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**SOUTH AFRICA'S NINA DEBTOR PLIGHT:
LESSONS FROM THE SCOTTISH CONSUMER
DEBT RELIEF SYSTEM POST THE COVID-19
PANDEMIC**

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Abstract

In this article, the authors consider the plight of the so-called No Income No Asset (NINA) debtors against the backdrop of debt relief measures provided for this category of debtors who find themselves in a debt trap. It is a well-known fact that South African insolvency law does not provide sufficient debt relief measures for all types of debts, and those, like the NINA debtors, who are effectively excluded from the relief afforded by the sequestration and ultimately rehabilitation procedures of the Insolvency Act 24 of 1936 have no proper statutory measure to provide a discharge of debt in instances where they may desperately need it. It is submitted that the debt restructuring mechanisms provided by the administration procedure and debt review measure, are not sufficient since these do not offer a discharge. Reference is made to the newly proposed debt intervention procedure that may provide some relief in this regard, but it is argued that the legislature needs to consider further procedures to deal with their plight. With the view of making some recommendations for reform, aspects of mainly the Scottish system of debt relief measures are also considered.

Keywords: *No Income No Asset (NINA) Debtors; debt relief measures; sequestration; debt restructuring; Covid-19 pandemic; rehabilitation; administration; debt review; debt intervention; discharge*

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I INTRODUCTION

South Africa is plagued by extreme consumer over-indebtedness¹ coupled with abject poverty.² The latter has resulted in many debtors being perpetually trapped in debt because they lack the means to meet their financial obligations or to access the debt relief system.³ This has, at times, culminated in debtor intimidation by creditors seeking to enforce their debts. Among the distinct categories of debtors, the so-called No Income No Asset (NINA)⁴ debtor category, which comprises overcommitted debtors in dire financial circumstances is the most susceptible to intimidation because of the lack of statutory protection afforded to this group.⁵

In the main, debtor protection may be facilitated by accessing the debt relief system, which in turn may result in a concomitant discharge of debts. In light of the above, this article outlines the protection afforded to NINA debtors within the South African natural person debt relief system and contrasts it with the protection afforded to this group within the Scottish personal insolvency system. This comparative analysis is important because of the comprehensive protection afforded to low or no income earners within the Scottish debt relief system.⁶ This analysis is positioned in the background of the devastation caused by the Coronavirus Disease 2019 pandemic, which has had a ripple effect on debtors.⁷ Therefore, highlighting the comprehensive protection of the Scottish relief system may guide law reform in South Africa to ensure a safe landing for debtors who are recovering from the negative impact of the Covid-19 pandemic. In summary, the main aim of this contribution is to highlight the forward-looking NINA-specific reform initiatives implemented in the Scottish relief system which may influence law reform for a developing system like South Africa.

The Covid-19 pandemic affected many sectors of the global economy

¹ See the National Credit Regulator, 'Credit Bureau Monitor', available at <https://www.ncr.org.za>, accessed on 27 January 2023 for an indication of the over-indebtedness in South Africa.

² See Stats SA, 'Five facts about poverty in South Africa', available at <https://bit.ly/3HDALjf>, accessed on 27 January 2023.

³ See Coetzee, *A comparative appraisal of debt relief measures for natural person debtors in South Africa* (unpublished LLD thesis, University of Pretoria, 2015) 157.

⁴ NINA debtors may also be referred to as Low Income Low Asset debtors (LILA), however, the term NINA debtors is preferred in this article.

⁵ See, in general, 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 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 18.

⁶ See s 2(2) read with schedule 1 of the Bankruptcy (Scotland) Act 2016 ('Bankruptcy Act').

⁷ Coronavirus Disease 2019 ('Covid-19').

and this has had a ripple effect on consumer debtors.⁸ Globally, the number of debtors substantially increased because of the pandemic-enforced retrenchments coupled with the loss of one or more sources of income for some debtors.⁹ In consideration of the dire circumstances of low or no income debtors, which has been compounded by the Covid-19 pandemic, this paper seeks to draw valuable lessons from the established personal debt relief system of Scotland. Drawing lessons from this jurisdiction is necessary because it may guide law reform for South Africa's developing relief system. In achieving this objective, this discussion is structured as follows. First, a precursory analysis of the general global NINA debtor plight is undertaken. After this, the natural person debt relief landscape of South Africa is explored. This is useful in highlighting the marginalisation of NINA debtors from the prevailing natural person debt relief system. Following this analysis, the reform initiatives within the South African debt relief system are outlined. The main focus of this section is the National Credit Amendment Act, which, once it commences, will introduce the debt intervention measure into the insolvency system.¹⁰ After this, an analysis of the Scottish personal insolvency regime is undertaken. This section is the main focus of this paper because it highlights the reform initiatives implemented within this system to mitigate the impact of the Covid-19 pandemic. Lastly, a conclusion is drawn and a summary of the recommendations for the reform of South Africa's debt relief system provided throughout this article is outlined.

II THE GLOBAL NINA DEBTOR PLIGHT

No firm empirical research has been undertaken regarding the proportion of low- or no-income debtors within the South African consumer insolvency system. However, it has been remarked that NINA debtors constitute a large number of debt relief applicants globally.¹¹ Consequently, this large number of NINA debtor applications reinforces the

⁸ See Fortune, "“This crisis is like no other”: Coronavirus recession will likely be worst since the Great Depression, predicts IMF" available at <https://bit.ly/33IDJPC>, accessed on 27 January 2023. Also, see Nicola et al, 'The socio-economic implications of the coronavirus pandemic (COVID-19): A review' (2020) 78 *International Journal of Surgery* 185.

⁹ See, in general, Kose et al, 'What has been the impact of Covid-19 on debt? Turning a wave into a tsunami' 2021 *World Bank Policy Research Working Paper* 99871.

¹⁰ The National Credit Amendment Act 7 of 2019 ('2019 Amendment Act'). The 2019 Amendment Act was assented to on 13 August 2019 but is yet to commence.

¹¹ See, amongst others, Ramsay, 'The new poor person's bankruptcy: Comparative perspectives' (2020) 29 *International Insolvency Review* 5, where it is estimated that this group of debtors amounts to millions in number.

need for inclusive debt relief systems, which facilitate access to all categories of debtors. In this respect, debt relief systems must facilitate access to all debtors and guarantee a discharge of debts regardless of the debtor's financial circumstance.

