CHAPTER 6

TREATMENT OF THE HOME IN SOUTH AFRICAN INSOLVENCY LAW

How does it feel
To be without a home
Like a complete unknown
Like a rolling stone?

- From *Like a Rolling Stone* by Bob Dylan (1965)

6.1 Introduction

Developments in relation to the forced sale of a debtor's home have thus far occurred only in the context of the individual debt enforcement process. As discussed in Chapter 5, the position is that, in every case in which a creditor seeks in the individual debt enforcement process to execute against a person's home, a court is required to carry out an evaluation taking into account "all the relevant circumstances" to determine whether execution should be permitted.[1] Essentially, the purpose of such evaluation is to prevent execution against a person's home occurring where it would constitute an unjustifiable infringement of the right to have access to adequate housing or an abuse of the process.[2] It is anticipated that it will not be long before the courts are called upon to address the question whether the realisation of an insolvent debtor's home, in the insolvency, that is, the sequestration or collective debt enforcement[3] or debt

[1]The position reflects the combined effect of *Jaftha v Schoeman*, the amended rule 46(1) of the High Court Rules, *Gundwana v Steko*, *FirstRand Bank v Folscher* and *Mkhize v Umvoti Municipality* (SCA).
[2]See *Jaftha v Schoeman*, discussed at 5.2, above, and *Gundwana v Steko*, discussed at 5.6.2, above. In *Nedbank v Fraser* par 27, Peter AJ seemed to suggest that, in relation to mortgaged property, the main purpose of the evaluation is to determine whether there has been an abuse of court procedure.
[3]As stated at 1.5, above, this may be regarded as a misnomer, in light of *Investec v Mutemeri* and *Naidoo v ABSA*, in which it was held that sequestration of a debtor's estate does not amount to "debt enforcement" for the purposes of s 88(3) of the NCA. See Boraine, Kruger and Evans "Policy Considerations" 637 639; Van Heerden and Boraine 2009 *PELJ* 40-41.

settlement,[4] process has constitutional implications which require similar considerations to be applied.[5]

This chapter deals with the current position in insolvency law in terms of which the home of the insolvent, often the most valuable asset in his estate, must be realised together with all the other assets in the insolvent estate in the liquidation process which is provided for the benefit of the creditors. It also considers the potential impact of recent developments in the individual debt enforcement process for the insolvency law and process. More specifically, it reflects on the need, bearing in mind constitutional imperatives, for clear policies to be formulated in relation to treatment of an insolvent debtor's home and for judicial oversight to be specifically focused upon issues surrounding the realisation of the home of the insolvent. This chapter deals with recent cases which illustrate the lack of a clearly defined interface between the Insolvency Act and the National Credit Act which has the effect that, in South Africa, consumer debt relief measures are not aligned with insolvency procedures. It also considers the desirability of the introduction of some form of statutory provision geared towards averting, or postponing, the realisation of the home of the insolvent, where appropriate, and perhaps even exempting it, or a portion of the proceeds of its sale, from the insolvent estate.

6.2 Overview of the applicable insolvency law and process

South Africa's insolvency regime has a pro-creditor orientation. Insolvency law is regulated mainly by the Insolvency Act. Where the Insolvency Act is silent, the common law applies.[6] To ensure "the orderly and equitable distribution of a debtor's assets where they are insufficient to meet the claims of all his creditors",[7] the Insolvency Act provides for an order to be granted by the high court[8] for the sequestration of a debtor's

[4]Van Heerden and Boraine 2009 *PELJ* 23.
[5]See Van Heerden, Boraine and Steyn "Perspectives" 260; Boraine "The Law of Insolvency and the Bill of Rights" par 4A8 (g); Evans "Does an insolvent debtor have a right to adequate housing?"; Els *De Rebus* 2011 (October) 21 23; Evans *Critical Analysis* 412-427; Stander and Horsten 2008 *TSAR* 215-216.
[6]The South African common law of insolvency is based largely on Roman-Dutch law; see 2.3, above.
[7]Sharrock *et al Hockly's Insolvency Law* 4.
[8]See definition of "court" in s 2 of the Insolvency Act.

estate. A sequestration order may be obtained either through voluntary surrender by a debtor of his estate or through application by a creditor for the compulsory sequestration of the estate of the debtor. If the procedural and substantive requirements have been met, the high court may grant the sequestration order although it always has the discretion to refuse it.

One of the requirements for the granting of a sequestration order is that it should be to the "advantage of creditors".[9] Indeed, that there should be a benefit for the creditors is a clear policy behind, and the main objective of, the Insolvency Act. Smith referred to it as "the recurrent motif of the Insolvency Act"[10] and Evans calls it the "golden rule" or the "golden thread in South African insolvency law that is woven through insolvency proceedings."[11] It has been held that an advantage to creditors will be shown where there is a "reasonable prospect – not necessarily a likelihood, but a prospect that is not too remote – that some pecuniary benefit will result to creditors".[12] It has also been held that sequestration should yield "a not negligible dividend" for creditors.[13] A court may also take into account the potential advantages which sequestration may bring for creditors. These might include, for instance, the prospect of investigation by the trustee in terms of the provisions of the Insolvency Act and the setting aside of transactions under sections 26, 29 and 30 of the Insolvency Act yielding assets for realisation for the benefit of creditors.[14] If advantage to creditors is not shown, a sequestration order cannot be granted. This means that a debtor who is "too poor" for the sequestration of his estate to yield sufficient advantage for his creditors will be denied access to the

[9]See ss 6, 10 and 12 of the Insolvency Act.
[10]Smith 1985 *MB* 27.
[11]Evans 2010 *SA Merc LJ* 483; Evans *Critical Analysis* 469.
[12]*Meskin & Co v Friedman* 1948 (2) SA 555 (W) 558.
[13]*Trust Wholesalers and Woollens (Pty) Ltd v Mackan* 1945 (2) SA 109 (N) 111. By creditors is meant the "general body of creditors" (see *Peycke v Nathoo* 1929 NLR 178) or "the body of creditors as a whole" (see *Stainer v Estate Bukes* 1933 OPD 86 89). It is submitted that, in this context, "creditors" means "concurrent creditors"; see Bertelsmann *et al Mars* 75; *Ex parte Brown* 1917 JDR 211.
[14]*Stainer v Estate Bukes* 1933 OPD 86 90; *Dunlop Tyres (Pty) Ltd v Brewitt* 1999 (2) SA 580 (W) 583; *Lynn & Main Inc v Naidoo* 2006 (1) SA 59 (N) 68-69; *Commissioner South African Revenue Services v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Services v Hawker Aviation Partnership* 2006 (4) SA 292 (SCA) 306. See, also, Van Heerden and Boraine 2009 *PELJ* 44-46.

insolvency system.[15] The implications of this, and associated problems, are discussed below.[16]

The effect of a sequestration order is, *inter alia*, to stay any proceedings brought by creditors against the debtor, to bring about a *concursus creditorum*[17] and to vest the insolvent debtor's assets, with the exception of assets which are specifically excluded or exempted, in the Master of the High Court and, upon his appointment, the trustee of the insolvent estate.[18] The trustee's duty is, *inter alia*, to collect and liquidate estate property.[19] During the sequestration process, decisions are taken by the trustee, who is obliged to act for the benefit of creditors, in consultation with them or by their votes, in accordance with the provisions of the Insolvency Act. It is by a system of meetings that creditors, *inter alia*, prove their claims against the insolvent estate, elect a trustee, and give directions to the trustee in relation to the administration of the estate.[20] Meetings are required to be presided over by the Master or an officer in the public service designated by him or, in districts where there is no Master's Office, a magistrate or an officer in the public service designated by him.[21]

It is also the duty of the trustee to distribute the proceeds of the sale of the estate assets to the creditors in a predetermined order of preference as laid down by the Insolvency Act.[22] A secured creditor who holds "security" in relation to his claim against an insolvent estate which in terms of its definition includes "property of that estate over which the creditor has a preferent right by virtue of any special mortgage",[23] must be paid out of the proceeds of the sale of such property.[24] After all of the secured creditors have been paid out of the proceeds of the secured assets, preferent creditors are paid

[15]Evans 2011 *PELJ* 39 52; Evans 2010 *SA Merc LJ* 483; Evans 2001 *SA Merc LJ* 485 508, referred to by Van Heerden and Boraine 2009 *PELJ* 161.
[16]See 6.4, below.
[17]A "coming together of creditors"; see Sharrock *et al Hockly's Insolvency Law* 4.
[18]S 20 and s 23 of the Insolvency Act.
[19]See Sharrock *et al Hockly's Insolvency Law* 160ff.
[20]See ss 39-42 of the Insolvency Act.
[21]See s 39 of the Insolvency Act.
[22]See Sharrock *et al Hockly's Insolvency Law* 167ff.
[23]See s 2 of the Insolvency Act. See Sharrock *et al Hockly's Insolvency Law* 169.
[24]See Sharrock *et al Hockly's Insolvency Law* 171.

out of the "free residue",[25] in their order of ranking according to the Insolvency Act and thereafter, the concurrent creditors, who rank *pari passu*, share proportionately in the balance remaining.[26]

Section 119 of the Insolvency Act makes provision for a statutory composition between a debtor whose estate has been sequestrated finally and his creditors in which the required majority of creditors may bind the others. A statutory composition of this type may be entered into at any time after the first meeting of creditors. It does not discharge the sequestration order, although the insolvent may in certain circumstances apply for early rehabilitation.[27] The insolvent may regain his solvent status by rehabilitation. This will discharge him from liability for pre-sequestration debt. This may occur either by the high court granting an order rehabilitating the insolvent, upon *ex parte* application to it by the insolvent in terms of the Insolvency Act or, in the absence of an application, automatically, after a period of 10 years.[28]

6.3 *Considerations pertaining to the insolvent's home*

6.3.1 Constitutional considerations

Once a sequestration order has been granted by the high court, unless specific issues are litigated by the trustee on behalf of the insolvent estate, decisions are taken either by the trustee, in consultation with the creditors, or by creditors' votes in accordance with the provisions of the Insolvency Act.[29] Thus, no judicial oversight of the process of realisation of the insolvent's home necessarily occurs, except to the extent that in some situations a magistrate presides over a creditors' meeting. Certainly, there is no formal requirement, as there now is in the individual debt enforcement process, that a court should specifically consider any circumstances which may be relevant to the realisation

[25]S 2 of the Insolvency Act defines "free residue" as "that portion of the estate which is not subject to any right of preference by reason of any special mortgage, legal hypothec, pledge or right of retention".
[26]See Sharrock *et al Hockly's Insolvency Law* 173-177.
[27]See Sharrock *et al Hockly's Insolvency Law* 187ff.
[28]See ss124-127A of the Insolvency Act.
[29]See ss 39-42 of the Insolvency Act.

of the insolvent debtor's home.[30] On the contrary, the trustee is obliged to have the home of the insolvent sold as a matter of course. The notion, expressed by the Constitutional Court, that execution against a person's home should occur only as last resort and that alternatives ought to be sought,[31] simply does not come into it, in the course of the administration of an insolvent estate. Indeed, very often, the application for sequestration is brought for the very reason that the debtor owns a home which, when realised, will yield a benefit for creditors. Moreover, it is submitted that it is cause for concern that, in instances where creditors opt for sequestration of the debtor's estate rather than bringing an action to execute against the home of the debtor using the individual debt enforcement procedure, they are able to avoid having to comply with the requirements of the NCA. In effect, this denies the debtor access to the protective elements of the consequences of an application for debt review and debt rearrangement.[32] It also undermines the effect of precedent established by the decisions in *Jaftha v Schoeman*, *Gundwana v Steko* and other cases. It is submitted that any such tendency on the part of creditors to circumvent the requirements and effects of the NCA should be averted by the introduction of appropriate statutory amendments.

As Evans has pointed out, the Insolvency Act and most of its amendments were enacted well before the introduction of our modern constitution with its bill of rights. The reality, therefore, is that "[t]he values and principles upon which the Constitution is built differ radically from many of the values, principles and policies that are the foundation of the Insolvency Act."[33] All law is subject to, and therefore must comply with, the provisions of the Constitution.[34] Therefore, in light of the developments in the individual debt enforcement process regarding the protection of a debtor's home against execution, it may be anticipated that it will be only a matter of time before the lack of

[30]For similar comments, see Evans "Does an insolvent debtor have a right to adequate housing?"; Evans "A brief comparative analysis"; Stander and Horsten 2008 *TSAR* 203 214.
[31]*Jaftha v Schoeman* par 59; *Gundwana v Steko* pars 53 and 54.
[32]This is evident, it is submitted, by the facts of *Investec v Mutemeri*, *Naidoo v ABSA* and *FirstRand Bank v Evans*. See also, Van Heerden and Boraine 2009 *PELJ* 22; Boraine and Van Heerden 2010 *PELJ* 84; and discussion at 4.5.4, above, and 6.10, below.
[33]Evans "A brief comparative analysis".
[34]See 3.2.1, above.

judicial oversight and evaluation of the position in relation to the insolvent debtor's home will be subjected to constitutional challenge.

Rights potentially infringed by the vesting in, and realisation by, the trustee of the home of an insolvent and/or his or her spouse or partner and family and/or dependants are, *inter alia*, the right to dignity,[35] the right to property,[36] the right to have access to adequate housing[37] and children's rights.[38] In the judgments in cases involving the individual debt enforcement process, courts have focused on the right to have access to adequate housing. It is submitted that this right, as well as children's rights, require closer consideration in the insolvency process. Essentially, the question is whether, given the debt collection and other purposes served by the sequestration process and other insolvency law mechanisms, any infringement of the rights of the insolvent debtor and his dependants, through realisation of the insolvent's home in terms of the provisions of the Insolvency Act, is justifiable in terms of section 36 of the Constitution.[39]

Evans submits that "this housing issue cannot be addressed without a well considered policy in respect of estate assets".[40] Further, such policy must conform to and promote the spirit, purport and objects of the Constitution and the Bill of Rights. As Evans has pointed out, such policy should be based, as exemptions policy generally is, on socio-economic and humanitarian grounds and the recognition of the need to assist the debtor in his financial recovery and to avoid becoming a welfare burden on the state and society.[41] Consideration of certain aspects of the South African insolvency law and process yields insights into the type of policy which is called for and the need for statutory provisions containing additional, or alternative, rules and mechanisms to regulate treatment of the debtor's home in the insolvency process.

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[35]Protected by s 10 of the Constitution, discussed at 3.3.2, above.
[36]Protected by s 25 of the Constitution. Courts have not yet based any of the relevant decisions, in the individual debt enforcement process, on the right to property. See, for example, *Gundwana v Steko* par 51, where the Constitutional Court opted to express no view on the merits of the argument based on s 25.
[37]Protected by s 26 of the Constitution. See 3.3.1, above.
[38]Protected by s 28 of the Constitution. See 3.3.3, above. None of the decisions, in the individual debt enforcement process, has been based on s 28.
[39]Stander and Horsten 2008 *TSAR* 215; Steyn '"Safe as Houses?"'.
[40]Evans "A brief comparative analysis". See, also Evans 2008 *De Jure* 262-263, 270-271.
[41]Evans 2008 *De Jure* 257, with reference to Milman *Personal Insolvency Law*.

6.3.2 Possible eviction and homelessness after sequestration

Issues surrounding the right to have access to adequate housing have not yet arisen directly in any insolvency matter.[42] Considerations pertaining to the insolvent's housing rights, the loss of his home or, for that matter, his or his dependants' accommodation arrangements, and his children's rights, do not form part of the procedural or substantive statutory requirements for either voluntary surrender or compulsory sequestration.[43] It will be unlikely in practice for a debtor to raise his right to have access to adequate housing as an issue in a voluntary surrender orin a friendly sequestration[44] where, in both instances, the debtor would be giving up his home "willingly".[45] Presumably, the debtor will have made alternative accommodation arrangements in anticipation of the effect of the sequestration order which he seeks either directly, in an application for voluntary surrender, or indirectly, in a friendly sequestration. However, it is conceivable that a spouse, married to him or her out of community of property, and his or her dependants might be averse, and wish to intervene in opposition, to the sequestration of the estate with the consequent liquidation of estate assets, including their home. In such circumstances, a pertinent question might be the likelihood of their finding alternative adequate housing.

In light of the fact that the home is often the most valuable asset in the estate, the situation might be that if the home is not sold, sequestration will not be shown to be to the "advantage of creditors".[46] The reality is also that, in South Africa, insolvency cases do not deal with apparently indigent debtors for whom access to "adequate housing" is an issue. Ironically, it is only more "affluent" debtors who can afford to be declared

[42]Although, in *ABSA v Murray*, insolvent persons were ultimately evicted from their former home after it was realised by the trustee. This case is discussed in this section, as well as at 3.3.1.4, above, and 6.6.3, below.
[43]Evans "A brief comparative analysis"; Evans "Does an insolvent debtor have a right to adequate housing?"; Stander and Horsten 2008 *TSAR* 203; Van Heerden, Boraine and Steyn "Perspectives" 261.
[44] In relation to friendly sequestrations, see 6.4.2, below.
[45]Although, conceivably, there is scope for the argument that the debtor is "seeking" sequestration of his estate out of desperation and a lack of any alternative, in the circumstances.
[46]Evans 2001 *SA Merc LJ* 485; Boraine, Kruger and Evans "Policy Considerations" 689-690.

insolvent given that the Insolvency Act requires that sequestration should be to the advantage of creditors and that it entails the cost of a high court application.[47] Be that as it may, it must be acknowledged that an indigent person in a similar position to that of the appellants in *Jaftha v Schoeman*, who cannot afford to become involved in the insolvency process, is nevertheless usually *de facto* insolvent.[48] It is submitted, contrary to the approach of the Constitutional Court in *Jaftha v Schoeman* and the full bench of the Western Cape High Court in *Standard v Bekker*, that a limited exemption from forced sale should be introduced in respect of a "low value" home to protect such debtors from being rendered homeless. As far as state-subsidised homes are concerned, in the interests of the owners and of the state, in view of its investment in such homes and its duty to provide accommodation for indigent persons, it is submitted that introduction of an exemption from forced sale should be considered.[49] This would mean, *inter alia*, that provisions contained in section 10B of the Housing Act, and the proposed amendments to it, will need to be reconsidered.[50]

It is conceivable that there will be instances where the insolvent and his dependants will be rendered homeless by the sequestration of his estate.[51] Personal financial difficulties, both before and, to a greater extent, since the recent global recession led to serious problems of homelessness of erstwhile mortgagees world wide and South Africa has also been affected by it.[52] The right to have access to adequate housing of the

[47]Van Heerden, Boraine and Steyn "Perspectives" 262-263; Evans 2001 *SA Merc LJ* 485.See, for example, *Van Rooyen v Van Rooyen (Automutual Investments (EC) (Pty) Ltd, Intervening Creditor* [2000] 2 All SA 485 (SE).

[48]See Steyn "'Safe as Houses?'". Evans developed this point further in "Does an insolvent debtor have a right to adequate housing?".

[49]This suggestion is discussed further, at 6.6.3 and 6.11, below. See, also, Evans "Does an insolvent debtor have a right to adequate housing?".

[50]For discussion of provisions, in the Housing Act, relating to the sale of state-subsidised homes, see 4.2.2, above.

[51]As were the circumstances, according to the respondent's version, in *ABSA v Murray*.

[52]See 7.2.4 and 7.5.4, below. Evidence exists that frequently over-indebted, *de facto* insolvent, erstwhile mortgagees and middle class debtors are being rendered homeless. See McKenzie Skene 2011 *Int Insolv Rev* 29 35; Glaister and Bruce-Lockhart "Subprime crisis: US foreclosures bring homelessness to the middle class" *The Guardian* England (25 June 2008) http://www.guardian.co.uk/world/2008/jun/25/usa.subprimecrisis [date of use 15 March 2012]; McKim "More being foreclosed into homelessness" *The Boston Globe* United States of America (22 April 2009) http://www.boston.com/business/articles/2009/04/22/more_being_foreclosed_into_homelessness/ [date of use 15 March 2012]; Cauvin "More families became homeless in recession" *Washington Post* United States of America (13 January 2011) http://www.washingtonpost.com/wp-

insolvent and his dependants as well as any affected children's rights may become an issue in compulsory sequestration proceedings where the parties are dealing at arm's length with one another and the debtor and his family members and dependants oppose the application for sequestration. The issue could also arise in an application for voluntary surrender where the applicant debtor's spouse or other dependants intervene to oppose the granting of a sequestration order on the basis of their constitutional rights. This may be particularly problematic where a spouse, partner, children or disabled or elderly persons rely on the insolvent for shelter and for maintenance.[53]

Another aspect which would need to be addressed is whether there is any difference between the situation in which a homeowner mortgaged his home in order to acquire funds to purchase it,[54] or whether he mortgaged it in order to provide security for the debts of, or to acquire working capital for, a business which is a separate legal entity. The question may be raised whether there should be any regulation of the sale of the mortgagor's home where the business fails and is liquidated as insolvent. Extrapolating from this, the question also arises, where a corporate entity owns a house which a director, a member, or an employee of that entity uses as their home, whether the housing position of the latter ought specifically to be addressed in the course of liquidation of such entity's assets, should it become insolvent. It may be remembered that, in the individual debt enforcement process, there is controversy in relation to whether differential treatment of the position is required depending on the purpose for which the home was mortgaged.[55] There are also conflicting decisions as to whether, in the event of the sale in execution of a house owned by a corporate entity, the section 26

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dyn/content/article/2011/01/12/AR2011011206298.html [date of use 15 March 2012]. See also Naidoo "Now for the big squeeze" *Sunday Times Business Times* South Africa (9 July 2006) 1; Duffett "No place like home" *Carte Blanche* South Africa (11 September 2005) featured at http://beta.mnet.co.za/carteblanche/Article.aspx?Id=2889 [date of use 15 March 2012].

[53] See Evans 2008 *De Jure* 263; Stander and Horsten 2008 *TSAR* 203. It may be noted that the "deserted wife's equity" was the basis, initially, for protection of the matrimonial home in England; see 7.5.3.1, below.

