

The interplay between Debt review in terms of the  
National Credit Act and Sequestration in terms of  
the Insolvency Act

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## Chapter 1

### INTRODUCTION

#### 1.1 Introduction

Both the National Credit Act<sup>1</sup> and the Insolvency<sup>2</sup> Act provide debt relief measures to over-indebted debtors. In terms of the Insolvency Act, debt relief comes in the form of voluntary surrender<sup>3</sup> and the so called “friendly” sequestration.<sup>4</sup> Although debt relief to over-indebted debtors is not the primary objective of the Insolvency Act, rehabilitation in terms of section 124<sup>5</sup> and section 127A<sup>6</sup> results in the discharge of all pre-sequestration debts thereby providing debt relief to debtors.<sup>7</sup> In terms of the NCA, debt relief comes in the form of debt review in terms of section 86. In terms of debt review, an over-indebted debtor applies to a debt counsellor for recommendations to court to be declared over-indebted. A debt counsellor may then issue proposals<sup>8</sup> recommending that the court make an order that the credit agreement in question be declared reckless credit<sup>9</sup> and/or an order that one or more of the debtor’s credit agreement be re-arranged to afford a debtor a longer term for payment on a reduced

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<sup>1</sup> National Credit Act 34 of 2005 (hereinafter “the NCA”).

<sup>2</sup> Insolvency Act 24 of 1936 (hereinafter “Insolvency Act”).

<sup>3</sup> S 4 of the Insolvency Act allows a debtor who is insolvent to apply to court for sequestration of his estate after complying with the requirements set out in this section.

<sup>4</sup> In terms of which a creditor, usually a friend of the debtor, applies for compulsory sequestration with the objective of assisting the debtor to get the sequestration order since the requirements for compulsory sequestration are less stringent than those for voluntary surrender.

<sup>5</sup> In terms of which an insolvent debtor can apply to court to be rehabilitated.

<sup>6</sup> In terms of which an insolvent debtor is automatically rehabilitated after a period of 10 years from the date of sequestration of his estate.

<sup>7</sup> S 129(1)(b). Also see Bertelsmann *et al Mars The law of insolvency in South Africa* 9<sup>th</sup> Edition (2008) at p 3.

<sup>8</sup> In terms of s 87(7)(c).

<sup>9</sup> In terms of s 83(2) the consequences of a court declaring a credit agreement reckless are, *inter alia*, that the court may make an order setting aside all or part of a consumer’s rights and obligations as the court may deem just and reasonable. The aforesaid could provide debt relief where the court orders that the debtor repays some of the debt owed to a creditor who extended reckless credit.

instalment. However, the debt review procedure does not make provision for any statutory discharge of debt as provided for in the Insolvency Act.

One of the main objectives of the NCA is to protect the consumer by addressing and preventing over-indebtedness and providing mechanisms to resolve over-indebtedness.<sup>10</sup> In this regard, the NCA can be classified as a piece of consumer protection legislation<sup>11</sup> as grasped from its main objectives. On the other hand, the Insolvency Act can be classified as a pro-creditor piece of legislation because one of its main objects is to provide a collective debt collection process which insures that all creditors of an insolvent debtor get a fair share of his liquidated assets.<sup>12</sup>

## 1.2 Background

In the past couple of years our courts have been confronted with the question as to whether the debt review<sup>13</sup> procedure should be followed by an over-indebted debtor first before applying for voluntary sequestration, which is viewed as a drastic measure when it comes to debt relief.<sup>14</sup> In contrast, the courts have also had to deal with the question of whether a creditor may proceed with compulsory sequestration whilst a debtor is under debt review.<sup>15</sup> It therefore seems that there is uncertainty as to which Act takes preference over the other in, for example, a situation where the debtor is under debt review and the creditor proceeds with compulsory sequestration or where a debtor chooses to proceed with an application for a voluntary surrender of his estate

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<sup>10</sup> S 3(g) of the NCA.

<sup>11</sup> Otto and Otto *The National Credit Act Explained* (2006), p 2. In *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D) the court remarked that it was abundantly clear that the NCA has introduced innovative mechanisms and concepts directed more at the protection and in the interest of credit consumers than of credit providers.

<sup>12</sup> *Walker v Syfret* 1911 AD 141. See also Mars, p 2.

<sup>13</sup> Debt review is a debt relief measure found in s 86 of the NCA read with Reg 24 of the National Credit Regulations.

<sup>14</sup> See for example *Ex Parte Ford* 2009 3 SA 376 (WCC), *Standard Bank v Hales* 2009 (3) SA 315 (D).

<sup>15</sup> In *Investec Bank Limited and Another v Mutemeri* 2010 (1) SA 265 (G) where the court held that sequestration does not constitute debt enforcement as contemplated in s 130(1).

without considering the alternative of debt review in circumstances where debt restructuring could arguably prove to be more advantageous.<sup>16</sup>

In *Ex parte Ford*<sup>17</sup> the court refused to grant a voluntary surrender stating that the applicants could have applied for debt review in terms of the NCA which was readily available to them instead of the more cumbersome sequestration procedure in terms of the Insolvency Act. The court came to its decision based on the fact that there were indications of the extension of reckless credit and consequently exercised its discretion in terms of section 85 of the NCA.<sup>18</sup> In *Investec Bank v Mutemeri* the respondents argued that since the debt arose from a credit agreement to which the NCA applied, the applicants were barred from bringing an application for compulsory sequestration because the respondents had already applied for debt review by the time the applicants brought their application for compulsory sequestration.<sup>19</sup> The essence of their argument was that section 88(3)<sup>20</sup> and section 130(1)<sup>21</sup> precluded the applicants from applying for compulsory sequestration since the latter amounts to debt enforcement which could not be invoked until their debt restructuring application was heard in court. The court granted the order for compulsory sequestration and held that sequestration in terms of the Insolvency Act does not amount to enforcement of a credit agreement or proceedings in respect of a credit agreement. The court held therefore that sequestration is not precluded by the prohibitions of sections 88(3) and

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<sup>16</sup> S 85 of the NCA gives the court a wide discretion “in any proceedings” to refer a matter involving a credit agreement to debt review.

<sup>17</sup> *Ex parte Ford* 2009 3 SA 376 (WCC).

<sup>18</sup> *Ex parte Ford supra*, par 16.

<sup>19</sup> *Mutemeri supra*, par 1.

<sup>20</sup> Which provides that:

subject to section 86(9) and (10), a credit provider who receives notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86(4)(b)(i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until, *inter alia*, the consumer is in default under the credit agreement and the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal.

<sup>21</sup> Which provides that :

a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default under credit agreement in question for at least 20 business days and, *inter alia*, at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(9), or section 129(1), as the case may be.



130(1) of the NCA. The implication of the aforesaid is that the debt review process does not preclude sequestration proceedings. These two decisions obviously resulted in confusion as debtors applying for voluntary surrender and creditors applying for compulsory sequestration are unable to make a probable prediction as to the outcome of their respective applications as it is unclear as to which proceedings the court would prefer. Neither the two pieces of legislation dealt with the interplay between the two processes. Another issue is whether or not debt review amounts to an act of insolvency.

### **1.3 Problem statement and research objective**

The research objective of my dissertation is to investigate the effect of statutory debt relief provisions, particularly debt review, in terms of the NCA on sequestration procedures, be it compulsory or voluntary and in contrast, the effect of sequestration proceedings on the debt review procedure.

### **1.4 Significance of the study**

The significance of this study is that it provides an analysis of the sequestration procedure in terms of the Insolvency Act with emphasis on how it is affected by the application of debt relief provisions contained in the NCA and, in contrast, how the sequestration procedure affects debt review. It also provides guidelines and suggestions on how these two procedures can be harmonised to ensure the best outcome for each individual case. This is significant as there is currently uncertainty amongst debtors, creditors, practitioners and academics in this regard.

### **1.5 Structure of dissertation**

This dissertation will be structured in five chapters. The first chapter consists of the introduction. The second chapter is on sequestration proceedings in terms of the Insolvency Act. The third chapter is on the debt relief measures in terms of the NCA. The fourth chapter is on the interplay, or lack thereof, between debt review in terms of

the NCA and sequestration in terms of the Insolvency Act including a discussion on case law and opinions. The last chapter, chapter 5 contains my general conclusions and recommendations.

## Chapter 2

# VOLUNTARY SURRENDER AND COMPULSORY SEQUESTRATION PROCEEDINGS

## 2.1 Introduction

As mentioned above,<sup>1</sup> debt relief to over-indebted or insolvent debtors is not the primary objective of the Insolvency Act<sup>2</sup> but debt relief is usually the consequence of a successful sequestration process in the form of rehabilitation.<sup>3</sup> The Insolvency Act does not define what the process of sequestration is.<sup>4</sup> Sequestration can broadly be described as a system in terms whereby an insolvent debtor's assets are liquidated in order to provide for a collective debt collecting process that insures an orderly and fair distribution of the debtor's assets in circumstances where the said assets are not sufficient to satisfy all creditors' claims in full.<sup>5</sup> The aforesaid results in the coming into existence of the concept of *concursum creditorum*.<sup>6</sup> This concept was explained in the case of *Walker v Syfrets*<sup>7</sup> where the court reasoned as follows:

The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transgression can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each must be dealt with as it existed at the issue of the order.

This chapter will focus on sequestration procedures and how they can be utilised as a debt relief procedure by over-indebted or insolvent debtors on the one hand and as a

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<sup>1</sup> Ch 1, par 1.1.

<sup>2</sup> See *R v Meer* 1957 (3) SA 614 N where the court remarked: "the Insolvency Act was passed for the benefit of creditors and not for the relief of harassed debtors".

<sup>3</sup> Bertelsmann *et al Mars The law of insolvency in South Africa* 9<sup>th</sup> Edition (2008), p 3.

<sup>4</sup> Only the term "sequestration order" is found in s 2 of the Insolvency Act which means an order of court whereby an estate is sequestrated and includes a provisional order, when it is not set aside.

<sup>5</sup> Mars, p 2.

<sup>6</sup> This concept basically means that the debtor's creditors' rights as a group take preference to the rights of an individual creditor. A single creditor may not claim from the debtor to the detriment of the group of creditors. See Mars, p 2.

<sup>7</sup> 1911 AD 141, p 166.

vehicle to collect debts due to creditors on the other. Voluntary procedure will be discussed by considering the stringent requirements that need to be complied with. The compulsory sequestration procedure which provides for less stringent requirements as compared to voluntary surrender will also be discussed in light of the fact that the former procedure gives rise to friendly sequestration. Further, the effect of a sequestration order and rehabilitation will be discussed.

## 2.2 Sequestration in terms of the Insolvency Act

### 2.2.1 Voluntary surrender

Section 3(1) of the Insolvency Act provides that:

an insolvent debtor or his agent or a person entrusted with the administration of the estate of a deceased estate insolvent debtor or an insolvent debtor who is incapable of managing his own affairs, may petition the court for the acceptance of the surrender of the debtor's estate for the benefit of his creditors.

This provision makes it clear that a surrender of the debtor's estate is aimed at benefiting the debtor's creditors as opposed to relief of an over-indebted debtor.<sup>8</sup> To defray prejudice to creditors of a debtor who intends to surrender his estate, stringent requirements have to be met by a debtor before a court can grant a debtor's application to surrender his estate. In terms of section 6(1) of the Insolvency Act, the court *may* accept the surrender of an estate if the court is satisfied that:

- (a) the provisions of section 4 have been complied with;
- (b) the estate of the debtor in question is insolvent;
- (c) the debtor owns realisable property of a sufficient value to defray all costs of sequestration which will be payable out of the free residue; and
- (d) it will be to the advantage of creditors.

It is important to note that even if the abovementioned requirements have been met, the use of the word "may" in section 6(1) gives the court the discretion to either accept or reject an application for surrender of an estate. The court will usually exercise its

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<sup>8</sup> Mars, p 48.

discretion in instances where the application is opposed by one or more creditors.<sup>9</sup> The stringent formalities and requirements in relation to a voluntary surrender application can be very costly to an already over-indebted debtor. These requirements and formalities are briefly set out in the following sub-paragraphs which an over-indebted debtor will need to consider whether or not it is prudent to proceed with voluntary surrender in an attempt to alleviate his debt problem.

### 2.2.1.1 Formal requirements

Before a debtor brings an application in terms of section 3, explained above,<sup>10</sup> the debtor must cause to be published in the government gazette and in a news paper circulating the area within which he resides, and if he is a trader, in the district in which his principal place of business is situated a notice of surrender (hereinafter referred to as “the notice”).<sup>11</sup> The notice must correspond substantially with form A in the first schedule to the Act.<sup>12</sup>

The notice must describe the debtor, his spouse (if married) and marital regime thereof with sufficient accuracy to enable his creditors to identify the debtor as accurately as possible.<sup>13</sup> The purpose of the notice is to ensure that the debtor’s creditors receive timely notice of the debtor’s intention to apply for the sequestration of his estate.<sup>14</sup>

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<sup>9</sup> Mars, p 76. Also see *Ex parte Hayes* 1970 (4) SA 94 (NC).

<sup>10</sup> Par 2.2.1.

<sup>11</sup> S 4(1).

<sup>12</sup> *Ibid.* Form A of the first schedule requires that the following information be contained in the notice: full names of the debtor; debtor’s occupation; debtor’s address; if the debtor is a partnership, its style or firm and the name in full and address of every partner; the date on which the debtor intends to bring his application to court; and the period within which the debtor’s statement of affairs will lie for inspection at the relevant Master’s office. In terms of S 4(6) the debtor’s statement of affairs must lie for inspection for at least 14 days from the date stated in the notice.

<sup>13</sup> Mars, p 49. It must be noted that the fact that form A of the first schedule of the Act does not require an ID number presents a problem in practice because debtors such as banks do not identify their debtors by name only but their ID by numbers as well. A publication in the gazette or news paper without an ID number reduces the possibility of creditors identifying their debtors with certainty in such publications which obviously means that the surrender may not be opposed.

