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CONSIDERATION OF THE PROPOSED DEBT INTERVENTION PROCEDURE FROM A DEBT RELIEF PERSPECTIVE

by

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May God bless you all.

Abstract

There has been a worldwide trend to move away from creditor-centric insolvency regimes to ones that are more accommodating of debtors. Many debtors land up in a spiral of debt from which they cannot escape without some form of statutory debt relief. There are three debt relief measures available in South Africa, of which only one, the sequestration under the Insolvency Act, provides a discharge from debt, which is the ultimate debt relief. However, the requirement of an advantage to creditors restricts access for many debtors who do not have the financial means to access the procedure. Both debt review under the NCA and an administration order under the Magistrates' Courts Act, have differing, restrictive requirements and provide only for a re-arrangement or rescheduling of debt repayment. No discharge from debt is granted. The National Credit Amendment Bill, 2017 proposes the introduction of a debt measure known as debt intervention. The measure is aimed at providing debt relief for debtors who are otherwise excluded from the debt relief measures available. In this dissertation, this Bill is examined to ascertain what debt intervention entails. The Bill proposes that the duties of the NCR be amplified to include the assessment of debt intervention applications administratively and the referral of applications to the Tribunal. The Tribunal will be empowered to amend and suspend debt repayments, including capital and costs and importantly, the Tribunal will be authorised to extinguish a debt in its entirety if it is determined that the debtor cannot meet his obligations in the time determined. This dissertation studies the provisions of the Bill relating primarily to how and to whom access to the debt intervention measure will be granted as well as the debt relief the measure will provide. The Bill is compared to the existing debt relief measures available in South Africa and also measured against international principles and guidelines as contained in two international studies. The study identifies areas of innovation and uncertainty in the debt intervention measure proposed in the National Credit Amendment Bill and considers the value of the measure to the South African debt relief arena.

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CHAPTER 1: INTRODUCTION

1.1 Background

At the beginning of 2018, a seemingly positive picture emerged from the statistics collected by the National Credit Regulator[1] from credit bureaux showing that during 2017 South Africa's household debt had decreased, with impaired credit records declining overall.[2] However, further examination of the statistics revealed that this picture is somewhat misleading. This is because the aggregate data is based on the debt of more affluent debtors who have mortgages.[3] Debt to micro-lenders and arrears due to municipalities is not reflected in the credit data.[4] According to the NCR's data, debt from store cards and personal loans is growing rapidly.[5]

There is a growing disparity in debt management between the different income groups.[6] Poorer households cannot manage their debt load and "indigent township families" are under stress.[7] As far back as 2012, a news report [8] highlighted the desperation of vulnerable consumers by uncompliant micro-lenders, as well as a culture of living off credit.[9]

These debtors have such limited income and limited assets, the so-called Low Income Low Asset (LILA) debtors, or possibly no income and no assets the so-called No Income No Asset (NINA) debtors, that their situation seems especially dire with growing interest and costs, and their income (if any) only covering basic necessities. Consequently, there is no way out of the spiral of debt for such consumers.[10] NINA and LILA debtors are a worldwide

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[1] Hereafter "the NCR".
[2] Van Rensburg "Don't be fooled, there is a credit problem" 7 Jan 2018 *Fin24* http://bit.ly/2T6jbJg (accessed 10 October 2018).
[3] *Idem* 2.
[4] *Idem* 1.
[5] According to the NCR, debt over 120 days was reaching R18 billion. *Idem* 1.
[6] According to the credit bureaus,
> "The problem with these aggregate data is that they are dominated by the relatively large and healthy debts of the rich, particularly mortgages. This hides deterioration in the credit situation of the poor majority." *Idem* 2.

[7] Referring to the data from Experian's Consumer Credit Default Index *Idem* 1.
[8] Davis "Marikana: The debt-hole that fuelled the fire" 12 Oct 2012 *Daily Maverick* http://bit.ly/2DjFIgk (accessed 8 October 2018).
[9] According to Davis 2012 Marikana the NCR addressed this by visiting microlenders in the (Marikana) area checking whether they were compliant and investigating 'undesirable practices'.*Idem* 2.
[10] A very moving example of this hopelessness is the case of Happiness Mbedzi (22) who committed suicide in 2012. In her suicide note she wrote that she did not see any way out of her debt problem. Her total debt was R3 320. De Waal "Debt traps, the silent killers of the SA's vulnerable" 7 August 2012 *Daily Maverick* http://bit.ly/2OGspZ7 (accessed 10 October 2018).

phenomenon.[11] Their plight and the possible debt relief measures available to them is a dilemma which affects society as a whole.[12] South Africa has an additional challenge with the unequal prospects of debt relief in the make-up of our very unequal society and economy.[13] One segment has a sophisticated socio-economic makeup and the other comprises an informal under-developed economy, with little middle ground between the sectors. This is often referred to as our dual economy.[14]

The approach to consumer debt has changed internationally.[15] Initially, insolvency law was primarily creditor-driven, protecting the interests of creditors. The United States of America[16] led the move in recognising the need for the protection of indebted consumers, especially the "honest but unfortunate debtor" who gets caught up in a spiral of increasing debt. The Bankruptcy Reform Act of 1978[17] introduced the "fresh start",[18] which enabled debtors to receive a discharge from debt and start their commercial life afresh, free from debt.[19] While internationally insolvency law has evolved into a more debtor sympathetic process; certain countries also passed consumer protection legislation, directed explicitly at preventing the exploitation of consumers by means of credit regulation.[20]

In South Africa, this trend was acknowledged and in 1987 the South African Law Commission,[21] was tasked to review and reform our insolvency law. A report and draft Insolvency Bill was published in 2000 and in 2010 a document containing the Draft

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[11] World Bank *Report* par 439 refers to this

> "One of the most pressing problems is the treatment of debtors who cannot generate significant disposable income for the duration of the plan. These debtors, commonly referred to as "NINAs" (No Income, No Assets), may have sufficient resources to cover their basic needs, but they have no extra resources to pass on to creditors."

[12] Coetzee and Roestoff Consumer debt relief in South Africa—should the insolvency system provide for NINA debtors? Lessons from New Zealand 2013 *Int Insolv Rev* 187, point out that

> "…the exclusion of this group will be even more expensive as it creates an obstacle for these debtors to enter the formal sector and economy, thereby discouraging broader economic growth."

[13] Calitz "Developments in the United States' consumer bankruptcy law: A South African perspective" 2007 *Obiter* 416.

[14] Coetzee *LLD thesis* 7 refers to the World Bank *South Africa economic update* regarding South Africa's dual economy.

[15] Calitz 2007 *Obite*r 397.

[16] Hereafter the "USA".

[17] Hereafter the "Code". Codified in Title 11 of the USA Code.

[18] *Local Loan v Hunt* 244 "the honest but unfortunate debtor … new opportunity in life …unhampered by the pressure and discouragement of pre-existing debt."

[19] The initial Code has been diluted from the original, very liberal access policy to include a means test by the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) is a result of a perception that consumers were abusing the procedure.

[20] The UK introduced the Consumer Credit Act in 1974.

[21] Hereafter the "SALRC".

Insolvency and Business Recovery Bill was introduced as a working document.[22] The Insolvency Bill proposed no revolutionary solutions to the South African insolvent debtor's dilemma[23] and to date, no amended Insolvency Act has been passed. Academics have long identified the lacuna in our insolvency law and have been vocal in their pleas for it to be addressed.[24]

South Africa also introduced consumer protection legislation with, amongst others, the National Credit Act[25] being enacted on 10 March 2006 and implemented fully on 1 June 2007. The NCA replaced earlier consumer credit legislation[26] and its intention is to protect consumers and to regulate the credit industry.[27] The NCA encourages credit providers to act more responsibly by, amongst others, also introducing the notion of reckless credit, and "to protect consumers by addressing and preventing consumer over-indebtedness by providing mechanisms for resolving over-indebtedness".[28] To assist overindebted consumers, the NCA introduced the debt review process, a form of debt relief colloquially referred to as "debt counselling".[29] The NCA established the National Credit Regulator,[30] the National Credit Tribunal,[31] payment distribution agents,[32] and debt counsellors,[33] and regulated credit bureaux.[34] Considered from a debt relief perspective, debt review has certain limitations,[35] such as that the relief it provides is the mere

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[22] In 2000 the South African Law Commission published the *Report on the review of the law of insolvency* which contained the 2000 draft Insolvency Bill and explanatory memorandum. Subsequent versions after 2000 are unofficial working documents and will be referred to as quoted and discussed by Coetzee *A Comparative reappraisal of debt relief measures for natural person debtors in South Africa* (LLD thesis University of Pretoria 2015).

[23] The 2015 Insolvency Bill is unpublished but Coetzee refers to copies accessed by her on file and states that it "does not take a holistic approach to re-evaluating all statutory natural person debt relief measures" and the advantage to creditors requirement is retained. Coetzee *LLD thesis* par 1.1 7

[24] Coetzee *LLD thesis* recommendations in ch 8, Boraine and Roestoff "The treatment of insolvency of natural persons in South African law: An appeal for a balanced and integrated approach" 2013 *World Bank Legal Review* 91, and Calitz *Obiter* 2007 417.

[25] 34 of 2005 (hereafter the "NCA").

[26] The Usury Act 73 of 1968 and the Credit Agreements Act 75 of 1980.

[27] Preamble and S3 of the NCA.

[28] S 3 of the NCA.

[29] S 86 of the NCA.

[30] (Hereafter the "NCR") S 12 of the NCA.

[31] (Hereafter "the Tribunal") S 26 of the NCA The Tribunal has jurisdiction throughout the Republic; is a juristic person and a tribunal of record. The Tribunal consists of a chairperson and not less than 10 other women or men appointed by the President, on a full-time or part-time basis. S 27 authorises a member of the Tribunal alone to adjudicate an application and make an order in terms of the Act.

[32] (Hereafter "PDA") s1 definition as well as s 44A of NCA.

[33] S 44 of NCA.

[34] Reg 1 issued in terms of the NCA.

[35] Boraine "Note on debt relief measures in SA Consumer insolvency law 2017 Unpublished, provided in University of Pretoria LLM class handouts – obtainable from the author 3.

rescheduling of debt with no prospect of a discharge[36] and that only credit agreements regulated by the NCA, where debt enforcement has not commenced, can be included in the process.[37] The NCA is but one of three pieces of legislation in South Africa containing debt relief measures.

Apart from the debt relief introduced by the NCA, the Insolvency Act[38] also provides some form of debt relief in the form of the sequestration procedure, whether by the voluntary surrender of his estate by a debtor or compulsory sequestration by creditors,[39] which culminates in the rehabilitation of the insolvent and has a discharge of debt as an element.[40] A sequestration order (whether voluntary surrender or compulsory sequestration) when used to assist over-burdened debtors has disadvantages from a debt relief perspective This is due[41] to the restrictive access requirements, especially the "advantage to creditors" requirement,[42] the fact that it entails a high court application (an expensive forum) and that conditions can be imposed to attain rehabilitation or a discharge from debt.[43] These challenges are not surprising as the Insolvency Act was not designed primarily to assist over-burdened debtors but rather to create a collective collection procedure for creditors.[44]

The third existing debt-relief measure in South Africa is contained in section 74 of the Magistrates' Courts Act[45] which provides for debt relief in the form of an administration order which results in the rescheduling of a consumer's debts.[46] Disadvantages from a debt relief perspective are that the Magistrates' Courts Act sets a monetary cap by regulation, currently R50 000,[47] on the debtor's total existing debt to qualify for an administration order. As is the case with debt review, this results in a mere rescheduling of debt and that no discharge from debt is granted.[48]

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[36] Coetzee *LLD thesis* 189, as well as s 4 of the NCA.
[37] Coetzee and Roestoff 2013 *Int Insolv Rev* 200.
[38] The Insolvency Act 24 of 1936 ("the Insolvency Act").
[39] Ss 6 and 8(g) of the Insolvency Act.
[40] Ss 124 and 129 of the Insolvency Act.
[41] Coetzee and Roestoff 2013 *Int Insolv Rev* 200.
[42] S 10(c) Insolvency Act.
[43] S 129(1) Insolvency Act.
[44] "The Insolvency Act was passed for the benefit of creditors, not for the relief of harassed debtors" *R v Meer* 1957 3 SA N 619A.
[45] The Magistrates' Courts Act 32 of 1944 (hereafter "the Magistrates' Courts Act").
[46] S 74(1) Magistrates' Courts Act.
[47] S 74(1)(b) total debt must not exceed amount determined by the Minister,
[48] There was an investigation into the possible reform of the administration order process but this was suspended pending the promulgation of the NCA. Coetzee *LLD thesis* 188.

The National Credit Amendment Bill, 2017,[49] together with the *Memorandum on the objects of the National Credit Amendment Bill, 2017,*[50] was introduced into the South African debt relief arena. The Bill was published for public commentary by the Portfolio Committee on Trade and Industry[51] in November 2017. It seeks to address not only some of the limitations in the current NCA but also the disparity identified in the treatment of debtors in the South African debt relief arena,[52] by introducing the notion of debt intervention to provide for low-income over-indebted consumers.[53] The draft Bill has as its object to provide relief to this "vulnerable group".[54]

This dissertation examines whether the Bill will achieve the desired effect of providing debt relief to over-indebted individuals who are presently excluded from existing debt relief measures in South Africa and how the Bill fares in the light of some international trends and guidelines.[55]

1.2 Research objectives

The research objective of this study is to establish whether the proposed debt intervention procedure will succeed in offering debt relief to presently marginalised consumers. An ancillary objective of this study is to determine to what extent it adheres to some of the international norms for natural person insolvency. In order to reach these objectives, the dissertation seeks to answer the following more specific questions, namely to what extent:

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[49] 'The Bill' published for comment in Notice 922 of 2017 Government Gazette 41274 of 24 November 2017.
[50] Hereafter the "*Memorandum*".
[51] "The Portfolio Committee".
[52] The Bill's object is to provide "capped intervention to South Africans who have no other effective or efficient options to extract themselves from over-indebtedness." *Memorandum* 21.
[53] Proposed s86A of the Bill.
[54] According to *Memorandum* 22.The Insolvency Act, 1936 (Act No. 24 of 1936), does not assist a debtor where there is no benefit to creditors, thus excluding consumers with no or minimal assets. The National Credit Act, 2005 (Act No. 34 of 2005) (''the Act''), provides for a debt review measure to alleviate household debt. Similarly, the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), provides for debt administration where an administrator assists to handle the debtor's finances and to pay off his/her debt. However, due to the costs involved in the debt review and debt administration procedures, this vulnerable group is in practice still excluded."
[55] The general principles espoused in the International Federation of Insolvency Professionals Consumer debt report: Report of findings and recommendations 2011 (hereafter "INSOL"), as well as the recommendations contained in the 2011 World Bank Insolvency and Creditor/Debtor Regimes Task Force Working Group (hereafter "World Bank") *Report on the treatment of the insolvency of natural persons* (hereafter "World Bank *Report*")will be referred to for guidelines about specific aspects of the treatment of natural person insolvency. Two *INSOL Consumer debt reports* were issued, one in 2001 and the second in 2011. According to Van Appeldoorn in the foreward to the 2011 report, the second edition is mostly an expansion of the first report, accompanied by specific country surveys.

(a) the existing statutory debt relief measures provide relief and who is excluded from such procedures;
(b) the proposed debt intervention procedure conforms with international principles, guidelines and best practices; and
(c) the proposed debt intervention procedure will address the lacuna created by the existing system.

1.3 Delineation and limitations

This study deals only with debt relief of natural person consumers.

The interplay between sequestration applications, administration applications, debt review and debt intervention of debtors will be mentioned only in passing.

The determination of reckless lending and credit and the recommendations and penalisation regarding it, will not be discussed.

Property rights will be alluded to in the context of the practical implementation of the debt intervention as a debt relief measure but will not be focused on.

Administrative law, especially the powers of delegation, is not discussed.

The constitutionality of the powers and procedures of the NCR and the Tribunal will only be commented on in passing. Procedural aspects will be dealt with only incidental to the effectiveness and viability of debt intervention. Similarly, any anticipated problems with referrals to, and the absence of, specific rules and regulations will not be scrutinised.

Unpublished proposals by the South African Law Reform Commission as well as proposals from workshops to reform the procedure or duration of the administration procedure are not dealt with in any detail in this study.

Causes of over-indebtedness will not be examined.

International principles and guidelines will be referred to in assessing debt intervention but the focus of this study is not the evaluation of the South African debt relief system as a whole in terms of international guidelines.

Only a cursory reference may be made to other international jurisdictions regarding possible solutions to NINA and LILA debt relief.

