LLM MINI-DISSERTATION

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The effectiveness of debt review in terms of the National Credit Act 34 of 2005 as a debt relief measure for over-indebted consumers

Submitted in partial fulfilment of the requirements

FOR THE MASTER'S DEGREE IN MERCANTILE LAW

UNIVERSITY OF PRETORIA

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TABLE OF CONTENTS

SUMMARY

The South African personal insolvency system needs reform to accommodate all categories of debtors who find themselves over-indebted and unable to re-establish themselves economically. Presently there are three statutory debt relief measures for an over-indebted consumer to utilise. Sequestration in terms of the Insolvency Act, administration in terms of the Magistrates' Courts Act, and debt review in terms of the National Credit Act. All these measures require disposable assets or disposable income which creates an access barrier for no-income-no-asset ("NINA") and low-income-low-asset ("LILA") debtors.

The National Credit Act came into effect on 1 June 2007 and one of the Act's main objectives is to "provide for debt re-organization in cases of over-indebtedness." Part D of Chapter 4 (sections 85-88, as amended in terms of the National Credit Amendment Act 19 of 2014) introduces remedies for alleviating debt burdens, notably incorporating sections 85 and 86, which introduced the debt review procedure. However, the existing procedure falls short of effectiveness, lacking a debt discharge and imposing indefinite time constraints. In response to this inadequacy, the National Credit Amendment Act 7 of 2019 introduced debt intervention as an alternative debt relief measure to the debt review process in terms of the original Act.

This mini-dissertation aims to investigate whether debt review as an alternative to the sequestration procedure genuinely offers effective debt alleviation for diverse categories of debtors. The dissertation emphasises the need for a more comprehensive natural person insolvency system in South Africa, addressing challenges specific to debtor-groups such as NINA and LILA debtors. While debt intervention is yet to be implemented it deserves commendation as a positive step in the right direction.

CHAPTER 1

GENERAL INTRODUCTION

1.1 Introduction

Over-indebtedness is a significant problem in South Africa, affecting a considerable portion of the population.[1] It occurs when a consumer's income is insufficient to meet all their financial commitments and living expenses.[2] Millions of South Africans rely on credit to survive, yet they are falling behind on debt repayments resulting in over-indebtedness.[3] This issue arises when individuals accumulate debts beyond their realistic repayment capacity.[4] According to the consumer credit market report released by the National Credit Regulator, which is based on data provided by registered credit providers, the total value of new credit granted in December 2022 amounted to R163.62 billion inclusive of 19.09 million impaired accounts, accounting for 21.36% of the total accounts.[5] To address the issue of over-indebtedness, the South African legislature has implemented various debt relief measures to offer relief and support to individuals struggling with their debts and facing financial distress.[6]

South Africa's approach to natural person insolvency in characterised by three debt relief procedures which are available for over-indebted consumers to utilise, sequestration in terms of the Insolvency Act,[7] debt review in terms of the National Credit Act,[8] and administration in terms of the Magistrates' Courts Act.[9] Sequestration is regarded as the ultimate debt relief measure as it

[1] "Credit extension slows down in the fourth quarter" available at https://www.ncr.org.za/documents/Circulars/CCMRCBM%20Press%20Release%20March%202023%20final.pdf. [Accessed on 14 July 2023] (hereafter "Credit extension").
[2] *Ibid.*
[3] Department of Trade and Industry South Africa *Consumer credit law reform: Policy framework for consumer credit* 2004 13.
[4] *Ibid.*
[5] Credit extension.
[6] Coetzee "An opportunity for no income no asset (NINA) debtors to get out of check? An evaluation of the proposed debt intervention measure" 2018 *THRHR* 595 and 596.
[7] 24 of 1936 (hereafter "Insolvency Act").
[8] 34 of 2005 (hereafter "National Credit Act" or "NCA").
[9] 32 of 1944 ("hereafter "Magistrates' Courts Act").

provides for a discharge of pre-sequestration debts.[10] In terms of the Insolvency Act, a person who is unable to pay his or her debts or has insufficient assets to discharge his or her liabilities is considered to be insolvent and may apply to have his or her estate sequestrated by an order of court.[11] The effect of sequestration is that a debtor's debts are discharged upon rehabilitation, either automatically after a period of ten years from the date of sequestration or upon application for rehabilitation.[12] According to the Insolvency Act, a sequestration order can be acquired by either the debtor voluntarily surrendering his or her insolvent estate or by a creditor of the insolvent applying for the sequestration of the debtor's insolvent estate.[13] In both instances an order for sequestration will not be granted unless it can be demonstrated that the sequestration will be to the advantage of creditors.[14] Therefore, to be eligible for sequestration a debtor must have realisable assets,[15] and free residue to cover the expenses of the sequestration process.[16] Unfortunately, this requirement excludes many debtors as only those with sufficient wealth can afford to undergo this process.

The National Credit Act is the piece of legislation that replaced the Usury Act[17] and the Credit Agreements Act.[18] These two pieces of legislation were the framework for consumer credit for a long period in South Africa. The NCA was enacted with an aim to transform the credit market, to prevent unscrupulous credit granting, over-indebtedness and to further create a credit regulation framework that would grant all consumers the right to have access to credit and more specifically to low-income consumers who were previously denied access to such credit.[19]

The NCA in Chapter 4 Part D provides for debt relief provisions to combat the over-indebtedness of credit consumers. It introduced debt review in terms of section 86 as an alternative to sequestration which intends to restructure the credit agreement debt of an over-indebted debtor.[20] A debt counsellor is appointed to review the debtor's financial obligations in terms of the credit

[10] Coetzee 2018 *THRHR* 596.
[11] Smith, Van der Linde and Calitz *Hockly's Insolvency law: winding-up and business rescue* (2022) 3.
[12] Smith, Van der Linde and Calitz 246 and 247.
[13] Smith, Van der Linde and Calitz 3.
[14] Smith, Van der Linde and Calitz 25 and 52.
[15] *Ex parte Harmse* 2005 1 SA 323 (N) 326.
[16] Smith, Van der Linde and Calitz 19.
[17] 73 of 1968; see also Otto and Otto *The National Credit Act explained* (2016) 3.
[18] 75 of 1980; see also Otto and Otto 3.
[19] S 3(a) of the NCA.
[20] Scholtz (ed) *Guide to the National Credit Act* (2008) par 11.3.3.

agreements he or she is a party to in order to establish and/or create a repayment plan.[21] Although debt review is one of the alternative debt relief measures available to sequestration, its effectiveness is put into question as it makes no provision for a discharge of debts which is critical for the re-establishment of a debtor's economic capability.[22] It is essentially a debt restructuring plan available for mildly indebted consumers which ensures that the consumer satisfies all his/her obligations, thus stretching the repayment over a longer period of time.[23] A further limitation is that it only applies to credit agreements that are defined in and subject to the NCA.[24] The administration process like debt review aims to restructure the consumer's debt with the goal of eventually settling the debtors' debt in full.[25] For the purpose of this dissertation I will not give a comprehensive discussion on administration.

The access requirements for both sequestration and debt review do not consider hopeless debtors such as the categories of debtors referred to as no-income-no-asset[26] and 'low-income-low-asset[27] debtors.[28] Given that the sequestration process by default excludes these categories of debtors as they neither have realisable assets nor a disposable income,[29] the alternative debt relief measures should then be effective enough to accommodate them, which they are not. NINA and LILA debtors are therefore in essence left destitute which according to Coetzee is unconstitutional as these present measures discriminate against them based on their financial status which is a violation of section 9 of the Constitution.[30]

[21] Roestoff and Coetzee "Consumer debt relief in South Africa; lessons from America and England; and suggestions for the way forward" 2012 *SA Merc LJ* 67.
[22] *Ibid.*
[23] Roestoff and Coetzee 2012 *SA Merc LJ* 68.
[24] *Ibid.*
[25] Mabe "Alternatives to bankruptcy in South Africa that provides for a discharge of debts: Lessons from Kenya" 2019 *PERPELJ* 6.
[26] "NINA".
[27] "LILA".
[28] Roestoff and Coetzee "Debt relief for middle-income debtors under the National Credit Act 34 of 2005 – International approaches and guidelines" in Botha and Barnard (eds) *De serie legenda: Developments in commercial law – Law of specific contracts and banking law* (2019) 163.
[29] Coetzee and Roestoff "Rectifying an unconstitutional dispensation? A consideration of proposed reforms relating to no income no asset debtors in South Africa" 2020 *Int. Insolv. Rev.* 95.
[30] Coetzee "Is the unequal treatment of debtors in natural person insolvency law justifiable? A South African exposition" 2016 *Int. Insolv. Rev.* 36; The Constitution of the Republic of South Africa, 1996 (hereinafter "The Constitution").

As a result, the legislature introduced a new debt relief process for credit consumers in the NCA in terms of the National Credit Amendment Act,[31] which is termed "debt intervention". The 2019 NCAA has been signed into law by the President, but has not been put into operation yet. The debt intervention process will only apply to unsecured credit agreements and is specifically designed for NINA and LILA debtors and takes into account their specific needs.[32] One potential outcome of applying this procedure to a consumer's financial circumstances is the discharge of qualifying unsecured debt.[33] The debt intervention procedure will allow unsecured debts to be suspended, restructured, or completely eliminated.[34] This will assist NINA and LILA debtors because assets or disposable income is not a pre-requisite to qualify for this process.

1.2 Research statement

This dissertation aims to investigate whether debt review in terms of the NCA and debt intervention in terms of the 2019 NCAA provides effective alternative debt relief measures to the sequestration procedure in terms of the Insolvency Act, affording debt relief or alleviation for all categories of debtors, regardless of their financial circumstances, in order for them to re-establish themselves economically and to rebuild their lives. The goal is to demonstrate the need for a more comprehensive system of natural person insolvency in South Africa, especially for debtors with unique challenges such as the NINA and LILA debtors.

The major areas of concern in respect to these procedures which will be attended to are their requirements, the goals of and the relief provided by each procedure.

1.3 Research objectives and overview of chapters

The proposed structure for the dissertation is as follows:

1.3.1 Chapter 1 will discuss the research question and briefly discuss the issue of over-.

[31] 7 of 2019, hereafter the "2019 NCAA".
[32] Coetzee and Roestoff 2020 *Int. Insolv. Rev* 96.
[33] Roestoff and Coetzee in Botha and Barnard (eds) 163.
[34] *Ibid* 164.

indebtedness of consumers, alternatives available to the insolvency procedure, the relevance of my research topic and will also provide definitions of frequently used terms.

1.3.2 Chapter 2 will be a discussion of the sequestration procedure in terms of the Insolvency Act as the main debt relief process available for discharging of debts, particularly looking at its requirements, consequences, and the advantages thereof. It will further discuss the advantage to creditors requirement with reference to case law.

1.3.3 Chapter 3 will consider the alternative debt relief procedures available in South Africa and discuss particularly the debt review procedure in terms of the NCA and further consider its effectiveness in respect of NINA and LILA debtors.

1.3.4 Chapter 4 will be a discussion of debt intervention in terms of the 2019 NCAA, with reference to the procedure, advantages and its effect on NINA and LILA debtors.

1.3.5 Chapter 5 will be the final chapter wherein I will conclude based on my research. The sequestration, debt review and debt intervention processes will be compared and contrasted, and it will be considered whether the new debt intervention procedure will constitute an effective, alternative debt relief measure affording sufficient debt alleviation to NINA and LILA debtors in South Africa, who do not have disposable income or assets. Recommendations, if any, will thereafter be made.

1.4 Delineations

Although administration in terms of the Magistrates' Courts Act is one of the debt relief measures available to over-indebted consumers in South Africa, it will not form part of the study, but will only be referred to briefly. The main moments and aspects of debt review and debt intervention in terms of the NCA and 2019 NCAA respectively will be discussed, and the processes will not be discussed in comprehensive detail. Although the process involved in each measure will be discussed, procedural shortcomings or lacunae and restrictions fell outside the scope of my dissertation. The failure to finalise sequestrations and debt review applications in the courts, and the reasons underlying these failures, are disregarded.

1.5 Terminology

1.5.1 The terms defined below will be frequently used in my dissertation, the definitions of which are provided for in terms of section 1 of the Insolvency Act:

"debtor" in connection with the sequestration of the debtor's estate, means a person or a partnership or the estate of a person or partnership which is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to Companies;

"insolvent" when used as noun, means a debtor whose estate is under sequestration and includes such a debtor before the sequestration of his estate, according to the context;

"sequestration order" means any order whereby an estate is sequestrated and includes a provisional order when it has not been set aside'.

1.5.2 The following terms, defined in section 1 of the NCA, will be referred to frequently:

"consumer" in respect of a credit agreement to which this Act applies, means-

(a) the party to whom goods or services are sold under a discount transaction, incidental credit agreement or instalment agreement;

(b) the party to whom money is paid, or credit granted, under a pawn transaction;

(c) the party to whom credit is granted under a credit facility;

(d) the mortgagor under a mortgage agreement;

(e) the borrower under a secured loan;

(f) the lessee under a lease;

(g) the guarantor under a credit guarantee; or

(h) the party to whom or at whose direction money is advanced or credit granted under any other credit agreement.

"credit", when used as a noun, means a deferral of payment of money owed to a person, or a promise to defer such a payment; or

b) a promise to advance or pay money to or at the direction of another person.

CHAPTER 2

SEQUESTRATION IN TERMS OF THE INSOLVENCY ACT

2.1 Introduction

This chapter will consider sequestration as outlined in the Insolvency Act. Sequestration is regarded as South Africa's principal debt relief mechanism, uniquely offering a pathway towards eventual discharge of debts.[35] In South Africa, insolvency refers to the inability of a person or a company to pay their debts when they become due.[36] A person is considered to be insolvent if their liabilities when fairly estimated exceed their assets when fairly valued.[37] If such a person does not have enough assets to pay off his or her liabilities that person will not automatically be regarded as being insolvent until his or her estate has been sequestered by a court order.[38] The primary objective of this chapter is to engage in a discussion of important aspects of the sequestration procedure, including voluntary surrender, compulsory sequestration and the concept of friendly sequestration. The discussion will extend to the specific requirements associated with sequestration, with particular emphasis on the pivotal "advantage to creditors" requirement. This discussion will provide insights into the criteria that must be met for sequestration to be considered a viable option.

Furthermore, the chapter will explore the topic of rehabilitation, aiming to assess its availability to NINA and LILA debtors within the framework of sequestration. This analysis seeks to provide an understanding of how these debtors are treated within the context of South Africa's insolvency laws.

[35] S 129 of the Insolvency Act; see also Adam "A critique of the available debt relief measures afforded to Nina debtors in the wake of transformative constitutionalism and international trends" 2021 *Pretoria Student Law Review* 282.
[36] Smith, Van der Linde and Calitz 3.
[37] *Ibid*; *Venter v Volkskas Ltd* 1973 3 SA 175 (T).
[38] Smith, Van der Linde and Calitz 3.

