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LLM-mini Dissertation

By

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Debt relief mechanisms for no-income-no-asset debtors in the National Credit Act 34 of 2005

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ABSTRACT

The purpose of this study is to investigate the debt relief mechanisms available to over-indebted credit consumers found in the National Credit Act.

This then demands an analysis of section 86 of the National Credit Act, which introduced the "debt review" procedure in terms whereof an over-indebted consumer can voluntarily apply to be placed under a debt re-arrangement order with respect to credit agreements that fall within the Act's scope of application. The debt review procedure has however been the subject of extensive criticism since its inception, particularly within the context of the legal position of no-income-no-asset debtors in the broader South African natural person debt relief system. This is due to the fact that the mechanism does not offer credit consumers a discharge from pre-existing indebtedness and is subject to the principle that the consumer satisfies all responsible financial obligations owed to the credit provider by the consumer. Accordingly, Magistrates' Courts will only confirm viable plan proposals. The socio-economic implication of this is that certain over-indebted credit consumers are accordingly prevented from obtaining financial inclusivity in the credit market, once again. Incidentally, this is antithetical to the post-1994 government's end to attain economic transformation in terms of which access to credit is essential thereto.

Recently, in tandem with the socio-economic aspirations of the Act, the Department of Trade and Industry devised the mechanism of "debt intervention" that will be introduced in the National Credit Act by the insertion of section 86A in Part D of Chapter 4 of the Act when the provisions of the 2019 National Credit Amendment Act become operative. Accordingly, the debt intervention procedure will be reviewed and critically discussed against the current debt review procedure in the National Credit Act, in order to consider whether the mechanism of debt intervention, on paper at least, offers an apt solution to respond to the legal plight of NINA debtors.

TABLE OF CONTENTS

CHAPTER 1

GENERAL INTRODUCTION

1 1 Introduction

This dissertation concerns the National Credit Act,[1] which was enacted on 15 March 2006, and following a three-stage implementation process, became fully operational on 1 June 2007.[2] This resulted in the replacement of the both the Usury Act[3] and the Credit Agreements Act[4] in terms of which the credit market was formerly regulated.[5]

The Act delineates an apparent discontinuity from the past and shares little similarity to its predecessors.[6] Notably, the National Credit Act has a wider scope of application,[7] and subsequently, affords South African credit consumers greater protection.[8] Consequently, upon reflection on the Act's purposes and the applicability thereof,[9] the legislature intended for the NCA to essentially transform the manner in which the South African credit market is regulated. The National Credit Act was passed at an apt time to protect South African credit consumers, to a certain extent, against the overextension of credit, which the world experienced at large, and that resulted in the devastating "credit crunch" experienced across the globe during the last half of the first decade of the twenty-first century.[10]

Nevertheless, the consumer credit market is an essential element of any economy and provides various advantages to consumers.[11] Along this point, the *Crowther Report on Consumer Credit* concludes that "[…] consumer credit contributes to a better allocation of resources by increasing both consumer satisfaction and economic efficiency".[12]

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[1] 34 of 2005, "National Credit Act", "NCA" or "Act". All references to sections and regulations hereinafter will be in accordance with the Act, unless indicated otherwise.
[2] The Act was put into operation on 1 June 2006, 1 Sep 2006 and 1 June 2007. See Proc 22, 2006 in *GG* 28824 of 11 May 2006.
[3] Act 73 of 1968, "Usury Act". See Otto and Otto *The National Credit Act explained* (2016) 3.
[4] Act 75 of 1980, "Credit Agreements Act". See Otto and Otto 3.
[5] For an overview of the historical development of consumer credit legislation in South Africa, see Nagel *et al Commercial law* (2015) 291.
[6] Scholtz (ed) *Guide to the National Credit Act* (2008) par 1.3.6.
[7] The Credit Agreements Act was only applicable to credit agreements in terms whereof the cash price did not exceed R500 000, and similarly, the Usury Act was restricted to credit agreements with a principal debt less than R500 000. Contrary, the NCA applies to all credit agreements, whether small or large, and irrespective of their form, duration, the type of goods or even the amount of money concerned. Otto and Otto 2.
[8] Scholtz (ed) par 1.3.6.
[9] For an overview of the NCA's purposes, see the preamble and s 3.
[10] Otto and Otto 2.
[11] *Ibid*.
[12] Crowther "Consumer Credit Report"(1970), "the *Crowther Report*", 117.

Subsequently, in an unequal economy such as South Africa's,[13] it can be argued that access to consumer credit is vital to achieving greater financial inclusivity and allocation of resources for all South African consumers.[14] This must be contextualised in accordance with the post-1994 government's aspiration to attain economic transformation in terms of which the consumer credit market is earmarked as an essential industry necessary to unlock economic benefits and substantive equality for all South Africans.[15]

Naturally, the National Credit Act then strives to attain pronounced socio-economic objectives[16] and, accordingly, is an essential piece of legislation not only from the consumer's point of view, but also from a broader socio-economic perspective.[17] Furthermore, whilst the NCA is directed at consumer protection it is necessary to note that these provisions are carefully drafted in a manner seeking to balance the interests of credit providers and consumers, and are not formulated to be one-sided.[18] This is evidenced by the stated aims of the Act as set out in section 3 thereof. Section 3 provides that the purpose of the NCA is "to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient and accessible credit market and industry, and to protect consumers". More specifically, for the purpose of this dissertation the following objectives as delineated in section 3 are of importance:

> (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;
> (i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.

To achieve these aforementioned objectives, the Act, now for the first time in the history of South African consumer credit legislation, introduced the mechanism of "debt review".[19] Debt

[13] See Coetzee and Brits "Extinguishing of debt in terms of the debt intervention procedure: Some remarks on "arbitrariness" 2020 *Magister Essays vir/for Jannie Otto* 11 and "The World Bank in South Africa overview", available at https://www.worldbank.org/en/country/southafrica/overview [Accessed on 23 May 2021].
[14] Scholtz (ed) par 2.3.
[15] The Department of Trade and Industry South Africa *Consumer Credit Law Reform: Policy Framework for Consumer Credit* 2004, "2004 DTI Policy Framework", par 1.12.
[16] See the finding in *Nkata v Firstrand Bank Ltd* 2016 (6) BCLR 794 (CC), "*Nkata*", par 94.
[17] Otto and Otto 1.
[18] See *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC), "*Kubyana*"; *Investec Bank Ltd v Motloung and Another* [2017] ZAFSHC 36, "*Motloung*"; and *Voltex (Pty) Ltd v Chenleza CC and others* [2010] JOL 25886 (KZP), "*Chenleza*". See also Scholtz (ed) par 2.3.
[19] Part D of Ch 4 of the Act, ss 78-88.

review is also colloquially referred to as "debt counselling" in practice, and intends to provide over-indebted credit consumers with debt relief in the form of debt restructuring.[20] However, this mechanism does not offer credit consumers a discharge from pre-existing indebtedness,[21] and is subject to the principle that the consumer satisfies *all*[22] responsible financial obligations owed to the credit provider by the consumer.[23]

Accordingly, it can be said that the NCA is not aimed at providing a "quick-fix" for over-indebted consumers, and merely offers such consumers a "second chance" to manage their debt in a responsible manner.[24] Incidentally, the Supreme Court of Appeal in *Collett v Firstrand Bank Limited*[25] remarked that "[t]he purpose of debt review is not to relieve the consumer of his obligations, but to achieve either a voluntary debt re-arrangement or a debt re-arrangement by the magistrates' court".[26]

The result of the aforementioned is that debt review will only offer debt relief to "mildly" over-indebted credit consumers, who can fully satisfy all their responsible financial obligations under their respective credit agreements by way of debt re-arrangement.[27] The *Memorandum on the objects of the National Credit Amendment Bill*, 2018,[28] states that for consumers earning less than R7 500 per month the debt review process is not cost effective for debt counsellors when considering the applications of such consumers.[29] Moreover, in accordance with the NCA's objectives, Magistrates' Courts will also only confirm viable plan proposals that favour the satisfaction of all responsible financial obligations.[30] The socio-economic implication of this is that certain over-indebted credit consumers are accordingly prevented from obtaining financial inclusivity in the credit market, once more. Incidentally, this is antithetical to the post-

[20] Scholtz (ed) par 11.1.
[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* 53.
[22] My emphasis.
[23] S 3(g) and (i).
[24] Otto and Otto 68 and Scholtz (ed) par 11.1.
[25] 2011 (4) SA 508 (SCA), "*Collett*".
[26] *Collett* par 10. See also the remark by Erasmus J in *Firstrand Bank v Olivier* 2009 (3) SA 353 that the purpose of debt review is to provide an over-indebted consumer with a debt reorganisation mechanism, and as a result, affords that consumer the opportunity to survive the immediate consequences of financial distress and obtain a manageable financial position.
[27] Roestoff and Coetzee 2012 *SA Merc LJ* 69.
[28] Hereafter the "2018 *Memorandum*".
[29] 2018 *Memorandum* 21.
[30] In this regard, see the decision in *Seyffert v Firstrand Bank Ltd* 2012 (6) SA 581 (SCA) 585 par 5,"*Seyffert*".

1994 government's end to attain economic transformation in terms of which access to credit is essential.[31]

For the purposes of this dissertation, this intrinsic shortcoming in the debt review mechanism must then be understood within the broader context of "no-income-no-asset debtors",[32] as debtors who fall into the NINA debtor category are explicitly excluded from any and all statutory debt relief measures.[33] This is owing to the fact that "asset less" insolvents will not qualify for sequestration and "income less" consumers will likewise fail to qualify for one of the statutory debt repayment plans, *viz*. debt review or administration.[34]

The South African debt relief system therefore differentiates between debtors "with" and "without" income and assets. Coetzee argues that this differentiation amounts to unjustifiable and unfair discrimination of NINA debtors' on the ground of their socio-economic status, as it conflicts with the right to equality in section 9 of the Constitution of the Republic of South Africa, 1996.[35] Accordingly, this discrimination in turn entrenches a duality within the South Africa economy by maintaining the indigent in a state of continuous poverty unable to escape the effects of "toxic debt".[36] Recently, for this reason, the Department of Trade and Industry devised the mechanism of "debt intervention".[37]

The debt intervention procedure, applicable only to unsecured credit agreement debt, will be introduced in the National Credit Act by the insertion of section 86A in Part D of Chapter 4 of the Act, when the provisions of the 2019 National Credit Amendment Act[38] become operative.[39] The mechanism of debt intervention intends to provide debt relief to over-indebted credit consumers who earn a low gross income and who have a relatively small amount of

[31] 2004 DTI Policy Framework par 1.12.
[32] "NINA debtors".
[33] There are currently three statutory debt relief measures in South Africa, namely the sequestration procedure provided for in the Insolvency Act 24 of 1936, "Insolvency Act", debt review in terms of the National Credit Act and administration in the Magistrates' Courts Act 32 of 1944, "Magistrates' Courts Act". For a pointed explanation of these mechanisms and their respective access requirements, see Nagel *et al* 502 and 503.
[34] 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", par 4.3.3.
[35] See Coetzee "Is the unequal treatment of debtors in natural person insolvency law justified?: A South African exposition" 2016 *Int. Insolv. Rev.* 36. The Constitution of the Republic of South Africa, 1996, is hereafter the "Constitution".
[36] *Ibid*.
[37] Scholtz (ed) pars 2.3.1 and 11.1.
[38] 7 of 2019, "2019 Amendment Act". The 2019 Amendment Act was signed into law on 15 August 2019. See *GG* 42649 of 19 August 2019.
[39] In terms of s 31 of the 2019 Amendment Act, the provisions of the Act will become operative on the date proclaimed in the *Gazette*.

unsecured debt.[40] Otherwise said, debt intervention seeks to provide debt relief to certain vulnerable consumers, who are excluded from accessing the current formal debt relief procedures.[41] One of the most noticeable and distinguishing remedial measures, in the debt intervention procedure, is the potential extinguishment of qualifying unsecured debt upon consideration of the consumer's financial circumstances.[42] The extinguishment of debt is subject to strict access and procedural requirements in order for the consumer to obtain the discharge of debt.

The proposed debt intervention process can therefore be measured in tandem with the socio-economic aspirations of the Act.[43] This mechanism operates as a means through which financial inclusivity can be obtained for over-indebted credit consumers who are financially excluded from the traditional insolvency regime of South Africa.[44] Debt intervention, whilst not yet operative, has been received with a wide-ranging reaction among legal scholars.

1 2 Research statement

The aim of this dissertation is to primarily investigate the debt relief mechanisms available to over-indebted consumers found in the National Credit Act. This demands an analysis of the debt review procedure set out in section 86 of the Act and the novel debt intervention procedure introduced in the 2019 Amendment Act via the insertion of section 86A in the NCA.

Accordingly, the debt intervention procedure will be reviewed and critically discussed against the current debt review procedure in the National Credit Act. This will be done in order to answer the central question whether the mechanism of debt intervention, on paper at least, offers an apt solution to respond to the plight of NINA debtors in accessing debt relief in South Africa. In addition, the question needs to be answered whether this novel debt relief mechanism gives greater effect to the socio-economic objectives of the Act as delineated in section 3 thereof.

[40] Coetzee and Brits 2020 *Magister Essays vir/for Jannie Otto* 12.
[41] See the preamble and s 2 of the 2019 Amendment Act; and Scholtz (ed) par 11.5.1.
[42] S 87A(6)(c).
[43] Scholtz (ed) par 2.3.
[44] *Ibid*.

