria, and these laws are largely based on the English law.<sup>444</sup> Despite the fact that these laws have existed for some time, it has been observed that the practise of bankruptcy in Nigeria is not viable and the laws are not effective.<sup>445</sup> In my opinion one of the reasons for this is the fact that these laws were transplanted from the English laws which were made for a developed country. Nigeria is a developing country and still has her idiosyncrasies; therefore transplanting laws from developed countries into the Nigerian legal system might not give the desired result if the peculiarity of Nigeria as a country is not taken into consideration.

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<sup>442</sup> Martin 2005 *Boston College International and Comparative Law Review* 75. See also Calitz 2008 *Obiter* 352.

<sup>443</sup> See par 5.3 above.

<sup>444</sup> See par 2.1 above.

<sup>445</sup> See par 1.1 above.

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### **List of Abbreviations**

NZ- New Zealand

INSOL- International Association of Restructuring Insolvency and Bankruptcy  
Professionals

SIO- Summary Instalment Order

NAP- No Asset Procedure

LFN- Laws of Federation