"MUCH ADO ABOUT NOTHING"? THE HISTORICAL JOURNEY TOWARDS FINANCIAL INCLUSION FOR ZIMBABWE'S LOW-EARNING CONSUMERS

Shammah G Boterere* and André Boraine**

Abstract: An investigation into the debt relief measures available to consumer debtors in Zimbabwe reveals that the former and now repealed insolvency statutes did not cater for debtors with smaller estates such as No-Income-No Asset (NINA) debtors. Given the dire state of the Zimbabwean economy due to a multiplicity of economic and political reasons fuelled by other factors such as the COVID-19 pandemic, this category of Zimbabwean consumer debtors found themselves in a lifelong debt trap. However, in 2018, Zimbabwe introduced a new Insolvency Act that, among others, provides for a pre-liquidation composition procedure that could benefit those debtors who do not qualify for the liquidation of assets process. Against the backdrop of the historical development and the plight of indigent debtors, the authors consider the new measure and conclude that although being a step in the right direction, it may still provide too little protection for NINA debtors.

Keywords: *advantage to creditors; debt relief measures; discharge of debts; financial literacy; Insolvency Act of Zimbabwe; insolvency law reform; No-Income-No Asset (NINA) debtors; pre-liquidation composition; rehabilitation*

I. Introduction

Zimbabwe has fairly recently reformed its insolvency and debt relief system by introducing an updated Insolvency Act.[1] This statute ushered in many reforms to the debt relief system by, among others, consolidating the previously fragmented[2] insolvency regime and introducing the novel pre- and post-liquidation composition

* Shammah G. Boterere, LLB, LLM, LLD (University of Pretoria) is Postdoctoral Fellow, Faculty of Law, University of Pretoria, Pretoria, South Africa. Shammah.boterere@up.ac.za. This article is partly based on Shammah Boterere, Debt Relief as Part of the Social Safety Net: A Comparative Appraisal of the Regulation of No Income No Asset Debtors in Zimbabwe (LLD Thesis, University of Pretoria, 2022).

** André Boraine, LLB (University of Pretoria), LLM (University of Witwatersrand), LLD (University of Pretoria), is Director of the Unit for Business Rescue and Insolvency Law, Faculty of Law, University of Pretoria, Pretoria, South Africa. Andre.boraine@up.ac.za.

1 The Insolvency Act 6 of 2018 (Insolvency Act of 2018), which may also be referred to as the Insolvency Act (Cap.6:07). It replaced the Insolvency Act 13 of 1973 (Insolvency Act of 1973).

2 Zimbabwe's debt relief system was fragmented because consumer insolvency was regulated by the Insolvency Act of 1973 while corporate insolvency was regulated by Pt.V of the Companies Act (Cap.24:03). Insolvency Act of 2018 also introduced the business rescue procedure in addition to the winding-up procedure.

measures over and above the liquidation of asset procedures.[3] The newly introduced Insolvency Act of 2018 is strongly influenced by the active reform initiatives in South Africa,[4] largely because of the countries' shared political and legal roots, and because South Africa offers a fairly advanced reform framework, which legislators within southern Africa have drawn from over the years.[5]

In respect of Zimbabwe, the reformed debt relief system is set at the background of a socio-economic and political upheaval that has also had a devastating ripple effect on consumer debtors.[6] The over-indebted debtors' plight was compounded by the negative effects of the COVID-19 pandemic, which affected consumers who had barely recovered from the destruction caused by the 2007–2009 global financial crisis.[7] Zimbabwe's economy continues to be unstable and this has pushed some consumers into further indebtedness. Considering this gloomy background, it is commendable that Zimbabwe's legislature enacted the Insolvency Act

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3 See Insolvency Act of 2018, Pt.XXII.

4 See, for instance, Hermie Coetzee, "Does the Proposed Pre-Liquidation Composition Proffer a Solution to the No Income No Asset (NINA) Debtor's Quandary and, If Not, What Would?" (2017) 80 *Journal for Contemporary Roman Dutch Law* 18; Hermie Coetzee and Melanie Roestoff, "Rectifying an Unconstitutional Dispensation? A Consideration of Proposed Reforms Relating to No Income No Asset Debtors in South Africa" (2020) 29:S1 *International Insolvency Review* S95; Hermie Coetzee, "Is the Unequal Treatment of Debtors in Natural Person Insolvency Law Justifiable? A South African Exposition" (2016) *International Insolvency Review* 36, 54. Also see Shammah Boterere, Debt Relief as Part of the Social Safety Net: A Comparative Appraisal of the Regulation of No Income No Asset Debtors in Zimbabwe (LLD Thesis, University of Pretoria, 2022), Ch.6, where the legal transplantation by Zimbabwe's legislature is criticised because it fails to take cognisant of the unique challenges experienced by debtors within these starkly contrasting economies. See in general Chuah, "A Thematic Evaluation of the Law's Response to Access to Credit and Debtor Financial Relief" (2023) 10:2 *Journal of International and Comparative Law* 157 who posits that although sharing of good practices in insolvency might be the best way forward, a uniformity of precepts through arbitrary transplantation is undesirable.

5 For a discussion of the historical influence of South African debt relief system within the southern African region, see Alastair Smith, Kathleen van der Linde and Juanitta Calitz, *Hockly's Law of Insolvency* (Juta, 2022), 14–15. Lesotho has also recently introduced the new Insolvency Act 9 of 2022. This largely reflects the reform initiatives in Southern Africa.

6 See Shammah Boterere, *Debt Relief as Part of the Social Safety Net: A Comparative Appraisal of the Regulation of No Income No Asset Debtors in Zimbabwe* (n. 4), Ch.1, for a discussion of the political and economic upheaval in Zimbabwe and its impact on consumers. The dire position of low-earning consumers is exacerbated by the lack of a sound social security system that may provide reprieve to such consumers. Of interest is the largely comparable position of such debtors in Hong Kong because of the increasing poverty levels in the country linked to a lack of social welfare. See Angus Young and Meihui Zhang, "Regulating Subprime Lending in Hong Kong and the Need for Law Reforms to Better Protect Vulnerable Consumers" (2023) 10:2 *Journal of International and Comparative Law* 267, especially "II. Moneylending Culture, Income Inequality, Lack of Welfare, and Hong Kong's Free Market Policies".

7 For a discussion of the devastation caused by the 2007–2009 financial crisis, see Stephanie Blankenburg and Jose Gabriel Palma, "Introduction: The Global Financial Crisis" (2009) 33:4 *Cambridge Journal of Economics* 531. Also see Angus Young and Meihui Zhang, "Regulating Subprime Lending in Hong Kong and the Need for Law Reforms to Better Protect Vulnerable Consumers" (n. 6) and Claudia Lima Marques and Káren Rick Danilevicz Bertoncello, "Consumer Credit and Over-indebtedness in Brazil: The Response of the 2021 Reform of the 1990 Brazilian Consumer Code" (2023) 10:2 *Journal of International and Comparative Law* 311 for a discussion of the impact of the Covid-19 pandemic on established economies of Hong Kong and Brazil respectively.

of 2018, which may potentially be pivotal in alleviating the plight of these overburdened consumers by facilitating a discharge of debts. Access to a sound relief system is important for all categories of debtors, especially the often-marginalised low earners, the so-called No-Income-No-Asset (NINA) debtors, who are perpetually trapped in debt in jurisdictions that require some form of excess income and/or disposable assets to obtain a discharge.[8]