1 3 Research objectives and overview of chapters

Pertinent research objectives have been formulated with reference to the above-mentioned research statement in order to define and restrict the scope of this study.

These are as follows:

(a) Chapter 1 provides an introduction to the dissertation, contains the research statement and the research objectives, and serves to delineate and limit the scope of the research. The definitions of selected key concepts are provided as well.
(b) The purpose of chapter 2 is to provide an overview of the legal position of NINA debtors in the South African debt relief system. In order to do so, relevant aspects of the sequestration and administration order procedures will be considered.
(c) Chapter 3 intends to critically discuss the underlying policy considerations and relevant provisions of the debt review procedure in the National Credit Act. Further, in this regard, the intrinsic shortcomings of this mechanism will be dealt with in the context of the legal position of NINA debtors.
(d) Chapter 4 aims to critically discuss the debt intervention mechanism introduced in the National Credit Act by the 2019 Amendment Act, in order to consider if this procedure offers an effective solution to the plight of NINA debtors, and in turn gives greater effect to the socio-economic aspirations of the Act.
(e) In the final chapter, chapter 5, and based on the research conducted in this dissertation, conclusions are reached and, where applicable, recommendations are made.

1 4 Delineations

The reasons for over-indebtedness and the prevention thereof are closely related to my research problem. Nevertheless, in order to maintain focused direction in this research these issues will not be considered in detail. Further, although the broader framework of South Africa's statutory debt relief mechanisms is relevant to the research problem, my dissertation is primarily concerned with the debt relief mechanisms in terms of the National Credit Act. Therefore, the relationship between sequestration, administration and debt review will only be reflected on in passing in regard to the legal position of NINA debtors in the existing debt relief system.

1 5 Terminology

The concept "debt intervention applicant" is defined in section 1 of the 2019 Amendment Act, and in respect of the debt intervention mechanism, means-

> a natural person, or natural persons who own a joint estate, who on the date of submission of the application for debt intervention contemplated in section 86A—
>
> (a) is a consumer under unsecured credit agreements, unsecured short term credit transactions or unsecured credit facilities only;
> (b) receives no income, or if he or she, or the joint estate, receives an income or has a right to receive income, regardless of the source, frequency or regularity of that income, that gross income did not, on an average for the six months preceding the date of the application for debt intervention exceed R7500 or such an amount as may be prescribed by section 171(2A)(a), per month;
> (c) is over-indebted, whether due to a change in personal circumstances or other circumstances; and
> (d) is not sequestrated or subject to an administration order;

The concept "extinguishment of debt" is defined in section 1 of the 2019 Amendment Act, and in respect of the debt intervention mechanism, means-

> (a) the cessation of all rights and obligations inherent to, or resulting from, a credit agreement; and
> (b) the cessation of any rights or obligations that may arise in law whether statutory or otherwise, because of the cessation contemplate?? in paragraph (a) prospectively from the date on which the act of extinguishment becomes effective;

The concept "over-indebtedness" is defined in section 79(1) of the NCA, in terms whereof a consumer is considered to be 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… [*inter alia*] having regard to that consumer's (a) financial means, prospects and obligations; and (b) probable propensity to satisfy in a timely manner all the obligations under all the credit agreements… indicated by the consumer's history of debt repayment.

The concept "unsecured debt" is defined as section 1 of the 2019 Amendment Act, and in respect of the debt intervention mechanism, means-

> the total of all principal debts due by a debt intervention applicant under the unsecured credit agreements, unsecured short term credit transactions or unsecured credit facilities to which the debt intervention applicant is a party.

These concepts will be addressed further in the chapters below.

1 6 Reference techniques

The masculine form is used throughout this dissertation to refer to a natural person. The credit provider, which is usually a juristic person, will be referred to as "it".

CHAPTER 2

AN OVERVIEW OF THE SOUTH AFRICAN STATUTORY DEBT RELIEF SYSTEM

2 1 Introduction

It has been identified hereinabove that the debt relief mechanisms in the National Credit Act form the focus of this research.[45] Prior to the enactment of the debt review procedure in the National Credit Act, South African consumer-debtors only had access to two statutory debt relief procedures, *viz*. sequestration and administration. The aim of this chapter is to provide an overview on the latter mentioned statutory debt relief mechanisms. This is done to provide a complete discussion of the legal position of NINA debtors in accessing the South African debt relief system, in order to further adequately assess the debt review and proposed debt intervention procedures, discussed in Chapters 3 and 4 below.

2 2 Statutory debt relief mechanisms

As already stated, there are three main statutory debt relief mechanisms at the disposal of over-committed South African natural person debtors.[46] These procedures are found in various pieces of legislation, which are overseen by different government departments.[47] The ultimate form of debt relief for over-committed consumer-debtors in South Africa remains sequestration followed by rehabilitation.[48]

2 2 1 The sequestration procedure

The sequestration procedure is regulated by the Insolvency Act.[49] The main objective of a sequestration order is to ensure the fair and orderly distribution of the consumer-debtor's assets which are insufficient to satisfy the claims of all individual creditors, in that it effects a

[45] See paras 1 1, 1 2, 1 3 and 1 4 *supra*.
[46] Bertelsmann *et al* Mars The Law of Insolvency in South Africa (2019) 5-6.
[47] 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.* 96.
[48] *Ibid*.
[49] For a detailed discussion of the sequestration procedure, 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* 80; and "(Part 2)" 2012 *De Jure* 254.

concursus creditorum.[50] Accordingly, the Insolvency Act makes provision for two types of sequestration procedures, *viz*. voluntary sequestration[51] and compulsory sequestration.[52]

Sequestration therefore entails an application by a consumer-debtor for the voluntary surrender of his estate or an application by a creditor for the compulsory sequestration of the debtor's insolvent estate.[53] However, in order for a court to grant a sequestration order, it must determine whether sequestration of the insolvent estate will be an advantage to creditors.[54] This is a fundamental factor in South African insolvency law, and is referred to as "the advantage to creditors" requirement. The practical application of this requirement delineates that there must be a pecuniary benefit for the general body of creditors.[55] In this regard, the court in *BP Southern African (Pty) Ltd v Furstenburg*[56] remarked that "[t]he whole tenor of the Act, inasmuch as it directly relates to sequestration proceedings, is aimed at obtaining a pecuniary benefit for creditors".[57]

This means that the court must on evaluation of the evidence presented to it conclude that there are sufficient assets of a sufficient value in the insolvent estate in order to satisfy the costs associated with sequestration and a non-negligible divide to creditors.[58] The practical implication of this prerequisite is that many debtors are unable to access the sequestration procedure,[59] as they are unable to demonstrate an advantage to creditors. This is the case for NINA debtors as they are "asset less".[60]

However, if a sequestration order is granted, albeit as a consequence of voluntary or compulsory sequestration, the effect thereof is that the consumer-debtor will, *inter alia*, lose control of his estate and his status will be altered.[61] Consequently, the insolvent estate will vest

[50] The court in *Walker v Syfret* 1911 AD 141 remarked that "[t]he sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration". See also Sharrock *et al Hockly's Insolvency Law* (2012) 3.
[51] See s 3(1) of the Insolvency Act. An application for voluntary surrender is done by an *ex parte* application in accordance with Form 2 of the Uniform Rules of Court.
[52] See s 9(1) of the Insolvency Act. An application for compulsory sequestration is done in accordance with Form 2A of the Uniform Rules of Court.
[53] Sharrock *et al* 3.
[54] See ss 6, 10 and 12 of the Insolvency Act. It is important to note that the advantage to creditors principle has elicited a considerable amount of judicial interpretation as it is not defined in the Insolvency Act. However, courts will generally accept that there is an advantage only if it is clear that concurrent creditors will benefit.
[55] See *Ex parte Mattysen et Uxor (First Rand Bank Ltd Intervening)* 2003 (2) SA 308 (T); and Roestoff and Coetzee 2012 *SA Merc LJ* 55-56.
[56] 1966 (1) SA 717 (O) 720.
[57] See also *Meskin & Co v Friedman* 1948 (2) SA 555 (W) 559.
[58] Roestoff and Coetzee 2012 *SA Merc LJ* 57.
[59] Coetzee and Roestoff 2020 *Int. Insolv. Rev*. 97.
[60] See par 2 3 *infra*.
[61] In respect of the effect of sequestration on *inter alia* the insolvent debtor's property, see ss 20 and 21 of the

in the Master of the High Court and then in a trustee that is mandated to manage the estate.[62] As sequestration affects a natural person's status, the application must be brought before the relevant High Court.[63] This results in the sequestration procedure being rather costly[64] as well as cumbersome, and clearly not a suitable procedure to address the legal position of NINA debtors.[65]

Once sequestration has run its course, the insolvent debtor is afforded the opportunity to "start afresh", without the embarrassment of being harassed by creditors, by means of rehabilitation, in terms of which the procedure will grant him a discharge of unpaid pre-sequestration debt.[66] Therefore, Coetzee argues that a discharge of debt is not the principal objective of sequestration proceedings but merely a consequence thereof.[67]

This has led to the practice of so-called "friendly sequestration" in terms of which debtors abuse sequestration proceedings in order to force a discharge of debt on their creditors.[68] In this instance a friend or family member of the debtor applies for the debtor's compulsory sequestration, in view of the fact that it is generally accepted that it is less cumbersome (than voluntary surrender) to obtain a sequestration order by way of compulsory sequestration.[69] Consequently, the "friendly creditor" makes no effort to have a trustee appointed or to prove a claim against the estate, and further, no other creditor takes steps to prove a claim for fear of contribution, as the debtor accordingly waits for the "dust to settle".[70] Unfortunately, many debtors are sequestrated in this manner leaving no real advantage to creditors.[71] The development of this practice signifies the need for a proper alternative "fresh start" procedure outside the ambit of the insolvency procedures.[72]

Insolvency Act; and Nagel *et al* 522-523.

[62] S 20(1)(a) of the Insolvency Act.

[63] Coetzee and Roestoff 2020 *Int. Insolv. Rev*. 97.

[64] *Ibid*.

[65] *Ibid*.

[66] See s 127A of the Insolvency Act. A debtor's rehabilitation and the concomitant discharge of all his pre-sequestration debts occur automatically ten years after the date of sequestration. Rehabilitation before expiration of the ten-year period is determined within the court's discretion.

[67] See the judgment in *Ex parte Arntzen* 2013 (1) SA 49 (KZP), which reaffirmed that the machinery of voluntary surrender operates for the particular benefit of the creditors of the insolvent estate and not for the specific benefit of the insolvent. See also *Ex parte Ford and two similar cases* 2009 (3) SA 376 (WWC).

[68] Mabe and Evans "Abuse of sequestration proceedings in South Africa revisited" 2014 *SA Merc LJ* 651.

[69] See *Hillhouse v Stott*: *Freban Investments (Pty)Ltd v Itzkin*; *Botha v Botha* 1990 (4) SA 580(W).

[70] *Ibid*.

[71] Mabe and Evans 2014 *SA Merc LJ* 651.

[72] Boranie and Roestoff "Fresh start procedures for consumer debtors in South African law" 2001 *Int. Insolv. Rev* 1.

2 2 2 The administration procedure: Section 74 of the Magistrates' Courts Act

The administration procedure[73] is provided for in section 74 of the Magistrates' Courts Act.[74] This relatively simple and inexpensive procedure involves an application to a Magistrate's Court whereby the financial obligations of over-committed debtors are rescheduled.[75] This procedure is therefore heavily reliant on the involvement of the Magistrate's Court.[76] From the onset it is important to note that this procedure provides for the possibility of debt restructuring coupled with a moratorium on debt enforcement, and hence does not provide debt relief in the form of an actual discharge of debt.[77]

Accordingly, Boraine defines the administration procedure as a debt relief mechanism, available to over-committed consumer-debtors who are experiencing financial distress, whereby such debtors are able to obtain a statutory rescheduling of their debt.[78] Consequently, it is evident that this procedure is devised to assist only "mildly" over-indebted consumers during a period of temporary financial distress and not to provide a solution for the plight of NINA debtors.[79]

If the application for administration is successful, section 74E(1) of the Magistrates' Courts Act provides for the appointment of an administrator. The administrator is mandated to take control of the consumer-debtor's finances and administer payments received by the debtor to his creditors.[80] In this regard, the administrator is tasked with collecting payments advanced in terms of the administration order and maintaining an up to date list of all payments and funds received by the administrator from or on behalf of the debtor.[81] The administration procedure does not establish maximum repayment periods.[82]

Accordingly, this procedure is characterised as an alternative debt relief measure to sequestration, which is only accessible under certain circumstances.[83] The administration procedure is thus available to regular income earning consumer-debtors in circumstances where

[73] The SCA confirmed that the administration procedure is in fact a debt relief mechanism in *Bafana Finance Mobopane v Makwakwa and Another* 2006 (4) SA 581 (SCA), "*Bafana Finance*", par 583.
[74] See Theophilopoulos, Van Heerden and Boraine *Fundamental principles of civil procedure* (2015) 438.
[75] Roestoff and Coetzee 2012 *SA Merc LJ* 63-64.
[76] Coetzee and Roestoff 2020 *Int. Insolv. Rev.* 97.
[77] *Ibid*.
[78] Boraine "Some thoughts on the form of administration orders and related issues" 2003 *De Jure* 217-218.
[79] Coetzee and Roestoff 2020 *Int. Insolv. Rev.* 97-98.
[80] *Ibid*.
[81] S 74J(1) of the Magistrates' Courts Act.
[82] Coetzee and Roestoff 2020 *Int. Insolv. Rev.* 97.
[83] *Ibid*.

the debtor is unable to satisfy a judgment debt or meet his financial obligations and where he does not have sufficient assets to attach in satisfaction of such judgment or obligations.[84]

This procedure is therefore in principle a repayment plan dependent on the consumer-debtor having disposable income.[85] In this regard, courts[86] are entitled to question the consumer-debtor's assets and liabilities as well as current and future income, which may include his spouse's income, standard of living and possibilities of economising and any other relevant information.[87] The administration procedure is intended to be used in instances of smaller estates in circumstances where the costs of sequestration would "swallow the assets" of the consumer-debtor's estate.[88] However, a condition for accessing the administration procedure is that the total amount of all debts due and payable should not exceed the amount as determined by the Minister from time to time in the *Government Gazette*.[89] At present, the amount is set at R50 000.[90]

The court in *Cape Town Municipality v Dunne*[91] remarked that the concept "debt" includes those debts "due and payable" and does not include *in futuro* debts. The implication of this judgment is that the over-committed consumer-debtors will still be burdened with the responsibility of paying such *in futuro* debts. Therefore, it is correctly argued that a shortcoming of the administration procedure is that it fails to take into account the full extent of the consumer-debtor's financial obligations.

