A COMPARATIVE ANALYSIS OF AN INSOLVENT'S CAPACITY TO EARN A LIVING WITHIN THE SOUTH AFRICAN CONSTITUTIONAL CONTEXT

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SUMMARY

An insolvent person in South Africa faces many statutory restrictions regarding his capacity to earn a living. These impediments can be grouped into three stages: impediments before sequestration, impediments during sequestration, and impediments after sequestration. This thesis aims to consider the constitutionality of the impact that the restrictions imposed on unrehabilitated insolvents have on their capacity to earn a living; whether such restrictions are still justifiable given international best practice; and to make recommendations for law reform. This thesis also aims to re-evaluate the rationale for the existence of the current restrictions coupled with the long rehabilitation period generally provided for in our insolvency law within the context of modern needs and realities. Moreover, the goal is to establish whether such restrictions' internal dynamics and characteristics are constitutionally justifiable and aligned with international best practice.

In this regard, it is argued that the restrictions imposed on unrehabilitated insolvents in South Africa limit their capacity to earn a living and are not always justifiable in light of constitutional values and international best practice. Therefore, this thesis concludes by making recommendations that could be considered by lawmakers embarking on law reform.

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Annexure G

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CHAPTER OVERVIEW

1.1 Introduction

1.1.1 Problem statement

An insolvent person in South Africa faces many impediments as regards his or her capacity to earn a living. These impediments present themselves in the form of certain restrictions, disqualifications, and prohibitions imposed by the Insolvency Act[1] and other legislation[2] on unrehabilitated insolvents. These impediments can be grouped in three stages: impediments before sequestration; impediments during sequestration; and impediments after sequestration (rehabilitation and discharge). These impediments may have an impact on unrehabilitated insolvent's ability to earn a living. This impact is exacerbated by the fact that the insolvent is automatically rehabilitated and discharged from his or her debts only ten years from the date of sequestration of his or her estate[3] unless he or she is rehabilitated earlier by court order.[4] This means that unless the insolvent is granted earlier rehabilitation, he or she will have to wait for

[1]Sections 23(3), 55(*a*) and 58(*a*) of the Insolvency Act 24 of 1936 (the Insolvency Act/ the Act).
[2] See, eg, ss 47(1)(*c*), 62 and 106(1)(*c*) of the Constitution of the Republic of South Africa, 1996 (the Constitution); ss 69(8)(*b*)(i), 69(11) and 138(1)(*d*) of the Companies Act 71 of 2008 (the Companies Act); ss 1 and 10(*e*) of the Land and Agricultural Development Bank Act 15 of 2002 (the Land and Agricultural Development Bank); ss 20(2)(*a*), (*c*) and s 46(2) of the National Credit Act 34 of 2005 (the NCA); and s 11(2)(*b*) of the Liquor Act 59 of 2003 (the Liquor Act).
[3] Section 127A of the Insolvency Act; Meskin et al *Insolvency law* para 14.2; Bertelsmann *et al Mars* para 25.1.
[4] Section 124 of the Act.

the ten-year period to expire before being relieved from the restrictions and disqualifications.[5]

Regarding the capacity to earn a living, it must be noted that the sequestration of the estate of an employee does not, as a rule, automatically terminate his or her employment contract.[6] Under sequestration, an insolvent may also follow any profession or occupation or enter into any employment, but is prohibited (without the consent of the trustee) from carrying on any trade, being employed in any capacity, or having any direct or indirect interest in the business of a trader who is a general dealer or manufacturer.[7] An unrehabilitated insolvent cannot be a Member of Parliament, a Member of the National Council of Provinces, or a Member of a provincial legislature.[8] In addition, an insolvent is, among others, disqualified from acting as a trustee in an insolvent estate,[9] a director[10] of a company, a business rescue practitioner,[11] a board member of the Land and Agricultural Development Bank,[12] a member of the governing board of the National Credit Regulator,[13] and a registered manufacturer or distributor of liquor.[14] A person employed in these positions or who holds these offices is required to vacate the position or office should his or her estate be sequestrated under the Insolvency Act.[15] Consequently, such a person is, in effect, dismissed from such a position or office.

Based on the insolvent's possible dishonesty and incompetence, he or she is prohibited from being a member of statutory councils, boards, or bodies.[16] A blanket

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[5] Section 129(1)(*c*) of the Act.
[6] Du Plessis and Fouché *A practical guide to labour law* para 2.10.5.
[7] Section 23(3) and (3)*bis* of the Insolvency Act. See in general Bertelsmann *et al Mars* para 8.4.
[8] Sections 47(1)(*c*), 62 and 106(1)(*c*) of the Constitution.
[9] Sections 55(*a*) and 58(*a*) of the Insolvency Act.
[10] Unless granted an exemption by a court, an unrehabilitated insolvent cannot be a director of a company. See s 69(8)(*b*)(i) and 69(11) of the Companies Act. However, under the Companies Act 61 of 1973, the court allowed an unrehabilitated insolvent to become a director of a company if there was no danger to the private interests of the members or to the public who might be injured by dishonest trading.
[11] Section 138(1)(*d*) of the Companies Act.
[12] Sections 1 and 10(*e*) of the Land and Agricultural Development Bank Act.
[13] Sections 20(2)(*a*), (c) and 46(2) of the NCA.
[14] Section 11(2)(*b*) of the Liquor Act.
[15] See, eg, ss 47(3)(*a*), 62(4)(*a*) and 106(3)(*a*) of the Constitution; s 58(*a*) of the Insolvency Act; s 69(4) of the Companies Act; ss 22(3)(*a*) and 46(5) of the NCA; Bertelsmann *et al Mars* para 8.4; Sharrock, Van der Linde and Smith *Hockly's insolvency law* para 4.4.
[16] Member of the Health Professions Council (s 6(1)(*a*) of the Health Professions Act 56 of 1974); a local transportation board (s 5(1)(*a*) of the Road Transportation Act 74 of 1977); Council of the Academy of Science (s 7(1)(*b*) of the Academy of Science of South Africa Act 67 of 2001); Board of the South African National Accreditation System (s 10(1)(*a*) of the Accreditation for Conformity Assessment,

disqualification is applied to all unrehabilitated insolvents, irrespective of whether or not a particular insolvent may still be honest and competent to be a member of such statutory councils or boards.[17] This blanket disqualification is applied in only a few instances to other debtors (ie, persons under administration orders,[18] persons subject to the debt review procedure,[19] or persons who have entered into arrangements or compromise agreements with their creditors) who have also failed to pay their debts[20] irrespective of their possible dishonesty.

The Insolvency Act exempts the income[21] of an insolvent from vesting in the insolvent estate because sequestration is not intended to leave an insolvent and his or her dependants destitute.[22] However, the disqualifications specified above may cause the insolvent to forfeit the protected income which has been exempted by the Act, leaving him or her without a livelihood and sometimes even destitute.

Calibration and Good Laboratory Practice Act 19 of 2006); or the Tourism Board (s 15(1)(*b*) of the Tourism Act of 2014). See Roestoff (2018) *THRHR* 402 n 85.

[17] Roestoff states that in only five of the instances is the honesty and competency of the insolvent considered. See further the disqualifications in s 3(7)(*b*) of the Agricultural Produce Agents Act 12 of 1992 regarding membership of the Agricultural Produce Agents Council; s 12(*b*) of the Agrément South Africa Act 11 of 2015 regarding membership of the Board of Agrément South Africa; s 9(5)(*b*) of the Agricultural Research Act 86 of 1990 regarding membership of the Agricultural Research Council; s 6(8) of the Construction Industry Development Board Act 38 of 2000; s 4(13)(*b*) of the Marketing of Agricultural Products Act 47 of 1996 regarding membership of the National Agricultural Marketing Council. Roestoff (2018) *THRHR* 402 n 86.

[18] A person who is subject to administration in terms of s 74 of the MCA is disqualified from being a debt counsellor in terms of s 46(4)(*a*) of the NCA.

[19] Section 6(1) of the Credit Ratings Services Act 24 of 2012: *Fit and proper requirements for credit rating agencies*, disqualifies a person who is subject to debt review from being a director or key employee of a registered credit rating agency. A person who is subject to debt re-arrangement in terms of ss 86 and 87 of the NCA is disqualified from being a debt counsellor. Section 46(4)(*b*) of the NCA. See generally *Swuhana v National Credit Regulator* (NCT 96402/2017/59(1)), [2019] ZANCT 22 (13 March 2019).

[20] Roestoff states that in only three of the instances mentioned above, does the use of such a procedure disqualify a person from membership of such statutory council or board. See s 7(*c*) of the Castle Management Act 207 of 1993, which disqualifies a person who is under any form of judicial administration from being a member of the Castle Control Board; s 9(*e*) of the Traditional Health Practitioner's Act 22 of 2007, which disqualifies a person from being a member of the Interim Traditional Health Practitioner's Council if he or she has entered into a composition agreement with his or her creditors; s 6(*a*) of the Nursing Act 33 of 2005, which disqualifies a person from being a member of the Nursing Council if he or she has entered into a composition agreement with his or her creditors in terms of s 119 of the Insolvency Act. In terms of s 10(1) of the Road Traffic Management Corporation Act 20 of 1999, a person who has committed an act of insolvency and whose estate has not yet been sequestrated, is also disqualified from being a member of the Board established in terms of the Act.

[21] Section 23(9) of the Insolvency Act. Bertelsmann *et al Mars* para 10.2.2.

[22] Sharrock, Van der Linde and Smith *Hockly's insolvency law* para 4.2. See also *Ex parte Kroese* 2015 (1) SA 405 (NWM) and *Ex parte Van Dyk* (1869/2015), [2015] ZAGPPHC 154 (26 March 2015).

In addition to these disqualifications, the Insolvency Act makes it an offence for an unrehabilitated insolvent to obtain credit above a certain amount.[23] Information regarding the sequestration of his or her estate is made publicly available for five years from the date of the sequestration order or until a rehabilitation order is awarded.[24] Also, the information regarding the rehabilitation order remains publicly available for five years after his or her rehabilitation.[25] Because of the public availability of information about the rehabilitation order, a rehabilitated insolvent can be compared to a rehabilitated prisoner who has been released from prison but who always has to declare that he or she was once convicted of a crime. Such declaration or public availability of information makes it difficult for a rehabilitated 'criminal' to obtain employment and by analogy, for a rehabilitated insolvent to access credit and sometimes employment.

These direct and indirect restrictions make it difficult for an insolvent to recover from insolvency and to re-establish him- or herself in the economy, for example by obtaining credit to start a business or by finding employment.[26] Because these restrictions limit an insolvent's capacity to earn a living during his or her insolvency and even after rehabilitation, they could have the unintended consequence of rendering the insolvent a burden on society or even leading to his or her insolvency after rehabilitation.[27] The rationale for the existence of these restrictions, coupled with the long rehabilitation period in our insolvency law, therefore, needs to be re-evaluated within the context of modern needs and realities. Moreover, it must be established whether the internal dynamics and characteristics[28] of such restrictions are constitutionally justifiable and aligned with international best practice.

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[23] Section 137 of the Insolvency Act; *S v Clifford* 1976 (1) SA 695 (A) 703B; *S v Saunders* 1984 (2) SA 102 (T) 104H; *Wetsgenootskap van die Goeie Hoop v Reneke* 1990 (4) SA 441; *Reyneke v Wetsgenootskap van die Goeie Hoop* 1994 (1) SA 359 (A); Bertelsmann *et al Mars* para 28.8; Roestoff (2018) *THRHR* 399.

[24] See reg 17(1) of the National Credit Act Regulations of 2006 (the NCA Regulations); Roestoff (2018) *THRHR* 400; Kelly-Louw (2015) *De Jure* 96.

[25] Regulation 17 of the NCA Regulations; Roestoff (2018) *THRHR* 400.

[26] Roestoff (2018) *THRHR* 399.

[27] The World Bank Working Group on the treatment of the insolvency of natural persons *Report on the treatment of the insolvency of natural persons* (World Bank Washington DC 2013) (the *World Bank Report*) para 103 notes that unemployment and a lack of available employment are among the primary causes of insolvency of natural persons.

[28] Boraine and Evans *The law of insolvency* para 4A1.

1.1.2 Reasons for the restrictions, disqualifications, and prohibitions

The restrictions that the Insolvency Act and other legislation impose on the insolvent by virtue of being insolvent, coupled with the period that must expire before an insolvent can apply for rehabilitation, were never intended as punishment for insolvent debtors.[29] Rather, they are intended to protect members of the public,[30] particularly the insolvent's creditors and those dealing with the insolvent as traders.[31] The aim is to assure the public that people holding offices of responsibility are people of stability and integrity.[32] It is intended that an enquiry should be undertaken – after a certain period – to establish whether the insolvent can be rehabilitated and thus be allowed to trade with the public like any other honest person.[33]

When the Act was promulgated, bankrupts were regarded as dishonest people who traded fraudulently with the public and who often maliciously incurred credit without any reasonable intention of repaying it.[34] This deviated from the social norm that individuals keep promises and pay back their debts.[35] As a result, bankrupts were treated as cheats akin to thieves.[36] As punishment, rehabilitation was withheld or postponed until such a time that the insolvent had learnt a severe lesson as to the necessity of trading honestly with others.[37]

This negative perception of bankrupts created the stigma[38] that bankrupts are irresponsible people who cannot be trusted and who should be barred from certain trades and responsibilities of trust until they have learnt their lesson.[39] Unfortunately, stigma is based on society's presumption that the insolvent debtor is in control of the circumstances that lead to his or her insolvency.[40] It ignores the reality that, especially

[29] Smith *The law of insolvency* 9.
[30] Smith *The law of insolvency* 9.
[31] Smith *The law of insolvency* 104.
[32] Smith *The law of insolvency* 9.
[33] Smith *The law of insolvency* 9.
[34] Smith *The law of insolvency* 290 n 25.
[35] Mols (2012) *Emory Bankr Dev J* 293.
[36] Calitz (2010) *Fundamina* 11.
[37] *Ex parte Heydenreich* 1917 TPD 657, 658; Smith *The law of insolvency* 9.
[38] Stigma operates in bankruptcy as a product of competing social and economic norms and finite resources. Social norms dictate that individuals keep promises and pay back debts; yet, society emphasises consumption and makes credit readily available for those borrowing beyond their means. See Mols (2012) *Emory Bankr Dev J* 293; Osunlaja *Debt relief measures for NINA debtors in Nigeria* 7.
[39] Mols (2012) *Emory Bankr Dev J* 296.
[40] Mols (2012) *Emory Bankr Dev J* 296.

in modern times, insolvency may be caused by involuntary job loss, terminal illness which may require time off from work, caregiving to a terminally ill family member, lack of adequate insurance, divorce, or death.[41]

The stereotyping of insolvent debtors as a group of dishonest, untrustworthy, irresponsible, and unstable people, resulted in the stigma being systematically entrenched in laws and institutions within our society.[42]

Stigma-perpetuating laws, such as the Insolvency Act, devalue and disadvantage certain individuals in the group of insolvent debtors and may have a psychological effect on these individuals due to possible reputational loss, labelling, isolation, and discrimination.[43]

The *World Bank Report*[44] notes that some countries which subscribe to long lists of restrictions and disabilities for unrehabilitated insolvents, as does South Africa, have reduced or eliminated those disabilities and restrictions to limit the undesirable effects of the stigma. In this respect, Justice C L'Heureux-Dube of the Canadian Supreme Court held that:

> [D]omination always appears natural to those who possess it, and the law insidiously transforms the fact of domination into a legal right. Inequality permeates some of our most cherished and long-standing laws and institutions. Our obligation, therefore, is to reconsider our assumptions, re-examine our institutions, and re-visit our laws, always keeping in mind the reality experienced by those whom nature did not place in a dominant position.[45]

Therefore, in the context of insolvency law it is also important to, as Justice L'Heureux-Dube suggests, re-examine our institutions and revisit our laws to reduce the stigma's psychological effect and to assist honest debtors.[46]

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[41] Mols (2012) *Emory Bankr Dev J* 290.
[42] Inequality not only emerges from irrational legal distinctions, but is often deeply rooted in social and economic rifts between groups in society. Such inequalities are referred to as 'systemic' as they are rooted in the structures, systems, and institutions of our society. See Cheadle *et al South African constitutional law* para 4.3.
[43] Stigma and stereotyping can lead to material disadvantage. In *Union of Refugee Woman v Director, Private Security Industry Regulatory Authority* (CCT 39/06) 2006 ZACC 23, the government argued that refugees could not be regarded as reliable. The minority judgment in this case held that this is unfairly prejudicial and stereotyping, and held that by excluding all refugees whether or not they can comply with the requirements of s 23(1)(*d*), sent a clear message that whether or not refugees can prove trustworthiness, they may not be employed as security service providers. See also Fredman (2016) *IJCL* 736; Mols 2012 *Emory Bankr Dev J* 293, 295 n 30; and Link and Phelan (2001) *Ann Rev Soc* 363, 371, 377.
[44] *World Bank Report* para 123.
[45] L'Heureux-Dube (1997) *SAJHR* 338; Albertyn (1998) *SAJHR* 249.
[46] L'Heureux-Dube (1997) *SAJHR* 338; Albertyn (1998) *SAJHR* 249.

1.1.3 The right to equality

The Bill of Rights[47] which is contained in the Constitution of the Republic of South Africa, 1996 (the Constitution) wrought many changes to the South African legal system.[48] As the supreme law, all law is subject to the Constitution and must be interpreted in a way that promotes the spirit, purport, and objects of the Bill of Rights.[49] In addition, such interpretation must consider international law and may in this context therefore consider foreign insolvency law.[50] Therefore, the Insolvency Act and other legislation are subject to the Constitution and must be interpreted in a manner that does not conflict with the values and principles in the Bill of Rights.[51] Thus, while the Insolvency Act was enacted before the introduction of the interim Constitution in 1993[52] and its foundations differ from the values and principles upon which the Constitution is built, it remains subject to constitutional values and principles.[53] Also, when interpreting the law of insolvency in terms of the Bill of Rights, foreign law may be considered. Where there is a conflict between the foundations of the law of insolvency and the values and principles in the Constitution, it is the laws of insolvency that must conform to constitutional imperatives.[54] Therefore, statutory provisions and established principles and practices such as those applicable in the law of insolvency, can now be constitutionally challenged[55] and international best practices and foreign law may be considered during the review.

The Insolvency Act does not provide for different classes of debtor who are treated differently depending on their circumstances.[56] Despite this, Evans[57] suggests that:

> it does in fact differentiate between those 'rich debtors' who are able to prove an advantage to creditors, and 'poor debtors' who cannot. This raises the question whether, under present legislation, the door has been opened for these 'poor debtors' to question the constitutionality of their position.

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[47] Hereafter the Bill of Rights/the Bill.
[48] Boraine, Evans, Roestoff and Steyn (2015) *NIBLeJ* para 4.
[49] Sections 8(1) and 39(2) of the Constitution; Boraine, Evans, Roestoff and Steyn (2015) *NIBLeJ* para 4.
[50] Section 39(1) of the Constitution.
[51] Boraine, Evans, Roestoff and Steyn (2015) *NIBLeJ* para 4.
[52] Republic of South Africa Constitution Act 110 of 1993 (the interim Constitution).
[53] Boraine, Evans, Roestoff and Steyn (2015) *NIBLeJ* para 6; See Evans *A critical analysis of problem areas* 379.
[54] Boraine, Evans, Roestoff and Steyn (2015) *NIBLeJ* para 4.
[55] Boraine, Evans, Roestoff and Steyn (2015) *NIBLeJ* para 4; see Evans *A critical analysis of problem areas* 379.
[56] Evans (2002) *Int Insol Rev* 34; Coetzee *A comparative reappraisal of debt relief measures* 12.
[57] Evans (2002) *Int Insol Rev* 4. See also Coetzee *A comparative reappraisal of debt relief measures* for a more detailed discussion. Boraine, Evans, Roestoff and Steyn (2015) *NIBLeJ* para 4.

Evans suggests that the Insolvency Act creates a distinction between 'poor debtors' and 'rich debtors'. By analogy, the reason for the existence of the restrictions on unrehabilitated insolvents also indicates the existence of a distinction between 'dishonest debtors' and 'honest debtors'.[58]

As with 'poor debtors', this raises the question of whether under present legislation a door has been opened for 'honest debtors' to question the constitutionality of their position regarding the restrictions imposed on them. While the restrictions on dishonest debtors are intended to direct them to correct their behaviour, the restrictions on honest debtors do not appear to have the same goal. Honest debtors become insolvent because they may have experienced an unfortunate income disruption.[59] The restrictions imposed on these honest insolvents, coupled with the long rehabilitation period, amount to punishment – a result intended for dishonest debtors only. In contrast, the *World Bank Report* notes that the primary purpose of an insolvency regime for natural persons should be to provide relief to honest debtors.[60]

Therefore, the restrictions and the long rehabilitation period in the Insolvency Act need to be re-evaluated to determine whether they are justified in an open and democratic society based on human dignity, equality, and freedom taking into account all the relevant factors. Pertinent questions that need to be addressed include, whether it is correct to punish debtors because they are insolvent, and whether punishment results in insolvents being unfairly and unjustifiably discriminated against simply on the basis of a sequestration order or former sequestration order.[61]

In an attempt to answer these questions and in search of a solution for honest debtors which is less restrictive on their ability to earn a living, an evaluation of the current restrictions on unrehabilitated insolvents is undertaken in light of the right to equality before the law,[62] the right to equal protection and benefit of the law,[63] the right to full and equal enjoyment of all rights and freedoms,[64] the right to have one's inherent

[58] *World Bank Report* paras 70, 370, 454.
[59] See *World Bank Report* paras 39, 190, 278, which states that the mismatch between disposable income and debt service is triggered by one of the many accidents of life, such as unemployment, illness, divorce, or other income interruption or unexpected expense.
[60] *World Bank Report* paras 70, 370, 454.
[61] See *World Bank Report* para 454; Roestoff (2018) *THRHR* 395.
[62] Section 9(1) of the Constitution.
[63] Section 9(1) of the Constitution.
[64] Section 9(2) of the Constitution.

human dignity respected and protected,[65] the right to fair labour practices,[66] and the right not to be unfairly dismissed from employment.[67] What is required, therefore, is harmony between the Bill of Rights and certain provisions in the law of insolvency and an investigation as to whether those provisions need to be amended to reflect harmony with the Bill of Rights on the one hand, and to align the Act in this context with international best practice and foreign law on the other.[68]

Chapter 2 of the Constitution contains the Bill of Rights which is the cornerstone of democracy in South Africa. The Bill of Rights applies to all laws and binds the legislature, the executive, the judiciary, and all organs of the state.[69] The Bill of Rights enshrines the rights of all people in South Africa and affirms the democratic values of human dignity,[70] equality, and freedom.[71] The Bill of Rights provides that the state must respect, protect, promote, and fulfil the rights in the Bill of Rights.[72]

The right to equality is contained in section 9 of the Constitution and reads:

> **Equality**
>
> 9.
>
> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

[65] Section 10 of the Constitution.
[66] Section 23(1) of the Constitution.
[67] Section 185 of the Labour Relations Act 66 of 1995 (the LRA).
[68] Boraine and Evans *The law of insolvency* para 4A1.
[69] Section 8(1) of the Bill.
[70] Section 10 of the Constitution.
[71] Section 7(1) of the Bill.
[72] Section 7(2) of the Bill.

Section 9 promotes equal protection and equal benefit of the law for all persons.[73] This includes the full and equal enjoyment of all rights and freedoms.[74] The Bill specifies that the realisation of this equality must be promoted by designing legislative and other measures that will protect or advance persons or categories of persons disadvantaged by discrimination.[75] In addition, it prohibits unfair discrimination,[76] whether direct[77] or indirect,[78] and provides that any discrimination on the grounds listed in section 9(3) is unfair unless it is established that it is fair.[79]

A distinction is made between formal equality and substantive equality.[80]

Formal equality refers to 'sameness' of treatment, which simply means that all persons who are in the same situation must be treated alike, regardless of their actual circumstances.[81] In addition, people should not be treated differently based on arbitrary characteristics such as religion, race, or gender.[82] Formal equality is generally the conceptual basis for direct discrimination.[83]

Formal equality affords all people equal rights and the view is that inequality can be eliminated by extending the same rights and entitlements to all, following the same neutral norm or standard of measurement.[84] Therefore, it requires only equal application of the law without further examination of the peculiar circumstances of the

[73] Section 9(1) of the Bill; Currie and De Waal *The bill of rights handbook* 210-215.
[74] Section 9(2) of the Bill.
[75] Section 9(2) of the Bill.
[76] Section 9(3) of the Bill.
[77] Direct discrimination occurs when there is a direct and explicit relationship between the distinction and the prohibited ground. Meskin *et al Insolvency law* para 4.8.2.1. See also Smith (2014) *AHRLJ* para 2.1.
[78] Indirect discrimination occurs when conduct that may appear neutral and harmless nevertheless treats people unequally based on other attributes or characteristics (unrelated to the specified grounds) that have the effect of impairing their fundamental human dignity as human beings, or impacts people harmfully in a comparably serious manner. See *Harksen v Lane* 1998 (1) SA 300 (CC) (*Harksen v Lane*) para 46; De Vos and Freedman *South African constitutional law in context* 446, 448; Meskin *et al Insolvency law* para 4.8.2.1.
[79] See s 9(5) of the Constitution.
[80] Currie and De Waal *The bill of rights handbook* 213.
[81] This is an Aristotelian concept of equality, *like cases should be treated alike*. Cheadle *et al South African constitutional law* para 4.3.1; Currie and De Waal *The bill of rights handbook* 213; Smith (2014) *AHRLJ* 611.
[82] Currie and De Waal *The bill of rights handbook* 213-215.
[83] When discrimination is based on a ground listed in s 9(3) of the Constitution.
[84] Cheadle *et al South African constitutional law* para 4.3.1; Currie and De Waal *The bill of rights handbook* 213.

individual or group and the potentially discriminatory impact of the law or policy under review.[85]

Substantive equality, on the other hand, requires a contextual analysis. It shifts the enquiry from an abstract comparison of 'similarly situated individuals' to an examination of the actual impact of an alleged rights violation within the actual socio-economic condition.[86] It examines the condition of the individual within and outside of different socio-economic groups.[87] Substantive equality requires the law to ensure equality of outcome and is prepared to tolerate differences in treatment to achieve this goal.[88] The effects of a particular rule on individuals in different socio-economic groups are emphasised.[89] Because it focuses on the impact of the law or policy and moves away from consistency to substance, the substantive-equality approach incorporates indirect discrimination in its analysis.[90] It is important to incorporate indirect discrimination in equality rights adjudication as it recognises the reality that not all people are on the same playing field. Moreover,

> [a]lthough the long term goal of our constitutional order [the South African Constitution] is equal treatment, insisting upon equal treatment in established inequality may well result in the entrenchment of that inequality.[91]

If one considers the two notions of equality, the contextual or substantive approach is preferred.[92] The Constitution's aim to create a non-racist and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos, and human rights, informs a conception of equality that goes beyond mere formal equality and mere non-discrimination – the latter requiring identical treatment whatever the impact.[93] One of the most important indicators that the Constitution envisages a

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[85] Smith (2014) *AHRLJ* 612. It does not take into account the actual social and economic disparities between groups and individuals. Currie and De Waal *The bill of rights handbook* 213.
[86] Albertyn (1998) *SAJHR* 260; Currie and De Waal *The bill of rights handbook* 213.
[87] Albertyn (1998) *SAJHR* 260.
[88] For example, to realise the right to equality of children with disabilities (eg, deaf children) in regard to school education, it may be necessary to treat them differently from other children. Such children would not have the full and equal enjoyment of their right to education (such education would be inadequate for their special needs) if they were to undergo the same school programme as other children. See Currie and De Waal *The bill of rights handbook* 213 n 18; Smith (2014) *AHRLJ* 613.
[89] Currie and De Waal *The bill of rights handbook* 213.
[90] Smith (2014) *AHRLJ* 613.
[91] See *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) (*Hugo*) para 112; Smith (2014) *AHRLJ* 613.
[92] Cheadle *et al South African constitutional law* para 4.2; Albertyn (1998) *SAJHR* 260; Smith (2014) *AHRLJ* 612; Currie and De Waal *The bill of rights handbook* 214.
[93] *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 26; Currie and De Waal *The bill of rights handbook* 214.

substantive conception of equality, is the endorsement in section 9(3) that equality includes the full and equal enjoyment of all rights and freedoms.[94] A substantive conception of equality supports these fundamental values whereas a formal understanding risks negating these commitments.[95]

Inequality can arise either from differential treatment of groups that should be afforded equal treatment, or from a failure to differentiate between unequal groups.[96] On the other hand, equality can be advanced through similar or differential treatment, depending on the context of the treatment.[97]

Therefore, constitutional interpretation requires section 9 to be read as grounded in a contextual conception of equality. In the *President of the Republic of South Africa v Hugo*[98] the Constitutional Court held that:

> We need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.

From this it is clear that a substantive or contextual approach to equality must be adopted when determining whether the right to equality of the group of insolvent debtors has been violated.

The discussion now turns to other rights relevant to this research.

When considering the impact of these restrictions on individuals in the insolvent debtor group, the human dignity of every individual must be taken into account. The public, for example, has an interest in allowing individuals to work for their living rather than being supported by public funds and also has an interest in benefiting from the skills of particular individuals.[99] Occupational freedom enables individuals to live profitable, dignified, and fulfilling lives and is part of one's identity and constitutive of one's

[94] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 62.
[95] Currie and De Waal *The bill of rights handbook* 214.
[96] An omission to act can also give rise to discrimination. See Cheadle *et al South African constitutional law* para 4.3.1.
[97] Cheadle *et al South African constitutional law* para 4.3.1.
[98] *Hugo* para 41; Currie and De Waal *The bill of rights handbook* 214.
[99] Currie and De Waal *The bill of rights handbook* 465.

dignity.[100] Therefore, it must be established for each individual debtor whether the restrictions have the effect of treating him or her in a way that is demeaning and impairs his or her fundamental dignity as a human being, or affects him or her seriously in a comparably serious manner.[101]

Section 22 of the Bill of Rights recognises the freedom of trade, occupation, and profession. It provides that people have the right to choose their trade, occupation, and profession freely and that only law may regulate the practise of such trade, occupation, or profession.[102] Section 22 is divided into two parts: the regulation of an individual's choice of trade or occupation; and the regulation of the practise of that trade or occupation.[103] The freedom to choose an occupation cannot be regulated by law unless the restriction is justifiable in terms of the limitation clause, section 36 of the Bill of Rights.[104] However, the law can regulate the practise if the regulation is rationally related to the achievement of a legitimate government purpose and does not unfairly and unjustifiably infringe any of the rights in the Bill of Rights.[105]

Section 22 is particularly relevant to insolvency law and this research because insolvency and the different restrictions imposed on insolvents, affect a debtor's right to gainful employment, to practise certain professions, and to act in certain fiduciary capacities. Therefore, the extended period that must pass before rehabilitation affects an insolvent debtor's right freely to participate in economic activity and to pursue a living in that during this period the insolvent is accountable to the trustee for his or her economic activities.[106] When comparing the Insolvency Act's long rehabilitation period

[100] *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 59.
[101] *Harksen v Lane* para 46: Currie and De Waal *The bill of rights handbook* 236. Work is part of one's identity and is constitutive of one's dignity.
[102] This provision is similar to art 12(1) of the German Constitution of 1949 (German Basic Law); art 22 of the 1947 Japanese Constitution; and arts 19(1)(g) and 19(6) of the Indian Constitution. Cheadle *et al South African constitutional law* para 17.1 n 2.
[103] *South African Diamond Producers Organisations v Minister of Minerals and Energy NO* 2017 (10) BCLR 1303 (CC); Cheadle *et al South African constitutional law* para 17.4.1; Currie and De Waal *The bill of rights handbook* 463.
[104] Cheadle *et al South African constitutional law* para 17.4.1; Currie and De Waal *The bill of rights handbook* 463, 467.
[105] *Affordable Medicines Trust v Minister of Health* para 77; *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 para 90. See also generally *Van Rensburg v South African Post Office Ltd* 1998 (10) BCLR 1307 (E); *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC). Currie and De Waal *The bill of rights handbook* 463, 467.
[106] Boraine and Evans *The law of insolvency* para 4A8(i).

with other jurisdictions which have shorter discharge periods,[107] the long period appears unreasonably burdensome on insolvent debtors and open to challenge in this regard.[108] As an unrehabilitated insolvent is excluded from certain positions and offices, it is important also to consider relevant labour-law provisions stemming from the Constitution and the Labour Relations Act (LRA) which relate to the dismissal of employees in a workplace. Section 23 of the Constitution guarantees everyone's right to fair labour practices, while section 185 of the LRA prohibits the unfair dismissal of employees.

Also relevant to this research is section 36 of the Bill of Rights. This section provides for a general limitation on all the rights in the Bill and provides that no law may limit a right entrenched in the Bill, except as provided for in section 36 or elsewhere in the Constitution.[109] Section 36 requires the state to show that a law of general application has limited a right for reasons that can be considered reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.[110] In such an instance, relevant factors to be taken into account include:

(a) the nature of the 'right';
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) whether there are less restrictive means to achieve that purpose.

Therefore, this research evaluates the rights and position of honest insolvent debtors against the background of the above constitutional provisions.

[107] In the United States of America a bankrupt could be discharged from his debts after a few months after filing a bankruptcy petition. See rule 4004(c) of the Federal Rules of Bankruptcy Procedure. In the United Kingdom a bankrupt receives automatic discharge after one year. See s 279(1) of the Insolvency Act of 1986 (the IA 1986). For further discussion see paras 5.2 and 5. 3 in Ch 5.
[108] Boraine and Evans *The law of insolvency* para 4A8(i); Boraine, Evans, Roestoff and Steyn (2015) *NIBLeJ* para 61.
[109] Section 36(1) and 36(2) of the Bill of Rights.
[110] See s 36(1) of the Bill of Rights; Currie and De Waal *The bill of rights handbook* 217; De Vos and Freedman *South African constitutional law in context* 360.

1.2 Research objectives

This research aims to discuss the constitutionality of the impact that the restrictions, disqualifications, and prohibitions relating to unrehabilitated insolvents have on their ability to earn a living and whether these restrictions are still justifiable.

This study aims to achieve the following objectives:

a. To determine the current state of affairs concerning the restrictions, disqualifications and prohibitions applicable to unrehabilitated insolvents.
b. To determine the rationale for the existence of restrictions, disqualifications, and prohibitions imposed on unrehabilitated insolvents.
c. To determine the extent to which the current restrictions, disqualifications, and prohibitions limit unrehabilitated insolvents' constitutional rights and to determine whether they are justifiable in an open and democratic society based on human dignity, equality, and freedom taking all relevant factors into account.
d. To compare the restrictions, disqualifications, and prohibitions currently imposed on unrehabilitated insolvents in South Africa with, and to evaluate them against, current international developments and the position in other jurisdictions.
e. To offer suggestions for law reform.

1.3 Methodology

1.3.1 General

This research involves a literature study and an evaluation of legislation, case law, books, journal articles, theses, and reports. As indicated above,[111] the primary focus of this study is the constitutionality of the impact that the restrictions, disqualifications, and prohibitions relating to unrehabilitated insolvents have on their ability to earn a living. As natural-person insolvency is a universal problem,[112] universal modern solutions should be considered and policymakers should not shy away from opening their thinking to solutions used by other insolvency systems in resolving the same or similar problems.[113] Thus, a study of international policy considerations on insolvency

[111] In para 2.
[112] As per the survey on the insolvency of natural persons over many jurisdictions in the *World Bank Report* and the Insol International consumer debt Report II: Report of findings and recommendations (Report submitted by Insol International 2011) (the *Insol Report*). See Ch 2 paras 2.3 and 2.5.
[113] Coetzee *A Comparative reappraisal of debt relief measures* 40.

systems for natural persons is important in offering guidelines for South African insolvency law reform as regards restrictions and disqualifications on insolvent debtors. In this regard, the American fresh-start policy, the *World Bank Report*, the *Insol Report* and the *European Union Final Report*[114] are discussed. Further, a comparative study of the insolvency systems of the United States of America, England and Wales, and Nigeria as regards restrictions on unrehabilitated bankrupts is undertaken.

1.3.2 The United States of America

The interest in the American system is compelled by the system's pro-debtor approach to bankruptcy and its focus on providing a discharge and a fresh start to the 'honest but unfortunate' debtors.[115] For consumers, the most important feature of bankruptcy is the discharge of debts and the possibility of a second chance for financial success.[116]

In *Local Loan Co v Hunt*,[117] the United States Supreme Court announced that the principal aim of bankruptcy law was to give "the honest but unfortunate debtor a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt".[118] Starting afresh, debtors have an incentive to engage in economically productive activity knowing that they will be able to retain the fruits of their labour.

A discharge prohibits creditors from taking further legal action to collect most pre-petition debts and provides debtors with a legal defence against legal collection actions.[119] In a straight bankruptcy (Chapter 7 asset-liquidation), the filling of the bankruptcy petition creates the insolvent estate and immediately all of the property owned by the debtor when the petition is filed, including exempt property,[120] transfers

[114] European Union Final Report 2003: Report on consumer over-indebtedness and consumer law (the *IFF Report*).
[115] Ferriell and Janger *Understanding bankruptcy* 1-2.
[116] Ferriell and Janger *Understanding bankruptcy* 2.
[117] *Local Loan Co v Hunt* 292 US 234, 244 (1934).
[118] See also *Stellwagen v Clum* 245 US 605, 617 (1918); Orovitz (2013) *Emory Bankr Dev J* 553; Mols (2012) *Emory Bankr Dev J* 305.
[119] Section 727 of the Bankruptcy Code. Ferriel and Janger *Understanding bankruptcy* 455 and 522.
[120] The exempt property starts as property of the estate even though ownership is later returned to the owner. Ferriel and Janger *Understanding bankruptcy* 198. See generally Jackson *The logic and limits of bankruptcy law* 252-279 on discharge and exempt property.

to the estate.[121] In exchange, the debtor is granted a discharge of his or her debts, generally two to three months after bankruptcy proceedings have been initiated.[122]

However, a discharge and a 'fresh start' are only available to 'honest but unfortunate debtors'.[123] Discharge is denied to Chapter 7 liquidation cases[124] where there has been misconduct on the part of the debtor,[125] or where the debtor with intent to hinder, delay or defraud a creditor, has transferred, removed, destroyed, or concealed his or her property within one year before the petition date or after it has been filed.[126] Where there is misconduct in reorganisation cases,[127] the court will deny a discharge by refusing to confirm the reorganisation plan.[128]

As regards employment, section 525 of the Bankruptcy Code contains several prohibitions on certain types of discrimination against bankrupt debtors in the workplace.[129] These include, a prohibition by government units discriminating against debtors as regards licences, permits, charters, franchises, or employment.[130] State supreme courts may not deny licences to practise law to aspiring lawyers unless there are aspects that reflect dishonesty, immorality, or irresponsible behaviour in the aspiring lawyer's background.[131] Although private employers may discriminate against job applicants who have received a bankruptcy discharge, they may not dismiss or discriminate against incumbent employees.[132] Also, the American Constitution[133] does not disqualify persons from being a member of the Senate or the House of Representatives because they are bankrupt.[134] However, creditors are allowed to deny

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[121] This includes the debtor's encumbered property. Ferriel and Janger *Understanding bankruptcy* 198. The property is then divided between the debtor and the creditors.
[122] Rule 4004 of the Federal Rules of Bankruptcy Procedure; Porter and Thorne (2006) *Cornell LR* 76.
[123] Ferriel and Janger *Understanding bankruptcy* 3.
[124] This may be voluntary or involuntary liquidation petitions brought by any individual, charitable, or business entity. See Ferriel and Janger *Understanding bankruptcy* 3.
[125] Section 727 of the Bankruptcy Reform Act of 1978 (the Bankruptcy Code).
[126] Section 727(a)(2) of the Bankruptcy Code.
[127] Chapter 9 (municipalities), Ch 11 (same as Ch 7, but excludes stockbrokers), Ch 12 (family farmers and family fisherman), and Ch 13 (individual with regular income) of the Bankruptcy Code's re-organisations.
[128] Section 541 of the Bankruptcy Code; Ferriel and Janger *Understanding bankruptcy* 198.
[129] See generally Ferriel and Janger *Understanding bankruptcy* 525-528; Orovitz (2013) *Emory Bankr Dev J*; Bronheim (1990) *Bankr Dev J;* Roestoff (2018) *THRHR* 411-412.
[130] Section 525(a) and (b) of the Bankruptcy Code; see Ferriell and Janger *Understanding bankruptcy* 525-258; *Perez v Campbell* 402 US 637 (1971); Dowling *The labour lawyer* (1994) 70.
[131] Ferriel and Janger *Understanding bankruptcy* 526; *Federal Communications Commission v NextWave Personal Communications Inc* 537 US 293 (2003).
[132] Section 525(b) of the Bankruptcy Code.
[133] See art 1 ss 1-3 of the Constitution of the United States of America (American Constitution).
[134] Roestoff (2018) *THRHR* 410.

credit to a previously discharged debtor.[135] Alternatively, creditors may increase interest charges or provide a lower debt limit.[136]

Unlike South African insolvency law, American bankruptcy law already distinguishes between 'honest but unfortunate debtors' and 'dishonest debtors'. Under Chapter 7, honest but unfortunate debtors are discharged from their debts almost immediately. In contrast, the dishonest behaviour of fraudulent debtors is punished by the courts by a denial of a discharge. Under section 525 of the Bankruptcy Code, it is prohibited to discriminate against debtors solely on the basis of their discharge. Therefore, a study of the American bankruptcy system will be beneficial in finding a solution for debtors who became insolvent because of misfortune and whose ability to earn a living has been limited by the restrictions imposed on unrehabilitated insolvents in South Africa.

1.3.3 England and Wales

Like the South African insolvency system, bankruptcy in England and Wales was characterised as punitive and carried a social stigma for the bankrupt. Also, a bankrupt debtor was the subject of legal restrictions and disabilities preventing him or her from holding certain offices and appointments.[137] An undischarged bankrupt could not obtain credit in excess of £250 without disclosing his or her status.[138] He or she could also not engage, directly or indirectly, in any business under a name other than that under which he or she was declared bankrupt without disclosing to all persons with whom he or she entered into any business transaction the name under which he had been adjudged bankrupt.[139] Among others, he or she could also not be a company director,[140] insolvency practitioner,[141] member of parliament,[142] chairman of a land tribunal,[143] school governor,[144] member of a regional or local flood defence

[135] Ferriel and Janger *Understanding bankruptcy* 527. This does not apply to student loans. See s 525(c) of the Bankruptcy Code.
[136] Ferriel and Janger *Understanding bankruptcy* 527.
[137] *Committee Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558 (*Cork Report*) paras 131-132; *Productivity and Enterprise: Insolvency – A Second Chance*, Cm 5234 (2001) (*Second Chance*) Annex A: examples of current restrictions on bankrupts; Fletcher *The law of insolvency* 370-372; Miller and Bailey *Personal insolvency* 455-463.
[138] Section 360(1)(a) of the IA 1986.
[139] Section 360(1)(b) of the UK Insolvency Act.
[140] Company Directors' Disqualification Act 1986. See also Miller and Bailey *Personal insolvency* 456.
[141] Sections 390(4)(a) and 389 of the IA 1986.
[142] Section 427 of the IA 1986.
[143] Agriculture Act 1947.
[144] Education (School Government) Regulations 1989.

committee,[145] member of an internal drainage board,[146] estate agent,[147] practising solicitor,[148] pension trustee,[149] member of a local authority,[150] mayor or member of the London Assembly,[151] or a justice of the peace.[152]

The reasoning behind these restrictions in England and Wales was that a debtor's failure to meet his or her obligations is a matter of public concern in that it creates a risk for the community as a whole and as a result had to be investigated and approved.[153] The result was that, for the future protection of the public, a bankrupt debtor was stigmatised as someone who was inherently untrustworthy.[154] The *Cork Report* even mentioned that a bankrupt:

> [S]hould be disqualified from holding certain positions, particularly those of a public nature involving trust and confidence, and where a record of integrity and competence is sought.[155]

However, the stigma had disadvantages for the bigger picture. For example, it discouraged new entrepreneurs from starting new businesses for fear of the public humiliation associated with business failure.[156] Most creditors were wary of lending money to those who had failed businesses.[157] In fact, most creditors shied away from those who had taken the risk, failed, but wanted to try again.[158] However, Peter Mandelson, Britain's Former Trade Secretary,[159] stated that such people should rather be supported. He maintained that Britain's regulatory system had to be reviewed to

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[145] Environment Act 1995.
[146] Land Drainage Act 1991.
[147] Estate Agents Act 1979.
[148] Solicitors Act 1974.
[149] Pensions Act 1995.
[150] Section 80(1)(b) of the Local Government Act 1972.
[151] Section 21(1)(c) of the Greater London Authority Act 1999.
[152] Justice of the Peace Act 1997.
[153] *Cork Report* paras 38, 51-53; *Second Chance* para 1.21; Walters (2005) *Journal of Corporate Law Studies* 9. It was also said that, "he who has made a shipwreck of his own fortunes is not fit to be trusted to guide and care for the interests of others". See Miller and Bailey *Personal insolvency* 455.
[154] Walters (2005) *Journal of Corporate Law Studies* 22.
[155] *Cork Report* para 1839.
[156] Walters (2005) *Journal of Corporate Law Studies* 4; *Bankruptcy: A Fresh Start – A Consultation on Possible Reform to the Law Relating to Personal Insolvency in England and Wales* (2000) (*Fresh-start consultation document*).
[157] Mandelson's (former Trade Secretary) speech to the British American Chamber of Commerce in New York, October 1998 https://bit.ly/2VO4sVu (accessed 24 February 2020); Walters (2005) *Journal of Corporate Law Studies* 3.
[158] Mandelson's (former Trade Secretary) speech to the British American Chamber of Commerce in New York in October 1998 https://bit.ly/2VO4sVu (accessed 24 February 2020); Walters (2005) *Journal of Corporate Law Studies* 3.
[159] Mandelson's (former Trade Secretary) speech to the British American Chamber of Commerce in New York in October 1998 https://bit.ly/2VO4sVu (accessed 24 February 2020); Walters (2005) *Journal of Corporate Law Studies* 3.

ensure that it did not needlessly deter entrepreneurs – as did the bankruptcy laws – but rather encouraged entrepreneurship.

Influenced by the American system, Britain therefore sought to liberalise its personal insolvency law through responsible risk-taking.[160] This could be done by stimulating entrepreneurship, or at least by removing barriers to its activity.[161] The aim was to encourage honest but responsible entrepreneurs who had pursued a business idea but had failed because of the risks inherent in a market economy to 'try again'.[162] However, the Insolvency Service's[163] fresh-start consultation document[164] also emphasised that 'irresponsible and culpable bankrupts' should still be penalised.

The fresh-start consultation document pointed out that in Britain no distinction is made between honest but unlucky or undercapitalised bankrupts, and reckless or fraudulent bankrupts.[165] It stated that a distinction should be made between the two groups so that the majority of honest bankrupts would not continue to be stigmatised through association with the dishonest.[166]

It also stated that failure by honest and unfortunate bankrupts is normal in a market economy and should not be stigmatised as this discourages such people from future participation in the economy.[167] Thus, it proposed that bankruptcy should be derestricted and post-discharge restrictions be introduced to distinguish the culpable from the honest and to stigmatise only the culpable.[168] The thinking behind the derestriction policy was that measures should be adopted to reduce the stigma of bankruptcy for honest and unfortunate debtors.[169]

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[160] Walters (2005) *Journal of Corporate Law Studies* 3.
[161] Walters (2005) *Journal of Corporate Law Studies* 5.
[162] Mandelson's (former Trade Secretary) speech to the British American Chamber of Commerce in New York, October 1998 https://bit.ly/2VO4sVu (accessed 24 February 2020); Walters (2005) *Journal of Corporate Law Studies 3*. The cost of failure should not be so high that it acts as a deterrent to economic activity. See *Second chance* para 1.24.
[163] The Insolvency Service is an executive agency of the Department for Business, Energy and Industrial Strategy with headquarters in London. It aims, amongst others, to administer bankruptcies and debt relief orders. See The Insolvency Service – GOV.ENGLAND AND WALES https://bit.ly/3ire7Op (accessed 6 August 2021).
[164] *Fresh-start consultation document*.
[165] The foreword to the *Fresh- start consultation document*. See also Walters (2005) *Journal of Corporate Law Studies* 4.
[166] Walters (2005) *Journal of Corporate Law Studies* 5.
[167] Walters (2005) *Journal of Corporate Law Studies* 23.
[168] Walters (2005) *Journal of Corporate Law Studies* 23.
[169] Walters (2005) *Journal of Corporate Law Studies* 22.

These policies gave rise to the Enterprise Act[170] which came into effect on 1 April 2004. Since 1 April 2004, a bankrupt is discharged from bankruptcy one year from the commencement date of his or her bankruptcy.[171] The Act abolished many of the automatic restrictions and disqualifications previously imposed on undischarged bankrupts, which, among others, prevented bankrupts from serving as a member of parliament or a member of a local authority.[172] In addition, upon discharge the disqualifications and restrictions applicable during bankruptcy, lapse.[173]

The reduction in the period before discharge and the reduction of the bankruptcy restrictions reflect parliament's recognition that some bankruptcies result from misfortune and not dishonesty,[174] and that such bankrupts' conduct need not give rise to public concern.[175] As a result, unfortunate debtors should be commercially rehabilitated after one year. In contrast, those whose bankruptcy resulted from their dishonest conduct should endure the disqualifications and restrictions for a period in excess of one year and are liable to remain subject to the restrictions for a period of between two to fifteen years.[176]

As is the case in the USA, England and Wales recognise a distinction between unfortunate debtors and dishonest debtors. Unfortunate debtors in England and Wales are discharged after one year and all bankruptcy restrictions lapse. In contrast, bankruptcy restrictions may continue for a period of up to fifteen years in respect of dishonest bankrupts. A study of the England and Wales insolvency system will be beneficial in finding a solution for debtors who became insolvent because of misfortune and whose ability to earn a living is limited by the insolvency restrictions,

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[170] Enterprise Act 2002 (the Enterprise Act).
[171] Section 279(1) of the IA 1986 as substituted by s 256 of the Enterprise Act.
[172] Sections 266 and 267 of the Enterprise Act. The disqualification only ensues if a bankruptcy restriction order or undertaking is made or given. See s 426A(1) of the IA 1986; Miller and Bailey *Personal insolvency* 457. Another provision that was repealed includes the prohibition on an undischarged bankrupt being or becoming a justice of the peace, which was repealed by s 265 of the Enterprise Act. Also, s 268 of the Enterprise Act empowers the Secretary of State to make an order regarding a provision disqualifying a bankrupt or a class of bankrupts from being elected or appointed to an office, holding an office or position, or becoming or remaining a member of a body or a group. See Kelly "The Enterprise Act 2002: changes in Bankruptcy Law" 7 https://bit.ly/2RZV6VD (accessed 5 June 2019); Walters (2005) *Journal of Corporate Law Studies* 24.
[173] Miller and Bailey *Personal insolvency* 464.
[174] Miller and Bailey *Personal insolvency* 464.
[175] Fletcher *The law of insolvency* 361.
[176] Miller and Bailey *Personal insolvency* 5 and 464; Fletcher *The law of insolvency* 372-376. The provisions relating to bankruptcy restriction orders and undertakings is contained in Schedule 4A to the IA 1986.

disqualifications, and prohibitions imposed on unrehabilitated insolvents in South Africa.

1.3.4 Nigerian system

The inclusion of Nigerian law is based on the desire to choose an African country with similar legal origins to South Africa and which intends to abolish the disqualifications and disabilities imposed on adjudged bankrupts.[177] Both jurisdictions are developing nations and are regarded as the two largest economies in Africa. Nigeria, like South Africa, was a British colony.[178] The Nigerian legal system has a common-law background and its Bankruptcy Act[179] borrowed extensively from Britain's Insolvency Act.[180]

The BA, like South Africa's Insolvency Act, is punitive.[181] This is clear from its Preamble which states that it is:

> An Act to make provisions for declaring as bankrupt any person who cannot pay his debts of a specified amount and to disqualify him from holding certain elective and other public offices or from practising any regulated profession (except as an employee).

Therefore, one of the main aims of the BA is to disqualify any person who has been adjudged bankrupt in Nigeria from holding certain elective and other public offices or from practising in any regulated profession.[182] The reasoning behind the disqualifications on adjudged bankrupts in Nigeria is that a person who cannot apply due diligence in the conduct of his or her own affairs, cannot be expected to apply it in the affairs of the public.[183] It is believed that the disqualifications serve as a means of ensuring that people will be more careful in the conduct of their affairs.[184]

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[177] See the Nigerian Bankruptcy and Insolvency Bill 2015 (the Nigerian Bankruptcy Bill/Bill).
[178] Park *The sources of Nigerian law* 1.
[179] Bankruptcy Act Ch 30 Laws of the Federation of Nigeria 1990 as amended by the Bankruptcy (Amendment) Decree 109 of 1992. This amendment gave rise to the Nigerian Bankruptcy Act Cap B2 Laws of the Federation of Nigeria 2004 (the BA).
[180] See Ihembe *Reforming the legal framework* 250; Roestoff (2018) *THRHR* 417.
[181] See s 126 of the BA; Osunlaja *Debt relief measures for NINA debtors in Nigeria* 64; Kalu (2010) *JILJ* 48.
[182] See the disqualifications in s 126 of the BA.
[183] See Busa "Consumer protection in Nigeria: The Nigerian Bankruptcy Act in perspective" 8 https://bit.ly/3avp6PB (accessed 12 March 2020).
[184] See Busa "Consumer protection in Nigeria: The Nigerian Bankruptcy Act in perspective" 8 https://bit.ly/3avp6PB (accessed 12 March 2020).

Currently, the BA contains a wide range of disqualifications for adjudged bankrupts.[185] Among others, an adjudged bankrupt cannot be elected to the office of the President, Vice-President, Governor, or Deputy-Governor,[186] Senate House of Representatives of the State House of Assembly,[187] or any local government council in any State or the Federal capital.[188] Also, an adjudged bankrupt cannot be appointed to the governing board of any statutory body,[189] act as a Justice of the Peace,[190] trustee of a trust estate,[191] practise any profession that is regulated by the law, or enter into a partnership or any association with any other person, except as an employee.[192]

If a person is adjudged bankrupt while holding these offices, he or she will be required to vacate the position or office.[193] In addition, a person who puts him- or herself forward for appointment or election to the above positions or offices, knowing that he or she has been adjudged bankrupt, is guilty of an offence[194] and may be liable to a fine, or six months' imprisonment, or both.[195] Like South African insolvency law, the current BA is lagging behind when compared with developments[196] regarding disqualifications and restrictions on unrehabilitated insolvents in modern systems.

An adjudged bankrupt in Nigeria receives an automatic discharge of his or her debts five years after a receiving order has been issued against the debtor,[197] but he or she may apply for earlier discharge.[198] This contrasts with the South African ten-year automatic discharge period. However, a Nigerian court may refuse a discharge application if the bankrupt, among others, contributed to his or her bankruptcy in any way, has previously been an adjudged bankrupt, has been found guilty of any

[185] See s 126 of the BA for disqualifications of the bankrupt; s 127 regarding a person who is an adjudged bankrupt while holding the offices mentioned in ss 126 and 128 regarding bankruptcy offences. Kalu (2010) *JILJ* 48; Busa "Consumer protection in Nigeria: The Nigerian Bankruptcy Act in perspective" 7 https://bit.ly/3avp6PB (accessed 12 March 2020).
[186] Section 126(1)(a) of the BA; ss 137(1) and 182(1)(f) of the Constitution of the Federal Republic of Nigeria 1999 (the Nigerian Constitution).
[187] Section 126(1)(b) of the BA; s 107(1)(e) and s 66(1)(e) of the Nigerian Constitution.
[188] Section 126(1)(c) of the BA.
[189] Section 126(1)(d) of the BA.
[190] Section 126(1)(e) of the BA.
[191] Section 126(1)(f) of the BA.
[192] Section 126(1)(e) of the BA.
[193] Section 127(1) of the BA.
[194] Section 128(1) of the BA.
[195] Section 128(6) of the Nigerian Bankruptcy Act.
[196] See American discharge and fresh start in para 3.1 and Britain's Enterprise Act in para 3.2.
[197] Section 31 of the Nigerian Bankruptcy Act. See *Insol Report II* 225.
[198] Section 28 of the Nigerian Bankruptcy Act. See *Insol Report II* 225.

fraudulent breach of trust, or has continued to carry on with trading activities knowing that he or she is insolvent.[199]

However, the BA will be repealed if the Bankruptcy and Insolvency Act,[200] which is currently a Bill before the National Assembly (Federal Parliament), becomes law.[201] In the Bill, a bankrupt will receive automatic discharge nine months from the date of bankruptcy[202] and he or she may apply for an even earlier discharge.[203]

The Nigerian Bankruptcy Bill does not refer to the disqualifications of bankrupts currently set out in section 126 of the BA. However, section 167 of the Bill states that all statutory disqualifications arising from bankruptcy will also end upon discharge provided that the bankrupt has obtained a certificate from the court indicating that the bankruptcy was caused by misfortune without any misconduct on his or her part. It is not clear which statutory disqualifications the Bill refers to as there is no section 126 equivalent in the Bill. The only disqualification that is evident in the Bill is that contained in section 181(2)(b), which takes away a trustee's licence to act as a trustee in a bankrupt estate should the trustee become bankrupt. Thus, section 167 may be referring to disqualifications stemming from other Acts.[204]

As in the BA, the Bill makes it an offence for a bankrupt to engage in any trade or business without disclosing that he or she is an undischarged bankrupt to all persons with whom he or she enters into any business transaction.[205]

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[199] Section 24(4)(a-i) of the Nigerian Bankruptcy Act.
[200] Bankruptcy and Insolvency Act of 2016.
[201] Section 269 of the Bill.
[202] Section 161(1)(g) of the Nigerian Bankruptcy Bill.
[203] Section s 161(2) of the Nigerian Bankruptcy Bill.
[204] See s 137(1) of the Nigerian Constitution which disqualifies an adjudged bankrupt from being elected to the office of the President; s 182(1)(f), which disqualifies an adjudged bankrupt from being elected to the office of Governor of a State; s 107(1)(e), which disqualifies an adjudged bankrupt from being elected to the House of Assembly; and s 66(1)(e), which disqualifies an adjudged bankrupt from being elected to the Senate or the House of Representatives. Also see similar disqualifications for an Area Council in s 107(1)(e) of the Electoral Act 6 of 2010; company director in ss 253(1), 257(1)(c) and 258(1)(b) of the Companies and Allied Matters Act 59 of 1990 of the Laws of the Federal Republic of Nigeria; Enabulele (2008) *Commw L Bull* 562, 563.
[205] An undischarged bankrupt who: (a) engages in any trade or business without disclosing to all persons with whom he or she enters into any business transaction valued at more than five hundred dollars that he or she is an undischarged bankrupt; or (b) obtains credit to a total of one thousand dollars or more from any person or persons without informing such persons that he or she is an undischarged bankrupt, commits an offence and is liable on summary conviction, to a fine of ten thousand dollars and imprisonment for one year. See s 247 of the Nigerian Bankruptcy Bill.

The Nigerian Bankruptcy Bill also does not indicate the reasons for the repeal of the Nigerian BA,[206] more particularly, the reasons for the removal of bankruptcy disqualifications.[207] However, the BA's Preamble is sufficient to deter any debtor from bankruptcy proceedings for fear of disqualification from public office or from practising in a regulated profession. By considering the Preamble on its own, it is clear that the BA is far from the envisaged purpose of an insolvency regime for natural persons, which the *World Bank Report* indicates is "to provide relief to honest debtors".[208]

Further, the fact that there is no record of bankruptcy cases in Nigeria[209] indicates that a greater stigma than in South Africa or in England and Wales is associated with bankruptcy in Nigeria, which has rendered the BA obsolete.[210] Nigerian bankruptcy authors have opined that the societal belief that debtors are outcasts who should be ostracised is one of the main reasons for the unpopularity of bankruptcy proceedings in Nigeria.[211] Further, bankruptcy law is not part of the curriculum in Nigerian law schools and bankruptcy practitioners in Nigeria are therefore largely unaware of its existence.[212]

In light of this, the Nigerian Bankruptcy Bill appears to be moving towards achieving the purpose of assisting honest debtors by removing the disqualifications on adjudged bankrupts and by providing for an early discharge which will then alleviate or reduce the stigma associated with bankruptcy in Nigeria.

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[206] See s 269 of the Nigerian Bankruptcy Bill's Explanatory Memorandum, which states that: "This Bill seeks to revise the law relating to bankruptcy to make provision for corporate and individual insolvency; to provide for the rehabilitation of the insolvent debtor and to create the office of Supervisor of Insolvency."

[207] A survey conducted by the World Bank in 2010 on insolvency reform in the sub-Sahara African region, indicated that Nigeria had no unified legislation, lacked expedient procedures, had no artificial framework for out of court debt negotiations, and lacked regulatory bodies for insolvency practitioners. The survey did not mention the reason for the removal of the bankruptcy disqualifications. See Insol International Report: African Round Table on Insolvency Reform 2.

[208] *World Bank Report* paras 70, 370, 454.

[209] *Insol Report II* 229.

[210] See Osunlaja *Debt relief measures for NINA debtors in Nigeria* 68.

[211] Osunlaja *Debt relief measures for NINA debtors in Nigeria* 68; Ajayi, SAN and Basiru "Implementing bankruptcy law in Nigeria: hindrances and solution options" https://bit.ly/3gMkYkt presented at the National Seminar on Banking and Allied Matters For Judges, Protea Hotel, Enugu, 2-4 December 2003 (accessed 12 March 2020).

[212] Ajayi, SAN and Basiru "Implementing bankruptcy law in Nigeria: hindrances and solution options" https://bit.ly/3gMkYkt presented at the National Seminar on Banking and Allied Matters For Judges, Protea Hotel, Enugu, 2-4 December 2003 (accessed 12 March 2020).

1.4 Chapter overview

a. Chapter one is the introductory chapter. It provides background information and explains the need for research in this field. This chapter also contains the research objectives and the methodology adopted in the research.

b. Chapter two provides an overview of international policy considerations on insolvency systems for natural persons. The American fresh-start policy for 'honest but unfortunate debtors' is considered. Further, the *World Bank Report*, the *Insol Report*, and the *IFF Report* are discussed. A discussion of international best practice for the insolvency of natural persons is important in providing guidelines for South African insolvency law reform as regards restrictions and disqualifications applicable to insolvent debtors.

c. Chapter three outlines the nature and policy objectives of South African insolvency law. It sets out the legal position in respect of the restrictions and disqualifications applied to insolvent debtors, the rationale for their existence, as well as the impact of an employee's right not to be unfairly dismissed on the restrictions and disqualifications.

d. Chapter four examines the prohibition of unfair discrimination. It addresses whether the restrictions and disqualifications imposed on unrehabilitated insolvents in South Africa amount to unfair discrimination in terms of the Bill of Rights. This chapter, consequently, sets out the relevant provisions of the Bill of Rights and analyses whether the restrictions unduly limit an insolvent's ability to earn an income.

e. Chapter five outlines the principles regarding restrictions and disqualifications for insolvents from the American system, the England and Wales insolvency system, and developments in the Nigerian system. This chapter analyses and compares international trends in these jurisdictions with the South African counterparts where it is relevant to do so.

f. Chapter six contains the conclusions and recommendations for possible law reform.

1.5 Reference methods, key references, terms and definitions

a. The full titles of sources in this thesis and abbreviated mode of citation used in the footnotes are provided in the bibliography.

b. Terms and definitions:

i. ‘insolvent natural person’ and ‘consumer debtor’ are used interchangeably in the course of this thesis;

ii. ‘insolvency’ and ‘over-indebtedness’ are used as synonyms in this study;

iii. ‘insolvency’ and ‘bankruptcy’ are used as synonyms in this study and are used depending on what is in use in the jurisdiction under consideration.

CHAPTER 2: INTERNATIONAL POLICY CONSIDERATIONS AND MODERN TRENDS IN NATURAL-PERSON INSOLVENCY SYSTEMS IN LIGHT OF INSOLVENCY RESTRICTIONS

CHAPTER OVERVIEW

2.1 Introduction

As indicated in Chapter 1, the impediments that an insolvent person face can be grouped into three stages: impediments before sequestration; impediments during sequestration; and impediments after sequestration (rehabilitation and discharge).[1] Although these three stages will be discussed in Chapter 3,[2] a brief overview is necessary in this chapter to understand the context of this chapter. Before sequestration, an insolvent person confronts the obstacle of accessing the sequestration process. The 'advantage-to-creditors' requirement which must be met before a court can grant the sequestration order is the main hindrance in this stage.[3]

[1] Ch 1 para 1.1.1.
[2] Ch 3 paras 3.3, 3.4 and 3.5.
[3] Ch 3 paras 3.1 and 3.3.

Once an insolvent has overcome this first hurdle, he or she enters the second stage, the impediments during sequestration.[4] This is the stage at which the bulk of the restrictions on insolvent debtors arise, amongst these is the disqualification from following a particular type of employment or occupation. The final stage occurs after rehabilitation and discharge.[5] While rehabilitation discharges a debtor from all pre-insolvency debts, it does not remove all the obstacles faced by rehabilitated insolvents. After rehabilitation and discharge, South African laws and policies continue to limit insolvents' ability to re-enter or re-establish themselves in the economy. These impediments may have an impact on unrehabilitated and a discharged insolvent's ability to earn a living.

This chapter provides an overview of international policy considerations in insolvency systems for natural persons. While the American bankruptcy law system as regards the restrictions on an insolvent's capacity to earn a living will be discussed in Chapter 5,[6] the American fresh-start policy for 'honest but unfortunate debtors' is considered in this chapter. Further, the *World Bank Report*,[7] the *Insol Report*,[8] and the *European Union Final Report*[9] are discussed. Thus, this chapter aims to extract international guidelines that could be taken as international best practice in this regard, and are seen as effective for natural-person insolvency systems which could be relevant in South African insolvency law as regards the limitations on insolvent debtors. Such guidelines should also be regarded as shared recommendations by the jurisdictions considered in this thesis and against which South African insolvency law on the limitations on insolvent debtors will be measured with a view to making recommendations for reform. As indicated in Chapter 1,[10] natural-person insolvency law poses various problems around the globe and universal modern solutions should therefore be considered. Consequently, taking into account inherently national

[4] Ch 3 paras 3.1 and 3.4.
[5] Ch 3 paras 3.1 and 3.5.
[6] Ch 5 para 5.2.
[7] World Bank Working Group on the Treatment of the Insolvency of Natural Persons Report on the Treatment of the Insolvency of Natural Persons (World Bank Washington DC 2013) (the *World Bank Report*).
[8] Insol International consumer debt report II: Report of findings and recommendations (Report submitted by Insol International 2011) (the *Insol Report II*).
[9] European Union Final Report 2003: Report on consumer over-indebtedness and consumer law (the *IFF Report*).
[10] Ch 1 para 3.1.

factors,[11] different policy options, and diverse sensitivities around the world,[12] policymakers should not shy away from solutions used in other insolvency systems for the same or similar problems.[13]

2.2 The American system

2.2.1 General background

The original purpose of bankruptcy law has always been a special collective debt-collection mechanism aimed at dealing with the rights and entitlements of creditors to the assets belonging to the debtor.[14] The fact that bankruptcy provides the debtor with some relief from creditor harassment does not detract from the fact that bankruptcy has always been a creditor's remedy.[15] Even the fresh-start policy that discharges a debtor from continued liability from pre-bankruptcy debts, was never intended as a relief measure for debtors.[16] Instead, it was an incentive for the debtor's efforts to increase the return to his or her creditors.[17]

The recognition of the need to protect debtors as a legislative aim arose from the recognition of the increasing rate and importance of credit in a country's economy during the nineteenth century.[18] While civil imprisonment was used as a heavy-handed method to enforce contracts and collect debts,[19] it proved uneconomical as the debtor's efforts to recover from his or her overindebtedness and to return to solvency were stopped.[20] It became apparent that the credit system is an important and integral part of a nation's wealth creation in which debtors and traders play a pivotal role.[21]

The attitudes towards borrowing, economic failure, and insolvency changed.[22] While overindebtedness was once a symbol of overspending and poor financial management, it was now seen as a fitting and necessary feature of commercial

[11] Coetzee *A Comparative reappraisal of debt relief measures* 92.
[12] *World Bank Report* para 8.
[13] Ch 1 para 3.1.
[14] Jackson *The logic and limits of bankruptcy law* 3-5; Hallinan (1986) *U Rich L Rev* 54; Howard (1987) *Ohio State LJ* 1050.
[15] Hallinan (1986) *U Rich L Rev* 54.
[16] Hallinan (1986) *U Rich L Rev* 54.
[17] Hallinan (1986) *U Rich L Rev* 54; Howard (1987) *Ohio State LJ* 1049.
[18] Hallinan (1986) *U Rich L Rev* 56.
[19] Noel *A history of the bankruptcy law* 184.
[20] Noel *A history of the bankruptcy law* 184.
[21] Noel *A history of the bankruptcy law* 183. See also Hallinan (1986) *U Rich L Rev* 56.
[22] Hallinan (1986) *U Rich L Rev* 56.

activity.[23] Clearly there was a link between insolvency and credit.[24] It was further observed that business failure and the resultant economic risks involved in commercial activity were not always caused by a debtor's dishonesty and irresponsibility.[25] Such failures could also have resulted from economic forces outside the debtor's control.[26] There was thus a close relationship between fault and default.[27] This justified the need for a system that retains credit, is fair to creditors while not unreasonably burdening debtors, and distinguishes the involuntary inability of the honest businessman from the fraudulent neglect of the skilful businessman.[28]

This gave rise to laws aimed at releasing insolvent debtors from severe collection methods and reducing the severity of the legal consequences of insolvency and economic failure.[29] These objectives led to the abolition of civil imprisonment by allowing the imprisoned debtor to transfer all his or her non-exempt property to his or her trustee for the creditor's benefit in exchange for a release from confinement.[30] This further led to the creation of systems that not only released the insolvent from confinement but also permanently discharged him or her from his or her debt.[31]

2.2.2 Fresh start for honest debtors

As early as 1877 the American courts established that for an individual debtor, bankruptcy is "general law by which the honest citizen may be relieved from the burden of hopeless insolvency".[32] Following on this, subsequent American cases stated that:

> Systems of bankruptcy are designed to relieve the honest debtor from the weight of indebtedness which has become oppressive and to permit him to have a fresh start in business or commercial life, freed from the obligation and responsibilities which may have resulted from business misfortunes.[33]

The term 'fresh start' originated in *Local Loan Co v Hunt*.[34] In this case, the United States Supreme Court held that the principal aim of bankruptcy law was to give 'the honest but unfortunate debtor' a new opportunity in life and a clear field for future effort,

[23] Hallinan (1986) *U Rich L Rev U Rich L Rev* 56.
[24] Noel *A history of the bankruptcy law* 184.
[25] Hallinan (1986) *U Rich L Rev* 56.
[26] Hallinan (1986) *U Rich L Rev* 56.
[27] Hallinan (1986) *U Rich L Rev* 56.
[28] Noel *A history of the bankruptcy law* 184.
[29] Hallinan (1986) *U Rich L Rev* 55-56.
[30] Hallinan (1986) *U Rich L Rev* 55.
[31] Hallinan (1986) *U Rich L Rev* 55.
[32] *Neal v Clark* 95 US 704, 709 (1877).
[33] See *Wetmore v Markoe* 196 US 68, 77 (1904); *Williams v US Fidelity Co* 236 US 549, 554-55 (1915).
[34] *Local Loan Co v Hunt* 292 US 234 (1934) 244.

unhampered by the pressure and discouragement of pre-existing debt.[35] Starting afresh, debtors have an incentive to engage in economically productive activity knowing that they will be able to retain the fruits of their efforts.

The fact that the courts always mention 'honest citizen', 'honest debtor', and 'honest but unfortunate debtor' alludes to the fact that a 'fresh start' is sufficiently important to merit discharge of some debts and for some debtors.[36] The discharge provisions[37] of the Bankruptcy Code, for example, exclude, amongst others, obligations for taxes, child support, education loans, obligations incurred by the debtor's willful and malicious injury of another, use of a false financial statement to secure credit, and any debt relating to the misconduct of the debtor in the bankruptcy proceedings. Therefore, bankruptcy is not intended to become a shelter for debtors who have engaged in dishonesty or intentional disregard of the rights of others.[38]

Individuals do not have a constitutional right to have their debts discharged.[39] Howard[40] observes that only 'worthy debtors' are eligible for a fresh start. A fresh start is exclusively available to the honest debtor.[41] At the centre of the honesty standard is an investigation into the conduct of the debtor during the bankruptcy process – his or her 'procedural honesty'[42] – and his or her conduct outside of the bankruptcy process but regarding the claims in the process – 'substantive honesty'.[43] Procedural honesty concerns, for example, the conduct of the debtor in which he or she intentionally conceals property affected by the bankruptcy, fails without justification to keep adequate records, makes a false oath during a bankruptcy case, or fails to explain the dissipation of assets.[44] This type of conduct by the debtor is regarded as the most serious in considering a denial of a discharge.[45]

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[35] See also *Stellwagen v Clum* 245 US 605, 617 (1918); Orovitz (2013) *Emory Bankr Dev J* 553; Mols (2012) *Emory Bankr Dev J* 305.
[36] Howard (1987) *Ohio State LJ* 1047.
[37] See ss 523 and 727 of the Bankruptcy Reform Act of 1978 (the Bankruptcy Code).
[38] Howard (1987) *Ohio State LJ* 1049.
[39]. *US v Kraus,* 409 US 434 (1973) 445; Bonica (2019) *St John's Bankr Research Libr* 1.
[40] Howard (1987) *Ohio State LJ* 1050-1057.
[41] See generally, Howard (1987) *Ohio State LJ* 1050-1057; Ferriell and Janger *Understanding bankruptcy* 1-2.
[42] Howard (1987) Ohio State *LJ* 1053.
[43] Howard (1987) *Ohio State LJ* 1054.
[44] Section 727(a) of the Bankruptcy Code; Howard (1987) *Ohio State LJ* 1053-1054.
[45] Howard (1987) *Ohio State LJ* 1053.

Substantive dishonesty concerns intentional and malicious acts by the debtor to injure or defraud another person who subsequently becomes an unpaid creditor because of the debtor filing for bankruptcy.[46] Another act is where a debtor recklessly incurs a debt not taking into account or caring that he or she cannot repay the debt or being naively optimistic that things will work out.[47] A debtor may also not have exercised reasonable care in his or her financial affairs and acted negligently or may have been unfortunate to have been trapped in events beyond his or her control through sudden and unexpected illness or loss of a job without fault.[48]

According to Howard, the dishonesty standard provides a reliable guideline in distinguishing the worthy from the unworthy or the honest from the dishonest.[49] In its extreme form, she states that the willful and malicious conduct of the debtor indicates dishonesty, and discharge in those instances should be barred.[50] While a debtor who is faced with unexpected financial problems is not dishonest,[51] she states that limitations on discharge are important to control the debtor's conduct.[52] This is because a debtor who is aware of the potential availability of a discharge may incur more debt than would a person who is granted credit on the basis of his or her ability to repay and expected future income.[53] In the main, the policy against the granting of a discharge to a dishonest debtor is firmly rooted in the norm that debts should be paid.[54] The denial of a discharge to a debtor who has been involved in undesirable activities helps to deter such conduct, and more particularly, to prevent fraudulent activities towards creditors.[55] It has the aim of making participation in fraudulent activities less attractive or riskier in that as such action would result in the denial of discharge – a harsh punishment.[56]

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[46] Howard (1987) *Ohio State LJ* 1054.
[47] Howard (1987) *Ohio State LJ* 1054.
[48] Howard (1987) *Ohio State LJ* 1054. See also Ramsay *Personal insolvency in the 21st Century* 20-21 on causes of bankruptcy per country.
[49] Howard (1987) *Ohio State LJ* 1054.
[50] Howard (1987) Ohio *State LJ* 1054 and 1070.
[51] Howard (1987) *Ohio State LJ* 1054.
[52] Howard (1987) *Ohio State LJ* 1054.
[53] Howard (1987) *Ohio State LJ* 1055 and1070.
[54] Howard (1987) *Ohio State LJ* 1054.
[55] Jackson *The logic and limits of bankruptcy* 274.
[56] Jackson *The logic and limits of bankruptcy* 278.

2.2.3 The justification for discharge from debt

The 1841 Bankruptcy Act[57] was the first bankruptcy Act to allow traders and non-traders voluntarily to seek a discharge of their debts in exchange for the surrender of their valuable property.[58] However, it was abandoned because it did not balance the interests of both debtors and creditors[59] and was seen to benefit debtors only.[60]

It was the 1898 Bankruptcy Act[61] that provided an unfettered discharge of the debts of all individual debtors. This was seen as the most generous provision in any law in the world.[62] It allowed all debtors voluntarily to turn their attachable property over and seek an immediate and unconditional discharge of their debts.[63] Before the 1898 Bankruptcy Act, discharge was dependent on obtaining creditors' consent which was generally subject to a two-thirds majority vote.[64]

As the discharge of debts freed individual debtors from their valid obligations, it conflicted with America's contract-law principle that contracts ought to be upheld.[65] Rational explanations were required to justify why the individual bankruptcy discharge should be ranked above the contractual obligation to respect and enforce contracts.[66] Kilborn distinguishes between three rationales or what he terms 'themes': the collection theme; the mercy theme; and the rehabilitation theme.[67]

The collection theme is linked to the original aim of bankruptcy as a debt-collection mechanism.[68] Under this theme, discharge is aimed at encouraging debtors to co-operate with their creditors to disclose property available to pay debts, avoid wasteful multiple collection actions, and provide for the equal distribution of the debtor's property among his or her creditors.[69] However, Kilborn observes that this rationale

[57] Bankruptcy Act of 1841.
[58] Kilborn (2003) *Ohio State LJ* 858.
[59] Coleman *Debtors and creditors in America* 23.
[60] Coleman *Debtors and creditors in America* 23.
[61] The Bankruptcy Act of 1898 (the 1898 Bankruptcy Act).
[62] Tabb and Jordon (1991) *American Bankr LJ* 325; Kilborn (2003) *Ohio State LJ* 860-861.
[63] Davies (1980) *Catholic University Law Review* 866; Kilborn (2003) *Ohio State LJ* 859. However, debts such as certain taxes, alimony and support obligations, and liability for wilful and malicious injury to another are not dischargeable.
[64] Kilborn (2003) *Ohio State LJ* 860.
[65] Kilborn (2003) *Ohio State LJ* 861.
[66] Kilborn (2003) *Ohio State LJ* 862.
[67] Kilborn (2003) *Ohio State LJ* 862. See also *Ramsay Personal Insolvency in the 21st Century* 17; Spooner (2015) *NIBLeJ* 540.
[68] Howard (1987) *Ohio State LJ* 1049; Kilborn (2003) *Ohio State LJ* 862.
[69] *United States v Kras* 409 US 434, 447 (1973); Howard (1987) *Ohio State LJ* 1049; Kilborn (2003) *Ohio State LJ* 862.

does not justify the provision of discharge as most bankruptcy cases initiated by individual debtors in America produce no assets for equal distribution among creditors.[70] Such cases are referred to as 'no-asset bankruptcies'[71] and they have been the norm in individual cases since the Bankruptcy Act of 1841.[72]

According to the mercy rationale, providing a discharge to an overburdened debtor is the morally just reaction to the suffering of the honest but unfortunate debtor.[73] This theme suggests that the call for mercy to the pointless suffering of a debtor through a discharge of debts, stems from the natural-law theory of morality,[74] providing basic humanity to fellow man,[75] and compassion towards the less fortunate in our society.[76] However, Kilborn states that the mercy theme played a role in the abolition of slavery and imprisonment for debt and not in the discharge of debts in that it had been long forgotten by the time the discharge of debts was introduced.[77] Other writers agree that limiting the discharge to the honest but unfortunate debtor shows the moral element in the fresh-start policy.[78] The question of when the law says 'let go' to the creditor and when it says 'pay' to the debtor, is the main issue in bankruptcy and these writers are of the view that this is a moral decision.[79] They state that this can be seen in the denial of a discharge to certain debts that were incurred dishonestly and the denial of a discharge to debtors involved in dishonest conduct by hiding assets, lying under oath, or to their creditors.[80]

The last theme, and the most common rationale according to Kilborn, is the rehabilitation theme.[81] Reliance on the rehabilitation theme was seen in the 'fresh-start' policy under the 1898 Bankruptcy Act[82] which was the immediate precursor to the Bankruptcy Code.

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[70] Kilborn (2003) *Ohio State LJ* 865.
[71] See Ch 7 of the Bankruptcy Code. This topic will be discussed in the Ch 5 discussion on Ch 7 of the Bankruptcy Code.
[72] Kilborn (2003) *Ohio State LJ* 865.
[73] Kilborn (2003) *Ohio State LJ* 863.
[74] Flint (1991) *Wash & Lee L Rev* 516-520; Kilborn (2003) *Ohio State LJ* 863.
[75] Noel *A history of the bankruptcy law* 200; Kilborn (2003) *Ohio State LJ* 863.
[76] Flint (1991) *Wash & Lee L Rev* 554; Kilborn (2003) *Ohio State LJ* 863.
[77] Kilborn (2003) *Ohio State LJ* 874-876.
[78] Sullivan, Warren and Westbrook *As we forgive our debtors* 9; Ferriell and Janger *Understanding bankruptcy* 3.
[79] Sullivan, Warren and Westbrook *As we forgive our debtors* 9.
[80] Ferriell and Janger *Understanding bankruptcy* 3; s 523(a)(2) and 725(a) of the Bankruptcy Code.
[81] Kilborn (2003) *Ohio State LJ* 863.
[82] Kilborn (2003) *Ohio State LJ* 863, 877.

