

Interplay between National Credit Act 34 of
2005 and the Insolvency Act 24 of 1936

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TABLE OF CONTENTS

CHAPTER 1 GENERAL INTRODUCTION

1.1	Background information	1
1.2	Problem statement and research objective	5
1.3	Delineation and limitations	5
1.4	Significance of the study	5

CHAPTER 2 HISTORY AND PURPOSE OF THE NATIONAL CREDIT ACT AND THE INSOLVENCY ACT

2.1	Introduction	6
2.2	History of consumer credit legislation in South Africa	6
2.3	History of insolvency legislation	8
2.4	Purposes of the NCA	10
2.5	Purposes of the Insolvency Act	11
2.6	Conclusion	13

CHAPTER 3 OVER-INDEBTEDNESS AND RECKLESS CREDIT GRANTING

3.1	Introduction	14
3.2	The concept of over-indebtedness	14
3.3	Reckless credit granting	17

3.4 Over-indebtedness and reckless credit granting 19

3.5 Conclusion 21

CHAPTER 4 OVERVIEW OF DEBT REVIEW AND SEQUESTRATION

4.1 Introduction 22

4.2 Sequestration 22

4.2.1 Voluntary sequestration 23

4.2.2 Compulsory sequestration 24

4.2.3 Consequences of sequestration and rehabilitation 26

4.3 Debt Review 26

4.4 Conclusion 29

CHAPTER 5 THE INTERACTION BETWEEN THE NCA AND THE INSOLVENCY ACT

5.1 Introduction 31

5.2 Background 31

5.3 Section 129 notice requirements prior to instituting legal action 33

5.4 Debt enforcement in terms of the NCA 34

5.5 Debt review constituting an act of insolvency 36

5.6 Conclusion 40

CHAPTER 6 CONCLUSION AND RECOMMENDATION

6.1	Introduction	42
6.2	Summary and Findings	45
6.3	Recommendations	47
6.4	A final word	48

CHAPTER 1: GENERAL INTRODUCTION

1.1 Background information

Chapter 1 of the dissertation is a general introduction. Chapter 2 of the dissertation discusses the history and purpose of both the National Credit Act¹ and the Insolvency Act² together with the history of consumer credit legislation in South Africa and the history of insolvency legislation. In chapter 3 the concepts of over-indebtedness and reckless credit granting and the effects thereof are discussed. Chapter of the dissertation discusses debt relief measures in the Insolvency Act and debt review. Chapter 5 of the dissertation discusses the interaction between the NCA and the Insolvency Act and chapter 6 is a summary of the aspects covered in the dissertation and the conclusions drawn in this dissertation.

The history of the South African financial sector presents a complicated picture.³ It consisted of two regimes, one was a highly formal financial sector primarily utilised by white consumers and the other was an informal financial sector primarily utilised by black consumers.⁴ The Usury Act⁵ and the Credit Agreements Act⁶ regulated consumer credit in South Africa for more than a quarter of a century⁷ and became out-dated due to the obvious failure and ineffectiveness of the system to address the needs of the financial sector, including but not limited to the challenges faced in the micro-lending sector, price control system, over-indebtedness, undesirable lending practices and many more.⁸ The review of the legal framework resulted in a single but comprehensive piece of legislation⁹ entitled the National Credit Act,¹⁰ which is applicable to natural persons and with limited application to juristic persons.¹¹

¹ 34 of 2005 (hereafter NCA).

² 24 of 1936 (hereafter the Insolvency Act).

³ Kelly-Louw 2008 *SA Merc LJ* 203.

⁴ *Ibid.*

⁵ 73 of 1968 (hereafter the Usury Act).

⁶ 75 of 1980 (hereafter the CAA).

⁷ Otto and Otto *The National Credit Act Explained* (2013) 5.

⁸ DTI *Making Credit Markets Work: Policy Framework for Consumer Credit* – available at http://www.ncr.org.za/publications/Background_NCA_docs/Credit%20Law%20Review.pdf 13; Kelly-Louw *Consumer Credit Regulation in South Africa* (2012) 3; Kelly-Louw 2008 20 *SA Merc LJ* 206.

⁹ Otto and Otto *The National Credit Act Explained* (2013) 3.

The repealed Usury Act and the CAA offered some protection to consumers only in respect of loan agreements, which were up to a certain amount.¹² However, credit facilities that exceeded the approved amount as stipulated in the legislations were regulated by the rules of common law.¹³ The NCA has a broader application than its predecessors (amongst other things, in removing the debt or credit ceiling for natural persons) and seeks to provide consumers with more extensive protection than what they had under the previous pieces of credit legislation.¹⁴

The NCA is an important piece of legislation in the debt relief regime as one of its objectives is to afford debt relief measures to over-burdened consumers.¹⁵ It seeks to encourage responsible lending and address reckless granting of credit to consumers.¹⁶ This object is especially useful in the current economic climate, as statistics have shown an increase in the reckless ways that banks grant credit to consumers.¹⁷ One such bank is African Bank Limited,¹⁸ which was placed under curatorship in September 2014.¹⁹ The main cause of the curatorship arose from the reckless granting of credit to consumers by African Bank. It disbursed loans to low income earners who had no assets to back up the loans and where many of those consumers are struggling to keep up with repayments of loans.²⁰ African Bank found itself in a precarious situation resulting in the South African Reserve Bank having to pay R7 billion rand to rescue the former from total collapse.²¹ The African Bank situation further illustrates the continued existence of imbalance of power between the credit providers and the consumers despite the enactment of the NCA.

The NCA further endeavours to promote and advance the social and economic welfare of all South Africans as well as promote a fair, transparent, competitive, efficient, sustainable,

¹⁰ 34 of 2005 (hereafter NCA).

¹¹ S 6 NCA; Otto and Otto *The National Credit Act Explained* (2013) 13.

¹² Kelly-Louw *Consumer Credit Regulation in South Africa* (2012) 19.

¹³ Otto and Otto *The National Credit Act Explained* (2013) 1.

¹⁴ Kelly-Louw *Consumer Credit Regulation in South Africa* (2012) 19.

¹⁵ Preamble of NCA and s 3 NCA.

¹⁶ Ss 3(c)(i) and 3(c)(ii) NCA.

¹⁷ <http://www.bdlive.co.za/business/financial/2014/08/11/embattled-african-bank-gets-bailed-out>.

¹⁸ Hereafter African Bank.

¹⁹ <http://www.moneyweb.co.za/moneyweb-financial/reserve-bank-places-african-bank-under-curatorship>.

²⁰ *Ibid.*

²¹ <http://www.bdlive.co.za/business/financial/2014/08/11/embattled-african-bank-gets-bailed-out>.

responsible and accessible credit market for all, particularly those who had historically been unable to access credit under sustainable market conditions.²² The NCA amongst others provides for a pre-assessment procedure by credit providers before granting credit to consumers to determine whether a consumer can afford to service a loan. Besides the foregoing, the NCA imposes severe sanctions against credit providers who engage in the reckless granting of credit to consumers.²³ Most importantly for purposes of this study, the NCA makes provision for debt review for those consumers who are over-indebted in order to have their debts rescheduled or rearranged.²⁴ An over-indebted consumer may take the initiative to voluntarily apply to a debt counsellor for an assessment of his indebtedness on the realisation of his over-indebtedness.²⁵ On confirmation of over-indebtedness, the debt counsellor makes a recommendation to the magistrates' court that the consumer be placed under debt review,²⁶ which can be classified as a debt relief measure under the NCA.

On the other hand, the Insolvency Act²⁷ also provides debt relief by means of the sequestration procedure. The Insolvency Act provides for sequestration proceedings and such sequestration proceedings provide for a discharge, only at rehabilitation of a debtor. It is important to note that the purpose of sequestration proceedings is not debt relief, but to bring about a *concursum creditorum*.²⁸ This entails a comprehensive debt collecting mechanism for all creditors and ensures an equitable, rationale and fair distribution of the assets of the debtor where such assets are insufficient to cover all the liabilities of the debtor. In this regard *Walker v Syfret*,²⁹ provides that:

[t]he object of the [Insolvency Act] is to ensure a due distribution of assets among creditors in the order of their preference...

²² S 3(a) NCA.

²³ Ss 81(2) and 83(2) NCA; See also Boraine and Van Van Heerden 2010 *THRHR* 1; Kelly-Louw *Consumer Credit Regulation in South Africa* ch 12; Kelly-Louw (2014) *SA Merc LJ* 24.

²⁴ S 86 NCA read with regulation 24 NCA.

²⁵ S 86(1) NCA.

²⁶ S 86(7)(c).

²⁷ 24 of 1936 (hereafter Insolvency Act).

²⁸ Van Heerden and Boraine 2009 *PERJ* 12 25.

²⁹ *Walker v Syfret* 1911 AD 166.

The Insolvency Act provides for two main procedures which are voluntary surrender,³⁰ which is initiated at the instance of the debtor and alternatively, compulsory sequestration³¹ which is at the instance of one or more creditors of the debtor jointly. A third category that falls under the compulsory sequestration category is entitled “friendly sequestration”. This phenomenon has emerged in practice but has not been given legal recognition as a stand-alone procedure. The emergence of the third category arises from the inadequacies in the existing debt relief procedures³² in providing debt relief to heavily burdened debtors.

The courts in some circumstances seem to give greater judicial patronage and recognition to the procedures in the NCA than the Insolvency Act in addressing the indebtedness of consumers. In an application for voluntary surrender in *Ex Parte Ford*,³³ the court questioned counsel for the debtor for not taking advantage of the mechanism provided in the NCA in addressing the over-indebtedness of the consumer.³⁴

On the other hand, the court granted an application for compulsory sequestration in *Investec Bank Limited v Mutemeri*³⁵ where the respondents used the debt review mechanisms of the NCA. The court held that sequestration did not amount to debt enforcement and that compulsory sequestration application is therefore competent even where a debt review is in force.³⁶

³⁰ S 3 Insolvency Act.

³¹ S 9 Insolvency Act.

³² *Ex Parte Lynne Anne Bezuidenout* case no 1858/2014 1-5 and 13-20; *Ex Parte Jan Hendrik Pieterse* case no 1859/2014 1-5 and 13-24; *Jacobus Cornelius Crafford v Heidi Crafford* Case No's: 19421/13 & 19422/13 1-4, 6-12, 11-21, 14-15, 17-18 and 19-20; *Ex Parte Tshiko* 2012 SA (GSJ) 14, 17, 22, 30-34, 43-45, 58- 59 and 62; *Edkins v The Registrar of Deeds* case no 16117/11 (JHB) 19. *Ex Parte Arntzen* 2013 (1) SA 49 (KZD) 6-8, 10, 11, 14, 16 and 22; *Plumb on Plumbers v Trevor Lauderdale* 2013 (1) SA 60 (KZD) 2-6 and 9-11; *Nedbank Limited (formerly trading as Nedcor Bank Limited) v Yunus Abrahams* case no 1318/2012 2 and 8-13, 15-18 and 23; *Mthimkhulu v Rampersad* case no 2333/2012 514 g-i; *Roger G Evans* 2001 SA *Merc LJ* 489-492 and 495-521; *Alastair Smith* (1998) 6 *JBL* 157-158; *R v Meer* 1957(3) SA 614 (N) 619; *Absa Bank Ltd v Mahomed* (876/12) [2012] ZASCA 1 (20 January 2014) 3; *Sharrock et al Hockly's Insolvency Law* 9 ed (2012) 43; *Ka-Mbonane* 2006 6 *De Rebus* 2-3; *Meskin & Co v Friedman* 1948 (2) SA 555 (W); S 23(5) Insolvency Act.

³³ 2009 (3) SA 376 (WCC).

³⁴ *Van Heerden and Boraine* 2005 *PER* 12 27; *Ex Parte Ford* 2009 (3) SA 376 (WCC) 384.

³⁵ 2010 (1) SA 265 (GSJ).

³⁶ *Investec Bank Limited v Mutemeri supra* 275.

These two cases among many illustrate the difficulties in respect of the interplay between the NCA and the Insolvency Act. These difficulties form the basis of this study.

1.2 Problem statement and research objective

In the original provisions of NCA and Insolvency Act, no specific reference was made by the two Acts recognising each other. Despite the fact that NCA sets out conflicting legislations in one of its schedules, one would have expected a provision in the NCA that addresses how debt review and debt restructuring should be viewed in the context of insolvency law. However, the National Credit Amendment Act,³⁷ which is yet to come into force, addresses some of the conflicts between the NCA and the Insolvency Act by including section 8A into the Insolvency Act.