2 3 Concluding remarks in respect of the existing debt relief measures and the plight of NINA debtors

From the above discussion it is evident that the sequestration procedure and administration order fail to provide effective debt relief to over-committed NINA debtors. Otherwise said, the cumulative effect of the differentiation brought about by the entry requirements of each individual procedure completely excludes NINA debtors from obtaining debt relief.[92]

[84] S 74(1)(a) of the Magistrates' Courts Act.
[85] Coetzee and Roestoff 2020 *Int. Insolv. Rev.* 97.
[86] Or any creditor and/or legal representative.
[87] S 74B(1)(e)(i)-(iv) of the Magistrates' Courts Act.
[88] *Bafana Finance* pars 587-588.
[89] S 74(1)(a) of the Magistrates' Courts Act.
[90] See proc 217 in *GG* 37477 of 27 March 2014.
[91] 1964 (1) SA 741 (C) par 745.
[92] Coetzee and Roestoff 2020 *Int. Insolv. Rev.* 98.

A NINA debtor may of course enter into a voluntary agreement with his creditors, which may provide for a rescheduling or even a full or partial discharge of debt. However, in such an instance the outcome of the matter will hinge on the will of the creditors.[93]

In respect of the sequestration procedure the "advantage to creditors" requirement is a major obstacle for NINA debtors in obtaining a sequestration order, as this category of debtor is "asset less".[94] Correspondingly, as far as the administration order is concerned, only debtors with less than R50 000 in outstanding debts have access to the procedure.[95]

[93] Nagel *et al* 502.
[94] *Ibid*.
[95] Roestoff and Coetzee 2012 *SA Merc LJ* 64.

CHAPTER 3

THE DEBT REVIEW PROCESS IN TERMS OF THE NATIONAL CREDIT ACT

3 1 Introduction

Over-indebtedness experienced among South African credit consumers remains widespread, as many consumers use credit in order to satisfy basic socio-economic needs and wants in South Africa's unequal economy.[96] The National Credit Regulator[97] recently observed that the average South African increasingly opts for credit in order to make ends meet.[98] This is due to price increases in petrol, food and the general high cost of living.[99] Incidentally, the National Credit Regulator Credit Bureaux Monitor First Quarter (March 2021) provided that out of 27.53 million credit-active consumers 10.52 million had impaired records.[100] Given the dire and precarious financial situation experienced by many consumers in the South African credit market it is evident that consideration of the debt relief mechanisms in the National Credit Act remains relevant. This is in particular true in respect of the Act's aim to address the substantial debt burdens experienced by consumers under the previous consumer credit legalisation and its failure to afford any consumer protection in this regard.

The National Credit Act assigns the entire Part D of Chapter 4 to reckless credit and over-indebtedness.[101] While reckless credit lending may result in consumers becoming over-indebted, these are treated as two distinct concepts in the Act.[102] The main focus of this chapter is on over-indebtedness and the alleviation thereof in terms of section 86 of the National Credit Act, which contains the debt relief mechanism referred to as "debt review".[103] The debt review procedure aims to resolve over-indebtedness in that it provides for a debt restructuring

[96] Whilst some consumers use credit in order to finance houses or cars. The same is true for consumers who use credit in order to finance school fees and school uniforms. See 2004 DTI Policy Framework par1.7.
[97] The NCA establishes the National Credit Regulator ("NCR"), which shoulders most of the burden of realising the Act's objectives. See s 13; and Scholtz (ed) par 2.3.1.
[98] See the foreword by the Accounting Authority to the *National Credit Regulator Annual Report* (2019/20), available at https://ncr.org.za/documents/pages/Annual%20Reports/NCR_AnnualReport_2019-2020_2611.pdf [Accessed on 12 August 2021].
[99] *Ibid*.
[100] Credit Bureau Monitor- First Quarter (March 2021). Available at https://www.ncr.org.za/documents/CBM/CBM%20Q1%202021.pdf [accessed 7 August 2021].
[101] See par 1 1 *supra.*
[102]The overlapping between over-indebtedness and reckless credit can occur, for example, in instances where the credit provider conducts a pre-agreement assessment before extending credit to the consumer, but ignores indications that entering into that specific credit agreement would make the consumer over-indebted and nevertheless recklessly enters into that credit agreement. See ss 80-84 and Scholtz (ed) par 11.1.
[103] See Roestoff, Haupt, Coetzee and Erasmus "The debt counselling process - closing the loopholes in the National Credit Act 34 of 2005" 2009 *PELJ* 247.

mechanism for over-indebted credit consumers.[104] However, this process has been the subject of extensive criticism since its introduction in the Act.[105]

In this chapter, I will set out the debt review procedure and the underlying policy considerations informing the procedure's enactment, and explain the essential aspects of the procedure which exclude NINA debtors from accessing debt relief in terms of the National Credit Act. This will be done so as to contextualise the development of the debt intervention procedure in the 2019 Amendment Act. In what follows, I will first provide background information in respect of the South African consumer credit market (before the promulgation of the NCA) and the policy considerations underlying the introduction of the debt review process, then address the purposes of the NCA and debt review, followed by a discussion of the latter process itself.

3 2 The South African credit market and underlying policy considerations to debt review

The consumer credit market is an essential aspect of any economy and provides various advantages to consumers.[106] The *Crowther Report* provides that "the consumer credit market offers certain advantages to the individual, which include both monetary and non-monetary returns. Thus it can be argued that consumer credit contributes to a better allocation of resources by increasing both consumer satisfaction and economic efficiency."[107] The consumer credit market therefore unlocks a diverse range of socio-economic opportunities, and in itself is not an odious thing. Nevertheless, "[t]he credit market is not a risk-free arena",[108] and can become problematic when credit consumers are unable to service their debts as a result thereof.[109] Accordingly, adequate consumer credit legislation is necessary to regulate the consumer credit market and afford effective protection in respect thereof.[110]

Prior to the enactment of the National Credit Act,[111] the South African consumer credit market was regulated by various pieces of legislation, *viz*. the Usury Act and the Credit Agreements

[104] See Renke, Roestoff and Haupt "The National Credit Act: New parameters for the granting of credit in South Africa" 2007 *Obiter* 249.
[105] *Ibid*.
[106] The Department of Trade and Industry explains that credit enables individuals to obtain the use of goods and services (at a cost represented by an interest rate) prior to having paid for that product or service or, where an item cannot be afforded from a single month's salary, in order to spread payments over a number of months. Accordingly, consumers would be able to purchase items such as houses and cars. The same is true for the cost of university education and school fees. See 2004 DTI Policy Framework pars 1.6 and 1.7.
[107] *Crowther Report* 117 and 118.
[108] 2004 DTI Policy Framework par 1.9.
[109] 2004 DTI Policy Framework par 1.8.
[110] Scholtz (ed) par 1.1
[111] For an overview of the NCA, see Otto and Otto 13 and 14.

Act.[112] These Acts respectively dealt with the financial and various contractual aspects of credit agreement transactions,[113] and were the subject of extensive criticism due to the lack of regulatory uniformity in the South African credit market.[114] It was, accordingly, apparent that a single comprehensive piece of consumer credit legislation was needed to regulate the credit market.[115]

In March 2002, the Department of Trade and Industry consequently introduced a review process by establishing a Technical Committee that was mandated to conduct a systemic review of the existing legislation that regulated the consumer credit market.[116] Moreover, the Technical Committee was tasked to propose a new regulatory framework for consumer credit. Consequently, several other reports were considered, including, *inter alia*, the 1992 South African Law Commission review of the Usury Act and 1995 South African Law Commission report on debt collection and related matters.[117]

This resulted in the publication of the 2004 DTI Policy Framework which provided that "[t]he credit market that developed over the last 40 years was inappropriate for the present and future political, economic and social context of South Africa".[118] This must be understood in the context of the post-1994 government's aspiration to achieve economic transformation in terms of which the consumer credit market was identified as an essential industry necessary to unlock economic benefits and substantive equality.[119] Accordingly, the Department of Trade and Industry explains that consumer credit policy requires a direct framework that establishes a regulated market that "will contribute positively to unlocking the economic potential of the nation, whilst minimising [the] social and economic costs of the structural legacy that still results in discrimination against a large section of the population".

Equally, the document identified a number of shortcomings in the legislative framework which preceded the National Credit Act, and rendered the reform thereof necessary.[120] One such

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[112] Scholtz (ed) par 1.1.
[113] The Usury Act and the Credit Agreements Act had to be applied jointly to credit agreements. In this regard, see Otto and Otto 3.
[114] For a detailed discussion on the criticism levelled against the Usury Act and Credit Agreements Act, see Kelly-Louw "The Prevention and alleviation of consumer over-indebtedness" 2008 *SA Merc LJ* 200.
[115] See Otto and Otto 1; Scholtz (ed) pars 1.1 and 1.3; and Nagel *et al* 219.
[116] 2004 DTI Policy Framework par 1.18.
[117] *Ibid.*
[118] It has been said that one of the principal intentions of the legislature in drafting the NCA was to promote equality in the credit market, specifically to those who have historically been unable to access sustainable credit markets. See 2004 DTI Policy Framework ch 2; and Scholtz (ed) par 2.3.
[119] 2004 DTI Policy Framework par 1.12.
[120] 2004 DTI Policy Framework ch 2.

shortcoming recognised was that many South African credit consumers were faced with substantial debt burdens[121] due to an oversupply of credit to those considered "creditworthy", and that there was no effective consumer protection afforded to consumers in this regard.[122]

Various explanations are cited in this policy document for the occurrence of this over-indebtedness including, *inter alia*, reckless credit lending, low levels of credit awareness, and that historically disadvantaged consumers gained access to credit.[123] In respect of the latter explanation, Kelly-Louw expounds that it is common cause that the level of over-indebtedness has indeed increased dramatically since 1994 as historically disadvantaged consumers suddenly had access to credit and that this went in *nexus* with affirmative action and aspirational lending practices.[124]

Additionally, the South African consumer credit market was characterised by formal and informal markets in terms of which varying levels of consumer protection was afforded.[125] The formal market was highly developed and serviced by reputable banks and other financial institutions that were organised to primarily serve middle and high-income earners, who were generally white consumers and large businesses.[126] In contrast, the informal market was serviced by unscrupulous micro-lenders, loan sharks and pawnbrokers who provided credit to low-income earners and previously disadvantaged consumers in respect of which exorbitant interest rates were implemented.[127] The implication of this was that many South African credit consumers faced substantial debt burdens with no means available to them to re-pay their "toxic debt", and, once more, obtain financial inclusivity in the consumer credit market. This consequence ran antithetical to the post-1994 government's aspiration to attain socio-economic transformation and sustainable market conditions.[128]

Consequently, the Department of Trade and Industry identified that there was an increasing need to provide over-indebted credit consumers with an intermediary debt relief measure in the National Credit Act. The *Memorandum on the objects of the National Credit Bill*, 2005, thus

[121] 2004 DTI Policy Framework par 6.8
[122] 2004 DTI Policy Framework par 6.10. The policy document provides that over-indebtedness occurs when a borrower can no longer service all of his debts or where the level of debt servicing depletes household income and consumption.
[123] *Ibid*.
[124] Kelly-Louw 2008 *SA Merc LJ* 204.
[125] See 2004 DTI Policy Framework chs 3 and 4. For a detailed discussion, see Kelly-Louw 2008 *SA Merc LJ* 203; and Stoop "South African consumer credit policy: measures indirectly aimed at preventing consumer over-indebtedness" 2009 *SA Merc LJ* 365.
[126] Stoop 2009 *SA Merc LJ* 365-366.
[127] *Ibid*.
[128] 2004 DTI Policy Framework ch 1.

advised that "[f]ocus should be shifted from price control to protection against over-indebtedness and to the regulation of predatory lending practices". Notably, the NCA, for the first time in the history of South African consumer credit legislation, introduced the mechanism of "debt review" in Part D of Chapter 4 of the Act.

The debt review procedure gives expression to these forgoing policy considerations as formulated in purposes of the National Credit Act, as discussed hereinafter.

