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DEBT RELIEF AS PART OF THE SOCIAL SAFETY NET: A COMPARATIVE APPRAISAL OF THE REGULATION OF NO INCOME NO ASSET DEBTORS IN ZIMBABWE

By

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DEDICATION

Ishe Komborera Zimbabwe • Nkosi Sikeleli Zimbabwe • God Bless Zimbabwe

This is my humble contribution to a better prosperous Zimbabwe – a Zimbabwe which those that come after me may someday proudly call home. I hope and pray that every citizen plays their most sincere role to brighten their corner, for only in this way shall the sleeping giant of Zimbabwe reawaken.

May God be with us and renew our strength as we rebuild our great nation of Zimbabwe for our children and those that will come after them – may we not grow weary until our beautiful nation reclaims her glory!

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SUMMARY

Zimbabwe has recently introduced a consolidated Insolvency Act [Chapter 6:07] that came into operation on 25 June 2018. The Insolvency Act regulates the debt relief system by consolidating Zimbabwe's natural and corporate insolvency systems. This thesis sought to examine the regulation of the natural person insolvency system by the Insolvency Act with a specific focus on its provision of access to debtors with no income and no assets, the so-called No-Income-No-Asset (NINA) debtors and its provision of a concomitant discharge of debts. This analysis has determined that the Insolvency Act marginalises NINA debtors because of their dire financial circumstances that hinder them from meeting the Act's stringent access requirements to facilitate relief from over-indebtedness.

In light of the marginalisation of NINA debtors, this thesis proposes viable recommendations for reforming Zimbabwe's natural person debt relief system to ensure its inclusivity and effectiveness. These recommendations mostly emanate from the internationally regarded policies, principles and guidelines outlined in this thesis. They are also based on the comparative analysis undertaken of leading natural person insolvency systems of England and Wales, Scotland and the United States of America, and the developing consumer insolvency regime of South Africa, which is in an active process of reform.

A reformed inclusive, and effective natural person debt relief system that affords access and a concomitant discharge of debts to all "honest but unfortunate" debtors is essential because it provides a soft landing for consumers who have failed in their enterprises. Consequently, reform of Zimbabwe's natural person debt relief system is increasingly important because it might help spur the country's ailing economy that has been adversely affected by the Covid-19 pandemic and the consequences of which have had a ripple effect on consumers who have barely recovered from the adverse effects of the 2007 - 2009 global financial crisis.

Key Words: NINA debtors, access, discharge, safe landing, natural person debtors, effective, inclusive, property exemption, moratorium, spur economy and reform.

DECLARATION OF ORIGINALITY

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ACRONYMS AND ABBREVIATIONS

AiB	Accountant in Bankruptcy
Annual Insolv Law Rev	*Annual Insolvency Law Review*
BAPCPA	Bankruptcy Abuse Prevention and Consumer Protection Act
BSAC	British Southern African Company
Cambridge Journ of Economics	*Cambridge Journal of Economics*
Cap	Chapter (statute)
Ch	Chapter
CILSA	*Comparative and International Law Journal of South Africa*
Covid-19	Coronavirus Disease 2019
DRO	Debt Relief Order
Emory Bankr Dev J	*Emory Bankruptcy Developments Journal*
et al	And others
GBP	Great British pound
INSOL	Insolvency International
Int Insolv Rev	*International Insolvency Review*
IVA	Individual Voluntary Arrangement
J Consum Policy	*Journal of Consumer Policy*
Journ of Agrarian Change	*Journal of Agrarian Change*
Journ of Asian and African Studies	*Journal of Asian and African Studies*
Journ of Southern African Studies	*Journal of Southern African Studies*
LILA	Low Income Low Assets
Loy Consumer L Rev	*Loyola Consumer Law Review*
Loy LA Int'l & Comp L Rev	*Loyola of Los Angeles International and Comparative Law Review*
MAP	Minimal Asset Process
Med Journ of Social Sciences	*Mediterranean Journal of Social Sciences*
Mich J Int'J	*Michigan Journal of International Law*

NCA	National Credit Act
NCR	National Credit Regulator
NIBLeJ	*Nottingham Insolvency and Business Law e-Journal*
NINA	No Income No Assets
Nottm. LJ	*Nottingham Law Journal*
Ohio St LJ	*Ohio State Law Journal*
Para	Paragraph
Paras	Paragraphs
PELJ	*Potchefstroom Electronic Law Journal*
PILR	*Pace International Law Review*
Rev of African Political Economy	*Review of African Political Economy*
S	Section
SA Merc LJ	*South African Mercantile Law Journal*
SARS	South African Revenue Service
Ss	Sections
THRHR	*Tydskrif vir Hedendaagse Romeins-Hollandse Reg*
TSAR	*Tydskrif vir die Suid-Afrikaanse Reg*
UCLA L. Rev	*University of California Los Angeles Law Review*
Uni of Pen Law Rev	*University of Pennsylvania Law Review*
Vand J Transnat'l L	*Vanderbilt Journal of Transitional Law*
ZAR	South African rand
ZBC	Zimbabwe Broadcasting Corporation
ZIMLII	Zimbabwe Legal Information Institute
ZWD	Zimbabwe dollar

CHAPTER 1

INTRODUCTION

Summary

1.1 Background information, topic introduction and research motivation

1.2 Research objectives

1.3 Delineations and limitations

1.4 Methodology

1.5 Chapter overview

1.6 Reference methods, key references, terms and definitions

> The liberty of the subject [is] not well protected if he [is] a civil debtor…[1]

1.1 Background information, topic introduction and research motivation

The correlation between economic stability and an efficient, effective and inclusive natural person debt relief system has long been emphasised by researchers.[2] This has culminated in increased calls by researchers in both established and developing countries for the inclusion of an oft-marginalised group of debtors, namely, the No-Income-No-Asset (NINA) debtors.[3] This group, which represents millions of consumer debtors worldwide,[4] forms the subject of this study, specifically, the treatment of such debtors in the natural person insolvency system of Zimbabwe. This study juxtaposes the treatment of the NINA group of debtors in Zimbabwe against the treatment of such debtors in select established and developing jurisdictions in the field of natural person insolvency. This comparison aims to evaluate and align Zimbabwe's natural person

[1] See McGregor *Social history* 64.
[2] See Rochelle 1996 *TSAR* 319; Boraine and Roestoff 2013 *The World Bank Legal Review*; Garrido 2014 *World Bank Legal Rev* 111.
[3] See Coetzee and Roestoff 2013 *Int Insolv Rev*; *World Bank Report* 19 and 62.
[4] Ramsay 2020 *Int Insolv Rev* 5.

insolvency system with internationally regarded policies, principles and guidelines in insolvency law.

Zimbabwe used to be referred to as the "bread-basket of Africa". This was in reference to its once-successful agricultural sector, which sustained food stability in Zimbabwe and most other African states.[5] The agricultural sector collapsed in the early 2000s, which coincided with the Fast Track Land Reform Programme and has never recovered.[6] Despite the continued disintegration of the agricultural sector, it remains essential to the economy of Zimbabwe. The agricultural sector provides 60% to 70% of the country's employment and income.[7] Further, the agricultural sector, contributes an estimated 60% of the raw materials required by the industrial sector and it contributes an estimated 40% of the country's total export earnings.[8] The sector sustains a large portion of Zimbabwe's rural and urban population. The Zimbabwean government has, over the years, implemented measures to improve agricultural production following the land reform programme. These measures include the much-publicised Command Agriculture programme. The latter has reportedly been a burden on the country's finances, largely because of the perceived corruption in the programme and its failure to yield any benefit for the public.[9] Despite the agricultural sector's contribution to the country's economy and citizens' lives, it has not yet translated into large-scale development of the country due to several factors. These include the perceivable government corruption that has culminated in the economy's collapse.

The economic collapse can also be attributed to the political challenges that the country has faced over the years, along with natural disasters, which have continually plagued the Southern African country. The notable natural disasters that have

[5] See Africa Check *Was Zimbabwe* 2017 https://bit.ly/3isyhVt (accessed 3 August 2020). This report however argues that Zimbabwe was never a breadbasket of Africa because its agricultural produce was only sufficient to sustain its population.
[6] See Tonini 2005 *Spring* 94. Also, see Mkodzongi and Lawrence 2019 *Rev of African Political Economy* for a discussion of the land reform programme in Zimbabwe.
[7] Food and Agriculture Organization *FAO in emergencies* https://bit.ly/2PDJR3v (accessed 3 August 2020).
[8] See Food and Agriculture Organization *FAO in emergencies* https://bit.ly/2PDJR3v (accessed 3 August 2020).
[9] Veritas *Economic government watch* 2022 https://bit.ly/3bsfTyd (accessed 5 August 2022). Also, see in general Dube 2020 *Journ of Asian and African Studies*. Also, see Zimbabwe Parliament "Report on command agriculture" for an indication of Zimbabwe's government spending on the Command Agriculture programme.

hampered economic stability in Zimbabwe include the 2018 to 2020 drought[10] and the March 2019 cyclone.[11] Since 2018, Zimbabwe has been experiencing a drought, affecting food production in most Southern African countries.[12] The drought significantly impacted Zimbabwe because it was already experiencing a financial downturn.[13] As highlighted above, the financial turmoil began in the early 2000's – which some researchers attribute to the land reform programme.[14] The drought left a large portion of the country without any food supply and reliant on donations.[15] These factors have had a negative impact on businesses, which in turn had a ripple effect on consumers.

The economic crisis in Zimbabwe was compounded by the 2007 to 2009 global economic meltdown.[16] The global economic crisis adversely affected the export of agricultural and mining products due to a drop in commodity prices worldwide.[17] The negative effect of the global financial crisis on these sectors had a ripple effect on Zimbabwean consumers because unemployment and inflation rates soared. Consumers who have barely recovered from the effects of the global financial crisis have been hit by a second major setback stemming from the consequences of the Covid-19 pandemic.[18] Zimbabwe is among the many countries in the world that were brought to a complete standstill by the novel Covid-19 pandemic. The virus, which continues to plague many countries, has led to a worldwide financial downturn with consequences predicted to be akin to those of the American Great Depression.[19]

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[10] For a detailed look into the 2018 to 2020 drought, see Relief Web 2020 https://bit.ly/2PCxtRp (accessed 3 May 2020).
[11] See eg The World Bank *Restoring Zimbabwe's livelihoods* 2019 https://bit.ly/3aaJeYE (accessed 3 May 2020) and Oxfam *Cyclone Idai in Zimbabwe* 2019.
[12] Relief Web 2020 https://bit.ly/2PCxtRp (accessed 3 May 2020).
[13] See in general Mnangagwa 2009 *Gettysburg Economic Review* for a discussion of the economic decline in Zimbabwe.
[14] See Lahiff and Cousins 2002 *Journ of Agrarian Change* for a discussion of the land redistribution programme in Zimbabwe. However, this study predicts that the agricultural sector will stabilise with time as farmers acquire the necessarily skills and raw materials, which the Zimbabwean government has undertaken through such programmes as the Command Agriculture. Further, the collapse of the agriculture sector should not only be attributed to the land reform programme because factors such as natural disasters also played a role in the sector's demise.
[15] See UN News 2019 https://bit.ly/3fDfcOh (accessed 3 May 2020).
[16] See eg Blankenburg and Palma 2009 *Cambridge Journ of Economics* 531-538 for a discussion of the global financial crisis.
[17] Mudzingiri 2014 *Med Journ of Social Sciences* 334.
[18] See Worldometer 2020 https://bit.ly/3kvOydR (accessed 9 June 2020) for an updated overview of the corona virus infection statistics in Zimbabwe. Also, see Financial Mail 2020 https://bit.ly/3gGpX3K (accessed 3 March 2020) for the financial impact of the virus in Zimbabwe.
[19] See Fortune 2020 https://bit.ly/33IDJPC (accessed 3 March 2020).

Within this context, consumers in Zimbabwe are in a dire position due to the country's dreadful socio-economic condition. This socio-economic condition has manifested in the breakdown of the economic lives of Zimbabwean citizens and a remarkable increase in extreme poverty.[20] In 2017, the World Bank statistics estimated Zimbabwe's poverty headcount ratio (percentage of the population living below the national poverty line) at 70%.[21] The collapse of the economy, exacerbated by the high inflation rate,[22] inevitably led to the closure of numerous businesses. Operating in Zimbabwe ceased to be profitable.[23] This resulted in a countrywide retrenchment of employees, which consequently saw unemployment levels skyrocketing.[24]

The socio-economic condition in Zimbabwe has unavoidably culminated in an increase in consumer over-indebtedness. Unemployed consumer debtors affected by the high cost of living emanating from the contraction of the economy and the accompanying high inflation rate have resorted to borrowing to survive.[25] This has resulted in a growing over-indebtedness crisis. Zimbabwean consumer debtors incur debts from both formal and informal lenders. Formal lenders include commercial banks and other formal micro-finance institutions, informal lenders include unscrupulous community money lenders who charge high-interest rates (loan sharks), relatives and friends. A 2014 survey by FinScope indicated that 42% of Zimbabwe's adult population is in debt, a decrease from 52% of the adult population indicated in 2011.[26] The report further indicates that a majority of those who do not borrow needed debt but were hindered

[20] The World Bank *Zimbabwe* 2019 https://bit.ly/2XKPxNz (accessed 11 March 2020). Also, see the World Bank 2016 https://bit.ly/2DApi5H (accessed 3 May 2020) where "extreme poverty" is defined as living on less than USD1.90 per person per day.
[21] World Bank *Poverty headcount ratio* https://bit.ly/3ite4yv (accessed 8 August 2020).
[22] See The World Bank *Zimbabwe* 2022 https://t.ly/C0da (accessed 6 May 2022) where the World Bank estimated inflation to have slowed from 838% in July 2020 to 60.70% in December 2021. Also, see Trading Economics 2020 https://bit.ly/2XGWlvy (accessed 3 May 2020), which estimates the 2020 inflation rate to have risen to 676.4% in March 2020 from 540.2% in February 2020. Varying figures exist on the actual levels of inflation in Zimbabwe.
[23] Financial Times *Zimbabwe: Hurricane closure* 2013 https://bit.ly/30EX6qU (accessed on 09 August 2020).
[24] Differing unemployment figures have been presented. See Statista *2019* https://bit.ly/2CangIG (accessed 3 May 2020), which estimates the 2019 unemployment rate to be at 4.90%. However, international sources, such as the BBC news channel, have repeatedly questioned and treated the unemployment statistics provided by Zimbabwean officials with circumspection, as can be noted from BBC News 2017 https://bbc.in/2Dr1X6z (accessed 3 May 2020).
[25] See FinScope *Consumer survey* 2011 46, which indicates that 41% of the adult borrowing population in Zimbabwe, borrows for living expenses, while only 20% borrows for farming expenses.
[26] FinScope *Consumer survey* 2014 8. This study predicts that this figure has remarkably increased because of the adverse effects of the Covid-19 pandemic that caused a ripple effect on consumers who predictably have had to incur debts to survive.

from accessing credit by psychological barriers such as fear of debt and defaulting.[27] However, these figures are questionable because they do not accurately account for the unregulated informal economy.[28] There are suspicions that the true figures are much higher. The consumer debt crisis in Zimbabwe is likely to increase as the ailing economy continues to suffer from the aforementioned factors, including, the devastating Covid-19 pandemic.

The extreme contraction of the economy, which has resulted in a consumer over-indebtedness crisis, thus makes protecting vulnerable consumers in society important. Protection of over-indebted consumers through an efficient, effective and inclusive debt relief system that facilitates a discharge of debts allows such debtors to re-enter the credit economy. This is especially significant in the context of Zimbabwe, where fear of default stops most people who otherwise would have been assisted by incurring debt, from incurring such debt.

Protection of consumer debtors has the desired effect of assisting consumers already suffering from over-indebtedness and concurrently encourages debt-free consumers to enter the credit economy. Credit is essential and has been aptly described as "the lifeblood of the modern industrialised economy".[29] Consequently, affording protection to consumer debtors has a dual effect of: facilitating economic activity among consumers by enabling them to take more financial risks, knowing that there is a safety net available should they fail and also affording a discharge of debts to over-indebted consumers. Although the protection of consumers through an efficient, effective and inclusive debt relief system will not solve the broader economic crisis in Zimbabwe, it will assist in alleviating the plight of over-indebted and excluded consumers. This might in turn assist in stimulating the ailing economy.

The socio-economic situation in Zimbabwe should be juxtaposed with that in South Africa, a neighbouring country of Zimbabwe. South Africa also suffers extreme poverty

[27] See FinScope *Consumer survey* 2014 8.
[28] See IMF Working Paper *Shadow economies* 23, which submits that Zimbabwe has the third largest informal economy, as a percentage of its total economy, in the world.
[29] *Cork Report* para 9.

rates[30] and is aptly regarded as one of the unequal countries in the world.[31] In its effort to protect the vulnerable in society, South Africa implemented a social security system. The latter system aims to safeguard the indigent and vulnerable members of society.[32] Though the social security system is not aimed at alleviating the plight of over-indebted consumers, it offers citizens, including NINA debtors who qualify for the system, a much-needed reprieve by ensuring the provision of government-subsidised houses[33] and the provision of social grants.[34] This starkly contrasts with Zimbabwe, which does not provide such a safety net.[35]

Despite the benefits afforded by the South African grant system to the indigent, shortfalls can be noted concerning its relevance to the NINA group of debtors, which forms the subject of this study. The main issue of contention is the grant system's perceived unsustainability. According to the latest figures, 31% of the total population of 57 458 000 individuals received a social grant in 2018, while 44.3% of households benefited from social grants in the same year.[36] These figures are disproportionally higher than the individual tax collection by South Africa's revenue collector, which sustains the country's social security system. The latest figures indicate that, despite the country's 23.8 million registered taxpayers in 2021, only 5.4 million individuals were expected to submit their returns, while only 5.2 million individuals accounted for the assessed taxpayers in the same year.[37]

Furthermore, South Africa's social security system does not provide blanket protection to all South Africans because it is not the system's aim. This failure to provide blanket protection to all indigent South Africans results in the exclusion of some over-indebted consumers who might be better served through governmental support, such as the

[30] For a detailed discussion of poverty in South Africa, see Statistics South Africa 2019 https://bit.ly/3ipPNcY (accessed 6 April 2022) where it is estimated that at least 49.2% of the South African adult population is living below the poverty line.
[31] See Stats South Africa 2020 https://bit.ly/31zNBZl (accessed 6 April 2022) for a detailed discussion of the unequal nature of South Africa.
[32] Institute for Security Studies *Chapter 2: Overview of the South African social security system* 2008 https://bit.ly/2PGFa8Y (accessed 9 August 2020).
[33] See the National Department of Human Settlement https://bit.ly/30J6uKq (accessed 3 May 2020) for a discussion of the South African government subsidy housing programme.
[34] Satumba, Bayat and Mohamed 2007 *Journ of Economics* 34.
[35] See Nhede *The social security policy* 228 where it is submitted that the Zimbabwean social security system is exclusionary and only provides partial protection for employees in the formal sector. However, the focus of this research is the provision of a safety net through an efficient, effective and inclusive debt relief system that assists in spurring economic growth.
[36] STATS SA Statistical Release 30.
[37] SARS *Tax statistics* 2021 31.

provision of grants resulting in fewer over-indebted individuals. With this shortfall in mind, South Africa's legislature has implemented a further safety net to assist over-indebted consumers. This was done by reforming the natural person debt relief system into an inclusive system that accommodates all honest but unfortunate debtors, especially those occupying the NINA debtor category.

This reform has manifested itself in introducing a debt intervention procedure,[38] which is not yet in force, and a proposed introduction of the pre-liquidation composition.[39] The South African Law Reform Commission has continually championed the active reform of the South African debt relief system.[40] The Law Commission's review of South Africa's insolvency law commenced in the 1980s, and this culminated in the publication of *ad hoc* working documents such as: the South African Law Commission *Preferences on Insolvency* Project 37 Working Paper 1 1982 and the *Report on the Review of Preferent Claims in Insolvency* Project 37 Interim Report 1984. The Law Commission subsequently published several reports. The important one for this study is the *Report on the review of the law of insolvency*, which was published in 2000 and it contains a draft insolvency Bill and an explanatory memorandum.[41] The Law Commission also fairly recently published the report on the *Review of administration order* Project 127, published in 2020 that seeks to unify the debt review and administration procedures.[42] Because South Africa is still in an active process of reform, the natural person debt relief system is yet to be tested to determine its efficiency and effectiveness.

However, the benefits of an efficient, effective and inclusive system can be noted from established jurisdictions such as England and Wales[43] and Scotland.[44] By extracting lessons from these reputable insolvency systems and examining the current

[38] See the 2019 National Credit Amendment Act that introduces the debt intervention procedure. It was signed into law by the President of the Republic of South Africa on 13 August 2019, however, it is not yet operational. See ch 4 para 4.5.3.
[39] See ch 4 para 4.5.2.
[40] The South African Law Reform Commission (hereafter "the Law Commission"). The Law Commission was previously referred to as the South African Law Commission.
[41] In turn, the Draft Insolvency Bill sought to usher a Unified Insolvency Act into the South African debt relief system chiefly because of the fragmented approach to debt relief. The latest version of the Bill is an unofficial working document, which has been circulated among interested persons by the Department of Justice and it is hereafter referred to as 'the 2015 Draft Insolvency Bill'.
[42] See ch 4 para 4.6.
[43] See Ramsay *Personal insolvency* 102 regarding the benefits of an effective and inclusive debt relief system. Also, see ch 5 para 5.2.
[44] See ch 5 para 5.3.

developments in South Africa, a country with a shared political history and shared Roman-Dutch law influence with Zimbabwe.[45] This study proposes the introduction of a NINA debt relief procedure as a social safety, which might spur economic growth.[46]

As highlighted above, Zimbabwe suffers from consumer over-indebtedness that has plagued many households seeking to sustain their livelihoods through borrowing. Furthermore, a large portion of the Zimbabwean population is unemployed and without any income. This lack of income has resulted in extreme household debt as consumers seek to sustain their livelihoods by borrowing from families, friends, and financial institutions. Without any form of income to enable such consumers to meet their financial obligations, many citizens have become perpetually trapped in debt over the years.

Efficient, effective and inclusive natural person debt relief systems, such as those found in England and Wales, Scotland and the United States of America's insolvency regimes, afford a reprieve to such over-indebted consumers. The reprieve is achieved by facilitating a restructuring of debts and, where necessary, offering a discharge option. A discharge of debts is fundamental because it affords debtors a fresh start. This allows them to re-enter the credit economy without the burden of debts. An efficient, effective and inclusive natural person insolvency regime that affords access to the system and an accompanying discharge of debts offers many advantages. It stimulates the economy by encouraging consumers to take risks with the reassurance of a safety net to protect them in case of failure. This starkly contrasts with the position in Zimbabwe, where a lack of income inhibits over-indebted consumers from obtaining much-needed access to debt relief measures. Disposable income and/or assets are necessary to access debt relief measures in Zimbabwe because the income is utilised for repayments. At the same time, the debtor's property is liquidated through the liquidation process to facilitate the redistribution of proceeds to creditors.[47]

Zimbabwe has recently introduced a consolidated Insolvency Act [Chapter 6:07],[48] which began operation on 25 June 2018. This Act repealed the Insolvency Act

[45] See ch 3 para 3.2 and ch 5 para 5.2.1.
[46] See ch 6 for the NINA debt relief procedure proposal.
[47] See ch 3 para 3.3 for a detailed discussion of Zimbabwe's debt relief system.
[48] The Insolvency Act [Chapter 6:07] (hereafter "the Act"). The Act largely borrows from the proposed reforms in the South African debt relief system. See ch 3 para 3.3 for an evaluation of this recently introduced Insolvency Act.

[Chapter 6:04],[49] which regulated Zimbabwe's natural person debt relief system. The main aim of the newly introduced Insolvency Act [Chapter 6:07] is to provide for the administration of insolvent and assigned estates and the consolidation of insolvency legislation in Zimbabwe.[50]

It has been over four years after the commencement of the Act, and no consumer debtor has reportedly obtained relief from over-indebtedness by utilising the debt relief measures introduced by the Act.[51] No research has been undertaken to determine the causes for the underutilisation of formal natural person debt relief measures in Zimbabwe.[52] However, numerous international researchers have examined the disproportionate underutilisation of informal alternatives to insolvency procedures in contrast to formal insolvency procedures, which also affects Zimbabwe.[53] The main factors that have been highlighted include the high costs associated with formal debt relief measures, lack of knowledge of the debt relief measures among the general populace,[54] out-of-court settlements among debtors and creditors[55] and the stigma attached to bankruptcy.[56] Stigma is of major concern in insolvency systems worldwide.

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[49] The Insolvency Act [Chapter 6:04] (hereafter "the Insolvency Act (Cap 6:04)").

[50] Preamble of the Act. The Act consolidates consumer and corporate insolvency regulation into a single piece of legislation.

[51] For an overview of reported case law in Zimbabwe, see, ZIMLII *Judgments* https://t.ly/kBY7 (accessed 6 May 2022).

[52] The underutilisation may also be attributed to the lack of expertise by legal practitioners within Zimbabwe. To this end, the only institutions that presently offer the Bachelor of Laws course in Zimbabwe, namely, the University of Zimbabwe, the Great Zimbabwe University, the Ezekiel Guti University and the Midlands State University do not present the consumer insolvency law course to its students. Therefore, legal practitioners are not exposed to consumer insolvency law during their studies, which limits their expertise in this field. Furthermore, consumers in Zimbabwe also lack knowledge of this field of the law. To remedy this, the Zimbabwean government or specifically, the Council of Estate Administrators and Insolvency Practitioners, a statutory board whose main purpose is to register and regulate the conduct of estate administrators and insolvency practitioners should organise regular community outreach programmes aimed at educating the general populace about insolvency regulation in the country. The council should also publish print and electronic adverts with the nation's broadcaster aimed at educating consumers about debt relief. Lastly, the above tertiary institutions must include consumer insolvency subjects in their Bachelor of Laws curriculums.
Information regarding the curriculum of the Bachelor of Laws programme in Zimbabwe obtained from academics from various institutions in Zimbabwe is on file with the author.

[53] See *World Bank Report* 46–47. Although the *World Bank Report* is in favour of out-of-court alternative procedures, it is imperative to note that judicial proceedings are necessary because they force parties to work together and they can be utilised where extra-judicial proceedings fail.

[54] This can be effectively eradicated by introducing community outreach programmes that are aimed at educating the public about natural person insolvency.

[55] See *World Bank Report* 47 where it is argued that voluntary settlements must be favoured because their flexibility allows them to be designed to suit the needs of all parties involved in contrast to formal proceedings. This is especially relevant in the Zimbabwean situation where 22% of the adult population incurs credit from both friends and family: see the FinScope *Consumer survey* 2014 8.

[56] See Efrat 2006 *Theoretical Inquiries in Law* for a detailed discussion of the stigma attached to bankruptcy systems worldwide.

However, this may be eradicated by removing obsolete and damaging restrictions, prohibitions and disqualifications.[57]

The liquidation procedure is the primary natural person debt relief measure in Zimbabwe, in terms of the newly introduced Act. The liquidation procedure provides much-needed rehabilitation to debtors, which has the desired effect of discharging an insolvent's pre-liquidation debts.[58] Economic rehabilitation enables a debtor to restart his life, without the burden of debts. The liquidation procedure may be commenced through a voluntary application to the court by the debtor[59] or through an application by his creditors.[60] However, the procedure does not recognise the plight of "honest but unfortunate" debtors[61] because access to the system is a privilege only afforded to debtors who can afford the expenses of the procedure.[62] In this regard, when making a voluntary application for liquidation to the court, the insolvent debtor is required to provide:[63]

> [A] certificate of the Master … that sufficient security has been given for the payment of all costs in respect of the application that might be awarded against the applicant, and all costs of the liquidation of the estate that may be incurred until the appointment of a liquidator.

From the above quotation, it can be inferred that NINA debtors are hindered from accessing the liquidation procedure because of its stringent access requirements. This limitation exists because of the financial requirement that prohibits debtors with no form of disposable[64] income to gain access to the system.[65] For the qualifying debtors, conditional discharge of qualifying pre-liquidation debts can be obtained through an

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[57] European Commission *Best project report* 28. Also, see in general Mabe *A comparative analysis*.
[58] Part XIX of the Act.
[59] S 4(1) of the Act.
[60] S 6(1) of the Act.
[61] This is in stark contrast with leading jurisdictions such as the United States of America where the fresh start principle ensures relief to all honest but unfortunate debtors in terms of the Bankruptcy Reform Act of 1978. This principle influenced the global reform of natural person insolvency regimes by moving away from mostly discriminatory creditor-oriented debt relief systems to inclusive regimes that afford protection to all categories of debtors, especially the NINA debtor category. This influence can be noted in countries such as South Africa, which is in an active process of implementing the inclusive debt intervention procedure in terms of the National Credit Amendment Act 7 of 2019. See ch 2 para 2.2 for a discussion of the fresh start principle within the American bankruptcy system.
[62] See s 88 of the Act for an indication of the costs associated with the liquidation procedure.
[63] S 4(4)(b) of the Act.
[64] Because this study prefers the term "disposable income", it thus also includes low earning debtors in the definition of NINA debtors. Therefore, reference to NINA debtors throughout this study does not strictly refer to debtors with no income and no assets but also includes low earning LILA debtors who do not have the requisite disposable income and/assets.
[65] Therefore, the liquidation procedure may be regarded as exclusionary because it distinguishes between debtors who can meet the procedure's stringent financial requirements and those who cannot. The latter mostly fall within the NINA debtor category.

application by a debtor to the court for rehabilitation[66] or automatically after a ten-year period[67] unless it can be proved that it is in the interest of justice for the debtor to remain under the liquidation process.[68] Rehabilitation has the effect of ending the liquidation process,[69] offering a discharge of pre-liquidation debts[70] and relieving the debtor of all disabilities that existed because of the liquidation.[71] However, it must be noted that the discharge option only applies to debts which were due, or the cause of which had arisen on or before the date of liquidation and which did not arise out of any fraud on the debtor's part.[72]

Over and above the exclusion of NINA debtors emanating from the procedure's stringent access requirements, the procedure further marginalises NINA debtors through its pro-creditor requirements. The creditor-oriented nature of the liquidation procedure is highlighted through, for instance, the "advantage for creditors" requirement which runs throughout the Act.[73] To this end, a court may only grant an order of liquidation if it is proved that such liquidation is to the advantage of creditors.[74]

In addition to the liquidation procedure, a debtor who wishes to access the Zimbabwean natural person debt relief system may also utilise the statutory composition measures.[75] The statutory composition measures envisage a voluntary debt restructuring agreement between a debtor and his creditors. The composition measures are divided into two procedures: the pre-liquidation composition[76] and the

[66] S 106 of the Act. This application requires the debtor to prove that he has met the financial obligations required of him through the liquidation procedure.
[67] S 108 of the Act.
[68] S 108 of the Act.
[69] S 109(1)(a) of the Act.
[70] S 109(1)(b) of the Act.
[71] S 109(1)(c) of the Act.
[72] S 109(1)(b) of the Act.
[73] See, ss 4(8)(a)(ii), 14(1)(b)(i), 15(1)(c) and 50(6) of the Act.
[74] This is in contrast with international trends in insolvency that call for a shift from creditor-oriented systems to systems that balance the interests of the debtor and his creditors along with those of society. See Boraine and Roestoff 2014 *THRHR*; Coetzee 2016 *Int Insolv Rev*. Also, see ch 3 paras 2.4 and 2.5.
[75] Part XXII of the Act.
[76] S 119 of the Act. The use of the term "pre-liquidation" is misleading because it creates the impression that the procedure is only available to debtors who intend or are in the process of accessing the liquidation procedure, but who have not yet obtained an order of liquidation or where the liquidator is yet to liquidate the debtor's property. However, it might be interpreted that the use of the term merely points to the procedure being accessible to debtors who have not applied or accessed the liquidation procedure. The latter interpretation is preferred because it might accommodate NINA debtors who cannot access the liquidation procedure. See Coetzee 2017 *THRHR* 18 (ch 3 para 3.3.3).

post-liquidation composition measure.[77] However, the post-liquidation composition measure is not an alternative to the liquidation composition.

The pre-liquidation composition entails an out-of-court negotiated settlement, concluded by a debtor and two-thirds or more of his creditors. The settlement is binding between the debtor and all creditors. The measure is a transplant of the proposed pre-liquidation composition in the South African natural person debt relief system in terms of the 2015 Draft Insolvency Bill. The proposed measure in the South African debt relief system has been criticised because it forces NINA debtors through a negotiation phase, despite lacking negotiating power.[78] The Zimbabwean pre-liquidation composition may be accessed by an insolvent debtor with debts of less than ZWD20 000 who cannot meet his financial obligations.[79] A debtor may initiate the process by lodging a signed copy of the composition and a sworn statement with an administrator.[80] After receiving an application for composition, the administrator must arrange a hearing between the debtor and his creditors.[81] A moratorium on debt enforcement becomes effective between determining a date for a hearing and the conclusion of the hearing.[82] At the hearing, the administrator and any interested credit provider may investigate and question the debtor's financial circumstances.[83] Two-thirds of the concurrent creditors must accept the composition for it to be binding between the debtor and his creditors.[84]

The pre-liquidation composition is not suited to NINA debtors' needs. Despite being a streamlined procedure that does not carry the same procedural costs associated with the liquidation procedure, it is debatable whether any group of debtors can successfully utilise this procedure. This is because the pre-liquidation measure requires an agreement between a debtor and at least two-thirds of concurrent creditors despite occupying an unequal bargaining position in relation to one another. Because

[77] S 120 of the Act. See ch 3 para 3.3.2.3.
[78] Coetzee 2017 *THRHR* 25.
[79] S 119(1) of the Act. Due to the high inflation rate in Zimbabwe the monetary values outlined in the current and repealed insolvency statutes shall only be referred to in passing because they do not reflect the reality in practice and neither can a viable recommendation be made because of the unstable and volatile nature of the Zimbabwean currency and the general economy.
[80] S 119(1) of the Act.
[81] S 119(6) read with s 119(7) of the Act.
[82] S 119(29) of the Act. Also, see Coetzee 2017 *THRHR* 23 in the context of the South African proposed pre-liquidation composition, where it is submitted that the moratorium on debt enforcement must become effective once a debtor applies for the procedure.
[83] S 119(8) of the Act.
[84] S 119(15) of the Act.

NINA debtors do not have anything to offer creditors, they do not have any bargaining power, and an agreement is thus highly improbable.[85] Even where a debt restructuring proposal is accepted, a NINA debtor will likely not be able to meet his obligations because NINA debtors lack the requisite excess income and/or assets to enable a re-arrangement of debts.

Non-acceptance of the composition by creditors triggers the second part of the procedure, which leads to a discharge of debts. In this regard, where a majority of creditors have rejected the composition, and the debtor cannot make a substantially different offer to creditors than he had offered, the administrator must declare that the proceedings have ceased.[86] After that, the administrator must lodge a copy of the declaration with the Master of the High Court. Upon application by the debtor, the Master may grant a discharge of unsecured debts if:[87]

> (i) [T]he debtor satisfies the Master that the administrator and all known creditors were given standard notice of the application for the discharge with a copy of the debtor's application at least 28 days before the application to the Master; and
> (ii) the Master is satisfied after consideration of comments, if any, by creditors and the administrator and the application by the debtor –
> A. that the composition was the best offer which the debtor could make to creditors;
> B. that the inability of the debtor to pay debts in full was not caused by criminal or inappropriate behaviour by the debtor.

It is praiseworthy that the pre-liquidation composition can lead to a possible discharge of debts for *bona fide* debtors. However, the procedure is not suited to NINA debtors' needs.[88] The pre-liquidation composition is initiated by an offer for a debt re-arrangement, which NINA debtors cannot make because they do not have the excess income or assets to make an offer for composition. Where a NINA debtor, who lacks the requisite income and/or assets, makes an offer for composition, the offer will not result in a financial benefit for creditors because the debtor is incapable of meeting his obligations in terms of the offer. Thus, this reinforces the view that the negotiation phase of the pre-liquidation composition is not suitable for the financial circumstances of NINA debtors who lack any negotiating power. While evaluating the South African proposed pre-liquidation composition, Coetzee[89] submits that "administrators would further not be willing to set security where there is insufficient value in the estate to

[85] See Coetzee 2017 *THRHR* 25.
[86] S 119(28)(a) of the Act.
[87] S 119(28)(b) of the Act.
[88] See Coetzee 2017 *THRHR* 25 where the same determination is made regarding the proposed procedure in the South African debt relief system.
[89] Coetzee 2017 *THRHR* 25.

cover costs". Furthermore, the procedural costs, which include the administrator's expenses, render the procedure unaffordable to indigent NINA debtors.

Additionally, a debtor who has gained access to the liquidation procedure can settle with his creditors through the post-liquidation composition.[90] A debtor can initiate the post-liquidation composition procedure by lodging a written composition offer with the liquidator.[91] The offer of composition may be lodged "at any time after issuing the first liquidation order but after he has sent his statement of affairs".[92] The post-liquidation composition is a debt re-arrangement settlement. It is debatable whether the procedure is suited to the needs of NINA debtors because it is only available to debtors who have already gained access to the liquidation procedure. As indicated above, NINA debtors cannot access the liquidation process because of the procedure's stringent access requirements. The post-liquidation composition is not an alternative measure because accessing it depends on one's access to the liquidation measure.

Therefore, it is arguable whether the liquidation or the pre-and post-liquidation compositions are suited to the needs of NINA debtors, potentially leaving them vulnerable to creditor intimidation because of the lack of statutory protection afforded to this group of debtors.

In summary, this study examines Zimbabwe's natural person debt relief system and argues for its reform. The call for reform argues for introducing an efficient, effective and inclusive system that caters to the needs of all "honest but unfortunate" debtors, especially NINA debtors. Such developments should form part of broader reforms, which should be aimed at spurring economic growth in Zimbabwe.

1.2 Research objectives

Over the years, there has been increased calls for reform of natural person debt relief systems worldwide by including a commonly neglected group of debtors, namely the NINA debtor group.[93] Internationally, this group constitutes the largest part of over-

[90] S 120 of the Act.
[91] S 120(1) of the Act.
[92] S 120(1) of the Act.
[93] See Coetzee 2016 *Int Insolv Rev*; Frade and De Jesus 2020 *Int Insolv Rev*; Heuer 2020 *Int Insolv Rev*; Schwartz and Ben-Ishai 2020 *Int Insolv Rev*.

indebted consumers, and as such, attention must be directed to their plight, namely, the inability to access debt relief measures. Such attention is especially necessary for Zimbabwe because of the socio-economic turmoil that has devastating financial consequences on consumers. In light of this, this study determines how the Zimbabwean natural person debt relief system inhibits or permits NINA debtors from accessing debt relief through the liquidation and composition measures. The current state of affairs, concerning debt relief for insolvent natural person debtors in Zimbabwe, is compared to the growing international debt relief trends that seek to provide recognition and protection to this excluded group of debtors.

Consequently, the main objective of this study is to critically examine the current natural person debt relief system in Zimbabwe with a particular focus on the extent to which it affords access and relief[94] to NINA debtors. In pursuit of the aforementioned main objective, the related aims of this study are to:

a. Determine the internationally recognised principles of an efficient, effective and inclusive natural person debt relief system;
b. Determine the extent to which the Zimbabwean debt relief system caters to the needs of natural person insolvents and, more particularly, to the needs of NINA debtors;
c. Investigate the debt relief systems of jurisdictions such as England and Wales, South Africa and Scotland that have either successfully provided, or are in an active process of reform to provide, for the needs of NINA debtors through efficient, effective and inclusive systems that provide access to the system and a concomitant discharge of debts; and
d. Advance relevant recommendations for developing the natural person debt relief system in Zimbabwe with a focus on the NINA group of debtors.

1.3 Delineation and limitations

The preventative measures for indebtedness are not discussed in this study. A study of possible preventive measures will derail the focus of this research. It will result in a plurality of arguments because this study is only aimed at considering the treatment

[94] Relief relates to a fresh start or economic rehabilitation emanating from a discharge option.

of over-indebted consumers. Furthermore, this study will not examine the broader insolvency landscape in Zimbabwe beyond natural person insolvency law. In the latter respect, corporate insolvency is not considered.

1.4 Methodology

This research is based on a literature review of legislation, case law, books, journal articles, thesis, and leading international reports on natural person insolvency. As mentioned above, this study examines Zimbabwe's natural person debt relief system with a specific focus on the system's regulation of the NINA category of debtors. This is achieved by analysing the recently introduced Insolvency Act [Chapter 6:07], which regulates the debt relief system in Zimbabwe. An evaluation of the Zimbabwean debt relief system is supplemented by a comparative study of established and developing jurisdictions in natural person debt relief regulation, namely, that of England and Wales, South Africa and Scotland, to determine their regulation of NINA debtors. Attention is also directed towards the United States of America's natural person debt relief system, albeit from a policy perspective. The United States of America's consumer insolvency system is pivotal because the "fresh start" principle emerged from this jurisdiction. The fresh start principle pioneered the philosophy of "honest but unfortunate debtors" – a philosophy, which does not exist in the Zimbabwean natural person debt relief system.

Examining internationally regarded policies, principles and guidelines serve as the basis for this study. This is facilitated by an analysis of the *World Bank Report on the treatment of the insolvency of natural persons* 2013[95] and the INSOL International *Consumer debt report: Report of findings and recommendations* 2001 and 2011.[96]

As highlighted above, the majority of the provisions in the Insolvency Act [Chapter 6:07] have been largely influenced by the South African insolvency law. This is reflected by the transplanted pre- and post-liquidation composition measures and other secondary reforms implemented therein. Because this study seeks to comprehend the treatment of NINA debtors by Zimbabwe's insolvency law and place this regulation in the proper context, it is imperative to determine how the law

[95] *World Bank Report*.
[96] *INSOL Consumer report* I and *INSOL Consumer report* II.

developed in the jurisdiction that influenced it. This prompts the need for an evaluation of the South African natural person debt relief system, which is in an active process of reform to shift from an exclusionary system[97] to an inclusive system that caters for the needs of NINA debtors. The current reform of the South African debt relief system has seen the introduction of the debt intervention measure in terms of the National Credit Amendment Act[98] and the proposed introduction of the pre-liquidation composition in the 2015 Draft Insolvency Bill. In addition to the reform initiatives, the South African debt relief system also allows debtors to access the system through secondary[99] debt relief measures, namely, the debt review procedure[100] and the administration order.[101]

Furthermore, this study also examines the regulation of NINA debtors in England and Wales's natural person debt relief system. Of major interest in this regard is the debt relief order that was incorporated into the Insolvency Act[102] through the Tribunals, Courts and Enforcement Act.[103] The debt relief order is of interest to this study as it comprehensively caters to the needs of NINA debtors by offering access and a concomitant discharge option. The debt relief order is pro-debtor, which contrasts with the Zimbabwean natural person debt relief system that champions the interests of creditors at the expense of debtors. England and Wales's natural person debt relief system has been chosen because it provides a holistic indication of the benefits that a social safety net affords by encouraging consumers to pursue entrepreneurial enterprises. This is important in a developing country like Zimbabwe, which is characterised by high unemployment and extreme poverty; and lacks such a safety net that can potentially stimulate the economy by encouraging entrepreneurship. Additionally, because of the political history of Zimbabwe, strong English influences are still evident in its legal system, as is the position with South Africa. The choice of using the debt relief system of England and Wales for a comparative study has been

[97] See Coetzee 2016 *Int Insolv Rev* 36; Evans 2002 *Int Insolv Rev* 34; Boraine and Roestoff 2014 *THRHR* 374; Coetzee *A comparative reappraisal* 12.
[98] 7 of 2019.
[99] The primary debt relief measure is the sequestration procedure, which is regulated by the Insolvency Act 24 of 1936. Although it is not the main aim of the Act, the sequestration procedure is essential because it results in a discharge of debts.
[100] See s 86 of the National Credit Act 34 of 2005. Also, see ch 4 para 4.3.2 for a discussion of the debt review procedure.
[101] See s 74 of the Magistrates' Courts Act 32 of 1944. Also, see ch 4 para 4.3.3 for a discussion of the administration order procedure.
[102] Act of 1986.
[103] Act of 2007.

prompted by its comprehensive NINA regulation that can potentially provide a framework for developing countries like Zimbabwe and the influence that this jurisdiction continues to exert on the Zimbabwean legal system.

Protecting consumers who have been adversely affected by the socio-economic situation in Zimbabwe, which culminated in a debt crisis, forms one of the motivations for this study. The Covid-19 pandemic has compounded consumer over-indebtedness. This has prompted the need to examine Scotland's natural person debt relief system, specifically the Minimal Asset Process,[104] which has recently been reformed in response to the Covid-19 pandemic.[105] The reform of the procedure was instigated by the need to protect over-indebted consumers affected by the pandemic from further financial turmoil. Despite having a sound social security system and a low rate of poverty, Scotland responded to the Covid-19 pandemic by implementing a further safety net to protect consumers from further financial ruin. Measures taken by Scotland are of interest to a developing country like Zimbabwe, characterised by high levels of poverty and a lack of a sound social security system that protects the indigent from the financial impact of external factors, such as pandemics. Further, examining Scotland's debt relief response to the Covid-19 pandemic is pivotal for a developing country like Zimbabwe because it provides essential lessons that may be implemented in the pursuit of protection of the currently marginalised NINA debtors in Zimbabwe.

1.5 Chapter overview

a. Chapter one provides the introduction to this study. It constitutes the background, highlighting why such a study is imperative. This chapter also contains the research objectives, delineations and limitations of the study and the methodology applied.

b. Chapter two examines the internationally regarded policies, regulatory principles and guidelines relevant to consumer insolvency law. This chapter focuses on the "fresh start" principle, which originated in the insolvency system of the United States of America and the more nuanced European "earned fresh start principle". Additionally, this chapter discusses the internationally regarded

[104] S 2(2) and ch 1 of the Bankruptcy Act 2016.
[105] Part 5 of the Coronavirus (Scotland) (No.2) Act 2020.

policies stemming from various crucial international reports, such as the *INSOL Consumer reports* and the *World Bank Report*. This chapter is important because it describes international standards used to benchmark the Zimbabwean system. It also serves as a guideline to inform possible recommendations for developing the Zimbabwean natural person debt relief system.

c. Chapter three focuses on the current debt relief measures in Zimbabwe. This chapter examines the historical development of the insolvency system and the problems that have arisen over time concerning access to debt relief measures and a discharge of debts for NINA debtors. It evaluates whether the newly introduced Insolvency Act [Chapter 6:07] has addressed the identified problems. This study of the Act focuses mainly on identifying the extent to which the Act provides access to debt relief measures for NINA debtors and a concomitant discharge of debts. Measures that are considered in this chapter are the liquidation procedure and the pre-and post-liquidation composition. Crucially, these debt relief measures are evaluated according to the internationally regarded principles outlined in chapter two.

d. Chapter four focuses on the natural person debt relief measures in South Africa. The latter has recently made an effort to move away from an exclusionary consumer debt relief system to a more inclusive system that affords access and a concomitant discharge of debts to all honest but unfortunate debtors, regardless of their financial circumstances. This reform is still in progress and can be inferred from the current development and proposed introduction of the debt intervention procedure in terms of the National Credit Amendment Act 7 of 2019.

Additionally, attention is also directed towards the proposed pre-liquidation composition first proposed in 2000 by the Law Commission in terms of the South African Law Commission *Report on the review of the law of insolvency* 2000.[106] The provisions of the proposed pre- and post-liquidation composition measures have been adopted in the Zimbabwean debt relief system. This

[106] 2000 Draft Insolvency Bill. In the latest version of the Bill circulated by the Department of Justice, it is proposed that the pre-liquidation composition be inserted into the Insolvency Act 24 of 1936 (Cl 118 of the 2015 Draft Insolvency Bill).

chapter further highlights the recent reform proposals by the Law Commission published in 2020 through the *Report on the review of administration orders* Project 127, along with the recent reform proposals introduced through the Lower Courts Bill that was published for public consultation on 29 April 2022. The former proposal seeks to amend the debt review measure and the administration order procedure, while the latter seeks to reform the administration order procedure.

e. Chapter five considers the United Kingdom's approach to natural person debt relief. This chapter focuses on how some of the UK's jurisdictions, namely, England and Wales, and Scotland have been able to protect NINA debtors adequately. Additionally, this chapter contrasts the fresh start principle, which originated in the United States of America's bankruptcy system and the earned fresh start policy that underlies the aforementioned European jurisdictions. A conclusion is reached as to which of the two approaches, or a more nuanced approach, is best suited for implementation in Zimbabwe.

f. Chapter six is the concluding chapter. This chapter provides comments and possible recommendations for reforming the Zimbabwean natural person debt relief system to align this system with international policies, principles, and trends in insolvency and – more importantly – to serve its socio-economic environment.

1.6 Reference methods, key references, terms and definitions

a. Full citations of sources along with abbreviated "modes of citation" used in this study, are provided in the bibliography.

b. This study uses the masculine form; unless indicated otherwise, any such reference must be read as including the feminine form.

c. This study refers to No-Income-No-Asset (NINA) debtors and unless indicated otherwise, any such reference must be read as including Low-Income-Low-Asset (LILA) debtors. Therefore, NINA debtors must be read to refer to all debtors with insufficient attachable assets and insufficient income to contribute towards debt repayment.

d. The law, as stated in this thesis reflects the position as of 30 September 2022.

e. The following terms are used interchangeably in the course of this study:

(i) insolvent natural persons and consumer debtors;
(ii) insolvency and bankruptcy;
(iii) excess and disposable;
(iv) insolvency regime and insolvency system; and,
(v) natural person insolvency, personal insolvency and consumer insolvency.

CHAPTER 2

INTERNATIONAL POLICIES, PRINCIPLES AND GUIDELINES IN NATURAL PERSON INSOLVENCY LAW

Summary

2.1 Introduction

The fairly new natural person insolvency regulation in developing jurisdictions primarily focuses on the satisfaction of creditors' claims. In contrast, insolvency systems in well-developed jurisdictions chiefly seek to balance the interests of all stakeholders in insolvency.[1] This distinction has sparked global interest among researchers regarding the need to develop debt relief systems in developing jurisdictions from exclusive creditor-oriented regimes to efficient, effective and inclusive systems – that balance the interests of all stakeholders. Global interest among researchers was largely propelled by the 2007 - 2009 global financial crisis that had a disproportionately adversely effected consumers.[2] With this in mind, this chapter highlights the internationally regarded policies, principles and guidelines that underlie the well-developed and leading insolvency regimes worldwide.

[1] See Litchtash 2011 *Loy LA Int'l & Comp L Rev* 170. Also, see Spooner 2015 *NIBLeJ* 540.

[2] See *World Bank Report on the treatment of insolvency of natural persons* 1 (hereafter "*World Bank Report"*). This study predicts that interest towards consumer insolvency regulation will increase as researchers seek solutions to mitigate the adverse effects of the Covid-19 pandemic on consumers.

Leading reports in consumer insolvency are explored to determine international best practices, principles and guidelines. These reports include the INSOL International *Consumer debt report: Report of findings and recommendations* 2001 and 2011[3] and the *World Bank Report on the treatment of insolvency of natural persons* 2013.[4] Examining these reports aims to highlight the best practice in consumer insolvency regulation that facilitates the provision of comprehensive protection to the often marginalised indigent group of debtors, the so-called No-Income-No-Asset (NINA) debtors that form the subject of this study. However, before exploring these reports, examining the fresh start principle, which originated in the United States of America's debt relief system,[5] is undertaken.

This chapter is structured as follows in ascertaining international best practices, principles, and guidelines in natural person insolvency. Paragraph two provides an analysis of the fresh start principle that originated in the USA insolvency system and has positively impacted various insolvency regimes worldwide and has influenced the reform of these systems.[6] Thereafter, paragraph three explores prominent reports that have impacted the general European natural person debt relief landscape. Paragraph four considers the *INSOL Consumer reports*, while paragraph five examines the *World Bank Report*. Paragraphs four and five are the most important in this chapter because they provide a detailed overview of internationally accepted policies, principles and guidelines that are essential in creating an efficient, effective and inclusive debt relief system, which is the core purpose of this chapter. Paragraph six explores the discharge principle, which constitutes one of the fundamental pillars of an effective and inclusive debt relief system. This exploration collates the discussion undertaken regarding the discharge principle in the American bankruptcy system and the discussion of the leading reports on insolvency. Further, paragraph six also evaluates the justifiability of the discharge principle in contemporary free market economies. Lastly, paragraph seven provides concluding remarks and recommendations regarding the policies, principles and guidelines. These are essential for a developing

[3] *INSOL Consumer report* I and *INSOL Consumer report* II (referred to collectively as 'the *INSOL Consumer reports"*).
[4] *World Bank Report*.
[5] Hereafter referred to as the "American or USA bankruptcy system". However, it is imperative to note that the notion of a statutory discharge had already been acknowledged in English law – notably around 1976 through the inception of the Insolvency Act 1976 (see ch 5 para 5.2.1).
[6] See Evans *A critical analysis* ch 6 for a detailed discussion of the American bankruptcy system. Also, see in general Jackson *The logic and limits*.

jurisdiction, like Zimbabwe, seeking to reform from a mere debt enforcement system to an efficient, effective and inclusive system that balances the interests of all stakeholders in insolvency.

2.2 The fresh start philosophy: An American approach to debt relief

2.2.1 General background

The fresh start approach to debt relief emerged from the American bankruptcy system which the Bankruptcy Reform Act regulates.[7] The fresh start policy ensures relief from indebtedness to all "honest but unfortunate debtors"[8] through a statutory right to a discharge of pre-bankruptcy debts.[9] The phrase "honest but unfortunate debtor" was coined in *Local Loan Co v Hunt* where it was held that:[10]

> Bankruptcy gives to the *honest but unfortunate debtor* who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt (own emphasis).

The discharge option and an exemption feature are key tenets of the American fresh start policy. On the one hand, discharge refers to the "freeing" of an insolvent from his past obligations.[11] This removes the burden of debts from the insolvent and allows him to regain self-esteem and once again become a productive member of society.[12] Mabe[13] submits that the discharge provision becomes a valid defence against any collection action by creditors by: prohibiting creditors from not only commencing an action and from using collection processes to collect, recover, or offset discharged debts. It also prohibits all other efforts to convince the debtor to pay. Consequently,

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[7] The Bankruptcy Reform Act of 1978 (hereafter the "Bankruptcy Code"). The American system uses the term bankruptcy in contrast to Zimbabwe where the term "insolvency" is preferred. However, these terms should be read interchangeably unless indicated otherwise.

[8] *Local Loan Co v Hunt* 1934 292 US 244 para 12. Affording a discharge of debts to all honest but unfortunate debtors is in contrast to the position in Zimbabwe's insolvency system, which only affords relief from indebtedness to debtors with excess income and/or disposable assets (see ch 3 para 3.3).

[9] Van Apeldoorn 2008 *Int Insolv Rev* 66 where this statutory right to a discharge is summarised as "an (almost) automatic right to be discharged from pre-bankruptcy debts in a fairly quick and formal bankruptcy proceedings".

[10] *Local Loan Co v Hunt* 1934 292 US 244.

[11] Ferriell and Janger *Understanding bankruptcy* 4.

[12] Gross *Failure and forgiveness* 94.

[13] Mabe *A comparative analysis* 218.

discharge plays a dual role of releasing the debtor from his past financial obligations and protecting him from some of the adverse consequences of the release.[14]

On the other hand, exemption refers to excluding an insolvent's essential property from the liquidation process. An exemption is essential in improving the outcome of a discharge by providing an insolvent with the necessities to begin a new economic life without having to incur further debt for life's necessities.[15] Jackson[16] argues that the discharge and exemption features of the fresh start policy are also essential in ensuring that debtors are given a head-start. To this end, he refers to *Lines v Frederick*[17] where the court points out that its order "not only permitted [the debtor] a fresh start, it gave him a head start".

Huls[18] also focuses on the fresh start policy's prohibition on discriminating provisions against a bankrupt, which he regards as a pivotal third key tenet of the fresh start policy. Removing discriminatory provisions against a discharged debtor is essential because, as highlighted above, it eradicates the stigma often attached to bankruptcy.[19]

In principle, the fresh start policy facilitates a discharge of debts to some[20] debtors without needing partial debt repayment.[21] This is essential because it allows all categories of debtors, especially the NINA category of debtors, who will gain access to the bankruptcy system, to obtain much-needed relief from indebtedness without inhibiting financial requirement in jurisdictions such as Zimbabwe.

Various rationalisations that seek to justify the introduction of a liberal American bankruptcy system, through the fresh start policy, have been advanced by many researchers. These rationalisations include the rehabilitation, mercy, and collection themes.[22]

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[14] See Jackson *The logic and limits* 225.
[15] *Patterson v Shumate* 504 U.S 753 (1992).
[16] See Jackson *The logic and limits* 227-228.
[17] *Lines v Frederick* 400 US 18 21 (1970); Jackson *The logic and limits* 227-228.
[18] Huls 1993 *J Consum Policy* 127.
[19] Ch 1 para 1.1. Also, see para 2.5.3 for a discussion of stigma as a countervailing factor in the implementation of an effective insolvency system as outlined in the *World Bank Report*.
[20] The Chapter 7 liquidation procedure. See para 2.2.2.1 below.
[21] This is in stark contrast with the Zimbabwean insolvency system where repayment is a pre-requisite for a debtor to obtain relief (see ch 3 para 3.3).
[22] Kilborn 2003 *Ohio St LJ* 864-883.

2.2.2 The legislative framework

Natural person insolvents can access the American bankruptcy system by utilising either the Chapter 7[23] or Chapter 13[24] route to a fresh start. Chapter 7 provides for the liquidation procedure, while Chapter 13 provides for a debt restructuring procedure that is accessible to debtors with a steady source of income to the exclusion of NINA debtors.[25] A detailed discussion of these procedures follows hereunder.

2.2.2.1 Chapter 7 liquidation procedure

The Chapter 7 bankruptcy procedure can be commenced by applying to the Bankruptcy Court.[26] The application must be filed by a lawyer on behalf of the debtor or his creditors. The debtor's insolvency is not a requirement for a bankruptcy filing.[27] After applying, the debtor must submit all non-exempt property to the trustee and the trustee, must after that liquidate the non-exempt property and distribute the proceeds to the debtor's creditors. Submission of the non-exempt property leads to an immediate and unconditional discharge of the insolvent's unsecured debts.[28] A discharge has a dual effect of freeing the debtor from his debts and further prohibiting any future claims against the debtor's property that he acquires after obtaining a fresh start.[29] Therefore, a fresh start is important because it ensures that debtors who have obtained a discharge from indebtedness are granted the opportunity to re-enter the credit market free from past debts.

Where a debtor has no assets or only has exempt property, the liquidation procedure grants an immediate discharge to the indigent debtor.[30] It is crucial to understand that debtors may obtain a discharge of debts through the Chapter 7 procedure without

[23] Ss 701-784 of the Bankruptcy Code.
[24] Ss 1301-1330 of the Bankruptcy Code.
[25] S 101(30) of the Bankruptcy Code.
[26] The American bankruptcy courts, that were created in 1978, function as units of the district courts and have subject-matter jurisdiction over bankruptcy cases.
[27] Kilborn 2005 *Mich J Int'l* 632. This is in stark contrast with the Zimbabwean insolvency system where the debtor or his creditors must successfully prove that the debtor is insolvent to access the debt relief system (see ch 3 para 3.3.2).
[28] Ss 725-726 of the Bankruptcy Code.
[29] Evans 2010 *CILSA* 339.
[30] Ss 725-726 of the Bankruptcy Code.

submitting any assets for the liquidation process.[31] In light of this, it may thus be concluded at the onset that the Chapter 7 procedure accommodates all categories of debtors, especially, NINA debtors who have no disposable property, the proceeds of which may be distributed among creditors. Where such debtors are involved, the bankruptcy court may, upon request, waive all procedural fees associated with a Chapter 7 application if the applicant is experiencing a serious financial challenge.[32] The waiting period for the Chapter 7 procedure is eight years; thus, a debtor may only access this procedure after eight years has lapsed from the date of filing of an application, which led to a successful discharge.[33]

It is also important to note that not all debts are dischargeable under the Chapter 7 liquidation procedure. Thus, some post-petition debts are not dischargeable. Some may be discharged if specific provisions of the Bankruptcy Code treat them as pre-petition debts.[34] Furthermore, this procedure prohibits the discharge of tax debts, family obligations such as domestic support, and fraudulently obtained debts.[35]

2.2.2.2 Chapter 13 repayment procedure

The Chapter 13 procedure is a voluntary debt repayment procedure accessible to debtors with a steady source of income.[36] This procedure allows a debtor to meet his financial obligations for a stated period without creditor intimidation.[37] Unlike the Chapter 7 liquidation procedure, the Chapter 13 procedure does not require a debtor to submit his property for liquidation. In terms of this procedure, a repayment plan must be arranged. To this end, a debtor's disposable income[38] is essential to meet his

[31] This facilitates access to the procedure to all categories of debtors, specifically, the NINA debtor category. However, this safe landing may potentially encourage reckless behaviour among debtors such as being less prudent with their finances with the assurance of an ever-present safety net ready to bail them from their own reckless decisions. See para 2.5.3 for a discussion of moral hazard.
[32] S 1930(f) of the United States Code 2016. Also, see United States Courts https://bit.ly/3qZaRxB (accessed 5 April 2022).
[33] S 727(a) of the Bankruptcy Code.
[34] Ss 502 and 727(b) of the Bankruptcy Code. Waiting period refers to the period between two discharges permitted in law (see par 2.4.1.2.).
[35] S 523 of the Bankruptcy Code.
[36] S 101(30) of the Bankruptcy Code.
[37] See eg, Whitford 1999 *J Consum Policy* 183.
[38] Disposable income refers to income not reasonably necessary for the debtor's household expenses (S 1325(b)(2) of the Bankruptcy Code). NINA debtors cannot gain access to the procedure because they lack the requisite disposable income that is essential for the procedure.

obligations through a three-year repayment plan.[39] A discharge of debts may only be granted if the debtor has complied with the procedure's repayment requirements.[40]

Where an insolvent encounters a financial misfortune and cannot meet his obligations in terms of the procedure, he may apply to the court for a hardship discharge.[41] A hardship discharge has the effect of affording an immediate and unconditional discharge of the insolvent's debts. To obtain a hardship discharge, the debtor must:[42]

(i) Convince the court that his failure to complete the plan is due to circumstances beyond his control;
(ii) Show that creditors have been paid at least the liquidation value of their unsecured claims; and
(iii) Prove that the amendment of the plan is not practicable.

