



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

**AN ANALYSIS OF THE JUSTIFICATION OF THE STRINGENT NATURAL
PERSON INSOLVENCY LAW SYSTEM IN SOUTH AFRICA IN LIGHT OF THE
"ADVANTAGE TO CREDITORS" REQUIREMENT**

by:

HANS JACOB GILDENHUYS

(Student No.: 19334720)

Submitted in partial fulfilment of the requirements of the degree:

MAGISTER LEGUM (*LL.M.*) IN INSOLVENCY LAW

Prepared under the supervision of:

Dr. JS van Wyk

Department of Mercantile Law

Faculty of Law

University of Pretoria

DECLARATION OF ORIGINALITY

Full names of student: **HANS JACOB GILDENHUYS**

Student number: **19334720**

Topic of work: **AN ANALYSIS OF THE JUSTIFICATION OF THE STRINGENT NATURAL PERSON INSOLVENCY LAW SYSTEM IN SOUTH AFRICA IN LIGHT OF THE "ADVANTAGE TO CREDITORS" REQUIREMENT**

Declaration

1. I understand what plagiarism is and am aware of the University's policy in this regard.
2. I declare that this mini dissertation is my own original work. Where other people's work has been used (either from a printed source, Internet, or any other source), this has been properly acknowledged and referenced in accordance with departmental requirements.
3. I have not used work previously produced by another student or any other person to hand in as my own.
4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

SIGNATURE

ACKNOWLEDGEMENTS

“This is the true joy in life, the being used for a purpose recognised by yourself as a mighty one; the being a force of nature instead of a feverish little clod of ailment and grievances complaining that the world will not devote itself to making you happy. I am of the opinion that my life belongs to the whole community, and as long as I live it is my privilege to do for it whatever I can. I want to be thoroughly used up when I die, for the harder I work the more I live. I rejoice in life for its own sake. Life is no ‘brief candle’ for me. It is a sort of splendid torch which I have got hold of for the moment, and I want to make it burn as brightly as possible before handing it on to future generations.” – Robin Sharma

This dissertation has been the brainchild of mine ever since I attended one of the first lectures presented by the learned Dr. J van Wyk during the start of my post graduate studies in 2019. It was Dr. van Wyk’s insolvency lectures which inspired my interest in the insolvency law. To Dr. van Wyk who assisted me and guided me throughout the past year I am forever grateful.

To my parents Louwrens and Ansie Gildenhuys who have supported me unconditionally throughout my postgraduate studies, words cannot begin to describe how grateful I am for having such supportive parents.

Lastly, I give all thanks to our Heavenly Father who has given me the strength, wisdom, patience and perseverance to complete this LLM.

ABSTRACT

The dissertation considers the justification of the stringent natural person insolvency system in light of the “advantage to creditors” requirement. Jackson’s (*The Logic and Limits of Bankruptcy Law* (1986) 3) criteria of “what is being addressed” by the South African natural person insolvency law system, and why that which is being addressed, is a “proper concern” of the South African system, is used as to assess the system. It is established that the South African natural person insolvency law system is a system which favours the protection of the interest of creditors.

The international trend towards more debtor-orientated insolvency law systems, has become the topic of academic discussion, with the South African insolvency law system harsh criticised for not developing in line with this trend. It can be safe to state that academics, in analysing the South African insolvency law system, have discovered a “problem” with the South African system and are approaching their insolvency analyses by viewing the South African system as conflicting with or overriding some social or economic goal due to the fact that it has not necessarily developed in line with the international systems.

In terms of the criteria established by Jackson for insolvency analyses, it can be argued that this approach is fundamentally flawed. The analysis in this dissertation is not undertaken for the purpose of identifying discrepancies or differences between the South African system and other natural person insolvency law systems found in foreign jurisdictions, but rather for the purpose of analysing the South African system against criteria distinctive to the purpose of its creation. Accordingly, to proceed with this analysis, one has to applying Jackson’s criteria and identify “what is being addressed” and why that which is addressed is a “proper concern” of the natural person insolvency law in South Africa. Against this background, it is possible to analyse the stringent South African natural person insolvency law system in light of the “advantage to creditors” requirement in a sound manner.

TABLE OF CONTENTS

DECLARATION OF ORIGINALITY	1
ACKNOWLEDGEMENTS	2
ABSTRACT	3
CHAPTER 1	6
1.1 INTRODUCTION	6
1.1.1 WHAT IS BEING ADDRESSED	9
1.1.2 WHY IS IT A PROPER CONCERN.....	12
1.2 THE TWO COMPETING INSOLVENCY LAW APPROACHES OR UNDERLYING POLICIES.....	15
1.3 THE SOUTH AFRICAN NATURAL PERSON INSOLVENCY LAW SYSTEM	19
1.4 RESEARCH QUESTION	20
1.5 PURPOSE OF THE RESEARCH	21
1.6 STRUCTURE OF THE DISSERTATION	22
CHAPTER 2	24
2.1 INTRODUCTION	24
2.2 VOLUNTARY SEQUESTRATION	26
2.2.1 REQUIREMENTS TO OBTAIN A VOLUNTARY SEQUESTRATION ORDER 28	
2.2.1.1 ESTATE OF DEBTOR IS INSOLVENT	29
2.2.1.2 COSTS OF SEQUESTRATION TO BE PAID FROM FREE RESIDUE OF ESTATE	30
2.2.1.3 WILL BE TO THE ADVANTAGE OF CREDITORS.....	32
2.3 COMPULSORY SEQUESTRATION	33
2.3.1 REQUIREMENTS TO OBTAIN A COMPULSORY SEQUESTRATION ORDER	35
2.3.1.1 ESTABLISHED CLAIM.....	36
2.3.1.2 ACT OF INSOLVENCY	39
2.3.1.3 REASON TO BELIEVE THERE WILL BE AN ADVANTAGE TO CREDITORS	42
2.4 CONCLUSION.....	45
CHAPTER 3	46

3.1	INTRODUCTION	46
3.2	THE “ADVANTAGE TO CREDITORS” REQUIREMENT	47
3.3	JUSTIFICATION IN LIGHT OF THE “ADVANTAGE TO CREDITORS” REQUIREMENT	48
	3.3.1 REQUIREMENT IN TERMS OF THE INSOLVENCY ACT	50
	3.3.2 ABUSE OF SEQUESTRATION PROCEEDINGS.....	53
	3.3.3 ESTABLISHMENT OF THE <i>CONCURSUS CREDITORIUM</i>	62
3.4	CONCLUSION.....	63
CHAPTER 4		65
4.1	INTRODUCTION	65
4.2	AMERICAN NATURAL PERSON INSOLVENCY LAW	67
4.3	CONCLUSION.....	70
CHAPTER 5		72
5.1	INTRODUCTION	72
5.2	SOUTH AFRICAN DEBT RELIEF ALTERNATIVES	73
5.3	CONCLUSION.....	78
CHAPTER 6		80
CONCLUSION.....		80
BIBLIOGRAPHY		86

CHAPTER 1

INTRODUCTION, BACKGROUND AND RESEARCH QUESTION

1.1 INTRODUCTION

1.1.1 WHAT IS BEING ADDRESSED

1.1.2 WHY IT IS A PROPER CONCERN

1.2 THE TWO COMPETING INSOLVENCY LAW APPROACHES OR UNDERLYING POLICIES

1.3 THE SOUTH AFRICAN NATURAL PERSON INSOLVENCY LAW SYSTEM

1.4 RESEARCH QUESTION

1.5 PURPOSE OF THE RESEARCH

1.6 STRUCTURE OF THE DISSERTATION

1.1 INTRODUCTION

The learned author Jackson¹ states the following in his seminal work *The Logic and Limits of Bankruptcy Law*:

“Much bankruptcy² [Insolvency] analysis is flawed precisely because it lacks rigor in identifying what is being addressed and why it is a proper concern of bankruptcy [Insolvency] law. For that reason, when a new and urgent ‘problem’ is discovered in the context of a bankruptcy [Insolvency] proceeding, courts, legislators, and commentators all too often approach

¹ Jackson *The Logic and Limits of Bankruptcy Law* (1986) (“Jackson”).

² “Bankruptcy” is the eventual status which is achieved through insolvency proceedings, and it is the equivalent of being “sequestered” in South African insolvency law. Fletcher *The Law of Insolvency* 5th Edition (“Fletcher”) at 4 states that, as a result of the uncoordinated and illogical condition of bankruptcy law, a distinction arose between being factually insolvent and being bankrupt by way of a legal condition or status. Fletcher at 4 states further that even with the paradox between factual insolvency and bankruptcy by way of a legal condition being maintained, it has become practice in the English law that a creditor to whom payment is due may initiate insolvency proceedings against a debtor if the debtor’s insolvency would be reasonably inferred in the circumstances. The author continues and states that a debtor’s state of insolvency can only be transformed into a legal form or status (bankruptcy) if formal proceedings are commenced and instituted against a debtor by a person who is duly qualified to institute the proceedings. Sharrock et al “Hockly’s Insolvency Law” 9th ed at 3 (“Hockly’s”) state that if a person does not have sufficient means to discharge a liability or debt, he satisfies the test for insolvency but is not treated as an insolvent as such for legal purposes if his estate has not been sequestered by an order of court.

its resolution in an ad hoc manner, by viewing bankruptcy [Insolvency] law as some how conflicting with – and perhaps overriding – some other urgent social or economic goal. ... I believe that this approach is fundamentally mistaken.”³

Jackson in essence states that several insolvency analyses are flawed because they lack the consistency and/or thoroughness to identify what is being addressed and why it is a proper concern of insolvency law.⁴ According to Jackson, when analysing any particular insolvency system, one should specifically identify the two aforesaid criteria to avoid a flawed analysis.⁵

Thus, since other criteria are used in insolvency analyses those analyses could be flawed. The flawed analyses result in certain irrelevant ‘problems’ being addressed by viewing the particular analysed insolvency system as not being aligned or being in conflict with social economic goals (which ever these social economic goals might be) that the system was never intended to achieve.⁶

What Jackson refers to as a conflicting social economic goal includes the goal referred to in the World Bank Report as the principal purpose of natural person insolvency (what it “should be”).⁷ Specifically, this goal aims to enable a debtor to re-establish his or her capacity to contribute to the economy of a country again, and by provides such a debtor primarily with a discharge of pre-sequestration debts.⁸

This insolvency analysis applies the criteria identified by Jackson. Accordingly, in analysing the justification of the stringent natural person insolvency law system in South Africa in light of the advantage to creditors requirement, it is important to identify “what is being addressed”⁹ by the system in South Africa, and why that which is being addressed, is a “proper concern”¹⁰ of the South African insolvency law system. In this context, reference to the “system” includes all aspects of the

³ Jackson at 3. Own emphasis.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Mabe “Alternatives to bankruptcy in South Africa that provides for a discharge of debts: lessons from Kenya” 2019 *PELJ* at 1.

⁸ *Ibid.*

⁹ See fn. 3 *supra*.

¹⁰ *Ibid.*

process – ranging from the governing laws, the interpretation of these laws by the judiciary, government policy, and the application of the laws by persons affected namely debtors and creditors. Referral to the “system” is therefore a much broader concept that includes much more than only, for example, the Insolvency Act.

Before proceeding, and to ensure that the insolvency analysis of this dissertation is not flawed, the two aforementioned criteria as set out by Jackson¹¹ must be discussed in detail. The criteria will form the basis upon which this particular insolvency analysis, limited to the South African “advantage for creditors” requirement, will be based.

Although there might be other criteria upon which courts, legislators and commentators may rely when conducting insolvency analyses, one must consider the criteria as identified by Jackson. I concur with his bold statement that legislators, courts and commentators, all too often (when they are confronted with some new, or what they would deem “urgent”, “problem” in the insolvency context), address the problem by viewing the problem as being in conflict with or overruling some other social or economic goal.¹²

It might even seem as if Jackson conveys his frustration to the reader as he has (in all probability) had due consideration of various insolvency analyses, wherein it was concluded that the insolvency laws were in conflict with some other socio-economical goals, such as excluding certain debtors from insolvency proceedings and the consequences of sequestration which would include a discharge of a debtor’s pre-sequestration debts.¹³

Some may even argue that the criteria identified by Jackson might be elementary proffering that the scope of insolvency analyses is far more complex. However, as will be demonstrated throughout this dissertation, the criteria as identified by Jackson can be said to be the criteria which should be used as the starting point of this natural person insolvency analysis as it, in essence, addresses the very core of insolvency analyses.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Coetzee “Does the proposed pre-liquidation composition proffer a solution to the No Income No Asset (NINA) debtor’s quandary and, if not, what would?” 2017 *THRHR* at 21-22.

Once the aforementioned criteria have been identified for a particular system at the onset, then one may proceed with further analyses – in this case, the analysis of the justification of the stringent natural person insolvency law system in South Africa in light of the “advantage to creditors” requirement.¹⁴

1.1.1 WHAT IS BEING ADDRESSED

The answer to the question of “what is being addressed”¹⁵ by the South African natural person insolvency law system and the Insolvency Act,¹⁶ can be found in the matter of *Collett v Priest*.¹⁷ In *Priest*, the Court had to consider *inter alia*, whether an application for the sequestration of a debtor’s estate could be considered a “civil suit”. The reason for this was due to the argument of the appellant that the respondent was not entitled to appeal the sequestration order given. The appellant argued that that sequestration proceedings do not fall within the ambit of the words “civil suit”.

At that time, only a party to a “civil suit” was entitled to pursue appeal proceedings to the Cape Provincial Division. The Court held that sequestration proceedings cannot be deemed to be “civil suit[s]”, as a “civil suit” is a contest between parties where one party claims a right from the other party.¹⁸ In sequestration proceedings there is no right claimed from one party by another.¹⁹

Although the Court in *Priest* had to consider an application for the compulsory sequestration of a debtor’s estate, this reasoning would apply to voluntary sequestration applications as well. Sequestration proceedings are not instituted by one party against the other for the purpose of claiming a debt due by one individual to another,²⁰ and even less so in voluntary sequestration applications. In the matter of *Ex Parte Pillay; Mayet v Pillay*,²¹ which entailed two petitions before the Court – one for voluntary sequestration and one for compulsory sequestration – the Court held that when the debtor petitioned for his voluntary sequestration, the debtor in

¹⁴ Same will be dealt with in Chapter 4 here below.

¹⁵ See fn. 3 *supra*.

¹⁶ Insolvency Act 24 of 1936 (“the Insolvency Act”).

¹⁷ 1931 AD 290 (“*Priest*”).

¹⁸ *Ibid* at 289-299.

¹⁹ *Ibid* at 289-299. Own emphasis.

²⁰ *Ibid* at 299.

²¹ 1955 2 All SA 228 (N) (“*Pillay*”).

that particular cases did not have the intention of surrendering his estate. The Court held that

“...it seems to me that he used this machinery of the Insolvency Act primarily in order to obtain a breathing space and to hold creditors at bay while he tried to negotiate a settlement with them, in the hope that he might thereby avoid surrender or sequestration and continue trading. This attitude was clearly not in accordance with the intention of the Legislature in the Insolvency Act. The machinery of voluntary surrender was primarily designed for the benefit of creditors, and not for the relief of harassed debtors.”²²

In *Priest*, De Villiers C.J. decided that when sequestration proceedings are instituted by a creditor against a debtor, same is not instituted by the creditor with the purpose of claiming something from the debtor but rather for the purpose of

“...setting the machinery of the law in motion to have the debtor declared insolvent. No order in the nature of a declaration of rights or of giving or doing something is given against the debtor. ... But while the Court has to determine whether the allegations are correct, there is no claim by the creditor against the debtor to pay him what is due nor is the Court asked to give any judgment, decree or order against the debtor upon any such claim.”²³

From the above extract it is evident that sequestration proceedings which are instituted either voluntarily or compulsory are not instituted to claim anything in particular from a debtor but rather to engage the “machinery” of the Insolvency Act. This is the first indication of a goal or purpose that the insolvency system of South Africa, by virtue of the provisions in the Insolvency Act, does not pursue. Although, the question was whether the sequestration proceedings would be deemed a “civil suit” for the purpose of establishing the Respondent’s right to appeal the sequestration of its estate to the Cape Provincial Division, the Court in considering this question crystallised, and in a sense defined, what is addressed by the institution or petitioning of sequestration proceedings.

²² *Ibid* at 230.

²³ *Priest* at 299. Own emphasis.

It is clear from *Priest* that no payment is claimed by a creditor from a debtor in insolvency proceedings. Accordingly *Priest* and *Pillay* established that “what is being addressed” by South African natural person insolvency law system is purely the sequestration of a debtor’s estate via the machinery of the law, and no other relief is sought against the debtor.²⁴

This has not changed. As recently as 2010, the Supreme Court of Appeal had to determine whether ABSA (the creditor) was allowed to institute sequestration proceedings against Naidoo (the debtor) before having complied with the relevant provisions of the National Credit Act 34 of 2005 (“NCA”).²⁵ In the judgment handed down by Cachalia JA, the Court again relied on the *dictum* established in *Priest*.²⁶ The Court confirmed that the sequestration proceedings are not instituted or petitioned²⁷ by a creditor (or a debtor if instituted by himself in voluntary sequestration applications) to claim anything from a debtor, but held that that they are instituted or petitioned to set the machinery of the law in motion to declare a debtor insolvent.²⁸

Accordingly, the application for the sequestration of the estate of a debtor is special type of application which does not fall within the ambit of those applications as contemplated by the National Credit Act because applications for the sequestration of a debtor’s estate are not instituted to recover a debt due by a debtor to a creditor.²⁹

It is clear that the Courts have adopted the stance that sequestration proceedings are special kinds of proceedings. The eventual goal of sequestration proceedings is an order sequestrating the estate of a debtor, whether this goal is sought voluntarily by a debtor or otherwise sought by a creditor of a debtor by institution of compulsory sequestration proceedings.

²⁴ *Ibid.*

²⁵ *Naidoo v ABSA Bank Ltd* (2010) JOL 25561 (SCA) (“*Naidoo*”).

²⁶ *Ibid* at 4-5.

²⁷ The Concise Oxford Dictionary (1982) at 767 defines a petition as follows; “**petition** n. & v. 1. n. asking, supplication, request; formal written supplication from one or more persons to sovereign etc.; (Law) formal written application to court for writ, order, etc.;...”.

²⁸ *Naidoo* at 4-5.

²⁹ *Ibid* at 5.

1.1.2 WHY IS IT A PROPER CONCERN

The Insolvency Act itself has no preamble or set objectives. The exact object of the Insolvency Act cannot be defined in a similar manner to laws that do contain preambles or objectives, such as the National Credit Act or the Companies Act 71 of 2008. However, upon a proper consideration and analysis of the Insolvency Act (keeping in mind the criteria identified by Jackson) and taking into consideration the history of insolvency and insolvency laws, and various judgments handed down by the Courts throughout the years pertaining to insolvency and sequestration of natural persons, one can clearly identify the object and the purpose of the Insolvency Act.

Nagel *et al* state the following in respect of insolvency law:

“Insolvency law developed as a special collective debt enforcement procedure in order to provide for a fairer distribution of the proceeds of a debtor’s property (also referred to as assets in this section) among the creditors where the debtor does not have sufficient assets to settle all his debts in full, in other words where his or her estate is insolvent.”³⁰

Nagel further held that insolvency law could similarly not be classified as a procedure which would amount to debt enforcement or debt execution against assets and that an order for the sequestration of the estate of a debtor is not a normal judgment but a species of arrest or execution.³¹

It can be said that it is a “proper concern” of the insolvency system that the machinery of the law be set in motion to have the debtor declared insolvent. The aim is to fulfil the object/s and the purpose of the Insolvency Act, and thus it is of significant importance that the object and purpose of the Insolvency Act be identified by considering the stance of our Courts. Various judgments of the South African courts must be considered, specifically the matter of *BP Southern Africa (Pty) Ltd Furstenburg*,³² where Erasmus J, in a sense defined the object of the Insolvency Act and held that the whole purpose of the Insolvency Act in so far as it relates to

³⁰ Nagel *et al Commercial Law* (2019) par 33.01 (“Nagel”).