3 3 The purposes of the NCA and debt review

The National Credit Act seeks to balance the inequalities related to the unequal bargaining power between large credit providers and credit consumers in the credit market.[129] Accordingly, when considering the general structure of the National Credit Act,[130] it is evident that the purposes of the Act are mainly directed at the protection and promotion of consumer interests.[131] In this regard, Naidu AJ observed in *Absa Bank Ltd v Prochaska*[132] that "[i]t is abundantly clear that the Act has introduced innovative mechanisms and concepts directed more at the protection and interests of credit consumers than [that] of credit providers".[133] The Constitutional Court likewise remarked in *Sebola v Standard Bank of South Africa Ltd*[134] that "[t]he main objective of the Act is to protect consumers".[135]

However, it is necessary to note that whilst the NCA is primarily directed at consumer protection, the provisions of the Act are carefully drafted in a manner seeking to balance the interests of credit providers and consumers and are not formulated to be merely one-sided.[136] This is evidenced by the stated objectives of the National Credit Act as set out in section 3

[129] In *Motloung* the court remarked that "[t]he Act seeks to balance the respective rights of consumers and credit providers. It is thus clear that the court may not only take into account the needs of the consumer for protection but must also take note of the credit provider's right to seek relief." See also Scholtz (ed) par 2.3.
[130] For a general overview of the structure of the NCA, see Otto and Otto 9-11; and Nagel *et al* 292.
[131] Various safeguards exist to ensure that such consumer protection is attained including, *inter alia*, a s 129 notice which requires that debtors' default be brought to their attention. Scholtz (ed) par 2.3; and Roestoff "The objective of providing debt relief to over-indebted consumers and the interpretation of section 85 of the National Credit Act *Firstrand Bank Ltd v Govender* [2014] JOL 31572 (ECP)" 2015 *THRHR* 702.
[132] 2009 (2) SA 512 (D), "*Prochaska*".
[133] *Prochaska* par 21.
[134] 2012 (5) SA 142 (CC), "*Sebola*".
[135] *Sebola* par 40. See also *Rossouw v Firstrand Bank Ltd* 2010 (6) SA 439 (SCA) par 17; and *Mostert and Others v Firstrand Bank t/a RMB Private Bank* (198/2017) [2018] ZASCA 54 par 24.
[136] See *Kubyana*; *Motloung*; and *Chenleza*. Also see Scholtz (ed) par 2.3; and Otto and Otto 8.

thereof.[137] Moreover, section 2(1) provides that the provisions of the Act must be interpreted in a manner that gives effect to these direct objectives of the National Credit Act.[138]

Pertinent for this research are sections 3(c), (g) and (i) of the National Credit Act, *per se*.[139] These provisions provide that the Act seeks to encourage the avoidance of over-indebtedness experienced by South African credit consumers, and to provide a harmonised debt restructuring system in terms of which the consumer satisfies *all*[140] responsible financial obligations.[141] It is evident that a core objective of the National Credit Act is to protect that interest of consumers by providing a debt relief procedure in terms of which over-committed credit consumers may apply for a statutory rescheduling of their debts.[142] Subsequently, the debt review procedure is merely a repayment plan dependent on the consumer having disposable income and does not provide actual debt relief in the form of a discharge of debt.[143]

3 4 Debt review: The scope of application of the National Credit Act

Item 4(2) of Schedule 3 to the National Credit Act provides that the provisions of Part D of Chapter 4 apply to pre-existing credit agreements, *viz*. agreements entered into before 1 June 2007. However, this is only to the extent that it does not concern reckless credit lending.[144] The implication is that a natural person consumer is able to obtain debt relief if he is over-indebted due to a pre-existing credit agreement, but will not be permitted to raise the issue of reckless credit lending.[145]

Furthermore, Part D of Chapter 4 of the National Credit Act does not apply to juristic persons as defined in the Act.[146] Therefore, the provisions relating to debt relief apply only to credit agreements concluded by natural person consumers,[147] more specifically a credit facility, credit transaction and credit guarantee that fall within the Act's scope of application.[148] Hence, debts

[137] For an overview of the purposes of the NCA, see Scholtz (ed) par 2.3; and Otto and Otto 8.
[138] Scholtz (ed) par 2.3.
[139] See par 1 1 *supra*.
[140] My emphasis.
[141] Scholtz (ed) par 11.3.
[142] Nagel *et al* 292.
[143] Coetzee and Roestoff 2020 *Int. Insolv. Rev*. 97.
[144] Scholtz (ed) par 11.1.
[145] *Land and Agricultural Development Bank of South Africa Ltd v Bosch* [2015] JOL 34131 par 33.
[146] S 78(1). S 1 defines a "juristic person" as a "partnership, association or other body of persons, corporate or unincorporated, or a trust if (a) there are three or more individual trustees; or (b) the trustee is itself a juristic person, but does not include a stokvel". The latter is defined in s 1.
[147] Scholtz (ed) par 11.2.
[148] S 4(1) read with s 8(1), (3), (4) and (5). For a detailed exposition of the NCA's field of application, see Scholtz (ed) chs 4 and 8; and Otto and Otto ch 3.

that do not qualify as credit agreements in terms of the Act will be excluded from the debt review procedure.[149] Examples of such debts may include municipal accounts and claims for professional services rendered where no interest is charged.[150] The practical implication of this is that only natural persons, who are consumers in terms of credit agreements regulated by the National Credit Act, are afforded debt relief provided for in this Part of the Act.[151] Therefore, a natural person who stands as a surety in respect of a credit agreement that falls outside the National Credit Act's ambit, by application of section 4(2)(c),[152] will also be excluded from accessing the debt relief pertaining to over-indebtedness as set out in Part D of Chapter 4.[153]

Although it is the National Credit Act's mandate to regulate consumer credit,[154] the fact that only credit agreements subject to the Act will qualify for debt review indirectly excludes a number of NINA debtors from obtaining debt relief in terms of the debt review process.[155]

3 5 When may a consumer apply for debt review?

In essence, a natural person consumer who enters into a credit agreement that is regulated by the National Credit Act and who at a later stage becomes over-indebted, may be granted debt relief in the form of debt restructuring pursuant to the debt review procedure.[156]

Section 79 of the National Credit Act sets out the test for over-indebtedness in terms of the Act[157] and defines the concept 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 having regard to that consumer's -
> (a) financial means, prospects, obligations; and
> (b) probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment.

Several key aspects must be noted in respect of the delineation of "over-indebtedness" in the National Credit Act. Firstly, Van Heerden explains that the person making the determination

[149] Coetzee LLD thesis par 4.3.
[150] *Ibid.*
[151] Scholtz (ed) pars 11.1 and 11.2.
[152] S 4(2)(c) provides that the NCA applies to a credit guarantee only to the extent that the Act applies to a credit facility or credit transaction in respect of which the credit guarantee is granted.
[153] See *First National Bank a Division of Firstrand Bank Ltd v Da Silva* [2019] ZAGPJHC 79, "*Da Silva*", pars 13 and 14, in terms of which the court set aside a debt re-arrangement order in respect of a credit guarantee for the reason that the principal debtor was a juristic person.
[154] Otto and Otto 2.
[155] *Ibid.*
[156] Scholtz (ed) par 11.1.
[157] Scholtz (ed) pars 11.1 and 11.3.1.

of over-indebtedness must consider the aforementioned factors in (a) and (b) as they exist at the time the determination is made.[158] In principle, this implies that a determination of over-indebtedness (which was not caused by reckless lending) is not conducted retrospectively in view of the time that the credit agreement was entered into,[159] but when the issue of over-indebtedness arises.[160] Van Heerden remarks that the reason for this is that a credit consumer might have been perfectly able to afford the credit at the time of entering into the credit agreement but may have become over-indebted at a later stage as a result of being retrenched, for example.[161]

Secondly, a consumer would typically be deemed over-indebted if that consumer is unable to satisfy all his financial obligations arising from all his credit agreements. Additionally, the words "or will be unable to satisfy" indicate that over-indebtedness does not only relate to an existing inability by the consumer to satisfy financial obligations, but also extends to a future inability to do so.[162]

Lastly, for the purposes of Part D of Chapter 4, section 78(3) of the National Credit Act provides that the words "financial means, prospects and obligations" must be interpreted to include

> (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 revenue flow from that business purpose.

The Court in *Standard Bank of South Africa (Pty) Limited v Panayiotts*[163] held that "[f]inancial means would include not only income and expenses but also assets and liabilities. Prospects would include prospects of improving that consumer's financial position, such as increases, and even, liquidating assets."[164] The Court then remarked that "[i]n the case of an instalment

[158] This implies that the information concerning a consumer's state of over-indebtedness should be current, and that a court should not be provided with out-dated information for the purposes of making a determination of over-indebtedness. Scholtz (ed) par 11.3.1.
[159] Scholtz (ed) par 11.3.2.
[160] *Ibid.*
[161] Scholtz (ed) par 11.3.1.
[162] S 79(1). Scholtz (ed) par 11.3.2.
[163] [2009] ZAGPHC 22, hereafter *Panayiotts.*
[164] *Panayiotts* par 9.

agreement, secured loan, lease or mortgage agreement, that the consumer's financial means and prospects must include the prospect of selling the goods in order to reduce the consumer's indebtedness".[165]

These above-mentioned considerations must be taken into account by the debt counsellor when assessing a consumer's application for debt review.[166]

3 6 Stages of the debt review procedure

The debt review procedure in the National Credit Act is comprehensive and consists of various stages.[167] For the purposes of this research, the debt review process can be divided into the following stages:(a) an application to the debt counsellor; (b) an assessment conducted by the debt counsellor; (c) the formation of a debt re-arrangement proposal; (d) the application filed at the Magistrate's Court; and (e) a granted debt re-arrangement order.[168] As will be seen hereinafter, this procedure is heavily dependent on the involvement of the Magistrates' Courts.

3 6 1 Stage 1: The application to the debt counsellor

Section 86 of the National Credit Act, read with Regulation 24,[169] governs the debt review application process, as set out in the National Credit Act.[170]

This provision states that a credit consumer may voluntarily apply to a debt counsellor[171] in the prescribed manner and form in order to be declared over-indebted.[172] The Court in *SA Taxi Securitisation (Pty) Ltd v Ndobela*[173] observed that section 86 of the Act places a pre-emptive duty on a consumer to take certain steps when it becomes clear to him that his finances have deteriorated to such an extent that there is a possibility of him being unable to satisfy his monthly obligations with the credit provider.[174]

Regulation 24(1)(a) provides that the consumer who intends to apply to a debt counsellor to be declared over-indebted must complete and submit a Form 16 for assessment in terms of the

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[165] *Panayiotts* par 10.
[166] Scholtz (ed) par 11.3.3.1.
[167] Scholtz (ed) par 11.3.3.2.
[168] *Ibid*.
[169] Of the National Credit Regulations, GN R489, *GG* 28864, 31 May 2006, "Regulations". Any reference to a regulation hereafter will be to the Regulations, unless indicated otherwise.
[170] Scholtz (ed) par 11.3.
[171] Debt counsellors are registered at and strictly regulated by the NCR.
[172] The NCA does not provide any limitations on the number of times that a consumer may apply for debt review.
[173] [2011] ZAGPJHC 14, hereafter "*Ndobela*".
[174] *Ndobela* par 15. See also the decisions in *Robertson v Firstrand Bank Ltd t/a Wesbank* [2017] ZAGPJHC 128; and *Tabane and Another v Standard Bank of South Africa Ltd and Others* [2017] ZAGPPHC 620.

Act. Section 86(3)(a) states that before accepting an application for debt review, the debt counsellor may require the consumer to pay an application fee not exceeding the prescribed amount.[175]

Subsequently, there are several administrative duties that the debt counsellor must comply with upon receipt of a debt review application.[176] Section 86(1) provides that the debt counsellor is mandated to provide the consumer with proof of receipt of the application, and in the prescribed manner and form notify all credit providers recorded in the application as well as every registered credit bureau.[177]

Accordingly, Form 17.1 must be completed and delivered[178] to the credit providers and credit bureaux involved within five business days[179] from the date on which the consumer first applied for debt review.[180] The debt counsellor must verify the information provided in terms of Regulation 24(1) by requesting documentary proof from the consumer, relevant credit providers or the consumer's employer or use any other method of verification.[181]

Notably, upon receipt of the notification that a debt review application has been lodged, the consumer and credit providers are obliged to act in good faith.[182] This is done by complying with all reasonable requests from the debt counsellor in terms of section 86(5)(a) of the Act. Accordingly, the Court in *Ndobela* remarked that "[there] is a reciprocal duty on both parties to engage meaningfully in a debt review procedure".[183] This participation is essential in order to enable the debt counsellor to adequately evaluate the consumer's state of over-indebtedness and the prospect of debt re-arrangement.[184]

[175] In terms of Sch 2 to the Regulations, a debt counsellor could charge the consumer a R50.00 application fee. However, new debt counselling fees as per the Debt Counselling Fee Guidelines, applicable from 1 April 2018, were issued by the NCR. These Guidelines prescribe different services that are rendered by debt counsellors in *nexus* with the amounts that may be charged and the time by when such a fee should be paid by the consumer. See Scholtz (ed) par 11.3.3.2(e).
[176] For an overview of the administrative duties of debt counsellors, see Scholtz (ed) par 11.3.
[177] Scholtz (ed) par 11.3.3.2 (f).
[178] Reg 24(5) states that Form 17.1 must be sent via fax, registered mail or e-mail.
[179] Reg 24(2).
[180] Scholtz (ed) par 11.3.3.2 (f).
[181] Reg 24(7).
[182] S 86(5)(b). For a detailed discussion on compliance and good faith, see Scholtz (ed) par 11.3.3.2 (g).
[183] *Ndobela* par 22.
[184] *Ibid.*

Lastly, a consumer who has filed an application for debt review[185] must not incur any further charges under a credit facility or conclude any further credit agreements[186] with any credit provider until the debt review matter has been finalised.[187]

3 6 2 Stage 2: Assessment

Section 86(6) of the National Credit Act provides that a debt counsellor who has accepted an application for debt review must in the prescribed manner and time determine whether the consumer appears to be over-indebted. Accordingly, Regulation 24(6) provides that the determination must be made within 30 business days after the date upon which the debt counsellor receives an application for debt review as set out in section 86(1).[188]

The debt counsellor, when assessing the consumer's application in accordance with section 86(6)(a), must refer to section 79 of the Act, as discussed above.[189] Moreover, the 2019 Amendment Act, when put into operation, imposes an obligation on debt counsellors to determine whether any reckless credit had been extended to the consumer.[190]

Upon completion of the assessment, the debt counsellor is mandated to notify all the credit providers and credit bureaux of that by delivering a Form 17.2 within five business days.[191] Depending on the outcome of the assessment, the National Credit Act prescribes three different courses of action that the debt counsellor could take as set out in section 86(7) of the Act.

