

SOME CONSEQUENCES OF THE NATIONAL CREDIT ACT 34 OF 2005 ON THE PROOF OF CLAIMS IN INSOLVENCY LAW

1 *Introduction*

As a general rule any creditor who wishes to share in the distribution of the proceeds of the assets in an insolvent estate must prove a claim against the estate at a meeting of creditors (“creditors” in this context refers to creditors in respect of debts incurred prior to sequestration – *cf Vather v Dhavraj* 1973 2 SA 232 (N)). South African insolvency law proceeds from the premise that once a sequestration order is granted, a *concursum creditorum* comes into being and the interests of the creditors as a group enjoy preference over the interests of individual creditors (*cf Walker v Syfret* 1911 AD 141 166, where the court explained the key concept of *concursum creditorum*; *Richter NO v Riverside Estates (Pty) Ltd* 1946 OPD 209 223; Sharrock *et al Hockly’s Insolvency Law* (2006) 5). The *concursum creditorum* is regarded as one of the key concepts of the South African law of insolvency, and the object of the Insolvency Act 24 of 1936 is to ensure a due distribution of assets among the general body of creditors. As a rule, however, a creditor has no right to share in the distribution of the assets, vote on matters concerning the administration of the estate, or challenge any of the trustee’s actions, unless he has successfully proven a claim against the estate. The proof of a claim gives the creditor the required *locus standi* and at the same time provides *prima facie* proof of the existence of a debt (*Grufin Finance Co (Pty) Ltd v Cohen* 1991 2 SA 345 (W); see also Nagel (ed) *Mars: The Law of Insolvency in South Africa* (2008) 3).

By means of a system of meetings the insolvent’s creditors *inter alia* establish their claims, and in general all claims must be proved to the satisfaction of the presiding officer at such a meeting of creditors. (Section 44 of the Insolvency Act

and section 366 of the Companies Act 61 of 1973 deal with the proof of claims; the new Companies Act 71 of 2008 will replace the Companies Act 61 of 1973 except for chapter 14 of the 1973 act, which deals with the winding-up and liquidation of insolvent companies, and which will remain in force until new insolvency legislation is enacted; see also Sharrock 100.) The purpose of this note is to consider the possible effect of certain provisions of the National Credit Act 34 of 2005 on the proof of claims in insolvency law following sequestration. The questions that will be addressed are whether the presiding officer at a meeting of creditors will have to consider the National Credit Act when adjudicating on the claims lodged for proof and to what extent the provisions of the National Credit Act dealing with reckless credit and unlawful credit agreements must be taken into consideration in this regard. Although the presiding officer follows the same procedure in the case of the sequestration of a natural person debtor in terms of section 2 of the Insolvency Act and in the case of a liquidated company that is unable to pay its debt, this note will largely be limited to the position regarding the first-mentioned type of debtors.

2 Meetings of creditors and proof of claims

2.1 Meetings of creditors

South African insolvency law does not provide for creditors' committees as found in various other jurisdictions and makes use of the meeting of creditors in an insolvent estate to afford creditors the opportunity to protect their interests and participate in the general administration of the estate. The meeting of creditors provides an interactive *forum* for discussion and debate to enable creditors to receive information on the course of insolvency proceedings and provide an opportunity to the trustee to consult with creditors on various issues. Although the purpose of the various meetings varies, claims can be proved at any of the indicated meetings.

There are four types of meetings: the first and second meetings (s 40(1), (2) and (3) of the Insolvency Act), which are compulsory in each estate, and the special and general meetings (s 41 and 42 of the Insolvency Act), which are convened when required. (In general, the provisions of the Insolvency Act or similar provisions of the Companies Act or Winding-up Reg 7-15 apply to meetings held during the winding-up of companies.)

The master of the high court must convene the first meeting on receipt of a copy of the final sequestration order and the main purpose of the first meeting is to prove claims and to elect a trustee (s 40 of the Insolvency Act). After the first meeting of creditors and the appointment of a trustee, the master must appoint a second meeting of creditors. The purpose of the second meeting is *inter alia* for creditors to prove claims against the estate and for the purpose of receiving the report of the trustee on the affairs and condition of the estate and giving the trustee directions in connection with the administration of the estate (s 40(3)(a) of the Insolvency Act).