³¹ *Ibid.*

³² [1966] 1 All SA 583 (O) (“*BP Southern Africa*”).

sequestration proceedings of natural persons, is to obtain a pecuniary benefit for creditors of a debtor.³³

A court will not grant an order sequestrating the estate of a debtor to fulfil any other motives of a sequestrating creditor.³⁴ More recently the Constitutional Court, in the matter of *Stratford and others v Investec Bank Limited and others*,³⁵ relied on the *dictum* of *BP Southern Africa* and confirmed that the Insolvency Act's object and purpose are to obtain at least some pecuniary benefit for the creditors of the debtor.³⁶

BP Southern Africa and *Stratford* dealt with compulsory sequestration applications. The voluntary sequestration application was considered in the matter of *Pillay*.³⁷ Holmes J held that it is clear from the specific words "advantage of creditors", found in section 3(1) and section 6(1) of the Insolvency Act, that voluntary surrender was designed primarily for the benefit of the creditors of a debtor and not to provide relief for debtors who were being harassed by their creditors.³⁸

The reasoning in *BP Southern Africa*, *Stratford* and *Pillay* aligns with the 1911-case of *Walker v Syfret NO*,³⁹ where Buchanan J originally held:

"The object of the Insolvent Ordinance⁴⁰ is to ensure a due distribution of assets among creditors in the order of their preference. And with this object all the debtor's rights are vested in the Master or the trustee from the moment insolvency commences. The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body.

³³ *Ibid* at 586.

³⁴ *Ibid*.

³⁵ 2015 (3) BCLR 358 (CC) at par 45 at 374 ("*Stratford*").

³⁶ *Ibid*.

³⁷ As recently as 2016 the Western Cape High Court in the matter of *Ex parte Concato and similar matters* [2016] 2 All SA 519 (WCC) again relied on the established principle of *Pillay* and held that at 524 "the fact that the debtor may consider such execution onerous or constitutes '*harassment*' to them has no relevance in relation to the merits of an application for surrender."

³⁸ *Pillay* at 230.

³⁹ 1911 AD 141 ("*Walker*").

⁴⁰ It is here referred to as the "Insolvent Ordinance" as it was known. For purposes of the modern-day interpretation these words, it can be substituted with "Insolvency Act".

The claim of each creditor must be dealt with as it existed at the issue of the order.”⁴¹

In 2020, the Supreme Court of Appeal confirmed what had been established in *Walker* more than a century ago when the following was stated in *Commissioner for the South African Revenue Service v Pieters and Others*:⁴²

“The preference afforded these payments must be understood against the backdrop of the importance of a *concursum creditorum*, which is generally recognized as a foundational concept in our law of insolvency. It was described as follows in *Walker v Syfret*: The object of the [Insolvency Act] is to ensure a due distribution of assets among creditors in the order of their preference.”⁴³

This due distribution is nothing more than a favourable distribution of the assets of the debtor to the creditors in an order of preference and it is surely an advantage to the creditors of a debtor if assets of a sequestrated debtor are managed and distributed in a fair and orderly manner.⁴⁴

Accordingly, the first criteria identified by Jackson being, “what is being addressed”⁴⁵ by the South African natural person insolvency law system is established from what was stated in *Priest and Pillay* and subsequently recognised and confirmed by *Naidoo*.⁴⁶ Sequestration proceedings are instituted by a creditor, or a debtor himself for the purpose of “setting the machinery of the law in motion”⁴⁷ to declare a debtor insolvent and not to claim a payment from a debtor or even to seek that a court grant an order for such payment.⁴⁸

Solomon J.A in the matter of *Estate Logie v Priest*⁴⁹ held that the underlying motive of a creditor for instituting sequestration proceedings against a debtor is in all probability to obtain a payment from the debtor of his debt. However, the Court held

⁴¹ *Walker* at 166. Own emphasis.

⁴² (2020) JOL 46545 (SCA) at par 10 (“*Pieters*”).

⁴³ *Ibid.* Own emphasis.

⁴⁴ Nagel at par 33.06.

⁴⁵ See fn. 3 *supra*.

⁴⁶ See fn. 17, 18 and 20 *supra*.

⁴⁷ See fn. 20 and 21 *supra*.

⁴⁸ *Ibid.*

⁴⁹ 1926 AD (“*Logie*”).

that it was not concerned with the underlying motive of the creditor – the debtor had committed an act of insolvency as contemplated by the Insolvency Act, and this entitled the creditor to seek an application for the sequestration of the debtor’s estate. The Court held that the underlying means of the creditor is not a material issue to take into consideration when granting an application for the sequestration of a debtor’s estate where an act of insolvency has been committed by a debtor.⁵⁰

As for the second criteria identified by Jackson – why it is a “proper concern”⁵¹ that the machinery of the law be set in motion to declare a debtor insolvent – it can be said that it fulfils the object and purpose of the Insolvency Act. The object and purpose have been clearly defined and established by the *dictums* set out in *BP Southern Africa*,⁵² *Stratford*,⁵³ *Pillay*,⁵⁴ *Walker*,⁵⁵ and *Pieters*,⁵⁶ – it is to obtain some sort of pecuniary benefit for the creditors of a debtor (an advantage to creditors). Accordingly it can be said that the Insolvency Act sets the machinery of the law in motion to have a debtor’s estate sequestrated for the advantage of the creditors of a debtor.

1.2 THE TWO COMPETING INSOLVENCY LAW APPROACHES OR UNDERLYING POLICIES

With the two criteria as set out by Jackson clearly defined and established at the very onset of the analysis, one cannot proceed with the analysis of the justification of the stringent natural person insolvency law system in South Africa in light of the “advantage to creditors” requirement without having due regard for the two main approaches (or underlying policies) present in the general insolvency law context which are contrasting options when compared with one another.⁵⁷

These two contrasting approaches determine whether protection should be afforded to debtors as a point of departure, or whether the interests of creditors in

⁵⁰ *Ibid* at 312.

⁵¹ See fn. 3 *supra*.

⁵² See fn. 32 *supra*.

⁵³ See fn. 35 *supra*.

⁵⁴ See fn. 21 *supra*.

⁵⁵ See fn. 39 *supra*.

⁵⁶ See fn. 42 *supra*.

⁵⁷ Wood *Principles of International Insolvency* (2007) at 4 (“Wood”).

sequestration proceedings should predominantly receive attention.⁵⁸ Wood refers to the two policies as “twin competing policies”.⁵⁹ These policies are concerned with either the protection of creditors or the protection of debtors during natural person insolvency proceedings, although the first does not mean that there is no protection granted to debtors or that the system is anti-debtor.⁶⁰ The chosen policy determines the primary *focus* of the system.

These two options for insolvency systems – of debtor’s interests and creditor’s interests – are hardly recent developments and as Wood observes:

“These interests represent fundamental and ancient attitudes – on the one hand, stern values of discipline, prudence, responsibility and diligent care of other people’s money, expressed in an intense moral disapproval of defaulting debtors, and, on the other hand, sympathy for the weak, resentment of the power of money, and a warm desire to save and resurrect, expressed in antipathy to creditors and a wish to redistribute.”⁶¹

The one system is founded upon a disapproval of debtors who default on their obligation towards creditors and the another system opposes creditors’ rights and their entitlement to claim what is due to them. Accordingly, it is clear that there are two main identifiable natural person insolvency law systems being implemented throughout the world in various jurisdictions.

The prevalence of one or the other of these two policies and its associated characteristics within an insolvency law system naturally results in the classification of an insolvency law system as a whole of a particular country or jurisdiction.⁶² The requirements of the Insolvency Act, and the prevalence of the policy and its many associated characteristics concerned with the protection of creditors in South

⁵⁸ *Ibid.*

⁵⁹ These being the the two competing insolvency law approaches or underlying policies which

⁶⁰ See eg the assets excluded from the insolvent estate.

⁶¹ Wood at 4. Own emphasis.

⁶² Boraine et al “The Pro-Creditor Approach in South African Insolvency Law and the Possible Impact of the Constitution” 2015 *Nottingham Business and Insolvency Law e-Journal* [2015 3 NIBLeJ 5] at 77 the authors state: “It is submitted that a decisive determining factor in the classification of a system as pro-creditor or pro-debtor ... the system is regarded as exceptionally pro-creditor...” (own emphasis); The learned authors in Coetzee “Is the Unequal Treatment of Debtors in Natural Person Insolvency Law Justifiable?: A South African Exposition” 2016 *International Insolvency Review* at 37; “The South African natural person insolvency system has fallen behind the times due to the fact that it has remained largely creditor-orientated and does not provide...” Own emphasis.

African sequestration proceedings, gave rise to the classification of the South African natural insolvency law system as pro-creditor.⁶³ Whilst this classification has been criticised, it has not been denied by either the courts or field-expert academics.

A familiar occurrence during analyses is the comparison between the South African natural person insolvency law system and foreign natural person insolvency law systems.⁶⁴ Importantly, the various systems provide different answers to the two questions posed by Jackson.⁶⁵

A conclusion that is often drawn is that the natural person insolvency law system in South Africa conflicts with or overrides some social economical goal when comparing the South African system with a foreign jurisdiction whose insolvency system has been designed with this particular goal in mind. Problems will most certainly be identified throughout such a study or comparative analysis as the criteria set out by Jackson and identified in terms of South African natural person insolvency in most instances differ from another jurisdiction's natural person insolvency law system. Whether the conclusion of a flaw, based on a conflict identified in a system with a different underlying policy and design, and recommendations for reform is sound, is debatable.

Against this background and having regard for what Jackson set out as the criteria for insolvency analyses, one must consider whether South African natural person insolvency analyses, which have not considered Jackson's criteria, might be flawed?⁶⁶ In posing this question, I do not deny that there isn't scope for comparative insolvency law analyses for reformative purposes, but that the differences between systems must be duly acknowledged in order to grasp the consequences of transplanting foreign elements into South African insolvency law. If the core of the

⁶³ *Ibid.*

⁶⁴ Comparative studies were done with worldwide insolvency law systems with the academics criticising the South African natural person insolvency law system: Coetzee 2016 *IIR* at 36; Roestoff and Coetzee "Debt relief for South African NINA debtors and what can be learned from the European approach" 2017 *CILSA* at 252; Roestoff and Coetzee "Consumer Debt Relief in South Africa; Lessons from America and England; and Suggestions for the Way Forward" 2012 *SA Merc LJ* at 55.

⁶⁵ See fn. 3 *supra*.

⁶⁶ See fn. 3 *supra*.

existing approach is challenged,⁶⁷ then the whole design of the system may require reconsideration.

The purpose of this analysis is not to set about on a study of the analysis of the justification of the stringent natural person insolvency law system in South Africa in light of the “advantage to creditors” requirement, compared to another natural person insolvency law system. The purpose of this analysis is to justify the stringent natural person insolvency law system in South Africa in light of the advantage to creditors requirement, having due regard for the dominating and chosen natural person insolvency law approach in South Africa.

To some it might seem like a simplistic way to analyse the natural person insolvency law system in South Africa, but this analysis will demonstrate the alignment of the whole system – especially the interpretation of the Insolvency Act by the courts – with the chosen underlying policy, and will further show that this alignment is justified. In the instance where different criteria is used to examine the justification of the stringent natural person insolvency law system in South Africa in light of the “advantage to creditors requirement”, one might arrive at a different conclusion. This realisation is of cardinal importance when evaluating recommendations for reform of the South African law.

Although the dissertation contains a comparative element in chapter 4, it will only be for the purpose of illustrating the impact of different criteria when it comes to that which is being addressed by the system, and why that which is addressed is a proper concern of that particular system.

⁶⁷ Roestoff “Rehabilitation of an insolvent and advantage to creditors under the Insolvency Act 24 of 1936 Ex parte Purdon 2014 JDR 0115 (GNP)” 2018 *THRHR* at 308 held that “The question arises as to whether the South African legislator’s emphasis on the debt collection aim and our courts’ strict enforcement thereof is still appropriate in light of the international trend to emphasise the fresh-start objective and its concomitant social insurance role over the debt-collecting aim of consumer insolvency law.”

1.3 THE SOUTH AFRICAN NATURAL PERSON INSOLVENCY LAW SYSTEM

The law of insolvency in South Africa, insofar as natural-person insolvency is concerned, is regarded as a pro-creditor system.⁶⁸ This aspect of the South African insolvency law system reflects in the basic characteristics of the system.⁶⁹

“It cannot be questioned that the primary function of the Insolvency Act 24 of 1936 (‘the Act’) is to regulate the sequestration of the estates of debtors for the advantage of their creditors.”⁷⁰

The manner in which courts approach the regulation of the sequestration of estates of debtors to the advantage of creditors in our pro-creditor system, and the courts’ strict adherence to the requirements of the Insolvency Act when it comes to establishing the “advantage to creditors” requirement⁷¹ (which will become apparent throughout this dissertation) evidences the soundness of the classification as one which is stringent, and even more so, stringently pro-creditor.

Natural person insolvency is regulated by the Insolvency Act and the sequestration of natural persons specifically by sections 3, 6, 9, 10, and 12 thereof. Sections 3 and 9 of the Insolvency Act refer to the word “petition” and these sections are the respective sections which a debtor or a creditor – in whichever circumstance – relies upon when instituting insolvency proceedings. Accordingly petitioning, as it was held in *Priest and Pillay*, sets the machinery of the law in motion of voluntary and compulsory sequestration proceedings.

Insolvency legislation in South Africa is primarily aimed at the benefit to creditors and not to provide relief for debtor’s who have been “harassed” by creditors.⁷² In South Africa, the primary function (or the object and purpose)⁷³ of the Insolvency Act is to ensure, in the circumstances where a debtor’s assets are insufficient to satisfy all of its creditors’ claims, that there is an orderly and a fair distribution of the

⁶⁸ See fn. 27 and 28 *supra*; Roestoff and Coetzee 2017 *CILSA* at 252.

⁶⁹ Boraine et al 2015 3 *NIBLeJ* at 63.

⁷⁰ Evans and Haskins “Friendly Sequestration and the Advantage of Creditors” 1990 *SA Merc LJ* at 246. Own emphasis.

⁷¹ Roestoff 2018 *THRHR* at 308.

⁷² Roestoff 2018 *THRHR* at 307.

⁷³ See fn. 26 to 36 *supra*.

assets of the debtor to his/her creditors.⁷⁴ A sequestration order establishes a *concursum creditorum* (“coming together of creditors”)⁷⁵ which means that the rights of the group of the creditors as a whole, is preferred over the rights of an individual creditor.⁷⁶

This *concursum creditorum* provides a collective forum for creditors to establish their rights against the assets of a debtor and it protects the creditors as a whole against the destructive effects of individual debt collection remedies of creditors stating a claim against a debtor’s estate.⁷⁷ The sequestration order also divests a debtor of his estate and he cannot burden it with any further debts, and nothing may be done by a creditor, other than what is permitted by the Insolvency Act, to diminish a debtor’s estate of any assets or to prejudice the rights of other creditors.⁷⁸

1.4 RESEARCH QUESTION

The main question is whether the stringent natural person insolvency law system in South Africa can be justified in light of the “advantage to creditors” requirement?

For the purposes of answering this question, Jackson’s criteria of “what is being addressed”⁷⁹ by the insolvency law system, and why that what is being addressed is a “proper concern”⁸⁰ of the insolvency law system, was established at the onset of the dissertation. It has also been established that the South African natural person insolvency law system is a system which favours the protection of the interests of creditors. It is upon this foundation that the research question will be answered. As such, the purpose of establishing Jackson’s criteria and the dominating natural person insolvency law approach in the South African is an essential part of the analysis as a whole.

The identified criteria and dominating approach has laid the foundation and provided the crucial background to the answer of the question of whether the stringent natural

⁷⁴ Nagel at par 33.01.

⁷⁵ *Hockly’s* at 4.

⁷⁶ Roestoff and Coetzee “Consumer Debt Relief in South Africa; Lessons from America and England; and Suggestions for the Way Forward” 2012 *SA Merc LJ* at 55.

⁷⁷ *Jackson* at 20.

⁷⁸ *Hockly’s* at 4.

⁷⁹ *Jackson* at 3.

⁸⁰ *Ibid.*

person insolvency law system in South Africa can be justified in light of the “advantage to creditors” requirement?

However, one cannot solely identify the criteria and approach to answer the question of whether the stringent natural person insolvency law system in South Africa can be justified in light of the “advantage to creditors” requirement. The natural person insolvency law system in South Africa makes provision for two distinct processes in the Insolvency Act to achieve the sequestration of an individual. Both processes (which provide for an “advantage to creditors” requirement) will be analysed by having due regard for Jackson’s criteria in order to determine whether there are grounds for justification in light of the “advantage to creditors” requirement.

1.5 PURPOSE OF THE RESEARCH

Worldwide the law of natural person insolvency was traditionally regarded as being creditor-orientated. Gradually, many foreign insolvency systems have developed into more debtor-orientated systems, which aim to provide a fresh start and a discharge of debt to debtors who are not able to repay their debt.⁸¹

This international trend towards more debtor-orientated insolvency law systems, has become the topic of discussion for several academics, with the South African insolvency law system receiving harsh critique for not developing in line with the international trends.⁸² It can be safe to state that academics, in analysing the South African insolvency law system, have discovered a “problem”⁸³ with the South African natural person insolvency law system. They approach insolvency analyses by viewing the South African insolvency law system as conflicting or overriding a social of economical goal due to the fact that it has not developed in line with the international systems.⁸⁴ However, in terms of the criteria established by Jackson for

⁸¹ Roestoff and Coetzee 2017 *CILSA* at 251.

⁸² Roestoff 2018 *THRHR* at 315; Roestoff and Coetzee 2017 *CILSA* at 273-274; Roestoff and Coetzee 2012 *SA Merc LJ* at 75-76; Boraïne et al 2015 *NIBLeJ* at 89; Coetzee 2016 *IIR* at 37.

⁸³ See fn. 3 *supra*.

⁸⁴ See fn. 81 *supra*.

insolvency analyses, it can be safe to state that this analytical approach may be fundamentally flawed.⁸⁵

It is this critique and flawed analyses which necessitate the analysis of the justification of the stringent natural person insolvency law system in South Africa in light of the “advantage to creditors” requirement. This analysis is not done for the purpose of identifying discrepancies or differences between the South African natural person insolvency law system, and other natural person insolvency law systems found in foreign jurisdictions. Rather, it is for the purpose of analysing the broader South African natural person insolvency law system (which continually entrenches the protection of the interest of creditors). By applying Jackson’s identified criteria to this analysis, logical and concise argument can be adduced to answer the question of whether the South African natural person insolvency law system can be justified in light of the “advantage to creditors” requirement.

1.6 STRUCTURE OF THE DISSERTATION

The two processes of obtaining a sequestration order against a natural person in South Africa will firstly be analysed by keeping in mind Jackson’s identified criteria as well as the dominating pro-creditor approach in South Africa.

Thereafter, it will be argued that the stringent natural person insolvency law system in South Africa which is in support of the pro-creditor insolvency law approach is justified due to the fact that:

- i. the “advantage to creditors” is a requirement as contemplated by the Insolvency Act in respect of voluntary sequestration applications as well as compulsory sequestration applications. This requirement cannot be circumvented in the process of seeking an order for the sequestration of a natural person. However, the Insolvency Act itself does not guide or elaborate on this requirement. It will be shown how the courts apply the “advantage to creditors” requirement; and that they have accordingly designed stringent criteria that applicants need to heed in order to meet this requirement;

⁸⁵ See fn. 3 *supra*.

- ii. the stringent application of the “advantage to creditors” requirement and the pro-creditor insolvency law approach prevents the abuse of sequestration proceedings by debtors;
- iii. a sequestration order establishes a *concursum creditorium* which provides a collective forum for creditors to determine their rights against the assets of a debtor. It protects the creditors as a whole against the destructive effects of individual debt collection remedies where multiple creditors bring single claims against a debtor’s estate on a “first come first serve” basis.⁸⁶

Once the stringent natural person insolvency law system has been analysed in light of the “advantage to creditors” requirement, the natural person insolvency law system of the United States of America will be considered, keeping in mind Jackson’s identified criteria. The discussion of the American system is not done with the aim of establishing a comparative analysis, but rather to establish that what is being addressed by the American natural insolvency law system and why that which is being addressed is a proper concern of the American natural person insolvency law system.

Lastly it will be argued that there is scope for the development of the alternative debt relief mechanisms in South Africa to include a wider variety of debtors and that the debt relief mechanisms currently in operation are duly applied by the Courts. If these alternative debt relief mechanisms are developed it would necessitate the institution of a sequestration application only in the appropriate circumstances i.e to obtain the sequestration of a debtor’s estate for the advantage of creditors. This would have the result that, when an application for sequestration is instituted either compulsory or voluntarily, the object and purpose of the Insolvency Act would be fulfilled each and every time such applications are instituted.

⁸⁶ See fn. 30 *supra*.

