

Revisiting the state of consumer insolvency in South Africa after twenty years: The courts' approach, international guidelines and an appeal for urgent law reform (2)*

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4 INSOLVENCY LAW REFORM INITIATIVES

4.1 Department of Justice

In 2000 the South African Law Reform Commission published a report and a draft Insolvency Bill.¹⁸¹ In March 2003, cabinet accepted the concept of a new unified Insolvency Act dealing with the liquidation of both natural person and business debtors, but this initiative has stalled.

In 2010 a working document containing the Draft Insolvency and Business Recovery Bill¹⁸² was completed by the Department of Justice. However, at present it is unclear when this new piece of legislation will be taken forward.

When considering the proposals of the 2010 Insolvency Bill it is apparent that little has changed from the current Insolvency Act and it clearly does not introduce a revolutionary new insolvency regime. The advantage to creditors requirement has also been retained.¹⁸³

The 2010 Insolvency Bill proposes an alternative debt relief measure to sequestration in the form of a pre-liquidation composition.¹⁸⁴ The composition is supervised by the Magistrate's Court and provision is made for an investigation into the affairs of the debtor.¹⁸⁵ In essence the proposed composition is a debt restructuring device, but a prescribed majority¹⁸⁶ of creditors can bind the minority.

* See 2014 *THRHR* 351 for Part 1.

181 South African Law Reform Commission *Report on the review of the law of insolvency* (Project 63) vol 1 (Explanatory Memorandum) and vol 2 (Draft Bill) (Feb 2000) – hereafter 2000 Explanatory Memorandum and 2000 Insolvency Bill respectively.

182 Hereafter the 2010 Insolvency Bill.

183 See cls 3(8)(a)(ii), 10(1)(c)(i) and 11(1)(c) of the 2010 Insolvency Bill.

184 See cl 118 of the 2010 Insolvency Bill.

185 Cl 118(10)(e).

186 That is, a majority in number and two-thirds in value of the concurrent creditors who vote on the composition – cl 118(17).

Should the majority not accept the composition and the debtor is unable to pay substantially more than what he or she offered, the court must declare that the proceedings have ceased and that the debtor is in the position he or she was in prior to the commencement thereof. Alternatively the court must determine whether section 74 of the Magistrates' Courts Act can be applied and if so, the court must apply the provisions accordingly and within the discretion of the presiding officer.¹⁸⁷

There have been a number of law reform initiatives regarding the administration order procedure,¹⁸⁸ but as mentioned earlier, this was suspended in anticipation of the promulgation of the National Credit Act. In 2011 a workshop was held at the University of Pretoria where various role players were consulted regarding the reform of administration orders. One of the suggested amendments was that provision should be made for a discharge after eight years subject to specified conditions.¹⁸⁹

4.2 Department of Trade and Industry

In December 2013, Cabinet took a decision authorising the Ministers of Finance and of Trade and Industry to take measures to assist over-indebted households and also to prevent them from becoming over-indebted in future. According to a media statement issued by the Ministries of Finance and of Trade and Industry, Government recognises that access to credit is critical for household consumption and economic growth. However, Government is concerned about the very high levels of household debt and over-indebtedness and accordingly, in addition to broader financial sector regulatory reforms, an immediate set of comprehensive steps is necessary to deal with the problem of present and future over-indebtedness.¹⁹⁰

Preventative steps to minimise the risk of over-indebtedness in future include the following:¹⁹¹

- (a) Setting clear affordability criteria for all retail lenders and clearly defining reckless credit granting and thereby enhancing reckless lending controls under the National Credit Act.
- (b) Ensuring that the provision of credit is not only affordable but suitable.¹⁹²

187 Cl 118(22)(a) and (b). The commission's proposal in the 2000 Insolvency Bill afforded the debtor the option to convert to liquidation and rehabilitation under the proposed Insolvency Act in instances where the composition was not accepted by the required majority – for a discussion of this proposal see Roestoff and Jacobs "Statutêre akkoord voor likwidasië: 'n Toereikende skuldenaarremedie" 1997 *De Jure* 189 207.

188 In July 2000, the Department of Justice and the Law Society of South Africa requested the Centre for Advanced Corporate and Insolvency Law at the University of Pretoria to investigate the reform of the administration procedure. The research conducted was incorporated in a report entitled "Interim Report on the Review of Administration Orders in terms of Section 74 of the Magistrates' Courts Act 32 of 1944". The matter was referred to the South African Law Reform Commission and a reform project was consequently registered as Project 127.

189 See the proposed amendment to s 74U and 74(1A)(d) in workshop documents on file with the authors.

190 See Media Statement: "Government moves to protect consumers and assist over-indebted households" available at <http://bit.ly/Ja788F> (accessed 2014-01-27) – hereafter DTI Media Statement.

191 See DTI Media Statement.

192 It is for example inappropriate to promote a short-term (30-day loan) as being suitable for supporting borrowing over longer periods – see DTI Media Statement.

- (c) Reviewing the pricing caps under the National Credit Act.
- (d) Strengthening regulatory monitoring, supervision and enforcement to ensure the shutting down of unregistered credit providers and full compliance by registered credit providers.
- (e) Reviewing the regulatory framework for credit insurance policies.
- (f) Setting norms and standards for access to the payment system (including debit orders) and emoluments attachment and garnishee orders issued for credit.
- (g) Extending and strengthening the debt collection law to apply to legal firms.
- (h) Regulating credit-linked deductions allowed on employer payroll systems.
- (i) Investigating simpler and lower-cost insolvency arrangements for lower- and middle-income individual persons.¹⁹³

Government furthermore intends to assist already over-indebted households by:¹⁹⁴

- (a) Engaging with lenders and their industry associations to provide suitable relief to qualifying over-indebted borrowers by reducing their instalment burden, without additional cost to the borrower.
- (b) Enabling major lenders to afford voluntary debt relief measures to over-indebted borrowers free of charge in addition to the current debt counselling process.¹⁹⁵
- (c) Engaging with current lenders to withdraw certain existing emolument attachment orders and in future only to utilise these orders as a last option and according to a strict code of conduct.
- (d) Regulating debt-collection firms to ensure that they do not apply unscrupulous debt collection practices.
- (e) Encouraging employers to investigate the legitimacy of all emolument attachment or garnishee orders enforced for purposes of credit¹⁹⁶ and to request credit providers to either reduce or remove all onerous orders.¹⁹⁷

4.3 Analysis

It is submitted that the current proposals of the South African Law Reform Commission will not, if implemented, address the ineffectiveness of the South African insolvency system to provide proper debt relief to insolvent or over-indebted individuals. As regards the proposed pre-liquidation composition with creditors it is submitted that the main deficiency of this proposed measure as a viable option for a debtor seeking debt relief is that it would not, in its current format, provide such a debtor with a discharge if the composition is not accepted by the required majority of creditors. As pointed out, the court may in such a case, according to the latest proposal, apply section 74 of the Magistrates' Courts

193 See, in this regard, the World Bank Report para 298ff regarding NINA debtors and the discussion in para 5.4.4.2 below.