After the second meeting the trustee may be called upon to convene a special meeting of creditors for the proof of claims against the estate. He is obliged to convene such meeting whenever required to do so by any interested party who at the same time tenders payment of all expenses incidental thereto (s 42(1) of the Insolvency Act; see Sharrock 101). The special meeting is usually convened to accommodate creditors who have not yet proved their claims at the conclusion of the second meeting.

It should be noted that it is not the duty of the trustee to lodge proof of claim documents and a trustee who as a creditor's agent lodges the latter's proof of claim

documents incurs no liability to such creditor where a contribution becomes payable unless the contract of agency contains, expressly or impliedly, a term imposing such liability on the trustee (*Bloom's Woollens (Pty) Ltd v Taylor* 1962 2 SA 532 (A); see also Kunst *et al Meskin, Insolvency Law and its Operation in Winding-up* (1990) par 9.2.3).

2.2 Proof of claims

Proof of claims is the first matter dealt with at any meeting if claims have been submitted for proof and there is a clear implication that claims can be proved at any meeting of creditors (s 44 of the Insolvency Act and s 366 of the Companies Act deal with the proof of claims). There are basically two elements to the proof of a claim: the submission of an affidavit in the prescribed form and the satisfaction of the presiding officer that the claim is indeed a valid claim (Nagel 390). The affidavit, claim form and documents submitted in support of the claim must be delivered at the office of the presiding officer not later than 24 hours before the advertised time of the meeting, failing which the claim shall not be admitted to proof at that meeting, unless the presiding officer is of the opinion that through no fault of the creditor he has been unable to deliver the documentation within the prescribed period. The late lodgment of documents cannot be overcome by lodging the claims more than 24 hours before an adjourned meeting (*Slabbert, Verster & Malherbe v Die Assistent-Meester* 1977 1 SA 107 (NC); see Klein "Die eisvorm – insolvente boedels" 1990 *De Rebus* 60 with regard to the proving of claims).

The presiding officer, the trustee or his agent, or a creditor who has proved his claim or his agent may interrogate under oath any person present at the meeting who wishes to prove a claim or has proved it (s 44(7) of the Insolvency Act). If the person is not present he may be summoned to appear. If he fails without reasonable excuse to appear, be interrogated under oath or answer fully and satisfactorily any lawful question put to him, his claim, if already proved, may be expunged by the master, and if not yet proved, may be rejected at the meeting (s 44(9) of the Insolvency Act).

2.3 General grounds for disallowing a claim

2.3.1 By the presiding officer

A claim must be proved "to the satisfaction of the officer presiding at [the] meeting, who shall admit or reject the claim" (s 44(3) of the Insolvency Act). Even though the creditor has complied with the necessary formalities before admitting a claim, the presiding officer at the meeting of creditors at which the claim is tendered must examine the claim and decide on the validity of the claim (Nagel 409). One of the most important functions of a presiding officer at a meeting of creditors is to examine and afterwards accept or reject a claim. The presiding officer must examine the claim carefully but it is not required to adjudicate upon a claim as if it were a court of law (*Cachalia v De Klerk NO and Benjamin NO* 1952 4 SA 672 (T) 675). He should examine the proof of claim documents for the purpose of deciding whether they disclose *prima facie* the existence of an enforceable claim (*Marendaz v Smuts* 1966 4 SA 66 (T) 71-72; *Ben Rossouw Motors v Druker NO* 1975 1 SA 821 (W); *Ilsley v De Klerk NO* 1934 TPD 55; *Steelnet (Zimbabwe) Ltd v Master of the High Court, Johannesburg* (2007/463) 2008 ZAGPHC 185).

In the *Steelnet* case a number of decisions were also cited where the role and duty of the presiding officer were conferred. The court stressed the duty of the presiding officer and quoted with approval *Aspeling v Hoffman's Trustee*:

“With regard to the proof of debt it is clear, under sec 42, that the magistrate has really to perform a judicial duty when he sits at a meeting of creditors and claims are produced before him. He must see that *prima facie* proper proof is produced, and if proper proof is not produced he ought to reject the claim. It is very desirable that magistrates should be precise in the carrying out of this function. ... I think the intention of the law is that matters of this kind should be perfectly clear. ... In a case like the present he ought in each instance to thoroughly scrutinise the claim and see whether *prima facie* the debt is one which ought to be admitted. The wording of the law is that the claim must be ‘*proved to the satisfaction of the presiding officer, who shall admit or reject the same*’” (1917 TPD 305 306-307 – emphasis added).