<sup>14</sup> *Ibid.*

The notice must be published not more than 30 days and not less than 14 days before the date the matter will be before court for an order of sequestration. Strict compliance with the aforesaid requirement is peremptory and non-compliance thereof will lead to the application for surrender being rejected by the court.<sup>15</sup> The debtor must, within 7 days of publication of the notice in the gazette, deliver or post a copy of the notice to all his creditors whose addresses he knows or can ascertain.<sup>16</sup> The debtor further has to send the notice by post to the South African Revenue Service and if the debtor is an employer, to every registered union that represent any of the employees and the employees themselves.<sup>17</sup>

After publication of notice in the gazette, it is unlawful to sell the debtor's property in terms of a writ of execution or other process unless the person charged with the execution of the writ could not have known of the publication.<sup>18</sup> However if the Master (or the court) is of the opinion that the value of the property is less than R5000, the master (or the court) may authorise the sale of such property and direct how the proceeds of the sale should be applied.<sup>19</sup> In practice, the publication is usually a desperate attempt to stay sales in execution of a debtor's bonded immovable property. A debtor would then attempt to postpone the application or extend the rule *nisi* for lengthy periods to buy time.<sup>20</sup>

A debtor must lodge at the office of the master that has jurisdiction over his property a statement of affairs of his property in duplicate, drafted in a form substantially corresponding with form B of the first schedule<sup>21</sup> of the Act.<sup>22</sup> The debtor's statement

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<sup>15</sup> *Ex Parte Van Rooyen* 1975 (2) SA 609 (T); *Ex parte Oosthuisen* 1995 (2) 694 (T); also see Mars, p 50.

<sup>16</sup> S 4 (2)(a); in practice a debtor usually does not send the notice to all creditors with the intention to limit the possibility of creditors opposing his application for surrender.

<sup>17</sup> S 4(2)(b).

<sup>18</sup> S 5(1).

<sup>19</sup> *Ibid.*

<sup>20</sup> *Edkins v Registrar of Deeds, Johannesburg and Others* [16117/11] 2011 ZACPEHC (9 March 2012).

<sup>21</sup> The statement of affairs must contain, *inter alia*, a proper description of a debtor's assets, claims and list of creditors.

<sup>22</sup> S 4(3).

of affairs must then be open at the master's office having jurisdiction or magistrates' court as the case may be during office hours for inspection by any creditor having an interest in the estate. The debtor's statement of affairs must remain open for inspection for a period of 14 days from the date mentioned in the notice.<sup>23</sup> After the expiry of the 14 days, the master will then issue a certificate confirming that the statement has been open for inspection for 14 days.<sup>24</sup>

### 2.2.1.2 Application and onus of proof

An application for surrender must be brought in the form of notice of motion with supporting affidavit signed by the debtor or an authorised person.<sup>25</sup> The debtor must state in his affidavit the full particulars and aspects that have a bearing on his application.<sup>26</sup> A debtor must allege and show, *inter alia*, that his estate is in fact insolvent, the surrender is to the benefit of his creditors, all formalities have been complied with, a likely dividend that would result from the liquidation of his assets and the calculation thereof.<sup>27</sup> A debtor must also disclose in his affidavit causes of his insolvency, nature of any business carried on, all his assets of whatever nature and his sources of income.<sup>28</sup> A tear sheet of the published notice to surrender in the relevant newspaper and gazette must be attached to the affidavit.<sup>29</sup>

An application for voluntary surrender carries the very stringent requirement of advantage to creditors. This requirement presents is or maybe a major stumbling block to an applicant who seeks to obtain voluntary surrender. A debtor as the applicant bares the onus of proof in this regard. He must demonstrate advantage to creditors

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<sup>23</sup> S 4(6).

<sup>24</sup> Mars *supra*, p 66.

<sup>25</sup> Rule 6(1) of the Uniform Rules of Court.

<sup>26</sup> Mars, p 68.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

with sufficient clarity and the expected dividend must be calculated.<sup>30</sup> The minimum dividend our courts will accept is 10 cents in the rand and only in exceptional circumstances will the court deviate from the minimum dividend.<sup>31</sup> A debtor also needs to show that he is actually insolvent. To do this he must convince the court that his liabilities, fairly estimated, exceed his assets, fairly valued.<sup>32</sup>

Although creditors may oppose the surrender application at the stage when the debtor's statement of affairs is laid for inspection, a creditor has the right to oppose an application for surrender by means of intervention in terms of the rules of court.<sup>33</sup> Such opposition by a creditor may be an essential factor for the court in the exercise of its discretion on the requirement of advantage to creditors.<sup>34</sup> The latter situation obviously influences the court to use its discretion in refusing a debtor's application for surrender of his estate.

Since courts are strict when it comes with compliance of the formalities and requirements as stated above, an over-indebted debtor has to carefully consider whether he wants to take this route. The fact that voluntary surrender applications can only be heard by the high court carries costs implication and non-compliance with the formalities and requirements will lead to the application for voluntary surrender being dismissed or successfully opposed by an intervening creditor leaving an already over-indebted debtor with a huge cost order against him.

## 2.2.2 Compulsory sequestration

A creditor who wishes to collect a debt owed to him by his debtor has the option of instituting civil action or applying for compulsory sequestration of his debtor.<sup>35</sup>

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<sup>30</sup> Mars *supra*, p 74.

<sup>31</sup> Mars *supra*, p 72.

<sup>32</sup> *Ex parte Harmse* 2005 (1) SA 323 (N); see also Mars *supra*, p 2.

<sup>33</sup> Rule 10 of the Uniform Rules of Court.

<sup>34</sup> Mars, p 76.

<sup>35</sup> Mars, p 1.



Although compulsory sequestration is not primarily aimed at debt collection, it is common cause that creditors use it as a vehicle to collect debts due to them.<sup>36</sup> A brief discussion on the requirements and formalities is necessary.

A creditor with a liquidated claim of R100 or more or two or more creditors with claims in aggregate of R200 or more may institute sequestration proceedings against a debtor's estate.<sup>37</sup> A creditor as the applicant in an application for compulsory sequestration needs to show that:<sup>38</sup>

- (a) he has established a claim which entitles him to apply for sequestration of the debtor's estate;
- (b) the debtor is actually insolvent. This will be the case where the debtor's liabilities, fairly estimated, exceed his assets, fairly valued or if the debtor commits one of the acts of insolvency contained in section 8; and
- (c) there is reason to believe that sequestration of the debtor's estate will be to the advantage of creditors.

The last requirement deserves elaboration. Unlike in the case of voluntary surrender where the applicant debtor needs to prove advantage to the creditors, in this case the sequestrating creditor need only include an averment in his affidavit that there is reason to believe that sequestration will be to the advantage of creditors supported by facts for such belief.<sup>39</sup> The sequestrating creditor does not have to advance substantive proof of the advantage to creditors.

### **2.2.2.1 Application for compulsory sequestration**

As is the case with voluntary surrender, an application for compulsory sequestration is instituted by means of application procedure in the high court.<sup>40</sup> It comprises of the

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<sup>36</sup> *Ibid.*

<sup>37</sup> S 9(1).

<sup>38</sup> Law Society of South Africa (L.E.A.D) Practice Manual *Insolvency Law* 2013, p 64.

<sup>39</sup> *Lynn & Main Inc v Naidoo and another* 2006 (1) SA 59 (N).

<sup>40</sup> Rule 6 of the Uniform Rules of Court.

notice of motion supported by one or more supporting affidavits and the master's certificate.<sup>41</sup>

### **2.2.2.1.1 Contents of the supporting affidavit**

The affidavit in support of an application for compulsory sequestration must contain the following information:<sup>42</sup>

- (a) the full names, identity number and date of birth of the debtor;
- (b) the marital status of the debtor and if married, the full names and identity number of the spouse;
- (c) the amount, nature and cause of the claim in question;
- (d) whether or not the claim is secured and if the claim is secured, the nature and value of the security; and
- (e) the act of insolvency upon which the application is based or an allegation that the debtor is in fact insolvent.<sup>43</sup>

### **2.2.2.1.2 Security for costs**

Before launching the application for sequestration, the sequestrating creditor is required to provide sufficient security to the master for the payment of all fees and charges necessary to cover all sequestration proceedings and costs of administration of the estate until a trustee has been appointed, or if no trustee is appointed, of all fees and charges necessary to discharge the estate from sequestration.<sup>44</sup> Thereafter, the master will issue a certificate confirming that security to his satisfaction has been provided. It is important to note that if a certificate issued by the master is not filed with

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<sup>41</sup> S 9(3)(b) requires a certificate by the master to be attached to the application which certificate confirms that sufficient security has been given for payment of all fees and charges necessary for the prosecution of all sequestration proceedings and of all costs of administering the estate until a trustee has been appointed.

<sup>42</sup> S 9(3)(a).

<sup>43</sup> In practice both the act of insolvency and actual insolvency are usually pleaded or in the alternative of each other.

<sup>44</sup> S 9(3)(b).

the court papers when the matter is heard, the application will be fatally defective.<sup>45</sup> The master's certificate of security must be given not more than 10 days of signing the notice of motion.<sup>46</sup>

### **2.2.2.1.3 Delivery of copies**

A copy of the application for compulsory sequestration must be delivered at the relevant master (or if there is no master, the relevant court) before the application is presented to the court.<sup>47</sup> If the debtor is an employer, a copy of the application must be delivered to every registered trade union that represents any of the debtor's employees and the employees themselves by affixing a copy to any notice board to which the employees have access.<sup>48</sup> The application also has to be delivered to the debtor and the South African Revenue Service.<sup>49</sup>

### **2.2.2.1.4 Supporting documents**

Although the Master's certificate confirming security does not have to be attached to the application when served, the certificate must be filed before the application is heard in court.<sup>50</sup> As in any application in terms of Rule 6 of the Uniform Rules, should there be anyone in addition to the applicant (or his/its agent) attesting to any facts in the main affidavit, a confirmatory affidavit also has to be attached to the application.<sup>51</sup>

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<sup>45</sup> LEAD Practice Manual *Insolvency Law supra*, p 76.

<sup>46</sup> *Ibid.*

<sup>47</sup> S 9(4).

<sup>48</sup> S 9(4A)(a)(ii)(aa).

<sup>49</sup> S 9(4A)(ii).

<sup>50</sup> *Court v Standard Bank of South Africa Ltd* 1995 (3) SA 123 (A).

<sup>51</sup> Sharrock *et al Hockly's Insolvency law* (2007) 6<sup>th</sup> edition, p 33.

### 2.2.2.2 Acts of insolvency

As mentioned above,<sup>52</sup> a creditor may bring an application for compulsory sequestration if a debtor commits an act of insolvency. It is difficult for a creditor to prove that the debtor is actually insolvent because he is usually not in the position to prove that the debtor's liabilities exceed his assets.<sup>53</sup> As a result, the legislature has put in place certain acts or omissions by a debtor to be 'acts of insolvency' justifying a creditor's application for compulsory sequestration without having to prove that the debtor is actually insolvent.<sup>54</sup> These acts of insolvency are briefly explained hereunder.

#### (a) Absence from the republic

A debtor commits an act of insolvency if he leaves and remains out of South Africa or leaves his residence or otherwise absents himself with the intention to evade or delay payment of his debts.<sup>55</sup>

#### (b) Failure to pay judgment debt

If a court order is given against the debtor and he fails, upon demand of an officer who is tasked with execution of that judgment (the sheriff of the court), to satisfy the judgment debt, or if it appears from the return made by that officer that he has not found sufficient disposable assets to satisfy the judgment.<sup>56</sup>

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<sup>52</sup> Par 2.2.2 above.

<sup>53</sup> Sharrock *et al supra*, p 26.

<sup>54</sup> *Ibid.* Also see *De Villiers NO v Maursen Properties (Pty) Ltd* 1983 (4) SA 670 (T).

<sup>55</sup> S 8(a).

<sup>56</sup> S 8(b).

(c) Disposition to the prejudice of creditors or preferring one creditor

if the debtor disposes or attempts to dispose of any of his assets which has or would have the effect of prejudicing his creditors or of preferring one creditor over another, he commits an act of insolvency.<sup>57</sup>

(d) Removal of property with the intent to prejudice creditors or prefer

A debtor commits an act of insolvency when he removes or attempts to remove any of his assets with the intention of prejudicing his creditors or preferring one creditor over the others.<sup>58</sup> This act of insolvency differs from the one in subsection 8(c) in two respects. On the one hand, the disposition of the property is not required and, unlike subsection 8(c), the intention of the debtor as oppose to the effect of disposition is the determining factor.<sup>59</sup> Such intention could be deduced from the circumstances surrounding the removal.

(e) Offer to make arrangement

The debtor commits an act of insolvency if he makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debt.<sup>60</sup> It must be clear from the debtor's offer or proposed arrangement that he is unable to pay his debts.<sup>61</sup> An example would be where a debtor offers to pay half of

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<sup>57</sup> S 8(c)

<sup>58</sup> S 8(d).

<sup>59</sup> *De Villiers NO v Mausen supra*.

<sup>60</sup> S 8(e).

<sup>61</sup> *Laeveldse Kooperasie Bpk v Joubert* 1980 (3) SA 1117 (T).

the debt to one of his creditors, informing him that if the debtor's offer is rejected the debtor would consider voluntary surrender.<sup>62</sup>

(f) Failure to apply for surrender

If the debtor, having published a notice to surrender his estate which has not lapsed or been withdrawn in terms of sections 6 or 7, fails to comply with the requirements of subsection 4(3) or lodges, in terms of the said subsection, a statement which is incorrect or incomplete in any material respect or fails to apply for the acceptance of his estate on the date mentioned in the notice to surrender as the date on which the application will be made.<sup>63</sup> When a debtor applies for voluntary surrender, he does so due to the fact that he is unable to pay his debt and this in itself conveys a message to the debtor's creditors that he is insolvent. Failure on the part of the debtor to complete the process of voluntary surrender is clearly an act of insolvency upon which a creditor may rely to sequester the debtor.

