

Insolvency restrictions, disabilities and disqualifications in South African consumer insolvency law: A legal comparative perspective

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OPSOMMING

Insolvensiebeperkings, -onbevoegdhede en -diskwalifikasies in die Suid-Afrikaanse verbruikersinsolvensiereg: 'n Regsvergelykende perspektief

Hierdie artikel ondersoek die insolvensiebeperkings, -onbevoegdhede en -diskwalifikasies wat tans ingevolge die Insolvensiewet en ander wetgewing op insolvente persone van toepassing is. 'n Regsvergelykende ondersoek na die reg sposisie in Engeland, Wallis, Australië en die VSA word gedoen met die doel om voorstelle vir regshervorming te maak rakende insolvensiebeperkings wat onnodig en ongeregverdig blyk te wees. Die ondersoek toon dat meeste van die beperkings bloot op grond van die bestaan van sekwestrasieverrigtinge opgelê word. Die onregverdigheid van hierdie beperkings blyk verder uit die feit dat 'n versuim om skuld te betaal, soos blyk uit 'n aansoek vir administrasie of skuldhersiening, nie as 'n basis vir meeste van die beperkings dien nie. Die blote feit dat 'n persoon versuim om sy skuld te betaal, behoort hom nie van werksgeleenthede of van die bevoegdheid om ampte te beklee, te ontneem nie. Die Suid-Afrikaanse wetgewer behoort, soos sy Engelse eweknie, 'n omvattende proses van hersiening van wetsbepalings wat onnodige en ongeregverdigde beperkings oplê van stapel stuur. Insolvensiebeperkings behoort net opgelê te word in gevalle waar oneerlike of onverantwoordelike gedrag ter sprake is. Die Amerikaanse benadering om oneerlike skuldenaars te straf deur te weier om aan hulle 'n kwytskelding en "fresh start" te verleen, is sinvol. 'n Verdere kwessie is die tydperk wat moet verstryk alvorens 'n insolvent van alle beperkings onthef word. Hierdie tydperk hang saam met die datum van rehabilitasie en 'n insolvent wat nie vroeër daarvoor aansoek doen nie, sal eers na verstryking van 10 jaar van alle beperkings onthef word. Die 10-jaar outomatiese rehabilitasietermyn moet ooreenkomsdig internasionale tendense verkort word. Ten einde die ekonomiese herinskakeling van insolvente verder te bespoedig, behoort die maksimum tydperk waarin inligting betreffende sekwestrasie, rehabilitasie, administrasie en skuldherstrukturering vir openbare insae beskikbaar mag wees ook verkort te word. Uiteindelik moet die ekonomiese rehabilitasie van 'n insolvent vooropgestel word. Insolvensiebeperkings strem 'n skuldenaar se ekonomiese herinskakeling en die afskaling daarvan is belangrik om skuldenaars in staat te stel om ekonomies weer op dreef te kom en 'n nuwe begin te maak.

INTRODUCTION

A sequestration order diminishes an insolvent's status¹ and therefore his legal capacity, capacity to contract and capacity to litigate.² Apart from the fact that an

¹ *Ex parte Taljaard* 1975 3 SA 106 (O); *Standard Bank of SA Ltd v Essop* 1997 4 SA 569 (D) 575.

insolvent is required to surrender all his non-exempt assets, which in terms of the Insolvency Act³ vest in the Master, and upon appointment of a trustee in the trustee,⁴ the Insolvency Act and other legislation provide for a wide range of restrictions, disabilities and disqualifications that limit an unrehabilitated insolvent's capacity to contract, litigate, earn a living and hold office.⁵ These restrictions are essentially the trade-off for acquiring the discharge of debts⁶ and the opportunity to make a fresh start after rehabilitation in terms of the Insolvency Act.⁷

Our law today is certainly more debtor-friendly than the degrading and punitive laws which applied in ancient times when the body of a debtor who failed to discharge his debts were cut up in parts and divided amongst his creditors,⁸ or later on,⁹ after introduction of a law of voluntary surrender of goods (*cessio bonorum*),¹⁰ when a debtor was only allowed the benefit of the *cessio* if he was willing to suffer the humiliation of standing before the town-house in his under-clothing for one hour on three successive days.¹¹ The current insolvency restrictions imposed by South African law apparently are not intended to punish an insolvent but rather to protect the interests of the general public.¹² However, the plethora of insolvency restrictions imposed by our law today certainly indicates that an unrehabilitated insolvent is still stigmatised as someone who is dishonest, irresponsible and untrustworthy.¹³ This view is contrary to the international trend to reduce the stigma associated with insolvency by minimising or eliminating

² Boezaart *Law of persons* (2016) 144ff.

³ Act 24 of 1936.

⁴ See s 20(1)(a).

⁵ Sharrock *et al Hockly's Insolvency law* (2012) 57; Smith *The law of insolvency* (1988) 100.

⁶ See s 129(1)(b) of the Insolvency Act.

⁷ S 127A provides for the automatic rehabilitation of an insolvent after expiry of a period of 10 years from the date of sequestration. An insolvent may also apply to court for his rehabilitation after expiry of certain periods after sequestration – s 124(1)–(5). Eg, an insolvent who was convicted of any fraudulent act in respect of his insolvency or of any offence in terms of the Act relating to the concealing or destroying of books, assets or liabilities or the failure to keep proper books (ss 132–134) will have to wait five years from the date of his conviction before he may apply for his rehabilitation – s 124(2)(c).

⁸ Wessels *History of the Roman-Dutch law* (1908) 661 points out that this literal interpretation of Table III of the *Twelve Tables* has been rejected by the best authorities. Smith 5 points out that “[i]t seems unlikely that this form of vivisection would have been tolerated even in those days of brutal oppression by the wealthy of their wretched debtors. However, there can be no question but that the treatment meted out to debtors was unbelievably crude and harsh”. See Roestoff “Skuldverligtingsmaatreëls vir individue in die Suid-Afrikaanse insolvensiereg: 'n Historiese ondersoek” (Part 1) 2004 *Fundamina* 113 120 fn 37 for a discussion of some of the viewpoints in this regard.

⁹ *Cessio bonorum* was introduced into Holland towards the beginning of the 16th century – Wessels 663.

¹⁰ See Smith 5. See generally, in respect of *cessio bonorum*, Roestoff “Skuldverligtingsmaatreëls vir individue in die Suid-Afrikaanse insolvensiereg: 'n Historiese ondersoek” (Part 2) 2005 *Fundamina* 78 79ff and authority referred to.

¹¹ Wessels 665; Smith 6. See also Efrat “The evolution of bankruptcy stigma” 2006 *Theoretical Inquiries in Law* 366 370 who discusses many of the publicly humiliating practices that were applied to bankrupts in ancient times.

¹² Smith 100; Boezaart 145.

¹³ Cf Smith 100.

insolvency restrictions.¹⁴ Furthermore, the principle of non-discrimination, namely, that debtors should be treated on an equal basis with non-debtors and should thus not be discriminated against merely because they have initiated insolvency proceedings, has been identified by the World Bank as a vital element¹⁵ of the “economic rehabilitation” of a debtor.¹⁶ According to the World Bank the economic rehabilitation of a debtor, that is, the re-establishment of a debtor’s economic capability, is supposed to be one of the main objectives of an insolvency system for natural persons.¹⁷

The first aim of the article is to investigate the legal position in respect of the insolvency restrictions, disabilities and disqualifications that apply to natural person debtors in terms of the Insolvency Act and other legislation.¹⁸ Secondly, a legal comparative investigation is done with the aim of making recommendations for law reform regarding current restrictions that may be unnecessary and unjustified.¹⁹ The comparative investigation is an analysis of the legal position in England and Wales, Australia and the United States of America. The historical connections and the English law’s influence on the development of the South African insolvency law,²⁰ but particularly the English legislator’s efforts since 2004 to reduce the restrictions that have previously automatically been imposed on all unrehabilitated insolvents motivated the selection of English law. The Australian and American systems represent the two opposite poles regarding insolvency restrictions. As is pointed out below, the Australian system, like the South African system, subjects natural person insolvents to a wide range of restrictions while the American system does not impose any direct restrictions.

2 INSOLVENCY RESTRICTIONS, DISABILITIES AND DISQUALIFICATIONS UNDER SOUTH AFRICAN LEGISLATION

2.1 Contractual capacity and capacity to litigate

An insolvent is not deprived of his contractual capacity.²¹ The fact that a person entering into a contract is an unrehabilitated insolvent will not affect the validity of the contract.²² However, in order to protect an insolvent’s creditors²³ certain restrictions are imposed on his capacity to contract.²⁴

14 Cf Working Group on the Treatment of the Insolvency of Natural Persons *Report on the treatment of the insolvency of natural persons* (World Bank 2013) paras 120–125 (hereafter *World Bank Report*).

15 The other two elements are that the debtor should be relieved from excessive debts and that he should be able to avoid becoming over-indebted again in the future – *World Bank Report* para 354.

16 *World Bank Report* paras 354 360.

17 *Idem* para 354.

18 See § 2 below.

19 See §§ 3 and 4 below.

20 Wessels 661.

21 See, generally, Bertelsmann *et al* *Mars the law of insolvency* (2008) 363ff; Sharrock *et al* 63ff.

22 See s 23(2) of the Insolvency Act.

23 S 23(2) is not concerned with public policy – see Bertelsmann *et al* 364 who refer to *Fairlie v Raubenheimer* 1935 AD 135 140–142.