In the *Commission Report*[83] submitted to Congress in 1973 by the commission convened to examine bankruptcy law reform, the commission explained that one important function of discharge for individuals is "to rehabilitate debtors for continued and value-productive participation, i.e., to provide a meaningful 'fresh start'".[84] Therefore, the rehabilitation policy was described as the economic rehabilitation of the debtor in that discharge facilitates future access to credit[85] and allows the debtor to resume economic participation in the open credit economy.[86]

The underlying rationale of this theme is that bankruptcy takes away a debtor's earning capacity[87] and future income.[88] As a result, the debtor loses his or her motivation to work, earn a living, and to acquire property because he or she knows that whatever money he or she makes will go to his or her creditors.[89] A discharge resolves this problem because a debtor is afforded a new opportunity to start afresh and resume participation in the economy after bankruptcy unburdened by pre-bankruptcy debts. Therefore, a discharge in bankruptcy insulates all the debtor's future income from creditors[90] and possibly also protects his or her job.[91]

In this context the open-credit economy refers to the systems used by private financial institutions to provide credit in terms of standard contracts to economically constrained debtors.[92] According to the *Commission Report*, the values involved in the open-credit economy are the main processes that connect them to the bankruptcy process.[93] For example, the values embedded in the open-credit economy include the debtor's and creditor's ability to foresee the legal consequences of their conduct and to trust that parties required to perform in terms of the contract can contract.[94] The bankruptcy process balances these values through an orderly set of rules which allow creditors

[83] Report of the Commission on the bankruptcy laws of the United States HR DOC No 93-137 (1973) , 68-74 (the Commission Report).
[84] See also Howard (1987) *Ohio State LJ* 1059; Kilborn (2003) *Ohio State LJ* 863; Spooner (2015) *NIBLeJ* 541.
[85] Kilborn (2003) *Ohio State LJ* 883.
[86] Howard (1987) *Ohio State LJ* 1062.
[87] Noel *A history of the bankruptcy law* 187.
[88] Baird *Elements of bankruptcy* 33.
[89] Kilborn (2003) *Ohio State LJ* 877.
[90] Jackson *The logic and limits of bankruptcy* 254; Baird *Elements of bankruptcy* 33; Hallinan (1986) *U Rich L Rev* 147.
[91] Kilborn (2003) *Ohio State LJ* 877.
[92] Commission Report 68-69; Howard (1987) *Ohio State LJ* 1062.
[93] Commission Report 69; Howard (1987) *Ohio State LJ* 1062.
[94] Commission Report 70; Howard (1987) *Ohio State LJ* 1062.

access to the debtor's assets and the debtor is rehabilitated "for continued and more value-productive participation".[95] Therefore, the fresh-start policy shifts the focus away from the interests of the creditors and instead balances the interest of creditors with those of debtors and determines which assets should be kept away from creditors.[96] Even though bankruptcy aims to serve the open-credit economy values, the *Commission Report* states that in the event of a conflict, bankruptcy's internal goals take preference.[97] Such goals are equal distribution among creditors, a fresh start for debtors, and economic administration.[98]

2.2.4 Other justifications for a discharge from debt

In trying to understand why society regards it desirable to allow individual debtors a discharge of debts, Jackson states that there may be two other reasons, amongst others, that may provide partial justification for the discharge of debts.[99] The first is that a discharge assists in risk allocation; the second is that it provides social safety nets.[100]

As regards risk allocation, the question that arises is whether the debtor or the creditor bears the greater risk?[101] Jackson refers to Eisenberg[102] who suggests that risk-bearing is the main issue underlying discharge.[103] Eisenberg states that a discharge system provides a technique for allocating the risk of financial distress between a debtor and his or her creditors.[104] He further suggests that the debtor should be presumed to be the superior risk bearer since he or she is in greater control of his or her financial activities than any lender.[105] Thus he or she is better able to judge when he or she is taking on excessive credit. However, Jackson observes that the risk allocation analysis does not provide enough justification for the discharge of the debts of individual debtors as it is based solely on assumptions.[106]

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[95] Commission Report 71; Howard (1987) *Ohio State LJ* 1062.
[96] Jackson *The logic and limits of bankruptcy* 225.
[97] Commission Report 68; Howard (1987) *Ohio State LJ* 1062.
[98] Commission Report 75; Howard (1987) *Ohio State LJ* 1062.
[99] Jackson *The logic and limits of bankruptcy* 229.
[100] Jackson *The logic and limits of bankruptcy* 229-230.
[101] Jackson *The logic and limits of bankruptcy* 229.
[102] Eisenberg (1981) *UCLA L Rev* 976-991.
[103] Jackson *The logic and limits of bankruptcy* 229.
[104] Jackson *The logic and limits of bankruptcy* 229.
[105] Jackson *The logic and limits of bankruptcy* 229.
[106] Jackson *The logic and limits of bankruptcy* 230.

Jackson then argues that discharge provides a social safety net as it can limit the moral hazard created by social programmes.[107] The knowledge that society will in the future bear some of the costs of involvement in risky activities through social programmes, leads individuals to underestimate the cost of such risky activities.[108] This leads to the moral hazard that individuals will become involved in risky activities knowing that they can rely on social insurance.[109] If there is no discharge, an individual who loses his or her assets to creditors might rely instead on social welfare programmes and the existence of those programmes may encourage him or her to become involved in more risky borrowing.[110]

A discharge, on the other hand, places most of the risk of an ill-advised decision on creditors rather than on social programmes.[111] The availability of a discharge in bankruptcy encourages creditors to police extensions of credit and thus minimise the moral hazard created by safety-net programmes. This is because creditors can monitor debtors and are free to grant or withhold credit – ie, the discharge system contains a built-in checking mechanism.[112] Therefore creditors monitor the debtors and the discharge of debts provide incentives to creditors for such monitoring.[113]

2.2.5 Factors that disrupt a 'fresh start'

Although the fresh-start policy aims to give the honest but unfortunate debtor a fresh start through a discharge of debts, it does not provide debtors with a completely clean slate as there are a few limiting factors.[114] These include the availability of a discharged bankrupt's credit history report,[115] employment discrimination after discharge, and laws that increase the stigma attached to bankruptcy. Thus, the interplay between adverse credit information and unemployment has been described as "almost like being forever sentenced to a debtor's prison".[116]

[107] Jackson *The logic and limits of bankruptcy* 231.
[108] Jackson *The logic and limits of bankruptcy* 231.
[109] Jackson *The logic and limits of bankruptcy* 231.
[110] Jackson *The logic and limits of bankruptcy* 231.
[111] Jackson *The logic and limits of bankruptcy* 231.
[112] Jackson *The logic and limits of bankruptcy* 231.
[113] Jackson *The logic and limits of bankruptcy* 232.
[114] Ferriell and Janger *Understanding bankruptcy* 4.
[115] See s 605(a)(1) read with ss (b) of the Fair Credit Reporting Act 15 USC §1681 (the FCRA).
[116] Orovitz (2013) *Emory Bankr Dev J* 591.

2.2.5.1 Credit history reports

The Fair Credit Reporting Act was adopted in 1970 to regulate the collection and reporting of consumer credit information by credit reporting agencies. The credit information collected and recorded in credit reports is used by lenders, employers, landlords, insurers, and other businesses when doing background checks on consumers for, among other things, credit transactions or employment.[117]

Section 605 of the FCRA regulates the information that must be excluded from consumer reports. This information includes cases under the Bankruptcy Act. Section 605(a)(1) provides:

> **§ 605. Requirements relating to information contained in consumer reports [15 U.S.C. § 1681c]**
>
> *(a) Information excluded from consumer reports.* Except as authorized under subsection (b) of this section, no consumer reporting agency may make any consumer report containing any of the following items of information:
>
> **(**1) Cases under title 11 [United States Code] or under the Bankruptcy Act that, from the date of entry of the order for relief or the date of adjudication, as the case may be, antedate the report by more than 10 years.

Therefore, a consumer's credit report may not include information about a debtor's bankruptcy that is older than ten years from the date of entry of the order for relief or the date of adjudication, unless specifically authorised by subsection (b) of section 605. This means that a bankruptcy filing may be retained in a bankrupt debtor's credit record for ten years and lenders may deny credit to bankrupt debtors or charge them higher fees and interest based on the bankruptcy for ten years.[118]

As already indicated, the credit report is also used by employers for pre-employment screening.[119] The reasons given by employers for using credit history checks before employing candidates include reducing the likelihood of theft, fraud, embezzlement, and managing liability for negligent hiring.[120] Other reasons include assessing the trustworthiness of candidates and compliance with state laws that compel them to do background checks.[121] Although section 605 of the FCRA allows employers to check a candidate's credit history which can disclose a bankruptcy, it is questionable whether such a credit history disclosing a bankruptcy is a fair predictor that the candidate might

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[117] See s 604 of the FCRA.
[118] Ferriell and Janger *Understanding bankruptcy* 4; Concepción (2010) *The Scholar* 529.
[119] Orovitz (2013) *Emory Bankr Dev J* 563.
[120] Cain (2017) *Amer Bankr Law J* 659. Orovitz (2013) *Emory Bankr Dev J* 573.
[121] Cain (2017) *Amer Bankr Law J* 659; Concepción (2010) *The Scholar* 537-541.

steal from his or her employer.[122] It is also questionable whether it provides proof that the candidate is mature, responsible, trustworthy, honest, reliable, has integrity, has good judgment, and is capable of handling the pressures of the job.[123]

Instead, a credit history check may show a candidate' circumstances that arose outside his or her control such as the effects of separation, divorce, death, disability, accidents, the behaviour of a co-signatory, identity theft of a person's finances, and his or her ability to meet credit deadlines, past youthful naivety, and retrenchment which an applicant could not have predicted or prepared for.[124]

Concepción is of the view that what needs to be established is whether the existence of bankruptcy is related to the characteristics of the job sought by the employee.[125] Essentially, whether there is a relation between bankruptcy and successful job performance.[126] Research has shown that there is no link between credit history and job performance.[127] Moreover, Cain states that it is irrational to deny employment to a person who is or was a debtor if the person is otherwise qualified and the job can be successfully performed regardless of bankruptcy status.[128] However, the creditworthiness of a person should be taken into account in the successful performance of jobs that require financial expertise[129] and positions that involve access to confidential or secure information.[130] On the other hand, the same cannot be said for jobs such as a project manager,[131] an unspecified job with an insurance company,[132] a job as an executive assistant,[133] a paralegal for a government contractor,[134] and a job as a customer service representative at a bank.[135]

Exclusion from such jobs limits the fresh-start promise of a clean slate for the honest but unfortunate bankrupt, and prohibits such a debtor from resuming participation in

[122] Cain (2017) *Amer Bankr Law J* 659; Concepción (2010) *The Scholar* 537-541.
[123] Cain (2017) *Amer Bankr Law J* 659; Concepción (2010) *The Scholar* 537-541.
[124] Concepción (2010) *The Scholar* 540.
[125] Concepción (2010) *The Scholar* 536.
[126] *Griggs v Duke Power Co* 401 US 424, 431 (1971).
[127] Concepción (2010) *The Scholar* 526 and 545; Orovitz (2013) *Emory Bankr Dev J* 563.
[128] Cain (2017) *Amer Bankr Law J* 658.
[129] Such as fund managers, investment portfolio managers, chief financial officers, stock or securities traders, or investment advisors. See Cain (2017) *Amer Bankr Law J* 662.
[130] Nissim (2010) *Geo J on Poverty L & Pol'y* 45, 48-49.
[131] *Rea v Federated Investors* 627 F 3d 937 (3d Cir 2010).
[132] *In re Martin* Case *No* 06-41010, Adversary No 07-7067 (Bankr D Kan Sep 28, 2007).
[133] *Leary v Warnaco Inc* 251 BR 656, 657 (SDNY 2000).
[134] *Fiorani v CACI* 192 BR 401, 403-04 (ED Va 1996).
[135] *Pastore v Medford Say Bank* 186 BR 553, 554 (1995); Cain (2017) *Amer Bankr Law J* 662.

the economy post-bankruptcy. To give effect to the fresh-start policy, section 525 of the Bankruptcy Code was enacted in 1978 to prohibit employment discrimination based on a credit history report showing bankruptcy. However, section 525 has challenges of its own in that it distinguishes between government employers and private employers.

2.2.5.2 Employment discrimination by private employers

In *Perez v Campbell*[136] the Supreme Court held that the part of the Arizona Revised Statutes[137] that conditioned the issuing or renewal of a driver's licence and vehicle registration on the satisfaction of a judgment stemming from a motor vehicle accident, even if that judgment had been discharged in bankruptcy, violated the supremacy clause in the Constitution. This is because it frustrated the 'full effectiveness' of the Bankruptcy Act which was intended to give debtors a new start unhampered by the pressure and discouragement of pre-existing debt.[138] When the Bankruptcy Code was enacted in 1978 it codified this decision in section 525 to provide additional protection to debtors.[139] Section 525(a) provides:

> **Section 525 – Protection against discriminatory treatment**
>
> (a) Except as provided in the Perishable Agricultural Commodities Act, 1930, the Packers and Stockyards Act, 1921, and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943, a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

When section 525 was originally enacted in 1978 it had no subsections and contained only the current section 525(a). Section 525(a) prohibits government units from denying employment, terminating the employment of, or discriminating concerning employment against a person who is or has been a debtor or a bankrupt, or a person

[136] *Perez v Campbell* 402 US 637 (1971) 651-652 (*Perez v Campbell*).
[137] Arizona Revised Statutes 28-1163(B).
[138] *Perez v Campbell* 651-652; Cain (2017) *Amer Bankr Law J* 666.
[139] Cain (2017) *Amer Bankr Law J* 668.

who has been associated with a debtor. Therefore section 525(a) applies to government employers and specifically lists forms of prohibited discrimination.[140] The original section 525 did not refer to private employers. Thus, originally, the anti-discrimination provision was aimed at preventing government employers from refusing employment, terminating employment, and from discriminating on the ground of bankruptcy.

This provision in the Bankruptcy Code appeared to resolve the problem experienced by discharged debtors because of a bankruptcy filing in their credit history report and gave effect to the aim of the fresh start. However, because this provision applied only to government employers, discharged bankrupts continued to be discriminated against when seeking employment with private employers.[141]

In 1984 section 525 was amended and renumbered as section 525(a) and a new section 525(b) was introduced.[142] Section 525(b) provides:

> (b) No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt, solely because such debtor or bankrupt—
> (1) is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act;
> (2) has been insolvent before the commencement of a case under this title or during the case but before the grant or denial of a discharge; or
> (3) has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act.

Section 525(b) extended the application of the anti-discrimination provisions in section 525(a) to private employers. Before this provision, private employers could still terminate the employment of debtors based on bankruptcy.[143] However, section 525(b) only refers to a prohibition on terminating the employment of or discriminating with respect to employment. The words ‘deny employment’ in section 525(a) are omitted in section 525(b). Most court decisions interpreted the omission to mean that private employers were only prohibited from terminating the employment and

[140] Cain (2017) *Amer Bankr Law J* 668.
[141] Cain (2017) *Amer Bankr Law J* 671.
[142] Cain (2017) *Amer Bankr Law J* 670.
[143] Cain (2017) *Amer Bankr Law J* 671.

discriminating with respect to employment, but were not prohibited from refusing to employ a bankrupt.[144]

In *Myers v Toojays* the court, referring to other Supreme Court judgments,[145] held that when Congress uses certain language in one section of legislation but omits it in another section, it is presumed that Congress's intention and purpose is that the two sections should have different inclusions and exclusions.[146] The court further held that had Congress wanted to cover a private employer's hiring policies and practices in section 525(b), it could have done so in the same way it covered a government unit's hiring policies and practices in section 525(a).[147] In support of this view, the court in *In re Martin* held that it is not uncommon for a government entity to place tighter restrictions on its employment policies than it places on private-sector employers.[148] This is because in the case of private employers, the process of political decision-making and the constituency is more likely to be more effective and better funded.[149] There are also more lobbyists to advocate against potential new causes of action in the case of private employers than in discrete governmental agencies.[150] Consequently, the court in *In re Martin* could not find Congress's decision not to extend protection from discrimination to prospective employees of private-sector employers absurd.[151]

It appears, then, that the omission of the words 'deny termination' from section 525(b) means that private employers are not prohibited from refusing to employ persons who are or have been bankrupt debtors because, as Cain suggests, even in the 1994[152] and 2005[153] amendments to section 525, Congress did not add the words 'deny

[144] *Myers v Toojay's Management Corp* 640 F 3d 1278 (11th Cir 2011) (*Myers v Toojays*); *Burnett v Stewart Title Inc* 431 BR 894 (SD Tex 2010); *Rea v Federated Investors* 627 F 3d 937 (3d Cir 2010); *In re Martin* Case No 06-41010, Adversary No 07-7067 (Bankr D Kan Sep 28, 2007) (*In re Martin*); *In Re Stinson* 285 BR 239 (Bankr WD Va 2002); *Fiorani v CACI* 192 BR 401, 403-404 (ED Va 1996); *Pastore v Medford Say Bank* 186 BR 553, 554 (1995). See too, Cain (2017) *Amer Bankr Law J* 673.
[145] *Dean v United States* 129 S Ct 1849, 1854 (2009); *Russello v United States,* 464 US 16, 23, 104 S Ct 296, 300 (1983); *United States v Wong Kim Bo* 472 F 2d 720, 722 (5th Cir 1972); *Delgado v US Att'y Gen* 487 F 3d 855, 862 (11th Cir 2007).
[146] *Myers v Toojays* 1284.
[147] *Myers v Toojays* 1285.
[148] *In re Martin* 6 n 10.
[149] *In re Martin* 6 n 10.
[150] *In re Martin* 6 n 10.
[151] *In re Martin* 6 n 10.
[152] Bankruptcy Reform Act of 1994.
[153] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

employment' to section 525(b).[154] Although this appears to be the correct interpretation of section 525(b), such interpretation frustrates the purpose of the fresh-start policy[155] and is unreasonably and unnecessarily punitive.[156]

Research has shown that the three main reasons for bankruptcy among consumers in America have been job problems, illness, and family break-ups.[157] These are all externalities beyond a bankrupt's control and which affect the unfortunate but honest debtor who is at the centre of the protection intended by the fresh-start policy. Allowing employers, whether government or private, to use credit report information which includes bankruptcy as an evaluative tool for employment punishes the honest debtors who are trying to get back on their feet.[158] Orovits argues that this is morally offensive and feeds the cycle of joblessness that the fresh-start policy aims to break.

Certain states in America have resolved the problem of discrimination by private employers by limiting employers' access to bankruptcy information which is damaging to a job candidate's application, and which also does not provide any legitimate insight into the candidate's qualifications.[159] Seven of these states[160] have, for example, enacted anti-credit legislation that either bans or limits an employer's access to a job applicant's consumer credit report.[161] Among the first to enact such legislation was Washington which limits employer's access to creditor reports unless the job applicant seeks to fill a position associated with credit.[162]

The Illinois Employee Credit Privacy Act,[163] which is regarded as the ideal credit check legislation and which has been used as a model by many states, forbids an employer from denying employment to an individual based on his or her credit report.[164] The ECPA provides that an employer may not order an applicant or employee's credit report, inquire about the applicant's employment history, or discriminate against an

[154] Cain (2017) *Amer Bankr Law J* 676-677.
[155] Hertz (2011) *Am Bankr Inst J* 16.
[156] Orovitz (2013) *Emory Bankr Dev J* 590.
[157] See generally, Orovitz (2013) *Emory Bankr Dev J* 580-585.
[158] Orovitz (2013) *Emory Bankr Dev J* 590.
[159] Orovitz (2013) *Emory Bankr Dev J* 590.
[160] California, Connecticut, Hawaii, Illinois, Maryland, Oregon, and Washington. See Orovitz (2013) *Emory Bankr Dev J* 591.
[161] Orovitz (2013) *Emory Bankr Dev J* 591.
[162] See Washington Fair Reporting Act, located at RCW 19.182.020(12) (2012) which is modelled on and parallels the federal FCRA. This legislation came into law in 2007.
[163] Section 10 of the Illinois Employee Credit Privacy Act 820 ILCS 70 (the ECPA).
[164] Orovitz (2013) *Emory Bankr Dev J* 592.

individual based on his or her credit history report unless the position in question meets certain criteria.[165] These requirements do not apply to employers in the financial, insurance industries, or certain government employers.[166] Under the ECPA, a credit check is only allowed if it is an "established bona fide occupational requirement of a particular position or a particular group of employees".[167] That would be the case in a managerial position,[168] where the duties of the position include the custody or unsupervised access to cash or marketable assets valued at $2,500 or more,[169] or where the position involves access to confidential information, financial information, or trade secrets.[170]

At the federal level, the proposed Equal Employment for all Act[171] was reintroduced by Congressman Steve Cohen in the 116th Congress in 2019.[172] This Bill aims to amend the FCRA to prohibit the use of consumer credit checks against prospective and current employees to make adverse employment decisions.[173] The EEA Act limits when an employer can use credit reports as an employment pre-screening tool and this may only be if the job entails a "supervisory, managerial, professional or executive position at a financial institution", or if the job requires national security or FDIC clearance.[174] If this Bill is passed into law it will prevent employment discrimination based on a credit history report which includes a bankruptcy filing.[175] However, the EEA Act has been introduced and reintroduced to Congress for many years and Orovits is of the view that this will continue in perpetuity.[176]

[165] Section 10(a) of the ECPA. See also Parks (2017) *The newsletter of the Illinois State Bar Association* 2; Orovitz (2013) *Emory Bankr Dev J* 592.
[166] Section 5 of the ECPA.
[167] Section 10(b) of the ECPA. See also Parks (2017) *The newsletter of the Illinois State Bar Association* 2; Orovitz (2013) *Emory Bankr Dev J* 592.
[168] Section 10(b)(4) of the ECPA.
[169] Section 10(b)(2) of the ECPA.
[170] Section 10(b)(5) of the ECPA.
[171] Equal Employment for All Act of 2019 (EEA Act).
[172] Congressman Steve Cohen "H.R. 3862 — 116th Congress: Equal Employment for All Act of 2019." www.GovTrack.us. 2019. March 15, 2021 https://www.govtrack.us/congress/bills/116/hr3862 (accessed 15 March 2021).
[173] See the Preamble.
[174] Orovitz (2013) *Emory Bankr Dev J* 595.
[175] Orovitz (2013) *Emory Bankr Dev J* 598.
[176] Orovitz (2013) *Emory Bankr Dev J* 598.

2.2.5.3 Stigma-increasing law

The Bankruptcy Abuse Prevention and Consumer Protection Act[177] was enacted to address abuse and fraud in the bankruptcy system.[178] Before the BAPCPA there was debate as to whether or not it is too easy for consumer debtors to abuse the bankruptcy system[179] and whether bankruptcy laws should make it more difficult for people to discharge their debts.[180] The abuse was defined as "discharging debts which debtors theoretically could afford, at least in part, to pay".[181] The reason for this debate was the increase in debtors discharging debts when they could pay more of their claims, and in repeated bankruptcy filings without any intention of repaying claims.[182] Further, debtors wrongly split their secured claims on personal property into their secured and unsecured components, only to seek the release of liens when the secured claims were paid.[183] Therefore, abuse and fraud in the consumer bankruptcy system increased.[184]

The impression was that the increased abuse and fraud resulted from a decrease in stigma.[185] This was alluded to by Senator John Kerry in his televised comment on PBS NewsHour in 2001 where he stated that:

> There has been a decline, as we all know, in the stigma of filing for personal bankruptcy, and certainly we would agree that the appropriate changes are necessary in order to ensure that bankruptcy not be considered a lifestyle choice.[186]

It was believed that the increased bankruptcy filing was not economic but rather a shift in social norms from a high bankruptcy stigma to a more tolerant stance regarding debt discharge.[187] Further, the portrayal of increased bankruptcy filing as a lifestyle choice assumes that debtors enter bankruptcy proceedings voluntarily[188] and that they

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[177] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the BAPCPA).
[178] US Department of Justice (2006) *United States Attorneys' Bulletin* 3, 7-8. *Kings v Wells Fargo,* NA, 362 BR 226 (Bankr D MD 2007) 231; *Bonica* (2019) *St John's Bankr Research Libr* 1.
[179] US Department of Justice (2006) *United States Attorneys' Bulletin* 1.
[180] Dickerson (2006) *Wash U L Rev* 1861.
[181] US Department of Justice (2006) *United States Attorneys' Bulletin* 1.
[182] US Department of Justice (2006) *United States Attorneys' Bulletin* 9. See also Mols (2012*) Emory Bankr Dev J* 308.
[183] US Department of Justice (2006) *United States Attorneys' Bulletin* 9. See also Mols (2012*) Emory Bankr Dev J* 308.
[184] US Department of Justice (2006) *United States Attorneys' Bulletin* 3, 7-8.
[185] Mols (2012*) Emory Bankr Dev J* 308-309.
[186] Mols (2012*) Emory Bankr Dev J* 309.
[187] Mols (2012*) Emory Bankr Dev J* 309.
[188] Mols (2012*) Emory Bankr Dev J* 309.

lack personal financial responsibility.[189] The focus was placed on the actions of the debtor rather than the causes of the debt.[190]

Therefore, lawmakers connected the lack of stigma to working debtors' abuse of the bankruptcy system and laid this at the door of voluntary filers' lack of personal and moral responsibility.[191] To address this problem, lawmakers introduced a means test to make bankruptcy law more stigmatising[192] to encourage debtors' sense of personal and moral obligation to pay debts they can afford to repay.[193] This the means test did by limiting a debtor's ability voluntarily to file for Chapter 7 liquidation and to eventually receive a fresh start.[194] The means test was aimed at distinguishing those deserving of a quick discharge, such as those whose bankruptcy was caused by uncontrollable circumstances,[195] from those who did not deserve a fresh start.[196] The non-deserving are those debtors who can afford to pay their creditors and the means test's aim is to prevent them from filing a Chapter 7 bankruptcy case.[197] These non-deserving debtors are required to prove that they need a discharge.[198]

The means test presumed bankruptcy abuse for above-average income debtors who file for Chapter 7 liquidations unless they showed an inability to pay 25% of their debt to general unsecured creditors in 60 monthly payments.[199] The National Bankruptcy Review Commission appointed to review and update the Bankruptcy Code before the BAPCPA in 1997, reported that without the means test, bankruptcy was too easy to obtain.[200] Further, it perceived bankruptcy to be the first resort instead of the last resort for people who cannot keep up with their bills. It noted that the moral stigma which

[189] Mols (2012) *Emory Bankr Dev J* 307.
[190] Mols (2012) *Emory Bankr Dev J* 309.
[191] Dickerson (2006) *Wash U L Rev* 1891-1892; Mols (2012) *Emory Bankr Dev J* 311.
[192] Dickerson (2006) *Wash U L Rev* 1891.
[193] Dickerson (2006) *Wash U L Rev* 1892.
[194] Mols (2012) *Emory Bankr Dev J* 311.
[195] Such as serious medical conditions or who are on a call or order to active duty in the Armed Forces, or if the debtor is a disabled veteran. See s 707(b)(2)(B) and (b)(2)(D) of the Bankruptcy Code. See also Dickerson (2006) *Wash U L Rev* 1869.
[196] Dickerson (2006) *Wash U L Rev* 1869.
[197] US Department of Justice (2006) *United States Attorneys' Bulletin* 3.
[198] Dickerson (2006) *Wash U L Rev* 1869.
[199] Section 707(2)(A) of the Bankruptcy Code; Mols (2012) *Emory Bankr Dev J* 309.
[200] The Report of the National Bankruptcy Review Commission Report (1997) 3 (the National Bankruptcy Review Commission Report); Dickerson (2006) *Wash U L Rev* 1865.

once characterised bankruptcy had disappeared[201] and that the means test should, therefore, be introduced.[202]

However, most individual debtors in bankruptcy do not have non-exempt assets and receive little or no income exceeding their reasonable expenses.[203] Further, the added expense to the entire bankruptcy system, made it costly and less accessible for those needing it the most.[204] Also, the list of people who are exempt from proving whether they are deserving of a quick discharge because bankruptcy was caused by circumstances beyond their control is restricted. It is limited solely to people who have serious medical conditions, or who are on a call or order to active duty in the Armed Forces, or qualify as a disabled veteran.[205] Other circumstances which are beyond a debtor's control, such as death, divorce, and loss of employment are not considered.[206]

The lawmakers also introduced pre-petition credit counselling.[207] Because it was believed that debtors had control over their financial situation and had thus entered bankruptcy voluntarily, it was assumed that credit counselling would identify the causes of financial distress and would be able to prevent its recurrence.[208] This assumption ignores the research showing that most consumer bankruptcies result from uncontrollable circumstances.[209] Therefore, most consumers seeking bankruptcy protection are not in a position to benefit from pre-petition credit counselling.[210] While it is important to have legislation that prevents abuse and fraud, it is equally important to catch the system's abusers without excluding many 'honest but unfortunate' debtors in the process.[211]

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[201] National Bankruptcy Review Commission Report 3; Dickerson (2006) *Wash U L Rev* 1865.
[202] National Bankruptcy Review Commission Report 3.
[203] Braucher (2002) *Fordham J Corp & Fin* 407; Mols (2012*) Emory Bankr Dev J* 313.
[204] Braucher (2002*) Fordham J Corp & Fin* 408, 411; Mols (2012*) Emory Bankr Dev J* 313.
[205] See s 707(b)(2)(B) and (b)(2)(D) of the Bankruptcy Code.
[206] Sullivan, Warren and Westbrook *As we forgive our debtors* 17-20; Mols (2012*) Emory Bankr Dev J* 315.
[207] Section 109(h)(1) of the Bankruptcy Code.
[208] Mols (2012*) Emory Bankr Dev J* 313.
[209] Sullivan, Warren and Westbrook *As we forgive our debtors* 17-20; Mols (2012*) Emory Bankr Dev J* 314-315.
[210] Mols (2012) *Emory Bankr Dev J* 316.
[211] Braucher (2002*) Fordham J Corp & Fin* 408.

2.2.6 Summary

The American fresh-start policy is an ideal policy for consumer debtors. It provides the honest but unfortunate bankrupt with an opportunity to start afresh and resume participation in the economy after bankruptcy free from pre-bankruptcy debts.

However, this policy is not without its problems. The availability of a bankrupt credit history report, employment discrimination after discharge, and stigma-enforcing laws prevent the fresh-start policy from being fully realised.

While some American states have enacted legislation to overcome some of the challenges, federal interventions are required as bankruptcy law is a federal issue.

The problem of stigma in consumer bankruptcy resurrected by the BAPCPA is the most difficult challenge to overcome. This is because it appears that the Act was enacted to increase the very stigma that it took years to change public attitudes towards borrowing. Over-indebtedness was initially seen as a symbol of overspending and poor financial management. This stigma changed and over-indebtedness was seen as a fitting and necessary feature of commercial activity. Thus, the BAPCPA's aim of making it more difficult to obtain a discharge and ultimately a fresh start, seems to conflict with the rationales on which the fresh-start policy through a discharge is based.

2.3 The Insol International consumer debt report

2.3.1 General background

Insol International first convened a meeting to discuss consumer debt problems at its 1997 world congress in New Orleans. The topic was also discussed at its Pacific conferences in Auckland, New Zealand, and in the Insol conferences of the Americas held in Bermuda in 1999. The Insol consumer debt committee was tasked to undertake a survey of an insolvency regime for individuals worldwide. This included gathering information from countries with developed consumer insolvency laws and also learning from issues emanating from consumer debtors and creditors from countries with under-developed insolvency laws. The goal was to offer a guide to countries reforming

laws that affect consumer debtors. Inputs were obtained from regulators, judges, practitioners, and academics who were professionals in the field.[212]

The findings of this committee gave rise to Insol's first report on consumer debt in 2001. The report provided principles on which consumer debt insolvency laws could be based, recommendations for the reduction or avoidance of consumer debtor insolvencies, and the improvement of the social and psychological effects of consumer debtor insolvencies.[213]

In 2011, a second edition of the consumer debt report was published.[214] This report expanded and clarified the 2001 report. However, as regards principles, things remained the same as the principles had already been embraced by the European Union, the Council for Europe, the *World Bank Report,* and UNCITRAL. In addition to the principles and recommendations, the 2011 report contains feedback from the survey of 17 countries including the United States of America, England and Wales, South Africa, and Nigeria.

The 2011 report is considered in this research. While the *Insol Report* considers consumer debt, in particular, together with the availability of bankruptcy procedures, release, and discharge of the bankrupt and the assets involved, amongst others, this research focuses on those aspects of consumer debt problems relating to the restrictions on insolvent debtors and a 'fresh start' through a discharge of debts.

2.3.2 Consumer debts

To assist lawmakers in determining whether restrictions on insolvent debtors are fit for purpose, to identify which debtor should be restricted during and after rehabilitation, or to distinguish honest but unfortunate debtors from dishonest debtors, it is important to be aware of the types of debt that consumers incur in that this reveals the reason for the debt. The *Insol Report* distinguishes between six types of consumer debt:[215]

a) Survival debts: These debts are incurred as a means of survival. They cater to the necessities of life when families live on a social minimum for extended periods and include food, rent, electricity, education, clothing, and health care.

[212] *Insol Report I*.
[213] *Insol Report I*.
[214] *Insol Report II*.
[215] *Insol Report II* 1.

b) Over-consumption debts: These debts are incurred when a debtor supplements an extravagant lifestyle through multiple loans but lacks financial management skills.

c) Compensation debts: These are incurred when a debtor seeking social class, power, status, or compensation for other loss, experiences social exclusion. This results in illness-related debts such as gambling, alcoholism, and mental illness.

d) Relational debts: These occur by operation of law because of marriage in community of property, death, and other relationships.

e) Accommodation debts: These are incurred due to unexpected life circumstances such as sudden unemployment, disability, or an increase in uninsured medical expenses.

f) Fraudulent debts: These are incurred when a debtor intentionally over-commits him- or herself financially. These debtors act in bad faith or intentionally attempt to defraud creditors. Debtors who incur these debts are regarded as dishonest debtors and are generally excluded from discharge or subjected to post-discharge restrictions.

There are, therefore, many reasons why debtors incur debts.[216] In some instances, it may be intentional as in the case of fraudulent, compensation, and over-consumption debts. In other instances, it may be due to factors beyond the control of the debtor or be born of necessity as in accommodation, relational, and survival debts. Irrespective of the type of debt all these factors lead to over-indebtedness because the debtor or family member's burden of debt ends up exceeding his or her repayment capacity. Such over-indebtedness sometimes results in social and health problems and social exclusion. Despite this, there is a general acknowledgement that consumer debtors should not be penalised but offered some form of protection.[217] In providing such protection, a balance needs to be struck between the interests of creditors and the basic rights of consumer debtors.[218]

[216] See Ramsay *Personal insolvency in the 21st Century* 20-21 on causes of bankruptcy per country.
[217] *Insol Report II* 2.
[218] *Insol Report II* 8.

2.3.3 Solutions to overindebtedness

The *Insol Report* provides that consumer overindebtedness can be overcome by measures that prevent overindebtedness, for example, curbing access to credit. Other measures include rehabilitation and discharge.[219] For purposes of this thesis, only rehabilitation and discharge are discussed.

The rehabilitation of a debtor is achieved in different ways in different countries. Some adopt the American fresh-start approach where honest, non-fraudulent debtors receive a discharge almost immediately after filing for bankruptcy. This is intended to encourage entrepreneurship and recognises that overindebtedness is a normal economic reality that should be resolved through insolvency law.[220]

Others require the debtor to remain liable for unsatisfied claims until a certain period has elapsed before a discharge is granted. These countries also impose lists of conditions and restrictions on the insolvent regarding professional, commercial, and personal activities. South Africa falls in this category of countries where automatic rehabilitation and discharge of debts occur after the expiry of ten years and the insolvent debtor is subjected to numerous restrictions before rehabilitation.[221] While the continued responsibility of the debtor during sequestration is intended to monitor his or her financial behaviour and encourage the creditor to provide financing, the *Insol Report* states that this limits opportunity, innovation, and entrepreneurial activity because the penalty for failure is too harsh.[222]

In other countries a compromise is sought in terms of which discharge is given after the period following distribution during which the debtor is expected to make a good faith effort to pay all his or her remaining debts.[223]

In all of these countries, however, and in certain situations, a discharge is restricted. Such situations may include where a debtor:

a) acted fraudulently;
b) engaged in criminal activity;
c) violated employment or environmental laws;

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[219] *Insol Report II* 9.
[220] *Insol Report II* 10.
[221] This is discussed in Ch 3 paras 3.4 and 3.5.
[222] *Insol Report II* 10.
[223] *Insol Report II* 10.

d) failed to keep appropriate records;
e) failed to participate in insolvency proceedings in good faith;
f) continued trading at a time when he or she knew he or she was insolvent;
g) incurred debts with no reasonable expectation of being able to pay them; or
h) concealed or destroyed assets or records after the commencement of the sequestration process.[224]

Further, in most countries debts such as maintenance agreements, taxes, fraud, and the imposition of penalties where the alternative is imprisonment, are excluded from discharge.[225]

While discharge is regarded as the solution to financial difficulties in insolvency laws that provide for it, it should not be an 'easy way out'.[226] On the other hand, the requirements for obtaining discharge should not be so high that they discourage debtors.[227] The systems should be so well-known that they allow society willingly to forgive the debtor and allow a fresh start.

Four principles for the resolution of consumer debt problems are recommended.[228] These are: a fair and equitable allocation of consumer credit risk; provisions for discharge, rehabilitation, or a fresh start, which take the form of extra-judicial rather than judicial proceedings where there are equally effective options available; and prevention to reduce the need for intervention. The latter two principles are not discussed in this research.

2.3.2.1 A fair and equitable allocation of consumer credit risk

This principle requires society to accept that overindebtedness is sometimes caused by factors beyond the debtor's control. Debtors are therefore not always at fault and creditors who are usually not paid are not always the victim.[229] A fair and equitable allocation of consumer risk in the context of this research requires legislators to establish anti-discrimination provisions to ensure a human approach to dealing with debtors,[230] and to maintain their rights to decent living standards during and after

[224] *Insol Report II* 10.
[225] *Insol Report II* 10.
[226] *Insol Report II* 9.
[227] *Insol Report II* 9.
[228] *Insol Report II* 13.
[229] *Insol Report II* 15.
[230] *Insol Report II* 15.

sequestration proceedings.[231] However, the benefits of this principle are only available to debtors who acted in good faith as regards the reasons for the debt and why it could not be repaid.[232]

An insolvency system should not be abusive to the debtor but must be balanced to allow the debtor a fresh start.[233] Although the debtor must endure financial hardship before being rewarded with a discharge, the period prescribed before discharge and a fresh start can be granted should not be excessive.[234] Debtors experience financial hardship long before the commencement of the sequestration procedure and they may not be able to cope with a limited budget for long periods.[235] In this instance, it should also be taken into account that financial difficulties bring psycho-social consequences for consumers.[236]

When providing a discharge, the debtor's individual circumstances, including the nature of the debt, must be considered. Debtors with minimal assets and who incurred survival debts should be treated differently from debtors who incurred fraudulent debts.[237] There is no point in having long insolvency procedures for debtors who are in a hopeless situation.[238]

2.3.2.2 Provisions for discharge, rehabilitation, or a 'fresh start'

The purpose of providing a discharge is to ensure that natural-person debtors are finally freed from pre-sequestration debts and able to make a fresh start. Their eligibility for discharge should ideally not depend on their future income post-rehabilitation.[239] The exclusion of certain debts from discharge should be kept to a minimum because they hinder a fresh start.[240] Although post-discharge restrictions can be imposed, they should also be kept to a minimum for the same reason.[241] However, fraudulent debtors may be excluded from obtaining a discharge.[242]

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[231] *Insol Report II* 15.
[232] *Insol Report II* 15.
[233] *Insol Report II* 16.
[234] *Insol Report II* 17.
[235] *Insol Report II* 17.
[236] *Insol Report II* 9.
[237] *Insol Report II* 18.
[238] *Insol Report II* 18.
[239] *Insol Report II* 20.
[240] *Insol Report II* 20.
[241] *Insol Report II* 20.
[242] *Insol Report II* 21.

2.3.4 Summary

At the heart of the *Insol Report* is that there should be a balance between the interests of creditors and the fundamental rights of debtors. While creditors may be unpaid because of the debtor's overindebtedness, it must be reacognised that his or her overindebtedness is a normal economic activity and may be caused by factors beyond the debtor's control.

It is acknowledged that overindebted debtors should not be punished but protected through the inclusion of anti-discrimination provisions in insolvency legislation and the provision of discharge and a fresh start for honest but unfortunate debtors. Fraudulent debtors should be excluded and the circumstances of each debtor must be considered to distinguish the honest from the fraudulent.

2.4 The *IFF Report*

2.4.1 General background

In the 1990s European countries experienced an economic depression which was worsened by the increase in overindebtedness in private households of low-income and middle-class families.[243] Consumer debt among the middle classes was caused by home mortgages, small business loans, personal guarantees of business, and private loans.[244]

This pressured European governments to review the measures then applicable to overindebted households and find alternative solutions to the problem.[245] The first study of European overindebtedness was commissioned in 1991 by the Director-General of the Consumer Policy Services of the European Commission and was published in 1994.[246] The research, known as the *Huls Study,*[247] was undertaken by experts from member states and coordinated by Huls and Reifner.[248] Its focus was on consumer overindebtedness in Europe[249] and at the heart of the study was that a plan

[243] *IFF Report* 14; Heuer JO "Social Inclusion and Exclusion in European Consumer Bankruptcy Systems" https://bit.ly/3HWZL1E (accessed 8 March 2022).
[244] *IFF Report* 14.
[245] *IFF Report* 14.
[246] *IFF Report* 14.
[247] The *Huls Study*.
[248] *IFF Report* 15-16.
[249] The *Huls Study* was influenced by the British Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558 (*Cork Report*) which is a study of English insolvency law published in 1982.

should be proposed for debtors to use their 'best efforts' to repay as much debt as possible within a reasonabe specified period and at the end to be granted a discharge of their remaining debts.[250]

The second large-scale study of consumer overindebtedness in Europe, again commissioned by the European Commission, was undertaken by major research institutes and experts from member states under Reifner's leadership.[251] The *IFF Report* is the result of that research.

While the *IFF Report* was influenced by Anglo-American consumer law, it only considered recommendations that were relevant to European debt-adjustment law[252] and showed that European countries had different policy approaches to overindebtedness.[253] The most notable difference was the acknowledgement by member states that the prevention of overindebtedness is more important than the rehabilitation of overindebted debtors.[254] In light of this, the *IFF Report* combines prevention and rehabilitation and the fresh-start approach and emphasises that overindebtedness should be seen as a social process.[255]

While the *IFF Report* considers both these approaches, this research focuses on its approach to rehabilitation and a fresh start. Before the philosophy behind European insolvency laws is discussed, it is important to mention that like the *Insol Report*, the *IFF Report* observed that the main causes of overindebtedness include unemployment, business failure, illness, divorce, over consumption, and other personal problems.[256]

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[250] Kilborn "Expert Recommendations and the Evolution of European Best Practices for the Treatment of Overindebtedness, 1984-2010" http://ssrn.com/abstract=1663108, 3 (accessed 9 July 2020).
[251] Kilborn "Expert Recommendations and the Evolution of European Best Practices for the Treatment of Overindebtedness, 1984-2010" http://ssrn.com/abstract=1663108, 6 (accessed 9 July 2020); *IFF Report* 16.
[252] This term is used in the *IFF Report*. Kilborn used it synonymously with other equivalent phrases often used more or less interchangeably in the literature and in legislation such as 'consumer bankruptcy,' 'consumer insolvency', and 'overindebtedness'; See Kilborn "Expert Recommendations and the Evolution of European Best Practices for the Treatment of Overindebtedness, 1984-2010" http://ssrn.com/abstract=1663108 (accessed 9 July 2020).
[253] *IFF Report* 14.
[254] *IFF Report* 15.
[255] *IFF Report* 15.
[256] *IFF Report* 15. Other factors that contribute to the process of overindebtedness include lending practices and debt collection.

2.4.2 The philosophy behind European insolvency laws

Unlike the American fresh start which refers to a right to be discharged from pre-bankruptcy debt almost immediately after filing, a discharge in European insolvency laws depends upon the fulfilment of a payment plan and of certain requirements connected to the debtor's behaviour.[257] A discharge will, therefore, not be granted if the payment plan has not been fulfilled.[258] This is referred to as an 'earned start'.

The aim is that after the legal process and the payment plan have been fulfilled, the debtor is rehabilitated by changing his or her financial situation to regain control over his or her economic affairs. The payment plan is generally long and demanding and could be anything from three to ten years although the preferred maximum period is five years.[259] During the payment period the debtor's payments and his or her behaviour, such as searching for employment, are monitored.[260] The payment plan is only annulled in the event of serious non-fulfilment resulting from reluctance by the debtor to fulfil the plan.[261]

The requirement that the debtor must earn his or her discharge and fresh start appears to be teaching the debtor the importance of good payment morals rather than promoting the economic interest of the creditors.[262] This is because the plans require a huge amount of administrative and judicial work and the returns on payments are small, whereas the payment moral attitudes are emphasised in European discussions on consumer insolvency regulation.[263]

Although one of the purposes of consumer insolvency laws is to ensure that debtors enjoy a meaningful standard of living[264] and it is preferred that the debtor return to normal financial transactions during the payment plan phase and after insolvency, this is not always practical.[265] Former bankrupts and consumer insolvency debtors in Europe experience discrimination in accessing credit, bank accounts, housing, signing

[257] *IFF Report* 166 and 189.
[258] *IFF Report* 189.
[259] *IFF Report* 167.
[260] *IFF Report* 189.
[261] *IFF Report* 189
[262] *IFF Report* 167.
[263] *IFF Report* 167.
[264] *IFF Report* 189.
[265] *IFF Report* 169.

new contracts especially a lease, employment, and establishing new businesses.[266] While it is accepted that differentiation in respect of credit during the payment plan is justifiable, once the payment plan has been fulfilled it amounts to unjustified discrimination.[267]

Some member countries have data protection laws that restrict the use of information about completed plans but not much attention has been given to the discrimination problem.[268] It therefore appears that there are no anti-discrimination provisions in European insolvency laws, and punitive measures such as those mentioned above and prohibitions on acting as executives of companies are still linked to bankruptcy.[269]

This type of discrimination hinders the achievement of the objective of rehabilitating debtors and providing a discharge and a fresh start.[270] It is suggested that satisfactory data-protection regulations should be developed by member states to prevent the general availability of credit files containing completed plans.[271] Such regulations should include ongoing plans.[272]

2.4.3 Principles and recommendations

Influenced by the *Insol Report*, the *IFF Report* sets out principles and recommendations drawn from the review of European insolvency laws which the *Report* recommends for use by member states intending to reform their laws in the future.[273] This research discusses only the principles relevant to recommendations for the restrictions imposed on insolvent debtors which affect their capacity to earn an income during sequestration and after rehabilitation. These principles and recommendations include:

[266] *IFF Report* 169 and 179.
[267] *IFF Report* 179.
[268] *IFF Report* 169 and 179.
[269] *IFF Report* 169 and 179.
[270] *IFF Report* 179.
[271] *IFF Report* 179.
[272] *IFF Report* 179.
[273] *IFF Report* 249.

a) Consumer insolvency law

This principle requires all roleplayers, such as the creditors who suffer a loss, society that is responsible for social security, and the debtor, to bear the cost of failure.[274] In all economically advanced countries, consumer credit and financing of small enterprises and self-employed persons is an important and productive part of the economy.[275] The debtor should therefore not bear the burden alone as this results in exclusion when the overindebtedness becomes unbearable.[276] Consequently, the *IFF Report* recommends that consumer insolvency law should be used as a remedy when the debt burden becomes intolerable.[277]

b) Discharge

The *IFF Report* recommends that consumer insolvency laws should provide for a discharge of debts. This discharge may be partial so that the debtor pays only part of the total debt. The individual circumstances of each debtor must be taken into account in calculating the payment obligation.[278] The total debts must be discharged when the debtor is experiencing hardship. All debts must be included in the discharge and exceptions such as taxes, fines, and damages are not recommended.[279]

The *IFF Report* further recommends that consumer insolvency law and discharge of debts should be accessible, except in cases of fraud and misconduct where discharge should be denied.[280]

c) Protection of income

This principle requires a recognition that a debtor and his or her family have a right to a decent standard of living and a debtor's income is at the centre of that right.[281] A debtor who is capable of being economically productive should not be required to live on the breadline during the payment plan because the bulk of his or her income goes

[274] *IFF Report* 150.
[275] *IFF Report* 250.
[276] *IFF Report* 250.
[277] *IFF Report* 250.
[278] Bricongne JC, Demertzis M, Pontuch P and Turrini A, European Commission Discussion Paper 032 "Macroeconomic Relevance of Insolvency Frameworks in a High-debt Context: An EU Perspective" June 2016 (European Commission Discussion Paper) 21.
[279] *IFF Report* 250.
[280] *IFF Report* 250.
[281] *IFF Report* 252.

to creditors.[282] The *IFF Report* recommends that the living costs in payment obligations should be structured in a manner that takes into account the changing living conditions of the debtor, and that this should be regulated specifically for consumer insolvency law.[283] Further, it should be noted that a payment plan should not seize all of the debtor's excess income because that removes the incentive for the debtor to generate income, irrespective of the length of the discharge period.[284]

d) Reasonable time frames

The *IFF Report* recommends a shorter time frame for completion of the payment plan which can be anything between three to ten years.[285] Factors to be taken into account include the reasonableness of the time frame and whether it is economically effective.[286]

It is indicated that a long time frame is psychologically demanding on most debtors who have been living under financial pressure even before filing for bankruptcy.[287] During the payment plan, life changes occur such as illness, childbirth, divorce, job changes, and job losses, which make it difficult for planning family finances.[288] A regular period of three years is recommended as this would be psychologically realistic and would not require significant modifications when life changes occur.[289]

e) Non-discrimination

Discharge should open the doors to a financial activity. The *IFF Report* recommends that European insolvency laws should include a clear statement on non-discrimination which should cover a prohibition against discrimination in accessing credit, the labour market, membership of organisations, and access to housing. Further, the registration of credit information should be regulated and completed payment plans should be excluded from such registers.[290]

[282] *IFF Report* 253.
[283] *IFF Report* 253.
[284] European Commission Discussion Paper 18.
[285] European Commission Discussion Paper 22.
[286] *IFF Report* 253.
[287] *IFF Report* 253.
[288] *IFF Report* 253.
[289] *IFF Report* 253-254.
[290] *IFF Report* 254.

The principles as listed in the *IFF Report* that are excluded in this research are:

f) preference for informal and out of court settlements;
g) court procedure;
h) consideration for the guarantors; and
i) availability of counselling and legal aid.

2.4.4 Summary

Like the *Insol Report*, the *IFF Report* emphasises that overindebtedness is a social reality in all economically active societies and its burden should not be carried by debtors alone as this results in exclusion. Earned discharge should be accessible save in cases of fraud and misconduct.

The fundamental rights of the debtor and his or her family must be protected and at the centre is the right to income. Another right of debtors that requires protection is the right not to be discriminated against when accessing employment, credit, and housing.

2.5 The World Bank Report

2.5.1 General background

Authorised by the Standards and Codes Initiative of the International Financial Architecture, the Financial Stability Board instructed the World Bank to develop a unified standard for the comparative examination of business insolvency and creditor/debtor regimes (ICR Standard).[291] These standards were created for the first time in 2001 and subsequently revised in 2005 and 2011.[292] The World Bank is mandated to support efforts by developing countries to strengthen the legal, regulatory, and institutional frameworks that govern ICR regimes through the preparation of detailed problem-solving reports.[293]

The World Bank's Task Force,[294] which comprises experienced judges, practitioners, academics, and policymakers from around the world, is responsible for implementing the World Bank's mandate. It provides an environment for collective discussions on

[291] The ICR Standard is composed of the recommendations from the UNCITRAL Legislative Guide on Insolvency Law (the Guide) (2004) and the World Bank Principles for Effective Insolvency and Creditor Rights Systems (the Principles). See the *World Bank Report* para 1.
[292] *World Bank Report* para 2.
[293] *World Bank Report* para 2.
[294] The World Bank's Insolvency and Creditor/Debtor Regimes Task Force (the Task Force).

the ICR Standard to spread the understanding and expertise on law and policy in the area of insolvency.[295]

Encouraged by the financial crisis at the time, the Task Force was first asked to consider the insolvency of natural persons in 2011.[296] It then conducted a preliminary survey on practised natural-person insolvency laws over 59 countries, 25 of which were high-income economies and 34 low- and middle-income economies.[297] The purpose of the survey was to collect information from countries worldwide on the existence of consumer insolvency legislation. The survey found that there were no legislative systems for the insolvency of natural persons in more than half of the low- and middle-income countries.[298]

Therefore, the 2011 Task Force meeting discussions highlighted the importance of an insolvency regime for natural persons.[299] It also recognised the need to use the expertise of the Task Force in a study of the essential regulatory aspects underlying the insolvency of natural persons, the differences in legal treatment under national legal regimes, and the implications of these differences for international collaboration and coordination.[300]

As a result, the World Bank and the Task Force established a special working group consisting of expert academics, judges, practitioners, and policy-makers.[301] This group studied the natural-person insolvency law topic and produced a representative report on the matter.[302] The report made certain recommendations for the treatment of different issues involved, taking into account different policy options and the diverse sensitivities around the world. [303]

At its Washington DC meeting in November 2011, the Working Group debated and made certain recommendations on the report which led to its revision. These

[295] *World Bank Report* para 3.
[296] *World Bank Report* para 4.
[297] *World Bank Report* para 5.
[298] *World Bank Report* para 5.
[299] *World Bank Report* para 6.
[300] *World Bank Report* para 6.
[301] The Working Group; *World Bank Report* para 8.
[302] *World Bank Report* para 8.
[303] *World Bank Report* para 8.

recommendations improved the report and were taken into account in preparing the *World Bank Report*.[304]

The *World Bank Report* presents the ideas and solutions to problems experienced in the regulation and implementation of systems for the insolvency of natural persons.[305] Its main aim is to assist in identifying the characteristics of an insolvency regime for natural persons and to assist in showing the opportunities and problems encountered in developing an effective regime for the treatment of the insolvency of natural persons.[306]

To achieve this it highlights the importance of a regime for the treatment of the insolvency of natural persons by indicating the advantages and disadvantages of the solutions to the problems that will be encountered in designing an insolvency regime for natural persons.[307] By showing the advantages and disadvantages of the different methods of regulating the insolvency of natural persons, it aims to assist policy-makers to develop a better sense of the social and economic advantages of some of the modern approaches to the insolvency of natural persons.[308]

Therefore the *World Bank Report* is not aimed at identifying a set of 'best practices' for the regulation of the insolvency of natural persons.[309] It rather offers guidelines on the policy issues that need to be addressed in developing modern legal regimes for the treatment of the insolvency of natural persons.[310]

2.5.2 The purpose and core attributes of an insolvency system

According to the *World Bank Report,* an insolvency system for natural persons has many goals, but one of its key aims is to re-establish the debtor's economic capability – ie, the economic rehabilitation of the debtor.[311] Essential to achieving this goal is freeing the debtor from excessive debt,[312] placing debtors on an equal basis with non-

[304] *World Bank Report* para 9. See generally, Kilborn (2015) *Pace Int'l L Rev* and Garrido (2014) *World Bank Legal Review* regarding the workings of the *World Bank Report.*
[305] *World Bank Report* para 15.
[306] *World Bank Report* para 10.
[307] *World Bank Report* para 10.
[308] *World Bank Report* para 13.
[309] *World Bank Report* para 11.
[310] *World Bank Report* para 11.
[311] *World Bank Report* paras 449-450.
[312] *World Bank Report* para 359.

debtors after receiving relief and enabling them to avoid again becoming overindebted.[313]

The *World Bank Report* states that a fresh start is the most effective relief from debt,[314] in particular, a 'straight' discharge as it provides an immediate and unconditional fresh start for the debtor.[315] However, some countries require the payment of part of the debt (minimum payment) in terms of a payment plan for a certain period before a discharge will be granted.[316] Other insolvency systems refer to this payment plan as a 'delayed fresh start' or an 'earned fresh start'.[317] The minimum payment requirement has been criticised as being discriminatory to the 'honest but unfortunate debtor' who has in the past been denied a discharge for failure to pay at least part of his or her debt.[318]

To receive the full benefit of discharge and to achieve the economic rehabilitation of the debtor, it is important also to consider the principle of non-discrimination[319] as it can occur during and after the completion of a payment plan.[320] The *World Bank Report* observed that while some countries have data protection regulations prohibiting the registration and use of information on completed payment plans, most countries appear not to have specific prohibitions against discrimination addressing the insolvency of natural persons.[321] In the latter countries, an insolvency filing leads to discrimination against former natural person debtors because the filing appears as a negative credit entry for several years after the conclusion of the insolvency case.[322] Lawmakers are therefore urged to bear these factors in mind when considering policies for natural-person debtors.

Although there is a general desire to include all of the debtor's debts in the discharge to achieve economic rehabilitation, there must also be equality in the treatment of

[313] *World Bank Report* paras 359 and 450.
[314] *World Bank Report* paras 359 and 451.
[315] *World Bank Report* paras 360 and 451.
[316] *World Bank Report* para 361.
[317] *World Bank Report* para 361.
[318] *World Bank Report* para 362.
[319] *World Bank Report* paras 364-365 and 452.
[320] *World Bank Report* paras 365 and 452.
[321] *World Bank Report* para 365.
[322] *World Bank Report* para 365.

creditors and so, for social or economic reasons, certain debts are excluded from discharge.[323]

Another important goal of an insolvency system is to provide relief to the honest but unfortunate debtor.[324] Almost all insolvency systems have debtors who abuse the system.[325] As a result, the 'good-faith' principle features in virtually all insolvency systems, and fraudulent debtors who abuse the insolvency system are identified and denied a fresh start and discharge.[326] The aim is to ensure that the honest but unfortunate debtor receives the full benefits of an insolvency system and is not counted and disadvantaged with the dishonest debtors.[327]

An insolvency system for natural persons affects fundamental legal rights such as the right not to be discriminated against, the right to work, and basic social rights.[328] The *World Bank Report* calls on researchers and lawmakers to consider these factors when developing policies for natural-person debtors.[329] Further, lawmakers should consider choosing insolvency structures that allow for similar treatment of individual debtors similarly situated and prevent fraud and the abuse of the insolvency process.[330]

Therefore, the ultimate goal of an effective insolvency system is to provide relief to those who need it. This relief should be for a short period and should not be overly burdensome.[331]

2.5.3 The benefits and purpose of an insolvency-law regime

The *World Bank Report* identifies three desired benefits for natural-person insolvent debtors.[332] The first is the benefit for creditors.[333] This benefit which was intended for

[323] 372 and 455. The excluded debts include: child and spouse support; fines and other sanctions; taxes; and education loans.
[324] *World Bank Report* paras 398 and 454.
[325] *World Bank Report* para 370.
[326] *World Bank Report* paras 370-371 and 454. Debtors are required to disclose their economic affairs in the insolvency procedure on the penalty of being denied a discharge. Some countries deny discharge based on the debtor's behaviour. This occurs when the debtor has incurred debt in an unscrupulous manner or in a way that the court regards as obviously and objectively reckless or speculative.
[327] *World Bank Report* para 371. The aim is to make sure that a discharge is not denied to debtors who genuinely need it.
[328] *World Bank Report* para 411.
[329] *World Bank Report* para 365.
[330] *World Bank Report* para 414.
[331] *World Bank Report* para 406.
[332] *World Bank Report* paras 56-57.
[333] See Spooner (2015) *NIBLeJ* 540.

business debtors, has been the main objective for most insolvency regimes – including that of South Africa – for many years. Over the years a desire to benefit debtors and their families has been sought for non-business debtors. Lastly, the desire to benefit not only creditors and debtors but also society as a whole, has received the most attention. This last category seeks to balance the interests of all stakeholders in an insolvency regime for natural persons. These benefits will only be discussed insofar as they relate to the objectives of this research.

2.5.3.1 Benefit to creditors

The benefit to creditors' objective is aimed at addressing two weaknesses in the ordinary method of enforcing collection of debts. First, the collection methods have proved ineffective and resulted in wasteful expenditure by creditors.[334] Second, the collection methods resulted in a few creditors being paid to the detriment of the collective of all creditors.[335] Therefore, most countries consented to the benefit-for-creditors aim in their insolvency laws despite not having mechanisms to force debtors to work and deliver future value for creditors.[336] Slavery and imprisonment for debt were abolished because they did not result in payment for creditors.[337] Although some countries make use of garnishee orders to attach a debtor's income, this leaves debtors with little incentive to work as all or most of their income is directed to creditors.[338] The debtor may strike and refuse to work for creditors.[339] Therefore, the *World Bank Report* provides that punishing the debtor is not an incentive.[340] A positive incentive is the hope of a discharge.[341]

2.5.3.2 Benefit to debtors and their families

One of the principal objectives of an insolvency system for natural-person debtors is the provision of relief to the 'honest but unfortunate debtor'.[342] This is based on the desire to relieve the debtor of long-term suffering including religious convictions, ideals of social solidarity, and basic sentiment or empathy. This suffering, which appears to

[334] *World Bank Report* para 58.
[335] *World Bank Report* para 58.
[336] *World Bank Report* para 63.
[337] *World Bank Report* para 63.
[338] *World Bank Report* para 64.
[339] *World Bank Report* para 64.
[340] *World Bank Report* para 65.
[341] *World Bank Report* para 65.
[342] *World Bank Report* paras 70-75.

be caused by the anxiety of not being able to pay creditors or from constant harassment by creditors, has psychological effects on the debtor. Such psycho-social effects result in depression, sleeplessness, heart and nerve problems, and even suicide. These effects affect not only the debtor but his or her family as a whole.

The *World Bank Report* notes that relieving debtors from long-term suffering, even temporarily, has shown significant changes to debtors experiencing feelings of helplessness, depression, guilt, and shame. Therefore providing relief to debtors is a worthy goal to pursue.

2.5.3.3 Benefit to society

The *World Bank Report* acknowledges that the benefits of an insolvency regime for natural-person insolvency debtors are not only directed to creditors and debtors but should also spread to society.[343] Benefits to society are aimed at maximising the engagement and productivity of debtors and disciplining creditors to acknowledge the reality of their low-value claims against distressed debtors.[344]

The advantages to society include the following:

- maximising economic activity and promoting entrepreneurship;[345]
- reducing the costs of illness, unemployment, and other welfare-related costs;[346]
- collection of income tax;[347] and
- reduction of wasteful collection costs and concentrating losses on more effective loss redistribution.[348]

2.5.4 The challenges to a natural person's insolvency regime

Despite the many advantages of an insolvency system, three factors hinder the application of an insolvency system for natural persons. These factors are a moral hazard, debtor fraud, and stigma.

[343] *World Bank Report* para 76.
[344] *World Bank Report* para 78.
[345] *World Bank Report* paras 106-110.
[346] *World Bank Report* paras 99-101.
[347] *World Bank Report* paras 102-105.
[348] *World Bank Report* paras 85-87.

2.5.4.1 Moral hazard and debtor fraud

The concern is that offering debtors inappropriate incentives to deal irresponsibly with their finances and obligations creates a moral hazard.[349] It is felt that if the option to escape one's obligations is made widely available to debtors, they will have a greater incentive to act immorally and irresponsibly by recklessly incurring more debt than they can reasonably pay.[350]

Countries have overcome this problem by designing suitable access requirements for entry into the insolvency system and receipt of discharge, and by isolating and excluding debtors who engage in excessively risky or undesirable credit behaviour.[351] While it is important to provide relief to debtors who have failed due to factors beyond their control, it is also a goal of an insolvency regime for natural-person debtors to prevent the dishonest avoidance of responsibilities by debtors who are capable of paying their debts.[352] However, the *World Bank Report* states that the prevention goal should not disadvantage the honest but unfortunate debtors.

As with moral hazard, the concern with debtor fraud is that dishonest debtors use the insolvency system to gain from its benefits by hiding assets and income and misrepresenting their financial situations.[353] Insolvency systems have attempted to overcome this problem through careful monitoring by administrators, but debtor fraud persists.[354] As in the case of moral hazard, the *World Bank Report* states that the existence of debtor fraud should not discourage lawmakers from providing relief to honest but unfortunate debtors.[355]

2.5.4.2 Stigma

When a debtor announces that he or she is unable to manage his or her obligations, feelings of guilt, shame, embarrassment, and stigma arise.[356] In many countries this marks the end of the debtor's social and economic activity[357] and discourages or delays debtors from seeking relief through an insolvency-law regime.[358] While a

[349] *World Bank Report* para 113.
[350] *World Bank Report* para 113.
[351] *World Bank Report* para 114.
[352] *World Bank Report* para 115.
[353] *World Bank Report* para 117.
[354] *World Bank Report* para 117 and 119.
[355] *World Bank Report* para 119.
[356] *World Bank Report* para 120.
[357] *World Bank Report* para 122.
[358] *World Bank Report* paras 120-121.

measure of stigmatisation is a good deterrent for debtors wishing to escape their liabilities, when it is excessive, a well-designed insolvency system may be jeopardised and its benefits limited.[359]

To overcome this problem, some countries have undertaken campaigns to create public awareness of insolvency relief.[360] Some have redesigned their insolvency systems for natural persons to reduce or eliminate the stigmatising elements such as the long lists of civil disabilities and restrictions following an insolvency case.[361] This has reduced the stigma, as has allowing a discharge from debt and the liberalisation of property exemption in certain countries.[362]

Other countries have chosen to avoid or repeal judgemental terms such as 'bankrupt' and replaced them with more neutral terms such as 'debtor'. Further, punitive measures in existing laws, and post-relief restrictions on activities by debtors, have been removed or reduced.[363]

While the above measures have been undertaken by certain countries to combat fraud, moral hazard, and stigma, other measures may be undertaken by other countries to reflect cultural and historical differences.[364]

2.5.5 Summary

The *World Bank Report* embraces the goals from the American system's fresh-start approach, the *Insol Report*, and the *IFF Report*. It draws from each the goals regarded as 'ideal insolvency attributes' for natural-person debtors and recommends that lawmakers from countries worldwide consider these goals when deliberating on policies for natural-person debtors.

At the heart of the *World Bank Report* is the economic rehabilitation of the debtor which can be achieved by freeing him or her from excessive debt, placing debtors on an equal basis with non-debtors after receiving relief, and enabling them to avoid again becoming overindebted. Key to fulfilling these goals is the provision of a fresh start

[359] *World Bank Report* para 124.
[360] *World Bank Report* para 123.
[361] *World Bank Report* paras 123 and 402.
[362] *World Bank Report* para 123.
[363] *World Bank Report* para 125.
[364] *World Bank Report* para 401.

through a discharge, setting specific prohibitions against the discrimination of insolvent natural-person debtors, and providing relief to the honest but unfortunate debtor.

While factors like stigma, moral hazard, and fraud limit the realisation of these goals, the *World Bank Report* observes that the benefits to the creditor, the debtor, and society outweigh the hindrances which, however, various countries have managed to overcome.

2.6 Conclusion

This chapter aimed to extract international guidelines regarded as effective in the natural-person insolvency system and which address the limitations on insolvent debtors' capacity to earn a living. These guidelines should embody shared recommendations from the jurisdictions discussed in this thesis[365] and against which the South African insolvency system as regards the limitations on insolvent debtors' capacity to earn a living, will be considered in the search for possible solutions. The American fresh-start policy was discussed followed by the *Insol, IFF,* and *World Bank Reports*. The elements regarded as essential in terms of these international policy considerations for an effective natural-person insolvency system to govern limitations on insolvent debtors include:

a. Access to the discharge of debts for the honest but unfortunate debtor

The common thread running through these policy-based approaches and standard-setting criteria is that the honest but unfortunate debtor should be protected rather than punished. This protection should take the form of a discharge that will provide some form of 'fresh start' that goes beyond the discharge of unpaid debt. The fresh start may be immediate or it may be a delayed or earned fresh start. This will give the honest but unfortunate bankrupt an opportunity to start afresh and resume participation in the economy after bankruptcy free from pre-bankruptcy debts. This reflects that economic rehabilitation is one of the main aims of an insolvency system for natural-person insolvency.

International policy considerations also recommend that the insolvent debtor not be alienated from society by imposing unnecessary restrictions as this limits his or her

[365] Ch 5.

fresh start.[366] Further, the requirements for qualifying for a discharge and the period that must pass before discharge should not be so long or burdensome that they discourage debtors.[367]

However, bankruptcy is not intended to become a shelter for debtors who have engaged in dishonesty or intentional disregard for the rights of other persons.[368] Therefore, fraudulent debtors should not benefit from a discharge policy, instead, they should be excluded from its ambit. To distinguish the honest from the fraudulent, the circumstances of each debtor must be considered. While creditors may remain unpaid because of the debtors' overindebtedness, it must be realised that their overindebtedness is a normal economic activity and may be caused by factors beyond their control.

Linked to the discharge of debts, is the exclusion or exemption of certain property which affects the outcome of the discharge. In this regard, the protection of the income of the bankrupt is important as a debtor and his or her family have a right to a decent standard of living and the debtor's income lies at the heart of that right. Thus, a debtor should not be forced to live close to the breadline during bankruptcy.[369]

b. Non-discrimination

Another common thread is that to implement the benefits of the fresh-start policy fully, laws must be created to eliminate or reduce the stigma attached to bankruptcy which manifests in some unnecessary and damaging restrictions on the debtor and through discriminatory employment and credit laws after discharge. This will assist in preventing a possible infringement of a discharged debtor's fundamental rights and allow for his or her effective financial and social inclusion post-discharge. Some countries have addressed the stigma caused by bankruptcy restrictions by eliminating or reducing the number of restrictions imposed on an insolvent debtor during and after discharge.

[366] Para 2.3.2.2.
[367] Paras 2.3.3 and 2.5.2.
[368] Para 2.2.2.
[369] Para 2.4.3(c).

As regards the stigma caused by employment and credit discrimination, as mentioned,[370] the three major reasons for bankruptcy among consumers have been job problems, illness, and family break-ups. These are all externalities beyond the bankrupt's control and which affect the unfortunate but honest debtor who is at the centre of the protection intended by the fresh-start policy. Allowing employers, whether government or private, to use credit report information which includes bankruptcy as an evaluative tool for employment, punishes the honest debtor who is trying to get back on his or her feet. This is morally offensive and feeds the cycle of joblessness that the fresh-start policy aims to break.

Some states in America, for example, have resolved the problem of discrimination by private employers by limiting employers' access to bankruptcy information which is damaging to a job candidates' application and which also does not provide any legitimate insight into the candidate's suitability for the post. Some states have enacted anti-credit legislation that either bans or limits employers' access to a job applicant's consumer credit report. The *IFF*[371] and *World Bank*[372] *Reports*, as in the case in America, recommend that countries include a clear statement on non-discrimination that should cover a prohibition on discrimination in accessing credit, the labour market, membership of organisations, and access to housing when considering policies for natural-person debtors.

[370] Para 2.2.5.2.
[371] Para 2.4.3(e).
[372] Para 2.5.2.

CHAPTER 3: INSOLVENCY RESTRICTIONS AND DISQUALIFICATIONS UNDER SOUTH AFRICAN LEGISLATION

CHAPTER OVERVIEW

3.1 Introduction

The original function of an insolvency system is that of a collective debt-collection device aimed at dealing with the rights of creditors.[1] The Insolvency Act, therefore, aims to distribute the assets of the debtor fairly amongst his or her[2] creditors according to their ranking as provided in the Act.[3] The Act was designed to benefit creditors[4] and not to lighten debtors' financial burdens while they find a way to pay their creditors.[5] As a result, insolvent debtors in South Africa are likened to modern lepers who are

[1] Jackson *The logic and limits of bankruptcy law* 4.
[2] Where relevant, the male and/or female genders will be used interchangeably. No discrimination is implied or intended.
[3] *Walker v Syftret* 1911 AD 141 166 (*Walker v Syftret*); Smith *The law of insolvency* 81; Bertelsmann *et al Mars* 3; Sharrock, Van der Linde and Smith *Hockly's insolvency law* 4.
[4] *Ex parte Pillay* 1955 (2) SA 309 (N) 311.
[5] Bertelsmann *et al Mars* 4; *R v Meer* 1957 (3) SA (N) 619; Rochelle (1996) *TSAR* 318.

punished for financial failure, discouraged from re-establishing themselves in the economy, and are completely discouraged by the rehabilitation period.[6] This is in contrast to the international policy considerations which focus on economic rehabilitation as one of the main aims of an effective insolvency system for natural person insolvency.[7]

An insolvent person in South Africa faces many disabilities as regards his or her capacity to earn a living. As indicated in Chapter 1,[8] these impediments can be grouped in three stages: impediments before sequestration; impediments during sequestration; and impediments after sequestration. The first obstacle that an insolvent person faces is that of accessing the sequestration process. At the core of this obstacle is the 'advantage-to-creditors' requirement which must be met before a court can grant the sequestration order.[9] This is discussed in this chapter under sequestration proceedings.

Once an insolvent has overcome this first hurdle, the consequences of being an unrehabilitated insolvent in South Africa kick-in, and this is the stage at which the bulk of the disabilities on insolvent debtors arise. The disabilities include disqualification from holding various offices until the eventual discharge of the insolvent's debts on his or her rehabilitation. Disqualification from holding various offices also has an impact on South African labour laws. While the sequestration of the estate of an employee does not automatically terminate his or her employment contract, his or her employment contract may be terminated if the Insolvency Act or any other legislation prohibits an insolvent or an unrehabilitated person from following a particular type of employment or occupation.[10] This chapter discuss these impediments under restrictions and prohibitions on insolvent debtors under South African legislation.

The final stage occurs after rehabilitation and discharge. While rehabilitation discharges a debtor from all pre-insolvency debts, it does not remove all the obstacles faced by rehabilitated insolvents. Because of the discharge and rehabilitation status of rehabilitated insolvents, South African laws and policies continue to limit insolvents' ability to re-enter or re-establish themselves in the economy. This chapter addresses

[6] Rochelle (1996) *TSAR* 320.
[7] Ch 2 para 2.6.
[8] Ch 1 para 1.1.1.
[9] See Asheela *Advantage Requirement in Sequestration Applications* para 3.2.
[10] See para 3.4.3 below.

these impediments under rehabilitation. While the Insolvency Act has not been amended as a whole, the South African Law Commission[11] has investigated insolvency law in its entirety and has made certain reform proposals. This chapter discusses only those proposals relevant to the impediments indicated above under current developments. References are also made to whether the impediments contrast or are aligned with international policy considerations on insolvency systems for natural persons as discussed in Chapter 2 of this thesis.

In a thesis that investigates the constitutional impact of disqualifications on an insolvent debtor's ability to earn a living, it is important to examine the rationale for the existence of these disqualifications. Therefore, this chapter outlines the legal position in respect of the disqualifications of insolvent debtors, the rationale for their existence, as well as the impact of these disqualifications on South African labour laws. However, the nature and policy objectives of South African insolvency law are first considered.

3.2 The nature of South African insolvency law

South African insolvency law is rooted in Roman-Dutch law with English law influences.[12] A person is legally insolvent in South Africa if his or her estate has been sequestrated by an order of court.[13] The term 'insolvency law' refers to both the sequestration of the estate of a natural person and the winding-up or liquidation of juristic persons. The Companies Act of 1973[14] regulates the winding-up or liquidation of juristic persons, while the Insolvency Act regulates the sequestration of the estates

[11] In 1987 the then South African Law Commission started an investigation into the law of insolvency as a whole and a Project Committee was appointed to conduct and direct the review as Project 63. A series of working papers for discussion dealing with selected topics followed by reports, culminated in the Draft Insolvency Bill of 1996. This was replaced by the Report and Draft Bill published by the South African Law Reform Commission in 2000 (2000 Explanatory Memorandum and 2000 Draft Insolvency Bill respectively). The 2000 Explanatory Memorandum contains the Discussion Paper (the Discussion Paper). This document was revised in 2013 and 2014 and it gave rise to the 2014 Explanatory Report on the review of the law of insolvency: Draft memorandum Insolvency Bill and explanatory memorandum (Project 63) 2014 (2014 Explanatory Memorandum). The 2014 Explanatory Memorandum contains the explanatory memorandum and the proposed 2015 Draft Insolvency Bill (the 2015 Draft Insolvency Bill). Both the 2000 and 2014 Explanatory Memoranda are Working Documents produced by the Department of Justice and contain proposals for a Draft Insolvency Bill. However, a formal Draft Bill has not yet been published.
[12] Jackson *The logic and limits of bankruptcy law* 1; Smith *The law of insolvency* 5-9; Bertelsmann *et al Mars* 9; Boraine, Evans, Roestoff and Steyn (2015) *NIBLeJ* 62.
[13] Section 2 of the Insolvency Act; Bertelsmann *et al Mars* 3.
[14] Companies Act 61 of 1973 (the old Companies Act).

of natural persons. The Insolvency Act repealed the Insolvency Acts of 1916 and 1926.[15]

The Insolvency Act provides for two sequestration proceedings: voluntary surrender of a debtor's estate; and compulsory sequestration of a debtor's estate. The voluntary surrender of a debtor's estate is where the debtor applies for the sequestration of his or her estate.[16] Compulsory sequestration is where creditors apply for the sequestration of a debtor's estate.[17]

Although the requirements and procedures for each of these processes differ, the sequestration order delivers the same outcome for both.[18]

When a sequestration order is granted a *concursus creditorum* is created.[19] This was explained in *Walker v Syfret* to mean that the hand of the law is laid upon the estate and from that moment the interests of creditors as a group are placed above those of individual creditors.[20] Therefore, after the creation of a *concursus creditorum,* no single creditor can enter into a transaction involving the estate which prejudices creditors as a collective.[21] The insolvent loses control over his or her estate and it vests first in the Master of the Supreme Court (the Master), and thereafter in the trustee upon his or her appointment.[22] Not only the estate of the insolvent vests in the trustee but also the estate of the solvent spouse.[23] Further, the granting of a sequestration order stays all civil proceedings instituted by or against the insolvent and also stops all execution of judgments against the insolvent estate.[24] Sequestration, therefore, involves the liquidation of the insolvent estate for the benefit of creditors.[25] Sequestration also has an important consequence of reducing the debtors' status, curtailing their capacity to

[15] Section 1 of the Insolvency Act.
[16] Section 3 of the Insolvency Act.
[17] Bertelsmann *et al Mars* 113.
[18] Sharrock, Van der Linde and Smith *Hockly's insolvency law* 17.
[19] *Richter v Riverside Estates (Pty) Ltd* 1946 OPD 209 223; Smith *The law of insolvency* 4; Bertelsmann *et al Mars* 3.
[20] *Walker v Syfret* 166; Bertelsmann *et al Mars* 3.
[21] *Walker v Syfret* 166; Bertelsmann *et al Mars* 3.
[22] Section 20 of the Insolvency Act. See also *De Villiers v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A) (*De Villiers v Delta Cables*).
[23] This is the spouse married to the insolvent out of community of property. Section 21 of the Insolvency Act.
[24] Bertelsmann *et al Mars* 191-195. However, criminal proceedings are not affected by the sequestration of the accused's estate.
[25] See Bertelsmann *et al Mars* 3.

contract, earn a living, litigate, and hold office.[26] Evans says that the very nature of insolvency law limits the rights of most of its participants.[27] Thus, the granting of a sequestration order has harsh and far-reaching consequences[28] for the debtor,[29] his or her assets,[30] and those of his or her solvent spouse.[31] Consequently, the South African insolvency system has been described as creditor friendly[32] and punitive, and it has essentially remained unchanged since 1936.[33] This is in contrast to international policy considerations which advocate that insolvent debtors should be protected not punished.[34] Further, insolvent debtors should not be alienated from society by imposing unjust and unnecessary restrictions as this creates a stigma and hinders a fresh start.[35]

In South Africa an insolvent debtor is automatically rehabilitated after ten years.[36] At this point the sequestration process ends and the debtor obtains a fresh start through discharge from all his or her pre-sequestration debts (other than debts arising out of fraud on his or her part) and is supposed to be relieved of all disabilities resulting from the sequestration.[37] A discharge of debts after sequestration is one of the elements of an effective natural-person insolvency system.[38] Thus, in this regard South African insolvency law meets international guidelines. However, although international guidelines state that there may be an immediate, delayed, or earned discharge, they recommended that the period that must pass before obtaining a discharge should not be excessive.[39] This is because it will become too burdensome for the insolvent and

[26] *Spencer v Standard Building Society* 1931 TPD 481 484; *Ex parte Taljaard* 1975 (3) SA 106 (O) 108; *Standard Bank of SA Ltd v Essop* 1997 (4) SA 569 (D) 575; Sharrock, Van der Linde and Smith *Hockly's insolvency law* 63; Roestoff (2018) *THRHR* 393.
[27] Evans (2018) *De Jure* 315.
[28] Evans *A critical analysis of problem areas* 198.
[29] Sharrock, Van der Linde and Smith *Hockly's insolvency law* 63; Roestoff (2018) *THRHR* 393.
[30] See s 20 of the Insolvency Act.
[31] See s 21 of the Insolvency Act.
[32] Bertelsmann *et al Mars* 6.
[33] Burdette *A framework for corporate insolvency law reform* Part 2 Ch 2; M Roestoff *'n Kritiese evaluasie van skuldverligtingsmaatreëls*; Evans *A critical analysis of problem areas*; Boraine and Roestoff (2014) 1 *THRHR* para 1; Calitz *A reformatory approach to state regulation* (Part II) para 1.6; Steyn *Statutory regulation of forced sale of the home in South Africa*.
[34] Ch 2 para 2.6.
[35] Ch 2 para 2.6.
[36] Section 127A of the Insolvency Act.
[37] Section 129(1) of the Insolvency Act.
[38] Ch 2 para 2.6.
[39] Ch 2 para 2.6.

will hinder a fresh start.[40] This is especially so in circumstances, as in South Africa, where the debtor is subjected to a long list of restrictions during this period.[41]

In an attempt to prevent a provisional sequestration order from becoming final, the debtor may enter into a composition with his creditors.[42] This will be a common-law compromise based on consensus with his or her creditors that may be difficult to obtain. The statutory composition with creditors in terms of section 119 of the Act requires 75% support by creditors but can only be considered after the first meeting of creditors.[43] The common-law compromise is thus based on a contract and to be binding all the creditors must consent to the agreement.[44] Where the consent of all the creditors is not obtained there is no agreement.[45] On the other hand, if all the creditors consent the debtor will be released from all his or her debts to the extent that the compromise allows and the provisional sequestration order should in principle then be discharged without the debtor being subjected to all the restrictions and disqualifications imposed on unrehabilitated insolvent debtors.[46] Furthermore, the debtor will in such an instance be able to continue with his or her trade if he or she was in business, and creditors may receive higher dividends earlier than in sequestration which saves on sequestration costs.[47] However, as mentioned, consent by all the creditors may be difficult to achieve.[48]

Where a final order of sequestration has been granted and after the first meeting of creditors, a debtor can enter into a statutory compromise with his or her creditors. Unlike the common-law compromise, a statutory compromise requires acceptance by creditors whose votes amount to no less than a three-fourths majority in value and in all proven creditor votes.[49] Once the required majority has been obtained, the

[40] Ch 2 para 2.6. See also Roestoff (2018) 81 *THRHR* 313.
[41] See para 3.4 below.
[42] *Mahomed v Lockhat Brothers & Co Ltd* 1944 AD 230 241; Sharrock, Van der Linde and Smith *Hockly's insolvency law* 203.
[43] See generally Bertelsmann *et al Mars* ch 24.
[44] *Prinsloo v Van Zyl* 1967 (1) SA 581 (T) 583 (*Prinsloo v Van Zyl*); *Kopman v Benjamin* 1951 (1) SA 882 (W); Meskin *et al Insolvency law* para 13.2; Bertelsmann *et al Mars* para 24.2; Sharrock, Van der Linde and Smith *Hockly's insolvency law* para 18.1.
[45] Bertelsmann *et al Mars* para 24.2.
[46] Bertelsmann *et al Mars* para 24.1; Sharrock, Van der Linde and Smith *Hockly's insolvency law* para 18.
[47] Bertelsmann *et al Mars* para 24.1.
[48] Mabe (2019) *PELJ/PER* para 6.
[49] Section 119(7) of the Insolvency Act; Bertelsmann *et al Mars* para 24.5; Sharrock, Van der Linde and Smith *Hockly's insolvency law* para 18.3.

agreement is binding on all creditors.[50] This type of compromise may allow the debtor to adjust the liquidation process and reduce the period of insolvency.[51] In practice it will usually be inspired by the insolvent who wants to regain some of the estate assets, or where he or she is interested in establishing a special ground to apply for rehabilitation. The insolvent will usually also need a family member or friend willing to advance funds in order to be able to make an attractive offer to the creditors. However, a statutory compromise as such neither releases the insolvent of his or her debts nor does it discharge the sequestration order.[52] Thus, an insolvent who has entered into a statutory compromise remains an unrehabilitated insolvent but can apply for early rehabilitation immediately after the offer of compromise has been accepted if it meets the minimum dividend of 50c per rand required.[53]

Thus, with the alternatives to sequestration available under the Insolvency Act, the common-law composition is the only procedure that provides a discharge of debts and ends the sequestration process with the debtor being subjected to only a few restrictions.[54] However, as pointed out above, getting all the creditors to consent may be difficult.

