THE INCOME OF AN INSOLVENT AND SEQUESTRATION UNDER THE INSOLVENCY ACT 24 OF 1936

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Abstract

In a recent case, the question arose as to whether the applicant in an application for the voluntary surrender of his or her estate may forfeit his or her salary with a view to establishing the requirement of advantage for creditors as envisaged by the Insolvency Act. Such forfeiture is impermissible, for example, because of the constitutional challenges that may arise should the insolvent in future require the forfeited amount for his or her basic needs. However, to exclude debtors from a debt relief measure because they do not have sufficient assets to prove advantage, may also be unconstitutional. It is argued in this article that the current system must be reviewed in order to afford these debtors relief in terms of an alternative discharge procedure.

A comparative investigation into the manner in which certain foreign consumer insolvency systems deal with income contributions indicates that the Act does not regulate this issue fairly or adequately. However, income contributions as part of the sequestration process are not truly appropriate and it is submitted that the American approach, which provides for an exclusively asset-liquidation procedure and a separate income-restructuring procedure should be followed. It is concluded that an unconditional exclusion of an insolvent's income from his or her insolvent estate could provide a mechanism through which the insolvent could be assisted to rebuild a new estate and eventually return to economic productivity.

I INTRODUCTION

Section 23(9) of the Insolvency Act[1] provides that an insolvent person may recover for his or her own benefit, any remuneration or reward for work done or for professional services rendered by or on his or her

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[1] Insolvency Act 24 of 1936.

behalf after the sequestration of his or her estate. An insolvent's income is therefore in principle excluded from his or her insolvent estate. However, section 23(9) is subject to section 23(5), which provides that the trustee shall be entitled to any surplus income that in the opinion of the Master is not necessary for the support of the insolvent and his or her dependants.

In a recent case, *Ex parte Van Dyk*,[2] the question arose as to whether the applicant in an application for the voluntary surrender of his estate, may forfeit his salary with a view to establishing the requirement of advantage for creditors as envisaged in section 6(1) of the Insolvency Act.[3] *Van Dyk* came before the court on the unopposed motion roll and stood down to the next unopposed roll to allow counsel for the applicant to file heads of argument as to whether there is any modern authority[4] on the question.[5] From the facts and decision[6] it is clear that the applicant made the undertaking as to the forfeiture of his salary specifically to increase the value of his estate in order to establish advantage for creditors and obtain the debt relief provided by the Act.[7]

The aim of this article is, first, to investigate the legal position in respect of whether an insolvent's available surplus income could establish advantage for his or her creditors. In this regard, *Van Dyk* and other relevant cases are analysed and evaluated.

Secondly, the aim is to analyse section 23(5) and related provisions of the Insolvency Act in order to determine whether the issue of income contributions is adequately regulated by the Act. A further question is whether it is appropriate to require an insolvent to make income contributions as part of the sequestration process in terms of the Insolvency Act. It should be noted that by requiring an insolvent to surrender his or her assets and, in addition, to make income contributions, his or her ability to build a new estate and to become economically productive again is negatively affected.[8] It should also be remembered that the sequestration process in terms of the Insolvency Act is mainly aimed at the liquidation and eventual distribution of the proceeds of an insolvent's assets, and not at the restructuring of his or her income as a

[2] *Ex parte Van Dyk* (1869/2015) [2015] ZAGPPHC 154 (26 March 2015) SAFLII, available at http://www.saflii.org/za/cases/ZAGPPHC/2015/154.html, accessed on 3 May 2017.

[3] *Van Dyk* para 1.

[4] Other than *Ex parte McKechnie* 1938 WLD 45, referred to in Bertelsmann et al, *Mars: The Law of Insolvency* 9 ed (Juta 2008) 75.

[5] *Van Dyk* para 1.

[6] *Van Dyk* para 21.

[7] See s 129(1)*(b)* of the Insolvency Act in terms of which rehabilitation of an insolvent has the effect of discharging all his or her pre-sequestration debts.

[8] Compare Miller, 'Income payment orders' (2002) 18(2) *Insolvency Law and Practice* 43.

measure to satisfy creditors' claims. Therefore, the question arises as to whether income repayments should not rather be dealt with in terms of the current alternative procedures to sequestration, namely, administration[9] and debt review,[10] as these procedures are specifically designed for the restructuring of an insolvent's income as a measure to satisfy claims.

In order to achieve the second aim of the article, section 23(5) and related provisions of the Insolvency Act, as well as the alternative procedures are analysed and evaluated. This is followed by a comparative investigation into how certain foreign consumer insolvency systems deal with income contributions. The aim is to detect possible lessons regarding the adequacy and appropriateness of the South African Insolvency Act's provisions on income contributions. The South African legal position is compared with the position in a number of foreign jurisdictions, before concluding remarks are offered.

II SURPLUS INCOME AND ADVANTAGE TO CREDITORS

(a) Advantage to creditors

In current South African consumer insolvency law, a debtor's estate may be sequestrated by voluntary surrender[11] or after a successful application by a creditor, or two or more creditors, for the compulsory sequestration of the estate.[12] Before a court can grant a sequestration order, the applicant is, inter alia, required to prove an 'advantage for creditors'.[13] The phrase 'advantage for creditors' is not defined in the Insolvency Act. According to case law, it entails a 'reasonable prospect of some pecuniary benefit to the general body of creditors'.[14] To show advantage, a court must make a decision on the evidence presented that there are sufficient assets in the estate with sufficient value to pay the costs of sequestration and a 'not-negligible'[15] dividend to creditors. [16]

[9] See s 74 of the Magistrates' Courts Act 32 of 1944 (MCA).

[10] See s 86 of the National Credit Act 34 of 2005 (NCA).

[11] Sections 3–7 of the Insolvency Act.

[12] Sections 9–12 of the Insolvency Act.

[13] See ss 6(1), 10*(c)* and 12(1)*(c)* of the Insolvency Act.

[14] See, eg, *Meskin & Co v Friedman* 1948 (2) SA 555 (W) at 559; *Ex parte Bouwer and similar applications* 2009 (6) SA 382 (GNP) para 13.

[15] See *London Estates (Pty) Ltd v Nair* 1957 (3) SA 591 (N) at 591G; *Absa Bank Ltd v De Klerk and related cases* 1999 (4) SA 835 (E) at 840B; *Ex parte Anthony en 'n ander en ses soortgelyke aansoeke* 2000 (4) SA 116 (C) para 11; *Ex parte Mattysen et Uxor (First Rand Bank Ltd Intervening)* 2003 (2) SA 308 (T) at 316B–C; *Ex parte Kelly* 2008 (4) SA 615 (T) para 3.

[16] The Act does not prescribe the size of the dividend. In recent times, a dividend of 20 cents in the rand is generally regarded as the minimum benefit that would have to be established before a sequestration application may be granted (*Ex parte Ogunlaja & others* [2011] JOL

The fact that sequestration can eventually afford a debtor a discharge of his or her debts,[17] has resulted in the sequestration process often being used — or according to some, abused[18] — usually in the form of an application for a so-called friendly sequestration,[19] to obtain debt relief. Debtors seeking debt relief have now reverted to the voluntary surrender procedure, because of the push-back by our courts with regard to friendly sequestration applications.[20] However, the advantage-for-creditors requirement has remained the main obstacle for debtors wishing to utilise sequestration as a measure to obtain a discharge of debt.[21] In this regard, our courts have often stated that the primary object of the Insolvency Act is to benefit creditors and not to grant debt relief to harassed debtors.[22]

(b) Ex parte Van Dyk

In *Van Dyk* the applicant's estate comprised solely of movable assets. The dividend that would accrue to creditors from the free residue of his

27029 (GNP) para 9). However, see *Stratford & others v Investec Bank Ltd & others* 2015 (3) SA 1 (CC) para 44, where the Constitutional Court noted '[t]hat the meaning of the term ''advantage'' is broad and should not be rigidified. This includes the nebulous ''not-negligible'' pecuniary benefit on which the appellants rely. To my mind, specifying the cents in the rand or ''not-negligible'' benefit in the context of a hostile sequestration where there could be many creditors is unhelpful'. The Constitutional Court held that a court, in evaluating the advantage for creditors-requirement, should be guided by the dicta outlined in *Friedman*. It is therefore for the court to decide whether sequestration will result in some payment to the creditors as a body, whether there is a substantial estate from which the creditors cannot receive payment, except through sequestration, or whether some pecuniary benefit will redound to the creditors (*Stratford* para 45).

[17] Section 129(1)*(b)* of the Insolvency Act.

[18] See Evans, 'Friendly sequestrations, the abuse of the process of court, and possible solutions for overburdened debtors' (2001) 13 *SA Merc LJ* 485. See also *Esterhuizen v Swanepoel and sixteen other cases* 2004 (4) SA 89 (W) at 92; *Ex parte Arntzen (Nedbank Ltd as intervening creditor)* 2013 (1) SA 49 (KZP) para 10.

[19] This phenomenon has developed in practice because the onus of proving advantage in the case of a compulsory sequestration application is less onerous than in the case of a voluntary sequestration application. Unlike voluntary surrender, which requires positive proof of advantage for creditors, compulsory sequestration requires only a 'reasonable prospect' that it will be to the advantage of creditors: compare the wording of ss 10*(c)* and 12(1)*(c)*. Furthermore, no formal requirements are prescribed with regard to compulsory sequestrations — Smith, 'Friendly and not so friendly sequestrations' (1981) 3 *Modern Business Law* 58 at 59.

[20] Boraine & Roestoff, 'Revisiting the state of consumer insolvency in South Africa after twenty years: The courts' approach, international guidelines and an appeal for urgent law reform' (2014) 77 *THRHR* 351 at 354.

[21] Compare Roestoff & Coetzee, 'Consumer debt relief in South Africa: lessons from America and England and suggestions for the way forward' (2012) 24 *SA Merc LJ* 53 at 58.

[22] Compare *Ex parte Pillay; Mayet v Pillay* 1955 (2) SA 309 (N) at 311E; *R v Meer & others* 1957 (3) SA 614 (N) at 619A; *Fesi v Absa Bank Ltd* 2000 (1) SA 499 (C) at 502E–F; *Ex parte Ford & two similar cases* 2009 (3) SA 376 (WCC) para 21; *Ex parte Mark Shmukler-Tshiko* [2012] ZAGPJHC 209 para 8: *Arntzen* para 13.

estate amounted to nil cent per rand, which, the applicant conceded, was clearly insufficient to afford his creditors a non-negligible dividend and the requisite advantage.[23] However, the applicant stated that he would be able to afford monthly payments in terms of section 23(5) of the Insolvency Act.[24] Therefore, should his application for voluntary surrender be granted, he irrevocably undertook to assist either the Master or his trustee to give effect to the forfeiture of a fixed portion of his income[25] in terms of section 23(5). He also consented to the deduction being made in favour of his trustee for distribution amongst his creditors, as opposed to the realisation of his inadequate unencumbered assets. If he were to lose his employment, his trustee would ensure that the implementation of section 23(5) would be reinstituted once he had again obtained employment. The applicant further confirmed that he was fully aware of the fact that the repayment period would run until his rehabilitation in terms of section 124(2) of the Act and that he would not be able to apply for rehabilitation until four years had elapsed since his sequestration. He also confirmed that he realised that neither the Master nor any of his creditors can or may be compelled to agree to his rehabilitation after expiry of the required period.[26]

Makhubele AJ adjourned the proceedings to allow counsel to conduct further research on the issue at hand.[27] However, according to the court, counsel's heads of arguments, filed a few days later, were not helpful.[28] As regards case law, counsel only referred to *McKechnie* mentioned above.