Watermeyer J in *Chappell v The Master* said:

“Before dealing with the facts of the case I would like to say that my view is that when claims are submitted for proof to the Master and there are reasonable grounds for suspicion that the claims are not genuine claims, the Master ought to disallow them and leave the parties who are putting forward these claims to apply to Court to establish their claims by way of action” (1928 CPD 289 291).

In *Marendaz v Smuts* the following was also confirmed:

“The decided cases referred to show, in my view, that each case must be decided on its own merits and that no hard and fast rule can be laid down as to when a presiding officer ought to be satisfied with the proof of a claim as provided in s 44(3) of the Act, or as to when he should resort to the calling of evidence as provided for in s 44(7)” (1966 4 SA 66 (T) 72D-E).

In deciding whether to admit a claim the presiding officer performs a quasi-judicial function and must exercise his judgment independently (*Aircondi Refrigeration (Pty) Ltd v Ruskin NO* 1981 1 SA 799 (W) 804; the *Cachalia* case 675 and authority there cited; the *Steelnet* case 185). It is therefore clear that the presiding officer will examine the claim carefully, but not too critically, and if the claim is on the face of it valid he should not reject it without first hearing the creditor’s evidence. If he is unsatisfied with the claim or if the claim is on the face of it flawed, *eg* if the documents clearly show that the debt has prescribed, he should reject the claim without calling for further evidence (see the *Ilsey* case 57; *Garlicks Wholesale v Magistrate of Sutherland* 1926 CPD 267 269-270; the *Ben Rossouw* case 823).

There is thus no hard and fast rule laid down on when the presiding officer ought to be satisfied with the proof of the claim or when he should resort to the calling of evidence. It is also apparent that the presiding officer’s duty is to examine the case at face value and if he is not satisfied with the claim at face value no duty rests on him to further investigate the matter. It had not been clarified whether the presiding officer when examining such a claim would be required to take note of the provisions of the National Credit Act and, if so, to what extent.

2.3.2 Following an examination by the trustee

The trustee must after receipt of the documents pertaining to the proven claims examine all available books and documents relating to the insolvent estate for the purpose of ascertaining whether the estate in fact owes the claimant the amount claimed (s 45(1) and (2) of the Insolvency Act). The mere admission of proof of such claim does not make it *res judicata*, and it is the trustee’s duty thereupon to satisfy himself that the admitted claims are correct. The trustee is obliged to ascertain for himself whether the estate in fact owes the claimant who has proved a claim the

amount claimed and, to this end, to examine all the available books and documents relating to the estate (s 45(2) of the Insolvency Act; see Nagel 410). For this purpose he is entitled “to a clear and unambiguous statement of the *causa debiti*” (see *Estate Wilson v Estate Giddy, Giddy and White* 1937 AD 239 245 *per De Wet JA*; Kunst par 9.7.1). In doing so he may seek further information, it is submitted, from the claimant or anyone else; and he may also resort to an interrogation (under s 44(7) or 65 of the Insolvency Act). If the trustee disputes the claim he must have a reasonable belief based on the facts ascertained by him that the insolvent estate is not in fact indebted to the creditor concerned, and a mere suspicion would not suffice (*Caldeira v The Master* 1996 1 SA 868 (N); Nagel 411).

If the trustee disputes a claim after it has been proved against the estate at a meeting of creditors he shall report the fact in writing to the master and shall state in his report his reasons for disputing the claim. Thereupon the master may confirm the claim, or he may, after having afforded the claimant an opportunity to substantiate his claim, reduce or disallow same (s 45(3) of the Insolvency Act).

In *PG Bison Ltd v Johannesburg Glassworks (Pty) Ltd (In Liquidation)* (2006 4 SA 535 (W), confirmed on appeal to the full bench 2008 JOL 21181 (W)), the master had expunged the proved claim of a creditor in terms of section 45(3) of the Insolvency Act on the suspicion that the agreements on which the claim was based constituted voidable dispositions in terms of section 26 of the act, and the applicant alleged that the master had acted *ultra vires* his powers on the basis that it is only the court that has the power to set aside a disposition in terms of section 26. The court rejected this submission, on the basis that in disallowing the claim the master was carrying out his administrative duty in terms of section 45(3) and by doing so the master had not purported to invalidate or set aside the dispositions. The applicant was still entitled to institute legal action in order to prove its claim, and the master’s conduct was not *ultra vires* (see 541J-542B and the discussion of the judgment in Kunst par 7.9.2).