As highlighted above, one of the requirements for accessing the Chapter 13 procedure is a steady source of income. Thus, NINA debtors with no income, or the necessary disposable income, cannot access this procedure. Consequently, NINA debtors seeking access to the USA bankruptcy system can only access the Chapter 7 liquidation procedure because the Chapter 13 stringent financial requirement is beyond their reach. However, the hardship discharge option gives NINA debtors, who had a steady source of income during the application stage and fell on tough times during the repayment stage, an opportunity to obtain a discharge of debts. Lastly, although the Chapter 13 procedure may result in a discharge of debts, this procedure prohibits the discharge of the following debts: long-term debts, tax debts, debts fraudulently incurred, unscheduled debts, student loans and domestic support.[43]

[39] The repayment plan can be extended to a maximum of a five-year period (S 1322(d)(1)(C) of the Bankruptcy Code).
[40] S 1328 of the Bankruptcy Code.
[41] This is available to debtors who previously had a steady source of income and have during the course of the procedure, run into financial difficulty. This includes debtors who became NINA debtors after accessing the procedure.
[42] S 1328(b) of the Bankruptcy Code. This objective test is essential for minimising fraud by dishonest debtors who rely on the hardship discharge to escape meeting their obligations through a repayment plan.
[43] S 1328 of the Bankruptcy Code.

2.2.3 The Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA)

2.2.3.1 General background

The sharp spike in, mostly, Chapter 7 liquidation applications led to much dissatisfaction among the pro-creditor policymakers in the USA.[44] The dissatisfaction emanated largely from the ultra-liberal nature of the bankruptcy procedure, which lacked sound procedural checks to prohibit dishonestly "can pay" debtors from obtaining debt relief.[45] Ramsay[46] submits that:

> The primary mischiefs identified were the perceptions that bankruptcy was increasingly used as a first rather than last resort, that responsible Americans were subsidising abusers through an implicit bankruptcy tax, and that loopholes and incentives in the existing system encouraged opportunistic behaviour.

Consequently, the Bankruptcy Abuse Prevention and Consumer Protection Act[47] was introduced in 2005 to combat this dilemma. The primary goal of the BAPCPA was to facilitate a shift of the American bankruptcy system from an ultra-liberal approach to a more nuanced creditor-friendly approach.[48] This was achieved by, *inter alia*, preventing the "can pay"[49] dishonest debtors who qualify for a Chapter 13 payment procedure from obtaining a less cumbersome immediate and unconditional discharge in terms of the Chapter 7 liquidation procedure.[50] The BAPCPA achieved this objective by introducing a mandatory means test along with mandatory pre-filing credit counselling. Thus, through these reforms, overcommitted debtors no longer have the privilege of self-selecting a preferred route to debt relief. All applicants are subjected to a means test to determine their financial circumstances and after that to determine a suitable procedure that suits the respective debtor's financial position.

However, the means test is applied only to applicants whose gross income exceeds the median income in the debtor's state of residence.[51] Therefore, the means test does not apply to NINA debtors because they either have no income or a very low income

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[44] Kilborn 2006 *Vand J Transnat'l L* 109.
[45] Kilborn 2012 *Loy Consumer L Rev* 3.
[46] See Ramsay *Personal insolvency* 56.
[47] The Bankruptcy Abuse Prevention and Consumer Protection Act Pub L No 108-9 of 2005 (hereafter "the BAPCPA").
[48] See eg, Evans 2010 *CILSA* 339.
[49] This excludes NINA debtors who have no disposable income and/or assets.
[50] See Evans 2010 *CILSA* 339.
[51] See Calitz 2007 *Obiter* 399.

that falls below the median income in their state of residence. Therefore, in the main, NINA debtors remain unaffected by the changes introduced by the BAPCPA. They are still free to subject themselves to the Chapter 7 liquidation procedure and utilise the discharge option it affords.

Despite being aimed at curbing abuse, the BAPCPA has been criticised by many commentators because it failed to achieve its intended purpose. In this regard, Kilborn[52] submits that only 1 per cent of Chapter 7 filings have been found to be abusive. He labels the reforms of the BAPCPA as having resulted in a "fool's errand" that has led to excessive paperwork and an increased burden of ensuring debtor compliance without any substantial financial return.[53]

Despite the drastic attempts by the legislature to alter the bankruptcy system through the BAPCPA, the Chapter 7 procedure remains very popular among bankruptcy applicants with only a minute fraction completing and obtaining relief through the Chapter 13 repayment procedure. This remains true despite the challenges in bankruptcy proceedings worldwide that were brought about by the adverse effect of the Covid-19 pandemic.[54] To this end, the American bankruptcy system's filings for both consumer and corporate bankruptcies continued a steep two-year fall that coincided with the Covid-19 pandemic.[55] Despite the fall in filings, the Chapter 7 procedure maintains its popularity over the Chapter 13 procedure.

Both Chapter 7 and Chapter 13 procedures are essential because they result in a discharge of debts for qualifying debtors. However, it is important to note that the discharge that the procedures afford is not free, except where NINA debtors are involved. Under the Chapter 7 liquidation procedure, the debtor must surrender his non-exempt property. In contrast, under the Chapter 13 repayment procedure, the debtor must repay a certain amount over a three to possibly five-year term.

[52] Kilborn 2012 *Loy Consumer L Rev* 12-13.
[53] Kilborn 2012 *Loy Consumer L Rev* 12-13. Also, see in general MacArthur 2009 *Emory Bankr Dev J* for a detailed discussion of the impact of the BAPCA on poor debtors.
[54] See United States Courts *Bankruptcy filings* https://bit.ly/3zEPV2l (accessed 8 August 2022).
[55] On the one hand, personal insolvency bankruptcy filings have fallen from 765 722 in the year ending 31 March 2018 to 382 213 in the year ending 31 March 2022, while on the other hand, corporate bankruptcy filings have fallen from 23 106 to 13 160 during the same period.

2.2.3.2 Procedural reforms

One of the major reforms introduced by the BAPCPA is the means test. The means test identifies the "can-pay" category of debtors through an objective assessment of an applicant's financial circumstances. In summary, the "can-pay" category refers to debtors in a financial position to meet their restructured obligations over a prescribed payment period. The means test was aimed at eradicating procedural abuse by unscrupulous debtors seeking to unfairly rely on the discharge option that the Chapter 7 liquidation procedure provides.[56]

Where an applicant, through the means test, proves that he is not in a financial position to meet his obligations, he is granted access to the Chapter 7 liquidation procedure, as outlined in the Bankruptcy Code. NINA debtors might fall into this category because they do not have the requisite disposable income to meet their obligations; however, this category of debtors is excluded from the means test owing to their financial circumstances. Where the means test finds that an applicant is in a position to meet his obligations through a repayment plan and thus falls within the "can pay" category, he is directed to the Chapter 13 repayment procedure.

The 2005 consumer reforms also introduced pre-filing credit counselling, mandatory for all applicants seeking access to the American bankruptcy system. All debtors must attend an individual or group briefing within 180 days before filing a Chapter 7 or Chapter 13 bankruptcy application.[57] The briefing may be conducted over the internet or telephonically.[58]

These reforms aimed to reduce debtor fraud emanating from the ultra-liberal bankruptcy system that facilitated a discharge of debts to dishonest debtors who sought access to the system to escape their obligations. The system afforded a discharge of debts to all debtors without basing the right to such a discharge on any level of the debt payment.

However, commentators have continuously regarded the BAPCPA reforms as a failure. Empirical evidence indicates that only about 3 per cent of pre-bankruptcy

[56] See Evans 2010 *CILSA* 339.
[57] S 109(h)(1) of the Bankruptcy Code.
[58] S 109(h)(1) of the Bankruptcy Code.

debtors find a solution to their indebtedness through pre-filing credit counselling.[59] The BAPCPA reforms have resulted in a costly and time-consuming bankruptcy system that has imposed added compliance pressure on trustees.[60] Despite the drastic changes introduced by the BAPCPA, the American bankruptcy system can still be regarded as pro-debtor because it accommodates NINA debtors who may access debt relief through a discharge of debts in terms of the Chapter 7 procedure.

2.3 England and European consumer insolvency landscape

The European insolvency regulation underpinned by the earned fresh start philosophy had and continues to have, an influence on the general international insolvency landscape. Therefore, it is important to review the leading studies that influenced shaping this philosophy's development. In this regard, the following leading reports on European consumer insolvency regulation are reviewed: *Report of the review committee on insolvency law and practice*;[61] *Over-indebtedness of consumers in the EC member states: Facts and search for solutions*;[62] and *Consumer Overindebtedness and consumer law in the European Union*.[63] This review seeks to outline the core principles contained in these reports and does not discuss the reports in detail.

The first study of the United Kingdom's insolvency law and practice that commenced in 1977 was undertaken by the Cork committee.[64] This study culminated in a comprehensive report published in 1982 and referred to here as the *Cork Report*. The recommendations of the *Cork Report* include the need for just insolvency systems that balance the interests of all stakeholders in insolvency, namely, debtors, creditors and society.[65] This balancing act requires an insolvency system that treats honest though unfortunate debtors with sympathy while punishing dishonest or reckless debtors.[66]

[59] Kilborn 2012 *Loy Consumer L Rev* 6.
[60] Littwin 2020 *Int Insolv Rev* 117.
[61] *Report of the review committee on insolvency law and practice* (hereafter "the *Cork Report"*).
[62] *Over-indebtedness of consumers in the EC member states: Facts and search for solutions* (hereafter "the *Huls Report"*).
[63] *Consumer Overindebtedness and consumer law in the European Union* (hereafter "the *Reifner Report"*).
[64] *Cork Report* 9.
[65] *Cork Report* para 20-30.
[66] *Cork Report* para 198.

Further, the *Cork Report* also proposed reforms in the UK's insolvency regime by introducing an automatic discharge for consumers subject to bankruptcy and the introduction of Individual Voluntary Arrangements.[67]

After the publication of the *Cork Report*, Huls led a study of the insolvency regimes of most European countries and produced his findings in a report referred hereto as the *Huls Report* published in 1994.[68] The study into the insolvency landscape of the European Commission was prompted by the economic depression that affected most of the European Commission in the 1990s. The economic depression led to massive consumer indebtedness because many households resorted to debt to withstand the economic upheaval. Following the economic downturn, an examination of the insolvency regulation in various European countries was commissioned. It sought to evaluate the safeguards in place to protect over-indebted consumers and find solutions for the over-indebtedness problem.[69]

One of the key principles highlighted in the *Huls Report* is the need for an insolvency system that balances the interests of all stakeholders in insolvency.[70] In terms of the *Huls Report*, a balance of interest may be achieved if a debtor is put in a position where he does the best he can towards servicing his debt.[71] Significantly, while discussing the procedural costs for debt relief measures, the *Huls Report* indicates that costs should not constitute a barrier to accessing debt relief.[72]

After the *Huls Report*, the European Commission commissioned another study of the consumer insolvency landscape in the European Commission member states in 2003.[73] This study was led by Reifner and comprised researchers such as Huls, who had led and produced the first European Commission study on consumer insolvency, namely, the *Huls Report*. The subsequent study led by Reifner culminated in the publication of a comprehensive report referred to herein as the *Reifner Report*. The *Reifner Report* relied heavily on the *INSOL Consumer report* and regarded the

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[67] See ch 5 para 5.2.3.1 for a detailed discussion of Individual Voluntary Arrangements.
[68] *Reifner Report* 14.
[69] *Reifner Report* 14.
[70] See Huls 1993 *J Consum Policy* 220-224. This had previously been recommended in the *Cork Report* para 20-30.
[71] See Huls 1993 *J Consum Policy* 221.
[72] Huls 1993 *J Consum Policy* 232. This is a significant recommendation, which continues to affect most NINA debtors globally who are unable to obtain relief from over-indebtedness because of the financial obstacle (see ch 3 para 3.3.2).
[73] See Kilborn 2010 https://bit.ly/3x421zh (accessed 5 January 2021).

principles outlined therein as a sound foundation on which scholars and practitioners can build.[74]

The *Reifner Report* refers to the European earned fresh start model of consumer debt relief as an approach that mandates that debtors earn "a new economic plan through a long and demanding repayment plan". The earned fresh start philosophy, which underpins the European model, does not proffer an automatic right to discharge debts but mandates that debtors earn this right to discharge debt. The right to discharge debt can be earned by, *inter alia*, partial repayment of the debt by the debtor. Although it has been noted that most payments made by debtors usually amount to merely 15 per cent of the total outstanding debt, the *Reifner Report* advocates for the earned fresh start approach to debt relief as a "manifestation of the importance of good payment morals".

The *Reifner Report* recognises the various mandatory repayment plans in various European countries.[75] Further, the report notes that the various models all lead or aim towards granting a discharge of debts.[76] In summary, as highlighted in the *Reifner Report*, the general principles which can be distinguished in the European laws are:[77]

(i) Rehabilitation;
(ii) Earned fresh start through a payment plan;
(iii) Access to insolvency proceedings without prohibitive costs;
(iv) Availability of counselling; and
(v) A preference for out-of-court or pre-court procedures.

2.4 INSOL International *Consumer debt reports*

In 1997, INSOL International held a World Congress in New Orleans in the United States of America, and for the first time, it included a meeting on consumer debt problems. The meeting on the consumer debt problem was a landmark congress that sought to address the drastic rise in consumer over-indebtedness witnessed during the last quarter of the 20th century. The over-indebtedness crisis was mostly driven by

[74] *Reifner Report* 45 and 249. For a discussion for the *INSOL Consumer report* see para 2.4 below.
[75] *Reifner Report* 166-167.
[76] *Reifner Report* 167.
[77] *Reifner Report* 247. Also, see Osunlaja *A comparative appraisal* 41-44 for a detailed discussion of the principles.

the easy availability of credit which largely contributed to the economic boom at the turn of the 20th century. This economic boom also ushered in an unprecedented high level of financial distress among consumer debtors and small businesses. The financial misfortune among consumers and businesses culminated in a consumer over-indebtedness crisis which the 1997 INSOL World Congress sought to address.

The INSOL World Congress led to the formation of the INSOL Consumer Debt Committee, tasked with addressing the rising global consumer over-indebtedness crisis. The Committee comprised different role players in the global insolvency system, including regulators, judges, practitioners and academics. The Committee was created to survey insolvency regimes for individuals throughout the world. This survey was subsequently undertaken in jurisdictions with both developed and developing consumer insolvency laws.

The outcome of this survey was the first INSOL International Consumer debt report published in 2001.[78] A subsequent report was published in 2011, it also discussed consumer over-indebtedness.[79] Despite being published in contrasting global economic climates, the second report reaffirmed the principles outlined in the *INSOL Consumer report* I. This study examines the two *INSOL Consumer reports* and refers to both reports, where necessary.

The *INSOL Consumer reports* discuss the consumer debtor phenomenon to provide a resource for jurisdictions developing or reforming their insolvency laws and systems to deal with the problems that consumer debtors face.[80] The discussion of these principles is pivotal in providing guidelines for reforming Zimbabwe's insolvency system against the background of an economic upheaval due to several factors, including natural disasters and dismal policy-making by the Zimbabwean government.[81]

The *INSOL Consumer reports* regard consumer debtors as debtors whose liabilities are incurred primarily for private, family or household purposes.[82] Additionally, it is

[78] Hereafter referred to as "the *INSOL Consumer report* I".
[79] Hereafter referred to as "the *INSOL Consumer report* II".
[80] See INSOL International President opening remarks: *INSOL Consumer report* I.
[81] See ch 1 para 1.1.
[82] *INSOL Consumer report* I 1; *INSOL Consumer report* II 3.

noted that consumer debtor problems may also arise from businesses with which the debtors are connected. Various types of consumer debts are indicated, namely:[83]

i. Survival debts which are incurred by consumer debtors as a survival strategy where there is an accumulation of recurrent debts for the necessities of life. This type of debt is usually incurred for food, rent, electricity, education and clothing;
ii. Over-consumption debts which are incurred through over-consumption by consumer debtors who initially had a surplus in their budget and have incurred debts to finance an extravagant lifestyle;
iii. Compensation debts which are incurred through over-consumption by debtors suffering deprivation or social exclusion;
iv. Relational debts which emanate from a debtor's connection with others because of marriage, other relationships or death;
v. Accommodation debts which may be caused by the inability to adapt to misfortune, a sudden drop in income or unforeseen expenses such as a rise in accommodation costs; and
vi. Fraudulent debts which are incurred by debtors who wilfully financially over-commit themselves.

The *INSOL Consumer reports* recognise the important role of debtor consumption in developing a country's economy. To this end, it is highlighted that a high level of consumption is necessary because it facilitates the stabilisation and growth of the economy. Consequently, governments must encourage high-level consumption to spur economic growth. High levels of consumption may be boosted through, for instance, an extension of credit facilities for consumers. Consumer debt only becomes a problem when debtors cannot meet their financial obligations and cannot find solutions without professional help.

Furthermore, the *INSOL Consumer reports* recognise the significant role that an effective debt relief system plays by affording a discharge of debts to consumer debtors who are unable to repay their credits.[84] In this regard, the *INSOL Consumer reports* outline principles that underlie the resolution of consumer debt problems and also outline recommendations necessary to achieve the principles. These principles are as follows:[85]

i. Fair and equitable allocation of consumer credit risks;
ii. Provision of some form of discharge of indebtedness, rehabilitation or "fresh start" for the debtor;
iii. Extra-judicial rather than judicial proceedings where there are equally effective options available; and
iv. Prevention to reduce the need for intervention.[86]

[83] *INSOL Consumer report* I 4-6; *INSOL Consumer report* II 4.
[84] *INSOL Consumer report* I 4-6.
[85] *INSOL Consumer report* I 11; *INSOL Consumer report* II 15.
[86] This principle falls outside the scope of this study and is not discussed any further.

To achieve these principles, legislatures must:[87]

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

Additionally, governments, semi-governmental or private organisations must also play a role in ensuring these principles are achieved. In this regard, the *INSOL Consumer reports* indicate that governments, semi-governmental or private organisations must:[88]

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

[87] *INSOL Consumer report* I 11-12; *INSOL Consumer report* II 13.
[88] *INSOL Consumer report* I 12; *INSOL Consumer report* II 13-14.

2.4.1 Principles and Recommendations

2.4.1.1 Fair and equitable allocation of consumer credit risks

The *INSOL Consumer reports* note the significance of a fair and equitable allocation of consumer credit risk. In this regard, the *INSOL Consumer reports* indicate that honest and unfortunate consumer debtors are not always solely to blame for failing to meet their financial obligations.[89] Additionally, creditors who receive little or no payment are not necessarily the only victims because honest but unfortunate debtors are also victims due to their financial circumstances.[90]

Consequently, society and legislators must consider the best interest of debtors, who are also victims, when implementing insolvency regulation. Consideration must be given to the levels of exemptions, specifically, the amount of property excluded from recourse by creditors.[91] Creditors must be allowed to access the remaining assets after a debtor's exempted property has been excluded. This allows the debtor to rebuild his life without purchasing life's necessities while allowing his creditors to obtain maximum value from the non-exempt property.

Furthermore, legislators must ensure that insolvency procedures take cognisance of the interests of creditors by nullifying certain acts by the debtor that are detrimental to the interests of creditors as a group.[92] This balances the interests of all stakeholders in insolvency by ensuring that all creditors are treated equally. In this regard, the *INSOL Consumer reports* call on legislators to ensure that trustees and administrators are vested with sufficient powers to nullify certain acts by the debtor. These acts may include voidable actions. Voidable actions include partial or full debt repayment by the debtor in favour of one or more creditors to the exclusion of others. Additionally, an automatic stay or moratorium that prohibits creditors from pursuing actions against a debtor during the insolvency process must be implemented. Lastly, legislators must implement regulation that ensures that all debtors who access the debt relief system do not experience any form of discrimination. In this regard, legislators must safeguard

[89] *INSOL Consumer report* I 14; *INSOL Consumer report* II 14.
[90] *INSOL Consumer report* I 14; *INSOL Consumer report* II 14.
[91] *INSOL Consumer report* I 14; *INSOL Consumer report* II 15.
[92] *INSOL Consumer report* I 14.

a humane approach to the debtor and the debtor's entitlement to maintain a decent living.

The *INSOL Consumer reports* recommend that legislators enact insolvency regulation that ensures the provision of a fair, equitable,[93] efficient[94] and cost-effective,[95] accessible[96] and transparent settlement[97] and discharge of consumer and small business debts to achieve humane approach towards debtors. Furthermore, insolvency systems should afford a discharge or fresh start to all *bona fide* consumer debtors who cannot to meet their financial obligations.

Crucially, the *INSOL Consumer reports* further recommend that legislators consider providing for separate proceedings, depending on the specific circumstances of the consumer debtor.[98] In this regard, legislators should implement laws that provide different routes to a discharge option depending on the specific financial circumstances of the debtor. Debtors must be able to consider their financial circumstances and choose a procedure that affords them relief from indebtedness that suits their financial position.In this regard, a debtor with survival debts, who has no prospect of changing his circumstances, must be differentiated from a debtor with accommodation debts, who is suffering a temporary setback and can regain his financial position if allowed to restructure his earnings and spending.

2.4.1.2 Discharge, rehabilitation or "fresh start" for debtors

The *INSOL Consumer reports* recognise the need to provide of a fresh start to overcommitted debtors. The *INSOL Consumer reports* indicate that the provision of a

[93] Legislators should ensure that insolvency systems provide for a fair allocation of risk between debtors and creditors in a predictable and equitable way. A balanced approach must be utilised, which is not pro-creditor but an approach that is neither abusive to debtors nor designed to merely protect and maximise value for creditors (*INSOL Consumer report* I 15).
[94] Insolvency procedures should not be complicated and time-consuming (*INSOL Consumer report* I 15).
[95] Costs of a bankruptcy or rehabilitation process should be shared by all the stakeholders in insolvency (*INSOL Consumer report* I 15).
[96] Debtors should easily access insolvency procedures. Debt relief should be accessible to debtors without the hurdle of costs and cumbersome formalities. Bankruptcy and rehabilitation procedures must be available to debtors, and debtors must be free to choose the procedure that suits their individual circumstances (*INSOL Consumer report* I 16).
[97] All insolvency stakeholders must be able to monitor the insolvency process and be afforded an opportunity to be heard, to receive notices and to exercise their rights (*INSOL Consumer report* I 16).
[98] *INSOL Consumer report* I 18.

fresh start to consumers is recognition by society of the excusable nature of over-indebtedness. Provision of a fresh start is a key element of natural person insolvency systems that require that debtors be afforded a fresh start, "free from past financial obligations and not suffer indefinitely".[99] Affording a fresh start to overcommitted debtors differentiates the yesteryear punishment-oriented insolvency systems from the present-day economic reality that promotes consumerism and its significance in the economy.

To afford a fresh start to overcommitted debtors, legislators should offer consumer debtors a discharge of indebtedness as an extension of a liquidation or rehabilitation procedure. The *INSOL Consumer reports* note the various forms of discharge in different jurisdictions. However, it mandates that all forms of discharge must lead to relief from pre-existing indebtedness. Furthermore, the discharge must lead to the freeing of debtors from their past financial obligations.

In this regard, legislators must ensure that debtors contribute to their creditor's estate.[100] Debtors may contribute either during the insolvency proceedings or after the proceedings have been terminated through an imposed condition on a debtor. Importantly, the provision of a discharge should ensure that the discharge releases the debtor from as many debts as possible, particularly debts existing at the beginning of the proceedings or at the time the discharge is obtained. Debts that are not covered by the discharge, such as student loans, taxes, court fines, fraud and maintenance agreements, should be kept to a minimum. In this regard, the *INSOL Consumer reports* advocate for the implementation of a test to determine whether the debtor acted in good faith while obtaining the respective debts.

Additionally, the *INSOL Consumer reports* note the different waiting periods that are in place in various insolvency regimes. The waiting period is the period between two discharges permitted in law. The waiting period may either affect a debtor's access to a new discharge or his access to insolvency proceedings that may lead to a new

[99] *INSOL Consumer report* I 22.
[100] *INSOL Consumer report* I 22-23.

discharge. In some jurisdictions, a discharge is a once-in-a-lifetime opportunity; in other jurisdictions, there is a ten-year mandatory waiting period.[101]

Furthermore, the provision of a discharge to a debtor may be dependent on a condition or numerous conditions. Such conditions may be imposed on the debtor during the proceedings or as a condition for the discharge. The conditions include, for example, the ability of the debtor to obtain new credit, leave the country or carry on a business for a certain period. However, the *INSOL Consumer reports* require that such conditions not affect the debtor's fresh start.[102]

Lastly, the *INSOL Consumer reports* recommend that legislators ensure that insolvency procedures are not vulnerable to abuse by debtors.[103] In this regard, legislators must impose anti-abuse provisions and there must be consequences for fraudulent activities by the debtor.[104]

2.4.1.3 Effective extra-judicial options for debtors

The *INSOL Consumer reports* regard the utilisation of extra-judicial or out-of-court proceedings as advantageous for overcommitted debtors.[105] To this end, the *INSOL Consumer reports* indicate that out-of-court proceedings are less time-consuming, less expensive and flexible enough to be tailor-made to the needs of the respective consumer debtors. Such needs are more often than not of a non-legal nature. In this regard, the *INSOL* Consumer *reports* call for the delegalisation and dejuridification of consumer debtor problems.

To achieve this, the *INSOL Consumer reports*, in terms of the sixth recommendation, call on legislators to encourage the implementation of extra-judicial or out-of-court proceedings for solving consumer and small business debt problems. Extra-judicial proceedings are considered significant in an insolvency system because, compared to judicial proceedings, extra-judicial proceedings proffer numerous advantages to

[101] INSOL Consumer report I 23. Also, see para 2.2.2.1 where it is highlighted that the waiting period for the Chapter 7 procedure in the American bankruptcy system is eight years from the date of filing an application that led to a successful discharge.
[102] *INSOL Consumer report* I 23.
[103] *INSOL Consumer report* I 24.
[104] *INSOL Consumer report* I 24.
[105] *INSOL Consumer report* I 25.

debtors and creditors. To promote the utilisation of extra-judicial proceedings, the legislators must ensure that creditors are assured that they would receive what they are entitled to under judicial proceedings. Furthermore, a debtor must also be clearly informed of the sacrifices that are required of him that will lead to the provision of a discharge and may be accepted by his creditors.

Out-of-court schemes of arrangement or rehabilitation procedures may be implemented to such effect that it mirrors all the provisions of insolvency laws. In this regard, court approval may be necessary where creditors' unanimous approval is required, but such a vote is not obtainable.[106] Crucially, the courts must be empowered to overrule the dissenting creditor if the creditor's position in the outcome of the out-of-court proceedings is not materially different from judicial proceedings.

The *INSOL Consumer reports* further indicate that some jurisdictions require consumer debtors to make an effort towards accessing out-of-court settlements before court proceedings will be started. Therefore, in such jurisdictions, debtors must satisfactorily prove to the court that an honest attempt towards accessing out-of-court proceedings was made before such a debtor may be granted a discharge of his debts.

The *INSOL Consumer reports* suggest that to achieve or facilitate the formulation of a sound out-of-court debt relief system, governments, quasi-governmental or private organisations should ensure the availability of sufficient competent and independent debt counselling.[107] In this regard, it is indicated that problems that consumer debtors often face are not only of a legal nature but also of a socio-psychological nature, which courts are not suited to administer effectively.[108] Therefore, this requires the input of independent professional counsellors that are specialised in negotiating arrangements with creditors and knowledgeable about the specific problems of consumer debtors.

[106] *INSOL Consumer report* I 26.
[107] *INSOL Consumer report* I 26.
[108] *INSOL Consumer report* I 27.

2.5 World Bank *Report on the treatment of insolvency of natural persons*

2.5.1 General background

Owing to the 2007 - 2009 global financial crisis, the World Bank first examined of the insolvency[109] of natural persons in 2011.[110] This examination was preceded by a preliminary survey of the natural person insolvency laws of 59 different countries to gather information about the existence of legislation addressing natural person insolvents.[111] The survey, which spanned from high to low-income economies, unearthed a lack of regulation on natural person insolvents in most low- and middle-income countries.

The shocking results of this survey culminated in creating a special working group[112] by the World Bank and the Task Force.[113] The Working Group comprised academics, judges, insolvency practitioners and policymakers. It was tasked with studying the issue of the insolvency of natural persons and producing a "reflective and non-prescriptive"[114] report, suggesting guidelines for the treatment of natural persons worldwide.[115] This resulted in a landmark reflective report by the World Group titled *Report on the treatment of the insolvency of natural persons*, completed in December 2012.

The *World Bank Report* starts with a lengthy introduction[116] followed by a discussion of the core legal attributes of an insolvency regime for natural persons[117] and a conclusion.[118] The introduction outlines the objectives and nature of the report.[119] Additionally, it describes the foundations of a system for treating the insolvency of natural persons.

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[109] See *World Bank Report* 6 where it is submitted that the *World Bank Report* prefers the term "insolvency" over other terms such as bankruptcy and sequestration to encompass all systems, which seek to alleviate the burdens of excessive debt and allocating benefits and losses, both among creditors and as between creditors and natural person debtors.
[110] *World Bank Report* 1.
[111] *World Bank Report* 2.
[112] Hereafter "the Working Group".
[113] *World Bank Report* 3.
[114] *World Bank Report* 5.
[115] *World Bank Report* 3.
[116] *World Bank Report* 4-45.
[117] *World Bank Report* 45-127.
[118] *World Bank Report* 127.
[119] *World Bank Report* 4.

The *World Bank Report* seeks guidance on the characteristics of an effective insolvency regime for natural persons. It also aims to highlight the opportunities and challenges encountered in developing an effective insolvency regime for natural persons. Importantly, the *World Bank Report* does not seek to identify any "best practice" for regulating natural person insolvents. It merely seeks to draw attention to the importance of a regime for treating the insolvency of natural persons.

The *World Bank Report* distinguishes between treating the insolvency of natural persons and preventing the insolvency of natural persons. In this regard, the *World Bank Report* indicates that it seeks to discuss the former; therefore, no attempt was made in the report to discuss the prevention of the insolvency of natural persons.[120] However, the *World Bank Report* notes the numerous benefits emanating from mechanisms such as financial literacy training in preventing natural persons' insolvency and treating such insolvency equally.

Lastly, the *World Bank Report* seeks to feature the treatment of "pure" natural person consumers to exclude natural person consumers engaged in business.[121] In this regard, the *World Bank Report* refers to the ICR Standard for discussing and examining the circumstances of natural person debtors engaged in business. A detailed analysis of the report is undertaken below.

2.5.2 Foundations of insolvency for natural persons

Over the years, lawmakers from various jurisdictions have sought to identify and evaluate the desired effects of effective insolvency regimes.[122] These desired effects, extracted by lawmakers worldwide, can be divided into three different categories, namely, benefits for creditors, benefits for debtors and benefits for society. These three categories are discussed in detail hereunder.

[120] *World Bank Report* 10.
[121] *World Bank Report* para 1.7.C.
[122] *World Bank Report* 20.

2.5.2.1 Benefits for creditors

An effective insolvency system is beneficial for creditors because it addresses the weaknesses of the ordinary system of debt enforcement. The major issues prevalent in the collection system, addressed by an effective insolvency system, can be summarised as the ineffectiveness and waste emanating from the blind pursuit of credit by a creditor to the detriment of himself or other creditors. The second issue is the inequitable distribution of value to one or a few aggressive or sophisticated creditors to the detriment of creditors as a group. Although these issues may be addressed by restructuring the debt enforcement system, an insolvency system is belied to be more effective and efficient in dealing with such issues.[123]

A coordinated insolvency system offers an advantage over an individual debt enforcement system because it allows creditors to maximise their returns. This advantage emanates from eliminating waste inherent in multiple individual enforcement actions and fire sales of the debtor's assets.[124] Additionally, an insolvency system also benefits creditors by concentrating the administrative expenses of enforcement into one proceeding, consequently maximising the value of the assets for all creditors. Coordinated insolvency systems also have the benefit of ensuring continuous monitoring of the debtor's financial circumstances and afford an incentive for the debtor to be cooperative as he searches for a possible discharge of debts. Lastly, the collective nature of an insolvency system ensures that the interests of all creditors concerned are protected, and no preference is afforded to aggressive or sophisticated creditors at the expense of others.[125]

2.5.2.2 Benefits for debtors

A sound insolvency system is beneficial because it facilitates relief from over-indebtedness. The primary purpose of sound insolvency systems is to provide relief to "honest but unfortunate" debtors.[126] Empirical evidence indicates that financial distress has often resulted in the emotional and/or physical suffering of overcommitted

[123] *World Bank Report* 21.
[124] *World Bank Report* 21.
[125] *World Bank Report* para 69.
[126] *World Bank Report* para 70. Also, see Mabe *A comparative analysis* 8.

debtors.[127] This distress has, in numerous circumstances, been regarded as resulting in a ripple effect by affecting the social, psychological and physical well-being of debtors' friends and family.[128] Therefore, the debt relief afforded by an insolvency system, such as a discharge of debts, has the desired effect of alleviating the problems of debtors. This is achieved by allowing them to re-enter the credit economy and be economically active. In this way, it also relieves the socio-psychological problems emanating from their financial woes.[129]

2.5.2.3 Benefits for society

Financial distress is not an isolated phenomenon that only affects a debtor and his creditors.[130] An over-indebtedness crisis that affects only a debtor and his creditors would not warrant the expense incurred in setting up an effective insolvency system. However, due to the interrelatedness of the financial system, financial distress equally affects society as a whole. Therefore, addressing a debtor's financial distress not only affords benefits to the debtor and his creditors but is concurrently beneficial for the entire society.

In this regard, the *World Bank Report* aptly states that:[131]

> The most powerful driving concerns behind an insolvency regime are about ameliorating the negative *systemic* effects of unregulated distressed debt. Thus, … in societies that lack a broad base of instances of distressed debt, or that address those problems effectively by cultural responses such as collective responsibility within families, tribes, or villages, an insolvency regime for natural persons might not serve a substantial purpose to warrant the costs of implementation. But where traditional methods of collective redress have begun to break down, a societal response may well be warranted in light not so much of the benefits to individuals, but of the follow-on benefits flowing through the web of relationships in complex societies.

The benefits afforded to society by an effective insolvency system are summarised by the *World Bank Report* as including:

i. Establishing proper account valuation; [132]
ii. Reducing wasteful collection costs and destroyed value in depressed asset sales;[133]

[127] *World Bank Report* 25.
[128] *World Bank Report* 27.
[129] *World Bank Report* 26.
[130] *World Bank Report* 27.
[131] *World Bank Report* para 77.
[132] *World Bank Report* 28-30.
[133] *World Bank Report* 30-31.

iii. Encouraging responsible lending and reducing negative externalities;[134]

iv. Concentrating losses on more efficient and effective loss distributors;[135]

v. Reducing the costs of illness, crime, unemployment, and other welfare-related costs;[136]

vi. Increasing production of regular taxable income;[137]

vii. Maximising economic activity and encouraging entrepreneurship;[138] and,

viii. Enhancing stability and predictability in the broader financial system and the economy.[139]

2.5.3 Countervailing factors

Despite the various benefits afforded to debtors, creditors and society, some challenges threaten the integrity of an effective insolvency regime. These challenges include moral hazard, debtor fraud and stigma.

Moral hazard concerns the fear among policymakers that providing a "safety net" to debtors might spur or encourage financial recklessness by enabling debtors to act less prudently and less carefully than they would in the absence of such a "safety net". In this regard, some policymakers believe that a safety net provided by an effective and inclusive insolvency regime gives an improper incentive for debtors to act irresponsibly concerning their finances and obligations.[140]

To address this concern, the *World Bank Report* advances that it is imperative that legislators:[141]

> [D]esign and implement proper access requirements – both for entry into the insolvency system and for receipt of a discharge or other relief.

Therefore, despite the dangers of a moral hazard among debtors, the benefits of an insolvency system must be regarded as outweighing this concern. Consequently, in pursuit of the benefits afforded by an effective insolvency regime, legislators must

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[134] *World Bank Report* 31-33.
[135] *World Bank Report* 33-36.
[136] *World Bank Report* 36-37.
[137] *World Bank Report* 37-38.
[138] *World Bank Report* 38-40.
[139] *World Bank Report* 40.
[140] *World Bank Report* 41. Also, see para 2.2.3.1 for a discussion of the factors that led to the introduction of the BAPCPA.
[141] *World Bank Report* 41.

design and implement measures to reduce moral hazard. The *World Bank Report* submits further that:[142]

> An overarching goal of any insolvency system is striking a careful balance between two competing considerations: first, demanding much of those who incur obligations; but second, not demanding more than can be reasonably borne by the victims of economic volatility and other common dangers of life.

Debtor fraud is one of the major problems in the smooth functioning of an insolvency system. To this end, policymakers have, over the years, expressed the fear of providing dishonest debtors with an opportunity to fraudulently evade their legitimate financial obligations by exploiting the debt relief afforded by an insolvency system.[143] Debtor fraud can manifest in different ways, including debtors lying about their financial circumstances and concealing their assets or income.[144]

Debtor fraud can be minimised through various means including careful monitoring by administrators and creditors.[145] To this end, the *World Bank Report* stresses the impact that monitoring by administrators and creditors has had globally in reducing debtor fraud.[146] Monitoring by administrators is effective in regimes where safeguards have been incorporated into insolvency systems to detect and deter fraudulent conduct by debtors.[147] Consequently, the *World Bank Report* indicates that the danger of debtor fraud should not be over-emphasised because empirical evidence from many jurisdictions has indicated a rapid decrease in fraud cases by debtors.[148]

Stigma also poses a danger to the effective utilisation and operation of insolvency systems worldwide. It affects both developing and well-developed insolvency regimes. It presents an obstacle to enticing honest but unfortunate debtors into the debt relief system.[149] To this end, the *World Bank Report* encourages policymakers to be sensitive to the cultural context of shame and stigma attached to the admission of financial failure because this can prevent the effective uptake by debtors even in well-developed insolvency regimes.[150]

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[142] *World Bank Report* 41.
[143] *World Bank Report* 42.
[144] *World Bank Report* 42.
[145] *World Bank Report* 42.
[146] *World Bank Report* 42.
[147] *World Bank Report* 43.
[148] *World Bank Report* 42-43.
[149] *World Bank Report* 43.
[150] *World Bank Report* 44.

However, the *World Bank Report* adds that a healthy level of stigma attached to insolvency systems is essential to deter debtors from seeking an easy escape from their legitimate obligations.[151] To achieve an equilibrium that prompts debtors to do their best to meet their financial obligations, legislators must ensure that they do not excessively stigmatise debtors, thereby disincentivising them from accessing debt relief measures.

To minimise stigma and fraud and to create incentives for natural person debtors to seek relief, legislators may:

(i) Avoid or repeal judgmental language and punitive measures;
(ii) Reduce post-relief restrictions on activity by debtors;
(iii) Introduce public campaigns of education and awareness to correct misimpressions as to new options of relief;
(iv) Redesign insolvency systems for natural persons to minimise or eliminate elements that have undesirable effects; and,
(v) Liberalise property exemption.

2.5.4 Core legal attributes of a natural person insolvency regime

The *World Bank Report* outlines six core legal attributes for a functioning natural person insolvency regime. These legal attributes, discussed in detail below, are general regime design, institutional framework, access to the formal insolvency regime, participation of creditors, solutions to the insolvency process and payment of claims, and discharge.[152]

2.5.4.1 General regime design

The discussion of the general design of an insolvency regime commences with an outline of two preliminary choices that legislators worldwide grapple with. These

[151] *World Bank Report* 44.
[152] *World Bank Report* 45. See Kilborn 2014 *PILR* 309 and Osunlaja *A comparative appraisal* 48 where only three attributes are regarded as pivotal for an effective insolvency regime, namely, informal legal mechanisms, informal alternative procedures and a discharge.

preliminary issues are the interaction of the formal insolvency procedures with informal negotiated alternatives and the placement of formal insolvency procedures.[153]

The *World Bank Report* notes the change in the attitude towards informal insolvency alternatives in many jurisdictions because many such insolvency regimes have ensured that a *bona fide* attempt to access informal alternative procedures is a prerequisite to accessing the formal system.[154] Such insolvency regimes have led to a two-stage approach to insolvency where a debtor and his creditors are required to make an effort to reach a voluntary settlement before accessing the formal insolvency system.

The *World Bank Report* recognises the advantages of informal alternative procedures to insolvency stakeholders. These include avoiding stigma, being less expensive, affording an incentive for participation to debtors, simpler filing and processing applications where an informal arrangement has failed, and flexibility.[155] However, despite the numerous benefits of utilising informal alternatives, the *World Bank Report* regards the merits of such alternatives as illusory.[156] This is because it is difficult for a debtor to settle with his creditors, and creditors may abuse their bargaining power and force debtors into onerous repayment plans that are not viable.[157] Furthermore, informal alternatives are prone to procedural delays in accessing counselling and the delays experienced by counsellors in collecting the necessary information and formulating compromise proposals.[158] The *World Bank Report* thus proposes that the success of informal procedures may be improved by, for instance, rendering voluntary settlements binding on minority and passive creditors and affording institutional support and incentives.[159]

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[153] *World Bank Report* 45.
[154] *World Bank Report* 46.
[155] *World Bank Report* 46-47.
[156] *World Bank Report* 47. This is contrary to earlier reports that favour out-of-court settlements as indicated above (see para 2.4.1.3).
[157] *World Bank Report* 47. See ch 1 para 1.1 for a discussion of the challenges that natural person debtors in the Zimbabwean insolvency system might face while utilising the pre-liquidation composition that promotes an arrangement between a debtor and his creditors.
[158] See *World Bank Report* 61 for a discussion of the challenges debtors might face in developing economies in relation to court-based insolvency regimes. Therefore, it is imperative for insolvency stakeholders to weigh the delays and challenges faced in formal and informal procedures in relation to their respective insolvency regime or jurisdiction.
[159] *World Bank Report* 48-49.

The *World Bank Report* also discusses the placement of formal insolvency procedures. In this regard, it emphasises the importance of establishing the judiciary's role.[160] The *Report* acknowledges that the right to access courts is a fundamental human right. The involvement of courts in insolvency matters is thus to be expected because of insolvency law and associated issues related to the rights of a debtor and his creditors.[161] Lastly, the *World Bank Report* also weighs the merits of integrating natural person insolvency legislation into the general insolvency law against creating a separate piece of legislation.[162]

2.5.4.2 Institutional framework

> An effective framework provides timely outcomes and achieves confidence in its operation by stakeholders and the general public … Establishing a framework for the insolvency of natural persons should be integral to the development of consumer credit and debt collection institutions within a country.[163]

The second core legal issue discussed by the *World Bank Report* is the institutional framework of an insolvency regime. To this end, the *World Bank Report* separates the discussion into six specific matters, namely, the classification of existing frameworks,[164] court-based systems and the role of courts,[165] the role of trusted intermediaries,[166] administrative models of insolvency processing,[167] comparative institutional issues in the choice of the institutional framework[168] and financial issues in insolvency matters.[169]

Regarding the classification of existing insolvency frameworks, the *World Bank Report* divides insolvency regimes into three distinct frameworks, namely:[170]

(1) systems in which an administrative agency dominates;

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[160] *World Bank Report* 50.
[161] *World Bank Report* 50.
[162] *World Bank Report* 51-52. See ch 3 para 3.3 where it is indicated that the Zimbabwean natural person insolvency law was reformed in 2018 to a consolidated insolvency system that combines natural person and corporate insolvency into a single piece of legislation.
[163] *World Bank Report* 53.
[164] *World Bank Report* 55-56.
[165] *World Bank Report* 56-57.
[166] *World Bank Report* 57-58 and para 198.
[167] *World Bank Report* 59-61.
[168] *World Bank Report* 61-62.
[169] *World Bank Report* 62-63.
[170] *World Bank Report* 55-56. The *World Bank Report* submits that courts play a vital role in all systems highlighted above.

(2) hybrid public/private systems where public processing of insolvency co-exists with private restructuring alternatives; and

(3) court-based systems primarily serviced by publicly funded or private intermediaries.

Regarding the court-based systems and the role of courts, the *World Bank Report* emphasises the different roles that courts play in insolvency matters. It is indicated that courts' role in insolvency regulation differs, and this may include:[171]

(i) acting as gatekeepers to entry;
(ii) determining issues relating to the assets and liabilities of a debtor;
(iii) monitoring insolvency representatives; and
(iv) determining the dischageability of debts.

The *World Bank Report* adds that over the years high-income countries have limited the role of courts in insolvency matters. This has been achieved by, for example, dispensing with the requirement of a court hearing for filing for insolvency. Some jurisdictions even mandate that all insolvency applications be directed to an administrative agency, while judges merely oversee ensuring that the formalities have been complied with.

The *World Bank Report* notes the institutional advantages of utilising the court system because of the impartiality and trustworthiness of judiciary officials.[172] Despite these advantages, numerous disadvantages are also indicated. These include the costly nature of the court system and the philosophical design of court systems, specifically, the underlying design of the court system that requires courts to deliberate on adversarial legal disputes, which are very rare in insolvency disputes.[173]

The third significant matter discussed under the institutional framework relates to the role of intermediaries in insolvency regimes.[174] Intermediaries are more useful in a

[171] *World Bank Report* 56.
[172] *World Bank Report* 56. However, see Compagnon *A predictable tragedy* 141-165 regarding the general attack on and untrustworthiness of the Zimbabwean judicial system during the era of the former president Robert Mugabe, which this study argues has continued even after his downfall in 2018.
[173] *World Bank Report* 56. The costly nature of court-based insolvency systems makes them inaccessible to NINA debtors. Therefore, court-based systems have a gatekeeping counter-effect and are inaccessible to NINA debtors who cannot meet the stringent financial requirements. However, a contrast must be drawn between this assertion and the position in the American bankruptcy system where bankruptcy matters are decided by specially constituted Bankruptcy Courts that are equipped to handle debt related matters. See para 2.2.2.1.
[174] *World Bank Report* 58.

court-based insolvency system than administrative one. Intermediaries play an important role in assisting debtors and negotiating, administering and supervising repayment plans. Intermediaries may have different backgrounds and qualifications, including lawyers, accountants, or debt counsellors.[175] Trust in intermediaries must be maintained because the loss of trust may significantly "undermine the effectiveness of a debt relief system".[176] Empirical evidence indicates that the perception of the partiality of debt counselling agencies has an adverse effect on the utilisation of informal settlements by creditors.

The fourth matter under the institutional framework outlined in the *World Bank Report* is the administrative models of insolvency processing. The *World Bank Report* notes the significant role public agencies play in sorting, processing, and administering the insolvency of natural persons.[177] Utilising public agencies offers numerous advantages to the insolvency system, which includes introducing "a stable bureaucracy with the ability to develop experience in identifying and sorting cases that deserve examination and investigation". Additionally, public agencies may aid in improving impartial advice and information to debtors and creditors and address moral hazard issues. However, too numerous disadvantages may arise from utilising public agencies.[178] These may be negated by implementing an appropriate monitoring and reporting framework for public agencies, retraining employees and separating the administration and investigation functions of the public agencies.[179] In relation to NINA debtors, utilising public agencies, such as official receivers, has an advantage in ensuring access to such indigent debtors because this may result in a low-cost summary procedure requiring little to no involvement of the costly court system.[180]

The fifth matter under institutional frameworks considered by the *World Bank Report* is the comparative institutional issues in the choice of the institutional framework. The *World Bank Report* encourages legislators to build upon existing institutional infrastructures when developing insolvency regimes.[181] Additionally, the *World Bank*

[175] *World Bank Report* 57.
[176] *World Bank Report* 58.
[177] *World Bank Report* 59.
[178] These disadvantages are mainly the dangers of capture by creditors, debtors or professional groups, and potential conflicts of interest within the administration (*World Bank Report* 59-60).
[179] *World Bank Report* 60.
[180] Also, see in general Schwartz; Ben-Ishai 2020 *Int Insolv Rev*.
[181] *World Bank Report* 61.

Report discourages transplanting overly complex procedures from richer onto poorer countries because the courts in these countries may not have the administrative capacity to address these issues.[182]

Lastly, the *World Bank Report* discusses the financing issues concerning the institutional frameworks of insolvency regimes. It is advised that most debtors experience difficulty accessing insolvency regimes due to the financial requirements in some jurisdictions.[183] The *World Bank Report* outlines five approaches to the financing of insolvency regimes, namely:[184]

(1) state funding of the process;[185]
(2) cross-subsidisation of low value insolvencies by higher value estates;
(3) state subsidies to professionals involved in the process and write-off of court costs where there is an inability to repay;
(4) levies on creditors, such as taxation of distressed debt to fund those cases where individuals have no ability to pay; and,
(5) no state support beyond any general public funding of the court system.

It is noted that all of the five funding models equally have their advantages and accompanying disadvantages. In relation to the "user pay system" used in the Zimbabwean insolvency system, many debtors are marginalised because they cannot access the insolvency system because of their inability to pay the associated fees with the debt relief system.[186] However, the expenses of the insolvency system may be overcome by introducing online systems in the application stage, which can reduce the costs of the procedure.[187]

[182] *World Bank Report* 61. Thus, in relation to NINA debtors, it is imperative that developing economies like Zimbabwe do not transplant complex procedures from developed jurisdictions. The Zimbabwean legislature must implement "incremental responses to the changing nature of the demand for insolvency" by building on the already existing infrastructure. See in general ch 4 para 4.6 regarding the transplantation of the insolvency regulation within Zimbabwe's debt relief system from South Africa's debt relief system.
[183] *World Bank Report* 62. See ch 3 para 3.3.2 for a discussion of the plight of NINA debtors who cannot access the Zimbabwean insolvency regime due to financial requirement in the regime.
[184] *World Bank Report* 62.
[185] Including both creditor and debtor costs.
[186] *World Bank Report* 62. See ch 1 para 1.1 for a discussion of the marginalisation of NINA debtors in Zimbabwe's natural person debt relief system.
[187] *World Bank Report* 62.

2.5.4.3 Access to the formal insolvency regime

The third core legal attribute discussed in the *World Bank Report* is "access to the formal insolvency regimes". The *Report* indicates that access to natural person debt relief procedures should be transparent and certain.[188] Additionally, lawmakers should ensure against improper use by the debtor and his creditors.

Many lawmakers have restricted debtors' access to debt relief measures by implementing a "cessation of payment tests" or a "balance sheet test". The former test is preferred because it is simpler to apply. Additionally, some insolvency systems include a further "act of bankruptcy" requirement as a pre-requisite to access debt relief measures. However, the "act of bankruptcy" requirement is not advised because it limits access to insolvency procedures to deserving debtors who cannot meet their obligations.

The *World Bank Report* discusses the "open access" nature of most insolvency regimes.[189] Many advantages arise from providing open access to an insolvency system to debtors. These advantages include reducing the initial screening costs of an insolvency test and encouraging over-indebted individuals to petition for insolvency relief.[190] However, an insolvency regime that provides open access to debtors also has several disadvantages, including the potential moral hazard.[191]

However, moral hazard may be addressed by limiting the frequency of access to debt relief measures.[192] To this end, the *World Bank Report* indicates that insolvency regimes may implement a "bright-line rule restricting access to a second insolvency procedure within a defined period of time". This period can range between two to ten years following a first successful insolvency case. Furthermore, insolvency regimes

[188] *World Bank Report* 63.
[189] *World Bank Report* 64. Open access is regarded as the notion that an individual who meets an insolvency test such as the inability to pay debts as they fall due may, without more, gain access to an insolvency procedure that would permit an ultimate discharge of debts. See *World Bank Report* para 199 where it is submitted that "[o]pen access does not mean, therefore, that an individual's conduct will not be reviewed or sanctioned in insolvency".
[190] *World Bank Report* 64. In relation to NINA debtors, open access removes the financial obstacle that drives this group's discrimination in some insolvency regimes.
[191] *World Bank Report* 64. See para 2.5.3 for a detailed discussion of the problem of moral hazard. Also, see para 2.2 for a discussion of the ultra-liberal USA bankruptcy system and the subsequent introduction of the BAPCPA in 2005 that reformed the USA bankruptcy system from an ultra-liberal system to a more nuanced system.
[192] *World Bank Report* 66.

can subject repeat filers to a more intensive investigation and only admit exceptional cases to a second relief proceeding.[193]

The *Report* distinguishes insolvency regimes that define "insolvency" as "a current inability to meet present debts" and those that include "the possibility of debtors being able to improve their financial situation and repay debts at a future date".[194] The forward-looking perspective of "permanent insolvency" is regarded as speculative and an uncertain standard that raises decision making and error costs and may result in adopting over-inclusive proxies.[195] It is also not preferred because it may potentially add an extra financial burden on NINA debtors who cannot afford the costs, which would subsequently exclude them from accessing debt relief and a discharge afforded by these insolvency regimes.

The *World Bank Report* proceeds to discuss the disadvantages of high access barriers to the formal debt relief system and it points out that they leave some debtors in a state of informal insolvency. The *World Bank Report* argues that failure to access the debt relief system results in debtors losing incentives to participate in society. Such disincentivised debtors may require continued state support or go underground for several years to avoid creditors until their problems disappear or passions cool off. Consequently, lawmakers need to ensure that the needs of all debtors are considered, especially those of NINA debtors, by providing them access to a debt relief system and facilitating the discharge of their debts.

2.5.4.4 Participation of creditors

Creditor participation is essential in an effective insolvency system, and this should never be taken for granted.[196] Creditor participation is usually threatened when creditors view their involvement as unlikely to increase their dividends. It is also indicated that creditor passivity has been noted in most cases where little or no dividend to creditors is expected. Consequently, in such instances where little to no dividend to creditors is guaranteed, especially in proceedings involving NINA debtors,

[193] *World Bank Report* 66.
[194] *World Bank Report* para 192.
[195] *World Bank Report* 65.
[196] *World Bank Report* 70.

legislators must implement the necessary measures to prevent creditor passivity based on loss of trust arising in the insolvency regime.

Problems associated with creditor passivity may be obviated by lowering the quorum for creditors' meetings. Alternatively, mandatory creditor participation may only be made a pre-requisite in cases where the significant value from assets or future income is expected. Therefore, creditor participation should be removed where NINA debtors are involved – where the expenses incurred by creditors during their participation in the insolvency proceeding outweigh the returns because of the dire financial circumstances of NINA debtors. This may be achieved by scrapping creditors' meetings, simplifying the submission process, and verifying claims.

Regarding "creditor participation in plan confirmation", the *World Bank Report* recommends minimal involvement of creditors in establishing a repayment plan or other requirement for discharge or other relief. However, the *World Bank Report* notes that some systems vests creditors holding a majority claim with more authority over plan approvals.[197] This is redundant where NINA debtors are involved because any endeavour by creditors will yield little to no dividend.

The *World Bank Report* discusses the pivotal role played by impartial courts and/or intermediaries in insolvency matters. Courts have sometimes played a crucial coercive role in facilitating the participation of creditors in plan confirmation. This has been met with success in many jurisdictions. To this end, the *World Bank Report* indicates that:[198]

> [T]he underlying premise of most existing insolvency systems is that the goals of such system can be achieved only if a higher authority is willing to step in and impose a compromise arrangement for the benefit of creditors, and society in general.

The role played by courts and/or other administrative bodies, rather than creditors, on plan confirmation and discharge of debts is essential for an effective and inclusive debt relief system. The court system is preferred over creditors because:[199]

(i) Creditors adopt very different policies regarding debt adjustment;

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[197] *World Bank Report* 70.
[198] *World Bank Report* 72. Therefore, it is essential that trust be maintained in the court system because lack of trust in the judiciary may undermine its integrity among insolvency stakeholders regarding its ability to act impartially and impose a compromise arrangement that is regarded as beneficial to all stakeholders involved.
[199] *World Bank Report* 72-73.

(ii) There is a problem of creditor passivity;

(iii) Creditors may not be well informed about the debtor's circumstances and situation; and,

(iv) Creditors may also find themselves in a situation where other motives affect their ability to make a rational judgment about the consequences of insolvency proceedings for the debtor.

An insolvency regime must ensure and guarantee the protection of creditor rights to ensure creditor participation. Creditor rights can be guaranteed in numerous ways, which include the following:[200]

(i) Creditors must be given an opportunity to be heard in the court or administrative procedure, and they must have a right to object to the relief requested by the debtor;

(ii) Creditors must have the chance to offer evidence of circumstances that the relief is unwarranted;

(iii) Creditors must have a right to request that an examination of the debtor or of third parties be commenced;

(iv) Creditors may be allowed to comment on the content of the plan and, for example, to demand higher payments than the debtor proposes;

(v) Where creditors oppose a discharge and a plan, there may be a hearing in the court or in front of an administrator;

(vi) Where an administrative body or an insolvency representative has the main responsibility for conducting the proceedings, a dissenting creditor must have the right to bring the case to the court;

(vii) Where a court has confirmed a plan, creditors must have a right to appeal to a higher court; and,

(viii) The law must provide a procedure for cases in which assets or unexpected income are discovered post-discharge or post-confirmation.[201]

The *World Bank Report* states that most insolvency regimes are premised on voluntary and honest compliance by both a debtor and his creditors. Therefore, such regimes

[200] *World Bank Report* 73-74.

[201] In such systems, creditors must be allowed to request the reopening of such cases to collect and retroactively distribute the new value to creditors (*World Bank Report* 74).

must have mechanisms that allow the imposition of sanctions on creditors or debtors who act fraudulently while filing or processing claims.[202]

2.5.4.5 Solutions to the insolvency process and payment of claims

The fifth core legal attribute outlined in the *World Bank Report* is the "solutions to the insolvency process and payment of claims".[203] The payment plans discussed in this section are "payment through liquidation of the estate"[204] and "payment through a payment plan".[205] Additionally, this section also explores the "advantages and disadvantages of the different approaches to payment"[206] and the "payment of mortgages and other secured loans".[207]

Payment of debts through liquidation of a debtor's estate has historically been regarded as a pivotal method to meet a debtor's obligations. However, this may only be utilised where the debtor has substantial assets to warrant the significant administrative expenses of the inventory and liquidation process.[208] To this end, empirical evidence has indicated that:[209]

> [T]he overwhelming majority of debtors in every existing system of insolvency for natural persons have proven to have few if any assets of any value that are available for liquidation and distribution to creditors.

Therefore, liquidating a debtor's estate as a payment plan is not viable where NINA debtors are involved because they have few to no assets available for the liquidation process. Consequently, NINA debtors should seek relief from other debt relief measures.

Where a debtor has substantial assets to warrant the expenses of a liquidation process, certain essential properties of the debtor be exempted from the liquidation process. In line with other leading reports,[210] the *World Bank Report* argues that natural person debtors must be afforded an exemption of property as an incentive for

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[202] *World Bank Report* 74.
[203] *World Bank Report* 75-116. Also, see Coetzee *A comparative reappraisal* 76-87 for a detailed discussion and analysis of this section.
[204] *World Bank Report* 75.
[205] *World Bank Report* 85.
[206] *World Bank Report* 103.
[207] *World Bank Report* 107.
[208] *World Bank Report* 75.
[209] *World Bank Report* 75.
[210] See para 2.4.1.1.

participating in the insolvency process and also as an incentive for future productivity.[211] Exemption entails safeguarding certain assets of the debtor from post-judgment execution and garnishment. Through exemption, a debtor is left with sufficient property to meet post-insolvency minimum domestic needs for himself and his family and, where necessary, minimum business needs.

However, the *World Bank Report* proceeds to argue that the benefits of an exemption should not be overstated. Consequently, the *World Bank Report* discourages relying on the property exemption option as an alternative to a discharge of debts. The *World Bank Report* argues that a discharge of debts limits creditors' rights and offers debtors a fresh start, while an exemption does not limit creditors' rights over time. Therefore, despite the several benefits that emanate from property exemptions, they are insufficient to achieve the benefits offered by a discharge option.

The *World Bank Report* further distinguishes between three different approaches to exemptions that exist in different insolvency regimes globally. These are:

(i) Exemptions of a narrow range of assets by a debtor up to a total value;[212]
(ii) Exemptions of particular assets by the debtor;[213] and
(iii) Standards-based approach.[214]

Concerning the first approach to exemptions, the *World Bank Report* regards it as penal in nature which largely reflects old laws that are unreasonable because it leaves debtors in a depressed state due to sacrificing future contributions to society.[215] This approach entails that all of the debtor's property at the time of the application or liquidation order automatically become part of the insolvency estate. After that, debtors are allowed to exempt a narrow range of assets for themselves and their families.[216] The exempted property, under this approach, has historically been limited to tools of the debtor's trade and very low levels of necessary apparel and bedding for debtors

[211] *World Bank Report* 76.
[212] *World Bank Report* 77-78.
[213] *World Bank Report* 78-79.
[214] *World Bank Report* 80.
[215] *World Bank Report* 78.
[216] *World Bank Report* 78.

and their families.[217] This approach to exemption is not favoured because it usually leaves debtors living at poverty levels.[218]

Regarding the second approach to exemptions, namely, exemptions of particular assets by the debtor, the *World Bank Report* refers to this approach as a modern adaptation of the first approach. In this regard, all of the debtor's property existing at the time of the application or liquidation order is made available for distribution to creditors. However, the debtor is allowed to exempt particular assets in particular categories and up a certain amount.[219] In systems that follow this approach, the legislature sets out a broad range of categories of assets that the debtor may seek to exempt, including family homes, vehicles, and general household goods and furnishings, and tools of the trade.[220] The procedure will also outline the exemption limits for the broad categories of assets, including the debtor's home, the debtor's motor vehicle, general household goods held primarily for personal, family, or household use of the debtor or the debtor's family, professional books or tools of the trade of the debtor, unmatured life insurance policies and health aids.[221] Variations of this approach exist, wherein some jurisdictions permit debtors unable to use up the exemption limits in some categories of assets to apply the unused amount to other assets. Some jurisdictions allow debtors to sell off assets to buy exempt assets.[222]

Challenges regarding this approach to exemption largely emanate from disagreements between the debtor and insolvency practitioners or his creditors regarding the debtor's need to maximise benefits under the broader categories. Additionally, the limits on the value of exempt assets that may be excluded from the liquidation process are often too low or become too low over time because of inflation. In such systems, mostly those experiencing hyperinflation, the legislature usually includes artificial or notional measures which are regularly updated.[223]

In relation to the third approach to exemption, namely, the standards-based approach, the *World Bank Report* regards this approach as the opposite perspective to the first two approaches. In this regard, all of the debtor's assets existing at the time of the

[217] *World Bank Report* 78.
[218] *World Bank Report* 78.
[219] *World Bank Report* 78.
[220] *World Bank Report* 78.
[221] *World Bank Report* 78.
[222] *World Bank Report* 79.
[223] *World Bank Report* 79.

application or liquidation are exempt from liquidation.[224] The burden then switches to the insolvency representative or regulator to petition to reclaim particular items of excess value that could be of value to the creditors and the insolvency estate. The *World Bank Report* indicates that this approach might be much more efficient in cases involving debtors with limited personal assets. It is further highlighted that the underlying assumption of this forward-looking approach is that the personal items of debtors are of greater value to them and their families than they are of economic value to their creditors.