[54] See 2.3.4 and 4.3.3, above, for discussion of a *kustingbrief*.

[55] See *Nedbank v Fraser* pars 20-21 and 27, discussed at 5.6.3, above; cf *Standard Bank v Bekker* pars 17-24, discussed at 5.6.6, above.

rights of a director, a member or an employee who uses the property as his home, require judicial evaluation.[56]

As stated above,[57] the position is that, where a sequestration order is granted and the home of the insolvent and his dependants is sold in the process of liquidation of the assets of the insolvent estate, if they have not vacated it, the new owner will have to apply for an eviction order and comply with the requirements of PIE. The position would be the same where a corporate entity is liquidated as insolvent and it is sought to evict occupiers of a home which was owned by it prior to its liquidation. In *ABSA v Murray*,[58] the court found that it would be just and equitable in terms of the provisions contained in PIE to evict the insolvent spouses and their family from their mortgaged home which had been sold in a public auction held, almost a year before, in terms of the Insolvency Act.[59] However, one may wonder what the outcome might have been in slightly different circumstances if the position of the insolvent and his family had been more precarious and the issues less clear-cut even for a "creditor-orientated" court. If, for example, the insolvent had been less articulate, had come across as less capable and less intelligent and the family's circumstances had presented as more desperate or hopeless, without resources to acquire alternative accommodation, one may wonder what would have constituted a just and equitable order.

ABSA v Murray underscores the fact that one cannot simply assume that a mortgagor, who might previously have been in a position to obtain credit and to afford mortgage bond instalments, is necessarily in a wholly separate category from, for example, indigent dwellers in informal settlements or occupiers of derelict inner city buildings. An erstwhile mortgagor and his family who have no access to resources and no alternative accommodation, once their home is realised, could well be as "desperately poor" and as

[56]See *Nedbank v Fraser* par 12, discussed at 5.6.3, above; cf *FirstRand Bank v Folscher* par 32, discussed at 5.6.4.2 (a), above.
[57]See 3.3.1.4 (b), above.
[58] Discussed at 3.3.1.4, above, and 6.6.3, below.
[59]*ABSA v Murray* par 48.

much "in a crisis" as such a person.[60] The lack, or minimal level, of housing subsidy and support which is available in the national housing programmes[61] to persons rendered homeless after falling on hard times might be a relevant factor which would weigh in favour of an insolvent debtor.[62] Apart from humanitarian reasons for permitting an insolvent and his family to retain a roof over their heads, as the Constitutional Court held in *Grootboom*, the state has a duty to provide access to adequate housing. It may well be in the interests of the state and society generally to allow the insolvent to retain possession of his home, even temporarily, or to receive some sort of exemption. This could take the form of an exemption from sale of "low value" or state-subsidised homes or of a portion of the proceeds of its sale to enable him to provide alternative accommodation for his dependants. Otherwise, the result could well be, after possibly protracted legal proceedings, to render the insolvent and his family an additional burden on the state or the local municipality, as seen in the recent decision of the Constitutional Court, in relation to evicted erstwhile lessees, in *Blue Moonlight Properties* (CC).[63]

ABSA v Murray is also a reminder of the fact that, in the eviction process, consideration of personal circumstances of the occupiers is required while, on the other hand, this is not required during the insolvency process in which the insolvent's home is realised by the trustee as a matter of course.[64] Thus, the insolvent mortgagor who, with his family, vacates their home immediately after the sequestration of his estate and who becomes homeless as a result, receives less statutory protection than one who "holds over".[65]

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[60]See, also, the comments of Harms JA in *Ndlovu v Ngcobo* pars 16-17, referred to at 3.3.1.4 (b). "Being desperately poor and … in a crisis" is a reference to *Blue Moonlight Properties* (SCA) par 59, referred to at 3.3.5, above.
[61]See 4.2, above.
[62]Boraine, Kruger and Evans "Policy Considerations" 638.
[63]See *Blue Moonlight Properties* (CC),discussed at 3.3.1.4 (c), above.
[64]Note the situation in *Mollem Boerdery (Pty) Ltd v Modisane* [2010] JOL 25457 (LCC), where the court, in an automatic review, in terms of s 19(3) of the Extension of Security of Tenure Act 62 of 1997, hereafter referred to as "ESTA", set aside orders, granted by a magistrate, for the eviction of residents of farm land whose employer, the lessee of the farm, had allegedly been liquidated. In the circumstances, there was insufficient clarity concerning the alleged liquidation of the employer and whether termination of the employees' right of residence had occurred in accordance with the provisions of ESTA. Notably, the court considered the personal circumstances of the residents and the fact that the court had insufficient information before it about the availability of alternative accommodation.
[65]A similar point was made in par 30.6 of appellant's submissions to the Constitutional Court, in *Gundwana v Steko* http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/x/0/0/5?searchdata1=CCT44/10 [date of use 15 March 2012].

However, the constitutional position of the person is the same. The point may also be made that it is the most vulnerable who cannot afford to engage in litigation in order to protect their rights. Therefore, in line with the Constitutional Court's direction for elements of grace and compassion to be infused into the formal structures of the law,[66] it is submitted that consideration ought to be given to formal recognition, in insolvency legislation, of the significance of the section 26, section 28 and other rights of an insolvent and his dependants. Consideration of various aspects of the applicable insolvency law and process, and how they impact upon the position of the home of the insolvent, follow. Considerations relevant to the home will also be mentioned at various points in the text, below.[67]

6.4 Sequestration procedures and consideration of debt relief measures posing alternatives to liquidation of assets

6.4.1 Voluntary surrender

In a voluntary surrender, the debtor must satisfy the court that: he is in fact insolvent, that is, that his liabilities exceed his assets; that he has complied with the procedural requirements, some of which are to give notice of the proceedings to his creditors; that there is sufficient free residue[68] in his estate to cover the costs of sequestration; and that sequestration "will be to the advantage of creditors".[69] Even if all of these requirements are met, the court still has the discretion to refuse the application[70] which it will probably do in a case where there appears to be some ulterior motive for the application, such as an attempt to defeat the claim of a creditor,[71] or where the applicant has not made full and frank disclosure.[72]

[66]See *Port Elizabeth Municipality* par 37.
[67]See 6.6.3, 6.11 and 6.12, below.
[68]See s 2 of the Insolvency Act, referred to in 6.2, above.
[69]See ss 4 and 6 of the Insolvency Act.
[70]See *Ex parte Ford and Two Similar Cases* 2009 (3) SA 376 (WCC); *Ex parte Hayes* 1970 (4) SA 94 (NC); *Ex parte Vallabh* 1935 TPD 93 95.
[71]*Ex parte Van den Berg* 1950 (1) SA 816 (W); *Fesi & another v ABSA Bank Ltd* 2000 (1) SA 499 (C).
[72]*Ex parte Hayes* 1970 (4) SA 94 (NC); *Fesi & another v ABSA Bank Ltd* 2000 (1) SA 499 (C).

As mentioned above,[73] the requirement that sequestration must be to the "advantage of creditors" means that, where a debtor is "too poor" to show that sequestration of his estate will yield a sufficiently high dividend for creditors, his application for voluntary surrender of his estate must be refused. In the result, he will be denied access to the benefits of the debt relief measures provided by the Insolvency Act, such as the stay of civil proceedings against him, being able to retain certain exempt assets and, ultimately, upon rehabilitation, a discharge from liability for pre-sequestration debt. Academic commentators have consistently criticised this aspect of South African insolvency law, pointing out the lack of effective and appropriate debt relief mechanisms available to debtors as alternatives to sequestration.[74] After *Ex parte Ford and two similar cases*,[75] a case in which the court exercised its discretion to refuse applications by three debtors for the voluntary surrender of their estates, Van Heerden and Boraine put forward strong arguments for more appropriate alternative debt relief procedures to be sought, *inter alia*, to avoid a self-perpetuating debt trap.[76]

6.4.2 Compulsory sequestration

A creditor who has a liquidated claim against a debtor for an amount of R100 or more may bring an application for the compulsory sequestration of the debtor's estate.[77] The applicant is required to show that there is reason to believe that sequestration will be to the "advantage of creditors" and either that the debtor is insolvent or, given that it may be difficult for a creditor to prove that the debtor's liabilities exceed his assets, that his

[73] See 6.2, above.
[74] See Van Heerden and Boraine 2009 *PELJ* 57-58; Boraine and Van Heerden 2010 *PELJ* 84; Boraine "Reform of Administration Orders" 215-216; Boraine and Roestoff 2002 *Int Insolv Rev* 1-11; Boraine and Roestoff 2000 *Obiter* 263; Evans 2002 *Int Insolv Rev* 29-31; Boraine and Roestoff 1993 *De Jure* 229; Roestoff and Jacobs 1997 *De Jure* 189; Loubser 1997 *SA Merc LJ* 325; Evans 2001 *SA Merc LJ* 485.
[75] *Ex parte Ford and two similar cases* 2009 (3) SA 376 (WCC), hereafter referred to as "*Ex parte Ford*", discussed at 6.10.4, below.
[76] Van Heerden and Boraine 2009 *PELJ* 58.
[77] See s 9(1) of the Insolvency Act.

debtor has committed an "act of insolvency".[78] The legislature has created eight acts or omissions which constitute "acts of insolvency" for this purpose.[79]

Of particular relevance to issues considered in this chapter[80] is the act of insolvency created by section 8(g) which provides that a debtor commits an act of insolvency if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts.[81] The notice must convey an inability and not mere unwillingness to pay. The test to be applied, to determine whether this act of insolvency has been committed, is whether a reasonable person in the position of the receiver of the document and with the same knowledge of the relevant circumstances would have interpreted the document in question to mean that the debtor cannot pay his debts.[82] Where a debtor applies for an administration order in terms of section 74 of the Magistrates' Courts Act[83] he is obliged to state that he cannot pay any of his debts. It has been held that, in the process, he commits an act of insolvency in terms of section 8(g).[84] On the other hand, it has also been held that if he states that he is unable to pay a debt but it is clear, from the application, or from the circumstances, that he is not *unable* to pay but is simply *unwilling* to do so, then he does *not* commit this act of insolvency.[85]

Another act of insolvency which, it was suggested in *Nedbank Ltd v Andrews and Another*,[86] is committed by a debtor who applies for debt review in terms of the NCA is that which is provided for in section 8(e) of the Insolvency Act. In terms of s 8(e), a

[78]See ss 10, 12 of the Insolvency Act.
[79]See s 8 of the Insolvency Act. A possible result of this is that a debtor's estate may be sequestrated where he has committed an act of insolvency, but where he is factually solvent, ie, where the value of his assets exceeds the extent of his liabilities. See, in this regard, Sharrock *et al Hockly's Insolvency Law* 31; *DP du Plessis Prokureurs v Van Aarde* 1999 (4) SA 1333 (T) 1335.
[80]See 6.10.3, below.
[81]"Any of his debts" means any one of his debts; see *Optima Fertilizers (Pty) Ltd v Turner* 1968 (4) SA 29 (D) 32-33; *Court v Standard Bank; Court v Bester NO and others* 1995 (3) SA 123 (A) 133.
[82]See *Court v Standard Bank; Court v Bester NO and others* 1995 (3) SA 123 (A) 134; *Barlow's (Eastern Province) Ltd v Bouwer* 1950 (4) SA 385 (E).
[83]Administration orders are discussed at 4.4.3.6, above.
[84]*Volkskas Bank ('n Divisie van Absa Bank Bpk) v Pietersen* 1993 (1) SA 312 (C) 316, hereafter referred to as "*Volkskas v Pietersen*".
[85]This is what occurred in *Barlow's (Eastern Province) Ltd v Bouwer* 1950 (4) SA 385 (E), hereafter referred to as "*Barlow's v Bouwer*".
[86]*Nedbank Ltd v Andrews and Another* (240/2011) [2011] ZAECPEHC 29 (10 May 2011), hereafter referred to as "*Nedbank v Andrews*".

debtor commits an act of insolvency "if he makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts." However, in *Nedbank v Andrews*, although initially the applicant creditor alleged that by applying for debt review, the debtor had committed acts of insolvency in terms of both section 8(e) and 8(g) of the Insolvency Act, when the matter came to court it withdrew these allegations and relied solely upon an allegation of actual insolvency.[87] Thus, the issue was not fully canvassed in the judgment.

Otto and Otto noted that Van Heerden had suggested that an application for debt review in terms of the relevant provisions of the NCA might constitute an act of insolvency in terms of the Insolvency Act. Otto and Otto stated that it remained to be seen what the courts would decide in this respect.[88] Subsequently, in *FirstRand Bank v Evans,*[89] an application for a provisional order of sequestration was granted. It was held that a letter written by the debtor to the bank, the mortgagee of his home, informing it to cancel a debit order as he had applied for debt review under the NCA, amounted to an act of insolvency in terms of section 8(g).[90] This case will be discussed further, below.[91]

A common occurrence is for a creditor who is favourably disposed towards a debtor to bring an application for the compulsory sequestration of the latter's estate at the request, or at least with willingness on the part, of the latter. This situation, where the applicant creditor and the debtor are not "at arm's length" and the applicant is actuated by friendly considerations towards the debtor, is referred to as a "friendly sequestration".[92] Usually, the main motive is to relieve the debtor from harassment by his creditors rather than to exact payment from the debtor for the benefit of his creditors.

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[87] *Nedbank v Andrews* par 3.
[88] Otto and Otto *National Credit Act* 134, with reference to Van Heerden "The Interaction between Debt Review in terms of the National Credit Act 34 of 2005 and Insolvency Law" 153 which is a reference to a paper delivered at the Annual Banking Law Update, hosted by the University of Johannesburg on 23 April 2009.
[89] This case is discussed at 4.5.4, above and 6.10.3, below.
[90] *FirstRand Bank v Evans* pars 12-22. It may be noted that the provisional order of sequestration was granted on 18 March 2011. After argument as to whether the order should be discharged or made final, judgment was reserved on 26 August 2011. According to the respondent's legal representatives, on 12 December 2011, the outcome has not yet been made known to the parties concerned.
[91] See 6.10.3, below.
[92] Sharrock *et al Hockly's Insolvency Law* 40-43; Evans 2001 *SA Merc LJ* 485.

Friendly sequestrations are often instituted in an attempt by the debtor to avoid having to comply with the formalities and meet the higher degree of proof required in the voluntary surrender procedure. More specifically, they are used to try to circumvent the requirement that the court "must be satisfied that sequestration will be to the advantage of creditors".[93] Largely for this reason, friendly sequestrations are viewed with circumspection by the courts.[94] Reported judgments have revealed clear indications of abuse of the sequestration procedure[95] and, particularly, ulterior motives. One such case was *Mthimkulu v Rampersad (BOE Bank Ltd, intervening creditor)*[96] where it transpired that the applicant creditor and the respondents had colluded by arranging for the application for sequestration in an attempt to avert the sale in execution of the respondents' home by the mortgagee.[97]

As in the case of voluntary surrender, even where the requirements for compulsory sequestration have been met, the court has a discretion whether or not to grant a sequestration order.[98] A court should consider all relevant circumstances and determine whether to grant a sequestration order or not, based on the facts and circumstances of the particular case[99] including, for example, where there is strong opposition by some of the creditors to sequestration taking place.[100]

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[93]See, and compare, ss 4, 6, 10 and 12 of the Insolvency Act. See *Epstein v Epstein* 1987 (4) SA 606 (C); *Hillhouse v Stott; Freban Investments v Itzkin; Botha v Botha* 1990 (4) SA 580 (W); *Craggs v Dedekind; Baartman v Baartman and Another; Van Jaarsveld v Roebuck; Van Aardt v Barrett* 1996 (1) SA 935 (C). See Evans 2002 *Int Insol Rev* 13 17-19.
[94]*Hillhouse v Stott; Freban Investments v Itzkin; Botha v Botha* 1990 (4) SA 580 (W); *Craggs v Dedekind; Baartman v Baartman and Another; Van Jaarsveld v Roebuck; Van Aardt v Barrett* 1996 (1) SA 935 (C).
[95]See Evans 2001 *SA Merc LJ* 485; Evans 2002 *Int Insol Rev* 13.
[96]*Mthimkulu v Rampersad (BOE Bank Ltd, intervening creditor)* [2000] 3 All SA 512 (N), hereafter referred to as "*Mthimkulu v Rampersad*".
[97]*Mthimkulu v Rampersad* 514-515.
[98]*Julie Whyte Dresses (Pty) Ltd v Whitehead* 1970 (3) SA 218 (D); see Sharrock *et al Hockly's Insolvency Law* 51; Bertelsmann *et al Mars* 141-144.
[99]*Amod v Khan* 1947 (2) SA 432 (N).
[100]*Theron v Scholtz* 1923 JDR 144. See Bertelsmann *et al Mars* 139, particularly cases cited at n 390 and n 391.

6.4.3 Alternatives to the liquidation of assets

For many years, insolvency academics have pointed out that South Africa needs an effective, easily accessible mechanism to serve as an alternative for consumer debtors to the sequestration process provided by the Insolvency Act.[101] As seen in Chapter 4, besides compromise, at common law, available debt relief mechanisms include administration in terms of section 74 of the Magistrates' Courts Act (in terms of which the total amount of debt is limited to R50 000 and *in futuro* debts are excluded), and debt review and debt restructuring under the NCA (which covers only obligations arising from credit agreements).[102] In both of these systems, a debtor is required to pay the debt in full without any measure of discharge being granted as is available upon rehabilitation after the sequestration process has run its course. Commentators, notably, Boraine, Roestoff and Evans, perceive this as unfair treatment of "poorer debtors" who are unable to show that sequestration would be to the "advantage of creditors".[103] They emphasise the need for a consumer debt relief measure which balances the interests of both debtors and creditors as well as society generally by, *inter alia*, allowing the rearrangement of debts so that they are payable over a reasonable, limited period. Further, at the end of it, a measure of discharge from liability is called for in accordance with a policy of providing an "honest" consumer debtor with a "fresh start". Such a feature is universally accepted as appropriate for an effective consumer debt relief system.[104]

[101] See, for example, Boraine and Roestoff 1993 *De Jure* 229; Evans 2001 *SA Merc LJ* 485; Boraine 2003 *De Jure* 217; Calitz 2007 *Obiter* 414; Boraine and Roestoff 2002 *Int Insolv Rev* 1.
[102] See 4.4.3.6, and 4.5, above.
[103] See Boraine and Roestoff 2000 *Obiter* 263; Roestoff *'n Kritiese Evaluasie* 357; Evans 2001 *SA Merc LJ* 504-505, 508; Boraine "Reform of Administration Orders" 195, 215; Boraine and Roestoff 2002 *Int Insolv Rev* 11; Van Heerden and Boraine 2009 *PELJ* 161; Evans 2010 *SA Merc LJ* 483; Evans 2011 *PELJ* 39 52; Coetzee "Personal bankruptcy and alternative measures". See, also, 6.2, above.
[104] See, in this regard, INSOL International *Consumer Debt Report II* 9-11, 15, 20-21; INSOL International *Consumer Debt Report* 2001; McKenzie Skene 2011 *Int Insolv Rev*29; McKenzie Skene 2005 *Int Insolv Rev* 1 14; van Apeldoorn 2008 *Int Insolv Rev* 57; Calitz 2007 *Obiter* 414; Van Heerden and Boraine 2009 *PELJ* 58.

In Chapter 4,[105] mention was made of the South African Law Reform Commission's proposal, in the Draft Insolvency Bill published as part of its report, in 2000, of the insertion of a new section 74X in the Magistrates' Courts Act to provide for a pre-liquidation composition procedure. This was never enacted. The most recent initiative is an unofficial working draft of a proposed Insolvency and Business Recovery Bill.[106] It contains section 118, a variation on the South African Law Reform Commission's proposed section 74X. The proposed section 118 provides for a pre-liquidation composition procedure which, once a majority in number and a two-thirds majority in value of the concurrent creditors have accepted it and the court has certified their acceptance, will be binding on all creditors who appeared at the meeting or who had been notified of it. In terms of the provision, "a composition may not be accepted if a creditor demonstrates to the satisfaction of the magistrate that it accords a benefit to one creditor over another creditor to which he or she would not have been entitled on liquidation of the debtor's estate."[107] In other words, the concurrent creditors must enjoy the same *pari passu* ranking in terms of the composition which they would have received if the estate had been sequestrated. Further, the rights of a secured or a preferent creditor will not be affected by the composition unless he has consented to it in writing.[108]

It is submitted that this proposed pre-liquidation process, appropriately remodelled and refined, may well provide a way out for over-indebted persons who seek an alternative to the voluntary surrender of their estate and an opportunity to avert the forced sale of their home. This process potentially provides such an alternative in terms of which the debtor could also benefit not only from the restructuring of debt, but also, ultimately, by receiving a measure of discharge from liability. It is also anticipated that the proposed section 118 procedure would pose a realistic alternative to the compulsory sequestration, or liquidation, of a debtor's estate by affording the debtor an opportunity

[105]See 4.4.3.6, above.
[106]See 1.6, above.
[107]See s 118(16) of the unofficial working draft of a proposed Insolvency and Business Recovery Bill. In the working document, the term "liquidation" is used in place of "sequestration", as it is currently referred to in the Insolvency Act.
[108]See s 118(17) of the unofficial working draft of a proposed Insolvency and Business Recovery Bill.

to fulfil his obligations to creditors through a type of restructured debt repayment plan. It is also anticipated that it would probably be an attractive proposition for a mortgagee of the debtor's home because, confident that its claim cannot be compromised without its explicit consent, it may be less inclined to pursue the forced sale of the home.