The objective of this study is to investigate the effect of the NCA on Insolvency law and *vice versa*. The question of whether debt review constitutes a possible act of insolvency in terms of the provisions of section 8(g) of the Insolvency Act is also considered.

1.3 Delineation and limitations

An in depth discussion of all the South African debt relief measures falls outside the ambit of the objectives of this study as the focus of the dissertation is on the effect of two specific measures, namely the effect of debt review and sequestration on one another. However, the different debt relief measures available to debtors in South Africa will be briefly discussed to illustrate what is available to debtors in financial distress and to describe the context in which debt review and sequestration function.

1.4 Significance of the study

This study is relevant in addressing the interplay between the NCA and the Insolvency Act and *vice versa* and examining the constant battles that play out in court cases in terms of the two acts.

³⁷ 19 of 2014 (hereafter NCAA).

CHAPTER 2: HISTORY AND PURPOSE OF THE NATIONAL CREDIT ACT AND THE INSOLVENCY ACT

2.1 Introduction

Insolvency legislation has developed over the centuries from a system where the debtor experienced harsh treatment arising from the inability to pay his debts to a more reasonable situation where a debtor has an opportunity of obtaining debt relief. Sequestration proceedings may offer debt relief in consequence of rehabilitation of a consumer though this is not the main aim of the South African Insolvency Act. In contrast, the National Credit Act¹ has as one of its purposes the protection of a debtor, by providing assistance to debtors who are in financial crises.

This chapter briefly discusses the history of consumer credit legislation in South Africa and provides a historical background to the South African insolvency legislation which is necessary in order to show how legislation has developed over the years to what it is now. Furthermore, the chapter discusses the purposes of the NCA and the Insolvency Act in order to demonstrate the prevalent distinctions between the two acts.

2.2 History of consumer credit legislation in South Africa

In South Africa, certain types of credit and usury were regulated by different provincial legislations long before the first Usury Act² was promulgated.³ The first Usury Act was the first attempt to consolidate consumer credit laws in South Africa on a national level and it only applied to money-lending transactions.⁴ Its aim was to protect consumers against exorbitant interest rates and fees.⁵ The first Usury Act was later replaced by the Limitation and Disclosure of Finance Charges Act,⁶ which was drastically amended in 1980 and regularly in the later

¹ 34 of 2005 (hereafter NCA).

² Usury Act 37 of 1926 (hereafter first Usury Act).

³ Kelly-Louw *Consumer Credit LAWSA* vol 5(1) (2010) par 1.

⁴ Renke and Pillay 2008 *THRHR* 2.1.

⁵ Van Zyl in Scholtz (ed) *Guide to the National Credit Act* (2014) par 10.1.

⁶ 73 of 1968 (hereafter LDFC Act).

years.⁷ In 1986 the LDFC Act was renamed the Usury Act.⁸ The Usury Act covered money lending activities where the principal debt did not exceed R500 000, and only placed a ceiling on interest rates for these loans.⁹ The primary aim of the Usury Act was to protect consumers from credit providers that charged excessive interest rates.¹⁰ It covered financial aspects of money-lending contracts.¹¹ The financial aspects covered *inter alia* included the maximum interest rate and other amounts recoverable from a consumer, advanced payment of debts and disclosure of finance charges.¹² The Hire-Purchase Act¹³ was passed in 1942 to protect hire-purchasers.¹⁴ However, the HP Act only covered a small number of transactions¹⁵ and was aimed at regulating contractual terms of an agreement. As a result of rapid developments in commerce and the ingenuity of financiers and dealers, new problem areas and forms of credit contracts arose which evaded the existing legislation.¹⁶ In 1980, the Credit Agreements Act¹⁷ replaced the HP Act. The CAA was mainly concerned with the contractual aspects of credit agreements¹⁸ in connection with the sale and lease of movable goods.¹⁹ The Usury Act and the CAA regulated a large part of the credit industry in South Africa for a quarter of a century until both were replaced by the NCA.²⁰ When compared to the above-mentioned legislation it is evident that the NCA is a comprehensive piece of legislation that represents a clean break from the past and bears very little resemblance to its predecessors.²¹ The Usury Act and the CAA only covered specific transactions and each respective act had its distinct purpose and differing aim to achieve. In contrast the NCA covers a much wider field of application.²² The definition of a

⁷ Kelly-Louw *Consumer Credit Regulation in South Africa* (2012) 7.

⁸ 1968 Usury Act.

⁹ Kelly-Louw *Consumer Credit Regulation in South Africa* (2012) 7.

¹⁰ Bamu, Schuckman and Godfrey 2007 11 *Law Democracy and Development* 36.

¹¹ Otto (2010) *FUNDAMINA* 266.

¹² *Ibid.*

¹³ 36 of 1942 (hereafter HP Act).

¹⁴ Otto LLD Dissertation (1981) 5-15.

¹⁵ Otto and Otto *The National Credit Act Explained* (2013) 2.

¹⁶ *Ibid.*

¹⁷ 75 of 1980 (hereafter CAA).

¹⁸ Kelly-Louw 2008 *SA Merc LJ* 203.

¹⁹ Otto (2010) *FUNDAMINA* 260.

²⁰ Otto and Otto *The National Credit Act Explained* (2013) 3.

²¹ *Ibid.*

²² Otto (2010) *FUNDAMINA* 261.

credit agreement in the NCA includes diverse forms of credit granting and credit contracts.²³ The NCA also impacts on the levying of a variety of fees, including service fees and insurance premiums.²⁴ The NCA also introduces into South African law new concepts and mechanisms for protecting credit consumers.²⁵ It protects natural persons regardless of the credit amount involved²⁶ as there is no ceiling for the application of the Act to such persons.²⁷ In a nutshell, the NCA applies to all credit agreements provided the agreement falls within the definition of credit agreement as defined in the NCA.²⁸ The definition of a credit agreement in the NCA is wide enough to include diverse forms of credit granting and credit contracts such as *inter alia* direct money loans, instalment sales of movables, leases of movables, sales of land and accounts with department stores.²⁹

2.3 History of insolvency legislation

The foundation of modern insolvency law remains Roman Dutch law as introduced in the Southern part of Africa approximately four centuries ago.³⁰ The South African insolvency law is neither pure Roman-Dutch law, nor pure English law, its legal tradition having been shaped both in substance and methodology by a fusion of influences deriving from periods of Dutch and British colonial domination in the Cape of Good Hope.³¹

Insolvency law has its origin in Table 3 of the Twelve Tables³² of Roman law. During the period of the Twelve Tables, creditors enjoyed the option, in the event of the inability of a consumer to pay his debts, to sell the consumer into slavery or cut his body into pieces.³³ Therefore the person of the debtor was pledged³⁴ for the repayment of the debt. The seizure of the debtor's

²³ *Ibid* 271.

²⁴ *Ibid* 261.

²⁵ Otto and Otto *The National Credit Act Explained* (2013) 3.

²⁶ *Ibid* 4.

²⁷ Otto (2010) *FUNDAMINA* 271.

²⁸ S 8 NCA.

²⁹ Otto and Otto *The National Credit Act Explained* (2013) 5.

³⁰ Calitz (2010) *FUNDAMINA* 78.

³¹ *Ibid* 3.

³² Table 3 was from 451-450 BC.

³³ Bertelsmann *et al* Mars *The Law of Insolvency in South Africa* (2008) 6.

³⁴ Calitz (2010) *FUNDAMINA* 5.

person and his reduction to slavery was known as the *manus iniection*.³⁵ Between 326 and 313 BC, the *Lex Poetelia* prohibited the sale into slavery or execution of the debtor.³⁶ The inability to repay a debt was then sanctioned by imprisonment instead.³⁷ However imprisonment was later abolished in AD 320, save in instances where the debtor continuously refused to pay.³⁸ In approximately 104 BC, the praetor provided means of execution against the property of the debtor known as the *missio in possessionem*.³⁹ Three decrees by the praetor were necessary, each marking a distinct stage in the proceedings.⁴⁰ The first decree authorised one or more creditors to take possession of, protect and advertise for sale all the assets of the debtor.⁴¹ The second decree empowered creditors to choose from their numbers a *magister bonorum* to supervise the sale of the assets and the third decree authorised the sale.⁴² A few days later the sale was held and the whole of the debtor's estate or *universitas juris* was sold and transferred to the person who offered the creditors the largest dividend on their claims.⁴³ The right of *missio in possessionem* was provided solely in the interests of creditors and the praetor did nothing for the relief of the debtor.⁴⁴ The *Lex Iulia de Bonis Cedendis* of AD 17 allowed the debtor to renounce his rights to his property in favour of his creditors instead of an execution against his person.⁴⁵ Such surrender did not discharge the debtor from his debts, but afforded him exemption from arrest, imprisonment, slavery and *infamia*. Any property acquired by the debtor subsequent to such *cessio* could be sold in order to pay debts and he was only entitled to retain what was necessary for his subsistence.⁴⁶

The foundation of modern South African law remains Roman-Dutch law as introduced in the southern part of Africa approximately four centuries ago.⁴⁷ The Amsterdam Ordinance passed

³⁵ Roestoff LLD Thesis 2002 16.

³⁶ Calitz (2010) *FUNDAMINA* 6.

³⁷ Stander LLD Thesis 1994 8.

³⁸ Bertelsmann *et al* Mars *The Law of Insolvency in South Africa* (2008).

³⁹ Roestoff LLD Thesis 2002 23.

⁴⁰ Bertelsmann *et al* Mars *The Law of Insolvency in South Africa* (2008) 6.

⁴¹ *Ibid* 6-7.

⁴² *Ibid* 7.

⁴³ *Ibid*.

⁴⁴ *Ibid*.

⁴⁵ *Ibid*.

⁴⁶ *Ibid*.

⁴⁷ Van Warmelo *The function of Roman-law in South African law* (1958) 565.

in 1777 to a large extent has been the basis of most of the subsequent South African insolvency law.⁴⁸ Between 1826 and 1831, various ordinances were passed in the Cape Colony and in other regions of the country. The Cape Ordinance 64 of 1829 was introduced under the English influence and regulated the administration of insolvent estates until repealed by the Consolidating Ordinance 6 of 1843.⁴⁹ Ordinance 64 of 1829 repealed the *cession bonorum*,⁵⁰ and enabled the debtor to surrender his estate for the benefit of his creditors.⁵¹ This Ordinance was adopted in Natal, Orange Free State and the Transvaal in different formats with some amending provisions of the Cape Act 15 of 1859.⁵² On 1 July 1936 throughout the then Union of South Africa, the current Insolvency Act⁵³ came into force repealing the earlier Insolvency Act 32 of 1916.⁵⁴

2.4 Purposes of the NCA

The NCA *inter alia*, aims to promote responsibility in the credit market⁵⁵ whereby responsible borrowing is encouraged, over-indebtedness is avoided, consumers are encouraged to fulfil their financial obligations under the credit agreements,⁵⁶ and reckless credit granting is discouraged.⁵⁷ In addition, the NCA seeks to address over-indebtedness of consumers⁵⁸ by *inter alia* providing for a mechanism of debt restructuring.⁵⁹

⁴⁸ *Fairlie v Raubenheimer* 1935 AD 135 144.

⁴⁹ Bertelsmann *et al* Mars *The Law of Insolvency in South Africa* (2008) 9; See also *Fairlie v Raubenheimer* *ibid* 146.

⁵⁰ Nathan *South African Insolvency Law* (1929) 11.

⁵¹ Evans 2001 *SA Merc LJ* 488.

⁵² Bertelsmann *et al* Mars *The Law of Insolvency in South Africa* (2008) 11.

⁵³ 24 of 1936 (hereafter Insolvency Act).

⁵⁴ Bertelsmann *et al* Mars *The Law of Insolvency in South Africa* (2008) 11-13.

⁵⁵ S 3(c) NCA.

⁵⁶ S 3(c)(i) NCA; *Ex Parte Ford* 2009 (3) SA 376 (WCC) 383; *Nedbank Limited v The National Credit Regulator* 2011 (3) SA 581 (SCA); *Kubyana v Standard Bank of South Africa Limited* 2014 JDR 0284; [2014] ZACC 1 (CC) 11-12.