194 See DTI Media Statement.

195 See, in this regard, the World Bank Report para 127ff regarding informal voluntary debt-settlements and the discussion in para 5.4.1 below.

196 Not maintenance.

197 Public sector employers are expected to lead by example by implementing these proposals early in 2014.

Act and at present this procedure does not provide for any discharge of debt obligations. Hopefully lawmakers will take note of the proposed amendment of the administration procedure by the 2011 workshop mentioned above to provide for a discharge of debt after expiry of a fixed period.¹⁹⁸

When considering the planned steps by Government to deal with the problem of over-indebtedness¹⁹⁹ it also does not appear that there is any intention of reforming the current formal processes of debt review or administration. In general, Government intends to improve the regulation of reckless lending, to investigate simpler and less-expensive debt relief measures for low and middle-income individuals, to encourage a system of voluntary measures and to address the problems relating to emolument attachment orders and unscrupulous debt collection practices. However, it does not appear that Government intends to address any of the vital shortcomings identified above with regard to debt review and administration, namely, the limited scope of application of these measures and the lack of a discharge provision and a fixed repayment period.²⁰⁰ Moreover, the two Government departments involved in consumer insolvency law reform, namely, the Departments of Justice and of Trade and Industry are at present still working separately and there is thus no principled view or approach regarding the treatment of consumer insolvency law in South Africa.²⁰¹ So, a holistic principled approach to reform this area of South African law is still sorely lacking.

5 MODERN TRENDS AND GUIDELINES – THE WORLD BANK REPORT²⁰²

5.1 Introduction

In January 2011 the World Bank convened its Insolvency and Creditor/Debtor Regimes Task Force²⁰³ to consider, for the first time, the topic of the insolvency of natural persons. In the closing statement to the January 2011 Task Force meeting, the following was stated:²⁰⁴

“[O]ne of the lessons from the recent financial crisis was the recognition of the problem of consumer insolvency as a systemic risk and the consequent need for the modernization of domestic laws and institutions to enable jurisdictions to deal

198 See para 3.1 above.

199 See DTI Media Statement and para 3.2 above.

200 See paras 2.3–2.5 above.

201 It is interesting to note that Cabinet noted the need for better co-ordination and co-operation between all sector regulators, namely, the National Credit Regulator, Financial Services Board and the Reserve Bank. However, co-operation between Government departments Justice and Trade and Industry is apparently not intended.

202 It should be noted that the International Association of Restructuring, Bankruptcy and Insolvency Professionals (Insol International) has also published reports on consumer debt problems – Insol International 2001 *Consumer Debt Report: Report on findings and recommendations* (hereafter the 2001 report); Insol International 2011 *Consumer Debt Report II: Report of findings and recommendations* (hereafter the 2011 report). For a discussion of the 2001 report see Roestoff and Renke 2003 *Obiter* 1. The 2011 report is a further expansion and clarification of the 2001 report, but in general it has been kept unchanged as far as the principles and recommendations are concerned. These principles have been widely embraced by the European Union, the Council of Europe, the World Bank and UNCITRAL – see the foreword to the 2011 report.

203 Hereafter the “Task Force”.

204 World Bank Report para 6.

effectively and efficiently with the risks of over-indebtedness. The importance of these issues to the international financial architecture that has been recognized in various ways by the G-20 and by the Financial Stability Board has today been reconfirmed and emphasized by this Task Force. It is important to recognize the diversity of policy perspectives, values, cultural preferences and legal traditions that shape the way jurisdictions may choose to deal with the problems of individual over-indebtedness. Yet recent events suggest that the expansion of access to finance, the extension of modern modes of financial intermediation, and the mobility and globalization of financial flows may have changed the character and scale of the risk of consumer insolvency in similar ways in many different economies. In response to these concerns, the World Bank, through the Legal Vice-Presidency will organize an appropriate Working Group of the Insolvency Task Force to begin work on identifying the policies and general principles that underlie the diverse legal systems that have evolved for effectively managing the risks of consumer insolvency and individual over-indebtedness in the modern context.”

Following up on the discussion at the 2011 Task Force meeting, a special working group of expert academics, judges, practitioners and policy makers was created to study the issue of the insolvency of natural persons and to produce a reflective report, suggesting guidance for the treatment of the different issues involved, taking into account different policy options and the diverse sensitivities around the world.²⁰⁵ The Working Group met in Washington DC in November 2011 and again in December 2012, whereafter it finalised its report in this regard.

In what follows, certain issues dealt with in the World Bank Report are highlighted and briefly discussed. The aim is to identify the modern trends and the broad issues which lawmakers need to take into consideration when devising a new and effective insolvency and debt relief regime for South Africa.²⁰⁶

5.2 Objectives and nature of the Report

The main objective of the Report is to provide guidance on the characteristics of an effective insolvency regime for natural persons and on the opportunities and challenges encountered in the development of such a regime. The Report seeks to provide guidance on policy issues that need to be addressed in developing modern legal regimes for the treatment of the insolvency of natural persons.²⁰⁷ However, it does not purport to identify any recommendations or set of “best practices” for the regulation of consumer insolvency law.²⁰⁸ It is explicitly non-prescriptive, leaving readers to arrive at their own conclusions taking into account different policy options and diverse sensitivities around the world.²⁰⁹ By setting out the advantages and disadvantages of the different approaches to the regulation of consumer insolvency law, the Report seeks to help policymakers develop a better sense of the social and economic benefits of some of the modern approaches to the regulation of consumer insolvency law.²¹⁰

205 *Idem* para 7.

206 See para 6 below.

207 By “insolvency” the Report does not refer to a particular legal structure or approach, but rather to the distressed condition of the debtor and the constellation of potential approaches to treating that condition. The focus of the Report thus pertains to “any system for alleviating the burdens of excessive debt and allocating benefits and losses, both among creditors and as between creditors and natural person debtors” – World Bank Report para 17.