In *McKechnie,* the court held — in circumstances where the debtor was being threatened with civil imprisonment proceedings, which, if pursued, would have resulted in his losing his employment and being unable to pay anything to anybody — that on the whole the surrender would be to the advantage of creditors where the insolvent undertook to make a portion of his salary available to his creditors in terms of section 23(5) the Act.[29]

Makhubele AJ referred to Bertelsmann et al who have the following reservations as to the relevance of *McKechnie* in recent times: [30]

[23] *Van Dyk* paras 2–3.
[24] *Van Dyk* para 4.
[25] Being not less than R2 900 per month — *Van Dyk* para 5. According to the applicant's pay slip, his nett salary was R13 107.99 — para 9.
[26] *Van Dyk* para 5.
[27] *Van Dyk* para 6.
[28] *Van Dyk* para 7.
[29] See *McKechnie* at 48.
[30] Bertelsmann et al, (Juta 2008) 75; *Van Dyk* para 6.

> 'It has been held in the past that it would be to the advantage of creditors to accept the surrender where a debtor receiving a salary undertakes to make available to creditors a portion of his salary in terms of the Act. In recent times, this option has seldom been exercised as such an order is very difficult to police and the payment of a portion of the salary, usually tendered to be made in monthly instalments, delays the liquidation of the insolvent's estate. If it is accepted at all, the contributions that accrue to the insolvent estate will have to be administered by the trustee in terms of the provisions of section 23(5) of the Act.'

Makhubele AJ also considered the judgment in *Ex parte Cloete*[31] to which the applicant referred in his affidavit.[32] According to the court, the only part of the judgment that may be relevant to the issue in casu, is where Daffue J stated the following:[33]

> 'Applicant's failure to disclose his income and expenditure is highly relevant, particularly insofar as the total of the concurrent claims is relatively small. If the income and expenditure were fully disclosed, it might have had an effect on considerations pertaining to the advantage to creditors. If a sufficient amount was available for the trustee to be appointed to utilise section 23(5) of the Insolvency Act to apply such excess income, I might have been persuaded to grant the application on condition that the applicant could also overcome my difficulties with the other apparently insurmountable problems referred to herein. However there is a dearth of evidence in this regard.'

However, Makhubele AJ could not see how this judgment supported the applicant's contention that a forfeiture of his salary could establish advantage.[34]

The court stated that, apart from the issues identified by Bertelsmann et al, there were serious uncertainties in life that the court had to consider in order properly to exercise its discretion.[35] Although there was no full disclosure of the applicant's employment history, it was clear that he did not have a stable employment history. The applicant also did not disclose whether he was qualified in any trade or profession.[36] It was, therefore, clear that what the applicant acknowledged to be a risk of losing his employment was indeed a real possibility.[37]

[31] *Ex parte Cloete* (1097/2013) [2013] ZAFSHC 45 (5 April 2013) SAFLII, available at http://www.saflii.org/za/cases/ZAFSHC/2013/45.html.
[32] *Cloete* para 8.
[33] *Cloete* para 25.
[34] *Van Dyk* para 8.
[35] *Van Dyk* para 10.
[36] *Van Dyk* paras 11–12.
[37] *Van Dyk* para 13.

The court referred to Bertelsmann et al who discuss certain favourable and unfavourable circumstances that would influence a court in considering whether to grant an order for the voluntary surrender of an estate.[38] The authors make the following observations:[39]

> 'The fact that the assets are of little value and the debtor is in receipt of a substantial salary out of which he may gradually pay his creditors, will be regarded as a negative factor because the court will normally be reluctant to accept the surrender conditionally on his paying a portion of such salary to his trustee. It is a negative indication that the debtor intentionally fails to make a full and frank disclosure of his affairs.'

The court pointed out that the applicant provided very little information to enable it to assess whether his needs were likely to change, which made it impossible for him to adhere to his undertaking to pay a monthly instalment to the trustee.[40] Furthermore, even if the applicant was able to keep his employment and thus be able to make regular payments, the finalisation of the administration of the estate would be delayed as the trustee would only have been able to submit an account after 48 months.[41] This, according to the court, would not be in the interest of creditors.[42]

According to Makhubele AJ, whether the applicant would at any time in future require additional funds to take care of himself and his dependants, is relevant. In light of the uncertainties regarding the applicant's job tenure and possible changes to his and his family's needs, the question thus arose 'whether the Master may lawfully deprive him of the protection afforded by section 23(5) or whether applicant would be bound by his undertaking'.[43]

Makhubele AJ referred to the decision of Landman J in *Ex parte Kroese* where the applicants sought to waive the protection in terms of section 86(6) of the Insolvency Act[44] in order to increase the value of the

[38] *Van Dyk* para 14.

[39] Bertelsmann et al, (Juta 2008) 77.

[40] *Van Dyk* para 16.

[41] *Van Dyk* para 17. The trustee would not have been able to finalise the administration of the estate and thus submit a *final* liquidation and distribution account before the agreed repayment period had elapsed. However, it should be noted that s 110(1) of the Act empowers the Master to direct the trustee to submit to him or her a plan of distribution where the trustee has funds in hand which, in the opinion of the Master, ought to be distributed among the creditors of the estate in question. The Master may make such a request even though the six-month period prescribed in s 91 for the submission of the trustee's account has not elapsed.

[42] *Van Dyk* para 17.

[43] *Van Dyk* para 19.

[44] Section 82(6) excludes certain property from the sale of the property in the estate in terms of s 82(1). This includes the wearing apparel and bedding of an insolvent, and the whole

insolvents' realisable assets and thereby show that the surrender of the respective estates would be to the advantage of creditors.[45] However, Landman J held that such a waiver was impermissible as the protections were enacted not only for the benefit of debtors, but also for the public, as it would not be in the state's interest that citizens should renounce their assets and become a burden on society.[46] The protection afforded to debtors is therefore not theirs to waive.[47] Relying on the decision in *Kroese*, Makhubele AJ held that the undertaking by the applicant in *Van Dyk* to make a contribution from his salary into the insolvent estate, was equally impermissible.[48] Makhubele AJ aligned himself with the reasoning of Landman J, who pointed out that there are constitutional considerations in this regard.[49] According to Landman J, the purpose of section 82(6) is clear; it includes measures intended to preserve the right to life and the dignity of an insolvent and his dependants and to enable them to rebuild their lives.[50] Landman J held as follows:[51]

> 'Taking into account the vital importance of the inalienable right to human dignity of the applicants and indeed whatever dependants they may have and the right to work or trade, coupled with the purpose of excepting basic necessities, I am of the view that the applicants may not waive their entitlement.'

According to Makhubele AJ, the Master may at some point be required to consider whether the undertaking to make a monetary contribution to his insolvent estate overrides the applicant's rights and obligations to provide for himself and his dependants.[52]

In light of the constitutional developments in our country, Makhubele AJ was therefore of the view that the authority of *McKechnie* would not stand today. The court pointed out that the applicant in *Van Dyk* (and other applicants in similar matters) made these undertakings

or such part of his or her household furniture, tools and other essential means of subsistence, as the creditors, or if no creditor has proved a claim against the estate, as the Master, may determine.

[45] *Ex parte Kroese & another* 2015 (1) SA 405 (NWM); *Van Dyk* para 19.

[46] *Kroese* para 56. In this regard, Landman J considered but did not follow the full-bench decision in *Ex parte Anthony* (above). In *Anthony,* it was unnecessary for the court to decide the issue of waiver of an entitlement to basic necessities. However, the court was of the opinion that the applicant would indeed be entitled to waive the protection under s 86(6) as the provisions of this subsection benefit the insolvent who is entitled to renounce the benefit thereof — see *Anthony* paras 19–20.

[47] *Kroese* para 63.

[48] *Van Dyk* para 23.

[49] *Van Dyk* para 20.

[50] *Kroese* para 41.

[51] *Kroese* para 67.

[52] *Van Dyk* para 20.

specially to increase the value of their estates in order to establish advantage for creditors in accordance with the Act.[53]

As regards section 6(1) of the Act, the court pointed out that it was common cause that the applicant did not own realisable property of a sufficient value to defray all the costs of sequestration out of the free residue. The court, therefore, concluded that the undertaking to make a contribution from the applicant's salary was impermissible, not only in light of the risks associated with policing the order and delays in finalising the administration of the estate, but also in light of the constitutional challenges that may arise should the applicant at any stage in future require that amount for the basic needs of his family. The court accordingly dismissed the application for voluntary surrender.[54]

(c) Other case law

Ex parte Veitch[55] is more recent authority than *McKechnie*. In *Veitch*, the only free residue in the estate was an amount in cash which had been deposited with the applicant's attorneys in trust for the payment of the costs of sequestration. The only other assets were immovable property valued at an amount less than the outstanding debt under two mortgage bonds over the property, and two worthless claims against debtors of the insolvent. However, the applicant contended that he and his spouse, to whom he was married out of community of property, earned a sufficient joint income to pay for their living costs and to provide for a surplus amount to be taken by his trustee under section 23(5) for the benefit of his creditors. With reference to *Mindel v Shaer*,[56] the court stated that the fact that there is surplus income is a factor to be taken into account when considering the requirement of advantage.[57] However, where the applicant's income is the only source of advantage, a mere possibility of a surplus out of it becoming available (as was the case in casu) will not be sufficient. There must be at least a 'probability' or a 'real likelihood'[58] that a surplus will become available.[59] Thus, in order to convert the 'possibility' of such a surplus being available into a 'real likelihood', the applicant is required to consent to at least some specific or substantial

[53] *Van Dyk* para 21.
[54] *Van Dyk* paras 22–24.
[55] 1965 (1) SA 667 (W).
[56] 1937 TPD 378.
[57] *Veitch* at 668E.
[58] In this regard the court referred to *Ressel v Levin* 1964 (1) SA 128 (C) at 129E.
[59] *Veitch* at 668F.

sum of his current income to be taken by his trustee for the benefit of his creditors.[60] Trollip J stated as follows:[61]

> 'It seems to me that generally when a surplus income is alleged to be the only advantage to creditors in an application for surrender, the applicant should either consent in his petition or file a written consent to some deduction being made therefrom by his trustee so as to put the matter beyond doubt if and when the surrender is accepted.'

In *Ressel v Levin*, an application for compulsory sequestration, the insolvent had no assets whatsoever. However, it appeared that he received a substantial salary, which in terms of section 23(5), could be made available for the benefit of his creditors. The court held that the onus is on the applicant-creditor to place before the court sufficient information[62] to satisfy the court that there is a real likelihood of moneys becoming available to the creditors in terms of section 23(5).[63] As none of the essential information was available to the court, it postponed the matter.[64]

As regards compulsory sequestration applications, Bertelsmann et al, referring to *Cragg v Scanlan*,[65] state that creditors are not likely to benefit from the sequestration of a debtor who has no available assets but who is able to earn a substantial salary.[66] In *Cragg*, creditors opposed the final sequestration of the respondent's estate on the basis, first, that the applicant and respondent colluded to have the respondent's estate sequestrated, and secondly, that the sequestration would not be for the benefit of creditors. The respondent owed various sums of money to several creditors and had been threatened with civil imprisonment proceedings. The court was not convinced of the respondent's bona fides as he had not made any of the monthly payments which he had been ordered to make in terms of two previous judgments granted against him, while he was clearly able to do so. In light of the fact that there were no assets, the court held that sequestration would not be to

[60] Compare *Ex parte Van der Merwe* 1937 OPD 15, where the court after acceptance of the surrender instructed the registrar to bring to the Master's attention that this was a case where s 23(5) could be applicable.

