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Maintenance Orders in terms of the South African Natural Person Insolvency Law

by

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ACKNOWLEDGEMENTS

The completion of this study was made possible by an overwhelming support received from various people who I truly value.

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ABSTRACT

Natural person insolvency in South Africa has primarily been governed by the Insolvency Act 24 of 1936, which is almost a century old. Despite a major jurisprudential shift that transpired in 1996, the Insolvency Act remains rigid to holistic transformation to align with the spirit of the Constitution of the Republic of South Africa, 1996 and international best practices regarding the treatment of the insolvency of natural persons. The South African insolvency system is still premised on the archaic policy of "advantage for creditors" as opposed to a fresh-start policy, the latter of which is widely commendable.

International trends and guidelines promote the discharge of all pre-sequestration debts, with some exceptions. These exceptions, among others, include the exclusion of maintenance debt from the discharge to ensure that the human rights of maintenance creditors are maintained and sustained. International trends and guidelines advocate for a balanced approach, which seeks to balance the competing interest of both insolvent debtors and maintenance creditors. However, the South African approach, falls-short of the international best practices, because it does not exclude maintenance debt from the discharge. This approach is dangerous and problematic, because it potentially compromises certain human rights guaranteed in the Constitution. Furthermore, maintenance claims do not enjoy any preference when the insolvent debtor's estate is being distributed. The maintenance creditors only have a concurrent claim against the insolvent estate. The implication of this, among others, is that maintenance creditors are burdened with liability for contribution, as envisaged in section 106(c) of the Insolvency Act, should there be insufficient funds in the free residue account to cover the costs of sequestration. International trends and guidelines are leaning towards affording maintenance creditors' claims preference, with an aim to promote the public policy of family support and human rights. The study argues that the South African position on the ranking of maintenance creditors' claims compromises the constitutional rights of maintenance creditors and this necessitate urgent legislative attention.

The violation of constitutional rights of maintenance creditors through the legal position of the discharge of maintenance obligations, and the ranking of maintenance claims, does not comply with the proportionality test, that is applied when assessing whether a violation of a right guaranteed in the Bill of Rights is justifiable and reasonable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

LIST OF ACRONYMS AND ABBREVIATIONS

BCLR	Butterworths Constitutional Law Reports
CC	Constitutional Court
D	Durban and Coast Local Division
GSJ	South Gauteng High Court, Johannesburg
Comp Int'l LJ SA	Comparative and International Law Journal of Southern Africa
JOL	Judgements Online
(Pty) Ltd	Proprietary Limited
PERJ	Potchefstroom Electronic Law Journal
SALRC	South African Law Reform Commission
NINA	No Income No Asset
Ltd	Limited
UIF	Unemployment Insurance Fund
VAT	Value Added Tax
N	Natal Provincial Division
RSA	Republic of South Africa
SA	South African Law Reports
S**CA**	Supreme Court of Appeal
SA Merc LJ	South African Mercantile Law Journal
THRHR	Tydskrif vir Hedendaagse Romeins Hollandse Reg
TPD.	Transvaal Provincial Division Reports
TSAR	Tydskrif Vir Die Suid-Afrikaanse Reg
USA	United States of America
WCC	Western Cape High Court, Cape Town
Rev	Review

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CHAPTER 1

INTRODUCTION

SUMMARY

1.1 Research motivation

The *World Bank Report on the Treatment of the Insolvency of Natural Persons* observes that jurisdictions have different approaches of dealing with maintenance obligations.[1] The World Bank *Report* notes that some insolvency systems exclude maintenance obligations from the discharge, while others discharge such obligations.[2] The South African insolvency system follows the latter approach. The approach followed by South Africa is problematic in the sense that it does not take cognisance of possible endangerment of maintenance creditors' basic welfare.[3] The approach also undermines the public policy of family support.[4] It is also important to note that the claims of maintenance creditors in South African insolvency law do not enjoy any preference.[5] Consequently maintenance creditors only have a concurrent claim against the insolvent debtor's estate. The implications of the latter, among others, include that the maintenance creditor may be liable for contribution, as envisaged in section 106 of the Insolvency Act, should there be

1 The World Bank *Report on the Treatment of the Insolvency of Natural Persons* (2013) para 119 (hereinafter "The World Bank *Report*").
2 *Ibid.*
3 *Ibid.*
4 *Ibid.*
5 Sections 96–99 of the *Insolvency Act* 24 of 1936 (hereafter "the *Insolvency Act"*).

insufficient funds in the free residue account to cover the costs of sequestration.[6] The South African approach in relation to the discharge of maintenance obligations and especially the non-ranking of maintenance creditors could be dangerous, because it negates the significance of maintenance creditors' basic welfare and seem to have the potential to impair such creditors' constitutional rights to human dignity, access to social security as well as children's rights.[7]

1.2 Research objectives

This study aims to evaluate whether the South African approach to the discharge of maintenance obligations and the ranking of maintenance creditors' claims as concurrent, rather than statutory preferent, are justifiable with reference to specific constitutional rights of maintenance creditors and their entitlement to basic social welfare. Closer attention will be paid to the implication of the current approach to the discharge of maintenance obligations and the ranking of maintenance creditors' claims as concurrent in nature on the rights of children, which are entrenched in section 28 of the Constitution. The latter includes the universally recognised right of the child to have his best interests ranked higher than any other interest.[8] In a nutshell the study aims to:

(a) Consider policy underlying insolvency law;
(b) Define the concept of maintenance and consider its policy objectives;
(c) Give a brief overview of the South African insolvency system;
(d) Consider the implications of not affording preference to maintenance creditors' claims with specific focus on their constitutional rights and entitlement to access basic welfare; and
(e) Consider international trends that South Africa can possibly draw lessons from.

1.3 Methodology and literature review

The study follows a descriptive, constitutional analysis and comparative approach. The descriptive approach is used to comprehensively consider the concept of maintenance in South African law with reference to common law and legislation

6 Section 106(c) of the *Insolvency Act*.
7 Sections 10, 27 and 28 of the *Constitution of the Republic of South Africa*, 1996 (hereafter "the *Constitution*").
8 Section 28(2) of the *Constitution*.

such as the *Maintenance Act*.[9] This approach will further be used to comprehensively define the concept of discharge and its implications; and outline the ranking of creditors' claims in terms of the Insolvency Act. The constitutional analysis approach is used to evaluate the possible impairment that the inclusion of maintenance obligations in the discharge of an insolvent debtor's liabilities and the current ranking of maintenance claims have on maintenance creditors' rights to human dignity; healthcare, food, water and social security and on children's rights as guaranteed in sections 10, 27 and 28 of the Constitution respectively. The comparative approach will briefly consider and take note of the approach followed by foreign jurisdictions, such as the United States of America (USA). Furthermore, it will be used to consider lessons that South Africa can draw from the American approach.

1.4 Delineation and limitations

Although this study will outline the ranking of various creditors' claims in South African insolvency law, the focus is on maintenance creditors. Also, in this study, insolvency law has a narrow meaning, referring to measures contained in the Insolvency Act. Thus, related procedures, for instance those contained in the National Credit Act,[10] are not considered.

1.5 Terminology and referencing style

In this dissertation,

(a) The term insolvent debtor is restricted to a natural person or a member of a partnership business.
(b) The masculine form is used throughout, but should be construed as to include a feminine form, unless stated otherwise.

The *PELJ* referencing style is used in this study.

1.6 Overview of chapters

(a) Chapter 1: This chapter introduces the topic of the study by outlining the research motivation, research objectives, methodology and literature review,

9 *Maintenance Act* 99 of 1998.
10 *National Credit Act* 34 of 2005.

delineation and limitations, terminology and referencing style and a list of chapters. The chapter briefly outlines the possible need for legal reform in respect of maintenance orders in the South African natural person insolvency law.

(b) Chapter 2: This chapter outlines policy considerations underlying insolvency law. The chapter also considers the concept of maintenance and traces the policy considerations underlying the concept.

(c) Chapter 3: This chapter gives a brief description of the South African insolvency system.

(d) Chapter 4: This chapter will consider the constitutional implications of excluding maintenance obligations from the discharge and of not affording maintenance creditors' claims any preference.

(e) Chapter 5: This chapter makes a summary of the study and ties up everything. The chapter also makes proposals for legal reform and a way forward.

CHAPTER 2

POLICY CONSIDERATIONS

SUMMARY

2.1 Introduction

The policy considerations underlying South African insolvency law are to provide a financial advantage to creditors as opposed to affording debtors an opportunity for a fresh start through relief from excessive debt.[11] The policy stunt followed in South African insolvency law is pro-creditor and thus incongruent with the international trends and guidelines, whereby many insolvency systems across the world have adopted the fresh start policy approach.[12] The latter of which has originated in the United States of America (USA).[13] The South African policy position is archaic because that it does not reflect prevailing economic and social circumstances.[14] ''We'' need to move away from a pro-creditor approach to a pro-debtor approach by ensuring that access to formal insolvency is affordable, so that debtors can eventually access a discharge.[15]

This chapter discusses the policy considerations underlying natural person insolvency law in South Africa in tandem with the international trends and guidelines,[16] with specific focus on the American fresh start policy position. Also, this chapter considers the policy considerations underlying maintenance law and the significance thereof in society to justify the necessity for the exclusion of maintenance obligations from the discharge and further to justify the need to afford maintenance claims against an

11 See sections 6, 10 and 12 of the *Insolvency Act* 24 of 1936 (hereafter "the *Insolvency Act*"). See also *Ex Parte Ford* 2009 (3) SA 376 (WCC) 383.
12 Roestoff 2018 *THRHR* 307. See also Calitz 2007 *Obiter* 399-408.
13 *Ibid*.
14 Calitz 2007 *Obiter* 414.
15 Boraine and Roestoff 2002 *International Insolvency Review* 1.
16 The international trends and guidelines referred to, are those contained in The World Bank *Report* and the American Bankruptcy Code.

insolvent estate priority. The latter will be done in comparison with the approach followed by the United States of America (USA) in relation to the treatment of maintenance obligations in the insolvency system.

