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THE PROPOSED DEBT INTERVENTION MEASURE

By

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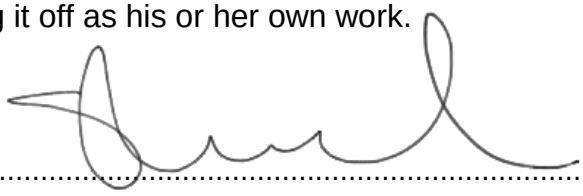
Signature of student 

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ABSTRACT

A debtor who chooses to enter the insolvency system can do so using either of three different pieces of legislation that regulate the natural person debt relief system in South Africa. These are the Insolvency Act 24 of 1936; the Magistrates' Courts Act 32 of 1944; and the National Credit Act 34 of 2005. Although it is not the main aim of the Act, only the Insolvency Act offers a discharge to debtors from pre-sequestration debts, while the Magistrates' Court Act and the National Credit Act merely offer a debt restructuring plan with no possibility of obtaining a discharge. These former Acts have overtime been argued to be of assistance to only mildly indebted consumers.

Due to stringent access requirements, such as advantage to creditors' in the sequestration procedure in terms of the Insolvency Act, no income no asset (NINA) debtors have over the years been discriminated against and cannot access the insolvency system. In response to the current discrimination of NINA debtors, a proposed debt intervention procedure contained in the National Credit Amendment Bill of 2018 has been put forward to alleviate the plight of such debtors.

This study takes an in-depth look at the current natural person debt relief system and how it ostracises a certain group of debtors. This is achieved by among other things, juxtaposing it with international trends in the field of insolvency law. This study further examines the extent to which the proposed debt intervention procedure will possibly be of assistance to the currently ostracised debtors.

Contents

CHAPTER 1: INTRODUCTION

SUMMARY

1.1 Research motivation

A lacuna exists in our law whereby no income no asset (NINA) debtors, without any form of legislative protection are left vulnerable to creditor intimidation as well as being perpetually bound in a debt trap.[1] The government has sought to remedy this by proposing a debt intervention procedure under the National Credit Amendment Bill,[2] which seeks to amend the National Credit Act.[3]

This 2018 Bill is a response to the present discriminatory insolvency system as regulated by the following Acts:[4] the Insolvency Act;[5] the NCA and the Magistrates' Courts Act.[6] These Acts presently regulate various insolvency aspects to the exclusion of NINA debtors.

1 H Coetzee "Is the unequal treatment of debtors in natural person insolvency law justifiable: A South African exposition" 2016 *Int Insolv Rev* 36.
2 The National Credit Amendment Bill of 2018 (hereafter 'the 2018 Bill').
3 The National Credit Act 34 of 2005 (hereafter 'the NCA').
4 The discriminatory nature of the current insolvency system shall be determined later in this discussion and forms the motivation for this study. The discrimination is mainly illuminated by the lack of access and a discharge option for NINA debtors.
5 The Insolvency Act 24 of 1936.
6 The Magistrates' Courts Act 32 of 1944.

The Insolvency Act provides for the sequestration procedure while section 74 of the Magistrates' Courts Act provides for the administration order procedure. Finally, section 86 of the NCA regulates the debt review procedure.[7]

On the one hand, the administration order and the debt review procedures can be summarised as repayment procedures whereby the court sanctions a debt re-arrangement which entails a restructuring of debt repayment periods and a reduction of instalments to be repaid to creditors. While on the other hand, the sequestration procedure entails the liquidation of a debtor's assets and eventual repayment of the proceeds of such liquidation to creditors who have proven their claim.[8] As can be ascertained; it is a fundamental requirement that a debtor must either have assets or an income to enter the insolvency system.[9]

The golden thread which runs through the South African insolvency system is the advantage to creditors' principle. This is an impediment for NINA debtors who neither have any income nor any assets which can be of any advantage to creditors.[10] The proposed debt intervention procedure seeks to assist such discriminated over-indebted debtors so that they can gain access to the insolvency system and thereafter obtain a discharge of debts.[11]

This study is, therefore, an evaluation of the impact that the proposed debt intervention procedure contained in the 2018 Bill might have on NINA debtors. The evaluation of the proposed debt intervention procedure is aided by a comparative study of international insolvency principles, namely, the fresh start principle in the United States of America, the no asset procedure (NAP procedure) in the New

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7 For a detailed discussion on the three procedures see H Coetzee *A comparative reappraisal of debt relief measures for natural person debtors in South Africa* (2015) LLD thesis University of Pretoria.

8 See *Walker v Syfret* 1911 AD 141 and E Bertelsmann *et al Mars*: *The law of insolvency in South Africa* (2008) 2 – 3 for a discussion on the principle of *concursus creditorum*.

9 See Coetzee *A comparative reappraisal of debt relief measures for natural person debtors in South Africa* 4 where in a discussion regarding the procedures in question, it is stated that, "as both of these measures are in essence repayment plans, some level of disposable income, which is susceptible to distribution among creditors, is necessary".

10 See M Rochelle "Lowering the penalties for failure: Using the insolvency law as a tool for spurring economic growth; The American experience, and possible uses for South Africa" 1996 *TSAR* 315 where it is argued that the exclusion of NINA debtors leads to a situation where a person can be "too poor to go bankrupt".

11 Objects of the Bill in the *Memorandum on the objects of the National Credit Amendment Bill* of 2018.

Zealand and a brief look at the World Bank *Report*.[12] This study furthermore highlights both the positive and negative consequences of the 2018 Bill and thereafter a conclusion on the extent to which it will probably alleviate the plight of NINA debtors is drawn.

1.2 Research objectives

The plight of NINA debtors is the primary problem that this dissertation serves to discuss, specifically the extent to which the proposed debt intervention procedure will assist such debtors to access the insolvency system and offer relief.

This study is aimed at achieving the following objectives:

a. To determine the extent to which the present insolvency system provides or otherwise inhibits access and discharge for NINA debtors;
b. To determine whether the proposed debt intervention procedure will adequately deal with access and discharge for NINA debtors;
c. To evaluate the proposed debt intervention procedure in relation to international developments and specifically the fresh start principle in America and the no asset procedure in New Zealand; and
d. To provide any relevant suggestions towards the proposed debt intervention procedure.

1.3 Delineation and limitations

One of the most contentious issues in insolvency law is the constitutionality of the current exclusion of NINA debtors from the insolvency system. This debate is closely related to the study at hand as the constitutionality of such exclusion is imperative in determining the importance of legislative redress. This study does not make a detailed discussion of the constitutionality of the exclusion in question. Instead, it merely highlights the conclusions made by other researchers.

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12 World Bank *Report on the treatment of the Insolvency of Natural Persons* (2013) (hereafter 'World Bank *Report*').

The socio-economic background upon which this study is conducted is integral to the arguments presented hereto. According to the December 2018 fourth quarter Credit Bureau Monitor Report, there are 25.85 million credit-active consumers in the country and merely 15.69 million of those credit-active consumers are in good standing.[13] However, a detailed look into the socio-economic environment in the country which leads to the present insolvency situation will lead to a plurality of arguments.

Furthermore, it is evident that a look into preventative methods or measures which lead to the avoidance of insolvency is linked to any study of the insolvency situation in South Africa. This research does not delve into this area of study as this will derail the focus of the study at hand.

One of the most important principles in the South African insolvency law is the advantage to creditors' principle. This is a major obstacle which hinders NINA debtors from accessing the insolvency system. A brief explanation of the meaning and consequences of this principle is provided. Such a discussion is limited to a very brief description as an in-depth study of this principle, although linked to, is not of extreme significance to the study at hand.

Over the years, legislative proposals dealing with NINA debtors have emerged and as a result, this development has seen the introduction of the proposed pre-liquidation composition according to clause 118 of the 2015 Draft Insolvency Bill. The 2015 Draft Insolvency Bill is specifically aimed at alleviating the plight of NINA debtors.[14] This study mentions the requirements for the pre-liquidation composition stipulated under the clause. It does not engage in a critical discussion of the impact of the proposed pre-liquidation composition. Instead, this study merely highlights the conclusions made by other researchers.

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13 National Credit Regulator 'Credit Bureau Monitor' http://www.ncr.org.za/credit-bureau monitoring-cbm (accessed 23 April 2019).

14 See H Coetzee "Does the proposed pre-liquidation composition proffer a solution to the No Income No Asset (NINA) debtor's quandary and, what would?" 2017 *THRHR* 18 for a discussion on the impact of the previous draft of the proposed pre-liquidation composition on NINA debtors.

1.4 Methodology

This study is an evaluation of the proposed debt intervention procedure. It takes a comparative look at the proposed procedure with international trends as a backdrop.

This study is a literature study and evaluation of legislation, case law, journal articles, reports, and books. The primary focus of this study is on the National Credit Amendment Bill of 2018 as an evaluation of the proposal from this 2018 Bill is the primary motivation for the study.

A comparative study of insolvency systems of the United States of America,[15] and New Zealand is pertinent.[16] The United States of America is of interest as this is where the fresh start principle originated from. This study briefly refers to this principle, but it does not consider making a detailed study of the entire insolvency system. This study coupled with various discussions by academics such as Coetzee has resulted in a conclusion that a comparative study of the proposed debt intervention should be juxtaposed against the New Zealand insolvency system.[17]

New Zealand has a functional system for NINA debtors which specifically and comprehensively deal with access to the system by NINA debtors and a discharge. The New Zealand system covers essential aspects of this study and in this regard, this study focuses on access to the measure and the discharge it provides. Other interesting international insolvency trends like the American fresh start principle are briefly highlighted along with the insolvency recommendations contained in the World Bank *Report*.

15 The Bankruptcy Reform Act of 1978.

16 For a study of the New Zealand system, this study makes use of the Insolvency Public Act 2006 No 55 (NZ).

17 H Coetzee *A comparative reappraisal of debt relief measures for natural person debtors in South Africa* (2015) LLD thesis University of Pretoria.

1.5 Chapter overview

a. Chapter one is the introductory chapter. In this chapter, this study highlights the background of the study and brings to light why such a study is imperative. Also contained in this chapter are the research objectives, delineations and limitations, and the methodology.
b. In chapter two, this study discusses the current South African insolvency situation. It considers the debt review procedure according to the NCA, the sequestration procedure in terms of the Insolvency Act and the administration order procedure according to the Magistrates' Court Act. In this chapter, this study further briefly describes the proposed pre-liquidation composition according to clause 118 of the 2015 Draft Insolvency Bill.
c. Chapter three constitutes a brief overview of relevant international trends in the area of insolvency law. This study considers the American fresh-start principle and the Bankruptcy Act of New Zealand. In the latter respect, the study is limited to the no asset procedure. This study, furthermore, briefly discusses the insolvency recommendations contained in the World Bank *Report* pertaining to access and discharge.
d. Chapter four is a detailed description of the proposed debt intervention procedure. In this chapter, this study highlights the important provisions in the 2018 Bill. A detailed evaluation of the provisions in question is also made.
e. This study is concluded in chapter five. After a study of the current South African debt relief system along with international trends as well as an evaluation of the proposed debt intervention procedure, this study is then finalised by making an evaluation of whether the plight of NINA debtors in South Africa will be solved by the proposed debt intervention procedure.