1.4 Methodology

This dissertation entails desk-based research. Current legislation is used to establish a foundation from which a pragmatic and comparative approach is adopted. The Bill (which has been circulated for public comment) is studied to establish what it entails and how it compares to the existing debt relief measures in South Africa. Articles, case law and textbooks discussing and criticising the deficiencies of the existing debt relief regime are used to measure and ascertain whether the objective of the Bill will be achieved. The primary areas of comparison between the existing debt relief measures and the Bill focuses on the access criteria and the debt relief offered. Whether or not the Bill addresses the identified shortcomings of the current debt relief landscape, is examined. The World Bank Report [56]and the INSOL Consumer debt report[57] contain guidelines and principles for natural person insolvency that are used to measure whether the proposed debt intervention procedure complies with international trends as a debt relief measure.

1.5 Overview

Chapter 1 briefly introduces the current debt relief measures available in South Africa. International trends are mentioned to illustrate the direction in which debt relief policies are developing. It also sets out the research objectives, delineations and limitations to the study, the chapter overviews and definitions that will be used throughout the study.

Chapter 2 briefly outlines some principles and guidelines compiled by two international bodies which are relevant to this study. The existing statutory and common law debt relief measures available in South Africa are discussed by comparing the access criteria as well as the relief provided by each procedure. The exclusion of certain debtors is highlighted.

Chapter 3 introduces the notion of debt intervention as proposed in the NCA Amendment Bill, 2018. Procedural aspects of the Bill will be discussed and salient concepts relating to

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[56] The 2011 World Bank Insolvency and Creditor/Debtor Regimes Task Force Working Group (hereafter "World Bank") *Report on the treatment of the insolvency of natural persons.*

[57] The INSOL International *Consumer debt report: Report of findings and recommendations* eds 2001 (hereafter INSOL *Consumer debt report I)* and 2011 (hereafter INSOL *Consumer debt report II*).

access criteria to the measure, as well as the nature of the debt relief provided, will be scrutinised. The Bill will be measured against some international guidelines, trends and principles.

Chapter 4 concludes the dissertation by assessing the debt intervention measure from a holistic debt-relief perspective by considering the value of the addition of this Bill to the debt-relief milieu in South Africa and determining whether the Bill accomplishes the objectives it sets out to achieve.

1.6 Terms, definitions and reference methods

(a) The masculine form is used throughout unless otherwise indicated

(b) The terms "consumer",[58] debtor, "insolvent",[59] "debt intervention applicant"[60] in this dissertation are interchangeable terms for the individual who finds himself in a situation of over-indebtedness.

(c) "Debt counselling" refers to the "debt review procedure".[61]

(d) "Discharge" means the release from the payment of liabilities resulting from the filing of a bankruptcy or insolvency proceeding.[62]

(e) "Extinguishment of debt" means the release from or expungement of debt.

(f) "Insolvent" and "over-indebted" for purposes of this dissertation are synonyms for the financial state of a consumer. In this respect, Section 79 of the NCA explains over-indebtedness as follows:

> "if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party"[63]

(g) "NINA" debtors are indigent debtors who have no income and no assets (and have so-called assetless estates).[64]

(h) "LILA" debtors are debtors who have a low income and low assets.[65]

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[58] S 1 the NCA.
[59] S 2 Act 24 of 1936.
[60] S 1 "the Bill".
[61] S 86 of NCA.
[62] INSOL C*onsumer debt report II* 9.
[63] The "NCA".
[64] Roestoff and Coetzee "Debt relief for South African NINA debtors" 2017 *CILSA* 252.
[65] Coetzee *LLD thesis* 5.

(i) "Rehabilitation" refers to the effect of discharging all debts which were due or the cause of which had risen before sequestration" as referred to in section 129 of the Insolvency Act.[66]

(j) The World Bank *Report* speaks of "*economic rehabilitation"* as[67]

> "Rehabilitation can be said to include three elements. First, the debtor has to be free from excessive debt. The benefits of the discharge have been extensively discussed from the point of view of the debtors, creditors and the society in section I.9, above. Second, the debtor should be treated on an equal basis with non-debtors after receiving relief (the principle of non-discrimination). Third, the debtor should be able to avoid becoming excessively indebted again in the future, which may require some attempt to change debtors."

(k) The South African Law Commission is now known as the "South African Law Reform Commission (SALRC)" and will be referred to as such.

[66] 24 of 1936.
[67] World Bank *Report* par 359.

CHAPTER 2: THE SOUTH AFRICAN DEBT RELIEF LANDSCAPE

2.1 Introduction

Statutory debt relief measures currently available to South African consumers include the sequestration of the debtor's estate under the Insolvency Act,[68] the administration order procedure under section 74 of the Magistrates' Courts Act,[69] and the debt review procedure in terms of section 86 of the National Credit Act.[70] In addition to these statutory measures, a consumer can also enter into a voluntary debt restructuring with his creditors under the common law.[71] These measures have different criteria setting out how they may be accessed and by whom, as well as the nature and extent of the relief provided.

International guidelines and principles have been compiled which provide guidance as to the characteristics of an effective treatment of natural person insolvency.[72] These reports[73] are not prescriptive but reflect global best practices.[74] The principles contained in these reports will be referred to when examining existing debt relief measures in South Africa. However, the focus is not on evaluating the current South African debt relief measures against such standards,[75] but rather on identifying that inadequacies do exist. In this chapter, salient aspects of international principles and guidelines will be listed and thereafter the current South African debt relief measures will be discussed referring to such guidelines and principles. Specific attention will be given to the access of debtors to the system, as well as the debt relief provided.

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[68] Act 24 of 1936 (hereafter "the Insolvency Act").
[69] Act 32 of 1944 (hereafter "Magistrates' Courts Act").
[70] Act 34 of 2005 (hereafter the "NCA").
[71] Boraine and Roestoff "The treatment of insolvency of natural persons in South African law" 2013 *World Bank Legal Review*.
[72] The 2011 World Bank Insolvency and Creditor/Debtor Regimes Task Force Working Group (hereafter "World Bank") *Report on the treatment of the insolvency of natural persons* and the INSOL International *Consumer debt report: Report of findings and recommendations* eds 2001 (hereafter INSOL *Consumer debt report I)* and 2011 (hereafter INSOL *Consumer debt report II*).
[73] The World Bank *Report* and INSOL *Consumer debt report II.*
[74] Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* (LLD thesis University of Pretoria 2015).
[75] An evaluation of natural person debt relief comparing it to international guidelines has already been done. Coetzee *LLD thesis*.

2.2 International studies and reports

To ascertain what the global principles and trends are in natural person insolvency two pertinent reports, namely the INSOL *Consumer debt report* (2011 edition) and the World Bank *Report*, will be considered. Specific attention will be paid to principles regarding debtors' access to debt relief as well as to the nature of the debt relief provided, especially the discharge from debt. In view of the stated objective[76] of the proposed debt intervention measure to provide debt relief for "over-indebted individuals especially in the lower income groups"[77] (identified as NINA and LILA debtors),[78] much focus will be on their treatment in other jurisdictions as formulated by these studies.

The INSOL *Consumer debt report I* was released in 2001 prior to the economic crisis. The second report, the INSOL *Consumer debt report II*, which expanded on the principles of the first report and contained an additional study of specific countries, was published in 2011.[79] The principles remained the same although the economic landscape had altered considerably.[80]

For ease of reference, certain points from both the INSOL *Consumer debt report* II and from the World Bank *Report*[81] have been quoted. The INSOL *Consumer debt report II* identifies four principles, namely

" 1 Fair and equitable allocation of consumer credit risks
2. Provision of some form of discharge of indebtedness, rehabilitation or "fresh start" for the debtor
3. Extra-judicial rather than judicial proceedings where there are equally effective options available
4. Prevention to reduce the need for intervention"[82]

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[76] Memorandum on the Objects of the National Credit Amendment Bill, 2017 (hereafter "*Memorandum*") 21.
[77] *Ibid.*
[78] Ch 1 par 1.1.
[79] Coetzee LLD thesis 58.
[80] Coetzee LLD thesis 64 points out that even in volatile economic times the original principles were still accepted.
[81] INSOL *Consumer debt report II* and the World Bank Insolvency and Creditor/Debtor Regimes Task Force Working Group (hereafter "World Bank") *Report on the treatment of the insolvency of natural persons* 2011 (hereafter the "World Bank *Report")*.
[82] INSOL *Consumer debt report II* 16.

In order to achieve these principles INSOL compiled practical recommendations. For purposes of this study, only the recommendations for legislators and government will be mentioned. They read as follows:

- "Enact laws to provide for a fair and equitable, efficient and cost-effective, accessible and transparent settlement and discharge of consumer and small business debts.
- Allow partial or total discharge of the debts of individuals and, where applicable, families in cases of over-indebtedness where other measures have proved to be ineffective, with a view to providing them with a new opportunity for engaging in economic and social activities.
- Provide for appropriate alternative proceedings depending on the circumstances of the consumer debtor.
- Consider providing for more appropriate separate or alternative proceedings for consumer debtors.
- Ensure that consumer debtor insolvency laws are mutually recognised in other jurisdictions and aim at standardization and uniformity.
- Offer the consumer debtor a discharge from indebtedness as a method of concluding a bankruptcy or rehabilitation procedure.
- Effectively limit the means of creditors to hinder debt settlements unreasonably.
- Ensure that payment plans in debt adjustment are reasonable, in accordance with national practices, both in repayment obligations and in duration; ensuring that debt adjustment covers all debts, excluding only those covered by special waivers provided under national law.
- Establish mechanisms for extra-judicial settlements and encouraging such settlements between the debtor and creditor."[83]

[83] INSOL *Consumer debt report II* 16.

Government, semi-governmental or private organisations should:

- "Ensure the availability of accessible, sufficient, competent and independent pre and post-bankruptcy debt-counselling.
- Set up voluntary educational programmes to improve information and advice on the risks attached to consumer credits.
- Encourage the development of extra-judicial or out-of-court proceedings in order to resolve the problems of consumer debts.
- Set up policies relating to debt management and to the treatment of over-indebted individuals and families and ensuring uniformity of such policies.
- Collect information and statistics on debt problems and analyse the situation of over-indebted individuals and families in their countries.
- Encourage effective financial and social inclusion of over-indebted individuals and families, in particular by promoting their access to the labour market.
- Encourage the active participation of the debtor in debt settlement and, where necessary, counselling and advice following the debt settlement.
- Set up debt advice, counselling and mediation mechanisms, as well as ensuring, or at least encouraging, effective participation of lending institutions and other public and private creditors in implementing national policies for debt management.
- Ensure appropriate quality standards and impartiality of the services provided."[84]

In addition to the INSOL *Consumer debt report II*, in 2011 the World Bank mandated a task force to consider natural person insolvency.[85] The report entitled *Report on the treatment of the insolvency of natural persons* was published in 2012.[86] The report is a non- prescriptive study of many jurisdictions and though certain best practice guidelines can be gleaned from it the report does not give a summary of the ideal insolvency regime.[87] Although the World

[84] INSOL *Consumer debt report II.*
[85] Coetzee LLD thesis 65.
[86] The World Bank *Report.*
[87] Coetzee LLD thesis 90.

Bank *Report* refers to "a series of core legal attributes of regimes designed to deal with the insolvency of natural persons"[88] Coetzee rightfully laments, "unfortunately, not one of the reports provide exact guidelines as to how a NINA procedure should be devised."[89]

Some of the attributes relating to natural person insolvency are listed here.[90] Many correspond with recommendations made by INSOL. The access criteria and procedures, as well as the debt relief provided, are primarily of interest to this study. In this regard, the report provides the following pertinent points:

> "Policymakers generally seek the following goals in choosing a particular structure for a system of insolvency for natural persons: similar treatment for individuals similarly situated, prevention of fraud and abuse, and reduction of unnecessary bureaucratic requirements."[91]

Regarding access, the report notes:

> "The standards for access to individual insolvency and restructuring procedures should be transparent and certain while ensuring against improper use by either creditor or debtor. Open access may be defined as the idea that an individual who meets an insolvency test such as the inability to pay debts as they fall due may, without more, gain access to an insolvency procedure permitting an ultimate discharge of debts".[92]

The report has the following to say about the role of creditors:

> "In the insolvency of natural persons, creditor participation does not assume the important role it normally has in business insolvency."[93]

An aspect which enjoys prominence in the discussion in the report is the role of exempt assets:

> "Another important aspect of the legal regime refers to exemptions. This is not only an issue relevant for insolvency but for debtor-creditor regimes in general. The notion of exempting some of the debtor's property from

[88] World Bank *Report* par 404.
[89] Coetzee LLD thesis 90.
[90] World Bank *Report* par 392 to 456.
[91] Par 414.
[92] Par 418.
[93] Par 421.

liquidation and distribution to creditors is closely tied to the discharge principle and the notion of the fresh start."[94]

The growing problem in all jurisdictions appears to be the prevalence of NINA debtors and how to deal with their dilemma,

"One of the most pressing problems is the treatment of debtors who cannot generate significant disposable income for the duration of the plan. These debtors, commonly referred to as "NINAs" (No Income, No Assets), may have sufficient resources to cover their basic needs, but they have no extra resources to pass on to creditors**.** Significant numbers of debtors in all insolvency systems for natural persons today fall into this category."[95]

A fundamental principle which is highlighted in both reports[96] is the necessity of discharge from debt and/or rehabilitation of a debtor. The INSOL *Consumer debt report II* states "A discharge from debt is the "provision of some form of discharge of indebtedness, rehabilitation or "fresh start" for the debtor"[97] and The World Bank *Report* sets it out as follows,

"One of the principal purposes of an insolvency system for natural persons is to re-establish the debtor's economic capability, in other words, *economic rehabilitation*. Rehabilitation can be said to include three elements. / First, the debtor has to be free from excessive debt. The benefits of the discharge have been extensively discussed from the point of view of the debtors, creditors and the society in section I.9, above. Second, the debtor should be treated on an equal basis with non-debtors after receiving relief (the principle of non-discrimination). Third, the debtor should be able to avoid becoming excessively indebted again in the future, which may require some attempt to change debtors' attitudes concerning proper credit use."[98]

These international reports reflect a general shift in insolvency regimes from pursuing natural person debtors[99] merely to obtain payment for creditors, to a recognition of debtor's

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[94] Par 426.
[95] Par 439.
[96] The second principle in the INSOL *Consumer debt report II* 13.
[97] INSOL *Consumer debt report* 13.
[98] World Bank *Report* par 359.
[99] INSOL *Consumer debt report II, the first principle 15 states.*

circumstances.[100] The necessity of enabling a debtor to get out of debt is recognised and the benefits[101] to society as a whole are recognised.[102] It is accepted, therefore, that access to debt relief should be simple and easy without unnecessary costs.[103] A properly functioning insolvency procedure should provide debt relief to debtors in a "brief and not overly cumbersome procedure".[104] The debt-relief regime should be designed to provide relief to over-indebted debtors by a brief procedure which removes the "unserviceable debt burden and re-invigorates the debtor's capacity for self support",[105] whereby the debt is cleared[106] and the debtor restored to a state where he is freed from the implications of debt to enable him to start his credit afresh.[107]

2.3 Statutory debt relief procedures

2.3.1 Sequestration

The sequestration procedure as set out in the Insolvency Act is considered archaic by many[108] because of its pro-creditor stance.[109] In essence, the purpose of sequestration is to ensure the orderly liquidation of assets to distribute the proceeds and settle the claims of creditors in accordance with the provisions of the Insolvency Act.[110] Because it was enacted as a collective collection procedure[111] in insolvent circumstances, and not to assist insolvent debtors, the most important access requirement is that there should be an "advantage for creditors"[112] in applying this procedure.