2.2 Insolvency law

2.2.1 International perspectives

2.2.1.1 The World Bank Report

The global financial crisis ("The Crisis") that transpired in 2007−2008 was a game changing moment for regulatory frameworks in various areas of the law.[17] The Crisis necessitated the convention of the World Bank's Insolvency and Creditor/Debtor Regimes Task Force ("Task Force") in January 2011 to consider, among others, insolvency-related issues, which arose in the advent of the Crisis.[18] The Task Force developed a non-prescriptive report aimed at providing guidelines on the treatment of insolvency of natural persons.[19] The *Report* outlines policy considerations that should underlie an insolvency system for the treatment of the insolvency of natural persons.[20] In outlining the latter policy considerations, the *Report* also outlines the key legal attributes of an insolvency system for the treatment of natural persons.[21] In essence, the *Report* provides characteristics that an effective insolvency law regime must poses. The *Report* acknowledges that, in adopting an insolvency regime for a specific country, policy makers must take an approach that enhances the policy objectives of that specific insolvency regime, taking into cognisance the specific needs of a territory.[22]

The *Report* observes that an essential component of an insolvency regime is to ensure that an insolvent debtor is afforded an opportunity for economic rehabilitation.[23] Economic rehabilitation entails freeing the debtor from excessive debt, treating him equally to other debtors after receiving such relief and assisting the debtor to avoid

17 The World Bank *Report on the Treatment of the Insolvency of Natural Persons* (2013) para 3 (hereinafter "The World Bank *Report*").
18 *Idem* para 2.
19 *Idem* para 3.
20 *Ibid.*
21 *Ibid.*
22 *Idem* para 56.
23 *Idem* para 354.

excessive debt in the future.[24] Freeing a debtor from excessive debt, as an essential component of economic rehabilitation, is of essence in this study and shall receive further attention later.[25] The most effective way to free a debtor from excessive debt is to afford such debtor an opportunity for a fresh start.[26] A fresh start entails that a debtor immediately attains a discharge of his debts in exchange of the surrender of all non-exempt property to the authorities, which implies that a debtor is afforded an immediate opportunity to re-establish himself. To meaningfully assist a debtor to attain economic rehabilitation as an essential component of a progressive insolvency regime, as many debts as possible must be included in the discharge.[27] Although as many debts as possible must be included in the discharge, it is fundamental that certain debts are excluded to serve broader policy considerations.[28] The *Report* notes that debts such as those stemming from spousal or child maintenance obligations, must be excluded from the discharge in line with public policy considerations.[29] The reason for this approach is to ensure that an insolvency system does not promote the negation of fundamental family responsibilities by debtors who find themselves in insolvency circumstances.[30] This is also necessary to ensure that maintenance debtors do not shift their responsibilities towards their dependents to other people who may also be vulnerable.[31] The *Report* notes that including maintenance debt in the discharge would endanger the welfare of maintenance beneficiaries and undermine the public policy of family support, which are regarded as, equally imperative to freeing a debtor from excessive debt.[32] Countries across the world have different approaches to the discharge of maintenance obligations; some exclude both spousal and child maintenance from the discharge, others exclude only child maintenance from the discharge and others do not exclude maintenance obligations from the discharge of debt at all. The latter approach is followed in South African law.

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24 *Idem* para 354.
25 See chapter 3 para 3.5.
26 The World Bank *Report* para 355.
27 *Idem* para 367.
28 See Roestoff 2019 *LitNet Akademies* 832.
29 The World Bank *Report* para 368.
30 *Ibid.*
31 *Ibid.*
32 *Ibid*.

2.2.1.2 The American fresh-start principle

The American natural person insolvency regime is premised on the "fresh-start" principle, as opposed to the "advantage for creditors" principle followed in South Africa. The approach followed by the American system ensures that debtors are economically rehabilitated and that they are re-integrated into to the economy as active participants. Achieving the re-integration of debtors into the economy is made possible through the "fresh-start" policy, which is charecterised by two fundamental features, namely the discharge of all pre-sequestration debts and the exemption of certain property from liquidation.[33] The American consumer insolvency regime, which is regulated by the Bankruptcy Reform Act of 1978 ("The Bankruptcy Code"), provides for a discharge to all honest but unfortunate debtors.[34] The American Bankruptcy Code provides two possible debt relief measures to an unfortunate debtor namely liquidation and rehabilitation. Chapter 7 of the Bankruptcy Code provides for liquidation, while chapters 11 and 13 provide for rehabilitation. Neither of these two options or routes require a debtor to prove "advantage for creditors"; instead they are premised on the "fresh-start" principle, which seeks to ensure that debtors are afforded an opportunity to re-establish themselves without being harassed and embarrassed by creditors.[35]

Although a discharge is a fundamental component of the American insolvency system, the Bankruptcy Code excludes certain types of debts from the discharge.[36] The Bankruptcy Code exclude the so-called "sensitive debt", which, among others, include maintenance debt, from eventual discharge after the debtor's rehabilitation.[37] In as much as a discharge of all pre-sequestration debt forms part of the main aims of the American insolvency system, the American system attempts to achieve a balance between the competing interests of the debtor to access debt relief and those of maintenance creditors to access basic welfare.[38]

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33 Coetzee *A comparative reappraisal of debt relief measures for natural person debtors in South Africa* 42.
34 Section 727 of the *Bankruptcy Reform Act* 1978.
35 See Roestoff 2018 *THRHR* 307.
36 See section 523 of the *Bankruptcy Reform Act* of 1978.
37 *Ibid*.
38 See Roestoff 2019 *LitNet Akademies* 833.

2.2.2 South African perspective

The policy underpinnings of the South African insolvency law, as primarily regulated by the Insolvency Act, is to provide a debt collection mechanism for the fair and orderly distribution of the insolvent debtor's assets among creditors in circumstances where a debtor is sequestrated due to insolvency.[39] To ensure that the latter is achieved, the South African insolvency system premises itself on the principle of the *concursus creditorium*.[40] The implication of this principle is that, in circumstances where an insolvent debtor has been successfully sequestrated, the interests of the creditors as a group rank higher than the interests of an individual creditor.[41] In that, individual debt enforcement procedures by creditors cannot be allowed once the *concurcus creditorium* has been triggered by a sequestration order. The principle of the *concursus creditorium* was unpacked in the *locus classicus* of Walker v Syfret.[42] The court outlined that:

> "The object of the [Insolvency Act] is to ensure a due distribution of assets among creditors in the order of their preference … The sequestration order crystallizes 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 the estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order."[43]

In view of the effects of sequestration in the context of the *concursus creditorium*, it is clear that the policy underpinnings of the South African insolvency system are pro-creditor, as opposed to the progressive pro-debtor approach that is taken the international community.[44] This is so because the objects of insolvency law in South Africa is to ensure the orderly and fair distribution of the insolvent's assets among creditors and not necessarily to afford debtors relief from excessive debt.[45]

The fact that the South African system is pro-creditor is further substantiated by the fact that debtors need to prove "advantage for creditors" to attain relief through sequestration.[46] In essence, the success of an application for sequestration depends,

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39 Bertelsmann *et al The law of insolvency in South Africa* 3.
40 *Walker v Syfret* 1911 AD 141.
41 Bertelsmann *et al The law of insolvency in South Africa* 3.
42 *Walker v Syfret* 1911 AD 141.
43 *Idem* para 166.
44 Roestoff and Coetzee 2012 *SA Merc LJ* 75.
45 *Idem* 55.
46 Sections 6, 10 and 12 of the *Insolvency Act*.

among others, on proving that the sequestration order will be to the "advantage of creditors".[47] Although the success of an application for sequestration also depends on meeting certain further requirements,[48] the most decisive requirement is the advantage for creditors prerequisite.[49] The latter is affirmed by the decision of the court in Amod v Khan,[50] where the court held that "advantage for creditors" is a fundamental consideration in relation to the sequestration of the insolvent debtor. Although the Insolvency Act does not define what "advantage for creditors" entails, it has been largely accepted that it must be construed to mean financial advantage. The Constitutional Court in Stratford v Investec Bank Ltd[51] stipulated that the concept "advantage for creditors" must be interpreted to mean that the granting of the sequestration order bears reasonable prospects that the general body of creditors will eventually yield financial benefit. The Constitutional Court also outlined that the term "advantage" is broad and ought not to be rigidified.[52] Botha JP in Lotzof v Raubenheimer[53] outlined that the phrase "to the advantage of creditors" must be construed to mean to the advantage of all creditors of the debtor or at least the general body of creditors as a whole.[54] It was remarked in Gardee v Dhamanta Holding[55] that sequestration will be advantageous to creditors if it is likely to result in better proceeds to creditors than the ordinary execution procedures available to creditors according to the rules of civil procedure. After all, the whole idea of insolvency in South African law is to afford creditors a financial benefit. When an order for sequestration results in the "substantial portion" of creditors (determined according to the value of their claims) yielding financial benefit,[56] the sequestration will be deemed to be advantageous for creditors.