1.6 Key references, terms and definitions

a. Full citations of sources used in this study are provided in the bibliography section.
b. Masculine form is used throughout this study. Any reference to such should be read as also including a feminine form unless indicated otherwise.

c. The term credit provider has been used interchangeably with the term creditors. All reference to credit providers in this study should be read as referring to creditors.
d. The advantage to creditors' principle has in some instances been interchangeably referred to as benefit for creditors' principle. The difference in terminology is not to be read as referring to different concepts.
e. On 30 April 2019, when this dissertation was submitted for examination, the following applicable exchange rate applied:

    1 New Zealand dollar (NZD/$) = 9.54 South African rand (ZAR/R)

f. The law as stated in this study reflects the position as 30 April 2019.

CHAPTER 2: DEBT RELIEF MEASURES IN SOUTH AFRICA

SUMMARY

2.1 Introduction

Three different pieces of legislation regulate the current South African natural person debt relief system. This chapter examines their application with a specific focus on no income no asset (NINA) debtors. A study into the respective legislations reviews the need for a legislative overhaul in the regulation of NINA debtors. Thereafter, this study uses the observations in this chapter and any problems identified herein to determine whether the proposed debt intervention procedure advances proposals which can comprehensively assist NINA debtors.

If a debtor cannot gain access to the safety net that an insolvency measure provides, individual execution will follow.[1] An individual creditor aggrieved by the non-performance of a debtor has numerous procedures at his disposal.[2] The first fundamental step is for the creditor to demand such performance from the debtor. If

1 E Bertelsmann *et al Mars: The law of insolvency in South Africa* (2008) 1.
2 As above.

this fails, a creditor can institute a civil claim in courts and as a result, a summons will be issued against the debtor.[3]

If the debtor still fails to perform, a warrant of execution - which empowers the sheriff to attach the debtor's property - will be issued.[4] The creditor's debt will thereafter be satisfied from the proceeds obtained after the property of the debtor has been sold in execution.[5]

If the debtor does not own any movable or immovable property, a garnishee order could be applied for if a third party owes the debtor money.[6] A creditor can also apply for an emoluments attachment order, whereby, in pursuance of a court order, a portion of the debtor's salary will be paid to the creditor for a determined period of time until the debt is satisfied.[7]

2.2 The sequestration procedure

The individual debt enforcement procedures mentioned above are not practical in instances where a debtor owes more than one creditor. In such an instance, a debtor can voluntarily surrender his estate in terms of the Insolvency Act.[8]

The court in the *Epstein v Epstein* case highlighted that voluntary surrender "should be aimed at realising not a negligible dividend for the debtor's creditors".[9] Bertelsmann *et al* provide that:[10]

> Once a debtor has established that he or she is unable to pay his or her debts, but that the debtor has sufficient assets that are uncumbered, or not fully encumbered, are capable of being liquidated and will render a sufficient residue after the payment of secured creditors, the costs of the liquidation of the estate and the payment of prescribed fees as part of the administration costs, he or she may consider surrendering his or her own estate.

3 As above.
4 As above.
5 As above.
6 S 72 of the Magistrates' Courts Act 32 of 1944.
7 S 65J of the Magistrates' Courts Act.
8 The Insolvency Act 24 of 1936.
9 *Epstein v Epstein* 1987 (4) SA 606.
10 Bertelsmann *et al Mars* 48. S 6(1) of the Insolvency Act.

Alternatively, the creditors can jointly apply for the compulsory sequestration of a debtor in terms of the Insolvency Act.[11] In this regard, Bertelsmann *et al* states that:[12]

> The main aim of the sequestration process in terms of the Insolvency Act is to provide for a collective debt collecting process that will ensure an orderly and fair distribution of the debtor's assets in circumstances where these assets are insufficient to satisfy all the creditor's claims.

The sequestration procedure triggers the *concursus creditorum* principle which underlies the South African insolvency law.[13] Evans puts forward that "[t]he establishment of the *concursus creditorum* replaces the individual creditor remedies with a collective execution procedure".[14] Because the sequestration procedure is a collective debt enforcement procedure, it is imperative that the interests of the creditors as a collective are protected. In this regard, the court in *Walker v Syfret* emphasised that "one creditor cannot, through the process of execution, receive full payment of his or her claim at the cost of the claims of other creditors".[15] It has been put forward that "the concept [of *concursus creditorum*] entails that the rights of the creditors as a group are preferred [over] the rights of individual creditors".[16]

Concisely, the sequestration procedure is an asset liquidation procedure which leads to partial satisfaction of debts.[17] As highlighted above, this procedure is pursued in instances where the debtor cannot satisfy his debts. The liquidation of assets enables creditors who have proven their claims to be paid from the proceeds of the sale in proportion to their respective debts. As a fundamental requirement, a debtor must have assets that can be liquidated to pay creditors.[18]

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11 In some instances, a single creditor can make such an application. Both the compulsory sequestration and the voluntary surrender are regulated by rule 6 of the High Court Rules.

12 Bertelmann *et al Mars* 2.

13 See amongst others, *Body Corporate v Sithole & another* (240/2016) [2017] par 9, where it is pointed out that "once a sequestration order is made, a *concursus creditorum* comes into being".

14 RG Evans *A critical analysis of problem areas in respect of assets of insolvent estates of individuals* (2008) LLD thesis University of Pretoria 198.

15 *Walker v Syfret* 1911 AD 141.

16 Bertelsmann *et al Mars* 2.

17 H Coetzee *A comparative reappraisal of debt relief measures for natural person debtors in South Africa* (2015) LLD thesis University of Pretoria 3.

18 The entry requirement for the sequestration procedure places a hindrance on NINA debtors who fail to access the procedure as they lack the required realisable assets which are essential for the sequestration procedure. See M Rochelle "Lowering the penalties for failure: Using the insolvency law as a tool for spurring economic growth; The American experience,

Critical to the sequestration procedure is the golden thread which runs through the entire South African insolvency law, namely the advantage to creditors' principle.[19] This principle stipulates that any sequestration application must be accompanied by proof that the intended procedure will be to the advantage of all creditors as a group.[20]

The advantage to creditors' principle implies that all the creditors involved should receive a non-negligible dividend after the liquidation of assets.[21] The court in *Trust Wholesalers* determined that the determination of the dividend will "depend on the facts and circumstances of each case, as well as the attitude of the creditors".[22]

Imperative to this discussion is the decision in the *London Estates* where the court dealt with instances where no such dividend is obtained by creditors after the realisation of assets.[23] It was emphasised that the advantage to creditors' principle will not be satisfied if no dividend or only a negligible dividend is available after the costs of sequestration have been met.[24]

The sequestration procedure is regarded as the primary South African natural person debt relief measure. This is mainly because it is the only statutory procedure which results in the statutory discharge of all pre-sequestration debts.[25] Discharge of pre-sequestration debts emanates from the rehabilitation option given to sequestrated natural person debtors in terms of the Act.[26] It should also be pointed

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and possible uses for South Africa" 1996 *TSAR* 315 where it is highlighted that this puts NINA debtors who have no realisable assets in a position where they are "too poor to go bankrupt".

19 For a detailed discussion of the advantage to creditors' principle, see amongst others, JC Kanamugire "The Requirement of Advantage to Creditors in South African Insolvency Law – a Critical Appraisal" 2013 *Mediterranean Journal of Social Sciences* 19.

20 See, amongst others, *Stainer v Estate Bukes* 1933 OPD 86; CH Smith "The recurrent motif of the Insolvency Act – advantage of creditors" 1985 *Modern Business Law* 27.

21 *Trust Wholesalers & Woollens (Pty) Ltd v Mackan* 1954 (2) SA 109 (N).

22 As above.

23 *London Estates (Pty) Ltd v Nair* 1957 (3) SA 591 (D). For a discussion of this issue, also see *ABSA Bank Ltd v De Klerk* 1999 (4) SA 835 (SE).

24 Such a requirement creates an obstacle for debtors who neither have an income nor assets and cannot, therefore, prove that the sequestration will benefit the creditors. This, therefore, leads to the deduction that the sequestration procedure in terms of the Insolvency Act excludes NINA debtors as the benefit for creditors' requirement hinders debtors from accessing the insolvency system. The dividend in question was held in *Ex parte Kroese* 201 (1) SA 405 (NVM) to be 20 cents in the rand.

25 S 129(1)(b) of the Insolvency Act. Also, see H Coetzee & M Roestoff "Consumer debt relief in South Africa – Should the insolvency system provide for NINA debtors? Lessons from New Zealand" 2013 *Int Insolv Rev* 188 193.

26 S 129 of the Insolvency Act.

out that the discharge of debts is merely a procedural consequence and not the main aim of the procedure.[27] In this regard, Bertelsmann *et al* provides that:[28]

> [I]t is not a principal aim of South African insolvency law to obtain the debtor's release from his or her liabilities, but to ensure an equitable distribution of the debtor's assets for the benefit of his or her creditors, as is expressly required by s 3(1) of the Act.

2.3 The debt review procedure

In instances where a debtor is over-indebted, he can apply for a debt review in terms of the National Credit Act.[29] The debt review procedure aims at ensuring that a consumer debtor with his respective inadequate income which cannot fully satisfy his debts is provided with an opportunity to repay his debts over an extended period of time in accordance with his income.[30] An over-indebted consumer debtor must have an income for the satisfaction of his debts after the agreed period.[31]

Only debtors who are liable in terms of credit agreements can undergo the debt review procedure.[32] Therefore, all debts which do not satisfy the criteria mentioned in section 1 read with section 8 of the NCA cannot undergo the debt review process.[33] It should also be pointed out that the debt review procedure is not applicable in instances where a credit provider has commenced with individual debt enforcement procedure.[34]

A debt review application is made to a debt counsellor.[35] The debt counsellor must make an assessment to determine:[36]

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27 See, amongst others, *Ex parte Ford* 2009 (3) SA 376 (WCC).
28 Bertelsmann *et al Mars* 48.
29 S 86 of the National Credit Act 34 of 2005 (hereafter 'the NCA').
30 S 86(7)(c)(ii)(aa) of the NCA.
31 This requirement excludes NINA debtors as they do not have the income to make the s 87 (7)(c)(ii)(aa) repayments.
32 S 1 of the NCA provides that a credit agreement means an agreement that meets all the criteria set out in section 8 [of the NCA]. S 8 thereafter lists the criteria to be complied with for an agreement to be deemed as a credit agreement.
33 This requirement acts as a barrier to many debtors who fail to access the procedure as their respective debts fail to satisfy the NCA's definition of a credit agreement.
34 S 86(2) of the NCA.
35 S 86(1) of the NCA.
36 S 86(6)(a) of the NCA.