[61] *Veitch* at 669A.

[62] That is, not only information pertaining to an insolvent's monthly income, but also information pertaining to his or her general circumstances, namely, whether sequestration would place his or her employment in jeopardy, and generally, what his or her ordinary financial requirements for the purpose of his or her and his or her dependants' day-to-day living are — see *Ressel* at 129F–H.

[63] *Ressel* at 129E.

[64] *Ressel* at 130G.

[65] 1931 WLD 93.

[66] Bertelsmann et al, (Juta 2008) 140.

the benefit of creditors and that the provisional order should therefore be discharged.[67]

The decision in *Yenson & Co v Garlick*[68] concerning a friendly sequestration application, provides authority for the view that available surplus income may well establish advantage for creditors. In *Yenson*, the harassment by his creditors eventually resulted in the respondent ceding his earnings to them. His employment was terminated after one of his creditors approached his employers to serve them with a copy of the cession. The respondent had no assets, but since he had been earning an adequate salary and his employers were prepared to cancel his dismissal if the creditors were to stop enforcement of their claims, the court was willing to grant a sequestration order.[69]

In *Ex parte Henning*,[70] the application was opposed by the respondent, one of the applicant's creditors. The value of the assets in the applicant's estate amounted to approximately R1 030, which was only sufficient to cover the sequestration costs, while his liabilities amounted to approximately R20 000, which was the total amount of the claims of five creditors. The respondent had the largest claim (approximately R15 000) against the applicant. This claim was based on a suretyship signed by the applicant in favour of the respondent at the request of a friend of the applicant, a former branch manager of the respondent. Hereafter, the branch manager disappeared, the respondent experienced its own financial problems, and the applicant was held liable based on the suretyship. The favour done by the applicant thus landed him in deep financial trouble because the remainder of his assets were sold in order to meet his other debt obligations. In addition, the applicant and his spouse, to whom he was married out of community of property, also made arrangements for monthly payments from their joint income to the applicant's five creditors. The court pointed out that the applicant's current debt obligations, if no interest was added, would only be paid off after nine years. The applicant indicated that he was not able to continue making payments on this basis. His spouse experienced health problems and would probably in the near future have no choice but to stop working. This would result in the applicant not being able to maintain the monthly payments to his creditors.

The respondent opposed the application on the basis, inter alia, that the surrender would not be to the advantage of creditors. He argued that

[67] *Cragg* at 95.
[68] 1926 WLD 53.
[69] *Yenson* at 59.
[70] 1981 (3) SA 843 (O).

he would be better off if the applicant, by the refusal of the application, were forced to continue with the monthly payments for nine years.[71] In answer to this, the applicant offered to make monthly payments for the 20 months after the surrender of his estate to his trustee in order to provide a dividend to his creditors. This offer was made in terms of a written affidavit, similar to the formal undertaking or consent required in *Veitch*.[72]

With regard to the respondent's contention that the surrender would not be to the advantage of creditors, the court pointed out that the test was not to compare the respondent's position after surrender with the position he would have been in if the monthly payments were to continue for a full nine years. The question was rather whether the papers showed that the surrender would now be to the advantage of all creditors. According to the court, a substantial residue above the costs of sequestration would be available as a dividend to creditors. The court furthermore pointed out that it was unrealistic to expect that the applicant's spouse, even if her health allowed her to do so, would for the following nine years be willing to bring in a salary that would be mainly applied to pay the applicant's old debts. If she were to stop working due to health problems, that would indeed not be to the advantage of the creditors as a group, as there would be no available assets or additional payments to pay the sequestration costs and to provide a dividend to creditors.[73] The court eventually granted the order for the surrender of the applicant's estate.[74]

It is clear from the facts in *Henning* that the applicant applied for the voluntary surrender of his estate in order to obtain the debt relief afforded by the Insolvency Act. In light of our courts' current pro-creditor approach of regarding sequestration applications aimed at obtaining the debt relief provided by the Act as an abuse of process, and an undermining of the rights and interests of creditors,[75] it is interesting to note that the court in *Henning* (a 1981 decision) was willing to grant the surrender, despite the fact that it was the clear intention of the applicant to obtain debt relief by applying for the surrender of his estate.[76]

[71] *Henning* at 847E–F.

[72] *Henning* at 846H–847A. However, Kotze AJ (at 848D–F) doubted whether such an undertaking would provide the necessary assurance that the trustee would indeed be able to enforce a contribution from the couple's salaries.

[73] *Henning* at 847G–848B.

[74] *Henning* at 853H.

[75] Compare *Arntzen* para 10.

[76] Kotze AJ (*Henning* at 853D) observed as regards the applicant's offer to make monthly payments for the 20 months after the surrender of his estate, instead of the initial agreement

In *Ex parte Arntzen*, Gorven J held that voluntary surrender applications require an even higher level of disclosure than do friendly sequestrations if a court is to be placed in a position to exercise its discretion in terms of section 6(1) of the Act.[77] The court provided an exposition of all the evidence, inter alia, that pertaining to the applicant-debtor's monthly income and expenses that needed to be disclosed,[78] and in this context made the following observations as regards the income of an insolvent and section 23(5) of the Act:

> '[A] factor as to whether it can be said that there will be advantage to creditors is whether, despite the applicant being insolvent, the indebtedness is likely to be liquidated over time if the income of the applicant exceeds expenses. Such a situation would clearly redound to the benefit of creditors since they would receive the full amount to them. The disclosure concerning income and expenditure is therefore highly relevant, particularly in small estates such as that of the applicant or those where there is a relatively small difference in value between the assets and liabilities. It would also affect considerations of the advantage to creditors if a trustee on insolvency would be able to utilise section 23(5) of the Act to apply excess income to the settlement of claims against the estate.'

(d) Analysis and evaluation

The older case law discussed above[79] supports the view that available surplus income, as the only source of advantage, may well establish advantage in terms of the Act. However, where it is the only source of advantage, some of the cases[80] require a 'probability' or a 'real likelihood' that a surplus will become available. In both *Veitch* and *Henning* the court did not have a problem with the applicant consenting to a deduction from his income, while the court in *Veitch* actually required such consent.

The more recent case law discussed above[81] does not provide authority for the viewpoint that the availability of surplus income, as the only source of advantage, may establish proof of advantage in terms of

which would require monthly payments for nine years, that 'die mees waarskynlike afleiding wat gemaak kan word uit die paadjie wat hierdie aanbod geloop het voordat dit in finale vorm gegiet [is,] is dat applikant mettertyd moes besef het dat hy (en sy eggenote) vir die volgende 20 maande nog vir, onder andere, die skuldpaaiemente sal moet werk indien hulle uit hulle jarelange skuld ballingskap verlos wil word deur boedeloorgawe'.

[77] *Arntzen* para 12.

[78] *Arntzen* paras 13–21.

[79] *Veitch*, *Ressel*, *Yenson* and *Henning*.

[80] *Veitch* and *Ressel*.

[81] *Cloete* and *Arntzen*.

section 6(1) of the Act.[82] It is merely authority for the viewpoint that the accurate disclosure of a debtor's income and expenditure is essential, as available surplus income, and thus the possible application of section 23(5), might be *one of the factors* that could convince a court that sequestration would be to the advantage of creditors. Available surplus income, which would enable a trustee to utilise the provisions of section 23(5), would thus only provide proof of advantage if there are other additional advantages.

It is submitted that the court in *Van Dyk* correctly dismissed the application for voluntary surrender on the basis that the applicant's forfeiture of his salary (being the only source of advantage) would not establish a benefit for his creditors. It is furthermore agreed that the intended forfeiture is impermissible, not only in light of the risks associated with policing the order and delays in finalising the administration of the estate, but also in light of the constitutional challenges that may arise should the applicant at any stage in future require the amount for his or his family's basic needs.[83] However, it should be noted that the debtor in *Van Dyk*, and in the other cases discussed above,[84] made these undertakings specially to increase the value of his or her estates with a view to establishing advantage for creditors[85] and thus to obtain the debt relief afforded by the Insolvency Act. Therefore, although the waiver of a portion of their salaries may be impermissible on constitutional grounds, the irony is that the exclusion of these debtors from a debt-relief measure, on the basis that they do not have sufficient assets to prove advantage, may also be unconstitutional. In this regard Coetzee has argued in respect of the so-called NINA[86] debtors, that by requiring advantage for creditors as a prerequisite to obtaining a discharge of debt, the South African system distinguishes between debtors 'with' and debtors 'without' assets and income.[87] Coetzee[88] argues that such differentiation amounts to unjustifiable unfair discrimination based on

[82] See in this regard the court's observation in *Van Dyk* para 8 iro *Cloete*.

[83] See *Van Dyk* para 23.

[84] *McKechnie*, *Veitch*, *Yenson* and *Henning*.

[85] See the observation made by Makhubele AJ in *Van Dyk* para 21.

[86] The 'no income no asset' debtors — see Coetzee & Roestoff, 'Consumer debt relief in South Africa — Should the insolvency system provide for NINA debtors? Lessons from New Zealand' (2013) 22 *International Insolvency Review* 188.

[87] Coetzee, 'Is the unequal treatment of debtors in natural person insolvency law justifiable?: A South African exposition' (2016) 25 *International Insolvency Review* 36.

[88] Coetzee (2016) 25 *International Insolvency Review* 54.

these debtors' socio-economic status and that such discrimination infringes their right to equality in terms of section 9 of the Constitution.[89]

III SECTION 23(5) OF THE INSOLVENCY ACT AND ITS ADEQUACY AND APPROPRIATENESS

(a) Section 23(5)

As mentioned earlier, the sequestration process in terms of the Insolvency Act is primarily designed to deal with the liquidation and eventual distribution of an insolvent's assets for the benefit of his creditors. Section 23(5)[90] is the only provision in the Insolvency Act that deals explicitly with the income of an insolvent and a trustee's powers to require income contributions from him or her. Section 23(5) provides as follows:

> 'The trustee shall be entitled to any moneys received or to be received by the insolvent in the course of his profession, occupation or other employment which in the opinion of the Master are not or will not be necessary for the support of the insolvent and those dependent upon him, and if the trustee has notified the employer of the insolvent that the trustee is entitled, in terms of this sub-section, to any part of the insolvent's remuneration due to him at the time of such notification, or which will become due to him thereafter, the employer shall pay over that part to the trustee.'

According to case law, a trustee is only entitled to the relevant portion of an insolvent's income if the Master indeed expresses the opinion that the income is not necessary for the support of the insolvent and his or her dependants.[91] Furthermore, the Act does not provide for any time limit within which a trustee should act to claim the surplus income and a trustee may thus decide to impose the provisions of section 23(5) at any time before rehabilitation.[92]

The Act does not provide a comprehensive definition of the concept 'income' or for any possible exclusions from income.[93] To enable a

[89] The Constitution of the Republic of South Africa, 1996.

[90] Read with s 23(9) of the Insolvency Act.