Firstly, if the consumer is found not to be over-indebted, the debt counsellor must reject the application, even if the particular credit agreement was found to be recklessly concluded.[192] Secondly, if the debt counsellor concludes that the consumer is not over-indebted, but is experiencing or is likely to experience difficulty in satisfying all his financial obligations under

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[185] S 86(1).
[186] Other than a consolidation loan. This concept is not defined in the NCA, but entails a credit agreement that consolidates the debt under all previously concluded credit agreements, which means that no new or fresh credit is granted to the consumer. See Renke, Roestoff and Haupt 2007 *Obiter* 249.
[187] For example, if the debt counsellor has rejected the consumer's application and the consumer has not filed a direct application to the Magistrate's Court in terms of s 86(9). See pars 3 6 2 and 3 6 5 below.
[188] Scholtz (ed) par 11.3.3.2 (g).
[189] See par 3 5 *supra*. If the consumer seeks a declaration of reckless credit, the possibility of the latter must also be assessed by the debt counsellor. S 86(6)(b).
[190] S 12(a) of the 2019 Amendment Act.
[191] Reg 24(10).
[192] S 86(7)(a). In terms of Reg 25, if a debt counsellor rejects a consumer's application for debt review, the debt counsellor is obliged to provide the consumer with a letter of rejection. Further, in such an instance, the consumer is entitled to apply directly to the Magistrate's Court for an order declaring the consumer over-indebted in terms of section 86(9), with leave of that Court. Reg 26 prescribes that such an application must be made within 20 business days from the date on which the debt counsellor provided the letter of rejection.

all his credit agreements timeously, the debt counsellor may recommend that the credit provider(s) and consumer voluntarily enter into a debt re-arrangement plan.[193] Lastly, it may be concluded that the consumer is indeed over-indebted, whereupon the debt counsellor may formulate and issue a debt restructuring proposal.[194] The latter consequence of the debt counsellor's determination is important for purposes of my dissertation.[195]

3 6 3 Stage 3: Formulating the proposal

If the debt counsellor reasonably concludes that the consumer is indeed over-indebted, he may issue a proposal recommending that the Magistrate's Court make an order in terms whereof some of the consumer's credit agreements be declared as reckless credit (if applicable) and/or that one or more of the consumer's obligations be re-arranged.[196]

In respect of the debt rescheduling proposal, the debt counsellor is mandated to ensure that the proposal is economically justifiable.[197] Various judgments have endorsed this principle. The Supreme Court of Appeal in *Seyffert* confirmed that the debt restructuring proposals *in casu* were devoid of any economic rationality and would have resulted in a substantial portion of the debt being left unpaid. [198] Equally, in *Norris* it was remarked that the court had no jurisdiction to grant a re-arrangement order that would not satisfy the amounts outstanding to the credit provider and the monthly payments. As to do so, would be antithetical to the essential purposes of the National Credit Act determined in section 3(g) and (i) of the Act,[199] which requires that the consumer satisfy all responsible financial obligations in terms of the debt review process.[200] The latter has the direct effect of excluding NINA debtors who do not have sufficient income required to fulfil the section 3(g) and (i) objectives to satisfy all their "responsible financial obligations". Section 86(10)(a), which allows a credit provider to terminate a debt review after at least 60 business days have expired since the application for debt review by the consumer, implies that a debt counsellor has at least the aforementioned

[193] S 86(7)(b).
[194] S 86(7)(c).
[195] See par 3 6 3 below.
[196] S 86(7)(c)(ii). See Scholtz (ed) par 11.3.3.2 (j)(iii).
[197] For a detailed discussion on the principle of economically viable plan proposals, see Scholtz (ed) par 11.3.3.2 (k).
[198] *Seyffert* par 13.
[199] See par 2 3 *supra*.
[200] *Norris* par 42.

number of days to ensure that the referral to a court is made.[201] However, in terms of section 86(10)(b), once the debt review application has been filed in court by the debt counsellor, the debt review may no longer be terminated, even if 60 business days have already expired since its commencement.

In practice debt counsellors first approach credit providers with voluntary proposals prior to referring the proposal to the Magistrate's Court for an order.[202]

3 6 4 Stage 4: The filing of the debt review application and the powers of the Magistrates' Courts

The debt counsellor must upon finalisation of his assessment, refer his proposal to a Magistrate's Court. This referral must be done in the form of an application in terms of Rule 55 of the Magistrates' Courts Act Rules.[203]

Consequently, when a recommendation is made to the court, in accordance with section 86(7)(c) of the Act, a hearing must take place in terms of section 87 of the NCA.[204] Section 87(1) provides that when the respective court hears the matter, it must have regard to the proposal and the information before it, as well as the consumer's "financial means, prospects and obligations".[205] After conducting the hearing, the Magistrate's Court have the following options in terms of section 87(1)(b)(i) to (iii):[206]

> (a) reject the recommendation or application as the case may be; or
> (b) make-
> (i) an order declaring any credit agreement reckless, and an order contemplated in section 83(2) or, if the magistrates' court concludes that the agreement is reckless;
> (ii) an order re-arranging the consumer's obligations in any manner contemplated in section 86(7)(c)(ii); or
> (iii) both orders contemplated in subparagraphs (i) and (ii).

Aside from declaring a credit agreement or agreements reckless,[207] the Magistrate's Court, after conducting its hearing and finding the consumer to be over-indebted, may re-arrange the consumer's obligations in terms of section 86(7)(c)(ii), which only affords limited powers to

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[201] The full bench of the High Court in the Cape in *Wesbank v Papier* 2011 (2) SA 395 (WCC) confirmed the understanding that a debt counsellor has at least 60 business days from the date of the application for debt review to comply with the referral requirement.
[202] Scholtz (ed) par 11.3.3.2.
[203] Reg 2 of the Debt Counselling Regulations, 2012. For the latter, see GN R362 in *GG* 35327, 10 May 2012. See also Du Plessis J's judgment in *National Credit Regulator v Nedbank* 2009 (6) SA 295 (GNP).
[204] Scholtz (ed) par 11.3.3.2 (k).
[205] *Ibid.*
[206] Scholtz (ed) par 11.3.3.2 (l).
[207] And making the reckless orders in s 83 of the Act.

the court in this respect. [208] Section 86(7)(c)(ii)(aa) and (bb) respectively provides that a court may re-arrange the consumer's obligations by extending the term of the agreement and reducing the amount of each payment due or postpone the dates on which payments are due under the agreement for a specified period of time. The court is also empowered to make both the aforementioned orders.[209] Finally, the Magistrate's Court may recalculate the consumer's obligations under limited circumstances.[210]

Interestingly, section 86(7)(c)(ii) of the National Credit Act does not provide the Magistrate's Court with the power to reduce contractual interest rates,[211] despite this being done in practice.[212] Accordingly, the court in *Firstrand Bank Ltd v McLachlan*[213] confirmed that a court may not reduce the contractually agreed interest rate in a credit agreement when re-arranging the consumer's credit agreements.

3 6 5 Stage 5: The effects of debt review or a debt re-arrangement order

Section 88 has been referred to briefly above[214] and concerns the effects of a debt review application,[215] agreement[216] or re-arrangement order.[217] Once a debt re-arrangement order is granted by the Magistrate's Court in terms of section 86(7)(c)(ii), the consumer is obliged to abide by it.[218] Moreover, the consumer must not enter into any further credit agreement[219] or incur any further charges in terms of a credit facility[220] before the debt review process has been finalised,[221] meaning that one of the following three events must have occurred:[222] (a) the debt counsellor has rejected the application of the consumer to be declared over-indebted and the

[208] Scholtz (ed) par 11.3.3.2 (l).
[209] S 86(7)(c)(ii)(cc).
[210] S 86(7)(c)(ii)(dd). This court order is only pertinent in the case of a contravention of Part A of Ch 5 ("Unlawful agreements and provisions"), Part B of Ch 5 ("Disclosure, form and effect of credit agreements") and Part A of Ch 6 ("Collection and repayment practices").
[211] However, for the position in terms of the 2019 Amendment Act, see par 4 3 3 *supra*.
[212] For a detailed discussion of the Magistrate's Court's powers to re-arrange the contractually agreed on interest rate in terms of a credit agreement, see Scholtz (ed) par 11.3.3.2.
[213] 2020 ZASCA 31. See also *Da Silva* pars 18-20.
[214] Par 3 6 1.
[215] Discussed in par 3 6 1 above.
[216] A debt review agreement refers to a voluntary agreement reached between the consumer and his credit providers in terms of s 86(7)(c)(b), mentioned in par 3 6 2 above.
[217] Discussed in par 3 6 4 above.
[218] Roestoff and Coetzee 2012 *SA Merc LJ* 68.
[219] With the exception of a consolidation agreement. See par 3 6 1 above. It makes sense that entering into a consolidation agreement is allowed while the consumer is over-indebted, as such an agreement should not entail further credit.
[220] The credit facility is defined in s 8(3) and includes the provision of goods or services or the payment of an amount or amounts on a revolving credit basis.
[221] S 88(1).
[222] Renke, Roestoff and Haupt 2007 *Obiter* 250.

period within which the consumer can approach the court in terms of section 86(9)[223] has lapsed;[224] (b) the relevant court has determined that the consumer is not over-indebted or has rejected the debt counsellor's proposal or the court's application;[225] or (c) all obligations having been re-arranged by order of court or an agreement between the consumer and his credit providers have been fulfilled, unless in terms of a consolidation agreement.[226]

If a credit provider enters into a new credit agreement with a consumer, knowing that the consumer is subject to debt review, such a credit agreement may be declared as reckless credit by a court.[227] The court seems to have a discretion in declaring such a new credit agreement as reckless.[228] If a consumer intentionally, while being subject to debt review, enters into a new credit agreement[229] with a credit provider, in spite of the section 88(1) prohibition, the consumer forfeits the protection afforded in terms of Chapter 4 Part D of the Act.[230]

A final consequence of debt review is that a credit provider cannot enforce a credit agreement[231] in respect whereof a consumer is in default while the consumer is subject to the debt review.[232] In terms of section 86(2) the opposite is also true,[233] meaning that debt review and debt enforcement can never be ongoing at the same time, which makes perfect sense.

Once a debtor has complied with all the obligations under each credit agreement in terms of a repayment order, the debtor must be issued with a clearance certificate in terms of section 71.[234] Thus, the consumer will only be rehabilitated upon the issuance of a clearance certificate by the debt counsellor.[235]

3 7 Concluding remarks regarding debt review and NINA debtors

In this chapter consideration was given to the debt review procedure introduced in section 86 of the National Credit Act. It was explained that this procedure aims to address the over-

[223] Discussed in par 3 6 2 above.
[224] S 88(1)(a).
[225] S 88(1)(b).
[226] S 88(1)(c). The consumer must eventually fulfil all his obligations in terms of the consolidation agreement or subsequent consolidation agreements. S 88(2).
[227] S 88(4). See Renke, Roestoff and Haupt 2007 *Obiter* 250.
[228] Scholtz (ed) par 11.3.
[229] Or part thereof. However, consolidation agreements, as discussed above, are excluded.
[230] S 88(5). See Renke, Roestoff and Haupt 2007 *Obiter* 250.
[231] In terms of Ch 6 Part C of the Act.
[232] S 88(3).
[233] If a credit provider has already commenced with steps to enforce the credit agreement, the consumer is barred from applying for debt review.
[234] Scholtz (ed) par 11.4.
[235] *Ibid*.

indebtedness of credit consumers in that it provides for a debt restructuring mechanism.[236] However, Roestoff and Coetzee[237] aptly refer to the remark by Johnson and Meyerman that the National Credit Act, despite its aim to assist over-indebted credit consumers[238] merely "[…] perpetuates over-indebtedness by not providing a simple debtor discharge mechanism".[239] NINA debtors are expressly excluded from the debt review procedure due to the direct and indirect access requirements to the process in terms of the National Credit Act.[240] While the debt review mechanism does not, similarly to the sequestration procedure,[241] require the consumer to show an advantage to creditors in order to obtain access thereto, the process only assists credit consumers who are "mildly" over-indebted, as the courts will only confirm viable proposal plans by debt counsellors.[242] This can be ascribed to the practical application of the National Credit Act's insistence that the consumer must satisfy "*all*[243] responsible financial obligations",[244] as well as on "the eventual satisfaction of *all*[245] responsible consumer obligations under credit agreements".[246] According to Roestoff and Coetzee, the debt review procedure therefore amounts to no more than a re-organisation of the consumer's credit agreements regulated by the National Credit Act.[247] Consequently, NINA debtors are systematically excluded from the debt review system due to a lack of disposable income available for distribution under a repayment plan.[248]

In addition, the administrative costs associated with the section 86 debt review procedure further excludes NINA debtors from its ambit. Debt review is simply not cost-effective for debt counsellors when considering applications of low-income consumers.[249]

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[236] See par 3 1 *supra*.
[237] Roestoff and Coetzee 2012 *SA Merc LJ* 69.
[238] See par 2 3 *supra.*
[239] Johnson and Meyerman "Insolvency Systems in South Africa - Strengthening the regulatory framework", available at http://www.fsp.org.za/blog/wp-content/uploads/SOUTH-AFRICA-INSOLVENCY-SYSTEM.pdf [Accessed on 30 August 2021].
[240] Coetzee LLD thesis par 4.3.3.
[241] See par 2 2 1 above.
[242] See also Roestoff and Coetzee "Debt relief for South African NINA debtors and what can be learned from the European approach" 2017 *CILSA* 256.
[243] My emphasis.
[244] S 3(g).
[245] My emphasis.
[246] S 3(i).
[247] Roestoff and Coetzee 2012 *SA Merc LJ* 69.
[248] *Ibid*.
[249] 2018 *Memorandum* 36.