The ultimate decision in arriving at the conclusion of whether the granting of a sequestration order will be advantageous to creditors rests with the courts. The courts

47 *Ibid.*
48 See sections 6 (1) and 12(1) of the *Insolvency Act*.
49 Boraine and Roestoff 2014 *World Bank Legal Rev* 94.
50 *Amod v Khan* 1947 (2) SA 432 (N) 438.
51 *Stratford v Investec Bank Ltd* 2015 (3) SA para 43.
52 *Idem* para 44.
53 *Lotzof v Raubenheimer* 1959 (1) SA 90 (O) para 94.
54 See Kanamugire 2013 *Mediterranean Journal of Social Sciences* 20.
55 *Gardee v Dhamanta Holdings* 1978 SA 1066 (N).
56 *Trust Wholesalers and Woollens (Pty) Ltd v Mackan* 1954 2 SA 109 (N).

will reach a conclusion by exercising a discretion based on the evidence before it.[57] The court's discretion is exercised judicially after consideration of all the relevant facts before it.[58] An order for sequestration will unequivocally be granted if the court is satisfied, based on the facts placed before it, that there is a prospect that the order will bear a financial advantage to the general body of creditors.[59] It is submitted that the prospect must not be too remote.[60] It must be noted that, although the sequestration procedure has the effect of a discharge,[61] its main aim is to afford creditors a financial advantage. The discharge is merely a consequence of the process, as was confirmed by the court in Ex Parte Ford.[62]

The above discussion has demonstrated that the South African insolvency system is aimed at affording a financial benefit to creditors, as opposed to affording a debtor a discharge in line with international trends and guidelines. Although there are ongoing initiatives in attempting to bring the South African insolvency system in line with international trends and guidelines,[63] these initiatives seem to be reluctant to completely move away from the pro-creditor insolvency law regime, which is premised on the "advantage for creditors" policy.[64]

2.3 Maintenance law

The overall maintenance system in South African law is divided into the public maintenance system and the private judicial maintenance system. The public maintenance system is aimed at ensuring that dependent persons have access to support where the private judicial system fails to support them.[65] It is submitted that this form of maintenance is primarily grants based.[66] The latter form essentially entails that the state affords certain categories of persons (for instance the disabled, orphans and elderly persons) social grants to support them. In the South African context, these

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57 *Stratford v Investec Bank Ltd* 2015 (3) SA para 45. See also Boraine and Van Heerden 2010 *PERJ* 88.
58 *Julie Whyte Dress (Pty) Ltd v Whitehead* 1970 (3) SA 218 (D).
59 *Meskin and Co v Friedman 1948* (2) SA 555 (W) 558.
60 *Ibid.*
61 See section 129(1)(b) of the *Insolvency Act*.
62 *Ex Parte Ford* 2009 (3) SA 376 (WCC) 383.
63 See chapter 3 para 3.4.2 for a discussion of these law reform initiatives.
64 Boraine and Roestoff 2014 *World Bank Legal Rev* 94.
65 Clarke 1998 *De Rebus* 63.
66 *Ibid*.

grants are distributed by the Department of Social Development through the South African Social Security Agency (SASSA). On the other hand, the private judicial maintenance system is concerned with an individual's legal duty to support his dependents.[67] For example, such obligation exists in a parent and child relationship.[68] This study is restricted to the private judicial maintenance system, where an individual has a duty to support his dependents and is not concerned with the public maintenance system.

Maintenance in South African law is premised on the common law duty of support.[69] Maintenance entails the provision of financial support to a person to finance their living expenses.[70] These living expenses include, among others, food and nutrition, clothing, shelter, medical expenses and other necessities of life, which are consistent with the financial resources, social stature and lifestyle of the maintainer and the person being maintained.[71] The concept of maintenance has broadened in recent times to include, among others, education related expenses.[72]

Spiro[73] stipulates that "[a]t the present time maintenance does not only embrace the necessities of life, such as food, clothing and shelter, but also extends to education and care in sickness, and the child must be provided with all those things that are required for its proper upbringing."

The law creates a duty of maintenance when three requirements are met. Firstly, there must be a relationship.[74] Secondly, the need for maintenance on a person's part must exist.[75] Thirdly, the maintainer must have the financial capabilities of providing the required maintenance.[76] In the context of the relationship requirement, a relationship

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67 The South African Law Reform Commission *Issue paper 5 review of the maintenance system* (1997) 39.
68 Clark and Van Zyl *Handbook of the South African law of maintenance* 3–4.
69 *Ibid*.
70 See Allen *Oxford school dictionary and thesaurus* 406.
71 Clark and Van Zyl *Handbook of the South African law of maintenance* 3.
72 *Ibid.*
73 Boezaart *Child law in South Africa* 39. See also Hahlo *The South African law of husband and wife* 408.
74 Clark and Van Zyl *Handbook of the South African law of maintenance* 4.
75 *Ibid*.
76 *Ibid*.

is established by blood, affinity and adoption.[77] The duty to maintain always rests with the closest relative.[78] Furthermore, in the South African jurisprudence, the duty to maintain is a reciprocal one.[79] In the context of child maintenance, a duty of support is triggered by operation of law at birth or adoption and the duty continues until such time that the child is self-supporting.[80]

The idea behind maintenance is to protect the welfare of citizens in line with the fundamental public policy considerations of family support.[81] Also, maintenance is considered necessary and crucial in South African law, because it is considered as a mechanism that will ensure that the constitutional values and aspirations of the South African jurisprudence are realised.[82] These constitutional values include, among others, the establishment of a society based on democratic values, social and economic justice, equality and fundamental human rights.[83] Maintenance also plays a crucial role in improving the quality of life of all citizens and to free the potential of all persons by every means possible. It is submitted that the achievement of the latter requires the creation of an equitable and fair maintenance system.[84] Another policy underpinning underlying maintenance is the protection of children who are vulnerable by ensuring that their universally recognised right for their best interests to rank high in every matter concerning them is realised.[85] The maintenance of children is regarded as a children's right.[86] Seeing that maintenance is a crucial and essential component in the life of a person, the Maintenance Act[87] makes extensive provision for the enforcement of maintenance obligations. The courts have been granted express powers in ensuring that maintenance responsibilities are not neglected by those with the duty to maintain. In the circumstance that a person who bears a maintenance responsibility attempts to dodge this responsibility, courts can make a maintenance

77 *Ibid*.
78 *Ibid.*
79 *Ibid*.
80 *Idem* 11.
81 The World Bank *Report* para 368.
82 See preamble of the *Maintenance Act* 99 of 1998 (hereafter "the *Maintenance Act*").
83 *Ibid*. See also preamble of the *Constitution of the Republic of South Africa,* 1996.
84 See preamble of the *Maintenance Act*.
85 *Ibid*.
86 *Bannatyne v Bannatyne* 2003 (2) BCLR 11 (CC). See also section 28(2) of the *Constitution*. See chapter 4 para 4.2.2 for a discussion the interlink between maintenance and children's rights.
87 99 of 1998.

order that seeks to ensure the compliance with maintenance responsibilities.[88] The Maintenance Act defines a maintenance order as:

> "any order for the payment; including the periodical payment, of sums of money towards the maintenance of any person issued by any court in the Republic; and includes, except for the powers of section 31, any sentence suspended on condition that the convicted person make payments of sums of money towards the maintenance of any other person."[89]

2.4 Conclusion

The fresh start approach to insolvency law, of which the discharge takes center stage, is important and ought to be followed in line with international trends and guidelines.[90] In this respect, the South African system remains pro-creditor, which is in need of reform to align it with what is expected in a modern socio-economic environment.[91] However, it is equally imperative that certain debts, such as maintenance, must be excluded from the discharge in line with other public policy considerations.[92] This chapter has outlined the policy objectives of South African insolvency and maintenance law to demonstrate that future reforms of South African insolvency law should be mindful thereof. Thus, future insolvency reforms should not only seek to promote a fresh start for the insolvent debtor, but should be mindful of maintenance law policy objectives and the broader policy objectives of South African jurisprudence as contained in the Constitution.

88 See section 16 of the *Maintenance Act.*
89 Section 1(1)(vii) of the *Maintenance Act*.
90 See Boraine and Roestoff 2002 *International Insolvency Review* 1.
91 See Boraine and Roestoff 2014 *THRHR* 374.
92 The World Bank *Report* para 368.

CHAPTER 3

AN OVERVIEW OF NATURAL PERSON INSOLVENCY LAW IN SOUTH AFRICA

SUMMARY

3.1 Introduction

The Insolvency Act makes provision for two routes that an application for sequestration can be initiated. These routes are the voluntary surrender and compulsory sequestration, as envisaged in sections 6 and 12 respectively. Both routes prescribe substantive and procedural requirements that must be met before a court can grant an order for sequestration.[93] Once an order for sequestration has been granted, the estate will be distributed among creditors in terms of the guidelines as stipulated in the Insolvency Act. The insolvent debtor's estate is distributed among creditors in a particular order, which is determined according to the nature of their claims.[94]

This chapter briefly outlines the procedural and substantive requirements for an application for sequestration and the rules of distributing an insolvent estate with an emphasis on the ranking of maintenance claims. The chapter also considers the possibility of the exclusion of maintenance debts from the discharge in the light of international best practices.[95]

93 See sections 6 and 12 of the *Insolvency Act* 24 of 1936 (hereafter "the *Insolvency Act*").
94 See sections 2 and 95–103 of the *Insolvency Act*.
95 See Roestoff 2019 *Litnet Akademies* 833.

3.2 Voluntary surrender

An application for voluntary surrender is initiated by the insolvent debtor himself. The application is brought by the debtor, his representative with special authority, his *curator bonis* if he is incapable of handling his own affairs or an executor of a deceased estate.[96] If the debtor is married in community of property, section 17(4)(a) of the Matrimonial Property Act[97] dictates that both parties must apply for voluntary surrender as co-applicants because they are co-owners of the joint estate in equal, undivided and indivisible shares. This implies that they are equal managers of the joint estate.

The Insolvency Act requires the insolvent debtor (or the person acting on his behalf) to comply with certain formalities before applying for voluntary surrender as envisaged in sections 4 and 6 the Insolvency Act. This is to ensure that creditors are made aware of the application for voluntary surrender, enabling them to exercise their rights, such as objecting to the application, should they wish to do so.[98] Non-compliance with the formalities can be condoned under certain circumstances.[99]

As to the formalities, an application for voluntary surrender has to be preceded by a publication of a notice of surrender in the *Government Gazette* and in the newspaper circulating in the magisterial district where the insolvent debtor resides or where his principal business is located.[100] The latter notice must be published no more than 30 days and no less than 14 days before the application for voluntary surrender takes place.[101] Once the publication has taken place, all sales in executions against the insolvent debtor's estate are stayed.[102] This is to ensure that the *concursus creditorium* is not undermined.[103] In addition to the staying of executions, the publications have two more effects, namely, that the debtor commits an act of insolvency as envisaged in section 8 of the Insolvency Act and the possible appointment of a *curator bonis* by the Master of the High Court to temporarily take control of the estate.[104] The applicant for voluntary surrender must then send a notice of surrender to all possible creditors

96 Section 3(1) of the *Insolvency Act*.
97 88 of 1984.
98 Bertelsmann *et al The law of insolvency in South Africa* 76.
99 See section 157(1) of the *Insolvency Act*.
100 Section 4(1) of the *Insolvency Act*.
101 *Ibid*.
102 Section 5 of the *Insolvency Act*.
103 See chapter 2 para 2.2.2.
104 See section 5(2) of the *Insolvency Act*.