24 Sharrock *et al* 63.

An insolvent is prohibited from concluding a contract which purports to dispose of any property of his estate.²⁵ Furthermore, he may not without the prior written consent of his trustee conclude a contract which adversely affects or is likely to adversely affect his estate.²⁶ Should the insolvent conclude a contract contrary to these provisions, the contract is voidable at the option of the trustee and not void.²⁷ However, although the contract may be valid and binding, or the trustee decided not to set aside the contract, the insolvent's right to enforce performance under the contract is limited and he may not sue for performance unless there is a specific statutory provision²⁸ allowing him to enforce his rights under the contract for his own benefit.²⁹ An insolvent is thus more restricted in his capacity to litigate than in his capacity to contract.³⁰

As regards an insolvent's capacity to litigate the Act provides that an insolvent may sue in his own name without reference to his trustee in any matter relating to status or any matter which relates to a right which does not affect the insolvent estate or in respect of any claim due to him in terms of section 23.³¹ An insolvent may further sue without reference to his trustee for any pension to which he is entitled for services rendered and for compensation in respect of loss or damage that he has suffered by reason of any defamation or personal injury.³² Subject to the trustee's right to surplus income³³ an insolvent may also sue for any remuneration or reward for work done or for professional services rendered after sequestration of his estate.³⁴ An insolvent also retains a reversionary interest in his insolvent estate and therefore is entitled to institute proceedings in his own name where his trustee has declined to take action.³⁵

2.2 Capacity to earn a living

Section 22 of the Bill of Rights in the Constitution³⁶ establishes every citizen's right to freedom of trade, occupation and profession, but also provides that the

²⁵ S 23(2).

²⁶ See s 23(2). S 23(2) is subject to s 24(1) which provides protection to third parties who enter into a contract with an insolvent but are unaware of the fact that he is insolvent. S 24(1) provides that if the insolvent alienates, for valuable consideration, and without the consent of the trustee, property which he acquired after sequestration to a third party who proves that he was not aware and had no reason to suspect that the estate was under sequestration, the alienation is nevertheless valid – see *Mackay v Fey* 2006 3 SA 182 (SCA) regarding ss 23(2) and 24(1).

²⁷ *Mackay* 188.

²⁸ See, eg, s 23(9) which expressly allows an insolvent to recover his remuneration for work done after sequestration – Sharrock *et al* 64.

²⁹ See Sharrock *et al* 64–65 who refer to *De Polo v Dreyer* 1991 2 SA 164 (W) 176.

³⁰ *De Polo* 176C.

³¹ S 23(6). However, in terms of s 23(6) a cession of an insolvent's earnings, whether made before or after sequestration, is for the duration of the sequestration of his estate not allowed in terms of the Act.

³² S 23(7) and (8).

³³ Ie, income that in the Master's opinion is unnecessary for the support of an insolvent and his dependants – see s 23(5). The trustee's powers to require income contributions from an insolvent impose a further possible restriction on an un-rehabilitated insolvent – see Roe-stoff "The income of an insolvent and sequestration under the Insolvency Act 24 of 1936" 2017 SA *Merc LJ* (forthcoming).

³⁴ S 23(9).

³⁵ Cf *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd* 2005 1 SA 398 (C) 424–425 and see Sharrock *et al* 67.

³⁶ The Constitution of the Republic of South Africa, 1996.

practise of a trade, occupation or profession may be regulated by law. The Insolvency Act does not preclude an unrehabilitated insolvent from following any profession or occupation or to enter into any employment.³⁷ Moreover, apart from the various disqualifications discussed below, sequestration of an employee's estate does not automatically terminate his contract of employment.³⁸ It is submitted that the dismissal of an employee simply because his estate has been sequestered may be challenged as an "unfair dismissal" under the Labour Relations Act (LRA).³⁹

The Insolvency Act does not prohibit an unrehabilitated insolvent from carrying on any trade, business or industry, except if it is the business of a trader who is a general dealer or a manufacturer. In this regard, section 23(3) provides that an insolvent may not during the sequestration of his estate carry on, or be employed in any capacity or have any interest in the business of a trader⁴⁰ who is a general dealer or a manufacturer⁴¹ without the written consent of his trustee.⁴² The legislator's intention with this prohibition apparently was to protect the general public, specifically creditors and other persons who may have dealings with such traders.⁴³ Contravention of this provision constitutes a criminal offence in terms of the Act.⁴⁴ In *AJ Ferreira Beleggings (Edms) Bpk v Swart*⁴⁵ the court questioned the logic behind this prohibition in so far as it excludes an unrehabilitated insolvent from carrying on business as a general dealer or manufacturer, but not to carry on business, for example, as a butcher, dealer in fresh products or manager of a garage.⁴⁶

37 See s 23(3). An unrehabilitated insolvent may also enter into contracts that are reasonably necessary for the purpose of following such profession or occupation or to enter into employment – see Sharrock *et al* 65–66 who refer to *George v Lewe* 1935 AD 249.

38 Cf Bertelsmann *et al* 242; Nagel *Commercial law* (2015) 551.

39 Act 66 of 1995. It is submitted that unfair discrimination against an employee whose estate has been sequestered, eg, by not promoting him, may be challenged as an "unfair labour practice" under the LRA – see ss 185, 186, 188, 193 and sch 8 para 2 of the LRA in respect of unfair dismissal and unfair labour practices.

40 See s 2 for the definition of "trader".

41 S 23(3). The terms "manufacturer" and "general dealer" are not defined in the Act.

42 S 23(3). Should the trustee give or refuse to give his consent, the creditors or the insolvent may appeal to the Master whose decision is final – s 23(3).

43 Cf Smith 104.

44 See s 137(c). However, our courts have construed the prohibition under this section restrictively – see Smith 104 and authority referred to. Eg, in *S v Van der Merwe* 1980 3 SA 406 (NC) 410 the court held that a "general dealer" is a person who trades at a fixed and recognised place in all sorts of wares and not just in one kind or a few specific kinds. A person who conducts a restaurant business therefore is not a general dealer – *R v Papangelis* 1960 2 SA 309 (O). See also *S v Moll* 1988 3 SA 236 (T) 244ff.

45 1969 2 SA 170 (E) 175. Referring to *AJ Ferreira Beleggings*, Smith 104 criticises the prohibition in s 23(3) as follows: "The prohibition, in its present form, would, however, appear to be somewhat of an anachronism. A pawnbroker or auctioneer and other individuals who might well be a danger to the public can ply their trades without the consent of their trustees with impunity, but an insolvent may not be employed without such consent as a shop assistant or clerk in a large departmental store, where his chances of inflicting harm are so remote as to constitute no danger at all." However, it should be noted that pawnbrokers and auctioneers are at present disqualified from plying their trades if they are unrehabilitated insolvents – see s 14(1)(c) of the Second-Hand Goods Act 6 of 2009, s 23(c) of the Consumer Protection Act 68 of 2008 and § 2 3 below.

46 However, the court considered itself bound to the express provision of the Act and held that the insolvent *in casu* had to obtain the written consent of his trustee in order to be continued on next page

Several other statutes disqualify an unrehabilitated insolvent from holding certain positions which in turn could restrict his ability to earn a living. In terms of the Estate Agency Affairs Act,⁴⁷ for example, an estate agent may not perform any act as an estate agent unless a valid fidelity fund certificate has been issued to him.⁴⁸ In terms of section 27, such certificate may not be issued to him if he is an unrehabilitated insolvent and his trustee has not certified that he is a fit and proper person to assume a position of trust and to be issued with such certificate.⁴⁹ Furthermore, simply being an unrehabilitated insolvent disqualifies a person from being registered as a manufacturer and distributor of liquor,⁵⁰ or as a credit provider, debt counsellor, payment distribution agent,⁵¹ dealer in second-hand goods, pawnbroker, scrap metal dealer,⁵² or from conducting an auction⁵³ or being a financial services provider.⁵⁴

An attorney whose estate has been finally sequestrated may on application of the relevant law society be struck from the roll of attorneys, or be suspended from practice by the court, unless he is able to satisfy the court that he is still a fit and proper person to continue to practise as an attorney.⁵⁵ Several other professional bodies impose restrictions on insolvent persons to register or to continue in the relevant profession. For example, the Regulatory Board for Auditors may decline to register a person who is an unrehabilitated insolvent, has entered into a

employed by a dressmaker as a dressmaker is a manufacturer in terms of s 23(3) – see *AJ Ferreira Beleggings* 174 175.

47 Act 112 of 1976.

48 See s 26.

49 See s 27(a)(iii). Likewise, a sheriff may not perform any functions assigned to a sheriff unless he is the holder of a fidelity fund certificate – s 30(1)(a) of the Sheriffs Act 90 of 1986. In terms of s 33(1)(c) such certificate will not be issued to him if he is an unrehabilitated insolvent. A person will also not be competent to be registered as a debt collector if he is an unrehabilitated insolvent – s 10(1)(a)(v) of the Debt Collectors Act 114 of 1998.

50 See s 11(2)(b) of the Liquor Act 59 of 2003. Upon sequestration an insolvent will no longer hold the licence, but the trustee may conduct the registered activities in the name of the estate – see s 17(2) of the Liquor Act.

51 See s 46(2) of the NCA.

52 See s 14(1)(c) read with s 2 of the Second-Hand Goods Act. In terms of s 2 “dealer” means “a person who carries on a business of dealing in second-hand goods, and includes a scrap metal dealer and a pawnbroker”. According to its preamble, the object of the Act is to regulate second-hand dealers and pawnbrokers “in order to combat trade in stolen goods; to promote ethical standards in the second-hand goods trade”. The disqualification of unrehabilitated insolvents from being registered as a dealer in terms of the Act thus appears to be motivated by the legislator’s view that unrehabilitated insolvents are dishonest and not trustworthy.

53 See s 23(c) of the Consumer Protection Act.

54 See the *Determination of fit and proper requirements for financial services providers* published under s 8(1) of the Financial Advisory and Intermediary Services Act 37 of 2002, Part IX of the Schedule – BN 106 in *GG* 31514 of 15 October 2008.