(g) Notice of inability to pay

If a debtor gives notice to any one of his creditors that he is unable to pay his debts.<sup>64</sup> This subsection is extensively relied on in practice as an act of insolvency because it is easy to prove by merely attaching the written letter by the debtor stating his inability to pay. The document confirming inability to pay must be of such nature that a reasonable person having knowledge of the debtor's circumstance could construe from the document that the debtor is giving notice of his inability to pay.<sup>65</sup>

(h) Inability to pay after notice to transfer business

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<sup>62</sup> *Joosub v Soomar* 1930 TPD 773.

<sup>63</sup> S 8(f).

<sup>64</sup> S 8(g).

<sup>65</sup> *Standard Bank Limited v Court* 1993 (3) SA 286 (C).

A debtor who is a trader commits an act of insolvency if he gives notice in the gazette in terms of subsection 34(1) of the Act that he is selling his business and thereafter fails to pay all his debts.<sup>66</sup>

### 2.2.3 Friendly sequestration

Due to the very stringent requirement of advantage to creditors, debtors applying for voluntary surrender usually fail in their applications, especially when a creditor intervenes and opposes the application. To circumvent the requirement of advantage to creditors, a debtor would arrange with a friend to whom he owes money that the debtor commits an act of insolvency. This is usually by writing a letter to the effect that he is unable to pay as contemplated in section 8(g), on which written notice the friend will rely on to apply for 'compulsory sequestration'. The aforesaid situation is referred to as friendly sequestration.<sup>67</sup>

The fact that an application for compulsory sequestration is brought by a creditor who is not at arm's length does not generally preclude the courts from granting a sequestration order.<sup>68</sup> However due to the growing trend of friendly sequestrations, the courts have adopted a strict approach towards them.<sup>69</sup> It must be kept in mind that in any sequestration application, be it voluntary or compulsory, the courts always have a discretion to grant or refuse the order and where it is clear that the application is an abuse of the court process, this discretion will be exercised against the granting of the sequestration order.<sup>70</sup> The courts have adopted an attitude that where an application

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<sup>66</sup> S 8(h).

<sup>67</sup> *In Craggs v Dedekind* 1996 (1) 935 (C) the court mentioned that friendly sequestrations, like pornography, are hard to define but easy to recognise.

<sup>68</sup> *Jhatam & others v Jhatam* 1958 (4) SA 36 (N) where the court was of the view that the fact that there was a special relationship between the debtor and sequestrating creditor *per se* should not prevent the court from granting a sequestration order provided that all relevant requirements are genuinely met.

<sup>69</sup> See for instance in *Mthimkhulu v Rampersad and another* 2000 (3) All SA 512 (N) where the court dismissed a "compulsory sequestration application" on the basis that friendly sequestrations are merely tools to engineer the relief of harassed debtors and are not concerned with the interests of creditors.

<sup>70</sup> Evans R "Friendly sequestration, the abuse of the process of court, and possible solutions for overburdened debtors" 2001 SA Merc LJ 13, p 487.

for sequestration is brought by a creditor who does not appear to be acting at arm's length, the courts will scrutinise in detail the interests of the creditors.<sup>71</sup>

## 2.2.4 The effect of sequestration

In many cases debtors apply for voluntary surrender or initiate friendly sequestration with different motives.<sup>72</sup> In this regard it is important to discuss the effect of a sequestration order. Some of the consequences of a sequestration order are discussed hereunder.

### 2.2.4.1 Property of the insolvent

After the sequestration order is granted, the insolvent debtor's estate divests and vests in the Master until a trustee is appointed and after the appointment of a trustee, the estate will vest in the trustee.<sup>73</sup> The estate of an insolvent debtor for purpose of vesting includes all property at the date of sequestration, including property or proceeds thereof in the hands of the sheriff under writ of attachment.<sup>74</sup> Property that has been bequeathed to the insolvent debtor in terms of a will will also fall within his vested estate unless he repudiates.<sup>75</sup> Property of both spouses married in community of property will vest in the trustee after sequestration of one of them, including each spouse's property not forming part of the joint estate.<sup>76</sup>

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<sup>71</sup> *Epstein v Epstein* 1987 (4) SA 606 (C).

<sup>72</sup> For example, a debtor will apply for voluntary surrender and publish his application in the Government Gazette in a desperate attempt to stop an imminent sale in execution of his property.

<sup>73</sup> S 20(1)(a).

<sup>74</sup> *Two sixty-Four Investment (Pty) Ltd v Trust Bank* 1993 (3) SA 348 (W). Also see C Visser *et al South African Mercantile and Company Law* (2003) 8<sup>th</sup> edition.

<sup>75</sup> *Badenhorst v Bekker NO en Andere* 1994 (2) SA 155 (N).

<sup>76</sup> *Du Plessis v Pienaar NO & others* 2003 (1) SA 671 (SCA).



#### 2.2.4.2 *Concursus creditorum*

As mentioned earlier<sup>77</sup> the sequestration of a debtor's estate establishes a *conkursus creditorum*. Thereafter no single creditor may enter into a transaction or enforce his claim to the prejudice of other creditors.<sup>78</sup>

#### 2.2.4.3 Legal proceedings

A sequestration order has the effect of pending any civil proceedings instituted against the insolvent until the appointment of a trustee.<sup>79</sup> It is not competent for a court to decide on a matter against a debtor after a sequestrating order of the debtor's estate but before the appointment of a trustee.<sup>80</sup> The plaintiff in the stayed proceedings may submit and prove his claim in respect of his taxed costs in terms of section 44 of the Insolvency Act, incurred in connection with those proceedings up to the date of the sequestration order.<sup>81</sup> The insolvent debtor on the other hand may sue or be sued in his own name in limited situations after the appointment of a trustee as mentioned in sections 23(6) – (10).<sup>82</sup> If the insolvent brings an action or application in his own name, he may be requested by the defendant/respondent to provide security for legal costs

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<sup>77</sup> At par 2.1.

<sup>78</sup> Mars, p 171.

<sup>79</sup> S 20(1)(b).

<sup>80</sup> *Lawrence & Co Ltd v Hirsch* 1913 CPD 1033.

<sup>81</sup> S 20(1)(b).

<sup>82</sup> S 23 (6)-(10) provide as follows:

(6) the insolvent may sue or be sued in his own name without reference to the trustee of his estate in any matter relating to his status or any right in so far as it does not affect his estate or in respect of any claim due to or against him under this section, but no cession of his earnings after the sequestration of his estate, whether made before or after the sequestration shall be of any effect so long as his estate is under sequestration; (7) The insolvent may for his own benefit recover any pension to which he may be entitled for services rendered by him; (8) The insolvent may for his own benefit recover any compensation for any loss or damage which he may have suffered, whether before or after the sequestration of his estate, by reason of any defamation or personal injury: Provided that he shall not, without the leave of the court, institute an action against the trustee of his estate on the ground of malicious prosecution or defamation; (9) Subject to the provisions of subsection (5) the insolvent may recover for his own benefit, the remuneration or reward for work done or for professional services rendered by or on his behalf after the sequestration of his estate; (10) The insolvent may be sued in his own name for any delict committed by him after the sequestration of his estate, and his insolvent estate shall not be liable therefore.

of the defendant/respondent to cover the latter in the event that an adverse costs order is granted against the insolvent debtor.<sup>83</sup>

#### **2.2.4.4 Insolvent's legal position**

After the sequestration order, the debtor's legal position is curtailed in a number of ways. Although the insolvent debtor retains his ability to conclude contracts in terms of section 23(2),<sup>84</sup> his contractual ability is limited. If the insolvent wishes to enter into a contract that may have an adverse effect on his estate by, for example, diminishing his estate, he must obtain written consent from his trustee.<sup>85</sup> If the insolvent debtor enters into a contract which has such an effect without consent, such a contract is valid but voidable at the discretion of the trustee.<sup>86</sup>

#### **2.2.4.5 Execution of judgments**

A sheriff whose duty is to execute any judgment given against the insolvent defendant must stay execution as soon as he becomes aware of the sequestration order against the insolvent debtor, unless a court directs otherwise.<sup>87</sup> Even a mortgagee creditor who has obtained judgment for his bond against the insolvent debtor, after granting of

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<sup>83</sup> Rule 62 of the Magistrates' Court Rules and Rule 47 of the Uniform Rules of Court.

<sup>84</sup> Which provides that :

the fact that a person entering into any contract is an insolvent, shall not affect the validity of that contract: provided that the insolvent does not thereby purport to dispose of any property of his insolvent estate; and provided further that an insolvent shall not in writing of the trustee of his estate, enter into any contract whereby his estate or any contribution towards his estate which he is obliged to make, is or is likely to be adversely affected, but in either case subject to the provisions of subsection (1) of section 24.

<sup>85</sup> S 23(2) *supra*.

<sup>86</sup> *W L Carroll & Co v Ray Hall Motors (Pty) Ltd* 1972 (4) SA 728 (T).

<sup>87</sup> S 20(1)(c).

the sequestration order, cannot proceed with sale in execution of the mortgaged property.<sup>88</sup> This has led to subsection 20(1)(c) often being relied on by debtors in a desperate attempt to buy time in circumstances where a creditor has proceeded with execution of a debtor's immovable property.<sup>89</sup> However, it has been held that if it is clear that the execution creditor and other mortgagees are the only creditors who have an interest in the sale, the court may, on application by the interested creditors, order the sale in execution to proceed.<sup>90</sup>

## 2.2.5 Rehabilitation

Usually, when a debtor applies for voluntary surrender or devises friendly sequestration, rehabilitation is an end result which he aims to achieve. It effectively ends insolvency and extinguishes all pre-sequestration debts thereby providing the debtor with a clean slate. The debtor regains his status in society and all limitations coupled with insolvency fall away, unless the court imposes certain conditions to the order of rehabilitation in terms of section 127(2). The insolvent becomes legible to hold certain offices of which he was disqualified due to his insolvency.<sup>91</sup> Hereunder is a brief discussion of ways and circumstances in which an insolvent may be rehabilitated.

### 2.2.5.1 Automatic rehabilitation

An insolvent debtor, if not rehabilitated by court within 10 years from date of the sequestration order, will be deemed to be rehabilitated after the expiration of 10 years unless the court, on application by an interested person, orders otherwise before the

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<sup>88</sup> Mars, p 178.

<sup>89</sup> *Fourie NO and another v Edkins* (6) SA 576 (SCA).

<sup>90</sup> *Massey v Priest* 1930 EDL 125.

<sup>91</sup> For example, trustee of an insolvent estate in terms of s 55 of the Act, member of parliament or provincial legislature in terms of s 50 and s 132 of the Constitution of the Republic of South Africa Act 200 of 1993 and director of a company without leave of the court in terms of s 218(1)(d)(i) of the Companies Act 61 of 1973.

expiry of the 10 years.<sup>92</sup> The 10 year period starts running from the date the provisional sequestration order is granted.<sup>93</sup>

### **2.2.5.2 Rehabilitation by court order prior to expiry of 10 years**

Section 124 of the Insolvency Act allows an insolvent to apply for rehabilitation to court before the expiry of 10 years upon meeting the requirements set therein. However the court retains the discretion to grant or refuse rehabilitation even after all requirements thereof have been complied with.<sup>94</sup> In exercising its discretion, the court has to decide whether or not the insolvent is a fit and proper person to be rehabilitated.<sup>95</sup>

### **2.2.5.3 Circumstances in which a rehabilitation application may be brought**

#### **2.2.5.3.1 Composition of not less than 50 cents in the rand**

An insolvent debtor may apply for a rehabilitation order if he has obtained a certificate from the Master stating that creditors have accepted an offer of composition in which payment has been made, or security has been furnished for payment, of not less than 50 cents in the rand for every concurrent claim proved or to be proven against the insolvent's estate.<sup>96</sup>

#### **2.2.5.3.2 Lapse of the prescribed period**

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<sup>92</sup> S 127A(1).

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ex Parte Woolf* 1958 (4) SA 190 (N); also see *Sharrock et al*, p 147.

<sup>95</sup> *Ex Parte Heydenreich* 1917 TPD 657.

<sup>96</sup> S 124(1) read with s 146; also see *Sharrock et al*, p 148.

Section 124(2) provides that an insolvent person who failed to obtain rehabilitation in terms of subsection 124(1) or does not wish to take that route, may apply for rehabilitation after the lapse of certain periods. The subsection provides that an insolvent may apply:

- (a) after 12 months have passed since the confirmation by the Master of the first account in the estate, unless he falls within the provisions of paragraphs (b) or (c);
- (b) after 3 years has elapsed from confirmation of the first account, if the insolvent's estate had been previously sequestrated and if he does not fall within the provisions of paragraph (c); or
- (c) after 5 years have passed from the date of his conviction of any fraudulent act in relation to the existing or any previous insolvency or of any offence in terms of sections 132, 133 or 134 of the Act.<sup>97</sup>

#### **2.2.5.3.3 No claims proven**

The insolvent can apply for rehabilitation of his estate after 6 months has elapsed from the date of the sequestration order if at the time of bringing the application, no claim had been proved against his estate; he has not been convicted of any fraudulent act in relation to his insolvency or of any offence in terms of sections 132, 133 or 134 and his estate has not been sequestrated before.<sup>98</sup>

#### **2.2.5.3.4 Full payment of all claims proved**

The insolvent may apply for rehabilitation after confirmation by the master of a plan of distribution providing for the full payment of all claims proved together with interest calculated in terms of the Insolvency Act and of all the costs of sequestration.<sup>99</sup> The insolvent must give 3 weeks written notice to the master and the trustee of his intended application for rehabilitation. The words "all claims proved" must be interpreted strictly

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<sup>97</sup> S 124(2) (a) to (c).