within a period of 7 days of the publication of the notice.[105] Furthermore, a copy of this notice needs to be sent to the revenue collector, all registered trade unions representing the insolvent debtor's employees and to the employees themselves.[106] The copy of the notice of surrender is deemed to have been brought to the attention of the employees when affixed on a notice board, which employees have access to on the insolvent debtor's premises or when placed at the front door or gate of the premises where the insolvent debtor was carrying out his business prior to the surrender.[107] Lastly, the insolvent debtor must prepare a statement of affairs, as envisaged in the Insolvency Act.[108] Following this, the debtor must ensure that two copies of the statement are sent to the office of the Master in the district where the insolvent debtor carries on business or otherwise reside.[109] Where there is no Master's office in his locality, the insolvent debtor may send the copy to the provincial Master's Office and the local magistrate office.[110] The statement of affairs is meant to confirm the assets and liabilities of the insolvent debtor.[111]

In addition to complying with the formalities discussed above, the insolvent debtor is required to prove specific substantive requirements to succeed with his application.[112] The debtor must prove that he is actually insolvent,[113] he must also prove that there will be sufficient funds in the free residue to cover the sequestration costs[114] and that the sequestration will be to the advantage of creditors.[115] If the applicant succeeds in proving these requirements, the court may grant the sequestration order, which will result in the estate vesting in the Master and later in the trustee, who will then distribute the estate among creditors guided by the rules of distribution as contained in the Insolvency Act.[116]

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105 Section 4(2)(a) of the *Insolvency Act*.
106 Section 4(2)(c) of the *Insolvency Act*.
107 Section 4(2)(b)(ii) of the *Insolvency Act.*
108 See section 4(3) of the *Insolvency Act.*
109 Section 4(5) of the *Insolvency Act*.
110 *Ibid.*
111 See section 4(4) and 4(5) of the *Insolvency Act*.
112 These requirements are set out in section 6 of the *Insolvency Act*.
113 The court in *De Villiers v Bateman* 1946 TPD 126 at 130 held that an applicant is deemed actually insolvent when the value of his liabilities exceeds the value of his assets.
114 Section 2 of the *Insolvency Act* defines free residue as the portion of the estate which is not subject to any right of preference by reason of any special mortgage, landlord's tacit, hypothec, pledge or lien.
115 See chapter 2 para 2.2.2.
116 Sections 20(1)(a) and 95–103 of the *Insolvency Act*.

3.3 Compulsory sequestration

The Insolvency Act provides for an application for compulsory sequestration by the creditor(s) of the insolvent debtor.[117] Similar to voluntary surrender, there are certain formalities prescribed in the Insolvency Act that applicant creditor(s) must comply with, before an application can be made.[118] The first formality that the applicant creditor(s) must comply with, is providing security to the Master to pay all sequestration costs, until the appointment of the trustee.[119] The creditor(s) will receive a certificate from the Master as confirmation of receipt and this certificate must be filed together with the application for compulsory sequestration.[120] The second formality that the applicant creditor(s) must comply with, is the furnishing of the copy of the application to interested parties.[121] Interested parties are the debtor, the registered trade unions representing employees of the debtor, the employees themselves and the revenue collector.[122]

As is the case in voluntary surrenders, there are requirements that the applicant must prove to succeed with an application for compulsory sequestration. The applicant debtor must prove that the prescribed formalities have been complied with.[123] Furthermore, the applicant creditor must prove that there is reason to believe that the granting of the sequestration would be advantageous to creditors.[124] The applicant debtor is also required to disclose, in his affidavit, an allegation of actual insolvency or an act of insolvency,[125] the nature, amount and cause of action of his claim, the nature

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117 Section 9 of the *Insolvency Act*.

118 Sections 9, 12 and 14(1) of the *Insolvency Act*.

119 Section 14(1) of the *Insolvency Act*.

120 Section 9(4)(b) of the *Insolvency Act*.
The certificate must be issued by the Master not more than ten days before the application for sequestration.

121 See section 9(4) of the *Insolvency Act*.

122 Section 9(4A)(a) of the *Insolvency Act*.
The court in *Samsudin v De Villers Berrange NO* 2005 (3) SA 529 (N) para 12 held that the requirement to furnish the debtor with a copy of the application may be dispensed if this will be in the interest of the debtor or creditors. The court in *Chiliza v Govendor* 2016 (4) SA 397 (SCA) held that it is mandatory for the applicant creditor to furnish the copy of the application to the revenue collector. The court in *Stratford v Investec Bank Ltd* 2015 (3) SA para 2, 10, 13, 14, 25 and 25 held that employees in the context of section 9(4)(a) include domestic workers.

123 Section 9 of the *Insolvency Act*.

124 Sections 10(c) and 12(1)(c) of the *Insolvency Act*. See chapter 2 para 2.2.2 for a detailed discussion of the "advantage for creditor" requirement in South African natural person insolvency law.

125 See section 8 of the *Insolvency Act* in relation to acts of insolvency.

and value of his security and also personal details of both the creditor and the debtor.[126] When an applicant creditor brings an application for compulsory sequestration and has met the prescribed requirements as discussed, the court will exercise a discretion and decide on whether to provisionally sequestrate the debtor's estate or not.[127] The granting of the provisional sequestration order is meant to allow interested parties, such as the revenue collector and employees, to object to the application should they wish to do so. To ensure that interested parties are aware of the application for sequestration, the Insolvency Act makes it mandatory for the copy of the provisional sequestration order to be served upon the debtor, registered trade unions, employees and the revenue collector.[128] The court will, at a later date, grant a final sequestration order if it is convinced that the prescribed requirements for the granting of a sequestration order are unequivocally met.[129] This will result in the estate of the insolvent debtor vesting in the Master of the High Court and later in the appointed trustee, who will bear the responsibility of administering the insolvent debtor's estate and distributing proceeds among creditors in terms of the prescribed rules of distribution.[130] The implication of the vesting of the insolvent estate in the Master and, upon appointment, in the trustee is that the trustee, as the administrator of the insolvent estate, acquires ownership of the insolvent debtor's estate for the purposes of distributing it among creditors.[131] The same transpires when a sequestration order has been granted in an application for voluntary surrender.

3.4 The distribution of the insolvent estate

The Insolvency Act provides for a ranking system of creditors' claims, which the trustee of an insolvent estate must follow when distributing the proceeds of the insolvent estate among the creditors.[132] Broadly speaking, creditors' claims in South African insolvency law are divided into two categories, namely, secured creditors and

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126 The creditor must disclose his personal details, such as his full names, address, occupation and status and disclose the personal details of the debtor, such as his full names, date of birth, identity number, information indicating the court's jurisdiction and if the debtor is married the full names of his spouse must be disclosed as well. In line with the decision of the court in *Ex Parte Shmukler-Tshiko* [2013] JOL 29999 (GSJ) and section 9(3)(c) of the *Insolvency Act*, if the applicant fails for whatever reason to state all the required information in the affidavit, he must provide the reason thereof.

127 Section 12 of the *Insolvency Act*.

128 See section 11(2A) of the *Insolvency Act*.

129 See section 12 of the *Insolvency Act*.

130 Section 20(1)(a) of the *Insolvency Act.*

131 Evans 1996 *TSAR* 724.

132 Sections 95–104 of the *Insolvency Act.*

unsecured creditors.[133] Secured creditors are those that have a preferential right over a specific asset in the estate.[134] This preferential right is created by virtue of a special mortgage, landlord's tacit hypothec,[135] a pledge, a lien or an instalment agreement hypothec.[136] A special mortgage for the purposes of section 2 of the Insolvency Act includes a notarial bond hypothecating specific movable property,[137] a bond registered on a ship,[138] and also the most common, known to be the mortgage bond hypothecating immovable property.[139] The implication of enjoying the status of secured creditor is that the creditor receives preferential treatment in relation to the security that he relies on. This means that such creditor will be paid first from the proceeds of his security.[140] Secured creditors are paid out of the encumbered asset account, which means that a secured creditor is paid out of his security after expenses associated to the realisation of the asset(s) he holds security on are settled.[141] In the event that the proceeds in the encumbered asset account are insufficient to cover the secured claim, the creditor will have a concurrent claim for the rest of the debt, if he does not solely rely on the security.[142] In the event that there is a surplus, after realising the creditor's security, it will be transferred to the free residue account for the purposes of distribution among unsecured creditors.[143] Unsecured creditors are divided into statutory preferent creditors and concurrent creditors.[144] The statutory preferent creditors are first in line for payments made out of the free residue account and the

133 See Bertelsmann *et al The law of insolvency in South Africa* 468–471.

134 See section 2 of the *Insolvency Act*.

135 Although a landlord (lessor) is recognised as a secured creditor in terms of section 2 of the *Insolvency Act*, it must be noted that his reliance on his security is "capped". Section 85(2) of the Act outlines that:
"A landlord's legal hypothec shall confer a preference with regard to any article subject to that hypothec for any rent calculated in respect of any period immediately prior to and up to the date of sequestration but not exceeding-
(a) three months, if the rent is payable monthly or at shorter intervals than one month;
(b) six months, if the rent is payable at interval exceeding one month but not exceeding three months;
(c) nine months, if the rent is payable at intervals exceeding three months but not exceeding six months;
(d) fifteen months in any other case.". The implication of section 85(2) is that the creditor will have a concurrent claim for the rest of his owed rental amount, which was excluded by the "capping".

136 Sections 2 and 84(1) of the *Insolvency Act*.

137 See section 1 of the *Security by Means of Movable Property* Act 57 of 1993.

138 See section 47(1) of the *Merchant Shipping Act* 57 of 1951.

139 Section 2 of the *Insolvency Act*.

140 Sections 2 and 95 of the *Insolvency Act*.

141 Section 89 of the *Insolvency Act*.

142 Section 83(12) of the *Insolvency Act*.

143 *Ibid*.