> whether the consumer appears to be over-indebted, and if the consumer seeks a declaration of reckless credit, whether any of the consumer's credit agreement appears to be reckless.

If after the assessment, the debt counsellor determines that the consumer debtor is not over-indebted, the application must be rejected.[37] In instances where the consumer is not over-indebted but is nevertheless experiencing, or likely to experience, difficulty satisfying all his obligations under credit agreements in a timely manner, the debt counsellor may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt re-arrangement.[38]

If the section 86(6) assessment leads to the conclusion that the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court make either or both of the following orders:[39]

(i) that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless; and

(ii) that one or more of the consumer's obligations be re-arranged by-

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

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

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

(dd) recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6.

Coetzee argues that this procedure is available to mildly indebted consumer debtors who have encountered a temporary financial problem.[40] In instances where a debtor defaults on his repayment, the debt review procedure can be terminated at the

37 S 86(7)(a) of the NCA.
38 S 86(7)(b) of the NCA.
39 S 86(7)(c).
40 H Coetzee *A comparative reappraisal of debt relief measures for natural person debtors in South Africa* 4.

instance of a credit provider.[41] However, no statutory discharge of debts is possible through the debt review procedure.

2.4 The administration procedure

A debtor who is unable to satisfy his financial obligations and who additionally does not have sufficient assets capable of attachment to satisfy his obligations can apply to a Magistrate's Court for an administration order.[42] The administration procedure only provides solace to debtors whose debts do not exceed R50 000.[43]

As in the case with the debt review procedure, the administration order can also be described as a payment plan.[44] It is therefore imperative that a debtor has some form of income or disposable assets which can be utilised for the satisfaction of the debtor's debts and the cost of the administration procedure.[45] Much like the debt review procedure, it is clear that this procedure is also only available to debtors who have encountered a temporary financial crisis.

The need for an income and disposable assets has been argued by Coetzee to be an indirect introduction of the advantage to creditors' requirement.[46] The advantage to creditors' principle is indirectly introduced as a debtor cannot access the administration procedure and the debt review procedure without proving that the debtor has income or disposable assets which can be utilised to repay creditors.

An administration order does not result in a discharge of debts. The order can, however, lapse after the debtor has fully paid the administrator and all creditors.[47]

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41 S 86(10).
42 Section 74(1) of the Magistrates' Court Act.
43 GN 217 in *GG* 37477 of 27 March 2014. This amount is determined by the Minister in terms of s 74(1)(b) of the Magistrates' Court Act. Debtors whose debts exceed the R50 000 threshold cannot have access to the procedure. This excludes a vast majority of debtors as in most instances debtors have debts which greatly exceeds this threshold.
44 Section 74C(1)(a) of the Magistrates' Court Act.
45 Similar to the debt review procedure, this requirement excludes NINA debtors who do not have any income or disposable assets.
46 H Coetzee *A comparative reappraisal of debt relief measures for natural person debtors in South Africa* 4.
47 S 74U of the Magistrates' Court Act.

After the order has lapsed, the administrator must send copies of a certificate to that effect to all creditors.[48]

2.5 The proposed pre-liquidation composition

Clause 118 of the 2015 Draft Insolvency Bill puts forward a pre-liquidation composition procedure.[49] The memorandum to the 2015 Draft Insolvency Bill states that it is intended for those who cannot pay their debts and are furthermore unable to prove an advantage to creditors'.[50] The South African Law Reform Commission was reacting to the overwhelming criticism of the current natural person debt relief measures in South Africa which are mainly credit-oriented due to among others, the advantage to creditors' principle.[51]

In terms of the proposed pre-liquidation composition, a debtor will be able to enter into a pre-liquidation composition with creditors. This procedure will be extra-judicial, and it is only available to debtors whose debts do not exceed R200 000.[52] In terms of this procedure, two-thirds of concurrent creditors must agree on the amount of each instalment to be repaid by the debtor.[53] Where negotiations do not result in any mutual consensus and fail due to a debtor's inability to pay more than what is offered, the debtor may approach the Master for a discharge.[54]

It is praiseworthy that the Commission has finally heeded the calls for an overhaul of the insolvency system. The proposed procedure is solely meant to assist over-indebted debtors who are excluded by the current natural person debt relief system.

However, upon close examination, many questions arise as to the probable success of the proposed procedure. One of the major questions which arise is regarding the

48 As above.
49 In terms of the 2015 Draft Insolvency Bill, liquidation encompasses the liquidation of juristic persons as well as the sequestration of natural persons.
50 2014 explanatory memorandum 201 208.
51 South African Law Reform Commission (hereafter 'the Commission').
52 Cl 118(1).
53 Cl 188(17).
54 Cl 118(22).

viability of entering into a negotiation when one has no assets nor any income to subsequently enter into a repayment agreement with.[55]

The proposed pre-liquidation composition procedure requires NINA debtors to engage in a negotiation with creditors despite not having any bargaining power.[56] The procedure can in some instances worsen a debtor's financial position as noted by Coetzee who puts forward that:[57]

> [N]egotiations are doomed from the outset, the costs involved, for instance, that of the administrator and insolvency practitioner as well as travelling expense (as credit providers' domiciles need to be followed) in employing the negotiation part of the procedure will all be for naught.

2.6 Conclusion

The South African insolvency system is creditor-oriented.[58] This is evident in long-held principles such as the advantage to creditors' principle. Various other insolvency entry requirements mentioned above also serve as examples of the creditor-orientated nature of the system.

As noted above, this has had the unintended consequence of excluding a large portion of debtors from obtaining access to the insolvency system. Those who manage to obtain such access usually suffer from being perpetually held in the clutches of insolvency as a result of the failure of the debt review procedure and the administration order procedure to grant any form of discharge to debtors.

The sequestration procedure which is the primary insolvency procedure in South Africa due to its possible discharge option, has received numerous criticism for its stringent access requirements. The procedure excludes all NINA debtors as only debtors with assets and those who receive an income can make use of the

55 H Coetzee "Does the proposed pre-liquidation composition proffer a solution to the No Income No Asset (NINA) debtor's quandary and, if not, what wound?" 2017 *THRHR* 18 25.
56 As above.
57 As above.
58 A Boraine and M Roestoff "Revisiting the state of consumer insolvency in South Africa after twenty years: The courts' approach, international guidelines and an appeal for urgent law reform" Part 1 2014 *THRHR* 351.

procedure. In this regard, it can be concluded that the sequestration procedure discriminates against NINA debtors.

The differential and subsequent unequal treatment of insolvent and over-indebted debtors was deemed to be regrettable by Boraine and Roestoff.[59] They criticised the provision of discharge to debtors in terms of the Insolvency Act only. They further advocate for a balancing of interests which does not favour the interests of creditors only or favourably treat a portion of debtors based on their financial status. This differential treatment of debtors was also held by Coetzee to be unconstitutional as it is based on unjustified unfair discrimination.[60]

In addition to the procedures mentioned above, debtors and creditors can voluntarily enter into an agreement in terms of which they agree on a release or novation. This is, however, not a useful or a commonly used option due to the unequal bargaining power between the debtor and the creditor. The creditor will always act in a manner that protects his interests. Furthermore, an act of insolvency is committed when a debtor proposes a release or points out his inability to satisfy his debts.[61] Lastly, a creditor in collusion with a debtor can apply for the compulsory sequestration of the debtor.[62] This is usually done so as to assist a debtor to gain access to the sequestration procedure. Debtors opt for the compulsory sequestration procedure as the voluntary sequestration procedure has cumbersome requirements which are difficult to satisfy.

59 A Boraine and M 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.

60 H Coetzee "Is the unequal treatment of debtors in natural person insolvency law justifiable: A South African exposition" 2016 *Int Insolv Rev* 36.

61 S 8(e) read with s 8(g) of the Insolvency Act.

62 A compulsory sequestration application brought by creditors who are not at arm's length is called a friendly sequestration.

CHAPTER 3: INTERNATIONAL TRENDS IN DEBT RELIEF MEASURES FOR NATURAL PERSONS

SUMMARY

3.1 Introduction

It has been established in chapter two that one of the biggest problems with the South African natural person debt relief system is that it has remained largely creditor-oriented.[1] This has led to a vast number of debtors being excluded from the insolvency system, especially no income no asset (NINA) debtors.[2]

The South African insolvency law has held steadfast to a creditor-oriented system despite the wave of change which has swept across the world.[3] Changes in the world's insolvency systems have been characterised by a need to accommodate all honest but unfortunate debtors. Consequently, providing a discharge to all honest but unfortunate debtors assists rehabilitated debtors in re-entering and actively participating in the economy.[4]

1 This is due to among others the advantage to creditors' principle.

2 See ch 2 where the exclusion of NINA debtors is dealt with in detail.

3 See JJ Kilborn "The innovative German approach to consumer debt relief: Revolutionary changes in German Law, and surprising lessons for the United States" 2004 *Northwestern Journal of International Law and Business* 257.

4 See H Coetzee *A comparative reappraisal of debt relief measures for natural person debtors in South Africa* 7-8 where it is argued that the lack of access to the insolvency system and the

The United States of America has played a pivotal role in fostering change in insolvency law across the world through the fresh start principle.[5] The discharge position in the American system can be juxtaposed with the European position where debtors obtain relief on the basis that they *earn* such relief.[6] This is in stark contrast with the American system where a discharge of debts is solely dependent on complying with specific procedural requirements.[7]

3.2 World Bank Report

After the global financial crisis, it became imperative for an international body to convene in order to tackle the insolvency phenomenon which had resulted. The World Bank seized the opportunity and produced a report aimed at discussing the treatment of insolvent natural persons.[8] The non-prescriptive[9] report is aimed at providing "guidance on the characteristics of an insolvency regime for natural persons".[10]

The report provides that access should be made clear and measures should be put in place to prevent any possible abuse by both creditors and debtors. One of the ways to curb any form of abuse is by making access requirements transparent and certain.[11] The report points out that some jurisdictions should require access barriers in order to reduce debtors' moral hazard and "to 'ensure' that agreements are kept".[12] The report advocates for an insolvency system with lower access requirements as this plays a significant role in "reducing honest but unfortunate debtors' reluctance to seek relief".[13]

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subsequent lack of discharge leads to a dual economy as over-indebted debtors decide to enter the informal economy.