<sup>98</sup> S 124(3)(a) to (d).

<sup>99</sup> S 124(5).

to the extent that each and every creditor's claim, whether secured, preferred or concurrent, must be settled in full.<sup>100</sup>

## 2.3 Conclusion

An over-indebted debtor may apply for voluntary surrender of his estate in order to alleviate his debt problem. However, due to the stringent requirements of voluntary surrender, debtors tend to devise 'friendly sequestration' which is a disguised compulsory sequestration. The Insolvency Act prescribes certain acts or omissions as acts of insolvency upon which a creditor can rely on to apply for compulsory sequestration of his debtor. The most prominent and frequently relied on of these acts of insolvency is a written notice of inability to pay.

As mentioned above,<sup>101</sup> the primary purpose of the Insolvency Act is not debt relief to over-indebted debtors, however it is the inevitable consequence of rehabilitation. Rehabilitation is the ultimate end result that an insolvent debtor who applied for voluntary surrender or devised a friendly sequestration of his estate aims to achieve. It has the effect that all pre-sequestration debts, usually not paid in full through sequestration, are expunged thereby providing debt relief to an insolvent debtor. The status of the insolvent debtor in society is restored and all limitations coupled with insolvency<sup>102</sup> fall away. As stated above, application for voluntary surrender involves a lot of peremptory requirements and formalities to be complied with, failing which the court may dismiss the application leaving an over-indebted or insolvent debtor in an even more dire financial position due to high costs of a high court application. The fact that both friendly sequestration and voluntary surrender can only be brought in the high court means that not every over-indebted debtor can afford debt relief in the form of sequestration, thus many debtors are thereby swayed from applying for a sequestration order. However, even if an over-indebted debtor can afford to bring the high court application, he still needs to consider the adverse consequences of a

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<sup>100</sup> *Ex Parte Van Zyl* 1991 (2) SA 313 (C).

<sup>101</sup> Ch 1, par 1.1.

<sup>102</sup> For example, limited contractual capacity and preclusions of holding certain offices.

sequestration order. He needs to consider if he is prepared to lose, for example, his property and his legal standing. The court has a discretion whether to grant a sequestration order thus a debtor needs to consider the high costs of the application which is not even guaranteed. All the above considerations must be taken into account by an over-indebted debtor when considering whether sequestration will be a solution to his debt problem. The aforesaid might lead to a debtor having to seek other alternatives to alleviate his debt problem. The following chapter will consider and discuss such alternatives to sequestration in terms of the Insolvency Act.

### Chapter 3

## ASPECTS OF DEBT RELIEF IN TERMS OF THE NCA

### 3.1 Introduction

In the new society granting and taking credit forms the cornerstone of the economy of every country in the world.<sup>1</sup> Before the coming into operation of the NCA,<sup>2</sup> many South Africans, especially those from poor and disadvantaged communities, have been forced to enter into credit agreements they could barely afford.<sup>3</sup> The aforesaid coupled with the unequal bargaining power between credit providers and credit consumers led to many South Africans becoming over-indebted and being exploited.<sup>4</sup> One of the historical causes of the aforesaid situation in South Africa was the boom in the micro-lending industry from December 1992 as the then Minister of Trade and Industry exempted micro-loans from the Usury Act 73 of 1968 which had the effect that no limitation was placed on the interest rate that micro-lenders could charge.<sup>5</sup> By August 2006 the total rand value of loans disbursed by registered micro lenders was R30,03 billion in which interest of up to 30% was charged.<sup>6</sup> This state of affairs left many South

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<sup>1</sup> Campbel "The excessive costs of credit on small money loans under the National Credit Act 34 of 2005" 2007 19(3) *SA Merc LJ* 251.

<sup>2</sup> 1 June 2007 (hereinafter referred to as "the effective date").

<sup>3</sup> Scholtz *et al Guide to the National Credit Act* 2008 par 2.1.

<sup>4</sup> *Ibid.*

<sup>5</sup> Campbel *supra*.

<sup>6</sup> *Ibid.*

Africans, more so the low income class, in dire financial circumstances and the legislature had to intervene. Even though section 74<sup>7</sup> of the Magistrates' Court Act<sup>8</sup> provided some form of relief the monetary cap of R50 000 means that many over-indebted debtors still can not avail themselves to it.

The NCA has brought much needed relief by providing over-indebted debtors with a range of remedies they can rely on for debt relief. These remedies include a court declaring a loan to be reckless and setting aside all or part of the of the debtor's rights and obligations,<sup>9</sup> finding that a consumer was over-indebted at the time of the conclusion of the credit agreement in terms of which the court could order the suspension of the force and effect of the credit agreement in question, restructuring the debtor's obligations<sup>10</sup> and declaring unlawful credit agreements void.<sup>11</sup>

Although the purpose of this chapter is to discuss debt review, it is important to discuss the provisions and concepts related thereto, for example the concept of over-indebtedness, reckless credit and prevention thereof and remedies available to an over-indebted debtor. Part D of Chapter 4 of the Act deals with all these provisions, concepts and remedies. Reference to a debtor will also refer to a consumer in context of the NCA. In the paragraphs below, the main debt relief measure contained in the NCA, namely debt review, will be discussed.

## **3.2. Debt review**

### **3.2.1 The purpose of debt review in terms of the NCA**

Section 3 of the NCA *inter alia* provides that the purpose of the Act is to address and prevent over-indebtedness of consumers and to provide mechanisms for resolving

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<sup>7</sup> Which provides, *inter alia*, that a debtor who is unable to satisfy his debts and who does not have sufficient assets capable of attachment to satisfy his financial obligations may apply to a court for an administration order in terms of which he can pay his debts in installments.

<sup>8</sup> Magistrates' Court Act 32 of 1944.

<sup>9</sup> S 83(2).

<sup>10</sup> S 83(3)(b).

<sup>11</sup> S 89(5).



over-indebtedness based on the principle of satisfaction by consumers of all responsible financial obligations<sup>12</sup> and providing for consistent and harmonised system of *debt restructuring*,<sup>13</sup> enforcement and judgment which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.<sup>14</sup> In the realm of debt relief, court in *First Rand Bank v Olivier*<sup>15</sup> summed up the purpose of the NCA by stating that:

the purpose of the NCA is to, *inter alia*, provide for the debt re-organisation of a person who is over-indebted, thereby affording that person the opportunity to survive the immediate consequence of his financial distress and achieve a manageable financial position.

In essence, a person who entered into a credit agreement in terms of the NCA and later became over-indebted may apply for debt-review as a debt relief mechanism in terms of which his debts may be restructured by a court order.<sup>16</sup>

### 3.2.2 Scope of application

It is important to note that not all over-indebted consumers can apply for debt review. The NCA applies to credit agreements which are deemed to be credit agreement for the purpose of the NCA.<sup>17</sup> These agreements are credit facilities,<sup>18</sup> credit

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<sup>12</sup> S 3(g).

<sup>13</sup> My emphasis.

<sup>14</sup> S 3(i).

<sup>15</sup> 2009 (3) SA 353 (SEC).

<sup>16</sup> Scholtz *et al*, par 11.1.

<sup>17</sup> Otto and Otto *The National Credit Act explained* 2008, p 2.

<sup>18</sup> A credit facility is an agreement in terms whereof the credit provider supplies goods or services, or pays an amount to a consumer, or on his behalf or at his direction.

transactions,<sup>19</sup> credit guarantees<sup>20</sup> or a combination thereof.<sup>21</sup> There is the obvious exclusion that a juristic<sup>22</sup> person may not apply for debt review.<sup>23 24</sup> Further, as a general rule the NCA applies to every credit agreement between parties dealing at arm's length made within, or having an effect within South Africa<sup>25</sup> with certain exceptions.<sup>26</sup> An agreement that does not comply with section 4 cannot form part of the debt review process when an over-indebted debtor applies for debt review. If a debtor seeks to apply for debt review in respect of an agreement that is not one of the aforesaid agreements or a combination thereof he will not succeed with his application.<sup>27</sup>

Further, section 86(2) provides:

an application in terms of this section may not be made in respect of, and does not apply to a particular credit agreement if, at the time of that application the credit provider under that credit agreement has proceeded to take steps contemplated in section 129 to enforce that agreement.

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<sup>19</sup> A credit transaction:

is a pawn transaction, instalment agreement, incidental credit agreement, a mortgage or secured loan, a lease or any other agreement, not being a credit facility or credit guarantee, in terms of which payment is deferred, and any charge, fee or interest is payable to the credit provider in respect the agreement....

<sup>20</sup> A credit guarantee:

is an agreement in terms of which a person binds himself to satisfy another consumer's obligation in terms of a credit facility or transaction which is subject to the Act, upon demand.

<sup>21</sup> See s 8(3)-(5) for a detailed explanation of what these agreements entail.

<sup>22</sup> Whose annual turnover or asset value is not less than R1 million(GG 28893 of June 2009).

<sup>23</sup> S 78(1).

<sup>24</sup> Since a trust can in certain instances be classified as a natural person and in other instances a juristic person in terms of the NCA, it can only apply for debt review if it is classified in the former. Scholtz *et al*, par 11.1.

<sup>25</sup> S 4(1).

<sup>26</sup> S 4(1)(a)-(d) if it is a large credit agreement or where the consumer is a juristic person with an annual turnover of over 1 million for example.

<sup>27</sup> In terms of s 8(2)(a)-(c) an insurance policy or credit extended by an insurer solely for the purpose of maintaining payment of premiums on the insurance policy, a lease of immovable property or a transaction of stokvel do not constitute a credit agreement.

Section 86(2) read with section 129(1)<sup>28</sup> has been a subject of debate as to whether the delivery of a section 129(1) notice triggers the bar against debt review provided for in section 86(2).<sup>29</sup> In *Nedbank v Motaung*<sup>30</sup> the court held that section 86(2) meant that once a creditor dispatched the section 129(1) has been dispatched a consumer is barred from applying for debt review.<sup>31</sup> If the narrow interpretation is followed to the effect that delivery of a section 129(1) notice is enforcement as contemplated in section 86(2), such delivery would have the effect of precluding that agreement from debt review.<sup>32</sup> Fortunately the uncertainty has been resolved by section 26 of the National Credit Amendment Act<sup>33</sup> by the substitution of “proceeded with to take steps contemplated in section 129” with “steps contemplated in section 130”.<sup>34</sup>

### 3.2.3 Determination of over-indebtedness

A court may on its own discretion or when the issue of over-indebtedness is brought up in court proceedings in which a credit agreement is at issue, declare a debtor over-

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<sup>28</sup> S 129(1) provides:

if the consumer is in default under a credit agreement, the credit provider – (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and .....

<sup>29</sup> See *BMW Financial Services (SA) (Pty) Ltd v Donkin* (6) 2009 SA 63 (KZN) where the court held that if a creditor begins enforcement proceedings it first gives notice in terms of s129(1) inviting the debtor to refer the matter, *inter alia*, to a debt counsellor with the view of bringing payments under the agreement up to date.

<sup>30</sup> [2007] ZAGPHC 367 (14 November 2007). Also see *Standard Bank v Hales* (3) 2009 SA 315 (D).

<sup>31</sup> See also Scholtz *et al*, par 11.3.3.2.

<sup>32</sup> Van Heerden C and Coetzee H “Debt counselling v debt enforcement: some procedural questions answered” *Obiter* 2010, 756.

<sup>33</sup> National Credit Amendment Act 19 of 2014 (hereinafter “NCAA”)

<sup>34</sup> S 130(1) provides:

a credit provider may approach the court for an order to enforce a credit agreement only if, at the time, the consumer is in default and has been in default under the agreement for at least 20 business days and – (a) at least 10 business days have elapsed since the credit provider delivered a notice as contemplated in section 86(9), or section 129(1) as the case may be; (b) .....

indebted<sup>35</sup> or a debt counsellor, on application of a debtor, make a determination of a debtor's over-indebtedness. It must be noted that in the latter instance a debt counsellor may only make a recommendation of over-indebtedness not a ruling. Thus only a court can make a determination of over-indebtedness on the recommendations of a debt counsellor or on its own accord.<sup>36</sup> A debtor is over-indebted if:

the preponderance of available information at the time a determination is made indicates that the particular debtor is or will be unable to satisfy in a timely manner all of the obligations under all the agreements to which he is party, having regard to the debtor's-

- (a) financial means, prospects and obligations; 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 debtor's history of debt repayment.<sup>37</sup>

It was held in *Standard Bank of South Africa v Hales*<sup>38</sup> that the exercise of the court's discretion in terms of section 85<sup>39</sup> is triggered by the presence of two factors namely:

- (a) proceedings in which a credit agreement is being considered; and
- (b) an allegation that a consumer under the credit agreement is over-indebted.

The court further held that although the court exercises its discretion judicially when determining whether or not to refer a matter to a debt counsellor, certain factors, which factors are not exhaustive, had to be taken into consideration. These factors include attempts by the debtor to settle the debt, surrounding circumstances in which the debt arose, financial situation of the debtor, whether the debtor is employed, amount of the debt/s and/or any other factor relevant to the facts of each matter.

The court has inherent powers in terms of section 85 in any proceedings to deal with over-indebtedness. This section provides that:

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<sup>35</sup> See S 85.

<sup>36</sup> *Ibid.*

<sup>37</sup> S 79(1).

<sup>38</sup> 2009 (3) SA 315 (D).

<sup>39</sup> To refer the matter to a debt counselor and eventually be declared over-indebted.

Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under the credit agreement is over-indebted, the court may-

- (a) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to the court in terms of section 87(7); or
- (b) declare that the consumer is over-indebted, as determined in accordance with [Part D of Chapter 4], and make any order contemplated in section 87 to relieve the consumer's over-indebtedness.