2.2 The policy considerations underlying sequestration

As already stated, sequestration is primarily governed by the Insolvency Act and it is the primary debt relief measure in South Africa although not always defined as such.[39] As soon as a sequestration order is issued, the debtor loses control over his or her estate, which then vests in the Master until a trustee is appointed.[40] In accordance with the Insolvency Act's provisions, the trustee sells the assets and distributes the proceeds amongst the creditors.[41] Due to the fact that the general interest of creditors takes precedence over the interests of specific creditors, this process results in a *concursus creditorum* as from commencement of sequestration.[42] The Insolvency Act's main goal is to benefit the creditors and not to provide a respite for the debtor.[43] Although this is the case it also in turn benefits the debtor as it enables him or her to have a fresh start through subsequent rehabilitation which discharges him or her from all pre-sequestration debts that have not been paid.

A debtor may obtain an order for sequestration through voluntary surrender in terms of section 3(1) of the Insolvency Act or through compulsory sequestration where a creditor applies for the sequestration of a debtor's insolvent estate in terms of section 9(1).[44] A variety of statutory requirements must be met in order for a sequestration order to be granted but the "advantage to creditors" requirement is important to determine if a particular estate will be sequestrated or not.[45] Due to the stringent requirements associated with the application for sequestration, debtors often resort to so-called friendly sequestration to ultimately try to force a discharge of debt on their creditors.[46] This is a form of compulsory sequestration brought by parties who do not have an arm's length relationship.[47]

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[39] Boterere *Debt relief as part of the social safety net: A comparative appraisal of natural person insolvency in Zimbabwe*, thesis submitted for the degree Doctor Legum, UP (2022) (hereinafter "Boterere LLD thesis"), par 4.2.1.
[40] *Ibid.*
[41] *Ibid.*
[42] *Ibid.*
[43] *Ex parte Ford and Two Similar Cases* 2009 3 SA (WCC) 376.
[44] Smith, Van der Linde and Calitz 23.
[45] Boraine and Roestoff "The treatment of insolvency of natural persons in South African law: An appeal for a balanced and integrated approach" in *The World Bank Legal Review*, volume 5: Fostering development through opportunity, inclusion, and equity 101.
[46] Mabe and Evans "Abuse of sequestration proceedings in South Africa revisited" 2014 *SA Merc LJ* 651.
[47] Smith, Van der Linde and Calitz 56.

2.3 Voluntary surrender

Voluntary sequestration or voluntary surrender is the process wherein a debtor brings an application to court for the surrender of his or her estate as being insolvent.[48] This is an *ex parte* application brought by the debtor on his or her own or by his or her authorised agent and must be brought on notice of motion accompanied by a founding affidavit and the procedural and substantive requirements must be met prior to the court granting the order for sequestration.[49] The debtor must show that he or she is in fact insolvent,[50] that he or she has free residue to defray all costs of the sequestration procedure,[51] and lastly, if a sequestration order is granted that the sequestration will be to the advantage of his or her creditors.[52] The debtor has the onus of proving compliance with the formalities.[53]

2.3.1 The debtor must be factually insolvent

An applicant in voluntary surrender is regarded as factually insolvent if his or her liabilities exceed his or her assets and his or her statement of affairs, as required by section 4(3), reflects this.[54]

2.3.2 The applicant must have a sufficient free residue to defray all costs of sequestration

The free residue is defined in section 2 of the Insolvency Act as "that portion of the estate which is not subject to any right of preference by reason of any mortgage, legal hypothec, pledge or right of retention",[55] which also includes the general administrative costs.[56] Unless there is sufficient free residue to provide a dividend for concurrent creditors the court will rarely decide that accepting a voluntary surrender is in the best interests of creditors,[57] as courts typically require a

[48] Kunst *et al Meskin: Insolvency law* (2022) par 3.1.
[49] Rule 6(1) Uniform Rules of Court; see also Smith, Van der Linde and Calitz 24 and *Ex parte Henning* 1981 3 SA 843 (O) 844.
[50] S 6(1) of the Insolvency Act.
[51] *Ex parte Lombard* 1968 2 PH C11 (O).
[52] *Ex parte Anthony & Another* 2000 (4) 116 (C) sets out what usual costs are involved; S 3(1) read with S 6(1).
[53] Kunst *et al* par 3.2.
[54] Smith, Van der Linde and Calitz 24.
[55] *Ibid.*
[56] Kunst *et al* par 3.2.
[57] Bertelsmann *et al Mars: The law of insolvency in South Africa* (2019) par 3.6.3.

minimum dividend to be disbursed to creditors.[58] It is for this reason that the courts are not inclined to accept the surrender of a debtor's estate that merely consists of liabilities as confirmed in *Ex parte Collins*.[59] If there is a question as to whether the free residue is adequate the court may allow the application if a guarantee for costs has been offered and is satisfactory to the Master.[60] In this situation the guarantee is viewed as removing the uncertainty.[61] Therefore, if there are no sufficient assets to pay all the costs of sequestration out of the realisable property, the court should not accept the surrender of the estate.[62] If there are just sufficient assets to pay the costs of sequestration, *prima facie*, it will also as a rule not be to the advantage of creditors.[63] However, under compulsory sequestration, an estate which consists of only liabilities may be sequestrated given that in such situations the creditor seeking the sequestration must provide the court with financial security to cover all the costs associated with the sequestration until a provisional trustee is officially appointed.[64]

2.3.3 The sequestration must be to the advantage of creditors

The court will not grant an order for sequestration unless the debtor can show that his or her sequestration will be to the advantage of his or her creditors.[65] The advantage to creditors is where the general body of creditors, also referred to as *concursus creditorum*, receive some benefit from the sequestration of the debtor's estate.[66] This requirement is discussed more comprehensively in 2.5 below.

[58] *Ibid*.
[59] 1927 WLD 172; Smith, Van der Linde and Calitz 19.
[60] Smith, Van der Linde and Calitz 19.
[61] *Ibid.*
[62] See *Ex parte Swanepoel* 1975 2 SA 367 (O); Kanamugire "The requirement of advantage to creditors in South African insolvency law – A critical appraisal" 2013 *Mediterranean Journal of Social Sciences* 19.
[63] Kanamugire 2013 *Mediterranean Journal of Social Sciences* 21*; Ex parte Vane* 1956 4 SA 616 (O) 617G-H.
[64] S 9(3)(b) of the Insolvency Act.
[65] S 6(1); See Ex *parte Smith* 1958 3 SA 568 (O).
[66] Roestoff and Coetzee 2012 *SA Merc LJ* 55 and 56.

2.3.4 Section 4 procedural formalities

Insolvents who desire to have their estate sequestrated must in addition to the substantive requirements also comply with the following statutory formalities: The insolvent must publish a notice of surrender in the *Government Gazette* as well as in the newspaper which is circulating the area where the insolvent resides at least fourteen days but not more than thirty days before the specified date indicated in the notice as the date of hearing of the application.[67] The insolvent must give notice to every creditor,[68] every registered trade union that represents any of the insolvent's employees,[69] and to the South African Revenue Services ("SARS") by way of registered post within seven days after the notice of surrender has been published.[70] Once this has been done the attorney for the applicant must depose to a confirmatory affidavit confirming that this requirement has been complied with and attach the necessary proof being a copy of the registered slip.[71]

Once notice has been given to all the relevant parties the applicant is to complete a statement of affairs which must be lodged in duplicate form at the Master's office in the area in which the applicant resides in order for it to lie for inspection for a period of fourteen days.[72]

2.4 Compulsory sequestration

Another way in which a debtor's estate is sequestrated is by means of compulsory sequestration. In terms of compulsory sequestration one or more of the creditors of a debtor apply to court for an order sequestrating the debtor's estate.[73] These creditors may bring an application to declare the debtor insolvent through compulsory sequestration.[74]

If the court finds that the application and other supporting documents are sufficient, it may issue an order provisionally sequestering the debtor's estate if it is satisfied that:

[67] S 4(1) of the Insolvency Act; Form A in schedule 1 to the Act; also see Smith, Van der Linde and Calitz 27.
[68] S 4(2)(a) of the Insolvency Act.
[69] S 4(2)(b)(i) of the Insolvency Act.
[70] Smith, Van der Linde and Calitz 28.
[71] S 4(2)(b)(ii)(aa) of the Insolvency Act.
[72] S 4(3) of the Insolvency Act.
[73] S 9(1); see also Smith, Van der Linde and Calitz 41.
[74] Smith, Van der Linde and Calitz 41.

(a) in accordance with section 9(1), the applicant has a liquidated claim of at least R100 against the debtor, alternatively, if there are many creditors, the total liquidated claim must be worth at least R200;[75]

(b) the debtor has committed an act of insolvency or is factually insolvent;[76] and

(c) there *is reason to believe,*[77] that if the debtor's estate is sequestrated the sequestration will be to the advantage of creditors.[78]

In compulsory sequestration proceedings the creditor carries the burden of persuading the court that the requirements have been met and the debtor has no obligation to disprove any allegations.[79]

2.4.1 The compulsory sequestration process

An application for compulsory sequestration is brought on notice of motion which must be accompanied by a founding affidavit by the sequestrating creditor setting out the facts giving rise to the application and substantiation that the requirements have been met.[80] The sequestrating creditor must furnish the Master with security for all the costs of the sequestration proceeding until a provisional trustee is appointed.[81] The creditor-applicant must further serve the application on the Master who may then write a report should reasons or facts exist as to why the application for sequestration should be dismissed or postponed.[82] The application should also be served on the debtor's employees, SARS and the debtor's trade unions.[83] On the hearing of the application for sequestration, if the court is satisfied that a proper case has been made, it will make an order provisionally sequestrating the debtor's estate.[84] However, the court may dismiss the application when it is obvious that the process of compulsory sequestration is being exploited to seek a relief for the debtor alone.[85]

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[75] *Ibid.*
[76] There are eight acts of sequestration which are listed in s 8(a)-(h) of the Insolvency Act.
[77] My emphasis.
[78] Bertelsmann *et al* par 5.10.4.
[79] Smith, Van der Linde and Calitz 41.
[80] Smith, Van der Linde and Calitz 60.
[81] S 9(3)(b) of the Insolvency Act.
[82] S 9(4) of the Insolvency Act.
[83] S 9(4A)(a)(i)-(iv) of the Insolvency Act.
[84] Smith, Van der Linde and Calitz 66.
[85] *Trust Wholesalers and Woollens (Pty) Ltd v Mackan* 1954 2 SA 109 (N) 112.

The provisional order must be served on the debtor with a return date, and the debtor may then oppose the application on the return date to give reasons as to why his or her estate should not be finally sequestrated.[86] After the order for provisional sequestration, if the court is satisfied that the requirements as set above have been met, the court may grant a final order for sequestration.[87] The granting of the sequestration order is in the discretion of the court even if all the requirements have been met.[88]

2.4.2 Friendly sequestrations

An application for friendly sequestration is essentially an application for a compulsory sequestration wherein a debtor as a way of freeing him or herself from financial distress colludes with a family member or a friend to file an application for the compulsory sequestration of his or her estate in order for him or her to obtain financial relief.[89] Due to the fact that such applications are usually viewed as not to be brought in good faith, such as debtors attempting to avoid the stringent requirements set for voluntary surrender – especially the requirement to prove the advantage to creditors – the court strictly scrutinises these applications to consider whether creditors will benefit and to ensure that there is no abuse of the process or prejudice to the creditors.[90]

The court in *Jhatam v Jhatam,*[91] held that a sequestration agreement between a creditor and a debtor is neither disagreeable nor sinister given that the creditor's claim is valid and sequestration is in fact legally justified under the circumstances.[92] However, it is still considered to be an abuse of the court process as held in *R v Meer,*[93] wherein the court remarked that the applicant is frequently not a real creditor, is aware that sequestration does not benefit creditors in general or has no intention of going any further with the process than a provisional sequestration order.[94] This

[86] S 11(1) of the Insolvency Act.
[87] Smith, Van der Linde and Calitz 70.
[88] Bertelsmann *et al* par 5.10.5.
[89] See *Esterhuizen v Swanepoel* 2004 4 SA 89 (W); Smith, Van der Linde and Calitz 56.
[90] See *Ex parte Steenkamp and related cases* 1996 3 SA 822 (W) 825.
[91] 1958 4 All SA 114 (N); 1958 4 SA 36 (N) 39 and 40.
[92] *Ibid.*
[93] 1957 3 SA 614 (N) 618.
[94] *Ibid.*

was further reiterated in the case of *Mthimkhulu v Rampersad,*[95] wherein the court held that these applications are only being made as a tool to prevent creditors from selling property in execution and not to benefit the creditors. For this reason, the court developed certain requirements which must be met when bringing an application for a friendly sequestration, namely:

'(i) sufficient proof of the applicant's locus standi;
(ii) sufficient documentary proof of the debt;
(iii) reasons should be given for the fact that the applicant had no security for the debt;
(iv) a full and complete list of the respondent's assets and acceptable evidence upon which the court could determine their true market value;
(v) in case of immovable property, the valuer should prove his or her qualifications to make the valuation and his or her experience;
(vi) notice of the application was to be given to the bondholder; and
(vii) full and acceptable reasons on affidavits to be given for an application for the execution of a provisional order'.

The court therefore would not reject such an application but would scrutinise these applications in view of the rules of practice to avoid an abuse of the process.[96]

2.5 Advantage to creditors

As previously stated, the primary objective of the Insolvency Act is to provide a financial benefit to creditors, who will subsequently obtain a portion of the funds distributed.[97] This amount is determined based on the principle of an "equitable distribution" of all the assets within the insolvent's estate.[98] This financial benefit is the fundamental consideration of whether a court will grant or decline to grant an order for sequestration even though all the other requirements for the granting of such order may have been satisfied.[99] The "advantage to creditors" requirement thus aims to favour the collective group of creditors, also referred to as the *concursus creditorum.*[100] An applicant for a sequestration order, whether compulsory or voluntary, must show that the advantage to creditors requirement has been met.[101] This requirement is much stricter in voluntary

[95] 2000 3 SA 512 (N).
[96] *Mthimkhulu v Rampersad* 2000 3 SA 512 (N).
[97] Smith "The recurrent motif of the Insolvency Act – Advantage to creditors" 1985 *Modern Business Law* 27.
[98] *Ibid.*
[99] Boraine and Van Heerden "To sequestrate or not to sequestrate in view of the National Credit Act 34 of 2005: A tale of two judgments" 2010 *PER/PELJ* 88.
[100] Smith 1985 *Modern Business Law* 27.
[101] *Ibid.*

surrender applications in that the debtor is obligated to show that if his or her estate is sequestrated it will be to the advantage of creditors, whereas in compulsory sequestration proceedings the applicant only needs to show that "there is reason to believe" that the sequestration will be to the advantage of creditors.[102] "Reason to believe" gives rise to a belief which must be proven *prima facie* when seeking a provisional order and on a balance of probabilities when seeking a final order.[103]

"Advantage to creditors" is not defined in the Act, therefore we have to consider case law in order to interpret what is meant by this.[104] The court in *Meskin & co v Friedman*[105] held that "reason to believe" in section 10 and 12 of the Insolvency Act is an indication that it is not essential for the creditor to persuade the court, either at the initial or final hearing, that sequestration will be financially beneficial to creditors.[106] The court further held that at the hearing and based on the facts which are before the court, there needs to be a prospect that some financial benefit will result to the creditor.[107] That where there is no prospect of a sufficient dividend then the advantage to creditors requirement would not have been met.[108] There must be a non-negligible dividend at the very least.[109] In *Stratford and Others v Investec Bank Limited and Other*[110] the court held that the appropriate method for assessing the benefit to creditors and establishing the specific amount that qualifies as significant is within the discretionary power of the court.