[91] *Miller v Janks* 1944 TPD 127 at 130; *Ex parte Van Rensburg* 1944 OPD 64 at 70; *S v Moll* 1988 (3) SA 226 (T) at 241. See also Sharrock et al, *Hockly's Insolvency Law* 9 ed (Juta 2012) 72 and Smith, *The Law of Insolvency* (Butterworths 1988) 88. In terms of s 23(6), after sequestration the insolvent is not entitled to cede his right to earnings.

[92] Sharrock et al, (Juta 2012) 73; Smith, (Butterworths 1988) 88.

[93] Section 23(5) merely refers to the 'moneys received or to be received by the insolvent in the course of his profession, occupation or other employment' and s 23(9), to the 'remunera-

trustee to place sufficient information before the Master for him or her to make the determination under section 23(5),[94] the Act places a duty on an insolvent to keep records of all assets received from whatever source and of all disbursements made by him or her in the course of his or her profession, occupation, or employment. Furthermore, if required by his or her trustee, an insolvent must provide a statement of these assets[95] and disbursements made during the preceding month, during the first week of every month.[96] The trustee may obtain payment of the surplus income from the insolvent's employer, simply by informing the employer that he or she is entitled thereto in terms of section 23(5).[97] Alternatively, he or she may also claim it by writ of execution issued by the registrar upon production to him or her of a certificate by the Master stating that the amount is claimable.[98]

One other issue that is not regulated by section 23(5), is a trustee's execution of the Master's determination under this subsection. There are no provisions as to how and when the surplus income should be collected from an insolvent, and how and when it should be distributed amongst his or her creditors. However, this issue is dealt with by the general provisions of the Act. The surplus income collected by a trustee in terms of section 23(5) forms part of the property in the insolvent estate and will thus have to be distributed amongst creditors in terms of the provisions of the Act dealing with the distribution of the proceeds.[99] Where there is an offer by an insolvent to pay the surplus in monthly instalments,[100] the finalisation of the administration of the estate will be delayed, as the trustee will only be able to submit a final account once the

tion or reward for work done or for professional services rendered'. Income earned illegally is not included in the exception provided for in s 23(9) and according to the decision in *Singer NO v Weiss & another* 1992 (4) SA 362 (T) it will vest in the trustee.

[94] Compare *Ex parte Theron en 'n ander; Ex parte Smit; Ex parte Webster* 1999 (4) SA 136 (O) 144C–F; Sharrock et al, (Juta 2012) 72; Smith, (Butterworths 1988) 88.

[95] The word 'assets' in this context includes earnings as the Master will have to base his or her assessment of available surplus income on this statement — Smith, (Butterworths 1988) 88.

[96] The trustee may inspect such records at all reasonable times and may demand the production of reasonable vouchers in support of any item in such accounts and of the expenditure of the insolvent for the support of him- or herself and his or her dependants — s 23(4). The insolvent is also not entitled to enter into any contract which adversely affects any contribution which he or she is obliged to make towards his or her estate under s 23(5) — see s 23(2) and Sharrock et al, (Juta 2012) 63.

[97] Section 23(5) and see Sharrock et al, (Juta 2012) 73.

[98] Section 23(11).

[99] In terms of s 113(3) the trustee must distribute the estate in accordance with the trustee's account immediately after confirmation of the account in terms of s 112. The distribution of the proceeds is done according to a prescribed order of preference — see ss 95–103.

[100] As was the position in *Van Dyk* discussed above.

agreed repayment period has expired.[101] A trustee is obliged to submit his or her liquidation and distribution account within six months after his or her appointment.[102] Should a trustee be unable to submit the account timeously, he or she may apply to the Master for an extension.[103] However, the Act empowers the Master, even if the six-month period has not yet expired, and if a trustee has funds on hand which in the Master's opinion should be distributed amongst creditors, to direct a trustee to submit a plan for the distribution of these funds.[104] Creditors, therefore, will be entitled to interim payments and will not have to wait until the final account has been submitted.

A major shortcoming of section 23(5) is that it does not provide any specific guidance as to how the Master should exercise his or her discretion under section 23(5). The only guideline is a vague and subjective one in terms of which the Master must determine which income of an insolvent '[is] not or will not be necessary' for the support of him or her and his or her dependants. The decision in *Ex parte Theron* sheds some light on certain of the issues regarding the Master's discretion.

Theron involved an application for rehabilitation where the Master made a ruling in terms of section 23(5) and then requested the court to make the rehabilitation subject to such ruling. The court was of the opinion that it could not grant such an order before it had been informed about the factors which the Master considered in making the relevant decision, and to what extent the principles of natural justice — such as audi alteram partem principle — had been taken into consideration.[105] Without sufficient information and details as to the procedure and how the Master arrived at his or her decision, it cannot be expected of a court to approve the Master's decision automatically, as this would frustrate the exercise of the court's discretion in terms of section 127 of the Act.[106] The court held that the Master exercises a quasi-judicial or administrative discretion, and that his or her decision is thus subject to

[101] See *Van Dyk* para 17 and the discussion above. The delays that would be caused in the administration of the insolvent's estate where the surplus income was the only source of advantage, was one of the reasons why Makhubele AJ refused to grant the order for voluntary surrender — see para 23.

[102] See s 91. Where the trustee is not able to submit a final liquidation account, the trustee is obliged, at least every six months, unless he or she has received an extension of time under s 109, to submit periodic accounts to the Master — s 92(4).

[103] See s 109.

[104] See s 110(1).

[105] *Theron* at 138F–I.

[106] *Theron* at 145H–J.

review in terms of section 151 of the Act.[107] However, the court was of the view that it would be unfair, in the event of an incorrect procedure having been followed, to leave it to an insolvent to approach a court for relief at his or her own cost.[108]

The court eventually granted an unconditional order for rehabilitation.[109] It held that there should be special circumstances before the imposition of conditions on rehabilitation could be sanctioned.[110] In this regard, the applicants, with the apparent approval of the court, also contended that a direction in terms of section 23(5) should not be left to the stage at which an application for rehabilitation is brought before the court. Allowing this would mean that the Master, while he and the trustee took no steps in terms of section 23(4) to ascertain what the applicant's monthly income and expenditure involved, wishes to punish the applicants by ensuring that they will never again be able to improve their standard of living or to function normally. The applicants submitted that the general spirit of the Insolvency Act is not that a hard-working insolvent person should never again be able to build a new estate.[111] An insolvent should thus be allowed to become economically productive and should not become a burden on the state.[112]

Regarding the Master's exercise of his or her discretion, the applicants, with the apparent approval of the court, contended that the Master's decision should be regular and based on reasonable conduct taking into consideration the provisions of the Constitution and the completion of the footwork required before the decision is made. The court pointed out that the decision under section 23(5) is difficult and

[107] *Theron* at 139C–D.

[108] *Theron* at 145A.

[109] *Theron* at 146H.

[110] *Theron* at 139C–D. The court referred, inter alia, to *Ex parte Sweke* 1938 WLD 175; *Ex parte Phillips* 1938 CPD 381; *Ex parte Parker* 1946 CPD 536; *Ex parte Smith* 1968 (1) SA 743 (C); and *Ex parte Isaacs* 1962 (4) SA 767 (W). The court also referred to De Wet & Yeats, *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 4 ed (Butterworths 1978) 515–516, where the authors list the following requirements for an order to be made subject to a condition for income contributions: blameworthy conduct on the part of the insolvent in connection with his or her insolvency or in respect of the sequestration of his or her estate; whether the insolvent is indeed able to make a contribution from his or her future income; and whether the creditors or the trustee took the necessary steps to claim surplus income in terms of s 23(5) to safeguard their interests.

[111] *Theron* at 143J–144C.

[112] Compare Stander & Botha, 'Voorwaardelike rehabilitasie en die rol van die skuldeisers van die gesekwestreerde boedel' (2002) 4 *TSAR* 822 at 825. See also *Singer* at 367 B–C, where the court stated that 'the real intention of s 23(3), 23(5) and 23(9) is to encourage industriousness on the part of the insolvent and to ensure that his insolvency will not destroy him as an income-producing person. He would, in this way, be able to support himself and those dependent upon him and not become a burden upon others'.

that the onus is on the Master eventually to decide which standard of living the insolvent maintains or should maintain.[113]

Theron also provided further clarity as regards the steps that the trustee should take before approaching the Master for a determination. The court referred to Mars[114] and held that it is important to determine the trend in respect of an insolvent's income and expenditure and that the Master should not rely on a single statement of income and expenditure in order to arrive at his or her decision.[115]

The above analysis indicates that section 23(5) does not deal comprehensively with all the possible issues pertaining to income repayments. Moreover, as mentioned, the sequestration process, being a predominantly asset-liquidation procedure, is clearly not ideal for dealing with income repayments, especially if an insolvents' surplus income is the only available property from which creditors' claims can be satisfied. The following paragraph deals with whether the current alternative procedures to sequestration — administration and debt review — would be better suited to dealing with income repayments by an insolvent.

(b) Alternative procedures to sequestration

South African consumer insolvency law provides for alternative procedures in the form of administration under section 74 of the Magistrates' Courts Act 32 of 1944 (MCA), and debt review in terms of section 86 of the National Credit Act of 2005 (NCA).

Administration[116] entails a relatively simple and inexpensive procedure whereby over-indebted debtors' obligations are rescheduled.[117] According to Boraine,[118] it is 'a debt relief measure available to some debtors that find themselves in financial distress, which affords them the opportunity to obtain a statutory rescheduling of debt sanctioned by a court order'.

[113] *Theron* at 145A–C. The Master in *Theron* was of the opinion that university education represents a luxurious expense and that it would be inappropriate for the insolvent and his or her children to follow a university career — 145C.

[114] See De la Rey, *Mars The Law of Insolvency* 8 ed (Juta 1988) at 185. See also Bertelsmann et al, (Juta 2008) at 187.

[115] *Theron* at 144F–G.

[116] See, in general, Harms, *Civil Procedure in Magistrates' Courts* (LexisNexis 1997) B48.1–B48.11; Paterson, *Eckhard's Principles of Civil Procedure in the Magistrates' Courts* 5 ed (Juta 2005) 318–344.

[117] See *Madari v Cassim* 1950 (2) SA 35 (D) at 38.

[118] Boraine, 'Some thoughts on the reform of administration orders and related issues' (2003) 36 *De Jure* 217 at 217–218.

