The Judiciary’s Discretion in Sequestration Applications

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CHAPTER 1: General Introduction

11 Discretion Defined

“Discretion” is defined as the power of a judge, public official or a private party (under authority given by contract, trust or will) to make decisions on various matters based on his opinion within general legal guidelines. Therefore, discretion is regarded as the power of choice.

The reader’s attention will be drawn to the meaning and origin of each of the words contained in the title of the dissertation to serve as an introductory remark to each chapter. The meanings encompassed in each of the words in the title are important in order to understand the purpose that the judiciary’s discretion serves and the extent thereof in sequestration applications.

12 Purpose

The purpose of this mini dissertation is to determine whether the judiciary has a discretion to consider the debtor’s interests in an application for sequestration or whether the judiciary, being a creature of statute, is bound by the letter of law contained in the Insolvency Act 24 of 1936, namely proving an advantage to creditors.

13 Structure

This chapter serves as an introduction to explain the research question to the reader. In chapter two the historical background containing the origins and development of the South African insolvency system will reveal how it has evolved with regard to discretion over a debtor’s property.

Chapter three firstly addresses the procedure of sequestration applications by looking at the different requirements provided for in the Insolvency Act for voluntary as opposed to compulsory sequestration applications and the court’s interpretation on the compliance of such requirements.

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2 Act 24 of 1936.
Thereafter, a recent judgment of the Supreme Court of Appeal's interpretation on the extent of their discretion is discussed to investigate how discretion is afforded to the hierarchy that exist among courts.

Chapter four critically evaluates the South African insolvency system in respect of insolvency law procedures contained in the World Bank Report. How and whether the South African courts exercise their discretion in terms of the international approach is investigated.

In chapter five the South African pro-creditor approach in sequestration applications is evaluated and proposals are made in terms of the World Bank Report’s suggestions on how to incorporate a balanced approach with regard to the judiciary’s discretion.

### 14 Phrasing

Wherever reference is made to the male gender it includes the female gender as if specifically traversed herein.
CHAPTER 2: Historical Background

2 1 Introduction

In this chapter the historical origin and development of the insolvency law procedures in South Africa will be discussed from the prospective of discretion over the debtor's property or person afforded to the judiciary or other administrative authorities.

In order for discretion to be enforceable, regard is given to the authorities and how legislation developed procedures to allow them a discretion. The term “judiciary” or “judicial authority” can be defined as the power to resolve disputes through determining what the law is and how the law should be applied to a specific case.³

The Constitution of the Republic of South Africa affords the judiciary the general power to exercise their discretion. Section 165(2) of the Constitution of South Africa⁴ reads as follows:

“The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.”

2 2 Origins of the South African Insolvency Act

Visser⁵ states that the South African insolvency law is currently governed by the Insolvency Act 24 of 1936, which as its predecessors, is based on the Amsterdam Ordinance of 1777. The aforementioned Ordinance originated from the Roman law constructs missio in possessionem and cessio bonorum. The various laws that formed the foundation of the South African Insolvency Act will be discussed hereinafter.

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⁵ Visser “Romeinsregtelike Aanknopings-punte van die Sekwestrasieproses in die Suid-Afrikaanse Insolvensiereg” 1980 De Jure 41, hereinafter referred to as Visser.
221 Roman Law

Mars comments that during the period of the Twelve Tables, a debtor’s creditors enjoyed the option, in the event of his inability to pay his debts, either selling him into slavery or cutting his body into pieces, with the additional advantage of incurring no liability in the case that anyone cut off more or less than his just share. The specific procedures that were at creditors’ disposal to enforce their respective claims against the debtor’s person or estate and the development thereof will now be addressed.

2211 Legis actio per manus iniectionem

Visser states that the prescriptions that applied with regards to this form of enforcement were of such a strict nature that it could be described as “regulated self-help.” The procedure that the creditor would use to enforce his claim was known as the legis actio per manus iniectionem. This procedure entailed that the debtor was afforded thirty days to satisfy the claim. If the debtor failed to repay his debt or if he admitted his indebtedness in front of an official or if his indebtedness is obvious, then the creditor would have taken possession of the debtor’s person and bring him before the praetor. The judicial process will commence when a creditor places his hand on the debtor where after only a vindex could defend the debtor. If the vindex was successful, the debtor would be released. However, the vindex would be held personally liable for double of the debtor’s debt if he failed to protect the debtor or to justify his debt. If the debtor failed to repay his debt and there was no vindex who intervened on the debtor’s behalf, the praetor will place the debtor’s person in the hands of the creditor by means of addictio. The creditor would have possessed the power to imprison the debtor for sixty days and the debtor was afforded the time to negotiate with the creditor. The debtor would have had to shout out the debt amount in the presence of the praetor in the town house for three days. If no one negotiated with the creditor on behalf of the debtor by the third market day, the debtor was either killed to distribute

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7 Visser 42.
8 Ibid.
9 Ibid.
10 Ibid.
11 Ibid.
12 Visser 43.
13 Ibid.
his body parts among his creditors or he would have been sold as a slave. These sombre consequences were to some extent limited by the lex Poetelia approximately 326vC since the killing of a debtor or the selling of the debtor for his debt was abolished. This reform afforded the debtor an opportunity to act as a slave in order to repay his debt by working for the creditor, instead of losing his life or being sold as a slave.

2 2 1 2 Missio in possessionem

In terms of this construct the law was developed to the extent that the assets of the debtor, as opposed to his person, could be attached. The other creditors were notified by public proclamation (proscriptio) and after a specific period of time the creditors would have called a meeting to appoint a magister bonorium. The magister bonorium would have been responsible for selling the debtor's assets to the highest bidder in order to provide the highest dividend to the creditors. The assets of the debtor would have been sold en bloc, which resulted in the debtor's infamia. Infamia entailed the loss of the debtor's social standing. The debtor was not given a discharge of his outstanding debt after this procedure, since further assets of the debtor could still be attached once the debtor obtained other assets which would suffice his outstanding debts.

2 2 1 3 Cessio bonorum

Up to this point only the creditors' interests have been taken into consideration and there has been no regard for the debtor's interests. The debtor had no remedy to prevent the aforementioned procedures to take place. The lex lulia de bonis cedendis tried to address this lacuna in the law by affording the debtor the opportunity to surrender his assets instead of execution against the debtor's person. This procedure allowed the debtor a moratorium against execution of his person and infamia. However,

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14 Visser 44.
15 Ibid.
16 Visser 44.
17 Visser 45.
18 Ibid.
19 Ibid.
20 Visser 46.
21 Ibid.
execution of the debtor’s property obtained after the *cessio bonorum* took place was still an option available to the creditors. It was found that the *cessio bonorum* procedure was not often applied in law due to the stringent requirements that had to be observed. Firstly, it required that the *cessio* should have been sanctioned by a *magister* with the relevant *imperium*, secondly, the financial distress should have been due to an accident and lastly, there should have been sufficient assets in the estate to make the *cessio* worthwhile.

### 2.2.2 Roman Dutch Law

Mars submits that the Roman law construct of *cessio bonorum* in its main features was in due course introduced into Holland. Van Leeuwen declared that it was not in use before the year 1288, while Van der Keessels suggests that it had come into use towards the end of the fifteenth century. Regardless of the exact time it was introduced, Mars submits that the remarkable point about *cessio* in the Dutch practice is that it had apparently ceased to be a right which the debtor could claim. *Cessio* was regarded as a privilege which the court might at its discretion have extended to a debtor and only if the debtor’s insolvency was due to misfortune alone. Grotius describes it as an “act of grace” which was granted by the court only after the debtor had supplied all the information concerning the position of his estate and after the creditors were given notice of the application. When a *cessio* was granted by the court, formerly the estate was administered by commissioners under the supervision of the *scout* and *schepenen*, or local magistrates, but subsequently during the eighteenth century, chambers were established known as *Desolate Boedelkamers*, to which was entrusted the administration of, amongst other, insolvent estates. In addition to the *cessio*, it appears to Mars that the *missio in possessionem* of the Romans in some form or other was also practiced in Holland and that a *curator* was appointed to distribute the

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22 Visser 46.
23 Ibid.
24 Mars 8.
25 Ibid.
26 Mars 8.
27 Ibid.
28 Grotius *The Introduction to Dutch Jurisprudence* 3.41.2.
29 Mars 8.
30 Ibid.
proceeds of the debtor’s estate pro rata among his creditors after the sale of the assets by public auction.

Van der Linden\textsuperscript{31} states that the estates of those who become insolvent require an especial provision on the part of the court within whose jurisdiction they are. In many places there were special ordinances on the subject and in great cities there were particular chambers for this purpose.\textsuperscript{32} Mars\textsuperscript{33} submits that it appears that there were a large number of such local ordinances, but that of Amsterdam passed in 1777 is of great importance, for it has, to a large extent, been the basis of much of the subsequent South African law of insolvency.

**2.2.3 Amsterdam Ordinance of 1777**

The Ordinance of Amsterdam established Chambers charged with the administration of the estates of all debtors obliged to stop payment, whether notice of such fact was given by the debtor himself or by his creditors.\textsuperscript{34} The Chamber also had to administer the estates ceded under the benefit of inventory. Mars\textsuperscript{35} submits that from the nature of the estates committed to the administration of this Chamber, that a debtor could obtain the sequestration of his estate either by obtaining \textit{cessio bonorum} or by stopping payment. This dual form of relief subsequently existed in South Africa for a while.\textsuperscript{36} Mars\textsuperscript{37} suggests that an important development of the Amsterdam Ordinance is the recognition of the principle of rehabilitation. In terms of sections 41 and 42 of the Ordinance, rehabilitation afforded the debtor the opportunity to be discharged of all pre-sequestration debt if a prescribed majority of the creditors voted in favour thereof.\textsuperscript{38} Debt relief in the Roman-Dutch law was provided in the form of \textit{surchéance van betaalinge} and the Dutch legal terminology thereof is \textit{surséance van betaling}.\textsuperscript{39} Boraine and Roestoff\textsuperscript{40} explain that the aim of this procedure was to give the debtor a temporary

\begin{itemize}
\item Van der Linden \textit{Institutes of the Laws of Holland} 500, hereinafter referred to as Van der Linden.
\item Ibid.
\item Ibid.
\item Ibid.
\item Mars 9.
\item Amsterdam Ordinance of 1777.
\item Mars 9.
\item Boraine & Roestoff “Vriendskaplike sekwestrasies- ’n produk van verouderde beginsels? (Deel 2)” 1994 1 \textit{De jure} 31.
\end{itemize}
postponement of payments for a specified time in order to afford the debtor an opportunity to recover financially. In the case of Newcombe v O’Brien,\textsuperscript{41} it was found that the \textit{surchéance van betaalinge} existed in South Africa until it was abolished by the Cape Ordinance 6 of 1843.\textsuperscript{42}