The court in *Lotzof v Raubenheimer*[111] defined the term "advantage to creditors" to mean that the sequestration must be to the advantage of the general body of creditors. The court will essentially be inclined to grant an order for sequestration if it is shown that if a debtor's estate is realised it

[102] Evans "Waiving of rights to property in insolvent estates and advantage to creditors in sequestration proceedings in South Africa" 2018 *De Jure* 301 and 302.
[103] Kunst *et al* par 2.1.4.
[104] Roestoff "The income of an insolvent and sequestration under the Insolvency Act 24 of 1936" 2017 *SA Merc LJ* 480.
[105] 1948 2 SA 555 (W) 558.
[106] *Ibid.*
[107] *Meskin & co v Friedman* 1948 2 SA 555 (W) 558; see also Kunst *et al* par 2.1.4 & 3.2.
[108] *Meskin & co v Friedman* 1948 2 SA 555 (W) 558.
[109] *Trust Wholesalers and Woollens (Pty) Ltd v Mackan* 1954 2 SA 109 (N); see *Ex parte Onuglaja & others* [2011] JOL 2709 (GNP) par 9, where the court held that in the divisions of Pretoria and Johannesburg the dividend must at least be 20 cents to the rand.
[110] 2015 JOL 32695 (CC).
[111] 1959 1 SA 90 (O) 94.

will bring a monetary dividend to the concurrent creditors.[112] In the case of *Trust Wholesalers and Woolens (Pty) Ltd v Mackan*,[113] the court emphasised that the determination of the dividend depends on the specific circumstances and the creditors' stance in each case. In *Gardee v Dhanmanta Holdings and Others*[114] the court held that sequestration will be to the advantage of creditors only if the creditors are more likely to benefit from the sequestration than from an ordinary execution.[115] If the sequestration would lead to the debtor's assets being utilised solely to cover the costs of the process, leaving nothing for the creditors afterward, the court is unlikely to grant such an order.[116] The reason for the stringent application of the advantage to creditors requirement by the court is twofold: firstly, it prevents any misuse or exploitation of the insolvency process,[117] and secondly, it reinforces the importance of the establishment of a *concursus creditorum*, which signifies that the collective rights of all creditors take precedence over those of individual creditors.[118]

Given that the advantage to creditors is the most important requirement and that the courts will not be inclined to grant an order for sequestration unless it is shown that it will benefit the creditors, it excludes many debtors from utilising the sequestration process as they are not able to meet this requirement and for this reason there is sometimes an abuse of the process by debtors to force a discharge on their creditors through friendly sequestration.[119] It must be noted that it was further determined in *Ex parte Ford* that in making the determination of whether or not the advantage to creditors requirement had been satisfied, the court may consider other alternative measures which are more appropriate, such as debt review in terms of the NCA.[120] It may be mentioned that such alternative measures may provide some relief to the debtor but he or she will not ultimately qualify for the statutory discharge that may follow formal rehabilitation after sequestration.

[112] *Ibid.*
[113] 1954 2 SA 109 (N) 111.
[114] 1978 1 SA 1066 (N) 1068-1970.
[115] *Ibid;* See *Investec Bank Ltd v Lambrechts NO & others* 2019 5 SA 179 (WCC).
[116] Kanamugire 2013 *Mediterranean Journal of Social Sciences* 21.
[117] Roestoff and Coetzee 2012 *SA Merc LJ* 55.
[118] *Ibid.*
[119] Evans 2018 *De Jure* 300.
[120] *Ex parte Ford and Two Similar Cases* 2009 3 SA (WCC) par 1.

2.6 Consequences of sequestration

The sequestration process has a significant effect on the debtor, both financially and personally, in that upon the granting of a sequestration order the insolvent is divested of his or her estate.[121] This consists of all the assets which the insolvent owned at the time of the sequestration.[122] Further, the insolvent is prohibited from holding certain positions,[123] litigating, and has limited contractual capacity.[124] He or she may further not have any interest in or be employed by a trader without the permission of the trustee of the insolvent estate.[125]

Where an insolvent is married in community of property, both the husband and the wife will become insolvents and the joint estate will then form part of the insolvent estate.[126] Notably, if parties live together as husband and wife without being legally married, only the insolvent's estate will be sequestrated.[127] The property of the solvent party will however become part of the insolvent estate of the insolvent party and the solvent party must then bring an application to release those assets by providing proof that he or she is legally entitled to the property, failure of which the property will be regarded as being that of the insolvent.[128]

2.7 Rehabilitation

Rehabilitation follows the sequestration of a debtor and is a process in terms of which a debtor is afforded the opportunity to have a fresh start through a discharge of pre-sequestration debts.[129] The primary objective of the procedure is not to secure a discharge from debt but rather that such discharge occurs as a consequence of the procedure.[130] This statutory induced discharge provides the insolvent person with a chance to make a fresh start, enabling him or her to rebuild his or her life without the burden of creditors constantly pressuring him or her to settle debts that he or she

[121] S 201(1)(a). The estate of the insolvent will vest in the Master until a trustee is appointed and once the trustee is appointed the estate will vest in the trustee.
[122] Except for the exempt categories in s 23(7), 23(8) and 23(9).
[123] Smith, Van der Linde and Calitz 82 and 83.
[124] Smith, Van der Linde and Calitz 77, 78 and 79
[125] Smith, Van der Linde and Calitz 80.
[126] *Ibid* 24.
[127] S 21 of the Insolvency Act; See *Chaplin NO v Gregory (or Wyld)* 1950 3 SA 555 (C).
[128] *Ibid.*
[129] S 129(1)(b) of the Insolvency Act.
[130] *Ex parte Ford and Two Similar Cases* 2009 3 SA (WCC) 376.

are incapable of repaying.[131] This aspect is a key component of consumer insolvency systems worldwide.[132] However, the point of departure in sequestration proceedings and the eventual rehabilitation hinges on the requirement of advantage to creditors and the subsequent discharge of debts incurred prior to sequestration which is only available to debtors who have enough liquid assets to prove this requirement.[133]

There are two options available in terms of the Insolvency Act that can be utilised to obtain rehabilitation:[134] the debtor may be rehabilitated automatically after the efflux of time,[135] or by way of a court order after bringing an application to the high court on a notice of motion to be rehabilitated.[136]

2.7.1 Requirements for rehabilitation

A high court application may be brought after the acceptance of a statutory composition by creditors, in terms of section 124(2), where no claims have been proved or after full payment of proved claims.[137] Following the acceptance of a composition, an application may be brought if the dividend to concurrent creditors is at least 50 cents in the rand and the applicant provides a certificate from the Master confirming this and further confirming that this dividend has been paid, alternatively that security for the payment of the dividend has been provided.[138] An application may further be brought if the applicant can prove that there are no claims proved against his or her estate,[139] or after the full payment of all the proved claims.[140]

Section 124 stipulates that an insolvent will qualify for rehabilitation after either a period of twelve months has lapsed from the date after the Master has confirmed the first trustee's account in the estate,[141] or after a period of three years has lapsed from the above confirmation if the insolvent

[131] Roestoff "Rehabilitation of an insolvent and advantage to creditors under the Insolvency Act 24 of 1936 *Ex parte Purdon* 2014 JDR 0115 (GNP)" 2018 *THRHR*307.
[132] Bertelsmann *et al* par 25.1.
[133] *Ibid*; see *Ex parte Snooke* 2014 5 SA 426 (FB) 42.
[134] Roestoff 2018 *THRHR* 307.
[135] S 127A of the Insolvency Act; *Ibid*; unless an interested party brings an application to court before the lapsing of the ten-year period for an order blocking the automatic rehabilitation.
[136] S 124; Roestoff 2018 *THRHR* 307
[137] Bertelsmann *et al* par 25.4.1.
[138] Kunst *et al* par 14.3.1.1; issued under s 119(7).
[139] S 124(3) of the Insolvency Act; Kunst *et al* par 14.3.1.3; see *Ex parte Snooke* 2014 5 SA 426 (FB) par 54.
[140] S 125(5) of the Insolvency Act; Kunst *et al* par 14.3.1.4.
[141] S 124(2)(a) of the Insolvency Act; Kunst *et al* par 14.3.1.2.

was previously sequestrated,[142] or after a period of five years if the insolvent has committed an offence under section 132 to 134 of the Act, calculated from the date of the insolvent's conviction for any such fraudulent act relating to his or her previous, or existing insolvency.[143] It is important to note however that the court cannot grant an order for rehabilitation prior to the lapsing of at least four years in these instances, unless such a recommendation is made by the Master.[144] In *Kruger v The Master* the court held that the test for determining whether an order for rehabilitation should be granted must be based on "whether the applicant is fit and proper to trade with the public on the same basis as an honest man".[145]

2.7.2 Procedure to obtain rehabilitation

The applicant must give the Master and his or her trustee at least six weeks written notice of his or her intention to apply for rehabilitation and publish the said notice in the *Government Gazette*, at least six weeks before making the application.[146] If the application is made after the acceptance of a composition worth at least 50 cents in rand, the notice must be published at least three weeks before the date of the application.[147] The insolvent must not less than three weeks prior to bringing his or her application for rehabilitation, furnish security to the Registrar of the High Court "to the amount or value" of R500 for the payment of any cost order resulting from the opposition by any person.[148] Any information that, in the trustee's opinion, might support the court's refusal, delay or limitation of the insolvent's rehabilitation must be reported to the Master as soon as the trustee receives notice that the insolvent intends to file for rehabilitation.[149] The Master will then also report to the court based on the trustee's report and based on the facts of the application and any other information which may assist the court in deciding upon the application for rehabilitation.[150]

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[142] S 124(2)(b) of the Insolvency Act; Kunst *et al* par 14.3.1.2.
[143] S 124(2)(c) of the Insolvency Act; Kunst *et al* par 14.3.1.2.
[144] S 124 (2) of the Insolvency Act; see *Kruger v The Master* 1982 1 SA 754 (W). In the case of *Greub v The Master* 1999 1 SA 746 (C), it was determined that it is permissible to subject the master's recommendation to a review process under the provisions of section 151; see also Bertelsmann *et al* par 25.4.2.
[145] *Kruger v The Master* 1982 1 SA 754 (W); see also *Ex parte Le Roux* 1966 2 SA 419 (C) 424.
[146] S 124(1) of the Insolvency Act.
[147] Smith, Van der Linde and Calitz 619.
[148] S 125 of the Insolvency Act; Also see Kunst *et al* par 14.3.2.2 D.
[149] Kunst *et al* par 14.3.3.
[150] Kunst *et al* par 14.3.4.

2.7.3 The effect of rehabilitation

The effect of rehabilitation is that the status of the debtor as an insolvent is removed, he or she is released from obligations for all debts owed or incurred prior to sequestration, excluding those resulting from his or her own fraud. (This includes overseas debts.)[151] The debtor may request that any surplus which remains in his or her estate after the creditors have been paid be paid back to him or her.[152] The debtor will further have full contractual capacity again and all the restrictions imposed by the insolvency resulting from the sequestration falls away.[153] However, rehabilitation has no bearing on a person's obligation to pay a fine, receive punishment in accordance with the Act, their rights, obligations and powers under a composition or the responsibility of a surety for an insolvent.[154]

The pre-sequestration estate of the insolvent does not reinvest in the insolvent again after rehabilitation, except in an instance where a composition specifies that the estate will reinvest in the insolvent,[155] or where rehabilitation was obtained due to no claims being proved within a period of twelve months during the sequestration.[156] The granting of a rehabilitation order lies solely in the discretion of the court.[157]

2.8 Issues pertaining to the sequestration procedure

According to Coetzee and Brits, the Insolvency Act, which strongly adheres to the principle of prioritising creditors' interests, falls behind modern international trends by not offering any relief to debtors in the lower economic strata.[158] This exclusion perpetuates the divide between the "privileged" and the less fortunate debtors, which poses constitutional concerns regarding equality rights.[159] Due to its strict access restrictions, the sequestration procedure, which is South Africa's

[151] *Ibid*, S 129(1)(c) of the Insolvency Act.
[152] S 116(1) of the Insolvency Act.
[153] S 129(1)(c) of the Insolvency Act.
[154] S 129(3)(d) of the Insolvency Act.
[155] S 120(2) of the Insolvency Act.
[156] S 129(2) of the Insolvency Act.
[157] *Ex parte Hittersay* 1974 4 SA 326 (SWA); In terms of section 127(2) of the Act, the court may grant rehabilitation under certain conditions.
[158] Coetzee and Brits "Extinguishing of debt in terms of the debt intervention procedure: Some remarks on 'arbitrariness'" in Van der Merwe (ed) *Magister Essays vir/for Jannie Otto* (2020) 1.
[159] *Idem* 12.

main process of debt relief, marginalises NINA and LILA debtors.[160] Since the Act's primary goal is to benefit creditors financially, as was already discussed, many debtors are effectively excluded from the process.[161] NINA and LILA debtors face significant barriers when attempting to access this procedure as they do not have disposable assets which can be liquidated for distribution for the benefit of creditors, therefore failing to meet the advantage to creditors requirement.[162] Another significant barrier is a lack of proper income, which is significant considering the related costs of the sequestration process, given that a proper case must be made before the high court due to the implications on the person's status.[163]

2.9 Conclusion

The preceding discussion indicates that in South Africa the sequestration procedure followed by rehabilitation remains the most effective method of debt relief for heavily indebted, insolvent consumers. South African insolvency laws are often criticised for being creditor-oriented, as it places a significant emphasis on protecting the rights and interests of creditors. The advantage to creditors requirement is a critical aspect of the insolvency process.[164] It ensures that the insolvency proceedings primarily serve the interests of creditors and contribute to a fair distribution of the proceeds of the debtor's assets amongst the creditors. This introduces gate keeping into the process because only individuals with sufficient assets at their disposal to demonstrate a financial advantage to the collective body of creditors are eligible for a sequestration order and subsequent release from pre-sequestration debts. This systematically excludes financially disadvantaged debtors such as the NINA and LILA debtors who lack the resources to benefit from a rehabilitation order. Consequently, desperate debtors who do not meet the stringent criteria often resort to friendly sequestration to circumvent these requirements.[165]

The creditor-centric nature of the system has led to calls for reform to create a more balanced approach that considers the interests of both creditors and debtors, particularly those who are

[160] Coetzee 2018 *THRHR* 594.
[161] See par 2.3 above.
[162] Boterere LLD thesis 136.
[163] Coetzee and Roestoff 2020 *Int. Insolv. Rev.* 97.
[164] Roestoff and Coetzee 2012 *SA Merc LJ* 76.
[165] Boraine and Roestoff "Developments in American consumer bankruptcy law: Lessons for South Africa (part 2)" 2000 *Obiter* 261.

financially vulnerable. [166] These debtors need an alternative cost-effective debt relief mechanism that effectively focuses on restructuring the debtor's income and alleviating their debts through a discharge of debt. The discussion that follows will consider whether NINA and LILA debtors, who are unable to find relief from their indebtedness through sequestration, can access relief through the alternative debt relief measures in terms of the National Credit Act.