5 See par 3.2 for a discussion of the principle.

6 This is called earned fresh start.

7 The procedural requirements are provided in par 3.2 below.

8 World Bank *Report on the treatment of the insolvency of natural persons* (2013) (hereafter 'World Bank *Report*').

9 World Bank *Report* par 14.

10 World Bank *Report* par 394.

11 World Bank *Report* par 185.

12 World Bank *Report* par 10 and 192. The report points out that achieving the objective of the *pacta sunt survanda* helps in alleviating the possibility of moral hazard.

13 See World Bank *Report* par 188 where the report discusses open access for debtors. The report explains insolvency open access as "the idea that an individual who meets an

The report further provide that stringent access requirements:[14]

> keep debtors in a state of informal insolvency, where they lose the incentive to participate in society, may rely on state support and even disappear to hide from creditors.

The report appreciates the possibility of abuse by debtors in instances where access requirements are extremely low thereby becoming susceptible to abuse.[15] In this regard, it puts forward that some jurisdictions are encouraged to require proof of insolvency before a debtor can access the system.[16] The report states that moral hazard can be eradicated or reduced by "limit[ing] the frequency of access to insolvency".[17] It is further stated that "[t]his might be accomplished by applying a bright line rule restricting access within a defined period of time".[18]

The World Bank *Report* notes discharge as a fundamental aspect in the sphere of natural person insolvency. It is highlighted that the main aim of discharge is economic rehabilitation. Rehabilitation has three core features, namely, the discharge of excess debt, non-discrimination after discharge, and avoidance of future debt.[19]

The fresh start principle is deemed to be the most suitable system in regard to the discharge of debts. The report shuns against the satisfaction of debt through repayment plans. The report goes further to note the reluctance of many jurisdictions in implementing a straight discharge; it, thereafter, proceeds to advocate for an earned discharge. This entails putting in place certain behavioural requirements which prohibit a debtor from engaging in certain activities and violation of which results in the termination of the procedure.[20] Furthermore, financial requirements

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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".

14 World Bank *Report* par 196.
15 World Bank *Report* par 188.
16 World Bank *Report* par 189 – 190.
17 World Bank *Report* par 193.
18 As above.
19 World Bank *Report* par 359.
20 World Bank *Report* par 189.

might be put in place which requires a debtor to make certain financial decisions which become fundamental to earning a discharge.[21]

These might include, but not limited to, repayment of a portion of the debts and making discharge to be dependent on the effluxion of time.[22] Earned discharge was however noted to be a hindrance to honest but unfortunate debtors' who cannot afford to repay a portion of the debt.[23]

The report does not encourage creditor involvement in the discharge process. Creditors usually act in their best interest; therefore, their involvement might lead to many debtors being perpetually trapped in the insolvency system as a discharge of debts is not usually in the best interest of a creditor.[24] However, the report also puts forward that creditors and other state agencies must be permitted to challenge debtor discharge *ex post facto* as their interests are also pivotal and should be protected.[25]

3.3 America: Fresh-start principle

> Bankruptcy law in the United States is unique in the world. Perhaps most startling to outsiders is that individuals and business in the United States do not seem to view bankruptcy as the absolute last resort, as an outcome to be avoided at all costs. No one wants to wind up in bankruptcy, of course, but many US debtors treat it as a means to another, healthier end, not as the End.[26]

The American system is fundamentally different from other international systems including the South African system.[27] While South Africa holds the advantage to

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21 World Bank *Report* par 189. However, the report notes that the majority of debtors might not be able to satisfy the financial requirement as they will not have surplus income or no income at all.
22 World Bank *Report* par 63.
23 World Bank *Report* par 258 – 308.
24 World Bank *Report* par 205 – 215.
25 As above.
26 D Skeel *Debts dominion: A history of bankruptcy law in America* (2001) 1.
27 The discussion of the fresh start principle reviews that the American system balances the interests of creditors, debtors, and the public. This is in contrast with the South African position where the interests of creditors rank in priority.

creditors' principle in sacrosanct,[28] the American system, in contrast, accommodates all honest but unfortunate debtors.[29]

Evans states that "the word 'unfortunate' is foreign to South African insolvency law policy".[30] In stark contrast to the South African system, America champions the need to assist debtors to be economically active by re-entering the economy without any insolvency prohibition.[31] This is achieved by offering a fresh start to all "unfortunate" debtors.[32] Huls puts forward that the primary and central principle in the American system is debt relief.[33]

Gross provides that:[34]

> Society mandates that creditors and other members of society forgive non-paying debtors…[forgiveness] gives the wrongdoer the opportunity to regain self-esteem and become once again a productive member of society. In a capitalistic economy, we want debtors to reintegrate into the system for their sake and our own. For debtors, reintegration allows the taking of new risks. For society, taking risks is exactly what we want individuals and businesses to do. This enables the wheel of commerce to turn, individuals fend for themselves and do not become a drain on scarce societal resources.

The American bankruptcy system is regulated by the Bankruptcy Reform Act.[35] State law and various other non-bankruptcy legislation also exert a vast influence on the American insolvency system.

The two fundamental features of the fresh-start principle are discharge and exemption.[36] After undergoing bankruptcy, a debtor should be discharged of all pre-

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28 See ch 2 par 2.2 for a brief discussion of this principle.

29 See the discussion by Apeldoorn in JC Van Apeldoorn "The 'fresh start' for individual debtors: Social, moral and practical issues" 2008 *Int Insolv Rev* 66 who states that the American system offers "an automatic right to be discharged from pre-bankruptcy debts".

30 RG Evans *A critical analysis of problem areas in respect of assets of insolvent estates of individuals* (2008) LLD thesis University of Pretoria 135.

31 The court in *Ex parte Taljaard* 1975 3 SA 106 (O) 108 held that insolvency diminishes a debtor's status. See amongst others, M Roestoff "Insolvency restrictions, disabilities, and disqualifications in South African consumer insolvency law: A legal comparative perspective" (2018) 81 *THRHR* 393 for a comprehensive discussion of the consequences of insolvency.

32 *Local Loan Co v Hunt* 1934 292 US 244.

33 N Huls "A next step in debt enforcement: The merger of debt help and debt collection" 2012 *Journal of Consumer Policy* 497 499.

34 K Gross "Failure and forgiveness: Rebalancing the bankruptcy system" (1997) *Yale University Press New Haven* 93 94.

35 The Bankruptcy Reform Act of 1978 (hereafter the 'Bankruptcy Code').

36 H Coetzee *A comparative reappraisal of debt relief measures for natural person debtors in South Africa* (2015) LLD thesis University of Pretoria 42.

bankruptcy debts. Exemption entails that certain property of the debtor is excluded from liquidation.[37] This is, however, not a novel characteristic as it is present in numerous systems.[38]

The Bankruptcy Code makes provision for two procedures, namely the liquidation procedure,[39] and the rehabilitation procedure.[40] Access to the insolvency system is not limited to insolvent debtors.[41] The Chapter 7 liquidation procedure, like the South African system, provides for both voluntary and involuntary applications.[42] Chapter 7 liquidation can therefore be summarily described as having two fundamental goals, namely, liquidation of the debtor's assets and the granting of a discharge. The Code does not specify the amount to be paid to debtors in order to qualify for a discharge.[43]

Under the Chapter 7 liquidation procedure, a debtor-applicant must submit all non-exempt property to a trustee.[44] After submitting the non-exempt property, the debtor-applicant can obtain an immediate discharge.[45] It is the trustee's duty to sell the property in his possession and thereafter distribute the proceeds to all creditors.[46]

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37 See H Coetzee *A comparative reappraisal of debt relief measures for natural person debtors in South Africa* 42 where it is argued that "the debtor's ability to retain 'exempt' property …improves the outcome of the discharge in that debtors are provided with the necessities to carry on with their lives".

38 An exemption is a great tool in promoting economical production to those who have undergone bankruptcy. This acts as an incentive and promotes self-sufficiency by helping debtors get back on their feet and be economically productive citizens again.

39 Chapter 7 of the Bankruptcy Code.

40 Chapters 13 of the Bankruptcy Code.

41 This is praiseworthy and can be contrasted with the South African system that requires 'actual insolvency' in order to enter the insolvency system. Actual insolvency is when a debtor's liabilities exceed his assets.

42 The American bankruptcy system can be commended for removing the stigma involved in being declared insolvent as can be found in the South African system. This has seen the widespread use of the voluntary surrender in terms of Chapter 7 which is in stark contrast with the South African system where voluntary surrender is viewed with much circumspect and the procedure is time-consuming. In South Africa, debtors who want to voluntarily surrender are usually faced with numerous hurdles and as a result, end up opting for a 'friendly sequestration' under section 8(g) of the Insolvency Act 24 of 1936.

43 This should be contracted with the South African system which according to case law requires 20c to the Rand as a non-negligible dividend in order to access to the system. See amongst others, *Stodel v Nedbank Limited* (47597/2014) [2015] ZAGPPHC 952 par 7.

44 This therefore limits court involvement in insolvency matters as this is an extra-judicial procedure.

45 S 727 of the Bankruptcy Code. Transplanting such a procedure in its current state can be argued to not be viable in the South African environment due to the dismally low financial literacy levels in the country. The low financial literacy levels mean that more than often consumers engage in poor financial decisions which leave them in dire financial situations.

Alternatively, a debtor can make use of the Chapter 13 rehabilitation procedure. This is a repayment plan procedure. It is a voluntary procedure whereby a debtor who has a source of income, albeit a low one in comparison with his debts, enters into an agreement with his creditors to reschedule the repayment of his debts. The repayment plan can only be granted for a period of 3 years.[47] A debtor will be granted discharge after the 3-year period has lapsed.[48] One of the major differences between the Chapter 7 liquidation procedure and the Chapter 13 rehabilitation procedure is that under the Chapter 13 rehabilitation procedure, a debtor is not expected to hand over his property to a trustee for liquidation.[49]

Therefore, granting an easy discharge leaves one wondering if it is financially sustainable. One of the ways to curb this would be to put a cap on the number of times an individual can be rehabilitated. Alternatively, discharge can only be granted to a single debtor after every 5-year period. This will help stop abuse by dishonest debtors.

