VONNISSSE

REHABILITATION OF AN INSOLVENT AND ADVANTAGE TO CREDITORS UNDER THE INSOLVENCY ACT 24 OF 1936

***Ex parte Purdon* 2014 JDR 0115 (GNP)**

OPSOMMING

Rehabilitasie van ’n insolvent en voordeel vir skuldeisers kragtens die Insolvensiewet 24 van 1936

Hierdie vonnisbespreking handel oor ’n aansoek om rehabilitasie wat op die feit dat geen eise teen die boedel bewys is nie gegrond is. Die oorkoepelende kwessie was of die applikant haar rehabilitasie verdien het, in die lig van die sekwestrasie-misbruik wat volgens die hof klaarblyklik plaasgevind het. Die hof het bevind dat die applikant die sekwestrerende hof mislei het met betrekking tot die vraag of aan die voordeel vir skuldeisers-vereiste voldoen is en het gevolglik die aansoek geweier.

Die doel van hierdie bespreking is om die beslissing te analiseer en te evalueer spesifiek met verwysing na die huidige onderliggende filosofie van die Suid-Afrikaanse verbruikersinsolvensiereg om vir ’n kollektiewe skuldinvorderingsprosedure voorsiening te maak wat hoofsaaklik daarop gemik is om die maksimum voordeel vir skuldeisers teweeg te bring. Die vraag is of die Suid-Afrikaanse wetgewer se klem op hierdie doelwit en ons howe se streng afdwinging daarvan, steeds gepas is in die lig van die internasionale tendens om eerder aan die sogenaamde *fresh start*-doelwit en sy gepaardgaande sosiale versekeringsfunksie voorkeur te verleen. Die hof se verknogtheid aan die voordeel vir skuldeisers-vereiste is deurgaans duidelik en sy opmerkings met betrekking tot die vereistes wat vir rehabilitasie gestel word, is aanduidend van ons howe se onsimpatieke houding oor die algemeen dat ’n insolvent sy rehabilitasie moet verdien, daarvoor verantwoording moet doen en sy rehabilitasie en voorreg om skuldverligting te bekom, moet regverdig en dus boete daarvoor moet doen. In teenstelling hiermee dui internasionale riglyne daarop dat eerlike skuldenaars wat as gevolg van teenspoed (soos *in casu*, die verlies van ’n lewensmaat) insolvent geraak het, eerder beskerming in die vorm van ’n kwytskeldingsprosedure gebied moet word en derhalwe nie gestraf moet word nie. Dit word aan die hand gedoen dat die vriendskaplike sekwestrasieaansoek *in casu*, wat die hof as samespanning en misbruik van proses gebrandmerk het, in werklikheid ’n produk van ’n verouderde sisteem is wat slegs skuldverligting verleen aan skuldenaars wat voldoende bates het om voordeel te bewys.

Die beslissing dui daarop dat voordeel vir skuldeisers nie net meer ’n stuikelblok vir insolvente is wat vir hul sekwestrasie aansoek wil doen nie, maar ook vir diegene wat hoop om voor die tien-jaar outomatiese rehabilitasietyperk te rehabiliteer. Die werklike implikasie van die beslissing is egter die feit dat die Suid-Afrikaanse verbruikersinsolvensieregstelsel dringend hervorm moet word. Dit is derhalwe verblydend om te hoor dat die wetgewer tans in die proses is om skuldverligtingsprosedures in te voer wat die kwessie van huishoudings wat met skuld oorbelas is, veral in die laer inkomstegroepe, aan te spreek.

1 Introduction

One of the effects of rehabilitation of an insolvent under the Insolvency Act 24 of 1936 is the discharge of all his pre-sequestration debts (s 129(1)(b)). Such discharge allows an insolvent the opportunity to start afresh and to re-establish himself without the embarrassment of creditors harassing him for payment of debts which he is unable to pay (cf Smith *The law of insolvency* (1988) 288 referring to *Ex parte Moodley* 1955 1 SA 678 (T) 681). The Insolvency Act provides for two possible routes to obtaining a discharge: Automatic rehabilitation after ten years have elapsed since the date of sequestration (s 127A) or rehabilitation by way of motion procedure directed to the court (s 124).