In terms of an administration order, a court assists a debtor by appointing an administrator to take control of the debtor's financial affairs and to manage the payment of debts due to his or her creditors. Contrary to the position in terms of section 23(5) of the Insolvency Act, which empowers the Master to make the decision as to the amount of the surplus income to be paid over to the trustee, section 74 obliges a court to make the decision as to the amount to be paid to the administrator. The payment of the amount and the manner in which it should be calculated are expressly regulated by the Act.[119] In order to assist a court in making the determination, section 74 provides that the court, or any creditor or legal representative, may question the debtor with regard to his or her assets and liabilities, present and future income (including the income of a spouse), standard of living, possibilities of economising, and any other relevant matter.[120] As regards the execution of the order, the Act obliges the administrator to distribute the moneys collected from the debtor pro rata amongst the creditors named in the list of creditors, at least once every three months.[121]

The administration procedure provides relief to a debtor against harassment by creditors as no creditor may commence enforcement proceedings for outstanding debt once the order is in force.[122] However, apart from the relief it provides in the form of a statutory rescheduling of debt, it does not provide for relief in the form of a discharge of debts or costs, as is the case with sequestration followed by rehabilitation. Furthermore, there is no maximum time limit within which payments should be completed. The order will only lapse once all listed creditors as well as the cost of administration have been paid in full.[123] In theory, a debtor may thus be subject to such an order indefinitely. Moreover, the procedure is only available to debtors where the claims do not exceed the

[119] See s 74C and the prescribed form — Annex 1 Form 51. The order must specifically state a weekly or monthly amount to be paid over to the administrator by the debtor — s 74C(1)*(a)*. The amount is calculated by taking into account the difference between the future income of the debtor and the sum of the debtor's and his or her dependants' 'necessary expenses', certain prescribed 'periodical payments' which the debtor is obliged to make (ie, ito an existing maintenance order), and other payment obligations due in future — s 74C(2). When determining the 'necessary expenses', the income of the debtor's spouse may be taken into consideration. Where the debtor is married in community of property it may also be taken into account in determining the debtor's income — s 74C(3). Where the administration order provides for the payment of instalments out of future income, the court shall authorise the issue of an emoluments attachment order or garnishee order to facilitate payments by the debtor — s 74D.

[120] Section 74B(1)*(e)*.

[121] Section 74G, 74H and 74J.

[122] Section 74P.

[123] Section 74U.

amount determined by the Minister by notice in the *Gazette*.[124] This amount is currently set at R50 000.[125]

Section 86 of the NCA contains the major debt relief mechanism introduced by the NCA, namely, debt review.[126] In terms of this procedure, a debtor's credit-agreement debt may be reviewed by a debt counsellor[127] with a view to possibly obtaining debt relief by means of consensual or court-ordered debt restructuring.[128] During the debt review process, a debt counsellor is required to review a debtor's credit agreements in order to determine whether the debtor is over-indebted and, if so required, whether reckless credit was extended.[129] When determining whether a debtor is indeed over-indebted, a debt counsellor must take into consideration the debtor's 'financial means, prospects and obligations'.[130] This includes the income, or any right to receive income, regardless of the source, frequency, or regularity of the income, of the particular consumer. It further includes the financial means, prospects, and obligations of any other adult person within the consumer's immediate family or household to the extent that they share their financial means and mutually bear their financial obligations.[131] Furthermore, where a consumer had a commercial purpose for applying for, or entering into a particular credit agreement, the future revenue flow from the business purpose would be included.[132] A debt counsellor must also consider the provisions of regulation 24(7), which provides a clarification of concepts such as 'over-indebtedness', 'net income', 'gross

[124] Section 74(1)*(b)*.

[125] Government Notice R3441 in *Government Gazette* 14498 of 31 December 1992 with effect from 1 January 1993.

[126] For a detailed discussion of the debt review process, see Roestoff et al, 'The debt counselling process — Closing the loopholes in the National Credit Act 34 of 2005' (2009) 1 *PELJ* 247; Van Heerden, 'Over-indebtedness and reckless credit' in Scholtz (ed), *Guide to the National Credit Act* (LexisNexis 2008) para 11.3.3.2; Van Heerden, 'A practical discussion of the debt-counselling process' in Scholtz (ed), (LexisNexis 2008) paras 14.1–14.12; Otto & Otto, *The National Credit Act Explained* 4 ed (LexisNexis 2015) 69–77; Kelly-Louw, *Consumer Credit Regulation in South Africa* (Juta 2012) 324–404.

[127] See s 86(1).

[128] See ss 86(7), 86(8) and 87.

[129] Section 86(6).

[130] Section 79(1).

[131] Section 78(3)*(a)* and *(b)*.

[132] Section 78(3)*(c)*. In *Standard Bank of South Africa Ltd v Panayiotts* 2009 (3) SA 363 (W) at 366F–G the court held that 'financial means' include not only income and expenses but also assets and liabilities, and that 'prospects' include prospects of improving a consumer's financial position, such as increases and liquidating assets. In the case of credit agreements that involve goods as the subject matter of the agreement, a consumer's financial means and prospects must include the prospect of selling the goods in order to reduce his or her indebtedness.

income' and 'minimum living expenses' in order to assist him or her to make the determination.

The practical execution of the debt review process is not fully regulated by the Act or the regulations promulgated in terms thereof. However, following an intensive review process involving industry stakeholders, the National Credit Regulator (NCR) has recently issued detailed guidelines — the so-called *Debt Review Task Team Agreements* (TTA) — to be applied by all industry participants.[133] The TTA are voluntary, non-statutory measures aimed at addressing operational and process weaknesses relating to the debt review process. In addition, they promote a uniform and consistent approach to dealing with debt review matters amongst all debt review stakeholders.[134] The TTA provide, inter alia, for comprehensive assessment guidelines to assist and guide a debt counsellor with his or her assessment of a consumer debtor's financial position. Amongst others, the TTA provide detailed guidelines as to the determination of a consumer's net income, the minimum available amount for debt repayments, and the identification of various expenses as essential, non-essential, and luxurious.[135]

If a debt counsellor determines that a debtor is indeed over-indebted, he or she may recommend that a magistrate's court make an order rearranging the debtor's credit agreement obligations and/or declaring one or more of the credit agreements reckless.[136] Having regard to the proposal and information before it and the consumer's financial means, prospects, and obligations, the court may, amongst others, make an order for the rearrangement of the debtor's obligations.[137] A counsellor does not receive or distribute payments under the rearrangement order as this function is assigned to independent Payment Distribution Agents.[138]

The debt review procedure places no monetary limitation on the total outstanding debt and thus allows more consumers to qualify for debt relief, as is the case with the administration order. However, it does not

[133] The NCR through the Credit Industry Forum initiated the review of the 2010 TTA Guidelines in October 2013 in order to align them with the current debt review process — see Circular 02 of 2015, *Debt Review Task Team Agreements of 2010 Guidelines* (January 2015), available at www.ncr.org.za (hereafter 2015 TTA Guidelines).

[134] 2015 TTA Guidelines.

[135] See Annexure B: *Proposed Debt Review Assessment Guidelines* of the 2015 TTA Guidelines.

[136] Section 86(7)*(c)*.

[137] Section 87(1). The methods of restructuring allowed by the Act are set out in s 86(7)*(c)*(ii)*(aa)–(dd)*.

[138] See Van Zyl, 'Registration and the consequences of non-registration' in Scholtz (ed), (LexisNexis 2008) para 5.2.5.

provide debt relief to all insolvent or over-indebted debtors as the Act only applies to credit agreements as defined in section 8.[139]

Moreover, as is the position with regard to administration orders, the Act does not provide for any form of discharge from pre-existing indebtedness. Therefore, as stated by the Court of Appeal in *Collett v FirstRand Bank Ltd*,[140] 'the purpose of the 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 Magistrate's Court'. It should be noted that the 'satisfaction by the consumer of *all* responsible financial obligations' and 'eventual satisfaction of *all* responsible consumer obligations under credit agreements' are two of the Act's purposes.[141] Furthermore, no time limit is prescribed in respect of the payment plan,[142] and a debtor can thus be bound to a debt-restructuring plan indefinitely. The process will also only assist a mildly over-indebted consumer, as a court will only confirm viable plan proposals.[143]

Although the administration and debt review procedures are clearly better designed to deal with the administration of income repayments than is the position with regard to sequestration in terms of the Insolvency Act, both procedures amount to no more than a reorganisation of a consumer's credit-agreement debt without providing any discharge. In the past, overcommitted and insolvent debtors have, therefore, often opted rather to utilise sequestration than administration or debt review as a measure to obtain debt relief.[144] Consequently, until the current alternative procedures provide for adequate relief in the

[139] Debts that are not incurred under these agreements, for example, delictual claims, clothing accounts, professional services and municipal accounts where no interest is charged, will therefore be excluded from the debt review procedure — Roestoff & Coetzee, (2012) 24 *SA Merc LJ* at 68.

[140] 2011 (4) SA 508 (SCA) at 514.

[141] My emphasis — see s 3*(g)* and *(i)*.

[142] If the process is not abandoned or terminated, it appears that the issue of a clearance certificate by a debt counsellor 'rehabilitating' the consumer will be the only means of concluding the procedure. It should be noted that the amended s 71 of the NCA has improved the consumer's legal position in this respect. Before the amendment of s 71 a debt counsellor could only issue a clearance certificate if the debtor had fully satisfied all the debt obligations under every credit agreement that was subject to the debt restructuring order. This implied that a consumer, who concluded a long-term credit agreement, for example, a home loan with a repayment period of, for example, 30 years as one of his or her credit agreements, would only be able to rehabilitate after expiry of a minimum period of 30 years. Under the amended s 71, such a consumer may now also be issued with a clearance certificate if he or she can show that he or she has the financial ability to satisfy the future obligations of the home loan, that there are no arrear payments, and that all obligations under every credit agreement included in the debt restructuring order have been settled in full.

[143] *Seyffert & another v Firstrand Bank Ltd t/a First National Bank* 2012 (6) SA 581 (SCA) para 13. See also Roestoff & Coetzee, (2012) 24 *SA Merc LJ* at 68.

[144] See, eg, *Ex parte Ford*.

form of a discharge of debt obligations, these procedures, although more suited to dealing with the restructuring of a debtor's income, will not readily be utilised by over-committed debtors to obtain relief.

In the next paragraph, the treatment of income contributions in terms of the consumer insolvency systems of England and Wales, Australia, and the United States of America is discussed and analysed.

(c) Comparative investigation

(i) England and Wales

In England and Wales, consumer insolvency is regulated by the Insolvency Act of 1986,[145] which provides for three personal insolvency procedures. The Act provides for bankruptcy proceedings[146] in terms of which a debtor is required to surrender all assets that are not exempt from the liquidation and distribution process.[147] The system is pro-debtor[148] and due to recent amendments to the Insolvency Act by the Enterprise Act,[149] a debtor is entitled to an automatic discharge of all pre-bankruptcy debt after one year, instead of three years after the application.[150] The Act also provides for the possibility that a debtor may negotiate a repayment plan, that is, a so-called individual voluntary agreement (IVA) with his or her creditors, which usually provides for a discharge after completion of the plan.[151] Finally, a debtor may also apply for a so-called debt relief order (DRO) in terms of which he or she receives a discharge of all qualifying debt after a period of one year.[152] The purpose of the DRO procedure is to provide debt relief to NINA debtors.[153]

As is the position under the South African Act, the earnings of an insolvent after bankruptcy proceedings do not form part of the bankrupt estate.[154] Fletcher explains this as follows:[155]

[145] Insolvency Act 1986 c 45.

[146] Section 71 of the Enterprise and Regulatory Reform Act 2013, Schedule 18 inserted ss 263H–263O into the Insolvency Act, which replaced debtors' court petitions with administrative procedures — see Fletcher, *The Law of Insolvency. Second Cumulative Supplement to the Fourth Edition* (Sweet and Maxwell 2014) 15.

[147] Section 283 of the Insolvency Act.

[148] Fletcher, *The Law of Insolvency* 4 ed (Sweet and Maxwell 2009) 43.

[149] 2002 c 40 — s 256.

[150] Sections 279, 281 and 382.

[151] See Part VIII of the Insolvency Act and Walters, 'Individual voluntary arrangements: A "fresh start" for salaried consumer debtors in England and Wales?' (2009) 18 *International Insolvency Review* 5.