46 It is evident that this is a brief procedure which aims to help repay creditors as well as help debtors to obtain a discharge. This is commendable in that; a short procedure will not inconvenience a debtor through numerous prohibitions such as the ability to hold certain offices such as in South Africa. This procedure is accommodative of all debtors and this is in stark contrast with the South African position. In this regard, the American system is praiseworthy. However, when one analyses the South African socio-economic situation and the extent to which poverty has affected the nation, it is questionable whether such a position will be viable. On the one hand, the viability of such a system comes to question when one wonders who will have to cover the enormous debt that is left when all debtors are offered discharge. On the other hand, one can strongly argue for this system as it will help many economically incapacitated debtors to re-enter the market. Coetzee has put forward that the South African economy is characterised by a dual system marked by the formal and the informal economy. An informal economy mostly fuelled by the poor who without any discharge option have opted to operate without any governmental control. Therefore, an introduction of a fresh-start principle with its discharge characteristic can assist many debtors to enter the formal economy and thereby contributing towards the growth of the economy by for example, paying income taxes.

47 S 1322(d). In certain instances, a debtor can apply for permission to extend the repayment plan to a period longer than 3 years but not more than 5 years.

48 S 1328(b) however, provides an option to obtain an early discharge called ‘hardship discharge’ when a debtor who has entered into a Chapter 13 repayment plan has been met with financial difficulties. The hardship discharge will only be granted when the following requirements are met:

a) The debtor’s failure to complete the plan is due to circumstances for which the debtor should not be held accountable; and
b) The creditors have received at least the liquidation value of their unsecured claims; and
c) Modification of the plan is not practicable.

The hardship discharge is a praiseworthy invention in the American system as it helps hardworking and honest debtors who have encountered financial difficult to find means to repay their debt while also being financially independent.

49 This can be a great introduction to the South African system as debtors who are undergoing bankruptcy will not be held financially incapacitated and can continue utilising their property to generate revenue. A debtor is placed in a position where he can continue to be productive and simultaneously repaying his debt. This is also a commendable procedure as compared to the Chapter 7 liquidation which leaves loopholes for abuse by dishonest debtors who

A remarkable change from a very liberal fresh start philosophy has been witnessed through the introduction of the Bankruptcy Abuse Prevention and Consumer Protection.[50] Under the BAPCPA, a debtor is supposed to obtain compulsory counselling.[51] Furthermore, a means test is also required to determine whether a debtor should utilise the Chapter 7 liquidation procedure or the Chapter 13 rehabilitation procedure.[52]

3.4 New Zealand: No asset procedure

> New Zealand was the first jurisdiction to specifically provide for the NINA debtor.[53]

The New Zealand insolvency system is regulated by the Insolvency Act 2006.[54] The Act provides for bankruptcy[55] and various alternative procedures such as proposals,[56] summary instalment orders,[57] and the no asset procedure.[58]

Specific focus will be directed towards the NAP procedure which specifically caters for NINA debtors. Coetzee puts forward that:[59]

> It seems that, unlike the South African debt relief landscape, the New Zealand system generally accepts that its insolvency regime should provide a debt relief measure to all honest but unfortunate individuals who are unable to pay their debts. In this regard and as far as access is concerned, the system does not discriminate against less fortunate debtors. On the contrary, the New Zealand system specifically provides for their unique needs. The system also does not discriminate in relation to the discharge as, once the debtor is accepted to the system, the bankruptcy, summary instalment orders and no asset procedures provide for the statutory discharge of the honest but unfortunate debtors' debt.

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recklessly obtain debt and have a guaranteed discharge at the end of a reckless financial spending spree.

50 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (hereafter 'the BAPCPA').

51 S 109(h).

52 S 707(b)(2).

53 H Coetzee and M Roestoff "Consumer debt relief in South Africa – Should the insolvency system provide for NINA debtors? Lessons from New Zealand" 2013 *Int Insolv Rev* 188.

54 Hereafter 'the Act'.

55 Ss 7 – 100.

56 Ss 325 – 339.

57 Ss 340 – 360.

58 Ss 361 – 377B (hereafter 'NAP procedure').

59 H Coetzee *A comparative reappraisal of debt relief measures for natural person debtors in South Africa* 306.

It is this argument that makes a comparative study of the New Zealand system of importance as it offers a guideline into the legislative reform needed in the South African system. The NAP procedure was specifically enacted for all debtors with no realisable assets and no means of repaying their debt.[60]

A debtor initiates the procedure by making an application to an assignee.[61] The debtor must complete and file an application form with an assignee.[62] The assignee is vested with the authority to reject the application in instances where the debtor-applicant has not been honest in his application.[63]

The Act recognises the potential for abuse of the procedure and consequently, entry requirements have been put in place, which a debtor need to satisfy before he can access the procedure. The debtor needs to satisfy both financial and conduct requirements, and failure of which an assignee can reject the application.[64]

To gain access to the procedure, the financial position of the debtor must be assessed, and it should be proven that:

(a) the debtor has no realisable assets; and[65]
(b) the debtor has not previously been admitted to the no asset procedure; and[66]
(c) the debtor has not previously been adjudicated bankrupt;[67] and
(d) the debtor has total debts (excluding any student loan balance) that are not less than NZ$1,000 and not more than NZ$47,000;[68] and
(e) under a prescribed meats test, the debtor does not have the means of repaying any amount towards those debts.[69]

Access to the procedure is also dependent on the actions of the debtor. An assignee can reject the application if it is proved that:

(a) the debtor has concealed assets with the intention of defrauding his or her creditors, for example, by transferring property to a trust;[70] or

60 S 361, ss 363(1)(a) and 363(1)(e).
61 S 362(1).
62 S 362(2).
63 S 362(3).
64 S 363(1).
65 S 363(1)(a).
66 S 363(1)(b).
67 S 363(1)(c).
68 S 363(1)(d).
69 S 363(1)(e).
70 S 364(a).

(b) the debtor has engaged in conduct that would if he or she were adjudicated bankrupt, constitute an offence under this Act;[71] or

(c) the debtor has incurred a debt or debts knowing that the debtor does not have the means to repay them;[72] or

(d) a creditor intends applying for the debtor's adjudication as a bankrupt and it is likely that the outcome for the creditor if the debtor is adjudicated bankrupt, will be materially better than if the debtor is admitted to the no asset procedure.[73]

Once an application has been lodged with an assignee, a debtor is prohibited from obtaining credit exceeding NZ$100 unless the debtor makes the credit provider aware that such an application has been made.[74] Entry into the procedure is marked by a formal notice to the debtor.[75] Furthermore, all creditors are to be notified by an assignee that the debtor has been granted access to the procedure.[76] Once a debtor has been granted access to the procedure, creditors are barred from commencing or continuing with debt enforcement measures and this has been argued by Coetzee to be in line with international guidelines which "favour the position where a moratorium on debt enforcement commences once an application for debt relief has been filed".[77]

The involvement of the creditors is minimal at this stage and it is up to an assignee to consider the creditors' interests in every decision-making process. Coetzee argues that this "coincides with the international guidelines that creditors should only participate in instances where estates represent the significant value".[78]

The assignee is vested with the authority to terminate the procedure in an instance where the debtor has obtained a discharge.[79] The debtor can also trigger such termination if he applies for his own adjudication.[80] An assignee can further terminate the procedure in instances where a debtor gained access to the procedure pursuant

71 S 364(b).
72 S 364(c).
73 S 364(d).
74 S 366.
75 S 367(1).
76 S 367(2).
77 H Coetzee *A comparative reappraisal of debt relief measures for natural person debtors in South Africa* 389.
78 H Coetzee *A comparative reappraisal of debt relief measures for natural person debtors in South Africa* 338.
79 S 372(b).
80 S 372(c). Application for adjudication by a credit provider also results in termination of the procedure in terms of s 372(d).

to any fraudulent activities such as concealment of assets or any other act which misled the assignee.[81]

A debtor who successfully participates in the procedure will automatically receive a discharge of his debts 12 months after being admitted to the procedure.[82] The Act gives the assignee the authority to postpone a discharge of debts after the 12 months period has lapsed.[83] Discharge results in debts being cancelled and consequently making all debts unenforceable. It should be noted that a discharge of fraudulently incurred debts is not possible under the Act.[84]

3.5 Conclusion

This chapter has discussed the American fresh start principle, the NAP procedure in New Zealand and the non-prescriptive insolvency recommendations as contained in the World Bank *Report*. The discussion has highlighted a contrast between South Africa and the worldwide insolvency trend of focusing and being cognisant of the plight of NINA debtors.

South Africa has lagged behind international trends in insolvency law due to its strict adherence to principles such as the advantage to creditors'. This has resulted in the exclusion of NINA debtors who cannot prove any benefit for creditors for various reasons which includes a lack of surplus income which can offer an advantage to creditors.

A study of the jurisdictions undertaken in this chapter further highlighted an urgent need for an overhaul of the insolvency system in line with international trends. The international trends in question included among others, the movement away from a formal court system to an extra-judicial process of insolvency law as can be seen in the New Zealand and American system through the use of an assignee. Such an overhaul will need to address the lack of access and subsequent discharge for NINA debtors in South Africa. Furthermore, it is imperative that any change in the system

81 Ss 372 373(1)(a).
82 S 377(1).
83 S 377(2).
84 S 377A(2).

focuses on achieving a balance of the interests of all stakeholders in the insolvency system.

It is evident from the study of the Chapter 7 liquidation procedure above that it is a brief procedure which aims to help repay creditors as well as help debtors to obtain a discharge. This is commendable in that; a short procedure will not inconvenience a debtor through numerous onerous prohibitions such as being barred from holding certain offices as can be witnessed in the South African system. This procedure is accommodative of all debtors and this is in stark contrast with the South African position. In this regard, the American system is praiseworthy.

However, when one analyses the South African socio-economic situation,[85] it is questionable whether such a position will be viable in the South African context. On the one hand, the viability of such a system comes to question when one wonders who will have to cover the enormous debt that is left when all debtors are offered a blanket discharge. On the other hand, one can strongly argue for this system as it will help many economically incapacitated debtors to re-enter the formal economy.

Coetzee has put forward that the South African economy is characterised by a dual system marked by the formal and the informal economy.[86] An informal economy mostly fuelled by the poor who without any discharge option have opted to operate without governmental control. Therefore, an introduction of a fresh-start principle with its discharge characteristic can assist many people to enter the formal economy and thereby contributing towards the fiscus by means such as paying their tax.

85 See amongst others, The World Bank *South Africa economic update: jobs and inequality* (2018) 24 where it is argued that South Africa is one of the most unequal countries in the world.

86 H Coetzee *A comparative reappraisal of debt relief measures for natural person debtors in South Africa* 7-8.

CHAPTER 4: DEBT INTERVENTION

SUMMARY

4.1 Introduction

It has been highlighted in the subsequent chapters that the current South African natural person debt relief system is creditor-oriented.[1] This has led to the marginalisation of the no income no asset (NINA) debtors as they cannot access the debt relief system due to among other things, their failure to prove an advantage for creditors'.[2] This study has shown that the discrimination of NINA debtors is not in line with international trends which have seen comprehensive attention being given to NINA debtors worldwide.[3]

The government took notice of such a disheartening state and sought to remedy this by putting forward the proposed debt intervention procedure as contained in the National Credit Amendment Bill of 2018.[4] The proposed procedure aims to be the solution that alleviates the plight of NINA debtors.