Alternatively, a debtor can meet his financial obligations through a payment plan. This is essential when a debtor has few or no disposable assets. In this regard, a debtor with "excess" income contributes his future income in exchange for benefits the debt relief system offers.[225] Where a debtor has adequate surplus income that can be utilised to meet his obligations, two pertinent issues must be examined: the payment plan duration and the proportion of surplus income a debtor participating in a payment plan can retain.[226]

However, financing through payment plans is not suited to the needs of NINA debtors because they have little to no income that can be utilised to meet the restructured financial obligations. In this regard, the *World Bank Report* accepts that many debtors in all insolvency systems for natural persons fall into this category.[227] Because of the dismal financial circumstances of NINA debtors, they are unable to provide a dividend to their creditors; thus, some insolvency systems have excluded this group from relief. The *World Bank Report* regards this exclusion as discrimination against NINA debtors. It provides that all insolvency systems must provide the same relief to all debtors regardless of their financial circumstances. Debt relief for NINA debtors who cannot proffer any value for creditors may be achieved by payment plans through recognising "zero plans".[228] In this regard, the payment plan will be purely symbolic and require

[224] *World Bank Report* 80.
[225] *World Bank Report* 85. The benefit is usually a discharge of debts.
[226] *World Bank Report* 85. This falls beyond the scope of this study because the group of debtors under consideration has little to no income that can warrant any fruitful participation in a repayment plan. Any participation by NINA debtors will amount to naught because no dividend can be awarded to the creditors. See, Coetzee *A comparative reappraisal* 80-84 for a detailed analysis of payment through a repayment plan. Also, see *World Bank Report* 99-100 for a discussion of the plight of NINA debtors who are excluded from accessing debt relief measures because of their inability to offer a benefit to creditors.
[227] *World Bank Report* 99.
[228] *World Bank Report* 100.

debtors only to pay the fees of the insolvency representative or not even those fees. The *World Bank Report* also notes that some leading insolvency regimes have introduced NINA-specific procedures that entail a low-cost administrative proceeding overseen by a state authority. Such procedures reduce the formalities and expenses of the court-based insolvency procedure and are specifically aimed at facilitating debt relief to debtors for whom court costs would otherwise have been a barrier to relief.

2.5.4.6 Discharge

The last core legal attribute of an effective natural person insolvency system outlined in the *World Bank Report* is "discharge". This discussion explores the purpose and characteristics of a discharge and also examines the scope, and concludes by discussing the impact of a discharge on co-debtors and third-party collateral.

The *World Bank Report* recognises the significant role of economic rehabilitation in insolvency law. It indicates that it constitutes one of the principal purposes of an insolvency system for natural persons.[229] Economic rehabilitation is aimed at re-establishing a debtor's economic capability and allowing him to re-enter the credit market without the burden of debts.

Three elements must be met to achieve economic rehabilitation, namely:[230]

(i) The debtor has to be freed from excessive debt;[231]
(ii) The debtor should be treated on an equal basis with non-debtors after receiving relief;[232] and,
(iii) The debtor should be able to avoid becoming excessively indebted again in the future.

The *World Bank Report* highlights the different discharge methods, namely the fresh start approach to discharge and the earned new start approach to discharge. The fresh start refers to a straight discharge offered to debtors without any form of payment.[233]

[229] *World Bank Report* 117.
[230] *World Bank Report* 117.
[231] See para 2.5.2 for a discussion of the benefits derived from freeing debtors from excessive debt for all insolvency stakeholders.
[232] This element relates to the principle of non-discrimination that is also essential in eradicating the stigma often attached to insolvents.
[233] See para 2.2 for a discussion of the fresh start approach to bankruptcy in relation to the American bankruptcy system.

Therefore, a debtor is guaranteed immediate statutory debt relief through a fresh start. The *World Bank Report* also indicates that numerous insolvency systems have shifted away from a liberal straight discharge except where the most impecunious debtors are involved.[234]

On the other hand, the earned new start approach to debt relief refers to a delayed or conditional discharge of debts offered to debtors based on partial payment of debts.[235] The earned new start approach entails regulating a debtor's economic life for some time through a debt adjustment plan or payment plan in return for a discharge of debts. The debtor has to earn the discharge; where the discharge is not earned, the debtor will be perpetually trapped in debt. However, the earned new start does not suit the needs of NINA debtors who, after accessing the insolvency system, will be perpetually trapped in debt because they cannot meet their financial obligations through a rearranged repayment plan. Therefore, the immediate discharge afforded by the fresh start approach is preferred because it is more suited to the needs of NINA debtors. This approach may ensure that such indigent debtors obtain relief from indebtedness as an extension of the debt relief system.

Two distinct philosophies underlie the earned new start discharge: yield to creditors and reward-based discharge. The former philosophy puts forward that an earned new start is aimed at facilitating a proportional payment to creditors before a debtor may, through a discharge, be freed from his debtors. This pro-creditor view is usually characterised by the advantage/benefit to creditors requirement.[236] The later debtor-oriented philosophy regards an earned new start as a reward offered to debtors for their effort in meeting their financial obligations.[237]

The *World Bank Report* proceeds to indicate that the benefits of a discharge may become illusory where anti-discrimination regulations and mechanisms do not

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[234] *World Bank Report* 117. Also, see para 2.2.3 for a discussion of the BAPCPA that reformed the American bankruptcy system from an ultra-liberal approach to a more nuanced approach.

[235] The payment is usually in proportion to the debt, perhaps ten per cent, or maybe even a symbolic payment of some modest amount (*World Bank Report* 118).

[236] See ch 3 para 3.3 and ch 4 para 4.2.2.3 for a discussion of the benefit to creditors requirement in the Zimbabwean and South African debt relief systems, respectively.

[237] Despite the fresh start discharge being the preferred form of discharge in this thesis, it is submitted that where an insolvency regime utilises an earned new start discharge, a debtor-oriented philosophy must be embraced because it gives an incentive to debtors to participate in the insolvency process with the hope of a reward through a discharge of debts that is tailor-made to suit an individual debtor's needs.

accompany the discharge to prevent the future over-indebtedness of debtors.[238] To this end, debtors must not experience discrimination during the plan and after obtaining a discharge. This may be achieved by implementing data protection regulations that prohibit the recording and using information on completed payment plans.[239] Additionally, legislators may remove any superfluous prohibitions and conditions imposed on debtors who have accessed a debt relief system, such as the prohibition on holding certain public offices. Lastly, future over-indebtedness can be tackled through compulsory financial education to improve a debtor's financial literacy.

Regarding the scope of the discharge, the *World Bank Report* indicates that as many of the debtor's debts as possible must be included in the scope of the discharge. It is noted that:[240]

> The more debts that are excluded from the effect of the discharge, the less effective the insolvency regime can be in achieving the debtor's rehabilitation… .

However, numerous exceptions to this rule apply, usually relating to debts not created in the market context and must be excluded from the discharge process. These debts are:[241]

(i) Maintenance: child/spousal support;
(ii) Fines and other sanctions;
(iii) Taxes and other government debts;
(iv) Educational loans;
(v) Reaffirmation agreements; and,
(vi) Post-commencement debts.

2.6 The discharge option

As outlined above, one of the key elements of an effective and inclusive debt relief system is the discharge option.[242] Discharge is a fundamental aspect of the fresh start policy that emerged from the American bankruptcy system. Its significance is also echoed by leading reports on insolvency discussed in this study.[243] Discharge is

[238] *World Bank Report* 118-119.
[239] *World Bank Report* 119.
[240] *World Bank Report* 120.
[241] *World Bank Report* 121-124.
[242] See para 2.4.1.2.
[243] See paras 2.2, 2.3, 2.4.1.2 and 2.5.4.6.

essential because it frees the debtor from his pre-insolvency debts and allows him to re-enter the credit economy without the burden of debts. Jackson[244] submits that discharge not only releases the debtor from his past financial obligations but also protects him from some of the adverse consequences that might otherwise result from that release.

Where debt relief systems do not result in a discharge of debts, debtors become perpetually trapped in debt, and it may have the unintended result that they are forced to resign and seek employment in the informal sector.[245] Coetzee[246] also submits that if these marginalised debtors cannot find a source of income in the informal sector, they become a social burden on the economy.

International guidelines indicate that discharge should be conditional and it should only be accessible by honest but unfortunate debtors – a principle that was first coined in the American bankruptcy system.[247] Consequently, international trends in insolvency law have reflected that the discharge option should not be proffered to individuals who have defrauded their credit providers.[248] This is also recognised in the Zimbabwean debt relief system, where fraudulently acquired debt cannot be statutorily discharged in terms of the liquidation and pre-liquidation composition procedures.[249] International guidelines also indicate that there should be consequences for debtor fraud.[250]

Discharge from indebtedness has numerous benefits, including placing the debtor in a position where he may positively participate in the credit economy. A discharge option encapsulates a social safety net that cushions debtors who have failed in their enterprises. The safety net also helps spur the economy because individuals may be encouraged to be more adventurous by taking necessary entrepreneurial risks with the assurance of a sound debt relief system ready to bail them out in case they fail. This is especially important in a country like Zimbabwe, which lacks a sound social security system. Furthermore, the social safety net that a discharge option provides is

[244] Jackson *The logic and limits* 225.
[245] See Coetzee *A comparative reappraisal* 10.
[246] Coetzee *A comparative reappraisal* 10.
[247] See para 2.2.
[248] See Jackson *The logic and limits* 226 who questions why individuals who fraudulently acquired debt are not offered a discharge option while other morally reprehensible individuals such as arsonists and murderers can access a discharge of debts.
[249] See ch 3 para 3.3.4.
[250] See paras 2.4.1.3 and 2.5.4.4.

increasingly significant for Zimbabwe, which has not recovered from the 2007 - 2009 global economic meltdown and the consequences of which have been compounded by the devastating Covid-19 pandemic.[251] In the latter respect, some well-developed personal insolvency systems have recently appeared to afford extended protection to consumers.[252] In this regard, the eligibility criteria of NINA-specific debt relief measures within the United Kingdom have undergone a process of reform to accommodate debtors adversely affected by the pandemic.

In respect of the significance of a sound insolvency system, Garrido[253] submits that:

> Constructive solutions to the negative consequences of indebtedness are useful tools for sustainable and inclusive development. The regulation of personal insolvency influences how individuals perceive and deal with risks in their economic activity, and determines whether and how individuals suffering from an excessive debt burden can return to a productive economic life.

However, despite the benefits that a discharge option's social safety net may provide, it is imperative to note the moral hazard emanating from this assurance. Moral hazard is referred to as a situation in which individuals systematically and rationally underestimate the real costs of engaging in a risky activity because some of these costs of the risky activity are borne by someone else.[254] Therefore, the unintended consequence of a discharge option's social safety net may result in debtors underestimating the real costs of engaging in risky entrepreneurial activities, thus, acting less prudently and less carefully than they would in the absence of such a safety net.[255]

Thus, when compared to debtors in jurisdictions with an earned fresh start discharge, debtors in jurisdictions with a fresh start discharge option may potentially act less prudently and less carefully because of the little to no costs nature of the discharge extended to them. However, despite the concerns of moral hazard that may arise in relation to effective debt relief systems, international guidelines favour a discharge option because the benefits it proffers to society, creditors and the debtor himself outweigh such concerns.[256]

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[251] See ch 1 para 1.1.
[252] See in general ch 5.
[253] See Garrido 2014 *World Bank Legal Rev* 114.
[254] See Jackson *The logic and limits* 231.
[255] See para 2.5.3.
[256] Para 2.5.3.

In relation to moral hazard, Jackson[257] correctly asserts that in contrast to general social welfare programmes, the social safety net that a discharge option provides reduces the moral hazard that general social welfare programmes create. This assertion emanates from the consensus that a discharge option facilitates the allocation of risk of financial distress between a debtor and his creditors.[258] Consequently, a discharge option's social safety net allocates much of the risk of ill-advised credit decisions not to general social welfare programmes but to creditors.[259]

Therefore, the potentially positive contribution to the economy that emanates from the social safety net of a sound debt relief system justifies the need for the implementation of a discharge option in contradiction to the sacrosanct private law principle of *pacta sunt servanda*.[260]

In relation to this, Kilborn[261] outlines three themes that he regards to be long-held rationalisations for the provision of a discharge option. These rationalisations are the collection, mercy and rehabilitation themes. However, this study echoes the benefits of the assurance afforded by a discharge option's safety net to debtors and its potential to encourage entrepreneurial enterprises, chiefly because of the socio-economic background upon which the study rests.

2.7 Conclusion

Different insolvency regimes approach the treatment of the insolvency of natural persons differently. However, an overlap of principles that are essential for a developing jurisdiction like Zimbabwe may be extracted from the discussion undertaken in this chapter. This chapter has highlighted how the American bankruptcy system, which pioneered the fresh start philosophy, accommodates NINA debtors by granting this oft-marginalised group of debtor's access to the bankruptcy system. The system also offers them an opportunity to obtain economic rehabilitation through an

[257] See Jackson *The logic and limits* 231.
[258] See Eisenberg 1981 *UCLA L. Rev* 976-991.
[259] Jackson *The logic and limits* 231.
[260] The *pacta sunt servanda* principle means that "agreements must be kept" and it forms the basis of the common law of contracts. See in general Pillay *The impact of pacta sunt servanda*.
[261] Kilborn 2003 *Ohio St LJ* 864-883. Kilborn further submits that these rationalisations no longer apply in modern insolvency law; therefore, they are merely indicated here to provide a holistic understanding of the discharge philosophy. Also, see Coetzee *A comparative reappraisal* 43-44.

immediate statutory discharge of debts.[262] Additionally, an analysis of leading reports in insolvency has shown that the general English and European insolvency landscape, underpinned by the earned new start philosophy, offers deserving debtors a discharge under a liquidation or repayment plan. Further, NINA debtors are accommodated through a largely tailor-made and streamlined NINA-specific procedure that leads to a discharge of debts.[263]

One of the key principles highlighted in this chapter, in respect of a sound insolvency system, is the need for a balance between the interests of all stakeholders in insolvency.[264] Society, creditors and the debtor are integral role players in insolvency. An effective system benefits all three parties, and their interests within the insolvency process must be guaranteed.

The American bankruptcy system, which was analysed first in this chapter, shifted from an ultra-liberal system to a more nuanced system through the introduction of the BAPCPA in 2005. However, the bankruptcy system may still be regarded as a debtor-oriented system because it continues to accommodate all honest but unfortunate debtors.[265] The BAPCPA reformed the American bankruptcy system by introducing a mandatory means test and pre-filing counselling requirement for applicants. These measures are chiefly aimed at simultaneously identifying the "can-pay" debtors and eradicating the moral hazard that may be caused by an ultra-liberal system that arguably promoted abuse by dishonest debtors. The reforms that the BAPCPA introduced were deemed to result in a "fool's errand" that increased monitoring and administrative pressure on the bankruptcy system and filing costs.

However, these reforms have not affected the position of NINA debtors, who may still obtain an opportunity for economic rehabilitation through the Chapter 7 liquidation procedure. Furthermore, the Chapter 13 repayment procedure accommodates debtors who, after accessing the measure, encounter a financial crisis falling within the NINA category by providing such debtors with a discharge opportunity through the hardship discharge.

[262] See para 2.2.1.
[263] See paras 2.3, 2.4.1.2 and 2.5.4.6.
[264] See paras 2.1, 2.3, 2.4.1.1 and 2.5.3.
[265] See para 2.2.3.2.

Several overlapping internationally regarded policies, principles and guidelines have been observed in the discussion of the leading reports on insolvency and the American bankruptcy system. The salient principles highlighted above, are access to all honest but unfortunate debtors and a discharge of debts as an extension to insolvency procedures. Further to the aforementioned core principles, this chapter highlighted several secondary recommendations for a sound personal insolvency regime. These recommendations are as follows: preference for out-of-court or extra-judicial proceedings, preference for informal debt relief proceedings, property exemptions, debtor counselling, and a moratorium on debt enforcement.

i. Access to all honest but unfortunate debtors

Access to the debt relief system for all honest but unfortunate debtors is an integral feature of an effective and inclusive debt relief system.[266] In this regard, legislators must implement debt relief measures that facilitate access to debtors of all categories regardless of their financial circumstances.[267] The underlying principle of a sound personal insolvency system is the non-discrimination of debtors, especially, indigent debtors who mostly fall within the NINA category of debtors.[268] Access requirements must be transparent and certain, and they should not be determined by a debtor's financial capacity to achieve this.[269] Legislators may guarantee the non-discrimination of the insolvency system by, for instance, ensuring that the insolvency regime makes provision for multiple relief procedures, thereby ensuring that different categories of debtors utilise procedures that best suit their financial circumstances.[270]

In respect of NINA debtors, cannot provide a dividend to their creditors, the *World Bank Report* recommends implementing NINA-specific measures that primarily refer to a low-cost administrative proceeding overseen by a state authority.[271] Such procedures are important because they reduce the formalities and expenses of the formal court-based insolvency procedure and specifically aim to facilitate debt relief to debtors to whom court costs would otherwise have been a barrier to relief. Additionally,

[266] See para 2.2.
[267] Para 2.5.4.5.
[268] See paras 2.2.1, 2.4.1.1 and 2.5.4.5.
[269] Paras 2.4, 2.4.1.1 and 2.5.4.3.
[270] See para 2.5.4.3.
[271] Paras 2.5.4.2 and 2.5.4.5. Also, see in general Schwartz and Ben-Ishai 2020 *Int Insolv Rev*.

legislators may implement “zero plans” where the debt repayment plan is purely symbolic and requires debtors to pay only the fees of the insolvency representative and, sometimes, not even those fees.[272]

Lastly, access to formal debt relief procedures may also be ensured by enforcing open access for NINA debtors. This is beneficial because it reduces the initial screening costs and incentivises such debtors to seek relief from their over-indebtedness. However, open access may result in a moral hazard, which the legislature may, in turn, curb by limiting the frequency of access to debt relief measures.[273]

ii. Discharge of debts

The *World Bank Report* indicates that economic rehabilitation is one of the main purposes of an insolvency system for natural persons. Economic rehabilitation offers a discharged debtor an opportunity to re-establish himself and re-enter the credit market without the burden of debts.[274] Different approaches to discharge have been identified, including the fresh start and the earned new start approach to debt relief. However, in all respects, the result of a discharge must be a release from pre-existing over-indebtedness because debtors should not suffer indefinitely.[275] Discharge is increasingly meaningful in contemporary insolvency systems because it differentiates the yesteryear punishment-oriented insolvency systems from modern economic reality that promotes consumerism and its significance in the economy.[276]

On the one hand, the fresh start discharge, that emerged in the American bankruptcy system reflects an immediate and unconditional discharge of debts, to honest but unfortunate debtors, upon accessing the bankruptcy system.[277] On the other hand, the earned fresh start discharge reflects an extension of a discharge opportunity to debtors who have successfully made a *pro-rata* repayment to creditors.[278] The fresh start

[272] See para 2.5.4.5.
[273] See para 2.5.4.3.
[274] See para 2.5.4.6.
[275] Para 2.4.1.2.
[276] See para 2.4.1.2.
[277] Para 2.2.
[278] See paras 2.3, 2.4.1.2 and 2.5.4.6.

approach to discharge has been regarded as the most suited approach to the needs of NINA debtors, who form the subject of this study.

However, despite the differing approaches guiding the discharge option, the overriding principle is that discharge is not free. Some jurisdictions require debtors to give up their non-exempt property to access the discharge that the liquidation process provides, while other jurisdictions require debtors to repay a certain amount over usually a three to five-year term to access discharge through repayment plans.

It has also been indicated that the benefits of a discharge may be illusory if not accompanied by non-discrimination principles and measures to avoid future over-indebtedness.[279] Non-discrimination principles are integral in eradicating the stigma often attached to the insolvency system and offer an incentive to debtors to seek assistance by accessing debt relief measures.

Further, the discharge must also free the debtor from as many debts as possible at the beginning of the proceedings or when the discharge is obtained.[280] However, certain debts may be excluded, or be kept to a minimum in the discharge. These debts include student loans, taxes, court fines, fraud and maintenance agreements.[281]

Lastly, this study has also highlighted that the discharge option's safety net may also potentially create a moral hazard.[282] This refers to a situation wherein individuals systematically and rationally underestimate the real costs of engaging in risky activities because some of the costs of the risky activities are borne by someone else.[283] However, despite the moral hazard concern, internationally regarded policies, principles and guidelines in insolvency favour a discharge option because the benefits it offers to society, creditors, and the debtor outweigh the moral hazard it might create.[284]

[279] See para 2.5.4.6.
[280] Para 2.4.1.3.
[281] See paras 2.4.1.3 and 2.5.4.6.
[282] Para 2.6.
[283] Jackson *The logic and limits* 231.
[284] Para 2.6.

iii. Preference for out-of-court or extra-judicial proceedings

It must be emphasised at the outset that the judicial system cannot be fully excluded from insolvency processes because insolvency proceedings deal with the determination of debtors' human rights.[285] The role of courts in insolvency issues includes the following: acting as gatekeepers to entry, establishing repayment plans, determining issues relating to the assets and liabilities of a debtor, monitoring insolvency representatives and determining the dischargeability of debts.[286] However, despite the judiciary's integral role in insolvency proceedings, international trends in insolvency favour out-of-court or extra-judicial proceedings.[287] To this end, legislators must implement measures that dispense with the requirement of a court hearing or limit the court's role to a bare minimum, by restricting the court to a largely oversight role in the insolvency proceedings. The judiciary may step in to overrule dissenting creditors if the creditors' position in the outcome of the extra-judicial proceedings is not materially different from that in judicial proceedings.[288] The *INSOL Consumer reports* provide that because the needs of debtors are more often of a non-legal than of a legal nature, there should be a delegalisation and dejuridification of consumer debt problems by relying on out-of-court alternatives to debt relief.[289]

Some advantages of out-of-court proceedings include easy filings and processing of applications. Further, extra-judicial proceedings are remarkably cheaper than court proceedings and they are flexible enough tailor to the debtor's needs. Thus, they may be entered at favourable conditions that suit all categories of debtors, especially, the NINA category of debtors.[290] To this end, out-of-court proceedings are regarded as the most favourable to NINA debtors who cannot meet the cumbersome requirements of formal court proceedings.[291]

[285] Para 2.5.4.2.
[286] See para 2.4.1.3.
[287] Paras 2.3, 2.4 and 2.4.1.3. Also, see *Reifner Report* 247.
[288] See para 2.5.4.2.
[289] Para 2.4.1.3. Also, see *INSOL Consumer report* I 25.
[290] Para 2.4.1.3.
[291] See paras 2.4.1.3 and 2.5.4.2.

iv. Preference for informal debt relief proceedings

Compared to formal proceedings, informal alternative proceedings are beneficial because they lower the stigma attached to insolvency and are also less expensive.[292] Additionally, informal procedures are faster than formal procedures and are flexible enough to be tailor-made to the needs of debtors. In this way, they may accommodate NINA debtors who are not in a position to afford the cumbersome requirements associated with formal proceedings.[293]

However, different viewpoints are provided regarding the effectiveness of such informal alternative proceedings. On the one hand, the *INSOL Consumer report* provides that they must be favoured over formal procedures. However, lawmakers may require debtors to show an attempt to access informal alternative procedures as a pre-requisite to access formal procedures.[294] On the other hand, a contrasting view is held by the *World Bank Report*, which provides that the benefits of informal procedures are illusory because creditors have historically shown little interest in engaging actively and constructively in such processes. Additionally, the *World Bank Report* submits that informal procedures have usually culminated in debtors being forced into onerous agreements that favour the interests of creditors because of the parties' unequal bargaining positions. The *World Bank Report* further provides that informal procedures are prone to procedural delays in accessing counselling.[295] The *World Bank Report* is the most recent report among the reports discussed in this thesis, and therefore, this report's recommendation regarding informal proceedings is preferred.

The *World Bank Report* also argues that in jurisdictions where informal proceedings have been successful, the legislators have ensured the availability of professional assistance.[296] Professional assistance entails reliance on an objective and impartial body that assists with negotiating with creditors. In this regard, empirical evidence indicates that the perception of the partiality of debt counselling agencies has an adverse effect on the utilisation of informal negotiated settlements by creditors.[297]

[292] See para 2.5.4.1.
[293] Para 2.5.4.1.
[294] See para 2.4.
[295] See para 2.5.4.1.
[296] Para 2.5.4.1.
[297] Para 2.5.4.2.

Lastly, success regarding negotiated informal settlements has been seen in jurisdictions where there is a prohibition against the immediate threat of debt enforcement by creditors during the negotiation phase.[298]

v. Property exemptions

The discussion in this chapter has also indicated that some sound insolvency systems usually include provisions to exempt some of the debtor's property from the liquidation process.[299] Thus, the exempted property will not form part of the insolvent estate, and the debtor retains ownership of the property despite the liquidation order against his estate. An exemption aims to provide a debtor with necessities that he may use to re-establish himself.[300] Therefore, through property exemptions, the discharged debtor will not use his money to purchase the necessities of life. It is also submitted that property exemptions improve the discharge outcome, giving debtors a head-start.[301] Because of the importance of property exemptions, legislators are encouraged to liberalise provisions that regulate the exemptions so that much of the debtor's property is excluded from the liquidation process.

The *World Bank Report* discusses three approaches to property exemptions: namely: exemptions of a narrow range of assets by a debtor up to a total value, exemptions of particular assets by the debtor, and the standards-based approach.[302] The first approach represents an archaic approach to exemption, and is regarded as penal. This approach is not preferred because it usually leaves debtors living close to poverty levels and in a depressed state due to sacrificing future contributions to society. The scope of the exemption under this approach is usually limited to the debtor's tools of the trade, necessary apparel and bedding for the debtor and his family up to a very low level.

The second approach to property exemption is a modern adaptation of the first approach. Where this approach is followed, the legislature sets out a broad range of

[298] Para 2.5.4.2.
[299] See paras 2.2.1, 2.4.1.1 and 2.5.4.5.
[300] Paras 2.2.1, 2.4.1.1 and 2.5.4.5.
[301] See Jackson *The logic and limits* 227-228.
[302] See para 2.5.4.5.

categories of assets that the debtor may seek to exempt, including family homes, vehicles, household goods and furnishings, and the debtor's tools of the trade.

Lastly, the third approach to property exemptions is the opposite perspective of the above two approaches and is the preferred approach in this study. In terms of this approach, all of the debtor's property existing at the time of the application or liquidation is exempt from liquidation. Therefore, the insolvency representative or regulator bears the burden of petitioning to reclaim particular items of excess value that could be of value to the creditors and the insolvency estate.[303]

vi. Debtor counselling

One of the two reform measures introduced by the BAPCPA to the American bankruptcy system is pre-filing credit counselling to debtors.[304] Counselling is also highly regarded in the general English and European insolvency landscape, and leading reports discussed in this chapter recommend its provision to debtors.[305] In this regard, the *INSOL Consumer reports* submit that debtors must be afforded counselling both before filing petitions for liquidation and after the bankruptcy proceedings.[306] The counselling must be provided by an impartial and independent professional intermediary knowledgeable about consumer specific problems.[307]

vii. Moratorium on debt enforcement

The last recommendation that is revisited here is a moratorium on debt enforcement. International best practice in insolvency recommends that legislators ensure that a temporary automatic prohibition against debt enforcement becomes active once a debtor files a debt relief petition.[308] A moratorium on debt enforcement is pivotal because it gives debtors "breathing space" for developing a payment plan or other

[303] See para 2.5.4.5.
[304] See para 2.2.3.1.
[305] Para 2.3.
[306] Para 2.4. Also, see *INSOL Consumer report* I 12; *INSOL Consumer report* II 13-14.
[307] *INSOL Consumer report* I 27.
[308] See *INSOL Consumer report* I 14.

resolution and frees debtors from creditor intimidation during the insolvency proceedings.[309]

[309] See *World Bank Report* 15.

CHAPTER 3

THE ZIMBABWEAN NATURAL PERSON DEBT RELIEF SYSTEM

Summary

3.1 Introduction

The Zimbabwean debt relief system is regulated by the recently introduced Insolvency Act [Chapter 6:07] (hereafter "the Act"),[1] which repealed the Insolvency Act [Chapter 6:04] that had been in force since 1 January 1975.[2] The liquidation procedure is the primary debt relief measure of this recently introduced consolidated Act.[3] The liquidation procedure follows an order by the High Court against an overcommitted debtor who cannot meet his obligations. The procedure is commenced by an application to the court by a debtor, or his creditors, requesting an order directing an insolvent to hand over his property to a trustee for sale and distribution of the proceeds among his creditors.[4] Access to the liquidation procedure imposes certain prohibitions on the insolvent. However, access to this measure is essential because it may release him from his pre-liquidation debts as an extension of the insolvency proceeding. Relief

[1] The Insolvency Act [Chapter 6:07] may also be cited as the Insolvency Act 7 of 2018. This statute came into operation on 25 June 2018 and sought to consolidate Zimbabwe's natural person and corporate insolvency systems.

[2] The Insolvency Act [Chapter 6:04] may also be cited as the Insolvency Act 13 of 1973. Hereafter referred to as the "Insolvency Act (Cap 6:04)". The Insolvency Act (Cap 6:04) superseded Chapter 53 of the Revised Laws of (Southern Rhodesia) that had repealed the Insolvency Act 21 of 1924.

[3] The Act reformed Zimbabwe's insolvency regime by, *inter alia*; referring to both consumer and corporate insolvency as liquidation, in contrast to the repealed insolvency statutes that referred to natural person insolvency as sequestration while corporate insolvency was referred to as liquidation.

[4] See para 3.3 for a detailed discussion of the liquidation procedure.

from indebtedness follows a rehabilitation order by the court, which discharges the debtor from certain qualifying debts.[5]

However, access to the liquidation procedure is a 'privilege' afforded to debtors with disposable income and/or assets, thus, marginalising indigent debtors who cannot meet this requirement.[6] Additionally, the eligibility criteria of the liquidation procedure also prevent indigent debtors from accessing the measure because of the "advantage for creditors" requirement. This golden thread runs throughout the Act.[7] In terms of the "advantage for creditors" requirement, the court must be convinced that granting a provisional or final liquidation order will proffer an advantage to all creditors. Inadvertently, this requirement marginalises debtors in dire financial circumstances who lack the requisite disposable income and/or assets that can offer an advantage to creditors. Such marginalised debtors largely fall within the so-called No-Income-No-Asset (NINA) category of debtors, forming this study's subject.[8] The NINA debtor category also includes small wage earners who have been adversely affected by the dreadful socio-economic situation in Zimbabwe and who have, over the years, been forced to borrow, mainly to survive.[9] This debtor group is expected to grow because of the negative consequences of the Covid-19 pandemic.

[5] S 106 of the Act. Access to a discharge option is fundamental for an effective debt relief system because this assists in affording the insolvent an opportunity to re-enter the credit economy without the burden of debts (ch 2 para 2.4.1.2).

[6] This is in stark contrast with international trends in insolvency law that require the provision of a discharge option to all honest but unfortunate debtors. This is encapsulated in the fresh start philosophy that emerged from the United States of America's bankruptcy system through the introduction of the Bankruptcy Reform Act of 1978. The fresh start philosophy entails a statutory right to a discharge of pre-bankruptcy debts to all honest but unfortunate debtors. See ch 2 para 2.2 for a discussion of the American bankruptcy system.

[7] Ss 4(4)(8)(a)(ii), 14(1)(b)(i) and 15(c) of the Act. Only the High Court may accept an application for liquidation and it may so accept it if it is satisfied that there is reason to believe that the order will be to the advantage of creditors. Consequently, debtors who cannot show an advantage to creditors because of a lack of disposable assets and/or excess income may not access the liquidation procedure.

[8] See in general Boterere 2021 *De Jure* for a brief overview of the Zimbabwean natural person debt relief system.

[9] See FinScope *Consumer survey* 2011 46; ch 1 para 1.1. This chapter does not distinguish between NINA debtors and low earning debtors, the so-called Low-Income-Low Asset (LILA) debtors. Zimbabwe's legislature has recently introduced the Consumer Protection Act [Chapter 14:14] that came into force in December 2019, which generally protects consumers. It is regrettable that the same consolidated and comprehensive approach has not been followed in respect of credit law. At present a disjointed approach to credit law is followed where this area of law is regulated by the following legislation: the Moneylending and Rates of Interest Act [Chapter 14:14], the Banking Act [Chapter 24:20], the Bank Use, Promotion and Suppression of Money Laundering Act [Chapter 24;24], Hire Purchase Act [Chapter 14:04], Microfinance Act [Chapter 24:29]; Prescribed Rate of Interest Act [Chapter 8:10].

In addition to the liquidation procedure, overcommitted debtors seeking relief from indebtedness may also access the pre- and post-liquidation composition measures.[10] The composition measures are novel features in the Zimbabwean natural person debt relief system introduced in 2018 by the Act. The pre- and post-liquidation composition measures replaced the composition measure previously regulated by the repealed Insolvency Act [Chapter 6:04].[11] The recently introduced pre- and post-liquidation composition measures envisage an extra-judicial debt rearrangement settlement between a debtor and his creditors following an acceptable composition offer by the debtor to his creditors. However, these composition measures only afford a reprieve from indebtedness to insolvent debtors with a source of income to rearrange debts and meet procedures' costs. Notably, the post-liquidation composition measure is not an alternative debt relief measure because it is only accessible to debtors who have been granted access to the exclusive liquidation procedure. In light of the above consideration, it is debatable whether the composition measures are suited to the needs of NINA debtors because of the procedures' stringent access requirements. Consequently, this chapter seeks to determine how debtors in Zimbabwe's natural person debt relief system are afforded protection through these novel composition measures.[12]

In line with the theme of this thesis, this chapter examines Zimbabwe's consumer insolvency system to determine the extent to which it provides or inhibits access to NINA debtors. An examination of the Act and other repealed insolvency statutes is undertaken to determine the legislative development of the insolvency regime and after that ascertain the protection afforded to the NINA debtors in the prevailing debt relief system. The insolvency regime is compared to internationally regarded policies, principles and guidelines in insolvency outlined in chapter two above. This juxtaposition is undertaken to determine the extent to which the debt relief system, through the recently introduced consolidated Act, has incorporated the internationally

[10] Ss 119 and 120 of the Act.
[11] Ss 136-137 of the repealed Insolvency Act (Cap 6:04).
[12] The *World Bank Report* regards access to formal debt relief measures as an essential feature of an effective debt relief system that balances the interests of creditors, debtors and the society. Inhibiting access to all honest but unfortunate debtors has the undesired effect of leaving marginalised debtors vulnerable to creditor intimidation. Such marginalised debtors may require continued state support thereby exerting pressure on the social security system (ch 2 para 2.5.4.3).

accepted guidelines necessary for an effective and inclusive insolvency regime and to provide necessary recommendations for reforming the system.[13]

In evaluating Zimbabwe's natural person debt relief system, this chapter utilises the following structure. Paragraph one offers a brief introduction that outlines the chapter's purpose, followed by a historical overview of Zimbabwe's natural person debt relief regulation in paragraph two. To this end, a discussion of the introduction of the Roman-Dutch law in the Cape of Good Hope that influenced the development of the Zimbabwean insolvency regime is undertaken. This discussion is also essential in highlighting the link between Zimbabwe and South Africa's insolvency regimes that share a common political and legal history. After that, the development of the insolvency regulation is explored by examining the provisions of the repealed insolvency statutes that regulated Zimbabwe's natural person debt relief system and were largely based on the South African insolvency law.[14] The discussion chiefly focuses on the extent to which the statutes afforded or prevented access by NINA debtors to the debt relief system and whether these statutes led to the desired discharge of debts for this marginalised debtor category. After that, paragraph three evaluates the present regulation of Zimbabwe's consumer insolvency regime by the Act. This paragraph also utilises the internationally regarded policies, principles and guidelines in insolvency law outlined in chapter two to evaluate the efficiency, effectiveness and inclusiveness of the natural person debt relief system under consideration. This evaluation of the debt relief system also seeks to provide necessary recommendations for the reforming the insolvency regime to align it with international trends in insolvency law which accommodate all honest but unfortunate debtors.[15] Furthermore, this paragraph explores the impact of the inalienable constitutional principle of equality and non-discrimination on Zimbabwe's personal

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[13] See, Parliament of Zimbabwe 2018 https://bit.ly/3fRTnxN (accessed 22 May 2021) where the Minister of Justice, Legal and Parliamentary Affairs, the Hon Ziyambi (as he then was) indicated during the second reading of the Insolvency Bill (H.B 11, 2016) in the Parliament of Zimbabwe that:

> By sponsoring this [Insolvency] Bill, I mark the central watershed of a noble process of reviewing and modernising our national insolvency regime that will enhance the *efficiency and effectiveness* of our insolvency systems (own emphasis).

Consequently, by benchmarking Zimbabwe's debt relief system with internationally regarded policies, principles and guidelines in insolvency this chapter seeks to determine whether the newly introduced Act achieved the objective it set out to achieve, namely, reforming the insolvency system into an efficient, inclusive and effective system that is aligned with international trends in insolvency.

[14] The Insolvency Act 21 of 1924 and the Insolvency Act 13 of 1973.

[15] See ch 2 paras 2.2 and 2.5.3.

insolvency system.[16] Lastly, the chapter's concluding remarks are provided in paragraph four. This paragraph offers a reflection on the discussions undertaken in this chapter and also provides a summary of the determinations made throughout the discussion in this chapter.

3.2 Historical overview

3.2.1 General background

Zimbabwe attained independence in 1980 after almost a century of colonial rule that commenced with the formal annexation of the country by the Pioneer Column in 1890.[17] Before the immediate[18] arrival of the Pioneer Column, Zimbabwe was predominantly occupied by the Shona and Mthwakazi (Ndebele) people. The Shona people mainly occupied the northern region of the country, named Mashonaland, while the Ndebele, under King Lobengula, largely occupied the southern region of the country, named Matabeleland. The different tribes regulated themselves through their tribal law, which also informally regulated the commercial enterprises of its subjects within the indigenous communities to which the law applied.

The formal occupation of Zimbabwe was facilitated through a Royal Charter awarded to the British South Africa Company by Queen Victoria of the United Kingdom on 18 April 1889.[19] The BSAC was formed through an amalgamation of the Central Search Association and the Exploring Company Ltd. The Central Search Association was led by Cecil John Rhodes, who subsequently led the amalgamated BSAC that espoused an imperialist agenda.[20] The imperialists' occupation of Zimbabwe was brought about by signing treaties such as the Rudd Concession on 30 October 1888.[21] The

[16] S 56 of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 (hereafter "the Constitution").
[17] See, eg, Fisher *The decolonisation of white identity* 1-5 for a brief discussion of the annexation of Zimbabwe and the ensuing struggle to uproot the colonial ideology in the country.
[18] A detailed historical discussion of Zimbabwe will reveal a myriad of ethnic groups that historically occupied the country. However, this is not the aim of this study and any exploration of this matter will derail its focus.
[19] The British South Africa Company (hereafter "the BSAC").
[20] The country was previously named Southern Rhodesia after Cecil John Rhodes. Rhodes's influence also extended to most of the central Southern African countries such as the present-day Malawi, South Africa and Zambia. The latter neighbouring country that is located north of Zimbabwe bordered by the Zambezi river, was similarly named after Cecil John Rhodes, and it was referred to as Northern Rhodesia.
[21] The Rudd Concession (hereafter "the Concession"). A written concession that derived its name from the BSCA's imperialist signatory, Charles Dunnel Rudd.

Concession was signed by Charles Dunell Rudd, Rochfort Maguire and Francis Robert Thompson, who acted under the instructions of Rhodes, and King Lobengula of the Matebele region, who relinquished mining rights in the country to the BSAC. In terms of the Concession, the Matebele King was reportedly entitled to a thousand Martini-Henry breech-loading riffles, one hundred thousand rounds of suitable bull cartridges and a steamboat with guns, while in return, Rhodes's BSAC obtained a monopoly of all metals and minerals, and a right to the mining company to do anything to further its operations.[22]

The Rudd Concession was integral in the imperialist agenda because it facilitated granting the Royal Charter to the BSAC and the subsequent occupation of Zimbabwe by the Pioneer Column in 1890. In turn, the Royal Charter vested legislative, administrative and judicial powers over Zimbabwe in the BSAC, and this inevitably culminated in the formal colonisation of the country and the subjugation of its subjects. Acting on the strength of the Royal Charter, Rhodes and his imperialist counterparts occupied Zimbabwe in 1890, an event marked by the hoisting of the Union Jack in the Mashonaland province. Thereafter, the settlers sought to secure their colonial interests by imposing common law upon the conquered. The common law that was imposed in Zimbabwe was the Roman-Dutch law that had developed in the Cape of Good Hope[23] because of imperialism. The administration and application of the Roman-Dutch law were facilitated by the legislative power granted to the BSAC through, for instance, the Royal Charter. Clause 10 of the Royal Charter provided that:[24]

> The Company shall to the best of its ability preserve peace and order in such ways and manners as it shall consider necessary, and may with that object *make ordinances* (to be approved by Our Secretary of State) and may establish and maintain a force of police (own emphasis).

The BSAC's legislative mandate was bolstered by the enactment of the Southern Rhodesia Order in Council of 1898 that came into force on 20 October 1898.[25] The Order in Council of 1898 led to the formation of the legislature that subsequently

[22] See eg Phimister *Journ of Southern African Studies* for a detailed discussion of the Rudd Concession and its terms. Also, see ZimFieldGuide https://bit.ly/3hkZRWr (accessed 10 September 2021).
[23] The Cape of Good Hope refers to a territory between the Atlantic and Indian coasts of the Cape Peninsula in the present-day South Africa, a neighbouring country located to the south of Zimbabwe.
[24] The BSAC Charter 1889 https://bit.ly/3gbkovb (accessed 31 May 2021).
[25] The Southern Rhodesia Order in Council 1898 (hereafter "the Order in Council of 1898").

introduced various statutes, as it deemed fit, in its quest to effectively administer the colony of Zimbabwe. Section 13(1) of the Order in Council of 1898 indicated that:[26]

> There shall be in Southern Rhodesia a legislative body to be styled "The Legislative Council," composed of the Administrator or Administrators for the time being, the Resident Commissioner, and nine other members, of whom five, hereinafter referred to as "nominated members," shall be appointed by the Company, with the approval of a Secretary of State, and four shall be elected by the registered voters in the manner hereinafter provided. Provided that the proceedings of the Council shall not be invalid on account of any vacancies therein.

In turn, High Court of South Rhodesia administered the law, which had full civil and criminal jurisdiction over all persons and matters within the country.[27] Thus, the Order in Council of 1898 facilitated the imposition of Roman-Dutch law in Zimbabwe by providing that:[28]

> [T]he law to be administered by the High Court and by the magistrates' courts … shall, so far as not inapplicable, be the same as the law in force in the [Cape] Colony on the 10th day of June 1891, except so far as that law has been modified by any Order in Council, Proclamation, Regulation or Ordinance in force at the date of the commencement of this Order.

Consequently, the imposition of law applied at the Cape of Good Hope by the Order in Council of 1898 ushered in insolvency law in Zimbabwe. However, this study avers that this legislative transplant was only in respect of formal insolvency law. Informal and unwritten insolvency law had already been recognised and widely applied in the indigenous communities of Zimbabwe and South Africa. Concerning Zimbabwe, unwritten, informal insolvency law regulated commercial engagements between indigenous groups *inter se* as well as between members of indigenous groups and

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[26] The legislative mandate of the Legislative Council was upheld in the Constitution of Southern Rhodesia 1923 wherein s 26(1) provided that:

> It shall be lawful for Us and Our successors, by and with the advice and consent of the Legislature, subject to the provisions of these Our Letters Patent [the Constitution of Southern Rhodesia, 1923], to make all Laws to be entitled "Acts", which shall be required for the peace, order, and good government of the Colony.

[27] S 49(1) of the Order in Council of 1898. The High Court was required to give regard to native law or custom. However, the native law must not have been repugnant to natural justice or morality, or any Order made by Queen Victoria (s 50 of the Order in Council of 1898).

[28] S 49(2) of the Order in Council of 1898. Roman-Dutch law remains integral as a source of law in the Zimbabwean legal system and its application in democratic Zimbabwe was first cemented by s 87 of the Constitution of Zimbabwe Rhodesia 1979 that provided as follows:

> Subject to the provisions of any law for the being in force in Zimbabwe Rhodesia relating to the application of African customary law, the law to be administered by the High Court and by any courts in Zimbabwe Rhodesia subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on 10th June, 1891, as modified by subsequent legislation having in Zimbabwe Rhodesia the force of law.

This provision was amended by s 13 of the Constitution of Zimbabwe Amendment Act 1981 (No 2) that upheld the continued application of the Roman-Dutch law in independent Zimbabwe. At present, the application of the Roman-Dutch law is safeguarded by s 192 of the Constitution of Zimbabwe 2013 that provides as follows: "[t]he law to be administered by the courts of Zimbabwe is the law that was in force on the effective date, as subsequently modified".

To this end, section 89 of the Constitution of Zimbabwe 2007, that was applicable on the effective date of the Constitution of Zimbabwe 2013, is significant. This provision recognised the application of Roman-Dutch law that was applicable at the Colony of the Cape of Good Hope on 10 June 1891 together with the country's African Customary law.

early colonial explorers. This is in line with Hon Sen (as he then was) Marava's[29] assertion that:

> Let us not think that insolvency was introduced by westerners. We know in our culture you would have a credit and when you fail to pay that credit, you find other ways of paying. The compensation at times even involve paying with your child(ren) or wife or at times you would give your cattle if you fail to pay for the grain which you have borrowed from your neighbour.

A comprehensive study of the prevailing insolvency regime requires an exploration of the development of the natural person insolvency law at the Cape Colony that was subsequently imposed in Zimbabwe. This development and the subsequent transplantation are expounded below.

3.2.2 The Cape of Good Hope

3.2.2.1 Roman law influence

Roman law is the root of modern insolvency law in most common and civil law jurisdictions.[30] It is widely held that the terms "insolvency" and "bankruptcy" are derived from Latin. Insolvency denotes one's ties to debt, while the term bankruptcy emanates from the Italian word *bancorupto*. *Bancorupto* was derived from the Latin term *bancus ruptus*, and Blackstone[31] remarks that:

> The word itself is derived from the word *bancus* or *banque*, which signifies the table or counter of a tradesman and *ruptus*, broken; denoting thereby one whose shop or place or trade is broken and gone.

Some researchers argued that the origins of medieval Roman insolvency law are found in Table 3 of the Twelve Tables.[32] Roman insolvency law developed from a creditor self-help system that recognised debtor imprisonment and, at times, execution. The different debt enforcement procedures recognised in medieval Roman law include the *legis actio per manus iniectionem* and the *legis actio per pignoris capionem*. The *legis actio per manus iniectionem* was aimed at the person of the

[29] See Parliament of Zimbabwe https://bit.ly/3fRTnxN (accessed 6 January 2022).
[30] See Levinthal 1919 *Uni of Pen Law Rev* 3-5. Also, see Fletcher *The law of insolvency* 8-10.
[31] See Blackstone *Commentaries on the laws of England* 381.
[32] See Calitz 2005 *TSAR* 730-732; Burdette *Framework for corporate insolvency* 22; Bertelsmann *et al Mars* 9.

debtor[33] while the object of the *legis actio per pignoris capionem* was the debtor's property.[34]

The *legis actio manus iniectionem* further distinguished between the *manus iniectio iudicati*, *manus inietio pro iudicati* and the *manus inietio pura*.[35] The *manus iniectio iudicati* was applied after a thirty-day grace period had lapsed from the date of proving one's debt by obtaining a judgment against a debtor.[36] Thereafter, a debtor who failed to meet his obligations during the thirty-day grace period was brought before the *praetor* at which point each of his creditors would put his hand on him and recite the prescribed *formula*.[37] This resembled a symbolic seizure of the debtor by force by one or more of his creditors. The debtor could not defend himself; however, he could, upon his choosing, rely on the intervention of a third party, namely, a *vindex.* The *vindex* took the debtor's place and sought to disprove the creditors' right of a seizure by indicating that the debt had been settled or that the parties had reached a compromise.[38] The successful intervention of a *vindex* led to the release of the debtor. However, the *vindex* could be held liable to double the initial amount owing if he failed to disprove the creditors' claims.[39]

Following the reciting of the prescribed *formula* before the *praetor*, the debtor or the unsuccessful *vindex* would be imprisoned for sixty days.[40] Thereafter, the creditor was expected to publicly present the debtor or *vindex* before the *praetor* on three consecutive days to solicit a debt settlement by the debtor's friends and to allow other creditors to state their claims. Where the debt remained unsettled, the creditors could sell the imprisoned debtor or *vindex* into slavery, and the sale proceeds were divided among his creditors. It has been widely remarked that the creditors were also permitted to cut up the prisoner's body and divide it among themselves.[41] The sale of

[33] Thomas *Textbook of Roman law* 78.
[34] Van Warmelo *Die oorsprong* 253.
[35] See Wenger *Institutes of Roman law* 230 for a detailed discussion of the *legis actio per manus iniectionem*.
[36] Visser 1980 *De Jure* 41-42. The grace period was aimed at giving the debtor an opportunity to comply with the judgment against him. In turn, the *manus iniectio pro iudicato,* which substantially reflected the *manus iniecto iudicati* procedure, applied to judgments obtained without litigation.
[37] See Visser 1980 *De Jure* 41-42; Thomas *Textbook of Roman law* 79.
[38] Kaser *Roman private law* 338; Visser 1980 *De Jure* 43; Burdette *Framework for corporate insolvency* 23.
[39] Kaser *Roman private law* 338.
[40] Visser 1980 *De Jure* 43.
[41] Visser 1980 *De Jure* 44; Stander 1996 *TSAR* 371; Rudolf and Ledlie *The Institutes* 27; Burdick *The principles of Roman law* 632; Van Zyl *History and principles* 370.

a debtor into slavery, in the execution of a judgment debt, is believed to have been abolished by the introduction of the *Lex Poetilia* between 326 and 313 BC.[42]

In addition to the *manus iniectio iudicati* procedure, a limited group of creditors[43] could also institute the *legis actio per pignoris capionem* procedure against an overcommitted debtor. This was a form of pledge that could be exercised against the debtor's property to force the debtor to meet his obligations. When the debtor undergoing the *legis actio per pignoris capionem* process successfully fulfils his obligations, the creditor would lose any right over the seized or pledged property, which had to be returned to the debtor.[44] However, it is also held that ownership over the pledged property could pass to the creditor through the effluxion of time.[45]

With the rise of commercial enterprises and the civilisation of Roman society, the pressure was exerted on authorities to develop insolvency regulations to accommodate execution against the property of a debtor by all categories of creditors. Subsequently, major reforms in insolvency regulation were witnessed around 104 BC by introducing of the *missio in possessionem* procedure that permitted execution against a debtor's property.[46] The *missio in possessionem* was encapsulated in the *bonorum venditio* or the *bonorum emptio* process and it required the *praetor* to issue three decrees that marked distinct stages in the insolvency proceedings.

The *praetor*'s first decree sought to advertise the sale of the seized assets.[47] This decree also invited other interested parties to lodge their claim(s) against the debtor's estate. Thereafter, one or more creditors collectively appointed by the creditors had a right to obtain possession of the debtor's property until its sale.[48] Alternatively, the debtor would remain in possession of the property under the supervision of one or more creditors concerned.

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[42] The introduction of the *Lex Poetilia* also empowered debtors to defend themselves against creditors through the *manus iniectio pura* procedure without utilising a *vindex*. However, similar to the *manus iniectio iudicati*, debtors would be held liable to double the initial owed amount where they failed to disprove the creditors' claim.
[43] Where the state and religious interests where involved.
[44] Jolowicz and Nicholas *Historical introduction* 190.
[45] Van Warmelo *Die oorsprong* 254.
[46] See in general Roestoff *'n Kritiese evaluasie* 23.
[47] See, eg, Visser 1980 *De Jure* 45.
[48] Visser 1980 *De Jure* 45.

After thirty days had lapsed, the *praetor* would order a meeting of creditors through a second decree.[49] During this meeting, creditors appointed a *magister bonorum* tasked with supervising the sale of the debtor's property.[50] The *magister bonorum* was chosen from the group of creditors and he represented the creditors' collective interests.[51] Furthermore, he was tasked with listing the debtor's assets and liabilities and sale of the property *en bloc*. The *praetor's* third decree empowered a sale of the debtor's complete estate[52] *en bloc* at a public auction to the highest bidder.[53] Thereafter, the *bonorum venditio* received ownership of the property and became liable for the debtor's obligations, as agreed upon during the public auction.

The *bonorum emptio* process was replaced by the *bonorum distractio* process to offset the challenges posed by the sale of assets *en bloc*.[54] The *bonorum distractio* empowered the *praetor* to sell a debtor's assets piecemeal and distribute a *pro-rata* payment to creditors.[55] The piecemeal sale of assets in the *bonorum distractio* process was supervised by a curator appointed by the *praetor.* Compared to the *en bloc* disposition, the piecemeal disposition of the debtor's property proved much better in increasing the proceeds available for distribution because it enabled the curator to obtain the highest return from the sale of the property.

However, before the inception of the *bonorum distractio*, the debtors' position had improved through the introduction of the *Lex Iulia de Bonis Cedendis*.[56] The *Lex Iulia de Bonis Cedendis* assisted debtors in avoiding judicial proceedings[57] by voluntarily surrendering their property through the *cessio bonorum* process.[58] Evans regards the *cessio bonorum* as the root of the current South African voluntary surrender process.[59] By extension, it is also the root of the current Zimbabwean voluntary surrender process. Despite not culminating in a discharge of the debtor's debts, the *cessio*

[49] See Van Oven *Leerboek Romeinsch* 191; Buckland *Text-book of Roman Law* 402-403.
[50] *Van Oven Leerboek Romeinsch* 191; Buckland *Text-book of Roman Law* 402-403.
[51] Therefore, it may correctly be concluded that this procedure was pro-creditor in nature.
[52] *Universitas iuris*.
[53] *Bonorum venditio*.
[54] See in general Burdette *Framework for corporate insolvency* 25.
[55] Burdette *Framework for corporate insolvency* 25.
[56] Van Oven *Leerboek Romeinsch* 190.
[57] That was requisite in the *bonorum venditio* process.
[58] Also a requisite in the *bonorum venditio* process.
[59] See Evans *A critical analysis* 29.

bonorum absolved him from the danger of imprisonment for the debts to which the process relates.[60]

3.2.2.2 Roman-Dutch law influence

Traditionally, no uniform rules of insolvency were recognised in Holland. However, in certain instances, overcommitted debtors who could not meet their obligations were attached as objects for their outstanding debts. This was subsequently changed to accommodate the expansion of commercial enterprises around the fifteenth or sixteenth century. The changes were necessitated by the inception of the *cessio bonorum* procedure that had revolutionised insolvency regulation within the Roman insolvency system.[61]

Like the Roman *cessio bonorum* procedure, the Dutch procedure also referred to a voluntary surrender of assets by a debtor to his creditors for liquidation. This procedure was initiated by a voluntary application to a court, along with an inventory of the debtor's assets and all creditors' accounts.[62] Thereafter, the application and the inventory were referred to the *burgomaster* and the governing authority of the debtor's place of domicile. A report had to be compiled by the *burgomaster* and the governing authority that would be sent to the court where the application had been lodged. The court would then grant a rule *nisi* that invited any interested party to indicate to the court why the provisional writ of *cessio bonorum* should not be granted.

The *cessio bonorum* did not lead to a discharge of debts; therefore, this procedure could not free debtors from their financial obligations. Consequently, property acquired by the debtor after a writ of *cessio bonorum* had been granted could be duly attached. Notably, the *cessio bonorum* procedure alleviated the plight of debtors by eradicating creditor intimidation by facilitating a stay of litigation against the debtor and by ensuring that the debtor's property was transferred into the custody of a curator.[63] However,

[60] Evans A critical analysis 29.
[61] See Wessels *History of the Roman Dutch law* 663; Roestoff *'n Kritiese evaluasie* 48.
[62] Gane *The selective Voet* 370.
[63] Wessels *History of Roman-Dutch law* 665.

this procedure was expensive and time-consuming, and as a result, it only afforded a reprieve to debtors who encountered a temporary misfortune.[64]

Further developments in Dutch insolvency regulation took place with the inception of the Amsterdam Ordinance of 1777. The reforms ushered in by the Amsterdam Ordinance of 1777 are pivotal for Zimbabwe and South Africa's insolvency regimes because they constitute the foundation of insolvency law imposed at the Cape of Good Hope at the time of its annexation.[65]

In terms of the Amsterdam Ordinance of 1777, a debtor or his creditors could apply to the commissioners to obtain control of the debtor's estate.[66] The commissioners would thereafter attempt to secure a compromise of all creditors concerned, failing which, the commissioners would proceed to make an inventory of the debtor's property.[67] After creating an inventory of the debtor's property, the commissioner convene a meeting where creditors would appoint a sequestrator. The debtor was granted a month to settle his obligations, failing which he was considered insolvent. However, if the debtor managed to settle his obligations, his estate was released from administration, and his property would be returned to him.

3.2.2.3 Colonialism and the imposition of formal insolvency law in Southern Africa

In 1652 Jan van Riebeeck formed a settlement in the Cape Colony, which was meant to be a halfway refreshment post for ships of the Dutch East Indian Company. The Dutch settlers implemented and administered Roman-Dutch law in the Colony, which was ultimately imposed in most regions of South Africa because of the exponential growth of the settlement. The annexation of the Cape Colony and the imposition of Roman-Dutch law led to the introduction of the *cessio bonorum* procedure that regulated insolvency law in Holland.[68]

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[64] Wessels *History of Roman-Dutch law* 665. Therefore, it marginalised indigent debtors such as those falling within the NINA category whose dire financial circumstances did not allow them to meet the costs of the procedure.
[65] Wessels *History of Roman-Dutch law* 668.
[66] Commissioners were introduced to the Dutch insolvency regime by this Ordinance and their duties included adjudicating on debtors' offers of composition and to make the necessary recommendation regarding debtors' insolvency and commence with administration, where necessary.
[67] Wessels *History of Roman-Dutch law* 669.
[68] See De Villers *Die Ou-Hollandse insolvensiereg* 62; Stander *Die Invloed van Sekwestrasie* 16.

Thereafter, insolvency law underwent a process of reform around 1803 after Commissioner-General Jacobus Abraham de Mist requested the establishment of the *Desolate Boedelkamers* in the Cape Colony.[69] The *Desolate Boedelkamers'* duties included administering abandoned estates and the execution of civil sentences.[70] Despite the Cape Colony's *Desolate Boedelkamers* being largely based on the Amsterdam Ordinance of 1777, they differed in two respects; creditors in the Cape Colony could not directly procure the sequestration of a debtor's estate and creditors in the Cape Colony were not involved in the administration of the debtor's estate.[71] This was subsequently changed in 1818 after the *Boedelkamers*' functions were momentarily transferred to a sequestrator until around 1827.[72] The sequestrator exercised the same functions and had the same jurisdiction as a *Boedelkamer*. Thereafter, the sequestrator's duties were transferred to a Master of the Supreme Court after the introduction of the Cape Ordinance 46 of 1828.

The first comprehensive insolvency legislation introduced in the Cape Colony was the Ordinance 64 of 1829, which sought to regulate the administration of insolvent estates. Although English law formed the basis of the Ordinance 64 of 1829, a substantial amount of Roman-Dutch insolvency principles were carried by the Ordinance, and it is the foundation of most present-day insolvency law in Zimbabwe, South Africa and other Southern African countries, such as Botswana, Lesotho, Namibia, Swaziland and Zambia, whose colonial past can be traced to the annexation of the Cape of Good Hope.[73] The Ordinance 64 of 1829 provided for creditor filing of applications for the sequestration of a debtor's estate where an act of insolvency had been committed.[74] Notably, ownership of the estate of a debtor who had surrendered it for liquidation was transferred to the Master of the Supreme Court and thereafter a court-appointed trustee.[75]

The Ordinance 64 of 1829 was repealed by the Ordinance 6 of 1843, which abolished the *cessio bonorum* procedure. The Ordinance 6 of 1843 made provision for voluntary

[69] See Wessels *History of Roman-Dutch law* 669; Roestoff *'n Kritiese evaluasie* 316-317.
[70] Wessels *History of Roman-Dutch law* 669.
[71] Bertelsmann *et al Mars* 12.
[72] De Villers *Die Ou-Hollandse insolvensiereg* 105.
[73] Wessels *History of Roman-Dutch law* 673. Also, see Bertelsmann *et al Mars* 18-20 for a brief discussion of the impact that the South African insolvency law has had on these countries.
[74] Ss 1 and 2 of the Ordinance 64 of 1829.
[75] S 49 of the Ordinance 64 of 1829.

applications by a debtor for the surrender of his estate and also permitted compulsory creditor sequestration petitions of a debtor's estate.[76] Some of the reforms ushered in by the Ordinance 6 of 1843 include:

(i) Vesting of the insolvent estate in the Master after the sequestration order had been granted;[77]

(ii) Debtor's sequestration divested the Master (or provisional trustees) of the estate and vested it in a trustee;[78]

(iii) Provision for the exemption of some of the debtor's property, which was excluded from the sequestration process;[79] and,

(iv) Provision for the voiding of *mala fide* and gratuitous alienation of assets where a debtor's liabilities exceeded his assets.[80]

After this, numerous statutes largely borrowed from the Ordinance 6 of 1843 were adopted throughout South Africa. These statutes include the Ordinance 24 of 184,7 adopted in Natal; the Ordinance 9 of 1878, adopted in the Orange Free State; and Insolvency Act 13 of 1895 adopted in the Transvaal. Despite their influence in general on South Africa's insolvency landscape, these statutes did not perceivably influence the development of the Zimbabwean insolvency regulation.

On 10 June 1891 Ordinance 6 of 1843 regulated insolvency law in the Cape Colony. The transplanted principles of this statute form the foundation of Zimbabwe's insolvency system in terms of section 49(2) of the Southern Rhodesia Order in Council of 1898.[81]

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[76] Ss 1, 2 and 5 of the Ordinance 6 of 1843.
[77] S 46 of the Ordinance 6 of 1843.
[78] S 48 of the Ordinance 6 of 1843.
[79] S 49 of the Ordinance 6 of 1843.
[80] S 83 of the Ordinance 6 of 1843.
[81] This provision states that:

> [T]he law to be administered by the High Court and by the magistrates' courts … shall, so far as not inapplicable, be the same as the law in force in the [Cape] Colony on the 10th day of June 1891, except so far as that law has been modified by any Ordinance in Council, Proclamation, Regulation or Ordinance in force at the date of the commencement of this Ordinance.

In turn Ordinance 6 of 1843 had been amended by the Cape Act 15 of 1859, the Cape Act 38 of 1884 and the Cape Act 17 of 1886.