[152] See Part 7A of the Insolvency Act (ss 251A–251X read with the applicable schedules).

[153] Fletcher, (Sweet and Maxwell 2009) 386.

[154] Section 307(5).

> 'Although it is logically correct to suppose that any money which constitutes the bankrupt's income should be claimable as after acquired property as and when it is paid to him, it is nevertheless the policy of the law of bankruptcy to encourage the bankrupt to continue to maintain himself and his family. This serves two purposes, in that it helps to preserve the dignity and self-respect of the bankrupt and his dependants, and at the same time serves to reduce the potential burden that would be imposed on the resources of the state if the bankrupt's family are rendered destitute. A rule has therefore been adopted whereby the bankrupt is allowed to retain a proportion of his income to the extent deemed necessary to maintain him and his family in reasonable circumstances.'

McKenzie, Skene and Walters[156] point out that the policy of the Enterprise Act was to 'encourage honest but unfortunate entrepreneurs to re-engage in risk-taking by providing a quick, comprehensive discharge and by reducing the stigma attached to bankruptcy'. However, they suggest that it was not intended that bankruptcy should become an easy way out of debt. Therefore, a bankrupt who receives an income, may, on application of the trustee to the court, be required to make contributions from his surplus income in terms of a so-called income payments order (IPO).[157] Alternatively, the order may also require the bankrupt's employer to make the payments to the trustee.[158] The definition of the concept 'income' in section 310(7) is broad.[159] It comprises every payment in the nature of income which is from time to time made to a bankrupt, or to which he or she from time to time becomes entitled, including any payment in respect of the carrying on of any business, or any office of employment, and including any payment under a pension scheme.[160] According to Fletcher, the definition of 'income' in section 310(7) does not require that it should be obtained by means of a regular or systematic course of activity or business dealing.

[155] Fletcher, (Sweet and Maxwell 2009) 242. Cf also Miller, (2002) 18(2) *Insolvency Law and Practice* 43.

[156] 'Consumer bankruptcy law reform in Great Britain' (2006) 80 *American Bankruptcy Law Journal* 477 at 482.

[157] Ibid. See s 310(1), (1A)*(a)* and (3)*(a)*.

[158] Section 310(3)*(b)*. Fletcher, (Sweet and Maxwell 2009) 243 points out that although this may be a safer course for a court to adopt to prevent a bankrupt from applying the money in some other way, it should be noted that a bankrupt may still change his or her employment. Moreover, apart from the added inconvenience for the employer, it may also have a detrimental effect upon the employee's employment prospects.

[159] Fletcher, (Sweet and Maxwell 2009) 243; Miller, (2002) 18(2) *Insolvency Law and Practice* 43 at 44.

[160] However, payments by way of guaranteed minimum pension and payments giving effect to a bankrupt's protected right as a member of a pension scheme are excluded — see s 310(7) read with 310(8).

However, it should be noted that 'income' includes payments received under a maintenance order made against a bankrupt's former spouse.[161]

The application for an IPO may only be made before the discharge of the bankrupt,[162] but debtors could be required to make contributions from surplus income even after their discharge. However, the order may not continue for a period of more than three years after the date of its issue.[163] Sums received by the trustee under an IPO form part of the bankrupt's estate.[164]

The effect of the order may not be such as to reduce the income of the bankrupt below what appears to be necessary for meeting his or her and his or her dependants'[165] reasonable domestic needs.[166] The aim is to balance the interests of debtors and creditors and to ensure that debtors 'who can pay, should pay'.[167] Debtors are thus not allowed to maintain lavish lifestyles at their creditors' expense.[168] Should a bankrupt's financial situation change, an IPO may, on application by the trustee or the bankrupt, before or after discharge, be varied by the court.[169]

The Act now also provides for the conclusion of so-called income payment agreements (IPAs) between a debtor and the Official Trustee or trustee.[170] If the parties are thus able to reach consensus regarding the terms of an IPA, it would not be necessary to apply for an IPO and the costs which would have been incurred in respect of bringing the application will thus be saved and better returns will be produced for creditors.[171]

[161] Compare Fletcher, (Sweet and Maxwell 2009) 244 and authorities cited.

[162] Section 310(1A)*(b)*.

[163] See s 310(6) (as amended by s 259 of the Enterprise Act).

[164] Section 310(6).

[165] See s 385(1).

[166] Section 310(2). What 'reasonable domestic needs' entail will obviously be a question of fact — see Fletcher, (Sweet and Maxwell 2009) 244. Miller, (2002) 18(2) *Insolvency Law and Practice* 43 at 48–49 points out that the courts follow a flexible approach when applying this standard. He explains: 'Not only is the bankrupt not to become a ''slave to his creditors'', but it does not mean the imposition of a uniform standard of living on all bankrupts and their families. Flexibility in lifestyle is permitted so as to reflect the efforts and to some extent the expectations of the bankrupt and his family, and where appropriate to provide encouragement to the bankrupt to achieve rehabilitation.'

[167] Compare Walters, 'Personal insolvency law after the Enterprise Act: An appraisal' (2005) 5 *Journal of Corporate Studies* 65 at 80; McKenzie, Skene & Walters, (2006) 80 *American Bankruptcy Law Journal* 477 at 482.

[168] Walters, (2009) 18 *International Insolvency Review* 5 at 15.

[169] Section 310(6A).

[170] See s 310A, inserted by s 260 of the Enterprise Act.

[171] Fletcher, (Sweet and Maxwell 2009) 246. See also Walters, (2005) 5 *Journal of Corporate Studies* 65 at 81; McKenzie, Skene & Walters, (2006) 80 *American Bankruptcy Law Journal* 477 483. An IPA is a written agreement between the parties in terms of which the bankrupt is to pay to the trustee or the Official Receiver a specified part or portion of the bankrupt's income for a specified period. Alternatively, the agreement may also provide that a third

(ii) Australia

The Australian Bankruptcy Act[172] currently provides for three personal insolvency procedures: bankruptcy;[173] personal insolvency agreements (PIAs);[174] and debt agreements (DAs).[175] Bankruptcy enables a debtor to petition for his or her voluntary bankruptcy. However, a creditor may also petition the court for the compulsory bankruptcy of a debtor. Most bankruptcies in Australia are voluntary, and a large proportion of them are 'assetless'.[176] There are no entry requirements in respect of debt, asset, or income limits for voluntary debtors' petitions.[177]

The Australian fresh-start policy has been described as reasonably generous to bankrupts.[178] In the case of bankruptcy, the debtor is entitled to an automatic discharge three years after commencement of the insolvency proceedings.[179] However, where the trustee has raised an objection, the discharge may be extended for a maximum period of five or eight years, depending on the grounds of the objection.[180] As regards PIAs and DAs, the discharge depends on the agreement between the debtor and his or her creditors. However, the Act expressly provides that

person must, for a specified period, pay to the trustee or Official Receiver a specified proportion of money which is due to the bankrupt by way of income — s 310A(1)*(b)*. In terms of s 310A(4) the provisions of s 310(5) (receipts to form part of the estate) and s 310(7)–(9) (meaning of income) shall apply to an IPA as they apply to an IPO. An IPA must specify the period during which it will have effect and, as is the position with regard to an IPO, the period may end after discharge of the bankrupt, but may not continue for a period of more than three years after the date of the order — s 310A(5). An IPA may be varied by written agreement between the parties or by the court on application by the bankrupt, trustee, or Official Receiver — s 310A(6).

[172] 1966 (Cth).

[173] See Part IV of the Act.

[174] Under Part X of the Bankruptcy Act. Wyburn, 'Debt agreements for consumers under bankruptcy law in Australia and developing international principles and standards for personal insolvency' (2014) 23 *International Insolvency Review* 101 at 103 defines a PIA as an agreement in terms of which 'the debtor offers their creditors some form of return, for example, from the sale of property or a share of income for a period, the full payment of the debts but over an extended period or some other form of compromise of debts' — see s 188A which sets out requirements for PIAs. The PIA binds all unsecured creditors if agreed to by a majority in number of creditors representing at least 75 per cent in value of the debts due — see Wyburn, (2014) 23 *International Insolvency Review* 101 at 103 and ss 5 and 204.

[175] Under Part IX of the Bankruptcy Act. Like the PIA, the DA is a binding agreement between a debtor and his or her creditors and may propose various ways in which to deal with a debtor's debt situation — Wyburn, (2014) 23 *International Insolvency Review* 101 at 103.

[176] Mason & Dunns, 'Developments in consumer bankruptcy in Australia' in Niemi-Kiesiläinen et al (eds), *Consumer Bankruptcy in Global Perspective* (Hart Publishing 2003) 232.

[177] Wyburn, (2014) 23 *International Insolvency Review* 101 at 102.

[178] Mason & Dunns, (Hart Publishing 2003) 234. According to Howell, (2014) 14(3) *QUT Law Review* 29 the fresh start is one of the main goals of the Australian Bankruptcy Act.

[179] Section 149.

[180] Sections 149A, 149B and 149D.

a debtor who is a party to a DA may only receive a discharge when his or her obligations under the agreement have been complied with.[181]

Although income earned by an insolvent after the commencement of bankruptcy would in principle fall within his or her property subsequently acquired, and thus be available for the satisfaction of creditors' claims, the policy of the legislation has been to treat income as an exception on the basis that insolvents should be urged, as part of the rehabilitation process, to earn income during bankruptcy.[182] However, the Act provides for compulsory income contributions in cases where an insolvent's income exceeds a certain amount.[183] The object of these provisions is to compel debtors who can afford to do so, to make income contributions towards their bankrupt estates.[184] The Act also aims to empower trustees to recover such contributions for the benefit of the estate.[185]

The amount of the required contributions is calculated by the trustee in accordance with a formula prescribed by the Act.[186] A bankrupt's liability[187] to make income contributions is assessed by the trustee on an annual basis termed a 'contribution assessment period' (CAP).[188]

The Act requires the trustee, as soon as practicable after the start of each CAP, to make an assessment[189] of the bankrupt's income and his or her contribution liability in terms of the formula.[190] Where the bankrupt's income or circumstances change, the Act allows for a reassess-

[181] Section 185N, 185NA.

[182] Mason & Dunns, (Hart Publishing 2003) 240–241.

[183] Part VI, Division 4B of the Bankruptcy Act.

[184] See s 139J*(a)*. See also Australian Financial Security Authority, *Official Trustee Practice Statement 1: Income Contributions* (updated 4 August 2016) para 1.2, available at www.afsa.gov.au — hereafter referred to as AFSA *Income Contributions*.

[185] See s 139J*(b)* and AFSA *Income Contributions* para 1.2. See, eg, s 139ZL which provides for the issue of a garnishee notice to a third party (such as the bankrupt's employer) for the recovery of income contributions payable by a bankrupt — AFSA *Income Contributions* paras 6.18 and 6.19. Where the bankrupt has failed to pay contributions and a s 139ZL notice has been ineffective, the Official Trustee may consider using the supervised account regime (SAR) — see Subdivision HA and AFSA *Income Contributions* para 6.20–6.27. The objects of this subdivision are to improve the likelihood that the bankrupt will have sufficient money to make contributions by ensuring that all monetary income of the bankrupt is deposited into a single account, (the supervised account), and to enable the trustee to supervise withdrawals from the account — s 139ZIA.

[186] Section 139S.

[187] See s 139P & s 139Q. It should be noted that a bankrupt's liability under the Act is not affected by his or her discharge from bankruptcy after the making of an assessment that gave rise to the liability — s 139R.