\textbf{2 2 4 Insolvency Act 32 of 1916}

Roestoff\textsuperscript{43} submits that in 1803 Commissioner-General De Mist issued instructions for the creation of a \textit{Desolate Boedelkamer} in the Cape to administer the distribution of insolvent estates, to enforce civil claims and to distribute the estates of persons who obtained a \textit{cessio bonorum}. Therefore a separate entity, similar to the Amsterdam Ordinance Chamber, was established to govern, \textit{inter alia}, insolvent estates. The 1803 instruction was largely based on the Amsterdam Ordinance of 1777 \textit{supra}; however with two distinct differences.\textsuperscript{44} Firstly, as a general rule a debtor could not personally obtain a sequestration order and secondly, he did not have any share in the distribution of the estate, since the whole estate was subject to the control of the \textit{Desolate Boedelkamer}.\textsuperscript{45}

In 1818, the \textit{Desolate Boedelkamer} was abolished and the office of a \textit{sequestrator} was created who conducted the same functions as the \textit{Desolate Boedelkamer}.\textsuperscript{46} However in 1827 the office of the \textit{sequestrator} was also abolished and all estates that were under the control of the \textit{sequestrator} were placed in the hands of a commissioner.\textsuperscript{47} It is evident that insolvent estates changed hands among authorities who were afforded sole discretion with regard to the assets of the debtor’s estate. In 1829 Ordinance 64 of 1829 was enacted which governed the distribution of insolvent estates however; this Ordinance was amended several times prior to it being repealed by Ordinance 6 of 1843.\textsuperscript{48}

\begin{itemize}
  \item \textsuperscript{41} \textit{Newcombe v O’Brien} 20 (EDC) 292 at 296.
  \item \textsuperscript{42} Mars 9.
  \item \textsuperscript{43} Roestoff “Skuldverligtingsmaatreëls vir individue in die Suid-Afrikaanse Insolvensiereg: ’n Historiese Onderzoek (Deel II)” 2005 \textit{FUNDAMINA} 92, hereinafter referred to as Roestoff LLD thesis.
  \item \textsuperscript{44} \textit{Idem} 93.
  \item \textsuperscript{45} \textit{Ibid}.
  \item \textsuperscript{46} \textit{Ibid}.
  \item \textsuperscript{47} \textit{Ibid}.
  \item \textsuperscript{48} \textit{Ibid}.
\end{itemize}
In 1916, the Parliament of the Union of South Africa repealed the existing statute law of insolvency in the various provinces and substituted a uniform law of insolvency and assignment throughout the then Union of South Africa. Mars submits that in structure it followed the Transvaal Law 13 of 1895 but in itself it was only an adaption of the old Cape Ordinance. The 1916 Act made provision for, *inter alia,* voluntary surrender, compulsory sequestration, composition, assignment and rehabilitation.

Roestoff questions whether the advantage to creditors’ requirement was included in the 1916 Act and points out that in the case of *Ex parte Theron* the court granted a sequestration application without the applicant proving on a balance of probabilities that the sequestration would have been to the advantage of creditors. The applicant was only required to prove that the requirements of section 4 were met and further that the free residue was sufficient to cover the administration costs. Although the court considered the interests of the creditors upon hearing the sequestration application; the order for sequestration would only have been refused had the sequestration of the debtor been detrimental to the creditors. In the case of *Ex parte Terblanche* the court favoured the *bona fide* debtor who fell into insolvent circumstances purely because of misfortune and due to no fraud or dishonesty on his part. Therefore, the court granted the sequestration application as a debt relief measure, an “act of grace”, to the *bona fide* debtor. In terms of the 1916 Act South African courts exercised a more pro-debtor discretion, since the advantage to creditors’ requirement was not a prevailing factor and the honest debtor could apply for sequestration as a debt relief measure.

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49 Mars 12.
50 Mars 12.
51 Act 32 of 1916.
52 Roestoff LLD thesis 103.
53 Ibid.
54 Act 32 of 1916.
55 *Ex parte Theron* 1923 (OPD) 46.
56 Act 32 of 1916.
57 Roestoff LLD thesis 103.
58 Ibid.
59 *Ex parte Terblanche* 1924 (TPD) 168 at 170.
60 Act 32 of 1916.
Another method available to the debtor to obtain debt relief was afforded by section 10561 where a debtor could make a composition offer to his creditors after the first meeting of creditors.62 However, a composition would only be binding on all the creditors if it was accepted by a three quarter majority in number and value of creditors who have proved their claims.63 Assignment was also a debt relief measure where courts were not approached to declare a debtor insolvent.

Assignment is the procedure which could be utilized in terms of section 116.64 This procedure allowed the debtor to surrender his estate to a third person, namely the assignee, who would have realised the assets and divided the proceeds among the creditors for their benefit.65 This resulted in a fresh start for the debtor without being declared insolvent, since he obtained a discharge of debts without sequestration proceedings lodged in court.

2 2 5 Insolvency Act 24 of 1936

On 1 July 1936 there came into force throughout the then Union of South Africa, Act 24 of 1936, being an Act to consolidate and amend the law relating to insolvent persons and their estates.66 This Act repealed the whole of Act 32 of 1916 and it consolidated the provisions of the previous Union Acts.67 Mars68 submits that several important features of those Acts have, however, been abolished. Thus the whole of the law relating to statutory assignments has been repealed and has not been re-enacted. Further no provision was made for the holding of examinations before a commissioner appointed by the court and provisional trustees are now appointed by the Master and not by the court.69 The advantage to creditors’ requirement that was incorporated in the 1936 Act70 changed the perspective of the courts’ discretion in that a discharge to debtors, even honest debtors, is not a prevailing factor to grant a sequestration application. The additions and amendments to the law and practice relating to

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61 Act 32 of 1916.
62 Roestoff LLD thesis 104.
63 Roestoff LLD thesis 105.
64 Act 32 of 1916.
65 Roestoff LLD thesis 107.
66 Mars 12.
67 Mars 12.
68 Mars 13.
69 Ibid.
70 Act 24 of 1936.
insolvent estates contained in the 1936 Act\textsuperscript{71} for sequestration applications is discussed further in Chapter 3. Take note that whenever the statute is silent on any point, recourse must be had to the common law.\textsuperscript{72}

\section*{2.3 Conclusion}

From this chapter it is evident that various stakeholders had a discretion over the debtor’s person and still has a discretion over his property in order to suffice a debt unpaid. The Roman law enforced a brutal and absolute discretion in that a debtor was physically punished by either being sold into slavery or being mutilated. Fortunately the law was reformed by limiting attachment to a debtor’s assets and various procedures could be utilized to enforce a creditor’s claim. The prevailing factor that is currently considered by the courts in exercising their discretion is the advantage to creditors’ requirement. However, certain procedures are not subject to the courts’ discretion but remain submissive to the discretion of the majority creditors. However, any interested party may approach the court at any given moment when an averment as to prejudice is being made in order for the court to interpret the legislation and exercise a discretion without fear, favour or prejudice.

\textsuperscript{71} Act 24 of 1936.
\textsuperscript{72} Mars 13.
CHAPTER 3: A Comparative Study on the Discretion afforded to the Judiciary in Sequestration Application Proceedings

3.1 Introduction

The word “sequestration” is derived from the Latin sequestrare which means “to place in safekeeping” and it was first attested to in the 1510s as “to seize by authority and to confiscate”.73

In this chapter the courts’ power of choice to confiscate as well as the extent of such choice which is exercised within the ambit of legal guidelines by the court that has jurisdiction over the debtor, will be analysed by comparing the proceedings, requirements and judgments on the different sequestration applications.

3.2 Jurisdiction

If discretion is commonly defined as the power of choice; then jurisdiction can be defined as the power to hear the application, where after the court may exercise a discretion and grant a binding judgment in accordance thereto. Insolvency affects the status of a person. Therefore in the Republic of South Africa, jurisdiction in insolvency is vested in the provincial or local divisions of the high court or in any judge thereof.74

In order to determine which high court has jurisdiction, the provisions of section 149(1)75 is applied. It reads as follows:

“The court shall have jurisdiction over every debtor and in regard to the estate of every debtor who-

(a) on the date on which the application for sequestration is lodged with the registrar of the court, is domiciled or owns or is entitled to property situated within the jurisdiction of the court; or

(b) at any time within twelve months immediately preceding the lodging of the application, ordinarily resided or carried on business within the jurisdiction of the court.”

75 Act 24 of 1936.
A magistrate’s court has jurisdiction over aspects that normally fall within its' jurisdiction. Therefore the ordinary grounds of jurisdiction apply, for example: hearing a criminal matter and the impeachment of voidable transactions or lawsuits in terms of sections 72(2), 73(1), 76, or 78(3) of the Insolvency Act 24 of 1936.76

3 3 Voluntary Sequestration Applications

Section 3(1)77 regulates the petition for acceptance of surrender of an estate and states:

“An insolvent debtor or his agent or a person entrusted with the administration of the estate of a deceased insolvent debtor or of 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.”

The voluntary surrender of a debtor’s estate should be aimed at realising a not negligible dividend for the debtor’s creditors.78 It is not a principal aim of South African insolvency law to release the debtor from his liabilities, but rather to ensure an equitable distribution of the debtor’s assets for the benefit of his creditors, as is expressly required by section 3(1).79 Once a debtor has established that he is unable to pay his debts, but that he has sufficient assets that are unencumbered, or not fully encumbered, are capable of being liquidated and will render a sufficient residue after the payment of secured creditors for the costs of the liquidation of the estate and the payment of prescribed fees as part of the administration costs, then he may consider surrendering his own estate.80 If these requirements are met, the applicant for a voluntary surrender is able to prove, as is required, that the sequestration of the applicant’s estate is to the advantage of creditors.81 The procedural requirements for acceptance of voluntary surrender are discussed next.

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76 Cronje et al Insolvency Law and Practice (2014) 22, hereinafter referred to as Cronje.
77 Act 24 of 1936.
78 Mars 48.
79 Ibid.
80 Ibid.
81 Mars 48.
3 3 1 Notice of Surrender

Section 4(1)\(^{82}\) regulates the notice of surrender and lodging of the statement of the debtor's affairs at the Master's office:

“Before presenting a petition mentioned in section three supra the person who intends to present the petition shall cause to be published in the Government's Gazette and in a newspaper circulating in the district in which the debtor resides, or, if the debtor is a trader, in the district in which his principal place of business is situated, a notice of surrender in a form corresponding substantially with form A in the First Schedule of the Insolvency Act. The said notice shall be published not more than thirty days and not less than fourteen days before the date stated in the notice of surrender as the date upon which application will be made to the court for acceptance of the surrender of the estate of the debtor.”