1 See the discussion in ch 2 of the current natural person debt relief measures in South Africa and how they exclude NINA debtors.
2 As above.
3 See ch 3 par 3.3 and par 3.4 for a discussion of the New Zealand no asset (NAP) procedure and the fresh start principle in America.
4 The National Credit Amendment Bill of 2018 (hereafter 'the 2018 Bill').

The discussion in this chapter seeks to dissect the proposed procedure's operation and further discover whether the proposal will possibly alleviate the plight of NINA debtors with special focus on the access to the procedure and a subsequent discharge. Various international trends brought to light in chapter 3 will be used to benchmark the procedure's possible success.

4.2 Purpose of the Bill

In relation to the debt relief, the 2018 Bill aims at amending the National Credit Act in the following manner:[5]

> [S]o as to provide for debt intervention; to insert new definitions; to include the evaluation and referral of debt intervention applications as a function of the National Credit Regulator and to provide for the creation of capacity within the National Credit Regulator and logistics arrangements to execute this function; [6] to include consideration of a referral as a function of the Tribunal; [7] to provide for the recordal of information related to debt intervention; … to provide for a court to enquire into and either refer a matter for debt intervention or make an order related to debt intervention; … to provide for an application for debt intervention and the evaluation thereof; … to provide for orders related to debt intervention … to provide for offences related to debt intervention; … and to provide for matters connected therewith.[8]

The 2018 Bill refers to the NCA's purpose which is to:[9]

> [P]romote and advance the social and economic welfare of South Africans; to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market industry; and to protect consumers.

5 The National Credit Act 34 of 2005 (hereafter 'the NCA').
6 See ss 12 – 25 of the NCA read together with proposed s 15A of the 2018 Bill in relation to the powers and functions of the National Credit Regulator (hereafter 'the NCR').
7 Tribunal refers to the National Consumer Tribunal regulated by s 26 of the NCA (hereafter 'the NCT').
8 The long title of the 2018 Bill.
9 Preamble of the 2018 Bill.

4.3 Access to the debt intervention procedure

Access to the proposed debt intervention procedure is limited to applicants who do not receive any income. However, in instances where the applicant receives income, the applicant will only qualify if the:[10]

> gross income [does] not, on an average for the six months preceding the date of the application for debt intervention not exceed R7500 per month.

The applicant must be over-indebted, and must neither be sequestrated nor be subject to an administration order.[11] A debt intervention applicant will only qualify for the procedure if "that debt intervention applicant has a total unsecured debt owing to credit providers of no more than R50 000".[12] All consumer debtors whose debts exceed the R50 000 threshold, are excluded from the procedure and are left to rely on other legislative procedures which as highlighted, exclude NINA debtors.[13]

As the 2018 Bill is intended on amending the NCA, the proposed debt intervention procedure will only be available to consumer debtors whose debts fall into the ambit of the definition of credit agreements.[14] The definition of a debt intervention applicant requires the applicant to be "a consumer under unsecured credit agreements, unsecured short-term transactions or unsecured credit facilities only".[15] Section 1 read with section 8 of the NCA provide a definition and criteria of a credit agreement. A debtor whose agreements fail to satisfy the section 8 criteria cannot undergo the proposed debt intervention procedure.[16]

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10 Proposed s 1.

11 Proposed s 1, proposed subsections (c) and (d) of the definition of debt intervention applicant. Proposed subsection (c) is plausible as it prevents abuse of the procedure by consumers who are not over-indebted but intend on escaping their financial obligations under their credit agreements. Proposed subsection (d) is also plausible as it helps in preventing a multiplicity of natural person debt relief procedures.

12 Proposed s 86A(1).

13 This is one of the major points for criticism of the administrative procedure which places the same financial threshold as can be noted in the discussion in ch 2 par 2.4.

14 S 1 of the NCA provides that a credit agreement means an agreement that meets all the criteria set out in section 8 [of the NCA]. S 8 thereafter lists the criteria to be complied with for an agreement to be deemed as a credit agreement.

15 Proposed s 1.

16 This requirement acts as a barrier to those debtors whose respective debts fail to satisfy the NCA's definition of a credit agreement. This is regrettable as it has been noted above that the current South African natural person debt relief system discriminates against NINA debtors and the proposed debt intervention procedure will continue this discrimination by excluding NINA debtors whose debts fall outside the ambit of the NCA. See Coetzee's comments on the

Various other credit agreements are also excluded from the ambit of the debt intervention procedure, for example, developmental credit agreements.[17] The 2018 Bill also excludes credit agreements in terms whereof, "the credit provider under the credit agreement has proceeded to take the steps contemplated in section 130 to enforce the agreement".[18]

4.4 Procedural matters

A debt intervention applicant will initiate the debt intervention process by an application in the prescribed manner and form to the NCR.[19] After consideration, the NCR may declare the applicant over-indebted if all requirements of the procedure are met.[20] When considering debt intervention application, the NCR is mandated to provide the debt intervention applicant with:[21]

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earlier version of the 2018 Bill in H Coetzee "An opportunity for No Income No Asset (NINA) debtors to get out of check? – an evaluation of the proposed debt intervention measure" 2018 81 *THRHR* 599.

17 Proposed s 86A(2)(a). S 10(1) of the NCA describes developmental credit agreements. It provides as follows:
A credit agreement, irrespective of its form, type or category, is a developmental credit agreement if-
(a) at the time the agreement is entered into, the credit provider holds a supplementary registration certificate issued in terms of an application contemplated in section 41; and
(b) the credit agreement is-
(i) between a credit co-operative as a credit provider and a member of that credit co-operative as a consumer, if profit is not the dominant purpose for entering into the agreement, and the principal debt under the agreement does not exceed the prescribed maximum amount;
(ii) an educational loan; or
(iii) entered into for any of the following purposes-
(aa) development of a small business;
(bb) the acquisition, rehabilitation, building or expansion of low housing; or
(cc) any other purpose prescribed in terms of subsection (2)(a).

18 Proposed s 86A(2)(b). This provision is regrettable as the only access consideration in this regard should be the effectiveness of the intended procedure. See H Coetzee "An opportunity for No Income No Asset (NINA) debtors to get out of check? – an evaluation of the proposed debt intervention measure" (2018) 81 *THRHR* 611 who makes the observation in the earlier version of the Bill that by excluding proposed s 86A(2)(b) credit agreements, the debt intervention will be rendered ineffective as excluding such credit agreements will prevent a holistic solution to the financial problem in that some agreements will be excluded.

19 Proposed s 86A(1).

20 Proposed s 86A(1). See ch 3 par 3.3 and ch 3 par 3.4, where it was pointed out that, internationally there has been a notable shift away from the court system when dealing with insolvency matters. This proposal is therefore plausible in this regard as it is in line with international insolvency trends. See Coetzee's comments on the earlier version of the 2018

(a) counselling on financial literacy; and

(b) access to training to improve th[e] debt intervention applicant's financial literacy.

After consideration of the debt intervention application and depending on the outcome thereof, the NCR can make various determinations, which include, that:[22]

(a) the debt intervention applicant does not qualify for debt intervention, the National Credit Regulator must reject the application;[23]

(b) the debt intervention applicant does not qualify for debt intervention, but is nevertheless experiencing, or is likely to experience, difficulty satisfying all the debt intervention applicant's obligations under credit agreements in a timely manner, the National Credit Regulator must recommend that the debt intervention applicant and the respective credit providers voluntarily consider and agree on a plan of debt re-arrangement;[24]

(c) a credit agreement that formed part of the application may constitute reckless lending, an unlawful credit agreement or a credit agreement resulting from prohibited conduct, the National Credit Regulator must refer the credit agreement to the Tribunal for an appropriate declaration;

(d) the debt intervention applicant qualifies for debt intervention, and the obligations of the debt intervention applicant can be re-arranged within a period of five years or such longer period as may be prescribed, the National Credit Regulator must refer the matter with a recommendation to the Tribunal in the prescribed manner and form for an order contemplated in section 87(1A);[25] or

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Bill in H Coetzee "An opportunity for No Income No Asset (NINA) debtors to get out of check? – an evaluation of the proposed debt intervention measure" (2018) 81 *THRHR* 610.

21 Proposed s 86A(5). By empowering applicants, future over-indebtedness may be curbed. This is as debtors will thereafter be in a position to make better and more informed financial decisions.

22 Proposed s 86A(6). See the discussion in ch 4 par 4.5 of the proposed s 87A which highlights "other orders related to debt intervention" which the NCR can order after considering the debt intervention application.

23 Despite not qualifying for the debt intervention procedure, the proposal in proposed s 86A(5) will ensure that every applicant will benefit from merely making an application to the NCR regardless of whether one subsequently qualifies for the debt intervention process.

24 It is plausible that the legislator has considered circumstances where negotiations between a debtor and a credit provider do not yield the desired results for the debtor and in this regard, proposed s 86A(6)(b) should be read with proposed s 86A(8)(b) which states that in instances where "a credit provider concerned did not accept the proposal, the National Credit Regulator must refer the matter to the Tribunal with the recommendation".

25 Proposed s 87(1A) provides that: If the National Credit Regulator makes a recommendation to the Tribunal in terms of section 86A(6)(d), the Tribunal or a member of the Tribunal acting alone in accordance with this Act, must conduct a hearing and, having regard to the recommendation and other information before it and the consumer's financial means, prospects, and obligations, may –

(a) reject the recommendation or application as the case may be; or

(b) make –

(e) the debt intervention applicant qualifies for debt intervention, but the income and assets of the debt intervention applicant are insufficient to allow for the obligations of the debt intervention applicant to be re-arranged during the period contemplated in paragraph (d), the National Credit Regulator must refer the matter with a recommendation to the Tribunal in the prescribed manner and form for an order contemplated in section 87A.[26]

4.5 Discharge

It should be noted that a credit provider may give notice, after the prescribed time, to terminate the debt intervention in instances where the debt intervention applicant defaults on his credit agreement which forms part of the application for the debt intervention procedure.[27] The notice should be given to the debt intervention applicant and the NCR.[28] However, if the credit provider continues to enforce the credit agreement despite the notice to terminate debt intervention procedure, "the court or Tribunal hearing the matter may order that the debt intervention resume on any conditions the court or Tribunal considers to be just in the circumstances".[29]

(i) an order declaring any credit agreement that forms part of the application to be reckless, and make an order contemplated in section 83(2) or (3), if the Tribunal concludes that agreement is reckless;
(ii) an order that none or more of the debt intervention applicant's obligations be rearranged by –
(aa) extending the period of the agreement and reducing the amount of each payment due accordingly;
(bb) postponing during a specified period the dates on which payments are due under the agreement;
(cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement;
(dd) 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); or
(ee) recalculating the consumer's obligations because of contraventions of Part A or B of Chapters 5, or Part A of Chapter 6; or
(iii) both orders contemplated in subparagraphs (i) and (ii).