[166] *Ibid.*

CHAPTER 3
DEBT REVIEW IN TERMS OF SECTION 86 (OR 85) OF THE NATIONAL CREDIT ACT

3.1 Introduction

This chapter concerns debt review in terms of the National Credit Act. It has already been mentioned[167] that debt review is a debt alleviation measure afforded to over-indebted credit consumers in terms of the Act. In what follows, the definition of over-indebtedness in terms of the Act will be discussed and also the stage when a determination of over-indebtedness must be made. This will be followed by a discussion of the policy considerations underlying the debt review measures in the NCA, including the pertinent objectives of the Act in this regard, the limited application of Part D of Chapter 4, containing the debt review provisions, section 86 and section 85, as the routes to access debt review, and the consequences of debt review. Finally, I will conclude the chapter.

3.2 The definition of over-indebtedness

Over-indebtedness is naturally a crucial concept in the debt review process in terms of sections 86 and 85, which are the two avenues (if applicable) to access the process and specifically make mention of "over-indebted" or "over-indebtedness". Section 79(1) provides a definition of the concept "over-indebtedness" and provides as follows:

"A consumer is over-indebted if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party".

In practice, being considered over-indebted by this definition means that a consumer is financially stretched to the point where they are at risk of defaulting on their credit obligations. This finding is crucial in the context of credit regulation since it initiates different steps, such as debt review or debt counselling, aimed at assisting the consumer in managing his or her debt and avoiding future financial difficulty.

[167] Par 1.1 above.

It must therefore be clear from the determination that the consumer will not only be unable to satisfy their existing debts but will additionally also be unable to satisfy future debts.[168] Section 79(1) sets out the criteria to be applied when making the determination of over indebtedness and stipulates that the consumer's "financial means, prospects and obligations" and "probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which [he or she] is a party, as indicated by the consumer's history of debt repayment" must be taken into account.[169] The term over-indebtedness is only applicable to credit agreements covered by the Act.[170]

When having to determine whether a consumer is over-indebted, regard must first of all be had to that consumer's financial means, prospects and obligations.[171] Secondly, the consumer's probable propensity to satisfy all his or her obligations under all his or her credit agreements in a timely manner must be assessed. This must be done with reference to the consumer's debt repayment history.[172] The phrase "financial means, prospects and obligations" is expanded on in section 78(3) which provides that the following is included:

"(a) income, or any right to receive income, regardless of the source, frequency or regularity of that income, other than income that the consumer or prospective consumer receives, has a right to receive, or holds in trust for another person;

(b) the financial means, prospects and obligations of any other adult person within the consumer's immediate family or household, to the extent that the consumer, or prospective consumer, and that other person customarily- (i) share their respective financial means; and (ii) mutually bear their respective financial obligations; and

(c) if the consumer has or had a commercial purpose for applying for or entering into a particular credit agreement, the reasonably estimated future revenue flow from that business purpose."

In the case of *Standard Bank of South Africa Ltd v Panayiotts,*[173] it was established that the term "financial means" encompasses not only income and expenses but also includes assets and liabilities. The court also clarified that "prospects" extend to potential improvements in a

[168] Scholtz (ed) par 11.3.1.
[169] S 79(1)(a) and (b) of the NCA.
[170] Scholtz (ed) par 11.3.2.
[171] S 79(1)(a) of the NCA.
[172] S 79(1)(b) of the NCA.
[173] 2009 3 SA 363 (W) 370C par 9.

consumer's financial situation, which could involve an increase in income or even the sale of assets.[174]

When a determination is to be made whether a particular consumer is over-indebted, the section 79(1) criteria set out above must be applied "at the time the determination is being made".[175] Van Heerden explains that this implies that a consumer may have been financially capable of meeting the obligations under a credit agreement at the time of its inception. However, the consumer may later experience over-indebtedness due to circumstances such as job loss. It is crucial to differentiate this scenario from cases were entering into a specific credit agreement directly led to the consumer immediately becoming over-indebted.[176] This was confirmed in *Driskel v Maseko & others*,[177] wherein the court held that a determination made by the court should be based on the facts and financial information as they exist at the time of the hearing or at least very close to that time.[178] Section 79(3) provides that, for purposes of a determination of over-indebtedness, the settlement value of a credit facility,[179] or the settlement value of a credit agreement guaranteed by a credit guarantee,[180] is the amount that must be taken into consideration for the determination.

3.3 The policy considerations underlying debt review

It has already been mentioned,[181] that debt review, introduced by the NCA, is an alternative debt alleviation process to sequestration and administration orders. The predecessors to the NCA, the Usury Act and the Credit Agreements Act, did not contain any measures to alleviate the debt of over-indebted consumers. Sequestration of a bankrupt consumer's estate takes place in terms of the Insolvency Act, and gives rise to the discharge of pre-insolvency debts. However, in order for

[174] *Ibid.*
[175] S 79(2) of the NCA.
[176] Van Heerden "Section 85 of the National Credit Act 34 of 2005: thoughts on its scope and nature" 2013 *De Jure* fn 10.
[177] [2017] ZAFSHC par 64.
[178] *Ibid.*
[179] S 79(3)(a) of the NCA. The "credit facility" is defined in s 8(3) of the NCA and includes all credit card and store-card transactions; See Scholtz (ed) par 8.2.2 for a complete discussion of this type of credit agreement.
[180] S 79(3)(b) of the NCA. The "credit guarantee" is defined in s 8(5) of the NCA. A suretyship agreement that is concluded in respect of a credit facility or a credit transaction (see Scholtz (ed) par 8.2.3) serves as an example of a credit guarantee. See *Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd* 2009 3 SA 384 (T) and par 8.2.4 in Scholtz (ed).
[181] Par 1.1 above.

a sequestration application to be successful, an advantage for creditors must be proved, which excludes low-income consumers from this measure.[182] Administration orders are granted by Magistrates' Courts in terms of section 74 of the Magistrates' Courts Act,[183] but this process is only available to consumers with a debt not exceeding R50 000.[184] When a debtor successfully requests an administration order, an administrator is designated to take control of and oversee the payment of debts to creditors until all designated creditors and administrative expenses are completely settled.[185] Thus, no discharge of debt is available to consumers making use of this procedure. The debtor is required to make periodic payments, such as weekly or monthly, to the administrator as ordered by the court.[186] The application of this process is therefore also limited.[187]

The Department of Trade and Industry[188] established the need for an alternative debt alleviation measure to alleviate the plight of over-indebted credit consumers. This policy framework[189] aimed to address over-indebtedness by promoting responsible lending practices,[190] enhancing credit information infrastructure and providing relief mechanisms for over-indebted consumers through a network of regulated debt counsellors.[191] It emphasised the importance of compliance, qualifications and funding to effectively implement these measures and protect consumers from the negative consequences of excessive debt.[192] Over-indebtedness is a consequence of several factors including reckless lending and borrowing practices, limited awareness among consumers and inadequate enforcement of responsible credit standards.[193] As previously stated,[194] over-indebtedness occurs when a borrower reaches a point where he or she can no longer manage his

[182] Par 2.4 above.
[183] Act 32 of 1944, "MCA".
[184] S 74(1)(b) of the MCA. This amount is determined by the Minister from time to time.
[185] Mabe "Alternatives to bankruptcy in South Africa that provide for a discharge of debts: Lessons from Kenya" 2019 *PER/PELJ* 7.
[186] S 74I(1) of the MCA.
[187] See Boraine, Van Heerden, and Roestoff, "A comparison between formal debt administration and debt review – The pros and cons of these measures and suggestions for law reform (Part 1)" 2012 *De Jure* 84.
[188] At the time. The Department is now known as the Department of Trade and Industry and Competition.
[189] The Department of Trade and Industry South Africa *Consumer credit law reform: Policy framework for consumer credit* 2004, "2004 DTI Policy framework".
[190] 2004 DTI Policy framework 31.
[191] *Ibid.*
[192] *Ibid.*
[193] *Ibid.*
[194] Par 3.2 above.

or her debt obligations and his or her debt repayments erode his or her household income and consumption.[195]

The 2004 DTI Policy framework gave rise to the promulgation of the National Credit Act in 2005. In terms of the preamble to the Act it *inter alia* aims to "provide for debt re-organisation in cases of over-indebtedness". The objectives-section in the NCA, section 3, provides that the aims of the Act *inter alia* are

"to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by -

(c)promoting responsibility in the credit market by-

(i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers;

(g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations";[196] and

(i) providing for a consistent and harmonised system of debt restructuring…, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements".[197]

In order to give effect to these goals, Chapter 4 Part D, and in particular sections 78 to 79 and sections 85 to 88, were legislated. These provisions however do not apply to juristic persons.[198]

3.4 The debt review process

The debt review process is found in section 86 of the NCA read together with regulations 24 to 26[199] and serves as a potential debt relief mechanism for persons who are moderately over-

[195] 2004 DTI Policy framework 7.
[196] S 3(g) of the NCA.
[197] S 3(i) of the NCA.
[198] S 78(1) of the NCA; In terms of s 1 of the NCA, a juristic person is a partnership, association or other body of persons corporate or unincorporated, and a trust where there are three or more individual trustees or, alternatively, if the trustee itself is a juristic person.
[199] Regulations made in terms of the National Credit Act, GN R489, *GG* 28864, 31 May 2006, "NCA Regulations".

indebted.[200] The purpose of debt review is to assist over-indebted consumers by re-arranging their financial commitments under a credit arrangement with the ultimate goal of paying off the debt.[201] Notably, the Act does not attempt to remedy over-indebtedness by granting debt discharge to consumers who are over-indebted but to attain a re-arrangement of their debts.[202] Given that debt review is governed by the NCA, the procedure will naturally only apply to agreements that fall within the ambit of the NCA.[203] A credit agreement to which the Act applies is an agreement that allows for payment deferral or delay and includes a fee, interest or charge in respect of the deferred payment.[204] The Act provides for four categories of credit agreements, namely; the credit facility, credit guarantee, credit transaction and any combination of the first three transactions.[205] In determining the field of application of the NCA the point of departure is section 4(1) which stipulates that the Act applies to every credit agreement made between parties dealing at arm's length and made or having an effect in the Republic.[206]

The debt review procedure consists of three phases.[207] The first phase encompasses the consumer's initial application for debt review, wherein the debt counsellor examines the consumer's financial status to ascertain if the consumer is over-indebted, the second phase the court's review of the application for a debt restructuring order and the third phase the court's issuance of a debt restructuring order, when the consumer is obligated to make payments as specified in the order.[208]

[200] Boterere LLD thesis 151. Debt review may also be accessed in terms of section 85 in instances where litigation has already commenced in respect of the credit agreement.
[201] Mabe 2019 *PER/PELJ* 6.
[202] See *Collett v Firstrand Bank Ltd* 2011 4 SA 508 (SCA) 514.
[203] Boterere LLD thesis 151 and 152.
[204] Scholtz (ed) par 4.2; unless an exception applies. Important exclusions are large juristic persons (with an annual turnover or asset value of R1 million or more) and smaller juristic persons (with an annual turnover or asset value of less than R1 million) that conclude a large credit agreement – s 4(1)(a)(i) and 4(1)(b), read with the Threshold Regulations GN 713, *GG* 28893, 1 June 2006.
[205] S 8(1) of the NCA; See Scholz (ed) par 4.3.
[206] Otto and Otto 20.
[207] Scholtz (ed) par 11.3.1; Van Heerden and Coetzee "Unintentionally trapped by debt review: Procedural inadequacies in the National Credit Act 34 of 2005 relating to withdrawal from the debt review process" 2019 *PER/PELJ* 6.
[208] *Ibid.*

3.4.1 A consumer's initial application for debt review

There are two avenues in terms of which a debtor may access the debt relief process. In terms of section 85, if a consumer failed to approach a debt counsellor to be declared over-indebted and placed under debt review, he or she may still access the procedure in terms of which the court has the discretion to refer the matter to debt review.[209] In terms of section 86, the debt review process begins when a consumer who believes that he or she is facing over-indebtedness, requests a debt counsellor to assess their financial situation to confirm if the consumer is in fact over-indebted.[210] The court concluded in *SA Taxi Securitization (Pty) Ltd v Ndobela*[211] that when it becomes evident that a consumer's financial situation is declining, the consumer has a proactive obligation to initiate actions aimed at restructuring his or her debts.[212] However, a consumer cannot access the process if the creditor has already begun taking enforcement action against the debt under the credit arrangement to which the application relates.[213] Notably, in terms of section 86(2), which was amended by the National Credit Amendment Act,[214] a credit agreement for which the credit provider has already initiated action to enforce the agreement in accordance with section 130 is exempt from the provisions of section 86.