6.5 Estate property

In terms of section 20(1)(a) of the Insolvency Act, the effect of a sequestration order is to divest the insolvent of his estate and to vest it in the Master of the High Court and, thereafter, in the trustee once the latter has been appointed.[109] The estate remains vested in the trustee until the discharge of the sequestration order by the court or the acceptance by creditors of an offer of composition made by the insolvent, if it provides for the insolvent's property to be restored to him, or an order for rehabilitation of the insolvent.[110] In terms of section 20(2) of the Insolvency Act, the insolvent estate includes:

> (a) all property of the insolvent at the date of the sequestration, including property or the proceeds thereof which are in the hands of a sheriff or a messenger under writ of attachment; [and]
> (b) all property which the insolvent may acquire or which may accrue to him during the sequestration, except as otherwise provided in section twenty-three.

In section 2 of the Insolvency Act, "property" is defined to include "movable or immovable property wherever situate within the Republic". In an article focusing mainly on issues relating to an insolvent debtor's duty of support towards his children, Stander and Horsten point out that it is in terms of section 20(2) of the Insolvency Act that an insolvent debtor's home may be realised to cover his debts. In view of the lack of any provision seemingly consistent with section 26(1) or section 26(3) of the Constitution, they submit that in this respect section 20(2) is strikingly at odds with section 26 of the Constitution. They analyse how the sequestration of the estate of a parent may infringe

[109] Sharrock *et al Hockly's Insolvency Law* 63.
[110] Granted in terms of s 124(1) of the Insolvency Act.

children's section 28 rights[111] and that the principle of "advantage of creditors" in insolvency law may be in conflict with children's constitutional rights.[112]

6.6 Excluded and exempt property

6.6.1 Exclusions and exemptions currently applicable in insolvency

In common with foreign jurisdictions,[113] South African insolvency law provides for certain assets to be either excluded or exempted from the insolvent estate.[114] However, being a "creditor-orientated" insolvency system, the exclusions or exemptions are limited.[115] Provisions of the Insolvency Act as well as other statutes, such as the Pensions Act 24 of 1956 and the Long-term Insurance Act 2 of 1998, have the effect of specifically exempting certain assets from vesting in the trustee. An insolvent person's home is neither excluded nor exempted from the insolvent estate. Nor is an inheritance excluded from the insolvent estate[116] or exempt from sale by the trustee. Therefore, a "family home" which has been left to an heir must also be realised as part of the assets of the insolvent person's estate.[117]

The effect of section 23 of the Insolvency Act is specifically to exclude or exempt certain property from the insolvent estate. This includes: any pension to which the insolvent may be entitled for services rendered by him;[118] any compensation for any loss or

[111]Stander and Horsten 2008 *TSAR* 214-216.
[112]Stander and Horsten 2008 *TSAR* 203, 207.
[113]See McKenzie Skene 2011 *Int Insolv Rev* 29-55; See also Evans *Critical Analysis* Chapters 5 and 6. It may be noted that exemptions provided for in the Insolvency Act differ from those provided for in the individual debt enforcement process, as discussed in 4.4.3.4 and 4.4.4.4, above.
[114]As Evans has stated, there is a distinction between property which is excluded from the insolvent estate and therefore never forms part of it and, on the other hand, exempt property which, strictly speaking, falls into the insolvent estate but is then exempted for particular reasons. See Evans 2008 *De Jure* 255 257; Bertelsmann *et al Mars* 192 n 1; Evans *Critical Analysis* 9.1.
[115]See Evans 2008 *De Jure* 255-272.
[116]*Vorster v Steyn NO en andere* 1981 (2) SA 831 (O); *Badenhorst v Bekker NO en andere* 1994 (2) SA 155 (N); *Wessels NO v De Jager en 'n ander NNO* 2000 (4) SA 924 (SCA); *Du Plessis v Pienaar NO & others* 2003 (1) SA 671 (SCA).
[117]*Badenhorst v Bekker NO en andere* 1994 (2) SA 155 (N).
[118]S 23(7) of the Insolvency Act. Other statutes also protect pension moneys. These include ss 3 and 37B of the Pension Funds Act 24 of 1956; s 79 of the Railways and Harbours Service Act 28 of 1912, s 2 of

damage suffered by reason of any defamation or personal injury;[119] and remuneration or reward for work done or for professional services rendered by the insolvent after the sequestration of the estate.[120] The exemption of the insolvent's earnings is subject to the trustee being entitled to any moneys received by the insolvent in the course of his or her profession, occupation, or employment which in the opinion of the Master of the High Court exceed that which is necessary for the support of the insolvent and his dependants.[121] Thus, the insolvent's earnings after sequestration vest in the insolent himself. However, once the Master has expressed an opinion that a certain amount exceeds that which is necessary for the support of the insolvent and his dependants, the insolvent is divested of such excess portion and it vests in the trustee, for distribution among the creditors in accordance with the provisions of the Insolvency Act.[122] Any asset purchased with exempt or excluded property does not form part of the insolvent estate.[123] It is common practice for the insolvent, upon application for rehabilitation, to apply also for an order declaring such an asset to be his property.[124]

In terms of section 82(6) of the Insolvency Act, an insolvent person's "wearing apparel and bedding … and the whole or such part of his household furniture, and tools and other essential means of subsistence as the creditors … may determine" is exempted from the sale of the insolvent's movable property which may be retained for own use. The insolvent may renounce this protection, in respect of particular assets, for the benefit of the creditors of his insolvent estate.[125] It may be noted that section 82(6) does not explicitly exempt from sale a motor vehicle owned by the insolvent which is used for

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the Statutory Pensions Protection Act 21 of 1962, s 14(3) of the Aged Persons Act 29 of 1979 and s 20(5) of the Social Assistance Act 13 of 2004.

[119]S 23(8) of the Insolvency Act.

[120]S 23(9) of the Insolvency Act. In terms of s 23(3), "an insolvent may follow any profession or occupation or enter into any employment", but may not, during the sequestration of his or estate without the consent in writing of the trustee of the insolvent estate, either carry on, or be employed in any capacity or have any direct or indirect interest in, the business of a trader who is a general dealer or manufacturer.

[121]S 23(5) of the Insolvency Act. In appropriate circumstances, the employer may be obliged to pay over the excess to the trustee.

[122]*Ex parte Van Rensburg* 1946 OPD 64 70; *Miller v Janks* 1944 TPD 127 130;

[123]*Ex parte Fowler* 1937 TPD 353. See Sharrock *et al Hockly's Insolvency Law* 69-70.

[124]Sharrock *et al Hockly's Insolvency Law* 201.

[125]*Ex parte Anthony en 'n ander en ses soortgelyke aansoeke* 2000 (4) SA 116 (C) 125. Evans 2010 *SA Merc LJ* 476 submits that legislation should be enacted to prevent a debtor from waiving his right to exempt or excluded property as this is in conflict with the "fresh start" policy.

business purposes and no court has ever regarded such a motor vehicle as a "tool" or "essential means of subsistence" in their interpretation and application of this section. Evans criticises this as well as the failure to provide for any protection for the insolvent's dwelling place as being *lacunae* in South African insolvency law policy.[126] Stander and Horsten state that it is unclear whether section 82(6) potentially allows for an amount of money for the maintenance of the insolvent's children and dependants, the common law concept of which, as they explain, includes, *inter alia*, their accommodation. Stander and Horsten suggest that section 82(6) ought to be construed in such a way and should be amended so as expressly to provide for this.[127]

6.6.2 Reform initiatives

The South African Law Reform Commission,[128] in a report on its review of the law of insolvency, completed in February 2000,[129] noted that section 39 of the Supreme Court Act and section 67 of the Magistrates' Courts Act contain more categories of exempt property than does section 82(6) of the Insolvency Act. It also noted that they provide the court with the discretion, in exceptional circumstances, to increase the amounts of the value of property exempt from execution. The Commission stated:[130]

> [a]lthough it could be argued that the phrase "other essential means of subsistence" gives s… 82(6) a wider application, …the phrase lacks certainty and gives no clear guidance about what property may be retained [by the insolvent]. If it is accepted that certain basic property is essential for a basic minimum standard of living, the inconsistency between property exempt from execution and property exempt from sale in terms of s 82(6) cannot be justified.

[126]See Evans 2008 *De Jure* 262-263. See, also, Evans *Critical Analysis* 423; Evans "Does an insolvent debtor have a right to adequate housing?".
[127]Stander and Horsten 2008 *TSAR* 209-210, 220. The authors submit that such a construction would accord with ss 23(12) and 79 of the Insolvency Act which, in effect, provide for the trustee, with the Master's consent, to give to the insolvent, before the second meeting of creditors, an allowance in the form of money or goods from the insolvent estate, for the support of himself and his dependants. They submit that s 82(6) applies after the second meeting of creditors.
[128]In this thesis, also referred to as "the Commission".
[129]See the *Report on the Review of the Law of Insolvency* Project 63 February 2000 *Explanatory Memorandum* (Vol 1), hereafter referred to as "the Explanatory Memorandum", and *Draft Insolvency Bill* (Vol 2), hereafter referred to as "the Draft Insolvency Bill".
[130]See the Explanatory Memorandum par 11.4.

It is submitted that, as far as possible, the types of assets exempted from execution in the individual debt enforcement process and those excluded or exempted from the insolvent estate in the insolvency process, should be the same. Evans submits that harmonisation in this respect is essential as he anticipates that "property that is not excluded from debt collection in the pre-sequestration collection procedure will probably be foreclosed on and sold prior to sequestration." He comments that such property will then be valueless "in the context of exemption law within the sequestration process."[131]

In order to create certainty and to give clear guidance about what property is excluded from the insolvent estate, so that it would not depend on the discretion of the liquidator,[132] the Commission recommended an expansion of section 82(6).[133] Clause 11(6) of the Draft Insolvency Bill reflects the changes recommended by the Commission. It provides for the exclusion from a person's insolvent estate of: the necessary beds, bedding and wearing apparel of the insolvent and his family; the necessary furniture and household utensils of the insolvent up to the value of R2 000; food and drink sufficient for the needs of the insolvent and his family for a month; and such arms and ammunition as the insolvent requires as part of his equipment. The Minister will have the power to amend[134] these amounts from time to time.[135]

Another innovation is that the liquidator, if authorised by the Master or by resolution of a meeting of creditors of the estate, will have the power to make available to the insolvent assets of the insolvent estate the value of which exceed these amounts.[136] The purpose is to provide more flexibility, especially given the very low values set in clause

[131]Evans 2010 *SA Merc LJ* 477. Evans criticises the Commission for not distinguishing between excluded assets and exempt assets. On this distinction, see Evans *Critical Analysis* 9.1; Evans 2008 *De Jure* 257. See, further, 6.6.1, above. It may be noted, as Stander and Horsten 2008 *TSAR* 211 point out, that in German law there is harmonisation of exclusion of assets in both the ordinary civil process and the insolvency process.
[132]In should be noted that, in terms of the Draft Insolvency Bill, the term "liquidator" will replace the term "trustee" which is used, in the current Insolvency Act.
[133]See the Explanatory Memorandum par 11.5 and Draft Insolvency Bill cl 11(6)(a).
[134]By notice in the *Government Gazette*.
[135]See cl 11(7) of the Draft Insolvency Bill.
[136]See cl 62(4) of the Draft Insolvency Bill. However, cl 42(9) of the Draft Insolvency Bill provides for a court to set aside, upon application to it, a directive of this sort that infringes the rights of creditors.

11(6)(a),[137] in order effectively to deal with the variety of circumstances which present themselves in administering different insolvent estates.[138] According to the Commission's recommendations, a liquidator who disagrees with a resolution by a meeting of creditors in relation to making available to the insolvent assets which belong to the insolvent estate, may refer the matter to the Master in the event of which whose decision will be subject to review by the high court.[139]

As Evans points out, and as mentioned in Chapter 2, above, allowing a debtor to keep a part of his estate apparently originated in the *beneficium competentiae*, in Roman law, on the basis of a policy that the insolvent and his dependants should not be deprived of basic life necessities.[140] However, Evans explains how the requirements of modern society, socio-political developments in most societies, and human rights requirements have necessitated a broadening of the classes of assets that should be excluded or exempted from insolvent estates.[141] In spite of this, however, the maximum values set in clause 11(6)(a) are unreasonably low. Further, the Commission's proposed new provision, expanding on section 82(6), is open to criticism for not allowing the retention by the insolvent of a motor vehicle as an essential means of transport on the basis that this did not enjoy the support of commentators.[142] The Commission reported that it had received comments which included that: it would "outrage creditors"; it was "unjustified"; it was "unacceptable"; it would reduce the dividend available to concurrent creditors; it would be difficult to draw the line between inexpensive and expensive vehicles; the solvent spouse would usually be in possession of a vehicle;[143] and the provision of a vehicle at the cost of the estate would be an unjustified luxury.[144] Evans submits that the Commission's stance in this regard is indicative of an "approach to assets in the

[137]For criticism of these low values, see Evans 2010 *SA Merc LJ* 477.
[138]See the Explanatory Memorandum par 11.5.
[139]See cl 62(5) and cl 106 of the Draft Insolvency Bill. Evans 2010 *SA Merc LJ* 478 submits that cl 62(4) and cl 62(5) should have been included in clause 11 of the Draft Insolvency Bill, just as the current section 82(6) was transferred into clause 11.
[140]See Evans 2011 *PELJ* 40; Evans *Critical Analysis* 17. See, also 2.2.3, above.
[141]Evans 2011 *PELJ* 40.
[142]The Explanatory Memorandum par 11.6 mentions "creditors". It is submitted that this should read "commentators".
[143]For criticisms of the Commission's approach, in this regard, see Evans 2010 *SA Merc LJ* 477-478.
[144]See the Explanatory Memorandum par 11.6.

insolvent estate, and in respect of exemption law, [which] is totally devoid of any policy consideration."[145]

6.6.3 Considerations relevant to the insolvent's home

The response to the notion of exclusion from the insolvent estate or exemption from sale by the trustee of a motor vehicle which might be an essential means of transport or of earning a living for an insolvent person, gives some idea of the response which a debate around the possible exemption of the insolvent's home might elicit. It may easily be understood what prompted counsel to pose the question, in argument in the Cape Provincial Division in *Jaftha v Schoeman*, in relation to exemptions from execution in the individual debt enforcement process: "Why stop the sheriff from taking the bed but not the bedroom?"[146] A similar question is pertinent in relation to exclusions and exemptions in insolvency: the insolvent is permitted to keep beds for himself and his family, without any consideration being given to whether he will have a shelter in which to place, and to sleep in, them. The irony in this, it is submitted, is inescapable.

Admittedly, the exemption of a person's motor vehicle, as opposed to his home, involves different considerations in insolvency. However, given the relative values, usually, of a person's motor vehicle and his home,[147] one may anticipate that creditors would be averse to any exemption being granted in respect of a person's home. A motor vehicle may be vital in any endeavour by the insolvent to support himself and his dependants and to earn sufficient income to make any meaningful contribution towards satisfying his outstanding debts. In the same vein, although the insolvent's home may be the most valuable asset in the estate, it may be vital to his and his dependants' very existence.[148] As Stander and Horsten point out, in a situation where the insolvent has a duty of support towards his children and other dependants, such support would include

[145]Evans 2010 *SA Merc LJ* 478.
[146]See Ellis "Court wrestles with sales in execution question" *The Mercury* South Africa (3 June 2004) http://www.lrc.org.za/lrc-in-the-news/535-2004-06-03-court-wrestles-with-sales-in-execution-question-the-mercury [date of use 15 March 2012].
[147]Although it may be recognised that some types of motor vehicle have a value that exceeds that of the average person's home and, certainly, the value of what would be viewed as "adequate housing".
[148]See discussion of the right to life, in 3.3.5, above.

the provision of accommodation[149] and, if the insolvent is not in a financial position to provide such support, then the burden will fall on the state. Bearing this in mind, the authors emphasise that it is essential that the insolvent should as soon as possible become economically productive once again.[150] They submit that the Insolvency Act should include a specific provision that a fair and reasonable amount of maintenance must be paid out of the estate by the trustee.[151]

This consideration tends to weigh in favour of allowing some sort of exemption for the home, or at least allowing funds to go towards accommodation of the insolvent and his dependants. However, the main controversy exists where the home of the insolvent has been mortgaged in favour of a creditor. The interests of the mortgagee weigh heavily against the notion of the exemption of the insolvent's home, or a limited portion of the proceeds of its sale, from the insolvent estate, especially in light of the adverse effects which it would have on the economy, generally, if real security rights are not upheld.[152] This may justify different treatment of the insolvent's home depending on whether or not it has been mortgaged as security for the payment of a debt. A possibility might be to allow an exemption of a portion of any equity which a debtor holds in his mortgaged home. Consideration could also be given to allowing a moratorium on the realisation of the home by the trustee, rather than a total exclusion of the home or a portion of the proceeds of its sale.[153]

Exemptions are generally based on policies formulated to reflect the result of weighing up the competing interests of the debtor, the creditors, and society.[154] Exemptions may be based on one or more of the following policies, or designed to fulfil one of the following purposes:[155] to provide the debtor with property necessary for his survival and

[149]Stander and Horsten 2008 *TSAR* 209, 220, referred to at 6.3.2, above.
[150]Stander and Horsten 2008 *TSAR* 207, 220.
[151]Stander and Horsten 2008 *TSAR* 220, 221.
[152]As explained, for instance, in *Standard Bank v Saunderson* pars 1-3. See Boraine, Kruger and Evans "Policy Considerations" 694.
[153]See Evans 2008 *De Jure* 270-271.
[154]See Evans "A brief "; Evans "Does an insolvent debtor have a right to adequate housing?"; Evans *Critical Analysis* 9ff; Van Heerden, Boraine and Steyn "Perspectives" 230ff; Keay 2001 *Comm L World Rev* 206 208.
[155]See Boraine, Kruger and Evans "Policy Considerations" 663-666.

maintenance;[156] to protect the debtor's family from the adverse consequences of impoverishment; to preserve the debtor's dignity; to enable the debtor to rehabilitate himself financially,[157] sometimes referred to as providing the debtor with a "fresh start";[158] to earn income in the future and to make a positive contribution to society; and to avoid the state, or society, from having to bear the burden of providing for the debtor and his family with minimal financial support.[159]

In relation to the last-mentioned policy, it may be noted that, in effect, part of the burden shifts to the creditors because whatever is exempted from the insolvent estate, shrinks the assets available for realisation for the satisfaction of the insolvent person's debts.[160] On the other hand, however, the nature and level of exemptions permitted will logically have a bearing on the generosity of the level of any discharge that the insolvent ultimately obtains.[161] Boraine, Kruger, and Evans explain that exemptions within the context of the law of insolvency must be viewed as the result of a "compact" to which the debtor, his creditors and society are all parties. The diverse values and norms of different societies, which may vary according to time and place, also impact on the notion of discharge and exempt property. The authors state:[162]

> The relief of the discharge will usually not come free and will be based on the debtor making a contribution, not only from the realization of his or her assets but also from his or her future earnings, as can reasonably be made by him or her without reducing him or her and his or her family to undue and socially unacceptable poverty and without depriving him or her of the incentive to succeed in obtaining a fresh start.

Evans has argued convincingly that, in South Africa, insufficient attention has been directed to formulating coherent exemptions policy, both in the individual debt

[156]Stander and Horsten 2008 *TSAR* 207.
[157]Evans 2008 *De Jure* 257; Stander and Horsten 2008 *TSAR* 208.
[158]It is the same notion that forms the basis of permitting an insolvent a discharge from a portion of his debt; see Van Heerden, Boraine and Steyn "Perspectives" 231. See also Stander and Horsten 2008 *TSAR* 207; Evans 2008 *De Jure* 257. See also McKenzie Skene 2005 *Int Insolv Rev* 1-26.
[159]Resnick 1978 *Rutgers L R* 621; Evans 2008 *De Jure* 257; Stander and Horsten 2008 *TSAR* 207 (with reference, *inter alia*, to *Singer NO v Weiss* 1992 (4) SA 362 (T) 367C), 208ff.
[160]McKenzie Skene 2011 *Int Insolv Rev* 29-55; Rajak 2011 *Int Insol Rev* 1-28; Boraine, Kruger and Evans "Policy Considerations" 637.
[161]See Boraine, Kruger and Evans "Policy Considerations" 662, 666.
[162]Boraine, Kruger and Evans "Policy Considerations" 666.

enforcement and insolvency processes.[163] *Grootboom* was decided, and the constitutionality of the forced sale of a debtor's home first became an issue in the individual debt enforcement process, in *Jaftha v Schoeman* and subsequent cases, only after the publication of the South African Law Reform Commission's report on the review of the law of insolvency, in February 2000. Thus, the content of the report is not necessarily an indication that the door is closed for consideration of some sort of exemption or protection for the insolvent's home. On the contrary, the right to have access to adequate housing may yet become a significant constitutional imperative in insolvency law, as it has in other spheres of South African law.

Of course, there are differences in relation to the competing interests that must be weighed up in the individual debt enforcement process and in the sequestration process. In the latter, it is not only the interests of the applicant creditor, or the mortgagee of the home, that must be balanced with those of the debtor but the interests of the general body of creditors. Sequestration may also be regarded as the "last resort", so to speak, for a creditor who seeks satisfaction of a debt. It could be argued that there would be no less restrictive alternative means of satisfying the debt and, therefore, that any infringement of the constitutional rights of the debtor and his dependants would be justifiable. This point was also made by Stander and Horsten.[164] However, it is submitted that one should not lose sight of the fact that, even in a situation where a debtor is technically insolvent, consumer debt relief measures such as administration under section 74 of the Magistrates' Courts Act, or debt review and debt restructuring in terms of the NCA, may present a potential solution to the problem. This might be the case in circumstances where the debtor has a regular income or other means whereby he will be able to service his debt over a longer period.