Marginalisation of low- or no-income earning debtors mostly emanates from the stringent requirements in some jurisdictions which require some form of repayment as a prerequisite to obtaining a discharge.¹² In relation to the South African insolvency system, NINA debtors are marginalised because of the stringent access and procedural requirements associated with the statutory debt relief procedures. It is argued that South Africa's legislative system exists on an overarching misconception of the principle of equality that has been correctly debunked as a smokescreen that hides an underlying systemic inequality in natural person debt relief regulation.¹³ This inequality is manifested through the unfair discrimination of NINA debtors by sidelining them from accessing the debt relief system.¹⁴ This dichotomy between those who can access and obtain a discharge of debts, and the less fortunate who cannot access the debt relief system persists contrary to the entrenched constitutional principle of equality.¹⁵

Marginalisation of NINA debtors within South Africa's debt relief system starkly contrasts the growing international trends in insolvency that champion the protection of all 'honest but unfortunate' debtors — a principle which does not exist in the prevailing South African insolvency system.¹⁶ The origins of this trend can be traced to the United States of America's bankruptcy system, which is underpinned by the 'fresh start' philosophy.¹⁷ However, the South African legislature has taken steps to alleviate the plight of NINA debtors by introducing the debt intervention measure, which is not yet in force. A discussion of the

¹² See, among others, Boterere, 'Zimbabwe's natural person debt relief system: Much-needed relief for No Income No Asset (NINA) debtors or "out with the new"?' (2021) 54 *De Jure Law Journal*.

¹³ See, amongst others, Coetzee & Roestoff, 'Rectifying an unconstitutional dispensation? A consideration of proposed reforms relating to no income no asset debtors in South Africa' (2020) 29 *International Insolvency Review* 96.

¹⁴ Coetzee & Roestoff, (2020) 29 *International Insolvency Review* 96.

¹⁵ See s 9 of the Constitution of the Republic of South Africa, 1996.

¹⁶ See, amongst others, Littwin, 'Low-income, low-asset debtors in the U.S bankruptcy system' (2020) 29 *International Insolvency Review* 116. Also, see *Local Loan Co v Hunt* 1934 292 US 244 para 12.

¹⁷ See Van Apeldoorn, 'The "fresh start" for individual debtors: Social, moral and practical issues' (2008) 17(1) *International Insolvency Review* 66, where the fresh start philosophy was summarised as referring to an almost automatic right to be discharged from pre-bankruptcy debts in a fairly quick and formal bankruptcy proceeding.

debt intervention measure and other reform initiatives, hereunder follows a brief overview of the prevailing debt relief measures.

III DEBT RELIEF IN SOUTH AFRICA

South Africa's disintegrated natural person debt relief system is primarily based on an early twentieth-century piece of legislation that provides for a creditor-oriented sequestration procedure.¹⁸ Although it is not the aim of the Insolvency Act,¹⁹ the sequestration procedure is regarded as the primary debt relief measure because it is the only procedure that results in a discharge of debts for qualifying debtors with disposable assets and/or excess income.²⁰ Secondary debt relief measures within this system are currently the administration order²¹ and the debt review procedure.²²

The sequestration procedure is an asset liquidation measure that entails the liquidation of a debtor's assets to satisfy his debts. Access to this measure is initiated by a debtor's voluntary application to the court for the surrender of his estate.²³ The application may only be accepted if the debtor can prove that he is insolvent and that he has sufficient realisable assets to defray the costs of the sequestration process.²⁴ However, this results in the sidelining of low- or no-income debtors because they do not have the excess income or disposable assets to defray the costs of the liquidation process. A further obstacle to NINA debtors is the formal court-based nature of the liquidation process. This sidelines NINA debtors because the court costs are out of their reach, and are thus a barrier to relief.

Debtors may also be forced to access the sequestration procedure through an application by a creditor or creditors, which may be lodged with the court for the compulsory participation of an over-committed debtor.²⁵ The compulsory sequestration application may only be filed

¹⁸ Insolvency Act 24 of 1936 ('Insolvency Act'). The insolvency system is disintegrated as it is regulated by three different pieces of legislation as indicated below. Also, see Coetzee & Roestoff, (2020) 29 *International Insolvency Review* 96 at 96–98.

¹⁹ See *Ex parte Ford* 2009 (3) SA 376 (WCC) 383.

²⁰ Debt relief is not the aim of the Act.

²¹ The Magistrates' Courts Act 32 of 1944 ('Magistrates' Courts Act'). Also, see the Lower Courts Bill and the South African Law Reform Commission *Report on the review of administration orders* Project 127 for an indication of the proposed amendments to the administration order procedure.

²² The National Credit Act 34 of 2005 ('NCA').

²³ Section 3 of the Insolvency Act.

²⁴ Section 6(1) of the Insolvency Act. The sequestration must be to the advantage of creditors.

²⁵ Section 9 of the Insolvency Act.

after a debtor has committed an act of insolvency.²⁶ Although the application stages of the voluntary and compulsory applications differ, the effect of the applications is similar.

As pointed out above, the sequestration procedure is regarded as the primary debt relief measure because it provides for a much-needed discharge of debts for qualifying debtors.²⁷ A discharge of debts is an important aspect of the insolvency system and it may be accessed at the end of the liquidation process. To this end, debtors may obtain an automatic rehabilitation after ten years from the date of sequestration have elapsed.²⁸ However, this period may be extended by any interested person through a court application,²⁹ and it may also be shortened through an application by the debtor.³⁰ Rehabilitation is important because it ends the sequestration process.³¹ This in turn ultimately releases the debtor from all his unsecured pre-sequestration debts³² and from every disability which arose because of the sequestration.³³

Key to the South African insolvency system is the advantage to creditors principle.³⁴ This principle requires that all applications be accompanied by proof that accessing the sequestration procedure will result in an advantage for all creditors.³⁵ The Insolvency Act does not define what the advantage to creditors principle entails. However, case law indicates that this principle refers to the provision of a non-negligible dividend from the free residue to all creditors with an unsecured claim.³⁶ Consequently, this principle is a barrier for NINA debtors who lack disposable assets and/or excess income, which are integral in facilitating the distribution of dividends to creditors.

²⁶ See s 8 of the Insolvency Act for an indication of the different acts of insolvency.

²⁷ See, among others, *Mayet v Pillay* 1955 (2) SA 311 (N); *R v Meer* 1957 (3) SA 619 (N); *Fesi v Absa Bank Ltd* 2000 (1) SA 502 (C); *Ex parte Ford* 209 (3) SA 376 (WCC) 383; *Ex parte Shmukler-Tshiko* 2013 JOL 29999 (GSJ); *Ex parte Snooke* 2014 (5) SA 426 (FB) para 16 and *Ex parte Ogunlaja* 2011 JOL 27029 para 9.

²⁸ Section 127A of the Insolvency Act.

²⁹ Section 127A(1) of the Insolvency Act.

³⁰ Section 124 of the Insolvency Act. Application for rehabilitation can only be granted at the discretion of the court.