The debt review application is brought by means of a completed Form 16 accompanied by all supporting documents which are listed in Form 16 together with the prescribed fee which fee must not be more the prescribed amount.[215] The debt counsellor must acknowledge receipt of the application and provide the consumer with proof that he or she has received the consumer's application.[216] The debt counsellor must then within a period of five days of receipt of the application notify the credit bureaux as well as each credit provider who is listed in the application

[209] Boraine, Van Heerden, and Roestoff, "A comparison between formal debt administration and debt review – The pros and cons of these measures and suggestions for law reform (Part 2)" 2012 *De Jure* 256.
[210] S 86(1) of the NCA; Scholtz (ed) par 11.3.1; S 85 of the NCA additionally states that a court has the authority to refer a credit arrangement for debt review if legal procedures have already begun in terms of S 86(2).
[211] [2011] ZAGPJHC par 14.
[212] *SA Taxi Securitisation (Pty) Ltd v Ndobela* par 15; also confirmed in the case of *Robertson v Firstrand Bank Ltd t/a Wesbank* [2017] ZAGPJHC 128.
[213] S 86(2) read with s 129 of the NCA; Also see *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D); *Nedbank Ltd v The National Credit Regulator* 2011 3 SA 581 (SCA).
[214] 19 of 2014 (herein after referred to as "2014 NCAA").
[215] S 86(3) of the NCA read with reg 24(1)(c) and (d) of the NCA Regulations; Boraine, Van Heerden, and Roestoff "A comparison between formal debt administration and debt review – The pros and cons of these measures and suggestions for law reform (Part 1)"2012 *De Jure* 95.
[216] Scholtz (ed) par 11.3.3.2.

of the application and send them a completed Form 17.1, within five working days from the date of application of the debt review.[217] The debt counsellor must further within thirty working days obtain all the necessary documentation from the applicant and credit providers and proceed to assess and determine whether the applicant is over-indebted and qualifies for debt review.[218]

During the process of assessing the financial status of the consumer, the debt counsellor may ask for evidence or confirmation by reaching out to credit providers or relevant parties such as employers in order to ensure that the information provided by the consumer is correct.[219] The consumer applying for debt review and each credit provider listed in the application has a duty to comply with the debt counsellor's requests.[220] All participants in the debt review process, including the consumer, credit provider, and debt counselor, are required to engage in the process in good faith and any negotiations aimed at appropriate debt restructuring.[221]

3.4.2 The debt counsellor's assessment of over-indebtedness

In accordance with section 86(6), a debt counsellor who accepts an application under this section shall determine whether the consumer appears to be over-indebted and in doing so must utilise the section 79(1) criteria set out above and within the prescribed time frame. Regulation 24(6) further clarifies that this should occur within thirty business days after the debt counsellor has received the application.[222]

There are three possible decisions that the debt counsellor can arrive at when deciding whether or not the consumer is over-indebted and in need of debt relief. The debt counsellor can either find the consumer to not be over-indebted, that the consumer is not over-indebted but is currently or most likely going to experience difficulties with meeting his or her financial obligations, that the consumer is over-indebted or may be over-indebted as a result of reckless credit granting by the

[217] S 86(4) of the NCA and reg 24(2)-24(5) of the NCA Regulations.
[218] Reg 24(6) of the NCA Regulations.
[219] Reg 24(3) of the NCA Regulations.
[220] S 86(5)(a) of the NCA.
[221] S 86(5)(b) of the NCA; Van Heerden and Coetzee 2019 *PER/PELJ* 69; Also see Scholz (ed) par 11.3.3.2(g) and *Mercedes Benz Financial Services South Africa (Pty) Ltd v Dunga* 2011 SA 374 (WCC), for a discussion on good faith.
[222] Scholz (ed) par 11.3.3.2(g).

credit provider.[223] After determining the consumer's level of indebtedness, a Form 17.2 is subsequently sent to credit providers and credit bureaus within five working days.[224]

3.4.2.1 Determination that the consumer is not over-indebted

If the debt counsellor determines that the consumer is not over-indebted, the application for debt review will be declined regardless of whether that particular agreement was entered into recklessly at the time it was concluded.[225] Regulation 25 requires the debt counsellor to send the consumer a letter of rejection containing the facts specified in the applicable regulation.[226] Regulation 26 further requires such an application be lodged within twenty business days and using Form 18 after the letters of objection have been provided.[227] This determination is however not final as a consumer has a right to, with leave of the court and after payment of the prescribed fee, approach the Magistrate's Court following this decision in order to obtain a debt restructuring order in terms of section 86(7)(c) within a period of twenty business.[228] Furthermore, if the order is granted by the court, the consumer must send a copy of the court order to each creditor who is affected within five working days of the court order's issuance.[229] Once the credit providers have received the court order they must within ten working days of receiving the order comply and implement the terms of the court order.[230]

3.4.2.2 Determination that the consumer is not over-indebted but is experiencing or likely to experience problems in the future

If a debt counsellor determines that the debtor is not over-indebted but is having or is likely to have problems in the future honouring his or her credit obligations, the debt counsellor may advise that the client and the relevant credit providers voluntarily come to an agreement on a debt

[223] S 86(7) of the NCA; Boraine, Van Heerden, and Roestoff (Part 1) 2012 *De Jure* 97.
[224] Reg 24(10) of the NCA Regulations.
[225] S 86(7)(a) of the NCA.
[226] Coetzee *A comparative reappraisal of debt relief measures for natural person debtors in South Africa,* thesis submitted for the degree Doctor Legum, UP (2015), "Coetzee LLD thesis" fn 208.
[227] *Ibid.*
[228] Reg 26 of the NCA Regulations; Boraine, Van Heerden, and Roestoff (Part 1) 2012 *De Jure* 97.
[229] Reg 4(4) of the NCA Regulations.
[230] Reg 4(5) of the NCA Regulations.

reorganisation plan.[231] If the proposal is accepted by the credit provider and the consumer, the debt counsellor must document it as an order and file it as a section 138 consent order.[232]

3.4.2.3 Determination that the consumer is over-indebted

If the debt counsellor determines that the consumer is indeed over-indebted, the debt counsellor must submit a proposal to the Magistrate's Court proposing that a restructuring of the consumer's debt be ordered, and that one or more of the credit agreements to have been granted be declared reckless.[233] This determination is more relevant for my dissertation and what follows.

3.5 Debt restructuring by court order

In cases where the debt counsellor concludes that the debtor is indeed over-indebted, as described earlier,[234] the debt counsellor may present a proposal to the Magistrate's Court suggesting to the court the issuance of one or both of the following orders: ; firstly, that the credit agreement/s be regarded as reckless, if according to the debt counsellor that is the case; and, secondly, that the court declares a restructuring of the consumer's debt in which case the court may use the following methods to rearrange the consumer's obligations:

a) extend the duration of the agreements and reduce each instalment payable;

b) postpone the payment due dates under the agreement within a set timeframe;

c) extend the duration of the agreement and postpone the payment due dates for a specified period;

[231] S 86(7)(b) of the NCA.
[232] S 86(8)(a) of the NCA.
[233] S 86(7)(c) of the NCA; In terms of reg 24(10) of the NCA Regulations the debt counsellor must proceed to notify the credit providers and credit bureaus of the outcome.
[234] See par 3.2 above.

d) recalculate the consumer's obligations because of violations of Part A or B of Chapter 5 or Part A of Chapter 6.[235]

Notably, the court is prohibited from decreasing interest rates in terms of the credit agreement/s as a method of granting debt relief to a consumer who has sought debt review and debt restructuring under the provisions of section 86(7)(c)(ii).[236] The court does however have the authority to modify the consumer's obligation during debt review by extending the duration of the agreement and decreasing the amount of each payment that is owed, alternatively , the court may also decide to postpone the due dates for payments under the agreement for a specified period of time.[237] The debt counsellor must subsequently send to the credit providers a proposal of the restructured payment.[238]

Importantly, the court will only be inclined to grant an order if it is satisfied that the debt can be rearranged and that the restructure-plan will be feasible. This was confirmed in the case of *Seyffert & Seyffert v Firstrand Bank Ltd,*[239] wherein it was held that that the proposal that is before the court must be logical and economically feasible. In *BMW Financial Services SA (Pty) Ltd v Mudaly*[240] the court reiterated the importance of a feasible restructure-plan and held that when it is not possible to construct a repayment plan that meets the aims of the Act, the debt counsellor should tell the consumer and credit providers and the parties must then pursue other remedies.[241] The restructuring of the debtor's debts guarantees that an individual with a consistent source of income who is unable to satisfy his debts in a timely manner is granted the opportunity to reorganise his or her debts and settle them over an extended duration in accordance with the debtor's unique financial situation.[242] It is for this reason that NINA and LILA debtors are excluded from utilising the debt review procedure because they do not have a stable or consistent income

[235] S 86(7)(c)(ii)(aa)–(dd) of the NCA. Part A and B of Ch 5 respectively concern the disclosure, form and effect of credit agreements and the consumer's liability, interest, fees and charges whilst Part A of Ch 6 involves collection and repayment practices.
[236] Scholtz (ed) par 11.3.3(j)(iii); *Nedbank Ltd v Norris* 2016 JDR 0355 (ECP); *SA Taxi Securitisation (Pty) Ltd v Lennard* 2012 2 SA 456 (ECG); *Firstrand Bank Ltd v McLachlan* 2020 ZASCA 31.
[237] S 86(7)(c)(ii)(dd) of the NCA; Boraine, Van Heerden, and Roestoff (Part 1) 2012 *De Jure* 99.
[238] S 86(7)(c) of the NCA.
[239] 2012 6 SA 81 (SCA); see also *Firstrand Bank Ltd v Barnard* 2015 JDR 1614 (GP) par 11; and *Motor Finance Corporation (Pty) Ltd v Jan Joubert* 2013 JDR 1912 (GNP).
[240] 2010 5 SA 618 (KZD).
[241] *Ibid.*
[242] Boterere LLD thesis 155.

for a logical or feasible proposal and according to the National Credit Regulator,[243] if a consumer lacks any disposable income to initiate a debt repayment proposal and there is no foreseeable possibility of gaining an income within three months to begin debt payments, the debt counsellor is advised to reject the debt review application.[244]

Upon receipt of a court order in terms of section 86(7)(c)(ii), the consumer is required to follow any orders issued by the Magistrate's Court with regards to the rescheduling of his or her debt and must pay the re-scheduled amount until the debt has been fully paid off.[245] A clearance certificate will then be issued once the debts have been settled and the credit bureau, credit providers and NCR will be notified.[246]

During the debt review period the credit providers may not enforce any claim against the consumer.[247] This does not however extinguish the claim that the credit provider has against a debtor but delays the enforcement of the claim.[248] However, under certain conditions a creditor has a right to elect to terminate a debt review and then continue with debt enforcement against the debtor.[249]

3.6 Effect of debt review

The effects of debt review are set out in section 88 of the NCA. Once a consumer has applied to be declared over-indebted and placed under debt review in accordance with section 86(1), that consumer may not obtain any new credit or incur any further debts by entering into any further credit agreements.[250] This condition is applicable until one of three things occurs. Firstly, until such time as the application is rejected by the debt counsellor, and the section 86(9) required time period for direct filing[251] has lapsed without the consumer having done so.[252] Secondly, the consumer's application or a debt counsellor's proposal was rejected by the court or the court has

[243] "NCR".
[244] The NCRCircular No. 2, January 2015, Annex B at 5.
[245] S 3(g) and (i) of the NCA.
[246] Reg 27 of the NCA Regulations.
[247] Coetzee and Roestoff 2020 *Int. Insolv. Rev.* 97
[248] S 88(3) of the NCA.
[249] S 86(10) of the NCA.
[250] S 88(1) of the NCA.
[251] See par 3.4.2.1 above.
[252] S 88(1)(a) of the NCA.

found that the consumer is not too indebted.[253] Lastly, that all the consumer's obligations under the rearranged credit agreement/s are fulfilled, unless the consumer fulfilled the obligations through a consolidation agreement,[254] which requires a court order or an agreement between the consumer and the credit providers.[255] If a consumer still proceeds to enter into a credit agreement despite the above provisions, the provisions relating to debt review and reckless credit in Part D of Chapter 4 will not apply to that agreement.[256]

Consequently, subject to sections 86(9) and (10), a credit provider who receives a notice of court proceedings as contemplated in sections 83[257] or 85 , or notice in terms of section 86(4)(b)(i), is not permitted to exercise or enforce any right or security under that credit agreement through litigation or other judicial action.[258] The credit provider will only be entitled to enforce its rights through litigation or any other judicial process should the consumer default in terms of a credit re-arrangement and has either

a) failed to meet any obligations in terms of a re-arrangement agreement between the consumer and credit provider; or
b) unless section 88(1)(a) to (c) is applicable.[259]

If a credit provider enters into a credit agreement that is not a consolidation agreement mentioned in the above section, with a consumer who has applied for debt re-arrangement and that re-arrangement is still in effect,[260] all or part of the new credit agreement may be declared to be reckless credit.[261]

[253] S 88(1)(b) of the NCA.
[254] The concept "consolidation agreement" is not defined in the NCA. However, it is merely an agreement in terms whereof the consumer's existing debts are consolidated.
[255] S 88(1)(c) of the NCA.
[256] S 88(5); Renke, Roestoff and Haupt "The National Credit Act 34 of 2005: New parameters for the granting of credit in South Africa" 2007 *Obiter* 250.
[257] S 83 deals with reckless lending cases.
[258] S 88(3)(a) and (b)(i) and (ii) of the NCA.
[259] S 88(3) of the NCA.
[260] S 88(4) of the NCA.
[261] *Ibid.*

3.7 The disadvantages of debt review

The main disadvantage of debt review is that it does not offer a discharge for debts as sequestration does and the consumer is obligated to satisfy all of its debts.[262] There are also no time restrictions to the repayment period ordered by a court, and thus a consumer may be forced to adhere to a repayment plan for an unreasonably long time.[263] As long as the consumer pays in accordance with the debt restructuring order, the credit provider will be unable to approach a court to review the order because the procedure does not provide for the order to be reviewed after a specified period of payment, and no provision is made for debt discharge after a certain period of payment or repayment of a certain amount of the original debt.[264] It is unclear what remedies a credit provider has if it believes that the restructuring period is excessively extended and not in its best interests.[265]

Another disadvantage of the process is that debt review as a debt relief measure only applies to credit agreements governed by the NCA which have been entered into by natural persons.[266] Therefore, debts that were not incurred in accordance with such agreements will not be subject to the debt review process.[267] Debt review can additionally only be utilised by mildly indebted consumers because courts will only approve feasible payment plans.[268] This relates to the Act's emphasis on the "eventual satisfaction of all responsible consumer obligations under credit agreements" and "satisfaction by the consumer of all responsible financial obligations".[269] Thus, debt review is merely a reorganisation of the consumer's credit agreement obligations without offering any discharge.[270]

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[262] Kelly-Louw and Stoop *Consumer credit regulation in South Africa* (2012) 324.
[263] Boraine, Van Heerden and Roestoff (Part 1) 2012 *De Jure* 102.
[264] Van Heerden and Boraine "The interaction between debt relief measures in the National Credit Act 34 of 2005 and aspects of Insolvency Law" 2009 *PER/PELJ* 161.
[265] *Ibid.*
[266] S 86(2) of the NCA; agreements where the credit provider has already taken action to enforce the agreement are also excluded. Roestoff and Coetzee 2012 *SA Merc LJ* 68.
[267] *Ibid.*
[268] Roestoeff and Coetzee 2012 *SA Merc LJ* 68.
[269] *Ibid.*
[270] *Ibid.*

3.8 Termination of debt review

Unlike sequestration, the debt review process does not terminate automatically upon the lapsing of any time period.[271] It can only be terminated in the event that the consumer defaults on the payment of a credit agreement that is already under review in terms of section 86(10).[272]

In such an instance the credit provider is entitled to notify the consumer in the prescribed manner as well as the debt counsellor and the NCR at any given time at least sixty business days after the consumer applied for a debt review.[273] If the application for debt review has already been filed in court, termination under section 86(10) is prohibited.[274]

Notably, the termination of debt review in terms of section 86(10) does not preclude the debtor from seeking additional debt relief.[275] In this regard section 86(11) is quite significant as it states that if a credit provider who has given notice to terminate a review contemplated in section 86(10) proceeds to enforce that agreement in accordance with Part C of chapter 6, the Magistrate's Court hearing the matter may order that the debt review resume on any terms the court considers just in the circumstances.[276]

3.9 Clearance certificate in terms of section 71

According to regulation 27, if a consumer has successfully met all the financial obligations for each credit agreement covered by a debt re-arrangement order or agreement, a debt counsellor is required to issue a clearance certificate in the specified format (Form 19) to the consumer as well as to the credit bureaus. All the details regarding these credit agreements and the consumer's participation in the debt review process are then completely removed from the consumer's records by the credit bureaus.[277] Form 19 is the document that confirms the consumer's fulfilment of all his or her responsibilities as stated in the issued court debt re-arrangement order and it also itemises

[271] See *Coetzee and Another v Nedbank Ltd* [2010] JOL 26260 (KZD).
[272] See *Collett v Firstrand Bank Ltd* 2011 4 SA 508 (SCA) par 12.
[273] S 86(10) of the NCA.
[274] S 86(10)(b) as inserted in the NCA in terms of the 2014 NCAA.
[275] Van Heerden and Boraine 2009 *PER/PELJ* fn 26.
[276] *Ibid.*
[277] Scholtz (ed) par 11.4.

the specific debts that have been completely resolved by the debtor.[278] The clearance certificate is to indicate that the debt review is complete, however it will not cancel the consumer's debts.[279] Section 71 was amended by the 2014 NCAA stipulating that if all the consumer's other credit agreements have been settled and the only remaining obligations are related to mortgages or other long-term agreements, the consumer is eligible to apply for a clearance certificate.