144 See Bertelsmann *et al The law of insolvency in South Africa* 468–471.

concurrent creditors are paid after the statutory preferent creditors have been paid.[145] The Insolvency Act recognises funeral and death bed expenses, sequestration costs, execution costs, salary or remuneration of employees, statutory obligations, income tax and general notarial bond holders' claims as statutory preferent creditors, who must be paid first from the free residue account.[146] Once statutory preferent claims have been paid, the concurrent creditors, who do not enjoy any form of preference, will be paid from what is left in the free residue account.[147] The concurrent creditors rank equally. If after paying statutory preferent claims, the free residue balance is insufficient to fully cover all the concurrent claims, each concurrent creditor will receive a proportionate dividend.[148]

3.4.1 Ranking of creditors' claims

(a) Encumbered asset account

Secured creditors' claims are paid from the encumbered asset account, and more narrowly, from the specific assets for which they hold security.[149] It must be noted that, before the proceeds of an asset subject to security are distributed to a secured creditor, certain costs must be settled first. The Insolvency Act[150] provides that the following costs be settled before the proceeds are distributed among creditors:

(a) The costs incurred for maintaining, conserving and realising the asset;
(b) The remuneration of the trustee in respect of the asset subject to security;
(c) The costs incurred by the trustee in giving security in proportion;
(d) The Mater's fees; and
(e) in the case of immovable property, taxes due on it for the period from two years before the date of the final sequestration to the date on which the property was duly transferred, including penalties and interests, where applicable.

(b) Free residue account

145 See sections 96–99 and 101–103 of the *Insolvency Act*.
146 Sections 96–99 and 101–102 of the *Insolvency Act*. See para 3.4.1 for a further untangling of statutory preferent creditors' claims in South African natural person insolvency law.
147 Section 103 of the *Insolvency Act*.
148 *Ibid.*
149 See para 3.4.
150 Sections 89(1) and 89(5) of the *Insolvency Act*.

Unsecured creditors are paid from the free reside (unencumbered asset) account.[151] Statutory preferent creditors are paid first and the remainder of the proceeds are pro rata paid to concurrent claims.[152] These include maintenance obligations. Unlike concurrent creditors, statutory preferent creditors do not rank equally. There is a specific ranking system for paying out statutory preferent creditors. They are paid out in the following order:

(a) Funeral and death bed expenses of the insolvent debtor, the insolvent debtor's spouse and his minor children, which is capped at R300;[153]

(b) The sequestration costs, which among others include, the sheriff's charges incurred since the sequestration, Master's fees payable in connection with the sequestration, the taxed costs of sequestration, the trustee's remuneration, the remuneration of the *curator bonis* and rent owed by the insolvent debtor for any period after his sequestration;[154]

(c) The costs of execution, including any other taxed costs in connection with execution not exceeding R50;[155]

(d) Wages or salaries of former employees of the insolvent debtor.[156] The insolvent debtor's employees will be paid wages or salaries due to them for a period not exceeding three months.[157] Including leave or holiday pay, which accrued to them by virtue of their employment to the insolvent debtor in the year of sequestration or the year before sequestration.[158] They will also receive monies due to them for paid absence.[159] Also for severance or retrenchment payments due to them in terms of any law, agreement, contract, wage regulating measures or as result of termination in terms of section 38 of the Insolvency Act.[160] They will also be paid monies due to them for pension, provident, medical aid, sick pay, unemployment or training scheme or fund contributions

151 See para 3.4.
152 Section 103 of the *Insolvency Act*.
153 Section 96(1)–(3) of the *Insolvency Act*.
154 Sections 97 and 37(3) of the *Insolvency Act*.
155 Section 98 of the *Insolvency Act*.
156 Section 98A of the *Insolvency Act*.
157 Section 98A(1)(a)(i) of the *Insolvency Act*.
158 Section 98A(1)(a)(ii) of the *Insolvency Act*.
159 Section 98A(1)(a)(iii) of the *Insolvency Act*.
160 Section 98A(1)(a)(iv) of the *Insolvency Act*.

owed by the insolvent debtor in his capacity as an employer immediately prior to sequestration;[161] and

(e) Certain statutory obligations, such as amounts owed in terms of the Compensation for Occupational Injuries and Diseases Act[162] to the compensation commissioner, income tax deductions, Value Added Tax (VAT), customs, excise and sales duty in terms of the Customs and Excise Act,[163] contributions to the Unemployment Insurance Fund (UIF) in terms of the Unemployment Insurance Contributions Act,[164] money owed to the Mines and Workmens Compensation Fund in terms of the Occupational Diseases in Mines and Works Act,[165] income tax and general bonds.

It is evident that maintenance creditors, who are at the center of this study, do not enjoy any form of preference. As a result, they only have a concurrent claim against the insolvent debtor's estate. This means they are paid from the free residue immediately after the statutory preferent creditors have been paid.[166] Furthermore, they will be liable for contribution, as envisaged in section 106 of the Insolvency Act.[167] This means that should there be insufficient funds in the free residue to cover the costs of sequestration, the concurrent creditors, who have proved claims against the insolvent estate, will be liable for such costs in proportion to the amount of their claim.[168] The legal position on contribution to sequestration costs by maintenance creditors will be argued to be unjustifiable, problematic and incongruent with the values that define South African jurisprudence.[169]

3.4.2 Proposals for law reform

The South African natural person insolvency law is mainly regulated by the Insolvency Act, which was enacted in 1936. Despite the legal developments that transpired in 1996, when the Constitution came into operation, the Insolvency Act has not been reformed in line with the new policy position that was brought about by the new legal

161 Section 98A(b) of the *Insolvency Act*.
162 130 of 1993.
163 91 of 1964.
164 4 of 2002.
165 78 of 1973.
166 Section 103(1)(a) of the *Insolvency Act*.
167 See Roestoff 2019 *LitNet Akademies* 833.
168 Section 106 of the *Insolvency Act*.
169 See para 3.4.2. See also chapter 4 for a detailed discussion.

order. The new legal order requires the promotion of human dignity, equality and human rights.[170] The Insolvency Act is archaic and must be revamped to address the constitutional order values to human dignity, and equality and human rights of stakeholders involved in the sequestration of an insolvent debtor.[171]

The South African Law Reform Commission ("The SALRC" or "The Commission"), which was established in terms of the South African Law Reform Commission Act,[172] has been tasked with the responsibility of conducting research in all areas of the law and to study and investigate these areas, with an aim of making recommendations for development, modernisation, improvement and reform.[173] The SALRC, in line with its responsibility, has engaged in initiatives of attempting to propose development, modernisation, improvement and reform of insolvency law in South Africa by searching for innovative solutions that will resolve the problems experienced.[174] During 1996, the Commission published a Draft Bill on insolvency together with an Explanatory Memorandum as Discussion paper 66.[175] Prior to this, the Commission also published six interim reports and seven working papers.[176] In line with the public participation policy, the Commission received various proposals from commentators. There are two specific proposals made by a commentator that are of great interest to this study.[177] The first proposal made by a commentator speaks to the legal position on the treatment of the Land Bank within the realm of natural person insolvency law.[178] The commentator submits that all creditors of the insolvent estate (including the Land Bank) must be bound to the provisions of the Insolvency Act.[179] The second proposal is that preferential claims afforded to state institutions must be limited to the absolute minimum.[180] These claims, among others, include income tax and VAT.[181]

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170 See section 1(a) of the *Constitution of the Republic of South Africa*, 1996.
171 See Mabe 2016 *PELJ* 19. See also Coetzee 2016 *Int. Insol. Rev.* 52–53.
172 19 of 1973.
173 Section 4 of the *South African Law Reform Commission Act* 19 of 1973.
174 Discussion Paper 86 (Project 63) Review of the law of insolvency 1999 1 Justice.gov.za/salrc/dpapers/dp86.pdf (Discussion Paper 86).
175 *Ibid.*
176 *Ibid.*
177 See subsequent sub-para for the discussion of these proposals.
178 See preceding sub-para.
179 Discussion Paper 86 5.
180 *Ibid*.
181 See para 3.4.1.

The Insolvency Act provides that its provisions do not affect the provisions of any law that confers powers and impose duties upon the Land and Agricultural Development Bank ("The Land Bank") in relation to any property that belongs to an insolvent estate.[182] The implication of the latter is that the Land Bank can continue to take action against a defaulting debtor through section 33(2) of the Land Bank Act, even when the debtor has been sequestrated.[183] This implies that the principle of the *concursus creditorium* will not be applicable where the Land Bank is a creditor. As a result, the Land Bank enjoys preference in relation to its claims against a debtor who is in default. The fundamental question is whether affording the Land Bank and state institutions, such as the revenue collector, preference over maintenance creditors is justifiable, taking into cognisance the policy considerations underlying South African law. Heath[184] submits that, to answer the latter question, it must be established whether there is any justification for preference to be afforded to one creditor over the other.[185] According to him, there should be a social, economic or political justification to afford a creditor's claim preference over the other.[186] Although state institutions, such as the Land Bank and the revenue collector, are in the interest of the general public, it is submitted that this cannot in itself justify preference.[187] The fact that income tax and VAT are used for the general public does not in itself justify preference in insolvency.[188] Preference ought not to be afforded to institutions, such as the revenue collector and the Land Bank, which are less vulnerable compared to a natural person seeking for maintenance. Although the Land Bank and the revenue collector act in the interest of the broader community, the impact of not affording them preference, is nothing compared to the impact of not affording preference to maintenance creditors. State institutions are less vulnerable compared to natural persons. State institutions have huge financial muscles, not affording them preference in insolvency will thus not have dire financial consequences to them in comparison to maintenance creditors, who are natural persons. State institutions can continue to fund their programmes which, among others, included social grants, even when they do not enjoy preference in insolvency. Unfortunately, it cannot be said that maintenance creditors can continue

182 Section 90 of the *Insolvency Act*.
183 Section 33(10) of the *Insolvency Act*.
184 Heath 1996 *Waikato L. Review* 31.
185 *Ibid*.
186 *Ibid*.
187 Discussion Paper 86 5.
188 *Idem* 16.

to fund their living expenses if their claims are not afforded priority. Therefore, in line with the reform proposals by the SALRC, maintenance creditors must be afforded preference to the exclusion of institutions such as the Land Bank and the revenue collector.[189] This will ensure that the social safety net of vulnerable persons in society is protected, maintained and sustained.