The Insolvency Act provides for two means by which a sequestration application can be launched; a voluntary surrender application of his estate by the debtor himself or a compulsory sequestration application by his creditors. Apart from the procedural

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[100] World Bank *Report* par 393 "the desire to relieve individual suffering is more direct and more central in the context of natural person insolvency."
[101] World Bank *Report* par 400 lists benefits to society of addressing natural person insolvency effectively.
[102] World Bank *Report* par 398.
[103] INSOL *Consumer debt report* II 16.
[104] World Bank *Report* 406.
[105] World Bank *Report* par 39.
[106] INSOL *Consumer debt report II* 13.
[107] World Bank *Report* par 359.
[108] Coetzee "Is the unequal treatment of debtors in natural person insolvency justifiable? A South African exposition" 2016 *Int Insolv Rev* 37.
[109] Boraine, Evans, Roestoff "The pro creditor approach in South African insolvency law and the possible impact of the Constitution" 2015 *NIBLeJ*.
[110] Sharrock *et al Hockly's Insolvency law* (2012) 4.
[111] A *concursus creditorum* sets in once the sequestration order is granted "which means that the interests of creditors as a group enjoy preference to those of individual creditors." *Ibid*.
[112] Ss 6(1) and 10(c) Insolvency Act.

requirements for a voluntary surrender application by the debtor,[113] the onus is on the debtor applicant to prove that he is insolvent,[114] that he owns "realisable property of a sufficient value to defray all costs of the sequestration" and that the sequestration "*will be* to the advantage of creditors".[115] Creditors may oppose the application[116] and even if they do not, the court has the discretion to refuse the application[117]and will do so if it that there is no advantage to creditors is established. The courts generally require that a minimum dividend payable to creditors be established.[118] A rule of thumb used in the courts is that a dividend of at least 20c in the rand must be asserted. If the court is of the opinion that a debt review application coupled with the provisions regarding reckless credit in terms of the NCA would be a more appropriate remedy, it may refuse an order for voluntary surrender.[119]

A compulsory sequestration application is petitioned by a creditor (or creditors) who has a liquidated claim for not less than R100 or an aggregate of not less than R200 if there is more than one creditor. There are statutory acts of insolvency set out in section 8 on which a creditor can rely as an "act of insolvency".[120] The applicant must allege that the debtor is insolvent and that he has "reason to believe" there is an advantage to the body of creditors.[121] The courts have interpreted the advantage requirement quite broadly as a reasonable prospect.[122] Because the requirements for a voluntary surrender of the estate is more stringent, it has become the practice to use "friendly" sequestrations by creditors, usually relying on section 8 (g) of the Act, where the debtor gives a friend or family member notice that he is unable to pay his debts.[123] Although a less onerous burden of proof is placed on the creditor-applicant, advantage must still be established, usually by having sufficient assets in the estate which can be liquidated. Although a potential advantage is required to grant the order and thus bars access, the actual dividend payable to creditors may prove

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[113] S 4 Insolvency Act.
[114] This is an objective test of whether the debtor's liabilities exceed his assets, not merely a failure to pay a debt. *Venter v Volkskas* 1973 SA 175 (T) 179.
[115] My italics; s 6(1).
[116] S 6(1) of the Insolvency Act.
[117] S 6(1) of the Insolvency Act
[118] Bertelsmann *et al Mars The Law of Insolvency in South Africa 9th ed (2008) 2.*
[119] *Ex parte Ford* 2009 (3) SA 376 WCC 381 and 382.
[120] Insolvency Act.
[121] *Stratford and Others v Investec Bank Limited and Others* 2015 (3) SA 1 (CC).
[122] *Dunlop Tyres Ltd v Brewitt* 1999 (2) SA 580 (W) where the advantage was that an enquiry enabled the piercing of the corporate (Trust) veil to locate assets.
[123] *Craggs v Dedekind* 1996 (1) SA 937(C).

negligible. A court will refuse the order if the application is for "aiding and shielding debtors."[124]

Once a sequestration order is granted, regardless of who brought the application, a *concursus creditorum* is created and the interests of the creditors as a collective are considered,[125] with preference given to secured creditors. Upon sequestration, the insolvent's estate vests in the Master until a trustee is appointed,[126] whereafter it vests in his trustee until his rehabilitation.[127] The insolvent estate includes all property of the insolvent as at the date of sequestration as well as property acquired during sequestration[128] and is administered by his trustee who collects and sells his assets after the second meeting as directed by the creditors. Certain movable assets are excluded from the estate, namely, wearing apparel, household furniture, bedding, tools and other means of subsistence.[129] No value is ascribed to these items in the Act. Remuneration due to the insolvent may only be retained by the insolvent only if the Master is of the opinion that the earnings are in excess of what is required by the insolvent and his family for subsistence.[130] Pension monies,[131] compensation for loss for personal injury or defamation[132] and also certain life insurance policies over the insolvent's life are excluded from the insolvent estate.[133]

There are negative aspects and consequences associated with the sequestration procedure. Both the application for sequestration, as well as a rehabilitation application ensue in the jurisdiction of the high court which usually requires costly legal representation. The insolvent's status and legal capacity are restricted while he is sequestrated, he may not deal with his assets or enter into contracts which may adversely affect his estate without the consent of his trustee.[134] He may also not carry on business as a trader who is a general dealer or manufacturer without the consent of his trustee.[135] He has to keep detailed records of assets and disbursements if required by the trustee[136] and the trustee is entitled to retain

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[124] *Epstein v Epstein* 1987(4) SA 606 (C).
[125] *Walker v Syfret* 1911 AD 141 par 166.
[126] S 20(1).
[127] S 25.
[128] Sharrock *et al Hockly's Insolvency law (2012)* 58.
[129] S 82(9) read with s 23(5).
[130] S 23(5).
[131] S 23(7).
[132] S 23(8).
[133] S 63 of the Long Term Insurance Act 52 of 1998, as amended.
[134] S 23(2).
[135] S 23(3).
[136] S 23(4).

money earned by him which the Master may consider not be necessary for his or his family's support.[137] A trustee may only carry on with the insolvent's business on instructions of the creditors or the Master.[138] Furthermore, there are many fiduciary positions, for instance, that of a director of a company,[139] member of Parliament[140] and a liquidator of a company or close corporation,[141] or a trustee of an insolvent estate[142] which may not be occupied by unrehabilitated insolvents.

The insolvent is deemed to be rehabilitated automatically after a period of 10 years from the date of sequestration[143] or earlier by application to the high court.[144] An insolvent can apply for rehabilitation twelve months after confirmation by the Master of the first trustee's estate account[145] unless the insolvent's estate has been sequestrated before, in which case he must wait for three years before applying for rehabilitation.[146] An insolvent can apply to the court for a rehabilitation order after six months from the date of sequestration if no claims are proved against his estate.[147] If an insolvent has been convicted of a fraudulent act in relation to this or a previous insolvency, he can apply for rehabilitation only after five years from the date of his conviction.[148]The Master's recommendation is required in cases where an application is brought within four years of sequestration.[149]An interested party may prevent automatic rehabilitation within that period.[150] The court has discretion in granting a rehabilitation order and may impose conditions on the rehabilitation.[151] Many factors are considered in the application, and the affidavit must include a statement of assets and liabilities, earnings, the total amount of claims proved and what dividend was paid to his creditors.[152] Rehabilitation has the effect of "discharging all his pre-sequestration debts"[153] and re-investing the insolvent's estate to him.

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[137] S 23(5) of the Insolvency Act.
[138] S 80.
[139] S218(1)(d)(i) of the Companies Act 61 of 1973.
[140] S106(1)(c) of the Constitution 1996.
[141] S372(a) of the Companies Act; s 66(1) of the Close Corporations Act 69 of 1984.
[142] S58(a) of the Insolvency Act.
[143] S127A (1).
[144] S124(3)(b).
[145] S124(2)(a).
[146] S124(2)(b).
[147] S124(3)(b).
[148] S124(3)(c).
[149] S124(2).
[150] S127A (1).
[151] S127(2).
[152] S126.
[153] S129(1)(b).

The Insolvency Act falls short of many of the principles of modern debt relief as espoused by the international community. Access is not automatic or open[154] since the sequestration order is exclusive to those who can afford the costs of the application[155] and have sufficient assets to comply with the financial advantage to creditors' requirement.[156] Access is also reliant on the court's discretion in granting the order and a creditor can oppose the application.[157] The process is court-driven (high court) which adds to the expense, time considerations and inconvenience.[158] International guidelines favour less creditor participation in natural person insolvency.[159] In light of the access requirements, NINA or LILA debtors are clearly excluded from this debt relief measure although they may be totally insolvent.[160]It has been suggested that this exclusion in itself may be discriminatory and therefore unconstitutional.[161]

On the other hand, the rehabilitation obtained does grant a clean discharge of pre-sequestration debt and complies with the World Bank *Report* where it is argued that *"*One of the principal purposes of an insolvency system for natural persons is to re-establish the debtor's economic capability, in other words, economic rehabilitation".[162] The period for automatic rehabilitation after 10 years is considerably longer than the time preferred by international standards.[163] Before then the rehabilitation application falls in the court's discretion which is contrary to preferred practice. There are few assets exempt from the administration procedure,[164] and this is linked to the debtor's ability to make a fresh start.[165]

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[154] World Bank *Report* par 418
"Open access may be defined as the idea that an individual who meets an insolvency test such as the inability to pay debts as they fall due may, without more, gain access to an insolvency procedure permitting an ultimate discharge of debts."

[155] The insolvent must provide security for the rehabilitation application, which creates a further financial impediment. S 125 Insolvency Act.

[156]S 3(1)"surrender his estate for the *benefit* of his creditors." My italics.

[157] World Bank R*eport* par 421 states that creditor participation does not play the same role in natural person insolvency as it does in business since there is normally little value available to creditors.

[158] Although the role of the courts can be beneficial in natural person insolvency because judges are trusted decision-makers and impartial, the disadvantages are the cost factor, judges being intimidating, disputes between creditors and debtors are rarely adversitorial but mostly administrative (World Bank *Report* par 163).

[159] World Bank *Report* par 421.

[160] NINA debtors "may have sufficient resources to cover their basic needs, but they have no extra resources to pass on to creditors**."** World Bank *Report* par 439.

[161] Coetzee *LLD thesis* 246.

[162] World Ban*k Report* par 359.

[163] World Bank Report par 269 "Existing evidence and widespread anecdotal reporting, however, consistently indicate an inverse relationship between plan length and plan success."

[164] World Bank *Report* par 426 raises concerns about leaving debtors with "a sufficient basis from which to recover their productive lives."

[165] Coetzee *LLD thesis* 164.

In evaluating the sequestration order procedure from a debt relief perspective it is clear that there are high requirements to access this procedure as a debt relief measure.[166]A debtor must pass the hurdle of being able to raise funds to afford the high court application as well as having sufficient assets to be sold to establish a pecuniary advantage for creditors.[167] The entire procedure is court-driven with creditors participation possible throughout from access to rehabilitation.[168] Debt discharge is incidental to the sequestration procedure, which is primarily a collective debt collection procedure, but it is currently the only procedure which does provide for a discharge from the insolvent's pre-sequestration debts.Once the sequestration is completed the insolvent is discharged of his pre-sequestration debt and on a rehabilitation order being granted, he has a clean slate as far as credit is concerned. It is for this reason that sequestration is still regarded as the primary debt relief measure in South Africa.[169]

2.3.2 Administration order

Section 74 of the Magistrates' Courts Act[170] introduces the administration order procedure which is described as a "simple and relatively cheap procedure under the supervision of the Magistrates' Court".[171] It has also been described as "a modified form of insolvency"[172] which creates a *concursus creditorum* and protects debtors with few assets as well as the interests of creditors.[173]

A debtor who cannot pay an amount of a judgement against him, or meet his financial obligations, or does not have sufficient assets which can be attached to satisfy the

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[166] World Bank *Report* paras 188 to 196 discuss the various access requirements and point out in par 196 that high access requirements create a barrier to individuals which may keep them in a state of 'informal insolvency' which hampers creditors from collecting debt and takes an emotional toll on the debtors and society.

[167] This barrier to access which has been suggested to be unjustifiable unfair discrimination on the basis of socio- economic status *Memorandum* 21.

[168] Contrary to international principles which advocate extra-judicial solutions for natural person insolvency. INSOL *Consumer debt report II,* the third principle 15.

[169] Coetzee *LLD thesis* 101.

[170] 32 of 1944.

[171] Coetzee *LLD thesis* 172.

[172] *Madari v Cassim* 1950 2 SA 35 (D).

[173] *Madari v Cassim* 38 Caney AJ.

> "This is designed, it seems to me, as a means of obtaining a *concursus creditorum* easily, quickly and inexpensively, and is particularly appropriate for dealing with the affairs of debtors who have little assets and income and genuinely wish to cope with financial misfortune which has overtaken them. Creditors have certain advantages under such an order, including the appointment of an independent administrator and the opportunity of examining the debtor. They are not debarred from sequestrating the debtor if the occasion to do so arises."

judgement, may apply to the magistrate's court for an administration order.[174] His total debt may not exceed the amount prescribed by the Minister (currently R50 000).[175] The debtor must provide all the information required by affidavit and, if illiterate, may be assisted by the clerk of the court.[176]

All creditors must be advised of the administration application and may attend the hearing and prove their claims or object to the application.[177] The debtor may be interrogated by the court or any creditor regarding his assets and liabilities, his income, his standard of living, and the possibility of economising and any other matter the court may deem relevant.[178] If the court grants the administration order,[179] the estate is placed under administration, and an administrator is appointed.[180] The administrator must provide security for his appointment and all funds must be administered in a separate bank or trust account.[181] Only the debtor's inability to pay his debts is considered and "advantage to creditors" is not a consideration. It may take years for creditors to be paid.[182]

The court sets the amount the debtor is obliged to pay to his administrator for distribution to his creditors.[183] The court may also issue an emoluments attachment or garnishee order[184] whereby the recipient of such order is compelled to pay a said amount to the administrator to be divided *pro rata* between the creditors.[185] Claims enjoy the same preference and are paid out in the order prescribed by insolvency laws, which indicates that secured creditors enjoy a preference.[186] The administrator is authorised to realise any of the assets of the estate if required.[187] In practice, this is seldom done.[188]

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[174] Magistrates' Courts Act s 74(1)(a).
[175] s 74(1)(b).
[176] s 74A.
[177] S 74B.
[178] S 74B(1)(e).
[179] S 74C.
[180] S 74E.
[181] S 74J(7).
[182] Boraine, van Heerden and Roestoff "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* 85.
[183] S 74C(1)(a).
[184] S 74D.
[185] S 74J.
[186] S 74J(4)" An administrator may, out of the moneys which he controls, pay any urgent or extraordinary medical, dental or hospital expenses incurred by the debtor after the date of the administration order."
[187] S 74K; S74C(1)(b).
[188] Because the administration procedure provides for both rescheduling of debt and the realisation of assets it is referred to as a hybrid debt relief measure. Coetzee *LLD thesis* 173.

If the debtor falls in arrears or disappears, the administrator must advise the creditors, and the administration order may be rescinded.[189] An administration order may also be suspended, amended or rescinded.[190]

A debtor who incurs further debts without divulging that he is under administration is guilty of an offence.[191] Other than this offence, the debtor's contractual capacity is not curtailed. Debt prescription is interrupted from the day on which the application is brought until a year later.[192] The administration order procedure can be summarised as follows,

> "The effect of the order is to reschedule payment of the debtor's debts under the direction of an administrator, thus granting temporary respite from the predations of creditors. In this sense, an administration order is aptly described as a 'debt relief measure'."[193]

From a debt relief perspective, access to the administration procedure under section 74 is limited to debtors whose total debts are under R50 000 and since it is a repayment plan, a debtor must have sufficient income to distribute amongst his creditors. A debtor with no steady income is excluded from an administration order because there are no funds to distribute to creditors on a regular basis[194] and the costs of the administration cannot be met.[195]

The administration procedure does not provide for the reduction of any amount payable or the interest due. The re-payment is extended only and only once the costs of the administration and all the participating creditors have been paid in full, does the administrator lodge a certificate with the clerk of the court and send copies to all the creditors, upon which the administration order lapses.[196] An administration order does not a debtor's estate still being sequestrated.[197] No time limit for the repayment of debts is prescribed and no discharge is granted.

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[189] S 74J(10).
[190] S 74Q.
[191] S 74S(1).
[192] S 74V.
[193] Boraine "Some thoughts on the reform of administration orders and related issues" 2003 *De Jure* 217.
[194] S 74(1) distribution must be made proportionately at least every three months.
[195] S 74J (1) and s74O.
[196] S 74U.
[197] S 74R.

Clearly, as a debt relief measure, the administration procedure falls short of international principles. With regard to access, the administration order procedure is restricted by a monetary ceiling of R50 000 and is limited to those debtors who have a regular income to be distributed amongst creditors. Contrary to suggested international attributes, the procedure is court-monitored (although the issue is of a financial, not judicial nature) with continued creditor involvement. NINA and LILA debtors are excluded from the procedure because they do not have an income which can be administered and paid to creditors. With regard to the debt relief the administration procedure provides, it is purely an extended repayment plan with no discharge granted to the debtor. The plan remains in place until the debt has been settled in full.

2.3.3 The debt review procedure

The National Credit Act[198] was introduced amongst others "to provide for debt re-organization in cases of over-indebtedness"[199] and for "debt counselling services"[200] by *inter alia* introducing the debt review procedure in section 86.[201] The debt review order entails a restructuring or repayment plan. The consumer must have sufficient income to pay for the re-arrangement instalment and the fees of the debt counsellor.[202] Consumers who earn less than R2 500 can apply for assistance from NCR.[203]

Section 4 dictates that the NCA applies to "every credit agreement between parties dealing at arm's length made within or having an effect within the Republic".[204] To qualify as a credit agreement, goods or services must have been supplied, payment must have been deferred, and a charge, fees or interest must be payable.[205] Credit agreements are divided into credit

[198] The NCA.
[199] Preamble to the NCA.
[200] Reg 1 defines debt counselling as "performing the functions contemplated in section 86 of the Act".
[201] The determination of reckless credit in terms of s 84 is also an important aspect of debt relief since it aims to ensure that credit providers do not grant credit recklessly by not assessing the consumer's circumstances and affordability. S 84 sets out the consequences of a determination of reckless credit which includes the suspension of a credit agreement and setting aside the agreement S83(2)(a) and(b).
[202] The NCR issued Debt Counselling Fee Guidelines (applicable from 1 April 2018) in February 2018 https://bit.ly/2qVObPo (accessed 10 October 2018). The Guidelines set out the tariff according to which a debt counsellor can charge his services.
[203] Quoted from Boraine and Roestoff 2013 *World Bank Legal Review* 107.
[204] S 4(1).
[205] S 8(3)(a) &(b).

transactions,[206] credit facilities[207] and credit guarantees.[208] However, even where an agreement technically resorts under one of these three classes of credit agreements, other provisions may explicitly exclude the NCA's application thereto.[209] For instance, the NCA does not apply to agreements where juristic persons with a turnover higher than the threshold (currently R1 000 000) enter into credit agreements in their capacity as consumers or where juristic persons enter into so-called large agreements in their capacity as consumers.[210] Other exclusions are agreements where the Reserve Bank is the credit provider and where the credit provider is located outside the Republic.[211]

The NCA applies to all credit agreements subject to the requirements and exclusions discussed above, but the provisions of Part D Chapter 4 dealing with over-indebtedness and reckless credit apply only to natural persons who are consumers.[212] A trust, if not seen as a juristic entity,[213] may qualify for debt review.[214]

Provided a consumer's debt falls within the scope of the credit agreements covered by the NCA, a consumer may approach a debt counsellor to apply for debt review in terms of

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[206] S 8(4).