The National Credit Act's debt review process therefore fails to provide a suitable, alternative debt relief mechanism for over-indebted individuals who are "income less" and "asset less".[250] Hence, it can be said that the debt review procedure fails to address the need for a suitable intermediary debt relief mechanism in the Act which is available to all consumers facing a substantial debt burden. [251] As far as NINA debtors and their socio-economic plight are concerned, the NCA merely locks this category of debtors in a perpetual "debt trap", rendering it impossible for them to improve their financial position and to become productive members in the South African consumer credit market once again. These debtors are consequently unable to access the advantages and benefits of the consumer credit market, which is against one of the NCA's objectives to make the credit market more accessible to "all South Africans".[252]

[250] Roestoff and Coetzee 2017 *CILSA* 255-256; Boraine, Evans, Roestoff and Steyn"The pro-creditor approach in South African insolvency law and possible impact of the constitution" 2015 *NIBLeJ* 82 and 84; and Roestoff and Coetzee 2012 *SA Merc LJ* 68.
[251] See the 2004 DTI Policy Framework par 6.10.
[252] S 3(a).

CHAPTER 4

THE DEBT INTERVENTION PROCESS

4 1 Introduction

The crux of the debt intervention process, which was introduced into the National Credit Act in terms of the 2019 Amendment Act, will be discussed in this chapter. The failures by the debt review process in terms of section 86 of the NCA to render credit accessible to NINA debtors and in particular to afford this group of debtors' effective debt relief, were discussed in the previous chapter. However, it has to be remembered that the 2019 Amendment Act is not operative yet, and that the lack of regulations to give effect to its debt intervention provisions, renders a complete assessment of the process impossible.

Be that as it may, the Department of Trade and Industry, after identifying the socio-economic cost of "toxic debt" experienced by no and low income debtors, developed the specialised procedure referred to as "debt intervention".[253] Accordingly, the debt intervention procedure is drafted in a manner that intends to provide debt relief to over-indebted natural person consumer debtors who are subject to the NCA's scope of application, earn a relatively low gross monthly income and owe a rather small amount of unsecured debt.[254] However, as mentioned above, this newly introduced debt relief mechanism will only be incorporated in the National Credit Act when the 2019 Amendment Act becomes operative.[255]

The main objective of this chapter is to establish whether the proposed debt intervention procedure will rectify the current unconstitutional dispensation, and consequently offer an adequate solution to the legal position of NINA debtors in the South African statutory debt relief system.[256] The aim is to ascertain whether this procedure will address the socio-economic plight of the NINA debtors, not only to access affordable, cheaper credit, but also debt alleviation in respect of their credit commitments, if necessary. Thus, it will be determined whether the debt intervention procedure will give greater expression to the socio-economic

[253] 2018 *Memorandum* 21. See also Scholtz (ed) pars 2.3.1, 11.1 and 11.5; Coetzee and Roestoff 2020 *Int. Insolv. Rev.* 95 and 96; and Coetzee and Brits 2020 *Magister Essays vir/for Jannie Otto* 11 and 12.
[254] Scholtz (ed) par 11.5.
[255] See Coetzee and Brits 2020 *Magister Essays vir/for Jannie Otto* 12. In terms of s 31 of the 2019 Amendment Act, the provisions of the Act will become operative on the date proclaimed in the *GG*. Whilst the 2019 Amendment Act is not operative yet, this dissertation will refer to the NCA as if the amendments in terms of the former have already been effected to the NCA's provisions. The implication is that section numbers in the 2019 Amendment Act will not be referred to.
[256] See pars 1 1 and 1 2 *supra*.

policy considerations of the South African consumer credit legislation.[257] In this chapter the policy considerations underlying the debt intervention process will be attended, followed by a discussion of the process itself, with particular reference to key, distinctive aspects, drafted in a manner intended to assist NINA debtors in obtaining debt alleviation in the South African statutory debt relief system. Finally, the two most noteworthy aspects of the debt intervention mechanism, *viz*. suitable access requirements[258] and the extinguishment of debt,[259] will be further discussed and commented on in light of the legal position of these vulnerable consumer debtors, followed by a conclusion.

4 2 Debt intervention: General policy considerations

The proposed debt intervention mechanism seeks to attain financial inclusivity for all credit consumers by providing an alternative remedial measure to over-indebted credit consumers, which are generally financially excluded from accessing the traditional insolvency regime.[260] Incidentally, the Department of Trade and Industry, discerning the socio-economic costs of "toxic debt" for marginalised debtors, developed the debt intervention procedure, a process which is tailored to satisfy the needs of consumer debtors with nominal assets and income.[261] This objective is in tandem with the socio-economic aspirations of the National Credit Act that seeks to attain financial inclusivity for all credit active consumers in the South African credit market.[262]

Accordingly, the Portfolio Committee on Trade and Industry[263] correctly accepts that the South African natural person insolvency system remains creditor-orientated that from time to time operates to the exclusion of certain vulnerable consumer debtors.[264] Additionally, due to the costs involved in the debt review and debt administration procedures, this vulnerable group of consumers are further barred from accessing any remedial relief under these alternative statutory debt relief procedures.[265] According to the 2018 *Memorandum* it is not profitable for debt counsellors to accept debt review applications of debtors who earn less than R7 500 per

[257] See pars 1 1 and 1 2 *supra*.
[258] See s 86A(1).
[259] See s 87A(6).
[260] See Scholtz (ed) pars 11.1 and 11.5; and Coetzee "An opportunity for no and no asset (NINA) debtors to get out of check? - An evaluation of the proposed debt intervention measure" 2018 *THRHR* 593.
[261] See 2018 *Memorandum* 21; and Coetzee 2018 *THRHR* 594.
[262] See Scholtz (ed) par 2.3.1 for a detailed discussion on the development of the debt intervention procedure and the transformative objectives of the NCA.
[263] Hereafter referred to as "the Committee".
[264] See 2018 Memorandum 21; and Coetzee and Roestoff 2020 *Int. Insolv. Rev.* 99.
[265] *Ibid*.

month.[266] In addition, reference is also made to the 12.5% costs associated with the money distributed in terms of administration order proceedings that renders the mechanism unaffordable for low income consumers.[267]

In practice, these cumulative impediments in the South African debt relief system maintain disqualified consumer debtors in a state of perpetual poverty unable to escape the effects thereof.[268] Accordingly, the Committee in acceptance of Coetzee's argument[269] further acknowledges that the exclusion of these vulnerable consumer debtors' results in unjustifiable and unfair discrimination on the grounds of their socio-economic status.[270]

One of the most noticeable remedial measures of the debt intervention procedure is thus that the consumer's financial circumstances could result in the extinguishment ("discharge") of qualifying unsecured debt.[271] However, and not surprisingly, the Committee is of the view that a procedure enabling consumers to repay their debt must be the first step of any proposed alternative remedial measure.[272] The debt intervention procedure is accordingly drafted to first attempt to "rearrange [the debtor's] obligations…free of charge",[273] and an essential policy consideration is that the proposed alternative procedure must be drafted in a manner that strives to establish "a fair and balanced process".[274] The latter is in accordance with the various judicial observations made in case law, that the legislature intended for the National Credit Act to balance the respective rights of credit providers and consumers.[275]

The 2019 Amendment Act effected an amendment to section 3 of National Credit Act by the insertion of paragraph (gA), providing that "appropriate debt intervention services for qualifying consumers" is one of the direct purposes of the Act.

4 3 Stages of the debt intervention procedure

"[D]ebt intervention" means "a measure contemplated in section 86A, which aims to assist identified consumers for whom existing natural person insolvency measures are not accessible

[266] *Ibid.*
[267] *Ibid.*
[268] See Scholtz (ed) pars 2.3.1 and 11.5.
[269] See 2018 *Memorandum* 21; and Coetzee 2016 *Int. Insolv. Rev* 36. See also par 1 1 *supra.*
[270] 2018 *Memorandum* 21.
[271] Scholtz (ed) par 11.5.1; Coetzee and Brits 2020 *Magister Essays vir/for Jannie Otto* 12; and Coetzee 2018 *THRHR* 610.
[272] 2018 *Memorandum* 21. See also Coetzee and Roestoff 2020 *Int. Insolv. Rev*. 99
[273] *Ibid.*
[274] *Ibid.*
[275] See *Kubyana*; *Motloung* and *Chenleza*. See also pars 1 1 and 1 2 *supra*.

in practice".[276] The proposed debt intervention procedure appears to generally reflect the debt review process, as set out in section 86 of the National Credit Act.[277] However, debt intervention is a *sui generis* procedure which introduces several key, distinctive features.[278] Nevertheless, in consideration of the "[s]ubstantial procedural overlap with the debt review process", various aspects of the debt review mechanism discussed in Chapter 3 apply *mutatis mutandis*.[279] Therefore, for the purpose of this dissertation the proposed debt intervention procedure will similarly be divided into stages.

4 3 1 Stage 1: Access to debt intervention

A natural person consumer may set the debt intervention procedure in motion by applying to the NCR in the prescribed manner and form[280] to be declared over-indebted.[281] Van Heerden explains that the implication of this statement is that applicants for the debt intervention procedure will have to satisfy the requirements for "over-indebtedness" as defined in section 79 of the National Credit Act.[282]

More specifically, a person ("the debt intervention applicant") may lodge an application with the NCR if such applicant's total unsecured debt[283] is no more than R50 000.00, or such an amount as prescribed in terms of section 171(2A)(b).[284] Accordingly, most of the access requirements for the debt intervention procedure originate from the definition of "debt intervention applicant", whilst some can be ascertained by procedural rules contained in the debt intervention process.[285]

A "debt intervention applicant" is defined as a natural person[286] who, on the date of the submission of the application for debt intervention contemplated in section 86A, is[287]

> (a) a consumer under unsecured credit agreement, unsecured short-term credit transaction, or unsecured credit facilities only;

[276] See s 1.
[277] Scholtz (ed) par 11.5.1.
[278] *Ibid.*
[279] *Ibid.*
[280] It has already been mentioned that no regulations (or forms) have been published yet. Coetzee and Roestoff however submit that the success of the debt intervention procedure, particularly in respect of being accessible to NINA debtors, will to a large extent depend on the care with which these regulations are drafted. Coetzee and Roestoff (2020) *Int. Insolv. Rev*.102.
[281] Scholtz (ed) par 11.5.1; and Coetzee and Roestoff 2020 *Int. Insolv. Rev.* 101 and 102.
[282] S 79(1), read with s 78(3). See par 3 5 *supra*.
[283] Scholtz (ed) par 11.5.1.
[284] S 86A.
[285] Coetzee and Brits 2020 *Magister Essays vir/for Jannie Otto* 13.
[286] Or natural persons who own a joint estate.
[287] Scholtz (ed) par 11.5.1

(b) receives no income, or if he or she, or the joint estate receives an income or has a right to receive income, regardless of the sources, frequency or regularity of that income, that gross income did not, on an average for the 6 months preceding the date of the application for debt intervention exceed R7 500.00 or such an amount as may be prescribed by section 171(2A)(a) per month;
(c) is over-indebted, whether due to change in personal circumstances or other circumstances; and
(d) is not sequestrated or subject to an administration order.