South African law also provides for alternative debt-relief measures falling outside of the sequestration process and the Insolvency Act. Overindebted debtors may apply for an administration order in terms of section 74 of the Magistrates' Courts Act[55] or may apply to be declared overindebted in terms of section 86 of the National Credit Act.[56]

The administration procedure re-arranges the financial obligations of overindebted debtors[57] without providing a discharge of debts, at any stage in the administration process.[58] The magistrate's court grants the administration order but only a debtor with

[50] Bertelsmann *et al Mars* paras 24.1, 24.2.
[51] Bertelsmann *et al Mars* para 24.1; Sharrock, Van der Linde and Smith *Hockly's insolvency law* 203.
[52] Sharrock, Van der Linde and Smith *Hockly's insolvency law* 204.
[53] Section 119 (7) read with section 124(1) of the Insolvency Act; Sharrock, Van der Linde and Smith *Hockly's insolvency law* para 18.4.5.
[54] See the restrictions on persons who have entered into arrangements and compromise agreements with their creditors in para 3.4.3 below.
[55] Magistrates' Courts Act 32 of 1944 (the MCA).
[56] National Credit Act 34 of 2005 (the NCA).
[57] Nel *Analysis of the legislative mechanisms* n 81, 21.
[58] Boraine, Van Heerden and Roestoff (2012) *De Jure* 254, 256; Kelly-Louw (2008) *SA Merc LJ* 222; Roestoff and Renke (2006) *Obiter* 99; Nel *Analysis of the legislative mechanisms* paras 2.6, 5.1.

debts not exceeding R50 000 may access the procedure.[59] Once the order has been granted, the appointed administrator takes control of managing the payment of debts to creditors until all the listed creditors and administration costs have been fully paid.[60] Thereafter the order terminates.[61] There is no specific time limit in the MCA regarding the period within which the debt must be fully paid by the debtor.[62]

The debt review process in the NCA also re-arranges the financial obligations of overindebted debtors to eventually settle their debt, but only those debts under a credit agreement[63] and there is no monetary limit on the total outstanding debt.[64] Debt review also does not end a creditor's claim against a debtor but only postpones its execution.[65] The issuing of a clearance certificate to a consumer who was under debt counselling terminates debt review[66] but does not discharge his or her debts. A credit provider may also issue the notice to terminate the review if a consumer is in default under a credit agreement that is being reviewed.[67] In this case, there will also be no discharge of debts and the debtor will have to continue paying as per the original credit agreement or as per the terms of the set-aside debt review order. Creditors are also not per se prevented from applying for the compulsory sequestration of the debtor's estate while he or she is under debt review.[68] However, an application for debt review does not constitute an act of insolvency in terms of the Insolvency Act.[69]

It is also important to note, albeit briefly, that in 2019 parliament passed the National Credit Amendment Act[70] which amends the NCA by introducing debt intervention by inserting section 86A in the NCA. Debt intervention aims to assist consumers who

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[59] The debt amount is determined by the Minister (currently of Justice and Constitutional Development) from time to time and is currently set at R50 000 (GN R1411 in *GG* 19434 of 30 October 1998).
[60] See s 74U of the MCA.
[61] Section 74U of the MCA; Kelly-Louw (2008) *SA Merc LJ* 222.
[62] Nel *Analysis of the legislative mechanisms* para 2.6. This means that debtors may remain trapped by their debt for many years.
[63] Kelly-Louw and Stoop *Consumer credit regulation in South Africa* 324.
[64] Section 4 read with s 8 of the NCA; Roestoff and Coetzee (2012) *SA Merc LJ* 68.
[65] Section 88(3) of the NCA; Otto *National Credit Act explained* para 30.9(b).
[66] Section 71 of the NCA as amended by s 21 of the National Credit Amendment Act. Otto *National Credit Act explained* para 11.4. For a detailed discussion of clearance certificates under the NCA see Scholtz *et al Guide to the National Credit Act* para 11.4.
[67] Section 86(10) of the NCA.
[68] *Investec Bank Ltd v Mutemeri* 2010 (1) SA 265 (GSJ) para 31; *Naidoo v ABSA Bank* 2010 (4) SA 597 (SCA); Otto *National Credit Act explained* para 58.
[69] Section 8A of the Insolvency Act which was inserted by the National Credit Amendment Act 19 of 2014 (hereafter the NCAA).
[70] Clause 13 of the NCAA.

have debts arising from credit agreements and who cannot access the existing natural-person insolvency measures.[71] To access debt intervention an applicant must apply to the National Credit Regulator to be declared overindebted.[72] However, the applicant should either have no income or his or her gross income should not on average during the previous six months exceed R7,500.[73] The applicant should also be overindebted and must not have been sequestrated or subject to an administration order.[74]

In considering the debt intervention application the National Credit Regulator must provide the applicant with counselling on financial literacy and access to training to improve that debt intervention applicant's financial literacy.[75] If the applicant qualifies for debt intervention, the National Credit Tribunal can order that the debtor's obligations be partly or wholly suspended,[76] or it can order that the total amounts of the debtor's obligations under the qualifying credit agreements be extinguished.[77] In terms of section 88B of the NCA, an applicant whose obligations have been extinguished can apply to the National Credit Regular for a rehabilitation order to be granted by the Tribunal.[78] However, although debt intervention allows for the discharge of debts and the rehabilitation of certain debtors, it is only applicable where the total unsecured debt owing to credit providers does not exceed R50 000[79] thereby excluding many low-income earners whose debts exceed R50 000.[80] Debt intervention also only applies when the unsecured debt arose as a result of credit agreements in terms of the NCA, thus excluding unsecured debt outside the NCA. Although debt intervention is less cumbersome than other debt-relief measures, unless the R50 000 ceiling is done away with[81] and it covers most low-income earners' debts,[82] it may not be effective.

[71] Clause 1(*b*) of the NCAA.
[72] Section 86A(1) of the NCA.
[73] Clause 1(*b*) of the NCAA. For a detailed comment on debt intervention see generally Coetzee and Roestoff (2020) *Int Insol Rev* 99-107; Chitimira and Magau (2021) *IJEBL* 284-304.
[74] Clause 1(*b*) of the NCAA.
[75] Section 86A(5) of the NCA.
[76] Section 87A(2) of the NCA.
[77] Section 87A(6) of the NCA.
[78] Section 88B(1) of the NCA.
[79] Section 86A(1) of the NCA.
[80] Chitimira and Magau (2021) *IJEBL* 296; Boraine, Van Heerden and Roestoff (2012) *De Jure* 255; Boraine and Roestoff (2014) *THRHR* 528.
[81] Chitimira and Magau (2021) *IJEBL* 296.
[82] Chitimira and Magau (2021) *IJEBL* 297.

Therefore, the sequestration process is intended to distribute the assets of the debtor to benefit his or her creditors and provide the debtor with a discharge of his or her debt. The administration and the debt review procedures, on the other hand, do not promise a discharge but aim to assist overindebted debtors by re-arranging their financial obligations eventually to settle their debt.[83]

3.3 Restrictions and prohibitions on insolvent debtors before sequestration: Entry requirements

3.3.1 Voluntary surrender

An application for voluntary surrender can be made by the debtor or his or her agent, the executor of his or her deceased estate, or by both spouses in a joint estate.[84] Certain substantive and procedural requirements must be met before an application for voluntary surrender will be accepted. The substantive requirements allow the court to accept the application if the debtor shows that his or her estate is insolvent;[85] he or she owns realisable property of sufficient value to defray all costs of sequestration[86] which will in terms of the Act be payable out of the free residue of the estate; and that it will be to the advantage of the debtor's creditors if the estate is sequestrated.[87]

The court will not grant an order unless it is shown that the sequestration will be to the advantage of the debtor's creditors.[88] When applying for voluntary surrender, a debtor must show that he or she has sufficient assets that can be realised to pay for the costs of sequestration and, most importantly, that the sequestration will be to the advantage of creditors (eg, all the creditors will receive a dividend).[89]

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[83] For a brief overview of the debt relief procedures currently provided for in South African law generally see Boraine and Roestoff (2014) 1 *THRHR* para 2.
[84] Section 3(1) of the Insolvency Act and s 17(4) of the Matrimonial Property Act 88 of 1984.
[85] Section 6(1) of the Insolvency Act.
[86] The requirement of assets of sufficient value to pay costs has been omitted in the 2015 Draft Insolvency Bill as it does not add to the requirement of 'advantage of creditors'. See cl 3(17) of the 2014 Explanatory Memorandum.
[87] Section 6(1) of the Insolvency Act.
[88] Section 6(1) of the Insolvency Act; Bertelsmann *et al Mars* paras 3.4.4, 5.10.4. For a more comprehensive explaination of the advantage to creditors requirement see Coetzee *A comparative reappraisal of debt relief measures* para 3.3.2.2.
[89] Section 6(1) of the Insolvency Act. See Bertelsmann *et al Mars* para 3.30 for a discussion of the concept 'advantage of creditors' in relation to voluntary surrender.

The advantage requirement has shown to be the most difficult to prove in voluntary surrender applications because the onus on the applicant debtor is more onerous.[90] The reason for this is that a debtor applying for the surrender of his or her estate is expected to provide a detailed account of his or her financial position[91] because, unlike the creditors, he or she has full knowledge of his or her affairs and can readily prove the advantage of the creditors.[92] In this regard, the debtor is required to provide real evidence or facts that the sequestration of the estate will be to the advantage of all creditors.[93]

Another reason for the stricter requirement in voluntary surrender applications is to prevent the abuse of the sequestration process by overindebted and desperate debtors who have in the past used fraudulent means to access the sequestration process[94] without any benefit for creditors[95] and eventually to secure a discharge of debts on rehabilitation.[96]

In *Ex parte Arntzen* Gorven J stated that a greater risk of abuse exists in voluntary surrender applications.[97] Thus, the courts should be stricter in requiring full and frank disclosure and well-founded evidence concerning the debtor's estate.[98] Abuse in voluntary surrender applications may occur where the costs of sequestration exceed the alleged shortfall between assets and liabilities, where the costs reduce the amount

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[90] Sharrock, Van der Linde and Smith *Hockly's insolvency law* 20; *Hillhouse v Stott; Freban Investments (Pty) Ltd v Itzkin: Botha v Botha* 1990 (4) SA 580 (W) 581 (*Hillhouse v Stott*); *Ex parte Arntzen (Nedbank Ltd as Intervening Creditor)* (2013) 1 SA 49 (KZP) 50 (*Ex parte Arntzen*); *Ex parte Bouwer* 2009 (6) SA 386 (GNP); *Ex parte Mattysen et Uxor* 2003 (2) SA 308 (T); Nel *Analysis of the legislative mechanisms* 3, 11; Coetzee (2016) *Int Insol Rev* 36-39.
[91] *Hillhouse v Stott* 581.
[92] *Amod v Khan* 1947 (2) SA 432 (N) 438.
[93] *Ex parte Smith* 1958 (3) SA 568 (O) 371.
[94] See Mabe (2017) *THRHR* 695 where she explains how in *Nedbank Limited v Malan; In re: Ex parte application of Malan* [2015] JOL 33458 (GP) a debtor used the process of voluntary surrender in s 4(1) of the *Insolvency Act* to activate the suspension of sales in execution in s 5(1) of the Insolvency Act; Mabe and Evans (2014) *SA Merc LJ* 651 where various fraudulent actions are taken by debtors and creditors to access the sequestration process are explained. See, amongst others cases, *Nedbank Limited v Malan; In re: Ex parte application of Malan* [2015] JOL 33458 (GP) ; *Ex parte Erasmus* 2015 (1) SA (GP); *Nedbank Limited v Spencer* (27051/2014) [2015] ZAGPPHC 172 (3 March 2015); *FirstRand Bank v Consumer Guardian* (10978/2012) [2014] ZAWCHC 27 (4 March 2014); *Crafford v Crafford* (19421/13, 19422/13) [2014] ZAWCHC 14 (13 February 2014); *Ex parte Snooke* 2014 (5) SA 426 (FB); *Ex parte Arntzen*; *Plumb on Plumbers v Lauderdale* 2013 (1) SA 60 (KZD); *Ex parte Mark Shmukler-Tshiko and Emma Shmukler-Tshiko* ZAGPJHC 209 (26 October 2012).
[95] Sharrock, Van der Linde and Smith *Hockly's insolvency law* 20. See also *Ex parte Arntzen* 11-12; *Botha v Botha* (4457/2016) [2016] ZAFSHC 194 (17 November 2016) paras 10-14 (*Botha v Botha*).
[96] Mabe (2019) *PELJ/PER* para 2.
[97] *Ex parte Arntzen* 11.
[98] *Ex parte Arntzen* 12.

available for distribution to creditors, and where the costs favour administrators rather than creditors.[99] Therefore, the advantage requirement excludes those debtors who only want to access the sequestration process to obtain a discharge from their debts.[100]

If debtors are unable to show that they possess the required assets to prove an advantage to creditors, they will be excluded from accessing the sequestration procedure and consequently also excluded from the possibility of a fresh start after rehabilitation.[101] Unfortunately, the advantage requirement not only prevents fraudulent or dishonest debtors from accessing the sequestration process, but also affects honest but unfortunate debtors who have good intentions.[102] This is contrary to international policy considerations which provide that discrimination on financial grounds should be avoided.[103]

In contrast, for the compulsory sequestration of a debtor's estate brought by the debtor's creditor, the creditor need only prove that there is reason to believe that it will be to the advantage of the debtor's creditors if the debtor's estate is sequestrated.[104] As indicated, the reason for this is that a debtor applying for the surrender of his or her estate can normally be expected to provide a detailed account of his or her financial position, whereas a sequestrating creditor in a compulsory sequestration application would generally not have access to this information.[105] The burden of proof on the applicant creditor in compulsory sequestration is, thus, less burdensome than in the case of voluntary sequestration.

However, before a court can even consider an application for voluntary surrender, the debtor must first satisfy the procedural requirements. He or she must publish a notice of surrender in the *Government Gazette* and in a newspaper circulating in the district in which he or she resides or, if he or she is a trader, in the district in which his or her principal place of business is situated.[106] The notice must state the day on which the

[99] Mabe and Evans (2014) *SA Merc LJ* 2.
[100] Bertelsmann *et al Mars* 74; Mabe (2017) *THRHR* 695.
[101] Evans (2018) *De Jure* 300. Coetzee and Roestoff (2020) *Int Insol Rev* para 2.
[102] Mabe (2019) *PELJ/PER* para 2.
[103] Coetzee *A comparative reappraisal of debt relief measures* para 2.7.
[104] Mabe and Evans (2014) *SA Merc LJ* 656; Sharrock, Van der Linde and Smith *Hockly's insolvency law* 33.
[105] *Hillhouse v Stott* 581.
[106] Section 4(1) of the Act.

application will be made to the court and the period during which the debtor's statement of affairs will lie for inspection in the Master's office.[107] The notice can only be withdrawn with the written consent of the Master which will only be given if the Master is satisfied that the notice was published in good faith and that good cause exists for it to be withdrawn.[108] Within seven days of the date of publication of the notice in the *Government Gazette*, the debtor must deliver or post a copy of the notice to each of his or her creditors whose addresses are known or can be established, to registered trade unions representing the debtor's employees, to the debtor's employees, and to the South African Revenue Service (SARS).[109] The purpose of this notice is to warn creditors of the intended application should they wish to oppose it[110] and it has the effect of staying all sales in execution against the insolvent estate.[111] The only problem with the notice is that depending on when the creditors receive the posted or delivered notice, they may be left with only a few days in which to inspect the statement of the applicant's affairs and to decide whether or not to intervene in the application.[112]

The statement of affairs with supporting documents must be lodged in duplicate[113] at the Master's office and must lie for inspection by creditors at all times during office hours for 14 days as stated in the notice of surrender.[114] The statement must be correct and complete, failing which the debtor commits an act of insolvency and a creditor can apply for the compulsory sequestration of his or her estate. The same applies if the debtor fails to lodge the statement or the statement is incorrect or incomplete.[115] The statement must list, amongst other things, the debtor's property (movable and immovable and securities held therein), his or her debtors and creditors, and must also indicate the causes of the debtor's insolvency.[116]

Establishing the reason for the insolvency may reveal whether the insolvency was caused by the debtor's fraudulent or dishonest dealings, or whether it was as a result

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[107] Section 4(3) of the Act.
[108] Section 7 of the Act. Bertelsmann *et al Mars* 60.
[109] Section 4(2) of the Act.
[110] Bertelsmann *et al Mars* 55; Sharrock, Van der Linde and Smith *Hockly's insolvency law* 20.
[111] Sections 5 and 20(1)(*b*) and (*c*) of the Act.
[112] *Ex parte Arntzen* para 7-8.
[113] Section 4(3) of the Act.
[114] Section 4(6) of the Act.
[115] Section 8(f) of the Act.
[116] Sharrock, Van der Linde and Smith *Hockly's insolvency law* 22-23. Bertelsmann *et al Mars* para 3.2.2.

of unfortunate financial disruptions. This has the effect of distinguishing between dishonest debtors and honest but unfortunate debtors. In this regard, South African insolvency law meets international guidelines as establishing the cause of the insolvency can potentially identify and distinguish between dishonest debtors and honest but unfortunate debtors so that the honest debtors can be protected.[117] However, as will be shown, the distinction between dishonest debtors and honest but unfortunate debtors is not acknowledged in South African insolvency legislation. Although fraudulent and dishonest debtors are identified, all unrehabilitated insolvent debtors are subjected to disqualifications and restrictions.[118]

Adhering to all these requirements, however, does not guarantee the granting of the sequestration order.[119] The court still has a discretion to grant or reject the application based on several factors.[120] This would be the case where the debtor displayed gross extravagance, had an ulterior motive in making the application, failed to give full and frank disclosure of his or her financial position, or his or her papers were deficient in many respects.[121] Even if the court has granted the sequestration order, it may still rescind, vary, or set aside the order if it was obtained incorrectly, fraudulently, or when subsequent events justify a rescission – especially if there was an abuse of the sequestration process.[122] Rescission in this case does not release the debtor from his or her liabilities, as under a rehabilitation order,[123] but places him or her in the same position he or she held before his or her estate was sequestrated.[124] In other words, the debtor's status does not change.

Where a sequestration order has been granted but more information regarding the insolvent's honest or fraudulent conduct leading to the sequestration is required, the

[117] Ch 2 para 2.6.
[118] See paras 3.4-3.7 below.
[119] Section 12(2) of the Act.
[120] In *Ex parte Ford* 2009 (3) SA 376 (WCC) paras 21-22 the applicants alleged that they had a constitutional right to the acceptance of the surrender of their estates, it was held that the voluntary surrender procedure was not intended for the relief of harassed debtors or the deprivation of creditors' claims, but is intended to regulate the manner and extent of payments. The court consequently used its discretion against the granting of the sequestration order.
[121] See Sharrock, Van der Linde and Smith *Hockly's insolvency law* 30; Bertelsmann *et al Mars* 83.
[122] Section 149(2) of the Act; Bertelsmann *et al Mars* 169-170; Sharrock, Van der Linde and Smith *Hockly's insolvency law* 31.
[123] See para 3.5 below.
[124] Bertelsmann *et al Mars* 175; Sharrock, Van der Linde and Smith *Hockly's insolvency law* 32.

trustee of the insolvent estate can conduct a meeting at the request of the creditors and with the Master's consent, to question the insolvent.[125]

3.3.2 Compulsory sequestration

The second method by which a debtor's estate may be sequestrated is through compulsory sequestration where the debtor's creditors apply for the sequestration of his or her estate. The petition for compulsory sequestration is made by bringing a notice of motion supported by an affidavit. The petition is required to indicate the act of insolvency committed by the debtor, or the facts that indicate that the debtor is in fact insolvent, or other important facts showing the debtor's conduct leading to his or her insolvency.[126] The facts in the petition should be confirmed by the affidavit supporting the petition.[127]

In compulsory sequestration the applicant creditor must approach the court twice: first to obtain a provisional order[128] of sequestration; and second to have the provisional order confirmed and made final.[129] The same requirements apply to both procedures but the standard of proof differs.[130] For the provisional order, the court must believe that *prima facie* the requirements for sequestration have been satisfied.[131] In this regard, a minimum of one creditor can apply to the court for the sequestration of the debtor's estate.[132] Since the application can be brought by a single creditor, as a precaution against creditors abusing their power to bring compulsory sequestration applications, the Insolvency Act allows a debtor to claim damages if the court finds the application to be an abuse of process, malicious, or vexatious.[133] In this regard, the debtor will have to prove the damage suffered as a result of the presentation of the petition.[134]

[125] Section 42(2) of the Insolvency Act; Bertelsmann *et al Mars* 452-453.
[126] Section 9(3)(*a)*(v) of the Insolvency Act.
[127] Section 9(3)(*b*) of the Insolvency Act.
[128] Section 10 of the Insolvency Act.
[129] Section 12 of the Insolvency Act.
[130] *Braithwaite v Gilbert* 1984 (4) SA 717 (W).
[131] Section 10 of the Act; Bertelsmann *et al Mars* para 5.6.2.
[132] Section 9(1) of the Insolvency Act.
[133] Section 15 of the Insolvency Act.
[134] Section 15 of the Insolvency Act.

Further, on the requirements of a compulsory application, the applicant creditor must show that he or she has a liquidated claim against the debtor of not less than R100.[135] He or she must prove that the debtor has committed an act of insolvency or is insolvent.[136] Lastly, he or she must show that there is reason to believe that the sequestration of the debtor's estate will be to the advantage of his or her insolvent estate.[137] To have the provisional order confirmed and made final, the court must be satisfied that the requirements in the provisional order have been proved on a balance of probabilities.[138]

The procedural formalities require the applicant creditor to provide security to the Master to cover all sequestration and administration costs until the appointment of a trustee. If a trustee is not appointed, the security will then cover all the costs necessary for the discharge of the estate from sequestration.[139] On presenting the application to the court, the applicant creditor must also furnish a copy to the debtor, every registered trade union representing the debtor's employees, the debtor's employees themselves, and to SARS.[140]

Once these requirements have been met, the court has a discretion to grant a provisional order of sequestration if it believes that *prima facie*[141] the applicant has a liquidated claim of not less than R100, or R200 where there are two or more creditors;[142] that the debtor has committed an act of insolvency or is insolvent;[143] and that there is reason to believe that the sequestration will be to the advantage of creditors.[144] However, even if a court has exercised its discretion and granted a

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[135] Section 10(*a*) read with s 9(1) of the Insolvency Act. This amount has been increased to R2 000 in clause 5(1) of the 2015 Draft Insolvency Bill.
[136] Section 10(*b*) of the Insolvency Act. The 'acts of insolvency' in the 2015 Draft Insolvency Bill have been abolished and have been replaced with the presumption that the debtor is unable to pay his or her debts. This is similar to s 345(1) of the old Companies Act where a debtor is presumed to be unable to pay its debts if a statutory demand has not been complied with, or if it appears from a return of service that a judgment of a court against the debtor has not been satisfied after its a valid execution. See cl 5(1)(*a*) of the 2015 Draft Insolvency Bill. This is aimed at aligning South African insolvency law with international trends that have replaced the concept of 'acts of insolvency' with the test of ability to pay debts. See cl 2 of the 2014 Explanatory Memorandum to the 2015 Draft Insolvency Bill.
[137] Section 10(*c*) of the Insolvency Act.
[138] Section 12 of the Insolvency Act.
[139] Section 9(3) of the Insolvency Act; Sharrock, Van der Linde and Smith *Hockly's insolvency law* 51.
[140] Section 9(4A)(*a*)(i)-(iii) of the Insolvency Act; Sharrock, Van der Linde and Smith *Hockly's insolvency law* 52.
[141] Section 10 of the Act; Meskin *et al Insolvency law* para 2.1.
[142] Section 9(1)(*f*) of the Act.
[143] Section 8 of the Insolvency Act; see generally Bertelsmann *et al Mars* ch 4.
[138] Section 8 of the Insolvency Act; see generally Bertelsmann *et al Mars* ch 4; *Stratford v Investec Bank Limited* 2015 (3) SA 1 (CC).

provisional order, it may allow an application for the withdrawal of the compulsory sequestration application with or without an order for costs against the debtor subject to notification of all known creditors.[145]

On granting the provisional order, the court will order that a *rule nisi* be served on the debtor.[146] The *rule nisi* states that the debtor should appear in court on a certain date to show reasons why his or her estate should not be finally sequestrated.[147] On the return date the court will issue a final order of sequestration if it is satisfied that the above requirements have been met.[148] Once the insolvent has been served with the sequestration order, he or she must lodge a statement of his or her affairs with the Master within seven days.[149] If there is a solvent spouse, he or she is also required to lodge a statement of his or her affairs with the Master within seven days of being served with the sequestration order.[150]

A creditor who does not appear to be acting at 'arm's length' can also access compulsory sequestration through so-called 'friendly sequestrations'.[151] This occurs when a debtor arranges with a friend or family member to whom he or she owes a debt and to whom he or she has sent a notice in writing of his or her inability to pay,[152] to apply for the compulsory sequestration of his or her estate.[153] Such notice may amount to an act of insolvency but the process may be deemed to be an abuse of process if it is merely to assist the debtors to escape the payment of their debts and achieve speedy rehabilitation.[154]

3.3.3 Property of the insolvent estate

Immediately on the granting of a sequestration order, a *concursus creditorum* is created, which activates the achievement of the Act's objective to liquidate the

[145] Bertelsmann *et al Mars* para 5.8.
[146] Section 11 of the Act.
[147] Section 11 of the Insolvency Act; Bertelsmann *et al Mars* para 5.9.
[148] Section 12 of the Act. See also the court's discretion in Bertelsmann *et al Mars* para 5.10.
[149] Section 16(2)(*b*) of the Insolvency Act.
[150] Section 16(3) of the Insolvency Act.
[151] For friendly sequestration see *Epstein v Epstein* 1967 (4) SA 606; Bertelsmann *et al Mars* para 4.9; Sharrock, Van der Linde and Smith *Hockly's insolvency law* 45; Mabe and Evans (2014) *SA Merc LJ* 656.
[152] Section 8(*g*) of the Insolvency Act.
[153] Sharrock, Van der Linde and Smith *Hockly's insolvency law* 45; Bertelsmann *et al Mars* para 4.9; Mabe and Evans (2014) *SA Merc LJ* 656.
[154] Not all 'friendly sequestration' applications are an abuse of the process of the court. See Meskin *et al Insolvency law* para 2.1.5; Mabe and Evans (2014) *SA Merc LJ* 656.

insolvent estate and to distribute the assets of the debtor evenly amongst his or her creditors per the order of preference provided for in the Act.[155] The trustee of the estate fulfils this objective.[156] To allow the trustee to perform his or her duties, the Insolvency Act provides that the effect of a sequestration order is to divest the insolvent of his or her estate and to vest it in the Master and later in the trustee once he or she has been appointed.[157]

The insolvent estate consists of all the property of the insolvent at the date of sequestration. This includes property or the proceeds thereof in the hands of a sheriff under a writ of attachment[158] and any property the insolvent acquires or which accrues to him or her during the sequestration.[159]

The Insolvency Act defines property to include movable and immovable property wherever situated in the Republic, and includes contingent interests in property other than the contingent interests of a *fideicommissary* heir or legatee.[160] Movable property is every form of property and every right or interest which is not immovable property. Immovable property refers to land and every right or interest in land or minerals which is registrable in a deeds registry with the Republic.[161]

The sequestration of the estate of a debtor affects not only his or her estate as a sequestration order also vests the separate property of the spouse of the insolvent in the Master and thereafter in the trustee.[162] Although this vesting is not permanent, until an asset is released from the insolvent estate, the solvent spouse cannot exercise any of the ordinary powers of ownership over it.[163]

Therefore, the property that could vest in the insolvent estate includes:[164]

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[155] Smith *The law of insolvency* 81; Evans *A critical analysis of problem areas* 198.
[156] Smith *The law of insolvency* 81; Sharrock, Van der Linde and Smith *Hockly's insolvency law* 130.
[157] Section 20(1)(*a*) of the Insolvency Act; *Brown v Oosthuizen* 1980 (2) SA 155 (O); Bertelsmann *et al Mars* para 9.1; Sharrock, Van der Linde and Smith *Hockly's insolvency law* 70.
[158] Section 20(2)(*a*) of the Insolvency Act.
[159] Section 20(2)(*b*) of the Insolvency Act.
[160] Section 2 of the Act. See Bertelsmann *et al Mars* para 9.4.
[161] Section 2 of the Act.
[162] Section 21 of the Insolvency Act.
[163] See generally *De Villiers v Delta Cables* regarding the ownership of property vesting in the insolvent estate.
[164] Bertelsmann *et al Mars* para 9.5.

- foreign assets;[165]
- solvent spouses' property;[166]
- the insolvent's title deeds and other muniments of title;
- money as it falls within the definition of movable property;
- proceeds of an execution sale;
- the goodwill of a business carried on by the insolvent;
- intellectual property rights;
- personal rights of action that existed at the time of sequestration or accrued before rehabilitation;
- debts incurred to insolvent during sequestration;
- liquor licences;
- shares;
- immovable property registered in the insolvent's name;
- property purchased by and delivered to the insolvent but not paid for;
- property acquired during sequestration;
- rights of inheritance;
- restraints; and
- damages against a trustee for maladministration.

However, there is certain property that does not form part of the insolvent estate which the debtor is allowed to keep for him- or herself.[167] Evans distinguishes between excluded assets and exempt assets.[168] He says that excluded assets are those assets that should never form part of the insolvent estate.[169] Exempt assets initially form part of the insolvent estate but may be exempted (in whole or part) from the estate to benefit the insolvent debtor.[170]

The rationale behind allowing an insolvent to keep some property, as developed through the case law, was to ensure that the insolvent and his or her family were not

[165] It must be noted that the definition of 'property' in s 2 of the Insolvency Act only refers to property situated in South Africa but it is possible to claim property outside the borders of South Africa in terms of cross-border insolvency rules that may apply – see further Meskin *et al Insolvency law* para 17; Bertelsmann *et al Mars* para 30.4.
[166] Section 21 of the Act.
[167] Evans *A critical analysis of problem areas* 250.
[168] Evans *A critical analysis of problem areas* 250; Evans and Mthethwa (2014) *SAPL* para 2.
[169] Evans *A critical analysis of problem areas* 250.
[170] Evans *A critical analysis of problem areas* 250 and 255.

deprived of their dignity and basic life necessities.[171] Further it ensures that they can start afresh financially and build a new estate.[172] The policy on the inclusion or exemption of certain property from the insolvent estate is in line with international guidelines that state that a debtor and his or her family have a right to a decent standard of living and a debtor should not be forced to live close to subsistence during bankruptcy.[173] Originally, debtors were arrested and imprisoned as a creditor's means of acquiring satisfaction for debts.[174] After the arrest and imprisonment for debt were abolished, the *cessio bonorum* enabled debtors voluntarily to surrender all their property to creditors in exchange for freedom from imprisonment and exemption of post-surrender assets from attachment for debts incurred before the surrender.[175] As countries developed, however, social and economic reality, humanity, and the dignity of the debtor called for leniency.[176] The idea of allowing debtors to keep some of their assets was, therefore, based on an element of forgiveness and some sense of compassion for fellow human beings.[177] Therefore, the following property is exempted or excluded from the insolvent estate, either at the date of sequestration or during sequestration:

- wearing apparel, bedding, household furniture, tools and other means of subsistence;[178]
- remuneration or reward for work done or for professional services rendered by the insolvent or on his behalf, after sequestration;[179]
- pensions that the insolvent is entitled to for services rendered by him;[180]
- compensation for defamation or personal injury which the insolvent may have suffered;[181]
- compensation for occupational injuries or diseases;[182]

[171] Evans *A critical analysis of problem areas* 251.
[172] *Ex parte Kroese* 2015 (1) SA 405 (NWM) (*Ex parter Kroese*) para 41. For a discussion of this case see generally Evans (2018) *De Jure* 306 and Roestoff (2017) *SA Merc LJ* 479.
[173] Ch 2 para 2.6.
[174] Smith *Law of insolvency* 5-6.
[175] Smith *Law of insolvency* 5.
[176] Evans *A critical analysis of problem areas* 252.
[177] Evans *A critical analysis of problem areas* 251.
[178] Section 82(6) of the Insolvency Act.
[179] Section 23(9) of the Insolvency Act.
[180] Section 23(7) of the Insolvency Act.
[181] Section 23(8) of the Insolvency Act.
[182] Compensation in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 is excluded from the insolvent estate as it falls under compensation for personal injury in terms of s 23(8) of the Insolvency Act.

- benefits payable by a miner;[183]
- unemployment insurance benefits;[184]
- life, disability, and health insurance policies;[185]
- share in accrual;[186]
- right of a labour tenant to land or right in land in terms of the Land Reform Act;[187]
- friendly society money and assets;[188] and
- property acquired with money from the above.

While in the past the exclusion or exemption of certain property was based on society's sense of compassion towards debtors, in the current constitutional democracy the two cases that follow show that it is not based solely on public interest but also on the debtor's constitutional right to life,[189] dignity,[190] and to work.[191]

In *Ex parte Kroese,* Mr and Mrs Kroese, who were married in community of property, applied for the voluntary surrender of their estate. In an attempt to increase the value of the estate to prove an advantage to creditors, they waived the protection afforded them in section 82(6) of the Act, to retain their bedding, wearing apparel, and furniture. Landman J held that whenever considering section 82(6) of the Act, the Constitution, more particularly the right to life, dignity, and to work or trade, must be considered.[192] Section 82(6) is intended to preserve the right to life and dignity of the insolvent and his or her dependants so that they can rebuild their lives.[193] He held that these protections were enacted not only to benefit debtors, but also to protect the public in that it would not be in the interest of the state to allow debtors to renounce their assets and become a burden on society.[194] Considering the importance of the inalienable

[183] Section 131(1) of the Occupational Diseases in Mines and Works Act 78 of 1973 provides that if the estate of the holder of a right to benefit under this Act or of a person to whom or for whose benefit such money has been paid, is sequestrated as insolvent, the said right or money shall not form part of his or her insolvent estate.
[184] Section 33 of the Unemployment Insurance Act 63 of 2001 as amended by the Unemployment Insurance Amendment Act 19 of 2016.
[185] Section 63 of the Long-Term Insurance Act 52 of 1998 as amended by the Financial Services Laws General Amendment Act 45 of 2013.
[186] Section 3(2) of the Matrimonial Property Act 88 of 1984.
[187] Section 39(*c*) of the Land Reform Act 3 of 1996.
[188] Section 48A(1) of the Friendly Societies Act 25 of 1956.
[189] Section 11 of the Constitution of the Republic of South Africa, 1996 (the Constitution).
[190] Section 10 of the Constitution. See Coetzee *A comparative reappraisal of debt relief measures* 137; Evans *A critical analysis of problem areas* 444.
[191] Section 22 of the Constitution.
[192] *Ex parte Kroese* paras 38, 39, 46 and 49.
[193] *Ex parte Kroese* para 41.
[194] *Ex parte Kroese* para 56.

right to the human dignity of the applicants and their dependants, coupled with the right to work or trade and the need for basic necessities, the applicants were not permitted to waive their entitlement.[195] Landman J held that the rights sought to be waived did not exist at the time of the sequestration application and could thus not be waived.[196]

Evans and Mthethwa agree with the decision in this case and the stance taken by the court regarding an insolvent debtor's constitutional rights.[197] They agree that the rights in section 82(6) cannot be waived before sequestration because, at that stage, there are no property rights to be waived.[198] They explain that the facts in *Ex Parte Kroese* refer to a situation that arises only after the sequestration of a debtor's estate.[199] They believe that Landman J shed light on the question of South African insolvency-law policy and possible confrontation with infringement of constitutional rights of debtors by legislation.[200] However, they question whether it was necessary for Landman J to discuss the constitutional implications as the applicants had no constitutional rights at that stage.[201]

In *Ex parte Van Dyk*[202] the applicant applied for the surrender of his estate. He stated that he would make monthly income contributions into his insolvent estate in terms of section 23(5) of the Insolvency Act to meet the advantage to creditor's requirement. Section 23(5) of the Act allows the trustee to claim any sums of money received or to be received by the insolvent for work performed after sequestration which the Master considers are not necessary to support the insolvent and his dependants. Makhubele AJ had to consider whether an insolvent can forfeit his or her salary to establish a benefit to creditors.[203] He followed the reasoning and conclusions of Landman J in *Ex parte Kroese* that constitutional considerations such as the applicant's basic right to food must be taken into account.[204] He held that the Master may have to consider

[195] *Ex parte Kroese* para 67. This decision is contrary to the judgment handed down in *Ex parte Anthony* 2000 (4) SA 116 (C) where the court ruled that such waiver of rights was acceptable.
[196] *Ex parte Kroese* para 65.
[197] Evans and Mthethwa (2014) *SAPL* paras 1 and 5.
[198] Evans and Mthethwa (2014) *SAPL* para 4.1.
[199] Evans and Mthethwa (2014) *SAPL* para 1.
[200] Evans and Mthethwa (2014) *SAPL* para 5.
[201] Evans and Mthethwa (2014) *SAPL* para 5; Evans (2018) *De Jure* para 5.1.
[202] *Ex parte Van Dyk* (1869/2015) [2015] ZAGPPHC 154 (26 March 2015) (*Ex parte Van Dyk*).
[203] *Ex parte Van Dyk* para 1.
[204] *Ex parte Van Dyk* para 19.

whether the undertaking to make monetary contributions to the insolvent estate overrides the applicant's rights and obligations to provide for himself and his family.[205] Taking into account the risks associated with the policing of the order, the delays in finalising the administration of the estate, and the constitutional challenges that may arise should the applicant at any stage in the future require the amount for the basic needs of his family, the judge found the undertaking unacceptable.[206]

While the insolvent may have excess income which the Master may think the insolvent does not need to support him- or herself and his or her dependants, as per *Ex parte Van Dyk,* constitutional challenges may arise should the insolvent and his or her dependants need the excess income in the future. The debtor and his or her dependant's level of sufficiency should be established[207] to consider future financial changes, especially as an insolvent is rehabilitated only after ten years in South Africa. In addition, the Insolvency Act offers no guidance on how the Master should exercise its discretion under section 23(5)[208] or whether the Master's determination can be altered if the insolvent's circumstances change in the future.[209]

In *Ex parte Theron*[210] the court emphasised the difficulty of the Master's decision under section 23(5) and the fact that ultimately it is the Master who must decide the standard of living the insolvent maintains or should maintain.[211] In addition, the court held that section 23(5) should not be invoked to punish an insolvent so that he or she is never again able to improve his or her standard of living or function normally.[212] The applicants in this case submitted that the general spirit of the Insolvency Act is not that a hardworking insolvent person should never again be able to build a new estate.[213] Instead, the insolvent should be permitted to become economically productive again so that he or she is not a burden on the state.[214] Further, the applicants indicated that the Master should exercise its discretion in a regular manner and reasonably taking

[205] *Ex parte Van Dyk* para 20.
[206] *Ex parte Van Dyk* para 23.
[207] Boraine and Roestoff (2014) 2 *THRHR* para 6(e).
[208] Roestoff (2017) *SA Merc LJ* 495, 510.
[209] Roestoff (2017) *SA Merc LJ* 511.
[210] *Ex parte Theron*; *Ex parte Smit*; *Ex parte Webster* 1999 (4) SA 136 (0) (*Ex parte Theron*) paras 143J-144C; Roestoff (2017) *SA Merc LJ* 495.
[211] *Ex parte Theron* para 145A-C; Roestoff (2017) *SA Merc LJ* 496.
[212] *Ex parte Theron* paras 143J-144C; Roestoff (2017) *SA Merc LJ* 495.
[213] *Ex parte Theron* paras 143J-144C; Roestoff (2017) *SA Merc LJ* 495.
[214] Roestoff (2017) *SA Merc LJ* 495.

into account the principles in the Constitution.[215]

When one considers that the purpose of excluding or exempting certain property from the insolvent estate is to uphold an insolvent's right to life, dignity, to work or trade, and to ensure that an insolvent and his or her dependants can rebuild their lives financially, section 23(5) of the Insolvency Act appears to negatively affect this aim.[216] Section 23(5) has the effect of limiting the insolvent's capacity to earn an income and prevent him or her from building a new estate and again becoming economically active.[217] The Insolvency Act is aimed at the equitable distribution of the debtor's assets, not his or her income, amongst the creditors, and to achieve this the debtor surrenders his or her non-exempt assets. Section 23(5) also contrast with international guidelines that advocate the protection of the income of the debtor necessary for the insolvent and his or her dependants to live decent lives taking into account possible changing living standards.[218] This is because the income of the insolvent is at the centre of the insolvent's right to a decent standard of living and it has an effect on the outcome of the discharge.[219]

3.4 Restrictions and prohibitions on insolvent debtors during sequestration

Insolvency is a status of diminished legal capacity imposed by the courts on persons whose liabilities exceed their assets.[220] This diminished legal capacity deprives the insolvent of certain rights and certain legal capacities.[221] A sequestration order, therefore, not only affects an insolvent's right to property, as shown above, but also limits his or her contractual capacity, capacity to litigate, to earn a living, and to hold office.[222] As the surrender of an insolvent's non-exempt property to creditors is in exchange for freedom from imprisonment, the restrictions on an insolvent's capacity

[215] *Ex parte Theron* paras 143J-144C; Roestoff (2017) *SA Merc LJ* 495.
[216] Roestoff (2017) *SA Merc LJ* para 1.
[217] Roestoff (2017) *SA Merc LJ* para 1. The insolvent's capacity to earn an income is discussed in para 2.4.3 of this chapter.
[218] Ch 2 para 2.4.3(c); Coetzee *A comparative reappraisal of debt relief measures* 138.
[219] Ch 2 para 2.4.3(c).
[220] *Spencer v Standard Building Society* 1931 TPD 481, 484 (*Spencer v Standard Building Society*); *Ex parte Taljaard* 1975 (3) SA 106, 108 (*Ex parte Taljaard*); *Standard Bank of SA Ltd v Essop* 1997 (4) SA 569 (D) (*Standard Bank of SA Ltd v Essop*); Bertelsmann *et al Mars* para 8.4; Sharrock, Van der Linde and Smith *Hockly's insolvency law* 63*;* Wille, Du Bois and Bradfield *Wille's principles of South African law* 387*.*
[221] *Spencer v Standard Building Society*; Wille, Du Bois and Bradfield *Wille's principles of South African law* 387*.*
[222] *Spencer v Standard Building Society*; *Ex parte Taljaard*; *Standard Bank of SA Ltd v Essop*.

to contract, litigate, earn a living and hold office during and after sequestration are essentially the trade-off for acquiring a discharge of debts and a fresh star upon rehabilitation.[223]

3.4.1 Contractual capacity

The insolvency of a debtor does not affect the validity of a contract that he or she has entered into.[224] Insolvency does not deprive a debtor of his or her contractual capacity and sequestration does not suspend or put an end to the contract.[225] However, in *De Polo v Dreyer*[226] it was held that the fact that an insolvent can enter into a contract does not mean that he or she is entitled to sue on that contract for his or her benefit unless the Insolvency Act specifically gives the right to do so.

Where a trustee's consent is not required for an insolvent to enter into a specific contract or where it is required and was given, the contract is valid and binding on the parties.[227] However, as per *De Polo v Dreyer*, the insolvent may not enforce performance in his or her favour. Only the trustee of the insolvent estate may demand payment.

Therefore, even though an insolvent may still enter into contracts, certain restrictions are imposed on his or her capacity to contract as protection for creditors. As a result, certain contracts which the insolvent enters into are voidable.

Section 23(2) of the Act prohibits an insolvent debtor from entering into a contract that purports to dispose of any property in the insolvent estate. He or she may also not, without the written consent of the trustee, enter into a contract whereby the estate or any contribution which he or she is obliged to make towards the estate is, or is likely to be, adversely affected.[228]

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[223] Roestoff (2018) *THRHR* 394.
[224] Section 23(1) of the Insolvency Act.
[225] *Mackay v Fey* 2006 3 SA 182 (SCA); *Cowan v Toffee* 1947 (2) SA 1148 (T); Bertelsmann *et al Mars* 393; Sharrock, Van der Linde and Smith *Hockly's insolvency law* 63, 87. However, there are certain exceptions to the general rule that sequestration does not suspend or end contracts into which an insolvent has entered. Contracts of employment are suspended on the sequestration of an employer's estate and contracts of mandate come to an end upon the sequestration of the estate of the mandatory. See s 38(1) of the Insolvency Act.
[226] *De Polo v Dreyer* 1991 (2) SA 164 (W) 176 (*De Polo v Dreyer)*.
[227] Section 23(2) of the Act.
[228] To avoid confusion regarding the meaning of the statement, s 23(2) was amended in clause 16(1) of the 2015 Draft Insolvency Bill and contains an express reference to any contract whereby any

Should a debtor enter into such contracts without the trustee's consent, the trustee can elect to perform and abide in terms of that contract or set the contract aside.[229] In *Mackay v Fey*[230] the court held that such a contract is not void but voidable depending on the trustee's election.[231]

If the trustee elects to abide by the contract, he or she 'steps into the shoes' of the insolvent and the contract remains binding on the parties.[232] Therefore the trustee will be bound to carry out any counter-performance that the contract requires of the insolvent. However, the insolvent's right to enforce performance under the contract is limited and he or she may not sue for performance under the contract for his or her benefit, unless there is a provision giving him or her the right to do so.[233]

If the trustee elects to set the contract aside, he or she is required to recover any performance rendered by the insolvent and must restore any benefits received by the insolvent under the contract to the third party.[234]

Insolvency also limits an insolvent's ability to obtain credit. Firstly, information regarding the sequestration of an insolvent estate is made publicly available for five years from the date of the sequestration order or until a rehabilitation order is awarded.[235] Secondly, section 137(*a*) of the Act makes it an offence for an unrehabilitated insolvent to obtain credit above a certain amount from any person during sequestration.[236] The insolvent is required to first inform that person that he or she is insolvent unless he or she can prove that the person was aware of the insolvency. However, this limitation on the insolvent's ability to obtain credit is no different from the limitations imposed on debtors who are under administration or debt review.

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earnings which accrue to the insolvent estate are or are likely to be adversely affected. See clause 16(2) of the 2014 Explanatory Memorandum.

[229] Sharrock, Van der Linde and Smith *Hockly's insolvency law* 87 and Meskin *et al Insolvency law* para 5.16.

[230] *Mackay v Fey* 2006 (3) SA 182 (SCA) 188.

[231] *WL Carroll & Co v Ray Hall Motors (Pty) Ltd* 1972 (4) SA 728 (T).

[232] Sharrock, Van der Linde and Smith *Hockly's insolvency law* 90.

[233] *De Polo v Dreyer* 1991 (2) SA 164 (W). Sharrock, Van der Linde and Smith *Hockly's insolvency law* 65.

[234] Sharrock, Van der Linde and Smith *Hockly's insolvency law* 65.

[235] See reg 17(1) of the National Credit Act Regulations of 2006 (the NCA Regulations); Roestoff (2018) *THRHR* 400; Kelly-Louw (2015) *De Jure* 96.

[236] *S v Clifford* 1976 (1) SA 695 (A) 703B; *S v Saunders* 1984 (2) SA 102 (T) 104H; *Wetsgenootskap van die Goeie Hoop v Reneke* 1990 (4) SA 441; *Reyneke v Wetsgenootskap van die Goeie Hoop* 1994 (1) SA 359 (A); Bertelsmann *et al Mars* para 28.8; Roestoff (2018) *THRHR* 399.

Such debtors also have limited ability to obtain credit while under administration or debt review. Section 74S(1) of the MCA[237] makes it an offence for a person who is subject to an administration order and who during the currency of such order incurs any debt without disclosing that he or she is under administration. Also, section 88(1) of the NCA prohibits a consumer who has filed an application for debt review or who has alleged in a court that he or she is overindebted, from incurring further charges under a credit facility or entering into any further credit agreements with any credit provider. If a rearrangement order is finally granted, the prohibition in section 88 will continue until all his or her obligations under the credit agreement subject to the rearrangement have been fulfilled.[238]

3.4.2 Capacity to litigate

Insolvency does not necessarily preclude an insolvent debtor from being a party to legal proceedings.[239]

Where legal proceedings relate to property in the insolvent estate, the trustee of the estate, not the insolvent, is the person to deal with the estate, to administer it, to sue in respect of it, and to defend actions concerning it.[240] This is because the effect of the sequestration of the estate of an insolvent is to divest the insolvent of his or her estate and to vest it in the Master until a trustee has been appointed, and, upon his or her appointment, to vest it in the trustee.[241] The insolvent nevertheless retains a reversionary interest in the estate.[242] In this regard, he or she can bring actions to recover his or her estate assets that vest in the trustee if the trustee fails or refuses to do so. If the trustee acts in this way the insolvent must join the trustee either as co-applicant or as co-defendant.[243]

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[237] Section 74S(1) of the MCA. Such a person shall be guilty of an offence and liable to imprisonment for 90 days or to periodical imprisonment for 2 160 hours. The administration order may even by set aside on application by any interested person.
[238] Section 88(1)(c) of the NCA.
[239] *Grevler v Landsdown* 1991 (3) SA 175 (T) 177H.
[240] *Mears v Rissik, MacKenzie and Mears' Trustee* 1905 TS 303, 305 (*Mears v Rissik)*; *Mulaudzi v Old Mutual Life Assurance Co (South Africa) Ltd* 2017 (6) SA 90 (SCA) (*Mulaudzi v Old Mutual Life Insurance Co)* para 16; *Nkosi v Van's Auctioneer* (9725/2017) [2017] ZAGPPHC 367 (21 June 2017) (*Nkosi v Van's Auctioneer)* para 22.
[241] Section 20(1) of the Insolvency Act; *Mulaudzi v Old Mutual Life Insurance Co* para 16. *Nkosi v Van's Auctioneer* para 22.
[242] *Mears v Rissik; Kuper v Stern and Hewitt NO* 1941 WLD 1 3-4; *Nkosi v Van's Auctioneer* para 23.
[243] *Nkosi v Van's Auctioneer* para 23.

However, under the exceptional circumstances set out in section 23 of the Insolvency Act, an insolvent can sue or be sued in his or her personal capacity. The instances mentioned in section 23 are not exhaustive.[244] Therefore, an insolvent may sue in his or her name without mentioning the trustee where the,[245]

- matter relates to status,[246] divorce for example;
- claim is to recover remuneration for work done or professional services rendered by him or her or on his or her behalf after the sequestration of the estate;[247]
- claim is for a pension to which he or she is entitled for services rendered;[248]
- claim is for compensation in respect of loss or damage that he or she has suffered because of defamation or personal injury;[249]
- matter concerns a delict committed by him or her after the sequestration of his or her estate;[250] and
- matter relates to a right that does not affect the insolvent estate, for example, a right to receive maintenance from the insolvent or the right not to be unlawfully dispossessed of property.

3.4.3 Capacity to earn a living and to hold office

In terms of the Constitution, all people have the right to choose their trade, occupation, and profession freely, and only the law may regulate the practise of such trade, occupation, or profession.[251] This proviso in the Constitution that only the law may regulate the practise of a trade, occupation, or profession has given rise to numerous regulations affecting, and some directed at, insolvent persons employed in certain industries in South Africa.

The Constitution itself prohibits an unrehabilitated insolvent from being a Member of Parliament (MP), the National Council of Provinces, or a provincial legislature.[252] If such a member ceases to be eligible, he or she loses that membership.[253] In February

[244] *Marais v Engler Earthworks (Pty) Ltd* 1998 (2) SA 450 (E).
[245] Sharrock, Van der Linde and Smith *Hockly's insolvency law* 66; Bertelsmann *et al Mars* 399.
[246] Section 23(6) of the Insolvency Act.
[247] Section 23(9) of the Insolvency Act.
[248] Section 23(7) of the Insolvency Act.
[249] Section 23(8) of the Insolvency Act.
[250] Section 23(10) of the Insolvency Act.
[251] Section 22 of the Constitution.
[252] Sections 47(1)(*c*), 62 and 106(1)(*c*) of the Constitution.
[253] Sections 47(3)(*a*) and 106(3)(*a*) of the Constitution.

2014, the estate of Mr Malema, the leader of the Economic Freedom Fighters (EFF) party, was placed under provisional sequestration by the North Gauteng High Court for an unpaid tax bill on application by SARS.[254] The affidavit supporting the compulsory sequestration application contained statements as to Malema's alleged dishonesty in dealing with SARS. It stated that Malema had net assets to the value of R8.5 million, which was reduced to R5.6 million and again further reduced to R1.4 million.[255] It revealed that the discrepancies were not conducive to a conclusion that Malema had made full and frank disclosure to SARS, and supported SARS' contention that it would be to the benefit of Malema's creditors to sequestrate his estate.[256]

Among other factors reflecting Malema's alleged dishonest conduct, were his failure to submit tax returns in 2009 and to declare to SARS any 'indirect assets' such as the smallholding owned by the Ratanang Family Trust and the farm he lived on which is owned by Gwama Properties.[257] Further, the Ratanang Family Trust that he failed to register for tax received a "large number of deposits", mainly used for Malema's "personal expenses". Malema also provided conflicting explanations of his financial affairs when asked.[258]

In May 2014 Mr Malema was sworn in as an MP after the EFF won seats in the 2014 general elections.[259] On 1 June 2015, the return date on which the court had to decide whether the provisional order should be made final or should be discharged, SARS withdrew the sequestration application.[260] SARS stated that it had several legal instruments available to it to recover the outstanding tax debt owed to it by Malema.[261] In addition, Malema had started complying with his SARS tax obligations including

[254] *Malema v Commissioner for the South African Revenue Service* (76306/2015) [2016] ZAGPPHC 263 (29 April 2016) (*Malema v SARS*) para 8; "Sequestration ruling puts Malema political future in balance" https://bit.ly/3mHc61h (accessed 7 October 2021); "Malema among 14,000 insolvent taxpayers" https://bit.ly/3AzKMqG (accessed 7 October 2021); "SARS files for Malema bankruptcy" News24 https://bit.ly/3audZbY (accessed 7 October 2021).
[255] "SARS files for Malema bankruptcy" News24 https://bit.ly/3audZbY (accessed 7 October 2021).
[256] "SARS files for Malema bankruptcy" News24 https://bit.ly/3audZbY (accessed 7 October 2021).
[257] "SARS files for Malema bankruptcy" News24 https://bit.ly/3audZbY (accessed 7 October 2021).
[258] "SARS files for Malema bankruptcy" News24 https://bit.ly/3audZbY (accessed 7 October 2021).
[259] "Members of Parliament: Mr Julius Sello Malema" https://bit.ly/3oXg4FP (accessed 13 October 2021).
[260] *Malema v SARS* para 41; "SARS withdraws Julius Malema sequestration order" eNCA https://bit.ly/3oR6dBn (accessed 11 October 2021); "Julius Malema: sequestration withdrawn" *The Mail & Guardian* https://bit.ly/2X5tjsG (accessed 11 October 2021).
[261] "SARS explains dropping Malema sequestration" *The Citizen* https://bit.ly/2YyM5sK (accessed 11 October 2021).

partial payment of his outstanding tax debt, and had withdrawn his application for declaratory and interdictory relief.[262]

While the sequestration application was withdrawn in June 2015, it could be argued that because of the provisional sequestration order Malema was already an unrehabilitated insolvent between the period February 2014 and 1 June 2015 (before the withdrawal). As a result, during this period he was ineligible to be an MP. Consequently, he should not have been sworn in as an MP in May 2014. This is because section 2 of the Insolvency Act defines a sequestration order as an order of the court whereby the estate is sequestrated and includes a provisional order of sequestration which has not been set aside. As indicated above,[263] a sequestration order has the effect of not only limiting an insolvent's right to property, contractual capacity, and capacity to litigate; it also limits his or her capacity to earn a living and to hold certain offices. Thus, until the order (provisional or final) has been set aside, the effects of a sequestration order and the status as an unrehabilitated insolvent apply to that insolvent, and should have applied to Malema. As regards the requirements and effect of setting aside a sequestration order,[264] the court can set aside an order if it was obtained incorrectly or fraudulently, or when subsequent events justify a recision, especially where there has been an abuse of the sequestration process. Further, once the order has been set aside, the insolvent is not released from his or her liabilities – as in the case of a rehabilitation order – instead, he or she is placed in the same position he or she enjoyed before his or her estate was sequestrated. In the case of Malema, the sequestration application was withdrawn, not set aside, by the court but the fact that Malema was not released from his liabilities and was required to continue paying his debt, means that the effect of the withdrawal was the same as setting the order aside. It appears that since Malema's sequestration application was withdrawn and he was placed in the position he was in before the application, his status as an unrehabilitated insolvent no longer applied from 1 June 2015, and he was only eligible to be an MP from that date.

[262] "SARS explains dropping Malema sequestration" *The Citizen* https://bit.ly/2YyM5sK (accessed 11 October 2021).
[263] Para 3.4.
[264] See para 3.3.1.

As will be indicated below,[265] the purpose of disqualifying insolvent debtors from certain employment and offices is to protect the public, and in particular the debtor's creditors, from dishonest debtors. In the case of alleged dishonest debtors, the disqualification appears justifiable and is aligned with international policy considerations which provide that bankruptcy is not intended to become a shelter for debtors who have engaged in dishonest or intentional disregard for the rights of other persons.[266] Therefore, fraudulent debtors should not benefit from a fresh start and should rather be excluded from the process. However, the disqualification in South African law excludes both the dishonest debtor and the honest but unfortunate debtors whom international practice advocates should be protected.

Limitations imposed on insolvent debtors by the Insolvency Act include the disqualification of an insolvent from acting as a trustee in an insolvent estate.[267] Further, section 23 of the Insolvency Act allows an insolvent to follow any profession or occupation or to enter into any employment in the business of a trader who is a general dealer or manufacturer during sequestration, provided that he or she obtains the written consent of his or her trustee.[268] An insolvent who disregards this will not only be guilty of an offence and liable to imprisonment[269] but risks the court refusing his or her application for rehabilitation.[270]

The definition of a 'trader' in terms of the Act is very wide and includes any person who carries on any trade, business, industry, or undertaking in which property is sold, bought, exchanged, or manufactured for purposes of sale or exchange, or in which building operations of whatever nature are performed. It further includes anyone involved in public entertainment, or who acts as a broker or agent for any person in the sale or purchase of any property or the letting or hiring of immovable property.[271] However, it excludes an insolvent involved in farming operations.[272]

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[265] See para 3.6.
[266] Ch 2 para 2.6.
[267] Section 55(*a*) and 58(*a*) of the Insolvency Act.
[268] Section 23(3) of the Insolvency Act.
[269] Section 137(*c*) of the Insolvency Act.
[270] *Ex parte Kahanovitz* 1941 GWL49; *Ex parte Scholtz* 1942 CPD 15.
[271] Section 2 of the Insolvency Act.
[272] Section 2 of the Insolvency Act.

A 'general dealer' refers to a trader operating in a fixed place of business in a variety of goods and wares,[273] and a 'manufacturer' refers to a trader who operates any kind of fabrication work.[274] Operations in which the consent of the trustee is not required include an insolvent dealing in fresh milk,[275] operating a restaurant,[276] operating the business of a chemist or a butchery,[277] or entering into any contracts that are reasonably incidental to the permitted trade.[278]

The consent to trade as a general dealer or as a manufacturer allows the insolvent to trade only in that capacity.[279] Even though the insolvent or his or her creditors may appeal to the Master if the trustee refuses to give consent,[280] it is up to the trustee to make that decision, the creditors cannot give directions because the decision is not part of the administration of the insolvent estate.[281]

The purpose of this limitation on the insolvent's right to be employed in the business of a trader who is a general dealer or manufacturer, is intended to protect the general public, in particular, the creditors and people having dealings with such traders.[282] Further, to ensure that the insolvent remains productive as an income-generating person during the sequestration of his or her estate.[283] This is in line with the international policy considerations that economic rehabilitation is one of the main aims of an effective insolvency system for natural-person insolvency.[284] However, it appears to find little application as the unrehabilitated insolvent is prohibited from continuing with certain types of employment which would have helped him or her remain productive as an income-generating person. The problem appears to lie in the fact that South African insolvency laws focus only on dealing with the dishonest insolvent from whom it aims to protect the public.[285]

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[273] *S v Van der Merwe* 1980 (3) SA 406 (NC) 408-410; Meskin *et al Insolvency law* para 5.14.1.
[274] *AJ Ferreira Beleggings* (*Edms*) *Bpk v Swart* [1969] 2 All SA 254 (E) 259 (*AJ Ferreira Beleggings*); Meskin *et al Insolvency law* para 5.14.1.
[275] *Ex parte Du Plessis* 1957 (2) SA 253 (W).
[276] *R v Papangelis* 1960 (2) SA 309 (O).
[277] Smith *The law of insolvency* 104.
[278] *Priest v Charles* 1935 AD 147; *George v Lewe* 1935 AD 249.
[279] Bertelsmann *et al Mars* para 16.14.
[280] Section 23(3) of the Insolvency Act.
[281] *AJ Ferreira Beleggings* 173; Meskin *et al Insolvency law para* 5.14.1; Bertelsmann *et al Mars* para 16.14.
[282] Smith *The law of insolvency* 104.
[283] See *Singer v Weiss* 1992 (4) SA 362 (T) 367.
[284] Ch 2 para 2.6.
[285] See para 3.6 below.

In terms of section 23, therefore, an insolvent may not be employed without the consent of his or her trustee as a shop assistant or a clerk in a large department store, no matter how remote his or her chances of inflicting harm might possibly constitute a real danger to the general public.[286] This prohibition hinges on the point above that South African insolvency laws focus on dealing with the dishonest insolvent, thus the second part of the purpose of enabling the insolvent to continue generating income during sequestration takes a back seat. This is because in South Africa no distinction is made between honest but unfortunate debtors and dishonest debtors. This is in contrast to international policy considerations that the honest but unfortunate debtor should be protected not punished and only the dishonest fraudulent debtor should be excluded.[287]

Apart from the Insolvency Act, statutory provisions in other statutes regulate the trade, occupation, and profession of unrehabilitated insolvents in South Africa.

In terms of section 50 of the Property Practitioner Act,[288] a fidelity fund certificate may not be issued to an unrehabilitated insolvent. If such a person already has a fidelity fund certificate, it will be of no force and effect[289] and must be returned to the Authority.[290]

In section 59(1) of the Property Practitioner Act,[291] a property practitioner who commits an act of insolvency or is insolvent is immediately disqualified from holding a fidelity fund certificate.[292] He or she must within 30 days inform, in writing, the Authority, his or her auditor, the bank holding his or her trust account, his or her clients, employees, employers, or any other affected person of his or her disqualification.[293] He or she must stop performing the functions of a property practitioner and hand over the administration of his or her trust account together with all relevant information and records to the Authority. The trust monies in the trust account will not form part of his

[286] Smith *The law of insolvency* 104.
[287] Ch 2 para 2.6.
[288] Section 50(*a)*(vi) of the Property Practitioner Act 22 of 2019 (the Property Practitioner Act) which repealed the Estate Agency Affairs Act 112 of 1976.
[289] Section 52(4)(*a*) of the Property Practitioner Act.
[290] Section 52(5) of the Property Practitioner Act 22 of 2019.
[291] Section 50(*a*)(vi) of the Property Practitioner Act which repealed the Estate Agency Affairs Act 112 of 1976.
[292] Section 59(1)(*a*)-(*b*) of the of the Property Practitioner Act.
[293] Section 59(1)(i)-(iii) of the Property Practitioner Act.

or her insolvent estate.[294] He or she must then hand over any outstanding matters in consultation with any affected person, to another property practitioner.[295] A person who fails to comply with subsection 59 commits an offence.[296]

The Companies Act[297] disqualifies an insolvent from acting as a business rescue practitioner.[298] The director of a company will also be disqualified if an exemption from the court has not been granted.[299] The Liquor Act[300] disqualifies an unrehabilitated insolvent from registering as a manufacturer or distributor of liquor. The NCA[301] disqualifies a person from registering as a credit provider, debt counsellor, or payment distribution agent if he or she is an unrehabilitated insolvent. The National Credit Regulator will deregister such a person if he or she becomes disqualified after being registered.[302]

The Second Hand Goods Act[303] disqualifies a person from dealing in second-hand goods, scrap metal, or acting as a pawnbroker if he or she is an unrehabilitated insolvent. With the object of this Act being to combat trade in stolen goods and promoting ethical standards in second-hand-goods trade,[304] it appears that the disqualification of unrehabilitated insolvents is based on the legislature's assumption that all insolvent people are dishonest and untrustworthy.[305]

The CPA[306] disqualifies an unrehabilitated insolvent from conducting an auction or in any other way acting as an auctioneer, or to represent him- or herself as an auctioneer. The FAISA[307] disqualifies a person from being a financial services provider if he or she is an unrehabilitated insolvent. The Regulatory Board for Auditors will decline to register a person as an auditor or candidate auditor if he or she has entered into a

[294] Section 59(4) of the Property Practitioner Act.
[295] Section 59(1)(iv)-(vii) of the Property Practitioner Act.
[296] Section 59(2) of the Property Practitioner Act.
[297] Companies Act of 71 of 2008 (the Companies Act).
[298] Section 138(1)(*d*) of the Companies Act.
[299] Sections 69(8)(*b*)(i) and 69(11) of the Companies Act. Under the old Companies Act, the court allowed an unrehabilitated insolvent to become a director of a company only if there was no danger to the private interests of the members or to the public who might be injured by dishonest trading.
[300] Section 11(2)(*b*) of the Liquor Act 59 of 2003.
[301] Section 46(2) of the NCA.
[302] Section 46(5) of the NCA.
[303] Section 14(1)(*c*) read with s 2 of the of the Second Hand Goods Act 6 of 2009 (the Second Hand Goods Act).
[304] See the Preamble.
[305] Roestoff (2018) *THRHR* 398.
[306] Section 23 of the Consumer Protection Act 68 of 2008 (the CPA).
[307] Section 8(1) of Financial Advisory and Intermediary Service Act 37 of 2008 (the FAISA).

compromise with creditors, applied for debt review, or has been provisionally sequestrated.[308] The Regulatory Board may also cancel the registration of such a person if he or she is already registered.[309]

Unrehabilitated insolvents are also restricted from being part of the board or council of certain professional bodies.[310] They are either prohibited from registration as a member, or from continuing to act as a board or council member. For example, an unrehabilitated insolvent may not be appointed as a member of a Regulatory Board for Auditors,[311] a council member of the South African Council of Planners,[312] a council member of the South African Council for Natural Scientific Professions,[313] a council member of the South African Council for Property Valuers Profession,[314] a member of the Legal Practitioners' Fidelity Fund Board,[315] a member of the Land and Agricultural Development Bank,[316] or a member of the governing board of the National Credit Regulator.[317]

It is doubtful whether all of these disqualifications imposed on unrehabilitated insolvents meet international policy considerations on anti-discrimination. While some of them are justified in protecting the public interests, they are based on the stigma that a debtor who becomes bankrupt is not someone in whom society can have trust or confidence.[318] Such a notion does not take into account the risks that are an ordinary part of business life.[319] International policy considerations recommend that laws must be created to eliminate or reduce the bankruptcy stigma which manifests in

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[308] Section 37(5) of the Auditing Profession Act 26 of 2005 (Auditing Profession Act).
[309] Section 39(2)(a) of the Auditing Profession Act.
[310] Member of the Health Professions Council (s 6(1)(*a*) of the Health Professions Act 56 of 1974); a local transportation board (s 5(1)(*a*) of the Road Transportation Act 74 of 1977); Council of the Academy of Science (s 7(1)(*b*) of the Academy of Science of South Africa Act 67 of 2001); Board of the South African National Accreditation System (s 10(1)(*a*) of the Accreditation for Conformity Assessment, Calibration and Good Laboratory Practice Act 19 of 2006); or Tourism Board (s 15(1)(*b*) of the Tourism Act of 2014). See Roestoff (2018) *THRHR* 402 n 85.
[311] Section 13(1)(*c*) read with s 13(4) of the Auditing Profession Act. Such a member shall cease to be a member from the date of disqualification.
[312] Sections 5(1)(*b*) and 5(2)(*a*) of the Planning Profession Act 36 of 2002. Such council member is required to vacate his or her office if disqualified.
[313] Section 6(1)(*b*) of the Natural Scientific Professions Act 27 of 2003.
[314] Sections 6(1)(*b*) and 6(2)(*a*) of the Property Valuers Profession 47 of 2000 Act. Such council member is required to vacate his or her office if disqualified.
[315] Section 64(2)(*a*) of the Legal Practice Act 28 of 2014 (Legal Practice Act).
[316] Sections 1 and 10(*e*) of the Land and Agricultural Development Bank Act.
[317] Section 20(2)(*a*), (*c*) and s 46(2) of the NCA.
[318] See para 3.5 below and Ch 5 para 5.3.3.
[319] Ch 2 para 2.6 and Ch 5 para 5.3.3.

unnecessary and damaging restrictions on the debtor when considering policies for natural-person debtors.[320] This will assist in preventing possible infringements of unrehabilitated insolvents fundamental rights and allow for effective financial and social inclusion of rehabilitated insolvent debtors after discharge.[321]

In some other professions in South Africa, an unrehabilitated insolvent will generally only be disqualified if his or her insolvency was caused by negligence or incompetence in performing the work of the relevant profession.[322] Such professions include[323] registering as a candidate, technical, or professional planner in terms of the Planning Profession Act,[324] a professional natural scientist in terms of the Natural Scientific Professions Act,[325] and a professional valuer, professional associated valuer, or a candidate valuer in terms of the Property Valuers Profession Act.[326] This is in line with international policy considerations as bankruptcy is not intended to become a shelter for debtors who have engaged in dishonesty or intentional disregard for the rights of others.[327]

In the legal profession, the Legal Practice Act[328] provides for the appointment of a *curator bonis* to control and administer the trust account of a legal practitioner, with rights, powers, and functions as the court may deem fit should the legal practitioner become insolvent. Therefore, the status as an insolvent does not disqualify a legal practitioner from practising law or remove him or her from the roll of legal practitioners. Instead, a legal practitioner is allowed to continue practising and earning a living

[320] Ch 2 para 2.6.
[321] Ch 2 para 2.6.
[322] See s 3(7)(*b*) of the Agricultural Produce Agents Act 12 of 1992 regarding membership of the Agricultural Produce Agents Council; s 12(*b*) of the Agrément South Africa Act 11 of 2015 regarding membership of the Board of Agrément South Africa; s 9(5)(*b*) of the Agricultural Research Act 86 of 1990 regarding membership of the Agricultural Research Council; s 6(8) of the Construction Industry Development Board Act 38 of 2000; s 4(13)(*b*) of the Marketing of Agricultural Products Act 47 of 1996 regarding membership of the National Agricultural Marketing Council. Roestoff (2018) *THRHR* 402 n 86.
[323] Sections 19(3)(vi) and 20(1)(*a*)(i) of the Architectural Profession Act 44 of 2000; ss 19(3)(vi) and 20(1)(*a*)(i) of the Landscape Architectural Professions Act 45 of 2000; ss 19(3)(*a*)(vi) and 20(1)(*a*)(i) of the Quantity Surveying Profession Act 47 of 2000; ss 19(3)(*a*)(vi) and 20(1)(*a*)(i) of the Project and Construction Management Professions Act 48 of 2000 and ss 13(8)(*a*) and 14(1)(*a*) of the Geomatics Profession Act 19 of 2013.
[324] See ss 13(1) and 13(7). If already registered it will be cancelled in terms of s14(1)(*a*).
[325] Section 20(4)(*a*)(v). If already registered such registration may be cancelled by the Council for Natural Scientific Professions in terms of s 21(1)(*a*)(i).
[326] Sections 19(1)(*a*) and 20(4)(*a*)(vi) of the Property Valuers Profession Act.
[327] Ch 2 para 2.6.
[328] Section 90(1)(*b*) of the Legal Practice Act.

despite not having control of his or her trust account.[329] This provision in the Legal Practice Act is commendable as it not only protects public interests by placing the trust account under the control of a curator, but also protects the livelihood of the insolvent legal practitioner so that he or she does not become a burden on the state. This aligns with the international policy consideration of allowing an insolvent to continue being an economically productive person. It is also aligned with an insolvent person's constitutional right freely to choose his or her trade, occupation, and profession in section 22 of the Constitution.

Before the enactment of the Legal Practice Act, the Attorneys Act[330] allowed for the removal of an admitted attorney from the roll of practising attorneys if the court was satisfied that he or she was not a fit and proper person to continue practising as an attorney.[331] A fit and proper person was described as a person with integrity and who is reliable and honest.[332] Further, if an admitted attorney was insolvent and unable to satisfy the court that despite his or her sequestration he or she was still a fit and proper person to continue practising as an attorney, such an admitted attorney was removed from the roll of admitted attorneys as no longer qualifying as a fit and proper person to practise law.[333] This provision in the Attorneys Act was aligned with international policy considerations that only the honest but unfortunate debtors should benefit from a fresh start and that dishonest debtors should be excluded. Therefore this provision had the effect of distinguishing between dishonest insolvent legal practitioners and honest but unfortunate insolvent legal practitioners.

The Legal Practice Act also makes a reference to a fit and proper person. Section 24(2)(*c*) provides that a person may only be admitted and enrolled as a legal practitioner if the High Court is satisfied that such a person is fit and proper to be admitted.[334] Further, section 31(1) directs the Council to suspend or cancel the

[329] Section 89 of the Legal Practice Act.
[330] Section 22(1)(*d*) of the Attorneys Act 53 of 1979 (Attorneys Act). The Attorneys Act was repealed by s 119 of the Legal Practice Act.
[331] Slabbert (2011) *PELJ/PER* 210; "A thought piece on ethical conduct for attorneys, advocates and corporate counsel having regard to the Legal Practice Act, 2014" https://bit.ly/3Jxr0AB (accessed 13 April 2022).
[332] "A thought piece on ethical conduct for attorneys, advocates and corporate counsel having regard to the Legal Practice Act, 2014" https://bit.ly/3Jxr0AB (accessed 13 April 2022).
[333] Section 22(1)(*e*) of the Attorneys Act.
[334] Section 24(2)(*c*) of the Legal Practice Act; "A thought piece on ethical conduct for attorneys, advocates and corporate counsel having regard to the Legal Practice Act, 2014" https://bit.ly/3Jxr0AB (accessed 13 April 2022).

enrolment of a legal practitioner where a High Court has ordered that he or she be struck off the roll of legal practitioners. In 2017, Legodi J in *South Africa v Jiba,*[335] stated that a lawyer should at least have integrity which he described as "impeccable honesty or an antipathy to doing anything dishonest or irregular for the sake of personal gain". As a result, Legodi J ordered that the second and third respondents be struck off the roll of advocates because their misconduct rendered them unfit to continue to practise as advocates.[336] This was especially because they were shown to be dishonest and lacked integrity.[337] Thus, it appears that also in terms of the Legal Practice Act a legal practitioner will not be struck off the roll of legal practitioners based on the sequestration of his or her estate but based on his or her integrity and honesty.

Debtors under debt review (debt rearrangement) and administration are also disqualified from certain positions since as debtors they fall under the category of people who have failed to pay their debts. They are disqualified from being a director or key employee of a registered credit rating agency[338] and from being a debt counsellor.[339] Their registration as an auditor may be cancelled, and their re-registration as a registered auditor or a registered candidate auditor may be declined.[340] Debtors who have entered into arrangements or compromise agreements with their creditors in terms of the Insolvency Act are also disqualified from certain positions. For example, the Traditional Health Practitioner's Act[341] disqualifies a person from being a member of the Interim Traditional Health Practitioner's Council if he or she has entered into a composition with his or her creditors. The Nursing Act[342] disqualifies a person who has entered into a composition with his or her creditors in terms of section 119 of the Insolvency Act from being a member of the Nursing Council. Further, the Regulatory Board for Auditors will decline to register a person as an auditor or candidate auditor if he or she has entered into a compromise with creditors.[343] Despite these restrictions on debtors under debt review, administration,

[335] *General Council of the Bar of South Africa v Jiba* 2017 (2) SA 122 (GP) (*South Africa v Jiba*) para 3.
[336] *South Africa v Jiba* paras 138 and 168. *General Council of the Bar of South Africa v Jiba* 2019 (8) BCLR 919 (CC) (*General Council of the Bar of South Africa v Jiba)* para 24.
[337] *South Africa v Jiba* para 168. *General Council of the Bar of South Africa v Jiba* para 24.
[338] Section 6 of the Credit Rating Services Act, 2012 *Fit and proper requirements for credit rating agencies* published under BN 177 in *GG* 36720 of 2 August 2013.
[339] Section 46(2) of the NCA.
[340] Sections 39(2)(*a*) and 37(5) of the Auditing Profession Act.
[341] Section 9(*e*) of the Traditional Health Practitioner's Act 22 of 2007.
[342] Section 6(*a*) of the Nursing Act 33 of 2005.
[343] Section 37(5) of the Auditing Profession Act 26 of 2005 (Auditing Profession Act).

or debtors who have entered into arrangements or compromise agreements with their creditors, are in a better position than insolvent debtors in that they are not subject to the disqualifications currently imposed on insolvent debtors.[344] After all, they are subject to fewer restrictions than unrehabilitated insolvents.[345]

3.5 Restrictions and prohibitions on insolvent debtors after sequestration: Rehabilitation

3.5.1 A discharge order

Rehabilitation and the subsequent release of pre-sequestration debts in South Africa have their roots in the Roman-Dutch law, Amsterdam Ordinance of 1777.[346] Currently in South Africa an insolvent is automatically rehabilitated by effluxion of time after the expiry of ten years, if he or she has not already been rehabilitated by the court within that period.[347] During these ten years, the insolvent debtor is subjected to numerous restrictions.[348] While the continued responsibility of the debtor during sequestration is intended to monitor his or her financial behaviour and encourage the creditor to provide financing, the extended period is contrary to international trends as it limits opportunity, innovation, and entrepreneurial activity and a fresh start as the penalty for failure is excessively harsh.[349]

Before the expiry of ten years an insolvent may bring a motion application to the High Court to be rehabilitated if he or she meets certain requirements.[350] Three weeks before making the rehabilitation application, the insolvent needs to furnish the registrar of the court with security in the amount of R500 for the costs of anyone who may oppose the rehabilitation and be awarded costs by the court.[351] An insolvent may apply for earlier rehabilitation if he or she has received a certificate from the Master stating that creditors have accepted a composition in terms of section 119 of the Act.[352] The

[344] Roestoff (2018) *THRHR* 401.
[345] Roestoff (2018) *THRHR* 401.
[346] Bertelsmann *et al Mars* para 25.1.
[347] Section 127A of the Insolvency Act.
[348] The restrictions imposed on the insolvent debtor are discussed in para 3.4 above.
[349] Ch 2 paras 2.3 and 2.6.
[350] See s 126 of the Insolvency Act for the facts to be stated in the motion application.
[351] Section 125 of the Insolvency Act.
[352] Section 124(1) of the Insolvency Act.

insolvent must however ensure that he or she has not given less than three weeks' notice in the *Gazette* and to the trustee.[353]

If the insolvent is unable to apply for rehabilitation as above, he or she may do so after 12 months have elapsed from the confirmation by the Master, after three years have elapsed from such confirmation, or after five years have elapsed from the date of his or her conviction of any fraudulent activities concerning his or her current or previous insolvency or any offence under sections 132,[354] 133,[355] and 134[356] of the Insolvency Act.[357] However, in this regard no application for rehabilitation can be made before the elapse of four years, unless it is on the Master's recommendation.[358] The application for rehabilitation by an insolvent who has been convicted of fraudulent activities is contrary to international trends which advocate the exclusion from the discharge of the debts of an insolvent who acted fraudulently.[359]

The insolvent may also apply for rehabilitation after six months from the sequestration of his or her estate if no claims have been proved by creditors against the estate and if he or she has not been convicted of any fraudulent activities concerning his or her insolvency or any offences[360] in terms of the Act.[361] Lastly, an insolvent may apply for rehabilitation earlier than ten years at any time after the confirmation by the Master of a distribution plan providing for the payment in full of all claims proved against the insolvent estate with interest thereon from the date of sequestration.[362]

Rehabilitation does not affect, amongst others, the right of the trustee or creditor to any part of the insolvent estate which is vested in but has not been distributed by the trustee, the liability of a surety for the insolvent, and the liability of any person to pay any penalty or suffer any punishment under any provision of the Act.[363] Rehabilitation

[353] Section 124(1) of the Insolvency Act.
[354] Concealing or destroying books or assets.
[355] Concealment of liabilities.
[356] Failure to keep proper records.
[357] Section 124(2) of the Insolvency Act.
[358] Section 124(2) of the Insolvency Act.
[359] Ch 2 para 2.6.
[360] Offences in terms of ss 132-134 of the Act.
[361] Section 124(3) of the Act.
[362] Section 124(5) of the Act.
[363] Section 129(3) of the Insolvency Act.

also does not revest the debtor with his or her estate, except if it has been granted on the basis of no creditor having proved a claim.[364]

Although the sequestration process is not aimed at granting debt relief to debtors, it is a consequence of the Insolvency Act[365] in that it puts an end to sequestration.[366] It relieves the insolvent of every disability resulting from the sequestration of his or her estate.[367] Although the release from the disabilities resulting from the sequestration is in line with international trends, this release only occurs after ten years and this could limit a true fresh start.[368]

Subject to conditions the court may have imposed in granting the rehabilitation order, rehabilitation further discharges all the insolvent's debts that were due or the cause of which had arisen before sequestration and which did not arise from fraud.[369] Thus, rehabilitation does not have the effect of releasing debts that arose fraudulently. The exclusion of only a few debts from discharge and post-discharge restrictions is in line with international policy considerations that recommend that the exclusion of certain debts from discharge should be kept to a minimum because it limits a fresh start.[370]

If the pre-sequestration debt arose from fraud because the insolvent misappropriated money in an insolvent estate in which he or she was the trustee, section 72(3) of the Insolvency Act states that despite rehabilitation, the insolvent will remain ineligible for appointment as trustee.[371] The exclusion of debts arising from fraudulent activities is in line with international policy considerations that recommend that fraudulent debtors should not benefit from a discharge policy and should be excluded.[372] This distinguishes the honest debtor from the dishonest and fraudulent debtor so that only the fraudulent debtor is punished. Roestoff suggests that to align South African insolvency law with international trends even further in this regard, debts resulting from

[364] Section 129(2) read with s 124(3) of the Insolvency Act.
[365] Nel *Analysis of the legislative mechanisms* 3.
[366] Section 129(1)(*a*) of the Insolvency Act.
[367] Section 129(1)(*c*) of the Insolvency Act.
[368] Coetzee *A comparative reappraisal of debt relief measures* 152.
[369] Section 129(1)(*b*) of the Insolvency Act.
[370] Ch 2 para 2.3.2.2.
[371] Bertelsmann *et al Mars* para 25.12
[372] Ch 2 para 2.6.

alimony, the intentional assault or killing of another, driving under the influence of alcohol, and fines or punishment should also not be extinguished after rehabilitation.[373]

Therefore, rehabilitation is intended to give the insolvent a fresh start, which is the most important characteristic of insolvency for a consumer.[374] The court in *Ex parte Le Roux*[375] pointed out that:

> The effect of rehabilitation of an insolvent is to restore him fully to the marketplace and, more importantly, to the obtaining of credit. The Court is accordingly as concerned with the probable future behaviour of the applicant as it is with his past.