"An agreement, irrespective of its form but not including an agreement contemplated in subsection (2) constitutes a credit transaction if it is colon —

(a) a pawn transaction or discount transaction;
(b) an incidental credit agreement, subject to section 5(2);
(c) an instalment agreement;
(d) a mortgage agreement or secured loan;
(e) a lease; or
(f) any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of —
    (i) the agreement; or
    (ii) the amount that has been deferred."

[207] S 8(3).

[208] S 8(5). Generally referred to as a suretyship. Coetzee *LLD thesis* 191.

[209] S 8(2)

"An agreement, irrespective of its form, is not a credit agreement if it is

(a) a policy of insurance or credit extended by an insurer solely to maintain the payment of premiums on a policy of insurance;
(b) a lease of immovable property; or
(c) a transaction between a stokvel and a member of that stokvel in accordance with the rules of that stokvel."

[210] S 4(1)(b) read with s 9(4) and s 7(1)(b).

[211] S (4)(1)(a)(b)(c) and (d).

[212] S 78(1).

[213] *FirstRand Bank v Olivier* 2009 (3) SA 353 (SEC)357D Erasmus J, but in *Standard Bank of SA Limited v Coskey and Others* [2016] ZAGPPHC 790 (1 September 2016), the court ruled that the reckless credit provisions of the Act do not apply when the consumer is a juristic person.

[214] *FirstRand Bank Ltd v Brand NO* 2017 ZAGPPHC 438 where a trust applied for debt review.

section 86[215] (also referred to as debt counselling).[216] If a creditor has already initiated steps to enforce payment of a debt, such debt is excluded from the debt review application.[217] Conversely, a credit provider who receives notice that a consumer has applied for debt review, may not take steps to enforce his rights under the credit agreement.[218] A consumer may raise over-indebtedness even when a creditor has proceeded with enforcement proceedings, in which case the court may refer the matter directly to a debt counsellor for assessment or declare that the consumer is over-indebted and make any order regarding reckless credit or the rearrangement of the consumer's obligations.[219] There is no financial cap to the amount of the debt to be considered for debt review, and the magistrates' courts have jurisdiction to hear a referral under section 87, regardless of the monetary value.[220]

The application for debt review entails the consumer applying to the debt counsellor to be declared over-indebted.[221] The criteria to assess whether a consumer is over-indebted is set out in section 79. The assessment is made as at the time of the determination (application), whether the consumer is then, or will in the future, be unable to meet his financial obligations under all his credit agreements.[222] The value of the debt,[223] the consumer's current finances as well as his financial history are considered.[224] It is a statutory requirement that in participating in the review and any negotiations to re-arrange the consumer's debt, the consumer and the credit providers must act in good faith.[225]

If the debt counsellor assesses the consumer not to be over-indebted, he must reject the application even if it appears that there may have been reckless lending at the time the agreement was concluded.[226] If the debt review application is rejected, the consumer may approach the magistrate's court directly to apply for an agreement to be declared reckless or to have his obligations rearranged.[227]

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[215] Reg 24 Form 16.
[216] Reg 1 refers to debt counselling as "performing the functions contemplated in section 86."
[217] S 86(2).
[218] S 88(3).
[219] S 85.
[220] Van Heerden "Over-indebtedness and reckless credit" in Scholtz JW *et al* (eds) *Guide to the National Credit Act (*2016). The legislator clearly intended to make the procedure more accessible by giving magistrates' courts jurisdiction.
[221] S 86(1).
[222] S 79(2).
[223] S 79(3)(a).
[224] S 79(1) (a) & (b).
[225] S 86(5)(b).
[226] S 86(7)(a).
[227] S86(9).

If the consumer is considered not to be over-indebted but experiencing difficulties, the debt counsellor may recommend that the consumer must voluntarily re-arrange his debts with the creditors. This re-arrangement can be made a consent order of the court in terms of section 138.[228]

If the debt counsellor concludes that the consumer is over-indebted, he may recommend that the magistrate's court orders that the agreement constitutes reckless credit,[229] and/or[230] that the consumer's debt be re-arranged in any of the following ways:

"(a) extending the period of the agreement and reducing the amount of each payment due accordingly;

(b) postponing during a specified period the dates on which payments are due under the agreement;

(c) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement, or

(d) re-calculating the consumer's obligations because of contraventions of Part A or B of Chapter 5 or Part A of Chapter 6."[231]

(e) The debt counsellor recommends the proposal to the court but ultimately only the court may make the order. Therefore, sufficient evidentiary information must be placed before the court to exercise its discretion in terms of section 87.[232]

Payments in terms of the debt review order are not made to the debt counsellor, but to payment distribution agents who are registered under the NCR and who receive and distribute the funds in terms of the re-arrangement order to the credit providers.[233]

The effects of a debt review order are set out in section 88. In this respect, the consumer is prohibited from incurring any charges or entering into any further credit agreements until the debt review application has been rejected; or the period for filing by the consumer has expired;[234] or the court has determined that the consumer is over-indebted or has rejected

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[228] S86(7)(b) & 8(a).
[229] S86(7)(c)(i).
[230] S86(7)(c).
[231] S86(7)(c)(ii).
[232] *Nedbank Ltd v Norris* 2016 JDR 0355 (ECP) Sufficient evidence must be placed before the magistrate to show over-indebtedness not merely that the consumer's payments exceed his income.
[233] S1 definition "means a person who on behalf of a consumer, that has applied for debt review in terms of the Act, distributes payments to credit providers in terms of a debt arrangement, court order, order of the Tribunal or an agreement".
[234] S 88(1)(a).

the debt counsellor's proposal;[235] or lastly, the consumer has fulfilled his obligations in terms of a rearranged credit agreement or by way of a consolidation agreement with his creditors.[236] If he applies for credit contrary to this, he is unable to invoke the provisions of Part D Chapter 4 and the protection afforded by it.[237]

On the other hand, although there is not a blanket stay of proceedings against the consumer, a creditor is prohibited from proceeding with litigation to enforce his rights or security once the consumer has applied for debt review[238] unless any of the events listed above have occurred.[239] Briefly, these events are that either the application has been rejected; or the court has accepted that the consumer is over-indebted, or the consumer has re-arranged or consolidated his credit agreements, or the consumer has defaulted on his obligations as ordered by the court or Tribunal. If a credit provider enters into a credit agreement while the consumer is under debt arrangement, such credit agreement can be declared reckless in terms of section 80,[240] whether or not those circumstances apply.[241]

In *Nedbank v Norris*[242] it was stressed that the magistrate's court is a creature of statute and cannot exceed its powers and that a "debt re-arrangement order, does not, and cannot, extinguish the underlying contractual obligations". The court decided that subsection 87(7)(c)(ii) spells out the orders which a court is authorised to make, and the court cannot order the reduction of an interest rate from a fixed rate of 17.5% to 0%. The court also found that:

> "[a] debt rearrangement order has as its purpose the rescheduling or re-arrangement of the obligations of the consumer in such a manner as to enable the consumer to meet his/her/its obligations to the credit provider. It serves to mitigate the effect of over-indebtedness by making provision for payments within the existing means of the consumer and over an extended period."[243]

However, in *Sansom v Mars and Others*, Judge Allie ruled,

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[235] S 88(1)(b).
[236] S 88(2).
[237] S 88(5).
[238] S 88(3).
[239] S 88(3)(b).
[240] S 80 sets out when it is determined that a credit agreement is reckless.
[241] S 88(4).
[242] 2016 JDR 0355 (ECP).
[243] Par 44.

"…. there are instances in which a magistrate, after duly applying his/her mind to all the relevant factors, will be required to vary the duration of the credit agreement, the instalments due and payable and interest that forms part of the indebtedness under the credit agreement to achieve an equitable and fair result for the parties."[244]

The NCA does not directly provide for the realisation of assets to restructure debt in debt review although in *Standard Bank of South Africa Ltd v Panayiotts*[245] it was stated that,

"Having regard to the wording of s 79, such proof must inevitably involve details of, *inter alia*, the consumer's financial means, prospects and obligations. Financial means would include not only income and expenses but also assets and liabilities. Prospects would include prospects of improving the consumer's financial position, such as increases, and, even, liquidating assets."[246]

and also that,

"the NCA does not envisage that a consumer may claim to be over-indebted whilst at the same time retaining possession of the goods which form the subject matter of the agreement. Such goods should be sold to reduce the defendant's indebtedness."[247]

[244] *Samson v Mars* A158/2017 ZAWCHC par 38.
[245] 2009 (3) SA 363 (W).
[246] 366 E-F.
[247] 375B–C.

There is no maximum period prescribed in the NCA for the repayment of the debts. In deciding whether to grant an order, the courts may consider the duration of a repayment plan in deciding whether the debt restructuring plan is viable or not.[248] In this respect, the eventual settlement of the debt is contemplated. Section 3(g) provides for one of the purposes of the NCA as,

> "addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based *on the principle of satisfaction by the consumer of all responsible financial obligations;"*[249]

and section 3(i*)* further provides that*,*

> "providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority *on the eventual satisfaction of all responsible consumer obligations under credit agreements."*[250]

Only after the consumer has satisfied all his obligations under every credit agreement that was subject to that debt re-arrangement order, or demonstrated his ability to satisfy the future obligations in terms of the re-arrangement order or agreement under a mortgage agreement, or every credit agreement has been settled in full,[251] can a clearance certificate be issued by a debt counsellor.[252] A debt counsellor cannot withdraw or terminate the debt review process.[253]

There are no provisions in the NCA for the automatic termination of debt review on the non-happening of a specific event[254] nor by the lapse of time.[255] There are no provisions allowing the cancellation of debt review by the debt counsellor although in *Mercedes Benz Financial Services South Africa v Holtzhausen*[256] the court found that non-payment of the debt

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[248] See *Seyffert v FirstRand Bank* 2012 6 SA 581 SCA, here a monthly repayment proposal would have resulted that not even the interest is repaid the restructuring was "devoid of economic rationality" and would not lead to the discharge of the debt.

[249] My italics.

[250] My italics.

[251] Coetzee *LLD thesis* 206 points out that the consumer is "rehabilitated" by the issue of the clearance certificate but that this "rehabilitation" is contrary to international guidelines since it is dependent on the level of payment made to creditors.

[252] S 71(1).

[253] Phaladi v Lamara and Another 2018 (3) SA 265 (WCC) (12 January 2018).

[254] Van Heerden and Coetzee "Perspectives on the termination of debt review in terms of Section 86(10) of 34 of 2005" 2011 *PER/PELJ*.

[255] *Coetzee and Another v Nedbank Ltd* (2793/10) [2010] ZAKZ DHC 46; 2011 (2) SA 372 (KZD).

[256] [2012] ZAWCHC 382 (7 December 2012).

counsellor's fees constituted sufficient grounds for withdrawing from the debt review process.

The credit provider may terminate the debt review if a consumer defaults on any of the debts which are under debt review, but only if he has given notice to the consumer, the debt counsellor and the NCR, at least 60 days after the date on which the consumer applied for debt review.[257] However, no credit provider may terminate the application for debt review if such application for debt review has already been filed in court or with the Tribunal.[258] The court is explicitly authorised to resume a debt review application if during enforcement proceedings it may be considered just to do so under the circumstances.[259]

The debt review lapses when a clearance certificate is issued by the debt counsellor. The debt counsellor must file a copy of the clearance certificate with the national credit register[260] and all the credit bureaux. All information regarding the debt review is then expunged from the records.[261] The consumer is then "rehabilitated."[262]

In evaluating the debt review procedure from a debt relief perspective, it is clear that access to debt review is limited to consumers under credit agreements only.[263] Debtors with debt not based on a credit agreement, like delicts, clothing accounts, maintenance and municipal accounts, are excluded,[264] as are debtors where a credit provider has initiated steps to enforce payment.[265]

There are no provisions for either the release of the debtor or discharge from his debts. One of the stated purposes of the Act is specifically "addressing and preventing over-indebtedness of consumers and providing mechanisms for resolving over-indebtedness

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[257] S 86(10).
[258] S 86(10)(b).
[259] S 86(11).
[260] Despite the fact the Act refers to the national credit register, it does not exist as yet and only the credit bureaux attend to such expungement as referred to in S 71 (5).
[261] S71(5).
[262] Coetzee *LLD thesis* Fn 243 207. She points out that contrary to international guidelines and principles, no discharge of debt is actually provided for. It is preferable that discharge should be granted in the not too distant future. The issue of a clearance certificate may be far in the future and only after the debtor has satisfied all his financial obligations or proved that he will be able to do so.
[263] S4 subject to exclusions and qualifications in par 2.3.1.
[264] Coetzee *LLD thesis* 212.
[265] S 86(2).

based on the principles of *satisfaction by the consumer of all responsible financial obligations".*[266]

Coetzee points out that although the debt review procedure does not require an advantage to creditors, only mildly over-indebted consumers can be assisted because a restructuring plan must be financially feasible to be accepted by the court.[267] NINA and LILA debtors could not benefit from a re-arrangement since their income would be insufficient to propose an economically viable restructuring plan.[268] In *Seyffert v Firstrand Bank*,[269] the Supreme Court of Appeal (Judge Malan) found,

> "Only scant material was presented by the appellants to the court below, and their evidence falls short of inspiring confidence that their affairs will improve so as to enable them to eventually discharge their obligations. Neither of the proposals envisages the discharge of the debt within the agreed period or within any suggested, and feasible, extended time. This is not a case where a debt review can usefully be employed."

Although the introduction of the measures in the NCA, especially debt review regulated by section 86, has arguably made a difference in the administration of credit, debt review as a debt relief mechanism is limited in its application and its effect. Although there is no ceiling to the size of the debt, only debt emanating from credit agreements qualifies for the debt review procedure. Any debt in which the credit provider has initiated enforcement steps is also excluded from debt review. With regard to the relief it provides, it is a debt restructuring procedure only, and no discharge of debt is granted to the debtor. NINA and LILA debtors do not benefit from the debt review process because more often than not their debt will not be based on a credit agreement and they do not have the financial income to service a debt albeit a restructured plan.

It has long been felt that South Africa needs an overhaul of all its debt relief measures in one piece of legislation where all the issues can be addressed.[270] It was suggested that the

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[266]S 3(g). (My Italics).
[267] Coetzee *LLD thesis* 214.
[268] The Memorandum on the Objects of the National Credit Amendment Bill, 2017 *(hereafter* the "Memorandum"). Debt counsellors are wary of accepting debtors with an income under R7 500 per month for debt review since it is not viable for them.
[269] *Seyffert v FirstRand Bank* 2012 (6) SA 315 D.
[270] Boraine, van Heerden and Roestoff "A comparison between formal debt administration and debt review – the pros and cons of these measures and suggestions for law reform" (part 2) 2012 *De Jure* 254.

legislature should expand on the infrastructure of debt counselling where the NCR strictly regulates the procedures,[271] especially regarding the payment through payment distribution agents.[272]

2.4 Common law measures

A consumer debtor can approach his creditors to arrange an informal debt arrangement; a voluntary restructuring or a composition. Debt counsellors also use voluntary re-arrangements for non-credit agreements together with debt review since the latter applies to credit agreements only.[273] Some international guidelines state that voluntary conciliation is desirable in the context of natural person insolvency but has "proven elusive especially as creditors frequently have shown little interest in active and constructive engagement."[274] Coetzee and Roestoff also point out that in the South African context there is no statutory "backup" for such negotiations and arrangements resulting from them.[275] The practicalities of a debtor being able to achieve such an arrangement informally with more than one creditor is very unlikely because creditors are unlikely to co-operate,[276] especially as a group and marginalised debtors do not have sufficient funds to contribute.[277]

2.5 Conclusion

From the above discussion, it is clear that there is a predicament for insolvent debtors in South Africa. The sequestration procedure under the Insolvency Act is the only measure which provides a discharge and enables the consumer to proceed with a "clean slate" as recommended by international principles and guidelines. However, debtors are restricted from access to this debt relief measure by the costs of the application but also because they do not have sufficient assets to satisfy the court that the sequestration will be to the benefit of the creditors. NINA and LILA debtors are excluded for access to the sequestration procedure. The discharge granted in terms of the sequestration procedure is the only

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[271] Boraine, van Heerden and Roestoff "A comparison between formal debt administration and debt review - the pros and cons of these measures and suggestions for law reform" (part 2) 2012 *De Jure* 254.
[272] Hereafter "PDA".
[273] Boraine "Note on debt relief measures in SA Consumer insolvency law 2017 Unpublished provided in University of Pretoria LLM class handouts – obtainable from the author 10.
[274] World Bank *Report* par 409.
[275] Coetzee and Roestoff "Consumer debt relief in South Africa – Should the Insolvency System provide for NINA debtors? Lessons from New Zealand" 2013 *Int InsolvRev* 4.
[276] The World Bank *Report* par 135 points out "Informal arrangements are more likely to succeed in cases where debtors are experiencing mild or temporary financial difficulties rather than severe insolvency."
[277] Coetzee and Roestoff 2013 *Int Insolv* Rev 4.

discharge available to debtors in South Africa which aligns with the attributes identified in international principles and guidelines.