A further question should then be whether the trustee should while examining all available books and documents relating to the insolvent estate for the purpose of ascertaining whether the estate in fact owes the claimant the amount claimed, take other legislative provisions such as the National Credit Act into consideration and could dispute a claim on the basis that the *causa* of the claims amounts to reckless or unlawful or otherwise void credit agreements.

2.4 The procedure to be followed by a creditor whose claim has been disallowed

The rejection of a claim at a meeting does not bar the creditor from proving his claim at a subsequent meeting or from establishing his claim by legal action before the time for such actions has expired in terms of section 75 of the Insolvency Act (s 44(3) of the Insolvency Act). An individual who wishes to challenge any decision or action of the presiding officer is confronted with several different avenues of relief. The first avenue available to a creditor would be to take the decision of the presiding officer on review in terms of section 151 of the Insolvency Act.

Another form of redress available would be judicial review of administrative actions as provided for in section 6 of the Promotion of Administrative Justice Act 3 of 2000 (see s 1 for the definition of “administrative action”). In the case of *Steelnet (Zimbabwe) Ltd v Master of the High Court, Johannesburg* the court confirmed that it is not in dispute that the presiding officer’s adjudication of a claim constituted an “administrative action” as envisaged by Act 3 of 2000 that was therefore review-

able in terms of section 6 of that act and section 33 of the constitution (see Kunst par 1.8).

3 *Unlawful and reckless credit agreements in terms of the National Credit Act*

3.1 Introduction

The National Credit Act regulates various aspects of credit granting and related matters and its purpose as set out in section 3 is “to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, effective and accessible credit market and industry, and to protect consumers”. Although the act applies to credit agreements as determined in section 4, certain protective provisions will only apply to consumers who are natural persons. (S 6 excludes the application of some sections where the consumer is a juristic person: see in particular s 78(1), which excludes part D, which deals with over-indebtedness and reckless credit likewise. See Scholtz *et al Guide to the National Credit Act* (2009) par 4.1-4.5.) Certain debt relations on which claims against an insolvent estate are based will thus not be regulated by the act. It is essential that the presiding officer at a meeting of creditors when considering claims submitted must have a clear understanding of the field of application of the act when considering the acceptance or rejection of such claims. Although the act also provides for different categories of possible “objections” to credit agreements, it should be recognised that it does not contain any reference to the duties of the presiding officer when considering a submitted claim in an insolvent estate.

In section 89(2) of the act it is clearly stated that credit agreements entered into under certain prescribed conditions are unlawful and it seems clear that the intention was that these categories will be void (s 89(1) stipulates that the section does not apply to pawn transactions). With regard to reckless credit agreements section 81(2) determines that a credit provider must not enter into a reckless credit agreement with a prospective consumer, but nowhere does the act state that such agreements are void or even voidable as such. Section 90 voids certain provisions in a credit agreement without voiding the whole agreement as such. The act also contains various provisions regulating interest rates, other finance charges and related matters. (See s 100-106 of the National Credit Act and Scholtz par 10.1-10.10.)

3.2 Unlawful credit agreements

3.2.1 General

Section 89 of the National Credit Act deals with unlawful credit agreements. (See Scholtz par 9.3.2 and 9.3.4.1; Otto “Die *par delictum*-reël en die *National Credit Act*” 2009 *TSAR* 417.) In terms of section 89(2) but subject to subsections (3) and (4), a credit agreement, except a pawn transaction, is unlawful if –

- (a) at the time the agreement was made the consumer was an unemancipated minor unassisted by a guardian, or was subject to –
 - (i) an order of a competent court holding that person to be mentally unfit; or
 - (ii) an administration order referred to in section 74(1) of the Magistrates’ Courts Act, and the administrator concerned did not consent to the agreement, and the credit provider knew, or could reasonably have determined, that the consumer was the subject of such an order;
- (b) the agreement results from an offer prohibited in terms of section 74(1);

- (c) it is a supplementary agreement or document prohibited by section 91(a);
- (d) at the time the agreement was made, the credit provider was unregistered and this act requires that credit provider to be registered; or
- (e) the credit provider was subject to a notice by the national credit regulator or a provincial credit regulator requiring the credit provider –
 - (i) to stop offering, making available or extending credit under any credit agreement, or agreeing to do any of those things; or
 - (ii) to stop offering, making available or extending credit under the particular form of credit agreement used by the credit provider, whether or not this act requires that credit provider to be registered, and no further appeal or review is available in respect of that notice.