55 See s 22(1)(e) of the Attorneys Act 53 of 1979. It should be noted that the Attorneys Act is to be repealed by s 119 of the Legal Practice Act 28 of 2014 (LPA) on a date to be proclaimed. The LPA does not impose the restriction currently provided for by s 22(1)(e). However, s 90(1)(b) of the LPA provides that if any legal practitioner (ie, an attorney or advocate – see s 1) becomes insolvent the High Court may, on application made by the Council or Board established in terms of the Act or by any person having an interest in the trust account of that legal practitioner or trust account practice, appoint a curator *bonis* to control and administer that account, with such rights, powers and functions as the court may deem fit.

compromise with creditors, has applied for debt review or has been provisionally sequestered, as an auditor or candidate auditor.⁵⁶ The Board may also cancel his registration if his estate is sequestered or provisionally sequestered or if he entered into a compromise with creditors or has applied for debt review.⁵⁷ As regards the disqualifications pertaining to other professions, an unrehabilitated insolvent will mostly only be disqualified from registering or to continuing in the profession if his insolvency was caused by his negligence or incompetency in performing the work of the relevant profession.⁵⁸

The Insolvency Act limits an insolvent's ability to obtain credit while under sequestration. An insolvent who wishes to obtain credit above a certain amount is obliged to first inform the credit grantor of his status. Failure to do so constitutes an offence unless he is able to prove that the person was aware of his insolvent status.⁵⁹ Debtors who are under administration or debt review also have a limited ability to obtain credit. In terms of the Magistrates Courts' Act⁶⁰ a debtor who incurs additional debts during the currency of the administration order and does not disclose the existence of the order, commits an offence.⁶¹ Likewise, a consumer who has filed an application for debt review in terms of the National Credit Act (NCA)⁶² or who has alleged in court that he is over-indebted is prohibited from incurring further charges under a credit facility or entering into any further credit agreement with any credit provider.⁶³ If a court eventually grants a rearrangement order, such prohibition will apply until all the consumer's obligations under all credit agreements that were subject to the re-arrangement order are fulfilled.⁶⁴ A consumer may thus effectively be removed from the credit market indefinitely.⁶⁵

Apart from the limitations regarding a debtor's ability to obtain credit while under sequestration, administration or debt review, his chances to get back on track by, for example, being able to rent a home, to find employment or to obtain a home loan are further inhibited by the compulsory public availability of

56 S 37(5) of the Auditing Profession Act 26 of 2005.

57 S 39(2)(a) of the Auditing Profession Act.

58 Cf ss 13(1)(b) and 14(1)(a) of the Planning Profession Act 36 of 2002; ss 20(4)(a)(v) and 21(1)(a)(i) of the Natural Scientific Professions Act 27 of 2003; ss 19(3)(vi) and 20(1)(a)(i) of the Architectural Profession Act 44 of 2000; ss 19(3)(a)(vi) and 20(1)(a)(i) of the Landscape Architectural Profession Act 45 of 2000; ss 20(4)(a)(vi) and 21(1)(a)(i) of the Property Valuers Profession Act 47 of 2000; ss 19(3)(a)(vi) and 20(1)(a)(i) of the Quantity Surveying Profession Act 49 of 2000; ss 19(3)(a)(vi) and 20(1)(a)(i) of the Project and Construction Management Professions Act 48 of 2000; and ss 13(8)(a) and 14(1)(a) of the Geomatics Profession Act 19 of 2013.

59 S 137(a).

60 Act 32 of 1944.

61 S 74S(1) Moreover, the court may also, upon application by an interested person, set aside the administration order – s 74S(1).

62 Act 34 of 2005 s 86.

63 S 88(1) of the NCA. Although contravention of this provision does not constitute a criminal offence as in the case of sequestration and administration, the effect is that the consumer will not be able to raise the issues of over-indebtedness or reckless credit and will be denied access to the debt relief measures afforded in respect thereof – see s 88(5).

64 See s 88(1)(c).

65 Cf Boraine *et al* "A comparison between formal debt administration and debt review – The pros and cons of these measures and suggestions for law reform" (Part 1) 2012 *De Jure* 80 101.

information pertaining to debt restructuring, sequestration, rehabilitation and administration orders.⁶⁶ Other than for purposes contemplated in the NCA, a credit report may, amongst others, be issued for the purpose of “considering a candidate for employment in a position that requires honesty in dealing with cash or finances”.⁶⁷ Regulation 17(1) of the NCA⁶⁸ prescribes certain maximum periods for the availability of consumer credit information. Information regarding debt-restructuring orders may only be available for public inspection for a maximum period as prescribed under section 71(1) of the NCA or until a clearance certificate has been issued. Generally, a clearance certificate will only be issued if the debtor has fully satisfied all the debt obligations under every credit agreement that was subject to the debt-rearrangement order.⁶⁹ Debtors who are subject to debt-restructuring orders may thus be precluded from obtaining credit or finding employment, etcetera, for an indefinite period.

Information pertaining to administration orders may be available for inspection for a period of five years or until the order has been set aside by the court.⁷⁰ Information pertaining to sequestration orders may only be available for a maximum period of five years, or until a rehabilitation order has been granted, where after the information pertaining to the granting of a rehabilitation order must appear on the credit record of an insolvent for a further period of five years after rehabilitation.⁷¹ Thus, although rehabilitation in terms of the Insolvency Act is supposed to have the effect of “putting an end to sequestration” and “relieving

66 According to the Department of Trade and Industry the main object of the 2014 amnesty regulations (published in GN R144 in *GG* 37386 of 26 February 2014 was to enable black-listed consumers to obtain credit again, to obtain employment and to rent a home. Cf the Minister’s media statement of 27 February 2014 entitled “Removal of adverse consumer credit information and information relating to paid up judgments”. However, information in respect of debt restructuring, sequestration, rehabilitation and administration was excluded from the amnesty. The regulations provide for a once-off removal of certain adverse consumer credit information (eg, “handed over” or “written off”) and for a once-off and on-going removal of information in respect of paid up judgments – see, in general, Kelly-Louw “The 2014 credit-information amnesty regulations: What do they really entail?” 2015 *De Jure* 92.

67 See reg 18(4)(c) of the National Credit Regulations 2006.

68 See the amended reg 17 in GN R202 in *GG* 38557 of 13 March 2015.

69 See s 71(1)(a). It should be noted that the NCA does not provide for any form of discharge of pre-existing indebtedness – see s 3(g) and (i) in terms of which the “satisfaction by the consumer of *all* responsible financial obligations” and “eventual satisfaction of *all* responsible consumer obligations under credit agreements” are two of the NCA’s purposes (my emphasis). However, after the amendment of the NCA by the National Credit Amendment Act 19 of 2014 the consumer’s legal position in this regard has been improved. In terms of the new s 71(1)(b) a clearance certificate may now also be issued if the consumer has demonstrated that he has the financial ability to satisfy the future obligations in terms of a re-arrangement order under a mortgage agreement or other long-term agreement, that there are no arrears, and that all obligations under all other credit agreements included in the re-arrangement order have been settled in full.

70 Reg 17. In terms of reg 18(11) information pertaining to an administration order must be removed from the consumer’s credit records where the source of the data (eg, the credit provider) informs the credit bureau that the capital amount has been discharged.

71 Reg 17. It is not clear what the position would be if an insolvent does not apply for his rehabilitation and rather awaits the expiration of the 10-year automatic rehabilitation period in terms of s 127A of the Insolvency Act. It would appear that the information will then only appear on his credit records for a period of five years despite the fact that he will only be automatically rehabilitated after expiry of a further period of five years.

the insolvent of every disability resulting from the sequestration”,⁷² he will in actual fact not be completely freed from all disabilities as his ability to obtain credit, find employment, etcetera, may be limited for at least five years after granting of a rehabilitation order and thus for a longer period than a debtor who is under administration.

Apart from the restrictions on the ability of debtors under administration or debt review to obtain credit and the negative effect of the compulsory public availability of credit information on their ability to get back on track, they are not subject to most of the other disqualifications that are currently imposed on unrehabilitated insolvents. There are a few exceptions, for example, the disqualification of a debtor who is under debt review from being a director or key employee of a registered credit rating agency.⁷³ A person is also disqualified from being a debt counsellor if he is subject to administration or subject to debt rearrangement in terms of the NCA.⁷⁴

2.3 Capacity to hold office

The Insolvency Act and several other statutes disqualify an unrehabilitated insolvent from holding certain offices. Smith⁷⁵ explains the justification for these disqualifications, stating that they are

“not [intended] as a punishment to be inflicted on the insolvent, but rather [aimed] at the protection of the interests of members of the general public who are entitled to the assurance that persons holding offices of responsibility whether in companies, boards of public bodies or the government of the country itself are people of stability and integrity”.

In terms of the Constitution an unrehabilitated insolvent may not be a member of the National Assembly, the provincial legislature or a municipal council.⁷⁶ An unrehabilitated insolvent is also disqualified from being a director of a company or from taking part in the management of a close corporation of which he is a member, except with the leave of the court.⁷⁷ He is also disqualified from being a

72 See s 129(1)(a) and (c).

73 See the *Fit and proper requirements for credit rating agencies* published under BN 177 in GG 36720 of 2 August 2013 under s 5(1)(d) of the Credit Rating Services Act 24 of 2012 – para 6(1) of the schedule requires the “financial soundness” of directors and key employees of a registered credit rating agency and provides that they may “not be an unrehabilitated insolvent, sequestered, applied for sequestration or subject to debt review as contemplated by the National Credit Act”.

74 See s 46(2) of the NCA. Furthermore, as indicated, the Regulatory Board for Auditors may also decline to register a person as a registered auditor or registered candidate auditor, or cancel his registration, if he has applied for debt review – ss 37(5) and 39(2)(a) of the Auditing Profession Act.

75 Smith 100.

76 See ss 47(1)(c), 106(1)(c) and 158(1)(c). A person is also not eligible to become a member of the National House of Traditional Leaders if he is an unrehabilitated insolvent – s 5(c) of the National House of Traditional Leaders Act 22 of 2009.