Access to the other two available debt relief measures, the administration order and the debt review procedure, is limited by various restrictions. To qualify for an administration order, the debtor must have debts under R50 000 and an income which can be distributed to his creditors. Under the debt review in terms of the NCA the consumer must have debt emanating from credit agreements and have an income which can be re-arranged to lead to the eventual settlement of the debt. Credit agreements where the creditor has commenced enforcement proceedings are also excluded. These debt relief measures are really not debt *relief* measures since they do not provide debt relief in the true sense by granting a discharge. They are re-arranged payment plans and do not provide for a reduction of the capital debt or decrease in the interest charged or discharge from debt. There is no termination of repayment provided for in the NCA or section 74 and the intention of both these procedures is that the creditor is ultimately paid in full. A debtor must have an adequate income and if a suggested instalment is paltry or the duration of the re-arrangement period considered excessive, the plan may be rejected as being unreasonable and the order refused. The intention is to discharge all of the debt through repayment. Since a debtor must have an adequate income to be re-arranged or distributed, NINA and LILA debtors are clearly excluded.

Contrary to international guidelines all these measures rely on court supervision, high court for sequestration applications and the magistrates' courts for administration application and debt review. Apart from the cost consideration, as Boraine points out, our courts are over-burdened and busy and there is a lack of capacity which causes delays and results in matters not being heard timeously.[278] Furthermore, the courts are loath to grant a sequestration order which is believed to assist the debtor and not primarily be concerned with payment to the creditors.[279]

Inadequate as our insolvency measures may be, they are totally inaccessible to NINA and LILA debtors. These debtors have neither the assets for liquidation under the sequestration procedure nor the income to have distributed amongst creditors under the administration procedure or re-arranged under debt review. Quite possibly, their debt does not fall within

[278] Boraine 2017 Note on debt relief 10.
[279] Par 2.3.1.

the ambit of a credit agreement or the credit provider has commenced with enforcement proceedings. They will not qualify under the NCA and they will not get a discharge.

CHAPTER 3: THE PROPOSED DEBT INTERVENTION MEASURE

3.1 Introduction

The Portfolio Committee on Trade and Industry[280] published the Draft National Credit Amendment Bill, 2017[281] together with the *Memorandum on the Objects of the National Credit Amendment Bill,* 2017.[282] The Bill was passed in Parliament on 12 September 2018.[283] In the preamble, the Bill identifies that

> "there are categories of consumers for whom existing natural person insolvency measures are inaccessible, either because of the focus that these interventions place on the benefit to credit providers, or the cost involved with such natural person insolvency measures;"[284]

and that

> "without suitable alternative insolvency measures being made available to over-indebted individuals who do not have sufficient income or assets to show benefit to creditors, to afford the costs associated with an administration order, or to be an economically viable client for a debt counsellor, it is not only an insurmountable challenge for them to manage or improve their financial position, but it also amounts to an unjustified and unfair discrimination on socio-economic grounds."[285]

According to the Portfolio Committee, approximately 39.3% of South African consumers have impaired records and may be considered over-indebted.[286] In drafting the Bill, the Portfolio Committee was cognisant of the criticism and shortcomings of the existing debt

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[280] Hereafter "Portfolio Committee".
[281] Hereafter "the Bill".
[282] Hereafter "*Memorandum*".
[283] The latest version of the Bill and the *Memorandum* was published on 6 September 2018.
[284] *Memorandum* 1 states that
"The Insolvency Act, 1936 (Act No. 24 of 1936), does not assist a debtor where there is no benefit to creditors, thus excluding consumers with no or minimal assets. The National Credit Act, 2005 (Act No. 34 of 2005) (''the Act''), provides for a debt review measure to alleviate household debt. Similarly, the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), provides for debt administration where an administrator assists to handle the debtor's finances and to pay off his/her debt. However, due to the costs involved in the debt review and debt administration procedures, this vulnerable group is in practice still excluded."
[285] Coetzee suggests that the exclusion of debtors amounts to unjustifiable discrimination based on socio-economic status and may therefore be considered unconstitutional; Coetzee "Is the unequal treatment of debtors in natural person insolvency law justifiable? A South African Exposition" 2016 *Int Insolv Rev* 57.
[286] *Memorandum* 39.

relief mechanisms,[287] as well as the global trends[288] in the treatment of vulnerable consumers.[289]

In keeping with its stated intention[290] to assist this vulnerable group, the Bill proposes the amendment of the National Credit Act[291] by introducing the notion of debt intervention.[292] The proposed debt intervention procedure will use and extend the infrastructure of the National Credit Regulator[293] and the National Consumer Tribunal.[294] The debt intervention will be state-funded. The Portfolio committee envisaged that capacity would be developed within the NCA to re-arrange debts free of charge and that debtors who can not afford it will not need to pay to access the procedure.[295]

This study will discuss the Bill in light of the Portfolio Committee's intention to address existing shortcomings in consumer debt relief as formulated above. It will also consider how the measure conforms to the guidelines and recommendations formulated in international studies.[296] In order to reach this chapter's objective, a brief expose of the fundamental concepts of the Bill will be given, concentrating on aspects of access to the measure as well as the actual debt relief it provides.

3.2 Access and procedure of the proposed debt intervention measure

The debt intervention application procedure is set out in proposed section 86A[297]of the Bill which prescribes that the debt intervention applicant[298] must apply to the NCR to be declared

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[287] *Memorandum* refers to Coetzee 2016 *Int Insolv Rev* 54.

[288] The international trends are reflected in the World Bank Insolvency and Creditor/Debtor Regimes Task Force Working Group (hereafter "World Bank") *Report on the treatment of the insolvency of natural persons* 2011, which provides "guidance on characteristics of an insolvency regime for natural persons" par 10; and INSOL *Consumer debt report: Report of findings and recommendations 2011* (hereafter "INSOL *Consumer debt report II*").

[289] The *Memorandum* explains that

> "despite a global trend to accommodate all debtors who are caught in an inescapable debt trap, South Africa's insolvency system still exclude (sic) a group of vulnerable consumers, due to costs."

[290] *Memorandum* 1.

[291] 34 of 2005 (hereafter "the NCA").

[292] Definition in proposed s 1: "'**debt intervention'** means a measure as contemplated in section86A, which aims to assist identified consumers for whom existing natural person insolvency measures are not accessible in practice;".

[293] Hereafter "NCR".

[294] Hereafter "the Tribunal".

[295] *Memorandum* 40. This implies open access for debtors (with the proviso that a consumer qualifies in terms of the access requirements).

[296] The World Bank *Report* and; INSOL *Consumer debt report II*.

[297] Cl 13.

[298] The definition in proposed s 1 sets out several substantive requirements.

over-indebted.[299] The debt intervention applicant must have a total unsecured debt[300] owing to credit providers of no more than R50 000[301]or such amount as may be prescribed by the Minister.[302] The definition[303] of "debt intervention applicant"[304] lists substantive requirements,[305] including that the debt intervention applicant must be a natural person [306] or persons who own a joint estate, and at the date of the application, is a consumer under either unsecured credit agreements, unsecured short-term credit transactions or unsecured credit facilities *only*.[307] The debt intervention applicant must, on the date of submission of the application, either have no income, or be entitled to, or have earned less than R7 500 on average for the preceding six months, regardless of the source[308] and must be over-indebted as at the date of submission of the application.[309]

The amount of R7 500 is based on research conducted by the Portfolio Committee that debt counsellors are less likely to assist consumers earning less than R7 500 since it is not financially viable for them to do so.[310] Less clear, and not addressed in the *Memorandum*,[311] is why a cap of R50 000 is set for unsecured debt. This corresponds to the ceiling set in the administration procedure.[312] This is especially limiting when one bears in mind that a debt intervention application relates to credit agreement debt only.

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[299] In the prescribed manner and form. Proposed s 86A (1).

[300] Falling under the NCA, only a consumer under a credit agreement will qualify for debt intervention. Coetzee "An opportunity for No Income No Asset (NINA) debtors to get out of check? — An evaluation of the proposed debt intervention measure" 2018 (This article is accepted for publication in *THRHR* November 2018. Accessed with permission of the author prior to publication.) 7.

[301] Proposed s 86A (1). One of the requirements for a debt intervention applicant is to be over-indebted. Proposed s 1 definition.

[302] In terms of proposed s 171 (2A)(b) the Minister may annually adjust the amount in respect of the maximum gross income of a debt intervention applicant by considering the gross income required by a consumer to be an economically viable client for a debt counsellor as at the time of the proposed adjustment, the costs associated with an administration and sequestration order as at the time of the proposed adjustment and inflation.

[303] Coetzee *Proposed debt intervention measure* 2018 (unpublished) 7, points out that the access requirements are contained in both the definition and thr procedural prescripts.

[304] Proposed s 1 "debt intervention applicant".

[305] Cl 1(b) (a), (b), (c) and (d).

[306] Cl1 definition.

[307] Proposed s (1)(b). A consumer who has secured credit will thus be excluded from debt intervention procedure.

[308] This amount can also be adjusted by the Minister 12 months after the commencement of the Act and he must report the National Assembly every 24 months thereafter.

[309] Proposed s 1(b)(d).

[310] Proposed s 86A(2)(b) and s 86(2).

[311] *Memorandum* speaks only of the "mandatory credit life insurance on credit agreements for longer than six months but no more than R50 000 in value" No indication is given how such amount was determined. *Memorandum* 2.

[312] S 74(1) Magistrates' Courts Act 32 of 1944 (hereafter the "Magistrates' Courts Act").

Also included in the definition of "debt intervention applicant", is the prohibition that the applicant must not be sequestrated or subject to an administration order procedure.[313] This requirement is directed at the interplay between the various insolvency and debt relief measures and has been contentious.[314]

A sequestrated insolvent may not apply for debt intervention, but it is unclear whether the debt intervention applicant (or his creditors) can apply for his sequestration.[315] The NCA does not currently oust the application of the Insolvency Act and it is uncertain whether this provision will do so.[316] There has been an interplay between debt review and an administration order in terms of section 74 where it seems one order could be converted to the other by a rescission application in terms of section 74Q. A rescission application will have to be made before a debt intervention application can be entertained, and there can be no question of both being applied simultaneously.[317]

Proposed section 86A(2) explicitly excludes a developmental credit agreement[318] from the total unsecured debt and excludes any credit agreement from debt intervention[319] where the credit provider has proceeded to take steps to enforce such credit agreement as contemplated in section 130.[320] This corresponds with the prohibition under debt review applications.[321]

The applicant must be over-indebted, whether due to a change in personal circumstances or other circumstances.[322] The criteria for over-indebtedness are those specified in section 79.[323] It is unclear why specific mention is made of a "*change of"* or "*othe*r" circumstances[324] and what relevance this will have.

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[313] Proposed s 1(b)(d).
[314] s 8A of the Insolvency Act 24 of 1936 (hereafter "Insolvency Act" specifically provides that debt review is not an act of insolvency. This does not oust the application of the Insolvency Act since all that is excluded is that once a debtor has been sequestrated, he may not apply for debt intervention.
[315] The NCA did not oust the application of the Insolvency Act and insolvency proceedings are not considered debt enforcement. In the absence of a specific provision ousting the Insolvency Act, by implication it is still applicable. Van Heerden and Boraine "The interaction between debt relief measures in the National Credit Act 24 of 2005 and aspects of insolvency Law" 2009 *PELJ* 11.
[316] Boraine *et al* 2012 *De Jure* 267 (HC 224).
[317] *Ibid.*
[318] Proposed s 86A(2)(a).
[319] Proposed s 86(2)(b).
[320] NCA s 130.
[321] NCA s 86(2).
[322] Proposed s1(c).
[323] NCA s 79. Discussed in ch 2 par 2.2.3.
[324] Proposed s 1 definition of debt intervention applicant includes "(c) is over-indebted, whether due to a change in personal circumstances or other circumstances".

3.3 Procedural matters

The debt intervention applicant must apply to the NCR[325] in the prescribed manner and form to be declared over-indebted.[326] On receipt of the application, the NCR, like the debt counsellor in the debt review process,[327] must provide proof of receipt to the consumer and inform all the credit providers and the credit bureaux.[328] In turn and in line with the provisions applicable to the debt review procedure,[329] the debt intervention applicant must comply with reasonable requests to facilitate the evaluation of the consumer's indebtedness,[330] and the consumer, NCR and each credit provider must participate in good faith.[331]

To enable the NCR to perform its tasks, the NCR Chief Executive Officer[332] or any employee authorised by the CEO may appoint any suitable employee as a debt intervention officer, and such person is "deemed to have been registered as a debt counsellor."[333] This is clearly an attempt to make the debt intervention procedure as accessible as possible. International guidelines have suggested the advantage of "building on existing institutional infrastructures and keeping procedures simple."[334]

Despite the debt review procedure being colloquially referred to as "debt counselling" and one of the NCA's objectives being to educate consumers about credit,[335] at present, there are no regulations in place to administer counselling or provide education regarding debt and finances to embattled consumers. The Bill introduces mandatory counselling and financial training[336] in line with international trends.[337] Clause 1 inserts the definition of "financial literacy" as "the knowledge, ability and opportunity to make sound money

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[325] Proposed s 15A(2) enables the NCR to appoint debt intervention officers who will receive a certificate that they are deemed to be debt counsellors for the purpose of assisting debt intervention applicants with the process, the re-arrangement of obligations, the application considered for an order and considering a rehabilitation application as set out in proposed s 15A(1).
[326] Proposed s 86A (1).
[327] NCA s 86(4) ch 2 par 2.2.3.
[328] Proposed s 86A (3).
[329] NCA s 86(5)(b). Par 2.2.3.
[330] Coetzee *Proposed debt intervention measure* (unpublished) 9.
[331] Proposed s 86A (4).
[332] Hereafter "CEO".
[333] Proposed s15A(2)(b).
[334] World Bank *Report* par 179.
[335] One of the purposes in NCA s 3(e)(i) is "providing consumers with education about credit and consumer rights".
[336] Proposed s 86A(5)(a) and(b) and s 87A(2)(b)(ii).
[337] "The importance of financial skills is being acknowledged in school systems and adult educational facilities" World Bank R*eport* para 367 117.

management choices".[338] Clause 3 of the Bill expands the duties of the NCR[339] to include the requirement that when the NCR is considering an application for debt intervention, it *must* provide the debt intervention applicant with counselling,[340] and access to training to improve financial literacy.[341] The infrastructure for this training must be created[342] and announced by the Minister.[343]

The NCR, after assessing the application, can either reject the application[344] or, if the NCR concludes that the applicant does not qualify for debt intervention but is experiencing difficulty in satisfying his debts, the NCR "must …recommend that the debt intervention applicant and the respective credit providers voluntarily consider[345] and agree on a plan of debt re-arrangement."[346] The NCR may decide that a credit agreement constitutes reckless lending, an unlawful credit agreement or that it results from prohibited conduct. He may then refer it to the Tribunal for an appropriate declaration.[347]

If the NCR assesses the debt intervention applicant and concludes that the applicant qualifies for debt intervention and that his obligations can be re-arranged[348] within five years,[349] the NCR must refer it to the Tribunal with a recommendation for an order to be

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[338] Cl 1 proposed s 1.

[339] S 15A adds other functions to NCR. Apart from ensuring that the formalities are complied with when the application is made, the NCR must provide proof to the applicant, notify creditors and every credit bureau. The NCR must also consider whether the applicant is over-indebted, provide financial counselling and access to training. The NCR must do a reasonable assessment and refer the application to the Tribunal with a recommendation. Proposed s 86A.

[340] Proposed s 86A(5)(a).

[341] My italics. Proposed s 86A(5)(b).