CHAPTER 2

SEQUESTRATION OF INDIVIDUALS IN SOUTH AFRICA

2.1 INTRODUCTION

2.2 VOLUNTARY SEQUESTRATION

2.2.1 REQUIREMENTS TO OBTAIN A VOLUNTARY SEQUESTRATION ORDER

2.2.1.1 ESTATE OF DEBTOR IS INSOLVENT

2.2.1.2 COST OF SEQUESTRATION TO BE PAID FROM FREE RESIDUE OF ESTATE

2.2.1.3 WILL BE TO THE ADVANTAGE OF CREDITORS

2.3 COMPULSORY SEQUESTRATION

2.3.1 REQUIREMENTS TO OBTAIN A COMPULSORY SEQUESTRATION ORDER

2.3.1.1 ESTABLISHED CLAIM

2.3.1.2 ACT OF INSOLVENCY

2.3.2.3 REASON TO BELIEVE THERE WILL BE AN ADVANTAGE TO CREDITORS

2.4 CONCLUSION

2.1 INTRODUCTION

The Insolvency Act provides for two methods to sequester the estate of a natural person debtor. These two methods are voluntary sequestration (also known as voluntary surrender) and compulsory sequestration.⁸⁷ A voluntary sequestration application is initiated by a debtor who applies for the sequestration of his own estate.⁸⁸ On the other hand, a compulsory sequestration application is initiated by a debtor's creditors who initiate the proceedings by petitioning for the compulsory sequestration of a debtor's estate.⁸⁹

⁸⁷ Mabe and Evans "Abuse of Sequestration Proceedings in South Africa" 2014 *SA Merc LJ* at 652.

⁸⁸ *Ibid* at 652-653.

⁸⁹ *Ibid*.

The procedures of these applications differ to some extent, but the consequences of both of these applications (which is the sequestration order granted by a High Court and the subsequent effects on *inter alia* the estate of the debtor) is the same.⁹⁰ Both of these procedures are initiated on application to the High Court and must comply with the various requirements as set out in the Insolvency Act.⁹¹

Throughout the Insolvency Act, and especially when a debtor applies for his estate to be sequestrated by way of voluntary sequestration,⁹² the “advantage to creditors” requirement is an essential requirement⁹³ which needs to be proved before a court will consider granting an application for the voluntary sequestration of a debtor’s estate.⁹⁴ Similarly, when a creditor applies for the sequestration of a debtor’s estate by way of compulsory sequestration,⁹⁵ the “advantage to creditors” requirement remains a requirement which a creditor needs to prove before a court will grant an order sequestrating the estate of a debtor provisionally,⁹⁶ or before ordering the eventual final sequestration of a debtor’s estate.⁹⁷ I deal with this matter in more detail below.

A court is not bound to grant an order for the sequestration of a debtor’s estate even if all of the requirements of the Insolvency Act have been complied with, and each application before the court is considered on its own merits.⁹⁸ It is solely within the court’s discretion in each application for sequestration to decide whether it would be in the best interest of the creditors of a debtor to grant an order sequestrating the estate of the debtor.⁹⁹

This discretion of the courts, and the manner in which they require strict compliance with the “advantage to creditors” requirement in sequestration applications, evidences the stringent nature of the natural person insolvency law system in South

⁹⁰ *Hockley’s* at 17.

⁹¹ Boraine and Van Heerden “To Sequester or not to Sequester in view of the National Credit Act 34 of 2005: A Tale of Two Judgements” 2010 *PELJ* at 86.

⁹² Sections 3 and 6 of the Insolvency Act.

⁹³ Roestoff and Coetzee 2012 *SA Merc LJ* at 55.

⁹⁴ Sections 3(1) and 6(1) of the Insolvency Act.

⁹⁵ Sections 9 to 12 of the Insolvency Act.

⁹⁶ Section 10(c) of the Insolvency Act.

⁹⁷ Section 12(1)(c) of the Insolvency Act.

⁹⁸ Boraine and Van Heerden 2010 *PELJ* at 88.

⁹⁹ *Ibid.*

Africa. If some “advantage to creditors” cannot be established, it is unlikely that a court will grant an order for the sequestration of the debtor’s estate.¹⁰⁰ There are several other requirements which also need to be proved in applications for voluntary sequestration or compulsory sequestration. I deal with these briefly hereafter. It is important to take cognisance of the fact that the “advantage to creditors” requirement plays an essential role in the the exercise of the court’s discretion, which discretion mostly hinges on whether there is an actual “advantage to creditors”.¹⁰¹

2.2 VOLUNTARY SEQUESTRATION

An order sequestrating a debtor’s estate by way of voluntary sequestration may be granted if the debtor has satisfied the court that: the debtor has complied with the formalities set out in the Insolvency Act;¹⁰² the debtor applying for the voluntary sequestration of his estate is actually insolvent; the debtor owns sufficient realisable property which will be used to pay the costs of the sequestration payable from the free residue of the estate; and it will be to the “advantage of the creditors” of the debtor if the debtor’s estate is sequestrated.¹⁰³

Section 3 of the Insolvency Act sets out the requirements for the petitioning of the acceptance for the surrender of a debtor’s estate¹⁰⁴ and states that:

“3. Petition for acceptance of surrender of estate.—

- (1) An insolvent debtor or his agent or a person entrusted with the administration of the estate of a deceased insolvent debtor or of an insolvent debtor who is incapable of managing his own affairs, may petition the court for the acceptance of the surrender of the debtor’s estate for the benefit of his creditors.

¹⁰⁰ Evans “Waiving the rights to property in insolvent estates and advantage to creditors in sequestration proceedings in South Africa” 2018 *De Jure* at 300.

¹⁰¹ Boraine and Van Heerden 2010 *PELJ* at 88.

¹⁰² Section 4 of the Insolvency Act sets out the formalities that a debtor has to comply with before applying for his estate to be sequestrated. For purposes of the discussion to follow, these formalities will not be discussed in depth.

¹⁰³ Section 6(1) of the Insolvency Act.

¹⁰⁴ Section 3 of the Insolvency Act.

- (2) All the members of a partnership (other than partners en commandite or special partners as defined in the Special Partnerships Limited Liability Act, 1861 (Act No. 24 of 1861) of the Cape of Good Hope or in Law No. 1 of 1865 of Natal) who reside in the Republic, or their agent, may petition the court for the acceptance of the surrender of the estate of the partnership and of the estate of each such member.
- (3) Before accepting or declining the surrender, the court may direct the petitioner or any other person to appear and be examined before the court.”¹⁰⁵

Section 3 of the Insolvency Act sets the parameters for those who may petition the voluntary sequestration of a debtor’s estate and includes the insolvent debtor himself, persons or agents of a debtor entrusted with the administration of an insolvent deceased estate or the administration of the estate of a debtor who is not capable of managing his own affairs,¹⁰⁶ and members of a partnership as set out in the Insolvency Act.¹⁰⁷

Accordingly, section 3(1) of the Insolvency Act, provides an indication of “what is being addressed”¹⁰⁸ by the Insolvency Act through the petitioning for the voluntary sequestration of the estate of the debtor. The petition by a debtor for the acceptance of the surrender of his estate, sets the machinery of the law in motion to have the debtor declared insolvent. No other goal or relief is set out or sought in section 3 of the Insolvency Act, like the claim of payment of a certain amount of money due by the debtor to the creditor.¹⁰⁹

Section 6 of the Insolvency Act does not only set out certain requirements which have to be complied with before a court may accept the petition for the sequestration of a debtor’s estate. It also establishes the object and purpose of the Insolvency Act

¹⁰⁵ Section 3 of the Insolvency Act. Own emphasis.

¹⁰⁶ Section 3(1) of the Insolvency Act. It is noteworthy to emphasise here the particular wording of section 3(1) of the Insolvency Act which specifically states that the debtor “may petition the court for the acceptance of the surrender of the debtor’s estate for the benefit of his creditors.” Own emphasis.

¹⁰⁷ Sections 3(2) of the Insolvency Act.

¹⁰⁸ See fn. 3 *supra*.

¹⁰⁹ See fn. 13, 16, 18, 20, 2 and 23 *supra*.

in respect of voluntary sequestration applications instituted by a debtor for the sequestration of his estate and determines the following:

“6. Acceptance by court of surrender of estate.—

- (1) If the court is satisfied that the provisions of section four have been complied with, that the estate of the debtor in question is insolvent, that he owns realizable property of a sufficient value to defray all costs of the sequestration which will in terms of this Act be payable out of the free residue of his estate and that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it may accept the surrender of the debtor’s estate and make an order sequestrating that estate.
- (2) If the court does not accept the surrender or if the notice of surrender is withdrawn in terms of section seven, or if the petitioner fails to make the application for the acceptance of the surrender of the debtor’s estate before the expiration of a period of fourteen days as from the date specified in the notice of surrender, as the date upon which application will be made to the court for the acceptance of the surrender of the debtor’s estate, the notice of surrender shall lapse and if a *curator bonis* was appointed, the estate shall be restored to the debtor as soon as the Master is satisfied that sufficient provision has been made for the payment of all costs incurred under subsection (2) of section five.”¹¹⁰

Accordingly, it can be said that why it is a “proper concern”¹¹¹ that the machinery of the law be set in motion to have the debtor declared insolvent by way an application for the sequestration of his estate, is to achieve the object and purpose of the Insolvency Act – that the sequestration of the estate of the debtor must be to the advantage of the creditors of the debtor.¹¹²

2.2.1 REQUIREMENTS TO OBTAIN A VOLUNTARY SEQUESTRATION ORDER

As already set out *supra*, the Insolvency Act sets out various requirements which must be complied with before a court will accept the voluntary surrender of the

¹¹⁰ Sections 6(1) and (2) of the Insolvency Act. Own emphasis.

¹¹¹ See fn. 3 *supra*.

¹¹² See fn. 52, 53, 54 and 55 *supra*.

estate of a debtor. These requirements will be dealt with briefly as each requirement plays a role, to some extent, in a court's decision to grant an order for the sequestration of a debtor's estate.

A voluntary sequestration application is brought by way of a notice of motion which must be supported by an affidavit deposed to by the debtor. This serves the purpose of persuading the Court that the requirements as contemplated by the Insolvency Act have been complied with.¹¹³

2.2.1.1 ESTATE OF DEBTOR IS INSOLVENT

The debtor must allege that he is insolvent and provide the facts supporting the allegation.¹¹⁴ A debtor will be deemed to be insolvent if the total of his reasonably valued liabilities exceed the total of his reasonably valued assets.¹¹⁵ Boshoff J, in the matter of *Venter v Volkskas Ltd*,¹¹⁶ held that, to objectively establish whether a debtor is insolvent, a creditor must establish that the fairly estimated value of the liabilities of a debtor exceed the debtor's fairly estimated assets.¹¹⁷ Although in the matter of *Volkskas* an application for the compulsory sequestration of a debtor's estate was considered, the test would also apply if a debtor wishes to sequester his estate voluntarily.

In order to enable a court to determine whether a debtor's liabilities exceed his assets, the debtor must file the application for sequestration together with a statement of affairs which will assist the Court in establishing a debtor's insolvency.¹¹⁸ Even if the statement so submitted reflects that the debtor's liabilities exceed his assets, it does not necessarily mean that the debtor is insolvent – as was established in *Volkskas*, the debtor will only be deemed to be insolvent if the fairly estimated value of the liabilities of a debtor exceed the debtor's fairly estimated assets.¹¹⁹

¹¹³ *Hockley's* at 27.

¹¹⁴ *Ibid* at 18.

¹¹⁵ *Ibid* at 3 and 18.

¹¹⁶ 1973 3 All SA 377 (T) ("*Volkskas*").

¹¹⁷ *Ibid* at 381.

¹¹⁸ *Hockley's* at 18 and 27.

¹¹⁹ See fn. 117 *supra*.

To answer the question of whether a debtor is in fact insolvent, it must be established whether the debtor is unable to pay his debts in full as and when the debts become due and payable, and that it would be unlikely that the realization of his assets will have the desired effect of settling his debt in full.¹²⁰ The courts interpreted this requirement of insolvency in the matter of *Ex Parte Harmse*,¹²¹ when Magid J held that

“[i]t is important to note, however, that it is only when it is established that it is improbable that his assets will realise sufficient to settle the amount of his debts in full that it can truly be said that the court ought to be satisfied that the estate of the debtor is insolvent. It is only acceptable and admissible evidence which can displace the prima facie inference of solvency when the applicant’s own estimate of values exceeds the amount of the liabilities.”¹²²

The court must be persuaded by the evidence placed before it, and be satisfied on a balance of probabilities, that the estate of the debtor is in fact insolvent.¹²³ Should the court not be persuaded, it is highly unlikely that an order for the sequestration of the estate will be granted.

2.2.1.2 COSTS OF SEQUESTRATION TO BE PAID FROM FREE RESIDUE OF ESTATE

A debtor in applying for the sequestration of his estate must make the averment that he owns enough property which can be realised to pay the costs of the sequestration¹²⁴ from the free residue¹²⁵ of the estate of the debtor.¹²⁶ The averred costs of the sequestration of the estate of a debtor may not amount to a rough estimate. The debtor must attempt to provide the court with a proper estimate which specifies the costs accordingly.¹²⁷ Naturally, a debtor who only has liabilities and no

¹²⁰ *Hockley’s* at 18.

¹²¹ [2004] 1 All SA 626 (N).

¹²² *Ibid* at 630.

¹²³ *Ibid* at 631.

¹²⁴ *Hockley’s* at 19 states that the “costs of the sequestration” are the costs of the surrender of the estate of the debtor as well as the costs of the general administration as set out in section 97 of the Insolvency Act.

¹²⁵ Section 2 of the Insolvency Act defines “**free residue**” as follows; “*in relation to an insolvent estate, means that portion of the estate which is not subject to any right of preference by reason of any special mortgage, legal hypothec, pledge or right of retention;*”

¹²⁶ *Hockley’s* at 27.

¹²⁷ *Ibid*.

assets will not be in a position to prove that he owns sufficient realisable property to defray the costs of sequestration.¹²⁸

In the matter of *Ex Parte Collins*,¹²⁹ De Waal JP held that a court will not accept the surrender of the estate of a debtor if a guarantee for the costs of the sequestration of the estate has been provided to the Master of the High Court in the absence of any described assets which would prove to the court that the costs of the sequestration of the estate of a debtor would be covered.¹³⁰

Accordingly, if there is not sufficient free residue to defray the cost of the sequestration, then the application for the voluntary sequestration will not be granted. This was confirmed in the matter of *Ex Parte Swanepoel*,¹³¹ where it was doubted whether there would be enough money available in the free residue of the debtor's estate to cover the costs of the sequestration and the Court accordingly refused to grant the application for voluntary sequestration.¹³²

It was also held in the matter of *Ex Parte Muller*¹³³ by Rampai J that the decade-long approach set out in the matter of *Ex Parte Swanepoel*¹³⁴ is for a court to refuse to grant an application for the sequestration of the estate of a debtor if there is not sufficient free residue in the estate of the debtor to pay for the costs of the sequestration. As such, Rampai J felt no need to justify any deviance from the principle relating to the sufficient free residue which should be available to cover the cost of the sequestration and accordingly refused to grant the application for sequestration in the particular instance.¹³⁵

Accordingly, a debtor who applies for the voluntary sequestration of his estate must prove to the court that there will be sufficient free residue to defray the costs of the sequestration of his estate, otherwise a court will not grant the application.

¹²⁸ *Ibid* at 19.

¹²⁹ 1927 WLD 172.

¹³⁰ *Ibid* at 176.

¹³¹ [1975] 1 All SA 17 (O).

¹³² *Ibid* at 20.

¹³³ 2015 JOL 33837 (FB).

¹³⁴ 1975 (2) SA 367 (O).

¹³⁵ *Ibid* at 6 to 7.

2.2.1.3 WILL BE TO THE ADVANTAGE OF CREDITORS

A debtor, in applying for the sequestration of his estate, must prove to the Court that the sequestration of his estate “will be to the advantage of creditors of the debtor if his estate is sequestrated”.¹³⁶ It was decided in the matter of *Amod v Khan*¹³⁷ that this requirement confers a strenuous onus on the debtor because the debtor is in a more favourable position to inform the court in detail of the status of his financial position. Hathron JP held that a debtor who applies for the sequestration of his estate is well aware of the status of his own affairs and is in a position to easily prove that his sequestration will be to the advantage of his creditors.¹³⁸

Accordingly, the applicant-debtor is well aware of the state of his accounts and estate, and is in the best position to adduce to proper facts to establish that there is or will be an advantage to his creditors.¹³⁹ The courts are appropriately concerned with whether sequestration will be to the advantage of a debtor’s creditors and, as such, this requirement of the Insolvency Act will be scrutinized by the courts in order to protect the interests of creditors.¹⁴⁰

It is clear that a debtor may petition a court for the acceptance of the surrender of his estate for the benefit of his creditors,¹⁴¹ and the court may only grant the order if it is satisfied, amongst others, that the debtor is insolvent; that the debtor owns enough property that can be realised to defray the costs of the sequestration; and that it will be to the advantage of the creditors of the debtor if the debtor’s estate is sequestrated.

Accordingly, the aim of the Insolvency Act, when it comes to voluntary sequestration applications, is to ensure that the order granted will initiate a process that will ultimately be “to the advantage of creditors”.¹⁴² This advantage is not only of a pecuniary nature as discussed below, but also lies in the due and orderly distribution

¹³⁶ Section 6(1) of the Insolvency Act. Own emphasis.

¹³⁷ [1947] 2 All SA 370 (N).

¹³⁸ *Ibid* at 375.

¹³⁹ Evans and Haskins 1990 SA Merc LJ at 246.

¹⁴⁰ Hockley’s at 27.

¹⁴¹ In terms of section 3(1) of the Insolvency Act, the court’s concern should be the advantage which the creditors of a debtor will gain from the sequestration of the debtor’s estate.

¹⁴² Section 6(1) of the Insolvency Act.

of a debtor's assets in an order of preference,¹⁴³ to the benefit of the general body of creditors after a sequestration order has been granted.¹⁴⁴

2.3 COMPULSORY SEQUESTRATION

A debtor's estate may also be sequestrated by way of compulsory sequestration, when a debtor's creditors apply for the sequestration of the debtor's estate.¹⁴⁵ An order sequestrating a debtor's estate in this manner may be granted by a court if the court is satisfied that: the applicant has a claim which is established in terms of section 9(1) of the Insolvency Act; the debtor is insolvent or an act of insolvency has been committed by the debtor; and the applicant-creditor has established that there is reason to believe that the sequestration of the debtor's estate will be to the "advantage to the creditors" of the debtor.¹⁴⁶

Section 9(1) of the Insolvency Act sets out the requirements for the petitioning for the compulsory sequestration of a debtor's estate:

"9. Petition for sequestration of estate.—

(1) A creditor (or his agent) who has a liquidated claim for not less than fifty pounds, or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than one hundred pounds against a debtor who has committed an act of insolvency, or is insolvent, may petition the court for the sequestration of the estate of the debtor."¹⁴⁷

Section 9(1) of the Insolvency Act determines who may apply for the compulsory sequestration of a debtor's estate. The list of applicants with locus standi includes a creditor, or his agent, who have a liquidated claim against a debtor who as committed an act of insolvency, or a debtor who is insolvent.¹⁴⁸

¹⁴³ See fn. 30, 41 and 43 *supra*.

¹⁴⁴ *Ibid.*

¹⁴⁵ Mabe and Evans 2014 *SA Merc LJ* at 655.

¹⁴⁶ *Hockley's at 33.*

¹⁴⁷ Section 9(1) of the Insolvency Act. Own emphasis.

¹⁴⁸ *Ibid.*

At the onset of the Insolvency Act, section 9 provides an indication of “what is being addressed”¹⁴⁹ by the Act through the petitioning for the compulsory sequestration of the estate of the debtor. The petition sets the machinery of the law in motion to have the debtor declared insolvent.¹⁵⁰ No other goal or relief is set out in this section of the Insolvency Act like the claim of payment of a certain amount of money due by the debtor to the creditor.¹⁵¹

Section 10 of the Insolvency Act determines that requirements which have to be complied with before a court may grant an order sequestrating a debtor’s estate provisionally:

“10. Provisional sequestration.—

If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that prima facie —

- (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and
- (b) the debtor has committed an act of insolvency or is insolvent; and
- (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,

it may make an order sequestrating the estate of the debtor provisionally.”¹⁵²

Section 12 of the Insolvency Act determines the requirements which have to be complied with before a court may make an order sequestrating a debtor’s estate finally and states *inter alia*:

“12. Final sequestration or dismissal of petition for sequestration.—

- (1) If at the hearing pursuant to the aforesaid rule nisi the court is satisfied that—
 - (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and
 - (b) the debtor has committed an act of insolvency or is insolvent; and

¹⁴⁹ See fn. 3 *supra*.

¹⁵⁰ *Priest* at 299.

¹⁵¹ See fn. 12 to 18 *supra*.

¹⁵² Section 10 of the Insolvency Act. Own emphasis.