Rehabilitation before expiration of the ten-year period is a matter entirely within the discretion of the court and an insolvent therefore has no right to rehabilitation (see, eg, *Ex parte Hittersay* 1974 4 SA (SWA) 328; *Ex parte Snooke* 2014 5 SA 426 (FB) 437). The Act provides for several grounds for rehabilitation by the court and depending on the specific circumstances described in the Act, an insolvent may apply for his rehabilitation immediately (s 124(1) and (5)), or after expiration of a period of six months, twelve months, three years or five years (s 124(2)(a)–(c) and (3)). However, a court may not grant an application for rehabilitation before the expiration of a period of at least four years unless the master recommended it (s 124(2)).

The fresh-start goal of consumer insolvency law is an important feature of many legal systems worldwide. In most systems, the philosophical bases of consumer insolvency law were initially divided between two primary objectives: first, the debt collecting aim and thus the maximisation of returns to creditors, and secondly, the aim of providing debt relief and a fresh start to over-indebted individuals (Howard "A theory of discharge in consumer bankruptcy" 1987 *Ohio State LJ* 1047 1049ff; Spooner "Seeking shelter in personal insolvency law: Recession, eviction, and bankruptcy's social safety net" 2017 *J of L and Society* 374 375). At first, there was an inclination towards the debt-collecting aim of the law. However, recently the international trend has been to emphasise the fresh-start goal over the aim of producing maximum returns to creditors (*idem* 378ff). Today, many systems regard consumer insolvency legislation as a mere social insurance mechanism and thus a so-called "insurer of last resort" (*idem* 375). This is because the law, in the vast majority of consumer insolvency cases, now operates as a so-called "social welfare law" as most cases involve consumers who lack sufficient assets or income to provide meaningful returns to creditors (*idem* 390).

In contrast to the international position, the primary object under South African consumer insolvency law has always been to benefit creditors and not to grant debt relief to harassed debtors (see, eg, *Ex parte Arntzen* 2013 1 SA 49 (KZP) para 13). Under the South African system, rehabilitation after sequestration is the only way in which a natural person can obtain a discharge of pre-insolvency debt obligations and thus a fresh start. The Insolvency Act lays down advantage to creditors in the form of a pecuniary benefit (see ss 6 10 12 and *Meskin & Co v Friedman* 1948 2 SA 555 (W) 559; *Stratford v Investec Bank Ltd* 2015 3 SA 1 (CC) para 44) as a prerequisite for sequestration applications and the discharge of debt obligations is thus only available to individuals who have sufficient disposable assets to prove advantage. Moreover, in contrast to the position in most other systems, the South African procedures for debt restructuring (debt review in terms of s 86 of the National Credit Act 34 of 2005 and

administration in terms of s 74 the Magistrates' Courts Act 32 of 1944) do not provide for any discharge of debt.

The overarching issue in *Ex parte Purdon* 2014 JDR 0115 (GNP) was whether the applicant, who based her application for rehabilitation on section 124(3) of the Insolvency Act, deserved to be rehabilitated in light of the sequestration abuse that was, in the court's view, evident *in casu*. In terms of section 124(3) an insolvent may, if no claims were proved against his insolvent estate, apply for his rehabilitation six months after his sequestration application. In *Purdon*, Makgoka J found that the applicant actually misled the sequestrating court regarding the issue of whether there were assets in the estate and consequently as to whether the advantage to creditors requirement in terms of section 12 of the Act was complied with. Makgoka J was of the view that the application for rehabilitation could be refused on this basis alone and therefore decided to exercise his discretion against the applicant (paras 18 21).

The aim of this discussion is to analyse and evaluate the decision in *Purdon* specifically in light of the current underlying philosophy of South African consumer insolvency law, which is to provide for a collective debt collecting procedure which is mainly aimed at producing maximum returns to creditors. The question arises as to whether the South African legislator's emphasis on the debt collection aim and our courts' strict enforcement thereof is still appropriate in light of the international trend to emphasise the fresh-start objective and its concomitant social insurance role over the debt-collecting aim of consumer insolvency law.