A sound debt relief system is important because it alleviates debtors' plight by offering them some safety net. In this backdrop, the central question of this article is whether the recent reforms in Zimbabwe's consumer relief system sufficiently protect all categories of debtors, especially those in the NINA category, by facilitating easy access to the relief system and ensuring a discharge of debts. Protection of NINA debtors has over the years been at the centre of global trends that seek to foster non-discrimination by offering a discharge option to all categories of debtors regardless of their financial circumstances.[9]

This article will show that Zimbabwe's insolvency system is greatly underexplored and examines the impact that global trends have had on underdeveloped economies like Zimbabwe especially in the wake of the COVID-19 pandemic. For this purpose, this article is structured as follows. Section II will provide a brief historical overview of the imposition of formal insolvency law in Zimbabwe. After this discussion, Section III will map the legislative framework of Zimbabwe's consumer insolvency system by exploring the repealed insolvency statutes and examining the prevailing reformed system. Thereafter, Section IV will outline the principal concerns within the prevailing consumer relief system, especially in respect of NINA debtor regulation, which require further law reform to ensure the system's effectiveness and efficiency and to align Zimbabwe's system with international standards. To aid this discussion, international best practices in insolvency, which may be implemented in Zimbabwe's developing system, will be highlighted. Last, the concluding section, Section V, summarises the recommendations that have been made in this article.

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8 Although no concise definition of NINA debtors exists, in the main, this category mostly refers to low-earning debtors and/or debtors without excess income and disposable assets. This debtor category is often marginalised because some insolvency regimes require excess income and/or disposable assets to obtain debt relief. In this context, excess income refers to surplus/extra income available after covering debtors' basic needs, which maybe be passed on to creditors.

9 See, among others, World Bank Working Group on the Treatment of the Insolvency of Natural Persons, Report on the Treatment of Insolvency of Natural Persons (2013), 99 and Jose Garrido, "The Role of Personal Insolvency in Economic Development: An introduction to the World Bank Report on the Treatment of the Insolvency of Natural Persons" in *World Bank Legal Review, Volume 5 Fostering Development through Opportunity, Inclusion, and Equity* (World Bank, 2014), 111, available at https://openknowledge.worldbank.org/handle/10986/16240. Also see Dan Wei and Zhe Ma, "Towards A Chinese Approach of Personal Bankruptcy Discharge: From Shenzhen Experience to National Legislation" (2023) 10:2 *Journal of International and Comparative Law* 334 where it is argued that discharge is not only beneficial to debtors but society as a whole because if consumers continue to be heavily indebted after the conclusion of the insolvency process, and such continued state of indebtedness is a disincentive to becoming economically active again - thereby making such debtors a burden on the society.

The discussion throughout this article pays special attention to NINA debtors by highlighting how this group was previously [un]protected and also determining whether the reformed Insolvency Act has improved their situation by facilitating easy access to the debt relief system and ensuring a concomitant discharge of debts.

II. Historical Overview

Formal insolvency law was introduced in Zimbabwe, and other neighbouring southern African countries, during colonial rule. Zimbabwe experienced almost a century of colonial rule, which began after the formal annexation of the country by the Pioneer Column in 1890.[10] Following the annexation, the country became a British colony, and it was then named Rhodesia and later Southern Rhodesia.[11] The annexation resulted in the imposition and administration of Roman-Dutch law within the country, at the expense of unwritten and uncodified Customary law.[12] The Roman-Dutch law that was imposed in Zimbabwe is the law that had been in force in the Cape of Good Hope[13] as on 10 June 1891.[14] Although Roman-Dutch law continues to be regarded as the common law of the country, the system resembles a mixed legal system because of its deep English law influence—especially in the fields of commercial and procedural law.

To fully comprehend the prevailing insolvency regulation, the discussion that follows situates the new insolvency statute within the context of Zimbabwe's political history that ushered in Anglo-Roman-Dutch law in the southern African region. The discussion begins with an overview of the insolvency law that applied at the Cape of Good Hope as on 10 June 1891. The discussion then proceeds to trace the historical roots of insolvency law in Zimbabwe and South Africa. The discussion commences with an overview of the insolvency law at the Cape of Good Hope, which was subsequently introduced in Zimbabwe, and thereafter explores its medieval Roman-Dutch roots.

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10 See Alois Mlambo, *A History of Zimbabwe* (Cambridge University Press, 2014), 30, 42. The Pioneer Column was a group of adventurers sponsored by Cecil John Rhodes who had been granted a charter authorising his British South Africa Company to colonise Zimbabwe on Britain's behalf.

11 Rhodes's influence also extended to countries such as the present-day Malawi, South Africa and Zambia (formerly Northern Rhodesia).

12 Although Zimbabweans (and Africans in general) have since time immemorial observed insolvency customs based on unwritten customary law, these were sidelined because of the forced imposition of the Roman-Dutch legal system on the natives. However, certain indigenous communities within southern Africa continue to observe customary law of insolvency by, for example, the practice of pledging one's daughter (or any nominated female relative) to a creditor for marriage as a form of debt repayment. See Lea Mwambene, "Recent Legal Responses to Child Marriage in Southern Africa: The Case of Zimbabwe, South Africa and Malawi" (2018) 18 *African Human Rights Law Journal* 527, 540–546.

13 The Cape of Good Hope refers to a territory between the Atlantic and the Indian coasts of the Cape Peninsula in the present-day South Africa, a neighbouring country of Zimbabwe.

14 See the Order in Council of 1898, s.49(2); the Constitution of Zimbabwe Rhodesia 1979, s.87; the Constitution of Zimbabwe Amendment Act 1981 (No 2), s.13; the Constitution of Zimbabwe 2013, s.13.

A. Cape of Good Hope Insolvency Law

Jan van Riebeeck, a Dutch explorer formed a settlement in the Cape Colony in 1652, which was meant to be a halfway refreshment post for ships of the Dutch East India Company.[15] The Dutch settlers implemented and administered Roman-Dutch law in the Cape Colony, which was ultimately imposed in most regions of South Africa because of the settlement's exponential growth. Consequently, the annexation of the Cape, which later became part of the larger South Africa, and the imposition of Roman-Dutch law led to the introduction of the *cessio bonorum* (surrender of estate assets) procedure, which regulated insolvency law in Holland during the period of annexation.[16]

Comprehensive insolvency legislation was subsequently implemented in the Cape Colony, which sought to regulate the consumer insolvency system, namely, Ordinance 64 of 1829. Although English law formed its basis,[17] it contained a substantial amount of Roman-Dutch insolvency principles including the *cessio bonorum*. Thereafter, this statute was repealed by Ordinance 6 of 1843, which abolished the *cessio bonorum* procedure. Ordinance 6 of 1843 made provision for debtors' voluntary applications for surrender of his estate while also recognising creditors' compulsory applications for the sequestration of a debtor's estate.[18] Additionally, this statute also recognised, among others, vesting of the insolvent estate in the Master after a sequestration order had been granted; provision for the exemption of some of the debtor's property and provision for the voiding of *mala fide* (bad faith) and gratuitous alienation of assets where a debtor's liabilities exceeded his assets.[19] These reforms are essential because these are the provisions that were subsequently applied in Zimbabwe after its annexation by the Pioneer Column.[20]

B. Medieval Roman-Dutch Insolvency Law

Roman law is the root of modern insolvency law in most common and civil law jurisdictions.[21] The terms "insolvency" and "bankruptcy" are derived from Latin.