(c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it may sequester the estate of the debtor.”¹⁵³

Although the requirements set out in section 10 of the Insolvency Act are the same as the requirements in section 12 of the Act, the burden of proof which a creditor bears, differs when it comes to the aforesaid sections. In order to obtain a provisional order for the compulsory sequestration of a debtor’s estate as contemplated by section 10, a court only needs to be of the prima facie opinion that the requirements as contemplated by the Insolvency Act have been complied with. However, before a court will grant a final order for the compulsory sequestration of a debtor’s estate, it must be satisfied that the requirements as contemplated by the Insolvency Act have been complied with.¹⁵⁴

Sections 10 and 12 of the Insolvency Act also set out why it is a “proper concern”¹⁵⁵ that the machinery of the law be set in motion to have a debtor declared insolvent. The concern is to the object and purpose of the Insolvency Act.¹⁵⁶ In a matter concerning the compulsory sequestration of a debtor’s estate, a creditor may petition a court for provisional and final orders to sequester a debtors estate. The creditor must satisfies the court that the creditor has an established claim; that an act of insolvency has been committed; and that there is a reason to believe that the compulsory sequestration will be to the advantage of the creditors of the debtor if the debtor’s estate is sequestrated.

2.3.1 REQUIREMENTS TO OBTAIN A COMPULSORY SEQUESTRATION ORDER

As mentioned above, the Insolvency Acts sets out various requirements which must be complied with before a court will grant an order for the compulsory sequestration of the estate of a debtor. These requirements will be dealt with briefly as each requirement also plays a role in determining whether a court should grant an order for the sequestration of a debtor’s estate.

¹⁵³ Section 12 of the Insolvency Act. Own emphasis.

¹⁵⁴ Mabe and Evans 2014 *SA Merc LJ* at 655.

¹⁵⁵ See fn. 3 *supra*.

¹⁵⁶ See fn. 52, 53, 54, 55 and 56 *supra*.

A compulsory sequestration application is brought by way of a notice of motion which must be supported by an affidavit deposed to by the sequestrating creditor or a person who can also attest positively to the facts set out therein. The affidavit serves the purpose of persuading the Court that the requirements in terms of the Insolvency Act have been complied with.¹⁵⁷

2.3.1.1 ESTABLISHED CLAIM

The first requirement is that the petitioning creditor has an established claim against the debtor's estate.¹⁵⁸ Section 9(1) of the Insolvency Act allows for compulsory sequestration proceedings to be instituted or petitioned by a creditor (setting the machinery of the law in motion¹⁵⁹) who has a liquidated claim against the debtor which is not less than one hundred rand or, if there is more than one creditor, creditors who have a combined claim against the debtor of more than two hundred rand.¹⁶⁰

In the matter of *Kleynhans v Van der Westhuysen*,¹⁶¹ the appellant argued that a liquidated claim should be interpreted as a claim which has a certain type of cause of action i.e. one which is based upon a court judgment or acknowledgement of debt by a debtor. In *Kleynhans* the claim by the creditor against the debtor was based upon theft and accordingly (as it was argued by the appellant/debtor) not a claim which falls within the ambit of what would be considered a liquidated debt contemplated by the Insolvency Act.¹⁶²

It was further argued that the wording of the section pertaining to a liquidated claim should be interpreted as referring only to an amount which is determined by agreement, or to an amount which had been made an order of court, excluding a claim for the payment of damages.¹⁶³

The Court held that, in normal circumstances where a claim is based on damages and where the amount has not been determined yet, it would be classified as an

¹⁵⁷ *Hockley's* at 48.

¹⁵⁸ *Ibid* at 33.

¹⁵⁹ See fn. 22 *supra*.

¹⁶⁰ *Hockley's* at 34.

¹⁶¹ 1970 3 SA 105 (A) ("*Kleynhans*").

¹⁶² *Ibid* at 107.

¹⁶³ *Ibid*.

unliquidated claim.¹⁶⁴ However, the intentions of the legislature with regards to a liquidated claim in insolvency, was that there should be certainty about the amount claimed:

“Wat die appellant se locus standi betref, is dit van kardinale belang dat sy vordering vir ‘n bedrag van minstens ‘n R100 is. Indien hierdie bedrag nog nie bepaal is nie wanneer hy sy versoekskrif aan die hof voorlê, slaag hy nie daarin om te bewys dat hy locus standi het nie. Kyk, o.m., Savory v. Bell, 1909 T.H. 130. Nòg die betrokke woordbepaling nòg enige ander bepaling van die 1916 Wet dui eniginsins daarop dat waar die bedrag van die vordering bepaal is, soos vereis word, die applikant hom nogtans nie op die bepalings van die Wet kan beroep nie, indien dit blyk dat sy vordering op die verhaal van skadevergoeding gerig is.”¹⁶⁵

If a creditor’s claim is based upon damages, the claim against the debtor is at least R100, and it is a claim which is determinable, then nothing would preclude a creditor from relying on the provision in the Insolvency Act to apply for the compulsory sequestration of a debtor’s estate.¹⁶⁶ The Court further held that, if the papers before the court indicates – with certainty – that a creditor has an established claim of at least one hundred rand against a debtor, then the legal grounds and status of the creditor’s claim against the debtor does not affect the creditor’s *locus standi* to petition a court for the sequestration of a debtor based on the creditor’s claim.¹⁶⁷ Thus, if the claim against a debtor is at least R100.00, the grounds upon which the claims is sought and the cause of the claim is left unaffected. A creditor only needs to prove with certainty that his claim against a debtor is R100.00 as it is this

¹⁶⁴ *Ibid* at 108.

¹⁶⁵ *Ibid* (own emphasis); the wording of the court in this specific extract of the judgement might be confusing. The court refers to “[w]at die appellant se locus standi betref”. The wording should have been “[w]at die respondent se locus standi betref”. The appellant was the one who was sequestered by order of court *a quo* upon application by the respondent. The appellant appealed to the Appellate Division against an order of the court *a quo*. For a creditor to be empowered to apply for the compulsory sequestration of a debtor he must have the necessary *locus standi* to bring a sequestration application. His *locus standi* is conferred upon him if he has a claim against the debtor for at least R100. It is obvious that the appellant (who is the debtor against who the application was granted) need not have *locus standi* in this regard.

¹⁶⁶ *Ibid* (the court here refers to section 9(1) of the 1936 Insolvency Act).

¹⁶⁷ *Ibid*. Own emphasis.

established claim which founds a creditor's *locus standi* to institute an application for the compulsory sequestration of the estate of a debtor.

In *Kleynhans*, the Court accepted that the claim against the debtor was one which was based upon damages¹⁶⁸ and held:

“Dit kom my as vanselfsprekend voor dat waar die skuldenaar 'n vaste som geld van 'n applikant gesteel het, die bedrag van laasgenoemde se vordering, wat op die pleging van die diefstal gegrond is, uiteraard met sekerheid bepaal is. Die bedrag behoef geen bepaling deur 'n hof of ooreenkoms met die dief nie, aangesien dit met sekerheid “andersins” bepaal is. Waar bewys is dat die diefstal gepleeg is, is die bedrag van skadevergoeding eweneens bewys, en daardie bepaalde bedrag is onmiddellik na die diefstal opeisbaar. Die dief is vanaf die datum van die diefstal in mora (Wessels, Law of Contract in S.A., 2de uitg., para. 2864).”¹⁶⁹

Accordingly, the mere fact that the amount claimed has been disputed by the debtor does not necessarily mean that it is not a liquidated claim.¹⁷⁰ The crux of the matter lies in the determinability of the amount, and as such the Court held:

“Dat 'n vordering vir skadevergoeding, waar die bedrag nie bepaal is nie, 'n ongelikwildeerde vordering is, behoef geen betoog nie. Meerendeels sou vorderings vir skadevergoeding uiteraard ongelikwildeerde vorderings wees, ongeag of dit uit kontrakbreuk of in delik voortspruit.”¹⁷¹

It is clear from *Kleynhans* that a Court's interpretation of a liquidated claim by a creditor against a debtor, should be interpreted in the widest sense – even to include amounts which arose as a result of theft by a debtor, amounts that can be determined with certainty, or amounts that have been determined.¹⁷²

¹⁶⁸ *Kleynhans* at 109.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

2.3.1.2 ACT OF INSOLVENCY

The second requirement, which must be proved by a petitioning creditor applying for the compulsory sequestration of a debtor's estate, is that the debtor must have committed an act of insolvency as contemplated in the Insolvency Act or is otherwise insolvent.¹⁷³ In this regard and with reference to the matter of *De Villiers No v Maursen Properties (Pty) Ltd*,¹⁷⁴ it was held by Van der Walt J that the statutory concept of an act of insolvency as contemplated by the Insolvency Act is of such a nature that it removes the requirement of proving that a debtor is actually insolvent.¹⁷⁵

Although a creditor may have reason to believe that a debtor is insolvent, he will not necessarily be in a position to confirm this, and present a proper case to a court that shows that the debtor's liabilities are more than his assets.¹⁷⁶ Accordingly, it is clear why the Insolvency Act makes provision for certain established acts of insolvency which can be committed by a debtor and upon which a creditor may act and proceed to apply for the compulsory sequestration of a debtor's estate.¹⁷⁷ Section 8 of the Act consequently lists acts of insolvency:

"8. Acts of insolvency. – A debtor commits an act of insolvency –

- (a) if he leaves the Republic or being out of the Republic remains absent therefrom, or departs from his dwelling or otherwise absents himself, with intent by so doing to evade or delay the payment of his debts;
- (b) if a court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment;

¹⁷³ *Hockly's* at 33.

¹⁷⁴ [1983] 4 All SA 517 (T).

¹⁷⁵ *Ibid* at 521. Own emphasis.

¹⁷⁶ *Hockly's* at 35.

¹⁷⁷ *Ibid*.

- (c) if he makes or attempts to make any disposition of any or his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another;
- (d) if he removes or attempts to remove any of his property with intent to prejudice his creditors or to prefer one creditor above another;
- (e) if he makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts;
- (f) if, after having published a notice of surrender of his estate which has not lapsed or been withdrawn in terms of section six or seven, he fails to comply with the requirements of subsection (3) of section four or lodges, in terms of that subsection, a statement which is incorrect or incomplete in any material respect or fails to apply for the acceptance of the surrender of his estate on the date mentioned in the aforesaid notice as the date on which such application is to be made;
- (g) if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts;
- (h) if, being a trader, he gives notice in the Gazette in terms of subsection (1) of section thirty-four, and is thereafter unable to pay all his debts.”¹⁷⁸

In the matter of *DP du Plessis Prokureurs v Andries Gideon van Aarde*,¹⁷⁹ Hartzenberg J held that a debtor can be sequestrated even though he is technically solvent but commercially insolvent. This means that the debtor’s assets exceed his liabilities but he is unable to pay his debts as and when they become due; or if the debtor has committed an act of insolvency as contemplated by section 8 of the Insolvency Act.¹⁸⁰ In the case where a debtor is commercially insolvent, it would in all probability be to the advantage of his creditors if the debtor is sequestrated in order for his assets to be divided equally between his creditors.¹⁸¹

¹⁷⁸ Section 8 of the Insolvency Act.

¹⁷⁹ 2000 JOL 5949 (T) (“*DP du Plessis*”).

¹⁸⁰ *Nagel* at par 33.05.

¹⁸¹ 2000 JOL 5949 (T) (“*DP du Plessis*”) at 2-3. Own emphasis.

Even though a debtor may be technically solvent¹⁸² a creditor may proceed to apply to have the debtor sequestrated if the debtor is commercially insolvent.¹⁸³ If a debtor has committed an act of insolvency and the creditor has an established claim in term of section 9(1) of the Insolvency Act, then it is arguably of no real significance if a debtor is technically insolvent or not.¹⁸⁴

In the matter of *ABSA Bank Limited v Chopdat*¹⁸⁵ the question was raised whether an act of insolvency committed by a debtor during “without prejudice” settlement negotiations¹⁸⁶ between the parties, should be disregarded. Would reliance by a creditor for the sequestration of a debtor’s estate offend against the common law rule of disclosure of privileged information?¹⁸⁷ Van Schalkwyk J held that, as a matter of public policy, an act of insolvency committed by a debtor should not necessarily be afforded the same protection as that which the common law provides to “without prejudice” settlement negotiations.¹⁸⁸ The Judge indicated that there should be no reason why a debtor, who has committed an act of insolvency by admitting that his liabilities exceeded his assets, should be provided with the same protection.¹⁸⁹

The justification and basis provided by Van Schalkwyk J for this particular exclusion was as a result of the special nature of sequestration proceedings and the particular effects of a sequestration order.¹⁹⁰ In *ABSA Bank* the debtor went as far as admitting his insolvency and public policy would require that such an admission by a debtor be allowed in sequestration proceedings even if such an admission was made during, or in the process of, privileged or “without prejudice” communications.¹⁹¹

Accordingly, it is clear from *ABSA Bank* that an act of insolvency can even be as far reaching as an “without prejudice” offer by a debtor made to one of his creditors to

¹⁸² *Hockly's* at 35; a debtor regarded as technically solvent if his assets exceed his liabilities, but he has committed an act of insolvency as set out in section 8 of the Act.

¹⁸³ *DP du Plessis* at 2-3.

¹⁸⁴ *Ibid* at 3.

¹⁸⁵ 2000 JOL 6563 (W) (“*ABSA Bank*”).

¹⁸⁶ I.e. an offer to settle a debt wholly or partially as contemplated in section 8(e) of the Act.

¹⁸⁷ *ABSA Bank* at 4-5.

¹⁸⁸ *Ibid* at 8. Own emphasis.

¹⁸⁹ *Ibid* at 11.

¹⁹⁰ *Ibid* at 12.

¹⁹¹ *Ibid*.

settle his debts wholly or partially.¹⁹² This is a further indication of the stringent nature of the insolvency system.

The respondent raised the argument that this stringent application of the Insolvency Act, and deviance from the common law principles regarding “without prejudice” negotiations, would impede settlement negotiations between parties.¹⁹³ The Court was not persuaded by the respondent’s argument as settlement negotiations between an insolvent debtor and a creditor might not be desirable at all – it may lead to a debtor favouring one creditor above another.¹⁹⁴ This would not be to the advantage of the creditors of a debtor as a group.

The Court accordingly held that the sequestration of the debtor’s estate, unimpeded by such negotiations, will render a far more favourable result for the creditors of the debtor. It would prevent a debtor from causing further damage as a result of the debtor’s failure to settle his debts due and owing to his creditors.¹⁹⁵

2.3.1.3 REASON TO BELIEVE THERE WILL BE AN ADVANTAGE TO CREDITORS

The third requirement which must be proved by a petitioning creditor applying for the compulsory sequestration of a debtor’s estate is that the creditor must establish that there is reason to believe that the sequestration of the debtor’s estate will be to the advantage of its creditors.¹⁹⁶ As such, it was duly held in the matter of *Trust Wholesalers and Wollend (Pty) Ltd v Mackan*¹⁹⁷ that, before a court may grant an order for the provisional sequestration of the estate of a debtor, the court must be satisfied upon a preponderance of probability that, if the estate of the debtor is sequestrated, there is reason to believe that such sequestration will be to the advantage of the creditors of the debtor being sequestrated.¹⁹⁸

¹⁹² *Hockly’s* at 35-36.

¹⁹³ *ABSA Bank* at 12.

¹⁹⁴ *Ibid*; Favours one creditor above another can be classified and deemed to be a voidable preference in terms of section 29 of the Insolvency Act or an undue preference in terms of section 30 of the Insolvency Act. The argument raised by the court in *ABSA Bank* i.e. settlement negotiations between a debtor and a specific creditor might not be desirable supports the argument of stringent insolvency law principles, which will be dealt with fully here below in chapter 3.

¹⁹⁵ *ABSA Bank* at 12.

¹⁹⁶ *Hockly’s* at 33.

¹⁹⁷ [1954] 2 All SA 74 (N) (“*Trust Wholesalers*”).

¹⁹⁸ *Ibid* at 76.

In *Meskin & Co v Friedman*¹⁹⁹ it was determined that the Insolvency Act²⁰⁰ places the *onus* on the creditor petitioning for the sequestration of a debtor's estate, to show that the debtor committed an act of insolvency and that there is reason to believe that, if the court grants the order, it would be to the advantage of its creditors.²⁰¹

The "advantage to creditors" requirement will be satisfied if it is shown that there is reason to believe that a significant portion of the creditors of a debtor will derive a benefit, whether this significant portion is made up by the actual number of the creditors or, alternatively, the value of their claims.²⁰²

If a court examines the facts before it and comes to the conclusion that there is reason to believe that the sequestration of the debtor's estate would be to the advantage of his creditors, then it would be irrelevant whether some creditors argue that the sequestration of the debtor's estate will be to the advantage of its creditors while other creditors argue the contrary.²⁰³

In order for a court to grant an order provisionally sequestering a debtor's estate, it "must be of the opinion, based, presumably, upon a preponderance of probability, that *prima facie* there is reason to believe that the sequestration will be to the advantage of creditors."²⁰⁴ In granting a provisional order, it would not be easy to think that a court should apply a "more cautious state of mind"²⁰⁵ than the wording which is provided for in the Insolvency Act,²⁰⁶ which forms the basis for an order allowing the provisional sequestration of a debtor's estate.²⁰⁷

At first presentation, a court must only be of the *prima facie* opinion that there is reason to believe that the sequestration will be to the advantage of the creditors.²⁰⁸ Once an order has been granted by a court for the provisional sequestration of a

¹⁹⁹ [1948] 2 All SA 416 (W) ("*Meskin*").

²⁰⁰ At sections 10 and 12 thereof.

²⁰¹ *Meskin* at 419.

²⁰² *Trust Wholesalers* at 76.

²⁰³ *Ibid.*

²⁰⁴ *Ibid* at 77-78.

²⁰⁵ *Ibid* at 78.

²⁰⁶ At section 10(c) of the Act and more specifically "*reason to believe*".

²⁰⁷ *Trust Wholesalers* at 78.

²⁰⁸ *Meskin* at 419.

debtor's estate and the rule *nisi* date has been served upon a debtor calling upon him to appear at court and show cause why a final sequestration order should not be granted,²⁰⁹ then section 12 of the Act comes into operation.

At the hearing of the rule *nisi*, the court may grant a final sequestration order if it is satisfied that there is reason to believe that the sequestration of the debtor's estate will be to the advantage of its creditors.²¹⁰ Similarly, if the creditor who petitioned the sequestration of the debtor's estate complied with the requirements as set out in section 12 of the Insolvency Act,²¹¹ then the *onus* of proving the contrary to what has been stated in the petitioning creditor's claim, shifts to the person or debtor opposing the compulsory sequestration of the debtor to show cause why the final sequestration order should not be granted by the court.²¹²

A petitioning creditor need not establish that the sequestration order will be to the advantage of the creditors, but rather that there is a reason to believe that the sequestration of the estate of the debtor will be to the advantage of the creditors.²¹³ Roper J, in *Meskin* held:

“In my opinion, the facts put before the Court must satisfy it that there is a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote - that some pecuniary benefit will result to creditors.”²¹⁴

The aforesaid “reasonable prospect”²¹⁵ sets a lower threshold for a petitioning creditor to prove an advantage to the creditors. A petitioning creditor need not even prove that a debtor owns any assets – in certain instances, it would be sufficient to show that there is reason to believe that assets would be revealed in an enquiry subsequent to a sequestration order being granted, and upon this basis it would be sufficient reason for a court to grant an order sequestrating a debtor's estate.²¹⁶

²⁰⁹ Section 11 of the Insolvency Act provides that a court must simultaneously grant a rule *nisi* together with a provisional sequestration order.

²¹⁰ *Meskin* at 419.

²¹¹ The requirements as set out in sections 12(1)(1)-(c) of the Insolvency Act.

²¹² *Trust Wholesalers* at 78.

²¹³ *Meskin* at 420; *Hockly's* at 44.

²¹⁴ *Meskin* at 420. Own emphasis.

²¹⁵ *Ibid.*

²¹⁶ *Ibid* at 421.

2.4 CONCLUSION

From the above it is clear that petitioning for the sequestration of the estate of a debtor either voluntarily by a debtor himself in terms of section 3(1) of the Insolvency Act, or compulsory by the creditors of a debtor in terms of section 9(1) of the Insolvency Act, sets the machinery of the insolvency law in motion to have a debtor declared insolvent. As such, it provides an answer to “what is being addressed”²¹⁷ by the natural person insolvency law system in South Africa.

Furthermore, and having due regard for why it is a “proper concern”²¹⁸ that the machinery of the law be set in motion to have the debtor declared insolvent, it can be said that it is to fulfil the object and the purpose of the Insolvency Act. The object and purpose are clear for voluntary sequestration applications where section 9(1) of the Insolvency Act requires *inter alia* that the voluntary sequestration of the debtor’s estate must be to the advantage of the creditors of a debtor.