On the other hand, in circumstances where the insolvent debtor is very poor, with insufficient income, very different factors may be present such as, for instance, his

[163]Evans "A brief comparative analysis"; Evans "Does an insolvent debtor have a right to adequate housing?"; Evans 2010 *SA Merc LJ* 466-468, 483; Evans 2008 *De Jure* 257, 271; Evans *Critical Analysis* 483. See, also, Boraine, Kruger and Evans "Policy Considerations" 663ff.
[164]See Stander and Horsten 2008 *TSAR* 215.

inability to see to the subsistence needs of, and otherwise to maintain, his children and other dependants. This could lead to homelessness, as in *Jaftha v Schoeman*. In such a case, where the insolvent will not be in the financial position to maintain those to whom he owes a duty of support, the burden will fall on the state and, therefore, ultimately on society, as discussed in preceding chapters. It is submitted that one cannot simply ignore, in insolvency law, section 26 of the Constitution, children's rights protected by section 28 of the Constitution and the balancing of interests, which section 36 requires. It is submitted that, to satisfy constitutional imperatives, judicial oversight specifically directed at the housing situation and needs of the insolvent and his family ought to occur during the insolvency process.

Ordinarily, in the sequestration process, judicial oversight takes place only at the point at which a court considers whether to grant the sequestration order. At this stage, the court is more concerned with whether sequestration would be to the advantage of creditors than how it would affect the debtor's and his family's rights of access to adequate housing.[165] At the application stage, a court would probably be able to evaluate with ease whether, in the circumstances, sequestration might constitute an abuse of process. However, it is submitted that, at this stage, not all factors relevant to the effect which sequestration would have on the section 26 and section 28 rights of the insolvent and his family would necessarily be known by, or accessible to, the court. The current position is that, if an insolvent and his family will be rendered homeless by the realisation of their home, their only course of action is to "hold over" until an application is brought, either by the trustee or by the new owner of the property, in terms of PIE for their eviction.[166] This is precisely what happened in *ABSA v Murray*.[167] After the respondents' joint estate was sequestrated,[168] ABSA, the mortgagee of the home, "bought in" at the auction sale[169] held in terms of the Insolvency Act. It subsequently sold the home to a third party. The insolvent spouses and their family remained in their home for almost a year until ABSA, who wished to give possession to the new owner,

[165]This point was also made by Evans in "Does an insolvent debtor have a right to adequate housing?".
[166]The position is discussed at 3.3.1.4 (b), above.
[167]*ABSA v Murray* is discussed at 3.3.1.4, and 6.3.2, above.
[168]On sequestration, see 6.2 and 6.4, above.
[169]On buying in, see 4 3.3, above.

brought an application in terms of section 4 of PIE for their eviction. In the circumstances, the court granted the eviction order but considered it just and equitable to delay the execution of the eviction order for six weeks in order to give the insolvent an opportunity to make alternative arrangements for the family's accommodation.

Thus, as the facts and decision in *ABSA v Murray* indicate, the effect of the applicable provisions of PIE is to provide a measure of protection to an insolvent who has sufficient knowledge of the law and his constitutional rights or who has access to sound legal advice. He must also have the type of disposition which equips him to be prepared to "dig his heels in" by "holding over" against any pressure which might be brought to bear on him to vacate his home, until a court application is brought in terms of PIE for the eviction of him and his dependants. However, it is submitted that this level of protection, if one may call it that, is insufficient and unsatisfactory. The reality, as Mokgoro J noted in *Jaftha v Schoeman*, is that not everyone has the wherewithal to insist on his rights or to avail himself of statutory defences and remedies.[170] As submitted in preceding chapters in relation to the individual debt enforcement process, this impacts on the level of access to justice available to ordinary persons.[171] It is submitted that the insolvent and his family should not be forced to remain in a precarious position for a protracted period. Further, with the purpose of yielding optimal advantage for all concerned, and to obviate any deterioration in condition of the property, it would be preferable for the housing situation of the insolvent and his family to be addressed at the earliest possible stage of the insolvency process.

6.7 Vesting of the property of a spouse

Where spouses are married in community of property, the joint estate is sequestrated. Thus, any home jointly owned by the spouses forms part of the insolvent joint estate and must be sold by the trustee to meet the claims of its creditors. A spouse may own property separately from the joint estate. However, because the spouses are jointly and

[170]See *Jaftha v Schoeman* pars 19, 54; *Gundwana v Steko* par 50.
[171]See 1.1, 3.3.5 and 5.5.4.7.

severally liable for the debts of their joint estate, where the proceeds of the sale of assets of the joint estate are insufficient to meet the claims against it, such separate property may be sold by the trustee to satisfy the claims of creditors of the insolvent joint estate.[172]

Where spouses are married out of community of property,[173] and the estate of one of them is sequestrated, in terms of section 21(1) of the Insolvency Act, all of the property of the solvent spouse also vests in the Master and then the trustee of the insolvent estate, as if it were property of the sequestrated estate.[174] Section 21(13) of the Insolvency Act contains a wide definition of "spouse" which extends the reach of section 21 to a man and a woman who are living together as husband and wife although they are not legally married.[175] Since the enactment of the Civil Union Act 17 of 2006, the definition of "spouse" in the Insolvency Act has by implication been amended to include persons of the same gender who have entered into a civil union.[176]

The Appellate Division held that the effect of section 21(1) is to vest in the trustee ownership of the solvent spouse's property.[177] Section 21(2) and section 21(4) provide grounds upon which the solvent spouse may obtain the release of his or her property, one such ground being that he or she holds such property by a title valid as against the insolvent's creditors.[178] The solvent spouse bears the onus of proving this on a balance

[172] *Badenhorst v Bekker NO en andere* 1994 (2) SA 155 (N); *Du Plessis v Pienaar NO and others* 2003 (1) SA 664 (SCA). Evans 2010 *SA Merc LJ* 470-471 criticises the position and suggests that legislative amendments should counter the unsatisfactory consequences, under the current law, for spouses married in community of property. See, also, Evans 2003 *SA Merc LJ* 228;
[173] Having entered into an antenuptial contract.
[174] On s 21 of the Insolvency Act, and related issues, see Evans 2010 *SA Merc LJ* 481-482; Evans 2010 *SAPL* 689 689-701; Evans *Critical Analysis* Chapter 10, and references cited there; Bertelsmann *et al Mars* Chapter 11; Evans 2004 *Stell LR* 193; Evans 1998 *Stell LR 359;* Evans 1996 *THRHR* 613 and 1997 *THRHR* 71.
[175] See s 21(13) of the Insolvency Act.
[176] See s 13(2)(a)-(b) of the Civil Union Act 17 of 2006. See, also, Evans 2010 *SA Merc LJ* 473-474.
[177] In *De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A) 16.
[178] See s 21(2)(c) of the Insolvency Act; s 22 of the Matrimonial Property Act 88 of 1984. For two cases involving application for release of immovable property, although not the homes of the spouses, and entailing the application of s 21 of the Insolvency Act and s 22 of the Matrimonial Property Act 88 of 1984, see *Snyman v Rheeder NO* 1989 (4) SA 496 (T); *Beddy NO v van der Westhuizen* 1999 (3) SA 913 (SCA). See, further, Evans *Critical Analysis* 330-331, 338, 340-354; Evans 2004 *Stell LR* 193; Evans 1998 *Stell LR* 359; Evans 1996 *THRHR* 613 and 1997 *THRHR* 71.

of probabilities. Unreleased assets of the solvent spouse may be sold ultimately by the trustee to satisfy the claims of the creditors of the insolvent estate.[179] It is possible, in terms of section 21(10), for a solvent spouse to obtain an order postponing the vesting of his or her property in terms of section 21(1). This order may be obtained either at the time the sequestration order is granted or thereafter. However, this provision applies only where the spouse is a public trader or if it appears to the court that he or she is likely to suffer serious prejudice through the immediate vesting of the property in the Master or the trustee. In addition, the court must be satisfied that the solvent spouse is willing and able to make arrangements to safeguard the interest of the insolvent estate, including protection against the alienation or fraudulent abandonment of assets by the solvent spouse, or malicious or accidental damage to, or theft of, them.[180]

The main object of section 21 is to prevent the collusive transfer of assets by a debtor to a spouse in order to avoid payment of debts.[181] However, one of the effects of its application is that, even where the sequestration is of the estate of an honest debtor, it imposes an additional burden on a spouse who is married to the insolvent out of community of property. This occurs through the vesting of the solvent spouse's assets – this would include a home registered in the name of the solvent spouse – in the trustee of the insolvent estate and imposing an onus of proof on the spouse in order for him or her to obtain their release. The criticism may be levelled that, instead of burdening the spouse in this situation, one might anticipate the law extending some measure of protection to the spouse, the family and other dependants. Certainly, the position contrasts with legislative provisions found in legal systems in some overseas jurisdictions which afford some form of protection for the home of the spouse and family of an insolvent person.[182] Section 21 has been the object of much criticism on the basis of its draconian effect.[183] However, when its constitutional validity was challenged in

[179]See s 21(5) of the Insolvency Act. See, also, Evans *Critical Analysis* 354-361.
[180]See *Ex parte Vogt* 1936 SWA 39; *Van Schalkwyk v Die Meester* 1975 (2) SA 508 (N).
[181]Sharrock *et al Hockly's Insolvency Law* 71-72; Evans 2010 *SAPL* 700.
[182]Some of these are discussed in Chapter 7, below.
[183]For background on the criticisms, see the Explanatory Memorandum par 22A.1. Criticisms by academic commentators include Joubert 1992 *TSAR* 699; Evans 1996 *THRHR* 613 and 1997 *THRHR* 71. Since the decision in *Harksen v Lane NO* 1998 (1) SA 300 (CC), academics have continued to criticise s 21; see, for example, Jansen van Rensburg and Stander 1998 *TSAR* 334; Boraine and van der Linde 1998 *TSAR*

Harksen v Lane NO,[184] on the basis of an alleged unjustified infringement of the solvent spouse's rights to equality and property rights, the Constitutional Court held that it was not unconstitutional. In spite of this, the South African Law Reform Commission recommended that section 21 should not be re-enacted in any new insolvency statute[185] and, instead, it proposed a provision in the form of clause 22A of the Draft Insolvency Bill.[186]

Clause 22A(1) was proposed to empower a liquidator[187] who suspects that a disposition of property by the insolvent to an "associate"(which includes by definition[188] a spouse[189]) may be liable to be set aside under the applicable insolvency legislation,[190] to instruct the sheriff to attach such property. In terms of clause 22A(2), if the liquidator instructs the sheriff to release the property, then the latter must do so. Clause 22A(3) obliges the liquidator to instruct the sheriff to release property as soon as it is evident that its attachment is not required to safeguard the interests of the estate in the setting aside of a disposition of property. As Evans points out, an aspect which may be viewed as an improvement on section 21 is that, in terms of clause 22A, dispossession of the property would be temporary, as opposed also to entailing a loss of ownership, as is presently the position in terms of section 21. Further, the property of the solvent spouse – this would include a home registered in the name of the spouse – would not form part of the insolvent estate until the liquidator had succeeded in having the disposition set aside by the court. Also, the fact that clause 22A would apply to "associates", a wider range of persons having a specific type of relationship or association with the insolvent, would mean that it would not discriminate specifically against spouses.[191]

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621 and Boraine and van der Linde 1999 *TSAR* 38. See, also, Evans 2000 *SA Merc LJ* 109; Evans, Loubser and van der Linde 1999 *SA Merc LJ* 210 and other journal articles cited in this section.

[184] *Harksen v Lane NO* 1998 (1) SA 300 (CC).

[185] See the Explanatory Memorandum par 22A.1-22A.12. See further Evans 2010 *SA Merc LJ* 482; Evans *Critical Analysis* 361-362, 389-412.

[186] See Evans 2010 *SA Merc LJ* 482; Evans *Critical Analysis* 451-452.

[187] This was the term proposed to replace the term "trustee".

[188] An "associate" is defined to include, *inter alia*, a spouse of the insolvent; see s 1 of the Draft Insolvency Bill.

[189] A spouse is widely defined, as it is in s 21(13) of the Insolvency Act; see s 1 of the Draft Insolvency Bill.

[190] See clauses 18-21 of the Draft Insolvency Bill in relation to suggested provisions regarding dispositions which may be set aside as dispositions without value, voidable preferences and collusive dealings.

[191] Evans 2010 *SA Merc LJ* 482; Evans *Critical Analysis* 451-452.

However, Evans submits that clause 22A may also be viewed as more drastic than section 21 in that the liquidator would have seemingly "unfettered powers to dispossess an associate of his or her property" while the latter would have no rights to its release, as is presently the position by virtue of section 21(2) and section 21(4). Further, no provision is made for the postponement of vesting such as occurs in the current section 21(10). Evans also points out that clause 22A makes no provision for the protection of the solvent spouse's separate creditors, as does the current section 21(5). He submits that section 22A "may fail constitutional scrutiny".[192] He also expresses concern that, in light of the proposed clause 22A, "it is doubtful whether policies in respect of issues such as housing and rights of the child, old, ill and disabled will even be considered."[193]

It may be noted that section 25 of the unofficial working draft of a proposed Insolvency and Business Recovery Bill[194] contains the same, although slightly differently arranged, provisions as clause 22A of the South African Law Reform Commission's Draft Insolvency Bill of 2000. It is hoped that, in light of the published comments and criticisms, notably by Evans, that the proposals in this regard will be reconsidered. It is also submitted that, when the content of these proposed provisions is being reconsidered, specific attention ought to be directed at their interrelatedness with other areas of law including, but not confined to, insolvency and consumer debt law. Consideration also needs to be given to the impact that they might have on the section 26 and section 28 rights of the insolvent, his family and other dependants. As Evans has argued consistently, any new insolvency legislation which is enacted should reflect properly formulated policies which conform to constitutional imperatives and respond to the needs and values of modern society.[195] They should also promote the spirit, purport and objects of the Constitution which would entail considered reflection on pertinent issues, some of which are presented in this and preceding chapters. It is submitted that, if appropriate legislative amendments are not brought about, we may well find that the

[192]Evans 2010 *SA Merc LJ* 482.
[193]Evans *Critical Analysis* 429; Boraine, Kruger and Evans "Policy Considerations" 696.
[194]See 4.4.3.6, above.
[195]See, generally, Evans *Critical Analysis*.

Constitutional Court will be called upon to revisit its decision in *Harksen v Lane* that section 21 is not unconstitutional – this time, with an unjustifiable infringement of section 26 of the Constitution as the basis for the challenge.

6.8 Realisation of estate assets

The trustee is under a duty to realise the estate assets for the benefit of creditors and must do so in the manner, and upon the conditions, directed by creditors at the second meeting of creditors. If, by the close of the second meeting, the creditors have not given any directions, the trustee must sell the property by public auction or public tender.[196] This applies also to immovable property held as security.[197] Where immovable property which is subject to a mortgage bond is also subject to the right of a lessee under the *huur gaat voor koop* rule, the trustee must first attempt to sell the property subject to the lease. If the proceeds of the sale would be sufficient to satisfy the claim of the mortgagee, the property must be sold subject to the lease. If the property cannot be sold for a price sufficient to satisfy the mortgagee's claim, it may be sold free of the lease.[198] Instead of realising the property, the trustee may, if the creditors authorise it, abandon the property to the secured creditor, as payment in kind to discharge his claim against the insolvent estate,[199] or take the property over at a value placed on it by the creditor when his claim was proved.[200]

The trustee is also obliged to realise any assets of the solvent spouse which vested in him, and which he has not released.[201] However, he must do so in accordance with the provisions of section 21 of the Insolvency Act. In terms of section 21(3) he may only realise assets which "ostensibly belonged" to the solvent spouse on six weeks' notice to

[196]S 82(1) of the Insolvency Act. See Sharrock *et al Hockly's Insolvency Law* 160.
[197]Sharrock *et al Hockly's Insolvency Law* 165.
[198]*Timm v Kay & Another* 1954 (4) SA 585 (T); see Sharrock *et al Hockly's Insolvency Law* 165.
[199]*United Building Society Ltd & Another NO v Du Plessis* 1990 (3) SA 75 (W) 80 81; see Sharrock *et al Hockly's Insolvency Law* 166.
[200]See s 83(11) of the Insolvency Act. In the latter situation, the trustee must take the property over within three months of his appointment, or the date on which the claim was proved, whichever is the later. See Sharrock *et al Hockly's Insolvency Law* 166.
[201]Either in terms of s 21(2) or s 21(4) of the Insolvency Act.

the latter of his intention to do so. "Ostensibly belonged"[202] includes property registered in the name of the solvent spouse and which has not been released by the trustee.[203] The spouse of an insolvent may not acquire an estate asset unless the acquisition is confirmed by the court.[204] Thus a spouse would have to obtain court approval if, in order to remain in their home, she wished to purchase it from the insolvent estate using her own money.

It is submitted that consideration should be given to introducing a statutory provision explicitly allowing a court to postpone the realisation of an insolvent debtor's home in appropriate circumstances. This would be, for example, where a period of grace might enable a family member to purchase or refinance the property or where a delay will allow the insolvent to make suitable accommodation arrangements for himself and his family, especially taking into account their personal circumstances including their age and state of health.[205]

6.9 Rehabilitation and discharge from pre-sequestration debts

The main objective of sequestration, as stated above,[206] is to achieve the orderly and equitable distribution of an insolvent debtor's assets. Therefore, as Van Heerden and Boraine explain, the "legal machinery that comes into operation" upon sequestration of an insolvent debtor's estate is designed to ensure that all of the debtor's assets "are liquidated and distributed amongst the creditors in accordance with a predetermined (and fair) order of preference."[207] While the overriding policy behind the Insolvency Act is geared towards achieving the greatest advantage for creditors, the sequestration of a debtor's estate also brings some benefits, albeit indirect, for the debtor. This is because after the legal machinery has done its work, that is, after liquidation, administration, and distribution of the proceeds of the sale of the assets in the insolvent estate by the

[202]Which is not defined in the Insolvency Act.
[203]*Constandinou v Lipkie NO* 1958 (2) SA 122 (O); see also Sharrock *et al Hockly's Insolvency Law* 166.
[204]S 82(7) of the Insolvency Act. See Sharrock *et al Hockly's Insolvency Law* 161.
[205]See Evans 2008 *De Jure* 270-271.
[206]See 6.2, above.
[207]Van Heerden and Boraine 2009 *PELJ* 43.

trustee, rehabilitation puts an end to the sequestration of his estate, upon which the debtor regains his solvent status and he is discharged from unsatisfied pre-sequestration debts.[208] Therefore, in this sense, sequestration in terms of the Insolvency Act may be regarded as a consumer debt relief mechanism.[209]

Rehabilitation may occur automatically after the lapse of ten years since the date of sequestration[210] or earlier by an order of the high court upon application by the insolvent in terms of the Insolvency Act.[211] The discharge from pre-sequestration debt, which is an effect of rehabilitation, distinguishes the insolvency process from other debt relief processes which are available to debtors in South Africa such as administration in terms of section 74 of the Magistrates' Courts Act and debt review and debt restructuring in terms of the NCA. In view of the discharge from liability for pre-sequestration debt which a declaration of insolvency ultimately affords a debtor, it may be understood why a heavily over-indebted person might prefer his estate to be sequestrated in terms of the Insolvency Act rather than applying for debt review and debt restructuring under the NCA. However, in such a situation, the debtor may also be viewed as trying to avoid the responsibility of fulfilling his obligations and satisfying his debts. Creditors might well be better off if sequestration did not occur but that the debtor's obligations were restructured in terms of the NCA. This issue was considered in *Ex parte Ford*, which will be discussed below.[212]

On the other hand, it has already been mentioned how, in certain situations, a mortgagee might prefer to obtain an order for the sequestration of the debtor's estate in order to avoid the requirements of, and restrictions imposed by, the NCA for, or in, enforcement of the terms of the mortgage bond.[213] For example, in *FirstRand Bank v Evans*, which will be discussed below,[214] the mortgagee of the debtor's home sought an order for the sequestration of his estate in spite of the fact that the debtor had applied

[208]See Sharrock et al *Hockly's Insolvency Law* 192ff.
[209]Van Heerden and Boraine 2009 *PELJ* 43.
[210]S 127A(1) of the Insolvency Act; see, also, Sharrock *et al Hockly's Insolvency Law* 192.
[211]See s 124 of the Insolvency Act.
[212]See 6.10.4, below.
[213]See 4.5.4, above.
[214]See 6.10.3, below. The case is also mentioned at 4.7.3, above.

for debt review and had obtained a debt restructuring order issued under the NCA. The creditor alleged that the monthly payments due, according to the debt restructuring order, did not even cover the interest payable, according to the terms of their original agreement. On the other hand, the debtor was strongly opposed to sequestration and insisted that he should be able to continue paying monthly payments in terms of the debt restructuring order. He preferred to do this in spite of the fact that it meant that he would not obtain any discharge from liability but would have to satisfy the debt in full, with additional interest ultimately having to be paid, given the longer repayment terms and reduced monthly instalments. Thus, considering the various debt relief options available, interesting issues may be observed as arising from the interaction between the statutory provisions which provide for, and regulate, insolvency, on the one hand, and debt relief and debt restructuring, on the other.

6.10 Interaction between the Insolvency Act and the NCA

6.10.1 Background

In preceding chapters, some consideration was given to the extent to which, in specific circumstances, the provisions of the NCA might provide relief for a mortgagor where, upon his default, the mortgagee seeks judgment and a court order declaring the mortgaged home of the debtor specially executable. The question raised concerned the extent to which a debtor could rely on debt review and debt restructuring to avoid the forced sale of his home. It was submitted, in light of the lack of clarity surrounding the application of certain sections of the NCA, that it would have minimal impact in this sphere, in practice.[215] A similar question may be posed in relation to the provisions of the NCA and the insolvency process. To what extent might recourse to debt review and debt restructuring and, possibly, the declaration of invalidity of certain obligations arising out of reckless lending, thwart an application for the sequestration of a debtor's estate

[215]See 4.5.5 and 5.5.5, above.

thus effectively preventing the sale of the debtor's home as part of the ensuing liquidation process?[216]

It may be noted that section 2(7) of the NCA provides that, except as specifically set out in, or necessarily implied by, the NCA, its provisions are not to be construed as limiting, amending, repealing, or otherwise altering any provision of any other Act. There is no specific reference to the Insolvency Act, in the NCA's Schedule 1, which sets out rules regarding conflicting legislation.[217] Thus, it may be concluded that the legislative intention was not that the NCA would prevail in the event of any conflict between the NCA and the Insolvency Act. From a practical perspective, bearing in mind that the NCA applies only to credit agreements and that a debtor might very well also have debts which do not fall under the NCA, there are limitations to the potential scope for the provisions of the NCA to prevail over the provisions of the Insolvency Act.[218] Further, the estate of a debtor who is under administration in terms of section 74 of the Magistrates' Courts Act, may be sequestrated in terms of the Insolvency Act.[219] Thus, there seems to be no reason, in principle, why the position would be any different in relation to the estate of a debtor who is subject to debt review, or who has had his debt restructured, in terms of the NCA.[220] The position has been clarified in the judgments, in *Investec v Mutemeri* and *Naidoo v ABSA Bank Ltd*. Cases that are more recent are *Nedbank v Andrews* and *FirstRand Bank v Evans*.[221] As may be seen from the judgments, the effect of the provisions of the NCA has extensive implications for the debtor as far as the vulnerability of his estate to sequestration is concerned.