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15 The Dutch settlers established the Cape Colony in 1652 and they ruled it until 1795 when the British settlers took over. However, the Dutch settlers temporarily re-annexed the Colony between 1803 and 1806 under the terms of the Treaty of Amiens.

16 See W De Villers, *Die Ou-Hollandse insolvensiereg en die eerste vaste insolvensiereg van die Kaap de Goede Hoop* (The Old Dutch Insolvency Law and the First Insolvency Law of the Cape of Good Hope) *(LLD Thesis, Rijksuniversiteit Leiden, 1923),* 62; L Stander, *Die Invloed van Sekwestrasie op Onuitgevorde Kontrakte* (The Impact of Insolvency on Unexecuted Contracts) (LLD Thesis, Potchefstroom University of Christian Higher Education, 1994), 16.

17 See Juanitta Calitz, "Historical Overview of State Regulation of South African Insolvency Law" (2010) 16:2 *Fundamina* 1, 20–23 regarding the British occupation in the Cape Colony and the influence on the legal system.

18 Ordinance 6 of 1843, ss.1, 2 and 5.

19 See *Ibid*., ss.46, 48, 49 and 83.

20 Order of Council of 1898, s.49(2).

21 See Louis Edward Levinthal, "The Early history of English Bankruptcy" (1919) *University of Pennsylvania Law Review* 1, 3–5. Also see Dan Wei and Zhe Ma, "Towards A Chinese Approach of Personal Bankruptcy Discharge: From Shenzhen Experience to National Legislation" (n.9)

Insolvency denotes one's ties to debt while the term bankruptcy emanates from the word *bancorupto*. Some commentators argue that the origins of medieval Roman insolvency law are found in Table Three of the Twelve Tables.[22]

Roman insolvency law developed from a creditor self-help system that recognised imprisonment and, in certain circumstances, execution of the debtor. To this end, debt enforcement was initially facilitated through the *legis actio per manus iniectionem* (the right to seize the person of the debtor) and the *legis actio per pignoris capionem* (the right to seize or attach a thing of the debtor as a pledge for payment).

Although various forms of the *legis actio manus iniectionem* were applied,[23] the process in essence entailed that the debtor received a 30-day grace period from the date of obtaining a judgment against a debtor to pay the debt.[24] A debtor who failed to meet his obligations during the 30-day grace period was brought before the *praetor* (the judge), at which point each of his creditors would lay his hand on the debtor and recited the prescribed *formula*.[25] This resembled a debtor's symbolic forceful seizure by one or more of his creditors. However, debtors could rely on the intervention of a *vindex*, being a person who defended the debtor, to disprove creditors' right of seizure by arguing that the debt had been settled or that the parties had reached a compromise.[26] Debtors could be released following the *vindex*'s intervention. Suppose that the *vindex* failed to disprove the creditors' claims, the debtor could be held liable to double the initial amount owing.[27]

The debtor (or his defender, *vindex*) would be imprisoned for 60 days following the reciting of the prescribed formula.[28] Thereafter, the creditor was expected to publicly present the debtor before the *praetor* on three consecutive days to solicit a debt settlement by the debtor's friends and to allow other creditors to state their

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22 See Juanitta Calitz and André Boraine, "The Role of the Master of the High Court as the Regulator in a Changing Liquidation Environment: A South African Perspective" (2005) *Journal for Contemporary Roman Dutch Law* 728, 730–732; David Burdette, *A Framework for Corporate Insolvency Law Reform in South Africa* (LLD thesis, University of Pretoria, 2002), 22; Eberhard Bertelsmann *et al*. (eds), *Mars: The Law of Insolvency in South Africa* (Cape Town: Juta, 10th ed., 2019), 9.

23 See Leopold Wenger, *Institutes of Roman Law of Civil Procedure* (Liberal Arts Press New York, 1955) 230, for a detailed discussion of the *legis actio per manus iniectionem*.

24 Coenraad Visser, "Romeinsregtelike aanknopingspunte van die sekwestrasieproses in die Suid-Afrikaanse insolvensiereg" ("Roman Law Linkage Points with South African Insolvency Law") (1980) *De Jure* 41, 41–42. The grace period was aimed at giving the debtor an opportunity to comply with the judgment against him. In turn, the *manus iniectio pro iudicato*, which reflected the *manus iniecto iudicati* procedure, applied to judgments obtained without litigation.

25 See Coenraad Visser, "Romeinsregtelike aanknopingspunte van die sekwestrasieproses in die Suid-Afrikaanse insolvensiereg" (n. 24) 41–42; Joseph Anthony Charles Thomas, *Textbook of Roman Law* (North-Holland Publishing Company Oxford, 1976).

26 Max Kaser, *Roman Private Law* (Durban: Butterworths, 1965), 338; Coenraad Visser, "Romeinsregtelike aanknopingspunte van die sekwestrasieproses in die Suid-Afrikaanse insolvensiereg" (n. 24), 43; David Burdette, *A Framework for Corporate Insolvency Law Reform in South Africa* (n. 22), 23.

27 Max Kaser, *Roman Private Law* (n. 26), 338.

28 Coenraad Visser, "Romeinsregtelike aanknopingspunte van die sekwestrasieproses in die Suid-Afrikaanse insolvensiereg" (n. 24), 43.

claims. Where the debt remained unsettled, the creditors could sell the debtor into slavery and divide the proceeds of sale among themselves. They could also cut up the prisoner's body and divide it among themselves.[29] The sale of a debtor into slavery is believed to have been abolished by the introduction of the *Lex Poetilia Papiria* (this law attributed to consuls Poetelius and Papirius is believed to have been passed in 326 BC or 313 BC).[30]

Subsequently, Roman insolvency law was modernised by the introduction of the *missio in possessionem* (attaching debtor's assets) procedure, which recognised execution against debtor's property.[31] This was encapsulated in the *bonorum venditio* or the *bonorum emptio* process (sale of all the assets of the insolvent debtor). The *praetor* issued three decrees in respect of this procedure, which marked distinct stages in the insolvency proceedings. The first decree advertised the sale of the debtor's assets.[32] This decree also invited other interested creditors to lodge their claim(s) against the debtor's estate. Any creditor, and if there were more than one then all of them collectively, had a right to obtain possession of the debtor's property until its sale.[33] After 30 days the *praetor* would hold a second meeting for the purpose of supervising the sale of the debtor's property.[34] And the third decree would order the sale of the property by auction. The successful bidder, *bonorum venditio*, became the owner and was liable to discharge the debt(s).

The *bonorum emptio* process was replaced by *bonorum distraction* (sale of goods), which empowered the *praetor* to sell a debtor's assets piecemeal and distribute the proceeds *pro-rata* among creditors.[35] The sale of assets was supervised by a curator appointed by the *praetor*. However, before the introduction of *bonorum distractio*, the debtors' position had been improved by the introduction of *Lex Iulia de Bonis Cedendis* (the law of Julius that allowed a debtor to surrender his assets

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29 *Ibid.,* 44; S Rudolf and J C Ledlie, *The Institutes of Roman Law* (Nabu Press, 2010), 27; WL Burdick, *The Principles of Roman Law and Their Relation to Modern Law* (First published in 1938 by the Lawyers Co-operative Publishing, Rochester, New York, reprinted by the Lawbook Exchange Ltd, 2012), 632; Van Zyl, *History and Principles of Roman Private Law* (Durban: Butterworths, 1983), 370.