³¹ Section 129(1)(a) of the Insolvency Act.

³² Section 129(1)(b) of the Insolvency Act.

³³ Section 129(1)(c) of the Insolvency Act.

³⁴ See s 10(c) of the Insolvency Act. This principle entails that access to the sequestration measure is limited to debtors who can prove that the measure will be to the advantage of all creditors.

³⁵ See ss 6, 10 and 12 of the Insolvency Act. Once a sequestration application is lodged, the *concursum creditorium* principle applies. This entails that the interests of creditors as a group are ranked in priority over the individual interests of creditors.

³⁶ *Trust Wholesalers & Woollens (Pty) Ltd v Mackan* 1954 2 SA 109 (N) para 111. Also, see *Trust Bank of Africa Limited v Demmers* 1968 (2) PH C13 (D); *Hillhouse v Stott* 1990 (4) SA 590 (W) 583; *BP Southern Africa (Pty) Ltd v Gaskell* [2010] JOL 25515 (KZP) paras 27–29.

An over-indebted consumer can alternatively obtain debt relief by lodging a debt review application with a debt counsellor.³⁷ Suppose a debtor lodges an application for debt review; the debt counsellor must investigate his financial circumstances³⁸ and make a recommendation to the Magistrates' Courts in respect of the application.³⁹ However, this procedure is only accessible by debtors who are party to a credit agreement that falls under the ambit of the NCA.⁴⁰ A debt review order entails a court-sanctioned restructuring of debts; thus, before access is granted, a debtor must prove that he has a steady source of income to facilitate the debt repayments.⁴¹ Resultantly, NINA debtors are in effect excluded from this procedure because they have low or no income which does not permit repayments.⁴² The debt review procedure does not result in a discharge of debts; consequently, debtors are trapped in the debt relief system until they meet their restructured obligations.

In addition to these measures, debtors may also access the insolvency system through the administration order procedure.⁴³ An administration order refers to a repayment plan⁴⁴ that is accessible to debtors whose debts do not exceed the R50 000 threshold.⁴⁵ Because the administration procedure is a repayment plan, a debtor must have excess income that can be utilised to offset his obligations and pay the administration costs.⁴⁶ It is also noteworthy that this measure does not result in a discharge of debts.

Therefore, it may be deduced that the alternative relief measures, namely, the administration order and debt review procedures, do not cater for NINA debtors' needs because of the stringent access and procedural requirements of these procedures. Coetzee and Roestoff⁴⁷

³⁷ Section 86 of the NCA. Over-indebtedness is mandatory in terms of s 86(6)(a) and (7)(a) of the NCA.

³⁸ Section 86(6) of the NCA.

³⁹ Section 86(7)(c) of the NCA.

⁴⁰ See s 1 read with s 8 of the NCA for the determination of a credit agreement. This sidelines all debtors who might be best assisted by accessing this measure but do not fall under the ambit of the Act.

⁴¹ Section 86(7)(c) of the NCA.

⁴² Section 86(7)(b) read with s 86(8)(a). Unqualifying debtors may conclude a voluntary debt rearrangement plan. However, a voluntary debt rearrangement plan does not apply to NINA debtors because they lack the bargaining power to conclude a viable plan.

⁴³ Section 74(1) of the Magistrates' Courts Act.

⁴⁴ See s 74C of the Magistrates' Courts Act.

⁴⁵ GN 217 in GG 37477 of 27 March 2014. Section 74(1)(b) of the Magistrates' Courts Act.

⁴⁶ The debtor may in terms of s 74C(b)(i) of the Magistrates' Courts Act be required to have realisable assets which can be attached, and the proceeds will be distributed to his creditors.

⁴⁷ Coetzee & Roestoff, 'Consumer debt relief in South Africa; Lessons from America and England; and suggestions for the way forward' (2012) 24 *South African Mercantile Law Journal* 69.

correctly remarked that these measures are aimed at misfortunate debtors' needs, who have encountered temporary financial setbacks.

Lastly, debtors can also conclude informal voluntary debt rearrangement plans with their creditors. However, because of the dire financial circumstances of NINA debtors, they lack the bargaining power that can ensure a fair voluntary debt rearrangement plan.⁴⁸ Where an informal plan is concluded, the agreement is unenforceable because NINA debtors do not have an income to facilitate the debt repayment.

In summary, NINA debtors in South Africa are currently hindered from accessing the formal debt relief system. Although the relief measures do not specifically exclude this debtor group, the entry criteria result in the exclusion. This marginalisation leads to low- or no-income earning debtors being perpetually trapped in debt. Rochelle⁴⁹ remarks that South African debtors can be 'too poor to go bankrupt'.

With this background, the South African legislature has taken necessary steps to remedy this exclusion through several reform initiatives that are aimed at ensuring that the debt relief system accommodates all categories of debtors, especially the NINA category. The main reform initiatives are discussed below. This is followed by an analysis of the Scottish natural person debt relief system; the aim of which is to draw lessons for further reform of the South African insolvency regime.

IV SOUTH AFRICA'S REFORM INITIATIVES

(a) *The proposed pre-liquidation composition*

South Africa's legislature introduced an Insolvency Bill in the year 2000, followed by a revised Insolvency Bill in the form of a working paper that was circulated in 2015.⁵⁰ The 2015 Insolvency Bill introduced the proposed pre-liquidation composition that specifically aims to assist over-indebted consumers who are prohibited from accessing the prevailing debt relief system.⁵¹ The proposed pre-liquidation composition entails an out-of-court pre-liquidation agreement between a debtor and his creditors.⁵² Unlike the 2000 Insolvency Bill, the 2015 Insolvency Bill

⁴⁸ See World Bank, 'Report on the Treatment of the Insolvency of Natural Persons' (2013) 47.

⁴⁹ Rochelle, 'Lowering the penalties for failure: Using the insolvency law as a tool for spurring economic growth: The American experience and possible uses for South Africa' (1996) *Tydskrif vir die Suid-Afrikaanse Reg* 319.

⁵⁰ Hereinafter referred to as the 2000 Insolvency Bill and the 2015 Insolvency Bill, respectively.

⁵¹ See 2014 Explanatory memorandum 201, 208.