The object and purpose are also clear for compulsory sequestration applications where sections 10 and 12(1) of the Insolvency Act requires *inter alia* that there must be reason to believe that the compulsory sequestration of the debtor’s estate will be to the advantage of the creditors of a debtor.

This chapter set out the legal position pertaining to the relevant requirements for voluntary and compulsory sequestration respectively. The requirements, and their relation to the application of the “advantage to creditors” requirement by the courts, will be discussed in the next chapter.

²¹⁷ See fn. 3 *supra*.

²¹⁸ See fn. 3 *supra*.

CHAPTER 3
THE ANALYSIS OF THE JUSTIFICATION

3.1 INTRODUCTION

3.2 THE “ADVANTAGE TO CREDITORS” REQUIREMENT

3.3 JUSTIFICATION IN LIGHT OF THE “ADVANTAGE TO CREDITORS” REQUIREMENT

3.3.1 REQUIREMENT IN TERMS OF THE INSOLVENCY ACT

3.3.2 PREVENTION OF ABUSE OF SEQUESTRATION PROCEEDINGS

3.3.3 ESTABLISHMENT OF THE *CONCURSUS CREDITORIUM*

3.4 CONCLUSION

3.1 INTRODUCTION

The natural person insolvency law system in South Africa, in dealing with the sequestration of the estates of debtors, aims to regulate the sequestration of the estate of the debtor for the advantage of the debtor’s creditors.²¹⁹ In applications for voluntary sequestration as well as compulsory sequestration, an “advantage to creditors” must be proved and as it has been held by Kanamugire JC that “[t]he advantage to creditors is a consideration of great importance in relation to the question whether or not a debtor’s estate should be sequestrated.”²²⁰ The “advantage to creditors” requirement is specifically contemplated by the Insolvency Act. As such, courts, legislators, and commentators should bear this in mind when dealing with any type of insolvency analyses and in each instance where a petition for the estate of a debtor is considered – whether brought voluntarily by a debtor himself, or compulsory by the creditors of a debtor.

²¹⁹ Kanamugire “The Requirement of Advantage to Creditors in South African Insolvency Law – a Critical Appraisal” 2013 *Mediterranean Journal of Social Sciences* at 19.

²²⁰ *Ibid.*

3.2 THE “ADVANTAGE TO CREDITORS” REQUIREMENT

The “advantage to creditors” requirement is a fundamental aspect specifically contemplated by the Insolvency Act. It plays an important role when a court applies its discretion in considering applications for the sequestration of a debtor’s estate, whether an application for voluntary sequestration or an application for compulsory sequestration.²²¹ The “advantage to creditors requirement” is not only a requirement contemplated by the Insolvency Act, but it is regarded by some as a “*golden thread running through the Act*”.²²² It becomes clear that the “advantage to creditors” requirement persists throughout the Insolvency Act and does not pertain to an individual creditor but rather all of the creditors of a debtor – the *concursum creditorum*.²²³

However not defined in the Insolvency Act,²²⁴ the concept “advantage to creditors” has been developed by means of case law and requires a “reasonable prospect of some pecuniary benefit to the general body of creditors.”²²⁵ The “advantage to creditors” requirement forms an essential part of the Insolvency Act.²²⁶ It has been held that the whole purpose of the Insolvency Act, as it relates to sequestration proceedings regarding natural persons, is aimed at the benefit for the creditors of a debtor.²²⁷ This benefit usually entails some monetary benefit, and a court will not grant the order for sequestration of the estate of a debtor based on other motives.²²⁸

Accordingly, nothing may be done during the sequestration of a debtor’s estate, which would have the effect that a debtor’s assets are diminished and would be prejudicial to the debtor’s creditors.²²⁹

²²¹ Boraie et al 2015 *NIBLeJ* at 78.

²²² Roestoff and Coetzee 2012 *SA Merc LJ* at 55.

²²³ Smith “The Recurrent Motif of the Insolvency Act – Advantage for Creditors” 1985 *Modern Business Law* at 27.

²²⁴ Kanamugire 2013 *Mediterranean Journal of Social Sciences* at 19.

²²⁵ Roestoff and Coetzee 2012 *SA Merc LJ* at 55-56; Boraie et al 2015 *NIBLeJ* at 78.

²²⁶ Roestoff and Coetzee 2012 *SA Merc LJ* at 55

²²⁷ *Ibid.*

²²⁸ Kanamugire 2013 *Mediterranean Journal of Social Sciences* at 19. There are also other benefits like the establishment of a *concursum creditorum*, but as referred to *supra* in *BP Southern Africa* the “point of departure” entails some “pecuniary” benefit.

²²⁹ *Hockly’s* at.4.

As it was held in the matter of *Pillay*,²³⁰ the insolvency law exists for the benefit of creditors and unless it is shown to a court that the sequestration of a debtor's estate will be to the advantage of his creditors, the court will not grant an order sequestrating a debtor's estate.²³¹ An order sequestrating a debtor's estate will only be made by a court if it will result in a dividend being paid to the debtor's creditors.²³² Such an order will not be granted if it will result in the assets of the debtor's estate being used for the costs of the sequestration, and the actual result will be that nothing is left for the creditors of the sequestrated debtor.²³³

The "advantage to creditors" requirement plays a decisive role in sequestration applications being considered by courts.²³⁴ Even if all the other formal requirements as contemplated by the Insolvency Act are complied with, the basis upon which a court eventually determines whether or not it should grant the application, is whether the sequestration order is to the "advantage of the creditors" of the debtor.²³⁵ The nature of this advantage was fittingly described in the matter of *Meskin*,²³⁶ as some pecuniary benefit in favour of the creditors of the debtor.²³⁷

3.3 JUSTIFICATION IN LIGHT OF THE "ADVANTAGE TO CREDITORS" REQUIREMENT

The question which must be answered is whether the stringent natural person insolvency law system in South Africa can be justified in light of the "advantage to creditors" requirement?

It has already been established that the "advantage to creditors" requirement is an essential requirement which must be proved in an application for the voluntary sequestration, as well as the compulsory sequestration of the estate of a debtor. Accordingly, it will now be argued that the stringent natural person insolvency law

²³⁰ See fn. 21 *supra*; *Hockly's* at 4.

²³¹ *Hockly's* at 4.

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ Borraine et al 2015 *NIBLeJ* at 78.

²³⁵ *Ibid.*

²³⁶ See fn.199 to 205 *supra*.

²³⁷ *Ibid.*

system in South Africa is justified in light of the “advantage to creditors” requirement, on the basis of three separate and identifiable grounds.

The first ground for this justification, albeit common knowledge, is that the “advantage to creditors” requirement is a requirement which is specifically contemplated by the Insolvency Act²³⁸ itself. As a result, it cannot be circumvented²³⁹ even if it is criticised.

Not only is this a requirement in terms of the Insolvency Act which debtors and creditors are required to prove in voluntary or compulsory sequestration applications, it has also been established that this “advantage to creditors” confirms the object and purpose of the Insolvency Act.²⁴⁰ The “advantage to creditors” requirement is not only a requirement which is specifically contemplated by the Insolvency Act when dealing with applications for the sequestration of natural persons, but it is also a golden thread running through the Insolvency Act.²⁴¹

Courts are regularly confronted with sequestration applications instituted by creditors and debtors alike, attempting to abuse the provisions of the Insolvency Act. As such, the second ground for the justification, and the reason why the “advantage to creditors” requirement has been strictly enforced by the courts, is as a result of the prospect of abuse of the sequestration process.

The last ground for the justification of the stringent application of the “advantage to creditors” requirement is that a sequestration order establishes a *concursum creditorum* (“coming together of creditors”),²⁴² which means that the rights of the group of the creditors as a whole is preferred over the rights of an individual creditor.²⁴³

²³⁸ Sections 3, 6, 10 and 12 of the Insolvency Act.

²³⁹ The requirement in terms of the Insolvency Act is also the object of the Insolvency Act (see fn.52 to 56 *supra*).

²⁴⁰ See fn. 52 to 56 *supra*. (“...to have a debtor’s estate sequestrated for the advantage of creditors.”)

²⁴¹ See fn. 221 *supra*.

²⁴² See fn. 75 *supra*.

²⁴³ Roestoff and Coetzee 2012 SA Merc LJ at 55.

3.3.1 REQUIREMENT IN TERMS OF THE INSOLVENCY ACT

It has already been determined that the “advantage to creditors” requirement in sequestration proceedings is specifically contemplated in the Insolvency Act and it was held in the matter of *Ex Parte Ogunlaja*²⁴⁴ that

“[u]nless and until the Insolvency Act is amended the South African insolvency law requires an advantage to creditors before the estate of an individual can be sequestrated. Much as the troubled economic times might engender sympathy for debtors whose financial burden has become too much to bear, the insolvency law seeks to protect the interests of creditors at least to the extent that a minimum advantage must be ensured for the concurrent creditor when the hand of the law is laid on the insolvent estate.”²⁴⁵

Accordingly, it is submitted that the Insolvency Act was enacted with the object and purpose of an advantage to creditors. This is the very nature of the Insolvency Act, which is at the core of the South African insolvency system. In *Ogunlaja*, the Court duly considered the Insolvency Act and the “advantage to creditors” requirement and was correct in stating that, unless the Insolvency Act is amended, the “advantage to creditors” requirement cannot be circumvented. The Court proceeded to indicate the minimum threshold – not specified in the Act itself – namely, a benefit for the concurrent creditor.²⁴⁶

Our courts have, on many occasions, emphasised the intention of the legislator in the enactment of the Insolvency Act. They have stressed that the sequestration proceedings as provided for by the Insolvency Act are aimed at conveying a benefit to the creditors of a debtor, and that it is not the main aim of the Insolvency Act to provide some sort of relief to debtors who are being harassed by their creditors.²⁴⁷

²⁴⁴ 2011 JOL 27129 (GNP) (“*Ogunlaja*”). Own emphasis.

²⁴⁵ *Ibid* at par 9 (own emphasis); Boraine et al. 2015 3 NIBLeJ at 80.

²⁴⁶ *Osunlaja* at par 9.

²⁴⁷ Boraine et al. 2015 3 NIBLeJ at 78; *Pillay* at 230; *Ex parte Ford* 2009 9 (3) SA 376 (WCC) at 383; *Ex parte Arntzen* 2013 (1) SA 49 (KZP) at par 13; *Ex parte Shmukler-Tshiko* 2013 JOL 2999 (GSJ) at par 8.

In the matter of *Ex Parte Lazarus*²⁴⁸ shortly after the Insolvency Act came into operation²⁴⁹ the Court had to consider an application for the voluntary sequestration of a debtor's estate in terms of the requirements contemplated by the Insolvency Act, and especially the requirement whether the sequestration of the debtor's estate will be to the advantage of the creditors of the debtor.²⁵⁰ The specific allegation that the sequestration will be to the advantage of the debtor's creditors – which is a requirement in terms of section 6(1) of the Insolvency Act – must be contained in a debtor's application for voluntary sequestration.

The Court in *Lazarus* duly relied upon the *dictum* in an earlier judgment that developed the concept of “advantage to creditors” for procedural purposes.²⁵¹ It was noted:

“As to the form of the petition, this will have to contain a specific allegation that the sequestration will be to the advantage of the creditors of the estate, not merely, as hitherto, an allegation that the petitioner is desirous of surrendering his estate for the benefit, of his creditors.”²⁵²

In a more recent judgment, the matter of *Smit v ABSA Bank Ltd; Smit v ABSA Bank Ltd*,²⁵³ the Court reiterated, that before an application for voluntary sequestration of the estate of a debtor will be granted, the requirement (amongst other requirements) that it will be to the advantage of the creditors if the debtor's estate is sequestrated²⁵⁴ must be proved before a Court will grant the application sequestrating the estate of a debtor.

In another matter of *Gool v Rahim*,²⁵⁵ which was also dealt with shortly after the Insolvency Act came into operation, the Court had to consider an application for the

²⁴⁸ 1937 WLD 7 (“*Lazarus*”) this matter specifically dealt with an application for voluntary surrender of a debtor's estate where the advantage to creditors requirement is required by the Insolvency Act.

²⁴⁹ The Insolvency Act came into operation on 1 July 1936.

²⁵⁰ *Lazarus* at 8.

²⁵¹ *Ex Parte Alberts* 1936 O.P.D. 2.

²⁵² *Lazarus* at 8.

²⁵³ 2011 JOL 27973 (GNP).

²⁵⁴ *Ibid* at 3.

²⁵⁵ 1938 CPD 397 (“*Gool*”) this matter specifically dealt with an application for compulsory sequestration of a debtor's estate where the advantage to creditors requirement is also required by the Insolvency Act, although a less stringent requirement than applying for the voluntary surrender of an estate.

compulsory sequestration of a debtor's estate in terms of the requirements set out in the Insolvency Act, and especially the requirement that there should be a reason to believe that sequestration will be to the advantage of creditors.²⁵⁶ It was held that:

“Before an estate may be sequestrated it is necessary that the Court should be satisfied: (1) the petitioning creditor has established against the debtor a claim such as is mentioned in sub-sec. (1) of sec. 9; (2) the debtor has committed an act of insolvency or is insolvent. There has been a return of nulla bona in respect of this debt and the debtor has therefore committed an act of insolvency. (3) There is reason to believe that it will be to the advantage of the creditors of the debtor if his estate is sequestrated; then it may sequestrate the estate of the debtor.

In the case of *Wilkins v Pieterse* 1937 CPD 165 it was decided that the onus was on the petitioning creditor to satisfy the. Court in regard to all these three requirements including the essential that there is reason to believe that the sequestration would be to the advantage of the creditors.²⁵⁷

In a more recent judgment and specifically in the matter of *Botha v Botha*²⁵⁸ the Court also placed specific emphasis on the “advantage to creditors” requirement contemplated by the Insolvency Act and Daffue J held that the “advantage to creditors” requirement as contemplated by the Insolvency Act is the most critical requirement in applications for the compulsory sequestration of the estates of debtors, which requirement is often not met in such applications.²⁵⁹

It is evident from *Lazarus* and *Gool* that the Courts, soon after the inception of Insolvency Act, had due regard for the requirement of an “advantage to creditors” set out in the Insolvency Act and this approach is still accepted by the Courts in recent judgments as the requirement of an “advantage to creditors” is still contained in the Insolvency Act.

Accordingly, having due regard to the aforesaid it can be said that the stringent natural person insolvency law system (“the stringent natural pro-creditor system”)

²⁵⁶ *Ibid* at 398.

²⁵⁷ *Ibid*. Own emphasis.

²⁵⁸ 2017 JOL 39349 (FB) (“*Botha*”).

²⁵⁹ *Ibid* at par 7. Own emphasis.

in South Africa is justified in light of the “advantage to creditors” requirement, as an “advantage to creditors” requirement, is a requirement specifically embedded within the Insolvency Act.

In other words, the Insolvency Act gives rise to this pro-creditor nature of the natural person insolvency law system as the “advantage to creditors” requirement must be satisfied in sequestration applications as required by the Insolvency Act. The notion of “stringency” is already evident in the different onus in applications for voluntary surrender versus applications for compulsory sequestration – “satisfied” versus “reason to believe”.²⁶⁰ However, the manner in which the onus in each application has to be met, has been developed by the judiciary over the years. It is observed that the requirements set by the courts have become increasingly detailed, especially in light of the abuse of sequestration proceedings aimed at circumventing the “advantage to creditors” objective of the Act. This matter is dealt with below.

It is doubtful whether courts, legislators, and commentators could identify the stringent compliance with the requirements as contemplated by the Insolvency Act and the requirements specified by the courts to show compliance in an application, as an urgent “problem”²⁶¹ or view the Insolvency Act as conflicting with or overriding other social or economic goal with which it is not concerned or for which another process was designed.²⁶²

The Insolvency Act sets the machinery of the law in motion to have a debtor’s estate sequestrated for the advantage of creditors. This is the conclusion drawn from applying Jackson’s criteria to the South African system. The insolvency system, as it stands and as it was developed by the judiciary over the years, and analysed in terms of Jackson’s criteria, is fulfilling its object and purpose i.e sequestrating debtors’ estates for the advantage of creditors.

3.3.2 ABUSE OF SEQUESTRATION PROCEEDINGS

The second ground, that determines why the courts enforce the “advantage to creditors” requirement in an increasingly stern manner, is based on the abuse of the

²⁶⁰ See par 3.3 *supra*.

²⁶¹ See fn. 3 *supra*.

²⁶² See chapter 5 *infra*.

sequestration process by debtors in order to obtain a discharge of their debts as provided for by the Act.²⁶³ This abuse of process by debtors occurs in the form of compulsory sequestration applications, referred to as “friendly sequestration”²⁶⁴ applications, and in order to obtain the consequential relief provided for debtors by the Act.²⁶⁵

In a friendly sequestration application there is collusion between a debtor and a creditor.²⁶⁶ It has the following characteristics: A debtor owes significant amounts of money to his creditors who expect payment of their debt, but the debtor is unable to effect payment to his creditors. As such, the debtor seeks the assistance of a sympathetic third party who is, or poses as, a creditor of the debtor. This creditor avers that the debtor owes the creditor an amount of money and that the debtor has failed to pay his debt due to the creditor. The debtor, in most instances, writes a letter to the creditor confirming his inability to extinguish his debt due to the creditor and, by doing so, the debtor commits an act of insolvency as contemplated by section 8(g) the Insolvency Act, upon which the creditor proceedd to apply to have the debtor sequestrated.²⁶⁷

The application by the creditor results in an order of court sequestrating the estate of the debtor and declaring it insolvent. This relieves the debtor from his obligations towards his actual creditors, save for the extent to which the debtor’s insolvent estate manages to settle a portion of the debtor’s debts. The remainder of the debtor’s actual debt due to his creditors remains unpaid and, with the collusive assistance of the friendly creditor, the debtor manages to escape liability of payment of his debts towards his actual creditors.²⁶⁸

Similarly, the sequestration process may also be abused by debtors when applying for the sequestration of their estates by way of voluntary surrender. Accordingly, to ensure that debtors do not abuse the process, the courts “have recently insisted

²⁶³ *Botha* at 56.

²⁶⁴ Friendly sequestration is best explained in Roestoff 2018 *THRHR* at 310.

²⁶⁵ *Ibid* at 56; Due to the fact that there is a ‘less stringent’ (“*reason to believe*”) requirement in proving advantage to creditors in compulsory sequestration applications, these applications have been abused by debtors.

²⁶⁶ *Ibid.*

²⁶⁷ 2018 *THRHR* at 310.

²⁶⁸ *Ibid.*

more stringently on exact information regarding the debtor's affairs being placed before them and on demanding a realistic calculation of the potential dividend."²⁶⁹

The justification and main reason for this stringent application of the "advantage to creditors" requirement is best explained by Mars:²⁷⁰

"The requirement that all information presented to the court in an application for surrender must be accurate and that the valuations must be exact arises from the courts' insistence that a debtor who is pressed by his creditors does not overestimate the value of his estate in order to obtain relief from his financial burdens. The administration of insolvent estates has over the years developed into a lucrative and therefore competitive profession. The pressure has therefore increased to identify debtors whose sequestration or liquidation may render a lucrative return to lawyers, trustees, liquidators, valuers and auctioneers. Advertisements in the media canvassing debtors who are desirous of ridding them of their financial burdens have become commonplace. This has increased the risk of debtors and creditors alike. Debtors who might be able to meet their obligation if they were given the opportunity to properly arrange their affairs, are pressurized into opting for insolvency proceedings instead, often if not always losing their homes and motor vehicles as a result thereof, suffering the consequences of a bad credit record for many years thereafter. On the other hand insolvency practitioners are tempted to present a rosy picture of the debtor's affairs that bears little semblance to reality, resulting in an estate being declared insolvent that renders little or no dividend for creditors once the fees of the various participants in voluntary surrender proceedings have been deducted and the administration costs have been paid."²⁷¹

Our courts focus attentively on sequestration applications which aim to avoid the "advantage to creditors" requirement, which is viewed as an abuse of the court process:²⁷²

"[It] was pointed out that dishonesty in insolvency proceedings places a burden on creditors and the South African economy in general. This abuse may occur where the costs of sequestration exceed the alleged shortfall between assets and

²⁶⁹ *Ibid* at 57.

²⁷⁰ Bertelsmann et al *Mars The law of insolvency* (2008) at 2 ("Mars").

²⁷¹ *Mars* at 2.