[188] See s 139K.

[189] In making the assessment, the trustee may have regard to any information provided by a bankrupt or any other information in the trustee's possession — s 139X.

[190] Section 139(W)(1).

ment.[191] The reassessment may be made on the trustee's own initiative or at the bankrupt's request, but in the latter case the trustee is not obliged to make the reassessment unless he or she is satisfied that there are reasonable grounds to do so.[192] Income contributions that a person is liable to pay, are payable at a time determined by the trustee, and payment in instalments may be allowed.[193]

The threshold at which contributions become payable is also regulated by the Act and does not fall within the discretion of the trustee.[194] In terms of the formula above, the amount that a bankrupt is liable to pay in respect of a CAP is 50 per cent of the surplus amount earned above the prescribed threshold.[195] The threshold that applies to a particular bankrupt is subject to the number of his or her dependants.[196]

The concept of 'income' for contribution purposes is wider than that for income tax purposes.[197] The Act contains a comprehensive definition of the concept 'income'.[198] 'Income' is defined as having its ordinary meaning[199] and includes pension payments, payments in consequence of a termination of employment, loans from associated entities, fringe benefits,[200] and tax refunds,[201] but excludes payments for child support and maintenance and income tax[202] that a bankrupt is liable to pay.[203] To enable a trustee to assess a bankrupt's contribution

[191] Section 139W(2).
[192] Section 139W(3).
[193] Section 139ZG.
[194] AFSA *Income Contributions* para 1.3.
[195] Compare Howell, (2014) 14(3) *QUT Law Review* at 37. The formula in terms of s 139S for calculating the liability of a bankrupt is the assessed income of the bankrupt less the actual income threshold amount divided by 2. 'Assessed income' means the amount assessed by the trustee to be the income that the bankrupt is likely to derive, or has derived, during the CAP. The 'actual income threshold amount' (AITA) is a set amount that depends on the number of dependants the bankrupt has — s 139K. The AITA is calculated with reference to the 'base income threshold amount' (BITA) — s 139K — and is updated twice a year in March and September — AFSA *Income Contributions* para 2.3.
[196] In terms of s 139K a dependant is a person who, during the relevant CAP, satisfies all the following conditions: he or she resides with the bankrupt; is wholly or partly dependent on the bankrupt for economic support; and does not earn more income than the amount prescribed by regulation.
[197] See AFSA *Income Contributions* para 1.4.
[198] See s 139L.
[199] That is, salary, wages, and profits obtained from carrying on a business or profession — see AFSA *Income Contributions* para 3.4.
[200] Section 139L(1)*(a)*. In terms of s 139M 'income' includes amounts 'derived' by a bankrupt even though they are not actually received by the bankrupt. In terms of s 139K 'derived' means 'earned, derived or received from any source, whether within or outside Australia'.
[201] Section 139N(1)*(b)*.
[202] The definition of 'income tax' includes 'Medicare levy' — see s 139K.
[203] Section 139N(1).

liability, the Act obliges a bankrupt to provide evidence of his or her and his or her dependants' income not later than 21 days after the end of a CAP. The evidence should relate to income derived within the particular CAP, as well as income that the bankrupt expects to derive during the next CAP.[204]

Section 139T provides for a possible reduction[205] in a bankrupt's contribution liability where it appears that he or she would suffer financial hardship if required to pay his or her assessed liability. The trustee must make a determination based on satisfactory evidence of the bankrupt's income and expenses and other relevant matters on which he or she relies to establish the reasons for the application.[206] The list of reasons is all-inclusive and the trustee does not have a discretion in this regard.[207] The Act requires the trustee to give written notice to the bankrupt setting out his or her decision, the evidence on which the decision was based and his or her reasons for the decision.[208] As is the position with regard to all assessments of a bankrupt's liability to make income contributions,[209] the trustee's decision under section 139T is reviewable.[210]

Should a bankrupt provide false or misleading information to the trustee pertaining to his or her income or where he or she failed to disclose any particulars of income, or failed to pay income contributions he or she was liable to pay,[211] the trustee may object to the discharge, which may then be extended for a period of eight years.[212]

[204] See s 139U. The trustee may also require the bankrupt to provide additional evidence where the trustee on reasonable grounds suspects that particulars provided by the bankrupt in a statement are false or misleading or have been omitted from the statement — s 139V.

[205] If the trustee is satisfied that the bankrupt will indeed suffer hardship, he or she may for the purposes of the formula in s 139S, make a determination to increase the AITA to an amount which he or she thinks fit — s 139T(6). Such determination must then be made an assessment in terms of s 139W in order to give effect to it — s 139T(8).

[206] Section 139T(3). The trustee must make his or her determination not later than 30 days after the day on which the application is received, and if he or she has not made the decision within the 30 days it will be regarded to have been refused by the trustee — s 139T(4) and (5).

[207] AFSA *Income Contributions* para 5.20. The reasons relate to: ongoing medical expenses incurred by the bankrupt for him- or herself or for a dependant; cost of child day-care to enable the bankrupt to continue in employment; certain rental costs; substantial expenses for travelling to and from work; loss of financial contributions by a spouse or other person residing with the bankrupt; and any other reason prescribed by the regulations (currently there are no reasons prescribed) — see s 139T(2) and AFSA *Income Contributions* para 5.20.

[208] Section 139T(9).

[209] See ss 139ZA–139ZF providing for a possible review by the Inspector-General and Administrative Appeals Tribunal.

[210] Section 139T(12).

[211] See ss 149D(1)*(da)*, *(e)* and *(f)*.

[212] See ss 149A, 149B and 149D.

(iii) United States of America

The American consumer insolvency system is regarded as the most liberal, debt-forgiving system in the world.[213] Unlike the South African system, debt relief is one of the primary purposes of the American system.[214] In this regard, the procedures in terms of the Bankruptcy Reform Act of 1978 (the Bankruptcy Code) provide for a discharge of debt obligations which enables a consumer debtor to make a fresh start.[215] The fresh-start principle relates to a financial rebirth of a debtor. The aim is to provide debt relief to honest and unfortunate debtors and to enable them once again to become productive members of society and the economy.[216]

The Bankruptcy Code provides for two forms of debt relief: liquidation under Chapter 7; and rehabilitation under Chapters 11[217] and 13. Chapter 7 provides for a procedure that is aimed exclusively at the liquidation and distribution of a debtor's assets.[218] In terms of Chapter 7 a debtor receives an almost immediate[219] discharge of debt in exchange for the surrender of all his or her assets to the trustee.[220]

The Code expressly excludes the debtor's earnings for services performed after commencement of the bankruptcy petition from a bankrupt estate.[221] The Code distinguishes between property *excluded* from the estate[222] and which does not belong to the estate, and property which belongs to the estate but is *exempt* from liquidation and distribution by the trustee.[223] Under the Code, almost everything that a debtor owns falls into the estate whereafter it is divided between him or her and

[213] Porter & Thorne, 'The failure of bankruptcy's fresh start' (2006) 92 *Cornell Law Review* 67 at 79; Kilborn, '*La responsabilisation de l'economie*: What the United States can learn from the new French law on consumer overindebtedness' (2005) 26 *Michigan Journal of International Law* 619 at 632.

[214] See *Local Loan Co v Hunt* 292 US 234 244 (1934).

[215] Ferriell & Janger, *Understanding Bankruptcy* 3 ed (LexisNexis 2013) 2.

[216] This is the so-called 'economic approach' to debt relief in the USA — see Howard, 'A theory of discharge in consumer bankruptcy' (1987) 48 *Ohio State Law Journal* 1047 at 1048.

[217] Chapter 11 provides for a reorganisation process similar to that of Chapter 13. However, the Chapter 11 process is more expensive and complicated than the one in Chapter 13 and therefore generally only used by businesses — Ferriell & Janger, (LexisNexis 2013) 166.

[218] In practice, liquidation cases under Chapter 7 are usually 'no-asset' cases — Ferriell & Janger, (LexisNexis 2013) 607.

[219] Usually within two or three months after insolvency proceedings have been initiated — Porter & Thorne, (2006) 92 *Cornell Law Review* 67 at 76.

[220] Often referred to as 'straight bankruptcy'. See in general in respect of the Chapter 7 procedure, Ferriell & Janger, (LexisNexis 2013) 607–643.

[221] Section 541*(a)*(6).

[222] See Ferriell & Janger, (LexisNexis 2013) 214–226.

[223] See in respect of 'exempt' assets, s 522 of the Code and Ferriell & Janger, (LexisNexis 2013) 401–441.

his or her creditors.[224] Various financial assets are exempt,[225] including wages, which are protected by the federal Consumer Protection Act[226] and, in some cases, more extensively by state law.[227]

Chapter 13 provides for the rescheduling of debts of an individual with a stable and regular source of income.[228] The source of the income is irrelevant.[229] However, there are limits in respect of the amount of a debtor's outstanding unsecured and secured debts,[230] which restricts Chapter 13 to relatively small cases involving less complicated finances.[231]

The Chapter 13 procedure entails a payment plan for a maximum duration of three or five years[232] in terms of which a debtor's future income, after meeting his or her basic living expenses,[233] is utilised for the total or partial satisfaction of creditors' claims. The debtor thus need not surrender his or her assets as is the case under a Chapter 7 bankruptcy.[234]

Creditors are usually not involved in the formulation of the plan and they do not vote on it.[235] The plan is confirmed by a court if it meets the standards of the Code,[236] amongst others, the requirement that it must be financially feasible. Therefore, a plan cannot be confirmed if a debtor lacks sufficient income to fund the plan and to meet his or her and his or her dependants' living expenses.[237] A debtor who does not earn sufficient income will thus have to utilise Chapter 7 to obtain debt relief.

[224] Ferriell & Janger, (LexisNexis 2013) 198 and 401. In this way preliminary disputes over what is or is not part of the bankrupt estate are avoided and the determination as to who gets what from the estate is left for later — Ferriell & Janger, (LexisNexis 2013) 198.

[225] In terms of s 522*(d)* of the Code or under the applicable state exemption statute — Ferriell & Janger, (LexisNexis 2013) 423.

[226] USC s 1673*(a)*(1). In most cases, 75 per cent of a person's disposable earnings is protected from creditors' claims.

[227] Ferriell & Janger, (LexisNexis 2013) 423–424.

[228] Section 101(30). See in general in respect of the Chapter 13 procedure, Ferriell & Janger, (LexisNexis 2013) 645–708.

[229] Ferriell & Janger, (LexisNexis 2013) 646.

[230] See s 109*(e)*. The figures in this section are adjusted every three years — s 104*(b)*(1).

[231] Ferriell & Janger, (LexisNexis 2013) 647.

[232] See Ferriell & Janger, (LexisNexis 2013) 674. The duration of the plan depends on the 'applicable commitment period' — s 1325*(b)*(1)(B) and *(b)*(4). Debtors with past annual income equal to or higher than their home state's median family income for households of similar size, must submit a five-year plan, while debtors with income below the applicable state median may propose a three-year plan — s 1325*(b)*(4)(A).

[233] See s 1325*(b)*(2).

[234] Ferriell & Janger, (LexisNexis 2013) 645.

[235] Ferriell & Janger, (LexisNexis 2013) 653.

[236] See s 1325 and Ferriell & Janger, (LexisNexis 2013) 668.