[216]For a comprehensive airing, and analysis, of issues surrounding the interaction between the NCA and the Insolvency Act, see Van Heerden and Boraine 2009 *PELJ* 22; Boraine and Van Heerden 2010 *PELJ* 84.
[217]The only reference, in the NCA, to the Insolvency Act, is in Schedule 2, in relation to the amendment to s 84 of the Insolvency Act to cater for changes occasioned by the repeal of the Credit Agreements Act 75 of 1980 and the enactment of the NCA. See Van Heerden and Boraine 2009 *PELJ* 36.
[218]See Van Heerden and Boraine 2009 *PELJ* 38-39.
[219]This was pointed out by Van Heerden and Boraine 2009 *PELJ* 37-38. See s 74R of the Magistrates' Courts Act 32 of 1944.
[220]Van Heerden and Boraine 2009 *PELJ* 39-40. Cf remarks by Otto and Otto *National Credit Act* 104.
[221]Discussed at 4.7.3 and 6.4.2, above.

6.10.2 Debt review does not preclude sequestration: Investec v Mutemeri

In *Investec v Mutemeri*, the respondents had applied for debt review in terms of the NCA. Their debt counsellor found them to be over-indebted and on 15 May 2009 launched an application to the magistrate's court for restructuring of their debt in terms of sections 86 and 87 of the NCA.[222] The matter was enrolled for hearing on 11 August 2010, almost fifteen months later. The delay was due to the backlog of debt restructuring applications brought in terms of the NCA. While the respondents were waiting for the court date, the applicants, alleging that the former had committed various acts of insolvency in terms of section 8(g) of the Insolvency Act and, by inference, that their liabilities exceeded their assets, brought an application for the compulsory sequestration of their joint estate.[223] The application for sequestration was set down for hearing in the high court on 25 August 2009, almost a year before the debt restructuring hearing was scheduled to be heard in the magistrate's court. The respondents opposed the application for sequestration of their estate. They did not dispute that they were indebted to the two applicant creditors in respect of a number of credit agreements,[224] including mortgage bonds passed over their immovable properties. However, they contended that sequestration amounted to the "enforcement" of a debt and that, in the circumstances, the creditors were barred by section 88(3) of the NCA[225] from applying for the sequestration of their estate while they awaited the court date for their debt restructuring hearing.

In terms of section 88(3) of the NCA, a credit provider may not exercise or enforce by litigation or any other judicial process any right or security under that agreement once such credit provider has received a notice from a debt counsellor of an application for debt review. The court, *per* Trengove AJ, observed that a sequestrating creditor's motive in applying for the sequestration of its debtor is often to obtain payment of its

[222] *Investec v Mutemeri* par 2.
[223] The court found that the respondents, having been married in Zimbabwe, impliedly admitted that they were married in community of property; see *Investec v Mutemeri* par 7.
[224] Although there was some dispute about the total amount outstanding; see *Investec v Mutemeri* pars 8-10.
[225] The respondents relied, in their defence, on ss 130(1) and 88(3) of the NCA, discussed at 4.5.2 and 4.5.4, above. See *Investec v Mutemeri* pars 2, 28.

debt.[226] However, the court stated that whether an application for sequestration amounts to an application "for an order to enforce a credit agreement"[227] depends not on the applicant creditor's underlying motive but on the nature of the relief.[228] The court concluded[229] that "the purpose and effect [of an application for sequestration] are merely to bring about a convergence of the claims in an insolvent estate to ensure that it is wound up in an orderly fashion and that creditors are treated equally."[230] Therefore, in the circumstances, the court held that, by applying for compulsory sequestration of the respondents' estate, the creditors were not trying to enforce the credit agreements[231] and thus the application for sequestration was not barred by section 88(3) of the NCA.[232] The respondents had stated under oath, in their application for debt review in terms of section 86 of the NCA, that they had assets of only R4 million and liabilities of R17,8 million. Considering this, the court concluded that they were "hopelessly insolvent".[233] Having found that the requirements of section 10 of the Insolvency Act had been met, the court issued an order for the provisional sequestration of the respondents' estate.[234]

Boraine and Van Heerden agreed with the finding of the court that sequestration does not amount to the enforcement of a debt, not only for the reasons given in the judgment, but also, *inter alia*,[235] on the basis that a successful application for compulsory sequestration "does not result in a civil judgment and does not convert the credit provider into a judgment creditor."[236] The authors submitted that sequestration should be viewed as a mechanism, *sui generis*, which sets a collective procedure in motion aimed at administering an insolvent estate on behalf of the insolvent's creditors in order

[226] *Investec v Mutemeri* par 27, with reference to *Estate Logie v Priest* 1926 AD 312 319.
[227] Within the meaning of s 130(1) of the NCA, discussed at 4.5.2, above.
[228] *Investec v Mutemeri* par 28.
[229] With reference to *Investec v Mutemeri* pars 29-30, *Collett v Priest* 1931 AD 290 and *Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd and Others* 1976 (2) SA 856 (W).
[230] *Investec v Mutemeri* par 31.
[231] And is thus not subject to the requirements of s 130(1) of the NCA; see *Investec v Mutemeri* par 31.
[232] *Investec v Mutemeri* par 34.
[233] *Investec v Mutemeri* pars 11-12.
[234] *Investec v Mutemeri* par 43.
[235] See additional reasons discussed by Boraine and Van Heerden 2010 *PELJ* 84 109-111.
[236] Boraine and Van Heerden 2010 *PELJ* 109.

to achieve an equitable distribution of the insolvent's assets.[237] It may be noted that the approach of the court in *Investec v Mutemeri* accords with earlier reported decisions[238] and academic opinions expressed elsewhere.[239] The Supreme Court of Appeal approved the reasoning behind the decision in *Naidoo v ABSA*. In *FirstRand Bank v Evans*, the court applied the same rationale and found that the NCA did not preclude a creditor from bringing an application for the sequestration of the debtor's estate.[240] The court, *per* Wallis J, pointed out that this conclusion avoids what would otherwise be an anomalous situation if the NCA precluded a credit provider from applying for the sequestration of the debtor while other creditors, who were not subject to the NCA, could do so.[241] However, the court went further, in *FirstRand Bank v Evans*, by finding that the debtor had committed an act of insolvency in terms of section 8(g) of the Insolvency Act through the process of debt review and debt rearrangement in terms of the NCA. This, and another issue, being the discretion of the court to grant or refuse an application for sequestration, which emerge from the judgment, merit consideration.

6.10.3 Application for debt review as an act of insolvency: FirstRand Bank v Evans

6.10.3.1 Facts and issues

FirstRand Bank v Evans concerned an application for the provisional sequestration of the estate of Evans. The bank alleged that he was indebted to it in an amount in excess of R2 million, obtained as a loan secured by two mortgage bonds passed over his home, as well as an amount in the region of R800 000, obtained as a commercial loan secured by a mortgage bond passed over another immovable property, a sectional title unit. FirstRand Bank relied on the commission by Evans of an act of insolvency in terms of section 8(g) of the Insolvency Act by giving written notice of an inability to pay his debts and, alternatively, that he was factually insolvent. According to the judgment,

[237] Boraine and Van Heerden 2010 *PELJ* 84, 111.
[238] See *WP Koöperatief Bpk v Louw* 1995 (4) SA 4 (O); *Samsudin v De Villiers Berrange NO* [2006] SCA 79 (RSA) par 19 citing with approval *Ex Parte B Z Stegmann* 1902 TS 40 47.
[239] See Otto and Otto *National Credit Act* 103-104; Van Heerden and Boraine 2009 *PELJ* 39-41; Sharrock *et al Hockly's Insolvency Law* 5.
[240] *FirstRand Bank v Evans* pars 23-25.
[241] *FirstRand Bank v Evans* par 25.

Evans had applied for debt review in terms of section 86 of the NCA, on 29 January 2009, and the bank was advised of this.[242] He addressed a letter to the bank, on 17 April 2009, informing it that: its records should show that he was under debt review; the mortgage bond repayment was being renegotiated and would be administered through the courts; and he was terminating the debit order against his bank account for the monthly instalment in respect of the commercial loan. The bank relied on this letter as constituting an act of insolvency.

On 18 May 2009, FirstRand Bank issued notice that it was terminating the debt review in terms of section 86(10) of the NCA.[243] On 16 July 2009, it issued summons against Evans for payment of an amount slightly in excess of R2 million, payment of which was secured by the two mortgage bonds over his home. The bank obtained default judgment and, presumably, an order declaring executable the immovable property constituting the home of Evans,[244] on 18 August 2009. Evans first heard of this when, on 12 March 2010, the sheriff served a notice of attachment at his residence informing him that a sale in execution of his home would take place on 28 May 2010.[245] It transpired that the summons had been served at the incorrect address. On 8 April 2010, the bank initiated the application for the sequestration of Evans' estate, based on both the judgment and an alleged amount of R841 940 owing in respect of their loan agreement. The court noted that the sequestration application made no mention of the attachment order or the sale in execution.[246]

Evans opposed the application for the sequestration of his estate. He furnished further information to the court, including the following. An application for the rearrangement of Evans' debt had been issued in the Durban Magistrate's Court on 3 July 2009 and an

[242] *FirstRand Bank v Evans* par 3.
[243] It should be borne in mind that this occurred prior to the decision of the Supreme Court of Appeal, in *Collett v FirstRand Bank*, discussed at 4.5.4, above, in which the effect of termination of debt review was settled.
[244] This is not specifically stated in the judgment.
[245] *FirstRand Bank v Evans* par 4.
[246] *FirstRand Bank v Evans* par 5.

order was made on 24 July 2009.[247] Evans provided details of regular monthly payments, from 28 August 2009 to 29 April 2010, in compliance with the debt rearrangement order, in respect of the two mortgage bonds and the loan agreement. In a letter to the bank's attorneys, Evans' attorneys had stated: "We cannot understand your client's persistence in prosecuting its claim against our client. In this regard we also refer to the ill-conceived sequestration application …".[248] Thereafter, Evans' attorneys had launched an urgent application to stay the sale in execution and to seek rescission of judgment and they filed an opposing affidavit in the sequestration application. The bank, in a replying affidavit, contended that the NCA was not a bar to an application for sequestration of the estate of the debtor and that, in any event, it had terminated the debt review. The bank also made the point that the amounts payable to it in terms of the debt rearrangement order were insufficient to service the loans as the amount of interest, due monthly, exceeded by about R4 000 the amount payable in terms of the order. The court noted that discrepancies in the figures presented by Evans, in relation to his income and expenditure, were impossible to reconcile.[249]

In October 2010, Evans informed the bank that he had sold the sectional title unit for an amount of R800 000 in excess of the value attributed to it by the bank.[250] By the time that the sequestration application was heard in February 2011, the default judgment had been rescinded by consent,[251] the sectional title property had been transferred to the purchaser, the mortgage bond passed over it having been cancelled, and the proceeds of the sale – an amount of R1 260 208,64 – had been paid to the bank. The proceeds had fully discharged the amount which had been owed to the bank in respect of the commercial loan agreement and the excess had been credited to Evans' loan

[247]This is the way in which it is expressed in the judgment, at par 6. It is not clear, it is submitted, what is meant when it is stated that an application for the rearrangement of debt was "issued" in the magistrate's court. Perhaps this means that it had taken from 29 January 2009 until 3 July 2009 for the debt review application to be enrolled in the magistrate's court? In relation to the debt rearrangement order, see also pars 10, 33, 34, 36, and 37. It may be noted, although the judgment is not clear on the details concerning it, that the court doubted the existence and validity of the debt rearrangement order. This point is discussed further, below.
[248]*FirstRand Bank v Evans* par 6.
[249]*FirstRand Bank v Evans* par 7.
[250]*FirstRand Bank v Evans* par 8.
[251]*FirstRand Bank v Evans* pars 6, 9.

indebtedness which was secured by the two mortgage bonds over his home. Although there was some dispute concerning the amount which ought to have been credited to his account, FirstRand Bank did not challenge Evans' claim that, in the circumstances, he could repay the interest and capital within less than the sixteen years that remained of the original 20-year term of the mortgage bond.[252] In spite of this, FirstRand Bank persisted in its application for the sequestration of his estate. It was argued on behalf of Evans that the NCA precluded such an application. Applying the reasoning in the decisions in *Investec v Mutemeri* and *Naidoo v ABSA*, the court rejected this argument. It was also contended on behalf of Evans that his letter did not constitute an act of insolvency but that, failing the acceptance of this argument by the court, it should exercise its discretion in favour of Evans to refuse to grant the order.[253]

6.10.3.2 The decision

The court, *per* Wallis J, stated at the outset that the purpose of a debtor applying for debt review in terms of section 86(1) of the NCA is always to obtain a declaration that he is over-indebted. Therefore, the court reasoned, "a debtor who informs his creditor that he has applied for, or is under, debt review is necessarily informing the creditor that he is over-indebted and unable to pay his debts."[254] The court considered the lapse of a period of almost a year between the date on which the letter was sent to the creditor and the date on which the application for sequestration was brought. It decided that the appropriate time for determining whether the reasonable person in the position of the creditor would have construed the letter as a notice of inability to pay, was when the letter was received. This was because "the question is what it means to the recipient at the time of its receipt."[255]

Wallis J viewed the most pertinent fact known to the bank at the time when it received the letter to be that Evans "was significantly in default of his obligation under both the

[252] *FirstRand Bank v Evans* par 10.
[253] *FirstRand Bank v Evans* par 11.
[254] *FirstRand Bank v Evans* par 13.
[255] *FirstRand Bank v Evans* par 15, with reference to *Optima Fertilizers (Pty) Ltd v Turner* 1968 (4) SA 29 (D), Meskin *Insolvency Law* par 2.1.2.7, and *Chenille Industries v Vorster* 1953 (2) SA 691 (O) 696 D-E.

bonds and the loan agreement." He reasoned that the bank, clearly familiar with the provisions of the NCA, would have construed the letter as unequivocally conveying to it that he was unable to repay the amounts borrowed in accordance with his contractual undertakings.[256] The court regarded such a construction as having been reinforced by the fact that Evans was in arrears with his payments and was cancelling a debit order by means of which he was supposed to be meeting his obligations arising from the loan agreement. The court concluded that Evans was "unequivocally conveying to … [the bank] that he was at that time unable to pay his debts".[257] Wallis J took into account the fact that the position is the same in relation to applications for administration orders in terms of section 74 of the Magistrates' Courts Act.[258] He stated that an application for debt review under the NCA, as opposed to any other type of request for debt rearrangement, did not change the fact that the letter was a notice of inability to pay debts.[259]

The main contention put forward on behalf of Evans was that the NCA precluded an application by FirstRand Bank for the sequestration of Evans' estate.[260] Counsel for Evans submitted that the effect of a debt rearrangement order is to alter the debtor's contractual obligation to the creditor, so that Evans was obliged to pay only a reduced sum, every month, in discharge of his indebtedness in terms of the mortgage bonds, and not the amount originally agreed upon.[261] However, the court did not regard a debt rearrangement order as altering the contractual obligation between the parties but as merely precluding the creditor from pursuing its contractual rights for as long as the debtor complies with the debt rearrangement order. Wallis J pointed out that, if the debtor does not comply with the debt rearrangement order, the creditor is not restricted to claiming remedies on the basis of "an amended contract". Instead, the bar, or "moratorium",[262] on exercising or enforcing by litigation or other judicial process any

[256] *FirstRand Bank v Evans* par 16.
[257] *FirstRand Bank v Evans* par 18.
[258] *FirstRand Bank v Evans* par 21, with reference to *Madari v Cassim* 1950 (2) SA 35 (D).
[259] *FirstRand Bank v Evans* par 22.
[260] See *FirstRand Bank v Evans* pars 23-25.
[261] *FirstRand Bank v Evans* pars 34, 35.
[262] *FirstRand Bank v Evans* par 35.

right or security under the credit agreement, is removed and the creditor is entitled to pursue in full its contractual remedies according to the terms of their original agreement.

However, the court stated that, once it is recognised that an application for sequestration does not constitute the enforcement of a credit agreement, it must follow that any moratorium to claiming payment under the credit agreement is not a bar to the grant of a sequestration order. According to this reasoning, the fact that a debt rearrangement order has been issued by the magistrate's court does not necessarily affect the situation.[263] An important consideration, in the view of Wallis J, was that, to hold "that the NCA operates to preclude credit providers from sequestrating the estates of their debtors, but does not prevent other creditors from doing so", would give rise to the anomalous position that credit providers would be placed in "a class of creditor excluded from invoking the mechanisms of the Insolvency Act".[264]

In the circumstances, the court decided that all of the requirements, contained in the Insolvency Act for the granting of a provisional sequestration order, had been met. In this regard, it stated that the bank had a liquidated claim against Evans for more than R100, Evans had committed an act of insolvency in terms of section 8(g) and sequestration would be to the advantage of creditors as the realisation of Evans' assets would result in a not negligible dividend for creditors. The court stated that there were also matters that could properly be investigated by a trustee, including, in view of discrepancies in the figures furnished by Evans, the source and amount of his income, the identity of his employer (whom the court suspected might be his 17 year old son), and the nature of his current business activities. All that remained, therefore, was for the court to consider whether it ought to exercise its discretion against granting a provisional sequestration order.[265]

Wallis J stated that he was unable to find much authority on how this discretion should be exercised. He noted that this might be an indication of how unusual it is for courts to

[263] *FirstRand Bank v Evans* par 35.
[264] *FirstRand Bank v Evans* par 25. Boraine and Van Heerden 2010 *PELJ* 118 also identified this anomaly.
[265] *FirstRand Bank v Evans* par 26.

exercise their discretion in favour of a debtor once all of the requirements had been established on a *prima facie* basis. He regarded the position as being that, in the absence of special, or unusual, circumstances, which the respondent must establish, the court should ordinarily grant the provisional sequestration order. In this regard, Evans relied on: the lapse of almost a year between the date on which the letter was sent and the date on which the application for sequestration was brought; his compliance with the debt rearrangement order between August 2009 and April 2010 in the course of which he reduced his indebtedness to the bank by R200 000; and the improvement in his overall financial position by reason of the sale of one of the mortgaged properties.

The court dismissed the argument that the lapse of time was material to the proper use of its discretion because it did not regard it as a clear case of an improvement in the debtor's financial position which would render the act of insolvency "stale".[266] On the contrary, the court expressed the view that it was clear, and "hardly surprising", why the bank brought the application for sequestration when it did. As the court saw it, the bank was confronted by the prospect of protracted litigation in respect of the default judgment which it had obtained against Evans. Further, Evans' indebtedness to it was mounting, with the payments which he was making in terms of the debt rearrangement order not even covering the interest charged in terms of the original agreement. It had therefore chosen to have recourse to sequestration proceedings. The court was also dismissive of Evans' anticipation of discharging his indebtedness to the bank as "overly optimistic"[267] and based on "a highly speculative assumption" about the improvement of his financial position.[268] The court was also apparently sceptical about whether Evans had engaged in full and frank disclosure to it about his financial circumstances.[269] Finally, on this point, Wallis J quoted the *dictum* of Innes CJ in *De Waard v Andrew &Thienhaus Limited*,[270] which included the statement: "Now, when a man commits an

[266] *FirstRand Bank v Evans* pars 30, 32.
[267] *FirstRand Bank v Evans* par 31.
[268] *FirstRand Bank v Evans* par 30.
[269] *FirstRand Bank v Evans* par 31.
[270] *De Waard v Andrew & Thienhaus Limited* 1907 TS 727.

act of insolvency he must expect his estate to be sequestrated. The matter is not sprung on him … ".[271]

However, Wallis J did accept that, in a clear case, where the debts have been rearranged by way of an order in terms of section 87 of the NCA and where it is apparent that this will result in the debts being discharged within a reasonable time, this would constitute a powerful reason for the court to exercise its discretion against the grant of a sequestration order.[272] In the circumstances, however, the court did not regard the matter before it as being such "a clear case" because it doubted the existence and validity of the debt rearrangement order.[273] Another factor that weighed against the exercise of the court's discretion in favour of Evans was that, in its view, the debt rearrangement order purported to extend his indebtedness to the bank far beyond the terms of the original agreements.[274] Wallis J also considered the submission made on behalf of Evans that he was in possession of sufficient income to pay his outstanding indebtedness to the bank in the ordinary course, by way of monthly instalments on a loan on conventional terms. Wallis J remarked that, if this was indeed the position, then there should be no reason why Evans could not either apply for reinstatement of his loan from the bank or obtain a loan from another financial institution. Wallis J suspected that he had not done this because his financial position was not as good as had been portrayed by counsel on his behalf. In the result, the court declined to exercise its discretion in favour of Evans, the respondent, and it granted an order for the provisional sequestration of his estate.[275]

[271] *FirstRand Bank v Evans* par 33, with reference to *De Waard v Andrew & Thienhaus Limited* 1907 TS 727 733.
[272] *FirstRand Bank v Evans* par 36.
[273] *FirstRand Bank v Evans* pars 35, 36. This aspect of the decision is discussed at 4.3, below.
[274] *FirstRand Bank v Evans* pars 38, 39.
[275] *FirstRand Bank v Evans* par 42.