²⁷² Evans et al "Abuse of sequestration proceedings in South Africa revisited" 2014 *SA Merc LJ* at 652.

liabilities; where the costs reduce the amount available for distribution to creditors; and where the costs favour administrators rather than creditors.”²⁷³

An instance where such an abuse of process had occurred and where the court was vigilant of the abuse of the proceedings was in the matter of *Ex parte Charmaine Purdon*.²⁷⁴ The Court had to consider whether the debtor’s application for rehabilitation in terms of the Insolvency Act²⁷⁵ should be granted considering that, according to the Court, there had initially been an abuse of the process when *Purdon* applied for a sequestration order.²⁷⁶

In reviewing the rehabilitation application, the presiding officer perused the sequestration application and found that Purdon had been sequestered by way of compulsory sequestration by JEL Lamont (“Lamont”), which sequestration application was not opposed by Purdon. In her application, Lamont insisted that Purdon’s sequestration would be to the advantage of creditors and that Purdon owned immovable property.²⁷⁷ The court reiterated that it was within its discretion to grant an application for rehabilitation and that an insolvent had no right to be rehabilitated in terms of section 127(2) of the Act.²⁷⁸

Subsequent to the sequestration application being granted, there were not any claims proven against the Purdon estate due to the fact that she did not own any assets. The Court remarked that the immovable property mentioned in the sequestration application was never included in the final liquidation and distribution account, and was a clear indication that the Court *a quo* had been misled. Had the Court *a quo* been aware that Purdon did in fact not own any immovable property, the sequestration application would never have been granted as it would not have been proven that the sequestration would be to the advantage of the creditors.²⁷⁹

The Court recognised that Purdon did not make the allegation that the sequestration would be to the advantage of her creditors, but noted that a copy of the application

²⁷³ *Ibid.* Own emphasis.

²⁷⁴ 2014 ZAGPPHC 95 (“Purdon”).

²⁷⁵ Section 124 (3) of the Act.

²⁷⁶ Roestoff 2018 *THRHR* at 308.

²⁷⁷ *Purdon* paras 3 and 4.

²⁷⁸ *Ibid* at par 5.

²⁷⁹ *Ibid* at paras 6 and 7.

was served upon Purdon. It was held that, if the allegation which was made by Lamont that that the sequestration of Purdon's estate would be to the advantage of Purdon's creditors was incorrect, Purdon was obligated to inform the Court and put the true facts before the Court.²⁸⁰ The Court suggested that, even though it was an application for compulsory sequestration and that there was no obligation upon Purdon to prove that there was "reason to believe" that the sequestration of her estate would be to the advantage of her creditors, she still had an obligation to inform the Court of the correct facts if they differed from what had been stated in the application. Purdon was aware of the allegations and she was in the best position to advise the Court of anything to the contrary.

In choosing not to bring to the Court's attention that the allegations in the sequestration application were incorrect, Purdon effectively implicated herself in misleading the Court.²⁸¹ The Court went so far as to extend the "advantage to creditors" requirement to place an obligation upon a debtor in a compulsory sequestration application: A debtor who has personal knowledge of such an application and the averments therein, and of any false claim that the sequestration would be to the advantage of his creditors, has a duty to inform the court if the creditor is trying to mislead the court. The debtor is the one who has personal knowledge of his financial position, his assets and liabilities, and whether the attachment and eventual sale of the assets would render a dividend which would be to the creditors' advantage.

The rehabilitation of a debtor after sequestration is not simply a formality,²⁸² and the Court justified its approach:

"The attitude of many applicants in this Division, as aptly demonstrated in the present application, is to place the barest minimum details before the court, coupled with generalised statements. This is not sufficient. ... She does not seem to appreciate that the sequestration of her estate had not resulted in any advantage to her creditors. If rehabilitated, the applicant, freed of her debts, would 'cock a snook' at her creditors and start on a clean state, incurring more debts."²⁸³

²⁸⁰ *Ibid* at par 8.

²⁸¹ *Ibid*.

²⁸² *Ibid* at par 9.

²⁸³ *Ibid* at par 10. Own emphasis.

The Court referred to debtors placing the barest minimum information before a court in an application for rehabilitation, and in light of the Court's reasoning in par 8 of the judgment, noted that many applications are similar to Purdon's application i.e. debtors do not place the correct facts before the court at the onset (at the hearing of the sequestration application, even though they have a duty to do so) and then apply for their rehabilitation of their estates. Applicants only place the bare minimum of facts before the court in an attempt to mislead the court, and "cock a snook" at their creditors once their applications have been successful.

The Court was further unsettled by the fact that Lamont, the sequestration creditor, "disappeared from the scene" after the sequestration application was granted and did not bother to lodge a claim with Purdon's trustees. The Court was of the view that the conduct of Lamont was an indication of collusion between Lamont and Purdon.²⁸⁴ It reaffirmed that the Purdon-matter was not the first of its kind and that the insolvency legislation had been abused by creditors before.²⁸⁵

In the matter of *Huntrex 337 (Pty) Ltd t/a Hubtrex Debt Collection Services v Vosloo and Another*,²⁸⁶ Louw J was well aware of the abuse of sequestration procedures (which occurred regularly in the particular division of the High Court) and even stated in his judgement that "[t]here is something so peculiar to the applicant's sequestration which appear regularly on the motion rolls of this court, that one cannot help but 'smell a rat'."²⁸⁷

In the matter of *Plumb on Plumbers v Lauderdale and Another*,²⁸⁸ which was heard in the Kwazulu-Natal High Court, it came to the Court's attention that an attorney who acted on behalf debtors in a number of sequestration applications (friendly sequestration applications), had been misleading the Court i.e. the affidavits deposed to by the attorneys' clients in different sequestration applications contained identical allegations of fact.²⁸⁹ The Court was of the view that no explanation could justify the reason as to why various expressions used in the different applications

²⁸⁴ *Purdon* paras 13 and 14.

²⁸⁵ *Purdon* par 15.

²⁸⁶ 2014 (1) SA 227 (GNP).

²⁸⁷ *Huntrex* par 1. Own emphasis.

²⁸⁸ 2013 (1) SA 60 (KZD).

²⁸⁹ *Ibid* at par 2.

for sequestration were identical.²⁹⁰ The Court was of the opinion that the applicants who had deposed to the affidavits were not truthful and that the affidavits contained false allegations. The Court refused to grant the applications.

The sequestration procedure is not only abused by way of friendly sequestration applications, but it is also abused by debtors during applications for voluntary sequestration. In the matter of *Ex parte Arntzen (Nedbank Limited intervening creditor)*²⁹¹ the applicant filed an application for the voluntary sequestration of his estate on an *ex parte* basis, but Nedbank was granted leave to intervene as it was a significant creditor of the applicant.²⁹² An *ex parte* application for the voluntary sequestration of a debtor requires full and frank disclosure due to the fact that such applications do not truly fulfil the criteria set for *ex parte* applications.²⁹³ The reason for this is that, ordinarily, the applicant is the only person who is interested in the relief claimed in *ex parte* applications. But in an *ex parte* application for the voluntary sequestration of a debtor, creditors have an actual interest in the outcome of the application.

Accordingly, creditors are left vulnerable when a debtor proceeds with an application for the voluntary sequestration of his or her estate, as a superficial case could be made out by a debtor that the estate should be sequestrated. Such an application could be granted by an overburdened court when confronted by an unopposed *ex parte* voluntary surrender application, lacking in material disclosures – an order which a court would not have granted in circumstances where the application had been opposed by a creditor.²⁹⁴

Another reason why courts require full and frank disclosure in applications for voluntary surrender is due to the fact that an order for the sequestration of a debtor's estate may be granted at the first appearance, which differs from the process in

²⁹⁰ *Ibid* at par 5.

²⁹¹ 2012 JOL 29552 (KZP).

²⁹² *Ibid* at 1.

²⁹³ *Ibid* at 3-4.

²⁹⁴ *Ibid* at 5.

compulsory sequestration applications where a provisional order is made prior to the final sequestration order being made.²⁹⁵

Gorven J raised his concern that the “cottage industry” in friendly sequestration applications,²⁹⁶ which resulted in various Divisions of the High Courts “tighten[ing] up” on friendly sequestration applications, had now “reared its head”²⁹⁷ in the Kwazulu-Natal division in the form of voluntary surrender applications as its own “cottage industry”.²⁹⁸ He held *inter alia* as follows;

“[12] I take the view that there is an even greater risk of abuse and a risk that the interests of creditors will be undermined in voluntary surrender applications than in “friendly” sequestration applications. Therefore the need for full and frank disclosure and well-founded evidence concerning the debtor’s estate is even more pronounced. There are a number of reasons for this, some of which have been foreshadowed in the discussion above. I shall mention only some. First, the applicant tends to focus on the formal requirements of section 4 of the Act and does not seem to appreciate the need to satisfy a more rigorous test than for sequestration applications at both provisional and final stages as regards advantage to creditors. Secondly, the Court must perforce, in most instances, rely on the founding papers. This brings into play the peculiar characteristics mentioned above of voluntary surrenders being brought as ex parte applications. Thirdly, no collusion between friendly creditor and debtor is necessary since it is the debtor who is the applicant and has a more direct interest in the application succeeding and understanding of the genuine position than the friendliest of creditors. Voluntary surrender applications therefore require an even higher level of disclosure than do “friendly” sequestrations if the Court is to be placed in a position where it can arrive at the findings and exercise the discretion set out in section 6(1) of the Act.”²⁹⁹

According to the above extract, the abuse of the sequestration process during voluntary sequestration applications is even more likely than with compulsory “friendly sequestration” applications. This blatant abuse of the process further justifies a stringent approach to the “advantage to creditors” requirement because

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid* at 6-7 (In the form of friendly sequestration applications).

²⁹⁷ *Ibid* at 7.

²⁹⁸ *Ibid.*

²⁹⁹ *Ibid* at 7 and 8. Own emphasis.

the creditors of a debtor would suffer significant injustice if a strict application of the “advantage to creditors” requirement is not enforced by the Courts.

In certain divisions of the High Courts of South Africa and more specifically in the Gauteng Local Division of the High Court of South Africa, even the practice manual³⁰⁰ attempts to curb the abuse of the sequestration procedure. The practice manual makes provision for instances where an applicant failed to establish that the application is not a friendly sequestration and provides that, in such instances, the applicant should provide sufficient proof of the debt which gave rise to the sequestration application and the assets of the respondent as valued by a sworn appraiser.³⁰¹ Opinions or speculations as the realisation costs of the assets will be disregarded.³⁰² The practice manual even provides for an assumed calculation regarding the administration costs of the sequestrated estate and determines that the calculation must show that a probable dividend of 20cents in the rand will be paid to the concurrent creditors.³⁰³ Regarding voluntary sequestration applications, the practice manual specifically states as follows:

- “6. In voluntary surrender applications, caution must be exercised by Judges. This procedure has been abused. Judges should scrutinise the affidavits in relation to the reasons for insolvency, the value of the assets, the valuations provided by sworn valuers (who have been found to manipulate the value of the assets in order to arrive at a dividend of +20 cents/R.”³⁰⁴

It is evident from the above that courts across South Africa have experienced the same type of abuse of the sequestration procedures so provided for in the Insolvency Act. It is this abuse which justifies the stringent approach of the natural person insolvency law system in South Africa when it comes to advantage to creditors.

³⁰⁰ Practice Manual – Gauteng Local Division: Johannesburg – October 2018 (“the practice manual”).

³⁰¹ The practice manual at par 10.12.

³⁰² *Ibid.*

³⁰³ *Ibid.*

³⁰⁴ *Ibid.*

3.3.3 ESTABLISHMENT OF THE *CONCURSUS CREDITORIUM*

The last ground that could explain why the “advantage to creditors” requirement has been stringently enforced by the courts is that one of the effects of sequestration proceedings instituted against debtors is to ensure a coming together of the claims of creditors against the insolvent estate of a debtor.³⁰⁵ This ensures that the estate of the insolvent debtor is wound up in an orderly manner and that the debtor’s creditors are treated equally, avoiding the instance where one creditor is favoured at the expense of other creditors.³⁰⁶

In the matter of *Fesi and Another v Absa Bank Ltd*,³⁰⁷ the court relied upon the *dictum* of *Lotzof v Raubenheimer*³⁰⁸ where it was held that the requirement of an “advantage to creditors” as contemplated by the Insolvency Act means that an advantage should be derived for all of the creditors of a debtor or at least the general body of creditors.³⁰⁹ Botha JP further held that what was meant by the wording of “general body” surely meant the “majority” of the creditors of a debtor – this reasoning concurs with that of Selke J in the matter of *Trust Wholesalers and Woollens (Pty) Ltd v Mackan*³¹⁰ where it was held that the advantage to creditors is an advantage to a “substantial portion” of the creditors.³¹¹

In the matter of *Body Corporate v Sithole & another*,³¹² the Supreme Court of Appeal held that the purpose of a sequestration application cannot fittingly be described as a process which may be utilised by single creditor to claim a debt due to it.³¹³

In *Body Corporate*, the Court had to consider an appeal against an order of the Court *a quo* that refused to grant the application of the Body Corporate of Empire Gardens (“the Body Corporate”) for the sequestration of one of its members who had defaulted on payment of their share of the levies.

³⁰⁵ *Body Corporate v Sithole & another* (240/2016) [2017] ZASCA 28 (27 March 2017) at par 9

³⁰⁶ *Ibid.* See fn 30 *supra*.

³⁰⁷ 1999 JOL 5634 (C) (“*Fesi*”).

³⁰⁸ 1959 (1) SA 280 (O).

³⁰⁹ *Fesi* at 10.

³¹⁰ 1954 (2) All SA 74 (N).

³¹¹ *Fesi* at 10-11.

³¹² (240/2016) [2017] ZASCA 28 (27 March 2017) (“*Body Corporate*”).

³¹³ *Ibid* at par 9.

The Body Corporate was a preferential creditor in terms of section 89 of the Insolvency Act read together with section 15B of the Sectional Titles Act 95 of 1986.³¹⁴ Notwithstanding this, the Body Corporate appealed against the decision of the Court *a quo* (who dismissed its application) arguing that it was not necessary for a body corporate, when applying for the sequestration of a member's estate, to prove that the sequestration would render an actual or prospective pecuniary benefit to the general body of creditors of the debtor.³¹⁵ It was further argued that a body corporate only needed to show that it had exhausted all of the execution remedies available to it, and that a distinction was necessary because a body corporate had a statutory obligation to protect the interests of all of its members.³¹⁶ Nedbank, one of the debtor's preferential creditors, sought leave to intervene and oppose the application on the basis that the Body Corporate did not prove that the sequestration of the member would be to the advantage of any creditor other than the Body Corporate itself.³¹⁷

The Court held that it could not seize the functions of the legislature and exempt body corporates from the requirements of the Insolvency Act.³¹⁸ There was not any basis for the Court to draw a distinction between a body corporate and other creditors of a debtor.³¹⁹ The application was dismissed on the basis that the sequestration would not be to the advantage of the general body of creditors.³²⁰

3.4 CONCLUSION

In light of the above, it can be argued that the stringent natural person insolvency law system in South Africa can be justified in light of the "advantage to creditors" requirement on the basis of three separate and identifiable grounds.

Logically, there can be no doubt that the "advantage to creditors" requirement cannot be circumvented as the requirement is specifically contemplated by the Insolvency Act when it comes to applications for voluntary and compulsory

³¹⁴ *Ibid* at par 4.

³¹⁵ *Ibid* at par 11.

³¹⁶ *Ibid*.

³¹⁷ *Ibid* at par 8.

³¹⁸ *Ibid* at par 13.

³¹⁹ *Ibid*.

³²⁰ *Ibid* at par 14.

sequestration. Accordingly, the “advantage to creditors” requirement plays an important role when a court applies its discretion in considering applications for the sequestration of a debtor’s estate. and the justification is clearly supported in this regard. The nature of the stringent pro-creditor natural person insolvency law system in South Africa stems from the requirement of an “advantage to creditors” which must be established, and thus any basic application of this “advantage to creditors” requirement find its justification in the Insolvency Act from which the system originates and which Act above all, is fulfilling its object and purpose.

However, the *manner* in which an “advantage to creditors” is proved during court applications is not determined by the Act, but rather by the interpretation of same by the judiciary. Through the years, the judiciary has developed rules for applicants and from the cases referred to in this dissertation it can be observed that these rules have become stricter as time progressed. The second ground analysed provided more insight into this development.

Secondly, when it comes to the “advantage to creditors” requirement, the stringent approach may arguably be justified as a result of abuse of the sequestration process by debtors in sequestration applications. Debtors and creditors alike have abused the sequestration procedure to the detriment of their creditors with the abuse occurring in various divisions of the South African High Courts. Some courts have even provided specific requirements to be met in their practice directives in a further attempt to curb this abuse. There can be no doubt as to the question whether the courts’ stringent application of the “advantage to creditors” requirement is justified in light of the oftentimes blatant abuse of the Insolvency Act.

Lastly, it can be said that the stringency of the system is justified as a sequestration order brings about a *consensus creditorum*. This aims to ensure that the rights of all of the creditors are protected and to avoid instances where one creditor is favoured to the detriment of the other creditors. This could occur in individual debt collection proceedings. The sequestration order ensures that the hand of the law is laid upon the insolvent estate of a debtor and should have the effect that the general body of creditors derives some advantage from the sequestration of the estate of a debtor.

CHAPTER 4

INTERNATIONAL CONSIDERATIONS

4.1 INTRODUCTION

4.2 AMERICAN NATURAL PERSON INSOLVENCY LAW

4.3 CONCLUSION

4.1 INTRODUCTION

The Working Group on the Treatment of the Insolvency of Natural Persons *Report on the Treatment of the Insolvency of Natural Persons*, Insolvency and Creditor/Debtor Regimes Task Force, World Bank 2012,³²¹ conducted the following analysis:

“Traditional insolvency laws have often proven unsuitable for these new problems, as these laws commonly arose under different circumstances and for different purposes. To be sure, many of the goals of the two types of insolvency regimes overlap, such as increasing and more fairly distributing payment to creditors, streamlining procedures, and enhancing economic performance for the ultimate benefit of society. However, traditional insolvency laws gravitate around the protection of credit and business, and the personal element is often disregarded. The desire to relieve individual suffering is more direct and more central in the context of natural person insolvency.”³²²

“An insolvency regime for natural persons is expected to meet a wide range of goals in contemporary societies. No longer a simple creditor-oriented mechanism for the forcible collection of debts from insolvent commercial entities, insolvency laws now contemplate benefits flowing to natural person debtors themselves. Providing relief to ‘honest but unfortunate’ debtors has long been a primary purpose of insolvency regimes for natural persons. Additionally, and more

³²¹ Working Group on the Treatment of the Insolvency of Natural Persons *Report on the Treatment of the Insolvency of Natural Persons* Insolvency and Creditor/Debtor Regimes Task Force, World Bank 2012 (“World Bank Report”).

³²² *Ibid* at par 393. Own emphasis.

importantly, such a regime provides benefits to society as a whole. Therefore, a regime for treating the insolvency of natural persons not only pursues the objectives of increasing payment to individual creditors and enhancing a fair distribution of payment among the collective of creditors, but, just as importantly, pursues the objectives of providing relief to debtors and their families and addressing wider social issues. In achieving those objectives, a regime for the insolvency of natural persons should strive for a balance among competing interests.”³²³

A worldwide trend has developed in consumer insolvency regimes, which aim to retreat from the principle of advantage to creditors and rather come to the assistance of debtors who are over indebted.³²⁴ The traditional consumer insolvency systems, which were regarded as being creditor-orientated, had to make way for the objective to provide a fresh start for consumers.³²⁵ Accordingly, new systems were adopted internationally.³²⁶ These systems were more debtor-friendly systems which aim to regulate the sequestration of the estate of a debtor primarily for the advantage of the debtor.

To ensure that the analysis of the foreign natural person insolvency law system is not flawed,³²⁷ the question of “what is being addressed”³²⁸ by the system and why it is a “proper concern”³²⁹ of the system will be examined. This evaluation of the system, making use of Jackson’s criteria, ensures that the analysis is done in a manner which will enable one to understand how this particular foreign natural person insolvency law system differs from the South African natural person insolvency law system.

The South African system cannot be viewed from the perspective that it conflicts with the objectives found in foreign insolvency law systems as our system differs from these systems when one considers Jackson’s criteria. To proceed with an unflawed insolvency law analysis, one must apply Jackson’s criteria to the foreign

³²³ *Ibid* at par 398. Own emphasis.

³²⁴ Roestoff and Boraine “Body Corporate Palm Lane v Masinge 2013 JDR 2332 (GNP): Discretion and powers of the Court in applications for sequestration” 2015 *De Jure* at 206.

³²⁵ Roestoff and Coetzee 2017 *CILSA* at 251.