If a credit agreement is unlawful, section 89(5) states in no uncertain terms that despite any provision of common law, any other legislation or any provision of an agreement to the contrary, a court must order that such an agreement is void *ab initio*. The court thus has no discretion but to order the credit provider to return to the consumer any money paid by him together with interest prescribed by this section. The court must also order that all the purported rights of the credit provider under that agreement to recover any money paid or goods delivered to, or on behalf of, the consumer in terms of such an agreement are cancelled, unless where the court concludes that doing so in the circumstances would unjustly enrich the consumer. Where it will lead to such enrichment the rights of the credit provider to recover such moneys or goods will be forfeited to the state in order to prevent the consumer as such from being unjustly enriched. (For a discussion of and criticism against this provision see Otto 2009 *TSAR* 417.)

3.2.2 Consideration by the presiding officer

It is clear from the wording of section 89(5)(a) that a court must declare the contract void, but this does not mean that relevant parties such as the parties to the contract or the presiding officer who does not sit as a court of law when adjudicating claims against insolvent estates at a meeting of creditors may not consider the possible unlawfulness of a claim based on a credit agreement and reject the claim on this basis. If the presiding officer initially failed to rule as such he may still expunge the claim based on the recommendation of the trustee as discussed in paragraph 2.3.2 above. Such an approach will find further support in the *PG Bison* case, where the court upheld the ruling of the master in expunging the proved claim of a creditor in terms of section 45(3) of the Insolvency Act on the suspicion that the agreements on which the claim was based constituted voidable dispositions in terms of section 26 of the Insolvency Act.

Although the National Credit Act does not place a positive duty on the presiding officer to deal with issues stemming from this act, he must apply his mind to the matter when deciding to admit or reject the claim as prescribed by section 44 (3) of the Insolvency Act. Nagel opines that even though the creditor has complied with the necessary technical formalities prior to admitting a claim, the presiding officer still has a duty to examine the claim and decide on the validity of the claim (409). This is the correct approach in general, and clearly where legislation such as the National Credit Act states that a particular agreement on which a claim is based is void, the presiding officer must take it into consideration when exercising his or her discretion. Where the presiding officer accepts such a claim initially, further examination by the trustee may still reveal such deficiencies and on recommendation of the trustee the presiding officer may later expunge a proven claim on the same basis.

Where a claim is disallowed or expunged on these premises, the creditor will have no choice but to make use of the court procedures as discussed in paragraph 2.4 in an attempt to prove to a court of law that the claim based on the credit agreement is in fact good in law. In general whenever litigation emanates from the rejection of a claim, the administration of the estate will be prolonged. Section 90 lists certain provisions in a credit agreement that is also void *ab initio* in terms of section 90(3). The presiding officer will have the same powers as discussed in paragraph 2.3.3 (Scholtz par 9.3.3 and 9.3.4.1).

3.3 Reckless credit

The National Credit Act provides for three types of reckless credit agreements in section 80(1), and prescribes the remedy in each instance. The first and second types of reckless credit in terms of sections 80(1)(a) and 80(1)(b)(i) of the act entail credit agreements where the credit provider in the first instance failed to conduct an assessment as required by section 81(2). In the second instance, despite having conducted an assessment as required by section 81(2), at the time when the credit agreement was entered into, or at the time when the amount approved in terms of the agreement was increased, the credit provider entered into a credit agreement with the consumer, despite the fact that the preponderance of information available to the credit provider indicated that the consumer had not generally understood or appreciated his or her risks, costs or obligations under the proposed credit agreement. The third type of reckless credit in terms of section 80(1)(b)(ii) deals with those instances where the preponderance of information available to the credit provider indicated that entering into that credit agreement would make the consumer over-indebted. (See in general Otto *The National Credit Act Explained* (2006) 66; Vessio “Beware the provider of reckless credit” 2009 *TSAR* 272; Stoop “South African consumer credit policy: Measures indirectly aimed at preventing consumer over-indebtedness” 2009 *SA Merc LJ* 365; Scholtz par 11.4.)