6.10.3.3 Comments

The fact that the mortgaged property was Evans' home was never raised as an issue,[276] presumably because, apparently, he was sufficiently wealthy to afford alternative accommodation once the realisation of his home took place in the sequestration process. Nevertheless, it is submitted that, in principle, the fact that sequestration would result in the loss of his home ought to have been considered. Indeed, this judgment provides an ideal example of the lack of any consideration given to the home of a debtor in the course of sequestration proceedings.

Although it is correct that sequestration proceedings do not constitute enforcement of a debt, as was held in *Investec v Mutemeri* and *Naidoo v ABSA*, the court, in *FirstRand Bank v Evans*, extended the rationale behind those decisions to a novel situation, or sphere, hitherto not addressed by the courts. This is the situation where an application for debt review in terms of the NCA constitutes an act of insolvency for the purposes of the Insolvency Act. Further, the position was different, in *Investec v Mutemeri* and *Naidoo v ABSA*, in that those cases concerned situations where the debtor had applied for debt review, but not where a debt rearrangement order had already been issued by the magistrate's court.

In *FirstRand Bank v Evans*, the bank claimed that they had terminated the debt review in terms of section 86(10) of the NCA. On the other hand, Evans claimed that a debt rearrangement order had been issued by the magistrate's court and that he had complied with its terms by making regular payments to the bank in accordance with it. Wallis J doubted the existence and validity of the debt rearrangement order but adopted the approach that, in any event, the existence of a debt rearrangement order did not affect the situation because the NCA did not preclude an application for sequestration of the debtor's estate.[277] Unfortunately, it is submitted, the judgment does not make it clear

[276] Although, it may be noted, this fact was mentioned in counsel for the respondent's heads of argument (a copy of which is on file with the author), presented on the return day. The hearing took place on 26 August 2011.
[277] *FirstRand Bank v Evans* par 35.

what the reason might have been for its existence and validity being open to doubt[278] nor what the issue surrounding "the provisional debt re-arrangement order", as the court referred to it,[279] entailed. How it came about that a rule *nisi* was issued by the magistrate's court is not explained. Nor is the reference by the court to "the impact of the order for a stay of operation of the debt re-arrangement order".[280] It is submitted that clarity on the facts surrounding this issue would have been useful in order better to understand the court's justification for not exercising its discretion in favour of the debtor, in the circumstances, to dismiss the application for the sequestration order.

Wallis J referred to "protestations" by Evans' counsel that the effect of the court's approach would be that any debtor who informs his creditors that he has applied for debt review, or that he is in the process of debt review, commits an act of insolvency.[281] In response to this, with reference to the judgment of Caney AJ in *Madari v Cassim*,[282] Wallis J pointed out that a debtor who applied for an administration order in terms of section 74 of the Magistrates' Courts Act was in precisely that situation. However, it may be noted that, in *Madari v Cassim*, the situation was not exactly the same in that the debtor had applied for an administration order but it had not yet been granted. Therefore, when the creditor applied for the sequestration of the debtor's estate, the latter's obligations had not yet been restructured by a court order. Further, in *Madari v Cassim*, it was common cause that the respondent had committed an act of insolvency in terms of section 8(g) of the Insolvency Act by applying for an administration order in terms of section 74 of the Magistrates' Courts Act. In *Madari v Cassim*, the court discharged the provisional order of sequestration on the basis that advantage to creditors had not been shown, but also stated:[283]

[278] *FirstRand Bank v Evans* par 37.
[279] *FirstRand Bank v Evans* par 34. Reference was also made to it at pars 27 (containing a reference to "the interim debt arrangement order"), 30 (containing a reference to payments having been made "purportedly in terms of a debt re-arrangement order"), 33 (containing a reference to the "alleged debt re-arrangement"), and 37 (a reference to "the status of the debt re-arrangement order … [being] highly questionable").
[280] *FirstRand Bank v Evans* par 37.
[281] *FirstRand Bank v Evans* par 21.
[282] *Madari v Cassim* 1950 (2) SA 35 (D), hereafter referred to as "*Madari v Cassim*".
[283] *Madari v Cassim* 39.

> Even if I felt that there were reason *prima facie* to believe that sequestration would be to the advantage of creditors, I would not be disposed in this case to confirm the provisional order, but to exercise a discretion against doing so. I consider that where a debtor has applied for an administration order in the circumstances in which the respondent has, this is a special consideration disentitling the petitioner to his order, within the contemplation of what Broome J said at p 165 in *Port Shepstone Fresh Meat and Fish Co (Pty) Ltd v Schultz* (1940 NPD 163). In my opinion debtors such as the respondent, and in his circumstances, should not be deterred from using the machinery provided by sec 74 of the Magistrates' Courts Act, and creditors should, in general, show good reason for superseding applications under that section or otherwise allow their debtor at any rate an opportunity of being heard on his application if he has filed one with the clerk of the court.

The decision in *Port Shepstone Fresh Meat and Fish Co (Pty) Ltd v Schultz*, referred to in the passage quoted above, followed precedent established in *De Waard v Andrew & Thienhaus Limited*, which was also referred to by Wallis J.[284] However, it should be noted that the decision in *Madari v Cassim*, as indicated in the passage quoted above, qualified the statements made, in both of those cases, in relation to the entitlement of an applicant creditor to a sequestration order, in the circumstances. It is submitted that it ought also to be borne in mind that, in *Madari v Cassim*, despite the lack of complete candour on the part of the debtor in that, in his application for an administration order, he had failed to disclose two of his debts, the court indicated that it nevertheless would *not* have granted a sequestration order.[285] This is in contradistinction to the approach of Wallis J in *FirstRand Bank v Evans*.

It is submitted that Evans' substantial reduction of his indebtedness to the bank, by applying the proceeds of the sale of the mortgaged sectional title property to it, could have been regarded as "a special consideration disentitling the petitioning creditor to his order", as contemplated by Broome J in *Port Shepstone Fresh Meat and Fish Co (Pty) Ltd v Schultz*. This is referred to in the passage quoted from the judgment in *Madari v Cassim*. It is therefore submitted that it would have been appropriate, in the circumstances, to refuse to grant the sequestration order and, in light of his improved financial circumstances and the reduction of his indebtedness to the bank, to give

[284]See *Port Shepstone Fresh Meat and Fish Co (Pty) Ltd v Schultz* 1940 NPD 163 165. See, also, *FirstRand Bank v Evans* par 33.
[285]See *Madari v Cassim* 36.

Evans an opportunity to fulfil his obligations. This would also have been in keeping with the policy of consumer protection that is reflected in the NCA.

Otto and Otto stated that "[t]he exact influence of insolvency law on the National Credit Act, and vice versa, is something that still has to be worked out by the courts."[286] Indeed, the recent judgments seem to suggest that this is precisely what the courts are busy doing. Otto and Otto noted that Van Heerden had suggested that an application for debt review, in terms of the relevant provisions of the NCA, might constitute an act of insolvency in terms of the Insolvency Act.[287] Otto and Otto pointed out that, on the other hand, it could be argued that the "well-intentioned legislative initiative" reflected in the NCA's unique procedure, including debt review and rearrangement, would be frustrated if sequestration might "*ipso iure* follow upon an application for debt review". In other words, it could be argued that the NCA "as *lex specifica* should enjoy preference over the Insolvency Act … and insolvency law in this particular instance."[288] However, they left the question open, stating that it remained to be seen what the courts would decide in this respect. In *FirstRand Bank v Evans*, clearly, the court held that a letter by a debtor to the creditor conveying the fact of his application for debt review, in particular circumstances, constitutes an act of insolvency in terms of section 8(g) of the Insolvency Act.[289] Further, it seems that, as initially argued in *Nedbank v Andrews*, a proposal for debt rearrangement by the debtor in terms the NCA could amount to commission of an act of insolvency in terms of section 8(e) of the Insolvency Act.

It is submitted that the current position, especially in light of *FirstRand Bank v Evans*, undermines the effectiveness of the entire consumer debt relief system introduced by

[286]Otto and Otto *National Credit Act* 134.
[287]Otto and Otto *National Credit Act* 134, with reference to Van Heerden "The interaction between debt review in terms of the National Credit Act 34 of 2005 and insolvency law" in *Annual Banking Law Update* 23 April 2009 University of Johannesburg 153.
[288]Otto and Otto *National Credit Act* 134.
[289]However, it remains to be seen whether this decision will be followed. As mentioned above, it may be noted that, according to information obtained by the author from legal representatives of Evans, on 12 December 2011, judgment had not yet been delivered indicating whether the provisional order that had been granted by Wallis J, in *FirstRand Bank v Evans*, had been confirmed or discharged.

the NCA.[290] It may thwart debtors' *bona fide* and genuine efforts to access the formal statutory debt relief mechanisms and tend to encourage abuse of process by creditors who opt to sequestrate the debtors' estates in order to circumvent the NCA's requirements for the enforcement of debts arising out of credit agreements.[291] It is further submitted that a clear decision is required in relation to whether a creditor may obtain an order for the sequestration of the estate of a debtor who is making regular payments in compliance with a debt rearrangement order in terms of the NCA. While this may indeed be the position, as the NCA does not specifically preclude it, clarity is nevertheless required on how a court ought to exercise its discretion whether to grant or dismiss an application for a sequestration order in such circumstances. As far as the exercise of the court's discretion is concerned, Van Heerden and Boraine suggested that a court could, in an application for sequestration, determine that "a debt restructuring order should be maintained as it appears to be more advantageous than sequestration."[292]

The Supreme Court of Appeal stated in *Collett v FirstRand Bank*,[293] a case decided after *FirstRand Bank v Evans*, that an application by a debtor for debt review, to be declared over-indebted and to have debts arising from credit agreements rescheduled, are "novel concepts" introduced by the NCA with the purpose "to assist not only consumers who are overindebted, but also those who find themselves in 'strained' circumstances."[294] It is submitted that the effect of the decision in *FirstRand Bank v Evans* was to counteract such assistance which, in the circumstances, the debtor had sought and had already received. To have a situation where a debtor is making regular payments in accordance with a debt rearrangement order issued in terms of section 87 of the NCA, and yet his estate is nevertheless sequestrated by a creditor whose claim arises out of an obligation which is subject to the debt rearrangement order, leaves the

[290] A similar view was expressed by Kupiso 2011 *De Rebus* (November) 26. See, also, remarks by Otto and Otto *National Credit Act* 134.
[291] See Boraine and Van Heerden 2010 *PELJ* 117. See, also, 6.10.5, below.
[292] Van Heerden and Boraine 2009 *PELJ* 55.
[293] This case is discussed at 4.5.4, above.
[294] *Collett v FirstRand Bank* par 9. This passage was emphasised by counsel for Evans, in argument on the return day, on 26 August 2011. (Respondent's heads of argument on file with author.)

debtor in an anomalously vulnerable position. It is submitted that this could not have been what the legislature intended and reflects a *lacuna* in the provisions of the NCA.[295]

In the circumstances, it is submitted that statutory amendments should be brought about to provide for an explicit, workable relationship between the debt review process and sequestration. Consideration should be given to the suggestions made by Maghembe for amendment to relevant provisions of the NCA to preclude a creditor from bringing an application for the sequestration of the debtor's estate in specific circumstances.[296] However, it is submitted that even more extensive, legislative intervention is called for. It is submitted that *FirstRand Bank v Evans* indicates the need, on a practical level, for solutions to be found to combat or at least reduce credit grantors' and, more specifically, in the context of a debtor's mortgaged home, a mortgagee's opposition, or resistance, to debt review and debt restructuring as consumer debt relief measures that pose alternatives to sequestration.[297]

From the judgment in *FirstRand Bank v Evans*, it appears that the bank's main concern was the fact that the monthly payment due to it in terms of the debt restructuring order did not even cover interest which would have been due according to their original agreement.[298] Where this is indeed the case, one may appreciate why a mortgagee might prefer to proceed with the sequestration of the debtor's estate in order to have the assets, including hypothecated property, liquidated and the debt satisfied out of the proceeds of its sale.[299] It is submitted that, where a debt restructuring order covers a mortgage debt in respect of the debtor's home, it is imperative, from a practical perspective, that the restructured monthly mortgage instalment should constitute "reasonable alternative means for the mortgagee to obtain satisfaction of the debt", as

[295] See, also, remarks in this regard by Otto and Otto *National Credit Act* 134.
[296] After *Naidoo v ABSA*, Maghembe 2011 *PELJ* 178-179 suggested specific amendments to ss 88(3) and 129 of the NCA. See also Kupiso 2011 *De Rebus* (November) 26 who, at 27, seems to suggest, in light of the effect of the judgment, in *FirstRand Bank v Evans*, that amendments might be brought about.
[297] See, in this regard, Roestoff *et al* 2009 *PELJ* 247 298.
[298] *FirstRand Bank v Evans* par 7.
[299] Boraine and Van Heerden 2010 *PELJ* 120 cite this as one of the situations where they would anticipate that a creditor might wish to apply for the sequestration of a debtor's estate after a debt rearrangement order has been issued.

envisaged in *Gundwana v Steko*. Otherwise, the mortgagee will simply resort to an application for sequestration of the debtor's estate, as recently established precedent has confirmed it is entitled to do. This leaves the homeowner debtor in a vulnerable position despite having availed himself of the formal consumer debt relief measures afforded by the NCA.[300]

6.10.4 Applications for voluntary surrender and the NCA

Another significant case which featured the exercise of the court's discretion to grant or to refuse a sequestration order, but this time in relation to the voluntary surrender procedure, is *Ex parte Ford*. In this case, the Western Cape High Court, *per* Binns-Ward AJ, refused three unopposed applications for voluntary surrender. In each case, the applicant's debts arose mostly out of credit agreements[301] and the cumulative size of the debt was strikingly disproportionate to his or her income. Binns-Ward AJ considered the allegation by each applicant that he or she had "become insolvent by misfortune and due to circumstances beyond [their] control, without fraud or dishonesty on [their] part". In the absence of any other explanation for the extension of such high amounts of credit to them, Binns-Ward AJ concluded, in the circumstances, that there were "[g]rounds for cogent suspicion of at least some degree of reckless credit extension".[302] Bearing in mind that the NCA provides relief in the form of the setting aside of obligations arising out of reckless lending, the court considered referring the applicants to a debt counsellor in terms of section 85 of the NCA.[303]

The applicants were opposed to the application of the provisions of the NCA in their situations. Counsel for the applicants contended that section 85 was not applicable in proceedings for voluntary surrender because the court was not "adjudicating upon a

[300] A similar observation may be made in relation to administration, under s 74 of the Magistrates' Courts Act, although it may be borne in mind that, from a practical perspective, administration orders will be of limited application, in the context of protection of a debtor's home from forced sale, in view of the maximum debt limit of R50 000.
[301] Arising out of credit card debt, loans on overdraft, or otherwise; see *Ex parte Ford* par 2.
[302] *Ex parte Ford* par 3.
[303] *Ex parte Ford* pars 4-9.

credit agreement".[304] However, the court rejected this argument, finding that section 85 is cast in very wide terms in that a court could invoke it "in any court proceedings".[305] Further, in each application for voluntary surrender, the court "considered" a credit agreement in the sense that a credit agreement was taken into account as a relevant matter.[306] Thus, Binns-Ward AJ found that section 85 could, theoretically, be relied upon by the court to refer the matters to a debt counsellor. However, each of the applicants indicated in a supplementary affidavit that they were unwilling to seek debt counselling as they anticipated that, if they were subjected to debt restructuring, after seven years of servicing their existing debt, they would still be heavily indebted at the end of such period.

In view of the applicants' resistance to being referred for debt counselling, Binns-Ward AJ decided not to resort to section 85 of the NCA, but to leave it open to them to approach a debt counsellor on their own initiative. However, the court also decided not to grant their applications for voluntary surrender in view of their reluctance to subject themselves to administration under the NCA for the benefit of themselves and those creditors who had extended credit to them responsibly.[307] The court did not regard the applicants as being entitled to choose the form of relief most convenient to them but, on the contrary, viewed it as the court's duty to exercise its discretion by properly considering and giving due effect to the policy, reflected in the NCA, that favoured responsible credit grantors and encouraged full satisfaction of debts.[308] Binns-Ward AJ perceived a certain measure of "consonance between the objects of the relevant provisions of the NCA and the Insolvency Act … [in the aim] 'not to deprive creditors of their claims but merely to regulate the manner and extent of payment'."[309] The court concluded that, on the incomplete facts disclosed in the applications, the machinery of

[304] *Ex parte Ford* par 11.
[305] *Ex parte Ford* par 12.
[306] *Ex parte Ford* par 13.
[307] As distinct from the creditors who extended credit recklessly and might therefore, if the NCA were to be applied, be prevented from enforcing their obligations. See *Ex parte Ford* par 17.
[308] *Ex parte Ford* pars 19-20.
[309] With reference to *Nel NO v Body Corporate of the Seaways Building* 1996 (1) SA 131 (SCA) 138E.

the NCA seemed to be the more appropriate mechanism to be used in the circumstances.[310]

Thus, the approach adopted in *Ex parte Ford* was that, in an application for voluntary surrender, it is open to the court to resort to section 85 of the NCA.[311] In a case where a debtor owns a mortgaged home, the sequestration of his estate would invariably result in the realisation of his home by the trustee. On the other hand, debt review and, ultimately, debt restructuring would most likely result in the reduction of mortgage repayment instalments over an extended payment period so that the debtor might remain in his home. Where appropriate, it could also provide a "breathing space" for an over-indebted debtor thus providing him with an opportunity to sell his home on the open market and to make alternative accommodation arrangements in the interim. Admittedly, this course of action would pose a potential solution only in circumstances where the debtor has a regular income and the resources to maintain regular payments to service his debt.[312] However, from *Ex parte Ford* it is evident that when the legislature enacted the NCA, it did not articulate, nor apparently even consider, the nature or extent of the interface between the provisions of the NCA and the voluntary surrender procedure available to debtors under the Insolvency Act.

The "pro-creditor" approach of the court, in *Ex parte Ford*, would thwart any attempt by a debtor to avoid the payment of his debts by applying for voluntary surrender in circumstances where it would be possible for him to satisfy the debt in full over a period.[313] But, as pointed out by Van Heerden and Boraine, it should also be borne in mind that payment in full over a longer period does not necessarily constitute "advantage of creditors". It is conceivable that, depending on the particular circumstances, creditors may be better off receiving a dividend sooner, rather than later, and "cutting their losses" occasioned by the discharge which the debtor will receive

[310] *Ex parte Ford* par 21.
[311] Given that, in sequestration proceedings, there will always be an allegation of over-indebtedness, presumably this requirement will invariably be met. See Van Heerden and Boraine 2009 *PELJ* 51.
[312] See *Standard Bank v Hales* 2009 (3) SA 315 (D), discussed at 5.5.4.2, above; Van Heerden and Boraine 2009 *PELJ* 58.
[313] See Van Heerden and Boraine 2009 *PELJ* 53.

upon his rehabilitation.[314] It would seem that the debtor does not necessarily have a choice in the matter. Creditors might have more of a chance of their preferences being taken into account as they may intervene in sequestration proceedings – either in an application for voluntary surrender or for compulsory sequestration – if they believe the provisions of the NCA would better serve their interests.[315] It would appear that consideration of the provisions of the NCA might form part of the court's decision whether sequestration is to the advantage of creditors.[316] In sequestration proceedings, a court might even refer the matter to a debt counsellor in terms of section 85 of the NCA in order to be able to make an informed decision whether sequestration would be to the advantage of creditors.[317] A court might order that a debt restructuring, or debt rearrangement, order be maintained if it appears to be more advantageous to creditors than sequestration would be.[318]

Another common occurrence is that over-indebted debtors who own mortgaged immovable property apply for the voluntary surrender of their estates based on inflated valuations for their properties. As Bertelsmann J remarked in *Ex parte Ogunlaja and five other matters*,[319] it appeared that values were being inflated by sworn valuators in order to make it appear that sequestration would yield sufficient advantage to creditors. As the court stated, if this impression is correct, then it is clear that the process of voluntary surrender is being abused. Bertelsmann J emphasised that courts should be vigilant in relation to such abuses because, "as much as the troubled economic times might engender sympathy for debtors whose financial burden has become too much to bear, the insolvency law protects the interests of creditors at least to the extent that a minimum advantage must be ensured for the concurrent creditor … ".[320] Each of the six applications for voluntary surrender was dismissed for lack of proof that sequestration

[314] See Van Heerden and Boraine 2009 *PELJ* 51-52.
[315] Van Heerden and Boraine 2009 *PELJ* 52-53, 54; Boraine and Van Heerden 2010 *PELJ* 91, 113.
[316] Van Heerden and Boraine 2009 *PELJ* 56. See also Boraine and Van Heerden 2010 *PELJ* 115-116.
[317] Van Heerden and Boraine 2009 *PELJ* 55; Boraine and Van Heerden 2010 *PELJ* 117-118.
[318] Van Heerden and Boraine 2009 *PELJ* 55.
[319] *Ex parte Ogunlaja and five other matters* (GNP case no 53146/09; unreported judgment delivered in January 2010), on file with author, hereafter referred to as "*Ex parte Ogunlaja*", par 35.
[320] *Ex parte Ogunlaja* par 36.

would be to the advantage of creditors.[321] In each application, the valuation relied upon was in respect of a residential property.[322] Although no reference is made to the fact in the judgment, one may wonder if, in view of their over-indebtedness, the applicants' motive was to give up their homes, and thus rid themselves of their mortgage obligations, through the voluntary surrender process. If so, the requirement of advantage of creditors would have thwarted their attempts and they would have had to endeavour to resort to some other debt relief mechanism available.