77 See s 69(8)(b) read with s 69(11) of the Companies Act 71 of 2008 and s 47(1)(b) of the Close Corporations Act 69 of 1984. A director or senior manager of a market infrastructure in terms of the Financial Markets Act 19 of 2012 may not be an unrehabilitated insolvent or subject to debt review – “Determination of fit and proper requirements for market infrastructures” – BN 97 in GG 36494 of 31 May 2013 – see para 6 1 of the schedule. An unrehabilitated insolvent may also not be a director of a co-operative – s 33(2)(b) of the Co-operatives Act 14 of 2005 or a director of a mutual bank – s 38(b)(i) of the Mutual Banks Act 124 of 1993.

business rescue practitioner,⁷⁸ a liquidator of a company⁷⁹ or a close corporation,⁸⁰ or a trustee of an insolvent estate.⁸¹ The sequestration of an executor of a deceased estate does not automatically terminate his office. However, it may be terminated if he does not lodge satisfactory security with the Master.⁸² A trustee of a trust whose estate is sequestered may be removed from his office by the Master.⁸³

The stigma that is still associated with insolvency is especially clear from the numerous⁸⁴ disqualifications that prohibit unrehabilitated insolvents from being a member of statutory councils, boards or bodies.⁸⁵ Most of these disqualifications apply irrespective of an insolvent's possible honesty, competency or culpability and they seemingly are imposed merely because of the existence of sequestration proceedings.⁸⁶ However, the fact that a person is subject to an administration order, has applied for debt review, is subject to a debt-restructuring order or has entered into an arrangement or composition with his creditors is mostly not regarded as a disqualification despite the fact that such debtor, like an unrehabilitated insolvent, has failed to pay his debt.⁸⁷

78 See s 138(1)(d) of the 2008 Companies Act.

79 See s 372(a) of the Companies Act 61 of 1973.

80 See ss 372 and 373 of the 1973 Companies Act read with s 66(1) of the Close Corporations Act.

81 See ss 55(a) and 58(b) of the Insolvency Act.

82 See s 23(3) of the Administration of Estates Act 66 of 1965.

83 See s 20(2)(c) of the Trust Property Control Act 57 of 1988.

84 The search for legislation that imposes disqualifications on unrehabilitated insolvents in this regard has yielded 133 statutory provisions.

85 Eg, member of the Health Professions Council (s 6(1)(a) of the Health Professions Act 56 of 1974); a local transportation board (s 5(1)(a) of the Road Transportation Act 74 of 1977), Council of the Academy of Science (s 7(1)(b) of the Academy of Science of South Africa Act 67 of 2001); Board of the South African National Accreditation System (s 10(1)(a) of the Accreditation for Conformity Assessment, Calibration and Good Laboratory Practice Act 19 of 2006); or Tourism Board (s 15(1)(b) of the Tourism Act of 2014).

86 In only five of the 133 instances mentioned above, the legislator considered the honesty, competency and culpability of the insolvent as a factor – see the disqualifications contained in s 3(7)(b) of the Agricultural Produce Agents Act 12 of 1992 re membership of the Agricultural Produce Agents Council; s 12(b) of the Agrément South Africa Act 11 of 2015 re membership of the Board of Agrément South Africa; s 9(5)(b) of the Agricultural Research Act 86 of 1990 re membership of the Agricultural Research Council; s 6(8) of the Construction Industry Development Board Act 38 of 2000; s 4(13)(b) of the Marketing of Agricultural Products Act 47 of 1996 re membership of the National Agricultural Marketing Council.

87 In only three of the 133 instances mentioned above, the use of such a procedure would disqualify a person from membership of the relevant statutory council or board – see s 7(c) of the Castle Management Act 207 of 1993 which disqualifies a person who is under any form of judicial administration from being a member of the Castle Control Board; s 9(e) of the Traditional Health Practitioner's Act 22 of 2007 which disqualifies a person from being a member of the Interim Traditional Health Practitioner's Council if he has entered into a composition with his creditors; s 6(a) of the Nursing Act 33 of 2005 which disqualifies a person from being a member of the Nursing Council if he has entered into a composition with his creditors in terms of s 119 of the Insolvency Act. In terms of s 10(1) of the Road Traffic Management Corporation Act 20 of 1999 a person who has committed an act of insolvency and whose estate has not been sequestered yet is also disqualified from being a member of the Board established in terms of the Act.

3 LEGAL COMPARISON

3.1 England and Wales

In England and Wales consumer insolvency is regulated by the Insolvency Act (IA).⁸⁸ This Act provides for three personal insolvency procedures, namely, bankruptcy, individual voluntary agreements (IVAs)⁸⁹ and debt relief orders (DROs).⁹⁰

Bankruptcy proceedings entail a surrender by the bankrupt of all his non-exempt assets⁹¹ in return for a discharge of all bankruptcy debts one year after commencement of the proceedings.⁹² Fletcher⁹³ observes that the terms “bankruptcy” and “bankrupt” “have traditionally carried heavy connotations of personal disaster accompanied by social stigma, giving rise to the supposition that bankruptcy is a fate to be avoided by all costs”. He further points out that⁹⁴

“the punitive and deterrent aspects of legal policy have seemed hard to reconcile with the rehabilitative philosophy with which they are supposed to co-exist. It would certainly appear to be the case even today that it is not very widely accepted that the bankruptcy law is also designed in part to protect the honest but unfortunate debtor, as well as to discipline and if necessary, punish one who has been incompetent or even dishonest”.

However, the introduction of the Enterprise Act (EA)⁹⁵ in April 2004 certainly has rebalanced the law towards the fresh-start goal of personal insolvency law.⁹⁶ The policy of the EA was to encourage honest but unfortunate entrepreneurs to once again take up the risk of entrepreneurship by providing a swift and broad discharge and to reduce the stigma attached to bankruptcy.⁹⁷ Amongst other things⁹⁸ the EA removed many of the automatic restrictions and disqualifications which had previously been imposed on all unrehabilitated bankrupts.⁹⁹

⁸⁸ Insolvency Act 1986 c 45.

⁸⁹ See Part VIII of the IA and in general Fletcher *The law of insolvency* (2017) 49ff and Walters “Individual voluntary arrangements: A ‘fresh start’ for salaried consumer debtors in England and Wales” 2009 *Int Ins R* 5.

⁹⁰ See Part 7A of the IA (ss 251A–251X read with the applicable schedules). See, generally, in respect of this procedure Fletcher 362ff. The objective of DROs is to provide debt relief to the so-called “no income no asset” (NINA) debtors – Fletcher 362.

⁹¹ In terms of s 306(1) the bankrupt’s estate automatically vests in the trustee after his appointment or in the official receiver when he becomes trustee. See, in general, Fletcher 208ff.

⁹² S 279.

⁹³ Fletcher 41.

⁹⁴ *Idem* 42.

⁹⁵ 2002 c 40.

⁹⁶ Cf Spooner “Seeking shelter in personal insolvency law: Recessions, evictions, and bankruptcy’s social safety net” 2017 *J of L and Society* 374 379; Walters 2009 *Int Ins R* 12; Keay “The Enterprise Act 2002: Pioneering a brave new world in insolvency law in the United Kingdom?” 2003 *Ins LJ* 163 175.

⁹⁷ McKenzie Skene and Walters “Consumer bankruptcy law reform in Great Britain” 2006 *Am Bankruptcy LJ* 477 482; Walters “Personal insolvency law after the Enterprise Act: An appraisal” 2005 *J of Corporate L Studies* 65 66; Fletcher 21.

⁹⁸ The EA, s 256 also provided for a drastic reduction of the automatic discharge period from three years to one.

⁹⁹ See s 257, sch 20 of the EA, inserting s 281A, sch 4A in the IA; Fletcher 22; McKenzie Skene and Walters 2006 *Am Bankruptcy LJ* 482; Walters 2009 *Int Ins R* 12.

Traditionally these restrictions were imposed as bankruptcy was regarded as form of social and moral failure.¹⁰⁰ Walters¹⁰¹ explains as follows:

“The English policy of deliberately stigmatising debtors who access the bankruptcy regime through the imposition of legal prohibitions was historically extensive and pervasive in scope. It reflected a deep-seated normative tendency towards the view that failure to pay debts (as evidenced by admission to the bankruptcy regime) casts doubt on the debtor’s moral character and capacity for financial responsibility and stewardship.”

The mere fact that a debtor initiated bankruptcy proceedings therefore resulted in him being regarded as a person who is not trustworthy and against whom the public should be protected.¹⁰²

Before the introduction of the EA, an undischarged bankrupt was subjected to numerous restrictions which were automatically imposed purely on the basis of his bankruptcy.¹⁰³ In a White Paper, Government rejected the view that all bankruptcies result from a debtor’s dishonesty or irresponsibility:¹⁰⁴

“Bankruptcy law in this country treats everyone subject to it in the same way irrespective of whether the bankrupt was dishonest or irresponsible or whether his failure was honest and above-board. There are numerous other enactments that impose restrictions, prohibitions or disqualifications on bankrupts solely on the basis of the existence of bankruptcy proceedings. This automaticity of approach may be capable of justification in some cases but requires a belief in the proposition that the debtor, by becoming bankrupt, is not someone in whom society can have trust or confidence. This approach takes no account of the risks that are an everyday part of business life, and warrants substantial re-appraisal . . . It is the nature of risk taking that, on occasions, there will be failure. But in a society which is genuinely enterprising the cost of failure must not be set so high that it acts as a deterrent to economic activity.”

After the introduction of the EA bankrupts were subjected to a reduced number of disabilities and restrictions in terms of the IA¹⁰⁵ and other legislation.¹⁰⁶ The IA has left the restriction on the obtaining of credit by an undischarged bankrupt intact. It is an offence for an undischarged bankrupt to obtain credit above a certain prescribed amount without disclosing his status.¹⁰⁷ The legislator has thus retained one of the most severe restrictions imposed on all bankrupts irrespective of the blameworthiness of their previous conduct.¹⁰⁸ However, the Act does not prohibit an undischarged bankrupt from obtaining credit at all.¹⁰⁹

¹⁰⁰ Walters 2009 *Int Ins R* 12.

¹⁰¹ *Ibid.*

¹⁰² Walters *J of Corporate L Studies* 82.

¹⁰³ *Idem* 82ff.

¹⁰⁴ The Insolvency Service and the Department of Trade and Industry *Insolvency – A second chance* Cm 5234 (2001) paras 1.21 and 1.24; Walters *J of Corporate L Studies* 83.

¹⁰⁵ See Insolvency Service “Part 1 Restrictions imposed on bankrupts by insolvency legislation (including CDDA86)”, available at <http://bit.ly/2FzEQmI> (accessed on 30 April 2018).

¹⁰⁶ See Insolvency Service “Part 2 Restrictions imposed on bankrupts by other legislation” – available at <http://bit.ly/2sUU8zG> (accessed on 30 April 2018).