2 Facts and decision

The relevant facts were as follows: *Purdon* entailed an application for the rehabilitation of the applicant on the basis that at the time of making the application no claims were proved against her estate (see s 124(3)). The applicant's estate was sequestrated on 23 February 2011, almost three years before the date of the rehabilitation application on 28 November 2013. All formal requirements pertaining to the application were complied with. The notice of intention to bring the application was published in the *Government Gazette* (see s 124(3)(a) – the court erroneously referred to s 124(2)) and the master and trustees filed their reports in which no objections were raised against the applicant's rehabilitation (para 1).

According to the applicant, a widow, the reasons for her sequestration were as follows (court's translation from Afrikaans – see para 2):

> "After my husband's death, I relocated from Plettenberg Bay to Pretoria, where I got employment. I tried to pay the escalating debts, but my salary was not enough to cover all the debts. As a result, I fell behind with payment of my accounts and was sequestrated."

The court perused the sequestration file from which it appeared that the applicant's estate was sequestrated at the instance of one Lamont. The applicant did not oppose the sequestration application. Lamont alleged that she lent an amount of R50 000 in terms of an oral agreement to the applicant during November 2009 in order to enable the applicant to set up a hair salon (para 3). The applicant failed to comply with the said agreement by not repaying the loaned amount in monthly instalments of R10 000 from May 2010, as agreed. Lamont further alleged that the applicant committed acts of insolvency in terms of section 8(a), (c) and (d) of the Insolvency Act, which eventually led to the

application for the compulsory sequestration of the applicant's estate. According to Lamont, sequestration was to the advantage of creditors as the applicant was, according to a deeds registry search, the owner of immovable property (para 4).

Makgoka J referred to section 127(2) of the Act in terms of which the court has a discretion to grant or refuse an application for rehabilitation. Referring to *Ex parte Hittersay* 326H–327D and *Ex parte Fourie* [2008] 4 All SA 340 (D) paras 23–25 the court stated (para 5): "The insolvent has no right to be rehabilitated in any particular situation. The discretion is dependent upon the conduct of an insolvent in relation to the business affairs which led to his insolvency."

The court pointed out that the obvious reason for the fact that no claims were proved against the estate was because there were no assets in the estate. The applicant stated that she had no assets at the time of the sequestration application and her liabilities amounted to R50 000. A real risk of creditors being held liable to contribute towards the costs of sequestration thus existed and a contribution of R5 110 was indeed levied against the applicant (the sequestrating creditor) in terms of section 14(3) of the Act (para 6).

Makgoka J further pointed out that the immovable property mentioned in the sequestration application did not feature in the trustee's liquidation and distribution account. Therefore, the applicant obviously did not own such property and the court was thus clearly misled. Makgoka J explained (para 7):

> "Had it been brought to the attention of the court that the applicant did not own immovable property, nor any other assets for that matter, the application for sequestration would clearly have been refused on the basis that it would not be to the advantage of creditors, as no dividend would accrue to them at all."

The court conceded that the allegation pertaining to the existence of immovable property was not made by the applicant, but by the sequestrating creditor, Lamont. However, the court pointed out that the application was served on the applicant. She thus had a duty to bring the correct state of affairs to the court's attention, but conveniently decided not to do so. According to the court, she was thus instrumental in the misleading of the court and could not expect the assistance of the court without explaining the situation. Makgoka J was of the opinion that the application should thus be refused on this basis alone (para 8).

Makgoka J stated that an application for rehabilitation is "not a formality [and] requires frankness and a full disclosure of all relevant facts". As to the requirements for rehabilitation, the court must at least be satisfied of three aspects (para 9):

> "First, a full and frank disclosure of the circumstances that led to his or her sequestration. Second, a demonstration that he or she had learnt the lessons from the insolvency, and third, that he or she is rehabilitated and ready to re-enter the commercial world and the economic mainstream."