A debt counsellor or court when making a determination of over-indebtedness must take into consideration factors that are present at the time of the determination.<sup>40</sup> The rationale of the aforesaid is that a debtor could have been able to afford credit when he entered into a credit agreement, but become over-indebted at a later stage due to unforeseen circumstances such as retrenchment.<sup>41</sup>

### 3.2.4 Application for debt review

A debtor may also apply to a debt counsellor for recommendation to be declared over-indebted.<sup>42</sup> The court has the power in any court proceedings in which a credit agreement in terms of the NCA is being considered to declare a consumer over-indebted and refer the matter to a debt counsellor with a request that the debt counsellor evaluate the debtor's circumstances and make a recommendation to the court.<sup>43</sup> In such proceedings the debtor may himself raise the issue of his over-indebtedness with the court.<sup>44</sup> In the said instance, the court has a discretion to either

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<sup>40</sup> S 79(2). Also see Scholtz *et al*, par 11.3.1.

<sup>41</sup> *Ibid*.

<sup>42</sup> S 86.

<sup>43</sup> S 85.

<sup>44</sup> Scholtz *et al*, par 11.3.3.1.

refer the matter to a debt counsellor or declare the debtor over-indebted on the face of the information before it.<sup>45</sup>

### 3.2.5 Procedure for debt review

The procedure of debt review is set out in section 86 read with regulation 24. Section 86 provides that a debtor may apply to a debt counsellor to be declared over-indebted. The procedure thereof is found in regulation 24 which provides that such a debtor must submit to the debt counsellor a completed form 16<sup>46</sup> or provide the debt counsellor with certain information which more or less is the same as contemplated in form 16. The debt counsellor must deliver a form 17.1<sup>47</sup> to all creditors that are listed in the application and every registered credit bureau within 5 business days<sup>48</sup> of receiving the application for debt review.<sup>49</sup> The debt counsellor must make a determination in terms of section 86(6)<sup>50</sup> as to whether the debtor is over indebted or not within 30 business days of receiving the application for debt review.<sup>51</sup> If the debt counsellor concludes after his assessment of the debtor that the debtor is not over-indebted, he must reject the application even if the debt counsellor has determined that there was

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<sup>45</sup> *Ibid.*

<sup>46</sup> NCR form 16 is a standard application form which contains, *inter alia*, the personal information of the debtor, a list of the debtor's creditors, the debtor's income and expenditure statements and declarations by the debtor.

<sup>47</sup> MCR form 17.1 is a notice that serves to advise creditors and registered credit bureaus of a debtor's application for debt review in terms of s 86 read with reg 24.

<sup>48</sup> S 2(5) provides:

when a particular number of business days is provided for in between the happening of one even and another, the number of days must be calculated by – (a) excluding the day on which the first of such event occurs; (b) including the day on or by which the second event is to occur; and (c) excluding any public holiday, Saturday or Sunday that falls on or between the days contemplated in paragraphs (a) and (b) respectively.

<sup>49</sup> Reg 24(2).

<sup>50</sup> S 86(6) provides:

a debt counsellor who accepted an application for debt review must determine (a) whether the debtor appears to be over-indebted; (b) whether the debtor's credit agreements of which he seeks declaration of reckless credit appear to be reckless.

<sup>51</sup> Reg 24(5).

a credit agreement that was recklessly concluded.<sup>52</sup> If the debt counsellor concludes that the debtor is over-indebted, he may issue recommendations to court to declare one or more of the credit agreements to be reckless credit or re-arranging one or more of the debtor's obligations or both.<sup>53</sup>

### 3.2.6 Orders that a court may make

Section 87 of the NCA provides that the magistrate's court must conduct a hearing if a debt counsellor makes recommendations to the court or if the consumer applies to court following rejection of his application by a debt counsellor. The court, having regard to the debt counsellor's recommendation and information before it, debtor's financial means, prospects and obligations may make the following orders:

- (a) reject the debt counsellor's recommendation or the debtor's application as the case may be;
- (b) declare any credit agreement as reckless and order the setting aside of all or part of the debtor's rights and obligations under the credit agreement<sup>54</sup> or suspending the force and effect of the credit agreement until a date determined by the court when ordering the suspension;
- (c) re-arranging the debtor's obligations in any manner contemplated in section 86(7)(c)(ii),<sup>55</sup> or
- (d) both orders in (b) and (c).<sup>56</sup>

The court's discretion is exercised judicially with due regard to the objectives of the NCA and not necessarily on the defendant debtor's allegations of over-

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<sup>52</sup> S 86(7)(a).

<sup>53</sup> S 86(7)(c).

<sup>54</sup> S 83(2)(a).

<sup>55</sup> Which provides that one or more of the debtor's obligations may re-arranged by (a) extending the period of the agreement and reducing the payable amount accordingly; (b) postponing during a specified period the dates on which payments are due in terms of the agreement; (c) extending the period of the agreement and postponing the during a specified period the dates on which payments are due in terms of the agreement ; or (d) recalculating the debtor's obligations because of contraventions of the NCA.

<sup>56</sup> S 87(1)(a) and (b).

indebtedness.<sup>57</sup> The exercise of a court's discretion is influenced by a number of aspects. The court in *First Rand Bank Ltd v Olivier*<sup>58</sup> laid down these factors as follows:

- (a) a debtor's failure to apply for debt review in terms of section 86(1) before being brought to court;
- (b) a debtor's failure to act upon a section 129(1) notice on receipt thereof and failure to give explanations or request for condonation; and
- (c) a debtor's failure to sell the property which caused his over-indebtedness.

Due to the wide discretion in terms of section 85 the court may, on the grounds thereof alone without referring to any other section, grant any order provided for in the NCA.

### 3.2.7 Termination of debt review

Section 86(10) provides that:

If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner to-

- (a) the consumer;
- (b) the debt counsellor; and
- (c) the National Credit Regulator

at any time at least 60 business days after the date on which the consumer applied for the debt review.

The aforesaid provision is a statutory pre-enforcement notice that a credit provider needs to deliver before proceeding with enforcement in respect of a credit agreement under review in terms of section 86.<sup>59</sup> Section 86(10) has however been amended in terms of section 26 of NCA to include an additional provision. Section 86(10)(b) now

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<sup>57</sup>*First Rand Bank Ltd v Olivier* 2009 (3) SA 353 (SEC).

<sup>58</sup> 2009 (3) SA 353 (SEC) at p 359-362.

<sup>59</sup> *In Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D) the court held that the notice to terminate a debt review in terms of s 86(10) of the NCA is a necessary first step before a credit provider can commence litigation. Also see Scholtz *et al*, par 11.3.3.3.



provides that a credit provider may not terminate an application for debt review if the debt review application has already been filed at court or in a tribunal.

It is important to note the provisions of section 88(3) stated above<sup>60</sup> in terms of which a credit provider is barred from proceeding with legal action upon receipt of notice of court proceedings. In *Firststrand Bank v Noroodien*<sup>61</sup> the court held that section 86(10) takes precedent over section 88(3), thus if a credit provider has duly terminated the debt review in terms of section 86(10) he will not be precluded by section 88(3) from enforcing the credit agreement.

### 3.2.8 The practical effect of debt review, re-arrangement by order or agreement

Debt review and subsequently debt re-arrangement has consequences for both the debtor and credit providers.<sup>62</sup> In respect of the debtor, section 88(1) provides that:

A consumer who has filed an application in terms of section 86(1), or who has alleged in court that the consumer is over-indebted, must not incur any further charges under a credit facility or enter into any further credit agreement, other than a consolidation agreement, with any credit provider until one of the following events has occurred:

- (a) the debt counsellor rejects the application and the prescribed time period for direct filing in terms of section 86(9) has expired without the consumer having so applied;
- (b) the court has determined that the consumer is not over-indebted, or has rejected a debt counsellor's proposal or consumer's application; or
- (c) a court having made an order or the consumer and credit providers having made an agreement re-arranging the consumer's obligations, all the consumer's obligations under the credit agreements as re-arranged are fulfilled, unless the consumer fulfilled the obligations by way of a consolidation agreement.

In practical terms, this will mean that a debtor under debt review may not obtain a loan or any form of credit prior to the occurrence of one the aforesaid events. This would, for example, mean that a contractor who stands to obtain a building contract or tender upon obtaining of a loan cannot bid due to the limitations of section 88(1). This is a

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<sup>60</sup> See par 3.2.6.

<sup>61</sup> (unreported) [2011] ZAWCHC 422.

<sup>62</sup> Scholtz *et al*, par 11.3.3.6.

dire consequence for the debtor since the obtaining of such a contract or tender could possibly remove the cause of the over-indebtedness.

If a debtor contravenes the provisions of section 88(1) by entering into further credit agreements, the provisions of Part D of Chapter 4 of the NCA will not apply to that agreement.<sup>63</sup> Consequently, if the debtor becomes further indebted than he already is due to the prohibited credit agreement he has entered into, he cannot invoke the debt relief provisions relating to over-indebtedness.<sup>64</sup>

Section 86(7)(c)(ii) provides that the court may re-arrange the consumer's obligations in the following ways:

- (a) by extending the period of the agreement and reducing the amount of each payment due accordingly;<sup>65</sup>
- (b) by postponing during a specified period the dates on which payments are due under the agreement;<sup>66</sup>
- (c) by extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement;<sup>67</sup> or
- (d) by recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5 or Part A of Chapter 6.<sup>68</sup>

The above provisions and the provisions of NCA as a whole do not provide for a statutory discharge as is the case with the Insolvency Act. Although debtor in terms of a re-arrangement order is afforded more time to satisfy his obligations with regard to his credit agreements, he has to satisfy all of his obligations with regard to all the credit agreements included in the re-arrangement order. The aforesaid situation results in the debtor falling deeper into debt given the fact that an increased term of repayment may result in increased interest rates on the debtor's credit agreements. The debt counsellor's administration fees, which would not be necessary save for debt review,

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<sup>63</sup> Scholtz *et al*, par 11.3.3.6.

<sup>64</sup> *Ibid*.

<sup>65</sup> S 86(7)(c)(ii)(aa).

<sup>66</sup> S 86(7)(c)(ii)(bb).

<sup>67</sup> S 86(7)(c)(ii)(cc).

<sup>68</sup> S 86(7)(c)(ii)(dd).

will also have to be paid over a long period thereby increasing the amount the debtor has to repay.<sup>69</sup>

In respect of the creditor, on the other hand, section 88(3) provides:

Subject to section 86(9)<sup>70</sup> and 86(10)<sup>71</sup>, a credit provider who receives a notice of court proceedings contemplated in section 83 or 84, or notice in terms of section 86(4)(b)(i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until-

- (a) the consumer is in default under the credit agreement; and
- (b) one of the following has occurred:
  - (i) an event contemplated in subsection (1)(a) through (c); or
  - (ii) the consumer defaults on any obligation in terms of the re-arrangement agreed between the consumer and credit providers, or ordered by court or tribunal.

The practical implications of the aforesaid provision is that a credit provider, once in receipt of notice of court proceedings, may not exercise his normal civil right to claim in terms of the credit agreement in question. If, for instance, a micro lender who has 10 clients receives notices of a re-arrangement order from 5 of his clients providing for much less instalments than initially agreed, such notices will have adverse consequences for the micro lender as he would be receiving far less monthly income to run his business than originally planned. Only once these consumers default with their obligations in terms of the re-arrangement order can he proceed with the normal civil action route.

The NCA does not have a time limit upon which re-arrangement orders are to run<sup>72</sup> thus a re-arrangement order may have an unreasonably increased term of repayment which would be burdensome to the micro creditor as he would have to administer the debtor's account for a longer period than planned. The re-arrangement order may also be made for a term beyond the life expectancy of a debtor which obviously leads to

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<sup>69</sup> [www.ncr.org/guidelines/2011/debt\\_counselling](http://www.ncr.org/guidelines/2011/debt_counselling) fees.

<sup>70</sup> Provides that a debtor may apply directly to court, with leave, for debt review in the event that a debt counsellor rejects his application for debt review.

<sup>71</sup> Gives a creditor the power to terminate debt review within 60 days after a debtor applied for debt review.

<sup>72</sup> Van Heerden and Boraine, The interaction between debt review measures in the Nation Credit Act 34 of 2005 and aspects of insolvency law *PER* 2009 12(3), p 31.

absurd results. The position as to the credit provider's remedies if he is of the view that the re-arrangement is unreasonably long is currently unclear.<sup>73</sup> It is submitted that this state of affairs justifies a creditor to circumvent the debt review and apply for compulsory sequestration of his debtor.

### 3.2.9 Conclusion

This chapter illustrates how Part D of Chapter 4 of the Act may be used by over-indebted debtors as a form of debt relief as opposed to resorting to a more drastic measure in the form of voluntary surrender in terms of the Insolvency Act. The introduction of the NCA undoubtedly introduced a much needed alternative procedure to help consumers overcome dire financial difficulties. Although relief in the form of administration Section 74 of the Magistrates' Court Act<sup>74</sup> provides for similar relief as debt review, it has a monetary limit of R50 000.00 which meant that debtors with debts over the amount of R50 000 had to opt for the more cumbersome voluntary surrender to escape their debt situation. The consequences coupled with a sequestration order, for example, the impairment of a debtor's legal position and status, the loss of property and exclusion from holding certain office or conducting certain business/es do not apply to debt review. The fact that an application for debt review may be brought in the magistrates' court<sup>75</sup> means that the cost implication of an application in the high court coupled with a sequestration application is not applicable to debt review. Debt review therefore provides an affordable debt relief to over-indebted debtors without hampering their status and or loss of their property. Debt review however, has its drawbacks for example not providing statutory discharge as provided in the Insolvency Act. A debtor may be so indebted due to a lot of credit agreements that settlement of all such debts over a longer period would practically be impossible. Such a debtor might have sufficient realisable property to satisfy most of these debts thereby making

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<sup>73</sup> *Ibid.* Van Heerden and Boraine however submit that the credit provider may contest debt re-arrangement only when the consumer has been declared over-indebted by a court on the grounds that the consumer has enough money to pay a larger installment than ordered by the court.