208 Paras 10–11.

209 See para 43.

210 Para 13.

5.3 Foundations of consumer insolvency systems

The report points out that the broad range of purposes to be served and the degree to which all of these purposes are relevant for any country's cultural, political and economic circumstances, are important factors when a new system for insolvency law is to be devised.²¹¹ In the past several decades, lawmakers from a variety of regions have identified a wide range of desired benefits to be achieved by an insolvency regime for natural persons. According to the Report these benefits fall into at least three distinct categories:²¹²

“First, *benefits for creditors* have historically constituted the main objective of insolvency regimes, which until the late twentieth century had been often primarily if not exclusively designed for business debtors. Second, more recent discussions of insolvency regimes, especially those specifically designed for non-business debtors, have focused on the *benefits for debtors and their families*. While the creditor-debtor relationship often has been viewed in simple binary terms, a third category of much more substantial benefits has now also received substantial attention: *benefits redounding to broader segments of society and to society as a whole*. As the discussion below will reveal, this third category encompasses a much longer and more significant list of benefits and purposes for an insolvency regime for natural persons. It is this category on which lawmakers seem to have concentrated most attention when evaluating the need for and the desired effects of such systems. In general, policymakers have taken care, as they should, to maintain a balanced approach in evaluating the distribution of benefits and burdens among these interest groups.”

As regards the “benefits for creditors” as objective of an insolvency law system the report explains as follows:²¹³

“An insolvency regime benefits creditors primarily by addressing two major weaknesses of the system of ordinary enforcement of obligations (collections); namely, (1) ineffective mechanisms for finding value and the resulting waste resulting from individual creditors' blindly pursuing enforcement actions to the detriment of themselves and other creditors, and (2) inequitable distribution of available value to one or a few aggressive or sophisticated creditors, to the detriment of the collective of all creditors.”

Instead of restructuring the enforcement system, lawmakers have, according to the Report, generally concluded that adopting an insolvency system would create a more efficient and effective means of increasing payment to creditors and enhancing the fair distribution of such payment among creditors.²¹⁴ However, the report indicates that the so-called “asset-based” benefits of insolvency are generally far less valuable in the context of natural persons than in the business context, as most individual debtors have little or no available asset value. More important than locating assets, according to the report, is the benefit of an insolvency system to create asset value by encouraging debtors to be productive, facilitating compromise payment of some of that future value to creditors and monitoring compliance with that compromise over a period of years.²¹⁵ Furthermore, experience in many countries over the past several decades attests to the effectiveness of insolvency regimes in providing incentives to debtors to produce value for creditors. The report points out that a respite or discharge offered to

211 Para 56.

212 Para 57 (our emphasis).

213 Para 58.

214 *Ibid.*

215 Para 62.

debtors may provide a very effective incentive for debtors to produce value to share with creditors.²¹⁶

Unlike the position in South African insolvency law, providing relief to “honest but unfortunate” debtors²¹⁷ has long been a primary purpose of insolvency regimes for consumer debtors.²¹⁸ Many policymakers around the world have concluded that relieving the pain and suffering of over-indebted debtors is a worthy goal in itself. However, modern discussions of insolvency regimes for consumer debtors have relied more on the broader benefits for society than to concentrate on compassion for individual debtors.²¹⁹

According to the Report the benefits to society can be grouped into two categories:²²⁰

“One category encompasses a variety of benefits associated with disciplining creditors to acknowledge the reality of their low-value claims against distressed debtors, internalize the costs of their own lax credit evaluation, and more effectively and fairly redistribute those costs among the society that benefits from the availability of credit. The other category focuses on the *intra*-national and *inter*-national benefits of maximising engagement and productivity by debtors, especially considering the increasingly competitive global marketplace.”

Notwithstanding the many benefits offered by a consumer insolvency system, three important concerns, namely, moral hazard, fraud and stigma, may prevent the adoption or proper implementation of such a system.²²¹ According to the Report many policymakers have expressed concern about the “moral hazard” created by offering improper incentives for debtors to act in an immoral or irresponsible way by recklessly taking on more debt than they could realistically service, and by renouncing their responsibility to deal with their obligations once insolvency has set in.²²² The most workable response to this concern which has been adopted by many existing insolvency systems, is apparently to design and implement proper access requirements, both for entry into the insolvency system and for receipt of a discharge or other relief.²²³ However, a balanced approach should be followed and the benefits afforded by an insolvency system should not be lost on account of access requirements being too strict.²²⁴ As a matter of fact there is, according to the Report, little substantial evidence of moral hazard in existing systems even with regard to systems where there is relatively open access²²⁵ to insolvency procedures.²²⁶ Such systems frequently apply intermediate

216 Para 65.

217 See *Local Loan Co v Hunt* 292 US 234 244 (1934) where the court declared: “One of the primary purposes of the bankruptcy act is to ‘relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes’. This purpose of the act has been again and again emphasized by the court as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns *at the time of bankruptcy*, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.”

218 Para 70.

219 Para 27.

220 Para 78. See also paras 79–111 for a further discussion of these benefits.

221 Para 112.

222 Para 113.

223 Para 114.

224 Para 115. See also para 193.

225 See the discussion in para 5 4 2 below.

226 Para 193.

sanctions to individuals after entry into the insolvency system rather than to block initial entry.²²⁷

Clearly the issue of debtor fraud should also be addressed. According to the Report, the only effective way of dealing with such potential fraud is by careful monitoring by administrators and creditors.²²⁸

The stigma relating to insolvency should also not be allowed to undermine an otherwise well-designed system or curtail the many benefits afforded by such a system. The Report states that policymakers may minimise stigma by avoiding or repealing judgmental language and punitive measures in existing laws, such as referring to the debtor as opposed to the bankrupt, or by reducing post-relief restrictions on activity by debtors.²²⁹

5 4 The core legal attributes of consumer insolvency systems

The Report states that an effective and well-designed regime for consumer insolvency should address a number of critical issues.²³⁰ They are the different approaches to the general design of the regime²³¹ as well as its institutional framework,²³² access to the formal insolvency regime,²³³ the participation of creditors,²³⁴ the solutions to the insolvency problems²³⁵ and the discharge.²³⁶ In what follows, the issues which are of relevance for the topic of the present article are highlighted and briefly discussed.

5 4 1 Design of the system and institutional framework

The Report points out that a formal insolvency system should encourage negotiation and resolution and in this regard a clear trend has emerged in consumer insolvency policy to prefer informal, negotiated alternatives and to avoid formal intervention between debtor and creditors.²³⁷ According to the Report the following arguments can be advanced in favour of voluntary debt settlements.²³⁸

- (a) The stigma of insolvency and registration in the credit information data banks may be avoided.
- (b) The costs are lower.
- (c) The debtor may have an incentive to make a better offer to creditors in order to avoid the inconvenience of the court procedure.
- (d) Should the attempt to settle be unsuccessful, the filing to court will be easier to process as the preparatory work has already been done by debt counsellors whose fees are lower than insolvency lawyers.
- (e) Voluntary settlements allow for more flexibility in serving the needs of the debtor and creditors.