The purpose of such notice is to ensure that, as much as this may be possible, the debtor's creditors receive timeous notice of the debtor's intention to apply for his estate to be sequestrated.\(^{83}\)

3 3 2 Notice to Interested Parties

Section 4(2)\(^{84}\) requires that within a period of seven days from the date of publication of the notice of surrender in the Gazette, the applicant must deliver or post a copy of the notice to every one of the creditors whose address he knows or can ascertain. The courts require that copies of the notice should be sent by registered post and if no such notices be sent, as was the case in Ex parte Bishop,\(^{85}\) or if several have been omitted, as in the case of Ex parte Marchesi,\(^{86}\) the court must refuse to accept the surrender. Mars\(^{87}\) states that condonation should only be granted if it is certain that the creditors concerned have not been prejudiced by a late notice or the failure to give any notice in writing. The amendment to section 4(2)\(^{88}\) introduced in 2002, requires the applicant to give notice by post to every registered trade union representing the debtor's employees.

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\(^{82}\) Act 24 of 1936.

\(^{83}\) Mars 49.

\(^{84}\) Act 24 of 1936.

\(^{85}\) Ex parte Bishop 1936 (WLD) 83.

\(^{86}\) Ex parte Marchesi 1960 (2) SA 52 (N).

\(^{87}\) Mars 57.

\(^{88}\) Act 24 of 1936.
to the applicant’s knowledge, as well as to the employees by affixing a copy of the notice of surrender to any notice board accessible to the employees inside the debtor’s premises. A similar notice must be posted to the South African Revenue Services. The aforementioned notices must be posted within the same period as the notices to the creditors. Failure to do so will invariably lead to the application being postponed until such notices have been given. It is important for the applicant to give notice to interested parties to give effect to the *audi alteram partem* rule which requires that all sides should be afforded a chance to be heard by the court. Even though creditors are not a party to a voluntary sequestration application, they have an interest as discussed in paragraph 3.3.6 hereinafter.

### 3.3.3 Lodgement of Statement of Affairs

Section 4(3) requires that the debtor must, in duplicate, lodge a statement of his affairs at the office of the Master. Such statement must be framed in a form corresponding substantially with form B in the First Schedule to the Insolvency Act. The notice of surrender must state where and the date from which the debtor’s statement of affairs will lie for inspection by interested persons. Such notice must lie for inspection at either the Master’s office, only if the debtor resides in a district in which there is a Master’s office of the court in which the application for surrender is launched, or, if the debtor resides in another district, (other than the districts of Wynberg, Simonstown or Bellville in the Cape Province) at the Master’s office of the court in which the application is launched and at the magistrate’s or additional magistrate’s office of the district in which he resides. If he carries on business in a district other than that in which he resides, another notice must also be given at the relevant Master’s or magistrate’s office to such district. The court found in the case of *Ex parte Kretschmar* that failure to lodge the statement of affairs at the Master’s office

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89 Mars 57.
90 Ibid.
91 Act 24 of 1936.
93 Ibid.
94 Mars 59.
95 Mars 59.
96 *Ex parte Kretschmar* 1929 (SWA) 89.
and at the proper magistrate’s office is a defect which cannot be condoned. However, the court may postpone the application to enable the statement to be properly lodged and direct that notice of such lodging be given to every creditor by registered letter. In terms of section 4(6) the statement of affairs, so lodged, must then lie for inspection of creditors in terms of the notice of surrender, at all times during office hours for a period of fourteen days from 08h00 on the day from and including which such period for fourteen days is to be reckoned.

3 3 4 Certificates by Master and Magistrate

The Master and the magistrate (where one has been involved) each issue a certificate confirming that the statement of affairs has been open for inspection and state whether objection by any creditor has been lodged. As a rule of practice the court may also require the filing of a report by the Master as was required in the case of Ex parte Anthony en ‘n Ander en Ses Soortgelyke Aansoeke. If the certificate has not been filed, or if it omits to state whether objections have been lodged, the court may accept the surrender subject to a proper certificate being filed, as in the case of Ex parte Stoop, or postpone the application to enable the certificate to be filed as in the case of Ex parte Blunt. Mars is of the opinion that the latter course is the better option.

3 3 5 Form of the Application

Before the date on which the application for surrender is to be made, the debtor must file with the court an application consisting of a notice of motion with supporting affidavit signed by himself or his agent stating that the debtor’s estate is insolvent and tendering the surrender thereof for the benefit of his creditors. The application for surrender must contain evidence establishing that the court has jurisdiction to entertain the application and that all the requirements for the acceptance of the surrender have

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97 Mars 65.
98 Mars 65.
99 Act 24 of 1936.
100 Idem 66.
101 Meskin 3-10(1).
102 Ex parte Anthony en ‘n Ander en Ses Soortgelyke Aansoeke (4) SA 116 (C) at 119.
103 Ex parte Stoop 1930 (GWL) 12.
104 Ex parte Blunt 1939 (SR) 280.
105 Mars 67.
106 Ibid.
been observed.\textsuperscript{107} The general rules governing motion proceedings apply to the application. Thus, due to the fact that a sequestration application is an \textit{ex parte} application, the debtor must observe the utmost good faith and must disclose all material facts to the court, that is, all those facts which may influence the court’s decision.\textsuperscript{108}

\subsection*{3.3.6 Discretion of the Court}

Mars\textsuperscript{109} states that even if the application for the acceptance of the surrender of the debtor’s estate is not opposed by any of the creditors, the Insolvency Act expressly provides that the court can accept the surrender only if it is satisfied with the following four points contained in section 6:\textsuperscript{110}

\begin{itemize}
\item[a)] That the prescribed formalities in section 4\textsuperscript{111} \textit{supra} have been duly observed;
\item[b)] That the estate is in fact insolvent;
\item[c)] That the debtor owns realisable property of a sufficient value to defray all costs of the sequestration which will be payable out of the free residue of the estate;
\item[d)] That it will be to the advantage of creditors if the estate is sequestrated.
\end{itemize}

According to Mars,\textsuperscript{112} if a court is satisfied with the compliance of abovementioned requirements, the court still has a discretion to accept or reject the surrender of the estate, particularly if creditors oppose the surrender. An advantage to creditors needs to be established in voluntary sequestration applications as opposed to compulsory sequestration applications where the applicant creditor merely has to allege that there is “reason to believe” that the sequestration will be to the advantage of creditors. Due to the aforementioned, the court will only find that a voluntary surrender is in the interest of creditors if sufficient free residue is available to render a dividend for concurrent creditors.\textsuperscript{113} Boraine and Roestoff\textsuperscript{114} submit that a court is not bound to grant an order

\begin{flushright}
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\textsuperscript{107} Meskin 3-10(1).
\textsuperscript{108} Meskin 3-10(1).
\textsuperscript{109} Mars 72.
\textsuperscript{110} Act 24 of 1936.
\textsuperscript{111} Ibid.
\textsuperscript{112} Mars 72.
\textsuperscript{113} Ibid.
\textsuperscript{114} Boraine and Roestoff “Revisiting the state of consumer insolvency in South Africa after twenty years: The courts’ approach, international guidelines and an appeal for urgent law reform (1)” 2014 \textit{THRHR} 357, hereinafter referred to as Boraine and Roestoff (1).
\end{flushright}
for voluntary surrender or compulsory sequestration when the requirements of the relevant sections are complied with. The aforementioned authors\(^{115}\) rely on the *dictum* contained in the case of *Julie Whyte Dresses (Pty) Ltd v Whitehead*\(^{116}\) where it was found that each case must be decided on its own facts and in each case the court has an overriding discretion that must be exercised judicially and upon consideration of all the facts and circumstances. It is submitted, as illustrated by judgments discussed hereunder, the prevailing factor to be considered by the court is whether the application is to the advantage of creditors. Only if this requirement is evident from the papers, may the court exercise a discretion in favour of the application for sequestration.

In the case of *Ex parte Arntzen (Nedbank Ltd as Intervening Creditor)*,\(^{117}\) Judge Gorven dismissed the application for voluntary surrender and further ordered the applicant to pay the costs occasioned by the intervention of the intervening creditor. The court found that the applicant’s application was insufficient and unsuccessful in proving its’ case on a balance of probabilities due to the unsubstantiated amounts provided for the applicant’s assets, debts and sequestration costs that resulted in failure to prove an advantage to creditors. Judge Gorven\(^{118}\) found that there is no dispute that the estate of the applicant is insolvent, which leaves two issues for determination before discretion granted by section 6(1)\(^{119}\) can be exercised. It is evident from Judge Gorven’s words that the court’s discretion is limited. If all the substantive requirements are not observed, the sequestration order cannot be granted, because ultimately the sequestration application should be to the advantage of creditors and is not merely intended to provide the debtor a discharge of pre-sequestration debts. In voluntary surrender applications, such as the one before the court, it cannot be said to have been to the advantage of creditors. Such an application may constitute an abuse of the process of court and undermine the rights and interests of creditors.\(^{120}\) Mars\(^{121}\) suggests that in addition to its statutory discretion when asked to grant a sequestration order, the court has an inherent jurisdiction to prevent abuse of its process.

\(^{115}\) Boraine and Roestoff (1) 357.
\(^{116}\) *Julie Whyte Dresses (Pty) Ltd v Whitehead* 1970 3 SA 218 (D) 219.
\(^{117}\) *Ex parte Arntzen* (Nedbank Ltd as Intervening Creditor) 2013 (1) SA 49 (KZP).
\(^{118}\) *Idem* at 3H.
\(^{119}\) Act 24 of 1936.
\(^{120}\) *Ex parte Arntzen* (Nedbank Ltd as Intervening Creditor) 2013 (1) SA 49 (KZP) at 10.
\(^{121}\) Meskin 2-26(1).
Judge Gorven states that just over a decade ago, various divisions of the high court ‘cracked down’ or ‘tightened up’ on so-called friendly sequestration applications. A friendly sequestration is achieved through co-operation between the creditor and the debtor, which were described as beginning to constitute a ‘cottage industry.’ Judge Gorven expresses her concern that voluntary surrender applications have also begun to proliferate in that division and ‘a fledgling cottage industry has reared its head.’ In an attempt to prevent the abuse of process, Judge Gorven requested that an applicant should present sufficiently detailed evidence to satisfy a sceptical court that the requirements of section 6(1) have been met and that the discretion of the court should be exercised in favour of the applicant.