In respect of these proposed access requirements as set out in the aforementioned definition, Coetzee and Roestoff make certain key observations in view of the legal position of NINA debtors in obtaining debt relief via the debt intervention mechanism.[288] Firstly, Coetzee and Roestoff argue that the R7 500 income threshold is acceptable as far as the financial circumstances of NINA debtors are concerned.[289] The R7 500 threshold exceeds any asset and income threshold necessary to qualify for a social grant in South Africa and far outweighs any benefit payable under such a subsidy.[290] Moreover, this income threshold will ensure that those who do not qualify for the debt review procedure due to its associated costs will have access to the remedial measures available under the debt intervention procedure.[291]

The authors further observe that the proposed procedure does not explicitly exclude credit agreements that are subject to the debt review mechanism. This is distinct from the explicit exclusion of consumer debtors who are subject to a sequestration order or administration order.[292] They postulate that this may be due to the fact that the legislature acknowledges that credit consumers may be locked into the debt review mechanism with no reasonable prospect of an economic rehabilitation.[293]

Coetzee and Roestoff's second argument is that the arbitrary R50 000-threshold is uninformed with no motivation as to how the amount was decided on by the legislature.[294] This threshold is similar to that of the administration order in in terms of section 74 of the Magistrates' Courts Act.[295] Additionally, NINA debtors will likewise be indirectly excluded from accessing the debt intervention procedure and its remedial measures due to the fact that the procedure is

[288] Coetzee and Roestoff 2020 *Int. Insolv. Rev.* 100.
[289] Coetzee and Roestoff 2020 *Int. Insolv. Rev.*100 and 101.
[290] *Ibid.* Further, for an overview of the benefits payable under social grants in South Africa, see "Sassa grant amounts", available at http://www.sassa.gov.za/index.php/newsroom/355-sassa-grants-amounts [Accessed on 30 August 2021].
[291] Coetzee and Roestoff 2020 *Int. Insolv. Rev.*101.
[292] *Ibid.*
[293] *Ibid.*
[294] *Ibid.*
[295] *Ibid.*

included in the National Credit Act, which renders it subject to the Act's scope of application.[296]

Thirdly, in consideration of the mechanism's field of application, the authors explain that the reference to "unsecured debt" is peculiar.[297] The question arises whether the word "unsecured debt" disqualifies a consumer subject to secured credit agreements from accessing relief in terms of the procedure or if such credit agreements are merely excluded from the measure's ambit.[298] In this regard, reference is made to a number of credit agreements that are specifically excluded from debt intervention's ambit, as set out in section 86A(2).[299] In consideration of the fact that secured credit agreements are not specifically listed in this provision and the use of the word "only" creates the understanding that credit consumers subject to secured agreements are excluded from accessing the remedial measures in the procedure.[300]

Lastly, the exclusion of credit agreements in terms of which credit providers have proceeded to enforce the agreement[301] is challenging.[302] Coetzee and Roestoff submit that this *proviso* is odd, as the estates of NINA debtors will not yield any value.[303] Moreover, the exclusion of credit agreements subject to civil debt enforcement will result in a fragmented approach to resolving the consumer debtor's financial circumstances.[304]

4 3 2 Stage 2: The NCR's evaluation of the application

The NCR's proposed functions in terms of the debt intervention mechanism are akin to some of the procedural measures forming part of the debt review procedure.[305] Accordingly, the NCR must comply with section 86(4) and (6), with the necessary changes.[306] This means that in accordance with Form 17.1, the NCR must provide the consumer with proof of receipt of the

[296] S 4(1) read with s 8(1), 8(3), 8(4) and 8(5); and Coetzee and Roestoff 2020 *Int. Insolv. Rev.*101. In respect of the NCA's field of application, see par 3 4 *supra.*
[297] Coetzee and Roestoff 2020 *Int. Insolv. Rev.*101.
[298] *Ibid.*
[299] These include developmental credit agreements in terms of s 10 as well as credit agreements in terms of which the credit provider has taken steps to enforce such agreements. See Coetzee and Roestoff 2020 *Int. Insolv. Rev.* 101.
[300] Coetzee and Roestoff 2020 *Int. Insolv. Rev.*101.
[301] S 86A(1). This exclusion also applies to the debt review procedure. See s 86(2), mentioned in par 3 6 5 *supra*.
[302] Coetzee and Roestoff 2020 *Int. Insolv. Rev.*101.
[303] Coetzee and Roestoff 2020 *Int. Insolv. Rev.* 102; and Coetzee (2018) *THRHR* 593.
[304] *Ibid.*
[305] *Ibid.*
[306] S 86A(3).

application and notify all credit providers that are listed in the application as well as all registered credit bureaux of the application.[307]

On acceptance of the application, the NCR must consider in the prescribed manner and time[308] if the consumer is indeed over-indebted and whether reckless credit was granted.[309] The debt intervention applicant and respective credit providers must comply with all reasonable requests by the NCR in order to determine the consumer's state of over-indebtedness and the prospect for a responsible debt re-arrangement.[310] Hence, similar to the debt review procedure, all stakeholders in the debt intervention procedure must act in good faith.[311] Notably, the NCR must, when it considers the debt intervention application, provide the debt intervention applicant with counselling on financial literacy, and access to training with the intent to improve the applicant's financial literacy.[312]

Depending on the outcome of the aforementioned evaluation the NCR is required to proceed in a particular way.[313] If the applicant does not qualify for debt intervention, the NCR must reject the application.[314] Nevertheless, if the applicant fails to qualify for the procedure "but is […] experiencing, or is likely to experience, difficulty satisfying all [his] obligations in a timely manner", the NCR must propose that the applicant and the respective credit providers voluntarily consider and agree on a debt re-arrangement plan.[315] If the credit agreement that forms part of the debt intervention application constitutes reckless credit lending, an unlawful credit agreement, or one resulting from prohibited behaviour, the NCR must refer the agreement to the National Consumer Tribunal,[316] to make an appropriate decision.[317]

Lastly, the final two outcomes of the evaluation are of importance in respect of the legal position of NINA debtors. These outcomes are as follows:[318] If the debt intervention applicant

[307] S 86(4) applies *mutatis mutandis*; and Scholtz (ed) par 11.5.2.1.
[308] Van Heerden submits that this determination must be made within 60 business days since the application was made. In this regard, see Scholtz (ed) par 11.5.2.1 and s 86(10).
[309] S 86(6) read together with Form 17.2 and s 86(10).
[310] Scholtz (ed) par 11.5.2.1.
[311] S 86(5)(a) and (b); and Scholtz (ed) par 11.5.2.1.
[312] S 1 defines financial literacy as "the knowledge, ability and opportunity to make sound money management choices".
[313] Coetzee and Brits 2020 *Magister Essays vir/for Jannie Otto* 14; and Coetzee and Roestoff 2020 *Int. Insolv. Rev.* 101 and 102.
[314] S 86A(6)(a).
[315] S 86A(6)(b).
[316] Hereafter referred to as the "NCT" or the "Tribunal". The Tribunal is a juristic person with jurisdiction throughout the country. For a detailed discussion on the role players and powers of the Tribunal, see Nagel *et al* 308.
[317] S 86A(6)(c).
[318] Coetzee and Roestoff 2020 *Int. Insolv. Rev.* 101 and 102.

is indeed over-indebted, and qualifies for the procedure, and his obligations can be re-arranged within a period of five years, the NCR must refer the matter with a recommendation to the NCT for an order as envisaged in section 87(1A).[319] However, and most significantly, if upon conclusion of the evaluation the NCR determines that the applicant qualifies for debt intervention but that the applicant's income and assets are insufficient to be re-arranged, it must recommend an order proposed in section 87A.[320] Subsequently, the NCR must inform all respective credit providers of the referral and invite them to make written representations at a specified date to the NCT.[321]

4 3 3 Stage 3: Debt intervention orders

The NCT may consider an application for debt intervention with reference to the documents received from the NCR, any written representations made by credit providers in respect thereof[322] and any other information deemed relevant to the application and then make an order[323]

> (a) that the debt intervention applicant does not qualify for debt intervention and reject the application; or
> (b) (i) suspend all of the qualifying credit agreements, in part or in full, for 12 months, which period may be extended for one further period of 12 months, taking into account the factors referred to in subsection (3); and
> (ii) further require the debt intervention applicant to attend a financial literacy programme.

The NCT is accordingly mandated to take a number of factors into consideration when evaluating whether to suspend or partially suspend a credit agreement, alter or extend such a suspension, or extinguish in whole or in part the total amounts in the relevant agreement as delineated in section 101(1).[324] These factors include, *inter alia*, whether the applicant is disabled, elderly, has ever applied for one of the other statutory debt relief measures or ever received an extinguishment of debt by a court or the NCT.[325] The conduct of the debt intervention applicant may also be considered.[326]

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[319] S 86A(6)(d).
[320] S 86A(6)(e).
[321] S 86A(9)(a) and (b); and Coetzee and Roestoff 2020 *Int. Insolv. Rev.* 102 and 103.
[322] S 87A(1); and Scholtz (ed) par 11.5.2.3.
[323] S 87A(2); and Scholtz (ed) par 11.5.2.3.
[324] S 87A(3); and Coetzee and Brits 2020 *Magister Essays vir/for Jannie Otto* 15. S 101(1) entails the cost of credit and includes the principal debt (the amount deferred in terms of the agreement) and interest.
[325] *Ibid.*
[326] S 87A(3)(b). Such conduct may include, *inter alia*, the debtor's conduct when entering into the relevant agreements and acts and omissions which resulted in his inability for re-arrangement.

Section 87A(5)(a) provides that, eight months after the 12 month suspension order was granted, the NCR must again review the financial circumstances of the applicant, in order to determine whether the applicant has income and assets of a sufficient value to qualify for a five year restructuring order as set out in section 86A(6)(d).[327] If the applicant does indeed have sufficient income and assets, the NCR must ensure that the matter be referred to the NCT, and recommend that an order be made as set out in section 87(1A).[328] If the applicant still does not have sufficient income or assets, the NCR must refer the matter to the NCT and recommend that a further extension be contemplated by the latter.[329]

Following the extended suspension, the NCR must again evaluate the applicant's financial situation eight months after the date on which the second suspension was granted.[330] If at this stage it is evident that the applicant has sufficient income or assets to qualify for a five year re-arrangement, the NCR must refer the matter to the NCT, and recommend that such an order be made.[331] However, if the second review shows that the applicant still does not have sufficient income and assets to allow for re-arrangement, the NCR must refer the matter to the NCT in order to consider extinguishing the whole or a portion of the amounts contemplated in section 101(1) under each qualifying agreement.[332]

Once again, the proposed procedure requires that credit providers must be invited to make written representations to the NCT by a specified date.[333] Coetzee and Roestoff state that this invitation for creditor participation in procedural aspects concerning debt relief is hapless to the extent that the estates of NINA debtors are insignificant, and that this participation is in contrast with international best practice.[334]

This final consequence of a prospective extinguishment of debt under NINA debtor circumstances is the most noteworthy outcome of the debt intervention procedure, which distinguishes this mechanism from the current statutory debt relief procedures at the disposal of South African credit consumers.[335] Once the NCT has considered the NCR's recommendations for a discharge to be granted, the fact that the debt intervention applicant still

[327] Coetzee and Roestoff 2020 *Int. Insolv. Rev.* 104.
[328] S 87(5)(b)(i); and Coetzee and Brits 2020 *Magister Essays vir/for Jannie Otto* 15.
[329] S 87(5)(b)(ii); and Coetzee and Brits 2020 *Magister Essays vir/for Jannie Otto* 15.
[330] Coetzee and Roestoff 2020 *Int. Insolv. Rev.*104.
[331] *Ibid.*
[332] *Ibid.*
[333] *Ibid.*
[334] *Ibid.*
[335] *Ibid.*

does not have adequate income or assets to warrant a debt re-arrangement and the factors discussed above, it may "declare the total amounts contemplated in section 101(1) under qualifying credit agreements as extinguished".[336]

Coetzee and Roestoff make the following submissions in respect of the proposed extinguishment of debt in terms of the debt intervention procedure:[337] (a) the possibility of an extinguishment of debt, only after a 24-month period, is a reasonable development that is aligned with the World Bank's stance that the applicable period should not exceed three years, which would be reckless from a social point of consideration;[338] (b) it is agreeable that the possible extinguishment of debt is not made contingent on any level of payment to creditors, in accordance with international best practices;[339] (c)the prospective extinguishment of debt is not far-reaching enough, which is ascribed to the fact that the debt relief measure is inserted in the National Credit Act, which is only concerned with credit agreements subject to the Act's scope of application;[340] and (d) the ambit of an extinguishment of debt could be widened if agreements subject to civil enforcement were introduced within the procedure's scope.[341]

Finally, Coetzee and Roestoff[342] remark that credit provider's interests and rights in the debt intervention procedure are sufficiently protected. Section 87A provides for the possibility of a rescission or amendment of any debt intervention order made, where the NCT receives information that the debt intervention applicant was dishonest in his application or did not comply with the conditions of the debt intervention order.[343] They further base their remark on the credit provider's involvement in the procedure, as well as the NCR's and NCT's gate-keeping function.[344]

[336] S 86A(6)(c); and Scholtz (ed) par 11.5.2.3.
[337] Coetzee and Roestoff 2020 *Int. Insolv. Rev.* 105
[338] *Ibid.*
[339] *Ibid.*
[340] *Ibid.*
[341] *Ibid.*
[342] *Ibid.*
[343] S 87A (10).
[344] Coetzee and Roestoff 2020 *Int. Insolv. Rev.* 105.