²²⁷ *Ibid.*

²²⁸ Para 118.

²²⁹ Paras 124 and 125.

²³⁰ Para 126.

²³¹ See paras 127–151.

²³² See paras 152–185.

²³³ See paras 186–205.

²³⁴ See paras 206–219.

²³⁵ See paras 220–353.

²³⁶ See paras 354–386.

²³⁷ See DTI Media Statement iro Government's intent to encourage voluntary debt relief measures and the discussion in para 3 2 above.

²³⁸ See para 130.

- (f) Financial institutions often renegotiate repayment terms with their debtors. It may be a desirable political goal to emphasise the importance of such renegotiations as a matter of policy.

The methods by which this preference is expressed and the results of these methods are, according to the Report, important considerations that should precede a discussion of formal regime design.²³⁹ As regards the formal regime itself, lawmakers need to make another important initial choice of where the system should be placed within the broader legislative scheme, either within an existing insolvency regime, or in a separate, or free standing law.²⁴⁰

With regard to the existing frameworks for consumer insolvency, the following three systems can be distinguished:

- (a) Systems in which an administrative agency dominates;
- (b) hybrid public or private systems where public processing of insolvency co-exists with private restructuring alternatives; and
- (c) court-based systems primarily serviced by publicly funded or private intermediaries.²⁴¹

The Report points out that the majority of countries have court-based systems for personal insolvency. However, there is an increased tendency in high income countries to limit the role of courts, for example by dispensing with the requirement of a court hearing for the filing of insolvency. Intervention by the court should thus be the exception rather than the norm.²⁴² A court-based system has definite disadvantages which lawmakers need to take into consideration when devising a new system. The Report explains as follows:²⁴³

“Courts and judges are costly; may be regarded as inaccessible and intimidating by individual debtors; and are designed to resolve adversarial legal disputes. However, adversarial legal disputes between creditors and debtors are rare in individual

239 Para 127. In several countries negotiation with creditors is a precondition for access to formal insolvency procedures – Report para 128. See also para 130 of the Report for a discussion of the arguments advanced in favour of voluntary agreements between debtors and their creditors. The Report, however, points out that experience in many systems has revealed that the merits of voluntary settlements are often illusory – see the discussion in paras 131–133 and see para 134 regarding the reasons for the low rates of voluntary settlements. The Report concludes that “[o]nly under circumstances of well-organised and carefully structured negotiation have informal alternatives to insolvency relief proven reliable, and even then, only a relatively small fraction of cases can be resolved through negotiation. Informal arrangements are more likely to succeed in cases where debtors are experiencing mild or temporary financial difficulties, rather than severe insolvency”. The success rate of informal alternatives to insolvency depends *inter alia* on the experience and impartiality of counsellors and mediators. Furthermore, some formal mechanism for suspending enforcement while negotiations are on-going is necessary and creditor passivity should not prevent the acceptance of a settlement, which should be binding on all creditors who have been notified. Lastly, dissent by a minority of the creditors should not lead to an automatic dismissal of a plan – see para 137.

240 Para 127. See paras 139–151 for a discussion of the issue of where to locate the system.

241 See, with regard to the role of intermediaries, Report paras 167–171. The Report points out that their role is crucial in establishing the viability and integrity of a system and a loss of trust may obviously undermine the effectiveness of a system of debt relief. It is thus important to promote strong ethical codes and/or regulation for intermediaries dealing with debtors – paras 168 and 171.

242 Para 162.

243 Para 164.

insolvency cases; thus personal insolvency adjudication is primarily an administrative process even in those systems where lawyers and courts are central actors. If courts are to be involved, there is a need to educate judges on issues related to credit and debt, budgeting, and social issues. The ability of courts to oversee and regulate the individual insolvency procedure is limited. Courts can act only when individuals bring issues before them and thus, are heavily dependent on individual initiative. Given the stakes in individual insolvency neither creditor nor debtor may have adequate incentives to bring issues before a judge. Court based systems may face significant delays. The pressure on public funding of the judicial system, the limited ability of lower courts to address economic and social issues of debt, and the variable decision making by judges create pressure for increased specialization and administrative processing, particularly for the large percentage of 'NINA' (no income, no assets) debtors, and more effective sorting of cases where private negotiation will be meaningful."

However, the Report points out that it may not be appropriate to transport complex procedures from richer to poorer countries and that there may be advantages in building upon existing institutional infrastructures and keeping procedures simple, at least initially.²⁴⁴

With regard to the financing of the institutional framework and thus the difficulty many individuals have in financing access to the insolvency procedure, the Report notes that there are five approaches to financing:²⁴⁵

- (a) State funding of the process (including creditor and debtor costs);
- (b) cross subsidisation of low value estates by higher value estates;
- (c) state subsidies to professionals involved in the process and write-off of court costs where there is an inability to pay;
- (d) levies on creditors, such as taxation of distressed debt to fund the cases where debtors have no ability to pay; and
- (e) no state support beyond any general public funding of the court system.²⁴⁶

Referring to the economic and social benefits of insolvency the Report concludes²⁴⁷

"that all parties should contribute their fair share to the financing of the framework. 'Fair share' may mean that creditors contribute through a levy. Creditors may pass along these costs to the public, but they may also have incentives to reduce the number of debtors in default. For some debtors with limited resources fair share could mean no contribution."

The Report points out that financing issues may, to a certain extent, be addressed by reducing the costs of personal insolvency. Several countries have done this by introducing summary procedures, so that the traditional formalities of insolvency such as creditors' meetings, or the examination of a debtor occur only in exceptional cases.²⁴⁸

244 Para 180.

245 Para 183. All of these approaches have some disadvantages – see para 183.

246 The majority of countries have adopted the final alternative – para 183.

247 Para 184.

248 Para 185. According to the Report, the use of the Internet has increased in the initial processing of cases, and the use of online systems may reduce costs, by for example using standardised programs for assessing and calculating debtors' disposable incomes and monitoring repayment plans. Intelligent use of online programs can therefore achieve the desired balance between uniformity and discretion in the treatment of debtors.