Regarding the last-mentioned requirement, the court was of the opinion that it would not be met by proving that the applicant, since her sequestration, lived strictly on a cash basis. The court stated that this is "a forced, natural, and intended, consequence of insolvency, and is by no means an indication of prudence on the part of the applicant for which he or she should be applauded" (para 9).

The court pointed out that the attitude of many applicants in the North Gauteng division is to provide the minimum of information and generalised statements. This, according to the court, does not suffice. *In casu*, for example,

the applicant had not stated how differently she would approach the factors which caused her sequestration. The court furthermore remarked (para 10):

> "She does not seem to appreciate that the sequestration of her estate had not resulted in any advantage to her creditors. If rehabilitated, the applicant, freed from her debts, would 'cock a snook' at her creditors and start on a clean slate, incurring more debts."

The court pointed out that one of the reasons given for the application for rehabilitation was that the applicant needed to obtain credit in the form of a home loan (para 10).

As regards the requirement that "a full and candid disclosure of material aspects of her estate" should be given, the court pointed out that the applicant's affidavit supporting her rehabilitation application did not mention whether or not she owned immovable property at the time of sequestration. Furthermore, the particulars regarding the salon business were not mentioned (para 11).

The court stated that it was of the opinion, without laying down any rule of practice, that it should not be expected from the court to search for and peruse the sequestration file in order to obtain additional information when considering a rehabilitation application. The rehabilitation application should, "be fulsome and self-contained" (para 12).

A further aspect of the application which the court described as "disquieting" was the fact that Lamont, the sequestrating creditor, simply disappeared from the scene after the sequestration order was granted and did not prove any claim against the estate. This conduct, according to the court, amounted to collusion. The court referred to the decision of Satchwell J in *Esterhuizen v Swanepoel and Sixteen Other Cases* 2004 4 SA 89 (W) 91G–92D who explained the issue as follows (para 13):

> "The collusion is frequently found in the following pattern of behaviour or *modus operandi*:
>
> (a) A debtor owes money, frequently in significant amount(s), to creditor(s) who expect and rely upon the anticipated repayments of this outstanding debt. The debtor cannot make payment of the debt;
>
> (b) He seeks the assistance of a third party who agrees to initiate sequestration proceedings to 'aid or shield [the] harassed debtor' from his genuine and perhaps demanding creditor(s). (*Epstein v Epstein* 1987 4 SA 606 (C));
>
> (c) A friend or relative masquerades as a 'creditor' then avers that the 'debtor' has not only failed or refused to repay his 'debt' but has written a letter advising of his inability to pay the 'debt';
>
> (d) An act of insolvency in terms of s 8(g) of the Insolvency Act 24 of 1936 has now purportedly been committed and the 'creditor' proceeds with sequestration proceedings against the 'debtor';
>
> (e) This 'friendly' application (or sequestration) procures an order declaring the respondent insolvent. The respondent is then relieved of his or her legal, financial and moral obligations to the original and genuine creditor(s) save to the extent that the insolvent estate is able to satisfy such debt(s). The balance of the genuine indebtedness remains unsatisfied and, with the connivance of another, the insolvent has been 'enabled to escape payments of his just debts'."

According to the court the above is precisely what occurred *in casu*. This, in the opinion of the court, amounts to collusion and thus an abuse of the process of court (para 14).

In order to avoid such abuse, an applicant for rehabilitation should, according to the court, demonstrate (para 15):

> "[H]ow the sequestration of his or her estate had been to the advantage of creditors, and if it had not, the reasons therefor. It should make no difference that the sequestration resulted from voluntary surrender or compulsory sequestration, for, in both instances, the benefit to the body of creditors, is the overarching and key consideration. Courts have a particular responsibility to ensure that people who have in the past failed in managing their financial affairs, and in the process caused financial loss to others, are not without more, unleashed back into the economic mainstream."