3.2.3 Legislative development

3.2.3.1 General background

Regulation of Zimbabwe's natural person debt relief system can be traced to an early twentieth-century piece of legislation that came into force on 1 January 1925.[82] The Insolvency Act [Chapter 53] sought to consolidate and amend the laws in force relating to the administration of insolvent and assigned estates.[83] This legislation was subsequently amended[84] and appeared as Chapter 53 of the Revised Laws of (Southern) Rhodesia, which in turn was repealed by the Insolvency Act[85] that came into force on 1 January 1975. The latter statute was largely based on the South African insolvency legislation.[86]

In line with the theme of this study, this paragraph explores the historic regulation of the Zimbabwean insolvency regime by the repealed Insolvency Act [Chapter 53 and the Insolvency Act [Chapter 6:04].[87] This exploration is pivotal because it highlights the historical marginalisation of NINA debtors in Zimbabwe's natural person debt relief system and provides a context to the plight of this debtor category, which the newly introduced Act potentially alleviates.[88]

3.2.3.2 The Insolvency Act 21 of 1924

i. The sequestration procedure

The Insolvency Act [Chapter 53] afforded debtors access to the sequestration procedure under a debtor's voluntary surrender application or a compulsory application by his creditors. An application initiated the sequestration procedure, in

[82] The Insolvency Act 21 of 1924 (hereafter "the Insolvency Act (Cap 53)"). The Insolvency Act (Cap 53) was amended by Act 11 of 1930.
[83] Preamble of the Insolvency Act (Cap 53). See para 3.2.2.3 regarding the law that applied in Zimbabwe before the inception of the Insolvency Act (Cap 53).
[84] Ss 53 of Act 45 of 1948.
[85] 13 of 1973.
[86] See eg Bertelsmann *et al Mars* 19-20. Also, see ch 4 for a discussion of the (South Africa) Insolvency Act 24 of 1936. Arguably, all the insolvency statutes that have thus far been implemented in Zimbabwe are largely based on the South African insolvency statutes and law reform initiatives.
[87] A detailed and separate discussion of the repealed statutes is essential because it provides a holistic understanding of the insolvency regime. However, it is held that the Insolvency Act (Cap 6:04) did not fundamentally depart from the provisions of the Insolvency Act (Cap 53) (Christie *Business law* 462).
[88] See para 3.3 for a discussion of the prevailing insolvency regime.

writing, lodged at the High Court.[89] The application must have set forth that the debtor was insolvent and that the surrender of his estate would be for the benefit of his creditors to facilitate a voluntary surrender.[90]

Before filing the surrender application, debtors were required to publish a notice of surrender, which could not be withdrawn without the written consent of the Master, in the *Government Gazette* not less than fourteen days before the hearing of the application.[91] The application had to be accompanied by a statement of the debtor's affairs, and a copy of the application and statement of affairs must have been served on the Master of the High Court before the application hearing.[92]

Upon acceptance of the application, the Act mandated that an order placing the debtor's estate under sequestration be granted if the court is satisfied that:[93]

a) A notice of surrender was duly published;
b) A statement of affairs was lodged and opened for inspection by creditors, and,
c) The debtor's estate has sufficient assets to defray all sequestration costs payable from the free residue.[94]

In addition to the voluntary surrender process, a debtor could also access the sequestration procedure after a compulsory application by his creditors.[95] The application had to be in writing and accompanied by an affidavit stating the grounds of the claim and a certificate of the Master or a magistrate that due security has been

[89] S 3 of the Insolvency Act (Cap 53). Sequestration applications may only be assessed by the High Court because sequestrations affect the status of an insolvent and only the High Court has jurisdiction over such matters. See s 149 of the Insolvency Act (Cap 53) for an indication of the High Court's jurisdiction.
[90] S 3(a) of the Insolvency Act (Cap 53). The sequestration procedure was creditor-oriented and it was essential to indicate that the voluntary surrender proffered a benefit to creditors.
[91] Ss 4(1) and 7(1) of the Insolvency Act (Cap 53). The notice of surrender had to be published in a newspaper circulating in the district in which the debtor resided, or, if the debtor was a trader, in the district in which the debtor had his principal place of business. The publication prohibited any disposition of assets by the debtor (s 6(1)). This requirement was not maintained in the Insolvency Act (Cap 6:04).
[92] S 4(3) of the Insolvency Act (Cap 53). The statement of affairs had to be supported by a valuation under oath of the assets of the debtor's estate that could be independently verified at the instruction of the Master. Additionally, the statement of affairs must have been left open for inspection by creditors for a period of fourteen days.
[93] S 5 read with s 4 of the Insolvency Act (Cap 53). Thereafter, control and administration of the insolvent estate was transferred from the debtor to the Master.
[94] This requirement was an impediment for NINA debtors who lacked the necessary disposable assets to cover the costs of the sequestration process. Because of their dire financial position, a voluntary surrender by a NINA debtor would not benefit creditors; consequently, this category of debtors could not access the sequestration procedure primarily because of this measure's stringent access requirements that inhibited such indigent debtors.
[95] S 9(1) of the Insolvency Act (Cap 53). Or by his duly authorised agent.

found for payment of all fees and necessary charges for the prosecution of all sequestration proceedings until a trustee had been appointed.[96] Thereafter, the court would grant an order of provisional sequestration of the debtor's estate if it was of the opinion that the debtor had committed an act of insolvency[97] or if it was convinced that the debtor was insolvent and that placing his estate under sequestration was to the advantage of his creditors.[98] A debtor whose estate had been placed under provisional sequestration could show any cause why a final order of sequestration should not be made against his estate.[99]

The sequestration procedure did not cater to the needs of NINA debtors because of, for instance, the advantage to creditors' requirements, which marginalised indigent

[96] S 9(2) of the Insolvency Act (Cap 53). The affidavit also had to indicate whether the creditor holds any security for his claim, and if so, the nature and value thereof.

[97] S 8 of the Insolvency Act (Cap 53) stated that:

> A debtor commits an act of insolvency–
>
> (a) if, having any property within Southern Rhodesia, he departs therefrom, or being out of Southern Rhodesia remains absent therefrom, or departs from his dwelling or otherwise absents himself, with intent by so doing to evade or delay the payment of his debts;
>
> (b) if, having against him the sentence of any competent Court, and being thereunto required by the officer charged with the execution of the same, he does not satisfy the same or point out to that officer sufficient disposable property to satisfy the same, or if it appears from the return made by such officer that he has not found sufficient disposable property;
>
> (c) if he makes any disposition of any of his property which has the effect of prejudicing his creditors or of preferring one creditor above another;
>
> (d) if, he removes any of his property with intent to prejudice his creditors or to prefer one creditor above another;
>
> (e) if, except as provided in this Act, he agrees or offers to assign his estate for the benefit of his creditors or any of them, or makes or offers to make any arrangement with his creditors for releasing him wholly or partially from his debts;
>
> (f) if, having published a notice of surrender which has not been withdrawn in manner aforesaid, he omits to lodge his schedules as by law required, or lodged schedules containing material misrepresentations or omissions, or fails to present his petition to the Court within twenty-one days from the publication in the *Gazette* of that notice;
>
> (g) if he gives notice to any of his creditors that he has suspended or is about to suspend payment of his debts or if he has suspended payment of his debts;
>
> (h) if he makes default in publishing the notice required by section *one hundred and nineteen*, or if his creditors have, in terms of section *one hundred and twenty-two*, declined the assignment of his estate;
>
> (i) if, being a trader, he gives notice in the *Gazette* in terms of section *thirty-two* and is unable to meet the liabilities of his business;
>
> (j) if, a notice of assignment having been published, he omits to lodge his schedules as by law required or his schedules to not fully disclose his debts or property and that omission is material.

[98] S 10 of the Insolvency Act (Cap 53). Thus, the Zimbabwean insolvency system has historically been creditor oriented and access to the sequestration measure has continually been dependent on the ability of a debtor to proffer a benefit to his creditors. Consequently, a NINA debtor who neither had any disposable assets nor excess income that could yield a benefit to his creditors, could not obtain access to the procedure and the debt relief it proffered.

[99] S 11(1) of the Insolvency Act (Cap 53). The provisional order of sequestration could be discharged where the debtor had shown cause why such final order of sequestration should not be made. Additionally, the provisional order could be discharged where the applicant creditor failed to prove his claim or if he failed to prove the act of insolvency with which the debtor is charged, and the court was not satisfied that the estate was insolvent or that it would be to the advantage of the creditors that the estate be placed under sequestration (ss 11(3) and 12 of the Insolvency Act (Cap 53)).

debtors.[100] Additionally, various costs were associated with the formal liquidation process, which includes the trustee's fees, the Master's fees and the sheriff's fees.[101] These costs were recoverable from the free residue, and it was improbable that a NINA debtor, with no disposable assets, would be able to cover the costs of this procedure and enable the distribution of dividends to meet the advantage to creditors' requirement. Consequently, due to their dire financial circumstances, NINA debtors could not obtain relief from Act's primary debt relief procedure.

In light of this exclusion, Squires[102] proposed introducing an administration procedure to Zimbabwe's natural person debt relief system. Squires[103] argued that:

> More clearly stated, the need is to provide some refuge for the small debtor of the salaried or wage earning class. If such a person's earnings are being compulsorily used to stave off creditors he usually has too little free residue to apply for a voluntary surrender of his estate as our courts now normally require a free residue of £70[104] before accepting a surrender. And on the other hand, creditors are most reluctant to institute sequestration proceedings because in small estates of that kind such proceedings would swallow all the assets and may even result in the creditor being called on to contribute.
>
> There are in fact a great many debtors in this category, as the Magistrates Court weekly dogfight makes only to apparent. Caught in such a dilemma the wretched debtor finds himself harassed and hounded from one civil imprisonment summons to another while his creditors are faced with decreasing prospects of ever getting anything from him.

Overcommitted debtors who accessed the sequestration procedure and sought to regain some of the assets in the estate could proceed to seek access to the statutory composition measure. Access to this measure was only granted to insolvents who had managed to access the sequestration procedure. Thus, NINA debtors who could not meet the stringent access requirements of the sequestration procedure could not be extended the relief the composition measure afforded.

Insolvents could make an offer of composition, or security for composition, at any meeting of creditors to access the composition measure.[105] Before making an offer of composition, the debtor must have published a notice of the intention to make the offer

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[100] It was held in *MacGillivray v Edmundson* 1958 (3) SA 384 (SR) that where a sequestration would be to the advantage of the debtor but not of creditors, because the estate has insufficient assets to facilitate a distribution to creditors, the estate should not be sequestrated.
[101] See ss 78-84 of the Insolvency Act (Cap 53).
[102] Squires 1962 *The Rhodesia and Nyasaland Law Journ* 123. Squires proposed the introduction of an administration order procedure similar to the South African administration order procedure presently regulated by the Magistrates' Court 32 of 1944 (ch 4 para 4.3.3).
[103] See Squires 1962 *The Rhodesia and Nyasaland Law Journ* 123.
[104] Zimbabwe's currency was previously the Southern Rhodesian pound, which was created in 1955 and was pegged at par to the sterling. Therefore, calculated to inflation, GBP70 in 1962 would be worth GBP1 395,44 in 2022 (Inflation Tool *Calculator* https://bit.ly/3Qu8qNU (accessed 9 August 2022)).
[105] S 104(1) of the Insolvency Act (Cap 53). At any meeting of creditors other than the first meeting.

in the *Gazette* not less than ten days before the meeting or adjourned the meeting at which the offer is considered.[106]

The offer of composition was regarded as accepted if it was accepted by creditors whose vote amounted to not less than three-fourths in value and three-fourths in the number of votes of all the creditors.[107] Where a composition offer was accepted, the insolvent could obtain a certificate from the Master of the acceptance of the offer as soon as the payment under the composition was made or security given to the trustee's satisfaction.[108]

Thereafter, the accepted offer of composition became binding upon the insolvent estates and all concurrent creditors.[109] When agreed, the acceptance of the offer of composition also had the effect of divesting the trustee of the debtor's property and reinvesting it with the insolvent.[110]

The composition procedure entails an agreement of a restructured debt repayment by the insolvent and his creditors. Unfortunately, this measure did not accommodate NINA debtors who lacked the requisite disposable income to meet the rearranged obligations that the measure envisaged. Furthermore, as outlined above, access to the sequestration procedure was a prerequisite to access the composition measure. Therefore, NINA debtors, who could not meet the stringent access requirements of the sequestration procedure, were also excluded from the ambit of the composition measure.

ii. The assignment procedure

In addition to the sequestration and composition procedures, an overcommitted natural person debtor could alternatively conclude an assignment agreement. Assignment agreements refer to an agreement, concluded in a deed of assignment, wherein a debtor transferred his property to an assignee to benefit of his creditors to

[106] S 104(1) of the Insolvency Act (Cap 53).
[107] S 104(2) of the Insolvency Act (Cap 53). Creditors whose claims were proved against the estate.
[108] S 104(2) of the Insolvency Act (Cap 53).
[109] S 105(1) of the Insolvency Act (Cap 53). The offer of composition could not be binding upon the insolvent and preferent creditors and their rights could not be prejudiced by the composition except where a preferent creditor has expressly consented in writing to surrender his preference.
[110] S 105(2) of the Insolvency Act (Cap 53).

obtain relief from indebtedness.[111] The assignment procedure could be accessed by any debtor who was not insolvent.[112]

To validate the deed of assignment, it had to be signed and executed by:[113]

(a) The debtor or any person who might under the like circumstances present an application on behalf of the debtor; and

(b) Any creditor whose claim, not being conditional, would be provable under the Insolvency Act [Chapter 53] at a meeting of creditors if the debtor were insolvent; and

(c) Assignees not exceeding two in number, designated as such in the deed and not disqualified under the Act for election as trustees.

Upon the execution of the deed of assignment, the assignee would immediately take possession of the immovable property, which the debtor could give or order possession of.[114] Thereafter, upon the Master's registration, the deed of assignment would become binding on the debtor and his creditors.[115] In turn, registration could only occur if, for instance, no creditor had given notice in writing that he intended to make an application to the court to set aside the assignment or place the estate under sequestration. Also, if a creditor who gave such notice failed to obtain and lodge with the Master an order placing the estate under provisional sequestration or setting aside the assignment within the prescribed time.[116] Registration had the immediate effect of:[117]

(a) Vesting in the assignee the estate of the debtor as fully and effectually as if the estate were under sequestration;

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[111] S 115 of the Insolvency Act (Cap 53).
[112] S 116 of the Insolvency Act (Cap 53). Therefore, unlike the composition measure, access to the sequestration procedure was not a pre-requisite to access the assignment procedure.
[113] S 117 of the Insolvency Act (Cap 53).
[114] S 118(1) of the Insolvency Act (Cap 53). The assignee would retain the property as against the debtor until the assignment was set aside or the Master certified that the assignment was declined by the creditors.
[115] S 125(1) of the Insolvency Act (Cap 53). The deed would be binding upon all creditors whose claims were due or the cause of whose claims arose before the date of the assignment and no condition could be inserted in the deed whereby any creditor could obtain any advantage or benefit to which he would not be entitled if the estate of the debtor were to be placed under sequestration.
[116] S 124(1) of the Insolvency Act (Cap 53). The date of registration of the deed was the date of the assignment.
[117] S 125(2) of the Insolvency Act (Cap 53).

(b) Relieving the debtor from every debt which was due or the cause of which arose before the date of the assignment but subject to the deed of assignment;

(c) Staying all legal proceedings against the debtor for any liquidated claim provable against the estate, whereupon the taxed costs of such proceedings by the plaintiff could be added to his claim provable against the estate;

(d) Suspending every other claim and all proceedings therein by or against the debtor, except such as, if he were insolvent, he would be entitled to commence or continue for his benefit; every action so suspended could be continued by or against the assignee in like manner and upon the like terms as to notice as if he were the trustee of an insolvent estate;

(e) Enabling the debtor, if in prison for debt, to apply to the Court for his release after notice to the creditor at whose suit he is so imprisoned.

The assignment procedure was an integral alternative debt relief procedure that ultimately freed the debtor from his pre-assignment debts. However, the measure did not cater for the needs of NINA debtors because it required debtors to have the requisite disposable property.

iii. Rehabilitation

Rehabilitation of debtors who accessed the composition measure and obtained a certificate of the acceptance of a composition offer could be commenced by a debtor's petition to the court.[118] However, insolvent debtors who had not obtained this certificate could apply for rehabilitation after six months had lapsed from the confirmation of any liquidation and distribution account in the insolvent estate.[119] Additionally, a rehabilitation order could be granted in favour of insolvents against whose estates no claim had been proved, and no trustee had been appointed.[120]

[118] S 107(1) of the Insolvency Act (Cap 53). The insolvent must have given, by advertisement in the *Gazette*, not less than three weeks' notice of his intention to institute the application.
[119] S 107(2) of the Insolvency Act (Cap 53). The insolvent must have given to the Master and to the trustee in writing and by advertisement in the *Gazette* not less than six weeks' notice of his intention to institute the application.
[120] S 107(3) of the Insolvency Act (Cap 53). Such insolvent debtors could only apply for a rehabilitation order after six months had elapsed from the date of sequestration. Additionally, the insolvents should

While filing an application for rehabilitation, the insolvent was required to furnish the registrar with security for the payment of costs of any person who could appear to oppose the rehabilitation and be awarded costs by the court.[121] The insolvent was expected to submit an affidavit indicating that he had made a full and fair surrender of his estate.[122] Additionally, he was also expected to outline to the court the dividend paid to his creditors, the assets available after realisation and the estimated value thereof, the total amount of all claims proved against the estate and the total amount of his liabilities at the date of the sequestration of the estate.[123]

A successful rehabilitation application had the effect of:[124]

(a) Putting an end to the sequestration;

(b) Discharging all debts of the insolvent not arising out of a fraudulent breach of trust, which were due, or the cause of which had arisen, before the sequestration; and

(c) Relieving the insolvent of every disability imposed on him by the sequestration.[125]

In summary, the composition and sequestration procedures were essential because they allowed debtors to ultimately obtain economic rehabilitation. Rehabilitation under the sequestration procedure afforded more advantages to debtors because it ensured a concomitant discharge of debts, compared with the composition measure. On the other hand, to obtain a discharge of debts, the insolvent must have ensured *pro-rata*

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have previously given to the Master and his creditors, in writing and by advertisement in the *Gazette* not less than six weeks' notice of his intention to make the application.

[121] S 108 of the Insolvency Act (Cap 53). Debtors who had the privilege of accessing the debt relief system and became NINA debtors before accessing the rehabilitation order could not ultimately access it, because of their inability to furnish the requisite security.

[122] S 109 of the Insolvency Act (Cap 53). And has not granted or promised any preference or security or made or promised any payment or entered into any secret or collusive agreement with intent to induce his trustee or any creditor not to oppose the rehabilitation.

[123] S 109 of the Insolvency Act (Cap 53).

[124] See s 111(2) of the Insolvency Act (Cap 53). Also, see s 111(1) which outlined that an order of rehabilitation did not affect:

(a) the rights of trustee or creditors under any composition duly accepted by the creditors;
(b) the rights, powers or duties of the Master or the duties of the trustee in regard to any such composition;
(c) the right of the trustee or creditors to any part of the insolvent's estate which is vested in but has not yet been distributed by the trustee; and,
(d) the liability of any person to pay any penalty or suffer any punishment under the provisions of the Act.

[125] See ss 20 and 21 of the Insolvency Act (Cap 53) for an indication of the prohibitions imposed on the insolvent because of sequestration.

distribution of proceeds to creditors after selling his disposable property, a requirement that NINA debtors could not meet.

Therefore, the sequestration procedure's stringent access requirements prevented NINA debtors from accessing the measure because of their dire financial circumstances, making it impossible for these marginalised debtors to obtain a much-needed discharge of debts. Consequently, despite the numerous advantages accruing to debtors because of a discharge option, the sequestration procedure was not suited to the needs of NINA debtors. Regrettably, NINA debtors were perpetually trapped in debt and left vulnerable to creditor intimidation because the Insolvency Act [Chapter 53] marginalised them.

3.2.3.3 The Insolvency Act 13 of 1973

i. The sequestration procedure

The Insolvency Act [Chapter 6:04] amended the sequestration procedure by requiring that the voluntary surrender application be provisionally accepted before a final order placing the estate under sequestration could be granted.[126] To this end, the High Court could provisionally accept the surrender application if it was satisfied that the property in the estate was sufficient to defray all the costs of the sequestration, which was payable out of the free residue,[127] and the debtor's estate was insolvent.[128] Thereafter, the court would issue a rule *nisi*, published in the *Gazette*, calling upon interested persons to appear and show cause why the insolvent's estate should not be sequestrated finally.[129]

Before issuing the rule *nisi*, the court could direct the insolvent, or any other interested person, to appear before it and be examined.[130] Once the procedural and substantive requirements were met, the court would finally accept the surrender application and

[126] S 3 read with s 4 of the Insolvency Act (Cap 6:04).
[127] S 4(1)(a) of the Insolvency Act (Cap 53). Applications were normally rejected if the estate had insufficient free residue. However, the court in *Ex parte Apsley-Thomas* 1934 SR 97 held that the High Court could conditionally accept the surrender upon the debtor finding a sufficient sum of money and paying it to the Master.
[128] S 4(1)(b) of the Insolvency Act (Cap 53). See eg, *Ex parte Yodaiken* 1938 SR 193; *Ex parte Tselentis* 1961 R & N 108.
[129] S 4(1)(b) of the Insolvency Act (Cap 53).
[130] S 4(2) of the Insolvency Act (Cap 6:04).

grant an order placing the insolvent's estate under sequestration if it was satisfied that:[131]

(a) There were available assets in the estate sufficient to defray all the costs of sequestration as were payable out of the free residue;
(b) The estate of the debtor was insolvent, and,
(c) The rule *nisi* had been duly published.[132]

In addition to the voluntary surrender, an insolvent debtor or a debtor who committed an act of insolvency[133] could be forced to access the sequestration procedure through a compulsory application to the court by his creditor(s) or an agent of his creditor(s).[134] The compulsory application had to specify the amount, cause and nature of the claim, whether or not the applicant held any security for his claim and, if so, the nature and value of the security, and the alleged act of insolvency committed by the debtor.[135]

The compulsory application had to be supported by a certificate of the Master or a magistrate, given not more than ten days before the date of the hearing of the application.[136] The certificate was proof that the debtor had given the Master sufficient security for the payment of all fees necessary for the prosecution of all sequestration proceedings and all costs of administering the estate until a trustee was appointed or if no trustee was appointed, of all fees and costs of sequestration and administration and all fees necessary for the discharge of the estate from sequestration.[137]

At the application hearing, the court could order that the debtor's estate was provisionally sequestrated, dismiss the application, postpone the hearing, or make any order in the circumstances that appeared to be just.[138] Therefore, the court could only make an order of provisional sequestration if it believed that the debtor had committed an act of insolvency or was insolvent, and there was reason to believe that the sequestration would be to the advantage of creditors.[139] After that, the court would

[131] S 6 of the Insolvency Act (Cap 6:04).
[132] S 5 of the Insolvency Act (Cap 6:04).
[133] See s 11 of the Insolvency Act (Cap 6:04) for an indication of the numerous acts of insolvency.
[134] S 12 of the Insolvency Act (Cap 6:04). The facts of the application were to be confirmed by an affidavit (s 12(4) of the Insolvency Act (Cap 6:04)).
[135] S 12(3) of the Insolvency Act (Cap 6:04).
[136] S 12(5) of the Insolvency Act (Cap 6:04).
[137] S 12(5) of the Insolvency Act (Cap 6:04).
[138] S 12(10) of the Insolvency Act (Cap 6:04).
[139] See s 13 of the Insolvency Act (Cap 6:04).

issue a rule *nisi* and ultimately grant an order of final sequestration or a discharge of the provisional order.[140]

In the main, the sequestration procedure, which could either be voluntarily or compulsorily accessed, was an asset liquidation procedure. To access this procedure, the debtor needed to have a disposable property that would be liquidated and the proceeds distributed among his creditors. Additionally, the debtor required disposable income to meet the numerous costs associated with the sequestration measure. Consequently, it was improbable that NINA debtors could obtain debt relief through the sequestration procedure because they neither had any disposable property nor income that could be utilised during the liquidation process.

Additionally, an insolvent who had accessed the sequestration procedure could opt to conclude a composition arrangement with his creditors. The composition could be commenced by a written composition offer by the insolvent to the trustee of his estate at any time after the first meeting of creditors.[141] Thereafter, the trustee would post a copy of the offer, with his report, to every proven creditor if he thought there was a reasonable possibility that the creditors would accept the offer of composition.[142] Alternatively, if the trustee belied there was no reasonable possibility that the creditors would accept the offer, he would inform the insolvent that the offer was unacceptable.[143]

The trustee, who had delivered the composition offer to creditors, must have also notified creditors of a meeting to be held at least fourteen days from the date of posting.[144] If the offer was accepted during the meeting by three-quarters in value and three-quarters in number of the votes of all the creditors who proved their claims against the estate, the composition became binding upon the insolvent and all creditors.[145]

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[140] Ss 14 and 15 of the Insolvency Act (Cap 6:04).
[141] S 136(1) of the Insolvency Act (Cap 6:04).
[142] S 136(2)(a) of the Insolvency Act (Cap 6:04).
[143] S 136(2)(b) of the Insolvency Act (Cap 6:04). Such insolvents could appeal to the Master who, after having considered the trustee's report and the offer, could direct the trustee to post a copy of the offer to all known creditors (s 136(3)).
[144] S 136(4) of the Insolvency Act (Cap 6:04). The purpose of the meeting was to consider the offer of composition.
[145] Ss 136(6) and 137(1) of the Insolvency Act (Cap 6:04). The composition was only binding upon the insolvent and upon unsecured or non-preferent creditors.

Thus, the composition measure entailed a debt restructuring arrangement between a debtor and his creditors. However, this debt rearrangement did not cater to the NNA debtors' needs because they lacked the requisite income to facilitate debt repayment. Furthermore, an offer of composition could only be made by an insolvent debtor who had accessed the sequestration procedure. NINA debtors were excluded from this procedure because of the sequestration procedure's stringent access requirements. In a nutshell, the composition measure excluded NINA debtors because of the NINA debtors' inability to meet the pre-requisite sequestration procedure's eligibility criteria.

ii. Rehabilitation

An insolvent with disposable income and/or assets, who accessed the sequestration procedure, or the composition measure, could direct an application for rehabilitation to the High Court.[146] Rehabilitation and the ultimate discharge of debts for insolvents who accessed the sequestration measure could be commenced by an application after twelve months had elapsed from the date of the confirmation by the Master of the trustee's first account in his estate or after two years had elapsed from the date of the final sequestration order, or, after three years had elapsed from the date of confirmation by the Master of the trustee's account if his estate had been sequestrated before the sequestration to which the application related, or after five years had elapsed from the date of his conviction of any fraudulent act in relation to his existing or previous insolvency.[147] An order of rehabilitation was essential for insolvents and had the much-needed effect of, *inter alia*, putting an end to the sequestration, discharging all debts of the insolvent which were due, or the cause of which had arisen, before the sequestration, and which did not arise out of any fraud on the insolvent's part, and relieving the insolvent of every disability resulting from the sequestration.[148]

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[146] S 141(1) of the Insolvency Act (Cap 6:04). Insolvents who accessed the composition measure must, as a requirement, have received a certificate from the Master of the acceptance of the offer and then given at least three weeks' notice to make the application in the *Gazette* and to the trustee.

[147] S 141(2) of the Insolvency Act (Cap 6:04).

[148] S 146(1) of the Insolvency Act (Cap 6:04). However, s 146(2) stipulated that rehabilitation did not affect:

(a) the rights of the trustee or creditors under a composition; or
(b) the powers or duties of the Master or the duties of the trustee in connection with a composition; or
(c) the right of the trustee or creditors to any part of the insolvent's estate which is vested in but has not yet been distributed by the trustee; or
(d) the liability of a surety for the insolvent; or

Clearly, both the composition measure and the sequestration procedure offered a rehabilitation option. However, access to rehabilitation for debtors who accessed the sequestration procedure offered more benefits because of the discharge option. The burden of debts was lifted by the discharge option that had the much-needed effect of releasing the insolvent from qualifying pre-sequestration unsecured debts. However, this benefit was only available to privileged debtors with disposable income and/or assets required to cover the costs of the sequestration procedure and meet the advantage to creditors' requirement. Therefore, despite the benefits emanating from the rehabilitation order, NINA debtors in their dire financial circumstances were perpetually trapped in debt and left vulnerable to creditor intimidation because of the measure's stringent access requirements that prohibited them from accessing the measure and obtaining a discharge of debts.

3.3 The Insolvency Act 7 of 2018

3.3.1 General background

The Insolvency Act [Chapter 6:04] was repealed by the Insolvency Act [Chapter 6:07], which came into operation on 25 June 2018. The latter Act presently regulates the administration of insolvent and assigned estates and consolidates insolvency legislation in Zimbabwe.[149] The Act defines a debtor as any person or entity that can incur debt and whose estate has been liquidated.[150] Therefore, this legislation regulates the liquidation of estates of natural persons, partnerships, trusts, companies, private business corporations, co-operatives and any other debtors besides natural persons or partnerships.[151]

The primary debt relief measure this legislation is the liquidation procedure. However, it should be noted at the onset that in relation to NINA debtors, the primary debt relief measure of the Act does not materially depart from the provisions of its predecessor regarding the provision of access to the measure and a concomitant discharge of

(e) the liability of any person to pay any penalty or suffer any punishment under any provision of the Act.

[149] Preamble to the Act.

[150] S 1 of the Act. Includes the estate of any such person or entity and any such debtor or debtor's estate before liquidation.

[151] Ss 4-5 of the Act. To avoid a plurality of arguments and to avoid diverting from the purpose of this study, this paragraph focuses on the Act's regulation of insolvent estates of natural persons.

debts.[152] The liquidation procedure arguably continues to marginalise NINA debtors through, for instance, the advantage to creditors requirements.[153]

In fully exploring the current regulation of NINA debtors in Zimbabwe's debt relief system in relation to the provision of access to debt relief measures and facilitation of a discharge of debts, This paragraph primarily focuses on the liquidation procedure and the novel pre- and post-liquidation composition measures that were ushered in by the Act. This analysis commences by exploring the liquidation procedure to determine the extent to which the measure affords or prevents access to NINA debtors. It also examines the provision of a discharge option to these debtors. Thereafter, this chapter examines the newly introduced pre- and post-liquidation composition measures.

The examination of Zimbabwe's consumer insolvency regime is underpinned by the internationally regarded policies, principles and guidelines in insolvency discussed in chapter two. This discussion also weighs the prevailing regulation against the fresh start philosophy. The discussion above examined how the sound, nuanced approach to bankruptcy in the American bankruptcy regime has influenced a global trend in insolvency that ensures access and a discharge of debts to all honest but unfortunate debtors.[154]

3.3.2 The liquidation procedure

3.3.2.1 Voluntary surrender

In the main, the liquidation procedure entails a court-ordered[155] surrender of a debtor's non-exempt property to a liquidator for sale and distribution of the proceeds to proven creditors.[156] The liquidation procedure is important because it may lead to an ultimate

[152] Para 3.2.3.3.
[153] Ss 8(a)(ii), 14(1)(b)(i), 15(1)(c) and 50(6) of the Act.
[154] See ch 2 para 2.2 for a detailed analysis of the fresh start philosophy that emerged from the United States of America's bankruptcy system. However, this juxtaposition does not seek to transplant the American bankruptcy system into the Zimbabwean insolvency regime. It merely seeks to determine how the internationally regarded policies, principles and guidelines discussed in chapter two may be implemented in Zimbabwe's debt relief system to facilitate the reform of the insolvency regime into an effective and inclusive system that protects the interests of all stakeholders in insolvency.
[155] S 1 of the Act provides that "court" refers to the High Court of Zimbabwe.
[156] Property exemption is one of the fundamental elements for sound insolvency systems (ch 2 paras 2.2.1, 2.4.1.1, 2.5.3 and 2.5.4.5). To this end, s 19(9)(a) of the Act provides that the following property must be excluded from the insolvent estate of a natural person debtor:
(i) the necessary beds, bedding and wearing apparel;

discharge of debts. It may be initiated by either a debtor's voluntary application or follows a compulsory application by the insolvent's creditors.[157]

In relation to natural person debtors,[158] the voluntary surrender process may be initiated by an application to the court by a debtor or by a person who lawfully acts on his behalf.[159] The application must satisfactorily identify the debtor[160] and be accompanied by:[161]

(a) The debtor's statement of affairs;[162] and,

(b) A certificate of the Master, issued not more than 14 days before the date on which the application is to be heard by the court, that sufficient security has been given for the payment of all costs in respect of the application that might be awarded against the applicant, and all costs of the liquidation of the estate that may be incurred until the appointment of a liquidator.[163]

To access this measure, the applicant must meet several substantive and procedural requirements, including that the applicant lodges the application with the court registrar for enrolment before noon on the fifth court day before the day on which the application is to be heard.[164] Additionally, the applicant must send a copy of the application, two

(ii) the necessary furniture (other than beds) and household utensils of the insolvent in so far as they do not exceed the amount of ZWD200 or the amount prescribed from time to time so as to reflect subsequent fluctuation in the value of money;
(iii) stock, tools and agricultural implements of a farmer, in so far as they do not exceed ZWD200 in value or the amount prescribed from time to time so as to reflect subsequent fluctuation in value of money;
(iv) the supply of food and drink in the house sufficient for the needs of the insolvent and his or her family for a period of one month;
(v) tools and implements of trade, in so far as they do not exceed the amount of ZWD200 or the amount prescribed from time to time so as to reflect subsequent fluctuations in the value of money;
(vi) such arms and ammunition as the insolvent is required by law, regulation or disciplinary order to have in his or her possession as part of his or her equipment;
(vii) necessary medicine and medical devices.

[157] Ss 4 and 6 of the Act.

[158] The voluntary surrender process can also be utilised in the liquidation of partnerships (s 4(1) of the Act).

[159] S 4(1) of the Act. Applications on behalf of debtors may only be made where such debtors are incompetent to manage their own affairs.

[160] See s 4(2) of the Act for an outline of the identification requirements.

[161] S 4(4) of the Act.

[162] The Master may require the applicant to cause the property outlined in the statement of affairs to be evaluated by an appraiser or some other person approved by him (s 4(7) of the Act).

[163] The repealed Insolvency Act (Cap 6:04) required the insolvent to prove that his estate contains sufficient free residue to meet the costs of the sequestration and if there were insufficient free residue the application was normally refused. However, the court in *Ex parte Apsley-Thomas* 1934 SR 97 accepted applications by applicants who could not pay a sufficient sum of money to the Master to offset the costs of the procedure. This stringent access requirement excludes debtors whose dire financial circumstances prevents them from obtaining the Master's certificate for lack of the necessary security.

[164] S 4(5) of the Act.

copies of the statement of affairs, and a copy of an affidavit in support of the application to the Master.[165]

After considering the voluntary surrender application, the court may make a provisional or final liquidation order, dismiss the application, postpone its hearing, or make any other order that it regards as just in the circumstances.[166] Thereafter, the court may only make a provisional or final liquidation order if:

(i) The debtor is unable to pay his debts;[167] and,

(ii) The liquidation of the estate of the debtor will be to the advantage of his creditors; and,

(iii) A pre- or post-liquidation composition, where applicable, would not be more appropriate than a liquidation order.

Notably, a debtor may not access the liquidation procedure if he cannot prove that the liquidation of his estate will benefit his creditors. The advantage to creditors requirement runs throughout the Act and renders the liquidation procedure pro-creditor.[168] The Act does not define what the advantage to creditors requirement entails. However, Evans[169] contends that traces of this requirement can be found in the Cape Ordinance 6 of 1843 which facilitated a debtor's voluntary surrender of his estate to benefit his creditors. In relation to the South African debt relief system,[170] the court in *Meskin and Company v Friedman* held that:[171]

> [T]he facts put before the Court must satisfy it that there is a reasonable prospect - not necessarily a likelihood but a prospect which is not too remote - that a not negligible pecuniary benefit will result to creditors.

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[165] S 4(5) of the Act. The affidavit must confirm that the requirements of this provision have been met (s 4(6) of the Act).
[166] See ss 4(8)(a) and 4(8)(b) of the Act.
[167] A debtor is deemed unable to pay his debts upon proof that the debtor is generally unable to pay debts which are due and payable, or proof that the debtor's liabilities exceed the value of his assets (s 3 of the Act). The "inability to pay debts" requirement is a reflection of the recent reform of Zimbabwe's insolvency regulation that seeks to align the debt relief system with international trends in insolvency. This requirement replaced the "acts of insolvency" requirement that was previously regulated by the repealed insolvency statutes. The "acts of insolvency" requirement is not favoured because it limits access to insolvency procedures to deserving debtors (ch 2 pars 2.5.4.3).
[168] Ss 4(8)(a)(iii), 5(1)(c)(i), 14(1)(b)(i), 15(1)(c) and 50(6) of the Act for an indication of the "advantage to creditors" requirement.
[169] See Evans 2002 *Int Insolv Rev* 15-16.
[170] See ch 4 for a detailed discussion of the advantage to creditors requirement in the South African natural person debt relief system and how it has led to the exclusion of NINA debtors.
[171] *Meskin and Company v Friedman* 1948 (2) SA 555 (W).

In short, the advantage to creditors requirement entails that a court may only grant a provisional and/or final liquidation order if satisfied that the liquidation will lead to creditors obtaining a "not negligible pecuniary benefit".[172] The advantage to creditors principle does not align with internationally regarded policies, principles and guidelines in insolvency law because it does not balance the interests of all stakeholders in protecting the interests of creditors to the detriment of debtors, especially the NINA category of debtors.[173] Therefore, the dire financial circumstances of NINA debtors who neither have any disposable income to meet the costs of the liquidation procedure, nor disposable assets that may be liquidated and the proceeds distributed among creditors, prevent them from accessing and obtaining relief through the voluntary surrender process.

3.3.2.2 Compulsory liquidation

An overcommitted debtor may also be forced to access the liquidation procedure by an application by his creditor(s). It must be noted at the onset that the compulsory liquidation procedure is not a debtor remedy because creditors may only initiate it. This starkly contrasts with the repealed Insolvency Act [Chapter 6:04] wherein a debtor could initiate the compulsory liquidation process by giving notice to a friendly creditor that he has or is about to suspend the payment of his debts.[174] This is commonly referred to as friendly sequestration, and such applications are also common within the South African debt relief system.[175] When compared to the voluntary surrender process, friendly sequestrations are important because of the lower burden of proof for such applications. In this regard, a mere reason to believe that sequestrating the debtor's estate would be to the advantage of his creditors was sufficient to warrant a provisional sequestration order[176] while *prima facie* evidence that the debtor's estate had sufficient assets to defray all costs of the sequestration payable out of the free residue was needed to warrant an order of provisional sequestration in respect of

[172] See eg, *Ex parte Battiscombe* 1930 SR 25 where it was held that this requirement may be dispensed with if there is no evidence of fraud or dishonesty or prejudice to any creditor.
[173] See ch 2 paras 2.1 and 2.3.
[174] See s 11(f) of the Insolvency Act (Cap 6:04).
[175] See ch 4 para 4.2.2.3.
[176] See s 13(b) of the Insolvency Act (Cap 6:04).

voluntary surrender applications.[177] However, such friendly sequestrations are no longer possible in the recently introduced Act.[178]

In terms of the Act, the compulsory liquidation process may be initiated by an application to a court[179] by a creditor or two or more creditors who have a liquidated claim[180] of not less than ZWD200.[181] The compulsory application may only be instituted against the estate of a debtor who cannot to pay his debts that are due and payable and whose liabilities exceed the value of his assets[182] and must be filed with direct notice to the debtor.[183] This provision mandating an inability to pay debts reflects the modernisation of Zimbabwe's insolvency system. In this regard, this provision replaces the "acts of insolvency" requirement that was previously prescribed under sections 11(8) of the repealed Insolvency Act [Chapter 6:04] and Insolvency Act [Chapter 53], respectively. In relation to the "acts of insolvency" requirement, international best practice indicates that this requirement limits access to insolvency procedures for deserving debtors who cannot to meet their obligations.[184] Therefore, the position in Zimbabwe's insolvency regime, wherein an inability to pay debts is prescribed, is preferred.

In terms of the application process, the creditors' petition must identify the debtor, and it should also include the marital status of the debtor if known, the amount, cause and nature of the claim, whether or not security has been given for the claim and if so, the nature and value of the security, and the circumstances on which the application is founded.[185] Notably, the application must be supported by an affidavit and be

[177] See s 4(1) of the Insolvency Act (Cap 6:04).
[178] The Act no longer provides for the "acts of insolvency".
[179] It can be deduced at the onset that the liquidation procedure affords relief from indebtedness to debtors with disposable assets that may be liquidated to enable a distribution of the proceeds to creditors. Clearly, NINA debtors cannot access this measure because they do not have the requisite disposable assets.
[180] See *Ex parte Benson* 1938 WLD 107, where the court held that a liquidated claim is a claim that is based on an obvious and ascertainable legal ground that is capable of quick and ready proof. Also, see s 6(2) of the Act, which provides that a claim in respect of a liquidated debt that is payable at some determined time in the future may be considered.
[181] S 6(1) of the Act. The liquidated claim can be adjusted from time to time to reflect subsequent fluctuation in the value of the money. This is essential because of the volatile and unstable nature of Zimbabwe's economy (ch 1 para 1).
[182] S 6(1)(a) read with s 3(1) of the Act. Also, see *Pieters & Co v Gordon* 1913 SR 71 73.
[183] S 6(3)(a) of the Act. The court may dispense with this requirement where it is satisfied that it would be in the interest of the debtor or of the creditors to do so.
[184] See ch 2 para 2.5.4.3.
[185] S 6(3)(b) of the Act. However, if an applicant is unable to comply with any of the requirements, the court may dispense with such requirements and dispose of the application in the manner that it finds just (s 6(9) of the Act).

accompanied by a certificate of the Master that sufficient security has been given for the payment of all costs in respect of the application that might be awarded against the applicant.[186]

The applicant(s) must lodge the application before the fifth court day before the day on which the application is to be heard by the court with the registrar of the court for issuing,[187] and the debtor and his spouse must be served with a copy of the application and copies of all annexures. The creditor application process ensures debtor participation by permitting opposing affidavits to be lodged with the registrar[188] and a copy of the affidavit served on the applicant before the second court day before the day on which the application is to be heard by the court.[189]

After considering the application, the court may make any of the following orders:[190]

(i) Award the debtor compensation which the court considers appropriate and damages he has sustained because of an application that is an abuse of the court's procedures or is malicious or vexatious;[191] or

(ii) Grant a provisional liquidation order; or

(iii) Grant a final liquidation order.

In relation to NINA debtors, it is debatable whether creditors' compulsory liquidation application may be successful because a court may only make a provisional and/or final liquidation order if there is reason to believe that the liquidation of the debtor's estate will be to the advantage of his creditors,[192] a requirement which NINA debtors cannot meet.

The advantage for creditors requirement has continued to be the foundation of Zimbabwe's corporate and natural person insolvency regimes. In relation to the corporate debt relief system, the principle espoused in *Bylo v Rhodesian Barter and*

[186] S 6(4) of the Act. Unlike the case with voluntary applications, this requirement is not onerous on debtors because the onus to furnish the Master's certificate rests on the creditors.
[187] S 6(6) of the Act. A copy of the application and every affidavit in support of the allegations in the application must also be sent to the Master by standard notice (s 6(8) of the Act).
[188] Where necessary and subject to the provisions of the High Court rules.
[189] S 6(7) of the Act.
[190] S 6(10) of the Act.
[191] Insolvency proceedings may lead to the stigmatisation of debtors. Therefore, compensation might help ameliorate the reputational damage suffered by the debtor because of vexatious and malicious applications.
[192] See ss 14(1)(b)(i) and 15(1)(c) of the Act.

Export no longer applies in contemporary insolvency law.[193] In this case, Beck J (as he then was) held that the lack of assets in a debtor's estate could not hinder access to the liquidation procedure.

In relation to the natural person debt relief system, the significance of the advantage for creditors requirement was confirmed in the *Scottish Rhodesian Finance Ltd v Ridgeway* case,[194] where Whitaker J (as he then was) held that the creditor-applicant has an indispensable onus to prove that there is reason to believe that liquidation will be to the advantage of creditors.[195] This indispensable requirement has thus far remained an integral aspect of the Zimbabwean natural person debt relief system. It was observed in the landmark case *MacGillivray v Edmundson* that in the absence of special circumstances,[196] an estate with insufficient assets to facilitate the distribution of proceeds to creditors cannot be sequestrated. Regrettably, this requirement continues to be a stumbling block to NINA debtors who lack any disposable assets to facilitate an advantage for creditors.

3.3.2.3 The post-liquidation composition

As pointed out above, one of the reforms of the Act was the novel pre- and post-liquidation composition measures. These measures repealed the composition measure that was previously regulated by the Insolvency Act [Chapter 6:07].[197] The post-liquidation process may be commenced by a debtor's offer of composition lodged with the liquidator of his estate, at any time after issuing the first liquidation order and after he has sent his statement of affairs to the Master and the liquidator in terms of

[193] *Bylo v Rhodesian Barter and Export (Pvt) Ltd* 1974 (1) SA 601 (R).
[194] *Scottish Rhodesian Finance Ltd v Ridgeway* 1979 (2) SA 251 (R).
[195] Whitaker J (as he then was) overturned the decision in *MacGillivray v Edmundson* 1958 (3) SA 384 (SR) by asserting that the onus was on the debtor to establish that the sequestration was not to the advantage of creditors. This decision was decided on the repealed Insolvency Act (Cap 53) and was followed in *Meaker v Heyns* 1965 (3) SA 496 (SR); *Hanan v Turner* 1967 (4) SA 368 (R); *J W Jagger & Co (Rhodesia) (Wholesaling) (Pvt) Ltd v Mubika* 1972 (4) SA 100 (R).
[196] *MacGillivray v Edmundson* 1958 (3) SA 384 (SR).
[197] See para 3.2.3.3 for a discussion of the repealed composition measure. Also, see para 3.2.3.2 where the composition measure is also discussed in relation to the repealed Insolvency Act (Cap 53). Although the post-liquidation measure is a recent introduction in Zimbabwe's debt relief system, it does not materially differ from the repealed composition measures.

section 43.[198] Consequently, it may be deduced that access to the liquidation procedure is a prerequisite to accessing the post-liquidation composition measure.[199]

Suppose the liquidator thinks that the creditors might accept the offer of composition. In that case, he must send a copy thereof to all known creditors along with a notice of the meeting at which the composition will be considered.[200] Where the offer is accepted by a majority in number and two-thirds in value of the concurrent creditors who have voted on the offer, and payment under the composition has been made, the Master must issue a certificate to the effect that the offer has been accepted.[201] However, the liquidator may, of his own volition, approach the court if the composition contains incorrect information, which caused a majority of creditors to vote in favour of its acceptance or where the debtor has failed to give effect to any term of the composition.[202]

Creditors' acceptance of the offer of composition has the effect of discharging a provisional liquidation order or setting aside a final liquidation order.[203] Notably, upon the acceptance of the offer, the liquidator must immediately transfer possession of the property to the debtor, where the composition requires the restoration of the debtor's property.[204] Therefore, this is the primary advantage that the post-liquidation composition measure provides, namely, enabling debtors who have accessed the

[198] S 120(1) of the Act. NINA debtors cannot access the liquidation procedure because of the measure's stringent access requirement. The post-liquidation composition maintains this exclusion because to access this measure, debtors must have met the requirements of the liquidation procedure. The post-liquidation composition measure may also be compared with the composition measure in terms of the repealed insolvency statutes within this jurisdiction so far as the nature of the measure and the need for an underlying liquidation order is concerned.

[199] This provision seemingly contradicts the provision in section 4(8)(iii) of the Act that provides that the court may only provisionally accept a liquidation application in terms of section 14 if a pre- or post-liquidation composition would be more appropriate than a liquidation order. Thus, in terms of section 4(8)(iii) of the Act, debtors may access the post-liquidation composition before the issuing of the first liquidation order.

[200] S 120(2) of the Act. However, if the liquidator is of the opinion that there is no likelihood that the debtor's creditors will accept the offer of composition, he must inform the debtor that the offer is unacceptable. This decision by the liquidator may be reviewed by the Master (ss 120(4) and 120(5) of the Act).

[201] S 120(6) of the Act. An accepted offer of composition is binding upon the debtor and all his creditors with an unsecured claim (s 120(11) of the Act).

[202] S 120(10) of the Act.

[203] S 120(8) of the Act.

[204] S 120(12) of the Act. This is essential because it offers an insolvent debtor an opportunity to re-enter the credit economy by gainfully utilising his property to be economically active without the burden of replacing any of his essential assets that may otherwise have been disposed of during the liquidation process.

liquidation procedure to obtain possession of their property by ending the liquidation process and commencing with a favourable debt repayment process.

Despite the benefits the post-liquidation composition measure provides, regrettably, it does not meet the needs of NINA debtors because it may only be accessed by debtors who have already accessed the exclusive liquidation procedure. Therefore, the post-liquidation procedure's access requirements perpetuate the marginalisation of NINA debtors who cannot access the liquidation procedure because of their inability to meet the costs and the property requirements associated with the procedure.

3.3.3 The pre-liquidation composition

The origins of the recently introduced pre-liquidation composition measure can be traced to the South African debt relief system. The proposed introduction of the pre-liquidation composition measure in South Africa's debt relief system was first made by the South African Law Reform Commission. The proposed-provision sought to facilitate reprieve to debtors who cannot access the debt relief system because of the failure to meet the advantage for creditors requirement central to the South African Insolvency Act.[205] The proposed measure seeks to, remedy the plight of the unregulated NINA debtor group vulnerable to creditor intimidation, which arguably enforces the duality of the South African insolvency regime.

The Zimbabwean Act does not define the measure's pre-liquidation title, and the (South African) 2015 Draft Insolvency Bill, where the measure originated, also does not define of this title. Coetzee[206] argues that the title is confusing because it could mistakenly be interpreted to require a composition as a precondition for liquidation proceedings. This assertion is not unfamiliar in insolvency as outlined in the *World Bank Report* that some jurisdictions have a two-stage approach to insolvency wherein an effort to reach a voluntary settlement is a pre-requisite to access the formal procedure.[207] Further, the Zimbabwean legislature's failure to define the measure's title might lead to an interpretation that the measure is only available to debtors who

[205] 24 of 1936. See cl 188(10) of the (South African) 2015 Draft Insolvency Bill. The pre-liquidation composition is yet to be implemented in the South African debt relief system. See ch 4 for a detailed analysis of the insolvency regime. Also, see Coetzee and Roestoff 2020 *Int Insolv Rev* 98-99.
[206] See eg, Coetzee 2017 *THRHR* 2.
[207] See ch 2 para 2.5.4.1.

have been granted access to the liquidation procedure, but whose estates have not been liquidated. However, this interpretation is not acceptable because this would essentially refer to the post-liquidation composition measure. It is confusing that a debtor's surrender application may only be provisionally accepted if the court is satisfied that a pre- or post-liquidation composition would not be more appropriate than a liquidation order.[208]

To access the pre-liquidation composition, an overcommitted debtor with debts less than ZWD20 000 may lodge a signed copy of a composition and an affidavit with an administrator.[209] The administrator is an intermediary, and to qualify as such, the administrator must not have been disqualified from being a liquidator, must have agreed to act as an administrator, and must have furnished security to the satisfaction of the Master within whose area of jurisdiction the debtor is resident.[210]

Negotiated settlements that the pre-liquidation composition envisages are in line with international principles and guidelines. Such settlements are useful in reducing the stigma associated with formal insolvency proceedings. Further, the low costs and increased flexibility associated with negotiated settlements are favoured.[211] However, the *World Bank Report* cautions that these benefits may be illusory because it is difficult to reach an agreement with all creditors, and delays usually mar informal procedures. Additionally, debtors are often pressured into concluding non-viable onerous settlements. Therefore, negotiated settlements are mainly effective in temporary financial difficulties or where debtors have a low income.

Suppose the lodged composition provides for an immediate case payment for distribution among creditors. In that case, the debtor must, pending the outcome of the

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[208] S 4(8)(a)(iii) of the Act. The confusion emanates from the fact that when narrowly interpreted, a liquidation order is fundamental to access the post-liquidation measure in terms of section 120(1). Thus, a determination of provisional acceptance in terms of section 4(8)(a)(iii) is contradictory and an oversight by the legislature.

[209] See s 119(1) of the Act. The ZWD20 000 eligibility threshold is unreasonable because of the current financial situation in Zimbabwe. At present ZWD20 000 equates to ZAR910.42 or GBP45.91 (see Converter *Personal* 2022 https://bit.ly/3bY2f60 (accessed 16 August 2022)). In contrast the eligibility debt threshold for the proposed pre-liquidation measure within South Africa's debt relief system is ZAR200 000 (see cl 118(1) of the 2015 Draft Insolvency Bill). Therefore, due to the eligibility threshold, the Zimbabwean legislature renders all the debt relief measures it seeks to regulate obsolete. A viable alternative would be to prescribe all eligibility thresholds in a foreign currency such as the Rand or US Dollar, that is already widely used in the country and is more stable and better able to withstand the currency fluctuations presently experienced in Zimbabwe.

[210] S 119(1) of the Act. Administrators are regulated by the Estate Administrators Act [Chapter 27:20].

[211] See ch 2 para 2.5.4.1.

composition offer, pay the cash to the administrator to invest the amount in an interest-bearing savings account.[212] Lodging a composition offer imposes various restrictions on the applicant, namely, restriction on alienation, encumbering or voluntary disposition of property available to his creditors in terms of the composition.[213] Additionally, a debtor who incurs debt during the period between lodging the composition and the date on which creditors vote on the composition, must inform the debt provider of the impending composition and provide the insolvency practitioner with full particulars concerning the debt he has incurred.[214]

Upon receipt of the composition offer, the administrator must determine a date for questioning the debtor and the consideration of the composition by his creditors.[215] The hearing must be convened at a place that is accessible and convenient to creditors and send a standard notice with the time, date and place of the hearing to creditors, and the Master at least 14 days before the hearing.[216] International trends in insolvency have indicated a shift towards the use of technology by concluding creditor meetings virtually.[217] This shift was mainly introduced by the limitations imposed by the Covid-19 pandemic. This may be a viable reform measure for the pre-liquidation composition procedure because it reduces the expenses debtors have to incur, including the transport costs to travel to the hearing venue. At the hearing, creditors[218] may prove[219] or object to a debt listed in the debtor's statement.[220] The administrator and creditors whose debt has been acknowledged or proved, or any other interested party with the administrator's permission, may question the debtor about:[221]

(i) His assets and liabilities;

(ii) His present and future income and that of his spouse living with him;

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[212] S 119(2) of the Act. This requirement does not apply to NINA debtors whose dire financial circumstance hinders them from making the cash payment to the administrator.
[213] S 199(4) of the Act.
[214] S 119(3) of the Act.
[215] S 119(6) of the Act.
[216] S 119(7) of the Act.
[217] See ch 5 para 5.3.2.1 in relation to the Minimal Asset Process in the Scottish debt relief system.
[218] A creditor may authorise any person by a written power of attorney to appear at the hearing on his behalf and do everything at the hearing, which the creditor would have been entitled to do (s 119(12) of the Act).
[219] Where a debt is being objected to by the debtor or another creditor, the administrator may require that the creditor corroborate his debt with evidence (s 119(8)(c) of the Act).
[220] Subject to any amendments by the administrator, every listed debt is deemed to be proved unless a creditor objects to it, or the administrator rejects it or requires that it be corroborated with evidence (s 119(8)(b) of the Act).
[221] S 119(8)(e) of the Act.

(iii) His standard of living and the possibility of living more frugally; and,

(iv) Any other matter that the administrator considers to be relevant.

Where a dispute regarding a debt, other than a debt based upon or derived from a judgment debt, arises between the debtor and his creditors or between creditors, the administrator may admit or disallow the debt, or part thereof, after an investigation of the objection.[222] It is noteworthy that creditors whose debts have been disallowed may institute an action or continue with an action that has already been instituted, in respect of the debt.[223]

The administrator may not accept the composition if a creditor demonstrates, to his satisfaction, that the composition "accords a benefit to one creditor over another creditor to which he would not have been entitled on liquidation of the debtor's estate".[224] The composition will be deemed accepted if it is accepted by the majority in number and two-thirds in value of the concurrent creditors who vote on the composition.[225] The voting threshold does not align with international best practices in insolvency where NINA debtors are involved. This is mainly because the dire circumstances of NINA debtors might result in creditor passivity. After all, little to no dividend to creditors is guaranteed.[226] A viable alternative would be to make creditor participation a pre-requisite in instances where the significant value from assets or future income is expected and dispensing with this requirement where NINA debtors are involved. This may also be achieved by scrapping creditors' meetings.[227]

Thereafter, the administrator must send a certificate that the composition has been accepted to the Master and creditors. The composition becomes binding on all creditors who received notice of the hearing or who appeared at the hearing.[228] If the composition provides for payments in instalments, the composition has the effect of an order in section 18 of the Magistrates' Courts Act [Chapter 7:10].[229]

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[222] S 119(9) of the Act.
[223] S 119(10) of the Act. Where the creditor obtains a judgment in respect of the disputed debt, the administrator must add the debt to the list of proved debts (s 119(11) of the Act).
[224] S 119(14) of the Act. Therefore, the composition offer may only be accepted if the administrator is satisfied that the composition affords a benefit to all creditors in relation to their debts.
[225] S 119(15) of the Act.
[226] See ch 2 para 2.5.4.4.
[227] Ch 2 para 2.5.4.4.
[228] S 119(15) of the Act.
[229] S 119(19) of the Act.

However, if suppose the offer of composition is not accepted by the required majority and the debtor is not able to make a substantially higher offer. In that case, the administrator must declare the proceedings to have ceased, and the debtor returns to the position he was in before the commencement of the proceedings.[230] Thereafter, upon the application of the debtor, the Master may grant a discharge of unsecured debts if:[231]

> (i) [T]he debtor satisfies the Master that the administrator and all known creditors were given standard notice of the application for the discharge with a copy of the debtor's application at least 28 days before the application to the Master; and
> (ii) the Master is satisfied after consideration of comments, if any, by creditors and the administrator and the application by the debtor –
> A. that the proposed composition was the best offer which the debtor could make to creditors;
> B. that the inability of the debtor to pay debts in full was not caused by criminal or inappropriate behaviour by the debtor.

A debtor who has failed to comply with his obligations in terms of the composition may, after obtaining permission from the administrator, lodge an amended offer of composition to his creditors.[232] Alternatively, the administrator may revoke the composition for reasons which include:[233]

(a) Failure by the debtor to comply with his obligations in terms of the composition; or
(b) If the debtor renders false information in his statement in the course of the questioning; or
(c) If the debtor gives a benefit in respect of a claim that falls under the composition to a creditor on whom the composition is binding and who is not entitled to the benefit in terms of the composition.

The pre-liquidation composition measure is a streamlined negotiated settlement that may alleviate the plight of debtors with the disposable income to repay debts. However, the measure is presently not suited to the needs of NINA debtors because of their dire financial circumstances, and thus the measure neither benefits the debtor nor his creditors. NINA debtors cannot offer a viable composition to creditors, and it is highly improbable that such debtors can access the measure and obtain the relief the measure provides. The major issue with this measure is that it forces debtors into a

[230] S 119(28) of the Act.
[231] S 119(28) of the Act.
[232] S 119(22)(c) of the Act.
[233] S 119(23) of the Act.

negotiation phase despite not having any bargaining power because of their financial position. Further, creditor passivity might be an issue because little to no dividend to creditors is guaranteed where NINA debtors are involved.[234] The measure forces debtors into a negotiation phase with creditors despite not being able to offer anything to their creditors while incurring procedural costs along with expenses to travel to and from the venue of the negotiation.[235]

Although the pre-liquidation composition measure seems to have been transplanted into the Zimbabwean debt relief system with marginalised NINA debtors in mind. The measure does not meet this category of debtors' needs because it only succeeds when the debtor has something to offer his creditors. The pre-liquidation composition is nevertheless a welcome alternative debt relief measure for debtors, other than those in the NINA category, who have encountered a temporary financial crisis. It provides a streamlined procedure with less stigma attached to it when compared to the formal liquidation process, and may ultimately lead to economic rehabilitation.

3.3.4 Rehabilitation

Some of the key tenets of a sound insolvency system are its ability to ensure access to all honest but unfortunate debtors regardless of their financial circumstances and to facilitate a discharge of debts as an extension of insolvency procedures.[236] In relation to the second element of discharge, the Act facilitates a discharge of qualifying unsecured debts to insolvent debtors following a rehabilitation order. In turn, the rehabilitation order may be accessed by insolvents by applying to the court:[237]

(a) At any time after the confirmation by the Master of a distribution account providing for the full payment of all claims proved against the estate, with interest thereon from the date of liquidation; or
(b) At any time after the Master has issued a certificate of acceptance of a post-liquidation composition; or
(c) In any other case after the expiration of four years from the date of the confirmation by the Master of the first liquidation account in the estate.[238]

[234] See ch 2 para 2.5.4.4.
[235] To eradicate this problem, this study recommends that the Zimbabwean legislature require virtual meetings, which might accommodate interested parties. However, the major concern regarding virtual meetings would be access to internet, especially for poor debtors.
[236] See ch 2 para 2.4.1.2.
[237] S 106 of the Act.
[238] The debtor may apply to the court, through the Master, to request that a rehabilitation order be granted before the expiration of the prescribed four years, but not before a twelve-month period has

To access the rehabilitation order, the insolvent applicant must satisfy numerous substantive and procedural requirements, including furnishing security to the registrar of the court in respect of the costs of any person who may oppose the rehabilitation application and who may be awarded costs by the court.[239] Alternatively, insolvents may obtain rehabilitation through the effluxion of time. To this end, it is provided:[240]

> Any natural person debtor not rehabilitated by the Court within a period of 10 years from the date of liquidation of his or her estate, is regarded as having been rehabilitated after the expiry of that period unless a Court upon application by an interested person after standard notice to the debtor, orders otherwise prior to the expiration of the period of 10 years.

Where an order granting rehabilitation has been granted, the order will thereafter have the effect of:[241]

(a) Putting an end to the liquidation;

(b) Discharging all debts of the debtor which were due, or the cause of which had arisen, on or before the date of liquidation, and which did not arise out of any fraud on his part or the commission by him of any offence referred to in section 149(1)(e) or section 149(1)(c) in respect of a previous liquidation; and

(c) Relieving the debtor of every disability resulting from the liquidation.

In line with international principles and guidelines, the Act affords a discharge option to debtors. Discharge is imperative because it offers numerous advantages, including affording a fresh start to debtors, enabling them to re-enter the credit economy without the burden of debts.

Notably, a rehabilitation order can also be applied for by insolvents that have accessed the post-liquidation composition. However, this is a court-based application. Consequently, the costs attached to such an application marginalise debtors in dire financial circumstances. The advantages of a rehabilitation order under the post-liquidation measure may potentially be illusory because the rehabilitation does not affect the rights of a liquidator or creditors under the composition and the powers or duties of the Master or the duties of the liquidator.[242] In relation to NINA debtors, the

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lapsed or in the case where the debtor's estate was liquidated prior to the liquidation in respect of which he applies for rehabilitation, within a period of three years from the said date (s 106(3) of the Act).

[239] S 106(4)(b) of the Act.

[240] S 108(1) of the Act.

[241] S 109(1) of the Act.