5.4.2 Access to the system

As indicated by the Report, any well designed insolvency regime will impose some entry requirements for obtaining relief.²⁴⁹ Since the present article deals with the issue of individual debtors obtaining debt relief by initiating insolvency proceedings the discussion in this section focuses on the issues pertaining to debtor access.²⁵⁰

Personal insolvency systems differ on the extent to which there is open access for debtors.²⁵¹ Some systems provide relatively open access but require a debtor to display good behaviour over a certain period of time by *inter alia* making available a certain portion of their income for the repayment of debts.²⁵²

Debtors' access to insolvency procedures may, amongst others, be subject to the following conditions:²⁵³

- (a) A minimal level of debt;
- (b) a future oriented test of "permanent insolvency";²⁵⁴
- (c) good faith;²⁵⁵
- (d) a requirement that debts be caused by events beyond a debtor's control;²⁵⁶ and
- (e) a requirement that the debtor must indicate that he has consulted an approved intermediary, obtained counselling, or attempted a negotiated settlement before being allowed to apply for an insolvency procedure.²⁵⁷

The World Bank's stance seems to be to prefer an open access policy.²⁵⁸ The Report points out that there is little substantial evidence of moral hazard in

249 Para 39.

250 In several countries both creditors and debtors can initiate individual insolvency procedures. However, in recent decades almost all the countries that have introduced distinct consumer insolvency systems only accept filings by debtors. The stance of the Report, in this regard, is that creditor petitions should be limited and that controls should be implemented to prevent its abuse as a collection tool – see the discussion in paras 187 and 188.

251 "Open access" pertains to the principle that an individual who complies with an insolvency test such as the inability to pay debts as they fall due may, without more, gain access to an insolvency procedure that would afford an ultimate discharge of debts – *idem* para 189.

252 *Idem* 191.

253 *Ibid.* Access criteria may be a combination of rules and standards. The Report points out that there are advantages to favouring rules over standards. Legislatures should therefore clearly articulate the rules for insolvency relief and avoid making the judiciary responsible for managing access to the system through the enactment of a standard (compare, in this regard, the advantage for creditors requirement in SA law). Rules are furthermore less costly to administer, reducing the need for unnecessary high levels of expertise – para 196.

254 This test pertains to the possibility of debtors being able to improve their financial situation and repay debts at a future date – see para 192.

255 The Report para 195 points out that that this requirement is likely to lead to variable decision-making and increased disputes and that this is particularly problematic in countries with a relatively decentralised judiciary.

256 Such as illness or unemployment – Report para 191.

257 According to the Report para 198 this requirement can be beneficial if there is adequate, high quality advice and if there is evidence that the benefits of this requirement will probably exceed its costs. Existing evidence, however, suggests the contrary.

258 In this regard, the Report para 197 explains as follows: "High access barriers to the formal system of relief may result in leaving some individuals in a state of 'informal insolvency'. Individuals unable to access debt relief lose incentives to participate in society; they may require continued state support or might go underground for several years to avoid creditors

existing systems where there is relatively open access.²⁵⁹ Such systems frequently apply intermediate sanctions after entry into the system²⁶⁰ rather than to block initial entry.²⁶¹ Potential moral hazard may, furthermore, be addressed by applying a bright-line rule restricting access to a second insolvency procedure within a specified period of time.²⁶²

5 4 3 *Participation by creditors*

The Report points out that very little value is usually available in insolvency procedures for natural persons and creditors normally play little or no role in the procedure.²⁶³ A trend has therefore developed to scrap creditors' meetings and to simplify the submission and verification of claims and other forms of creditor participation.²⁶⁴ Also, with regard to creditor participation in plan confirmation, creditors generally have little influence over the confirmation of a payment plan or the discharge or other relief afforded to the debtor.²⁶⁵ However, creditors' rights are guaranteed in other ways, such as, giving them the opportunity to be heard in court and to object to the relief requested by the debtor.²⁶⁶ One specific way in which creditors' rights are protected, in spite of their lack of participation, is for the law to provide a procedure in terms of which cases will be reopened when assets or unexpected income are discovered post-discharge or post-confirmation. In several systems, however, the debtor may keep such wind-falls. Finality or termination of the effects of the procedure on the debtor is thus regarded by some systems to be of greater importance than ensuring that creditors receive the maximum payment from debtors' later discovered assets or income.²⁶⁷

5 4 4 *Solutions to the insolvency process and payment of claims*

5 4 4 1 *Payment through liquidation of assets*

Traditionally, insolvency systems have regarded the debtor's assets as the only source of value to be distributed amongst creditors in payment of their claims.²⁶⁸

until their problems go away or passions cool off. Creditors may be unlikely to recover significant amounts in the free-for-all of individual collection actions but they nevertheless inflict a significant social and emotional toll." In a multi-track insolvency system access is dependent on consumer choice or a decision of a public agency or official. Systems that permit consumer choice require public or private intermediaries to assist individuals in their choice, which in turn necessitates the regulation of these intermediaries. The advantage of systems that allow public agency decision-making is that debtor's costs are reduced. Furthermore, impartial decision making is ensured which will in turn safeguard the integrity of the system – see Report paras 201 ff.

259 Para 193.

260 Eg, by imposing limits on the discharge of debts – Report para 199.

261 See Report paras 193 199 200.

262 Various countries prevent repeat access within 2, 4, 6 or 10 years following a first insolvency proceeding. Some countries subject a repeat filer to more intensive investigation. A repeat filer will only be admitted to a second proceeding in exceptional circumstances – para 194.

263 Para 206.

264 Para 208.

265 Para 209.

266 Para 215.

267 Para 216.

268 Para 220.

Most modern systems have continued to follow the approach of looking at the debtor's assets, at least initially. However, the vast majority of debtors in every existing consumer insolvency system have proven to have so little available assets for liquidation and distribution to creditors that several systems have abandoned the step of liquidation of assets unless the debtor appears to have sufficient assets of value to cover the administrative costs.²⁶⁹ The idea of exempting some of the debtor's property from liquidation and distribution to creditors is closely related to the discharge principle. The modern trend with regard to the level of exempt assets is to afford debtors a true "fresh start" and the debate revolves around defining the level of sufficiency.²⁷⁰

5 4 4 2 Payment through a payment plan

As most debtors have little available assets for liquidation and distribution to creditors, many insolvency regimes generally require some contribution from the debtor's future income in exchange for the relief offered by the system, usually a discharge of debt. Most systems require an "earned start" for natural person debtors rather than providing a simple "fresh start" where no contribution or effort is expected/required from the debtor. One of the most problematic issues pertaining to consumer insolvency policy is that of formulating a payment plan, especially the twin issues of how long debtors should be expected to devote their surplus income to repayment of their debts (plan duration)²⁷¹ and how much debtors should be required to pay during that period.²⁷² Once a plan has been established and confirmed, an effective insolvency regime should contain rules for monitoring the debtor's compliance and should provide for the possibility of modifications to the plan for changed circumstances.²⁷³