Makgoka J reiterated that the applicant has not explained the position pertaining to her ownership of immovable property or her business activities and stated (para 16):

> "She has thus shown lack of candour. What is more, she has not demonstrated that she has learnt any lessons from the circumstances which led to her sequestration, and how differently she would manage her financial affairs; if rehabilitated. She seems oblivious to the fact that her sequestration has caused total loss to her creditors, to the extent that no claims were proven against her estate, for the reasons mentioned earlier."

According to Makgoka J the applicant has not complied with the test set out by Slomowitz AJ in *Kruger v The Master; Ex parte Kruger* 1982 1 SA 754 (W) 762A (para 17):

> "As I have been at pains to point out, what the Master should have asked himself was not whether the applicant's insolvency causes him hardship, which it patently does, but rather whether the applicant had shown that he was indeed a man who had rehabilitated himself in the sense that he understood his obligations to society in general and the business world in particular, or whether, in all the circumstances, he needed the lesson of time."

The court concluded that the applicant still needed the lesson of time. Consequently, it decided to exercise its discretion against the applicant and held that the application for rehabilitation should rather be refused at this stage (paras 18 and 21).

The court finally referred to what it regarded to be "a disturbing aspect" (para 19) and "an unethical practice" (para 20) in the North Gauteng Division. In terms of this practice, applicants whose applications for either voluntary surrender or rehabilitation had not succeeded, simply bring a new application, on the same papers, but under a different case number, without stating that the previous application had been refused by the court. Makgoka J pointed out that such applications are frequently brought by the same attorneys and often the same advocates are briefed. This is clearly done in the hope that another judge may perhaps grant the application. The court warned that legal practitioners who engage in this practice would, without fail, be reported to their relevant professional bodies (paras 19 20).

3 Analysis and evaluation

Apart from the court's dealing with the alleged sequestration abuse and the requirements for rehabilitation in such an instance, two further aspects of *Purdon* warrants comment: first, the court's reference to "the rehabilitation of the applicant's *estate*" (see, eg, paras 1 21 – own emphasis), and second, the fact that the applicant based her rehabilitation application on the circumstance that no claims were proved against the estate (paras 1 6).

As regards the court's reference to "the rehabilitation of the applicant's *estate*", it should be noted that although an insolvent's estate is sequestrated it is not his estate, but the insolvent himself, who is rehabilitated (see, eg, *Acar v Pierce* 1986 2 SA 827 (W) 829I; *Vengadesan v Shaik* 2014 3 SA 14 (KZD paras 8 13); *Ex parte Snooke* 428). Therefore, a deceased estate is also not entitled to be rehabilitated and decisions (eg, *Ex parte Fineberg's Executors* 1907 TS 960; *Ex parte Estate Swaites* 1931 CPD 9; *Ex parte Van Driel's Estate* 1934 TPD 137 139 and the *obiter* remark in *Koller v Steyn* 1961 1 SA 422 (A) 429)) which support this view, are thus incorrect (*Vengadesan* paras 14 15; see also Smith 289; Bertelsmann *et al Mars The law of insolvency* (2008) 555; Kunst *et al Meskin Insolvency law* (1990) para 14.1). Smith argues that these decisions were given under the 1916 Insolvency Act which referred to an insolvent bringing an "application for the rehabilitation of his estate" (s 110 of Act 32 of 1916). However, the current Act's sections dealing with rehabilitation refers to an insolvent applying for his rehabilitation and not for the rehabilitation of his estate (*Vengadesan* para 12; Smith 289).

As regards the fact that no claims have been proved against the applicant's estate, section 124(3) provides that if her estate has not been previously sequestrated, and if she has not been convicted of any fraudulent act in relation to her existing insolvency or any offence under sections 132, 133 and 134, she may apply for her rehabilitation after the expiration of a period of six months after sequestration. However, as mentioned earlier, the application *in casu* was brought almost three years after the sequestration application. Smith 290 argues that the grounds for rehabilitation by court order have been designed with the severity of the insolvency in a particular instance in mind. The intention of the legislature is thus that the expiration of these time periods is necessary before it can be said that a particular insolvent has indeed rehabilitated himself (see *ibid* referring to *Kruger* 758.)