⁵⁷ S 3(c)(ii) NCA; *Ex Parte Ford* 2009 (3) SA 376 (WCC) 379; Van Heerden and Borraine 2009 *PERJ* 3.

⁵⁸ S 3(g) NCA.

⁵⁹ S 3(i) NCA.

The provisions of NCA create a single, consistent and harmonised system to regulate the provision of credit agreements.⁶⁰ All of this promotes socio-economic welfare of South Africa and a fair, competitive, equitable and sustainable financial market.⁶¹

The courts are also not left out in promoting and construing the object and effect of NCA by addressing the imbalances of the past and improving relations between consumers and creditor providers.⁶² In *Standard Bank of South Africa Limited v Hales*,⁶³ it was held that protection of the consumer is neither the sole nor the main purpose of the NCA. In *FirstRand Bank Limited v Olivier*,⁶⁴ it was held that the rights of the credit providers must be restricted, reasonable and justifiable in a democratic society in pursuance of the objects of NCA.⁶⁵ The court also found that the correct interpretation of section 129 of the NCA is one that strikes an appropriate balance between the competing interests of both parties to a credit agreement.⁶⁶ It can thus be seen, in context of this dissertation, that the objects of the NCA are of utmost importance when interpreting the provisions of the act, as they are the cornerstones upon which all the other provisions of the Act are built.

2.5 Purposes of the Insolvency Act

The primary object of the Insolvency Act is to ensure an orderly and fair distribution of the assets of the debtor in circumstances where the assets are insufficient to satisfy all the claims of the creditors.⁶⁷ Insolvency law is essentially a collective debt collecting procedure that provides a fairer distribution of the proceeds of the property of a debtor amongst the creditors where the former does not have sufficient assets to settle all his debts in full.⁶⁸ In the event that the

⁶⁰ Renke, Roestoff and Haupt 2007 *OBITER* 229.

⁶¹ S 3 NCA; *Sebola v Standard Bank Limited* 2012 (5) SA 142 (CC) 154; *Kubyana v Standard Bank of South Africa Limited* 2014 JDR 0284; [2014] ZACC 1 (CC) 11-12.

⁶² *Nedbank Limited v The National Credit Regulator* 2011 (3) SA 581 (SCA), 584, 585; *Collett v Firstrand Bank Limited* 2011 (4) SA 508 (SCA) 514 & 517; *Kubyana v Standard Bank of South Africa Limited* 2014 JDR 0284; [2014] ZACC 1 (CC) 11.

⁶³ 2009 (3) SA 315 (D) 322.

⁶⁴ 2009 (3) SA 353 (SE) 359.

⁶⁵ *Ibid.*

⁶⁶ *Kubyana v Standard Bank of South Africa Limited* 2014 JDR 0284; [2014] ZACC 1 (CC) 11-12.

⁶⁷ *Walker v Syfret* 1911 AD 141; Roestoff & Coetzee 2012 *SA Mercantile Law Journal* 55.

⁶⁸ Jackson *The Logics and Limits of Bankruptcy Law* 3.

assets of the debtor are not sufficient to satisfy all of the debtor's debts in full, the debtor by means of voluntary surrender⁶⁹ or one of the debtor's creditors or a group of creditors may apply to the High Court for compulsory sequestration of the estate of the debtor.⁷⁰ The sequestration procedure creates a *concursum creditorum* with the result that the creditors are treated equally as a group.⁷¹ The *concursum creditorum* is regarded as one of the key concepts of the South African insolvency law.⁷² Bertelsmann J in *Ex parte Ogunlaja*⁷³ remarks that

despite the fact that consideration is given to a financially troubled debtor due to the harsh economic situation, the minimal right of the creditor to lay his hands on the estate of a debtor cannot be taken away unless and until the amendment of the Insolvency Act occurs.⁷⁴

Essentially, it is not the primary object of the Insolvency Act to grant debt relief to debtors.⁷⁵ However, one of the consequences of the Insolvency Act is that debt relief is impliedly granted to an individual debtor because of rehabilitation in terms of the Act, which results in discharge of all pre-sequestration debts.⁷⁶

It is important to note that the Insolvency Act requires an applicant to prove the golden rule that the sequestration will be to the advantage of the creditors. Advantage to creditors is a requirement in both compulsory sequestration and voluntary surrender applications. However, this requirement is stricter in voluntary surrender applications. In voluntary surrender applications the proof must be reasonable and not be a probability. It must also not be too remote, so that creditors can have financial benefits.⁷⁷ In *London Estates (Pty) Ltd v Nair*⁷⁸ the court held that there will be no advantage for creditors if no dividend or only a negligible

⁶⁹ S 3 Insolvency Act.

⁷⁰ *Ibid.*

⁷¹ Bertelsmann *et al* Mars *The Law of Insolvency in South Africa* 2.

⁷² Swart LLD Thesis (1990) 1.

⁷³ [2011] JOL 27029 (GNP) 36.

⁷⁴ *Ibid* 36.

⁷⁵ Bertelsmann *et al* Mars *The Law of insolvency in South Africa* (2008) 3.

⁷⁶ S 129(b) Insolvency Act.

⁷⁷ Ss 6, 10 & 12 Insolvency Act; Roestoff & Coetzee 2012 *SA Merc LJ* 55. *Meskin & Co v Friedman* 1948 (2) SA 555 (W) 559; *BP Southern Africa (Pty) Ltd v Furstenburg* 1966 (1) SA 717 (O) 720.

⁷⁸ 1957 (3) SA 591 (D) 593.

dividend is available after the costs of sequestration have been met.⁷⁹ The essence of this proof is that the court must make a decision as to whether there are sufficient assets to cover the costs of sequestration and to distribute a non-negligible dividend to creditors.⁸⁰ In this regard, in voluntary surrender applications the courts have strictly insisted on exact information regarding the affairs of the debtor being placed before them and a realistic calculation of the potential dividend to be paid to creditors.⁸¹ The burden of proving this golden rule places a stumbling block in the way of debtors wishing to use the sequestration process as a debt relief measure.⁸²

2.6 Conclusion

Credit legislation in South Africa has come a long way, from the Usury Act and Credit Agreements Act to the enactment of the NCA. The overarching purpose of NCA is to create a single system of credit regulation which seeks to promote and advance the social and economic welfare of South Africans, particularly those who had historically been unable to access credit under sustainable market conditions. From the cases discussed above, there is no doubt that the courts are in agreement as to the purpose of the NCA. The object of NCA is to balance the interests of consumers and credit providers in the interpretation and enforcement of the provisions of the Act. The consumer credit legislation also developed over the years from being more regulatory in its nature to one, which protects the interests of consumers as a result of the introduction of the NCA. Insolvency legislation has also drastically developed over the centuries from a situation where execution was against the debtor's person to a comprehensive debt collecting procedure. From the above, it is apparent that the NCA and the Insolvency Act have distinct purposes and should always be used accordingly in order for the respective acts to advance and achieve the purposes for which they were enacted.

⁷⁹ *Braithwaite v Gilbert* 1984 (4) SA 717 (W) 717.

⁸⁰ *Ex parte Bouwer* 2009 (6) SA 382 (GNP) 386.

⁸¹ *Ibid* 2.

⁸² Boraime and Roestoff 1993 *De Jure* 241;

CHAPTER 3: OVER-INDEBTEDNESS AND RECKLESS CREDIT GRANTING

3.1 Introduction

One of the objects of the National Credit Act¹ is to address the problem of over-indebtedness.² The NCA discourages reckless credit granting by credit providers.³ The NCA addresses over-indebtedness by providing debt relief in the form of debt restructuring. Towards this end, the courts are empowered in section 85 of the NCA to declare a consumer as over-indebted according to the guidelines and make alleviating orders in this regard.⁴ Over-indebtedness usually results from reckless credit granting, low levels of awareness by consumers and lack of enforcement.⁵ However, sometimes a consumer may become over-indebted without the occurrence of reckless credit granting,⁶ as the cause of the over-indebtedness may arise as a result of turbulent economic times, which cause job losses or demotions for consumers. The effect of the declaration of over-indebtedness temporarily relieves a consumer from servicing the debt. On the other hand, the declaration of reckless credit granting has far-reaching adverse effects in terms of imposition of penalties for such conduct against the credit provider. This chapter discusses over-indebtedness and reckless credit in terms of the act. The next chapter will focus on the remedial measure for over-indebtedness, namely, debt review.

3.2 The concept of over-indebtedness

The NCA introduced new concepts into the South African financial law. The concept of over-indebtedness was introduced into South African consumer credit law by the NCA.⁷ The

¹ 34 of 2005 (hereafter NCA).

² S 3(c)(i) NCA.

³ S 3(c)((ii) NCA.

⁴ Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2014) par 11.3.3.1.

⁵ Kelly-Louw 2008 *SA Merc LJ* 218.

⁶ Renke LLD Thesis (2012) 416.

⁷ *Ibid.*

prevention of over-indebtedness is one of the objects of the NCA.⁸ A consumer is considered over-indebted

if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party to.⁹

The determination of over-indebtedness is made by having regard to the consumer's

- (a) financial means, prospects and obligations;¹⁰ and
- (b) probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which he is a party, as indicated by the consumer's history of debt repayment.¹¹

Section 79(2) provides that the person making the determination whether the consumer is over-indebted or not, must apply the criteria prescribed in section 79(1)(a) and (b) above, as they exist at the time the determination is made. The reason for this time is linked to the time the determination of over-indebtedness is made, which is at the time the issue of over-indebtedness is raised.¹² It is evident from the definition of over-indebtedness that a consumer will be over-indebted only if the consumer does not have the ability, having regard to the specified criteria, to satisfy his debts.¹³ Difficulty to pay debts by a consumer does not amount to over-indebtedness in terms of the NCA.¹⁴ Over-indebtedness does not only relate to existing inability to satisfy obligations but also relates to future inability, thus the use of the words "or

⁸ S 3(c)(i) NCA.

⁹ S 79(1) NCA.

¹⁰ S 79(1)(a) NCA.

¹¹ S 79(1)(b) NCA.

¹² Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2014) par 11.3.2; Renke LLD Thesis (2012) 418.

¹³ Renke LLD Thesis (2012) 418.

¹⁴ S 86(7)(b) NCA.

will be unable to satisfy” in section 79(1) of the NCA.¹⁵ Over-indebtedness for the purposes of the NCA relates only to credit agreements governed by the act.¹⁶ The test for over-indebtedness centres on the question of the consumer’s ability or inability to settle his debt “in a timely manner”.¹⁷ The NCA does not define the concept of “in a timely manner” and what would constitute a payment of a debt in a timely manner.¹⁸ This is thus a factual question to be answered and Renke submits that the time limits provided in the contract between the parties should serve as a guideline in determining whether payment was made “in a timely manner”.¹⁹

According to Vessio,²⁰ the legislative definition of over-indebtedness is theoretical in that the courts will be hard pressed to translate the legislative wording into practical implementation. In *Standard Bank of South Africa Limited v Panayiotts*,²¹ the court held that the consumer bears the onus to prove over-indebtedness including details of his or her statement of affairs (assets and liabilities), prospects (including the possible liquidation of assets) and obligations on a balance of probabilities in summary judgment proceedings. However a contrary view was expressed in that the consumer does not have such onus in *Standard Bank of South Africa Limited v Hales and Another*.²² Vessio’s submission that the court will be hard pressed to interpret the legislative definition may be correct looking at the two cases referred to above which give conflicting views on the onus. Renke submits that when analysing the above-mentioned definition of over-indebtedness it is apparent that a consumer will be over-indebted only if the consumer does not have the ability, having regard to the specified criteria, to satisfy his debt.

The NCA addresses the problem of over-indebtedness by providing for debt relief in the form of debt restructuring.²³ Section 85 of the NCA gives the courts the power to declare and relieve over-indebtedness. Section 86 of the NCA provides for an application for debt review which

¹⁵ Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2014) par 11.3.2.

¹⁶ *Ibid.*

¹⁷ Renke LLD Thesis (2012) 418.

¹⁸ *Ibid.*

¹⁹ *Ibid* 418 to 419.

²⁰ 2009 TSAR 276.

²¹ 2009(3) SA 363 (W) 55.

²² 2009 (3) SA 315 (D) 320 F-G.