The statutory powers of the court in respect of the first two types of reckless credit referred to are that it may make an order setting aside all or part of the consumer’s rights and obligations under that agreement, as it deems just and reasonable in the circumstances (s 83(2)(a) of the act). Alternatively, it may suspend the force and effect of that specific credit agreement, in which instance the provisions of section 83(3)(b)(i) will apply (s 83(2)(b) of the act).

Although the treatment of reckless credit agreements is prohibited in principle, it is clear that such agreements are not void as such. In the case of the first two types of reckless credit the National Credit Act allows the court to set all or part of the rights and obligations of the consumer in terms of that agreement aside. Where the court sets all the rights and obligations of the consumer aside, the nett effect will be that such a credit agreement has been set aside, *ie* voided. In such circumstances the agreement is thus voidable. Although the act is silent on the consequences of such setting aside, common law principles relating to restoration and the principles of unjust enrichment may possibly apply in terms whereof restoration must then be effected or the amount to be returned be calculated. In the absence of a statutory provision or direct authority on the point, it is submitted that where the rights and obligations of a contract are set aside the patrimonial transfers rendered in terms thereof should in principle be returned since the basis of such transfers will then fall away. The specific basis for restoration must still be determined, but this falls outside the scope of this note. (For a comprehensive discussion on unjust enrichment see Sonnekus *Unjustified Enrichment in South African Law* (2008); Visser *Unjusti-*

fied Enrichment (2008); and *cf Laco Parts (Pty) Ltd t/a ACA Clutch v Turners Shipping (Pty) Ltd* 2008 1 SA 279 (W).) It must be emphasised that the National Credit Act does not declare reckless credit agreements to be unlawful or even void. (Cf par 3.2.1 above and the forfeiture clause in s 89(5) that follows an unlawful credit agreement but not a reckless credit agreement as such.) It is not clear what a court must consider when deciding to set aside all or part of the consumer's rights and obligations. Nevertheless the ruling of a court to set aside the rights and obligations in the case of a mortgage bond, for instance, may cause the credit provider to lose his right of security, which will convert such a credit provider into an unsecured creditor for any amount that may still be claimable after such setting aside.

Regarding the third type of reckless credit, which amounted to the over-indebtedness of the consumer, the court may suspend the force and effect of such an agreement for a determined time period and other credit agreement debt of the consumer may be restructured by the court (s 83(3) and (4) and s 84 of the act). At the expiration of the period of suspension, the reckless credit agreement will be of full force and effect again unless the court directs otherwise.

It is unclear to what extent the presiding officer must take cognisance of the notion of reckless credit in the sense that a claim submitted for proof may amount to such a type of credit agreement. As a general rule the approach proposed in paragraph 3.2.2 should also be adopted by the presiding officer, but it remains a question what the effect will be with regard to the various types of reckless credit and statutory remedies discussed above. Where the presiding officer rejects a claim based on the fact that it amounts to reckless credit, he or she must be fully aware of the fact that the act does not state that such agreements are null and void as such and that only in the first two types of reckless credit may a court set some or all of the rights and obligations of the consumer aside. Where a court subsequently to the rejection of the claim by a presiding officer rules that one of the first two types of reckless credit is present, the court can subsequently suspend the operation of the agreement or, as indicated, set all or some of the rights and obligations aside. It is submitted that mere suspension will have no real effect since sequestration will usually have the effect that the outstanding amount will become payable as a claim against the estate and it will serve no purpose in suspending the operation of such an agreement. Where the court sets all or some of the rights of the consumer aside, it may have an effect on the amount still payable by the consumer, but the credit provider will still have a claim against the consumer and therefore against the estate. The practical difficulty is that the presiding officer will basically have no choice in such an instance but to reject the claim in order to get clarity from the court on both the setting aside as well as the then subsequent amount of the claim. In this sense, and unless the parties settle the matter, it can cause a considerable and undesirable delay in the finalisation of the administration of the estate.