The purpose of rehabilitation is thus to restore the insolvent fully into the marketplace and to enable him or her to obtain credit after rehabilitation. However, if there are still estate assets at the time of rehabilitation that have not been realised they will remain vested in the trustee even after rehabilitation unless the insolvent applied for a vesting order together with his or her rehabilitation application.[376] Also, rehabilitation does not affect the rights, duties, and powers of a trustee and the Master under a composition.[377] Rehabilitation also does not affect the liability of a surety for the insolvent,[378] or the liability of any person to pay a penalty or suffer punishment in terms of the Insolvency Act.[379]

3.5.2 Denial of discharge

The fact that an insolvent has complied with the requirements above does not mean that he or she is entitled to be rehabilitated.[380] The granting of a rehabilitation order lies entirely within the court's discretion and the insolvent bears the onus of showing that the discretion should be exercised in his or her favour.[381] The court will enquire whether the insolvent is a person who ought to be allowed to trade with the public on the same basis as any other honest person and whether he or she is a fit and proper

[373] Roestoff *'n Kritiese evaluasie van skuldverligtingsmaatreëls* 395-401; Coetzee *A comparative reappraisal of debt relief measures* 151.
[374] Bertelsmann *et al Mars* para 25.1.
[375] *Ex parte Le Roux* 423.
[376] Section 25(1) of the Insolvency Act.
[377] Section 129(3)(*a*) and (*b*) of the Insolvency Act.
[378] Section 129(3)(*d*) of the Insolvency Act.
[379] Section 129(3)(e) of the Insolvency Act.
[380] Sharrock, Van der Linde and Smith *Hockly's insolvency law* 209.
[381] *Ex parte Hittersay* 1974 (4) SA 326 (SWA) 328; *Ex parte Snooke* 2014 (5) SA 426 (FB) 437 (*Ex parte Snooke*); *Ex parte Fourie* 1937 OPD 25 (*Ex parte Fourie*); *Ex parte Linström* 2014 JOL 32526 (FB) para 5; *Ex parte Purdon* 2004 JDR 0115 (GNP) 5.

person to participate in commercial life free of any constraints and disabilities.[382] Thus, the insolvent debtor must include sufficient information in his or her application to show that he or she has learnt from the insolvency and understands that the sequestration of his or her estate could have prejudiced his or her creditors.[383] The court will take many factors into account in deciding whether to grant the rehabilitation order,[384] including how the insolvent conducted trade before insolvency and his or her probable future behaviour.[385]

Factors that the court will consider in exercising its discretion against granting a rehabilitation order include: that the insolvent had excessive debts before sequestration; the insolvent conducted business in a dishonest, reckless and improper manner; he or she concealed a liability to obtain credit or obtained credit on misleading statements; he or she contravened the Insolvency Act by being employed in a general dealer's business during insolvency; failed to keep proper books of account; failed to cooperate with the trustee; or in his or her application for rehabilitation failed to set out fully and frankly the causes of his or she insolvency.[386] Thus, a rehabilitation order may not be granted if the insolvent's conduct before and during sequestration shows that he or she is dishonest, fraudulent, and reckless.

This is in line with international trends that favour the consideration of the circumstances of the debtor so that a distinction can be drawn between the honest and the fraudulent debtor and only the fraudulent debtor is excluded from discharge.[387]

Where a South African court has refused a rehabilitation application, it may indicate a period that has to pass before the old rehabilitation application can be renewed which may vary from three months to three years.[388] After that period has passed the new rehabilitation application may be granted automatically.[389] However, in other instances

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[382] *Ex parte Heydenreich* 1917 TPD 657 658; *Ex parte Fourie* 45; *Greub v The Master* 1999 (1) SA 746 (C) 752 (*Greub v the Master*); *Ex parte Snooke* 437; *Ex parte Harris v Fairhaven Country Estate (Pty) Ltd (intervening party)* 2016 JDR 0159 (WCC) 84 (*Ex parte Harris*). See also Roestoff (2018) 81 *THRHR* 313.
[383] *Ex parte Le Roux* 1996 (2) SA 419 (C) 424 (*Ex parte Le Roux*). Coetzee *A comparative reappraisal of debt relief measures* 146.
[384] Bertelsmann *et al Mars* para 25.10.7
[385] *Ex parte Heydenreich* 657; *Ex parte Fourie* 43; *Greub v The Master* 752; *Ex parte Snooke* 437; *Ex parte Harris* 84.
[386] Sharrock, Van der Linde and Smith *Hockly's insolvency law* 216.
[387] Ch 2 para 2.6. Boraine and Roestoff (2014) 2 *THRHR* para 6(k).
[388] Bertelsmann *et al Mars* para 25.10.7
[389] Bertelsmann *et al Mars* para 25.10.7.

a court may not indicate a renewal period, leaving it to the insolvent to make another rehabilitation application after a reasonable period and after proof of good conduct.[390]

3.5.3 Discrimination against debtors

While rehabilitation and discharge aim to restore the insolvent fully in the marketplace and to enable him or her to obtain credit after rehabilitation, the NCA contains certain regulations that limit the insolvent's ability to obtain credit, rent a home, or find employment after rehabilitation and consequently make a fresh start.

The Department of Trade and Industry's 2014 amnesty regulations[391] which were aimed at enabling blacklisted consumers to obtain employment, rent a home, and again access credit, excluded information about debt restructuring, sequestration, rehabilitation, and administration.[392] This amnesty allows for a once-off removal of certain adverse consumer credit information[393] and a once-off and on-going removal of information about paid-up judgments from a consumer's credit report held by a credit bureau.[394]

Therefore, because information regarding debt restructuring, sequestration, administration, and rehabilitation were excluded from the amnesty, a credit bureau may publicly display information regarding the sequestration of an insolvent for five years from the date of the sequestration order or until a rehabilitation order is awarded.[395] If an insolvent was granted early rehabilitation, information regarding the granting of a rehabilitation order must appear on his or her credit record for a further five years after rehabilitation.[396] If an insolvent was rehabilitated by effluxion of time after ten years, it appears that this information will also have to appear on his or her credit record for five years, despite he or she having been sequestrated for ten years.[397]

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[390] Bertelsmann *et al Mars* para 25.10.7.
[391] The removal of adverse consumer credit information and information relating to paid-up judgment regulations published in GN R144 in *GG* 37386 of 2014 (Amnesty regulations).
[392] Kelly-Louw (2015) *De Jure* 98.
[393] Section 1 of the Amnesty regulations.
[394] Section 2 of the Amnesty regulations. See also Kelly-Louw (2015) *De Jure* 97.
[395] See reg 17(1) of the National Credit Act Regulations of 2006 published in GN R489 in *GG* 28864 of 2006-05-31, substituted by GN R1209 in *GG* 29442 of 2006-11-30 and amended by *Regulation Gazette* No 10382 in *GG* No 38557 of 2015-03-13 (NCA Regulations); Roestoff (2018) *THRHR* 400; Kelly-Louw (2015) *De Jure* 96.
[396] Regulation 17 of the NCA Regulations.
[397] Roestoff (2018) *THRHR* 400.

This depiction of an insolvent's rehabilitation status in his or her credit record has adverse consequences for the insolvent because credit providers generally use information held by a credit bureau to determine a consumer's credit profile and to establish whether a consumer has a good or bad payment history before granting him or her credit.[398] Further, potential employers in employment where honesty and trust in dealing with finances and cash are required may also use a candidate's credit report depicting sequestration or rehabilitation when considering whether to employ him or her.[399]

While it was hoped that the removal of certain adverse credit information from the records of consumers would provide opportunities for them to obtain employment and rent houses, possibilities that would not otherwise have been possible had they remained blacklisted,[400] as shown above this is not the case for insolvent debtors. This limits the possibility of a true fresh start as once the discharge has been granted, the debtor should have full access to financial activities.[401] While it is accepted that differentiation in respect of credit during a payment plan or bankruptcy can be justified, after the payment plan or discharge it amounts to unjustified discrimination.[402] Thus, international policy considerations recommend that countries should include a clear statement on non-discrimination which should cover a prohibition against discrimination in accessing credit, the labour market, membership of organisations, and access to housing, when considering policies for natural-person debtors.[403]

3.6 The rationale for the prohibitions and disqualifications imposed on an insolvent

The restrictions that the Insolvency Act and other legislation impose on the insolvent because of his or her insolvency, coupled with the period that must pass before an

[398] Kelly-Louw (2015) *De Jure* 93. See Asheela *Towards responsible lending* 143 on credit information that may be kept by a credit bureau. Reliance on credit bureau information before granting credit to a person without considering other factors that have a real impact on that person's financial position such as divorce, loss of employment, illness or death of a family member is not the desired course of action. See Boraine and Van Wyk (2017) *CILSA* 153.
[399] Regulation 18(4)(*c*) of the NCA Regulations.
[400] See Minister's media statement "Removal of adverse consumer credit information and information relating to paid-up judgments regulations" https://bit.ly/2T63seZ (accessed 13 May 2020); Kelly-Louw (2015) *De Jure* 98.
[401] Coetzee *A comparative reappraisal of debt relief measures* 151.
[402] Ch 2 para 2.4.2; Boraine and Roestoff (2014) 2 THRHR para 6(k).
[403] Ch 2 para 2.6.

insolvent can apply for rehabilitation, were never intended as punishment for insolvents.[404] Instead, they are intended to protect members of the public,[405] particularly the insolvent's creditors and people having dealings with him or her (as traders).[406] The aim is to assure the public that people holding offices of responsibility are people of stability and integrity.[407] It is intended that an enquiry should be undertaken after a certain period to establish whether the insolvent can be rehabilitated and can now be allowed to trade with the public as any other honest person.[408]

When the Act was promulgated, bankrupts were regarded as dishonest people who traded fraudulently with the public and who often maliciously acquired credit without any reasonable intention of repaying it.[409] This deviated from the social norm that individuals keep promises and pay back their debts.[410] As a result, bankrupts were treated as cheating people, akin to thieves.[411] As punishment, rehabilitation was withheld or postponed until such a time as the insolvent had learnt a severe lesson as to the necessity of trading honestly with others.[412]

This negative view of bankrupts created the stigma[413] that bankrupts are irresponsible people who cannot be trusted and who should be barred from certain trades and responsibilities of trust until they have learned their lesson.[414] Unfortunately, insolvency is viewed through the lens of fault,[415] and the stigma is based on society's assumption that the insolvent debtor was in control of the circumstances that led to his or her insolvency.[416] It ignores the reality that, especially in modern times, insolvency may be caused by involuntary job loss, terminal illness (which may require time off

[404] Smith *The law of insolvency* 9.
[405] Smith *The law of insolvency* 9.
[406] Smith *The law of insolvency* 104.
[407] Smith *The law of insolvency* 9.
[408] Smith *The law of insolvency* 9.
[409] Smith *The law of insolvency* 290 n 25.
[410] Mols (2013) *Emory Bankr Dev J* 293.
[411] Calitz (2010) *Fundamina* 11.
[412] *Ex parte Heydenreich* 1917 TPD 657, 658; Smith *The law of insolvency* 9.
[413] Stigma operates in bankruptcy as a product of competing social and economic norms and finite resources. Social norms dictate that individuals keep promises and pay back debts; but society emphasises consumption and makes credit readily available to those borrowing beyond their means. See Mols (2013) *Emory Bank Dev J* 293; Osunlaja *Debt relief measures for NINA debtors in Nigeria* 7.
[414] Mols (2013) *Emory Bankr Dev J* 296.
[415] Sullivan, Warren and Westbrook *As we forgive our debtors* 8.
[416] Mols (2013) *Emory Bankr Dev J* 296.

from work), caregiving to a terminally ill family member, lack of adequate insurance, divorce, or death.[417]

The stereotyping of insolvent debtors as a group of people who are dishonest, untrustworthy, irresponsible, and unstable, results in the systematic entrenchment of the stigma in laws and institutions in our society.[418]

Stigma-entrenching laws, like the Insolvency Act, devalue and disadvantage certain individuals in the group of insolvent debtors and affect them psychologically as they face possible reputational loss, labelling, separation, and discrimination.[419]

The *World Bank Report*[420] notes that some countries, like South Africa, that subscribed to long lists of restrictions and disabilities for unrehabilitated insolvents, have reduced or eliminated those disabilities and restrictions to limit the undesirable effects of the stigma. In this respect, Justice C L'Heureux-Dube' of the Canadian Supreme Court held that:

> [D]omination always appears natural to those who possess it, and the law insidiously transforms the fact of domination into a legal right. Inequality permeates some of our most cherished and long-standing laws and institutions. Our obligation, therefore, is to reconsider our assumptions, re-examine our institutions, and re-visit our laws, always keeping in mind the reality experienced by those whom nature did not place in a dominant position.[421]

Therefore, it is also important within the context of insolvency law to, as Justice C L'Heureux-Dube' suggests, re-examine our institutions and re-visit our laws to reduce the stigma's psychological effect and to assist honest debtors.[422]

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[417] Mols (2013) *Emory Bankr Dev J* 290.
[418] Inequality not only emerges from irrational legal distinctions but is often deeply rooted in social and economic cleavages between groups in society. Such inequalities are referred to as 'systemic' because they are rooted in the structures, systems, and institutions in our society. See Cheadle *et al South African constitutional law* para 4.3.
[419] Stigma and stereotyping can lead to material disadvantage. In *Union of Refugee Woman v Director, Private Security Industry Regulatory Authority* (CCT 39/06) 2006 ZACC 23, the government argued that refugees could not be regarded as reliable. The minority judgment in this case held that this is unfairly prejudicial and stereotyping and held that by excluding all refugees, whether or not they can comply with the requirements of s 23(1)(d), sent a clear message that whether or not refugees can prove trustworthiness, they may not be employed as security service providers. See also Fredman (2016) *IJCL* 736; Mols 2013 *Emory Bankr Dev J* 293, 295 n 30; and Link and Phelan (2001) *Ann Rev Soc* 363, 371, 377.
[420] *World Bank Report* para 123.
[421] L'Heureux-Dube (1997) *SAJHR* 338; Albertyn (1998) *SAJHR* 249.
[422] L'Heureux-Dube (1997) *SAJHR* 338; Albertyn (1998) *SAJHR* 249.

3.7 The effect of the disqualifications on the insolvent's right not to be unfairly dismissed

The right of every person to choose their trade, occupation, and profession freely in section 22 of the Constitution is followed by the right of every person to fair labour practices in section 23. The right to fair labour practices in the Constitution is extended to employees through the LRA's[423] protection against the unfair dismissal of employees. The prohibition against unfair dismissal upholds the security of employment[424] which is a core value in the Constitution and is afforded to vulnerable employees.[425] The protection against unfair dismissal is essential to fair labour practices, mutual respect, the preservation of the dignity, employee autonomy, and the principle of ubuntu.[426] These provisions are particularly important to a debtor who is the subject of dismissal from a particular office or employment on the basis of his or her insolvency.

The LRA defines the termination of employment with or without notice as a dismissal.[427] It provides that every employee has a right not to be unfairly dismissed or to be subjected to unfair labour practices.[428] A dismissal is initiated by the employer not by the employee,[429] and the employer bears the onus of proving that the dismissal is fair.[430] Many of the provisions in statutes, rules, or codes of standards which disqualify unrehabilitated insolvents from holding certain positions,[431] require the insolvent to vacate such office and so terminate his or her employment and limit his or her capacity to earn an income.[432] Income or earnings refers to the remuneration received by a person in the exercise of his or her employment, business, or profession and loss of income refers to both past and future loss.[433] This thesis is concerned only with the termination of a debtor's employment resulting in future loss of income due to the insolvent debtor's status.

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[423] Ch VIII of the LRA.
[424] Du Toit *et al Labour relations law* Ch VIII paras 1 and 12.
[425] *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC) (*Sidumo v Rustenburg*) para 72.
[426] Van Niekerk (2013) *ILJ* 34-36.
[427] Section 186(1)(*a*) of the LRA.
[428] Section 185 of the LRA.
[429] Du Toit *et al Labour relations law* Ch VIII para 2.
[430] Section 188(1) of Schedule 8 to the LRA; Du Toit *et al Labour relations law* Ch VIII para 5.2.
[431] See para 2.4.3 in this chapter.
[432] Millard *Loss of earning capacity* 52.
[433] Millard *Loss of earning capacity* 52.

Termination of the insolvent's employment in such instances amounts to a dismissal of the insolvent from that office, as contemplated in the definition of 'dismissal' in the LRA.

A dismissal will automatically be unfair if the reason for dismissal is, among others, because the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including but not limited to, race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status, or family responsibility.[434] If the reason for a dismissal is found to be unfair on these grounds, no justification is possible because it amounts to an infringement of the fundamental rights of employees.[435]

To determine whether the dismissal amounts to unfair discrimination, it must be established whether the ground for discrimination was 'arbitrary' or was unfair on a listed or unlisted ground.[436] If the ground is listed in section 187(1)(*f*) of the LRA, it is by definition arbitrary.[437] However, if the reason for dismissal is not on a listed ground, it will have to be ascertained whether the differential treatment can be justified to determine if the dismissal is automatically unfair.[438]

However, a dismissal that is not automatically unfair, will be unfair if the employer fails to prove that the reason for the dismissal is a fair reason related to the employee's conduct or capacity and that it was conducted in terms of a fair procedure.[439] Whether or not a dismissal is for a fair reason depends on the facts of each case and the appropriateness of dismissal as a penalty.[440]

When a person determines whether a dismissal on misconduct is unfair, the LRA states that he or she should consider whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace.[441] If a rule or

[434] Section 187(1)(*f*) of the LRA.
[435] Section 187(1) of the LRA; Du Toit *et al Labour relations law* Ch VIII para 3. See also the Explanatory Memorandum to the Draft Negotiating Document in the form of a Labour Relations Bill (Draft Labour Relations Bill) GN 97 *GG* 16259 of 10 February 1995, 140.
[436] Du Toit *et al Labour relations law* Ch VIII para 3.2(c).
[437] Du Toit *et al Labour relations law* Ch VIII para 3.2(c).
[438] Du Toit *et al Labour relations law* Ch VIII para 3.2(c).
[439] Section 188(1) of the LRA.
[440] Section 2(1) to Schedule 8 of the LRA.
[441] Section 7(*a*) of Schedule 8 to the LRA. See also the CCMA guidelines on misconduct arbitrations published by the Commission for Conciliation, Mediation and Arbitration in terms of s 115(2)(*g*) of the Labour Relations Act 66 of 1995 (CCMMA guidelines on misconduct) paras 79-83.

standard was contravened, he or she must consider whether the rule was a valid or reasonable rule or standard.[442] In this case, it must be established whether the rule is lawful under common law, statute law, a collective agreement, a contract of employment, or public policy.[443] Although the employer is entitled to determine the rules and standards that apply in the workplace,[444] it must do so fairly;[445] the rule must be reasonable and fair.[446]

Further, the person will have to establish whether the employee was aware of the rule or standard, or could reasonably have been expected to be aware of the rule or standard.[447] It must also be established whether the rule or standard has been consistently applied by the employer and whether a dismissal is an appropriate sanction for contravening the rule or standard.[448]

In determining whether a dismissal was an appropriate sanction, an enquiry has to be made as to the gravity of the contravention of the rule, the consistency of application of the rule and sanction, and whether there were factors that may have justified a different sanction.[449]

In ascertaining the gravity of the infringement the circumstances of the employee, the nature of the job and the circumstances of the infringement will have to be taken into account.[450] In *Sidumo v Rustenburg Platinum Mines Ltd*[451] the Constitutional Court held that in determining the fairness of dismissal as a sanction, the commissioner must take all the circumstances into account. He or she must consider the importance of the rule that was breached, the reason the employer imposed the sanction of dismissal, and the grounds on which the employee challenges the dismissal. The commissioner must also consider the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating

[442] Section 7(*b*)(i) of Schedule 8 to the LRA.
[443] Du Toit *et al Labour relations law* Ch VIII para 6.3; Du Plessis and Fouché *A practical guide to labour law* para 14.5.1.
[444] *County Fair Foods (Pty) Ltd v CCMA* [1999] 11 BLLR 1117 (LAC) para 11 confirmed in *Sidumo v Rustenburg* paras 67 and 176. See also the CCMA guidelines on misconduct para 89.
[445] Du Toit *et al Labour relations law* Ch VIII para 6.3.
[446] *Sidumo v Rustenburg* para 62.
[447] Section 7(*b*)(ii) of Schedule 8 to the LRA.
[448] Sections 7(*b*)(iii), (iv) and 3(6) of Schedule 8 to the LRA.
[449] CCMA guidelines on misconduct para 94.
[450] Section 3(5) of Schedule 8 to the LRA.
[451] *Sidumo v Rustenburg* para 78.

the misconduct, the effect of dismissal on the employee, and his or her long-service record. This list is not exhaustive.

As regards consistency, like cases should be treated alike.[452] An employer is required to show consistency over time and consistency between employees charged with the same contravention.[453] An employee who alleges that another employee was not dismissed for infringing the same rule, must indicate the basis upon which he or she ought not to have been treated differently,[454] and the employer must justify the difference in treatment.[455] If the employer cannot justify the difference in treatment, the inconsistency is unfair.[456]

The employee's circumstances – length of service, previous disciplinary record, a likelihood that continued employment will not be intolerable, and personal circumstances; the nature of the job – does the risk of future contravention make continued employment intolerable; and the circumstances of the infringement – absence of dishonesty; are factors that favour continued employment over dismissal.[457] In *Miyambo v CCMA*[458] it was held that dismissal should not be treated as punishment but as an operational response to risk management in that a business's risk depends on the trustworthiness of its employees. If by not terminating employment, an employee will not pose a risk to the employer in the future, then it appears that the employee is trustworthy and will not make continued employment intolerable.[459]

3.8 Current Developments

3.8.1 The 'advantage-to-creditors' requirement

Although the South African Law Reform Commission acknowledged that the advantage-to-creditors requirement has been criticised as being difficult to prove and resulting in debtors being unable to escape their debts as they do not have

[452] Du Toit *et al Labour relations law* Ch VIII para 6.4(b).
[453] CCMA guidelines on misconduct para 100.
[454] CCMA guidelines on misconduct para 101.
[455] CCMA guidelines on misconduct para 101.
[456] *Cape Town City Council v Masitho* (2000) 21 ILJ 1957 (LAC) paras 14 and 18.
[457] CCMA guidelines on misconduct para 105-108.
[458] *Miyambo v CCMA* [2010] 10 BLLR 1017 (LAC) 1020. See also *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero* (2017) 38 ILJ 881 (LAC) para 26; *Khumalo v University of Johannesburg* (JS533/16) [2018] ZALCJHB 31 (6 February 2018) para 31.
[459] See CCMA guidelines on misconduct para 104.

unencumbered assets of sufficient value, the 2000 Explanatory Memorandum proposed that the requirement be retained.[460] This is intended to encourage creditors to participate in the administration of insolvent estates.[461] The advantage requirement was therefore retained in the 2000 Draft Insolvency Bill.[462]

The question of the retention of the advantage-to-creditors requirement was again addressed in the 2014 Explanatory Memorandum where it was stated that this requirement is not common in other legal systems and does not apply in the case of companies.[463] However, it was again retained in the 2015 Draft Insolvency Bill.[464]

3.8.2 Entering into contracts

Section 23(2) of the Insolvency Act prohibits an insolvent, without the written consent of the trustee, from entering into a contract whereby his or her estate or any contribution which he or she is obliged to make towards the estate, is or is likely to be adversely affected.

The Law Reform Commission indicated that this provision leads to problems as trustees and insolvents generally differ on whether or not the consent of the trustee is necessary.[465] The Commission also questioned whether the words "any contract whereby his estate is or is likely to be adversely affected" were redundant.[466] It proposed that these words be omitted as to do so will not be prejudicial to creditors.[467] This suggestion was included in the 2000 Draft Insolvency Bill[468] and has been retained in the 2015 Draft Bill.[469]

Section 23(3) of the Insolvency Act allows an insolvent to follow any profession or occupation or to enter into any employment during the sequestration of his or her estate. However, during the sequestration it prohibits that insolvent, without the written consent of the trustee, from carrying on or being employed in any capacity or have any direct interest in the business of a trader who is a general dealer or manufacturer.

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[460] Clause 3.6 of the 2000 Explanatory Memorandum.
[461] Para 4.4 of the Discussion Paper.
[462] Clauses 7(1)(*b*) and 8(1)(*c*) of the 2000 Draft Insolvency Bill.
[463] Clause 3(15) of the 2014 Explanatory Memorandum.
[464] Clauses 3(8)(*a*)(ii) of the 2015 Draft Insolvency Bill.
[465] Clause 15(1) of 2000 Explanatory Memorandum.
[466] Clause 15(1) of 2000 Explanatory Memorandum.
[467] Clause 15(1) of 2000 Explanatory Memorandum.
[468] See cl 15(1).
[469] See cl 16(1).

The Law Reform Commission suggested that in its current form this provision is outdated.[470] Further, it makes no sense to require the consent of the trustee in the case of an insolvent who acts as a general dealer or manufacturer, but at the same time not require consent where the insolvent is not a general dealer or manufacturer.[471] It noted that such consent is not required in other jurisdictions such as England, Scotland, Australia, or the United States of America.[472] Thus, it proposed that the trustee's consent requirement be removed and that the different professions and industries be allowed to create their own rules disqualifying an insolvent from entering those professions or industries.[473] The 2000 Draft Insolvency Bill,[474] therefore, omitted this requirement and that has been maintained in the 2015 Draft Insolvency Bill.[475]

Section 23(5) of the Insolvency Act allows the trustee to claim money received or to be received by the insolvent during the exercise of his or her profession, occupation, or any other employment that the Master thinks is unnecessary to support the insolvent and his or her family. The Law Reform Commission pointed out that requiring the insolvent to contribute surplus money that has already been received might have unfair consequences.[476] Thus, it suggested that only money which is to be received by the insolvent in the future may form the basis of a direction by the Master.[477] Section 23(5) potentially limits a fresh start because it takes away the protection of the income of the insolvent whether it has already been received or will be received in the future.[478] Taking away the insolvent's future surplus income will result in the debtor losing his or her motivation to work, earn a living, and to acquire property as he or she knows that for the ten years before automatic discharge whatever surplus income he or she earns could possibly go to his or her creditors.[479]

As regards the insolvent's right to claim compensation in respect of loss or damage suffered because of defamation or personal injury, in section 23(8) of the Insolvency

[470] Clause 15(4) of the Explanatory Memorandum.
[471] Clause 15(4) of the Explanatory Memorandum.
[472] Clause 15(4) of the Explanatory Memorandum.
[473] Clause 15(4) of the Explanatory Memorandum.
[474] See cl 15(2).
[475] See cl 16(2).
[476] Clause 16(8) of the 2014 Explanatory Memorandum.
[477] See cl 16(5) of the 2015 Draft Insolvency Bill.
[478] Ch 2 para 2.6.
[479] Ch 2 para 2.2.3.

Act, the Law Reform Commission pointed out that it applied to both general damages[480] and special damages[481] as held in *Santam Versekeringsmaatskappy v Kruger*.[482] It indicated that this may be prejudicial to creditors in a situation where the insolvent incurred medical and hospital expenses before sequestration and those creditors were left as concurrent creditors while the insolvent enjoyed the compensation benefit for those expenses.[483] The 2000 Draft Insolvency Bill, therefore, provides that where compensation recovered by the insolvent includes medical or other expenses, a creditor in respect of such expenses is entitled to be paid out of the compensation or recover the compensation from the insolvent even though the claim for such expenses arose before the date of liquidation of the estate.[484]

3.8.3 Obtaining credit

Section 137(*a*) of the Insolvency Act makes it an offence for an unrehabilitated insolvent to obtain credit above a certain amount from any person during sequestration. The offence is punishable with imprisonment of not more than one year. In this regard, the commentators to the 2000 Explanatory Memorandum proposed, amongst others, that sequestration should merely take away the insolvent's power to dispose of assets and limit his or her right to incur further debts.[485] Sequestration should not punish the insolvent by diminishing his or her status.[486] Therefore, the Law Reform Commission suggested that the offence be limited to where the insolvent, despite having been expressly asked about his or her financial standing or creditworthiness, falsely concealed his or her insolvency status and as a result obtained credit of more than R500.[487] This is in line with international trends that favour the exclusion of fraudulent debtors from a fresh start.[488]

The commentators on the 2014 Explanatory Memorandum further criticised section 137 for not providing the option of a fine and the suggestion that insolvent debtors would not have the money to pay the fine.[489] They stated that the reason that insolvent

[480] This refers to compensation for pain and suffering.
[481] Medical expenses.
[482] *Santam Versekeringsmaatskappy v Kruger* 1978 (3) SA 656 (A).
[483] Clause 15(12) of the 2000 Explanatory Memorandum.
[484] See cl 15(7)(*c*).
[485] Para 3.8 of the Discussion Paper.
[486] Para 3.8 of the Discussion Paper.
[487] Clause 101(1)(*c*) of the 2000 Explanatory Memorandum.
[488] Ch 2 para 2.6.
[489] Clause 136(3) of the 2014 Explanatory Memorandum.

debtors would not have the money to pay the fine is incorrect because insolvent debtors have assets and income that do not vest in the trustee and they could use that part of their income that is not claimed by the trustee in terms of section 23(5) to pay the fine.[490] They further stated that the sanction of imprisonment for insolvency offences is ineffective as it contributes to the overpopulation of prisons, exposes insolvent debtors to criminals, and makes criminals of honest persons.[491] Instead, they suggested that the emphasis should be on those cases where the insolvent acted with criminal intent or deliberately disregarded the rights of creditors.[492] This suggestion is in line with international trends which favour the protection of honest but unfortunate debtors[493] and the abolition of civil imprisonment as it is ineffective in that it frustrates a debtor's efforts to recover from his or her overindebtedness and return to solvency.[494] However, only some of the Law Reform Commission's proposals in this regard are contained in the 2015 Draft Insolvency Bill. They provide that a person who contravenes clause 136(1)(*c*), which is the equivalent of section 23(5) of the Insolvency Act, is guilty of an offence and is liable to a fine or imprisonment.[495] The Bill still does not exclude the sanction of imprisonment as per the Law Reform Commission's proposals and is contrary to international trends.

3.8.4 Rehabilitation and a fresh start

In line with international policy considerations, the Law Reform Commission in the 2000 Explanatory Memorandum acknowledged that a debtor may become insolvent through no fault of his or her own and that such a debtor should be allowed to make a fresh start.[496] The Law Reform Commission stated that creditors are sometimes to blame for a debtor's insolvency in that they extend credit to debtors who cannot repay it.[497] In this regard, the Law Reform Commission stated that a balance should be struck between creditors' rights and allowing debtors to make a fresh start. However, debtors

[490] Clause 136(3) of the 2014 Explanatory Memorandum.
[491] Clause 136(3)-(4) of the 2014 Explanatory Memorandum.
[492] Clause 136(4) of the 2014 Explanatory Memorandum.
[493] Ch 2 para 2.6.
[494] Ch 2 para 2.2.1.
[495] Clauses 136(1)(*c*) and 136(4)(*b*) of the 2015 Draft Insolvency Bill.
[496] Para 4.6 of the Discussion Paper.
[497] Para 4.6 of the Discussion Paper.

should still be expected to act honestly and assist in the winding up of their insolvent estates[498]

Commentators on the 2000 Explanatory Memorandum proposed, amongst others, that formalities should be limited to the minimum and should be as simple as possible.[499] In this regard, proposals were made for the simplification of the rehabilitation application.[500] The amendments to sections 124, 125, 126 and 127 were indicated in clause 96 of the 2000 Draft Insolvency Bill and clauses 101 and 102 of the 2014 Explanatory Memorandum. These are currently included in clause 101 of the 2015 Draft Insolvency Bill. Clause 101 provides:

> **101.** (1) A debtor who is a natural person may, subject to subsection (2), apply to the court for an order for his or her rehabilitation—
>
> *(a)* at any time after the confirmation by the Master of a distribution account providing for the full payment of all claims proved against the estate, with interest thereon from the date of liquidation, calculated in terms of sections 84(12) and (13) and all costs of liquidation; or
>
> *(b)* at any time after the Master has issued a certificate of acceptance of a composition as contemplated in section 119; or
>
> *(c)* in any other case after the expiration of four years from the date of the confirmation by the Master of the first liquidation account in the estate
>
> (2) In the case where a debtor has been convicted, in respect of the existing or any prior insolvency, of an offence referred to in section 136(1)*(a)*, *(b)*, *(d)*, *(e)* or *(g)* or 2*(e)* or *(f)* or of any other fraudulent activity, the debtor may not apply to the court for an order for his or her rehabilitation before a period of five years has elapsed from the date of the conviction in question.
>
> (3) The Master may on the request of the debtor recommend to the court that an application referred to in subsection (1)*(c)* may be made before the expiration of the said period of four years but no such application may be made within a period of twelve months from the said date or, in the case where the debtor's estate was liquidated prior to the liquidation in respect of which he or she applies for rehabilitation, within a period of three years from the said date.
>
> (4) A debtor who wishes to apply for a rehabilitation order must—
>
> (a) send a written standard notice of his or her intended application by mail, telefax, electronic mail, or personal delivery—
>
> (i) in the case of an application contemplated in subsection (1)(a), to the Master and the liquidator, not less than four weeks before the date of the intended application; or
>
> (ii) in the case of an application contemplated in subsection (1)(b), (c) or (d), to the Master and the liquidator, not less than six weeks before the date of the intended application, and by way of the publication of a notice in the Gazette, and he or she must send a copy of the said notice by mail, telefax, electronic

[498] Para 4.6 of the Discussion Paper.
[499] Para 3.8 of the Discussion Paper.
[500] Clause 96(1) of the 2000 Explanatory Memorandum. Also see generally Coetzee *A Comparative reappraisal of debt relief measures* 146-152.

> mail, or personal delivery by standard notice to every creditor of the estate whose name and address are known to him or her or which he or she can readily obtain; and
>
> (b) furnish security to the registrar of the court in the amount of or to the value of R5000 in respect of the costs of any person who may oppose the application for rehabilitation and who may be awarded costs by the court.

Clause 101(1)(*b*) allows the court to rehabilitate an insolvent immediately after a composition has been accepted without requiring that the composition provide for not less than 50-cents for every one rand of proved claims.[501] The Law Reform Commission stated that this encourages compositions and that the 50-cent limit is arbitrary as the connection between the percentage paid to creditors and the fitness of the insolvent to be rehabilitated, is in all likelihood tenuous.[502]

Currently, section 124(3) of the Insolvency Act requires six months to pass before an insolvent can apply for rehabilitation if no claims have been proved against his or her estate.[503] The Law Reform Commission explained that the fact that no claims have been proved against an estate is not necessarily an indication that the debtor is entitled to early rehabilitation.[504] It indicated that it may be a sign that the debtor disposed of all his or her assets and creditors do not want to run the risk of being liable to contribute.[505] In this regard, clause 101(1)(*c*) incorporates cases where no claims have been proved so that the normal period or four years applies to these cases. However, in terms of clause 101(3), before such an application can be made, a period of 12 months must pass and where it is not the first time the debtor's estate has been liquidated before a period of three years has expired.

Clause 101(2) is intended to prevent the situation where a person who has a conviction relating to a prior insolvency can be rehabilitated even before any account has been confirmed.[506] Thus, a person who has been convicted of a certain offence may not

[501] Clause 96.4 of the 2000 Explanatory Memorandum.
[502] Clause 96.4 of the 2000 Explanatory Memorandum and cl 101.4 of the 2014 Explanatory Memorandum.
[503] See para 3.5 above.
[504] Clause 96.2 of the 2000 Explanatory Memorandum and cl 101.2 of the 2014 Explanatory Memorandum. See also Roestoff (2018) 81 *THRHR* 312.
[505] Clause 96.2 of the 2000 Explanatory Memorandum and cl 101.2 of the 2014 Explanatory Memorandum.
[506] Clause 96.3 of the 2000 Explanatory Memorandum and cl 101.3 of the 2014 Explanatory Memorandum.

apply within five years after his or her conviction and may also be subjected to other waiting periods.[507]

Clause 101(4)(*b*) amends section 125 of the Insolvency Act by increasing the amount to be furnished as security for opposition costs to R5 000,[508] and clause 101(5) allows the Minister to change this amount to accommodate changes in the value of money.

Clause 101(6) is a new provision that requires the insolvent to state in the notice to creditors the estimated value and reflect full details of the assets at the time of the application.[509] This is intended to prevent unexpected rehabilitation applications while investigations into possible assets are still being conducted.[510] It ensures that creditors are given an opportunity to oppose the granting of rehabilitation.[511]

Clauses 101(7)-(10) correspond to section 126 of the Insolvency Act which deals with the facts that need to be stated on the application for rehabilitation.[512]

Commentators on the 2000 Explanatory Memorandum further proposed that a court not grant a rehabilitation order until ten years after the liquidation of a debtor's estate if the court is satisfied, based on the Master's certificate or other evidence, that the debtor has intentionally impeded, obstructed, or delayed the administration of his or her insolvent estate.[513] Although the ten years in this recommendation was criticised in that it would delay rehabilitation because it was peremptory in all cases where the Master issues a certificate. The Law Reform Commission stated that there should be a real danger of penalisation for an insolvent and a wide discretion from the court is undesirable.[514] Thus, the recommendation was effected in clauses 97(2) of the 2000 Draft Insolvency Bill and 102(2) of the 2015 Draft Insolvency Bill. The rationale behind the recommendation is that although a sanction is required to induce an insolvent to

[507] Clause 96.3 of the 2000 Explanatory Memorandum and cl 101.3 of the 2014 Explanatory Memorandum.
[508] In terms of s 125 of the Insolvency Act the security for opposition costs is R500. See para 3.5 above.
[509] Clause 96.8 of the 2000 Explanatory Memorandum.
[510] Clause 96.8 of the 2000 Explanatory Memorandum and cl 101.7 of the 2014 Explanatory Memorandum.
[511] Clause 96.8 of the 2000 Explanatory Memorandum and cl 101.7 of the 2014 Explanatory Memorandum.
[512] Clause 96.9 of the 2000 Explanatory Memorandum and cl 101.8 of the 2014 Explanatory Memorandum.
[513] Para 4.6.4 of the Discussion Paper "Review of the law of Insolvency". See also cl 97(2) of the 2000 Explanatory Memorandum.
[514] Clause 97.4 of the 2000 Explanatory Memorandum and cl 102.4 of the 2014 Explanatory Memorandum.

cooperate, it does not have to be a criminal sanction.[515] In line with the Decriminalisation Act's objective to get rid of statutory offences that do not belong in criminal courts, it was recommended that strictly technical offences in the Insolvency Act should attract alternative sanctions.[516] This is aligned with international policy considerations that insolvent debtors who act dishonestly should be excluded from discharge because bankruptcy is not intended to become a shelter for debtors who have acted dishonesty or intentionally disregarded the rights of others.[517]

As regards the effects of rehabilitation, the commentators to the 2000 Explanatory Memorandum for the 2000 Draft Insolvency Bill proposed that claims which are not discharged by rehabilitation should be expanded to include not only claims arising from fraud but also those arising after an insolvent obtained credit by giving false information or after he or she concealed insolvency in respect of a previous liquidation.[518] It was explained that if the continuation of debts that arose from fraud on the insolvent's part is justified, there should be no objection to extending this to offences stipulated in the Insolvency Act.[519] This is also aligned with international trends that insolvent debtors who act dishonestly should be excluded from discharge as bankruptcy is not intended to become a shelter for debtors who have engaged in dishonesty or intentional disregard for the rights of others.[520] In this regard, Roestoff suggests that debts resulting from alimony, the intentional assault or killing of another, driving under the influence of alcohol, and fines or punishment should also not be extinguished after rehabilitation.[521] This would be aligned with the international trend to exclude debts such as maintenance agreements, taxes, fraud, and penalties where the alternative is imprisonment, from discharge.[522]

In addition to the proposals regarding the effects of rehabilitation, the revesting of the assets not reflected in the statement of affairs in the insolvent after rehabilitation,

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[515] Clause 97.2 of the 2000 Explanatory Memorandum and cl 102.2 of the 2014 Explanatory Memorandum.
[516] Clause 97.2 of the 2000 Explanatory Memorandum and cl 102.2 of the 2014 Explanatory Memorandum.
[517] Ch 2 para 2.6.
[518] Para 4.6.4 of the Discussion Paper "Review of the law of Insolvency". See also cl 99(1)(*b*) of the Explanatory Memorandum.
[519] Clause 99.1 of the 2000 Explanatory Memorandum and cl 104.1 of the 2014 Explanatory Memorandum.
[520] Ch 2 para 2.6.
[521] Roestoff *'n Kritiese evaluasie van skuldverligtingsmaatreëls* 395-401; Coetzee *A comparative reappraisal of debt relief measures* 151.
[522] Ch 2 paras 2.2.2, 2.3.3 and 2.4.3.

where no claims have been proved has been omitted.[523] This is because the absence of proved claims is not an indication that the debtor is entitled to early rehabilitation.[524]

As regards automatic rehabilitation after ten years by effluxion of time, some commentators on the 2000 Explanatory Memorandum criticised the period. They recommended that as the period is arbitrary, it should be reduced or a different period should apply to insolvents who have been sequestrated multiple times.[525] In line with international trends, they stated that some countries have reduced the period for automatic rehabilitation, alternatively, they suggested different periods for different scenarios.[526] However, the Law Reform Commission stated that simplicity is desirable and advised that a rule that rehabilitation takes place after a fixed number of years unless there is a court order, is simple and is recommended.[527] Further, because there were limited comments in this regard and the fact that the ten-year period in the current legislation is well known, no reduction of the period was proposed.[528] Thus, the ten years is retained in the 2015 Draft Insolvency Bill.[529] This is contrary to international trends that favour shorter discharge periods and also has the potential to limit the outcome of a fresh start.[530] As a result South African authors still advocate that the period required for automatic rehabilitation should be reduced to three years so aligning it with international trends favouring a fresh start as early as possible.[531]

3.9 Conclusion

In addressing an insolvent debtor's capacity to earn a living, this chapter aimed to discuss the impediments faced by insolvent debtors before, during, and after sequestration and the reform proposals made by the South African Law Reform Commission in this regard. References were made to whether the impediments contrasted or were aligned with international policy considerations on insolvency

[523] See cl 99(1) of the 2000 Draft Insolvency Bill and cl 104 of the 2015 Insolvency Draft Working Paper.
[524] Clause 11.2 of the 2000 Explanatory Memorandum and cl 104.3 of the 2014 Explanatory Memorandum.
[525] Clause 98.1 of the 2000 Explanatory Memorandum.
[526] Clause 98.1 of the 2000 Explanatory Memorandum.
[527] Clause 98.1 of the 2000 Explanatory Memorandum and cl 103.1 of the 2014 Explanatory Memorandum.
[528] Clause 98.1 of the 2000 Explanatory Memorandum and cl 103.1 of the 2014 Explanatory Memorandum.
[529] See cl 103(1).
[530] See para 3.5 above.
[531] Coetzee *A comparative reappraisal of debt relief measures* 150-151.

systems for natural persons. This chapter also aimed to outline the legal position in respect of the disqualifications on insolvent debtors and the rationale for their existence, as well as on South African labour laws.

Ultimately the purpose was to show how these disqualifications limit an insolvent's capacity to earn a living, and to find solutions for law reform that would be less restrictive on an insolvent ability to earn an income. The nature and policy objectives of South African insolvency law were discussed first. The outcome was that South African insolvency law is by nature creditor-friendly. The sequestration procedure aims to benefit creditors through a debt collection process where the interests of creditors as a group take preference over those of individual creditors. Although a discharge is not its primary aim, it is a consequence which distinguishes it from the debt review procedure and administration orders under which a debtor is not promised a discharge of his or her debts.[532]

Although an insolvent must surrender ownership in all his or her moveable and immovable assets, to preserve his or her dignity and to assist him or her to start afresh financially, certain assets are excluded or exempt from the insolvent estate.[533] It is interesting that these assets include the remuneration or reward for work done or professional services rendered by the insolvent as the disqualifications and prohibitions against unrehabilitated insolvents target the same income.

In line with international trends that favour balancing the interests of the creditors, the insolvent, and the broader public,[534] the South African Law Reform Commission proposed that a balance should be found between creditors' rights and allowing debtors to make a fresh start. However, debtors should still be expected to act honestly and assist in the winding up of their insolvent estates. On the one end of this balancing of interests, the intention is to preserve the life, dignity, and the right to work of an insolvent so that he or she does not become a burden on society, and on the other end, the intention is to protect the interests of the public – creditors and those having dealings with the insolvent – against dishonest insolvents.

[532] See para 3.2 above.
[533] See para 3.3.3.
[534] Ch para 2.5.3.

In this balancing act, if the interests of unrehabilitated insolvents are upheld, creditors may be disadvantaged in that the provisions dealing with the waiver of the protection of exempt or excluded assets to benefit creditors, will not be approved by the courts. Secondly, an employee whose insolvency is a result of dishonest activities may pose a business risk if the relationship of trust and honesty has been breached.

If the interests of the public are upheld by the disqualifications and prohibitions imposed on insolvents, the insolvents may become a burden on society and destroy the insolvent as an income earning person. This would not be in the interests of the state as the insolvent's capacity to earn an income would be limited and he or she wold not be able to rebuild a new estate and again be economically active. This could, in turn, lead to insolvency after rehabilitation as research has shown that unemployment and lack of available jobs are among the main causes of insolvency among natural persons.[535]

Unfortunately, the current state of affairs in South African insolvency law shows that the interests of the public weigh more heavily than the interests of unrehabilitated insolvents. This is not aligned with the international policy which supports a fresh start for the honest but unfortunate debtor and allows for economic rehabilitation – one of the principal aims of an insolvency system for natural-person insolvency.[536]

An insolvent's ability to secure credit is limited during sequestration. Without the consent of his or her trustee, an insolvent may not be employed as a shop assistant or a clerk in a large department store, no matter how remote his or her chances of endangering the general public may be. An insolvent is disqualified from occupying many employment offices, from being a member of or sitting on many statutory boards or councils.

While the Law Reform Commission has made proposals regarding obtaining credit and entering into contracts with the trustee's consent[537] which are aligned with the international policy favouring the exclusion of only the fraudulent debtor from discharge,[538] no proposals were made regarding the insolvent's disqualification from certain employment, offices, or boards. It is doubted whether all of the disqualifications

[535] Ch 2 para 2.6.
[536] Ch 2 para 2.6.
[537] See paras 3.8.2 and 3.8.3 above.
[538] See paras 3.8.2 and 3.8.3.

applied to unrehabilitated insolvents meet international policy considerations of anti-discrimination.[539] While some of them are justified for the protection of public interests, they are based on the stigma that a debtor who becomes bankrupt is not someone in whom society can have trust or confidence. Such a notion disregards that the risk of bankruptcy is an ordinary manifestation of business life. International policy considerations recommend that laws must be created to eliminate or reduce the stigma attached to bankruptcy which manifests in unnecessary and damaging restrictions on the debtor when considering policies for natural-person debtors.[540] This will assist in preventing possible infringements of the discharged debtor's fundamental rights and allow for his or her effective financial and social inclusion after discharge.[541] While in terms of the Act rehabilitation is intended to relieve the insolvent of every disability resulting from sequestration, the omission of information about sequestration and rehabilitation from the 2014 amnesty regulations means that, despite their financial position having changed, rehabilitated insolvents are unable to start with a clean slate and a new credit record after rehabilitation. An insolvent is therefore not freed from all disabilities after his or her rehabilitation – his or her ability to access credit and find employment remains limited for five years post-rehabilitation. This prevents him or her from resuming economic activity and defeats the purpose of rehabilitation. Again this is contrary to international policy trends which favour a fresh start and economic rehabilitation. While the Law Reform Commission acknowledged that some debtors become insolvent through no fault of their own, should be allowed a fresh start, and that the rehabilitation period be simplified, it still recommended that the ten-year automatic rehabilitation period be retained.[542] It reasoned that this is simpler as it is well known and there were few suggestions that it should be curtailed. The retention of the ten-year period was recommended notwithstanding calls from certain commentators that it is arbitrary and should be reduced, or that different periods should be applied to insolvents who have been sequestrated multiple times. These recommendations would have aligned this aspect with international trends and recognised the interest of the debtor subjected to numerous disqualifications which inhibit economic rehabilitation during the ten years.

[539] See para 3.4.3 above.
[540] Ch 2 para 2.6.
[541] Ch 2 para 2.6.
[542] See para 3.8.4 above.

Even though debtors under administration and debt review are also prevented from accessing credit and their credit information is also made publicly available, they remain in a better position than insolvent debtors as they are not subject to all the disqualifications currently imposed on insolvent debtors.[543]

An insolvent who has been dismissed from employment because the rules in his or her workplace disqualify unrehabilitated insolvents from occupying that office, can challenge his or her dismissal on the unfair dismissal principles in section 188(1)(*a*)(i) of the LRA and section 7 of its Schedule 8.

An unrehabilitated insolvent, like a person under debt administration, debt review, or a person who has entered into arrangements or compromise agreements with their creditors, falls under the umbrella of people who have failed to pay their debts and are thus overindebted. However, only in a few instances are these other debtors disqualified from occupying certain offices or being a member of certain statutory boards or councils.[544] An unrehabilitated insolvent, by contrast, is dismissed based solely on his or her insolvency and irrespective of whether or not a particular insolvent may still be honest and competent for employment or membership of such councils or boards. In only a few instances is the honesty and competency of an insolvent considered when determining whether or not he or she should be a member of a statutory board or council. This blanket disqualification is not applied to other debtors such as those under administration orders, debt review procedures, or persons who have entered into arrangements or compromise agreements with their creditors but who have also failed to pay their debts, irrespective of their possible dishonesty.[545]

An unrehabilitated insolvent can argue that this differentiation between debtors who have failed to pay their debts is unfair. The onus would then be on the employer to show the reason for and fairness of the rule, its consistency in the application of the rule in like cases, and the appropriateness of dismissal as a sanction.

In making his or her ruling a commissioner would have to take the circumstance of the insolvent into account. That would include the cause of his or her insolvency which may be an involuntary job loss, terminal illness requiring time off work, caregiving to a

[543] See para 3.4.3 above.
[544] See para 3.4.3.
[545] Para 3.4.3 above.

terminally ill family member, lack of adequate insurance, divorce, or death.[546] Further, he or she would also have to consider the insolvent's length of service, previous disciplinary record, the likelihood that continued employment will not be intolerable. Whether or not the debtor's insolvency affects his or her ability to perform the job, whether he or she breached a relationship of trust, and whether his or her insolvency involved dishonesty are further factors that must be considered.

All of this points to the need for South African insolvency law to distinguish between honest but unfortunate debtors, and dishonest debtors. The rationale for the disqualifications on unrehabilitated insolvents indicates that the disqualifications were and still are intended to punish debtors who act fraudulently and negligently in their business dealings. This has resulted in all insolvent debtors being stigmatised irrespective of their honesty or dishonesty. If it is established whether a debtor's insolvency involved dishonesty or unfortunate life circumstances, a debtor will be dealt with according to his or her circumstances.

The South African Law Reform Commission's recommendation that the offence committed by an insolvent who obtains credit exceeding a certain amount, be changed to apply only where the insolvent, despite having been expressly asked about his or her financial standing or creditworthiness, falsely concealed his or her insolvency status and as a result obtained credit above the limit, is a step in that direction. It draws a distinction between the honest but unfortunate debtor who disclosed his or her insolvency status when asked, and a dishonest insolvent who falsely concealed his or her status when asked. It aims to punish only the dishonest insolvent and limits the restriction on the ability to obtain credit to insolvents who have acted maliciously.

Drawing such a distinction would also assist employers in determining whether dismissal is an appropriate remedy for an employee who becomes insolvent while holding a position of trust and honesty. If an employee's insolvency is caused by an unfortunate circumstance not related to his or her employment and which does not diminish his or her competence or breach the relationship of trust, insolvency should not be permitted to limit such an employee's ability to earn a living. However, if such an employee acted dishonestly, his or her ability to earn a living may be limited. The intention, therefore, is to protect the interests of honest but unfortunate debtors. This

[546] See Ch 2 para 2.6.

would be in line with international best practice for natural persons as discussed in Chapter 2.[547]

The Law Reform Commission's recommendation to allow the different professions and industries to set their own admission rules for unrehabilitated insolvents by removing the requirement of the trustee's consent in section 23(3), has both positive and negative consequences. If this provision in the 2015 Draft Insolvency Bill is retained in a future Insolvency Act, insolvents can be employed in the business of traders irrespective of whether the businesses are general dealers or manufacturers. This is positive and is aligned with one of the purposes of section 23(3) which is to ensure that the insolvent remains productive and income-generating during sequestration. Currently, however, only the aim of protecting the public (creditors) is considered.

The negative consequence, however, is that the different professions and industries will continue making rules that disqualify insolvent debtors from those professions and industries, irrespective of whether those rules can be justified under the Constitution.[548]

[547] Ch 2 para 2.6.
[548] The constitutional aspects of the disqualifications imposed on insolvent debtors by certain professions and industries are discussed in Ch 4.

CHAPTER 4: EVALUATION IN TERMS OF THE RIGHT TO EQUALITY

CHAPTER OVERVIEW

4.1 Introduction

The adoption of a Constitution[1] for the Republic of South Africa in 1994 which contains a Bill of Rights, enshrined the right to equality of every person in South Africa and changed the legal system in the Republic.[2] Since 1994, all law is subject to and must be consistent with the Constitution which is the supreme law of the land.[3] When interpreting any legislation, the courts, tribunals and forums must promote the spirit, purport and objects of the Bill of Rights,[4] and the Bill of Rights must be interpreted in a manner that promotes the values that underlie an open and democratic society based on human dignity, equality, and freedom, and international law must be considered.[5]

Therefore, human-rights considerations now apply to every aspect of the law, including insolvency law and other debt-enforcement mechanisms which are required to be consistent with constitutional constraints.[6] Most importantly, this allows for a challenge

[1] Constitution of the Republic of South Africa, Act 200 of 1993 (interim Constitution) which was later replaced by the Constitution of the Republic of South Africa, 1996 (the Constitution).
[2] Boraine, Evans, Roestoff and Steyn (2015) *NIBLeJ* 60.
[3] Section 2 of the Constitution.
[4] Section 39(2) of the Constitution.
[5] Section 39(1) of the Constitution.
[6] Boraine, Evans, Roestoff and Steyn (2015) *NIBLeJ* 60.

to well-established principles and practices on constitutional grounds[7] and is aligned with international practice.

The Insol International Consumer Debt Report II,[8] for example, states that the rights of natural-person debtors during insolvency proceedings may be affected by the obligations under international treaties protecting human rights and a balance needs to be struck between protecting the basic living necessities of the debtor and his or her family, and the effectiveness of debt recovery.[9] Discussing England and Wales, Fletcher[10] observes that the introduction of the Human Rights Act[11] compelled a review of the validity of well-established provisions dealing with the insolvency of natural persons in England and Wales, and questions whether they are aligned with the European Convention of Human Rights.[12] The result is that whenever giving effect to any legislation in England and Wales, this must done in a manner that is consistent with the Convention rights.[13]

The South African Constitution takes the same stance so that when interpreting any legislation, including the Insolvency Act, any forum, court, or tribunal must promote the values of the Bill of Rights and must consider international law.

The Insolvency Act[14] does not provide for different classes of debtor who are treated differently depending on their circumstances.[15] Despite this, Evans[16] suggests that:

> [I]t does in fact differentiate between those 'rich debtors' who are able to prove advantage to creditors, and 'poor debtors' who cannot. This raises the question whether, under present

[7] Boraine, Evans, Roestoff and Steyn (2015) *NIBLeJ* 60.
[8] Insol International Consumer Debt Report II: Report of findings and recommendations (Report submitted by Insol International 2011) (*Insol Report II)* para 19.
[9] See also Boraine, Evans, Roestoff and Steyn (2015) *NIBLeJ* 60.
[10] Fletcher *The law of insolvency* (4th ed) 27; Boraine, Evans, Roestoff and Steyn (2015) *NIBLeJ* 59.
[11] Human Rights Act 1998 (Human Rights Act). The Human Rights Act is set to be changed with a Bill of Rights, but it is not clear what it will contain. However, the aim is to ensure that rights are set by the UK parliament rather than in Europe. See Disability Rights UK "Brexit and the Human Rights Act" https://bit.ly/3KCjdD8 (accessed 12 April 2022).
[12] The European Convention of Human Rights protects the human rights of people in member states of the Council of Europe.
[13] Sections 3(1) and (2)(a) of the Human Rights Act. See Boraine, Evans, Roestoff and Steyn (2015) *NIBLeJ* 59; Fletcher *The law of insolvency* (4th ed) 27. Despite Brexit, the government has stated that it is committed to membership in the Convention Rights. See Disability Rights UK "Brexit and the European Convention on Human Rights" https://bit.ly/3jtp7dB (accessed 12 April 2022).
[14] Insolvency Act 24 of 1936 (Insolvency Act/ the Act).
[15] Evans (2002) *Int Insol Rev* 34. Instead, we have 'de facto classes' comprising those who qualify for sequestration and ultimately rehabilitation and discharge, and those who do not qualify. See Coetzee *A comparative reappraisal of debt relief measures* 12. Boraine and Roestoff (2014) 1*THRHR* 264.
[16] Evans (2002) *Int Insol Rev* 34. See also Coetzee *A comparative reappraisal of debt relief measures* for a more detailed discussion.

> legislation, the door has been opened for these 'poor debtors' to question the constitutionality of their position.

He argues that the Insolvency Act creates a distinction between 'poor debtors' and 'rich debtors'. By analogy, the reason for the existence of the restrictions on unrehabilitated insolvents[17] also points to a distinction between 'dishonest debtors' and 'honest but unfortunate debtors'.[18] As we saw in Chapter 3, dishonest debtors are debtors who trade fraudulently with the public and who often maliciously incur credit without any reasonable intention of repayment.[19] The rationale for the existence of restrictions on insolvent debtors in South Africa shows that the restrictions were intended to teach the dishonest debtors to trade honestly.[20] The *World Bank Report* describes dishonest debtors as fraudulent debtors who abuse the insolvency system and because of their behaviour should bear the negative consequences of an insolvency system.[21]

However, honest but unfortunate debtors are described as those debtors who became insolvent because of factors beyond their control such as terminal illness (which may require time off work), caregiving to a terminally ill family member, lack of adequate insurance, divorce, death,[22] or lack of available employment.[23] These debtors may include debtors who may have been laid off from work during the level five lockdown in South Africa due to the COVID-19 pandemic.[24] Honest but unfortunate debtors may further include debtors who may only have a matriculation certificate and in today's world qualify only for employment as shop assistants or clerks in a large department store. However, these debtors are, without the consent of their trustee,[25] disqualified from employment in the businesses of a trader who is a general dealer or manufacturer and so find it difficult to find alternative employment.

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[17] Ch 3 para 3.6.
[18] World Bank Working Group on the Treatment of the Insolvency of Natural Persons Report on the Treatment of the Insolvency of Natural Persons (World Bank Washington DC 2013) (*World Bank Report*) paras 70, 370, 454.
[19] Ch 3 para 3.6.
[20] Ch 3 para 3.6.
[21] *World Bank Report* paras 370-371 and 454. Debtors are required to disclose their economic affairs during the insolvency procedure on the penalty of being denied a discharge. Some countries deny discharge based on the debtor's behaviour. This occurs when the debtor has incurred debt in an unscrupulous manner or in a way that the court regards as obviously and objectively reckless or speculative. See Ch 2 para 2.5.
[22] Ch 3 para 3.6.
[23] Ch 3 para 3.9.
[24] STATS SA "Statistical Release June 2020".
[25] Section 23 of the Insolvency Act. See also Ch 3 para 3.4.3.

The *World Bank Report* states that an insolvency system for natural persons aims to protect honest but unfortunate debtors and to ensure that they receive the full benefits of an insolvency system and are not counted and disadvantaged with the dishonest debtors.[26] Further, the *World Bank Report* states that as an insolvency system for natural persons affects fundamental legal rights, such as the right not to be discriminated against, the right to work, and basic social rights, researchers and lawmakers must consider these factors when formulating policies for natural-person debtors.[27]

As for the 'poor debtors' referred to by Evans, the distinction between 'dishonest debtors' and 'honest but unfortunate debtors' raises the question of whether, under current legislation, a door has been opened for 'honest but unfortunate debtors' to question the constitutionality of the restrictions imposed on them. While the restrictions on dishonest debtors are intended to direct them to correct their behaviour, the restrictions on honest debtors do not appear to have the same aim. Honest debtors become insolvent because they may have experienced unfortunate income disruptions.[28] The restrictions imposed on such honest but unfortunate insolvents coupled with the long rehabilitation period amount to punishment, which was intended only for dishonest debtors.

In contrast, the *World Bank Report* notes that the primary purpose of an insolvency regime for natural persons should be to provide relief to honest but unfortunate debtors.[29] Further, some countries that subscribed to long lists of restrictions and disabilities for unrehabilitated insolvents, like South Africa, have reduced or eliminated those disabilities and restrictions.[30] The reason for the reduction or elimination was to reduce the stigma of bankruptcy stemming from the restrictions and promote economic rehabilitation while minimising discrimination based on insolvency status in accessing credit, the labour market, membership in organisations, and access to housing.[31] Another reason was to protect the income of the bankrupt as a debtor and his or her

[26] Ch 2 para 2.5.
[27] *World Bank Report* para 365.See also Ch 2 para 2.5.
[28] See *World Bank Report* paras 39, 190, 278, which state that the mismatch between disposable income and debt service is triggered by one of the many accidents of life, such as unemployment, illness, divorce, or other income interruption or unexpected expense.
[29] *World Bank Report* paras 70, 370, 454.
[30] See England and Wales after the Enterprise Act and the proposed changes to the Nigerian Bankruptcy Act Cap B2 Laws of the Federation of Nigeria 2004 in Ch 5 paras 5.3.3 and 5.4.3.
[31] Ch 2 para 2.6.

family are entitled to a decent standard of living (which cannot mean more than the basic necessities such as housing, food, medical care, and schooling for children) and a debtor's income is at the centre of that right.[32]

Therefore, in comparison with other international insolvency systems, the intended purpose of the restrictions, and the restrictions imposed on other debtors who fall into the category of debtors unable to pay their debts,[33] the question arises whether honest but unfortunate debtors in South Africa are unfairly discriminated against by existing insolvency provisions which exclude them from certain employment, offices, or boards.

Thus, the restrictions coupled with the long rehabilitation period in the Insolvency Act need to be re-evaluated to determine whether they are justified in an open and democratic society based on human dignity, equality, and freedom and considering all the relevant factors. Pertinent questions that need to be addressed include whether it is correct to punish debtors because they are insolvent, and whether punishment results in insolvents being unfairly and unjustifiably discriminated against simply because of the existence of a sequestration order.[34]

In an attempt to answer these questions and in search of a solution for honest but unfortunate debtors which is less restrictive of their ability to earn a living, this chapter evaluates the current restrictions on unrehabilitated insolvents in light of the right to equality before the law,[35] the right to equal protection and benefit of the law,[36] the right to full and equal enjoyment of all rights and freedoms,[37] the right against unfair discrimination,[38] the right to have one's inherent human dignity respected and protected,[39] and the right freely to choose a trade, occupation, and profession.[40] These questions are answered in light of the Bill of Rights.

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[32] Ch 2 para 2.6.
[33] Ch 3 para 3.4.3. 'Other debtors' includes persons under administration orders in terms of s 74 of the Magistrates' Court Act 32 of 1944, persons subject to the debt review procedure in terms of s 86 of the National Credit Act 34 of 2005, or persons who have entered into arrangements or compromise agreements with their creditors in terms of s 119 of the Insolvency Act. Like insolvent debtors, these debtors fall under the category of overindebted debtors who have failed and are unable to pay their debts. These other debtors are not subjected to all the disqualifications that are currently imposed on insolvent debtors, despite their possible dishonesty.
[34] See *World Bank Report* para 454; Roestoff (2018) *THRHR* 395.
[35] Section 9(1) of the Constitution.
[36] Section 9(1) of the Constitution
[37] Section 9(2) of the Constitution.
[38] Section 9(3) of the Constitution.
[39] Section 10 of the Constitution.
[40] Section 22 of the Constitution.

4.2 The right to equality under the Constitution

Chapter 2 of the Constitution contains the Bill of Rights which is the cornerstone of democracy in South Africa.[41] The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all organs of the state.[42] The Bill of Rights enshrines the rights of all people in South Africa, affirms the democratic values of human dignity,[43] equality, and freedom,[44] and mandates the state to respect, protect, promote, and fulfil the rights in the Bill of Rights.[45]

The right to equality is contained in section 9 of the Constitution. This section reads:

> **Equality**
>
> 9.
>
> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Everyone is equal before the law and section 9(1) promotes equal protection and equal benefit of the law for all persons.[46] This includes the full and equal enjoyment of all rights and freedoms.[47] Section 9(2) specifies that the achievement of this equality must be promoted by designing legislative and other measures that will protect or advance persons or categories of persons disadvantaged by discrimination. In addition, section 9(3) prohibits unfair discrimination, whether direct or indirect. It provides that any

[41] Albertyn and Goldblatt "Equality" para 35.1(a).
[42] Section 8(1) of the Bill.
[43] Section 10 of the Constitution.
[44] Section 7(1) of the Bill.
[45] Section 7(2) of the Bill.
[46] Currie and De Waal *The bill of rights handbook* 210-215.
[47] Section 9(2) of the Bill.

discrimination based on race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth is unfair[48] unless it is established that it is fair.[49]

While inequality in South Africa has historically been attributed to discrimination on the ground of race, Coetzee, referring to Currie and De Waal, states that inequality in South Africa can no longer be attributed solely to race.[50] Other grounds of discrimination have emerged[51] and class is growing as an indicator of inequality which is especially important in natural-person insolvency law.[52] While one may argue that poverty and race, for example, may amount to indirect racial discrimination, Albertyn and Goldblatt state that there is a certain class and wealth differentiation that cannot be attributed to race.[53] They argue that for these types of differentiation the basis of discrimination could be socio-economic status which is a prohibited but unlisted ground.[54]

This statement by Albertyn and Goldblatt is especially important to the plight of insolvent debtors who are distinguished from other debtors based on their insolvency, socio-economic status, or class, and the lack of differentiation between dishonest and honest but unfortunate debtors. The question arises whether honest but unfortunate debtors are unfairly discriminated against based on their insolvency status, which is their socio-economic status or class, by existing insolvency provisions disqualifying them from certain employment, offices, or membership of boards.

The inclusion of a prohibition against both direct and indirect discrimination is intended to cover all possible forms of discrimination on a ground listed in section 9(3) or on an unspecified ground.[55] Direct discrimination occurs when there is a direct and explicit relationship between the distinction and the prohibited ground.[56] Therefore, in the face

[48] Section 9(3) of the Constitution.
[49] See s 9(5) of the Constitution.
[50] Coetzee *A comparative reappraisal of debt relief measures* 14.
[51] Other grounds such as birth, pregnancy, and marital status which were not listed grounds under s 8(2) of the interim Constitution.
[52] Coetzee *A comparative reappraisal of debt relief measures* 14.
[53] Albertyn and Goldblatt "Equality" para 35.28 n 4.
[54] Albertyn and Goldblatt "Equality" para 35.28 n 4.
[55] Currie and De Waal *The bill of rights handbook* 238.
[56] Cheadle *et al South African constitutional law* para 4.8.2.1. See also Smith (2014) *AHRLJ* para 2.1.

of law or conduct, such a rule or law expressly draws a clear distinction between persons and groups on a prohibited ground.[57]

Indirect discrimination can be based on a listed or a newly-recognised ground. This may arise when conduct which may appear neutral and harmless, nevertheless treats people unequally based on other attributes or characteristics (related to the specified grounds) that has the effect of impairing their fundamental human dignity as human beings or impacts negatively on them in a comparably serious manner.[58] Thus, indirect discrimination is based on the realisation that although the basis of differentiation may differ and may be innocent or neutral at face value, the impact or effect of the differentiation may be discriminatory.[59] Consequently, a law or rule may have an unfairly discriminatory effect or consequence or it may appear neutral but be administered unfairly.[60]

This is what happened in the US case of *Griggs v Duke Power Co*[61] in which a power company required a high school diploma and a satisfactory intelligence-test score for certain jobs previously limited to white employees.[62] The black employees challenged these hiring and promotion requirements.[63] The question before the court was whether an employer is prohibited by the Civil Rights Act[64] from requiring a high school education or a predetermined score in a standardised general intelligence test as a condition for employment in or transfer to jobs, when neither standard is shown to be significantly related to successful job performance, and both operate to disqualify minorities at a substantially higher rate than white applicants.[65] In addition, the jobs in question had previously been filled only by white employees as part of a long-standing

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[57] Cheadle *et al South African constitutional law* paras 4.8.2.1-4.8.2.2. Examples include the denial of the spousal benefit of permanent residence to same-sex life partners under the Aliens Control Act 96 of 1991; the exclusion of same-sex life partners from the medical aid scheme of the South African Police Services; the denial of pension benefits to same-sex life partners of judges; the denial of joint adoption rights to same-sex couples under the Child Care Act 74 of 1983 and Guardianship Act 192 of 1993; the failure of the common law to afford a same-sex partner an action for loss of support against a person who unlawfully kills his or her same-sex partner, and the exclusion of same-sex partners as co-parents of children conceived by way of artificial insemination under the Children's Act.
[58] See *Harksen v Lane* 1998 (1) SA 300 (CC) (*Harksen v Lane*) para 46. See also De Vos and Freedman *South African constitutional law in context* 446, 448; Meskin *et al Insolvency law* para 4.8.2.1; Loenen (1997) *SAJHR* 419.
[59] Currie and De Waal *The bill of rights handbook* 238.
[60] Currie and De Waal *The bill of rights handbook* 238.
[61] *Griggs v Duke Power Co* 401 US 424 (1971) (*Griggs v Duke Power Co*).
[62] *Griggs v Duke Power Co* para 5.
[63] *Griggs v Duke Power Co* para 2.
[64] Civil Rights Act of 1964, Title VII.
[65] *Griggs v Duke Power Co* para 1.

practice of preferring white employees.[66] On the face of it the law did not appear discriminatory, however, it had the indirect effect of keeping black people out of the job as fewer black applicants were able to meet the requirement than white candidates.[67] *Griggs v Duke Power Co* is an example of indirect discrimination based on race – a listed ground.

The court held that the Civil Rights Act prohibits employers from requiring a high school education or a certain score on a standardised general intelligence test as a condition for employment in or transfer to jobs when the test is unrelated to job performance and perpetuates a discriminatory practice.[68] However, the Civil Rights Act does not prohibit the use of testing or measuring procedures provided they are not used as a controlling force;[69] they must show a reasonable relation to job performance.[70] Further, it is not the intention to prefer the less qualified over the better qualified simply on their status as a minority.[71] Any tests used must measure the person for the job and not the person in the abstract.[72] Where the controlling factor is a qualification, race, religion, nationality, and sex become irrelevant.[73]

Another example is *Union of Refugee Woman v Director, Private Security Industry*[74] which involved the rights of refugees to work in the private security industry in South Africa. The Private Security Industry Regulation Act[75] which regulates the industry, requires prospective registrants as security providers to submit a police clearance certificate.[76] At face value this appears to be a neutral formality facilitating the vetting of candidates.[77] However, its impact is potentially discriminatory in that has the effect of excluding most refugees who are, by definition, at odds with the authorities in their

[66] *Griggs v Duke Power Co* para 1.
[67] Currie and De Waal *The bill of rights handbook* 238.
[68] *Griggs v Duke Power Co* paras 12-13.
[69] *Griggs v Duke Power Co* para 21.
[70] *Griggs v Duke Power Co* para 21.
[71] *Griggs v Duke Power Co* para 21.
[72] *Griggs v Duke Power Co* para 21.
[73] *Griggs v Duke Power Co* para 21.
[74] *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC) (12 December 2006) (Union *of Refugee Women v Director, Private Security Industry*).
[75] Section 20 of the Private Security Industry Regulation Act 56 of 2001 (Security Act).
[76] *Union of Refugee Women v Director, Private Security Industry* paras 1 and 4. Section 23(1)(*a*) of the Security Act limits the refugees' right to choose employment only to the extent that they may not work in the private security industry.
[77] Currie and De Waal *The bill of rights handbook* 238.

home countries who are required to furnish the clearance certificate.[78] Also, it does not consider the fact that people seek refuge due to events beyond their control.[79]

The majority judgment held that the discrimination between citizens and permanent residents and foreigners, including refugees, was not unfair[80] as it was aimed at screening entrants; it was not a blanket discrimination excluding refugees from all industries.[81] It only excluded them from being private security service providers as the industry regulated by the Private Security Industry Regulation Act by its nature involves serious risk.[82] Further, the Private Security Industry Regulation Act requires registrants to be able to prove their trustworthiness but the reality is that citizens and permanent residents are more easily able to do so.[83]

The minority judges, on the other hand, stated that the mere fact that the government argued that refugees could not be regarded as trustworthy and reliable was unfairly prejudicial and amounted to stereotyping.[84] O'Reagan and Mokgoro JJ stated that excluding all refugees whether or not they can comply with the requirement of section 23, meant that whether refugees can prove their trustworthiness or not, they may not be employed as security service providers in the private sector.[85] They held that such discrimination would not only bring about social stigma but would also have a material impact on those refugees.[86]

While *Union of Refugee Woman v Director, Private Security Industry* involved refugees, the minority judgment, which is preferred, is similar to the position of an insolvent debtor who has been disqualified from employment as a clerk or a salesperson in the business of a trader who is a general dealer or manufacturer in terms of section 23(3) of the Insolvency Act, and who has only a matric certificate and thus may find it difficult to find alternative employment. Such an insolvent debtor is disqualified from working in such a department store even if there are no chances of his or her inflicting harm that will create a real danger to the general public, and even

[78] *Union of Refugee Women v Director, Private Security Industry* para 29; Currie and De Waal *The bill of rights handbook* 238.
[79] *Union of Refugee Women v Director, Private Security Industry* para 28.
[80] *Union of Refugee Women v Director, Private Security Industry* paras 45-54.
[81] *Union of Refugee Women v Director, Private Security Industry* para 47.
[82] *Union of Refugee Women v Director, Private Security Industry* para 31.
[83] *Union of Refugee Women v Director, Private Security Industry* para 38.
[84] *Union of Refugee Women v Director, Private Security Industry* paras 118, 122-123.
[85] *Union of Refugee Women v Director, Private Security Industry* paras 122-123.
[86] *Union of Refugee Women v Director, Private Security Industry* paras 122-123.

if they can show that they are trustworthy. In this regard, the provisions in the Insolvency Act are over-inclusive in disqualifying all insolvent debtors. They unjustifiably violate an insolvent debtor's right to practise in the trade of general dealers or manufacturers. This was acknowledged by the South African Law Commission[87] which stated that section 23(3) in its current form is outdated.[88] This is because it makes no sense to require the consent of the trustee in the case of an insolvent who is employed in the business of a general dealer or manufacturer, but not to require it where the insolvent is employed in a different business.[89] Further, such consent is not required in other jurisdictions such as England and Wales, Scotland, Australia, or the United States of America.[90] As regards differentiation, a distinction is also made between 'discrimination' and 'mere differentiation'.[91] As people are different and laws affect them differently, to regulate the affairs of a country laws must classify people and treat some differently from others.[92] However, this classification must be based on legitimate reasons. If differentiation is based on the listed grounds in section 9(3) of the Constitution it is automatically impermissible unfair discrimination in that it is not based on legitimate reasons.[93] However, a differentiation that does not amount to unfair discrimination may not necessarily be fair.[94] The Constitutional Court refers to differentiation that is not fair as 'mere differentiation' and its validity is determined by using the standard of rationality in section 9(1) of the Constitution.[95]

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[87] In 1987 the then South African Law Commission started an investigation of the law of insolvency as a whole and a Project Committee was appointed to conduct and direct the review as Project 63. A series of working papers for discussion dealing with selected topics, followed by reports culminated in the Draft Insolvency Bill of 1996. This was replaced by the Report and Draft Bill that was published by the South African Law Reform Commission in 2000 (2000 Explanatory Memorandum and 2000 Draft Insolvency Bill respectively). The 2000 Explanatory Memorandum contains the Discussion Paper (Discussion Paper). This document was revised in 2013 and 2014 and it gave rise to the 2014 Explanatory Report on the review of the law of insolvency: Draft memorandum Insolvency Bill and explanatory memorandum (Project 63) 2014 (2014 Explanatory Memorandum). The 2014 Explanatory Memorandum contains the explanatory memorandum and the proposed 2015 Draft Insolvency Bill (2015 Draft Insolvency Bill). Both the 2000 and 2014 Explanatory Memoranda are Working Documents produced by the Department of Justice and Constitutional Development that contain proposals for a Draft Insolvency Bill. However, a formal Draft Bill has not yet been published.
[88] Ch 3 para 3.8.2.
[89] Ch 3 para 3.8.2.
[90] Ch 3 para 3.8.2.
[91] *Prinsloo v Van der Linde* (CCT4/96) [1997] ZACC 5 (*Prinsloo v Van der Linde*) para 23; Albertyn and Goldblatt "Equality" para 35.17.
[92] *Prinsloo v Van der Linde* para 24; Currie and De Waal *The bill of rights handbook* 218.
[93] Albertyn and Goldblatt "Equality" para 35.17; Currie and De Waal *The bill of rights handbook* 219.
[94] Currie and De Waal *The bill of rights handbook* 219.
[95] *Prinsloo v Van der Linde* para 23; Albertyn and Goldblatt "Equality" para 35.17; Currie and De Waal *The bill of rights handbook* 219.

Therefore, a law or conduct that differentiates between groups of people will only be valid if it does not deny equal protection or benefit of the law, or if it does not amount to unequal treatment under the law thereby infringing section 9(1) of the Constitution.[96] In terms of the rationality standard, section 9(1) will be violated if the law or conduct differentiates without a legitimate purpose and if there is no rational connection between the differentiation and the purpose sought to be achieved.[97]

If differentiation is found to be rational, there is no need to test for justification in terms of section 36 of the Constitution which requires a higher standard of justification.[98] Also, if the differentiation is found to be irrational, it would be difficult to save its irrationality by the justification in section 36 which requires a higher standard of justification than the rationality standard.[99] For example in *Van der Merwe v Road Accident Fund,*[100] the court wished to test for justification but found it impossible given the absence of a legitimate purpose for the legislation.[101] Therefore, it could happen that differentiation which fails the rationality standard in section 9(1) will be found to be irretrievably unconstitutional.[102]

In *Prinsloo v Van der Linde,*[103] a case involving differentiation between owners of land in fire control areas and those in non-fire control areas where negligence was presumed, it was held that in a case of 'mere differentiation' a constitutional state is required to act rationally. This means that the state should not regulate arbitrarily or establish preferences that serve no legitimate government purpose since this would be inconsistent with the rule of law and the foundations of a constitutional state.[104] The court held that mere differentiation would violate section 8(1) (now s 9(1)) if there is no rational relationship between the differentiation and the government purpose which it is intended to validate.[105] Since the differentiation in this case was not based on a listed ground or on attributes and characteristics that potentially impair the fundamental human dignity of persons as human beings, it amounted to 'mere

[96] Currie and De Waal *The bill of rights handbook* 219.
[97] Currie and De Waal *The bill of rights handbook* 219. Albertyn and Goldblatt "Equality" para 35.15.
[98] Albertyn and Goldblatt "Equality" para 35.23.
[99] Albertyn and Goldblatt "Equality" para 35.23.
[100] *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC) (*Van der Merwe v Road Accident Fund*).
[101] Albertyn and Goldblatt "Equality" para 35.23.
[102] Albertyn and Goldblatt "Equality" para 35.23.
[103] *Prinsloo v Van der Linde* para 25. See also Albertyn and Goldblatt "Equality" para 35.17.
[104] *Prinsloo v Van der Linde* para 25.
[105] *Prinsloo v Van der Linde* para 26.

differentiation'.[106] For that reason, the court had to determine whether the imposition of negligence in one area and not in the other, infringed the right to equal protection and benefit and equality before the law in terms of section 8(1).[107]

The Constitutional Court held that the differentiation between owners of land in fire-control areas and those in non-fire-control areas was intended to serve the legitimate government purpose of preventing veld fires.[108] In fire-control areas there was compulsory participation in schemes to prevent fires.[109] In non-fire-control areas, the presumption of negligence was linked to the aim of reducing fires and it increased the vigilance of those responsible for land outside of fire-control areas.[110] Thus, the court held that there was a legitimate purpose for the differentiation and the means to address the purpose were rationally connected to the purpose. There was thus no violation of sections 9(1) and 9(3) of the Constitution.[111]

The equality right in section 9 can be given effect through formal equality or substantive equality.[112]

Formal equality refers to the sameness of treatment, which simply means that all persons who are in the same situation must be treated alike, regardless of their actual circumstances.[113] It affords all people equal rights and the view is that inequality can be eliminated by extending the same rights and entitlements to all through the same neutral norm or standard of measurement.[114] Therefore, it only requires equal application of the law without further examining the peculiar circumstances of the individual or group and the potentially discriminatory impact of the law or policy under review.[115]

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[106] Currie and De Waal *The bill of rights handbook* 219.
[107] Currie and De Waal *The bill of rights handbook* 219.
[108] *Prinsloo v Van der Linde* para 39.
[109] *Prinsloo v Van der Linde* para 39.
[110] *Prinsloo v Van der Linde* para 40.
[111] *Prinsloo v Van der Linde* paras 40-41.
[112] Currie and De Waal *The bill of rights handbook* 213.
[113] This is an Aristotelian concept of equality, *like cases should be treated alike*. Peters *Aristotle's Nichomachaen Ethics* Book 5, Part 3, 108. Cheadle *et al South African constitutional law* para 4.3.1; Currie and De Waal *The bill of rights handbook* 213. See also Loenen (1997) *SAJHR* 404-405; Smith (2014) *AHRLJ* 611.
[114] Cheadle *et al South African constitutional law* para 4.3.1; Currie and De Waal *The bill of rights handbook* 213.
[115] Currie and De Waal *The bill of rights handbook* 213. Formal equality assessments are guided by the value of consistency or same treatment. See Albertyn (2018) *SAJHR* 457; Smith (2014) *AHRLJ* 612. It does not consider the actual social and economic disparities between groups and individuals. It provides that justice should be blind and no differentiation should be allowed. Loenen (1997) *SAJHR* 415.

As formal equality disregards the real social and economic differences between individuals and groups and looks at them only through a neutral lens which promotes the interests and experiences of socially privileged groups, its application may exacerbate the inequality of socially or economically disadvantaged groups.[116] Formal equality is generally the conceptual basis for direct discrimination.[117]

While formal equality is based on the Aristotelian concept that like cases should be treated alike, when cases are 'unlike', the same concept further states that unlike people should be treated 'unlike' in proportion to their 'unlikeness'.[118] This latter part of the Aristotelian concept refers to substantive equality.[119]

Substantive equality requires a contextual analysis.[120] It shifts the enquiry from an abstract comparison of 'similarly situated individuals' to an examination of the actual impact of an alleged rights violation within the actual socio-economic condition.[121] It examines the condition of the individual both within and outside of different socio-economic groups.[122] It requires the law to ensure equality of outcome and is prepared to tolerate differences in treatment to achieve this goal.[123] In *National Coalition for Gay and Lesbian Equality,*[124] Sachs J stated that:

> [E]quality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across difference. It does not pre-suppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference.

For example, to give effect to the right to equality as regards children with disabilities (eg, deaf children) in school education, it may be necessary to treat them differently from other children.[125] This would allow such children to have the full and equal enjoyment of their right to education which would not be possible were they to follow

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[116] It may worsen the inequality in circumstances where the social and economic differences of individuals play a pivotal role in the protection of their right to equality. Cheadle *et al South African constitutional law* para 4.3.1; Loenen (1997) *SAJHR* 403.
[117] When discrimination is based on a ground listed in s 9(3) of the Constitution.
[118] Peters *Aristotle's Nichomachaen Ethics* Book 5, Part 3, 108. Loenen (1997) *SAJHR* 404-405.
[119] Loenen (1997) *SAJHR* 404-405.
[120] Albertyn and Goldblatt "Equality" in 35.6.
[121] Currie and De Waal *The bill of rights handbook* 213; Loenen (1997) *SAJHR* 415; Albertyn (1998) *SAJHR* 260.
[122] Albertyn (1998) *SAJHR* 260.
[123] See Currie and De Waal *The bill of rights handbook* 213; Smith (2014) *AHRLJ* 613.
[124] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) (*National Coalition for Gay and Lesbian Equality*) para 132.
[125] Loenen (1997) *SAJHR* 405.

the same school programme as other children.[126] If formal equality were applied to such children, all children would be required to be educated following the same school curriculum, giving effect to the sameness of treatment of all children.[127] The sameness treatment would be detrimental to deaf children because it would not adequately address their special needs and would expose and intensify the inequality.[128] Therefore, with substantive equality, the concern is not with differentiation but with the harm that might flow from it.[129] Substantive equality aims to accommodate differences rather than requiring members of prejudiced groups to conform to dominant norms.[130]

Substantive equality thus emphasises the effects and results of a particular rule on an individual in different socio-economic groups.[131] As it focuses on the impact of the law or policy and moves away from consistency to substance, it incorporates indirect discrimination in its analysis.[132] It is important to incorporate indirect discrimination in equality rights adjudication in that to do so recognises the reality that not all people operate on the same field of play. Moreover, as was stated in *President of the Republic of South Africa v Hugo:*[133]

> [A]lthough the long term goal of our constitutional order [the South African Constitution] is equal treatment, insisting upon equal treatment in established inequality may well result in the entrenchment of that inequality.