³²⁶ Calitz “Developments in the United States’ Consumer Bankruptcy Law: A South African Perspective” 2007 *Obiter* at 397.

³²⁷ *Jackson* at 3.

³²⁸ *Ibid*.

³²⁹ *Ibid*.

insolvency law system chosen for comparative purposes. Only after Jackson's criteria has been applied to both insolvency law systems, can a comparison be drawn.

Selected aspects of the natural person insolvency system of the United States of America will be discussed briefly hereafter. The purpose is to establishing "what is being addressed" by this particular insolvency law system and why that which is addressed is a "proper concern" of the insolvency law system of the United States of America.

4.2 AMERICAN NATURAL PERSON INSOLVENCY LAW

The approach in the United States of America's natural person insolvency law system differs to some extent from the South African system as the American system primarily aims to provide rehabilitation and a fresh start to debtors who are overburdened.³³⁰ Chapter 7 of the United States Bankruptcy Code³³¹ provides for a liquidation procedure.³³² This is the most common form of bankruptcy, where petitions³³³ for bankruptcy may be filed voluntarily in terms of section 301 of the Bankruptcy Code:

- (a)** A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter.
- (b)** The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter."³³⁴

³³⁰ Roestoff and Coetzee 2012 *SA Merc LJ* at 71.

³³¹ In the United States of America, the insolvency legislation is regulated by what is known as federal legislation which is the Bankruptcy Reform Act of 1978, but it commonly known as the US Bankruptcy Code. The US Bankruptcy Code is found under title 11 of the United States Code ("Bankruptcy Code").

³³² This procedure is the South African equivalent of voluntary and compulsory sequestration. In stating that it is the "equivalent" should by no means be construed as being exactly the same. Sequestration is referred to as liquidation in the United States of America.

³³³ Section 101 (42) of the Bankruptcy Code Defines a petition as; "*The term "petition" means petition filed under section 301, 302, 303 and [3] 1504 of this title, as the case may be, commencing a case under this title.*"

³³⁴ Section 301 of the Bankruptcy Code.

A petition for bankruptcy may also be filed involuntarily in terms of section 303 of the Bankruptcy Code which determines that:

“(a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.”³³⁵

This liquidation procedure is known as “straight bankruptcy” and is a procedure regulated by the courts.³³⁶ It is a trustee realisation and collection procedure where the assets of a debtor is collected and realised, with a distribution made to certain creditors subject to the rights of certain secured creditors and the debtor’s right to retain property which is exempt from the process.³³⁷ A successful applicant receives an immediate discharge of unsecured debts and this protects the debtor’s income and assets acquired after the petition, and prohibits a creditor from collecting a debt which has been discharged.³³⁸

The answer to the question of “what is being addressed”³³⁹ by the United States of America natural person insolvency law system, it can be said that “debt relief is one of the main aims of the American system.”³⁴⁰ This statement is supported by the matter of *William B. Wetmore, v. Annette B. Markoe (formerly Annette B. Wetmore)*³⁴¹ where Justice Day held as follows:

“Systems of bankruptcy are designed to relieve the honest debtor from the weight of indebtedness which has become oppressive, and to permit him to have a fresh start in business or commercial life, freed from the

³³⁵ Section 301 of the Bankruptcy Code; Roestoff and Coetzee “Consumer Debt Relief in South Africa; Lessons from America and England; and Suggestions for the Way Forward” 2012 *SA Merc LJ* at 72.

³³⁶ Calitz 2007 *Obiter* at 401.

³³⁷ *Ibid* at 402.

³³⁸ *Ibid*.

³³⁹ Jackson at 3.

³⁴⁰ Roestoff and Coetzee 2012 *SA Merc LJ* at 71.

³⁴¹ 196 U.S. 68 (25 S.Ct. 172, 49 L.Ed. 390) (“*Wetmore*”).

obligation and responsibilities which may have resulted from business misfortunes.”³⁴²

As for the question of why it is a “proper concern”³⁴³ of the United States of America natural person insolvency law system that the debtor be relieved from the weight of his oppressive indebtedness, it can be said that it is to fulfil the object of the Bankruptcy Code which was held in the matter of *R.P. WILLIAMS and J.B. Carr, as Partners under the Firm Name of R. P. Williams & Company, Plffs. in Err. v. United States Fidelity & Guaranty Company*³⁴⁴ by Justice McReynolds to be as follows:

“It is the purpose of the bankrupt act to convert the assets of the bankrupt into cash for distribution among creditors, and then to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.”³⁴⁵

In the matter of *Local Loan CO. v. Hunt*³⁴⁶ Justice Sutherland further set out the primary object of the Bankruptcy Act:

“One of the primary purposes of the Bankruptcy Act is to 'relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.' Williams v. U.S. Fidelity & Guaranty Co., 236 U.S. 549, 554, 555, 35 S.Ct. 289, 290, 59 L.Ed. 713. This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.”³⁴⁷

³⁴² *Ibid.* Own emphasis.

³⁴³ Jackson at 3.

³⁴⁴ 236 U.S. 549 (35 S.Ct. 289, 59 L.Ed. 713) (“*United States Fidelity*”).

³⁴⁵ *Ibid.* Own emphasis.

³⁴⁶ 292 U.S. 234 (54 S.Ct. 695, 78 L.Ed. 1230) (“*Hunt*”).

³⁴⁷ *Ibid.* Own emphasis.

Accordingly, the question of “what is being addressed”³⁴⁸ in the United States of America’s natural person insolvency law system is clear from what was stated in *Wetmore*,³⁴⁹ as the liquidation proceedings which are instituted voluntary or involuntary are instituted for the purpose “to relieve the honest debtor from the weight of indebtedness which has become oppressive, and to permit him to have a fresh start in business or commercial life.”³⁵⁰

Why this is a “proper concern”,³⁵¹ is in order for the Bankruptcy Code to fulfil its object is clear from what was stated in *United States Fidelity*³⁵² and *Hunt*³⁵³ which is to “relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.”³⁵⁴

4.3 CONCLUSION

Accordingly, it can be said that what is being addressed by the natural person insolvency law system in the United States of America and the object of the Bankruptcy Code are aligned. By making use of Jackson’s criteria in evaluating the insolvency law system of the United States of America it is clear that the system differs from the South African natural person insolvency law system.

It is evident that the insolvency system of the United States of America has a different primary object and purpose than that of the South African system when applying the same criteria of Jackson in analysing both insolvency law systems. Although the South African system also provides for a discharge of debts, exempted assets and a prohibition against collection of debts directly from the debtor, it is not immediate (as is the case with chapter 7), the debtor's income and assets (save those exempted) post-petitioning are not protected and the purpose of prohibiting collection from the debtor is to avoid impugning the *concursum creditorum*. The

³⁴⁸ Jackson at 3.

³⁴⁹ See fn. 341 *supra*.

³⁵⁰ *Ibid*.

³⁵¹ Jackson at 3.

³⁵² See fn. 344 *supra*.

³⁵³ See fn. 346 *supra*.

³⁵⁴ See fn. 344 and 346 *supra*.

American system does not require up-front proof “advantage to creditors”³⁵⁵ and is concerned with providing relief to harassed debtor’s and to provide them with a fresh start.

It would be illogical to argue that the difference between the two systems is problematic as it is clear that the one system significantly differs from the other system in applying the self-same criteria in their analysis.

³⁵⁵ See fn. 213 *supra*.

CHAPTER 5

SOUTH AFRICAN DEBT RELIEF LEGISLATION

5.1 INTRODUCTION

5.2 SOUTH AFRICAN DEBT RELIEF ALTERNATIVES

5.3 CONCLUSION

5.1 INTRODUCTION

The Insolvency Act remains the main source of South African insolvency law. However, the desire to overhaul this branch of the law has been expressed by some in the light of foreign jurisdictions who have made some significant changes to their insolvency law systems.³⁵⁶ It has been argued that due regard should be given to developments in other jurisdictions during the process of insolvency law reform and even that some of the statements made in the United Kingdom's Cork Report should be applied to South Africa.³⁵⁷ Having regard to the statements in the Cork Report relied upon by South African commentators, it is agreed that an insolvency system should contain various procedures that should be integrated and harmonised within the system. Furthermore, less formal procedures and alternatives to sequestration and liquidation should be considered in the appropriate circumstances.³⁵⁸

In South Africa, there have been various attempts to review the insolvency law system, and a draft insolvency bill has even been published for comment.³⁵⁹ It is common knowledge that the Insolvency Act does not *per se* regulate the winding up and liquidation of companies and close corporations (or juristic persons), as

³⁵⁶ Boraine and Van der Linde "The Draft Insolvency Bill – An Exploration" (Part 1) 1998 *TSAR* at 621.

³⁵⁷ *Ibid.*

³⁵⁸ *Ibid.*

³⁵⁹ *Ibid* at 622; The Draft Insolvency Bill and an Explanatory Memorandum thereto has been published for comment entitled as the documents the "Review of the Law of Insolvency: Draft Insolvency Bill and Explanatory Memorandum" Working Paper 66 Project 63 (1996) ("The Draft Insolvency Bill").

these provisions are still enacted within chapter 14 of the Companies Act 61 of 1973 as well as the Close Corporations Act 69 of 1984.³⁶⁰

In support of the contention that less formal procedures and alternatives to sequestration and liquidation should be considered in the appropriate circumstances, it will be argued that the less formal procedures and alternatives to sequestration in South Africa currently in existence, should be developed and revived to include a wider range of debtors to the extent necessary. The two statutory debt relief measures which should be developed are the procedure of obtaining an administration order in terms of section 74 of the Magistrates' Court Act³⁶¹ and the debt review procedure as contemplated by section 86 of the National Credit Act.³⁶²

5.2 SOUTH AFRICAN DEBT RELIEF ALTERNATIVES

Enacted within various pieces of legislation, there are three unique and familiar statutory debt relief measures available to debtors who are over-indebted.³⁶³ Two of these statutory debt relief measures consist of "repayment plans".³⁶⁴

The first option is an administration order in terms of section 74 of the Magistrates' Court Act. If a debtor is unable to pay an amount due in terms of a judgment against him, or if he is unable to meet his financial obligations, and the debtor does not own enough assets which are sufficient to attach and satisfy his debt in terms of a judgment or his obligations,³⁶⁵ a court may grant an administration order which provides for the administration of a debtor's estate and the repayment of the debtor's debts to be effected in instalments or otherwise.³⁶⁶ An administration order has been described by some as form of insolvency which has been modified in order to be

³⁶⁰ *Ibid.* It would be practical to include the liquidation of companies and other juristic entities into one act,³⁶⁰ and accordingly it is agreed that that an insolvency system should be formulated in which various existing procedures (liquidation of juristic entities and sequestration of natural persons) should be integrated and harmonised into one Act.

³⁶¹ 32 of 1944 ("the Magistrates' Court Act").

³⁶² 34 of 2005 ("NCA"). See Coetzee 2017 *THRHR* at 21.

³⁶³ Coetzee 2017 *THRHR* at 20.

³⁶⁴ *Ibid* at 21.

³⁶⁵ Section 74 (1)(a) of the Magistrates' Court Act.

³⁶⁶ Section 74 (1)(b) of the Magistrates' Court Act.

applied to relatively small estates and is accordingly classified as an alternative debt relief measure.³⁶⁷

However, the relief provided by an administration order is limited in its scope i.e. it is only available to debtor whose total amount of debt does not exceed the amount determined in the Gazette.³⁶⁸ A debtor will not be able to apply for the relief provided by an administration order if the debtor's debt exceeds R50 000.00.³⁶⁹

It was held, in the matter of *Cape Town Municipality v Dunne*,³⁷⁰ that an administration order as contemplated by the Magistrate's Court Act was aimed at assisting a debtor over the period of time that the debtor is under financial stress, without the need to institute sequestration proceedings.³⁷¹

In the matter of *Prima Slaghuis (Carletonville) v Roux & 'n ander*³⁷² a distinction was drawn between the provisions as contemplated by section 65 and 74 of the Magistrates' Court Act. The Court held that section 65 finds application in instances where an individual creditor of a debtor seeks to obtain payment of a judgment debt against a debtor.³⁷³ On the contrary, the provisions contemplated by section 74 find application in instances where a judgment debtor has several judgment creditors and seeks to obtain relief – in that his goods would not be sold in execution immediately, but rather that an administration order would be granted whereby a debtor would gradually repay his creditors from his available income.³⁷⁴

In the matter of *Fortuin & another v Various Creditors; Van Schalkwyk v Various Creditors; Bouwers & another v Various Creditors; Persens & another v Various Creditors; Booij & another v Various Creditors*,³⁷⁵ the Constitutional Court had to consider an appeal against a joint application for an administration order dismissed by a magistrate.³⁷⁶ The Magistrate contended that the offer made by the applicants

³⁶⁷ Boraïne "Some thoughts on the reform of administration orders and related issues" 2003 *De Jure* at 225.

³⁶⁸ *Ibid.*

³⁶⁹ Coetzee 2017 *THRHR* at 21.

³⁷⁰ 1964 (1) SA 741 (C) ("Dunne").

³⁷¹ *Ibid.*

³⁷² 1973 (1) SA 108 (T) ("Prima").

³⁷³ *Ibid.*

³⁷⁴ *Ibid.*

³⁷⁵ 2006 JOL 17958 (C) ("Fortuin").

³⁷⁶ *Ibid* at 1.

in terms of section 74 must be aimed at disposing of the debt and costs accompanied by the debt in full,³⁷⁷ and that the debt should be disposed of within a reasonable time.³⁷⁸

The Court in *Fortuin* held that an administration order is a modified form of insolvency which finds application in small estates where sequestration costs would deplete the value of the estate of a debtor.³⁷⁹ The provisions of section 74 enables the establishment of a form of *concursum creditorum* with ease and at little expense.³⁸⁰ Furthermore, an administration order results in a situation where undue preferences are avoided as creditors are paid in terms of the order,³⁸¹ and the order does not require a debtor to show that there would be some immediate advantage to the creditors of a debtor or the debtor himself.³⁸²

The Court in *Fortuin* further held that section 74 of the Magistrates' Court Act was designed with the purpose of assisting debtors who are experiencing financial difficulty in mind, and that any benefit that creditors may derive from such an order should be accepted.³⁸³ The legislator did not intend that an immediate benefit accrue or befall the creditors of a debtor in the granting of an administration order, and, if it had been the legislator's intention, it would have made specific provision therefore as in the Insolvency Act. The legislator had also not included or stipulated a specific time period within which the debt of the debtor should be distinguished,³⁸⁴ and the Act provides for the variation of the administration order if the circumstances of the debtor changes.³⁸⁵

In light of the aforesaid, the Court in *Fortuin* held that the Magistrate erred in refusing to grant the administration orders on the basis that the instalments did not cover the interest burden of the debt because section 74J of the Magistrates' Court Act provides that the Magistrate may order that the debtor's payment be allocated towards the settlement of the capital debt first and consequently allow for the

³⁷⁷ *Ibid* at 2.

³⁷⁸ *Ibid* at 3.

³⁷⁹ *Ibid* at 5.

³⁸⁰ *Ibid* at 6.

³⁸¹ *Ibid* at 7.

³⁸² *Ibid* at 8.

³⁸³ *Ibid*.

³⁸⁴ *Ibid*.

³⁸⁵ *Ibid* at 9.

payment of the interest thereafter.³⁸⁶ The Court further held that the Magistrate erred in not granting the administration orders as there was nothing to suggest that there was no prospect of the debts being extinguished within a reasonable time.³⁸⁷

Having due regard to *Dunne, Prima, and Fortuin*, and in general the provisions of section 74 of the Magistrates' Court Act, it is evident that an administration order is an alternative to applications for voluntary and compulsory sequestration, and that the legislator should consider extending the ambit of administration orders to include a wider variety of debtors.³⁸⁸

The second of the two repayment plans is the debt review procedure in terms of section 86³⁸⁹ of the NCA. This process allows for a debtor³⁹⁰ to apply to a debt counsellor to have him declared over-indebted.³⁹¹ This application by a debtor to a debt counsellor may, however, not be taken in respect of a particular credit agreement if the credit provider has already taken steps to enforce that credit agreement.³⁹² Another challenge that a debtor faces in the process is that only credit agreements regulated by the NCA are subject to the debt review procedure.³⁹³

The aims of the NCA *are inter alia* to: ensure that credit market participants act responsibly when it comes to borrowing; avoid consumer over-indebtedness; discourage the granting of reckless credit by credit providers; and ensure that aspects pertaining to contractual defaults by consumers are regulated.³⁹⁴ It is not an aim of the NCA to apply in instances where a debtor is insolvent and has debts which do not qualify as credit agreements as contemplated by the NCA.³⁹⁵

In the matter of *Ex Parte Ford and Two Similar Cases*,³⁹⁶ the Court had to consider three applications for the voluntary surrender of the estates of debtors in terms of

³⁸⁶ *Ibid* at 7.

³⁸⁷ *Ibid* at 9.

³⁸⁸ Boraime 2003 *De Jure* at 226

³⁸⁹ Coetzee 2017 *THRHR* at 21.

³⁹⁰ Or "consumer" as per the NCA who are one and the same.

³⁹¹ Section 86(1) of the NCA.

³⁹² Section 86(2) of the NCA.

³⁹³ Coetzee 2017 *THRHR* at 21; section 4 of the NCA.

³⁹⁴ Boraime and Van Heerden 2010 *PELJ* at 84.

³⁹⁵ *Ibid* at 84-85.

³⁹⁶ 2009 (3) SA 376 (WCC) ("*Ford*").

the Insolvency Act.³⁹⁷ Most of the liabilities of the applicants consisted of debts which arose as a result of credit agreements falling within the ambit of the NCA.³⁹⁸ After due consideration of specific provisions of the NCA, the Court called upon the debtors' legal representative to address it on the issue of whether the over-indebtedness of the debtors should not rather be addressed by means of the provisions of the NCA.³⁹⁹ Counsel consequently argued that section 85 of the NCA does not find application in proceedings instituted for the voluntary sequestration in terms of the Insolvency Act, and that section 85 of the NCA would only find application in the instance where the Courts consider cases where credit agreements are the cause of the litigation.⁴⁰⁰

The Court disagreed with the submissions made on behalf of the applicants and held that applications for voluntary sequestration requires an applicant to make full disclosure to the Court to satisfy the Court that the sequestration would be to the advantage to its creditors.⁴⁰¹ It was further held by the Court that the fact that the NCA did not affect the provisions of the Insolvency Act, is evidence that insolvency may arise as a result of various situations – in most cases, unrelated to indebtedness arising out of credit agreements.⁴⁰²

“Insolvents whose misfortune arises out of credit agreement transactions would be well advised, for the reasons that follow, to take into account the policy and objects of the NCA, and also the special remedies under that Act, before opting to apply for the surrender of their estates under the Insolvency Act rather than availing of the provisions under the NCA.”⁴⁰³

The Court held that the NCA provided for remedial relief including provisions that determined that the recovery of the debt be disallowed if it was as a result of reckless credit, or provisions to stay the accrual of interest on the debt.⁴⁰⁴ The Court accordingly refused to grant the applications as the applicants failed to indicate why

³⁹⁷ *Ibid* at 1.

³⁹⁸ *Ibid* at 2.

³⁹⁹ *Ibid* at 8.

⁴⁰⁰ *Ibid* at 8-9.

⁴⁰¹ *Ibid* at 10.

⁴⁰² *Ibid* at 11.

⁴⁰³ *Ibid*.

⁴⁰⁴ *Ibid* at 12.

their debt, related to credit agreements, would not be susceptible to review, which would also be to their own benefit.⁴⁰⁵ In addition, it was held that the mechanisms provided by the NCA would more appropriate than that of the Insolvency Act in these particular circumstances.⁴⁰⁶

From the above it is clear that the Court in *Ford* had due consideration for the provisions of the NCA and the application of the relevant provisions thereof to insolvency matters. The Court's application of the relevant provisions of the NCA shows that these provisions can be an alternative to sequestration in South Africa. The provisions of the NCA should be developed and revived to include a wider range of debtors to the extent necessary.

5.3 CONCLUSION

The two aforesaid repayment plans, or debt relief procedures, do not provide a debtor the option of a discharge of his debts.⁴⁰⁷ However, the discharge of a debt of a debtor is not the object and purpose of the Insolvency Act in applications for sequestration of a debtor, as could be determined from the case law discussed earlier in the dissertation. Coetzee notes that the discharge of a debtor's pre-sequestration debt is simply a consequence of sequestration applications.⁴⁰⁸ A discharge is thus not available to all debtors as the Insolvency Act determines that there should be a benefit to the creditors of a debtor before a sequestration application is granted.⁴⁰⁹

It is submitted that the existing provisions of the Magistrates' Court Act and the NCA could be amended to extend the ambit of their applicability, which would result in more debtors being able to access the relief provided by these mechanisms, rather than endeavouring to amend the Insolvency Act to such an extent that the object and purpose thereof would not be the same anymore, resulting in the

⁴⁰⁵ *Ibid* at 13.