26 Proposed s 86A(6)(e) must be read together with proposed s 86A(9)(a) which mandates the NCR which has made a proposed s 86A(6)(e) referral to "inform each credit provider listed in the application for debt intervention of such referral and invite such credit providers to make representations to the Tribunal by a specific date".

27 Proposed s 86A(10)(a).

28 Proposed ss 86A(10)(a)(i) and 86A(10)(a)(ii).

29 Proposed s 86A(11).

A single member of the NCT may make a consideration of any referral contemplated in proposed section 86A(6)(e).[30] The NCT's consideration must be made in the prescribed manner and form and reference must be made to the documents included in the referral by the NCR.[31]

Furthermore, the NCT must refer to proposed section 86A(9) representations.[32] After making a consideration of the referral, the NCT may:[33]

> (a) make an order that the debt intervention applicant does not qualify for debt intervention and reject the application;[34] or
> (b) (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 subsection (3); and
> (ii) require the debt intervention applicant to attend a financial literacy programme.

When making the proposed section 87A(2)(b)(i) suspension, the NCT must taking various factors into consideration. These include:[35]

> (a) 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.

The NCT must take into consideration the circumstances of the debt intervention applicant.[36] Any act or omission of credit providers "when entering into the relevant credit agreement" or during the proposed section 86A process must be taken into

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30 Proposed s 87A(1).
31 As above.
32 Proposed s 87A(1). Proposed s86A(9) states that:
> (a) If the National Credit Regulator refers an application for debt intervention in terms of subsection (6)(e), the National Credit Regulator must inform each credit provider listed in the application for debt intervention of such referral and invite such credit providers to make representations to the Tribunal by a specific date.
> (b) A credit provider contemplated in paragraph (a) may submit written representations to the Tribunal in the prescribed form and manner, on or before the date so specified.

33 Proposed s 87A(2).
34 Reference should be made to ch 4 par 4.4, specifically the discussion of proposed s 86A(5) where it was raised that provision of counselling and financial literacy training helps NINA debtors despite the proposed s 87A(2)(a) rejection.
35 Proposed s 87A(3)(a).
36 Proposed s 87A(3)(b).

account by the NCT when making its consideration.[37] Furthermore, cognisance must be given to any act or omission by the applicant when entering into a credit agreement that contributed to the fact that such applicant:[38]

> does not have sufficient income or assets to allow for the obligations of the debt intervention applicant to be re-arranged during the period contemplated in [proposed] section 86A(6)(d).

Eight months after making the proposed section 87A(2)(b)(i) suspension, the NCR "must review the financial circumstances of the debt intervention applicant".[39] Such a review will be aimed at:[40]

> determin[ing] whether the debt intervention applicant at that time has sufficient income or assets to allow for the obligations of the debt intervention applicant to be re-arranged during the period contemplated in [proposed] section 86A(6)(d).

If it is discovered that the debt intervention applicant has sufficient income or assets which can allow his obligations to be re-arranged, the NCR must refer the matter to the NCT in the prescribed manner and form.[41] If the proposed section 87A(5)(a) review brings to light that the debt intervention applicant "still does not have sufficient income or assets to allow for the obligations to be re-arranged", the NCR must refer the matter to the NCT "to consider an extension of the period of suspension as contemplated in [proposed section] 87A(2)(b)(i)".[42]

If the NCT makes a proposed section 87A(5)(b)(ii) suspension, the NCR must conduct another proposed section 87A(5)(a) review eight months into the extended suspension.[43] The NCT must refer the debt intervention applicant to the NCT in the prescribed manner and form for a proposed section 87(1A) order, if the review brings to light that the debt intervention applicant "has sufficient income or assets to allow for the obligations to be re-arranged during the period contemplated in [proposed]

37 Proposed s 87(3)(c).
38 Proposed s 87A(3)(b)(ii).
39 Proposed s 87A(5)(a).
40 As above.
41 Proposed s 87A(5)(b)(i). After the referral, the NCT must make a proposed s 87(1A) order.
42 Proposed s 87A(5)(b)(ii).
43 Proposed s 87A(5)(c).

section 86A(6)(d)".[44] However, if after the review it is discovered that the debt intervention applicant:[45]

> still does not have sufficient income or assets to allow for the obligations to be re-arranged during the period contemplated in [proposed] section 86A(6)(d), refer the matter to the Tribunal to consider the extinguishing of the whole or a portion of the total of the amounts contemplated in section 101(1) under each qualifying agreements.

Before making any declaration, the NCT may make a consideration of:[46]

(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 subsections (7) and (8), declare the total of the amounts contemplated in section 101(1) under the qualifying credit agreements as extinguished.[47]

The 2018 Bill also provides for a partial discharge of debts - whereby the NCT will order the extinguishment of "a percentage of the total of the amounts contemplated in section 101(1)".[48] Such partial extinguishment of debts "must apply equally to all qualifying credit agreements".[49]

After a debt intervention applicant has obtained a discharge, the NCT must make an order to the effect that the debt intervention applicant will only be eligible to apply for credit agreements contemplated in section 60 of the NCA after a minimum period of six months.[50] Such a limitation must however not apply for a period longer than 12 months.[51]

The NCR is mandated with the duty of notifying the debt intervention applicant of any order contemplated in proposed section 87A.[52] Copies of the notice must be served

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44 Proposed s 87A(5)(c)(i).
45 Proposed s 87A(5)(c)(ii). Proposed s 87A(5)(d) furthermore provides that when the NCR makes a proposed s 87A(5)(c)(ii) referral, proposed s 86A(9) will apply.
46 Proposed s 87A(6).
47 It should be noted that this is the proposed sections which provides a discharge for NINA debtors.
48 Proposed s 87A(7)(a).
49 Proposed s 87(7)(b).
50 Proposed s 87(8).
51 Proposed s 87(9).
52 Proposed s 87(10).

in the prescribed manner and form to all credit providers which are listed in the application and all registered credit bureau.[53]

If it is proved that the debt intervention applicant was dishonest in his application, the NCT may rescind or change an order for debt intervention.[54]

4.6 Conclusion

The proposed 2018 Bill does not stipulate which procedure is the primary natural person debt relief procedure to be followed in South Africa. With the introduction of the proposed debt intervention procedure, the legislature missed an opportunity to provide clarity on the primary natural person debt relief procedure.

The proposed debt intervention procedure offers some of the previously excluded NINA debtors with an opportunity to access the insolvency system and to after a period of 24 months, obtain a discharge of debts.[55] However, it should also be pointed out that the proposed procedure will continue to exclude many NINA debtors as the proposed procedure can only be used by debtors whose credit agreements fall within the ambit of the NCA and where no debt enforcement has commenced.[56]

It has been pointed out that there has been a shift in international insolvency trends from the court system to an extra-judicial process.[57] The proposed debt intervention procedure's use of the NCR and the NCT is plausible and in line with international trends.[58] It should, however, be pointed out that despite the use of the NCR being a great achievement, the services of the NCR should be decentralised in order to offer the much-needed assistance to as many people as possible in the country. This can

53 Proposed ss 87A(10)(a) and 87A(10(b).
54 Proposed s 87A(11).
55 Proposed s 1 definition of debt intervention states that the proposed procedure is aimed at assisting "consumers for whom existing natural person insolvency measures are not accessible in practice".
56 See H Coetzee "An opportunity for No Income No Asset (NINA) debtors to get out of check? an evaluation of the proposed debt intervention measure" (2018) 81 *THRHR* 599 who makes the observation in the earlier version of the 2018 Bill.
57 See the discussion in ch 3 par 3.4 of the no asset procedure and the fresh start principle in ch 3 par 3.3.
58 See observations made by Coetzee on the earlier version of the 2018 Bill in H Coetzee "An opportunity for No Income No Asset (NINA) debtors to get out of check? – an evaluation of the proposed debt intervention measure" (2018) 81 *THRHR* 602.

be achieved through community outreach programmes in mostly rural areas of the country.

The introduction of the proposed section 86A(5) is plausible. This recognises and appreciates the need for financial literacy in the country. By presenting an opportunity for financial counselling and training, debtors will be empowered and be able to make much informed financial decisions and probably leading into a reduction of the insolvency pandemic in the country.[59] In addition to providing financial literacy training and counselling, this study further proposes that all debt intervention applicants should be provided with a government-funded curator who will assist debtors in handling their finances until they are fully empowered to do so.

The 2018 Bill fails to comment on whether the proposed debt intervention procedure will be a once-off procedure, or it can be utilised whenever it becomes necessary for a debtor. This can be interpreted to mean that, debtors can make use of the proposed procedure more than once. This is a commendable move which will help in assisting all honest and unfortunate debtors. However, it should also be appreciated that this leaves loopholes of abuse by *mala fide* debtors who might make use of the procedure to escape their financial obligations on their credit agreements.

59 It should also be pointed out that this might be regarded as a reactionary measure aimed at empowering already over-indebted consumers while a better alternative would be a proactive measure aimed at empowering consumers in order to avoid being over-indebted. This might be achieved by offering such financial counselling and financial literacy training to consumers without waiting for them to be over-indebted or suspect that they are over-indebted.

CHAPTER 5: CONCLUSION

SUMMARY

5.1 Summary and recommendations

This study has highlighted the discriminatory nature of the current South African natural person debt relief system.[1] It has been illustrated that no income no asset (NINA) debtors are the most vulnerable group of debtors in South Africa who have over the years been denied the ability to enter the debt relief system.[2] This has been brought to light through a discussion of the natural person debt relief measures imbedded in the Insolvency Act,[3] the Magistrates' Court Act,[4] and the National Credit Act.[5] The above pieces of legislation along with the discussion on the proposed pre-liquidation composition in terms of the 2015 Draft Insolvency Bill has revealed how NINA debtors cannot access the insolvency system and are therefore excluded from obtaining any form of discharge of debts.[6]

The discussion of the American fresh start principle,[7] the New Zealand no asset procedure,[8] coupled with a brief discussion of the recommendations in terms of the

1 See the discussion in ch 2.
2 As above.
3 The Insolvency Act 24 of 1936.
4 The Magistrates' Court Act 32 of 1944.
5 The National Credit Act 34 of 2005 (hereafter 'the NCA').
6 See ch 2 par 2.5 for a discussion on the proposed pre-liquidation composition.
7 See ch 3 par 3.3 for a discussion of the fresh start principle according to the Bankruptcy Reform Act of 1978.
8 See ch 3 par 3.4 for a discussion of the New Zealand position in terms of the Insolvency Act 2006.