If the two notions of equality are considered, the contextual or substantive approach is preferred.[134] The Constitution's aim to create a non-racist and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos, and human rights, informs a conception of equality that goes beyond mere formal equality and non-discrimination, the latter of which requires identical treatment whatever its impact.[135] One of the most important indicators that the Constitution envisages a substantive conception of equality is the endorsement in section 9(3) that equality

[126] Loenen (1997) *SAJHR* 405.
[127] Loenen (1997) *SAJHR* 405.
[128] Loenen (1997) *SAJHR* 405.
[129] Fredman (2016) *Inter Journal of Const Law* 733; Albertyn (2018) *SAJHR* 456.
[130] Fredman (2016) *Inter Journal of Const Law* 733.
[131] Currie and De Waal *The bill of rights handbook* 213.
[132] Smith (2014) *AHRLJ* 613.
[133] See *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) (*Hugo*) para 112; Smith (2014) *AHRLJ* 613.
[134] Cheadle *et al South African constitutional law* para 4.2; Albertyn (1998) *SAJHR* 260; Smith (2014) *AHRLJ* 612; Currie and De Waal *The bill of rights handbook* 214.
[135] *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 26; Currie and De Waal *The bill of rights handbook* 214.

includes the full and equal enjoyment of all rights and freedoms.[136] A substantive conception of equality supports these fundamental values, whereas a formal understanding risks neglecting them.[137]

Inequality can arise either from differential treatment of groups that should be afforded equal treatment, or from a failure to differentiate between unequal groups.[138] On the other hand, equality can be advanced through similar or differential treatment, depending on the context of the treatment.[139] Therefore, a strict application of either formal equality or substantive equality in everyday life is impossible.[140] The same treatment of all people always and everywhere would prohibit legislation because it classifies people into different groups by the definitions provided.[141] Also, starting from the unique characteristics of every citizen at all times would be difficult to achieve.[142] The treatment of children with disabilities in the education system is a perfect example that in a rights-violation challenge, there should be a balancing of the two forms of equality to reach an outcome that fits the context of a particular case.[143]

Therefore, constitutional interpretation requires section 9 to be read as grounded in a contextual conception of equality. In the *President of the Republic of South Africa v Hugo*[144] the Constitutional Court held that:

> [W]e need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.

Therefore, a context-based approach to equality needs to be considered, for instance, when determining whether the right to equality of unrehabilitated insolvents has been violated by differentiating between insolvent debtors and other debtors who are not

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[136] *National Coalition for Gay and Lesbian Equality* para 62.
[137] Currie and De Waal *The bill of rights handbook* 214.
[138] An omission to act can also give rise to discrimination. See Cheadle *et al South African constitutional law* para 4.3.1.
[139] Cheadle *et al South African constitutional law* para 4.3.1.
[140] Loenen (1997) *SAJHR* 415.
[141] Loenen (1997) *SAJHR* 415.
[142] Loenen (1997) *SAJHR* 415.
[143] Sachs J stated in *National Coalition for Gay and Lesbian Equality* para 131 that the success of the whole constitutional endeavour in South Africa will depend in large measure on how successfully sameness and difference are reconciled.
[144] *Hugo* para 41; Currie and De Waal *The bill of rights handbook* 214.

subjected to the same disqualifications despite also being unable to pay their debts. A context-based approach to equality also needs to be considered when determining whether the right to equality of unrehabilitated insolvents has been violated by the failure to differentiate between 'dishonest' and 'honest but unfortunate' insolvent debtors when excluding them from certain offices and employment.

The Insolvency Act, for example, came into effect long before the adoption of the Constitution.[145] The values and principles on which the Constitution is built are very different from the values, principles, and policies on which the Insolvency Act and some of its amendments are founded.[146] Thus, the constitutionality of the foundations of the South African insolvency system is questionable.[147] While the foundations of insolvency law in South Africa were influenced by Roman-Dutch and English bankruptcy law,[148] the insolvency systems in these jurisdictions have changed. In the Netherlands, for instance, a bankrupt is automatically discharged from his or her debts once the final distribution plan for the creditors becomes binding or all creditors who have proved their claims have been paid in full.[149] However, if there is no prospect of the debtor paying off his or her debts, bankruptcy can terminate after one year.[150] In England and Wales,[151] automatic discharge has been reduced from three years to one year to accelerate the rehabilitation of bankrupts whose conduct did not give rise to public concern.[152]

Secondly, the long lists of restrictions on bankrupt debtors were also limited to reduce the stigma traditionally associated with bankruptcy.[153] Currently, in England and Wales an adjudged bankrupt is only disqualified from being a member of the House of Parliament if he is subjected to a bankruptcy restriction order.[154] A debtor's conduct determines whether such an order should be made and only the bankrupt whose

[145] Boraine, Evans, Roestoff and Steyn (2015) *NIBLeJ* 61.
[146] Boraine, Evans, Roestoff and Steyn (2015) *NIBLeJ* 61.
[147] Evans (2018) *De Jure* para 4.1.
[148] Ch 3 para 3.2.
[149] Section 193 of the Dutch Bankruptcy Act 1893 (the DBA). *Insol Report II* 298.
[150] Section 354 of the DBA.
[151] In England and Wales the Enterprise Act abolished many of the restrictions that applied before 2002. See ss 266-267 of the Enterprise Act. Most of the disqualification after the Enterprise Act only ensues if a bankruptcy restriction order or bankruptcy undertaking (BRO or BRU respectively) is made or given. See s 426A(1) of the UK Insolvency Act.
[152] Ch 5 para 5.3.4.
[153] Ch 5 para 5.3.3.
[154] Ch 5 para 5.3.4.
[154] See Ch 5 para 5.3.3.

conduct (dishonest and fraudulent) justifies a restriction, is subjected to all the restrictions imposed on undischarged bankrupts which applied before the Enterprise Act.[155]

On the other hand, under the influence of English bankruptcy law South African insolvency law has stagnated and continues to cling to outdated principles that may now be found to entrench inequality when viewed through a constitutional lens. The restrictions on unrehabilitated insolvents were intended to serve the valid purpose of protecting creditors from fraudulent debtors. However, this purpose is not valid for honest but unfortunate debtors. While other jurisdictions also restricted all bankrupt debtors, they have developed mechanisms[156] to distinguish the honest but unfortunate debtor from the dishonest debtor to avoid discriminating against honest but unfortunate debtors based on their bankruptcy status or socio-economic status where it no longer served a valid purpose. International developments in this field, however, are to be considered in the context that different approaches adopted in different jurisdictions stem from different textual provisions, historical circumstances, jurisprudence, and philosophical understandings of equality.[157]

The Constitutional Court in *Harksen v Lane* set out a three-stage test to establish whether section 9 has been violated, consequently, to decide whether the right to protection aginst unfair discrimination has been violated.[158] The first step is to ask whether the differentiation amounts to discrimination? Secondly, whether the discrimination is unfair? And lastly, whether the unfair discrimination can be justified under the limitations clause?

As regards the first question,[159] the court must establish whether there has been differentiation.[160] If there has, the next question is whether there is a rational

[155] Ch 5 para 5.3.3.
[156] In America the 'means test' is used as an entry requirement for Chapter 7 liquidations in terms of s 707 the Bankruptcy Reform Act of 1978 (Bankruptcy Code or Code). The means test investigates whether a debtor's intention is to abuse the bankruptcy system and the dishonest debtor is disqualified from entering the bankruptcy process. A debtor whose case was not dismissed in the filing by the means test could still be dismissed if the filing was done in bad faith and if the totality of the debtor's circumstances indicates an abuse. Further during bankruptcy which could be as little as three months in America, only the dishonest or fraudulent bankrupt is subjected to insolvency restrictions. Also based on dishonesty and misconduct a bankrupt could be refused a discharge. In England and Wales only the dishonest debtor is subjected BRO's which may even apply after discharge. See Ch 5 paras 5.2-5.3.
[157] *Prinsloo v Van der Linde* para 21 with reference to *Brink v Kitshoff* 1996 (4) SA 197 para 39.
[158] *Harksen v Lane* 1998 (1) SA 300 (CC) (*Harksen v Lane*) para 52.
[159] *Harksen v Lane* para para 52(a); Currie and De Waal *The bill of rights handbook* 216.
[160] *Harksen v Lane* para 46.

connection between the differentiation and a legitimate government purpose that will be achieved by the differentiation.[161] If there is no rational connection, there will have been a violation of section 9(1).[162]

The next question is whether the differentiation amounts to unfair discrimination.[163] This involves a two-stage analysis.[164] It must first be established whether the differentiation amounts to discrimination. Differentiation may either be on one or more of the grounds listed in section 9(3),[165] or it may be on a ground not specified in section 9(3) but analogous to such a ground.[166] If it is on a specified ground discrimination will have been established.[167] If the differentiation is not on a specified ground, the determination of whether or not the differentiation amounts to discrimination will depend on whether the ground is based on characteristics that have the potential to impair the fundamental human dignity of persons as human beings or seriously affect them in a harmful manner.[168]

On establishing that there has been discrimination it must be determined whether the discrimination is unfair.[169] If the discrimination is on a specified ground, unfairness will be presumed but the respondent may still show that the discrimination was fair.[170] If, on the other hand, the discrimination is on an unspecified ground, unfairness must be established by the complainant by focusing on the impact the action will have on him or her and those who stand to be affected by it.[171]

Fairness and unfairness are both legal and moral concepts that are primarily established by considering whether persons who are inherently equal in dignity, have been treated differently in a way that impairs their fundamental right to human

[161] *Harksen v Lane* para 46.
[162] *Harksen v Lane* para 46.
[163] *Harksen v Lane* para 52(b).
[164] *Harksen v Lane* para 52(b); Currie and De Waal *The bill of rights handbook* 216.
[165] These are referred to as specified grounds. See *Harksen v Lane* para 46; Cheadle *et al South African constitutional law* para 4.8.2.
[166] Referred to as an unspecified ground. See *Harksen v Lane* para 46.
[167] *Harksen v Lane* para 52(b)(i) ; Cheadle *et al* South African constitutional law para 4.8.2.
[168] *Harksen v Lane* para 52(b)(i); Cheadle *et al South African constitutional law* para 4.8.2. Currie and De Waal *The bill of rights handbook* 216; De Vos and Freedman *South African constitutional law in context* 444-447.
[169] *Harksen v Lane* para 52(b)(ii); Currie and De Waal *The bill of rights handbook* 216.
[170] *Harksen v Lane* para 52(b)(ii); Currie and De Waal *The bill of rights handbook* 216.
[171] *Harksen v Lane* para 52(b)(ii).

dignity.[172] Dignity as a value requires the state to treat everyone with equal concern and respect, to avoid prejudice and stereotyping,[173] and to protect those who are socially and economically disregarded in society.[174] Therefore, the fairness enquiry is concerned with the social, economic, and political contexts in which the action occurred and its impact on the complainant.[175]

In determining the impact of the discrimination on the complainant, the court must consider the position of the complainant in society, and whether he or she has suffered in the past from patterns of disadvantage,[176] including systemic disadvantages.[177] Further, the court will have to consider the nature of the discriminatory provision or power and the purpose sought to be achieved by it.[178] If it is aimed at achieving a worthy and important societal goal related to advancing the equality right for all, it may, depending on the facts of each case, influence whether the complainant has suffered an impairment of his or her dignity.[179] The court will also have to consider any other relevant factors such as the extent to which the discrimination has affected the rights or interests of complainants.[180]

If, after these considerations,[181] the discrimination is found not to be unfair, then there will be no violation of sections 9(3) and 9(4).[182] However, if the discrimination is found to be unfair, it will have to be established whether the provision can be justified under the limitation clause, section 36 of the Constitution.[183] Section 36 provides a general limitation test that applies to the infringement of all the rights in the Bill of Rights.

Section 36 provides:

> **36. Limitation of rights.**—(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

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[172] *Prinsloo v Van der Linde* paras 31-32; *Harksen v Lane* para 50(c); Cheadle *et al South African constitutional law* para 4.8.3.2 (c).
[173] *Jordan v S* 2002 (11) BCLR 1117 (CC) para 65; Fredman (2016) *Inter Journal of Const Law* 713.
[174] *Harksen v Lane* para 50; Cheadle *et al South African constitutional law* para 4.8.3.1. Fredman (2016) *Inter Journal of Const Law* 728.
[175] Cheadle *et al South African constitutional law* para 4.8.4.
[176] *Harksen v Lane* para 50(a).
[177] Cheadle et al *South African constitutional law* para 4.8.3.2.
[178] *Harksen v Lane* para 50(b).
[179] *Harksen v Lane* para 50(b).
[180] *Harksen v Lane* para 50(c).
[181] The factors do not constitute a closed list. See *Harksen v Lane* para 50.
[182] *Harksen v Lane* para 52(b)(ii); Currie and De Waal *The bill of rights handbook* 216.
[183] *Harksen v Lane* paras 51 and 52(c); Currie and De Waal *The bill of rights handbook* 216.

(*a*) the nature of the right;

(*b*) the importance of the purpose of the limitation;

(*c*) the nature and extent of the limitation;

(*d*) the relation between the limitation and its purpose; and

(*e*) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Section 36 obliges the state to show that the right infringed has been limited by a law of general application for reasons that can be considered reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.[184] Factors to be considered include the nature of the right and the nature and extent of the limitation, the importance and purpose of the limitation, and the relation between the limitation and its purpose. Lastly, the court must consider whether there are less restrictive means by which to achieve the purpose.

Goldstone J in *Harksen v Lane* summarised this to mean that there must be a weighing of the purpose and effect of the provision in question and a determination of its proportionality in light of the extent to which it infringes equality.[185] Therefore, this enquiry tests the finding of unfairness against the state's justifications of the action in question while, at the same time, balancing rights and values.[186] If the court finds the limitation is justified, the rule will have passed the test of constitutionality. If, however, the court finds that the limitation is not justified, the legal rule will be unconstitutional and therefore invalid.[187]

In *Sarrahwitz v Maritz*[188] the court dealt only with the first enquiry in *Harksen v Lane* – establishing whether there has been a violation of section 9(1) of the Constitution. In this case Ms Sarrahwitz entered into a written deed of sale with Mr Posthumus to buy a house. Sarrahwitz paid the full purchase price for the house frequently and in small amounts within one month[189] from money she borrowed from her employer.[190] She

[184] Currie and De Waal *The bill of rights handbook* 217; De Vos and Freedman *South African constitutional law in context* 360; Cheadle *et al South African constitutional law* para 4.8.4.
[185] *Harksen v Lane* para 51.
[186] Cheadle *et al South African constitutional law* para 4.8.4.
[187] De Vos and Freedman *South African constitutional law in context* 360.
[188] *Sarrahwitz v Maritz* 2015 (8) BCLR 925 (CC) (*Sarrahwitz v Maritz*). See generally Van der Linde and Van Staden (2017) *J S Afr L* 417-425 and Heyns and Mmusinyane (2017) *PELJ/PER* 4-34 for a discussion of *Sarrahwitz v Maritz.*
[189] *Sarrahwitz v Maritz* para 7.
[190] *Sarrahwitz v Maritz* para 5.

then moved into the house and was informed by Posthumus that he would arrange for the transfer of the house into her name.[191] However, the transfer did not occur and four years after Sarrahwitz had paid the full purchase price and occupied the house, Posthumus's estate was sequestrated.[192] A trustee of the insolvent estate was appointed and as transfer into Sarrahwitz's name had not taken place, the house become part of Posthumus's insolvent estate in terms of the common law.[193] In this regard, the Alienation of Land Act[194] enables the transfer of residential property from the estate of an insolvent seller to a vulnerable instalment purchaser who has paid the full purchase price in at least two instalments over one year or longer.[195] Thus, the Land Act protects the right of access to adequate housing only for vulnerable purchasers who pay for a residential property in at least two instalments over one year or longer, which was not the case with Sarrahwitz who had paid the full purchase price in a few instalments and in one month.

The Constitutional Court had to determine whether the Constitution allowed for legislation to benefit certain vulnerable instalment purchasers to the exclusion of equally vulnerable purchasers who make a one-off payment or payment in less than one year.[196] The court stated that none of the listed grounds of discrimination in section 9(3) applied in this case and the ground (the method of payment) for differentiating between the two groups of purchasers did not appear to be based on attributes or characteristics which have the inherent potential to impair the fundamental dignity of persons as human beings.[197] Mogoeng CJ consequently found that further consideration was required to conclude that it was based on attributes or characteristics with the inherent potential to impair the fundamental dignity of persons as human beings. He stated that instead of relying on section 9(3) to prove the inequality of treatment of various categories of purchaser, resort should be had to section 9(1)[198] which guarantees everyone's right to equal protection and benefit of the law.[199]

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[191] *Sarrahwitz v Maritz* para 5.
[192] *Sarrahwitz v Maritz* para 8.
[193] *Sarrahwitz v Maritz* para 8.
[194] Alienation of Land Act 68 of 1981 (Land Act).
[195] *Sarrahwitz v Maritz* para 3.
[196] *Sarrahwitz v Maritz* para 47.
[197] *Sarrahwitz v Maritz* para 48.
[198] *Sarrahwitz v Maritz* para 48.
[199] *Sarrahwitz v Maritz* para 49.

Mogoeng CJ held that section 9(1) implies that equally vulnerable purchasers must enjoy the same legal entitlement irrespective of their method of payment. Accordingly, he found that the protection and benefits accorded by the Land Act to vulnerable homebuyers apply to all other vulnerable purchasers unless the differentiation is justifiable.[200] Further, sections 21 and 22 of the Land Act[201] recognise and protect the fundamental right of access to adequate housing only for those who pay for a residential property in at least two instalments over one year or longer.[202] As a result, the Land Act effectively excludes those purchasers who settle the purchase price in full immediately in less than one year.[203]

Mogoeng CJ held that this amounts to differentiation and must be examined to establish whether it is constitutionally acceptable. In this regard, he referred to the step-by-step guidelines provided in *Harksen v Lane*.[204] The first step requires a determination of whether the provision differentiates between people or categories of people and if so, whether the differentiation bears a rational connection to a legitimate government purpose. [205]

The court held that differentiation is at the heart of the right to equality in section 9 of the Constitution.[206] Further, section 9 sought not only to eliminate differentiation which qualifies as unfair, but also that which amounts to 'mere' differentiation.[207] He stated that this case involved mere differentiation which requires the state to act rationally at all times and not arbitrarily or whimsically.[208] Moreover, state action must always advance a legitimate government purpose and the state must always regulate its affairs rationally and justifiably in that its core business is to treat every citizen equally and promote the common good of all.[209]

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[200] *Sarrahwitz v Maritz* para 49.
[201] Section 21 of the Land Act entitles the purchaser to be notified to take transfer of land when that land is attached or the owner becomes an insolvent. Section 22 entitles the purchaser to the transfer of land when such land is attached, or the owner becomes an insolvent.
[202] *Sarrahwitz v Maritz* para 50.
[203] *Sarrahwitz v Maritz* para 50.
[204] *Sarrahwitz v Maritz* para 50.
[205] *Harksen v Lane* paras 52-53.
[206] *Sarrahwitz v Maritz* para 51.
[207] *Sarrahwitz v Maritz* para 51.
[208] *Sarrahwitz v Maritz* para 51.
[209] *Sarrahwitz v Maritz* para 51.

Referring to *Ngewu v Post Office Retirement Fund*[210] and *Van der Merwe v Road Accident Fund,*[211] the court held that differentiation between people or classes of people violates constitutional standards it is validated by a legitimate purpose.[212] Moreover, if the legislation does not have a rational connection to the legitimate purpose it will be in contravention of the right to equal protection and benefit of the law because of the uneven conferment of benefits or imposition of burdens by legislation without a rational basis.[213] Quoting *Van der Merwe v Road Accident Fund*,[214] Mogoeng CJ stated that this:

> would be an arbitrary differentiation which neither promotes public good nor advances a legitimate public object. In this sense, the impugned law would be inconsistent with the equality norm that the Constitution imposes inasmuch as it breaches the rational differentiation standard set by section 9(1) thereof.[215]

As regards *Sarrahwitz v Maritz,* Mogoeng CJ indicated that denying Sarrahwitz the protection and benefit that the Land Act amounts to differentiating between certain instalment-sale purchasers. This raises the question of whether that differentiation is rationally connected to a legitimate government purpose and can be justified.[216] The court therefore had to analyse the limitation arising from the impairment of Sarrahwitz's right to access adequate housing, dignity, and her exclusion from the protection and benefit the Land Act offers to vulnerable instalment purchasers.[217]

The Minister's justification for the exclusion of vulnerable purchasers who pay the full purchase price for a house before transfer was based on the assumption that considering the high costs of residential properties, it was unlikely that people with few resources could afford to pay the full purchase price immediately or within a short period.[218] Further, that the Land Act's goal in this regard was to protect people who are under-resourced and who can only afford to purchase a residential property by paying in two or more instalments over one year or longer.[219]

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[210] *Ngewu v Post Office Retirement Fund* 2013 (4) BCLR 421 (CC).
[211] *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC) (hereafter *Van der Merwe v Road Accident Fund)*.
[212] *Sarrahwitz v Maritz* para 54.
[213] *Sarrahwitz v Maritz* para 54.
[214] *Van der Merwe v Road Accident Fund* para 49.
[215] *Sarrahwitz v Maritz* para 54.
[216] *Sarrahwitz v Maritz* para 57.
[217] *Sarrahwitz v Maritz* para 57.
[218] *Sarrahwitz v Maritz* para 61.
[219] *Sarrahwitz v Maritz* para 61.

Mogoeng CJ said that the Minister was unable to provide a legitimate governmental purpose for the exclusion of vulnerable purchasers who pay the full purchase price in under a year, and the justification offered was based on an assumption that is not always correct as evidenced by Sarrahwitz's situation.[220] He added that the impact of strict compliance with this assumption has devastating consequences for vulnerable purchasers who are excluded and that they needed to be accommodated.[221] Mogoeng CJ held that it was difficult to imagine a situation where the refusal to transfer a home to a vulnerable purchaser who has paid in full and is faced with homelessness, would not outweigh the advantage to creditors of the seller's insolvent estate.[222] He said the situation was exacerbated by the indignity to which the prospective homeowner is exposed, and the denial of equal protection and benefit of the law to those like Sarrahwitz.[223]

Therefore, the court held that there was no rational basis for protecting a vulnerable instalment purchaser of a residential property who pays over one year or longer, and excluding an equally vulnerable purchaser who borrows money to pay the full purchase price immediately or who does so in several instalments within one year.[224] In addition, when the common-law was being adapted the two types of purchasers were equally exposed to the same risk of losing the opportunity to access adequate housing and the monies already paid.[225] The refusal to transfer has the same devastating impact on both types of purchaser but the differentiation created by the exclusion impairs Sarrahwitz's fundamental rights.[226] The court found accordingly that there was no legitimate government purpose for the differentiation[227] and that for so long as there is a real risk within the legislative scheme for some vulnerable purchaser to be rendered homeless, the scheme was under-inclusive.[228] Therefore

[220] *Sarrahwitz v Maritz* para 62.
[221] *Sarrahwitz v Maritz* para 62. Mogoeng CJ referred to Mokgoro J's explanation of the impact of limiting the right of access to adequate housing, particularly on people like Ms Sarrahwitz, and the implications of this impairment on the right to dignity in *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC). See *Sarrahwitz v Maritz* para 63.
[222] *Sarrahwitz v Maritz* para 64.
[223] *Sarrahwitz v Maritz* para 64.
[224] *Sarrahwitz v Maritz* para 65.
[225] *Sarrahwitz v Maritz* para 66.
[226] The consequential hardship and misfortune the beneficiary of the legislative accommodation is protected from applies with equal force to the excluded Ms Sarrahwitz. See *Sarrahwitz v Maritz* para 66.
[227] *Sarrahwitz v Maritz* para 66.
[228] *Sarrahwitz v Maritz* para 67.

the court held sections 21 and 22 of the Land Act unconstitutional and ordered the severance and reading-in of words that would remedy that constitutional invalidity.[229]

While the minority judgment agreed with that of the majority that the unusual circumstances facing Sarrahwitz required that she be assisted,[230] it found that there was indeed a rational purpose for the distinction created by the Land Act.[231] Cameron and Froneman JJ based the rational purpose on the view that purchasers who have access to enough money to pay off property within a year, are better off than those who must pay in instalments over a period of one year or more.[232] Therefore, they considered that purchasers who have the funds to pay their property debt within a year need less protection than those whose financial constraints allow them to pay off their property debt over a longer period.[233] The majority judgment found this distinction considering the high costs of residential properties to be irrational.[234]

Cameron and Froneman JJ found that the majority judgment's order risks an interpretation that any beneficial legislative distinction made by the Legislature in extending consumer protection may be struck down as irrational if all persons are not protected.[235] Such an approach would, in their view, be taking things too far and is risky for a number of reasons.[236] First, it limits what parliament can do when enacting beneficial consumer legislation.[237] Second, the reading-in remedy takes over an important parliamentary function of enacting remedial consumer legislation.[238] Lastly, there is an inherent danger in the courts attempting to introduce legislative distinctions in existing legislation through the reading-in remedy.[239]

According to Cameron and Froneman JJ the trustee's election in respect of uncompleted contracts was very important.[240] They suggest that the trustee should

[229] *Sarrahwitz v Maritz* para 70.
[230] *Sarrahwitz v Maritz* para 79; Heyns and Mmusinyane (2017) *PELJ/PER* para 6.
[231] *Sarrahwitz v Maritz* para 82.
[232] *Sarrahwitz v Maritz* para 82.
[233] *Sarrahwitz v Maritz* para 82.
[234] *Sarrahwitz v Maritz* para 83.
[235] *Sarrahwitz v Maritz* para 84.
[236] *Sarrahwitz v Maritz* paras 84-85.
[237] *Sarrahwitz v Maritz* para 85.
[238] *Sarrahwitz v Maritz* para 85.
[239] *Sarrahwitz v Maritz* para 86.
[240] *Sarrahwitz v Maritz* para 92. Van der Linde and Van Staden (2017) *J S Afr L* 424.

have considered Sarrahwitz's constitutional right to adequate housing and protection against eviction in deciding whether to give transfer under the contract.[241]

Further, a less invasive approach in the spheres of the other arms of government would, according to the Justices, have been a simple possessory remedy.[242] In terms of section 26(3) of the Constitution, the Protection against Illegal Eviction and Unlawful Occupation of Land Act[243] would have provided a narrower remedy to protect Sarrahwitz's possession.[244] According to Cameron and Froneman JJ once possession had been safeguarded, the obstacle of transferring the property into Sarrahwitz's name would have disappeared.[245] They suggested that they would have ordered the parties to provide more information on whether an eviction order had been granted against Sarrahwitz.[246] In light of this additional information, written arguments could have been sought on what order should have been given and whether the trustee should have been ordered to effect transfer to Sarrahwitz.[247] Thus, if the trustee had other reasons for refusing the transfer, they would have emerged and if he did not, then the trustee would have been ordered to transfer the property to Sarrahwitz. Cameron and Froneman JJ stated that even though this procedure would have delayed the finalisation of the matter, it would have provided Sarrahwitz with secure occupation and transfer of the property without intruding upon the functions of the Legislature.[248]

The discussion now turns to other rights relevant to this research.

4.3 The right to human dignity

The value of human dignity, the achievement of equality, and the advancement of human rights and freedoms are the founding values of the Republic of South Africa.[249] As a founding value, human dignity is a central and pre-eminent value in the

[241] *Sarrahwitz v Maritz* para 92. Van der Linde and Van Staden (2017) *J S Afr L* 424.
[242] *Sarrahwitz v Maritz* para 91.
[243] Protection against Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998.
[244] *Sarrahwitz v Maritz* paras 91. See also Van der Linde and Van Staden (2017) *J S Afr L* 424.
[245] *Sarrahwitz v Maritz* para 91.
[246] *Sarrahwitz v Maritz* para 99.
[247] *Sarrahwitz v Maritz* para 99.
[248] *Sarrahwitz v Maritz* para 99.
[249] Section 1(*a*) of the Constitution. Cheadle *et al South African constitutional law* para 5.3.

Constitution and is intricately linked to the right to equality in section 9.[250] It is the impairment of dignity that violates the equality clause.[251]

Equality is not only defined as a right to equal treatment – because everyone possesses human dignity in equal measure they should be treated the same – but is a right to be treated as an equal with equal concern and respect.[252] Therefore, equality is defined through the value of human dignity, which is the idea that everyone has intrinsic moral worth and is entitled to equal concern and respect.[253]

Therefore, in equality litigation dignity plays a central role.[254] Firstly, it is considered when determining whether there has been discrimination on a ground not specified in section 9(3) of the Constitution.[255] Secondly, it lies at the heart of the prohibition of unfair discrimination[256] and is thus considered when determining whether discrimination on a specified or unspecified ground is unfair.[257]

The value of human dignity is protected by the right to have one's dignity respected and protected in section 10 of the Constitution. The constitutional protection of dignity acknowledges the value and worth of all individuals as members of society and that is central to the equality right in the Constitution.[258] Human dignity is thus a source of a person's innate right to freedom and to physical integrity from which other rights flow and are concretised.[259]

The right to dignity implies that every individual's level of autonomy must be respected – their self-worth must be respected and protected from unjustified inroads into the

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[250] *S v Makwanyane* 1995 (3) SA 391 (CC) (*S v Makwanyane*) paras 144, 329. Cheadle *et al South African constitutional law* paras 5.2, 5.3.4; Currie and De Waal *The bill of rights handbook* 250, 252.
[251] Cowen (2001) *SAJHR* 40.
[252] *Prinsloo v Van der Linde* para 32*; National Coalition for Gay and Lesbian Equality* para 30; Woolman "Dignity" para 36.10(b); Currie and De Waal *The bill of rights handbook* 252; Chaskalson (2003) *IJCL* 600, 607. See also Albertyn (2018) *SAJHR* 457.
[253] *S v Makwanyane* para 328; Albertyn (2018) *SAJHR* 457.
[254] Cowen (2001) *SAJHR* 35.
[255] *Haksen v Lane* para 47; Cowen (2001) *SAJHR* 36. See also Woolman "Dignity" para 36.26.
[256] See generally *National Coalition for Gay and Lesbian Equality;* Cheadle *et al South African constitutional law* para 5.3.4.
[257] *Prinsloo v Van der Linde* paras 31-32; *Harksen v Lane* para 50(c); Cowen (2001) *SAJHR* 36.
[258] *S v Makwanyane* para 329; Currie and De Waal *The bill of rights handbook* 250; Albertyn (2018) *SAJHR* 457.
[259] In *S v Makwanyane* para 144 the court held that the right to life and human dignity are the most important of all human rights and the source of all other personal rights in the Bill of Rights. Such other personal rights include the right not to be subjected to slavery and the right to bodily integrity *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) (*Dawood v Minister of Home Affairs*) para 35. See also Cheadle *et al South African constitutional law* para 5.2.

individual's capacity to make choices.[260] Secondly, individuals must be protected from conditions or treatment that are offensive to their self-worth in society – ie, actions which treat people as less than human or as objects.[261] Lastly, all human beings must be recognised as having equal worth and value and that includes not being subjected to indignity resulting from inequality in treatment or unfair discrimination.[262] The right to dignity requires people to be treated as recipients of rights and not as objects subjected to statutory mechanisms without a say in the matter.[263] Further, the recognition that everyone must be treated as an equal with equal concern and respect, allows for principled differentiation.[264]

As regards dignity and employment, in *Minister of Home Affairs v Watchenuka*[265] Nugent JA held that the freedom to engage in productive work, even if it is not required to survive, is an important part of human dignity.[266] This is because human beings are social and have a natural need for meaningful association.[267] Therefore, one's self-esteem and sense of self-worth, which are the fulfilment of what it is to be human, are often associated with acceptance as being socially useful.[268] In this case, the respondent and her disabled 22-year-old son applied for asylum in South Africa after entering the country from Zimbabwe.[269] The respondent alleged that her savings had been depleted and that she needed to secure employment to support herself and her son.[270] A permit was issued to the first respondent under section 22(1) of the Refugees Act.[271] However, the permit included standard conditions which prohibited the respondent and her son from undertaking employment and from studying.[272]

Nugent JA held that the general prohibition on employment and study for the first 180 days after a permit has been issued, conflicted with the Bill of Rights.[273] He held that

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[260] Cheadle *et al South African constitutional law* para 5.2.2.
[261] Cheadle *et al South African constitutional law* para 5.2.2.
[262] Cheadle *et al South African constitutional law* para 5.2.2.
[263] *Advance Mining Hydraulics v Botes* 2000 (1) SA 815 (T) para 823F.
[264] *Prinsloo v Van der Linde* para 32*;* Chaskalson (2003) *International Journal of Constitutional Law* 600, 607. See also Albertyn (2018) *SAJHR* 457.
[265] *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA) (*Minister of Home Affairs v Watchenuka*).
[266] *Minister of Home Affairs v Watchenuka* para 27.
[267] *Minister of Home Affairs v Watchenuka* para 27.
[268] *Minister of Home Affairs v Watchenuka* para 27.
[269] *Minister of Home Affairs v Watchenuka* para 11.
[270] *Minister of Home Affairs v Watchenuka* para 11.
[271] Refugees Act 130 of 1998 (Refugees Act).
[272] *Minister of Home Affairs v Watchenuka* para 12.
[273] *Minister of Home Affairs v Watchenuka* para 24.

human dignity knows no nationality, it is inherent in all people whether citizens or not, by the mere fact of their being human.[274] The right to human dignity in section 10 of the Constitution protects citizens and non-citizens alike.[275] However, the limitation clause also applies to the right to human dignity as it is not absolute.[276] Section 36 recognises that human dignity may be limited by the law of general application if it is reasonable and justifiable in an open and democratic society based on the value of human dignity, equality, and freedom and taking all relevant factors into account.[277]

Nugent JA held that it is reasonable and justifiable to limit the right to dignity in the context of this case because allowing any person at all times to undertake employment would imply that any person might freely enter and remain in this country merely to exercise that right.[278] The right to enter and remain in the Republic, and the right freely to choose a trade, occupation, or profession are limited to citizens as per sections 21 and 22 of the Constitution.[279] The court referred to *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa*[280] where it was held that the restriction of the right to choice of occupation to citizens is in accordance with recognised international human rights instruments.[281]

However, Nugent JA stated that where employment is the only reasonable means for the person's support, the issue is not merely a restriction on the person's capacity for self-fulfilment, but a restriction upon his or her ability to live without positive humiliation and degradation.[282] Further, the deprivation of the freedom to work takes on a different dimension when it threatens positively to degrade rather than merely to inhibit the realisation of the potential for self-fulfilment.[283] Nugent JA held that there is no

[274] *Minister of Home Affairs v Watchenuka* para 25.
[275] *Minister of Home Affairs v Watchenuka* para 25. In para 26 the court referred to *S v Makwanyane* para 144 that the right to life and dignity are the most important of all human rights and the source of all other personal rights.
[276] *Minister of Home Affairs v Watchenuka* para 28.
[277] *Minister of Home Affairs v Watchenuka* para 28.
[278] *Minister of Home Affairs v Watchenuka* paras 29, 31.
[279] *Minister of Home Affairs v Watchenuka* para 30.
[280] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa,* 1996 1997 (2) SA 97 (CC) (*Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa*) para 20.
[281] *Minister of Home Affairs v Watchenuka* para 30.
[282] *Minister of Home Affairs v Watchenuka* para 32.
[283] *Minister of Home Affairs v Watchenuka* para 32.

justification for limiting the protection afforded by section 10 beyond that degree.[284] Further, simply because people who are not genuine refugees abuse the rights accorded to asylum seekers, does not justify and is not a ground for a general prohibition limiting those rights to those who are genuine refugees.[285] He stated that such a general prohibition would unavoidably include amongst those that it affects asylum seekers who have no reasonable means of support other than through employment.[286] Therefore, it was held that a prohibition against employment in these circumstances is a material invasion of human dignity which cannot be justified in terms of section 36.[287]

While this case concerned refugees, the statements above that:

> [T]he freedom to engage in productive work, even if it is not required to survive, is an important part of human dignity. This is because human beings are social and have a natural need for meaningful association. Therefore, one's self-esteem and the sense of self-worth, which is the fulfilment of what it is to be human, is often associated with being accepted as being socially useful.

and

> [W]here employment is the only reasonable means for the person's support, the issue is not merely a restriction upon the person's capacity for self-fulfilment, but a restriction upon his ability to live without positive humiliation and degradation,

are also true for an insolvent who has been dismissed from working as a clerk or an assistant in a large department store because of the disqualification from being employed in the business of a trader who is a general dealer or manufacturer without the consent of his or her trustee and finds it difficult to find alternative employment. This disqualification is not only a constitutional violation based on the right to human dignity, but is also a violation based on an insolvent debtor's socio-economic status or class which renders him or her a burden on society.

As Navsa ADP indicated in *Somalia Association of South Africa v Limpopo,*[288] which followed the precedent in *Minister of Home Affairs v Watchenuka,* the constitutional right to dignity is affected when persons have no other means to support themselves and are left destitute.[289] The stereotyping of insolvent debtors without first looking at the individual circumstances of each insolvent is based on generalisations about all insolvent debtors which infringe upon their fundamental human dignity in a harmful

[284] *Minister of Home Affairs v Watchenuka* para 33.
[285] *Minister of Home Affairs v Watchenuka* para 33.
[286] *Minister of Home Affairs v Watchenuka* para 33.
[287] *Minister of Home Affairs v Watchenuka* para 33.
[288] *Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism* 2015 (1) SA 151 (SCA) (*Somali Association of South Africa v Limpopo*).
[289] *Somalia Association of South Africa v Limpopo* para 43.

manner. Thus, the general disqualification of all insolvent debtors from certain employment inevitably includes amongst those that it affects honest but unfortunate debtors who it was not the legislature's intention to affect and who may have no reasonable means of support.

As regards dignity and debtors, Landman J stated in *Ex parte Kroese*[290] that the law is concerned with the dignity of debtors.[291] In this regard, the judge was referring also to section 67 of the Magistrates' Courts Act[292] and section 39 of the Supreme Court Act[293] which provide for protection similar to that found in section 82(6) of the Insolvency Act but applied in the pre-sequestration debt-collection procedure.[294] As discussed in Chapter 3,[295] in an attempt to increase the value of their estate to prove an advantage to creditors, Mr and Mrs Kroese in *Ex parte Kroese*, waived the protection afforded to them in section 82(6) of the Insolvency Act.

Landman J held that the right to life, dignity, and to work or trade entrenched in the Constitution are important in this regard.[296] This is because section 82(6) of the Insolvency Act is intended to preserve the right to life and dignity of the insolvent and his or her dependants so that they can rebuild their lives.[297] He held that these protections were enacted not only to protect the public but also to benefit debtors in that it would not be in the interest of the state to allow debtors to renounce their assets and become a burden on society.[298]

Commenting on Landman J's judgment, Evans states that if the debtor's estate were sequestrated and the insolvent was left destitute after sequestration by the creditors' refusal to 'except' certain estate property for the insolvent's benefit, his or her right to dignity, property, and to practise a trade, occupation or profession freely may be infringed.[299]

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[290] *Ex parte Kroese* 2015 (1) SA 405 (NWM) (*Ex parte Kroese*) para 19. See also Ch 3 para 3.3.3.
[291] *Ex parte Kroese* paras 38-39.
[292] Magistrates' Courts Act 32 of 1944.
[293] Supreme Court Act 59 of 1959.
[294] *Ex parte Kroese* paras 38-39.
[295] Ch 3 para 3.3.3.
[296] *Ex parte Kroese* paras 38, 39, 46 and 49.
[297] *Ex parte Kroese* para 41.
[298] *Ex parte Kroese* para 56.
[299] Evans (2018) *De Jure* para 5.1.

While the *Ex parte Kroese* case and Evans's statement relate to insolvents' right to waive certain entitlements given them to avoid their becoming destitute thereby infringing their constitutional right to dignity, life, and to work and trade, the same basis for the court's refusal to allow such a waiver could be used by the honest but unfortunate debtors in their challenge against being dismissed from employment on the basis of their insolvency or socio-economic status. As Landman J stated, the law is concerned with the dignity of debtors which is inextricably linked to the right to work and trade. The same constitutional rights of the insolvent debtor whom the law intended to protect in *Ex parte Kroese*, are the constitutional rights violated by the blanket disqualification of all insolvent debtors.

While *Ex parte Van Dyk* discussed in Chapter 3[300] was concerned with meeting the requirements for the acceptance of a voluntary surrender (meaning the debtor estate had not yet been sequestrated), the court showed the constitutional challenges that could arise when taking away insolvent debtors' income during sequestration affects their right to basic life necessities such as food. As automatic rehabilitation is ten years in South Africa, such challenges could last for as long as ten years if earlier rehabilitation is not granted. Because Makhubele AJ linked the right to the human dignity of an insolvent debtor to his or her income, the constitutional rights of the insolvent which the law intends to protect by refusing a waiver of salary contributions are the same constitutional rights violated by the blanket disqualification of all insolvent debtors from certain employment. Thus, the same basis for the court's refusal to allow a waiver of the protection on the salary of insolvent debtors could be used by the honest but unfortunate debtors to challenge their dismissal from employment on the basis of their insolvency or socio-economic status as the dismissal amounts to taking away the income of insolvent debtors just as a waiver does.

4.4 Freedom of trade, occupation, and profession

Section 22 of the Bill of Rights recognises the freedom of trade, occupation, and profession for every citizen. It provides:

> **Freedom of trade, occupation and profession**
> 22. Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

[300] Ch 3 para 3.3.3.

The freedom to choose a trade, occupation, and profession in section 22 is only afforded to citizens of the Republic of South Africa. As indicated in *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa*[301] and applied in *Minister of Home Affairs v Watchenuka*,[302] affording this right to citizens only is in line with recognised international human rights instruments.[303]

Section 22 is divided into two parts.[304] The first part guarantees the right to choose a trade, occupation, or profession, and the second provides for the regulation of the practise of such profession.[305] Although section 22 does not expressly guarantee the right to practise the chosen profession, the second part of the right implies it because the drafters of the Constitution would not guarantee the right to choose a profession but not the right to practise the chosen profession.[306] Therefore the two parts of section 22 must be read together to protect both the right to choose a trade, occupation, or profession and the right to practise that chosen profession.[307]

Therefore, the freedom to choose an occupation cannot be limited by law unless the restriction is justifiable in terms of the limitation clause in section 36 of the Constitution.[308] On the other hand, the law can regulate the practise if the regulation

[301] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa*) paras 11-12, 20.
[302] *Minister of Home Affairs v Watchenuka* para 30.
[303] The international human rights instruments include the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHPR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). See also Cheadle *et al South African constitutional law* para 17.3; Currie and De Waal *The bill of rights handbook* 463-464.
[304] *Affordable Medicines Trust v Minister of Health* paras 62-63; *South African Diamond Producers Organisation v Minister of Minerals and Energy* 2017 (10) BCLR 1303 (CC) para 65; Cheadle *et al South African constitutional law* para 17.2; Currie and De Waal *The bill of rights handbook* 463.
[305] *Affordable Medicines Trust v Minister of Health* para 62; *South African Diamond Producers Organisations v Minister of Minerals and Energy NO* 2017 (10) BCLR 1303 (CC); Currie and De Waal *The bill of rights handbook* 463*;* Cheadle *et al South African constitutional law* para 17.4.1.
[306] *Affordable Medicines Trust v Minister of Health* paras 62, 63; Currie and De Waal *The bill of rights handbook* 467.
[307] *Affordable Medicines Trust v Minister of Health* para 63, 63; Currie and De Waal *The bill of rights handbook* 467.
[308] Cheadle *et al South African constitutional law* para 17.4.1; Currie and De Waal *The bill of rights handbook* 463, 467.

is rationally related to the achievement of a legitimate government purpose[309] and if it does not unfairly and unjustifiably infringe any of the rights in the Bill of Rights.[310]

The most obvious way of limiting the right to choose a trade, occupation, or profession freely is by denying access to certain groups of people to a particular trade, profession, or occupation.[311] It can also be limited by reserving a particular trade, profession, or occupation to certain groups of people only.[312] As regards insolvent debtors, the former is applicable. The disqualifications from entering certain positions or offices and the compulsion to vacate those positions or offices based on their insolvency or socio-economic status alone amounts to a denial of access. Thus, it limits their rights protected by section 22 of the Constitution.

The question is whether the limitation on these rights is justifiable in terms of section 36. Secondly, whether the laws which regulate certain practices to exclude insolvent debtors are rationally connected to the realisation of legitimate government purposes and do not unfairly and unjustifiably infringe any of the rights in the Bill of Rights.

Although German law is not compared as such in this thesis, it is useful to note that section 22 is similar to article 12(1) of the German Constitution[313] which provides that:

> All Germans have the right freely to choose their occupation or profession, their place of work, and their place of training. The practice of trades, occupations and profession may be regulated by or pursuant to a law

As section 22 resembles article 12(1), German jurisprudence dealing with the interpretation of article 12(1) provides valuable comparative assistance in interpreting section 22.[314] In the *Pharmacy* case,[315] which is the leading German case on article 12(1), it was held that work shapes and completes the individual over a lifetime of devoted activity and is the foundation of a person's existence.[316] Further, that article

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[309] *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) (*New National Party of South Africa)* para 19.
[310] *Affordable Medicines Trust v Minister of Health* paras 74, 77; *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 para 90. See also generally *Van Rensburg v South African Post Office Ltd* 1998 (10) BCLR 1307 (E); *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC). Currie and De Waal *The bill of rights handbook* 463, 467.
[311] Currie and De Waal *The bill of rights handbook* 466.
[312] Currie and De Waal *The bill of rights handbook* 466.
[313] German Constitution of 1949 (German Constitution). See also *Affordable Medicines Trust v Minister of Health* para 64.
[314] Currie and De Waal *The bill of rights handbook* 462.
[315] *Pharmacy Case* 7 (1958) BVerf GE.
[316] See translation in Currie *The constitution of the Federal Republic of Germany* 299.

12(1) allows for the regulation of both the choice and the practise of an occupation or profession.[317] However, the regulation of choice is subject to stricter scrutiny than the regulation of the practise of a trade, occupation, or profession.[318]

4.2.1 Choice of a trade, occupation or profession

Before the 1996 Constitution, the interim Constitution provided for an economic-activity right in section 26, which read:

> **Economic activity**
>
> **26.**(1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.
>
> (2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality.

Although section 26 differs from section 22 and is no longer applicable, the cases heard under the previous section continue to assist in the interpretation of section 22.[319] The right "freely to engage in economic activity and to pursue a livelihood anywhere in the national territory" was replaced with the right of citizens "to choose their trade, occupation or profession freely".

Occupational freedom in section 22 is an individual right and is subject to other underlying values.[320] For instance, it is in the public interest that those who hold themselves out as experts in a certain field of activity are who they claim to be and that they practise in terms of acceptable standards.[321] This is especially important when other people's rights, livelihoods, or health depend on that expertise.[322] On the other hand, the public has an interest in allowing individuals to work for their own living so that they do not need to be supported by public funds.[323] Also, the public has an interest in benefitting from the skills of certain individuals.[324] Thus, occupational freedom allows individuals to be independent and self-sufficient.[325]

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[317] See translation in Currie *The constitution of the Federal Republic of Germany* 300.
[318] See translation in Currie *The constitution of the Federal Republic of Germany* 300.
[319] Currie and De Waal *The bill of rights handbook* 459.
[320] Currie and De Waal *The bill of rights handbook* 465.
[321] Cheadle *et al South African constitutional law* para 17.4.1.
[322] Cheadle *et al South African constitutional law* para 17.4.1.
[323] Currie and De Waal *The bill of rights handbook* 465.
[324] Currie and De Waal *The bill of rights handbook* 465.
[325] Currie and De Waal *The bill of rights handbook* 465.

In *Affordable Medicines Trust v Minister of Health,* Ngcobo J held that section 22 not only affords a person a right to earn a living but allows that person to live a profitable, dignified, and fulfilling life.[326] This is because the right to choose a vocation is inherent in the nature of a society based on dignity.[327] Further, that:

> [O]ne's work is part of one's identity and is constitutive of one's dignity. Every individual has a right to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life.[328]

Ngcobo J stated that legal limitations on the right to choose a profession or trade cannot be accepted lightly.[329] Tolerance of the limitation of such a right can only be allowed if it is in the public's interest and is not arbitrary or capricious.[330] Therefore, the regulation of the right to choose a trade or profession can only be allowed if it aims to protect the persons involved in it and the community at large affected by it.[331]

To ascertain whether an insolvent debtor's right to choose a trade, profession, or occupation has been limited, the question is whether the law that regulates the practise of a profession, viewed objectively, affects the choice of a profession negatively.[332] If it does, Ngcobo J stated,[333] that regulation limits the right to choose a profession and must be evaluated in terms of section 36 of the Constitution.[334] In *Affordable Medicines Trust v Minister of Health*, the court held that a law which requires medical practitioners to dispense medicine as part of their practice and to do so from premises that comply with good dispensing practice if they so wish, does not deter a person from choosing to pursue the medical profession.[335] Such a law does not affect the choice of a profession in any negative manner.[336]

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[326] *Affordable Medicines Trust v Minister of Health* para 59. Currie and De Waal *The bill of rights handbook* 465.
[327] *Affordable Medicines Trust v Minister of Health* para 59.
[328] *Affordable Medicines Trust v Minister of Health* para 59.
[329] *Affordable Medicines Trust v Minister of Health* para 60.
[330] *Affordable Medicines Trust v Minister of Health* para 60.
[331] *Affordable Medicines Trust v Minister of Health* para 60.
[332] *Affordable Medicines Trust v Minister of Health* para 68. Cheadle *et al South African constitutional law* para 17.2.
[333] *Affordable Medicines Trust v Minister of Health* para 68.
[334] *Affordable Medicines Trust v Minister of Health* para 68.
[335] *Affordable Medicines Trust v Minister of Health* para 71.
[336] *Affordable Medicines Trust v Minister of Health* para 72.

4.2.2 Practise of a trade, occupation, or profession

The second part of section 22 gives parliament the general power to enact legislation to regulate the practise of a profession or occupation.[337] The term 'regulation' allows for the rational ordering or organising of a certain trade, occupation, or profession.[338] As indicated above the exercise of such power is subject to two constitutional limitations.[339] First, there must be a rational connection between the legislation and the achievement of a legitimate government purpose, and second, the legislation must not unfairly and unjustifiably infringe any of the rights in the Bill of Rights.[340] In *New National Party of South Africa*[341] the court held that the rational connection test is the standard for reviewing legislation and the absence of such a rational connection will result in the measure being unconstitutional. In *Van Rensburg v South African Post Office* the court suggested that restrictions on the practise of a profession must be 'necessary or desirable'.[342] Thus, what is required is that the power to regulate practise in a certain profession or occupation must be exercised in an objectively rational manner.[343] A court will not interfere with the regulation of a practice if objectively viewed it is rationally connected to a legitimate government purpose, irrespective of whether it disagrees with it or regards it as inappropriate.[344]

If the regulation of the practise of a profession is rationally connected to a legitimate government purpose and does not infringe any of the rights in the Bill, then it complies with section 22.[345] However, if, despite being rationally related to a legitimate government purpose, the regulation limits any of the rights in the Bill of Rights it must still meet the section 36(1) standard.[346] Ngcobo J in *Affordable Medicines Trust v Minister of Health* found that the link between a licence to dispense medicines and particular premises was rationally connected to the government objective of increasing

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[337] *Affordable Medicines Trust v Minister of Health* para 73.
[338] Currie and De Waal *The bill of rights handbook* 467.
[339] *Affordable Medicines Trust v Minister of Health* para 74.
[340] *New National Party of South Africa* para 19; *Affordable Medicines Trust v Minister of Health* paras 74, 77; *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 para 90. See also generally *Van Rensburg v South African Post Office Ltd* 1998 (10) BCLR 1307 (E) (*Van Rensburg v South African Post Office)*; *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC). Currie and De Waal *The bill of rights handbook* 463, 467.
[341] *New National Party of South Africa* para 19.
[342] *Van Rensburg v South African Post Office* para E-F.
[343] *Affordable Medicines Trust v Minister of Health* para 77.
[344] *Affordable Medicines Trust v Minister of Health* para 77.
[345] *Affordable Medicines Trust v Minister of Health* para 80.
[346] *Affordable Medicines Trust v Minister of Health* para 80.

access to medicines that are safe for consumption by the public and fell within the scope of section 22.[347]

It is against this background that restrictions on unrehabilitated insolvents will now be considered so as to evaluate the rights and the position of honest insolvent debtors against the background of the above constitutional provisions.

4.5 The *Harksen v Lane* analysis

The three-stage analysis in *Harksen v Lane* will now be applied to establish whether unrehabilitated insolvents' rights to equality, human dignity, the freedom freely to choose a trade, occupation, and profession, and thus the right to earn an income to provide basic necessities of life such as food, have been violated based on the unlisted or analogous grounds of insolvency, socio-economic status, or class. In this regard, a distinction is drawn between a violation of the right to equality based on the failure to differentiate or lack of differentiation between 'dishonest' and 'honest but unfortunate' insolvent debtors, and the differentiation between insolvent debtors and other debtors who are not subjected to the same disqualifications but who may also be dishonest.

The three stages of the enquiry are as follows:

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of s 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination
(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
    (i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
    (ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

    If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2).
(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.

[347] *Affordable Medicines Trust v Minister of Health* para 100; Cheadle *et al South African constitutional law* para 17.2.

As the Constitutional Court distinguishes between 'mere differentiation' and 'unfair discrimination', an investigation into the violation of insolvent debtor's constitutional rights will first be tested under mere differentiation which uses the standard of rationality to determine whether the differentiation is constitutionally permissible. Secondly, constitutional permissibility of the violation of insolvent debtor's constitutional rights will be analysed in terms of the right not to suffer unfair discrimination.

4.5.1 Mere differentiation

The first leg of the *Harksen v Lane* enquiry questions whether a law differentiates between people or groups of people and if it does, whether the differentiation bears a rational connection to a legitimate government purpose.

The Insolvency Act and other legislation disqualify unrehabilitated insolvents from certain offices and employment and from serving as a member on certain boards based solely on their insolvency or socio-economic status or class.[348] This effectively excludes unrehabilitated insolvents from many offices of trust and some employment.[349] This does not apply to other debtors such as persons under debt review, administration, or persons who have entered into arrangements or compromise agreements with their creditors, irrespective of their possible dishonesty. Moreover, these other debtors could also be factually insolvent (ie, due to lack of cash flow they are unable to pay their debts as they fall due)[350] but because their estates have not been sequestrated under the Insolvency Act, they are subjected to fewer restrictions. This, therefore, differentiates between debtors who are insolvent[351] and those who are not insolvent,[352] despite all these debtors falling into the group of 'debtors unable to pay their debts'.

Secondly, within the group of insolvent debtors there are classes of debtor; those who are dishonest, and those who are honest but because of an unfortunate event become insolvent. This distinction is not made by the Insolvency Act and other legislation

[348] Ch 3 para 3.4.
[349] Ch 3 para 3.4.3.
[350] See Sharrock, Van der Linde and Smith *Hockly's insolvency law* 3.
[351] Insolvent in this context means a person whose estate has been sequestered in terms of the Insolvency Act.
[352] Persons under debt review, administration or persons who have entered into arrangements or compromise agreements with their creditors, who may also be factually insolvent.

whereas to disqualify insolvent debtors a distinction is made between insolvent debtors and other debtors. A failure to distinguish between 'honest but unfortunate debtors' and 'dishonest debtors' burdens the class of honest but unfortunate debtors by disqualifying them from many employment opportunities and offices of trust based on their socio-economic status which was intended only for dishonest debtors. However, the same or fewer burdens are imposed on other debtors who may be dishonest and as a result unfit for certain employment, offices, or board membership. Therefore, the question of whether the law differentiates between people or groups of people would probably be answered affirmatively.

The ground of insolvency, socio-economic status, or class that could be relied upon by insolvent debtors is not a listed ground in section 9(3) of the Constitution and it is not a ground that appears at first glance to be based on attributes or characteristics which have the inherent potential to impair the fundamental dignity of persons as human beings. As Mogoeng CJ stated in *Sarrahwitz v Maritz*, one must dig deeper to establish whether insolvency or socio-economic status are grounds based on attributes or characteristics which have the inherent potential to impair the fundamental dignity of persons as human beings. However, as per Mogoeng CJ in *Sarrahwitz v Maritz*, this should not be done under section 9(3), but in terms of section 9(1) which guarantees everyone – including that of insolvent debtors – the right to equal protection and benefit of the law.[353]

Section 9(1) guarantees equal protection and equal benefit of the law to everyone who is similarly situated. In this respect, overindebted debtors who are unable to pay their debt such as insolvent debtors, debtors who have entered into arrangements or compromise agreements with their creditors in terms of the Insolvency Act, and debtors under debt review and administration should receive the same legal entitlements or be subjected to the same burdens unless the differentiation is justifiable. Currently, the law imposes many disqualifications on insolvent debtors that are not imposed on other debtors who themselves may be dishonest and as result disqualified from holding certain employment and offices. This affects insolvent debtors' ability to earn an income to support themselves and their dependants. As regards the lack of differentiation between honest and dishonest debtors, treating

[353] *Sarrahwitz v Maritz* para 48.

honest and dishonest debtors in the same way means that many burdens are imposed on honest insolvents which were intended only for insolvents who act dishonestly. Equality is not achieved by treating these two classes of insolvent equally.

The question now is whether the differentiation bears a rational connection to a legitimate government purpose?

In *Sarrahwitz v Maritz* Mogoeng CJ held that differentiation between people or classes of people violates constitutional standards unless it is validated by a legitimate purpose in the legislation which must itself have a rational connection to the legitimate purpose. If the legislation does not meet these requirements it contravenes the right to equal protection and benefit of the law in that it confers unequal benefits or imposes unequal burdens without a rational basis.[354]

It is clear from the reasons set out in Chapter 3[355] of this thesis that unrehabilitated insolvents are disqualified from certain offices and employment because the legislature aims to protect the public from fraudulent and reckless debtors who incur debt without a reasonable intention of repaying it. The disqualifications were and still are based on the legislature's assumption that insolvent people are dishonest and untrustworthy and should be barred from certain forms of employment for up to ten years if early rehabilitation is not granted to ensure that they have 'learnt the lesson' of trading honestly with others. This assumption has created a stereotype of insolvent debtors based solely on their insolvency or socio-economic status or class.[356] As a result of this assumption or stereotype – which has been institutionalised in various laws – insolvent debtors are excluded from numerous offices of trust and certain employment.[357] This does not happen to other debtors who, while they may be dishonest, are not similarly penalised for being placed under debt review, administration, or having entered into arrangements or compromise agreements with their creditors.

Secondly, the assumption on which the legislature relies for the disqualifications fails to recognise that within the insolvent debtor's group, a further distinction between 'honest but unfortunate debtors' and 'dishonest debtors' could and should be made to

[354] *Sarrahwitz v Maritz* para 54.
[355] Ch 3 para 3.6.
[356] Ch 3 para 3.6.
[357] Ch 3 para 3.4.3.

ensure that the purpose of the legislation affects only those at whom it is aimed as opposed to a blanket prohibition on all insolvent debtors.

In *Sarrahwitz v Maritz*, Mogoeng CJ stated that the Minister's justification for excluding vulnerable purchasers who pay the full purchase price in less than a year and the justification that it was unlikely that people with limited means could afford to pay the full purchase price immediately or in less than a year, was based on a questionable assumption as evidenced by Sarrahwitz's situation. He added that the impact of strict adherence to this assumption has terrible consequences for vulnerable purchasers who are excluded and who needed to be accommodated.

Mogoeng CJ held that it was difficult to imagine a situation where the refusal to transfer a home to a vulnerable purchaser who has paid in full and faces homelessness, would not outweigh the advantage to creditors of the seller's insolvent estate. He pointed out that the situation is exacerbated by the indignity to which the prospective homeowner is exposed, and the denial of equal protection and benefit of the law to people like Sarrahwitz. The minority's view that in making his or her election the trustee should have considered Sarrahwitz's constitutional right to adequate housing and protection against eviction is also important in balancing Sarrahwitz's interests with those of creditors in the insolvent estate.

Similarly, in the case of insolvent debtors the legislature's assumption that all insolvents are dishonest and untrustworthy and should be barred from certain employment until they have learnt the lesson of trading honestly with others, is not always correct and should be reviewed. Strict compliance with this assumption has negative consequences for honest but unfortunate debtors including limiting their right to earn a living, protect their income, and to economic rehabilitation. For the honest debtor who has only a matric certificate and no alternative employment or means of support, the consequence is him or her becoming a burden on society as now he or she will have to apply for government grants and warrants accommodation as is the case with other debtors who are not subjected to as many disqualifications.

In addition, the insolvent debtor becomes a burden on society for ten years if automatic rehabilitation has not been awarded, and even after the ten years the insolvent is

subjected to other restrictions when accessing credit.[358] As with vulnerable purchasers, the goal of protecting the interests of creditors cannot outweigh the impact that certain disqualifications have on honest insolvent debtors' constitutional rights. Therefore, the different classes of insolvent debtor should be distinguished as failure to do so burdens the class of honest but unfortunate debtors based on their socio-economic status.

In *Sarrahwitz v Maritz* the court found that there was no legitimate government purpose for the differentiation and that for as long as there is a real risk within the legislative scheme for some vulnerable purchaser to be homeless, the scheme was under under-inclusive which was the cause of the problem. Therefore, the court found that sections 21 and 22 of the Land Act were unconstitutional and ordered the severance and reading in of words that would remedy that constitutional invalidity.

The same applies to insolvent debtors; there is no legitimate government purpose for disqualifying honest but unfortunate debtors from certain employment and offices. There is only a legitimate government purpose for disqualifying dishonest insolvent debtors.

Unlike in *Sarrahwitz v Maritz*, where the Land Act was under-inclusive, the Insolvency Act's failure to distinguish between honest but unfortunate debtors and dishonest debtors is over-inclusive. The over-inclusivity lies in the fact that in the case of honest but unfortunate debtors (clerks, sales assistance, a person with a matric certificate in these jobs), where there is no real risk of dishonestly in the workplace and danger to the public, their rights to practise in the trade of general dealer or manufacturer are being violated. Their inclusion with dishonest debtors is irrational because it is not linked to the government's purpose of protecting the public from dishonest insolvents.

As indicated, this was acknowledged by the Law Reform Commission when it stated that the provision in its current form is outdated.[359] This is because it does not make sense to require the consent of the trustee in the case of an insolvent who is a general dealer or manufacturer, but not to require the same consent if the insolvent is not a general dealer or manufacturer. It held that such consent is not required in other jurisdictions such as England and Wales, Scotland, Australia, or the United States of

[358] Ch 3 para 3.5.
[359] Ch 3 para 3.8.2.

America. Thus, the Law Reform Commission proposed that the trustee's consent requirement be removed and the different professions and industries be allowed to create their own rules to disqualify an insolvent from entering those professions or industries.

As indicated above, if the differentiation is found to be irrational, it would be difficult to save the irrationality by the justification in section 36 which demands a higher standard of justification than that of the rationality standard. In *Van der Merwe v Road Accident Fund,* the court found it impossible to justify the irrationality because of the absence of a legitimate government purpose. Thus, differentiation that fails the rationality standard in section 9(1) could be found to be irretrievably unconstitutional.

The minority judgment's view that purchasers who have the funds to pay their property debt within a year need less protection than those whose financial constraints allow them to pay off their property debt only over a longer period, is an assumption that is not always true and is not supported. In cases like *Sarrahwitz*, such a purchaser may have had to sacrifice and use saved money to pay off the property debt in less than a year. It may not be that the purchaser is in a better financial position but that he or she had to use up all their life savings to pay off the house. Thus, losing the house or not receiving transfer has far-reaching consequences, including the spectre of homelessness.

4.5.2 Unfair discrimination

While section 9(1) of the Constitution could be relied upon to declare certain provisions of legislation constitutionally invalid, the rationality standard used in section 9(1) does not provide a higher level of constitutional scrutiny.[360] Some legal distinctions not protected by sections 9(3) can give rise to levels of disadvantage that deserve greater constitutional scrutiny than the rationality standard in section 9(1). For example, any equality challenge in terms of section 9(1) requires only 'good' reasons' for state action and will not necessarily scrutinise policy choices.[361] Albertyn and Goldblatt opine that other options exist. They suggest that sections 9(3) or 9(4) could be used to test for unfair discrimination but that grounds such as socio-economic status ought to be recognised as additional (unlisted) grounds to cater for class and wealth differentiation.

[360] Albertyn and Goldblatt "Equality" para 35.28.
[361] Albertyn and Goldblatt "Equality" para 35.28.

Thus, as an alternative to testing whether the disqualification of insolvent debtors amounts to mere differentiation, insolvent debtors may base their arguments in terms of the right against unfair discrimination in section 9(3) of the Constitution on the unlisted ground of socio-economic status.

In this regard, the *Harksen v Lane* analysis will be used to determine whether the unlisted ground of socio-economic status can be used by honest but unfortunate insolvent debtors to show that the disqualifications imposed on them infringe their right against unfair discrimination in terms of section 9(3) of the Constitution.

The discussion above has already established that the Insolvency Act and other legislation differentiates between people or groups of people. The second leg of the enquiry seeks to establish whether the differentiation amounts to unfair discrimination.

Socio-economic status as a ground that may be relied on by insolvent debtors is not a listed ground in section 9(3) in terms of which discrimination is presumed. The question, in this instance, is whether the ground of socio-economic status is based on characteristics that potentially impairs insolvent debtors' fundamental human dignity as human beings in a harmful manner.

The value of human dignity is at the core of the rights of insolvent debtors freely to choose their trade, occupation, or profession and is important to their ability to earn an income and to participate in the economy. As indicated by Landman J in *Ex parte Kroese,* the law is concerned with the dignity of debtors and the rights to life, work, and trade are linked to that dignity. The same constitutional rights of the insolvent debtor which the law intended to protect in *Ex parte Kroese* to prevent the insolvent from becoming destitute, are the constitutional rights threatened by the blanket disqualification of all insolvent debtors. Similarly, while the disqualifications were intended to protect the public it could not have been the interest of the state to disqualify the insolvent debtor from employment which is the only means of support which prevents him or her from becoming a burden on society.

In *Ex parte Van Dyk,* Makhubele AJ linked the right of human dignity and an insolvent debtor and his or her family to his or her income, the right to work and trade, and the right to basic necessities such as food. As in *Ex parte Kroese,* these constitutional rights – especially that of income which the law aims to protect by preventing a waiver of salary contributions – are the same constitutional rights that are violated by the

blanket disqualification of all insolvent debtors from certain forms of employment. Thus, the basis for the court's refusal to allow a waiver of the protection for the salary of insolvent debtors could equally be used by honest but unfortunate debtors in their challenge against their dismissal from employment because of their socio-economic status. Such a dismissal denies insolvent debtors an income just as does the waiver.

Addressing dignity and employment, Nugent JA in *Minister of Home Affairs v Watchenuka* stated that the freedom to engage in productive work, even if it is not required to survive, is an important part of human dignity in that humans are social beings with an instinctive need for meaningful association. One's self-esteem and sense of self-worth are linked with being accepted as socially useful. Nugent JA further stated that where employment is the only reasonable means of support for the person, the issue is not merely a restriction on his or her capacity for self-fulfilment, but a restriction on his or her ability to live without positive humiliation and degradation. As indicated above, an insolvent who has been dismissed from working as a clerk or an assistant in a large department store because he or she may not be employed in the business of a trader who is a general dealer or manufacturer without the consent of his or her trustee and finds it difficult to find alternative employment, not only subject to a constitutional violation based on the right to human dignity, but also a violation based on an insolvent debtor's socio-economic status which renders him or her a burden on society.

Another important statement by Nugent JA for insolvent debtors was that just because people who are not genuine refugees abuse the rights accorded asylum seekers, does not justify and it is not a basis for a general prohibition limiting those rights to genuine refugees only. He stated that such a general prohibition would unavoidably include asylum seekers who have no reasonable means of support other than through employment. The plight of insolvent debtors is no different. The purpose of disqualifying insolvent debtors from certain jobs is to protect the public from debtors who abuse their borrowing capacity and intentionally borrow without an intention of meeting their obligations – in short, reckless borrowers. But as per Nugent JA in *Minister of Home Affairs v Watchenuka,* just because dishonest debtors become insolvent recklessly or fraudulently, does not justify and it is not ground for a general prohibition limiting the rights of debtors who did not act recklessly or fraudulently. Such

a general prohibition unavoidably affects honest debtors negatively and was not intended for them.

In addition, the insolvent debtor becomes a burden on society for ten years if automatic rehabilitation has not been awarded. Even after the ten years, the insolvent is subjected to other restrictions such as limiting his ability to obtain credit, rent a home, or find employment after rehabilitation and so start afresh.[362] It could be argued that the differentiation between insolvent debtors and other debtors and the failure to differentiate between honest and dishonest debtors does not amount to unfair discrimination as insolvent debtors have not suffered in the past from patterns of disadvantage. However, as indicated, class and wealth differentiation are gaining ground as indicators of inequality. This is especially important for insolvent debtors who are distinguished from other debtors based on their insolvency, socio-economic status or class, and the lack of differentiation between dishonest and honest but unfortunate debtors. The purpose of the restrictions is to protect the public from reckless debtors and to teach them to trade honestly with others by postponing rehabilitation until they have understood the error of their ways. Thus, the aim is to protect the public against *dishonest* debtors.

However, if one looks at this aim and the fact that the stigma and stereotyping that has flowed from it has been rooted in the structures, systems, and institutions of our society[363] for so many years that the stereotype has become an unrecognisable, unquestioned, and dominant norm, it is clear that because of class differentiation insolvent debtors have become a minority group. Stigma-enforcing laws like the Insolvency Act, devalue and disadvantage the *honest* debtors in the group of insolvent debtors and affect them psychologically due to possible reputational loss, labelling, separation, and discrimination.[364] As indicated above, the assumption on which the legislature relies for the disqualification is not always correct, and strict adherence to it sends a clear message that all insolvent debtors are unreliable. Furthermore, irrespective of whether or not they can prove that they are honest debtors and competent for the job, the restrictions will still be imposed to punish them on the basis of their class or socio-economic status. This goes against the state's obligation to

[362] Ch 3 para 3.5.
[363] Referred to as 'systemic disadvantage'. See Ch 3 para 3.5.
[364] Ch 3 para 3.6.

prohibit unfair discrimination and to treat everyone with equal concern and respect, to avoid prejudice and stereotyping, and to protect those who are socially and economically disregarded in society.

In *MEC for Education v Pillay* the court found that the failure to treat Sunali differently from her peers amounted to withholding from her the benefit, opportunity, and advantage of fully enjoying her culture and/or of practising her religion[365] because the Code had a disparate impact on certain religions and cultures. Further, learners who were granted an exemption should not be compared with those who were not as such an approach identifies only the direct effect flowing from the school's decisions and fails to address the underlying indirect impact inherent in the Code itself. Instead, the comparison should be between those learners whose sincere religious or cultural beliefs or practices are not compromised by the Code, and those whose beliefs or practices are compromised by the school's Code.

The Constitutional Court's approach in this case to comparing the impact of the discrimination on the people it affects to prove that the discrimination is unfair in the case of unlisted grounds, can also be applied in the case of insolvent debtors. It could further be argued that comparing insolvent debtors with other debtors who are not affected by discrimination based on the unlisted socio-economic status or class, only shows the direct effect flowing from the discrimination. It amounts to formal equality which fails to address the underlying indirect effect the inherent restrictions have on insolvent debtors. Instead, what should be compared are dishonest insolvent debtors, for whom the restrictions were intended, and honest debtors for whom they were not intended but who are compromised by the restrictions because of the blanket ban on all insolvent debtors.

As indicated, inequality can arise either from the differential treatment of groups that should be afforded equal treatment, or from a failure to differentiate between unequal groups. On the other hand, equality can be advanced by both similar and differential treatment depending on the context of the treatment. Therefore, applying the approach in *MEC for Education v Pillay* to insolvent debtors would be aligned to substantive equality which aims to accommodate differences rather than requiring members of

[365] *MEC for Education v Pillay* para 15.

prejudiced groups to conform to dominant norm. It is, therefore, not concerned with differentiation but with the harm that might flow from it. It would also be aligned with the pursuit of the aim of insolvency for natural persons which is to allow the honest debtor to start afresh both economically and socially.[366]

In *Affordable Medicines Trust v Minister of Health* it was held that to establish whether a person's right to choose a trade, profession, or occupation has been limited, the question is whether the law that regulates the practise of a profession, viewed objectively, negatively affects the choice of a profession.[367] As regards insolvent debtors, the question is whether a law which disqualifies an applicant employee from a particular job or office or requires an employee to vacate his or her employment or office based on his or her insolvency status has, objectively viewed, a negative impact on that employee's choice of a profession, occupation, or trade.

As is so often the case, the answer is 'it depends'. It must be established on a case-by-case basis by distinguishing honest but unfortunate debtors from dishonest debtors. This would consider the circumstances of each insolvent debtor and the balancing of rights in the Bill of Rights.

In the United States, for example, a 'means test' is used as an entry requirement into Chapter 7 liquidations under the Bankruptcy Code.[368] The means test investigates whether a debtor is attempting to abuse the bankruptcy system and disqualifies such a dishonest debtor from entering the bankruptcy process. A debtor whose case is not dismissed at the filing stage by the means test, can still be dismissed if the filing was in bad faith and if the totality of the debtor's circumstances indicate an abuse.[369] Bad faith includes circumstances where the debtor files for bankruptcy multiple times to take advantage of the automatic stay benefit which suspends foreclosure while he or she hides assets and intentionally abuses credit cards. Other instances include where the debtor has lived an extravagant lifestyle for months before the bankruptcy filing.

Further, during bankruptcy – which could be as short as three months in America – only the dishonest or fraudulent bankrupt is subjected to insolvency restrictions. Again

[366]Ch 2 paras 2.2 and 2.5.
[367] *Affordable Medicines Trust v Minister of Health* para 68. Cheadle *et al South African constitutional law* para 17.2.
[368] Ch 5 para 5.2.2.
[369] Ch 5 para 5.2.3.

based on dishonesty and misconduct, a bankrupt may be refused a discharge. As indicated in England and Wales, an adjudged bankrupt is only disqualified from being a member of the House of Parliament if he is subjected to a BRO.[370] The debtor's conduct determines whether such an order should be awarded and only the bankrupt whose conduct (dishonest and fraudulent) justifies a restriction, is subjected to all the restrictions imposed on undischarged bankrupts which applied before the Enterprise Act.

Thus, a case-by-case analysis could be established by amending the provisions in the Insolvency Act and other legislation which disqualify insolvent debtors from certain employment and offices to draw a clear distinction that the provisions apply to insolvents whose insolvency was caused by their acting fraudulently or dishonestly, or those who act dishonestly during the sequestration process.

In both voluntary surrender and compulsory sequestration proceedings, the statement of affairs that should be lodged in the Master's office is, amongst other things, required to list the causes of the debtor's insolvency.[371] Establishing the cause of the insolvency may reveal whether the insolvency was caused by the debtor's fraudulent or dishonest dealings or whether it was as a result of unfortunate financial disruptions. This has the effect of distinguishing between dishonest debtors and honest but unfortunate debtors. This provision in the Insolvency Act requiring an indication of the cause of the insolvency is a step in the right direction. Should a court grant a sequestration order, the order should include a statement that the insolvency was caused by fraudulent or dishonest activity, or it was a result of unfortunate circumstances? Further, in the case of dishonest or fraudulent behaviour, the limitations and disqualifications on the insolvent should be applied strictly.

In the case of compulsory sequestration, the petitioning application is required to indicate the act of insolvency committed by the debtor, or the facts that indicate that the debtor is in fact insolvent, or other important facts showing the debtor's conduct leading to the insolvency.[372] In 2014, for example, the estate of Mr Malema, leader of political party, the Economic Freedom Fighters, was placed under provisional sequestration by the North Gauteng Court High Court for an unpaid tax bill of R16

[370] Ch 5 para 5.3.3.
[371] Ch 3 paras 3.3.1 and 3.3.2.
[372] Ch 3 para 3.3.2.

million on application by the South African Revenue Service (SARS).[373] Although the sequestration application was withdrawn by the SARS on the return date, the affidavit supporting the compulsory sequestration application alleged that Malema's conduct was dishonest in handling his financial affairs and in dealing with the SARS.[374] Among the factors reflecting Malema's alleged dishonest conduct was his failure to submit tax returns in 2009 or to declare to SARS any 'indirect assets' such as the smallholding owned by the Ratanang Family Trust and the farm owned by Gwama Properties on which he lived.[375] Further, the Ratanang Family Trust which he failed to register for tax, received a large number of deposits which were mainly spent on Malema's personal expenses. He also offered conflicting explanations of his financial affairs when asked.[376]

While the disqualification of alleged dishonest debtors, such as Malema, from being a member of the National Assembly is justifiable as it meets the government's purpose of protecting the public against dishonest debtors and is aligned with international policy considerations,[377] it does not appear to be justifiable in the case of honest but unfortunate debtors as the disqualifications were not intended for them. As such this could also be resolved by including a similar statement to that indicated above, in the sequestration order. Further sections 55(*a*) and 58(*a*) of the Insolvency Act disqualify an insolvent from being elected or appointed as trustee of an insolvent estate, and the insolvent is required to vacate that office if his or her estate is sequestrated. The provision could be amended by including the words:

> if the insolvency was caused by acting fraudulently or dishonestly or the insolvent acted dishonestly during the sequestration process'

or

> if the insolvency was caused by the insolvent's negligence or incompetence in performing the duties of his or her position.

Such an amendment has already been recommended by the Law Reform Commission in the context of section 137(*a*) of the Insolvency Act which makes it an offence for an unrehabilitated insolvent to obtain credit above a certain amount from any person

[373] Ch 3 para 3.4.3.
[374] Ch 3 para 3.4.3.
[375] "SARS files for Malema bankruptcy" News24 https://bit.ly/3audZbY (accessed 7 October 2021).
[376] "SARS files for Malema bankruptcy" News24 https://bit.ly/3audZbY (accessed 7 October 2021).
[377] Ch 3 para 3.4.3.

during sequestration.[378] The Law Reform Commission suggested that the offence be changed to only be committed where the insolvent, despite having been expressly asked about his or her financial standing or creditworthiness, falsely concealed his or her insolvency status and as a result obtained credit exceeding R500. This has the effect of distinguishing the dishonest insolvent from the honest but unfortunate insolvent and deals with each case individually so that only the dishonest may be restricted.

As per the Law Reform Commission's recommendation, the consent required by section 23(3) of the Insolvency Act for an insolvent to follow any profession or occupation or to enter into any employment during the sequestration of his or her estate, should be removed to allow for the various industries to set their own rules for insolvent debtors in their industry.[379] However, in making their own rules the industries should only disqualify an unrehabilitated insolvent if his or her insolvency was caused by his or her negligence or incompetence in performing the work of the relevant profession.

Although a few other Acts, such as the Planning Profession Act,[380] Natural Scientific Professions Act,[381] and the Property Valuers Profession Act,[382] already distinguish between the dishonest and honest but unfortunate debtors.[383] These laws only disqualify an unrehabilitated insolvent if his or her insolvency was caused by his or her negligence or incompetence in performing the work of the relevant profession.[384] This could also be extended to other legislation regulating other professions where the unrehabilitated insolvents are disqualified while other debtors are not.[385] As with the recommendation for section 137(*a*) above, this would have the effect of distinguishing the dishonest insolvent from the honest but unfortunate insolvent and deals with each case individually so that only the dishonest would be restricted.

[378] Ch 3 para 3.8.3.
[379] Ch 3 para 3.8.2.
[380] See ss 13(1) and 13(7) of the Planning Profession Act 36 of 2002.
[381] Section 20(4)(*a*)(v) of the Natural Scientific Professions Act 27 of 2003.
[382] Sections 19(1)(*a*) and 20(4)(*a*)(vi) of the Property Valuers Profession Act 47 of 2000.
[383] Ch 3 para 3.4.3.
[384] See Ch 3 para 3.4.3.
[385] Ch 3 para 3.4.3 discusses these professions and the relevant legislation.

As indicated in *Griggs v Duke Power Co*, where the controlling factor is the qualifications, factors such as race, religion, nationality, and sex become irrelevant.[386] Similarly, where the insolvent is competent for the job, other factors such as his or her insolvency that is not caused by negligence or incompetence in performing the work of the relevant profession, are not controlling factors and should be irrelevant. In this regard, the legal profession is already a step ahead. For example, the Legal Practice Act[387] provides for the appointment of a *curator bonis* to control and administer the trust account of a legal practitioner, with any rights, powers, and functions as the court may deem fit, if the legal practitioner becomes insolvent. Therefore, the status of being insolvent does not disqualify a legal practitioner from practising as a legal practitioner or remove him or her from the Roll of legal practitioners. Instead, a legal practitioner is allowed to continue practising and earning a living despite not having control of his or her trust account.[388] The provision serves two purposes: it protect public interests by placing the trust account under the control of a curator; and it protects the livelihood of the insolvent legal practitioner so that he or she does not become a burden on the state. This also aligns with the international policy consideration of allowing an insolvent to continue as an economically productive person. Further, it is aligned with insolvent persons' constitutional right in section 22 to choose their trade, occupation, and profession freely.

A similar amendment could also be effected in other legislation regulating certain industries where the insolvent is still competent for the job and his or her insolvency is not a controlling factor. In instances where the sequestration of a debtor's estate was caused by his or her dishonest activities, and to distinguish between dishonest and honest but unfortunate debtors, a provision similar to section 22(1)(*e*) of the Attorneys Act[389] could also be adopted by certain industries. The Attorneys Act provided for the removal of admitted attorneys from the Roll of practising attorneys if they were no longer 'fit and proper' persons to practise law. This applied if an admitted attorney became insolvent and was unable to satisfy a court that despite his or her sequestration, he or she was still a fit and proper person to continue practising as an

[386] *Griggs v Duke Power Co* para 21.
[387] Section 90(1)(*b*) of the Legal Practice Act.
[388] Section 89 of the Legal Practice Act.
[389] Attorneys Act 53 of 1979 (Attorneys Act). The Attorney's Act was repealed by s 119 of the Legal Practice Act.

attorney. [390] This will allow only the dishonest debtor to be subjected to the harsh disqualification from the relevant employment sector.

Further, the period that has to pass before automatic rehabilitation could be reduced from ten years to one or three years and early rehabilitation could be refused to insolvents who acted fraudulently or honestly.[391] The restrictions that apply to insolvents after rehabilitation could also be reserved for those for whom the restrictions were intended – dishonest debtors. These amendments to the Insolvency Act and other legislation would not only be aligned with constitutional values but also with international trends.

In circumstances where an insolvent is disqualified from acting as a member of a board or from registering as a credit provider, for instance, where a specific qualification is not required and the insolvent is also employed elsewhere, the insolvent would not have known at that time of choosing a profession that one day he or she would wish to be a member of a board or register as a credit provider. That would be the case where an insolvent is disqualified from being a member of the governing board of the National Credit Regulator or registering as a credit provider. Thus, in that regard regulating entry into that board would not have negatively affected the insolvent's choice of profession as the insolvent could be disqualified or removed from membership of a board or from registering as a credit provider but he or she could continue working in that industry in another capacity.