⁵² Clause 118(1) of the 2015 Bill.

places the threshold of debts for prospective applicants at a maximum of R200 000.⁵³

The proposed pre-liquidation composition must be accepted by two-thirds of concurrent creditors to be binding.⁵⁴ To access this measure, a debtor must file a signed copy of the composition with an administrator, who plays a supervisory role over the procedure.⁵⁵ After this, the administrator must organise a hearing where the debtor is questioned by interested parties on his financial circumstance, before agreeing on a composition.⁵⁶ The composition will be binding on all creditors if the debtor and two-thirds of concurrent creditors reach an agreement and the administrator sends a certificate to the Master after the hearing.⁵⁷

Commentators have criticised the proposed pre-liquidation composition because it does not address NINA debtors' needs.⁵⁸ First, NINA debtors cannot afford the costs of this procedure because of their financial circumstances. Coetzee⁵⁹ argues that this procedure may exacerbate NINA debtors' dire position because they have to incur costs to attend the hearing and pay other costs associated with this measure. Furthermore, low- or no-income debtors lack bargaining power; thus, they may be forced into onerous agreements by creditors.⁶⁰

In summary, despite the proposed pre-liquidation composition aiming to accommodate marginalised NINA debtors, it falls short of meeting the specific needs of this category. This measure may however be used by other groups of debtors such as those experiencing a temporary setback.

(b) The debt intervention measure

The debt intervention measure, which is not yet in operation, was introduced by the 2019 Amendment Act.⁶¹ This measure aims to address the plight of excluded NINA debtors by facilitating access to the debt relief system and affording a much-needed discharge of debts, as a tailpiece. It also seeks to alleviate the over-indebtedness crisis in South

⁵³ Clause 118(1) of the 2015 Bill. The 2000 Insolvency Bill did not have any debt threshold.

⁵⁴ Clause 118(17) of the 2015 Bill.

⁵⁵ Clause 118(1) of the 2015 Bill.

⁵⁶ Clause 118(10) of the 2015 Bill.

⁵⁷ Clause 118(17) of the 2015 Bill.

⁵⁸ See, amongst others, Coetzee, (2015) para 5.2 for a detailed discussion of the proposed pre-liquidation composition procedure.

⁵⁹ Coetzee, (2015) 253.

⁶⁰ Coetzee, (2015) 253.

⁶¹ In terms of the long title, the 2019 Amendment Act seeks to amend the NCA. This will result in the exclusion of debtors whose debts do not fall under the ambit of the NCA.

Africa through, among others, stricter and more rigorous enforcement of the NCA.⁶²

The debt intervention process may be initiated by a debtor's application to the National Credit Regulator.⁶³ On the one hand, when compared to formal court processes that are inaccessible to NINA debtors, the role of the NCR in the debt relief process is crucial because the NCR is more suited to facilitate insolvency matters. However, on the other hand, this may be an obstacle to NINA debtors who have to incur extra transportation costs to access the office of the NCR, which is located in Midrand, Johannesburg; thus, sidelining low- or no-income debtors who cannot access the NCR.⁶⁴

To qualify for the debt intervention measure, the debtor must receive a maximum income of R7 500 monthly and he must not be sequestered or subject to an administration order.⁶⁵ Furthermore, the consumer must have a total unsecured debt⁶⁶ owing to credit providers of no more than R50 000.⁶⁷ It must be noted that filing a debt intervention application prohibits the debtor from entering into further credit agreements.⁶⁸

Suppose the debtor has lodged a debt intervention application. The NCR must provide the applicant with counselling and training aimed at improving his financial literacy.⁶⁹ After assessing the application, the NCR must reject the application if the applicant does not meet the access criteria.⁷⁰ After this, the rejected applicant may, with leave of the

⁶² The Memorandum on the objects of the National Credit Amendment Bill, 2018 21–22.

⁶³ Section 86A(1) of the 2019 Amendment Act. See s 12 of the NCA for a detailed description of the National Credit Regulator ('NCR').

⁶⁴ This challenge may be eradicated by decentralising the office of the NCR in each major city across South Africa.

⁶⁵ As already stated, this challenge may be eradicated by decentralising the office of the NCR in each major city across South Africa. The monthly income threshold has been unjustly lowered and this will marginalise a large number of NINA debtors who receive a monthly income higher than R7 500 but cannot afford to access other debt relief measures. This results in such debtors being pushed into a unique 'missing-middle' debtor group, which comprises debtors who are 'too rich' to access the debt intervention measure and equally 'too poor' to access other debt relief measures.

⁶⁶ See s 86A(2)(a)–(b) for excluded unsecured agreements.

⁶⁷ Section 86A(1) of the 2019 Amendment Act. Also, see amongst others, Coetzee & Roestoff, (2020) 29 *International Insolvency Review* 96 at 107 who propose that the R50 000 threshold must be increased to accommodate NINA debtors with larger debts.

⁶⁸ See s 88A of the 2019 Amendment Act.

⁶⁹ Section 86A(5)(a)–(b) of the 2019 Amendment Act. See Magau, *A comparative legal analysis of the promotion of financial education for low-income earners in South Africa* (unpublished LLD thesis, North-West University, 2022) 93–94, where it is argued that the provision of counselling and training may significantly improve the over-indebtedness crisis in South Africa because the low financial literacy rate among low-income earners has been a contributor to this crisis.

⁷⁰ Section 86A(6)(a) of the 2019 Amendment Act.

Magistrate's Court, apply directly to the same court for an order of debt intervention.⁷¹

The NCR may determine that the applicant does not qualify for debt intervention and hold the view that the applicant is likely to experience difficulties satisfying his obligations under the credit agreements in a timely manner.⁷² In such instances, the NCR must propose a debt rearrangement plan between the applicant and his or her creditors. The debt rearrangement plan is voluntary, and all creditors must agree to the terms of the debt rearrangement plan.⁷³ If an agreement is reached, the NCR must record and file the plan as an order.⁷⁴ However, if any of the creditors reject the rearrangement plan, the NCR must refer the matter with a recommendation to the Tribunal.⁷⁵

The NCR must recommend⁷⁶ that the applicant's obligations be rearranged if his financial circumstance reveals that he qualifies for the debt intervention.⁷⁷ However, the debtor must have a steady source of income enabling a five-year, or longer, rearrangement.⁷⁸ Therefore, this order does not apply to low- or no-income earning applicants.⁷⁹ In relation to this category, if the NCR determines that the applicant qualifies for the debt intervention measure but lacks sufficient income for a debt rearrangement, the NCR must recommend a s 87A order to the Tribunal,⁸⁰ which can be considered by a single member of the Tribunal.⁸¹ After this, the NCR must inform all creditors listed by the applicant and invite them to make any representations to the Tribunal.⁸²

⁷¹ Section 86A(7) of the 2019 Amendment Act. This assists in eradicating arbitrary decisions by the NCR.

⁷² Section 86A(6)(b) of the 2019 Amendment Act.

⁷³ The debt rearrangement plan should not be a mere recommendation but an order of the NCR. Credit providers are predisposed to make decisions which favour their individual interests. This will unfortunately lead to the abuse of debtors who hold an inferior bargaining position.

⁷⁴ Section 86A(8)(a) of the 2019 Amendment Act read with s 86(8)(a) of the NCA.