30 The introduction of the *Lex Poetilia* (the law that abolished the sale of a debtor into slavery) also empowered debtors to defend themselves against the exercise of the creditors' right to seize them without relying on a *vindex*. However, debtors would be held liable for twice the initial debt where they failed to disprove the creditors' claim.

31 See in general Melanie Roestoff, *'n Kritiese evaluasie van skuldverligtingsmaatreels vir individue in die Suid-Afrikaanse insolvensiereg)* (A Critical Evaluation of Debt Relief Measures for Individuals in the South African Insolvency Law) (LLD Thesis, University of Pretoria, 2002), 23.

32 See, for example, Coenraad Visser, "Romeinsregtelike aanknopingspunte van die sekwestrasieproses in die Suid-Afrikaanse insolvensiereg" (n. 24) 45.

33 *Ibid.,* 45. Debtors could also remain in possession of the property under the supervision of one or more creditors concerned.

34 See W W Buckland, *A Textbook of Roman Law from Augustus to Justinian* (Cambridge University Press, 3rd ed., 1964), 402–403.

35 See in general David Burdette, *A Framework for Corporate Insolvency Law Reform in South Africa* (n. 22), 25.

to his creditors),[36] which helped debtors avoid judicial proceedings[37] by voluntarily surrendering their estate through the *cessio bonorum* process, which allowed for such surrender.[38] The *cessio bonorum* is the root of the current Zimbabwean and South African voluntary surrender process.[39] Although the *cessio bonorum* did not culminate in a discharge of debts, it absolved debtors from the danger of imprisonment for the debts to which the process related.[40]

Ancient Roman law had a wider influence on the development of the law of Holland, which previously had no uniform system of insolvency.[41] The Roman law procedure of *cessio bonorum* was adopted in Dutch law and it was initiated by a debtor's voluntary application to court, along with an inventory of the debtor's assets and all creditors' accounts.[42] Thereafter, the application and the inventory were referred to the *burgomaster* (the town magistrate) and the governing authority of the debtor's place of domicile. A report had to be compiled by the *burgomaster* and the governing authority that would be sent to the court where the application had been lodged. The court would then grant a *rule nisi* (an interim order with a return date) that invited any interested party to indicate to the court why the provisional writ of *cessio bonorum* should not be granted. Property acquired by the debtor after a writ of *cessio bonorum* had been granted could also be attached. This procedure facilitated a stay of litigation against the debtor and ensured transfer of debtor's property into the custody of a curator.[43]

Further developments in the Dutch insolvency system were prompted by the enactment of the Amsterdam Ordinance of 1777. The reforms introduced by this statute are pivotal for Zimbabwe insolvency system because they constitute the foundation of insolvency law imposed on the Cape of Good Hope at the time of its annexation.[44] The Amsterdam Ordinance of 1777 enabled creditors to apply to the commissioners to obtain control of the debtor's assets.[45] Thereafter, the commissioners would attempt to secure a compromise of all creditors concerned, failing

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36 J C Van Oven, *Leerboek Romeinsch Priaatrecht* (*Textbook of Roman Private Law*) (Leiden: Brill, 1948), 190.

37 That was a requisite in the *bonorum venditio* process.

38 Also, a requisite in the *bonorum venditio* process.

39 See Rodger Evans, *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* (LLD Thesis, University of Pretoria, 2008) 29.

40 *Ibid*. However, at present, overcommitted debtors in Zimbabwe may continue to be detained in prison for failure to satisfy a debt following a judgment by the court. See s.27 of the Magistrate Court Act (Cap.7:10).

41 See J W Wessels, *History of the Roman-Dutch Law* (Grahamstown, Cape Colony: African Book Company, 1908), 663; Melanie Roestoff, *'n Kritiese evaluasie van skuldverligtingsmaatreels vir individue in die Suid-Afrikaanse insolvensiereg* (n. 31) 48.

42 *The Selective Voet: being the Commentary on the Pandects* (translated with explanatory notes and notes of all South African Reported Cases by Percival Gane) (Durban: Butterworths, 1957), Volume 6, 370.

43 J W Wessels, *History of the Roman-Dutch Law* (n. 41), 665.

44 *Ibid.,* 668.

45 Commissioners were introduced to the Dutch insolvency regime by this Ordinance and their duties included adjudicating on debtors' offers of composition and to make the necessary recommendation regarding debtors' insolvency and commence with administration, where necessary.

which the commissioners[46] would proceed to make an inventory of the debtor's property.[47] After creating an inventory of the debtor's property, the commissioner would convene a meeting where creditors would appoint a sequestrator. The debtor was granted a month to settle his obligations, failing which he was considered insolvent. However, if the debtor managed to settle his debts, his estate was released from administration and his property would be returned to him.

III. Legislative Development in Zimbabwe

A. The Insolvency Act 21 of 1924

The first insolvency statute enacted in Zimbabwe, the Insolvency Act of 1924, facilitated access by consumer debtors to the debt relief system through the sequestration procedure and the assignment procedure.[48] The sequestration procedure regulated both debtors' voluntary surrender applications and creditors' compulsory applications and caused a liquidation of the assets of the debtor in a collective proceeding.[49]

The voluntary surrender process could be initiated by lodging a written application at the High Court,[50] setting forth that the debtor was insolvent and that the surrender of his estate would be for the benefit of his creditors.[51] Following which, the court could only grant a sequestration order if it was satisfied that a notice of surrender was duly published, a statement of affairs was lodged and opened for inspection by creditors, and, the debtor's estate had sufficient assets to defray all sequestration costs payable from the free residue.[52]

A creditor's application had to be accompanied by an affidavit stating the grounds of the claim and a certificate of the Master or a magistrate that due security has been found for payment of all fees and necessary charges for the prosecution of all sequestration proceedings until a trustee had been appointed.[53] Thereafter, the

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46 J W Wessels, *History of the Roman-Dutch Law* (n. 41), 669.

47 Facilitating a debtor's access to his property is important because the insolvent does not have to incur extra expenses to purchase the seized property.

48 See Insolvency Act of 1924, Pts.I and VI.

49 *Ibid*., ss.3–7 and ss.8–18. The former procedure was voluntary because debtors could only initiate the application at their own volition, while the latter procedure was initiated by creditors and debtors were forced to participate in the sequestration procedure. Also, see in general International Monetary Fund, *Orderly & Effective Insolvency Procedures: Key Issues* (International Monetary Fund, 1999) regarding the collective nature of the sequestration procedure.

50 Insolvency Act of 1924, s.3. Sequestration applications may only be assessed by the High Court because sequestrations affect the status of an insolvent and only the High Court has jurisdiction over such matters.

51 Insolvency Act of 1924, s.3(a). The sequestration procedure was creditor-oriented, and it was essential to indicate that the voluntary surrender proffered a benefit to creditors.

52 Section 5 of the Insolvency Act of 1924 read with s.4. Thereafter, control and administration of the insolvent estate was transferred from the debtor to the Master.