Judge Gorven quoted the words of Judge Holmes in the case of Ex parte Pillay; Mayet v Pillay to reiterate that the best interests of creditors as a group prevail above the relief sought by the debtor:

“The machinery of voluntary surrender was primarily designed for the benefit of creditors, and not for the relief of harassed debtors.”

### 3 4 Compulsory Sequestration Applications

Section 9(1) regulates the petition for sequestration of a debtor's estate. It reads as follows:

“A creditor (or his agent) who has a liquidated claim for not less than fifty pounds, or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than a hundred pounds against a debtor who has committed an act of insolvency, or is insolvent, may petition the court for the sequestration of the estate of the debtor.”

Compulsory sequestration applications are procedurally divided into two parts. Firstly, the applicant creditor applies to court for a provisional sequestration order where a less

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122 Ex parte Arntzen (Nedbank Ltd as Intervening Creditor) 2013 (1) SA 49 (KZP) at 9.
123 Idem at 11.
124 Act 24 of 1936.
125 Ex parte Arntzen (Nedbank Ltd as Intervening Creditor) 2013 (1) SA 49 (KZP) at 13.
126 Ex parte Pillay; Mayet v Pillay 1955 (2) SA 309 (N) at 311.
127 Act 24 of 1936.
cumbersome *prima facie* case has to be made out in terms of section 10\textsuperscript{128} and at the hearing hereof, the court will allocate a return date. The high court rule\textsuperscript{129} requires that upon the return date, if the court is satisfied that the applicant has proven that there is reason to believe the sequestration will be to the advantage of creditors on a balance of probabilities, then a final sequestration order will be granted against the debtor’s estate in terms of section 12.\textsuperscript{130}

On the return date, the applicant must, *inter alia*, satisfy the court on a balance of probabilities that the following requirements have been met. Firstly, that he has established a claim that enables him to bring the application; secondly, that the respondent is factually insolvent or has committed an act of insolvency; and lastly, (arguably most importantly), that there is reason to believe that sequestration will be to the advantage of creditors.\textsuperscript{131} The aforementioned substantive requirements which the court takes into consideration before granting the provisional and final sequestration order will now be discussed.

### 3 4 1 Creditor Proved a Claim

In the case of *Freidberg v Van Niekerk*,\textsuperscript{132} the court found that it is not competent to bring the sequestration proceedings on the basis of a claim not sound in money. As discussed in paragraph 3 4, the applicant creditor should have a liquidated claim which is a claim for an amount which is fixed, either by agreement or by an order of the court or otherwise.\textsuperscript{133} Meskin\textsuperscript{134} comments that the mere fact that the claim is disputed does not render it unliquidated if nevertheless it is capable of easy and speedy proof.\textsuperscript{135} Independent of the applicant having the requisite liquidated claim, the creditor must also have *locus standi* generally to proceed in the Supreme Court.

\begin{itemize}
  \item[\textsuperscript{128}] Act 24 of 1936.
  \item[\textsuperscript{129}] Rule 6 of the Uniform Rules of the High Court read with section 8 to 12 of the Insolvency Act 24 of 1936.
  \item[\textsuperscript{130}] Act 24 of 1936.
  \item[\textsuperscript{131}] Meskin 2-3.
  \item[\textsuperscript{132}] *Freidburg v Van Niekerk* 1962 (2) SA 413 (C) at 415.
  \item[\textsuperscript{133}] Meskin 2-3.
  \item[\textsuperscript{134}] *Idem* 2-5.
  \item[\textsuperscript{135}] Meskin 2-5.
\end{itemize}
3 4 2 Factual Insolvency of a Debtor

There are only two grounds on which it is competent for a creditor’s application for the sequestration of his debtor’s estate to be made. Firstly, that the debtor has committed an act of insolvency within the meaning of that expression as defined in section 8\textsuperscript{136} and secondly, that the debtor is insolvent which entails that his liabilities in fact exceed the value of his assets.\textsuperscript{137} The intention of the legislature to designate certain acts which constitute acts of insolvency is that proof of any such act, as distinct from proof of actual insolvency, is to be sufficient ground for the purpose of obtaining a sequestration order.\textsuperscript{138} The reason for the provisions is the legislature’s recognition of the fact that a creditor seldom has sufficient evidence available to him to prove that his debtor actually is insolvent.\textsuperscript{139}

3 4 2 1 Commission of an Act of Insolvency

In the case of\textit{De Villiers NO v Maursen Properties (Pty) Ltd}\textsuperscript{140} the court found that an act of insolvency is a statutory concept which obviates the necessity of proving actual insolvency. Mars\textsuperscript{141} submits in cases such as,\textit{inter alia} the case of\textit{Savage and Hill v Thrash}\textsuperscript{142} that acts of insolvency are limited to those clearly created by the statute and cannot be extended by the court. Where an act of insolvency is relied on, it is desirable that in framing his application the creditor should adopt the actual words of the Insolvency Act constituting the particular act of insolvency. The creditor should also set out the particular facts constituting an act of insolvency, so that no doubt shall exist as to the specific act of insolvency which is relied on.\textsuperscript{143} Due to the aforementioned, courts are bound by section 8\textsuperscript{144} during interpretation of an alleged act of insolvency by the debtor and cannot recognize or create new acts of insolvency.

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\textsuperscript{136} Act 24 of 1936.
\textsuperscript{137} Meskin 2-6(3).
\textsuperscript{138} Ibid.
\textsuperscript{139} Meskin 2-6(4).
\textsuperscript{140} De Villiers NO v Maursen Properties (Pty) Ltd 1983 (4) SA 670 (T) at 676E.
\textsuperscript{141} Mars 81.
\textsuperscript{142} Savage and Hill v Thrash 1 (NLR) 173.
\textsuperscript{143} Mars 82.
\textsuperscript{144} Act 24 of 1936.
3 4 3 Advantage to Creditors Requirement

The court may not grant a compulsory sequestration order, whether provisionally or finally, unless it is established that there is a reason to believe that it will be to the advantage of creditors if the debtor's estate is sequestrated. Meskin states that the applicant bears the onus of establishing that there is a reason to believe that sequestration will be to the advantage of creditors. Although there is some difference of judicial opinion on the point, Meskin submits that this is the case even where reliance is placed on an act of insolvency by the respondent debtor.

In the case of Erasmus v Van Zyl, Judge O'Hagan decided to follow the rule laid down in past cases heard by the Cape Provincial Division. The first case which O'Hagan relied on was Wilkins v Pieterse, where the court found that:

“Where an act of insolvency is established, very strong grounds will have to be adduced to afford the court reason to doubt whether sequestration will be to the advantage of creditors. Direct financial advantage would by no means be the only benefit to be gained by sequestration of the debtor’s estate.”

O'Hagan also quoted the judgment of Judge Wessels in the case of Lewis v Qually, who stated that:

“Where a petitioning creditor produces a return of nulla bona and shows that the respondent is insolvent, the Judge is bound to assume that it will be to the benefit of his creditors that the estate should be sequestrated.”

O'Hagan granted the provisional sequestration order based on the assumption that the sequestration of the debtor's estate will prima facie be to the advantage of creditors if an act of insolvency is proved by the applicant.

In contrast to the aforementioned judgment and which judicial opinion Meskin agrees with, is the case of Paarl Wine & Brandy Co Ltd v Van As wherein Judge De Villiers...
stated that he is not prepared to subscribe to the view in the case of *Wilkins v Pieterse*.

Judge De Villiers referred to the judgment of Judge Schreiner in the case of *Leadenhall Meat Market v Hartman*, where it was found that a sequestrating creditor, who relies on an act of insolvency, is under the same obligation to establish advantage to creditors as one who relies on an allegation of general insolvency. Judge De Villiers stated that the fact that an act of insolvency has been committed is in itself not necessarily material to the question whether sequestration will be to the advantage of creditors.

There are some acts of insolvency, that from their nature, tend to indicate that sequestration will be to the advantage of creditors, as, for instance, where the debtor has given preference and there is consequently matter for investigation. While there are other acts of insolvency, such as a *nulla bona* return, which provide no reinforcement for the contention that the sequestration will be to the advantage of creditors.

In the case of *Paarl Wine & Brandy Co Ltd v Van As* the applicant prayed, *inter alia*, that the respondent’s dealings and transactions be investigated and examined by an independent person and that the trustee, being a fit and proper person to carry out such investigation, should be the said independent person appointed.

In connection with this, Judge De Villiers found it compelling to quote the words of Judge Van Den Heever in the case of *Awerbuch, Brown & Co. (Prop.) Ltd v Le Grange*:

“I think that a petitioner discharges the onus of showing that there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated, if he shows that there are transactions of the debtor which require investigation, and it is not necessary (as it will frequently be impossible) for him to prove that the estate will pay a dividend.”

Judge De Villiers found that the bald statement that it will be to the advantage of creditors to have an investigation is not sufficient, because no facts are alleged on which the conclusion is based.

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151 *Wilkins v Pieterse* 1937 (CPD) 165.
153 *Paarl Wine & Brandy Co Ltd v Van As* 1955 3 ALL SA 376 (O).
154 Ibid.
By making such a bald statement the applicant is, usurping the function of the court, because it is the court which must make the decision. Judge De Villiers concurred with the judgment in the case of *Malcomess & Co v Baker* by stating that:

“Surely it is insufficient to allege that it has been “ascertained” that respondent is in fact insolvent and expect the court to act on the *ipse dixit* of the applicant? To place a person under sequestration, even provisionally, is a serious matter and the court will not do so unless there is *prima facie* evidence before it to support the allegation of general insolvency.”

Mars suggests that the advantage to creditors must be demonstrated with sufficient clarity and that the expected dividend should be calculated. In the case of *Ex parte Alberts*, the court found that if the allegation of advantage was not made, when in fact the schedules show that the surrender will be to their advantage, the court will only in exceptional circumstances accept the surrender. In the case of *In re Provincial Trading Co* the court found that by ‘creditors’ it is meant all the creditors. Eight years later in the case of *Peycke v Nathoo* it was found that ‘creditors’ mean at least the general body of creditors. Mars states that generally the court will presume that the creditors know best what is to their advantage. Thus, as was concluded in the case of *In re Deare*, the court may be influenced in its decision when sequestration is desired by the debtor’s creditors.

Although other factors may be considered, the primary consideration in deciding the question of benefit of creditors is whether all the creditors will receive a dividend. The courts generally demand a dividend of not less than 20c (twenty cents) in the rand for concurrent creditors in order to establish an advantage to creditors.