[242] See ss 109(2)(a) and 109(9)(b) of the Act. Therefore, the pre- and post-liquidation measures do not lead to a discharge of debts.

rehabilitation option is beyond their reach because of the stringent access requirements of the liquidation measure and by extension, the post-liquidation composition, which prevents this category of debtors from ultimately being freed from their debts.

3.3.5 Constitutional consideration

Natural person debtors may access Zimbabwe's insolvency regime through either the liquidation procedure or the pre-liquidation composition measure. To access these measures, an overcommitted debtor must have adequate disposable income and/or assets. This chapter has highlighted that this stringent access requirement results in the marginalisation of NINA debtors who are prevented from accessing the debt relief system because of their dire financial circumstances. Therefore, the marginalised NINA debtors are left vulnerable to creditor intimidation because of the lack of statutory protection afforded to them. Further, debtors who once had a stable source of income and/or disposable assets who accessed any debt relief measures and afterwards encountered financial difficulty are also not accommodated by the insolvency regime. Therefore, this study recommends that Zimbabwe's legislature introduce a hardship discharge option for such debtors who became NINA debtors after accessing any of the relief measures.[243]

In light of the marginalisation of NINA debtors, this study argues that Zimbabwe's debt relief system distinguishes between debtors who are too poor to offer anything to creditors and debtors who have encountered a temporary financial setback but can afford to offer something[244] to creditors. I echo the sentiments of Rochelle,[245] who, in an evaluation of the South African debt relief measures, submit that some debtors within this jurisdiction can be "too broke to go bankrupt".

This differential treatment of debtors is based on a purely socio-economic ground that inhibits access to debt relief measures for indigent debtors while facilitating access

[243] This is in line with internationally regarded principles in insolvency as noted in the United States of America's bankruptcy system where debtors whose financial position negatively change after accessing the bankruptcy measure may apply for a hardship discharge that leads to a statutory discharge of pre-petition debts (see ch 2 para 2.2.2.2).
[244] Disposable assets and/or income.
[245] See Rochelle 1996 *TSAR* 319. This sentiment is apt in relation to the Zimbabwean natural person debt relief system.

and a concomitant discharge of debts for mildly indebted "can-pay" debtors. This differential treatment is not in line with international policies, principles and guidelines in insolvency that provide that discrimination or differential treatment of debtors on financial ground as regards both access and discharge should be eliminated.[246] Such discriminated debtors who are "too broke to go bankrupt" chiefly fall within the NINA category of debtors. This chapter comprehensively highlights this group's plight, which emanates from the lack of statutory protection that culminates in an inability to access the debt relief system and a failure to obtain the much-needed relief from indebtedness. In light of the NINA debtor plight, the focus of this paragraph now shifts towards evaluating the constitutionality of this differential treatment by weighing it against the overarching constitutional principle of equality. The discussion of constitutionality regarding access to the debt relief system was first raised by Evans[247] within the South African debt relief system and has since been developed by researchers such as Coetzee,[248] who discusses it in respect of NINA debtors' marginalisation. Similarly, Fletcher observes in respect of the English and Welsh debt relief systems that the introduction of the Human Rights Act[249] compelled a review of the validity of well-established provisions dealing with consumer insolvency.[250]

Unlike the South African debt relief system, where the seminal judgment of *Harksen v Lane*[251] forms the basis of the constitutionality argument, Zimbabwean law is still largely underdeveloped. Where any such discussion was undertaken, the perceivable political interference raises more questions than answers.[252] Any focus on case law will thus result in a plurality of arguments.[253] Consequently, the discussion that follows is limited to an evaluation of the provisions of Zimbabwe's Constitution of 2013.[254] As regards the role of the Constitution in Zimbabwe; the Constitution is the supreme law in the country, and any law, practice, custom or conduct inconsistent with it is invalid.[255] This, therefore, allows a review or challenge of the debt relief regulation or practices

[246] See ch 2 para 2.4.1.1.
[247] See Evans 2002 *Int Insolv Rev* 34.
[248] See in general Coetzee 2016 *Int Insolv Rev*.
[249] The Human Rights Act 1998.
[250] See Fletcher *The law of insolvency* 27; Boraine *et al* 2015 *NIBLeJ* 58.
[251] 1998 (1) SA 300 (CC).
[252] See Compagnon *A predictable tragedy* ch 5 for a discussion of the challenges that have historically been experienced by the judiciary in Zimbabwe.
[253] See Coetzee *A comparative reappraisal* 155-160 where this discussion was undertaken.
[254] The Constitution of Zimbabwe Amendment (No 20) Act 2013 (hereafter "the Constitution").
[255] See s 2 of the Constitution.

on constitutional grounds, specifically, a determination of whether the system's differential treatment aligns with the provisions of the Constitution.

The focus is on equality as the marginalisation of NINA debtors amounts to unequal treatment of such debtors who presently cannot access the insolvency regime, in contrast to mildly indebted debtors who have something to offer creditors. As regards equality in Zimbabwe: the Constitution commences by asserting that the people of Zimbabwe are united in their diversity by their common desire for freedom, justice and equality.[256] The recognition of the equality of all human beings is further entrenched in the Constitution and this constitutes one of the nine founding values and principles of Zimbabwe.[257] In respect of the enshrined equality principle, the Constitution provides that:[258]

> (1) All persons are equal before the law and have the right to equal protection and benefit of the law.
> (2) Women and men have the right to equal treatment, including the right to equal opportunities in political, *economic*, cultural and social spheres (own emphasis).
> (3) Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or *economic or social status*, or whether they were born in or out of wedlock (own emphasis).

This chapter has comprehensively highlighted how Zimbabwe's debt relief system facilitates access to "privileged" debtors with disposable assets and/or income while marginalising indigent debtors.[259] Such privileged debtors may proceed to obtain a rehabilitation order by applying to the court or through the effluxion of time. Rehabilitation can facilitate much-needed economic rehabilitation by freeing the debtor from his qualifying unsecured obligations. On the other hand, NINA debtors who cannot offer anything to their creditors are prevented from accessing the debt relief system because of their dire circumstances. This differential treatment of debtors, in respect of access and discharge, is in contravention of the Constitution, which specifically prohibits any discrimination between individuals on socio-economic grounds. In respect of the discrimination, the Constitution provides that a person is treated in a discriminatory manner if:[260]

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[256] Preamble of the Constitution.
[257] See s 3(1)(f) of the Constitution.
[258] S 56 of the Constitution.
[259] See paras 3.3.2, 3.3.3 and 3.3.4 above.
[260] See s 56(4) of the Constitution.

(a) they are subjected directly to a condition, restriction or disability to which other people are not subjected; or
(b) other people are accorded directly or indirectly a privilege or advantage which they are not accorded.

Therefore, in light of the above provisions, it may be concluded that the prohibition on accessing relief from over-indebtedness for NINA debtors amounts to discrimination on the ground of economic and social status. However, despite the apparent discrimination of NINA debtors within the Zimbabwean debt relief system, it is imperative also to determine whether such discrimination is fair, reasonable and justifiable.[261] This determination must be made by reading section 56 of the Constitution together with section 86, which holds that:[262]

> The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors including –
>
> (a) the nature of the right or freedom concerned;
> (b) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest.

To this end, it is determined that the purpose of limiting the right to equality and non-discrimination on NINA debtors should be determined by evaluating the Act's main purpose, which is the only piece of legislation that regulates Zimbabwe's natural person debt relief system. Due to the pro-creditor nature of the Act, it has been determined that it aims to ensure a fair distribution of proceeds to creditors. Therefore, although the Act does not specifically exclude or prohibit access to NINA debtors, its provisions that mandate an advantage for creditors, result in their discrimination.[263]

It may be found that the limitation of NINA debtors' right to equality and non-discrimination is justifiable when considering the purpose of the Insolvency Act, namely, to ensure a fair distribution of proceeds to creditors. However, the prerogative then falls upon the legislature to introduce alternative pro-debtor relief measures that facilitate access and discharge debts to all honest but unfortunate debtors, especially the marginalised NINA debtors. Therefore, this study concludes that when viewed holistically, the debt relief system unfairly discriminates against NINA debtors owing

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[261] See s 56(5) of the Constitution which holds that:
> Discrimination on any of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair, reasonable and justifiable in a democratic society based on openness, justice, human dignity and freedom.

[262] S 86(2) of the Constitution.
[263] See para 3.3.2.

chiefly to the legislature's failure to ensure the statutory protection of such debtors by enabling them to obtain relief from indebtedness. A conclusive determination of unconstitutionality may be made as the general law in Zimbabwe develops.

In conclusion, the Zimbabwean natural person debt relief system unfairly discriminates against NINA debtors. This study avers that the legislature must alleviate the plight of this marginalised group of debtors by ensuring that they are afforded equal and fair access to the debt relief system and eradicate this discrimination in line with the Constitution, which holds that:[264]

> The State must take reasonable legislative and other measures to promote the achievement of equality and to protect or advance people or classes of people who have been disadvantaged by unfair discrimination.

It has also been determined that a discharge option provides a safe landing for debtors who have failed in their enterprises,[265] thereby alleviating pressure from other social security programmes. By ensuring access to the debt relief system for NINA debtors and facilitating a concomitant discharge of debts, the legislature will also be complying with the constitutional prescripts, which hold that "[t]he State must take all practical measures, within the limits of the resources available to it, to provide social security and social care to those who are in need".[266] This social safety net might help encourage prudent entrepreneurial risk-taking among consumers with the assurance of a safety net providing a fresh start in instances where one fails. This prudent risk-taking might ripple effect and spur the country's ailing economy.

Lastly, although the prevailing debt relief system in Zimbabwe does not meet the needs of the marginalised NINA debtors and there is an urgent need for reform of the insolvency regime to accommodate this group; still this study does not recommend the implementation of an additional debt relief procedure or insolvency statute. Introducing a separate non-discriminatory statute will result in a fragmented approach that is widely criticised within South Africa's debt relief system.[267] The viable solution to the discrimination presently experienced in Zimbabwe's debt relief system is to amend the eligibility criteria of the prevailing measures, specifically, the liquidation measure. This may be achieved by affording an immediate and unconditional discharge of debts to

[264] See s 56(6) of the Constitution.
[265] See para 2.6.
[266] See s 30 of the Constitution.
[267] See ch 4.

NINA debtors. Where NINA applicants are involved in the liquidation procedure, a government-subsidised intermediary[268] must evaluate the application and grant a discharge of debts after a twenty-four to thirty-six-month period has lapsed from the date of the application. Furthermore, the intermediary must also offer all applicants pre-filling and post-liquidation credit counselling. This is vital because it may help prevent future over-indebtedness.[269]

3.4 Conclusion

Zimbabwe's legislature has made a plausible attempt to modernise the debt relief system by ushering in the consolidated Insolvency Act [Chapter 6:07] that came into operation on 25 June 2018.[270] The primary aim of the Act is to regulate the administration of insolvent and assigned estates and to consolidate insolvency legislation in Zimbabwe. The Insolvency Act regulates the liquidation of estates of natural persons, partnerships, trusts, companies, private business corporations, co-operatives and other debtors other than natural persons or partnerships.[271]

In relation to natural persons, the Act regulates the insolvent estates of such debtors through the liquidation procedure along with the post-liquidation composition and the pre-liquidation composition measures. The liquidation procedure is the primary debt relief measure, and it is pivotal because it may result in economic rehabilitation for qualifying overcommitted debtors. This chapter considered the debt relief measures in light of the internationally regarded policies, principles and guidelines examined in chapter two, namely; access to all honest but unfortunate debtors, discharge of debts, preference for out-of-court or extra-judicial alternative proceedings, preference for informal alternative proceedings, property exemptions, debt counselling and a moratorium on debt enforcement.

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[268] Government subsidised intermediaries are not unusual in insolvency regulation (ch 2 para 2.5.4.2). These are essential because they may remove the burden of procedural costs for NINA debtors thereby incentivising reliance on debt relief measures. Also, see ch 5 para 5.3.2.1 for a discussion of the role of the Accountant in Bankruptcy within the Scottish debt relief system that has a statutory duty to supervise and administer all consumer insolvencies.

[269] See in general Magau *A comparative legal analysis* for a discussion of how the role of financial education is ameliorating over-indebtedness.

[270] See para 3.3.1.

[271] See para 3.3.1.

Internationally regarded policies, principles and guidelines in insolvency indicate that all honest but unfortunate debtors should be given an opportunity to access the debt relief system.[272] To this end, legislators must ensure that they remove all discriminatory provisions in relief measures so that all debtors may access the debt relief system regardless of their financial circumstances.[273] In relation to Zimbabwe's debt relief system, the Act's primary natural person debt relief measure is the liquidation procedure. A debtor may voluntarily apply to the court or be compulsorily forced by his creditors to access this measure.[274] The applicant-debtor must, as a prerequisite, be unable to meet his debts. The Act deems a debtor unable to meet his debts,[275]

> [U]pon proof that the debtor is generally unable to pay debts which are due and payable or proof that the debtor's liabilities exceed the value of the debtor's assets.

This access requirement is in line with international best practice in insolvency, and it replaces the "acts of insolvency" requirement prescribed in the legislation's repealed pieces.[276] The "acts of insolvency" requirement is regarded as outdated because it restricts access of debtors to the insolvency regime by focusing on a debtor's wrongful acts instead of his inability to pay. Although this requirement is regarded as outdated, it was integral to facilitating friendly sequestrations, which have since been outlawed after the overhaul of the insolvency regime.

The liquidation procedure is an asset liquidation procedure, and it requires that a debtor's non-exempt property be liquidated for the benefit of his creditors. Therefore, a debtor must have assets that may be utilised for the liquidation process, marginalising debtors with no disposable assets. The formal judicial liquidation procedure is expensive and can only be accessed by debtors with disposable assets and some form of disposable income. This procedure limits access to indigent debtors who have neither disposable assets nor income. Such debtors largely occupy the NINA category of debtors.

The Act also regulates the newly introduced pre- and post-liquidation composition measures. On the one hand, to access the pre-liquidation measure, a debtor must

[272] See ch 2 para 2.2.
[273] See ch 2 para 2.5.4.5.
[274] See para 3.3.2.
[275] See para 3.3.2.
[276] See para 3.3.2.2.

furnish security to the satisfaction of the Master in respect of the measure sought.[277] Therefore, it is important that a debtor has a source of income to furnish the security and to meet his obligations in terms of the negotiated repayment plan. On the other hand, access to the post-liquidation measure is limited to insolvents that have accessed the liquidation procedure and such debtors must have a source of income to meet the restructured debts.[278] Consequently, access to both the pre- and post-liquidation composition measures is not available to NINA debtors who lack the disposable income to facilitate an acceptable composition. Zimbabwe's personal insolvency system, which is presently regulated by the Act, does not conform to international policies, principles and guidelines in insolvency because the system does not facilitate access to the debt relief system to all honest but unfortunate debtors., NINA debtors are marginalised and cannot access any debt relief measure because of their financial circumstances.

Economic rehabilitation is integral to a sound insolvency system. This allows debtors to re-establish their lives without the burden of debts.[279] Further, discharge differentiates the yesteryear punishment-oriented insolvency systems from the modern economic reality that promotes consumerism and its significance in the economy.[280]

In relation to the international principle of discharge, the Act did not depart from the provisions of the repealed insolvency statutes because economic rehabilitation continues to be accessible only to debtors who have accessed the liquidation procedure. A discharge of debts is proffered to debtors under a rehabilitation order that may be granted at any time after the confirmation by the Master of a distribution account providing for the full payment of all claims. Alternatively, after the expiration of four years from the date of the confirmation by the Master of the first liquidation account in the estate.[281] However, an application for rehabilitation may be made before the prescribed four-year period, but not within a period of twelve months after the confirmation by the Master of the first liquidation account in the estate or within three years from the said date by debtors whose estates were liquidated before the

[277] See para 3.3.3.
[278] See para 3.3.2.3.
[279] See ch 2 para 2.5.4.5.
[280] See ch 2 para 2.4.1.2.
[281] See para 3.3.4.

liquidation in respect of which he applies for rehabilitation. Alternatively, debtors may automatically obtain a discharge of dates after the effluxion of ten years.[282] The tediously long period to which debtors remain stuck within the insolvency system before obtaining economic rehabilitation is not in line with international best practice insolvency, which holds that discharge should be available to debtors in the future.[283]

Although the post-liquidation composition measure may ultimately lead to a debtor accessing the rehabilitation order, the benefits of such a rehabilitation order may be illusory.[284] Rehabilitation does not affect the rights of a liquidator or of creditors under the composition. The pre-liquidation composition measure is important to Zimbabwe's natural person debt relief system because it may result in a discharge of debts. Where the negotiations have collapsed, the debtor may apply to the Master to grant a discharge of his debts other than secured or preferred debts.[285]

NINA debtors within Zimbabwe's debt relief system may neither access any of the debt relief measures nor is a discharge of debts a possibility. Zimbabwe's insolvency regime is not in line with internationally regarded principles in insolvency that mandate that all honest but unfortunate debtors be granted a discharge of debts as an extension of insolvency procedures. Therefore, reform is required to ensure that the insolvency regime does not marginalise any category of debtors, especially NINA debtors and that such debtors are rewarded with a discharge opportunity for accessing the debt relief system.

International trends in insolvency have indicated a shift towards a preference for extra-judicial alternative proceedings. It appears that the judicial system may not be fully excluded from the insolvency process because insolvency procedures deal with the determination of debtors' human rights.[286] However, out-of-court proceedings are essential because they are cheaper than judicial proceedings, and they are flexible enough to tailor to debtors' needs. Therefore, they may be especially significant where NINA debtors are involved.

[282] See para 3.3.4.
[283] See ch 2 para 2.5.4.6.
[284] See para 3.3.4.
[285] See para 3.3.3.
[286] See ch 2 para 2.5.4.2.

In addition to out-of-court proceedings, international trends in insolvency have also indicated a preference towards utilising informal alternative proceedings to debt relief. Similar to extra-judicial proceedings, informal alternatives are regarded as favourable, because they are faster than formal procedures and flexible.[287] Further, informal alternative proceedings assist in ameliorating stigma while also lowering the procedural costs associated with formal debt relief procedures.

In relation to Zimbabwe's insolvency system, the pre-and post-liquidation composition measures envisage an informal negotiated settlement between a debtor and his creditors. Therefore, introducing these measures is in line with international guiding principles that favour out-of-court proceedings because they are faster and more cost-efficient.[288] However, the *World Bank Report* submits that the benefits of informal procedures are illusory because creditors have historically shown little interest in engaging actively and constructively in such proceedings.[289] Additionally, the *World Bank Report* also warns that informal procedures, in different jurisdictions culminated in debtors being forced into onerous agreements that protect the interests of creditors at the expense of the interests of debtors because of the unequal bargaining positions the parties occupy.[290]

Additionally, international best practice in insolvency recommends the implementation of liberal property exemption provisions in insolvency procedures. Property exemption is essential because it improves the outcome of a discharge and it gives debtors a head start.[291] Although the liquidation procedure ensures property exemption, the exemption is very narrow and leaves debtors very badly off.[292] The exemption envisaged in Zimbabwe's debt relief system does not achieve its purpose. It is punitive in nature, and reform is necessary in this regard. To this end, the third approach to property exemption outlined in the *World Bank Report*, when all of the debtor's property existing at the time of the application or liquidation is exempt from liquidation, is preferred.[293] The burden of petitioning to reclaim items of excess value that could be of value to creditors and the insolvency estate must thereafter be the regulator's

[287] See ch 2 para 2.5.4.1.
[288] See ch 2 paras 2.4.1.3 and 2.5.4.3.
[289] See ch 2 para 2.5.4.1.
[290] Ch 2 para 2.5.4.1.
[291] See ch 2 para 2.2. Also, see Jackson *The logic and limits* 227-228.
[292] See s 19(9)(a) of the Insolvency Act (Cap:07).
[293] See ch 2 para 2.5.4.5.

responsibility.[294] This approach to property exemption is forward-looking and especially pivotal in Zimbabwe's debt relief system, which is in the background of an economic turmoil that is presently not conducive to financial prosperity.[295] Therefore, this approach will give discharged debtors a much-needed head-start to re-engage in economic activities without the burden of re-acquiring necessities of life, considering the difficulty of participating in economic activities that Zimbabwean consumers find themselves in.

To sum up, the recently introduced consolidated Act does not explicitly exclude NINA debtors because the debt relief measures are open to all groups of debtors. However, the eligibility requirements of these debt relief measures culminate in the marginalisation of NINA debtors because they do not offer open access to all debtors and require disposable income and/or assets. These stringent access requirements marginalise NINA debtors because of their dire financial circumstances. This is not in line with international guiding principles that mandate that access to the debt relief regime be guaranteed to all honest but unfortunate debtors regardless of their financial circumstances.[296] Consequently, reform of Zimbabwe's debt relief system to ensure access to all honest but unfortunate debtors is necessary.[297]

Access to the debt relief system and a concomitant discharge of debts is increasingly important for Zimbabwean consumers who are crippled by the country's ailing economy. The maladies plaguing Zimbabwe, such as hyperinflation, high unemployment and other problems associated with the collapsing economy, have an adverse effect on overburdened consumers. Thus, there is a strong need for a sound insolvency regime that may provide such consumers with a safe landing if they fail.[298] Further, a sound insolvency regime may promote entrepreneurial enterprises because the safety net will embolden debtors that a sound debt relief system provides, thus stimulating the economy.

The Zimbabwean natural person debt relief system's marginalisation of NINA debtors may also be attributed to the Act's extensive transplantation from the South African

[294] Ch 2 para 2.5.4.5.
[295] Ch 1 para 1.1.
[296] See ch 2 paras 2.2.3.1 and 2.5.4.3.
[297] See ch 2 para 2.5.2.2. Also, see Mabe *A comparative analysis* 8.
[298] See ch 1 para 1.1.

debt relief system.[299] Zimbabwe's debt relief system has been strongly influenced by the South African insolvency regime since time immemorial.[300] It is thus imperative that Zimbabwe's legislature domesticate any international influence on its insolvency regime to suit the specific needs of debtors within its system, the unique nature of Zimbabwe's economy, and implement debt relief measures that are supported by an empirical analysis of the needs of its debtors.

Although the introduction of the amended liquidation procedure and the pre and post-liquidation composition measures is a welcome development, these measures still do not provide any statutory protection to the NINA group of debtors. Lamentably, the novel pre- and post-liquidation composition measures uphold the widely criticised provisions proposed in the South African insolvency system, and they continue to exclude NINA debtors – a group that the South African proposals sought to regulate.

[299] See paras 3.2.1 and 3.3.3.
[300] See para 3.2.2.

CHAPTER 4

THE SOUTH AFRICAN CONSUMER INSOLVENCY REGIME

Summary

4.1 Introduction and a brief historical overview

Compared with Zimbabwe, South Africa, which shares a common political history with Zimbabwe, has taken great strides towards protecting the so-called No-Income-No-Asset (NINA) debtors. The recent reform initiatives that have been proposed for the South African debt relief system were mainly initiated by the overwhelming criticism of the system's creditor-oriented nature that marginalises NINA debtors. These proposed reforms seek to provide statutory protection to this group of debtors.[1] This chapter, therefore, examines the South African natural person debt relief system in light of the recent reform initiatives and considers them in relation to the international policies, principles and guidelines discussed in chapter two. Specific attention is directed towards determining whether South Africa's consumer insolvency regime, which developed alongside Zimbabwe's system, has managed to afford protection, if any, to NINA debtors, a marginalised and unprotected group in Zimbabwe's personal insolvency system.[2]

[1] See Roestoff and Coetzee 2013 *Int Insolv Rev* 2; Boraine and Roestoff 2014 *THRHR* 351; Evans and Haskins 1990 *SA Merc LJ* 246.
[2] See ch 3 para 3.3.

The current statutory prescribed debt relief measures in South Africa's debt relief system are regulated by the following three statutes: the Insolvency Act,[3] the National Credit Act,[4] and the Magistrates' Courts Act.[5] The Insolvency Act regulates the sequestration procedure, while section 86 of the NCA regulates the debt review procedure. Finally, the Magistrates' Courts Act provides for the administration order procedure.

The Insolvency Act is the primary source of law within South Africa's debt relief system.[6] Similar to Zimbabwe's insolvency statute,[7] the root of South Africa's Insolvency Act is Roman-Dutch law.[8] The inception of the Roman-Dutch law of insolvency, specifically, the *cessio bonorum* process in South Africa, was facilitated by the colonial conquests of Jan van Riebeeck who formed a settlement in the Cape Colony in 1652.[9] Thereafter, major reforms to the debt relief system were brought about by the inception of the Amsterdam Ordinance of 1777, and also in 1803 through the institution of the *Desolate Boedelkamers*.[10]

The legislature enacted several statutes, including the Ordinances 46 and 53 of 1828, the Ordinances 58, 61 and 64 of 1829 and Ordinance 6 of 1843 which played a pivotal role in shaping South Africa and Zimbabwe's debt relief systems.[11] Of major significance is the Ordinance 6 of 1843, which abolished the *cessio bonorum*, and this legislation is widely regarded as the foundation of the South African law of

[3] The Insolvency Act 24 of 1936 (hereafter "the Insolvency Act"). Also, see Calitz 2010 *Fundamina* 3.
[4] The National Credit Act 34 of 2005 (hereafter "the NCA").
[5] The Magistrates' Courts Act 32 of 1944. It must be noted that a draft Lower Courts Bill was recently published on 29 April 2022. The Lower Courts Bill seeks to repeal the Magistrates' Court Act. However, the Lower Courts Bill will continue to regulate the administration order procedure (see ss 83-86 of the Lower Courts Bill).
[6] See ch 3 para 3.3 where it is highlighted that the Zimbabwean insolvency system is regulated by a single consolidated piece of legislation. This is in contrast with the South African debt relief system where the Insolvency Act is the primary legislation regulating natural person insolvency while the Companies Act 61 of 1973 and the Close Corporations Act 69 of 1984 also contain provisions for the winding up or liquidation of companies and close corporations. Numerous other statutes also regulate consumer debt relief in addition to the Insolvency Act.
[7] 7 of 2018.
[8] See ch 3 para 3.2.2 for a detailed discussion of the inception and development of formal insolvency law at the Cape of Good Hope. See Calitz 2010 *Fundamina* 5. The South African insolvency legislation is largely modelled on English law. Also, see Boraine *et al* 2015 *NIBLeJ* 62.
[9] See ch 3 para 3.2.2.3.
[10] See Roestoff *'n Kritiese evaluasie* 316-317.
[11] Several territorial Ordinances that largely borrowed from Ordinance 6 of 1843 were introduced throughout South Africa. These Ordinances include Ordinance 24 of 1847 in the Natal province, Ordinance 9 of 1878 in the Orange Free State province and Ordinance 21 of 1880 in the Transvaal province.

insolvency.[12] Thereafter, the Parliament of the Union of South Africa enacted the Insolvency Act,[13] which repealed several existing territorial statutes that regulated the administration of insolvent estates. This Act applied throughout South Africa. The Insolvency Act was then amended by Act 29 of 1926 and Act 58 of 1934. The latter Act was repealed by the prevailing Insolvency Act,[14] which remains the primary insolvency statute in South Africa.[15]

The Insolvency Act provides for the sequestration of the estate of natural person debtors.[16] In turn, the sequestration procedure refers to an asset liquidation process whereby a debtor's property is liquidated to facilitate the distribution of proceeds to his creditors.[17] Consequently, a debtor must have a disposable property that may be liquidated to access this procedure. Therefore, it can tentatively be deduced that NINA debtors cannot access the sequestration procedure because they lack the requisite property for the liquidation process. A source of income is also essential for the sequestration procedure because it is a judicial procedure with high administrative costs attached to it, which NINA debtors clearly cannot afford.

Additionally, the key to the Insolvency Act is the advantage to creditors' requirement.[18] The advantage to creditors requirement mandates that all sequestration applications be accompanied by proof that the intended procedure will benefit all creditors.[19] This advantage can only be achieved if all creditors receive a non-negligible dividend after distributing the liquidation proceeds.[20] Furthermore, creditors' collective interests in the sequestration procedure are protected through the *concursus creditorum* principle.[21] The *concursus creditorum* principle entails that the interests of creditors as

[12] Bertelsmann *et al Mars* 15.
[13] 32 of 1916.
[14] 24 of 1936.
[15] See s 1 of the Insolvency Act.
[16] S 2 of the Insolvency Act includes partnerships and their estates under the definition of a debtor.
[17] See Coetzee *A comparative reappraisal* 3.
[18] Ss 6, 10 and 12 of the Insolvency Act.
[19] See *Meskin & Co v Friedman* 1948 2 SA 555 (W) 559 para 583F-G where it was held that the advantage to creditors' principle is deemed to have been satisfied where the debtor has no assets but can prove that there is a reasonable prospect that an investigation in terms of the Insolvency Act may result in the discovery of assets to the benefit of the creditors.
[20] See *Trust Wholesalers & Woollens (Pty) Ltd v Mackan* 1954 2 SA 109 (N) para 111. Also, see in general, Roestoff and Boraine 2015 *De Jure* for a discussion of the discretion that courts have regarding the advantage to creditors principle.
[21] It was pointed out in *Body Corporate v Sithole* 2017 4 SA 161 (SCA) para 9 that once a sequestration order is made, a *concursus creditorum* comes into being.

a group are prioritised over the individual interests of creditors. Through the *concursus creditorum*,[22]

> [O]ne creditor cannot, through the process of execution, receive full payment of his or her claim at the cost of the claims of other creditors.

The creditor-oriented nature of the sequestration procedure has proved to be an unscalable obstacle for NINA debtors. Without any income or assets, NINA debtors cannot access the sequestration procedure because they cannot provide any dividend to creditors, thereby failing to meet the advantage to creditors requirement and the *concursus creditorum* principle.

Alternatively, a debtor may access the South African debt relief system by making use of the debt review procedure.[23] The debt review procedure entails a court-sanctioned debt restructuring for debtors with a stable income source and can afford to make periodic payments to creditors.[24] Unfortunately, the debt review procedure is arguably only available to mildly indebted consumers who have encountered a temporary financial setback.[25] To access this procedure, a debtor must have a source of income that can be utilised to meet his obligations.[26] It should, however be highlighted that the debt review procedure does not result in a discharge of debts.

Lastly, an overcommitted debtor who cannot meet his financial obligations and does not have adequate assets that may be liquidated can apply for an administration order.[27] The administration order procedure is a repayment plan[28] available to debtors whose debts do not exceed the ZAR50 000 threshold.[29]

The administration order procedure is a repayment plan; thus, a debtor must have a source of income that can be utilised to meet his restructured obligations and cover the costs of the procedure. Coetzee[30] submits that the income requirement is an indirect introduction of the advantage to creditors requirement. The administration

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[22] See *Walker v Syfret* 1911 AD 141 para 166. Also, see Bertelsmann *et al Mars* 3-4 where it is submitted that "the concept entails that the rights of the creditors as a group are preferred over the rights of individual creditors".
[23] S 86 of the NCA.
[24] S 86(7)(c)(ii)(aa) of the NCA.
[25] See Coetzee *A comparative reappraisal* 4.
[26] This requirement is an obstacle for NINA debtors because they have no income to access the debt review procedure.
[27] S 74(1) of the Magistrates' Courts Act.
[28] S 71C(1) of the Magistrates' Courts Act.
[29] GN R217 in *GG* 37477 of 27 March 2014.
[30] Coetzee *A comparative reappraisal* 4.

procedure is inaccessible to NINA debtors because of their inability to make the mandated periodic repayments.[31]

The exclusion of NINA debtors from accessing the current South African debt relief system has resulted in NINA debtors perpetually trapped in debt over the years. This has culminated in NINA debtors being regarded as "too poor to go bankrupt".[32] It is aptly stated that the South African natural person debt relief system unfairly discriminates against NINA debtors on financial grounds.[33] This unfair discrimination has, in some instances, resulted in these unprotected and marginalised NINA debtors being forced to resign and seek employment in the informal sector. If they fail to find employment in the informal sector, they become a social burden on the economy.[34]

In response to the plight of NINA debtors, the South African legislature has proposed introducing the pre-liquidation composition measure and the debt intervention procedure that specifically addresses the marginalisation of the NINA group of debtors. In line with this study's theme, this chapter analyses the entire natural person debt relief system of South Africa to determine the extent to which it facilitates access for NINA debtors. Furthermore, an exploration of the debt relief reform initiatives is undertaken to highlight whether such proposed measures might accommodate the needs of all "honest but unfortunate debtors" within the debt relief system.

To this end, the chapter is structured as follows: the first paragraph provides a brief overview of South Africa's debt relief system, followed by an evaluation of the sequestration procedure in paragraph two. Paragraph three offers an understanding of the numerous alternative debt relief measures available to South African natural person debtors. In contrast, paragraph four indicates the interplay between the primary debt relief measures and the secondary measures. A discussion of the various reform initiatives follows in paragraph five, and a critical analysis and reflection of the consumer insolvency regulation are undertaken in paragraph six. Lastly, a conclusion of the discussion undertaken throughout the chapter follows in paragraph seven.

[31] See Coetzee *A comparative reappraisal* 179.
[32] See Rochelle 1996 *TSAR* 319.
[33] See Coetzee 2016 *Int Insolv Rev* 54.
[34] See Coetzee *A comparative reappraisal* 10 and all sources referred therein.

4.2 The Insolvency Act 24 of 1936

4.2.1 General background

The primary debt relief measure in South Africa is the sequestration procedure. It is regarded because it is the only measure that currently provides a much-needed discharge option for debtors.[35] However, this is not the main aim of the Insolvency Act, but simply the end result.[36] In the main, the sequestration process refers to liquidating a debtor's non-exempt[37] property to facilitate the distribution of proceeds to his creditors. In addition to the sequestration procedure, the Insolvency Act also provides for the statutory composition measure, which entails an agreement between a debtor and his creditors regarding debt repayment.[38]

In relation to the sequestration procedure, there are two types of applications: the voluntary surrender application[39] and the compulsory sequestration application.[40] These two types of applications differ mainly in the application stage. In the voluntary surrender, the application may be submitted by a debtor or his agent,[41] while the compulsory sequestration application may be submitted by a creditor(s) or his agent.[42]

The access requirements for the voluntary surrender and the compulsory sequestration applications differ substantially, and when compared to the compulsory sequestration application, the voluntary surrender application carries a higher burden of proof.[43] However, after the application stage, the two applications have a similar consequence: liquidating a debtor's property. The sequestration procedure is discussed in detail below, and the focus is mainly directed towards determining the

[35] S 129 of the Insolvency Act.
[36] See *Ex parte Ford* 2009 (3) SA 376 (WCC) 383.
[37] The law regulating property exemption in South Africa is underdeveloped mainly because the Insolvency Act does not expressly distinguish between excluded and exempt assets. This has over the years given rise to litigation. Therefore, in this regard, the Insolvency Act is not in line with internationally regarded best practice in insolvency that favours explicit liberal property exemptions that afford a head-start to debtors and improve the position of discharged debtors (ch 2 paras 2.2.1, 2.4.1.1 and 2.5.4.5). For a detailed discussion of the position in South Africa, see in general Evans 2011 *PELJ*; Boraine, Kruger and Evans *Annual Insolv Law Rev* 637-699.
[38] S 119 of the Insolvency Act.
[39] See ss 3 and 4 of the Insolvency Act.
[40] S 9 of the Insolvency Act.
[41] S 3(1) of the Insolvency Act.
[42] S 9(1) of the Insolvency Act.
[43] Consequently, it is more difficult to obtain a sequestration order through the voluntary surrender application route than the compulsory sequestration route.

extent to which the procedure facilitates or inhibits access and a concomitant discharge of debts to the NINA group of debtors.

4.2.2 The sequestration procedure

4.2.2.1 Voluntary surrender application

The voluntary surrender application route offers a debtor, his agent or any person entrusted with the administration of the estate of a deceased insolvent debtor an opportunity to obtain relief from indebtedness by applying to the court[44] for the acceptance of the surrender of the debtor's estate.[45] Thereafter, the debtor may be directed to appear and be examined by the court before it accepts or rejects the application.

Before submitting a surrender application, the debtor must meet certain procedural requirements, namely:

(i) The debtor must cause a notice of surrender in the form corresponding substantially with Form A in the First Schedule of the Insolvency Act to be published in the *Government Gazette*[46] and in a newspaper circulating in the district in which the debtor resides, or, if the debtor is a trader, in the district in which his principal place of business is situated. The notice must be published not more than thirty days and not less than fourteen days before the date stated in the notice of surrender as the date upon which application will be made to the court for acceptance of the surrender of the estate.[47]

(ii) The debtor must, within a period of seven days from the date of publication of the notice of surrender in the *Gazette*, deliver or post a copy of the notice of surrender to every one of the creditors in question whose address he knows or can ascertain, by post to every registered trade union that, to the debtor's

[44] Only the High Court has jurisdiction over sequestration applications because a liquidation order affects a debtor's status.
[45] S 3(1) of the Insolvency Act. Because a debtor's property is central to the sequestration procedure, NINA debtors are excluded from accessing the relief that this procedure offers because they lack the necessary assets.
[46] *Government Gazette* (hereafter "*Gazette*").
[47] S 4(1) of the Insolvency Act. Also, see s 8(f) which provides that it is an act of insolvency if a debtor fails to proceed with the surrender application after having published a notice of surrender which has not lapsed or been withdrawn in terms of sections 6 and 7.

knowledge, represents any of the debtor's employees and to the employees themselves,[48] and to the South African Revenue Services.[49]

Furthermore, the applicant must lodge, in duplicate, a statement of the debtor's affairs at the office of the Master.[50] The statement of affairs must be verified by an affidavit and must be open to the inspection of any creditor of the debtor during office hours for a period of fourteen days from the date mentioned in the notice of surrender.[51] These requirements provide information to creditors about the debtor's financial circumstances and offer them an opportunity to object to the liquidation process.[52]

Publishing a notice of surrender is an essential step during the application stage, and renders any subsequent sale of the debtor's property unlawful.[53] However, where the Master is of the opinion that the value of the property does not exceed ZAR5 000, or the court, if it exceeds that amount, may order the sale of the assets and direct how the proceeds of the sale shall be applied.[54] Furthermore, after the publication of the notice of surrender, the Master will have the discretion to appoint a *curator bonis* to the debtor's estate, who effectively takes custody of the debtor's business or his undertaking.[55]

Thereafter, the court will have the discretion to accept the surrender application and make an order of the sequestration of the debtor's estate if it is satisfied that:[56]

(i) The publication requirements in section 4 have been complied with;

(ii) The estate of the debtor is insolvent;

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[48] The debtor must affix a copy of the notice to any notice board to which the employees have access inside the debtor's premises; or if there is no access to the premises by the employees, by affixing a copy of the notice to the front gate of the premises, where applicable, failing which, to the front door of the premises from where the debtor conducted any business immediately prior to the surrender.
[49] S 4(2)(a) of the Insolvency Act. The South African Revenue Services (hereafter "SARS").
[50] S 4(3) of the Insolvency Act. If the debtor resides or carries on business in a district where there is no Master's office, the debtor must lodge a copy of the statement of affairs at the office of the magistrate.
[51] Ss 4(3) and 4(6) of the Insolvency Act.
[52] Although creditor participation is integral to insolvency matters because it ensures the protection of creditor interests, international best practice in insolvency recommends minimal involvement of creditors in the establishment of a repayment plan or other requirements for discharge or other relief (ch 2 para 2.5.4.4).
[53] S 5(1) of the Insolvency Act. Such a sale would be lawful where the person charged with the execution of the writ or other process could not have known of the publication of the notice of surrender.
[54] S 5(1) of the Insolvency Act.
[55] S 5(2) of the Insolvency Act.
[56] See s 6 of the Insolvency Act.

(iii) The debtor owns realisable property of a sufficient value to defray the costs of the sequestration, which will be payable out of the free residue of his estate; and

(iv) The sequestration will be to the advantage of his creditors.

The procedural and substantive requirements in Zimbabwe's debt relief system are preferred; where applicants must provide security for the payment of all costs in respect of the surrender application that may be awarded against the application, as well as costs of the liquidation which are not recoverable from creditors. However, it should be noted that the South African Law Reform Commission[57] has proposed that these provisions be implemented in South Africa's debt relief system.

4.2.2.2 Compulsory sequestration application

The second route to a liquidation order follows a creditor or agent's application for the sequestration of a debtor's estate.[58] The application must be accompanied by an affidavit confirming the facts averred in the application,[59] and a certificate of the Master, given no more than ten days before the date of application, that security has been given for the payment of all fees necessary for the prosecution of all sequestration proceedings and all costs of administering the estate until a trustee is appointed.[60] Furthermore, the applicant must furnish a copy of the application to every registered trade union that represents the debtor's employees, to the employees themselves, to SARS and to the debtor.[61]

[57] See cl 3(8) read with cl 10 of the 2015 Draft Insolvency Bill. The South African Law Reform Commission (hereafter "the Law Commission"). Formerly referred to as the South African Law Commission.

[58] S 9(1) of the Insolvency Act. A creditor with a liquidated claim for not less than ZAR100 or in situations where there are two or more creditors, they must not have an aggregate claim of less than ZAR200 against the debtor.

[59] See s 9(3)(a) that requires that the application provide the following information:

(i) the full names and date of birth of the debtor, if an identity number has been assigned to him, his identity number;
(ii) the marital status of the debtor and, if he is married, the full names and date of birth of his spouse and, if an identity number has been assigned to his spouse, the identity number of such spouse;
(iii) the amount, cause and nature of the claim in question;
(iv) whether the claim is or is not secured and, if it is, the nature and value of the security; and
(v) the debtor's act of insolvency upon which the petition is based or otherwise allege that the debtor is in fact insolvent.

[60] S 9(3)(b) of the Insolvency Act.

[61] S 9(4A)(a)(i)-(iv) of the Insolvency Act.

After considering the application and any other supporting documents, the court may make an order sequestrating the estate of the debtor provisionally if it is of the opinion that *prima facie*:[62]

(a) The applicant has a liquidated claim of at least ZAR100 against the debtor (or in aggregate have liquidated claims of ZAR200 or more where more than one creditor applied jointly);
(b) The debtor has committed an act of insolvency or is insolvent;[63] and
(c) There is reason to believe that the sequestration will be to the advantage of creditors of the estate.

Thereafter, the court may grant an order of final liquidation if it is satisfied that the applicant creditor has established a liquidated claim against the debtor, the debtor has committed an act of insolvency or is insolvent, and there is reason to believe that the sequestration of the debtor's estate will be to the advantage of creditors.[64] However, if the court is not so satisfied, it has the discretion to dismiss the application and set aside the order of provisional sequestration or require further proof of the matters outlined in the application and postpone the hearing.[65]

4.2.2.3 The advantage for creditors requirement

One of the key features of the sequestration procedure is the advantage for creditors requirement.[66] This requirement is not only contemplated by the Insolvency Act, but it

[62] S 10 of the Insolvency Act.
[63] See s 8 of the Insolvency Act for a list of the acts of insolvency. Internationally regarded principles are not in favour of the "acts of insolvency" requirement because it limits access to insolvency procedures to deserving debtors who are unable to meet their obligations (ch 2 para 2.5.4.3). The position in the Zimbabwean debt relief system which requires a debtor to prove an inability to pay his debts, is preferred (ch 3 para 3.3.2).
[64] S 12(1) of the Insolvency Act. Also, see *Braithwaite v Gilbert* 1984 (4) SA 717 (W) where the court outlined the difference in the degree of proof required between a provisional and a final order of sequestration. For a final order of sequestration, the court must be satisfied on a balance of probabilities that liquidating the debtor's estate is to the advantage of his creditors while a mere *prima facie* case will suffice in regard to a provisional liquidation order.
[65] S 12(2) of the Insolvency Act.
[66] See ss 6, 10 and 12 of the Insolvency Act. See Kanamugire 2013 *Med Journ of Social Sciences* 19; Gildenhuys *An analysis of the justification* ch 3.

is regarded by some researchers as a "golden thread running through the Act".[67] Smith sums up this requirement by noting that:[68]

> In considering the provisions of the [Insolvency] Act it becomes apparent that there is a recurrent motif or dominant thread (if 'thread' is used in the sense of something that runs a continuous course through anything) and that is the advantage of creditors, not one creditor, or some creditors but the creditors as an entity or the *concursus creditorum*.

The advantage for creditors requirement is an obstacle for debtors seeking access to the sequestration procedure. In terms of this requirement, a voluntary surrender applicant must show that liquidation of the debtor's estate will benefit his creditors.[69] In relation to compulsory applications, a mere reason to believe that liquidation of the debtor's estate will be to the advantage of creditors suffices.[70] Therefore, a higher burden of proof exists for voluntary surrender applications, and in this regard, the applicant bears the onus of establishing the benefit.

Over the years, this stringent burden of proof has led to overcommitted debtors seeking the discharge that the sequestration procedure offers by approaching a friendly creditor to apply for the compulsory sequestration of their estates.[71] This procedure is commonly referred to as "friendly sequestrations". Friendly sequestrations are not specifically recognised by the Insolvency Act. However, the Act provides a route for their prolific and continued existence mainly because the sequestration procedure is the only procedure that presently offers a discharge option and because of the stringent access requirements of the voluntary surrender application route. In relation to friendly sequestrations, Evans[72] argues that they are mostly used to evade the section 4 preliminary formalities and avoid the more rigorous task of proving an advantage to creditors.

In the main, friendly sequestrations are usually initiated by a debtor's written notice indicating an inability to pay his debt to a friendly creditor.[73] This act by the debtor qualifies as an act of insolvency under section 8(g) of the Insolvency Act, which

[67] See Roestoff and Coetzee 2012 *SA Merc LJ* 55; Smith 1985 *Modern Business Law* 27.
[68] See Smith 1985 *Modern Business Law* 28.
[69] See s 6 of the Insolvency Act.
[70] See ss 10 and 12 of the Insolvency Act.
[71] See *Esterhuizen v Swanepoel* 2004 (4) SA 89 (W); Mabe and Evans 2014 *SA Merc LJ* 658.
[72] See Evans 2001 *SA Merc LJ* 656; Evans 2002 *Int Insolv Rev* 17.
[73] See Conradie J's remarks in *Craggs v Dedekind* 1996 (1) SA 937 (C).

empowers the friendly creditor to commence the compulsory sequestration process.[74] Friendly sequestrations have been widely criticised as an abuse of the sequestration process.[75] However, it is also widely held that this route to a liquidation order is acceptable where the application complies with the requirements outlined in section 12 of the Insolvency Act.[76] Because this route to sequestration is facilitated through the outdated "acts of insolvency" which is not in line with international trends in insolvency because it limits access to insolvency procedures to deserving debtors,[77] its continued existence is debatable.

As indicated above, friendly sequestrations arose chiefly out of the need to evade the stringent access requirement, which the advantage for creditors principle presents for voluntary surrender applications.[78] The Insolvency Act does not define the advantage for creditors requirement. However, the courts have indicated that this refers to some form of pecuniary benefit accruing to the general body of creditors.[79] Consequently, an advantage for creditors is established where the applicant has proved that there is a reasonable prospect that is not too remote that some pecuniary benefit will accrue to creditors if his estate is liquidated.[80] However, it is sufficient for a debtor to prove that there are reasonable grounds for concluding that upon a proper investigation of the debtor's affairs a trustee may discover or recover assets for disposal for the benefit of creditors.[81] Therefore, it can be concluded that a benefit is established where the applicant has proved a non-negligible[82] pecuniary benefit to creditors or that an advantage is to be gained through an enquiry into his financial affairs. However,

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[74] See, in general, *Mthimkhulu v Rampersad* [2003] 3 All SA 512 (N). Also, see s 8(g) of the Insolvency Act which provides that "[a] debtor commits an act of insolvency if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts".

[75] Smith 1997 *JBL* 50. Also, see *Ex parte Shmukler-Tshiko* 2013 JOL 29999 (GSJ) 10; *Ex parte Arntzen (Nedbank Ltd intervening)* 2013 (1) SA 49 (KZP). Criticism usually arises where there is a deception or where the interests of other creditors are infringed.

[76] See *Beinash & Co v Nathan* 1998 (3) SA 541 (W); *Kerbel v Chames* 1925 WLD; *Yenson & Co v Garlick* 1926 WLD 57.

[77] Ch 2 para 2.5.4.3.

[78] See *Ex parte Bouwer* 2009 (6) SA 386 (GNP) 393 where the court reaffirmed that the advantage for creditors requirement is essential in determining whether or not a sequestration order is granted.

[79] *Meskin & Co v Friedman* 1948 (2) SA 559 (W) 559.

[80] This approach was followed by the Constitutional Court in *Stratford v Investec Bank Ltd* [2015] JOL 32695 (CC) para 45. Also, see *London Estate (Pty) Ltd v Nair* 1957 (3) SA 591 (N); *Seaways (Pty) Ltd t/a South African Express Line v Rubin* [2014] JOL 31127 (GSJ).

[81] See *Dunlop Tyres (Pty) Ltd v Brewit* 1999 (2) SA 580 583 (W); *Standard Bank of SA Ltd v Mackenzie; Standard Bank of SA Ltd v Grant* [2005] JOL 13594 (W) 18-19.

[82] See *Trust Wholesalers and Woollens (Pty) Ltd v Mackan* 1954 (2) SA 109 (N) 111; *Trust Bank of Africa Limited v Demmers* 1968 (2) PH C13 (D); *Hillhouse v Stott* 1990 (4) SA 580 (W) 583; *BP Southern Africa (Pty) Ltd v Gaskell* [2010] JOL 25515 (KZP) paras 27-29.

determining the exact amount that constitutes a non-negligible dividend is a difficult task at the court's discretion.[83] To this end, courts have determined that a dividend as low as 5 and 6 cents in the Rand constitutes a non-negligible dividend that establishes an advantage for creditors.[84]

In the recent case of *Ex parte Snooke* the court reaffirmed that a pecuniary benefit is established where there is proof of a dividend of at least 10 cents in the Rand for the concurrent creditors.[85] However, the court in *Ex parte Ogunlaja* rejected the 10 cents in the Rand dividend requirement by noting that this is insufficient and an advantage for creditors may only be established if the debtor proves a minimum dividend of 20 cents in the Rand.[86]

The advantage for creditors requirement also presents a similar obstacle for compulsory applications where the applicant must present adequate evidence to give the court reason to believe that the liquidation of the debtor's estate will benefit his creditors.[87] To access the sequestration procedure, debtors must have sufficient property in their estates to establish the requisite advantage to creditors. This poses a challenge to NINA debtors who do not have assets that may be liquidated, and the proceeds to be distributed among creditors. Consequently, the prescriptive nature of the advantage for creditors requirement, which runs throughout the Insolvency Act, renders the sequestration procedure pro-creditor and prevents NINA debtors from accessing this measure and obtaining relief from indebtedness because of the dire financial circumstances they find themselves in.

4.2.3 Statutory post-sequestration composition

The Insolvency Act also offers insolvent debtors an opportunity to conclude a debt rearrangement settlement with creditors. Such negotiated settlements may be initiated by a debtor's offer of composition to his creditors, wherein he offers creditors to repay

[83] See *Stratford v Investec Bank Ltd* [2015] JOL 32695 (CC) paras 44-46.
[84] See in general *ABSA Bank Ltd v De Klerk* 1999 (4) SA 835 (E).
[85] See *Ex parte Snooke* 2014 (5) SA 426 (FB) para 16. Also, see *Ex parte Ford* 2009 (3) SA 376 (WCC) 383.
[86] *Ex parte Ogunlaja* 2011 JOL 27029 (GNO) para 9. Therefore, unless a superior court indicates otherwise, only a minimum dividend of 20 cents in the Rand establishes an advantage for creditors within the High Court of North Gauteng's jurisdiction.
[87] Ss 10(c) and 12(c) of the Insolvency Act. The discussion of the courts' interpretation of the advantage for creditors requirement undertaken above, also applies here.

his debts "partially or in full, subject to certain circumstances and conditions, as a full and final settlement".[88] In terms of the statutory composition, an insolvent may submit a written offer of composition to his creditors through the trustee of his estate at any time after the first meeting of creditors.[89]

It should be noted that the statutory composition is not an alternative to sequestration because it may only be accessed after the liquidation order has been granted.[90] Further, it is important to note that this measure is rarely used in practice because the insolvent must have some form of funding to make the composition offer. However, where such insolvents have secured funding to make the composition offer, the measure may create a ground to access rehabilitation, and the post-sequestration composition enables an insolvent to regain certain property from his estate.

The trustee must assess the feasibility of the composition offer and if he is of the opinion that the creditors will probably accept it, he must deliver a copy of the offer with his report thereon to all proven creditors.[91] However, suppose the trustee is of the opinion that the offer is not viable and that there is no possibility of creditors accepting it. In that case, he must notify the insolvent accordingly of the offer's non-viability and that he does not propose to send any copy to creditors.[92] The Master plays an oversight role, and an insolvent whose offer of composition has been rejected, by the trustee, may approach the Master to consider the offer and the trustee's report.[93] Suppose the Master is of the opinion that the offer of composition is sufficient for submission to the creditors. In that case, he may direct the trustee to submit a copy of the offer to every proven creditor.[94]

After submitting the offer of composition to creditors, the trustee must convene a creditors' meeting to consider the offer and any other matter mentioned in the notice to creditors.[95] The creditors' meeting must be convened within twenty-eight days and

[88] S 119 of the Insolvency Act. See Boraine and Delport "Insolvency law" 570.
[89] S 119(1) of the Insolvency Act. See Osunlaja *A comparative appraisal* 118-120 for a discussion of the common law composition.
[90] In this respect, the statutory composition measure is largely comparable with the post-liquidation composition measure in Zimbabwe's debt relief system that may also only be accessed by debtors to whom a liquidation order has been granted (ch 3 para 3.3.2.3).
[91] S 119(2) of the Insolvency Act.
[92] S 119(3) of the Insolvency Act.
[93] S 119(4) of the Insolvency Act.
[94] S 119(4) of the Insolvency Act.
[95] S 119(5) of the Insolvency Act.

not earlier than fourteen days after the date upon which the notice to creditors is posted.[96] The offer of composition must be accepted by creditors whose votes amount to three-fourths in value and three-fourths in the number of the votes of all proven creditors.[97]

If the offer of composition is so accepted, the insolvent must duly make payment under the composition or provide security for such payments. Thereafter, he becomes entitled to a certificate of the Master of the acceptance of the offer. However, the insolvent will not be entitled to this certificate if the offer contains any condition where any creditor would obtain as against another creditor any benefit to which he would not have been entitled upon distribution of the estate. Furthermore, there should not be any condition which makes the offer or the fulfilment thereof subject to the rehabilitation of the debtor and that the offer fully specifies the nature of any security, where necessary.[98]

In line with international principles, an accepted offer of composition is also binding on all unsecured and non-preferent creditors, including passive creditors.[99] The measure may also be accessed by debtors who have found funding, usually from a family member or friend who assists the debtor in funding the procedure to facilitate the transfer of property back to the debtor. To this end, an accepted composition may ensure that the insolvent has restored his property that had been transferred to the trustee in line with the requirements of the sequestration procedure.[100] The insolvent may recover his property only if the offer makes provision for this. This provision is pivotal and is the main reason debtors seek access to the composition measure.

The statutory composition measure provides a streamlined debt relief option to insolvents that have the requisite funding to necessitate a viable composition. Debtors must have been granted a liquidation order to access the statutory composition measure. Thus, as a prerequisite, they must have satisfied the sequestration procedure's eligibility criteria that includes the advantage for creditors requirements.[101] Consequently, NINA debtors cannot access the statutory composition measure

[96] S 119(6) of the Insolvency Act.
[97] S 119(7) of the Insolvency Act.
[98] See para 4.2.4 for a discussion of the rehabilitation requirements of the Insolvency Act and the effect thereof.
[99] S 120(1) of the Insolvency Act. Also, see ch 2 para 2.5.4.1.
[100] S 120(2) of the Insolvency Act.
[101] See para 4.2.2.3 for a discussion of the advantage for creditors requirement.

because their dire financial circumstances prevent them from accessing the sequestration procedure.[102]

4.2.4 Rehabilitation

The sequestration procedure is the only measure in South Africa's natural person debt relief system that presently provides an option to obtain economic rehabilitation through a discharge of debts.[103] However, this is not the aim of the Insolvency Act but merely the consequence thereof. Discharge is essential because it frees the insolvent of his qualifying unsecured pre-sequestration debts and allows him to re-enter the credit economy without the burden of debts.[104]

A discharge of debts is facilitated through the rehabilitation of the debtor, which may either be obtained automatically after the effluxion of ten years from the date of sequestration of the debtor's estate[105] or through an order by the High Court at any time within the ten years after sequestration.[106] Additionally, with three weeks' notice, insolvency may obtain an order of rehabilitation. The order can be obtained as envisaged in section 119(7) where, creditors have agreed to a composition that resulted in the Master issuing a certificate indicating that the insolvent has made payment or that security has been set for payment of at least 50 cents in the Rand of every claim proved or to be proven.[107] The rehabilitation option and the option to access property that the composition measure offers possibly constitute the fundamental underlying reason why debtors use this measure.

In regards to the procedural requirements, an insolvent who intends to apply for his rehabilitation must furnish the court's registrar with security to the amount of ZAR500, three weeks before the application for the payment of the costs of any successful opposition[108] to his rehabilitation application.[109] Despite opposition to the application,

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[102] See paras 4.2.2.1 and 4.2.2.2 for a discussion of the sequestration procedure's marginalisation of NINA debtors.
[103] S 129(1)(b) of the Insolvency Act.
[104] See in general ch 2 para 2.5.4.6.
[105] S 127A of the Insolvency Act.
[106] S 124 of the Insolvency Act.
[107] S 124(1) of the Insolvency Act.
[108] See s 127 of the Insolvency Act for an indication of the requirements to lodge an opposition to the debtor's rehabilitation.
[109] S 125 of the Insolvency Act.

the court may order the rehabilitation on conditions it deems fit.[110] It was emphasised in the *Ex parte Hittersay* case that the decision to grant a rehabilitation order is at the court's wide discretion.[111]

Additionally, an insolvent who has given six weeks' notice in writing of his intention to apply to the court for his rehabilitation to the Master, the trustee of his estate and published in the *Gazette*, may apply for the rehabilitation:[112]

(i) After twelve months have elapsed from the confirmation by the Master, of the first trustee's account in his estate, unless he falls within the provisions of paragraph (b) or (c) below.

(ii) After three years have elapsed from confirmation of the first trustee's account by the Master if the insolvent's estate has previously been sequestrated unless the matter falls within the provisions of paragraph (c) below.

(iii) After five years have elapsed from the date of his conviction of any fraudulent act in relation to his existing or any previous insolvency or of any offence under sections 132,[113] 133[114] and 134[115] of the Insolvency Act.

Additionally, insolvents may submit applications for rehabilitation under the following periods and on the following grounds:

(i) After the expiration of a period of six months from the sequestration where no claims have been proven against his estate, where the insolvent has not been convicted of any of the offences in sections 132, 133 and 134 of the Insolvency Act and the insolvent estate has not been previously sequestrated. The rehabilitation application must be lodged with at least six weeks' written notice to the Master and the trustee and published in the *Gazette*.[116]

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[110] S 127(2) of the Insolvency Act.
[111] See in general *Ex parte Hittersay* 1974 (4) SA 328 (SWA).
[112] See s 124(2)(a)-(c) of the Insolvency Act. No rehabilitation order may be granted under this section before the expiration of a period of four years from the date of sequestration of the debtor's estate except upon the Master's recommendation.
[113] Concealing or destroying books or assets.
[114] Concealment of liabilities or pretext to existence of assets.
[115] Failure to keep proper records.
[116] S 124(3) of the Insolvency Act. A rehabilitation order under this proviso is significant because it also has the effect of reinvesting the insolvent with his estate (s 129(2)).

(ii) At any time after the Master has confirmed the distribution account where all claims have been paid in full with interest as well as the costs of sequestration provided that the application was brought with at least three weeks' written notice to the Master and the trustee of his estate.[117]

A rehabilitation order is crucial to debtors because it has the immediate effect of putting an end to the sequestration process.[118] Additionally, an order of rehabilitation has the much-needed effect of discharging all qualifying debts of the insolvent, which were due, or the cause of which has arisen, before the sequestration, and which did not arise out of fraud on the insolvent part.[119] However, the court in *Dicks v Pote* held that discharge does not extinguish all pre-sequestration debts.[120] Lastly, a rehabilitation order also has the effect of relieving the insolvent of every disability resulting from the sequestration.[121]

In summary, a rehabilitation order is important because it leads to a discharge of debts. The discharge option is only available under the sequestration procedure. Insolvents who accessed the statutory composition measure may also obtain relief from indebtedness through the rehabilitation order. However, NINA debtors cannot obtain the benefits emanating from a rehabilitation order because they cannot access the sequestration procedure due to its stringent access requirements.

Rehabilitation is essential because it releases the debtor from a wide range of restrictions, disabilities and disqualifications due to sequestration. These restrictions limit an unrehabilitated insolvent's capacity to contract, litigate, earn a living and hold certain offices.[122] Roestoff[123] argues that these restrictions are the trade-off for acquiring the discharge of debts and the opportunity to make a fresh start after rehabilitation.

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[117] S 124(5) of the Insolvency Act.
[118] S 129(1)(a) of the Insolvency Act.
[119] S 129(1)(b) of the Insolvency Act.
[120] *Dicks v Pote* 3 EDC 81. However, this decision has been criticised and it is widely held that it is authority of the existence of the principle of reaffirmation in the South African insolvency law; see Roestoff *'n Kritiese evaluasie* 381 as referred to by Coetzee *A comparative reappraisal* 145.
[121] S 129(1)(c) of the Insolvency Act.
[122] See Sharrock *et al Hockly's insolvency law* 57 and Smith *The law of insolvency* 100.
[123] See Roestoff 2018 *THRHR* 394; Mabe *A comparative analysis* ch 3 for a detailed discussion of the numerous restrictions on debtors before, during and after the sequestration process.

4.3 Alternative relief measures

4.3.1 General background

It has been shown that the sequestration procedure, which is the primary debt relief measure in South Africa, marginalises NINA debtors because of its stringent access requirements. In light of this marginalisation, this paragraph now discusses the alternative relief measures in South Africa to determine whether they provide access to this marginalised group, and if so, the extent to which they facilitate a concomitant discharge of debts. At present, the secondary debt relief measures are the administration order and the debt review procedures. The administration order is regulated by section 74 of the Magistrates' Courts Act while section 86 of the NCA regulates the debt review procedure. However, this regulation of the natural person debt relief system by three different statutes reinforces the fragmented approach to debt relief in South Africa.[124]

The discussion that follows analyses the regulation of the natural person debt relief system by both the Magistrates' Courts Act and the NCA. This discussion seeks to determine whether NINA debtors who cannot obtain relief from indebtedness through the primary debt relief measure may access the relief through the secondary debt relief measures indicated hereunder. Thereafter, a brief exploration of the interplay of the primary and secondary debt relief procedures follows.