²³ Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2014) par 11.3.3.1.

review is to be conducted by the debt counsellor. This issue will be discussed in detail in the next chapter. Over-indebted consumers may voluntarily apply to a debt counsellor for debt review if they are over-indebted.²⁴ It is also possible for consumers in terms of section 85 of the NCA, to raise the issue of over-indebtedness after the credit provider has proceeded to take action to enforce a credit agreement in respect of which the consumer has defaulted.²⁵ In such case, the court may either refer the matter to a debt counsellor for debt review or it can itself make a declaration of over-indebtedness.²⁶ Once the consumer is declared over-indebted, the process of debt review may commence.

3.3 Reckless credit granting

Section 81 of NCA introduces the concept of reckless credit granting which is new in South Africa. The effect of section 81 is that it prohibits reckless credit granting by credit providers²⁷ and penalises a credit provider that enters into such agreements.²⁸ This is in line with the objectives of the NCA, wherein reckless lending by credit providers is discouraged.²⁹ Reckless lending includes not only the act of disregarding the consequences of lending, but also the act of not analysing a client at all or analysing a client or potential client incorrectly or failing to carry out certain prescribed assessments or investigations.³⁰

The NCA introduces peremptory pre-assessment requirements and imposes severe sanctions in certain instances of reckless credit granting.³¹ The NCA stipulates that a credit provider who wishes to conclude a credit agreement with a consumer falling within the ambit of the NCA must first conduct an assessment of the consumer in terms of section 81(2) of the NCA. In terms of the assessment, the credit provider must assess whether the consumer can afford to service the debt, the debt repayment history of the consumer and the general understanding of

²⁴ *Ibid.*

²⁵ *Firststrand Bank Limited v Olivier* 2009 (3) SA 353 (SEC) 360 D-F.

²⁶ Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2014) par 11.3.3.1.

²⁷ S 81(3) NCA.

²⁸ S 83(2)(a) and (b) NCA.

²⁹ S 3(c)(ii) NCA.

³⁰ *Vessio* (2009) *TSAR* 275.

³¹ Ss 81(2)(a)(i),(ii), (iii) and 83(a) and (b) NCA.

the risks involved in the credit and obligations of the consumer in connection with the debt.³² The NCA does not prescribe a particular evaluation format to be undertaken by credit providers, it allows credit providers to use their own means of evaluation as long as such means of evaluations are fair and objective.³³ The fairness and objectivity may not be guaranteed as the evaluation formats by different credit providers may expose consumers to arbitrary discretion or treatment since there is no uniform standard provided by the National Credit Regulator.

It is imperative that the consumer answer fully and truthfully, any requests for information made by the credit provider as part of the assessment.³⁴ Failure by the consumer to answer fully and truthfully is a defence against an allegation of reckless credit granting in the event that the National Consumer Tribunal or a court finds that the failure of the consumer materially affects the ability of the credit provider to make a proper assessment.³⁵ The failure by the credit provider to conduct an assessment irrespective of what the outcome of such assessment would have been, amounts to a conclusion of a reckless credit agreement.³⁶ In *Absa Bank Limited v COE Family Trust*,³⁷ the court held that section 81(4) gives the credit provider a defence. However, if an assessment is not undertaken in the first place then section 81(4) is irrelevant. Furthermore, the credit agreement will also be reckless if it emerges that the credit provider conducted an assessment, but where the information available indicates that the consumer did not generally understand or appreciate the risks, costs or his obligations under the credit agreement. The third instance of reckless credit is where an agreement is concluded that results in or enters into the credit agreement that would result in the over-indebtedness of the consumer.³⁸

³² S 81(2) NCA.

³³ S 82(1) NCA.

³⁴ S 81(4)(a) NCA.

³⁵ *Ibid.*

³⁶ S 80(1)(a) NCA.

³⁷ 2012 (3) SA 184 (WCC) 189C.

³⁸ S 80(1)(a) and (b) NCA.

3.4 Over-indebtedness and reckless credit granting

Over-indebted consumers may voluntarily apply to a debt counsellor for debt review should they find themselves in financial woes.³⁹ A consumer may raise the issue of over-indebtedness after steps have been taken by a credit provider to enforce a credit agreement in respect of which the consumer has defaulted on.⁴⁰ In the event that a consumer raises the issue of over-indebtedness, the court may either refer the matter to a debt counsellor for debt review or it may make a declaration of over-indebtedness itself.⁴¹

Furthermore, in any court proceeding in which a credit agreement is being considered, courts are given the power to declare a credit agreement reckless.⁴² If the court declares a credit agreement reckless in terms of section 80(1)(a) because no credit assessment was conducted or in terms of section 80(1)(b)(i) because, although an assessment was conducted the consumer did not understand the risks, costs and obligations under the credit agreement the court may make an order:

- (a) setting aside all or part of the consumer's rights and obligations under that credit agreement, as it determines just and reasonable in the circumstances;⁴³ or
- (b) suspending the force and effect of that credit agreement in accordance with section 83(3)(b)(i).⁴⁴

Section 84(1) of the NCA provides that during the period that the suspension of the credit agreement, the consumer is not required to make payment under the agreement, no interest fee or other charge under the agreement may be charged to the consumer and the credit provider's rights under the agreement or under any law in respect of that agreement are

³⁹ *Ibid.*

⁴⁰ S 85 NCA.

⁴¹ Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2014) par 11.3.3.1.

⁴² S 83(1) NCA.

⁴³ S 83(2)(a) NCA.

⁴⁴ S 83(2)(b) NCA.

unenforceable, despite any law to the contrary. According to Boraine and Van Heerden,⁴⁵ the credit provider is entitled to the return of his performance in the event that the contract is set aside. This was confirmed in *SA Taxi Securitisation (Pty) Ltd v Mbatha*⁴⁶ wherein the court held that the consumer could not retain the goods if all payments under the credit agreement are suspended. If the court declares that a credit agreement is reckless in terms of section 80(1)(b)(ii) because the entering into such credit agreement caused the consumer to be over-indebted, the court:

- (a) must further consider whether the consumer is over-indebted at the time of those court proceedings;⁴⁷ and
- (b) if the court concludes that the consumer is over-indebted, the court may make an order⁴⁸-
 - (i) suspending the force and effect of that credit agreement until a date determined by the court when making the order of suspension;⁴⁹ and
 - (ii) restructuring the consumer's obligations under any other credit agreements, in accordance with section 87.⁵⁰

Prior to making an order in terms of section 83(3), the court must consider the consumer's current means and ability to pay the consumer's current financial obligations that existed at the time the agreement was made and the expected date when any such obligation under a credit agreement will be fully satisfied, assuming the consumer makes all required payments in accordance with any proposed order.⁵¹ According to Van Heerden⁵² the wording of section 83(3)(a) and (b) suggests that, although the credit agreement may be declared reckless because it caused over-indebtedness, the court will be able to exercise its powers in terms of section

⁴⁵ Boraine and Van Heerden 2010 *THRHR* 50.

⁴⁶ 2011 (1) SA 301 (GSJ) 23.

⁴⁷ S 83(3)(a) NCA.

⁴⁸ S 83(3)(b) NCA.

⁴⁹ S 83(3)(b)(i) NCA.

⁵⁰ S 83(3)(b)(ii) NCA.

⁵¹ S 83(4)(a) –(b) NCA.

⁵² Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2014) par 11.4.5.2.

83(3) only if the consumer is actually still over-indebted when the court makes the declaration of over-indebtedness. If the consumer is still over-indebted, the court has a discretion to suspend the force and effect of the agreement in accordance with the provisions of section 84 of the NCA and to restructure any other obligation under any other credit agreement entered into by the over-indebted consumer.⁵³

3.5 Conclusion

Part D of chapter 4 of the NCA places significant obligations on credit providers to ensure responsible credit granting. The consequences for non-compliance with the provisions of the NCA by credit providers are severe. The severity ranges from setting aside the obligations of the consumer under the credit agreement to the court finding it just and reasonable to suspend the effect of the credit agreement thereby resulting in no fees, interest or charges being required during and or after the suspension of the credit agreement. The introduction of the concept of over-indebtedness in the NCA goes a long way in assisting over-indebted consumers receive the much needed debt relief which will be discussed further in chapter 4. Even more vigorous is the power of the courts to declare credit reckless, thereby temporarily alleviating the debt burden of over-indebted consumers and thereby achieving the purpose of the NCA.

⁵³

Ibid.

CHAPTER 4: OVERVIEW OF DEBT REVIEW AND SEQUESTRATION

4.1 Introduction

The National Credit Act¹ and the Insolvency Act² contain procedures, which may be used by debtors to achieve debt relief. In order to utilise the procedures offered by the NCA and the Insolvency Act for debt relief various requirements have to be met. At present there is no clear indication in the debt relief procedures available as to the interplay between these procedures and courts sometimes prefers one procedure over the other. The aim of this chapter is to provide an overview of both the debt relief measures provided by the NCA, namely debt review and the sequestration process in terms of the Insolvency Act. In paragraph 4.2 of this chapter voluntary and compulsory sequestrations is discussed and in paragraph 4.3 the debt review procedure is discussed.

4.2 Sequestration

The Insolvency Act contains two main procedures, namely voluntary surrender³ and compulsory sequestrations⁴ (including the friendly sequestration which has not been recognised as a stand-alone class of sequestration). These procedures can be categorised as debt relief measures as they provide the debtor with some form of relief by discharging a debtor from the pre-sequestration debt at rehabilitation.⁵ Debt relief measures in the Insolvency Act are not limited to credit lending but extend to all forms of indebtedness as opposed to debt review in terms of the NCA.

¹ 34 of 2005 (hereafter NCA).

² 24 of 1936 (hereafter Insolvency Act).

³ Ss 3 to 7 Insolvency Act.

⁴ Ss 9 to 12 Insolvency Act.

⁵ Roger G Evans 2001 *SA Merc LJ* 486, 490-491 and 500-501; *Vermeulen v Hubber* TPD case no 1165/1990; *Sellwell Shop Interiors v Van de Merwe* WLD case no 27527/1990; Alastair Smith 1997 *JBL* 50; *Vermeulen v Hubber* TPD case no 1165/1990.

4.2.1 Voluntary sequestration

A debtor who is in financial crises may surrender his estate by applying to the High Court for the surrender of his estate for the benefit of the debtor's creditors.⁶ The debtor or an agent appointed by the debtor may institute the application for the surrender of the estate of the debtor.⁷ Procedural and substantive requirements are to be fulfilled prior to the assumption of jurisdiction by the court.⁸ The debtor must comply with the procedural requirements, which are set out in section 4 of the Insolvency Act.⁹ The requirements are the notice of intention to surrender,¹⁰ notice to creditors and other parties¹¹ and preparation and lodging of the statement of affairs.¹² To fulfil the substantive requirements the debtor must prove insolvency, that the debtor owns realisable property of a sufficient value to defray all costs of the sequestration which will be payable out of the free residue of his estate and that it will be to the advantage of the debtor's creditors if the debtor's estate were to be sequestrated.¹³ In *Ex Parte Van Den Berg*,¹⁴ the court held that

courts will only accept the surrender of an estate where it is satisfied on the papers or from other evidence that the petitioning debtor is actually insolvent.

Therefore, the debtor must prove actual insolvency.¹⁵ Furthermore, without proving an advantage to creditors, the debtor will not succeed in an application for voluntary surrender. This requirement in the voluntary surrender procedure is more stringent than in the case of an application for compulsory sequestration.¹⁶

⁶ S 3(1) and (2) Insolvency Act.

⁷ *Ibid.*

⁸ *Meskin Insolvency Law* (2014) 3.2.

⁹ Sharrock et al *Hockly's Insolvency Law* 9 ed. (2012) 20-24; *Ex Parte Arntzen* 2013 (1) SA 49 (KZD) 1, 6, 7 and 22; *Edkins v The Registrar of Deeds* case no 16117/11 (JHB) 14-15; *Ex Parte Henning* 1981 (3) SA 843 (O) 844.

¹⁰ S 4(1) Insolvency Act.

¹¹ S 4(2) Insolvency Act.

¹² S 4(3) Insolvency Act.

¹³ *Meskin Insolvency Law* (2014) 3.2.

¹⁴ *Ex Parte Van Den Berg* 1962 (2) SA 402 (O) 402.