4 3 4 Stage 4: The effects of a debt intervention order

Section 88A sets out the effects of a debt intervention application in terms of the National Credit Act.[345] This provision contains similar stipulations than those in section 88(3) of the National Credit Act.[346]

Accordingly, a consumer debtor who has filed a debt intervention application,[347] is prohibited from entering into any further credit agreements[348] with a credit provider, unless[349] the application has been rejected by the NCR;[350] the NCR's proposal or the debtor's application has been rejected, because the NCT concluded that the consumer debtor is not over-indebted;[351] all debts subject to a re-arrangement order are fulfilled, excluding fulfilment by means of a consolidation agreement;[352] and the period in terms of which the applicant's right to apply for credit was restricted, has expired.[353]

The provisions relating to the debt intervention mechanism will not apply to an agreement the debtor has applied for and which was concluded in contravention of section 88A.[354] A credit agreement, or part thereof, concluded by a credit provider with a debt intervention applicant who is expecting an order or is subject to an order related to debt intervention, may be declared reckless credit lending.[355]

Furthermore, section 88A(3) provides that a credit provider who has received notice of a debt intervention application may not exercise or enforce by litigation or other judicial process any right under that credit agreement until one of the ensuing happenings has occurred.[356] Section 88A(6) is particularly relevant in respect of the debt relief feature of debt intervention.[357] It provides that no right under a credit agreement may be exercised[358] by a credit provider in respect of any portion of a debt that is extinguished in terms of a NCT order.

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[345] Scholtz (ed) par 11.5.3.
[346] *Ibid*.
[347] In terms of s 86A.
[348] Except a consolidation agreement.
[349] See s 88A(1).
[350] S 86A(1)(a).
[351] S 86A(1)(b).
[352] S 86A(1)(c).
[353] S 86A(1)(d).
[354] S 88A(5).
[355] Irrespective of whether or not it conforms to the circumstances contained in s 80. S 88A(4).
[356] See Scholtz (ed) par 11.5.3.
[357] *Ibid*.
[358] By litigation or other judicial process.

4 3 5 Stage 5: Rehabilitation

Section 88B of the 2019 Amendment Act introduces the rehabilitation[359] of the debt intervention applicant.[360] Van Heerden remarks that the intent of a rehabilitation order is to facilitate the debt intervention applicant's re-entry into the South African consumer credit market by removing any prohibition against the applicant from entering into any further credit agreements.[361]

Section 88B(1) provides that a debt intervention applicant, who was awarded an extinguishment of debt in terms of section 87A(6),[362] may apply to the NCR for a rehabilitation order, eventually to be granted by the NCT.[363] According to Van Heerden this implies that the NCR will bring the application for rehabilitation on behalf of the debt intervention applicant.[364] In order for the debt intervention applicant to qualify for a rehabilitation order, the applicant must prove that he has satisfied the obligations that were due on the date on which the extinguishment was granted.[365]

The NCR must upon receiving the application for rehabilitation notify all affected credit providers and registered credit bureaux.[366]Thereafter, the NCR must consider the application and subsequently refer the application to the NCT, if the prescribed requirements have been complied with.[367] The NCT is then mandated to notify affected credit providers of the date on which the application will be considered.[368] On this date, the NCT may award a rehabilitation order if it is satisfied that the application has indeed complied with the requirements.[369] Finally, the NCT must notify the applicant of the order as well as service a copy thereof to all respective credit providers and registered credit bureaux.[370]

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[359] Van Heerden explains that the 2019 Amendment Act fails to define the concept "rehabilitation", but that the ordinary meaning of the term in view of the debt intervention procedure is "the action of restoring someone to former privileges or reputation after a period of disfavour". See Scholtz (ed) par 11.5.4.
[360] See s 88B(1); and Scholtz (ed) par 11.5.4.
[361] Scholtz (ed) par 11.5.4.
[362] See par 4 3 3 *supra*.
[363] Scholtz (ed) par 11.5.4.
[364] *Ibid*.
[365] S 88B(3)(a). It is submitted that the Minister should prescribe the supporting information necessary to accompany the application for rehabilitation. In this regard, see Coetzee and Roestoff 2020 *Int. Insolv. Rev.* 106.
[366] S 88B(4)(a) read with s 87A(6). See also Coetzee and Brits 2020 *Magister Essays vir/for Jannie Otto* 15.
[367] S 87A(4)(b).
[368] S 88B(6).
[369] S 88B(7).
[370] S 88B(8).

4 3 6 Stage 6: Clearance certificate

Briefly, it is necessary to note that the 2019 Amendment Act has introduced an amendment to section 71 of the National Credit Act in order to provide for the issuing of a clearance certificate to debt intervention consumers.[371] Section 71(1A) states that a consumer whose debt has been re-arranged in terms of Part D of Chapter 4 must be issued with a clearance certificate by the NCR within seven business days after the consumer has complied with the requirements set out in section 71(1A)(a) and (b) of the Act.[372] Furthermore, section 71(1A) mandates that the NCR must submit a copy of the clearance certificate to all registered credit bureaux in terms of the Act.[373]

4 4 Concluding remarks regarding debt intervention and NINA debtors

In this chapter, consideration was given to the specific policy considerations which resulted in the introduction in the National Credit Act of the specialised debt intervention procedure in terms of the 2019 Amendment Act. In this regard, it was explained that the Department of Trade and Industry recognised the need for an alternative remedial measure necessary to assist over-indebted credit consumers that are generally financially excluded from accessing the traditional insolvency regime.[374] NINA debtors fall in the latter category.

From the onset, it is essential to note that the ensuing discussion[375] remains in the realm of conjecture as the regulations necessary to facilitate the implementation of this procedure are yet to be published. In this regard, Coetzee and Roestoff correctly submit that "[…] the devil will be in the detail", and that the drafters must consequently pay particular attention to the needs of NINA debtors when developing the procedural aspects of this proposed process.[376] A similar concern is that whilst the participation of the NCR and NCT is applauded as a significant development in the debt intervention procedure due to their extensive knowledge of the South African credit market and the regulation thereof, these institutions will need to be expanded to ensure they have capacity to deal with the applications for debt intervention, effectively and efficiently.

[371] Scholtz (ed) par 11.5.5.
[372] *Ibid.*
[373] *Ibid.*
[374] See par 4 2 *supra*.
[375] And the conclusions in the final chapter.
[376] Coetzee and Roestoff 2020 *Int. Insolv. Rev.* 107.

The main tenant of the debt intervention procedure is to provide an opportunity for vulnerable natural person consumers, who satisfy the definition of "debt intervention applicant", to access this distinctive debt relief procedure introduced in the National Credit Act by the insertion of section 86A.[377]

In respect of the financial position of South African NINA debtors and their socio-economic plight, the most significant developments of the debt intervention procedure are the suitable access requirements and possible extinguishment of debt.[378] Notwithstanding, there are several pending issues in the proposed debt intervention procedure that require greater consideration and improvement in view of the financial circumstances of NINA debtors. These include the R50 000 limit on unsecured debt; the procedure's applicability to credit agreements as defined in the National Credit Act; the exclusion of credit agreements that are subject to civil debt enforcement proceedings; the ambiguity surrounding consumers' secured debt; and the unnecessary participation of credit providers in the application process.[379]

It is correctly submitted by Coetzee and Roestoff that while the debt intervention procedure is likely to provide much needed relief for no and low income debtors, it also adds to the fragmented insolvency and debt relief system.[380] According to them the indirect implication of this is that middle-income consumer debtors will most likely be excluded from accessing the remedial measures of the proposed procedure.[381]

[377] Scholtz (ed) par 11.5.1.
[378] Coetzee and Roestoff 2020 *Int. Insolv. Rev.* 107.
[379] *Ibid.*
[380] Coetzee and Roestoff 2020 *Int. Insolv. Rev.* 95 and 107.
[381] For a detailed discussion of the plight of middle-income debtors see, Roestoff and Coetzee "Debt relief for middle-income debtors under the National Credit Act 34 of 2005 – International approaches and guidelines" *De serie legenda: Developments in commercial law – Law of specific contracts and banking law* (2019) 158-181.

CHAPTER 5

GENERAL CONCLUSIONS AND PROPOSALS

5 1 Introduction

The National Credit Act, which is the legislative enactment currently regulating the South African consumer credit industry, with its coming operation introduced the debt review process into our legislative framework as an alternative debt relief measure to sequestration and administration.[382] The legislature recently, with the insertion of section 86A in the NCA in terms of the 2019 Amendment Act, incorporated yet another debt alleviation process, debt intervention, into the broader legislative framework.[383] The aim of my dissertation was to research and compare these debt alleviation measures (and in particular the NCA's measures) with each other, with the ultimate aim to ascertain whether the newly introduced debt intervention process will afford access to debt relief to NINA debtors. The latter, as was indicated,[384] is not achieved by sequestration, administration, or debt review. The acronym "NINA" stands for "no-income-no-asset".[385]

The introduction of debt review and debt intervention must be seen against the background of the National Credit Act's objectives in its preamble and section 3, with one of the main aims to protect credit consumers.[386] Section 3(g) and (i) is of particular importance and aims to address the over-indebtedness of credit consumers and to provide a "harmonised system of debt restructuring". However, these subsections require the satisfaction of all the consumer's financial obligations, which was clearly aimed at balancing the rights of credit providers and consumers.[387] It has to be reiterated that the lack of regulations to give effect to the provisions of section 86A renders an accurate evaluation of the new process impossible.[388]

5 2 Debt relief outside the National Credit Act's ambit

Sequestration in terms of the Insolvency Act and administration orders in terms of the Magistrates' Courts Acts were discussed in Chapter 2. Sequestration, and subsequent rehabilitation, is the ultimate debt relief measure in that a discharge of pre-sequestration debt

[382] Par 1 1 and ch 3.
[383] Par 1 1 and ch 4.
[384] Chs 2 and 3.
[385] Pars 1 1, 1 2 and 1 3.
[386] Pars 1 1 and 3 3.
[387] Pars 1 1 and 3 3.
[388] Par 4 1.

is achieved.[389] Administration is nothing more than a repayment plan for consumers having a disposable income.[390]

For various reasons, neither of these debt relief procedures affords debt relief to NINA debtors. The main obstacles in respect of sequestration are the advantage to creditors and its cost.[391] As far as administration is concerned, the R50 000 limit and the cost of the process limit NINA debtors from accessing the procedure.[392] However, the fact that a debtor must have a disposable income is the main stumbling block for NINA debtors to access and accordingly obtain debt relief in terms of both the aforementioned procedures.[393] This amounts to the unequal treatment of this group of debtors in terms of the Constitution.[394]

5 3 Debt review in terms of the National Credit Act

The introduction of the debt review process in terms of the National Credit Act is to be welcomed.[395] Credit, the deferral of payment, although necessary, is also a dangerous instrument if used irresponsibly.[396] Although the NCA attempts to prevent the over-indebtedness of credit consumers, it is clearly not a success, which renders an alternative (to sequestration and administration) debt alleviation process, specifically for credit consumers, necessary.[397] However, debt relief, similarly to administration in terms of the Magistrates' Courts Act, is also only a repayment of debt plan for consumers having a sufficient disposable income.[398] This much was confirmed by our courts, requiring the debt counsellor to come up with a viable debt re-arrangement proposal before the court will make its section 86(7)(c)(ii) orders.[399] These access requirements are to be ascribed to section 3(g) and (i), requiring the satisfaction of all the consumer's financial obligations.[400] The process is also too costly for these debtors.[401] NINA debtors are consequently excluded from debt review,[402] which is once again unconstitutional.

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[389] Par 2 2.
[390] Par 2 2 2.
[391] Par 2 2 1.
[392] Par 2 2 2.
[393] Pars 2 2 1 and 2 2 2.
[394] Par 1 1.
[395] The NCA's predecessors failed to afford direct debt relief to consumers. Par 3 2.
[396] Pars 1 1, 3 1 and 3 2.
[397] Par 3 1.
[398] Pars 3 3 and 3 7.
[399] Par 3 6 3.
[400] Pars 3 6 3 and 3 7.
[401] Par 3 7.
[402] Pars 3 6 3 and 3 7.

Finally, even if a NINA debtor could access the debt review process, it does not afford a discharge of debt,[403] and if the courts' powers in respect of over-indebtedness in terms of section 86(7)(c)(ii) are considered,[404] the process only affords temporary debt relief.

5 4 Debt intervention in terms of the National Credit Act

The insertion of debt intervention in the National Credit Act must likewise be welcomed, in particular from the perspective of affording debt relief to NINA debtors. It is submitted that the legislative amendment will probably, depending on the effectiveness of the regulations still to be published, bring NINA debtors constitutionally on an equal level with other groups of debtors. This process, which was explicitly developed for NINA debtors,[405] is first of all more accessible to this group than the previously mentioned debt relief measures and secondly (eventually) affords a discharge of credit agreement debt. However, the interests of credit providers are not disregarded.[406]

The only question is whether debt intervention is far reaching enough. The R50 000 cap (similarly to that of administration orders), restriction to unsecured credit agreement debt subject to the NCA only and the exclusion of credit agreements that are already subject to civil debt enforcement, may possibly prevent the protection ambit of this measure being wide enough.[407] However, the debt prevention measures in the Act,[408] if properly enforced, should prevent a NINA debtor from accessing credit exceeding R50 000. It is also submitted that these consumers would only qualify for secured credit under exceptional circumstances, due to them having no income and no assets. The bar on debt intervention by debt enforcement is understandable to avoid the misuse of the former.

5 5 Final remarks

The South African debt relief framework needs to be revised and it is submitted that the legislature should combine all the aforementioned relief measures in one Act, which affords effective and accessible debt relief to all South African consumers, irrespective of their income and assets. However, although we will have to await the debt intervention regulations to

[403] Pars 3 3 and 3 7.
[404] See par 3 6 4.
[405] Pars 4 1 and 4 2.
[406] Par 4 2.
[407] Pars 4 3 1 and 4 4.
[408] Eg, the compulsory credit assessment in terms of s 81(2).

determine this new process' real value, its promulgation must be endorsed, in particular from the viewpoint of NINA debtors.

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