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156 *Paarl Wine & Brandy Co Ltd v Van As* 1955 3 ALL SA 376 (O) at 2.
157 *Malcomess & Co v Baker* 7 (E.D.C) 140.
158 Mars 74.
159 *Ex parte Alberts* 1937 (OPD) 2.
160 *In re Provincial Trading Co* 1921 (CPD) 781.
161 *Peycke v Nathoo* 1929 (NLR) 178.
162 Mars 75.
163 *In re Deare* 17 (NLR) 94.
164 Mars 75.
3 4 4 Discretion of the Court

Meskin relies on the case of *Firstrand Bank Ltd v Evans*\(^{166}\) to reach the conclusion that notwithstanding that the creditor is able to establish all the elements of the case for sequestration, the court still has a discretion as to whether or not to grant the sequestration order, whether provisional or final.\(^{167}\) The judiciary has an inherent right to decide on a judgment and to have a discretion, but the question remains whether the power of choice is only afforded after all the substantive requirements are met.

It is evident from the case of *Gishen v Lefitas*\(^{168}\) that as far back as 1928 the judiciary has pondered the question whether their discretion to grant a sequestration order is a wide or limited discretion when faced with facts where the debtor has little or no assets to surrender. The result of the contradictory conclusions in case law on the topic of the courts’ discretionary power regarding an act of insolvency; is that the only solution seems to lie in the intervention of the legislature.\(^{169}\) It was suggested in 1955 in the Annual Survey of South African Law that a provision in the Insolvency Act, that an act of insolvency is or is not *prima facie* evidence of advantage to creditors would appear to meet the difficulty.\(^{170}\)

Meskin\(^{171}\) states that the concept of advantage to creditors is a relative one and is to be judged in relation to the circumstances of each case. He suggests that in deciding whether there is reason to believe that sequestration will be to the creditors’ advantage, the court must have regard to any other suggested method of regulating the debtor’s affairs as stated by Judge Didcott in the case of *Gardee v Dhanmanta Holdings and Others*:\(^{172}\)

> “The notion of advantage to creditors is a relative and not an absolute one. Sequestration cannot be said to be to the creditors’ advantage unless it suits them better than any feasible and reasonably available alternative course.”

\(^{166}\) *Firstrand Bank Ltd v Evans* 2011 (4) SA 597 (KZD) at 27.
\(^{167}\) Meskin 2-6(3).
\(^{168}\) *Gishen v Lefitas* 1928 (WLD) 288.
\(^{170}\) Mars 75.
\(^{171}\) Meskin 2-23.
\(^{172}\) *Gardee v Dhanmanta Holdings and Others* 1978 (1) SA 1066 (N) at 1070.
It is evident from the aforementioned cases the judiciary first and foremost considered whether the advantage to creditors' requirement was met, where after a discretion was exercised in respect of the merits of the case.

Contrary to the general rule of thumb in aforementioned case law, Judge Kubushi presented a different approach when he dismissed an application for compulsory sequestration in the recent case of Body Corporate Palm Lane v Masinge$^{173}$ where he found that:

“Even if a court is satisfied that the creditor has established his or her claim, that the debtor has committed an act of insolvency or is in fact insolvent, and that there is reason to believe that it would be to the advantage of creditors that the debtor's estate be sequestrated, the court nevertheless has a discretion, which must be exercised judicially, to grant or refuse a final order of sequestration.”

Judge Kubushi relied on the judgment in Epstein v Epstein$^{174}$ in finding that a discretion may be exercised in granting an application for sequestration even if it is proved that sequestration will be to the advantage of creditors. He further found that, based on the respondent's evidence; he was inclined to give the respondent the benefit of the doubt and to afford the respondent a chance to pay off his debt in instalments whilst continuing to pay the monthly levy.$^{175}$

Judge Kubushi's judgement signifies a change in the interpretation of the extent of the judiciary's discretion. This may lead to the development of an insolvency culture which does not merely rely on the checklist of requirements that need to be observed in order to prove an advantage to creditors; but one that affords a discretion to refuse an application if the debtor's evidence suffices an alternative remedy.

In the event where an applicant disagrees with the judgment of the court a quo and the matter is referred to the Supreme Court of Appeal, the Supreme Court of Appeal has to consider, inter alia, whether they have a discretion to set aside the decision of the court a quo.

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$^{173}$ Body Corporate Palm Lane v Masinge JDR 2332 (GNP) 2013.
$^{174}$ Epstein v Epstein 1987 (4) SA 606 (CPD) at 612G-1.
$^{175}$ Body Corporate Palm Lane v Masinge JDR 2332 (GNP) 2013 at 6.
3 5 Supreme Court of Appeal’s Discretion

Recent case law will now be discussed in order to compare the discretion afforded to the different levels of the hierarchy that exist among courts. In the case of Oakdene Square Properties (PTY) Ltd & Others v Farm Bothasfontein (Kyalami) (PTY) Ltd & Others, the appellants appealed the ruling of the court a quo who dismissed their application for business rescue. Due to the juristic nature of a company, it is common cause that there are different requirements that need to be met for business rescue applications as opposed to sequestration applications of natural persons. However, the court’s interpretation contained in this particular case regarding whether their discretion is ‘strict’ or ‘loose’, is relevant to understanding the extent of the Supreme Court of Appeal’s discretion in value judgments.

3 5 1 Decision vs. Discretion

In the case of Oakdene Square Properties (PTY) Ltd & Others v Farm Bothasfontein (Kyalami) (PTY) Ltd & Others, the court considered, inter alia, whether the court’s decision amounts to the exercise of a discretion. The second and third respondents contested the Supreme Court’s discretion under section 131(4) of the Companies Act. Judge Brand agreed with their view due to the fact that the decision by the court a quo derived from the exercise of discretion, the Supreme Court’s authority to interfere with that decision is limited. Judge Brand further stated that the contention has its roots in the well-established principle that a court of appeal is not allowed to interfere with the exercise of discretion merely because it would have come to a different conclusion. It may only interfere if the lower court had been influenced by wrong principles of law, or a misdirection of fact, or if it had failed to exercise a discretion at all. The reason for the limitation, it is said, is because, in an appeal against the

176 Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd 2012 (3) SA 273 (GSJ) at 12.
177 Ibid.
178 Act 71 of 2008.
179 Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd supra at 18.
180 Ibid.
181 Ibid.
exercise of a discretion, the question is not whether the lower court had arrived at the right conclusion, but whether it had exercised its discretion in a proper manner.¹⁸²

Judge Brand refers to the judgement of Judge O'Regan in *Mabaso v Law Society of the Northern provinces*,¹⁸³ where the court discussed appeals to the Supreme Court of Appeal in circumstances where condonation for a failure to comply with its rules was refused. Judge O'Regan¹⁸⁴ stated that it is trite law that a court considering whether or not to grant condonation exercises a discretion, as was found in the case of *Louw v Louw*.¹⁸⁵ The discretion must, of course, be exercised judicially on a consideration of all the facts and as Judge Holmes found in the case of *S v Yusuf*¹⁸⁶ where he stated that:

“In essence it is a matter of fairness to both sides.”

Judge O'Regan found that the Supreme Court of Appeal may decide an application for condonation without considering the merits of the case, though it does so only where there is a gross and flagrant failure to comply with its rules.¹⁸⁷ To support this finding Judge O'Regan quotes a paragraph from the judgement of the *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*¹⁸⁸ case, which states that:

“The approach of the appellate court to the exercise of such a discretion is that it will not set aside the decision of the lower court merely because the court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion. It may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.”

¹⁸² *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* supra at 18.
¹⁸³ *Mabaso v Law Society of the Northern provinces* 2005 (2) SA 117 (CC) at 20.
¹⁸⁵ *Louw v Louw* 1965 (3) SA 750 (E) at 751G.
¹⁸⁶ *S v Yusuf* 1968 (2) SA 52 (A) at 53H.
¹⁸⁷ *Mabaso v Law Society of the Northern provinces* supra at 20.
¹⁸⁸ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at 11.
Judge Brand\textsuperscript{189} relies on the aforementioned case law to establish that his discretion is limited to whether the lower court has exercised its discretion in an improper manner. It is submitted that he is not afforded the power of choice to judge on the facts of the matter and to consider the interests of the various stakeholders. Judge Brand could merely decide if the court \textit{a quo} failed to exercise its discretion in a judicial manner.

\textbf{3 5 2 ‘Strict’ or ‘Loose’ Discretion}

Judge Brand\textsuperscript{190} then addresses whether the limitation on interference only applies to the exercise of a discretion in the strict sense. Judge Brand\textsuperscript{191} states that what gives rise to the emphasis on the ‘strict sense’ in this context, is that the term ‘discretion’ is sometimes used in the loose sense to indicate no more than the application of a value judgment. Where the ‘discretion’ exercised by the lower court was one in the loose sense of a value judgment, the limitation imposed on the authority of the court of appeal to interfere does not apply.\textsuperscript{192} Judge Brand states that in that event, the court of appeal is both entitled, and in fact duty-bound, to interfere if it would have come to a different conclusion.\textsuperscript{193} Judge Brand quotes the explanation contained in the case of \textit{Knox D’Arcy Ltd v Jamieson},\textsuperscript{194} where Judge Grosskopf found that a discretion in the strict sense is confined to those instances where the lower court could legitimately have adopted any one of a range of options which there may well be a justifiable difference of opinion as to which one would be the most appropriate. By way of explanation Judge Brand\textsuperscript{195} states that an award of general damages for instance, may vary from say R90 000 to R120 000. No award within that range could be described as ‘wrong’. This is a discretion in the strict sense, since all these options would be legitimate. The choice of any one of them could therefore not be said to be inappropriate, as long as the choice was properly made.\textsuperscript{196}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd supra} at 18.
\item \textit{Ibid.}
\item \textit{Ibid.}
\item \textit{Ibid.}
\item \textit{Ibid.}
\item \textit{Knox D’Arcy Ltd v Jamieson} 1996 (4) SA 348 (SCA) at 361C-D.
\item \textit{Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd supra} at 19.
\item \textit{Ibid.}
\end{enumerate}
\end{footnotesize}
In the case of *Media Workers Association of South Africa and other v Press Corporation of South Africa Ltd (Perskor)*\(^{197}\) Judge Grosskopf sought to explain the concept of discretion in the loose sense. He referred to the threefold distinction between matters of fact, matters of law and matters of discretion. The third category would therefore include all those issues arising in litigation which cannot be classified as either questions of fact or questions of law.\(^{198}\)

Judge Brand\(^{199}\) reverted back to the initial question: Does section 131(4)\(^{200}\) afford the court a discretion in the strict sense or not? Judge Brand\(^{201}\) answered the question in the negative, since in the case before him; the court’s discretion is bound up with the question whether there is a reasonable prospect for rescuing the company. The other pertinent requirement contained in section 131(4)\(^{202}\) namely, that the company must be financially distressed, seems to turn on a question of fact.\(^{203}\) As to whether there is a reasonable prospect of rescuing the company, it can hardly be said, in Judge Brand’s view, that it involves a range of choices that the court can legitimately make, of which none can be described as wrong.\(^{204}\) Judge Brand found that it involves a value judgement. If the court of appeal disagrees with the conclusion of the lower court, it is bound to interfere. However, in the present case, Judge Brand and his brothers of the bench concurred that in the court *a quo* the appellants failed to establish a reasonable prospect of rescuing the company. Therefore the appeal was dismissed with costs.\(^{205}\)

\(^{197}\) *Media Workers Association of South Africa and other v Press Corporation of South Africa Ltd (Perskor)* 1992 (4) SA 791 (A) at 795-796.