⁷⁵ Section 86A(8)(b) of the 2019 Amendment Act.

⁷⁶ To the Tribunal.

⁷⁷ Section 87A(6)(d) of the 2019 Amendment Act.

⁷⁸ Section 87A(6)(d) of the 2019 Amendment Act.

⁷⁹ It should be noted that the s 87(1A) provision is meant to effect changes to s 87 of the NCA. Therefore, the above discussion regarding the shortfalls of debt rearrangement orders in terms of the debt review procedure applies with necessary changes.

⁸⁰ Section 86A(6)(e) of the 2019 Amendment Act. A s 87A order refers to an order for debt intervention.

⁸¹ Section 87A(1) of the 2019 Amendment Act. The Tribunal must refer to the debtor's documents and any recommendation(s) made by any of the applicant's creditors. This is plausible as it can expedite the debt intervention process.

⁸² Section 86A(9) of the 2019 Amendment Act. See World Bank, 'Report on the Treatment of the Insolvency of Natural Persons' (2013) 68–69, where minimal creditor participation is preferred. This is an oversight by the legislature because this may lead to the reintroduction of the benefit to creditors requirement.

The Tribunal may reject the application⁸³ or make an order suspending the applicant's qualifying debts along with an order for financial literacy education.⁸⁴ The initial suspension period is twelve months and it extends the prescription period.⁸⁵

The NCR must, after eight months, review the debtor's financial circumstance to determine if it has improved to enable a rearrangement plan.⁸⁶ If it has improved, the NCR must refer the matter with a recommendation to the Tribunal.⁸⁷ However, if his financial circumstance has not improved, the NCR must recommend to the Tribunal that the twelve-month suspension period be extended.⁸⁸ If the latter recommendation is made, the NCR must, eight months into the extended suspension, conduct another review of the debtor's financial circumstance.⁸⁹ If the debtor's financial circumstance has improved to warrant a debt rearrangement, the NCR must refer the matter to the Tribunal for a s 87(1A) order.⁹⁰ However, if the debtor's financial circumstance has not improved, the NCR must refer the matter to the Tribunal, with a recommendation to consider extinguishing his debts.⁹¹ After this recommendation, the Tribunal may make an order to extinguish the whole or a portion of the applicant's qualifying credit

⁸³ Section 87A(2)(a) of the 2019 Amendment Act.

⁸⁴ Section 87A(2)(b) of the 2019 Amendment Act. The twelve-month suspension applies to a portion or all of the applicant's qualifying debts, which may be extended to a further twelve months. See s 87A(3) of the 2019 Amendment Act for the factors to be considered by the Tribunal when making an order of suspension or extension.

⁸⁵ Section 87A(4)(b) of the 2019 Amendment Act. This has the effect of protecting creditors who might be able to obtain a financial benefit where a debtor's financial circumstance has improved during the period of suspension.

⁸⁶ Section 87A(5)(a) of the 2019 Amendment Act. This ensures that a discharge of debts by extinguishing is only accessible to 'honest but unfortunate' debtors by sifting out the 'can pay' debtors. This safeguards against abuse by unscrupulous debtors who might use the measure to escape their debts despite being in a position to meet their obligations through a repayment plan.

⁸⁷ Section 87A(5)(b)(i) of the 2019 Amendment Act. Thereafter, the Tribunal may make an order of debt re-arrangement contemplated in s 87(1A) of the 2019 Amendment Act.

⁸⁸ Section 87A(5)(b)(ii) of the 2019 Amendment Act. This may be interpreted as the legislature introducing the earned discharge policy by requiring debtors to try to the best of their ability to improve their financial circumstances and affording them an opportunity to repay their debts before being granted a discharge of debts. This is important because it eradicates debtor moral hazard.

⁸⁹ Section 87A(5)(c) of the 2019 Amendment Act.

⁹⁰ Section 87A(5)(c)(i) of the 2019 Amendment Act.

⁹¹ Section 87A(5)(c)(ii) of the 2019 Amendment Act. Also, see in general, Coetzee & Brits, 'Extinguishing of debt in terms of the debt intervention procedure: Some remarks on "arbitrariness"' in Van der Merwe (ed), *Essays vir/for Jannie Otto* (LexisNexis 2020), who conclude that extinguishing debts is constitutional and not an arbitrary deprivation of creditors' property.

agreements.⁹² This order prohibits the debtor from applying for credit for a period of six months,⁹³ which may be extended to a further period not exceeding twelve months.⁹⁴

(c) Review of the administration order

It must also be noted that the South African Law Reform Commission is currently reviewing administration orders,⁹⁵ and the Commission made proposals to either improve various aspects of the administration order,⁹⁶ or alternatively to replace the administration order with a procedure to deal with debt relief that would replace both the administration order as well as debt review.⁹⁷ Some of the issues relating to the administration order and the debt review may be addressed by either of these proposals should these become law, but it is not clear if and when this will happen. The preferred option is that debt rearrangement, being a combination of best practices of administration and debt review, should be implemented, but this may prove to be difficult to attain.

In short, the proposals to replace s 74 of the Magistrates' Courts Act include a recommendation to increase the R50 000 threshold of administration orders to R300 000.⁹⁸ Where the debtor has been under administration for a period of seven years, or more, he may become entitled to apply to court for a discharge of the whole, or a portion of one or more of his unsecured debts.⁹⁹ To qualify for the discharge, the debtor should have made full and regular payments in terms of the administration order and the creditors should have received at least the amount of their principal debt.

As an alternative, but in fact as the preferred option, the Commission proposed a Debt Rearrangement Act, currently in the format of a Bill, (the DR Bill), for a comprehensive debt relief procedure that combines the best practices from both debt review and the administration

⁹² Section 87A(7) of the 2019 Amendment Act. The extinction must apply equally to all qualifying credit agreements.

⁹³ Section 87A(8) of the 2019 Amendment Act read with s 60 of the NCA.

⁹⁴ Section 87A(9) of the 2019 Amendment Act.

⁹⁵ Project 127 Review of Administration orders, available at <https://www.justice.gov.za/salrc/projectlist.htm>, accessed on 30 January 2023.

⁹⁶ The recommendations are set out in an amended s 74 as set out in the proposed Magistrates' Courts Amendment Bill ('the MC Bill').

⁹⁷ The recommendations are set out in the proposed Debt Rearrangement Bill (the DR Bill).

⁹⁸ See the proposed amendment to s 74(1). The Minister should also have the power to increase this amount from time to time by notice in the *Government Gazette*.

⁹⁹ See clause 74(3)(h).

order.¹⁰⁰ As far as discharge is concerned, the current version of the DR Bill in c 17(5)(g) states that the court must be satisfied that the debtor will have sufficient means for his or her maintenance and that of his or her dependants after payment of the instalment order by the court.