<sup>74</sup> 32 of 1944.

<sup>75</sup> 26 of the NCA amended section 86 by replacing the word "magistrates' court" with "court" meaning that a debt review application may now be brought in any court including the high court.

sequestration application more of a suitable alternative. Each case of over-indebtedness presents its own set of facts and circumstances therefore a debtor should be able to weigh up his options and choose which process between debt review and sequestration would best resolve his problem, although the courts do not support such an approach.<sup>76</sup>

## **Chapter 4**

### **INTERPLAY BETWEEN DEBT REVIEW IN TERMS OF THE NATIONAL CREDIT ACT AND SEQUESTRATION IN TERMS OF THE INSOLVENCY ACT**

#### **4.1 Introduction**

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<sup>76</sup> See *Ex Parte Ford Supra*.

The last couple of years have seen litigation on the subject of the interplay between debt review and sequestration.<sup>77</sup> Both these processes are available to over-indebted debtors who seek relief from the burden of credit agreements in which he is a party. A debtor may apply for debt review in order to buy more time in settling his obligations, pay less with regard to his payment than agreed in terms of credit agreements and retain his assets. As pointed out above<sup>78</sup> the debt review process can lead to a debtor being more indebted due to the possibility of increased interest due to lower monthly payments than originally agreed and debt counsellor's administration fees. Debt review does not provide for a statutory discharge thus a debtor has to settle all his obligations in terms of the credit agreements in full.<sup>79</sup> An over-indebted debtor may opt for debt review rather than the voluntary surrender of his estate by reason of the fact that a sequestration order would have a detrimental effect on his legal capacity<sup>80</sup> especially if the debtor holds a certain office or conducts a particular business.<sup>81</sup>

However, an over-indebted debtor may find himself in such a dire debt situation that it would be impractical if not impossible to fulfil all his debts under his credit agreements. In such a situation the debtor will more likely opt for voluntary surrender even before considering the option of debt review. In other instances debtors who can actually afford to settle their debts in full if debt review is utilised opt for voluntary surrender due to the statutory discharge of pre-sequestration provided by the Insolvency Act. The aforesaid situations give rise to the question as to whether or not an over-indebted debtor has an option of either applying directly for voluntary surrender before considering the route of debt review on the one hand or whether he has to consider the relief provided for in the NCA failing which he could apply for voluntary surrender of his estate. This interplay between debt review and voluntary surrender was dealt

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<sup>77</sup>*FirstRand Bank Ltd v Janse Van Rensburg 2012 2 all SA 186 (ECP), Ex parte Ford 2009 (3) SA 376 (WCC), Investec Bank Ltd and Another v Mutemeri 2010 (1) SA 265 (G) and Naidoo v Absa Bank Ltd 2010 (4) 597 (SCA)* for example.

<sup>78</sup> Par 3.2.7.

<sup>79</sup> S 3(c)(i) provides as one of the objectives of the NCA, the promoting responsibility in the credit market by encouraging responsible borrowing, avoidance of over-indebtedness and fulfillment of financial obligations by consumers.

<sup>80</sup> See par 2.2.4.4.

<sup>81</sup> For example, a stock broker, director of a company or Member of Parliament.

with in *Ex parte Ford*. The debtor applied for voluntary surrender before properly ventilating the procedures provided for in the NCA. The court refused the application and held that the procedures provided for in the NCA were more appropriate in the given circumstances of the applicants.

On the other hand, debtors who resort to the mechanisms of the NCA in an attempt to resolve their over-indebtedness may be frustrated in their attempts by credit providers with whom they have concluded credit agreements. The NCA itself provides that a credit provider may terminate debt review within 60 days from its commencement.<sup>82</sup> Credit providers may also bring an application for compulsory sequestration while the debtor is under debt review since it has been held that sequestration proceedings are not proceedings to enforce a creditor's claim as contemplated in section 130(1) of the NCA.

This chapter will focus on the interplay between debt review in terms of the NCA and sequestration in terms of the Insolvency Act in light of the decisions in the cases of *Ex parte Ford*, *Mutemeri* and *Naidoo*. This chapter will further deal with the question whether a notice to creditors that a debtor will apply or has applied for debt review constitutes an act of insolvency in terms of the Insolvency Act upon which a creditor may rely upon to bring an application for compulsory sequestration.

## 4.2 Effect of the NCA on the applicability of the Insolvent Act

Section 172 of the NCA provides that if there is a conflict between a provision of the NCA and a provision of another Act set out in schedule 1<sup>83</sup>, such conflict must be

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<sup>82</sup> S 86(10).

<sup>83</sup> Schedule 1 includes the following Acts: The Alienation of Land Act 68 of 1981; the Conventional Penalties Act 15 of 1962; the Consumer Affairs Act 71 of 1988, the Public Finance and Management Act 1 of 1999, the Public Service Act 103 of 1994 and the Magistrates' Court Act 32 of 1944.

resolved in accordance with the rule set out in the third column of the table in schedule 1. Schedule 1 however does not mention the Insolvency Act which begs the question as to which act takes precedent over the other specifically, in context of the topic at hand. One may ask which procedure between debt review and sequestration takes precedent over the other in the case of a conflict.

Section 2(1) of the NCA provides that the Act must be interpreted in a manner that gives effect to the purposes set out in section 3. Section 2(7) provides as follows:

except as specifically set out in, or necessarily implied by this Act, the provisions of this Act are not to be construed as -

- (a) limiting, amending, repealing or otherwise altering any provision of any other Act;
- (b) exempting any person from any duty or obligation imposed by any other Act; or
- (c) prohibiting any person from complying with any other provision of another Act.

On proper reading of subsection 2(7)(a) one can conclude that it was not the intention of the legislature to limit the application of the Insolvency Act in any way.<sup>84</sup> The aforesaid provision however does not answer the question as to how to deal with a conflict between the respective Acts, specifically conflict between debt review and sequestration. One cannot conclude that the legislature did not have the Insolvency Act in mind when drafting the NCA since schedule 2 of the NCA provides for the amendment of section 84 of the Insolvency Act.<sup>85</sup> Section 84 of the Insolvency Act provides a hypothec to a creditor over property to which the creditor has sold to a consumer in terms of an instalment agreement. The creditor reserves ownership until the debt in respect of the property sold is settled in full, on sequestration of the consumer. Such hypothec secures the creditor's claim for the outstanding amount

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<sup>84</sup> See Van Heerden and Boraie, The interaction between debt review measures in the Nation Credit Act 34 of 2005 and aspects of insolvency law *PER* 2009 12(3) , p 36.

<sup>85</sup> *Ibid.* Schedule provides that s 84 of the Insolvency Act should be amended by: (a) the substitution of the following heading: "special provisions in case of goods delivered to a debtor in terms of an [instalment sale transaction] instalment agreement"; and (b) the substitution for the opening clause of subsection (1) of the following words: "if any property was delivered to a person (hereinafter referred to as the debtor) under a transaction [which is an instalment sale transaction contemplated in paragraphs (a) and (b) of the definition of 'instalment sale transaction' in section of the Credit Agreement Act, 1980] that is an instalment agreement contemplated in paragraphs (a), (b) and (c)(i) of the definition of 'instalment agreement' set out in section 1 of the National Credit Act of 2005".



under the credit agreement and ranks him as a secured creditor.<sup>86</sup> As a result of the amendment of section 84 of the Insolvency Act by schedule 2 Van Heerden and Boraine<sup>87</sup> submit that due to the fact that the NCA does not explicitly oust the application of the Insolvency Act it can be argued that the aforesaid amendment sways away a possible conclusion that the legislature intended to oust the application of the Insolvency Act by necessary implication.

### **4.3 Effect of the NCA on sequestration proceedings**

Neither the NCA nor the Insolvency Act prescribes to an over-indebted debtor as to which procedure the latter may utilise first between voluntary surrender and debt review in order to resolve his over-indebtedness. As mentioned above,<sup>88</sup> both these procedures have their advantages and disadvantages. Due to such lack of guidance as to which procedure to utilise especially from the NCA, given the fact that it is a new piece of legislation, the consumer is left at liberty to choose which procedure to utilise given his financial predicament. This issue was dealt with in *Ex Parte Ford* which shall be discussed hereunder.

#### **4.3.1 *Ex Parte Ford***

The facts in *Ex Parte Ford* were as follows: Three Applications for voluntary surrender were brought before Judge Binns-Ward AJ at the Western Cape High Court. The three applications had striking similarities in that each of their respective alleged causes of insolvency involved credit agreements to which the NCA applied. The Applicant's respective liabilities were disproportionately high given their modest incomes. The applicants averred in their respective applications that they became insolvent due to misfortune and circumstances beyond their control, without fraud or dishonesty on

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<sup>86</sup> Van Heerden and Boraine *supra*, p 37. Also see Sharrock *at al*, par 7.2.8.

<sup>87</sup> *Ibid*, p 38.

<sup>88</sup> Par 4.1.

their part.<sup>89</sup> Due to the modest income of the respective applicants and lack of averments or in their application papers, save for one of the applicants,<sup>90</sup> that the applicants enjoyed a higher income prior to their over-indebtedness than they did at the time of their applications, the court raised a suspicion of some form of reckless credit.<sup>91</sup> This suspicion was aggravated by the fact that the creditors that granted credit to the applicants were aware or could have easily ascertained the limits of the applicants' abilities to service their debts.<sup>92</sup> On this point, the court stated that one of the NCA's objectives was to discourage the extension of reckless credit.<sup>93</sup>

The court considered the provisions of section 80(1); 81(2)-(3); 85; 86 and 87 of the NCA respectively and stated that it was apparent that an evaluation by a debt counsellor pursuant to a request by court in terms of section 85 could lead to a debt counsellor's recommendations to the court. On consideration of the said recommendations, the court can declare one or more of the consumer's credit agreements reckless and setting aside all or part of the consumer's rights and obligations or suspending the force and effect of the credit agreements.<sup>94</sup> The court called on counsel who appeared on behalf of all the applicants to address argument as to why the applicants resorted to voluntary surrender under the Insolvency Act instead of addressing their over-indebtedness more appropriately by using the mechanisms afforded by the NCA.<sup>95</sup> The applicants' counsel stated that the legislature took cognisance of the Insolvency Act when it enacted the NCA as is apparent from the amendment of section 84 by schedule 2 of the NCA. Applicants' counsel emphasised the fact that legislature did not see it fit to amend the provisions of the Insolvency Act concerning voluntary surrender.<sup>96</sup> He submitted that section 85 of the

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<sup>89</sup> *Ex Parte Ford supra*, par 3.

<sup>90</sup> Who earned a higher income which was later diminished due to injuries sustained in a car accident.

<sup>91</sup> *Ex Parte Ford supra*, par 3.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ex Parte Ford supra*, par 4.

<sup>94</sup> *Ex Parte Ford supra*, par 9.

<sup>95</sup> *Ex Parte Ford supra*, par 10.

<sup>96</sup> *Ex Parte Ford supra*, par 11.

NCA was not applicable in proceedings for voluntary surrender under the Insolvency Act.<sup>97</sup> In support of his argument he stated that section 85's operation depended on the satisfaction of three requirements, namely (i) the context of court proceedings; (ii) the allegations in those in those proceedings; and (iii) consideration by a court in those proceedings of a credit agreement.<sup>98</sup> The applicant's counsel conceded to the first two requirements being met but argued that there were no credit agreements before court as contemplated in terms of section 85. He argued that section 85 of the NCA applied only in cases in which the terms of a credit agreement were being considered by a court in the context of resistance by a creditor who claimed performance in terms a credit agreement in circumstances where a debtor pleaded over-indebtedness.<sup>99</sup> He stressed on the point that employment of the term 'a credit agreement' is used in singular.<sup>100</sup>

The court disagreed with applicant's counsel and held that the language of section 85 was cast in very wide terms in that the court may invoke section 85 despite any provision of law or agreement to the contrary and in any court proceedings. The aforesaid provision, the court held, provides the clearest indication of the intended wide ambit for the operation of section 85.<sup>101</sup> With regard to the use of 'a credit agreement' in singular, the court stated that it has no significance. It was held that the limitation of section 85 to proceedings which a credit agreement is being considered did not imply that the proceedings in question are restricted only to those in which the enforcement of a single credit agreement is at issue.<sup>102</sup>

The court then turned to the issue of satisfaction of the court that voluntary surrender must be to the advantage of the creditors and stated that the applications before court where over-indebtedness was mostly related to debt arising from credit agreements

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<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ex Parte Ford supra*, par 12.

<sup>102</sup> *Ibid.*

require the court to take the existence and effect of those agreements into account.<sup>103</sup> The court held that the word ‘consider’ in section 85 denotes that court proceedings contemplated in section 85 must be provisions in which a credit agreement was considered which was the case in the present matter.<sup>104</sup>

The Applicants filed supplementary affidavits to the effect that they had considered debt counselling but found it to be financially impracticable. They set out in detail how application of their disposable income over the next seven years in service of their respective debts would leave them still heavily indebted at the end of the seven year period.<sup>105</sup> On this point the court held that the NCA provided a wide range of remedies tailored to suit the particular case which include the disallowance of recovery of the debt if it arose from reckless credit, the staying of interests and ranking of liability.<sup>106</sup> The court stated that there was no indication on the respective applications that proper consideration taken in context of debt-counselling to anything beyond debt collection. In particular, the court remarked, there was no indication that the debt counsellors took any consideration to obtaining a declaration of reckless credit in respect of the debts as contemplated in section 86 (7) of the NCA.<sup>107</sup> Due to the applicants’ resistance to a referral in terms of section 85 of the NCA, the court refrained from exercising its discretion to refer the matter for recommendation by a debt counsellor and left it in the applicants’ hands to do so at their own initiatives.<sup>108</sup> The court concluded that due to the applicants’ failure to properly explain why they did not properly ventilate the alternative of the mechanisms provided by the NCA to resolve their credit agreement related debts, the court did not exercise its discretion in granting their application for voluntary surrender.<sup>109</sup> The court pointed out that in exercising of its discretion it considered the circumstances in which the applicants were able to obtain credit from

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<sup>103</sup> *Ex Parte Ford supra*, par 13.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ex Parte Ford supra*, par 15.