¹⁵ *Ex Parte Harmse* [2004] 1 All SA 626 (N) 629; *Ex Parte Mattysen Et Uxor* 2003 (2) SA 308 (T) 316.

¹⁶ Boraime and Roestoff 2000 *Obiter* 261.

Even where all the formal requirements have been satisfied, the court has the discretion whether or not to grant a voluntary surrender application.¹⁷

4.2.2 Compulsory sequestration

Section 9(1) of the Insolvency Act provides that a creditor or the creditor's appointed agent who has a liquidated claim for not less than R100 or where two or more creditors who in aggregate have liquidated claims for not less than R200 may apply for compulsory sequestration of the estate of the debtor. The applicant must provide the master of the High Court with security for costs to defray all sequestration costs until a trustee is appointed.¹⁸ The applicant must also furnish a copy of the application together with all supporting affidavits to the master, to every registered trade union representing the debtor's employees or the employees themselves, to the South African Revenue Service and to the debtor.¹⁹ Factual insolvency or an act of insolvency as envisaged by section 8 is required to be proved by the applicant creditor. If a debtor amongst others gives notice in writing to any of his creditors of an inability to pay his debts, that action by the debtor constitutes an act of insolvency.²⁰ The written notice by the debtor must be given formally and deliberately and with the intention of giving notice.²¹ The applicant creditor must also show that there is a 'reasonable belief' that the sequestration of the debtor will be to the advantage of the body of creditors.²² In compulsory sequestration applications, the court usually grants provisional liquidation orders with a return date. On the return date, the debtor and interested parties may give reasons why the provisional sequestration order should not be made final.²³ Debtors in voluntary surrender applications have more stringent requirements to fulfil²⁴ than a creditor applying for compulsory sequestration of a debtor's estate. In voluntary surrender applications, the debtor

¹⁷ *Ex Parte Bouwer* 2009 (6) SA 382 (GNP) 385; Nagel *et al Commercial Law* (2011) 495.

¹⁸ S 9(3)(b) Insolvency Act.

¹⁹ S 9(4).

²⁰ S 8(g) Insolvency Act.

²¹ Bertelsmann *et al Mars The Law of insolvency in South Africa* (2008) 97.

²² Ss 10(c) and 12(1)(c) Insolvency Act 24; *Botha v Botha* 1990 (4) SA 580 (W) 585; *Ismail v Moosa* 1954 (1) SA 441 (W) 442; *Vincemus Investments (Pty) Ltd v Laher* [2008] JOL 22629 (C) 19.

²³ S 11(1) Insolvency Act.

²⁴ Boraine and Roestoff 2000 *Obiter* 261.

must prove an actual advantage to creditors,²⁵ whereas in compulsory sequestration applications the court must only be satisfied that there is reason to believe that the sequestration of the debtor's estate will be to the advantage of creditors.²⁶

The voluntary surrender applications are characterised by many technical formalities.²⁷ Furthermore, the degree of proof required in respect of the advantage to creditors requirement is more stringent than in compulsory sequestration applications. As a result, it often happens that a family member or friend of the debtor institutes an application for the compulsory sequestration of the debtor relying on act of insolvency usually under section 8(g) of the Insolvency Act.²⁸ This procedure is known as friendly sequestration, because sequestration can eventually force a discharge of the debtor's debts, this form of compulsory sequestration has in the past been subject to abuse.²⁹ It was stated in *Vermeulen v Hubner*³⁰ that debtors with the co-operation of creditors abuse friendly sequestration proceedings in order to escape the formal requirements of voluntary surrender. The court found that the applicant creditor must produce adequate information with regard to the claim against the debtor, with sufficient evidence on respect of the assets of the debtor and a list of the debtor's creditors. This judgment is criticised on the basis that courts are not empowered to usurp the functions of the legislature by setting further requirements to those already imposed by the existing legislation.³¹ The applicant is only required to prove a reasonable belief that the sequestration will be to the advantage of creditors.³² In many instances the main aim for instituting friendly sequestration applications is to assist the debtor in forcing a discharge of the debtor's debts. In order to prevent abuse of this procedure, the court scrutinizes such applications with extreme care in order ensure the advantage to creditors requirement is met.³³ In *R v Meer*³⁴ the court held that in order to guard against abuse of friendly sequestrations, the courts must pay more

²⁵ S 6(1) Insolvency Act.

²⁶ S 12(1)(c) Insolvency Act.

²⁷ S 4 Insolvency Act

²⁸ Loubser 1997 *Codicillis* 23.

²⁹ Evans 2001 *SA Merc LJ* 485.

³⁰ Case no 1165/1990 (T) unreported.

³¹ *Sellwell Shop Interiors CC v Van der Merwe* case no 27537/1990 (W) unreported.

³² Boraine and Roestoff 2000 *Obiter* 261.

³³ *Epstein v Epstein* 1987 (4) SA 606 (C) 606.

³⁴ 1957 (3) SA 614 (N) 619.

attention to the requirement of advantage to creditors in the application and refuse repeated adjournments of the rule *nisi* unless satisfied on affidavit that such adjournment would be to the advantage of creditors.

4.2.3 Consequences of sequestration and rehabilitation

The effect of sequestration of the debtor's estate is to divest the insolvent of his estate and to vest it in the master until a trustee is appointed and upon the appointment of the trustee, to vest the estate in the trustee.³⁵ A debtor who has been sequestrated may apply to the high court for his rehabilitation³⁶ alternatively the debtor may wait for 10 years for an automatic rehabilitation.³⁷ Subject to any special conditions that may be attached thereto by the court, the effect of an order of rehabilitation is to put an end to the sequestration and all pre-sequestration debts are discharged.³⁸ On obtaining his rehabilitation, the debtor is at once relieved of every disability resulting from the sequestration.³⁹ Rehabilitation has the effect of discharging all the debtor's debts, which were due or the cause of which has arisen prior to sequestration.⁴⁰ The rehabilitation of the debtor affords him a fresh start as the debtor is released from all his pre-sequestration debts and the creditors no longer have a right to enforce against his estate subsequent to his rehabilitation.⁴¹

4.3 Debt Review

Debt review is a relief measure that has limited application as it only relates to credit agreements as defined in the NCA.⁴² A consumer who is over-indebted may apply voluntarily to a debt counsellor to have his debt reviewed in terms of section 86 of the NCA with full details from the consumer.⁴³ The details include the personal information, income, monthly expenses,

³⁵ S 20(1)(a) Insolvency Act.

³⁶ *Acar v Perce* 1986 (2) SA 827 (W) 829.

³⁷ S 127A(1) Insolvency Act.

³⁸ S 129(1)(b) Insolvency Act.

³⁹ S 129(1)(c) Insolvency Act.

⁴⁰ S 129(1)(b) Insolvency Act.

⁴¹ Fletcher *The Law of Insolvency* (2011) 48.

⁴² Ss 4(1) and 8 NCA.

⁴³ Van Heerden 2013 *De Jure* 970; Otto 2009 21 *SA Merc LJ* 273; Regulation 24(1)(a) NCA.

debts and living expenses of the consumer.⁴⁴ The debt counsellor must notify all the credit providers listed in the application for debt review as well as all registered credit bureaux in the application received.⁴⁵ The debt counsellor must then evaluate the indebtedness of the consumer,⁴⁶ the consequence of which may result in any of the following: Firstly, the consumer is not over-indebted and the application is rejected.⁴⁷ Secondly, the consumer is not over-indebted but is having difficulty with punctual debt repayments, in which a recommendation of voluntary agreement of debt re-arrangement may be made with the creditors.⁴⁸ Thirdly, the consumer is indeed over-indebted.⁴⁹

If the consumer is over-indebted, the debt counsellor may then recommend to the magistrate's court one or both of the following orders: Firstly, one or more of the agreements of the consumer be declared reckless.⁵⁰ Secondly, one or more of the obligations of the consumer be rearranged.⁵¹ This is done by extending the period of a contract and by requiring the consumer to make smaller repayments or by postponing the dates of repayment.⁵²

Whilst debt review is pending, litigation by the credit provider against the consumer is suspended, but this is subject to a number of exceptions⁵³ under section 88(3) of the NCA. Section 86(2) also excludes those agreements where the credit provider has proceeded to take steps to enforce the credit agreement, in terms of the provisions of section 130,⁵⁴ from debt review. The Supreme Court of Appeal in *Nedbank Limited v The National Credit Regulator*⁵⁵ held that the section 86 procedure can only be accessed in respect of a specific credit agreement if the credit provider has not yet delivered a section 129(1) notice to the consumer in respect of

⁴⁴ Regulation 24 (1)(a) and (b) NCA.

⁴⁵ Otto 2009 21 SA Merc LJ 273.

⁴⁶ *Ibid.*

⁴⁷ S 86(7)(a) NCA.

⁴⁸ S 86(7)(b) NCA.

⁴⁹ S 86(7)(c) NCA.

⁵⁰ S 86(7)(c)(i) NCA.

⁵¹ S 86(7)(c)(ii) NCA.

⁵² S 86(7)(c)(ii) (aa) and (bb) NCA.

⁵³ Otto 2009 21 SA Merc LJ 274.

⁵⁴ S 86(2) NCA has been amended by the National Credit Amendment Act 19 of 2014 (hereafter NCAAA) which is yet to come into effect by deleting s 129 referred to in that section and replacing it with s 130 instead.

⁵⁵ 2011 (3) SA 581 (SCA) 14.

that agreement. The result of this is that a single consumer may have debt review of some of the consumer's agreements while the same consumer may not have debt review of other agreements if a section 129(1) notice has been delivered to him in respect of those agreements.⁵⁶ The current position in terms whereof the delivery of a section 129(1)(a) notice is subsequently, in accordance with section 86(2) of the NCA, bars a consumer from applying for debt review in respect of that specific agreement will however change once the NCAA comes into operation.⁵⁷ Section 86(2) has been amended to impose a bar on the application for debt review in respect of a specific agreement only once the credit provider has proceeded to take the steps envisaged in section 130 (and not in terms of section 129 as currently provided) to enforce that agreement. The implication of the amendment will be that delivery of a section 129(1)(a) notice in respect of a specific agreement will no longer bar an application for debt review in respect of that agreement.⁵⁸

Section 85 of the NCA provides the consumer with yet another opportunity for debt review or a determination of a declaration of over-indebtedness and thus another opportunity at obtaining debt relief.⁵⁹ This is done by allowing the court to use its discretion when dealing with a credit agreement to refer the matter directly to a debt counsellor with the request that the debt counsellor evaluate the circumstances of the consumer and make a recommendation to the court whether or not to declare the consumer over-indebted.⁶⁰

The purpose of debt review in *Collett v FirstRand Bank Limited*,⁶¹ was recognised as debt-rearrangement and not to relieve the debtors of their obligations. The aim of debt counselling is thus to assist over-indebted consumers in rearranging their debts in order to meet their monthly living expenses and furthermore to pay each of their creditors as much as they can afford each month, thereby avoiding legal action.⁶² The aim of debt restructuring has as its

⁵⁶ Van Heerden 2013 *De Jure* 971.

⁵⁷ Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2014) par 11.3.3.1.

⁵⁸ S 26 NCAA.

⁵⁹ *Ibid* 972.

⁶⁰ S 85(a) and (b) NCA.

⁶¹ 2011 (4) SA 508 (SCA) 514.

⁶² Campbell and Logan *The Credit Guide Manage Your Money with the National Credit Act* (2008) 98.

object the ultimate settlement of debt.⁶³ If a consumer is in default under a credit agreement that is being reviewed by a debt counsellor in terms of section 86 of the NCA, the credit provider in respect of that agreement may in terms of section 86(10) give notice to terminate debt review in the prescribed manner to the consumer, the debt counsellor and the National Credit Regulator, at any time at least 60 business days after the date on which the consumer applied for the debt review.⁶⁴ The method of delivery of the section 86(10) notice is not prescribed, however it is submitted that the same considerations apply to “delivery” of a section 86(10) notice to a consumer as those which currently apply to delivery of a section 129(1)(a) except that section 86(10) has no requirement that the notice must be drawn to the attention of the consumer.⁶⁵ It appears that the consumer will in a credit agreement be able to choose the method of delivery of a section 86(10) notice.⁶⁶ It should, however, be noted that the NCA now statutorily prescribes the delivery of a section 129(1)(a) notice but that this delivery procedure has not been prescribed for section 86(10) notices.⁶⁷ Once the NCA comes into effect it will have the result that delivery of a section 86(10) notice will be governed by section 86(2) read with sections 96 and 168.⁶⁸ Once the section 86(10) notice has been given, the credit provider may proceed with enforcing the agreement. However, section 86(11) provides that a magistrate court hearing the matter has a discretion to order resumption of the debt review on any condition the court considers to be just in the circumstances.⁶⁹

4.4 Conclusion

Statutory debt relief measures provided for in the Insolvency Act pose difficulties for debtors in proving the required elements. This is because in voluntary surrender, the debtor must prove an advantage to creditors and in compulsory sequestration and in friendly sequestrations a

⁶³ *Standard Bank of South Africa Limited v Newman* (unreported case no 27771/2010, 15 April 2011 (WCC) 11.