In *Smit v ABSA Bank Ltd, Smit v ABSA Bank Ltd*,[323] the applicant spouses sought the acceptance of the voluntary surrender of their separate estates which comprised their only asset – their mortgaged home. According to the papers, sequestration of Mr Smit's estate would yield a dividend of 16,33 cents in the rand and sequestration of Mrs Smit's estate would yield a dividend of 10,84 cents in the rand. They relied on a forced sale valuation of their home of R900 000 and a mortgage bond balance of R744 864.[324] The mortgagee, ABSA Bank, sought leave to oppose the applications, pointing out that, according to its internal valuation, the market value of the property was R850 000 and the balance outstanding on the mortgage bond was R873 540,22. According to the bank's calculations, sequestration would not yield any dividend at all.[325] The court pointed out that the applicants' valuation was defective and did not comply with the requirements laid down in the case law. It also suspected that there might be additional assets the existence of which the applicants had not disclosed.[326] In the circumstances, the court bore in mind that there had been five postponements in the matter and that the applicants' attorney did not amend the papers, despite having been informed that they did not comply with the requirements. The court viewed the applicants' persistence in bringing the applications as vexatious. It granted the bank leave to intervene and, in

[321] *Ex parte Ogunlaja* par 33.
[322] *Ex parte Ogunlaja* par 20. The first application, by Ogunlaja, involved two immovable properties; see par 19.
[323] *Smit v ABSA Bank Ltd, Smit v ABSA Bank Ltd* (24086/10, 24088/10) [2011] ZAGPPHC 208 (8 November 2011), hereafter referred to as "*Smit v ABSA*".
[324] *Smit v ABSA* par 4.
[325] *Smit v ABSA* par 5.
[326] *Smit v ABSA* par 6.

view of the fact that the bank did not ask for a costs order on the attorney and client scale, dismissed the application for voluntary surrender with costs.[327]

6.10.5 Abuse of process

In the previous chapter, it was mentioned that the position, in the individual debt enforcement process, is that execution against the home should not be permitted where there has been an abuse of process.[328] This statement, which was first made by Mokgoro J in *Jaftha v Schoeman*, has been reiterated in numerous judgments. It is a reason for the requirement of judicial oversight. Generally, abuse of process is regarded as occurring where a person uses a court or legal process for a purpose or to achieve a result other than that for which it was designed or intended.[329] It is also referred to as an abuse of process where the result of a particular process is unfair, iniquitous or unconscionable.[330] It was submitted, in the previous chapter,[331] that Bertelsmann J, in *FirstRand Bank v Folscher*, extended this conception of "an abuse of process" to the situation where a judgment creditor seeks to execute against the debtor's home in circumstances where he could obtain satisfaction of the debt by alternative means.[332] It may be observed that references to abuse of process also abound in relation to the insolvency process,[333] especially in view of the fact that, in addition to the court's statutory discretion to grant or refuse a sequestration order,[334] it has inherent jurisdiction to prevent abuse of its process.[335]

A common occurrence has been the use of the compulsory sequestration process, in "friendly sequestrations", in an attempt "to pull the wool over the court's eyes", so to speak. This has occurred where debtors wanted their estates to be sequestrated, in

[327] *Smit v ABSA* pars 7-9. The court further directed that the attorney was not entitled to charge any fee or recover any expenses from the applicants.
[328] See 5.2.3, 5.5.2.2, 5.6.4.2 (d) and 5.6.8, above.
[329] See *Beinash v Wixley*, referred to at 5.6.4.2 (d), above.
[330] See, for example, *Standard Bank of SA Ltd v Essop* 1997 (4) SA 569 (D).
[331] See 5.6.4.2 (d), above.
[332] *FirstRand Bank v Folscher* par 40.
[333] See, for example, Evans 2001 *SA Merc LJ* 485 and Evans 2002 *Int Insol Review* 13.
[334] See ss 6, 10 and 12 of the Insolvency Act.
[335] See Meskin *Insolvency Law* 2.1.5 and 2.1.8.

order to be relieved of harassment by creditors in circumstances where they knew that they would not be able satisfactorily to establish that sequestration would be to the "advantage of creditors".[336] A "friendly sequestration" is not *per se* an abuse of process, as long as the requirements for a compulsory sequestration are satisfied. However, an abuse has been identified where an application is brought by a creditor in a "friendly sequestration" where the motive is not to liquidate the debtor's assets, in order to achieve the payment of debts, but to prevent or forestall an imminent sale in execution of the debtor's property. This occurred, for example, in *Mthimkhulu v Rampersad*, in an effort to prevent the sale in execution of the debtors' home at the instance of the mortgagee.[337]

Another form of abuse of process identified by the courts occurs in the inflation of valuations of assets, in applications for voluntary surrender, in an attempt to create the impression that, after sequestration, there would be sufficient free residue for distribution to creditors to constitute advantage to creditors. In *Ex parte Ogunlaja*, and in *Smit v ABSA*, the courts dismissed the applications for voluntary surrender on the basis of defective valuations.[338] In effect, therefore, the debtors could not gain access to the insolvency system and could not derive the benefit of any discharge from liability which would have been the consequence of rehabilitation after the sequestration process had run its course. If the mortgagees were to execute against the mortgaged properties,[339] in the individual debt enforcement process, and the proceeds of their sale in execution did not satisfy the mortgage bond debt, the debtors would remain liable for the shortfall. The result, as has been highlighted by numerous commentators, is that if a debtor is

[336]See Evans 2001 *SA Merc LJ* 485 and Evans 2002 *Int Insol Review* 13; Meskin *Insolvency Law* 2.1.5 and references cited there.
[337]See 6.4.2, above. See, also Meskin *Insolvency Law* 2.1.5.
[338]See 6.10.4, above.
[339] Without wishing to speculate, it would appear that the mortgagee might indeed have obtained a writ of execution against Mr Ogunlaja, the first applicant in *Ex parte Ogunlaja*. According to notices published in the *Government Gazette*, a sale in execution of a residence belonging to Ogunlaja was advertised to be held on 27 August 2009 and again on 25 March 2010. See Legal Notice 32465 in *GG* of 7 August 2009 page 107 and Legal Notice 32984 in *GG* of 5 March 2010 page 83. The unsuccessful application for voluntary surrender was brought by Ogunlaja in January 2010, that is, between the two advertised dates for the sales in execution.

"too poor" to be declared insolvent, he often finds himself in a debt trap with little prospect of any escape.[340]

In *Ex parte Ford*, no abuse of process was alleged or identified. However, the court was of the view that to allow sequestration might produce an unfair result for those creditors who had acted responsibly in extending credit to the debtors seeking to surrender their estates, in circumstances where there were indications that other creditors might have been guilty of reckless lending.[341] The court also regarded the consumer debt relief processes provided for in the NCA as the more appropriate route, in the circumstances, in light of the need for debtors to take responsibility for the debts which they had incurred.[342] Thus, the court adopted what may be regarded as a creditor-orientated approach in rejecting their applications for voluntary surrender and refusing to grant sequestration orders.[343] The court indicated that the NCA's debt relief processes should first be considered.[344]

Considering matters in which a creditor seeks the sequestration of the debtor's estate but the debtor opposes the application because he would prefer to opt for consumer debt relief measures provided by the NCA, it may be noted that the authors, in Meskin *Insolvency Law*, point out that, in *Estate Logie v Priest*, [345] Solomon JA stated that:[346]

> it is perfectly legitimate for a creditor to take insolvency proceedings against a debtor for the purpose of obtaining payment of his debt. In truth that is the motive by which persons as a rule are actuated in claiming sequestration orders.

The authors also refer to *Vincemus Investments (Pty) Ltd v Laher (ABSA Bank Ltd as intervening creditor)*,[347] in which it was stated:[348]

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[340]See 6.2 and 6.4.1, above.
[341]*Ex parte Ford* par 20.
[342]*Ex parte Ford* par 21.
[343]See Van Heerden and Boraine 2009 *PELJ* 53.
[344]See 6.10.4, above.
[345]*Estate Logie v Priest* 1926 AD 312.
[346]*Estate Logie v Priest* 1926 AD 312 319, referred to in Meskin *Insolvency Law*2.1.
[347]*Vincemus Investments (Pty) Ltd v Laher (ABSA Bank Ltd as intervening creditor)* [2008] JOL 22629 (C).
[348]Meskin *Insolvency Law* 2.1 n 1 quoting from *Vincemus Investments (Pty) Ltd v Laher (ABSA Bank Ltd as intervening creditor)* [2008] JOL 22629 (C) par 10.

> absent any proof of an abuse of the court's process, it is perfectly legitimate for a creditor to institute sequestration proceedings against a debtor for the purpose of obtaining payment of an unpaid debt ….

They point out further, however, that in *Investec v Mutemeri*, Trengove AJ stated that:[349]

> while the creditor's underlying motive may be to obtain payment of his debt, an application for sequestration in fact does not constitute proceedings for the recovery of a debt, but rather "[i]ts purpose and effect are merely to bring about a convergence of the claims in an insolvent estate to ensure that it is wound up in an orderly fashion and that creditors are treated equally…. The order for the sequestration of the debtor's estate is thus not an order for the enforcement of the sequestrating creditor's claim."

Therefore, the position appears to be that, although an application for the sequestration of a debtor's estate does not constitute proceedings to enforce the debt, a creditor is entitled, in the absence of an abuse of process, to apply for the sequestration of the debtor's estate where the underlying motive or purpose is to enforce the debt. Strictly speaking, therefore, where a creditor applies for the sequestration of a debtor's estate in circumstances where, *prima facie*, the requirements for sequestration are able to be established, this does not necessarily constitute an "abuse of process". However, it is submitted that, where a creditor does this in order to circumvent the requirements of the NCA, or to avoid being bound by a restructuring order issued by the magistrate's court in terms of the NCA, the court should refuse to grant the sequestration order on the basis that it would tend to frustrate the legislative purpose behind the NCA.[350] An argument could also be made out, employing a similar conception of an "abuse of process" as that which was adopted, in the individual debt enforcement process, by the court in *FirstRand Bank v Folscher*. This would be that it is iniquitous that, in consequence of the sequestration of the estate of a homeowner consumer debtor, he will lose his home while the creditor could obtain satisfaction of the debt by the alternative means provided by a debt restructuring order issued in terms of the NCA.[351]

[349] Meskin *Insolvency Law* 2.1, quoting from *Investec v Mutemeri* par 31.
[350] See, also, comments by Otto and Otto *National Credit Act* 134, quoted at 6.10.3.3, above.
[351] See *FirstRand Bank v Folscher* par 40, discussed at 5.6.4.2 (d), above.

6.10.6 The need for alignment between sequestration and other debt relief mechanisms

Of concern, it is submitted, is the lack of alignment, in a coherent system and procedure, between the different consumer debt relief mechanisms available in South Africa. Further, as things stand, our system, including provision for sequestration of insolvent estates in terms of the Insolvency Act and for debt review and debt restructuring measures in terms of the NCA, does not conform to internationally recognised principles and recommendations in relation to rehabilitation procedures as alternatives to procedures involving the liquidation of a debtor's assets.[352] It may be noted that internationally, a more debtor-orientated approach is advocated.[353] In Chapter 7, some of the debt relief mechanisms and, especially those which assist a debtor in protecting his home from forced sale, will be canvassed. Significantly, in the formulation of principles that underlie the resolution of consumer debt problems, the INSOL International *Consumer Debt Report II* states:[354]

> … [F]or effective help to be made available to the consumer debtor, it should not be structured solely by way of discharge through bankruptcy proceedings, which will be mainly court-driven procedures requiring the involvement of a [*sic*] insolvency representative or administrator. …
>
> Help should also be directed at both finding a solution for the adverse financial situation and, as far as possible, preventing the debtor from getting into debt again. This may also require an out-of-court or extra-judicial approach and the involvement of a debt counsellor, a consumer advisory bureau or a social worker.

As part of the "first principle" established in the INSOL International *Consumer Debt Report II*, it is recommended that a debtor should be free to choose between a liquidation procedure and a rehabilitation procedure.[355] A rehabilitation procedure is defined as one which "is designed to give the consumer debtor time to recover from temporary or more permanent liquidity difficulties and provide a way, through debt counseling or debt-restructuring, to reorganize his financial affairs." It is also

[352]See INSOL International *Consumer Debt Report II* 1-24.
[353]See INSOL International *Consumer Debt Report II*, referred to at 6.10.6, above; INSOL International *Consumer Debt Report* 2001; Evans 2010 *CILSA* 337; Van Heerden and Boraine 2009 *PELJ* 53; Calitz 2007 *Obiter* 397; Roestoff and Renke 2005 *Obiter* 561 and Roestoff and Renke 2006 *Obiter* 98.
[354]INSOL International *Consumer Debt Report II* 10-11.
[355]INSOL International *Consumer Debt Report II* 16.

recommended that, upon the successful completion of the procedure, "the debtor will obtain discharge or prepare a rehabilitation plan, composition or scheme of arrangement which is typically required to be approved by a majority of the creditors … and … by the court."[356] Forming part of the "first principle" is also the recommendation that:[357]

> Creditors should be prohibited from pursuing the debtor during the insolvency process. If this were otherwise, creditors who chose not to be bound by the process would prevail over those utilizing the collective mechanism.
>
> In addition the law should take into account the issues that are generally provided for in any insolvency law. In this respect reference is made to provisions regarding the handling of encumbered assets and the position of secured creditors, treatment of contracts … and the priority of distribution.

It is submitted that by "insolvency process", referred to in this "first principle", is meant the consumer debt relief process which includes both liquidation and rehabilitation procedures. It would appear that, as illustrated by cases such as *Investec v Mutemeri*, *Naidoo v ABSA*, *FirstRand Bank v Evans* and *Ex parte Ford*, the South African consumer debt relief mechanisms do not conform to these recommendations in at least the following respects.

- According to *FirstRand Bank v Evans* and *Ex parte Ford*, a debtor is not free to choose between the liquidation process provided for by sequestration in terms of the Insolvency Act and the "rehabilitation procedure" posed by debt review and debt restructuring provided for by the NCA.
- There is no discharge available to the debtor who undergoes the NCA's "rehabilitation procedure".
- In light of *Investec v Mutemeri*, *Naidoo v ABSA* and *FirstRand Bank v Evans*, a creditor who chooses not to be bound by the NCA's process is entitled, in effect, to "pursue" the debtor during such process by applying for, and obtaining, an order for the sequestration of the debtor's estate. The effect is that the creditor who insists on sequestration "prevail[s] over those utilizing the collective mechanism" provided for by the NCA.

[356] INSOL International *Consumer Debt Report II* 12.
[357] INSOL International *Consumer Debt Report II* 17.

- In the "rehabilitation procedure" afforded by the NCA, when a magistrate's court issues a debt restructuring order, it has the power, in effect, to override or overlook "provisions regarding the handling of encumbered assets and the position of secured creditors, treatment of contracts … and the priority of distribution". This is because it can restructure obligations between the debtor and even a secured creditor, such as a mortgagee of the debtor's home, without the secured creditor's specific agreement on the restructured terms.[358] The resultant restructured payment terms may be unsatisfactory, or even untenable, from the perspective of the mortgagee.

As mentioned above,[359] for years, academic commentators have called for an appropriately effective, easily accessible, consumer debt relief mechanism as an alternative to the sequestration, or liquidation, process currently available in terms of the Insolvency Act.[360] They have expressed the desirability of a legislative and administrative framework that facilitates "single portal access" to the consumer debt relief system.[361] It is submitted that the judgments in *Ex parte Ford*, *Investec v Mutemeri*, *Naidoo v ABSA*, and *FirstRand Bank v Evans* illustrate, and tend to confirm, such a need. It is within this context that it is submitted that a suitably revised and modified version of the pre-liquidation procedure, proposed as section 118 of the unofficial working draft of a proposed Insolvency and Business Recovery Bill, discussed above,[362] holds the potential to be the alternative debt relief mechanism envisaged by commentators.[363]

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[358]This is referred to, in American parlance, as "cram down"; see 7.2.3, below.
[359]See 6.4.3, above.
[360]See, also, 6.2 and 6.4.3, above. For ease of reference, the following citations are repeated from 6.4.3. See Boraine and Roestoff 1993 *De Jure* 229; Evans 2001 *SA Merc LJ* 485 508; Boraine 2003 *De Jure* 217; Calitz 2007 *Obiter* 414; Boraine and Roestoff 2002 *Int Insolv Rev* 1, 11; Van Heerden and Boraine 2009 *PELJ* 58, 161; Evans 2010 *SA Merc LJ* 483; Evans 2011 *PELJ* 39 52; Coetzee "Personal bankruptcy and alternative measures".
[361]See Calitz 2007 *Obiter* 414, with reference to Boraine 2003 *De Jure* 217. See also, for example, Boraine and Roestoff 2000 *Obiter* 267; Van Heerden and Boraine 2009 *PELJ* 59.
[362]See 1.6, 4.4.3.6 and 6.4.3, above.
[363] See Evans 2001 *SA Merc LJ* 505-506, 508, in relation to the proposed s 74X. Coetzee's submissions, in "Personal bankruptcy and alternative measures", echoed sentiments expressed, in relation to the proposed s 74X, by Boraine 2003 *De Jure* 230; Boraine "Reform of Administration Orders" 197.

It is submitted that a revised version of the proposed section 118 may provide a solution for over-indebted homeowners who wish to avert the forced sale of their homes and who have at least some regular income which they may apply towards restructured debts over a longer period than that for which the parties originally contracted. In terms of the proposed section 118, the claims of secured and preferent creditors remain unaffected unless they consent in writing to an amendment of their obligations. However, a debtor may have his debts to concurrent creditors restructured and made payable by lower regular instalments over a longer period. It is submitted this aspect of the proposed provision would tend to counter the nature and level of opposition to debt restructuring, especially by a mortgagee of the debtor's home, as was encountered in *FirstRand Bank v Evans*, as long as the terms of the restructuring orders are feasible.

An advantage of the proposed section 118 is that it would apply in respect of all types of debts and not only those arising from credit agreements, as is the position under the NCA. This would rule out the anomaly, alluded to by Boraine and Van Heerden and by Wallis J in *FirstRand Bank v Evans*, which would arise if it were to be held that a credit provider is barred from applying for the sequestration of a debtor's estate after the latter has applied for debt review in terms of the NCA.[364] It would also be more useful than an administration order issued in terms of section 74 of the Magistrates' Courts Act, with its limited application to cases where the total debt does not exceed an amount of R50 000 and its exclusion of *in futuro* debts.[365] Further, in terms of the proposed section 118, where the composition procedure has been successfully completed, at the end of the repayment period, the debtor stands to benefit by a measure of discharge from liability. This aspect would address criticisms by commentators and bring our system more in line with internationally recognised consumer debt relief policies.[366]

The fact that the section 118 pre-liquidation composition procedure is located in proposed insolvency legislation has the advantage that an appropriately modified provision could allow the court to determine, within the framework of a single insolvency

[364]See Boraine and Van Heerden 2010 *PELJ* 118; *FirstRand Bank v Evans* par 25.
[365]See Boraine 2003 *De Jure* 217.
[366]See INSOL International *Consumer Debt Report II* 12; Boraine 2003 *De Jure* 217.

statute, whether a repayment plan or a liquidation process is more appropriate, depending on the particular circumstances of the case. Provision could also be made for simple, streamlined conversion, where appropriate, between the two processes. The need for this might arise, for instance, where the debtor fails to comply with the terms of the repayment plan. Thus, the interface and the relationship between the repayment plan, or "pre-liquidation composition" procedure, and the liquidation procedure could be explicitly stated in the single insolvency statute in which they would both operate.

It may be noted that the pre-liquidation composition procedure, originally proposed as a new section 74X of the Magistrates' Courts Act, incorporated a subsection 16 in terms of which, where a debtor's offer of composition was rejected by creditors, the debtor could opt to have his estate liquidated in terms of the Insolvency Act.[367] This part of the provision does not appear in section 118 of the unofficial working draft of a proposed Insolvency and Business Recovery Bill, presumably in light of criticisms levelled at the potential of section 74X for encouraging an abuse of the process by debtors.[368] It is submitted that the omitted text, suitably modified to counter this potential effect, might be considered for re-incorporation in the proposed section 118 to provide for convenient mobility between the composition and liquidation procedures at the instance of either the debtor or a creditor, where circumstances require it. Further, currently, section 118(23) provides that, between the date of determination of a date for a hearing and the conclusion of the hearing, the creditors may not institute any action against the debtor, or apply for the liquidation of the debtor's estate, without the permission of the court. Section 118(19) provides for the revocation of the composition by the court in certain circumstances, such as where the debtor has failed to comply with its obligations. Presumably, in such circumstances, the estate of the debtor may thereafter be liquidated. However, these are details for specific consideration in the formulation of a new, appropriately devised and worded provision in the applicable insolvency legislation.

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[367]See the proposed s 74X(16) of the Magistrates' Courts Act, contained in the *Report on the Review of the Law of Insolvency*, of February 2000. See also par 124.1 of the *Explanatory Memorandum* to the *Draft Insolvency Bill* of February 2000. The Commission's report refers to Roestoff and Jacobs 1997 *De Jure* 189.

[368]See Boraine and Roestoff 2002 *Int Insolv Rev* 9.