According to the Law Reform Commission, the fact that no claims were proved against an insolvent estate is not necessarily an indication that the insolvent is entitled to his rehabilitation at an earlier stage. According to the Law Commission, it may rather be an indication of a dissipation of his assets by an insolvent and that his creditors did not prove their claims for fear of being required to contribute towards the costs of sequestration (see *South African Law Commission Working Paper 39 Project 63* "Review of the law of insolvency: Rehabilitation" (1991) 5; *South African Law Reform Commission Report Project 63* "Review of the law of insolvency" (2000) vol 1: Explanatory memorandum 231ff and vol 2: Draft bill – cl 96). The Law Commission has thus recommended that the Act be amended and that an insolvent, in such an instance, should not be allowed to apply for his rehabilitation before expiration of four years from the date of confirmation by the master of the first liquidation account in the estate (see cl 96(1)(c) Draft bill).

It is submitted that the fact that no claims were proved against the estate would, in most instances, not be an indication of a dissipation of assets by an insolvent but rather, as was the case in *Purdon*, and pointed out by the court (para 6), an indication of the fact that there were no assets in the estate and thus no advantage to creditors. However, although, as argued by the Law Commission, an insolvent should not necessarily be entitled to his rehabilitation at an earlier stage when no claims were proved against his estate, this fact does not justify the end result of *Purdon*, namely, that the applicant was wholly

denied the opportunity to be rehabilitated and thus to receive a discharge and a fresh start.

The required period that needs to expire before rehabilitation of an insolvent is allowed, has recently enjoyed the attention of several law makers world-wide (Roestoff "Rehabilitasie in die Suid-Afrikaanse verbruikersinsolvensiereg: Internasionale tendense en riglyne" 2016 *LitNet Akademies* 594 603). It is submitted that the current South African Insolvency Act delays the automatic rehabilitation after sequestration of an insolvent for an unnecessary long period. Moreover, the Law Reform Commission's attitude is still that an insolvent should only be regarded to be rehabilitated after expiration of a period of 10 years, unless the court on application of the insolvent grants an order for rehabilitation at an earlier stage (see Explanatory memorandum 236). The international trend is that the period should be shortened and generally a maximum period of three years for the automatic rehabilitation of an insolvent is accepted to be sufficient, to enable an insolvent to "learn the lesson of time" (see Roestoff 605ff for a discussion of the international trends in this regard). In *Purdon*, the applicant, on the date of her rehabilitation application (ie, almost 3 years after sequestration) would thus, according to this trend, have been a few months away from learning the required "lesson of time". In this respect it was argued elsewhere (Roestoff 621) that South African law makers should take notice of international developments and that the law should be amended to, in all instances, provide for the automatic rehabilitation of a debtor after expiration of a period of three years. However, it is submitted that a creditor should be able to oppose such automatic rehabilitation in instances of *mala fide* conduct on the part of the debtor. The possibility of an insolvent being rehabilitated by a court order should thus fall away and courts should only become involved in instances where the good faith requirement has not been complied with.

In *Purdon* the *bona fides* of the applicant was a central issue. As regards the alleged sequestration abuse and the requirements for rehabilitation in this regard, Makgoka J emphasised the fact that he has a discretion under section 127(2) to grant or refuse an application for rehabilitation. According to the court, the exercising of its discretion in favour of an insolvent is greatly dependent upon his conduct in relation to his business affairs which resulted in his eventual insolvency (para 5). The court furthermore stated that rehabilitation is "not a formality and requires frankness and a full disclosure of facts" (para 9). This would, according to the court, entail a disclosure of the circumstances that led to his sequestration. The reasons for his sequestration and, obviously, the question as to whether he has been *bona fide* in this regard, are thus clearly important. Secondly, an insolvent must, according to the court, demonstrate that he has learnt the lessons from the insolvency, and thirdly, that he or she is rehabilitated and ready to enter the commercial world and the economic mainstream (para 9). The applicant *in casu* thus also needed to prove that she had truly been rehabilitated. As regards the third requirement, the court was of the view that it was not complied with by proving that the applicant lived on a cash basis as this was a "forced, natural, and intended, consequence of insolvency", and not "an indication of prudence on the part of the applicant for which he or she should be applauded" (para 9). However, the court did not indicate what in its opinion needs to be proved to comply with its third requirement. The fact that the applicant was forced to live on a cash basis and not being able to obtain any credit, even when circumstances were tough is, in my view, certainly relevant