53 Insolvency Act of 1924, s.9(2). The affidavit also had to indicate whether the creditor holds any security for his claim, and if so, the nature and value thereof.

court would grant an order of provisional sequestration of the debtor's estate if it was of the opinion that the debtor had committed an act of insolvency or if it was convinced that the debtor was insolvent and that placing his estate under sequestration was to the advantage of his creditors.[54]

Privileged insolvents who met the procedure's stringent access requirements, notably the "to the advantage of creditors" requirement, could subsequently apply for a statutory composition measure, which enabled debtors to regain possession of their seized assets.[55] However, access to this measure was limited to debtors who had accessed the sequestration procedure; consequently, NINA debtors would be sidelined from this measure. Access to this measure was initiated by an insolvent's composition offer at any meeting of creditors following commencement of sequestration.[56] To be binding, the offer needed to be accepted by creditors whose vote amounted to not less than three-fourths in value and three-fourths in the number of votes of all creditors.[57]

In addition to the sequestration and composition procedures, overcommitted debtors could alternatively execute an assignment agreement, by way of deed, whereby the debtor transferred his property to an assignee.[58] Upon execution of the deed of assignment, the assignee would immediately take possession of the property[59] and the deed of assignment would become binding on the debtor and his creditors.[60] The assignment freed debtors from pre-assignment debts. However, this measure did not cater to the needs of NINA debtors because it required debtors to have some form of disposable property, which debtors in this category did not.

B. The Insolvency Act 13 of 1973

The Insolvency Act of 1973, which repealed the Insolvency Act of 1924,[61] amended the sequestration procedure by, among others, requiring that a voluntary surrender application must be provisionally accepted before a final order placing the estate under sequestration could be granted.[62] To this end, the High Court could

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54 Insolvency Act of 1924, s.10. Thus, Zimbabwe's insolvency system has historically been creditor-oriented because access to the sequestration measure was dependent on the ability of a debtor to proffer a benefit to his creditors. Consequently, NINA debtors who have no disposable assets or excess income that could yield a benefit to their creditors could not access this measure and obtain the relief it proffered.

55 Insolvency Act of 1924, s.105(2).

56 *Ibid*., s.104(1). At any meeting of creditors other than the first meeting.

57 *Ibid*., s.104(2). Creditors whose claims were proved against the estate.

58 *Ibid*., s.115.

59 *Ibid*., s.118(1). The assignee would retain the property as against the debtor until the assignment was set aside or the Master certified that the assignment was declined by the creditors.

60 Insolvency Act of 1924, s.125(1). The deed would be binding upon all creditors whose claims were due or the cause of whose claims arose before the date of the assignment and it could not confer any advantage or benefit to a creditor which he would not be entitled if the estate of the debtor were to be placed under sequestration.

61 Insolvency Act 13 of 1973.

62 *Ibid*., s.3 read with s.4.

provisionally accept the surrender application if it was satisfied that the property in the estate was sufficient to defray all the costs of the sequestration payable out of the free residue,[63] and that the debtor's estate was insolvent.[64] Thereafter, the court would issue a *rule nisi*, published in the *Gazette*, calling upon interested persons to appear and show cause why the insolvent's estate should not be sequestrated finally.[65]

Before issuing the *rule nisi*, the court could direct the insolvent, or any other interested person, to appear before it and be examined.[66] Once these requirements were met, the court could finally accept the surrender application and grant an order placing the insolvent's estate under sequestration if it was satisfied that, *inter alia*, there were available assets in the estate sufficient to defray all the costs of sequestration as were payable out of the free residue.[67]

A creditor may petition the court for the sequestration of the estate of a debtor[68] who had committed an act of insolvency.[69] The court could grant an order of provisional sequestratio2n if it believed that the debtor had committed an act of insolvency or was insolvent, and there was reason to believe that the sequestration would be to the advantage of creditors.[70]

Debtors with a stable source of income could conclude a composition arrangement with creditors. This was commenced by a written offer to the trustee of the insolvent estate at any time after the first meeting of creditors.[71] The composition became binding if creditors accepted the offer by three-quarters in value and three-quarters in number of the votes of all the creditors who proved their claims against the estate.[72] In effect, this was a debt restructuring arrangement between a debtor and his creditors; therefore, it was designed for better positioned debtors experiencing a temporary financial setback. It did not cater to the NINA debtors' needs because they did not have the requisite income to facilitate debt repayment. Furthermore, composition offers could only be made by insolvents who first accessed the sequestration procedure, which further sidelined NINA debtors who were barred from accessing the sequestration measure. This statutory post-commencement composition was nevertheless only used in exceptional circumstances since the insolvent required funding to make an offer.

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63 *Ibid*., s.4(1)(a). Applications were normally rejected if the estate had insufficient free residue. However, the court in *Ex parte Apsley-Thomas* 1934 SR 97 held that the High Court could conditionally accept the surrender upon the debtor finding a sufficient sum of money and paying it to the Master.

64 Insolvency Act of 1973, s.4(1)(b). See for example, *Ex parte Yodaiken* 1938 SR 193; *Ex parte Tselentis* 1961 R & N 108.

65 *Ibid*., s.4(1)(b).

66 *Ibid*., s.4(2).

67 *Ibid*., s.6.

68 *Ibid*., s.12. The facts of the application were to be confirmed by an affidavit (Insolvency Act of 1973, s.12(4)).

69 Insolvency Act of 1973, s.11 for an indication of the acts of insolvency.

70 *Ibid*., s.13.

71 *Ibid*., s.136(1).

72 Insolvency Act, ss.136(6) and 137(1). The composition was only binding upon the insolvent and upon unsecured or non-preferent creditors.

C. The Insolvency Act 7 of 2018

As highlighted in the above discussion, the repealed insolvency statutes did not cater for debtors with smaller estates such as NINA debtors. Resultantly, such debtors could not access the debt relief system and obtain a much-needed discharge of debts. In light of this marginalisation, some commentators proposed the introduction of an administration procedure—an alternative relief measure permitting an extended repayment plan which could potentially facilitate relief to some of these sidelined debtors.[73] However, this measure was never implemented in Zimbabwe's relief system, despite the strong English influence and its connection with the South African system where this debt repayment procedure and some others had been introduced.[74]

The updated insolvency statute, the Insolvency Act of 2018 (Cap.6:07), has introduced reforms that may potentially cater for this marginalised group through a novel pre-liquidation composition measure. Although no explanatory notes have been provided regarding the aim of this measure, its purpose is outlined in one of South Africa's debt relief reform proposals which inspired it.[75] This measure was initially proposed in South Africa's developing insolvency reform process to address the plight of marginalised NINA debtors who are vulnerable to creditor intimidation and are perpetually trapped in debt because of a lack of statutory protection.[76]

The Insolvency Act of 2018 introduced a post-liquidation composition measure, borrowing from the active reform initiatives in the South African debt relief system. However, the main features of the post-liquidation measure reflect the provisions of the statutory composition measures previously regulated by the Insolvency Act

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73 See H G Squires, "Suggested reforms of the Insolvency Act" (1962) 2:2 *The Rhodesia and Nyasaland Law Journal* 113, 123.

74 André Boraine argued in his article, "Some Thoughts on the Reform of Administration and Related Issues" (2003) 36 *De Jure* 217, that this procedure was introduced in South Africa's debt relief system because of the English law influence. Also, see s.74 of South African Magistrates' Courts Act 32 of 1944. Regarding a discussion of all the current debt relief procedures in South Africa, including the debt review procedure as provided for by the National Credit Act, see André Boraine and Melanie Roestoff, "Revisiting the State of Consumer Insolvency in South Africa After Twenty Years: The Courts' Approach, International Guidelines and an Appeal for Urgent Law Reform". Part (1) of this article is published in (2014) 77 *Tydskrif vir Hedendaagse Romeins-Hollandse/ Journal of Contemporary Roman-Dutch Law* 351 and Part (2) is published in (2014) 77 *Journal of Contemporary Roman-Dutch Law* 527.