In the third instance the court may suspend the operation of the reckless agreement and restructure other credit agreements of the debtor. Following sequestration such an approach will serve little purpose, since sequestration as such does not represent an alternative instalments repayment plan. The essence of the law of insolvency, on the contrary, is that the insolvent's assets will be utilised to pay the proven debts and costs of sequestration in accordance with the distribution rules contained in the Insolvency Act.

Although the presiding officer may follow the approach as suggested in paragraph 3.2.2 by rejecting a claim based on a reckless credit agreement, there will in many instances be little purpose in doing so. Some may however argue that such an approach may actually provide an escape for the consumer from his over-in-

debtedness. Such a point of view is shortsighted, since the court when hearing the application for sequestration should have considered all options to deal with the debt situation and could have rejected the application based on better alternatives provided outside the sequestration provisions (see *Ex parte Ford* 2009 3 SA 376 (WCC); *Investec Bank Ltd v Mutemeri* 2010 1 SA 265 (GSJ); and Van Heerden and Boraine “The interaction between debt relief measures in the National Credit Act 34 of 2005 and aspects of insolvency law” 2009 *PELJ* 22). This aspect may pose serious difficulties in practice should such a situation arise.

4 Conclusion

A presiding officer adjudicating the acceptance or rejection of claims submitted by creditors at meetings of creditors of an insolvent estate must in principle take cognisance of the provisions of the National Credit Act that may have an effect on the validity of credit agreements, since this may affect the ultimate validity of the claim under consideration, or at least the amount of the claim.

When considering the provisions of the National Credit Act it seems that in certain instances the act is clear in that it states what types of credit agreements are void due to unlawfulness. Clearly a presiding officer should not accept a claim based on any one of these instances. The creditor will subsequently have to approach the court in order to attack the ruling of the presiding officer (see par 3.2.2 above). In the case of reckless credit, the difficulty exists that there are three types of reckless credit defined and, depending on the type of reckless credit involved, the court may either set aside all or some of the rights and obligations of the consumer or it may suspend the operation thereof. In the case of the third type of reckless credit it may suspend the operation of such an agreement for a determined time period after which it becomes fully enforceable again as a general rule, and the court may restructure other credit agreements of an over-indebted consumer. Although the rejection of a claim against an insolvent estate may yield some positive results for the consumer, it will in many instances be contra-productive, since the credit provider will nevertheless have a claim against the estate and the rejection of the claim under such circumstances may cause delays in the administration of the estate that may be to the detriment of all involved. In practice the best solution in many of these instances might be for the creditor and trustee to settle the matter out of court (see par 3.3 above). The presiding officer at a meeting of creditors, and failing him the trustee, will have to consider the effects of the provisions of the National Credit Act on the validity of the claim, or the exact amount to be claimed. In many instances clarity on the validity or voidness of a credit agreement will only be obtained after a court proceeding, since in many instances only courts of law have the powers to determine such matters. It is clear that litigation on many of these issues might be time-consuming, which will work against a swift finalisation of the administration of an estate and may also cause additional costs to the estate. Since several (if not the majority of) claims lodged for proof against a particular insolvent estate will amount to credit agreements regulated by the National Credit Act, this will undoubtedly become an important aspect of the administration of insolvent estates to deal with in future.

South African law- and policymakers are at present on the threshold of introducing significant new legislation in both corporate and insolvency law disciplines. Almost two decades ago, policymakers in South Africa engaged in an extensive study of South African insolvency law. (See South African Law Commission *Review of the Law of Insolvency* Project 63 (2000) Report, vol I Explanatory Memorandum,

and vol II Draft Bill.) This report included recommendations for what were described as mainly technical reforms to insolvency law in South Africa.

One of the key objectives of any insolvency law reform proposal should be to integrate and harmonise the insolvency law within the broader legal and commercial framework. It is clear from the above discussion that the basic principles contained in both the South African insolvency law and the National Credit Act are not coherent and the outcome of the impact of the National Credit Act on the law of insolvency may hamper the effectiveness of the insolvency law system. It would therefore be necessary for the South African Law Reform Commission not only to focus on the review of the current Insolvency Act but also take cognisance of the impact of associated legislation such as the National Credit Act on the insolvency law system. The key objective should be to assure that these two components of the law, namely the law of credit and insolvency, reinforce one another, and that the policies behind both are coherent. They should at the same time, however, be in step with the wider social goals of the South African legal system as a whole.

A BORAINÉ

University of Pretoria

J CALITZ

University of Johannesburg