However, both the MC Bill as well as the DR Bill in principle prohibit the granting of an administration or debt review order if it will leave the debtor without sufficient means for his or her maintenance and that of his or her dependants. The idea is that in such instances those debtors qualifying for debt intervention may apply for that relief, or, when it becomes law, make use of the offer of composition to creditors as provided for by the Insolvency Bill.

Important, though, is that such a debtor may avail himself of the proposed composition as provided for in the Draft Insolvency Bill, and where the majority of the creditors reject the composition offer, the debtor would be entitled to apply to the Master of the High Court for a discharge of debts.¹⁰¹

In footnote 9 of this clause, the Commission states that the order should not be granted under those conditions but that such a debtor with debt below R300 000 should be able to use the debt intervention procedure and/or the statutory composition procedure as provided for by the proposed Insolvency Bill.

V SCOTLAND'S NATURAL PERSON DEBT RELIEF SYSTEM

The primary piece of legislation that regulates Scotland's debt relief system is the Bankruptcy Act 2016.¹⁰² This statute regulates the bankruptcy procedure, which affords comprehensive statutory protection to all categories of debtors regardless of their financial circumstances. The discussion that follows highlights the best practices within this system in the wake of the Covid-19 pandemic and draws lessons for law reform in South Africa. Some commentators have already evaluated the Scottish relief system; therefore, this discussion is mostly limited to the recent reform initiatives aimed at mitigating the consequences of the Covid-19 pandemic on debtors. The reforms were ushered in through the Coronavirus (Scotland) (No 2) Act 2020.¹⁰³

It is noteworthy that despite the sound social security system — thus a

¹⁰⁰ This will ensure that a holistic assessment of a person's financial position is conducted. It further aligns with international trends and guidelines that prefer a holistic approach towards dealing with all of a debtor's debts.

¹⁰¹ B-2021.

¹⁰² The Bankruptcy (Scotland) Act 2016 ('Bankruptcy Act').

¹⁰³ Part 5 of the Coronavirus (Scotland) (No 2) Act 2020 ('Coronavirus Act').

lesser need to reform the debt relief system — the Scottish legislature implemented reforms to the debt relief system, which reflects the integral role of an inclusive and effective insolvency regime in cushioning debtors. In relation to the South African insolvency system, the debt intervention measure will facilitate access to the debt relief system and enable a much-needed discharge of debts to low- or no-income earning debtors once it comes into force. However, further reform is needed to align this measure with international trends, especially in the wake of the Covid-19 pandemic.

In addition to the bankruptcy procedure, debtors within Scotland's insolvency system may access the following alternative relief measures: the Voluntary Trust Deeds¹⁰⁴ and the Debt arrangement schemes.¹⁰⁵ These measures do not cater for NINA debtors' needs; therefore, they are not discussed further because NINA debtors form the subject of this article. However, it should be noted that the consequences of the Covid-19 pandemic have been far-reaching, and this led to an amendment of the Debt arrangement schemes, to ensure the protection of debtors who are better positioned than NINA debtors.¹⁰⁶

(a) Bankruptcy

Specific protection of NINA debtors is afforded by the bankruptcy procedure.¹⁰⁷ However, the protection is not limited to indigent debtors because all 'honest but unfortunate' debtors may access the bankruptcy procedure, regardless of their financial circumstances. To this end, the bankruptcy procedure encapsulates the Minimal Asset Process, (the MAP),¹⁰⁸ and the Full Administration.¹⁰⁹ On the one hand, the former procedure is intended for low- or no-income earning debtors, while on the other hand, the latter procedure is intended for debtors with some form of disposable income and/or excess assets.¹¹⁰ These relief measures have different eligibility criteria and the debtor may obtain relief through the process that suits his or her individual circumstance.

¹⁰⁴ Part 14 of the Bankruptcy Act.

¹⁰⁵ Debt Arrangement and Attachment (Scotland) Act 2002.

¹⁰⁶ See, in general, the Debt Arrangement Scheme (Scotland) Regulations 2019, which came into force on 4 November 2019.

¹⁰⁷ This is similar to the sequestration procedure in South Africa in that it is an asset liquidation procedure aimed at ensuring a redistribution of proceeds of the liquidation process to creditors.

¹⁰⁸ See s 2(2) of the Bankruptcy Act.

¹⁰⁹ See s 2(8) of the Bankruptcy Act.

¹¹⁰ See s 2(8) of the Bankruptcy Act. The Full Administration process is not discussed here because it does not affect the position of NINA debtors, which form the subject of this article.

(i) *Minimal Asset Process*

The MAP was introduced in 2015 to cater to the needs of NINA debtors. This group was, between 2007 and 2015, regulated by the Low Income Low Asset procedure,¹¹¹ and before this, the relief system did not have a suitable solution for NINA debtors.¹¹² Regarding access to the MAP, it is only accessible to debtors who have been assessed by the common financial tool¹¹³ as being required to make no contribution or having been in receipt of payments for a period of at least six months, ending with the day on which the sequestration application is made.¹¹⁴ Such debtors may only access this measure if the total amount of the debts at the date of application is not less than GBP1 500 and not more than GBP25 000.¹¹⁵ Further access requirements are as follows:¹¹⁶

- (i) The total value of the debtor's assets¹¹⁷ on the date the debtor application is made must not exceed GBP2 000 or such other amount as may be prescribed,
- (ii) No single asset of the debtor has a value which exceeds GBP1 000 or such other amount as may be prescribed, and
- (iii) The debtor must not own land.

The eligibility criteria reflect the reforms introduced by the Coronavirus (Scotland) (No 2) Act,¹¹⁸ which was introduced because of the adverse effects of the Covid-19 pandemic. This statute implemented temporary changes to bankruptcy regulation, which include: (i) Allowing electronic signatures;¹¹⁹ (ii) Allowing electronic service of documents;¹²⁰ (iii) Allowing creditor meetings in bankruptcy to be carried out virtually;¹²¹ and (iv) Increasing the deadline for submitting Debtor Contribution Order proposals.¹²²

¹¹¹ See s 15 of the Bankruptcy and Diligence etc. (Scotland) Act 2007.

¹¹² See McKenzie Skene & Walters, 'Consumer bankruptcy law reform in Great Britain' (2006) 80(4) *American Bankruptcy Law Journal* 477.

¹¹³ See, in general, the Common Financial Tool (Scotland) Regulations 2018, which came into force on 1 April 2019.

¹¹⁴ Section 2(2)(a) of the Bankruptcy Act.