75 For details regarding the South African reform proposals, see, for instance, Hermie Coetzee, "Does the Proposed Pre-liquidation Composition Proffer a Solution to the No Income No Asset (NINA) Debtor's Quandary and, If Not, What Would?" (2017) 80 *Journal of Contemporary Roman-Dutch Law* 18; Hermie Coetzee and Melanie Roestoff, "Rectifying an Unconstitutional Dispensation? A Consideration of Proposed Reforms Relating to No Income No Asset Debtors in South Africa" (2020) 29 *International Insolvency Review* S95, S96.

76 The South African legislature proposed introduction of an Insolvency Bill in 2000. This was followed by a revised Insolvency Bill in the form of a working paper, which was circulated in 2015, that contained a proposed pre-liquidation composition measure. However, in spite of these initiatives new insolvency legislation has not been introduced in South Africa as yet.

of 1924 (Cap.53) and the Insolvency Act of 1973 (Cap.6:04).[77] The liquidation procedure is discussed first, and a discussion of the novel pre-liquidation composition follows thereafter.

(i) The liquidation procedure

In the main, the (asset) liquidation procedure[78] entails a court-ordered surrender of a debtor's non-exempt property to a liquidator for sale and distribution of the proceeds among proven creditors. This procedure is important because the rehabilitation of a natural person following the full payment of all claims of the creditors or after the certification of a composition, or after the expiration of four years from the confirmation of the first liquidation account puts an end to liquidation, discharges all the debts and relieves the debtor from every disability resulting from the liquidation.[79] The liquidation process may be initiated by a debtor or a creditor.[80] On a debtor's application a provisional or final liquidation will be granted only if the court is satisfied that, *inter alia*, the debtor is unable to pay his debts[81] and the liquidation is to the advantage of his creditors.[82]

A debtor may not access the liquidation procedure if he cannot prove that the liquidation of his estate will benefit his creditors—an exclusionary pro-creditor requirement that runs throughout this Act.[83] Evans[84] contends that traces of this requirement can be found in the Cape Ordinance 6 of 1843. The Insolvency Act of 2018 does not define what this requirement entails; however, South African case law indicates that "the facts put before the Court must satisfy it that there is a reasonable prospect—not necessarily a likelihood but a prospect which is not

77 Therefore, this measure is not discussed further because it has already been concluded above that it does not cater to the needs of NINA debtors who form the subject of this article.

78 One of the reforms introduced by this statute is that both corporate and consumer insolvency relating to asset liquidation is now referred to as "liquidation" removing the previous distinction between "sequestration" in consumer insolvency and "winding up" or "liquidation" in corporate insolvency.

79 Insolvency Act of 2018, s.109 (effect of rehabilitation) and s.106 (rehabilitation). This procedure must be contrasted with the two-stage approach to consumer over-indebtedness in established jurisdictions such as Brazil. To this end, the first stage is extra-judicial and mandates obligatory consensus between a consumer and his creditors while the second stage is a judicial phase. In respect to the first stage, it mandates creditor proactive and good faith participation, which may be fundamental for Zimbabwe's low-earning consumers who have to incur, at times, onerous expenses to obtain a sequestration order through the country's costly and congested judicial system. See Claudia Lima Marques and Káren Rick Danilevicz Bertoncello, "Consumer Credit and Over-indebtedness in Brazil: The Response of the 2021 Reform of the 1990 Brazilian Consumer Code" (n. 7), especially "III. Overview of the treatment of consumer over-indebtedness".

80 Insolvency Act of 2018, ss.4 and 6.

81 For the meaning of inability to pay debts see Insolvency Act of 2018, s.3. The "inability to pay debts" requirement replaced the "acts of insolvency" requirement of the previous Insolvency Acts.

82 Insolvency Act of 2018, ss.14(1)(b)(i) and 15(1)(c).

83 See Insolvency Act of 2018, ss.4(8)(a)(iii), 5(1)(c)(i), 14(1)(b)(i), 15(1)(c) and 50(6).

84 See Roger G Evans, "The Abuse of the Process of the Court in Friendly Sequestration Proceedings in South Africa" (2002) *International Insolvency Review* 13, 15–16.

too remote—that a not negligible pecuniary benefit will result to creditors".[85] This requirement may be dispensed with if there is no evidence of fraud or dishonesty or prejudice to any creditor.[86]

Overcommitted debtors may also be forced to access the liquidation procedure. This is not a debtor remedy because it may only be initiated by creditors who have a liquidated claim[87] of not less than ZWD200.[88] The compulsory application may only be instituted against the estate of a debtor who cannot pay his debts that are due and payable, and whose liabilities exceed the value of his assets.[89]

In relation to NINA debtors, it is debatable whether creditors' compulsory applications may be successful because a court may only grant a provisional and/or final liquidation order if there is reason to believe that the liquidation of the debtor's estate will be to the advantage of his creditors,[90] a requirement which NINA debtors cannot meet. "To the advantage of creditors" requirement has continually been the bedrock of Zimbabwe's corporate and consumer insolvency system. In relation to the corporate debt relief system, the principle in *Bylo v Rhodesian Barter* no longer applies in contemporary insolvency law.[91] In this case, Beck J held that the lack of assets in a debtor's estate could not hinder access to the liquidation procedure. In respect of the personal insolvency system, the significance of the "to the advantage of creditors" requirement was confirmed in the *Scottish Rhodesian Finance Ltd v Ridgeway*,[92] where Whitaker J held that the creditor-applicant has an indispensable onus to prove that there is reason to believe that liquidation will be to the advantage of creditors.[93] It was also held in *MacGillivray v Edmundson* that in the absence of special circumstances, an estate with insufficient assets to facilitate the distribution of proceeds to creditors cannot be sequestrated.[94]

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85 *Meskin and Company v Friedman* 1948 (2) SA 555 (W). Also, see *Stratford v Investec Bank Ltd* [2015] JOL 32695 (CC), [44]–[46].

86 See eg, *Ex parte Battiscombe* 1930 SR 25, where it was held that this requirement may be dispensed with if there is no evidence of fraud or dishonesty or prejudice to any creditor.

87 See *Ex parte Benson* 1938 WLD 107, where the court held that a liquidated claim is a claim that is based on an obvious and ascertainable legal ground that is capable of quick and ready proof. Also, see Insolvency Act of 2018, s.6(2), which provides that a claim in respect of a liquidated debt that is payable at some determined time in the future may be considered.

88 Insolvency Act of 2018, s.6(1). The liquidated claim can be adjusted from time to time to reflect subsequent fluctuation in the value of the money. This is essential because of the volatile and unstable nature of Zimbabwe's economy.

89 Insolvency Act of 2018, s.6(1)(a) read with s.3(1). Also, see *Pieters & Co v Gordon* 1913 SR 71, 73.

90 Insolvency Act of 2018, ss.14(1)(b)(i) and 15(1)(c).

91 *Bylo v Rhodesian Barter and Export (Pvt) Ltd* 1974 (1) SA 601 (R).

92 *Scottish Rhodesian Finance Ltd v Ridgeway* 1979 (2) SA 251 (R).

93 Whitaker J overturned the decision in *MacGillivray v Edmundson* 1958 (3) SA 384 (SR) by asserting that the onus was on the debtor to establish that the sequestration was not to the advantage of creditors. This case was decided applying the repealed Insolvency Act of 1924 and was followed in *Meaker v Heyns* 1965 (3) SA 496 (SR); *Hanan v Turner* 1967 (4) SA 368 (R); *J W Jagger & Co (Rhodesia) (Wholesaling) (Pvt) Ltd v Mubika* 1972 (4) SA 100 (R).