However, where an insolvent is a member of parliament or holds another similar public office, removing that person from that office based on his or her insolvency status alone without conducting an individual-specific investigation into what led to the insolvency, would negatively affect that person. This is because that office may be his or her only source of income and, because it is a public office, removal based on insolvency status would result in public humiliation. Further, if the insolvency was the result of factors beyond his or her control, it would be based on a generalised stereotype of insolvent debtors which attributes to all insolvent debtors characteristics that some individuals do not possess. Such generalisations may be unjustified for honest debtors.

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[390] Section 22(1)(*e*) of the Attorneys Act.
[391] Ch 3 para 3.8.4.

It may be argued that an insolvent who holds public office may easily be tempted into corruption but that can also be said of other debtors who are overindebted. For other overindebted debtors the pressure may be even greater in light of the knowledge that if declared insolvent they would lose their jobs. However, because they are not declared insolvents they are allowed to continue holding their public offices despite the possible temptation to abuse public funds. This is not the same for unrehabilitated insolvents.

Another instance where, objectively viewed, the regulation of a trade negatively affects the choice of occupation is where an insolvent has been disqualified from being employed in the business of a trader who is a general dealer or manufacturer, without the consent of his or her trustee.[392] As indicated, the limitation on the insolvent's right to be employed in such trade is aimed at protecting the general public, and in particular the creditors and people having dealings with such traders.[393]

However, the limitation applies to an insolvent even if there are no chances of his or her inflicting harm that will constitute a real danger to the general public, as in the case of a shop assistant or a clerk in a large department store.[394] This type of disqualification negatively affects the insolvent whose level of qualification makes it difficult to find employment, or one who may have been laid off work due to the country's COVID-19 lockdown regulations and so joins the ever-growing ranks of the unemployed.[395]

In *Minister of Home Affairs v Watchenuka,* Nugent JA stated that where employment is the only reasonable means for the person's support, the issue is not merely a restriction upon the person's capacity for self-fulfilment, but a restriction upon his or her ability to live without positive humiliation and degradation. While this case involved refugees, the statement is also true of an insolvent for who working as a clerk or an assistant in a large department store was his or her only job and who has no other means of support. As Navsa ADP indicated in *Somalia Association of South Africa v Limpopo*, the constitutional right to dignity is affected when persons have no other means of supporting themselves and are left destitute.[396] Therefore, discriminating against insolvent debtors based on their socio-economic status without first looking at

[392] Section 23 of the Insolvency Act.
[393] Smith *The law of insolvency* 104.
[394] Smith *The law of insolvency* 104; Sharrock *Insolvency* para 251.
[395] Stats SA "Statistical Release" June 2020.
[396] *Somalia Association of South Africa v Limpopo* para 43.

the individual circumstances of each insolvent is based on generalisations about all insolvent debtors which impact negatively and detrimentally on their fundamental human dignity and which, it is submitted, amounts to unfair discrimination.

The final stage of the enquiry is whether, if unfair discrimination is shown, it can be justified in terms of section 36 of the Constitution? In this regard, the question is whether insolvent debtors' rights to equality; against unfair discrimination; to human dignity; the free choice of an occupation, profession, or trade; income; and basic necessities of life, have been limited by law of general application and can be justified in an open and democratic society based on human dignity, equality, and freedom.

As indicated, the factors to be considered include the importance and purpose of the limitation, the relation between the limitation and its purpose, and whether there are less restrictive means available to achieve that purpose. It has been established that the disqualifying unrehabilitated insolvents from certain employment and offices serve the important purpose of protecting the public against the reckless behavior of fraudulent debtors. It has also been established that the purpose is only directed at insolvent debtors who caused their insolvency through their fraudulent or reckless behaviour.

However, the importance and the purpose of the limitations must be questioned as regards certain industries and certain insolvent debtors. This is because the purpose itself is based on generalised assumptions about debtors who fall within the category of unrehabilitated insolvent debtors. The generalisations that inform this purpose attribute dishonesty as a characteristic to all insolvent debtors – even those who do not show that characteristic, or who can show that their insolvency was the result of factors beyond their control and that past behavior points to their indeed being trustworthy and honest.

As the limitations do not separate the honest from the dishonest debtor so as to restrict their effect only to the dishonest, the question is whether the limitation serves the purpose envisaged? It appears that the blanket ban imposed by the limitations on all unrehabilitated insolvents does not always do so and it is not always justified. This is based on the Act’s failure to distinguish where differences necessitate differential

treatment if equality is to be achieved.[397] Instead, the limitations distinguish where it is not necessary. This is the case between insolvent debtors and other debtors – eg, those under debt review, administration, or who have entered into arrangements and compromise agreements with their creditors – all of whom fall under the category of over-indebted debtors unable to pay their debts. As shown in the cases discussed, the Constitutional Court is opposed to unjustified blanket bans or prohibitions and rather favour a case-by-case investigation to ensure principled differentiation. Further, while the law is concerned with protecting the public, especially creditors and people having dealings with the insolvent, the law is also concerned with the dignity of debtors which is linked to their right to life, work, and trade and to the basic necessities of life.

Therefore, even though the purpose of the limitations placed on insolvent debtors is important, as regards certain industries where the insolvency status is not a controlling factor and as regards honest but unfortunate debtors for whom the limitations were not intended, a less restrictive way to achieve the intended purpose would be to treat each insolvent debtor individually by distinguishing between the different classes of insolvent debtors. This would avoid unjustified limitations on insolvents' right to equality, human dignity, income, basic necessities, and the right to choose their profession, occupation, and trade freely.

4.6 Conclusion

This chapter has discussed whether unrehabilitated insolvents are currently discriminated against on the basis of their insolvent status. This question was addressed in light of the prohibition against unfair discrimination in the Bill of Rights and the rights to equality, human dignity, and to choose a profession, occupation, to trade freely, and the right to income and basic necessities.

A distinction was drawn between ‘mere differentiation’ and ‘unfair discrimination’. Alternative arguments on behalf of the honest but unfortunate insolvents were raised regarding mere differentiation where a rationality standard is used under section 9(1) of the Constitution, and the prohibition of unfair discrimination under section 9(3) of the Constitution. The arguments relied on the infringement of insolvent debtors’

[397] Loenen (1997) *SAJHR* 404.

constitutional rights based on the unlisted or analogous ground of insolvency, socio-economic status or class.

As regards the argument that the differentiation between insolvent debtors and other debtors and the failure to distinguish between dishonest and honest but unfortunate debtors amounts to 'mere differentiation', it was established that there is no legitimate government purpose for disqualifying honest but unfortunate debtors from certain forms of employment and offices. The disqualifications are based on an incorrect assumption which if strictly applied results in negative consequences for the honest but unfortunate debtor. It was shown that a legitimate government purpose for disqualifying debtors exists only for dishonest insolvent debtors. Further, the Insolvency Act's failure to distinguish between honest but unfortunate debtors and dishonest debtors is over-inclusive in that for honest but unfortunate debtors (clerks, sales assistants, a person with limited qualifications), where there is no real risk of dishonestly in the workplace or danger to the public, their right to practise in the trade of general dealer or manufacturer are being violated. Thus, the inclusion of honest but unfortunate debtors with dishonest debtors is irrational in that it is not linked to the governmental purpose of protecting the public from dishonest insolvents and is constitutionally impermissible.

As regards the argument that the differentiation between insolvent and other debtors and the failure to distinguish between dishonest and honest but unfortunate debtors amounts to unfair discrimination on the unlisted or analogous ground of socio-economic status or class, it was established that such unfair discrimination is unjustified when it comes to honest but unfortunate debtors – it does not always serve the envisaged purpose.

It was shown that the purpose of the limitations placed on insolvent debtors are to protect the public against fraudulent and reckless debtors and that this is an important purpose. However, it was informed by the legislature's generalisation, and the assumption that all insolvent debtors are dishonest is not always correct. As a result of this assumption or stereotyping, the characteristic of dishonesty has been attributed to all insolvent debtors, even those who do not display that characteristic or can show that their insolvency was caused by factors beyond their control and that they are in

fact trustworthy and honest. This means that substantive equality has not been realised.

In virtually all the cases discussed in this chapter, the courts have preferred a case-by-case investigation into the circumstances of the individual debtor over a blanket prohibition which amounts to indirect unfair discrimination and negatively affects those it was not intended to affect. Further, that the Act aims at protecting the public, and more specifically creditors and those having dealings with the insolvent. However, the law is also concerned with the dignity of debtors which is linked to their right to life, to work, to trade, and to the basic necessities of life. It was consequently found that although the purpose of the limitations imposed on insolvent debtors serves an important purpose, as regards certain industries where the insolvency status is not a controlling factor, and as regards honest debtors for whom the limitations were not intended, a less restrictive way to achieve the intended purpose would be to treat each insolvent debtor individually by distinguishing honest but unfortunate debtors from dishonest debtors. This would avoid unjustified limitations on insolvents' rights to equality, human dignity, and freely to choose their profession, occupation, and trade.

CHAPTER 5: INSOLVENCY RESTRICTIONS AND DISQUALIFICATIONS IN AMERICA, ENGLAND AND WALES, AND NIGERIA

CHAPTER OVERVIEW

5.1 Introduction

This chapter outlines the principles governing restrictions and disqualifications on insolvents in the American system, the UK insolvency system, and developments in the Nigerian system. Further, it analyses and compares the trends in these jurisdictions with their South African counterparts where it is relevant to do so.

As the American and the UK bankruptcy systems already distinguish between 'honest but unfortunate debtors' and 'dishonest debtors', a study of their bankruptcy system is beneficial in finding a solution for debtors who became insolvent because of misfortune and whose ability to earn a living has been limited by the restrictions imposed on unrehabilitated insolvents in South Africa. While the Nigerian bankruptcy system is still developing, it will also be beneficial because its Bankruptcy Act,[1] like South African insolvency legislation, imposes many restrictions on unrehabilitated insolvents. However, if their pending Bankruptcy and Insolvency Bill[2] becomes law, many of the disqualifications will be removed.

[1] Section 126 of the Bankruptcy Act Ch 30 Laws of the Federation of Nigeria 1990 as amended by the Bankruptcy (Amendment) Decree 109 of 1992. This amendment gave rise to the Nigerian Bankruptcy Act Cap B2 Laws of the Federation of Nigeria 2004 (the BA).
[2] Bankruptcy and Insolvency Bill of 2016 (Nigerian Bankruptcy Bill or Bill).

As did Chapter 3, this chapter discusses the impediments faced by bankrupt debtors before bankruptcy, during bankruptcy, and after bankruptcy in all three jurisdictions. As regards the impediments before the bankruptcy process commences, the entry requirements into the bankruptcy processes in each jurisdiction are discussed to establish what disqualifies a debtor from accessing the process and from eventually receiving a discharge on rehabilitation.

The impediments during the bankruptcy process concern the restrictions imposed on bankrupts because of their bankruptcy status during the process. Thus, this discussion will include the legal position of the bankrupt during bankruptcy. This is discussed for each jurisdiction if any exists. Lastly, the impediments faced by bankrupts after discharge stem from the restrictions faced by rehabilitated bankrupts solely for being discharged bankrupts which includes the legal position of former bankrupts after discharge. The requirement for discharge and restrictions can only be understood against the background of the various procedures and payment plans provided by the various systems. This discussion further includes how the discharge of unpaid debts works to the extent that such measures apply.

5.2 The United States of America

5.2.1 General background

The Bankruptcy Code[3] provides for different types of bankruptcies which are referred to according to the Chapter in which they occur in the Code.[4] As this thesis addresses the restrictions imposed on individual debtors, an overview of the American bankruptcy procedures for individuals in Chapters 7, 11, and 13 are important and are discussed.

The liquidation of the estate of an individual debtor can take place in terms of Chapter 7's asset liquidation. Like the sequestration process, Chapter 7 allows for the orderly and equitable distribution of the debtor's assets amongst his or her creditors. Thus, the trustee collects and sells the debtor's non-exempt assets and uses the proceeds to pay creditors as provided in the Bankruptcy Code.[5] Like the sequestration process,

[3] Bankruptcy Reform Act of 1978 (Bankruptcy Code or Code).
[4] Chapter 9 allows municipalities to reorganise. Businesses may file for bankruptcy to liquidate under Chapters 7 and to reorganise under Chapters 11 and 13. Chapter 12 provides debt relief to family members and fishermen and Chapter 15 allows parties from more than one country to file for bankruptcy.
[5] See ss 704(a) and 726 of the Bankruptcy Code.

the debtor is allowed to keep certain exempt property and the trustee is allowed to liquidate the debtor's remaining assets. However, under Chapter 7 individual debtors obtain a discharge, releasing their liability from certain dischargeable debts a few months after filing a bankruptcy petition.[6] Filing a bankruptcy petition under Chapter 7 automatically stays most collection actions against the debtor or the debtor's property including lawsuits and wage garnishments.[7]

If an individual debtor has a regular income he or she may seek an adjustment of debts under Chapter 13.[8] Chapter 13 allows a debtor to keep a valuable asset by entering into a payment plan over a three to five year period[9] and a discharge is only granted after the completion of the payment plan.[10] While a debtor under Chapter 13 does not obtain an immediate discharge, this procedure allows for more debts to be discharged than Chapter 7.[11] As with Chapter 7, during the Chapter 13 process the debtor is protected from lawsuits, garnishments, and other actions that could be initiated by creditors.[12] Chapter 13 is preferred by debtors who do not qualify for Chapter 7 liquidation.[13] Chapter 13 is somewhat similar to the South African debt review procedure under the NCA which also allows debtors to retain their assets but rearranges their debts in a payment plan.[14] However, in principle debt review aims to assist over-indebted debtors eventually to settle their debts in full. It applies only to credit agreements as regulated by the NCA and does not provide a discharge or end a creditor's claim against the debtor. Instead, it postpones the execution which occurs if the debtor does not keep to the agreement.[15] The creditors of a person under debt

[6] Rule 4004(c) of the Federal Rules of Bankruptcy Procedure.
[7] Section 362 of the Bankruptcy Code.
[8] Ferriell and Janger *Understanding bankruptcy* 171.
[9] Section 1322(d) of the Bankruptcy Code; Ferriell and Janger *Understanding bankruptcy* 645.
[10] Section 1328 of the Bankruptcy Code.
[11] Debts dischargeable in Chapter 13 but not in Chapter 7 include debts for wilful and malicious injury to property (as opposed to a person), debts incurred to pay non-dischargeable tax obligations, and debts arising from property settlements in divorce or separation proceedings. See s 1328(a) of the Bankruptcy Code.
[12] Section 362 of the Bankruptcy Code.
[13] These are debtors who could not comply with the means test. See s 707(b)(1) of the Bankruptcy Code. In South Africa, overindebted debtors disqualified from the sequestration procedure or who want to avoid sequestration may make use of the debt review procedure in terms of s 86 of the National Credit Act 34 of 2005 (NCA), administration orders in term of s 74 of the Magistrates' Courts Act 32 of 1944 (MCA), or enter into voluntary arrangements or composition agreements with their creditors. However, of the three options, only the common-law composition allows for a discharge if the creditors agree, but it requires the consent of all creditors which may be difficult to secure. See Ch 3 para 3.2
[14] Ch 3 para 3.2.
[15] Ch 3 para 3.2.

review are also not per se precluded from applying for compulsory sequestration of the debtor's estate while he or she is under debt review.[16] Similarly, the creditors of a person under administration in terms of the MCA are also not per se precluded from applying for compulsory sequestration of the debtor's estate while he or she is under administration.

If an individual debtor is involved in business – eg, a partnership or a sole proprietorship – and would like to remain in business but avoid liquidation, he or she may also seek an adjustment of debts under Chapter 11. This Chapter allows for a period of consolidation by adjusting debts to allow for reduced debts or extended periods of repayment. Filing a Chapter 11 petition also automatically stays certain of a creditor's actions against the debtor or his or her property.[17] However, the stay under Chapter 11 only allows a breathing-space during negotiations to resolve the difficulties in the debtor's financial situation[18] as some creditors can request an order to relieve them from the automatic stay.[19] As with Chapter 13, a discharge in Chapter 11 is only received after the payment of all debts under the plan,[20] after which the plan will be confirmed.[21] As with Chapter 13, Chapter 11 is preferred by debtors other than corporations (who may also qualify to use Chapter 11) who are not eligible for the Chapter 7 relief as they do not qualify under the means test.[22] Thus, Chapters 11 and 13 are alternatives to the asset liquidation process in Chapter 7.[23]

The Bankruptcy Code allows for voluntary and involuntary filing of bankruptcy petitions. A voluntary petition is filed by the debtor him- or herself and it is considered to be an immediate order of relief.[24] An involuntary petition is filed by the debtor's creditors without the debtor's consent.[25] An involuntary filing allows creditors to compel the debtor to deal with his or her creditors as a group while the debtor still has sufficient assets to make meaningful payments.[26] A bankruptcy case commences when a

[16] Ch 3 para 3.2.
[17] Section 362(a) of the Bankruptcy Code.
[18] Secrion 362(b) of the Bankruptcy Code.
[19] Section 362(d) of the Bankruptcy Code.
[20] Section 1141(d)(5) of the Bankruptcy Code.
[21] Section 1141(d)(1) of the Bankruptcy Code.
[22] See Ferriell and Janger *Understanding bankruptcy* 166.
[23] See Ferriell and Janger *Understanding bankruptcy* 166 and 645.
[24] Section 301 of the Code; Ferriell and Janger *Understanding bankruptcy* 159.
[25] Section 303(b) of the Bankruptcy Code; Ferriell and Janger *Understanding bankruptcy* 182.
[26] Ferriell and Janger *Understanding bankruptcy* 182.

petition is filed with the bankruptcy court.[27] This may be done by a debtor individually, by spouses together,[28] or by a corporation or other entity.[29] The Code allows Chapters 12 and 13 to be filed voluntarily,[30] while Chapters 7 and 11 can be filed both voluntarily and involuntarily.[31] As indicated, Chapter 12, dealing with debt relief for family members and fishermen is not addressed in this thesis.

Accompanying the petition, a petitioner must pay a filing fee.[32] A debtor's petition must also be accompanied, amongst other documents, by a statement of his or her affairs reflecting his or her financial history,[33] a certificate confirming that he or she has received pre-bankruptcy credit counselling,[34] and a copy of any debt repayment plan developed during the debtor's credit counselling briefing.[35] In addition, a debtor must file a schedule of exempt property,[36] evidence of payment from employers,[37] a statement of his or her net monthly income,[38] and any anticipated increase in income or expenses after filing.[39] These documents are required to ensure that the debtor complies with the Bankruptcy Code and to identify any abuse of the Code.[40] In South Africa, the applicant debtor in voluntary surrender and the applicant creditor in compulsory sequestration are not required to pay a filing fee, but an applicant creditor in compulsory sequestration is required to deposit an amount as security to cover the cost of sequestration and administration of the estate until a trustee is appointed.[41] Further, in South Africa the legal practitioner's fee, which is generally in the region of R20 000, is paid from the costs of sequestration.

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[27] Ferriell and Janger *Understanding bankruptcy* 155.
[28] Section 302(a) of the Bankruptcy Code.
[29] Sections 301 and 303 of the Bankruptcy Code.
[30] Section 301(a) of the Bankruptcy Code.
[31] Section 303(a) of the Bankruptcy Code; Ferriell and Janger *Understanding bankruptcy* 161 and 183.
[32] Section 1930(a) of the Bankruptcy Code. The filing fee is required for bankruptcies filed under Chapters 7, 9, 11, 12 and 13.
[33] Section 521(a)(1) of the Bankruptcy Code. This statement must contain a list of his or her creditors, property, executory contracts, co-debtors, income, and expenditure. Ferriell and Janger *Understanding bankruptcy* 171.
[34] Section 521(b) of the Bankruptcy Code.
[35] Section 521(b)((2) of the Bankruptcy Code.
[36] See ss 521(2)(A) and 522(L) of the Bankruptcy Code.
[37] Section 522 of the Bankruptcy Code.
[38] Section 521(a)(1)(B)(v) of the Bankruptcy Code.
[39] Section 521(a)(1)(B)(vi) of the Bankruptcy Code. This requirement applies to Chapter 13 cases.
[40] Ferriell and Janger *Understanding bankruptcy* 172.
[41] Ch 3 para 3.3.2.

In South Africa too, the applicant debtor in voluntary surrender applications is required to lodge a statement of his or her affairs with the Master's Office.[42] This statement must also indicate a list of the debtor's assets, debtors, creditors, and movable assets together with security. What is interesting is that the statement must also indicate the causes of the debtor's insolvency which may assist in identifying and distinguishing which debtors acted fraudulently or dishonestly before the insolvency, and which debtor's insolvency was a result of unfortunate circumstances.[43] Thus, the investigation into the causes of the insolvency will reveal and distinguish between the dishonest and the honest but unfortunate debtors. However, despite this knowledge, the distinction made between the honest and the dishonest debtors is not acknowledged which would allow honest but unfortunate debtors be treated differently. Thus, despite this knowledge at the application stage of the sequestration, all insolvent debtors are treated equally as regards disqualifications which were only intended for dishonest and fraudulent debtors.[44]

Immediately on filing a bankruptcy petition an estate is created.[45] In Chapter 7 cases the estate consists of all the debtor's legal or equitable interests in property as at the commencement of the case,[46] and any interest in property which the estate acquires after the commencement of the case.[47] Therefore, all of the debtor's property goes into the estate, including exempt and non-exempt property.[48] It is then divided between the creditors and the debtor. Only at the division stage is ownership of exempt property returned to the debtor.[49]

Income that a bankrupt debtor acquires after the commencement of bankruptcy for services rendered after filing under Chapter 7, is excluded from the estate and may not be used by the bankruptcy trustee to pay creditors' claims.[50] This is aligned with the Bankruptcy Code's policy of providing a fresh-start policy because including a bankrupt's post-petition earnings would nullify the debtor's earning capacity[51] and

[42] Ch 3 para 3.3.1.
[43] Ch 3 para 3.3.1.
[44] Ch 3 paras 3.3.1 and 3.6
[45] Section 541(a) of the Bankruptcy Code; Ferriell and Janger *Understanding bankruptcy* 197.
[46] Section 541(a)(1) of the Bankruptcy Code.
[47] Section 541(a)(7) of the Bankruptcy Code.
[48] Ferriell and Janger *Understanding bankruptcy* 198.
[49] Ferriell and Janger *Understanding bankruptcy* 198.
[50] Section 541(a)(6) of the Bankruptcy Code.
[51] Noel *A history of the bankruptcy law* 187.

future income.[52] Such a debtor would lose his or her motivation to work to earn a living and to acquire property as whatever money he or she may make would go to his or her creditors.[53] This would be contrary to the goal of economic rehabilitation which is at the centre of the fresh-start policy[54] as it would make the debtor a virtual indentured servant.[55] However, if the earnings received after filing a petition are for services rendered before the petition, they will form part of the estate and will be available for distribution in his or her bankruptcy estate, although a substantial portion of the earnings will be exempt in terms of section 522(b) of the Bankruptcy Code.[56]

Like the Bankruptcy Code, the Insolvency Act exempts or excludes the remuneration or reward for work done or for professional services rendered by the insolvent or on his or her behalf after sequestration.[57] As in America, this exemption or exclusion is aimed at ensuring that the insolvent and his or her family are not deprived of their dignity and basic life necessities and to ensure that they can start afresh financially.[58] In *Ex parte Van Dyk*,[59] the court elaborated further that the protection of the income of the insolvent cannot be waived by the debtor as such a waiver would infringe a debtor's right to human dignity and income, and the right to work is at the centre of that right as it affects basic necessities such as food.[60] Further, should the insolvent and his or her family need the income in the future, it could lead to constitutional challenges. South Africa's premise for protecting the income of the insolvent and the decision of the court in *Ex parte Van Dyk* are aligned with the Bankruptcy Code's fresh-start policy.

However, section 23(5) of the Insolvency Act allows the trustee to claim any sums of money received or to be received by the insolvent for work done after sequestration if the Master considers that they are not required to support the insolvent and his or her dependants.[61] While the insolvent may have excess income which the Master may feel the insolvent does not need to support him- or herself and his or her dependants, as per *Ex parte Van Dyk,* constitutional challenges may arise should the insolvent and

[52] Baird *Elements of bankruptcy* 33.
[53] Kilborn (2003) *Ohio State LJ* 877.
[54] Ch 2 para 2.2.2.
[55] Ferriell and Janger *Understanding bankruptcy* 201.
[56] Ferriell and Janger *Understanding bankruptcy* 202.
[57] Ch 3 para 3.3.3.
[58] Ch 3 para 3.3.3.
[59] *Ex parte Van Dyk* (1869/2015) [2015] ZAGPPHC 154 (26 March 2015) (*Ex parte Van Dyk*).
[60] See Ch 3 para 3.3.3.
[61] Ch 3 para 3.3.3.

his or her dependants need the excess income in the future.[62] This is especially because in South Africa an insolvent is automatically rehabilitated by effluxion of time only after ten years and during that period financial changes may occur. Makhubele AJ in *Ex parte Van Dyk,* even stated that the Master may have to consider whether the undertaking to make monetary contributions to the insolvent estate overrides the applicant's rights and obligations to provide for him- or herself and his or her family. As regards section 23(5), the Insolvency Act is contrary to the American fresh-start policy which, amongst other things, protects income that the bankrupt receives for services rendered after bankruptcy.

An interim trustee is appointed in a voluntary Chapter 7 liquidation case.[63] The interim trustee takes control of the estate's property and conducts the estate's financial affairs.[64] If all the debtor's assets are exempt or are subject to security interests and mortgages, a 'no asset' report is filed by the trustee, and unsecured creditors will not be required to file proof of claims as there will be no distribution of assets.[65] However, if the trustee later recovers assets, the creditors will be notified and given additional time to file proof of claims.[66] On the other hand, if from the onset there are assets, unsecured creditors must file their claims with the court within 90 days after the first date set for the meeting of creditors.[67]

In most Chapter 11 cases the debtor remains in possession of the estate as a 'debtor in possession' and no trustee is appointed.[68] In Chapter 13 cases the debtor also remains in possession of the estate, but gives a portion of his or her post-petition income to the standing trustee[69] for distribution to his or her creditors as per the plan.[70] Thus, in Chapter 13 cases the income that the debtor earns during the process is

[62] Ch 3 para 3.3.3.
[63] See s 701(a) of the Bankruptcy Code; Ferriell and Janger *Understanding bankruptcy* 197.
[64] See s 704(a) of the Bankruptcy Code; Ferriell and Janger *Understanding bankruptcy* 197.
[65] Ferriell and Janger *Understanding bankruptcy* 313*,* 635.
[66] Ferriell and Janger *Understanding bankruptcy* 314.
[67] Rule 3002(c) of the Federal Rules of Bankruptcy Procedure; Ferriell and Janger *Understanding bankruptcy* 314.
[68] Ferriell and Janger *Understanding bankruptcy* 198.
[69] The standing trustee supervises all Ch 13 cases in a district. In particular he supervises the debtor to appear and be heard on questions of valuations, confirmations, and modification to ensure that he or she begins making payments in a timely fashion and to disburse payments to creditors under the plan. See ss 1302(a) and 1302(b)(1) of the Bankruptcy Code.
[70] Sections 1306(b) and 1322(a) of the Bankruptcy Code; Ferriell and Janger *Understanding bankruptcy* 197.

included in the estate.[71] While the trustee aims to collect and distribute the assets of the debtor among his or her creditors in a Chapter 7 case, in the distribution of the estate[72] the debtor is not concerned with the disposition of the estate assets. He or she is only concerned with those debts which are not dischargeable in the bankruptcy case, and with retaining exempt property and receiving a discharge that covers as many debts as possible. Thus, the main difference between Chapter 7 cases (liquidation) and Chapters 11 and 13 cases (reorganisation or rehabilitation) is that in Chapter 7 debtors surrender all their property in exchange for discharge,[73] whereas in reorganisation cases, debtors generally retain their property and make payments to creditors from future income under a court-approved repayment plan.[74]

5.2.2 Restrictions and prohibitions on bankrupt debtors before bankruptcy: Entry requirements

5.2.2.1 Voluntary Filling

As indicated, voluntary petitions may be filed for Chapters 7,11, and 13. The eligibility requirements for filing a voluntary Chapter 11 case are the same as those for filing a Chapter 7 case, save for who may file and the means-test requirement. Any individual, including partnerships and corporations, but excluding railroads, domestic insurance companies, foreign insurance companies, and foreign banks, may file a voluntary petition under Chapter 7.[75] However, in Chapter 11 cases, stockbrokers and commodity brokers are ineligible but railroads are eligible.[76]

An eligible individual in Chapter 7 will be subjected to the 'means test' if his or her current monthly income exceeds the estate median for establishing whether the filing is presumptively abusive.[77] In other words, Chapter 7 cases filed by debtors who have the financial means to make meaningful payments to their unsecured creditors, will be dismissed.[78] In this regard, the court may dismiss a case filed by a debtor with consumer debts under Chapter 7, or may convert it to a Chapter 11 or 13 case if it

[71] Section 1306(a) of the Bankruptcy Code.
[72] Section 726 of the Bankruptcy Code.
[73] Ferriell and Janger *Understanding bankruptcy* 607.
[74] Ferriell and Janger *Understanding bankruptcy* 607.
[75] Section 109(b) of the Bankruptcy Code. Ferriell and Janger *Understanding bankruptcy* 165.
[76] Section 109(d) of the Bankruptcy Code. Ferriell and Janger *Understanding bankruptcy* 166.
[77] Section 707(b) of the Bankruptcy Code.
[78] Ferriell and Janger *Understanding bankruptcy* 611.

finds that the granting of relief under Chapter 7 would be an abuse of the provisions of the Chapter.[79]

Chapter 7 presumes that there is an abuse of process if the debtor's aggregate current monthly income over a five-year period, net of certain statutorily allowed expenses, is more than $12,850 or 25% of the debtor's non-priority unsecured debt provided that that amount is at least $7,700.[80] Therefore, if a debtor's household income is below the threshold, there is no presumption of abuse of Chapter 7.[81] However, if it is above the threshold, abuse will be presumed.[82]

The presumption of abuse may only be rebutted if the debtor can show special circumstances that justify additional expenses or adjustments to his or her current monthly income,[83] failing which the case will be converted to Chapter 13 or be dismissed. A debtor who is disqualified from Chapter 7 by the means-test because his or her income is too high and whose debts exceed the limits of Chapter 13, may be required to file under Chapter 11.[84] In South Africa, the advantage-to-creditors requirement determines a debtor's access to the sequestration procedure, in that if an advantage to creditors is not shown a sequestration order will not be granted.[85] The means-test requirement is similar to the advantage requirement in that if a debtor's aggregate current monthly income is above the threshold, the Chapter 7 relief may not be used. Perhaps the thinking was that if you earn a certain amount a repayment plan would be the better option for creditors.

However, the South African advantage requirement does not test the possible abuse of the sequestration process as the motive for making the application.[86] The advantage requirement tests whether sequestrating the debtor's estate will benefit creditors. However, in voluntary surrender applications the advantage requirement is sometimes the cause of the abuse of process because if the applicant debtor cannot prove an advantage, a sequestration order is not granted.[87] Thus, debtors attempting to comply

[79] Section 707(b)(2) of the Bankruptcy Code.
[80] Section 707(b)(2)A(i) of the Bankruptcy Code.
[81] Ferriell and Janger *Understanding bankruptcy* 165. Wedoff (2006) *Missouri Law Review* 1046.
[82] Ferriell and Janger *Understanding bankruptcy* 165.
[83] Section 707(b)(2)B(iv) of the Bankruptcy Code. Ferriell and Janger *Understanding bankruptcy* 625.
[84] Ferriell and Janger *Understanding bankruptcy* 166.
[85] Ch 3 para 3.3.1.
[86] Ch 3 para 3.3.1.
[87] Ch 3 para 3.3.1.

with the requirement abuse the process in their efforts by inflating asset values. Unfortunately, the advantage requirement not only prevents fraudulent or dishonest debtors from accessing the sequestration process, but also has this effect for honest but unfortunate debtors who have good intentions.[88]

An individual is also disqualified from filing a petition under Chapter 7 and other chapters if during the 180 days preceding a bankruptcy petition, a petition was dismissed due to the debtor's wilful failure to appear before the court.[89] Further, if a petition has been dismissed for failure to comply with the orders of the court, or the debtor voluntarily dismissed the previous case after creditors sought relief from the bankruptcy court to recover property upon which they hold liens.[90] South African insolvency law does not have a similar provision regarding the dismissal of a voluntary surrender application by the court. However, the court can rescind or set aside a sequestration order if it was awarded incorrectly, fraudulently, or certain events necessitate rescission, especially if there has been an abuse of process.[91] Furthermore, it becomes an act of insolvency if having published a notice of surrender of his or her estate which has not lapsed or been withdrawn, a debtor fails to submit an application on the appointed day and the notice has not been properly withdrawn.[92]

Another requirement that must be met under Chapter 7 and other chapters, is that a debtor must have received credit counselling from an approved credit counselling agency.[93] Such credit counselling must have been received 180 days before the bankruptcy filing.[94] South African insolvency law does not have a similar provision.

As regards Chapter 13, a petition may only be filed by an individual debtor alone or together with his or her spouse.[95] Corporations, partnerships, stockbrokers, and commodity brokers are ineligible.[96] In South Africa, an application for voluntary

[88] Ch 3 para 3.3.1.
[89] Sections 109(g), 362(d) and (e) of the Bankruptcy Code.
[90] Sections109(g), 362(d) and (e) of the Bankruptcy Code.
[91] Ch 3 para 3.3.1.
[92] Ch 3 para 3.3.1.
[93] Sections 109(h) and 111 of the Bankruptcy Code.
[94] Sections 109(h) and 111 of the Bankruptcy Code. There are exceptions in emergency situations or where the US trustee (or bankruptcy administrator) has determined that there are insufficient approved agencies to provide the required counselling. If a debt management plan is developed during required credit counselling it must be filed with the court.
[95] Section 109(e) of the Bankruptcy Code.
[96] Section 109(f) of the Bankruptcy Code.

surrender can be made by the debtor or by his or her agent, the executor of his or her deceased estate, or by both spouses in a joint estate.[97] Further, in America the debtor must have a regular income, meaning it must be sufficiently stable and regular so that he can make payments in terms of the Chapter 13 plan,[98] but the source of such an income is irrelevant.[99] Thus, if the debtor fails to show that his or her income is regular, the case may be dismissed. Lastly, the debtor must have a non-contingent, liquidated, unsecured claim of less than $360,475 and a non-contingent, liquidated, secured claim of less than $1081,400.[100]

5.2.2.2 Involuntary Filing

As indicated, involuntary filing can only be made under Chapters 7 and 13.[101] Involuntary filings may be made against one debtor only – ie, joint debtors are excluded.[102] However, an involuntary filing must be brought by at least three creditors and each creditor must have a claim that is non-contingent and is not subject to a bona fide dispute.[103] The petitioning creditor's claims must have an aggregate total of at least $15,775 in unsecured claims.[104] In *re Gilbraltor Amusements,*[105] it was held that:

> The entire process that resulted in the enactment of the Act of 1898 was a pitched battle between those who wanted to give the creditor an effective remedy to assure equal distribution of a bankruptcy's estate and those who were determined to protect the debtor from the harassment of ill-considered or oppressive involuntary petitions, including those by a single creditor interest.

Thus, having more than one petitioning creditor and setting a statutory minimum aggregate amount for the creditor's claims, protects debtors from a single disgruntled creditor forcing a debtor into an involuntary case.[106] In contrast, in South Africa a minimum of one creditor who has a liquidated claim of not less than R100,00 can bring an application for compulsory sequestration.[107] Thus debtors in South Africa are not

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[97] Ch 3 para 3.3.1.
[98] Section 101(30) of the Bankruptcy Code.
[99] Ferriell and Janger *Understanding bankruptcy* 171.
[100] Section 109(e) of the Bankruptcy Code. A non-contingent debt is where there are no remaining triggering events before liability exists. An example of a contingent claim would be one that the debtor is responsible for if and only if another party fails to pay, such as certain types of co-signed loans. A liquidated debt is one where the amount is fixed or can be readily determined.
[101] Section 303(a) of the Bankruptcy Code.
[102] Ferriell and Janger *Understanding bankruptcy* 184.
[103] Section 303(b)(1) of the Bankruptcy Code.
[104] Section 303(b)(1) of the Bankruptcy Code.
[105] *In re Gibraltor Amusements* Ltd 291 F 2d 22 (2d Cir 1961) 368.
[106] Ferriell and Janger *Understanding bankruptcy* 185.
[107] Ch 3 para 3.3.2.

protected from a single-creditor interest. If creditors in America file involuntary petitions to influence their settlement negotiations with the debtor, and the court dismisses the petition on its merits, the court may penalise the creditors by granting an order against them for the costs and attorney's fees the debtor incurred in contesting the petition.[108] The court may award additional damages against the petitioning creditors if they acted in bad faith in filing the petition.[109] That would be the case where the facts of a case did not warrant an involuntary filing relief[110] or the creditors only wanted to harm the debtor.[111] The reason for this is that the consequences of an unfounded or bad faith petition can be substantial for the debtor, such a debtor who may not yet be insolvent may fail because of the bad publicity or expenses incurred because of the petition.[112] This is similar to South African insolvency law as a compulsory sequestration application can be brought by one creditor with a liquidated amount of at least R100,00. As a precaution against creditors abusing their power to bring compulsory sequestration applications, the Insolvency Act allows a debtor to claim damages if the court thinks the application is an abuse of process or is malicious or vexatious.[113]

The Bankruptcy Code provides two grounds for granting involuntary relief. First, the petitioning creditors must show that the debtor is not generally paying his or her debts as they become due, provided that the debts are not the subject of a bona fide dispute as to liability or amount.[114] Second and alternatively, involuntary relief will be granted if a custodian was appointed or took possession of substantially all of the debtor's property within 120 days before the date of the filing of the petition.[115]

If the petitioning creditors are unable to show that the debtor is unable to pay his or her debts as they fall due or that a custodian has taken control of the debtor's assets, the petition will be dismissed.[116] An involuntary petition will also be dismissed on the motion of any of the petitioning creditors, with the consent of the other petitioners and

[108] Section 303(i)(1) of the Bankruptcy Code.
[109] Section 303(i)(2) of the Bankruptcy Code.
[110] *In re Cadillac by DeLorean DeLorean Cadillac* 265 BR 574 (Bankr ND Ohio 2001).
[111] See *In re John Richards Homes Building Co* Case No 02-54689-R (Bankr ED Mich 17 Sept 2003) where the petitioning creditors even hired a public relations firm to publicise the bankruptcy case.
[112] Ferriell and Janger *Understanding bankruptcy* 192.
[113] Ch 3 para 3.3.2.
[114] Section 303(h)(1) of the Bankruptcy Code.
[115] Section 303(h)(2) of the Bankruptcy Code.
[116] Ferriell and Janger *Understanding bankruptcy* 191.

the debtor, for a lack of prosecution by the petitioning creditors.[117] Once the petition has been dismissed and the debtor is an individual, the court may enter an order prohibiting all consumer reporting agencies[118] from making any consumer report[119] that contains any information relating to the petition or the case commenced by the filing of the petition.[120] While a South African court also has a discretion whether or not to grant a sequestration order, if the court exercises its discretion against granting the order, thus dismissing the application, it does not appear that the court can make an order prohibiting credit bureaux from publicly displaying information regarding the compulsory sequestration petition.[121] This may be because in South Africa, once a sequestration order has been rescinded or set aside, the rescission does not release the debtor from his or her liabilities as does a rehabilitation order, but places the debtor in the position he or she was in before his or her estate was sequestrated. [122] This implies that the debtor's status does not change.

5.2.3 Restrictions and prohibitions on bankrupt debtors: During bankruptcy

In view of the bankruptcy procedures provided by the American Bankruptcy Code, their approach to restrictions on the bankrupt will now be considered. The American Constitution does not disqualify a person from being a member of the Senate or the House of Representatives simply because they are bankrupt. This is in contrast to the South African Constitution[123] which prohibits an unrehabilitated insolvent from being a Member of Parliament, the National Council of Provinces, or a provincial legislature. It however, draws no distinction between the dishonest and the honest but unfortunate debtor.[124] Although the disqualification of dishonest debtors, as discussed earlier from being members of the National Assembly is justifiable as it meets the government's purpose of protecting the public against dishonest debtors, it does not appear to be justified in the case of honest but unfortunate debtors.[125]

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[117] Section 303(j) of the Bankruptcy Code.
[118] As defined in s 603(f) of the Fair Credit Reporting Act 15 USC 1681a(f) (FCRA).
[119] As per s 603(d) of that FCRA.
[120] Section 303(k)(2) of the Bankruptcy Code.
[121] Ch 3 para 3.5.
[122] Ch 3 para 3.3.1.
[123] Constitution of the Republic of South Africa, 1996 (the Constitution).
[124] See Ch 3 para 3.4.3 and Ch 4 para 4.5.2.
[125] Ch 4 par 4.5.2.

While the American Constitution does not disqualify a person from being a member of the Senate or the House of Representatives because they are bankrupt, the Bankruptcy Code is not without restrictions and penalties for the bankrupt debtor. However, it appears that most of the restrictions and penalties are, in the main, directed at the dishonest debtor and that is what makes the American bankruptcy system appealing.

For example, if a debtor's Chapter 7 case could not be dismissed in terms of the means test's presumption of abuse,[126] it could still be dismissed under the discretionary standards of abuse.[127] In this regard, the court will look into whether the debtor filed the petition in bad faith[128] or whether the totality of the circumstances of the debtors' financial situation points to abuse.[129]

Bad faith includes circumstances where the debtor has filed bankruptcy multiple times to take advantage of the automatic stay benefit which then suspends foreclosure, while the debtor hides assets and intentionally abuses credit cards.[130] Other instances include where the debtor lived a luxurious lifestyle months before the bankruptcy filing.[131]

As regards the totality of circumstances, just as under the means test, the court compares the debtor's anticipated income and his or her resulting ability to pay his or her creditors.[132] However, the approach is more flexible than in the case of the means test. The court looks at high payments made to secured creditors to avoid dismissal under the means test to maintain an extravagant lifestyle of expensive houses and cars.[133] In *In re Mestemaker*[134] the debtor passed the means test but the court noted that the debtors' bankruptcy schedules showed excess income over expenses available to pay a substantial portion of its unsecured non-priority debt. The court found that there was an abuse of Chapter 7.[135] In South Africa too, the court may rescind or set aside a sequestration order if it was awarded incorrectly, fraudulently,

[126] Section 707(b)(2) of the Bankruptcy Code.
[127] Section 707(b)(3) of the Bankruptcy Code.
[128] Section 707(b)(3)(C) of the Bankruptcy Code. Ferriell and Janger *Understanding bankruptcy* 627.
[129] Section 707(b)(3)(B) of the Bankruptcy Code.
[130] Ferriell and Janger *Understanding bankruptcy* 628.
[131] Ferriell and Janger *Understanding bankruptcy* 628.
[132] Ferriell and Janger *Understanding bankruptcy* 629.
[133] Ferriell and Janger *Understanding bankruptcy* 629.
[134] *In re Mestemaker* 359 BR 849 (Bankr ND Ohio 2007) (*In re Mestemaker*) para 853.
[135] *In re Mestemaker* para 858.

or certain events necessitate rescission, especially if there has been an abuse of process.[136]

Other penalties imposed on dishonest debtors during bankruptcy in America include the removal of a debtor as a 'debtor in possession' for reasons of fraud, dishonesty, incompetence, or gross mismanagement of his or her affairs either before or after the commencement of the case.[137] Other instances include the denial of the debtor's exemption benefits because of his or her fraud or other misconduct in the bankruptcy proceedings[138] and the denial of discharge. These penalties are the harshest because, for individual debtors, exemption benefits and the promise of a fresh start through early discharge are the main driving forces in filing for bankruptcy. South African insolvency law does not appear to have a penalty denying the protection of excluded and exempt property based on the debtor's fraudulent conduct. As indicated in *Ex parte Kroese* and *Ex parte Van Dyk,* to safeguard against the debtor becoming a burden on society and to avoid constitutional challenges, the exclusion or exemption of the insolvent's income, furniture, and tools of trade cannot be waived.[139] However, in South Africa all insolvent debtors, whether dishonest or honest but unfortunate, are subjected to disqualifications during sequestration and certain limitations after rehabilitation.[140] The dishonesty of a debtor is only considered when that debtor applies for early rehabilitation, in which case rehabilitation can be denied based on dishonest conduct.[141]

While the goal of bankruptcy in providing a fresh start to the honest but unfortunate debtor is achieved through discharge, the protection of the interests of the honest debtor, and sometimes the protection of the dependants of the dishonest debtor, is seen at all the stages of bankruptcy in America. For example, when filing a bankruptcy petition, the debtor is required to file a schedule of his or her exempt property.[142] However, in certain instances where the debtor is irresponsible or is estranged from his dependants and may not be interested in a property that may be in the dependants'

[136] Ch 3 para 3.3.1.
[137] Section 1204 of the Bankruptcy Code.
[138] For example, if a debtor's misconduct would deprive him or her of the exemption under state statutory or case law, the same result applies to bankruptcy. See Ferriell and Janger *Understanding bankruptcy* 433.
[139] See para 5.2.1 above and Ch 3 para 3.3.3.
[140] Ch 3 paras 3.4 and 3.5.3.
[141] Ch 3 para 3.5.2.
[142] Sections 521(2)(A), 522(l) of the Bankruptcy Code.

possession, may fail to submit the list of exempt property.[143] In this regard, the Bankruptcy Code allows the dependants themselves to submit the list or to claim property as exempt for the estate on the debtor's behalf.[144] South African insolvency law does not have a similar provision. Even though the Insolvency Act requires the debtor to lodge a statement of his or her affairs and the debtor commits an offence if he or she fails to lodge the statement or makes false statements in the statement of affairs, he or she is not required to list exempt or excluded assets.[145]

Further, in America a waiver of the benefit of the exemption in favour of a creditor with an unsecured claim is ineffective and unenforceable.[146] That is because the benefit of the waiver is intended to protect consumers from waiving an exemption without fully understanding the consequences.[147] This is similar to the position in South Africa, as set out in *Ex parte Kroese* and *Ex parte Van Dyk,* to safeguard against the debtor becoming a burden on society and to avoid constitutional challenges, the exclusion or exemption of an insolvent's income, furniture, and tools of the trade cannot be waived.[148]

Other provisions in the Bankruptcy Code designed to protect bankrupt debtors include the prohibition on utilities[149] from altering, refusing, or discontinuing services to the trustee, a debtor in possession, or the debtor, merely because the debtor has filed a bankruptcy case or because the debtor's pre-petition utility debts remain unpaid.[150] The utility may also not discriminate against the trustee or the debtor by charging higher rates.[151] This is because certain utility providers are government-run or government-regulated and it may thus be impossible for a debtor to obtain the services from an alternative provider.[152] However, the utility is permitted to charge a deposit as

[143] Rule 4003(a) of the Federal Rules of Bankruptcy Procedure. See also Ferriell and Janger *Understanding bankruptcy* 429.
[144] Section 522(l) of the Bankruptcy Code.
[145] Ch 3 para 3.3.1.
[146] Section 522(e) of the Bankruptcy Code. Ferriell and Janger *Understanding bankruptcy* 431.
[147] Ferriell and Janger *Understanding bankruptcy* 431.
[148] See para 5.2.1 above and Ch 3 para 3.3.3.
[149] This refers to utilities that have some special position with regard to the debtor, such as an electric company, gas supplier, or telephone company that is a monopoly in the area so that the debtor cannot easily obtain comparable service from another provider. See *In re One Stop Realtour Place Inc* 268 BR 430 (Bankr ED Pa 2001) para 435 (*In re One Stop Realtour Place Inc*).
[150] Section 366(a) of the Bankruptcy Code.
[151] Section 366(a) of the Bankruptcy Code. Ferriell and Janger *Understanding bankruptcy* 294.
[152] In *In re One Stop Realtour Place Inc* para 437 the evidence presented showed that the debtor could not easily obtain comparable services; Ferriell and Janger *Understanding bankruptcy* 294.

adequate insurance that they will be paid for future goods or services to the debtor.[153] South African insolvency law does not have a similar provision.

As regards securing credit while a bankruptcy case is pending, section 364 of the Bankruptcy Code regulates a debtor's ability to access credit in re-organisation cases between the commencement of the case and the confirmation of the plan.[154] For instance, a debtor who is self-employed and thus engaged in business, and who incurs trade credit in the production of income from such employment,[155] is allowed to enter into transactions, including the selling, leasing, or using the property of the estate, in the ordinary course of business and without notice or a hearing.[156] However, if a debtor wishes to enter into a transaction, including the sale or lease of property of the estate, that falls outside the ordinary course of business, a notice and a court hearing are required before entering into the transaction.[157] Again, South African insolvency law does not have a similar provision. Section 137(*a*) of the Insolvency Act makes it an offence bearing imprisonment for up to twelve months, for an unrehabilitated insolvent to obtain credit above a certain amount from any person during sequestration,[158] irrespective of whether the credit is obtained inside or outside the ordinary course of his or her business. The insolvent must first inform the person from whom the credit is obtained that he or she is insolvent unless he or she can prove that the person was aware of his or her insolvency.[159]

Other debtors, such as those under debt review and administration which are procedures aimed at assisting over-indebted debtors to re-arrange their financial obligations to eventually settle their debt, also have limited ability to obtain credit while under administration or debt review.[160] Section 74S(1) of the MCA makes it an offence for a person who is subject to an administration order who, during the currency of such an order, incurs any debt without disclosing that he or she is under administration.[161] Also, section 88(1) of the NCA prohibits a consumer who has filed an application for

[153] Section 366(b) of the Bankruptcy Code.
[154] Ferriell and Janger *Understanding bankruptcy* 296.
[155] Section 1304 of the Bankruptcy Code.
[156] Section 364(a) read with ss 1304 and 363(c) of the Bankruptcy Code.
[157] Section 363(b)(1) of the Bankruptcy Code.
[158] Ch 3 para 3.4.1.
[159] Ch 3 para 3.4.1.
[160] Ch 3 para 3.4.1.
[161] Ch 3 para 3.4.1.

debt review or who has alleged in a court that he or she is over-indebted, from incurring further charges under a credit facility or entering into any further credit agreements with any credit provider.[162] If a rearrangement order is finally granted, such a consumer will be prohibited by section 88 from accessing credit until all his or her obligations under the credit agreement subject to the rearrangement have been fulfilled.[163]

In the case of executory contracts, that is contracts in which neither party has performed in terms of the contract, where a bankruptcy case has been filed, the debtor[164] has a choice to reject the contract, to assume and retain the contract, or to assume and assign the contract.[165] The determining factor in either rejection or assumption is whether there would be a benefit to the estate.[166] This is similar to the South African situation. The insolvency of a debtor does not affect the validity of a contract entered into before the sequestration of his or her estate.[167] However, in South Africa it is the trustee who elects to either perform and abide by the terms of that contract, or to repudiate and set the contract aside.[168]

Therefore, apart from the restrictions and penalties directed at dishonest bankrupts, a bankrupt debtor in America does not experience as many restrictions as a South African insolvent debtor who is exposed to blanket restrictions during the bankruptcy period. This is especially so in no-asset bankruptcies where discharge is awarded immediately as there are no assets to distribute and thus no proof of claims by creditors.[169]

5.2.4 Restrictions and prohibitions on bankrupt debtors: After discharge

5.2.4.1 A discharge order

Once the bankruptcy process ends, the automatic stay expires and creditors are allowed to continue to pursue the debtor for unpaid debts as if the bankruptcy had

[162] Ch 3 para 3.4.1.
[163] Ch 3 para 3.4.1.
[164] Through the trustee or current management action as debtor in possession. Ferriell and Janger *Understanding bankruptcy* 371.
[165] Section 365(a) of the Bankruptcy Code.
[166] Ferriell and Janger *Understanding bankruptcy* 374.
[167] Ch 3 para 3.4.1.
[168] Ch 3 para 3.4.1.
[169] Rule 4004(c) of the Federal Rules of Bankruptcy Procedure.

never been filed.[170] Thus, the debtor becomes exposed to the creditor's recovery actions.

However, if a debtor receives a discharge, all judgments based on the debtor's personal liability for discharged debts are void[171] and unenforceable and the creditors are prevented from attempting to collect discharged debts.[172] Thus, a debtor receives a fresh start because the discharge prohibits the creditors from taking further action to collect discharged pre-petition debts[173] and discharge becomes a valid legal defence against such collection actions.[174] The discharge stay prohibits creditors not only from commencing an action and from using collection processes to collect, recover, or offset discharged debts, but it also prohibits all other efforts to convince the debtor to pay.[175] If a debtor suffers hardship because a creditor has violated the discharge stay, the court can award him or her damages for the creditor's intentional violation of section 524 of the Bankruptcy Code.[176]

However, not all debts are dischargeable, certain debts may be non-dischargeable[177] and some may be dischargeable under one Chapter but not under another.[178] Under Chapter 7, post-petition debts are not discharged but some can be discharged if specific provisions of the Code treat them as pre-petition debts.[179] Further, family obligations such as domestic support, tax debts, and debt fraudulently incurred are not dischargeable under Chapter 7.[180] Under Chapter 13 all plan obligations and all debts that were disallowed under section 502 of the Code are discharged.[181] Under Chapter 13, the non-dischargeable obligations include, long-term debts, tax debts, debts fraudulently incurred, unscheduled debts, student loans, and domestic support.[182] Under Chapter 11, if the debtor is a corporation, all existing debts are discharged and the remaining debts are those under the plan. An individual debtor remains liable for

[170] Ferriell and Janger *Understanding bankruptcy* 457-458.
[171] Section 524(a)(1) of the Bankruptcy Code.
[172] Section 524(a)(2) of the Bankruptcy Code.
[173] Section 727(b) of the Bankruptcy Code.
[174] Section 524(a)(2) of the Bankruptcy Code.
[175] Section 524(c) of the Bankruptcy Code. *In re Wassem* 456 BR 566 (Bankr MD Fla 2009); *In re Crudup* 287 BR 358 (Bankr EDNC 2002).
[176] Section 105 of the Bankruptcy Code.
[177] See s 523 of the Bankruptcy Code.
[178] Ferriell and Janger *Understanding bankruptcy* 457.
[179] See ss 502, 727(b) of the Bankruptcy Code.
[180] Section 523 of the Bankruptcy Code.
[181] Section 1328 of the Bankruptcy Code.
[182] Section 1328 of the Bankruptcy Code.

non-dischargeable debts under section 523 of the Code, and thus the discharge stay will not apply to these. In South Africa, rehabilitation discharges all the insolvent's debts that were due, or the cause of which arose before sequestration, and which did not result from fraud.[183] Thus, as in America rehabilitation does not have the effect of releasing debts that arose fraudulently. However, in South African insolvency law, debts resulting from alimony, the intentional assault or killing of another, driving under the influence of alcohol, and fines or punishment are not excluded from discharge, and are also extinguished after rehabilitation.[184]

In certain instances, in America, a discharge previously granted may be revoked but that rarely occurs. Under Chapter 7, for example, a previously granted discharge may be revoked amongst other circumstances when it was obtained by fraud,[185] or where the debtor failed to report the acquisition of estate property, or failed to surrender the newly acquired property to the trustee.[186] Under Chapter 11, confirmation and subsequently a discharge may be revoked if it was obtained fraudulently and if the revocation is sought within 180 days of the confirmation order.[187] South African insolvency law does not have a provision allowing for the revocation of a rehabilitation order obtained fraudulently. It is submitted that such a provision is unnecessary as in South Africa automatic rehabilitation is already set at ten years.[188] In instances where the insolvent applies for early rehabilitation, the court can use its discretion not to grant a rehabilitation order if it emerges that the debtor acted fraudulently.[189] However, if the insolvent is rehabilitated earlier and it is discovered after rehabilitation that the rehabilitation order was obtained fraudulently, it would be advisable to have a provision allowing for the revocation of the rehabilitation order to protect the public. This is because the reason for allowing a certain period to pass before rehabilitation is to ensure that the insolvent has learnt from his or her insolvency[190] and can now be allowed to trade with the public like any other honest person.[191]

[183] Ch 3 para 3.5.1.
[184] Ch 3 para 3.5.1.
[185] Section 727(d)(1) of the Bankruptcy Code.
[186] Section 727(d)(2) of the Bankruptcy Code.
[187] Section 1144 of the Bankruptcy Code.
[188] Ch 3 para 3.5.2.
[189] Ch 3 para 3.5.2.
[190] Ch 3 para 3.5.
[191] Ch 3 para 3.6.

5.2.4.2 Denial of discharge

A discharge in Chapter 7 cases is available to all individuals but not all individuals receive the discharge.[192] It is only given to the honest debtors. Thus, a discharge is denied to debtors who with intent to hinder, delay, or defraud a creditor or the trustees, transfer, remove, destroy, mutilate, or conceal their property within one year before the date of their bankruptcy petition or after it has been filed.[193] These debtors are not regarded as honest and do not deserve the fresh start that bankruptcy provides.[194] Thus, a debtor who files a schedule of his or her property which fails to reflect some of his or her property and hides the existence of that property, will not receive a discharge.[195] A debtor who sells his or her non-exempt property and uses the proceeds to pay the mortgage on his or her exempt residence is also denied a discharge if he or she acted to place the asset beyond the reach of creditors.[196]

A debtor will also be denied a discharge if he or she falsifies or fails to keep or preserve any recorded information from which his or her financial condition or business transactions can be established.[197] This is because the trustee needs to be aware of the debtor's financial history for a reasonable period past to present.[198]

Misconduct in the bankruptcy proceedings is also punished by a denial of discharge. This may, for example, be where the debtor knowingly and fraudulently made a false oath or account, or presented or used a false claim, or gave, offered, or received money, property, or advantage for acting or for omitting to act.[199] Other instances are where the debtor fails to explain satisfactorily, before determination of denial of discharge, any loss of assets or lack of assets to meet the debtor's liabilities,[200] or where he or she refuses to obey any lawful order of the court.[201] In South African insolvency law, automatic rehabilitation occurs after ten years, however, an insolvent

[192] Section 727(a)(1) of the Bankruptcy Code.
[193] Section 727(a)(2) of the Bankruptcy Code.
[194] Ferriell and Janger *Understanding bankruptcy* 460.
[195] *In re Derer* 400 BR 97 (Bankr ED Tex 2008).
[196] See *In re Reed* 33 Cal 3d 914; 191 Cal Rptr 658, 663 P 2d 216 (Cal 1983).
[197] Section 727(a)(3) of the Bankruptcy Code.
[198] *In re Trogdon* 111 BR 655 (Bankr ND Ohio 1990); *In re Caneva* 547 F 3d 1082; 550 F 3d 755 (9th Cir 2008).
[199] Section 727(a)(4)(A)-(C) of the Bankruptcy Code. *In re Weiner* 233 AD 2d 67; 663 NYS 2d 153 (NY App Div 1997); *In re Freese v Freese* No 11-6055 (8th Cir Dec 14, 2011).
[200] Section 727(a)(5) of the Bankruptcy Code.
[201] Section 727(a)(6) of the Bankruptcy Code.

can apply for rehabilitation earlier if he or she complies with certain requirements.[202] As in the American bankruptcy system, the conduct of the insolvent before or during the sequestration process influences whether a rehabilitation order and subsequently a discharge can be granted by the court.[203] A South African court can exercise its discretion against granting a rehabilitation order if the insolvent's conduct before and during sequestration shows that he or she is dishonest, fraudulent, or reckless.[204] This is in line with the Bankruptcy Code and international trends that favour the consideration of the debtor's circumstances to distinguish the honest from the fraudulent and dishonest debtor so that only the fraudulent debtor is excluded from discharge.[205]

In America, there is also an eight-year ban for repeat bankruptcy filers.[206] The eight years is calculated from the date of filing in the first bankruptcy case to the date of filing in the second case.[207] However, if the first bankruptcy case was in terms of Chapter 12 or 13, the ban is reduced to six years.[208] South African insolvency law has no similar provision as it is unnecessary since automatic rehabilitation is already set at ten years. Further, on an application by an interested person and after notice to the insolvent, the court may on good cause order that rehabilitation will not set in after ten years.[209] However, if automatic rehabilitation were to be earlier – one to three years, for example – an eight-year ban would be advisable to avoid a debtor's estate from being repeatedly sequestrated as a means to avoid paying his or her debts by benefitting from the discharge of debts after rehabilitation.

Discharge in America is also denied where the debtor effectively waives his or her right to receive a discharge.[210] In South Africa, the right to automatic rehabilitation cannot be waived. Further, the Bankruptcy Code denies a discharge if the debtor has failed to complete a credit counselling course.[211] South African insolvency law does not require a credit counselling course for the sequestration of a debtor's estate, and

[202] Ch 3 para 3.5.2.
[203] Ch 3 para 3.5.2.
[204] Ch 3 para 3.5.2.
[205] Ch 3 para 3.5.2.
[206] Section 727(a)(8) of the Bankruptcy Code.
[207] Ferriell and Janger *Understanding bankruptcy* 468.
[208] Ferriell and Janger *Understanding bankruptcy* 469.
[209] Ch 3 para 3.5.1.
[210] Section 727(a)(10) of the Bankruptcy Code.
[211] Section 727(a)(11) of the Bankruptcy Code.

this is therefore not a reason for the denial of rehabilitation. Where there is a reasonable belief that the debtor may have a criminal conviction for, amongst others, a bankruptcy crime, securities fraud, or wilful misconduct resulting in the death of or personal injury to another person, discharge is also denied in America.[212] In South Africa, a rehabilitation order may not be granted if the insolvent's conduct before and during sequestration shows that he or she is dishonest, fraudulent, or reckless.[213]

In a Chapter 11 case, a debtor obtains a discharge upon the plan's confirmation which occurs when all the payments have been made.[214] Thus a discharge will be denied when the court refuses to confirm the plan. The standard for confirming the plan is that it must be proposed in good faith.[215] Lack of good faith is a ground for denying a discharge based on misconduct. Under Chapter 11 there is no eight-year ban as under Chapter 7, instead a debtor can be discharged any time provided the plan has been confirmed.[216] However, as with Chapter 7, the right to a discharge in Chapter 11 can also be waived by the debtor.[217]

Under Chapter 13, as under Chapter 11, a discharge is denied by the refusal of the court to confirm the plan when it was not proposed in good faith.[218] Also, earlier discharge from Chapters 7, 11, or 12 cases filed within four years before the date of the Chapter 13 case, disqualifies a debtor from discharge.[219] Under Chapter 13, a debtor is disqualified from obtaining a discharge if he or she received a discharge under Chapter 13 in a case filed within two years before the date of filing the later case.[220] As with Chapters 7 and 11, a debtor under Chapter 13 can waive his or her right to a discharge.[221]

If a debtor's discharge has been denied or some of his or her debts are non-dischargeable, once bankruptcy ends he or she is exposed to creditor's collection actions for pre-petition debts but reduced by the amount he or she paid during bankruptcy. This is because the automatic stay which protected him or her during the

[212] Section 727(a)(126) of the Bankruptcy Code.
[213] Ch 3 para 3.5.2.
[214] Section 1141(d) of the Bankruptcy Code.
[215] Section 1129(a)(3) of the Bankruptcy Code.
[216] Ferriell and Janger *Understanding bankruptcy* 472.
[217] Section 1141(d)(4) of the Bankruptcy Code.
[218] Sections 1225(a)(3) and 1325(a)(3) of the Bankruptcy Code.
[219] Ferriell and Janger *Understanding bankruptcy* 474.
[220] Section 1328(f)(2) of the Bankruptcy Code.
[221] Sections 1228(a) and 1328(a) of the Bankruptcy Code.

bankruptcy process expires when the bankruptcy ends.[222] The debtor's assets in a Chapter 7 case, will still be sold and distributed among his or her creditors and thus the debtor still loses his or her non-exempt assets despite not receiving a fresh start.[223] Therefore, in a Chapter 7 case where the debtor intended to exchange his or her non-exempt assets for a fresh start through a discharge, if the discharge is denied, the debtor loses everything – both his or her non-exempt assets and the fresh start.[224] In South Africa, if an application for early rehabilitation has been denied, the court may indicate a period that must pass before the insolvent may renew the application which may be after three months or three years, in which event the application may be granted automatically. [225] Alternatively, the court may not indicate a renewal period, in which case the insolvent may renew the application after a reasonable period on proof of good conduct.[226]

5.2.4.3 Discrimination against debtors

Discharged bankrupts in America do not experience as many restrictions after discharge as the South African rehabilitated insolvent.

Section 605 of the Fair Credit Reporting Act[227] regulates the information that must be excluded from consumer credit reports. In terms of section 605(a)(1), a consumer's credit report may not include information about a debtor's bankruptcy that is older than ten years from the date of entry of the order for relief or the date of adjudication, unless specifically authorised by subsection (b) of section 605. Thus, a bankruptcy filing may be retained in a bankrupt debtor's credit record for ten years, and lenders may deny credit to bankrupt debtors or charge them higher fees and interest based on the bankruptcy during those ten years.[228] In terms of this section, it is only after ten years that the retention of a bankruptcy filing in a bankrupt's credit record is prohibited. Thus, during those ten years, the fresh start promise of a new clean slate for the honest but unfortunate bankrupt and economic participation after the bankruptcy is derailed.[229]

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[222] Ferriell and Janger *Understanding bankruptcy* 458.
[223] Ferriell and Janger *Understanding bankruptcy* 458.
[224] Ferriell and Janger *Understanding bankruptcy* 458.
[225] Ch 3 para 3.5.2.
[226] Ch 3 para 3.5.2.
[227] Fair Credit Reporting Act 15 USC §1681 (the FCRA).
[228] Ferriell and Janger *Understanding bankruptcy* 4 and 527. Concepción (2010) *The Scholar* 529.
[229] Ch 2 para 2.2.5.1.

Similar to section 605 of the FCRA is the South African Department of Trade and Industry's amnesty regulations which are aimed at enabling blacklisted consumers to obtain employment, rent a home, and again access credit, exclude information about debt restructuring, sequestration, rehabilitation, and administration.[230] The amnesty allows for a one-off removal of certain adverse consumer credit information and a one-off and ongoing removal of information about paid-up judgments from a consumer's credit report held by a credit bureau.[231] However, the amnesty excludes information about debt restructuring, sequestration, rehabilitation, and administration.[232] As a result, credit bureaus may publicly display information regarding the sequestration of an insolvent for five years from the date of the sequestration order or until a rehabilitation order is awarded.[233] If an insolvent was granted early rehabilitation, information regarding the granting of a rehabilitation order must appear on his or her credit record for a further five years after rehabilitation.[234] Further, if an insolvent was rehabilitated by effluxion of time after ten years, it appears that this information will also have to appear on his or her credit record for five years, despite having been sequestrated for ten years.[235] As in America, the credit report of a candidate may be in issue when considering whether to employ him or her in a position where honesty and trust in dealing with finances and cash are required.[236] However, the information in the credit report may also be used against a candidate when he or she seeks a position where honesty and trust in dealing with finances and cash are not required.[237]

To give effect to the fresh-start policy in America, section 525 of the Bankruptcy Code was enacted in 1978 to prohibit employment discrimination based on a credit history report depicting bankruptcy.

Section 525(a) of the Bankruptcy Code prohibits government units from denying employment to, terminating the employment of, or discriminating with regard to employment against a person who is or has been a debtor or a bankrupt, or a person

[230] Ch 3 para 3.5.3.
[231] Ch 3 para 3.5.3.
[232] Ch 3 para 3.5.3.
[233] Ch 3 para 3.5.3.
[234] Ch 3 para 3.5.3.
[235] Ch 3 para 3.5.3.
[236] Ch 3 para 3.5.3.
[237] Ch 3 para 3.4.3.

who has been associated with a debtor. Thus, in terms of section 525(a) government units are prohibited from discriminating against debtors with regard to licences, permits, charters, franchises, or employment on the basis of the debtor's status as a discharged bankrupt.[238] By virtue of the words 'denying employment' and 'termination of the employment', the prohibition against discrimination in section 525(a) is in respect of both current and prospective applicants but applies to government units only. In *FCC v Nextwave Personal Communications*[239] it was held that for there to be a violation of section 525(a), the failure to pay a dischargeable debt should be the only proximate cause of the cancellation of the licence. Government units are only permitted to discriminate if there is a reason, apart from the discharge of debt, that is the proximate cause.[240] Thus, in the case of aspiring lawyers, unless there is another aspect in their background that reflects dishonesty, moral turpitude, or irresponsible behaviour, denying a licence to practise law to discharged bankrupts, violates section 525(a) of the Bankruptcy Code.[241]

While section 525(a) applies to government units, section 525(b) applies to private employers. Section 525(b) prohibits private employers from terminating the employment of or discriminating with respect to employment against a person who is or has been a debtor or a bankrupt, or a person who has been associated with a debtor. However, section 525(b) does not include the phrase 'denying employment' as is the case in section 525(a); it contains only the phrase 'terminating the employment of or discriminating with', meaning that section 525(b) only applies to discrimination in respect of current employees.[242] Thus, if a debtor is a current employee, a private employer may not terminate his or her employment on the basis of his or her having obtained a bankruptcy discharge or having unpaid discharged debts.[243] However, if the debtor is a job applicant a private employer may refuse to employ him or her based on his or her bankruptcy status as the prohibition does not apply.

Consequently, while section 525 was introduced to give effect to the fresh-start policy by prohibiting employment discrimination based on a credit history report reflecting

[238] Section 525(a) of the Bankruptcy Code.
[239] *Federal Communications Commission v NextWave Personal Communications Inc* 537 US 293 (2003) (*FCC v Nextwave Personal Communications*) para 301-2.
[240] *FCC v Nextwave Personal Communications* para 301-2.
[241] Ferriell and Janger *Understanding bankruptcy* 527.
[242] See Ch 2 para 2.2.5.2.
[243] Section 525(b) of the Bankruptcy Code.

bankruptcy during the ten years indicated in section 605(1)(a) of the FCRA, private employers may still refuse to employ persons who are or have been bankrupt debtors based on a credit history report reflecting bankruptcy.[244]

To overcome the problem of discrimination by private employers some states in America limit employers' access to bankruptcy information which is damaging to a job candidate's application and which also does not provide any legitimate insight into the candidate's qualification.[245] Seven of those states[246] have enacted anti-credit legislation that either bans or limits employer's access to a job applicant's consumer credit report.[247]

The Illinois Employee Credit Privacy Act[248] which is regarded as the ideal credit check legislation and which has been used as a model by many states, prohibits an employer from denying employment to an individual based on his or her credit report.[249] The ECPA provides that an employer may not order an applicant or employee's credit report, inquire about the applicant's employment history, or discriminate against an individual based on his or her credit history report unless the position in question meets certain criteria.[250] These requirements do not apply to employers in the financial, insurance industries and certain government employers.[251] Under the ECPA, a credit check is only permitted if it is an "established bona fide occupational requirement of a particular position or a particular group of employees".[252] This would be the case in a managerial position[253] where the duties of the position include the custody or unsupervised access to cash or marketable assets valued at $2,500 or more,[254] or

[244] Ch 2 para 2.2.5.2.
[245] Orovitz (2013) *Emory Bankr Dev J* 590.
[246] California, Connecticut, Hawaii, Illinois, Maryland, Oregon, and Washington. See Orovitz (2013) *Emory Bankr Dev J* 591.
[247] Orovitz (2013) *Emory Bank Dev J* 591.
[248] Section 10 of the Illinois Employee Credit Privacy Act 820 ILCS 70 (the ECPA).
[249] Orovitz (2013) *Emory Bankr Dev J* 592.
[250] Section 10(a) of the ECPA. See also Parks (2017) *The newsletter of the Illinois State Bar Association* 2; Orovitz (2013) *Emory Bankr Dev J* 592.
[251] Section 5 of the ECPA.
[252] Section 10(b) of the ECPA. See also Parks (2017) *The newsletter of the Illinois State Bar Association* 2; Orovitz (2013) *Emory Bankr Dev J* 592.
[253] Section 10(b)(4) of the ECPA.
[254] Section 10(b)(2) of the ECPA.

where the position involves having access to confidential information, financial information, or trade secrets.[255]

At the federal level, the proposed Equal Employment for All Act[256] was reintroduced by Congressman Steve Cohen in the 116th Congress in 2019.[257] This Bill aims to amend the FCRA to prohibit the use of consumer credit checks against prospective and current employees in making adverse employment decisions.[258] The EEA Act limits when an employer can use credit reports as an employment pre-screening tool only to where the job entails a "supervisory, managerial, professional or executive position at a financial institution" or if the job requires national security or Federal Deposit Insurance Corporation clearance.[259] If this Bill is passed into law it will prevent employment discrimination based on a credit history report reflecting a bankruptcy filing.[260] As regards student loans, section 525(c) of the Bankruptcy Code prohibits government units from denying a student loan to a previously bankrupt debtor. This applies to granting the loan, loan guarantee, or loan insurance.[261] This provision is intended to prevent former bankrupts from being restricted to access further education, which may unduly increase the possibility of future financial difficulties.[262] Another exception is where an involuntary filing has been dismissed. In this case, a court may grant an order prohibiting credit agencies from reflecting the dismissal in the debtor's credit report. This is intended to avoid disadvantaging a debtor based on a dismissed involuntary case.[263]

Although there may be a practice that a bad credit record may prevent a person from being employed by the civil service in South Africa,[264] South African law does not have a provision akin to section 525 prohibiting the denial and termination of employment and prohibiting discrimination against an insolvent based on his or her insolvency status. Although private employers may still use a credit report reflecting bankruptcy

[255] Section 10(b)(5) of the ECPA.
[256] Equal Employment for All Act of 2019 (EEA Act).
[257] Congressman Steve Cohen "HR 3862 — 116th Congress: Equal Employment for All Act of 2019" www.GovTrack.us. 2019. March 15 2021 https://www.govtrack.us/congress/bills/116/hr3862 (assessed 15 March 2021).
[258] See the Preamble.
[259] Orovitz (2013) *Emory Bankr Dev J* 595.
[260] Orovitz (2013) *Emory Bankr Dev J* 598.
[261] Section 525(c) of the Bankruptcy Code.
[262] Ferriell and Janger *Understanding bankruptcy* 528.
[263] Section 303(k)(2) of the Bankruptcy Code.
[264] Ch 3 para 3.5.3.

against a job applicant by refusing to employ that debtor in America, the section 525 equivalent in South Africa would be beneficial in resolving the problem of discrimination against insolvent and rehabilitated debtors in respect of obtaining employment, renting a home, and again securing credit. However, the anti-discrimination provision would have to apply to both government units and private employers if it is to avoid amounting to differentiation between employees in the government sector and those employed by private institutions which may not be constitutionally justifiable.[265] The developments in America regarding the use of credit reports by employers as a pre-screening tool only in circumstances if it is an "established bona fide occupational requirement of a particular position or a particular group of employees" or only if the job entails a "supervisory, managerial, professional or executive position at a financial institution", or if the job requires national security or FDIC clearance, would also be valuable in South Africa. This is because in South Africa too, it is justified to protect the public against dishonest debtors in occupations and positions that require honesty and trust in dealing with finances and cash. However, even in such occupations and positions, the cause of the insolvency would have to be established to avoid discrimination and the refusal to employ a person based solely on his or her insolvency status when the insolvency did not result from dishonesty or fraud.

5.2.5 Summary

From the outset certain debtors are disqualified from accessing the asset liquidation process in Chapter 7 of the Bankruptcy Code. However, the reason for the access disqualification in America is also linked to the goal of bankruptcy in America, which is to provide a fresh start to the honest but unfortunate debtor.

Thus, debtors in America who are found in terms of the means test to be abusing the Bankruptcy Code because they have the financial muscle or means to pay their debts, are disqualified from Chapter 7 asset liquidation. This means that those debtors are regarded as dishonest for attempting to use the Code to obtain a discharge of debt when they can afford to pay them. In South Africa, the advantage-to-creditors entry requirement which disqualifies many debtors from accessing the sequestration

[265] See the discussion on the right to equality and prohibition against unfair discrimination in Ch 4 paras 4.2 and 4.5.

process and ultimately discharge, is also linked to its aim of benefitting creditors. However, while the means test disqualifies certain debtors who are trying to abuse the Bankruptcy Code, the advantage requirement is sometimes the cause of the abuse of the sequestration process by debtors unable to show an advantage to creditors.[266]

Debtors who are not eligible for the Chapter 7 relief, as they do not qualify under the means test, may as an alternative to the asset liquidation process in Chapter 7, file for bankruptcy under Chapters 11 or 13 which are reorganisation cases. However, Chapter 13 also disqualifies debtors who do not show that they have a regular and stable income to pay off their debts over an extended period. Further, it will take such a debtor a longer period to obtain a discharge under Chapter 13 than under Chapter 7. Therefore, factors that prohibit a debtor from accessing a voluntary bankruptcy case under Chapter 7 include dismissal of a case for not meeting the means test, dismissal of a petition 180 days before the new filing, and the failure to undergo credit counselling. Under Chapter 13 a debtor who fails to show that he or she has a regular income will be ineligible and the case will be dismissed.

As in the case of a voluntary filing, the goal of bankruptcy to protect honest but unfortunate debtors is seen in the involuntary filing, where a minimum of three creditors with an aggregate amount for claims, are required to file. This is to avoid a single disgruntled creditor from forcing a debtor into bankruptcy. These requirements do not exist in South African insolvency legislation. Once the creditors have met this requirement, they then need to show that the debtor is not paying his or her debts as they fall due. If they cannot prove this their case will be dismissed. To protect the honest debtor further, if an involuntary filing has been dismissed the court may order that consumer reporting agencies not reflect such dismissal in a credit report. Thus, a dismissed involuntary filing will not disadvantage the debtor by being reflected in his credit record.

Unlike the South African sequestration process which may last for ten years during which time an insolvent is subjected to blanket disqualifications and restrictions, the American Chapter 7 bankruptcy process may take as little as three months in a no-asset case after which the bankrupt is discharged. Because Chapters 11 and 13 are payment plans, discharge is only granted after the confirmation of the plan which

[266] See Ch 3 paras 2.3.3 and 2.8.1.

occurs after the completion of the payment plan. Depending on how soon the bankrupt can complete paying all his or her debts, the plan can be confirmed after three to five years.

Further, most of the restrictions during the bankruptcy process in America are directed at the dishonest debtor. For example, a debtor whose case has not been dismissed on the basis of the means test in the filing stage, could still be dismissed if the filing was in bad faith and the totality of the debtor's circumstances indicates an abuse. Also based on dishonesty, fraud, or misconduct, amongst others, a debtor could be removed as a 'debtor in possession' or he or she could be denied exemption rights or a discharge.

At the end of the bankruptcy process, the discharge stays all creditors' actions against discharged pre-petition debts. However, it does not apply to non-dischargeable debts or where discharge has been denied. Unlike the South African insolvency legislation, the Bankruptcy Code prohibits discrimination against the debtor solely on the ground of his or her status as a discharged bankrupt. This is in respect of obtaining licences, permits, and employment. While both government and private employers may not discriminate against current employees, private employers may still discriminate against job applicants, and discharged bankrupts will still be exposed to credit discrimination after bankruptcy. As indicated, South African law does not have a section 525 equivalent and a similar provision would be valuable as an anti-discrimination mechanism in South Africa.

To overcome the discrimination by private employers in America, developments have included using credit reports by employers as a pre-screening tool only in circumstances where it is an "established bona fide occupational requirement of a particular position or a particular group of employees" or only if the job entails a "supervisory, managerial, professional or executive position at a financial institution' or if the job requires national security or FDIC clearance". These initiatives would also be beneficial to the insolvent and rehabilitated debtor in South Africa.

5.3 England and Wales

5.3.1 General Background

A general background of the insolvency system in England and Wales is important to ultimately understand the system, and discharge and restrictions flowing from different procedures. Like the South African and American insolvency legislation, the Insolvency Act[267] provides for the liquidation of the estate of a debtor who is unable to pay his or her current debts, or is unlikely to be able to pay his or her future debts when they fall due.[268] Under Part IX of the IA, the bankrupt's estate vests in the trustee immediately upon his or her appointment.[269] The trustee then realises and distributes the estate among the bankrupt's creditors per the priority of the various claims.[270] As under American bankruptcy law, bankruptcy in England and Wales is premised on the notion that in exchange for giving up all current non-exempt property, a debtor may secure freedom from the accumulated burdens of his or her debts and enjoy a fresh start through a discharge.[271]

To commence the proceedings for the granting of a bankruptcy order, a creditor, a temporary administrator, an insolvency practitioner, or the supervisor of, or any person who is for the time being bound by, an individual voluntary arrangement[272] approved under Part VII of the IA must present a petition to the High Court upon which the court may issue a bankruptcy order.[273] As from 2016,[274] a debtor wishing voluntarily to initiate a bankruptcy process against him- or herself must apply online to an adjudicator for a bankruptcy order.[275] In South Africa, the applications for both compulsory sequestration and voluntary surrender are made to the High Court – there are no online applications.

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[267] Insolvency Act of 1986 (IA 1986).
[268] See s 267(2)(c) of the IA 1986; Miller and Bailey *Personal insolvency* 5.
[269] Section 306(1) of the IA 1986.
[270] Section 305(2) of the IA 1986.
[271] Fletcher *The law of insolvency* 151.
[272] See individual voluntary arrangements (IVA) in ss 252-263G of the IA 1986.
[273] Section 264 of the IA 1986.
[274] Before 2016 a debtor was required to present a petition to the court in terms of ss 272-274A of the IA 1986. These provisions were repealed by s 71 and Schedules 18 and 19 to the Enterprise and Regulatory Reform Act 2013 which came into effect from April 2016. The repealed provisions were replaced by ss 263H-263O of the IA 1986.
[275] Section 263H of the IA 1986.