3.10 Conclusion

As discussed earlier in the chapter, sequestration under the Insolvency Act is considered the ultimate debt relief option for individuals who are currently severely indebted, as it allows for a discharge of debt. However, this process is primarily designed for asset liquidation, meaning the consumer must have realisable assets and a stable income, thus not accommodating consumers categorised as NINA or LILA consumers.[280]

The inadequacy of the debt review process to give adequate assistance to all over-indebted consumers has been widely criticised.[281] Chapter 4 Part D as currently implemented is therefore ineffective in providing the desired debt relief through debt review as it is ineffective in providing sufficient relief for heavily indebted consumers. Several reasons contribute to this ineffectiveness. Firstly, the current debt review process does not result in a discharge of debt.[282] It is only available to temporarily assist consumers with mild debts during financial difficulties, thus leaving the majority of heavily indebted South African consumers without assistance.[283] Secondly, there is no maximum time frame for debt review in South Africa, which means that theoretically a consumer can remain under debt review indefinitely.[284] This creates uncertainty for consumers because they may be caught in debt review for an extended period of time with no apparent end in sight.[285] In

[278] *Ibid.*
[279] S 71 amended by s 21 of the 2014 NCAA.
[280] S 3(g) and (i) of the NCA; Coetzee and Roestoff "Rectifying an unconstitutional dispensation? A consideration of proposed reforms relating to no income no asset debtors in South Africa" 2020 *Int. Insolv. Rev.* 97.
[281] Boraine and Roestoff "Revisiting the state of consumer insolvency in South Africa after twenty years: The courts' approach, international guidelines and an appeal for urgent law reform" (Part 1) 2014 *THRHR* 359.
[282] Boraine, Van Heerden, and Roestoff (Part 2) 2012 *De Jure* 256.
[283] Roestoff and Coetzee 2012 *SA Merc LJ* 69.
[284] Boraine, Van Heerden and Roestoff (Part 1) 2012 *De Jure* 102.
[285] See Roestoff and Coetzee 2012 *SA Merc LJ 69*.

some situations, debt review may worsen a consumer's terrible financial situation rather than provide a road to recovery.[286]

The tight repayment schedules and continuous debt responsibilities can make it difficult for a consumer to obtain credit, secure housing, or even meet basic living needs. This may aggravate their financial difficulties rather than aiding a long-term sustainable solution. Furthermore, the debt review process does not cover all types of debt.[287] This omission can leave consumers with huge debts that they are unable to address through the debt review process, exacerbating their financial problems.[288] Overall, the debt review process's drawbacks, such as the absence of a debt discharge option, indefinite time constraints, limited debt inclusion, and the continuation of financial hardship, contribute to its ineffectiveness in providing substantial relief for deeply indebted consumers.

In addition to the aforementioned factors rendering debt review ineffective as a broader debt relief mechanism, the courts' unwillingness to restructure the debt of a particular consumer under circumstances where the restructuring of the debt would be economically unfeasible, specifically excludes the NINA and LILA consumer-groups from debt review in terms of the original NCA. Lack of sufficient financial means and prospects disqualifies debt review as a viable debt relief option in the case of these consumers.

Coetzee point out that the debt review process in its nature was designed specifically to aid mildly over-indebted consumers during a temporary financial difficulty to settle their debts by means of restructuring them.[289] There is therefore an obvious need for reforms and improvements to guarantee that debt review provides meaningful and long-term solutions for all categories of over-indebted consumers. Additionally, NINA and LILA debtors who are excluded from debt review require an effective debt relief program that caters specifically to their unique needs.

[286] Roestoff and Coetzee 2012 *SA Merc LJ* 69.
[287] Coetzee and Roestoff 2020 *Int. Insolv. Rev.* 98.
[288] *Ibid.*
[289] Coetzee LLD thesis 4.

CHAPTER 4

DEBT INTERVENTION IN TERMS OF THE 2019 NCAA

4.1 Introduction

This chapter will be a discussion of debt intervention in terms of section 86A (inserted into the NCA in terms of the 2019 NCAA) and its impact on the current natural insolvency measures available to assist over-indebted consumers. As discussed in the previous chapters, the current natural debt relief measures in terms of the Insolvency Act and the initial NCA, as amended in terms of the 2014 NCAA,[290]exclude NINA and LILA debtors from effective debt relief resulting in unjust and discriminatory treatment of these debtors based on their financial status.[291] According to Coetzee this is unconstitutional as it violates section 9 of the Constitution which refers to equality.[292] In the context of South Africa, NINA and LILA debtors represent a vulnerable group of individuals who are facing significant financial challenges and are often unable to meet their debt obligations.[293] The issue of NINA and LILA debtors is closely related to discussions around debt relief and financial inclusion.[294] Debt intervention refers to a legal process through which individuals who are overwhelmed by debt can seek relief and assistance in managing their financial obligations.[295] This process can be seen as a potential solution to address the financial plight of these debtors as it aims to address financial inclusion,[296] which aligns with the constitutional principles of promoting equality and socio-economic rights.[297]

This chapter will further discuss how the new measure will be favourable toward these marginalised debtors. I will discuss the policy considerations underlying the debt intervention procedure, followed by the access requirements into the procedure, the procedure itself, the powers of the NCT in respect of a debt intervention application, and the effect of debt intervention. I will then discuss the process of obtaining a rehabilitation in the case of debt

[290] The same holds for the administration process in terms of s 74 of the Magistrates' Courts Act; see par 3.3 above.
[291] Coetzee 2018 *THRHR* 594.
[292] Coetzee 2018 *THRHR* 593 and 594.
[293] *Ibid.*
[294] Coetzee 2018 *THRHR* 594.
[295] *Ibid.*
[296] Scholtz (ed) par 2.3.1.
[297] S 1 of the Constitution.

intervention and a clearance certificate, and lastly the criticisms regarding the procedure, before concluding the chapter.

4.2 The policy considerations

As an objective to provide relief to the marginalised categories of debtors and to foster a more inclusive South African credit market, the Draft National Credit Amendment Bill, 2018,[298] was published by the Portfolio Committee on Trade and Industry together with the *Memorandum on the objects of the National Credit Amendment Bill,2018.*[299] The Memorandum was an important document that outlined the purpose, objectives, and proposed changes to the existing credit legislation in South Africa.[300] It highlighted the need to address the challenges faced by consumers who were struggling with high levels of debt.[301] Its goal was to provide improved protection to NINA and LILA debtors by potentially restructuring, temporarily suspending, or entirely cancelling their unsecured credit debts.[302]

One of the most significant changes proposed in the 2018 Amendment Bill was the introduction of debt intervention measures in the NCA, which are only applicable to debt arising from unsecured credit agreements.[303] Fresh debt relief measures designed to aid the NINA and LILA debtors who cannot access existing natural person insolvency measures and further aiding them from being trapped in a cycle of debt, were thus introduced.[304] Additionally, debt intervention's primary objective is to afford an alternative insolvency option for these groups of debtors who lack enough income or assets to qualify for sequestration, as well as to avoid the high expenses associated with filing for an administration order or to apply for debt review.[305] In addition, the restrictions and ineffectiveness of debt review as a debt relief measure have already been pointed out.

[298] "2018 Amendment Bill".
[299] Hereinafter "Memorandum".
[300] Scholtz (ed) pars 2.3.1, 11.1 and 11.5 and Coetzee and Brits in Van der Merwe (ed) pars 11 and 12.
[301] *Ibid.*
[302] S 7A(3); Coetzee and Roestoff 2020 *Int. Insolv. Rev.* 103.
[303] Scholtz (ed) par 11.5.1.
[304] Coetzee and Brits in Van der Merwe (ed) pars 11 and 12.
[305] Coetzee and Roestoff 2020 *Int. Insolv. Rev*. 99.

Debt intervention as a process will be implemented by adding section 86A to Part D of Chapter 4 of the NCA.[306] Therefore, after the 2019 NCCA has been put into operation, debt review in terms of section 86 of the NCA (which is intended to assist the mildly indebted consumer) and debt intervention (designed to assist the most financially vulnerable individuals) will co-exist.[307] The one notable difference between debt review and debt intervention is that the debt intervention process will be administered by the NCR rather than debt counsellors and this procedure also includes the improvement of financial literacy as part of the procedure.[308] Additionally, the debt intervention procedure will typically not require court involvement as any orders associated with this process will fall under the jurisdiction of the National Consumer Tribunal.[309]

4.3 Access to debt intervention

In order for a consumer to access the debt intervention procedure he or she must qualify as a "debt intervention applicant" as defined in the 2019 NCAA, as the requirements for access flow from this definition.[310] Firstly, only a natural person debtor qualifies for the procedure.[311] Secondly, that applicant must have unsecured debt which should not exceed R 50 000[312] Section 86A(1) states that unsecured debt pertains specifically to unsecured credit agreements, unsecured credit transactions, or unsecured credit facilities. Thirdly, the applicant should not receive an income or if he or she does, his or her gross income for the six months leading up to the application should not exceed R7 500 per month.[313] Fourthly, the applicant must be over-indebted.[314] The over-indebtedness can either be because of a change in his or her own circumstances or because of external circumstances and must further meet the criteria for over-indebtedness as defined in section 79 of the NCA.[315] Lastly, the applicant cannot be subject to sequestration or an administration order.[316]

[306] In terms of s 13 of the 2019 NCAA. Scholtz (ed) par 11.5.1.
[307] *Ibid.*
[308] *Ibid.*
[309] Hereinafter "NCT"; Scholtz (ed) par 11.5.1.
[310] Coetzee and Brits in Van der Merwe (ed) 13.
[311] S 1(b) of the 2019 NCAA.
[312] S 1(b)(a); Scholtz (ed) par 11.5.1; or an amount prescribed in terms of section 171(2A)(b).
[313] S 1(b)(b) of the 2019 NCAA.
[314] S 1 (b)(c) of the 2019 NCAA.
[315] Discussed in par 3.2 above; Scholtz (ed) par 11.5.1.
[316] S 1(b)(d) of the 2019 NCAA.

Once it has been determined that the individual meets the eligibility requirements, he or she can commence the debt intervention process by submitting an application to the NCR in the appropriate format to be officially declared over-indebted.[317] Notably, the debt intervention process does not apply to credit agreements where the credit provider has already taken steps to enforce the agreement as outlined in section 130 of the NCA,[318] nor does it encompass developmental credit agreements as defined in section 10 of the NCA.[319]

4.4 The debt intervention procedure

Once a consumer[320] has made an application for debt intervention to the NCR, the NCR will assess if the consumer is over-indebted and may refer the matter to the NCT as well as provide remedial action.[321] Additionally, the NCR will offer counselling and resources to enhance the consumer's financial literacy.[322] Once the NCR receives the application, it is obligated to provide the applicant with evidence of the receipt of the application and notify all credit providers mentioned in the application, as well as all registered credit bureaus, of the application.[323] Throughout the evaluation procedure, both the applicant and the relevant credit providers are expected to collaborate with the reasonable demands set forth by the NCR.[324] These demands encompass assessing the consumer's debt level and determining the feasibility of responsible debt restructuring.[325]

Thus, as the point of departure, upon the receipt of the debt intervention application the NCR will proceed to analyse the application and decide whether to accept or reject it.[326] The NCR has the authority to refuse the application if it believes that the consumer does not qualify for debt intervention.[327] Alternatively, the NCR may also conclude that, although the applicant does not

[317] Coetzee and Roestoff 2020 *Int. Insolv. Rev* 102.
[318] S 86A(2)(b); Coetzee and Roestoff 2020 *Int. Insolv. Rev* 101.
[319] S 86A(2)(a) of the 2019 NCAA.
[320] A debt intervention applicant with an unsecured debt not exceeding R50 000.
[321] S 86(A)(1) of the 2019 NCAA.
[322] S 86A (3) and (5) of the 2019 NCAA; S 1(c) defines financial literacy as "the knowledge, ability and opportunity to make sound money management choices".
[323] Scholtz (ed) par 11.5.2.1.
[324] In terms of section 86A(4) the debt intervention applicant and each credit provider involved must act in good faith in the debt intervention process. *Ibid.*
[325] S86A(5)(a) and (b) of the 2019 NCAA; *Ibid.*
[326] Coetzee and Brits in Van der Merwe (ed) 14.
[327] S 86A(6) of the 2019 NCAA. Similarly to s 86(9) discussed in par 3.4.2.1 above in connection with debt review, the applicant is empowered upon a rejection of his or her application by the NCR to apply directly to the Magistrate's

meet the eligibility criteria for the debt intervention program, he or she is still struggling or is expected to struggle to settle all debts in a timely manner. In the case of such a finding the NCR is required to suggest that both the applicant and the credit providers consider and reach an agreement for restructuring the applicant's debt.[328] The NCR may also conclude that a credit agreement that formed part of the debt intervention application may constitute reckless lending, an unlawful credit agreement,[329] or a credit agreement that came into existence as a result of prohibited conduct,[330] whereupon the NCR must refer the said agreement to the NCT for an appropriate declaration.[331]

If the NCR comes to a decision that the debt intervention applicant qualifies for debt intervention, in other words that the applicant is over-indebted, and that the consumer's over-indebtedness can be resolved by means of a re-arrangement within five years,[332] the NCR must refer the matter in the prescribed manner and form[333] to the NCT for an appropriate order in terms of section 87(1A). [334] If the debt intervention applicant qualifies for debt intervention, but his or her income and assets are insufficient to allow for the debt to be re-arranged within the time period specified above, the NCR must refer the matter to the NCT with a recommendation for an order as outlined in section 87A.[335]

The NCR is further obligated to notify all relevant credit providers about the referral and extend an invitation to them to submit written representations to the NCT on a specified date.[336] Finally, before the powers of the NCT in respect of debt intervention are considered, it is important to note that debt intervention, similarly to debt review,[337] may be terminated by a credit provider after the prescribed period if the debt intervention applicant is in default in terms of a credit agreement that forms part of

Court with the leave of the Court for an order in terms of s 87 (s 86A(7)). It is submitted that the reference to Magistrate's Court in s 86A(7) is incorrect and should be replaced with the NCT.