Requiring a longer term for repayment would appear to promote the goal of maximising payment to creditors. However, experience in many existing systems has shown that longer terms in fact repress creditor returns and reduce the number of debtors who can be assisted by the system. The Report points out that a lifelong liability for debt creates a definite disincentive to being productive, but even a limited repayment term can hinder the debtor's motivation and rehabilitation as well as the fulfilment of the other important goals of an insolvency law system.²⁷⁴ However, a shorter term can pursue the goal of teaching payment responsibility and to avoid moral hazard among debtors. As most debtors would be unable to produce a significant return to creditors, many existing systems have chosen to pursue this educational purpose.²⁷⁵ In many countries, experience has shown that debtors would normally fail to complete their plans where the repayment terms are longer than three years.²⁷⁶

269 Para 221.

270 Para 255.

271 Para 263ff.

272 Para 274ff.

273 Para 262.

274 Para 264.

275 Para 265. See also para 315 where the following is stated: "Multi-year plans remind debtors and those around them that everyone must do their best to fulfil their obligations, whatever the 'best' is, and relief from one's duly undertaken obligations does not come lightly and without sacrifice."

276 Para 269.

The second issue pertaining to payment plans relates to the question of how much payment may be expected or demanded from debtors. Most policymakers agree that this issue is more a question of defining a predetermined level of sacrifice for debtors than defining a predetermined benefit for creditors. An important factor in determining the potential payment to creditors is to first of all determine the amount to be reserved for the reasonable support of the debtor and those dependent on him or her.²⁷⁷ Only income in excess of this embodies “surplus” income that might be allocated to creditors.²⁷⁸ Another important factor pertaining to payment plans is for systems to create incentives that will encourage maximum productivity by debtors. In this regard, the Report states that “[t]he most prominent, fundamental, and effective way of encouraging debtors to be as productive as possible is simply to offer the relief of a discharge of unpaid debts”.²⁷⁹ Several systems have also incorporated penalties in their approach. Debtors are required to earn their discharge and those who fail to apply reasonable efforts in seeking productive work may be denied the relief offered by the insolvency system.²⁸⁰

An important problem pertaining to payment plans relates to the significant number of debtors falling into the category of debtors with no income and no assets (NINAs). Although these debtors may have sufficient means to cover their basic needs, they do not have any surplus to pass on to their creditors. Consequently, a minority of systems have excluded them from relief. However, the preferred viewpoint is to avoid inequality among debtors and thus discrimination by affording the same relief to all debtors regardless of their financial means. Providing a low-cost informal proceeding could provide relief to the NINAs.²⁸¹

5 4 5 Discharge

The Report states that a discharge of debt is one of the most prominent features of modern systems for the regulation of consumer insolvency law.²⁸² One of the main aims of consumer insolvency systems is thus to restore the debtor’s economic capability, in other words, economic rehabilitation. Rehabilitation includes three elements, namely, a discharge of debt, non-discrimination and avoidance of future excessive indebtedness.

The most effective form of relief from debt is a “fresh start” or a “straight discharge” which entails a discharge without a payment plan. Most systems continue to reject the notion of a straight discharge. Instead of a “fresh start” the debtor is afforded a delayed or “earned new start”.²⁸³

277 The most important challenge in defining a proper reserve budget for debtors is deciding how best to achieve fair and equal treatment – para 284. Finding an ideal approach to payment plan budgeting is not a simple choice between wide open discretion and inflexible, bright-line rules. Even if a standard budgeting rule is implemented, some discretionary element is desirable and probably unavoidable – para 291.

278 Para 274. As regards the question of how much income the debtor has from which the reasonable expenses may be deducted, there are two broad approaches. The first approach is to base calculations on the debtor’s current income, while the other uses an income projection – para 275ff.

279 Para 281.

280 Para 282.

281 Para 298ff.

282 Para 444.

283 Paras 355–356.

The principle of non-discrimination is an important factor for attaining the full benefit of a discharge. Debtors should thus not be discriminated against merely because they have received insolvency relief.²⁸⁴

In order to prevent the debtor from becoming excessively indebted again in future, an attempt must be made to change debtors' attitudes regarding responsible credit use.²⁸⁵ In this regard, many systems attempt to educate debtors, while others allow a discharged debtor from implementing insolvency proceedings only after a period of several years. Some systems regard a discharge as a "once in a lifetime" event.²⁸⁶ Another issue which is of relevance in this regard is the principle of good faith which is present in almost all insolvency law systems. The essential idea of insolvency law is to assist unfortunate, but honest, debtors. Debtors who abuse the system should be denied a discharge especially where debt has been incurred in a fraudulent manner.²⁸⁷

6 CONCLUSION

From the foregoing discussion it should be evident that the current South African insolvency system does not provide effective debt relief to insolvent or debt stressed individuals and that current insolvency law reform initiatives do not address this situation. Over the past 20 years the system has remained creditor-orientated *inter alia* because of our courts' stern approach regarding sequestration applications aimed at obtaining debt relief. However, the fact of the matter is that in a modern credit-driven society, debt relief is of the utmost importance and it is thus apparent that the South African insolvency regime is in urgent need of reform. Equal relief should be provided to all insolvent and debt-stressed individuals and the opportunity to obtain a statutory discharge should thus be afforded to all debtors, not only those who are able to prove an advantage to creditors. A proper alternative debt relief measure providing for a discharge of debt is thus of paramount importance.

Due to the increased availability of credit, national mortgage crises and the resulting global financial crises the World Bank has emphasised the importance of designing modern and effective regimes for the insolvency of natural persons.²⁸⁸ An effective consumer insolvency regime and hence its ability to assist in counteracting poverty, economic exclusion and inequality²⁸⁹ may, it is submitted, play an important role in the economic development of South Africa.²⁹⁰ Thus, as regards the argument of Satchwell J that sequestration applications aimed at obtaining debt relief is an attempt by debtors to evade the consequences of their indebtedness by *inter alia* passing the burden on the South African

284 Para 360.

285 Para 354.

286 Paras 361–363.

287 Para 365.

288 See the Report para 6 and the discussion in para 5 1 above.

289 See, with regard to financial inclusion in South Africa, The World Bank *South Africa economic update – Focus on financial inclusion* (May 2013). As indicated in this report (v), this topic is especially important to South Africa as it could help reduce poverty and inequality and stimulate job creation.