\(^{198}\) *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* supra at 20.

\(^{199}\) *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* supra at 21.

\(^{200}\) Act 71 of 2008.

\(^{201}\) *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* supra at 21.

\(^{202}\) Act 71 of 2008.

\(^{203}\) *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* supra at 21.

\(^{204}\) *Ibid.*

\(^{205}\) *Ibid* read with 39-40.
3.6 Conclusion

Mars\textsuperscript{206} states that the most important consideration in determining whether an application for the surrender of an estate should be accepted remains the advantage to creditors. If the estate will render a sufficient dividend, the surrender should be accepted. The position or convenience of the insolvent is a secondary consideration, although it is often the motivation for the application, which is not wrong in itself.\textsuperscript{207}

In this chapter it is evident that the majority ruling of the court remains that the judiciary will be inclined to refuse to accept a surrender if satisfied that the application is not a genuine attempt to benefit the general body of creditors, but that the application’s real object is to avoid payment of debt, or to interfere with the rights of a creditor.

\textsuperscript{206} Mars 76.
\textsuperscript{207} Ibid.
CHAPTER 4: The International Developments to Insolvency Law

4 1 Introduction

Wood\textsuperscript{208} comments that insolvency law is the root of commercial and financial law because it obliges the law to choose. There is not enough money to go round and so the law must choose who to pay. Wood’s words instil a power of discretion in the black letter law which gives direction to the courts who have jurisdiction, on the procedures that need to be adhered to.

In order for bankruptcy law to be applied universally in the practice of insolvency proceedings, Wood\textsuperscript{209} points out that there must be a petition as is the practice in England or an application as is the practice in South Africa, to put the machinery in motion. The word “application” is defined as the act for making a request for something; \textsuperscript{210} which in South Africa entails approaching the court with a request to exercise its discretion in the applicant’s favour.

This chapter critically evaluates the South African insolvency system in respect of insolvency law procedures contained in the World Bank Report. How and whether the South African courts exercise their discretion in terms of the international approach will be investigated. The terms “insolvency” and “bankruptcy” are used interchangeably in this chapter due to reference work that contain international legal terminology.

4 2 International Features and the Impact of Insolvency Law

Wood\textsuperscript{211} discredits each of the following essential features of bankruptcy law which is said to be universal principles that should result from insolvency proceedings. Firstly, actions by individual creditors against the bankrupt are frozen. This results that the piecemeal seizure of assets by disappointed creditors through attachment or execution are stayed, and replaced by a right to claim for a dividend against the pool. This moratorium is said to be the only true universal feature. Secondly, all assets are pooled

\textsuperscript{208} Wood Principles of International Insolvency Law (2007) 3, hereinafter referred to as Wood.

\textsuperscript{209} Ibid.

\textsuperscript{210} Bouvier Free Legal Dictionary Farlex com (1856).

\textsuperscript{211} Wood 3.
which becomes available to pay creditors. Wood\textsuperscript{212} comments that this universal principle has eroded due to different jurisdictions providing different exceptions. It is important to note that exempt-property, in other words property that is specifically excluded from the insolvent’s estate, only applies to individuals and do not apply to corporate entities. Thirdly, creditors are paid pro rata (\textit{pari passu}) out of the assets according to their claim. Wood\textsuperscript{213} describes this last essential feature as a piece of wishful ideology which is nowhere honoured.

Wood\textsuperscript{214} submits that bankruptcy is often treated as a procedural subject: who files what document by when, how creditors’ committees are elected, the procedures for a liquidation sale and so forth. He agrees that administrators need to be familiar with their tasks, but that the procedural, mechanical approach totally underestimates the topic and ignores its real power.\textsuperscript{215}

It is the impact of bankruptcy on transactions, on the legal system and on economies which is central. On bankruptcy where competition is at its sharpest, black letter law decides negotiating position and outcomes.\textsuperscript{216} Wood criticizes this procedural approach to insolvency created by the black letter law, since the court is not afforded a discretion to consider the influence a bankruptcy has on an economy where the real creditors in interest are often the depositors of banks, namely the taxpayer.\textsuperscript{217} Wood\textsuperscript{218} suggests, \textit{inter alia}, that the law should be reasonably predictable and not arbitrary, capricious or discretionary. Parties should be able to evaluate legal risks in advance and either price those risks or adjust their transactions to reflect those legal risks, so far as they can.\textsuperscript{219}

Jackson\textsuperscript{220} comments that in a world where creditors can call on the state to take a debtor’s assets from him, it is necessary to establish what to do when debts are greater than assets. Two questions arise: Firstly, should one place limits on what creditors can take from their debtors and secondly, how do we decide rights among creditors when

\textsuperscript{212} Wood 3.
\textsuperscript{213} Ibid.
\textsuperscript{214} Ibid.
\textsuperscript{215} Ibid.
\textsuperscript{216} Ibid.
\textsuperscript{217} Wood 7.
\textsuperscript{218} Ibid.
\textsuperscript{219} Ibid.
\textsuperscript{220} Jackson \textit{The Logic and Limits of Bankruptcy Law} (1986) 4, hereinafter referred to as Jackson.
there are not enough assets to go around.\textsuperscript{221} Jackson\textsuperscript{222} submits that there are debt-collection law that address these questions as do bankruptcy law. However bankruptcy law does so against the backdrop of other debt-collection law. Indeed, bankruptcy law is an ancillary; parallel system of debt-collection law which position both defines its usefulness and sets its limits.\textsuperscript{223}

Historically the main features of bankruptcy have done two things: Firstly, it allowed for some sort of a financial fresh start for individuals (debtors) and secondly, it provided creditors with a compulsory and collective forum to sort out their relative entitlements to a debtor's assets.\textsuperscript{224} In order to determine whether the South African insolvency system follows the international approach with regards to the courts’ discretion in consumer insolvency applications, one needs to look at the different international policy options as discussed in the World Bank Report.

4 3 International Policy Options

In January 2011, the World Bank convened its Insolvency and Creditor/Debtor Regimes Task Force to consider, for the first time, the topic of the insolvency of natural persons.\textsuperscript{225} By setting out the advantages and disadvantages of the different approaches to the regulation of consumer insolvency law, the Report seeks to help policymakers develop a better sense of the social and economic benefits of some of the modern approaches to the regulation of consumer insolvency law.\textsuperscript{226} In the absence of legislation that explicitly deals with matters where more than one court has jurisdiction and thus a discretion over the debtor's property, countries have adopted certain policies and principles to breach the borders and limitations of the law. A brief discussion on the principles of comity and convenience follows where after the foundations of consumer insolvency systems are discussed in order to determine whether South African courts apply the international balanced approach in recognizing both the creditors’ and debtor's interest and, if so, the extent of their discretion.

\textsuperscript{221} Jackson 4.
\textsuperscript{222} Ibid.
\textsuperscript{223} Ibid.
\textsuperscript{224} Ibid.
\textsuperscript{225} Boraine and Roestoff “Revisiting the state of consumer insolvency in South Africa after twenty years: The courts’ approach, international guidelines and an appeal for urgent law reform (2)” Publication in \textit{THRHR} pending, hereinafter referred to as Boraine and Roestoff (2).
4 3 1 Principles of Comity, Convenience and Equity

Boraine and Olivier\(^{227}\) state that globalization has made insolvencies with an international character where debtors have assets in more than one state, a common phenomenon. This calls for formal co-operation between the different jurisdictions involved and legal rules to govern practical matters flowing from cross-border insolvencies.\(^{228}\) Smith and Ailola\(^{229}\) found that cross-border insolvency issues are approached either by following a universality or a territoriality model. The universality approach calls for treatment of such an insolvency matter as a single case in order to treat creditors from different jurisdictions equally. An absolute universalistic approach supports a single bankruptcy procedure, whilst territoriality also provides for a plurality of bankruptcy procedures.\(^{230}\) The territoriality approach seeks to protect the interests of the local creditors before allowing local assets to be utilized in favor of foreign creditors. The territoriality approach is currently the prevalent approach in cross-border insolvency matters.\(^{231}\)

Smith\(^{232}\) states that the UNCITRAL Model Law on Cross Border Insolvency was adapted in South Africa in a discussion document by the Project Committee of the South African Law Commission. The document sets out the necessary changes for local use under the title of the Cross-Border Insolvency Act. The act includes a designation clause in section 2(2)\(^{233}\) which entails that the act applies in respect of any State designated by the Minister by notice in the Gazette.\(^{234}\) The Cross-Border Insolvency Act came into force on 28 November 2003 and yet the Minister has not drawn up a list of designated states to which this act will apply. Due to the fact that no country has been designated in terms of section 2(2)\(^{235}\), this act does not apply in practice yet. Before designating a state, the Minister must be satisfied that the foreign state recognizes proceedings under the South African law on insolvency to the extent that it is justified to apply the Cross-

\(^{227}\) Boraine and Olivier “Some aspects of international law in South African cross border Insolvency Law” 2005 CILSA 373, hereinafter referred to as Boraine and Olivier.

\(^{228}\) Ibid.


\(^{230}\) Ibid.

\(^{231}\) Ibid.


\(^{233}\) Act 42 of 2000.

\(^{234}\) Smith “Some aspects of Comity” 2002 SA Merc LJ 17.