with regard to the court's second and third requirement. In my view, the fact that the applicant was able to live on a cash basis for almost three years since sequestration, proved that she has learnt to live on a tight budget and to do the necessary financial planning without the advantage of being able to take up credit when difficulties emerge. In this way she was actually forced to learn the lessons of insolvency and therefore equipped to re-enter the commercial world as a fully rehabilitated person.

The court's emphasis on the debt collection aim of the South African consumer insolvency system and its devotedness to the advantage to creditors-requirement is clear throughout the decision. As regards the reasons for her insolvency, the applicant must, according to the court, also indicate how "differently she would have approached factors that led to her sequestration" (para 10). The court furthermore observed that the applicant "does not seem to appreciate that the sequestration of her estate had not resulted in any advantage to her creditors" (para 10); that she "seems oblivious to the fact that her sequestration has caused total loss to her creditors" (para 16) and referring to Slomowitz AJ in *Kruger*, that she is not entitled to her rehabilitation unless she has "understood her obligations to society in general and the business world in particular" (para 17). These observations are evidence of our courts' unsympathetic attitude generally, that insolvents must deserve, account for and justify their rehabilitation and privilege to obtain debt relief and must in actual fact do penance for their insolvency and eventual sequestration. In *Purdon* the court actually required advantage or at least an explanation as to why sequestration was not to the advantage of creditors as a pre-condition for granting the rehabilitation order. The court stated that the "benefit to the body of creditors, is the overarching and key consideration" (para 15). Future applicants for rehabilitation should thus note that their rehabilitation may be refused if the court is not satisfied of the advantage requirement (cf also the decision in *Snooke* 436 and the discussion by Taljaard and Smith "Sequestration abuse snookered" 2016 *THRHR* 522 530 531). Moreover, attorneys of debtors who persist in assisting their clients in their attempts to obtain debt relief, by re-launching their applications that had been refused on the same papers, but under a different case number and without mentioning that the application had been refused, must be mindful of the fact that they may face disciplinary action by their relevant professional bodies on the basis of unethical conduct (see *Purdon* paras 19–20).

In contrast to our courts' attitude regarding rehabilitation and debt relief, international guidelines direct that "*bona fide* but unfortunate debtors" who land in a hopeless financial situation due to factors beyond their control (such as, in *Purdon*, the loss of a life partner) should be offered some protection in the form of a discharge procedure and should not be penalised (cf INSOL International *Consumer debt report: Report of findings and recommendations* (2001) 6; see Working Group on the Treatment of the Insolvency of Natural Persons *Report on the treatment of the insolvency of natural persons* (Insolvency and Creditor/Debtor Regimes Task Force, World Bank 2012 para 70 – available at http://bit.ly?Oft3hp). More than a decade ago the consumer debt committee of the International Federation of Insolvency Practitioners (INSOL International), in their report on consumer debt observed (INSOL *Report* 15): "The system should not be abusive to debtors and not necessarily designed just to protect and maximise value for creditors. It should contain a balanced approach to give the debtor the possibility of a second chance."

Moreover, as pointed out by INSOL International, "[s]ociety should accept that consumer debtors who cannot repay debts, for reasons beyond their control are not always solely to blame" and provision should thus be made for a fair and equitable allocation (distribution) of consumer credit risks (INSOL *Report* 14; see also Spooner 376). However, any benefits which law makers decide on, should, according to international guidelines, be limited to "*bona fide* but unfortunate debtors", that is, debtors who acted in good faith, both as regards the way in which the debts arose and as regards the reasons the debts could not be repaid (INSOL *Report* 14).