[342] This is a broad concept and an ambitious obligation. Indeed, most of the population would appreciate being trained to improve this skill! It is unclear what standard of training must be provided and how it will be monitored. Presumably it will be of a fairly basic standard.

[343] Proposed s 171 Minister to make regulations establishing financial literacy or financial capability after consultation with the Minister of Finance. In terms of definition of Minster under the NCA s 1 "Minister" means "the member of cabinet responsible for consumer credit matters".

[344] Proposed s 86A(6)(a).

[345] The international experience has been that a voluntary settlement with creditors by debtors is not easy. Some creditors demand enforcement and may hinder negotiations. There may not be incentives for financial institutions to 'engage in meaningful restructuring negotiations' with debtors. See the World Bank *Report* par 409.

[346] Proposed s 86A(6)(b).

[347] Proposed s 86A(6)(c).

[348] Proposed s 86A(6)(d) (or longer as prescribed by the Minister).

[349] See the World Bank *Repor*t for the discussion of how long a payment plan should run. There seems to be two approaches, one to decide on a case-by-case basis and the other being pre-defined in law, par 265. In the Bill the legislator seems to have adopted a hybrid approach with the five year period being used as a measure to determine the debt intervention applicant's ability to pay. Internationally the generally accepted period falls within three to five years, Par 268. Some systems have adopted a three-year basis. The period is calculated more for the purpose of inculcating a payment responsibility amongst debtors than an actual return for creditors since a significant return for creditors is unlikely, par 264.

made.[350] The Tribunal will then conduct a hearing[351] where it considers the recommendation, "other information"[352] and the applicant's "financial means, prospects and obligations".[353] It may reject the application[354] or, in addition to any finding regarding reckless credit,[355] may make orders to re-arrange the debt, similar to the provisions under the debt review procedure.[356] In this respect clause *(dd)*[357] will be inserted enabling the Tribunal to make an order re-arranging the debt intervention applicant's obligations by

> "determining the maximum interest, fees or other charges, excluding charges contemplated in section 101(1)(e), under a credit agreement, which maximum may be zero, for such a period as the Tribunal deems fair and reasonable but not exceeding the period contemplated in section 86A(6)*(d)*;"[358]

This is a drastic departure from the debt review process[359] which provides only for the re-arrangement of debt by extending the period, postponing payments, or recalculating the consumer's obligations because of contraventions.[360] Notably, only the debtor's circumstances are considered, and no provision is made for an increased payment to the creditor if the debtor's circumstances improve.[361]

The Tribunal can determine a period which is "fair and reasonable"[362] but not exceeding five years.[363] The introduction of a time period to pay off the debt to measure the viability of the debt rearrangement is in line with international principles and guidelines which raise the question of "how long a debtor should toil for the benefit of creditors, and how much debtors should be required to pay during that period?"[364] The World Bank *Report* points out that the duration of the plan depends on the purpose of the plan.[365] It is submitted that the repayment

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[350] Proposed s 86A(6)(d) and s 87(1A).
[351] The Bill specifies that the Tribunal or a "*member acting alone"* in accordance with the Act may conduct the hearing. Proposed s 87(b). My italics.
[352] It is unclear what "other information" would be relevant or available.
[353] Proposed s 87(1A).
[354] Proposed s 87(1A) (a).
[355] Proposed s 87(1A) (a)(b)(i).
[356] The Tribunal's powers correspond to the magistrate's under the debt review process in s 86(6)(c), except for the addition of proposed ss (dd) quoted above. See ch 2 par 2.2.3.
[357] Proposed s 87(b)(b)(ii)(dd).
[358] Proposed s 87(1A)(b)(ii)(dd).
[359] See ch 2 par 2.2.3 referring to s 86(7)(c)(ii) in which the debt counsellor can recommend that the magistrate's court can make certain orders.
[360] s 86(7)(c)(ii).
[361] World Bank *Report* 307.
[362] Proposed s 87 (1A)(b)(ii)(dd).
[363] Proposed s 86A(6)(d) Or such period as may be prescribed by the Minister in terms of s 171.
[364] World Bank *Report* par 431.
[365] World Bank *Report* par 262.

plan under debt intervention is less about payment to creditors[366] and more about a symbolic payment[367] and enabling the debtor to obtain debt relief. NINA debtors have no value to pass on to creditors.[368] The World Bank *Report* noted that if the repayment period is too long debtors may abandon the plan[369] and one study concluded that "expecting debtors to live longer than three years[370] at a subsistence level would be 'from a social point of view not responsible'."[371] In view of the relatively low amount of the debt[372] which qualifies under debt intervention, a shorter period would probably be more appropriate.Coetzee also points out that the discharge is not linked to a level of payment to creditors which addresses possible discrimination on financial grounds.[373]

If the NCR concludes that the applicant qualifies for debt intervention but that the consumer's income and assets[374] are insufficient to enable his obligations to be re-arranged within the five-year period envisaged above,[375] the application must be referred to the Tribunal for an order provided for in proposed section 87A. The Tribunal[376] will adjudicate the debt intervention application primarily on the documents from the NCR,[377] although there is provision for any representations[378] and "any other relevant information". This is in line with World Bank *Report*[379] which advocates administrative processes, particularly for NINA debtors.[380] The Tribunal may determine that the applicant does not qualify for debt intervention and reject the application. The Bill empowers the Tribunal to

> "(i) suspend all of the qualifying credit agreements, in part or in full, for 12 months, which period may be extended for one further period of 12 months, taking into account the factors referred to in subsection (3);"[381]

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366 Par 263.
367 Par 299.
368 Par 297 and 298.
369 Par 265.
370 Coetzee *Proposed debt intervention measure* (unpublished) 12.
371 Par 268.
372 Proposed s 86A(1).
373 Coetzee *Proposed debt intervention measure* (unpublished) *ibid.*
374 No specification of which assets are to be considered is given so presumably all the debt intervention applicant's assets are considered. Does this indicate that the Tribunal could order an applicant to sell assets to settle his debts?
375 Proposed s 86A(6)(d).
376 The Bill again stipulates that a single member of the Tribunal may consider the referral. Proposed s 87A(1).
377 Coetzee *Proposed debt Intervention measure* 10.
378 Proposed s 86A (9) credit providers are advised of the referral and invited to make representations to the Tribunal.
379 World Bank Report par 164.
380 Coetzee *Proposed debt intervention measure* (unpublished) 10.
381 Proposed s 87A(2)(b)(i).

When the Tribunal is considering making an order in terms of which it considers

> "the suspension or part suspension of a credit agreement, an alteration or extension of that suspension, or the *extinguishing* of the whole or a portion of the total of the amounts contemplated in section 101(1) under a qualifying agreement"[382]

the Tribunal, "*must* take into account relevant factors,"[383] which "*may* include" whether the debt intervention applicant—

" (i) is a disabled person, a minor heading a household, a woman heading a household, or an elderly person;

(ii) had ever applied for debt review or for an order of sequestration or administration; or

(iii) ever had any debt extinguished by an order of a court or Tribunal;"[384]

The first set of criteria[385] that may be relevant to consider the suspension of the qualifying agreements is whether the applicant is disabled, a minor-headed household, a woman-headed household or an elderly person. It is unclear what difference it would make whether a household is headed by a man or woman or a disabled person when debt intervention is required. From a practical point of view, a minor should not have had the capacity to contract and should not be bound to such credit agreement. "Elderly" is not defined, nor is any indication given of what age would be considered as elderly. By mentioning these considerations explicitly, the danger exists that a *numerous clausus* is created which may become a checklist for the NCR and/or Tribunal to consider when suspending or extinguishing a part or whole of an agreement.

Whether an applicant has previously applied for an administration order, sequestration or debt review[386] should be a relevant factor for the Tribunal in considering an order for a suspension, part suspension or extinguishing of a debt in terms of a debt intervention application but specific guidelines and limitations should be provided as to what extent such application should be regarded. Similarly, the extinguishment of debt by order of a court or the Tribunal[387] should be relevant, but no time limits or criteria are prescribed. Nothing other

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[382] Proposed s 87A (3).
[383] My italics. Proposed s 87A (3).
[384] Proposed s 87A(3)(a).
[385] Set out under proposed ss 87A(3)(a)(i)(ii) and (iii).
[386] Proposed s 87A(3)(a)(ii).
[387] Proposed s 87A(3)(a)(iii).

than the Tribunal exercising its discretion in accordance with these criteria seems to prevent the debt intervention applicant from applying for debt intervention more than once.[388] This corresponds with the debt review procedure in which the NCA does not stipulate either the number of times a debtor can apply for debt review nor a specified period before a debtor may again apply for debt review.[389]

Secondly, the Tribunal must consider the circumstances and any act or omission of the debt intervention applicant when the credit agreement was entered into. The Tribunal must consider any circumstances that resulted in or contributed to the debt intervention applicant not having sufficient income or assets to allow for his obligations to be re-arranged.[390] The circumstances of the debt intervention applicant to secure an income or increase an existing income must also be considered.[391]

Lastly, the Tribunal must also look at the acts or omissions by the credit provider when entering into the credit agreement, during the debt intervention process and the proceedings before the Tribunal.[392] The NCA has strenuous provisions regarding reckless credit[393] and unlawful credit agreements,[394] and legal precedents have been set[395] regarding the standard of conduct expected from credit providers when the consumer applies for credit.[396] The Bill enables the Tribunal to declare an unlawful credit agreement void.[397] Furthermore, it is a

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[388] International guidelines refer to jurisdictions which give an open discharge as usually limiting the number of times a debtor can apply for this relief. The most common approach is a "once-in-a-lifetime" chance unless it is an earned discharge. The World Bank *Report* par 193, also points out that one way of preventing moral hazard in an open access system is to restrict access for a certain time or frequency. No such limitation exists in the Bill.

[389] Coetzee *A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* (LLD thesis University of Pretoria 2015) 212.

[390] Proposed s 87A(3)(b)(ii).

[391] Proposed s 87A(3)(b).

[392] Proposed s 87A(3)(c).

[393] s 80(1) and s 81.

[394] s 89.

[395] *Absa Bank Ltd v De Beer* 2016 3 SA 432 (GP) Louw J par 60; *Absa Bank Limited v Kganakga* (GJ) (unreported case no 26467/2012(18 March 2016) Satchwell J at paras 24 to 28.

[396] s 81(2)(a) (2)

"A credit provider must not enter into a credit agreement without first taking reasonable steps to assess —

(a) the proposed consumer's —

(i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;

(ii) debt re-payment history as a consumer under credit agreements;

(iii) existing financial means, prospects and obligations; and

(b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement."

[397] Clause 17 amends s 89 to provide for the Tribunal to make such an order.

statutory requirement that the parties act in good faith.[398] It is therefore unclear which act or omissions by the credit provider when entering the agreement[399] and during the debt intervention application before the Tribunal,[400] will be considered in deciding whether the debt intervention applicant's debt should be suspended.[401] It is interesting to note that although credit providers are granted an opportunity to make representations to the Tribunal by a specified date,[402] and such representations may be considered by the Tribunal,[403] the credit providers do not have further input regarding the granting of the debt intervention order. This is in line with international research[404] which found that in natural person insolvency creditors do not have "meaningful influence over the establishment (confirmation) of a payment plan or other requirement for discharge or other relief."[405]

If the Tribunal does suspend all the qualifying credit agreements in part or in full for 12 months,[406] the NCR must review the debt intervention applicant's financial circumstances eight months after the order is granted to ascertain whether, at that time, he has sufficient assets or income to have his debts re-arranged within the period of five years.[407] If he has sufficient income or assets, it must be referred to the Tribunal for an order re-arranging his finances within the prescribed period.[408] If he still does not have sufficient income or assets, the NCR refers it back to the Tribunal who may grant an extension of the suspension for a further period of 12 months.[409] If the suspension is extended, the NCR must again, after eight months, conduct a review of the debtor's circumstances to determine whether the debt intervention applicant has sufficient income or assets for a re-arrangement at that stage.[410] The World Bank *Report* stresses the importance of monitoring "the debtor's compliance and the possibility of modifications to the plan for changed circumstances."[411] The multiple assessments by the NCR of the debt intervention applicant's circumstances after an extension has been granted are clearly intended to monitor compliance and changed

[398] s 86(5)(b).
[399] Proposed s 87A(3)(c)(i).
[400] Proposed s 87A(3)(c)(ii).
[401] Proposed s 87A(2)(b)(i).
[402] Proposed s 86A(9).
[403] Proposed s 87A (1).
[404] Coetzee *Proposed debt intervention measure* 2018 (unpublished) 11.
[405] World Bank *Report* par 208.
[406] Proposed s 87A(2)(b). The extension period may be extended for a further period of 12 months.
[407] Proposed s 87A(5)(a).
[408] Proposed s 87A(5)(b)(i).
[409] Proposed s 87A(5)(b)(ii).
[410] Proposed s 87A(5)(c)(i).
[411] World Bank *Report* par 305.

circumstances.[412] The fact that the debtor is re-assessed after eight months to ascertain whether his income or assets have improved, thereby granting him an opportunity to pay some of his debts, falls within the international recommendations of encouraging the debtor to become economically productive and instilling a payment morality.[413] It therefore also serves a "moral and educational purpose".[414]

Together with the suspension,[415] the Tribunal will "*require* the debt intervention applicant to attend a financial literacy programme."[416] This reiterates the obligation and seems additional to the counselling and training on financial literacy[417] which the NCR *must*[418] provide to the debt intervention applicant when the application for debt intervention is initially considered.[419]

The effect of a debt intervention application is set out in proposed section 88. Once the debt intervention applicant has filed for debt intervention, he may not enter into any further credit agreement, except a consolidation agreement, with a credit provider unless—

"(a) the National Credit Regulator rejects the application for debt intervention and the prescribed time period for direct filing in terms of section 86A (7) has expired without the debt intervention applicant having so applied;

(b) the Tribunal has determined that the debt intervention applicant is not over-indebted, or has rejected the proposal of the National Credit Regulator or the debt intervention applicant's application;

(c) the Tribunal having made an order, or the debt intervention applicant and credit providers having made an agreement re-arranging the debt intervention applicant's obligations and all the debt intervention applicant's obligations under the credit agreements as re-arranged are fulfilled, except where the debt

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[412] This may prove to be a mammoth task since there is no existing infrastructure within the NCR to perform such monitoring functions.
[413] Ch 3 par 3.3.
[414] World Bank *Report* par 314.
[415] Proposed s 87A(2)(b) reads "and".
[416] Proposed s 87A (2) (b(ii).
[417] International studies contemplate that economic failure is caused by insufficient financial skills. World Bank *Report* para 367. Instilling better credit habits is sought through debt counselling or education. World Bank *Report* para 368.
[418] My italics. Proposed s 86A(5)(a) and(b).
[419] This appears to differ from the training provided under proposed s 86A(5)(a) and (b) since this training which the applicant is required to attend, is inseparable from the suspension order. It is contentious whether imposed education actually leads to credit behaviour modification. World Bank *Report* para 368.

intervention applicant fulfilled the obligations by way of a consolidation agreement; or

(d) the period contemplated in section 87A (8) has expired."[420]

If a debt intervention applicant applies for or enters into a credit agreement contrary to the above provisions, the provisions dealing with debt intervention will never apply to such an agreement.[421]

The effects on a credit provider, save for those discussed above, are that once he receives notice of a debt intervention application, he is prohibited from exercising or enforcing that credit agreement by litigation or any other judicial process.[422] Coetzee points out that the introduction of a moratorium on debt enforcement is in accordance with international principles but that it would be preferable if the moratorium would be effective as soon as the debt intervention applicant applies for the debt intervention procedure.[423]A creditor may only institute proceedings once the NCR or Tribunal has rejected the debt intervention application, or the applicant has defaulted on that credit agreement[424] and the prescribed time period to apply directly to the magistrate's court has expired,[425] or the Tribunal has determined that the debt intervention applicant is not over-indebted or has rejected the proposal of the NCR or the debt intervention applicant's application;[426] or an order of the Tribunal or an agreement re-arranging the debt intervention applicant's obligations with the credit provider has been fulfilled. An exception is if the debt intervention applicant enters into a consolidation agreement[427] or if the debt intervention applicant defaults on any obligation in terms of a re-arrangement agreed between the debt intervention applicant and credit providers, or ordered by the Tribunal agreement.[428] If a credit provider does enter into such agreement whilst the above impediments are still in force, the credit agreement may be declared as reckless credit,[429] whether or not the circumstances of section 80, setting out the traditional instances of reckless credit extension, apply.[430]

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[420] Proposed s 88A(1)(a) to (d).
[421] Proposed s 88A (5).
[422] Proposed s 88A (3).
[423] Coetzee *Proposed debt intervention measure* 2018 (unpublished)15.
[424] Proposed s 88A (3)(a).
[425] Proposed s 88A (1)(a).
[426] Proposed s 88A (1)(b).
[427] Proposed s 88A (1)(c).
[428] Proposed s 88 (3)(b(ii).
[429] Proposed s 88A (4).
[430] NCA s 80(1).