\(^{235}\) Act 42 of 2000.
Border Insolvency Act to foreign proceedings in that state. The provisions under section 2(2) therefore introduce the requirement of reciprocity into the South African version of the Model Law which entails that it will only become effective in respect of designated countries. Boraine and Olivier further comment that South Africa has no bilateral or multilateral cross-border insolvency treaty with any other jurisdiction. This branch of South African law is presently regulated by the principles of comity, convenience and equity. Based on these principles, the court found in the case of Ex parte BZ Stegmann that a South African high court is still entitled to recognize the appointment of a foreign representative.

Due to the introduction of a system of designation, South African law will in future follow a dual approach to the recognition of foreign bankruptcy orders. Representatives from designated countries will follow the procedure of the Cross-Border Insolvency Act, whilst those representatives from non-designated countries will still have to follow the general law route that is based on common law and precedent. Granting recognition to deal with an insolvent’s immovable property in South Africa to a foreign administrator is a matter for the local court’s discretion. This discretion is absolute, but recognition is usually granted in the interests of comity and convenience. Judge Innes in the case of Ex parte BZ Stegmann accepted the abovementioned rule and stated that:

“But on the other hand, in the same court, acting from motives of comity or convenience, is equally justified in allowing the order of the judge of the domicile to operate within its jurisdiction, and in assisting the execution or enforcement of such order. The matter is entirely one for its own discretion.”

The abovementioned precedent was followed in the more recent case of Ex parte Palmer NO: In re Hahn. It is submitted that South African courts exercise an absolute

238 Boraine and Olivier 373.
239 Ex parte BZ Stegmann 1902 (TS) 40.
240 Boraine and Olivier 373.
241 Ibid.
242 Boraine and Olivier 373.
243 Ex parte BZ Stegmann 1902 (TS) 40.
244 Ex parte Palmer NO: In re Hahn 1993 (3) SA 359 (C).
discretion, as set out in the case law, since no legislation currently governs cross border insolvency practices in South Africa apart from the common law.

### 4 3 2 Foundations of Consumer Insolvency Systems

In the past several decades, lawmakers from a variety of regions explicitly identified and evaluated a wide range of desired benefits that an insolvency regime for natural persons needs to achieve.\(^{245}\) The desired benefits fall into at least three distinct categories which are discussed hereinafter by comparing each category to the South African courts’ approach.

#### 4 3 2 1 Benefits for Creditors

The Task Force\(^{246}\) submits that benefits for creditors historically constitute the main objective of insolvency regimes and this was the case until the late twentieth century. Until such time, benefits for creditors were primarily, if not exclusively, designed for business debtors.

In terms of section 6 of the South African Insolvency Act,\(^{247}\) a court may only accept the surrender of an estate if the sequestration will be to the advantage of creditors. In the case of *Meskin & Co v Friedman*,\(^ {248}\) the advantage to creditors’ requirement was defined as:

> “There must be a reasonable prospect - not necessarily a likelihood, but a prospect which is not too remote- that some pecuniary benefit will result to the creditors.”

Advantage to creditors plays a pivotal role in the exercise of the court’s discretion and is often the basis of declining a sequestration order.\(^ {249}\) Boraine and Roestoff\(^ {250}\) submit that sequestration is viewed as a drastic measure and therefore courts will consider alternative measures such as administration or debt review in considering the advantage to creditors’ requirement. In *Ex parte Ford*,\(^ {251}\) the court refused to exercise its discretion in favour of the applicants for an order for the voluntary surrender of their

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\(^{245}\) World Bank Report 2012 Para 57.

\(^{246}\) Ibid.

\(^{247}\) Act 24 of 1936.

\(^{248}\) *Meskin & Co v Friedman* 1948 2 SA (W) 559.

\(^{249}\) Boraine and Roestoff (1) 351.

\(^{250}\) Ibid.

\(^{251}\) *Ex parte Ford and Two Similar Cases* 2009 (3) SA 376 (WCC).
respective estates, because it found that debt review was the appropriate mechanism to be used and thus more advantageous than sequestration.²⁵²

The Task Force²⁵³ comments that a legal regime of insolvency never exists in a vacuum.²⁵⁴ From the creditors’ perspective, such a system is necessary in response to a weakness or failure in a coordinate system. The Task Force²⁵⁵ submits that an insolvency regime benefits creditors primarily by addressing two major weaknesses of the system of ordinary enforcement of obligations known as collections. The first weakness is the ineffective mechanisms for finding value and the resulting waste resulting from individual creditor’s blindly pursuing enforcement actions to the detriment of themselves and other creditors. The second weakness is the inequitable distribution of available value to one or a few aggressive or sophisticated creditors, to the detriment of the collective of all creditors.

The Task Force²⁵⁶ suggests that abovementioned weaknesses could theoretically be overcome without a separate insolvency system if the enforcement system were restructured. It was found that lawmakers seem to have concluded that adopting an insolvency system represents a more efficient and effective means of increasing payment to creditors and enhancing the fair distribution of such payments among all creditors.²⁵⁷ In South Africa it rings true that this benefit has existed largely unchanged since the very advent of the idea of a formal response to financial distress. However, the South African courts rely on other ‘weak’ alternatives such as administration or debt review to provide debt relief for harassed debtors if the advantage requirement is not proven.

4 3 2 2 Benefits for Debtors

The Task Force²⁵⁸ comments that in more recent discussions of insolvency regimes, especially those designed for non-business debtors, the focus was on the benefits for

²⁵² Borraine and Roestoff (1) 361.
²⁵³ Ibid.
²⁵⁵ Ibid.
²⁵⁶ Ibid.
²⁵⁷ Ibid.
debtors and their families. As discussed in Chapter 3\textsuperscript{259}, the South African courts confirmed our continuing creditor-orientated approach in cases such as \textit{Ex parte Arntzen}\textsuperscript{260} and \textit{Ex parte Shmukler-Tshiko and 13 other cases} \textsuperscript{261} where they cited the words from \textit{Hillhouse v Stott}\textsuperscript{262} in their respective judgments:

“The insolvency process is not one to enable the debtors to obtain a welcome relief from misery.”

Boraine and Roestoff\textsuperscript{263} comment that the requirement of advantage to creditors is fundamental to the South African Insolvency Act and the act actually places a stumbling block in the way of debtors wishing to use it as a form of debt relief. South African courts afforded sequestration as a debt relief measure for the honest but unfortunate debtors in terms of the 1916 Insolvency Act\textsuperscript{264} as discussed in Chapter 2\textsuperscript{265}. However, currently no distinction is made between debtors, since all debtors have to prove an advantage to creditors regardless of the circumstances that lead to their over-indebtedness.

Contrary to the current approach in South Africa, the Task Force\textsuperscript{266} comments that many policymakers around the world have concluded that relieving the long-term pain and suffering of ‘honest but unfortunate’ debtors is a worthy goal in and of itself. Especially since the spouses and children of distressed debtors suffer through no fault of their own and thus are deserving of compassion and relief\textsuperscript{267}. At present the South African courts’ discretion is limited in that the interests of the debtor and the debtor’s family are not taken into consideration when an application for sequestration is brought before the court.

\begin{footnotes}
\textsuperscript{259} Chapter 3 \textit{supra} Para 3 3 6.
\textsuperscript{260} \textit{Ex parte Arntzen (Nedbank LTD as intervening creditor)} 2013 1 SA 49 (KZP).
\textsuperscript{261} \textit{Ex parte Shmukler-Tshiko and 13 other cases} 2013 JOL 2999 (GSJ).
\textsuperscript{262} \textit{Hillhouse v Stott} 1990 (4) SA 580 (W) 288.
\textsuperscript{263} Boraine and Roestoff (1) 356.
\textsuperscript{264} Act 32 of 1916.
\textsuperscript{265} Chapter 2 \textit{supra} Para 2 2 2 and 2 2 4.
\textsuperscript{266} World Bank Report 2012 Para 73.
\textsuperscript{267} \textit{Idem} 75.
\end{footnotes}
4323 Benefits for Society

The Task Force submits that if financial distress was an isolated phenomenon, which affects only small pockets of individuals, an official regime for treating insolvency would most likely not be regarded as a moral or political imperative. The primary goals of an insolvency regime for natural persons are thus not so much based on isolated benefits to specific creditors and debtors, but rather on the more widespread benefits to the broader society on which those creditors and debtors have a variety of important indirect influences. Boraine and Roestoff submit that in the *Ex parte Shmukler-Tshiko and 13 other cases*, twelve of the fourteen sequestration applications were for voluntary surrender, of which eleven were dismissed. Judge Satchwell found that:

“Since 2008 economies of the world have been faltering and, in some cases, stalling and in certain sectors there has been partial or almost total collapse. The South African economy has not been immune from these economic crises. One day in the insolvency Motion Court in the South Gauteng Division of the High Court indicates the extent to which South African consumers and their legal representatives are doing their best to further exacerbate this. The range of dishonesty and abuse of both the Insolvency Act and the court process has ceased to surprise me since this is encountered every day in the insolvency Motion Court. However, it is worth reminding consumers and bankers, creditors and debtors, legal representatives and the courts of the lengths to which individuals can and will go in order to evade the personal consequences of their indebtedness and to pass on such burden to their creditors including shareholders, taxpayers and the general South African economy.”

Boraine and Roestoff further submit that Judge Satchwell views sequestration applications aimed at obtaining debt relief as an abuse of the process. It is evident that the South African courts presently consider all debtors as dishonest in that they

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268 World Bank Report 2012 Para 76.
269 Ibid.
270 Boraine and Roestoff (1) 371.
271 *Ex parte Shmukler-Tshiko and 13 other cases* 2013 JOL 2999 (GSJ).
272 Ibid.
273 Boraine and Roestoff (1) 371.
approach the court with the intention to evade the consequences of their indebtedness and cause a further burden to the South African economy.

On the other hand, the Task Force\textsuperscript{274} shifts the blame to the creditors by commenting that the benefits to society can be grouped loosely into two categories. One category encompasses a variety of benefits associated with disciplining creditors to acknowledge the reality of their low-value claims against distressed debtors, to internalize the costs of their own lax credit evaluation, and to more effectively and fairly redistribute those costs among the society that benefits form the availability of credit.\textsuperscript{275} The other category focuses on the \textit{intra}-national and \textit{inter}-national benefits of maximizing engagement and productivity by debtors, especially in considering an increasingly competitive global marketplace.\textsuperscript{276} It is submitted that the South African courts are yet to be persuaded that the act of credit-lending and debtor-repayment encompass a responsibility and a risk to both parties which calls for a balanced approach.