World Bank *Report* has shown a major disparity between the worldwide trends in insolvency law and the current state of regulation in South Africa.[9]

Some of the major differences have been noted in the lack of proper access and relief for honest but unfortunate NINA debtors.[10] It has also been shown that, there are differences in the extra-judicial nature of insolvency internationally while the South African system has been revealed to be much reliant on the formal court system.

Furthermore, it has been noted that internationally insolvency regulation has championed the need to accommodate all honest but unfortunate debtors through features which include among others a balancing act of interests for all stakeholders in the insolvency system. In this regard, South Africa has been noted as lagging behind international trends as it places much importance on the archaic benefit for creditors' principle.[11] This principle has been argued to be the main reason for the exclusion of NINA debtors who cannot satisfy the requirement in question mainly because of the lack of assets and surplus income.[12]

A discussion of the National Credit Amendment Bill,[13] specifically, the proposed debt intervention procedure has highlighted the commendable initiative by the legislature to remedy the current discriminatory system.[14] It has brought to light that a large portion of NINA debtors will be able to access the insolvency system in future.[15] This is plausible and it was one of the major aspects this study served to investigate.[16]

However, various disheartening aspects have also been noted. A study of the proposed debt intervention procedure has revealed that despite the procedure alleviating NINA debtor's plight, it however, still discriminates against a portion of

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9 See ch 3 par 3.2 where the World Bank *Report on the Treatment of the Insolvency of Natural Persons* (2013) was discussed in detail.

10 See ch 3 par 3.5 for a summary of the international trends in question.

11 See amongst others, H Coetzee *A comparative reappraisal of debt relief measures for natural person debtors in South Africa* (2015) LLD thesis University of Pretoria ch 3 par 3.3.

12 As above.

13 The National Credit Amendment Bill of 2018 (hereafter 'the 2018 Bill').

14 See ch 4 par 4.1 above.

15 See ch 4 par 4.2 and ch 4 par 4.3 where the purpose of the 2018 Bill and access to the proposed debt intervention procedure is discussed.

16 See ch 1 par 1.2 where the objectives of this study are highlighted.

such debtors.[17] Therefore, despite the proposed debt intervention procedure being a step in the right direction, this study has shown that much is left to be desired regarding access for NINA debtors.

Aspects of criticism as pointed out in this study include the exclusion of debtors whose debt fall outside of the scope and application of the NCA.[18] In this regard, this study proposes the wider application of the proposed procedure for all debtors. This might entail making the proposed procedure accessible to all NINA debtors despite failure to satisfy the general NCA requirements. Alternatively, the legislature can introduce the proposed procedure as a separate piece of legislation which does not seek to amend the NCA.

Perhaps, the best solution is the amalgamation of all-natural person debt relief measures. This can be achieved by putting into force a single and comprehensive piece of legislation which contains all-natural person debt relief measures.[19] In this regard, it will be up to a debtor to choose a procedure which suits their respective financial circumstance.

Moreover, a key function in the eradication of the insolvency pandemic in South Africa is financial literacy. In this regard, much appreciation is given to the proposed procedure for its introduction of compulsory financial literacy training and financial counselling for all debt intervention applicants.[20] This will probably alleviate the insolvency situation in the country. However, this research proposes that the provision of financial literacy should be widened to apply to all-natural person debt relief measures available in the country. As a consequence of financial literacy training being fundamental in empowering consumers, the researcher submits that offering it to all debtors can have a significant financial impact on the nation.

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17 The discussion in ch 4 par 4.3 has highlighted the exclusion of NINA debtors who fall outside the ambit of the NCA.

18 See ch 4 par 4.3 for a discussion on the access to the debt intervention procedure.

19 Such an Act will include among others, the proposed debt intervention procedure, the administration order procedure, the proposed pre-liquidation composition procedure, the sequestration procedure and the debt review procedure. See amongst others, the recommendations contained by Coetzee in H Coetzee *A comparative reappraisal of debt relief measures for natural person debtors in South Africa* (2015) LLD thesis University of Pretoria par 8.2.

20 See the discussion of the proposed s 86A(a) in ch 4 par 4.4.

One of the most important international insolvency trends highlighted in this study is the movement away from the formal court system.[21] This has been highlighted as the current position in South Africa as the court's role is regarded as pivotal when dealing with insolvency matters. The proposed debt intervention procedure changes this by moving away from courts by advancing an extra-judicial procedure which makes use of the National Credit Regulator and the National Credit Tribunal which is in line with international trends.[22]

5.2 Final remarks

The current exclusion of NINA debtors is regrettable. It is therefore plausible that the legislature has taken measures to remedy the discrimination. Despite the criticism provided above, the proposed debt intervention procedure will probably alleviate the plight of NINA debtors in the country who are currently left to be bound in a debt trap.

However, it is debatable whether this will comprehensively deal with the plight of NINA debtors. It has been pointed out in this study that the proposed procedure in some instances further perpetuates discrimination against a large portion of NINA debtors. In this regard, it is questionable whether this will be the final solution for NINA debtors in the country. Numerous access amendments are required in order to eradicate the discriminatory aspect of the proposed procedure.

Lastly, it is commendable that a portion of NINA debtors will obtain access to an insolvency system. For a debt relief measure to be comprehensive, it needs to adequately and equitably regulate access and discharge. In this regard, it is plausible to note that in addition to the debt intervention procedure's regulation of access it further provides for a much-needed statutory discharge in terms of proposed section 87A(6)(c) extinguishment of debts.

21 See amongst others, ch 3 par 3.3 and par ch 3.4.
22 See ch 4 par 4.4.

Bibliography

Books

Bertelsmann, E; Evans, RG; Harris, A; Kelly-Louw, M; Loubser, A; Roestoff, M; Smith, A; Stander, L & Steyn, L; Nagel, C (ed) *Mars: The Law of Insolvency in South Africa* 9th ed Juta: Cape Town 2008

Nagel, CJ; Barnard, J; Boraine, A; Delport, PA; Kern, KM; Lötz, DJ; Otto, JM; Papadopoulos, SM; Prozesky-Kuschke, B; Roestoff, M; Van Eck, BPS & Van Jaarsveld, SR *Commercial Law* 5th ed: LexisNexis 2015

Skeel, D *Debts Dominion: A history of Bankruptcy law in America* Princeton University Press (2001)

Cases

ABSA Bank Ltd v De Klerk 1999 (4) SA 835 (SE)

Body Corporate v Sithole & another (240/2016) [2017]

Epstein v Epstein 1987 (4) SA 606

Ex parte Ford 2009 3 SA 376 (WCC)

Ex parte Kroese 2015 (1) SA 405 (NVM)

Ex parte Taljaard 1975 3 SA 106 (O) 108

Investec Bank Ltd v Mutemeri 2010 1 SA 265 (GSJ)

Local Loan Co v Hunt 1934 292 US 244 (United States of America)

London Estates (Pty) Ltd v Nair 1957 (3) SA 591 (D)

Stainer v Estate Bukes 1933 OPD 86

Stodel v Nedbank Limited (47597/2014) [2015] ZAGPPHC 952

Trust Wholesalers & Woollens (Pty) Ltd v Mackan 1954 (2) SA 109 (N)

Walker v Syfret 1911 AD 141

Journal articles

Boraine, A and Roestoff, M "Revisiting the state of consumer insolvency in South Africa after twenty years: The courts' approach, international guidelines and an appeal for urgent law reform" Part 1 2014 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 351

Boraine, A and Roestoff, M "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

Coetzee, H "An opportunity for No Income No Asset (NINA) debtors to get out of check? – an evaluation of the proposed debt intervention measure" 2018 81 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 593

Coetzee, H and Roestoff, M "Consumer debt relief in South Africa – Should the insolvency system provide for NINA debtors? Lessons from New Zealand" 2013 *International Insolvency Review* 188

Coetzee, H "Does the proposed pre-liquidation composition proffer a solution to the No Income No Asset (NINA) debtor's quandary and, what would?" 2017 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 18

Coetzee, H "Is the unequal treatment of debtors in natural person insolvency law justifiable: A South African exposition" 2016 *International Insolvency Review* 36

Gross, K "Failure and forgiveness: Rebalancing the bankruptcy system" 1997 *Yale University Press New Haven*

Huls, N "A next step in debt enforcement: The merger of debt help and debt collection" 2012 *Journal of Consumer Policy* 497

Kanamugire, JC "The Requirement of Advantage to Creditors in South African Insolvency Law – a Critical Appraisal" 2013 *Mediterranean Journal of Social Sciences* 19

Kilborn, JJ "The innovative German approach to consumer debt relief: Revolutionary changes in German Law, and surprising lessons for the United States" 2004 *Northwestern Journal of International Law and Business* 257

Rochelle, M "Lowering the penalties for failure: Using the insolvency law as a tool for spurring economic growth; The American experience, and possible uses for South Africa" 1996 *Tydskrif vir die Suid-Afrikaanse Reg* 315

Roestoff, M "Insolvency restrictions, disabilities, and disqualifications in South African consumer insolvency law: A legal comparative perspective" (2018) 81 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 393

Smith, CH "The recurrent motif of the insolvency Act – advantage of creditors" 1985 *Modern Business Law* 27

Van Apeldoorn, JC "The "fresh start" for individual debtors: Social, moral and practical issues" 2008 *International Insolvency Review* 66

Legislation

Bankruptcy Reform Act of 1978 (United States of America)

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (United States of America)

Draft Insolvency Bill 2015

Insolvency Act 24 of 1936

Insolvency Act 55 of 2006 (New Zealand)

Magistrates' Court Act 32 of 1944

National Credit Act 34 of 2005

National Credit Amendment Bill of 2018

Others

GN 217, *Government Gazette* 37477, 27 March 2014

H Coetzee *A comparative reappraisal of debt relief measures for natural person debtors in South Africa* (2015) LLD thesis University of Pretoria

INSOL International *Consumer Debt report: Report of findings and recommendations* London May 2001; and the INSOL International *Consumer debt report: Report of findings and recommendations* (2nd edition) London November 2011

RG Evans *A critical analysis of problem areas in respect of assets of insolvent estates of individuals* (2008) LLD thesis University of Pretoria

Memorandum on the objects of the National Credit Amendment Bill, 2018

National Credit Regulator 'Credit Bureau Monitor' http://www.ncr.org.za/credit-bureau-monitoring-cbm

World Bank *Report on the Treatment of the Insolvency of Natural Persons* (2013)

The World Bank *South Africa economic update: jobs and inequality* (2018)