6.11 Implications for insolvency law of recent developments in the individual debt enforcement process

There have been no reform initiatives in insolvency law in relation to the home of the insolvent. The South African Law Reform Commission's report on its review of the law of insolvency, completed in February 2000, did not contain any proposal for protection of any sort for the home of an insolvent, nor for that matter was there even any reference to it.[369] Further, despite the developments which have taken place in the individual debt enforcement process, from the delivery of judgment in *Jaftha v Schoeman* onwards, the most recent unofficial working draft of a proposed Insolvency and Business Recovery Bill, compiled in 2010, makes no provision for any changes in the treatment of the insolvent's home in the liquidation process.[370] It is submitted that this is surprising because, as in relation to execution in the individual debt enforcement process, the realisation of an insolvent's home by the trustee during the sequestration process may, in certain circumstances, constitute unjustifiable infringement of the insolvent's, his family's and dependants' section 26, section 28 and other rights.[371]

In every application for sequestration, whether or not the issue is raised by the insolvent, his spouse or partner or their dependants, their rights to have access to adequate housing and the relevant rights and interests of any children[372] ought to be specifically addressed by the court.[373] The purpose of the required judicial scrutiny would be to ascertain whether there is any abuse of process and whether realisation of the insolvent's home by the trustee will be an unjustifiable infringement of his and his

[369]See Roestoff *'n Kritiese Evaluasie* 370-371, 394-395, referred to by Evans "Does an insolvent debtor have a right to adequate housing?". See, also, Boraine and Roestoff 2002 *Int Insolv Rev* 10, for a reference to the need to consider the position with respect to the family home.
[370]See 1.6, above. As already mentioned at 6.4.3, the unofficial working draft of a proposed Insolvency and Business Recovery Bill uses the term "liquidation" in place of "sequestration", as it is currently referred to in the Insolvency Act.
[371]See 3.3.1 and 3.3.3, above. This part of the text is based largely on, and has developed out of research done subsequently to, Steyn '"Safe as Houses?"'. See, also, Evans "Does an insolvent debtor have a right to adequate housing?".
[372]This point is also made by Evans "Does an insolvent debtor have a right to adequate housing?".
[373]This is also discussed at 6.3.2, above.

family members' rights. More specifically, the purpose would be to prevent them from being rendered homeless in consequence of sequestration. Such a requirement would conform to constitutional imperatives and bring the position into line with that in the individual debt enforcement process. In *Jaftha v Schoeman*, the Constitutional Court stated that execution against a person's home should take place only as a last resort[374] and, in *Gundwana v Steko*, it stated that, where reasonable alternative means exist to obtain satisfaction of the debt, execution should not be permitted.[375] With this in mind, it is submitted that, likewise, even where the debtor is factually insolvent, realisation of his home should occur only as a last resort, where no reasonable alternative exists.

Evans has proposed that measures should be put in place for the housing position of the debtor, and his dependants who share his home, to be considered prior to an application for sequestration.[376] This would be preferable, especially in light of the fact that sequestration might not be to the advantage of creditors if the home, often the most valuable asset, were to be placed beyond the reach of creditors and, therefore, the sequestration order should not even be granted. It is agreed that consideration of the section 26 and section 28 rights of the debtor and his family should occur as early in the process as possible. However, it is submitted that, often, not all relevant circumstances are known, at the application stage, but are only revealed once the trustee has been appointed and he has commenced his duties. It is therefore important that the evaluation by the court should not be completed until all relevant factors have been ascertained but, obviously, that it should occur before the home is realised by the trustee for the benefit of creditors.

Taking all relevant circumstances into account, the court should evaluate the position to decide whether the trustee may go ahead with the immediate realisation of the home of the insolvent. By "relevant circumstances" is meant circumstances of the same kind as those referred to in judgments concerning execution against a person's home in the

[374] *Jaftha v Schoeman* par 59.
[375] *Gundwana v Steko* par 53.
[376] Evans "Does an insolvent debtor have a right to adequate housing?".

individual debt enforcement process,[377] taking into account, where appropriate, any differences which exist in the purposes served by the ordinary civil process, as opposed to the insolvency process. The various affected parties' interests, including, where appropriate, the legitimate interests of society, generally, should be balanced with a view to ensuring that an insolvent's home is sold only in circumstances where the infringement of rights is justified in terms of section 36 of the Constitution. As in the individual debt enforcement process, it is judicial oversight which is required and, therefore, neither the Master nor the trustee may determine whether, or when, an insolvent's home may be realised by the trustee of an insolvent estate.

During the balancing process in the insolvency context, it is important to acknowledge the differences in the weighting of the interests of secured, preferent and concurrent creditors, respectively, in relation to the interests of the insolvent and his dependants. It is anticipated that there may be circumstances in which, after evaluation of a mortgagee's security interests, where the insolvent is not indigent, but has access to at least some resources and, perhaps, some equity in his home, the sale of the home may be justifiable *vis-à-vis* the mortgagee. However, consideration of the factors which are relevant in the "balancing process" may yield a different result in relation to unsecured creditors. Bearing in mind the principles and guidelines set out in *Jaftha v Schoeman*, *Gundwana v Steko*, and other judgments, such as *ABSA v Ntsane*[378] and *FirstRand Bank v Maleke*,[379] it may not be justifiable to sell the home and deprive the insolvent of the equity which he holds in the property, for the benefit of unsecured creditors because there is no counter-balancing real right of a mortgagee, in the hypothecated home, to include in the complex matrix of factors. It is submitted that, if the required limitation analysis is properly carried out, it could yield a result that would entail that, once the home is sold, any proceeds or, possibly, depending on the particular circumstances, a portion of them, which would ordinarily have fallen into the free residue and would have been distributed to preferent and concurrent creditors, ought instead to be retained or,

[377]Such as referred to in *Jaftha v Schoeman*, *Nedbank v Mortinson*, *Gundwana v Steko* and *FirstRand Bank v Folscher*, discussed in Chapter 5.
[378]Discussed at 5.5.2, above.
[379]Discussed at 5.5.4.3, above.

more accurately, returned, to the insolvent. Thus, it may not be feasible, on a practical level, always to achieve a wholly satisfactory solution.

Commentators have suggested that treatment of an insolvent debtor's home should be reconsidered in light of the recognition of fundamental rights protected by the Constitution and more recent developments, in relation to a debtor's home, in the individual debt enforcement process.[380] One suggestion is that specific legislative provisions should allow the court to postpone the realisation of the insolvent's home, where appropriate, in order for the insolvent to make suitable alternative accommodation arrangements for himself and his dependants, especially in cases concerning children, particularly those with special needs, the elderly and the infirm.[381] A delay in the realisation of the home by the trustee of an insolvent estate might also provide the insolvent with a period of grace within which to reach a mutually satisfactory statutory composition with his creditors or to make arrangements to refinance the home or even for a family member to purchase it from the insolvent estate.[382]

Further, in the interests of legal certainty, it may pose a solution to exempt, by specific statutory enactment, homes of low value which have not been mortgaged in favour of any creditor.[383] In *Jaftha v Schoeman,* the Constitutional Court gave the notion of a "blanket exemption" for the debtor's home a wide berth. However, it is submitted that it may merit more careful consideration, especially in light of subsequent developments. Academic commentators have suggested an exemption from forced sale, in both the individual debt enforcement and the insolvency process, of a "low value" home and,

[380]See Evans "A brief comparative analysis"; Evans "Does an insolvent debtor have a right to adequate housing?"; Evans *Critical Analysis* 474-475; Els 2011 *De Rebus* (October) 23; Boraine, Kruger and Evans "Policy Considerations" 694-696; Van Heerden and Boraine 2006 *De Jure* 347ff; Van Heerden, Boraine and Steyn "Perspectives" 261ff.
[381]It may be noted that these suggestions are based largely on the statutory protection of the sort provided for in England and Wales, discussed at 7.5, below. See, also, Evans "A brief comparative analysis"; Evans "Does an insolvent debtor have a right to adequate housing?";Boraine, Kruger and Evans "Policy Considerations" 694; Van Heerden, Boraine and Steyn "Perspectives" 262; Evans *Critical Analysis* 474-475; Evans 2008 *De Jure* 270-271.
[382]For instance, in *Badenhorst v Bekker NO en andere* 1994 (2) SA 155 (N), the insolvent spouses' home was purchased by the wife's father, from the insolvent estate, for them to continue to live in it.
[383]Boraine, Kruger and Evans "Policy Considerations" 694.

particularly, one in which a state subsidy was provided for its acquisition.[384] Evans advocates that it should become entrenched policy completely to exclude low value homes from the reach of creditors in general and he goes further to suggest that the passing of mortgage bonds over low value homes, in order to access capital, should be prohibited.[385] It should be noted that, if this change in the law is considered, then the proposed amendment to section 10A and 10B of the Housing Act[386] would also need to be revisited. It is submitted that exemptions, or the nature and level of protection provided, should, as far as is practical and possible, be mirrored in the individual debt enforcement and insolvency procedures.[387]

In the circumstances, it is submitted that legislative intervention is required to provide, in all applications for the sequestration of a debtor's estate, for judicial consideration of "all the relevant circumstances" pertaining to the home of the insolvent. It is hoped that, in any new insolvency statute, clear policies will be formulated and applied in determining the nature and level of exemptions to be permitted in order to uphold the constitutional rights, including housing and children's rights, of the insolvent and his family. Logically, any exemption of the home or of any of the proceeds of its sale would impact on, and could be justifiable on the basis of, the ultimate level of discharge for the insolvent.[388]

The inadequacies of statutory consumer debt relief measures currently available in South Africa, in the form of an administration order in terms of section 74 of the Magistrates' Courts Act and debt review and debt restructuring in terms of the NCA, as

[384]Van Heerden and Boraine 2006 *De Jure* 352 argued for exemption from execution of state-subsidised houses. Evans "Does an insolvent debtor have a right to adequate housing?" also argues for exemption of low value, including state-subsidised, homes. Steyn 2007 *Law Dem Dev* 118-119 did not regard an exemption as a "ready solution" to the problem and submitted that a thorough enquiry would first need to be conducted.
[385]See discussion at 6.6.3, above, and Evans "A brief comparative analysis"; Evans "Does an insolvent debtor have a right to adequate housing?". See, also, earlier comments by Evans *Critical Analysis* 423-424, 474; Evans 2008 *De Jure* 270. Cf *Standard Bank v Bekker* par 23, with reference to *Jaftha v Schoeman* par 58, discussed at 5.6.6, above.
[386]See 4.2.2, above.
[387]See Evans 2010 *SA Merc LJ* 477 and further discussion of this aspect at 6.6.2, above. See, also, pertinent remarks by Van Heerden and Boraine 2006 *De Jure* 349; Van Heerden, Boraine and Steyn "Perspectives" 265.
[388]See Boraine, Kruger and Evans "Policy Considerations" 666, also referred to at 6.6.3, above; Evans 2008 *De Jure* 255; McKenzie Skene 2011 *Int Insolv Rev*29; McKenzie Skene 2005 *Int Insolv Rev* 1 14; van Apeldoorn 2008 *Int Insolv Rev* 57; Rajak 2011 *Int Insolv Rev* 1-28.

alternatives to sequestration, have been discussed above.[389] It is submitted that they do not pose a solution for both creditors and debtors as reasonable alternative methods of achieving satisfaction of the debts of an over-indebted homeowner who wishes to avoid the forced sale of his home. Legislative amendments should also be directed at establishing effective debt relief mechanisms as alternatives to the sequestration (or liquidation) process to constitute reasonable means by which a debtor can satisfy his obligations without necessarily losing his home, in appropriate cases. Once viable alternatives to sequestration are made available to parties, this could result in the forced sale of a debtor's home occurring truly only as a last resort.

6.12 Conclusion

It is submitted that the realisation by the trustee of the insolvent estate of the home of an insolvent debtor, during the sequestration process in terms of the Insolvency Act, may, in certain circumstances, constitute an unjustifiable infringement of the insolvent's and his family's or dependants' section 26, section 28 and other rights. However, in insolvency cases, at no stage of the process is a court required, as in the individual debt enforcement process, specifically to address whether, taking relevant circumstances into account, realisation of the home of the debtor would constitute an unjustifiable infringement of constitutional rights. Neither is any statutory provision made for protection of these rights, where necessary.[390] Further, the automatic vesting of the solvent spouse's property, in terms of section 21 of the Insolvency Act, and its possible realisation for the ultimate benefit of the creditors of the insolvent estate, may unjustifiably infringe the section 26 and section 28 rights of affected members of the insolvent's family.[391] It is anticipated that it is only a matter of time before an insolvent or his family members bring a constitutional challenge to the validity of provisions in the Insolvency Act which allow their home to be realised without due consideration of their rights.

[389] See 4.4.3.6 and 4.5.5 above.
[390] See 6.3 and 6.4, above.
[391] See 6.7, above.

As things stand, in the absence of specific legislative provisions applicable to the treatment of an insolvent person's home, it is possible that a court could exercise its discretion to dismiss an application for a sequestration order[392] in order to protect the section 26 and section 28 rights of an insolvent and his dependants. A court also has the power, in terms of section 172(1)(b) of the Constitution, to make any order that is just and equitable.[393] Theoretically, in the case of a mortgaged home, or where other debts arise from credit agreements, if there is an allegation of over-indebtedness, a court could resort to section 85 of the NCA. This would be with a view to having its debt relief provisions applied to ameliorate the position of an over-indebted person and to permit him and his family to remain in their home while complying with a debt rearrangement order.[394] However, neither an application for debt review nor the issuing of a debt rearrangement order in terms of the NCA precludes a creditor from applying for sequestration of the debtor's estate. Further, the apparently creditor-orientated approach adopted by courts in cases such as *Ex parte Ford*, *Investec v Mutemeri* and *FirstRand Bank v Evans*, in the course of exercising their discretion whether to order sequestration, casts doubt on whether courts will tend towards assisting financially distressed homeowners in this way.[395]

The NCA's debt relief mechanisms have the potential to avert the forced sale of a debtor's home in appropriate circumstances where the debtor has a regular income which will allow him to service his debt over a longer period. However, lack of alignment between the provisions of the Insolvency Act and the NCA, as evidenced by *Ex parte Ford*, *Investec v Mutemeri*, *Naidoo v ABSA* and *FirstRand Bank v Evans*, detract from the NCA's usefulness as a protective measure in this respect.[396] The effect of the NCA, as illustrated by *FirstRand Bank v Evans*, which leaves open the possibility of a creditor obtaining an order for the sequestration of the debtor's estate even though the latter has applied for debt review, or has obtained a debt rearrangement order in terms of the NCA, leaves the homeowner debtor in a vulnerable position. The effect is to undermine

[392] See 6.4.1 and 6.4.2, above.
[393] See 3.3.1.4 (b) and 3.4, above.
[394] See 6.10.4, above.
[395] See 6.10, above.
[396] See 6.10.5 and 6.10.6, above.

the debt review and debt restructuring process as an effective and satisfactory consumer debt relief mechanism.[397]

In the circumstances, there is an urgent need for statutory amendment, not only to clarify the relationship between the NCA and the Insolvency Act, but also more effectively to balance the interests of creditors, especially secured creditors, and consumer debtors in the debt restructuring process. It would also be desirable for provisions to conform to internationally recognised principles and policies applicable to consumer debt legislative mechanisms and systems. It is submitted that a need is indicated for new legislative provisions posing additional, more workable, alternatives to sequestration.[398] It may be recalled, from Chapter 2, that the Amsterdam Ordinance of 1777, regarded as an important source of South African insolvency law, imposed the very first task of the two commissioners of the *Desolate Boedelkamers* to try to make an arrangement with the creditors, before they called a meeting of creditors at which provisional sequestrators would be appointed.[399] Thus, a policy of administrators of the insolvency process first considering, or even encouraging, debt rearrangement in an endeavour to avert the liquidation of an insolvent estate is firmly embedded in our historical roots.

As discussed in Chapter 5, in relation to the individual debt enforcement process, the Constitutional Court stated in *Jaftha v Schoeman*, that execution against a person's home should occur as a last resort.[400] In *Gundwana v Steko*, the Constitutional Court stated that all reasonable alternatives should be explored before execution against the debtor's home is permitted.[401] Likewise, in insolvency, it is submitted that it would be more in keeping with constitutional imperatives for the realisation of the insolvent debtor's home, which, in terms of applicable insolvency law, is an invariable consequence of sequestration, to be permitted only as a last resort. In other words, a debtor who is willing, and in a position reasonably to endeavour, to satisfy in full a debt

[397] See 6.10, above.
[398] See 6.10.6, above.
[399] See 2.3.3, above.
[400] See 5.2.3, above, with reference to *Jaftha v Schoeman* par 59.
[401] See 5.6.2.3, above, with reference to *Gundwana v Steko* par 53.

which he secured by passing a mortgage bond over his home, should be afforded a reasonable opportunity to do so by resorting to alternative debt relief measures. There is an even stronger argument for such an approach to be adopted where a viable debt rearrangement order has already been issued by a court in terms of the NCA and the debtor is making regular payments in accordance with it. Interpretation and application of the more recent Constitutional Court judgment in *Gundwana v Steko* may act to temper the effect of the decision in *FirstRand Bank v Evans*. It is nevertheless submitted that legislative intervention is required to regulate the relationship between sequestration in terms of the Insolvency Act and other available consumer debt relief mechanisms as well as to ensure that the latter indeed represent methods whereby debts "can be satisfied in a reasonable manner" within the contemplation of the Constitutional Court in *Gundwana v Steko*.[402]

It is submitted that the provision, originally included in the South African Law Reform Commission's proposed section 74X of the Magistrates' Courts Act, in 2000, and the somewhat similar section 118, contained in the unofficial working draft of a proposed Insolvency and Business Recovery Bill, put forward as a pre-liquidation composition procedure, ought to receive thorough consideration. It is submitted that a suitably revised and modified version of this provision holds the potential to become an alternative debt relief mechanism which may provide a solution in this context. In appropriate cases, an over-indebted or factually insolvent homeowner with a regular income could avert the forced sale of his mortgaged home by maintaining instalment repayments, in accordance with the original terms of the mortgage bond, while servicing all other debt to creditors who would have concurrent claims, in insolvency, on the restructured terms of a repayment plan. In this way, it is submitted, the nature and level of opposition to debt restructuring, especially by a mortgagee of the debtor's home, as was encountered in *FirstRand Bank v Evans*, will be minimised as long as the terms of the restructuring orders are reasonable.[403]

[402] See 6.10.6 and 6.11, above.
[403] See 1.6, 4.4.3.6, 4.7.4, 5.6.8, 6.4.3 and 6.10.6, above.

Furthermore, as long as the applicable provisions are included in the national insolvency statute, as is currently proposed, it has the potential to address commentators' criticisms of South Africa's insolvency system by turning it into one which provides "single portal access" to debt relief mechanisms which function in harmony with one another. It is also anticipated that, given the proposed possibility of a measure of discharge for the debtor from liability for debt, once the composition procedure has been successfully completed, this would bring South Africa's system more into line with internationally recognised consumer debt relief principles and policies.[404]

It is submitted that section 21 of the Insolvency Act should be repealed. However, it should not be replaced with a provision such as clause 22A of the Draft Insolvency Bill of 2000, or section 25 of the unofficial working draft of the Insolvency and Business Recovery Bill, compiled in 2010. The position, in relation to the effect of sequestration on the property of the solvent spouse, should be fully interrogated, taking into account constitutional imperatives and applying proper policies appropriate to our modern society, as advocated, notably, by Evans.[405]

In the result, it is submitted that legislative intervention is necessary to regulate treatment of the home of the insolvent and his dependants who share it with him. Statutory provisions should be enacted which would have the effect, where appropriate, of averting the invariable realisation by the trustee of the home of the insolvent for the benefit of the creditors. Legislation should require a court specifically to address the housing position of the insolvent and his family and, where appropriate, to provide a measure of protection for them. In the formulation of appropriate legislation, including, possibly, the introduction of a modified version of the pre-liquidation composition procedure, as discussed above,[406] which should be encouraged and promoted wherever a composition or repayment plan is feasible, the following submissions are made.

[404]See 6.10.6, above.
[405]See 6.7, above.
[406]See 4.4.3.6, 6.4.3, 6.10.6 and 6.11, above.

- A clear conception, and definition, of a debtor's "home", which will be eligible for protection, will have to be devised. The definition should include his "primary residence". Movable structures such as mobile homes, trailers, or "shacks" should also be included in the definition.[407]
- Ideally, before a sequestration order is granted and, thereafter, before the realisation of an insolvent person's home occurs, specific consideration should be required to be given to the position of the home of the insolvent. This would possibly be a convenient point at which it should be determined whether the liquidation process, or the proposed composition process, if this were to be introduced into the insolvency system, should be followed. Where the insolvent has employment or a steady income or other means at his disposal, it would be appropriate to consider the debt review and rearrangement process, under the NCA, or something along the lines of the proposed section 118 pre-liquidation composition process, as a possible course to be adopted.[408]
- A court should be expressly empowered, where it deems it just and equitable, in its discretion to order the postponement of the realisation of the insolvent's home for a limited period. This would be so that the insolvent may make alternative accommodation arrangements for himself and his dependants or arrange for the refinancing of the home. A postponement should be considered where an alternative consumer debt relief process, such as debt rearrangement under the NCA, or one along the lines of the proposed pre-liquidation composition process, is not indicated as being appropriate in the circumstances and, for example, where children or the elderly or persons of poor health are affected.[409]
- Consideration ought to be given to the introduction of an exemption from forced sale of low value and state-subsidised homes. Alternatively, where appropriate, a capped amount of the proceeds of the sale of such a home might be exempted,[410] either out of any equity held by the debtor, to be applied towards the acquisition of alternative accommodation, or to be transferred to the state as

[407] See 5.6.8 and 5.7, above.
[408] See 6.4, 6.10.6 and 6.11, above.
[409] See 6.3 and 6.11, above.
[410] See 6.6.3 and 6.11, above.

reimbursement of any subsidy investment originally made. In the latter regard, the proposed amendment to section 10A and 10B of the Housing Act would need to be reconsidered.[411]

- Consideration might also be given to reserving a portion of the equity even in moderately valued homes of insolvent persons.[412]
- Provision should be made for a court order to include, where appropriate, a direction that an indigent insolvent debtor and his family should be provided with emergency, or temporary, state or municipal housing pending more permanent accommodation arrangements being made.[413]

In the interim, in the absence of dedicated legislation regulating the position, it is submitted that, in every insolvency matter, a court should specifically address issues surrounding the housing rights of the insolvent and his dependants as well as any children's rights. Where appropriate, an order which is just and equitable should be made in terms of section 172(1)(b) of the Constitution.[414]

[411]See 4.2 and 4.7.1, above. It is submitted that, where a mortgagee has a real right of security over a previously subsidised home, the amount of the subsidy should first be reimbursed to the state before the mortgagee's claim against the insolvent estate is paid.
[412]See 6.6.1, 6.6.3 and 6.11, above.
[413]See 3.3.1.4 (c), 6.3.2 and 6.6.3, above.
[414]See 3.3.1.4 (b) and 3.4, above.