290 See Boraine and Roestoff *World Bank Review* 91 and Rochelle "Lowering the penalties for failure: Using the insolvency law as a tool for spurring economic growth; the American experience, and possible uses for South Africa" 1996 *TSAR* 315.

economy,²⁹¹ the counter-argument is that a system providing debt relief will actually not generate a burden on the economy, but will indeed assist in improving economic growth. In this regard Rochelle observes as follows:²⁹²

“Improving the citizen’s economic lot is a central priority for most national governments. Insolvency laws can have a significant role to play in this work. Were the penalties for failure lowered from their current levels in South Africa, citizens and companies would take more economic risks to succeed. More businesses would start, more jobs would be created, and society as a whole would benefit. Those who fail would not become modern lepers, but instead would receive another chance to be productive for themselves and society.”

As indicated, the advantage to creditors requirement has been the stumbling block in the way of many South African debtors seeking debt relief. Because sequestration is an expensive procedure to follow, it should only be implemented in cases where it would be cost-effective to do so. We therefore believe that the advantage requirement should be retained but then as suggested above, proper alternative debt relief measures affording a discharge of debt should be provided for. However, when exercising their discretion to grant a sequestration order, our courts should follow a balanced approach by taking into consideration the interests of the debtor regarding the choice of debt relief. It is therefore suggested that the time has come that insolvency legislation should, in addition to the advantage to creditors requirement, explicitly require an advantage for the *debtor* as a pre-requisite for compulsory sequestration applications. In voluntary surrender applications, the legislator should expressly provide that the court, when exercising its discretion, should take into consideration the debtor’s interests regarding what the best solution for his or her debt problems should be.²⁹³

Despite the fact that the World Bank Report does not endeavour to be prescriptive as regards the favoured purposes to be served by a consumer insolvency system,²⁹⁴ it is generally clear that the benefits for the debtor, their families and society have definite preference.²⁹⁵ The Report furthermore clearly states that a discharge is one of the most salient features of all modern insolvency systems.²⁹⁶ Nonetheless, as indicated, the South African system has remained creditor-orientated – a state of affairs which is clearly in contrast with the world-wide trend to provide debt relief to “honest but unfortunate debtors” as one of the primary purposes of consumer insolvency law systems.²⁹⁷ At present the South African system clearly does not follow a balanced approach to distributing the benefits and burdens of an insolvency system among the different interest groups. In this regard, the following observation in the World Bank Report is relevant:²⁹⁸

“An overarching goal of any insolvency system is striking a careful balance between two competing considerations: first, demanding much of those who incur obligations; but second, not demanding more than can reasonably be borne by the

291 See *Ex parte Shmukler-Tshiko* para 2 and the discussion in para 3 3 above.

292 1996 *TSAR* 315.

293 See the discussion of *Mutemeri* and *Ex parte Ford* in paras 2 4, 3 1, 3 3 and 3 4 above and *Roestoff and Coetzee* 2012 *SA Merc LJ* 63.

294 See Report para 43 and the discussion in para 5 2 above.

295 See, eg, the discussion above with regard to creditor participation (para 5 4 3) and exemptions (para 5 4 4 1).

296 Para 444.

297 See Report para 70 and the discussion in para 5 3 above.

298 Para 115.

victims of economic volatility and other common dangers of life. Just as an insolvency system carries a risk of undermining payment morality, there is an equally significant risk in losing the many benefits of an insolvency system by failing to provide effective relief.”

When devising a new and effective insolvency and debt relief system for South Africa, it is submitted that lawmakers should take note of the following modern trends and broad issues identified in the World Bank Report:

- (a) *Foundations of insolvency law*: All insolvency procedures in South Africa are primarily aimed at increasing payment to creditors. It is submitted that lawmakers should take into consideration the so-called social benefits of an effective insolvency regime.²⁹⁹ These include the social benefits in the sense that an effective regime of insolvency would remove the social costs of leaving debtors to languish in a state of perpetual debt distress and secondly, the social benefit of enabling debtors to become productive again for themselves and society.³⁰⁰
- (b) *Access to the system, moral hazard, and stigma*: The World Bank’s stance with regard to entry requirements for access appears to be to prefer an open access policy.³⁰¹ As regards the South African position, it is submitted that individuals who are not able to prove advantage to creditors should not be denied access to the system due to the amount³⁰² or type of debt.³⁰³ Concerns of moral hazard may be addressed by restricting access to a second insolvency proceeding within a specified period of time.³⁰⁴ The stigma relating to insolvency should be minimised by avoiding judgmental language and punitive measures in legislation.³⁰⁵
- (c) *Design of the system and institutional framework*: It should be noted that a clear trend has emerged in consumer insolvency policy to prefer informal, negotiated alternatives and to avoid formal intervention between debtors and creditors.³⁰⁶ In this regard, the South African Government’s plans to encourage voluntary debt relief measures are certainly a step in the right direction.³⁰⁷ Instead of providing for a separate voluntary pre-liquidation composition,³⁰⁸ it is suggested that provision should be made for negotiations as a precondition for relief under the formal system.³⁰⁹ Out-of-court negotiations are valuable as they save costs and it would also relieve the work-load of our courts which have to deal with huge back-logs. Should the

299 Report paras 76ff and 99 and see the discussion in para 5 3 above.

300 Report paras 100 106 197.

301 Report para 197 and see the discussion in para 5 4 2 above.

302 See iro the administration procedure (para 2 3 above) where a limit of R50 000 applies.

303 See iro the process of debt review para 2 4 above, which only applies to credit agreement debt.

304 Report para 194 and see the discussion in para above 5 4 2.

305 Report paras 124 and 125 and see the discussion in para 5 3 above.

306 Report para 127. See also Report para 130 as regards the arguments advanced in favour of voluntary settlements and the discussion in para 5 4 1 above.