<sup>106</sup> *Ex Parte Ford supra*, par 16.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ex Parte Ford supra*, par 17.

<sup>109</sup> *Ibid.*

financial institutions to the extent demonstrated in their respective applications, their failure to avail themselves to remedies provided by the NCA and the fact that the applicants' assets demonstrated marginal monetary advantage to the creditors if voluntary surrender were to be granted.<sup>110</sup> The applicants' respective estates comprised of little assets to which advantage to the creditors was fractional after realisation of the assets.

The court held that counsel for the applicants' argument that it is up to the applicants to choose the form of relief that suit their convenience simply by mechanically satisfying the relevant statutory requirements under the Insolvency Act was a misdirected approach particularly where the granting of the selected remedy was discretionary.<sup>111</sup> The court stated that in such an exercise of its discretion, it was duty bound to have proper regard to giving due effect to the public policy reflected in the NCA.<sup>112</sup>

The applicants' counsel argued that it was the applicants' constitutional right to have the surrender of their estates accepted by court.<sup>113</sup> The court held that this argument was also misdirected and emphasised that the primary object of the voluntary surrender process is not to the relief of harassed debtors.<sup>114</sup> The court further held that the objectives of the relevant provisions of both the Insolvency Act and the NCA were not to deprive creditors of their claims but to regulate the manner and extent of their payment.<sup>115</sup> The court concluded by stating that it would not be consistent with policy considerations, especially the purposes of the NCA expressed in section 3, to grant the application for voluntary surrender.<sup>116</sup>

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<sup>110</sup> *Ex Parte Ford supra*, par 18.

<sup>111</sup> *Ex Parte Ford supra*, par 19.

<sup>112</sup> *Ex Parte Ford supra*, par 20.

<sup>113</sup> *Ex Parte Ford supra*, par 21.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ex Parte Ford supra*, par 22.

### 4.3.2 Influence of *Ex Parte Ford* on the interplay between debt review and voluntary surrender

As mentioned above,<sup>117</sup> neither the NCA nor Insolvency Act gives guidance to an over-indebted debtor on which procedure to employ in order to overcome his debt problem related to credit agreement/s. Counsel for the applicants in *Ex Parte Ford* contended that the applicants were at liberty to choose which procedure to employ depending on the particular circumstances of the applicant. The court disagreed with this line of argument given the fact that both applications for debt review and voluntary surrender were discretionary and the court took into account policy considerations when making its decision. The court put emphasis on public policy reflected in the NCA and the purpose thereof in coming to the conclusion as to whether a consumer has a choice where a credit agreement gave rise to the over-indebtedness of a debtor. The court was of the view that the applicants ought to have availed themselves of the more sophisticated remedies under the NCA instead of the cumbersome procedure of voluntary surrender. In light of the above, the court in essence concluded that where the debt arose from a credit agreement a debtor has to consider and apply remedies provided in terms of the NCA before he can even consider voluntary surrender. After a debtor has applied for debt counselling, the debtor counsellor not only has to consider if a debtor is over-indebted and eligible for debt review but also to determine the possibility of the extension of reckless credit granting and consider obtaining a declaration of reckless credit as contemplated in section 86(7) of the NCA.<sup>118</sup> After having considered and applied the processes in terms of the NCA and after they have failed can a debtor opt for voluntary surrender. Although the court did not conclusively decide that the mechanisms provided in the NCA should always be considered, it can be construed from the judgment as a whole that a debtor needs to set out in detail the steps he took in term of the NCA in his application for voluntary surrender to the satisfaction of the court. The court also touched on the fact that the applicants' respective estates comprised of little assets to satisfy the court that realisation of such assets would have a monetary value which will be to the advantage of the creditors. This leaves a question as to what happens if a debtor has considered and applied the

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<sup>117</sup> *Ex Parte Ford supra*, par 4.1.

<sup>118</sup> Van Heerden and Boraine *supra*, p 51.

mechanisms in terms of the NCA which turned out unsuccessful and the voluntary surrender also did not demonstrate monetary surrender to the creditors. The court did not address this possibility and it is submitted that the court should have given clarity in that regard.

#### **4.4 Effect of sequestration proceedings on the debt review procedure**

On the flip side of the coin, the question has to be answered on whether a creditor who seeks to sequester a debtor in order to collect what is due to him must wait for the debt review process already commenced by a debtor to either fail or come to its conclusion before commencing compulsory sequestration. In this regard it is necessary to discuss the two prominent cases on this matter being the *Mutemeri* and the *Naidoo* case.

##### **4.4.1 Investec Bank Limited v Mutemeri**

In this case the applicants applied for the compulsory sequestration of the respondents. In their defence, the respondents contended that since the applicants' claims against them were based on credit agreements within the meaning of the NCA, the applicants were barred from proceeding with compulsory sequestration since they had applied for debt review.<sup>119</sup> They contended that until their application came before court for determination, no legal action could be instituted against them for the enforcement of the applicants' claims under the credit agreements and that the applicants' application for their sequestration constituted such proceedings to enforce the applicants' claims.<sup>120</sup> The respondents relied on section 129 and 130 (1)(b) for their contention. Section 129(1) provides as follows:

if a consumer is in default of a credit agreement, the credit provider –

- (a) may draw to the default to the attention to the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve

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<sup>119</sup> *Mutemeri supra*, par 1.

<sup>120</sup> *Mutemeri supra*, par 2.

any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and

- (b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before –
  - (i) first providing notice to the consumer, as contemplated in paragraph (a), or section 86(10), as the case may be; and
  - (ii) meeting any further requirements set out in section 130.

Section 130(1)(b) provides:

Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only, at the time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and –

- (a) .....
- (b) in the case of a notice contemplated in terms 129(1), the consumer has –
  - (i) not responded to that notice; or
  - (ii) responded to the notice by rejecting the credit provider's proposal; and
- (c) ....

The legal question that the court was called to answer was whether an application for sequestration of the respondents' estates based on a claim arising from a credit agreement constituted an application 'for an order to enforce a credit agreement' as contemplated in section 130(1) of the NCA.<sup>121</sup> The court accepted that the motive of a sequestrating creditor when sequestrating his debtor is often to obtain payment. In this regard, the court referred to the case of *Estate Logie v Priest*<sup>122</sup> where the court stated as follows:

it appears to me that it is perfectly legitimate for a creditor to take insolvency proceedings against a debtor for the purpose of obtaining payment of his debt. In truth that is the motive by which persons, as a rule, are actuated in claiming sequestration orders. They are not influenced by altruistic considerations or regard for the benefit of other creditors, who are able to look after themselves. What they want is payment of their debt, or as much of it as they can get.

The court held that the answer to the question at hand depended on the nature of relief the creditor wanted and not on the creditor's underlying motive in bringing the application and further that whatever the creditor's underlying motive, the application

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<sup>121</sup> *Mutemeri supra*, par 26.

<sup>122</sup> 1926 AD 312.



was not barred unless it was an application for an order ‘to enforce a credit agreement.’<sup>123</sup> The court considered the case of *Collett v Priest*<sup>124</sup> where the court had to determine whether a sequestration order by the Eastern District local division could be taken on appeal to the Cape Provincial Division of the Supreme Court.<sup>125</sup> The relevant legislation permitted appeals from the one court to the other in ‘any civil suit’.<sup>126</sup> The appellate division found that a civil suit was a ‘legal proceeding in which one party sues for or claims something from another’ which did not include sequestration.<sup>127</sup> The Appellate Division reasoned as follows:

the order placing a person’s estate under sequestration cannot fittingly be described as an order for a debt due by the debtor to the creditor. Sequestration proceedings are instituted by a creditor against a debtor not for the purpose of claiming something from the latter, but for the purpose of setting the machinery of the law in motion to have the debtor declared insolvent. No order in the nature of a declaration of rights or of giving or doing something is given against the debtor. The order sequestering his estate affects the civil status of the debtor and results in vesting his estate in the Master. No doubt before an order so serious in its consequences to the debtor is given, the court satisfies itself as to the correctness of the allegations in the petition. It may for example have to determine whether a debtor owes the money as alleged in the petition. But while the court has to determine whether the allegations are correct, there is no claim by the creditor against the debtor to pay him what is due nor is the court asked to give any judgment, decree or order against the debtor upon any such claim.

After consideration of the above case law including *Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd and Others*,<sup>128</sup> the court concluded that on proper interpretation of section 130(1) of the NCA it is clear that the said section only applies to an application to court for ‘an order to enforce a credit agreement’ and not to an application by a creditor for the sequestration of a consumer’s estate based on a claim

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<sup>123</sup> *Mutemeri supra*, par 28.

<sup>124</sup> 1931 AD 290.

<sup>125</sup> *Mutemeri supra*, par 29.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*

<sup>128</sup> 1976 (2) SA 856 (W) where the court had to determine whether s 11 of the Limitation and Disclosure of Finance Charges Act 73 of 1968 was applicable to winding-up proceedings. The section provided for examination in any proceedings ‘for recovery of a debt’ in pursuance of a money-lending transaction. The court held that an application for the winding-up of a debtor’s estate did not constitute proceedings ‘for the recovery of a debt’.

in terms of a credit agreement. Section 9(2) of the Insolvency Act,<sup>129</sup> the court held, clarifies this point since a sequestrating creditor's claim need not be due and enforceable before applying for sequestration because a sequestration order is not an order for enforcement of a claim.<sup>130</sup> The court subsequently found that application for sequestration is not an application for enforcement of the sequestrating creditor's claim and thus not subject to the requirements of section 130(1) NCA.<sup>131</sup>

The respondents further contended that, notwithstanding the fact that a sequestration application is not subject to section 130(1), it is subject to section 130(3) of the NCA which provides:

Despite any provision of law or contract to the contrary, in any proceedings commenced in court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that –

- (a) In the case of proceedings to which section 127, 129 or 131 apply, the procedures required by the sections have been complied with; .....

They submitted that a sequestration application is proceedings 'in respect of a credit agreement' as contemplated in section 130(3) and that the application was therefore subject to the requirements of section 129 of the NCA.<sup>132</sup> In this regard, the court held that section 130(3) of the NCA did not extend the scope of application of section 129 but merely provides that, in proceedings (already) subject to the requirements of section 129, the requirements thereof must be complied with to the satisfaction of the court.<sup>133</sup>

The respondents' lastly attempted to invoke the provisions of section 88(3) of the NCA which provides:

subject to the provision 86(9) and (10), a credit provider who receives notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86(4)(b)(i), may

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<sup>129</sup> Which provides "Petition for sequestration of estate – (1) ..... ;(2) a liquidated claim which has accrued but which is not yet due on the date of hearing of the petition, shall be reckoned as a liquidated claim for the purposes of subsection (1)".

<sup>130</sup> *Mutemeri supra*, par 31.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Mutemeri supra*, par 33.

<sup>133</sup> *Ibid.*

not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until –

- (a) the consumer is in default under the credit agreement; and
- (b) one of the following has occurred:
  - (i) .....
  - (ii) The consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court or tribunal.

The court reiterated that for the reasons already stated, an application for sequestration of a consumer did not constitute litigation or other judicial process by which a creditor exercises or enforces any right under the credit agreement.<sup>134</sup> The court dismissed all the respondents' defences.

#### **4.4.2 Effect of *Investec Bank Limited v Mutemeri* on the interplay between compulsory sequestration and debt review**

The fact that debt review is not enforcement of a claim by a creditor as contemplated in the NCA gives a creditor the power to sequester his debtor who is under debt review in terms of a credit agreement to which the debtor and the creditor are parties. The impact of *Mutemeri* on the interplay between compulsory sequestration and debt review is that a creditor does not have to consider whether or not debt review could be a more suitable procedure as oppose to compulsory sequestration before applying for sequestration of a debtor's estate. The court in *Mutemeri* mechanically considered whether debt review barred a creditor from proceeding with compulsory sequestration and did not consider public policy as reflected in the NCA when exercising its discretion on granting the sequestration order. The court in *Ex Parte Ford* held that in the exercise of its discretion whether to grant voluntary surrender or not, it had to have proper regard to giving due effect to the public policy reflected in the NCA. The question then arises as to whether the finding in *Ex Parte Ford* applies only to voluntary surrender applications or can be extended to compulsory sequestration as well in situations where the debtor had already applied for debt review. As it stands in terms of *Mutemeri*, it can be concluded that a creditor's right to apply for compulsory

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<sup>134</sup> *Mutemeri supra*, par 33.

sequestration while a debtor is under debt review supersedes the right of a debtor to ventilate his over-indebtedness by way of debt review.