In England and Wales, the presentation of a bankruptcy petition in court against the debtor marks the beginning of a court-controlled moratorium in favour of the debtor in respect of actions, execution, or any legal process against him or her or his or her property.[276] Thus, while the bankruptcy petition is pending, the court may stay any action, execution, or legal process against the debtor or his or her property.[277] However, the court may also allow such action, execution, or legal process to continue on terms it deems fit.[278]

To further protect the property of the bankrupt debtor between the presentation of the petition and the making of the bankruptcy order, an official receiver may be appointed as the interim receiver of the debtor's property.[279] The interim receiver will cease to act in this capacity if the bankruptcy petition is dismissed, if a bankruptcy order is made on the petition, or if a court order otherwise terminates the appointment.[280] Once the bankruptcy process commences on the date a bankruptcy order is made, the court-controlled moratorium is replaced by a statutory automatic stay[281] which suspends all actions or proceedings against the debtor.[282] In South Africa, a *concursus creditorum* comes into effect upon the granting of a sequestration order after which no single creditor can enter into a transaction concerning the estate which prejudices creditors as a collective.[283] Further, the granting of a sequestration order stops the execution of judgments against the insolvent estate and civil proceedings instituted by or against the insolvent.[284] However, in voluntary surrender applications sales in execution are stopped when the notice of intention to surrender is published. This means that they are stopped long before the court hearing granting the sequestration order.[285] Thus, in a compulsory sequestration application, filing the notice of motion, affidavit, and supporting documents before the court hearing does not have the effect of staying all sales in execution.[286] It is only the notice of intention to surrender in voluntary

[276] Section 285(1) of the Bankruptcy Code; Fletcher *The law of insolvency* 149.
[277] Section 285(1) of the Bankruptcy Code.
[278] Section 285(2) of the Bankruptcy Code; Fletcher *The law of insolvency* 149.
[279] Section 286(1) of the IA 1986.
[280] Section 286(7) of the IA 1986.
[281] Section 278(a) of the IA 1986.
[282] Section 285(3) of the Bankruptcy Code; Rule 10.31(3) of the Insolvency Rules 2016 (IR 2016); Fletcher *The law of insolvency* 149.
[283] Ch 3 para 3.2.
[284] Ch 3 para 3.2. However, criminal proceedings are not affected by the sequestration of the accused estate.
[285] Ch 3 para 3.3.1.
[286] Ch 3 para 3.3.2.

surrender applications that has the effect of staying all sales in execution against the insolvent estate before the court hearing.[287]

Once bankruptcy commences in England and Wales, the bankrupt's estate vests in the trustee upon his or her appointment[288] and consists of all property belonging to or vested in the bankrupt at the commencement of his or her bankruptcy together with all property which in terms of section 283 forms part of the estate or is treated as falling into the estate.[289] As in South Africa, items of equipment the bankrupt needs for his or her personal use in his or her employment, business, or vocation – eg, clothing, bedding, furniture, household equipment, and provisions necessary for satisfying the basic domestic needs of the bankrupt and his or her family – are not included in the estate which vests in the trustee.[290]

Also similar to South Africa, a bankrupt in England and Wales is allowed to keep a portion of his or her income that he or she acquires after bankruptcy that is considered necessary to maintain himself or herself and his or her family.[291] This is aimed at encouraging the bankrupt to continue maintaining himself or herself after bankruptcy and to preserve his or her dignity. It is also aimed at limiting the potential burden that would be imposed on the resources of the state if the bankrupt's family are rendered destitute.[292] Similar to section 23(9) of the Insolvency Act, the trustee of the bankrupt estate can make an application to the court for an income payment order which compels the bankrupt to pay the surplus income that is above his or her income to the trustee.[293] That surplus income claimed by the trustee will form part of the bankrupt estate.[294]

Also, as in South Africa, bankruptcy in England and Wales affects the status[295] of the bankrupt. However, the Enterprise Act has reduced the number of disqualifications imposed on a bankrupt although the applicability of the disqualification will depend on

[287] Ch 3 para 3.3.1.
[288] Section 306(1) of the IA 1986.
[289] Section 283(1) of the IA 1986.
[290] Section 283(2) of the IA 1986.
[291] Fletcher *The law of insolvency* 228.
[292] Fletcher *The law of insolvency* 228.
[293] Section 310(I A)(a) of the IA 1986; Fletcher *The law of insolvency* 228.
[294] Section 310(5) of the IA 1986.
[295] Fletcher *The law of insolvency* Ch 7 under the personal situation of the debtor.

whether the bankrupt is subject to a bankruptcy restriction order,[296] a bankruptcy restriction undertaking,[297] or a debt relief restriction order.[298]

A bankrupt is discharged from all provable debts in England and Wales after 12 months from the date of the bankruptcy order.[299] However, as in America and South Africa, not all debts are discharged in England and Wales.[300]

The IA 1986 also makes provision for the annulment of the bankruptcy order if it appears to the court that on any grounds existing at the time the order was made, the order ought not to have been made, or that, to the extent required by the rules, the bankruptcy debts and the expenses of the bankruptcy have all, since the making of the order, been either paid or secured to the satisfaction of the court.[301] Once an annulment has been made the person to whom the order relates is to be regarded in law as if the bankruptcy order was never made.[302] However, unlike a discharge which releases the bankrupt from provable debts, an annulment does not have the same effect and a creditor who has not proved a claim in the bankruptcy case may still take action to enforce his or her debt after the bankruptcy has been annulled.[303] However, a creditor who lodged a claim which was rejected by the trustee before the annulment cannot enforce his or her action after the annulment.[304]

Instead of applying to the High Court for a bankruptcy order, an application can be made to the County Court for an administration order in terms of the County Court Act.[305] Administration orders were introduced in response to claims of unequal treatment of working-class insolvents, between the rich and the poor who could not make use of the bankruptcy procedure.[306]

A County Court administration order can be granted for debtors whose total debts are very low and whose source of income is sufficient to allow them to repay their debts

[296] Bankruptcy restriction order or bankruptcy undertaking (BRO).
[297] Bankruptcy restriction undertaking (BRU).
[298] Debt relief restriction order (DRRO). See the insertion of s 426A in the IA 1986. Fletcher *The law of insolvency* 346-347.
[299] Section 279(1) of the IA 1986.
[300] Section 281(6) of the IA 1986.
[301] Section 282(1) of the IA 1986.
[302] Fletcher *The law of insolvency* 356.
[303] See *More v More* (1962) Ch 424; Fletcher *The law of insolvency* 357.
[304] *Brandon v McHenry* (1891)1 QB 538.
[305] See ss 112-117 of the Country Courts Act 1984 (Country Courts Act).
[306] Ramsay *Personal insolvency in the 21st century* 77-78.

over time.[307] A request for an administration order must be made by the debtor to a County Court.[308] Before an administration order is made, the County Court sends a notice to each of the debtor's creditors identified by the debtor.[309]

The County Court will make an administration order if the debtor is unable to pay the amount of a judgment obtained against him or her and who alleges that his or her entire indebtedness amounts to a sum not exceeding the County Court limit, inclusive of the debt for which the judgment was obtained.[310] However, the administration order is not invalidated solely because the total amount of the debt is at any time found to exceed the County Court limit. In such a case the court may, if it deems fit, set aside the order.[311] Again after making the administration order, the County Court will notify each of the creditors identified by the debtor.[312]

A County Court administration order is regarded as a 'mini-bankruptcy'[313] as it allows a debtor who owes a few debts to discharge them by making regular payments[314] to the court.[315] The payments may be made by the debtor in instalments or otherwise, and either in full or to such extent as appears practicable to the court under the circumstances of the case.[316] The money is first used to pay the costs of administration and thereafter to pay the liquidation debt in accordance with the order.[317] Once the amount received is sufficient to pay each creditor scheduled to the order to the extent provided by the order, the plaintiff's costs in the action in respect of which the order was made, and the cost of the administration, the order shall be superseded, and the debtor shall be discharged from his or her debts to the scheduled creditors.[318] Thus, a discharge releases the debtor from the debts of the scheduled creditors[319] and the administration order becomes outdated.

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[307] See ss 112-117 of the Country Courts Act; Miller and Bailey *Personal insolvency* 6. Ramsay *Personal insolvency in the 21st century* 83.
[308] Section 112(1) of the County Courts Act.
[309] Section 112(3) of the County Courts Act.
[310] Section 112(1) of the County Courts Act.
[311] Section 112(5) of the County Courts Act.
[312] Section 113(a)(iii) of the County Courts Act.
[313] Ramsay *Personal insolvency in the 21st century* 81; Miller and Bailey *Personal insolvency* 1095.
[314] Section 112(6) of the County Courts Act.
[315] Section 117(1) of the County Court Act.
[316] Section 112(6) of the County Courts Act.
[317] Section 117(1) of the County Court Act.
[318] Section 117(2) of the County Court Act.
[319] Miller and Bailey *Personal insolvency* 1105.

While the County Court administration order is similar to the South African debt review under the NCA and the MCA administration order in that it allows the debtor to pay his or her debts by making regular payments and, like the MCA administration order, caters for debtors with few debts, it differs from these South African procedures in certain respects. While debt review and an MCA administration order rearrange the debts of a debtor, these processes do not provide for a discharge of debts.[320] The debt review process ends when the debtor has paid his or her debts in full and has received a clearance certificate.[321] The MCA administration order process terminates once the debtor has paid all his or her listed creditors' debts and all administration costs in full.[322] When viewed from a South African perspective, the County Court administration order appears to be a combination of the sequestration process, debt review, and administration under the MCA.

As in bankruptcy, when the County Court administration order is made the debtor obtains protection from creditors' remedies in respect of the debts of which the debtor notified the court before the order was made, and the debts which are scheduled to the order.[323] The relevant creditors are prohibited from enforcing their debts without the leave of the court.[324] Creditors who have scheduled debts are also prohibited, without the leave of the court, to apply to the High Court for a bankruptcy order in respect of those debts.[325] During the period in which the debtor is under administration, the court may stay any proceedings in the County Court which are pending against the debtor in respect of any debt so notified or scheduled, but it may allow costs already incurred by the creditor, and these costs may, on application, be added to the debt.[326] However, the requirement that proceedings be stayed, does not operate as a requirement to stay any proceedings in bankruptcy pending against the debtor.[327] Thus, the County Court administration order does not stop creditors without scheduled debts from applying for the debtor's bankruptcy. This is similar to the South African

[320] Ch 3 para 3.2.
[321] Ch 3 para 3.2.
[322] Ch 3 para 3.2.
[323] Section 114(1) of the County Courts Act.
[324] Section 114(1) of the County Courts Act; Miller and Bailey *Personal insolvency* 1095.
[325] Section 112(4) of the County Courts Act.
[326] Section 114(2) of the County Courts Act.
[327] Section 114(3) of the County Courts Act.

debt review process which does not per se prevent creditors from applying for the compulsory sequestration of the debtor's estate while under debt review.[328]

If a debtor who has filed for a County Court administration order becomes bankrupt, the action in the County Court is adjourned to allow the trustee in bankruptcy to elect whether to continue with the action.[329] If the trustee elects to continue because it would benefit the creditors of the estate, he or she must make the election within a reasonable time and must provide security for the costs of the action.[330] If the trustee decides to discontinue the action or fails to provide security within the time limit set by the court, the defendant may use his or her bankruptcy as a defence to the action.[331] As the debt review process and administration in terms of the MCA in South Africa do not prevent creditors from applying for the sequestration of the debtor who is under debt review or administration, once a sequestration order is granted, the trustee of an insolvent estate does not have the right of election as to whether or not to continue with debt review or administration.

England and Wales have a few alternatives to bankruptcy, namely debt relief orders,[332] IVAs,[333] and in May 2021 the debt respite scheme came into force.[334] While administration orders are a court relief process provided by legislation outside of bankruptcy, DROs are an out-of-court administrative process provided within bankruptcy laws.[335] A DRO is intended to provide relief to debtors with no income and no assets to repay what they owe, and to debtors who cannot afford to pay the cost of filing for bankruptcy.[336] Also, because DROs are out of court, they are less formal and more accessible to debtors with limited resources. The cost involved in the so-called 'no income and no asset' cases is also reduced.[337] The process is therefore intended

[328] Ch 3 para 3.2.
[329] Section 49(1), (2) of the County Courts Act.
[330] Section 49(1) of the County Courts Act.
[331] Section 49(3) of the County Courts Act.
[332] See debt relief orders (DRO) in ss 251A-251X of the IA 1986 and Sch 4ZB of the IA 1986.
[333] See IVA's under Part 8 of the IA 1986.
[334] Sections 6 and 7 of the Financial Guidance and Claims Act 2018; s 35 of the Financial Services Act 2021; The Breathing Space Regulations; Conway "Debt Respite Scheme Report" 5; Debt Respite Scheme (Breathing Space) guidance for creditors - GOV.UK https://bit.ly/2YiH0VM (assessed 4 November 2021).
[335] Ramsay *Personal insolvency in the 21st century* 99; Fletcher *The law of insolvency* 362.
[336] Fletcher *The law of insolvency* 362.
[337] Fletcher *The law of insolvency* 362.

to promote financial inclusion[338] and the term debt relief is used in preference to bankruptcy to avoid the stigma of bankruptcy which may deter some applicants.[339]

An application for a DRO is made online to the official receiver[340] and carries a fee of £90. The application is made by an individual who is unable to pay his or her debts in respect of a qualifying debt of less than £30 000 which includes debt for a liquidated amount.[341] A debtor who makes false representations, omissions, or conceals or submits false documents in his or her application is guilty of an offence.[342]

As with administration orders, once the DRO has been made by the official receiver, a moratorium commences which prevents creditors with schedule debts from exercising any remedy in respect of the debt or commencing a creditor's petition for bankruptcy, unless they have the court's permission.[343] However, if at the time of making the order, a creditor to whom a specified qualifying debt is owed has any such petition, action, or other proceedings pending, the court may stay the proceedings on the petition, action, or other proceedings, or may allow them to continue on such terms as the court thinks fit.[344] Further, if at the time of making the DRO the debtor is subject to other debt management arrangements, such as administration orders, those other debt arrangements will terminate.[345]

The moratorium continues for one year from the effective date of the DRO[346] and after 12 months the debtor is discharged from all qualifying debts indicated in the order, including all interest, penalties, and other sums which may have become payable on those debts since the application date.[347] However, the discharge will not apply to any qualifying debt that the debtor incurred in respect of any fraud or fraudulent breach of trust to which he or she was a party.[348]

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[338] Ramsay *Personal insolvency in the 21st century* 99.
[339] Ramsay *Personal insolvency in the 21st century* 101.
[340] Section 251B of the IA 1986.
[341] Section 251A of the IA 1986.
[342] See ss 251O-251T of the IA 1986.
[343] Sections 251G(1), (2) of the IA 1986. Fletcher *The law of insolvency* 362.
[344] Section 251G(3) of the IA 1986.
[345] Section 251E of the IA 1986.
[346] Section 251H of the IA 1986.
[347] Section 251I(1) of the IA 1986.
[348] Section 251I(3) of the IA 1986.

The IVA consists of a binding legal arrangement between the debtor and his or her creditors.[349] A debtor can enter into an IVA before undergoing adjudication as a bankrupt or after a bankruptcy order has been issued.[350] In the arrangement, the debtor agrees to pay a certain amount of his or her debts over a fixed period. The repayments may either be in monthly instalments over 5 years, or a shorter period may be arranged if the debtor can pay a lump sum. Alternatively, the arrangement can be a combination of a lump sum payment and instalments.

The IVA proposal is prepared by the debtor so that the appointed nominee can prepare his or her report on whether the debtor's proposal for an IVA has any reasonable prospect of being approved and implemented, and whether the debtor's creditors should consider the proposal.[351] Although the IVA proposal can be brought forward without an interim order,[352] an interim order moratorium prevents the debtor's creditors from initiating bankruptcy proceedings against him or her and halts any enforcement action without the court's permission while the interim order is effective.[353] Thus, if an interim order is not obtained, creditors can still take enforcement action against the debtor until the IVA proposal is accepted.[354] The interim order ceases to be effective after the acceptance of the IVA proposal.[355]

The IVA proposal will be accepted and will be binding on the debtor and all his or her creditors[356] if more than 75 per cent of creditors in value vote for its acceptance at the creditors meeting.[357] Once this majority has been reached, the insolvency practitioner supervises the arrangements to ensure that the debtor pays accordingly.[358] If the debtor whose proposal for an IVA is accepted by creditors is an undischarged bankrupt, the court will annul the bankruptcy order on application by the bankrupt or by the official receiver of the bankrupt estate.[359] However, the debtor may no longer

[349] Fletcher *The law of insolvency* (4th ed) 51.
[350] Fletcher *The law of insolvency* (4th ed) 51. Miller and Bailey *Personal insolvency* 208.
[351] Section 256(1) of the IA 1986.
[352] Section 256A of the IA 1986.
[353] Section 252(2) of the IA 1986.
[354] Fletcher *The law of insolvency* (4th ed) 72-73.
[355] Section 260(4) of the IA 1986; Miller and Bailey *Personal insolvency* 293.
[356] Section 260(2) of the IA 1986; Miller and Bailey *Personal insolvency* 288-289.
[357] Section 257 of the IA 1986.
[358] Fletcher *The law of insolvency* (4th ed) 52.
[359] Section 261 of the IA 1986. Miller and Bailey *Personal insolvency* 294.

be an undischarged bankrupt when the proposal is accepted since automatic discharge occurs after one year.[360]

When the arrangement is no longer effective but there is still an amount of money that has not been paid by the debtor to the creditors legally bound by the arrangement, and the arrangement has not ended prematurely, the debtor will become liable to pay to that person the amount payable under the arrangement.[361]

Although bankruptcy has a shorter discharge period than the IVA, IVAs are more appealing because they allow a debtor whose insolvency is imminent to avoid the bankruptcy process,[362] the stigma associated with having a bankruptcy status, and the bankruptcy restrictions applicable to certain debtors. For a debtor who is already undergoing bankruptcy adjudication, the IVA also provides a way out of bankruptcy[363] in that once the IVA proposal has been accepted, it can be annulled and the status of being bankrupt together with the disqualifications are removed.[364]

The IVA process appears to be a combination of the South African common-law compromise and the statutory post-sequestration composition.[365] However, a statutory composition in South Africa does not release the debts of the insolvent and does not discharge the sequestration order. Thus, an insolvent who has entered into a statutory compromise remains an unrehabilitated insolvent but can apply for early rehabilitation immediately after the offer of composition has been accepted.[366] On the other hand, a common-law composition provides a discharge of debts and ends the sequestration process with the debtor being subjected to only a few restrictions.[367] However, consent by all the creditors may be difficult to secure.[368]

The final alternative to bankruptcy in England and Wales is the debt respite scheme. The debt respite scheme consists of two elements: a statutory debt repayment plan; and a breathing-space moratorium. The statutory debt repayment plan allows a person with financial problems to enter into a statutory arrangement to repay his or her debts

[360] Miller and Bailey *Personal insolvency* 294; section 279(1) of the IA 1986.
[361] Section 260(2A) of the IA 1986.
[362] Fletcher *The law of insolvency* (4th ed) 51.
[363] Fletcher *The law of insolvency* (4th ed) 51.
[364] Miller and Bailey *Personal insolvency* 294.
[365] See Ch 3 para 3.2.
[366] See Ch 3 para 3.2.
[367] See Ch 3 para 3.2.
[368] See Ch 3 para 3.2.

under a manageable timetable with protection from creditor enforcement actions.[369] But the statutory debt repayment plan is not yet operational.[370]

The breathing-space moratorium gives a qualifying individual debtor with a debt problem a period of protection from creditors.[371] During the breathing-space moratorium the debtor has access to professional debt counselling without having to worry about increasing debt and without impeding enforcement actions.[372] However, the debtor is still required to continue paying all his or her ongoing liabilities.[373]

The Breathing Space Regulations provide for two types of moratorium: a standard breathing space;[374] and a mental-health-crisis breathing space.[375] The standard breathing-space moratorium is available to eligible debtors.[376] An eligible debtor includes a debtor who is an individual,[377] owes a qualifying debt to a creditor,[378] is domiciled or ordinarily resident in England or Wales,[379] and is not subject to a DRO,[380] interim order, or IVA.[381] An eligible debtor includes a person who is not subject to another breathing-space moratorium and, if he or she has previously been subject to a breathing-space moratorium, that moratorium ended more than 12 months before the date of the application.[382] Further, the debtor should not be subject to a mental-health-crisis moratorium[383] and not be an undischarged bankrupt.[384]

The application for the breathing-space moratorium must be made by an eligible debtor to a debt advice provider.[385] The eligible debtor must seek professional debt advice which may be provided in person, on the phone, or electronically.[386] The debt

[369] Conway "Debt Respite Scheme Report" 5.
[370] Conway "Debt Respite Scheme Report" 6.
[371] Conway "Debt Respite Scheme Report" 5.
[372] Conway "Debt Respite Scheme Report" 5.
[373] Conway "Debt Respite Scheme Report" 5.
[374] See ss 23-27 of the Breathing Space Regulations.
[375] See ss 28-34 of the Breathing Space Regulations.
[376] Section 24(3) of the Breathing Space Regulations.
[377] Section 24(3)(a) of the Breathing Space Regulations.
[378] Section 24(3)(b) of the Breathing Space Regulations.
[379] Section 24(3)(c) of the Breathing Space Regulations.
[380] Section 24(3)(d) of the Breathing Space Regulations.
[381] Section 24(3)(e) of the Breathing Space Regulations.
[382] Section 24(3)(g) of the Breathing Space Regulations.
[383] Section 24(3)(h) of the Breathing Space Regulations.
[384] Section 24(3)(f) of the Breathing Space Regulations.
[385] Section 23(1) of the Breathing Space Regulations.
[386] Section 23(2) of the Breathing Space Regulations.

advice provider will only initiate a breathing-space moratorium[387] if the debtor is eligible, the debts to be included in the moratorium are qualifying debts,[388] the debtor is unable or unlikely to be able, to repay some or all of his or her debt as it falls due, and a breathing-space moratorium would be appropriate.[389] The breathing-space moratorium gives the eligible debtor 60 days of legal protection from creditors.[390] During this period contact from creditors is paused and creditors cannot enforce their claims and most interests, fees, and penalties on their debts are frozen.[391]

A mental-health-crisis moratorium may only be applied in respect of a person who is receiving mental health crisis treatment.[392] The application must be made to a debt advice provider by amongst other persons, the debtor or his or her career, an approved mental health professional, a mental health nurse, a social worker, or the relevant person's representative.[393]

As with the standard breathing-space moratorium, the mental-health-crisis moratorium is available to eligible debtors.[394] Eligible debtors in this regard are the same as those for the breathing-space moratorium, but they are contained in section 30 of the Breathing Space Regulations. The debt advice provider will only initiate a mental-health-crisis moratorium if the debtor is eligible, the debts to be included in the moratorium are qualifying debts, the debtor is unable or unlikely to be able to repay some or all of his or her debt as it falls due, a mental-health-crisis moratorium would be appropriate, and an approved mental health professional has provided evidence that the debtor is receiving mental health crisis treatment.[395] Unlike a breathing-space moratorium, a mental-health-crisis moratorium lasts for as long as the debtor is in

[387] Section 24(2) of the Breathing Space Regulations.
[388] A 'qualifying debt' means any debt or liability other than non-eligible debt and it includes any amount which a debtor is liable to pay under or in relation to an order or warrant for possession of the debtor's place of residence or business, a court judgment, a controlled goods agreement, or any debt owed or liability payable to the Crown. See s 5(1) read with s 5(3) of the Breathing Space Regulations.
[389] Section 24(4) of the Breathing Space Regulations.
[390] Section 26(2) of the Breathing Space Regulations.
[391] Section 7(2) read with s 7(6) of the Breathing Space Regulations; Conway "Debt Respite Scheme Report" 5.
[392] Section 28(1) of the Breathing Space Regulations.
[393] Section 29(1) of the Breathing Space Regulations.
[394] Section 30(3) of the Breathing Space Regulations.
[395] Section 30(2) read with s 30(3) and 30(4) of the Breathing Space Regulations.

mental health crisis treatment, plus 30 days, no matter how long the crisis treatment lasts.[396]

South African law does not have an alternative to bankruptcy similar to the debt respite scheme. As the debt respite scheme provides for a statutory debt repayment plan without actually being in an IVA, it appears that once effective it will be a valuable alternative to the IVA because the period for the repayment plan may be shorter and the requirements may be less cumbersome than those for an IVA. The breathing-space moratorium may even be of greater assistance to a debtor in a financial crisis and who is unaware of his or her options to escape from the financial difficulty because the debt advisor will provide him or her with financial advice. The breathing-space moratorium is especially important when one considers that some honest but unfortunate debtors' bankruptcy is caused by factors beyond their control such as hospital bills[397] and the breathing space will in certain instances avoid or delay bankruptcy caused by these.

5.3.2 Entry requirements

5.3.2.1 Involuntary case: Creditor's petition

For a creditor to present a petition, he or she must be owed at least one debt by the debtor, but a petition may be presented by two or more creditors jointly[398] provided that each creditor has at least one debt owed by the debtor. This contrasts with the South African application for compulsory sequestration where one creditor is sufficient to bring an application for the compulsory sequestration of the estate of a debtor.[399] Before a petitioning creditor can even present a petition in England and Wales he or she must first provide the reason for doing so.[400] When a debt is payable immediately, this can be achieved by indicating that he or she has served a statutory demand on the debtor who has failed to comply with it or have it set aside,[401] or that he or she has obtained a judgment and the execution returned unsatisfied.[402] In doing this, the

[396] Section 32(2) of the Breathing Space Regulations; Conway "Debt Respite Scheme Report" 5.
[397] See Ch 2 para 2.6.
[398] Section 264(1)(a) of the IA 1986.
[399] Ch 3 para 3.3.2.
[400] Miller and Bailey *Personal insolvency* 365.
[401] Section 268(1)(a) of the IA 1986; rule 10.9(2)(b) of the IR 2016.
[402] Section 268(1)(b) of the IA 1986.

petitioning creditor shows that it appears that the debtor is unable to pay his or her debt.[403]

When the debt is not immediately payable, the petitioning creditor must show that he or she has served a statutory demand on the debtor requiring him or her to indicate to the creditor's satisfaction that there is a reasonable prospect that he or she will be able to pay the debt when it falls due.[404] Proof by the creditor that three weeks have passed since the demand and that the debtor has failed to comply or to have it set aside[405] will be taken to show that the debtor apparently has no reasonable prospect of being able to pay the debt.[406]

Therefore, a petitioning creditor may present a petition if he or she can show that it is for a debt that the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay.[407] In addition, the petitioning creditor must show that at the time of presentation the debtor owed an unsecured liquidated amount[408] equal to or exceeding[409] the bankruptcy level.[410]

Before the petition can be filed the petitioning creditor must pay a deposit as security for fees payable, among others, to any person who has prepared an insolvency practitioner's report.[411] This is similar to the South African application for compulsory sequestration where the petitioning creditor is required to provide security to the Master to cover all sequestration and administration costs until the appointment of a trustee.[412] Further, in England and Wales the petition must be verified by a statement of truth,[413] and where a statutory demand should have been served, the petition must specify the date and manner of service of the statutory demand.[414]

The court will only make a bankruptcy order on a creditor's petition if it is satisfied that the debt or debts in respect of which the petition has been presented are debts payable

[403] Section 268(1)(a) of the IA 1986.
[404] Section 268(2)(a) of the IA 1986.
[405] Section 268(2)(b) and (c) of the IA 1986.
[406] Section 268(2) of the IA 1986.
[407] Section 267(2)(c) of the IA 1986.
[408] Section 267(2)(b) of the IA 1986.
[409] Section 267(2)(a) of the IA 1986.
[410] As of June 2021, the bankruptcy level is £5,000. See s 267(4) of the IA 1986.
[411] Rule 10.12(2)(a) of the IR 2016; s 415(3) of the IA 1986.
[412] Ch 3 para 3.3.2.
[413] Rule 10.10 of the IR 2016.
[414] Rule 10.9(2)(a) of the IR 2016.

at the date of the petition or having since become payable which have been neither paid nor secured or compounded.[415] Alternatively, it is a debt that the debtor has no reasonable prospect of being able to pay when it falls due.[416] On the other hand, the court will dismiss a petition if it is satisfied that the debtor can pay all his or her debts.[417] The court may even dismiss the petition or stay proceedings where there has been a contravention of the rules, the petition has been tainted by an abuse of process,[418] or for any other reason including lack of assets.[419] Thus, where it appears that the continuation of the proceedings would be a waste of effort and expense as it has been established that there can be no assets or hope of assets accruing in the future which would be available for distribution amongst the creditors, the court could dismiss the petition.[420] In South Africa too, a court has a discretion to rescind, vary, or set aside any order it has made in terms of the Insolvency Act. Thus, even if the court has granted the sequestration order, it may still rescind, vary, or set it aside if it was obtained incorrectly, fraudulently, or when subsequent events justify a rescission, especially if there was an abuse of the sequestration process.[421]

5.3.2.1 Voluntary case: Debtor's petition

As indicated, a debtor wishing to initiate a voluntary bankruptcy process against him- or herself must apply to an adjudicator for a bankruptcy order[422] on the ground that he or she is unable to pay his or her debts.[423] Such an application must be made and submitted to the adjudicator in electronic format[424] and must include particulars of the debtor's creditors, debts, and other liabilities and assets[425] and be accompanied by a fee or deposit.[426] In South Africa, the applicant debtor in a voluntary surrender application is required to submit a statement of affairs setting out particulars similar to

[415] Section 271(1)(a) of the IA 1986.
[416] Section 271(1)(b) of the IA 1986.
[417] Section 271(3) of the IA 1986.
[418] See *Bank of Scotland v Bennett* [2004] EWCA Civ 988, [2004] All ER (D) 417 (Jul).
[419] Section 266(3) of the IA 1986.
[420] Fletcher *The law of insolvency* 148.
[421] Ch 3 para 3.3.1.
[422] An adjudicator has jurisdiction to determine a bankruptcy application only if the centre of the debtor's main interests is in England and Wales, or the centre of the debtor's main interests is not in a member state of the European Union which has adopted the EU Insolvency Regulation. See s 263I of the IA 1986.
[423] Section 263H of the IA 1986.
[424] Rule 10.36(1) of the IR 2016.
[425] Section 263J(1) of the IA 1986; Rule 10.35 of the IR 2016.
[426] Section 263J(2) of the IA 1986.

those required of a debtor in England and Wales. However, in South Africa the applicant debtor in a voluntary surrender application is not required to pay a deposit[427] as security. This is only required in an application for compulsory sequestration.[428]

Further in England and Wales, once the application has been made it cannot be withdrawn[429] and the debtor must notify the adjudicator if at any time before the bankruptcy order is made or the adjudicator refuses to make the order, whether he or she has become able to pay his or her debts, or a bankruptcy petition has been presented to the court against him or her.[430] In South Africa, an application by the debtor for the surrender of his or her estate can be withdrawn by withdrawing the notice of surrender. The notice can only be withdrawn with the written consent of the Master which will only be given if the Master is satisfied that the notice was published in good faith and that good cause exists for it to be withdrawn.[431]

The adjudicator will only make a bankruptcy order if he or she is satisfied[432] that he or she has jurisdiction to determine the application, the debtor is unable to pay his or her debts at the date of the determination, no bankruptcy petition is pending concerning the debtor at the date of the determination, and no bankruptcy order has been made in respect of any of the debts subject of the application at the date of the determination.[433] If the adjudicator is not so satisfied, he or she must refuse to make a bankruptcy order against the debtor.[434] If he or she requires more information he or she may request additional information from the debtor to assist in deciding on making the bankruptcy order.[435] However, he or she must make a bankruptcy order against the debtor or refuse to make such an order before the end of the prescribed period,[436] because failure to decide before the prescribed period of 28 days amounts to a refusal by default.[437]

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[427] Ch 3 para 3.3.1.
[428] Ch 3 para 3.3.2.
[429] Section 263J(3) of the IA 1986.
[430] Section 263J(4) of the IA 1986.
[431] Ch 3 para 3.3.1.
[432] Section 263K(2) of the IA 1986.
[433] Section 263K(1) of the IA 1986.
[434] Section 263K(3) of the IA 1986.
[435] Section 263L of the IA 1986.
[436] Section 263K(4) of the IA 1986. The provisions in s 263K are mandatory and do not allow for discretion on the part of the adjudicator. Fletcher *The law of insolvency* 155.
[437] Rule 10.40(1) read with rule 10.40(3) of the Insolvency Rules 2016.

Once a bankruptcy order has been made the procedure that follows is the same as in an involuntary case.[438]

5.3.3 Restrictions and prohibitions on bankrupt debtors: During bankruptcy

As in South Africa, the status of being adjudged bankrupt in England carries consequences that limit the bankrupt's capacity and freedoms and exposes him or her to certain disqualifications.[439] Before 2002, bankruptcy law in England did not distinguish between the dishonest or irresponsible debtor, and a debtor whose failure was honest.[440] The limitations on a bankrupt debtor based on his or her bankruptcy status applied to all bankrupt debtors.[441]

Thus, before the Enterprise Act an undischarged bankrupt could not act as a director[442] of or in the management of a limited company without the court's permission.[443] He or she could also not obtain credit in excess of £250 without disclosing his or her status,[444] or engage, directly or indirectly in any business under a name other than that under which he or she was adjudged bankruptcy without disclosing to all persons with whom he or she enters into any business transaction the name under which he or she was adjudged bankrupt.[445] These restrictions were and still are intended to protect public interests generally, especially the business community. Breaching the restrictions is a criminal offence for which the bankrupt risks imprisonment for up to two years and/or a fine.[446]

Among other mandatory restrictions on undischarged bankrupts[447] before the Enterprise Act included disqualification from being an insolvency practitioner,[448]

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[438] Fletcher *The law of insolvency* 160.
[439] Fletcher *The law of insolvency* Ch 7 under personal situation of the debtor.
[440] Para 1.21 of the *Second Chance Report* the *Productivity and Enterprise: Insolvency – A Second Chance*, Cm 5234 (2001) Annex A: examples of current restrictions on bankrupts (*Second Chance Report*).
[441] Para 1.21 of *Second Chance Report.*
[442] Company Directors' Disqualification Act 1986 (Director's Disqualification Act). See also Miller and Bailey *Personal insolvency* 456.
[443] Para 1.22 of the *Second Chance Report;* Fletcher *The law of insolvency* 370-372; Miller and Bailey *Personal insolvency* 455-463.
[444] Section 360(1)(a) of the IA 1986.
[445] Section 360(1)(b) of the IA 1986.
[446] Para 1.23 of the *Second Chance Report* Annex A.
[447] For more examples see the *Second Chance Report* Annex A; Fletcher *The law of insolvency*.
[448] Sections 390(4)(a) and 389 of the IA 1986.

Member of Parliament,[449] chairman of a land tribunal,[450] school governor,[451] member of a regional or local flood defence committee,[452] member of an internal drainage board,[453] estate agent,[454] practising solicitor,[455] pension trustee,[456] member of a local authority,[457] member of the UK National Board of Nursing, Mayor or member of the London Assembly,[458] or a justice of the peace.[459]

The discretionary power to remove an undischarged bankrupt[460] from certain offices, employment and board membership include the power of the Secretary of State to suspend or remove a member of a Local Probation Board,[461] the National Park Authority's power to revoke the appointment of an Interim Monitoring Officer,[462] the Lord Chancellor's power to revoke the appointment of the President of Industrial Tribunals,[463] and the Secretary of State's power to remove a member of the Dental Practice Board.[464]

While some of these restrictions and disqualifications are justified to protect public interests, they are based on the stigma that a bankrupt debtor is not someone in whom society can have trust or confidence.[465] Such a notion does not consider the risk that is in an ordinary part of business life.[466]

Thus, when the Enterprise Act came into force it aimed to reduce the stigma traditionally associated with bankruptcy by reducing the number of restrictions imposed on undischarged bankrupts.[467]

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[449] Section 427 of the IA 1986.
[450] Agriculture Act 1947.
[451] Education (School Government) Regulations 1989.
[452] Environment Act 1995.
[453] Land Drainage Act 1991.
[454] Estate Agents Act 1979.
[455] Solicitors Act 1974.
[456] Pensions Act 1995.
[457] Section 80(1)(b) of the Local Government Act 1972 (Local Government Act).
[458] Section 21(1)(c) of the Greater London Authority Act 1999.
[459] Justice of the Peace Act 1997 (Justice of the Peace Act).
[460] See the *Second Chance Report* Annex A.
[461] Local Probation Boards Appointments Regulation 2000.
[462] National Park Authorities (England) Order 1996.
[463] Industrial Tribunals (Constitution and Rules of Procedure) Regulations 1993.
[464] Dental Practice Board Regulations 1992.
[465] Para 1.21 of the *Second Chance Report.*
[466] Para 1.21 of the *Second Chance Report.*
[467] Fletcher *The law of insolvency* 348. The Enterprise Act 2002 (Enterprise Act) abolished many of the restrictions that applied. See ss 266-267 of the Enterprise Act. Most of the disqualification after the Enterprise Act only ensue if a BRO or a BRU is made or given. See s 426A(1) of the IA 1986; Miller

Therefore, after the Enterprise Act only certain of the restrictions on an adjudged bankrupt were retained. Consequently, an adjudged bankrupt is still disqualified from acting as an insolvency practitioner[468] and may not hold any office relating to insolvency proceedings in section 388 of the IA 1986. Such offices include being a liquidator or provisional liquidator,[469] a trustee in bankruptcy, or a receiver of property in bankruptcy.[470]

Also, it is a criminal offence for an adjudged bankrupt who is subject to a BRO to act as a director, or directly or indirectly to take part in or be concerned in the promotion, formation, or management of a company without the leave of the court which adjudged him or her bankrupt.[471] Such an adjudged bankrupt could be convicted even if he or she was unaware that he or she had not been discharged from bankruptcy.[472]

As regards membership of the Houses of Parliament, the automatic disqualification that applied to all adjudged bankrupts before the Enterprise Act was repealed and section 426A was inserted in the IA 1986 to apply only to adjudged bankrupts who are under a BRO.[473] In terms of section 426A(1) such an adjudged bankrupt is disqualified from being a member of the House of Commons, from sitting or voting in the House of Lords, and from sitting or voting in a committee of the House of Lords or a joint committee of both Houses. Such a member will have to vacate his or her seat when he or she becomes disqualified.[474]

A bankrupt who is subject to a BRO is also disqualified from being a member of a local authority.[475] Thus, an undischarged bankrupt is no longer automatically disqualified from being a member of the local authority, the disqualification only applies if he or she is subject to a BRO. The Enterprise Act also abolished the automatic disqualification from being a justice of the peace.[476] However, a solicitor's practice

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and Bailey *Personal insolvency* 457. See Kelly "The Enterprise Act 2002: Changes in Bankruptcy Law" 7 https://bit.ly/2RZV6VD (accessed 5 June 2019); Walters (2005) *Journal of Corporate Law Studies* 24.
[468] Section 390(4) of the IA 1986.
[469] Section 388(1) of the IA 1986.
[470] Section 388(2) of the IA 1986.
[471] Director's Disqualification Act as amended by s 257(2) of the Enterprise Act.
[472] Fletcher *The law of insolvency* 348.
[473] Fletcher *The law of insolvency* 346-347.
[474] Section 426A(2) of the IA 1986.
[475] Local Government Act as amended by the s 267 of the Enterprise Act.
[476] Section 265 of the Enterprise Act abolished s 65 of the Justice of the Peace Act.

certificate will not be issued to an undischarged bankrupt or a person who is the subject of a BRO.[477]

While the position in England and Wales before 2002 was largely similar to the South African position as regards the restrictions on unrehabilitated insolvents, the position in South Africa has remained the same despite having similar aims and challenges as England and Wales. For example, in both South Africa and England and Wales the restrictions and disqualifications on bankrupt debtors were and still are intended to protect the public and are justified for the protection of public interests.[478] However, in both South Africa and England and Wales the need for protection was based on the notion of the stigma that a debtor who becomes bankrupt is not a person in whom society can have trust or confidence.[479] Such a notion does not take into account the risk that is an ordinary part of business life.[480] While England and Wales have made changes to address these challenges, South Africa has not.

5.3.4 Restrictions and prohibitions on bankrupt debtors: After discharge

5.3.4.1 A discharge order

At the end of one year from the date on which the bankruptcy commenced the bankrupt debtor is automatically discharged[481] from all bankruptcy debts.[482] A bankruptcy debt includes, any debt or liability to which the bankrupt is subject at the commencement of the bankruptcy, or any debt or liability to which he or she may become subject after the commencement of the bankruptcy, including after his or her discharge from bankruptcy because of any obligation incurred before the commencement of the bankruptcy.[483] The discharge also frees a bankrupt debtor from all disabilities and disqualifications to which he or she was subjected while having a bankruptcy status.[484] However, the discharge does not affect the functions of the trustee of his or her estate which must still be performed, or the right of any creditor of the bankrupt to prove any

[477] Section 12(1)(h) and (i) of the Solicitors Act.
[478] Ch 3 paras 3.4.3 and 3.6.
[479] Ch 2 para 2.6 and Ch 3 para 3.4.3.
[480] Ch 2 para 2.6 and Ch 3 para 3.4.3.
[481] Section 279(1) of the IA 1986.
[482] Section 382(1)(a) and (b) of the IA 1986; *Secretary of State for Work & Pensions v Balding* [2007] EWCA Civ 1327; *Secretary of State for Work and Pensions v Payne* [2012] 2 WLR 1; Fletcher *The law of insolvency* 342.
[483] Section 382(1)(a) and (b) of the IA 1986.
[484] Fletcher *The law of insolvency* 342; Miller and Bailey *Personal insolvency* 464.

debt from which the bankrupt is released.[485] This is similar to the South African position where rehabilitation does not affect, amongst others, the right of the trustee or creditor to any part of the insolvent estate which is vested in but has not been distributed by the trustee, the liability of a surety for the insolvent, and the liability of any person to pay any penalty or suffer any punishment under any provision of the Act.[486]

Again, as in South Africa, not all bankruptcy debts[487] are released by an automatic discharge in England and Wales. For example, bankruptcy debts incurred by fraud or fraudulent breach of trust to which the bankrupt was a party,[488] or any liability in respect of a fine imposed for an offence, or any liability under an obligation imposed by a court are not released.[489] The discharge also does not release debts that arose from personal injury to any person or liability to pay damages for negligence, nuisance, or breach of a statutory contractual or other duty, or those that arose under an order made in family proceedings.[490] However, in South African insolvency law debts resulting from alimony, the intentional assault or killing of another, driving under the influence of alcohol, and fines or punishment, are not excluded from discharge, meaning that they are also extinguished after rehabilitation.[491]

5.3.4.2 Denial of discharge

In England and Wales, automatic discharge can be postponed to a later date. Section 279(3) of the IA 1986 allows an official receiver or the trustee of the bankrupt's estate to apply to court for an order to discontinue the one-year automatic discharge period and instead to allow bankruptcy to continue until the end of a specified period or on the fulfilment of a specific condition.[492] This situation may arise when it appears that an undischarged bankrupt who is eligible for automatic discharge fails to comply with an obligation to which he or she is subject because of his or her bankruptcy.[493] Similarly, in South Africa on an application by an interested person and after notice to

[485] Section 279(1) of the IA 1986.
[486] Ch 3 para 3.5.1.
[487] See rule 10.146 of IR 2016.
[488] Section 281(3) of the IA 1986.
[489] Section 281(4) of the IA 1986.
[490]Section 279(5) of the IA 1986.
[491] Ch 3 para 3.5.1.
[492] Section 279(3) of the IA 1986.
[493] Fletcher *The law of insolvency* 339.

the insolvent, the court may on good cause order that rehabilitation will not set in after ten years, in which case the debtor will be insolvent for a longer period.[494]

Before the 2004 amendments by the Enterprise Act, a court could refuse a discharge application made by a bankrupt debtor based on his or her behaviour.[495] After 2004, conduct that could have led to a denial of discharge before 2004 now leads to the awarding of a BRO, BRU, or a DRRO which will be discussed below.

5.3.4.3 Discrimination after discharge

Before the 2004 amendments by the Enterprise Act, automatic discharge occurred three years from the date of the bankruptcy order. The reduction of the automatic discharge period from three years to one year was intended to accelerate the rehabilitation of bankrupts whose conduct did not give rise to public concern[496] and thus provide only a deserving debtor with a fresh start.[497] It also reflects parliament's awareness that some bankruptcies are caused by misfortune and not by dishonesty.[498] Consequently, the over-arching aim was to move away from the 'one-size-fits-all' approach that characterised bankruptcy in England[499] towards distinguishing between bankrupts based on their culpability, provided that the reasons for a bankrupt's failure were tested with appropriate rigour.[500] This led to the insertion of section 281A and of Schedule 4 to the IA 1986 which provides for the BRO and BRU.

Thus, while a discharge is intended to give a debtor a fresh start by restoring his or her ability to enter into contractual relations and engage in trade freely, a debtor's conduct may lead to an award of a BRO or a BRU which may impose restrictions on him or her for up to fifteen years from the date of discharge.[501] This means that the debtor would not be freed from all the disabilities and disqualification to which he or she was subject before discharge. Thus, a BRO or BRU has the effect of distinguishing

[494] Ch 3 para 3.5.1.
[495] Fletcher *The law of insolvency* 350.
[496] Paras 1.2-1.6 of the *Second Chance Report.* Fletcher *The law of insolvency* 338.
[497] Para 1.2-1.6 of the *Second Chance Report.*
[498] Miller and Bailey *Personal insolvency* 464.
[499] Para 1.2 of the *Second Chance Report.*
[500] Para 1.3 of the *Second Chance Report.*
[501] Para 4.2(b) of Sch 4A to the IA 1986. In February 2022 the Insolvency Service punished 32 bankrupt individuals for excessive gambling or unnecessarily extravagance by subjecting them to BROs to prevent them from resuming the gambling, rash speculation, or extravagant spending that contributed to their bankruptcy. See "Insolvency Service punishes 32 bankrupt individuals for gambling" https://bit.ly/3KMvZOX (accessed 16 March 2022).

between the honest and dishonest debtor, and only the bankrupt whose conduct justifies a restriction[502] will be subjected to all the restrictions on undischarged bankrupts that applied before the Enterprise Act.

The application for a BRO may be made to the court only by the Secretary of State or the official receiver acting on a direction of the Secretary of State.[503] The court must make the order if it considers it appropriate having regard to the bankrupt's conduct before or after the making of the bankruptcy order.[504]

The bankrupt's conduct that the court must consider includes the failure to keep records that account for a loss of property by the bankrupt, or by a business carried on by him or her, failure to produce records on demand by the official receiver or the trustee, entering into a transaction at an under value, giving a preference, making excessive pension contributions, failure to supply goods or services which were wholly or partly paid for and which gave rise to a claim provable in the bankruptcy, and trading before the commencement of the bankruptcy when the bankrupt knew or ought to have known that he or she was him- or herself unable to pay his or her debts.[505]

Other conduct includes instances where the debtor incurred a debt which the bankrupt had no reasonable expectation of being able to pay before commencement of the bankruptcy, failure to account satisfactorily to the court, carrying on any gambling, rash or hazardous speculation or unreasonable extravagance which may have materially contributed to or increased the extent of the bankruptcy, or which took place between the making of the bankruptcy application and commencement of the bankruptcy, neglect of business affairs of a kind which may have materially contributed to or increased the extent of the bankruptcy, and fraud or fraudulent breach of trust.[506]

Many of these grounds are similar to the grounds for refusal of discharge that applied before the Enterprise Act.[507] To avoid repeat bankrupts from obtaining a discharge, the court, in considering whether to grant a BRA, is required to enquire whether the

[502] See s 281A of the IA 1986.
[503] Para 1 of Sch 4A to the IA 1986.
[504] Para 2.1 of Sch 4A to the IA 1986.
[505] Para 2.2(a)-(g) of Sch 4A to the IA 1986.
[506] Para 2.2(h)-(m) of Sch 4A to the IA 1986.
[507] Fletcher *The law of insolvency* 350.

debtor was an undischarged bankrupt at some time during the six years preceding the date of the bankruptcy to which the application relates.[508]

While a BRO is imposed by the court, a BRU is based on an undertaking offered by the bankrupt to the Secretary of State.[509] However, in determining whether to accept a BRU the Secretary of State considers the same type of conduct of the bankrupt that is considered before making a BRO[510] and a reference in an enactment to a person in respect of whom a BRO applies includes a reference to a person in respect of whom a BRU applies.[511] This avoids the situation where a person subject to a BRU attempts to bypass provisions intended to protect the public during the time in which he is affected by the BRU, by claiming that a certain provision refers only to a BRO.[512]

Thus, the introduction of BROs and BRUs reflects the legislature's aim to give a fresh start only to the honest and deserving debtor and that those whose bankruptcy is a result of their dishonest conduct should endure the disqualifications and restrictions for a longer than one year and may remain subject to restriction for a period of between two to fifteen years.[513]

While a bankrupt debtor's conduct can give rise to a BRO or BRU, similarly a court on application by the Secretary of State, or the official receiver acting at a direction of the Secretary of State, may order a DRRO against a debtor who is subject to a DRO.[514] The DRRO is intended to prevent the abuse of the use of DROs by debtors who continually incur debt irresponsibly hoping that their debts will be discharged automatically.[515]

As with a BRO, a DRRO is a sanction for the debtor's behaviour[516] and the grounds are essentially the same as those for a BRO.[517] An application for a DRRO may be

[508] Para 2.3 of Sch 4A to the IA 1986.
[509] Para 7.1 of Sch 4A to the IA 1986.
[510] Para 7.2 of Sch 4A to the IA 1986.
[511] Para 8 of Sch 4A to the IA 1986.
[512] Fletcher *The law of insolvency* 352.
[513] Para 4.2 of Sch 4A to the IA 1986.
[514] See paras 1 and 7.1 of Sch 4ZB to the IA 1986. A reference in an enactment to a person in respect of whom a DRRO has an effect (or who is 'the subject of' a DRRO) includes a reference to a person in respect of whom a debt relief restriction undertaking has an effect. See para 8 of Sch 4ZB to the IA 1986.
[515] Fletcher *The law of insolvency* 363.
[516] Ramsay *Personal insolvency in the 21st century* 101.
[517] See paras 2 and 7.2 of Sch 4ZB to the IA 1986. Fletcher *The law of insolvency* 363.

made at any time during or after the moratorium period of the DRO in question, but only with the permission of the court.[518] The order commences when it is made and ends on the date specified in the order which may not be before the end of two years beginning on the date on which the order is made, or after the end of a period of fifteen years beginning on that date.[519] Thus, as with BRO, a DRRO may last between two to fifteen years.

South African insolvency law does not have a BRO, BRU, or DRRO equivalent. The awarding of a BRO, BRU, or a DRRO would also be beneficial in South African insolvency law. It would have the similar effect of distinguishing between the honest and dishonest debtor, and only the bankrupt whose conduct justifies a restriction would be subjected to all the restrictions imposed on unrehabilitated insolvents. However, the ten-year period would first have to be reduced to one to three years to avoid a person being restricted for more than 20 years.

5.3.5 Summary

As in South African insolvency legislation, certain debtors are disqualified from accessing the bankruptcy process. However, ineligible debtors in England and Wales are not without recourse. They can make use of the administration orders or DROs both of which provide for a discharge of debts, notwithstanding that in administration orders, discharge may be obtained after a longer period than one year, which is the case with bankruptcy and DROs. However, under the DRO, the discharge will not apply to any qualifying debt that the debtor incurred in respect of any fraud or fraudulent breach of trust to which he or she was a party. In South Africa, the alternatives to insolvency – such as administration orders[520] and debt review[521] – do not provide for a discharge of debts as they aim to assist overindebted debtors eventually to settle their debt.[522] Because DROs are termed debt relief instead of bankruptcy, they avoid the stigma associated with bankruptcy which may deter some applicants. DROs are also aimed at promoting financial inclusion as opposed to bankruptcy which comes with many restrictions.

[518] Paras 3 and 7.2 of Sch 4ZB to the IA 1986.
[519] Paras 4 and 9(1), (2) of Sch 4ZB to the IA 1986.
[520] See s 74 of the MCA.
[521] See s 86 of the NCA.
[522] See para 2.2 in Ch 3.

Debtors in England and Wales can also make use of the IVAs or the debt respite scheme. IVAs assist debtors to avoid bankruptcy, thereby avoiding the stigma associated with having a bankruptcy status and the bankruptcy restrictions applicable to certain debtors. For a debtor who is already undergoing bankruptcy adjudication, after the acceptance of the IVA proposal, it can be annulled and the status of being bankrupt together with the disqualifications are removed. Under an IVA, discharge may be obtained after a period in excess of one year. The debt respite scheme can either avoid a debtor's bankruptcy or at least delay it. The breathing-space moratorium ends after 60 days while a mental-health-crisis moratorium lasts for as long as the debtor is in mental health crisis treatment, plus 30 days, no matter how long the crisis treatment lasts.

The introduction of the Enterprise Act in 2002 brought many changes to bankruptcy law in England and Wales. Before the Enterprise Act the situation in England and Wales was similar to the current situation in South Africa where insolvency law carries a social stigma seen in the punitive restrictions and disabilities imposed on unrehabilitated insolvent debtors. Since 2002, the period from commencement to discharge of bankruptcy has been reduced to one year in all cases, and the bankrupt debtor is no longer automatically subjected to all the disqualifications and restrictions previously imposed.

As in the USA, after the Enterprise Act the UK distinguishes between honest but unfortunate debtors and dishonest or serial debtors and, only the bankrupt whose conduct justifies a BRO will be subjected to all the restrictions which applied before the Enterprise Act. Even a dishonest debtor who is subject to a DRO can be subjected to restriction orders on the same grounds as a BRO. Such restrictions could last for anything between two to fifteen years for both under a BRO or a DRO.

5.4 Nigeria

5.4.1 General Background

The restrictions in the Nigerian legal system will be discussed against the background of bankruptcy procedures. The Nigerian legal system has a common-law background and the Bankruptcy Act borrowed extensively from the IA 1986.[523] Therefore, the

[523] See Ihembe *Reforming the legal framework* 250; Roestoff (2018) *THRHR* 417.

purpose of bankruptcy in Nigeria is also the fair and equitable distribution of the debtor's property among his or her creditors[524] and provides for a fresh start through a discharge.[525] However, unlike the IA 1896 from which the BA borrowed extensively, there are no alternatives to bankruptcy in Nigeria apart from informal payment plan arrangements with creditors and out of court settlements before bankruptcy.[526]

Like insolvency law in South Africa and the UK before the Enterprise Act, Nigerian bankruptcy law is more punitive in that a bankrupt debtor in Nigeria is subjected to many restrictions and disqualifications.[527] Although the BA provides for both voluntary[528] and involuntary bankruptcy,[529] there is no reported case of a voluntary debtor bankruptcy petition.[530] This shows that in Nigeria a greater stigma is associated with bankruptcy than in South Africa and explains why the BA is largely obsolete.[531] Nigerian bankruptcy authors blame the unpopularity of bankruptcy proceedings in Nigeria on the societal belief that debtors are outcasts who should be ostracised.[532] Further, bankruptcy law is not part of the law degree curriculum in Nigerian law schools.[533] Therefore, natural-person insolvency law in Nigeria does not comply with international best practice and appears outdated.[534] For these reasons, the BA is

[524] Onakoya and Oluta (2017) *International Journal of Economics and Financial Issues* 707; Opara, Okere and Opara (2014) *Canadian Social Sciences* 61; Nwobike J "Whether Bankruptcy and Winding Up Proceedings are Veritable Tools for Debt Recovery in Nigeria'' (2013) https://bit.ly/3zQ4HCD at 4 (accessed 22 June 2021).
[525] See ss 28 and 31 of the BA.
[526] *Insol Report II* 214 and 216.
[527] See the Preamble to and s 126 of the BA; Osunlaja *Debt relief measures for NINA debtors in Nigeria* 64; Opara, Okere and Opara (2014) *Canadian Social Sciences* 64; Nwobike J "Whether Bankruptcy and Winding Up Proceedings are Veritable Tools for Debt Recovery in Nigeria'' (2013) https://bit.ly/3zQ4HCD (accessed 22 June 2021) 2.
[528] See debtors petition in s 8 of the BA.
[529] See creditor petition in s 7 read with s 4 of the BA; Opara, Okere and Opara (2014) *Canadian Social Sciences* 62.
[530] *Insol Report II* 229. Ajayi, SAN and Basiru "Implementing bankruptcy law in Nigeria: hindrances and solution options" presented at the National Seminar on Banking and Allied Matters for Judges, at Protea Hotel, Enugu, 2-4 December 2003 https://bit.ly/3gMkYkt (accessed 12 March 2020).

[531] See Osunlaja *Debt relief measures for NINA debtors in Nigeria* 68.
[532] Osunlaja *Debt relief measures for NINA debtors in Nigeria* 68; Ajayi, SAN and Basiru "Implementing bankruptcy law in Nigeria: Hindrances and solution options" presented at the National Seminar on Banking and Allied Matters For Judges, at Protea Hotel, Enugu, 2-4 December 2003 https://bit.ly/3gMkYkt (accessed 12 March 2020).

[533] Ajayi, SAN and Basiru "Implementing bankruptcy law in Nigeria: hindrances and solution options" presented at the National Seminar on Banking and Allied Matters for Judges, at Protea Hotel, Enugu, 2-4 December 2003 https://bit.ly/3gMkYkt (accessed 12 March 2020).

[534] Chidi (2018) *Port Harcourt Journal of Business Law* 158.

currently under review, and if the Bankruptcy and Insolvency Act, which is currently a Bill before the National Assembly (Federal Parliament), is signed into law the BA will be repealed.[535] The Bill aims to harmonise and regulate the insolvency of natural persons and corporate entities.[536] However, in 2019 when the Bill was in its final stages of approval it was returned to the lawmakers for amendments.[537]

The Bill was criticised for lack of clarity which could negatively impact on its effective operation.[538] Further, despite the Bill aiming to harmonise bankruptcy and insolvency law, it did not provide for corporate insolvency.[539] Instead, it created confusion in respect of the applicable rules governing corporate insolvency.[540] The President required clarification regarding the relationship between the corporate insolvency provisions of the Bill and the existing provisions for winding up and insolvency under the Companies and Allied Matters Act.[541] The Bill also failed to include moratorium clauses to prohibit the institution of pending suits or proceedings or the execution of any judgment, decree, or order against the insolvent debtor and his or her property.[542] Therefore, the current BA is still the applicable law on bankruptcy and insolvency in Nigeria.[543]

To commence the bankruptcy procedure for a receiving order[544] in terms of the BA, the debtor must have committed an act of insolvency.[545] The act of insolvency creates the presumption as to the debtor's insolvency whereafter a creditor or debtor may file a bankruptcy petition for the debtor's bankruptcy.[546]

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[535] Section 269 of the Bill.
[536] Osunlaja *Debt relief measures for NINA debtors in Nigeria* 73; Chidi (2018) *Port Harcourt Journal of Business Law* 157.
[537] Osunlaja *Debt relief measures for NINA debtors in Nigeria* 73.
[538] "Buhari rejects five bills, gives reasons" https://bit.ly/2Sjuhz9 (accessed 22/06/2021).
[539] Chidi (2018) *Port Harcourt Journal of Business Law* 157.
[540] "Buhari rejects five bills, gives reasons" https://bit.ly/2Sjuhz9 (accessed 22/06/2021).
[541] Companies and Allied Matters Act 59 of 1990 of the Laws of the Federal Republic of Nigeria (the CAMA). See "Buhari rejects five bills, gives reasons" https://bit.ly/2Sjuhz9 (accessed 22/06/2021).
[542] Chidi (2018) *Port Harcourt Journal of Business Law* 157.
[543] Chidi (2018) *Port Harcourt Journal of Business Law* 158.
[544] See s 3 of the BA.
[545] Section 1 of the BA; Opara, Okere and Opara (2014) *Canadian Social Sciences* 64; Nwobike J "Whether Bankruptcy and Winding Up Proceedings are Veritable Tools for Debt Recovery in Nigeria'' (2013) https://bit.ly/3zQ4HCD 2 (accessed 22 June 2021).
[546] Opara, Okere and Opara (2014) *Canadian Social Sciences* 64.

In an involuntary procedure, a creditor or a group of creditors must present the petition to the court.[547] This is the same as in South African insolvency law. Further in Nigeria, the creditor's petition must be verified by an affidavit by the creditor or any person on his or her behalf who knows the facts. The affidavit is served in the same manner as a writ of summons unless some other form of service is prescribed.[548] The petitioning creditor must – as in South African insolvency law – also provide security for the benefit of creditors.[549]

In a voluntary procedure the debtor him- or herself must petition the court for bankruptcy.[550] Neither a creditors nor a debtor's petition can be withdrawn after presentation without the court's permission.[551] In South Africa, both the creditor's compulsory sequestration application and a debtor's voluntary surrender application can be withdrawn. The voluntary surrender application can be withdrawn by withdrawal of the notice of surrender.[552] In compulsory sequestration even if a court has exercised its discretion to grant a provisional order, it may allow an application for the withdrawal of the compulsory sequestration application subject to notification of all known creditors.[553]

Any time after the presentation of a bankruptcy petition the court can either stay any action, execution, or other legal processes against the property or person of the debtor, or allow it to continue on such terms as it may think just.[554] To protect the estate of the debtor between the presentation of the petition but before the receiving order is made, the court may appoint the official receiver as interim receiver to take immediate possession of the debtor's property.[555]

Once a receiving order has been granted, the official receiver receives the debtor's property pending the appointment of the trustee.[556] Therefore, the order vests the title to all the debtor's property in either the interim receiver, the official receiver, or the

[547] Opara, Okere and Opara (2014) *Canadian Social Sciences* 64.
[548] Section 7(1) of the BA.
[549] Section 4(2) of the BA.
[550] Opara, Okere and Opara (2014) *Canadian Social Sciences* 64.
[551] Sections 7(7) and 8(3) of the BA.
[552] Ch 3 para 3.3.2.
[553] Ch 3 para 3.3.2.
[554] Section 12(1) of the BA.
[555] Section 11 of the BA.
[556] Section 10(1) of the BA.

trustee.[557] No creditor who has a provable debt against the debtor shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the court and on such terms as the court may impose.[558] Further upon making the receiving order, the debtor must submit a statement of his or her affairs listing all his or her assets, debts, and liabilities to the official receiver.[559] The BA does not require that the statement should indicate the causes of the debtor's bankruptcy or his or her financial history as is the case in South Africa and America.[560] The statement may be inspected by creditors who have paid an inspection fee.[561] Once the list of assets has been submitted, control over the assets vests in the official receiver to the exclusion of the debtor and for benefit his or her creditors.[562]

Although the Nigerian system does not provide alternatives to bankruptcy before commencing with the bankruptcy process, a debtor may make a proposal for a composition or for a scheme of arrangement with his or her creditors seven days after submitting his or her statement of affairs[563] After the proposal is accepted by a two-thirds majority of creditors, the debtor or the official receiver may apply to the court for its approval.[564] The court shall refuse to approve the proposal if it thinks that the terms of the proposal are unreasonable or do not benefit the general body of creditors.[565] If the court accepts and approves the proposal, it shall be binding on all the creditors with provable claims[566] but acceptance of the proposal does not discharge the debtor from his debts.[567] Moreover, the court will adjudge the debtor bankrupt and annul the composition or scheme if the debtor misses one of his or her instalment payments or if it appears to the court that the composition or scheme causes injustice to the creditors or the debtor, or if it was obtained fraudulently.[568]

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[557] Chidi (2018) *Port Harcourt Journal of Business Law* 153.
[558] Section 10(1) of the BA.
[559] Section 16(1)(a) of the BA.
[560] Ch 3 para 3.3.1 and para 5.2.1 above.
[561] Section 16(4) of the BA.
[562] Nwobike J "Whether Bankruptcy and Winding Up Proceedings are Veritable Tools for Debt Recovery in Nigeria'' (2013) https://bit.ly/3zQ4HCD 16 (accessed 22 June 2021).
[563] Section 18(1) of the BA; *Insol Report II* 224.
[564] Section 18(5) of the BA; *Insol Report II* 224.
[565] Section 18(9) of the BA.
[566] Section 18(13) of the BA.
[567] Section 18(21) of the BA.
[568] Section 18(16) of the BA.

5.4.2 Entry requirements

5.4.2.1 Involuntary case: Creditor's petition

As indicated, the bankruptcy process commences once a debtor commits an act of insolvency upon which the creditor files a bankruptcy petition. The bankruptcy petition must be accompanied by a bankruptcy notice.[569] Before presenting a creditor's petition it must be shown that the debt owed by the debtor to the petitioning creditor or creditors is a liquidated amount that is payable immediately or at some certain future time.[570] Secondly, the aggregate amount of the debt must not be less than N2,000[571] and the act of bankruptcy on which the petition is based must have occurred within three months before the presentation of the petition.[572] Lastly, the debtor should have ordinarily been a resident in Nigeria, or within a year before the date of the presentation of the petition, have ordinarily resided or had a dwelling-house or place of business in Nigeria, or have carried on business in Nigeria.[573]

During the hearing, the court will require proof of the petitioning creditor's debt, the service of the petition, and the act of bankruptcy.[574] If the court is satisfied with the proof presented it will make a receiving order.[575] However, if the court is not satisfied it may dismiss the petition.[576] The court may also dismiss the petition when the act of bankruptcy relied on does not comply with a bankruptcy notice[577] or where the debtor attends the hearing but denies that he or she is indebted to the petitioner.[578]

[569] Rule 22 of the Bankruptcy Rules Cap B1 Laws of the Federation of Nigeria 2004. See also Nwobike J "Whether Bankruptcy and Winding Up Proceedings are Veritable Tools for Debt Recovery in Nigeria'' (2013) https://bit.ly/3zQ4HCD 14 (accessed 22 June 2021) 14.
[570] Section 4(1)(b) of the BA. See generally Chidi (2018) *Port Harcourt Journal of Business Law* 152; Opara, Okere and Opara (2014) *Canadian Social Sciences* 66; Osunlaja *Consumer debt relief in Nigeria* 8; Nwobike J "Whether Bankruptcy and Winding Up Proceedings are Veritable Tools for Debt Recovery in Nigeria'' (2013) https://bit.ly/3zQ4HCD 4-12 (accessed 22 June 2021); Ajayi, SAN and Basiru "Implementing bankruptcy law in Nigeria: hindrances and solution options" presented at the National Seminar on Banking and Allied Matters For Judges, at Protea Hotel, Enugu, 2-4 December 2003 https://bit.ly/3gMkYkt (accessed 12 March 2020).
[571] Section 4(1)(a) of the BA.
[572] Section 4(1)(c) of the BA.
[573] Section 4(1)(d) of the BA.
[574] Section 7(2) of the BA.
[575] Section 7(2) of the BA.
[576] Section 7(3) of the BA.
[577] Section 7(4) of the BA.
[578] Section 7(5) of the BA.

5.4.2.2 Voluntary case: Debtor's petition

As with the creditor's petition, to commence a debtor's petition the debtor must commit an act of insolvency. In this case, he or she commits an act of insolvency when he or she files a declaration of inability to pay his or her debts or presents a bankruptcy petition against him- or herself to the court.[579] Once this declaration has been made and the petition has been presented to the court, it will be deemed an act of bankruptcy without the prior filing by the debtor of any declaration of inability to pay his or her debts, and the court will then issue a receiving order.[580] The official receiver is allowed to attend the hearing, to call and examine any witness, and to support or oppose the issuing of the receiving order.[581] In South Africa, an act of insolvency is only a requirement in a creditor's application for the compulsory sequestration of the debtor's estate.[582]

If the debtor's petition in Nigeria is to the satisfaction of the court,[583] a receiving order is made.[584] The court may use its discretion to refuse the order if it is not satisfied that the assets for division among the unsecured creditors after payment of all costs, charges, and expenses, and the debts which are preferential under the BA, will be sufficient to pay a dividend of fifteen per cent, or if the court considers for other sufficient cause that no order ought to be made.[585] Sufficient cause in this respect refers to non-attendance at the hearing by the debtor, the absence of any material book of account, or any fraud or misconduct by the debtor concerning his or her affairs.[586]

After making the receiving order, the court may specify a date for a public sitting to examine the debtor regarding his or her conduct, dealings, and property. [587] This allows for punishment in instances where the debtor has acted fraudulently or where

[579] Section 1(c) of the BA. See generally Osunlaja *Consumer debt relief in Nigeria* 8; Kalu (2010) *JILJ* 46.
[580] Section 8(1) of the BA.
[581] Section 9 of the BA.
[582] Ch 3 para 3.3.2.
[583] Section 7(2)(e) of the BA.
[584] Section 3 of the BA.
[585] Section 8(1) of the BA.
[586] Section 8(2) of the BA.
[587] Section 17(1) of the BA.

there has been misconduct on his or her part.[588] Thus, even though the law is willing to give the debtor a new opportunity through a discharge of his or her debts, the law and public policy still require that the debtor be called to explain how he or she became insolvent.[589] This examination can thus be a barrier for an insolvent who wishes to take advantage of the bankruptcy process to the detriment of his or her creditors. [590] In South African insolvency law, an insolvent can also be questioned by the trustee in a meeting requested by the creditors of the estate, but only with the Master's permission.[591] This occurs after a sequestration order has been granted but more information regarding the insolvent's honest or fraudulent conduct leading to the sequestration is needed.[592]

5.4.3 Restrictions and prohibitions on bankrupt debtors: During bankruptcy

As indicated, the consequences of being adjudged bankrupt in Nigeria are punitive.[593] This is evident from the Preamble to the BA, which states that:

> An Act to make provisions for declaring as bankrupt any person who cannot pay his debts of a specified amount and to disqualify him from holding certain elective and other public offices or from practising any regulated profession (except as an employee).

Therefore, one of the main aims of the BA is to disqualify any persons who have been adjudged bankrupt on the basis of their inability to meet their financial obligations in Nigeria from holding certain elective and other public offices or from practising in any regulated profession.[594] Regulated professions in Nigeria include[595] the medical and

[588] Busa "Consumer protection in Nigeria: The Nigerian Bankruptcy Act in perspective" https://bit.ly/3avp6PB 8 (accessed 12 March 2020).
[589] Busa "Consumer protection in Nigeria: The Nigerian Bankruptcy Act in perspective" https://bit.ly/3avp6PB 8 (accessed 12 March 2020).
[590] Busa "Consumer protection in Nigeria: The Nigerian Bankruptcy Act in perspective" https://bit.ly/3avp6PB 8 (accessed 12 March 2020).
[591] Ch 3 para 3.3.1.
[592] Ch 3 para 3.3.1.
[593] See s 126 of the BA; Osunlaja *Debt relief measures for NINA debtors in Nigeria* 64; Opara, Okere and Opara (2014) *Canadian Social Sciences* 64; Nwobike J "Whether Bankruptcy and Winding Up Proceedings are Veritable Tools for Debt Recovery in Nigeria'' (2013) https://bit.ly/3zQ4HCD 2 (accessed 22 June 2021).
[594] See the disqualifications in s 126 of the BA. Opara, Okere and Opara (2014) *Canadian Social Sciences* 64; Nwobike J "Whether Bankruptcy and Winding Up Proceedings are Veritable Tools for Debt Recovery in Nigeria'' (2013) https://bit.ly/3zQ4HCD 2 (accessed 22 June 2021).
[595] "Nigeria - Licensing Requirements for Professional Services: https://bit.ly/3dJHUPz (accessed 5 July 2021).

dental professions,[596] the engineering profession,[597] the architect's profession,[598] the lawyer's profession,[599] and the accountants and auditors professions.[600] Therefore, in terms of the BA, adjudged bankrupts will be disqualified from practising in these professions.

The reasoning behind the disqualifications on adjudged bankrupts in Nigeria is that a person who cannot apply due diligence in the conduct of his or her own affairs, cannot be expected to do so in the affairs of the public.[601] Therefore, the bankrupt cannot be allowed unlimited freedom to do what he or she likes.[602] The disqualifications are intended to protect the interests of creditors and the public and serve as a means of making people more careful in conducting their affairs.[603]

Currently, section 126 of the BA contains a wide range of disqualifications for adjudged bankrupts.[604] Among others, an adjudged bankrupt cannot be elected to the office of President, Vice-President, Governor or Deputy-Governor,[605] the Senate House of Representatives of the State House of Assembly,[606] and any local government council in any state or the federal capital.[607] Also, an adjudged bankrupt cannot be appointed to the governing board of any statutory body,[608] act as a justice of the peace[609] or trustee of a trust estate,[610] or practice any profession regulated by the law or enter into

[596] Medical and Dental Practitioners Act Cap 221 (now Cap M8) Laws of Federation of Nigeria 1990.
[597] Council for the Regulation of Engineering in Nigeria (COREN).
[598] Architects Registration Council of Nigeria (ARCON).
[599] Council of Legal Education.
[600] Institute of Chartered Accountants of Nigeria (ICAN), Association of National Accountants of Nigeria (ANAN) and Chartered Institute of Management of Nigeria (CIMA).
[601] See Busa "Consumer protection in Nigeria: The Nigerian Bankruptcy Act in perspective" https://bit.ly/3avp6PB 8 (accessed 12 March 2020).
[602] Busa "Consumer protection in Nigeria: The Nigerian Bankruptcy Act in perspective" https://bit.ly/3avp6PB 8 (accessed 12 March 2020).
[603] Busa "Consumer protection in Nigeria: The Nigerian Bankruptcy Act in perspective" https://bit.ly/3avp6PB 7-8 (accessed 12 March 2020).
[604] See s 126 of the BA for disqualifications of the bankrupt, s 127 regarding a person who is an adjudged bankrupt while holding the offices mentioned in s 126 and s 128 regarding bankruptcy offences. Busa "Consumer protection in Nigeria: The Nigerian Bankruptcy Act in perspective" https://bit.ly/3avp6PB 7 (accessed 12 March 2020); Chidi (2018) *Port Harcourt Journal of Business Law* 152; Kalu (2010) *JILJ* 48.
[605] Section 126(1)(a) of the BA; s 137(1) and s 182(1)(f) of the Constitution of the Federal Republic of Nigeria 1999 (the Nigerian Constitution).
[606] Section 126(1)(b) of the BA; s 107(1)(e) and s 66(1)(e) of the Nigerian Constitution.
[607] Section 126(1)(c) of the BA.
[608] Section 126(1)(d) of the BA.
[609] Section 126(1)(e) of the BA.
[610] Section 126(1)(f) of the BA.

a partnership or any association with any other person, save as an employee.[611] Further, section 126 disqualifies an adjudged bankrupt from being admitted to practise any profession for the time being regulated by law on his or her own or in a partnership or any other form of association with any other person.[612] In addition to section 126, section 92 provides that if a receiving order is made against a trustee he or she shall vacate his or her office of trustee.

If a person is adjudged bankrupt while holding the offices in section 126, he or she will be required to vacate the position or office.[613] If such an adjudged bankrupt does not comply with the disqualifications in section 126, knowing that he or she is an adjudged bankrupt, he or she will be guilty of an offence[614] and may be liable to a fine or six months' imprisonment or both.[615] These disqualifications are similar to those imposed by the Insolvency Act and other legislation on unrehabilitated insolvents in South Africa[616] and those imposed by the IA 1986 before the Enterprise Act.[617]

As regards the securing of credit during the bankruptcy proceedings, the BA like the South African Insolvency Act,[618] contains various prohibitions. An undischarged bankrupt is guilty of an offence if he or she obtains credit in the amount of N100 or more from any person without first informing that person that he or she is an undischarged bankrupt.[619] Further, he or she is guilty of an offence if he or she engages in any trade or business under a name or names other than that or those under which he or she was adjudged bankrupt, and in the course of that trade or business obtains credit from any person without first disclosing to that person the name or names under which he or she was adjudged bankrupt.[620] He or she will also be guilty of an offence if he or she engages in any trade or business under a name or names other than that or those under which he or she has adjudged bankrupt without first publishing a notice in the *Federal Gazette* and a daily newspaper.[621]

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[611] Section 126(1)(e) of the BA.
[612] Section 126(1)(g) of the BA.
[613] Section 127(1) of the BA.
[614] Section 128(1)-(5) of the BA.
[615] Section 128(6) of the BA.
[616] Ch 3 para 3.4.3.
[617] See para 5.3.3.
[618] Ch 3 para 3.4.1.
[619] Section 131(a) of the BA.
[620] Section 131(b) of the BA.
[621] Section 131(c) of the BA.

However, because of the bracketed phrase – "except as an employee" – in the Preamble, the disqualifications on an adjudged bankrupt do not apply if he or she is an employee. This implies that even in a profession regulated by law, an adjudged bankrupt who is an employee will not be disqualified from employment based on his or her bankruptcy status. This provides some protection to a bankrupt debtor during bankruptcy. In this regard an adjudged bankrupt in Nigeria is in a better position than an unrehabilitated insolvent in South Africa who is subjected to a blanket disqualification based on his or her status whether practising in a regulated profession as an employee or not.

While the BA provides some protection to adjudged bankrupts who are employees, like South African insolvency law, the current BA is lagging behind as regards developments[622] around disqualifications imposed on adjudged bankrupts. This is because the Nigerian bankrupt is still subjected to numerous disqualifications during bankruptcy non-compliance with which is sanctioned by a fine, or imprisonment, or both.[623]

However, if the BA is repealed by the Nigerian Bankruptcy Bill, the statutory disqualifications will be removed. The Bill does not refer to the disqualifications of bankrupts currently set out in section 126 of the BA. However, section 167 of the Bill states that all statutory disqualifications resulting from bankruptcy will end upon discharge, if the bankrupt obtains a certificate from the court indicating that the bankruptcy was caused by misfortune and involved no misconduct on his or her part. It is unclear to which statutory disqualifications the Bill refers as there is no section 126 equivalent in the Bill. The only disqualification evident in the Bill is that in section 181(2)(b), which takes away a trustee's licence to act as trustee in a bankrupt estate should he or she become bankrupt. Thus, section 167 may be referring to disqualifications stemming from other Acts.[624] Section 167 further states that the

[622] See the American and the UK's system disqualifications during bankruptcy in paras 5.2.3 and 5.3.3, respectively.
[623] Busa "Consumer protection in Nigeria: The Nigerian Bankruptcy Act in perspective" https://bit.ly/3avp6PB 9-10 (accessed 12 March 2020).
[624] See s 137(1) of the Nigerian Constitution which disqualifies an adjudged bankrupt from being elected to the office of the President; s 182(1)(f), which disqualifies an adjudged bankrupt from being elected to the office of Governor of a State; s 107(1)(e) which disqualifies an adjudged bankrupt from being elected to the House of Assembly; s 66(1)(e) which disqualifies an adjudged bankrupt from being elected to the Senate or the House of Representatives. Also, see similar disqualifications for an Area

statutory disqualifications will only be discharged if the bankrupt obtains a certificate from the court indicating that the bankruptcy was caused by misfortune without any misconduct on his or her part. It is submitted that the requirement of a certificate indicating misfortune without misconduct as a cause of the bankruptcy to end the statutory disqualifications is aimed at aligning the BA with the international practice of providing a fresh start only to the honest but unfortunate debtor. This further implies that if the certificate has not been given by the court, the statutory disqualifications applicable during the bankruptcy continue after discharge for the bankrupt whose bankruptcy cannot be ascribed to misfortune and who contributed to his or her bankruptcy.

As in the BA, the Bill prohibits a bankrupt from engaging in any trade or business without disclosing to all persons with whom he or she enters into any business transaction in excess of N500 that he or she is an undischarged bankrupt.[625] A bankrupt who fails to do so commits an offence.[626] Further, if he or she obtains credit to a total of N1,000 or more from any person or persons without informing them that he or she is an undischarged bankrupt, he or she commits an offence and is liable on summary conviction to a fine of N10,000 dollars and imprisonment for one year.[627]

The *Explanatory Memorandum* to the Nigerian Bankruptcy Bill states the purpose of the Bill as to revise the law relating to bankruptcy to make provision for corporate and individual insolvency, to provide for the rehabilitation of the insolvent debtor, and to create the office of Supervisor of Insolvency.[628] Therefore, the Bill does not indicate the reasons for the repeal of the Nigerian BA, more particularly the reasons for the removal of bankruptcy disqualifications. A survey conducted by the World Bank in 2010 on insolvency reform in sub-Saharan Africa indicated that Nigeria had no unified legislation, lacked expedient procedures, had no artificial framework for out-of-court debt negotiations, and lacked regulatory bodies for insolvency practitioners.[629] The survey also made no mention of the reason for the removal of the bankruptcy disqualifications. However, the BA's preamble is enough to deter any debtor from

Council in s 107(1)(e)) of the Electoral Act 6 of 2010; company director in s 253(1), 257(1)(c) and 258(1)(b) of the CAMA; Enabulele (2008) *Commw L Bull* 562, 563.

[625] Section 247 of the Nigerian Bankruptcy Bill.

[626] Section 247(a) of the Nigerian Bankruptcy Bill.

[627] Section 247(b) of the Nigerian Bankruptcy Bill.

[628] See s 269 of the Nigerian Bankruptcy Bill's *Explanatory Memorandum.*

[629] See *Insol Report: African Round Table on Insolvency Reform* 2.

bankruptcy proceedings for fear of disqualification from public office or from practising in a regulated profession. From the Preamble alone, it is clear that the BA falls far short of the envisaged purpose of an insolvency regime for natural persons which the *World Bank Report* articulates as "to provide relief to honest debtors".[630]

5.4.4 Restrictions and prohibitions on bankrupt debtors: After bankruptcy

5.4.4.1 A discharge order

An adjudged bankrupt in Nigeria is automatically discharged from his or her debts five years after a receiving order has been issued against him or her.[631] This period is shorter than the South African ten-year period, but it appears also unreasonable when you consider the restrictions that the bankrupt is subjected to during that period. Like South Africa, America, and the UK an automatic discharge order in Nigeria ends the bankruptcy proceedings and the adjudged bankrupt is released from the debts he or she incurred before the receiving order.[632] The discharge also ends the disqualifications that the adjudged bankrupt has been subject to during the bankruptcy process.[633]

As in other jurisdictions, the adjudged bankrupt may apply for an earlier discharge order any time after being adjudged bankrupt but the application can only be heard after a public examination of the bankrupt has concluded.[634] On hearing the application, the court will consider the official receiver's report regarding the bankrupt's conduct and affairs before and during the bankruptcy proceedings.[635] Upon such consideration, the court may either grant or refuse an absolute order of discharge, suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions regarding any earnings or income which may afterwards become due to the bankrupt or regarding his or her property acquired post-discharge.[636]

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[630] *World Bank Report* paras 70, 370, 454.
[631] Section 31 of the BA. See *Insol Report II* 225.
[632] Opara, Okere and Opara (2014) *Canadian Social Sciences* 66.
[633] Section 126(2)(b) of the BA.
[634] Section 28(1) of the BA. Opara, Okere and Opara (2014) *Canadian Social Sciences* 66; *Insol Report II* 225.
[635] Section 28(3) of the BA.
[636] Section 28(3) of the BA.

If an adjudged bankrupt has been granted an early discharge, the discharge order will also end the disqualifications he or she was subject to during the bankruptcy process if he or she is granted a certificate by the court indicating that his or her bankruptcy was the result of misfortune without any misconduct on his or her part.[637] In this regard, the BA is aligned with international policy considerations in that the certificate distinguishes the honest from the fraudulent debtor and allows only the honest debtor to benefit from the end of the disqualifications. The certificate requirement is retained in the Bill.[638] If a Nigerian court discharges the bankrupt from his or her debts, the discharged bankrupt will still be required to assist the trustee to realise and distribute his or her property vested in the trustee.[639] If the bankrupt fails to assist he or she will be guilty of contempt of court and the discharge may be revoked, but without prejudicing the validity of any sale, disposition, or payment made or done after the discharge but before its revocation.[640]

While as in South Africa, America, and the UK, an order of discharge releases the bankrupt from debts provable in bankruptcy,[641] not all of the bankrupt's debts are discharged in Nigeria. An order of discharge will not release the bankrupt from any debt or an obligation imposed by a court or from any debt with which the bankrupt may be chargeable at the suit of the state or of any person for any offence against a statute relating to any branch of the public service on a bail bond entered into for the appearance of any person prosecuted for any such offence.[642] A discharge order will also not release the bankrupt from any debt or liability incurred through any fraud or fraudulent breach of trust to which he or she was party.[643]

An order of discharge is conclusive evidence that the discharged bankrupt had undergone bankruptcy.[644] Thus, a discharged bankrupt may use the order as a defence against any action instituted against him or her regarding any debt from which

[637] Section 126(2)(c) of the BA.
[638] Section 167 of the Nigerian Bankruptcy Bill.
[639] Section 28(10) of the BA.
[640] Section 28(10) of the BA.
[641] Section 29(2) of the BA.
[642] Section 29(1)(a) of the BA.
[643] Section 29(1)(b) of the BA.
[644] Section 29(3) of the BA.

he or she has been released by the order.[645] He or she may plead that the cause of action occurred before his or her discharge.[646]

However, if the BA is repealed by the Nigerian Bankruptcy Bill, a bankrupt will obtain automatic discharge nine months from the date of bankruptcy[647] and may apply for an even earlier discharge.[648] In this light, the Nigerian Bankruptcy Bill appears to be moving towards achieving the purpose of assisting honest debtors by removing the disqualifications on adjudged bankrupts and by providing for an early discharge. This will then alleviate or reduce the stigma associated with bankruptcy in Nigeria.