⁶⁴ Kelly-Louw *Consumer Credit Regulation in South Africa* (2012) 351; *National Credit Regulator v Nedbank Limited* 2009 (6) SA 295 (GNP) 8.

⁶⁵ Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2014) par 11.3.3.3.

⁶⁶ *Ibid.*

⁶⁷ S 26 NCA introduces subsections (5), (6) and (7) to section 129.

⁶⁸ Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2014) par 11.3.3.3.

⁶⁹ Kelly-Louw *Consumer Credit Regulation in South Africa* (2012) 352.

reasonable belief that the sequestration will be to the advantage of creditors must be shown. If the debtor can prove that sequestration is to the advantage of creditors, the sequestration application would be granted and the debtor would obtain a discharge. The NCA provides debt review as a statutory debt relief measure. Section 86 also sets out the debt review procedure. Section 85 of the NCA serves to facilitate access to debt review and debt restructuring by a declaration of over-indebtedness and subsequent debt relief by the court without the necessity in all instances of debt review by a debt counsellor. However, debt review is only available to those consumers in instances where enforcement action has not commenced, and where the debt has arisen from credit agreements. Furthermore, debt review does not result in a discharge of any debt.

CHAPTER 5: THE INTERACTION BETWEEN THE NCA AND THE INSOLVENCY ACT

5.1 Introduction

There are fundamental gaps in the provisions of the National Credit Act¹ in relation to its interplay with the Insolvency Act.² No specific mention of the Insolvency Act is made in the NCA or in schedule 1 which refers to conflicting legislations. This has resulted in controversial decisions, *inter alia*, whether sequestration proceedings amount to legal proceedings to enforce an agreement in terms of section 129 of the NCA and whether debt review under the NCA constitutes an act of insolvency in terms of section 8(g) of the Insolvency Act, thereby allowing the debtor to be sequestrated. This chapter addresses the interaction between the National Credit Act and the Insolvency Act, which is the issue that this dissertation seeks to investigate. This is as a result of the interplay between these two acts having been the subject of legal discussions for many years.³ The chapter also examines what constitutes debt enforcement in terms of the NCA and discusses the requirements of section 129 of NCA prior to instituting legal proceedings against a debtor and considers whether an application for debt review under the NCA constitutes an act of Insolvency under section 8(g) of the Insolvency Act.

5.2 Background

An important issue in respect of the interplay between the NCA and the Insolvency Act is whether the choice of the debtor to elect what procedure (either debt review or sequestration) he prefers is taken away by the discretion of the court. In *Ford*, three applications for voluntary surrender of the estates of the debtors were argued in the unopposed motion court. It appears that a large portion of the applicants' debts was made up of credit agreement debt to which the

¹ 34 of 2005 (hereafter NCA).

² 24 of 1936 (hereafter Insolvency Act).

³ Van Heerden and Boraine 2009 *PELJ* 22 and 84, Maghembe 2011 *PELJ* 171, Chokuda 2013 *SALJ* 5; Steyn 2012 *PELJ* 190; *Ex parte Ford* 2009 (3) SA 376 (WCC) (hereafter *Ford*); *Investec Bank Limited v Mutemeri* 2010 (1) SA 265 (GSJ) (hereafter *Mutemeri*); *Naidoo v ABSA Bank Limited* 2010 (4) SA 597 (SCA) (hereafter *Naidoo*); *Nedbank Limited v Andrews* (240/2011) 2011 ZAECPHC 29 (hereafter *Andrews*); *FirstRand Bank Limited v Evans* 2011 (4) 597 (KZD) (hereafter *Evans*); *FirstRand Bank Limited v Janse van Rensburg* 2012 2 All SA 186 (ECP) (hereafter *van Rensburg*).

NCA applied.⁴ The court found the amounts of the debts by the applicant strikingly and disproportionately high in relation to the relatively modest income of each of the applicants.⁵

The court stated that on the facts presented in each application, grounds for cogent suspicion of at least some degree of reckless credit granting exist.⁶ The court referred to its powers in terms of section 85⁷ of the NCA, and pointed out that an evaluation by a debt counsellor may result in one or more of the credit agreement of the consumer being declared reckless, resulting in the setting aside of the agreements or the suspension thereof.⁸ The court called upon counsel for the applicants to present evidence as to why the over-indebtedness of the consumer should not be more appropriately addressed by the mechanisms of the NCA, rather than the blunter instrument afforded in terms of the voluntary surrender remedy under the Insolvency Act.⁹ Counsel for the applicants pointed out that the legislature was aware of Insolvency Act when it enacted the NCA and submitted that section 85 of the NCA was not applicable in voluntary surrender applications under the Insolvency Act. However, the court did not agree with counsel for the applicants and found that the machinery of the NCA was the more appropriate mechanism to be used. The court refused the applications for voluntary surrender of the estates of the debtors.¹⁰ The court in this case took away the choice of applicants to choose which mechanism best suit them by basically forcing them to use the debt review mechanism instead of what they wanted, namely the sequestration of their estates. However, it is however important to note that the court must consider the motive of parties before taking away the right of the debtor. This is because case law has shown that debtors and their counsel abuse the court processes in sequestration proceedings.¹¹ On the other hand in

⁴ *Ex parte Ford supra* 378.

⁵ *Ibid.*

⁶ *Ibid* 379.

⁷ Par 4.2.

⁸ *Ibid* 380.

⁹ *Ibid* 380-381.

¹⁰ *Ibid* 384.

¹¹ *Ex Parte Bezuidenout* case no 1858/2014 1-5 and 13-20; *Ex Parte Pieterse* case no 1859/2014 1-5 and 13-24; *Crafford v Crafford* case no's 19421/13 & 19422/13 1-4, 6-12, 11-21, 14-15, 17-18 and 19-20; *Edkins v The Registrar of Deeds* case no 16117/11 (JHB) 19. *Ex Parte Arntzen* 2013(1) SA 49 (KZD) 6-8, 10, 11, 14, 16 and 22; *Plumb on Plumbers v Trevor Lauderdale* 2013 (1) SA 60 (KZD) 2-6 and 9-11; *Nedbank Limited v Yunus Abrahams* case no 1318/2012 2 and 8-13, 15-18 and 23; *Mthimkhulu v Rampersad* 514 g-i; Roger G Evans 2001 13 SA *Merc LJ* 489-492 and 495-521; Alastair Smith (1998) 6 *JBL* 157-158; *R v Meer* 1957(3) SA

*Mutemeri*¹² the respondents had applied for debt review under section 86 of the NCA and their application for debt review had been accepted by the debt counsellor when the applicants applied for their compulsory sequestration. The application for the sequestration of the respondents was granted by the court on the basis that the court found that an application for sequestration is not an enforcement action and thus not subject to the provisions of section 130(1) of the NCA. In this instance, once again the applicants had elected a procedure which they felt best suited them, but instead found themselves being confined to a procedure they did not ask for. The *Naidoo*¹³ decision resulted from an appeal against an order of sequestration granted against the appellant. The appellant had failed to meet payment obligations under instalment sale agreement to which the NCA was applicable. The appellant argued that the provisions of section 129(1)(a) read with section 130(3) of the NCA should have been complied with prior to the sequestration application being instituted. The court found that application for sequestration does not amount to enforcement action as envisaged by section 129(1)(b). Therefore the appeal was dismissed.

5.3 Section 129 notice requirements prior to instituting legal action

Section 129(1)(a) of the NCA stipulates that in the event that the consumer is in default under a credit agreement, the attention of the consumer is drawn to the default by the credit provider in writing with a proposal that the consumer refer the credit agreement to any of the following: debt counsellor, alternative dispute resolution agent, consumer court or ombudsman with jurisdiction. The notice is intended to commence initiatives to resolve any dispute under the credit agreement or develop and agree on a plan to bring the payments under the credit agreement up to date.¹⁴

614(N) 619; *Absa Bank Ltd v Mahomed* (876/12) [2012] ZASCA 1 (20 January 2014) 3; *R v Meer* 1957(3) SA 614(N) 619; Sharrock et al *Hockly's Insolvency Law* 9 ed. (2012) 43; *R v Meer* 1957(3) SA 614(N) 619; Ka-Mbonane 2006 6 *De Rebus* 2-3; *Meskin and Co v Friedman* 1948 (2) SA 555 (W).

¹² 2010 (1) SA 265 (GSJ).

¹³ 2010 (4) SA 587 (SCA).

¹⁴ *Ibid.*

Although the section stipulates that the credit provider *may* send such default notice to the consumer, the use of the word *may* in the section seems to be inappropriate, keeping in mind the provision of sections 129(1)(b) and 130(3)(a) which provide that the section 129 notice must be sent before legal action may be instituted.¹⁵ Van Heerden and Coetzee¹⁶ agree that the notice is mandatory. Compliance with the section 129(1)(a) procedure can therefore be seen as a pre-requisite to embark on debt enforcement litigation¹⁷ as it was held in *Absa Bank Limited v Prochaska*.¹⁸

Section 130(3) further states that despite any provision of law or contract to the contrary in any proceedings commenced in a court in respect of a credit agreement to which the NCA applies, the court may determine the matter only if it is satisfied that in the proceedings to which sections 127, 129 or 131 apply, have been complied with.¹⁹

5.4 Debt enforcement in terms of the NCA

The NCA introduces the term “enforce” which is not defined in the Act and this has created some uncertainty²⁰ and confusion. In *Standard Bank Limited v Newman*,²¹ Binns-Ward J held that the wordings of some of the provisions of NCA are unclear.²² For purposes of the NCA, it is submitted that the term “enforce” refers to the enforcement of any remedies by the credit provider by means of legal proceedings.²³ In *Mutemeri*,²⁴ the applicants applied for compulsory sequestration of the estate of the respondents in respect of debts relating to credit agreements in terms of the NCA. The respondents had various defences to the sequestration application, the most important for purposes of this dissertation was the defence that the claims of the applicants were based on credit agreements within the meaning of the NCA and thus their

¹⁵ National Credit Amendment Act 19 of 2014 (hereafter NCA) which is yet to come into effect provides for the amendment of section 129 and section 130 of the NCA.

¹⁶ 2009 PER 333.

¹⁷ Van Heerden in Scholtz *Guide to The National Credit Act* (2014) par 12.4.2.

¹⁸ 2009 (2) SA 512 (D) 520; *Nedbank Limited v The National Credit Regulator* 2011 (3) SA 581 (SCA) 14.

¹⁹ S 130(3)(a) NCA.

²⁰ *Ibid* par 12.1.

²¹ [2011] ZAWCHC 91 4.

²² *Ibid* 4-5.

²³ Part C of Chapter 6 NCA; Van Heerden and Otto 2007 TSAR 655.

²⁴ *Investec v Mutemeri supra*.

application for sequestration was barred under it.²⁵ According to the respondents, the sequestration application by the applicants amounted to “debt enforcement”. According to the court, the question whether an application for sequestration constitutes an application for an order to enforce a credit agreement within the meaning of section 130(1) of the NCA depends on the nature of the relief sought by the creditor and not on the underlying motive of sequestration application by the creditor.²⁶

The court in *Mutemeri* referred to *Collett v Priest*²⁷ wherein it was held that an order placing a person’s estate under sequestration cannot be described as an order for a debt by the debtor to the creditor.²⁸ According to *Mutemeri* sequestration is 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 the creditors are treated equally.²⁹ Thus in *Mutemeri* it was held that the application for sequestration is not an enforcement of the claim of the creditor for sequestration and therefore is not subject to the provisions of section 129(1) of the NCA. Thus, applicants do not have to comply with the requirements in section 130(3) of the NCA.³⁰ Further, the court held that an application for the sequestration of a consumer by a credit provider does not amount to litigation or other judicial process by which the credit provider exercises or enforces any right under the credit agreement between itself and the consumer as contemplated in section 88(3) of NCA.³¹ Conversely, the court in *Estate Logie v Priest*³² held that there is little doubt that the motive of a creditor in applying for the sequestration of its debtor may be, and often is, to obtain payment of its debt.³³

According to the court in *Mutemeri*, the question whether an application for sequestration constitutes an application “for an order to enforce a credit agreement” within the meaning of

²⁵ *Ibid* 268.