The applicant in *Purdon* appears to have been in good faith as to the way in which the debt arose and as to the reasons why the debts could not be repaid. She struggled to cope with debts which escalated after the death of her husband and her income was insufficient. According to international guidelines, she should thus not be penalised but offered some protection (INSOL *Report* 6). The alleged "abuse of process" and the "misleading" of the court pertaining to the question as to whether there was sufficient advantage to creditors resulted from the fact that the applicant had no other option to obtain relief from her oppressive situation. As mentioned earlier, the current alternatives to sequestration, debt review and administration, do not provide debt relief in the form of a discharge of debt. Therefore, sequestration (*in casu* a so-called "friendly" sequestration) was the only available measure to force a discharge on her debtors and to obtain debt relief. The so-called "abuse" is in actual fact a product of an outdated system which only provides debt relief and a discharge of debt to debtors who have sufficient realisable assets to prove advantage to creditors (cf 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).

In *Purdon* the court's unwillingness to grant the rehabilitation application obviously stemmed from its creditor-orientated view of the applicant's situation. According to the court the applicant, if she was to be rehabilitated, would, after being relieved of her debts, be able to "cock a snook" at her creditors and incur more debts (para 10). This, according to the court, is evident from the fact that she indicated that she needed to obtain credit in the form of a home loan, as one of her reasons for seeking rehabilitation (para 10). Therefore, instead of assisting her in her efforts to get back on her feet, amongst others, by obtaining a home loan and thus credit which does not qualify as credit for a luxurious item, the court regarded the matter as collusion and an abuse of process and therefore penalised her by withholding her rehabilitation.

5 Conclusion

An important inference of the decision in *Purdon* is that advantage to creditors is no longer merely a stumbling block for insolvents wishing to apply for the sequestration of their estates, but also for those who hope to rehabilitate before expiration of the ten-year automatic rehabilitation period.

However, the real significance of *Purdon* is undoubtedly that the South African consumer insolvency system is in urgent need of reform. Over the past few decades many academics have argued for a system which would provide debt relief to all insolvent debtors and that those debtors who are not able to prove advantage should be afforded the opportunity to obtain relief in terms of an alternative discharge procedure (cf Boraine and Roestoff 353 and authority

referred to in fn 17). The end result of *Purdon* was that the applicant was excluded from debt relief on the basis that she did not have sufficient assets to prove advantage. The current law thus distinguishes between debtors "with" and debtors "without" assets, which some have argued to be unconstitutional, as it infringes the right of equality of debtors "without" assets under section 9 of the Constitution (see, eg, Coetzee "Is the unequal treatment of debtors in natural person insolvency law justifiable?: A South African exposition" 2016 *International Insolvency R* 36 54).

In light of the international trend to rebalance the law towards the fresh-start goal, the South African legislator's consistent emphasis on, and our courts strict enforcement of, the debt-collection aim of the law, is certainly not appropriate. In the midst of difficult economic times currently experienced by South Africans, law makers should take notice of the new trend to regard the law as a social insurance mechanism and it is thus gladdening to hear that the legislator is currently in the process of introducing debt relief procedures in order to address the issue of household over-indebtedness of especially the lower income groups (see the *Draft National Credit Amendment Bill*, 2018 and the Memorandum on the Objects of the Bill – GN 922 in *GG* 41274 of 24 November 2017) providing for a so-called process of "debt intervention"). The following explanation of INSOL International regarding its recommendation that legislators should offer consumer debtors a discharge of indebtedness, rehabilitation and a fresh start, is pertinent in this regard (INSOL *Report* 14):

> "Providing a fresh start to a debtor who cannot reasonably repay all of his pre-existing debts is the recognition by society that over-indebtedness is, in many cases excusable. It is a key element of any consumer debtor insolvency law or rehabilitation procedure, based on the principle that it is in society's interest – that the debtor should be able to begin afresh, free from past financial obligations and not to suffer indefinitely. It is the distinction between punishment of yesteryear and the economic reality of the twenty-first century."

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