#### **4.4.3 *Naidoo v Absa Bank Ltd***<sup>135</sup>

In this case the appellant appealed against an order of the Durban High Court sequestrating his estate for failure to pay the respondent under instalment agreements.<sup>136</sup> He contended that it was not competent for the respondent to have instituted proceedings for his sequestration before complying with the procedure provided for in section 129(1)(a) read with 130(3)<sup>137</sup> of the NCA.<sup>138</sup> The appellant's counsel conceded that the *Mutemeri* judgment is correct to the extent that a sequestration order against a debtor's estate is not an order for enforcement of the sequestrating creditor's claim and that sequestration is accordingly not legal proceedings to enforce a credit agreement.<sup>139</sup> The crux of the appellant's argument was that the effect of section 130(3)(a) of the NCA read with section 129(1) indicated that the legislature intended to the said provisions to apply all proceedings to which the NCA applied, and not only limited to proceedings to enforce a credit agreement.<sup>140</sup> It was argued that the words in section 130(3),

despite any provision of law or contract to the contrary, in any proceedings commenced in court in respect of a credit agreement to which this Act applies,

suggested that all proceedings arising from a credit agreement to which the NCA applied, fall within its ambit.<sup>141</sup>

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<sup>135</sup> *Naidoo v Absa Bank Ltd 2010 (4) 597 (SCA)*.

<sup>136</sup> *Naidoo supra*, par 1.

<sup>137</sup> See par 4.4.1 above for the full provisions.

<sup>138</sup> *Naidoo supra*, par 2.

<sup>139</sup> *Naidoo supra*, par 4.

<sup>140</sup> *Naidoo supra*, par 5.

<sup>141</sup> *Ibid.*

The court distinguished the present case with *Ex Parte Ford* in that the latter case dealt with the question of whether section 85 was applicable to voluntary surrender applications.<sup>142</sup> Section 85, of which *Ex Parte Ford* dealt with, is found in Part D of Chapter 4 providing for the alleviation of over-indebtedness through debt restructuring as a method of debt relief.<sup>143</sup> The court held that section 129 to 133 on the other hand dealt with debt enforcement and contained in Part C of Chapter 6 therefore section 130(3) should be interpreted in context of chapter 6 as a whole and not in isolation and outside its context.<sup>144</sup> The court held that, on proper interpretation of section 130(3)(a), the proceedings referred thereto do not extend the application of section 129 but simply provides that where a creditor decides to institute proceedings to enforce a credit agreement, he may do so only after having complied with the procedure in section 129(1)(a).<sup>145</sup> The court accordingly dismissed the appellant's application.

#### **4.4.4 Effect of *Naidoo v Absa Bank Ltd* on interplay between debt review and sequestration**

The court in *Naidoo* confirmed the position as fully elaborated in *Mutemeri* regarding the interplay between debt review and compulsory sequestration. Section 85 and 130(3) are phrased in almost identical wording. The court in *Ex Parte Ford* stated that the language of section 130(3) was cast widely and the limitation of the provision to 'proceedings in which a credit agreement was being considered' did not imply that

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<sup>142</sup> *Naidoo supra*, par 6.

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.*

<sup>145</sup> *Naidoo supra*, par 7.

proceedings in which the enforcement of a credit agreement was in issue thus the court concluded that section 85 was also applicable to proceedings for voluntary surrender.<sup>146</sup> The court in *Naidoo* had an opportunity to decide whether this position stands but left the question open stating the fact that the matter of *Ex parte Ford* was distinguishable from *Naidoo* in that *Ex Parte Ford* dealt with alleviation of over-indebtedness in terms of Part D of Chapter 4 whilst it dealt with debt enforcement in terms of Part C of Chapter 6. It is submitted that the Supreme Court of Appeal in *Naidoo* should have decided on this point in order to conclusively clarify what the position is. Since the court *Naidoo* did not over-rule the finding of the court in *Ex Parte Ford*, it is unclear whether sections 85 and 130(3) are applicable only in applications for voluntary surrender. The *Naidoo* case is a supreme court of appeal decision therefore as it stands, application for compulsory sequestration takes precedent over an application for debt review.

#### **4.5 Whether or not application for debt review constitutes an act of insolvency**

Another contentious issue regarding the interplay between debt review and sequestration is the question whether a notice of application for debt review constitutes an act of insolvency in terms of section 8(g) of the Insolvency Act.<sup>147</sup> In this regard, the case of *Firstrand Bank Ltd v Evans*<sup>148</sup> and *Firstrand Bank Ltd v Janse Van Rensburg*<sup>149</sup> will briefly be discussed.

##### **4.5.1 *Firstrand Bank Ltd v Evans***

In this case the respondent was indebted to the Applicant in terms of loan agreements entered between the parties.<sup>150</sup> The applicant brought an application for the provisional

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<sup>146</sup> *Naidoo supra*, par 6.

<sup>147</sup> See par 2.2.2.2.7 above.

<sup>148</sup><sup>148</sup> *Firstrand Bank Ltd v Evans* 2011 (4) SA 597 (KZD).

<sup>149</sup> *Firstrand Bank Ltd v Janse Van Rensburg* 2012 2 all SA 186 (ECP).

<sup>150</sup> *Evans supra*, par 1.

sequestration of the respondent based on two grounds namely: that the respondent had committed an act of insolvency in terms of section 8(g) by giving written notice of his inability to pay his debt and secondly, that the respondent was factually insolvent.<sup>151</sup> For the purpose of this work, only the first ground will be considered.

The respondent addressed a letter to the applicant informing it that he was under debt review and requesting the applicant to cancel the debit order in terms of which the loans were serviced.<sup>152</sup> The applicant relied on the said letter as notification that the respondent was unable to pay its debts. In his defence, the respondent contended that the letter relied on was not a notice as contemplated in section 8(g) of the Insolvency Act; the provisions of the NCA barred the applicant from bringing the application for sequestration and that the court should exercise its discretion to refuse a provisional sequestration order.<sup>153</sup> The court held that since the letter stated that the respondent was under debt review, it was common cause that he had applied for debt review in terms of section 86 of the NCA.<sup>154</sup> The purpose of the said application, the court held, was to be declared over-indebted in terms of section 79 of the NCA.<sup>155</sup> It was held that a notification by a debtor to a creditor stating that the debtor applied for debt review and intends to pay his debts in accordance with a debt restructuring order, as oppose to the original agreement, was a notice that the debtor is unable to pay his debts as contemplated in section 8(g) of the Insolvency Act. The court therefore granted the provisional sequestration order on the bases that the respondent had committed an act of insolvency.

#### **4.5.2 *Firstrand Bank Limited v Janse Van Rensburg***

In this case the applicant brought an application for the sequestration of the respondents based on a credit bureau report stating that the respondents had applied

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<sup>151</sup> *Ibid.*

<sup>152</sup> *Evans supra*, par 12.

<sup>153</sup> *Evans supra*, par 11.

<sup>154</sup> *Evans supra*, par 13.

<sup>155</sup> See par 3.2.5 above for definition of over-indebtedness in terms of s 79.

for debt review. It was contended on behalf of the applicant that the *Evans* case was authority that an application for debt review in terms of section 86 of the NCA constituted an act of insolvency as contemplated in section 8(g) of the Insolvency Act.<sup>156</sup> The court disagreed with the applicant's contention and held that the *Evans* case dealt with the delivery of a written notice drawing the creditor's attention that the debtor had applied for debt review.<sup>157</sup> Due to the surrounding circumstances of *Evans* case, such as the fact that the respondent had regularly been defaulting on his bond instalments, the reasonable interpretation of the notice in question by the creditor was that the debtor was unable to pay his debts.<sup>158</sup> A notice of inability to pay a debt envisaged in section 8(g) of the Insolvency Act must be given deliberately with the intention to give such notice.<sup>159</sup> The court concluded that a credit profile report issued by a credit bureau reflecting that the respondents made applications for debt review did not qualify as an unequivocal notice of inability to pay their debts as envisaged in section 8(g) of the Insolvency Act.<sup>160</sup> Therefore, an application for debt review in terms of the NCA does not, *ipso facto*, constitute an act of insolvency.<sup>161</sup>

Fortunately, the National Credit Amendment Act<sup>162</sup> brought clarity to the issue of whether application for debt review constitutes an act of insolvency. The schedule of the aforesaid Act provides:

The Insolvency Act is hereby amended by the insertion after section 8 of the following section: "Debt review 8A. A debtor who has applied for a debt review must not be regarded as having committed an act of insolvency."

Application for debt review can therefore not be construed as an act of insolvency anymore.

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<sup>156</sup> *Janse Van Rensburg supra*, par 8 to 9.

<sup>157</sup> *Janse Van Rensburg supra*, par 16.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Janse Van Rensburg supra*, par 28.

<sup>160</sup> *Janse Van Rensburg supra*, par 29.

<sup>161</sup> *Janse Van Rensburg supra*.par 19.

<sup>162</sup> National Credit Amendment Act 19 of 2014.



## 4.6 Conclusion

The court in *Ex Parte Ford* put emphasis on policy consideration and the purpose of the NCA when exercising its discretion to refuse voluntary surrender. On the strength of *Ex Parte Ford*, a court considering an application for voluntary surrender would probably choose to invoke the provisions of section 85 of the NCA in exercising its discretion to grant or refuse sequestration applications considering the question of advantage to creditors.<sup>163</sup> This would enable the court to be at liberty to choose whether debt review or sequestration is the best route to take when considering an application for sequestration. However, *Ex Parte Ford* is not the strongest authority compared to *Naidoo* which is a supreme court of appeal decision. Although in certain circumstances<sup>164</sup> debt review could have a more advantageous outcome to creditors, on the strength of *Naidoo*, a creditor can apply for and obtain a sequestration order regardless of the fact that a debtor has applied for debt review. In the exercise of its discretion whether to grant a sequestration order in a situation where a debtor is under debt review, the court should consider each case on its own merit. Where an over-indebted debtor has sufficient disposable income to satisfy all his debts in full should he be given an opportunity in accordance with a debt restructuring order, the court should exercise its discretion to dismiss a sequestration application. Conversely, in the event that an over-indebted debtor does not earn enough to pay off all his debts within a reasonable period and yet has enough disposable assets that can yield sufficient dividend to the advantage of creditors, the court should exercise its discretion in favour of a sequestration application.

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<sup>163</sup> Van Heerden and Boraine *supra* p 51.

<sup>164</sup> For example where a debtor in sequestration proceedings has descent disposable income but doesn't have enough assets.

## Chapter 5

### Conclusion

The purpose of this piece of work was to investigate the interplay (or lack thereof) between debt review in terms of the NCA and sequestration in terms of Insolvency Act. The Supreme Court of Appeal in *Naidoo* has laid down the precedent to the effect that a creditor has the right to side-step debt review process which a debtor has commenced and proceeded with sequestration proceedings against a debtor. The court has effectively concluded that under no circumstances can a debtor under debt review have a defence against unscrupulous credit providers who wish to obtain payment of their debt even when sequestration is not the better option when compared to debt review. This position is in contrast with the objectives of the NCA. It is submitted that since legislature had the Insolvency Act in mind when drafting the NCA, it should

have made provision for the interplay between debt review and sequestration. One of the objectives of the NCA is to promote equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers,<sup>165</sup> and yet a credit provider, in terms of *Naidoo*, has an absolute right to terminate debt review by way of compulsory sequestration. This state of affairs defeats the purpose of the NCA. One of the reasons the NCA was enacted to assist over-indebted debtors to overcome their indebtedness by processes therein.<sup>166</sup>

It is submitted that the court was correct in *Ex Parte Ford* in taking into account the policy considerations of the NCA when exercising its discretion whether to grant voluntary surrender or not. The court also considered the fact that the respondents did not have sufficient assets to satisfy the advantage to the creditors requirement. It is submitted that the principle to be grasped *Ex Parte Ford* is that since the courts have discretion to grant or refuse sequestration, be it voluntary surrender or compulsory sequestration, courts should consider which procedure between debt review or sequestration would be best suitable for a matter before it based on the facts of each case. For example where a debtor has sufficient valuable property but earns a relatively low income. Obviously if the debt in terms of the credit agreement/s is a large amount of money, sequestration of the debtor's estate would be to the advantage of the creditors and the debtor, upon rehabilitation, will enjoy the benefit of discharge if his debts are not satisfied in full. However, if a debtor earns enough money and the debts which led to his over-indebtedness can be paid off in full if they are restructured, it would be to the advantage of both the debtor and the creditor if debt review is resorted to. The creditor will receive his debt in full, although later than agreed, and the debtor gets to keep his assets. It is submitted that, although *Mutemeri* and *Naidoo* are correct on the fact that sequestration is not proceedings to enforce a credit agreement, and the fact that a sequestration order is discretionary, the court must take all the surrounding facts and circumstances of a case into account when adjudication on matters where the interplay between debt review and sequestration are an issue.

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<sup>165</sup> S 3(d).

<sup>166</sup> Par 3.1 *supra*. Also see S 3(g) of the NCA which states that "the purposes of the NCA are to promote .....(g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations".

Maghembe<sup>167</sup> suggests that section 129 and 88(3) of the NCA should be amended as follows:<sup>168</sup>

“(1) If the consumer is in default under a credit agreement, the credit provide –

(a) .....

(b) May not commence *an application for sequestration* or legal proceedings to enforce the agreement before.....

Section 88(3) Subject to section 86 (9) and (10), a credit provider who receives notice of court proceedings contemplated in section 83 and 85, or notice in terms of section 86(4)(b)(i), may not exercise or enforce by litigation or other judicial process any right or security under that agreement *or apply for the compulsory sequestration of the relevant consumer's estate until.....*”.

It is submitted that Maghembe is correct in suggesting the above amendments. However, in the absence of the aforesaid amendments, it is submitted that debt review in terms of the NCA should always be considered as an alternative in sequestration proceedings before the final sequestration order is granted. Section 85 of the NCA should be interpreted to include sequestration proceedings to give effect to the aforesaid.

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<sup>167</sup> Maghembe, The Appellate Division has spoken – sequestration proceedings do not qualify as proceedings to enforce a credit agreement under the National Credit Act 34 of 2005: *Naidoo v Absa Bank 2010 4 SA (SCA) 2011 PER (14)2*, p 178.

<sup>168</sup> Suggested amendments in italic.

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