94 *MacGillivray v Edmundson* 1958 (3) SA 384 (SR).

(ii) The pre-liquidation composition

To access the newly introduced pre-liquidation composition, an overcommitted debtor with debts less than ZWD20,000 may lodge with an administrator a signed copy of a composition and an affidavit.[95] The administrator is an intermediary, and to qualify as such, the administrator must not have been disqualified from being a liquidator, must have agreed to act as an administrator and must have furnished security to the satisfaction of the Master within whose area of jurisdiction the debtor is resident.[96]

In the main, the pre-liquidation composition envisages a negotiated settlement between a debtor and his creditors. Negotiated settlements are important because they reduce the stigma associated with formal insolvency proceedings.[97] Furthermore, negotiated settlements are less costly and provide increased flexibility. However, these benefits may be illusory because it is difficult to reach an agreement with all creditors and delays usually mar informal procedures. Additionally, debtors are often pressured into concluding non-viable onerous settlements.[98] Therefore, negotiated settlements are mainly effective in temporary financial difficulties or where debtors have a low income.

Suppose the lodged composition provides for an immediate cash payment for distribution among creditors. In that case, the debtor must, pending the outcome of the composition offer, make payment to the administrator for investment in an interest-bearing savings account.[99] Lodging a composition offer imposes various restrictions on the applicant, namely, restrictions on alienation, encumbering or voluntary disposition of property available to his creditors in terms of the composition.[100] Additionally, a debtor who incurs debt during the period between lodging the composition and the date on which creditors vote on the composition must inform the debt provider of the impending composition and provide the insolvency practitioner with full particulars concerning the debt he has incurred.[101]

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95 See s.119(1) of the Insolvency Act 2018. The ZWD20,000 eligibility threshold is unreasonable because of the current financial situation in Zimbabwe. At present, ZWD20,000 equates to USD62.12. Therefore, due to this unreasonable eligibility threshold, the Zimbabwean legislature renders this relief measure obsolete because the procedural costs that debtors have to incur might exceed this debt threshold. A viable alternative would be to prescribe all eligibility thresholds in a foreign currency such as US dollars, which is already widely used in the country and is more stable and may withstand the currency fluctuations presently experienced in Zimbabwe.

96 Insolvency Act of 2018, s.119(1). Administrators are regulated by the Estate Administrators Act of 2000 (Cap.27:20).

97 World Bank Working Group on the Treatment of the Insolvency of Natural Persons, Report on the Treatment of Insolvency of Natural Persons (2013). Paragraph 130 lists arguments in favour of voluntary debt settlements, available at https://openknowledge.worldbank.org/server/api/core/bitstreams/1780a7a6-1e04-53bd-99c8-dde06425bf3e/content.

98 *Ibid.,* 47.

99 Insolvency Act of 2018, s.119(2). This requirement does not apply to NINA debtors whose dire financial circumstance hinders them from making the cash payment to the administrator.

100 Insolvency Act of 2018, s.199(4).

101 *Ibid*., s.119(3).

Upon receipt of the composition offer, the administrator must determine a date for questioning the debtor and the consideration of the composition by his creditors.[102] The hearing must be convened at a place that is accessible and convenient to creditors and he must send a standard notice with the time, date and place of the hearing to creditors and the Master at least 14 days before the hearing.[103] At the hearing, creditors may prove or object to a debt listed in the debtor's statement.[104] This meeting ensures creditor involvement in the debt relief process. However, it is noteworthy that debtors might be pushed into further indebtedness because of the costs, such as transportation costs in attending this meeting. A viable alternative would be to introduce virtual meetings. This reform is especially important in the wake of the COVID-19 pandemic when some leading insolvency systems introduced virtual meetings to accommodate the challenges imposed by, among others, bans on in-person gatherings.[105]

Where a dispute regarding a debt, other than a debt based upon or derived from a judgment debt, arises between the debtor and his creditors or between creditors, the administrator may admit or disallow the debt, or part thereof, after an investigation of the objection.[106] Creditors whose debts have been disallowed may institute an action or continue with an action that has already been instituted, in respect of the debt.[107]

The administrator may not accept the composition if a creditor demonstrates, to his satisfaction, that the composition "accords a benefit to one creditor over another creditor to which he would not have been entitled on liquidation of the debtor's estate".[108] The composition will be deemed accepted if it is accepted by the majority in number and two-thirds in value of the concurrent creditors who vote on the composition.[109] The voting threshold is too high and may result in creditor passivity where NINA debtors are involved. After all, little to no dividend to creditors is guaranteed. A viable alternative would be to only require creditor participation in instances where a significant value from assets or future income is expected and to dispense with this requirement where NINA debtors are involved.

When the creditors have accepted the composition, the administrator must send a certificate of such acceptance to the Master and creditors. The composition

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102 *Ibid*., s.119(6).

103 Insolvency Act of 2018, s.119(7).

104 Subject to any amendments by the administrator, every listed debt is deemed to be proved unless a creditor objects to it, or the administrator rejects it or requires that it be corroborated with evidence: Insolvency Act of 2018, s.119(8)(b).

105 Coronavirus (Scotland) (No 2) Act 2020, s.12, which introduced virtual creditor meetings within the Scottish debt relief system. Also, see s.8 of the Coronavirus (Scotland) (No) Act 2020, regarding electronic service of documents.

106 Insolvency Act of 2018, s.119(9).

107 Insolvency Act of 2018, s.119(10). Where the creditor obtains a judgment in respect of the disputed debt, the administrator must add the debt to the list of proved debts (Insolvency Act of 2018, s.119(11)).

108 Insolvency Act of 2018, s.119(14). Therefore, the composition offer may only be accepted if the administrator is satisfied that the composition affords a benefit to all creditors in relation to their debts.

109 Insolvency Act of 2018, s.119(5).

becomes binding on all creditors who receive notice of the hearing or who appeared at the hearing.[110] If the offer of composition is not accepted by the required majority of creditors and the debtor is not able to make a substantially higher offer, the administrator must declare the proceedings to have ceased, and the debtor returns to the position he was in before the commencement of the proceedings.[111] Thereafter, upon the application of the debtor, the Master may grant a discharge of unsecured debts if:

(i) [T]he debtor satisfies the Master that the administrator and all known creditors were given standard notice of the application for the discharge with a copy of the debtor's application at least 28 days before the application to the Master; and
(ii) the Master is satisfied after consideration of comments, if any, by creditors and the administrator and the application by the debtor —
    A. that the proposed composition was the best offer which the debtor could make to creditors;
    B. that the inability of the debtor to pay debts in full was not caused by criminal or inappropriate behaviour by the debtor.[112]

The pre-liquidation composition measure may be considered a streamlined negotiated settlement that may help debtors with some form of disposable income to meet their restructured obligations. However, this measure is not suited to the needs of NINA debtors because of their dire financial circumstances, and thus the measure benefits neither the debtor nor his creditors. NINA debtors cannot offer a viable composition to creditors, and it is highly improbable that such debtors can access the measure to benefit from it. The major issue with this measure is that it forces debtors into a negotiation phase despite not having any bargaining power because of their financial position. The pre-liquidation composition measure forces debtors into a negotiation phase with creditors, despite not being able to offer anything to their creditors while incurring procedural costs along with expenses to travel to and from the venue of the negotiation.[113] Further, creditor passivity might be an issue because little to no dividend to creditors is guaranteed where NINA debtors are involved.