¹⁰⁷ S 360(1)(a). See, generally, in respect of this offence Fletcher 381ff. Fletcher 382 points out that the purpose of this provision is to protect the general public from unknowingly granting credit to an undischarged bankrupt.

¹⁰⁸ Fletcher 382.

¹⁰⁹ *Ibid.*

The prohibition on undischarged bankrupts to act as company directors has also remained intact and it is a criminal offence for an undischarged bankrupt to act as a director of, or to take part in the promotion, formation or management of a company without permission of the court by which he was adjudged bankrupt.¹¹⁰ An undischarged bankrupt is also disqualified from acting as an insolvency practitioner¹¹¹ and an adjudication in bankruptcy of a solicitor or the making of a DRO in respect of a solicitor shall operate immediately to suspend any practising certificate of such solicitor.¹¹²

Although the law does not prohibit an undischarged bankrupt from recommencing trading, it would be difficult for him to do so.¹¹³ In terms of the IA, it is an offence for an undischarged bankrupt¹¹⁴ to engage directly or indirectly in any business under a name other than that in which he was adjudicated bankrupt without disclosing to all persons with whom he enters into business the name in which he was adjudicated.¹¹⁵ The aim of this prohibition obviously is the protection of the public as well as other persons who may unsuspectingly engage in business with an undischarged bankrupt.¹¹⁶

The EA¹¹⁷ introduced a new post-discharge restrictions system that was modelled on the Company Directors' Disqualifications Act.¹¹⁸ The EA abolished the automatic prohibition on membership of Parliament and in terms of section 426A of the IA only members in respect of whom a so-called bankruptcy restriction order (BRO), bankruptcy restriction undertaking (BRU) or debt relief restriction order (DRRO) has been granted, are disqualified for the period of the order.¹¹⁹ Simply being a bankrupt is thus not a sufficient reason to be excluded from sitting in Parliament.¹²⁰ Likewise, the automatic disqualification of undischarged bankrupts from local authority membership was also abolished.¹²¹

A BRO, BRU or DRRO may be granted if the court is of the opinion that it is appropriate in light of the bankrupt's conduct.¹²² These restrictions may be

110 S 11 of the Company Directors Disqualification Act 1986 c 46.

111 S 390(4) and see s 388(1), (2), (2A) and (2B) of the IA.

112 S 15(1) of the Solicitors Act 1974 c 47. A solicitor may apply to the Law Society to lift the suspension. Should the Society refuse such application, he may appeal to the High Court – see s 16(3) and (5) of the Solicitors Act.

113 Fletcher 386.

114 Or a bankrupt after his discharge while a bankruptcy restriction order is applicable in respect of him – see s 360(5).

115 S 360(1)(b).

116 Fletcher 385.

117 Ss 266–267.

118 Fletcher 348.

119 S 266. The EA has also abolished the automatic restriction on an un-rehabilitated insolvent to be appointed as a justice of the peace – s 265. BROs, BRUs and DRROs have been introduced by the EA by the insertion of ss 426A, 281A and sch 4A and 4ZB in the IA.

120 Tribe “Parliamentarians and bankruptcy: The disqualification of MPs and peers from sitting in the palace of Westminster” 2014 *King's LJ* 79 80. However, the automatic prohibition in s 427 still applies to bankrupts in Northern Ireland and Scotland.

121 See s 80(1)(b) of the Local Government Act 1972 c 70 as amended by EA s 267.

122 Conduct that would qualify includes a bankrupt's failure to cooperate with the Official Receiver or trustee, fraudulent conduct by the bankrupt, failure to keep proper books and incurring, before commencement of the bankruptcy, a debt without a reasonable expectation of being able to pay it – see sch 4A of the IA.

imposed for any period ranging from two to 15 years.¹²³ This system of post-discharge insolvency restrictions has been introduced to penalise dishonest and irresponsible bankrupts who do not deserve a fresh start.¹²⁴ However, these orders do not restrict the bankrupt's discharge¹²⁵ but merely his economic re-establishment in so far as he is prevented from holding certain positions, such as an insolvency practitioner¹²⁶ and a company director¹²⁷ and from obtaining credit above a certain limit without disclosing that he is subject to such an order.¹²⁸ With these amendments to the IA, the English legislator has thus effected a balance between the interests of debtors and those of the general public and the business community by imposing restrictions only on the small number of debtors who are actually dishonest and irresponsible.¹²⁹

Walters¹³⁰ points out that the EA does not directly affect professional bodies and regulators who may impose their own restrictions on undischarged bankrupts to enter or continue in a particular profession or occupation. The possible impact of bankruptcy on members of professional bodies may thus, according to Walters,¹³¹ be an important motivation to avoid bankruptcy and rather follow the route of applying for an IVA to obtain debt relief.

The new section 268 of the EA provides an instrument for future reform regarding bankruptcy disqualifications.¹³² Section 268 confers on the Secretary of State the power to make delegated provision by ordering the repeal or revocation of any statutory provision that disqualifies an unrehabilitated bankrupt from being elected or appointed to an office or position, from holding an office or position, or to become a member of a body or group or to remain a member of that body or group. In this way, he is allowed to revoke or review restrictions which may be outdated or unnecessary without the need for primary legislation.¹³³ Several restrictions that disqualified undischarged bankrupts from holding certain public offices or offices as a member of certain bodies or councils and which previously have been imposed mainly on the basis of a person's bankrupt status have in the meantime been repealed or amended by the Secretary of State pursuant to the powers provided for under section 268.¹³⁴

The fact that a debtor has applied for bankruptcy proceedings must be recorded on a statutory register which is available for public inspection.¹³⁵ The

123 Paras 4(2) and 9(2) of sch 4A and para 4(2) of sch 4ZB of the IA.

124 McKenzie Skene and Walters 2006 *Am Bankruptcy LJ* 483; Walters 2009 *Int Ins R* 13.

125 A debtor's discharge may be suspended where he fails to comply with his obligations in terms of the Act – s 279(3)–(4). However, there are no grounds for an outright denial of a discharge – Walters 2009 *Int Ins R* 13 fn 35.

126 S 390(5) IA.

127 S 11 of the Company Directors' Disqualification Act.

128 S 360(5) and (6) IA; McKenzie Skene and Walters 2006 *Am Bankruptcy LJ* 483; Walters 2009 *Int Ins R* 13.

129 Spooner "Long overdue: What the belated reform of Irish insolvency law tells us about comparative consumer bankruptcy" 2012 *Am Bankruptcy LJ* 255; McKenzie Skene and Walters 2006 *Am Bankruptcy LJ* 483; Walters 2009 *Int Ins R* 13; Walters 2005 *J of Corporate L Studies* 86.

130 2005 *J of Corporate L Studies* 84.

131 *Ibid.*

132 Seally and Millman *Annotated guide to the insolvency legislation* (Vol 1) (2008) 688.

133 Walters 2005 *J of Corporate L Studies* 84.

134 See EA 2002 (Disqualification from Office: General) Order 2006 SI 2006/1722.

135 See Insolvency Rules (IR) SI 1986/1925 r 6A1-6A2.

particulars of debtors who are subject to post-discharge restrictions must be recorded on a separate register.¹³⁶ After expiration of three months from the date of discharge all bankruptcy information must be removed from the register.¹³⁷ However, legislation does not prohibit the future display of this information on the credit records of the debtor. At present the practice of credit bureaus is that records may be maintained for a period of six years.¹³⁸

Another possible restriction that may apply to a bankrupt even beyond his discharge is the possibility of an income payments order (IPO) in terms of which the surplus income of an insolvent may be seized for the benefit of his estate.¹³⁹ The EA¹⁴⁰ amended section 310(6) of the IA by providing that an IPO may be effective even after discharge.¹⁴¹

3.2 Australia

The Australian Bankruptcy Act (BA)¹⁴² offers three procedures to insolvent debtors, namely, bankruptcy,¹⁴³ personal insolvency agreements (PIAs)¹⁴⁴ and debt agreements (DAs).¹⁴⁵

The current emphasis on the fresh-start goal of bankruptcy in Australia is in stark contrast with the traditional view that bankruptcy should be aimed at punishing the deviant bankrupt.¹⁴⁶ However, the fresh-start principle under Australian law is neither immediate nor unconditional and several qualifications to this principle exist.¹⁴⁷ During bankruptcy a bankrupt is subjected to several restrictions, disqualifications and disabilities¹⁴⁸ which are essentially the trade-off

¹³⁶ IR r 6A6 and sch 4A, para 12, IA.

¹³⁷ IR r 6A5(b).

¹³⁸ Walters 2005 *J of Corporate L Studies* 87 fn 136 100 fn 204.

¹³⁹ See s 310. See, in general in respect of IPOs – Miller “Income payment orders” 2002 *Ins L and Practice* 43; Roestoff 2017 *SA Merc LJ* (forthcoming).

¹⁴⁰ S 259.

¹⁴¹ However, it may not end after a period of three years from the date on which it was granted – see s 310(6). S 260 of the EA also inserted a new s 310A into the IA providing for an income payments agreement (IPA) between the debtor and his trustee or official receiver without the need for a court order. Like an IPO an IPA may also have effect beyond discharge for a maximum period of three years beginning from the date of the agreement – s 310A(2), (5).

¹⁴² Act 1966 (Cth).

¹⁴³ See Part IV of the BA.

¹⁴⁴ Under Part X of the BA. See s 188A which sets out requirements for PIAs. A PIA is a formal arrangement with creditors in terms of which a debtor offers full repayment of debts over an extended period or some other form of compromise of debts – Wyburn “Debt agreements for consumers under bankruptcy law in Australia and developing international principles and standards for personal insolvency” 2014 *Int Ins R* 101 103.

¹⁴⁵ Under Part IX of the BA. A DA is an administrative, out-of-court procedure which, like a PIA, is a binding agreement between the debtor and his creditors in terms of which the debt can be dealt with in a variety of ways. However, certain access requirements in respect of the maximum level of the outstanding debt, the value of the property which would be available for distribution and the debtor’s after tax available income, are applicable (s 185C(4)) and it is thus clear that DAs have been introduced with the interests of consumer debtors in mind – Wyburn 2014 *Int Ins R* 103–104.