4.3.2 The debt review procedure

As pointed out above, section 86 of the NCA provides another pathway to the natural person debt relief system through the debt review procedure.[125] The debt review procedure is a debt restructuring measure[126] that only applies to credit agreements

[124] The position in Zimbabwe is preferred where the entire debt relief system is regulated by the recently introduced consolidated Insolvency Act [Chapter 6:07]. However, measures have been taken towards addressing this fragmented approach in South Africa and this has culminated in the publication of the 2015 Draft Insolvency Bill that will reform South Africa's debt relief system by following Zimbabwe's consolidated approach to insolvency regulation.

[125] See Coetzee *A comparative reappraisal* 189 where the debt review procedure is referred to as debt counselling.

[126] See Van Heerden and Boraine 2009 *PELJ* 23. Also, see *Collett v FirstRand Bank Limited* 2011 (4) SA 508 (SCA) 514. Consequently, NINA debtors cannot obtain relief from indebtedness through the debt review procedure because they do not have an income, or at times only a minimal income, to facilitate a debt repayment regardless of the terms of the restructured repayment plan.

that are regulated by the NCA.[127] In turn, section 4 of the Act outlines the scope of application of the NCA and it provides that it applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within South Africa.[128] It can thus be summarised that the NCA applies if:[129]

(a) The agreement is classified as a credit agreement;

(b) The parties are dealing at arm's length; and,

(c) The agreement was concluded or has effect within South Africa.

An agreement constitutes a credit agreement if it is a credit facility,[130] a credit transaction[131] or a credit guarantee.[132] In the main, a credit agreement entails a deferral of payment and fees and the imposition of charges or interest in respect of the deferred payment.[133] However, despite qualifying as a credit agreement, the NCA will not apply to that agreement if: the consumer is the state or an organ of the state or a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is concluded, equals or exceeds the threshold value of ZAR1 000 000.[134] Additionally, the NCA also excludes the following credit agreements from its ambit: an insurance policy, a lease of immovable property, and a transaction between a stokvel and its members.[135]

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[127] See in general Stoop 2008 *De Jure* 352; Van Zyl "The scope of application of the National Credit Act" ch 4 and Otto "Types of credit agreement" ch 8.

[128] S 4(1) of the NCA.

[129] See Coetzee *A comparative reappraisal* 190.

[130] A credit agreement qualifies as a credit facility if a credit provider undertakes to supply goods or services or pay an amount to a consumer from time to time and, either defers the consumer's obligations to pay any part of the cost of goods or services or bills the consumer periodically for any part of the cost of goods or services (s 8(3)(a) of the NCA).

[131] A credit agreement qualifies as a credit transaction if the agreement constitutes a pawn transaction or discount transaction, incidental credit agreement, instalment agreement, mortgage agreement, secured loan or a lease of movable property (s 8(4) of the NCA).

[132] S 8(1)(a)-(d) of the NCA. A credit agreement qualifies as a credit guarantee if, in terms of that agreement, a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which the NCA applies (s 8(5) of the NCA).

[133] S 8(1)(d) of the NCA. Or a combination of those mentioned.

[134] See s 4(1)(a)-(d) read with s 7(1)(a) of the NCA. Also, see in general the provisions of ss 4 and 78(2) of the NCA for other exclusions.

[135] S 8(2) of the NCA. Also, see s 1 of the NCA where a stokvel is defined as a formal or informal rotating financial scheme with entertainment, social or economic functions, which (a) consists of two or more persons in a voluntary association, each of whom has pledged mutual support to the others towards the attainment of specific objectives; (b) establishes a continuous pool of capital by raising funds by means of the subscriptions of the members; (c) grants credit to and on behalf of members; (d) provides for members to share in profits from, and to nominate management of, the scheme; and (e) relies on self-imposed regulation to protect the interest of its members.

The second requirement for the NCA to apply to a credit agreement is that the parties must be dealing at arm's length.[136] The NCA does not define "arm's length" but outlines different scenarios where parties are deemed to not be dealing at arm's length.[137] Thus, the NCA will not apply to credit agreements that are concluded in any of the excluded scenarios. Lastly, the credit agreement must have been concluded within South Africa or have effect within South Africa.[138]

The debt review procedure may be commenced by a debtor's application to a debt counsellor for a declaration of over-indebtedness.[139] Therefore, a consumer has a pre-emptive duty to take necessary steps towards debt restructuring the moment it becomes clear that his finances have deteriorated.[140] However, a consumer may not access the procedure where the credit provider under the credit agreement, which the application relates to, has taken steps to enforce the debt.[141] The debt counsellor may

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[136] S 4(1) of the NCA.

[137] S 4(2)(b) of the NCA provides that in any of the following arrangements, the parties are not dealing at arm's length: (i) a shareholder loan or other credit agreement between a juristic person, as consumer, and a person who has a controlling interest in that juristic person, as credit provider; (ii) a loan to a shareholder or other credit agreement between a juristic person, as credit provider, and a person who has a controlling interest in that juristic person, as consumer; (iii) a credit agreement between natural persons who are in a familial relationship and are co-dependent on each other or one is dependent upon the other; and (iv) any other agreement in which each part is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction or that is of a type that has been held in law to be between parties who are not dealing at arm's length.

[138] See Coetzee *A comparative reappraisal* 193 where it is submitted that the legislature ousted the common-law presumption that legislation does not have extraterritorial application.

[139] S 86(1) of the NCA. Also, see s 79(1) of the NCA which provides that a consumer is over-indebted if at the preponderance of available information at the time a determination is made, which indicates that the consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements which the consumer is party to. This provision was fairly recently reaffirmed in *Driskel v Maseko* [2017] ZAFSHC 150 (24 August 2017) para 64 where the court remarked that:

> My interpretation of this subsection is that when a court considers an application for debt review and consequently firstly has to determine whether the consumer is over-indebted, such a determination by the court is to be based on facts and figures as they exist at the time of the hearing, or at least relatively close to that time. In my view logic dictates that this is the correct interpretation, because had a determination been made by a debt counsellor, for example a year before the hearing, the circumstances could have changed since then, even to the extent that the consumer might not even be over-indebted anymore. Surely it cannot have been the intention of the legislature that the court should then still declare the consumer to be over-indebted just because that was the situation at the time that the debt counsellor made his/her determination.

[140] See *SA Taxi Securitisation (Pty) Ltd v Ndobela* [2011] ZAGPJHC 14 para 15. Also, see *Robertson v Firstrand Bank Ltd t/a Wesbank* [2017] ZAGPJHC 128 where the court criticised a consumer for taking no responsibility towards her deteriorating financial circumstances by holding her debt counsellor responsible.

[141] S 86(2) read with s 129 of the NCA. Also, see *Nedbank v Motaung* [2007] ZAGPHC 367 (TPD); *Potgieter v Greenhouse Funding (Pty) Ltd* [2009] ZAGPHC 84 (GSJ); *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D); *Standard Bank of South Africa v Hales* 2009 (3) SA 315 (D); *National Credit Regulator v Nedbank Ltd* 2009 (6) SA 295 (GNP); *Investec Bank Ltd v Mutemeri* 2010 (1) SA 265 (GSJ); *BMW Financial Services (SA) (Pty) Ltd v Donkin* 2009 (6) SA 63 (KZD); *BMW Financial Services (SA) (Pty) Ltd v Mudaly* 2010 (5) SA 618 (KZD) 2010; *Nedbank Ltd v The National Credit Regulator* 2011 (3) SA 581 (SCA); *Jansen van Vuuren v Standard Bank of South Africa* [2015]

require the debtor to pay an application fee before accepting the debt review application.[142]

Upon receipt of the debt review application, the debt counsellor must provide the consumer with proof of receipt and notify every registered credit bureau and all credit providers listed in the application.[143] On the other hand, the consumer-applicant must comply with any reasonable requests by the debt counsellor to facilitate the evaluation of his state of indebtedness and the prospects for responsible debt re-arrangement and must participate in good faith in the review and in any negotiations designed to result in responsible debt re-arrangement.[144]

The debt counsellor must assess the debtor's financial circumstances and his application to determine whether the debtor appears to be over-indebted. If the consumer seeks a declaration of reckless credit, he must also assess whether any of the debtor's credit agreements appear to be reckless.[145] If, after this assessment, the debt counsellor determines that the debtor is not over-indebted, the debt counsellor must reject the application even if he has concluded that a particular credit agreement was reckless at the time it was entered into.[146] If the debt counsellor concludes that the consumer is not over-indebted but is nevertheless experiencing or likely to experience difficulty satisfying all his obligations under the credit agreements promptly, the debt counsellor may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt re-arrangement.[147] However, if the debt counsellor determines that the consumer is over-indebted, he may issue a proposal recommending that the Magistrate's Court make an order that one or more of the debtor's agreements be declared to be reckless credit[148] and/or that one or more of the debtor's obligations be re-arranged.[149]

ZAGPPHC 356; *De Beer v Nedbank Ltd* [2018] ZAGPPHC 367; *Nedbank Ltd v Mokhonoana* 2010 (5) SA 551 (GNP).

[142] S 86(3) of the NCA. However, he may not require or accept a fee from a credit provider in respect of the application.

[143] S 86(4) of the NCA.

[144] S 86(5) of the NCA.

[145] S 86(6) of the NCA. See s 80 of the NCA for an indication of reckless credit agreements.

[146] S 86(7)(a) of the NCA. However, the debtor, with the leave of the Magistrate's Court, may apply directly to the Magistrate's Court for an order of over-indebtedness (s 86(9) of the NCA).

[147] S 86(7)(b) of the NCA. If the debtor and the creditor provider accept the proposal, the debt counsellor must record the proposal in the form of an order (s 86(8)(a) of the NCA).

[148] If the debt counsellor has concluded that those agreements appear to be reckless.

[149] S 86(7)(c) of the NCA. The debtor's obligations may be re-arranged by extending the period of the agreement and reducing the amount of each payment due accordingly, or postponing during a specified

Where a referral or direct application has been made to the Magistrate's Court, it has the sole discretion of granting an order of over-indebtedness and a re-arrangement of debts or rejecting the application, and the NCR may not intervene.[150] It should be noted that a creditor may give notice to terminate the review to the consumer, the debt counsellor and the NCR, in respect of a credit agreement if the debtor has defaulted on his payments.[151] However, if the creditor proceeds to enforce the agreement, the Magistrate's Court may order that the debt review resume on any conditions the court considers to be just in the circumstances.[152]

A debtor who has applied for debt review may not conclude a further credit agreement unless:[153]

(i) The debt counsellor rejects the application and the prescribed time period for direct filing to the Magistrate's Court has expired without the debtor having so applied;
(ii) The court has determined that the consumer is not over-indebted, or has rejected a debt counsellor's proposal or the consumer's application; or
(iii) A court having made an order, or the consumer and credit providers having made an agreement re-arranging the debtor's obligations, all the debtor's obligations under the credit agreements as re-arranged are fulfilled, unless the debtor fulfilled the obligations by way of a consolidated agreement.

In short, the debt review procedure ensures that a debtor with a stable source of income, who cannot meet his debts, is allowed to restructure his debts and repay them over an extended period in line with his particular financial circumstances.[154] Because this procedure entails repayment of debts, it is pivotal that a debtor has a stable source of income to meet his restructured debts and can afford the cost of the measure. Consequently, NINA debtors are excluded from this measure because of their financial circumstances. Coetzee[155] points out that the debt review measure is suited to the

period the dates on which payments are due under the agreement or extending the period of the agreement and postponing during a specified period of dates on which payments are due under the agreement or recalculating the debtor's obligations. Also, see Osunlaja *A comparative appraisal* 130-131 for a discussion of the procedure to be followed after an order for debt review has been granted.
[150] S 87 of the NCA.
[151] S 86(10) of the NCA.
[152] S 86(9) of the NCA.
[153] See s 88(1)(a)-(c) of the NCA.
[154] S 86(7)(c)(ii)(aa) of the NCA.
[155] See Coetzee *A comparative reappraisal* 4.

circumstances of mildly indebted consumers who have encountered a temporary financial crisis. Lastly, it should be noted that no statutory discharge of debts is possible through the debt review procedure.

4.3.3 The administration order

An overcommitted debtor may access debt relief through the administration order procedure as an alternative to the debt review process.[156] The administration order is a hybrid debt relief measure that generally takes the form of a Magistrate's Court-sanctioned restructured debt repayment plan.[157] However, in some instances, the measure may lead to the realisation of assets in terms of which the court orders the administrator to sell the debtor's property and distribute the proceeds among his creditors.[158]

Boraine[159] mentions that the administration order procedure was introduced into South Africa under the influence of English law. However, despite the strong English law influence in Zimbabwe's consumer debt relief system the administration order was never introduced into this system and researchers have argued for its implementation instead of the liquidation procedure, because of the benefit it provides to some debtors with little income and smaller estates.[160]

In the main, it may be concluded that the administration order procedure suits the needs of debtors who have encountered a temporary financial setback. This is in line with internationally regarded policies, principles and guidelines that favour the implementation of alternative relief measures that facilitate relief from indebtedness to different categories of debtors depending on their individual financial circumstances.[161] In this vein, the *INSOL Consumer reports* provide that a debtor with

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[156] S 74 of the Magistrates' Courts Act. However, a draft Lower Courts Bill was published on 29 April 2022 and, once in operation, it will repeal the Magistrates' Court Act. The draft Lower Courts Bill proposed to continue regulating the administration order procedure (ss 83-86 of the draft Lower Courts Bill). Also, see para 4.6 for a discussion of the Law Commission's reform initiatives that include repealing both the NCA and the Magistrates' Court Act to introduce a merged debt relief process.
[157] See s 74C of the Magistrates' Courts Act. Also, see Theophilopolos *et al Fundamental principles of civil procedure* 490.
[158] S 74C(1)(b) read with s 77K of the Magistrates' Courts Act.
[159] Boraine 2003 *De Jure* 219.
[160] Squires 1962 *The Rhodesia and Nyasaland Law Journ* 123. See ch 3 para 3.2.3.2.
[161] See ch 2 para 2.4.1.1.

survival debts,[162] who has no prospect of changing his circumstances, must be differentiated from a debtor with accommodation debts,[163] who is suffering a temporary setback and can regain his financial position if allowed to restructure his earning and spending.[164]

NINA debtors cannot obtain relief from indebtedness through this measure because they can neither afford the repayment of the restructured debt nor do they have an estate that can, where necessary, be realised. Further, debtors within the NINA category are also incapable of paying the costs of the administration process. However, the administration order procedure is an integral alternative measure that allows mostly poor[165] debtors to access debt relief where the sequestration procedure would exhaust their estate.[166] It can be argued that the measure largely favours the needs of low-income-low-asset debtors who, at times, have to cope with a temporary financial misfortune that has befallen them.[167]

The administration order measure is accessible to a debtor who has either obtained a judgment debt against him in court or is generally unable to meet his financial obligations and does not have sufficient assets to facilitate an attachment.[168] The procedure may be commenced by an application by the debtor to the Magistrate's Court, which is accompanied by a statement of affairs detailing the information required by the law.[169] The statement of affairs must be confirmed by an affidavit in which the debtor declares that to the best of his knowledge, the names of all his creditors and the amounts owed by him are outlined in the statement, and the declarations made therein are true.[170] As a prerequisite, the debtor-applicant should

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[162] Survival debts refer to debts which are incurred by consumer debtors as a survival strategy where there is an accumulation of recurrent debts for the necessities of life. This type of debt is usually incurred for food, rent, electricity, education and clothing (*INSOL Consumer report* II 4).

[163] Accommodation debts refer to debts which may be caused by the inability to adapt to misfortune, a sudden drop in income or unforeseen expenses such as a rise in accommodation costs (*INSOL Consumer report* II 4).

[164] See ch 2 para 2.4.1.1.

[165] The Supreme Court of Appeal in *Bafana Finance Mabopane v Makwakwa* 2006 (4) SA 581 (SCA) 587-588 indicated that the aim of the administration order procedure is:

> [T]o protect debtors with small estates, 'usually … those who are poor and either illiterate or uninformed about the law or both'. It has a second, but also important purpose, which is to ensure that creditors to whom money is owed for payment by the debtor are able to recover as much as the administrator permits.

[166] See *Ex parte August* 2004 (3) SA 268 (W) 271.

[167] See *Madari v Cassim* 1950 (2) SA 35 (D) 38.

[168] S 74(1)(a) of the Magistrates' Courts Act.

[169] See ss 74(1), 74A(1) and 74A(2) of the Magistrates' Courts Act.

[170] S 74A(3) of the Magistrates' Courts Act. Every debt listed in the statement of affairs shall be deemed to be proved (s 74B(1)(b) of the Magistrates' Courts Act).

not have accessed the administration order, which, because of his non-compliance, was rescinded within the preceding six months, unless the debtor proves that his non-compliance was not wilful.[171]

To access the measure, the debtor's obligations must not exceed the ZAR50 000 threshold, as prescribed from time to time by the minister of justice.[172] The debtor's application is evaluated by the court at a hearing which is also attended by his creditors or their legal representatives.[173] At the hearing, the court and any proven[174] creditor or his legal representative may interrogate the debtor about:[175]

(i) His assets and liabilities;
(ii) His present and future income and that of his wife living with him;
(iii) His standard of living, and the possibility of economising; and
(iv) Any other matter that the court may deem relevant.

After evaluating the application and hearing all submissions in relation to it, the court may grant an order it deems just and necessary.[176] If the court grants an order of administration, it must appoint an administrator who takes charge of the debtor's estate.[177] After taking his financial circumstance into account, he determines the amount of the weekly or monthly payments to be made by the debtor.[178] Additionally, the court may specify the assets that may be realised for the distribution of the proceeds among the creditors.[179] The administrator may also deduct and/or retain a portion of the proceeds or money that he has collected to cover his necessary

[171] S 74B(5) of the Magistrates' Courts Act.
[172] S 74(1)(b) of the Magistrates' Courts Act. GN R217 in *Gazette* 37477 of 27 March 2014. See SALRC *Review of administration* xviii where the Law Commission proposes that the ZAR50 000 threshold be increased to ZAR300 000.
[173] See in general s 74B of the Magistrates' Courts Act about the hearing of the application for an administration order.
[174] Or by leave of the court.
[175] S 74B(1)(e) of the Magistrates' Courts Act.
[176] See *Fortuin v Various Creditors* 2004 (2) SA 570 (C) 573 regarding the court's discretion.
[177] S 74E of the Magistrates' Courts Act.
[178] Ss 74C(1)(a), 74C(2) and 74C(3) of the Magistrates' Courts Act. The weekly or monthly payments must be made to the administrator, and he shall make a *pro rata* distribution of the payments among the creditors at least once every three months, unless all the creditors otherwise agree or the court otherwise orders (s 74J(1) read with s 74J(2) of the Magistrates' Courts Act).
[179] S 74C(1)(b)(i) of the Magistrates' Courts Act. Thus, in line with international principles the debtor's property is not as a matter of course susceptible to realisation and may only be attached where necessary. This affords the debtor an opportunity to rebuild his life without the burden of purchasing life's necessities. See ch 2 para 2.4.1.1.

expenses and fees along with the costs he may incur if the debtor is in default or disappears.[180]

Despite affording a reprieve to poor debtors, the administration order procedure may be criticised for marginalising debtors who exceed the ZAR50 000 debt threshold.[181] Furthermore, as indicated above, the procedure entails a debt restructuring; therefore, NINA debtors cannot obtain relief from indebtedness through this measure because of their woeful financial circumstances. Additionally, accessing this measure may be much more costly for debtors in bad financial circumstances because of the high administration costs and the extended repayment period. Notably, the administration procedure does not result in a discharge of debts and to this end, this procedure does not meet international principles in insolvency that require that a discharge of debts be afforded to all categories of debtors regardless of their financial circumstances.[182]

In summary, the alternative debt relief measures in South Africa, namely, the debt review procedure and the administration order procedure are repayment plans that afford reprieve to debtors who have mostly encountered a temporary financial crisis. These secondary debt relief measures exclude NINA debtors because they do not have the requisite excess income and/or assets to facilitate the repayment, which the procedures envisage.

4.4 Interplay between the primary and alternative relief measures

It has already been highlighted that a natural person debtor may access the South African debt relief system by utilising any of the three statutory relief measures that regulate the consumer insolvency regime namely: the sequestration procedure and, the administration order procedure and the debt review procedure. The sequestration procedure is the primary debt relief procedure that the Insolvency Act regulates while the administration order and the debt relief procedures are regulated by section 74 of the Magistrates' Courts Act and section 86 of the NCA, respectively. In light of this fragmented approach to debt relief, this paragraph explores the interplay between the

[180] See s 74L(1)(a)-(b) of the Magistrates' Courts Act.
[181] See Coetzee *A comparative reappraisal* 237. However, it is important to note the reform initiatives by the Law Commission that include changing the ZAR50 000 threshold to ZAR300 000 (para 4.6).
[182] See ch 2 para 2.5.4.6.

primary and secondary debt relief measures. This analysis specifically examines whether accessing any secondary debt relief measures impacts a debtor's ability to access the primary debt relief measure.

The Magistrates' Courts Act clarifies that granting an administration order shall be no bar to the sequestration of the debtor's estate.[183] Therefore, a debtor who has been granted an administration order may proceed to seek and subsequently access the sequestration procedure. This clarity by the legislature in the Magistrates' Court Act is welcome and prevents any ensuing dispute on the matter. However, the position above does not necessarily apply when a debtor has first accessed the sequestration procedure and thereafter seeks an administration order. In this regard, it is correctly held that the impact of the sequestration procedure is far-reaching; therefore, it is highly improbable that a debtor will be able to obtain an administration order after his estate has been sequestrated.[184]

Conversely, regarding the sequestration procedure, the NCA and the Insolvency Act are silent on the interplay between these two statutes. The NCA has always recognised the Insolvency Act and to this end, the recent amendment of the NCA inserted section 8A into the Insolvency Act, which holds that "a debtor who has applied for a debt review must not be regarded as having committed an act of insolvency".[185]

Although clear recognition of the primary debt relief measure is provided throughout the NCA, the Act does not outline the interplay between the debt review procedure that it regulates, and the sequestration procedure. The judiciary consequently provided clarity on the interplay between these two statutes in the landmark case of *Ex parte Ford*.[186] The court held that a debtor seeking access to the sequestration procedure should consider whether the debt review procedure might not be more advantageous,

[183] See s 74R of the Magistrates' Courts Act.
[184] See Coetzee *A comparative reappraisal* 129; Joubert 1956 *THRHR* 140.
[185] The National Credit Amendment Act 19 of 2014.
[186] See *Ex parte Ford* 2009 (3) SA 376 (WCC). Also, see *Investec Bank Ltd v Mutemeri* 2010 (1) SA 265 (GSJ); *Naidoo v Absa Bank Ltd* 2010 (4) SA 597 (SCA); *Firstrand Bank Ltd v Evans* 2011 (4) SA 597 (KZD); *Firstrand Bank Ltd v Kona* [2015] ZASCA 11; *Ex parte Cloete* (1097/2013) [2013] ZAFSHC 60; *Ex parte Fuls and Three Similar Matters* 2016 (6) SA 128 (GP); *Ex parte Oberholzer and Others* [2017] ZAGPPHC 566 (9 June 2017); *Botha v Botha* [2017] JOL 38011 (FB) para 31; *LMV v Mv* [2019] JOL 44963 (GP).

and the court must evaluate this consideration when it exercises its discretion to grant a liquidation order.[187] However, Van Heerden[188] submits that:

> It should however be noted that the Ford case has not elevated debt review (and subsequently debt re-arrangement and/or a declaration of reckless credit) as formal prerequisites to obtain an order for voluntary or compulsory sequestration although, as appears from subsequent developments in case law[189] … it is becoming an increasingly important consideration in the context of the court's discretion to grant an order for voluntary surrender.

Consequently, in line with the decision in *Ex parte Ford*, where applicable, reliance must first be given to the debt review procedure before a court may facilitate access to the sequestration procedure. This was upheld by the Law Commission which seeks to formally reform the debt relief system by requiring that a debtor must, to the satisfaction of the court, show that a debt review application has been concluded before it may grant a provisional order of liquidation of the debtor's estate.[190]

In respect to the interplay between the two statutory alternative relief measures, consumers may access both the debt review measure and an administration order because these measures relate to different categories of debts. Although both measures deal with debt rearrangement, the debt review measure applies to debt that emanates from credit agreements while the administration measure applies to other debts such as judgment debts and credit agreements where legal proceedings have been taken to enforce such agreements. The Law Commission submits that this defeats the purpose of providing relief to over-indebted consumers, as an already financially strained person would have to pay the cost for two separate applications.[191] In light of this, the Law Commission proposes the introduction of a hybrid system that uses best practice from both the administration procedure and the debt review process.[192]

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[187] *Ex parte Ford* 384. Also, see Van Heerden and Boraine 2009 *PELJ* 51.
[188] See Van Heerden "Over-indebtedness and reckless credit" para 11.7.
[189] See *Investec Bank Ltd v Mutemeri* 2010 (1) SA 265 (GSP); *Naidoo v Absa Bank Ltd* 2010 (4) SA 597 (SCA); *Firstrand Bank Ltd v Evans* 2011 (4) SA 597 (KZD); *Firstrand Bank Ltd v Kona* [2015] ZASCA 11; *Ex parte Cloete* [2013] ZAFSHC 60; *Ex parte Fuls and Three Similar Matters* 2016 (6) SA 128 (GP); *Ex parte Oberholzer and Others* [2017] ZAGPPHC 566; *Botha v Botha* [2017] JOL 38011 (FB) para 31; *LMV v Mv* [2019] JOL 44963 (GP).
[189] *Ex parte Ford* 2009 (3) SA 376 (WCC) at 384. Also, see Van Heerden and Boraine 2009 *PELJ* 51.
[190] See cl 3(8)(a)(iii) of the 2015 Draft Insolvency Bill.
[191] See SALRC *Review of administration* xv.
[192] See SALRC *Review of administration* ch 8.

4.5 Reform initiatives

4.5.1 General background

As outlined above, neither the primary nor secondary debt relief measures in South Africa cater for the needs of all honest but unfortunate debtors, specifically, the NINA debtor category.[193] NINA debtors are prevented from accessing South Africa's consumer debt relief system because of the measures' creditor-oriented nature and the stringent access requirements such as the advantage for creditors' requirement embedded in the Insolvency Act.[194] Additionally, the secondary debt relief measures are in the main debt restructuring plans that are not suited to the needs of NINA debtors who are in bad financial circumstances.

Consequently, NINA debtors are left vulnerable to creditor intimidation because of the lack of statutory protection afforded to them. In response to this exclusion and various other criticisms levelled against the debt relief system, the legislature has proposed various reform initiatives that seek to reform the natural person debt relief system into an effective and inclusive system that affords relief from indebtedness to all honest but unfortunate debtors. These reform initiatives are the pre-liquidation composition and the debt intervention measure, which are discussed in detail below.

4.5.2 The pre-liquidation composition

The Law Commission's major attempt to reform the South African consumer debt relief system in 2000 was largely driven by the archaic nature of the operative debt relief measures, which marginalise some categories of debtors, specifically those without disposable income and/or assets. To this end, the Law Commission published a seminal report titled the *Report on the review of the law of insolvency* that contained a Draft Insolvency Bill and an explanatory memorandum.[195] The Law Commission

[193] See paras 4.2 and 4.3.
[194] See para 4.2.2.3.
[195] The Draft Insolvency Bill (hereafter "the 2000 Draft Insolvency Bill"). An updated version of the 2000 Draft Insolvency Bill has since been circulated as an unofficial working document by the Department of Justice (hereafter "the 2015 Draft Insolvency Bill"). This study focuses on the 2015 Draft Insolvency Bill because it is the latest version and any reference to the 2000 Draft Insolvency Bill will be clearly indicated.

proposed the introduction of the pre-liquidation composition[196] as an alternative debt relief measure. It also seeks to reform the fragmented approach to debt relief by unifying South Africa's insolvency statutes, which will include the proposed pre-liquidation composition. The Draft Insolvency Bill influenced the newly introduced insolvency statute in Zimbabwe's debt relief system that incorporates the proposed pre-liquidation composition measure with minor immaterial changes.[197] This statute also consolidates Zimbabwe's consumer and corporate insolvency systems and constitutes the primary insolvency statute in the country.

The proposed introduction of the pre-liquidation composition in South Africa's consumer debt relief system seeks to offer an opportunity to obtain relief from indebtedness to debtors who cannot access the prevailing debt relief measures because of the stringent requirements such as the advantage for creditors requirement.[198] Therefore, this proposed measure might alleviate the plight of the unregulated NINA category of debtors who are currently without statutory protection. This proposal is welcomed because it might remedy the potentially unconstitutional nature of South Africa's debt relief system that affords unequal protection to debtors and differentiates between them on financial grounds. This entrenches the duality of the South African economy, which keeps the poor in a state of perpetual poverty.[199]

The 2015 Draft Insolvency Bill does not define the pre-liquidation measure's title Researchers have argued that the title is confusing because it could mistakenly be interpreted as requiring a composition as a precondition for liquidation proceedings.[200] The proposed pre-liquidation composition envisages a negotiated debt-rearranged settlement between a debtor and his creditors. This is in line with international policies, principles and guidelines because such settlements assist in ameliorating the stigma against overcommitted consumers and they are more flexible than formal relief procedures.[201] However, the *World Bank Report* argues that the benefits of settlement agreements may be illusory because it is difficult to reach an agreement with all

[196] See cl 118 of the 2015 Draft Insolvency Bill. The 2015 Draft Insolvency Bill uses the term "liquidation" to refer to both the liquidation of estates of juristic persons and the sequestration of estates of natural persons. This is in contrast with the Insolvency Act that differentiates between the two terms.
[197] See ch 3 para 3.3.3 for a discussion of the pre-liquidation composition in the Zimbabwean debt relief system. That discussion applies here with necessary changes.
[198] See Coetzee 2017 *THRHR* 20; Coetzee and Roestoff 2020 *Int Insolv Rev* 98-99.
[199] See Coetzee 2016 *Int Insolv Rev* 54.
[200] See Coetzee 2017 *THRHR* 18.
[201] See ch 2 para 2.5.4.1.

creditors and informal procedures are marred by delays. Additionally, debtors are pressured into concluding non-viable, onerous plans. Consequently, it is suggested that negotiated settlements are more effective in instances of temporary financial crisis or where debtors have a low income, which could enable them to meet the re-arranged debts.

To access the pre-liquidation composition measure, a debtor with debts that do not exceed the ZAR200 000 threshold may lodge a signed copy of a composition and a complete sworn statement with an administrator.[202] Debtors may only make an offer of composition once every six months and once an offer of composition has been lodged, the debtor must not incur further debt without informing the prospective creditor of the pending debt and providing the insolvency practitioners with particulars concerning such debt.[203] Furthermore, lodging an offer of composition prohibits the debtor from alienating, encumbering or voluntarily disposing of property available to his creditors in terms of the composition or acting in a manner, which can impede compliance therewith.[204]

Upon receipt of the offer of composition, the administrator must determine a date for questioning the debtor and the consideration of the composition by his creditors.[205] In line with international guidelines, a moratorium on debt enforcement is placed when no creditor may, without the court's permission, institute any action against the debtor or apply for the liquidation of his estate between the determination of a date for the hearing and the conclusion thereof.[206] The hearing must be convened at a place which is accessible and convenient to creditors and the administrator must send a standard notice with the time, date and place of the hearing to creditors and the Master at least 14 days before the hearing.[207] At the hearing, creditors[208] may prove[209] or object to a

[202] Cl 118(1) of the 2015 Draft Insolvency Bill. The administrator acts as an intermediary who supervises the negotiation of the composition, and he must not be disqualified from being a liquidator.
[203] Cl 118(3) of the 2015 Draft Insolvency Bill.
[204] Cl 118(4) of the 2015 Draft Insolvency Bill.
[205] Cl 118(6) of the 2015 Draft Insolvency Bill.
[206] Cl 118(23) of the 2015 Draft Insolvency Bill.
[207] Cl 118(7) of the 2015 Draft Insolvency Bill. Also, see Coetzee 2017 *THRHR* 23 where it is submitted that requiring the location of the meeting to be accessible to all creditors with different domiciles is not practical.
[208] A creditor may authorise any person by a written power of attorney to appear at the hearing on his behalf and do everything at the hearing which the creditor would have been entitled to do (cl 118(14) of the 2015 Draft Insolvency Bill).
[209] Where a debt is being objected to by the debtor or another creditor, the administrator may require that the creditor corroborate his debt with evidence.

debt listed in the debtor's statement.[210] The administrator and creditors, whose debt has been acknowledged or proved, or any other interested party with the administrator's permission, may interrogate the debtor about: his assets and liabilities, his present and future income and that of his spouse living with him, his standard of living and the possibility of living more frugally, and any other matter which the administrator considers being relevant.[211]

The administrator may not accept the composition if a creditor demonstrates, to his satisfaction, that the composition accords a benefit to one creditor over another creditor to which he would not have been entitled on liquidation of the debtor's estate.[212] The composition will be deemed as accepted if it is accepted by the majority in number and two-thirds in value of the concurrent creditors who vote on the composition.[213] However, the question is whether a mere majority in value and number is sufficient.[214] Suppose the offer of composition has been duly accepted. In that case, the administrator must certify it and send a certificate to the Master that the composition has been accepted, and thereafter the composition becomes binding on all creditors who received notice of or appeared at the hearing.[215] The administrator must within six-month intervals send an account of receipts, expenses and payments to creditors and the Master.[216] Suppose the Master believes that the account is incorrect, contains an improper charge or that the administrator has no acted in good faith or was negligent or unreasonable in incurring any costs in the account and that it should be amended. In that case, he may direct the administrator to do so and may further provide such directions in relation thereto as he deems fit.[217]

Suppose offer of composition is not accepted by the required majority, and the debtor is not able to make a substantially higher offer. In that case, the administrator must

[210] Subject to any amendments by the administrator, every listed debt is deemed to be proved unless a creditor objects to it, or the administrator rejects it or requires that it be corroborated with evidence.
[211] Cl 118(10)(e) of the 2015 Draft Insolvency Bill.
[212] Cl 118(16) of the 2015 Draft Insolvency Bill. Consequently, the offer of composition may only be accepted if the administrator is satisfied that the composition proffers a benefit to all creditors in relation to their debts.
[213] Cl 118(17) of the 2015 Draft Insolvency Bill. However, a debtor who on reasonable grounds is unable to comply with the composition may lodge an amended composition (cl 118(18)(b)(ii) of the 2015 Draft Insolvency Bill).
[214] See Roestoff and Jacobs 1997 *De Jure* 195.
[215] Cl 118(17) of the 2015 Draft Insolvency Bill. However, the claims or rights of secured or preferent creditors will be subject to the composition only if they consented thereto in writing.
[216] Cl 118(17)(a) of the 2015 Draft Insolvency Bill.
[217] Cl 118(17)(b) of the 2015 Draft Insolvency Bill.

declare the proceedings to have ceased, and the debtor must return to the position he was in before the commencement of the proceedings.[218] Thereafter, upon the application of the debtor, the Master may grant a discharge of unsecured or non-preferent debts if:[219]

> (i) the debtor satisfies the Master that the administrator and all known creditors were given standard notice of the application for the discharge with a copy of the debtor's application at least 28 days before the application to the Master; and
> (ii) the Master is satisfied after consideration of comments, if any, by creditors and the administrator and the application by the debtor –
> (aa) that the proposed composition was the best offer which the debtor could make to creditors;
> (bb) that the inability of the debtor to pay debts in full was not caused by criminal or inappropriate behaviour by the debtor;
> (cc) that the debtor does not qualify to apply for an administration order in terms of section 74 of the Magistrates' Courts Act 32 of 1944.[220]

The pre-liquidation composition is a streamlined negotiated settlement that may alleviate the plight of debtors with the requisite disposable income to enable repayment of the restructured debts. However, this measure is not suited to the needs of NINA debtors because of their financial circumstances; consequently, the measure turns into a fool's errand that neither benefits the debtor nor his creditors. NINA debtors cannot offer an acceptable composition to creditors. It is highly improbable that such debtors can access the procedure and obtain the relief that it provides. However, the pre-liquidation composition is nevertheless a welcome alternative debt relief measure for debtors with a stable source of income, and it is in line with international guidelines that favour alternative debt relief measures that may facilitate access to all categories of debtors irrespective of their financial circumstances. However, this measure will not change the position of the excluded debtors within the NINA category, only debtors who have encountered a temporary financial crisis.

4.5.3 The debt intervention measure

In 2018 the Portfolio Committee on Trade and Industry published the Draft National Credit Amendment Bill 2018.[221] The Amendment Bill was accompanied by a Memorandum on the objects of the National Credit Amendment Bill, 2018, that notes

[218] Cl 118(22)(a) of the 2015 Draft Insolvency Bill.
[219] Cl 118(22)(b) of the 2015 Draft Insolvency Bill.
[220] See para 4.3.3 for a discussion of the administration order procedure. Coetzee 2017 *THRHR* 24 submits that it appears strange that the debt review procedure in terms of the NCA is not mentioned.
[221] The Draft National Credit Amendment Bill, 2018 (hereafter "the Amendment Bill").

the over-indebtedness crises in South Africa.[222] The Amendment Bill was signed into law by the President of the Republic of South Africa on 13 August 2019, but it is not yet in force.[223] The National Credit Amendment Act aims to ameliorate the over-indebtedness crisis by advocating for stricter and more rigorous enforcement of the NCA.[224]

On the one hand, the 2019 National Credit Amendment Act recognises the plight of some categories of consumer debtors for whom the prevailing debt relief measures are inaccessible and the difficult. Such debtors, who do not have sufficient income or assets, experience in proving a benefit for creditors.[225] On the other hand, the Memorandum also notes the vulnerable state of indigent debtors who suffer from the actions of "unscrupulous lenders", and in response, the 2019 National Credit Amendment Act aims to curb this by providing for criminal prosecutions of those who contravene the provisions of the NCA.[226]

The 2019 National Credit Amendment Act amends the NCA to: [227]

> [P]rovide for debt intervention; to insert new definitions; to include the evaluation and referral of debt intervention applications as a function of the National Credit Regulator and to provide for the creation of capacity within the National Credit Regulator[228] and logistics arrangements to execute this function; to include consideration of a referral as a function of the Tribunal; [229] to provide for the recordal of information related to debt intervention; … to provide for a court to inquire into and either refer a matter for debt intervention or make an order related to debt intervention; … to provide for an application for debt intervention

[222] See the Memorandum on the objects of the National Credit Amendment Bill, 2018 21-22 (hereafter "the Memorandum").
[223] The Amendment Bill will appear as the National Credit Amendment Act 7 of 2019 (hereafter "the 2019 National Credit Amendment Act").
[224] For a discussion on the over-indebtedness crises in South Africa, see, National Credit Regulator 2021 https://bit.ly/38yvv1d (accessed 27 April 2022) where, in terms of the first quarter (September 2021) Credit Bureau Monitor Report, there are 26.42 million credit-active registered consumers and merely 15.55 million of the registered credit-active consumers are in good standing while 16.25 million consumers have impaired records.
[225] See in general the Preamble of the 2019 National Credit Amendment Act. Also, see para 4.2.2.3 for a discussion of the advantage for creditors requirement in the South African debt relief system. Such consumers fall within the NINA category that forms the subject of this study.
[226] The Memorandum 22.
[227] The long title of the 2019 National Credit Amendment Act. Therefore, the measure will only be accessible to consumers who fall within the ambit of the NCA, thereby excluding debtors whose debts do not qualify as credit agreements in terms of section 8 of the NCA.
[228] The National Credit Regulator (hereafter "the NCR"). See s 12 of the NCA for a detailed description of the NCR. It is laudable that the debt intervention measure will be administered by the NCR, which is more suited to handling financial matters than the judicial system. However, this poses some problems, such as the accessibility of the NCR offices, which are located in Midrand, Johannesburg, for the NINA group. In this regard, this study proposes the decentralisation of the NCR services to all parts of the country to reach the intended group of debtors.
[229] The National Consumer Tribunal as provided in section 26 of the NCA (hereafter "the Tribunal").

> and the evaluation thereof; … to provide for orders related to debt intervention … to provide for offences related to debt intervention; … and to provide for matters connected therewith.

The debt intervention measure may be commenced by a debtor's application to the NCR, in the prescribed manner and form.[230] To access this measure, the applicant[231] must have a "total unsecured[232] debt owing to credit providers of no more than ZAR50 000, or such an amount as may be prescribed by section 171(2A)(b)".[233] The 2019 National Credit Amendment Act does not indicate why the ZAR50 000 threshold was prescribed. This threshold might exclude debtors who might have obtained relief from indebtedness through the debt intervention measure but cannot be assisted because their debts exceed this debt threshold. In line with international guidelines, a moratorium on debt enforcement is placed on all credit agreements once credit providers are notified of the application.[234]

While assessing the application, the NCR must provide the applicant with counselling on financial literacy and ensure that he has access to training to improve his financial literacy.[235] This provision is crucial because it might alleviate the over-indebtedness crises in South Africa since all debt intervention applicants will obtain the much-

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[230] S 86A(1) of the 2019 National Credit Amendment Act. The debt intervention measure is an extra-judicial proceeding that is administered by the NCR, an institution equipped to handle insolvency matters. This is in line with internationally accepted guidelines because court-based debt relief proceedings are costly and the philosophical design of court systems is problematic in that courts are designed to deliberate on adversarial legal disputes which are very rare in insolvency cases (see ch 2 para 2.5.4.2).

[231] In terms of S 2 of the 2019 National Credit Amendment Act the measure will apply to a natural person debtor who:

> (a) is a consumer under unsecured credit agreements, unsecured short-term credit transactions or unsecured credit facilities only,
> (b) receives no income, or if he or she, or their joint estate, receives an income or has a right to receive income, regardless of the source, frequency or regularity of that income, that gross income did not, on an average for the six months preceding the date of the application for debt intervention exceed R7500 or such an amount as may be prescribed by section 171(2A), per month,
> (c) is over-indebted, whether due to a change in personal circumstances or other circumstances, and
> (d) is not sequestrated or subject to an administration order.

Also, see Coetzee 2018 *THRHR* 593 who submits that over-indebtedness was not a requirement for accessing the debt intervention procedure in terms of the Amendment Bill.

[232] Despite qualifying as unsecured debt, the 2019 National Credit Amendment Act excludes developmental credit agreements contemplated in section 10 of the NCA and any credit agreement where, at the time of the application for debt intervention, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 130 of the NCA to enforce that agreement (s 86A(2) of the 2019 National Credit Amendment Act).

[233] S 86A(1) of the 2019 National Credit Amendment Act. The minister may once every twelve months, by notice in the *Gazette*, adjust the amount of the qualifying total unsecured debt contemplated in section 86A(1), after having considered the effect inflation may have had on the amount (s 171(2A)(b) of the 2019 National Credit Amendment Act).

[234] See s 88A(3) of the 2019 National Credit Amendment Act. Also, see ch 2 para 2.4.1.1.

[235] S 86A(5) of the 2019 National Credit Amendment Act. This is in line with internationally accepted guidelines that favour the provision of both pre-filing and post-liquidation counselling to debtors (ch 2 paras 2.3 and 2.4).

needed knowledge, ability and opportunity to make sound financial decisions. The provision is imperative when considered in the light of the socio-political landscape of South Africa with its apartheid history. This caused the poor black populace of South Africa to be systematically denied the opportunity to obtain a quality education, which resulted in a low financial literacy rate in the country, especially among low-income earners.[236] However, it is yet to be seen how the NCR will manage to implement such a huge task on a national scale.[237] Financial literacy might also assist in ameliorating the stigma attached to over-indebtedness.

If, as a result of the assessment, the NCR concludes that the applicant fails to qualify for the procedure, the NCR must reject the application.[238] Despite failing to qualify for the debt intervention measure, if the NCR is of the view that the applicant might encounter difficulties in satisfying his obligations under the credit agreements promptly, the NCR must propose a debt re-arrangement plan between the applicant and all his credit providers.[239] Additionally, if the NCR discovers that any of the credit agreements contained in the application constitutes reckless lending, an unlawful credit agreement or a credit agreement resulting from prohibited conduct, the NCR must make a referral to the Tribunal for an appropriate declaration.[240]

However, suppose the NCR is of the opinion that the applicant qualifies for debt intervention, and his obligations can be re-arranged within a period of five years, or such longer period as may be prescribed. In that case, the NCR must refer the matter with a recommendation to the Tribunal for an order contemplated in section 87(1A).[241]

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[236] See Magau *A comparative legal analysis* 93-94.

[237] At present, the NCR offices are located in Midrand, Johannesburg.

[238] S 86A(6)(a) of the 2019 National Credit Amendment Act. With leave of the Magistrate's Court, the applicant may apply directly to the Magistrate's Court for a section 87 order in instances where the NCR has rejected the debt intervention application in terms of this provision (s 86A(7) of the 2019 National Credit Amendment Act).

[239] S 86A(6)(b) of the 2019 National Credit Amendment Act. If the debtor and his credit providers accept the proposal, the NCR must record the proposal in the form of an order and file it as a consent order in terms of section 138. Alternatively, if any of the credit providers reject the proposal, the NCR must make a referral of the matter to the Tribunal with a recommendation (s 86(8) of the 2019 National Credit Amendment Act). However, debt re-arrangement plans are not viable for NINA debtors because they do not have a source of income to meet the restructured obligations. Additionally, it is improbable that creditor providers would agree to a debt re-arrangement plan with a NINA debtor who does not have an income to facilitate the repayment.

[240] S 86A(6)© of the 2019 National Credit Amendment Act. This provision will assist in curbing unscrupulous behaviour by credit providers who abuse their power by providing credit to vulnerable and desperate consumers in contravention of the law.

[241] S 86A(6)(d) of the 2019 National Credit Amendment Act. This provision does not cater for the needs of NINA debtors because their financial circumstances prevent them from meeting their financial

Despite qualifying for the debt intervention measure, if the applicant has neither income nor assets to meet his debts within a five-year period, the NCR must refer the matter with a recommendation to the Tribunal for an order contemplated in section 87A.[242]

If the debtor defaults on the credit agreements that form part of the application for debt intervention, the credit provider may give notice to the debtor and the NCR to terminate the procedure.[243] However, if a credit provider proceeds to enforce the credit agreement despite lodging a notice to terminate the debt intervention, a court or Tribunal hearing the matter may order that the debt intervention procedure resume on any conditions the court or Tribunal considers to be just.[244]

A single member of the Tribunal may consider the referral contemplated in section 86A(6)(e), and reference must be made to the documents included in the referral from the NCR along with any representations therein.[245] After considering the referral, representations and other information; the Tribunal may order that the applicant does not qualify for the debt intervention and reject the application.[246] Alternatively, the Tribunal may order the suspension of all qualifying credit agreements in part or in full for twelve months, which may be extended to twelve months.[247] After ordering a suspension, the Tribunal must make a subsequent order directing the applicant to attend a financial literacy programme.[248]

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obligations despite the debt re-arrangement plan. This order is only suited to debtors who have encountered a temporary financial misfortune.

[242] S 86A(6)(e) of the 2019 National Credit Amendment Act. The NCR must inform all credit providers of the referral and all affected credit providers must be invited to make representations to the Tribunal (s 86A(9)(a)). It is laudable that all stakeholders be notified for procedural fairness. However, involving credit providers in the debt intervention process through representations during the application stage is disappointing. Creditor involvement can lead to intentional frustration of the procedure which delays debtors from obtaining relief from indebtedness (ch 2 para 2.2.5.4).

[243] S 86A(10)(a) of the 2019 National Credit Amendment Act. However, a credit provider may not successfully terminate the application for debt intervention if the application has already been filed in the Tribunal (s 86A(10)(b) of the 2019 National Credit Amendment Act).

[244] S 86A(11) of the 2019 National Credit Amendment Act. The debt intervention measure will resume on any condition the court or Tribunal considers to be just in the circumstances.

[245] S 87A(1) of the 2019 National Credit Amendment Act.

[246] S 87A(2)(a) of the 2019 National Credit Amendment Act.

[247] S 87A(2)(b)(i) of the 2019 National Credit Amendment Act. The twelve-month suspension period may be extended for a further twelve-month period.

[248] S 87A(2)(b)(ii) of the 2019 National Credit Amendment Act. This is a step in the right direction; however, it is not clear how this provision will be implemented along with the financial literacy programme requirement in section 86A(5).

Notably, the prescription period for all credit agreements that underwent a suspension cannot be completed before a year has elapsed after the day on which the suspension ended.[249] The NCR must review the debtor's financial circumstances after eight months have elapsed since ordering a suspension.[250] If the debtor's financial circumstances have improved enough to enable a re-arrangement, the NCR must refer the matter with a recommendation to the Tribunal.[251] However, suppose the NCR determines that the debtor's financial circumstances have not improved. In that case, the NCR must refer the matter to the Tribunal to consider extinguishing[252] the whole or a portion, of the amounts contemplated in section 101(1).[253] After considering the referral, if the Tribunal determines that the debtor has failed to improve in his financial position, by having sufficient income or assets to enable a re-arrangement, the Tribunal may extinguish the debtor's qualifying credit agreements.[254] When the debt underlying the credit agreement is extinguished, the credit provider loses his right to enforce or exercise any right under the credit agreement by litigation or other judicial processes.[255]

Extinguishing credit agreements places limitations on the debtor, including a prohibition from applying for any credit contemplated in section 60 for a minimum period of six months.[256] The NCR must notify the debtor of any orders it has made,

[249] S 87A(4)(b) of the 2019 National Credit Amendment Act.
[250] S 87A(5)(a) of the 2019 National Credit Amendment Act. This review seeks to determine whether the debtor has acquired sufficient income or assets that may enable his obligations to be re-arranged for a five-year period. It is improbable that NINA debtors might improve their financial circumstances during the suspension period to warrant a debt re-arrangement. Thus, this provision only applies to debtors who have encountered a temporary financial crisis.
[251] S 87A(5)(c)(i) of the 2019 National Credit Amendment Act. After the referral, the Tribunal may make an order in terms of section 87(1A) of the 2019 National Credit Amendment Act.
[252] S 1 of the 2019 National Credit Amendment Act defines extinguishing as:
(a) the cessation of any rights or obligations inherent to, or resulting from, a credit agreement; and
(b) the cessation of any rights or obligations that may arise in law, whether statutory or otherwise, because of the cessation contemplated in paragraph (a) above.
[253] S 87A(5)(c)(ii) of the 2019 National Credit Amendment Act.
[254] S 87A(6) of the 2019 National Credit Amendment Act. This is a very significant provision that might alleviate the plight of NINA debtors by obtaining a discharge of debts, thereby ensuring that debtors re-enter the credit economy without the burden of debts through a fresh start. However, caution must be exercised in applying this provision because of the likely moral hazard whereby debtors intentionally plead poverty to obtain relief from indebtedness. See ch 2 paras 2.5.3 and 2.5.4.3.
[255] S 88A(6) of the 2019 National Credit Amendment Act. This might assist in ensuring a fresh start to debtors. See ch 2 para 2.5.4.6.
[256] S 87A(8) of the 2019 National Credit Amendment Act. The Tribunal has the discretion to extend the limitation for a further period that the Tribunal deems fair and reasonable.

and it must serve a notice of the order to all credit providers listed in the debt intervention application and all registered credit bureaus.[257]

Filing a debt intervention application prohibits the applicant from entering into further credit agreements unless the NCR has rejected the application. After the rejection, the applicant fails to make a direct filing to the Magistrate's Court within the prescribed period.[258] Additionally, the debtor may apply to a credit provider for a credit agreement after the Tribunal has determined that the debt intervention applicant is not over-indebted or has rejected NCR's proposal.[259] The prohibition from entering into further credit agreements does not apply if the debtor fulfils his obligations as determined in a debt re-arrangement agreement between him and his creditors.[260]

Suppose a credit provider enters into a credit agreement, other than a consolidation agreement contemplated in section 88A of the 2019 National Credit Amendment Act, with a debtor despite a debt intervention order. In that case, the credit agreement may be declared to be reckless credit.[261] However, if the debt intervention applicant applies or enters into a credit agreement contrary to section 88A of the 2019 National Credit Amendment Act, the provisions related to debt intervention will not apply.[262]

After obtaining an order extinguishing any debt under the qualifying credit agreements, the debtor may apply to the NCR for a rehabilitation order to be granted by the Tribunal.[263] To obtain the rehabilitation order, the debtor must show proof that he has paid the amounts contemplated in section 101(1).[264] The applicant must prove that he has made payment of the amounts in full to all credit providers or prove that he has

[257] S 87A(10) of the 2019 National Credit Amendment Act. The Tribunal has the discretion to rescind or change an order for debt intervention if information is placed before the Tribunal showing that the debt intervention applicant was dishonest in his application or fails to comply with the conditions of the debt intervention order (s 87A(11) of the 2019 National Credit Amendment Act).
[258] S 88A(1)(a) read with s 86A(7) of the 2019 National Credit Amendment Act.
[259] S 88A(1)(b) of the 2019 National Credit Amendment Act.
[260] S 88A(1)(c) of the 2019 National Credit Amendment Act. However, this does not apply if the debt intervention applicant fulfils the obligations by way of a consolidated agreement (s 88A(1)(c) of the 2019 National Credit Amendment Act).
[261] S 88A(4) of the 2019 National Credit Amendment Act. It can be argued that the use of the term "may" in the declaration is not mandatory but merely a discretion.
[262] S 88A(5) of the 2019 National Credit Amendment Act.
[263] S 88B(1) of the 2019 National Credit Amendment Act.
[264] S 88B(2) of the 2019 National Credit Amendment Act. As payment was due on the date on which the order contemplated in section 87A(6) of the 2019 National Credit Amendment Act was granted, under each credit agreement affected by that order by payment in full to each credit provider of those amounts or entering into a settlement agreement with a relevant credit provider to the effect that those amounts have been resolved to the satisfaction of the credit provider.

entered into a settlement agreement with each credit provider that the section 101(1) amounts have been effectively resolved to the satisfaction of the credit provider.[265] Thus, rehabilitation is only accessible when a debt rearrangement plan has been concluded, and the cost of the credit has been defrayed. Consequently, NINA debtors cannot apply for rehabilitation under this provision. However, NINA debtors may apply for rehabilitation after a six-month period in which their right to apply for credit has lapsed.[266]

In addition to any information prescribed by the Minister, the application for rehabilitation must be accompanied by proof that the applicant has improved his financial circumstances to the extent that enables the applicant to participate in the credit market.[267] Furthermore, the applicant must prove that he has successfully attended a financial literacy programme.[268] After assessing the rehabilitation application and if the applicant complied with sections 88B(2) and 88B(3) of the 2019 National Credit Amendment Act, the NCR must refer the application for rehabilitation to the Tribunal.[269] However, if the NCR rejects the rehabilitation application, the applicant may apply directly to the Tribunal for the rehabilitation order.[270]

The Tribunal must notify all affected credit providers "of the date on which the application for rehabilitation will be considered" once the rehabilitation application has been referred to it.[271] When making an order for rehabilitation, the Tribunal must consider the rehabilitation application, any information submitted supporting the application, and submissions made by affected credit providers.[272]

Any limitation on the rights of the debt intervention applicant in terms of section 60 of the NCA is nullified once an order for rehabilitation has been granted.[273] The NCR

[265] S 88B(2) of the 2019 National Credit Amendment Act.
[266] S 87A(8) read with s 88B(2) of the 2019 National Credit Amendment Act.
[267] S 88B(3)(a) of the 2019 National Credit Amendment Act.
[268] S 88B(3)(b) of the 2019 National Credit Amendment Act.
[269] S 88B(4)(b) of the2019 National Credit Amendment Act.
[270] S 88B(5) of the 2019 National Credit Amendment Act. This once again assists in curbing arbitrary decisions that might be detrimental to applicant debtors.
[271] S 88B(6) of the 2019 National Credit Amendment Act.
[272] S 88B(7) of the 2019 National Credit Amendment Act. Less weight should be placed on any of the submissions by affected credit providers because creditors might potentially intentionally frustrate the rehabilitation of debtors.
[273] S 88B(8) of the 2019 National Credit Amendment Act.

must notify the applicant and serve a copy of the order to all credit providers listed in the rehabilitation application and every registered credit bureau.[274]

It appears that the debt intervention measure might alleviate the plight of marginalised debtors, especially NINA debtors, because of the measure's liberal access requirements.[275] This measure is a great improvement on the proposed pre-liquidation composition, because the latter[276] requires forced negotiations, which are doomed from the start. The debt intervention measure caters to the needs of NINA debtors with no income or assets and provides them with a discharge option through the extinguishment of debts. The discharge option for NINA debtors is in line with international principles, which favours the provision of discharge on one's repayment of his debts.[277] Lastly, it must be noted that the debt intervention measure may only be accessed by a debtor once. This is crucial because international guidelines argue that limiting the frequency of access to debt relief measures might assist in addressing moral hazard among debtors.[278]

4.6 Analysis

As indicated above, the primary legislation regulating the South African consumer debt relief system is an archaic early twentieth-century statute that has not kept up with the needs of an ever-changing modern society. The primary debt relief measure in South Africa is the sequestration procedure the Insolvency Act regulates. The sequestration procedure is necessary because it results in a discharge of pre-sequestration debts. However, this is not the aim of the Act. The primary debt relief measure has been criticised for being creditor-oriented, and this is, for instance, evidenced by the advantage for creditors requirement – the golden thread that runs throughout the Act.

In line with international guidelines and principles, the debt relief system also offers debtors an opportunity to obtain relief from indebtedness by utilising alternative relief measures, namely, the administration order procedure and the debt review procedure. These procedures are regulated by the Magistrates' Courts Act and the NCA,

[274] S 88B(9) of the 2019 National Credit Amendment Act.
[275] See Coetzee 2018 *THRHR* 17.
[276] See para 4.5.2.
[277] See ch 2 para 2.5.4.6.
[278] See ch 2 para 2.5.4.3.

respectively. These measures are mainly debt repayment plans that do not result in a discharge of debts and are not suited to the needs of NINA debtors.

The continued regulation of the administration order procedure by the Magistrates' Courts Act is not guaranteed because of the introduction of the draft Lower Courts Bill proposed on 29 April 2022 to repeal the Magistrates' Court Act.[279] The draft Lower Courts Bill seeks to make provisions for the establishment, composition and functioning of Lower Courts in South Africa. These comprise Regional Courts, District Courts and Municipal Courts.[280] It also seeks to make provision for the administration of the judicial functions of all Lower Courts within the country. Concerning the administration order procedure, the draft Lower Courts Bill's provisions do not depart from the provisions of the same measure currently regulated by the Magistrates' Court Act.[281] If implemented, the administration order procedure will continue being administered by the Magistrates' Court, specifically, the District Court.[282]

Both the current primary and secondary debt relief measures in South Africa marginalise NINA debtors because of the stringent access requirements of these measures. Therefore, no statutory protection is presently afforded to this marginalised category of debtors. In her evaluation, Coetzee[283] argues that this marginalisation of NINA debtors is potentially unconstitutional and pleads for reforming the debt relief system to accommodate all honest but unfortunate debtors, especially NINA debtors. The unconstitutionality of the Insolvency Act's regulation of the natural person debt relief system was first raised by Evans[284] who argued that:

> Although the [Insolvency] Act does not provide for different classes of debtors who are to be treated differently in accordance with differing or changing circumstances, it does differentiate between those 'rich debtors' who are able to prove advantage to creditors, and the 'poor

[279] See s 2(1)(a) of the draft Lower Courts Bill.
[280] Long Title of the draft Lower Courts Bill.
[281] See para 5 for a discussion of the Magistrates' Court Act's regulation of the administration order procedure. Also, see ss 74-74C of the Magistrates' Court Act read with ss 83-86 of the draft Lower Courts Bill.
[282] See s 83(1)(b) of the draft Lower Courts Bill. Also, see The DOJ & CD *Courts in South Africa* 2022 https://bit.ly/3y8TAFN (accessed 04 October 2022) for a discussion of the structure of courts in South Africa.
[283] See Coetzee *A comparative reappraisal* 11-25. Also, see ch 3 para 3.3.5 where it is submitted that the Zimbabwean natural person debt relief system excludes NINA debtors because of their dire financial situation and this is in contravention of the equality principle of the Constitution of Zimbabwe.
[284] See Evans 2002 *Int Insolv Rev* 34.

> debtors' who cannot.[285] This raises the question whether, under present legislation, the door has been opened for these 'poor debtors' to question the constitutionality of their position.

In her evaluation, Coetzee[286] weighs the lack of protection afforded to NINA debtors with the equality provision of the South African Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act.[287] To this end, the Equality Act defines equality as the:[288]

> [F]ull and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes.

Therefore, it is averred that excluding NINA debtors from accessing the natural person debt relief system is unfair discrimination of debtors that amounts to a violation of the equality principle of the Constitution and the Equality Act. In determining of the unfair discrimination of NINA debtors, Coetzee[289] utilises the test outlined in the seminal case of *Harksen v Lane*,[290] and she concludes that the prevailing statutory debt relief measures result in systemic and unfair discrimination based on NINA debtors' financial circumstances.

In addition to the criticism levelled against the potentially unconstitutional nature of the creditor-oriented South African natural person debt relief system, numerous researchers have continually criticised the fragmented approach to debt relief and argued for the introduction of unified legislation regulating the debt relief system.[291] This argument is rooted in regulating of the natural person debt relief system by three different statutes and further regulating the juristic person debt relief system by the

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[285] See Rochelle 1996 *TSAR* 319 where it is submitted that an over-committed natural person debtor in South Africa can be 'too broke to go bankrupt'.

[286] S 9 of the Constitution of the Republic of South Africa, 1996 (hereafter "the Constitution") provides that:

1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination
5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

[287] The Promotion of Equality and Prevention of Unfair Discrimination Act 52 of 2002 (hereafter "the Equality Act").

[288] S 1 of the Equality Act.

[289] See Coetzee *A comparative reappraisal* 229.

[290] *Harksen v Lane* 1998 (1) SA 300 (CC).

[291] See Rochelle 1996 *TSAR* 315.

Companies Act[292] and partly by the Close Corporations Act.[293] However, proposals to introduce a Unified Insolvency Act have already been put forward by the Law Commission through the 2000 Amendment Bill that was subsequently circulated as the 2015 Amendment Bill.