Although the pre-liquidation composition measure seems to have been transplanted into the Zimbabwean debt relief system with the indigent debtors including marginalised NINA debtors in mind, it does not meet this debtor group's needs because it can only succeed when the debtor has something to offer his creditors.

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110 *Ibid*., s.119(15).
111 *Ibid*., s.119(28).
112 *Ibid*., s.119(28).
113 To eradicate this problem, this article recommends that the Zimbabwean legislature require virtual meetings, which might accommodate interested parties. However, the major concern regarding virtual meetings would be access to Internet, especially by poor debtors.

The pre-liquidation composition is nevertheless a welcome alternative debt relief measure for debtors, other than those in the NINA category, who have encountered a temporary financial crisis. It provides a streamlined procedure with potentially less stigma attached in contrast to the formal liquidation process, and it may ultimately lead to economic rehabilitation.

IV. Zimbabwe's Debt Relief System: Room for Improvement?

The major concern of Zimbabwe's natural person debt relief system is its marginalisation of debtors with smaller estates, specifically those who fall within the NINA category. This has been a continual issue highlighted by, among others, the "to the advantage for creditors" requirement. Access to Zimbabwe's primary debt relief measure has always been dependent on the provision of sufficient proof to the court that a pecuniary benefit will accrue to creditors if the debtor's estate is liquidated. To meet this requirement, debtors must have some form of excess income or disposable assets that may be liquidated and proceeds distributed to creditors. As a result, low-earning debtors, who mostly fall within the NINA category, cannot access this measure.

Recent law reform in Zimbabwe has resulted in the introduction of a transplanted pre-liquidation composition, which was initially proposed as part of the ongoing South Africa's debt relief and insolvency reform process to cater for marginalised debtors. This measure is a welcome step in the right direction but it falls short of meeting the needs of the debtor group's plight, which it seeks to address. This is mainly because this measure is a negotiated settlement between a debtor and his creditors, and to access it, debtors must, as a pre-requisite, have some form of stable source of income. Consequently, forced negotiated phase with NINA debtors results in no benefit because such debtors cannot offer any viable composition to creditors.

Therefore, despite the recent law reform, the marginalisation of NINA debtors in Zimbabwe is set to continue. This marginalisation does not align with international trends in insolvency that seek to foster non-discrimination and ensure the protection of all "honest but unfortunate debtors".[114] In this respect, international guidelines reflect that a sound debt relief system facilitates access to the debt relief

114 See *Local Loan Co v Hunt* 1934 292 US 244, where the phrase "honest but unfortunate debtors" was first coined. In respect of the obstacles in accessing debt relief in Zimbabwe's system, the position in Russia's system that ensure open access to most debtors is preferred. See Jason J. Kilborn, "(Not) Following the Leader in the Newest Personal Insolvency Laws in Uzbekistan and Kazakhstan" (2023) 10:2 *Journal of International and Comparative Law* 243, especially "III. Review, Reform, and International Norms-Assessment of Russian Model". Although, criticism can be advanced to this system, its open access is integral because it might eradicate the marginalisation of debtors through, among others, the "advantage to creditors" requirement. If implemented, the open access must be followed by some form of sacrifice of non-exempt assets by consumers and where no such disposable property exists, such as

system and guarantee a concomitant discharge of debts to all categories of debtors regardless of their financial circumstances.

To align Zimbabwe's personal insolvency system with international trends in insolvency, it is thus imperative that further law reform be undertaken to eradicate this discrimination against low-income debtors. Non-discrimination may be achieved by, among others, removing the "to the advantage of creditors" requirement where NINA debtors are involved. In this respect, where "honest but unfortunate" NINA debtors seek access to the liquidation measure, a government subsidised waiver of application fees must be guaranteed and "to the advantage of creditors" requirement should not apply. This will facilitate this group's access to the debt relief system, which should be followed in the not-too-distant future by a discharge of debts, which will enable discharged debtors to re-enter the credit economy. Re-entering the credit economy is beneficial to the broader society because credit is the lifeblood of the modern industrialised economy.[115] In this respect, the position within the United States' bankruptcy system is preferred where all "honest but unfortunate" debtors may access the liquidation measure, including the NINA category, and obtain an immediate discharge of debts, where necessary.

However, for the successful implementation of these recommendations, it is imperative that insolvency regulators in Zimbabwe balance the interests of debtors and creditors. To this end, regulators need to ensure that the insolvency system is not susceptible to debtor abuse by implementing measures that eradicate the possibility of debtor moral hazard. This may be achieved by, among others, ensuring that this easily accessible discharge for NINA debtors is only accessible after a protracted 10-year period after the initial successful discharge or even once in the debtor's lifetime.

To reinforce the benefits of the discharge, it is also imperative that insolvency regulators provide mandatory financial literacy training to debtors during the application stage and after accessing this measure. Financial literacy is important because it may help debtors avoid reckless financial decision-making, thereby avoiding future insolvency.[116]

Furthermore, general training on insolvency matters must be provided to consumers and legal practitioners. This training may help remove the stigma attached to insolvency, which is generally associated with failure. In respect of legal practitioners, it is noteworthy that half a decade after the reform of the insolvency system, no consumer insolvency proceeding has been reported yet. This may be

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where NINA debtors are involved, discharge must still be facilitated and accompanied by other forms of sacrifice or limitation.

115 See Cork Report, Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 855, para.9.

116 See, in general, Annamaria Lusardi and Flore-Anne Messy, "The Important of Financial Literacy and Its Impact on Financial Wellbeing" (2023) 1:1 *Journal of Financial Literacy and Wellbeing* 1; Elsa Fornero and Anna Lo Prete, "Financial Education: From Better Personal Finance to Improved citizenship" (2023) 1:1 *Journal of Financial Literacy and Wellbeing* 12.

attributed to the lack of knowledge among legal practitioners because most tertiary institutions do not offer courses on insolvency law.

V. Conclusion

The current consumer debt relief regime in Zimbabwe does not cater for the needs of NINA debtors. Attempts have been made to address the marginalisation of this indigent group by introducing the pre-liquidation composition but the reforms have fallen short of alleviating their plight. Although, the recent law reform in Zimbabwe does not provide for NINA debtors, it is nonetheless commendable because this is a step in the right direction.

The main criticism of the pre-liquidation composition is that it forces debtors into a negotiation phase despite the unequal bargaining position they are in. Furthermore, this measure does not accommodate virtual meetings which could reduce debtors' costs of participation. To this end, this article proposed the introduction of virtual meetings, which might be beneficial to already-overburdened consumers. However, the challenge of Internet connectivity is also recognised and resultantly a hybrid system is preferred where debtors have to opt for virtual or in-person meetings depending on their individual circumstances. Another major concern regarding the pre-liquidation composition is that the debt threshold is prescribed in unstable Zimbabwean currency. As a result of currency volatility, the threshold has become meaningless. Therefore, it is recommended that the legislature prescribes all amounts in US dollars which are already widely in use.

In respect of the liquidation procedure, the sidelining of low-earning debtors is maintained through, among others, the "to the advantage of creditors" requirement, which runs through the Insolvency Act. This requirement marginalises NINA debtors because they do not have disposable income or assets that can yield a benefit to creditors. In light of this, this article proposes that this requirement should not be implemented where NINA debtors are involved. This will facilitate access to marginalised low-earning debtors, which must be followed by a discharge of debts. The discharge must, among others, be dependent on successful completion of financial literacy training, which might help avoid future over-indebtedness.