²⁶ *Ibid* 274.

²⁷ 1931 AD 290.

²⁸ *Ibid* 299.

²⁹ *Investec v Mutemeri supra* 275.

³⁰ *Ibid* 276.

³¹ *Ibid*.

³² 1926 AD 312 319.

³³ *Ibid* 274; *Estate Logie v Priest* 1926 AD 312 319.

section 130(1) of the NCA depends on the nature of the relief sought by the creditor and not on the motive of the creditor underlying the institution of sequestration application. The application for the compulsory sequestration of the respondent was granted in *Mutemeri*.³⁴ In *Naidoo v ABSA*, the appellant argued that prior to the respondent applying to sequester his estate, the respondent had to comply with the procedures stipulated in section 129(1) of the NCA.³⁵ The counsel for the appellant further argued that the procedures prior to debt enforcement provided for in section 129(1)(a) read with section 130(3) of the NCA should be interpreted to cover circumstances relating not only to the enforcement of a credit agreement but also to sequestration proceedings. This is because unpaid claims were the subject matter of the sequestration application arising from credit agreements to which the NCA is applicable.³⁶ Section 129(1) of the NCA requires a credit provider to serve a section 129 notice on the consumer prior to instituting any legal proceeding to enforce the credit agreement. The Supreme Court of Appeal confirmed that sequestration proceedings are not for the recovery of debt for purposes of Part C of Chapter 6 of the NCA, but for the purpose of declaring a debtor insolvent.³⁷

5.5 Debt review constituting an act of insolvency

In *Andrews*,³⁸ the applicant sought a provisional sequestration of the first respondent in an undisputed amount of R1 188 000.78. The indebtedness of the respondent was subject to a re-arrangement in terms of section 87 of the NCA.³⁹ In its founding papers the applicant sought to rely on three grounds for the sequestration namely, an alleged act of insolvency in terms of section 8(e) and (g) of the Insolvency Act and the alleged actual insolvency of the respondent. The counsel for the applicant abandoned the allegations of the commissions of the acts of insolvency and sought to rely only on the allegation of actual insolvency.⁴⁰ According to the

³⁴ *Investec v Mutemeri supra* 274; Boraine and Van Heerden 2010 *PERJ* 116-117.

³⁵ *Naidoo v Absa* 599.

³⁶ *Ibid* 600.

³⁷ *Ibid*; *Investec v Mutemeri supra* 274; Boraine and Van Heerden 2010 *PERJ* 116-117; *Prudential Shippers SA Limited v Tempest Clothing Co (Pty) Ltd* 1976 (2) SA 856 (W) 863.

³⁸ *Nedbank v Andrews supra*.

³⁹ *Ibid* 2.

⁴⁰ *Nedbank v Andrews supra* 2.

applicant, the respondent applying for and being placed under debt review amounted to the respondent giving notice in writing to his creditors that he was unable to pay his debts and the re-arrangement of the debts of the respondent constituted a further act of insolvency in terms of section 8(g) of the Insolvency Act.⁴¹ According to the respondent, the applicant was not entitled to rely on the proceedings conducted in terms of the NCA as constituting acts of insolvency for the purposes of the Insolvency Act. However, in view of the withdrawal of the allegations by the applicant, that the respondent had committed acts of insolvency and only relying on actual insolvency, the court did not deal in more detail with issues raised by the respondent in this regard. However, the court dismissed the application for provisional sequestration on the basis that it found that the applicant failed to establish that the liabilities of the respondent exceeded his assets.⁴²

In *Evans*,⁴³ provisional sequestration was instituted on the basis that Evans had committed an act of insolvency in terms of section 8(g) of the Insolvency Act by giving written notice of his inability to pay his debts and also on the basis of actual insolvency. On 29 January 2009, Evans made an application for debt review under section 86 of the NCA.⁴⁴ On 17 April 2009, Evans addressed a letter to the applicant *inter alia* informing it that its records should that he is under debt review. The applicant argued that the letter constituted an act of insolvency under section 8(g) of the Insolvency Act.⁴⁵ Evans opposed the application on three grounds, however, for purposes of this discussion only Evans submission that the letter of 17 January 2009 did not constitute an act of insolvency⁴⁶ is relevant and will be dealt with. Wallis J, stated that the purpose of the application for debt review in terms of section 86(1) of the NCA is for the debtor to obtain a declaration of over-indebtedness.⁴⁷ According to the court, a debtor who informs his creditor that he has applied for, or is under debt review is necessarily informing the creditor

⁴¹ *Ibid* 3.

⁴² *Ibid* 6.

⁴³ *FirstRand v Evans supra*.

⁴⁴ *Ibid* 2.

⁴⁵ *Ibid*.

⁴⁶ *Ibid* 6.

⁴⁷ *Ibid* 7.

that he is over-indebted and is unable to pay his debts.⁴⁸ The court concluded that Evans was unequivocally conveying to the bank that he was at the time unable to pay his debts.⁴⁹ The court stated that the application for debt review under the NCA, as opposed to any other type of request for debt re-arrangement, did not change the fact that the letter was a notice of inability to pay debts.⁵⁰ According to the court the requirements of section 8(g) are complied with when the notice given by the debtor to the creditor conveys that the debtor is at present unable to pay his debts.⁵¹ Counsel to Evans argued that section 8(g) of the Insolvency Act must be interpreted differently in consequence of the enactment of the NCA.⁵² However, the court noted that it failed to see how a well-established meaning of a provision in the Insolvency Act can be altered as a result of a different statute that makes no reference to it.⁵³ According to the court, Parliament was aware of the existence of the Insolvency Act when it enacted the NCA, as the NCA contains Schedule 1, which deals with rules regarding conflicting legislation but makes no reference to the Insolvency Act.⁵⁴ The court held that if Parliament intended to qualify section 8(g) of the Insolvency Act as suggested by Evans' counsel it would surely have done so.⁵⁵ Accordingly, the court held that the letter of 17 April 2009 constituted an act of insolvency by Evans in terms of section 8(g) of the Insolvency Act.⁵⁶ Steyn⁵⁷ submits that the judgment in Evans undermines the potential for the consumer debt relief system introduced by the NCA to serve as an alternative to sequestration.

In *Janse van Rensburg*,⁵⁸ the applicant brought applications for the provisional sequestration of the estate of two separate spouses, married out of community of property. In each application, the applicant relied on the commission of an act of insolvency in terms of section 8(g) of the Insolvency Act. The applicant alleged that each of the respondents made an application for a

48

Ibid.

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Ibid 9.

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Ibid 9 -10.

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Ibid 10.

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Ibid 11.

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Ibid.

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Ibid.

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Ibid.

56

Ibid 12.

57

Steyn 2012 *PERJ* 224.

58

FirstRand v Janse van Rensburg supra.

declaration of indebtedness in terms of section 86(7)(c) of the NCA. In confirmation, the applicant relied on a consumer profile report issued by a credit bureau stating that the respondents had applied for debt review.⁵⁹ The court noted that the credit bureau report merely reflected that each of the respondents “had applied for debt rehabilitation or to be placed under debt review with a registered debt counselor” and no other information was provided except that the application was made on 23 March 2011.⁶⁰ Counsel to the applicant argued that an application to be placed under debt review in terms of section 86 of the NCA constitutes an act of insolvency in terms of section 8(g) of the Insolvency Act.⁶¹ According to the court, an application for debt review in terms of section 86 of the NCA does not involve the issuance of notice by the debtor to the creditor in which the debtor declares an inability to pay one or more of his debts. A notice of inability to pay a debt in terms of section 8(g) is required to be given deliberately and with the intention of giving such notice.⁶² The court held that the notice must be such that upon its receipt, the recipient can conclude that the debtor is unable to pay his debts. The notice must convey an unequivocal statement of inability to meet a debtor’s obligation.⁶³ The court noted that the applicant did not rely on written communication addressed to it by the respondents but on a profile report issued by the credit bureau reflecting that the respondents has applied for debt review in terms of the provisions of the NCA.⁶⁴ The court in *Janse van Rensburg* held that there was no basis to find that the credit bureaux acted upon the basis of authority conferred by the respondents nor on the basis of any general authority, which could bind the respondents.⁶⁵

The result was the dismissal of the sequestration applications of the respondents.⁶⁶ The courts were obviously not in agreement as to whether an application for debt review constitutes an act of insolvency under section 8(g) of the Insolvency Act. Fortunately, the legislature has provided certainty through the enacted of the NCAA, which inserts section 8A to the Insolvency

⁵⁹ *Ibid* 3.
⁶⁰ *Ibid*.
⁶¹ *Ibid* 3-4; *FirstRand v Evans supra* 6.

⁶² *Ibid* 13.

⁶³ *Ibid* 13-14.

⁶⁴ *Ibid* 14 and 15; *Eli Spilkin (Pty) Ltd v Mather* 1970 (4) SA 22 (E) 24.

⁶⁵ *FirstRand v Janse van Rensburg supra* 16.

⁶⁶ *Ibid* 17.

Act, which expressly stipulates that a debtor who has applied for debt review must not be regarded as having committed an act of insolvency. Chokuda⁶⁷ agrees with the court's reasoning in *Van Rensburg* and submits that the court was correct in rejecting both the contention that debt review constitutes an act of insolvency under section 8(g) of the Insolvency Act and the applicant's reliance on the *Evans* case.

5.6 Conclusion

The language of section 129(1)(a) is misleading by the use of the word “*may*”. Rather, the word “*must*” or “*shall*” should have been used to make it unequivocal that it is compulsory for the provisions of section 129(1)(a) to be complied with prior to instituting legal action to enforce a credit agreement. It is submitted that the courts are correct in their interpretation that sequestration proceedings are not legal proceedings to enforce a credit agreement, therefore, they do not amount to those proceedings contemplated under sections 129(1)(a) read together with 130(3), hence the credit provider is not required to first deliver a section 129 notice to a consumer prior to instituting sequestration proceedings.

The decision in *Ford* makes it evident that prior to instituting a voluntary surrender application, it would be prudent of the applicant to first consider whether debt review is not a better option to sequestration proceedings in circumstances where the debts result from credit agreements to which the NCA is applicable. Once the applicant has considered this issue and decided that sequestration proceedings are better suited, it is recommended that the applicant should set out the reasons why sequestration of the estate of the debtor would be better than debt review under the Insolvency Act. Otherwise, the court may decide on the choice of procedure it deems appropriate for the debtor, thereby taking away the right of the debtor to elect a procedure to be bound by.

The *Mutemeri* case provides that credit providers can institute an application to sequester the estate of a debtor who is under debt review in terms of the NCA as sequestration proceedings do not amount to debt enforcement.

⁶⁷ Chokuda 2013 SALJ 10.

I submit that the *Mutemeri* judgment is correct, sequestration does not amount to debt enforcement. However, I submit that it is rather an unfortunate situation in which debtors find themselves as they are caught between a rock and a hard place. In electing to use the mechanism of debt review under the NCA they expose themselves to possible sequestration.

It is clear from the judgment of *Janse van Rensburg* that a notice issued by a credit bureau stating that a consumer has applied for debt review is not sufficient proof of an act of insolvency. However, from the judgments of *Andrews*, *Evans* and *Janse van Rensburg*, there is a measure of doubt as to whether debt review itself amounts to an act of insolvency under section 8(g) of the Insolvency Act. The courts did not rule on this issue in the case of *Andrews*, where the court only made *obiter* remarks regarding acts of insolvency in circumstances of debt review as the applicant withdrew the allegation of an act of insolvency under section 8(g). However, the courts have not ruled on the issue of whether being under debt review constituted an act of insolvency under the provisions of the Insolvency Act. Clarity on this issue has now been established by the amendment to schedule 2 of the NCA, where the NCA has specifically added section 8A to the Insolvency Act. This section provides that a debtor who has applied for debt review should not be regarded as having committed an act of insolvency. However, there is still confusion in respect of the interplay between the NCA and the Insolvency Act as both acts do not adequately address the interplay between these two acts therefore, I submit that the courts will in the near future once again have to deal with the issue of the interplay between the NCA and the Insolvency Act.