Additionally, fairly recently, the Law Commission released a discussion paper that seeks to tackle the challenges that debtors face regarding access to the administration order procedure and the debt review procedure.[294] The discussion paper proposes to tackle this challenge by proposing both short-term and long-term solutions to the problems that plague these processes. The short-term solution is reflected in the proposed two options in terms of the Magistrates' Courts Amendment Bill[295] while the long-term solution is encapsulated in the proposed Debt Rearrangement Bill.[296] The Law Commission holds that having multiple debt relief procedures is counterproductive. Therefore, the proposed Debt Rearrangement Bill proposes to merge the administration order and the debt review procedure.[297] Merging these debt restructuring procedures will be achieved by repealing the NCA and the Magistrates' Court Act that presently regulates these procedures. The proposed Debt Rearrangement Bill will introduce an improved debt review process that optimises best practice from the repealed procedures.[298]

The Law Commission, realising that the process of implementing the proposed Debt Rearrangement Bill might potentially take years to be finalised, proposes a two-stage approach to reform. The proposed Debt Rearrangement Bill is regarded as a long-term solution to the over-indebtedness crisis while either of the two proposed amendment options of the Magistrates' Courts Act must be implemented first as an immediate solution. The immediate solutions that the latter proposals advance are summarised as follows:[299]

- The Commission recommends that the threshold of R50 000 for administration order application be increased to R300 000. Increasing the limit to an amount of R300 000 would

[292] The Companies Act 61 of 1973.
[293] The Close Corporations Act 69 of 1984.
[294] See SALRC *Review of administration*.
[295] See SALRC *Review of administration* 310-345 and 346-378 for an indication of the draft Magistrates' Courts Amendment Bill (option 1) and the draft Magistrates' Courts Bill (option 2) respectively.
[296] See SALRC *Review of administration* 252-309.
[297] See SALRC *Review of administration* xvi.
[298] See SALRC *Review of administration* xv.
[299] See SALRC *Media statement* 2.

widen the scope of administration order as a debt relief measure to include those who qualify neither for sequestration nor for debt review.

- The Commission recommends that an administrator should determine whether any of the debtor's credit agreements appear to be reckless. Consequently, an administration order may include a declaration of reckless credit by the court that considered the application for an administration order. Furthermore, the [Magistrates Court Amendment] Bills entitle an administrator to an amount for the determination of reckless credit.
- The Commission is of the view that it is not cost-effective to establish a new regulatory body for a relatively small number of full-term administrators in South Africa. Therefore, the [Magistrates' Courts Amendment] Bills provide for a process in terms of which complaints against an administrator may be referred to the professional body of which the administrator is a member.
- The Magistrates' Courts Amendment Bill (option 1) removes the function of collecting and distributing payments from the administrator. However, this function remains with the administrator in terms of the Magistrates' Courts Amendment Bill (option 2).

If viewed independently, both the immediate and long-term reform initiatives by the Law Commission might promote inclusivity in South Africa's debt relief system by eliminating the obstacles that hinder some debtors from accessing the administration order procedure and/or the present review procedure. However, regrettably, these proposals will add to the much-criticised fragmentation crisis of the South African debt relief system. If implemented, the reform proposals will regulate the consumer insolvency regime along with the Insolvency Act and/or the 2015 Draft Insolvency Bill. To eradicate this fragmented approach, this study recommends the implementation of a coherent approach such as the one followed in the American bankruptcy system wherein the Bankruptcy Code regulates both the liquidation procedure and the debt repayment procedure.[300] A coordinated approach to debt relief reform may be fostered by mandating only a single government institution to spearhead the reform initiatives.[301]

The challenges that have continually been experienced in South Africa's natural person debt relief system have also been witnessed in Zimbabwe's consumer insolvency regime. These challenges are shared by these two jurisdictions, especially regarding the exclusion of NINA debtors, largely emanating from the shared colonial history that influenced the development of formal insolvency law in both countries.[302]

However, South Africa is presently undertaking measures to reform its debt relief system to shift from a pro-creditor exclusionary system to a modern, effective and inclusive system that accommodates the needs of all honest but unfortunate debtors.

[300] See ch 2 para 2.2. Also, see ch 3 para 3.3 regarding the consolidated approach to debt relief in Zimbabwe's debt relief system.
[301] The government institution may be the Department of Trade and Industry or the Department of Justice and Constitutional Development or a collaborative approach between the two departments.
[302] See ch 3 para 3.2.

These reform initiatives, which are not yet in operation, have appeared in the form of the proposed pre-liquidation composition[303] and the debt intervention measure.[304] Among the reform initiatives, the debt intervention measure is the most welcome initiative because it may likely provide a much-needed discharge opportunity for NINA debtors while the proposed pre-liquidation composition is unlikely to alleviate the plight of this marginalised debtor group.

The reform initiatives in the South African debt relief system have had a widespread impact that has influenced the development of Zimbabwe's debt relief system. This influence is observed in the continued initiatives by the Zimbabwean legislature to align its debt relief system with international trends, which regrettably has been limited to trends within South Africa. The latest influence has culminated in the introduction of an Insolvency Act [Chapter 6:07] that consolidates the consumer and corporate debt relief systems.[305] Following the country's repealed insolvency statutes, the recently introduced Insolvency Act largely borrows from the South African debt relief system. It can be seen in the pre- and post-liquidation composition measures introduced by the Act that were first proposed by the 2000 Draft Insolvency Bill and the introduction of a consolidated or Unified Insolvency Act. Although this reform initiative by the Zimbabwean legislature is welcomed because it attempts to align the debt relief system with international trends, it falls short of affording the much-needed protection to marginalised NINA debtors. This is largely because, in the international trends in insolvency which have continually influenced the development of Zimbabwe's insolvency regulation, these debtors also suffer from marginalisation. The system is yet to comprehensively afford protection to all honest but unfortunate debtors.

The criticism against the proposed pre- and post-liquidation composition measures in the South African debt relief system can thus *mutatis mutandis* be extended to the Zimbabwean debt relief system because the Zimbabwean legislature introduced the measures without any material changes or necessary domestication.[306] It may correctly be argued that the Zimbabwean legislature has continually embarked on a "copy and paste" exercise. It has failed to shed its colonial past and chart its path by affording assistance to the downtrodden populace doubly suffering from the effects of

[303] See para 4.5.2 for an evaluation of the proposed pre-liquidation composition.
[304] See para 4.5.3 for an evaluation of the debt intervention measure.
[305] See ch 3 para 3.3.
[306] See ch 3 paras 3.3.2.3 and 3.3.3.

woeful government policy-making and economic ruin owing to both natural disasters and global pandemics. These global pandemics include the Covid-19 pandemic that, has had an incomparably devastating impact on the global economy, especially, Zimbabwe's already ailing economy that did not recover from the impact of the 2007 - 2009 global financial crisis.[307] Therefore, despite the recent reforms in Zimbabwe's natural person debt relief system, further reforms are required to accommodate the marginalised NINA debtors. The Zimbabwean legislature must take lessons from the viable proactive steps that are being taken within the South African jurisdiction and other insolvency systems discussed in this study. Also, the Zimbabwean legislature incorporates these lessons to suit the specific needs of the consumers in Zimbabwe that would fit its unique socio-economic environment.

4.7 Conclusion

This chapter explored the regulation of the South African natural person debt relief system with a specific focus on NINA debtors. This regulation was juxtaposed with the corresponding regulation of such debtors in the Zimbabwe's natural person debt relief system, which shares a common legal and political history with South Africa. Exploration of the South African debt relief system mainly focused on the system's facilitation of access of NINA debtors to the statutory debt relief measures and the provision of a concomitant discharge of debts. This examination is against the background of the main guiding principles in insolvency highlighted in chapter two, namely, access for all honest but unfortunate debtors, concomitant discharge of debts, preference for out-of-court proceedings, preference for informal alternative proceedings, property exemptions, debtor counselling and a moratorium on debt enforcement. The first two guiding principles are revisited below in relation to NINA debtors within South Africa's debt relief.

In regards to the main theme of access to all honest but unfortunate debtors, this chapter indicated that South Africa's consumer insolvency regime facilitates access to debt relief through the sequestration procedure, the administration procedure and the debt review procedure.[308] Three different statutes regulate the three debt relief

[307] See ch 1 para 1.1 for an overview of the prevailing socio-economic situation in Zimbabwe.
[308] See para 4.1.

measures, and this fragmented approach has, over the years, been widely criticised. Also, the introduction of a Unified Insolvency Act has been proposed.[309] The sequestration procedure is the primary debt relief measure in South Africa, and this entails an asset liquidation process to enable the distribution of proceeds to creditors.[310] Both the administration order procedure and the debt review procedure envisage a debt rearrangement plan between a debtor and his creditors.[311]

To access the sequestration procedure a debtor must have the requisite non-exempt property that may be liquidated to facilitate the distribution of proceeds. At the same time, some form of excess income is required to access the secondary debt relief measures.[312] Consequently, the debt relief system excludes debtors with no disposable income and/or assets. These debtors mostly fall within the NINA category and presently lack any statutory protection because their financial circumstances prohibit them from accessing the primary and secondary debt relief measures. Because of this unfair discrimination of NINA debtors, which prevents them from accessing any formal debt relief measure, this study concludes that the South African natural person insolvency regime is potentially unconstitutional.[313] The present marginalisation of NINA debtors mainly emanates from the debt relief system's pro-creditor nature and, more specifically, the advantage for creditors requirement, which features throughout the Insolvency Act.[314] However, South Africa is in an active process of reform, and this may shift the debt relief system from a pro-creditor position into an effective and inclusive debt relief system that provides an opportunity to obtain relief from indebtedness to all honest but unfortunate debtors, especially, NINA debtors. This welcome reform initiative will be facilitated by the introduction of a debt intervention measure. Although a proposed pre-liquidation composition measure might be implemented in the future, this measure will not provide the benefit of affording a discharge opportunity to NINA debtors.

It has been highlighted throughout this study that international policies, principles and guidelines mandate that all debt relief systems ensure that they provide a discharge

[309] See para 4.6.
[310] See paras 4.2.1 and 4.2.2.
[311] See paras 4.3.2 and 4.3.3.
[312] See paras 4.2.2, 4.3.2 and 4.3.3.
[313] See pars 4.6.
[314] See para 4.2.2.3.

option for all honest but unfortunate debtors irrespective of their financial circumstances.[315] In relation to South Africa's natural person debt relief system, only the primary debt relief measure, namely, the sequestration procedure ensures a discharge of qualifying pre-sequestration debts as an end result of insolvency.[316] However, discharge is not the main aim of the Insolvency Act, but merely a consequence thereof.

To access the discharge, a debtor must first access the sequestration procedure. This excludes numerous categories of debtors, especially NINA debtors, because of the stringent access requirements of the procedure. However, in line with international guidelines, the discharge that the sequestration procedure provides is not unconditional and may not be extended to debt fraudulently attained.[317]

In summary, an evaluation of the current South African natural person debt relief system indicates that it is not in line with international policies, principles and guidelines in insolvency in so far as the system inhibits access and a discharge of debts to NINA debtors. Additionally, the prevailing debt relief system does not provide any viable informal alternative to debt relief or any out-of-court proceeding. International guidelines favour extra-judicial alternative measures to debt relief because they help limit the stigma, which is often encountered in developing countries such as South Africa and Zimbabwe.[318] Furthermore, when compared to judicial proceedings, extra-judicial debt relief proceedings are more flexible and less costly.

Consequently, this study indicates that the prevailing South African natural person debt relief system marginalises NINA debtors because of their financial circumstances because NINA debtors have neither the disposable income nor assets required to access any of the formal debt relief measures in South Africa. As a result, such marginalised NINA debtors cannot obtain a discharge of their debts. However, attempts have been made to reform the debt relief system to cater for NINA debtors and this is evidenced by the proposed introduction of the pre-liquidation composition and the debt intervention measure.[319]

[315] See ch 2 para 2.6.
[316] See paras 4.2.1, 4.2.2 and 4.2.4.
[317] See ch 2 paras 2.6 and 4.2.4.
[318] See ch 2 para 2.5.4.
[319] See paras 4.5.2 and 4.5.3.

The proposed pre-liquidation composition is essential because it may lead to a discharge of debts in certain instances.[320] However, criticism has been levelled against the proposed measure's prerequisite negotiation phase between a debtor and his creditors. This proposed negotiation phase is strenuous and it is not financially viable for NINA debtors, a group which the procedure seeks to regulate, because of their dire financial circumstances. As a result, the proposed pre-liquidation procedure has been widely dismissed before its formal introduction in the debt relief system.

On the other hand, the proposed debt intervention measure has been largely welcomed because it may cater for the needs of the NINA debtors.[321] This measure might likely meet the international principle of access because the provisions of the measure reflect open access for honest but unfortunate indigent debtors, specifically, NINA debtors. Additionally, the debt intervention measure will be administered by the NCR and the Tribunal, thus, it might satisfy the international guiding principle of out-of-court proceedings, which the South African debt relief system presently does not meet. Further, access to the measure will result in a discharge of qualifying debts for NINA debtors, thus, this measure will also meet the international guiding principle of discharge.

To sum up, South Africa's debt relief system offers numerous lessons for the reform of Zimbabwe's consumer insolvency system. This is especially important because strong traces of South African insolvency law continue to exist in the Zimbabwean natural person debt relief system. Therefore, the challenges experienced in South Africa's debt relief system are significant for the reform of Zimbabwe's insolvency regime. Furthermore, the initiatives undertaken within the South African jurisdiction to reform the system to an effective and inclusive debt relief system by proposing the introduction of the debt intervention measure are significant for the much-needed process of reform of Zimbabwe's personal insolvency regime.

[320] See para 4.5.2.
[321] See para 4.5.3.

CHAPTER 5

DEBT RELIEF MEASURES IN ENGLAND AND WALES, AND SCOTLAND

Summary

5.1 Introduction

It has been pointed out that both Zimbabwe and South Africa's consumer insolvency regimes have strong traces of English insolvency law owing to the colonial history that is largely shared by both countries.[1] However, these countries' debt relief systems have not developed along with the English law of insolvency to ensure the systems' inclusivity and effectiveness. Therefore, the choice of the comparative study of the consumer insolvency law in England and Wales is fundamental in examining how the law developed in the jurisdiction that influenced both Zimbabwe and South Africa's insolvency regimes. Furthermore, this chapter also primarily explores how the personal insolvency systems of England and Wales, and Scotland have proactively afforded comprehensive and non-discriminatory statutory protection to debtors with no income and no assets, the so-called No-Income-No-Asset (NINA) debtors during the Covid-19 pandemic.

The non-discrimination of debtors within the English and Welsh debt relief system has fairly recently been introduced through the Debt Relief Order in 2007[2] which largely borrows from New Zealand's No Asset Procedure.[3] In light of this reform, this chapter examines the inclusive and effective consumer insolvency regime of England and Wales to draw lessons that may be essential in reforming Zimbabwe's debt relief

[1] See ch 3 para 3.2 and ch 4 para 4.1.
[2] The Debt Relief Order (hereafter "the DRO"). The DRO was incorporated into the Insolvency Act 1986 through the Tribunals, Courts and Enforcement Act of 2007.
[3] See McKenzie Skene and Walters 2006 *Am Bankr LJ* 501; Ramsay 2020 *Int Insolv Rev* 7; Coetzee *A comparative reappraisal* 387. Also, see ss 361-377B of the (New Zealand) Insolvency Act 2006.

system into an inclusive and effective system that affords relief to all honest but unfortunate debtors.[4] Further, this chapter also examines the Scottish natural person debt relief system that was recently reformed as a result of the Covid-19 pandemic.[5] The Scottish, English and Welsh debt relief systems have thus been chosen because they offer comprehensive protection to the NINA debtor group by ensuring access to the debt relief system with the provision of a concomitant discharge of debts. A comparative analysis of the English debt relief system is significant because some of the leading international reports in insolvency that outline the policies, principles and guidelines in insolvency, which are central to this study, were based on an analysis of this debt relief system.[6]

In respect of England and Wales's natural person debt relief system, attention is directed towards the DRO because it makes specific provision for NINA debtors, a marginalised group within Zimbabwe's debt relief system that will foreseeably grow in number because of the economic turmoil in the country. As far as access to the DRO is concerned, this procedure does not discriminate against NINA debtors. It ensures access to NINA debtors by eradicating the stringent access requirements imposed on debtors by the traditional bankruptcy procedure. Consequently, the DRO is a viable debt relief measure for the NINA group that may lead to a release from indebtedness through the discharge option.[7] In respect of the discharge, NINA debtors are guaranteed an easily accessible discharge of most of the unsecured debts after a twelve-month moratorium by the DRO.

As regards the Scottish natural person debt relief system, the Scottish legislature ensured extensive statutory protection of the NINA category by introducing a slightly modified DRO procedure. The Low Income Low Asset bankruptcy procedure was introduced in 2007 and subsequently replaced by the Minimal Asset Process (MAP) in 2015.[8] The MAP makes specific provision for the needs of NINA debtors by providing a low-cost and less cumbersome pathway to debt relief to this group of debtors and a concomitant discharge of qualifying unsecured debts. In addition to the

[4] See ch 3 para 3.3 for a discussion of the exclusive nature of the Zimbabwean debt relief system that presently does not offer access or a discharge option to all honest but unfortunate debtors.
[5] See Part 5 of the Coronavirus (Scotland) (No.2) Act 2020.
[6] See ch 2 para 2.3.
[7] See Ramsay 2020 *Int Insolv Rev* 6.
[8] See s 2(2) and schedule 1 of the Bankruptcy (Scotland) Act 2016. The Minimal Asset Process (hereafter "the MAP").

protection this system affords to NINA debtors, this jurisdiction has been specifically chosen because of how the Scottish legislature has proactively managed to provide continued comprehensive protection to indigent debtors by reforming the procedure's eligibility criteria to accommodate debtors who the Covid-19 pandemic has adversely impacted. An analysis of this reform is significant because it provides lessons for the reform of Zimbabwe's debt relief system that presently marginalises NINA debtors who had barely recovered from the 2007 - 2009 global financial crisis and are in worse financial circumstances because of the Covid-19 pandemic.[9]

In achieving the above objective, this chapter utilises the following structure. Paragraph one contains the chapter's introduction and briefly indicates why this comparative analysis is undertaken. Paragraph two outlines how colonialism led to the inception of formal English insolvency law in both Zimbabwe and South Africa.[10] The discussion in this paragraph also provides a holistic description of England and Wales's consumer debt relief system, and this analysis also weighs the personal insolvency regulation within this system against the internationally regarded policies, principles and guidelines discussed in chapter two. An evaluation of the Scottish debt relief system is undertaken in paragraph three. This evaluation mostly focuses on the system's provision of access and a concomitant discharge of debts to NINA debtors. An analysis of the Scottish, English and Welsh debt relief systems in paragraphs two and three is important because it provides necessary recommendations for the reform measures that may be implemented in Zimbabwe's debt relief system to ensure the system's inclusivity and effectiveness. Lastly, a conclusion of this chapter is provided in paragraph four.

[9] See ch 1 para 1.1.

[10] The South African debt relief system continues to be evaluated because it played a pivotal role in the colonial history of Zimbabwe, hereby influencing the statutory insolvency regulation within the jurisdiction.

5.2 Debt relief system of England and Wales

5.2.1 Historical overview

Calitz[11] correctly submits that the South African insolvency law is neither pure Roman-Dutch law nor pure English law; however, it is deeply rooted in English law. The inception of English insolvency law in South Africa can be traced to 1795 when the British occupied the Cape of Good Hope and seized it from the French after the territory had become a French vassal during the Napoleonic Wars.[12] The British ruled the Cape Colony from 1795 and temporarily relinquished control of the territory in 1803 but readministered it again from 19 January 1806 after the Battle of Blaauwberg until 1910 when the formation of the Union of South Africa took place.[13]

The period of British conquest resulted in the reform of Roman-Dutch law, specifically, in the areas of company law, insolvency and negotiable instruments by infusing the law with English law principles.[14] The re-annexation of the Cape of Good Hope by the Dutch between 1803 and 1806 did not extensively affect the English insolvency law that had been ushered in by the British during their occupation of this territory.[15] As a result, the prevailing South African insolvency law has strong elements of both Roman-Dutch law and English law because insolvency regulatory principles largely developed from the law that was implemented at the Cape of Good Hope by both Dutch and English explorers. This infused English-Roman-Dutch insolvency law is significant in this study because it was subsequently introduced in Zimbabwe after its annexation by British settlers in 1890.[16] This law is the basis of the present insolvency law in Zimbabwe. At present, the Constitution of the Republic of Zimbabwe continues to acknowledge and prescribe the recognition and application of this law, in its changed form.[17]

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[11] See Calitz 2010 *Fundamina* 3. Also, see Coetzee *A comparative reappraisal* 355; Roestoff *'n Kritiese evaluasie* 8; Evans *A critical analysis* 13; Steyn *Statutory regulation* 451; Maghembe *A proposed discharge* 114-115.
[12] See Wilmot and Chase *History of the Cape of Good Hope* 202-203.
[13] See De Villiers *Die Ou-Hollandse insolvensiereg* 77 as referred to by Calitz 2010 *Fundamina* 19.
[14] Lubbe "Three aspects of South African law" 209. Also, see Smith *The law of insolvency* 8 where it is submitted that the influence of English common law on the early development of insolvency in the Cape Colony is often omitted.
[15] See Calitz 2010 *Fundamina* 19 and all references there.
[16] See ch 3 para 3.2.1.
[17] Ch 3 para 3.2.1.

English insolvency law can be traced to medieval England and it is widely held that it was founded on Roman law that had been derived from Italian law. Consequently, early English law recognised the *cessio bonorum*, *distractio bonorum*, *remissio* and *dilatio*.[18] It is also widely held that the first statute that introduced attachment in English law is the Statute of Marlbridge of 1267.[19] This early statute regulated the attachment of the person and it permitted a debtor's imprisonment. Thereafter, numerous statutes, such as the Act of Burnell of 1283/5 and the Statute of Merchants of 1285 were enacted, and these statutes permitted the imprisonment of overcommitted debtors for non-payment of debts. Imprisonment of non-paying debtors was the general law in England for over five centuries until it was eventually outlawed by the Debtors Act of 1869. However, before the enactment of the Debtors Act of 1869, English law had already recognised the attachment of a debtor's property. 188his was first regulated by the Statute of Westminster II of 1285.[20]

It is accepted that the first bankruptcy statute in England is the Act of Parliament, which was introduced in 1545 by Henry VIII.[21] This statute introduced compulsory sequestration that applied to all dishonest and absconding debtors.[22] Thereafter, the first true bankruptcy statute was introduced in 1571; namely, the Act of Elizabeth, which was introduced during the reign of Queen Elizabeth I. Burdette[23] states that the 1545 statute also regulated the appointment of commissioners by the Lord Chancellor once an application by a creditor was received. Their task was to determine if a debtor had acted fraudulently towards any fraudulent act towards creditors. Of major significance is the statute's introduction of the concept of equal distribution of the debtor's assets among creditors.[24] After the introduction of the Act of Elizabeth, English insolvency law underwent an extensive process of reform that culminated in the introduction of the Act of 1732. The latter was replaced by the Act of 1842 and subsequently by the Bankruptcy Act 1883.[25]

[18] See Fletcher *The law of insolvency* 7-9.
[19] Statute of Marlbridge 1267 (52 Hen III c 23).
[20] See Dalhuisen *International insolvency* para 2.02[8].
[21] Dalhuisen *International insolvency* para 2.02[8].
[22] See Dalhuisen *International insolvency* para 2.02[8] 1-41.
[23] See Burdette *Framework for corporate insolvency* 29.
[24] See Dalhuisen *International insolvency* para 2.02[8] 1-42.
[25] This statute forms the basis of modern English insolvency law.

In 1977 the Cork committee was commissioned to conduct the first study of the United Kingdom's insolvency law and practice.[26] The committee published the non-prescriptive *Cork Report* in 1982, containing suggestions on how best to deal with insolvency within this jurisdiction.[27] The *Cork Report* was only given attention after a series of financial scandals, and this culminated in the reform of the English insolvency law that resulted in the introduction of the Insolvency Acts of 1985 and 1986.[28]

However, the English debt relief system had already recognised the significance of affording relief from indebtedness to debtors before the establishment of the Cork committee. A right to an automatic discharge was first introduced in English law in 1976 by the Insolvency Act 1976, which afforded debtors an opportunity to obtain relief from indebtedness after a period of five years had elapsed since the commencement of bankruptcy proceedings.[29] This period was then changed to three years by the Insolvency Act 1986[30] and later to twelve months by the Enterprise Act of 2002.[31] In respect of the latter statute, Walters summarises the major reforms it introduced as including:[32]

> (i) the reduction in the duration of bankruptcy, (ii) the lifting of statutory restrictions and disabilities hitherto imposed on undischarged bankrupts, (iii) the new regime of post-discharge restrictions for so-called "culpable" bankrupts, (iv) the introduction of a "fast-track" post-bankruptcy individual voluntary arrangement procedure supervised by the official receiver.

Currently, the Insolvency Act provides for the bankruptcy procedure[33] and two formal statutory[34] alternative debt relief measures, namely, the individual voluntary arrangements[35] and the DRO.[36] In addition to these formal statutory alternative debt relief measures, debtors may also access the administration order procedure.[37] Therefore, apart from the administration order procedure, the Insolvency Act regulates

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[26] The *Report of the review committee on insolvency law and practice* (hereafter "the *Cork Report*"). Also, see ch 2 para 2.3.
[27] See ch 2 para 2.3.
[28] See Fletcher *The law of insolvency* 19.
[29] See ss 7 and 8 of the Bankruptcy Act 1976.
[30] The Insolvency Act 1986 (hereafter "the Insolvency Act").
[31] See s 279 of the Enterprise Act of 2002. This reform was arguably motivated by the fresh start philosophy that emerged from the United States of America's bankruptcy system. See Coetzee *A comparative reappraisal* 357. Also, see ch 2 para 2.2 for a discussion of the fresh start philosophy.
[32] See Walters 2005 *Journ of Corporate Law Studies* 65.
[33] See pt 9 of the second group of parts of the Insolvency Act.
[34] Debtors may also conclude informal agreements with their creditors. See Coetzee *A comparative reappraisal* ch 7 para 7.1.
[35] See pt 8 of the second group of parts of the Insolvency Act.
[36] See pt 7A of the second group of parts of the Insolvency Act.
[37] See ss 112-117 of the County Court Administration Act 1984.

most of the bankruptcy issues within England and Wales, including both natural person and corporate insolvency.[38] The bankruptcy and the formal statutory alternative debt relief measures are discussed below.

However, it is predicted that major reforms will be implemented in the English and Welsh natural person debt relief system in the near future. This follows the call for evidence between 5 July 2022 and 24 October 2022 in this jurisdiction that seeks to review the DRO, bankruptcy procedure and individual voluntary arrangements.[39]

5.2.2 Bankruptcy

5.2.2.1 Access to the measure

An overcommitted debtor may access the bankruptcy measure through his own volition or an application by a hostile creditor. In the main, the bankruptcy measure relates to a court-based process for the liquidation of a debtor's non-exempt assets,[40] and it seeks to balance the interests of a debtor and his creditors.[41] This balancing of creditor and debtor interests is in line with internationally regarded policies, principles, and guidelines advanced in leading reports such as the *Cork Report*.[42]

A bankruptcy order may be made by the High Court or a County Court following a bankruptcy application.[43] It must be noted at the onset that the English and Welsh

[38] This is similar to the Zimbabwean debt relief system that regulates both the corporate and natural person insolvency through the Insolvency Act 7 of 2018 (see ch 3 para 3.3).
[39] See The Insolvency Service *Call for evidence*.
[40] In terms of ss 283(2), 283(3) and 308(1) of the Insolvency Act the following property is specifically excluded from the bankrupt's estate:

i. Such tools, books, vehicles and other equipment as are necessary to the bankrupt for personal use by him in his employment, business or vocation (subject to the trustee's right to replace any of these items at a lower cost if this is reasonable),
ii. Such clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the bankrupt and his family,
iii. Property held by the bankrupt on trust for any other person,
iv. Student loan made to the bankrupt before or after the date of the bankruptcy order, and
v. Certain state benefits are also excluded from the bankrupt's estate by virtue of the provisions of other statutes.

England and Wales's exemption provision is advanced and favoured over Zimbabwe's exemption provision in so far as it does not prescribe non-viable value thresholds that are not relative to the currency valuation (see ch 3 para 3.3.2).
[41] See McKenzie Skene and Walters 2006 *AM Bankr LJ* 481.
[42] See ch 2 para 2.3. This is in contrast to the Zimbabwean liquidation measure that protects the interests of creditors at the expense of debtors through creditor-oriented principles such as the advantage to creditors requirement (see ch 3 para 3.3).
[43] This procedure is largely administrative and there is rarely any need for a full hearing in the case of a debtor's application.

bankruptcy system does not provide for an automatic general moratorium. Therefore, creditors may proceed with individual enforcement and execution proceedings despite a bankruptcy application. However, the court has the discretion to stay any action, execution or other legal processes against the property or person of the debtor.[44]

Debtor-initiated applications may be filed with the court, and the application must be accompanied by a debtor's statement of affairs.[45] The only eligibility requirement to file this application is the debtor's inability to pay his debts.[46] An inability to pay debts is also fundamental in voluntary applications within the Zimbabwean debt relief system, and this is a novel feature that was introduced in 2018 and replaced the archaic "acts of insolvency" requirement.[47] Notably, the English and Welsh bankruptcy system does not impose any pre-petition obligations on debtors and they are not required to notify creditors of the impending bankruptcy application.[48]

Despite the measure being relatively easy to access, a court may not make a bankruptcy order if it appears that:[49]

(a) if a bankruptcy order were made the aggregate amount of the bankruptcy, so far as unsecured, would be less than the small bankruptcies level,
(b) if a bankruptcy order were made, the value of the bankruptcy's estate would be equal to or more than the minimum amount,
(c) within the period of 5 years ending with the presentation of the petition the debtors has neither been adjudged bankrupt nor made a composition with his creditors in satisfaction of his debts or a scheme of arrangement of his affairs.

The above test is intended to channel appropriate cases to the individual voluntary arrangement procedure.[50] An inquiry into the debtor's affairs may be made by an insolvency practitioner[51] appointed in terms of section 273 of the Insolvency Act, and the insolvency practitioner must submit a report to the court indicating whether the

[44] S 285(1) of the Insolvency Act.
[45] Ss 272(1) and 272(2) of the Insolvency Act. The statement of affairs must contain particulars of: the debtor's creditors, of his debts, other liabilities, of his assets as may be prescribed, and such other information as may be prescribed.
[46] S 272(1) of the Insolvency Act. See Walters and Smith 2010 *Int Insolv Rev* 191.
[47] See ch 3 para 3.3.2.1.
[48] See Walters and Smith 2010 *Int Insolv Rev* 192.
[49] S 273(1) of the Insolvency Act.
[50] S 274(1) of the Insolvency Act. See para 5.2.3.1 for a discussion of the individual voluntary arrangements in the English and Welsh debt relief system.
[51] In addition to the delay in judicial proceedings, one of the major concerns is the inability of courts to understand insolvency matters because the design of courts require them to deliberate on adversarial legal disputes which are very rare in insolvency disputes (ch 2 para 2.5.4.2). Therefore, the use of insolvency practitioners within the formal bankruptcy procedure is crucial because it may eradicate this concern thereby ensuring that all insolvency matters are comprehensively attended to by an institution that is well equipped to handle such matters. This is in contrast to Zimbabwe's judicial liquidation procedure (ch 3 para 3.3).

applicant is willing to propose a voluntary arrangement.[52] The insolvency practitioner must also indicate whether a meeting of the debtor's creditors should be summoned to consider the proposals. If so, he must indicate the date, time and place at which he proposes the meeting should be held.[53] If the insolvency practitioner's report proposes a meeting of the debtor's creditors, the practitioner must summon that meeting for the time, date and place proposed in his report. Thereafter, the meeting is deemed to have been summoned under sections 257, 257(2) and 257(3) of the Insolvency Act. Sections 258-263, which set out the procedural aspects of the individual voluntary arrangements, will apply. The court may make an interim order under section 252 of the Insolvency Act to facilitate the consideration and implementation of the debtor's proposal, or alternatively, make a bankruptcy order.[54]

A court may not make a bankruptcy order in instances where the debtor has been granted an individual voluntary arrangement order except if it is satisfied: that the debtor has failed to comply with his obligations under the voluntary arrangement,[55] that misleading information or materially false statements or omissions were contained in the statement of affairs or other documents or were otherwise made available to creditors at or in relation to a meeting summoned,[56] or that the debtor has failed to do all that was reasonably required of him by the supervisor.[57]

As indicated above, debtors may be forced to access the bankruptcy system through an application by a hostile creditor.[58] Creditor applications are the most common.[59] The application must relate to a debt owed by the debtor and the creditor-applicant must be the person to whom the debt is owed.[60] However, the creditor may only present the application to the court if at the time the petition is presented:[61]

(a) the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds the bankruptcy level,
(b) the debt, or each of the debts, is for a liquidated sum payable to the petitioning creditor, or one or more of the petitioning creditors, either immediately or at some certain, future time, and is unsecured,

[52] S 274(1) of the Insolvency Act.
[53] S 274(2) of the Insolvency Act.
[54] S 274(3) of the Insolvency Act.
[55] S 276(1)(a) of the Insolvency Act.
[56] S 276(1)(b)(i)-(ii) of the Insolvency Act.
[57] S 276(1)(c) of the Insolvency Act.
[58] S 267(1) of the Insolvency Act.
[59] See Fletcher *The law of insolvency* 102.
[60] S 267(1) of the Insolvency Act. The application may be made by creditors jointly.
[61] S 267(2)(a)-(d) of the Insolvency Act.

(c) the debt, or each of the debts, is a debt which the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay, and
(d) there is no outstanding application to set aside a statutory demand[62] served in respect of the debt or any of the debts.

The Insolvency Act further adds that a debtor appears to have no reasonable prospect of being able to pay a debt if the debt is not immediately payable and:[63]

(a) the petitioning creditor to whom it is owed has served on the debtor a demand (also known as "the statutory demand") in the prescribed form requiring him to establish to the satisfaction of the creditor that there is a reasonable prospect that the debtor will be able to pay the debt when it falls due,
(b) at least three weeks have elapsed since the demand was served, and
(c) the demand has been neither complied with nor set aside in accordance with the rules.

The court may not make a bankruptcy order unless it is satisfied with one of two things:[64] First, that the debt which, having been payable at the date of the petition or having since become payable, has been neither paid nor secured or compounded for[65] and secondly, that the debtor has no reasonable prospect of being able to pay the debt, to which the application relates when it falls due.[66] Therefore, an inability to pay one's debts when they fall due is essential and the court may dismiss the bankruptcy application if it is satisfied that the debtor is able to pay all his debts, or is satisfied that:[67]

(a) the debtor has made an offer to secure or compound for a debt in respect of which the petition is presented,
(b) that the acceptance of that offer would have required the dismissal of the petition, and
(c) that the offer has been unreasonably refused.

The consequences of a bankruptcy order are similar for both the compulsory and voluntary application and the same general procedure follows. The bankruptcy order places a duty on the bankrupt individual to deliver possession of his estate to the official receiver and to deliver to the official receiver all books, papers and other records of which he has possession or control and which relate to his estate and affairs.[68]

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[62] See Fletcher *The law of insolvency* 134 where it is submitted that the statutory demand was introduced on recommendation of the *Cork Report*. Statutory demand replaced the "acts of insolvency" requirement in English law and it has simplified this area of law.
[63] S 268(2) of the Insolvency Act.
[64] S 271(1) of the Insolvency Act.
[65] S 271(1)(a) of the Insolvency Act.
[66] S 271(1(b) of the Insolvency Act.
[67] See s 271(3) of the Insolvency Act. In determining for the purposes of this subsection whether the debtor is able to pay all his debts, the court shall consider his contingent and prospective liabilities.
[68] Ss 291(1)(a)-(b) of the Insolvency Act.

5.2.2.2 Discharge

Once a bankruptcy order has been granted, the bankruptcy will immediately commence from the day on which the order is made and continues until the individual is discharged.[69] Therefore, to end the bankruptcy process, a debtor must be discharged from his debts and may automatically access the discharge after one year has lapsed.[70] This period is in line with international principles and guidelines because it ensures that debtors are not trapped within the debt relief system for a long time and should obtain a discharge of debts in the not-too-distant future.[71] This short period before being able to access discharge is in stark contrast to the position in the Zimbabwean insolvency system, where debtors who have accessed the liquidation procedure may only obtain an automatic discharge of debts ten years after the date of liquidation.[72]

Discharge is essential because it removes all prohibitions and disqualifications relating to bankruptcy[73] and releases the debtor from qualifying unsecured debts.[74] However, the discharge is not unconditional because it does not release the debtor from bankruptcy debt which he incurred in respect of any fraud or fraudulent breach of trust to which he was a party.[75] Further, discharge does not release the bankrupt from any liability in respect of a fine imposed for an offence or from any liability under a recognisance; except, in the case of a penalty imposed for an offence under an enactment relating to the public revenue or of a recognisance, with the consent of the Treasury.[76]

[69] S 278 of the Insolvency Act.
[70] See s 279(1) of the Insolvency Act. However, the Insolvency Act also accommodates court granted discharge orders for individuals who are excluded from automatic discharge by section 264(1)(d).
[71] See ch 2 paras 2.4.1.2 and 2.5.4.6.
[72] See ch 3 para 3.3.4.
[73] See McKenzie Skene and Walters 2006 *Am Bankr LJ* 482; Walters and Smith 2010 *Int Insolv Rev* 191.
[74] S 281(1) of the Insolvency Act.
[75] S 281(3) of the Insolvency Act.
[76] S 281(4) of the Insolvency Act.

5.2.3 Statutory alternative debt relief measures

5.2.3.1 Individual voluntary arrangements

In addition to the primary debt relief measure, an overcommitted debtor seeking relief from indebtedness may also alternatively access the individual voluntary arrangement measure. This procedure refers to a statutory agreement between a debtor and his creditors for the settlement of his debts.[77] The individual voluntary arrangement is a viable alternative debt relief measure that may afford an earned fresh start to debtors, as an extension of insolvency procedures. Regarding the general outline of the individual voluntary arrangement, the Insolvency Act divides the procedure into two parts; the first part regulates the interim order of the court[78] while the second part regulates the final order of the court.[79]

Access to the measure, in the form of an interim order, may be initiated by an application to the court by a debtor who intends to make a proposal to his creditors for a composition in satisfaction of his debts or a scheme of arrangement of his affairs.[80] Because the voluntary agreement procedure envisages a debt settlement between a debtor and his creditors, and because it may be accessed where a debtor has already been granted a bankruptcy order, it is comparable to Zimbabwe's post-liquidation composition measure.[81] Furthermore, as the name denotes, the voluntary agreement procedure is voluntary in nature, and it may not be imposed upon the debtor or his creditors because it is a contractual agreement between parties.

As for NINA debtors, this measure is out of reach of this indigent group because a debtor must have some form of disposable assets and/or income to access the measure.[82] Furthermore, this procedure requires debtors to rely on insolvency practitioners, and such debtors cannot afford the fees of these insolvency practitioners. Consequently, NINA debtors who neither have any disposable assets nor income are unable to access this measure because of their strained financial circumstances.

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[77] See Spooner *Personal insolvency law* 90.
[78] See ss 252-257 of the Insolvency Act.
[79] See ss 258-263 of the Insolvency Act.
[80] S 253(1) of the Insolvency Act.
[81] See ch 3 paras 3.3.2.3 and 3.3.3.
[82] See McKenzie Skene and Walters 2006 *Am Bankr LJ* 484.

However, this measure is very important to debtors with the requisite disposable income and/or assets, who meet the measure's access requirements because it may assist the debtor in avoiding the cumbersome prohibitions of the bankruptcy procedure.[83] As pointed out above, access to this measure may be initiated by a debtor. The Insolvency Act mandates that a proposal for a voluntary agreement nominate a person to act as trustee in relation to the voluntary agreement to supervise its implementation.[84] The nominated person must be a person who is qualified to act as an insolvency practitioner or authorised to act as a nominee as regards the voluntary agreement.[85]

It must be noted that both the application stage and the granting of the interim order have binding consequences on the debtor and third parties who are in a contractual relationship with him. While the application is pending no landlord or any other person whose rent is payable, may exercise any right of forfeiture by peaceable re-entry in relation to premises let to the debtor in respect of a failure by the debtor to comply with any term or condition of his tenancy of such premises.[86] Furthermore, the court may forbid the levying of any distress on the debtor's property or its subsequent sale and stay any action, execution or other legal processes against the property or person of the debtor.[87] Notably, the court has, during the application stage, a discretion to institute a moratorium on debt enforcement, while an automatic moratorium comes into force once an interim order has been made.[88]

During the application stage, the court may, according to its discretion, determine whether an interim order should be made.[89] A court may only make an interim order if it is satisfied that:[90]

(a) the debtor intends to make proposal;
(b) on the day of the making of the application the debtor was an undischarged bankrupt or was able to make a bankruptcy application;
(c) no previous application has been made by the debtor for an interim order in the period of 12 months ending with that day; and
(d) the nominee under the debtor's proposal is willing to act in relation to the proposal.

[83] See Walters 2009 *Int Insolv Rev* 17.
[84] S 253(2) of the Insolvency Act.
[85] See s 253(2) of the Insolvency Act.
[86] See s 254(1)(a) of the Insolvency Act.
[87] See s 254(1)(b) of the Insolvency Act.
[88] See s 255 of the Insolvency Act.
[89] See Fletcher *The law of insolvency* 57 where it is submitted that the main factor of consideration for the court is whether the proposal is serious and viable.
[90] S 255(1) of the Insolvency Act.

If the above factors are met, the court to which the application is directed may duly grant an interim order if it thinks that it would be appropriate to do so to facilitate the consideration and implementation of the debtor's proposal.[91] The interim order is only effective for 14 days beginning on the day after the making of the order.[92] However, before the 14 days have lapsed, the nominee is expected to submit a report to the court indicating whether, in his opinion, the voluntary arrangement order that the debtor seeks, has a reasonable prospect of success and whether, in his opinion, the debtor's creditors should consider the debtor's proposal.[93] If the nominee is of the opinion that the debtor's proposal is acceptable to creditors then the court shall direct the extension of the 14 days, for such further period as it may specify in the direction, to enable the debtor's proposal to be considered by his creditors.[94]

Coetzee[95] argues that the application stage of the interim order and the moratorium is expensive, and the costs are cumbersome for debtors. Due to the prohibitive costs associated with the interim order, the legislature introduced greater flexibility by reforming the procedure to enable debtors propose for a voluntary agreement order without first applying for an interim order.[96] Thus, the debtor who intends to make a proposal but has not applied for an interim order must be an undischarged bankrupt and must have given notice of the proposal to the official receiver and, if there is one, the trustee of his estate.[97]

To facilitate access to this order, the undischarged bankrupt must submit to the nominee a document setting out the terms of the voluntary arrangement which the debtor is proposing, along with a statement of his affairs.[98] Thereafter, the nominee shall, if he is of the opinion that the debtor is an undischarged bankrupt or can make a bankruptcy application, report to the debtor's creditors within fourteen days[99] stating

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[91] S 255(2) of the Insolvency Act.
[92] S 255(6) of the Insolvency Act. The fourteen-day period may be extended by the court at the request of the debtor or nominee (ss 256(3A) and 256(4) of the Insolvency Act).
[93] S 256(1) of the Insolvency Act.
[94] See s 256(5) of the Insolvency Act. However, the court has a discretion, upon consideration of the proposal, to discharge the interim order if it deems necessary (s 256(6) of the Insolvency Act).
[95] See Coetzee *A comparative reappraisal* 382.
[96] See s 256A(1) of the Insolvency Act.
[97] S 256A(1) of the Insolvency Act.
[98] S 256A(2) of the Insolvency Act. The statement of affairs must contain particulars of his creditors and of his debts and other liabilities and of his assets as may be prescribed, and such other information as may be prescribed.
[99] This period may be extended by the court on application of either the nominee or the debtor (ss 256A(4) and 256A(5) of the Insolvency Act).

whether, in his opinion, the voluntary agreement sought has a reasonable prospect of being approved and implemented and whether in his opinion the debtor's creditors should consider the debtor's proposal.

Where the nominee has recommended in his report that the creditors should consider the debtor's proposal, the nominee must take necessary steps to seek a decision from such creditors as to whether they approve the proposed voluntary arrangement[100] through a creditors' decision procedure.[101] Thereafter, the creditors may approve the proposed voluntary agreement with or without modifications.[102] The debtor must consent to any modification before approval, and such modifications may not affect the right of secured creditors of the debtor to enforce their individual security.[103] The creditors may not approve any proposal or modification under which:

(a) any preferential debt of the debtor is to be paid otherwise than in priority to such of his debts as are not preferential debts,
(aa) any ordinary preferential debt of the debtor is to be paid otherwise than in priority to any secondary preferential debts that the debtor may have,
(b) a preferential creditor of the debtor is to be paid an amount in respect of a secondary preferential debt that bears to that debt a smaller proportion than is borne to another secondary preferential debt by the amount that is to be paid in respect of that other debt, or
(c) if the debtor is a relevant financial institution, any non-preferential debt is to be paid otherwise than in accordance with the rules in section 328(3A) [of the Insolvency Act].

After the decision by the debtor's creditors regarding the proposal, the nominee must give notice of the decision to such persons as may be prescribed and to the court.[104] Suppose the creditors reject the proposal and the nominee so indicates in his report to the court. In that case, the court has the discretion to discharge any interim order that is in force in relation to the debtor.[105] However, if the debtor's creditors accept the proposal and the nominee so indicates in his report to the court, the approved arrangement takes effect as if it was made by the debtor at the time the creditors decided to approve the proposal. It is binding on every person who in accordance with the rules was entitled to vote in the creditors' decision by which the decision to approve

[100] S 257(1)-(2) of the Insolvency Act.
[101] S 257(2A) of the Insolvency Act. For this purpose, the Insolvency Act regards the creditors of a debtor who is an undischarged bankrupt to include every person who is a creditor of the bankrupt in respect of a bankruptcy debt and every person who would be such a creditor if the bankruptcy had commenced on the date on which notice of the creditors' decision is given (s 257(3)(a)-(b) of the Insolvency Act).
[102] S 258(2) of the Insolvency Act.
[103] S 258(4) read with s 258(2) of the Insolvency Act.
[104] S 259(1) of the Insolvency Act.
[105] S 259(2) of the Insolvency Act.

the proposal was made or would have been so entitled if he had had notice of it as if he were a party to the arrangement.[106]

Although the voluntary arrangement order is a viable alternative debt relief measure within the English and Welsh insolvency system, it is not suited to the needs of NINA debtors. This is chiefly because of the costs of the procedure that are beyond the reach of indigent NINA debtors. Furthermore, this procedure is voluntary in nature; thus, it is highly improbable that creditors may accept any proposal by a NINA debtor who has little to no disposable income to meet his obligations. Lastly, the voluntary agreement order entails a repayment plan that seeks to provide relief to debtors who have an income that may be utilised to meet their restructured obligations. As such, NINA debtors who are in a dire financial position can obtain neither access nor relief from indebtedness through this measure because they lack the requisite income to meet their obligations.

5.2.3.2 The administration orders

As pointed out above, the English law administration order procedure influenced the introduction of the administration order procedure in the South African debt relief system.[107] However, although South Africa and Zimbabwe's debt relief systems developed similarly because of a shared colonial history influenced by both English and Dutch influence,[108] the administration order procedure was never implemented in Zimbabwe's debt relief system.[109]

As with the South African administration order procedure[110] the English measure is also not suited to the needs of NINA debtors. Despite the administration order procedure's lack of protection for NINA debtors, they were previously, before the inception of the DRO, forced to no avail to seek relief from indebtedness through this measure.[111] The English and Welsh administration order procedure is regulated in terms of part 6 of the County Courts Act.[112] This is a court-based measure that may

[106] See s 260(2) of the Insolvency Act.
[107] See ch 4 para 4.3.3. Also, see Boraine 2003 *De Jure* 219.
[108] See para 4.1 and ch 3 para 3.2.
[109] See ch 3 para 3.2.3.2.
[110] See ch 4 para 4.3.3.
[111] See McKenzie Skene and Walters 2006 *Am Bankr LJ* 501.
[112] The Country Courts Administration Act 1984.

be utilised by a debtor who cannot pay the amount of a judgment debt obtained against him, provided that the debt does not exceed the GBP5 000 threshold.[113]

The administration order procedure may be initiated by a debtor who makes an application to the County Court. Thereafter, the application will be considered by an officer who determines whether the applicant has sufficient means to fully service the debts within a reasonable timeframe. If the officer is satisfied, he must set the amount and frequency of payments and notify the debtor and creditors listed in the application.[114] Barring an objection by any of the debtor's creditors, the County Court may thereafter grant an order of administration which effectively imposes a moratorium on debt enforcement. No further interest may henceforth be charged on the debt.[115] Although the administration order procedure is a streamlined alternative measure to the bankruptcy procedure, it is not suited to the needs of NINA debtors because they are incapable of making the necessary debt repayments. Consequently, NINA debtors cannot obtain relief from indebtedness through the administration order procedure.

5.2.3.3 The debt relief order

The discussion above has observed that NINA debtors within the English and Welsh debt relief system are incapable of obtaining relief from indebtedness through the bankruptcy measure. They are equally incapable of accessing both the individual voluntary arrangement orders and the administration orders because of their financial circumstances. Because of this marginalisation, NINA debtors in the English and Welsh debt relief systems were until fairly recently left without protection because of the stringent access requirements of the debt relief measures that usually require a debtor to have disposable income to facilitate repayment and/or disposable assets that can be liquidated in terms of the bankruptcy process.

In response to this marginalisation and inspired by international trends in insolvency, the legislature reformed the consumer debt relief system by introducing the DRO procedure in 2007. The DRO procedure specifically provides comprehensive

[113] S 112(1) of the County Courts Administration Act.
[114] See s 113 of the County Courts Administration Act.
[115] S 114(2) of the County Courts Administration Act.

protection to the NINA debtor group by abolishing the discrimination against them that prevented access to the debt relief system.

As stated earlier, the introduction of the DRO procedure was largely influenced by the No Asset Procedure in the New Zealand debt relief system.[116] The No Asset Procedure specifically caters for the needs of NINA debtors and it has been widely held that this measure's objective is to channel NINA debtors away from bankruptcy.[117] On the other hand, the objective of the DRO is to:[118]

> [P]rovide debt relief for people who owe relatively little, have *no income and no assets*[119] to repay what they owe, and who cannot afford the cost of petitioning for their own bankruptcy adjudication (own emphasis).

Discussions about the introduction of the DRO can be traced back to the seminal paper by the then Department of Constitutional Affairs[120] in 2004. It was provided in this paper that:[121]

> The type of person at whom the scheme is aimed cannot pay even a portion of their debt within a reasonable timeframe. Such people are often living on very low incomes, and whilst at the time they borrowed the money they had every intention of paying it back, they simply lack the means to do so.

The DRO procedure is pro-debtor in nature and as highlighted in the quotation above, it specifically addresses the needs of the NINA debtors by ensuring easy access to the debt relief system and affording a discharge of debts as an extension of the insolvency procedure. At the onset, it must be noted that the DRO procedure does not involve assets thus NINA debtors are not barred from accessing it. Furthermore, the low application costs render the procedure attractive to indigent debtors in dire financial circumstances. The measure came into operation on 6 April 2009 and the Tribunals, Courts and Enforcement Act introduce it.[122] However, the procedure is incorporated into the Insolvency Act, and it is regulated by part 7A of this statute.[123]

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[116] See para 5.1. Also, see Boterere *The proposed debt intervention* 25-27 for a discussion of the No Asset Procedure in New Zealand.
[117] See McKenzie Skene and Walters 2006 *Am Bankr LJ* 501.
[118] See Fletcher *The law of insolvency* 386. Also, see Ramsay *Personal insolvency* 99 where it is submitted that "the objectives of the [DRO] are both to provide relief for those who cannot pay their debts and are unable to access current procedures of debt relief and to promote financial inclusion".
[119] The so-called NINA debtors.
[120] Presently referred to as the Ministry of Justice.
[121] See in general, Department of Constitutional Affairs "A choice of paths".
[122] Of 2007.
[123] See ss 251A-251X of the Insolvency Act.

In the main, the DRO procedure conforms to internationally regarded principles in that it is extra-judicial, and the courts are not involved during the application and consideration stage. However, the courts play a crucial oversight role and may be approached by any debtor who is dissatisfied by any act, omission or decision made in connection with the DRO or his application.[124] An overcommitted debtor who is unable to pay his debts may initiate this procedure by applying to the official receiver through an approved intermediary[125] for a DRO order to be made in respect of his qualifying debts.[126] In turn, the Insolvency Act regards "qualifying debt" as debt that:[127]

(a) is for a liquidated sum payable either immediately or at some certain future time; and
(b) is not an excluded debt.[128]

The Act mandates that all DRO applications include a list of the debts to which the debtor is subject[129] and the application must specify the amount of each debt and the creditor to whom it is owed.[130] Furthermore, the application must include the details of any security held in respect of any of those debts and other information about the debtor's affairs.[131]

As pointed out above, a DRO application is directed to the official receiver, who must consider such an application and then make the necessary determination whether to refuse the application or make a debt relief order.[132] However, the official receiver may, at his discretion, stay consideration of the application until he has received answers to any queries raised with the debtor in relation to anything connected with the DRO

[124] S 251M(1) of the Insolvency Act. The official receiver may also approach the court to seek directions or an order in relation to any matter arising in connection with the DRO (s 251M(2) of the Insolvency Act).
[125] See s 251U of the Insolvency Act where an approved intermediary is defined as an individual approved by a competent authority to act as an intermediary between a person wishing to make an application for a debt relief order and the official receiver. The intermediaries are publicly subsidised and their duty in relation to the DRO application is to screen and check the eligibility of the applicant-debtor.
[126] See s 251A read with s 251B of the Insolvency Act.
[127] S 251A(2) of the Insolvency Act.
[128] The Act specifically excludes secured debt from the DRO procedure (s 251A(3) of the Insolvency Act).
[129] At the date of the application.
[130] S 251B(2)(a) of the Insolvency Act. The application must include any interest, penalty or other sum that has become payable in relation to that debt on or before that date.
[131] S 251B(2)(a)-(b) of the Insolvency Act. The debtor's affairs include his creditors, debts and liabilities and his income and assets.
[132] S 251C(3) of the Insolvency Act.

application.[133] The official receiver may, after consideration, refuse the DRO application if he determines that:[134]

(a) the application does not meet all the requirements imposed by or under section 251B [of the Insolvency Act];
(b) any queries raised with the debtor have not been answered to the satisfaction of the official receiver within such time as he may specify when they are raised;
(c) the debtor has made any false representation or omission in making the application or on supplying any information or documents in support of it.[135]

The provisions outlined above denote that the official receiver has a discretion that he may exercise as he deems fit. In light of this, the Insolvency Act proceeds to stipulate the circumstance upon which the official receiver may not exercise any discretion and must refuse the DRO application if he is not satisfied that:[136]

(a) the debtor is an individual who is unable to pay his debts;
(b) at least one of the debts was a qualifying debt of the debtor at the application date;
(c) each of the conditions set out in Part 1 of Schedule 4ZA is met.[137]

Similarly, the official receiver may only grant a DRO order if he is satisfied that:[138]

(a) The debtor has total liabilities of GBP30 000 or less;
(b) The debtor has a maximum surplus income of GBP75 per month after paying tax, national insurance and normal household expenses;
(c) The debtor has assets, other than excluded assets, of no more than GBP2 000. If the debtor owns a motor vehicle it may not be worth more than GBP2 000;
(d) The debtor has, within the past three years, lived or worked in England and Wales; and
(e) The debtor has not applied for a DRO within the past six years.

Where the official receiver has granted a debt relief order, he must ensure that the order includes a list of the debts which he is satisfied were qualifying debts of the

[133] S 251C(2) of the Insolvency Act.
[134] S 251C(4) of the Insolvency Act.
[135] See s 251O of the Insolvency Act where false representations and omissions are regarded as an offence.
[136] S 251C(5) of the Insolvency Act.
[137] See Coetzee *A comparative reappraisal* 390 who submits that these conditions relate to the following: the debtor's connection with England and Wales, his previous insolvency history, bankruptcy petitions, whether a DRO has been made within the previous six years, the limit on the debtor's overall indebtedness and monthly surplus income and property.
[138] See The Insolvency Service *Getting* https://bit.ly/3Tgd0jP (accessed 2 August 2022). These eligibility requirements were recently changed to accommodate indigent debtors who have been negatively affected by the Covid-19 pandemic. Also, see in general Omar and Russell 2021 *Int Insolv Rev* for a discussion of the reforms in corporate insolvency that were instigated because of the Covid-19 pandemic.

debtor at the application date.[139] Furthermore, he must give a copy of the order to the debtor and make an entry for the order in the register containing the prescribed information about the order or the debtor.[140]

The Insolvency Act specifically outlines the interplay between the DRO procedure and other debt management arrangements outlined above. A debt relief order takes precedence, and where such an order is granted to a debtor who had been granted other debt management orders in his favour, such other debt management orders cease to be in force.[141]

Importantly, a DRO effectively triggers a moratorium on debt enforcement against the debtor that commences on the effective date of the DRO.[142] The moratorium lapses after one year unless it is terminated early. However, it may be extended more than once,[143] by the official receiver.[144]

The DRO is so important because it may lead to a discharge of debts for NINA debtors. As can be gathered from the discussion throughout this thesis, a discharge is crucial because it enables debtors to re-enter the credit economy without the burden of debts. Furthermore, it encourages consumers to prudently take more risks with the assurance of a safe landing if they fail, thereby stimulating the economy. In relation to the DRO, this measure ensures relief from indebtedness by affording a discharge option for qualifying debts, including all interest, penalties and other sums that may have become payable in relation to those debts since the application date.[145] However, this provision will not apply if the moratorium was terminated early and it does not apply to any qualifying debt that the debtor incurred in respect of any fraud or fraudulent breach of trust.[146]

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[139] S 251E(3) of the Insolvency Act. The order must specify the amount of the debt at the time and the creditor to whom it is owed.
[140] S 251E(4)(a)-(b) of the Insolvency Act.
[141] S 251F(2) of the Insolvency Act.
[142] S 251G(1) of the Insolvency Act. Creditors will not, during the period of the moratorium, have no remedy in respect of the debt but may not commence a creditor's petition in respect of the debt or otherwise commence any action or other legal proceedings against the debtor for the debt, except with the permission of the court and on such terms as the court may impose (s 251G(2)(a)-(b) of the Insolvency Act).
[143] S 251H(5) of the Insolvency Act.
[144] S 251H(1) of the Insolvency Act.
[145] S 251I(1) of the Insolvency Act.
[146] Ss 251I(2) and 251I(3) of the Insolvency Act.

5.3 The Scottish debt relief system

5.3.1 General background

The Insolvency Act 1986 is the primary legislation that regulates corporate insolvency throughout the United Kingdom. This Act also regulates natural person insolvency in England and Wales.[147] However, both Scotland and Ireland have separate systems of personal insolvency. The Scottish personal insolvency system is regulated by the Bankruptcy (Scotland) Act[148] while the Irish personal insolvency system is regulated by the Personal Insolvency Act.[149]

As regards the Scottish consumer debt relief system, comprehensive protection is afforded to NINA debtors through the Minimal Asset Process that facilitates access to the debt relief system and a concomitant discharge of qualifying unsecured debts.[150] However, the protection afforded to NINA debtors is a product of recent legislative development that was largely influenced by international trends in insolvency,[151] specifically, the reforms in New Zealand and the English and Welsh debt relief systems. Historically, the Scottish debt relief system developed along with the English and Welsh debt relief systems[152] thus, the *cessio bonorum* provided the earliest form of insolvency resemblance within the Scottish regime.[153] The first recorded piece of legislation that regulated the insolvency system within this jurisdiction is the Bankruptcy Act 1621.[154] Further reforms to the system were undertaken throughout

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[147] See para 3.2 for a discussion of the natural person debt relief in England and Wales.
[148] The Bankruptcy (Scotland) Act 2016 (hereafter "the 2016 Bankruptcy Act").
[149] The Personal Insolvency Act 2012. No detailed discussion of the Irish debt relief system is undertaken here because it does not fall within the scope of this study. However, it is important to note that the Irish debt relief system comprehensively protects NINA debtors through the Debt Relief Notice. See Part 3, Personal Insolvency Act. Furthermore, it must also be highlighted that there has been recent reform within the Irish personal insolvency system through the introduction of the Personal Insolvency (Amendment) Act 2021 that was introduced in 2021 as a response to the Covid-19 pandemic and it seeks to:

> [A]mend the eligibility criteria for Debt relief Notices; to make provision for the holding of certain meetings … by remote means; to make further provision in relation to the maximum duration of a Personal Insolvency Arrangement.

[150] Minimal Asset Process (hereafter "MAP"). See s 2(2) read with schedule 1 of the 2016 Act.
[151] See McKenzie Skene 2014 *Nottm. LJ* 111-132. Also, see McKenzie Skene and Walters 2006 *Am Bankr LJ* for a detailed account.
[152] McKenzie Skene 2014 *Nottm. LJ* 111-132.
[153] See Bell *Commentaries on the laws of Scotland* part X.
[154] The Bankruptcy Act 1621 dealt with gratuitous alienations after the commencement of diligence.

the centuries which culminated in the 2016 Bankruptcy Act that presently regulates the consumer debt relief system throughout Scotland.[155]

However, before the inception of the 2016 Bankruptcy Act, the Scottish legislature had introduced the Bankruptcy and Diligence (Scotland) Act, which received Royal Assent on 15 January 2007.[156] The Bankruptcy and Diligence Act introduced major reforms to the law of diligence[157] in the Scottish debt relief system by amending the Bankruptcy (Scotland) Act 1985, which regulated the debt relief system. McKenzie Skene states that:[158]

> The impetus for the bankruptcy element of the reforms came from a desire to have a comprehensive and integrated debt management framework in Scotland and the need to respond to developments such as the introduction of the debt arrangement scheme and changes to bankruptcy law in England and Wales.

Some of the reforms introduced by the Bankruptcy and Diligence Act include the option of self-nominated bankruptcy by application to the Accountant in Bankruptcy[159] and it introduced the Low-Income-Low-Asset (LILA) route to bankruptcy.[160] The LILA route to bankruptcy provided a streamlined process for insolvent individuals with a low income and very few assets. This was also the only route available to the so-called NINA debtors. This process was subsequently replaced by a more flexible procedure, namely, the MAP in 2015, which was introduced by the Bankruptcy and Debt Advice (Scotland) Act.[161] In contrast to the LILA process, the MAP is most welcome because it has flexible entry criteria and a substantially lower application fee, which affords greater access to NINA debtors. The MAP is presently incorporated in the 2016 Bankruptcy Act.[162] This Act also regulates the Trust Deeds procedure, an alternative debt relief measure within the Scottish jurisdiction. In addition to the Trust Deeds procedure, qualifying debtors within the Scottish debt relief system may also obtain

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[155] As outlined above, the Insolvency Act 1986 is the primary statute that regulates corporate insolvency throughout the United Kingdom. However, there is secondary legislation that also regulates corporate insolvency within Scotland, namely, the Insolvency (Scotland) (Receivership and Winding Up) Rules 2018 and the Insolvency (Scotland) (Company Voluntary Arrangement and Administration) Rules 2018.
[156] The Bankruptcy and Diligence etc. (Scotland) Act 2007 (hereafter "the Bankruptcy and Diligence Act").
[157] "Diligence" is the Scottish term for the methods of creditor debt enforcement.
[158] See McKenzie Skene 2015 *NIBLeJ* 291.
[159] The Accountant in Bankruptcy (hereafter "the AiB") has a statutory duty to supervise all consumer insolvencies and administer them where he is appointed as trustee (see Part 16 of the 2016 Bankruptcy Act).
[160] See s 15 of the Bankruptcy and Diligence Act.
[161] The Bankruptcy and Debt Advice (Scotland) Act 2014 (hereafter "the BADAS").
[162] See s 2(2) read with schedule 1 of the 2016 Bankruptcy Act.

relief from indebtedness by concluding a Debt Payment Plan under the Debt Arrangement Scheme, a government-run debt management tool.[163]

5.3.2 Bankruptcy

Bankruptcy in Scotland refers to the sequestration procedure. This procedure provides two pathways to bankruptcy that cater to different categories of debtors. The first route to bankruptcy is by accessing the MAP, which comprehensively regulates the affairs of NINA debtors.[164] The second route to bankruptcy, commonly referred to as the Full Administration process, regulates the affairs of debtors with some form of disposable income and/or assets.[165] Both routes to bankruptcy may be commenced by either a debtor or a creditor application. Although the end result of both the MAP route and the Full Administration route is similar, the two routes have different eligibility criteria and different thresholds that are aimed at sifting out the "can-pay" debtors and ameliorating debtor abuse.