¹¹⁵ Section 2(2)(b)(i)–(ii) of the Bankruptcy Act. The GBP25 000 threshold far exceeds the R50 000 limit of the debt intervention measure, which, as highlighted above, might result in the exclusion of debtors whose debts exceed this limit. Therefore, it is recommended that the R50 000 limit be increased.

¹¹⁶ Section 2(2)(c)–(e) of the Bankruptcy Act.

¹¹⁷ Leaving any liabilities out of account.

¹¹⁸ The Coronavirus (Scotland) (No 2) Act 2020.

¹¹⁹ Section 13 of the Coronavirus (Scotland) (No 2) Act 2020.

¹²⁰ Section 8 of the Coronavirus (Scotland) (No 2) Act 2020.

¹²¹ Section 12 of the Coronavirus (Scotland) (No 2) Act 2020.

¹²² Section 11 of the Coronavirus (Scotland) (No 2) Act 2020.

These forward-looking reforms reflect the Scottish legislature's desire to modernise the relief system and respond to modern challenges affecting debtors. Modernisation of the insolvency system, in so far as it allows electronic signatures and servicing of documents, ties in with the Fourth Industrial Revolution that was accelerated by the Covid-19 pandemic. These reforms should be implemented in South Africa's relief system. If implemented, these reforms will accommodate debtors who — under the debt intervention measure — would otherwise incur extra transportation costs to file applications with the NCR and to attend meetings with creditors.¹²³ As pointed out above, the centralisation of the NCR offices will be an obstacle to low- or no-income debtors. The transportation expenses that NINA debtors will incur to access the NCR office will exacerbate their already dire financial circumstances, thus, inhibiting them from obtaining debt relief. This problem may however be eradicated by introducing electronic filing. Allowing electronic meetings to be conducted virtually will also alleviate the financial burden of participating in insolvency, for already suffering indigent debtors. In addition to aligning South Africa's system with international trends, these reforms will also increase the efficiency of the debt relief system.

The Scotland Covid-19 Act's other notable changes include increasing the debt eligibility threshold from GBP17,000 to GBP25,000 and removing student loan debt from contributing to the eligibility calculation.¹²⁴ This statute also lowered access costs for the MAP and the Full Administration, and it permitted non-payment of fees for debtors in receipt of certain prescribed benefits. Debtor application fees were lowered from GBP90 to GBP50 for the MAP while the Full Administration application costs were reduced from GBP200 to GBP150.¹²⁵

Although these reforms were intended to be temporary, they facilitated continued comprehensive protection of all debtors, especially indigent debtors, despite the devastating effects of the Covid-19 pandemic.¹²⁶ It should be noted that the Scottish legislature has taken steps

¹²³ However, this article acknowledges the challenges that might emanate from relying on an online system, especially for a developing country like South Africa. Thus, a hybrid system is preferred where provision is made for an online system along with the prevailing system.

¹²⁴ Section 9(2) of the Coronavirus (Scotland) (No 2) Act 2020.

¹²⁵ Section 14(3) of the Coronavirus (Scotland) (No 2) Act 2020. Because of the dire financial circumstances of NINA debtors in South Africa, this paper proposes that the government subsidise all debt intervention applications. This is important because it will reinforce this measure's inclusivity by facilitating access to indigent debtors whose access might be limited by this proposed measure's access and procedural costs, which might be beyond the reach of NINA debtors, thus further perpetuating the current NINA group exclusion.

¹²⁶ The flexibility of the Scottish system is commendable because it permits legislators to introduce emergency measures to suit the prevailing circumstances, such as the Covid-19

to permanently implement these reforms.¹²⁷ In addition to this, the legislature has also fairly recently passed the Coronavirus (Recovery and Reform) Scotland Act¹²⁸ that aims to safeguard the country's healthcare and bankruptcy systems that were affected by the Covid-19 pandemic by reforming the Bankruptcy Act.¹²⁹ In relation to the bankruptcy system, the Bill seeks to permanently implement remote meetings of creditors¹³⁰ and to amend the law regarding the servicing of documents.¹³¹ Furthermore, the Bill also seeks to amend the debt level specified in the definition of 'qualified creditor(s)'¹³² from GBP3 000 to GBP5 000.¹³³

Regarding the procedural aspects of the bankruptcy procedure, all applications must be made to the Account in Bankruptcy (AiB)¹³⁴ and the application must include a declaration by a money adviser who provided advice to the debtor, that such advice has been given, and specify the name and address of the money adviser.¹³⁵ The advice that the money adviser must provide to debtors is comparable to the counselling and final literacy training that NINA debtors will receive under the debt intervention procedure. Therefore, the debt intervention procedure is in line with interventional trends in this respect. Additionally, the role of the AiB is comparable to the role of the NCR and this aligns with internationally regarded policies and guidelines that favour extra-judicial proceedings over judicial proceedings.

To access the bankruptcy measure, the debtor must send a statement of assets and liabilities, and a statement of undertakings to the AiB, along with the bankruptcy application.¹³⁶ After this, the debtor may, upon request to the money adviser, be granted a certificate for sequestration, which may only be granted if the debtor can demonstrate that he is unable to pay debts as they become due.¹³⁷

Because of the financial circumstances of NINA debtors, the AiB may

pandemic-enforced temporary relief measures, thereby guaranteeing extended protection to affected consumers, where necessary. This is in stark contrast to the rigid and creditor-oriented South African debt relief system, where no such emergency measures have ever been introduced.

¹²⁷ See the Coronavirus (Extension and Expiry) (Scotland) Act 2021 for an indication of the extensions of the reforms.

¹²⁸ The Coronavirus (Recovery and Reform) Scotland Act 2022 ('the Recovery and Reform Act'). The Act received Royal Assent on 10 August 2022.

¹²⁹ Section 15(1) of the Recovery and Reform Act.

¹³⁰ Section 17 of the Recovery and Reform Act.

¹³¹ Section 15(2) of the Recovery and Reform Act.

¹³² See s 7(1) of the Bankruptcy Act.

¹³³ Section 16 of the Recovery and Reform Act.

¹³⁴ Section 8(1) of the Bankruptcy Act.

¹³⁵ Section 8(2) of the Bankruptcy Act.

¹³⁶ Section 8(3) of the Bankruptcy Act.