It is observed in the Discussion Paper that, there is a trend of disinterest by creditors to actively participate in sequestration proceedings.[190] This disinterest is triggered, among others, by the fact that creditors who have a concurrent claim rarely receive a benefit from the insolvent estate.[191] It is also triggered by the fact that the state and other creditors are afforded preference and special rights when paying claims from the free residue.[192] The Draft Bill proposes a new ranking system of creditors who have a claim from the free residue account.[193] According to the Draft Bill, preferences that should be retained are those in favour of employees, contributions to employee funds by the employer (the insolvent debtor) and claims for arrear maintenance payable in terms of an order of the court.[194] The proposal for the recognition of arrear maintenance claims as a statutory claim is praiseworthy and necessary in a democratic South Africa that is founded of the promotion and recognition of human rights, such as the right to human dignity, the right to healthcare, food, water and social security as well as children's rights.[195] Furthermore, this proposal ensures that maintenance creditors (who currently have a concurrent claim) are not burdened with the liability for contribution, should there be insufficient funds in the free residue account to cover the costs of sequestration.[196] Roestoff submits that maintenance creditors must expressly be exempted from contribution to sequestration costs.[197] This submission must be welcomed as it relieves maintenance creditors from the burden of liability to sequestration costs, which might compromise their social safety net. The obligation by a maintenance creditor to contribute to sequestration costs undermines

189 Discussion Paper 86 5. See also cl 80 of Explanatory Memorandum.
190 *Idem* 6.
191 *Idem* 8.
192 *Ibid*.
193 *Ibid*.
194 *Ibid.* See also Cl 80 of The Explanatory Memorandum.
195 See sections 10, 27 and 28 of the *Constitution of the Republic of South Africa*, 1996.
196 See para 3.4.1.
197 See Roestoff 2019 *LitNet Akademies* 833.

their ability to fund their living expenses and it is thus tantamount to undermining their social safety net.

The statutory preferences that are instrumental to the promotion of human rights must be retained, while those that do not in any way promote human rights, are discarded. The discarding of the latter preferences will create room for the recognition of new preferent claims that will play a role in the advancement of human rights, this will be in line with the South African constitutional jurisprudence. Statutory preferences, such as death bed expenses are justified and must be retained to protect the right to healthcare, life and human dignity of the insolvent creditor, his spouse and his children.[198] Affording employees preference is justified, because employees generally use their income to maintain themselves, hence affording them preference in a way protects their rights and those of their dependents to human dignity, healthcare, food and social security. However, it is important to note that recognising creditors, such as the revenue collector, as statutory preferent, to the exclusion of maintenance creditors is not justified.[199] International trends demonstrate that jurisdictions are in favour of affording maintenance claims preference over claims by the state such as for income tax.[200] Therefore, it is important that "we" review the Insolvency Act to align it with international trends and guidelines.[201] This is also necessary to ensure that it is congruent with the policy considerations underlying the legal system in South Africa.

3.5 Discharge consequence of sequestration

The sequestration of an insolvent debtor results in the discharge of all pre-sequestration debts.[202] Coetzee and Roestoff submit that sequestration is the main debt relief measure in South African law because it provides a discharge of all pre-sequestration debts.[203] However, it must be noted that the main aim of sequestration is to afford creditors a financial advantage.[204] The discharge component is merely a

198 See section 96(1)–(3) of the *Insolvency Act*. See also sections 10, 11 and 27 of the *Constitution*.
199 See para 3.4.2.
200 Discussion Paper 86 (Project 63) Review of the law of insolvency 1999 5 Justice.gov.za/salrc/dpapers/dp86.pdf.
201 See Roestoff 2019 *Litnet Akademies* 833.
202 Section 129(1)(b) of the *Insolvency Act*.
203 Coetzee and Roestoff 2013 *Int Insolv Rev* 193.
204 See chapter 2 para 2.2 for a detailed discussion of the concept of the "advantage for creditors".

consequence of the procedure.[205] As already outlined,[206] the main aim of insolvency in the United States of America (USA) is to proffer an insolvent debtor a fresh-start of which the discharge of pre-sequestration debt is an essential component. Despite this, the USA does exclude maintenance orders from the discharge in an attempt to balance the competing interests of the insolvent debtor to access a discharge and that of the creditor to access basic welfare.[207] The American approach is praiseworthy as it attempts to strike a balance between these competing interests. South Africa, on the other hand, does not exclude maintenance obligations from the discharge. The latter approach is a threat to the basic welfare of maintenance creditors and might impair their constitutional rights.[208]

3.6 Conclusion

The sequestration of an insolvent debtor takes place either through voluntary surrender or compulsory sequestration.[209] An application for voluntary surrender is initiated by the insolvent debtor, whereas an application for compulsory sequestration is initiated by creditors of the insolvent.[210] The latter is due to creditors' interest in the insolvent debtor's estate.[211] Both voluntary and compulsory applications are made in the high court because sequestration has an impact on the status of a person.[212] Initiating an application for sequestration requires the fulfilment of certain prescribed formalities.[213] Both applications have their own special requirements, which are very similar. When the requirements for an application for sequestration have been met, the court uses discretion in arriving at a conclusion of whether a sequestration order must be granted or not.[214] In voluntary sequestration applications, the court will grant a sequestration order if it has satisfied itself that the prescribed formalities have been met, if the debtor is actually insolvent, if there is sufficient residue to cover the costs of sequestration and if the sequestration will be to the advantage of creditors.[215] In the

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205 *Ex Parte Ford* 2009 (3) SA 376 (WCC) 383. See also Roestoff and Coetzee 2017 *Int LJ SA* 254. See also Coetzee 2017 *THRHR* 20.
206 See para 2.1.
207 *Ibid*.
208 See chapter 4 for a detailed discussion of these constitutional rights.
209 Sections 3 and 9 of the *Insolvency Act*.
210 Sections 3(1) and 9(1) of the *Insolvency Act*.
211 Section 9(1) of the *Insolvency Act*.
212 Section 2 of the *Insolvency Act*.
213 See sections 4(1)–(3) and 9(3)–(5) of the *Insolvency Act*.
214 Sections 6 and 12 of the *Insolvency Act*.
215 Section 6 of the *Insolvency Act*.

case of compulsory sequestrations, the court will grant a sequestration order if, after exercising its discretion, it is satisfied that the prescribed formalities have been met, that the applicant has a liquidated claim of at least R100 against the debtor, the debtor is actually insolvent or has committed an act of insolvency and the order will be to the advantage of creditors.[216] The effect of a sequestration order is that the estate of the insolvent debtor vests in the Master and upon appointment, in the trustee.[217] The trustee is then charged with the responsibility to distribute the insolvent debtor's estate among creditors according to the rules of distribution prescribed in the Insolvency Act.[218]

The Insolvency Act is outdated and thus requires reconsideration for a possible revamp in line with the major legal developments that transpired since 1996. It is unlikely that all provisions will meet constitutional muster because the enactment of the Act was not informed or guided by the current constitutional values that underpin South African jurisprudence. The current ranking of creditors' claims is archaic, not least because it hampers the safety net of maintenance creditors.[219] The law reform proposals by the SALRC for the recognition of maintenance creditors as statutory preferent creditors must be welcomed because it is one step in the right direction for the promotion of certain fundamental rights as contained in the Bill of Rights.[220]

216 Sections 8 and 12 of the *Insolvency Act*.
217 See para 3.2 and 3.3.
218 See para 3.4.1.
219 See para 3.4.2.
220 See chapter 2 of the *Constitution*.

CHAPTER 4

CONSTITUTIONAL ANALYSIS

SUMMARY

4.1 Introduction

The Constitution states that the Republic of South Africa is founded, among others, on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.[221] The Constitution is the supreme law in South Africa and any law inconsistent with it is invalid.[222] In view of the fact that the South African jurisprudence is based on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, it is imperative that all legislation, including the Insolvency Act,[223] is aligned with these values.

This chapter considers the constitutional implications of not affording maintenance creditors preference in the distribution of the insolvent estate, the exclusion of maintenance debt from the discharge and the possible liability of maintenance creditors (who currently have a concurrent claim) to contribute to sequestration costs.[224] The chapter first discusses some of the rights that are probably compromised by the current South African approach on the treatment of maintenance debt and creditors, and whether the compromise is justifiable and reasonable in an open and democratic society based on human dignity, equality and freedom, taking into

221 Section 1(a) of the *Constitution of the Republic of South Africa*, 1996.
222 Section 2 of the *Constitution*.
223 24 of 1936.
224 See chapter 3 para 3.4 and 3.5.

cognisance all relevant factors.[225] Lastly, the probable violation of these rights is measured against the African philosophy of *Ubuntu*.

4.2 Potentially compromised rights

4.2.1 The right to human dignity

The Constitution guarantees the right to human dignity.[226] In terms of section 10, "[e]veryone has inherent dignity and the right to have their dignity respected and protected"[227]. The right to human dignity is crucial because it is a foundational value of the South African jurisprudence and thus has a very pivotal role to play in the scheme of the Constitution.[228] The importance of the right to human dignity is also evident from the fact that it is inherent. According to Chaskalson, this implies that the right is "an attribute to life itself".[229] The importance of this right was reaffirmed by the constitutional court in *Dawood v Minister of Home Affairs*.[230] The court stated that

> "The value of human dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitation analysis. Section 10, however, makes it plain that dignity is not only a *value* fundamental to our Constitution; it is a justifiable and enforceable right that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour."[231]

The latter quotation of the Constitutional Court also affirms the interlink between the right to human dignity and other rights. The development of the value of human dignity arguably gave birth to other rights.[232] This also demonstrates that there is an interlink between this right and other rights such as the right to healthcare, food, water and social security. As well as children's rights. The quote further affirms that the right to human dignity informs the adjudication and interpretation of other rights.

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225 See section 36(1) of the *Constitution*.
226 Section 10 of the *Constitution*.
227 *Ibid*.
228 See section 1(a) of the *Constitution*. See also Haysom "Dignity" 5.
229 Chaskalson 2000 *SAHRJ* 196.
230 *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC).
231 *Idem* para 35.
232 Haysom "Dignity" 2.