307 See DTI Media Statement discussed in para 4 2 above.

308 See the discussion of the Law Reform Commission’s proposal in para 4 1 above.

309 Report para 128 and see the discussion in para 5 4 1 above. It should be noted that the NCA provides for voluntary negotiations (ss 86(5)(b), (7)(b) and (8)(a)). However, practice has proved that creditors are not willing to negotiate.

debtor's proposed repayment plan not be accepted by the creditors, provision should be made for the possibility that a court could impose the debtor's proposal on dissenting creditors.³¹⁰ As regards the formal regime itself, South African lawmakers need to decide where the consumer insolvency system should be placed within the broader legislative scheme, either within a specific law or in a general insolvency law.³¹¹ It has been mentioned that Cabinet has accepted the concept of a unified Insolvency Act for South Africa, providing for an assets-liquidation procedure for both consumer and business debtors.³¹² However, it is submitted that all consumer insolvency procedures should be contained in this single statute. Existing procedures should be streamlined by doing away with the overlapping between the different procedures³¹³ and the unnecessary duplication of regulators,³¹⁴ forums³¹⁵ and intermediaries.³¹⁶ A principled approach should thus be adopted to deal with liquidation, debt restructuring and the NINA debtors in a comprehensive and coherent way. It should also be noted that there is an increased international tendency, especially in high income countries, to limit the role of our courts, and lawmakers need to take into consideration the disadvantages of a court-based system.³¹⁷ However, the Report points out that it may not be appropriate to transport complex procedures from richer to poorer countries and there may be advantages in building upon existing institutional infrastructures.³¹⁸ As regards South Africa it is suggested that lawmakers should build upon the well-established system of debt review and debt counselling regulated by the National Credit Regulator under the National Credit Act, when devising a system pertaining to restructuring the income of the debtor.³¹⁹ It is furthermore submitted that lawmakers should address the issues pertaining to the financing of the institutional framework and thus the difficulty individuals have in financing access to insolvency procedures.³²⁰ As indicated, financing issues may be addressed by reducing the costs of personal insolvency. This can be done *inter alia* by introducing summary procedures³²¹ and by utilising information technology.³²²

- (d) *Liquidation of assets as solution to insolvency*: The Report points out that most debtors in every existing insolvency system have proven to have insufficient assets for liquidation and distribution to creditors. Several systems

310 See Roestoff and Coetzee 2012 *SA Merc LJ* 76. See also Report para 209ff as regards the international trend to reduce creditor participation in insolvency procedures and the discussion in para 5 4 3 above.

311 See Report para 127 and see the discussion in para 5 4 1 above.

312 See para 4 1 above.

313 Ie, administration and debt review.

314 These are the National Credit Regulator and the Master of the High Court in terms of the NCA and Insolvency Act respectively.

315 These are the high courts and the lower courts as well as the National Consumer Tribunal provided for by the NCA.

316 These are the debt counsellors, administrators and insolvency trustees in terms of the NCA, Magistrates' Courts Act and Insolvency Act respectively.

317 See Report paras 162 and 164 and see the discussion in para 5 4 1 above.

318 Para 180 and see the discussion in para 5 4 1 above.

319 See Boraine, Van Heerden and Roestoff 2012 *De Jure* 270.

320 Report para 183 and see the discussion in para 5 4 1 above.

321 See, eg, our proposals regarding the NINAs below and the Report para 298ff discussed in para 5 4 2 above.

322 See Report para 185.

have therefore abandoned the step of liquidation unless the debtor appears to have sufficient assets to cover the administration costs.³²³ As regards the South African system, it is accordingly submitted that the advantage to creditors requirement should be retained and that sequestration should be reserved for those instances where sequestration would be cost-effective and where the procedures pertaining to interrogations and impeachable transactions are necessary to properly deal with the insolvency of an individual.

- (e) *Exempt assets*: As regards the principle of exempting some of the debtor's assets from liquidation and distribution it should be noted that there is a close connection with the discharge principle. The modern trend in this regard is to afford a debtor a true "fresh start" and to ascertain the level of sufficiency as regards the debtor and his or her dependants.³²⁴
- (f) *Payment plans as solution to insolvency*: It should be noted that most systems require an "earned start" rather than a simple "fresh start". It is therefore submitted that some contribution from the debtor's future income should be required in order to uphold the educational goal that can be achieved thereby.³²⁵
- (g) *Plan duration*: Experience in many systems has shown that longer terms in fact repress creditor returns and also reduce the number of debtors who can be assisted by the system. Longer terms create a disincentive to being productive, while a shorter term can pursue the goal of teaching payment responsibility. In many countries experience has shown that repayment terms of longer than three years are not successful.³²⁶ As regards the South African position, it should be clear that the future income-restructuring measure should provide for a limit to the payment term as administration and debt restructuring under the National Credit Act has proved to be a failure due to the lack of a prescribed limited payment period.³²⁷
- (h) *Required payment under payment plans*: Of paramount importance is to determine the amount reserved for the reasonable support of the debtor and his or dependants. Insolvency systems should create incentives that will encourage maximum productivity by debtors. Several systems have incorporated penalties into their approach and debtors who fail to apply reasonable efforts in seeking productive work may be denied the relief offered by the system.³²⁸ In South Africa, an obvious starting point for creating an incentive to being productive is for the system to offer the relief of a discharge of debt also with regard to debt restructuring measures.³²⁹
- (i) *Modification of plans*: As indicated by the Report, effective insolvency regimes contain rules for monitoring the debtor's compliance. Lawmakers should therefore consider the inclusion of provisions for the modification of plans when circumstances change.³³⁰

323 Para 221 and see the discussion in para 5 4 4 1 above.

324 Report para 255 and see the discussion in para 5 4 4 1 above.

325 See Report para 262 and see the discussion in para 5 4 4 2 above.

326 Report paras 264, 265 and 269 and see the discussion in para 5 4 4 2 above.

327 See para 2 5 above.

328 Report paras 274 and 282 and see the discussion in para 5 4 4 2 above.

329 See also Report para 281.

330 Report para 262 and see the discussion in para 5 4 4 2 above.

- (j) *NINA debtors*: The Report emphasised the need to avoid inequality among debtors. Discrimination should be avoided by providing the same relief to all debtors regardless of their financial means. In South Africa an inexpensive informal proceeding should be devised in order to afford relief to the NINA debtors.³³¹
- (k) *Discharge*: As indicated the Report states that a discharge of debt is one of the most prominent features of modern consumer insolvency systems. In this regard, South Africa has noticeably fallen behind the rest of the world and reform of the system in this regard is thus vital. As mentioned, most systems have rejected the notion of a fresh start and the debtor is rather afforded a “delayed” or “earned new start”. Debtors who are afforded a discharge should furthermore not be discriminated against, but future excessive indebtedness should be avoided by educating debtors or by placing a limit on the number of times a discharge can be obtained within a certain period. As the essential idea of insolvency law is to assist the unfortunate but honest debtor, debtors who abuse the system should be denied relief.³³²

The quest should thus be to reform our insolvency law as far as it relates to consumers in such a way as to align it with modern consumer credit realities rather than tinkering with various statutory procedures without addressing cardinal issues that exist.

331 See Report para 298ff and see the discussion in para 5 4 4 2 above. See also the discussion of *Van Rooyen* in para 3 2 above and the DTI Media Statement regarding Government’s intent to investigate simpler and lower-cost insolvency arrangements for lower and middle income individuals – see para 4 2 above.

332 See Report paras 354ff and see the discussion in para 5 4 5 above.