¹⁴⁶ King “Moving beyond the ‘hard’–‘easy’ tug of war: A historical, empirical and theoretical assessment of bankruptcy discharge” 2004 *Melbourne Univ LR* 654 659.

¹⁴⁷ *Idem* 659ff.

¹⁴⁸ *Idem* 660.

for the automatic discharge and concomitant fresh start which occur three years after commencement of the proceedings.¹⁴⁹ However, where the trustee raised an objection¹⁵⁰ the discharge may, depending on the grounds of the objection, be extended for a maximum period of five or eight years.¹⁵¹ Thus, in contrast with the position under English law, where bankruptcy restrictions may, due to a BRO, BRU or DRRO, extend after discharge, dishonest or blameworthy bankrupts under Australian law may have the period of their bankruptcy extended.¹⁵² In this way the bankrupt's cooperation during bankruptcy and the protection of the general public are ensured.¹⁵³ A bankrupt may also be liable for income contributions where his income exceeds a certain amount.¹⁵⁴

On a personal level the bankrupt suffers social stigmatisation, humiliation and a loss of self-worth.¹⁵⁵ Bankruptcy also disqualifies an unrehabilitated bankrupt from holding certain public positions.¹⁵⁶ For example, an undischarged bankrupt is incapable of being chosen or of sitting as a senator or a member of the House of Representatives.¹⁵⁷

Being an asset-liquidation procedure, bankruptcy obviously has an impact on the bankrupt's property.¹⁵⁸ The bankrupt's divisible property as well as property acquired during bankruptcy and which do not qualify as exempt property¹⁵⁹ vest in the bankruptcy trustee.¹⁶⁰ Consequently, any claims that are the subject of legal proceedings initiated by the bankrupt and which constitute property of the bankrupt will also vest in the trustee.¹⁶¹

The bankrupt is required to surrender his passport to his trustee and should he wish to travel overseas during his bankruptcy he must obtain the permission of his trustee.¹⁶² Failure to do so constitutes an offence.¹⁶³

A bankrupt and a person who is subject to a DA are obliged to disclose to anyone to whom they apply for credit for more than a certain amount that they are

149 See s 149; Howell "The fresh start goal of the Bankruptcy Act: Giving a temporary reprieve or facilitating debtor rehabilitation?" 2014 *QUT LR* 29. Murray and Harris Keay's *Insolvency* (2014) 103 point out that although the legal effects of bankruptcy appear to be severe, the impact is generally minimal as most bankrupts have limited devisable assets and their affairs are not complex.

150 Eg, where the bankrupt failed to disclose property or income – see s 149D of the BA.

151 S 149A, B and D.

152 Keay 2003 *Ins LJ* 177.

153 King 2004 *Melbourne Univ LR* 662.

154 See Part VI, Division 4B of the BA. See, generally, Roestoff 2017 *SA Merc LJ* (forthcoming).

155 King 2004 *Melbourne Univ LR* 660.

156 See Australian Financial Security Authority (AFSA) "What are the consequences of bankruptcy?" available at <http://bit.ly/2CodQrv>.

157 See s 44(iii) of the Commonwealth of Australia Constitution Act.

158 King 2004 *Melbourne Univ LR* 660.

159 See s 116(2) of the BA.

160 See ss 58(1) and 116(1).

161 S 116(1)(b).

162 Ss 77(1)(a)(ii) and 272

163 S 272. However, there are no such restrictions on a debtor who is subject to a DA – Wyburn 2014 *Int Ins R* 106

undischarged bankrupts.¹⁶⁴ Bankruptcy may thus effectively preclude a bankrupt from carrying on a business.¹⁶⁵

Bankruptcy also excludes a bankrupt from certain employment opportunities.¹⁶⁶ In terms of the Corporations Act¹⁶⁷ a bankrupt and a debtor subject to a PIA (but not a debtor subject to a DA) may not manage a corporation.¹⁶⁸ The BA does not impose any restrictions on any trades or professions.¹⁶⁹ However, bankrupts who are licensees or members of certain industry associations may be subjected to certain restrictions or conditions imposed by the relevant licensing authorities or industry associations.¹⁷⁰ Normally, state governments oversee the legislation that regulate admittance to particular trades, such as builders, plumbers and second-hand vehicle dealers, while the requirements for admittance to certain professions such as solicitors, barristers, accountants and real estate agents¹⁷¹ are set by professional associations and/or statutory boards.¹⁷² A trustee who becomes bankrupt will generally also be replaced, either in terms of the trust deed or by the court.¹⁷³

Apart from the above-mentioned restrictions, a bankrupt also has to endure discriminatory treatment by creditors and employers. Bankruptcy obviously implies that the bankrupt has a poor credit record and his prospects of obtaining credit are thus diminished.¹⁷⁴ Creditors are notified of the bankruptcy¹⁷⁵ and the bankrupt's position regarding his discharge is recorded on the National Personal Insolvency Index which is available for public inspection. When discharged from his debts, his status of being a discharged bankrupt will remain on this database forever.¹⁷⁶ Furthermore, his bankruptcy may be recorded on the commercial credit records for a period of five years and in some instances for longer periods.¹⁷⁷ The public availability of bankruptcy information may also reduce the bankrupt's chances of obtaining or keeping his employment both before and after he has attained a fresh start.¹⁷⁸ He may also find it difficult to rent a home as estate agents normally inspect the credit records of potential tenants.¹⁷⁹

¹⁶⁴ S 269(1)(a).

¹⁶⁵ Murray and Harris (2014) 103.

¹⁶⁶ King 2004 *Melbourne Univ LR* 660.

¹⁶⁷ Corporations Act 2001 (Cth).

¹⁶⁸ S 206B(3) and (4). This includes not only being a director or promoter of such corporation, but also taking part in its management – Murray and Harris 103.

¹⁶⁹ See AFSA *Employment restrictions*, available at <http://bit.ly/2CMPXFL> (hereafter AFSA *Employment restrictions*).

¹⁷⁰ *Ibid.*

¹⁷¹ See, eg, the Estate Agents Act 1980 (Vic) – ss 14(5)(d) and 31B.

¹⁷² Murray and Harris 103 and see AFSA *Employment restrictions* for the long list of trades and professions that may be affected.

¹⁷³ See s 80(2) of the Trusts Act 1973 (Qld); Murray and Harris 103.

¹⁷⁴ King 2004 *Melbourne Univ LR* 66.

¹⁷⁵ S 19(1)(a) of the BA.

¹⁷⁶ Bankruptcy Regulations 1996 (Cth) reg 13.03 and 13.06 and see King 2004 *Melbourne Univ LR* 660; Tribe “Discharge in bankruptcy: An historical and comparative examination of personal insolvency relief in England and Australia 2012 *Ins LJ* 240 261. The same applies to DAs and PIAs – Wyburn 2014 *Int Ins R* 104.

¹⁷⁷ See s 20X of the Privacy Act 1998 (Cth). In terms of s 20X these periods also apply to PIAs and DAs.

¹⁷⁸ Cf Howell 2014 *QUT LR* 37.

¹⁷⁹ King *Melbourne Univ LR* 661.

3.3 UNITED STATES OF AMERICA

The Bankruptcy Reform Act of 1978¹⁸⁰ essentially provides for two consumer insolvency procedures. Chapter 7¹⁸¹ of the Code provides for an asset-liquidation procedure in terms of which, in return for the surrender of all of his non-exempt assets, the debtor may almost immediately¹⁸² receive a discharge of his debt obligations. Chapter 13 provides for a debt-restructuring measure in terms of which the debtor, after completion of a repayment plan, which extends over a period of three to five years, may obtain a discharge of all unsecured debt obligations that arose before his insolvency.

The American consumer insolvency system is regarded as the most liberal, debt-forgiving system in the world.¹⁸³ One of its main aims is to provide a discharge and a fresh start to the “honest but unfortunate” debtor and thus to provide him with the opportunity to become economically productive again.¹⁸⁴

The public perception of bankrupts in the USA, when compared to the perception in other systems, certainly is more favourable¹⁸⁵ and in recent years the stigma associated with bankruptcy has declined significantly.¹⁸⁶ However, bankruptcy in the USA has not completely lost its stigma and debtors therefore have often preferred to pursue the relief provided for by chapter 13 of the Code.¹⁸⁷

There is no provision in the American Constitution that disqualifies a person from becoming a member of Senate or the House of Representatives on the basis of the existence of bankruptcy proceedings.¹⁸⁸ Moreover, the Code does not provide for any direct bankruptcy restrictions, disqualifications or disabilities. However, the underlying philosophy of American bankruptcy law, that is, that a fresh start is only available to “honest but unfortunate debtors” provides an indirect

¹⁸⁰ 11 USC – generally known as the “Bankruptcy Code” or “Code” – hereafter the Code.

¹⁸¹ Generally referred to as “straight bankruptcy” – Ferriell and Janger *Understanding bankruptcy* (2013) 607.

¹⁸² Usually two to three months after bankruptcy proceedings have been initiated – Porter and Thorne “The failure of bankruptcy’s fresh start” 2006 *Cornell LR* 67 76.

¹⁸³ *Idem* 79; Kilborn “La responsabilisation de l’économie: What the United States can learn from the new French law on consumer overindebtedness” 2005 *Michigan J of Int L* 619 632.

¹⁸⁴ *Local Loan Co v Hunt* 292 US 234 244 (1934); Ferriell and Janger 1–4; Howard “A theory of discharge in consumer bankruptcy” 1987 *Ohio State LJ* 1047.

¹⁸⁵ Cf Stander “Die effek van ’n voorlopige sekwestrasiebevel – Word my reg om ’n lid van die Parlement te wees ingeperk?” 2015 *PELJ* 1367 1387 who submits that the public attitude in respect of bankrupts in the USA clearly differs from the attitude in respect of un-rehabilitated insolvents in South Africa.