¹³⁷ Section 9(1)–(3) of the Bankruptcy Act.

not appoint a trustee (other than himself)¹³⁸ to manage such debtors' estate.¹³⁹ In respect of the Full Administration, a trustee must prepare a statement of the debtor's affairs in so far as it is within his knowledge, including that in the trustee's opinion the debtor's assets are unlikely to be sufficient to pay any dividend whatsoever in respect of the debtor's debts.¹⁴⁰ However, where NINA debtors are involved, the AiB must perform the trustee's duties by preparing a statement of the debtor's affairs indicating that no claims may be submitted by creditors against the estate of the debtor.¹⁴¹

In relation to the provision of a discharge, low- or no-income earning debtors may be discharged after six months from the date on which the sequestration has lapsed.¹⁴² This discharge period starkly contrasts the relatively longer 24 months under the debt intervention procedure. A shorter discharge period is essential because debtors must not be unnecessarily kept within the insolvency system. To this end, international trends indicate that debtors must receive a discharge in the not-too-distant future.¹⁴³ However, before accessing the discharge, the debtor may at any time be required by the AiB to give an account in writing of his or her current state of affairs.¹⁴⁴ Discharge affects the debtor's ability to access debt for a further period of six months beginning on the date of the discharge. The debtor must, within this period, inform any credit provider from whom he or she seeks credit of GBP2 000 or more, or at the time of obtaining credit if the debtor has debts amounting to GBP1 000, of his or her status regarding his or her past sequestration and the discharge.¹⁴⁵ Furthermore, the debtor may

¹³⁸ The AiB performs the trustee's duties, which include those outlined in s 50(1)(a)–(d) read with schedule 1 para 1(3) of the Bankruptcy Act.

¹³⁹ Section 51(11)(a) read with s 51(9) of the Bankruptcy Act. This is an important cost-cutting exercise by the legislature, which recognises the dire circumstances of NINA debtors who do not have an estate that can be managed by a trustee, thereby eliminating possible trustee costs.

¹⁴⁰ See s 42(1) of the Bankruptcy Act.

¹⁴¹ See schedule 1 para 1(2)(1) of the Bankruptcy Act.

¹⁴² Section 140(1) of the Bankruptcy Act. The six-month time frame is in line with international best practices in insolvency, which do not prefer perpetually trapping debtors in insolvency. Therefore, debtors must access the discharge option in the not-too-distant future. To this end, the discharge period within the Scottish system is commendable and it must be contrasted with developed and developing systems such as that of England and Wales as well as South Africa. On the one hand, NINA debtors may only access discharge after twelve months in respect of the DRO procedure in England and Wales, while on the other hand, such debtors will only be able to access a discharge of debts after 24 months in South Africa in terms of the proposed debt intervention measure. See Ramsay, (2020) 29 *International Insolvency Review* 5 at 22–24.

¹⁴³ See Ramsay, (2020) 29 *International Insolvency Review* 22–24.

¹⁴⁴ Section 116 read with schedule 1 para 1(4) of the Bankruptcy Act.

¹⁴⁵ See s 146(2), 146(3) and 146(6) of the Bankruptcy Act.

not engage in a business under a name other than that to which the discharge relates unless the debtor informs any person with whom the debtor enters into any business transaction of the name of the business to which the discharge relates.¹⁴⁶ Therefore, although NINA debtors may access a discharge after six months in terms of the MAP, the debtor remains under certain bankruptcy restrictions for a further six-month period.

VI CONCLUSION AND RECOMMENDATIONS

As stated by many commentators on South African insolvency law, the current debt relief regime does not cater for the needs of low- or no-income earning debtors, the so-called NINA debtors. This void in the system may also militate against the basic right to equality enshrined in the Constitution. Against this backdrop, the introduction of the debt intervention measure is commendable because it might result in the presently marginalised NINA debtors being granted easy access to the debt relief system and obtaining the much-needed discharge. The discharge period is also noteworthy because it conforms to international policies and guidelines in that it is not unnecessarily drawn out. However, the main aspect of criticism that has been highlighted in this article is the challenge of accessibility of the NCR office, which NINA debtors will encounter when lodging applications for this measure and attending compulsory meetings for the determination of the application. It is nevertheless recommended that this process be put into operation as soon as possible.

Another major factor that has been addressed in this paper is the financial threshold of the debt intervention measure. To this end, it has been argued that the R50 000 limit is too low and will result in the marginalisation of debtors whose debts accumulated because of the adverse effects of the Covid-19 pandemic. Lastly, all costs associated with the debt intervention measure such as the application costs must be subsidised by the government. This is integral in eradicating all barriers that may hinder the already marginalised NINA debtors from obtaining a discharge of debts.

In spite of various initiatives by the South African Law Reform Commission over a number of years to revise the South African insolvency law, including statutory debt relief measures, it is not clear if and when meaningful reform will be effected. Apart from revision of the insolvency legislation as such that is currently in the heads of the

¹⁴⁶ Section 140(4) and 140(5) of the Bankruptcy Act.

Department of Justice, the Law Reform Commission also made proposals concerning the improvement of the administration order and debt review as debt relief measures, but it is also uncertain if and when these proposals will be put into legislation.

Meanwhile, commentators will continue to ponder the options for reform. In this context, it is submitted that some reform initiatives within the Scottish debt relief system may provide some guidance to South African law reform in this regard. As pointed out, it is noteworthy that despite the sound social security system, the Scottish legislature implemented reforms to the debt relief system, which reflects the integral role of an inclusive and effective insolvency regime in assisting debtors. The special measures that were enforced following the Covid-19 pandemic may also provide some guidance for the reform of some South African debt relief measures. It is submitted that although the debt intervention procedure will facilitate a discharge for low- or no-income debtors, once it comes into force, this procedure can be further improved to align with international trends, especially in the aftermath of the Covid-19 pandemic.

In the Scottish system, specific protection is afforded to NINA debtors but is not limited to indigent debtors but to all 'honest but unfortunate' debtors regardless of their financial circumstances. To this end, the bankruptcy procedure provides the MAP and the Full Administration procedures. The former procedure is intended for low- or no-income earning debtors, while the latter procedure is intended for debtors with some form of disposable income and/or excess assets. These relief measures have different eligibility criteria, and the debtor may obtain relief through the process that suits his individual circumstances. The system also provides for lowered access costs for these procedures and the involvement of the AiB in case of low-income debtors, instead of a trustee. In relation to the provision of a discharge, low- or no-income earning debtors may be discharged after six months from the date on which the sequestration has lapsed.

It is nevertheless submitted that although the debt intervention procedure will facilitate a discharge for low- or no-income debtors, once it comes into force, this procedure can be further improved to align with international trends, especially in the aftermath of the Covid-19 pandemic. To this end, this article proposes that a hybrid system could be considered, whereby debtors will be permitted to choose either to hand in hard copies of the application to the NCR or submit the application through an online system. A hybrid system is preferred because a strictly online system might inadvertently sideline some debtors who might be

better served by relying on the current system. This contribution also proposes that the South African government decentralises the NCR office to all cities within the country. This will contribute to eradicating the accessibility challenges of the NCR office, which might exacerbate the already dire financial circumstances of NINA debtors.