[328] S 86A(6)(b). If the proposal is accepted by the applicant and all the credit providers involved, s 86(8)(a) discussed in par 3.4.2.2. above applies with the required changes. If a credit provider does not accept the proposal, the matter must be referred to the NCT with the NCR's recommendation (s 86A(8)(a) and (b)).

[329] In terms of s 89 of the NCA.

[330] "Prohibited conduct" means "an act or omission in contravention of the [NCA]" (s 1 NCA).

[331] S 86A(6)(c).

[332] Or a longer period as may be prescribed.

[333] No regulations or forms to give effect to the provisions of the new amendments have been published yet.

[334] S 86A(6)(d).

[335] S 86A(6)(e).

[336] S 86A(9)(a) and (b); Coetzee and Roestoff 2020 *Int. Insolv. Rev.* 102.

[337] See par 3.8 above.

the debt intervention application. The ordering of a terminated debt intervention to resume is likewise possible.[338]

4.5 The powers of the NCT

The powers of the NCT in respect of a referral to it in terms of section 86A(6)(d) are provided for in section 87(1A). In order to provide clarity, a section 86A(6)(d) referral concerns the case where the NCR, doing the referral, is of the opinion that the debt intervention applicant qualifies for the debt intervention, and that the obligations of the applicant can be re-arranged within a period of five years (or a longer period as prescribed). The powers of the NCT in terms of section 87(1A) are the same than the powers of the courts in relation to a debt review application in terms of section 86.[339] The NCT may therefore reject the NCR's recommendation or the consumer's application to approach the NCT directly,[340] or make an order that the credit agreement is reckless, followed by the section 83(2) or (3) relief, or make an order re-arranging on or more of the applicant's credit agreements. The re-arrangement powers of the NCT are similar than those of the courts in the case of a successful debt review application.[341] The only difference is that the NCT is additionally empowered to determine the maximum interest, fees or charges under a credit agreement,[342] which includes the power to set the maximum at zero, for a period which the NCT "deems fair and reasonable", but not exceeding five years.[343] The duty is imposed on the NCR to inform the debt intervention applicant, his or her credit providers and all registered credit bureaus of any NCT order in terms of section 87(1A).[344]

Section 15 of the 2019 NCAA inserts section 87A, entitled 'Other orders related to debt intervention" in the NCA. To reiterate, the section 87A orders pertain to a section 86A(6)(e) referral, which occurs where the NCR is not of the opinion that the qualifying applicant has sufficient income and assets to allow for the re-arrangement of the applicant's obligations within a period of five years. The

[338] S 86A(10)-(11). However, s 86A10(b) prohibits the termination of an application for debt intervention if the application has already been filed in the NCT.
[339] S 87(1A)(a) and (b). See par 3.5 above for the powers in respect of debt review.
[340] As discussed above, if the NCR rejects the applicant's application.
[341] S 87(1A)(b)(ii).
[342] Excluding the cost of credit insurance.
[343] See s 87(1A)(ii)(dd).
[344] S 87(1B).

significance of section 87A lies in the fact that it may culminate in the extinguishing of debt for consumers who do not qualify for sequestration according to the Insolvency Act.[345]

A section 86A(6)(e) referral may be considered by a single member of the NCT, who must consider the documents forming part of the NCR's referral, and any representations made to the NCT in terms of section 86A(9).[346] The NCT may make an order that the debt intervention applicant does not qualify for debt intervention and proceed to reject the application due to the applicant's ineligibility for the debt intervention. Alternatively, the suspension of all the qualifying credit agreements for twelve months (which period may be extended once for a further twelve months) may be ordered, together with an order requiring the applicant to participate in a financial literacy programme.[347] Section 84 of the NCA applies to such suspension.[348]

The applicant's financial circumstances must be reviewed by the NCR eight months after the first suspension order was made, and it must be determined if the applicant now has sufficient income or assets to merit a re-arrangement of the applicant's obligations within a period of five years.[349] If the answer is in the affirmative, the matter must be referred to the NCT for debt re-arrangement in terms of section 87(1A). If the applicant still lacks sufficient income or assets to merit a re-arrangement, the matter must be referred to the NCT for consideration of the second suspension period of twelve months.[350]

Eight months into the second (extended) suspension period, if any, another review as aforementioned must be conducted by the NCR. If the finding is that there are now sufficient income or assets available for a five-year re-arrangement order, such an order must be recommended to the NCT. If the income or assets are still insufficient to support a five-year re-arrangement order, the matter must be referred to the NCT recommending that the applicant's debts under his or her qualifying credit agreements be extinguished.[351] The NCR must inform all

[345] Coetzee and Roestoff 2020 *Int. Insolv. Rev* 104.
[346] S 87A(1).
[347] S 87A(2)(a) and (b).
[348] This means that all the rights and obligations of the parties in terms of the credit agreements are suspended (the consumer is not required to make any payments in terms of his or her credit agreements/s and may not be charged any interest, fees or charges) and unenforceable, but revive and become enforceable after the suspension.
[349] S 87A(5)(a).
[350] S 87A(5)(b)(i) and (ii); See Coetzee and Roestoff 2020 *Int. Insolv. Rev*. 104; Coetzee and Brits in Van Der Merwe (ed) 15.
[351] S 87A(5) (c)(i) and (ii); *Ibid*.

the credit providers listed in the application for debt intervention of a referral to the NCT recommending the second suspension or the extinguishing of debt, accompanied with an invitation to make representations to the NCT by a specified date.[352]

The NCT may eventually declare "the total of the amounts contemplated in section 101(1)[353] under the qualifying credit agreements as extinguished.[354] Alternatively, only a partial extinguishment (a percentage) of the section 101(1) amounts may occur, but such extinguishment must be applied equally to all the qualifying credit agreements.[355]

When determining whether to suspend, partially suspend, modify, or prolong the suspension of a credit agreement, or extinguish the whole or any portion of the total amounts noted in section 101(1) in relation to a qualifying credit agreement, the NCT must consider the relevant factors carefully, such as:

(a) whether the applicant is a person with disabilities, a minor responsible for a household, a woman responsible for a household, or an elderly individual;
(b) whether the applicant has previously initiated processes such as debt review, sequestration, or administration;
(c) whether the applicant's debt has ever been discharged through a court or NCT order;[356]
(d) the circumstances of the debt intervention applicant;[357] or
(e) an act or omission of each affected credit provider when a relevant credit agreement was entered into, or during the debt intervention process or the proceedings before the NCT.[358]

In addition to an order extinguishing the total debt of a debt intervention applicant, the NCT must also make an order limiting the applicant's right to apply for credit in terms of section 60 of the

[352] S 87A(5)(d); *Ibid*.
[353] S 101(1) lists the amounts forming part of the total cost of credit recoverable by a credit provider from the consumer, such as interest, initiation-and service fees.
[354] S 87A(6).
[355] S 87A(7)(a) and (b).
[356] S 87(A)(3); Scholz (ed) par 11.5.2.4.
[357] And any act or omission, eg, before entering into any qualifying credit agreement.
[358] S S 87(A)(3); Scholz (ed) par 11.5.2.4.

NCA. This limitation must be for a minimum period of six months, may be extended for a further period as the NCT deems fair and reasonable, but must not exceed 12 months.[359]

The NCR must notify the applicant, his or her credit providers and every registered credit bureau of any section 87A order.[360] An order for debt intervention may be rescinded or changed by the NCT, upon the presentation of evidence that the debt intervention applicant was dishonest in the application or did not comply with the conditions of an intervention order.[361]

4.6 Effect of debt intervention

Section 88A prohibits the consumer from entering into any new credit agreements other than consolidation agreements with a credit provider once the intervention process has started.[362] The restriction on obtaining additional credit is exempted in five specific situations:

(a) The NCR or NCT rejects the application for debt intervention.
(b) The NCT declares all agreements included in the application as reckless or invalid.
(c) The applicant declines a referral by the NCR or NCT to a debt counsellor for "debt review or assistance with a voluntary plan of debt re-arrangement".
(d) The procedure related to the referral to a debt counsellor concludes or terminates under the NCA.
(e) The specified period for the debt intervention order or NCT-ordered debt re-arrangement has expired.[363]

A similar bar against debt enforcement than in terms of section 88(3) in respect of debt review[364] exists in relation to a credit provider that receives notice of a debt intervention application. Further, section 88A(6) specifies that if the NCT orders the discharge or extinguishment of debt, the credit provider cannot take legal action or enforce the credit agreement or any related order in regard to the portion of debt applicable under the order.

[359] S 87A(8) and (9).
[360] S 87A(10).
[361] S 87A(11).
[362] S 86A(1)(a).
[363] Scholtz (ed) par 11.5.3.
[364] See par 3.6 above.

4.7 Rehabilitation

Section 88B provides that debt intervention applicants who have been granted section 87A(6) extinguishing-of-debt-orders by the NCT can apply to the NCR in the prescribed form and manner for rehabilitation, which then may be granted by the NCT.[365] The requirements are that the particular debt intervention applicant must have paid all the section 101(1) amounts, as they were due on the date the order extinguishing the debt was granted, and that proof to this effect must be submitted. Payment could have been effected in full to each affected credit provider involved, or by means of a settlement agreement with one or more credit provider/s, having the effect that a particular credit provider is satisfied that the section 101(1) amounts have been resolved. The effect of a rehabilitation order, if granted by the NCT, is that any limitation on the rights of the applicant to apply for credit in terms of section 60 of the NCA[366] comes to an end from the date of the order.[367]

4.8 Clearance certificate

Section 71(1A) provides for the issuing of a clearance certificate to a debt intervention applicant whose debts have been re-arranged by the NCT in terms of section 87(1A), forming part of Chapter 4 Part D. Although it is not specifically mentioned in the 2019 NCAA,[368] the certificate obliges the registered credit bureaus, upon the receipt of the certificate, to expunge the fact that the applicant was subject to debt intervention from their records. The certificate is thus of crucial importance to the applicant, as it allows an applicant whose debts have been re-arranged to apply for new credit. However, to qualify for the issuing of the clearance certificate, all the applicant's debts as re-arranged must be satisfied.[369] Alternatively, it is also permitted for the applicant to demonstrate that he or she has the financial ability to satisfy future obligations payable in terms of the re-arrangement order,[370] and that all obligations under every other credit agreement included in the re-arrangement, except those in respect of which he or she has demonstrated the financial

[365] S 88B(1). Coetzee and Roestoff 2020 *Int. Insolv. Rev*. 106.
[366] See par 4.5 above.
[367] S 88B(8). For more information regarding the rehabilitation process, see Scholtz (ed) par 11.5.4.
[368] This is probably an oversight by the legislature.
[369] S 71(1A)(a).
[370] S 71(1A)(b)(i); or that the re-arranged agreements contemplated in subpar (i) are not in arrears (s 71(1A)(b)(ii)).

ability, as aforementioned, have been settled in full.[371] The NCR must issue the certificate to the applicant within seven working days of the applicant's compliance with the conditions set out in section 71(1A)(a) or (b), and provide the registered credit bureaus with a copy of the certificate.[372] If the NCR does not want to issue the certificate, fails to issue the certificate, or fails to submit a copy thereof to the credit bureaus, the applicant may apply to the NCT to review the NCR's decision or failure, whereupon the NCR may be ordered by the NCT to rectify the situation.[373] Thus, obtaining a clearance certificate is significant for debt intervention applicants as it provides them with a fresh start and allows them to rebuild their financial standing.

4.9 Criticism on debt intervention

In April 2019 DTI commissioned an independent socio-economic impact assessment conducted by Genesis Analytics.[374] This assessment spanned from January to March 2019 with the final report being completed in April 2019.[375] Its aim was to provide insights into the potential effects of the proposed amendments to the NCA in terms of the 2019 NCAA. The report delves into various aspects of the NCAA, examining its potential impacts on different stakeholders such as consumers, credit providers, and the broader financial sector.[376] In terms of the assessment there is approximately 177,700 consumers who are over-indebted and could benefit from the debt intervention process.[377] A further 85,800 consumers could potentially have their debts discharged.[378] This will assist the NINA or LILA debtors with a fresh financial start which will undoubtably relieve them from the burden of unmanageable debts that they might have accumulated due to their limited financial capacity.[379]

[371] S 71(1A)(b)(iii).
[372] S 71(1A).
[373] S 71(3A).
[374] Genesis; 2019 Socio-economic impact study of the debt intervention measures as proposed in the National Credit Amendment Bill.
[375] *Ibid.*
[376] *Ibid.*
[377] "Debt relief bill would leave overindebted worse off, says govt commissioned study" available at https://www.news24.com/Fin24/debt-relief-bill-would-leave-overindebted-worse-off-says-govt-commissioned-study-20190911 (accessed 2023-08-25) ("Hereafter Debt relief bill").
[378] *Ibid.*
[379] *Ibid.*

However, the 2018 Amendment Bill[380] has also been criticised by Genesis which reported that the implementation of the Bill has some consequences.[381] One of these include credit providers applying a preventative approach by having stricter measures when it comes to credit assessments for the NINA and LILA debtors. It cannot be foretold which of these consumers will encounter excessive debt which will ultimately require a discharge.[382] To counterbalance this effect, credit providers will further likely raise interest rates and/or decrease the amount of credit offered to these particular groups due to the perceived elevated risk which will be caused by the process.[383] As a result of this, these consumer will resort to obtaining credit from loan sharks or "Mashonisas", an illegal and unregulated lender, which comes with significant disadvantages and risks that can have detrimental effects on these consumers' financial well-being and personal lives.[384]

Loan sharks provide loans which are ineligible for debt relief: these loans consist of speedy pay-out, minimal paperwork, and straightforward terms.[385] The high interest rates of approximately 30% to 50% and aggressive collection practices of loan sharks can lead to a debt spiral, where borrowers need to borrow more to repay existing loans.[386] This perpetuates a cycle of increasing debt and financial instability.[387]

In light of the above, Genesis provided several proposals to ensure the financial inclusion of low-income consumers by incorporating the debt intervention system into the existing debt review system by providing subsidies to low-income clients.[388] This would be "cost effective" because it would not necessitate new state capacity and credit providers would be responsible for subsidizing debt review for lower income workers".[389]

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[380] Now an Act.
[381] *Ibid.*
[382] Debt relief bill.
[383] "Why the debt relief bill will see loan sharks circling consumers" available at https://www.news24.com/Fin24/why-the-debt-relief-bill-will-see-loan-sharks-circling-consumers-20190818 (accessed 2023-08-25) ("Herein after "loan sharks circling consumers").
[384] *Ibid.*
[385] *Ibid.*
[386] *Ibid.*
[387] *Ibid.*
[388] *Ibid.*
[389] *Ibid.*

4.10 Conclusion

NINA and LILA debtors in South Africa face significant challenges due to their lack of income and assets, coupled with their existing debt burdens. Addressing the plight of these debtors requires a comprehensive approach that includes financial education, accessible credit options, and potentially targeted debt relief programs designed to alleviate their financial struggles and promote financial inclusion. The debt intervention process, which will in future, as soon as the 2019 NCAA is put into effect, form part of the NCA, is an attempt by government to address the plight of these debtors in particular. This is indicated by the policy that the preceded the promulgation of the 2019 NCAA, and the scope of application of the new debt intervention process, which is restricted to unsecured credit not exceeding R50 000, and to consumers with no income (NINA debtors), or with a gross income not exceeding R7 500 on average in the six months preceding the application (LILA debtors).