CHAPTER: 6 CONCLUSION AND RECOMMENDATION

6.1 Introduction

The purpose of this dissertation is to investigate the interplay between the National Credit Act 34 of 2005 (NCA) and the Insolvency Act 24 of 2005 (the Insolvency Act) and *vice versa*. As indicated in the dissertation, the purpose of the NCA is to provide debt relief to over-burdened consumers.¹ Whilst the purpose of the Insolvency Act is to ensure an orderly and fair distribution of the assets of the debtor in circumstances where the assets are insufficient to satisfy all the claims of the creditors.²

The NCA repealed the Usury Act and the Credit Agreements Act, which regulated consumer credit in South Africa for more than a quarter of a century.³ The NCA applies to all credit agreements provided the agreement falls under the ambit of the definition of credit agreement as defined by the NCA.⁴

The foundation of modern law insolvency is Roman Dutch as introduced in the southern part of Africa approximately four centuries ago.⁵ Insolvency law has its origin in Table 3 of the Twelve Tables of Roman law.⁶ During this time creditors enjoyed the option, in the event of the debtor's inability to pay his debt to execute against the person of the debtor.⁷ However, over the centuries the insolvency law developed and became less harsh and allowed for the sale of the assets of the debtor and abolished execution against the person of the debtor. On 1 July 1936 the Insolvency Act 24 of 1936 came into effect thereby repealing the 1919 Insolvency Act.⁸

¹ See par 1.1.

² See par 2.4.

³ See par 2.2.

⁴ *Ibid.*

⁵ See par 2.3.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

The NCA is an important piece of legislation in the administration of debt relief as it aims to *inter alia* protect consumers, prevent over-indebtedness and discourage reckless credit granting.⁹ In order to achieve its goals the NCA added a new dimension to credit regulation by introducing measures to preventing reckless credit granting and introducing severe sanctions for those credit providers who provide reckless credit.¹⁰ Part D of chapter 4 of the NCA deals with over-indebtedness and reckless credit. Whereas the purpose of the Insolvency Act is a collective debt collecting procedure that provides for a fairer distribution of proceeds of property amongst creditors where a debtor does not have sufficient assets to settle all his debts in full.¹¹ The Insolvency Act provides an option to a debtor who is unable to pay his debts to apply for voluntarily surrender of his estate.¹² The debtor must ensure that the preliminary formalities are complied with prior to the application of the surrender of his estate.¹³ The court may only accept the surrender of the estate if the following conditions are satisfied: the estate of the debtor is, in fact insolvent; the debtor owns realisable property of sufficient value to defray all the costs of the sequestration and the sequestration will be to the advantage of creditors. The most important requirement in a successful voluntary surrender is to prove that the sequestration will be to the advantage of creditors.¹⁴ However, with the decision in *Ex parte Ford*, it is no longer a certainty that once all the requirements have been complied with the court will grant the order. The court has held that in voluntary applications, it has the discretion to determine the machinery that is more appropriate to be used by a debtor and found that the NCA was more appropriate, thus, sequestration and the voluntary surrender applications were refused.¹⁵ As a result of the stringent requirements of voluntary sequestration, friendly seuestration emerged in order to avoid having to comply with such strict requirements. The second way the estate of a debtor may be sequestrated is by way of compulsory sequestration.¹⁶ Whereas the debtor makes an application for voluntary surrender, an

⁹ See par 2.4.

¹⁰ See par 3.4.

¹¹ See par 2.5.

¹² See par 4.2.1.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ See par 4.2.2.

application for compulsory sequestration is made by one or more creditors of the debtor. The court may grant an application for the sequestration of the estate of a debtor if the following conditions are met: the applicant has established a claim which entitles him to apply for the sequestration of the estate of the debtor, the debtor has committed an act of insolvency or is insolvent and there is reason to believe that it will be to the advantage of creditors if the estate of the debtor is sequestrated.¹⁷

It is submitted that where a debtor, from the facts of the matter, sincerely chooses the path of voluntary surrender, the court should not force a debt review option on such debtor unless it is clear that voluntary surrender is meant to frustrate the efforts of creditors. Otherwise, the provisions of the NCA meant to assist debtors may be rendered useless. The NCA provides over-indebted consumers with debt relief in the form of debt review, however debt review does not provide consumers a discharge from debt. Rehabilitation in terms of the Insolvency Act provides debtors with a discharge however, the advantage to creditors requirement in both voluntary and compulsory sequestration applications is a stumbling block for creditors to obtain debt relief.

The NCA operates on the principle of extending or restructuring the payment obligations of a consumer in order to achieve the eventual satisfaction of debts, whereas the Insolvency Act operates on the principle of bringing about a *concursum creditorium* that is a collective debt settlement procedure. The outcome of the insolvency procedure is the liquidation of all the assets of the debtor (excluding exempt assets) in order to pay the creditors. The NCA impacts on the Insolvency Act and in light of this, it is rather surprising that provision was not made in the NCA to exclude a credit provider from applying for sequestration of a consumer under debt review in terms of the NCA.

The interplay between the NCA and the Insolvency Act is further evident from the *Mutemeri*, *Naidoo and Ford* decisions. The *Mutemeri* case shows how *inter alia* sections 88(3), 129(1) and section 130(3) of the NCA impact on the Insolvency Act. The court found that section 130 of the NCA does not apply to sequestration applications as an application for sequestration is not an

¹⁷ *Ibid.*

application to enforce the credit provider's right against the consumer. Therefore the credit provider does not need to comply with the provisions of section 129(1)(a) of the NCA prior to instituting a sequestration application.¹⁸ On appeal the Supreme Court of Appeal in *Naidoo* confirmed confirmed the *Mutemeri* judgment and confirmed that the credit provider does not need to comply with section 129(1)(a) of the NCA prior to instituting a sequestration application and that sequestration applications are not proceedings to enforce a credit agreement therefore there is not need to comply with section 130(3)(a).¹⁹ In *Ford* the court found that section 85 of the NCA applies to proceedings for voluntary surrender applications and to any proceeding in which credit agreements are relevant. As a result in the case where credit agreement debt is relevant the court is entitled to invoke the provisions of section 85 using its discretion as provided in the section.²⁰

6.2 Summary and Findings

From the cases of *Mutemeri*, *Naidoo*, *Ford*, *Andrews*, *Evans* and *Janse van Rensburg*, it is clear that credit providers are attempting to outrightly deprive the consumers of the choice to debt review offered under the provisions of NCA. An application by a credit provider to sequestrate a debtor ensures that a collective debt process takes place where the liquidation of assets will occur instead of allowing the restructuring of payment of debt over a longer period. In the latter case, the debtor keeps the assets and eventual full repayment of the debt takes place. Allowing a debtor under debt review to be sequestered undermines the entire object of the NCA.

It is clear that a *lacuna* exists in this regard which requires the legislature to rectify in order to ensure the proper functioning of the NCA and to prevent the conflicting objects of the NCA and the Insolvency Act from depriving consumers of the protection envisaged under the NCA. The legislature has attempted to address some of the problems relating to the interplay between the NCA and the Insolvency Act by including section 8A in the Insolvency Act under the National

¹⁸ See par 5.4.

¹⁹ See par 5.2.

²⁰ See par 5.2.

Credit Amendment Act. Section 8A of the Insolvency Act provides that a debtor who has applied for debt review must not be regarded as having committed an act of insolvency.

It is submitted that the inclusion of section 8A to the Insolvency Act adequately addresses the issue of the conflicting provisions in the NCA in relation acts. Section 8A will also overrule the decision in *Evans* where an act of insolvency emanated from a letter written by the debtor to the applicant advising them that he is under debt review and that debit order on this account should be cancelled.²¹ The court stated that if a debtor is under a debt review and he is declared over-indebted, it reasonably follows that he is unable to pay his debts. The amendment brings about the best solution as debt review is meant to assist over-indebted consumers by allowing them to pay their debts over an extended period.

However, it is submitted that debt review process itself cannot fall under the provisions of section 8(g) of the Insolvency Act. What the section requires is a written notice to a creditor of the inability of the debtor to pay his debts. Under a debt review process, the consumer does not have to give written notice to his creditors of his inability to pay them. Therefore it cannot be said that debt review under the NCA is an act of insolvency under the provisions of section 8(g) of the Insolvency Act.

It is argued that the ruling of the court that the letter by *Evans* constituted an act of insolvency under 8(g) did not go far enough to comply with the requirements of section 8(g) of the Insolvency Act. The letter on its own should state an inability to pay. One should not rely on surrounding circumstances to support the contention that the letter is an act of insolvency. Doing so amounts to placing reliance on factual insolvency. The decision in *Evans* is reasonable on the basis that the applicant also alleged and proved factual insolvency of *Evans* as section 9(1) of the Insolvency requires the applicant to prove an act of insolvency or factual insolvency to obtain a sequestration order. If actual insolvency was not proved, it is submitted that *Evans* should not have been sequestrated, as the letter submitted to prove an act of insolvency did not comply with what is required in section 8(g) of the Insolvency Act. This case should be distinguished from *Andrews* and *Janse van Rensburg* cases. This is because the court did not

²¹ See par 5.5.

find that *Evans* committed an act of insolvency under section 8(g) of the Insolvency Act by being under debt review, but rather the letter sent by *Evans* to the applicant was found to constitute an act of insolvency under section 8(g) of the Insolvency Act.

Once again the issue of debt review constituting an act of insolvency came before the court in the case of *Janse van Rensburg* where it was alleged that a report issued by the credit bureau stating that the respondents had applied for debt review constituted an act of insolvency under section 8(g) of the Insolvency Act.²² The court held that the application for debt review under section 86 of the NCA does not involve notice given by a debtor to the creditor in which the debtor declares an inability to pay his debts. Therefore, debt review does not constitute an act of insolvency under section 8(g) of the Insolvency Act and credit bureau report was found not to be sufficient evidence for an act of insolvency as alleged. It is submitted that the findings of the court in this case, as already alluded to in the requirements of section 8(g), are specific in their nature. It is noted that being under debt review does not meet those requirements neither is a report evidencing an application that the consumer is under debt review or has applied for debt review under the NCA.

6.3 Recommendations

In conclusion it is submitted that the inclusion of section 8A in the insolvency Act largely addresses the *lacuna* created between the provisions of NCA and the Insolvency Act only as far as the question of whether debt review constitutes an act of insolvency. From the case law, it is evident that debt review does not constitute an act of insolvency. The legislature should further amend the NCA to reflect that debt review is an automatic bar to the granting of a sequestration order under compulsory sequestration as opposed to voluntary surrender which is intentionally carried out by the debtor himself. This will then take away the situation encountered in the cases of *Mutemeri* and *Naidoo* where debtors who applied for debt review were sequestrated, thereby frustrating the object of the NCA.

²² *Ibid.*

In addition, the discretion of the court in voluntary surrender applications as alluded to in *Ford* to refer the debtor for debt review should be regulated to allow the court to only decide whether to grant or refuse the application before it, thereby allowing a debtor to exercise his choice of procedure. The legislature should also ensure the protection of the rationale behind voluntary surrender where a debtor chooses not to undergo a debt review process. It is however noted that where the court observes that the debtor intends to engage in the abuse of the already abused court process in voluntary sequestration proceedings, the court should use its discretion to ensure a balance of interests between the parties.

From this discussion it should also be clear to the debtor that writing a letter to the creditor advising them of the debt review should be avoided in order to prevent such letter being interpreted to constitute an act of insolvency.

6.4 A final word

The NCA and the Insolvency Act were enacted for distinct purposes. The NCA was enacted with the aim of providing debt relief to over-indebted consumers and as such debt relief in terms of the NCA is a direct consequence thereof. The Insolvency Act on the other hand was enacted as a collective debt enforcement procedure with its aim being to ensure an advantage to creditors. However, the Insolvency Act has as an indirect consequence debt relief for the debtor at rehabilitation of the debtor. The purpose of these two acts should be remembered when considering issues relating to these two acts in order to avoid a situation where the acts are used in circumstances which does not warrant such use.

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