[237] See Ferriell & Janger, (LexisNexis 2013) 670. Section 1325*(a)*(6) provides that 'the debtor will be able to make all payments under the plan and to comply with the plan'. See also s 1322*(a)*(1) in term of which a Chapter 13 plan must provide for the submission of a

A debtor may propose to modify a Chapter 13 plan before or after its confirmation.[238] However, confirmation of a plan does not discharge a Chapter 13 debtor.[239] A Chapter 13 discharge is granted only when the debtor has made full payment in terms of the payment plan.[240]

Unlike the South African system, which requires advantage for creditors, there is no link between eligibility for a discharge and the amount that creditors receive. However, since the introduction of the Bankruptcy Abuse Prevention and Consumer Protection Act, 2005, (BAPCPA)[241] certain debtors are now required to earn their discharge by making payments under a Chapter 13 plan.[242] In this regard, BAPCPA has limited debtors' free access to debt relief by denying them the relief under Chapter 7 in instances where it appears that they are abusing the process since they are able to pay a portion of their debt from future income. The BAPCPA introduced a means test in terms of which debtors are channelled to the Chapter 13 procedure when their income exceeds the median income in their state of residence and they have sufficient disposable income to make meaningful payments to their creditors under a Chapter 13 plan.[243]

(d) Legal comparison and comment

From the above analysis it is clear that section 23(5) of the South African Insolvency Act does not regulate an insolvent's liability for income contributions comprehensively. It provides no specific guidance as to how the Master should exercise his or her discretion under this subsection, and no guidelines are given as to what exactly the income of an insolvent, or possible exclusions from this income, entails. The Act furthermore does not provide specific guidelines as to the process that a trustee should follow before he or she approaches the Master for his or her determination. There are no specific provisions as regards the

sufficient portion of the debtor's future income and earnings to the supervision and control of the trustee as is necessary for the execution of the plan.

[238] See ss 1323 and 1329. See Ferriell & Janger, (LexisNexis 2013) 704–707.

[239] Ferriell & Janger, (LexisNexis 2013) 703.

[240] Section 1328*(a)*. A debtor may, however, request a Chapter 13 'hardship discharge' if his or her failure to complete the plan is due to circumstances for which the debtor should not justly be held accountable, the creditors have received at least the liquidation value of their unsecured claims, and modification of the plan is not practicable — s 1328*(b)*.

[241] Pub L No 109–8, 119 Stat 23.

[242] The American system's fresh-start approach to debt relief has thus moved closer to the traditional European so-called 'earned-discharge' approach — see in this regard Roestoff & Coetzee, 'Debt relief for South African NINA debtors and what could be learned from the European approach' (2017) 2 *CILSA* 251.

[243] Section 707*(b)*(2). The calculation in this regard is based on a complicated statutory formula — see Ferriell & Janger, (LexisNexis 2013) 165 and 611–631.

evidence that should be provided to the Master to enable him or her to exercise his or her discretion in terms of section 23(5). No time limit is given as to when a trustee must approach the Master with a request for a determination. The collection of surplus income and the enforcement of an insolvent's liability to make income contributions are also not dealt with in any great detail. Finally, the Act does not provide for a possible variation of the Master's determination should an insolvent's financial situation change.

The English Act's bankruptcy provisions also do not regulate a bankrupt's liability for income contributions extensively. However, the Act's provisions pertaining to IPOs are certainly an improvement on section 23(5) to the extent that they contain a more detailed definition of 'income', and also provide for the possible variation of an IPO should the bankrupt's financial situation change. Unlike the Australian provision, the English provision does not provide a formula for the calculation of a bankrupt's liability to make income contributions, but leaves it to the court to decide what his or her and his or her dependants' 'reasonable domestic needs' are. In this regard, the World Bank has noted that a flexible, discretionary approach, while theoretically attractive, is quite problematic in practice.[244] One of the problems relates to the inevitable variation in how decision makers in the various regions exercise their discretion.[245] This, according to the World Bank, raises serious concerns of fairness and equality of treatment.[246] However, it is submitted that the English discretionary approach is still an improvement on section 23(5) to the extent that it requires judicial supervision over the process culminating in the attachment of a bankrupt's income, while section 23(5) empowers the Master to make the decision regarding the possible attachment of surplus income. In light of the recent decision in *University of Stellenbosch Legal Aid Clinic & others v Minister of Justice and Correctional Services & others*,[247] it is submitted that insolvents who are required to make income contributions based on a decision made by the Master in terms of section 23(5), may perhaps question the constitutionality of their position as this subsection in fact authorises the attachment of an insolvent's income without the constitutionally

[244] Working Group on the Treatment of the Insolvency of Natural Parsons, *Report on the Treatment of the Insolvency of Natural Persons* (World Bank 2013) para 285 — (hereafter *World Bank Report*).

[245] *World Bank Report* para 288.

[246] *World Bank Report* para 288.

[247] 2016 (6) SA 596 (CC).

required judicial supervision.[248] In *Stellenbosch*, the Constitutional Court held that the South African Constitution requires judicial supervision of execution processes against all forms of property of debtors, including their income.[249] Although the Master's decision in terms of section 23(5), being a quasi-judicial or administrative discretion, is subject to review in terms of section 151 of the Insolvency Act, it is submitted that the prospect of a review does not address the issue here, as the insolvent will have to approach the court for relief at his or her own expense.[250]

The Australian Bankruptcy Act regulates the trustee's assessment of a bankrupt's liability for income contributions in detail, and not much is left to the trustee's discretion. The trustee makes his or her assessment based on a formula prescribed by the Act and in this regard, a comprehensive definition of the concept 'income' as well as possible exclusions from income are provided. Provision is also made for reassessments where a bankrupt's financial position has changed and all decisions made by the trustee are subject to review. Lastly, the Act also contains comprehensive provisions for the recovery of income contributions by the trustee.

When compared to the equivalent provisions of the English and Australian systems, section 23(5) clearly does not regulate an insolvent's liability for income contributions fairly or adequately, and it is submitted that South African lawmakers should reconsider the provisions of this subsection. However, it is further submitted that income contributions as part of the sequestration process under the Insolvency Act are not truly appropriate and that the American approach, which provides for an exclusively asset-liquidation procedure and a separate income-restructuring procedure, should be followed.[251] Requiring income contributions from insolvents reduces their potential to build a new estate, to improve their financial future, and once again to become productive

[248] See also the provisions of s 23(11) discussed above. As pointed out by Smith, (Butterworths 1988) 89 this subsection introduces a drastic remedy, as a writ of execution can normally only be issued after the correct procedure, culminating in a court order or judgment, has been followed.

[249] In *Stellenbosch* the interests of debtors (in casu, indigent, low-wage earners who had emolument attachment orders issued against them by clerks of the court employed in various magistrates' offices) triumphed over those of creditors. The Constitutional Court (in a majority decision) held that ss 65J(2)*(a)* and 65J(2)*(b)*(1) of the MCA are inconsistent with s 34 of the Constitution and invalid to the extent that they authorise the issuing of emolument attachment orders without judicial supervision — see *Stellenbosch* paras 129–133.

[250] Compare *Theron* at 139C–D and 145A–B discussed above.

[251] Compare Roestoff, 'Rehabilitasie in die Suid-Afrikaanse verbruikersinsolvensiereg: internasionale tendense en riglyne' (2016) 13(2) *LitNet Akademies* 594 at 623.

members of the economy and society.[252] Requiring an insolvent's employer to make payments to the trustee may also have a detrimental effect on an insolvent's employment prospects.[253] Moreover, as indicated, the sequestration process, being an expensive and complex asset-liquidation procedure, is not ideally suited to dealing with the administration of income repayments. The current alternatives to sequestration — administration and debt review — are clearly better suited to deal with the restructuring of an insolvent's income as a measure to satisfy creditors' claims. However, as indicated, until the current South African alternative procedures provide for adequate relief in the form of a discharge of debt obligations, these procedures will not readily be utilised by over-committed debtors to obtain relief.

The analysis of section 23(5) and the alternative procedures, as well as the comparative investigation, clearly indicate that law reform is imperative and lawmakers will have to address the shortcomings of the current South African system comprehensively. Obviously, several issues need to be addressed.[254] As regards the treatment of an insolvent's income under the various insolvency procedures, access requirements,[255] including the issue of directing a debtor to the appropriate procedure, are central. In this regard, it is submitted that lawmakers should consider furthering the current debt-counselling system, which is at present supervised by the NCR, to direct debtors to the appropriate proceedings.[256]

IV CONCLUDING REMARKS

For more than eight decades our courts have grappled with the advantage-for-creditors requirement. To the extent that it results in differentiation between debtors 'with' and debtors 'without' assets and income, and their respective capability or incapability to obtain debt relief, it may perhaps in the near future become a matter for constitutional consideration.[257]

[252] Compare *Theron* at 144A–C.

[253] Compare Fletcher, (Sweet and Maxwell 2009) 243 and see *Yenson* discussed above.

[254] For example, the issue of providing a separate debt relief measure to the NINA debtors — see Coetzee & Roestoff, (2013) 22 *International Insolvency Review* 188; Coetzee, 'Does the proposed pre-liquidation composition proffer a solution to the No Income No Asset (NINA) debtor's quandary and, if not, what would?' (2017) 80 *THRHR* 18.

[255] Compare the discussion of the means test introduced by BAPCA in para III*(c)*(iii) above.

[256] Compare Roestoff & Coetzee, (2017) 50(2) *CILSA* (forthcoming).

[257] Compare Coetzee, (2016) 25 *International Insolvency Review* 36.

Unlike the position under South African law, the foreign consumer insolvency systems discussed above do not require advantage as a prerequisite for debt relief. An insolvent's income as a possible source of advantage or route to obtaining debt relief, would thus not, as was the position in *Van Dyk*, be an issue in any of these systems. The real significance and implication of *Van Dyk* is thus not that it provides modern authority for the view that a debtor may not forfeit his or her salary with a view to establish advantage. It rather points to the fact that a comprehensive review of the South African system is inevitable and that those debtors who are not able to prove advantage should be afforded the opportunity to obtain relief in terms of an alternative discharge procedure.

According to the World Bank, the 'economic rehabilitation' of a debtor (and, therefore, the prospect of a debtor being able to re-establish his or her economic capacity) should be one of the principal purposes of any consumer insolvency system.[258] Therefore, the focus should not only be on giving a debtor a 'fresh start' by allowing him or her a discharge of all pre-sequestration debts after rehabilitation, and thus a mere temporary reprieve,[259] but also to provide him or her with a 'new start' and thus the prospect of an improved financial future.[260] In this regard, Howard has argued that 'the availability of a debtor's earning capacity as an asset free from the reach of creditors is what gives the debtor a new start'.[261] An unconditional exclusion of an insolvent's income from his or her insolvent estate provides a mechanism through which he or she could be assisted to improve his or her standard of living, to rebuild his or her estate, and eventually to return to economic productivity. At the same time, the dignity of an insolvent and his or her dependants is restored and the potential of their becoming a burden on the state is reduced.[262]

[258] *World Bank Report* para 354.
[259] Howell, (2014) 14(3) *QUT Law Review* at 52.
[260] Ibid.
[261] Howard, (1987) 48 *Ohio State Law Journal* 1047 at 1085. See also Howell, (2014) 14(3) *QUT Law Review* at 36.
[262] Compare *Theron* at 144A–C and Fletcher, (Sweet and Maxwell 2009) 242.