¹⁸⁶ Cf Efrat 2006 *Theoretical Inquiries in Law* 380ff. The reduced stigma is evident, amongst others, from the use of the term “debtor” instead of “bankrupt” throughout the Bankruptcy Code – cf Stander 2015 *PELJ* 1379. According to the *World Bank Report* para 125 the avoiding or repealing of judgmental language and punitive measures in existing laws, such as referring to a “debtor” as opposed to the “bankrupt” is one of the ways in which policymakers can minimise the stigma of failure.

¹⁸⁷ Cf Gross *Failure and forgiveness* (1997) 35. Ch 13, the repayment chapter of the Code, was apparently designed to accommodate debtors who wish to avoid the stigma attached to straight bankruptcy – Efrat 2006 *Theoretical Inquiries in Law* 378.

¹⁸⁸ Ie, the two chambers of the United States Congress, the legislature of the federal government of the United States. See ss 2 and 3 of the Constitution of the United States of America regarding the qualifications for members of Senate and the House of Representatives respectively and Stander 2015 *PELJ* 1392–1393.

limitation that is exemplified by several of the Code's provisions.¹⁸⁹ For example, the culpability of a debtor in a chapter 7 case who, for instance, defrauded his creditors by concealing or transferring his assets, or failed to keep proper books may be punished by the court who may deny him his discharge.¹⁹⁰ In such a case, the assets of a bankrupt will still be affected by his bankruptcy and the trustee will still collect and realise his assets in order to distribute the proceeds to creditors.¹⁹¹ In chapter 13 cases, misconduct by the debtor will be punished by the court's refusal to confirm a plan in which case the debtor will not be able to receive a discharge.¹⁹² The Code also provides for a list of non-dischargeable debts and debts fraudulently incurred are excluded from the discharge.¹⁹³

The American system supports the principle of non-discrimination¹⁹⁴ by prohibiting certain types of discrimination against bankrupt debtors.¹⁹⁵ In terms of section 525(a) of the Code a government institution may not discriminate against a debtor who received a discharge by refusing to employ him or to issue a licence, permit, charter, franchise or other similar grant.¹⁹⁶ Section 525(a) prohibits such discrimination "solely because" of the debtor's discharge and discrimination is thus only permitted if there is some other reason, apart from the discharge of debt, for the refusal to employ the debtor or to issue a licence, etc.¹⁹⁷ For example, section 525(a) may prevent state supreme courts from denying licences to prospective lawyers whose only moral deficiency is their decision to apply for bankruptcy and to obtain a discharge.¹⁹⁸ A refusal to issue a licence to practise law may thus constitute discrimination under section 525(a) unless there is some other evidence indicating that the prospective lawyer has been found guilty of dishonest conduct or irresponsible behaviour.¹⁹⁹

As regards employment discrimination against bankrupt debtors by private employers, the Code imposes a more limited prohibition.²⁰⁰ In terms of section 525(b) it is illegal for a private employer to *terminate* the services of an existing

¹⁸⁹ Ferriell and Janger 3.

¹⁹⁰ See s 727(a) of the Code. In terms of s 707(b) a court may dismiss a ch 7 case due to "abuse". Ferriell and Janger 3 submit that the recent amendments to the Code in this regard (by the Bankruptcy Abuse Prevention and Consumer Protection Act 2005) to restrict the availability of the fresh start under ch 7 to debtors who are unable to repay their debt in terms of a ch 13 plan, was based on the assumption that many debtors used the system dishonestly to avoid paying debts which they were actually able to repay. Dismissal has the same effect as a denial of a discharge – the debtor is not relieved from his debt obligations. However, in the case of a dismissal the trustee does not collect, realise or distribute the debtor's assets – Ferriell and Janger 458.

¹⁹¹ Ferriell and Janger 458.

¹⁹² *Idem* 458–459.

¹⁹³ S 523(a)(2).

¹⁹⁴ See the *World Bank Report* paras 354 360 and the discussion in § 1 above.

¹⁹⁵ Ferriell and Janger 525.

¹⁹⁶ The courts have construed the words "license, permit, charter, franchise, or other similar grant" widely, and business licences and certain entitlements, such as subsidies received from the government for housing, are included – cf Ferriell and Janger 527 and authority referred to.

¹⁹⁷ Cf Ferriell and Janger 526 who refer to *Federal Communications Commission v NextWave Personal Communications Inc* 537 US 293 (2003).

¹⁹⁸ Cf Ferriell and Janger 526 who rely on *NextWave*.

¹⁹⁹ *Ibid.*

²⁰⁰ *Idem* 527.

employee or to discriminate against him by, for example, decreasing his salary or refusing to promote him *merely*²⁰¹ because he initiated insolvency proceedings or received a discharge.²⁰² Section 525(b) thus applies to *existing* employees and a decision not to appoint a bankrupt debtor who *applied* for a position will not be discrimination under section 525(b).²⁰³

Although the interpretation that section 525(b) does not apply to private employers' "hiring decisions" is probably correct, Cain²⁰⁴ raises the question whether it should be allowed in light of the fact that it clearly frustrates the fresh-start goal of bankruptcy. He argues as follows:²⁰⁵

"Relying on bankruptcy status simpliciter is antithetical to a core purpose of the bankruptcy system, which is to give debtors a fresh start. Employers' prerogatives to operate according to whatever employment policies and practices they wish should be balanced against employees' and potential employees' right to participate in the labor market in an environment free of irrational discrimination. It is irrational to deny employment to a person who is or was a debtor if the person is otherwise qualified and the job can be successfully performed regardless of bankruptcy status. To allow such discrimination makes the bankruptcy system's promise of a fresh start illusory."

In terms of the Fair Credit Reporting Act²⁰⁶ credit bureaus may keep insolvency records for a maximum of ten years. Consequently, a bankrupt debtor's chances of obtaining employment in the private sector may be limited for a period of up to ten years after the filing of bankruptcy proceedings.²⁰⁷

The Code allows creditors to discriminate against debtors who previously received a discharge by, for example, denying them credit, allowing smaller debt limits, requiring higher interest rates or more burdensome default provisions.²⁰⁸ Moreover, this type of discrimination against bankrupt debtors may, in terms of the Fair Credit Reporting Act,²⁰⁹ continue for up to ten years after bankruptcy proceedings have been initiated.²¹⁰

201 Ferriell and Janger 527 argue that s 525(b) prevents discrimination "solely because" the debtor has received a discharge. Consequently a private employer may consider the employee's financial circumstances among other factors to terminate an employee's services. Nonetheless, employees may still struggle to prove that their discharge was the sole reason for their dismissal – *ibid.*

202 *Ibid.* Cf Stander 2015 *PELJ* 1390.

203 Ferriell and Janger 527. The majority view of the courts is that s 525(b) applies to existing employees – Cain "The bankruptcy of refusing to hire persons who have filed bankruptcy" 2017 *Am Bankruptcy LJ* 657 673ff.

204 Cain 2017 *Am Bankruptcy LJ* 671 and the viewpoints referred to in fn 103.

205 *Idem* 695.

206 15 USC s1681c(a)(1).

207 See s 1681b(a)(3)(B) of the Fair Credit Reporting Act which allows consumer reporting agencies to issue a report to any person who intends to use the report for employment purposes.

208 Ferriell and Janger 527.

209 15 USC – s 1681c(a)(1).

210 Credit discrimination is prohibited in one instance. In terms of s 525(c) governmental units and private lenders are barred from denying a student loan to a person who has previously been bankrupt. The addition of this provision was apparently motivated by the view that a refusal of a student loan will limit a debtor's access to education and consequently increase the likelihood of him ending up in financial difficulty – Ferriell and Janger 527.

4 ANALYSIS AND RECOMMENDATIONS

The constraints on an unrehabilitated insolvent's capacity to contract and litigate stem from the fact that sequestration, like bankruptcy under English, Australian and American law, is an asset-liquidation proceeding in terms of which the creditors' rights and interests in respect of the insolvent estate's property need to be protected. The restrictions in this regard are thus obviously necessary and justifiable.

However, the question is whether the many other restrictions on an insolvent's capacity to earn a living or to hold office are in fact necessary and justifiable. As mentioned earlier,²¹¹ Smith²¹² is of the view that these restrictions are not aimed at punishing the insolvent but rather at protecting the interests of the general public in order to ensure that persons holding positions of trust and responsibility are people of "stability and integrity". However, it should be clear from the above discussion²¹³ that most of these restrictions are imposed merely on the basis of the existence of sequestration proceedings. It is submitted that unless there is other evidence pointing to dishonesty, incompetency or irresponsibility, simply being an unrehabilitated insolvent should not exclude one from employment opportunities or from holding office.²¹⁴ The unfairness of the restrictions also appears from the fact that a debtor's failure to pay his debts, as evidenced by an application for administration or debt review or the entering into an arrangement or composition, does not serve as a disqualification from practising many of the trades, occupations or professions or as a disqualification from membership of many of the statutory councils, boards or bodies.²¹⁵ It is not clear why these debtors who, like unrehabilitated insolvents have failed to pay their debts, are considered to be people of "stability and integrity", while the latter are not considered to be so capable.

The South African Law Reform Commission's viewpoint²¹⁶ that the prohibition on an unrehabilitated insolvent to carry on business as a general trader or manufacturer should be omitted from future consumer insolvency legislation is supported.²¹⁷ The Commission points out that similar prohibitions do not exist in England, Scotland, Australia or the USA.²¹⁸ The Commission suggests that professions and industry should devise their own rules to exclude an insolvent from the profession or trade in question.²¹⁹ I support this view, provided that the prohibition indeed is necessary and justified.

It is submitted that the current restrictions pertaining to the practising of most of the professions in South Africa are sensible and justifiable. Most professions only disqualify a person from registering or to continue in the relevant profession if his insolvency was caused by his negligence or incompetency in performing

211 See § 2 3 above.

212 Smith 100.

213 See §§ 2 2 and 2 3.

214 Cf the legal position in English and American law in §§ 3 1 and 3 3 above.

215 See the discussion in §§ 2 2 and 2 3 above.

216 See South African Law Reform Commission *Report Project 63 "Review of the law of insolvency"* (2000) Vol 1: Explanatory memorandum (hereafter Explanatory memorandum).