4.2.2 The right to healthcare, food, water and social security

The Constitution expressly guarantees that everyone has the right to have access to healthcare, sufficient food and water, and social security.[233] The state is obligated to take reasonable legislative and other measures it deems fit to ensure that these rights are progressively realised.[234] Maintenance is primarily intended to finance things such as healthcare, food, water and social security of the beneficiary.[235] These necessities, which the provision of maintenance is intend to finance, are recognised as human rights in South African jurisprudence.[236] The current insolvency legislation, which is archaic,[237] does not afford serious protection to the rights of maintenance creditors.[238] Despite the fact that maintenance is recognised as a human right, as is evident in section 27 of the Constitution, the current insolvency framework does not proffer any special protection to this right by affording maintenance creditors preference and excluding maintenance debt from the discharge in line with international trends and guidelines.[239] In line with the obligation placed on the state to take measures aimed at ensuring that this right is realised, the Insolvency Act must be reformed to allow for maintenance creditors to have preferent claims during the distribution of the insolvent estate.[240] This will also advance the right to human dignity of maintenance creditors.[241]

4.2.3 Children's rights

The Constitution provides that every child has the right to basic nutrition, shelter, basic health care services and social services.[242] The concept of maintenance include, among others, providing the maintenance creditor with basic nutrition, shelter, health care services and social services.[243] It can be argued that the ranking of maintenance creditors as concurrent rather than statutory preferent will, in some instances, violate

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233 Section 27(1)(a)–(b) of the *Constitution*.
234 Section 27(2) of the *Constitution*.
235 See chapter 2 para 2.3.
236 See section 27 of the *Constitution*.
237 See chapter 3 para 3.4.2.
238 *Ibid*.
239 See chapter 3 para 3.4 and 3.5.
240 See chapter 3 para 3.4.
241 See para 4.2.1 for a discussion of the interlink between the right to human dignity and other rights.
242 Section 28(1)(c) of the *Constitution*.
243 See chapter 2 para 2.3.

the right of children to basic nutrition, shelter, health care services and social services, as envisaged in section 28(1)(c) of the Constitution. The duty of maintaining a child primarily rest with the parents of the child.[244] However, it must be noted that the state has a legal obligation to step-up and maintain a child where the parent(s) are unable to do so.[245] Furthermore, the state bears the responsibility of ensuring that legislative and administrative measures are put in place to ensure that the rights of children are protected.[246] The failure by the state to amend the Insolvency Act to allow for the recognition of maintenance creditors' claims as statutory preferent is a negation of the states' obligation to take legislative and administrative measures for the protection of the rights of children. After all, the best interest of the child is of paramount importance in every matter concerning the child.[247] I argue that it would be in the best interest of the child for maintenance obligations to be afforded priority in the distribution of the insolvent estate. Thus, it is imperative that the state devise legislative measures to ensure that the best interest of the child is taken into cognisance when distributing the insolvent estate. The failure to protect the rights of children, as guaranteed in section 28(1), is a direct violation of the child's right to human dignity.[248] This is because depriving the child of protection as an indirect maintenance creditor and thus depriving him access to shelter, healthcare services, basic nutrition and social services impairs their right to human dignity.[249]

The section 28 right is a fundamental one and ought to be protected. The Constitutional Court in *Grootboom v Oostenberg Municipality*[250] stressed the importance of protecting the children's rights as guaranteed in the Constitution. The court clearly outlines that the right is not qualified by either "available resources" or by the "progressive" realisation clause.[251] It has been argued that section 28 of the Constitution affords children two sets of rights.[252] The right to be under the care of an adult and the right to be supported with basic needs by the state.[253] The fact that this

244 *Ibid*.
245 See section 7(2) of the *Constitution*.
246 *Ibid*.
247 Section 28(2) of the *Constitution*.
248 See also para 4.2.1.
249 *Ibid*.
250 *Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277 (CC).
251 *Ibid*.
252 Sunstein 2000 *Const F* 127.
253 *Ibid*.

right is unqualified demonstrates how important it is. Therefore, it makes logical sense for the legislator to amend the Insolvency Act to afford maintenance creditors priority and to exclude maintenance debt from the discharge so that this unqualified right is not undermined.

4.3 The limitation clause

The rights guaranteed in chapter 2 of the Constitution can be limited in terms of section 36. The rights in the Bill of Rights may be limited in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society that is based on human dignity, equality and freedom, taking into account all relevant factors, including the five factors that are listed in section 36(1).[254] The five factors that must to be taken into account are the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and whether less restrictive means are employed to achieve the purpose.[255] These factors do not necessarily carry the same weight.[256] Furthermore, the factors are not a close list, which means that additional factors may also be considered.[257]

As is evident from the preceding paragraph, the limitation of the rights contained in the Bill of Rights can only take place in terms of the law of general application. The latter requirement can be quickly dispensed, since the limitation of the maintenance creditor's rights (as discussed above) has been "affected" in terms of the Insolvency Act, which qualifies as law of general application. The important question now is whether the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors.[258] To answer the latter question, one needs to conduct the so-called proportionality analysis.[259] The proportionality analysis is a balancing act of the harm caused by the infringement against the benefits achieved through the infringement.[260] In the event that the harm caused by the limitation outweighs the benefits, then the

254 Section 36(1) of the *Constitution*.
255 Section 36(1)(a)–(e) of the *Constitution*.
256 See Cheadle "Limitation of rights" 707–708.
257 See Currie and De Waal *The Bill of Rights handbook* 164.
258 See section 36(1) of the *Constitution*.
259 See *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 104.
260 *Ibid*.

limitation is considered illegitimate.[261] However, should the benefits outweigh the harm caused by the limitation, the limitation is deemed constitutionally legitimate.[262] If the purpose of limiting a right guaranteed in the Constitution is compatible with the values contained in section 36(1), then the limitation will be deemed justifiable and thus constitutional.[263] If not, then the limitation will be considered unjustifiable and thus unconstitutional.[264] In the event that the limitation is found to be justifiable, it must further be established whether the means employed to achieve the purpose are justifiable as well.[265]

The Insolvency Act, by providing for the discharge of all pre-sequestration debts in section 129(c) aims to relieve the insolvent debtor from excessive debt. This provision burdens maintenance creditors, because it deprives them of their right to maintenance.[266] This consequently impairs children's rights to basic nutrition, shelter, health care services and social services, the right to human dignity and the right to healthcare, food, water and social security.[267] In this context, the harm caused by section 129(c) of the Insolvency Act is the impairment of maintenance creditors rights, while the benefit achieved through the infringement is relieving the insolvent debtor from excessive debt. In my considered view, the harm caused by the infringement does not outweigh the benefits achieved through the infringement. Freeing a debtor from excessive debt at the expense of maintenance creditors' fundamental rights can never be justifiable. Although it is important to free a debtor from excessive debt, exception must be made to maintenance debt. The limitation of maintenance creditors rights in this regard is incompatible with the values contained section 36(1) and consequently constitutionally illegitimate.

Maintenance claims do not enjoy any preference whatsoever.[268] This legal position infringes upon the rights in sections 10, 27 and 28 of the Constitution as discussed throughout the study. It is imperative that we once again evaluate whether or not the

261 *Ibid*.
262 *Ibid*.
263 *Ibid*.
264 *Ibid*.
265 *Ibid*. See also Currie and De Waal *The bill of rights handbook* 162–163.
266 See chapter 2 para 2.3 and para 4.2.
267 See sections 10, 27 and 28 of the *Constitution*.
268 See chapter 3 para 3.4.

harm caused by the infringement outweigh the benefits achieved through the infringement. There is absolutely no benefit that is to be achieved through this infringement and therefore the proportionality test has not been met. In the premise, the limitation is unjustifiable and also incompatible with the values of section 36(1) of the Constitution.

4.4 Ubuntu

The African continent is founded on rich traditions of the notion of human dignity and 'humanness'.[269] These traditions are congruent with the value of *Ubuntu* as practiced in the African continent. Mokgoro notes that the value of *Ubuntu* is not an easily definable one.[270] This arguably implies that there is no universally recognised or clear-cut definition of this value. Murithi defines *Ubuntu* as "an ancient African code of ethics; it emphasises the importance of hospitality, generosity and respect for all members of the community, and embraces the view that we all belong to one family."[271] The court in *Resnick v Government of the Republic of South Africa*[272] (*Resnick*) defined *Ubuntu* to be a notion that promotes humanity, meaning the existence of human beings who are compassionate and recognises the dignity of fellow human beings.[273] In view of the definition proffered by Murithi and the court in the *Resnick* case, it is clear that the notion of *Ubuntu* has a place in "our" constitutional order, particularly when one notes that "our" jurisprudence is founded on the value of the promotion of human dignity.[274] The inclusion of maintenance debt in the discharge and the ranking of maintenance creditors' claims as concurrent goes against human dignity and this is tantamount to underming the value of *Ubuntu*. It is unfortunate that the Insolvency Act fails to promote the value of *Ubuntu* by not affording maintenance creditors priority and by including maintenance debt in the discharge. The Insolvency Act must be reformed to align with the principle of *Ubuntu*, which finds expression in the Constitution.

269 Murithi 2007 *Globalisation, Societies and Education* 281.
270 See Mokgoro "*Ubuntu* and the law in South Africa" 2.
271 Murithi 2007 *Globalisation, Societies and Education* 281.
272 *Resnick v Government of the Republic of South Africa* 2014 (2) SA 377 (WCC).
273 *Ibid*.
274 See section 1(a) of the *Constitution*.

4.5 Conclusion

The above discussion has demonstrated that the exclusion of maintenance debt from the discharge and the ranking of maintenance creditor's claims as concurrent in nature have serious constitutional implications on the constitutionally guaranteed rights to healthcare, water, food, social security, and human dignity. It also affects the rights of children. The discussion has also demonstrated that the inclusion of maintenance debt in the discharge and the ranking of maintenance claims as concurrent in nature is incongruent with the limitation clause in section 36 of the Constitution. Furthermore, it was demonstrated that the legal position is not in line with the value of *Ubuntu*, which forms part of 'our' constitutional jurisprudence. This chapter illustrated that the current legal position necessitates legal reform to align it with the Constitution. The current position is not surprising, considering that the Insolvency Act is 84 years old and has been in existence even before the Constitution came into being. The current insolvency regime undoubtably requires serious reconsideration so that it is able to meet the demands of the South African constitutional era.[275]

[275] See Mabe 2016 *PELJ* 19. See also Coetzee 2016 *Int. Insol. Rev.* 52–53.