The Task Force\textsuperscript{277} submits that, in general, policymakers have taken care in maintaining a balanced approach when evaluating the distribution of benefits and burdens among the interest groups. In South Africa, the below mentioned recommendations were made in order to implement a more balanced approach, as opposed to the predominant pro-creditor approach utilized by our courts whose discretion is bound (and tainted) by the advantage to creditors’ requirement.

\textbf{4.4 Recommendations in the World Bank ROSC}

For purposes of this dissertation, the recommendations for implementation of the Cross-Border Insolvency Act and judicial decision making are addressed.

\textbf{4.4.1 Implementation of the Cross-Border Insolvency Act}

It is proposed that a submission should be made to the Minister of Justice and Constitutional Development to designate a wide range of countries in terms of section

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\textsuperscript{274} World Bank Report 2012 Para 78.
\textsuperscript{275} World Bank Report 2012 Para 78.
\textsuperscript{276} \textit{Ibid}.
\textsuperscript{277} \textit{Idem} 57.
\end{flushleft}
2(2) of the Cross-Border Insolvency Act 42 of 2004. Amendments should be considered and incorporated in the Uniform Insolvency Bill in order to remove the reciprocity requirement. Alternatively, if the requirement is retained, it should be reworded so that designated states are excluded from the reciprocity requirement and non-designated states included.

4411 International Considerations

Insolvency proceedings may have international aspects and therefore a country’s legal system should establish clear rules pertaining to jurisdiction, the recognition of foreign judgments, cooperation among courts in different countries and with respect to the choice of law. The following key factors are recommended in order to ensure effective handling of cross-border matters:

a) A clear and speedy process for obtaining recognition of foreign insolvency proceedings;
b) Relief to be granted upon recognition of foreign insolvency proceedings;
c) Foreign insolvency representatives to have access to courts and other relevant authorities;
d) Courts and insolvency representatives to cooperate in international insolvency proceedings;
e) Non-discrimination between foreign and domestic creditors.

Although the common law makes provision for the recognition of foreign creditors and proceedings to some extent, the absence of efforts to implement the Cross-Border Insolvency Act is problematic, since it can create delays and uncertainty for foreign creditors. The current initiatives aiming at a closer regional integration in Southern Africa would be reinforced by the implementation of a regulatory regime for cooperation in international insolvencies.

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280 Idem 84.
281 Ibid.
282 Ibid.
4.4.1.2 Comments by the Commission

Although substantial harmonization of insolvency law seems complex and out of reach at the present moment, a regime based on recognition and cooperation would place South Africa on equal footing with the most advanced jurisdictions in the world. This would allow for the effective resolution of cross-border insolvencies. The Report on the review of the law of insolvency by the South African Law Reform Commission (February 2000) did not recommend that reciprocity should be required for the application of the South African version of the UNCITRAL Model Law of Cross-Border Insolvency. The provisions of the designation clause contained in section 2 are subject to three possible interpretations: A narrow interpretation, a broad interpretation and a liberal interpretation. The multiple interpretations of the designation clause do not allow the courts to exercise a discretion in terms of a clear process.

4.4.2 Increase in the Quality of Administrative Staff

It is proposed that the Branch Court Services of the Department of Justice and Constitutional Development should consider the below mentioned recommendations in consultation with the Judicial Service Commission.

4.4.2.1 Role of the Courts

The South African legal system comprises judges of high quality, but the system as a whole appears to be suffering from a number of serious challenges. The first challenge is the time taken for cases to be heard and secondly, although judges are of a very high calibre and well qualified, their work is often under-resourced, with little support from research assistants or clerks. In order to address these challenges it is recommended that the judges are afforded more resources, and especially support staff that would increase their ability to deliver high-quality judgements in reasonable

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283 World Bank ROSC report 85.
284 Ibid.
286 World Bank ROSC report 85-87.
287 Idem 13.
288 Idem 93.
289 Ibid.
It is submitted that if the judges are afforded support staff to assist the backlogs on the court roll, more applicants will have access to the courts to apply for relief in a shorter amount of time.

### 4 4 2 2 Judicial Decision Making

The reinforcement of the resources at the disposal of the courts may give effective support to the timely enforcement of court orders. This can have beneficial effects for the whole system of credit protection and insolvency. Judges may benefit from specialized training in insolvency and commercial matters. If the recommendations contained in the World Bank ROSC report are implemented in South Africa, it will assist the bench in exercising a discretion in local and cross-border insolvency matters.

### 4 5 Conclusion

Wood is of the opinion that the battleground of insolvency lies not in its procedures. The battleground lies in the concepts of priority, property, contract, liability and similar fundamental propositions, and whether the law should protect creditors or the debtor's estate: and who suffers losses. Rochelle suggests that if the priority of National government is to spur economic growth and development, then a discharge of debt and a fresh start policy in personal insolvency may prove to be an effective tool. The ‘fresh start’ approach, adopted by various international countries, resulted in a universal change from debtor repression to debtor protection.

Contrary to the universal approach, South Africa is hesitant to incorporate a pro-debtor insolvency regime by implementing the fresh start procedure, where courts may exercise a discretion influenced by the debtor's interests. Furthermore, due to the absence of designated foreign countries; South African courts have an absolute discretion regarding cross-border insolvency matters. This is not in line with the universal feature that the law should be reasonably predictable, not arbitrary, capricious or discretionary.

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290 World Bank ROSC report 94.
291 World Bank ROSC report 93.
292 Wood 30.
293 Rochelle “Lowering the penalties for failure: using the insolvency law as a tool for spurring economic growth; the American experience, and possible uses for South Africa” 1996 TSAR p315.
CHAPTER 5: General Conclusion and Reform

5 1 The Limitations of the Judiciary’s Discretion

Meskin\textsuperscript{294} quotes the \textit{dicta} of Judge Innes in \textit{De Waard v Andrew and Thienhaus Ltd}\textsuperscript{295} which he finds to remain firmly apposite in matters where the courts’ power on the return day of the provisional order is discussed:

“The court has a large discretion in regard to making the rule absolute: and in exercising that discretion the condition of a man’s assets and his general financial position will be important elements to be considered. Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says: ‘I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities.’ To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes.”

In the case of \textit{FirstRand Bank v Evans},\textsuperscript{296} Judge Wallis stated that the discretion afforded to the court constitutes a power combined with a duty. The duty is to uphold the precedent created by predecessors of the bench and to act as a creature of statute. It is submitted that the words of the bench confirms their general suspicion in insolvency proceedings and that they are to be convinced that the application is to the advantage of creditors as a group.

At present it remains a minority view in South Africa, but it may nonetheless be the start of a mind-shift in courts towards a more balanced approach where the debtor’s interests are considered as was the case in \textit{Body Corporate Palm Lane v Masinge}.\textsuperscript{297}

\textsuperscript{294} Meskin 2-51.
\textsuperscript{295} \textit{De Waard v Andrew and Thienhaus Ltd} 1907 TS 727 at 733.
\textsuperscript{296} \textit{FirstRand Bank v Evans} 2011 4 SA 597 (KZD).
\textsuperscript{297} \textit{Body Corporate Palm Lane v Masinge} JDR 2332 (GNP) 2013.
5.2 Proposals for Reform

The Task Force submits that, despite the many advantages offered by a system for treating the insolvency of natural persons, three particularly salient concerns might hinder the adoption or proper implementation of such a system. These concerns have been overcome in many existing insolvency systems and they need not stand in the way of lawmakers hoping to reap the benefits described in Chapter 4. It is submitted that if the South African insolvency law is reformed to overcome the three countervailing factors listed below, the courts will be afforded a discretion to weigh up the interests of the creditors, debtor and the society in order to obtain balanced value judgements.

5.2.1 Moral Hazard

Moral hazard as a concept appears most prominently in context of insured risks, the concern being that the availability of insurance or other protection against downside risks will produce undesirable incentives for insured parties to act less prudently and carefully than they would in the absence of insurance. If the extraordinary option of escaping one’s obligations is made widely available, the theory goes, that debtors will have a greater incentive to act in an immoral or irresponsible way, by recklessly taking on more debt than they can reasonably service, as well as by abdicating their responsibility to deal with their obligations once insolvency as set in.

The Task Force submits that the most sensible response to moral hazard is to design and implement proper access requirements - both for entering the insolvency system and for receipt of a discharge or other relief. These factors will isolate and exclude debtors who engage in excessively risky or other undesirable credit behaviour.

299 Chapter 4 supra Para 4.3.2.
301 Ibid.
302 Idem 114.
5 2 2 Debtor Fraud

For centuries, policymakers have expressed their concerns about debtors that improperly gain the extraordinary advantages of an insolvency system and who evade their legitimate obligations by means of fraud.\textsuperscript{303} However one should not overemphasize the danger that such fraud represents. The Task Force\textsuperscript{304} submits that proper monitoring by system administrators and creditors seems to have rooted out most instances of debtor’s attempting to take improper advantage. The fact that some limited amount of fraud will creep into the system and some undeserving debtors will take improper advantage should not dissuade policymakers from pursuing the greater good of relief for the vast majority of honest but unfortunate debtors who can derive legitimate benefit- and pass on significant benefit to creditors and society.\textsuperscript{305}

5 2 3 Stigma

The Task Force\textsuperscript{306} comments that a much more intractable challenge relates not to the problem of keeping undeserving debtors out of the insolvency system, but to entice honest but unfortunate debtors into the system. The notion of announcing one’s failure, either in writing or in person before a public or private administrator, is a deeply embarrassing and stigmatizing event.\textsuperscript{307} The Task Force\textsuperscript{308} submits that attitudes towards debt and the slow cultural stigma change, causes that relatively little can be done to affect such an expansive and disperse notion directly. Policymakers can make choices to minimize stigma by avoiding or repealing judgmental language and punitive measures in existing laws. Therefore, the process of reducing stigma goes hand in hand with appropriately containing concerns about moral hazard and fraud. If South African lawmakers reform our Insolvency Act by balancing the rights and responsibilities of the creditors and the debtors, the courts’ discretion will include the interests of debtors for the benefit of society and our economy.

\textsuperscript{303} World Bank Report 2012 Para 117.
\textsuperscript{304} \textit{Idem} 118.
\textsuperscript{305} \textit{Idem} 119.
\textsuperscript{306} \textit{Idem} 120.
\textsuperscript{307} \textit{Idem} 121.
\textsuperscript{308} \textit{Idem} 125.
5 3 Conclusion

John Marshall embodied the power of choice afforded to the judiciary in the following words:

"We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."\(^{309}\)

In the end, courts remain a creature of statute that is bound by law, interpreted by the bench and argued by practitioners: a power of choice which is given or usurped at any given moment.

\(^{309}\) John Marshall *Wikiquote* (1821).
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