5.4.4.2 Denial of discharge

Under certain circumstances a Nigerian court may refuse a discharge application, suspend the discharge until a dividend of not less than 50 per cent has been paid to the creditors, or require the bankrupt, as a condition of his or her discharge, to consent to judgment being entered against him by the official receiver or trustee for any balance or part of any balance of the debts.[649] Such circumstances include[650] where the bankrupt continued to trade after knowing that he or she was insolvent,[651] contributed to his or her bankruptcy by rash and hazardous speculations, unjustifiable extravagant living, gambling, culpable neglect of his or her business affairs,[652] or by incurring unjustifiable expense by bringing a frivolous or vexatious action.[653] Other instances include where the bankrupt had previously been adjudged bankrupt[654] or found guilty of any fraudulent breach of trust.[655] In such circumstances, the court may summarily sentence the bankrupt to imprisonment for one year.[656]

[645] Section 29(3) of the BA.
[646] Section 29(3) of the BA.
[647] Section 161(1)(g) of the Nigerian Bankruptcy Bill.
[648] Section 161(2) of the Nigerian Bankruptcy Bill.
[649] Section 28(3)(a)-(c) of the BA.
[650] See s 28(4) of the BA.
[651] Section 28(4)(c) of the BA.
[652] Section 28(4)(f) of the BA.
[653] Section 28(4)(h) of the BA.
[654] Section 28(4)(k) of the BA.
[655] Section 28(4)(l) of the BA.
[656] Section 28(5) of the BA. However, the sentence to imprisonment applies in respect of ss 28(4)(b), (c), (d), (f), (g), (h), (i) or (l) of the BA.

5.4.4.3 Discrimination after discharge

Discharge in Nigeria frees the adjudged bankrupt from all restrictions and disqualifications save if, on an early discharge application, the bankrupt did not obtain a certificate indicating that his or her bankruptcy was the result of misfortune without any misconduct on his or her part. In such an instance a discharge order will not free the adjudged bankrupt from the disqualifications in section 126 of the BA. As the disqualifications in this section do not apply to bankrupts who are employees during the bankruptcy process, it would appear that such disqualifications would also not apply to bankrupts who have been granted early discharge but who continue to be subject to disqualifications because they could not obtain the above certificate. Thus, Nigerian bankruptcy law appears not to discriminate against employees based on their bankruptcy status after discharge.

However, the Nigerian Bankruptcy Bill removes section 126. Therefore, if the Bill becomes law there will be no restrictions and disqualifications on adjudged bankrupts before and after discharge except the disqualification provided in section 181(2)(b) of the Bill. This section takes away a trustee's licence to act as a trustee in a bankrupt estate should he or she become bankrupt. In such an instance, the trustee would remain disqualified after discharge if he or she failed to obtain the certificate.

5.4.5 Summary

As in South Africa, debtors and creditors who are unable to meet the Nigerian entry requirements for voluntary or involuntary bankruptcy proceedings cannot use the bankruptcy process. While in South Africa acts of insolvency are a requirement in compulsory sequestration, a debtor in Nigeria wishing to present a voluntary petition for his or her bankruptcy must also have committed an act of insolvency for the bankruptcy process to commence.

Interestingly, the act of insolvency in voluntary petitions in Nigeria is a declaration by the debtor of his or her inability to pay his or her debts. Such an act of insolvency is similar to the South African notice by a debtor to his or her creditors that he or she is unable to pay his or her debts[657] which is an act of insolvency for compulsory

[657] Section 8(g) of the Insolvency Act 24 of 1936 (Insolvency Act or Act).

sequestration. Similar to the South African advantage-to-creditors requirement, the Nigerian court will not grant a receiving order if it is not satisfied that the assets remaining after payment of the costs of bankruptcy will be sufficient to pay dividends to creditors.

Another important barrier to the debtor who wishes to be adjudged bankrupt in Nigeria so as to benefit from discharge to the detriment of his or her creditors, is the examination of the debtor. The examination is intended to investigate the cause of the debtor's bankruptcy and his or her conduct and allows for punishment if it is found that the debtor acted fraudulently or there was misconduct on his or her part. Therefore, the BA intends to punish the dishonest bankrupt. In South Africa the questioning of the insolvent by the trustee to establish the circumstances that led to the insolvency does not lead to any additional punishment for a dishonest debtor as all insolvent debtors are subject to the same restrictions and are all automatically rehabilitated after ten years. Their dishonest conduct may, however, result in a refusal of an application for earlier discharge.

Once a receiving order has been granted and bankruptcy has commenced, adjudged bankrupts in Nigeria are subjected to similar disqualifications as South African unrehabilitated insolvents. The important difference is that the disqualifications in Nigeria do not apply when the adjudged bankrupt is an employee. In this regard the BA is a step ahead of the Insolvency Act in protecting the interests of adjudged bankrupts.

Automatic discharge in Nigeria occurs after five years as opposed to South Africa’s ten years. However, if the Bill becomes law, adjudged bankrupts will receive automatic discharge nine months from the date of bankruptcy and may apply for an even earlier discharge. Further, the Bill ends all statutory disqualifications on adjudged bankrupts upon the discharge of a debtor who has obtained a certificate from the court that the cause of his or her bankruptcy was misfortune and not misconduct. This will align Nigerian insolvency law with international practice as it will provide for an even earlier discharge and distinguish the honest but unfortunate debtor from the dishonest debtor with the discharge ending only the statutory disqualifications of the honest but unfortunate debtor.

While in South Africa there are no alternatives to bankruptcy outside of the Insolvency Act that provide a discharge of debts, in Nigeria there are no alternatives to bankruptcy at all. However, the BA provides for compositions and schemes of arrangement similar to the South African statutory composition. However, in Nigeria, the court will adjudge the debtor bankrupt and annul the composition or scheme if the debtor misses one of his or her instalment payments, or if it appears to the court that the composition or scheme causes injustice to the creditors or the debtor, or if it was obtained fraudulently.

5.5 Conclusion

This chapter has outlined the principles regarding restrictions and disqualifications on insolvents from the American system, the UK insolvency system, and developments in the Nigerian system. Further, it compared the trends in these jurisdictions with their South African counterparts where it was relevant to do so. In particular, it discussed the impediments faced by bankrupt debtors before bankruptcy, during bankruptcy, and after bankruptcy in all three jurisdictions.

As regards the impediments before bankruptcy, all three jurisdictions contain entry requirements disqualifying debtors unable to meet those requirements.

In America, the reason for the access disqualification is linked to the goal of bankruptcy to provide a fresh start for the honest but unfortunate debtor and to move away from the stigma notion. Debtors who are found by the means test to be abusing the Bankruptcy Code in that they have the financial means to pay their debts are disqualified from Chapter 7 asset liquidation. This means that such debtors are regarded as dishonest for attempting to use the Code to obtain a discharge of debts when they can afford to pay them. In South Africa, the advantage-to-creditors entry requirement, which disqualifies many debtors from accessing the sequestration process and ultimately discharge, is also linked to its purpose of benefitting creditors. However, while the means test disqualifies certain debtors attempting to abuse the Bankruptcy Code, the advantage requirement is sometimes the cause of the abuse of the sequestration process by debtors unable to show an advantage to creditors. Further in America, to avoid a single disgruntled creditor from forcing a debtor into bankruptcy, a minimum of three creditors who must have an aggregate amount for claims, are required to file an involuntary petition. This requirement is non-existent in South African insolvency legislation. To further protect the honest debtor, if an

involuntary filing has been dismissed the court may order that consumer reporting agencies not reflect the dismissal in a credit report. Thus, a dismissed involuntary filing will not disadvantage the debtor by having it reflected in his or her credit record.

Debtors who are not eligible for the Chapter 7 relief in that they do not qualify under the means test, may as an alternative to the asset liquidation process in Chapter 7 file for bankruptcy under Chapters 11 or 13 which are reorganisation cases. In Chapter 7 debtors surrender all their property in exchange for discharge, whereas in reorganisation cases, debtors generally retain their property and make payments to creditors from future income under a court-approved repayment plan.

In England and Wales, as in South Africa, certain debtors are disqualified from accessing the bankruptcy process in terms of the IA 1986. Similar to America and in contrast to the South African application for compulsory sequestration, an involuntary bankruptcy application must be made by at least two creditors. Debtors disqualified from accessing the bankruptcy process can make use of the mini-bankruptcy procedure provided by the County Court administration order, which also provides for a discharge of debts although this may be subject to a period in excess of the customary one-year period.

If those debtors are still ineligible, they can make use of the alternatives to bankruptcy, namely a DRO, IVAs, or the debt respite scheme notwithstanding that with DRO and IVA discharge may also be obtained after a period in excess of one year. In South Africa, by contrast, the alternatives to the sequestration process within the Act (statutory compositions) and outside the Act (administration orders and the debt review) do not provide for a discharge of debts. While South African law does not have an alternative to bankruptcy similar to the debt respite scheme, the breathing-space moratorium provided by the scheme is especially important considering that some honest but unfortunate debtors' bankruptcy is the result of factors beyond their control, such as hospital bills, and the breathing space will in certain instances avoid or delay bankruptcy caused by such unforeseen events.

In Nigeria, as in South Africa, debtors and creditors who are unable to meet the entry requirements to the bankruptcy proceedings cannot use the bankruptcy process. In Nigeria there are no alternatives to bankruptcy within the BA. The BA provides for compositions and schemes of arrangement and like the South African statutory

composition, the composition and arrangement scheme in Nigeria do not discharge the debts of the debtor. While in South Africa acts of insolvency are a requirement in compulsory sequestration, a debtor in Nigeria wishing to present a voluntary petition for his or her bankruptcy must also have committed an act of insolvency for the bankruptcy process to commence. As in South African insolvency law, a creditor or a group of creditors must present the petition to the court in an involuntary procedure. To prevent debtors wishing to be adjudged bankrupt in Nigeria from using discharge to the detriment of their creditors, an investigation into the debtor's bankruptcy and conduct is undertaken and a debtor found to have acted dishonestly is punished.

As regards the impediments during bankruptcy, all three jurisdictions contain some restrictions on unrehabilitated insolvent debtors, albeit minimal in some cases.

In America, for instance, the American Constitution does not disqualify a person from membership of the Senate or the House of Representatives merely on the basis of his or her bankruptcy. However, the Bankruptcy Code is not without restrictions and penalties for the bankrupt debtor, but such restrictions and penalties are largely restricted to the dishonest debtor. Such restrictions and penalties include the removal of a debtor as a 'debtor in possession' for reasons of dishonesty or gross mismanagement of his or her affairs either before or after the commencement of the case or the denial of discharge or of the debtor's exemption benefits because of his or her fraud or other misconduct in the bankruptcy. Further, a notice and a court hearing are required before a bankrupt debtor can enter into a transaction, including the sale or lease of property of the estate, that falls outside the ordinary course of his or her business. Therefore, apart from the restrictions and penalties directed at dishonest bankrupts, a bankrupt debtor in America does not experience as many restrictions as a South African insolvent debtor who is exposed to blanket restrictions during the bankruptcy period. This is especially so in no-asset bankruptcies where discharge is immediate.

In the UK, which previously imposed disqualifications similar to those imposed on undischarged bankrupts in South Africa, the introduction of the Enterprise Act to reduce the stigma associated with bankruptcy, limited the number of restrictions imposed on undischarged bankrupts with only certain of the restrictions being retained. The Enterprise Act repealed the automatic disqualification applicable to adjudged

bankrupts and currently some of the disqualifications apply only to those bankrupts under a BRO. Because DROs, IVAs and the debt respite scheme avoid bankruptcy, they also avoid the stigma associated with bankruptcy and the bankruptcy restrictions applicable to certain debtors during and after discharge. In Nigeria, adjudged bankrupts are subject to similar disqualifications as the South African unrehabilitated insolvent. However, the disqualifications in Nigeria do not apply when the adjudged bankrupt is an employee. Furthermore, if the BA is repealed by the Nigerian Bankruptcy Bill all statutory disqualifications will be removed.

The impediments post-bankruptcy in all three jurisdictions are certainly fewer than those on unrehabilitated insolvents in South Africa. In America, for instance, the Chapter 7 bankruptcy process may take as little as three months in a no-asset case, after which the bankrupt is discharged. Because Chapters 11 and 13 are payment plans, discharge is only granted after the confirmation of the plan which occurs after the completion of the payment plan. Depending on how soon the bankrupt can complete paying all his or her debts, the plan can be confirmed after a three to five-year period.

In the UK automatic discharge is after one year. A County Court administration order allows a debtor who owes a few debts to discharge them by making regular payments to the court. Once the amount received is sufficient to pay the scheduled creditors, the plaintiff's costs in the action and the cost of the administration, the order shall be superseded, and the debtor shall be discharged from his or her debts to the scheduled creditors. Under a DRO or IVA, discharge may be obtained after a period in excess of one year. However, under the DRO, the discharge will not apply to any qualifying debt that the debtor incurred in respect of any fraud or fraudulent breach of trust to which he or she was a party. A breathing-space moratorium ends after 60 days while a mental-health-crisis moratorium lasts for as long as the debtor is in mental health crisis treatment, plus 30 days, no matter how long the crisis treatment lasts

In Nigeria automatic discharge is after five years and can be as little as nine months if the Bill comes into law. In South Africa, automatic discharge is after ten years during which time an insolvent is subjected to blanket disqualifications and restrictions.

At the end of the bankruptcy process in America, the Bankruptcy Code prohibits discrimination against the debtor solely on the ground of him or her being a discharged

bankrupt. While both government and private employers may not discriminate against current employees, private employers may still discriminate against job applicants and discharged bankrupts will still be exposed to credit discrimination after bankruptcy.

In the UK, after the Enterprise Act, a distinction is drawn between honest but unfortunate debtors and dishonest or serial debtors, and only a bankrupt whose conduct justifies a BRO will be subject to all the restrictions on undischarged bankrupts that applied before the Enterprise Act. Even a dishonest debtor who is subject to a DRO can be subjected to restriction orders on the same grounds as those subject to a BRO. Such restrictions could last for between two to fifteen years under both a BRO or a DRO.

In Nigeria, if the Bill becomes law it will end all statutory disqualifications on adjudged bankrupts on the discharge of a debtor who has obtained a certificate from the court indicating that the cause of his or her bankruptcy was misfortune and not misconduct. Therefore, the Bill distinguishes the honest but unfortunate debtor from the dishonest debtor as is the case in America and the UK, and discharge will only end the statutory disqualifications of the honest but unfortunate debtor.

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

CHAPTER OVERVIEW

6.1 Objectives and general conclusion

6.2 Recommendations for law reform

6.3 Concluding remarks

6.1 Objectives and general conclusions

In general, South African insolvency law is still largely based on the Insolvency Act of 1936 and most commentators agree that the perceptions and policies formed by this dated piece of legislation do not serve current realities. The restrictions imposed on insolvent debtors which have remained unchanged for many years and the unreasonably long period before rehabilitation and discharge need to be considered through the constitutional lens and the critical question of whether they still serve our society. Discharge (rehabilitation requirements) remains a key aspect and there must be a clear policy and rationale for such requirements, as well as for every restriction imposed on rehabilitated and unrehabilitated insolvents.

Therefore, the overarching research objectives of this thesis were to discuss the constitutionality of the impact of the restrictions imposed on unrehabilitated and rehabilitated insolvents as regards their capacity to earn a living; whether such restrictions are still justifiable; and to find solutions for law reform. This study aimed to achieve the following objectives:

a. To determine the current state of affairs with regard to the restrictions, disqualifications, and prohibitions on unrehabilitated insolvents.
b. To determine the rationale for the existence of restrictions, disqualifications, and prohibitions on unrehabilitated insolvents.
c. To determine the extent to which the current restrictions, disqualifications and prohibitions limit unrehabilitated insolvents' constitutional rights and to determine

whether such limitations are justifiable in an open and democratic society based on human dignity, equality, and freedom having regard to account all relevant factors.

d. To compare the restrictions, disqualifications, and prohibitions currently imposed on unrehabilitated insolvents in South Africa with, and evaluate them against, current international developments and the position in other jurisdictions.

e. To offer suggestions for law reform.

The restrictions imposed on unrehabilitated insolvents in South Africa can be grouped in three stages: restrictions before sequestration; restrictions during sequestration; and restrictions after sequestration. The first obstacle facing an insolvent is that of accessing the sequestration process. At the core of this obstacle is the advantage-to-creditors requirement which must be met before a court can grant the sequestration order.

Once an insolvent has overcome this initial hurdle, the consequences of being an unrehabilitated insolvent in South Africa kick in, and this stage is where the bulk of the restrictions on insolvent debtors lie. The restrictions include the disqualification from being a Member of Parliament, the National Council of Provinces, or a provincial legislature; a member of certain statutory councils and boards or bodies; and carrying on any trade, being employed in any capacity, or having any direct or indirect interest in the business of a trader who is a general dealer or manufacturer. These restrictions last until the eventual discharge of the insolvent's debts on his or her rehabilitation. The disqualification from holding various offices also impacts on South African labour laws. While the sequestration of the estate of an employee does not automatically terminate his or her employment contract, the employment contract will be terminated if it is prohibited by the Insolvency Act.[1] Further, the Insolvency Act exempts the income of an insolvent from vesting in the insolvent estate as sequestration is not intended to leave an insolvent and his or her dependants destitute. However, the disqualifications specified above can still deprive an insolvent of this (protected) income, which has been exempted by the Act – leaving the insolvent without a livelihood and sometimes even destitute. In addition to these disqualifications, the

[1] 24 of 1936 (Insolvency Act or the Act).

Insolvency Act makes it an offence for an unrehabilitated insolvent to obtain credit in excess of a specified amount.

The last stage arises after rehabilitation and discharge. While rehabilitation discharges a debtor from all pre-insolvency debts, it does not remove all the obstacles faced by rehabilitated insolvents. South African laws and policies continue to limit rehabilitated insolvents' ability to re-enter or re-establish themselves in the economy because of their discharge and rehabilitation status. Information regarding the sequestration of their estates is made publicly available for five years from the date of the sequestration order or until a rehabilitation order has been awarded. Also, the information regarding the rehabilitation order is made publicly available for five years after rehabilitation. Because of the public availability of information about the rehabilitation order, a rehabilitated insolvent can be compared to a rehabilitated prisoner who has been released from prison, but who always has to declare that he or she was once convicted of a crime. Such declaration or public availability of information makes it difficult for a rehabilitated 'criminal' to secure employment and by analogy, for a rehabilitated insolvent to access credit (and sometimes employment).

Therefore, a blanket disqualification is applied to all unrehabilitated insolvents irrespective of whether or not a particular insolvent may still be honest and competent to act as a member of the relevant statutory councils or boards. This blanket disqualification is applied in only a few instances to other debtors (persons under administration orders, persons subject to the debt review procedure, or persons who have entered into arrangements or compromise agreements with their creditors) who have also failed to pay their debts (irrespective of their possible dishonesty).

These restrictions have an impact on the unrehabilitated insolvent's capacity to earn a living and is exacerbated by the fact that the insolvent is only automatically rehabilitated by effluxion of time and discharged from his or her debts ten years from the date of sequestration of his or her estate unless he or she is rehabilitated earlier on application to the court. But even so, save where special circumstances exist, it will generally take four years before rehabilitation will be achieved. This means that unless the insolvent is rehabilitated before the end of the ten-year period, he or she will have to wait ten years before being freed from the restrictions and disqualifications and then

only if there has been no application to the court for an order preventing automatic rehabilitation.

Thus, it was indicated in Chapter 1[2] that these restrictions, whether direct or indirect, make it difficult for an insolvent to recover from his or her insolvency and to re-establish him- or herself in the economy, for example by obtaining credit to start a business or by finding employment. Because these restrictions limit an insolvent's capacity to earn a living during his or her insolvency and even after rehabilitation, they could have the unintended consequence of rendering the insolvent a burden on society or even lead to his or her insolvency after rehabilitation. Therefore, this thesis also aimed to re-evaluate the rationale for the existence of the restrictions coupled with the long rehabilitation period in general provided for in our insolvency law within the context of modern needs and realities. Moreover, the goal was to establish whether such restrictions' internal dynamics and characteristics are constitutionally justifiable and aligned with international best practice.

From the discussion of the rationale for the existence of the restrictions,[3] it emerged that the restrictions were and still are intended to protect members of the public from debtors who act fraudulently and negligently in their business dealings. The intention is to assure the public that people holding offices of responsibility are stable and honest. It is intended that an enquiry should be made, after a certain period, to establish whether the insolvent can be rehabilitated and can now be allowed to trade with the public like any other honest merchant. Thus, the restrictions are intended to punish debtors who act fraudulently and negligently in their business dealings.

However, because the restrictions are intended to protect the public from dishonest debtors and also punish fraudulent and negligent debtors, a stigma attaches to all insolvent debtors branding them as irresponsible people who cannot be trusted and who should be barred from certain trades and responsibilities of trust until they have learnt to trade honestly with others. As a result, all insolvent debtors were treated as cheats, akin to thieves. Unfortunately, stigma is based on society's perception that the insolvent debtor is in control of the circumstances that lead to his or her insolvency. It ignores the reality that, especially in modern times, insolvency may be the result of

[2] Ch 1 para 1.1.
[3] Ch 3 para 3.6.

involuntary job loss, terminal illness (which may require time off work), caregiving to a terminally ill family member, lack of adequate insurance, divorce, or death.

The rationale for imposing these restrictions on unrehabilitated and rehabilitated insolvents was tested against the values of the Constitution and whether insolvent debtors and more particularly honest but unfortunate debtors, are discriminated against because of their insolvency status.[4] This question was addressed in light of the prohibition against unfair discrimination, the rights to equality, human dignity, to choose a profession, occupation, and trade freely in the Bill of Rights, and the right to an income and to basic necessities.

A distinction was made between 'mere differentiation'[5] and unfair discrimination.[6] Alternative arguments on behalf of the honest but unfortunate insolvents were raised in terms of mere differentiation where a rationality standard is used in terms of section 9(1) of the Constitution,[7] and the prohibition against unfair discrimination in terms of section 9(3) of the Constitution. The arguments relied on the infringement of insolvent debtors' constitutional rights based on the unlisted or analogous ground of insolvency or socio-economic status or class.

As regards the argument that the differentiation between insolvent debtors and other debtors and the failure to distinguish between dishonest and honest but unfortunate debtors amounts to 'mere differentiation', it was established that there is no legitimate government purpose for disqualifying honest but unfortunate debtors from certain forms of employment and offices. The disqualifications are based on an incorrect assumption which if strictly adhered to results in negative consequences for the honest but unfortunate debtors. It was argued that there is only a legitimate government purpose for disqualifying dishonest insolvent debtors. Further, the Insolvency Act's failure to distinguish between honest but unfortunate debtors and dishonest debtors is over-inclusive in that for honest but unfortunate debtors (clerks, sales assistants, a person with a matric certificate in these jobs), where there is no real risk of dishonesty in the workplace or danger to the public, their right to practise in the trade of a general dealer or manufacturer are being violated. Thus, the inclusion of honest but

[4] Ch 4 para 4.1.
[5] Ch 4 para 4.5.1.
[6] Ch 4 para 4.5.2.
[7] Constitution of the Republic of South Africa, 1996 (the Constitution).

unfortunate debtors with dishonest debtors is irrational in that it is not linked to the government's purpose of protecting the public from dishonest insolvents and it is consequently constitutionally untenable.

As regards the argument that the differentiation between insolvent and other debtors and the failure to distinguish between dishonest and honest but unfortunate debtors amounts to unfair discrimination on the unlisted or analogous ground of socio-economic status or class, it was established that such unfair discrimination is not justified in respect of honest but unfortunate debtors. This is because it does not always serve the purpose envisaged.

It was explained that the purpose of the limitations placed on insolvent debtors – to protect the public against fraudulent and reckless debtors – is important. However, it was informed by the legislature's generalisation and an assumption that all insolvent debtors are dishonest which is not always correct. As a result of this assumption or stereotyping, the characteristic of dishonesty has been attributed to all insolvent debtors, even if they do not have that characteristic or can show that their insolvency was caused by factors beyond their control and that they are thus trustworthy and honest. Therefore, substantive equality is not achieved.

In almost all cases discussed, the courts preferred a case-by-case investigation into the circumstances of an individual debtor over a blanket prohibition as a blanket prohibition amounts to indirect unfair discrimination and negatively affects those it was not intended to affect. Further, the law is concerned with protecting the public, especially creditors and people having dealings with the insolvent. However, the law is also concerned with the dignity of debtors which is linked to their right to life, work and trade, and to the basic necessities of life. Thus, it was stated that even though the purpose of the limitations imposed on insolvent debtors serves an important purpose, as regards certain industries where the insolvency status is not a controlling factor, and as regards honest debtors for whom the limitations were not intended, the less restrictive way of achieving the intended purpose would be to treat each insolvent debtor individually by distinguishing honest but unfortunate debtors from dishonest debtors. This would avoid unjustified limitations on insolvents' rights to equality, human dignity, and freely to choose their profession, occupation, and trade. Thus, a new Insolvency Act may set the tone to cultivate a new approach.

In Chapter 2 international guidelines were extracted from international practices regarded as effective for the natural-person insolvency system as regards the limitations on insolvent debtors' capacity to earn a living. It was stated that in the quest to find solutions, the guidelines should evidence shared recommendations in the jurisdictions discussed in this thesis against which the South African insolvency system as regards the limitations on insolvent debtors' capacity to earn a living can be tested.

The American fresh-start policy[8] was discussed followed by the *Insol*,[9] *IFF*[10] and *World Bank*[11] *Reports*. The elements that were identified as essential in terms of these international policy considerations for an effective natural-person insolvency system as regards the limitations on insolvent debtors' capacity to earn a living included:[12]

a. Access to the discharge of debts for the honest but unfortunate debtor

The common thread throughout the policy-based approaches and standard-setting criteria discussed is that the honest but unfortunate debtor should not be punished but should be protected. Such protection should be in the form of a discharge that will provide some form of a fresh start that goes beyond the discharge of unpaid debt. The fresh start may be immediate or it may be a delayed or an earned fresh start. This will give the honest but unfortunate bankrupt an opportunity to start afresh and resume participation in the economy after bankruptcy without pre-bankruptcy debts. This is because economic rehabilitation is one of the main aims of an insolvency system for natural-person insolvency.

International policy considerations also recommend that the insolvent debtor not be alienated from society by imposing unnecessary restrictions as this hinders a fresh start. Further, the requirements for receiving a discharge and the pre-discharge period should not be so long that it becomes too burdensome and discourages debtors.[13]

However, it was stated that bankruptcy is not intended to become a shelter for debtors who have engaged in dishonesty or intentional disregard for the rights of others.

[8] Ch 2 para 2.2.
[9] Ch 2 para 2.3.
[10] Ch 2 para 2.4.
[11] Ch 2 para 2.5.
[12] Ch 2 para 2.6.
[13] Ch 2 paras 2.3.3 and 2.5.2.

Therefore, fraudulent debtors should not benefit from a discharge policy, instead, they should be excluded, and the circumstances of each debtor must be considered to distinguish the honest from the fraudulent. While creditors may be unpaid because of the debtor's overindebtedness, it must be acknowledged that overindebtedness is a part of normal economic activity and may be caused by factors beyond the debtors' control.

Linked to the discharge of debts is the exclusion or exemption of certain property which affects the outcome of the discharge. Thus, it was stated that the protection of the income of the bankrupt is important because a debtor and his or her family have a right to a decent standard of living and the debtor's income lies at the heart of that right. Thus, a debtor should not be forced to live close to subsistence during bankruptcy.

b. Non-discrimination

Another common thread discussed was that to implement the benefits of the fresh-start policy fully, laws must be created to eliminate or reduce the 'bankruptcy stigma' evidenced in various unnecessary and damaging restrictions imposed on the debtor and through discriminatory employment and credit laws post-discharge. This will assist in preventing a possible infringement of a discharged debtor's fundamental rights and allow for his or her effective financial and social inclusion after discharge. Some countries have addressed the stigma caused by bankruptcy restrictions by eliminating or reducing the number of restrictions imposed on an insolvent debtor during and after discharge.

As regards the stigma arising from employment and credit discrimination, the three big reasons for bankruptcy among consumers have been job problems, illness, and family break-ups. These are all externalities beyond a bankrupt's control, and which affect the unfortunate but honest debtor who is at the centre of the protection intended by the fresh-start policy. Allowing employers, whether government or private, to use credit report information depicting bankruptcy as an evaluative tool for employment punishes the same honest debtors who are trying to get back on their feet. This is morally offensive and feeds the cycle of joblessness that the fresh-start policy is attempting to break.

Some states in America, for example, have resolved the discrimination problem among private employers by limiting employers' access to bankruptcy information which is damaging to a job candidate's application, and which also does not offer any legitimate insight into the candidate's qualification for the job. Some states have enacted anti-credit legislation which bans or limits employers' access to an applicant's consumer credit report. The *IFF* and *World Bank Reports*, as in the case in America, recommend that when considering policies for natural-person debtors, countries include a clear statement on non-discrimination that should include a prohibition of discrimination in accessing credit, the labour market, membership of organisations, and access to housing.

In addition to the international guidelines drawn from international practice, South African insolvency law on restrictions limiting an insolvent debtors' capacity to earn a living, were contrasted against the trends in America, England and Wales, and Nigeria where it was relevant to do so. In particular, the restrictions faced by bankrupt debtors before bankruptcy, during bankruptcy, and after bankruptcy in all three jurisdictions were discussed.

As regards the restrictions before bankruptcy, it was observed that all three jurisdictions contain entry requirements disqualifying debtors unable to meet those requirements.

In America,[14] the reason for the access disqualification is linked to the goal of bankruptcy to provide a fresh start to the honest but unfortunate debtor. Debtors who are found, in terms of the means test, to be abusing the Bankruptcy Code[15] in that they have the financial means to pay their debts, are disqualified from Chapter 7 asset liquidation. This means that these debtors are regarded as dishonest for attempting to use the Code to obtain a discharge of debts when they can afford to pay them. In South Africa, the 'advantage-to-creditors' entry requirement which disqualifies many debtors from accessing the sequestration process and ultimately from discharge, is also linked to its purpose of benefitting creditors. However, while the means test disqualifies certain debtors attempting to abuse the Bankruptcy Code, the advantage requirement is sometimes the cause of the abuse of the sequestration process by

[14] Ch 5 para 5.2.2.
[15] Bankruptcy Reform Act of 1978 (Bankruptcy Code or Code).

debtors unable to show an advantage to creditors. Debtors who are not eligible for the Chapter 7 relief in America, as they do not qualify under the means test, may as an alternative to the asset liquidation process in Chapter 7 file for bankruptcy under Chapters 11 or 13 which are reorganisation cases. However, Chapter 13 also disqualifies debtors who do not show that they have a regular and stable income to pay off their debts over an extended period. Further, it will take such a debtor a longer period to obtain a discharge under Chapter 13 than under Chapter 7.

Further in America, to avoid a single disgruntled creditor from forcing a debtor into bankruptcy, a minimum of three creditors with a statutory minimum aggregate set amount in creditor's claims, are required to file an involuntary petition. This is not a requirement in South African insolvency legislation. To further protect the honest debtor, if an involuntary filing has been dismissed, the court may order that consumer reporting agencies not reflect the dismissal in a credit report. Thus, a dismissed involuntary filing will not disadvantage the debtor by it being reflected in his or her credit record. South Africa does not have a similar provision and it does not appear that a High Court can make an order prohibiting credit bureaux from publicly displaying information regarding the dismissed sequestration application once rescinded, dismissed, or set aside.

In England and Wales,[16] as in South Africa, certain debtors are disqualified from accessing the bankruptcy process in terms of the UK Insolvency Act. Like America and in contrast to the South African application for compulsory sequestration, an involuntary bankruptcy application must be made by at least two creditors. Debtors disqualified from accessing the bankruptcy process can make use of the mini-bankruptcy procedure provided by the County Court administration order, which also provides for a discharge of debts even though it may be obtained after a longer period than one year.

If those debtors are still not eligible, they can use the alternatives to bankruptcy, namely a DRO, IVAs, or the debt-respite scheme notwithstanding that with the DRO and IVA discharge may also be obtained after a period longer than one year. In South Africa the alternatives to the sequestration process within the Act (statutory compositions) and outside the Act (administration orders and the debt review) do not

[16] Ch 5 para 5.3.2.

provide for a discharge of debts. While South African law does not have an alternative to bankruptcy akin to the debt-respite scheme, the breathing-space moratorium provided by the scheme is especially important when considering that some honest but unfortunate debtors' bankruptcy is caused by factors beyond their control, hospital bills for example, and the breathing space will in certain instances avoid or delay bankruptcy resulting from these factors.

In Nigeria,[17] as in South Africa, debtors and creditors who are unable to meet the entry requirements to the bankruptcy proceedings cannot use the bankruptcy process. In Nigeria there are no alternatives to bankruptcy within the BA. The BA provides for compositions and schemes of arrangement and like the South African statutory composition, the composition and scheme in Nigeria do not discharge the debts of the debtor. While in South Africa acts of insolvency are requirements in compulsory sequestration, a debtor in Nigeria wishing to present a voluntary petition for his or her bankruptcy must also have committed an act of insolvency for the bankruptcy process to commence. Like South African insolvency law, a creditor or a group of creditors must present the petition to the court in an involuntary procedure. To prevent debtors wishing to be adjudged bankrupt in Nigeria from taking advantage of discharge to the detriment of their creditors, an investigation into the debtor's bankruptcy and conduct is carried out. A debtor found to have acted dishonestly is punished.

As regards the restrictions during bankruptcy, it was observed that all three jurisdictions contain some restrictions on unrehabilitated insolvent debtors – albeit minimal in some.

In America,[18] the Constitution does not disqualify a person from serving as a member of the Senate or the House of Representatives merely because he or she is bankrupt. However, the Bankruptcy Code is not without restrictions and penalties for the bankrupt debtor, but these restrictions and penalties are mainly for the dishonest debtor. Such restrictions and penalties include the removal of a debtor as a 'debtor in possession' for reasons of dishonesty or gross mismanagement of his or her affairs either before or after the commencement of the case or the denial of discharge or of the debtor's exemption benefits because of his or her fraud or other misconduct in the

[17] Ch 5 para 5.4.2.
[18] Ch 5 para 5.2.3.

bankruptcy. Further, a notice and a court hearing are required before a bankrupt debtor can enter into a transaction, including the sale or lease of property of the estate, that falls outside the ordinary course of his or her business. Therefore, apart from the restrictions and penalties directed at dishonest bankrupts, a bankrupt debtor in America does not experience as many restrictions as a South African insolvent debtor who is exposed to blanket restrictions during the bankruptcy period. This is especially so in no-asset bankruptcies where discharge is awarded immediately.

In the UK,[19] which previously had similar disqualifications on undischarged bankrupts as South Africa, the introduction of the Enterprise Act to reduce the stigma associated with bankruptcy reduced the number of restrictions imposed on undischarged bankrupts with only a few being retained. The Enterprise Act[20] repealed the automatic disqualification that applied to adjudged bankrupts and currently some of the disqualifications apply only to those bankrupts subject to a BRO. As DROs, IVAs and the debt respite scheme avoid bankruptcy, the stigma attached to bankruptcy and the bankruptcy restrictions applicable to certain debtors during and after discharge are also avoided.

In Nigeria,[21] adjudged bankrupts are subjected to disqualifications similar to those of the South African unrehabilitated insolvent. However, the Nigerian disqualifications do not apply when the adjudged bankrupt is an employee and, if the BA[22] is repealed by the Nigerian Bankruptcy Bill, all statutory disqualifications will be removed.

After bankruptcy in all three jurisdictions, the restrictions are certainly fewer than those imposed on unrehabilitated insolvents in South Africa. In America,[23] for instance, a bankrupt under a Chapter 7 case may be discharged after a few months in a no-asset case. Under Chapters 11 and 13 payment plans, discharge is granted after the confirmation of the plan which occurs after the completion of the payment plan which can be confirmed after three to five years.

In the UK,[24] automatic discharge is after one year. A County Court administration order is superseded, and the debtor is discharged from his or her debts to the scheduled

[19] Ch 5 para 5.3.3.
[20] Enterprise Act 2002 (Enterprise Act).
[21] Ch 5 para 5.4.3.
[22] Nigerian Bankruptcy Act Cap B2 Laws of the Federation of Nigeria 2004 (the BA).
[23] Ch 5 para 5.2.4.
[24] Ch 5 para 5.3.4

creditors. as soon as the amount received is sufficient to pay the scheduled creditors, the plaintiff's costs in the action, and the cost of the administration. Under a DRO or IVA, discharge may be obtained after a period in excess of one year. However, under the DRO, the discharge will not apply to any qualifying debt that the debtor incurred in respect of any fraud or fraudulent breach of trust to which he or she was a party. A breathing space moratorium ends after 60 days while a mental-health-crisis moratorium lasts for as long as the debtor is in mental health crisis treatment, plus 30 days, no matter how long the crisis treatment lasts.

In Nigeria[25] automatic discharge is after five years and may be reduced to nine months if the Bill comes into law. In South Africa, automatic discharge is after ten years during which time an insolvent is subjected to blanket disqualifications and restrictions.

At the end of the bankruptcy process in America, the Bankruptcy Code prohibits discrimination against the debtor solely on the ground of his or her being a discharged bankrupt. While both government and private employers may not discriminate against current employees, private employers may still discriminate against job applicants, and discharged bankrupts will still be exposed to credit discrimination after bankruptcy.

In the UK, after the Enterprise Act, a distinction is made between honest but unfortunate debtors and dishonest or serial debtors, and only the bankrupt whose conduct justifies a BRO will be subjected to all the restrictions imposed on undischarged bankrupts before the Enterprise Act. Even a dishonest debtor who is subject to a DRO can be subjected to restriction orders on the same grounds as for a BRO. Such restrictions could last anything between two and fifteen years under both the BRO and DRO.

In Nigeria, if the Bill[26] becomes law, it will end all statutory disqualifications on adjudged bankrupts upon the discharge of a debtor who obtains a certificate from the court that the cause of his or her bankruptcy was misfortune and not misconduct. Therefore, the Bill distinguishes the honest but unfortunate debtor from the dishonest debtor as is the case in America and the UK, and discharge will only end the statutory disqualifications of the honest but unfortunate debtor.

[25] Ch 5 para 5.4.4.
[26] Bankruptcy and Insolvency Act of 2016 (Nigerian Bankruptcy Bill or Bill).

It is in light of these considerations that the following recommendations are made.

6.2 Recommendations for law reform

6.2.1 Distinguishing between the dishonest debtor and the honest but unfortunate debtor

Both international trends and the jurisdictions discussed in this thesis – America, England and Wales, and Nigeria – distinguish in some or other way between dishonest debtors and honest but unfortunate debtors. This distinction aims to ensure that only honest but unfortunate debtors benefit from a discharge and a fresh start, and that only dishonest or fraudulent debtors are punished. The exclusion and punishment of dishonest or fraudulent debtors was also the legislature's primary intended purpose when the limitations on unrehabilitated insolvents were created. Further, the infringement of unrehabilitated insolvents' constitutional rights as regards their capacity to earn an income are the result of the failure to acknowledge that honest but unfortunate debtors exist and so to distinguish them from dishonest debtors and punish only the latter.[27]

In this regard, I recommend that an enquiry into the conduct of the debtor before sequestration is undertaken at the application stage to reveal whether the insolvency was caused by the debtor's fraudulent or dishonest dealings or whether it resulted from unfortunate financial disruptions. The aim of the early enquiry should not be to deny or restrict access to certain debtors if all the requirements for a sequestration order have been met (although the court still has the discretion to grant or reject the sequestration order). Instead, the aim should be to identify and distinguish between the types of debtor entering the sequestration process so that only the honest but unfortunate debtor can benefit from a fresh start. Thus, for constitutional imperatives, all debtors should have access to the sequestration process but a distinction between the types of debtor should be drawn early so that not only the honest debtor can be protected but the public can still be protected from fraudulent debtors. An early inquest also allows for a consideration of the circumstances of each insolvent debtor and the balancing of the rights in the Bill of Rights.

[27] Ch 4 para 4.6.

In some ways an early inquest already takes place in the South African insolvency process. In a compulsory sequestration application, the petitioning creditor must indicate the act of insolvency committed by the debtor or the facts that indicate that the debtor is insolvent, or other important facts showing the debtor's conduct leading to his or her insolvency.[28] Further, in both voluntary surrender and compulsory sequestration applications, a debtor is required to submit a statement of his or her affairs to indicate the reason for the insolvency and, as the circumstances of all debtors differ, the causes of their insolvency will also differ.[29] In America too, a statement of affairs is required to show the debtor's financial history to establish his or her compliance with the Code and to identify abuse of the bankruptcy process, and accordingly to distinguish dishonest debtors from honest but unfortunate debtors.[30] The provision in the Insolvency Act requiring an indication of the cause of the insolvency is a step in the right direction in distinguishing the dishonest from the honest and is aligned with international trends. In this regard, I recommend that should a court grant a sequestration order, the order should include a statement that the debtor's insolvency was caused by his or her acting fraudulently or dishonestly, or was due to unfortunate circumstances. In Nigeria, if the BA is repealed by the Insolvency Bill, statutory disqualifications imposed on an adjudged bankrupt during bankruptcy will only be discharged if the bankrupt obtains a certificate from the court indicating that the bankruptcy was the result of misfortune without any misconduct on the debtor's part.[31] Similarly in South Africa, it is recommended that as an alternative to a statement in the sequestration order by the court stating the cause of the insolvency, the court can issue a certificate together with the sequestration order indicating that the sequestration was caused by misfortune without any misconduct by the insolvent.

Therefore, the factors that could be considered to determine honesty or dishonesty on the part of the insolvent in the three stages of the sequestration process include the:

- conduct of the insolvent before the sequestration and his or her probable future behaviour, i.e concealing a liability to obtain credit or obtained credit on misleading statements, intentionally accumulating excessive debt without the

[28] Ch 3 para 3.3.2.
[29] Ch 3 para 3.3.1.
[30] Ch 5 para 5.2.1.
[31] Ch 5 para 5.4.3.

means to pay or intentionally not paying debts when the debtor has the means to pay, intentionally paying certain creditors while prejudicing others, disposing of assets immediately before sequestration, failing to cooperate with his or her creditors;[32]

- cause of insolvency, i.e unfortunate circumstances such as unemployment, divorce, death, ill health or luxurious lifestyle and fraudulent or reckless dealings;[33] and
- presences of an abuse of the sequestration process, i.e overindebted and desperate debtors accessing and using the sequestration process to secure a discharge of debts on rehabilitation (escape liabilities) without any benefit for creditors.[34]

6.2.2 Protection of the income of insolvent debtors

International guidelines advocate the protection of the income of the debtor necessary for the insolvent and his or her dependants to live decent lives taking into account possible changing living standards.[35] This is because the income of the insolvent is at the centre of the insolvent's right to a decent standard of living and it has an effect on the outcome of the discharge.[36] In America, income that a bankrupt debtor acquires after the commencement of bankruptcy for services rendered after filing under Chapter 7, is excluded from the estate and may not be used by the bankruptcy trustee to pay the creditors' claims.[37] Further, a waiver of the benefit of an exemption in favour of a creditor with an unsecured claim is ineffective and unenforceable.[38] That is because the benefit of the waiver is intended to protect consumers from waiving an exemption without fully understanding the consequences.[39]

In England and Wales, the income that the bankrupt acquires after bankruptcy does not form part of the bankrupt estate.[40] However, an income payment order can be made by the court on application by the trustee of the bankrupt estate, in which case

[32] Ch 3 para 3.5.2.
[33] Ch 3 para 3.6.
[34] Ch 3 para 3.3.1.
[35] Ch 2 para 2.6.
[36] Ch 2 para 2.6.
[37] Ch 5 para 5.2.1.
[38] Ch 5 para 5.2.3.
[39] Ch 5 para 5.2.3.
[40] Ch 5 para 5.3.1.

the bankrupt would be required to make income contributions into the bankrupt estate from his or her surplus income.[41] The advantage of the English income payment order is that it can be amended in the future on application to the court by the trustee or the bankrupt should the bankrupt's circumstances change.[42]

Although the exclusion or exemption of the income and furniture and tools of the insolvent's trade cannot be waived in South Africa,[43] section 23(5) of the Insolvency Act, like the English income payment order, allows the trustee of an insolvent estate to claim any sums of money received or to be received by the insolvent for work done after sequestration which the Master regards as unnecessary to support the insolvent and his or her dependants. However, the Insolvency Act provides no guidance on how the Master should exercise its discretion under section 23(5) and whether the insolvent financial position can be reassessed in the future, or whether the Master's determination can be amended if circumstances change in the future.[44] The rationale behind exempting certain assets and allowing an insolvent to keep these assets as developed through case law, is to ensure that the insolvent and his or her family are not deprived of their dignity and basic life necessities, and to safeguard against the debtor becoming a burden on society.[45] Further, it aims to ensure that the insolvent and his or her family can start afresh financially and to avoid constitutional challenges arising in the future.

Section 23(5) defeats this purpose. The Law Reform Commission pointed out that requiring the insolvent to contribute surplus money that has already been received may have inequitable consequences.[46] I agree with this view as the insolvent may have already used the money. However, allowing money that is to be received by the insolvent in the future to form the basis of a direction by the Master may also have inequitable consequences for the insolvent and his or her dependants in the future. Taking away some insolvent's future surplus income may demotivate him or her from wishing to work, earn a living, and acquire property as he or she knows that during the period before automatic discharge whatever surplus income he or she makes could

[41] Ch 5 para 5.3.1.
[42] Ch 5 para 5.3.1.
[43] Ch 5 para 5.2.1 and Ch 3 para 3.3.3.
[44] Ch 3 para 3.3.3.
[45] Ch 3 para 3.3.3.
[46] Ch 3 para 3.8.2.

possibly go to the creditors, rendering him or her a virtual servant to the creditors.[47] Also, money that is currently not required to support the insolvent and his or her dependants may be necessary in the future in the light of possible lifestyle changes. Therefore, section 23(5) potentially hinders a fresh start as it deprives the insolvent of his or her income, current or future.[48]

A recommendation that the Insolvency Act be amended to provide for the return of the excess income claimed by the trustee to the insolvent should the need arise in the future to avoid constitutional challenge, is untenable as that money would already have been used to pay creditors. A recommendation that the debtor and his or her dependants' current and potential future level of sufficiency should be established by the Master before allowing a claim to surplus income by the trustee would also not work. This is because the Master is unable to foresee the future changing needs of the debtor and his or her dependants to establish an adequate amount.

A recommendation, similar to the American stance that all income acquired by an insolvent debtor after sequestration for services rendered be excluded from the insolvent estate and should not be used or claimed by the trustee of the insolvent estate to pay creditors claims is no more viable. This is because it would not prevent the situation where an insolvent who lands a lucrative position and who earns far more than is required to support him- or herself and his or her family, lives a lavish lifestyle at the expense of his or her creditors. In America, individual debtors under Chapter 7 can obtain a discharge after just three months after filing a bankruptcy petition. But in South Africa a minimum period of four years must pass before the debtor can even apply for rehabilitation. Thus, the chances of the insolvent's financial position changing in four years are higher than in America where the bankrupt could be discharged within a few months of filing a bankruptcy petition.

Therefore, it is recommended that South African insolvency law should follow the English position of allowing for the amendment of the Master's determination in terms of section 23(5) on application by the trustee or the bankrupt should the insolvent during sequestration earn far more than is necessary to support him- or herself and his or her family. Further, in South Africa an insolvent debtor is required to submit

[47] Ch 2 para 2.2.3 and Ch 3 para 3.8.2.
[48] Ch 3 para 3.8.2.

monthly statements of his or her income and expenditure to the trustee which could serve to monitor his or her lifestyle. In this regard, I recommend stricter compliance with this requirement as it will allow for easier monitoring and assessment of the insolvent debtor's income and life changes which would then justify amending the Master's determination.

6.2.3 Anti-discriminatory laws

International guidelines suggest that to fully implement the benefits of the fresh-start policy, laws must be created to eliminate or reduce the stigma of bankruptcy which is revealed in some unnecessary and damaging restrictions imposed on the debtor and through employment and credit discriminatory laws.[49] This will assist in preventing a possible infringement of a discharged debtor's fundamental rights and allow for his or her effective financial and social inclusion. The *IFF* and *World Bank Reports* recommend that when considering policies for natural person debtors, countries should include a clear statement on non-discrimination which should cover prohibitions on discrimination in accessing credit, the labour market, membership of organisations, and access to housing.[50] Further, international policy considerations suggest that the period before discharge should not be so long and burdensome that it discourages debtors.[51]

6.2.3.1 Anti-discriminatory laws before discharge

The recommendations for discrimination in accessing credit will be discussed first, followed by recommendations for discrimination in employment and certain offices, and discrimination in membership of certain boards and councils. The discrimination applicable to 'other debtors' such as those under debt review or administration, or debtors who have entered into arrangements or compromise agreements with their creditors, will also be discussed as they too fall under the category of people who have failed to pay their debts, albeit subject to fewer restrictions. Lastly, the recommendations for the ten-year period that must pass before automatic rehabilitation, will be discussed.

[49] Ch 2 para 2.6.
[50] Ch 2 para 2.6.
[51] Ch 2 para 2.6.

Section 137(*a*) of the Insolvency Act makes it an offence punishable by imprisonment of not more than one year,[52] for an unrehabilitated insolvent to obtain credit above a certain amount from any person during sequestration. The insolvent is required to first inform that person that he or she is insolvent unless he or she can prove that the person knew that he or she was insolvent.[53] Similar to section 137(*a*) of the Insolvency Act, section 88(1) of the NCA prohibits a consumer who has filed an application for debt review or who has alleged in a court that he or she is overindebted, from incurring further charges under a credit facility or entering into any further credit agreements with any credit provider. Also, section 74S(1) of the MCA makes it an offence for a person who is subject to an administration order and who during the currency of such order incurs any debt without disclosing that he or she is under administration. In America, section 364 of the Bankruptcy Code regulates a debtor's ability to obtain credit in re-organisation cases between the commencement of the case and the confirmation of the plan. For instance, a debtor who is self-employed and thus engaged in business, and who incurs trade credit in the production of income from such employment is permitted to enter into transactions, including the sale, lease, and use of property in the estate in the ordinary course of business without notice or a hearing.[54] However, if a debtor wishes to enter into a transaction including the sale or lease of property of the estate, that falls outside the ordinary course of business, a notice and a court hearing are required before entering into such a transaction.[55] This regulation of a debtor's credit is possible in reorganisation cases in America because debtors normally keep their property and make payments to their creditors from future income in terms of a court-approved plan, whereas in Chapter 7 cases the debtor gives up all his or her property in exchange for discharge.[56] The regulation of a debtor's credit in this way is not recommended for South African insolvency law. This is because all the debtor's assets vest in the trustee upon sequestration in South Africa and as regards uncompleted contracts, the trustee steps into the shoes of the insolvent and gets to decide whether to continue with a contract or enter into a new contract if it is in the best interests of the creditors of the insolvent estate.

[52] Ch 3 para 3.8.3.
[53] Ch 3 para 3.4.1.
[54] Ch 5 para 5.2.3.
[55] Ch 5 para 5.2.3.
[56] Ch 5 para 5.2.1.

However, as regards a debtor who is under debt review or administration (thus under a repayment plan) and who is self-employed and thus engaged in business, and who incurs trade credit in the production of income from such employment, a section 364 of the Bankruptcy Code equivalent could work. In this regard, as in America such a debtor under debt review or administration would be allowed to incur credit provided it is in the ordinary course of his or her business. Therefore, it is recommended that a debtor who is in business and who is under debt review or administration be allowed to enter into credit transactions that are in the ordinary course of his or her business. However, if the credit transaction is outside the ordinary course of his or her business it is recommended that the debtor should be prohibited from entering into that transaction. Alternatively, the debtor could be required to disclose that he or she is under debt review or administration or first obtain the consent of his or her administrator before entering into that credit transaction. In England and Wales, the situation regarding the accessing of credit in excess of £250 by an undischarged bankrupt without disclosing his or her status is unchanged after the Enterprise Act. Section 360 of the UK Insolvency Act still prescribes that an undischarged bankrupt is prohibited from obtaining credit above £250 or more without disclosing his or her status.[57] This is because these restrictions were and still are intended to protect public interests in general, and especially those of the business community. A breach of the restrictions is a criminal offence and the bankrupt risks imprisonment for up to two years and/or a fine.[58]

In Nigeria too, the Insolvency Bill does not change the situation under the BA. The Bill still makes it an offence for an undischarged bankrupt to engage in any trade or business valued at more than N500 without disclosing to all persons with whom he or she enters into any business transaction that he or she is an undischarged bankrupt. Further, an undischarged bankrupt commits an offence and is liable on summary conviction to a fine of N10,000 and imprisonment for one year, if he or she obtains credit to a total of N1,000 or more from any person or persons without informing them of his status as an undischarged bankrupt.[59] In Nigeria too, the disqualifications are

[57] Ch 5 para 5.3.3.
[58] Ch 5 para 5.3.3.
[59] Ch 5 para 5.4.3.

intended to protect the interests of creditors and the public and serve as a means of making people more careful in conducting their affairs.[60]

In South Africa, the Law Reform Commission has suggested that the offence committed when an insolvent debtor obtains credit above a certain amount, be changed to only apply to an insolvent who, despite having been expressly asked about his or her financial standing or creditworthiness, falsely conceals his or her insolvent status and as a result obtains credit in excess of R500.[61] The reason provided is that sequestration should merely take away the insolvent's power to dispose of assets and limit his or her right to incur further debts, it should not punish the insolvent by diminishing his or her status.[62] The Law Reform Commission's proposal is supported and is recommended because, as in both England and Wales and Nigeria, the prohibition on obtaining credit in South Africa was and still is intended to protect the public, especially those having business dealings with the insolvent debtor, from fraudulent debtors.[63] This is in line with international trends that favour the exclusion of fraudulent debtors from a fresh start and also has the effect of distinguishing the dishonest debtors from the honest but unfortunate debtors.[64]

The Law Reform Commission's further proposal that insolvent debtors contravening section 137 should have the option of a fine as a sanction, is also supported and recommended. After all, it is in line with international trends which favour the protection of honest but unfortunate debtors[65] and the abolition of civil imprisonment which proved ineffective in that it halted a debtor's efforts to recover from his or her over-indebtedness and to return to solvency.[66]

Section 23 of the Insolvency Act allows an insolvent to follow any profession or occupation or to enter into any employment in the business of a trader who is a general dealer or manufacturer, during sequestration, provided that he or she obtains the written consent of his or her trustee. An insolvent who disregards this will not only be

[60] Ch 5 para 5.4.3.
[61] Ch 3 para 3.8.3.
[62] Ch 3 para 3.8.3.
[63] Ch 3 para 3.6.
[64] Ch 3 para 3.8.3.
[65] Ch 3 para 3.8.3.
[66] Ch 3 para 3.8.3.

guilty of an offence and liable to imprisonment, but also risks the court refusing his or her application for rehabilitation.[67]

Although in Nigeria the disqualifications imposed by the BA are similar to those imposed on unrehabilitated insolvents in South Africa and England and Wales before the Enterprise Act, they do not apply when the adjudged bankrupt is an employee.[68] Thus, the offence in the BA which disqualifies an adjudged bankrupt from engaging in any trade or business under a name or names other than that or those under which he or she has adjudicated bankrupt without first publishing a notice in the *Federal Gazette* and a daily newspaper, does not apply to a bankrupt who is an employee.[69] Consequently, even if the adjudged bankrupt is in a profession regulated by law, if he or she is an employee, he or she will not be disqualified from employment based on his or her bankruptcy status.[70]

A recommendation that the section 23(3) disqualification or any other disqualification on insolvent debtors in South Africa should not apply when the unrehabilitated insolvent is an employee, would not work. This is because it would defeat the purpose of the disqualifications in South Africa and internationally, which is to protect the public from dishonest and fraudulent debtors. An administrative clerk whose insolvency was caused by acting fraudulently or dishonestly, or by his or her negligence or incompetence in performing the duties of the job, or who acted dishonestly during the sequestration process should be treated the same as other dishonest debtors. An insolvent person should not be protected merely because he or she is an employee, but only if he or she qualifies as an honest but unfortunate debtor.

The South African Law Reform Commission's recommendation that the consent requirement in section 23(3) of the Insolvency Act be removed to allow for the different industries to make their own rules for insolvent debtors in their industry, is supported and recommended.[71] However, in making their own rules it is further recommended that the different industries should only disqualify an unrehabilitated insolvent if his or her insolvency was the result of his or her negligence or incompetence in performing

[67] Ch 3 para 3.4.3.
[68] Ch 5 para 5.4.3.
[69] Ch 5 para 5.4.3.
[70] Ch 5 para 5.4.3.
[71] Ch 4 para 4.5.2.

the work of the relevant profession.[72] After all, the law is not only concerned with protecting the public, creditors, and those having dealings with the insolvent, but also with the dignity of debtors which is linked to their right to life, work, and trade, and to the basic necessities of life. Therefore, it is recommended that as regards certain industries where the insolvency status is not a controlling factor and as regards honest debtors at whom the limitations were not directed, the insolvent debtors should be considered individually. This would avoid unjustified limitations on insolvents' right to equality, human dignity, and the right freely to choose their profession, occupation, and trade. This recommendation should also apply in the case of other debtors who are disqualified from certain positions such as being a debt counsellor, auditor, a key employee in a credit rating agency, or a member of certain boards because they, like insolvent debtors, fall under the category of people who have failed to pay their debts. These debtors should also only be disqualified from certain industries if their overindebtedness was the result of their negligence or incompetence in performing the work of the relevant profession.

Further in South Africa, a credit bureau may include in an insolvent person's credit record, information regarding the sequestration of his or her estate for five years from the date of the sequestration order or until a rehabilitation order has been awarded which may take as long as ten years.[73] A credit report can be issued when considering whether to employ a candidate, who may be an insolvent person, in employment where honesty and trust in dealing with finances and cash are required.[74] However, the information in the credit report may also be used against a candidate when he or she applies for employment where honesty and trust in dealing with finances and cash are not required.[75]

Although few, other Act such as the Planning Profession Act,[76] the Natural Scientific Professions Act,[77] and the Property Valuers Profession Act[78] already distinguish between the dishonest and honest but unfortunate debtors.[79] These laws only

[72] Ch 4 para 4.5.2.
[73] Ch 3 para 3.5.3.
[74] Ch 3 para 3.5.3.
[75] Ch 3 para 3.5.3.
[76] Planning Profession Act 36 of 2002.
[77] Natural Scientific Professions Act 27 of 2003.
[78] Property Valuers Profession Act 47 of 2000.
[79] Ch 3 para 3.4.3.

disqualify an unrehabilitated insolvent if his or her insolvency was caused by his or her negligence or incompetence in performing the work of the relevant profession.[80] It is recommended that this also be done for other legislation regulating other professions where the unrehabilitated insolvents are disqualified, while other debtors are not.[81] As with the recommendation for sections 137(*a*) and 23(3) above, this would have the effect of distinguishing the dishonest insolvent from the honest but unfortunate insolvent and deal with each case individually so that only the dishonest could be restricted. As indicated in *Griggs v Duke Power Co,*[82] where the controlling factor is qualification, factors such as race, religion, nationality, and sex become irrelevant.[83] Similarly, where the insolvent is competent to do the job, other factors such as his or her insolvency not caused by negligence or incompetence in performing the work of the relevant profession are not controlling factors and should be disregarded.

The legal profession in South Africa is already on a sound footing in this regard.[84] The Legal Practice Act[85] provides for the appointment of a *curator bonis* to control and administer the trust account of a legal practitioner, with any rights, powers, and functions as the court may deem fit, should the legal practitioner become insolvent. Therefore, the fact of being insolvent does not disqualify a legal practitioner from acting as a legal practitioner or remove him or her from the roll of legal practitioners in South Africa. Instead, a legal practitioner is permitted to continue practising and earning a living despite not having control of his or her trust account, thus protecting public interests by placing the trust account under the control of a curator. It also protects the livelihood of the insolvent legal practitioner so that he or she does not become a burden on the state. The Legal Practice Act is not concerned with the sequestration of a legal practitioner's estate but whether that legal practitioner is still an honest person with integrity. This aligns with the international policy of allowing the honest but unfortunate bankrupt to continue being an economically productive person. It is also aligned with an insolvent person's constitutional right to choose his or her trade, occupation, and profession freely in section 22 of the Constitution.

[80] Ch 3 para 3.4.3.
[81] Ch 3 para 3.4.3.
[82] *Griggs v Duke Power Co* 401 US 424 (1971).
[83] Ch 4 para.4.5.2.
[84] Ch 3 para 3.4.3.
[85] Legal Practice Act 28 of 2014.

Before the enactment of the Legal Practice Act, the Attorneys Act[86] allowed for the removal of an admitted attorney from the roll of practising attorneys if the court was satisfied that he or she was not a fit and proper person to continue practising as an attorney. Further, if an admitted attorney went insolvent and was unable to satisfy the court that despite the sequestration of his or her estate, he or she was still a fit and proper person to continue practising, such an admitted attorney was removed from the roll of admitted attorneys for being not a fit and proper person for legal practice. This practice was aligned with international policy considerations that only the honest but unfortunate debtors should benefit from a fresh start and that a dishonest debtor should be excluded. The practice also had the effect of distinguishing between dishonest insolvent legal practitioners and honest but unfortunate insolvent legal practitioners.

Therefore, it is recommended that in other professions too, where a person is required to be 'fit and proper' to practise in that profession, that person should only be removed from that profession based on his or her insolvency (overindebtedness) if he or she is unable to satisfy the court that despite the sequestration of his or her estate, he or she remains a fit and proper person; ie, a person who deals with the affairs of the public honestly and with integrity.

As regards discrimination in certain offices, the Constitution prohibits an unrehabilitated insolvent from being a Member of Parliament (MP), the National Council of Provinces, or a provincial legislature, without first distinguishing between the dishonest and the honest but unfortunate debtor so that only the dishonest debtor is prohibited.[87]

The American Constitution does not disqualify a person from being a member of the Senate or the House of Representatives simply because they are bankrupt.[88] After the Enterprise Act in England and Wales, the automatic disqualifications that applied to all adjudged bankrupts were repealed and since 2004 an adjudged bankrupt is only disqualified from being a member of the House of Parliament if he or she is subjected to a bankruptcy restriction order.[89]

[86] Attorneys Act 53 of 1979.
[87] Ch 3 para 3.4.3.
[88] Ch 5 para 5.2.3.
[89] Ch 5 para 5.3.3.

In Nigeria, if the BA is repealed by the Nigerian Bankruptcy Bill, all statutory disqualifications will be removed as the Bill makes no reference to the disqualifications of bankrupts currently set out in section 126 of the BA. These include disqualification from being elected to the office of the President, Vice-President, Governor or Deputy-Governor, and Senate House of Representatives of the State House of Assembly.[90]

Therefore, I recommend that, as in England and Wales and Nigeria, if the BA is repealed, unrehabilitated insolvents in South Africa not be prohibited from being elected Members of Parliament, the National Council of Provinces, or provincial legislatures without first identifying the cause of their insolvency.

Further, it is recommended that if it is established that the insolvency was the result of dishonesty or fraudulent activities, only those insolvents guilty of dishonesty or misconduct should be prohibited from election to membership of parliament. As indicated, the protection of public interests was intended to guard only against the dishonest insolvent, not the honest but unfortunate debtor who is adversely affected by the disqualification.[91] Although the disqualification of dishonest debtors from being members of the National Assembly is justified as it meets the government's purpose of protecting the public from dishonest debtors, it does not appear to be justifiable in the case of honest but unfortunate debtors[92] as their disqualification is based on the stigmatisation of the bankrupt debtor as someone in whom society can have no trust or confidence.[93] Such a notion does not consider the vicissitudes that are an ordinary part of business life.

Therefore, disqualification from election as an MP only if the insolvency was caused by dishonesty or misconduct by the insolvent, aligns with international guidelines that honest but unfortunate debtors should not be subjected to unnecessary disqualification. It also mirrors the position in England and Wales where bankruptcy restriction orders are imposed on dishonest and fraudulent debtors.

Regarding the election of an insolvent as trustee of an insolvent estate, sections 55(*a*) and 58(*a*) of the Insolvency Act disqualify an insolvent from being elected or appointed

[90] Ch 5 para 5.4.3.
[91] Ch 3 para 3.6.
[92] Ch 4 para 4.5.2.
[93] Ch 3 para 3.6.

as a trustee of an insolvent estate and he or she is required to vacate that office if his or her estate is sequestrated.[94] In America, there is no such disqualification.[95]

In England and Wales, the Enterprise Act aimed to reduce the stigma traditionally associated with bankruptcy by reducing the number of restrictions imposed on undischarged bankrupts. However, for public interest purposes, the Enterprise Act did not remove the prohibition on an adjudged bankrupt from practising as an insolvency practitioner.[96] Therefore, after the Enterprise Act an adjudged bankrupt is still disqualified from being an insolvency practitioner and may not hold any office relating to insolvency proceedings which include, being a liquidator, provisional liquidator, or a trustee in bankruptcy or a receiver of property in bankruptcy. While all statutory disqualification will be removed if the BA is repealed by the Insolvency Bill in Nigeria, the only disqualification retained in the Bill is the prohibition on an adjudged bankrupt being elected as a trustee of the bankrupt estate.[97]

In this regard, I recommend that sections 55(*a*) and 58(*a*) of the Insolvency Act be amended to apply only where the reason for the insolvency is dishonesty or misconduct by the insolvent. As indicated, the disqualifications were and still are intended to disqualify dishonest and fraudulent debtors. Therefore, the provisions should be amended by including the words:

> if the insolvency was caused by acting fraudulently or dishonestly or the insolvent acted dishonestly during the sequestration process.

or:

> if the insolvency was caused by his or her negligence or incompetence in performing the duties of his or her job.

Such an amendment has already been recommended by the Law Reform Commission in the context of section 137(*a*) of the Insolvency Act as explained above.

While an unrehabilitated insolvent in South Africa is subjected to numerous limitations during sequestration, the ten-year period that must pass before automatic rehabilitation is far too long and requires attention. In America, individual debtors under

[94] Ch 3 para 3.4.3.
[95] Ch 5 para 5.2.3.
[96] Ch 5 para 5.3.3.
[97] Ch 5 para 5.4.3.

Chapter 7 obtain a discharge releasing liability from certain dischargeable debts a few months after filing a bankruptcy petition – on occasion as little as three months.[98]

In England and Wales a bankrupt debtor is automatically discharged at the end of one year from the date on which the bankruptcy commenced.[99] In Nigeria, an adjudged bankrupt is automatically discharged from his or her debts five years after a receiving order has been issued against him or her, but, as in South Africa, may apply for an earlier discharge. However, if the BA is repealed by the Nigerian Bankruptcy Bill, a bankrupt will obtain automatic discharge nine months from the date of bankruptcy and may apply for an even earlier discharge.[100] Therefore, in line with international trends favouring a fresh start as early as possible, and recommendations by South African authors that the period is too burdensome on the insolvent debtor, I recommend that the ten years for automatic rehabilitation in South Africa should be reduced to between one and three years.[101]

In South Africa, the court has a discretion, on application by the trustee, to order that automatic rehabilitation not set in after ten years so extending the period even further. This denial of automatic rehabilitation occurs after an already unreasonably long period of ten years. Thus, if the ten years for automatic rehabilitation is reduced to as recommended, I further recommend that the South African natural-person insolvency law should introduce an earned-fresh-start policy that allows only honest but unfortunate debtors to be automatically rehabilitated. Dishonest debtors should earn their discharge and a fresh start. Further, if the ten years for automatic rehabilitation is reduced as indicated, I recommend that the postponement of automatic rehabilitation to a later date under certain circumstances should be retained.

In England and Wales an official receiver or the trustee of the bankrupt's estate may apply to court for an order suspending the one-year period for automatic discharge.[102] In such circumstances the official receiver suggests that bankruptcy continue until the end of a specified period or until the fulfilment of a specific condition. This situation may occur when it appears that an undischarged bankrupt who is eligible for automatic

[98] Ch 5 para 5.2.4.1.
[99] Ch 5 para 5.4.4.1.
[100] Ch 5 para 5.4.4.1.
[101] Ch 3 para 3.8.4.
[102] Ch 5 para 5.3.4.2.

discharge fails to comply with an obligation to which he or she is subject because of his or her bankruptcy.[103] As an alternative to suspension of automatic discharge in England and Wales, automatic discharge can be permitted but the discharged debtor could be subjected to restriction orders.

In Nigeria, a court may refuse a discharge application or suspend the discharge until a dividend of not less than fifty per cent has been paid to the creditors, or as a condition of discharge, require the bankrupt to consent to judgment being entered against him or her by the official receiver or trustee for any balance or part of any balance of the debts.[104] This may occur where, among others, the bankrupt has continued to trade after knowing that he or she was insolvent, contributed to his or her bankruptcy by rash and hazardous speculations, unjustifiable extravagant living, gambling, culpable neglect of his or her business affairs, or by incurring unjustifiable expense through bringing a frivolous or vexatious action.[105] Further, in Nigeria an early discharge order ends the disqualifications if the adjudged bankrupt obtains a certificate from the court indicating that his or her bankruptcy was the result of misfortune without any misconduct on his or her part.

Similarly in South Africa, if the ten years for automatic rehabilitation is reduced to between one to three years, it is recommended that the court could exercise its discretion either to postpone automatic rehabilitation or to allow it but subject the debtor to restriction orders after discharge. This should also apply in the case of applications for early rehabilitation. Circumstances that could lead to the postponement of automatic rehabilitation and the imposition of restriction orders could be the same as those currently relied upon by our courts to deny an application for rehabilitation.[106] Therefore, whether it is upon an early rehabilitation application, or by effluxion of time, only the honest but unfortunate debtor should be rehabilitated.

6.2.3.1 Anti-discriminatory laws after discharge

In South Africa, rehabilitation, as a rule, discharges all the debts of the insolvent due or the reason occurred, before sequestration and which did not arise from fraud.[107]

[103] Ch 5 para 5.3.4.2.
[104] Ch 5 para 5.4.4.2.
[105] Ch 5 para 5.4.4.2.
[106] Ch 5 para 3.5.2.
[107] Ch 3 para 3.5.1.

Thus in South Africa, rehabilitation does not have the effect of releasing debts that arose fraudulently. However, debts resulting from alimony, the intentional assault or killing of another, driving under the influence of alcohol, and fines or punishment are not excluded from discharge –in other words, they are discharged upon rehabilitation.[108]

Like South Africa, not all debts are discharged in America, England and Wales, or Nigeria. In America, student loans, family obligations such as domestic support, tax debts, and debts fraudulently incurred are not dischargeable under Chapter 7.[109] In England and Wales, bankruptcy debts incurred in respect of fraud or fraudulent breach of trust to which the bankrupt was a party, or from any liability in respect of a fine imposed for an offence, or from any liability under a court order are not released. The discharge also does not release debts that arose from personal injury to any person or liability to pay damages for negligence, nuisance, or breach of a statutory contractual or other duty, or those that arose under an order made in family proceedings.[110]

In Nigeria, the discharge does not release the bankrupt from any debt or from any liability under a court order, or from any debt with which the bankrupt may be chargeable at the suit of the state or of any person for any offence against a statute relating to any branch of the public service on a bail bond entered into for the appearance of any person prosecuted for any such offence. A discharge order will also not release the bankrupt from any debt or liability incurred through any fraud or fraudulent breach of trust to which he or she was a party, or from any debt or liability for which he or she has obtained forbearance by any fraud to which he or she was a party.[111]

Therefore, in support of the recommendations by South African authors, I recommend that debts resulting from alimony, the intentional assault or killing of another, driving under the influence of alcohol, and fines or punishment should not be extinguished after rehabilitation.[112] This is in line with the international trend of excluding debts such

[108] Ch 3 para 3.5.1.
[109] Ch 5 para 5.2.4.1.
[110] Ch 5 para 5.3.4.1.
[111] Ch 5 para 5.4.4.1.
[112] Ch 3 para 3.8.4.

as maintenance agreements, taxes, fraud, and penalties where the alternative is imprisonment, from discharge.[113]

As indicated by the rehabilitation theme in Chapter 2, the one important function of discharge for individuals is "to rehabilitate debtors for continued and value-productive participation, i.e., to provide a meaningful 'fresh start'".[114] Therefore, the rehabilitation policy was described as the economic rehabilitation of the debtor in that discharge facilitates future access to credit and allows the debtor to resume economic participation in the open credit economy.[115]

However, in South Africa, if an insolvent person is granted early rehabilitation information regarding the granting of a rehabilitation order must appear on his or her credit record for five years after rehabilitation.[116] If the insolvent person is rehabilitated by effluxion of time after ten years, information regarding the granting of a rehabilitation order will also have to appear on his or her credit record for five years, despite he or she having been sequestrated for ten years.[117] As indicated, information in a credit report may be used when considering whether to employ a person or when that person applies for credit. This dilutes the possibility of a true fresh start as once the discharge has been granted, the debtor should have full access to financial activity.

In America, section 525 of the Bankruptcy Code prohibits employment discrimination based on a credit history report reflecting bankruptcy.[118] As a result, government units in America are prohibited from discriminating against debtors with regard to licences, permits, charters, franchises, or employment on the basis of his or her status as a discharged bankrupt.[119] Government units are only permitted to discriminate if there is some reason distinct from the discharge of debt, that is the proximate cause.[120] To overcome discrimination by private employers in America, credit reports are used as a pre-screening tool only in circumstances where there is an "established bona fide" occupational requirement of a particular position, or a particular group of employees,

[113] Ch 3 para 3.8.4.
[114] Ch 2 para 2.2.3.
[115] Ch 2 para 2.2.3.
[116] Ch 3 para 3.5.3.
[117] Ch 3 para 3.5.3.
[118] Ch 5 para 5.2.4.3.
[119] Ch 5 para 5.2.4.3.
[120] Ch 5 para 5.2.4.3.

or only if the job entails a "supervisory, managerial, professional or executive position at a financial institution", or if the job requires national security or FDIC clearance.[121]

In England and Wales only discharged bankrupts who, because of their conduct are subject to bankruptcy restriction orders which may subsist for up to fifteen years from the date of discharge, are discriminated against after discharge.[122] As in England and Wales, an adjudged bankrupt in Nigeria is only discriminated against after discharge if upon an early discharge application the bankrupt did not obtain a certificate indicating that his or her bankruptcy was caused by misfortune without any misconduct on his or her part. In such an instance, a discharge order will not free the adjudged bankrupt from the disqualifications in section 126 of the BA.

As the disqualifications in section 126 of the BA do not apply to bankrupts who are employees during the bankruptcy process, they would also not apply to bankrupts who are employees and who have been granted early discharge but could not obtain the above certificate. However, if the BA is repealed, there will be no restrictions before or after discharge save for section 181(2)(b), which takes away a trustee's licence to act as a trustee in a bankrupt estate should he or she become bankrupt. The trustee would continue being disqualified after discharge if he or she failed to obtain the certificate.

Although private employers may still use a credit report reflecting bankruptcy against a job applicant by refusing to employ that debtor in America, a section 525 equivalent is recommended for South Africa because it would resolve the problem of discrimination against insolvent and rehabilitated debtors with regard to finding employment, renting a home, and accessing credit after rehabilitation. This is because in South Africa too, it is justified to protect the public against dishonest debtors in occupations and positions that require honesty and trust in dealing with finances and cash. However, even in such occupations and positions, the cause of the insolvency would have to be established to avoid discriminating against and refusing to employ a person based solely on his or her insolvency status, when the insolvency did not involve dishonestly or fraud. Further, it is recommended that the anti-discrimination provision should apply to both government units and private employers otherwise it

[121] Ch 5 para 5.2.4.3.
[122] Ch 5 para 5.3.4.3.

may give rise to differentiation between employees in government units and those employed by private institutions which may not be constitutionally justifiable.

6.3 Concluding remarks

From the discussion in this thesis, it should be evident that the restrictions imposed on unrehabilitated insolvents in South Africa limit their capacity to earn a living and are not always justifiable in light of constitutional values and international best practice. Therefore, in conclusion, it is suggested that the time has come for law reform initiatives to address this problem. Thus, as regards the restrictions on unrehabilitated and rehabilitated insolvents in South Africa, the following recommendations are suggested for consideration by lawmakers:

a. *Distinguishing between the dishonest debtor and the honest but unfortunate debtor:* I recommend that an enquiry into the conduct of the debtor before sequestration be undertaken at the application stage to reveal whether the insolvency was caused by the debtor's fraudulent or dishonest dealings, or resulted from unfortunate financial disruptions. Further, I recommend that should a court grant a sequestration order, the order should include a statement that the debtor's insolvency was caused by fraudulent activity or dishonestly, or that it can be laid at the door of unfortunate circumstances. As an alternative to a statement in the sequestration order by the court stating the cause of the insolvency, the court could issue a certificate together with the sequestration order indicating that the sequestration was the result of misfortune and involved no misconduct by the insolvent.
b. *Protection of the income of insolvent debtors*: It is recommended that South African insolvency law should follow the English position which allows for the amendment of the Master's determination in terms of section 23(5) of the Insolvency Act on application by the trustee or the bankrupt should the insolvent earn appreciably more while under sequestration than is required for his or her support or that of his or her family. As regards the requirement that the insolvent debtor submit a monthly statement of his or her income and expenditure to the trustee to monitor his or her lifestyle, I recommend stricter compliance with this requirement as this will allow for easier monitoring and assessment of the

insolvent debtor's income and life changes which would then justify amending the Master determination.

c. *Anti-discriminatory laws before discharge*:

- The Law Reform Commission's proposal that the offence committed in section 137 of the Insolvency Act by the insolvent debtor obtaining credit in excess of a set amount be changed to apply only where the insolvent, despite having been expressly asked about his or her financial standing or creditworthiness, falsely conceals his or her insolvency status and as a result obtains credit exceeding R500, is supported and recommended. The Law Reform Commission's further proposal that insolvent debtors who contravene section 137 should be allowed the option of a fine as sanction is also supported and recommended. As regards debtors, who are in business and who are under debt review or administration, it is recommended that those debtors should be allowed to enter into credit transactions that fall within the ordinary course of their business. However, if the credit transaction is outside the ordinary course of their business, it is recommended that they should be prohibited from entering into those transactions. Alternatively, they could be required to first disclose that they are under debt review or administration or first obtain the consent of their administrator before entering into credit transactions outside the ordinary course of their business.
- The South African Law Reform Commission's recommendation that the consent requirement in section 23(3) of the Insolvency Act be removed to allow for the different industries to make their own rules for insolvent debtors in their industry is supported and recommended. However, in making their own rules, it is further recommended that the different industries should only disqualify an unrehabilitated insolvent if his or her insolvency was caused by his or her negligence or incompetence in performing the work of the relevant profession. Therefore, as regards certain industries where the insolvency status is not a controlling factor, and as regards honest debtors for whom the limitations were not intended, debtors should be considered individually. Further, employment where honesty and trust in dealing with finances and cash

is not required, it is recommended that an unrehabilitated insolvent should only be disqualified if his or her insolvency was caused by his or her negligence or incompetence in performing the duties required by the relevant profession. However, in employment where honesty and trust in dealing with finances and cash are required, for example, professions which require a person to be 'fit and proper' to practise in that profession, it is recommended that an unrehabilitated insolvent should only be removed from that profession based on his or her insolvency if he or she is unable to satisfy the court that despite the sequestration of his or her estate, he or she is still a fit and proper person – ie, a person who deals with the affairs of the public honestly and with integrity. These recommendations should also apply in the case of other debtors who are disqualified from certain positions because of their overindebtedness.

- Regarding the prohibition on the election of unrehabilitated insolvents as Member of Parliament, the National Council of Provinces, or a provincial legislature, I recommend, as is the position in England and Wales and Nigeria if the BA is repealed, that unrehabilitated insolvents in South Africa not be prohibited from being elected as Members of Parliament, the National Council of Provinces, or provincial legislatures without first identifying the reason for their insolvency. Further, it is recommended that if it is established that the insolvency was the result of dishonesty or fraudulent activity, only insolvents whose insolvency was caused by dishonesty or misconduct should be prohibited from being elected as an MP.
- Regarding the prohibition on electing an insolvent as a trustee of an insolvent estate in sections 55(*a*) and 58(*a*) of the Insolvency Act, I recommend that these sections be amended to apply only in circumstances where the cause of the insolvency was dishonesty or misconduct on the part of the insolvent. The provisions should be amended by including the words "if the insolvency was caused by acting fraudulently or dishonestly or the insolvent acted dishonestly during the sequestration process" or "if the insolvency was caused by his negligence or incompetence in performing the duties of his job."

- Regarding the ten-year period that must pass before automatic rehabilitation, I recommend that the ten years for automatic rehabilitation in South Africa be reduced to between one and three years. If the ten-year automatic rehabilitation is reduced to between one to three years, I recommend that South African natural-person insolvency law should introduce an earned-fresh-start policy which limits automatic rehabilitation to honest but unfortunate debtors. Dishonest debtors should earn their discharge and a fresh start. Further, if the ten years for automatic rehabilitation is reduced to between one and three years, I recommend that the postponement of automatic rehabilitation to a later date under certain circumstances, be retained. Alternatively, it is recommended that the court could use its discretion either to postpone automatic rehabilitation or to allow it but subject the debtor to restriction orders after discharge. This should also apply in the case of applications for early rehabilitation. Circumstances that could lead to the postponement of automatic rehabilitation and the imposition of restriction orders could be the same as those the court currently relies on to deny an application for rehabilitation. Therefore, whether it is upon an early rehabilitation application or by effluxion of time, only the honest but unfortunate debtor should be rehabilitated.

d. *Anti-discriminatory laws after discharge:* Regarding the discharge of debts after rehabilitation, I recommend that debts resulting from alimony, the intentional assault or killing of another, driving under the influence of alcohol, and fines or punishment should not be extinguished after rehabilitation. Regarding the depiction of a debtor's insolvency or rehabilitated status on his or her credit record, an equivalent of the American section 525 of the Bankruptcy Code is recommended in South Africa as this would resolve the problem of discrimination against insolvent and rehabilitated debtors in respect of obtaining employment, renting a home, and accessing credit after rehabilitation. However, it is recommended that the anti-discrimination provision should apply to both government units and private employers otherwise it may lead to differentiation between employees in government units and those employed by private institutions, and this may be open to constitutional challenge.

Whether a new insolvency law will address the issues raised in this thesis remains to be seen, however, there are some positive indications in the working documents. Consequently, it is hoped that the legislature will take note of the recommendations in this thesis.

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TABLE OF ABBREVIATIONS

AHRLJ	African Human Rights Law Journal
Am Bankr Inst J	American Bankruptcy Institute Journal
Amer Bankr Law J	American Bankruptcy Law Journal
Ann Rev Soc	Annual Review of Sociology
Bankr Dev J	Bankruptcy Developments Journal
Comm L. orld Rev	Common Law World Review
Commw L Bull.	Commonwealth Law Bulletin
Emory Bankr Dev J	Emory Bankruptcy Development Journal
Fordham J Corp & Fin L	Fordham Journal of Corporate & Financial Law
Geo J on Poverty L &	Pol'y Georgetown Journal on Poverty Law and Policy
Int Insol Rev	International Insolvency Review
IJCL	International Journal of Constitutional Law
IJEBL	Interdisciplinary Journal of Economics and Business Law
IJEFI	International Journal of Economics and Financial Issues
JILJ	Journal of International Law and Jurisprudence
J S Afr L	Journal of South African Law
NIBLeJ	Nottingham Insolvency and Business Law e-Journal
N Ir Legal Q	Northern Ireland Legal Quarterly
Ohio State LJ	Ohio State Law Journal

Pace Int'l L Rev	Pace International Law Review
PELJ/PER	Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad
SAJHR	South African Journal of Human Rights
SA Merc LJ	South African Mercantile Law Journal
SAPL	South African Public Law
St John's Bankr Research Libr	St. John's Bankruptcy Research Library
THRHR	Tydskrif vir hedendaagse Romeins-Hollandse reg / Journal of Contemporary Roman-Dutch Law
U Rich L Rev	University of Richmond Law Review
Wash U L Rev	Washington University Law Review
Wash & Lee L. Rev.	Washington and Lee Law Review
Am. Bankr. Inst. J	American Bankruptcy Institute Journal