217 In this regard the Commission referred to Smith's criticism quoted in fn 45 above.

218 See Explanatory memorandum cl 15 4.

219 *Ibid.*

the work pertaining to the relevant profession.²²⁰ Attorneys may currently only be disqualified from practising if they cannot satisfy the court that they are still fit and proper persons to continue to practise. The LPA, which would sometime in the future repeal the Attorneys Act, improves an insolvent's legal position. The Act does not disqualify an insolvent from practising as an attorney or advocate, but empowers the High Court to appoint a curator *bonis* to control and administer the insolvent's trust account.²²¹ The auditing profession, on the other hand, still maintains a strict approach and a mere failure to pay debts as evidenced by the mere existence of, amongst others, sequestration or debt review proceedings, disqualifies a person from practising or to continue to practise in this profession.²²² It is submitted that lawmakers should reconsider the many disqualifications pertaining to occupations or positions where a person's honesty and financial expertise are vital to the position.²²³ Unrehabilitated insolvents who are able to prove that they are fit and proper to perform the relevant work should not be disqualified from holding such positions purely on the basis of their insolvent status.²²⁴

It is recommended that the South African legislator should, like its English counterpart, introduce a comprehensive process of review and repeal of legislative provisions that impose unnecessary and unjustifiable restrictions on unrehabilitated insolvents.²²⁵ An important lesson can be learned from the English approach of repealing restrictions that are automatically imposed purely on the basis of the existence of bankruptcy proceedings and to impose restrictions only on those who are dishonest and/or irresponsible.²²⁶ English, Australian and American law provide three examples of how the issue of dishonest or blameworthy bankrupts may be dealt with. Under English law, bankruptcy restrictions may, due to a bankrupt's dishonest or blameworthy conduct and the subsequent granting of a BRO, BRU or DRRO be imposed after discharge, while under Australian law the issue is dealt with by extending the period of bankruptcy.²²⁷ Under South African law dishonest conduct will also extend the period of sequestration. An insolvent who has been convicted of fraudulent conduct in relation to his insolvency or

220 See the discussion in § 2 2 above. However, simply being an unrehabilitated insolvent still disqualifies a person from being a member of the statutory councils of the different professions – see the discussion in § 2 3 above.

221 See the discussion in § 2 2 and fn 55 above.

222 See the discussion in § 2 2 above.

223 Ie. auditors, business rescue practitioners, liquidators of companies or close corporations, trustees of insolvent estates, sheriffs, debt collectors, manufacturers or distributors of liquor, credit providers, debt counsellors, dealers in second-hand goods, pawnbrokers, auctioneers and financial services providers – see the discussion in §§ 2 2 and 2 3 above for the disqualifications that are currently in place.

224 This is the current position regarding company directors, the attorneys' profession and estate agents – see §§ 2 2 and 2 3 above.

225 It is interesting to note that the South African legislator has in the meantime repealed some of the restrictions that were previously imposed. Previously an unrehabilitated insolvent was disqualified from being a member of the board which governs the National Credit Regulator (see s 3 of the National Credit Amendment Act 19 of 2014 which repealed s 20(2)(c) of the NCA). See also the provisions pertaining to attorneys – s 22(1)(e) of the Attorneys Act, which is to be repealed by the LPA – see the discussion in § 2 2 above.

226 See the discussion in § 3 1 above.

227 See the discussion in §§ 2 2 and 2 3 above.

certain offences in terms of the Insolvency Act will have to wait for five years after his conviction before he will be entitled to apply to court for his rehabilitation.²²⁸ The American approach is sensible. As mentioned, the American system supports the principle of non-discrimination and restrictions are generally not imposed merely on the basis of the existence of bankruptcy proceedings. However, dishonesty is dealt with harshly and will be punished by the court by denying the dishonest debtor his discharge and fresh start. Debts fraudulently incurred are also excluded from the discharge.²²⁹

Another important issue which lawmakers ought to address is the period which has to expire before an insolvent will be relieved from all restrictions, disabilities and disqualifications. In terms of the Insolvency Act, this period depends on the date of rehabilitation.²³⁰ Under current South African law an insolvent who did not apply to court for his rehabilitation earlier²³¹ will only be automatically rehabilitated after expiry of a period of ten years after his sequestration, which, compared to the automatic discharge period applicable in other systems, is clearly excessive.²³² Although the Australian system imposes many restrictions which in some instances are even more harsh than those imposed under South African law,²³³ bankrupt debtors in Australia will be relieved from these restrictions after their automatic discharge, three years after commencement of the proceedings. Under English law a bankrupt debtor will receive his discharge and be relieved of all disabilities one year after commencement of the proceedings²³⁴ while under American law a debtor will receive his discharge almost immediately after commencement of bankruptcy proceedings.²³⁵

An important lesson to be learned from the American approach is that there are various legislative prohibitions against discrimination by governmental institutions against debtors in respect of licences, permits, charters, franchises or employment.²³⁶ As is the position under English law, the initiation of bankruptcy proceedings and the subsequent granting of a discharge may not be the sole reason for such discrimination. Discrimination is only permitted if there is some other reason, apart from the discharge of debt, for the refusal to employ the debtor or to issue the licence, etc. However, bankruptcy is certainly not cost-free.²³⁷ As is the position in South African, English and Australian law, the American system allows creditors to discriminate by denying credit to debtors who initiated bankruptcy proceedings and subsequently received a discharge.²³⁸ Moreover, under American law bankruptcy information may be on a debtor's credit records for ten years which would not only reduce his chances of obtaining credit, but also exclude him from certain employment opportunities for a period of up to

228 See s 124(2)(c) of the Insolvency Act and the discussion in § 1 fn 7 above.

229 See the discussion in § 3 3 above.

230 Cf s 129(1)(c).

231 See s 124.

232 Cf Roestoff "Rehabilitasie in die Suid-Afrikaanse verbruikersinsolvenciesreg: Internasionale tendense en riglyne" 2016 *LitNet Akademies* 594 621.

233 See, eg, the restrictions imposed on overseas travel in § 3 2 above.

234 Unless he is subject to a BRO, BRU or DRRO – see the discussion in § 3 1 above.

235 See the discussion in §§ 3 1 and 3 3 above.

236 See the discussion in § 3 3 above.

237 Cf Ferriell and Janger 4.

238 See the discussion in §§ 2 2, 3 1, 3 2 and 3 3 above.

ten years after the filing of bankruptcy proceedings. As explained earlier²³⁹ a decision by a private employer not to appoint a bankrupt debtor who applied for a position will not be regarded as discrimination under the American system. It is heartening to see that the South African legislator has limited the public availability of credit information for employment purposes.²⁴⁰ However, limiting it to requests pertaining to “positions that require honesty in dealing with cash and finances” indicates that our legislator still regards a failure to pay as an indication of a prospective employee’s honesty and trustworthiness. Although employers are now barred from refusing to employ a prospective employee who applies for a position which does not require honesty and financial expertise merely because such an employee has failed to pay his debt, employers are still not precluded from discriminating in such a way in instances where honesty and financial expertise are indeed essential to the relevant position. It is therefore submitted that South African lawmakers should consider the views of authors²⁴¹ who argue that the American legislator should make provision for a general statutory prohibition against all employers, including private employers, to refuse to employ a person merely because he is or has been a debtor.

Obviously the availability of consumer credit information cannot be prohibited completely, as it is necessary to protect both the debtor and his creditors against extension of credit to a debtor who cannot afford to incur further debt.²⁴² However, such prohibitions should not have the effect of the debtor being denied credit indefinitely. Therefore, in order to expedite the re-establishment of South African insolvent debtors’ economic capability,²⁴³ it is submitted that lawmakers should consider a shortening of the maximum period for which information pertaining to sequestration, debt restructuring, administration and rehabilitation orders may be displayed on a debtor’s credit records.²⁴⁴

5 CONCLUSION

The above analysis indicates that there is definitely a need for the South African legislature to reconsider the significance and justification of the insolvency restrictions that are currently in place. The central consideration should be that restrictions should not be imposed merely on the basis of a person’s failure to pay his debt. Therefore, unless there is other evidence indicating dishonesty, incompetency or irresponsibility on the part of an insolvent, discrimination should not be allowed.

239 See § 3 3 above.

240 See the discussion in § 2 2 above.

241 Cf Cain 2017 *Am Bankruptcy LJ* 671 and sources referred to in fn 103.

242 Cf Roestoff 2016 *LitNet Akademies* 603.

243 Ie, one of the important elements of the *World Bank Report*’s required “economic rehabilitation” – see § 1 above and *World Bank Report* para 354.

244 Cf Roestoff 2016 *LitNet Akademies* 624. As pointed out above (§ 2 2), the procedures pertaining to administration and debt review currently do not provide for a maximum repayment period or for a discharge of debt. This is a shortcoming of the South African system and an issue which has been raised often in the past – see, eg, 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” (Part 1) 2014 *THRHR* 351 353 and authority referred to in fn 17.

Ultimately, the “economic rehabilitation” of an insolvent is paramount.²⁴⁵ Therefore, the emphasis should not only be on giving an insolvent a discharge and a “fresh start”, but also on providing him with a “new start” by supporting him to get back on track.²⁴⁶ Insolvency restrictions clearly hamper an insolvent’s economic reintegration²⁴⁷ and the ideal is that they should be completely abolished. That this is not a farfetched idea appears from recent law reform initiatives in Nigeria. When enacted into law, the new Nigerian Bankruptcy and Insolvency Act²⁴⁸ will abolish all insolvency restrictions in terms of the current Nigerian Bankruptcy Act.²⁴⁹

245 See the discussion in § 1 above and *World Bank Report* para 354.

246 Cf Roestoff 2017 *SA Merc LJ* (forthcoming).

247 Cf Howell 2014 *QUT LR* 38.

248 See the Bankruptcy and Insolvency Act of 2015.

249 See ss 126–128 of the Bankruptcy Act Ch 30 Laws of the Federation of Nigeria 1990. Disqualifications which would be abolished, include disqualifications from being elected to, or sitting in either House of the National Assembly, or any governing board of any company, from holding public office and from practising any regulated profession, other than as an employee. The law reform initiatives pertaining to insolvency restrictions and disqualifications in Nigeria are the topic of a separate article.