⁴⁰⁶ *Ibid* at 15.

⁴⁰⁷ Roestoff and Coetzee 2012 *SA Merc LJ* at 53.

⁴⁰⁸ Coetzee 2017 *THRHR* at 20.

⁴⁰⁹ Borraine 2003 *De Jure* at 226.

disappearance of the “advantage to creditors” requirement and a system which still protects the valuable interests of a creditor.

Academics have indicated that the debt relief measures are inadequate as the jurisdictional requirements of an administration order precludes some debtors of making use thereof.⁴¹⁰ However, the threshold of R50,000.00 may be increased which would result in more debtors being able to obtain the relief provided by this debt relief mechanism.

Furthermore, upon consideration of the matter of *Ford*, it is clear that the courts have a discretion to refuse sequestration applications in instances where the mechanisms provided for in the NCA, which find application in instances where a debtor’s debt arose as a result of a credit agreement regulated by the NCA, is more appropriate than instituting an application for the sequestration of a debtor’s estate.

However, when considering the Draft Insolvency Bill and in particular the provisions regulating voluntary⁴¹¹ and compulsory sequestration⁴¹² of natural persons it is evidently clear that the “advantage to creditors” requirement has not been left out by the legislator.

It is submitted that there is scope for the development of the alternative debt relief mechanisms in South Africa to include a wider variety of debtors. Courts seem to take due cognisance of the debt relief mechanisms currently in operation. If these alternative debt relief mechanisms currently in existence are developed, it would only necessitate the institution of sequestration proceedings in the appropriate circumstances where the sequestration of the estate of the debtor would be to the advantage of the creditors of the debtor. This would have the result that, if an application for sequestration is instituted, the object and purpose of the Insolvency Act would be fulfilled in those particular circumstances.

⁴¹⁰ Boraie 2003 *De Jure* at 247.

⁴¹¹ Sections 3-7 of the Draft Insolvency Bill.

⁴¹² Sections 8-12 of the Draft insolvency Bill.

CHAPTER 6

CONCLUSION

Over the years, many of the foreign insolvency law systems which were previously classified as pro-creditor systems developed into systems which are more debtor friendly (pro-debtor systems).⁴¹³ This trend towards more debtor-friendly natural person insolvency law systems naturally became the topic of discussion for numerous academics and commentators alike, which eventually resulted in harsh critique of the South African natural person insolvency law system because it was not developing in line with the international trend.⁴¹⁴ In their analyses of the South African natural person insolvency law system, academics and commentators seem to have discovered a “problem”⁴¹⁵ with the system. This resulted in a common trend of insolvency analyses finding that the South African system, i.e. the South African natural person insolvency law system and Insolvency Act, is conflicting with or overriding some social or economic goal due to *inter alia* the allegation that the South African system has not developed like other foreign systems.⁴¹⁶

It is this critique which gave rise to the main question which was posed at the onset of this dissertation: whether the stringent natural person insolvency law system in South Africa can be justified in light of the “advantage to creditors” requirement.

Naturally, analysing what others deem should not be the *status quo* (being a stringent pro-creditor natural person insolvency law system in South Africa) is a daunting task, especially when considering the strong contradicting opinions of learned insolvency academics and commentators such as Boraïne, Roestoff, Coetzee and Van Heerden. Nevertheless, this dissertation does not argue for or against a particular system but analysed the existing system in light of Jackson’s criteria.

⁴¹³ See fn. 82 and 84 *supra*.

⁴¹⁴ Roestoff 2018 *THRHR* at 315; Roestoff and Coetzee 2017 *CILSA* at 273-274; Roestoff and Coetzee 2012 *SA Merc LJ* at 75-76; Boraïne et al 2015 *NIBLeJ* at 89; Coetzee 2016 *IIR* at 37.

⁴¹⁵ See fn. 3 *supra*.

⁴¹⁶ See fn. 82 and 84 *supra*.

In terms of the criteria established by Jackson for insolvency analyses, it can be safe to state that, by approaching insolvency analyses through the lens of some urgent or new problems based on social or economic goals that a particular system was not designed to address, is fundamentally flawed.⁴¹⁷

Jackson identified two essential criteria to be applied in insolvency analyses: firstly identify “what is being addressed”⁴¹⁸ by the insolvency law, and secondly, why that which is being addressed is a “proper concern”⁴¹⁹ of the insolvency law. Accordingly, the insolvency analysis of the stringent natural person insolvency law system in South Africa in light of the “advantage to creditors” requirement was done by applying Jackson’s identified criteria.

The South African legal system is premised upon the legal principle of *stare decisis* (to stand or abide by cases already decided) as was duly held in the matter of *Afrox Healthcare Bpk v Strydom*.⁴²⁰ In order to identify “what is being addressed” by the South African natural person insolvency law system as guided by the Insolvency Act, reference to the matter of *Priest*,⁴²¹ decided as early as 1931, and Pillay⁴²² provided a clear and unambiguous answer. The institution of insolvency proceedings either voluntarily or compulsory, sets the machinery of the law in motion to have a debtor declared insolvent. The proceedings are not instituted to claim any other rights or to seek some declaration against a debtor.⁴²³

This position has not changed – it was reiterated in 2010 by the Supreme Court of Appeal in the matter of *Naidoo*.⁴²⁴ The eventual goal of an application for the sequestration of a debtor’s estate is an order sequestering the estate of a debtor for the advantage of the creditors of a debtor, whether this goal is sought voluntarily by a debtor himself or by a creditor of a debtor through the institution of compulsory sequestration proceedings. The “advantage to creditors” requirement is central to the success of this application. Only once a successful application has been made, does the administration process start, with the concomitant consequences that

⁴¹⁷ See fn. 3 *supra*.

⁴¹⁸ *Ibid.*

⁴¹⁹ *Ibid.*

⁴²⁰ [2002] 4 All SA 125 (SCA) at 134.

⁴²¹ See fn. 49 *supra*.

⁴²² See fn. 21 *supra*.

⁴²³ See fn. 42 *supra*.

⁴²⁴ See fn. 25 *supra*.

sequestration brings about. Although the aim of the order is to allow only estates whose administration during the process of sequestration pose an advantage to the creditors, this dissertation only focused on the consideration of the “advantage to creditors” requirement by the courts during the application process.

In answering the question of why it is a “proper concern”⁴²⁵ that the machinery of the law be set in motion to declare a debtor insolvent, it was found that it cannot be for any other reason than to achieve the object and the purpose of the Insolvency Act in applications for the sequestration of natural persons in South Africa. With the Insolvency Act having no preamble or objects-section to it, the question of what the object of the Insolvency Act is cannot be determined without considering the whole Act and the judiciary’s interpretation of its provisions. As such, the courts have answered and, in essence, defined the object when it comes to the advantage to creditors. By considering and analysing the Insolvency Act, applying the criteria identified by Jackson, and taking the various judgments handed down by South African courts throughout the years into account, the object and purpose can be clearly defined with reference to *BP Southern Africa*,⁴²⁶ *Stratford*,⁴²⁷ *Pillay*,⁴²⁸ *Walker*,⁴²⁹ and *Pieters*,⁴³⁰ which is to obtain some sort of pecuniary benefit for the creditors of a debtor.

Against this background, and when Jackson’s criteria was applied, it was found that petitioning for the sequestration of the estate of a debtor – either voluntarily by a debtor himself in terms of section 3(1) of the Insolvency Act, or compulsory by the creditors of a debtor in terms of section 9(1) of the Insolvency Act – sets the machinery of the insolvency law in motion to have a debtor declared insolvent. This provided an answer to the question of “what is being addressed”⁴³¹ by the stringent natural person insolvency law system in South Africa.

Jackson’s criteria was also duly applied in answering the question of why it is a “proper concern”⁴³² of the South African natural person insolvency law system that

⁴²⁵ See fn. 3 *supra*.

⁴²⁶ See fn. 32 *supra*.

⁴²⁷ See fn. 35 *supra*.

⁴²⁸ See fn. 21 *supra*.

⁴²⁹ See fn. 39 *supra*.

⁴³⁰ See fn. 42 *supra*.

⁴³¹ See fn. 3 *supra*.

⁴³² See fn. 3 *supra*.

the machinery of the law be set in motion to have a debtor declared insolvent – it was found that it is to fulfil the object of and the purpose of the Insolvency Act.

The object and purpose of the Insolvency Act is clear when it comes to voluntary sequestration applications as section 6(1) of the Insolvency Act requires *inter alia* that the voluntary sequestration of the debtor's estate must be to the advantage of the creditors of a debtor. The object and purpose of the Insolvency Act is also clear when it comes to compulsory sequestration applications as sections 10 and 12(1) of the Insolvency Act requires *inter alia* that there must be a reason to believe that the compulsory sequestration of the debtor's estate will be to the advantage of the creditors of a debtor. This supports the notion that this procedural requirement set out in the Insolvency Act is aimed at “the reasonable prospect of some pecuniary benefit to the general body of creditors...”⁴³³

After duly applying Jackson's criteria to the voluntary and compulsory sequestration provisions as contemplated by the Insolvency Act, and finding answers to the questions of “what is being addressed” and why it is a “proper concern”, it was argued that the Insolvency Act and subsequent stringent natural person insolvency law system in South Africa is justified in light of the “advantage to creditors” requirement.

The justification is firstly based upon the analysis of the “advantage to creditors” requirement. It is logical that this requirement, specifically contemplated by the Insolvency Act, may not be circumvented. The pro-creditor nature of the natural person insolvency law system in South Africa is codified in this requirement of an “advantage to creditors”. Any application of this “advantage to creditors” requirement find its justification in the Insolvency Act from which the system originates and must adhere to in order to fulfil its object and purpose.

However, the manner in which an “advantage to creditors” is proved during court applications is not determined by the Act, but rather by the interpretation of same by the judiciary. Through the years, the judiciary has developed rules for applicants and from the cases referred to in this dissertation it can be observed that these rules

⁴³³ Boraine 2003 *De Jure* at 226.

have become stricter as time progressed. The second ground analysed provided more insight into this development.

Secondly, it was determined that the system could be justified in light of the “advantage to creditors” requirement due to the fact that debtors and creditors alike abuse the sequestration provisions of the Insolvency Act. This was found that the courts’ applied an increasingly stringent approach as the abuse would be to the detriment of creditors of a debtor.

Lastly, it was noted that a sequestration order establishes a *consensus creditorum* which ensures that the rights of all of the creditors are protected, and to avoid instances where one creditor is favoured to the detriment of other creditors. This resulted in a third ground that justifies a stringent approach to the “advantage to creditors” requirement.

In considering the very liberal⁴³⁴ insolvency system of the United States of America, and by proceeding to apply Jackson’s criteria to this system, it was found that “what is being addressed” by the natural person insolvency law system in the United States of America and the object of the Bankruptcy Code are directly aligned. Through the application of Jackson’s criteria to this analysis, it became clear that the system differs from the South African natural person insolvency law system because the system of the United States of America has a different primary object and purpose than that of the South African system.

Strangely enough, no problem was found in the analysis of the foreign system. When considering “what is being addressed”,⁴³⁵ it was found that “debt relief is one of the main aims of the American system.”⁴³⁶ As for the question of why it is a “proper concern”⁴³⁷ of the system that the debtor be relieved from the weight of his oppressive indebtedness, it was found to fulfil the object of the Bankruptcy Code. This object is clear from what was stated in *United States Fidelity*⁴³⁸ and *Hunt*⁴³⁹ – to “relieve the honest debtor from the weight of oppressive indebtedness, and permit

⁴³⁴ Boraie 2003 *De Jure* at 225.

⁴³⁵ Jackson at 3.

⁴³⁶ Roestoff and Coetzee 2012 *SA Merc LJ* at 71.

⁴³⁷ Jackson at 3.

⁴³⁸ See fn. 344 *supra*.

⁴³⁹ See fn. 346 *supra*.

him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.”⁴⁴⁰

In concluding the dissertation, some final suggestions were made by proposing that less formal procedures and alternatives to sequestration and liquidation should be considered in the appropriate circumstances, and that these procedures should be developed and reviewed, rather than amending the Insolvency Act. The two statutory debt relief measures which should be developed are the procedure of obtaining an administration order in terms of section 74 of the Magistrates’ Courts Act and the debt review procedure as contemplated by section 86 of the National Credit Act. If these alternative debt relief mechanisms, which are currently in existence, are developed it would only necessitate the institution of a sequestration application in the appropriate circumstances, negating the need for an abuse of the process.

The Insolvency Act, as it stands, serves the purpose of setting the machinery in motion to have a debtor declared insolvent. It is clear from the criteria identified by Jackson and by analysing the Insolvency Act and insolvency system in South Africa in this light, that the insolvency legislation is fulfilling its object and purpose. As a result, it can be said that the stringent natural person insolvency law system in South Africa is justified in light of the “advantage to creditors” requirement.

⁴⁴⁰ See fn. 344 and 346 *supra*.

BIBLIOGRAPHY

JOURNALS

Boraine "The Draft Insolvency Bill – An Exploration" (Part 1) 1998 *Tydskrif vir die Suid-Afrikaanse Reg TSAR* 621

Boraine "Some thoughts on the reform of administration orders and related issues" 2003 *De Jure* 217

Boraine and Van der Linde "The Draft Insolvency Bill – An Exploration" (Part 2) 1999 *TSAR* 38

Boraine et al "The Pro-Creditor Approach in South African Insolvency Law and the Possible Impact of the Constitution" 2015 *Nottingham Business and Insolvency Law e-Journal* [(2015) 3 NIBLeJ 5] 59

Boraine and Van Heerden "To Sequestrate or not to Sequestrate in view of the National Credit Act 34 of 2005: A Tale of Two Judgements" 2010 *Potchefstroom Electronic Law Journal (PELJ)* 84

Calitz "Developments in the United States' Consumer Bankruptcy Law: A South African Perspective" 2007 *Obiter* 397

Coetzee "Is the Unequal Treatment of Debtors in Natural Person Insolvency Law Justifiable?: A South African Exposition" 2016 *International Insolvency Review (IIR)* 36

Coetzee "Does the proposed pre-liquidation composition proffer a solution to the No Income No Asset (NINA) debtor's quandary and, if not, what would?" 2017 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg (THRHR)* 18

Evans et al "Abuse of sequestration proceedings in South Africa revisited" 2014 *South African Mercantile Law Journal (SA Merc LJ)* 651

Evans and Haskins "Friendly Sequestration and the Advantage of Creditors" 1990 *SA Merc LJ* 246

Evans “Waiving the rights to property in insolvent estates and advantage to creditors in sequestration proceedings in South Africa” 2018 *De Jure* 298

Kanamugire “The Requirement of Advantage to Creditors in South African Insolvency Law – a Critical Appraisal” 2013 *Mediterranean Journal of Social Sciences*

Mabe and Evans “Abuse of Sequestration Proceedings in South Africa” 2014 *SA Merc LJ* 651

Mabe “Alternatives to bankruptcy in South Africa that provides for a discharge of debts: lessons from Kenya” 2019 *PELJ* 1

Roestoff “Rehabilitation of an insolvent and advantage to creditors under the Insolvency Act 24 of 1936 *Ex parte Purdon* 2014 JDR 0115 (GNP)” 2018 *THRHR* 306

Roestoff & Coetzee “Debt relief for South African NINA debtors and what can be learned from the European approach” 2017 *Comparative and International Law Journal of Southern Africa (CILSA)* 251

Roestoff & Coetzee “Consumer Debt Relief in South Africa; Lesons from America and England; and Suggestions for the Way Forward” 2012 *SA Merc LJ* 53

Roestoff and Borraine “Body Corporate Palm Lane v Masinge 2013 JDR 2332 (GNP): Discretion and powers of the Court in applications for sequestration” 2015 *De Jure* 206

Smith “The Recurrent Motif of the Insolvency Act – Advantage for Creditors” 1985 *Modern Business Law* 27

BOOKS

Bertelsmann et al *Mars The law of insolvency* 9th Edition Cape Town: Juta (2008)

Fletcher *The Law of Insolvency* 5th Edition London: Sweet & Maxwell (2009)

Jackson *The Logic and Limits of Bankruptcy Law* Cambridge, Mass: Harvard University Press (1986)

Nagel et al *Commercial Law* LexisNexis South Africa (2019)

Sharrock et al *Hockly's Insolvency Law* 9th Edition Cape Town: Juta (2012)

Wood *Principles of International Insolvency* 2nd Edition London: Sweet & Maxwell (2007)

CASE LAW

ABSA Bank Limited v Chopdat 2000 JOL 6563 (W)

Amod v Khan [1947] 2 All SA 370 (N)

Afrox Healthcare Bpk v Strydom [2002] 4 All SA 125 (SCA)

BP Southern Africa (Pty) Ltd v Furstenburg [1966] 1 All SA 583 (O)

Body Corporate v Sithole & another (240/2016) [2017] ZASCA 28 (27 March 2017)

Cape Town Municipality v Dunne 1964 (1) SA 741 (C)

Collett v Priest 1931 AD 290

Commissioner for the South African Revenue Service v Pieters and others 2020 JOL 46545 (SCA)

De Villiers No v Maursen Properties (Pty) Ltd [1983] 4 All SA 517 (T)

DP du Plessis Prokureurs v Andries Gideon van Aarde 2000 JOL 5949 (T)

Estate Logie v Priest 1926 AD

Ex Parte Pillay; Mayet v Pillay [1955] 2 All SA 228 (N)

Ex Parte Harmse [2004] 1 All SA 626 (N)

Ex Parte Collins 1927 WLD 172

Ex Parte Swanepoel [1975] 1 All SA 17 (O)

Ex Parte Muller 2015 JOL 33837 (FB)

Ex Parte Ogunlaja 2011 JOL 27129 (GNP)

Ex Parte Lazarus 1937 WLD 7

Ex Parte Alberts 1936 (2) O.P.D. 2

Ex parte Charmaine Purdon 2014 ZAGPPHC 95

Ex parte Arntzen (Nedbank Limited intervening creditor) 2012 JOL 29552 (KZP)

Ex Parte Ford and Two Similar Cases 2009 (3) SA 376 (WCC)

Fesi and another v ABSA Bank Ltd 1999 JOL 5634 (C)

Fortuin & another v Various Creditors; Van Schalkwyk v Various Creditors; Bouwers & another v Various Creditors; Persens & another v Various Creditors; Booie & another v Various Creditors 2006 JOL 17958 (C)

Gool v Rahim 1938 CPD 397

Huntrex 337 (Pty) Ltd t/a Hubtrex Debt Collection Services v Vosloo and Another 2014 (1) SA 227 (GNP)

Kleynhans v Van der Westhuysen 1970 (3) SA 105 (A)

Meskin & Co v Friedman [1948] 2 All SA 416 (W)

Naidoo v ABSA Bank Ltd 2010 JOL 25561 (SCA)

Plumb on Plumbers v Lauderdale and Another 2013 (1) SA 60 (KZD)

Prima Slaghuis (Carletonville) v Roux & 'n ander 1973 (1) SA 108 (T)

Stratford and others v Investec Bank Limited and others 2015 (3) BCLR 358 (CC)

Trust Wholesalers and Wollend (Pty) Ltd v Mackan [1954] 2 All SA 74 (N)

Venter v Volkskas Ltd [1973] 3 All SA 377 (T)

Walker v Syfret NO 1911 AD 141

SOUTH AFRICAN LEGISLATION

Insolvency Act 24 of 1936

Magistrates' Court Act 32 of 1944

National Credit Act 34 of 2005

INTERNATIONAL CASE LAW

William B. Wetmore, v. Annette B. Markoe (formerly Annette B. Wetmore) 196 U.S. 68 (25 S.Ct. 172, 49 L.Ed. 390)

R.P. WILLIAMS and J.B. Carr, as Partners under the Firm Name of R. P. Williams & Company, Plffs. in Err. v. United States Fidelity & Guaranty Company 236 U.S. 549 (35 S.Ct. 289, 59 L.Ed. 713)

Local Loan CO. v. Hunt 292 U.S. 234 (54 S.Ct. 695, 78 L.Ed. 1230)

INTERNATIONAL LEGISLATION

Bankruptcy Reform Act of 1978

OTHER

The Working Group on the Treatment of the Insolvency of Natural Persons *Report on the Treatment of the Insolvency of Natural Persons*, Insolvency and Creditor/Debtor Regimes Task Force, World Bank 2012

Practice Manual – Gauteng Local Division: Johannesburg – October 2018