5.3.2.1 Minimal Asset Process

As indicated above, the MAP was introduced to cater for the needs of NINA debtors who had between 2007 and 2015 been regulated by the LILA procedure.[166] Before the introduction of the LILA procedure, the Scottish natural person debt relief system did not have a suitable solution for NINA debtors.[167] Regarding access to the MAP, it is only accessed by a living debtor[168] who has been assessed by the common financial tool[169] required to make no debtor's contribution or has been in receipt of payments for at least six months ending with the day on which the sequestration application is made.[170] The 2016 Bankruptcy Act places a debt threshold on all applicants, and in

[163] The Debt Arrangement Scheme is regulated by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2019.
[164] See s 2(2) of the 2016 Bankruptcy Act.
[165] See s 2(8) of the 2016 Bankruptcy Act.
[166] See para 5.3.1.
[167] See McKenzie Skene and Walters 2006 *Am Bankr LJ*.
[168] The 2016 Bankruptcy Act distinguishes between the sequestration applications of the estate of a living and a deceased debtor.
[169] See, in general, the Common Financial Tool (Scotland) Regulations 2018 that came into force on 1 April 2019.
[170] S 2(2)(a) of the 2016 Bankruptcy Act.

this case, the total amount of the debtor's debts at the date of application should not be less than GBP1 500 and not more than GBP25 000.[171] In addition to these requirements, the 2016 Bankruptcy Act also adds that:[172]

(i) The total value of the debtor's assets[173] on the date the debtor application is made does not exceed GBP2 000 or such other amount as may be prescribed,
(ii) No single asset of the debtor has a value which exceeds GBP1 000 or such other amount as may be prescribed, and
(iii) The debtor does not own land,

The eligibility criteria were recently implemented to accommodate indigent debtors who have been adversely affected by the Covid-19 pandemic. The Scottish legislature proactively responded to the adverse effects of the Covid-19 pandemic by enacting the Coronavirus (Scotland) Act[174] and the Coronavirus (Scotland) (No. 2) Act.[175] The former statute received Royal Assent on 6 April 2020, while the latter statute received Royal Assent on 26 May 2020. The Scotland Covid-19 Act is the most relevant statute for this study because it made temporary changes to bankruptcy regulation by allowing the electronic signature[176] and electronic service of documents,[177] increasing the deadline for submitting Debtor Contribution Order proposals,[178] and allowing creditor meetings in bankruptcy to be carried out virtually.[179] The Scotland Covid-19 Act's other notable changes include increasing the debt eligibility threshold from GBP17 000 to GBP25 000 and removing student loan debt from contributing to the eligibility calculation.[180] This Act also lowered access costs for both routes to bankruptcy and permitted non-payment of fees for debtors in receipt of certain prescribed benefits. Lastly, the Scotland Covid-19 Act reduced the debtor application fees from GBP90 to GBP50 for the MAP while the Full Administration application costs were reduced from GBP200 to GBP150.[181]

[171] S 2(2)(b)(i)-(ii) of the 2016 Bankruptcy Act.
[172] S 2(2)(c)-(e) of the 2016 Bankruptcy Act.
[173] Leaving any liabilities out of account.
[174] The Coronavirus (Scotland) Act 2020.
[175] The Coronavirus (Scotland) (No. 2) Act 2020 (hereafter "Scotland Covid-19 Act").
[176] S 13 of the Scotland Covid-19 Act.
[177] S 8 of the Scotland Covid-19 Act.
[178] S 11 of the Scotland Covid-19 Act.
[179] S 12 of the Scotland Covid-19 Act.
[180] S 9(2) of the Scotland Covid-19 Act.
[181] S 14(3) of the Scotland Covid-19 Act.

Although the reforms introduced by the Scotland Covid-19 Act were intended to be temporary, they were important and were implemented to ensure the continued protection of debtors affected by the pandemic's adverse effects. At present, steps have been taken to ensure extended and permanent implementation of these reforms within the Scottish insolvency regime.[182] Additionally, the Scottish legislature has also fairly recently passed the Coronavirus (Recovery and Reform) Scotland Bill[183] that seeks to safeguard the country's healthcare and bankruptcy systems which were affected by the Covid-19 pandemic by reforming the 2016 Bankruptcy Act.[184] In relation to the bankruptcy system, the Bill seeks to make permanent changes to the personal insolvency system to accommodate remote meetings of creditors[185] and to amend the law regarding the servicing of documents.[186] Furthermore, the Bill also seeks to amend the debt level specified in the definition of "qualified creditor(s)"[187] from GBP3 000 to GBP5 000.[188]

Regarding the procedural aspects of the sequestration application, all applications must be made to the AiB[189] and the application must include a declaration by a money adviser who provided advice to the debtor, that such advice has been given and specify the name and address of the money adviser.[190] The debtor must send a statement of assets and liabilities, and a statement of undertakings to the AiB along with the bankruptcy application.[191] Thereafter, upon request to the money adviser, the debtor may be granted a certificate for sequestration, which may only be granted if the debtor can demonstrate that he is unable to pay debts as they become due.[192]

Because of the financial circumstances of NINA debtors who fall within the MAP's ambit, the 2016 Bankruptcy Act precludes the AiB from appointing a trustee (other

[182] See the Coronavirus (Extension and Expiry) (Scotland) Act 2021 for an indication of the expiry and extension of the changes ushered in by the covid-19 relief reform measure.
[183] The Coronavirus (Recovery and Reform) Scotland Bill (hereafter "the Bill").
[184] S 15(1) of the Bill.
[185] S 17 of the Bill.
[186] S 15(2) of the Bill.
[187] See s 7(1) of the 2016 Bankruptcy Act.
[188] S 16 of the Bill.
[189] S 8(1) of the 2016 Bankruptcy Act.
[190] S 8(2) of the 2016 Bankruptcy Act.
[191] S 8(3) of the 2016 Bankruptcy Act.
[192] S 9(1)-(3) of the 2016 Bankruptcy Act. An inability to pay debts is a modern concept in insolvency law that replaces the archaic and less preferred "acts of insolvency" requirement. This has also been introduced in the Zimbabwean debt relief system (ch 3 para 3.3).

than himself)[193] to manage such debtor's estate.[194] Consequently, whereas under the Full Administration process, a trustee must prepare a statement of the debtor's affairs so far as it is within his knowledge, including that in the trustee's opinion the debtor's assets are unlikely to be sufficient to pay any dividend whatsoever in respect of the debtor's debts,[195] the AiB must perform such duties by preparing a statement of the debtor's affairs indicating that no claims may be submitted by creditors against the estate of the NINA debtor.[196] Thereafter, the AiB must send a copy of the statement of affairs to every known creditor of the debtor.[197]

In relation to the provision of a discharge to NINA debtors under the streamlined and easily accessible MAP, such debtors may be granted a discharge after six months from the date on which the sequestration has lapsed.[198] The discharge is not unconditional because it does not affect any right of a secured creditor for an obligation in respect of which the debtor has been discharged.[199] Following this discharge, the debtor may apply to the AiB for a certificate declaring the discharge, in the prescribed form.[200] However, before being granted a discharge of debts, the NINA debtor may at any time be required by the AiB to give an account in writing of his current state of affairs.[201]

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[193] The AiB will perform the duties of the trustee which includes those outlined in s 50(1)(a)-(d) read with schedule 1 para 1(3) of the 2016 Bankruptcy Act.

[194] S 51(11)(a) read with s 51(9) of the 2016 Bankruptcy Act. This is an important cost cutting exercise by the legislature that recognises the circumstances of NINA debtors who do not have an estate that can be managed by a trustee thereby eliminating possible trustee costs.

[195] See s 42(1) of the 2016 Bankruptcy Act.

[196] See schedule 1 para 1(2)(1) of the 2016 Bankruptcy Act.

[197] Schedule 1 para 1(1B) of the 2016 Bankruptcy Act.

[198] S 140(1) of the 2016 Bankruptcy Act. The six-month time frame is in line with international best practice in insolvency that caution against perpetually trapping debtors in insolvency. Therefore, debtors must access the discharge option in the not-too-distant future. Furthermore, this is the leading position internationally because NINA debtors may only access discharge after twelve months in respect of the DRO procedure in England and Wales while such debtors will only be able to access a discharge of debts after twenty-four months in South Africa in terms of the proposed debt intervention measure. See Ramsey 2020 *Int Insolv Rev* 22-24. Also, see ch 4 par 4.5.3 and para 5.2.3.3.

[199] S 145(5) of the 2016 Bankruptcy Act. In terms of s 145(3) the discharge also excludes the following debts:

(a) Any liability to pay a fine or other penalty due to the Crown,
(b) Any liability to pay a fine imposed in a justice of the peace court (or a district court),
(c) Any liability under a compensation order (within the meaning of section 249 of the Criminal Procedure (Scotland) Act 1995,
(d) Any liability incurred by reason of fraud or breach of trust,
(e) Any obligation to pay –
    (i) Aliment, or any sum of any alimentary nature, under any enactment or rule of law, or
    (ii) Any periodical allowance payable on divorce by virtue of a court order under an obligation, or
(f) The obligation imposed on the debtor by section 215 [of the 2016 Bankruptcy Act].

[200] S 140(2) of the 2016 Bankruptcy Act.

[201] S 116 read with schedule 1 para 1(4) of the 2016 Bankruptcy Act.

The discharge affects the debtor's ability to access debt for a further period of six months beginning on the date of the discharge. The debtor must, within this period, inform any credit provider from whom he seeks credit of GBP2 000 or more, or at the time of obtaining credit if the debtor has debts amounting to GBP1 000, of his status regarding his past sequestration and the discharge.[202] Furthermore, the discharged debtor may also not engage in a business under a name other than that to which the discharge relates unless the debtor informs any person with whom the debtor enters into any business transaction of the name of the business to which the discharge relates.[203] Therefore, although debtors may access a discharge after six months, the debtor remains under certain bankruptcy restrictions for a further six-month period.

5.3.2.2 Full Administration

Debtors with some form of disposable income and/or assets may access bankruptcy through the Full Administration route provided that the total amount of the debtor's debts at the date of application is not less than GBP3 000.[204] Furthermore, the 2016 Bankruptcy Act also mandates that:[205]

(i) An award of sequestration must not have been made against the debtor in the 5 years ending on the day before the date the debtor application is made;
(ii) The debtor must have obtained advice from a money adviser[206] in accordance with section 4(1) of the 2016 Bankruptcy Act;
(iii) The debtor has given a statement of undertakings;[207] and
(iv) The debtor is apparently insolvent.

Similar to sequestration applications through the MAP route, sequestration applications under the Full Administration route must also be directed to the AiB.[208] In addition to receiving sequestration applications, the AiB must also determine the

[202] See ss 146(2), 146(3) and 146(6) of the 2016 Bankruptcy Act.
[203] Ss 140(4) and 140(5) of the 2016 Bankruptcy Act.
[204] S 2(8)(a) of the 2016 Bankruptcy Act. See para 5.3.2.1 for a discussion of the reform of the eligibility threshold for the MAP. NINA debtors are precluded from utilising the Full Administration route and they may only utilise the MAP route.
[205] See s 2(8)(b)-(e) of the 2016 Bankruptcy Act.
[206] See s 4 of the 2016 Bankruptcy Act.
[207] Including an undertaking to pay to the trustee, after the award of sequestration of the debtor's estate, an amount determined by using the common financial tool.
[208] S 8(1) of the 2016 Bankruptcy Act.

outcome of the application. If the sequestration application was not incomplete and where it would not be inappropriate to grant the sequestration, the AiB must award sequestration forthwith if he is satisfied that the application was made in accordance with the provisions of the 2016 Bankruptcy Act, it met the eligibility requirements, and the debtor provided the AiB with a statement of assets and liabilities of his estate.[209]

Access to the sequestration procedure through the Full Administration process is important because it may lead to a conditional discharge of qualifying unsecured debts. Such discharge may only be granted twelve months after the date on which sequestration is awarded has lapsed, and it is symbolised by the granting of a certificate of discharge by the AiB.[210] Although the 2016 Bankruptcy Act distinguishes the procedural requirements between instances where the AiB acts as the trustee[211] and instances where the AiB does not act in such a position,[212] the end result of the discharge is similar in both instances.[213] Lastly, it must be pointed out that the Full Administration route to bankruptcy is not suited to the needs of NINA debtors.

5.3.3 Alternative debt relief measures

5.3.3.1 Voluntary Trust Deeds

The introduction of the 2016 Bankruptcy Act also drastically changed the law regarding voluntary trust deeds. It simplified and consolidated all previous statutes into one accessible piece of legislation by repealing the Protected Trust Deeds (Scotland) Regulations 2013. At present, Voluntary Trust Deeds are, since 30 November 2016, regulated by part 14 of the 2016 Bankruptcy Act.[214] Voluntary Trust Deeds may largely be compared with IVA within the English and Welsh debt relief systems.[215] McKenzie Skene and Walters define a trust deed as:[216]

> [A] voluntary deed granted by a debtor, which conveys specified assets and, usually, income to a named trustee to be administered for the benefit of creditors and the payment of debts.

[209] See s 22(1) read with s 8(3)(a) of the 2016 Bankruptcy Act.
[210] See ss 137(2) and 138(2) of the 2016 Bankruptcy Act.
[211] See s 138 of the 2016 Bankruptcy Act.
[212] S 137 of the 2016 Bankruptcy Act.
[213] See para 5.3.2.1 for an indication of the effect of the conditional discharge.
[214] See ss 162-193 and schedule 4 of the 2016 Bankruptcy Act.
[215] See McKenzie Skene and Walters 2006 *Am Bankr LJ*. Also, see para 5.2.3.1 for a discussion of IVAs in England and Wales.
[216] McKenzie Skene and Walters 2006 *Am Bankr LJ.*

It may therefore be concluded at the onset that trust deeds do not cater for the needs of NINA debtors who lack the necessary disposable assets and/or income that could be administered by a trustee. However, to debtors who meet this measure's eligibility criteria, the voluntary trust deeds procedure is significant because it may result in the debtor's discharge.[217] It is also noteworthy that this procedure excludes, from its regulation, a debtor whose estate has been sequestrated if the trustee in the sequestration has not been discharged under sections 148 and 151 of the 2016 Bankruptcy Act.[218] Furthermore, a debtor whose debts are less than GBP5 000 may also not access the trust deed measure.[219]

The trust deed procedure entails an extra-judicial private affair between parties that is supervised by the AiB. This is in line with international best practice in insolvency that favours is the flexible and cheap nature of extra-judicial procedures because they have the advantage of ameliorating the stigma attached to formal debt relief measures.[220] However, the World Bank regards the merits of informal and extra-judicial measures to be illusory since it may lead to debtors being forced to conclude onerous payment plans.[221] Despite the challenges that emanate from extra-judicial measures, empirical evidence indicates that trust deeds are presently favoured over the formal sequestration procedure within the Scottish debt relief system.[222] The high interest in and uptake of this measure may be attributed to the fact that it represents informal sequestration but without all of the sequestration's consequences for the debtor.

As highlighted above, this measure does not accommodate NINA debtors because it requires some form of disposable income that can be used to pay contributions for the benefit of creditors.[223] The payment period is usually limited to forty-eight months but may be shortened or extended accordingly.[224] The successful repayment may culminate in a discharge of the debtor who has met his obligations in terms of the trust

[217] See s 186 of the 2016 Bankruptcy Act.
[218] S 164(2)(a) of the 2016 Bankruptcy Act.
[219] S 164(3) of the 2016 Bankruptcy Act.
[220] See ch 2 para 2.5.4.1.
[221] Ch 2 para 2.5.4.1.
[222] See The Insolvency Service *Commentary* https://bit.ly/3zsBlej (accessed 2 August 2022).
[223] S 168(1) of the 2016 Bankruptcy Act.
[224] S 168(2) of the 2016 Bankruptcy Act.

deed, and the discharge application may be directed towards the AiB who receives and decides on the petition.[225]

5.3.3.2 Debt Arrangement Scheme

The other alternative debt relief measure within the Scottish debt relief system is the Debt Arrangement Scheme (DAS). This measure is regulated by the Debt Arrangement and Attachment (Scotland) Act[226] and it came into operation on 30 November 2004. In addition to this Act, further secondary regulation is also provided by the Debt Arrangement Scheme (Scotland) Regulations[227] that have recently been amended.[228]

The DAS envisages a debt payment programme between a debtor with multiple debts[229] and his creditors.[230] Although the debtor's assets may be used on rare occasions, the DAS procedure encompasses deductions from a debtor's earnings by a payment distributor.[231] Consequently, it can be assumed that this measure is not suited to the needs of NINA debtors who do not have the requisite disposable income. Notably, the measure may only be initiated by a debtor who had obtained debt advice from a money adviser in relation to his financial circumstances, the effect of the proposed programme and the preparation of the application.[232]

Significantly, the DAS requires all creditors to consent to the debtor's application for approval of a debt payment programme.[233] However, the consent requirement may be dispensed with where it is not forthcoming.[234]

In summary, the DAS permits periodic payments by a debtor from his surplus income towards his obligations. The payment is distributed to creditors by an approved payment distributor. Significantly, during the existence of a duly concluded DAS,

[225] See, in general, s 184 of the 2016 Bankruptcy Act.
[226] Debt Arrangement and Attachment (Scotland) Act 2002 (hereafter "DAA Act").
[227] The Debt Arrangement Scheme (Scotland) Regulations 2011 (hereafter "DAS Regulations").
[228] See, in general, the Debt Arrangement Scheme (Scotland) Regulations 2019 (hereafter "DAS Amendment Regulations") that came into force on 4 November 2019.
[229] See the Scotland Parliament *Policy memorandum* 2002 paras 12 and 15.
[230] S 1 of the DAA Act.
[231] See s 6(1) of the DAA Act.
[232] S 3(1) of the DAA Act. Thereafter, the debt adviser submits the application to the AiB on behalf of the debtor.
[233] S 23(1) DAS Regulations.
[234] See s 7(2) of the DAA Act.

creditors may not institute any enforcement action against the debtor, including sequestration. Finally, the DAS does not lead to an automatic discharge of debts.

5.4 Conclusion

In this chapter, a comparative study was made of the established personal insolvency debt relief systems of England and Wales, and Scotland. These consumer insolvency regimes are regarded as established because they afford comprehensive protection to all honest but unfortunate debtors. This is in stark contrast with the position in Zimbabwe where NINA debtors are currently not afforded protection from any statutory debt relief process.[235] This is also the position in South Africa, which is, however, in an active process of reform.[236] The choice of a comparative study of the aforementioned established jurisdictions was prompted by the comprehensive protection the systems afford to NINA debtors, in so far as the debt relief systems ensure easy access and provide a wide-ranging discharge option. Further, the choice for comparative analysis was also motivated by the strong English law influence in both Zimbabwe and South Africa's debt relief systems.[237]

In relation to the English and Welsh natural person debt relief system, the primary insolvency statute is the Insolvency Act 1986, which regulates the bankruptcy measure[238] and two formal debt relief secondary measures, namely, the individual voluntary arrangements[239] and the DRO.[240] Additionally, the system also provides for the administration order procedure, a further secondary debt relief measure regulated by the County Court Administration Act.[241] In this regard, England and Wales's debt relief regulation mirrors the fragmented approach presently followed in South Africa, and there has been a proposal for it to be amended by the 2015 Insolvency Bill.[242] Zimbabwe's system is an example of a unified insolvency regime where the newly

[235] Ch 3 para 3.3.
[236] See ch 4.
[237] See para 5.2.1 and ch 3 para 3.2
[238] Para 5.2.2.
[239] Para 5.2.3.1.
[240] Para 5.2.3.3.
[241] Para 5.2.3.2.
[242] Ch 4 para 4.6. Also, see Rochelle 1996 *TSAR* 315 regarding the criticism of the fragmented approach.

introduced consolidated Insolvency Act [Chapter 6:07] regulates the entire personal insolvency regime and parts of the corporate insolvency system.[243]

Where more than one debt relief measure applies to a debtor's particular financial circumstances within England and Wales's system, the debtor can select his preferred procedure.[244] However, despite this choice, the system also provides guidelines on the interplay between the debt relief measures, and this largely guides an insolvent's determination of his preferred measure.[245]

The bankruptcy procedure within England and Wales's system refers to an asset liquidation procedure that is largely comparable to both Zimbabwe's liquidation procedure and South Africa's sequestration procedure. The main obstacle to NINA debtors that stops them from accessing the bankruptcy procedure is the application fee and the property requirement This is the position in both Zimbabwe and South Africa's insolvency systems. In other respects, the bankruptcy measure provides a debtor-friendly regulatory framework that is in sharp contrast to Zimbabwe's pro-creditor liquidation measure, which largely seeks to facilitate debt repayment.[246] The bankruptcy measure does not recognise the advantage for creditors requirement that prevents access to NINA debtors in both Zimbabwe and South Africa's debt relief systems. Therefore, in many respects, the bankruptcy measure is in line with internationally regarded principles as it balances the interests of debtors and creditors and has an advanced exemption regime. However, the bankruptcy measure falls short in that an immediate moratorium is not instituted as soon as a bankruptcy application is lodged.[247]

The other essential aspect of my analysis, following access to the bankruptcy procedure, is the provision of a discharge option. In this regard, the English and Welsh bankruptcy procedure facilitates a wide discharge of debts for debtors.[248] Although this discharge is conditional, it is worth noting that the non-dischargeable debts are restricted, in stark contrast to the position in Zimbabwe. The discharge is also in line with international policies, principles and guidelines in that it is not unnecessarily

[243] Ch 3 para 3.3.1.
[244] Para 5.2.3.3.
[245] See s 251F(2) of the Insolvency Act.
[246] Ch 3 para 3.3.2.
[247] S 285 of the Insolvency Act.
[248] Para 5.2.2.2.

prolonged. To this end, insolvent debtors may automatically be discharged after one year has lapsed[249] while debtors in both Zimbabwe and South Africa's debt relief systems may only be automatically discharged after a strenuous ten-year period.[250] Discharge for qualifying debtors under the bankruptcy procedure frees them from certain pre-bankruptcy debts and lifts all prohibitions that were in force because of the bankruptcy.[251] However, it has also been highlighted that the bankruptcy procedure is not accessible to NINA debtors because, like the position in Zimbabwe, it requires property that may be liquidated to facilitate the redistribution of proceeds to creditors.

The first statutory alternative debt relief measure examined in this study is the individual voluntary arrangement order. This procedure refers to a statutory debt repayment agreement between a debtor and his creditors.[252] To this end, this measure is comparable with Zimbabwe's newly introduced pre- and post-liquidation composition measures. However, the post-liquidation composition measure is the most comparable measure to the individual voluntary arrangement order procedure because it is only accessible to debtors who have been granted a liquidation order in their favour and this is similar to the position with the voluntary arrangement order procedure.[253] This measure is important because it circumvents the prohibitions and limitations of the bankruptcy procedure. It also noteworthy that this measure is voluntary in nature and may not be forced on any of the parties involved. This is problematic because the measure might result in creditor passivity where little to no dividend is guaranteed, especially where indigent debtors are involved. However, when measured against international policies, principles and guidelines in insolvency, the *World Bank Report* favours such debt settlements because they are flexible, cost-effective and may assist in ameliorating the stigma attached to formal insolvency procedures. This report does aver, though, that the benefits of negotiated settlements may be illusory as debtors may be forced into onerous agreements because of the unequal bargaining power between the debtor and his creditors.[254] This measure does

[249] S 279(1) of the Insolvency Act.
[250] See ch 3 para 3.3.4 and ch 4 para 4.2.4 respectively.
[251] McKenzie Skene and Walters 2006 *Am Bankr LJ* 482. Also, see Walters and Smith 2010 *Int Insolv Rev* 191.
[252] Spooner *Personal insolvency law* 90.
[253] Ch 3 para 3.3.2.3.
[254] See ch 2 para 2.5.4.1.

not lead to a discharge of debts and it is not suited to the needs of NINA debtors whose financial circumstances do not allow them to conclude a debt repayment agreement.

The English and Welsh personal debt relief system also facilitates access to debtors through the administration order procedure. This procedure has had a direct influence on South Africa's system where the administration order procedure appears and envisages a debt repayment agreement between a debtor and his creditors.[255] Although researchers have historically called for the introduction of this measure in Zimbabwe's debt relief system, it was never introduced.[256] According to empirical evidence, the administration order procedure has since fallen into disuse in England and Wales, thus, debtors find recourse in other statutory procedures.[257] This measure is also not suited to the needs of NINA debtors and it does not result in a discharge of debts for the qualifying debtors.

Lastly, a comparative analysis of England and Wales's natural person debt relief system was increasingly relevant for this study because of the DRO. The DRO was introduced in 2007 with NINA debtors in mind because of the marginalisation this group experienced. As to the marginalisation, it should be noted that the debt relief measures, namely, the bankruptcy procedure, the individual voluntary debt arrangement order procedure and the administration order procedure do not specifically exclude NINA debtors because they are open to all categories of debtors. However, NINA debtors are prevented from accessing these measures because of the eligibility criteria of the procedures that either require disposable assets and/or excess income, which NINA debtors lack.

The DRO has gained increased significance by the recent reform in the eligibility criteria of the procedure to accommodate indigent NINA debtors who have been negatively affected by the Covid-19 pandemic.[258] This reform initiative by the English and Welsh legislature might provide lessons for the Zimbabwean legislature that should reform its personal insolvency system to accommodate NINA debtors whose circumstances have been compromised by the Covid-19 pandemic. Zimbabwe's debt relief system is set against the background of an ailing economy that might potentially

[255] Ch 4 para 4.3.3. Also, see Boraine 2003 *De Jure* 219.
[256] See Squires 1962 *The Rhodesia and Nyasaland Law Journ* 123.
[257] See Spooner *Personal insolvency law* 90; McKenzie Skene and Walters 2006 *Am Bankr LJ* 497.
[258] Para 5.2.3.3.

be stimulated by the reassurance of a safe landing for the hard-hit consumers who have barely recovered from the consequences of the 2007 - 2009 global financial crisis.[259] Lastly, the DRO affords NINA debtors a discharge opportunity after twelve months.[260]

In addition to the analysis of the personal insolvency system of England and Wales, the personal insolvency regime of Scotland was also analysed in this chapter. At present, the 2016 Bankruptcy Act regulates bankruptcy[261] and the Trust Deeds procedures.[262] The Trust Deed procedure is a secondary debt relief measure along with the Debt Arrangement Scheme procedure that is regulated by separate legislation.[263]

The bankruptcy procedure essentially refers to an asset liquidation procedure. However, this procedure can be distinguished from the liquidation procedure in Zimbabwe because the Scottish bankruptcy measure accommodates NINA debtors. It guarantees two distinct pathways to bankruptcy, namely, the MAP[264] and the Full Administration routes.[265] The MAP route was introduced in 2015 and replaced the LILA procedure that had been in force since 2007 and had been introduced with NINA debtors in mind. The Full Administration route to bankruptcy is intended for debtors with some form of disposable income and/or assets.

The eligibility criteria for the MAP have recently been changed because of the adverse effects of the Covid-19 pandemic.[266] NINA debtors with debts of no more than GBP25 000,[267] and various other statutorily prescribed property,[268] may access the debtor-friendly MAP route, and such debtors are granted an opportunity to obtain a discharge of debts after six months.[269] However, some restrictions may continue for a further period of six months after the discharge. In line with internationally regarded principles, the MAP is administered by the AiB, an intermediary with little to no court

[259] Ch 1 para 1.1.
[260] S 251I(1) of the Insolvency Act.
[261] Para 5.3.2.
[262] Para 5.3.3.1.
[263] Para 5.3.3.2.
[264] S 2(2) of the 2016 Bankruptcy Act.
[265] S 2(8) of the 2016 Bankruptcy Act.
[266] See the Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland) (No. 2) Act 2020.
[267] S 2(2)(b)(i)-(ii) of the 2016 Bankruptcy Act.
[268] S 2(2)(c)-(e) of the 2016 Bankruptcy Act.
[269] S 140(1) of the 2016 Bankruptcy Act.

involvement during the application and discharge stages of the process. Further, all applicants to the process must be under debt counselling by a financial adviser, and this reinforces the international best practice in insolvency that favours pre-filing and post-discharge debt counselling to debtors.[270]

The MAP route to bankruptcy is the only procedure accessible to NINA debtors because the other procedures impose cumbersome demands on debtors that NINA debtors cannot meet. The eligibility criteria of the Full Administration process is not suited to the needs of NINA debtors, while the statutory alternative debt relief measures envisage a debt restructuring agreement between a debtor and his creditors. However, when assessed holistically, Scotland's entire personal insolvency system is in line with international policies, principles and guidelines in insolvency because it provides access to all categories of debtors by allowing debtors to select a measure that suits their particular financial circumstances.

[270] See ch 2 paras 2.2.3.2, 2.3, 2.4, 2.4.1.3 and 2.5.4.1.

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

Summary

6.1 General background

The overarching objective of this study has been to critically examine the prevailing natural person debt relief system of Zimbabwe with a particular focus on the extent to which it affords access and a concomitant discharge of debts to the so-called No-Income-No-Asset (NINA) debtors.[1] To achieve this objective, Zimbabwe's consumer insolvency regime was juxtaposed with established and developing personal insolvency systems of England and Wales,[2] Scotland[3] and South Africa that is in an active process of reform.[4] The United States of America's bankruptcy system was also reviewed, albeit from a policy perspective.[5] This comparative analysis sought to draw inferences on whether any of the attributes of these systems could be considered for law reform in Zimbabwe. Further, the discussion throughout this thesis was guided by internationally regarded policies, principles and guidelines in insolvency that stem from the following leading reports: the *Cork Report*,[6] the *Huls Report*,[7] the *Reifner Report*,[8] the *INSOL Consumer reports*[9] and the *World Bank Report*.[10]

[1] See ch 1 para 1.2.
[2] See ch 5 para 5.2.
[3] See ch 5 para 5.3.
[4] See ch 4.
[5] See ch 2 para 2.2.
[6] See ch 2 para 2.3.
[7] Ch 2 para 2.3.
[8] Ch 2 para 2.3.
[9] See ch 2 para 2.4.
[10] See ch 2 para 2.5.

In relation to Zimbabwe's consumer insolvency system, it has been determined that the prevailing insolvency law developed from an infusion of English and Roman-Dutch insolvency principles largely because of colonialism that commenced with the occupation of the Cape of Good Hope by Dutch explorers in 1652.[11] The formal Anglo-Roman-Dutch insolvency law that developed at the Cape of Good Hope strongly influenced the development of formal insolvency law in most Southern African countries, such as Botswana, Lesotho, Namibia, Swaziland, Zambia and Zimbabwe.[12] South Africa's insolvency law continues to influence the development of insolvency law in Zimbabwe. Strong traces of South Africa's insolvency law reform initiatives were transplanted into Zimbabwe's insolvency system through the recently introduced Insolvency Act [Chapter 6:07].[13]

In light of this continued influence, this study posits that this has stifled the development of Zimbabwe's natural person insolvency system and has resulted in an overlap of challenges experienced in both jurisdictions in respect of the current marginalisation of NINA debtors.[14] To this end, Zimbabwe's natural person debt relief system does not facilitate access to all honest but unfortunate debtors because it is still largely pro-creditor and reflects the prevailing position in the jurisdiction that influenced it.[15] Furthermore, the insolvency system does not provide an opportunity for a discharge of debts to all categories of debtors.[16] The marginalised debtors fall mainly within the NINA debtor category, which forms the subject of this study.

At present, Zimbabwe's natural person insolvency system is regulated by the consolidated Insolvency Act [Chapter 6:07] ("the Act") that came into force in 2018. The Act regulates the consumer insolvency system through its liquidation procedure along with the novel pre- and post-liquidation composition measures, that were first proposed in South Africa. The primary and secondary debt relief measures do not specifically exclude NINA debtors because the procedures are open to all categories of debtors. However, the procedures' access requirements are beyond the reach of indigent NINA debtors which results in this group's marginalisation. In the result, these

[11] See ch 3 paras 3.2.1 and 3.2.2. Also, see ch 4 para 4.1.
[12] See ch 3 para 3.2.2.3.
[13] Ch 3 paras 3.2.1, 3.3.3 and 3.4.
[14] See ch 4.
[15] Ch 4 para 4.2.2.3.
[16] Ch 4 para 4.2.4.

debt relief measures are only accessible to debtors with some form of disposable assets and/or income.

The liquidation procedure refers to the liquidation process wherein a debtor's property is liquidated to enable a *pro rata* distribution of proceeds to his creditors. The underlying objective of the liquidation procedure is to proffer a benefit for creditors and this is determined by the advantage for creditors requirement that runs throughout the Act.[17] The Act does not define what this requirement entails. However, its origins may be traced to the Cape Ordinance 6 of 1843, which is the foundation of modern insolvency law in both South Africa and Zimbabwe.[18] In relation to the advantage for creditors requirement, this study has deduced that the court may only grant a provisional and/or final liquidation order if it is satisfied that creditors will obtain a non-negligible dividend from the proceeds of the liquidation process.[19] Consequently, NINA debtors cannot obtain relief through the liquidation measure because they do not have the requisite disposable assets that could be liquidated to facilitate an advantage to their creditors.

The two alternative statutory debt relief measures, namely, the pre- and post-liquidation composition measures, envisage an extra-judicial negotiated settlement between a debtor and his creditors.[20] However, these measures are also not accessible by NINA debtors because the post-liquidation composition measure is only available to debtors who have accessed the exclusive liquidation procedure, while the financial circumstance of NINA debtors does not permit them to conclude any viable negotiated settlement envisaged by the pre-liquidation composition measure.[21] Further, the *World Bank Report* provides that the benefits of such negotiated settlements may be illusory.[22]

This study argues that a sound insolvency system is a system that treats all categories of debtors equally by facilitating access and a concomitant discharge of debts to all honest and unfortunate debtors regardless of their financial circumstances. In light of this, it was established that Zimbabwe's prevailing consumer debt relief system

[17] See ch 3 para 3.3.2.1.
[18] Ch 3 para 3.3.2.1.
[19] Ch 3 para 3.3.2.1.
[20] See ch 3 paras 3.3.3 and 3.3.2.3 respectively.
[21] Ch 3 paras 3.3.3 and 3.3.2.3.
[22] See ch 2 para 2.5.4.1.

unfairly discriminates against NINA debtors to the extent that their access and a concomitant discharge of debts are restricted, thereby violating the constitutional equality principle.[23]

Because of the marginalisation of NINA debtors, this chapter seeks to advance recommendations for the reform of the natural person insolvency regime to ensure its inclusivity and effectiveness. An inclusive and effective debt relief system that provides access to all honest but unfortunate debtors and affords a discharge of debts is important because it provides a safe landing to consumers who have failed in their entrepreneurial enterprises. In relation to Zimbabwe, the safety net that a debt relief system provides is especially significant because it may potentially rejuvenate the country's ailing economy by incentivising consumers to take prudent risks with the assurance of a soft landing should they fail.[24]

Zimbabwe's economy has been devastated by both woeful governmental policy-making and natural disasters, such as the 2018 to 2020 drought and the March 2019 cyclone.[25] Additionally, at present, the economy has been grappling with the adverse effects of the Covid-19 pandemic, which has had a ripple effect on consumers who have barely recovered from the effects of the 2007 - 2009 global financial crisis.[26] With this background in mind, this chapter outlines the reform recommendations that are aimed at ensuring that Zimbabwe's exclusionary debt relief system develops from a pro-creditor perspective to an inclusive and effective debt relief system that provides access to all honest but unfortunate debtors. A reformed inclusive, and effective debt relief system is imperative because it will afford a fresh start to the consumers who have been hardest hit by the collapse of Zimbabwe's economy. Further, a sound debt relief system will also give consumers an incentive to re-enter the credit economy and take prudent risks with the assurance of a safe landing should they fail, thereby stimulating the ailing economy.[27] However, it should be noted that the reform that this study proposes will not solve the broader economic crisis in Zimbabwe.

[23] See ch 3 para 3.3.5.
[24] See ch 1 para 1.1.
[25] Ch 1 para 1.1.
[26] Ch 1 para 1.1.
[27] See ch 1 para 1.1.

6.2 Conclusions and determinations

6.2.1 Introduction

In chapters four and five, a comparative analysis of selected established and establishing consumer insolvency regimes was undertaken to draw inferences on whether any of the attributes of these systems could be considered for law reform in Zimbabwe. This analysis followed a discussion of internationally regarded policies, principles and guidelines in insolvency that was undertaken in chapter two and which forms the basis of this study. Some of the internationally regarded guiding principles and policies for an inclusive and effective consumer insolvency regime include: access to all honest but unfortunate debtors, discharge of debts, preference for out-of-court or extra-judicial proceedings, preference for informal proceedings, property exemptions, debtor counselling and a moratorium on debt enforcement. These factors guided the analysis of Zimbabwe's consumer debt relief system and the comparative analysis that was undertaken in this thesis. In the latter respect, a summary of the findings from the comparative analysis benchmarked by the international best practice in insolvency follows below.

6.2.2 The American approach to debt relief

The American natural person debt relief system is regulated by the Bankruptcy Reform Act.[28] The bankruptcy system pioneered the fresh start philosophy that facilitates relief from indebtedness to all honest but unfortunate debtors and has influenced insolvency law reform globally.[29] The fresh start philosophy guarantees an immediate discharge to debtors, and this straight discharge may be accessed either through the Chapter 7 liquidation procedure or the Chapter 13 repayment procedure.[30]

The Chapter 7 liquidation procedure is a court-based process. It entails liquidating a debtor's non-exempt property to facilitate the distribution of proceeds among creditors, and an immediate discharge follows.[31] Although the non-exempt property is central to the liquidation process, this procedure also accommodates debtors who have no

[28] The Bankruptcy Reform Act of 1978 (hereafter "the Bankruptcy Code").
[29] See ch 2 para 2.2.1.
[30] See ch 2 para 2.2.2. Also, see ss 701-784 and 1301-1330 of the Bankruptcy Code.
[31] See ch 2 para 2.2.2.1.

disposable property, provided that they do not earn above the prescribed disposable income threshold.[32] Consequently, though this procedure, NINA debtors may access the debt relief system and obtain an immediate discharge of debts as an extension of the insolvency proceeding. Notably, discharged debtors may only permissibly re-access the liquidation procedure after a period of eight years has lapsed from the date of the filing of an application that led to the discharge.[33]

On the other hand, the Chapter 13 repayment judicial procedure envisages a voluntary debt repayment plan accessible by debtors with a steady source of income.[34] The repayment procedure is important because it also leads to a discharge of debts. Although the income requirement prevents access to NINA debtors; the procedure provides a discharge opportunity for debtors who once had a steady source of income during the application stage, but subsequently encountered a financial crisis.[35] To access the hardship discharge, the debtor must convince the court that the failure to complete the repayment plan is due to circumstances beyond his control and that creditors have been paid at least the liquidation value of their unsecured claims.[36] Further, the debtor must convince the court that an amendment of the repayment plan is not practicable.[37]

In relation to the bankruptcy system, reforms have been introduced fairly recently through the Bankruptcy Abuse Prevention and Consumer Protection Act.[38] This statute was introduced in 2005 and sought to reform the bankruptcy system from an ultra-liberal approach to a more nuanced creditor-friendly approach.[39] The reforms that the statute introduced were a means test along with mandatory pre-filing credit counselling.[40] These reforms sought to prevent the “can pay” dishonest debtors who qualify for a Chapter 13 repayment procedure from obtaining a less cumbersome immediate and unconditional discharge in terms of the Chapter 7 liquidation procedure.[41] Because the means test is only applicable to debtors whose gross

[32] Ch 2 para 2.2.2.1.
[33] Ch 2 para 2.2.2.1.
[34] See ch 2 para 2.2.2.2.
[35] This is referred to as a hardship discharge.
[36] See ch 2 para 2.2.2.2.
[37] Ch 2 para 2.2.2.2.
[38] The Bankruptcy Abuse Prevention and Consumer Protection Act Pub. L. No 108-9 of 2005.
[39] See ch 2 para 2.2.3.1.
[40] Ch 2 para 2.2.3.1.
[41] See ch 2 para 2.2.3.2.

income exceeds the median income in the debtor's state of residence, it does not affect the position of NINA debtors within the system.[42] Consequently, the 2005 reforms have had no impact on NINA debtors' access to the Chapter 7 liquidation measure and the discharge opportunity the procedure affords.[43]

6.2.3 The South African reform initiative

At present, the South African natural person debt relief system does not accommodate NINA debtors.[44] This system provides for a sequestration procedure,[45] which is the primary debt relief measure that is regulated by the Insolvency Act.[46] Further to the sequestration procedure, the system also provides for two alternative secondary measures, namely, the administration order[47] and the debt review[48] procedures that are regulated by the Magistrates' Courts Act[49] and the National Credit Act,[50] respectively. The primary sequestration measure prevents access to NINA debtors because it is only accessible to debtors with disposable assets, while the secondary measures are repayment procedures that are not suited to the financial circumstances of NINA debtors. In light of this marginalisation, the South African legislature has introduced a debt intervention measure which is not yet in operation, to address the plight of NINA debtors.[51]

The debt intervention measure will amend the NCA, and it specifically seeks to facilitate access to marginalised debtors who have no income or whose gross income does not exceed an average of ZAR7 500 for a period of six months preceding the date of application.[52] Because this measure will amend the NCA, it will exclude some NINA debtors whose debts are not regarded as credit agreements under the NCA.

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[42] Ch 2 para 2.2.3.2.
[43] Ch 2 para 2.2.3.2.
[44] See ch 4.
[45] See ch 4 para 4.2.2.
[46] The Insolvency Act 24 of 1936.
[47] See ch 4 para 4.3.3.
[48] See ch 4 para 4.3.2.
[49] The Magistrates' Courts Act 32 of 1944.
[50] The National Credit Act 34 of 2005 (hereafter "the NCA").
[51] See the National Credit Amendment Act 7 of 2009.
[52] See ch 4 para 4.5.3.

Further, this measure will only be accessible to debtors with a total of not more than ZAR50 000 in unsecured debt.[53]

The debt intervention procedure will be administered by the National Credit Regulator and thus be an extra-judicial procedure.[54] At the recommendation of the NCR, the National Credit Tribunal will suspend the debtor's qualifying debts for twelve months, which may be extended to a further twelve months if an examination of the debtor's affairs reveals that his position did not improve during the initial suspension period to warrant a repayment plan.[55] Before the extended twelve-month suspension period lapses, the NCR will re-examine the debtor's affairs and may thereafter propose that the Tribunal extinguish all of the debtor's qualifying unsecured debts.[56] Because it is reasonably expected that NINA debtors will not be able to improve their financial circumstances throughout the twenty-four-month suspension period, accessing this measure will culminate in a discharge of qualifying unsecured debts.[57] Therefore, once the debt intervention measure comes into force, it will facilitate access and a concomitant discharge of debts to the presently marginalised NINA debtor group.

6.2.4 The English and Welsh Debt Relief Order

England and Wales's natural person debt relief system is regulated by the Insolvency Act[58] which provides for the bankruptcy procedure and two statutory alternative debt relief measures, namely, the individual voluntary arrangements[59] and the Debt Relief Order.[60] In addition to these measures, the system also ensures access to debtors through the administration order procedure, a secondary debt relief measure that the County Court Administration Act regulates.[61]

The bankruptcy procedure is an asset liquidation procedure that is not accessible to NINA debtors because they do not have the requisite disposable property.[62] Equally,

[53] Ch 4 para 4.5.3.
[54] Ch 4 para 4.5.3.
[55] Ch 4 para 4.5.3.
[56] See ch 4 para 4.5.3.
[57] Ch 4 para 4.5.3.
[58] The Insolvency Act 1986.
[59] See ss 252-263 of the Insolvency Act.
[60] Hereafter "the DRO". The DRO was incorporated into the Insolvency Act through the Tribunals, Courts and Enforcement Act of 2007.
[61] The County Courts Administration Act 1984.
[62] See ch 2 para 5.2.2.1.

the individual voluntary arrangement measure and the administration order procedure envisage a debt repayment plan between a debtor and his creditors that debtors may only access with a steady source of income.[63] In response to the NINA debtors' marginalisation by the aforementioned measures, the legislature introduced the DRO in 2007, which was influenced by the No Asset Procedure in New Zealand.[64]

The DRO is extra-judicial, and it is administered by the official receiver. However, applications regarding the procedure are directed to an approved intermediary.[65] To access this measure, debtors must meet the following criteria: the debtor's total liabilities must be GBP30 000 or less, the debtor's maximum surplus income must be GBP75 per month after paying tax, national insurance and normal household expenses, the debtor's non-exempt assets should be no more than GBP2 000, and if the debtor owns a motor vehicle, it may not be worth more than GBP2 000, the debtor must have lived or worked in England and Wales within the past three years, and the debtor must not have applied for a DRO within the past six years.[66]

As pointed out, this measure addresses the special needs of NINA debtors within the English and Welsh debt relief system and once they access this measure, they obtain a guaranteed discharge of qualifying unsecured debts after twelve months. The discharge applies to all interest, penalties and other sums that may have become payable in relation to those debts since the application date.[67]

6.2.5 The Scottish Minimal Asset Process

The Scottish natural person debt relief system is regulated by the Bankruptcy (Scotland) Act.[68] The primary debt relief measure within this system is the bankruptcy procedure[69] while the secondary measures are the voluntary trust deeds[70] and the Debt Arrangement Scheme that is regulated by the Debt Arrangement Scheme (Scotland) Regulations.[71] The alternative statutory measures envisage a debt

[63] See ch 5 paras 5.2.3.1 and 5.2.3.2.
[64] See ch 5 para 5.1. Also, see ss 361-377B of the (New Zealand) Insolvency Act 2006.
[65] See ch 5 para 5.2.3.3.
[66] Ch 5 para 5.2.3.3.
[67] Ch 5 para 5.2.3.3.
[68] The Bankruptcy (Scotland) Act 2016.
[69] See ch 5 para 5.3.2.
[70] See ch 5 para 5.3.3.1.
[71] See ch 5 para 5.3.3.2. The Debt Arrangement Scheme (Scotland) Regulations 2019.

repayment programme between a debtor and his creditors, and, as such, this is not available to NINA debtors who do not have the requisite excess income to facilitate debt repayment.[72]

However, NINA debtors are comprehensively protected by the bankruptcy procedure, an asset liquidation procedure. In this regard, access to the bankruptcy measure is ensured through two pathways: the Minimal Asset Process (MAP) and the Full Administration routes.[73] The latter route is only accessible by debtors with some form of disposable assets, while the MAP route is specifically meant for the NINA debtor circumstances.

The MAP was introduced in 2015 and replaced the Low-Income-Low-Asset procedure that had been in force since 2007.[74] Regarding the MAP, the eligibility criteria were recently reformed to accommodate debtors adversely affected by the Covid-19 pandemic.[75] To this end, to access this measure, the applicant's debts should not be less than GBP1 500 and not more than GBP25 000.[76] Further, the total value of the applicant's assets should not exceed GBP2 000, no single asset of the applicant must have a value exceeding GBP1 000, and the debtor must not own land.[77] The recent reforms also related to the procedure's application fee, which was lowered from GBP90 to GBP50.[78] Although the aforementioned eligibility criteria may exclude some NINA debtors, such as those with debts exceeding the GBP25 000 threshold; this measure is widely regarded as inclusive and effective.

After accessing the measure, NINA debtors may subsequently obtain a discharge of debts after six months.[79] However, despite obtaining a discharge of debts, the debtor remains liable to certain bankruptcy restrictions for a further six-month period from the date of discharge.[80] Consequently, NINA debtors may only be fully released from all bankruptcy restrictions after twelve months have lapsed.

[72] Ch 5 paras 5.3.3.1 and 5.3.3.2.
[73] See ch 5 paras 5.3.2.1 and 5.3.2.2 respectively.
[74] Ch 5 para 5.3.1.
[75] Ch 5 para 5.3.1.
[76] See ch 5 para 5.3.2.1.
[77] Ch 5 para 5.3.2.1.
[78] Ch 5 para 5.3.2.1.
[79] Ch 5 para 5.3.2.1.
[80] Ch 5 para 5.3.2.1.

6.3 Recommendations and way forward

6.3.1 Introduction

The internationally regarded policies, principles and guidelines in insolvency discussed in this thesis have indicated that: legislators must ensure that all honest but unfortunate debtors must be provided access to the debt relief system and the insolvency regimes must facilitate a discharge opportunity for all debtors as an extension of insolvency procedures.[81] The comparative analysis undertaken in this study has also highlighted crucial regulatory measures that have been implemented in these systems that facilitate access to all honest but unfortunate debtors, especially the NINA category of debtors.

Following this analysis, the discussion below outlines the recommendations that must be implemented in Zimbabwe's exclusionary natural person debt relief system that may align the system with international best practices in insolvency. At the onset, that this thesis does not recommend the implementation of a further secondary insolvency statute because this will lead to the much-criticised fragmented approach presently in South Africa.[82] Therefore, the following recommendations must be incorporated into the prevailing debt relief measures that the Act regulates.

6.3.2 Access to all honest but unfortunate debtors

As highlighted above, the Zimbabwean natural person debt relief system marginalises NINA debtors. Consequently, debtors falling within this category are vulnerable to creditor intimidation because of the lack of statutory protection afforded to them.[83] To remedy the plight of such debtors, this study proposes that a separate pathway to the liquidation procedure, similar to the MAP in the Scottish debt relief system,[84] be implemented to cater for the needs of NINA debtors.

Although the liquidation procedure is a judicial procedure, the amended NINA-specific pathway to liquidation should be administered by an intermediary who is well-versed in insolvency issues. At the same time, the court plays an oversight role in the process.

[81] See ch 2 paras 2.2, 2.4.1.2, 2.5.4.5 and 2.5.4.6.
[82] Ch 4 paras 4.3.1 and 4.6.
[83] See ch 3 para 3.3.
[84] Ch 5 para 5.3.2.1.

This is imperative considering the challenges historically experienced by Zimbabwe's judicial system.[85] An intermediary may potentially satisfy both debtors and their creditors of his impartiality, thereby ameliorating creditor passivity.[86] Additionally, reliance on a knowledgeable intermediary is essential because this person will also be mandated with providing pre-filing counselling to debtors and base discharge on the successful completion of financial literacy programmes. Although this process will be administratively cumbersome, the benefits that it will provide outweigh this concern.

The proposed amended NINA pathway to liquidation must be fully government-funded, including the measure's screening costs. This is in contrast to the "user pay system" currently in Zimbabwe that marginalises NINA debtors because of their inability to pay the prohibitive fees associated with the debt relief system. Consequently, there should be minimum or no financial requirement for participation. The intermediary must also be fully funded by the government.

Although in the main, the liquidation procedure is an asset liquidation measure, this proposed NINA-specific route to liquidation should be implemented similarly to the MAP in Scotland wherein no disposable assets are required when NINA debtors are involved.[87] Because this will be a streamlined procedure with no dividend guaranteed to creditors, the proposed intermediary should fully administer it and no trustee should be involved. Involving a trustee is costly and unnecessary because NINA debtors do not have an estate, or have few assets, that may warrant the involvement of a trustee.

Regarding access to this proposed NINA-specific measure, this thesis prefers the position in the American bankruptcy system where applicants meeting a certain prescribed threshold undergo a mandatory pre-filing means test.[88] The pre-filing means test will be essential in stopping "can pay" applicants who meet the requirements of the full liquidation measure from abusing the streamlined NINA-specific measure.

[85] See ch 3 para 3.3.5.
[86] See ch 2 para 2.5.4.2.
[87] See ch 5 para 5.3.2.1.
[88] See ch 2 para 2.2.3.1.

6.3.3 Discharge of debts

The proposed amended pathway to liquidation must result in a conditional discharge of qualifying unsecured debts that existed at the date of the application. The discharge must be awarded after a period of between twenty-four and thirty-six months from the date of the application. When compared with the well-established and established personal insolvency systems discussed in this thesis, this proposed discharge period is the longest.[89] However, this proposed period is reasonable and has been chosen because it will afford adequate time for the intermediary to provide comprehensive credit counselling to qualifying NINA debtors who have accessed the measure. Further, this period will ameliorate the moral hazard that may be created by a six- or twelve-month discharge period. It also considers the interests of both the society and creditors who might not favour a seemingly easy escape from one's obligations. In relation to the full liquidation measure, this thesis also proposes that the discharge period be reduced from the strenuous ten-year period to a period of twenty-four to thirty-six months.[90] This will ensure equal treatment between debtors with disposable assets who access the full liquidation measure and NINA debtors who qualify for the proposed amended NINA-specific measure.

The extent of the discharge must cover as many unsecured debts as possible including any interest on the credit to which the discharge relates. In line with international best practice in insolvency, the discharge must exclude the following: secured debts, maintenance, fines and other sanctions, taxes and other government debts, educational loans and post-commencement debts.[91] Additionally, a moratorium on debt enforcement must be active from the application stage, and it should lapse immediately after the intermediary has rejected the debtor's application.

In line with international best practices in insolvency, to ensure protection for debtors with disposable assets who have accessed the full liquidation measure, the measure must ensure a liberal property exemption. In this regard, all of the debtor's assets existing at the time of the application must be exempted from liquidation.[92] The burden

[89] The discharge period under the DRO in England and Wales is twelve months while under the MAP in Scotland is six months but the debtor remains liable to certain bankruptcy restrictions for a further six months. Lastly, the discharge period under the debt intervention measure to be implemented in South Africa is twenty-four months.
[90] See ch 3 para 3.3.4.
[91] See ch 2 para 2.5.4.6.
[92] See ch 2 para 2.5.4.5.

of petitioning to reclaim the particular items of excess value that could be of value to creditors and the insolvency estate must then be on the trustee administering the insolvent estate.

Additionally, although creditors' participation is essential in an effective and inclusive insolvency regime,[93] their involvement during the application and discharge stage must be kept to a bare minimum. To this end, the intermediary must merely inform the creditors of the application and its outcome. However, the creditors must be allowed to make representations to the intermediary, and the intermediary must consider the representations when deciding on the application. However, creditors must not be permitted to veto the intermediary's decision. Further, to ensure a balance of interest, discontented creditors, or any other interested person, must also be permitted to appeal the decision of the intermediary to the court overseeing the process.

Lastly, the position in the American bankruptcy system is preferred where the waiting period for readmission to the proposed NINA-specific measure should be eight years from the date of the initial discharge.[94] This waiting period is essential in removing any moral hazard that may emanate from overreliance on the discharge option by dishonest debtors seeking to escape their financial obligations. A long waiting period will also encourage prudent risk-taking by discharged debtors who would have received comprehensive financial literary training during the initial insolvency proceeding. Further, in line with international guidelines, these repeat filers must be subjected to a more intensive investigation, and only exceptional cases should be admitted to a second relief proceeding.[95]

6.3.4 Need for domestication

This thesis contends that the current exclusion of NINA debtors in Zimbabwe's consumer insolvency system is largely attributed to the transplantation of insolvency law from the South African debt relief system without giving due consideration to the

[93] See ch 2 para 2.5.4.4.
[94] See ch 2 para 2.2.2.1.
[95] See ch 2 para 2.5.4.3. This restriction is not unreasonable because the financial literacy provided to insolvents is expected to adequately equip them with skills to deal and/or avoid future over-indebtedness.

uniqueness of Zimbabwe's debt relief system and the socio-economic landscape.[96] Although it is necessary to consider international trends, which this thesis does, it is nonetheless imperative that Zimbabwe's legislators domesticate the insolvency trends to suit the needs of debtors within the country.

This thesis recognises the colonial history that Zimbabwe and South Africa share and the influence South Africa has continued to have on the development of formal insolvency law in Zimbabwe and most Southern African countries.[97] However, after many decades of independence, it is realistic to expect that the legislature has adequately developed to regulate its affairs without an overreliance on South Africa. To this end, the proposed NINA-specific proposals advanced by this thesis depart from the long-standing transplantation of South Africa's legislation by Zimbabwe's legislature. Furthermore, it takes cognisance of the country's unique insolvency regime and the socio-economic circumstances of consumers in Zimbabwe who are presently in financial difficulties because of the country's ailing economy. This proposal also recognises the lack of social security afforded to consumers in Zimbabwe as against the position in South Africa, which has a functional social welfare system.[98]

6.3.5 Debt relief education for legal practitioners and consumers

One of the major concerns regarding the newly introduced insolvency statute in Zimbabwe is its underutilisation.[99] Four years after the Act came into operation, there has not been a single reported judgment involving consumer debtors under this statute. Some of the reasons that have been advanced for this underutilisation includes the stigma attached to insolvency, along with a lack of knowledge of consumer insolvency regulation among legal practitioners and consumers.[100]

As to the latter, this is mainly attributed to the Bachelor of Laws curriculum at public and private universities such as the University of Zimbabwe, the Great Zimbabwe University, the Midlands State University and the Ezekiel Guti University where consumer insolvency is not part of the curriculum of these institutions. This thesis

[96] See ch 1 para 1.1. Also, see ch 4 para 4.6.
[97] See ch 3 para 3.2.2.3.
[98] See ch 1 para 1.1.
[99] Ch 1 para 1.1.
[100] Ch 1 para 1.1.

recommends that these institutions include consumer insolvency law in their curriculum because this might potentially promote the utilisation of the consumer insolvency statute.

In relation to the awareness of insolvency regulation among consumers, this thesis proposes that the Council of Estate Administrators and Insolvency Practitioners of Zimbabwe, or any other concerned body, undertakes public awareness programmes or campaigns, especially in underprivileged communities. Further, the council may also publish informative programmes with the Zimbabwe Broadcasting Corporation. This is the only television and radio broadcaster in Zimbabwe; therefore, it will guarantee that information on insolvency matters will be comprehensively disseminated through such informative programmes or advertisements. Public awareness campaigns and information dissemination by the national broadcaster may also assist in reducing the stigma attached to insolvency.

6.3.6 Modernisation of the insolvency system

The discussion of the Scottish, English and Welsh debt relief systems highlighted the proactive measures taken by the legislators in these jurisdictions to ensure continued comprehensive protection to its debtors in response to the adverse effects of the Covid-19 pandemic.[101] This proactive response is especially laudable because these jurisdictions already had sound debt relief systems and sound social security systems before the devastation caused by the Covid-19 pandemic. When compared with Zimbabwe, which has no safety net for consumers, these countries had a much lesser need to implement these changes. Because of these forward-looking modern changes, this study also proposes the modernisation of Zimbabwe's insolvency system.

Modernisation first relates to the flexibility of the debt relief measures' eligibility criteria that may be reformed by the legislature, where necessary. This will be crucial in affording extended protection to NINA debtors even during periods of economic crisis, such as the present situation.

[101] See ch 5 paras 5.2.3.3 and 5.3.2.1.

Further, the restrictions enforced by the Covid-19 pandemic that prohibited social movement resulted in a much greater reliance on technology in insolvency matters, for example, in the Scottish debt relief system.[102] In light of this, this thesis proposes that provision be made in Zimbabwe's debt relief system for online debt relief applications along with virtual creditor meetings. Virtual creditor meetings will also assist in reducing procedural costs, for example, the costs incurred by debtors during the negotiation phase of the pre-liquidation composition measure.[103]

6.3.7 Currency devaluation

Lastly, one of the concerns raised in this study is the monetary thresholds throughout the Act. The thresholds are problematic when considered in relation to the hyperinflation currently experienced in Zimbabwe, which has resulted in currency devaluation.[104] The currency devaluation has rendered the debt relief measures redundant because they presently stipulate non-feasible monetary thresholds.

In light of this, this thesis proposes that the legislature either remove the monetary thresholds or implement foreign currency stipulations. In this regard, the stable currencies of the United States of America and South Africa that are widely used in the country[105] must be implemented in all monetary thresholds throughout the insolvency statute. This will ensure that the debt relief measures remain feasible because they will withstand any currency devaluation in the country that presently affects the Zimbabwean dollar.

6.4 Final remarks

This study has established that Zimbabwe's natural person debt relief system is neither effective nor inclusive because it prevents access to NINA debtors, and this debtor category is left vulnerable to creditor intimidation. The consumer debt relief system is regulated by a consolidated Act that came into operation on 25 June 2018. This statute regulates Zimbabwe's consumer insolvency system through a liquidation

[102] Ch 5 para 5.3.2.1.
[103] See ch 3 para 3.3.3.
[104] See ch 3 para 3.3.
[105] Ch 3 para 3.3.

procedure along with the pre-and post-liquidation composition measures. NINA debtors cannot access the liquidation measure because it denotes an asset liquidation process that is only accessible by debtors with disposable assets. Furthermore, the novel composition measures envisage a debt repayment negotiated settlement between a debtor and his creditors. This presupposes that a debtor must have some form of a steady source of income to access any of these measures.

Viable recommendations that seek to reform Zimbabwe's consumer insolvency system into an effective and inclusive system, that provides access to all honest but unfortunate debtors, have been provided. A reformed effective, and inclusive natural person debt relief system is vital because it will ensure that marginalised NINA debtors are afforded access to the system and provided an opportunity to obtain a discharge of debts. The safety net that these recommendations will provide might also be critical in incentivising debtors to take prudent entrepreneurial risks with the assurance of a safety net if they fail. This might rejuvenate the ailing economy that has recently been devastated by the adverse effects of the Covid-19 pandemic and which has had a ripple effect on consumers who have barely recovered from the negative effects of the 2007 - 2009 global financial crisis.

The proposals advanced above balance the interests of the society, creditors and debtors. Creditors' interests are guaranteed because the "can pay" debtors will continue to be mandated to provide a non-negligible dividend to creditors to obtain a discharge of debts. Honest but unfortunate debtors' interests are guaranteed because they will access the debt relief system and obtain a discharge of debts along with financial literacy training. The financial literacy training is in line with international guidelines and is forward-looking because it will assist in educating consumers about debt management and possibly ameliorate future over-indebtedness.

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