3.4 Discharge

One of the primary objectives in modern-day insolvency regimes is the obtaining of a discharge from debt. The INSOL *Consumer debt report II* lists as one of its four principles the "provision of some form of discharge of indebtedness, rehabilitation or "fresh start" for the debtor."[431]

Under the Bill, if the debt review applicant still does not have sufficient income or assets[432] to re-arrange his obligations within the stipulated period,[433] the NCR will refer the matter back to the Tribunal to consider extinguishing[434] the whole or a portion of the total amounts of the qualifying credit agreements.[435] The Tribunal is empowered to declare the debt, as referred to in section 101(1),[436] extinguished.[437] The extinguishment may be a percentage of each qualifying agreement and must apply equally to all qualifying agreements.[438] The Tribunal must simultaneously prohibit the debt intervention applicant from applying for credit for a period it considers fair and reasonable for a minimum of six months from the date of the order.[439] The prohibition may be extended for a further period subject to prescribed

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"A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of s 119(4) –

(a) the credit provider failed to conduct an assessment as required by section 81(2) irrespective of what the outcome of such an assessment might have concluded at the time; or

(b) (the credit provider, having conducted an assessment as required by section 81(2) eentered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that:

(i) the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement; or

(ii) entering into that credit agreement would make the consumer over-indebted."

[431] INSOL *Consumer debt report II* 13.

[432] No specification is given as to which assets are taken into account and no assets are exempted.

[433] Proposed s 87A(5)(c)(ii).

[434] See definition of "extinguish" added by proposed s 1 (c).

" (a) the cessation of all rights and obligations inherent to or resulting from, a credit agreement; and (b) the cessation of any rights or obligations that may arise in law, whether statutory or otherwise, because of the cessation contemplated in paragraph (a),"

Prospectively from the date on which the act of extinguishment becomes effective.

[435] Proposed s 87A(5)(c)(ii).

[436] NCA s 101.

[437] Proposed s 87A(6)(c) refers to the total of the amounts contemplated in s 101(1) extinguished. S101(1) refers to the principal debt, an initiation fee, a service fee, interest, costs of credit insurance, default administration charges and collection costs.

[438] Proposed s 87(7)(a) and(b).

[439] Proposed s 87A (8).

considerations[440] but may not exceed a total of 12 months.[441] Coetzee opines that this is "remarkable as it offers the long-awaited discharge under NINA circumstances."[442]

Once a credit agreement has been extinguished by the Tribunal, the credit providers may not enforce any right under or arising from any portion of a debt arising from that order.[443] Under the proposed amendment of section 130, a court must dismiss a matter if the Tribunal has ordered the whole or a part of the underlying credit agreement as extinguished.[444] Empowering the Tribunal to extinguish a debt is a radical introduction in the South African insolvency law where previously discharge from debt was only attained through the sequestration procedure. Furthermore, the discharge provided is not an earned discharge but granted when the debt intervention applicant's circumstances are so bleak that he does not have sufficient income or assets to settle his debt over a five-year period. This innovation will be contentious in our *pro* creditor insolvency milieu[445] as well as the business community.[446] No doubt there will be consequences with regard to the provision of credit, but the Portfolio Committee anticipates that because the constitutional rights to property are affected, a fair and balanced approach will be taken "thus ensuring that the rights of credit providers are not arbitrarily affected."[447] Only time will tell.

The Bill authorises the Tribunal, in addition to the magistrate's court,[448] to rearrange a consumer's obligations.[449] Both the magistrate's court and Tribunal are empowered[450] to determine *all* the costs, except the costs of credit insurance, and may reduce the interest rate to zero. The Bill repeatedly specifies that the Tribunal *or a single member of the Tribunal*

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[440] Proposed s 87A (9) the Tribunal must consider the total unsecured debt, the number of agreements submitted, the period of the agreements and the applicant's credit record.
[441] Proposed s 87A (9).
[442] Coetzee *Proposed debt intervention measure* 2018 (unpublished)12.
[443] Proposed s 88A (6).
[444] Cl 21 amending s 130.

[445] Sonnekus "Respyte verknog aan die person ven die primere skuldenaar of tog met deurwerking? Enkele gedagtes oor die voorgestelde wysiging van die Nasionale Kredietwet en skuldkwytskelding" 2013 *TSAR 10*, points out that there is no compensation given to the credit provider for the legislator's generosity in writing off the debt. He also questions whether donations tax should be payable.
[446] The Banking Association of South Africa (BASA). "Annexure A – Draft NCA Bill: Legal and Operational Concerns Comments Matrix on the 3 clauses" 2018 https://bit.ly/ 2Bn523w (accessed 10 October 2018).
[447] *Memorandum* 40.
[448] Proposed s 87(a).
[449] Cl 14.
[450] Proposed heading s 87.

will conduct a hearing[451] or consider the referral from the NCR.[452] International guidelines[453] encourage extra-judicial proceedings to supplement court-driven procedures which can provide more flexibility and save time and money.[454] The World Bank *Report* points out that establishing an insolvency infrastructure nationwide can be expensive, especially for developing economies. Therefore, it is advantageous to expand existing institutions.[455]

The Tribunal may rescind or amend an order if "information is placed before the Tribunal" showing the applicant was dishonest or fails to comply with the conditions of the debt intervention order.[456] "Information" is a broad term and the level of proof is not stipulated.[457] It is not clear who would investigate such information but the Bill does provide for offences where a person intentionally submits false information or alters his financial circumstances.[458] Although the provision refers to the debt intervention applicant failing to comply with the "conditions of the debt intervention order", the only condition evident is the limit that the Tribunal may impose that the debt intervention applicant may not apply for credit in the prescribed period.[459] Insolvency regimes have a dilemma in deciding what the baseline expenses and what the duration of a payment plan should be.[460] Referring to the debt intervention applicant for re-assessment after eight months (after each suspension has been ordered) should enable the Tribunal to monitor the debt intervention applicant's resources. This is clearly intended to incentivise and encourage the debtor to become economically productive.[461]

It is notable that the provisions of proposed section 86A(6)(e) dealing with the referral to the Tribunal where a debt intervention applicant qualifies for debt intervention but has insufficient income and assets is effective for a period of 48 months from the date on which the Bill becomes operational.[462] The impact of the provisions of proposed section 87A must

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[451] My italics. Proposed s 87(1A).
[452] Proposed s 87A (1).
[453] INSOL *Consumer debt report II*.
[454] INSOL *Consumer debt report II* Expounded in the third principle. Often consumer debtors' problems are of a non-legal nature.
[455] World Bank R*eport* par 179.This also raises one of the practical reservations regarding debt intervention. Since the NCR is currently localised in Midrand, it may be problematic for applicants in far-lying and rural areas to gain access to the procedure.
[456] Proposed s 87A (11).
[457] Could a mention on a TV program or magazine constitute information?
[458] *Memorandum* 3.25 and clause 25 inserting proposed s 157A.
[459] Proposed s 87A (8).
[460] World Bank *Report* paras 431 to 436.
[461] World Bank *Report* par 436.
[462] Proposed s 86A(12)(a).

be reviewed and the Minister must table a report on the findings of such a review to the national assembly no later than 36 months after section 87A becomes operational.[463] International guidelines suggest that if the insolvency structure is managed by an administrative process it is imperative that such system must be monitored and a reporting framework created since it is not possible to gauge the success in terms of financial profit and loss.[464]

3.5 Rehabilitation and clearance certificate

Clause 16 inserts proposed section 88B to the NCA which deals with a debt intervention applicant's application to the NCR for a rehabilitation order to be granted by the Tribunal.[465] A debt intervention applicant who was granted an order under section 87A(6) may apply to the NCR for a rehabilitation order to be granted. Section 87A(6) deals with the extinguishment of debt and reads as follows:

> "The Tribunal may, in addition to its other powers in terms of this Act, after having considered
>
> a) the referral contemplated in subsection (5)(c)(ii);
>
> b) whether the debt intervention applicant still does not have sufficient income or assets to allow for the obligations to be re-arranged during the period contemplated in section 86A(6)(d); and
>
> c) the factors contemplated in subsection (3), and subject to subsections (7) and (8), declare the total of the amounts contemplated in section 101(1) under the qualifying credit agreements as extinguished."

The requirements for applying for rehabilitation include submitting proof of payment of the amounts paid in full under each credit agreement affected by the order as it was due on the date the order was made,[466] [467] or proof that a settlement agreement has been resolved to the satisfaction of the credit provider.[468] This seems illogical if the debt intervention

[463] Proposed s 86A(12)(b).
[464] World Bank *Report* par 172.
[465] Proposed s 88B (1).
[466] Proposed s 88B (2).
[467] Proposed s 88B(2)(a).
[468] Proposed s 88B(2)(b).

applicant's debt has been extinguished by the Tribunal,[469] not least because he had insufficient assets or income to allow for re-arrangement in the period prescribed.[470]

It has been suggested that rehabilitation was introduced for the purpose of enabling a debt intervention applicant from not being locked into the process.[471] However, it seems strange then that only debt intervention applicants whose debts have been extinguished should be able to do so. It is also not clear why the criteria set out in proposed sections 88B(2) and 88B(3) are included. There simply will not be proof of any payment to submit. If the debt intervention applicant can submit proof of payment and that is the basis on which to "exit " from the process there would be few applicants who would qualify since their debts were extinguished *because* they did not have sufficient assets or income. During the debt interview application, the debt intervention applicant would have been assessed by both the NCR and the Tribunal who concluded that he would be unable to pay off his debts within five years.[472]

It may be that the "rehabilitation" as provided for in proposed section 88B will be used in the exceptional circumstance where a debt intervention applicant's circumstances change drastically, and having had his debt extinguished, he does not wish to wait out the period of limitation on his ability to apply for credit, and applies for rehabilitation to exit the procedure. The provisions in this section appear somewhat convoluted to achieve this.

Apart from the above requirements,[473] the application for a rehabilitation order must be further supported by information which the Minister may prescribe, including proof that the debt intervention applicant's financial circumstances have improved to such an extent that he can participate in the credit market, as well as proof that he completed the financial literacy programme in terms of section 87A(2)(b)(ii).[474] The NCR must notify all credit providers who could be affected by the potential rehabilitation order and the credit bureaux of the application for rehabilitation.[475] If the requirements have been complied with, the NCR refers the application to the Tribunal for consideration.[476] If the NCR rejects the application,

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[469] Proposed s 87A (6).
[470] Proposed s 86A(5)(e).
[471] This is a concern with debt review since consumers whose circumstances change have no way of exiting the procedure.
[472] Proposed s 86A(6)(e) and s 87A(5)(ii) and (6).
[473] Proposed s 88B (2).
[474] Proposed s 88B (3).
[475] Proposed s 88B(4)(a).
[476] Proposed s 88B (4).

the debt intervention applicant may apply directly to the Tribunal for a rehabilitation order.[477] The Tribunal must inform each affected credit provider of the date when the application for rehabilitation will be considered.[478] The Tribunal will consider the application, the information submitted, any submissions made by an affected credit provider and whether the requirements have been met.[479] The NCR must notify the debt intervention applicant, and serve a copy of the order on all credit providers listed on the application as well as every listed credit bureau.[480] Although rehabilitation is not defined,[481] the effect of a rehabilitation order is that from the date of the rehabilitation order it ends any limitation imposed[482] on the debt intervention applicant to apply for credit as provided for in section 60.[483]

The Bill does, in fact, comply with the international guidelines and provide discharge from debt without it being necessary to resort to the procedure in proposed section 88B. Under proposed section 87A(6)(c)[484] the Tribunal can declare the total amount of qualifying credit agreements *extinguished.*[485] This frees the debt intervention applicant from excessive debt (the first element of rehabilitation).[486] Secondly, after the debt has been extinguished, and after the period in which the debt intervention applicant's right to apply for credit has lapsed, the NCR must advise the credit bureaux who must remove the listing relating to the debt intervention within seven days from the date of receipt of proof. This enables the debtor to be "treated on an equal basis as non-debtors" as referred to in the guidelines.[487] Lastly, liberation from the debt and the listing, together with the provision of debtor financial training and counselling should change the debtor's attitude regarding credit and enable him to "avoid excessive indebtedness in the future"[488] which constitutes *de facto* rehabilitation.

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[477] Proposed s 88B (5).
[478] Proposed s 88B (6).
[479] Proposed s 88B (7).
[480] Proposed s 88B (9).
[481] In the World Bank *Report,* they speak of these "zero plans" where payment may be purely symbolic because the debtor has insufficient income or assets. "It is probably both more honest and more meaningful to refer to these arrangements as "debt adjustment" plans, rather than "payment" plans, or better yet, something like "rehabilitation" plans, to focus on their real purpose.
[482] Proposed s 88B (8).
[483] NCA s 60(1) "Every adult natural person, and every juristic person or association of persons, has a right to apply to a credit provider for credit."
[484] In par above the World Bank *Report* was quoted which provides for three elements of rehabilitation par 450.
[485] My italics.
[486] World Bank *Report* par 450.
[487] World Bank *Report* par 450.
[488] World Bank *Report* par 450.

In addition to a rehabilitation order, the Bill provides for the issuing of a clearance certificate.[489] The debt intervention applicant can apply to the NCR[490] for a clearance certificate within seven days after he has satisfied his obligations under every agreement that was subject to the re-arrangement.[491] A clearance certificate may be issued when the debt intervention applicant has demonstrated the financial ability to satisfy future obligations[492] as well as having settled the re-arranged obligations in full[493] and having no arrears.[494] Credit bureaux must remove a listing relating to debt intervention within 7 days of proof of a decision by the NCR of a rejection of an application for debt intervention or from the date on which a suspension ends unless the NCR provides proof of an extension or the imposition of a limitation under section 60. The credit bureaux must remove a listing related to debt intervention within 7 days from receipt of proof of the rehabilitation order issued under proposed section 88B(7).[495]

In accordance with the proposed section 71(3A), the NCR must submit proof to the credit bureaux within *two days* of the decision being made of an order rejecting the application for debt intervention, suspending the order,[496] any extension of the order, an order limiting the rights of the consumer under section 60,[497] as well as an order for rehabilitation.[498]

The effect of the issue of a clearance certificate being issued is that all information regarding the debt re-arrangement is expunged. In this regard section 71(5)[499] reads,

> "Upon receiving a copy of a clearance certificate, a credit bureau, or the national credit register, must expunge from its records —
>
> (a) the fact that the consumer was subject to the relevant debt re-arrangement order or agreement;
>
> (b) Any information relating to any default by the consumer that may have:
>
> (i) precipitated the debt re-arrangement; or
>
> (ii) been considered in making the debt arrangement order or agreement; and

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[489] Proposed s 71(1A).
[490] If the NCR refuses to issue a clearance certificate, the applicant is entitled to apply to the Tribunal to review the decision and the Tribunal may order the NCR to issue a certificate or submit a copy to all credit bureaux.
[491] Proposed s 71A.
[492] Proposed s 71(1A) (b)(ii).
[493] Proposed s 71(1A) (b)(iii).
[494] Proposed s 71(1A) (b)(ii).
[495] Proposed s 71(3c).
[496] Proposed s 87A(2)(b)(i).
[497] Proposed s 87A (8).
[498] Proposed s 88B (7).
[499] NCA s 75.

(iii) any record that a particular credit agreement was subject to the relevant debt re-arrangement order or agreement."[500]

The rehabilitation order thus lifts the limitations on applying for credit, and the issue of a clearance certificate expunges all details regarding the consumer's default on a credit agreement and any application or subsequent re-arrangement or settlement thereof.[501] The effect, therefore, is that a debt intervention applicant whose debt is extinguished[502] may apply for rehabilitation[503] and once the rehabilitation order has been granted the credit bureaux have seven days after receipt of proof of a rehabilitation to remove a listing relating to debt intervention. This "clean slate" approach is in line with international trends.[504] The World Bank *Report* states,

> The most effective form of relief from debt is a fresh *start*, which in historical usage refers to a straight discharge; that is, to the possibility of being freed from debt without a payment plan.[505]

3.6 Conclusion

In this chapter, the debt intervention procedure as introduced in the Bill is considered. The Bill sets out to address debt relief for consumers who are excluded from current debt relief measures. The Bill uses the structures within the NCA, expanding the judicial and administrative functions of the NCR and the Tribunal. Oddly, debt counsellors play no role in the debt intervention application.[506]

From the definition of a debt intervention applicant, the procedure appears to be directed at debt relief for NINA and LILA debtors.[507] However, because the debt intervention procedure falls under the NCA, only credit agreement debt qualifies.[508] This, and the criteria set out in proposed section 86A(1) and 86A(2) that the debt intervention applicant must have a total

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[500] s 71(5).
[501] s 71(5).
[502] Proposed s 87A (6).
[503] Proposed s 88B (1).
[504] INSOL *Consumer debt report II* 9 "Discharge is the release from the payment of liabilities resulting from the filing of a bankruptcy or insolvency proceeding".
[505] World Bank *Repor*t par 360 115.
[506] Para 3.1.
[507] Para 3.1.
[508] This excludes NINA debtors from the procedure. Coetzee *Proposed debt intervention measure* (unpublished) 7.

unsecured debt of no more than R50 000[509] and if a credit provider has proceeded with enforcement of the debt, such debt it is excluded from the debt intervention procedure, limits the application of the debt intervention procedure significantly.