CHAPTER 5

CONCLUSION

SUMMARY

5.1 Synopsis

The South African natural person insolvency law, which is primarily regulated by the Insolvency Act,[276] ranks maintenance claims as concurrent in nature and includes maintenance debt in the discharge of pre-sequestration debts as envisaged in section 129(c).[277] This is despite international trends and guidelines, which have taken a stunt of affording maintenance claims statutory preference and excluding maintenance debt from the discharge.[278] The approach followed by South Africa is problematic and dangerous, because it fails to appreciate and protect the fundamental rights of maintenance creditors, despite the major jurisprudential developments that took place in 1996.[279]

The South African jurisprudence is founded on the Constitution, which is the supreme law of the land.[280] The Constitution explicitly states that South Africa is founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.[281] Despite the latter, the legislator has failed to amend the archaic Insolvency Act to disallow for the discharge of maintenance debt and to afford maintenance creditors statutory preference. This has constitutional implications, which have been discussed and highlighted in the study.[282] The current legal position impairs on the maintenance creditors' rights to human dignity and social security, and on children's rights as guaranteed in the Constitution.[283] The violation of the latter rights

276 24 of 1936.
277 See chapter 3 para 3.4 and 3.5.
278 See chapter 2 para 2.1.
279 See chapter 4.
280 Section 2 of the *Constitution of the Republic of South Africa*, 1996.
281 Section 1(a) of the *Constitution*.
282 See chapter 4.
283 See sections 10, 27 and 28 of the *Constitution*.

is incongruent with the limitation clause in the Constitution.[284] The limitation of rights contained in chapter 2 of the Constitution can only be in terms of law of general application.[285] Furthermore, the limitation must reasonable and justifiable in an open and democratic society that is based on human dignity, equality and freedom taking into cognisance all relevant factors.[286] The limitation of the rights as discussed,[287] falls short of the requirements of the limitation clause because the harm caused by infringing the maintenance creditors' rights does not outweigh the benefits achieved by the infringement.[288] The current approach in South African natural person insolvency is further incongruent with the public policy of family support.[289] The South African approach has also be highlighted to be incongruent with the value of *Ubuntu,* which forms part of the Constitution and the African way of life.[290] It has been highlighted in the study that international trends and guidelines have moved from including "sensitive debt" as coined by The World Bank *Report*[291] in the discharge to excluding it.[292] Furthermore, internationally, statutory preference is afforded to maintenance creditors' claims.[293] Such approach is progressive and the South African legislator must take lessons therefrom.[294]

5.2 Recommendations

It is fundamental that South Africa keeps up with modern international trends and guidelines. The current insolvency legislation is archaic and does not keep up with the policy position of the South African constitutional dispensation.[295] The legislator must reconsider the current natural person insolvency regime and align it with the values on which "our" jurisprudence is founded on.[296] The Insolvency Act must be amended to afford maintenance claims statutory preference and to exclude maintenance debt, which is a "sensitive debt" from the discharge.[297] The said amendments will ensure

284 See chapter 4 para 4.3.
285 Section 36(1) of the *Constitution*.
286 *Ibid*.
287 See chapter 4 para 4.2.
288 See chapter 4 para 4.3.
289 See chapter 1 para 1.1.
290 See chapter 4 para 4.4.
291 See also Roestoff 2019 *LitNet Akademies* 833.
292 See chapter para 2.2.1.
293 *Ibid*.
294 See chapter 2 par 2.2.1.
295 Mabe 2016 *PELJ* 19. See also chapter 4.
296 *Ibid*.
297 See para 5.1.

that the constitutional rights of maintenance creditors are afforded protection. Maintenance creditors will also be freed from the burden of contributing to sequestration costs if there are insufficient funds in the free residue account.[298]

[298] See section 106 of the *Insolvency Act* 24 of 1936.

BIBLIOGRAPHY

Literature

Allen R *Oxford school dictionary and thesaurus* (Oxford University Press United Kingdom 2012)

Bertelsmann E *et al* (eds) *Mars*: *The law of insolvency in South Africa* 9th ed (Juta Cape Town 2008)

Boezaart T *Child law in South Africa* (Juta Cape Town 2009)

Boraine A and Roestoff M "Fresh start procedures for consumer debtors in South African bankruptcy law" 2002 *International Insolvency Review* 1–11

Boraine A and Roestoff M "Revisiting the state of consumer insolvency in South Africa after twenty years: The courts' approach, international guidelines and an appeal for urgent law reform (1)" 2014 *THRHR* 351–374

Boraine A and Roestoff M "The treatment of insolvency of natural persons in South African law: An appeal for a balanced integrated approach" 2014 *World Bank Legal Rev* 91–110

Boraine A and Van Heerden C "To sequestrate or not to sequestrate in view of the National Credit Act 34 of 2005: A tale of two judgements" 2010 *PERJ* 84–124

Calitz J "Developments in the United States' consumer bankruptcy law: A South African perspective" 2007 *Obiter* 397–417

Chaskalson A "Human dignity as a foundational value of our constitutional order" 2000 *SAHRJ* 193–205

Cheadle MH "Limitation of rights" in Cheadle MH, Davis DM and Haysom NRL (eds) South African constitutional law: The Bill of Rights (Lexis Nexis Durban 2020) 693-713

Clarke B "The new maintenance bill– Some incremental reform to judicial maintenance procedure" 1998 *De Rebus* 63–68

Clarke B and Van Zyl L *Handbook of the South African law of maintenance* 4th ed (Lexis Nexis Durban 2016)

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

Coetzee H “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* 18–26

Coetzee H “Is the unequal treatment of debtors in natural person insolvency law justifiable?: A South African exposition” 2016 *Int. Insol. Rev.* 36–55

Coetzee H and Roestoff M “Debt relief for South African NINA debtors and what can be learned from the European approach” 2017 *Comp. and Int’l L.J. S. Afr*. 251–274

Currie I and De Waal J *The Bill of Rights handbook* 6th ed (Juta Cape Town 2013)

Evans RG “Who owns the insolvent estate?” 1996 *TSAR* 719–724

Hahlo HR *The South African law of husband and wife* 5th ed (Juta Cape Town 1985)

Heath P “The stace Hammond grace lecture: Preferential payments on bankruptcy and liquidation in New Zealand: Are they justifiable exceptions to the parti passu rule” 1996 *Waikato L. Rev.* 24–55.

Haysom NRL “Dignity” in Cheadle MH, Davis DM and Haysom NRL (eds) South African constitutional law: The Bill of Rights (Lexis Nexis Durban 2020) 2–18

Kanamugire JC “The requirement of advantage to creditors in South African Insolvency law- A critical appraisal” 2013 *Mediterranean Journal of Social Sciences MCSER Publishing, Rome Italy* 19–36

Mabe Z “Section 27 of the *Insolvency Act* 24 of 1936 as a violation of the equality clause of the *Constitution of South Africa:* A critical analysis” 2016 *PELJ* 1–24

Mokgoro JY “*Ubuntu* and the law in South Africa” in Konrad-Adenauer-Stiftung Seminar Report *Constitution and Law Colloquium* (31 October 1997 Johannesburg) 1–11

Murithi T “A local response to the global human rights standard: the *ubuntu* perspective on human dignity” 2007 *Globalisation, Societies and Education* 277–286

Roestoff M and Coetzee H “Consumer debt relief in South Africa; Lessons from America and England; and suggestions for the way forward” 2012 *SA Merc LJ* 53–76

Roestoff M and Coetzee H “Consumer debt relief in South Africa- Should the insolvency system provide for NINA debtors? Lessons from New Zealand” 2013 *Int Insol. Rev* 188–210

Roestoff M “Insolvency restrictions, disabilities and disqualifications in South African consumer insolvency law: A legal comparative perspective” 2018 *THRHR* 393–417

Sunstein CR “Social and economic rights? Lessons from South Africa” 2000 *Const. F* 123–132

Roestoff M “Onderhoudseise en sekwestrasie ingevolge die Insolvensiewet 24 van 1936” 2019 *LitNet Akademies* 830–862

Case law

Amod v Khan 1947 (2) SA 432 (N)

Bannatyne v Bannatyne 2003 (2) BCLR 11 (CC)

Chiliza v Govendor 2016 (4) SA 397 (SCA)

Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC)

Ex Parte Ford 2009 (3) SA 376 (WCC)

Ex Parte Shmukler-Tshiko [2013] JOL 29999 (GSJ)

Gardee v Dhamanta Holdings 1978 (1) SA 1066 (N)

Grootboom v Oostenberg Municipality 2000 (3) BCLR 277 (CC)

Julie Whyte Dress (Pty) Ltd v Whitehead 1970 (3) SA 218 (D)

Lotzof v Raubenheimer 1959 (1) SA 90 (O)

Meskin and Co v Friedman 1948 (2) SA 555 (W)

Resnick v Government of the Republic of South Africa 2014 (2) SA 377 (WCC)

Stratford v Investec Bank Ltd 2015 (3) SA 1 (KH)

Samsudin v De Villers Berrange NO 2005 (3) SA 529 (N)

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

Walker v Syfret 1911 AD 141

Legislation

Bankruptcy Reform Act of 1978 (United States of America)

Constitution of the Republic of South Africa, 1996

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Customs and Excise Act 91 of 1964

Diseases in Mines and Works Act 78 of 1973

Insolvency Act 24 of 1936

Land and Agricultural Bank Act 15 of 2002

Maintenance Act 99 of 1998

Matrimonial Property Act 88 of 1984

Merchant Shipping Act 57 of 1951

National Credit Act 34 of 2005

Security by Means of Movable Property Act 57 of 1993

South African Law Reform Commission Act 19 of 1973

Unemployment Insurance Contributions Act 4 of 2002

Internet sources

Discussion Paper 86 (Project 63) Review of the law of insolvency 1999 Justice.gov.za/salrc/dpapers/dp.86.pdf accessed 29 September 2020

The World Bank *Report on the Treatment of the Insolvency of Natural Persons* (2013) http://documents1.worldbank.org/curated/en/668381468331807627/pdf/771700WP0WB0In00Box377289B00PUBLIC0.pdf accessed 29 September 2020

The South African Law Reform Commission Issue Paper 5 review of the maintenance system (1997) justice.gov.za/salrc/ipapers/ip05_prj100_1997.pdf accessed 03 November 2020.