This chapter focused on access to the debt intervention process, the procedure to be followed in the case of an application for debt intervention, the powers of the NCT in respect of debt intervention, the effect of debt intervention, rehabilitation, the clearance certificate and its importance, and some criticism directed towards debt intervention. The main feature of the debt intervention process is that the applicant's debt may eventually be extinguished via an order by the NCT, which is similar to a discharge of pre-sequestration debt in terms of the Insolvency Act.

The changes brought about by the NCAA could however have broader economic consequences. These include stricter lending practices, reduced credit access, and increased informal lending which might impact consumption, spending, and the overall economic activity of the affected population.

It is important to note that while these adverse consequences are potential outcomes, they are not guaranteed to occur in every case. The impact of the NCAA will depend on various factors, including how credit providers and consumers respond to the new regulations, the effectiveness of implementation and whether any corrective measures are taken to address unintended negative outcomes.

In my final chapter the debt relief measures available to debtors[390] in terms the South African law will be compared and distinguished. Focus will in particular be paid to the effectiveness of the debt review process in terms of the NCA, including the newly introduced debt intervention process in terms of the 2019 NCAA.

[390] Excluding administrations in terms of s 74 of the Magistrates' Courts Act.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

The challenge that over-indebted consumers face in South Africa is that the existing alternative debt relief measures to sequestration, debt review and administrations in terms of the Magistrates' Courts Act, do not offer debt discharge, which is the primary goal sought by debtors. The primary objective of this dissertation was to examine if debt review in terms of the National Credit Act is an effective debt relief measure in providing debt alleviation for all categories of debtors, regardless of their financial circumstances, in order for them to re-establish themselves economically and to rebuild their lives.[391] The debt intervention process, which now forms part of the NCA, but has not been put into operation yet, was also discussed. Although to be distinguished from debt review in terms of the original Act, debt intervention forms part of the NCA's debt alleviation measures for credit consumers subject to the Act.[392] In addition to the NCA's debt relief mechanisms, sequestration in terms of the Insolvency Act was considered, with the aim to provide an overall picture of the debt alleviation measures available to natural person consumers in South Africa. However, although administration in terms of the Magistrates' Courts Act is also regarded as a debt alleviation measure, it was excluded from the scope of my dissertation, *inter alia* because of its limited application, but also because of its ineffectiveness.[393] A debtor whose debts are placed under administration does not receive a discharge of debt.[394]

Chapter 2 provided a discussion of sequestration, followed by rehabilitation, which in conjunction with each other is regarded as the ultimate debt relief method. Subsequently, in chapter 3, the focus shifted to debt review as outlined in the original NCA, as amended by the 2014 NCAA. This dissertation further discussed the importance of finding an alternative debt relief measure for debtors with unique challenges, such as the NINA and LILA debtor-groups, and to explore alternative options to the sequestration and debt review processes to assist these debtors.

[391] See par 1.2.
[392] See par 4.1.
[393] See par 1.4.
[394] See par 3.3.

Chapter 4 thus engages in a discussion of debt intervention in terms of the 2019 NCAA. In what follows a summary of the aforementioned debt relief measures in terms of the Insolvency Act and the NCA will be provided, with the focus on their respective access requirements, the debtor-groups they consequently cater for, and whether they afford effective debt relief. It must be remembered that although the process involved in each measure was discussed, procedural shortcomings or lacunae and restrictions fell outside the scope of my dissertation. It must also be remembered that the failure to finalise sequestrations and debt review applications in the courts, and the reasons underlying these failures, are disregarded.[395]

5.2. Sequestration

It has been established in chapter 2 that sequestration in terms of the Insolvency Act, and the debtor's eventual rehabilitation, is the ultimate debt relief measure.[396] This is to be attributed to the discharge of pre-sequestration debt, which is a consequence of a successful rehabilitation order. The access requirements to this procedure are limited to applicants who can demonstrate that it will benefit their creditors as a group. Sufficient realisable assets are thus required.[397] Additionally, debtors must be insolvent but still have enough assets or income to cover the costs of the sequestration application.[398] These criteria, and adherence to the principle of prioritising creditors' interests, disqualifies sequestration as a debt relief protection measure to debtors in the lower economic strata.[399] Although the court in *Ex parte Ford* suggested the use of alternative debt relief measures where access to sequestration is barred, such as debt review, some relief may be experienced, but not a discharge of debts.[400] Although sequestration is effective as a debt relief mechanism, it distinguishes between "privileged" and less fortunate debtors. Sequestration is also not suitable for debtors who are only mildly indebted.[401]

[395] Par 1.4.
[396] See par 2.1.
[397] See par 2.5.
[398] See par 2.2.2.
[399] See par 2.8.
[400] Par 2.5.
[401] See par 2.8.

5.3 Debt review in terms of section 86 of the NCA

When the NCA became fully effective in 2007, section 86 of the NCA introduced debt review to offer relief to consumers who are moderately over-indebted and have credit agreements under the Act.[402] Debt review's aim, to serve as an alternative debt relief mechanism to sequestration to credit consumers, is thus commendable. However, debt review as a debt relief measure is ineffective. Importantly, no discharge of debt is granted.[403] To the contrary, the section 3 objectives pertaining to debt review accentuate the satisfaction of all the consumer's obligations in terms of his or her credit agreements. Debt review is merely a re-payment plan.[404] Lack of restrictions in the NCA in respect of the maximum period that a debt or debts could be re-arranged by the courts was also pointed out as a lacuna.[405] Consequently, consumers could indefinitely be stuck with re-arranged debts.[406] Another concern is that all debts are not covered by debt review, but only those arising from credit agreements which are subject to the NCA. Thus, although the consumer may receive relief in respect of certain debts, the same does not necessarily hold true for others. Debt review mostly caters for moderately indebted consumers.[407] This is deducted from the fact that the courts will only restructure the debt obligations of a consumer if the debt review proposal is logical and economically feasible, and if the repayment plan thus meets the objects of the NCA.[408] At the end of the day a consumer's economic circumstances may be aggravated by debt review, because the qualifying consumer pays more in interest and other costs than he or she would have paid in terms of the credit agreement he or she entered into with the credit provider.[409] This is exacerbated by the courts' lack of jurisdiction to adjust the interest and other costs payable in terms of a credit agreement.[410] Coetzee's statement that debt review was in its nature only designed to assist mildly indebted consumers experiencing a temporary financial difficulty to settle his or her debts, by

[402] See par 3.2.
[403] See par 3.7.
[404] Kelly-Louw and Stoop 324.
[405] Par 3.10.
[406] *Ibid.*
[407] Par 3.4.
[408] See par 3.5.
[409] Par 3.5.
[410] Par 3.7

restructuring them, is thus supported.[411] Importantly, the limited application of debt review excludes the less affluent credit consumers, NINA or LILA debtors, from debt relief.[412]

5.4 Debt Intervention in terms of the 2019 NCAA

It is evident from the analysis in the dissertation that the currently effective insolvency framework offers minimal support to NINA and LILA debtors.[413] These debtors are too poor to access sequestration or debt review. This deficiency in the existing measures led to the introduction of the debt intervention procedure as an addition to the NCA.[414] The definition of a debt intervention applicant indicates that this procedure is primarily aimed at providing debt relief to NINA and LILA debtors.[415] The eligibility criteria for debt intervention, which require individuals to be natural person consumers earning R7 500 or less per month, with unsecured debts of R50 000 or less, should enable most NINA and LILA debtors to access the procedure, provided of course that the debtor is over-indebted and not already subject to a sequestration or administration order.[416] This is a positive development as it aligns with the constitutional principle of equality and consumer protection which is one of the main purpose of the NCA as stipulated in section 3.[417] The procedure introduces debt extinguishment and financial literacy training, offering NINA and LILA debtors an opportunity for a fresh start, and to acquire the knowledge avoiding them becoming over-indebted again.[418] The NCR, the responsible body for administering the debt intervention process, has a wider array of recommendation-options to the NCT than a debt counsellor has to the courts in the case of debt review.[419] Both debt counsellors and the NCR may recommend that the consumer is not over-indebted, or not over-indebted yet but struggling to make ends meet, or over-indebted.[420] However, in the case of a finding that a debt intervention applicant is over-indebted, the NCR has additional recommendation-options under circumstances where the

[411] Par 3.10.
[412] *Seyffert v Firstrand Bank Ltd* 81.
[413] See par 4.1.
[414] Par 4.1.
[415] See par 4.3.
[416] Par 4.3.
[417] See par 4.1.
[418] See par 4.3.
[419] Par 3.5.
[420] See par 4.4.

NCR reaches the conclusion that the consumer does not possess sufficient assets or income for the consumer's obligations to be re-arranged successfully during a period of five years.[421] Two suspensions of 12 months each may be recommended, and if the consumer's obligations after the expiry of the 24 months can still not be re-arranged during a period of five years, the NCR may recommend the extinguishment of the consumer's qualifying debts to the NCT.[422]

The powers of the NCT in respect of debt intervention naturally differ from those of the courts in respect of debt review.[423] In the case where the NCR recommends re-arrangement of obligations to the NCT, the NCT, if it agrees with the NCR's recommendation, possesses similar re-arrangement powers to those of the courts.[424] The NCT's power to tamper with the interest, fees or charges in terms of the qualifying credit agreement/s, a power the courts do not have in respect of debt review, constitutes an important exception.[425] Although it is uncertain what this NCT power will entail until the promulgation of the regulations to give effect to debt intervention, it is commendable that the power of the NCT to adjust the costs in terms of a credit agreement or credit agreements is restricted to a period of five years.[426] The NCT may, upon a recommendation of the NCR, suspend a debt intervention applicant's qualifying agreement/s as aforementioned, and eventually order that the qualifying agreement/s be extinguished. These are additional, important powers the debt review courts do not possess.[427] However, the NCT's power to extinguish debt must be singled out and must be commended, as it holds the promise of providing the poorest debtors with a chance for a fresh start. However, it is worth noting that the introduction of this process has faced criticism for its potential broader economic consequences, which may include stricter lending practices, reduced credit access, and increased informal lending.[428]

[421] Par 4.4.
[422] Par 4.5.
[423] See par 4.5.
[424] See pars 3.5 and 4.5.
[425] See par 4.5.
[426] See par 4.5.
[427] Par 4.5.
[428] See par 4.9.

5.5 Final remarks and recommendations

According to the World Bank, a well-functioning personal insolvency system is of utmost importance for upholding economic stability, safeguarding individuals from financial catastrophe, and fostering responsible lending and borrowing practices.[429] It serves as a safety net that benefits both individuals and society as a whole by providing a structured and orderly way to address financial challenges and regain financial stability.[430] The current South African personal insolvency system has been widely criticised by numerous academics. The primary point of contention against South Africa's individual insolvency system being that it is creditor orientated, which contrasts with the global trend of accommodating debtors seeking debt relief.[431] Boraine and Roestoff suggest that the current statutory processes should be made more efficient by removing any redundancy among different procedures and avoiding unnecessary duplication of regulatory bodies.[432] Further, that South Africa's insolvency system should shift away from its creditor-centric approach and ensure equitable treatment for all debtors.[433]

The introduction of debt intervention is a commendable effort to address our country's inherent insolvency issues and promote inclusion to debt relief and credit and for NINA and LILA debtors. However, since its implementation is pending, we cannot be certain about the resolution of broader personal insolvency problems. Depending on the effectiveness of debt intervention, it could be considered in future to extend provisions pertaining to debt intervention to render debt review more effective. The power bestowed on the NCT to adjust the cost of credit in the case of a re-arrangement could for instance be considered.[434] The same holds for the NCT's power to order

[429] Garrido "The role of personal insolvency law in economic development, an introduction to the world bank report on the treatment of the insolvency of natural persons" *The World Bank Legal Review, vol 5: Fostering development through opportunity, inclusion, and equity* 114 and 115.
[430] Garrido "The role of personal insolvency law in economic development, an introduction to the world bank report on the treatment of the insolvency of natural persons" *The World Bank Legal Review, vol 5: Fostering development through opportunity, inclusion, and equity* 114 and 115.
[431] Boraine and Roestoff, "The treatment of insolvency of natural persons in South African law: An appeal for a balanced and integrated approach" *The World Bank Legal Review, vol 5: Fostering development through opportunity, inclusion, and equity* 110.
[432] *Ibid.*
[433] Boraine and Roestoff, "The treatment of insolvency of natural persons in South African law: An appeal for a balanced and integrated approach" *The World Bank Legal Review, vol 5: Fostering development through opportunity, inclusion, and equity* 110.
[434] Par 4.5.

that the debt intervention applicant undergoes financial literacy training when qualifying credit agreements are suspended.[435] The need to advance financial literacy amongst consumers cannot be over-emphasised as it is a critical tool for empowering consumers to break the cycle of poverty, make informed financial decisions, access financial services, and work toward long-term financial stability. The review of personal insolvency legislation is an ongoing process.

[435] See fn 347.

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