An applicant's ability to re-arrange his debts within a five year period[510] is used as a measure to decide whether debt intervention is feasible. If the debt intervention applicant cannot pay off his debts within this time the Tribunal may grant a suspension. There is provision for a review of the debt intervention applicant's circumstances by the NCR eight months after the order is granted before an extension of suspension may be granted by the Tribunal. The NCR must again review the debtor's circumstances, eight months after that extension.

It remains to be seen from the practical application how workable the repeated re-assessment procedure will be. International studies have pointed out that an insolvency system should not only be brief but also "not overly cumbersome".[511] The Bill provides specific factors and circumstances for the Tribunal to consider in suspending and/or extinguishing the debt.[512] Although these are a useful indication of factors to be considered, the fact that they are contained in the Bill may lead to them becoming a bureaucratic checklist.[513] The application process is administrative with the NCR making an assessment and referring the application to the Tribunal to make the order.[514] The introduction of financial literacy training and counselling is both laudable and challenging.[515]

The effect of debt intervention and especially discharge from debt is revolutionary in the South African insolvency arena.[516] The introduction of the notion that the Tribunal can re-arrange debt by reducing interest and costs as well as extinguishing the debt is a major innovation. This, together with the rehabilitation, should enable a debtor to be discharged of those debts that prevent him from moving forward.[517] Contrary to international guidelines which stress the importance of as many of the debtor's debts as possible being discharged,[518] however, the debt intervention procedure is limited to debt from qualifying

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[509] Coetzee *Proposed debt intervention measure* (unpublished) 18, points out that the amount of R50 000 is arbitrary and could have a negative impact on access to debt intervention.
[510] Para 3.3.
[511] World Bank *Report* par 406.
[512] Par 3.2.
[513] Par 3.4.
[514] Par 3.3.
[515] Par 3.3.
[516] Coetzee *Proposed debt intervention measure* (unpublished) 17.
[517] Coetzee *Proposed debt intervention measure* (unpublished) 18.
[518] World Bank *Report* par 372.

credit agreements only, which excludes many debtors who could benefit from the relief it provides but for such limitation. In effect, the debt intervention applicant does not get a fresh start as such but a reprieve from those debts which qualified for the debt intervention procedure.

CHAPTER 4: SUMMARY AND CONCLUSION

4.1 Objectives of the dissertation

The primary research objective of this dissertation is to study the proposed debt intervention measure introduced by the National Credit Amendment Bill, 2017[519] to ascertain whether it meets its stated objective of providing debt relief to those debtors who are otherwise excluded from existing debt relief measures.[520] A secondary study involves determining whether the Bill conforms to certain international guidelines and principles.[521] Some aspects of the Bill's practical application as a debt relief measure are also considered.[522]

4.2 Existing statutory debt relief measures and those excluded from such procedures

To contextualise the Bill, certain principles stemming from international reports are raised[523] and the existing statutory debt relief measures which are available to financially distressed consumers in South Africa are discussed. Debtors who are excluded from such procedures are identified.[524]

With regard to the sequestration procedure, the requirements that the debtor must be insolvent yet have sufficient realisable assets to defray the costs of the sequestration application and that he must establish an "advantage to creditors" creates an obstacle to access the procedure. This particularly excludes the so-called low-income low asset (LILA)[525] debtors or the no income and no assets (NINA) debtors,[526] who cannot gain access to the sequestration procedure because they do not have sufficient assets to cover the costs of the court application or to liquidate to fulfil the advantage to creditor's requirement[527] for liquidation. Thus, they are denied the ultimate benefit of an effective debt relief measure,

[519] Hereafter "the Bill" ch 1 par 1.1.1.
[520] Ch 1 par 1.1.
[521] Ch 2 par 2.1.
[522] Ch 3 par 3.4.
[523] Ch 2 par 2.2.
[524] Ch 2 par 2.4.
[525] Ch 1 par 1.5
[526] *Ibid.*
[527] Ch 2 par 2.2.1.

namely rehabilitation including discharge from pre-sequestration debt, which only the sequestration procedure currently grants.[528]

Provided the debtor's total debt does not exceed R50 000, a debtor can approach the magistrate's court for an administration order in accordance with section 74 of the Magistrates' Courts Act. An administrator is appointed by the magistrate's court to distribute the debtor's income amongst his creditors in terms of the administration order, which entails the restructuring of payment only. No discharge of debt is obtained prior to the settlement of all the debt included in the administration order.

To apply for debt review under section 86 of the National Credit Act[529] a debtor can approach a debt counsellor to assess whether he is over-indebted and qualifies for debt review.[530] Although there is no limit to the amount of debt, only debt emanating from credit agreements can be reviewed in terms of the NCA. Furthermore, if a creditor has instituted enforcement proceedings such debt is excluded. If the debtor does qualify for debt review, his repayment instalments are only restructured[531] and no discharge from debt is granted.

In summary, not only are some debtors excluded from both the section 74 administration order procedure and the debt review procedure under section 86 of the NCA due to the entry requirements mentioned, but they are also excluded because they do not have sufficient income to be distributed to creditors. Consequently, it is clear that NINA and LILA debtors are excluded from accessing any and all of the available debt relief measures since they do not have sufficient assets and/or income.[532]

All three debt relief procedures currently available have limitations to gaining access and have deficiencies in the debt relief provided. It is only the sequestration procedure which provides rehabilitation and discharge from debt.[533] The other procedures grant no discharge from debt and entail the repayment of debt whether it be through distribution to creditors under an administration order or through the re-arrangement of debt under debt review until the debt has been settled in full.[534] Contrary to international principles and guidelines, there

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[528] Ch 2 Par 2.2.1.
[529] The "NCA".
[530] A debtor can also raise indebtedness during enforcement proceedings in which case the court is authorised to either refer the matter to a debt counsellor or declare the debtor as over-indebted, ch 2 par 2.2.3.
[531] Ch 2 par 2.2.3.
[532] Ch 2 par 2.4.
[533] Par 2.3.1.
[534] Par 2.1.

is no open access in the current South African debt relief milieu[535] since not all debtors have access to debt relief. Even though a debtor may clearly be insolvent or over-indebted, unless he complies with the access criteria as discussed, he cannot gain access to a debt relief procedure. Contrary too to international trends, some debtors who do gain access to a debt relief measure do not receive the same benefits as those who, for instance, obtain a discharge under the sequestration procedure of the Insolvency Act. In South Africa, therefore, certain debtors, specifically NINA and LILA debtors are denied a true respite from debt.

4.3 Evaluation of the debt intervention measure

This dissertation is focused on the proposed debt intervention measure,[536] as contained in the Bill. The Bill's object is to provide capped debt intervention to South Africans who have no other effective or efficient options to extract themselves from over-indebtedness.[537]

The access criteria, which include being a natural person consumer[538] who earns R7 500 or less and who has relatively low debt (capped at R50 000)[539] and which excludes any secured debt, should enable most NINA debtors to gain access to the debt intervention procedure. The Portfolio Committee must be lauded[540] for endeavouring to address the lacuna in the current debt relief arena, by consciously devising a measure for NINA debtors, since indigent debtors will undoubtedly be able to access debt relief by these criteria.

However, there are still many limitations to accessing the debt intervention procedure. The most obvious limitation is that the proposed debt intervention procedure falls under the ambit of the NCA and, like debt review, relates only to unsecured credit agreements. Therefore, debt that emanates from any other source and any secured debt will be excluded.[541] The cap of R50 000, which corresponds with the administration order procedure, creates another barrier which will exclude debtors with debt above this ceiling as will the limit on debtors earning more than R7 500.[542] A further limitation is that a credit agreement in which the creditor has initiated legal proceedings to enforce such debt, may not be included in the debt

[535] Par 2.2.
[536] Par 3.1.
[537] Ch 1 par 1.
[538] Or a joint estate, ch 3 par 3.2.
[539] Par 3.2.
[540] Ch 3 par 3.6.
[541] *Ibid.*
[542] *Ibid*.

intervention application.[543] The fact that a debtor who is subject to an administration order will not be able to apply for debt intervention seems unreasoned and it seems unfair that a debtor who has been paying off for years under an administration order will be denied the same debt extinguishment or discharge as those who are subject to debt intervention.[544]

Some of the objections raised by academics regarding the lacuna in our insolvency law and debt relief procedure have been addressed to an extent, but the reservations expressed about the exclusion of certain categories of debtors still hold true while the lower middle-class consumers continue to be excluded from debt relief in South Africa. The broad object of the Bill has thus only been partially met since there are still South Africans who do not have the option of extricating themselves from debt.

The debt intervention procedure will be initiated when a debtor applies to the National Credit Regulator[545] to be declared over-indebted. The NCR performs the evaluation functions corresponding with those currently reserved for debt counsellors in the debt review procedure.[546] The NCR will provide financial counselling and literacy training to the debt intervention applicant. After assessing the debt intervention applicant's position, should the NCR find the consumer to be overindebted, it will refer the application to the National Credit Tribunal[547] who will ultimately decide on and is able to make an order for debt intervention.[548]

In keeping with international procedural guidelines, although credit providers will be notified and informed of the application process[549] and may submit written representations to the Tribunal, their participation is not a pre-requisite.[550] Creditor participation in assessing the repayment plan is minimal although creditors will be able to make representations.[551] They are protected to some extent in that secured credit is excluded from the process.[552] The Portfolio Committee, as stated in the memorandum,[553] anticipated that since the application is before a Tribunal, the credit providers' rights would not be arbitrarily affected.[554] The

[543] Ch 3 par 3.4.
[544] Par 3.2.
[545] The "NCR".
[546] Ch 3 par 3.3.
[547] The "Tribunal".
[548] Ch 3 par 3.3.
[549] Par 3 3.3.
[550] Ch 2 par 2 2.
[551] Ch 3 par 3.3.
[552] Par 3.3.3
[553] Par 3.4.
[554] *Ibid.*

exclusion of creditor participation is in line with international guidelines as natural person insolvency creditors contribute very little to the development of a repayment plan.[555]

The NCR will ensure that the substantive requirements have been met and will assess whether the debt intervention applicant will be able to re-arrange his debts within a five year period.[556] This timeframe to determine the repayment period falls within the international parameters but, given the NINA debtors' precarious financial circumstances, a shorter period would be preferable.[557] If such re-arrangement appears not to be possible, the repayment of the debt will be suspended for a 12-month period. After eight months a reassessment is done by the NCR to determine whether the debtor's circumstances have changed. If the debt can still not be rearranged, the application is again referred to the Tribunal for an extension of the suspension.[558] A further assessment of the debt-intervention applicant's circumstances will take place again after eight months to ascertain whether his income or assets have improved. This assessment presumably serves the practical purpose of granting the debtor an opportunity to improve his circumstances and to pay some of his debts. This falls within the international recommendations of encouraging the debtor to become economically productive and instilling a payment morality.[559] The debt intervention process is largely administrative by design, in keeping with international guidelines which suggest that debt relief procedures should be extra-judicial with courts playing a limited role where necessary.[560] The NCR's duties have been extensively amplified. This, and the extended jurisdiction of the Tribunal and the fact that one member can constitute a Tribunal should facilitate the process. The Portfolio Committee envisaged that there will be no costs payable by a consumer who cannot afford to pay. The process will be government-funded. This should enable and encourage currently excluded NINA debtors to enter the procedure. The Portfolio Committee must be acknowledged for adhering to international guidelines by using and expanding existing administrative structures.

However, contrary to international principles which stress the importance of a simple extra-judicial procedure, the continued reassessment by the NCR creates a cumbersome process

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[555] Ch 2 par 2.3.1.
[556] Ch 3 par 3.2.
[557] See the discussion in ch 3 par 3.3.
[558] *Ibid.*
[559] *Ibid*.
[560] *Ibid*.

which will create additional formalities and expense.[561] With the repeated bureaucratic reassessment by the NCR, the procedure may not be as simple as intended.[562]

Concerns have been raised about the logistics and resources required by the NCR to administer the number of applicants who may wish to access the system and the fact that the existing infrastructure of debt counsellors is omitted.[563] There are debt counsellors in most centres and, although the NCR is an existing entity, its duties have been increased substantially and it is not represented nationwide. I have some reservations regarding the bureaucratic process[564] as well as the institutional accountability in South Africa. Adequate monitoring and reporting will have to be ensured.[565]

The most radical innovation of the Bill is the introduction of a discharge by way of the extinguishment of debt. The Tribunal can order all the debt-intervention applicant's credit agreement debt to be extinguished. In keeping with international guidelines, the discharge will not be dependent on the payment of debt[566] and could possibly be obtained within a period of 24 months.[567]

To enable the observation of the impact of the debt intervention measure, the provisions dealing with the extinguishment of debt are effective for a period of 48 months from the date on which the Bill becomes operational.[568] The Minister must then review the impact of the provisions and table a report on the findings to the national assembly no later than 36 months after the Bill becomes operational.[569]

Although the Bill provides for a discharge of debt, it is not a total discharge, since it is restricted to debt qualifying under the NCA and to instances where the creditor has not instituted legal proceedings. There are still lower middle-class debtors who will be excluded from access to the debt intervention measure and who will not be able to benefit from the discharge it provides.

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[561] Ch 3 par 3.4.
[562] Ch 2 par 2.2.
[563] Ch 3 par 3.3.
[564] Par 3.6.
[565] Par 3.4.
[566] Par 3.3.
[567] Ch 2 par 2.2.1.
[568] Ch 3 par 3.4.
[569] *Idem*.

As a side observation, the provision of financial education is a welcome addition to the Bill. Training is prescribed at two stages of the debt intervention procedure, namely when the application is being considered by the NCR, as well as by the Tribunal as part of the suspension order when the applicant may be required to attend a financial literacy programme. The definition of "financial literacy" which must be provided is quite extensive, namely "the knowledge, ability and opportunity to make sound money management choices."[570] Bearing in mind the diverse debtors coming from dissimilar backgrounds, speaking any of eleven languages in South Africa and having varying levels of education, determining the level of training may prove to be a challenge. The infrastructure for such training must also still be developed.[571] It is hoped that financial counselling and training will be implemented since it may go a long way to curbing debt.

4.4 Final remarks

It has been established that certain debtors are excluded from the existing South African statutory insolvency regime either because the requirements to access the debt-relief measure excludes them or because the measure does not provide debt relief in the true sense. The debt intervention measure contained in the National Credit Amendment Bill, 2017 aims to address this lacuna and identifies two categories of debtors who are presently excluded from debt-relief measures, namely those who are excluded because of the focus on the benefit to credit providers, and those who are excluded because of the costs involved with natural person insolvency measures.

The Bill introduces certain innovative concepts to the South African insolvency law, including, the suspension of payment because a debtor is over-indebted and cannot pay his debt, as well as a discharge of debt (and not an earned discharge) by extinguishment. The most important innovation, however, is the paradigm shift from the traditional approach in insolvency law. As regards the proposed debt intervention procedure, the focus is no longer on the creditors' rights but rather on the debtor's economic ability and rehabilitation. In a society based on the use of credit, and the enthusiasm with which credit providers provide credit, it seems only fair that responsibility for the fallouts thereof must be shared. Until now, the *pacta sunt servanda* principle has been so enshrined in South African law that it was

[570] Ch 3 par 3.3.
[571] *Ibid*.

promoted at the cost of fairness and constitutionality,[572] with creditors' rights being of paramount importance in all our insolvency laws. Debt intervention is a radical departure from this.

However, due to the Bill's limitations, primarily because it resorts under the credit legislation contained in the NCA, and also because of other restrictions like the debt threshold being under R50 000 and a person's income being less than R7 500, many consumers are still excluded from this measure. Lower middle-class debtors in South Africa will still not have access to this measure and the discharge it provides. They also do not qualify for debt relief under the Insolvency Act, which is the only other debt relief measure that provides a discharge from debt. These lower middle-class debtors will still only be able to obtain debt relief through re-arrangement of debt under debt review or the administration procedure, neither of which provides a discharge of debt or rehabilitation which the international principles promote as the essence of an effective insolvency system.

The introduction of the debt-intervention measure certainly addresses some of the shortcomings of debt relief in South Africa. This introduction of this measure must be applauded, especially for the NINA and some LILA debtors. However, it does not address the systemic problems of the natural person insolvency landscape in South Africa as a whole. The introduction of the Bill is to be celebrated for being a move in the right direction but it is another measure in an arsenal of measures which only addresses one facet of debt relief. For decades academics have criticised the fractured natural person insolvency system in South Africa and called for a unified, coherent system with one regulating entity which allows for access by all debtors. This criticism still stands.

[572] Ch 3 par 3.1.

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